IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEMTURA CORPORATION,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

2. For the reasons discussed below, the most-favored-nation ("MFN") obligation under Article 1103 does not alter the substance of the fair and equitable treatment obligation under Article 1105(1).

3. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued a binding interpretation of the NAFTA, as contemplated under Article 1131, confirming that "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."[1] The Commission clarified that "the concepts of 'fair and equitable treatment' and 'full

[1] Free Trade Commission, Interpretation of NAFTA, July 31, 2001, at 2.

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."[2] The Commission also stated that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[3]

4. Under the "Governing Law" provision of NAFTA Chapter Eleven, Article 1131, the Commission's interpretation is binding on Chapter Eleven tribunals.[4] Under Article 1131, Chapter Eleven tribunals are required to apply governing law, which includes binding interpretations issued by the Commission.[5]

5. Here, all three NAFTA Parties jointly and expressly issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1). Moreover, all three Parties later confirmed, through subsequent submissions commenting on that interpretation, that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).

6. In a submission to the *Pope & Talbot* tribunal, in a section entitled "Implications of Article 1103," Canada stated 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 Note of Interpretation, which is binding on the Tribunal." Canada further stated that "Article 1131(2) interpretations bind tribunals in stating the governing law, and the NAFTA *cannot operate so as to create a conflict between Article 1103 and the interpretation.*"[6] Canada added:

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[2] *Id.*

[3] *Id.*

[4] NAFTA Article 1131 ("Governing Law") states:

> 1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
>
> 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

[5] The power to issue an authentic interpretation of a treaty remains with the State Parties themselves. *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 136 (2d ed. 1984) ("It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it."); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC, 256 (7th ed. 2002) ("L'interprétation réellement authentique est celle qui est fournie par un accord intervenu entre *tous les États parties au traité.*") (The truly authentic interpretation is that provided by agreement among *all State parties to the treaty.*) (translation by counsel; emphasis in original).

[6] *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from M. Kinnear to Tribunal, Oct. 1, 2001, at 3 (emphasis added), attached at Exhibit A.

> In acting in their plenary capacity as the Free Trade Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the Agreement was ratified and implemented. Once they exercise their power, a tribunal must comply with the Commission's interpretation. A refusal to do so would be an act in excess of the governing law jurisdiction that is vested in the Tribunal under Article 1131.[7]

7. Mexico and the United States agreed with Canada's position. In an Article 1128 submission, Mexico informed the *Pope & Talbot* tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . to the Tribunal regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that *Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.*"[8]

8. In its own Article 1128 submission, the United States similarly informed the *Pope & Talbot* tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that *Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.*"[9]

9. The NAFTA Parties thus unanimously agreed that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).

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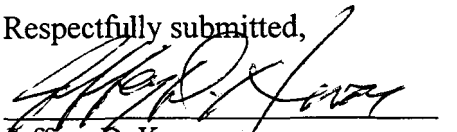
[7] *Id.* at 3-4.

[8] *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from H. Perezcano Díaz to Tribunal, Oct. 1, 2001, at 1 (emphasis added), attached at Exhibit B.

[9] *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Sixth Submission (Corrected) of the United States of America, Oct. 2, 2001, at para. 2 (emphasis added), attached at Exhibit C.

Respectfully submitted,



Jeffrey D. Kovar
Assistant Legal Adviser
Lisa J. Grosh
Deputy Assistant Legal Adviser
Mark E. Feldman
Chief, NAFTA/CAFTA-DR Arbitration
Alicia Cate
Danielle Morris
Jeremy Sharpe
Jennifer Thornton
Attorney-Advisers
Office of International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

July 31, 2009

Exhibit A

Department of Foreign Affairs and International Trade
Ministère des Affaires étrangères et du commerce international

Department of Justice
Ministère de la Justice

125 Sussex Drive
Ottawa, Ontario
K1A 0G2

October 1, 2001

BY FACSIMILE

The Honourable Lord Dervaird
4 Moray Place
Edinburgh
EH3 6DS
Fax: +44 131 220-0644

Mr. Murray Belman
Fax: 1-202-585-6969

Hon. Benjamin Greenberg
Fax: 1-514-397-3363

Dear Sirs:

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

Canada writes in reply to the Tribunal's letter of 17 September 2001.

A tribunal must apply Commission interpretations

You have asked four questions concerning the deliberations of the Free Trade Commission ("Commission"). The Commission is the prime interpreter of the NAFTA. Article 1131 does not provide for a tribunal to second-guess the Commission. Rather, the Commission's interpretation is the full expression of what the NAFTA Parties intended. The effect of such an interpretation could not be clearer: it is binding on the Tribunal.

The Commission established under Article 2001 of the NAFTA comprises cabinet-level representatives of each Party, specifically, the Ministers of the three Parties responsible for international trade, including investment issues arising under Chapter Eleven. The Commission is the Parties to the NAFTA acting collectively under that treaty. It is the highest level policy-making organ and administrator for the treaty as a whole. In acting through the Commission, the Parties act through a single body vested with decision-making power under the Agreement.

The NAFTA Parties have a long-term institutional interest in the proper functioning of the treaty. For that reason, Article 1128 confers upon each non-disputing Party the right to make submissions to arbitral tribunals on questions of interpretation of the treaty

arising in individual disputes. For the same reason, Articles 2001(2) (c) and (e), generally, and Article 1131(2), specifically in the context of Chapter Eleven disputes, grant the Commission the prime and final authority as the interpreter of the NAFTA. Article 1131(2) provides that "[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section", *i.e.* Section B of Chapter Eleven.

A tribunal established under Section B of Chapter Eleven has only such jurisdiction as has been conferred upon it by that Section. Chapter Eleven Tribunals have been conferred jurisdiction to resolve disputes in accordance with the NAFTA, the applicable rules of international law, and any interpretation by the Free Trade Commission. Any Commission interpretation forms part of the governing law from which a tribunal cannot derogate without exceeding its jurisdiction.

The Tribunal's letter suggests that "the Commission's interpretation must have been intended to apply to future cases [...]" only. This is incorrect. This is not a question of retroactive application of the law, but rather of the correct interpretation of the governing law, which remains unchanged.

The Tribunal also states in its letter that the Commission's actions "could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Tribunal." Again, the Tribunal is referred to Article 1131(2). Chapter Eleven tribunals must apply a Commission interpretation of a Chapter Eleven provision. 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 stipulated in Article 1131(1). This Tribunal does not 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 as set out in the Note of Interpretation.

The Tribunal's statements indicate a misunderstanding of the nature of the NAFTA as a treaty and of the Commission's structure and functions. As a treaty, the NAFTA is the creature of the States that are party to it. The Parties have assumed obligations *vis-à-vis* one another that protect investors and investments and have established the process that applies to the present proceedings. In this instance, the Parties acting as the Commission have simply carried out a function that they expressly reserved for their Ministers acting collectively: to ensure correct understanding of the governing law through issuance of authoritative interpretations.

The Tribunal, for its part, is a creature of the Treaty. Its task is to interpret and apply the relevant provisions of the Treaty, which include interpretations of the Commission. It has no jurisdiction to expand the rights the Parties have given to Investors under the Treaty, nor to control the NAFTA Parties acting in their sovereign right as the states that have created the international agreement that is the constituting instrument for the Tribunal itself.[5] The Tribunal's task is limited to that set out in Article 1131(1): to "decide the issue in dispute in accordance with this Agreement and applicable rules of international law" and in accordance with any applicable interpretation.

There has been no change to the meaning of Article 1105. This is clear from the Note of Interpretation and the Commission's preambular statement that:

> Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions...

Where, because of the misinterpretation or misapplication of the terms of the NAFTA by subordinate tribunals, the Parties determine, as is their right, to set out the proper interpretation of the Treaty's provisions, tribunals have no option but to apply that interpretation. A Tribunal that disregards a Commission interpretation exceeds its jurisdiction.

Implications of Article 1103

The Tribunal suggests that Canada did not respond to its question respecting the implications of Article 1103, arguing solely that the Investor abandoned its Article 1103 claim. With respect, this is inaccurate. For the sake of convenience, the response submitted on September 10, 2001 reads:

> 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. 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 Note of Interpretation, which is binding on the Tribunal.

Canada clearly stated 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 Note of Interpretation, which is binding on the Tribunal." In addition, Canada noted that the Tribunal is not seized with a claim under Article 1103. The issue of whether there could be a claim under that provision consequently is irrelevant and beyond its jurisdiction.

With respect to the Tribunal's inquiry as to whether Article 1103 could undo the Interpretation, Canada observes that Article 1131(2) interpretations bind tribunals in stating the governing law, and the NAFTA cannot operate so as to create a conflict between Article 1103 and the Interpretation. It would be absurd, therefore, for a tribunal to ignore or question a binding interpretation of the Commission through reference to another provision of the NAFTA, or such provisions' supposed "practical" effects, and its view of the provisions of treaties to which Canada is not even a Party (U.S. BITs). The Parties to this Agreement, using a mechanism specifically designed to bind tribunals with respect to this Agreement, have spoken. The Tribunal is bound by their interpretation.

In acting in their plenary capacity as the Free Trade Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the

obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the Agreement was ratified and implemented. Once they exercise their power, a tribunal must comply with the Commission's interpretation. A refusal to do so would be an act in excess of the governing law jurisdiction that is vested in the tribunal under Article 1131.

Conclusion

The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states with a clear interest in the proper operation of the Agreement, transcends the merits of specific cases. The Tribunal's letter gives the impression that it believes Canada was acting in bad faith in relation to the Commission's issuance of a Note of Interpretation. In view of the foregoing, we trust that our concern is ill-founded, or alternatively, that we have addressed the concern to the Tribunal's satisfaction.

Yours sincerely,

Meg Kinnear
General Counsel
Trade Law Division

c.c. Mr. Barry Appleton

Exhibit B

Hugo Perezcano Díaz
Consultor Jurídico de Negociaciones

Washington, D.C., 1 October 2001

The Honourable Lord Dervaird
4 Moray Place
Edinburgh
EH3 6DS
Fax: 44 131 220 0644

Mr. Murray Belman
Fax: 1 202 585 6969

Hon. Benjamin Greenberg
Fax: 1 514 397 3363

RE: **Pope & Talbot Inc. Government of Canada**

Further to the Tribunal's invitation, the United Mexican States (Mexico) makes this submission pursuant to Article 1128 of the NAFTA. Mexico's failure to comment further on any other issue raised in the proceeding should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

Mexico fully concurs with Canada in the views expressed in Canada's letter, dated 1 October 2001, to the Tribunal regarding the NAFTA Free Trade Commission's interpretation, dated 31 July 2001, of Article 1105 and that interpretation's applicability to pending NAFTA Chapter Eleven arbitrations.

Mexico also concurs with Canada that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.

Attentively,

c.c. Ms. Meg Kinnear General Counsel, Trade Law Division, Government of Canada
Mr. Barton Legum, Chief, NAFTA Arbitration Division, U.S. Department of State.
Mr. Barry Appleton.

SECRETARÍA DE ECONOMÍA
CONSULTORÍA JURÍDICA DE NEGOCIACIONES
ALFONSO REYES NO. 30, PISO 17 • COL. CONDESA • 06179 • MÉXICO, D F
TELÉFONO: (525) 729-9134 • FAX: (525) 729-9310

Exhibit C

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

POPE & TALBOT, INC.,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SIXTH SUBMISSION (CORRECTED) OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America makes this submission on certain questions of interpretation of the NAFTA. Those questions are raised in the Tribunal's letter, dated September 17, 2001. No inference should be drawn from the absence of comment on any issue not addressed here.

2. The United States fully concurs with Canada in the views expressed in Canada's letter, dated October 1, 2001, to the Tribunal regarding the NAFTA Free Trade Commission's interpretation, dated July 31, 2001, of Article 1105 and that interpretation's applicability to pending NAFTA Chapter Eleven arbitrations. The United States also concurs with Canada that Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105.

Respectfully submitted,

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Barton Legum
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
Alan Birnbaum
Attorney-Adviser, Office of International Claims and Investment Disputes
United States Department of State
Washington, D.C. 20520

October 2, 2001