NAFTA UNCITRAL INVESTOR STATE CLAIM

POPE & TALBOT INC AND THE GOVERNMENT OF CANADA

RULING BY TRIBUNAL

ON

CLAIMANTS' MOTION FOR INTERIM MEASURES

Article 1134 of NAFTA does not confer jurisdiction on the Tribunal to enjoin the application of a measure. Since the relief requested is, in the view of the Tribunal, to enjoin the application of the measure which is the quota regime and its implementation, the Tribunal takes the view that it lacks power to grant such relief.

That view applies regardless of the jurisdictional basis of the Tribunal's general power to grant a measure of relief. It follows that the motion will be dismissed.

However the Tribunal feels compelled to state that the verification review and the report thereon were seriously flawed and are not a reliable basis for further action. Nevertheless there were also admitted errors by Pope & Talbot Inc. But the Tribunal finds these to be immaterial in the context of Pope & Talbot's total quota and past action by Canada in implementing the measure.

The Tribunal wishes it to be understood that it will be mindful of the views just expressed should these matters become material in the future.

Presiding Arbitrator

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN

POPE & TALBOT, INC

Claimant/Investor

and

THE GOVERNMENT OF CANADA

Respondent/Party

AWARD

by

THE ARBITRAL TRIBUNAL

The Honourable Lord Dervaird (Presiding Arbitrator)
Mr Murray J Belman (Arbitrator)
The Honourable Benjamin J Greenberg Q.C. (Arbitrator)

In relation to

PRELIMINARY MOTION BY GOVERNMENT OF CANADA

TO

DISMISS THE CLAIM BECAUSE IT FALLS OUTSIDE THE SCOPE AND COVERAGE OF NAFTA CHAPTER ELEVEN "MEASURES RELATING TO INVESTMENT" MOTION

1. The Parties

1. The Claimant is Pope & Talbot, Inc, 1500 S.W. First Avenue, Suite 200 Portland Oregon, a publicly traded corporation incorporated under the laws of the State of Delaware in the USA. It has an Investment, Pope & Talbot Ltd., a corporation organised under the laws of the Province of British Columbia – which is a wholly owned subsidiary of another British Columbia corporation, Pope & Talbot International Limited, which is, in turn, a wholly owned subsidiary of the Claimant. The Investment is a wood products company that manufactures and sells softwood lumber. It harvests timber in the province of British Columbia and operates three sawmills and two forestry divisions there.

2. The Respondent is the Government of Canada, Justice Building, 284 Wellington Street, Ottawa.

3. The parties are hereafter referred to as the "Claimant," the "Investor" or "Pope & Talbot" and the "Respondent" or "Canada" respectively.

2. Summary Description of the Dispute and the Proceedings

4. This is an arbitration under Chapter 11 of NAFTA for settlement of a dispute between Canada as a NAFTA Party and Pope & Talbot as an Investor of another NAFTA Party (together with its Investment).

5. Pope & Talbot claims that Canada has breached certain of its obligations in relation to investments set forth in NAFTA Chapter 11, Section A, and submits its claims to arbitration under Section B.

6. For the purpose of the present motion only, Canada does not dispute the accuracy of Pope & Talbot's pleadings on factual matters; consequently, the exposition of the facts set out in this ruling are as alleged by the Claimant. Canada does contend that as pleaded the claim falls outside the scope of Chapter 11 of NAFTA and

should be dismissed.

7. On March 19, 1996 Canada and the United States of America exchanged diplomatic letters whereby Canada undertook to add certain softwood lumber products to its Export Control List. On March 26, 1996 Canada added them to the Export Control List and thereby required exporters of softwood lumber products originating from the provinces of Quebec, Ontario, Alberta and British Columbia, "the Listed Provinces," to obtain an export permit to qualify to export such products to the United States. On May 29, 1996 they entered into a bilateral agreement, the Softwood Lumber Agreement ("SLA") for 5 years retroactive to 1st April 1996, which established a limit on the free export into the United States of softwood lumber by Canadian softwood lumber producers located in the Listed Provinces.

8. To give effect to the SLA Canada created an Export Control Regime under which

(1) Canada required manufacturers of softwood lumber products first manufactured in the Listed Provinces to obtain a permit in order to export those products to the United States;

(2) Canada promulgated Export Permits Regulations (Softwood Lumber products) providing for a permit application regime;

(3) Canada promulgated the Softwood Lumber products Export Permits Fees Regulations requiring payment of fees for issuance of such export permits;

(4) Canada provided for a discretionary allocation regime that authorised the Canadian Minister of Foreign Affairs and International Trade, "the Minister," to exempt certain exporters from paying the full fee for export permits based upon annual quota levels fixed under the SLA.

9. On 31 October 1996 the Minister issued Notice to Exporters No. 94 stating Canada's policy as to who would qualify for a limited exemption from paying fees to obtain the export permits. Notice No. 94 stated that only certain softwood lumber producers in the Listed Provinces would qualify for allocation of the annual quota levels fixed under the SLA and that export permits would only be issued at the discretion of the Minister. Other notices have since been issued governing how the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of the business of lumber producers are affected by Canada's allocation of quota.

10. Under the Export Control Regime exporters of softwood lumber first manufactured in the Listed Provinces are required to pay a fee called for by the SLA in respect of lumber exported to the United States at a fixed rate per thousand board feet. If the Minister determines a producer so qualifies under the Canadian quota allocation policy, it may export a limited amount to the United States "fee free" (i.e. without that fixed charge) and a lesser amount at a lower fee base (currently one half of the standard fixed rate). Softwood lumber producers located elsewhere in Canada than the Listed Provinces do not require permits to export lumber to the United States nor do they have to pay export permit fees.

11. Pope & Talbot claims that measures by Canada that have resulted in harm to the Investor and its Investment in Canada include:

(1) requiring permits for export to the United States of softwood lumber products originating in only the Listed Provinces under the Export Control List

(2) requiring payment of export permit fees

(3) unfairly and inequitably allocating "fee-free" and "LFB" quota amounts to the Investment of the Investor from 1996.

12. Canada argues in relation to the present motion:

(1) The facts alleged in the Statement of Claim disclose no "investment dispute" within the meaning of NAFTA Article 1115. Accordingly, the Statement of Claim cannot be arbitrated under the NAFTA chapter Eleven dispute settlement mechanism established exclusively for investment disputes. We address this contention at Section 3(A) below.

(2) The SLA and Canada's measures to implement the SLA do not "relate" to investors or investments. The claim advanced cannot be arbitrated under NAFTA Chapter Eleven because it falls outside the scope and coverage of the Chapter (NAFTA Article 1101). We address this contention at Section 3(B) below.

(3) Despite the Investor's assertion that the Claim is not about the legitimacy of the SLA per se, the Statement of Claim challenges the SLA itself. It is not a measure, and is thus outside the scope of Chapter Eleven (NAFTA Article 1101). We address this contention at Section 3(C) below.

13. Pursuant to Article 1128 of NAFTA, the United Mexican States, having given notice of intention to make a submission to the disputing parties, provided that submission dated 2nd December 1999. Mexico concurred with the general interpretation of NAFTA propounded by Canada. In particular it supported, with further arguments, the distinction between measures relating to trade in goods and services, and investment.

14. The disputing parties accept that this Tribunal has jurisdiction to determine whether a claim falls within NAFTA Chapter Eleven, under particular reference to Article 21 of the UNCITRAL Arbitration Rules.

15. For the purposes of the present Award it is not necessary to record the procedural

history of this arbitration to date save to record that the disputing parties are agreed that this motion be disposed of without an oral hearing.

3. Discussion of Canada's Challenges to the Tribunal's Jurisdiction

A. Canada's Contention That This Is Not an Investment Dispute

16. Canada first contends that the jurisdiction of the Tribunal extends only to "investment disputes" and that "an investment dispute arises [only] when a measure prohibited by * * * NAFTA Chapter Eleven * * * is *primarily aimed* at investors of another Party or at investments of investors of another Party." (Emphasis added.)

17. NAFTA Article 1115 provides:

> Without prejudice to the rights and obligations of the Parties under Chapter Twenty ... this Section [B of Chapter Eleven] establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

18. NAFTA Article 1139 defines "investment" to include an "enterprise," and "enterprise" in turn is defined by Article 201(1) to include "any corporation." "Investment of an investor of a Party" is defined in Article 1139 to mean "an investment owned or controlled directly or indirectly by an investor of such Party." And "investor of a Party" is defined in Article 1139 as meaning "a Party * * * or an enterprise of such Party that seeks to make, is making or has made an investment." Applying these definitions, Pope & Talbot is an investor of a Party and Pope & Talbot Ltd. an investment of an investor of a Party. Pope & Talbot is making a claim under Section B of Chapter Eleven and is thus a disputing

investor within the definition in Article 1139 as "an investor that makes a claim under Section B."

19. The contention of Canada in this regard is that the fact that Pope & Talbot is "an investor that makes a claim under Section B" does not make its claim an investment dispute. NAFTA does not define "investment dispute," but, as noted, Canada contends that the term applies only to disputes about measures "primarily aimed" at investors of another Party or investments of those investors. In support of this definition, Canada points to the following:

(1) The definition of investment already cited. However, as noted, neither that definition, nor any other in NAFTA defines "investment dispute."

(2) The types of investment measures for which the NAFTA Parties claimed an exemption from Article Eleven obligations that would otherwise apply. The exemptions cited by Canada relate to government loans, acquisitions of Canadian businesses, constraints on ownership of companies, sales of shares in state enterprises, limitations on share voting, acquisition of realty and the like. Since the claim before us does not fall into any of these categories, Canada argues that it is not covered by Chapter Eleven. However, as the Claimant points out, Canada's references to exemptions leave out others that contain elements quite similar to those of the dispute before us, like waivers of customs duties conditioned on the fulfilment of performance requirements and limitations of the rights of foreign enterprises to secure import or export permits.

(3) The "sharp distinction" NAFTA draws between trade in goods issues and investment issues. NAFTA's Part Two, "Trade in Goods," deals with matters concerning trade in goods such as market access, rules of origin and customs procedures. Canada notes that softwood lumber is a "good" covered by Part Two, and the dispute in the present case therefore relates to trade in a good.

According to Canada, Article 2004 reserves dispute settlement respecting trade in goods to the NAFTA Parties. Article 2004 provides:

> Except for the matters covered in Chapter Nineteen ... and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter [i.e. Chapter 20] shall apply with respect to the avoidance or settlement of *all disputes between the Parties* regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004. (Emphasis added.)

Accordingly, in general all disputes between the Parties to the NAFTA Agreement are to be dealt with under the dispute settlement provisions of Chapter 20. This, however, is not a dispute between Parties, so the limitations in Article 2004 are not applicable to the question before us.

20. For their part, Pope & Talbot argue that, since "investment dispute" is not defined as such, the term cannot be considered as a limitation on the Tribunal's assessment whether it has jurisdiction to decide a particular dispute. (They further contend that, even if there were a minimal definition of the term (of the kind found, for example, in the United States Model Bilateral Investment Treaty), the dispute before us would surely qualify under that definition.) There being no definition of an investment dispute, Pope & Talbot assert that the only requirements for an investor to bring a claim within Chapter 11 are that it shall have fulfilled the conditions actually set out in Chapter 11. These are set out in Article 1116:

(1) That a Party has breached an obligation under (a) Section A or Article 1503(2) (State Enterprise) or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A;

(2) That the investor must have incurred loss or damage by reason of, or arising out of, that breach;

(3) That the investor has made the claim within three years from the date on which the investor first acquired, or should first have acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

In all material respects, the same conditions apply where the claim is made by an investor of a Party on behalf of an enterprise of another Party.

21. As noted, Pope & Talbot further observe that the list of exceptions to Chapter Eleven taken by the Parties may yield an inference opposite to the one Canada urges.

22. In its Reply, Canada again refers to the wording of Article 1115. It also claims that the Investor "states incorrectly that there is no limit on the disputes that may be submitted to arbitration pursuant to Chapter 11." The Tribunal does not so read the Investor's Response. But even if, as Canada argues in its Reply, there are both procedural and substantive limits beyond those cited by the Investor in its Response, none of those limits appear applicable to the present case.

23. Section B of Chapter Eleven is entitled Settlement of Disputes between a Party and an Investor of another Party. As Article 1115 states, Section B establishes a mechanism for the settlement of "investment disputes." The only person to whom it gives a right to make a claim is an investor of one Party contending either (i) that it has incurred loss or damage by reason of or arising out of a breach by another Party of an obligation under Section A of Chapter Eleven (or other obligations immaterial for present purposes) or (ii) that an enterprise of another Party owned or controlled by the investor has incurred such loss or damage.

24. In the present case the Investor claims that Canada is in breach of four separate provisions of Section A of Chapter 11.

(1) In terms of Article 1102 – National Treatment, it claims breach of the obligation to accord to investors of another Party treatment no less favourable than it accords in like circumstances to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments. The like obligation arises under 1102(2) in relation to investments of investors of another Party.

(2) In terms of Article 1105 – Minimum Standard of Treatment, it claims breach of the obligation to accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

(3) In terms of Article 1106 – Performance Requirements, it claims breach of the obligation not to impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

a. to export a given level or percentage of goods or services;

* * *

c. to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports.

In addition, under the same Article, it claims breach of the obligation not to condition the receipt or continued receipt of an advantage in connection with an investment in its territory, of an investor of a Party or of a non-Party, on

compliance with the following requirement:

d. to restrict sales of goods in its territory that such investment produces or provides by relating such sales in any way to the volume of its exports.

(4) In terms of Article 1110 – Expropriation and Compensation, it claims breach of the obligation not to 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.

25. In its Statement of Claim the Investor claims that the breaches described above relate to the Investor or the Investment, and that in each case it or the Investment has sustained loss or damage by reason of those breaches. For the purposes of the present Motion, the Tribunal must take those assertions of fact as true. Upon that basis it cannot be said that there is no investment dispute between the Investor and Canada. The Investor claims breaches of specified obligations by Canada which fall within the provisions of Section A of Chapter Eleven. In the view of the Tribunal, the Investor and Canada are disputing parties within the definition in Article 1139. Whether or not the claims of the Investor will turn out to be well founded in fact or law, at the present stage it cannot be stated that there are not investment disputes before the Tribunal.

26. The Tribunal would further observe this. There is no provision to the express

effect that investment and trade in goods are to be treated as wholly divorced from each other. The reference in Section A of Chapter 11 to treatment of investments with respect to the management conduct and operation of investments is wide enough to relate to measures specifically directed at goods produced by a particular investment. The provisions for minimum standard of treatment in Article 1105 might well relate to similar measures. And Article 1106 in relation to performance requirements makes specific reference to limitations on dealing with goods in certain ways. It appears to the Tribunal accordingly that the language of Section A of Chapter 11 does not support the narrow interpretation of investment dispute which Canada and Mexico seek to advance.

B. Canada's Contention That the Measures Challenged Do Not Relate to Investment or Investors.

27. Canada submits in any event that "the SLA and Canada's administration of the SLA are not measures relating to Investors of another Party or to investments of Investors of another Party." (Emphasis in original.) Article 1101 limits the coverage of Chapter 11 to measures "relating to" such investors or investments, and Canada (supported on this argument by Mexico) claims that it is not enough that a measure may "affect" an investor or investment. The measure must "relate" to the investor or investment in a "direct and substantial" way.

28. Canada points out that in several articles of NAFTA the more general term "affect" has been used and suggests that this denotes a lesser extent of connection than "relate." Canada also cites certain WTO cases that considered Article XX(g) of the GATT, which also addresses "measures relating to." In those cases, panels have found the term "relating to" to be synonymous with "primarily aimed at." So while Canada accepts that the Investor's operations are affected by the SLA and Canada's administration of the SLA, this does not transform the case into one dealing with measures related to investment.

29. The Investor points out that the position taken by Canada here is contrary to its Statement on Implementation submitted to Parliament on the coming into force of NAFTA, which states "Article 1101 states that Section A covers measures by a Party (i.e. any level of government in Canada) that affect:

- investors of another Party (i.e. American parent company or individual Mexican or American investor)
- investments of investors of another Party (i.e. the subsidiary company or asset located in Canada)."

Canada in its Reply argues that its Statement on Implementation is not legally binding in domestic law, nor does it have legal effect in international law.

30. The Investor also points out that the WTO cases relied on by Canada involved derogations from the obligations of the GATT and, therefore, must be interpreted strictly. The provisions before the Tribunal involve substantive treaty obligations for which there is no equivalent justification for strict construction.

31. In its support of Canada, Mexico observes that a measure such as allocation of quota is on the face of it a measure relating to trade in goods, and in its view a claim of this nature prima facie falls outside the scope and coverage of Chapter Eleven.

32. The view of Canada and Mexico appears thus to be that it is possible at the outset to categorize a measure as relating to trade in goods. If it is, then the measure cannot be seen as relating to, i.e. as primarily aimed at, Investors or investments. Accordingly, the investor will have no redress under Chapter Eleven of NAFTA in such cases, and any remedy must be found in Governments applying the dispute resolution provisions of Chapter 20 if they wish to do so.

33. It appears to the Tribunal that Canada's arguments fail in two quite different ways:

In the first place, where a quota allocation system is involved of the type

here under consideration, it necessarily involves that quota be directly conferred upon or removed from enterprises. It is not a mere linguistic truism to say that such a system directly applies to a particular enterprise, namely each of the relevant softwood lumber producers in the Listed provinces. It directly affects their ability to trade in the goods they seek to produce, but it can equally be described as the way that the measures applied to the various enterprises affect the total trade in the relevant products.

In the second place, the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. But it is clear from the terms of Article 1106 that it is also a measure relating to investment insofar as it might affect an enterprise owned by an investor of a Party.

34. For these reasons, the Tribunal rejects Canada's submissions that a measure can only relate to an investment if it is primarily directed at that investment and that a measure aimed at trade in goods *ipso facto* cannot be addressed as well under Chapter 11.

C. Canada's Contention that the SLA is Not a Measure

35. NAFTA Article 201, which contains definitions of general application, defines "measure" as including any law, regulation, procedure, requirement or practice. Measure is not otherwise defined, and Article 1101 provides that Chapter Eleven applies to measures adopted or maintained by a Party exclusive of those covered by Chapter Fourteen (Financial Services).

36. Canada observes that Pope & Talbot's Statement of Claim expressly challenges components of the SLA, and observes that the SLA is not a domestic measure

adopted or maintained by a NAFTA Party, but rather is an international agreement. To the extent that the Investor challenges the SLA as a measure, it is outside the scope and coverage of NAFTA Chapter Eleven. The Investor points out that it pleaded in its notice of arbitration that it was not challenging the SLA in this claim. What it is expressly challenging are the measures taken by Canada which it claims to be an unfair and inappropriate implementation by Canada of its obligations under the SLA.

37. The Tribunal is not concerned with the SLA directly, which the Investor concedes is not a measure and cannot be the subject of the claim in this arbitration. On the other hand the steps taken by Canada to implement its obligations under the SLA are capable of constituting measures within the meaning of Articles 201 and 1101 of NAFTA. Since the claim is restricted to a challenge of certain measures of implementation, it does relate to measures within the meaning of Chapter Eleven. This head of challenge is accordingly rejected.

CONCLUSION

38. For the foregoing reasons the Tribunal rejects at this stage the motion by Canada to dismiss the Investor's Claim.

The Honourable Lord Dervaird, Presiding Arbitrator

The Honourable Benjamin J. Greenberg, Q.C., Arbitrator

Murray J. Belman, Arbitrator

Dated: January 26, 2000

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2 April 2000

Dear Sirs

NAFTA UNCITRAL Investor-State Claim
Pope & Talbot Inc and the Government of Canada

The Tribunal refers to the faxes passing between the parties and the Tribunal in relation to the question whether Canada was or is entitled to make available to representatives of sub-national governments documents occurring in or generated by the present arbitration.

1. The parties are subject to a Confidentiality Order, Procedural Order No. 5 whereby Protected Documents and Third Party Protected Documents are subject to restriction.

2. Under paragraphs 9 and 10 of that Order disclosure of those documents is limited to particular classes of person as set out in each of those paragraphs.

3. Wide ranging arguments have been put forward by each party, relating on the one hand to the proper scope and meaning of the expression "Canada" in the NAFTA Agreement and on the other to the proper scope and range of confidentiality in relation to international commercial arbitration in general and NAFTA arbitration in particular.

4. In the view of the Tribunal those wide ranging arguments do not arise immediately. The Tribunal is conscious that Procedural Order on

Confidentiality No. 5 is a document based on materials put forward by the parties to this arbitration. In particular paragraphs 4, 5, 9 and 10 of Procedural Order No. 5 are in precisely the terms which Canada proposed that these paragraphs should have in their faxes to the Tribunal dated 17th and 18th November 1999. There was no difference between the parties as to the terms of paragraph 9, and as to paragraph 10 Canada desired, and the Tribunal agreed, and therefore included in its direction that the prohibition on disclosure should not apply only to a representative of the Claimant/Investor present at the hearings. In these circumstances the initial question which arises is the extent to which disclosure is permitted by the terms of the Order, whatever the general law may be in regard to the wider matters canvassed. Canada is a party to this arbitration. The sub-national governments of Canada as such are not parties to this arbitration. The only possible right that there might be under the present Order for representatives of sub-national governments to have access to these documents would be if they fell within category (2) of paragraph (9), namely officials or employees of the parties whose involvement in the preparation or conduct of these proceedings is reasonably necessary. Otherwise there could be no entitlement under any head. It appears to the Tribunal self-evident that representatives of sub-regional governments are not officials or employees of Canada. Accordingly there can be no question under the present Procedural Order of such persons being permitted access to Protected Documents. (No similar provision exists under paragraph 10 for Third Party Protected Documents).

5. In its submissions Canada refers to its long standing practices for the sharing of information with provinces and territories, and in particular so informing them in relation to Chapter 11 materials. However the fact is that Canada and the Claimant were agreed upon and the Tribunal in due course directed in relation to Protected Documents in paragraph 9 that such documents may be used only in these proceedings ... and may be disclosed only for such purposes, and in the case of paragraph 10 that neither Pope & Talbot Inc nor the Government of Canada may, directly or indirectly, use Third Party Protected Documents or information recorded in or derived from those Documents for any purpose other than this arbitration. The passages underlined indicate clearly that whatever other information Canada might properly share with provincial and territorial governments, it was restricted in the use it might make of any information within the protected classes to the purposes of this arbitration. Sharing that material with C-Trade representatives is not for the purposes of this arbitration but as Ms. Ayotte states at paragraph 18 of her affidavit "essential to avoid new measures that may generate future claims ...". If that be the purpose for which Canada seeks to use that protected information the Tribunal is in no doubt that it is not open to Canada to do so under the terms of the Procedural Order.

6. For the foregoing reasons it is unnecessary for the Tribunal to consider the wide issues raised by the parties in relation to Procedural Order No. 5. Canada has proposed and the Tribunal has accepted and contained in its Order restrictions on the use which may be made and the persons to whom disclosure may be made of the information produced in this arbitration, in particular, protected and third party protected information. In these circumstances it is

not open to Canada to disclose such information unless a variation order is made to Procedural Order No. 5.

7. In its submission Canada makes an alternative case that for the proper functioning and due observance of the NAFTA access to such documents should be permitted by variation of Procedural Order No. 5 to that effect. In the view of the Tribunal, Canada makes a convincing case that such a variation is desirable in order to enable Canada to ensure compliance with the NAFTA. Reference is made to NAFTA Article 105 and to the affidavit of Ms Ayotte.

8. The Tribunal has considered the amendments proposed by Canada. It is satisfied that with certain modifications those amendments will safeguard the confidentiality of protected documents as well as meeting Canada's requirements. However one issue arises. Under Article 10, both parties, that is to say Pope & Talbot Inc and the Government of Canada, are subject to the prohibition already mentioned in that neither may "directly or indirectly use Third Party Protected Documents or information recorded in or derived from these Documents for any purpose other than this arbitration." The amendment proposed by Canada permits disclosure to provincial and territorial trade representatives to the "C-Trade committee". It appears to the Tribunal that if that general prohibition in paragraph 10 is to be overcome it is necessary to include a reference to federal representatives as well in paragraph 10.1.

9. The Tribunal also considers that it is necessary to ensure that each person who may be comprised within the "C-Trade" committee provides Confidentiality Agreements before gaining access to any such Protected or Third Party Protected Documents. Accordingly any exercise of the power conferred under the proposed Article 10.1 will be subject inter alia to the provision of paragraph 13 of the existing Order.

10. The Tribunal accordingly orders that Procedural Order No. 5 be amended in the manner shown in the Annex hereto.

Yours faithfully

Lord Dervaird
Presiding Arbitrator

Copy:

Murray J Belman
Benjamin J Greenberg

ANNEX
NAFTA UNCITRAL INVESTOR - STATE CLAIM
POPE & TALBOT INC. AND THE GOVERNMENT OF CANADA

AMENDMENT TO PROCEDURAL ORDER NO. 5
(PROCEDURAL ORDER ON CONFIDENTIALITY)

The following amendments shall be made to Procedural Order No. 5 with immediate effect.

1. After Paragraph 10 there shall be a new paragraph 10.1 as follows:-

   10.1 Notwithstanding paragraphs 2, 3, 4, 9 and 10 of this Order, but subject always to paragraphs 11 and 13 of this Order, Canada may disclose to federal, provincial and territorial trade representatives of the "C-Trade", a federal-provincial/territorial committee which meets on matters relating to international trade policy, any confidential, Protected or Third Party Protected Documents, including pleadings, submissions, memorials, evidence tendered to the Tribunal and evidence and argument heard by the Tribunal at hearings. All such documents shall be treated as confidential and used solely for purposes of "C-Trade" deliberations.

2. In paragraph 11 there shall be inserted immediately before the last sentence the following: "Canada shall have the obligation of notifying all "C-Trade" representatives provided with confidential Protected or Third Party Protected Documents of the obligations under this Order."

3. In all other respects Procedural Order No. 5 shall remain unchanged and of full force and effect.

Lord Dervaird
Presiding Arbitrator

2 April 2000

15. The Investor has drawn the attention of the Tribunal to the award on jurisdiction in the *Ethyl* Case and in particular paragraphs 90 and 91 where the Tribunal there dealt with a similar issue. Canada points out that in that case the claimant provided its waiver and consent with the Statement of Claim rather than with the Notice of Arbitration but did so within the three-year limitation period. In the present case the Investor presented *its* consent and waiver with the Notice of Arbitration and the Statement of Claim. It was Harmac's waiver only that was not then presented.

16. As noted by the *Ethyl* Tribunal, consent to arbitration and the initiation of arbitral proceedings may be taken as a constructive waiver of the right to initiate other proceedings. The presence of the waiver requirement in Article 1121 might, therefore, be seen as unnecessary, at least as it would apply to the investor – the party both issuing the consent under Article 1121(1)(a) and initiating the proceedings. However, Article 1121(1)(b) is something other than a description of what otherwise would be a constructive waiver, for it tells us what exactly is being waived. The Article 1121(1)(b) waiver is not absolute; it permits the investor to seek injunctive and similar relief from the courts and administrative bodies of the disputing NAFTA Party. The availability of this type of relief from the Tribunal is limited under Article 1134, and the limitations on the waiver appearing in Article 1121(1)(b) must therefore be in recognition of the need to provide investors with some recourse to judicial or administrative injunctive relief even when an arbitration is underway. Thus, the investor's failure to execute an Article 1121(1)(b) waiver could not prejudice the disputing Party; that failure could only work to the investor's disadvantage. Viewed in this light, the Tribunal believes that there would be no good reason to make the execution of the investor's waiver a precondition of a valid claim for arbitration.

17. This analysis does not address waiver by the investment, as is also required by Article 1121(1)(b). The investment does not issue a consent to arbitration; indeed, it has no right to the remedies of Chapter 11. Therefore, it might be argued that the waiver requirement plays a more important role with respect to an investment and that that importance should be respected by making the waiver a precondition to the validity of a claim grounded on injury to the claimant caused by harm to its investment. The short answer to such a contention is that the investment would likely be subject to the same constructive waiver that would apply to the investor itself. That is, the consent to and initiation of arbitration by an investor would likely cause a court to invoke a constructive waiver on its owned or controlled subsidiary, particularly where, as here, the two are hypothetically so close that damage to one can be quantified as injury to the other. (Of course, other owners of a non-wholly-owned, non-waiving enterprise might seek relief for injuries caused to their interests, but, in those circumstances, the disputing NAFTA Party would not normally be prejudiced by the absence of a formal waiver because that portion of the investment's damages subject to arbitration would, for the reasons noted, likely be subject to a constructive waiver.) The provisions of Article 1121(1)(b) relating to an investment's waiver thus play the same role as with respect to investors, *i.e.*, they limit what would otherwise be a constructive waiver of all rights to recourse before other tribunals. For these reasons, the Tribunal is not willing to attribute such importance to the requirement

for an investment's waiver in Article 1121(1)(b) as to make that waiver a precondition to the validity of a claim.

18. In any case, there is nothing in Article 1121 preventing a waiver from having retroactive effect to validate a claim commenced before that date. The requirement in Article 1121(3) that a waiver required by Article 1121 shall be included in the submission of a claim to arbitration does not necessarily entail that such a requirement is a necessary prerequisite before a claim can competently be made. Rather it is a requirement that before the Tribunal entertain the claim the waiver shall have been effected. That has now been done. Canada has sustained no prejudice in this respect. No attempt was made by Harmac to initiate any proceedings in relation to the measure (even assuming that it would ever have been competent for it to do so). In its argument Canada states "Harmac's right to commence proceedings against Canada if any expired three years after Canada imposed the measure or measures described in the Statement of Claim." In terms of Chapter 11 of NAFTA Harmac, being a Canadian company, could not at any time have brought proceedings against Canada under the arbitration provision. If it had any right to take proceedings against Canada, those rights would have rested upon other legal foundations, and the three year time limit to which Canada refers relates only to the claim in an arbitration by the Investor, and not to any claim by Harmac or its successor the amalgamated Pope & Talbot Ltd. There is thus no prejudice in this respect to Canada.

19. The foregoing parts of this award have assumed that the Statement of Claim adequately defined the scope of the dispute and the case Canada must meet with respect to Harmac, and to this we now turn.

20. Canada makes the point that paragraphs 34 and 103 of the Statement of Claim fail to state whether the investor submits the claim on its own behalf under NAFTA Article 1116 or on behalf of Harmac under Article 1117. Both the Notice of Arbitration and the Statement of Claim issued therewith on 25 March 1999 are expressly made under Article 1116. There is no substance in this point.

21. The important point made in this respect by Canada is that the pleadings ought to define the issues between the parties so as to give the opponent adequate information on the case it must meet, and to avoid surprise at the hearing. Canada alleges that the references to Harmac in the Statement of Claim are too vague. Bearing in mind that this claim is one under NAFTA Article 1116 only, it appears to the Tribunal that the pleadings are such as to give notice that the Investor is claiming loss or damage to its investment in Harmac Inc by reason of the breaches of the several articles of NAFTA specified by the Investor, that loss having arisen for the reasons stated in paragraph 103. It does not appear to the Tribunal that this pleading is so exiguously stated in the Statement of Claim that it should be excluded upon that basis.

22. The Tribunal accordingly refuses Canada's motion to strike paragraphs 34 and 103 of the Statement of Claim at this stage.

23. Canada in its letter dated January 28, 2000 sought leave, in the event that the Tribunal rejected its motion, to amend its Statement of Defence to include a response. That leave is granted, to the effect that Canada may make such an amendment within 14 days of this decision being communicated to its counsel.

The Honourable Lord Dervaird, Presiding Arbitrator

The Honourable Benjamin J. Greenberg, Q.C., Arbitrator

Murray J. Belnick, Arbitrator

Dated: February 24, 2000

IN THE MATTER OF AN ARBITRATION
UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN

POPE & TALBOT INC

and

THE GOVERNMENT OF CANADA

AWARD CONCERNING THE MOTION BY GOVERNMENT OF CANADA RESPECTING THE CLAIM BASED UPON IMPOSITION OF THE "SUPER FEE"

BY

ARBITRAL TRIBUNAL

The Hon Lord Dervaird
(Presiding Arbitrator)

The Hon Benjamin J Greenberg Q.C.

Mr Murray J Belman

1. In a motion dated July 13, 2000, the Government of Canada asked the Tribunal to decline to address the issue raised by the Investor concerning implementation of the so-called "super fee." For the reasons described below, the Tribunal denies that motion.

BACKGROUND

2. The background and procedural history of this arbitration are set out at length in the Tribunal's Interim Award dated June 26, 2000. Briefly, the matters in dispute arise out of Canada's implementation of the April 1996 Softwood Lumber Agreement with the United States (the "SLA"). The arbitration proceedings began on December 24, 1998, when the Investor served upon Canada a notice of intent to submit a claim to arbitration under Article 1119 of NAFTA. The Claim was submitted on March 25, 1999, and Canada submitted its Defence on October 8, 1999. As it stands today (after amendment by the Investor and rulings by the Tribunal), the Claim involves alleged violations of two provisions of NAFTA, Articles 1102 (national treatment) and 1105 (minimum standards of treatment).

3. Effective June 1, 1998, the Government of British Columbia introduced a reduction in stumpage fees charged to harvesters of timber from Crown lands in that province. That measure triggered an arbitration between the United States and Canada which, on August 26, 1999, resulted in a bilateral agreement amending the SLA to create a "super fee" to be applied to exports to the United States of softwood lumber first manufactured in British Columbia. For the

remainder of year 4 of the SLA after the registration of SOR/99-419 on October 21, 1999, the super fee on those exports was implemented by repricing 90,000,000 board feet previously assessed at the lower fee base ("LFB") to the higher, upper fee base ("UFB"). In addition, after the registration, the fee applicable to UFB exports over 110,000,000 board feet (including the repriced former LFB exports) was increased to US$146.25 per thousand board feet. Canada also announced similar (but not identical) increases for year 5 of the SLA.[1]

4. The first reference to the super fee in the pleadings and briefs occurred in paragraph 89 of the Investor's Memorial (Initial Phase), submitted on January 28, 2000. The Investor contended that the measure discriminated between investors and investments in British Columbia and those in other provinces, thereby providing further evidence of Canada's alleged breach of national treatment obligations under Article 1102 of NAFTA. Canada's Counter Memorial submitted on March 29, 2000 argued that the Tribunal should not address the super fee issue, since it was not pleaded in the Statement of Claim, but that, in any event, the super fee was justifiable because of circumstances prevailing in British Columbia that differed from those existing in other provinces and, presumably, not violative of Article 1102.

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[1] These provisions were set out in Notice to Exporters, 120, September 3, 1999.

5. The Tribunal did not address the super fee in its Interim Award dated June 26, 2000. However, in its appendix to the Award, it requested documents and information regarding the super fee. In seeking clarification of those requests, Canada asserted on July 10, 2000 that the super fee issue is not properly before the Tribunal. In its Procedural Order No. 9, the Tribunal required the parties to submit statements of their position on that question. Canada made its submission on July 13, 2000 and the Investor on July 20, 2000. The Tribunal also received statements concerning the issue by the governments of Mexico and the United States, as well as comments thereon by Canada and the Investor.

CONTENTIONS OF THE PARTIES

Position of Canada

6. Canada argues that it would be inappropriate under NAFTA and the UNCITRAL arbitration rules to allow an investor to enlarge and alter the scope of its dispute without amending its original claim, particularly after a responsive pleading has been filed. Canada notes that the UNCITRAL rules require the parties to state their positions clearly in their statements of claim and defence, and, hence, to narrow the issues to be arbitrated; it asserts that the scope of the arbitration is limited by the facts and issues as set out in the investor's claim. UNCITRAL Rules 18 and 19. Canada also points out that the UNCITRAL rules permit a tribunal to disallow an amendment to a claim "having regard to

the delay in making it or prejudice to the other party or any other circumstances." UNCITRAL Rule 20.

7. Canada notes that the March, 1999 Statement of Claim was confined to measures then in existence. Since the regulations implementing the super fee are thus new and distinct measures from those pleaded in the Claim, they cannot be found to be a part of that Claim. Because the super fee arises out of a distinct set of facts from those set out in the Claim, Canada argues that its implementation cannot properly be characterized as a "continuing breach."

8. Canada also suggests that the Investor has failed to take certain procedural steps necessary to make a claim regarding the super fee. It notes that the Investor has never sought consultation on the issue as contemplated by NAFTA Article 1118 nor did it file notice of intent to arbitrate the super fee as required by Article 1119 or a waiver pursuant to Article 1121. Canada contends that, since the super fee did not exist when the Investor filed its Claim and the Claim has not been amended, there is no basis for finding a constructive or retroactive waiver concerning a measure that did not exist at the time the Investor made its original waiver.

9. Canada argues that the failure of the Investor to amend its Claim (and not raise the super fee issue until it filed its Memorial, five months after the measure in question occurred) prejudiced Canada by denying it an opportunity to address the issue in its Defence.

10. As a result of these defects, Canada believes that the questions posed by the Tribunal with regard to the super fee are "irrelevant" to issues of national treatment and "have no anchor in an alleged breach of Article 1105." Canada is concerned that the Tribunal could, therefore, find in favor of the Investor on grounds not previously disclosed to Canada.

11. Canada argues that it would be inappropriate to allow the Investor to amend its Claim at this juncture. Canada notes that the Investor had notice of the super fee agreement for at least a month before Canada filed its Defence, and it should have sought to amend or supplement its Claim at that point. Canada notes that the Investor could also have sought to amend its Claim prior to filing its Memorial. Because the Investor did not do so, Canada argues that it was prevented from responding adequately to the super fee issue to its prejudice.[2]

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[2] Canada also makes certain arguments concerning the possibility of consolidation under NAFTA Article 1126. In view of the Tribunal's ruling, these arguments are not relevant. However, the Tribunal notes that consolidation under that NAFTA provision appears to be directed to consolidation of cases involving different investors making similar claims, rather than single investors making different claims:

> Article 1126 addresses the possibility that more than one investor might submit to arbitration claims arising out of the same event. It provides for the appointment * * * of a special three-member tribunal to consider whether such multiple claims have questions of law or fact in common * * *.

Statement of Administrative Action submitted by the President of the United States in transmitting the NAFTA to the Congress, H. Doc. 103-159, Vol. 1 (1993) at 596.

Position of the Investor

12. For its part, the Investor asserts that the super fee represents a continuing breach of NAFTA and that an amendment to the Claim is unnecessary. It argues that Paragraph 15 of the Claim, which described the Export Control Regime implementing the SLA, described various aspects of that Regime in language applicable to the super fee. The Investor contends that the super fee is an integral part of the Regime and is "merely a repackaging" of other elements of the Regime with specific reference to British Columbia. The Investor alleges that the super fee is thus not a "new measure" but an adjustment to existing measures, which has had a more damaging effect on producers in British Columbia.

13. The Investor also argues that it would be "unfair to permit Canada to insulate itself from effective review by this Tribunal on the simple basis that Canada had re-priced or re-labeled its former UFB softwood lumber export levy with an amended regulation." Allowing parties to act in this manner would permit them effectively to avoid NAFTA Chapter 11 review by modifying challenged measures during the course of arbitration. In this respect, the Investor contends that it was impossible for it to anticipate Canada's change of policy but that its Claim plainly intended to cover any modifications having a bearing on the issues it was raising.

14. The Investor also points out that if the Tribunal were to refuse to consider the super fee issue, it would be entitled to resubmit the very same claim to another NAFTA tribunal. It states that this course would penalize the Investor and would be wasteful of the arbitral process.

15. The Investor also challenges the arguments concerning procedural requirements raised by Canada. It points out that consultations never occurred prior to the submission of any aspect of the Claim. The Investor argues that NAFTA does not require that the Investor issue a new notice of intent for each and every amendment to the measures it challenges, noting that such an interpretation would enable parties to evade NAFTA review by making frequent changes to constituent elements of challenged regulations. In any event, the Investor argues that the six-month "cooling off" period has long since elapsed.

16. The Investor also contends that its waiver previously submitted pursuant to Article 1121 covers the measures at issue in the arbitration, including subsequent amendments; therefore, there is no need for a new waiver.

17. The Investor also argues that an amendment to the Claim at this juncture would not be prejudicial to Canada. It argues that Canada has had ample opportunity in its Counter Memorial and at the substantive hearings in Montreal in May 2000 to address the issue before the Tribunal. The Investor also states that it has previously provided all the documents in its possession sought by Canada in its third request for documents. Consequently, there is no

new documentary information available (in the possession of the Investor) that Canada is not now aware of. For these reasons, the Investor argues that if an amendment of the Claim were required, it would be appropriate for the Tribunal to permit it.

Positions of the United States and Mexico

18. Acting pursuant to Article 1128 of NAFTA, on July 24, 2000 the United States submitted comments related to the super fee issue; although it expressly took no position on how the interpretations it offered apply to the particular facts before the Tribunal. Basically, the United States pointed out that international precedent and authorities, particularly the UNCITRAL arbitration rules, are clear that a claim properly before a NAFTA arbitral tribunal may not be amended to include an additional or incidental claim that is outside the scope of the NAFTA Parties' consent to arbitration. Under NAFTA, the State Parties consent "to the submission of a claim to arbitration in accordance with the procedures set out in this agreement." NAFTA Article 1122 (1). The United States argued that that language serves to condition consent to arbitration on the satisfaction of what it called "procedural prerequisites for submitting a claim to arbitration," which are "principally set forth in Section B of Chapter 11." For these reasons, the United States concluded that "a Chapter 11 tribunal confronted with a new claim may not permit amendment unless that claim is properly within the tribunal's jurisdiction in all respects."

19. By letter dated July 24, 2000, the Government of Mexico subscribed to the positions taken by the United States. Mexico added that it believed that NAFTA Article 1119 was intended to enable the respondent Party to take measures in response to a claim, including consultation, remedial action, etc. Mexico pointed out that if a new claim is asserted during the course of an arbitral proceeding, the respondent Party is denied the opportunity to take those steps. Mexico concluded by claiming that the procedural requirements in Articles 1116 through 1122 of NAFTA are mandatory in order for "a subsequently established tribunal to have jurisdiction."

Responses of Canada and the Investor

20. By letter dated July 27, 2000, Canada claimed that the submissions of the United States and Mexico "support Canada's argument that the 'super fee' is outside the scope of this arbitration."

21. On July 27, 2000, the Investor contested the suggestion that the super fee constituted a "new claim" outside the jurisdiction of the Tribunal. Accordingly, it contended that the position of the United States did not apply to the facts at issue in this claim. The Investor also contested the suggestion that the consent of the NAFTA Parties to arbitration pursuant to Chapter 11 goes only "to the claim as it is expressed at the time of submission of the claim."

DECISION

22. Analysis of the issues raised by the several submissions must begin with an analysis of the Claim in this proceeding. If the super fee issue is comprehended within the Claim as originally submitted, much of the argument concerning the extent of the NAFTA Parties' consent to arbitration falls by the wayside. Thus, we start with the very first paragraph of the Claim submitted by the Investor on March 25, 1999. That paragraph opens with the statement: "This is a case about the discriminatory application of a quota scheme concerning exports from Canada." The paragraph goes on to describe briefly the genesis of the SLA and the Export Control Regime and concludes with the following:

> The Export Control Regime is not imposed on all exports, but only on certain exports from certain parts of Canada. The Claim in the present case is based on the unfair allocation of the rights to export softwood lumber free of the export fee (or at a reduced fee rate), in violation of several provisions of the Investment Chapter of NAFTA. This Claim is not about the legitimacy of the Canada-U.S. *Softwood Lumber Agreement per se*, but it is about the specific and unfair manner in which Canada chose to implement this Agreement.

23. The Claim then proceeded to discuss at some length how the various types of quotas were allocated during the first years of the agreement and the effects of

those allocations on the Investor. Claim ¶¶ 46-68. That discussion analyzed how the regime changed over the first three years of the SLA.

24. Based on any fair reading of the Claim, it is patent that the Investor was challenging the implementation of the SLA as it affected its rights under Chapter 11 of NAFTA and that, as the Regime changed from year to year, those effects might also change. In other words, the Claim asked the Tribunal to consider the Regime not as a static program, but as it evolved over the years. Canada's Counter Memorial followed the very same approach, analyzing at some length the various changes in the program over its life. Counter Memorial, ¶¶ 71-105. Indeed, the circumstances surrounding the implementation of the super fee are set out in Canada's historical account as another development in the evolution of the program in year 4 of the SLA.

25. For these reasons, the Tribunal concludes that the Investor's contentions regarding the super fee are not a "new" claim, but relate instead to a new element that has recently been grafted onto the overall Regime. In this respect, the super fee is akin to the various changes in allocation methodology, use of discretionary quotas, and the like, that have marked the Regime since its inception. The fact that the super fee arose from a request by the United States for arbitration under the SLA is not relevant; an investor's rights under NAFTA do not depend on the motivations behind the measures it challenges. Nor is it relevant that the super fee arbitration resulted in an amendment to the SLA; as

with the rest of its claim, the Investor challenges the implementation of the SLA, in this instance as it has been amended.

26. The Tribunal's conclusion makes issues raised by the United States and Mexico irrelevant to this case. Even if the Tribunal were to concur with the United States that Article 1122 (1) conditions consent to arbitration on the satisfaction of each of the procedures set out in Articles 1116-1122, the Tribunal has concluded in its previous rulings that those requirements have been satisfied. In any case, as rulings by this Tribunal and the *Ethyl* Tribunal have found, strict adherence to the letter of those NAFTA articles is not necessarily a precondition to arbitrability, but must be analyzed within the context of the objective of NAFTA in establishing investment dispute arbitration in the first place.[3] That objective, found in Article 1115, is to provide a mechanism for the settlement of investment disputes that assures "due process" before an impartial tribunal.

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[3] *See, e.g.*, this Tribunal's ruling dated February 24, 2000 (the Harmac Ruling) wherein we stated:

> [T]he investor's failure to execute an Article 1121(1)(b) waiver could not prejudice the disputing Party; that failure could only work to the investor's disadvantage. Viewed in this light, the Tribunal believes that there would be no good reason to make the execution of the investor's waiver a precondition of a valid claim for arbitration.

The *Ethyl* Tribunal made a similar determination:

> The Tribunal has little trouble deciding that Claimant's unexpected delay in complying with Article 1121 is not of significance for jurisdiction in this case. While Article 1121's title characterizes its requirements as "Conditions Precedent," it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121 * * *.

Ethyl Corp. v. Canada, Award on Jurisdiction (June 24, 1998), 28 ILM 708 at ¶ 91.

Lading that process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat that objective, particularly if employed with draconian zeal.[4]

27. The Tribunal also notes that contrary to the suggestion made by Canada, neither the United States nor Mexico argued that the super fee is outside the scope of this arbitration. Indeed, the submission of the United States was at pains to make clear that it was taking no position on how its legal argument applied to the facts of this case. As noted above, since there is no "new claim," the legal arguments of the United States and Mexico are not pertinent to the super fee issue.

28. Since the Tribunal finds that the super fee is not a new claim and consequently no amendment of the Claim is required, the contentions of Canada regarding serious prejudice are not strictly relevant. Nonetheless, the Tribunal would have been sympathetic to a request for an extension of time to remedy real prejudice. However, the Tribunal notes that the issue has been on the table since January, 2000, when the Memorial was filed, that Canada delivered a substantial response in its own Counter Memorial, that Canada has long since received all of the Investor's documents relating to the issue, and that it still has almost two and one-half months to work on its Counter Memorial concerning

[4] It must be remembered in considering the positions taken by the State Parties, that if their arguments prevailed, it would still be open to the Investor to institute a new claim to be handled by a new tribunal. It is difficult to see how the aims of Article 1115 would be furthered by resort to this duplication of effort.

the current phase of this Arbitration, which presumably will address the issue of the super fee under Articles 1102 and 1105.[3] Under these circumstances, the Tribunal does not believe that Canada has demonstrated serious prejudice.

29. For the foregoing reasons, the Tribunal refuses the relief requested by Canada.

The Honourable Lord Dervaird, Presiding Arbitrator

The Honourable Benjamin J. Greenberg, Q.C., Arbitrator

Murray J. Belman, Arbitrator

Dated: August 7, 2000

[3] For the avoidance of doubt, notwithstanding paragraph 9 of Procedural Order 9 dated July 11, 2000, Canada will, in its Counter Memorial, be entitled to address the application of Article 1102 to the super fee irrespective of whether the Investor makes any comments under paragraph 7 of that Order, and the Investor will be entitled to address the issue in its Supplemental Memorial as provided in paragraph 11 of that Order.