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Geneva, Switzerland 5 November 2000

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RE: Pope & Talbot, Inc. v. Government of Canada

Pursuant to NAFTA Article 1128, the Government of Mexico makes the following submission on the interpretation of Article 1105 of the NAFTA.

With the exception of the Government of Canada's discussion of the award in *Metalclad v. United Mexican States*[1], Mexico is in broad agreement with Canada's views as expressed in the Counter-Memorial (Phase Two) at paragraphs 187-438.

At paragraphs 280 and 330-1, Canada refers to the *Metalclad* Tribunal's finding of a breach of Article 1105. Mexico considers that the *Metalclad* Tribunal's Article 1105 finding was patently unreasonable and contrary to public policy. Mexico shall be applying to set the *Metalclad* award aside in the courts of British Columbia. Until the Canadian courts have spoken on the matter, it would be inappropriate to consider that award for any informal precedential guidance.

A. The Importance of this Phase of the Arbitration

This phase of the arbitration raises important issues relating to the Tribunal's jurisdiction, power, and authority. An unduly expansive interpretation of Article 1105 will raise not only jurisdictional issues for the award, but will also expose the Parties to unintended and unanticipated Chapter Eleven claims.

1. ICSID Case No. ARB/AF/97/1.

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Article 1105(1) expresses a *minimum* standard of conduct under international law to which a NAFTA Party must adhere in its treatment of investors of another Party to the NAFTA. It does not vest a Chapter Eleven tribunal with the jurisdiction to judicially review the Party's conduct in the same fashion as a domestic court of that Party could conduct such a review.

Where the NAFTA Parties intended a judicial review-like jurisdiction to be conferred upon a dispute settlement panel, they expressly so provided. Chapter Nineteen, which permits, *inter alia*, review of anti-dumping and countervailing duty orders by binational panels, expressly does so[2].

Only in Chapter Nineteen has a judicial review power been conferred upon a NAFTA panel. In accordance with basic principles of treaty interpretation, the inference to be drawn, therefore, is that NAFTA's drafters did not intend to expand the tribunal's jurisdiction to apply the minimum standard.

B. The Claimant's Attempt to Expand the Scope of Article 1105 in this Proceeding

The Investor has attempted to expand the scope of Article 1105 to include other treaty obligations under the NAFTA and the WTO Agreements as part of the requirement to accord the investors of other Parties (and their investments) "treatment in accordance with international law".

For example, the Investor notes that the principle of *pacta sunt servanda* obliges Canada to abide by all of its treaty obligations, including its obligation under the WTO Agreement on Safeguards not to "seek, take or maintain any voluntary export restraints"[3] and its obligations under GATT Article X and NAFTA Chapter Eighteen to provide a transparent, procedurally fair regulatory regime[4].

The Investor then describes those obligations as requirements that are "generally incorporated into international law, and thereby, applicable through NAFTA Article 1105"[5]. In effect, the Investor contends that any breach of a common treaty obligation which adversely affects an investor of another Party (or its investment) amounts to a breach of

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2. See Article 1903 (Review of Statutory Amendments), and Article 1904 (Review of Final Antidumping and Countervailing Duty Determinations), which by paragraph 2 endows a binational panel to determine whether a final antidumping or countervailing duty determination made by the authorities of an importing Party are in accordance with the domestic law of that Party. The standard of review is also determined by the domestic law of the importing Party.

3. Investor's Memorial (Phase Two), at paragraphs 247-251.

4. *Ibid.* at paragraphs 148-165.

5. *Ibid*, at paragraph 165.

Article 1105 for which that investor may seek compensation under Section B of Chapter Eleven.

The NAFTA Parties did not give each other's investors a right of action for anything other than breaches of the substantive obligations prescribed by Section A of Chapter Eleven[6]. An alleged breach of any other chapter of NAFTA is subject to dispute settlement under Chapter Twenty at the instance of another NAFTA Party, and only a NAFTA Party. It is not actionable under Chapter Eleven at the suit of an investor of another Party. Likewise, an alleged breach of a provision of the GATT (1994) (or any of the WTO Agreements) is subject to dispute settlement under the Dispute Settlement Understanding at the instance of another WTO Member, and only a WTO Member. It does not give rise to Chapter Eleven claims by investors affected by the measure.

Article 1105 does not have imported into it, nor is it defined by, other treaty obligations the NAFTA Parties have assumed. Mexico respectfully submits that an arbitral tribunal established under Chapter Eleven would exceed its jurisdiction were it to hold otherwise.

C. "The international responsibility of the State is not to be presumed."[7]

It is a fundamental principle of international law that a State is presumed to have acted in accordance with international law unless the contrary is proved:

> "I consider therefore that in international law there is a presumption in favour of every State, corresponding very nearly to the presumption in favour of the innocence of every individual in municipal law. There is a *presumptio juris* that a State behaves in conformity with international law."[8]

Thus, if a party alleges that a State has committed a breach of international law giving rise to international responsibility, the onus of proving the truth of the allegation lies with that party; it is not for the State to prove its innocence. For example, in the *German Interests in Upper Polish Silesia Case*, the Permanent Court of International Justice held that:

> "...un tel abus [de droit] ne se présume pas, mais il incombe à celui qui l'allègue de fournir la preuve de son allégation."[9]

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6. Or Articles 1503(2) and 1502(3)(a), as provided by Articles 1116 and 1117.
7. *Spanish Zone of Morocco Claims* (1923), Claim 28, 2 U.N.R.I.A.A. p.615 at p.699.
8. Dissenting Opinion of Judge E er, *Corfu Channel Case* (Merits) (1949), ICJ Reports 1949, p.4 at p.119.
9. "Such an abuse [of right] cannot be presumed, it is incumbent on the party who alleges it to prove such allegation." *PCIJ*, Series A, no. 7, p.30.

A corollary of the presumption of non-responsibility of a State is that "good faith is to be presumed, whilst an abuse of right is not."[10]

D. The International Minimum Standard

1. General

The authorities uniformly hold that the threshold for a finding of a breach of the standard is a high one. Mexico concurs with Canada's view that "[t]he conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty"[11].

A foreigner's minimum substantive rights under international law can be divided into two broad categories: public rights, or those which relate to the security of person and property under public law, and private or civil rights, particularly those of an economic nature[12]. Of most relevance in the context of Chapter Eleven is the right to acquire property and the right to engage in investment activity.

2. The International Standard and the Protection of Economic Rights

Unless bound by a treaty obligation it has undertaken, a State may exclude foreigners from the acquisition of certain types of property or require that such acquisition is subject to special authorization, on the grounds that investment in such activity is reserved to the State's own nationals for national security or other reasons. However, once investment has been permitted, the State is under an obligation to protect rights of ownership. In particular, the alien is entitled to compensation if his defined property interests have been expropriated by the host State.

The Tribunal in the present case has already rejected the Investor's claim under Article 1110 that Canada's Export Control Regime effected a compensable expropriation of certain of the Investor's property rights[13].

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10. B. Cheng, *General Principles of Law*, p.305.
11. Counter-Memorial (Phase Two), para.309.
12. A.V. Freeman, *International Responsibility of States for Denial of Justice*, Longman, 1970, p. 507.
13. Interim Award, June 26, 2000, paras. 81-105.

3. The International Standard and the Protection of Procedural Rights

Another right that is relevant in the context of Article 1105 is the right of an alien to receive a minimum level of administrative and judicial protection; failure on the part of a State to adequately protect the lawfully-acquired rights of an alien may constitute a discrete claim on the grounds of a denial of justice.

In principle, a State will not be in breach of its duties with respect to the procedural rights of an alien if the protection afforded aliens is at least equal to that normally afforded nationals. The onus of proving that a particular State's domestic remedies do not meet international standards is a heavy one.

The content of the standard has been defined as consisting of the "freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing and the right to a just decision rendered in full compliance with the laws of the State within a reasonable time".[14]

The standard of procedural justice varies according to the circumstances of the case. As in the case of the standard of substantive justice, what is required by international law is equivalence, not identity. As A. Freeman argues:

> "Even in the most advanced countries, a certain margin of tolerance must be prescribed due to the fact that no system of police or administration of justice operates with mechanical perfection. Being a practical standard, it always takes into account the possibility of governmental action under existing conditions."[15]

A notable example of failure to meet the international standard in the matter of expropriation, both on substantive and procedural grounds, is the case of *Walter Fletcher Smith* v. *The Compañia Urbanizadora del Parque y Playa de Marinao*[16], described by Friedman as follows:

> "The Arbitrator drew attention to the haste with which the procedure was carried out, the lack of prior notification to the owner, and the fact that, eight hours after the expropriation had been effected, 150 men completely destroyed the buildings belonging to the claimant. He also pointed out that the expropriation in question was contrary to the provisions of the constitution and the laws of Cuba, that it had been carried out neither in good faith nor for public purposes, and that the property thus ostensibly expropriated for public use, was handed over to a private company for purposes of private profit, notably the entertainment of the public, without any

14. A. Roth, *Minimum Standard of International Law Applied to Aliens*, p. 185.
15. A.V. Freeman, *International Responsibility of States for Denial of Justice*, Longman, 1970, p. 546.
16. U.S.A.–Cuba, Sole Arbitrator, Clarence Hale, 24 AJIL (1930), p.384.

reference to a public purpose. Thus, in the forceful words of the Arbitrator, the destruction of the claimant's property was 'wanton, riotous, oppressive'."[17]

E. The Proper Issue in this Proceeding

There have been allegations in the Investor's pleadings that the quota law and regulations unfair and inequitable. In Mexico's respectful submission, the proposition that measures as these, duly enacted into Canadian law and regulation, which result from an inter-ernmental agreement between two WTO Members that deals with a long-stemming trade ute, cannot be said to even remotely fall within the class of governmental acts that have found to fall below the minimum international standard. Viewed in light of the very standard that a claimant must meet to prove a breach of the minimum standard discussed he arbitral awards and learned commentaries cited by Canada, such a contention is le on its face.

Has Canada fallen below the minimum standard at international law in administering its s and regulations? Here the Tribunal must keep in mind the limited and special nature of urisdiction discussed above.

ico concurs with Canada that where domestic procedures exist for an investor to have aints concerning administrative action dealt with fairly by an independent domestic unal, an investor cannot claim breach of Article 1105 if it has failed to avail itself of such ilable domestic remedies.

The objective of an analysis under the minimum standard of treatment provision is to ermine whether Canada's legal system *as a whole* has afforded the Investor treatment in ordance with international law. If Canada has done so, the Investor has no complaint and cle 1105 inquiry is at an end.

1. Canadian Constitutional and Judicial Review Remedies Were Available to the Investor

The acts of Canadian officials at issue in this proceeding were authorized and regulated an Act of Parliament and Cabinet approved regulations.

It is the Canadian courts, not this Tribunal, who have jurisdiction to review the nstitutionality of such laws and to judicially review the actions of officials pursuant to them determine whether they have acted in accordance with the precise terms of such laws.

7. S. Friedman, *Expropriation in International Law*, Stevens & Sons Limited, London, 1953, p.138.

2. The Investor Did Not Avail Itself of Such Remedies

If the Investor had a legal complaint about the establishment of the quota system or its ninistration, a Canadian court was the appropriate forum to hear such complaints. The estor apparently chose not to avail itself of such remedy. Instead, it has asked this bunal to in effect ignore its failure to challenge the acts complained of in Canada and to e it upon itself to evaluate the acts against a vague international standard. This amounts, in xico's respectful submission, to a circumvention and the *de facto* usurpation of the isdiction of the Canadian courts.

It is well established in international law that where a claimant has instituted proceedings a domestic court to contest an act or decision of a State body, international law does not mit the claimant to appeal an adverse decision to an international tribunal unless there is nd persuasive evidence that a denial of justice has taken place[18]. Here the Investor has : even resorted to the courts, yet it complains of unfair and inequitable treatment at the ıds of Canadian officials.

Although made in the context of the international review of a domestic court decision, the -vation of Eduardo Jiménez de Arechaga, a former President of the International Court of ², is apposite to this Tribunal's examination of Canada's compliance with Article 1105 nstant case:

> "It is not for an international tribunal to act as a court of appeal or of cassation and to verify in minute detail the correct application of municipal law. The essential business of an international tribunal in these cases is to see whether gross injustices have been committed against an alien and, if so, whether the three indicated requirements are present[19]. *The angle of examination is different from that of an appeal judge*: it is not the grounds invoked by the domestic tribunal which must be scrutinized, but rather the result of the decision which must be evaluated, taking into account the elements of justice and equitable consideration[20]." [Emphasis added]

The angle of this Tribunal's examination of Canada's acts is different from that of a anadian court. It must be satisfied only that Canada's system *as a whole* meets the inimum international standard in order to find that Canada has complied with Article 1105.

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3. See for example, the Separate Opinion of Judge Tanaka, *Barcelona Traction, Light and Power ompany, Ltd*, 1970 ICJ Reports at pp.157-158.

He cited three cumulative requirements: the decision had to be a "flagrant and inexcusable violation of icipal law", it had to be a decision of a court of last resort, all remedies available having been exhausted, ubjective factor of bad faith and discriminatory intention on the part of the courts had to have been

Eduardo Jiménez de Arechaga, 'International Law in the Past Third of a Century", 159 Receuil des Cours I, p. i at p.281.

F. Conclusion

In summary:

a) The Tribunal's jurisdiction is to apply only Section A of the NAFTA and applicable rules of international law;

b) The standard of treatment articulated under Article 1105 is the international minimum standard presently existing under customary international law;

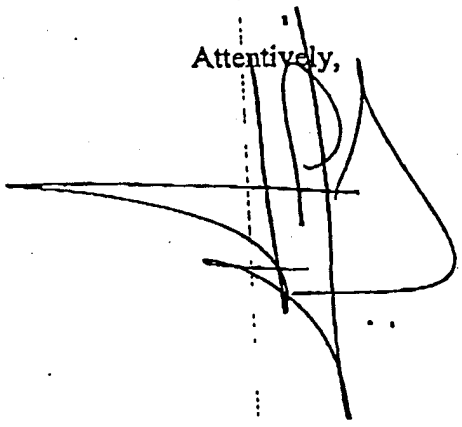
c) The test for establishing a breach of the minimum standard of treatment is that set out in the *Neer* claim, *viz.*:

> "The propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[21]

d) In order to find that Canada has complied with Article 1105, it must be satisfied that Canada's system *as a whole* has afforded the Investor the necessary remedies;

e) The Investor's failure to invoke such remedies should lead to a finding that the system as a whole did not fail to meet the minimum standard required at international law.

Attentively,



21. (1926) 4 UNRIAA, p.60.