

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

BETWEEN:

S. D. MYERS INC.

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

PUBLIC DOCUMENTS

CONTENTS:

- 1)Notice of Intent to Submit dated July 21, 1998
- 2)Notice of Arbitration dated October 30, 1998
- 3)Statement of Claim dated October 30, 1998
- 4)Statement of Defence dated June 18, 1999
- 5)Procedural Orders (Nos. 1 - 16)

APPLETON & ASSOCIATES

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**NOTICE OF INTENT TO SUBMIT
A CLAIM TO ARBITRATION
UNDER SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

S. D. MYERS INC.

Investor

v.

GOVERNMENT OF CANADA

Party

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA"), the Investor, **S. D. MYERS INC.**, serves a Notice of Intent to Submit a Claim to Arbitration for breach of the Party's obligations under the North American Free Trade Agreement.

A NAME AND ADDRESS OF THE DISPUTING INVESTOR

INVESTOR: S. D. MYERS INC.
180 South Ave.
Tallmadge, Ohio 44278

B BREACH OF OBLIGATIONS

The Investor alleges that the Government of Canada has breached its obligations under:

- (i) Article 1102 - National Treatment
- (ii) Article 1105 - Minimum Standard of Treatment
- (iii) Article 1106 - Performance Requirements; and
- (iv) Article 1110 - Expropriation.

the relevant portions of the NAFTA are:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that 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.

Article 1105: Minimum Standard of Treatment

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.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1106: Performance Requirements

1. 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 of a non-Party in its territory:
 - (c) 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;
 - (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

Article 1110: Expropriation and Compensation

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.

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 the 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.*
3. *Compensation shall be paid without delay and be fully realizable.*
4. *If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.*
5. *If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of the exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.*
6. *On payment, compensation shall be freely transferable as provided in Article 1109.*
7. *This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).*
8. *For the purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.*

C FACTUAL BASIS FOR THE CLAIM AND ISSUES

FACTS

1. The Investor, S. D. Myers, is a corporation incorporated under the laws of the State of Ohio, with its head office in Tallmadge, Ohio. The Investor engages in, or arranges for, the processing, transportation and disposal of waste contaminated with polychlorinated biphenyls ("PCBs"). It does its processing at its specialized treatment facility in Tallmadge, Ohio.
2. The treatment facility in Tallmadge Ohio operates within the guidelines established by the United States Environmental Protection Agency ("EPA") for the handling and disposal of PCB's.
3. From 1995 onwards, the Investor operated in Canada and sought to process, distribute and treat PCB-contaminated waste from Canada. The Investor conducted lawful business-related activities in Canada and obtained contracts to process, distribute and treat PCB-contaminated waste from customers in Canada.

In 1990, Canada issued its *PCB Waste Export Regulations*. This regulation bans the export of PCB wastes to all countries other than the United States. Exports to the United States are permitted with the prior approval of the United States Environmental Protection Agency ("EPA")¹.

5. PCB's and PCB wastes are primarily regulated in the United States under the federal *Toxic Substances Control Act (TSCA)*². TSCA imposes a restriction on the manufacture, use, import, export and disposal of PCB's and PCB wastes. Under TSCA, the EPA may grant one-year "enforcement discretions" if it is satisfied that the activity will not result in unreasonable risk to human health or the environment, and that the applicant has made good faith efforts to develop a substitute that does not represent an unreasonable risk
6. On October 26, 1995, the EPA acceded to the investor's request for enforcement discretion in respect to the export of PCB waste from Canada into the United States. The EPA subsequently issued similar letters to other American PCB waste disposal facilities.
7. On November 28, 1995, the Government of Canada issued Order-in-Council #1995-2013 which is also known as the *PCB Waste Export Interim Order*. This order amends the existing *PCB Waste Export Regulations* to prohibit the export of PCB wastes from Canada to the United States. The *PCB Waste Export Interim Order* was converted to a final order on February 26, 1996, by Order-in-Council #1996-261.
8. Within the Regulatory Impact Analysis Statement accompanying the final order, the Canadian government cited its knowledge of the EPA's prior consent to accept Canadian PCB waste. The Statement also made clear Canada's knowledge that its export ban would affect one particular American investor -- S.D. Myers. The statement provided:

On becoming aware that the United States Environmental Protection Agency (US EPA) had granted a request for "enforcement discretion" to a U.S. company, S.D. Myers, allowing Myers to import P.C.B.'s from Canada to the USA for the purpose of disposal, the Minister of the Environment issued the *PCB Waste Export Interim Order* on November 20, 1995. This Interim Order prohibited any PCB wastes to be exported to the USA.
9. The effect of both of these measures was to prohibit S.D. Myers from conducting business in Canada. Throughout this time, Canadian-based investments that disposed of PCB wastes in Canada were permitted to conduct business in Canada. The inability of the Investor to have continued access to the Canadian PCB disposal market has resulted in damage to the Investor arising directly from Canada's NAFTA inconsistent measures.

¹ SOR/90-453

² 15 U.S.C. §§ 2601-2654

10. The Investor alleges that Canada has acted in a manner inconsistent with at least four provisions of the NAFTA through the promulgation of the export bans.

National Treatment

11. When read substantively, the national treatment obligation ensures that all investments, whether domestic or foreign, are treated equally. The *PCB Waste Export Interim Order* discriminates against American waste disposal operators who wish to operate in Canada by preventing them from processing PCB contaminated waste in the United States. Thus, American waste disposal companies were not permitted to operate in Canada in the same fashion as Canadian waste disposal companies.

Minimum Standard of Treatment

12. The PCB Export bans were promulgated in a discriminatory and unfair manner which constituted a denial of justice as well as a violation of Canada's domestic practice for the making of regulations. In the making and application of these export bans, Canada failed to accord to the Investor and its Investment treatment in accordance with international law in violation of NAFTA Article 1105.

Performance Requirements

13. The PCB Export Bans operated in such a manner as to mandate that the destruction of PCB contaminated waste occur in Canada, if such destruction was to occur at all. This resulted in a performance requirement requiring PCB disposers to accord a preference to Canadian goods and services contrary to Canada's obligations arising under Article 1106 of the NAFTA.

Expropriation

14. The effect of the PCB Export Bans has been to totally frustrate the Canadian operations of the Investor. This has resulted in the deprivation of the benefits of the Investor's investment in Canada, constituting a measure tantamount to an expropriation. The Government of Canada has not paid any compensation to the Investor for this expropriation despite the requirements of NAFTA Article 1110.

ISSUES

1. Has the Government of Canada taken measures inconsistent with its obligations under Articles 1102, 1105, 1106 and 1110 of the North American Free Trade Agreement?
2. If the answer to question 1 is yes, what is the quantum of compensation to be paid to the Investor as a result of the inconsistency of the Government of Canada with its obligations

arising under Chapter 11 of the North American Free Trade Agreement?

D RELIEF SOUGHT AND DAMAGES CLAIMED

The Investor claims damages for the following:

1. Damages of not less than USD\$ 10 million for the damages caused by Canada's measures that were inconsistent with its obligations contained in Part A of Chapter 11 of the North American Free Trade Agreement;
2. Costs associated with these proceedings, including all professional fees and disbursements;
3. Fees and expenses incurred to oppose the *PCB Waste Export Interim Order*.
4. Pre-award and post-award interest at a rate to be fixed by the Tribunal.
5. Tax consequences of the award to maintain the integrity of the award.
6. Such further relief that counsel may advise and that this Tribunal may deem appropriate.

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