POPE & TALBOT INC
AND
THE GOVERNMENT OF CANADA

AWARD

IN RELATION TO PRELIMINARY MOTION BY GOVERNMENT OF CANADA TO STRIKE PARAGRAPHS 34 AND 103 OF THE STATEMENT OF CLAIM FROM THE RECORD (THE "HARMAC MOTION")

1. In a Preliminary Motion dated November 12, 1999, Canada requested the Tribunal to strike out paragraphs 34 and 103 of the Statement of Claim. Paragraph 34 alleges that, in addition to lumber mills operated through its Investment (Pope & Talbot Ltd), the Investor controlled Harmac Pacific Inc. "a publicly traded pulp and paper company that operates a facility located at Nanaimo, British Columbia." Paragraph 103 states: "The decreasing supply of wood chips due to lost production on the British Columbia coast has resulted in economic loss for Investor's Investment (sic) in Harmac Pacific Inc., which must purchase increasingly expensive wood chips for its pulp and paper operation."

2. Canada argued in the first place that these allegations were too unspecific to serve as an adequate basis for a case in relation to Harmac. In the second place Canada argued that the Investor had failed to meet procedural pre-requisites to a valid Claim under NAFTA Articles 1119, 1120 and 1121. In particular, Canada argued that submission of a waiver by Harmac was an essential pre-condition for a valid claim under NAFTA Articles 1116 and 1117, and that as Harmac had filed no waiver in this case, that was fatal to the claim under whichever head it purported to be presented.

3. On November 25, 1999, the Investor replied to the Motion and sought to rebut the arguments of Canada on each head.

4. With effect from 31 December 1999, the Investment (Pope & Talbot Ltd) and Harmac effected an amalgamation, approved by the Supreme Court of British Columbia on December 15, 1999, whereby the two companies were merged into one. The new company, which has the name Pope & Talbot Ltd, has taken over the entire assets and liabilities of both former companies.

5. On January 10, 2000, in response to a request from the Tribunal for specific confirmation of the waiver of certain rights, the amalgamated company, Pope & Talbot Ltd, executed a document whereby it waived its right with respect to the business formerly known as Harmac Pacific Inc. to initiate or continue any proceedings before any administrative tribunal or court relative to the measures of Canada under consideration in this arbitration. That waiver made specific reference to NAFTA Article 1121(1)(b), and

it is a necessary consequence of that reference that the claim advanced concerning Harmac is under NAFTA Article 1116 and not Article 1117.

6. On January 28, 2000 Canada lodged a further document challenging any claim due to alleged injury to Harmac. Without conceding its validity, Canada contended that the waiver was time barred by NAFTA Article 1116(2) and that permitting the waiver to have retroactive effect would work a substantial prejudice on Canada's interests. The Investor responded on February 2, 2000.

7. Article 1116(2) provides that an investor may not make a claim if more than three years have elapsed from the date on which it first acquired or should have first acquired, knowledge of the alleged breach and knowledge it has incurred loss or damage as a result. There is no dispute that the Statement of Claim on behalf of the Investor was presented before the expiry of any possible three-year period.

8. Article 1121 provides that a disputing investor may not make claims under Article 1116 unless (a) the investor consents to arbitration in accordance with the procedures set out in NAFTA Chapter 11 and (b) the investor and (where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly) that enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedure, any proceedings, save actions for injunctive and similar relief.

9. The principal additional contention advanced by Canada was that the waiver could only be effective as of its date January 10, 2000. Therefore, according to Canada, any claim relating to Harmac has not been submitted within the three-year limitation period set out in Article 1116. The basis for that contention is that the waiver is an explicit precondition to the submission of a claim and that the date of perfection of the submission of the Harmac claim must be considered to be January 10, 2000 at the earliest. Canada states: "Therefore, to fall within the three- year limitation period for the making of a claim, the Investor or the Enterprise must not have first acquired, nor should they have first acquired, knowledge of an alleged breach and related loss prior to 10 January, 1997. The Softwood Lumber Agreement was signed on May 29, 1996, it took effect as of April 1, 1996 and the quota allocation methodology was announced on October 31, 1996. It follows that the Investor should have first acquired knowledge of the alleged breach of Chapter Eleven and loss arising therefore with respect to Harmac well before 1997."

10. In its response, the Investor points out that under Article 1116(2) the time limit requirement relates to the knowledge of the Investor, and not to the knowledge of the investment. It goes on to suggest that the requirement of Article 1116(2) does not relate to investments.

11. Canada's contention that the Harmac claim is time barred is in the nature of an affirmative defence, and, as such, Canada has the burden of proof of showing factual

predicate to that defence. That is, even if one accepts that the waiver is a precondition to a valid claim and that the critical date is January 10, 2000, it is for Canada to demonstrate that the three-year period had elapsed prior to that date. Canada's assertions do not in the view of the Tribunal establish that critical factor. In the first place it is now clear that the claim is one in respect of loss allegedly sustained by the Investor by reason of certain consequences of the Softwood Lumber Quota Regime on its controlled enterprise Harmac, and it is not for the loss sustained by Harmac itself. Before time can begin to run in terms of NAFTA Article 1116(2) in respect of a claim by an Investor, two matters must have come to its actual, or properly imputed, knowledge knowledge of the breach and knowledge that it has incurred loss or damage thereby.

12. The statements by Canada cited in paragraph 9 above go towards demonstrating that the Investor knew or should have known of the breach of Chapter Eleven alleged by it before 1997. (It is not, of course, in dispute that the Investor made a timely claim in respect of the breaches alleged by it insofar as other losses it claims.) However, as paragraph 103 of the Investor's Statement of Claim puts the matter, the economic loss for the Investor's investment in Harmac has been caused by the decreasing supply of wood chips due to lost production on the British Columbia coast requiring the purchase of increasingly expensive wood chips for Harmac's pulp and paper operation. It is not clear to the Tribunal at what stage this loss of production resulted in a necessity to purchase expensive wood chips, except that it can only have arisen at some stage after implementation of the Export Control Regime. The critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur. Examined by that standard, Canada has not satisfied the Tribunal that the Investor knew or ought to have known for more than three years prior to January 10, 2000 that it had incurred loss or damage in respect of its investment in Harmac.

13. Beyond Canada's failure to establish that the three-year time period had run, the Tribunal does not agree that the underlying claim is perfected only when the waiver is submitted. In this case, the Statement of Claim refers to the existence of Harmac, describes its relationship with the Investor and identifies the character of the loss sustained by the Investor in relation to its investment in Harmac. As noted, Canada received the Statement of Claim before any possible three-year period could have elapsed. The requirement of Article 1116 in this respect is that a claim may be made by an Investor on its own behalf where it claims breach by a Party of a relevant obligation and that it, the Investor, has incurred loss or damage by reason of or arising out of that breach. The only further requirement is that the claim may not be made after the lapse of three years, which as above stated did not happen in this case.

14. Article 1121 of NAFTA imposes two conditions for the submission of a claim under Article 1116. The first is that the investor consents to arbitration in accordance with the procedures set out in NAFTA. The second is the submission of the waiver. Article 1121(3) further provides "A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration."

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. Belmen, Arbitrator

Dated: February 24, 2000