

**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 State. 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 these 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 after 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(C) 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 1123 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 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 claim an exemption from Article Eleven that would otherwise apply. The exemptions cited by Canada relate to government loans, acquisitions of Canadian business; 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 Suite 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 damages 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 provision 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 export.

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 purpose 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 adapted 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