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

GOVERNMENT OF CANADA

REPLY TO INVESTOR'S RESPONSE TO CANADA'S PRELIMINARY MOTIONS

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A. Nature of the Reply

1. This is a reply to Pope & Talbot Inc.'s (the "Investor") Response to Canada's preliminary motions[1] which the Investor filed on November 26, 1999 ("Response"). Section B of the reply addresses the "Measures Relating to Investment Motion" and Section C addresses the "Harmac Motion."

B. Measures Relating to Investment Motion

2. The Investor's Response to Canada's "measures relating to investment motion":
   a) ignores the purpose of Section B of Chapter Eleven;
   b) fails to comprehend the significance of the term "relating to" and that the only jurisprudence considering the term "relating to" is found in the GATT;
   c) fails to interpret the term "relating to" in a manner consistent with the purpose of Section B of Chapter Eleven;
   d) ignores NAFTA's dispute resolution scheme and, especially, the role of Chapter Twenty dispute settlement, in promoting the NAFTA's objectives;
   e) invokes the Canadian Statement on Implementation as an aid to interpretation contrary to customary international principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention; and
   f) ignores the contradiction between its pleadings (at paragraphs 3, 4 and 5 of the Notice of Arbitration and paragraphs 76, 86, 87 and 93) and its assertion (at paragraphs 42 and 45 of its Response) that it is not challenging the SLA.

[1] Preliminary motion to dismiss the Claim because it falls outside the scope and coverage of NAFTA Chapter Eleven ("Measures Relating to Investment Motion"), filed by the Government of Canada on November 26, 1999; Preliminary motion to strike paragraphs 34 and 103 of the Statement of Claim from the record ("Harmac Motion"), filed by the Government of Canada on November 26, 1999.

The Purpose of Section B of Chapter Eleven Is to Settle Investment Disputes

3. The Investor's understanding of the requirements of Chapter Eleven, as evidenced in paragraphs 2 through 6 of its Response, is overly simplistic, incomplete and inaccurate. The Investor adopts the novel proposition that a claimant need only allege a breach of Section A to initiate investor-state arbitration. This ignores the requirements of Articles 1115 and 1121.

4. To ignore Article 1115 is contrary to customary international law on treaty interpretation.[2] Disregarding Article 1115 reduces this NAFTA article to inutility or nullity.

5. Article 1115 sets out the purpose of Section B of Chapter Eleven as follows:

   Article 1115: Purpose

   Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section 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. (emphasis added)

6. Satisfying the preconditions enumerated in either Article 1116 or Article 1117 means only that a claim may be submitted to arbitration under Chapter Eleven. It is not determinative of whether an investment dispute has been pleaded, thereby bringing such a claim within the scope of Chapter Eleven's dispute settlement procedures.

7. Contrary to the Investor's assertion at paragraph 6 of its Response, the term "investment disputes" must be considered by a Tribunal. Its ability to arbitrate the dispute turns on such a consideration. Chapter Eleven's dispute settlement procedures are restricted to addressing disputes within the scope and coverage of Chapter Eleven.

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[2] The requirement that there be an "investment dispute" is not a novel interpretation as argued by the Investor; it is a verbatim quote from Article 1115.

8. The term "investment disputes" in Article 1115 is informed by the scope and coverage of Chapter Eleven as set out at Article 1101. Investment disputes are those that allege measures adopted or maintained by a Party primarily aimed at investors or investments of investors breach Chapter Eleven obligations. A tribunal established pursuant to Chapter Eleven may only resolve an investment dispute.

9. A treaty must be interpreted in a manner that gives effect to all of its provisions.[3] The Investor invites this Tribunal to interpret Chapter Eleven in a manner that deprives Article 1115 of any force or effect.

10. Ignoring Article 1115 and depriving it of force or effect leads to an absurd result. Chapter Eleven dispute settlement procedures would be available to investors for claims respecting every matter addressed in other NAFTA chapters. This result is contrary to the NAFTA Parties' clear delineation of disputes falling to the various dispute resolution procedures provided in Chapter Twenty, in Chapter Nineteen and in Chapter Eleven.

Access to Chapter Eleven dispute resolution is further limited

11. The Investor, at paragraphs 5 through 8 of its Response, states incorrectly that there is no limit on the disputes that may be submitted to arbitration pursuant to Chapter Eleven. NAFTA places various limits on the disputes that may be submitted to arbitration pursuant to Chapter Eleven. These limits are found in Chapter Eleven as well as other chapters. Some are substantive in nature, while others are procedural.[4]

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[3] The Tribunal is referred to paragraph 32 of Canada's "Measures Relating to Investment Motion".

[4] Substantive limits on the disputes that may be arbitrated pursuant to Chapter Eleven include: non-application of Chapter Eleven to "measures ... covered by Chapter Fourteen"(Article 1101(3)); non-application of Chapter Eleven where a Party provides a service or performs a function "such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care" (Article 1101(4)); the reservations and exceptions to Chapter Eleven as set out in Article 1108; Article 1105(3) (exception to the obligation to provide the minimum standard of treatment); the closed lists of Article 1106(1) and (3), and Article 1106(2), (4), (5) and (6) (only some kinds of performance requirements are forbidden); Article 1109(4) (non-application of the obligation to permit transfers of monies in certain cases); 1110(7) and (8) (non-application to the obligations related to expropriation in certain cases); Article 1111 (non-application of the Article on National Treatment in certain cases); Article 1112 (precedence of the obligations set forth in

12. If the Tribunal rules in favour of the Investor on this motion, it would effectively create an open season for claimants to challenge any government measure by simply meeting the procedural requirements identified by the Investor in paragraph 7 of its response. This conflicts with the plain language, purpose and intent manifested by the provisions cited in paragraph 11 above.

NAFTA Annexes

13. The NAFTA Annexes constitute "an integral part of this Agreement", as specified in Article 2201.[5] Moreover, they form part of the context for the purpose of the interpretation of NAFTA.[6]

14. Canada refers the Tribunal to the Annexes, in particular those cited at paragraph 17 of its preliminary motion on Measures Relating to Investment, as they are indicative of the NAFTA Parties' intention as to the scope of measures related to investment.

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other Chapters over Chapter Eleven in certain cases); Article 1113 (denial of the benefits provided for in Chapter Eleven in certain circumstances); Article 1114 (exception to Chapter Eleven for environmental reasons); Article 1115 (only investment disputes); Article 1138 (exception to Chapter Eleven for reasons of national security) and the closed list in the definition of "investment" and explicit exclusions thereto set out in Article 1139. See also Annex I to NAFTA.

Procedural limits include the three-year limitations specified in Article 1116(2) and Article 1117(2). (Article 1116 (2) states "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." Article 1117(2) states: "An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.")

Limits on the disputes that may be arbitrated under Chapter Eleven are also found in other chapters. They include the taxation exceptions of Article 2103 and the balance of payments exceptions of Article 2104.

[5] Article 2201 states "The Annexes to this Agreement constitute an integral part of this Agreement."

[6] See *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980) at Article 31 (2).

15. Contrary to the Investor's assertion at paragraph 10 of its Response, the reservations taken are not evidence that all export and import control measures or all measures taken to implement international agreements are within the scope of Chapter Eleven dispute resolution.[7]

Instructive Jurisprudence Respecting The Term "Relating To"

16. The term "relating to" is found in both the NAFTA and the General Agreement on Tariffs and Trade 1994 ("GATT").[8]

17. The term "relating to" has yet to be considered in NAFTA jurisprudence. However, it has been considered in GATT jurisprudence. Such considerations of the term "relating to" are instructive to the Tribunal.

18. The fact that Article XX(g) of GATT is an exception does not detract from the discussion in the case law cited[9] on the meaning of the "kind or degree of connection or relationship"[10] imported by words such as "relating to".[11] In all those cases, the panels interpret the meaning of "relating to" in the context of a trade agreement by applying the plain meaning of the term. These panels do not invoke a restrictive interpretation.

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[7] See Articles 1101 and 1115.

[8] Which by Article 1 (a) includes the *General Agreement on Tariffs and Trade*, October 30, 1947, 58 U.N.T.S. 187 (entered into force January 1, 1948).

[9] See Canada's "Measures Relating To Investment" Motion at paragraphs 36 to 40.

[10] United States – Standards for Reformulated and Conventional Gasoline, (complaint by Brazil and Venezuela) (1996), WTO Doc. WT/DS2/AB/R AB-1996-1 (Appellate Body Report) ("Reformulated Gasoline") at pages 17 and 18 at Tab 3 of Canada's "Measures Relating to Investment Motion".

[11] See Canada's "Measures Relating to Investment Motion" at paragraphs 32 to 41. In the GATT 1947, the term "relating to" is found also found in Article II:1(b), (c), and Article II:6 in contrast to the term "affecting" used in Article III:1. **Tab 1.**

Interpreting "Relating To"

19. NAFTA's general objectives are listed at subparagraphs (a) to (f) of Article 102 (1).[12] To gain a complete appreciation of NAFTA's objectives, Article 102 suggests that one have regard to how they are more specifically elaborated in other sections of NAFTA, through principles and rules, including national treatment and most-favored-nation treatment.

20. Canada's interpretation of the term "relating to" as "primarily aimed at" accords with Article 102, the specific elaboration of rules and principles found in Chapter Eleven[13] and applicable rules of international law. [14]

The Objective of Effective Dispute Resolution Procedures

21. The Investor's reliance on Article 102 (1) in isolation to interpret "relating to" also ignores NAFTA's dispute resolution scheme.

[12] The Investor, at paragraphs 23 and 25 of its Response, refers to Article 102.

> Article 102: Objectives
>
> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> b) promote conditions of fair competition in the free trade area;
>
> c) increase substantially investment opportunities in the territories of the Parties;
>
> d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.
>
> (2) The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

[13] See for example Articles 1101, 1102, 1103, and 1115.

[14] See for example *Vienna Convention on the Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980) at Article 31.

22. Chapter Twenty contains NAFTA's general dispute resolution procedure. Article 2004 states:

> Article 2004: Recourse to Dispute Settlement Procedures
>
> Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter 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)

23. Chapter Twenty's dispute settlement provisions apply to "all disputes between the Parties" except as otherwise provided in NAFTA and disputes concerning antidumping and countervailing duty matters which are resolved through the dispute resolution procedures found in Chapter Nineteen.[15]

24. Chapter Eleven is extraordinary in nature. It is a departure from NAFTA's Party to Party dispute settlement. It allows non-parties to an international agreement to challenge a measure[16] of a sovereign party to the agreement. Access to such an extraordinary procedure be strictly construed.

25. To achieve the objective stated in Article 102(1)(e), NAFTA clearly delineates the scope of its various dispute resolution procedures. Chapter Eleven dispute resolution procedures are for investment disputes, "without prejudice to the rights and obligations of the Parties under Chapter Twenty."[17]

[15] See Articles 1903 and 1904.

[16] Of course, such challenges are limited to cases where there has been a breach of an obligation under Section A of Chapter Eleven. See Articles 1116 and 1117.

[17] Article 1115.

26. The position of Canada respects NAFTA's dispute settlement scheme by reserving investment disputes submitted by investors for arbitration under Chapter Eleven. All other disputes, including investment disputes between the sovereign state Parties, are adjudicated pursuant to Chapter Twenty or Chapter Nineteen as the case may be.

27. The Investor's Claim raises a "trade in goods" dispute. NAFTA's dispute resolution scheme delineates the scope of each of NAFTA's dispute settlement procedures, thereby ensuring effective dispute resolution procedures. Trade in goods disputes are resolved between the Parties pursuant to Chapter Twenty.[18]

28. The Investor, at paragraphs 36 to 41 of its Response, suggests that treaty obligations may overlap. Clearly some measures may have several aspects, such as a trade in goods aspect, an investment aspect, or a trade in services aspect. However, only a dispute concerning a measure primarily aimed at investment or at investors can be characterised as an investment dispute within the meaning of Article 1115. Only such disputes are properly resolved under Chapter Eleven. If the dispute raises a measure primarily aimed at trade in goods or trade in services it falls outside the scope of Chapter Eleven, and must be resolved between the Parties pursuant to Chapter Twenty dispute resolution procedures.

29. On a plain reading, the measures in question are primarily aimed at trade in goods and merely affect or have an incidental effect on the Investor's investment. Chapter Eleven dispute resolution is not available for disputes primarily aimed at trade in goods.[19]

30. The Investor equates a lack of an investment dispute with a lack of any obligation on Canada respecting the treatment of Investors.

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[18] See Canada's "Measures Relating to Investment Motion" at paragraphs 22 – 29.

[19] *Ibid.* paragraphs 25 – 28.

31. On the contrary, Canada is not relieved of obligations arising out of measures that merely affect or have an incidental effect on investors or investments. A NAFTA Party may submit such a dispute for resolution pursuant to Chapter Twenty.

Statements on Implementation

32. In domestic law, the Canadian Statement on Implementation[20] is not legally binding.[21] It is an "administrative interpretation of statutes"[22] and is of limited value as an aid to statute interpretation.

33. In international law, the Canadian Statement on Implementation is neither an authoritative interpretation of the provisions of NAFTA nor a document that the Vienna Convention construes as being of assistance for interpretation of NAFTA provisions. It has no legal effect.

34. The Vienna Convention views "any instrument made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" as forming part of the context for the purpose of the interpretation of the treaty. (emphasis added) [23]

35. The Canadian Statement on Implementation does not form part of the "context for the interpretation" of the NAFTA because the other NAFTA Parties have not accepted the Canadian Statement on Implementation as an instrument related to the NAFTA.[24]

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[20] Canadian Statement of Implementation, Canada Gazette 1994.I.68 (pursuant to NAFTA), **Tab 2.**

[21] P.-A. Côté, *The Interpretation of Legislation in Canada* (Cowansville : Yvon Blais, 1991) at 454, says: "It is beyond doubt that the judge is not bound by an administrative interpretation of a statute or regulation." **Tab 3.**

[22] See R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3d ed. (London: Butterworths, 1994) at 469, that defines "administrative interpretation" as: "interpretation given to legislation by persons, other than judges, who are charged with the administration or enforcement of the legislation". **Tab 4.**

[23] Vienna Convention, Article 31 (2) (b).

[24] To the extent this Tribunal considers this statement in interpreting "relating to", it should note the Statement of Administrative Action issued by the United States. The part of the Statement of Administrative Action relevant to the meaning of Article 1101 states:

Investor Challenging the SLA

36. Contrary to the Investor's assertions in paragraphs 42 through 45 of its Response, the Investor expressly challenges measures required in Article II of the SLA.[25]

37. Article V of the SLA provides for settlement of disputes concerning alleged breaches of obligations undertaken in the SLA by the United States and Canada.

C. Harmac Motion

38. In this reply to the Investor's Response to the Harmac motion Canada says:
    a) the pleadings regarding Harmac are insufficient and cannot be cured at the memorial stage;
    b) Article 1116 requires the Investor to plead the separate claims made on its own behalf and with respect to each investment on whose behalf it seeks to claim and recover damages;
    c) Article 1121 requires a separate waiver to be filed by each enterprise of an Investor which has incurred loss or damage at issue in the Claim;
    d) submission of the waiver is a precondition to a valid claim; and
    e) failure to file the waiver is prejudicial to Canada.

The chapter applies to all governmental measures relating to investment, with the exception of measures governing financial services, which are treated in Chapter Fourteen. Under Article 1112, in the event of any inconsistency between Chapter Eleven and another chapter, the other chapter will prevail. (emphasis added)

Statement of Administrative Action contained in Message from the President of the United States transmitting North American Free Trade Agreement, H. Doc. 103-159, Vol. 1 (Nov. 4, 1993), at page 140. **Tab 5.**

The Statement of Administrative Action is part of the United States' statutory scheme for the approval and implementation of trade agreements. (See Title 19 of the United States Code Annotated (Customs Duties), at paragraph 2903). **Tab 6.**

The United States Congress approved the Statement of Administrative Action along with NAFTA. (See the North American Free Trade Agreement Implementation Act, 103rd Congress (1st Session) H.R. 3450 at section 101.) **Tab 7.**

[25] The Tribunal is referred to paragraph 4 of Canada's "Measures Relating to Investment Motion".

Adequacy of Pleadings

39. Paragraphs 34 and 103 of the Investor's Statement of Claim do not constitute a "statement of facts supporting the claim" concerning Harmac under Article 18 of the UNCITRAL Rules or international arbitral practice.[26]

40. The pleading with respect to Harmac does not fulfil the basic function of a pleading: to define the issues, to define the scope of production,[27] to state the relevant facts on which the claim is based and to avoid surprise at the hearing.

41. The Statement of Claim never addresses which substantive breach (or perhaps breaches) of NAFTA is at issue with respect to Harmac.

42. In paragraph 59 of its Response, the Investor suggests that paragraphs 34 and 103 of the Claim would inform a Respondent that the Harmac claim is:

> "...a separate claim of damages incurred under NAFTA Article 1102(1) by the Investor... with respect to those investments of the Investor that are distinct from the Investment of the Investor as claimed under NAFTA Article 1102(2)".

This is not what has been pleaded in this Statement of Claim. The Investor pleads no facts linking the Harmac claim to a breach of the national treatment obligation.

43. Nor does Article 1102 confer a procedural right to submit a claim. This interpretation of Article 1102(1) conflicts with the plain language of that provision. Article 1102(1) states the national treatment obligation with respect to investors. Article 1102(2) states the national treatment obligation with respect to investments of investors.

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[26] See Canada's Harmac Motion at paragraphs 8 to 14 in particular, authorities at footnote 4.

[27] Since the date fixed to demand production of documents preceded the disposition of this position, Canada was compelled to request production of documents relating to Harmac.

44. The Investor's interpretation of Article 1102(1) ignores the clear distinction between Articles 1102(1) and (2). It seeks to read in an additional clause in Article 1102(1) that would extend the obligation to investments (but not Article 1102(2) investments). Such an interpretation cannot be sustained by the text of Article 1102.

45. A pleading this deficient cannot be saved by promising that all will become known at the memorial stage. Canada is not asking for evidence or law that would become apparent in a memorial. Canada is entitled to respond to a pleading that states what breaches and what damage are being claimed. It would be unfair and inefficient to allow the Claimant to explain the basics of its case at the memorial stage of these proceedings.

46. The issue in this motion is quite distinct from a request for particulars. In this case, the Claimant has not even pleaded the substantive breaches at issue with respect to Harmac or the facts supporting those allegations.

Harmac is an investment but not the Investment

47. The Investor misstates Canada's position: Canada does not say that a separate claim must be submitted for every loss suffered by every investment held by the investor.[28]

48. Canada does say that every claim by the investor for loss incurred in an interest in an enterprise must be pleaded sufficiently. This is the effect of Article 18 of the UNCITRAL Rules and Articles 1116 and 1117.

49. Article 1116 is entitled "Claim by an Investor of a Party on its Own Behalf". It allows an investor to submit a claim that "the investor has incurred loss or damage by reason of, or arising out of, that breach". There is a direct relationship between the breach of the obligation and the damages sustained by the investor.[29]

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[28] Investor's Response, at paragraph 61.

[29] Article 1116: Claim by an Investor of a Party on Its Own Behalf

50. Where the investor wishes to claim for damage sustained by reason of loss to an enterprise it controls it should claim under Article 1117. Article 1117 is entitled "Claim by an Investor of a Party on Behalf of an Enterprise". Article 1117 allows an investor to claim for damage the investor has sustained where "...the enterprise has incurred loss or damage by reason of, or arising out of, that breach".[30]

51. Article 1117(3) states that "an investment may not make a claim under this Section".

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1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached:

(a) Section A or Article 1503(2) (State Enterprises),; or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with a Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. 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.

[30] Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached:

(a) Section A or Article 1503(2) (State Enterprises),; or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with a Party's obligations under Section A,

and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events which gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

52. It is clear that NAFTA contemplated two types of claim: Article 1116 claims on the investor's own behalf and Article 1117 concerning claims by the investor for damages sustained by the enterprise.

53. Contrary to the submission of the investor at paragraphs 58 to 60 of its Response, there is no third category of claims in NAFTA whereby the investor can claim on its own behalf and on behalf of an enterprise for damages sustained by the investor and for damages sustained by an enterprise.

54. The drafters of NAFTA avoided creating a cumbersome third category of this nature by recognising that the loss or damage incurred by an investor could be described as "loss or damage to an interest in an enterprise". [31]

55. However, where the Investor's claim on its own behalf relates to "loss or damage to an interest in an enterprise", a waiver <u>must</u> be provided by that same enterprise.[32]

56. A waiver must be filed by each investor claiming on its own behalf and by each enterprise on whose behalf the investor is seeking to recover damages. Article 1121 requires the waiver for all claims under Articles 1116 and 1117.[33]

57. Canada presumes that this is exactly why the investor submitted two waivers: one on behalf of the investor and the other on behalf of the enterprise that is the Investment (Pope & Talbot Ltd.).[34] There is no reason why a waiver would be required to seek damages for loss incurred by one investment that is a wholly owned subsidiary of the investor (the Investment - Pope & Talbot Ltd.)[35] but would not be required to seek

[31] Article 1121(1)(b).

[32] The Investor at paragraph 34 of its Claim, admits that it controls Harmac. Consequently, it must submit a waiver.

[33] *Ibid.*

[34] See Statement of Claim, at Tab 2.

[35] See Statement of Claim, at paragraph

damages for loss incurred by another investment that is a subsidiary controlled by the investor (Harmac Pacific Inc.).[36] They are both claims for an interest in an enterprise.

58. If that enterprise does not submit a waiver, the portion of the claim that concerns loss from the Investor's interest in that enterprise cannot be pursued.

59. Harmac did not submit a waiver. Consequently, that portion of the Investor's claim on its own behalf dealing with loss to its interest in Harmac cannot be maintained.

60. The assertion that Harmac's losses somehow flow through to the investor does not remove the claim for those losses from Articles 1116 or 1117 or from the requirements of Article 1121. Harmac must still file a waiver. The waiver filed by the Investor does not relieve Harmac of this obligation.

61. The filing of a waiver is not just a procedural formality.

62. The consent of the State Parties to arbitration is conditioned on the submission of claims to arbitration "in accordance with the procedures set out in this Agreement".[37] The requirement to file waivers in Article 1121 is clearly a "Condition Precedent to Submission of a Claim to Arbitration", as its title states. (emphasis added)

63. The filing of a waiver by an enterprise under Article 1121 is also evidence of the consent of the enterprise to arbitration. In this case there is no evidence that Harmac has consented to the arbitration of any losses that might have been sustained by the investor on its behalf.

64. Without such a waiver Harmac could begin proceedings in a domestic court or under other dispute settlement procedures at any time.

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[36] See Statement of Claim, at paragraph 34.

[37] Article 1121 (1)(a) and (2)(a).

65. Further, the filing of the waiver is an essential marker in defining the three year period referred to in Articles 1116(2) and 1117(2).

66. A waiver is an essential condition for a valid claim.

67. In *Ethyl Corporation* v. *Government of Canada*, [38] the issue was timing: when did a waiver have to be filed? The tribunal allowed the investor to perfect its claim by filing a waiver with the Statement of Claim, rather than with the Notice of Intent to Submit a Claim to Arbitration pursuant to Article 1119.[39]

68. The Tribunal's award in *Ethyl* did not hold that waivers need not be filed, that waivers may be filed at any time before judgment is rendered or that waivers are not an essential condition for a claim.

69. No waiver by Harmac has been filed at any time in these proceedings. A waiver did not accompany the Statement of Claim. As a result, an essential precondition has not been fulfilled and the claim on behalf of Harmac is not valid.

70. The *Desona*[40] case does not stand for the proposition that issues of standing should only be determined at the merits phase of a case. Such determinations are discretionary and will depend on the facts of a case.

71. In *Desona* the principals of Desona, Desona A and Desona B were all before the Tribunal. The Tribunal simply held that the "complications relating to the various forms of "DESONA" would form part of the merits".[41]

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[38] *Ethyl Corporation* v. *Government of Canada,* Award on Jurisdiction, June 24, 1998.

[39] *Ibid.,* at paragraph 92, the Tribunal noted that submission of the waiver with the Notice of Intent would have been the better practice.

[40] See Investor's Response, at Tab 17.

[41] *Ibid.,* at paragraph 48.

72. Harmac is an entirely distinct entity from the investor. It is a publicly-traded company in a different sector (pulp and paper) than the Investor and the Investment. It is doubtful that the principals of Harmac are before the Tribunal and it is clear that these principals have not filed a waiver indicating their consent to arbitration concerning the impact of the implementation of the SLA on their business.

73. Further, the Claim with respect to Harmac necessitates discovery and evidence on an entirely different company in a different business and will prolong the hearing.

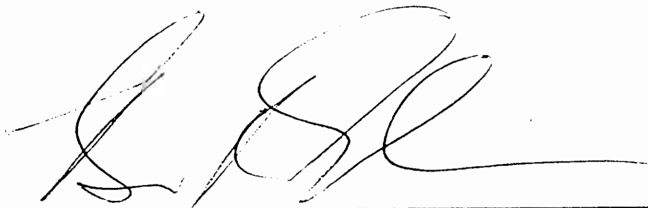
74. In these circumstances the Tribunal should not permit the claim on behalf of Harmac to continue. This claim has not been properly pleaded and there is no evidence that Harmac has consented to being involved in arbitration.

D. Relief Sought

75. Canada reiterates its requests at paragraph 52 of the Measures Relating to Investment Motion and at paragraph 21 of the Harmac Motion.

THE WHOLE RESPECTFULLY SUBMITTED

Signed at Ottawa, the 7th day of December, 1999



Of Counsel for Canada