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

RESPONSE TO PHASE TWO POST-HEARING SUBMISSIONS OF THE UNITED MEXICAN STATES AND THE UNITED STATES OF AMERICA

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Introduction

1. Canada makes the following submission in reply to the issues addressed in the Phase Two post-hearing NAFTA Article 1128 submissions of the United States of America ("U.S.") and the United Mexican States ("Mexico"), as filed December 1, 2000.

2. Canada maintains all arguments submitted in the Counter-memorials filed with the Tribunal during this arbitration, but will limit its comments at this stage to those issues addressed by the U.S. and Mexico in their latest submissions. As a general observation, it should be noted that all three NAFTA Parties have offered a consistent interpretation of the obligations agreed to pursuant to NAFTA Articles 1102 and 1105.

Article 1102 and Article 1105 are distinct obligations under NAFTA

3. Canada concurs with the U.S. and Mexico that, to the extent that the tribunal's decision in *S.D. Myers Inc. v. Government of Canada* ("*S.D. Myers*") suggests that a breach of Article 1102 can essentially establish a breach of Article 1105[1], this finding is incorrect.

4. Canada reiterates its position[2] that Articles 1102 and 1105, as distinct obligations under NAFTA, require separate legal analyses and a breach of one of these obligations does not establish a breach of the other. Article 1102 is a comparative provision that necessitates an assessment of the treatment of foreign investments relative to that of domestic investments. Article 1105, by contrast, is an absolute standard that necessitates the assessment of the treatment accorded the foreign-owned investment, independent of the treatment accorded domestic investments.

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[1] *S.D. Myers v. Government of Canada* (November 12, 2000), at para. 266.
[2] Counter-memorial (Phase Two), paras 209, 228-233.

5. Moreover, an interpretation of Article 1105 that purports to include a national treatment obligation is contrary to the principle of effectiveness, as it would reduce Article 1102 to redundancy.[3]

6. The three NAFTA Parties agree that consideration of a breach of Article 1105 requires a separate and distinct legal analysis from that required under Article 1102. There is also agreement on the nature and scope of these legal analyses.

7. The remainder of this submission will address those aspects of the interpretation of the National Treatment and Minimum Standard of Treatment provisions that have been discussed in the latest submissions of the U.S. and Mexico.

Article 1102 prohibits measures that disproportionately favour domestic investments over foreign investments

8. Mexico's Phase Two Post-Hearing Submission notes that "it is the common position of the NAFTA Parties that a breach of Article 1102 requires a finding of *de jure* or *de facto* discrimination on the basis of nationality."[4] Mexico concurs with the Second Submission of the U.S. (Phase One Post-Hearing Submission) and adopts the following passage from that submission:

> 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 like circumstances.

[3] Counter-memorial (Phase Two), para. 228.
[4] Post-Hearing Submission of the United Mexican States (Phase Two), p. 1.

9. Canada fully concurs with the interpretation of Article 1102 offered in the above passage, and anticipates that the clear agreement of all three NAFTA Parties on this point will be of considerable assistance to the Tribunal.

10. Canada also confirms its agreement[5] with the following passage contained in Mexico's Phase Two Post-Hearing Submission[6]:

> It is noted that Article 1102 requires the Tribunal to compare the treatment of investors of another Party to the treatment of domestic investors, not a domestic investor (in the singular). This requires the Tribunal to examine domestic investors as a class, not to use one domestic investor or some domestic investors as the benchmark for comparison. [emphasis in original]

11. As Mexico notes[7], the only instance when it would be appropriate to consider the effect of a measure on a single investment of another NAFTA Party for the purposes of Article 1102 is when the class of foreign investments affected by the measure is a class of one. This is clearly not the case with respect to the measures at issue in this arbitration.

The meaning of "Fair and Equitable" within Article 1105

12. The submissions of the three NAFTA Parties with respect to the proper construction and scope of Article 1105 are consistent. Mexico[8] expressly adopts the portions of the United States' Third Submission that address the key parameters of the Article 1105 obligation. Canada also concurs with the interpretation of the provision offered in the U.S. submission.

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[5] See transcript of Phase Two hearing, Vol. 13, p. 22-27.
[6] Post-Hearing Submission of the United Mexican States (Phase Two), p. 2.
[7] Post-Hearing Submission of the United Mexican States (Phase Two), p. 2.
[8] Post-Hearing Submission of the United Mexican States (Phase Two), p. 3.

13. In particular, the Parties agree that Article 1105 incorporates the customary international law concept of the minimum standard of treatment and that the phrase "fair and equitable treatment" does not expand the scope of the provision beyond this standard.[9]

14. Canada also agrees with the points made by the U.S. in its most recent submission regarding the misplaced reliance of the *S.D. Myers* tribunal on a passage from an article by F.A. Mann.[10]

15. It must be remembered that the views expressed by Dr. Mann in that article are expressly confined to a discussion of the provisions of British investment treaties and, specifically, to a 1980 agreement with the Philippines[11], the text of which is annexed to the article. The provision of the Philippines treaty that includes the phrase "fair and equitable treatment", Article III:2, reads:

> 2. Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

16. The context of the phrase "fair and equitable treatment" in the treaty considered by Dr. Mann is significantly different from the phrase's context within Article 1105 of NAFTA. The obligation to accord "fair and equitable treatment" is a free-standing obligation in the treaty provision under consideration by Dr. Mann. There is no reference in that provision to the minimum standard of treatment and the phrase "fair and equitable treatment" is not subsumed in the obligation to accord treatment in accordance with international law.

17. Dr. Mann argues that, in the context of the treaty he is considering, the bald obligation to accord "fair and equitable treatment" exceeds the level of treatment otherwise required at

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[9] Fourth Submission of the United States of America, paras 3-8; Post-Hearing Submission of the United Mexican States (Phase 2), p. 3. This is also consistent with the *Canadian Statement of Implementation* for NAFTA, Counter-memorial (Phase Two), para. 220.

[10] F.A. Mann, "*British Treaties for the Promotion and Protection of Investments*", (1981) 52 Brit. Y.B. Int'l L.241, cited in *S.D. Myers* at paras 265-266. Pursuant to the Tribunal's request, Canada filed a copy of this article during the Phase Two hearing. For ease of reference, a copy of the article is attached to this submission.

international law.[12] This interpretation is clearly not applicable to the obligation in Article 1105, where the obligation is explicitly to accord treatment in accordance with international law.

18. It should also be noted that the tribunal in *S.D. Myers* incorrectly cited the excerpt from Dr. Mann's article as a comment on "the breadth of the 'minimum standard'."[13] In fact, as noted above, Dr. Mann's comments expressly relate to his opinion[14] on the scope of the phrase "fair and equitable" treatment in the British-Philippine treaty provision before him. Dr. Mann's musings on the possible scope of the phrase in that context cannot be understood as a comment on the meaning of the phrase as contained in different treaty obligations, and certainly cannot be taken as a comment on the scope of the minimum standard of treatment at international law.[15]

19. In fact, Dr. Mann proceeded, in the same article, to reject any correlation between the phrase "fair and equitable treatment" and the minimum standard of treatment at customary international law. In considering the scope of "fair and equitable treatment" within the provision at issue, Dr. Mann stated:

> It is submitted that nothing is gained by introducing the conception of a minimum standard and, more than this, it is positively misleading to introduce it...No standard defined by other words is likely to be material. The terms [fair and equitable treatment] are to be understood and applied independently and autonomously.[16]

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[11] Mann, p. 241. In the introduction to the article, Mann expressly states that "the Agreement with the Philippines...will be taken as a basis for the following discussion."

[12] Mann, p. 243.

[13] S.D. Myers, para. 265.

[14] Or, as he states, at p. 241, a discussion of "some specific points which have occurred to one reader."

[15] Additionally, the validity of Dr. Mann's interpretation of the British-Philippines treaty in the excerpt quoted by the *S.D. Myers* tribunal is highly questionable. His suggestions that "the right to fair and equitable treatment goes much further than the right to most-favoured-nation and to national treatment" and that "[s]o general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the agreements affording substantive protection are not more than examples of specific instances of this overriding duty" are directly contrary to the principle of effectiveness that has been consistently applied by the WTO Appellate Body. See for example *Japan - Taxes on Alcoholic Beverages*,4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) at 13 (Phase 2 Authorities – Tab 8).

[16] Mann, p. 244.

20. Unlike the provision considered by Dr. Mann, in Article 1105 the terms "fair and equitable treatment" cannot be understood and applied independently and autonomously. The phrase "fair and equitable treatment" is included within the ambit of "treatment in accordance with international law", and the obligation is entitled "Minimum Standard of Treatment". This context is crucial[17] to the proper interpretation of the words "fair and equitable treatment" within Article 1105. As noted by Dolzer and Stevens[18] "in NAFTA, the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law."

Conclusion

21. For the reasons above, as well as those set out in the Counter-memorials (Phase One and Two), the Supplemental Counter-memorial (Phase Two), and Canada's oral argument at the Phase Two hearing, Canada requests that the Tribunal dismiss the Investor's claim that Canada has breached NAFTA Articles 1102 and 1105.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
THIS 15TH DAY OF DECEMBER, 2000, OTTAWA, ONTARIO, CANADA.

"Ted Kinnear, B. R. Evernden"

Of Counsel for Canada

TO: The Tribunal

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

[17] in accordance with Article 31(1) of the *Vienna Convention.*

[18] R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, (The Netherlands: Martinus Nijhoff, 1995) at 60 (Phase 2 Authorities – Tab 7), referenced in Counter-memorial (Phase Two), paras 222-223.