BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

S.D. MYERS, INC.

V.

THE GOVERNMENT OF CANADA

SUBMISSION OF THE UNITED MEXICAN STATES

S.D. MYERS, INC. V. THE GOVERNMENT OF CANADA

Submission of the United Mexican States

A. Introduction

1. This submission, pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), is filed as directed by the Tribunal on October 28, 1999. The United Mexican States (Mexico) respectfully reserves the right to make further submissions after hearing the evidence and arguments of the parties.

2. Mexico has an interest in this Tribunal's interpretation of the NAFTA. This is only the third claim to proceed to a hearing on the merits[1]. Although this Tribunal's findings on questions of interpretation will not be binding in subsequent cases, they will be of guidance to future tribunals considering similar issues and to prospective claimants in deciding whether to bring claims against a Party under Chapter Eleven.

3. Would-be claimants will look to the facts of this case and the reasoning of the Tribunal in deciding whether, by comparison or analogy, their own dealings with the governments of the NAFTA Parties could give rise to state responsibility for any alleged losses. An overly expansive interpretation of Chapter Eleven could trigger claims for compensation in circumstances that were not contemplated or intended by the Parties when they agreed to extend a direct right of action to each others' investors.

4. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Mexico's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

5. Mexico does not take a position on any particular issues of fact in this case. However, as the questions of interpretation that Mexico seeks to address arise on certain facts, this submission will refer to the facts which appear to be undisputed or clear on the evidence. In particular, Mexico considers the following points to be salient to certain questions of interpretation:

- In fact and in law, S. D. Myers (Canada), Inc. (Myers-Canada) is owned by the four Myers brothers, not by the Claimant, S.D. Myers, Inc. (Myers-USA);

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1. Two cases have proceeded to a hearing on the merits – an award on the merits in favor of Mexico was rendered in Azinian and others v. The United Mexican States; an award on the merits is pending in Metalclad Corporation v. The United Mexican States.

- In fact and in law, Myers-Canada is controlled by the four Myers brothers, or by Dana S. Myers, not Myers-USA;

- Myers-USA's claim is for loss of profits that it says it would have earned, together with Myers-Canada, in providing PCB waste disposal services that (with the possible exception of certain sales and facilitation services) would have been performed at facilities in the United States by Myers-USA (or by other U.S. service providers contracted by Myers-USA) for prospective customers in Canada.

- The measure complained of (the *Interim Order*) was in force from November 20, 1995 to February 4, 1997, a period of fourteen and a half months. The United States again closed its border to imports of PCB waste from Canada on July 20, 1997, about five and a half months after the *Interim Order* ceased having legal effect.

B. The Proper Interpretation of the Claimant's Status as an "Investor of a Party"

6. Section B of Chapter Eleven provides that an "investor of a Party" may seek compensation for loss or damage that it has suffered (and for loss or damage to an enterprise that it owns or controls, directly or indirectly) arising out of a breach of Section A of Chapter Eleven[2]. An "investor of a Party" includes a national of a Party and an enterprise of a Party "that... has made an a investment". "Investment" includes an "equity security of an enterprise" and "a loan to an enterprise where the enterprise is an affiliate of the investor"[3].

7. Article 201's definition of "enterprise" includes a "joint venture or other association". Neither term is defined. However, Article 1117 makes it clear that a claim can only be for loss or damage suffered by an enterprise that a claimant "owns or controls, directly or indirectly".

8. In the instant case, it appears that the Claimant does not own or control Myers-Canada. However, it alleges other investment interests such as a "loan to an affiliate" and an interest in a "joint venture" which it uses as the basis to assert a claim for the entirety of the profits that it alleges were lost due to its inability to provide PCB waste disposal services, in the United States, to prospective customers in Canada.

9. In Mexico's submission, it will be crucial for the Tribunal to ascertain the nature and extent of the Claimant's investment in Canada (if any) before it can address the following questions:

- whether the Claimant and/or its investment in Canada (if any) were denied treatment no less favorable to that accorded to domestic investors "in like circumstances", contrary to Article 1102;

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2. See Article 1116: Claim by an Investor of a Party on Its Own Behalf and Article 1117: Claim By an Investor of a Party of Behalf of an Enterprise.

3. See Article 1139: Definitions.

- whether the Claimant or its investment (if any) in Canada were denied treatment in accordance with international law, contrary to Article 1105;

- whether Canada's ban on the export of PCB waste to the United States for a period of fourteen and a half months pursuant to the *Interim Order* was a measure "tantamount to expropriation" of the Claimant's investment in Canada (if any), contrary to Article 1110; and

- if Canada breached one or more of the foregoing obligations under Section A of Chapter Eleven, whether the Claimant has suffered loss or damage in connection with its investment and whether it has standing to assert a claim for any loss suffered by Myers-Canada.

10. The following examples illustrate the importance of properly characterizing the nature and extent of the Claimant's investment (if any) in Canada:

- if, as the Claimant alleges, Myers-Canada is an investment of the Claimant and if the intended economic activity of Myers-Canada was to act as the agent of Myers-USA in procuring sales of PCB waste disposal services to be performed by Myers-USA in the United States, did the *Interim Order* violate Article 1102 if it equally prevented Canadian investors from engaging in the same economic activity?

- if, as the Claimant alleges, Myers-Canada is an investment of Myers-USA, and if, as Canada alleges, Myers-Canada had engaged in or sought to engage in other economic activities, such as the intended licensing in Canada of PCB disposal technology owned by Myers-USA or the establishment of its own PCB disposal facilities in Canada, did the *Interim Order* amount to a permanent, complete, or even substantial taking of Myers-USA's investment in Canada?

- if the Claimant's investment is restricted to a "loan to an affiliate" within the meaning of Article 1139 (its financial expectation being repayment of the loan with interest), is Myers-USA entitled to compensation for the alleged loss of profits of the affiliate arising from the alleged breach? Or for its own expectation of profits that it would have earned as a result of economic activity (i.e. disposal of PCB wastes) that it might have carried on in the United States?

C. The Proper Interpretation of the Parties' Obligations Under Section A of Chapter Eleven

1. Article 1101: Scope and Application

a. The Architecture of the NAFTA

11. In addition to regulating trade in goods issues, the NAFTA contains disciplines on other trade measures, including government procurement, cross-border trade in services, financial services, temporary entry of business personnel, trade-related-intellectual property, and review of

antidumping and countervailing duty cases. The investment chapter falls within a broader context of trade disciplines.

12. The NAFTA employs a drafting convention. Each chapter is devoted exclusively to a particular subject and employs defined terms that are used throughout the agreement, as well as defined terms that apply only to that chapter. There is also a common drafting style and relatively consistent usage of common undefined terms in each chapter.

13. Dispute settlement under the NAFTA takes three forms. First, any question involving the application or interpretation of the agreement can be submitted by a Party to a dispute settlement panel established under Chapter Twenty. This is "state-to-state" dispute resolution and cannot be invoked by private parties. Second, a private party directly affected by a final determination under a Party's antidumping or countervailing duty laws may seek review of the final order by a binational panel established under Chapter Nineteen. Finally, a private party that fulfills the requirements of Section B of Chapter Eleven may submit a claim to arbitration for loss or damage arising out of an alleged breach of a Party's obligations under Section A of Chapter Eleven.

14. Chapter Eleven does not create a right of action for loss or damage arising in connection with a Party's alleged breach of NAFTA obligations contained in chapters other than Chapter Eleven[4]. Private investors have not been given the right to enforce rights and obligations contained in the rest of the agreement. Those rights and obligations are subject to dispute resolution as between the NAFTA Parties pursuant to Chapter Twenty, or as between the Parties and private litigants in the special case of Chapter Nineteen binational panel review.

b. Requirement for Measures "Relating To" Investment in the Territory of the Disputing Party

15. Mexico concurs generally in the submissions made in paragraphs 204 to 213 of Canada's Counter-memorial. The language "measures adopted or maintained by a Party relating to investors of another Party [and] investments of investors of another Party within the territory of a Party" used in Article 1101 indicates two things:

- In contra-distinction to language used elsewhere in the NAFTA (such as Articles 709 and 901 which apply to measures "that may, directly or indirectly affect trade...") the phrasing indicates that the Parties did not intend to subject any and all governmental measures that might incidentally or indirectly affect an investor or investment of an investor of another Party to investor-state arbitration[5]. There must be a sufficient nexus between the measure and the subject matter of investment in order to constitute an "investment dispute" within the meaning of Article 1115 .

- The measure must relate to the investment of an investor of another party within the territory of the host Party. Accordingly, Chapter Eleven applies only to the

4. With the narrow exception of an alleged breach of certain provisions of Chapter Fifteen. See Article 1116.

5. Note by way of comparison the use of the words "relating to" in the "scope and coverage provisions" of Article 701, Article 1001, Article 1101, Article 1201, Article 1301, and Article 1401.

extent that such measures relate to the investment in the territory of the host Party, not measures which can be said to relate to the economic activities of the investor or its investment beyond the borders of the host Party.

16. In the instant case, the impugned measure (a temporary ban against the export of PCB waste to the United States) is on its face a trade in goods measure falling within the scope and coverage of NAFTA Chapter Three. It does not appear to pertain to or purport to govern investment in any aspect of the PCB waste disposal business in Canada or the management, conduct, operation or sale of such investments.

17. If the *Interim Order* was considered by the United States to be inconsistent with Canada's obligations under Chapter Three, it was open to the United States to seek dispute settlement under Chapter Twenty.

18. The Claimant alleges that the true purpose of the *Interim Order* was to prevent Myers-USA (and perhaps other U.S. enterprises) from providing PCB disposal services in the United States in order to protect domestic PCB waste disposal service providers from foreign competition. In such case the measure might be construed as "relating to cross-border trade in services" under Chapter Twelve.

19. If the *Interim Order* was considered by the United States to be inconsistent with Canada's obligations under Chapter Twelve, it was open to the United States to seek dispute settlement under Chapter Twenty.

20. The definition of "cross-border trade in services" expressly excludes "the provision of a service in the territory of a Party by an investment, as defined in Article 1139 (Investment - Definitions), in that territory". Accordingly, if the primary business activity of Myers-Canada was to act as an agent or facilitator for the provision of PCB waste disposal services by Myers-USA (or any other US-based operator), it can be seen Chapter Eleven applies only to the extent that the measure complained of could "relate to" Myers-Canada in that capacity. It does not give rise to any obligation in connection with services that Myers-USA sought to provide in the United States to prospective customers possessing PCB waste in Canada.

21. Mexico observes that the claim arises from the interaction of the United States PCB import regime with Canada's PCB export regime. It appears to Mexico to be anomalous that damages could be sought against one NAFTA Party for the foreclosure of a market segment that was subsequently closed off by the other NAFTA Party[6]. This underscores the point made above; the gravamen of the complaint seems to be against the interaction of two trade regulatory actions rather than being an investment dispute within the meaning of Article 1115.

2. Article 1102 – National Treatment

22. Mexico concurs generally in the submissions made in paragraphs 255 to 285 of Canada's Counter-memorial.

6. The Claimant has a right to commence a Chapter Eleven claim against its own government.

23. Mexico submits that, upon a proper interpretation of Article 1102, if the *Interim Order* is a measure relating to investment at all, it is not one which failed to accord investors of another Party or their investments the same treatment that Canada accorded to its own investors at the material time. Nothing in the measure complained of restricted the Claimant from investing in Canada and Myers-Canada was not restricted from pursuing business activities that domestic investors were not similarly restricted from pursuing. The *Interim Order* prevented all investors in Canada, domestic and foreign, from exporting PCB waste to the United States for the fourteen and a half months that it was in effect.

24. Mexico concurs in Canada's view that "in like circumstances" requires a comparison of treatment accorded to domestic investors and investors of the other Parties who are engaged in (or seek to engage in) business activities that are substantially the same, not a loose "sectoral" comparison as the Claimant urges.

25. On the facts of this case it is appropriate to compare Canada's alleged treatment of the Claimant with the treatment accorded to Canadian investors who seek to engage in the "like" business activity (i.e. the sale or facilitation of PCB disposal services), not the effect of the impugned measure on Canadian-based PCB waste disposal firms that operate PCB disposal facilities in Canada as compared to its effect on the PCB waste disposal firms based in the U.S. that seek to import PCB's from Canada for disposal at their facilities in the U.S.

3. Article 1105 – Minimum Standard of Treatment

26. Mexico generally concurs in the submissions made in paragraphs 286 to 302 of Canada's Counter-memorial and paragraphs 77 to 90 of Canada's Supplementary Memorial.

27. The minimum standard of treatment incorporated in Article 1105 is treatment "in accordance with international law". This standard of treatment can be divided into two express components— fair and equitable treatment and full protection and security—and one residual component—other standards of treatment mandated by international law.

28. In Mexico's submission, Article 1105 does not expand the standard of treatment recognized in customary international law. Rather, it is a minimum standard that reflects the expectation in international law that governments will act in good faith and will not subject foreign investors to abusive or discriminatory treatment, nor fail to accord them full protection and security. (The Parties' obligations in respect of non-discrimination are prescribed by Article 1102: National Treatment.)

29. The minimum standard of treatment article does not authorize a claimant to challenge decisions of public policy that may affect it adversely. The article is intended to ensure that the basic guarantees of investment protection are extended to investors and investments.

30. Similarly, tribunals established under Chapter Eleven are not vested with the jurisdiction to "second guess" the validity or propriety of governmental decisions on complex social, economic, legal or scientific issues. Article 1105 does not vest tribunals with a jurisdiction akin to that of judicial review by the domestic courts.

31. If the Parties had been intended that Chapter Eleven tribunal could engage in a review of a minister's assessment as to whether a measure was, for example, necessary to comply with an

international obligation such as the Basel Convention, clear language to that effect would have been employed.

32. Chapter Nineteen —Review and Dispute Settlement in Antidumping and Countervailing Duty Matters— contains such language. It provides for the establishment of binational panels to review final determinations of the relevant government authorities[7]. It also describes the standard of review[8] and provides for the establishment of a roster of panelists knowledgeable of international trade law[9]. Finally, it provides for the establishment of an extraordinary challenge committee comprised of judges (or retired judges) of the superior courts of the Parties to deal with allegations of misconduct by panelists and panels acting in excess of their jurisdiction by, for example, failing to apply the appropriate standard of review[10].

33. The absence of similar provisions in Chapter Eleven is telling of the Parties' intentions as to the scope of inquiry that a Chapter Eleven tribunal would engage in when applying the "minimum standard of treatment" provisions of Article 1105.

34. Mexico submits that NAFTA tribunals must exercise caution when deciding whether a regulatory measure taken by a NAFTA Party could amount to denial of treatment in accordance with international law. Regulatory measures that affect the economic activities of domestic and foreign investors, positively and negatively, are promulgated daily by the three national governments, and the 95 state or provincial governments, respectively that, between them, are responsible for governance in North America.

35. The actions of officials and ministers who have a duty to legislate or regulate in respect of human health and safety or protection of the environment should not be measured according to an exacting standard that does not exist in Article 1105. Rather, a finding that an investor of another Party or its investment has been denied treatment in accordance with international law should be made only in egregious cases, in the face of clear and convincing evidence that the investor (or its investment) was targeted by a measure that was, for example, "arbitrary" as that concept is understood in international law[11].

4. Article 1110: Expropriation and Compensation

36. Mexico generally concurs in the submissions made in paragraphs 399 to 442 of Canada's Counter-memorial and paragraphs 93 to 92 of Canada's Supplementary Memorial.

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7. See Article 1904: Review of Final Antidumping and Countervailing Duty Determinations.

8. See Article 1904 (3) and Annex 1911 which prescribes the standard of review to be employed in the case of each Party. The standard applicable in each case is derived from the national law of the Party whose final order is being reviewed.

9. See Annex 1901.2 – Establishment of Binational Panels. It provides that the roster of panelists shall include judges and former judges to the fullest extent possible and that "candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law". It also stipulates that a majority of the panelists on each panel shall be lawyers in good standing.

10. See Article 1904 (13) and Annex1904.3

11. See *Case Concerning Elettronica Sicula S.P.A. (ELSI)*, 1989 I.C.J. 15. See also *Azinian and others v. the United Mexican States*, cited and discussed in Canada's Supplementary Memorial at paragraphs 81-90.

37. The Claimant alleges that the *Interim Order* was "a measure tantamount to expropriation" within the meaning of Article 1110. No claim of direct or indirect expropriation is advanced.

38. Article 1110 is informed by the rest of the NAFTA, including Article 1114, which permits a Party to adopt, maintain, or enforce any measure otherwise consistent with Chapter Eleven that it considers appropriate to ensure that any investment activity in its territory is undertaken "in a manner sensitive to environmental concerns". The term "environmental concerns" is undefined and is subjective (note the self-determining nature of the power recognized by the words "that it considers appropriate").

a. The Meaning of "Tantamount to" Expropriation

39. The dictionary meaning of the word "tantamount" is "equivalent". The equally authentic Spanish and French versions of the NAFTA use the word "equivalent" (see Article 2206). Mexico submits that for a NAFTA tribunal to find that a measure is tantamount to expropriation, that measure must be equivalent to expropriation in all material respects.

40. Although the word 'tantamount' has not received much discussion, the concept appears to date back to a recommendation from the New York City Bar Association to the U.S. Senate Committee on Foreign Relations where it was suggested that there should be a definition of a taking that would include "...measures which, though falling just short of the seizure of the full title to the property, effectively deprive its owner of the use and enjoyment thereof, for example, the appointment of a custodian"[12]. [Emphasis added]

41. Mexico notes that vested property rights are contemplated and that the deprivation effected by such a measure is total —all economic use and enjoyment of the property is taken, not just an optimal economic use, and the taking is permanent.

42. The commonly accepted elements of an expropriation are not apparent from the factual record of this proceeding. There appears to be no evidence of a substantial permanent interference with, or taking of, any investment. The measure complained of affected the range of available business opportunities.

b. The Applicability of the Jurisprudence of the Iran-U.S. Claims Tribunal

43. The Claimant relies on awards rendered by the Iran-U.S. Claims Tribunal. In contrast to a NAFTA tribunal's jurisdiction, the Iran-U.S. Claims Tribunal had a broader jurisdiction to consider "expropriation or other measures affecting property rights"[13].

44. Some of that tribunal's awards have found that deprivation of property rights constituted "a lesser form of interference" than expropriation. The cases of *Eastman Kodak Company*[14] and

12. Hearings Before the Senate Committee on Foreign Relations on Executives E, G, and H, 84th Cong., 2nd Sess., 15 (1956).

13. Article II, paragraph 1 of the Claims Settlement Declaration.

14. *Eastman Kodak Company, et al. v. The Government of Iran, et al.*, 17 Iran-U.S. C.T.R. 153 and 27 Iran-U.S. C.T.R. 3.

Foremost Tehran[15], for example, found a deprivation based on "measures affecting property, although the level of interference established did not rise to the level of a taking"[16]. Although the claims advanced were expropriation claims, two Chambers decided they could consider a claim of deprivation because "a claim for expropriation must be taken to include a claim for a lesser degree of interference with its rights"[17]. Similarly, in *Seismograph Service Corporation*, the tribunal found that a deprivation of use, benefit and control of property was compensable under the Claims Settlement Declaration, not as an expropriation, but rather as a deprivation[18].

45. Other Chambers of the Iran-U.S. Claims Tribunal tended to simply equate "deprivation" with "expropriation". The Claimant relies upon this latter approach, one which has been the subject of some controversy. For example, Sonarajah cautioned:

> "The awards of the Iran-U.S. Claims Tribunal have been a fruitful recent source for the identification of such takings ["indirect takings", or "disguised" or "creeping" expropriation]. But the Iran-U.S. Claims Tribunal dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events that attended the Iranian upheaval following the overthrow of the Shah of Iran. Also, one has to be cautious in the making of any generalization on the basis of dicta in the awards of this tribunal as its constituent documents gave the tribunal power to deal not only with direct takings of physical assets but 'all measures affecting property rights'. It is clear that such a wide definition of taking will not be acceptable in international law for the simple reason that many normal activities of states, such as taxation, affect property rights and cannot be expected to give rise to international concern[19]." [Emphasis added]

46. In Mexico's view, a NAFTA tribunal's jurisdiction is narrower than that of the Iran-U.S. Claims Tribunal and caution should be exercised in applying that tribunal's reasoning in the NAFTA context.

c. International Law Recognizes the State's Right to Regulate

47. International law has always recognized a state's right to regulate.

48. B.H. Weston, "'Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation'"[20] states that it:

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15. *Foremost Tehran Inc. et al, v. The Government of the Islamic Republic of Iran,* 10 Iran-U.S. C.T.R. 229, 240.

16. In *Foremost*, the Tribunal found that to was open to find that the acts of governmental shareholders against Foremost's right to receive dividends constituted interference "attributable to the Iranian Government or other State organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question". [At page 251.]

17. *Foremost Tehran Inc. et al, v. The Government of the Islamic Republic of Iran,* 10 Iran-U.S. C.T.R. 229, 240.

18. *Seismograph Service Corporation v. The Government of the Islamic Republic of Iran*, 22 Iran-U.S. C.T.R.3.

19. M. Sonarajah, *The International Law on Foreign Investment*, (1994), at pp. 282-283.

20. (1975), 16 Va. J. Int'l. L. 103, at page 121.

"...is serious business to dispute a state's claim to "regulation". International law traditionally has granted states broad competence in the definition and management of their economies."

49. In an article in the British Yearbook of International Law, entitled, "What Constitutes a Taking of Property Under International Law"[21], G.C. Christie stated:

> "A state's declaration that a particular interference with an alien's enjoyment of his property is justified by the so-called "police power" does not preclude an international tribunal from making an independent determination of this issue. But, if the reasons given are valid and bear some plausible relationship to the action taken, no attempt may be made to search deeper to see whether the state was activated by some illicit motive." [Emphasis added]

50. Rosalyn Higgins in her article, "The Taking of Property by the State: Recent Developments in International Law"[22], states that as a general proposition no compensation will be payable for general regulatory measures, even measures that decrease the value of property provided the right to use, enjoy, manage and control property are left substantially intact.

51. In the instant case, the *Interim Order* does not appear to have rendered Myers-Canada barren of any reasonable economic use. Nor, for that matter, does it appear to have caused "interference", of a permanent nature, with an economic activity that Myers-Canada would otherwise have been entitled to engage in. It prevented, for a period of fourteen and a half months, Myers-Canada and any other enterprise (domestic or foreign) from commercially exploiting a twenty month period during which PCB waste exports to the United States were permissible under U.S. law.

52. A finding that the *Interim Order* amounted to a measure tantamount to expropriation of Myers-Canada would be unprecedented, both in international law, and in the domestic law of the NAFTA Parties. The Parties did not intend that regulatory measures merely having an effect on the activities of the investors of the other Parties would be construed as "tantamount to expropriation" of investments.

D. Questions of Interpretation Affecting The Proper Scope of Compensation Under Chapter Eleven

53. Mexico is mindful that the hearing is bifurcated such that the question of compensation will be addressed only in the event of a finding that Canada breached an obligation under Section A of Chapter Eleven. However, Mexico submits that the Tribunal should be aware of certain issues affecting the question of compensation when considering the nature and extent of the Claimant's investment (if any) in Canada, according to the applicable definitions set out in Article 1139 and Article 201.

54. The Claimant seems to contend that if it can show that it had any form of "investment" in Canada, then it should be able to claim all of the profits that it anticipated earning (together with

21. (1988), 33 B.Y.I.L. 307, at page 338.

22. Rosalyn Higgins, (1982) 176 Receuil des Cours 259 at p. 271.

Myers-Canada) in the provision of PCB disposal services, in the United States, for the useful economic lifetime of the intended business venture.

55. Mexico submits that the loss or damage suffered by an investor or its investment must depend on the nature and extent of the investment made in the territory of the host country.

56. Thus, if the investment consists only of a "loan to an affiliate", the only compensable loss would be the outstanding amount of the loan (and interest accrued thereon) that would have been recovered but for the impugned measure.

57. Similarly, if the investment was in an enterprise comprising a "joint venture" in Canada to solicit customers for the Claimant's PCB waste disposal business in the United States, the only compensable loss that would be the investor's share of profits that would have been earned in Canada but for the impugned measure. In such case the only anticipated profit lost in connection with a lost business opportunity in Canada would be profit associated with acting as agent and or facilitator of Myers-USA's waste disposal services in the United States which, in the case of a joint venture, would have to be divided with the Claimant's co-venturer (Myers-Canada), according to the terms of the joint venture agreement between them[23].

58. Finally, it may be necessary for the Tribunal to determine the actual effect (if any) of the impugned measure on the Claimant's alleged loss of business opportunity. Given that the United States closed its borders to further imports of PCB waste twenty months after the U.S. Environmental Protection Agency issued an "enforcement discretion" allowing the Claimant to import PCB waste from Canada, it does not seem open to contend that the *Interim Order* deprived the Claimant of a long term opportunity.

All of Which is Respectfully Submitted:

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14 January 2000

23. As the taxation laws of Canada and the United States would require the joint venture participants to attribute and separately report the profits earned in each country, the Claimant is not a position to contend that the joint venture would have accrued all of the profits in Canada, including the profit derived from the use of its commercial PCB disposal facilities and related activities in the United States.