

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEMTURA CORPORATION,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

**SUBMISSION
OF THE UNITED STATES OF AMERICA**

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.
2. For the reasons discussed below, the most-favored-nation (“MFN”) obligation under Article 1103 does not alter the substance of the fair and equitable treatment obligation under Article 1105(1).
3. On July 31, 2001, the Free Trade Commission (“Commission”), comprising the NAFTA Parties’ cabinet-level representatives, issued a binding interpretation of the NAFTA, as contemplated under Article 1131, confirming that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”¹ The Commission clarified that “the concepts of ‘fair and equitable treatment’ and ‘full

¹ Free Trade Commission, Interpretation of NAFTA, July 31, 2001, at 2.

protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”² The Commission also stated that “a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”³

4. Under the “Governing Law” provision of NAFTA Chapter Eleven, Article 1131, the Commission’s interpretation is binding on Chapter Eleven tribunals.⁴ Under Article 1131, Chapter Eleven tribunals are required to apply governing law, which includes binding interpretations issued by the Commission.⁵
5. Here, all three NAFTA Parties jointly and expressly issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1). Moreover, all three Parties later confirmed, through subsequent submissions commenting on that interpretation, that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).
6. In a submission to the *Pope & Talbot* tribunal, in a section entitled “Implications of Article 1103,” Canada 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.” Canada further stated 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.*”⁶ Canada added:

² *Id.*

³ *Id.*

⁴ NAFTA Article 1131 (“Governing Law”) states:

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

⁵ The power to issue an authentic interpretation of a treaty remains with the State Parties themselves. See IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 136 (2d ed. 1984) (“It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it.”); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC, 256 (7th ed. 2002) (“L’interprétation réellement authentique est celle qui est fournie par un accord intervenu entre *tous les États parties au traité.*”) (The truly authentic interpretation is that provided by agreement among *all State parties to the treaty.*) (translation by counsel; emphasis in original).

⁶ *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from M. Kinnear to Tribunal, Oct. 1, 2001, at 3 (emphasis added), attached at Exhibit A.

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 1131.⁷

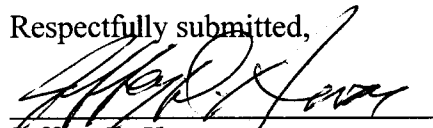
7. Mexico and the United States agreed with Canada's position. In an Article 1128 submission, Mexico informed the *Pope & Talbot* tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . to the Tribunal regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that *Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.*"⁸
8. In its own Article 1128 submission, the United States similarly informed the *Pope & Talbot* tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that *Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.*"⁹
9. The NAFTA Parties thus unanimously agreed that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).

⁷ *Id.* at 3-4.

⁸ *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from H. Perezcano Díaz to Tribunal, Oct. 1, 2001, at 1 (emphasis added), attached at Exhibit B.

⁹ *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Sixth Submission (Corrected) of the United States of America, Oct. 2, 2001, at para. 2 (emphasis added), attached at Exhibit C.

Respectfully submitted,



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