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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

SUBMISSION RESPECTING POST-HEARING ARTICLE 1128 SUBMISSIONS FILED BY THE UNITED MEXICAN STATES AND THE UNITED STATES OF AMERICA

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INTRODUCTION

1. At the conclusion of the hearing of the Initial Phase of the arbitration of the Investor's claim, the Tribunal afforded the disputing parties an opportunity to make submissions respecting the other NAFTA Parties' post-hearing NAFTA Article 1128 submissions.

2. The United Mexican States (hereafter "Mexico") and the United States of America (hereafter the "U.S.") each filed a post-hearing NAFTA Article 1128 submission.[1]

3. Canada makes the following submission respecting Mexico's Supplemental Submission and the U.S. Second Submission. Canada agrees completely with the positions taken by Mexico and by the U.S. in their respective post-hearing NAFTA Article 1128 submissions. Canada reiterates the positions it submitted to the Tribunal in its Counter-memorial and no inference should be drawn from the absence of comment on any issue not addressed in this submission.

4. It is apparent from the post-hearing NAFTA Article 1128 submissions as well as the earlier NAFTA Article 1128 submissions[2], that the U.S. and Mexico concur with Canada in respect of the interpretation of the NAFTA provisions negotiated by the NAFTA Parties and placed at issue in this arbitration, and that they wholly disagree with the interpretations advanced by the Investor. It is especially significant that the U.S., the Party of the Investor, concurs with Canada's interpretation of the NAFTA provisions at issue and wholly disagrees with the interpretations advanced by the Investor because the obligations at issue in this case are owed by Canada to the United States.[3]

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1 Supplemental Submission of the United Mexican States (hereafter "Mexico's Supplemental Submission"), submitted May 25, 2000; Second Submission of the United States of America (hereafter "U.S. Second Submission), submitted May 25, 2000.

2 Submission of the United States of America dated April 7, 2000; Submission of the United Mexican States dated April 3, 2000.

3 Canada's Counter-memorial, para. 5.

5. Canada agrees with Mexico that the Tribunal should place "great weight on the shared views of the three States party to the agreement."[4]

ARTICLE 1102

Objective

6. Canada agrees with Mexico and the U.S. that the objective of the national treatment obligation in NAFTA Article 1102 is to prevent a NAFTA Party from discriminating against investors or investments of investors of the other NAFTA Parties on the basis of nationality.[5]

7. Mexico rightly points out that the Investor's interpretation ignores this "essential feature of the [national treatment] obligation".[6] Canada has noted that the Investor does not claim, nor has it adduced any evidence, that the SLA and Canada's administration of the SLA discriminate on the basis of the nationality of the investors or their investments.[7]

8. The U.S. underscores this essential feature by describing it as the first stage of application of the national treatment provision, beyond which a Tribunal should proceed "only if presented with some evidence of less favorable treatment <u>on the basis of nationality</u>".[8](emphasis added) The U.S. position accords with Canada's submission: "... there is no basis even for inquiring into a distinction between circumstances where, as here, there is neither an allegation nor evidence that the distinction is motivated by or has the effect of discriminating by nationality."[9]

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4 Mexico's Supplemental Submission, Section B, second paragraph on page 10 of 11.

5 Mexico's Supplemental Submission, Section 1, last two paragraphs on page 2 of 11 - first two paragraphs on page 3 of 11; U.S. Second Submission, para. 3.

6 Mexico's Supplemental Submission, Section 1, last full paragraph on page 2 of 11.

7 Canada's Counter-memorial, paras. 162, 163, 167 and 168.

8 U.S. Second Submission, paras 2 and 3. See also Canada's Counter-memorial at paras. 162, 163 and 167.

9 Canada's Counter-memorial, para. 167.

9. The submissions made by Mexico and the U.S. pursuant to NAFTA Article 1128 and those made by Canada in its Counter-memorial leave no doubt that the three NAFTA Parties share a common interpretation of NAFTA Article 1102. It must be interpreted as an obligation owed by a NAFTA Party to the other NAFTA Parties to refrain from discriminating on the basis of the nationality of investors of NAFTA Parties or their investments. The core objective is to prevent discrimination on the basis of nationality. As pointed out in Mexico's Supplemental Submission[10], NAFTA Article 1102 must not be interpreted as an obligation owed by a NAFTA Party to provide investors of other NAFTA Parties or their investments with the best treatment it accords to its own investors or investments anywhere within its national boundaries.

***De jure* or *de facto* discrimination**

10. Mexico and the U.S. join Canada in acknowledging that the discrimination on the basis of nationality proscribed by NAFTA Article 1102 may be *de jure* or *de facto*, but in either case must be such as to treat foreign investors and foreign-owned investments less favourably than domestic investors and investments.[11]

11. Canada concurs with the position set out in footnote 3 of Mexico's Supplemental Submission.[12] The Investor has misconstrued Canada's position as one that insists on an aim <u>and</u> effects test, possibly by disregarding Canada's clear statement that discrimination can be either *de facto* <u>or</u> *de jure*. Canada does not propose an aim and effects test.

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10 Mexico's Supplemental Submission, page 2 of 11, first and third full paragraphs.

11 Mexico's Supplemental Submission, Section 2, first paragraph on page 4 of 11; U.S. Second Submission, para. 3; Canada's Counter-memorial, paras 166, 177 and 194.

12 Mexico's Supplemental Submission, footnote 3 on page 4 of 11. See Canada's Counter-memorial, paras 166, 177 and 194.

"In like circumstances"

12. Mexico and the U.S. both reject the Investor's attempt to have the Tribunal interpret the term "in like circumstances" in a manner that would restrict its comparison of investors to those enterprises which compete as sellers of the same product in the same market.[13] Canada agrees with Mexico and the United States.[14]

13. The submissions of the three NAFTA Parties, therefore, concur in urging the Tribunal to heed the text of NAFTA Article 1102 which indicates that all relevant circumstances, as opposed to the Investor's single circumstance, must be considered when comparing the treatment accorded foreign investors and domestic investors, or alternatively the treatment accorded foreign-owned investments and domestic-owned investments.[15] As noted above,[16] there is no basis for inquiring into what circumstances may be relevant unless there is evidence that less favourable treatment was accorded to the foreign investors or their investments based on their nationality.

GATT/WTO Jurisprudence

14. GATT/WTO jurisprudence supports the position that NAFTA Article 1102 must be interpreted in a manner that inquires into whether a NAFTA Party has discriminated between investors or investments on the basis of their nationality.

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[13] Mexico's Supplemental Submission, Section 1, first full paragraph on page 3 of 11 and Section 5, second and third full paragraphs on page 8 of 11; U.S. Second Submission, para. 5.

[14] Canada's Counter-memorial, paras 193 and 195.

[15] Mexico Supplemental Submission, Section 1, first paragraph on page 3 of 11; U.S. Second Submission, paras 4 and 5; Canada's Counter-memorial, paras 197.

[16] *Supra*, para. 8.

15. Mexico notes in its discussion of GATT/WTO jurisprudence[17], as did Canada,[18] that in every case referred to by the Investor in which a measure was found to be inconsistent with GATT Article III, the measure discriminated between domestic and imported products on the basis of national origin.[19]

16. Consistent with the positions set out in Mexico's Supplemental Submission and in the U.S. Second Submission, Canada's Counter-memorial emphasised that the focus of the national treatment obligation in Article 1102 was upon eliminating discrimination based on nationality.[20] In fact, the GATT/WTO jurisprudence cited by the Investor reinforces these positions:

a) *United States - Section 337 of the Tariff Act of 1930* [21] discussed two separate regimes, one of which applied to goods generally and another less favourable regime under section 337 that applied only to imported goods;

b) *Canada-Certain Measures Affecting the Automotive Industry*[22] in which only domestic goods and services provided in Canada counted in the computation of CVA while like foreign-origin goods and services provided from abroad did not; and

c) *EC – Regime for the Importation, Sale and Distribution of Bananas (Complaint by Ecuador et al.)*[23] where two separate quota regimes applied to distinct service providers such that domestic service providers received more

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[17] Mexico's Supplemental Submission, Section 3 on pages 4 and 5 of 11.
[18] Canada's Counter-memorial, para. 177.
[19] Mexico's Supplemental Submission, first paragraph of Section 3 on page 4 of 11.
[20] Canada's Counter-memorial, paras 8-9, 166-168, 194, 199-201, 210-211, 221, 230, 233, 235, 241-242, 248-253.
[21] (1989) GATT Doc. L/6439 – 36S/345 (Panel Report) (Authorities referenced in the Memorial of the Investor, Tab 10).
[22] WT/DS 139/R, WT/DS 142/R, February 11, 2000 (WTO Panel Report) (Authorities referenced in the Memorial of the Investor, Tab 14).
[23] *(1997),* WTO Doc. WT/DS27/AB/R (Appellate Body Report)) (Authorities referenced in the Memorial of the Investor, Tab 35).

quota at the expense of another group of providers, the vast majority of whom were service providers from the complaining countries.

All these cases recognise that breaches of national treatment arise when states adopt or maintain measures that discriminate, in law or fact, against like imported goods or foreign services or service providers on the basis of nationality. The same approach to discrimination applies with respect to foreign investors and their investments under NAFTA Article 1102.

17. Mexico's Supplemental Submission addresses an argument raised by the Investor in its Supplementary Memorial relating to the "competitive opportunities" doctrine.[24] The Investor urges the Tribunal to disregard the requirement to determine, in the first place, whether Canada discriminated between investors or investments of investors on the basis of nationality. Canada agrees with Mexico that this approach confuses a potential consequence of a breach of national treatment[25] with the determining whether a breach of national treatment occurred.

18. Mexico's Supplemental Submission also addresses the determination of likeness in the GATT/WTO cases.[26] Canada agrees with Mexico that a determination of likeness in the GATT/WTO cases is made subject to careful examination of many factors[27] and that using the GATT "like product" analysis is insufficient to determine which investors or investments of investors are to be included when comparing the treatment accorded investors or their investments by a NAFTA Party.[28]

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24 Investor's Supplementary Memorial, paras 47, 49.

25 Mexico's Supplemental Submission, second paragraph of Section 3 on page 4 of 11 and last paragraph of Section 3 on page 5 of 11.

26 Mexico's Supplemental Submission, Section 5, third paragraph on page 8 of 11 to first full paragraph on page 9 of 11.

27 Mexico's Supplemental Submission, Section 5, third paragraph on page 8 of 11; Canada's Counter-memorial, paras 188, 189, 193 – 195.

28 Mexico's Supplemental Submission, Section 5, first paragraph on page 9 of 11; Canada's Counter-memorial, para. 187.

Mexico's Submissions on Tribunal's Questions respecting Article 1102

19. Mexico makes submissions relating to certain questions the Tribunal posed to test certain hypotheses relating to Article 1102.[29] The questions elicited answers from Counsel for Canada concerning the interpretation of NAFTA Article 1102 and its application to hypothetical situations. Canada wishes to comment on these submissions.

20. To the extent that the hypothetical questions posed and answers given may cause confusion or affect the Tribunal's interpretation of NAFTA Article 1102, Canada exhorts the Tribunal to have regard to Section 5 of Mexico's Supplemental Submission and, above all, Canada's position on the interpretation of NAFTA Article 1102 as set out in its Counter-memorial.[30] Canada regrets that its responses to the hypothetical questions posed elicited responses from Counsel for Canada that -- based on a misapprehension of their underlying premises -- were unclear and to some extent inconsistent with Canada's stated positions as set out in its Counter-memorial.

21. Mexico notes[31] that Arbitrator Belman posed the following hypothetical question:

> Supposing you had this situation: British Columbia and Quebec subsidised their wood producers and the United States industry was up in arms and Canada went in and negotiated with the United States, and said, 'Okay, we're going to take care of this. We're going to put a prohibitive tax on exports of British Columbia wood, but we're not going to tax Quebec wood at all.' And the United States said, 'Fine', Canada said, 'Fine', and that was the regime. Would you say that because all British Columbia producers are disadvantaged, that an American producer in British Columbia couldn't claim that they're entitled to the same treatment as the Quebec producers?[32]

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[29] Mexico's Supplemental Submission, Section 5 at pages 6 – 9 of 11.

[30] Canada's Counter-memorial, paras 8-9, 166-168, 194, 199-201, 210-211, 221, 230, 233, 235, 241-242, 248-253.

[31] Mexico's Supplemental Submission, Section 5, first paragraph at page 6 of 11.

[32] Transcript, page 66, line 21 and page 67, lines 1-4. This question assumed a claim under NAFTA Article 1102. The answer provided by counsel at the hearing was correct if, but only if, all or substantially all B.C. producers were American owned or controlled and all or substantially all Quebec producers were Canadian owned or controlled and discrimination based on nationality had occurred through the adoption of the measure.

22. Mexico's answer to Arbitrator Belman's hypothetical question is "yes".[33] Canada agrees with this answer and refers the Tribunal to its Counter-memorial.[34] In this hypothetical situation, the B.C. producer cannot claim entitlement to the same treatment as Quebec producers unless there is evidence that such a hypothetical measure discriminates on the basis of nationality. Canada reiterates that the Investor adduced no evidence of an adverse impact on American investors on the basis of their nationality.[35]

23. Later, the hypothetical question was expanded to postulate an "intention to disadvantage British Columbia producers, some of whom happen to be foreign - or one of whom happens to be foreign".[36] Canada's response is set out at paragraphs 194, 200 and 201 of Canada's Counter-memorial. Assuming Canada had adopted measures designed to disadvantage all British Columbia producer-exporters without regard to the nationality of the producer-exporters' investors, Canada would not have breached its obligation pursuant to NAFTA Article 1102. The reason for this is that the measures would affect every producer-exporter in B.C. regardless of the nationality of investors.

24. Other exchanges tested the hypothesis of whether a measure may breach the NAFTA Article 1102 obligation where it does not discriminate on the basis of the nationality of the investor or their investments.[37] Mexico submits that it cannot breach NAFTA Article

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33 Mexico's Supplemental Submission, second paragraph of Section 5 on page 6 of 11.

34 Canada's Counter-memorial, paras 166 – 7:

> 166. Article 1102(2) does not prevent a Party from implementing a measure that affects investments differently as long as the measure neither directly nor indirectly discriminates on the basis of nationality as between foreign and domestic investments.
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> 167. Determination of "like circumstances" must be made on a case-by-case basis, depending on the facts and treatment at issue in each situation. However, there is no basis even for inquiring into a distinction between circumstances where, as here, there is neither an allegation nor evidence that the distinction is motivated by or has the effect of discriminating by nationality.

35 Canada's Counter-memorial, paras 162, 163, 168 and 200.

36 Transcript, page 67, lines 13 – 15.

37 Arbitrator Belman:
"So ... you don't have to go look around for any provision that is intended or has the effect of disadvantaging foreign producers. You don't have to have that, all you have to do is have a foreign producer who can claim that he is in like circumstances to other producers in Canada that get better treatment."
Transcript, Volume VII, page 69, lines 14-20.

1102, as does Canada in its Counter-memorial.[38] As emphasised by both the U.S. and Mexico, there can be no finding of denial of national treatment unless there is a determination that the measure adopted by a NAFTA Party had the effect of discriminating against investors of the other NAFTA Parties or their investments on the basis of nationality.

25. Mexico submits that the Tribunal must carefully examine all relevant circumstances when determining likeness.[39] Canada agrees. Indeed, the NAFTA Parties, as noted above[40], agree the term "in like circumstances" requires the Tribunal to go beyond the Investor's "like product" analysis which yields, in this case, a single circumstance, namely participation in a market.

26. Further exchanges tested the hypothesis of whether an investor of another NAFTA Party or its investment is entitled to the "best treatment" accorded by a NAFTA Party to its own investors or investments assuming they are in like circumstances. These questions may have been premised on the assumption that B.C. and Quebec producers were "in like circumstances" by virtue of their participation in a single market.[41] Arbitrator Belman observed:

> "U.S. investor [in his hypothetical example] would be receiving better treatment than some Canadian producers, the ones in British Columbia, because they're claiming the treatment that the Quebec producers got ...".

"It happens all the time in the national treatment division (sic), because the requirement is just to find somebody in like circumstances and that could be everybody in like circumstances [or] (a)nybody in like circumstances." Transcript, Volume VII, page 165, lines 25-29.

[38] Mexico's Supplemental Submission, Section 5, last paragraph on page 7 of 11 – first full paragraph on page 8 of 11; Canada's Counter-memorial, paras 251, 166, 177 and 194.

[39] Mexico's Supplemental Submission, Section 5, page 8 of 11, second full paragraph.

[40] *Supra*, paras 12, 13 and 18.

[41] Transcript, page 71, lines 2 –5.

27. As Mexico indicates,[42] NAFTA Article 1102 must not be interpreted so as to entitle the U.S. investor to receive the "best treatment", hypothetically that received by Quebec producers. The Investor urges the Tribunal to adopt this interpretation. Yet, as the NAFTA Parties indicate, Article 1102 does not prevent the NAFTA Parties from implementing location-based measures to achieve regulatory objectives.[43]

28. Where location-based measures exist, NAFTA Article 1102 is not breached simply because an investment within the location is not accorded the same treatment accorded investors or investments outside the location. For there to be a breach, facts would need to be adduced proving:

a) the measure discriminated against foreign investors or investments on the basis of nationality,

b) the investors and investments are in like circumstances, and

c) the foreign investors or investments are treated less favourably than domestic investors.

29. In view of the foregoing, the hypothethical U.S.-owned lumber producer-exporter in B.C. would not be entitled to the treatment accorded to Quebec lumber producer-exporters simply because the lumber producer-exporters in the two provinces share one circumstance in common (participation in the same market).[44]

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[42] Mexico's Supplemental Submission, Section A, first full paragraph to third full paragraph on page 2 of 11. See also Canada's Counter-memorial, paras 179 to 184.

[43] Mexico's Supplemental Submission, Section 4, first and second paragraphs on page 6 of 11. See Submission of the United States of America dated April 7, 2000 at paras 6 and 7 and Canada's Counter-memorial, paras 179 to 184.

[44] Mexico's Supplemental Submission, Section 5, last paragraph on page 6 of 11 through to the last paragraph on page 7 of 11; Canada's Counter-memorial, paras 166-168, 194, 200-201 and 235.

ARTICLE 1110 – EXPROPRIATION AND COMPENSATION

30. Mexico and the U.S. join Canada[45] in rejecting the Investor's interpretation of Article 1110.[46]

31. Specifically, the U.S in its Second Submission takes issue[47] with the Investor's use[48] of Articles 1110 (8) and 2103 to enlarge the scope of NAFTA Article 1110 and the standard for expropriation at international law.

32. The NAFTA Parties agree that NAFTA Article 1110 must be interpreted so as to require substantial deprivation of an investment's rights in order to find an expropriation. The Investor is also in agreement with the NAFTA Parties on this interpretation. At the hearing of the Initial Phase, the Investor conceded that the standard for expropriation is not one of "mere interference" with an investment but rather one where there has been "substantial deprivation".[49]

33. As Mexico notes, the three NAFTA Parties concur that NAFTA Article 1110 does not create a *lex specialis* or a different standard of expropriation than that recognised at customary international law.[50]

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45 Canada's Counter-memorial, para. 380.

46 See Submission of the United States of America dated April 7, 2000 at para. 14 and referenced attachment; Submission of the United Mexican States dated April 3, 2000 at paras 31 to 46; U.S. Second Submission paras 6-7; Mexico's Supplemental Submission, Section B; and Canada's Counter-memorial, paras 363, 380.

47 U.S. Second Submission, paras 6, 7. Canada also disagrees with the Investor's use of Article 1110 (8). See Canada's Counter-memorial, paras 431-432.

48 Supplemental Memorial, 151-152.

49 Transcript, Volume VII, p. 47, lines 14 – 21; p. 48, lines 18-19.

50 Mexico's Supplemental Submission, Section B, last paragraph on page 9 of 11; Submission of the United States of America dated April 7, 2000 at para. 14 and referenced attachment at paras 10 – 14; Canada's Counter-memorial, paras 380-393.

CONCLUSION

34. For the reasons above, as well as those set out in the Counter-memorial, Canada requests that the Tribunal dismiss the Investor's claim pursuant to NAFTA Articles 1102, 1106 and 1110.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF JUNE, 2000, OTTAWA, ONTARIO, CANADA.

Of Counsel for Canada

TO: The Tribunal

AND TO: Barry Appleton,
Counsel for Pope & Talbot, Inc.