

FEDERAL COURT – TRIAL DIVISION

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

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

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

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

S.D. MYERS, INC.

Respondent

- and -

UNITED MEXICAN STATES (“MEXICO”)

Intervener

REPLY

The Applicant files this Reply pursuant to an Order of the Associate Chief Justice dated September 21, 2001 and a subsequent order dated December 24, 2001 extending the time within which to file the Reply to January 7, 2002.

Overview

1. The Applicant addresses several issues in this Reply. Firstly, the Applicant explains the errors underlying the Respondent's submission that NAFTA Chapter Eleven Tribunals should

receive considerable deference and why "correctness" remains the appropriate standard of review in this case. Secondly, the Applicant addresses the Respondent's submissions concerning the terms "investor" and "investment" as they appear in the NAFTA. In that context the Applicant shows that the Respondent is not an investor within the meaning of NAFTA Chapter Eleven and that Myers Canada is not an investment of the Respondent. Thirdly, the Applicant demonstrates through a brief examination of NAFTA Articles 1102 and 1105 why a failure to distinguish between investors and their investments resulted in the Tribunal assuming jurisdiction over matters outside the submission to arbitration. Finally, the Applicant addresses the Respondent's mistaken reliance on the "separate opinion" of Professor Schwartz.

Standard of Review

2. The Respondent argues that the Court should disregard the “pragmatic and functional” approach in determining the appropriate standard of review for the decision of NAFTA Chapter Eleven Tribunals under Article 34 of the Code and instead, should accord such decisions the highest deference.

Respondent’s Memorandum of Fact and Law, paras. 44, 61, 62 and 63

3. The Respondent bases its arguments on the erroneous assumption that the Model Law mandates a particular standard of review for all international arbitral awards.

4. Article 5 of the Commercial Arbitration Code (the “Code”) stipulates that, in matters governed by the Code, no court shall intervene except where so provided by the Code. Articles 34 through 36 of the Code state the grounds for challenging an arbitral award. Article 34(2) of the Code states the grounds for setting aside an arbitral award. These grounds are identical to those on which a court may refuse to recognize or enforce an arbitral award under Article 36(1). Article 1(2) of the Code directs that the provisions of the Code, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is Canada.

Applicant’s Memorandum of Fact and Law, paras. 102 to 107

5. The *Commercial Arbitration Act* (the “CAA”) and the Code govern all applications to review NAFTA Chapter Eleven awards to which the Applicant is a disputing party and where the place of arbitration is Canada. Applications to set aside an arbitral award are limited to the grounds of review in Article 34 of the Code. However, neither the Code nor the Model Law on which it is based provides a standard of review.

6. Hence, in *Mexico v. Metalclad Corp.* (“*Metalclad*”), Tysoe J. erroneously rejected the argument that NAFTA Chapter Eleven tribunals should neither attract extensive judicial deference nor be protected by a high standard of review. He erred also in holding that sections 5 and 34 of the British Columbia *International Commercial Arbitration Act* (“ICAA”) --which are equivalent to Articles 5 and 34 of the Code – set out the appropriate standard of review. In fact, ss. 5 and 34 of the ICAA prescribe the grounds of review, but not the standard of review.

Mexico v. Metalclad Corp. (2001), 89 B.C.L.R. (3d) 359 (BCSC), Appendix B (Authorities), Volume I, Tab 26

7. The adoption by Canadian courts of a standard of review that accords high deference to decisions of international arbitral tribunals is intended to facilitate international business transactions between private parties.

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

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

8. The principal objective of this policy is to enhance predictability in arbitrations by ensuring a measure of finality. To that end, a high degree of judicial deference favours finality of arbitral proceedings over concerns relating to the fairness of the process and obtaining a correct result. The question arises as to whether the same considerations apply to investor-state dispute resolution under NAFTA Chapter Eleven.

Ibid.

Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Third edition, 1999) at pp. 285 and 286, Appendix B (Authorities), Volume II, Tab 36

9. As the Applicant and Intervener noted in their Memoranda of Fact and Law, international commercial arbitration involving private parties differs fundamentally from international arbitrations involving a claimant and a state in respect of a treaty, such as the NAFTA, to which the Respondent is not a party. Unlike private commercial disputes, arbitration under NAFTA Chapter Eleven involves matters of public import and the impact of an award extends beyond the disputing parties.

Applicant's Memorandum of Fact and Law, paras. 140, 141, 142, 144, 145 and 146

Intervenor's Memorandum of Fact and Law, paras. 53, 54, 55, 56, 57 and 58

10. In *United Parcel Service of America, Inc. v. Government of Canada*, a NAFTA Chapter Eleven Tribunal recognized this when it stated :

Such proceedings [Chapter Eleven investor-state arbitrations] are not now, if ever, to be equated to the standard run of international commercial arbitration between private parties.

Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", dated October 17, 2001, para. 70, Intervener's Appendix B (Authorities), Tab 8

11. The NAFTA Chapter Eleven Tribunal in *Methanex Corporation v. United States of America* expressed a similar view:

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

Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", dated 15 January 2001, Appendix B (Authorities), Volume I, Tab 16

12. In these circumstances, the interest in obtaining a correct legal result in NAFTA Chapter Eleven arbitration is at least as important as that of securing finality of arbitral proceedings.

When the question is whether an arbitral award falls within the scope of NAFTA Chapter Eleven, obtaining a correct legal result is of paramount importance.

13. The sole basis of the Tribunal's jurisdiction is the consent of the NAFTA Parties as evidenced by NAFTA Chapter Eleven. This Chapter defines the scope of the submission to arbitration. Arbitral awards that exceed the limits of NAFTA Chapter Eleven exceed the consent for the submission to arbitration and must be set aside if challenged pursuant to an application under Article 34 of the Code.

Applicant's Memorandum of Fact and Law, paras. 75 to 79

Respondent's Memorandum of Fact and Law, paras. 23, 24, and 79

14. In *Metalclad*, Tysoe, J. indicated that the principles discussed by the Supreme Court of Canada in relation to the pragmatic and functional approach could not be used to determine a standard of review for the grounds of review in Article 34 of the Code. However, as the Applicant noted in paragraph 121 of its Memorandum of Fact and Law, Tysoe, J. did not address the question of how a court determines whether a tribunal decision, or any part thereof, falls outside the terms of the submission to arbitration. One of the purposes of the pragmatic and functional approach is to deal with this very question. As Bastarache J explained in *Pushpanathan v. Canada (M.C.I.)*: "In other words, 'jurisdictional error' is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional approach, the tribunal must make a correct interpretation and to which no deference will be shown."

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

15. Here, the Applicant argues that the Tribunal exceeded its jurisdiction or issued an award contrary to the public policy of Canada by finding that Myers Canada was an "investment" of the Respondent within the meaning of NAFTA Article 1139, and that the Applicant breached its obligations under NAFTA Articles 1102 and 1105.

16. In these circumstances, the proper standard of review on the question of whether the Tribunal acted within the terms of its authority is correctness. The absence of a privative clause,

the fact that the Tribunal is an *ad hoc* body the members of which are not necessarily chosen for their knowledge of trade law, and the nature and limited scope of the Tribunal's jurisdiction all weigh in favour of according the Tribunal a low level of judicial deference.

Applicant's Memorandum of Fact and Law, paras. 135 to 146

Investment

17. The Respondent ("SDMI") contends that the Tribunal correctly found that Myers Canada was an investment of the Respondent within the meaning of NAFTA Article 1139 because, even though SDMI held no shares in Myers Canada, it nonetheless controlled Myers Canada.

Respondent's Memorandum of Fact and Law, paras. 116, 118, 119 and 137

18. The Respondent further contends that the question of whether it controls Myers Canada should be determined on the basis of international law and not Canada's domestic law.

Respondent's Memorandum of Fact and Law, paras. 117(b), 128, 129, 130 and 131

19. Even if it were accepted that only international law is relevant to the determination of this issue, none of the Respondent's assertions regarding international law or the case law cited support its position. The Respondent's assertions amount to the proposition that at international law if a minority shareholder of a corporation exercises *de facto* control over the affairs of that corporation, the minority shareholder can be said to control that corporation. This proposition does not assist the Respondent in this case where it neither directly nor indirectly holds any shares in Myers Canada.

Applicant's Memorandum of Fact and Law, para. 164.

20. The Respondent also takes issue with the Applicant's assertion that the Respondent and Myers Canada were not affiliates of each other. Even if the Respondent's assertion were accepted, this does not result in Myers Canada constituting an investment of SDMI for the purposes of NAFTA Article 1139. Nothing in that Article suggests that two corporations

controlled by the same third party are investments of each other, or that one is the investment of the other.

21. In any event, the Applicant disputes the Respondent's contention that the Tribunal found that the Respondent controlled Myers Canada. Rather, the Partial Award shows clearly that the Tribunal assumed an equitable jurisdiction. The Tribunal found that, in the absence of any shareholding by the Respondent in Myers Canada and any control by the Respondent over Myers Canada, it nevertheless would proceed on the basis that Myers Canada was an investment of the Respondent. To this effect, the Tribunal noted that "it does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant..." In doing so the Tribunal Award went beyond the scope of the submission to arbitration and must be set aside.

Partial Award on Liability, para. 229

22. The Applicant also does not accept that the domestic law of Canada is irrelevant for the purposes of determining whether Myers Canada was an affiliate of the Respondent. NAFTA Article 1139 states that "investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party" and "investment" is defined in that Article to mean, amongst other things, "an enterprise". NAFTA Article 201 in defining "enterprise" expressly refers to "applicable law" which in this matter is the *Canada Business Corporations Act*.

23. The Applicant further contends that even if international law governs the question of whether Myers Canada was an investment of the Respondent under NAFTA Art 1139, international law also directs that recourse be had to Canadian domestic law in this instance.

24. The International Court of Justice ("ICJ") considered the relationship between municipal corporate law and international law in the *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* ("*Barcelona Traction*"). In that case, Belgium initiated a claim against Spain on behalf of Belgian nationals for alleged harm caused to

Barcelona Traction, Light and Power Company, Ltd. – a company incorporated in Canada in which the Belgian nationals held shares. In dealing with this claim the ICJ broached the issue of the relationship between municipal corporate law and international law:

In the [field of diplomatic protection] international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. All this means is that international law has to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the court must devote attention to the nature and interrelation of those rights.

I.C.J. Reports 1970, p. 3, Supplemental Appendix B (Authorities), Volume IV, Tab 58

Ibid at pp. 33 and 34

25. Contrary to the Respondent's bald assertion in paragraph 117(a) of its Memorandum of Fact and Law that *Barcelona Traction* does not correctly state the relevant law, the foregoing has been widely recognized by legal commentators as an authoritative statement on the relationship between municipal corporate law and international law.

For example, see Ian Brownlie, *Principles of Public International Law*, Fifth Edition, Oxford University Press (1998) pp. 18, 19 and 491 to 495, and the authorities cited by the author, Applicant's Book of Authorities, Tab 1.

26. Hence, although the *Barcelona Traction* case concerned the right of states to bring claims on behalf of their nationals against other states, the ICJ's statement of the law is a persuasive enunciation of law and hence relevant in investor-state disputes under NAFTA Chapter Eleven, when an issue arises relating to the recognition and status of municipal corporate law in the international field.

National Treatment

27. The Respondent argues at paragraphs 141 and 142 of its Memorandum of Fact and Law that the claim proceeded on the basis of both NAFTA Articles 1102(1), relating to the treatment of investors, and NAFTA Article 1102(2), relating to investments.

28. The reliance on Article 1102(1) to justify the comparison between the activities of the Respondent in the U.S. with those of Canadian companies in Canada is misplaced. NAFTA Article 1102(1) concerns the treatment accorded to investors “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.” More specifically, NAFTA Article 1102(1) requires a comparison between the treatment accorded to the Respondent in respect of its alleged investment and that accorded to Canadian investors, in like circumstances, in respect of their investments in Canada. Therefore, activities of the Respondent in the U.S. that are unrelated to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of its alleged investment in Canada are not relevant for purposes of Article 1102(1). Nor are they relevant under Article 1102(2) as it calls for a comparison between the treatment accorded to an alleged investment of the Respondent in the territory of Canada and that accorded to Canadian investments in like circumstances in Canada.

29. Contrary to the Respondent’s contention that an investor may also be an investment for the purposes of NAFTA Chapter Eleven, the definitions of “investor”, “investor of a Party”, “investment” and “investment of an investor of a Party” in NAFTA Article 1139 clearly indicate that “investor” and “investment” are mutually exclusive concepts. This distinction is fundamental to the operation of NAFTA Articles 1102(1) and 1102(2), which set out separate national treatment obligations for investors and investments “with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.”

Applicant's Memorandum of Fact and Law, paras. 152 to 157

30. Hence, under both obligations the Tribunal must ascertain the nature and extent of the Respondent's investment in Canada, if any, before it can properly address whether the Applicant denied the Respondent or its investment in Canada national treatment under Article 1102. In this case, this would have required a comparison between the investment in Canada as defined by the Tribunal, Myers Canada, and other similar Canadian companies marketing their own PCB disposal services or acting as agents for PCB disposal companies. The arbitration did not raise issues of treatment of an investor with respect to its investment.

31. The Respondent also challenges the Applicant's contention that, pursuant to NAFTA Article 1101, Chapter Eleven obligations apply only to investments located in the territory of the Party whose measure is being challenged. However, NAFTA Article 1101 and the definition of "investor of a Party" in Article 1139 when read together clearly indicate that NAFTA Articles 1102(1) and 1102(2) were not intended to have extra-territorial effect. In other words, by virtue of Article 1101 the "investment" must be within the territory of the Party adopting or maintaining the measure to trigger the application of NAFTA Chapter Eleven and more specifically Article 1102.

Respondent's Memorandum of Fact and Law, paras. 151 to 154

32. Hence, even if the Respondent can be both an investor and investment, comparing an investment situated in the territory of another NAFTA Party to an investment in Canada falls outside the scope of the arbitration.

33. The Tribunal misinterpreted and misapplied NAFTA Article 1102 by treating the Respondent and Myers Canada – the investor and investment – as a unit and comparing their treatment to that of Canadian investments. In essence, the Tribunal compared the Respondent's own activities in the U.S. as a cross-border provider of PCB disposal services with the activities of Canadian investments providing the same services in Canada. This is not the proper

comparison under Articles 1102(1) or 1102(2). In doing so, the Tribunal created a different obligation than that in either NAFTA Article 1102(1) or 1102(2).

34. Moreover, such a comparison between a cross-border service provider of PCB disposal services (SDMI) and a domestic service provider of PCB disposal services falls squarely within the purview of NAFTA Article 1202 and outside the scope of NAFTA Chapter Eleven. NAFTA Article 1202 requires each NAFTA Party to accord to service providers of another Party treatment no less favourable than that it accords, in like circumstances, to its own service providers.

35. Hence, any claim regarding a breach of national treatment with respect to the Respondent's sale in Canada of its PCB remediation services in the U.S. must be brought under the state-to-state dispute settlement provisions in NAFTA Chapter 20, not NAFTA Chapter Eleven.

36. The evidence and the Tribunal's findings of fact demonstrate that the Respondent provided PCB waste disposal services in the United States and that Myers Canada limited its activities to sale and marketing activities in Canada, and making arrangements for shipping Canadian PCB wastes to the United States for processing. The Respondent therefore did not provide PCB Waste disposal services in Canada through any alleged investment within the meaning of NAFTA Article 1139.

37. Hence, contrary to the Respondent's assertions in paragraphs 165 to 168 of its Memorandum of Fact and Law, the Respondent was a cross-border service provider within the meaning of NAFTA Article 1213. The Respondent's reliance on NAFTA Article 1213 to support its argument that Chapter Twelve does not apply to the cross-border service provided by an investment (as defined in Article 1139) in the territory of another NAFTA Party fails for two principal reasons.

38. First, the activities of the Respondent in Canada (for example marketing) do not constitute an investment as defined in NAFTA Article 1139. Second, the mere fact that the

Respondent owned a marketing enterprise in Canada is irrelevant, given that the Respondent was not providing the PCB remediation services through its investment in Canada. The Respondent provided the remediation services in the U.S.. Had Myers Canada operated PCB remediation services in Canada then the Respondent could have been said to operate PCB remediation services through its investment in Canada and these activities would have fallen within the scope of NAFTA Chapter Eleven.

Partial Award, paras. 92, 93, 109 and 117

Applicant's Memorandum of Fact and Law, paras. 186 to 190

39. The Respondent's reliance on the *General Agreement on Trade in Services* (GATS) is misplaced and provides no support for its assertion that its cross border services in the U.S. are covered under NAFTA Chapter Eleven. The NAFTA, unlike the GATS, deals differently with different modes of supply. Hence, the comparison with the GATS illustrates the different approach adopted by the NAFTA Parties and the distinctions that should be drawn. For example, coverage under the GATS includes both cross-border services and services provided through a commercial presence (i.e. investment). However, under NAFTA the various modes of supply are covered under different and separate Chapters of the NAFTA. Investment and cross-border services are dealt with under separate NAFTA Chapters – investment in Chapter Eleven and cross-border services in Chapter 12 and provide different recourses for violations of obligations under those Chapters.

40. Therefore, the Respondent's assertion that the exclusion in the NAFTA Article 1213(2) definition of "cross-border provision of a service" provided by way of an investment parallels GATS Article I(2)(c) has no foundation. GATS Article I(2)(c) provides that services provided through a commercial presence are covered under that Agreement. On the other hand, NAFTA Article 1213(2) makes clear that cross-border services are covered exclusively under Chapter 12 and services through an investment are not because they are covered under Chapter Eleven.

41. The Respondent argues that the interpretation of the phrase "in like circumstances" contained in NAFTA Article 1102(1) and 1102(2) empowers the Tribunal to treat the

Respondent and Myers Canada as a unit and to compare their treatment to that given to domestic investors or investments.

42. According to the Respondent, the Tribunal adopted an approach consistent with these principles by first considering whether the Respondent and Myers Canada as a unit were “in like circumstances” with Canadian investments and then examining the surrounding circumstances to determine if “there was anything in the legal or factual context that would render what would otherwise be like circumstances, unlike.”

Respondent’s Memorandum of Fact and Law, para. 150.

43. Nothing in the text of Article 1102 supports treating the investor and investment as a unit. Moreover, the Respondent’s reliance on the OECD *Declaration on International Investment and Multilateral Enterprises* (issued on June 21, 1976) and jurisprudence interpreting the term “like products” found in GATT Article III is misplaced.

44. These are separate and distinct instruments. GATT Article III is worded differently than Article 1102 of the NAFTA. For example, GATT Article III is not qualified by the treatment accorded “in like circumstances” condition of Article 1102 but uses the term “like products”. To the extent that the jurisprudence of the WTO/GATT has interpretative value for Article 1102, neither of the cases referred to support the proposition advanced by the Respondent. The OECD Declaration is not binding, and more importantly it does not suggest that an investor and investment be looked at as a unit when comparing treatment accorded to domestic investments in like circumstances.

45. It is the express wording of Article 1102 that must be applied here. The express wording of Article 1102 permits only a comparison between foreign and domestic investors with respect to their investments under Article 1102(1), and between foreign and domestic investments under 1102(2). In this case, in the context of NAFTA Article 1102(2), an issue only arises as to whether Myers Canada and Canadian investments such as Chem-Security and Cintec are accorded treatment “in like circumstances”. Hence, comparing the Respondent and its alleged investment

as a unit imposes a separate obligation in addition to those in NAFTA Article 1102(1) and 1102(2).

46. The Respondent argues that the Applicant's submission that the Respondent was a cross-border service provider amounts to an objection that the Tribunal lacked jurisdiction to hear and adjudicate the Respondent's claim. According to the Respondent, Article 21(3) of the UNCITRAL Arbitration Rules requires the Applicant to plead this "objection" in its Statement of Defence failing which, it is precluded from raising the matter in the arbitration and subsequent court proceedings.

Respondent's Memorandum of Fact and Law, paras. 158 to 163

47. The Respondent mischaracterizes the nature and import of the Applicant's submission. The Tribunal had jurisdiction to interpret Articles 1102(1) and 1102(2) and make a comparison between treatment accorded foreign and domestic investors in the former case with respect to their investments, and between foreign and domestic investments, in the latter case. The issue before this court is the improper application of NAFTA Article 1102 by the Tribunal and its effect of importing into NAFTA Chapter Eleven the separate and distinct obligations of NAFTA Chapter Twelve.

48. In any case, the Applicant pleaded in its Memorials and raised the issue of whether the Respondent was a cross-border service provider at the hearing. The failure to do so in its Statement of Defence neither gives the Tribunal licence to act beyond the submission to arbitration nor precludes a court from setting aside an arbitral award made on this basis.

49. The passage from the Analytical Commentary, to which the Respondent refers in paragraph 163 of its Memorandum of Fact and Law, supports this conclusion:

As expressed above in the observation of the Working Group, there are limits to the effect of a party's failure to raise his objections. These limits arise from the fact that certain defects such as violation of public policy, including non-arbitability, cannot be cured by submission to the proceedings. Accordingly, such grounds for lack of jurisdiction would be decided by a court in accordance with article 34(2)(b) or, as regards awards made under

this Law, article 36(1)(b) even if no party has raised any objections in this respect during the arbitral proceedings.

Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Trade Commission on International Trade Law, para. 10, Respondent's Appendix B (Authorities), Volume II, Tab 37.

50. Section 4(2) of the CAA provides that, in interpreting the Code, Article 34 of which sets forth the grounds for review for this proceeding, recourse may be had to the Analytical Commentary.

51. In summary, NAFTA Article 1102 precludes the Tribunal from doing what it did in the Partial Award namely, treating the Respondent and its alleged investment - Myers Canada - as a unit and comparing the treatment allegedly accorded to this unit with that of Canadian investments. Article 1102 also precludes the Tribunal from comparing the treatment given to the Respondent as a cross-border provider of PCB waste disposal services with Canadian investments engaged in domestic PCB waste disposal. The Tribunal's misinterpretation and misapplication of NAFTA Article 1102 goes beyond mere error of law and results in a decision that falls outside the scope of the submission to arbitration and must be set aside.

Minimum Standard of Treatment

52. Notwithstanding the Respondent's contentions to the contrary, the Tribunal's errors with regard to NAFTA Article 1105 extend beyond the scope of the submission to arbitration and are contrary to Canadian public policy. This is so for two principal reasons.

53. First, NAFTA Article 1105(1) states that

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. [emphasis added]

54. In focussing its analysis under NAFTA Article 1105 on the treatment of the investor, rather than the investment of the investor, the Tribunal ignored the express terms of the provision. Contrary to the Respondent's assertion that the question is whether harm has been

caused to an Investor, the essential element of NAFTA Article 1105 is treatment of the “investments” of investors. By failing to act pursuant to the express terms of this provision, the Tribunal went beyond the scope of arbitration.

55. Second, the Tribunal found in this arbitration that a breach of NAFTA Article 1102 in and of itself can constitute a breach of NAFTA Article 1105. The Respondent asserts that there is no basis for interfering with the Tribunal’s interpretation of NAFTA Article 1105. In fact, the Tribunal went beyond the scope of arbitration in this instance by expanding NAFTA Article 1105 beyond its proper terms.

56. NAFTA Article 1105 reflects the customary international law minimum standard of treatment of aliens. This is abundantly clear. The Canadian Statement of Implementation of the NAFTA, for instance, declares that:

National Treatment provides a relative standard of treatment while this article provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law.

North American Free Trade Agreement, Canadian Statement of Implementation, Canada Gazette, Part I, January 1, 1994, p. 149, Intervener’s Appendix B (Authorities), Tab 16.

57. In *Metalclad*, Mr Justice Tysoe held that the words “international law” in NAFTA Article 1105 refer to customary international law and not to treaties between States such as the NAFTA (“conventional law”).

58. Finally, the highest level policy-making organ and administrator for the Treaty as a whole (the “Free Trade Commission”) has addressed this matter authoritatively and conclusively. Pursuant to its authority under NAFTA Article 1131(2), the Free Trade Commission confirmed that:

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

and

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

59. In finding that a breach of NAFTA Article 1102 can constitute a breach of the minimum standard of treatment, the Tribunal in effect found that a contravention of an independent treaty obligation can constitute a breach of Article 1105. As explained above, this unwarranted misconstruction of Article 1105 disregards the text of the provision and therefore falls beyond the scope of the submission to arbitration and is contrary to Canadian public policy.

60. As a final matter, to the extent that the Respondent submits that national treatment is a rule of customary international law, the submission lacks any supporting authority and, for the reasons given by the Intervenor in paragraphs 156 to 161 of its Memorandum of Fact and Law, is in any event wrong.

Status of the Separate Opinion of Professor Schwartz

61. The Respondent refers throughout its Memorandum of Fact and Law to the separate opinion of Professor Schwartz. Under Articles 31 and 32 of the UNCITRAL Arbitration Rules there can only be one "award" of the Tribunal on any particular issue. A separate opinion is technically not "part of" or "annexed to" an award, and it has no status other than that of being literally a "separate opinion".

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

This 7th day of January, 2002 in the City of Ottawa, in the Province of Ontario.

Morris Rosenberg
Deputy Attorney General of Canada
Per: Brian Evernden

Morris Rosenberg

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