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A First Look at the Interim Merits Award in *S.D. Myers, Inc. v. Canada*: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection

BY TODD WEILER*

In the last issue of this journal, Joseph de Pencier provided a very interesting paper on investment protection, environmental protection, and investor-state arbitration under the NAFTA, focusing on his experience as counsel for Canada in *S.D. Myers, Inc. v. Canada (Myers)*.¹ I have written a reply, based upon my experience as counsel for the investor in *Myers* and similar cases. This Article provides a critical commentary on various elements of Mr. de Pencier's paper that deal with the *Myers* claim, having the benefit of being drafted in the wake of an interim award issued by the *Myers* tribunal on November 12, 2000. With its award, the *Myers* tribunal found that Canada violated two substantive provisions of the NAFTA

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1. Joseph de Pencier, *Investment, Environment and Dispute Settlement: Arbitration Under NAFTA Chapter Eleven*, 23 HASTINGS INT'L & COMP. L. REV. 409 (2000).

and owed compensation to Myers as a result.² The paper concludes by providing some tentative suggestions as to how the substantive provisions of NAFTA Chapter 11 might be interpreted in order to ensure that a balance is maintained in future cases where the objectives of investment protection and environmental protection appear to be at odds.

I. Environmental Protection Versus Investment Protection: Not Always a Valid Dichotomy

The first, and probably most important, conclusion that can be drawn from the four NAFTA claims that have resulted in merits awards to date (two final and two partial), is that there has yet to be a true test of the alleged dichotomy between protecting investment and protecting the environment. While three of the cases did involve environmentally sensitive waste treatment businesses, and the other case involved a lumber business, none of the claims turned on an environmental protection issue. This is not to say that people have not tried to use environmental policy to justify the treatment of the investors and investments in these cases—only that none of the tribunals hearing these claims found that environmental protection was at the heart of any of them.

The first case, *Azinian v. United Mexican States*,³ essentially involved a contract dispute between a Mexican municipality and a waste contractor from the United States. The tribunal essentially concluded that the investor had no case because it was unable to fulfil the terms of its contract, and that the municipality accordingly had every right, in international law, to end it. The second case, *Pope & Talbot, Inc. v. Canada*,⁴ which has so far resulted in a partial merits award denying the investor's claims under NAFTA Articles 1106 and 1110, involved the deleterious impact of an export control regime on U.S. lumber investments in Canada.⁵ The third case, *Metalclad Corp.*

2. S.D. Myers, Inc. v. Canada (U.S.-Can.), NAFTA/UNCITRAL Tribunal, (Nov. 13, 2000) [hereinafter *Myers*], available at <http://www.appletonlaw.com/cases/Myers%20-%20Final%20Merits%20Award.pdf>.

3. *Azinian v. Mexico*, NAFTA/ICSID Tribunal, No. ARB(AF)97/2 (1999), 14 ICSID REV. 538 (1999).

4. *Pope & Talbot, Inc. v. Canada*, Interim Award, NAFTA/UNCITRAL Tribunal (Jun. 26, 2000), reprinted in 23 HASTINGS INT'L & COMP. L. REV. 455 (2000) [hereinafter *Pope & Talbot*].

5. North American Free Trade Agreement, Dec. 17, 1993, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA]. The *Pope & Talbot* tribunal held a hearing

v. United Mexican States,⁶ involved the expropriation and unfair and inequitable treatment of the investment of a U.S. investor in the waste treatment business, including a last-minute “environmental decree” that would have rendered the business useless even if it had been able to overcome all other questionable attempts by state and local governments to prevent it from competing against local businesses. The final case, *Myers*,⁷ involved an overtly discriminatory course of government conduct aimed at preventing a U.S. investor and its investment from being able to compete in the Canadian market for destroying PCB wastes.

Of course, although none of these cases involved an actual conflict between investment and environmental values, there is nonetheless a serious risk that investors in other cases may attempt to use the provisions of NAFTA Chapter 11 to seek damages for the imposition of legitimate environmental measures that harm their businesses. The question is whether NAFTA tribunals have been provided with the tools necessary to deny unmeritorious claims for compensation arising from legitimate environmental measures, but nonetheless identify cases where environmental policy is being used as little more than a shield to obscure arbitrary or discriminatory treatment of a foreign investor. Before addressing this question, it might be useful to study the anatomy of a case where the provisions of NAFTA were properly applied to prevent environmental policy from being used to justify arbitrary and discriminatory conduct. For this task, we shall use the *Myers* claim.

The *Myers* claim involved a very dangerous (and hence a symbolically potent) hazardous substance: PCB waste. It would be understandable for a person to hear that an investment claim has been brought concerning PCB wastes and worry about the potential for investment and environmental conflict. However, *Myers* and its Canadian investment were not PCB waste producers. Moreover, they did not store PCB wastes (as thousands of Canadian businesses were doing in 1995, with no feasible domestic destruction options available

on the investor’s claims under NAFTA Articles 1102 and 1105 in November 2000. The export control regime was imposed by Canada in order to implement an agreement it had struck with the U.S. government to avoid the leveling of what are arguably WTO-inconsistent countervailing duties against softwood lumber being imported to the United States from Canada.

6. *Metalclad Corp. v. Mexico*, NAFTA/ICSID Tribunal, No. ARB(AF)/97/1 (Sept. 2, 2000) [hereinafter *Metalclad*].

7. *Myers*, *supra* note 2.

to them); and they certainly did not landfill PCB wastes.⁸ Rather, Myers was a leading U.S. PCB waste remediator that invested in Canada so that it could supply Canadian customers with the same exclusive PCB waste destruction system that it had been successfully offering to U.S. customers for years.⁹ Myers' final treatment facility was located in Ohio, thousands of miles closer to the vast majority of Canadian-held PCB wastes than its only large Canadian competitor, a former provincial-government-owned business with an incinerator located in Northern Alberta.

Myers offered Canadian waste holders the opportunity to destroy their wastes with a safe, secure and economically efficient method. Unsurprisingly, then, when Canadian environmental officials originally briefed their minister about the affordable alternative being presented by Myers, they made such arguments as:

—“[Destroying PCBs] in either country is positive for the environment and offers greater cost-effective choice of PCB destruction for PCB owners.”

—The export of PCB wastes to the United States for destruction is “consistent with the Canada-U.S.A. Agreement on the Transboundary Movement of Hazardous Wastes.”

—Alternatives to preventing Myers from being able to export PCB wastes to the United States for treatment and destruction include merely imposing sufficient insurance requirements on waste exporters, or allowing the increased competition to encourage new Canadian entrants into the market for PCB waste destruction.¹⁰

8. Although certainly not sufficient, it could be argued that landfilling in a secure site would have been safer than the “temporary” above-ground storage sites that had been cropping up by the thousand all over Ontario and Quebec because of a lack of options for permanent destruction in 1995, when Myers attempted to enter the Canadian market.

9. Myers' system involved the chemical dechlorination of PCB wastes such as old transformers, capacitors and ballasts, which resulted in the generation of thousands of tons of scrap metal that would otherwise have been buried, burned or left in storage until an affordable destruction option materialized.

10. These examples are drawn from briefing memoranda that were originally made public through a domestic court challenge brought by PCB waste holders against the Minister of the Environment for using the emergency provisions of Canada's environmental protection legislation in an illegal manner in order to bypass the normal regulatory amendment process that would not have allowed her to immediately foreclose on the Myers' option. For a more detailed account of these documents, see Todd Weiler, *Application of the Federal Regulatory Policy to Regulatory Decision-Making: The Curious Case of the 1995 PCB Waste Export Interim Order*, 4 CAN. J. ENVTL. L. & PRAC. 181 (1999).

Given these comments, why did Canada impose a ban on PCB waste exports, effectively foreclosing upon the ability of Myers and its investment to compete in the Canadian market? In its award, the *Myers* tribunal provided a rather succinct answer: “[T]he protectionist intent of the lead minister in this matter was reflected in decision-making at every stage that led to the [PCB waste export] ban.”¹¹ Canada’s environment minister, Sheila Copps, had been lobbied heavily by Myers’ Canadian competitors, using a lobbyist who had only months earlier been employed on her personal staff. These competitors had even secured a promise from the minister that if Myers ever received permission from the U.S. Environmental Protection Agency (EPA) to import PCBs from Canada for destruction, she would close the border immediately. These competitors regularly updated the minister and high level officials about Myers’ activities to open the border, including Myers’ attendance at various public hearings held by the EPA concerning the possibility of opening the border. Canadian officials certainly knew of the existence of these EPA hearings (the latest of which was held in the spring of 1995), but apparently never decided to make their own submissions to the EPA about the subject.

The *Myers* tribunal did not shy away from making the kind of findings that the damning official memoranda required. It concluded that “the documentary record as a whole clearly indicates that the [export ban was] intended primarily to protect the Canadian PCB disposal industry from U.S. competition” and that “Canada [had] produced no convincing witness testimony to rebut the thrust of the documentary evidence.”¹² This evidence even included a handwritten note between senior officials considering making an extraordinary request of their legal counsel to write directly to their minister advising her of the “serious legal problems” they had with her proposed course of conduct, in the hopes that “it might make it easier for the Minister of the Environment to accept contrary advice!”¹³

When faced with a clear set of marching orders from their minister, officials nonetheless attempted to explain to her the ramifications of her demands. For example, on October 30, 1995, the Director of the Hazardous Waste Branch in the Canadian

11. *Myers*, *supra* note 2, ¶ 162.

12. *Id.* ¶ 194.

13. *Id.* ¶ 180.

Department of the Environment wrote the following memorandum:

Possible Immediate Action the Minister Could Take re PCB Export

1. Obtain immediately an Interim Order under Section 35 of [the Canadian Environmental Protection Act (CEPA)] (go straight to Gazette I immediately with no public consultation).
2. Make a public statement that the U.S. has opened its borders to PCBs from Canada, that this is contrary to her longstanding position that Canadian PCBs should be destroyed in this country.

PROS: The Canadian environmental industry investment, i.e. Chem-Security is protected by a secure supply of PCBs for their facility in Swan Hills [Alberta].

CONS: Interim Orders are design [sic] to provide immediate action to resolve "significant danger" to the environment and/or human health. It can be argued that the opening of the U.S. border poses no such significant danger.

S.D. Myers will certainly seek redress through NAFTA intervention, since they have invested/lobbied greatly to get the border opened. The company can be expected to object formally to any action taken under CEPA to close the border.

It will be difficult to argue that the transportation of PCBs to the U.S.A. poses a greater danger than transporting PCBs to Swan Hills Alberta.

[The Canadian Departments of] Industry Canada and Foreign Affairs are likely to object to the closing of the Canadian border because it will appear to be an unjustifiable restriction on international trade.

Current practice of returning U.S.-owned PCBs in Canada to their originators in the U.S. will be jeopardized if the Canadian border is completely shut. An "escape hatch" will have to be provided.¹⁴

Later, the same official wrote an urgent memorandum—just five

14. Memorandum of George Cornwall, Director, Hazardous Waste Branch, Department of the Environment, Canada (Oct. 30, 1995) (on file with author).

days before Myers would have been able to start competing in Canada—in which he expressed his “crucial and problematic” concern that his staff was still unable “to come up with any persuasive rationale to cover ‘significant danger to the environment or to human health’” (the standard required under Canada’s environmental legislation to issue an emergency order to close the border).¹⁵ This does not sound like the mind of an official who was convinced that government action was urgently needed to protect the environment. In fact, the documentary evidence before the tribunal completely contradicted the Canadian argument, reflected in the de Pencier article,¹⁶ that urgent action was needed to ensure that the EPA’s decision (to allow Myers to import PCB wastes, and therefore compete in the Canadian waste treatment market) was not dangerous for the Canadian environment.

These official documents demonstrated that Canadian officials, far from being unaware that Myers had an investment in Canada, actually knew that Myers’ Canadian business would be severely damaged by their actions, and that Myers would likely use the NAFTA in response. They show that Canadian officials initially had little or no concern about how the EPA had given Myers its approval,¹⁷ and no concern that exporting PCB wastes to the United States might be inconsistent with Canada’s international environmental obligations.¹⁸ In the words of the tribunal, “[T]here was no legitimate environmental reason for introducing the ban. Insofar as there was an indirect environmental objective—to keep the Canadian industry strong in order to assure a continued disposal capacity—it could have been achieved by other measures.”¹⁹

15. Memorandum of George Cornwall, Director, Hazardous Waste Branch, Department of the Environment, Canada, to H. A. Clarke (Nov. 10, 1995) (on file with author).

16. de Pencier, *supra* note 1, at 412-16.

17. The EPA granted a time-limited “enforcement discretion” to Myers to import PCB wastes from Canada explicitly for destruction in their EPA-approved facilities. At the time, only Myers was granted such permission, in advance of a general rule that the EPA issued later the following year. It is interesting to note that the vast majority of all PCB wastes present in Canada were originally manufactured in the United States, and so this permission to import might well be seen as nothing more than a “repatriation” of these PCBs.

18. See *Myers*, *supra* note 2, ¶¶ 204-11.

19. *Id.* ¶ 195.

II. Article 1102: National Treatment

The *Myers* tribunal unanimously concluded that Canada's treatment of Myers and its investment in Canada violated NAFTA Article 1102, which requires NAFTA governments to accord treatment to NAFTA investors and investments that is *no less favorable* than that which it accords to their domestic investors and investments, providing that the treatment is accorded *in like circumstances*.²⁰ To reach this conclusion, the tribunal first determined whether Myers and its competitors should be accorded treatment in like circumstances. It did so by concluding that Myers and the companies that had successfully lobbied the minister to prevent it from exporting PCB wastes to the United States were obviously in direct competition with each other in the Canadian market for PCB waste destruction. Regardless of whether these businesses used identical destruction processes, or whether they utilized facilities only in Canada or in Canada and the United States, they were both active in the Canadian market, trying to convince PCB waste holders to do business with them and not the other.²¹ Accordingly, it was incumbent upon Canada to treat Myers no less favorably than it did its domestic competitors. Second, the tribunal decided that Canada had offered "less favorable treatment" to Myers because its export ban effectively prevented Myers from competing in the Canadian market.

It is submitted that this is exactly the kind of result that NAFTA Article 1102 was designed to address: providing compensation whenever a government measure upsets the natural, competitive equality that should exist between foreign and domestic investors and investments. NAFTA Article 1116 provides that a NAFTA investor

20. *Id.* ¶¶ 238-57.

21. Myers demonstrated its "investment" in the Canadian market in at least five ways: (1) it had an affiliate company in Canada; (2) to which it had made substantial loans; (3) with which it was working in common cause (i.e. a joint venture). Myers also demonstrated that the activities of its own employees and commitment of capital in Canada demonstrated that (4) it had a branch in Canada. Finally, Myers demonstrated that (5) it had acquired a dominant share of the Canadian market through extensive sales and marketing efforts prior to opening the border. The tribunal unanimously determined that Myers had an "investment" in Canada, under the extensive definition that exists in NAFTA, and accordingly did not find it necessary to make specific findings on how or whether each particular type of economic activity qualified as an investment in order for it to have standing under Article 1116 to bring a claim. It was satisfied that Myers' Canadian affiliate was controlled by Myers, through the person of Dana Myers, who was a one quarter owner and president of both companies. *Id.* ¶¶ 222-32.

can make a claim for the losses that *it* incurs as a result of a breach of provisions such as NAFTA Article 1102. Because Canada effectively stopped Myers and its investment in Canada from competing in the Canadian PCB waste treatment market for sixteen months (at a time when they would have held a dominant market position), the tribunal found that Canada was liable for paying compensation to Myers for all of its losses, so long as they could be directly traced to Canada's inappropriate behavior in relation to it or its investment.²² The tribunal found that such compensation was due simply because Canada had failed to prove that this case was really about environmental protection.

But what is there to prevent a different NAFTA investor from using Article 1102 to seek damages for "less favorable" treatment that results from the proper application of a legitimate environmental law? What if the "treatment" in question is less favorable because an environmental regulation prohibits the investor from using an environmentally dangerous manufacturing process that is not employed by its domestic competitors, but that would be very costly to change? The investor could argue that it is entitled to compensation because it operates in like circumstances with domestic competitors and is receiving less favorable treatment than they are receiving under the same regulation. It might even be able to provide some circumstantial evidence that regulators knew their measure would impact more harshly upon them, or foreigners as a group.

Under the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS), *prima facie* breaches of national treatment provisions similar to NAFTA Article 1102 can be excused through the application of general exemption provisions.²³ Even if the measure upsets the equality of competitive opportunities that should exist between foreign and domestic businesses, thus violating a national treatment obligation, government action could nonetheless be justified so long as it was "related" to the preservation of the environment or "necessary" to protect human, plant or animal health (and was not applied in an arbitrary or discriminatory manner). The NAFTA contains a general exemption provision, Article 2102, but it specifically provides that it does *not* apply to investment obligations, such as Article 1102. Chapter 11 only contains a hortatory environmental provision, Article 1114(1),

22. *Id.* ¶¶ 311-19.

23. *E.g.*, GATT art. XX; GATS art. XIV.

which permits NAFTA governments to impose measures they believe will ensure that investment activities are “undertaken in a manner sensitive to environmental concerns”²⁴ *only* if they are otherwise consistent with the obligations contained within Chapter 11. Similar hortatory statements about the need to promote “sustainable development” and to act in “a manner consistent with environmental protection and conservation”²⁵ can also be found in the NAFTA’s preamble, but hortatory statements cannot generally be used to override mandatory treaty obligations such as NAFTA Article 1102.

Nonetheless, the very fact that NAFTA Article 1102 has not been modified by an environmental exemption provision may provide sufficient reason as to why it should be interpreted in a slightly different manner than the GATT and GATS national treatment provisions. Successive NAFTA tribunals have declared that the NAFTA’s terms must be interpreted in good faith, in accordance with their ordinary meaning, in the context within which they appear, and in light of the objects and purposes of the treaty. While environmental protection is not listed among the objectives provided in NAFTA Article 102, the requirement that the NAFTA’s terms be interpreted in *good faith* may be of assistance. The principle of good faith is a fundamental element of international law,²⁶ and under Article 1131(1), tribunals are directed to decide the issues in dispute before them in accordance with the provisions of NAFTA *and* with the applicable rules of “international law.” Observing the principle of good faith requires a tribunal to be mindful of the totality of the international obligations that are borne by NAFTA Parties, including environmental treaty obligations and international law principles such as precaution, proportionality and necessity,²⁷ and to endeavor to interpret NAFTA’s provisions in a fashion that avoids conflicts between them.

One solution to the problem of a missing general exemption for

24. NAFTA, art. 1114(1), 32 I.L.M. at 642.

25. NAFTA, Preamble, 32 I.L.M. 289, 297 (1993).

26. See J. F. O’CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* (1991); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1994).

27. There is considerable debate as to whether the precautionary principle constitutes an international law norm. Proportionality and necessity are concepts that can be seen running through various bodies of public and private international law. Though it is beyond the scope of this Article to inquire as to their application in the international environmental policy context, these issues do form the subject of some of my continuing research.

NAFTA Article 1102 is to read an exemption into its “like circumstances” test, in good faith, and in accordance with international environmental law principles. After all, it would hardly be a just or fair result, keeping in mind the hortatory statements about protection of the environment appearing throughout the NAFTA text, for a tribunal to find that competing investments should be treated in “like circumstances” despite the fact that their economic activities generate substantially dissimilar environmental externalities. Interpreting NAFTA Article 1102 in a fashion that promotes reasonable and balanced environmental protection hardly seems inconsistent with the goals and objectives of the NAFTA, and can be supported by the plain language of the NAFTA text.

Support for this kind of interpretive approach can be found in the *Myers* Award, which recalled the international environmental principles contained within the Rio Convention and the North American Agreement on Economic Cooperation to suggest the need for a balanced approach to environmental measures that may have the effect of distorting trade and development.²⁸ A five-member panel struck under the NAFTA’s state-to-state dispute settlement provisions (to hear Mexico’s complaint that the United States was arbitrarily discriminating against the cross-border provision of trucking services and investment in the trucking industry) appears to have come to this same conclusion, going so far as to refer to the “like circumstances” wording of NAFTA Article 1102 as constituting a potential “exemption” from the national treatment principle of competitive equality for all similarly situated businesses.²⁹ Of course, the availability of such an exemption would be conditional upon a NAFTA government’s being able to prove that its measure was applied in a fair and balanced manner. In the *Trucking* case, the United States was unable to demonstrate how its measure was environmentally justified, as it was applied in an unnecessarily restrictive and arbitrary fashion that discriminated against Mexican investors and their investments.

28. *Myers*, *supra* note 2, ¶¶ 246-48, 250.

29. See NAFTA Arbitral Panel Decision in the Matter of Cross-Border Trucking Services, USA-MEX-98-2008-01, ¶¶ 292-93 (Feb. 6, 2001) [hereinafter *Trucking*], available at <http://www.naftalaw.org/Trucking%20Services%20Award.pdf> (applying its analysis of the national treatment and most favored treatment provisions of the NAFTA Chapter on cross-border trade in services). The similarity of interpretation of national treatment provisions in both cases is most likely not a coincidence, given that the same person chaired both panels: Martin Hunter, one of the world’s leading experts on international commercial arbitration.

III. NAFTA Article 1105: Treatment in Accordance with International Law

A similar approach can be used in the interpretation of NAFTA Article 1105. Article 1105 states that NAFTA governments must treat investments “in accordance with international law, including fair and equitable treatment and full protection and security.”³⁰ As I have described elsewhere,³¹ NAFTA Article 1105 simply requires investments to be treated “in accordance with international law,” and sets out two examples of such treatment. “Full protection and security” is an old concept that has received consideration by various mixed claims tribunals over the past century, involving the obligation of governments to protect investments against losses suffered as a result of maladministration or enforcement failures.³² “Fair and equitable treatment” has just received detailed consideration by the *Metalclad* tribunal, which concluded that providing “fair and equitable treatment” requires governments to act in a transparent manner, to provide investors with a fair hearing, to not make decisions on the basis of irrelevant factors or with insufficient evidence, and to not frustrate the legitimate expectations of investors (when they are raised as a result of government conduct).³³ A majority of the *Myers* tribunal also appears to have concluded that intentional discrimination on the basis of nationality constitutes a breach of international law and, therefore, a breach of NAFTA Article 1105.³⁴

The “international law” referred to in NAFTA Article 1105 also includes international environmental law, whether in the form of customary international law, international environmental principles, or obligations contained within international environmental treaties. While a NAFTA investor may be able to construct a credible argument that the treatment accorded to its investment under some

30. NAFTA, art. 1105, 32 I.L.M. at 639.

31. Todd J. Weiler, *2000 in Review: Investor-State Dispute Settlement Gains Steam*, INT'L LAW. (forthcoming 2001); Todd J. Weiler, *Investor-State Arbitration Under the NAFTA: Remedies for Poor Regulatory Treatment*, 6 INT'L TRADE L. & REG. 84 (2000).

32. See RUDOLPH DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 60 (1995).

33. *Metalclad*, *supra* note 6, ¶¶ 51-52, 80, 88, 91-92.

34. *Myers*, *supra* note 2, ¶¶ 266-68. In so doing, the tribunal demonstrated an adherence to the practice of “judicial economy” becoming common in the WTO and decided not to consider the remainder of *Myers*' arguments under NAFTA Article 1105.

environmental measure was substantively unfair or inequitable (as opposed to the procedural type of unfairness discussed in the *Metalclad* award), it would remain open for a NAFTA Party to justify the apparently unfair impact of its measure through recourse to any number of international environmental obligations or principles. The same principles could be used to explain how a measure that discriminated against an investment on the basis of nationality could be justified as conduct authorized by an international environmental obligation, such as a prohibition on trade in endangered species.³⁵

IV. NAFTA Article 1110: Expropriation

The final NAFTA provision that has been the subject of considerable environmental concern is NAFTA Article 1110, which provides in part:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.³⁶

NAFTA Article 1110 requires compensation to be paid for government measures that have the effect of directly or indirectly expropriating foreign investments. While the international law of

35. The balancing tests employed by the WTO Appellate Body to apply the GATT Article XX general exemption to prima facie GATT breaches in the *Shrimp / Turtle* and *Gasoline* cases may be of particular assistance in this regard.

36. NAFTA, art. 1110, 32 I.L.M. at 641-42.

expropriation may bear something in common with U.S. takings jurisprudence, it is not the same thing, and NAFTA tribunals have, so far, studiously avoided any reference to the domestic law of expropriation, which differs dramatically among the NAFTA Parties.

The concern that many have identified in respect of NAFTA Article 1110 is that what appears to be an exception at the end of the first paragraph is really not an exception at all. Subject to certain conditions covered elsewhere,³⁷ NAFTA Article 1110 requires compensation to be paid for *all measures that have the effect of substantially interfering with an investment*.³⁸ It does not matter whether the measure is discriminatory, of general or specific application, or imposed in a procedurally unsound manner, so long as compensation is paid in accordance with the terms of Article 1110.³⁹ It does not matter if the NAFTA government claims to be exercising

37. See, e.g., NAFTA, art. 1110(7) (excluding compensation for expropriation by way of various intellectual property measures), art. 2103(6) (providing a special approval mechanism for claims in respect of confiscatory taxation measures).

38. The "substantial interference" standard was recalled by the *Pope & Talbot* tribunal in its finding that while a Canadian export control measure certainly affected the claimant's investment, the level of interference involved was not substantial enough to rise to the level of expropriation under international law. It is unclear what "substantial" means, although it would appear to involve more than just a 10-20% loss of market share for an otherwise profitable company. *Pope & Talbot, supra* note 4, ¶¶ 96, 101-02.

39. There has yet to be a NAFTA tribunal award concerning such a measure, as the only tribunal to make a finding of expropriation under NAFTA Article 1110 made factual determinations that would clearly lead one to conclude that the expropriation in that case was not only discriminatory but also procedurally defective and arguably not a valid exercise of public authority. See *Metalclad, supra* note 6, ¶¶ 82-96, 110-12. The Mexican government has challenged this award on a number of grounds in the domestic court of British Columbia, Canada (the site of the arbitration). While a full analysis is beyond the scope of this Article, it is surprising to see arguments that because the tribunal erred, the award should be set aside (given the far stricter standards of review prescribed under the UNCITRAL Model Law and New York Convention). Accordingly, it is doubtful that Mexico will ultimately be successful. Moreover, it is not clear that the *Metalclad* tribunal made any errors in law. It has been suggested that the tribunal was wrong to conclude that a questionable ecological decree by the state governor was a "measure tantamount to expropriation." A simple reading of the entirety of the tribunal's expropriation findings demonstrates that the tribunal regarded the term "tantamount to expropriation" as being equivalent to "indirect expropriation"—the current position of all three NAFTA Parties. Even if the tribunal was wrong to find that the decree was an indirect expropriation (as opposed to a direct expropriation), it was open to the tribunal to make such a finding on the facts, and it would clearly not be appropriate for a domestic court to substitute its opinion for that of an international tribunal, much less a tribunal chaired by as eminent an international scholar as Sir Eli Lauterpacht.

its sovereign authority to regulate (sometimes referred to as the “police power”).⁴⁰ The plain and ordinary meaning of the words of NAFTA Article 1110, taken in the context of an investment promotion chapter in a multilateral free trade agreement with objectives such as substantially increasing investment opportunities, indicates that in all cases compensation must be paid.

Room for an environmentally sensitive interpretation of NAFTA’s expropriation provision does exist, however, in the level of compensation that should be paid. Whereas NAFTA Article 1110(1) obviously enshrines a strong preference for the protection of investment (by promising compensation for all measures that substantially interfere with it), Article 1110(2) includes an open-ended definition of the criteria that may be used in the valuation of the compensation to be paid for such interference. If the economic activity undertaken by an investment leads to externalities that are so damaging to the environment that a government must take regulatory steps that substantially interfere with that investment, the appropriate level of compensation for such interference should take into account the negative value of those externalities. While professional business valuers may puzzle at the thought of adding “negative environmental externalities” to a list of criteria that is supposed to be used to determine the “fair market value” of an investment, it is incumbent upon treaty interpreters to arrive at a meaning of “other criteria, as appropriate,” in Article 1110(2), that balances the NAFTA right of investment protection with the fundamental need to protect human, plant and animal life or health, and the environment generally.

The *Myers* tribunal determined that it was not dealing with an expropriation case. Following the lead suggested by Mr. de Pencier in his article,⁴¹ the tribunal found that the sixteen-month export ban imposed by Canada to prevent Myers from competing in the Canadian market for PCB waste reduction was not of sufficient length to constitute an indirect expropriation under NAFTA Article 1110.⁴² The *Myers* tribunal also determined, along with the *Pope & Talbot* tribunal, and Mr. de Pencier,⁴³ that the words “tantamount to expropriation” in Article 1110 did not expand the definition of

40. See *Pope & Talbot*, *supra* note 4, ¶ 100.

41. de Pencier, *supra* note 1, at 414.

42. *Myers*, *supra* note 2, ¶ 284.

43. de Pencier, *supra* note 1, at 415.

expropriation under the NAFTA any further than to include indirect (or “creeping”) expropriation.⁴⁴ However, it seems clear that if the export ban had been permanent, the tribunal would likely have determined it to have been an indirect expropriation for which compensation would have been due.

Given that Myers’ investment only provided an answer to the environmental externalities of PCB use, rather than generating environmental problems of its own, there would be no need to invoke the “other criteria, as appropriate” language of Article 1110(2) because only full compensation would have been appropriate. The exact quantum of the compensation to be paid to Myers for Canada’s breach of Articles 1102 and 1105 will be the subject of a future hearing on damages.⁴⁵

Conclusion: Squaring the Circle

The *Myers* case demonstrates that there is a definite need for investment protection in the NAFTA, as blatantly discriminatory measures can apparently emerge even from a country such as Canada, with a stable government, fully functioning legal institutions, and a highly developed economy. NAFTA tribunals must have the analytical tools to sort through the legitimate and less-than-legitimate justifications provided by governments for measures that harm NAFTA investments. The *Myers* Award provides an excellent example of how to undertake such an analysis. In the event that another case arises where environmental protection is really at the heart of a measure, the aforementioned analytical tools can be employed to ensure that that protection is not jeopardized.

44. *Myers*, *supra* note 2, ¶ 286 (citing *Pope & Talbot*, *supra* note 4, ¶ 104).

45. The government of Canada has taken the unusual step of asking a domestic court to strike down the *Myers* award for being contrary to the “public policy” of Canada and an illegal usurpation of jurisdiction on the part of the tribunal (even though Canada failed to bring any jurisdictional challenges before—or even after—the pleadings were closed). It would be inappropriate to comment upon the chances of success for Canada’s application while domestic judicial proceedings are underway.