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Awards in Pope & Talbot, Inc. v. Government of Canada--Introduction

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Awards in *Pope & Talbot, Inc. v. Government of Canada*

INTRODUCTION BY WILLIAM S. DODGE*

In March 1999, Pope & Talbot, Inc. brought a claim against the Government of Canada alleging that Canada's implementation of its Softwood Lumber Agreement with the United States ("SLA")[1] violated Chapter Eleven of NAFTA.[2] Pope & Talbot, Inc. is a Delaware corporation. It has a wholly owned subsidiary Pope & Talbot International Ltd., organized under the laws of British Columbia, which in turn has a wholly owned subsidiary Pope & Talbot Ltd., also organized under the laws of British Columbia. A substantial part of Pope & Talbot Ltd.'s business was exporting softwood lumber to the United States. Prior to 2000, Pope & Talbot Inc., had a separate subsidiary Harmac Pacific, Inc., a British Columbia corporation, which was merged into Pope & Talbot Ltd. effective December 31, 1999. Pope & Talbot, Inc. originally claimed that Canada's system of export permits and fees and its allocation of quotas pursuant to the SLA violated NAFTA Article 1102 (National Treatment), Article 1103 (Most Favored Nation Treatment), Article 1105 (Minimum Standard of Treatment), Article 1106 (Performance Requirements), and Article 1110 (Expropriation and Compensation), although it later dropped its most-favored-nation-treatment claim.

A tribunal of three arbitrators—Lord Dervaird (presiding arbitrator), Benjamin J. Greenberg, and Murray J. Belman—was constituted in August 1999. Through August 2000, the tribunal has rendered four separate awards dealing with both procedural and

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1. *See* Softwood Lumber Agreement, May 29, 1996, Can.-U.S., 35 I.L.M. 1195 (1996).

2. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., ch. 11, 32 I.L.M. 605, 639-49 (1993) [hereinafter "NAFTA"].

substantive matters under Chapter Eleven. These awards are reprinted here in chronological order so that they may be available to scholars and practitioners in permanent form.[3]

On January 26, 2000, the tribunal issued an award rejecting a motion by Canada to dismiss the claim.[4] Canada had argued that the claim should be dismissed on the grounds that, because the measures challenged concerned the trade in goods, the dispute was not an "investment dispute" and that these measures did not "relate to" an investment or investors. Canada also argued that the SLA was not a "measure" covered by Chapter Eleven. In rejecting Canada's motion, the tribunal reasoned that Pope & Talbot, Inc. had alleged breaches of Chapter Eleven damaging it and its investment and that Chapter Eleven's protection of investments was wide enough to cover measures directed at goods produced by an investment. The tribunal also rejected Canada's argument that Article 1101's "relating to" language required that a measure be primarily directed at an investment. Finally, the tribunal noted that although the SLA was not itself a "measure" covered by Chapter Eleven, Canada's implementation of the SLA could constitute such measures.

On February 24, 2000, the tribunal issued an award rejecting Canada's motion to strike those portions of the claim related to damages allegedly suffered by Harmac because of an increase in the cost of wood chips.[5] Canada had argued that Harmac had not filed the necessary waiver of its right to bring suit in domestic court[6] until January 10, 2000, at which point more than three years had elapsed

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3. The text of the awards and various procedural orders have been made available on the website of the claimant's counsel. *See* NAFTA Cases: Pope & Talbot, Inc. (visited Aug. 31, 2000), <http://www.appletonlaw.com/4b3P&T.htm>.

4. Pope & Talbot, Inc. v. Government of Canada, Award 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 (Jan. 26, 2000), 23 HASTINGS INT'L & COMP. L. REV. 435-46 (2000).

5. Pope & Talbot, Inc. v. 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 (Feb. 24, 2000), 23 HASTINGS INT'L & COMP. L. REV. 447-53 (2000).

6. Article 1121 of NAFTA requires an investor (and where applicable the injured enterprise that the investor owns or controls) to "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach ... except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." NAFTA, Art. 1121, 32 I.L.M. at 643.

since Pope & Talbot, Inc. knew or ought to have known of the claim.[7] The tribunal denied Canada's motion. It held that Canada's contention that the claim was time-barred was in the nature of an affirmative defense, so that Canada had the burden of showing when Pope & Talbot, Inc. knew or ought to have known of the claim and that Canada had not carried its burden. The tribunal further rejected Canada's argument that a Chapter Eleven claim is perfected only when a waiver is submitted. It reasoned that Pope & Talbot, Inc.'s filing of its claim could be taken as a constructive waiver and that, in any case, the written waiver could be given retroactive effect to validate a claim commenced before that date.

On June 26, 2000, the tribunal issued an interim award rejecting Pope & Talbot, Inc.'s performance-requirements and expropriation claims.[8] Pope & Talbot, Inc. had argued that Canada's export fees for softwood lumber violated Article 1106 on performance requirements by requiring its subsidiary to export less softwood lumber than it otherwise would and that Canada's "use it or lose it" system of allocating quotas created a *de facto* requirement to export up to a given level. However, the tribunal agreed with Canada that Article 1106 must be interpreted narrowly and held that because these measures did not constitute "requirements" Canada had not violated Article 1106. With respect to expropriation, the tribunal agreed with Pope & Talbot, Inc. that its subsidiary's access to the U.S. market was a property interest protected by Article 1110 and that Article 1110 extends to nondiscriminatory regulation that might be said to fall within a state's police powers. However, the tribunal concluded that Canada's interference with the subsidiary's rights was not substantial enough to constitute an expropriation. The tribunal also rejected Pope & Talbot, Inc.'s argument that Article 1110's phrase "measure tantamount to nationalization or expropriation" broadened its protection beyond that afforded by customary international law.

On August 7, 2000, the tribunal issued an award denying Canada's motion that the tribunal refuse to address Pope & Talbot, Inc.'s claims based on a "super fee" imposed on exports of softwood

7. Article 1116(2) provides: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." *Id.* Art. 1116(2), 32 I.L.M. at 643.

8. Pope & Talbot, Inc. v. Government of Canada, Interim Award (June 26, 2000), 23 HASTINGS INT'L & COMP. L. REV. 455-84 (2000). The tribunal deferred the national-treatment and minimum-standard-of-treatment claims for later decision.

lumber from British Columbia to the United States beginning August 26, 1999.[9] Canada argued that the "super fee" claims were new and that Pope & Talbot, Inc. had not sought consultation on these claims nor filed a notice of intent and waiver with respect to them. However, the tribunal read Pope & Talbot, Inc.'s original claim to include all measures implementing the SLA even if those measures were not in existence at the time the claim was filed.

9. Pope & Talbot, Inc. v. Government of Canada, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee" (Aug. 7, 2000), 23 HASTINGS INT'L & COMP. L. REV. 485-93 (2000).