

In the NAFTA Arbitration Under Uncitral Rules

S.D. Myers (Claimant)

- and -

Government of Canada (Respondent)

Submissions of the Canadian Alliance on Trade and Environment

The following submissions are made on behalf of the Sierra Club of Canada, the Canadian Labour Congress, the Polaris Institute and the Council of Canadians.

Introduction

1. It is critical that arbitral awards arising pursuant to NAFTA investment rules be subject to judicial oversight by Canadian Courts. Indeed the importance of providing for judicial review of international commercial arbitral awards is recognized by international convention and Canadian law.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York, 10 June 1958)
Commercial Arbitration Act, R.S.C. 1985, c.17 (2nd Supp.)

2. However, in our view, arbitrations arising solely under NAFTA investment rules are not commercial arbitrations within the meaning of the international conventions and Canadian statutes which provide for the recognition and enforcement of arbitral awards arising from legal commercial relations. They are not for this reason reviewable pursuant to the provisions of these regimes.

Submissions of C.A.T.E. re: S.D. Myers vs. Canada

3. Notwithstanding the absence of a statutory basis for seeking judicial review of this Award, we believe that Canadian Courts have inherent jurisdiction to do so.¹
4. Moreover, the importance of judicial scrutiny of NAFTA based awards is even greater than for disputes arising from formal commercial relationships, because NAFTA based investor claims routinely raise issues of broad public policy importance. These are public not private disputes, and must ultimately be resolved in accordance with Canadian legal and procedural norms, including fundamental justice and the rule of law. .
5. Accordingly, we request that you make application for a judicial order setting the award made by the Tribunal in this matter based on the grounds that:
 - a. the Tribunal exceeded its jurisdiction by purporting to determine a claim that is not capable of being resolved by arbitration under Canadian law;
 - b. the Tribunal erred in its interpretation of Canada's obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention), and in a manner that subsumes the objectives of this international environmental agreement to NAFTA trade disciplines;
 - c. the Tribunal's Award is contrary to the public policy of Canada because it purports to punish Canada for prohibiting the export of PCBs to the US when at all material times the importation of PCB wastes was unlawful under US law.
 - d. the Tribunal erred in its interpretation of Articles, 104, 1102, 1105 and 1112 of the NAFTA, and failed to give effect to NAFTA provisions relating to sustainable development and environmental protection. By doing so the Tribunal has dramatically expanded the reach of NAFTA investment disciplines; and fundamentally diminished the scope for competing policy, legislative or programmatic objective such as those necessary to protect the environment.
6. The following sets out the grounds for such an application in greater detail.

¹. We note that in addition to relying upon BC statutory provisions, the government of Mexico is seeking to invoke the inherent jurisdiction of the BC Supreme Court to review an award made against it, and in favour of US investor.

The Tribunal erred in its interpretation of the Basel Convention

7. Article 2 of the Basel Convention provides as follows:

Each Party shall take the appropriate measures to:

(b) Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal;

(d) Ensure that the transboundary movement of hazardous wastes and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes, and is conducted in a manner which will protect human health and the environment against the adverse effects which may result from such movement;

8. As we know, the establishment of hazardous waste treatment infrastructure is expensive and often arduous. The scale and location of such facilities must be carefully calculated to ensure sufficient capacity to deal with available waste streams. Overestimates can result in unused capacity and undermine the financial viability of such projects. Canada's apparent concern with the financial viability of its domestic waste management industry is entirely consistent with these economic imperatives.
9. Furthermore, to justify the very substantial financial commitments that such undertakings require, both private and public sector proponents must be assured of a reasonably predictable regulatory environment in which to operate.
10. It is apparent that the Tribunal in this case was not only reluctant to acknowledge the clear obligations imposed by the Basel convention on Canada to find domestic solutions to its waste problems, but also appears to have been totally unaware of, or indifferent to, the economic context within which sustainable waste management regimes must be established.
11. To equate Canada's desire to sustain its domestic capacity to meet its commitments under the Basel Convention, with a desire to protect domestic investors, reveals a lamentable lack of familiarity with the contemporary realities of the environmental law and policy.
12. Moreover the Tribunal's failure to acknowledge the need to integrate economic and environmental policies ignores the clear direction imparted by NAFTA preambular language to respect the principles of sustainable development.

Submissions of C.A.T.E. re: S.D. Myers vs. Canada

13. In fact, under Article 4.9 of the Basel Convention, Canada was under a positive obligation to prohibit the transboundary movement of hazardous waste because it had the capacity to manage those wastes responsibly within Canada. Article 4.9 provides that :

Parties shall take the appropriate measures to ensure that the transboundary movement of hazardous wastes and other wastes only be allowed if:

(a) The State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner;

The Tribunal failed to take into account, or even acknowledge Canada's obligations pursuant to these provisions.

14. Furthermore, the Tribunal's conclusion that Canada had no justifiable environmental basis for the PCB export controls it established [paragraph 298] betrays an astonishing failure to acknowledge the very raison d'être for the Basel convention. At the very least, the claim that Canada was attempting to honour its obligations under Basel should raise a strong presumption that its efforts were justified as measures necessary to protect the environment and public health.
15. If allowed to stand, the Tribunal's award will directly undermine one of the most important demands of contemporary environmental law and policy - certainty. By demonstrating a willingness to second guess the good faith judgement of environmental regulators, by doubting the environmental rationale for one the most important international environmental agreements to which Canada is party, and by articulating an ad hoc approach to delineating the nature of Canada's obligations under NAFTA - this Award represents a profound challenge to the capacity of both government and business to pursue environmental goals, and to do so in a reasonably predictable regulatory and policy environment.
16. Finally on this point, in our view, the lack of sensitivity to environmental concerns revealed by this Tribunal is reminiscent of judicial attitudes that were rejected in Canada more than thirty years ago. The ecological imperatives facing our society have, as we know, grown considerably more acute in the intervening years. It will not be possible for us to meet these challenges, if both domestic and international environmental initiatives are to be subject to review before tribunals that reveal a single minded preoccupation with trade policy objectives to exclusion of all other societal goals.

By encouraging Canada to ignore US laws banning PCB imports, the Tribunal's award is contrary to public policy.

17. Throughout the entire period of time relevant to this dispute, the importation of PCB waste to the United States was illegal under US law. The Tribunal acknowledges this fact at paragraph 119 of its Award.
18. However, under the rubric of “enforcement discretion” the US EPA purported to waive enforcement of US statutory and regulatory requirements subject to certain specified conditions.² From the outset, “enforcement discretion” was controversial and legally dubious. Indeed, it only endured as long as it took to invoke judicial consideration of this administrative practice which soon found it to be unlawful. [para. 191]
19. Not only did the Tribunal brush aside the documented concerns of Canadian officials about the legality of allowing PCB exports to the US in contravention of US law, but it is now proposing to punish Canada for interfering with such exports.
20. In our view, Canada's decision to respect the statutory constraints of US environmental law, was not only prudent and responsible, but necessary under international law. Its approach was no more than consistent with the standard of behaviour which must be expected of all nations.
21. In our submission it is contrary to public policy to impose upon Canada an obligation to facilitate exports to another jurisdiction in contravention of that country's environmental laws. Nor would it be appropriate for Canada to disregard clear legal constraints on the basis of administrative policies of dubious and untested legal validity.
22. The Tribunal's award would penalize Canada for failing to facilitate hazardous waste exports that were unlawful in the receiving jurisdiction, and entirely inconsistent with commitments Canada made in signing and then ratifying the Basel Convention. In our submission, this Award is fundamentally inconsistent with Canadian public policy and must be set aside.

The Tribunal erred in finding that Canada's export controls concerning PCB wastes were measures relating to foreign investment or foreign investors.

23. Article 1101(1) of NAFTA provides as follows:

This Chapter applies to measures adopted or maintained by a Party relating to:

² Similar proposals were floated in Canada during the same time which under at the federal level were codified in draft legislation under the banner “regulatory efficiency.”

(a) investors of another Party;

(b) investments of investors of another Party

[emphasis added]

24. Canada's PCB export control orders are fundamentally measures relating to the environment not measures relating to investments or investors within the meaning of Article 1102.
25. Like many government policy, legislative or programmatic initiatives, PCB export controls are likely to have at least some incidental, or indirect impact on the economic activities of both domestic and foreign investors. Moreover, as we have noted, it will be perfectly appropriate for governments to have regard to such investment impacts, as a means for achieving the environmental or other policy objectives that are the fundamental purpose of the initiative. This is not however, sufficient to transform them into measures relating to investment.
26. In our view, to be considered measures relating to investment, Government initiatives must either be explicitly established for the purpose of regulating investment, or at least have that primary purpose. To conclude otherwise, would be to dramatically expand the reach of NAFTA investment measures to include virtually every aspect of public policy and law, no matter how remote the purpose of those initiatives from the regulation of foreign investment.
27. Had it been the intent of NAFTA drafters to capture within the orbit of NAFTA investment disciplines - all government measures affecting investment, however indirect that influence, then NAFTA provisions would have been drafted accordingly. This indeed was the approach taken by the Parties in crafting the provisions of Article 1110 which concern expropriation.

The Tribunal erred in its interpretation of NAFTA Article 104

28. As noted by the Tribunal, Article 104 of the NAFTA establishes the paramountcy of the Basel Convention where conflicts arise with the provisions of NAFTA. However, the Tribunal concluded that because the Convention had not been ratified by the Parties that Article 104 had no application in the present case.
29. In fact, both Canada and Mexico have ratified the Convention, only the US has not. Moreover, Article 104 (1)(c) does not explicitly require formal ratification by all three NAFTA Parties.

Submissions of C.A.T.E. re: S.D. Myers vs. Canada

30. Within the context of North America, the effect of the Tribunal's Award, if it is allowed to stand, effectively puts the solemn commitments made by both Canada and Mexico into abeyance until the US decides to ratify this Treaty. It was surely not the intent of Article 104 to provide the US an effective veto over its trading partners efforts to meet their commitments under the Basel Convention.
31. Moreover, even in the absence of Article 104, in our view under the international law, the specific provisions of the Basel Convention concerning trade in hazardous waste would not give way to the general provisions of NAFTA concerning investment.

The Tribunal erred in its interpretation of the National Treatment obligations set out in Article 1102

32. Article 1102 of NAFTA provides:

Each Party shall accord to investors of another Party treatment no less favourable 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.

33. Canada's PCB export control regulations prohibited PCB exports from Canada without regard to the nature, or nationality or character of the proponents of such exports. Nor did those regulations distinguish in any other way between US, Mexican and Canadians investors. Rather the impugned orders were environmental regulations of general application that treated foreign investors in precisely the same manner as they did Canadian investors.
34. Rather, the explicit purpose of this initiative was "to ensure that Canadian PCB Wastes are managed in an environmentally sound manner in Canada" [para. 123]. Canada has established no restriction on the capacity of foreign investors to provide for that safe management in Canada.
35. For these reasons, we believe that Canada's PCB export controls were entirely consistent with Canada's obligation to accord US investors treatment no less favourable than provided Canadian investors.
36. The Tribunal's conclusion to the contrary was founded upon a novel interpretation of Article 1102 which interpreted the term "in like circumstances" to require *national treatment* of foreign investors operating in "the same sector." There is no textual or other legal authority whatsoever for this interpretation. [para. 250]

Submissions of C.A.T.E. re: S.D. Myers vs. Canada

37. Apart from this concern however, and notwithstanding a lack of clarity in the reasons, the import of finding SDMI and Myers Canada to be “in like circumstances” with Canadian companies providing PCB waste remediation services in Canada, is to impose National Treatment obligations on Canada with respect to a US company operating in the US.
38. This conclusion seems inescapable in light of the fact that S.D. Myers provided no PCB waste remediation services in Canada, but simply maintained a business office in this country for the purposes of negotiating contracts, and arranging for the export of PCB wastes to its US facility.
39. Such a finding would dramatically expand Canada’s obligations under Chapter Eleven, and render the provisions of Chapter Twelve, concerning the provision of cross border services, vulnerable to investor-state litigation.
40. If this interpretation is allowed to stand, US companies would simply have to establish a modest business presence in Canada in order to circumvent border measures which put their US operations at some disadvantage relative to their sectoral counterparts in Canada. This would entitle US investors for example, to claim access to Canadian water for irrigation purposes, or raw logs for sawmill and chipping operations.
41. Moreover, the *national treatment* standard the Tribunal articulates, would put Canadian governments to the impossible task of vetting every policy, regulatory and programmatic initiative to determine whether, if only indirectly, such measures might favour Canadian businesses over their US sectoral counterparts but operating effectively and exclusively in the US.

The Tribunal Erred in Finding Canada in Breach of Its Obligations Under Article 1105 to Treat Foreign Investors in Accordance with International Law.

42. The Tribunal’s finding with respect to Article 1105, is entirely unsupported by the identification of any principle of international law that Canada has purported to violate in the manner in which it treated S.D. Myers.
43. Rather the Tribunal simply advises, at paragraph 263 that “ a breach of Article 1105 occurs only when it is shown that an investor has been treated in such a manner that the treatment rises to the level that it is unacceptable from an international perspective.” At paragraph 266 we learn that in the Tribunal’s view “on the facts of this particular case the breach of 1102 essentially establishes a breach of Article 1105 as well.”
44. It is unfortunate that the Tribunal declined to provide any further guidance about the standard of treatment under international law that it found Canada to have violated. Surely Canada must have been guilty of more than establishing a ban on hazardous waste

Submissions of C.A.T.E. re: S.D. Myers vs. Canada

exports that applies equally to all prospective exporters.

45. In our submission, the Tribunal's award on this point is tantamount to saying: Canada is in breach of its obligations under Article 1105 because we say so. In our submission, the deficiency of the Tribunal's explanation on this point, fails to meet its obligation to provide written reasons for its determination.

The Tribunal erred in failing to give effect to NAFTA provisions concerning trade in goods, and to the environmental exceptions that qualify these obligations.

46. The Tribunal's conclusion that Canada's obligations are "cumulative" under the trade in goods and investment provisions of NAFTA [Paragraph 292] fails to properly interpret Article 1112 which stipulates that any conflict between Canada's obligations under Chapter 11 and other chapters be resolved in favour of the latter.
47. Canada's obligations under Chapter Three (Trade in Goods) are qualified by GATT Article XX exceptions which include environmental and conservation measures. But this is not the case with respect to Chapter Eleven disciplines [Article 2101 of NAFTA].
48. By disregarding this critical difference, the Tribunal has effectively negated the environmental exceptions that qualify Canada's obligations under NAFTA with respect to measures that relate the trade in goods.

All of which is respectfully submitted on behalf of the Canadian Alliance for Trade and the Environment.

Date: Jan. 16, 2000.

Sack, Goldblatt and Mitchell
20 Dundas St. West, Suite 1130
Toronto, Ont.
M5G 2G8

Steven Shrybman
(613) 233-4897 – telephone
(416) 591-7333 - fax

Counsel for Petitioners.