

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

- between -

**S.D. Myers, Inc.
("SDMI")**

(Claimant)

- and -

**Government of Canada
("CANADA")**

(Respondent)

**PROCEDURAL ORDER No. 21
(concerning certain applications for correction and
interpretation of the Tribunal's Second Partial Award)**

Introduction

- 1 The Tribunal made its Second Partial Award (the "SPA") on 21 October 2002, and communicated it to the Disputing Parties on the same day.
- 2 By a letter dated 1 November 2002 SDMI requested the Tribunal to make certain corrections and/or interpretations of the SPA pursuant to Articles 35 and 36 of the UNCITRAL Rules (the "Rules").
- 3 By a letter dated 13 November 2002 CANADA requested the Tribunal to give an interpretation of the SPA pursuant to Article 36 of the Rules.

- 4 Both requests were submitted within the time limits specified in the relevant Articles of the Rules.

SDMI's Request

- 5 SDMI contends that there are three errors in the SPA, as follows:

- a. CAN\$2,329,319.00 of orders obtained by SDMI were incorrectly omitted from the total value of bids, quotations and orders from which the Tribunal assessed the gross income that would have been received but for CANADA's measure;
- b. a deduction of CAN\$1,900,000.00 in respect of duplicate bids was incorrectly applied by the Tribunal because CAN\$1,100,000.00 already had been deducted to account for duplicate bids, and;
- c. paragraph 134 of the SPA contained an incorrect reference to a provision of the NAFTA, and some incorrect comments by the Tribunal concerning the relationship between Chapters 11 and 14 of the NAFTA.

Discussion of SDMI's request

Bids and Orders

- 6 SDMI refers to the fact that the Tribunal specifically mentioned "orders" at an early stage in its discussion on the value of bids and quotations (see, eg, paragraph 230), but not thereafter.
- 7 As stated in the text of the section of the SPA, under the heading *The Income Stream*, in reaching its conclusion concerning the value of the bids and quotations

the Tribunal considered a number of elements; made certain specific deductions; and applied its collective judgment. It assessed SDMI's losses during the closure and afterwards. This analysis took into account all of the components of the bid population referred to by SDMI, including completed orders.

- 8 The Tribunal's analysis reflected its consideration of inventory processed by others both during and after the closure, and its assessment of the effect of delay to its opportunities to process PCBs and PCB wastes. It was and remains the judgment of the Tribunal that its analysis took due account of all of the opportunities available to SDMI, and the effect of CANADA's measure on those opportunities.
- 9 Accordingly, the Tribunal determines that it would not be appropriate to correct or interpret the SPA as requested by SDMI.

Duplication

- 10 SDMI contends that the Tribunal made a deduction of CAN\$1,900,000 in respect of duplicated quotations, bids and orders. In fact, it did not. The paragraph to which SDMI refers involved the Tribunal's consideration of the value of quotations issued by SDMI after CANADA's closure of the border. The Tribunal's reference to duplication involved some quotations that related to inventory on which SDMI had bid prior to the re-opening of the border. The paragraph in question does not address, and the deduction does not relate to, duplications as such. In determining the deduction to be applied in the relevant context, the Tribunal took into account other broader considerations including its assessment of the reliability of the data.
- 11 Accordingly, the Tribunal determines that it would not be appropriate to correct or interpret the SPA as requested by SDMI.

Chapters 11 and 14

- 12 SDMI has correctly identified a typographical error in paragraph 134 of the SPA, and the Tribunal will make a correction pursuant to Article 36 of the Rules in the form of an Addendum to the SPA.
- 13 Concerning SDMI's request for correction of the Tribunal's comment on the relationship between Chapters 11 and 14, the Tribunal stated in paragraph 134 of the SPA:

.....an investor in financial services generally could not bring a Chapter 11 claim.....

(emphasis added)

- 14 It seems clear that investors in financial services acquire some level of Chapter 11 protection, but not all. A Tribunal appointed in a Chapter 11 arbitration initiated by such an investor might be required to analyse the relationship between the Chapters 11 and 14 in considerable detail. However, this case did not involve an investor in financial services, and the Tribunal's passing comment had no effect on its determinations concerning either liability or quantum.
- 15 Accordingly, the Tribunal determines that it would not be appropriate to correct or interpret the SPA as requested by SDMI, other than to correct the typographical error mentioned above.

. CANADA's request

- 16 CANADA contends that the Tribunal's award in respect of interest in the SPA is ambiguous, and states that it *.....cannot reconcile its calculation of interest payable under the [SPA] with [SDMI's] publicly announced estimate.*

Discussion of CANADA's request

- 17 In the SPA the Tribunal established a specific procedural regime for dealing with any differences between the Disputing Parties in connection with the calculation of interest, as follows:


If the Disputing Parties are unable to agree on the relevant calculations they may place the issue before the Tribunal as a matter to be determined, together with the question of the allocation of costs, in its Final Award. In that event the Tribunal will consider appointing an accountancy expert, in accordance with Article 27 of the UNCITRAL Arbitration Rules, to review the Disputing Parties' respective positions and to report to the Tribunal

and

All questions concerning costs and, if necessary, the calculation of interest shall be postponed to the Tribunal's Final Award.

- 18 It appears that, at the time of CANADA's request, the Disputing Parties had not attempted to agree on the interest calculations. CANADA's request was premature, and did not conform to the procedure established by the Tribunal. Nevertheless, by a letter dated 21 November 2002 the Tribunal provided informal guidelines concerning the calculation of interest and specified a time limit within which the Disputing Parties should state whether it will be necessary to invoke the procedure for appointing an expert as contemplated by the SPA.
- 19 Accordingly, the Tribunal determines that it would not be appropriate to interpret the SPA as requested by CANADA.

Signed:



J Martin Hunter (on behalf of the Tribunal)

Dated 2 December 2002