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 UFE 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), 38 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.*

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

* 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.