



***UNCITRAL, CASE BETWEEN S.D. MYERS, INC. AND THE GOVERNMENT OF CANADA  
(EXCERPTS RELATING TO THE FACTS OF THE CASE AND THE DECISION OF THE ARBITRAL  
TRIBUNAL) SOURCE: UNCITRAL***

**IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES**

**S.D. Myers, Inc.  
(Claimant)  
-and-  
Government of Canada  
(Respondent)**

(...)

**CHAPTER III  
THE FACTUAL BACKGROUND**

88. By the end of the 20th Century Tallmadge, Ohio, had a population of around 15,000. It is not a large community by modern standards. It is situated about 50 kilometres South East of Cleveland, in the suburban environs of Akron, and is approximately 100 kilometres South of that part of the U.S./Canadian border that runs through Lake Erie.
89. Mr. Stanley Myers founded his business in Tallmadge in 1965. At that time he was engaged primarily in maintaining and repairing transformers and other industrial electrical equipment. In due time, the business flourished and became one of the two largest employers in Tallmadge. Later, Stanley Myers handed over ownership of the business to his four sons leaving the eldest, Dana, with 51% of the share capital of the principal company within the group. At the time of the events that gave rise to this arbitration Mr. Dana Myers was chief executive officer of SDMI, which by then had an annual turnover of some \$25 million.
90. Historically, SDMI's core businesses were transformer oil testing, oil reclaiming, and rewinding, rebuilding, manufacturing transformers. It returned to these businesses in 1999 when its PCB remediation activities in the USA were sold. This aspect of the Claimant's business had begun in earnest in the 1980's.<sup>2</sup>
91. PCB remediation in this context consists of analysing equipment and oil to assess the level of contamination, the transportation of the oil or equipment to a facility and the extraction of the PCBs from the materials so transported. The decontaminated components of the equipment and the oil are recycled. The extracted PCBs and PCB waste material then is destroyed.<sup>3</sup> <sup>2</sup> Transcript, February 15, 2000, q.475. <sup>3</sup> Valentine affidavit, paras. 7-12.
92. SDMI's interest in Canada developed in the 1990's as the U.S. market declined. Mr. Dana Myers testified that SDMI went into the Canadian market because ...that's going



to extend the usefulness of our facility. It's going to extend our business.<sup>1</sup> The PCB remediation business was working its way out of existence, because no new PCBs were being manufactured and the world's stockpiled inventory was decreasing as SDMI and its competitors did their work.<sup>2</sup>

93. Although SDMI did give consideration to developing a treatment facility in Canada, the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility.<sup>3</sup> It was envisaged that Canadian entities would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the contract as its remuneration. The business was done by marketing, customer contact, testing and assessment of oil and other like services. SDMI personnel from the USA participated in these activities.
94. The term "PCB" is an abbreviation for a synthetic chemical compound known as polychlorinated biphenyl. This compound consists of chlorine, carbon and hydrogen and has a combination of properties that provide an inert, fire-resistant and insulating material. This makes the compound suitable for insulation. PCBs were used mainly in electrical equipment and to a lesser extent in other products. PCBs biodegrade slowly and remain in the environment for a long time. To eliminate them from the environment, PCBs must be disposed of through either a process of thermal destruction at high temperatures or by chemical processing. Landfilling is also used as a means of disposal, but this method merely contains the material in a relatively safe manner and does not result in the removal of the substance from the environment.
95. The most widely used technique for destroying PCBs is high temperature incineration, typically at temperatures of about 1200 degrees Centigrade. Most incinerators can accept the full range of PCB wastes, including high and low concentration PCB liquids, PCB contaminated soils and electrical equipment. Before incineration, electrical equipment is either shredded or pre-cleaned with heat or solvents to facilitate metal recycling and to reduce the amount of material to be incinerated.
96. Air pollution control equipment is used to clean the incinerator stack gases by removing hydrogen chloride gas, particulate matter and other compounds, such as dioxins and furans. These are by-products of the incineration process and are highly toxic. When properly conducted, incineration is a highly efficient means of destroying PCBs and is used in many countries throughout the world, but a poorly operated incinerator can be a major source of air pollution.
97. Chemical treatment is often used to destroy PCBs found at concentrations of less than 1000 parts per million. Such concentrations are sometimes found in oil from transformers that has been inadvertently contaminated when the transformers were serviced.

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<sup>1</sup> Transcript, February 15, 2000, q.475.

<sup>2</sup> Ibid.

<sup>3</sup> Mr. Jeff Smith, then employed as a political assistant to the Minister of the Environment, was asked if CANADA would be willing to provide funds to SDMI for the purpose of constructing a treatment facility in Canada. The answer was 'No'.



98. By the early 1970s PCBs had become recognised as highly toxic substances that harmed both human and animal health. Since that time PCBs have been the subject of increasingly strict regimes of regulation both in Canada and internationally.
99. In February 1973 the OECD, of which CANADA is a member, adopted a Council Decision urging member countries to limit the use of PCBs and to control them in a manner designed to minimise risk to human health and the environment. Thereafter, together with other nations, the USA and CANADA banned future production of PCBs and joined the international community in attempting to determine the best way of resolving the substantial environmental problem caused by existing PCBs.
100. In 1977 CANADA added PCBs to the toxic substances listed under the Environmental Contaminants Act and prohibited the use of PCBs in new products manufactured in or imported into Canada. This legislation was later replaced by the CEPA which came into force on June 30, 1988. The regime imposed by the CEPA were in turn supplemented by the PCB Waste Export Regulations 1990, which effectively banned the export of PCB waste from Canada to all countries other than the USA. Under these regulations exports to the USA were permitted with the prior approval of the US EPA.
101. The position in the USA was not dissimilar. In 1980 the USA closed its borders to the import and export of PCBs and PCB waste for disposal. Since then the U.S.-Canadian border has been closed so far as PCBs are concerned. It was open to imports from CANADA from November 15, 1995 to July 20, 1997.<sup>4</sup>
102. In the USA PCBs primarily are regulated under the federal TCSA, which imposes restrictions on the manufacture, sale, use, import, export, and disposal of PCBs and PCB contaminated waste. The US EPA may grant an operator exemption for one year if it were satisfied that the activity would 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.
103. At the international level, in 1986 CANADA and the USA entered into the Transboundary Agreement, which contemplated the possibility of cross-border activity. The recitals contain the following passage: *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:*
104. During the arbitration CANADA took the position that this agreement did not cover PCBs because PCB wastes have never been classified as a “hazardous waste” in the USA. SDMI responded that, pursuant to the terms of the Transboundary Agreement, it was not necessary for PCBs to be so classified.<sup>5</sup>
105. In March 1989 a number of countries including CANADA signed the Basel Convention. This convention deals with international traffic in PCBs and other

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<sup>4</sup> There were exceptions for U.S. military PCB's and a few minor enforcement discretions.

<sup>5</sup> Investor's Supplemental Memorial, paras. 78-79.



hazardous wastes. It was developed under the auspices of the United Nations Environment Programme. Although the USA signed the Basel Convention it had not ratified it by the time of the events under review in this arbitration.

106. State parties to the Basel Convention accept the obligation to ensure that hazardous wastes are managed in an environmentally sound manner. The Basel Convention establishes rules and procedures to govern the transboundary movement of hazardous wastes and their disposal. Amongst other things, it prohibits the export and import of hazardous wastes from and to states that are not party to the Basel Convention (Article 4(5)), unless such movement is subject to bilateral, multilateral or regional agreements or arrangements whose provisions are not less stringent than those of the Basel Convention (Article 11).
107. The Basel Convention also requires appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that are located within it (Article 4(2)(b)). It also requires that the transboundary movement of hazardous wastes be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and be conducted in a manner that will protect human health and the environment (Article 4(2)(d)).
108. Following signature of the Basel Convention, but before it came into force, the CCME, which includes the Federal and provincial ministers responsible for the environment, agreed that the destruction of PCBs should be carried out to the maximum extent possible within Canadian borders. At the same time, CANADA confirmed its policy that PCB wastes from Federal sites would not be exported for disposal in other countries.
109. This was the regulatory and policy background that confronted SDMI in 1990 when it began its efforts to obtain the necessary approvals to import electrical transformers and other equipment containing PCB wastes into the USA from Canada. By this time SDMI had become one of the most prominent operators in the PCB disposal industry in the USA. It also had expanded into Australia, MEXICO and South Africa and was looking for other markets in which its expertise could be deployed.
110. SDMI possessed full details of the PCBs inventory in Canada, because a computerised database was available freely. It also knew that it could compete successfully against the Canadian hazardous waste disposal industry, which was virtually non-existent in 1990.
111. In 1993, Myers Canada was incorporated under the Canada Business Corporations Act.
112. Even by 1993, when SDMI entered the Canadian market, there was only one credible Canadian competitor: Chem-Security, which was located in Swan Hills, Alberta. As the majority of the Canadian PCB inventory was in Ontario and Quebec - several thousand kilometres from Alberta - SDMI possessed a significant cost advantage as against Chem-Security and, indeed, as against many of its U.S. competitors.



113. SDMI started a lobbying campaign which involved making numerous petitions to the US EPA in the USA (there were two in August 1993 alone) and many representations to Environment Canada. In Canada, SDMI enlisted the assistance of several potential Canadian customers who were under pressure to dispose of their PCB waste and wanted to have it done as cost-effectively as possible.
114. Research carried out by CANADA for the purposes of the arbitration indicated that SDMI's lobbying ...involved at least 2 mayors, 6 Congressmen, 2 Senators, a County Executive, the US Chamber of Commerce... and others.
115. The position was clearly moving towards a critical point in the USA during the spring and summer of 1995. All the players were expecting a significant development. Whichever way the USA moved there would be considerable publicity. A number of participants had much to gain and much to lose.
116. The position in Canada was equally sensitive. In answer to a parliamentary question on July 9, 1995, the then Minister for the Environment is recorded by Hansard as saying: *It is still the position of the government that the handling of PCBs should be done in **Canada by Canadians** [emphasis added]*  
This may have reflected a movement from the 1989 policy, referred to above, that CANADA's policy (in line with the Basel Convention), was simply that disposal of PCBs should take place in Canada.
117. The Tribunal received a substantial amount of evidence concerning SDMI's activities during the period 1990 to the Fall of 1995. In summary, SDMI through its employees and the employees of Myers Canada, contacted Canadian PCB holders with the objective of having their PCBs remediated by SDMI using its facilities in the USA. Marketing initiatives were undertaken and assessments made of PCB contaminated equipment. Equipment was drained and transportation organized.
118. That evidence may be relevant to other questions that arise in the case, but no more need be said about it for the purposes of this narrative of the events giving rise to the measure taken by CANADA to close the border to the transit of PCBs. For present purposes, it is sufficient to record that on October 26, 1995 the US EPA issued an enforcement discretion - 22 - Document: 742416:01 to SDMI, valid from November 15, 1995 to December 31, 1997, for the purpose of importing PCBs and PCB waste from Canada into the USA for disposal.
119. The term "enforcement discretion" is not defined in U.S. law, but apparently means that the US EPA would not to enforce the U.S. regulations banning importation of PCBs against SDMI, provided that SDMI met the detailed conditions that were attached to the US EPA's October 26, 1995 letter (which included "no landfilling"). The import ban itself would remain in place and any imports to the USA technically would be contrary to U.S. law. Following the decision relating to SDMI, the US EPA (as predicted in its October 26, 1995 letter) granted further enforcement discretions to about nine other U.S. companies, permitting them to import PCBs and PCB waste from Canada for disposal.



120. From early 1995 CANADA was well aware that the US EPA was likely to take action to open the border within a relatively short period, but the Tribunal accepts that CANADA's ministers and their officials were taken by surprise by the lack of government-to-government consultation, the timing and the method used by the US EPA to achieve this result.
121. A period of intensive activity followed, both inside and outside Canadian government circles. Within government, a number of meetings took place and a number of memoranda were circulated. Undoubtedly, there were legitimate concerns. These were listed in CANADA's Counter Memorial as follows:
- whether the enforcement discretion fully complied with U.S. law;
  - whether exports of PCB wastes to the U.S., a non-party, would comply with the Basel Convention;
  - whether PCBs would be disposed of in the U.S. in an environmentally sound manner;
  - compliance with CANADA's 1989 policy to destroy Canadian PCBs in CANADA;
  - the long-term viability of domestic PCB disposal facilities; and
  - what would happen in the event that U.S. disposal facilities subsequently became unavailable, or if the U.S. border was closed again, as eventually happened.
122. Simultaneously, the fledgling Canadian PCB disposal industry started a vigorous lobbying campaign designed to persuade CANADA to maintain the closed status of the border. For example, on November 1, 1995 a letter written by the General Manager of Chem-Security to the Minister of the Environment stated: *I am writing to reaffirm your commitment to assist the Canadian hazardous waste industry by removing the exemption which allows export of PCB waste to the United States and to underline the urgency of the situation currently facing the industry... You should be aware that EPA estimates that it will take only approximately 30 days to import the entire Canadian PCB inventory. You will recall that we stressed the fact that the inventory is a finite resource which is vital to our industry's growth and our ability to provide capital for the export of our technology. Any delay in the Canadian response to the EPA action could have serious repercussions.*
123. On November 16, 1995 the Minister of the Environment signed an Interim Order that had the effect of banning the export of PCBs from Canada. This order was defective for procedural reasons and, after the procedural defect had been remedied, on November 20, 1995 the Minister approved and signed the following Interim Order which was in the same terms: *INTERIM ORDER RESPECTING THE PCB WASTE EXPORT REGULATIONS WHEREAS PCB's are substances specified on the list of Toxic Substances in Schedule 1 to the Canadian Environmental Protection Act; AND WHEREAS the Minister of the Environment and the Minister of National Health believe that PCBs are not adequately regulated and that immediate action is required to deal with a significant danger to the environment and to human life and health; THEREFORE, the Minister of the Environment, pursuant to subsection 35(1) of the Canadian Environmental Protection Act, hereby makes the annexed Interim Order respecting the export of PCB wastes. Ottawa, in the National Capital Region, November 20, 1995 The annexed Interim Order stated as follows: INTERIM ORDER RESPECTING THE PCB WASTE EXPORT REGULATIONS Short title: This Order*



may be cited as the PC8 Waste Export Interim Order Amendment Section 4 of the PCB Waste Export Regulations is replaced by the following: “4. Section 3 does not apply to a person who exports: (a) to the United States, any PCB waste from United States agencies operating in CANADA where the Environmental Protection Agency has given prior consent in respect of the export or (b) any product that is in good working order and has a capacitor that contains not more than 500 g of PCB and is an Integral part of the product where the capacitor is necessary for the operation of the producer. EXPLANATORY NOTE (This note is not part of the Order) On becoming aware of information indicating that the U.S. Environmental Protection Agency is allowing PCB imports into the U.S. from CANADA for destruction, the Minister of the Environment made this Interim Order to Amend the PCB Waste Export Regulations on November 20, 1995. The purpose of the Interim Order is to ensure that Canadian PCB Wastes are managed in an environmentally sound manner in CANADA and to prevent any possible significant danger to the environment or to human life or health.

124. Under Canadian law the Interim Order had to be approved by the Privy Council within fourteen days. This requirement led to further intensive activity within the government. Among this activity two meetings were held at the offices of the Canadian Privy Council, at which several government departments were represented. These meetings are referred to in more detail later in this award.
125. The Interim Order was confirmed by the Canadian Privy Council on November 28, 1995 in the following terms: *ORDER IN COUNCIL DEPARTMENT OF THE ENVIRONMENT Interim Order Respecting the PCB Waste Export Regulations P.C. 1995 2013 November 28, 1995 Whereas, pursuant to subsection 35(1) of the Canadian Environmental Protection Act, the Minister of the Environment, on November 20, 1995, made the annexed Interim Order respecting the PCB Waste Export Regulations to deal with a significant danger to the environment or to human life or health; Whereas the Minister of the Environment has, within 24 hours after making the Order, offered to consult the governments of all the affected provinces to determine whether they are prepared to take sufficient action to deal with the significant danger; Whereas the Minister of the Environment has consulted with other Ministers of the Crown in right of CANADA to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger; And whereas less than 14 days have elapsed since the Order was made; Therefore, His Excellency the Governor General in Council on the recommendation of the Minister of the Environment pursuant to subsection 35(3) of the Canadian Environmental Protection Act, is pleased hereby to approve the annexed Interim Order respecting the PCB Waste Export Regulations, made by the Minister of the Environment on November 20, 1995. INTERIM ORDER RESPECTING THE PCB WASTE EXPORT REGULATIONS Whereas PCBs are substances specified on the List of Toxic Substances in Schedule 1 to the Canadian Environmental Protection Act; And whereas the Minister of the Environment and the Minister of the National Health and Welfare believe that PCBs are not adequately regulated and that immediate action is required to deal with a significant danger to the environment and to human life and health; Therefore, the Minister of the Environment pursuant to subsection 35(1) of the Canadian Environmental Protection Act, hereby makes the annexed Interim Order respecting the*



*export of PCB wastes. Ottawa, in the National Capital Region, November 20, 1995  
SHEILA COPPS Minister of the Environment*

126. On February 26, 1995, by means of an Order in Council of the Governor General amending the PCB Waste Export Regulations, CANADA turned the Interim Order into a Final Order banning the commercial export of PCB waste for disposal. This Order was in the following terms: *WHEREAS, on November 20, 1995, the Minister of the Environment made, pursuant to subsection 35(1) of the Canadian Environmental Protection Act, the PCB Waste Export Interim Order. WHEREAS, by Order in Council P.C. 1995 2013 of November 28, 1995 the Governor in Council approved the Interim Order pursuant to subsection 35(3) of the Act; AND WHEREAS, pursuant to subsection 35(5) of the Act, the Minister of the Environment and the Minister of National Health and Welfare within ninety days after approval of the Interim Order by the Governor in Council, recommended to the Governor in Council that the PM Waste Export Regulations be amended under section 34 of the Act to have the same effect as the Interim Order, THEREFORE HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL on the recommendation of the Minister of the Environment and the Minister of National Health and Welfare pursuant to subsection 35(5) of the Canadian Environmental Protection Act is pleased hereby to accept the recommendation of the Minister of the Environment and the Minister of National Health and Welfare that the PCB Waste Export Regulations be amended under section 34 of the Act to have the same effect as the PCB Waste Export Interim Order.*
127. In February 1997 CANADA opened the border by a further amendment to the PCB Waste Export Regulations. The border was closed (for the cross-border movement of PCBs and PCB waste) by regulations introduced by CANADA for a period of approximately 16 months, from November 20, 1995 to February 1997. Thereafter, the border was open and there were seven contracts pursuant to which PCBs and PCB waste material was exported from CANADA to the USA for processing by SDMI.
128. In July 1997 the border once again was closed to PCBs and PCB wastes as a result of a decision of the Ninth Circuit of the U.S. Court of Appeals. The overall effect of these events in Canada and the USA was that the border was only open for cross-border shipment of the materials in question from February to July 1997 – a period of approximately five months.

(...)

## CHAPTER IX

### DID CANADA COMPLY WITH ITS NAFTA CHAPTER 11 OBLIGATIONS?

237. In this Chapter the Tribunal reviews the merits of SDMI's claims under four separate provisions of Chapter 11 of the NAFTA.

#### Article 1102 (National Treatment)

238. SDMI claims that CANADA denied it "national treatment", contrary to Article 1102. Article 1102(1) states: Each Party shall accord to investors of another Party treatment no less favorable than 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.

239. Article 1102(2) is identical, except that it refers to “investments”, rather than “investors”: 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.
240. Article 1102(3) addresses the obligations of “sub-national” authorities - local states or provinces - and states that in that context the relevant comparison is between the treatment accorded to an investment or an investor and the best treatment accorded to investments or investors within the jurisdiction of the sub-national authority: 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 the investments of investors, or the Party of which it forms a part.<sup>6</sup>
241. CANADA argues that the Interim Order merely established a uniform regulatory regime under which all were treated equally. No one was permitted to export PCBs, so there was no discrimination. SDMI contends that Article 1102 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.
242. CANADA’s submission is one dimensional and does not take into account the basis on which the different interests in the industry were organized to undertake their business.

### “Like Circumstances”

243. 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 open to a wide variety of interpretations in the abstract and in the context of a particular dispute.
244. WTO dispute resolution panels, and its appellate body, frequently have been required to apply the concept of “like products”. The case law has emphasized that the interpretation of “like” must depend on all the circumstances of each 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 - Alcoholic Beverages*, WT/DS38/AB/R, the Appellate Body stated at paragraphs 8.5 and 8.6: [the interpretation and application of “like”] is a discretionary decision that must be made in considering the various

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<sup>6</sup> Article 1102(4) appears to be of little relevance to the current discussion. It confirms 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.



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 the provisions may apply.

245. In considering the meaning of “like circumstances” under Article 1102 of the NAFTA, it is similarly necessary to keep in mind the overall legal context in which the phrase appears.
246. 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” does not dispose of the case. 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.
247. The Tribunal considers that the legal context of Article 1102 includes the various provisions of the NAFTA, its companion agreement the NAAEC and principles that are affirmed by the NAAEC (including those of the Rio declaration). The principles that emerge from that context, to repeat, are as follows: •□□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; •□□environmental protection and economic development can and should be mutually supportive.
248. As SDMI noted in its Memorial, all three NAFTA partners belong to the OECD. 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 on International and Multinational Enterprises, issued on June 21, 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 reviewed the “like situation” test in the following terms: As regards the expression ‘in like situations’, the comparison between foreign-controlled enterprises is only valid if it is made between firms operating in the same sector. More general considerations, such as the policy objectives of Member countries could be taken into account 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.
249. The Supreme Court of Canada has explored the complexity of making comparisons as it has developed its line of decisions on discrimination against individuals. In the Andrews case, the Court stated that the question of whether or not discrimination exists cannot be determined by applying a purely mechanical test whether similarly



situated individuals are treated in the same manner. Whether individuals are “similarly situated”, and have been treated in a substantively equal manner, depends on an examination of the context in which a measure is established and applied and the specific circumstances of each case.<sup>7</sup>

250. The Tribunal considers that the interpretation of the phrase “like circumstances” in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of “like circumstances” must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of “like circumstances” invites an examination of whether a non-national investor complaining of less favourable treatment is in the same “sector” as the national investor. The Tribunal takes the view that the word “sector” has a wide connotation that includes the concepts of “economic sector” and “business sector”.
251. From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services. SDMI was in a position to attract customers that might otherwise have gone to the Canadian operators because it could offer more favourable prices and because it had extensive experience and credibility. It was precisely because SDMI was in a position to take business away from its Canadian competitors that Chem-Security and Cintec lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border.

#### **National treatment and protectionist motive or intent.**

252. The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:
- whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals;
  - whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.
253. Each of these factors must be explored in the context of all the facts to determine whether there actually has been a denial of national treatment.
254. Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word “treatment” suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.

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<sup>7</sup> [1989] 1 S.C.R. 143, at paragraphs 27 to 31. Decisions of U.S. courts are to a similar effect. Although domestic law is not controlling in Chapter 11 disputes, it is not inappropriate to consider how the domestic laws of the parties to the dispute address an issue.



255. CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them. The indirect motive was understandable, but the method contravened CANADA's international commitments under the NAFTA. CANADA's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures. The fact that the matter was addressed subsequently and the border re-opened also shows that CANADA was not constrained in its ability to deal effectively with the situation.
256. The Tribunal concludes that the issuance of the Interim Order and the Final Order was a breach of Article 1102 of the NAFTA.
257. The consequences of the Tribunal's determination in relation to Article 1102 of the NAFTA are considered later.

#### Article 1105

258. SDMI submits that CANADA treated it in a manner that was inconsistent with Article 1105(1) of the NAFTA. Entitled "Minimum Standard of Treatment", it reads as follows: 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.
259. The minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. 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 foreign investors must not fall, even if a government were not acting in a discriminatory manner.
260. 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 laws...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.<sup>8</sup>
261. When interpreting and applying the "minimum standard", a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they

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<sup>8</sup> The USA on behalf of George W. Hopkins v. The United Mexican States (Docket No. 39), 21 American Journal of International Law 160, at 166-167 (1926).



may appear 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 were one, for errors in modern governments is through internal political and legal processes, including elections.

262. Article 1105(1) expresses an overall concept. The words of the article must be read 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.
263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.
264. In some cases, the breach of a rule of international law by a host Party may not be decisive in determining that a foreign investor has been denied “fair and equitable treatment”, but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favour of finding a breach of Article 1105.
265. The breadth of the “minimum standard”, including its ability to encompass more particular guarantees, was 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 not more than examples of specific instances of this overriding duty.<sup>9</sup>
266. Although modern commentators might consider Dr Mann’s statement to be an overgeneralisation, and the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well.
267. Mr. Chiasson considers that a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11. On the facts of this case, CANADA’s

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<sup>9</sup> F.A. Mann, “British Treaties for the Promotion and Protection of Investments”, (1981) 52 Brit. Y.B. Int’l L.



actions come close to the line, but on the evidence no breach of Article 1105 is established.

268. By a majority, the Tribunal determines that the issuance of the Interim and Final Orders was a breach of Article 1105 of the NAFTA. The Tribunal's decision in this respect makes it unnecessary to review SDMI's other submissions in relation to Article 1105.
269. The consequences of the Tribunal's determination in relation to Article 1105 of the NAFTA are considered in the next chapter.

### **Article 1106 – Performance Requirements**

270. SDMI contends that CANADA's export ban breached Article 1106 of NAFTA because, in effect, SDMI 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, SDMI effectively would have been required to consume goods and services in Canada.
271. Article 1106 states: No party may imposed 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: (b) to achieve a given level or percentage of domestic content (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;
272. Article 1106(5) states: Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs
273. 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 the Tribunal must look at substance, not only form.
274. The 1947 GATT agreement contained no specific provisions on performance requirements. One dispute was brought before a GATT panel. The USA challenged CANADA's FIRA. Under that statute, non-Canadian investors in some circumstances had to obtain regulatory approval before operating or expanding in CANADA. The regulator could attach conditions to its approval. For example, a factory operator might 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, but the GATT panel looked at the substance of the measure notwithstanding the fact that the GATT did not contain any express provision equivalent to Article 1106 of the NAFTA.
275. Although the Tribunal must review the substance of the measure, it cannot take into consideration any limitations or restrictions that do not fall squarely within the "requirements" listed in Articles 1106(1) and (3).



276. The only part of the definition that might apply to the current situation is ...conduct or operation of an investment.... but in the opinion of the majority of the Tribunal, subparagraph (b) clearly does not apply and, neither does subparagraph (c).
277. Looking at the substance and effect of the Interim Order, as well as the literal wording of Article 1106, the majority of the Tribunal considers that no “requirements” as defined were imposed on SDMI that fell within Article 1106. Professor Schwartz considers that the effect of the Interim Order was to require SDMI to undertake all of its operations in Canada and that this amounted to a breach of subparagraph (b).
278. By a majority, the Tribunal concludes that this is not a “performance requirements” case.

### **Article 1110 – Expropriation**

279. SDMI claims that the Interim Order and the Final Order were “tantamount” to an expropriation and violated Article 1110 of the NAFTA.
280. 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 international law cases. In general, the term “expropriation” carries with it the connotation of a “taking” by a governmental-type authority of a person’s “property” with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the “taking”.
281. The Tribunal accepts that, in legal theory, rights other than property rights may be “expropriated” and that international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures. The Interim Order and the Final Order were regulatory acts that imposed restrictions on SDMI. The general body of precedent usually does not treat regulatory action as amounting to expropriation. Regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the Tribunal does not rule out that possibility.
282. Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.
283. An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary.



284. In this case the closure of the border was temporary.<sup>10</sup> SDMI's venture into the Canadian market was postponed for approximately eighteen months. Mr. Dana Myers testified that this delay had the effect of eliminating SDMI's competitive advantage. This may have significance in assessing the compensation to be awarded in relation to CANADA's violations of Articles 1102 and 1105<sup>11</sup>, but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110.
285. SDMI relied on the use of the word "tantamount" in Article 1110(1) to extend the meaning of the expression "tantamount to expropriation" beyond the customary scope of the term "expropriation" under international law. The primary meaning of the word "tantamount" given by the Oxford English Dictionary is "equivalent". Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.
286. The Tribunal agrees with the conclusion in the Interim Award of the Pope & Talbot Arbitral Tribunal<sup>12</sup> that something that is "equivalent" to something else cannot logically encompass more. In common with the Pope & Talbot Tribunal, this Tribunal considers that the drafters of the NAFTA intended the word "tantamount" to embrace the concept of so-called "creeping expropriation", rather than to expand the internationally accepted scope of the term expropriation.
287. In this case, the Interim Order and the Final Order were designed to, and did, curb SDMI's initiative, but only for a time. CANADA realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. An opportunity was delayed.
288. The Tribunal concludes that this is not an "expropriation" case.

(...)

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<sup>10</sup> The fact that the border was closed again on the U.S. side in July 1997 cannot be laid at CANADA's door.

<sup>11</sup> This is a matter for argument at a later stage of the proceedings.

<sup>12</sup> Award of June 26, 2000, para. 104.