IN A NAFTA ARBITRATION UNDER THE UNCITRAL RULES

S.D. MYERS, INC. (CLAIMANT)

-AND-

THE GOVERNMENT OF CANADA (RESPONDENT)

Bryan Schwartz*

I. PRELIMINARY REMARKS

BOTH PARTIES IN THIS CASE have indicated that they regard this case as a landmark one. They have both indicated over the course of the hearings that they looked forward to receiving, as a result of this panel's reflections, some broad guidance for the future.

In that spirit, this separate opinion attempts to provide some distinctive insights or suggestions that may be of some use in the longer run, as well as in the immediate disposition of this case.

I have signed the partial award of this tribunal to confirm that:
(a) all of the determinations it contains are indeed the decisions of a majority;
(b) all of the determinations were made after duly convened deliberations during which each arbitrator was afforded a proper opportunity to express his views either orally or in writing.

I actively participated in the extensive deliberations of the tribunal and in the formulation of the award. I agree with most of the reasoning contained in the award of the tribunal, and I agree with all of the final conclusions of the tribunal but one. I would find that Canada breached the NAFTA provisions that prohibit performance requirements; the majority of the tribunal does not. This one difference with respect to final

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* Separate Opinion concurring except with respect to performance requirements, in the partial award of the tribunal.

conclusions would appear to have no effect at all on the amount of compensation owed to the investor.

There are some passages in the award of the tribunal and in this opinion that are quite similar to each other. In the interests of coherence, I generally chose to set out my reasoning in full, rather than making cross-references to various passages in the award of the tribunal.

This opinion should be taken as the expression of my own views, and my views only, where there are differences between my analysis and that of the majority.

II. INTRODUCTION

THIS CASE RAISES SOME FUNDAMENTAL ISSUES about the meaning and application of the North American Free Trade Agreement (NAFTA). In particular, it raises some questions that have been the subject of great public controversy.

What balance is being struck in trade agreements like NAFTA between two potentially conflicting values?

On the one hand, citizens are concerned about the ability of governments to regulate in the public interest. Citizens want to be assured that governments can act constructively and decisively to protect values such as health, welfare, labour standards, and the environment.

On the other hand, trade agreements impose constraints on the ability of governments to act freely. In the interests of promoting freer trade, and thereby enhancing prosperity and economic choice, trade agreements limit the ability of governments to make certain decisions.

Concerns have been expressed from many quarters – various advocacy groups, academic commentators, even governments – about the extent to which NAFTA already tips the balance too heavily in favour of freer trade and against the ability of government to regulate in the public interest.

Similar concern has also been expressed about whether governments should expand existing trade agreements or enter into new ones, like the Multilateral Agreement on Investment (MAI). There is a real anxiety in many quarters that there will be an increased and undue impairment of the ability of governments to regulate. That impairment may prevent measures from being taken that protect citizens or promote social justice.

In this case a U.S. investor, S.D. Myers, claims that the Government of Canada breached Chapter 11 (Investment) of NAFTA. S.D. Myers was in the business of remediating hazardous waste. Canada had an inventory of waste contamined with polychlorinated biphenyls (PCBs). S.D. Myers wanted to engage in the business of transporting such waste to the United States. There, S.D. Myers planned to recycle the waste or dispose of it in a safe manner. S.D. Myers had an affiliate in Canada,

Myers Canada, which would also be involved in this project. S.D. Myers expected that its Canadian affiliate would help S.D. Myers in generating revenues in Canada. Employees of the Canadian affiliate would help raise the profile of S.D. Myers in Canada, provide local expertise, and assist with marketing and carrying out contracts.

S.D. Myers expended considerable effort and money in Canada in attempting to develop its business. It provided its Canadian affiliate with capital, know-how, and managerial direction. S.D. Myers sent its own employees into Canada from time to time to assist with promotional efforts and carrying out contracts. The employees of S.D. Myers, while in Canada, would often work closely with employees of the Canadian affiliate on achieving their shared objectives.

S.D. Myers lobbied long and hard to obtain regulatory approval from U.S. authorities to import waste into its own country. In 1995 it finally succeeded. But its victory was short lived. Canada reacted almost immediately by imposing a ban on the export of PCB wastes into the United States.

The Government of Canada said that it had environmental concerns about the proposed export of PCBs by companies like S.D. Myers. It said it wanted to be sure that the wastes would be safely handled and disposed of in the United States. Canada also cited a variety of legal considerations for closing the border.

After a while, Canada repealed its export ban. It decided that it would actually be beneficial, both economically and environmentally, to permit companies like S.D. Myers to help eliminate the inventory of PCB wastes in Canada.

S.D. Myers argues the following. Canada never did have a sound public policy basis for closing the border from its side. Canada could have taken advantage of the opportunity that S.D. Myers was offering right from the beginning. For many Canadian owners of PCB wastes, the S.D. Myers option would have been much cheaper and safer than any alternative available in Canada. Furthermore, the physical site where S.D. Myers would have done most of its work was in Ohio. This was actually much closer to PCB waste locations than S.D. Myers' main Canadian competitor. The latter was based in Swan Hills, Alberta. S.D. Myers offered lower transportation costs, less risk of mishaps during transportation over its shorter route, and lower disposal costs. Some PCB owners in Canada were not able to pay the relatively high Canadian costs. The alternative that S.D. Myers offered would have enabled many of these owners to go ahead with the disposal of their inventories, and thereby expedite an important aspect of cleaning up Canada's environment.

S.D. Myers has brought a claim under Chapter 11 (Investment) of NAFTA. That Chapter contains a series of provisions that protect an investor from one NAFTA party from a variety of measures by other governments. Among other things, NAFTA directs governments to treat

foreign investors in a non-discriminatory manner, and to compensate those investors in case of expropriation.

Chapter 11 authorizes an investor who believes that these investor-protecting provisions have been breached by a government to bring a claim for compensation to an arbitral tribunal like this one. Generally, when there is a breach of a trade agreement, any complaint is brought by one government against another. Chapter 11 however, enables an aggrieved investor to bring a complaint directly against a government and to do so before a tribunal with the legal authority to make a legally enforceable ruling.

The conclusion I have reached is that S.D. Myers does have a valid claim. S.D. Meyers was the target of discrimination on the part of the Canadian Government. The export ban that the Government of Canada imposed was not necessary. The ban was motivated largely by a desire to promote the economic interests of the Canadian competitors of S.D. Myers. Any legitimate concerns that Canada had over safety and environmental protection could have been readily satisfied by measures that did not exclude S.D. Myers from the market.

By pursuing a largely protectionist agenda here, Canada did miss an opportunity that was in both the economic and environmental interest of the country. The safe and relatively low-cost option offered by S.D. Myers would have enabled Canadian owners of PCB wastes to proceed more expeditiously to get rid of them and to do so at a lower cost.

There was in this case no intrinsic tension between the free trade guarantees in NAFTA and Canada's interest in protecting the environment. Rather, taking advantage of the options offered by U.S. participants in the market, including S.D. Myers, would actually have promoted the protection of the Canadian environment.

But what of the wider implications of NAFTA? There may be situations in which there is a genuine and unavoidable conflict between the environmental standards that Canadian authorities favour and various free trade norms contained in NAFTA.

A close examination of NAFTA and its surrounding agreements shows that NAFTA is actually environmentally friendly. It does not place trade above environmental standards. It generally permits public authorities to pursue whatever environmental objectives they desire, no matter how ambitious. Governments are basically only required by NAFTA to pursue those objectives in ways that do not *unnecessarily* interfere with NAFTA's provisions on free trade.

"Unnecessarily" does not mean that, in the subjective view of an arbitral panel, the government's environmental objectives are themselves "too high." It is for governments to freely determine those objectives.

"Unnecessarily" does mean this: that the government could have accomplished the same environmental objective by an alternative measure that was reasonably available and that would have infringed less on those free trade norms.

A variety of environmental agreements, including NAFTA, recognize that trade and the protection of the environment can often be mutually supportive. This case is an illustration of how the promotion of the environment and respect for free trade can go hand in hand.

This particular case is basically about how Canada, early in the life of NAFTA, missed an opportunity to enable free trade and environmental protection to work in tandem. Indeed, this case is really a story about a lost opportunity for a convergence of interests in many respects.

Had S.D. Myers been allowed to freely compete in the Canadian market, it would have made substantial profits and contributed to economic growth and employment in its own home country. S.D. Myers would also have contributed to safeguarding the United States environment. A large amount of PCB waste in Canada is located near the border with the United States, particularly around the Great Lakes. This waste can be carried into Canada in a variety of ways, including seepage into water systems or as a result of the contamination of air resulting from fires in PCB waste sites.

As already mentioned, if allowed to freely compete in the Canadian market, S.D. Myers and its Canadian affiliate would have both saved money for Canadian interests and promoted the clean-up of the Canadian environment.

The preceding comments are a synopsis of what this opinion says about this particular dispute and about the general impact of NAFTA on the ability of governments to act to protect the environment. The main body of this opinion explores in much more detail the facts of this case and the applicable law.

I have reflected not only on the substance of this opinion, but the style in which I should write it. I do think it is important to try to frame an opinion like this in a way that explains a decision to not only the immediate parties, but to the wider public.

Trade agreements have an enormous impact on public affairs in many countries, including Canada. They affect the political and economic life of a country in many ways. These agreements are comparable in many ways to changes to a country's constitution. They restrict the ways in which governments can act and they are very hard to change. A government usually has the legal right to withdraw from a trade agreement, but it is often practically impossible to do so. Pulling out of a trade agreement may create too much risk of reverting to trade wars, and may upset the settled expectations of many participants in the economy. But amending a trade agreement can be very hard to do, just as it is usually very hard to change a provision of a domestic constitution.

Tribunals like this one, which interpret trade agreements, can have a major impact on how an agreement is understood and operates in practice. It is not easy, as just mentioned, for governments to change a trade agreement if it does not like the way in which it has been interpreted.

This panel was constituted under a set of rules that apply to commercial arbitrations. Usually these decisions are often not made public, are of primary concern to the parties only, and are almost exclusively intended to definitively resolve a particular dispute rather than establish any guidance for the future. The accompanying reasons for the decision may, quite properly, be quite spare. Given the stakes for the wider public and the influence of tribunals like this one however, it is important to try to more fully elaborate the reasons behind a decision.

The award of this tribunal provides a review of the procedural steps that have led us to this stage of the proceedings, and I would adopt that account in its entirety.

III. WAS S.D. MYERS AN INVESTOR IN CANADA, AND WHAT WAS ITS INVESTMENT?

THE EXISTENCE AND EXTENT of a claimant's rights under Chapter 11 depend on its ability to prove that under the terms of Chapter 11 the claimant qualifies as an "investor" with a relevant "investment." My conclusions in this respect are as follows:

- S.D. Myers is a company incorporated under the laws of the United States and its main headquarters and main operations were located there;
- The directing mind of S.D. Myers, Mr. Dana Myers, was interested in expanding into the Canadian market;
- He established a Canadian company, Myers Canada, to promote that end. He thought that having an affiliate with a distinctly Canadian profile and employing Canadian expertise would make it easier to market and deliver services;
- The major shareholders of S.D. Myers, rather than S.D. Myers itself, owned the shares of Myers Canada;
- Technically, therefore, Myers Canada was not a subsidiary of S.D. Myers. It was an affiliate;
- S.D. Myers supplied that affiliate with about one million dollars worth of loans for which it eventually expected repayment;
- S.D. Myers also supplied its affiliate with technical know-how and managerial direction;
- S.D. Myers expected that both S.D. Myers and its affiliate would share in the profits obtained from contracts performed wholly or partly in Canada;
- Employees of S.D. Myers and those of Myers Canada acted in concert in many respects. At times, employees from S.D. Myers actually came to Canada to work in combination with employees of Myers Canada on marketing and other pre-contractual efforts. During the short period when the border was open, seven contracts were actually carried out involving the export of PCBs to the S.D. Myers' facilities in United States.

Myers Canada received a share of the revenues for its efforts to assist customers on these contracts. An employee of S.D. Myers, Lynn Fritz, came to Canada to further assist customers with such matters as draining equipment and arranging for transportation;

- The basic raison d'être of Myers Canada was to promote and serve the interests of S.D. Myers. The role of Dana Myers as the directing mind and controller of both companies ensured that the relationship would continue;

There is no way of escaping the fact that S.D. Myers had an investment in Canada at least in this respect: it made a loan to an affiliate, Myers Canada. Article 1139, definition (d) of NAFTA, expressly includes as an investment a loan to an affiliate.[1]

Article 1139 defines an investment as including an "enterprise." Myers Canada certainly qualifies as an enterprise. But should the enterprise Myers Canada be viewed as an investment of S.D. Myers in Canada? My colleagues on this panel have concluded that it should be. Looking at the substance of the relationship between the two companies, I agree. S.D. Myers was an investor in Canada, and Myers Canada was at least one of its investments. S.D. Myers has actually argued or implied that its investment actually extends beyond its interest in Myers Canada.

This tribunal has decided however, that it should not resolve at this first stage of proceedings the extent to which S.D. Myers is correct in its wider assertions. The finding that Myers Canada is an investment of S.D. Myers is entirely sufficient by itself to permit this tribunal to examine and decide whether Canada breached various provisions of Chapter 11 that protect investors and investments.

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[1] SD Myers argued that it qualified as having an investment in Canada under definition 1139(h):

> Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under:
> (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts or concessions; or
> (ii) contracts where remuneration depends substantially on the production, revenue or profits of an enterprise.

I would leave it to the next round for the parties to explore this argument in more detail if either thinks that doing so has some effect on the measure of compensation in this case. They may, if they wish, similarly explore S.D. Myers' argument that it qualified under definition 1139(e), an interest in an enterprise that entitles the owner to share in income or profits of the enterprise.

At the second stage, when the precise amount of compensation is to be determined, it may or may not be necessary for this tribunal to explore the wider claims of S.D. Myers concerning the scope of its investment. At this second stage, the tribunal might have the benefit of more detailed evidence that might include reports from accounting experts. The tribunal would also expect that the parties could address in more depth some of the subtler points that could not be dealt with in the less focussed first stage.

The wider claims of S.D. Myers with respect to the scope of its investment include certain "entity" claims. Specifically:

- S.D. Myers claims that S.D. Myers and Myers Canada operated in many respects as a joint enterprise in Canada. The interest of S.D. Myers in that joint enterprise, it argues, was part of its investment in Canada;[2]
- S.D. Myers claims that it had a branch operation in Canada.[3] S.D. Myers' employees at times carried out various activities in Canada, claims S.D. Myers, from marketing to overseeing the actual drainage of contaminated equipment and its shipment to the United States. S.D. Myers' interest in its "Canadian branch," argues S.D. Myers, was also part of its overall investment in Canada.

This tribunal has decided to leave these "entity" claims to the second stage. With more information and argument from the parties, it will be easier to decide whether the "entity" claims actually have any effect on the proper measure of compensation. If they do not, this panel might decide to refrain from adjudicating upon them.

The wider claims of S.D. Myers also, at least implicitly, include "property" claims. Specifically:

- S.D. Myers claims that S.D. Meyers and its affiliate were poised to win many contracts to remediate PCB wastes located in Canada, but were prevented from doing so by the export ban imposed by Canada. S.D. Myers claims that it lost "market share" as a result.[4]

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[2] Article 201 defines an "enterprise" as including "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

[3] Article 1139 of NAFTA defines "enterprise" as including "a branch of an enterprise."

[4] In *Manitoba Fisheries Ltd.* v. *Canada*, [1979] 1 S.C.R. 101 a company had many loyal customers who used its services as a fish marketer. A federal statute then intervened and required that fish producers instead use the marketing services of a Crown corporation. The company was effectively put out of business. It claimed that an expropriation had taken place. The federal government, it claimed, had expropriated its goodwill. The Supreme Court of Canada agreed. I will refrain at this stage from deciding whether either "market share" or "goodwill" are included in the "property" branch of the definition of investment under Chapter 11 of

This tribunal has similarly decided to leave the "property issue" to the next stage of proceedings.

A. Were the Measures in This Case "In Relation To" S.D. Myers or its Investment?

Article 1101 of NAFTA is as follows:

> Scope and Coverage
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party; and
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

In this case, the requirement that the export ban be "in relation" to S.D. Myers and its investment in Canada is easily satisfied. It was the prospect that S.D. Myers would carry through with its plans to expand its Canadian operations that was the specific inspiration of the export ban. It may be that the lead decision makers in Canada did not realize that S.D. Myers had a major investment in Canada, Myers Canada. But this fact could have been easily discovered. A government that targets a specific U.S. company for a trade-restrictive measure can reasonably be expected to investigate and take into account the extent of that company's investment in Canada. A government that fails to do so cannot reasonably claim as a result that that the measure was not "in relation" to the Canadian investment as well as the investor.

That is sufficient to dispose of the "relating to" requirement for the immediate purpose of determining liability in this case. As the question was mooted in this hearing however, it might be useful to provide some comments on the wider theoretical issue: how high a hurdle is presented by the requirement that a measure be "relating to" an investor or an investment?

Canada submits that the export ban related to trade in goods, not investment, and so cannot be the subject of a Chapter 11 (Investment) claim.

For example, the case law under GATT/WTO (General Agreement on Tariffs and Trade/World Trade Organization) has considered the meaning of "relating to" in the context of Article XX (General Exceptions) of the

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NAFTA; see Article 1139(g). I will also refrain from exploring any similarities and differences between the facts of the *Manitoba Fisheries* case and those before this tribunal in this case.

GATT. Suppose a government seeks to justify an infringement of a provision of GATT because it is carrying out, in a nondiscriminatory and reasonable way, a measure "relating to the conservation of natural resources." It is not enough that the measure have some weak connection to conservation. To satisfy the requirements of Article XX, according to the GATT/WTO case law, the measure must actually have a substantial relationship with conservation.

An unduly broad interpretation of Article XX (General Exceptions) would enable governments to use it as a means of too easily avoiding some of the most fundamental norms of the whole GATT/WTO system. It is understandable, therefore, that "relating to" in Article XX has been interpreted as requiring a substantial link between government measures and the values that are recognized in Article XX.

Canada suggests that "relating to" in Article 1101 of NAFTA has this effect: measures that "incidentally" or "inadvertently" affect foreign investors or investment cannot be the subject of Chapter 11 (investment) challenges.

Is it always true that any measure that only "incidentally" or "inadvertently" affects investors is outside the scope of Chapter 11? I would think not. For example, a government measure might have a legitimate even noble purpose, unrelated to trade, but have the practical effect of devastating foreign investors and their operations, while leaving local investors unscathed. It may be that the government's purpose could be readily accomplished without this discriminatory impact. If all of that were true, there might still be a violation of Article 1102 (National Treatment) of NAFTA. Inadvertence would not necessarily be a successful defence.

The most sensible approach to understanding "relating to" in Article 1101 avoids viewing that phrase in isolation. Rather, a tribunal must read Article 1101 in conjunction with the specific provisions of NAFTA that protect investors. It would be rare that the clear purpose and scope of such provisions will be frustrated by reference to Article 1101.

The general approach just proposed can be illustrated by examining the contents of a specific investor-protection provision of Chapter 11, such as Article 1110. Article 1110 requires compensation when there is an expropriation. An investor might have a right to compensation under an expropriation, even if the measure has an entirely non-economic purpose (such as creating a national park). An investor might have a right to compensation even if the government that enacted an expropriation measure primarily had in mind local owners and did not consider or care whether some foreign owners might also be expropriated. The fact that the impact on foreign owners was "incidental" or "inadvertent" would not preclude a valid claim for compensation. The government measure would be sufficiently "related" to foreign investors and their investment.

It is implausible that the obvious purpose and effect of Article 1110 would be frustrated by taking an expansive view of the meaning of "relating to" in Article 1101. The point just made is supported by a consideration of the wider legal context from which Article 1110 (Expropriation) is drawn.

Chapter 11 (Investment) largely incorporates norms that have a long history of being incorporated into BITS (Bilateral Investment Treaties).[5] These agreements generally do not say that they apply to measures "relating to" investments. Rather, BITS generally define investment and then provide a series of norms that protect investments.

It seems obvious that the framers of NAFTA, in incorporating standard phrases from BITS, intended that they would have their standard meaning, or something very close to it. It is implausible that the phrase "relating to" at the beginning of Article 1101 is somehow a signal that these norms are generally weaker, or have less scope or application, in NAFTA than they do elsewhere.

Thus Article 1110 of NAFTA is very similar in its wording (apart from the damage formula) to the standard provision of expropriation in BITS entered into by the United States and by many other countries. Article 1101 of NAFTA will not generally result in an interpretation of Article 1110 of NAFTA that makes it substantially weaker or narrower in scope than its counterpart in a wide variety of BITS.

S.D. Myers, in its legal memorial, has pointed out that the Government of Canada has itself issued formal statements that suggest that "relating to" in Article 1101 was not intended to stand as a formidable hurdle to bringing claims. Indeed, the Government of Canada issued a Statement of Implementation of NAFTA in the following terms:

> Article 1101 states that section A covers measures by a Party (i.e., any level of government in Canada) that *affect*:
> - investors of another Party (i.e., the Mexican or American parent company or individual Mexican or American investor);
> - investments of investors of another Party (i.e., the subsidiary company or asset located in Canada); and
> - for purposes of the provisions on performance requirements and environmental measures, all investments (i.e. all investments in Canada).[6] [Emphasis

[5] See generally K. J. Vandevelde, *United States Investment Treaties: Policy and Practice* (Deventer: Kluwer Law and Taxation, 1992) and M. Sornarajah, *The International Law on Foreign Investment*, (New York: Cambridge University Press, 1994) at. 225 – 276.

[6] *Statement on Implementation, Canada Gazette* Part 1 (1 January 1994) 68 at 148.

added.]

In other words, the government submitted a formal statement to the Parliament of Canada in which "relating to" is paraphrased as merely "affects." To be fair, even in a formal statement to Parliament, the Government of Canada may not choose each and every word with the maximum possible care and precision. The statement is however, a bit of confirmation for the approach to Article 1101 that is fully supported by other considerations.

Article 1101 does convey some important information. For example, Article 1101 reinforces a special aspect of Article 1106: that unlike most other provisions it applies to the treatment of all investors, and not only those from other NAFTA countries. Article 1101 also informs us that "investment" for the purposes of Chapter 11 generally means "the investment by one NAFTA in the territory of another." But to repeat, the "relating to" phrase in Chapter 11 was not generally intended to weaken the scope and strength of the specific investor-protection provisions of Chapter 11.

The next step in this analysis is to look at the overall context in which Chapter 11 (Investment) of NAFTA occurs, with a view to better understanding the various specific safeguards it provides for investments.

IV. CHAPTER 11 IN THE CONTEXT OF INTERNATIONAL TRADE AGREEMENTS GENERALLY

INTERNATIONAL TRADE AGREEMENTS TEND TO ADDRESS the liberalized or free movement of one or more of four different economic factors: goods, services, people, and investment. NAFTA addresses all four in various ways. Chapter 11 (Investment) of NAFTA focuses on the free and nondiscriminatory treatment of investors and investment.

NAFTA does not stand in isolation from other developments in international trade law. Many of the ideas and legal phrases in NAFTA are drawn from the global trade law system that used to be called the GATT system. That system was expanded and consolidated in the Uruguay round of negotiations in 1994, leading to the creation of the WTO.

The 1947 GATT agreement addressed trade in goods. But many of its concepts, such as prohibiting discrimination in the way states treat different trading partners, can be applied in other areas like trade in services and investment. In 1994, the Uruguay round of the GATT negotiations led to a new agreement, the GATS, which extended many GATT norms to trade in services.

Some parties to the Uruguay round of global trade negotiations wanted it expanded to also include an extensive agreement on

investment. A much more modest consensus however, was reached. The parties to the new WTO agreements agreed that with respect to investment, there should be only a limited agreement on Trade-Related Investment Measures (TRIMS).[7]

While the Uruguay round of WTO negotiations were not able to include an extensive code on investment, the parties to NAFTA succeeded in doing just that. Chapter 11 (Investment) of NAFTA is a broad-ranging set of rights and remedies for individuals and enterprises from one NAFTA state that invest in another. Many of these rights and remedies are invoked by S.D. Myers in this case.

While the GATT/WTO system itself has not thus far gone down a similar route as Chapter 11 of NAFTA and included an extensive code that specifically protects investors, many general ideas from the global system are reflected in Chapter 11. Norms such as "national treatment," for example, are a core part of the GATT/WTO provisions dealing with trade in goods and services. Many dispute-settling panels under the GATT/WTO system have, in varying circumstances, interpreted and applied that norm. This body of precedents is not strictly binding on a NAFTA tribunal. But the GATT/WTO case law does provide considerable guidance.

One recurring issue under the GATT/WTO system is as follows. Precisely to what extent do various provisions of the GATT/WTO agreements limit the right of government to regulate in the interest of important public values, like the protection of health, safety, and the environment? Under international law, governments begin with the almost unlimited right to make and enforce their own policy choices in these areas. Trade agreements however, to some extent limit the discretion of states. Certain measures may be incompatible with a trade agreement. A government might wish to adopt a particular measure to protect the environment, but be challenged by other governments who say that these measures would, contrary to GATT/WTO guarantees, interfere with trade.

Under the GATT/WTO system, the tension between the regulatory authority of government and respect for trade norms is often explored in the context of "Article XX" cases. Article XX (General Exceptions) of the GATT is intended to recognize the abiding right of governments, even in the face of certain open trade guarantees, to take reasonable measures to

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[7] The TRIMS agreement applies only to "investment measures related to goods." Parties are prohibited from adopting such measures that breach two core articles of the original GATT agreement, Articles III and Article XI. Article III (National Treatment) of GATT requires a state to extend "national treatment" - the most favorable treatment it applies to its own goods. In that way the good is regulated or taxed once it has entered the local stream of commerce. Article XI (Quantitative Restrictions) of GATT proscribes limitations on the import and export of goods.

protect the public welfare. Article XX provides, among other things, that government measures can override various trade norms in the GATT when those measures are "necessary to protect human, animal or plant life or health."

Article XX (General Exceptions) does not however, give carte blanche to override trade norms. A trade-restricting measure must actually be "necessary" to the pursuit of the government objective. The introductory words (also called the "chapeau" of Article XX (General Exceptions) of the GATT) stipulate that Article XX cannot be invoked to defend a measure where that measure is:

> applied in a manner which would constitute a means of an arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

This opinion will explore the extent to which Article XX (General Exceptions) of the GATT has been expressly incorporated into NAFTA. It will also discuss the extent to which the basic ideas in Article XX, as interpreted and applied in the GATT system, are of assistance in interpreting certain provisions of NAFTA, even where the text of NAFTA does not expressly refer to Article XX of the GATT.

Among the conclusions that I will arrive at is this: that in determining whether a foreign investor has been discriminated against, contrary to Article 1102 (National Treatment) of NAFTA, a tribunal may in many cases have to pursue the same kind of approach as would be taken in an Article XX case under the GATT. In particular, if:

- a government has a legitimate environmental objective;

and

- something about the situation of foreign investors unavoidably requires them to be treated differently from local investors in order to achieve that environmental objective

then the appropriate conclusion will generally be that that the foreign investors is not being subjected to the kind of discrimination that is prohibited by Article 1102 (National Treatment) of NAFTA.

A. Bilateral Investment Treaties (BITs)

Apart from the GATT/WTO system and regional trade agreements like NAFTA, attempts to provide in treaties for liberalized or free trade in investment have proceeded in at least two different tracks.

One has been the BIT track. BITS are bilateral investment treaties. These are entered into between pairs of states. The United States, for example, has a model BIT and a program of entering into agreements with other states based on the model, albeit sometimes with variation in

the details. Many BITS have been entered into between pairs of states that do not include the United States, such as Japan-China or Australia-Vietnam. Many BITS, including the current U.S. model, are very similar in content to Chapter 11 (Investment) of NAFTA. These BITS, like NAFTA, include assurances of nondiscriminatory treatment, treatment in accordance with a minimum international standard, a prohibition on trade-related investment restrictions and guarantees of compensation when expropriations occur.

BITS often incorporate norms concerning investor protection that are identical, or similar, to principles that are recognized in general international law. The international legal system includes norms that arise from widely followed state practices and these general rules can apply even to states that have not accepted the rule by way of an express provision of a treaty. For example, under general international law, even apart from any specific treaty, an investor has a right to compensation when its property is expropriated. (There is some dispute however, over the standard of compensation that applies in some situations.)

Many BITS however, go beyond general international law in the matter of remedies. These BITS provide an investor with a special method of recourse when it believes it has been mistreated by the host state. The investor can, on its own initiative and without the co-operation of its home state, submit its dispute with the host state to an arbitral tribunal. The latter has the authority to make a legally binding determination of whether the host state has breached its obligations to the investor under the treaty and to make a legally binding order for compensation.

General international law, by contrast, is primarily concerned with legal relations and remedies among sovereign states. The wrong that is done to an investor, in the eyes of general international law, is usually viewed as a wrong that is done to the investor's home state. If host state A expropriates a company from home state B without compensation, it is state B that has the right under general international law to bring a claim for compensation – not the company itself. As far as general international law is concerned, state B is under no duty to bring the claim. It might decline to do so for various reasons. State B might not agree that the company has a valid claim, it might not wish to absorb the expense of researching and advocating the claim or it might not wish for diplomatic reasons to engage in a dispute with state A.

Chapter 11 (Investment) of NAFTA has followed many BITS in providing for an investor-state dispute settlement process. The investor can choose among a variety of procedures. In this case the investor has invoked its right to seek a binding determination from an arbitral tribunal established pursuant to rules incorporated by the United Nations Commission on International Trade Law (UNCITRAL).

With respect to the rest of the main text of NAFTA, an individual or company has no independent right to pursue a claim. The claim must be brought by a state, not by an individual. Article 2018(2) of NAFTA

provides that a tribunal established under the general state-to-state dispute settlement process can make an award of compensation.

In other words, the special investor-state dispute settling process in Chapter 20 is not the only route for compensation where NAFTA is breached. Rather, it is the only route to obtaining compensation that can be activated and conducted by a private claimant acting on its own.

B. The Multilateral Agreement on Investment (MAI)

The other treaty track that has been pursued of late in the cause of investor protection, has been the Multilateral Agreement on Investment. Its contents were largely patterned after Chapter 11 (Investment), which in turn reflected many earlier BITS. A multilateral agreement offered the prospect of simplifying and widening the international protection of investment. Proponents of the MAI hoped that it might be a shared legal framework for investment protection among many states throughout the world. The MAI was a project of the Organization for Economic Cooperation and Development (OECD), the "rich countries club," but it was hoped that states outside of the OECD might embrace it as well.

Drafts of the MAI triggered vigorous protests from various academics, social activists, and non-governmental organizations. Critics suggested that the MAI lacked balance. It would enhance the rights of wealthy foreign corporations at the expense of local authorities who might be pursuing valid public objectives. Governments might shy away from measures to protect public health, environmental safety, and other legitimate social concerns for fear of being "hauled into court" by foreign investors under the investor-state dispute system. The "chilling effect" of the MAI on public regulation would result not only from the risk of losing cases, but from the inconvenience and expense of having to defend actions in front of tribunals. Critics variously called for the MAI to be abandoned or for its language to be modified to better recognize countervailing social values. The weight of outside criticism and the doubts of some governments within the OECD led to a stalling of the MAI negotiations. No agreement is currently in sight.

The experience of investor-state claims to date under NAFTA has been criticized in its own right, and as a warning of the potential adverse effects of the MAI. Some academic observers contend that some of the NAFTA claims that have been filed to date have challenged the practical ability of governmental authorities to protect health and the environment. The controversy over the MMT case has been a particular source of great concern. Canada settled, for almost twenty million dollars, a massive claim that had been brought on behalf of a company after a fuel additive it manufactured was banned. To critics, it showed that a measure legitimately designed to protect public health had led to Canada's obligation to pay dearly.

Of course, that is not the only way of looking at the matter. Counsel for the investor in this case – the same counsel who acted for the investor in the MMT case – invited us to look at that case as similar to the present one: as one in which Canada wrapped up raw economic protectionism in the guise of an environmental measure which was actually without scientific merit.

Some proponents of liberalized trade are concerned about the "new protectionism." They argue that as old-fashioned tariff barriers are disappearing there is an emerging threat that states will engage in a new and insidious kind of protectionism; one in which states cite health, safety and environmental concerns as justifications for measures that are actually protectionist in both their aim and effect. In the long run, the opponents of the "new protectionism" warn, such measures may impair the very social causes they are supposed to promote. Trade barriers can impede economic development that in turn leads to social and environmental improvements.

The MMT case raised many of these broad issues, but NAFTA tribunals are just beginning to have the opportunity to provide opinions on them. Counsel for both the investor and Canada have indicated to us in this case that they would now very much welcome an attempt by this panel to provide broad guidance on the nature and effect of Chapter 11 (Investment). There is no principle of *stare decisis* under the Chapter 11 system, but a decision of earlier tribunals may be persuasive to those that follow – depending of course, on the cogency of the reasoning and the factual similarity of earlier disputes to those that are under active consideration. Dispute-settling bodies under the WTO system have been generally observing the principle of "judicial economy" – that they should decide no more than the issues necessary to dispose of a particular dispute.

This opinion will address those issues necessary to dispose of this first stage of this case, and in doing so will attempt to provide reasoning that is sufficiently well elaborated as to be a potential source of assistance in the future. With respect to some of these issues, it would be possible for me to reach a particular conclusion on one legal basis, and avoid considering other possible bases for reaching the same conclusion. I have not always however, taken this path of maximum avoidance. The parties to this case have devoted a great deal of thought, energy, and expense to arguing a variety of legal points and have expressly indicated their desire for some broad guidance for the future. I would think it might be rather uneconomic from their point of view for me to now refrain from expressing the opinion I have formed on some important points that have been fully debated in these proceedings and which will likely be of considerable ongoing interest.

While there is an ongoing political debate between those who favour more investor protection and those who are concerned to protect the role of activist government, as a tribunal under Chapter 11 is not our role to

make political choices. It is rather our duty to interpret fairly the actual words chosen by the framers of NAFTA. If those words amounted to a clear-cut choice in favour of one political view over the other, a tribunal like ours would be obliged to be faithful to the text and decide cases accordingly. It would be for the state parties to the NAFTA to make any amendments that they deemed necessary in light of those decisions.

As I shall try to explain however, it is in fact my view that a careful reading of NAFTA reveals that NAFTA embodies a balanced approach. The open-trade guarantees of NAFTA can and should be interpreted in light of the clear messages of concern that NAFTA and its companion agreements express over protection and enhancement of the environment of the entire region. NAFTA also provides direction on how to reconcile open trade norms with environmental concerns. States are directed to find ways to achieve their freely chosen environmental standards that are as consistent as is reasonably possible with open-trade guarantees.[8]

C. International Agreements and the Mutually Supportive Relationship of Open Trade and Environmental Protection

The interpretation of Chapter 11 (Investment) of NAFTA requires an examination of a wider legal context that includes environmental treaties

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[8] See generally I. S. Moreno, J. W. Rubin, R. F. Smith III, and T. Yang, "Free Trade and the Environment: the NAFTA, the NAAEC and Implications for the Future" (1999) 12 Tulane International Law Journal 405 at 458-459. The authors summarize a recent report of the WTO's Committee on Trade and the Environment as follows:

> The CTE Report concluded however, that the WTO was interested in building a constructive relationship between trade and environmental concerns. It stated that trade and the environment were both important areas of policy-making and should be mutually supportive to promote sustainable development. The Report further indicated that governments had the right to establish their national environmental standards in accordance with their own conditions, needs and priorities, but that it was inappropriate for them to relax their existing standards or enforcement merely to promote trade. The Report acknowledged that an open, equitable and non-discriminatory multilateral trading system and environmental protection are essential to promoting sustainable development. Finally, the CTE Report noted that removal of trade restrictions and distortions, in particular high tariffs, tariff escalation, export restrictions, subsidies, and non-tariff barriers, can potentially yield benefits for both the multilateral trading system and the environment.

as well as trade treaties. A close look at these treaties reveals the following:

- environmental agreements have acknowledged the importance of trade and economic development, just as trade treaties have affirmed the importance of environmental protection;
- in both trade treaties and environmental treaties, a general approach is taken to reconciling the promotion of trade with the protection of the environment. Governments have the unrestricted right to their environmental objectives. They can aim as high as they like. In pursuing those standards however, governments should avoid measures that are discriminatory. Governments should also avoid measures that restrict trade more than is reasonably necessary in order to achieve the objectives they have freely chosen;
- governments should seek ways in which the promotion of trade and the protection of the environment can be mutually supportive.

A more detailed look at the environmental agreements that bear on this case will, I believe, substantiate the broader ideas just proposed.

In 1992, before NAFTA came into being, Canada, the United States, and Mexico all adopted the Rio Declaration on the Environment and Development. It recognizes that open trading systems and environmental protection can be mutually supportive. Principle 12 of the Rio Declaration is as follows:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problem of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environment problems should, as far as possible, be based on an international consensus.

At the same time as NAFTA was entered into, the three parties also agreed to "The North American Agreement on Environmental Cooperation" (NAAEC). In it, the parties "reaffirm" the Stockholm Declaration on the Human Environment of 1972 and the Rio Declaration on the Environment and Development.

The NAAEC was entered into by the parties as one of the conditions that President Clinton stipulated for approval by the United States of the main NAFTA agreement. The side-by-side creation of the two agreements

in itself suggests that the parties viewed open trade and environmental protection as compatible goals, and the reference to the Rio Declaration makes it clear that the goals can be viewed as mutually supportive.

The Vienna Convention on the Law of Treaties confirms the importance of the NAAEC to the interpretation of the provisions of NAFTA. Article 31 of the Vienna Convention states that:

> 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 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 connexion with the conclusion of the treaty*;
> (b) *any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*. [Emphasis added.]

D. The Transboundary Agreement

The possibility of achieving both economic efficiencies and the effective management of hazardous waste is recognized in the 1986 Transboundary Agreement between Canada and the United States.[9] The preamble of the Transboundary Agreement states:

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

[9] Agreement between the Government of the United States of America and the Government of Canada concerning the Transboundary Movement of Hazardous Wastes C.T.S. 1986 No. 39 (Date of Entry into Force 11 August 1986).

Article 2 of the Transboundary Agreement provides that:

> The parties shall permit the export, import, and transit of hazardous waste across their common border for treatment, storage, or disposal pursuant to the terms of their domestic laws, regulations and administration practices, and the provisions of this Agreement.

Article 5(2) of the Transboundary Agreement states:

> The parties will cooperate in monitoring and spot-checking shipments of hazardous waste to ensure, to the extent possible, that such shipments conform to the requirements of the applicable legislation and of this Agreement.To the extent that any implementing regulations are necessary to comply with this Agreement, the parties will act expeditiously to issue such regulations consistent with domestic law. Pending such issuance, the parties will make their best efforts to provide notification in accordance with this Agreement where current regulatory authority is insufficient. The parties will provide each other with a diplomatic note upon the issuance and the coming into effect of any such regulation.

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

Article 11 cannot reasonably be interpreted as giving the parties free reign to exclude the import or export of hazardous waste simply by enacting whatever domestic laws it chooses. To do so would give no force or effect to the preamble statements and articles of the Transboundary Treaty that call for cooperative efforts to permit transboundary movement in the context of improving and protecting the environment of both Canada and the United States.

E. The Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was signed by 105 states in 1989. It came into force in May 1992, when twenty states had ratified it. Canada has become a party to it. The United States had not.

The Basel Convention commits its participants to:

- Ensure that the generation of hazardous wastes is reduced to a minimum (Article 4(2)(a));

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

It would be fair to say that the Basel Convention is not as strong as the Transboundary Agreement in emphasizing the potential that transboundary movement has for achieving economies and better protecting the environment. Article 4(2)(d) of Basel does however, acknowledge that the environmentally sound and efficient management of waste is not necessarily accomplished by avoiding transboundary shipments.[10]

Furthermore, Article 11 expressly allows parties to enter into bilateral or multilateral agreements for the transboundary movement of waste, provided that these agreements do not undermine Basel's own insistence on environmentally sound management of waste. As far as Canada and the United States were concerned, Article 11 "made room" for the continuation of the Transboundary Convention with its clear emphasis on including transboundary movements as a means to be considered in achieving the most cost-effective and environmentally-friendly solution to hazardous waste problems.[11]

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[10] For more information on the Basel Agreement, see K. Kummer *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules* (Oxford: Clarendon Press, 1995).

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

> Although NAFTA is designed to promote free uninhibited trade between the three countries, it also recognizes the supremacy of the Basel Convention, the 1986 Agreement between Canada and the United States, and the 1983 La Paz Agreement between the United States and Mexico in case of any inconsistency between NAFTA and these environmental agreements. [Actually, Basel is not supreme unless and until ratified]. In fact, the Canada – U.S. and Mexico – U.S. hazardous waste agreements are predicated upon the free movement of hazardous waste between the parties subject to prior notice and consent by the importing country. The Basel Convention principle that disposal facilities be established within the country generating waste and that transboundary movement of waste shall be reduced to the minimum do not apply to bilateral movements of hazardous waste between the United States and Mexico or Canada because

The framers of NAFTA considered which earlier environmental treaties would prevail over the specific rules of NAFTA in case of conflict. Article 104 provided that the Basel Convention would have priority if and when all the NAFTA parties ratified the agreement. The United States had not done at the time of the export ban by Canada. The United States was not therefore, required to comply with Basel rules as such and Canada could not, in a NAFTA dispute, argue that a particular NAFTA rule must be subordinate to Basel.

Even if the Basel Convention had been ratified by all three NAFTA parties, Canada would not be able to use it freely as a shield against a specific NAFTA obligation. Rather, according to Article 104 of NAFTA, "where a party has a choice among equally effective and reasonable available alternatives for complying" with a Basel obligation, it must choose the one which is least inconsistent with NAFTA. If a party can find a way to comply with both NAFTA and Basel at the same time – as it appears Canada likely could have done here – it must do so.

F. General Provisions of NAFTA Concerning the Environment

NAFTA came into force in 1994. The Preamble includes commitments to both open trade and environmental protection. The three parties to NAFTA resolved, among other things, to:

- STRENGTHEN the special bonds of friendship and cooperation among their nations;
- CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
- REDUCE distortions to trade;
- ENSURE a predictable commercial framework for business planning and investment;
- BUILD on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation;
- UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
- PROMOTE sustainable development;
- STRENGTHEN the development and enforcement of environmental laws and regulations.

The preamble is part of the text of NAFTA that is of assistance in understanding the objects and meaning of specific detailed provisions.

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these would be governed by the principle of freedom of movement, subject to notification and consent of the country of import. *Joint Book of Documents,* Volume I, Tab 4.

As already mentioned, the main NAFTA agreement was accompanied by a "side agreement" on the environment, namely the North American Agreement on Environmental Cooperation. Its Statement of Objectives include both:

- Article 1(d) - support the environmental goals and objectives of the NAFTA;

and

- Article 1(e) - avoid creating trade distortions or new barriers.

Article 3 of the NAAEC "Levels of Protection," states that:

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

The NAAEC mandates the creation of a Commission for Environmental Cooperation. The Council of the Commission is authorized to strengthen cooperation on environmental laws and regulations. Without reducing levels of environmental protections, the Council is considering ways to render technical requirements more compatible.[12]

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

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

These principles are all consistent with the express provisions of the Transboundary Agreement and the Basel Convention on the international movement of hazardous waste.

A logical corollary of these principles is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it should choose the alternative that is most consistent with its commitments under international agreements to open trade. This corollary is also consistent with the language and case law connected with the WTO family of agreements.

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[12] NAAEC, Article 10(3)(b).

Article XX (General Exceptions) of GATT, it may be recalled, permits states to override certain open trade norms of the GATT where it is "necessary" to do so in the interests of such values as human and animal safety. In connection with Article XX and similar provisions in other agreements that are part of the WTO package, dispute settling bodies have found that states are free to set high standards. A dispute settling body has no authority to hold public safety and welfare measures invalid merely because they strike that body as being unreasonably demanding. A dispute settling body may find a breach of the GATT or a related agreement however, where that high standard is injurious to an open trade norm that is recognized by the GATT *and* where that high standard could have been achieved by reasonably available means that are less injurious to trade.

G. Article 1114 of NAFTA: Environmental Measures

Article 1114 of NAFTA states that:

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
> 2. The parties recognize that it is inappropriate the encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party, and the two Parties shall consult with a view to avoiding any such encouragement.

Commentators on NAFTA have referred variously to Articles like 1114 as "tautologies" or as "diplomatic, rather than legal" statements. Whatever acknowledgment of environmental concerns is stated in Article 1114 is tempered by the fact that measures must be "consistent with this Chapter." How can such a provision be of any incremental guidance in interpreting what the Chapter actually means?

I do not think that Article 1114 must be viewed as empty rhetoric. Treaties are a form of communication. Human beings engaged in

communication sometimes repeat things even where, on an abstract and logical plane, it may appear unnecessary to do so. Repetition can serve, among other things, as a reminder or as a means of emphasizing a particular concern or proposition. I view Article 1114 as acknowledging and reminding interpreters of Chapter 11 (Investment) that the parties take both the environment and open trade very seriously and that means should be found to reconcile these two objectives and, if possible, to make them mutually supportive. I have already indicated that the context of NAFTA as a whole clearly provides the basic approach that should be followed: parties are free to choose high environmental standards, but should adopt and apply them in a way that avoids barriers to trade that are not necessary in order to achieve the environmental purpose.

V. ARTICLE 1102 OF NAFTA

THE NEXT STAGE IN MY ANALYSIS is to consider the specific provisions of Chapter 11 (Investment) that Canada allegedly breached.

S.D. Myers contends that the Canadian government denied it "national treatment" contrary to Article 1102 of NAFTA. Article 1102(1) states:

> (1) Each Party shall accord to *investors* of another Party treatment no less favorable than it accords, in like cicrumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [Emphasis added.]

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

> (2) Each Party shall accord to *investments* of investors of another Party treatment no less favorable than it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [Emphasis added.]

Article 1102(3) addresses the obligation of sub-national units – local states or provinces – and clarifies that the relevant comparison is with how the investment or investor is treated compared to the best treatment accorded to investments or investors from the same federation:

> (3) The treatment accorded by a Party under paragraphs

> 1 and 2 means, with respect to a state or a province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.[13]

The Government of Canada argues that its contested measure merely established a uniform regulatory regime in which all will be treated equally. No one was permitted to export PCBs. S.D. Myers contends that Article 1102 (National Treatment) was breached by a ban on the export of PCBs that was not justified by bona fide health or environmental concerns, but which had the aim and effect of protecting and promoting the market share of producers who were Canadians and who would perform the work in Canada.

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

The Supreme Court of Canada has explored the complexity of making comparisons as it has developed its line of decisions on non-discrimination against individuals. *In Law Society of British Columbia v. Andrews*, the Court stated that whether discrimination exists cannot be determined by applying a mechanical test of whether similarly situated people are treated the same. Whether individuals are "similarly situated," and have been treated in a substantively equal manner, depends on an examination of the wide context in which a governmental measure is established and applied and the specific circumstances of each case.[14]

In the WTO system, dispute settling panels and the appellate bodies have often had to apply the context of "like products." The case law has emphasized that the interpretation of "like" must depend on all the circumstances of each individual case. The case law also suggests that close attention must be paid to the legal context in which the word "like" appears. The same word "like" may have different meanings in different provisions of the GATT. In *Japan – Taxes on Alcoholic Beverages*, the Appellate Body states at paragraphs 12.2 and 12.3:

> [the interpretation and application of "like"] is a discretionary decision that must be made in considering

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

[14] [1989] 1 S.C.R. 143, at paragraphs 27 to 31.

> the various characteristics of products in individual cases. No one approach to exercising judgment will be appropriate for all cases. The criteria in [an earlier case], Border Tax Adjustments should be examined, but there can be no one precise and absolute definition of what is "like." The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.[15]

In considering the meaning of "like circumstances" of Article 1102 (National Treatment) of NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears.

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

Article 1102 (National Treatment) of NAFTA is not made subject to an equivalent of Article XX (General Exceptions) of GATT. *Read in its proper context however, the phrase "like circumstances" in Article 1102 in many cases does require the same kind of analysis as is required in Article XX cases under the GATT.* The determination of whether there is a denial of national treatment to investors or investments "in like circumstances" under Article 1102 of NAFTA may require an examination of whether a government treated non-nationals differently in order to achieve a legitimate policy objective that could not reasonably be accomplished by other means that are less restrictive to open trade.

In my view, the legal context for Article 1102 (National Treatment) includes the various provisions of NAFTA, its companion agreement NAAEC and principles, including those of the Rio Declaration, that are affirmed by the NAAEC. The principles that emerge from that context, as noted earlier, include the following:

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

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[15] AB-1996-2

- states should avoid creating distortions to trade;
- that environmental protection and economic development can and should be mutually supportive.

Accordingly, an analysis of "like circumstances" in this case must explore whether the Government of Canada had legitimate environmental reasons, or other important public welfare reasons, for treating S.D. Myers in a less favourable manner than its Canadian competitors.

A. A Possible Counter-Argument: Article XX Concepts Only Apply to Certain Chapters of NAFTA, But Have No Application With Respect to Chapter 11

The following argument might be made against the approach just stated. It might be contended that:

- NAFTA expressly refers to Article XX (General Exceptions) of GATT and expressly make Article XX concepts applicable to *some* open trade commitments in NAFTA;
- by *not* expressly making Article XX of GATT applicable to other parts of the NAFTA, including Chapter 11, the framers must have intended that these norms would not be subject to reasonable limitations in the interest of public welfare.

I would reject the argument just sketched for the following reasons.

The text of Article 2101(1) of NAFTA is as follows:

> 1. For the purposes of:
> (a) Part Two (Trade in Goods), except to the extent that a provision of that part applies to services or investment; and
> (b) Part Three (Technical Barriers to Trade), except to the extent that a provision of that part applies to services, GATT Article XX and its interpretative notes, or any equivalent provision of a successor Agreement to which all Parties are party, are incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible resources.

There is an obvious reason why the framers of NAFTA would have chosen to "cut and paste" Article XX from the GATT and into Chapters 3 and 4 (Exception for Services) of NAFTA. The GATT basically concerns itself with trade in goods, and so do Chapters 3 and 4 of NAFTA. So the "cut and paste" operation must have seemed like a simple and logical

step. It by no means follows that the framers of NAFTA had no interest in having public policy exceptions apply to other open trade guarantees, such as those in Chapter 11 (Investment).

As S.D. Myers itself notes in its memorial, all three NAFTA parties belong to the OECD, and OECD practice suggests that an evaluation of "like situations" in the investment context should take into account policy objectives in determining whether enterprises are in like circumstances. The OECD Declaration and Decision on International Investment and Multinational Enterprises, issued on 21 June 1976, states that investors and investments should receive treatment that is "no less favorable than that accorded in like situations to domestic enterprises." In 1993, the OECD clarified the "like situation" test by noting that:

> As regards the expression "in like situations," the Committee, first of all, agreed that comparison between foreign-controlled enterprises is valid only if the comparison is made between firms operating within the same sector. The Committee also agreed that more general considerations, such as the policy objectives of Member countries in various fields, could be taken into account in order to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of National Treatment.[16]

To sum up thus far, the analysis of "like circumstances" under Article 1102 (National Treatment) may in many cases require a tribunal to take into account whether governments have legitimate public welfare reasons for viewing the circumstances of nationals and non-nationals as unlike. The text and context of NAFTA make it clear that the protection of the environment must be ranked among the most important concerns of government. They also make it clear that in pursuing environmental objectives, governments should avoid measures that discriminate against non-nationals unnecessarily.

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[16] OECD International Investment and Multinational Enterprises: National Treatment of Foreign-Controlled Enterprises (Paris: OECD, 1985) at 17.

B. "Like Circumstances" and an Examination of Whether the Non-National Complaining of Less Favourable Treatment is in the Same Economic Sector as the National

It is time to turn to another facet of "like circumstances." In Article 1102 (National Treatment) of NAFTA "like circumstances" obviously requires a tribunal, as part of its analysis, to consider whether a non-national is engaged in the same kind of business activity as the nationals who are allegedly treated better.

From the business perspective, it is clear that S.D. Myers was in "like circumstances" with Canadian operators such as Chem-Security and Cintec. S.D. Myers and the Canadian operators were engaged in providing PCB waste remediation services. S.D. Myers was in a position to attract customers that might have otherwise gone to the Canadian operators because it could offer superior prices and because it had extensive experience and credibility. It was precisely because S.D. Myers was in position to take away some business from its Canadian competitors that Chem-Security and Cintec successfully lobbied the Minister of the Environment to ban exports as soon as the United States' authorities permitted imports. Economic protectionism was in fact a highly influential factor in shaping Canadian public policy in this matter.

Canadian authorities could have viewed S.D. Myers and other PCB waste-importing competitors as being in "different circumstances" if the fact of exporting the waste into the United States reasonably required differential treatment from the point of view of environmental protection.

If, for example, the export of waste into the United States threatened the Canadian environment in some way, Canadian authorities would have the right to regulate in a manner that reasonably addressed that concern. On the facts of this case however, any concerns of Canadian authorities regarding adverse consequences of allowing exports into the United States could have been readily addressed. Canadian authorities could, for example, have acted promptly to ensure that all PCBs imported into the United States were disposed or recycled, rather than being put in landfills. The latter approach might have led to some seepage of waste back into the Canadian ecosystem.

There was no objective basis, on the record, for Canada to shut down access to the United States in order to keep Canadian facilities in operation. The Canadian operation of Chem-Security, in Swan Hills, Alberta, disposed of different kinds of waste, not only PCBs. It had other work to do. Furthermore, the investment chapter of NAFTA expressly permits a government to give outright preferences to nationals in the form of subsidies or preferred treatment with respect to government procurement. The Swan Hills operation had been the object of generous government subsidies for many years and these could have continued.

The evidence also shows that owners of PCBs who were denied access to the U.S. option would in many cases simply hold on to the waste rather than pay the much higher prices connected with the Canadian facility.

In other words, Canadian authorities could have taken the approach they did eventually adopt when they repealed the ban initiated by the Minister of the Environment in 1995. They could have permitted Canadians to take advantage of the additional disposal facilities offered by S.D. Myers and other U.S. operators while taking reasonable measures to address any environmental concerns. The result would have been good for many Canadian owners of PCB waste, good for the Canadian environment, good for S.D. Myers and other companies and good for the U.S. environment in the Great Lakes area where the storage of PCBs by Canadians poses a threat.

C. National Treatment Under Chapter 11 of NAFTA and Protectionist Motive or Intent

In assessing whether a measure is contrary to a national treatment norm a tribunal should, in my view, consider:

- protectionist *motive or intent:* whether the intent of the government is to create barriers to trade;
- whether the measure, *on its face,* appears to favour its nationals over non-nationals who are protected by the relevant treaty;
- whether the *practical effect* of the measure is to disproportionately benefit nationals over non-nationals.

Each factor must be explored thoroughly in the context of all of these facts to determine whether there has actually been a denial of national treatment. This list of factors is essentially the same as those that courts and administrative agencies typically consider when they are exploring the existence of discrimination in other contexts, such as human rights laws or constitutional provisions. The precise interpretation and application of these factors in a particular trade law case however, must be closely attentive to the particular trade provisions that are germane and the wider trade law context in which those provisions appear.

The intent factor is important, but protectionist intent is not necessarily decisive in every case. An intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 (National Treatment) of NAFTA if the actual measure produced has no adverse effects. The word “treatment” suggests that practical impact is required to produce a breach of 1102, not merely motive or intent that are in principle contrary to NAFTA norms.

Furthermore, the intent of government is a complex and multifaceted matter. Government decisions are shaped by different politicians and bureaucrats with differing philosophies and perspectives. Every person involved may tailor his or her recommendation or vote to address a

variety of different policy objectives and may sometimes take into account partisan political factors or career concerns. As challenging as the task is, a tribunal such as this can fairly characterize the motivation or intent of government by examining the evidence as a whole. The record may include statements or texts that in law carry the authority of the government as a whole, and it may be possible to determine which particular participants were especially influential in arriving at a decision.

In this case, the evidence establishes that the policy of the Government of Canada has been 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 work in Canada and that were owned by Canadian nationals. Other factors were considered, particularly at the bureaucratic level, but the protectionist intent of the lead Minister in this matter, The Honourable Sheila Copps, was reflected in decision-making at every stage that led to the ban. Had that intent been absent, policy-makers could and likely would have reached the conclusion that was consistent with the views of the Canadian bureaucracy prior to the ban and which were eventually accepted by the Canadian Government after the ban. This view was that the opening of the United States border should be welcomed in the interests of expediting the cleanup of PCBs from the environment. Canadian policy makers could have concentrated on ensuring that any risks associated with exporting PCB waste to the United States was eliminated through proper regulations and safeguards.

To briefly recap some facts that are essential to my conclusion:

- on 2 August 1994, a briefing noted prepared by Mr. John Hilborn and two other officials in the Department of the Environment stated the EPA might approve the import of PCBs from Canada. The briefing note concluded by advising that federal and provincial policies should be changed so as to open the border from the Canadian side, as such a policy would represent "a technically and environmentally sound solution to the destruction of some of Canada's PCBs;" *Joint Book of Documents,* Volume III, Tab 86;
- a policy memorandum to the Minister in the fall of 1994, signed by Mr. H. A. Clarke, Assistant Deputy Minister of Environmental Protection Service, and Mr. Mel Cappe, refers to a current policy that PCB waste be managed in Canada, but calls for a review of the policy based on the following factors:
    - our domestic destruction capacity, either short term or long term, has seen limited development;
    - Canada's position at Basel Convention meetings has been to support the use of regional capacity;
    - the U.S. EPA is considering a change to their PCB policy and may permit selected Canadian PCB imports;

- the U.S. ban has effectively allowed Canada to restrict PCB shipments to the U.S. in the absence of authority in CEPA to do so; *Joint Book of Documents,* Volume III, Tab 80;

- in March 1995, federal and provincial officials discussed the issue of PCB waste shipments to the United States. According to a letter from the Minister of the Environment of the Province of Manitoba, dated 18 December 1995, "the open border concept was specifically discussed and supported by all the jurisdictions." Environment Canada's position was that the U.S. closed the border and it was the U.S. who could open it. Now, without prior consultation, the Interim Order [banning exports to the U.S. issued by the Minister of the Environment] seems to reverse the federal position; *Joint Book of Documents,* Volume IV, Tab 101;
- the Deputy Minister of the Environment expressed support for the principle of the opening of the border at a meeting with Mr. Cloghesy in 1995; *Joint Book of Documents,* Volume II, Tab 43;
- the Minister of the Environment met with senior officials from two Canadian companies who wanted to avoid competition from S.D. Myers and other Canadian suppliers. In July 1995, senior officials of two Canadian operators of hazardous waste facilities, Chem-Security and Cintec, met with Minister Copps in her office. They warned that the EPA might respond positively to lobbying to permit the import of PCB waste from Canada for disposal. It is clear from the account of Mr. Mathes, who attended that meeting on behalf of Chem-Security, that the arguments of the Canadian companies focused on the contention that U.S. competition would threaten the economic viability of their own operations, not on any health or safety concerns. In addition, to the account of the meeting by a senior official of Chem-Security who attended, Mr. Art Mathes, there is on record a letter from Mr. Mathes dated 14 March 1995, invoking "[t]he economic benefits of maintaining the current Canadian policy." Mr. Mathes' letter does not in any way suggest that opening the border would have had adverse environmental or health effects. Also in attendance at the meeting on behalf of Chem-Security was Jeff Smith, who had earlier been a staff member in Minister Copps' office; *Joint Book of Documents,* Volumes II and III, Tabs 39 and 81;
- at that meeting, Minister Copps stated it was the policy of the Canadian Government that PCB waste should be disposed "in Canada by Canadians." The phrase "by Canadians" suggests a nationalist and protectionist intent, rather than any concern about the environmental impact of moving waste across the border into the United States;
- no representative of the federal government made any submission to the EPA at its hearings into S.D. Myers' application. The federal government was well aware of the hearings, as it monitored them, and Mr. Cappe, the Deputy Minister, even indicated to Mr. Cloghesy that he could express to the EPA hearing that the Department favoured an open

border with the United States; *Joint Book of Documents,* Volume III, Tab 43;

- on 9 June 1995, Minister Copps repeated her "in Canada by Canadians" statement in the House of Commons. I would note that a statement by the lead Minister in the House of Commons with respect to government policy on an issue must ordinarily be accepted at face value insofar as it states official policy and the rationale behind it; *Joint Book of Documents,* Volume1, Tab 17;
- on 13 July 1995, a Department of Environment note on the Minister's "business week" recalled that the Minister had promised the Canadian industry that she would close the border from the Canadian side if the EPA opened it from the United States' side. The note referred to concerns over NAFTA and attached a "paper that Chem-Security" had prepared on this. Chem-Security's actual paper does not appear on the record in this case; *Joint Book of Documents,* Volume II, Tab 59;
- on 2 August 1995, Mr. John Hilborn, Mr. Dave Campbell, and Mr. Hugh Dibbs, three Department of the Environment officials, prepared a briefing note on the potential opening of the border from the U.S. side. They recommended that federal policy be changed to support the EPA proposal "because it represents a technically and environmentally sound solution for the destruction of some of Canada's PCBs"; *Joint Book of Documents,* Volume III, Tab 86;
- a typed draft undated letter from Mr. Cappe, the Deputy Minister of the Environment, to Jeff Smith, thanks Mr. Smith for a memorandum of 1 September 1995, concerning a possible opening of the border by the EPA. The Cappe letter recalls the promise that the Minister had made to Chem-Security and Cintec officials. The reference to that promise however, is crossed out by hand, with the explanatory note "I don't want to put the commitment down on paper;" *Joint Book of Documents,* Volume II, Tab 56;
- on 7 September 1995, Mr. Hilborn prepared a briefing note on PCB waste management policy. He noted that:
    - [Canada's] domestic destruction capacity, either short term or long term, has seen limited development;
    - Canada's position at the Basel Convention meetings has been to support the use of regional capacity;
    - the U.S. EPA is considering a change to their PCB policy, and may permit selected Canadian PCB imports;
    - the U.S. ban has effectively allowed Canada to restrict PCB shipments to the U.S. in the absence of authority in CEPA to do so; *Joint Book of Documents,* Volume III, Tab 80;
- on 27 October 1995, Mr. Hilborn prepared a memorandum at the request of the Associate Deputy Minister. He stated that "[a]n interim order to amend the PCB Waste Export Regulations quickly is not a viable option because it cannot be demonstrated that closing the border is

required to deal with a significant danger to the environment or to human health." The 27 October memorandum notes that the Minister had told the House of Commons that PCB Waste should be destroyed in Canada and suggests that banning exports to the United States would be consistent with "current policy" and would mean that "the Commitment to the Canadian PCB destruction industry" would be fulfilled. The 27 October memorandum is entirely consistent with the theory that the case for the export ban was that it kept the Minister's promise to protect Canadian producers from U.S. competition. The 27 October memorandum outlines the case against banning exports. It notes that:

- PCBs destroyed in either country is positive for the environment.
- PCB owners may have lower destruction costs due to competition, and more incentive to destroy PCBs; *Joint Book of Documents,* Volume I, Tab 6;

- on 30 October 1995, George Cornwall, Director of the Hazardous Waste Branch wrote a note referring to the Minister's possible immediate action on PCB wastes. She would pass an interim order that would close the border from the Canadian side and make a public statement that the opening from the U.S. was contrary to her "longstanding position that Canadian PCBs should be destroyed in this country." Mr. Cornwall cited the only "pro" factor in favour of this decision was that "[t]he Canadian environmental industry investment, i.e., Chem-Security is protected by a secure supply of PCBs for their facility in Swan Hills; *Joint Book of Documents,* Volume I, Tab 30;
- in that same note of 30 October 1995, Mr. Cornwall outlined the "cons" of the Minister's possible closing of the border as follows:
  - interim orders are design [sic] to provide immediate action to resolve "significant danger" to the environment and/or human health. It can be argued that the opening of the U.S. border poses no such significant danger;
  - S.D. Myers will certainly seek redress through NAFTA intervention, since they have invested/lobbied heavily to get the border opened. The company can be expected to object formally to any action taken under CEPA to close the border;
  - It will be difficult to argue that the transportation of PCBs to the U.S.A. poses a greater danger than transporting PCBs to Swan Hills, Alberta;
  - industry Canada and Foreign Affairs are likely to object to the closing of the Canadian border because it will appear to be an unjustifiable restriction on international trade;
  - current practice of returning U.S.-owned PCBs in Canada to their originators in the U.S. will be jeopardized if the Canadian border is completely shut. An "escape hatch" will have to be provided; *Joint Book of Documents,* Volume I, Tab 30;
- on 9 November 1995, Mr. George Cornwall, an official of the Waste

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

> (i) We could ask an (independent?) consultant to assess that the disposal facilities in the U.S. that would be handling/disposing of Canadian PCB wastes in an environmentally acceptable way. U.S. EPA did this before accepting stablex (??);
> (ii) We need to satisfy ourselves that U.S. consents are all adequate vis-a-vis our export-import of hazardous waste (eihw) regulations; *Joint Book of Documents,* Volume II, Tab 58;

- Mr. Cornwall's suggestions, including verifying that the wastes would be handled in a safe way in the United States, are precisely the course of action that a government could take if it was genuinely interested in reconciling its environmental concerns with the demands of NAFTA. There is no record that the federal government pursued this line of investigation in the fall of 1995;
- on 10 November 1995, Mr. Jeff Smith, a former member of Minister Copps' staff, now acting as a lobbyist for the Canadian company Chem-Security, sent a letter to Mr. Tony Clarke, Deputy Minister of the Environment, suggesting points that could be used as a "justification" for an interim ban. Mr. Clarke appears to have passed the note on to Mr. Victor Shantora and Mr. John Hilborn, two department officials, with the note that "this letter makes some interesting arguments which could be used as its basis for the Minister's justification." The letter from Mr. Smith does not appear on the record; *Joint Book of Documents,* Volume II, Tab 35;
- on 15 November 1995, Mr. Hilborn prepared a note entitled "Export of PCBs to the United States." It stated:

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

- Mr. Hilborn also noted that a draft opinion from the Department of Foreign Affairs and International Trade "indicates that closing the Canadian border would likely be found by a NAFTA panel to be a restriction on trade."
- the first consideration listed by Mr. Hilborn in his review of the considerations for or against an interim order however, was the Minister's statement in the House that "the handling of PCBs in Canada should be done in Canada by Canadians"; *Joint Book of Documents,* Volume II, Tab 42;
- on the morning of 16 November 1995, the Minister signed an "interim order" that prohibited PCB exports to the United States unless they were of PCBs in Canada owned by U.S. agencies. The Minister relied on her authority under the Canadian Environmental Protection Act to issue such an order where "there is a significant danger to the environment and to human life and health";
- in a speech later that day, 16 November 1995, to the Canadian Bar Association Environmental Section, the Minister stated:

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

- on 16 November 1995, Mr. Hilborn revised his note of the previous day. This version of the note completely omitted any reference to the Transboundary Convention. It referred to the fact that Canada has signed the Basel Convention, which imposed obligations upon Canada to ensure that it had adequate destruction facilities within its borders and to ensure that it reduced the transboundary movement of PCBs to a minimum. "Consequently, the federal government's policy is that Canadian PCBs should be destroyed in this country." There was "no confirmatory evidence at this time to assure ourselves that Canadian PCBs would be managed in an environmentally sound manner." There were also uncertainties, the note said, about assured long term access to U.S. facilities, and the EPA's granting of an enforcement discretion might be challenged in the courts; *Joint Book of Documents,* Volume I, Tab 29;
- the Minister of Health was required by CEPA to concur in the issuance of the interim order. There is no evidence that the Minister of Health personally directed her mind to the issue. There is no evidence that her department made an independent evaluation of whether any health risk existed. The evidence rather, is that an official in the

department simply accepted the Department of Environment's suggestion that a risk existed;

- on 20 November 1995, the Interim Order was re-issued; shortly after the first interim order was issued, there was a meeting of officials from various departments to discuss it. Mr. Aharon Mayne, a Department of Foreign Affairs and International Trade official, attended the meeting. His responsibilities attended to transboundary transportation issues involving the United States, including PCB wastes. He had not heard of any proposed ban prior to its being imposed. At the meeting, he recalled that some officials thought the ban was ill-conceived, "some of them thought it was not being done on its merits, but rather for 'political' reasons that had nothing to do with the substance of the issue." Some Environment Canada officials were not happy with the Order and were quite 'expressive' on this point; *Joint Book of Documents,* Volume III, Tab 84;
- on 12 December 1995, Mr. Dana Myers wrote to Minister Copps to propose that Canada satisfy any possible environmental concerns by making it a condition of allowing the transborder movement that the waste would be disposed of or recycled, rather than landfilled, in the United States. S.D. Myers does not landfill. The Minister did not even respond to the proposal. *Joint Book of Documents,* Volume X, Tab 186.

With respect to many of the points offered as justification for its policy, the Government of Canada did not actually carry out a thorough investigation and did not actually search for a remedy. Specifically:

- the government did not adequately investigate whether any health or safety risks were actually created by allowing exports of PCBs to the United States for disposal by S.D. Myers;
- the government did not ask for an internal or independent legal opinion to be prepared on whether leaving the border open from the Canadian side would be contrary to the Basel Convention. As purported reliance on Basel was a centerpiece of the government's public justification for its policy, this failure is remarkable. There is no record either of the government's ever having obtained a legal opinion on whether closing the border was contrary to the Transboundary Convention;
- the government did not even respond to proposals fromS.D. Myers offering specific steps the federal government could take to ensure that PCB waste exported to the United States was treated as safely, or even more safely, than it is in Canada. This lack of dialogue is in sharp contrast with the record of direct contact and assurances given directly to lobbyists from Chem-Security and Cintec, two companies who were seen by the Minister as being "Canadian." It is also inconsistent with the letter and spirit of the Treasury Board of Canada's Regulatory Policy, 1992, which proposes that there be consultation with stakeholders when there are changes to government. [*Joint Book of Documents,* Volume IV,

Tab 99.][17]

The Government of Canada did send a diplomatic note to the United States on 6 December 1995, asking whether PCBs are defined as hazardous waste under United States legislation and implementing regulations, and whether PCBs are covered by the Transboundary Agreement.[18] On 23 January 1996, the United States confirmed that the answer to both questions was yes. Any bona fide concerns that Canada had in this regard could have been investigated long before the EPA enforcement discretion was issued. Canada was well aware of the possibility that the border would open when the Minister of the Environment made her commitment to the Canadian companies to close it in March, 1995.

D. National Treatment and Adverse Effects on the Non-National Who is Complaining of Less Favourable Treatment

At this stage in the proceedings, the parties agreed that the burden on S.D. Myers is to prove, with respect to damages, only that material injury was sustained as a result of a breach of Chapter 11 (Investment).

On the evidence, it appears that S.D. Myers was poised to obtain a substantial amount of business with respect to the remediation of PCB wastes in Canada. It had worked for many years and invested a substantial amount of money in positioning itself to be the market leader as soon as the border opened. S.D. Myers had established a Canadian affiliate, Myers Canada, and loaned it the money to operate. S.D. Myers had directly bought advertising in Canada and stationed its own employees in Canada for various purposes, including establishing contacts and reeling in customers.

While in force, the export ban had the effect of discouraging customers from giving business to S.D. Myers or Myers Canada. The record proves that S.D. Myers was offering very substantial price advantages over the Swan Hills facility. S.D. Myers entered into evidence scores of quotes it had provided to potential customers. A number of customers indicated that they would probably have entered into contracts with S.D. Myers or Myers Canada if it had not been for the closing of the Canadian border. David Sheppard, Ph.D. Senior Specialist, Environmental and Regulatory Affairs at 3M, wrote on 6 December 1995 [S.D. Myers memorial, page 14]:

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[17] The Treasury Board policy does not, by itself, render a regulation passed in an inconsistent manner illegal under the laws of Canada.

[18] Joint Book of Documents, Volume III, Tab 78.

> Your quotation is attractive for at least two reasons. First Your facilities are 1000's of miles closer to our facilities than the only approved Canadian destruction activity at Swan Hills, Alberta. All other factors being equal, given a choice I would prefer to **minimize the risk of a transportation** incident by shipping to a closer facility. Second, your quotation is approximately half of that quoted to us by the most competitive agent we have found for the Swan Hills facility. In my mind, there is absolutely **no value added** to support the **extra** cost required to deal with Swan Hills. From an environmental perspective, it would be better to invest the money saved by shipping to the U.S. in **another** environmental protection project. At present, the border of the U.S. is closed to shipment of PCB waste by the Canadian Federal Government. If that situation were to change, we would ship the PCB waste currently stored at the two 3M Canada sites to the U.S. in preference to Swan Hills for the reasons stated above.

Custom Environmental Services from Edmonton, Alberta, sent a letter to the Investor on 7 December 1995, stating that it would have to cancel its order for $5,720,000 worth of work. Custom Environmental Services had gone so far as to submit notices to Environment Canada to permit export of its waste to Ohio.

Custom Environmental stated: "It is our intent to pursue this disposal option should the interim order banning PCB shipment be reversed." [S.D. Myers memorial, page 14.]

Dana Myers testified at the hearing that he was 95% certain that he would have obtained a large contract from Stelco but for the Canadian export ban.

During the period of the ban, S.D. Myers worked on two fronts: to obtain a repeal of the ban and to secure contracts with respect to PCB remediation that could be carried out once the ban was lifted.

When the ban from the Canadian side was lifted, S.D. Myers found that business was slow. It obtained and carried out seven contracts only. The arrangement between S.D. Myers and its affiliate was that they shared the revenues from these contracts. Employees from both companies participated in performing various remediation steps in Canada that took place prior to export of the PBCs to Talmadge; these steps included assisting customers with the drainage of contaminated equipment and the making of arrangements for transportation. According to the testimony of Dana Myers at the oral hearing of this matter, Canada seemed to hold exciting business prospects prior to the ban.

> When the border opened the first time, I remember going home and all's I could think of was I played Handel's Messiah like seven times and when it opened the second time, it was like pfft, (phoen.) because all the fun had been taken out, the big part of the business had been taken out....

Mr. Myers explained that when the border reopened, it no longer had a market lead; both Canadian and U.S. competitors were in a position to grab some of the business. When the United States border closed again in response to a Ninth Circuit Court decision, Myers gave up trying to do business in Canada.

E. National Treatment and Policy Justifications for the Canadian Measures that are the Target of S.D. Myers' Complaint

As noted earlier, keeping the Canadian border opened in the aftermath of the EPA enforcement discretion would have conferred environmental benefits on Canada. It would have encouraged owners of PCBs who otherwise would have found it uneconomic to dispose of their waste to use the services of lower-cost American operations like S.D. Myers. Use of S.D. Myers would have reduced the environmental risks associated with the continuing storage of PCBs. These risks included those arising from storage or theft. The S.D. Myers facility was much closer to the site of many PCBs, and using it would have lowered the risks associated with transportation. These policy considerations are supported by a mass of evidence in this case. In fact, the federal government explicitly adopted these considerations in the "regulatory impact statement" it issued when it finally repealed the ban by the PCB Waste Export Regulations in 1996.

Had Canadian authorities wished to do so, they could have made appropriate changes to ensure that the handling of PCB waste in the United States was conducted only by companies who could be counted on to handle the material in a manner that was at least equal to Canadian standards. In other words, Canadian authorities could have adopted, from the beginning, the approach they eventually settled upon.

Accordingly, I would conclude that the Canadian Government did not have legitimate public policy, including environmental reasons, to treat S.D. Myers and its affiliate less favourably than their Canadian competitors. There were no "unlike circumstances" that warranted differential and adverse treatment.

F. The Precautionary Principle

It must be acknowledged that a solution which eventually is recognized as being optimal in all respects, may not be recognized as such immediately by honest and competent public authorities. Faced with a new technology or set of circumstances, public authorities may need some time to investigate the risks involved, to consult, to think through the appropriate measures, and to go through the proper steps required to enact legislation or regulations. Governments may sometimes want to take immediate temporary measures with the intention of reconsidering and, when necessary, revising them after it has had a reasonable opportunity to study the matter.

Principle 15 of the Rio Declaration states:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing-cost-effective measures to prevent environmental degradation.

Chapter 7 of NAFTA addresses measures that a state may take to protect the safety of humans, animals, and plants. As it addresses concerns similar to those invoked by Canada in the context of this Chapter 11 (Investment) dispute, there may be some value to examining its provisions – which include an acknowledgment that sometimes a government may adopt provisional measures until a more definitive response can be prepared in light of further study and consultation.

> 712(1) Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation;
> 712(3) Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is: based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions; not maintained where there is no longer a scientific basis for it; and based on a risk assessment, as appropriate to the circumstances;
> 712(4) Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate

> between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail;
> 712(5) Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility;
> 712(6) No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties;
> 715(3) Each Party, in establishing its appropriate level of protection:
> (a) should take into account the objective of minimizing negative trade effects; and
> (b) shall, with the objective of achieving consistency in such levels, avoid arbitrary or unjustifiable distinctions in such levels in different circumstances, where such distinctions result in arbitrary or unjustifiable discrimination against a good of another Party or constitute a disguised restriction on trade between the Parties;
> 715(4) Notwithstanding paragraphs (1) through (3) and Article 712(3)(c), where a Party conducting a risk assessment determines that available relevant scientific evidence or other information is insufficient to complete the assessment, it may adopt a provisional sanitary or phytosanitary measure on the basis of available relevant information, including from international or North American standardizing organizations and from sanitary or phytosanitary measures of other Parties. The Party shall, within a reasonable period after information sufficient to complete the assessment is presented to it, complete its assessment, review and, where appropriate, revise the provisional measure in the light of the assessment.

It may well be that government measures that are challenged under Article 1102 (National Treatment) can sometimes be found in compliance by taking into account the need for government to adopt provisional measures. Whether nationals and non-nationals are in "like circumstances" is an evaluation that can reasonably change, in the eyes of a reasonable and competent government, in light of the available information. It seems to make sense that a tribunal that is measuring a

government's compliance with Article 1102 can take into account the way a government reasonably perceives a matter, rather than judging government conduct on the basis of hindsight.

On the facts of this case however, there is no basis for viewing the actions of the Government of Canada in the context of NAFTA as a reasonable provisional measure. The Government of Canada had a long period of advanced warning that the border might be opened and ample time to prepare a response. Officials of the Department of the Environment also had every reason to be familiar with S.D. Myers and its safety record; Mr. John Hilborn had visited its Ohio facility years before EPA opened the border. Department officials had initially embraced the border opening as a technically sound solution to an environmental problem, and as being in conformity with Canada's legal obligations. In the fall of 1995, no effort was made to obtain a thorough internal assessment or independent external assessment of whether the proposed operations of S.D. Myers actually presented a risk to the Canadian environment.

G. The Relationship Between Chapter 11 and Chapter 3 of NAFTA

Article 1112 (Relation to Other Chapters) of NAFTA provides as follows:

> 1112(1) In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
> 1112(2) A requirement by a Party that a service provider of another Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Chapter applicable to the provision of that cross-border service. This Chapter applies to that Party's treatment of the posted bond or financial security.

The Government of Canada argues that Chapter 3 (Trade in Goods) of NAFTA is inconsistent with Chapter 11 of NAFTA on the facts of this case. The Government of Canada argues as follows:

- even if the ban on PCB exports appears to contravene Chapter 11, it would also be, on its face, an export ban with respect to goods;
- Chapter 3 prima facie prohibits export bans on goods;
- but open trade norms in Chapter 3, including the prohibition on export restrictions, are subject to a major qualification. Article 2101 of NAFTA incorporates in Chapter 3 (Trade in Goods) the provision of Article XX (General exceptions) of GATT. An export ban on goods can be justified

under Article XX(g) of GATT. Article XX(g) provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The Government of Canada apparently intends to suggest that the purpose of the export ban was to protect the environment, and so comes under "conservation of natural resources." I rather, think that (g) addresses the policy concern of a government that a natural resource not be used up. That is why (g) refers to placing restrictions on domestic consumption as well. The federal government did not indicate what restrictions on domestic production or consumption it was referring to on the facts of this case.

The concerns of the federal government over the safe handling of PCBs would seem to come more squarely under (b), "necessary to protect human, animal or plant life," and I will consider the federal argument on that basis as well.

It does make sense that the framers of NAFTA would have wanted to make sure that Chapter 11 (Investment) is not used to impugn government measures that are protected by other specific aspects of the agreement.

As suggested earlier however, the analysis in Article 1102 cases will often involve the same kind of respect for the public policy objectives of government, including its environmental concerns, as is mandated by Chapter 3. This is such a case. S.D. Myers would not have prevailed under Article 1102 (National Treatment) in this case if Canada had been able to demonstrate that a legitimate environmental concern necessitated Canada's differential and adverse treatment of S.D. Myers and its affiliate.

In any event, I do not agree that the government's actions in this case were warranted under the concepts embodied in Article XX(b) (Human, Animal or Plant Life) or Article XX(e) (Conservation) of GATT. As I have already suggested, in my view, the measures taken by the Government of Canada would not satisfy the requirements of the chapeau of Article XX (General Exceptions). The federal government could have satisfied any health or environmental concerns it had in a manner that did not impair open trade. Indeed, it would have better served the cause of a safe environment if it had kept the Canadian border open but put in place

certain safeguards. The challenged measures of the federal government in this case did in fact amount to "arbitrary or unjustifiable discrimination" and to a "disguised restriction on trade." According to GATT case law, the latter term refers to situations in which a restriction on trade is presented as some kind of health, safety, or other public welfare measure, but is actually, in its purpose and effect, a barrier to trade.

The Government of Canada did not even suggest that S.D. Myers is denied by protection of Chapter 11 merely because S.D. Myers may also have some rights under Chapter 3.

It is well established by now that trade treaties like NAFTA and GATT can, with the scope of a single agreement, provide for overlapping obligations. The same government measure might be inconsistent with two or more binding treaty commitments.

In the *EC-Bananas* case, the Appellate Body had to determine the legal consequences of an overlap between obligations contained in GATT 1994 (which generally deals with trade in goods) and the GATS, the General Agreement on Trade in Services. The Appellate Body concluded that the obligations in both treaties were broadly worded and it was likely that some overlap would occur. The Appellate Body stated:

> There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter than can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in Canada – Periodicals.[19]

The report of the WTO panel in the *Indonesia – Certain Measures Affect the Automobile Industry* case,[20] addresses the compatibility of two different parts of the 1994 WTO package. These two parts were the Subsidies and Countervailing Measures Agreement (SCM) and the Agreement on Trade Relation Investment Measures (TRIMS). The panel

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[19] EC-Bananas, AB-1997-3; WT/DS27/AB/R, 9 September 1997at paragraph 221; *Memorial of the Investor,* 25 at paragraph 35.

[20] WT/DS54/R, WT/DS55R, WT/DS59R, WT/DS64/R, (2 July 1998), at paragraphs 14.52-53; *Memorial of the Investor,* 26 paragraph 36.

stated:

> [W]e consider that the SCM and TRIMS Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMS Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different foci, and they impose different types of obligations. In support of this finding, we agree with the principles developed in the Periodicals and Bananas III cases concerning the relationship between two WTO agreements at the same level within the structure of WTO agreements. It was made clear that, while the same measure could be scrutinized both under GATT and under GATS, the specific aspect of that measure to be examined under each agreement would be different. In the present case, there are in fact two different, albeit linked, aspects of the car programs for which the complainant have raised claims. Some claims relate to the existence of local content requirements, alleged to be in violation of the TRIMS Agreement, and the other claims relate to the existence of subsidies, alleged to cause serious prejudice within the meaning of the SCM Agreement.

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

> It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously unless there is a formal "conflict" between them.[21]

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[21] The Dispute Settling Panel, at footnote 422 to the quoted passage, elaborates:

> The principle of interpretation against conflict has been confirmed by the Appellate Body in *Canada - Certain Measures Concerning Periodicals* adopted on 30 July 1997, WT/DS31/AB/R, ("*Canada Periodicals* "), page 19; in *EC - Bananas*, paras. 219-222; in *Guatemala - Cement*, para.65; and by the panel in *Indonesia - Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R (not appealed) ("*Indonesia - Autos*"), para. 14.28. For a definition of conflict, see for instance the Appellate Body

Different chapters of NAFTA are, of course, part of a "single undertaking" and there appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as cumulative and complementary.

The WTO Panel in the *Korean Dairy Products* case adopts the definition of "conflict" in several earlier cases, including the report of the Appellate Body of the WTO in Guatemala Cement, at paragraph 65. The latter case suggests that provisions of agreements in the WTO system should be read as complementary unless there is a conflict in the sense that adherence to one provision would cause a violation of the other.

The view that different chapters of NAFTA can overlap, and that the rights it provides can be cumulative except in cases of conflict, is accepted by the decision of the NAFTA tribunal in *Pope and Talbot Inc. v. Canada*.

H. Conclusion on National Treatment

The Government of Canada established the export ban primarily because it was interested in economically protecting "Canadian" operators; those which were based in Canada and which would carry out all of their operations in Canada.

The export ban did not, on its face, expressly discriminate in favour of Canadian operators and against U.S. operators. Both were prohibited from engaging in exports. The intent and practical effect of the measure however, make it clear that it was discriminatory and inconsistent with Articles 1102(1) and 1102(2) of NAFTA.

The Government of Canada was determined to keep S.D. Myers from capturing a substantial part of the emerging market. The Government of Canada intended to discriminate against S.D. Myers for economic reasons, and its discriminatory intent should be deemed to extend to S.D. Myers' affiliate in Canada, Myers Canada. The practical effect of the export ban was to prevent S.D. Myers and its affiliate from obtaining a number of potentially lucrative contracts.

The discriminatory character and effect of the actions of the Government of Canada are not obviated by any legitimate environmental concerns that may have factored into the deliberations of the Government of Canada. Any such concerns could readily have been addressed by measures that did not involve discriminating against U.S. operators and their Canadian investments.

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statement in *Guatemala - Cement*, para. 65 or the Panel Report on *Indonesia - Autos*, para. 14.28.

The export ban by Canada constituted a breach of Articles 1102(1) and 1102(2) of NAFTA, which require that a Party extend national treatment to investors and investments of other Parties.

VI. ARTICLE 1106 OF NAFTA

S.D. MYERS CONTENDS THAT CANADA'S EXPORT BAN breached Article 1106 (Performance Requirements) of NAFTA. It says that, in effect, S.D. Myers was required, as a condition of operating in Canada, to carry out a major part of its proposed business – the physical disposal of PCB waste – in Canada. In doing so, S.D. Myers would effectively be required to consume goods and services in Canada.

Under the 1947 GATT agreement, there was no specific provisions on performance requirements. One dispute however, was brought before a GATT panel. The United States challenged Canada's Foreign Investment Review Act (FIRA). Under that statute non-Canadian investors, in some circumstances, had to obtain regulatory approval before operating or expanding in Canada. The agency could attach conditions to its approval. It was authorized to attach performance requirements. A factory operator might, for example, be required to purchase 50% of its supplies from local suppliers, rather than from abroad. The GATT panel accepted some aspects of the U.S. complaint and rejected others.

In NAFTA, unlike the original GATT agreement, there is an Article 1106, which expressly addresses the issue of performance requirements and severely restricts the ability of host states to impose them on investors. As mentioned earlier, the GATT system itself was expanded in the Uruguay Round to include a TRIMS agreement that similarly addresses performance requirements.

Article 1106 states that:

> No party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or a non-Party in its territory:
> (a) to achieve a given level or percentage of domestic content;
> (b) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.

The export ban imposed by Canada was not cast in the form of express conditions attached to a regulatory approval. But in applying

Article 1106, a tribunal like ours must look at substance, and not only form.

The practical effect of the export ban was contrary to Article 1106(b); S.D. Myers and its affiliate Myers Canada were effectively required to carry out a major step in the remediation process, the physical disposal of the waste, in Canada. The "Canadian content" of the service provided had to include destruction operations.

S.D. Myers and its affiliate remained ready and willing to carry out many steps of the remediation process within the boundaries of Canada. These steps included assessment of a customer's problems, recommending solutions, assisting the customer with the drainage of contaminated equipment, and arranging for transportation. While S.D. Myers and its affiliate had originally attempted to find ways in which to carry out the final step, physical destruction, in Canada as well, they were ultimately frustrated in their efforts to secure a government-approved Canadian site. In effect, the Government of Canada through its export ban, was telling S.D. Myers and its Canadian affiliate that they could only engage in remediation operations in Canada if a particular and major part of the process, physical destruction, took place in Canada.

The Minister of the Environment, in her statement to the House of Commons on 9 June 1995,[22] stated that it was government policy that PCB wastes not only be disposed in Canada, but "by Canadians." It might therefore be inferred that the Minister had no desire to see S.D. Myers operate in Canada at all; that she was interested not in "performance requirements," but in shutting out U.S. investors altogether. But even if that is so, the export ban actually adopted by Canada was not an outright prohibition on the participation of non-Canadians in the disposal of PCB wastes. What it effectively did amount to was a performance requirement.

It seems clear that the requirement of disposing PCBs in Canada was "in connection with" the expansion of the operations of the specific investor in this case. It was in response to S.D. Myers' plans to expand its business of remediating Canadian PCB wastes that the government imposed the export ban.

It is debatable, and no firm decision need be made here, whether the export ban also amounted in substance to a breach of Article 1106(c) as well as Article 1106(b). It can be argued that (b) refers to requirements with respect to how an investor carries out its own operations, and that (c) refers only to requirements with respect to purchases from third parties. It seems obvious that if S.D. Myers had actually carried out the physical destruction of PCBs in Canada, it would have had to purchase

[22] Joint Book of Documents, Volume I, Tab 17.

various goods or services from local suppliers and hire various local employees. We do not however, have much hard evidence in this regard.

Article 1106(6) of NAFTA states that:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:
> (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
> (b) necessary to protect human, animal or plant life or health; or
> (c) necessary for the conservation of living or non-living exhaustible natural resources.

For reasons explained earlier, in connection with Article 1102 (National Treatment), the export ban did constitute a disguised barrier of trade. It was presented as an environmental measure but was in large measure intended to protect local industry. The measure was not "necessary" to protect health, safety, or other public interests, because its aims could have readily been accomplished by means that did not restrict trade.

The export ban was also "arbitrary or unjustifiable" because it was both discriminatory and unnecessary. The introductory words (chapeau) of Article 1106 actually refer to measures that are "applied" in an "arbitrary or unjustifiable manner." It might be argued that this aspect of Article 1106 refers only to the way in which a measure is administered in practice, as opposed to its substantive content. Nothing turns on this possible distinction in this case, nor will it in general. A measure that is "arbitrary or unjustified" in its substantive content will surely also run afoul of at least one or more other prohibitions of Article 1106; such a measure will be a disguised barrier to trade, not "necessary," or both.

Finding that the export ban breached Article 1106 (Performance Requirements), would not affect the measure of damages of in this case. There are no damages, as far as I can tell, that would flow from a breach of Article 1106 that are not already included in damages flowing from the breach of Article 1102 (National Treatment).

VII. ARTICLE 1110 OF NAFTA

S.D. MYERS CLAIMS THAT THE EXPORT BAN amounted in substance to a nationalization or expropriation. A variety of complaints that have been filed under NAFTA have resulted in a real anxiety on the part of many academic critics, on the extent to which Article 1110 will be interpreted and applied in an unduly expansive way.[23]

The concern of the critics is that Article 1110 will be applied by tribunals like ours to require compensation for legitimate regulatory actions of government. To the extent that such actions cause economic detriment to investors, they will in some cases be compensated. The cost of satisfying awards may be extravagant. Even the threat that Article 1110 challenges will be brought against regulatory action by the state may have a chilling effect on public authorities, the critics warn. Fear of liability may cause governments to shy away from bold regulatory action in the interests of health, safety, the environment, and social justice and adopt a laisser-faire attitude. As a result, there may be real harm to the public interest at the hands of private interests. Moreover, whatever the long-term utilitarian benefits of regulation as opposed to laisser-faire, the choice between the two approaches is one that should be made by democratically elected governments. It should not be distorted by fear of the invocation of Article 1110 by litigious investors or its application by activist tribunals.

The Supreme Court of the United States has acknowledged that in some cases, regulation may be tantamount to a "taking" which, under the terms of the American Bill of Rights, requires compensation. In some cases, the Supreme Court has said, regulation can go "too far."[24] Some academic writing has expressed the concern that the "regulatory takings" doctrine may be incorporated in Article 1110 jurisprudence by panels like ours.

The Government of Canada has been so occupied by the concerns just outlined that it has proposed that Article 1110 be amended. In addressing expropriation cases, panels would apply the definition of

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[23] See, for example, J. Martin Wagner, "International Investment, Expropriation and Environmental Protection" (1999) 29 Golden Gate University Law Review 465.

[24] *Pennsylvania Coal Co. v Mahon*, (1922) 260 U.S. 393, at 415. For an overview of more recent pronouncements from the Supreme Court of the United States, see D. L. Callies editor, *Takings: Land-Development Conditions and Regulatory Takings After Dolan and Lucas* (American Bar Association 1996). There is a useful review of expropriation laws in the three NAFTA countries in Wagner, *Ibid.* In addition, see generally A. Mouri *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* (Dordrecht: Kluwer Academic, 1994).

expropriation that prevails under the law of the relevant government, rather than the all-purpose definition stipulated by Article 1110. Concerns about Article 1110 are especially great because it requires compensation for governmental conduct that is entirely lawful and reasonable under both national and international standards. An expropriation or nationalization does not have to be unlawful or improper in any sense to trigger a right of compensation under Article 1110.

I cannot make a categorical statement that Article 1110 can never address a governmental measure that is presented as a regulation. As discussed several times in this award already, international trade law does in many contexts insist on looking at substance as well as form, and does so in the context of the objectives of whatever legal provision is at issue.

There may be some cases where a measure that is presented as a regulation must, in law and justice, be treated as a nationalization or expropriation for the purposes of Article 1110.In the vast run of cases, regulatory conduct by public authorities is not remotely the subject of legitimate complaints under Article 1110.

To begin with, international law, which is reflected in Article 31 of the Vienna Convention on the law of treaties, requires that a treaty provision be interpreted in accordance with the "ordinary meaning" to be given a term. The "ordinary meaning" of expropriation is different from that of regulation.

The term "expropriation" in Article 1110 must be interpreted in light of the whole body of state practice, treaties, and judicial interpretations of that term in other international law cases. That body of precedent does not generally treat regulatory action as amounting, in substance, to expropriation.

International law obliges tribunals to look at the object and purpose of a provision. There are powerful reasons why the framers of Article 1106 would have seen "expropriation" as warranting different treatment from "regulation."

Expropriations tend to be severe deprivations of ownership rights; regulations tend to amount to much less interference. The distinction between expropriation and regulation screens out most potential cases of complaints about regulatory conduct by the state, and reduces the risk that governments will be harassed or chilled as they go about managing public affairs.

Expropriations tend to deprive the owner and to enrich – by a corresponding amount – the public authority that the property, or the third party to whom the property is given. There is both unfair deprivation and unjust enrichment when an expropriation is carried out with compensation. By contrast, regulatory action tends to prevent an owner from using property in a way that unjustly enriches the owner. For example, an unregulated manufacturing operation might make more money by not bothering to reduce the amount of pollution it sends into

the wider community. The government that imposes the regulation does not necessarily profit from its intervention; indeed, it may be expensive to both enact and administer regulations.

Expropriations without compensation tend to upset an owner's reasonable expectations concerning what belongs to him, in law and in fairness. Regulation is something that owners ought reasonably to expect. It generally does not amount to an unfair surprise.

International law also requires a tribunal to look at the context of a provision. The immediate context of Chapter 1110 is the text of NAFTA itself, which exhibits in various places including Article 1114 and elsewhere, a concern that governments remain reasonably free to continue to take measures that are in the public interest. The wider context of Article 1110 includes the "side agreements" that were entered into along with NAFTA, which address the environment and labour standards. Looking at Article 1110 in context, it is not possible to see it as a generous invitation for tribunals to impose liability on governments that are engaged in the ordinary course of protecting health, safety, the environment, and other public welfare concerns.

The context of Article 1110 also includes a whole set of safeguards in Article 11 for investors. Various provisions assure national treatment, the avoidance of performance requirements, and the observance of international standards, including full protection and security for investments. The overall purpose of Chapter 11 (Investment) by all means includes broad protection for investors, but this overall objective is achieved through a whole set of provisions. It is not necessary, in logic, law or justice, to stretch Article 1110 in order to ensure that Chapter 11 as a whole secures the kind of protection that was contemplated by the framers of NAFTA.

As mentioned earlier, Article 1110 is the only investor-protecting provision of Chapter 11 that includes a precise formula for assessing damages. That formula may not always be a convenient or just guide to assessing damages in many situations. By attaching a precise formula to Article 1110, in my view, the framers of NAFTA signaled that it is intended to apply to a particular kind of economic injury, and that it should not be stretched by unduly aggressive interpretive maneuvers.

The phrase "*tantamount* to expropriation" in Article 1110 does however, require a tribunal to take a hard look at whether government conduct amounts *in substance* to an expropriation. The protection offered by Article 1110 does not cease to apply merely because an expropriation is dressed up in a more innocuous form, or accomplished by subtle or indirect means. The real purpose and real impact of a measure must be considered, not merely the official explanations offered by government or the technical wrapping in which the measure is cloaked. The justification that a government offers for a measure may not be consistent with the real motive or intent behind it. A measure that appears innocuous on its face may, on close factual examination, produce the kind of deprivation

that must fairly be considered an expropriation. A government might proceed with a gradually unfolding series of disparate measures; none of them individually may amount to expropriation, but the whole series might in some cases be substantially equivalent to an expropriation.

A reasonable argument, it must be acknowledged, may be made for viewing the export ban in this case as amounting in substance, to an expropriation. The aim of the government was to prevent S.D. Myers from taking advantage of a maturing business opportunity that it had developed at considerable expense, and thereby to free up opportunity for Canadian enterprises that would otherwise lose business to S.D. Myers. It might be argued that the efforts of S.D. Myers and its affiliate in Canada produced a kind of property interest known in law as "goodwill." It is well settled in international law that an expropriation can include measures that transfer wealth from one private party to a third party that is favoured by the expropriating government.

The measure was arbitrary and discriminatory and even the Government of Canada's legal brief acknowledges that if a measure is properly so characterized, that weights in favour of finding that it amounts to an expropriation. On the other hand, the export ban does not in several respects fit into the standard model of an expropriation. None of these differences from an easy case are decisive in isolation, but looked at together, in the context of this case, they seem to outweigh the grounds for characterizing the export ban as an expropriation.

Usually, an expropriation amounts to a lasting removal of the ability of an owner to make use of its economic rights. The export ban here was temporary. It may be that in some contexts and circumstances, it would be appropriate for international law to view a deprivation as amounting to an expropriation, even though it is partial or temporary. But the temporary nature of the impairment here is one factor, albeit not decisive in itself, in refraining from characterizing the export ban as an expropriation.

Another difficulty here is that there was not a clear transfer of wealth from S.D. Myers to either the government or to its Canadian competitors. Denying S.D. Myers the ability to carry out its business did not necessarily shift that same business to its Canadian competitors. The latter may have been, from the point of view of many owners of PCB wastes, too expensive, too geographically remote or too inexperienced.

Given the existence of a wide variety of other investor-protecting provisions that S.D. Myers can and did invoke in this case, it makes no practical difference to S.D. Myers whether the expropriation label is attached to the export ban. It seems unlikely that the measure of damages would be any greater. On the other hand, a finding of expropriation might contribute to public misunderstanding and anxiety about both this decision and the wider implications of the investment chapter of NAFTA.

In light of the considerations just canvassed, I would refrain in this case from characterizing the export ban as an expropriation.

VIII. ARTICLE 1105 OF NAFTA

S.D. MYERS SUBMITS THAT THE GOVERNMENT OF CANADA treated it in a manner that is inconsistent with Article 1105(1) of NAFTA. Titled "Minimum Standard of Treatment," the article reads as follows:

> 1105(1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

The Minimum Standard of Treatment article in NAFTA is similar to clauses contained in many BITS (Bilateral Investment Treaties). The inclusion of a "minimum standard" article is necessary to avoid what might otherwise be a major gap in the protection that BITS and NAFTA provide to investors. A government might treat an investor in a harsh, injurious and unjust manner, but do so in a way that is no different than the treatment inflicted on its own nationals.

The "Minimum Standard" is a floor below which treatment of investors cannot fall, even if a government is not acting in a discriminatory manner.

The existence of a minimum international standard means that in the eyes of international law, non-nationals might have rights and remedies that to some extent exceed those of nationals. International law has traditionally given great respect to the right of the governments of sovereign states to manage their own internal affairs. Even in the earlier development of international law however, states took an interest in how their nationals were treated by other states. When a state mistreated foreigners, including investors, within its own boundaries, home states viewed that mistreatment as a wrong to themselves. States developed the norm that in dealing with foreigners in their midst, every state should observe minimum standards of fair treatment.

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

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

> aliens may enjoy rights and remedies which the nation does not accord to its own citizens.[25]

In the last fifty years, international law has increasingly recognized the right of individuals to complain about mistreatment by their own governments. Under some arrangements, like the European Convention of Human Rights or the Optional Protocol to the International Covenant on Civil and Political Rights, individuals have been given standing to make claims against their own governments. In many situations however, nationals remain without international remedies in the face of domestic injustice.

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

The mere fact that a government has not acted consistently with its own internal law does not elevate a domestic error into an international incident. In many areas, the constitutional and administrative law is complex and evolving, and governments that are both competent and honorable will find themselves corrected from time to time by domestic tribunals. Sometimes the determination of whether a legal "mistake" has been made depends to a large extent as to whose opinion counts as the final one in an area where judgment is involved, and not on any objective and fixed norms that can be discerned through purely logical analysis.

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

A breach of Article 1105 occurs only when an investor has been treated in such an unjust or arbitrary manner that it can fairly be said that the treatment rises to a level that is unacceptable from the international perspective. That determination must be made in light of the high measure of respect that international law generally extends to the right of domestic authorities to regulate matters within their own

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[25] "*The United States of America on behalf of George W. Hopkins, Claimant, v. the United Mexican States* (Docket No. 39)" (1926) 21 American Journal of International Law 160 at 166-167.

borders. The determination must also take into account any specific rules of international law that are applicable to the case.

The interpretation and application of Article 1105 must, I tend to think, also take into account the letter or spirit of widely, though not universally, accepted international agreements like those in the WTO system and those typical of BITS. I will pursue this point in more detail below.

In some cases the breach of a treaty rule of international law by a host state may not be decisive in determining that a foreign investor has been denied treatment in accordance with the international standard. Suppose that States A and B both belong, with other states, to a currency union created by a regional agreement. State A, faced with a deteriorating economy and rising unemployment, devalues its currency even though it has promised not to do so under that regional agreement. Many investors from B sustain some economic losses, as the revenues and dividends they send back to their home state are worth less. Have investors been denied treatment in accordance with the minimum standard? The answer might depend on the particular details of the relevant international treaties and the accompanying economic and social context. Depending on all of the circumstances, a tribunal might decline to hold that there has been a breach of the minimum standard. A tribunal might reason along the following lines: the ability to devalue a currency may go to the core of a government's ability to manage its economic and social affairs. A devaluation may be comprehensive in their effects, and not have a disproportionate impact on investors or a particular economic interest group that includes foreign investors. Investors could not reasonably expect to be compensated should a devaluation occur, but rather should have continued to insure themselves or hedge their risks in other ways.

On the other hand, in my view, it will tend to weigh heavily in favour of finding a breach of Article 1105 that a host state has breached a treaty rule of international law that is specifically designed to protect investors. Such conduct does not appear to be consistent with the concept that the investor has been given treatment "in accordance with international law, including fair and equitable treatment and full protection and security." On the facts of this case, I have already found that the Government of Canada denied "national treatment" to S.D. Myers, contrary to the commitment contained in Article 1102 of NAFTA.

The closing of the border took place at the behest of these competitors, as a direct response to the EPA's ruling on S.D. Myers' application. Rather than receiving the protection that it had every right to expect under the national treatment guarantee of NAFTA, it was treated in a discriminatory and injurious manner. The breach of Article 1102 (National Treatment) in this case essentially establishes a breach of Article 1105 as well.

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

> ...it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment, ...So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are no more than examples or specific instances of this overriding duty.[26]

In this case, no additional compensation for S.D. Myers would appear to flow from the mere fact that the same course of conduct – imposing the export ban – that amounted to a breach of Article 1102 also amounted to a breach of Article 1105.

S.D. Myers submits that there is a second basis for finding that the Government of Canada failed to comply with Article 1105.

S.D. Myers argues that an examination of BITS and WTO agreements suggests that the "minimum standard" includes the right to some minimum standard of procedural fairness. S.D. Myers submits that it was denied fair notice that a regulatory change was in the works, that its competitors had privileged access to the decision-makers, and that it was not consulted. It further contends that the federal government breached its own regulatory policy in the way it managed the process leading to the closing of the border. The investor submits for our consideration the following passage from the *Shrimp-Turtle* case:

> It is also clear to us that Article X:3 of GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here. The non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the Office of Marine Conservation, the Department of State, and the United States National Marine Fisheries Service throughout the certification processes under Section 609, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal

[26] F. A. Mann, "British Treaties for the promotion and protection of Investments" (1981) 52 Brit. Y. B. Int'l L. 241 at 243.

> procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article X:3 of the GATT 1994.[27]

Some caution is needed in assessing S.D. Myers' claim that it did not receive procedural fairness that satisfied the minimum international standard.

The internal laws of Canada recognize that there can be a legitimate difference between the way decision-makers deal with the application of one particular individual or company, and the way decision-makers deal with the creation of regulations or laws of general effect. When a discretionary decision is made with respect to the fate of a particular applicant, Canadian administrative law often requires proper notice and a fair hearing of the individual's views. When a broader change is contemplated, there may be few or no rights for an individual to make direct representations. Governments have to ration their time and attention. It may not be practical or useful to hear from everyone who has a material or philosophical interest in a proposed change. The minimum standard under international law would, I think, take into account this distinction between the exercise of an administrative discretion with respect to a particular individual and the exercises of a broad, law-making character.

The international laws of Canada recognize that government may, when engaged in broad policy-making, lawfully engage in more extensive discussions with the advocates of some groups rather than others. An organization might share the philosophy of government, represent a constituency for which the government has a special concern or have information and expertise that is of particular value to government policy-makers. The evaluation of government processes from the international perspective would be sensitive to the needs of government to determine which sources of information and advice it will rely upon the most.

It must also be kept in mind that there may be a distinction in some cases between the duty in international law for a government to consult with the governments of other states, as opposed to foreign individuals and enterprises. Sometimes, it may be entirely reasonable for a government to consult with the government representing the interests of a particular investor, rather than dealing directly with the private entity.

With all of these cautions stated, I would think that there is a strong case here evidencing that the process that led to the PCB export ban did fall below the minimum standard.

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[27] United States – Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (12 October 1998) 55 at paragraph 183.

S.D. Myers was not just another interest affected by Canada's export ban. The Government of Canada imposed the ban in direct response to the success of S.D. Myers in obtaining approval from the EPA to import PCBs. The government's thinking was largely shaped by lobbying from two of S.D. Myers' potential competitors, whose main interest was to keep S.D. Myers in particular, and other U.S. competitors in general, out of the game. Lobbyists for these interests were given access to senior political and bureaucratic officials at the Department of the Environment, and were provided with assurances that the border would be closed. S.D. Myers was not alerted that a regulation was in the works and was not consulted.

In fact, the Government of Canada gave S.D. Myers' competitors preferred and privileged access to key decision-makers, made no effort whatsoever to inform or consult S.D. Myers, and produced a ban that was intended to specifically minimize S.D. Myers' place in the market – and effectively did so for some time. The defects in how S.D. Myers was treated cannot be dismissed on the basis that S.D. Myers was just another party with a material interest in a regulatory or legislative change of broad effect. S.D. Myers was the principal cause of the ban and was the interest that was most harmed by it.

In its treatment of S.D. Myers, the Government of Canada did not act in a manner consistent with the principles of transparency and procedural fairness that are recognized in modern international agreements like the WTO and NAFTA itself. The passage from the *Shrimp-Turtle* case quoted earlier, explores one provision of GATT that expressly addresses the fair and transparent administration of laws and regulations.

A provision of NAFTA that acknowledges the principles of transparency and procedural fairness is found in Chapter 18, which was drawn to our attention by the memorial of the Government of Canada. Article 1802 states:

> 1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.
> 2. To the extent possible, each Party shall
>
> (a) publish in advance any such measures that it proposes to adopt; and
>
> (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.

Article 1802, it should be noted, refers to both "interested persons" and parties. A private party, like S.D. Myers, would be included within the scope of the concern expressed by Article 1802.

In any event, from the record, there is no indication that the Government of Canada consulted either S.D. Myers or the United States prior to its initial ban on PCB exports to the United States. Canada had ample time to give S.D. Myers or the Government of the United States notice that an export ban was in the works prior to putting in place its prohibition.

It appears to me that Canada may have breached the specific terms of Article 1802 in this case. I will come to no definite conclusion in this regard however, as S.D. Myers did not expressly argue that Canada's conduct was contrary to Article 1802. I am reluctant to find a breach of a specific treaty provision where Canada has not been properly alerted to the issue and thereby given a full chance to respond.

I wish therefore, to explore the implications of Article 1802 primarily in the context of the wider argument that is suggested by S.D. Myers: that the minimum international standard in Article 1105 of NAFTA includes a general principle of transparency and fairness in the making of regulations.

S.D. Myers has not provided evidence that procedural fairness and transparency in the making of regulations is part of general international law and, as such, applicable worldwide. Rather, S.D. Myers has appealed to the letter or spirit of a provision of the 1947 GATT, and case law associated with it, to argue that procedural fairness and transparency is part of the minimum international standard. But the GATT agreement, while widely accepted, has by no means been adopted by all states. It is far from obvious, in the absence of evidence, that basic GATT norms like transparency and procedural fairness have been accepted by states throughout the world and so have passed into the body of general (or "customary") international law.

Accordingly, S.D. Myers' argument with respect to unfair process must, if it can succeed at all, be formulated as follows:

- Article 1105 speaks of "treatment in accordance with international law, including fair and equitable treatment and full protection and security;"
- the meaning of "international law" in that phrase is colored by the words that follow, "fair and equitable treatment" and "full protection and security." If "international law" had its routine meaning, those following words would be pointless. The framers of NAFTA, in adopting the formulation they did of Article 1105, must have had in mind something more than "whatever protection to investors is accepted by the body of international law that applies throughout the entire world;"
- the interpretation and application of Article 1105 must also take into account the letter or spirit of widely, though not universally, accepted

international agreements like those in the WTO system and those typical of BITS. Even if a norm has not yet technically passed into customary international law, that norm may still be encompassed in the broad concept expressed by Article 1105. The fact that some states may not have an elevated regard for the operation of the market, property rights or open trade should not be used to radically restrict the interpretation of the minimum standard in an agreement like NAFTA;

- states that adopt treaties that include the minimum standard as formulated in NAFTA and many BITS, with express references to "just and equitable treatment" and "full protection and security" must have in mind the expectations that are reflected in a wide range of modern trade agreements and practices;
- the GATT, as pointed out in the Shrimp-Turtle case, and regional agreements such as NAFTA, include specific provisions that recognize a broader principle of transparency and regulatory fairness in the making of regulation. That broader principle should be considered part of the "international law" referred to in Article 1105.

This line of argument is one that does appear sensible to me. It gives reasonable value and meaning to all of the words of Article 1105 of NAFTA. It invites interpreters of Article 1105 to look to the "state of the art" in international trade agreements to determine the content of the minimum international standard, rather than relying on personal subjective notions of what is "fair," "equitable," or "full protection and security."

I must admit however, that the line of argument just sketched is not one that is expressly made in any earlier case law or academic literature with which I am familiar. Moreover, it is not a line of argument that was fully elaborated by S.D. Myers or which the Government of Canada expressly addressed in its reply. Furthermore, even if I were to definitively adopt this line of argument, my doing so would not appear to have any effect on the measure of damages in this case. I will refrain therefore, from definitively concluding that it is an additional ground for holding Canada liable in this case under Article 1105.

S.D. Myers suggests a third basis for holding that the Government of Canada did not comply with the minimum international standard. Canada, alleges S.D. Myers, did not act towards it in good faith.

I do not see that any useful purpose would be served at this stage of the proceedings by engaging in the factually, legally, and semantically difficult task of definitively determining whether Canada's actions should be formally characterized as being "in bad faith." It should be recalled that NAFTA expressly forbids tribunals such as ours from awarding punitive damages (Article 1135(3)).

I would disagree however, with one particular submission of S.D. Myers with respect to the alleged existence of "bad faith" on the part of the Government of Canada. S.D. Myers contends in its legal memorial

that Canada acted in bad faith because it had a malicious intent to injure S.D. Myers. The memorial quotes the following passage from Bin Cheng:

> The exercise of a right – or a supposed right, since the right no longer exists – for the sole purpose of causing injury to another is thus prohibited. Every right is the legal protection of a legitimate interest. An alleged exercise of a right not in furtherance of such interest, but with the malicious purpose of injuring others can no longer claim the protection of the law.[28]

I have found that the Government of Canada was motivated in large part by a desire to promote the economic interests of Canadian competitors of S.D. Myers. We have no evidence that the Government of Canada had any gratuitous, Iago-like desire to inflict harm on S.D. Myers.

The promotion of the prosperity of the business of nationals is not inherently evil. Depending on how that promotion is carried out, it can be entirely consistent with even demanding free trade agreements like NAFTA. In fact, as noted earlier in this award, Chapter 11 (Investment) expressly recognizes that governments can, without breaching NAFTA, promote enterprises owned by nationals by providing them with subsidies or giving them preferential treatment with respect to government procurement.[29]

Over its long history, Canada has sometimes had national policies that were strongly protectionist. The governments who adopted those policies were not acting out of malice or ill will to foreigners. The extent to which free trade or protectionism is good for Canadians in the long run has been debated throughout the life of Canada and will no doubt continue to be debated. There have been, and will continue to be, humane and intelligent advocates on both sides of the question.

IX. PRINCIPLES CONCERNING COMPENSATION

MY FINDING IS THAT CANADA'S BAN on PCB exports to the United States had the purpose of attempting to benefit Canadian providers with respect to PCB remediation and that the measure materially damaged a U.S. investor, S.D. Myers. The next step, therefore, is to look at the various provisions of Chapter 11 NAFTA that have been

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[28] B. Cheng, General Principles of Law as applied by International Courts and Tribunals (London: Stevens & Sons Ltd., 1953) at 122; Memorial of the Investor, 50 at paragraph 114.

[29] See NAFTA, Article 1108(7)

breached, and determine what principles of compensation they suggest.

A. Compensation Under Article 1102 of NAFTA

Article 1102 (National Treatment) does not provide much explicit guidance on how damages should be calculated.

Article 1131 provides that Tribunals shall decide "the issues in dispute in accordance with this Agreement and applicable international law." The general principle in international law is stated in the *Chorzow factory* case:

> The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[30]

The Draft Articles on State Responsibility, which are currently being worked on by the International Law Commission, similarly propose that in international law, a wrong committed by one state against another gives rise to a right to compensation for the economic loss sustained.

It was not suggested to us by either participant that the Chorzow Factory principle is somehow inapplicable because the claim in this case is brought directly by the investor. As mentioned earlier, under international law, a wrong done to an investor is usually viewed as a wrong done to its home state and it is the state that brings the claim against the host state, not the investor directly.

Article 1131 refers to providing compensation not only in accordance with international law, but with the NAFTA Agreement. It is to these provisions that my analysis now turns.

Article 1135 provides that an investor may submit to arbitration a claim that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. Article 1135 provides that an arbitral tribunal has the authority to award only "monetary damages and any applicable

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[30] *Germany v. Poland* (1922) 17 P.C.I.J. Ser. A No. 17, 3 at 47; *Memorial of the Investor,* 78 at paragraph 212.

interest" or "restitution of property." The combination of the Articles suggest the same general principle as stated in the *Chorzow factory* case: that monetary compensation is to be provided where there is a legal wrong and the amount of damage should be determined in a way that undoes the wrong.

The only express formula concerning compensation is contained in Article 1110, which addresses compensation for expropriations. That article states:

> 1110(1) No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation in accordance with paragraphs 2 through 6.
> 1110(2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value, including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

S.D. Myers suggests in its memorial that tribunals under Chapter 11 (Investment) will likely find that the standard in Article 1110(2) applies to breaches of other sections of Chapter 11. I doubt that Article 1110(2) will always be the appropriate standard when a party to NAFTA has breached one of the other investor provisions.

The framers of NAFTA did not say that the "fair market value of the asset" formula applies to all breaches of Chapter 11. They expressly attached it to expropriations. According to academic commentators, that express attachment was intended to resolve a long standing difference of opinion between the United States and Mexico over compensation in expropriation cases. The latter contended that in the case of a lawful expropriation, a lower standard of compensation might be appropriate than all of the economic loss sustained.

Expropriations that take place in accordance with the strictures of Article 1110 – expropriations that are conducted "for a public purpose," "on a non-discriminatory basis," and "in accordance with due process of

law" – are *lawful* in terms of Chapter 11 (Investment) as along as compensation is paid in accordance with the "fair market of the asset" formula. With other sections of Chapter 11, state liability arises out of the fact that the government has done something that is contrary to NAFTA. The standard of compensation that a tribunal should apply might sometimes be influenced by the distinction between compensating for a lawful, as opposed to unlawful, act. That is not to say that punitive damages may ever be awarded; these are expressly prohibited by NAFTA.

The "fair market value of the asset" standard may not lead to a just or practicable result in all cases. In some cases, it may be difficult or impossible to assess "fair market value." In others, a tribunal might think it lawful and just use a different standard than "fair market value."

Sometimes the value of an asset to an investor is much greater than its fair *market* value. It may be appropriate in some cases, for example, to apply the standard of "fair value," which takes into account that the market may not derive as much economic use from an asset or an opportunity as the investor itself.

By not spelling out any particular methodology, I believe, the framers of NAFTA intended to leave it open to tribunals to determine a measure of compensation that is just in all of the specific circumstances of the case, taking into account both general international law and the special provisions of NAFTA.

Just compensation in this case would take into account the profits that S.D. Myers lost as a result of the export ban and any lost capital. The overall calculation must ensure that there is no "double counting," no compensation beyond what has actually been lost.

I would agree with the Government of Canada that it would be premature at this stage for us to set out a highly detailed set of principles for calculating damages. The parties should have the opportunity to make further factual and legal submissions on which precise methodology ought to be used.

I have already suggested that whatever precise approach is taken it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation. I have also noted already that there can be no punitive damages under NAFTA.

The Government of Canada has submitted, and I agree, that the following principles also apply:

- the burden is on S.D. Myers at any further proceedings to quantify damages to provide the extent of any losses;
- compensation will only be provided for losses that are proved to have a sufficient causal link with the specific NAFTA provision that is breached. The economic losses claimed by S.D. Myers must be proved to be those that have arisen from a breach of NAFTA, and not other causes;

- breaches of damages for violation of any one NAFTA provision can take into account any damages already awarded under a breach of another NAFTA provision. In general, there should not be "double recovery." S.D. Myers should be compensated, not provided with a bonus of any sort.

During closing oral argument, counsel for the Government of Canada suggested that there should be some territorial limitation to damages. Canada suggested that it does believe that a panel should allow compensation for losses that are not sufficiently linked to the territory of the state that is hosting the investment.

S.D. Myers does not appear to agree that any such territorial limitation on compensation is stated or implied by NAFTA.

Neither side provided detailed legal argument on this point during the proceedings to date. They have focused their attention primarily on whether there is any liability or not, and not on nuances of calculating damages. It is quite understandable that they have done so. The precise quantification of damages was supposed to be left to a second stage. It is true that this tribunal was supposed to try to establish "principles" concerning damages at this first stage, but sometimes it is difficult to identify and debate what principles are at stake in advance of looking closely at matters of "detail." In addressing the more immediate issue of liability, both parties have had to contend with a complex fact situation and a variety of difficult and largely untested legal questions. The procedural orders at the beginning of this case established that the parties could not introduce expert evidence as to the quantification of damages; such expert evidence might prove very useful in identifying and considering the question of whether territorial allocation of damage is proper or even feasible.

This litigation has already cost the parties considerable time and expense. It would be preferable, other things being equal, for this tribunal to set out principles concerning compensation that are so clear and complete that parties could very easily agree upon the precise amount of compensation without any further recourse to this tribunal. The path of wisdom however, is not to guess at answers to potentially important questions that have not yet been fully explored by the parties.

B. Compensation Under Article 1105 of NAFTA

While I have found that Canada's actions, by breaching Article 1102 (National Treatment) also breached Article 1105 (Minimum Standard of Treatment), it would appear that the two sections require the same measure of compensation in the facts of this case.

C. Compensation Under Article 1106 of NAFTA

I have also found that the export ban constituted a "performance requirement" under Article 1106 of NAFTA. Article 1106, like Article 1102 (National Treatment) but unlike Article 1110 (Expropriation) does not contain its own explicit formula for determining compensation. I would think that the same general principles apply to determining compensation under Article 1106 as under Article 1102. S.D. Myers, as far as I can see at this point, has no basis for obtaining any greater compensation by virtue of the fact that the export ban was inconsistent with Article 1106 as well as Article 1102.

Article 1106 does, admittedly, have some special features unlike other investment-protection provisions of NAFTA. One of the triggers for the operation of Article 1106 can be the way a government treats an investor from outside of the NAFTA area.

Whatever the peculiar features of Article 1106, and however they may affect other situations, my current thinking is that it would be contrary to common sense that on the facts of the case, S.D. Myers would somehow recover more under Article 1106 than it could under Article 1102 (National Treatment). The same government measure in the context of the same facts would be the basis for recovery under either section, and there is no special "compensation formula" in either section.

D. Compensation That Would Have Been Obtained Under Article 1110 Had a Breach Been Found

Article 1110 (Expropriation) contains an explicit formula for determining compensation. It is the "fair market value of the expropriated investment."

That formula might actually allow for more modest compensation than is required when other investor-protecting articles of NAFTA are breached. This is not such a surprising or illogical result. It must be remembered that Article 1110 requires compensation even when a government measure is, apart from the issue of compensation, entirely lawful and reasonable. Compensation in other cases arises when a government has breached a specific provision of the NAFTA intended to protect investors.

As noted earlier, "fair market value" might, in some cases, be less than "fair value." An investment might be worth more to the investor for various reasons, including synergies within its overall operations, than it is to third parties.

Accordingly, even if I had found that the export ban did amount to an expropriation under the terms of Article 1110, that finding would not necessarily have provided a basis for awarding any compensation above

and beyond that already recoverable under the terms of Article 1102 (National Treatment).

The finding that there was an expropriation would not, on the other hand, have in any way reduced the amount of compensation that ought to be awarded. The cumulative principle applies within Chapter 11 (Investment). When a government denies to an investor the protection assured by specific provisions of Chapter 11, compensation may be required above and beyond that which would apply in the ordinary case of a lawful expropriation.

X. CONCLUSIONS

S.D. MYERS QUALIFIES AS AN INVESTOR in Canada and Myers Canada was an investment. The measures adopted by Canada in this case, including the interim and longer-term ban on imports, breached Article 1102(1) and 1102(2) of NAFTA, which require "national treatment" of investors and investments from another NAFTA Party.

The same measures amounted to a breach of the minimum international standard, Article 1105, inasmuch as a violation of a specific investor-protecting provision of a trade agreement, including Article 1102 (National Treatment), is contrary to the guarantee of treatment in accordance with international law, including full protection of security. The breach of Article 1105 does not add in any way to the amount of compensation that would be recoverable in any event under Article 1102.

The same measures in my view also amounted to a performance requirement that is not consistent with Article 1106 of NAFTA. Again, this finding does not appear to affect the measure of compensation to which S.D. Myers is entitled.

The measures did not amount to an expropriation under the terms of Article 1110 of NAFTA. Even if they had, the amount of compensation that is recoverable would probably not be affected.

A basic principle that will guide the precise quantification of compensation is that S.D. Myers should be compensated for the economic losses that resulted from the export ban. The precise calculation must avoid "double recovery"; the consideration of different aspects of S.D. Myers' losses cannot result in more compensation that was lost as a whole. The burden of proof with respect to providing amounts of actual economic loss is on S.D. Myers.

This was a case that placed unusual demands upon the legal counsel for both sides. The facts are complex. The law was in many respects untested. The use of international arbitration rules and procedures raised additional and to some extent novel challenges. I must respectfully say that I have been greatly impressed with the skill, professionalism, and courtesy with which counsel for both sides, including Mr. Barry Appleton on behalf of S.D. Myers and Mr. Joseph de

Pencier and Mr. Brian Evernden on behalf of the Government of Canada, have conducted themselves throughout all stages of these proceedings thus far.

SIGNED and DATED at the City of Winnipeg, in Manitoba, Canada, this 12th day of November, 2000.

Bryan P. Schwartz

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BRYAN P. SCHWARTZ