IN THE ARBITRATION PURSUANT TO CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES BETWEEN

POPE & TALBOT, INC.,

Claimant/Investor,

-and-

THE GOVERNMENT OF CANADA,

Respondent/Party.

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

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1. Pursuant to NAFTA Article 1128, the Government of the United States of America makes this submission to comment further on certain questions of national treatment and expropriation in this case. The United States reiterates and incorporates by reference its positions as expressed in its April 7, 2000 submission under Article 1128. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

National Treatment

2. Application of the national treatment provision of NAFTA Chapter 11 should be undertaken in two stages. A Tribunal should ask (*i*) whether a Party has accorded less favorable treatment to investors or investments on the basis of nationality, and, if so, (*ii*) whether the investor or investment accorded less favorable treatment was "in like circumstances" with domestic investors or investments accorded more favorable treatment.

3. The objective of the national treatment provision is to prohibit discrimination against foreign investors and investments, in law and in fact, on the basis of nationality. Implementation of the national treatment provision requires a comparison of a measure's treatment of domestic investors and their investments with that of their counterparts from other NAFTA Parties. If the measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102 and a Tribunal should proceed no further. Only if presented with some evidence of less favorable treatment on the basis of nationality should a Tribunal examine the question of which investors are "in like circumstances."

4. The phrase "in like circumstances" ensures that comparisons are made with respect to investors and investments on the basis of characteristics that are relevant for purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investments, in deciding to which domestic investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not relevant to such a comparison.

5. The circumstances relevant to the comparison will vary by case. The relevant inquiry is not limited to whether investors or investments produce the same product: merely because investors or investments produce the same products does not mean they are "in like circumstances." For example, the fact that producers of such products are located in different geographical or political regions may also be germane to the question of whether they are in like circumstances.

Expropriation

6. NAFTA Article 1110(8) does not imply that a nondiscriminatory regulatory measure of general application necessarily constitutes an expropriation merely because it adversely affects an investment. Article 1110(8) simply clarifies that such a measure could not constitute an expropriation "solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt." The provision is included "for greater certainty," a phrase repeatedly used in the NAFTA not to create or limit a right or obligation but to reflect an understanding that the scope of a particular right or obligation is already implied in other provisions of the text. *See, e.g.*, NAFTA arts. 1102(4), 1405(4), 1416, annexes 308.1(4), 1001.1a-2(1).

7. Similarly, Article 2103 does not support the argument that a nondiscriminatory regulatory measure of general application necessarily constitutes an expropriation merely because it adversely affects an investment. Article 2103 does not exclude all taxation

measures from the ambit of expropriation claims, thereby implying that other similar measures would be actionable. Rather, Article 2103(6) explicitly states that Article 1110 "*shall apply* to taxation measures" subject to certain limitations. (Emphasis added).

Dated: Washington, D.C.
May 25, 2000

Respectfully submitted,

/S/

Mark A. Clodfelter
UNITED STATES DEPARTMENT OF STATE
Office of the Legal Adviser
Office of International Claims and
Investment Disputes
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037