IN THE ARBITRATION PURSUANT TO CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

POPE & TALBOT, INC.,

Claimant/Investor,

-and-

THE GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

---

1. Pursuant to NAFTA Article 1128, the Government of the United States of America makes this submission to address certain questions of interpretation of the NAFTA arising in the case brought by Pope & Talbot, Inc. against the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.

National Treatment

2. One question that has arisen in this case is the purpose and scope of Article 1102, the national treatment provision. Article 1102 paragraphs (1) and (2) provide that each Party shall accord to investors, and investments of investors, of another Party "treatment no less favorable than that it accords, in like circumstances, to its own investors [or investments] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

3. The national treatment provision was designed to prohibit discrimination on the basis of nationality. *See* U.S. Statement of Administrative Action at 589, *in* Message from The President of the United States Transmitting North American Free Trade Agreement, Text of Agreement, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 103-159, Vol. 1 (1993) ("Articles 1102 and 1103 set out the basic non-discrimination rules of 'national treatment' and 'most-favored-nation treatment.'"). Article 1102 paragraphs (1) and (2) were not intended to prohibit all differential treatment among investors or investments. Rather, they were intended only to ensure that Parties do not treat entities that are "in like circumstances" differently based on their NAFTA Party nationality.

4. Nothing in Article 1102 paragraphs (1) and (2) requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The relevant comparison is not between the treatment that a Party accords to an investment of an investor of another Party and the *best* treatment that it accords to the investments of its nationals (or between the treatment that it accords to an investor of another Party and the *best* treatment that it accords to investors that are its nationals). The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This distinction is important and was intended by the Parties. Thus, a NAFTA Party may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

5. The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. Any suggestion to the contrary misconstrues the obligation to provide "national treatment" – whose object and purpose are to prevent nationality-based discrimination – as an obligation to provide "nationally uniform treatment." The Parties, all of whom are geographically, politically and economically diverse nations, did not intend such a result.

6. Nothing in Article 1102 constitutes a general prohibition against the adoption or maintenance of measures that apply differently to investments located or operating in different places, or of measures that apply differently to products depending on where they are grown or harvested. Such measures do not inherently discriminate on the basis of nationality. The fact that a location-specific measure affects enterprises operating or goods produced in different locations in its territory differently does not alone establish the discrimination that Article 1102 prohibits.

7. The NAFTA Parties did not intend Article 1102 to foreclose the use of location-based regulatory measures simply because such measures have the effect of advantaging some investors and disadvantaging other investors, including those from other NAFTA Parties. The United States, for example, limits business activities in certain

environmentally sensitive areas and imposes additional limitations on emissions from manufacturing operations in areas where air pollution is more serious.

8. For the foregoing reasons, an investor or investment that operates within the territory covered by a location-specific measure may not be in circumstances "like" those of an investor or investment that does not operate within that territory. An investor cannot rest his claim under Article 1102 solely on the fact that an enterprise operating in another part of the country receives a different or greater benefit or is subject to a different or lesser burden.

Performance Requirements

9. Article 1106 identifies two categories of performance requirements and, separately for each category, sets forth an exhaustive list of the specific performance requirements prohibited. The Article prescribes different prohibitions for each category.

10. The first category is described in Article 1106(1). It encompasses seven specific requirements, commitments, or undertakings that a Party may not impose or enforce in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment in its territory.

11. The second category is described in Article 1106(3). It provides that a Party may not condition the receipt of an advantage, in connection with an investment, upon compliance with any of four specifically listed requirements.

12. Article 1106(5) states explicitly and clearly that Article 1106(1) applies only to the seven performance requirements specifically listed in Article 1106(1) – and Article 1106(3) applies only to the four performance requirements specifically listed in Article 1106(3).

13. In determining whether a Party may condition the receipt or continued receipt of an advantage upon compliance with a particular performance requirement, the pertinent provision is Article 1106(3) and the pertinent performance requirements are exclusively the four listed in that article. Article 1106(1) can play no role in that determination.

Expropriation

14. We note that the Investor in this case raises certain issues with respect to expropriation. The United States has addressed certain of these issues in its submission in the *Metalclad* case. We invite the Tribunal to consult that document, which is

attached, for an explanation of the position of the United States on the meaning of the phrase "measure tantamount to expropriation."

Dated: Washington, D.C.
April 7, 2000

Respectfully submitted,

/S/

Ronald J. Bettauer
UNITED STATES DEPARTMENT OF STATE
Office of the Legal Adviser
Office of International Claims and
Investment Disputes
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037