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APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

Washington DC Toronto

February 7, 2000

**UNDER THE UNCITRAL ARBITRATION RULES AND
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**INVESTOR'S REPLY MEMORANDUM
ON US LAW ISSUES**

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

INVESTOR'S REPLY MEMORANDUM ON US LAW ISSUES

1. This Reply Memorandum is made pursuant to *Procedural Order No.13* and in response to Canada's Memorandum on US Law Issues ("Canada's Memorandum") dated January 14, 2000.
2. In summary, the Investor replies that:
 - A. The governing law of this arbitration is international law not municipal law;
 - B. The granting of an enforcement discretion should be presumed to be a valid legal act of the US Government;
 - C. Canada's actions during the development of the *PCB Export Waste Ban* are not consistent with its argument that its officials actually had concerns about the validity of the US Government's actions;
 - D. Canada was aware of the Enforcement Discretion mechanism well before the making of the *PCB Waste Export Ban*; and
 - E. Canada did not have any legal authority to question the "prior consent" provided by the US EPA to S.D. Myers to import PCB wastes from Canada.

The Governing Law of this Arbitration Is Not Municipal Law

3. NAFTA Article 1135 provides that the governing law of this arbitration is the NAFTA and international law. Arguments solely based on domestic American or Canadian law should have no weight before this Tribunal unless the NAFTA or international law direct the Tribunal to consider municipal law.
4. Canada had obligations under international legal agreements, such as the NAFTA. Canada's failure to address these obligations cannot be answered by arguments based in the municipal law of any NAFTA Party.

The Enforcement Discretion is Presumed Valid

5. Under international law, it is presumed that when a state takes an official act within its own territory that such an act is valid and complies with its own laws. This presumption is rooted in the phrase *omnia rite acta praesumuntur*.¹ This presumption is cited with approval as a general principle of law by Dr. Bin Cheng when he states:

*International tribunals have applied a number of presumptions founded on general principles of law. In the first place, international tribunals constantly have recourse to the rebuttable presumption of the regularity and validity of acts and recognise that this is a general principle of law.*²

6. In the *Valentiner Case*, before the Germany-Venezuela Mixed Claims Commission, the German Commissioner sought a finding that the law in question, regarding the military draft of Venezuelans, was contrary to the Venezuelan constitution and illegal. The Tribunal rejected this contention stating:

*... under the general presumption of law, in the absence of any testimony to the contrary, the draft must be considered lawful. Omnia rite acta praesumuntur. This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons.*³

7. In the affidavit submitted with Canada's Counter-Memorial, Victor Shantora confirms that the Senior US Regulator of PCBs, Dr. Lynn Goldman "expressed the view that the enforcement discretion complied with the *Toxic Substances Control Act*".⁴ In Canada's Memorandum on U.S. law, Canada confirms that the EPA had the authority to grant an enforcement discretion as a general matter of law.⁵ Indeed, at paragraph 74 counsel for Canada goes so far as to note that even they were "...not sure what Canada means by describing enforcement discretion as extra-legal and irregular."

¹ *Blacks Law Dictionary*, 6th ed. (1990) at 1087. The translation for this phrase is: "All things are presumed to be rightly done". A copy of this definition is included as Schedule 1 to this Reply Memorandum.

² Bin Cheng, *General Principles of Law* (1987) at 305. An extract of which is included as Schedule 2 of this Reply Memorandum.

³ *Valentiner Case*, Mixed Claims Commission, Germany-Venezuela (1903) RIAA, Vol. X 403 at 405. A copy of which is included as Schedule 3 of this Reply Memorandum.

⁴ Affidavit of Victor Shantora, sworn October 4, 1999 at para. 95. A copy of which is attached as Schedule 167 to the Joint Book of Documents.

⁵ Memorandum on US law on behalf of the Government of Canada at para. 51.

Ex Post Facto Justification of PCB Waste Export Ban

8. Canada relies on the conclusions of the Memorandum on US Law in its Reply to the Myers Supplemental Memorial, at paragraphs 42 and 43, to support its position that Canada's alleged concerns were actually well-founded. There is no evidence that Canada sought, much less possessed, the necessary information to support its position about the validity of the enforcement discretion as of October or November 1995. Canada's Memorandum is an *ex post facto* justification of Canada's actions based on a legal opinion provided four years after the actual ban was imposed. The fact that Canada has decided to provide this memorandum on US law at this very late date demonstrates that Canada did not fully and properly consider these questions in November 1995 and now feels obliged to provide some form of justification for the *PCB Waste Export Ban*.
9. It is clear on the face of the evidence that Canada cannot rebut the presumption of validity of the US Government's actions under international law. Canada made little, if any, effort to:
 - (i) notify the Government of the United States of America of its concerns, if any, at the March 6 and June 6, 1995 EPA hearings into opening the US border to the import of PCB wastes from Canada for their destruction;
 - (ii) notify the US Government of its concerns in November 1995;
 - (iii) consider the means by which the Government of the United States of America might permit such exports in November 1995; or
 - (iv) learn anything about the regulation of PCB wastes in the United States in November 1995.

There is certainly no evidence that, in October or November 1995, Canada sought a legal opinion as to the validity of an enforcement discretion or the possible effects of such discretion being challenged in a US Court. If the validity of an enforcement discretion was really of serious concern to Canadian officials, why did Canada only engage US counsel on the issue in December 1999?

10. There is also no evidence that Canada followed standard diplomatic protocol to resolve its alleged concern over the validity of the enforcement discretion by issuing a diplomatic note. Canada followed this procedure when it posed its question to the US government concerning the *Canada-US Transboundary Waste Agreement*.⁶
11. Canada claims, at paragraph 150 of its Counter-Memorial, that its officials were "concerned" at the time the *PCB Waste Export Ban* was being developed as to whether the enforcement discretion granted to S.D. Myers complied with US law. The only evidence of this apparent "concern" is the 1999 affidavit of Victor Shantora which states, at paragraph 74, that:

"[t]he enforcement discretion did not accord with the Canadian approach to these problems and did not seem consistent with US law." (emphasis added)

Canada obviously had no basis for these alleged concerns other than the opinion of a Canadian official that the enforcement discretion "seemed" to be inconsistent with US law. This evidence cannot possibly rebut the presumption of international law that a state shall be considered to be acting lawfully and within its authority when it regulates.

12. Moreover, Mr. Shantora made absolutely no mention of his apparent concern about the EPA's enforcement discretion authority in the affidavit he swore on February 2, 1996 in the *Centre Patronal* case concerning the development of the *PCB Waste Export Ban*. Sworn much closer to the relevant time, the *Centre Patronal* affidavit contains considerable detail about the process and all of Canada's apparent concerns at the time, listed at paragraphs 46 to 52 of that document. The only impression that one can take from this affidavit about how Canadian officials regarded the US practice of granting enforcement discretion letters was that they treated the letter granted to S.D. Myers, Inc. as being valid on its face.⁷

Canada was aware of enforcement discretion mechanism in 1993

13. As part of Canada's *ex post facto* justification, Canada also states, at paragraph 138 of its Counter-Memorial, that it "was not aware that such a mechanism existed whereby a U.S. agency would undertake not to enforce a law." This statement is not consistent with the fact that at least three US corporations were recently granted enforcement discretion

⁶ As noted at para. 142 of the Counter-Memorial.

⁷ Affidavit of Victor Shantora, dated 2 February 1996, a copy of which is included as Schedule 4 to this Reply Memorandum.

letters by the EPA to import PCB wastes from Canada into the US.⁸ Canada has provided no evidence that its officials had any concern about the EPA's use of its authority to grant an enforcement discretion in any of those cases.

14. For example, on April 8 1993, Premark International ("Premark") received an enforcement discretion letter from the EPA permitting Premark to import PCB wastes from Canada to the US before 1995.⁹ Canada allowed these PCB wastes to be exported from Canada to the US pursuant to Regulation SOR/90-453 ("*PCB Waste Regulations*"). This is the exact same regulation under which Myers sought, on the basis of the enforcement discretion letter granted to it by the EPA, to export PCB wastes from Canada.

Canada had no Authority Under its Own Regulation to Question the EPA's Approval

15. In 1995, Canada permitted PCB wastes to be exported from Canada to the US pursuant to the *PCB Waste Regulations*. On the basis of the enforcement discretion letter granted to it by the EPA, Myers sought to export PCB wastes from Canada for their destruction. The *PCB Waste Export Ban* was imposed in order to amend this regulation, thus preventing Canada from honouring its obligation to permit the EPA-approved export of PCB wastes to the US under the *PCB Waste Regulations*.
16. Sections 3 and 4 of the *PCB Waste Regulations* provided:

Prohibition

3. Subject to section 4, no person shall offer to export or export any PCB waste.

Exemption

4. Section 3 does not apply to a person who offers to export or exports:
(a) any PCB waste to the United States where the **Environmental Protection Agency has given prior consent in respect of export; ... (emphasis added)**

⁸ As indicated at paragraph 4 of the Investor's Reply to the Statement of Defence, which accompanied the submission of the Memorial

⁹ A copy of the letters are included as Schedules 64, 65 and 66 to the Joint Book of Documents. Copies of these documents are included at Schedules 5, 6 and 7 to this Reply Memorandum.

17. In October 1995, the *PCB Waste Regulations* simply required that the US EPA provide "prior consent" for the export of PCB wastes to the US. These regulations did not provide any directions, or authority, for Canadian officials to question the validity or sincerity of the EPA's consent. Accordingly, for as long as the EPA enforcement discretion letter provided, Canada was obliged to permit S.D. Myers to export PCB wastes under its own regulations. Under the terms of Canada's *PCB Waste Regulations*, there was simply no room for debate.

Submitted this 7th day of February, 2000



For Appleton & Associates International Lawyers
Counsel for the Investor, S.D. Myers, Inc.