IN THE MATTER OF AN ARBITRATION

UNDER CHAPTER ELEVEN

OF THE

NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN

POPE & TALBOT INC

and

GOVERNMENT OF CANADA

AWARD

IN RESPECT OF COSTS

BY

ARBITRAL TRIBUNAL

The Hon Lord Dervaird
(Presiding Arbitrator)

The Hon Benjamin J. Greenberg QC

Mr Murray J Belman

AWARD ON COSTS

POPE & TALBOT INC v GOVERNMENT OF CANADA

1. In this final phase of the arbitration both parties have made submissions in which each argues that the Tribunal should exercise its discretion by awarding arbitration costs and costs for legal representation and assistance in its favour against the other party. Canada submits, in the alternative, that each party should bear its own legal costs and that the Investor should pay to Canada its share of costs of the arbitral Tribunal.

2. In accordance with Article 38 of the UNCITRAL Arbitration Rules which apply to this arbitration the arbitral tribunal is required to fix the costs of arbitration. In the present case the relevant items constituting the costs include (a) the fees of the arbitral tribunal, (b) the travel and other expenses incurred by the arbitrators and (c) the costs of expert advice and of other assistance required by the arbitral tribunal. At the date of this award each party has advanced US $750,000, i.e. a total of $1,500,000. The fees of the members of the Tribunal were fixed at the outset of the arbitration as to daily and hourly rates, and the entire sum advanced subject to certain bank deductions but together with interest earned thereon has been expended thereon, taking into account the expenses incurred by each arbitrator and the costs of assistance from Mr Michael Miller, advocate, except for the sum of US $39,571.30.

3. Article 38 also addresses other costs:-

   (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal.

   (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to

the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

4. Article 40 of the UNCITRAL Rules provides:-

(1) Except as provided in paragraph 2, the costs of the arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

(2) With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e) the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs, or may apportion such costs between the parties if it determines that apportionment is reasonable.

5. It is thus clear that as regards the costs of the arbitral Tribunal, it is to provide in principle for the costs to be borne by the unsuccessful party, but that is subject to the power of the Tribunal to apportion such costs if, taking into account the circumstances of the case, it determines that apportionment is reasonable.

As regards costs of legal representation and assistance of the parties, the matter is at the discretion of the Tribunal taking into account the circumstances of the case. In this case both parties claim legal costs in the course of the proceedings in terms of Article 38(e). They both include in these legal costs the travel and other expenses of witnesses and experts, which might otherwise fall under Article 38(d).

6. The Investor claims US $3,780,088 for legal costs (after deduction of $465,044 awarded to it by the Tribunal and since paid to it by Canada). Canada claims costs of Can $3,953,231.22. In addition each claims its share

of the Tribunal's fees and expenses. In the alternative, upon the basis that each party bears its own legal costs, Canada claims the amount advanced by it to the Tribunal.

7. It is common ground between the parties that this arbitration raised a number of important and novel issues relating to NAFTA Chapter 11. Further, many complex issues of fact and law were raised, and significant procedural issues arose.

8. While the Investor was successful in that it obtained an award of damages from the Tribunal, that success was limited to one Article only of those upon which claims were made, and the sum awarded was less than 1% of the sum claimed at earlier stages in the arbitration, and about 20% of the sum claimed at the damages phase. The claims presented by the Investor under Articles 1102, 1106 and 1110 failed. On the merits, so did the claims based on Article 1105 in all respects other than in relation to the Verification Review Episode, which occurred after the arbitration proceedings had been commenced. Upon that basis, in summary, Canada submits that although technically the Investor may have "won" the arbitration it was in effect unsuccessful in all the major issues raised and for that reason should be required to pay the legal costs incurred by Canada.

9. It appears to the Tribunal that it is over simplistic to treat this case as one where the Investor "won" and therefore should recover costs, or where Canada "really won" having regard to the very limited degree of success of the Investor and should therefore recover costs. Rather it is necessary to consider a variety of aspects in order to arrive at a reasonable result.

10. In the first place, many issues were raised by each party by way of incidental pleading. Canada sought to have the case dismissed for lack of jurisdiction on three different bases – that the claim was not an "investment dispute", that the measures challenged did not "relate" to investment and that the Softwood Lumber Agreement was not a "measure". These all failed after consideration

by the Tribunal of written submissions. Similarly Canada's attempt to have paragraphs 34 and 103 of the Statement of Claim struck out (the "Harmac" matter) failed. Similarly the attempt by Canada to have the "Super Fee" issue excluded failed. It is thus clear that Canada failed on important legal aspects of the case.

11. The matter of documentary production requires special mention. Canada made documentary requests, and to the extent that the Investor objected to production, that objection was in large measure upheld. Similarly, the Investor made requests for documents and some of Canada's objections were upheld. However, particular difficulties were created by Canada's treatment of the issue of confidentiality in the arbitral process on the one hand and its reluctance to produce documents on the grounds of cabinet confidence on the other. The Tribunal does not consider it necessary to rehearse these matters in detail. It suffices to observe that Canada simply chose not to comply with the directions of the Tribunal in either respect.

12. Canada has drawn attention to the fact that the Tribunal has already imposed a sanction by way of an award of costs in favour of Canada in its decision of September 27, 2000. As that decision makes expressly clear, that matter was closed by that decision, and the legal position of the parties would not in any way be prejudiced by that matter.

13. One other matter of concern to the Tribunal is that Canada, despite requests by the Investor and by the Tribunal, did not produce any Travaux Preparatoires in relation to the relevant Articles of NAFTA, in particular 1105, until virtually the end of the arbitration, having previously asserted they did not exist.

14. Of equal concern to the Tribunal is the fact that certain documents were withheld from the Investor and the Tribunal until the actual hearing on breach of Article 1105, which had a direct and material impact upon the matters in dispute (see Award on Merits Phase II paras 177 – 179).

15. The Investor made an application at the end of the damages hearing to change the place of the arbitration. It was rejected because of the very late stage at which it was made. The issues raised were important and difficult.

16. The Investor put before the Tribunal certain letters passing between the parties with a view to arriving at a settlement. Canada objected to these having been produced but in the event produced some further material. The Tribunal has not found this material particularly helpful.

17. Taking an overall view of the case, the Tribunal concludes that the success of each party was mixed. In the circumstances the Tribunal has determined that each party should bear its own legal costs under Article 38(d) and (e).

18. As to the costs of the arbitral Tribunal under Article 38(a), (b) and (c), the parties have each advanced US $750,000. Those sums (inclusive of interest earned thereon) have been expended on the fees and expenses of the arbitral Tribunal and its assistant Mr Michael Miller, to the extent of US $1,474,359.50. But the Tribunal considers it reasonable that the Investor should be awarded that portion of the arbitral Tribunal's costs which relates to the Verification Review Episode, including the hearing which took place at Fort Lauderdale, Florida on January 6 and 7, 2000, and the consequent damages phase. Based upon an in depth review of the fees and expenses incurred by the Tribunal on these elements of the case, the Tribunal assesses the costs of this portion at US $240,400. Accordingly it awards to the Investor US $120,200 being its one half share of those costs. Interest on that sum is assessed at 5% per annum compounded quarterly and pro rata within a quarter.

CONCLUSION

For the reasons given above, the Tribunal orders the Government of Canada to pay the Investor US $120,200 with interest payable from and after the date hereof until

payment in full at the rate of 5% per annum compounded quarterly and pro rata within a quarter.

The Honourable Lord Dervaird
Presiding Arbitrator

The Honourable Benjamin J Greenberg Q.C.
Arbitrator

Murray J Belman
Arbitrator

Montreal
Dated November 26 2002