

S.D. Myers versus Canada

BACKGROUND

Statement of claim: Oct. 30, 1998

Claim: US\$20 million

Award: US\$ 9 million

The case of S.D. Myers, a US waste disposal company, demonstrates in practice what was already very clear in theory: trade agreements, through their extremely powerful enforcement regimes, trump all other international treaties. In this case, Canada ordered a temporary ban on the export of PCB wastes to the US in February 1996. Canada was simply complying with the commitments it made when it signed the Basel Convention on the Transboundary Movement of Hazardous Waste. This treaty pre-dates NAFTA and requires that Canada treat its own hazardous waste while curtailing exports.

Not only does the ruling by the tribunal ride roughshod over Canada's solemn commitments under an important international environmental treaty, it demonstrates just how far such tribunals will go in ignoring domestic laws and regulations. The decision covered a sixteen-month period when the export ban was in place and during that entire period US law held that the transfer of such hazardous wastes into the US was illegal. The ruling demonstrates that such panels and those administering them - appointed officials of the three NAFTA countries - are of the view that not even domestic criminal law is relevant to its decisions. In the normal course of relations between sovereign nations, Canada would have been expected to inform the US that one of its own companies was breaking US law. But if the NAFTA ruling is upheld, Canada will be paying a penalty for refusing to allow a corporation to engage in an activity that violated a neighbouring country's laws.

Critics of the award to S.D. Myers have pointed to several major legal errors in the tribunal's ruling. As a result, the Canadian government filed an appeal with the Federal Court of Canada based on its claim that the tribunal exceeded its jurisdiction in several key areas. Unfortunately, the Federal Court upheld the NAFTA Tribunal's decision in January of 2004.