This case summary was prepared in the course of research for
S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008)

Case summary

S.D. Myers, Inc. v Canada

Years of the awards: 2000-2002
Forum: *Ad Hoc* Tribunal (UNCITRAL arbitration rules)
Applicable investment treaty: NAFTA

Arbitrators	**Timeline of the dispute**
Mr. J. Martin Hunter – President Mr. Bryan P. Schwartz Mr. Edward C. Chiasson	30 October 1998 – notice of arbitration 4 March 1999 – arbitral tribunal constituted 13 November 2000 – First Partial Award ("Merits Award") 21 October 2002 – Second Partial Award ("Damages Award") 30 December 2002 – Final Award ("Award on Costs") 13 January 2004 – domestic judicial review (not relevant for damages)

Table of Contents

I. Executive Summary

SDMI, a U.S. corporation engaged in treatment of Polychlorinated biphenyl (PCB), an environmentally hazardous chemical compound, established an investment in Canada (MYERS Canada) to obtain Canadian PCB waste for treatment by SDMI in its U.S. facility.

In 1980 the U.S. closed the border for the movement of PCB waste, but in the fall of 1995 SDMI was granted permission to import PCB from Canada. Promptly after this Canada issued an Order prohibiting the export of PCB waste to the U.S. thus precluding SDMI and its Canadian investment from carrying out the business they intended to. The prohibition was in effect for approximately 16 months.

SDMI brought a claim under NAFTA Chapter 11 alleging that Canada violated a number of its NAFTA obligations and claiming damages that arose therefrom. The Tribunal established a violation of NAFTA national treatment and minimum standard of treatment provisions as the evidence showed that the Order was intended primarily to protect the Canadian PCB disposal industry from U.S. competition and favoured Canadian nationals. SDMI's claims in respect of performance requirements and expropriation were dismissed.

The issue of damages was addressed by the Tribunal in detail. It elucidated a number of general principles on awarding damages, including the following:

- the "fair market standard" may not apply in non-expropriation cases; instead, rules of public international law (the *Chorzow* doctrine) may be applied;
- damage does not necessarily have to arise in the host state in order to recoverable; it simply has to be a result of the measure at issue;
- availability of other remedies under NAFTA does not deprive an investor from remedies under NAFTA Chapter 11 (cumulative principle);
- when a measure at issue breaches more than one investment-treaty provision, there should be no 'double recovery'.
- in relation to the issue of causation, the 'proximity' was supported; the 'foreseeability' and 'direct/indirect damages' approaches rejected.

SDMI claimed compensation for lost profits, loss of opportunity, out-of-pocket expenses and goodwill. Out of these, only the issue of lost profits received significant attention from the Tribunal. In great detail the Tribunal set out its methodology and findings on this issue. However, these methodology and findings are very fact-specific and will not necessarily be relevant for future cases.

The Tribunal awarded CAN$6 million in compensation (*cf.* more than US$70 million claimed by SDMI), plus interest calculated from the date of notice of arbitration and compounded annually.

Canada attempted to set aside the Tribunal's award in the Federal Court of Canada but its application for judicial review was dismissed (issue of damages was not discussed).

II. Factual Background and Claims of the Investor

The Claimant, S.D. Myers, Inc. ("SDMI"), is a U.S. corporation with an investment in Canada – MYERS Canada. One of the core SDMI's businesses is treatment of Polychlorinated biphenyl (PCB), an environmentally hazardous chemical compound used mainly in electrical equipment. MYERS Canada was created to obtain Canadian PCB waste for treatment by SDMI in its U.S. facility.

In 1980 the U.S. closed the border for the movement of PCB waste, but in the fall of 1995 the U.S. granted to SDMI a permission for the period of 25 months to import PCB from Canada. Promptly after this, Canada issued an Order prohibiting the export of PCB waste to the U.S. (the "Order" or "measure") thus precluding SDMI and its Canadian investment from carrying out the business they intended to. The prohibition was in effect for approximately 16 months (November 1995 to February 1997).

In February 1997, Canada revoked the export ban, and the border was open for about five months. However, then it was closed again – this time from the U.S. side – as a result of a U.S. court decision. Since then the border has remained closed for shipment of PCB.

SDMI brought a claim under NAFTA Chapter 11 alleging that Canada's Order violated the following of its NAFTA obligations:

- Article 1102 – National Treatment.
- Article 1105 – Minimum Standard of Treatment.
- Article 1106 – Performance Requirements.
- Article 1110 – Expropriation.

SDMI claimed US$ 70 to 80 million in compensation for damages that arose as a result of these violations.

III. Findings on Merits

A. National Treatment (Article 1102)

As a result of the examination of the evidence before it, the Tribunal found that Canada's Order prohibiting the export of PCB waste to the U.S. was not driven by environmental concerns, as asserted by Canada, but intended primarily to protect the Canadian PCB disposal industry from U.S. competition and favoured Canadian nationals over non-nationals. SDMI and its investment were prevented from carrying out the business they planned to undertake, which was a clear disadvantage in comparison to its Canadian competitors.

The Tribunal thus concluded that the issuance of the Order was in breach of Article 1102.

B. Minimum Standard of Treatment (Article 1105)

Regarding the minimum standard of treatment obligation, the Tribunal stated that its "breach occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective." (para. 263) The Tribunal determined that on the facts of this particular case the breach of Article 1102 essentially established a breach of Article 1105 as well.

Thus the Tribunal determined that the Order was in breach of Article 1105.

C. Performance Requirements and Expropriation

The Tribunal dismissed SDMI's claims alleging violations of NAFTA provisions on performance requirements and on expropriation.

IV. Findings on Damages

A. Introduction

According to the SDMI's claim, the damages arose out of the treatment by Canada of SDMI's investment – MYERS Canada. MYERS Canada was established to be the Canadian face of SDMI, to assist with Canadian operations and thereby to generate business and revenue for SDMI. SDMI spent in excess of US$ 1 million to establish the MYERS brand as the leading name for the disposal of PCB's in Canada. The ban on PCB exports, introduced by Canada contrary to NAFTA Articles 1102 and 1105, prevented SDMI and MYERS Canada from fulfilling the orders they have obtained, as well as from obtaining firm commitments from other potential customers. (Damages Award, paras.86, 89)

B. Applicable Law

The Tribunal decided that it should award a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. In support of the applicability of public international law to the case at hand, the Tribunal suggested that a wrong done to an investor is usually viewed as a wrong done to its home state and it is the state that brings the claim against the host state, not the investor directly. (Merits Award, para.313)

C. Standard of Compensation

NAFTA contains guidelines only in respect of compensation for expropriation – the "fair market value" standard. The Tribunal rejected this standard as being inappropriate for the purpose of awarding damages caused by breach of other NAFTA articles (1102 and 1105 in this case). In the view of the Tribunal, the standard of

compensation has to take into account the distinction between compensating for a lawful (expropriation), as opposed to unlawful, act. (Merits Award, paras.307-308)[1]

With reference to the *Chorzow Factory (Indemnity)* case, the Tribunal employed an international law principle that compensation should undo the material harm inflicted by a breach of an international obligation. Compensation must, as far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. (Merits Award, paras.311-315)

The Tribunal also said that damages for breach of any one NAFTA provision can take into account any damages already awarded under a breach of another NAFTA provision; there must be no "double recovery" (Merits Award, para.316) On the facts of this case, the Tribunal was satisfied that the damages to which SDMI was entitled arising out of Canada's breach of Article 1102 were neither increased not diminished by its breach of Article 1105. (Merits Award, para.319)

D. Damages Sustained Outside the Host State

The Tribunal usefully clarified that in order to be recoverable, damages do not necessarily have to be sustained by the investor *in the host state*, but also may arise elsewhere (e.g., in the home state of the investor). The important thing is that damages have to be suffered by the investor as a result of *interference with the investment in the host state*. (Damages Award, paras.118, 122)

E. Relationship with Other Remedies

SDMI's activities and activities of MYERS Canada involved cross-border trade in services governed by Chapter 12 of NAFTA. In this connection, Canada argued that SDMI cannot recover – under the rules of Chapter 11 – the damages related to its activities as a cross-border service provider, as Chapter 12 has a different dispute settlement mechanism.

In rejecting Canada's assertion, the Tribunal relied on the *cumulative principle*. According to it, where a person has different rights under different trade provisions, these rights generally complement, rather than diminish, each other.[2] (Damages Award, paras.131-133). Thus, the fact that SDMI as a cross-border service provider may have recourse to the dispute provisions of Chapter 12, does not deprive it of the right to claim as an investor under Chapter 11. Extending to it rights as a cross-border service provider under Chapter 12 does not take away from SDMI rights conferred on it by Chapter 11. (Damages Award, para.138)

F. Causal Link

[1] The Tribunal did not completely reject the idea of applying the "fair market value" standard in non-expropriation cases. Whether it should apply or not, depends on the circumstances of a particular case. (Merits Award, para.309)

[2] The cumulative principle does not apply where there is a conflict between the provisions in question.

The Tribunal determined that damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. The harm must not be too remote; the breach of the specific NAFTA provision must be the *proximate* cause of the harm. (Merits Award, para.316; Damages Award, para.140)

In the context of causation, both parties referred to a concept of foreseeability. This concept limits recoverable damages to those that were foreseeable by both parties at the time of breach. However, the Tribunal rejected this concept as the one relating to the law of contracts and thus, not helpful in a case, which is more akin a tort or delict, where remoteness is the key. Similarly, the Tribunal rejected the classification of damages into direct and indirect, as inappropriate and not limiting the recoverability of damages. (Damages Award, paras.159-160)

G. Burden of Proof

The Tribunal determined that the burden was on SDMI to prove the quantum of the losses in respect of which it puts forward its claims. (Merits Award, para.316)

The challenges noted by the Tribunal in connection to quantifying future profits, also have relevance for the burden of proof issue:

- On the one hand, the claimant bears the burden of establishing his damages, so that they are neither speculative, nor too remote;
- On the other hand, fairness to the claimant requires that the court or tribunal should approach the task both realistically and rationally.

(Damages Award, para. 173)

The Tribunal thus seemed to be saying that it would not be overly strict when assessing comprehensiveness and sufficiency of claimant's evidence.

H. Heads of Recoverable Damages

SDMI claimed compensation for the following heads of damages:

- Present value of the lost net income stream (lost profits);
- Loss of opportunity;
- Out-of-pocket expenses;
- Goodwill.

Lost profits. The Tribunal accepted the value of the SDMI's lost net income stream as the appropriate primary measure of compensation.

Loss of opportunity. The Tribunal rejected SDMI's loss of opportunity claim (referring to the opportunity to invest or use the money derived from the lost income stream), as speculative and too remote. In Tribunal's view, payment of interest should compensate for the value of the lost use of money. (Damages Award, para. 161)

Out-of-pocket expenses (money spent to develop and sustain MYERS Canada). The Tribunal said that its award for the lost net income stream subsumed these expenses.[3] (Damages Award, para. 167)

Goodwill. As a result of the SDMI's marketing campaign, Canadian PCB holders became aware of the Myers brand name and reputation for quality service, as well as of the fact that SDMI and MYERS Canada could offer materially lower prices than those being quoted by competitors (goodwill). The Tribunal equated goodwill with the SDMI's first-mover advantage (see below) and decided that the damage caused to SDMI's goodwill must be addressed when quantifying the loss of net income stream, as part of the overall context of the harm suffered by the SDMI. (Damages Award, paras. 170-171)

I. Valuation

1. First-mover advantage

To recall, the Tribunal equated the first-mover advantage issue with SDMI's claim for compensation of damage to its goodwill. SDMI claimed that its first-mover advantage was lost as a result of the border closure by Canada – by the time the border was re-opened, SDMI's competitive advantage was eliminated due to actions of competitors.

The Tribunal examined the evidence before it, in particular testimonies of expert witnesses. The Tribunal confirmed that SDMI would have had a clear advantage over Canadian competitors at the time of border closure. However, SDMI would have had to face competition from up to ten other US companies. The Tribunal concluded that although SDMI did have a first-mover advantage and it was eroded by the closure, the extent of that erosion was incapable of precise assessment. (Damages Award, paras. 182-185)

2. Determination of whether profit was lost

The Tribunal enumerated the factors that affected SDMI's potential for generating profits and compared these factors at the time of border closure and at the time of its re-opening:

- SDMI's contacts and profile with customers;
- the inventory of PCB's owned by customers;
- the presence of competitors;
- average market prices; and
- its ability to undercut competitors in terms of price.

The Tribunal concluded that SDMI's position was substantially worse at the time of re-opening, which means that a certain amount of profit was lost. SDMI had enjoyed a highly favourable position with respect to its standing with customers and prices at the time the border closed; when the border re-opened, its profile with many customers had been eroded and SDMI needed time and effort to try to re-establish itself; new Canadian competitors had emerged and some U.S. competitors were starting to participate in the market. SDMI's position was eroded, although not destroyed completely. (Damages Award, paras.208, 210)

[3] However, nowhere further in the Damages Award the Tribunal referred to out-of-pocket expenses.

3. Limits of Canada's liability

According to the Tribunal, the negative consequences caused to SDMI by the closure of the border, were the following:

- it lost the opportunity to process part of the inventory, which was processed by others during the closure;
- it lost to others part of the inventory that remained available after Canada re-opened the border;
- it lost part of the inventory for which it could have obtained orders and exported before the US closed the border in July 1997. (Damages Award, paras.215, 222)

The Tribunal held that Canada had to compensate for these negative consequences and, in particular, "for the net income streams that it lost, for the abridgement of the time available to SDMI and the value of income delayed by the Canadian closure." Canada was not to be held responsible for SDMI's inability to remediate Canadian PCBs after the US closure. (Damages Award, para.228)

4. Quantification of lost profits

The situation at hand was complicated by the fact that there was little relevant track record of SDMI's business in Canada. Parties' experts presented widely differing estimates, and the Tribunal considered it necessary to perform its own analysis of the facts and figures, guided by the experts and the overall evidence. (Damages Award, para.173)

To assess the value of the net income stream, lost by SDMI due to negative effects of the Canadian measure, the Tribunal devised a step-by-step methodology. Essentially, to calculate the *net* lost profit the Tribunal determined the difference between SDMI's projected revenues and costs/expenses that would have had to be borne to generate these revenues. To do this, the Tribunal did the following:

Income stream lost to others during the closure period

Step 1. An assessment of the realistic value of the quotations relied upon by SDMI.
Step 2. An assessment of the price degradation that would have occurred if the border had remained open, and the respective adjustment of the value obtained in Step 1.
Step 3. An assessment of the likely success rate for turning quotations into completed orders.
Step 4. Application of the success rate to the value obtained in Step 2.
Step 5. An assessment of the proportion of this value that would have been converted into a gross income stream for SDMI during the period of the closure.
Step 6. The value of the remaining gross income stream is derived.

Income stream lost to others during the post-closure period

Step 7. Calculation of the value of post-closure quotations. It is added to the value obtained in Step 6, to produce the gross income stream available to SDMI when the border re-opened.
Step 8. An assessment of the amount of the total post-closure gross income stream that was, or would have been, lost to others due to the closure.

Income stream not lost to others, but which would have been processed by SDMI during the 19 month "window of opportunity"
Step 9. An assessment of the portion of the pre-closure inventory that was not lost to others.

Net income stream
Step 10. An assessment of the net income streams that would have been derived from the total gross income streams, by deducting the cost of sales.
Step 11. An assessment of the financial effect of the shortened time available to SDMI to process (or at least export) the remaining pre-closure inventory, and of the financial effect of the delay.

Total recovery for SDMI
Step 12. The compensation to be awarded to SDMI is the total of the two lost net income streams, plus the estimated income that would have been derived from part of the remaining pre-closure inventory that could have been processed (or exported) by SDMI before July 1997 when the border was closed by the USA, and the time-value of the delayed net income stream.

Determinations of the Tribunal with regard to each of these steps are very fact-specific. They can be found in paras.230-300 of the Damages Award. Analysis of these determinations shows that the Tribunal attempted to take into account, as much as possible, all factors considered relevant. However, it was impossible to quantify the value of many of these factors; therefore, in several instances the Tribunal had to exercise its discretionary judgment and adopt figures not supported by precise calculations (e.g., the SDMI's likely success rate for turning quotations into completed orders, and others). The Tribunal based its calculations on the evidence produced by the parties, i.e., documents and experts' opinions. It also relied on the principle of fairness.

Having followed all of the steps set out above, the Tribunal calculated the total compensation to be CAN$6,050,000 excluding interest.

J. Interest

The Tribunal ordered the payment of interest on the awarded sum at the Canadian prime rate plus 1% over the period from the date of the Notice of Arbitration until the date of payment. The interest should be compounded annually.

K. Legal Costs

The Tribunal (by majority) made its award of legal costs under the UNCITRAL rules (Articles 38 and 40), which distinguish between arbitration costs (to be borne "in principle" by the "unsuccessful party"), and the costs of legal representation and assistance (to be apportioned after "taking into account the circumstances of the case").

With respect to arbitration costs, the Tribunal set out the following benchmarks in terms of "success":

a) the results on the various liability issues, and
b) the difference between the amounts claimed by SDMI and the amount ultimately awarded.

The Tribunal found that SDMI succeeded on the liability, but not as to the full extent of its pleaded case ("performance requirements" and "expropriation" claims were rejected). Furthermore, the ultimate award was only a small percentage of the amount claimed. Therefore the Tribunal decided that SDMI was entitled to recover a significant portion of its arbitration costs, but not all of them and allocated them in such a way that Canada would have contributed nearly three times as much as SDMI to the total amount.

When determining the apportionment of costs of legal representation and assistance, the Tribunal considered that the following factors were relevant:

- the nature, quantum and reasonableness of the costs of legal representation and assistance claimed by SDMI;
- the conduct of the parties during the proceedings;
- the perception of the relative "success", or "lack of success", of each of the disputing parties in the two principal stages of the arbitration;
- the published decisions of other NAFTA Chapter 11 arbitral tribunals; and
- the so-far-as-known practices of international tribunals.

Among these factors, the Tribunal effectively assigned primary importance to the degree of success achieve by the parties. It ordered Canada to pay CAN$500,000 in legal representation costs, out of some CAN$4,200,000 claimed by SDMI.

The Tribunal also determined that interest should be paid on the sum of all costs awarded to SDMI (at the same rate as for damages) for the period from the date of the Final Award to the date of payment.

V. Implications / Initial Analysis

- **Expropriation standard of compensation** ("fair market value") does not necessarily have to be applied to non-expropriation cases – in this case it was rejected as inappropriate.
- At the same time, one act of a State which simultaneously violated two provisions of the investment treaty, should not increase the amount of compensation own to an investor, that is, this should not lead to "**double recovery**".
- The award contains the discussion of **causal link**. "Foreseeability" and "direct/ indirect damages" approach rejected. "Proximity" approach adopted. Determination of whether particular damage is 'too remote' is very fact-specific, therefore there will always be space for argument about causal link in each case.
- In this case, the claimant managed to recover **lost profits** even when the investment is a **start-up company with little track record** – the Tribunal looked at the investor's own performance in his home country and then made an adjustment taking into account peculiarities of the host-country market.
- The Tribunal was ready to exercise a degree of flexibility as far as the **standard of proof** was concerned. Understanding that it may be difficult to

make an impeccable case in relation to lost profits, the Tribunal seemed prepared to be not excessively strict when assessing claimant's evidence. Other tribunals have stated that damages need to be proven to a degree of **reasonable certainty**, as opposed to absolute certainty.

- The Tribunal's assessment was based on the **evidence** produced by the parties (information, statistics and experts testimony), without appointing its own expert. The Tribunal exercised its full control and discretionary judgment when weighing the evidence produced by the parties.
- There might be damage incapable of assessment (**unquantifiable damage**) – in this case the Tribunal found that SDMI's first-mover advantage was eroded by the Canada's measure but said that the extent of this erosion was incapable of precise assessment. Thus, the damage was not compensated. This seems to be in contradiction with holdings of other tribunals which stated that the difficulties in quantifying the damage should not prevent from awarding it where the fact of the loss is certain.
- The Tribunal awarded **compound interest** and used the **prime rate** at the host country (Canada) + 1%.