

IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

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

(Claimant)

- and -

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

(Respondent)

DISSENTING OPINION OF PROFESSOR BRYAN P. SCHWARTZ

(concerning the apportionment of costs between the Disputing Parties)

OPINION ON COSTS (Bryan Schwartz, DISSENTING)

1. SDMI, the Investor, asks for reimbursement from CANADA in respect of:
 - arbitration costs (consisting mostly of fees and disbursements charged by the arbitrators), in the amount of about \$700,000;

 - and

 - legal representation and assistance costs (consisting mostly of the cost of legal counsel, disbursements of legal counsel and accounting experts), in the amount of about \$3.7 million.

(All figures throughout will be in Canadian dollars, unless otherwise indicated.)

2. CANADA responds that the parties should split the costs of tribunal and that each party should pay its own costs of legal representation and assistance.
3. Considered in its own right, the difference between the parties on costs is very large. In the context of this dispute it is fully half as big as the approximately \$8 million award (including interest) issued earlier on by the tribunal.
4. This arbitration was conducted under the UNCITRAL rules. Article 40 of those rules states a presumption that the costs of the arbitration (paying the panel members' fees) should "in principle" be borne by the "unsuccessful party". Article 40 provides, however, that the tribunal has the discretion to make some other allocation.
5. With respect to the cost of legal representation and assistance, the UNCITRAL rules state no presumption at all. The tribunal may apportion costs if it is "reasonable" to do

so in light of the circumstances of the case.¹

6. Actual practice varies widely. With respect to international commercial arbitrations in general, there appears to be no uniform practice.²
7. Within the NAFTA context, there is only one award so far where the claimant succeeded in the main part of its case. That is the *Metalclad* decision.³ A large award was made in favour of the claimant. The tribunal ordered, however, that the parties should share equally the costs of the tribunal and each bear its own costs of legal representation and assistance. The *Metalclad* tribunal offered no explanation for its decision in this regard.
8. In most other NAFTA cases that are fully complete, the respondent government has been entirely successful. Tribunals in these cases have generally shown leniency with respect to awarding costs against the unsuccessful claimant. They have considered such factors as the extent to which governments have dealt harshly with the investor, even if no right of redress is technically available within NAFTA.⁴ Some allowance has

¹ UNCITRAL rules, Article 40(2): "With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable."

² "Despite the significance of a claim for costs and fees, international tribunals have no uniform approach for awarding them"; John Yukio Gotanda, (1999) 21 Michigan Journal of International Law 1, at p. 3. "There has been little analysis of this matter. The well known arbitration texts, for example, contain only sketchy discussions"; Lester Nurick, (1992) "Costs in International Arbitrations", 7 ICSID Review Foreign Investment Law Journal, 57, at p. 57.

³ *Metalclad Corporation v. United States*, ICSID ARB/(AF)/97/3, August 30, 2000. The tribunal states at paragraph 130 "both parties seek an award of costs and fees. However, the Tribunal finds that it is equitable in this matter for each party to bear its own costs and fees, as well as half the advance payments made to ICSID." As the quote makes clear, the arbitration in *Metalclad* was conducted under the ICSID rules, rather than the UNCITRAL rules.

⁴ *Mondev International Ltd. and United States of America*, ICSID ARB(AF)/99/2, paragraph 159. The tribunal states that:

"NAFTA tribunals have not yet established a uniform practice in respect of the award of costs and expenses. In the present case, the Tribunal does not think it appropriate to make any award for

been made as well for the fact that in the earlier days of NAFTA, investors might be uncertain as to the procedures or law applicable to the particular dispute.

9. The UNCITRAL rules are, in this case, operating within the context of Chapter 11 and the NAFTA Agreement as a whole. It is appropriate to begin at the beginning: by looking at the text of NAFTA and the first principles that apply with respect to remedies.
10. The parties to NAFTA have, in the preamble, stated an intention to:

“Ensure a predictable commercial framework for business planning and investment.”

Article 201 of NAFTA states that:

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

...c) increase substantially investment opportunities in the territories of the Parties.”

Article 201(2) states that:

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

11. Article 1117 of NAFTA provides that a party shall have the right to submit a claim to arbitration where there has been a breach of the investor-protection provisions of Chapter 11, and there has been damage “arising” from that breach.

costs or expenses, for several reasons. First, the United States has succeeded on the merits, but it has by no means succeeded on all of the many arguments it advanced. Secondly, in these early days of NAFTA arbitration the scope and meaning of the various provisions of Chapter 11 is a matter both of uncertainty and of legitimate public interest. Thirdly, the tribunal has some sympathy for Mondev’s situation, even if the bulk of its claims related to pre-1994 [coming into force of NAFTA] events. It is implicit in the jury’s verdict that there was a campaign by Boston (both the City and BRTA) to avoid contractual commitments freely entered into. In the end the City and BRTA succeeded, but only on rather technical grounds. An appreciation of these matters can fairly be taken into account in exercising the Tribunal’s discretion it terms of costs and expenses.”

12. In its award at the liability phase, this tribunal found that the broad principle applicable to Chapter 11 claims, as in international law generally, is this: an award of damages should place the wronged party in the position it would have been if the unlawful act had not taken place. This tribunal, at paragraph 311 of its award, quoted with approval this passage from the *Chorzow Factory* case:

“The essential principle contained in the actual notion of an illegal act is that reparation 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. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it; such are the principles which would serve to determine the amount of compensation for an act contrary to international law.” [emphasis added].

13. The broad principle - “of wiping out the consequences of the illegal act” - was stated in the particular context of the *Chorzow Factory* case. In other contexts, the application of this principle might be replaced with a consistent rule that provides more precision. Article 1110 of NAFTA, for example, provides that where property is expropriated in an otherwise lawful manner, damages will be the fair market value of the property.
14. There might also be contexts in which special rules of international law specifically call for less than full compensation for a wrong. There might be yet other contexts where the general principle of full compensation will not be applied with its full force because of countervailing considerations of justice, policy or pragmatics. With respect to the breaches of NAFTA Chapter 11 found to exist in this case, however, this tribunal did not identify any such limiting considerations that would limit the award of damages. On the contrary, this tribunal expressly found that the appropriate measure of compensation is that which is sufficient to “undo the material harm” caused by the breach of these obligations.

15. If the incurring of legal costs are part of the initial harm caused to an investor due to a breach of Chapter 11, it would appear that the investor can obtain full compensation. In *Pope & Talbot*, the investor sustained legal costs while fruitlessly attempting to participate in an administrative process that was conducted by Canada in a manner contrary to NAFTA. The tribunal ordered that almost all of the investors' legal costs in that respect be reimbursed by Canada.⁵
16. While absolute consistency is not to be expected, there should be at least some broad compatibility in the approach taken to legal costs foisted upon an investor:
- during the initial events;
 - in their aftermath, when arbitral proceedings must be pursued in order to achieve redress.

In both situations, at least a reasonable measure of compensation should ordinarily be available.⁶

⁵ At paragraph 85 of the *Pope & Talbot* decision on damages the tribunal finds that the heads of damages recoverable with respect to the Verification Review episode were "out of pocket expenses, including the applicable accountants' and legal fees". With respect to lawyers' fees, the investor claimed about \$327,000; the government of Canada suggested that only about 15% of that amount should be allowed; and pursuant to an independent expert appointed by the tribunal, the latter allowed about \$287,000, or almost 90% of what the investor sought. The Verification Review Episode actually took place after arbitral proceedings were launched, but appears to be considered as a matter of damages rather than as a costs issue.

The award of the *Pope & Talbot* tribunal on costs was issued after the parties to this case had already made their submissions on costs. It awarded the investor its arbitration costs with respect to the Verification Review episode, and split the other costs of arbitration and let each party absorb its own costs of legal representation and assistance. The tribunal indicates that costs had to be determined in the context of an unusual and complex set of procedural and substantive outcomes. Some indication of the formidable task before the *Pope & Talbot* tribunal was that each party proposed that the other should reimburse it for almost \$4 million. The costs award in that case is best viewed as a fact-specific one, rather than as one that explicitly or implicitly purports to provide guidance of a general nature.

⁶ The causal link between the initial breach of Chapter 11 and the incurring of costs at arbitration can, of course, be diluted or dissolved in certain circumstances. If a state offers an investor full

17. Some distinctive considerations, however, can reasonably be applied to the determination of an award of legal representation costs arising in the arbitral process. These considerations to some extent mitigate the application of the principle that the investor should be compensated fully for the losses it has sustained as a direct result of a breach of Chapter 11.
18. In many legal systems, such as Canada's, even an entirely successful party does not recover all of its actual legal representation costs. The system provides less than full indemnity for legal costs incurred by a successful party. It aims to encourage even a party that is fully in the right to settle its case, rather than litigating it to the bitter end. It would seem reasonable for international arbitration panels to adopt this approach generally, including in the context of Chapter 11 cases.
19. The review of the case law suggests a number of considerations that can be applied in appropriate considerations to a losing government as well as an unsuccessful investor - e.g., it may be harsh to order the losing party to pay all of the winner's actual costs when the law in the area is unclear.
20. The investor SDMI argues that several contextual factors require that it be compensated fully for the legal and arbitration costs it sustained in this arbitration.
21. SDMI submits that the government of Canada has in a number of NAFTA episodes failed to act in a manner consistent with its duty under international law to perform its treaty obligations in good faith.⁷ Full indemnity for arbitration and legal representation costs is required, argues the investor, in order to impress upon the government of

compensation for the harm inflicted, but the investor refuses, it is no longer fair to say that the original legal wrong is the sole cause of the investor having to incur costs. The investor's own intransigence or poor judgment about its legal prospects is at least one of the causes.

Canada that a high standard of good faith compliance with NAFTA is expected. SDMI documents the following concerns:

- the government of Canada has argued that decisions made by NAFTA tribunals are not worthy of a high standard of judicial deference. The UPS tribunal has stated that it is troubled by these statements and cited it as one reason for sitting the arbitration in the United States, rather than Canada⁸;

- the *Pope & Talbot* tribunal severely admonished Canada for not making full disclosure of the negotiating record with respect to Chapter 11. The tribunal stated that:

“...it is almost certain that the documents provided, which included nothing in explication of the various drafts, are not all that exist, yet no effort was made by Canada to let the Tribunal know what, if anything, has been withheld.”

“The incident’s injury to the Tribunal’s work can now be remedied. But the injury to the Chapter 11 process will surely linger.”⁹

- in this case, the government of Canada adopted protectionist measures aimed at SDMI even though its own lawyers advised it that a NAFTA panel would likely find such a measure to be a “restriction on trade”.¹⁰

⁷ Vienna Convention of the Law of Treaties, Article 26.

⁸ *United Parcel Services of America Inc. and The government of Canada*, Decision as to the Place of Arbitration (October 17, 2001) at paragraph 11.

⁹ *Pope & Talbot Damages Award*, at paragraphs 31-42.

¹⁰ Memorandum by George Cornwall, Director, Hazardous Waste Branch, October 30, 1995, schedule 4 to investor’s memorial on costs. Mr. Cornwall warned that “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. 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.” Paragraph 183 of this Tribunal’s award on the merits phase quotes a memorandum by Mr. Hilborne, a department official. He states that “a draft opinion by the

22. Upon reflection, it is my view that the events just listed do not warrant increasing the allocation of costs in favour of the investor beyond that which would otherwise be appropriate.
23. To begin with, NAFTA tribunals have to be careful to avoid giving punitive damages. Absent clear authorization in the text of NAFTA or under the general principles of international law, Chapter 11 tribunals must assume that they have no authority to do so.¹¹
24. Furthermore, it would be imprudent for this tribunal to attempt to distill some general pattern of conduct on the part of the federal government based on our reading of other cases. We have not reviewed the full record in these other cases and might not appreciate the wider context in which various incidents took place.
25. In this case, CANADA was indeed warned by some of its officials that a proposed export ban might be difficult to justify on environmental and health grounds and that a NAFTA panel would “likely” hold the ban to be a “restriction on trade.” It might be argued that full indemnification of costs is appropriate when a government denies liability in arbitral proceedings despite actually knowing that it is in the legal wrong. But the record must be viewed cautiously and in context. The 1995 warning by certain legal officials was contained in a “draft” opinion that was prepared in the middle of fast-moving events. That opinion referred to a “likely”, rather than “certain”, outcome of a NAFTA arbitration. CANADA’s legal advisors in this arbitration might have taken a different view of

Department of Foreign Affairs and International Trade warned that an export ban would likely be found by a NAFTA panel to be a restriction on trade".

¹¹ In *Mondev*, the harsh conduct of public authorities towards the investor was held to be one factor justifying leniency on costs when the investor ultimately lost the case. But it would not be appropriate for this tribunal to increase the costs it would otherwise award as any kind of admonishment to the government of Canada.

CANADA's legal prospects after the events had fully unfolded and there was time to consider carefully the whole range of arguments that CANADA might present.

26. CANADA argues that with respect to liability and damages, Myers has respectively achieved only "partial success" and a "small fraction" of what it sought.¹² The investor SDMI argued that CANADA's actions breached four provisions of NAFTA, but the tribunal found that only two were breached. SDMI sought a very large amount at the damage stage – but emerged with a comparatively modest award of about \$8 million, including interest.
27. SDMI responds that it established liability for breach of NAFTA and it won a substantial award. It contends that quite simply, SDMI is the successful party in these proceedings.
28. The degree of success is important in considering the allocating of costs. A tribunal must take into account whether proceedings were necessitated or complicated because a party advanced a position that was ultimately rejected.
29. In my view, the investor was essentially successful at the liability phase. Its presentation of the facts was basically accepted by the tribunal. Applying the law to the facts, SDMI claimed that four provisions of NAFTA were breached. The tribunal agreed that the breach was in respect of two provisions. The case was not complicated or protracted to any great extent by the need to deal with the two other provisions.
30. SDMI was, however, only partially successful at the damages phase. The investor sought far more in the way of damages than it obtained. It claimed about \$53 million U.S. (including interest) in its reply memorial just prior to the damages hearing. It had

¹² CANADA, memorial on costs, paragraph 73.

claimed an even higher figure in its initial memorial on compensation, but scaled back its claimed in light of CANADA's response.

31. CANADA itself, however, also adopted an ambitious position on damages. In its memorial on damages, CANADA's principal position was that the tribunal should render an award "dismissing SDMI's claim for damages in its entirety for failing to establish quantum of loss."¹³ Its next fallback position was that the investor suffered a "delay on return" of its investment and that compensation in this regard of \$248,000 was "likely too high."¹⁴
32. CANADA states that the investor never made a settlement offer that was as low as the award of about \$8 million (including interest) that SDMI eventually obtained.¹⁵ But CANADA does not suggest that CANADA itself ever offered a settlement as high as \$8 million.
33. It seems possible that a more modest claim for damages by the investor might have led to a settlement and spared CANADA the costs of the damages hearing. But the fact that CANADA proposed a seriously inadequate measure of damages means that CANADA too can fairly be assigned some of the responsibility for the necessity of proceeding with the damages phase. One possible response would be for this tribunal to simply order that each party bear its own legal representation and assistance costs with respect to

¹³ CANADA, Counter-Memorial (damages phase) paragraph 228.

¹⁴ Ibid, paragraph 176.

¹⁵ CANADA, Memorial on Costs, paragraph 31: "Generally, domestic court rules governing the treatment of offers to settle deemed settlement offers relevant only if they meet or exceed the amount of the final award. By analogy, any settlement discussions between Canada and the Investor would only be relevant if the damages awarded in the Second Partial Award met or exceeded the amounts proposed in the Investor's offer to settle. There can be no suggestion that this occurred in this case. Hence, the Tribunal should not take any settlement discussions into account when determining apportionment of costs."

the damages phase. I do not propose, however, to take this route. The position of the two parties was not symmetrical. It was CANADA that wronged SDMI. Absent a settlement between the parties, the only way for SDMI to recover a reasonable measure of redress was to proceed with the damages phase of these proceedings.¹⁶

34. CANADA itself has not used the formulation that SDMI “lost” or was the “unsuccessful” party at the damages phase.
35. It is true that the tribunal’s award was only about a tenth of what SDMI sought. It is also true that the tribunal’s award was more than an infinite multiple of CANADA’s preferred proposal – which was zero. The tribunal’s award was more than twenty times greater than CANADA’s primary fallback position. It was more than three times larger than a further fallback position of CANADA: that if loss or profits were used as the basis for compensation, the correct estimate would be a little less than \$2 million, to which simple interest would be applied.

¹⁶ CANADA’s memorial on costs quotes a passage from Craig, Park and Paulsson, “International Chamber of Commercial Arbitration”, in which it is noted that in one unpublished award, where the claimant sought hundreds of millions of dollars but obtained a far smaller amount, the tribunal ordered the parties to split the costs of arbitration and bear their own costs of legal representation and assistance. The authors suggest that in other cases of a claimant’s reach for damages exceeding its grasp, a tribunal might order the respondent to pay all the arbitration costs, but leave each party to bear its own costs of representation and assistance.

On the other hand, in an article submitted by CANADA itself as part of its book of authorities, Gotanda, *supra*, observes at p. 24:

“In *SPP Ltd. v. Arab Republic of Egypt*, the claimant there sought \$42.5 million in damages, but the tribunal awarded it \$12.5 million. Although the tribunal recognized that the sum awarded was “significantly less than what was requested” it determined that “the right course to follow” was to award the claimant 80% of its arbitration and legal costs.

As noted earlier, the precedents might not be consistent. It is risky to compare and contrast them without having access to, and reviewing, the actual text of some of the awards referred to in the textbooks. It must be kept in mind as well that they were conducted under different rules and outside of the overarching context of NAFTA.

36. The figure awarded by this tribunal was indeed much closer on a number line to CANADA's proposal than to SDMI's. There was a juridical floor to what CANADA could propose – zero – and that is precisely what CANADA chose. SDMI's theoretical ceiling was actually higher than what it actually proposed; among other things, SDMI based its estimate on a success rate of 50% on turning quotes on contracts, even though a higher rate was theoretically possible.
37. The tribunal in this case arrived at its own collective estimate on a difficult question: what would have happened if the border had stayed open? I joined in that judgment and abide by it. It does not follow that it is unreasonable for SDMI to have proposed a much more profitable scenario. The company had a demonstrated history in the United States of seizing opportunities and generating tens of millions of dollars in profits in just a few years.¹⁷
38. In the end, while SDMI achieved a far smaller award than it sought, it still obtained a very substantial award in its favour. It was \$8 million more than what SDMI would have achieved if it had not pursued this arbitration to completion. It was \$8 million more than CANADA proposed.
39. It can be eminently reasonable for a party to protect its interests by retaining the best legal counsel and experts and directing them to prepare their case with the utmost thoroughness. But it can, in some circumstances, be harsh to require the losing party to pay for all of the premium services retained by the winning party. The losing party might already have to pay a substantial damage award and the costs of its own legal representation and assistance. It seems appropriate to make an award of legal representation and assistance costs that takes into account the following consideration.

¹⁷ Damages award in this case, paragraph 179.

What expense would have been incurred had the successful party purchased legal and expert services in a quantity, of a quality and for a price associated with a merely competent and serviceable exercise in advocacy, rather than a premium one? Answering this question can help to provide a more objective and predictable basis for recovery by the successful party.

40. The time and money spent by CANADA on its defence is some indication of whether SDMI's representation costs are close to the premium version of advocacy or close to the competent-and-serviceable middle. In fact, the government of Canada's lawyers devoted almost the same amount of time - 7220.6 hours - as did the investor's lawyers (over 7500 hours). It might be that the thoroughness and presentational elegance of the investor's submissions to some extent required CANADA to ratchet up its own efforts. But at least a large part of the explanation for the massive effort by the lawyers and accountants for CANADA lies in the intrinsic complexity and difficulty of the issues themselves.¹⁸
41. Appleton and Associates, the lead counsel for the investor, charged approximately \$2 million for those 7500 hours of work. The firm wrote off approximately \$800,000 that they would have ordinarily charged based on hourly fees.¹⁹ Appleton and Associates effectively billed at a rate of about \$270/hour. To be clear, this is in Canadian dollars. These figures suggest that the rates charged in the end by Appleton and Associates, for which the investor is now seeking reimbursement, were well within the going range in

¹⁸ The memorial on costs filed by CANADA states, at paragraph 35, "The number of hours expended by counsel - particularly during the Damages Phase - reflects the intensity of effort required by Canada's counsel to address the case presented by the Investor and the numerous complex and novel issues raised by the claim."

¹⁹ SDMI submission on costs, paragraphs 40 and 41.

Toronto (where the arbitration was held) for services by a top-notch firm in an area of law involving commerce.²⁰

42. Each side has charged the other with contributing unnecessarily to the costs of the overall process here.
43. SDMI contends that CANADA on a number of occasions resisted and stalled on the production of documents. It further points out that CANADA adopted other positions that added to the length of these proceedings - such as seeking unsuccessfully a stay of these proceedings while CANADA proceeded with an application in the courts to set aside this tribunal's award on liability.
44. With respect to various unsuccessful procedural maneuvers on the part of CANADA, no finding of bad faith on the part of CANADA is warranted here. It has not been shown that CANADA was aiming to wear down its adversary or striving for cynical purposes to withhold damaging evidence. CANADA was, as far as I can tell, attempting to protect or establish certain rights that it believed it should enjoy under Canadian or international

²⁰ CANADA suggests (Memorial on Costs, footnote 37) that under the "Ontario rules" - the status of which are not explained - a lawyer with less than ten years of experience might charge in the range of \$225 - \$300 per hour and one with over 10 years might charge in the range of \$300 - \$400 per hour. Mr. Appleton was called to the bar of New York in 1991, the Bar of Ontario in 1992 and the Washington D.C. Bar in 1998. A number of the lawyers working with Mr. Appleton did have fewer than ten years at the bar. CANADA's argument that the hourly rates were high by Ontario standards however, does not appear to take into account the write-off by Appleton & Associates, which was about 30% of the fees that would ordinarily be charged. The rate that an Ontario lawyer would reasonably charge, moreover, could reasonably take into account ability and specialized expertise as well as years at the bar. Mr. Appleton is the author of a well-respected book on NAFTA law, and Appleton and Associates have served as counsel for investors in a number of other Chapter 11 cases. Furthermore, legal rates typically charged at the site of the arbitration would not necessarily be the only reasonable basis for gauging billing rates. Mr. Appleton is a member of the bar in two U.S. jurisdictions and was retained by a U.S. client. The firm's agreement to write-off some of its fees were in fact made under the rules of the New York State Bar. His personal rate (as opposed to the average rate of Appleton and Associates), taking into account the write-off, was about U.S. \$300/hour (or about Cdn \$465). The investor's memorial on costs states, at paragraph 40, that "the hourly billing rate charged by the Investor are within the standard range for American corporate law firms." It appears that this statement is in relation to the hourly rate even before the write-off. CANADA has offered no evidence to suggest that Appleton and Associates' rates, even prior to the write-off, were

law. With respect to the overall cost to SDMI of these proceedings as a whole, it is reasonable that CANADA pay a certain percentage. The latter should not be increased, however, because CANADA resisted the disclosure of information at some stages or sought a stay of proceedings.

45. CANADA has reminded this tribunal that SDMI produced, very late in the proceedings, an electronically stored database concerning customer contracts. It appears that various officials within SDMI were either unaware of the existence of the electronic database or did not realize until late in the day that it had to be produced to the government of Canada. Bad faith cannot plausibly be ascribed to the investor in this regard. The data actually tended to support the investor's case. The mistake that SDMI made about the electronic data base did delay the holding of the damages hearings by several weeks, and that can fairly be taken into account.
46. CANADA also complains that SDMI varied the quantum of its damages claim at various stages in the proceedings.
47. It could not reasonably be expected that the investor would proceed to obtain an exhaustive report on damages at the very outset of these proceedings. A prudent investor would wait until liability was established at the first phase of these hearings, and the tribunal gave some direction on the principles to be used in assessing compensation.
48. The task of fully estimating damages in this case was inherently complex; it involved applying a series of professional judgment and analysis to a large mass of information. The SDMI accounting experts were highly skilled, but could not reasonably be expected to consider every valid point that their equally capable counterparts might raise after examining their analysis. It is to the credit of the SDMI accounting team that it was

in any way out of line with U.S. standards.

ready and willing to revise their analysis downward in some respects in light of some legitimate points raised by their counterparts.

49. CANADA knew throughout that it was faced with a very large damage claim. The basic approach adopted by SDMI with respect to estimated damages was constant: take a population of documented customer quotes and project how many would have been turned into contracts and at what profit. Some details, evidence and the bottom line did change through time, and I have no doubt that CANADA's team at times found these changes to be frustrating and a source of some additional labour. But I am not convinced that these adjustments added in any drastic way to the overall complexity or length of these proceedings.
50. I would begin the specific calculation of legal representation costs by first taking into account the limited success of the investor at the damages' phase. In light of that, I would begin by reducing by 25% the legal representation and assistance costs claimed by the investor.
51. I would then take that remaining 75% and cut it approximately 50% further.
52. The further discount of 50% reflects these considerations:
 - the principle that full indemnification for even a fully successful party may not be appropriate, inasmuch as arbitral practices with respect to costs should promote settlements;
 - the principle that tribunals should avoid visiting unduly harsh consequences for parties who are eventually held to be unsuccessful, but could not know for sure how a tribunal would rule on contested legal arguments and evidence;

- the principle that legal representation and assistance costs should be geared to the standard of what reasonably competent-and-serviceable, rather than premium, advocacy would cost. The 50% discount is intended to give the benefit of the doubt to the respondent, CANADA, and should fully encompass any possibility that the investor could have submitted a reasonable case using fewer resources;
- some limited adjustments should be made to take into account the fact that SDMI was responsible for several avoidable complications and delays, including that connected with the late production of the electronic data base on customers;
- in the absence of a clear and consistent body of precedent in the area of costs connected with arbitral proceeding, this tribunal can reasonably be conservative in fixing the amount of the investor's cost that CANADA must reimburse.

53. With respect to arbitration costs, as opposed to legal representation and assistance costs, I would adopt an approach that is similar but not identical.

54. In view of the mixed success of the investor at the damages phase, I would begin again by discounting by about 25% the amount of tribunal costs that must be reimbursed by CANADA.

55. I would not, however, order a further discount of 50% in the same way as I did with the costs of legal representation and assistance.

56. First of all, the concern about visiting unduly harsh consequences on the unsuccessful party are not as substantial when it comes to tribunal costs. The latter can be large, but they will still tend to be less than the costs of legal representation and assistance. The tribunal in this case had to collectively spend much time and effort to analyze and evaluate thousands of pages of documents and testimony. But the record was the

edited and distilled results of the over 14,500 hours of wider efforts by the lawyers for the parties.

57. Furthermore, when it comes to tribunal costs, there should be somewhat less concern about whether the amount spent is objectively necessary and whether the unsuccessful party could anticipate how much it might have to pay. The UNCITRAL rules establish a presumption that the unsuccessful party will pay them. Tribunal costs are incurred by tribunal members who are supposed to be knowledgeable and dispassionate in discharging their duties. When it comes to legal representation and assistance costs, by contrast, an unsuccessful party is being asked to pay expenses that were initially incurred at the free discretion of its adversary.
58. The overall result is that I would award the investor \$500,000 for arbitration costs and \$1.4 million for legal representation and assistance (including the costs of accounting and other non-lawyer experts).
59. Interest would run on this proposed award at a rate of the Canadian prime rate plus 1%, compounded from the date of the award.
60. Let me try to put into perspective the figures I have proposed for legal representation and assistance. The \$1.4 million I propose can be viewed as covering about \$500,000 out of over \$1.3 million on non-legal experts and on the disbursements of the lawyers, and about \$900,000 out of over \$2.3 million in actual legal fees.
61. The investor might indeed view the figure I propose as markedly low. It leaves the investor to absorb over two and half million dollars in overall litigation-related costs that it sustained in the course of obtaining redress for an international wrong inflicted over seven years ago.

62. These costs were sustained with no guarantee of eventual success and by a company that is only of medium size. The investor is still faced with proceedings by the government of Canada in the Canadian courts to set aside this tribunal's ruling at the liability stage.
63. The risk and burden to the investor in carrying forward litigation can be much greater than it is to a government defending it. The latter might have a large in-house legal staff and the ability to absorb the costs of litigation and any eventual loss without too much disruption to its plans and ability to operate. A government might reasonably be reluctant to settle because of an eagerness, in the public interest, to have a tribunal clarify the law. A private investor cannot reasonably be expected to have a comparable interest in advancing the state of the law, as opposed to having the specific dispute settled in a reasonable manner as quickly and cheaply as possible.
64. At the end of the day, a difficult judgment call must be made about allocating costs in this case. The figures I have proposed represent my own conclusions after considerable reflection on the arguments ably submitted by both sides.

Signed,

Bryan Schwartz
30 December 2002