APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

Washington DC *Toronto*

October 5, 2001

By Fax

The Hon Lord Dervaird
4 Moray Place
Edinburgh, UK EH3 6DS

Dear Lord Dervaird:

RE: NAFTA UNCITRAL Investor-State Claim
Pope & Talbot, Inc. and the Government of Canada
Our File No. A5236

We are writing pursuant to the Tribunal's letter of September 17, 2001, which invited the Investor to respond to the submission made by Canada and the non-disputing Parties to the Tribunal's questions. The Investor relies upon its earlier submission however, the Investor has two additional points to make with respect to the Tribunal's question on the implication of NAFTA Article 1103 on the Tribunal's ruling.

We would like to clarify the situation with respect to the use of the Most-Favoured Treatment ("MFN") principle in international law. Canada has mis-constructed the effect of the Investor's decision to not fully pursue its NAFTA Article 1103 claim. This decision is different from our observations on the relationship between NAFTA Articles 1103 and 1105(1). In its *Merits Award (Phase 2)*, the Tribunal noted that it would be absurd to suppose that the NAFTA Parties actually intended NAFTA Article 1105(1) to actually have as narrow a meaning as that advanced by Canada or the non-disputing NAFTA Parties within this arbitration. The Tribunal came this conclusion because if such an interpretation were to be adopted, it would result in having the NAFTA Parties providing less favourable treatment to each other's Investors than that which they provide to the investors of various other countries through "minimum standard" provisions contained within other bilateral trade and investment agreements.

The Investor does not suggest that this Tribunal should make any findings based upon NAFTA Article 1103 MFN obligation because the Investor has long since withdrawn its claim under that provision. However, the Tribunal remains bound by NAFTA Article 1131(1) to interpret and apply the provisions of the NAFTA in accordance with the rules of international law. In applying the rules of international law (which this Tribunal has already done within this claim), the Tribunal must consider the likely impact of NAFTA Article 1103 on its interpretation of NAFTA Article 1105(1).

Canada's argument that it did not enter into any bilateral investment treaties of the kind described in the award is simply irrelevant[1]. It may also be useful to note that the international law treatment obligations contained in many *Foreign Investment Promotion and Protection Agreements* that Canada has ratified since the NAFTA came into force require "fair and equitable treatment in accordance with the principles of international law". The Investor submits that these clauses obviously connote a different source of international law than custom, which appears to by the subject of the NAFTA Free Trade Commission's recent statement.

Second, it should be noted that MFN treatment is expressly identified in NAFTA Article 102(1) as one of the three "principles and rules" that must be used by treaty interpreters to "elaborate" the NAFTA's objectives. NAFTA Article 102(2) states that the Parties "shall interpret" the NAFTA text in light of these objectives, as elaborated by the principle of most-favoured nation treatment. Accordingly, it is incumbent upon the NAFTA Parties and the Tribunal to interpret both the NAFTA text and the Commission's purported interpretation of that text in light of the NAFTA's objectives and the MFN principle.

It would be absurd to suggest that the interpretation of NAFTA Article 1105(1) put forward by Canada and the other NAFTA Parties could possibly be seen as better promoting "conditions of fair competition in the free trade area" or increasing "substantially investment opportunities" or ensuring "a predictable commercial framework for business planning and investment" than the interpretation already provided by this Tribunal with its *Merits Award (Phase 2)*. The Tribunal's interpretative approach must consider how these objectives must be elaborated by the MFN principle, which is most likely why the Tribunal has twice asked Canada to consider its arguments in light of it.

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[1] Examples of these other provisions can be found at the following URL: http://www.sice.oas.org/bitsc.asp#CAN .

If the interpretation of NAFTA Article 1105(1) that Canada says has been made binding by the NAFTA Commission's statement cannot be reconciled with the customary international law rules of treaty interpretation and the express provisions of NAFTA Article 102, that interpretive statement would have exceeded its authority under the terms of the NAFTA and thus could not possibly have any impact upon a finding made by this Tribunal. The Investor submits that this would be the correct approach to follow even if the Tribunal had made this same finding after the issuance of the Free Trade Commission's Interpretative Statement.

Yours very truly,

Barry Appleton
Counsel for the Investor

cc: M. Belman
B. Greenberg, Q.C.
M. Kinnear