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and International Trade

Ministère des Affaires étrangères
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Department of Justice

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October 1, 2001

BY FACSIMILE

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Dear Sirs:

Re: Pope & Talbot Inc. v. Government of Canada

Canada writes in reply to the Tribunal's letter of 17 September 2001.

A tribunal must apply Commission interpretations

You have asked four questions concerning the deliberations of the Free Trade Commission ("Commission"). The Commission is the prime interpreter of the NAFTA. Article 1131 does not provide for a tribunal to second-guess the Commission. Rather, the Commission's interpretation is the full expression of what the NAFTA Parties intended. The effect of such an interpretation could not be clearer: it is binding on the Tribunal.

The Commission established under Article 2001 of the NAFTA comprises cabinet-level representatives of each Party, specifically, the Ministers of the three Parties responsible for international trade, including investment issues arising under Chapter Eleven. The Commission is the Parties to the NAFTA acting collectively under that treaty. It is the highest level policy-making organ and administrator for the treaty as a whole. In acting through the Commission, the Parties act through a single body vested with decision-making power under the Agreement.

The NAFTA Parties have a long-term institutional interest in the proper functioning of the treaty. For that reason, Article 1128 confers upon each non-disputing Party the right to make submissions to arbitral tribunals on questions of interpretation of the treaty

arising in individual disputes. For the same reason, Articles 2001(2) (c) and (e), generally, and Article 1131(2), specifically in the context of Chapter Eleven disputes, grant the Commission the prime and final authority as the interpreter of the NAFTA. Article 1131(2) provides that “[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section”, *i.e.* Section B of Chapter Eleven.

A tribunal established under Section B of Chapter Eleven has only such jurisdiction as has been conferred upon it by that Section. Chapter Eleven Tribunals have been conferred jurisdiction to resolve disputes in accordance with the NAFTA, the applicable rules of international law, and any interpretation by the Free Trade Commission. Any Commission interpretation forms part of the governing law from which a tribunal cannot derogate without exceeding its jurisdiction.

The Tribunal's letter suggests that “the Commission's interpretation must have been intended to apply to future cases [...]” only. This is incorrect. This is not a question of retroactive application of the law, but rather of the correct interpretation of the governing law, which remains unchanged.

The Tribunal also states in its letter that the Commission's actions “could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Tribunal.” Again, the Tribunal is referred to Article 1131(2). Chapter Eleven tribunals must apply a Commission interpretation of a Chapter Eleven provision. Since this Tribunal is “established” under Section B of Chapter Eleven, the Commission's interpretation is binding on it and must be applied as part of the governing law stipulated in Article 1131(1). This Tribunal does not act consistently with the governing law of Article 1131 if it acts on the basis of an interpretation of Article 1105 that is inconsistent with the Commission's interpretation as set out in the Note of Interpretation.

The Tribunal's statements indicate a misunderstanding of the nature of the NAFTA as a treaty and of the Commission's structure and functions. As a treaty, the NAFTA is the creature of the States that are party to it. The Parties have assumed obligations *vis-à-vis* one another that protect investors and investments and have established the process that applies to the present proceedings. In this instance, the Parties acting as the Commission have simply carried out a function that they expressly reserved for their Ministers acting collectively: to ensure correct understanding of the governing law through issuance of authoritative interpretations.

The Tribunal, for its part, is a creature of the Treaty. Its task is to interpret and apply the relevant provisions of the Treaty, which include interpretations of the Commission. It has no jurisdiction to expand the rights the Parties have given to investors under the Treaty, nor to control the NAFTA Parties acting in their sovereign right as the states that have created the international agreement that is the constituting instrument for the Tribunal itself.⁶ The Tribunal's task is limited to that set out in Article 1131(1): to “decide the issue in dispute in accordance with this Agreement and applicable rules of international law” and in accordance with any applicable interpretation.

There has been no change to the meaning of Article 1105. This is clear from the Note of Interpretation and the Commission's preambular statement that:

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions...

Where, because of the misinterpretation or misapplication of the terms of the NAFTA by subordinate tribunals, the Parties determine, as is their right, to set out the proper interpretation of the Treaty's provisions, tribunals have no option but to apply that interpretation. A Tribunal that disregards a Commission interpretation exceeds its jurisdiction.

Implications of Article 1103

The Tribunal suggests that Canada did not respond to its question respecting the implications of Article 1103, arguing solely that the Investor abandoned its Article 1103 claim. With respect, this is inaccurate. For the sake of convenience, the response submitted on September 10, 2001 reads:

The jurisdiction of a Tribunal established under Section B of Chapter Eleven is limited to the specific claims made by an investor in conformity with procedural requirements under the Agreement. In this case, the Investor has abandoned its claim under Article 1103 of the NAFTA. This Tribunal is therefore not seized with any claim or issue under Article 1103, nor does it have jurisdiction in that respect. Moreover, Canada notes that Article 1103 can no longer be relevant or constitute an issue with respect to the interpretation of Article 1105, as the interpretation of the latter is set out in the Note of Interpretation, which is binding on the Tribunal.

Canada clearly stated that "Article 1103 can no longer be relevant or constitute an issue with respect to the interpretation of Article 1105, as the interpretation of the latter is set out in the Note of Interpretation, which is binding on the Tribunal." In addition, Canada noted that the Tribunal is not seized with a claim under Article 1103. The issue of whether there could be a claim under that provision consequently is irrelevant and beyond its jurisdiction.

With respect to the Tribunal's inquiry as to whether Article 1103 could undo the interpretation, Canada observes that Article 1131(2) interpretations bind tribunals in stating the governing law, and the NAFTA cannot operate so as to create a conflict between Article 1103 and the interpretation. It would be absurd, therefore, for a tribunal to ignore or question a binding interpretation of the Commission through reference to another provision of the NAFTA, or such provisions' supposed "practical" effects, and its view of the provisions of treaties to which Canada is not even a Party (U.S. BITs). The Parties to this Agreement, using a mechanism specifically designed to bind tribunals with respect to this Agreement, have spoken. The Tribunal is bound by their interpretation.

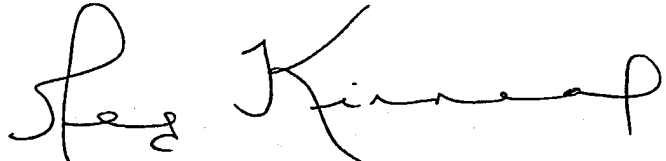
In acting in their plenary capacity as the Free Trade Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the

obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the Agreement was ratified and implemented. Once they exercise their power, a tribunal must comply with the Commission's interpretation. A refusal to do so would be an act in excess of the governing law jurisdiction that is vested in the tribunal under Article 1131.

Conclusion

The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states with a clear interest in the proper operation of the Agreement, transcends the merits of specific cases. The Tribunal's letter gives the impression that it believes Canada was acting in bad faith in relation to the Commission's issuance of a Note of Interpretation. In view of the foregoing, we trust that our concern is ill-founded, or alternatively, that we have addressed the concern to the Tribunal's satisfaction.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Meg Kinnear". The signature is fluid and cursive, with the first name "Meg" written in a larger, more prominent script than the last name "Kinnear".

Meg Kinnear
General Counsel
Trade Law Division

c.c. Mr. Barry Appleton