Federal Court

CANADA

Cour fédérale

Date: 20040113
Docket: T-225-01
T-81-03
Citation: 2004 FC 38

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C. 17 (2nd SUPP.)

IN THE MATTER OF ARTICLES 1, 6 AND 34 OF THE *COMMERCIAL ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL ARBITRATION ACT*

AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE *NORTH AMERICAN FREE TRADE AGREEMENT* ("NAFTA") BETWEEN S.D MYERS, INC. AND THE GOVERNMENT OF CANADA

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

S.D. MYERS, INC.

Respondent

- and -

THE UNITED MEXICAN STATES ("MEXICO")

Intervener

REASONS FOR ORDER

KELEN J.:

[1] This is an application pursuant Article 34 of the *Commercial Arbitration Code*, a schedule to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), to set aside decisions dated November 13, 2000 ("liability award"), October 21, 2002 ("damages award") and

December 30, 2003 ("costs award") made by an Arbitral Tribunal established pursuant to the *North American Free Trade Agreement* ("NAFTA").

BACKGROUND

[2] This application is the first to come before the Federal Court with respect to an arbitration award issued under Chapter 11 of the NAFTA.

[3] The applicant seeks judicial review of the NAFTA arbitration awards, which arose from a determination that Canada was in breach of articles 1102 and 1105 of the NAFTA, when it imposed a ban on exports of PCB wastes from Canada for treatment in the United States, implemented through an interim and a final Order-in-Council issued in November 1995 and February 1996 respectively. The Tribunal awarded the respondent $6,050,000 plus interest in compensation for damages, $500,000 for legal costs and $350,000 for arbitral costs.

S.D. Myers Inc.

[4] The respondent, S.D. Myers Inc., ("SDMI") is a privately held Ohio corporation headquartered in Tallmadge, Ohio. It is owned by Mr. Dana Myers (who holds fifty-one percent of the share capital and is its chief executive officer), and his three brothers. SDMI is in the business of treating or remediating toxic wastes contaminated with polychlorinated biphenyls (hereinafter referred to as "PCBs").

[5] SDMI assesses the level of PCB contamination in transformers and other equipment, transports and dismantles the equipment, removes and contains the PCBs in drums or tanks, and destroys or arranges for the destruction of the PCBs.

Myers Canada Inc.

[6] S.D. Myers (Canada) Inc. ("Myers Canada") is a privately held Canadian company incorporated in 1993 and owned by the four Myers brothers in equal shareholdings. SDMI, while not owning any shares, advanced hundreds of thousands of dollars to Myers Canada and provided Myers Canada with technical and other support personnel. The CEO of SDMI made all decisions regarding the business of Myers Canada.

[7] Myers Canada offered waste remediation services to Canadian customers. Myers Canada would drain PCBs from equipment in Canada, and then transport the equipment and PCBs to SDMI in Ohio for further decontamination of the equipment, and for the destruction of the PCBs.

The export ban of PCBs

[8] On or about November 15, 1995 the United States Environmental Protection Agency ("E.P.A.") issued an "enforcement discretion" permitting the respondent to import PCBs upon certain conditions. Anticipating this development, two Canadian operators of hazardous waste facilities met with the Environment Minister at her office to advise that this anticipated U.S. action would threaten the economic viability of their own operations.

[9] On November 16, 1995, Canada banned exports to the United States of PCB wastes and the ban remained in force for fourteen months until Canada replaced existing regulations controlling PCB exports and re-opened the border. Shortly after re-opening the border SDMI submitted an arbitration claim under Chapter 11 of NAFTA asserting that Myers Canada constituted its "investment" in Canada and that the Canadian PCB ban violated its entitlements

under NAFTA to National Treatment (Article 1102) and Minimum Standard of Treatment (Article 1105). SDMI also alleged that the ban was contrary to the provisions on Performance Requirements (Article 1106) and Expropriation (Article 1110), all of which resulted in harm to SDMI and its "investment", Myers Canada, in form of financial loss.

[10] The Tribunal found at paragraph 162 that the ban on the export of PCBs was "to protect and promote the market share of enterprises that would carry out the destruction of PCBs in Canada and that were owned by Canadian nationals". The Tribunal also found in the same paragraph that:

> [...] the protectionist intent of the lead Minister in this matter was reflected in decision-making at every stage that led to the ban. Had that intent been absent, policy makers might have reached a conclusion in November 1995 that would have been consistent with the conclusion reached by Canada when the ban was lifted in February 1997. Canada's view in 1997 was that the opening of the U.S. border should be welcomed in the interests of expediting the elimination of PCBs from the environment, provided that any risks associated with exporting PCB waste to the U.S. was minimized through proper regulations and safeguards.

[11] It is noteworthy that the ban was directed against the respondent since it was the only company that was granted permission from the EPA to import PCBs.

[12] The Department of Environment officials had advised the Minister that closing the border from the Canadian side if the U.S. EPA opened it up from the U.S. side would raise NAFTA concerns. These NAFTA concerns were disregarded by the Minister.

[13] In paragraph 176 the Tribunal referred to evidence from Department of Environment officials that banning PCB exports "is not a viable option because it cannot be demonstrated that closing the border is required to deal with a significant danger to the environment or to human health".

[14] After the Tribunal reviewed the evidence in detail, it concluded in paragraph 195:

> The Tribunal finds that there was no legitimate environmental reason for introducing the ban.

The arbitration proceedings

[15] On July 28, 1998 SDMI delivered a Notice of Intent to submit a claim to arbitration under NAFTA Chapter 11. Three months later, it delivered its Notice of Arbitration and Statement of Claim alleging that the Canadian ban on exports of PCBs breached NAFTA articles 1102, 1105 and two other Articles which were not upheld by the Tribunal.

Composition of the Arbitral Tribunal

[16] The Tribunal was constituted in accordance with the UNCITRAL Arbitration Rules. Each party selected one member of the Tribunal and the two parties jointly selected the chair. SDMI selected Professor Bryan P. Schwartz of the University of Manitoba, Faculty of Law. Canada selected Mr. Edward C. Chiasson, Q.C., of Borden, Ladner, Gervais, LLP of Vancouver. Both parties selected Professor Martin J. Hunter, Q.C. of London, England as the Chair. All three members are knowledgeable, experienced and distinguished in international law, international trade law and international arbitration. In fact, the Chair is the co-author of a leading text book with respect to international commercial arbitration. Canada's nominee, Mr. Chiasson has been the Chair of two other NAFTA panels, and chaired a panel under the Canada-U.S. Free Trade Agreement. Professor Schwartz is a highly respected Canadian authority on international law and NAFTA. Accordingly, the arbitration mechanism in Chapter 11 ensured that the parties had confidence in the persons who will be adjudicating the claim.

[17] The three Tribunal awards or decisions under review were unanimous with respect to the liability of Canada, the quantum of damages and the costs.

The Tribunal's Decision

[18] Based on the evidence the Tribunal found that the interim and final orders favoured Canadian nationals over non-nationals, and that the effect of the orders was to prevent SDMI and its investment from carrying out the Canadian business that they planned to undertake. It further found that "there was no legitimate environmental reason for introducing the ban." In particular the Tribunal found the following:

1) that Myers Canada operated as a branch of SDMI;

2) SDMI established Myers Canada as a means of furthering its business in Canada;

3) Dana Myers exercised control over Myers Canada in his capacity as President and CEO of SDMI;

4) The president of Myers Canada reported to Dana Myers;

5) SDMI committed to provide full financial and technical support to Myers Canada;

6) SDMI made loans to Myers Canada;

7) Myers Canada paid SDMI for certain services; and

8) SDMI had an expectation that it would share in any income or profit from Myers Canada's operations.

[19] The Tribunal decided that Canada had breached its NAFTA obligations, and was liable to compensate SDMI ("Frist Partial Award"). The Tribunal's "Second Partial Award" dated October 21, 2002 ordered that Canada pay SDMI compensation for the loss or damage suffered as a result of Canada's breaches of its obligations under Chapter 11 of NAFTA in the amount of $6,050,000 plus interest.

[20] The Tribunal's "Final Award" dated December 30, 2003 ordered that Canada pay SDMI $350,000 in respect of the arbitration costs it incurred and $500,000 in respect of its legal costs.

THE RELEVANT LEGISLATION, TREATY PROVISIONS AND ARBITRAL RULES

[21] This application for judicial review is pursuant to Article 34 of the *Commercial Arbitration Code*, the "Model Law on International Commercial Arbitration" adopted by the United Nations Commission on International Trade Law on June 21, 1985, and given the force of law in Canada by the *Commercial Arbitration Act*, which expressly applies to an arbitral claim under Chapter 11 of NAFTA.

[22] Chapter 11 of NAFTA applies to measures adopted or maintained by one of the NAFTA parties (Canada, United States of America, or United States of Mexico) which relate to investors and investments of another party. NAFTA imposes legal obligations and confer legal rights which apply to Canada and SDMI in this case.

[23] NAFTA also provides an arbitration mechanism for the settlement of investment disputes. The arbitration may be submitted under different international arbitration rules, and in this case the claim to arbitration was under the UNCITRAL Arbitration Rules (UNICITRAL is the acronym for the United Nations Commission on International Trade Law). Accordingly, the relevant excerpts from the UNCITRAL Arbitration Rules are set out herein.

[24] Finally, NAFTA, an international treaty, is subject to the rules for interpreting international treaties which are set out in the Vienna Convention. Accordingly, the relevant excerpts from the following authorities are set out in Appendix A to these Reasons:

1. Commercial Arbitration Act and Commercial Arbitration Code
2. NAFTA
3. UNCITRAL Arbitration Rules
4. Vienna Convention on the Law of Treaties

THE ISSUES

[25] The issues in this application are:

(i) whether the arbitral awards exceeded the scope of the arbitration agreement in Part B of the NAFTA Chapter 11 by dealing with a dispute or disputes not contemplated by Chapter 11 of the NAFTA; and,

(ii) whether the awards contravene the public policy of Canada.

[26] With respect to the first issue Canada, and Mexico, which intervened in support of Canada, raise the following sub-issues:

(1) whether the Tribunal erred in concluding that for the purposes of NAFTA Chapter 11, SDMI was an "investor" and Myers Canada was its "investment";

(2) whether the Tribunal misconstrued the obligation of National Treatment in NAFTA Article 1102 as permitting a comparison between the treatment accorded SDMI and Myers Canada with Canadian companies, and wrongly concluded that SDMI and Myers Canada were "in like circumstances" with Canadian companies for the purposes of Article 1102;

(3) whether the Tribunal erred in concluding that under international law, a breach of an obligation related to investment protection supports a finding that a State Party breached NAFTA Article 1105 and that in the circumstances of this case, a breach of Article 1102 essentially establishes a breach of Article 1105; and,

(4) whether the Tribunal exceeded the scope of the submission to arbitration by applying Chapter 11 obligations to "cross-border trade in services" which are governed by Chapter 12;

ANALYSIS

The objectives and interpretation of NAFTA

[27] The relevant objectives of NAFTA are set out in Article 102, and can be paraphrased as follows:

(1) to eliminate trade barriers in the free trade zone of Canada, United States and Mexico;

(2) to promote conditions of fair competition in the free trade area;

(3) to substantially increase investment opportunities in the free trade area;

(4) and to create effective procedure for the application of NAFTA and for the resolution of disputes under NAFTA.

[28] The objectives also provide that the parties "shall interpret and apply" NAFTA in light of its objectives and in accordance with "applicable rules of international law".

[29] Under Chapter 11, NAFTA has created an obligation on Canada to treat a U.S. company which chooses to invest and compete in Canada in a fair and non-discriminatory manner, and that the provisions of NAFTA shall be interpreted and applied in a manner which fulfills this objective.

[30] Article 1114 of NAFTA allows Canada to adopt a legitimate environmental measure without regard to Chapter 11. However, the Tribunal found that the Canadian law banning exports of PCBs was not a measure for a legitimate environmental purpose, but was for the purpose of protecting Canadian industry from U.S. competition. Therefore, Article 1114 is not in issue.

The meaning of the pertinent Chapter 11 NAFTA provisions

[31] In Article 1102 of NAFTA, Canada, the United States of America and the United States of Mexico, have agreed that each country will accord investors from the other two countries no less favourable treatment than it accords its own investor with respect "to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments".

[32] Moreover, NAFTA provides, unlike its predecessor, the Canada-U.S. Free Trade Agreement, a mechanism which allows individual investors to settle disputes with respect to alleged discriminatory treatment. This creates a powerful and significant new cause of action to protect investors against state protection. It also creates an impartial, efficient and timely arbitration process to settle such disputes. This arbitration process only applies to disputes with respect to Chapter 11 claims by "investors" with respect to "investments of investors".

Limited jurisdiction of the Federal Court for judicial review

[33] Canada and Mexico assert that the appropriate standard of review in this case is "correctness" because this international arbitration involves a State, and the State has only consented to arbitration to the extent provided in NAFTA. They state that this is a different situation from where private parties have agreed that the international arbitration will decide the whole matter in issue between the private parties.

[34] Canada submits at paragraph 87 of its Memorandum:

> A corner stone of the law of arbitration is the requirement that parties consent to the arbitration. That consent must comprehend not only the fact of arbitration but also the specific issues to be resolved by arbitration and may stipulate the governing law. An arbitration tribunal only has jurisdiction over those specific issues that the parties have agreed to submit and any award that goes beyond those issues exceeds the scope of the submission to arbitration.

Canada's authority is Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3d ed. (London: Sweet & Maxwell, 1999). (The co-author, Professor Martin Hunter, a world expert on the subject, was chosen by the parties to be the chairman of the Arbitration Tribunal in this case.)

[35] The limited extent of the Court's jurisdiction to review is under Article 34 of the *Commercial Arbitration Code*. The Canadian jurisprudence that examines the limited jurisdiction for judicial review of a NAFTA Chapter 11 arbitration tribunal is:

(i) *The United Mexican States v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285 (B.C.S.C.) and,

(ii) *The United Mexican States v. Marvin Roy Feldman Karpa* (8 December 2003), Ottawa 03-CV-23500, (Ont. Sup. Ct.) (unreported).

[36] In *Metalclad, supra,* Tysoe J. states at paragraph 54:

> I need not decide whether it is appropriate to use the "pragmatic and functional approach" to determine the standard of review under the CAA. With respect to the International CAA, it is my view that the standard of review is set out in ss. 5 and 34 of that Act and that it would be an error for me to import into that Act an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute. It may be that some of the principles discussed by the Supreme Court of Canada in this line of authorities will be of assistance in applying ss. 5 and 34 but the "pragmatic and functional approach" cannot be used to create a standard of review not provided for in the International CAA. I note that since the "pragmatic and functional approach" was fully articulated by the Supreme Court of Canada in Pushpanathan v. Canada, [1998] 1 S.C.R. 982, the approach has not been utilized in Canadian cases involving international commercial arbitrations (e.g., Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A. (1999), 45 O.R. (3d) 183 (Ont. S.C.J.); affirmed (2000), 49 O.R. (3d) 414 and D.L.T. Holdings Inc. v. Grow Biz International, Inc. (2000), 194 Nfld. & P.E.I.R. 206 (P.E.I.S.C.T.D.)). [Emphasis added.]

[37] In *Feldman, supra*, Chilcott J. at paragraph 77 states:

> In my view, a high level of deference should be accorded to the Tribunal especially in cases where the Applicant Mexico is in reality challenging a finding of fact. The panel who has heard the evidence is best able to determine issues of credibility, reliability and onus of proof.

And at paragraph 97 he concludes:

> I accept the proposition that judicial deference should be accorded to arbitral awards generally and to international commercial arbitrations in particular.

[38] Other Canadian jurisprudence considers the limited jurisdiction of a superior court to judicially review an award under Article 34 of the *Code* with respect to international arbitration

between two private parties, rather than investor-State arbitration. See *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1990] B.C.J. No. 2241 (BCCA).

[39] The Courts have held that the "pragmatic and functional" approach cannot be used to create a standard of review not provided for in Article 34 of the *Code*. Courts restrain themselves from exercising judicial review with respect to international arbitration tribunals so as to be sensitive to the need of a system for predictability in the resolution of disputes and to preserve the autonomy of the arbitration forum selected by the parties.

[40] In *Desputeaux v. Éditions Chouette (1987) Inc.*, [2003] S.C.J. No. 15 the Supreme Court of Canada overturned a Québec Court of Appeal decision that allowed for the annulment of an arbitral award that arose out of a copyright dispute. The Supreme Court expressly disagreed with the Québec Court of Appeal's approach because it led to a merits based review not contemplated by legislation. At paragraphs 66 - 67 Lebel J. states:

> The Court of Appeal stated at paras. 49:
>
> > [TRANSLATION] Where an arbitrator, in performing his or her mandated, is required to apply the rules of public order, he or she must apply them correctly, that is, in the same manner as do the courts.
>
> That statement runs counter to the fundamental principle of the autonomy of arbitration (Compagnie nationale Air France, supra at p. 724). What it necessarily leads to is review of the merits of the dispute by the court. In addition, it perpetuates a concept of arbitration that makes it a form of justice that is inferior to the justice offered by the courts (Condominiums Mont St-Sauveur, supra, at p. 2785).

And with respect to the standard of review, LeBel J. states at paragraphs 68 - 69:

> Some judgments have taken a broad view of that power, or sometimes tended to confuse it with the power of judicial review provided for in arts. 33 and 846 C.C.P.[...] The judgment in issue here illustrates this tendency when it adopts a standard of review based on simple review of any error of law made in considering a matter of public order. That approach extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases intended by the legislature. It ignores the fact that the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system.[emphasis added.]
>
> [...]
>
> Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law. Thibault J.A. of the Court of Appeal identified this problem, when she said:
>
> > [TRANSLATION] In my view, the argument that an interpretation of the regulation that is different from, and in fact contrary to, the interpretation adopted by the ordinary courts means that the arbitration award exceeds the terms of the arbitration agreement stems from a profound misunderstanding of the system of consensual arbitration. The argument makes that separate system of justice subject to review of the correctness of its decisions, and thereby substantially reduces the latitude that the legislature and the parties intended to grant to the arbitration board.

[41] By analogy to a case where Parliament has spelled out in the *Criminal Code* the precise standard of judicial review, the Supreme Court of Canada decision in *R. v. Owen*, 2003 SCC 33 per Binnie J. at paragraphs 31 and 32 is applicable to the case at bar:

> The appellant submitted an extensive analysis of the Court's administrative law jurisprudence applying the "functional and pragmatic test" to establish the appropriate standard of review from U.E.S. Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1087 (emphasis deleted), to Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249, 2002 SCC 11. However, in the case of these review boards, Parliament has spelled out in the Criminal Code the precise standard of judicial review, namely that the court may set aside an order of the review board only where it is of the opinion that:

> (a) the decision is unreasonable or cannot be supported by the evidence; or,
>
> (b) the decision is based on a wrong decision on a question of law (unless no substantial wrong or miscarriage of justice has occurred); or,
>
> (c) there was a miscarriage of justice. (Cr. C., s. 672.78)
>
> It must be kept in mind that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation": Bibeault, at p. 1087. Where Parliament has shown its intent in the sort of express language found in s. 672.78 Cr. C. then, absent any constitutional challenge, that is the standard of review that is to be applied. [Emphasis added]

In the case at bar, Article 34 of the *Code* spells out the limited jurisdiction of the Court to set aside an arbitration award.

[42] It is noteworthy, that Article 34 of the *Code* does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal. The principle of non-judicial intervention in an arbitral award within the jurisdiction of the Tribunal has been often repeated. See Lax J. in *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.P.A. et al.* (1999), 45 (3d) 183 at page 191, affirmed by 49 O.R. (3d) 414 (C.A.):

> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:
>
> > The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).

An arbitral award is not invalid because, in the opinion of the Court hearing the application, the Arbitral Tribunal wrongly decided a point of fact or law. In the text book, *Law and Practice of International Commercial Arbitration, supra* at page 432:

> Nevertheless, the Model Law, basic though it is, reflects the modern movement towards finality of arbitration awards. There is a belief that, so far as international arbitrations are concerned, the parties should be prepared to accept the decision of the arbitral tribunal even if it is wrong, so long as the correct procedures are observed. *If a court is allowed to review this decision on the law or merits, the speed and, above all, the finality of the arbitral process is lost.* Indeed, arbitration then becomes merely the first stage in a process that may lead, by way of successive appeals, to the highest appellate court at the place of arbitration. [Emphasis added]

And at page 433:

> [...] there is no provision in the Model Law for any form of appeal from an arbitral award, on the law or on the facts, or for any judicial review of an award on its merits. If the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award, good, bad or indifferent -- is final and binding on the parties.

Judicial Review under Article 34(2)(a)(iii)

[43] As discussed, the Federal Court has limited jurisdiction to hear an application for setting aside the arbitral awards in this case pursuant to Article 34 of the Code. The first pertinent subparagraph of the *Code* is Article 34(2)(a)(iii), which provides:

> An arbitral award may be set aside by the Court specified in Article 6 only if:
>
> (a)(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; The award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration;

[44] In analysing the Court's jurisdiction under this subparagraph, the arbitral awards may only be set aside if the applicant, in this case the Attorney General of Canada, furnishes proof on one of two grounds:

(i) the awards deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration; or,

(ii) the awards contain decisions on matters beyond the scope of the submission to arbitration.

[45] With respect to the first ground, I am not satisfied that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, namely whether Canada breached Articles 1102 and 1105 of NAFTA in relation to the respondent. In fact, this is the dispute submitted by the respondent to arbitration.

[46] The second ground is more difficult. The Attorney General submits that the arbitral decision that SDMI falls within the definition of an "investor" or that Myers Canada is "an investment of the investor" in accordance with the definitions in Article 1139 of NAFTA are matters beyond the scope of the submission to arbitration. Mexico submits that the Tribunal exceeded the scope of the submission to arbitration by applying Chapter 11 obligations to "cross-border trade in services" which are governed by Chapter 12, and Chapter 12 is beyond the scope of arbitration.

Matters beyond the scope of arbitration go to jurisdiction

[47] Article 21 of the *UNCITRAL Arbitration Rules* give the Arbitration Tribunal the power to rule on objections regarding its jurisdiction. Article 21(3) requires that any plea that the Tribunal does not have jurisdiction be raised not later than the Statement of Defence. Article 21(4) requires that "in general" the Tribunal should rule on its jurisdiction as a preliminary question, however, the Tribunal may proceed with the arbitration and rule on its jurisdiction as part of its final award. In this case, SDMI submits that Canada did not object to the jurisdiction of the Tribunal as required in Article 21 of the *UNCITRAL Arbitration Rules*, and is now barred from seeking judicial review on this basis.

[48] The Court has considered the Notice of Arbitration and the Statement of Claim submitted by the respondent and Canada's Statement of Defence. Canada submits that it challenged the jurisdiction of the Arbitration Tribunal in paragraph 4 of its Statement of Defence under the heading "The Facts":

> ¶4. Except as expressly submitted below, Canada denies the facts alleged in paragraphs 2, 4 - 12 and 16 - 57 of the Claim and puts Myers to the strict proof of every fact alleged in those paragraphs.

Canada submits that this plea satisfies the requirements of Article 21(3) of the Arbitral Rules because paragraphs 6 to 12 of the Statement of Claim are under the heading "Jurisdiction of this Tribunal", and alleged that the claim is within the jurisdiction of the Tribunal.

[49] Article 21 requires that a party make a clear objection to the jurisdiction of the Arbitration Tribunal as soon as possible, and not later than the Statement of Defence. In reviewing paragraph 4 of Canada's Statement of Defence, the Court concludes that Canada did not make a clear objection to the Tribunal's jurisdiction. The plain and ordinary meaning of the Rules are that a party must make a specific, express objection to jurisdiction, and must ask the Tribunal to rule on its jurisdiction as a preliminary question. At that stage, parties can seek judicial review before the arbitration proceeds in, what was in this case, a lengthy and expensive arbitration. I find paragraph 4 of Canada's Statement of Defence obtuse with respect to jurisdiction.

[50] Canada's position on this matter is undermined by its own past practice. In a prior NAFTA Chapter 11 arbitration under the same Arbitration Rules between Ethyl Corporation and the Government of Canada, Canada clearly and expressly stated that the Tribunal is without jurisdiction to entertain Ethyl's claim and requested that:

> "The Tribunal should, as a preliminary matter, determine that it does not have jurisdiction to hear the claim or any part of the claim."

As a result, the NAFTA Arbitration Tribunal in that case rendered a preliminary decision dated June 24, 1998 with respect to its jurisdiction in *Ethyl Corporation and the Government of Canada* 38 ILM 708 (1999).

[51] The Arbitration Tribunal decision in this case did not expressly address "jurisdiction". However, it considered Canada's argument that SDMI did not have any "standing" to bring the complaint in Chapter VII of its liability decision under the heading:

"WAS SDMI AN INVESTOR? WAS THERE AN INVESTMENT?"

[52] This issue was considered as a mixed question of fact and law, not as a question of jurisdiction. At no point in this part of the decision is there any reference to an objection to the "jurisdiction" of the Tribunal by Canada.

[53] Jurisdiction is a term of art and a legal objection must be raised clearly at the outset of the arbitration. Canada failed to do so in this case, and cannot now argue that the Tribunal did not have jurisdiction to render the three decisions which are the subject of these applications for judicial review. To find otherwise would undermine the clear and express procedures incorporated in NAFTA for the resolution of disputes.

Failure to give notice

[54] The rule requiring that jurisdiction be pleaded is analogous to the requirement in subsection 57(1) of the *Federal Court Act* that a party may not raise a constitutional question unless notice has been served in accordance with section 57. The Federal Court of Appeal and the Supreme Court of Canada have held that the failure to give notice under the Act bars a party from subsequently challenging the constitutionality of a law. See *McIntosh v. Canada (Secretary of State)*, [1994] F.C.J. No. 67 at paragraph 5, (F.C.A.), *Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 SCR 854 at paragraph 38, *Nelson v. Canada*, [2000] F.C.J. No. 1613 at paragraph 7, (F.C.A.), *Stone v. Canada*, [2003] F.J. No. 953 at paragraph 4 (F.C.A.).

Judicial Review under Article 34(2)(b)(ii) - Public Policy

[55] Article 34(2)(b)(ii) of the *Code* provides that a Court may judicially review and set aside an award where "it is in conflict with the public policy of Canada". "Public policy" does not refer to the political position or an international position of Canada but refers to "fundamental notions and principles of justice." Such a principle includes that a tribunal not exceed its jurisdiction in the course of an inquiry, and that such a "jurisdictional error" can be a decision which is "patently unreasonable", such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice. See *Navigation Sonamar Inc. v. Algoma Steamships Ltd.*, [1987] R.J.Q. 1346; *Analytical Commentary on the Draft Text of the Model Law on International Commercial Arbitration, Eighteenth Session of the United Nations Commission on International Trade Law*; *Mexico v. Feldman, supra* at paragraph 87.

[56] In the case at bar, the Tribunal's findings with respect to the two jurisdictional questions, and with respect to Article 1102, are not "patently unreasonable", "clearly irrational", "totally lacking in reality" or "a flagrant denial of justice". Accordingly, the Court concludes that there is no aspect of the Tribunal decisions under review which "conflicts with the public policy of Canada".

Standard of review on legal meaning of definitions in NAFTA and the application of NAFTA Chapter 12

[57] I will undertake this review in the alternative that I am wrong in my conclusion above that Canada did not properly plead jurisdiction before the Tribunal so that Canada is now barred from seeking judicial review on this basis.

[58] On the two issues raised by Canada and Mexico that go to the jurisdiction or the "scope of the submission to arbitration", the standard of review on a pure question of law is correctness, and on a mixed question of law and fact is reasonableness.

[59] In *Dynamex Canada Inc. v. Mamona*, [2002] F.C.J. No. 534, the Federal of Appeal stated that characterizing an issue as legal or jurisdictional does not mean that the standard of review must be correctness. In applying the "pragmatic and functional approach" the Federal Court held that on questions of law normally considered by the Courts, and not on questions that engage the special expertise of the tribunal or require the application of the facts to the law, the standard is correctness. However, the manner in which the correct legal principles are applied to the facts is a question of mixed law and fact, and should be reviewed on the standard of reasonableness. The Court of appeal stated at paragraph 45:

> In my view, the determination of the referee as to the common law principles applicable to the determination of the status of a person as an employee should be reviewed on the standard of correctness. I reach that conclusion, despite the privative clauses, because it is a question of law of a kind that is normally considered by the courts, and is not a question that engages the special expertise of a referee. However, the manner in which those principles are applied to the facts, which is a question of mixed law and fact, should be reviewed on the standard of reasonableness. Thus, if the referee's reasons disclose no error of

> law, and the conclusion is reasonably supportable on the record after a somewhat probing examination, the decision will stand.

[60] For these reasons, I will review the arbitral award with respect to the legal meaning of the word "investor" and "investment of an investor" in NAFTA on the standard of correctness. With respect to the application of the facts to the definitions, I will review the award on the standard of reasonableness.

[61] With respect to the second issue related to jurisdiction, namely whether Chapter 11 applies to cross-border trade in services under Chapter 12, the same two standards will be applied.

The meaning of "investor" and "investment of an investor" in Chapter 11

[62] The Tribunal concluded that SDMI was an "investor" for the purposes of Chapter 11 of NAFTA and that Myers Canada was an "investment". (See paragraph 231 of the decision regarding liability.) Article 1139 defines "investor of a Party", "investment of an investor of a Party" and "investment" in broad terms.

[63] Myers Canada, the Canadian company incorporated by the Myers brothers in Canada, was an "investment". This is not disputed. The basis for Canada's objection to the right of SDMI to bring this claim is that SDMI did not own the shares of Myers Canada. The definition of "investment of an investor of a Party" means that the investment is either owned by the investor or "controlled directly or indirectly" by the investor. The definitions read:

> **investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;
>
> **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

This is broad language, and contrasts with the precise definition of "control" in a comparable chapter of the Canada-U.S. Free Trade Agreement (Chapter 16). In Chapter 11 of NAFTA there is no definition of "control". Instead the definition of "investment of an investor of a Party" uses the broad words "indirectly controlled" -- an open-ended, vague definition. The Vienna Convention provides that words in a treaty such as NAFTA shall be given their ordinary meaning. The ordinary meaning of "control" is defined in Barber, Katherine. *The Canadian Oxford Dictionary.* Toronto: Oxford University Press, 2001 as:

> "The power of directing, command (under the control of)".

[64] Whether SDMI indirectly controlled Myers Canada becomes a question of fact. On the evidence Mr. Dana Myers, the President of SDMI, testified that he exercised control over SDMI in the United States and over SDMI's operations in Australia, Saudia Arabia, Mexico and Canada as CEO of SDMI. It was a family business which operated in the United States and other countries through SDMI. SDMI advanced the money necessary for the operation of Myers

Canada, SDMI provided personnel and technical support for Myers Canada and SDMI expected to share in the profits from Myers Canada. Other witnesses confirmed that SDMI, through its President, Mr. Dana Myers, had "the power of directing" Myers Canada.

[65] The Court concludes that the broad nature of the definition of "investment of an investor of a Party", in particular the use of the words "controlled directly or indirectly", together with the objective of NAFTA that it shall be interpreted and applied to meet the objectives of NAFTA, support the finding of the Tribunal at paragraph 231:

> On the evidence and on the basis of its interpretation of NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of NAFTA and that Myers Canada was an "investment".

[66] Since the language of NAFTA permits this finding, the Court also concludes that this finding was not *ex aequo et bono*, as submitted by Canada. The Tribunal did not exercise any equitable or chancery court power. It only exercised its power to properly interpret and apply the definition in Article 1139 of "investment of an investor of a Party" to the facts.

[67] The Attorney General states that the domestic law of Canada is applicable to determine whether Myers Canada is controlled by SDMI. (See paragraph 160 of the Memorandum of Fact and Law of the Attorney General of Canada.) NAFTA is to be interpreted according to the provisions of NAFTA and the principles of international law. The meaning of "controlled directly or indirectly" is its ordinary meaning. In this case, the Tribunal found as a fact that SDMI controlled Myers Canada. This control was not based on the legal ownership of shares, but on the

fact that Mr. Dana Myers controlled every decision, every investment, every move by Myers Canada, and Mr. Myers did so as chief executive officer of SDMI.

[68] Therefore, the references to the *Canadian Business Corporations Act* relied upon by the Attorney General are not relevant for determining whether SDMI, as a question of fact, controlled, indirectly or directly, Myers Canada in the ordinary meaning of the word "controlled".

[69] The position of the Attorney General is a narrow, legalistic, restrictive interpretation contrary to the objectives of NAFTA and contrary to the purposive interpretation which NAFTA Article 2.01 and Article 31 of the Vienna Convention stipulate.

[70] Accordingly, the Court concludes that the Tribunal's interpretation of the pertinent definition is correct, and its application of the definitions to the facts is reasonable.

Chapter 12 - Cross-border trade in services

[71] Canada and Mexico argue that the respondent's activities in Canada are properly characterized as cross-border trade in services and are therefore governed by Chapter 12 of NAFTA. The Court is of the view that the different chapters of NAFTA overlap, and that NAFTA rights are cumulative, unless there is a direct conflict. Since SDMI did have an investment in Canada with respect to waste remediation services, SDMI is entitled to the protection under Chapter 11 toward its investment, as well as the rights and protection afforded by Chapter 12 with respect to its trade in services. The rights and obligations under Chapter 12 are not mutually exclusive or inconsistent with the rights and obligations under Chapter 11. Accordingly, the Tribunal correctly applied Chapter 11 rights and obligations to SDMI.

Judicial review of the issue: did the export ban of PCBs breach Canada's obligations under Article 1102 (National Treatment)

[72] In the event that I am wrong about the Court not having the power to judicially review this issue under Article 34 of the *Code*, I will briefly do so. Article 1102 requires Canada accord to investors and investments of a national of another party, the U.S. in this case, treatment no less favourable 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".

[73] There is no dispute that the Canadian ban on PCB exports sought to protect Canadian companies from U.S. competition, and was not for a legitimate environmental purpose. The applicant, with the support of Mexico, submits that the phrase "in like circumstances" means that the Tribunal must compare U.S. investors in like circumstances with Canadian investors and U.S. investments in Canada with Canadian investments in like circumstances. The Tribunal found at paragraph 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 Cintex. 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 Cintex lobbied the Minister of Environment to ban exports when the U.S. authorities opened the border.

[74] This is a question of mixed fact and law. The Court concludes that the Tribunal's decision was reasonably open to it. The authorities show that the comparison of "in like circumstances" is a flexible benchmark, which can be expanded and contracted like an accordion to suit the particular facts of each case. In this case the Tribunal used a broad comparator, which was reasonably open to the Tribunal. Accordingly, the Court would not set aside this decision under Article 1102 if this was within the Court's jurisdiction.

Article 1105

[75] Since the Tribunal's finding with respect to Article 1105 is within the dispute submitted to arbitration, this Court similarly does not have the power to review this aspect of the decision. If the Court did have the power, it would not be necessary to review this aspect of decision because of the Court's finding with respect to Article 1102. The same damages flow from a breach of Article 1102 so that the Tribunal's finding with respect to a breach of Article 1105 is redundant. Accordingly, the Court does not express any view on the Tribunal's interpretation and application of Article 1105 in this case.

CONCLUSION

[76] The Court has concluded that this application for judicial review must be dismissed for the following reasons:

1) Under Article 1102 of NAFTA, Canada, the United States, and Mexico have agreed to accord investors from their countries no less favourable treatment than the NAFTA country accords its own investors with respect to investments;

2) Chapter 11 of NAFTA creates a new cause of action to protect investors against state protectionism or discrimination and an independent dispute resolution arbitration process which can be invoked by an investor against the NAFTA country allegedly favouring one of its own nationals;

3) The Arbitration Tribunal in this case found that the Canadian law banning the exports of PCBs was not for a legitimate environmental purpose, but for protection of Canadian enterprises from U.S. competition. This finding was within the scope of the Arbitration Tribunal's jurisdiction under Chapter 11 of NAFTA.

4) The Arbitration Tribunal's decision that Canada breached its NAFTA obligations and was liable to compensate SDMI $6,050,000 plus interest for damages, $500,000 for legal costs and $350,000 for arbitration costs was the unanimous decision of three international trade and arbitration experts, including two Canadians.

5) The Federal Court has a limited jurisdiction to judicially review and set aside such NAFTA arbitration decisions. In this case, Canada relies upon four grounds for judicial review:

(i) The U.S. company SDMI making the arbitration claim is not an "investor", and the Canadian company, Myers Canada, is not an "investment of the investor" as those terms are defined under Chapter 11 of NAFTA so that the arbitration claim is beyond the scope of the Tribunal's jurisdiction;

(ii) The U.S. company SDMI is involved with "cross-border trade in services" which is governed by Chapter 12 of NAFTA, and which is beyond the scope of the Chapter 11 arbitration tribunal's jurisdiction;

(iii) The arbitration claim that Canada breached its Articles 1102 and 1105 NAFTA obligations are disputes not contemplated or falling within the terms of the submission to arbitration because the Tribunal has misapplied the law with respect to those two Articles in this case;

(iv) The Arbitration Tribunal's decision conflicts with public policy of Canada and is subject to being set aside for that reason;

6) The Court concludes that Article 21 of the *UNCITRAL Arbitration Rules* bars Canada from challenging the Tribunal's jurisdiction with respect to whether the U.S. company SDMI is an "investor" entitled to bring the arbitration claim, and whether the arbitration claim relates to Chapter 12 "cross-border trade in services";

7) In the alternative, the Court concludes that the broad nature of the definition of "investor" and "investment of an investor", reasonably support the Tribunal finding that SDMI was an "investor" and that Myers Canada was an "investment of an investor";

8) The NAFTA definition of "investment of an investor of a party" means an investment owned or controlled directly or indirectly by such an investor. In this case, whether SDMI indirectly controlled Myers Canada was a question of fact. On the evidence the Tribunal found that SDMI indirectly controlled Myers Canada, its Canadian investment. In fact, SDMI was a family business which advanced funds for the operation of Myers Canada, which provided personnel and technical support for Myers Canada, and which directed and controlled every decision of Myers Canada.

9) Also in the alternative, the Court concludes that SDMI did have investment in Canada so that SDMI was entitled to submit a claim to arbitration under Chapter 11 with respect to its investments. The rights and obligations under Chapters 11 and 12 are cumulative, and not mutually exclusive;

10) The Canadian submission that the Tribunal erred in law in applying Articles 1102 and 1105 in this case is a matter outside the Court's authority under Article 34 to judicially review. A dispute falling within the terms of the submission to arbitration, even if wrongly decided on a point of fact or law, cannot be judicially reviewed;

11) In the alternative, the application of Article 1102 in this case is a question of mixed fact and law. The Tribunal's decision was reasonably open to it because the comparison of "in like circumstances" used in Article 1102 is a flexible benchmark which can be expanded or contracted as appropriate to suit the particular facts of each case. The Court expresses no opinion with respect to Article 1105 since the same damages flow from a breach of Article 1102 so that Article 1105 is redundant; and,

12) While Article 34 provides that a Court may set aside an award where "it is in conflict with the public policy of Canada", public policy does not refer to a political position, it refers to "fundamental notions and principles of justice". In this case the Tribunal's decision does not breach fundamental notions and principles of justice so that the decision is not in conflict with the public policy of Canada.

DISPOSITION

[77] For these reasons, the Court dismisses this application for judicial review with costs.

"Michael A. Kelen"
JUDGE

APPENDIX A

AUTHORITIES

Commercial Arbitration Act

The relevant sections of the *Commercial Arbitration Act* are as follows:

2. In this Act,

"Code" means the *Commercial Arbitration Code*, based on the model law adopted by the United

Nations Commission on International Trade Law on June 21, 1985, as set out in the schedule;

[...]

Law in force

5. (1) Subject to this section, the Code has the force of law in Canada.

5(3) When applicable

(3) The Code applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Act.

5(4) Meaning of "commercial arbitration"

(4) For greater certainty, the expression "commercial arbitration" in Article 1(1) of the Code includes

(a) a claim under Article 1116 or 1117 of the Agreement, as defined in subsection 2(1) of the North American Free Trade Agreement Implementation Act;

R.S., 1985, c. 17 (2nd Supp.), s. 5, c. 1 (4th Supp.), s. 9; 1993, c. 44, s. 50; 1997, c. 14, s. 32.

COURTS

6 Definition of "court" or "competent court"

6. In the Code, "court" or "competent court" means the Federal Court or any superior, county or district court, except where the context otherwise requires.

2. Les définitions qui suivent s'appliquent à la présente loi.

« Code» Le *Code d'arbitrage commercial* -- figurant à l'annexe -- fondé sur la loi type adoptée par la

Commission des Nations Unies pour le droit commercial international le 21 juin 1985.

[...]

Code en vigueur

5. (1) Sous réserve des autres dispositions du présent article, le Code a force de loi au Canada.

5(3) Applicabilité

(3) Le Code s'applique aux sentences arbitrales rendues et aux conventions d'arbitrage conclues avant ou après l'entrée en vigueur de la présente loi.

5(4) Précision

(4) Il est entendu que le terme « arbitrage commercial », à l'article 1-1 du Code, vise :

a) les plaintes prévues aux articles 1116 et 1117 de l'Accord au sens du paragraphe 2(1) de la Loi de mise en oeuvre de l'Accord de libre-échange nord-américain;

L.R. (1985), ch. 17 (2e suppl.), art. 5, ch. 1 (4e suppl.), art. 9; 1993, ch. 44, art. 50; 1997, ch. 14, art. 32.

TRIBUNAUX

6 Définition de «tribunal» ou «tribunal compétent»

6. Dans le Code, «tribunal» ou «tribunal compétent» s'entend, sauf indication contraire du contexte, de la Cour fédérale ou de toute cour supérieure, de district ou de comté.

Commercial Arbitration Code

The relevant sections of the *Commercial Arbitration Code* are Articles 1, 5, 6 and 34, as follows:

SCHEDULE
(Section 2)
COMMERCIAL ARBITRATION CODE

(Based on the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on June 21, 1985)

Article 1
Scope of Application

(1) This Code applies to commercial arbitration, subject to any agreement in force between Canada and any other State or States.
(2) The provisions of this Code, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in Canada.
(3) This Code shall not affect any other law of Parliament by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Code.

Article 5
Extent of Court Intervention

In matters governed by this Code, no court shall intervene except where so provided in this Code.

Article 6
Court or Other Authority for Certain Functions of Arbitration Assistance and Supervision

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by the Federal Court or any superior, county or district court.

ANNEXE
(article 2)
CODE D'ARBITRAGE COMMERCIAL

(fondé sur la loi type adoptée par la Commission des Nations Unies pour le droit commercial international le 21 juin 1985)

Article premier
Champ d'application

1. Le présent code s'applique à l'arbitrage commercial; il ne porte atteinte à aucun accord multilatéral ou bilatéral en vigueur au Canada.
2. Les dispositions du présent code, à l'exception des articles 8, 9, 35 et 36, ne s'appliquent que si le lieu de l'arbitrage est situé au Canada.
3. Le présent code ne porte atteinte à aucune autre loi fédérale en vertu de laquelle certains différends ne peuvent être soumis à l'arbitrage ou ne peuvent l'être qu'en application de dispositions autres que celles du présent code.

Article 5.
Domaine de l'intervention des tribunaux

Pour toutes les questions régies par le présent code, les tribunaux ne peuvent intervenir que dans les cas où celui-ci le prévoit.

Article 6.
Tribunal ou autre autorité chargé de certaines fonctions d'assistance et de contrôle dans le cadre de l'arbitrage

Les fonctions mentionnées aux articles 11-3, 11-4, 13-3, 14, 16-3 et 34-2 sont confiées à la Cour fédérale ou à une cour supérieure, de comté ou de district.

Article 34
Application for Setting Aside as Exclusive Recourse against Arbitral Award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Canada; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Code from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Code; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Canada; or

Article 34.
La demande d'annulation comme recours exclusif contre la sentence arbitrale

1. Le recours formé devant un tribunal contre une sentence arbitrale ne peut prendre la forme que d'une demande d'annulation conformément aux paragraphes 2 et 3 du présent article.
2. La sentence arbitrale ne peut être annulée par le tribunal visé à l'article 6 que si, selon le cas :

a) la partie en faisant la demande apporte la preuve :

i) soit qu'une partie à la convention d'arbitrage visée à l'article 7 était frappée d'une incapacité; ou que ladite convention n'est pas valable en vertu de la loi à laquelle les parties l'ont subordonnée ou, à défaut d'une indication à cet égard, en vertu de la loi du Canada;

ii) soit qu'elle n'a pas été dûment informée de la nomination d'un arbitre ou de la procédure arbitrale, ou qu'il lui a été impossible pour une autre raison de faire valoir ses droits;

iii) soit que la sentence porte sur un différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire, ou qu'elle contient des décisions qui dépassent les termes du compromis ou de la clause compromissoire, étant entendu toutefois que, si les dispositions de la sentence qui ont trait à des questions soumises à l'arbitrage peuvent être dissociées de celles qui ont trait à des questions non soumises à l'arbitrage, seule la partie de la sentence contenant des décisions sur les questions non soumises à l'arbitrage pourra être annulée;

iv) soit que la constitution du tribunal arbitral, ou la procédure arbitrale, n'a pas été conforme à la convention des parties, à condition que cette convention ne soit pas contraire à une disposition de la présente loi à laquelle les parties ne peuvent déroger, ou, à défaut d'une

(ii) the award is in conflict with the public policy of Canada.

telle convention, qu'elle n'a pas été conforme à la présente loi;

b) le tribunal constate :

i) soit que l'objet du différend n'est pas susceptible d'être réglé par arbitrage conformément à la loi du Canada;

ii) soit que la sentence est contraire à l'ordre public du Canada.

NAFTA

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

(b) promote conditions of fair competition in the free trade area;

(c) increase substantially investment opportunities in the territories of the Parties;

(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Article 201: Definitions of General Application

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

INVESTMENT, SERVICES AND RELATED MATTERS

Chapter Eleven: Investment

Section A - Investment

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.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

> (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
>
> (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

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.

Section B - Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach. (Emphasis added)

Article 1136: Finality and Enforcement of an Award

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.

5. If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the Party abide by or comply with the final award.

6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the InterAmerican Convention regardless of whether proceedings have been taken under paragraph 5.

7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the InterAmerican Convention.

Section C - Definitions

Article 1139: Definitions

For purposes of this Chapter:

[...]

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

[...]

investment means:

(a) **an enterprise**;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(ii) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(iii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

(Emphasis added.)

Chapter Twelve: Cross-Border Trade in Services

Article 1201: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to cross-border trade in services by service providers of another Party, including measures respecting:

[...]

Article 1213: Definitions

[...]

cross-border provision of a service or **cross-border trade in services** means the provision of a service:

(a) from the territory of a Party into the territory of another Party,

(b) in the territory of a Party by a person of that Party to a person of another Party, or

(c) by a national of a Party in the territory of another Party,

but does not include the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment Definitions), in that territory;

UNCITRAL Arbitration Rules

PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 21

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

Vienna Convention on the Law of Treaties

SECTION 3. INTERPRETATION OF TREATIES

ARTICLE 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[...]

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-225-01 and T-81-03
STYLE OF CAUSE:	Attorney General of Canada and S.D. Myers Inc. and others
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 1, 2, and 3, 2003
REASONS FOR ORDER:	The Honourable Mr. Justice Kelen
DATED:	January 13, 2004

APPEARANCES:

Mr. Brian Evernden Ms. Sylvie Tabet	for the Applicant
Mr. John B. Laskin Mr. John A. Terry Mr. Barry Appleton Mr. Robert Wisner	for the Respondent
Mr. Christopher Thomas, Q.C. Mr. J. Cameron Mowatt	for the Intervener

SOLICITORS OF RECORD:

Morris Rosenberg Deputy Attorney General of Canada Ottawa, Ontario	for the Applicant
Torys LLP Toronto, Ontario	for the Respondent
Appleton & Associates Toronto, Ontario	for the Respondent
Thomas and Partners Vancouver, British Columbia	for the Intervener

Federal Court

CANADA

Cour fédérale

Date: 20040113

Docket: T-225-01
T-81-03

OTTAWA, Ontario, this 13th day of January, 2004

Present: THE HONOURABLE MR. JUSTICE KELEN

BETWEEN:

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C. 17 (2nd SUPP.)

IN THE MATTER OF ARTICLES 1, 6 AND 34 OF THE *COMMERCIAL ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL ARBITRATION ACT*

AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE *NORTH AMERICAN FREE TRADE AGREEMENT* ("NAFTA") BETWEEN S.D MYERS, INC. AND THE GOVERNMENT OF CANADA

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

S.D. MYERS, INC.

Respondent

- and -

THE UNITED MEXICAN STATES ("MEXICO")

Intervener

ORDER

UPON AN APPLICATION for judicial review pursuant Article 34 of the *Commercial Arbitration Code*, a schedule to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), to set aside decisions dated November 13, 2000 ("liability award"), October 21, 2002 ("damages

award") and December 30, 2003 ("costs award") made by an Arbitral Tribunal established pursuant to the *North American Free Trade Agreement* ("NAFTA");

AND UPON reading the material filed and hearing submissions from the parties;

AND for the reasons for order issued today;

THIS COURT ORDERS THAT:

This application for judicial review is dismissed with costs.

"Michael A. Kelen"
JUDGE