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and International Trade

Ministère des Affaires étrangères  
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Department of Justice

Ministère de la Justice

125 Sussex Drive  
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September 10, 2001

**BY FACSIMILE**

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Dear Sirs:

**Re : Pope & Talbot Inc. v. Government of Canada**

This responds to the Tribunal's letter of August 14, 2001, concerning the Notes of Interpretation of Certain Chapter 11 Provisions ("Notes of Interpretation") issued by the NAFTA Free Trade Commission ("Commission") on July 31, 2001. In its letter, the Tribunal asks each party to submit its position on the following questions:

1. Should the Commission's interpretation be considered to have retroactive effect on rulings previously made by NAFTA Tribunals?
2. If the interpretation is to have retroactive effect,
  - a. Should the interpretation change the result reached in this proceeding by the Tribunal with regard to "the verification episode"?
  - b. If the answer to a. is in the affirmative what would be the implications of Article 1103 on the Tribunal's ruling?

Canada answers those questions as follows.

### Question 1

The Tribunal has asked whether the Commission's interpretation is to be considered to have retroactive effect on rulings previously made by NAFTA tribunals. This question can be answered only by reference to the terms of the "Notes of Interpretation" themselves and to the provisions of the NAFTA relating to such interpretations.

The question of retroactivity would arise if the "Notes of Interpretation" constituted an amendment to the Treaty. Amendments to treaties operate prospectively unless specifically made retrospective. However, the "Notes of Interpretation" are not amendments to the provisions of the Treaty. By their own terms, the "Notes of Interpretation" consist of "interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions." They state not what the provisions of the Treaty are to mean in the future, but what they always have meant. They identify the legal standard that the NAFTA Parties intended to apply when agreeing to certain provisions of the NAFTA. It is the legal standard that has been applicable under Article 1105 since the NAFTA entered into force on 1 January 1994.

As an interpretation of the provisions of the NAFTA, the "Notes of Interpretation" do not operate to abrogate prior rulings of Tribunals. Rather, they constitute directions to tribunals established under Chapter Eleven on the interpretation of particular provisions of the NAFTA. As an interpretation of the Treaty by the Commission, the "Notes of Interpretation" must be given effect by Chapter Eleven tribunals.

Under Article 1131(2) of the NAFTA an interpretation of the Commission "shall be binding on a Tribunal established [under Section B of Chapter Eleven]." Thus, in the light of the "Notes of Interpretation", a Chapter Eleven tribunal cannot interpret Article 1105 in a manner that is inconsistent with the interpretation set out in the "Notes of Interpretation". Equally, a Chapter Eleven tribunal cannot act on the basis of an interpretation of Article 1105 that is contrary to the interpretation set out in the "Notes of Interpretation".

Since this Tribunal is established under Section B of Chapter Eleven, the Commission's interpretation is binding on it and must be applied as part of the governing law as set out in paragraph 1 of Article 1131. Accordingly, this Tribunal cannot act consistently with the governing law of Article 1131 if it acts on the basis of an interpretation of Article 1105 that is inconsistent with the Commission's interpretation of Article 1105 as set out in the "Notes of Interpretation".

### Question 2(a)

In light of the effects of the "Notes of Interpretation" as set out in response to Question 1, the Tribunal cannot award damages on the basis of a ruling that adopts an interpretation of Article 1105 that is inconsistent with the Commission's interpretation. Thus, to the extent that the Tribunal's conclusion in respect of "the verification episode" was based on an interpretation of Article 1105 that is not in conformity with the

Commission's interpretation of Article 1105, then the Tribunal cannot award damages for "the verification episode".

In paragraphs 117 and 118 of its Award, the Tribunal made clear that it regarded the words "fair and equitable treatment" as adding to the obligations expressed in the phrase "treatment in accordance with international law." In the Tribunal's view, the phrases imported obligations found in the BITs and provided investors and investments with "the benefits of the fairness elements under ordinary standards applied in the NAFTA countries". This constituted a finding that the standard of "fair and equitable treatment" under Article 1105 was different from the standard of "treatment in accordance with international law." In reaching its conclusions on "the verification episode", the Tribunal gave no indication that it was deviating from this interpretation of Article 1105. Rather, the Tribunal stated that it would "test Canadian implementation of the SLA against the fairness elements".

In paragraph B.1 of the Notes of Interpretation, the Commission states: "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." In paragraph B.2 of the Notes of Interpretation, the Commission states: "The concepts of "fair and equitable treatment" and "full 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." These statements constitute a rejection of the "additive" theory on which the Tribunal's interpretation of Article 1105 rests.

As Article 1116 makes clear, an investor is only entitled to bring a claim in respect of loss or damage "by reason of or arising out of" a breach of an obligation under Chapter Eleven. A tribunal can thus only make an award of damages where such a breach has occurred. It cannot award damages on the basis of a finding of a breach that does not exist under a proper interpretation of the provisions of the NAFTA. In the present case, any award by the Tribunal in respect of "the verification episode" would be in error if it were to be based on a finding of a breach that does not conform with the Commission's interpretation of Article 1105.

Canada submits that an interpretation of the minimum standard of treatment that is consistent with the Commission's interpretation of Article 1105 would not result in a finding that the verification review episode constituted a breach of Article 1105.<sup>1</sup> As a result, there is no basis upon which to award damages in this case.

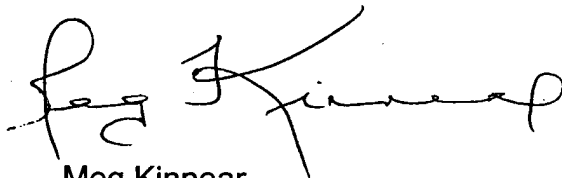
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<sup>1</sup> In this respect Canada refers the Tribunal to its submissions at paragraphs 410 to 415 of its Counter-Memorial (October 10, 2000) in phase 2 of this arbitration.

## Question 2(b)

The jurisdiction of a Tribunal established under Section B of Chapter Eleven is limited to the specific claims made by an investor in conformity with procedural requirements under the Agreement. In this case, the Investor has abandoned its claim under Article 1103 of the NAFTA.<sup>2</sup> This Tribunal is therefore not seized with any claim or issue under Article 1103, nor does it have jurisdiction in that respect. Moreover, Canada notes 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 "Notes of Interpretation", which is binding on the Tribunal.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Meg Kinnear". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Meg Kinnear  
General Counsel  
Trade Law Division

c.c. Mr. Barry Appleton

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<sup>2</sup> Procedural Order No. 2, dated October 28, 1999. Letter from the Investor's Counsel, dated November 15, 1999, confirming the withdrawal of the Investor's claim under NAFTA Article 1103.