Hugo Perezcano Díaz
Consultor Jurídico de Negociaciones

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The Honourable
Lord Dervaird
4 Moray Place
Edinburgh EH3 6DS

Fax: 44-131-220-0644

Mr. Murray J. Belman

Thompson Coburn
700 14th Street, N.W., Suite 900
Washington, DC 20005-2010
Fax: (202) 508-1010

The Honourable Benjamin Greenberg, Q.C.
Stikeman, Elliott
40e étage, 1155 boul. René-Lévesque Ouest
Montréal, PQ H3B 3V2

Fax: (514) 397-3222

RE: Pope & Talbot, Inc. v. Government of Canada

POST-HEARING SUBMISSION OF THE UNITED MEXICAN STATES (PHASE TWO)

Pursuant to NAFTA Article 1128, the Government of Mexico makes the following submission on the interpretation of Articles 1102 and 1105 of the NAFTA.

This submission is directed to certain points of interpretation that appeared to remain in issue at the hearing of Phase Two. Mexico maintains and relies on its submissions in Phase One concerning the interpretation of Article 1102 and its previous submission in Phase Two in connection with the interpretation of Article 1105. No inference should be drawn from Mexico's failure to address any issue or argument other than those discussed below.

A. Article 1102 – National Treatment

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.

Mexico concurs in the United States' Second Submission and adopts the following passage:

> 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.

Mexico agrees with the following observations of the Tribunal in *S.D. Myers v. Canada*:

> 252. The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account:
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> - whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals;
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> - whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.
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> 253. Each of these factors must be explored in the context of all the facts to determine whether there actually has been a denial of national treatment.

Mexico concurs in Canada's submissions that the relevant GATT and other WTO jurisprudence supports the position that a finding of *de facto* discrimination of investors (or investments) of another Party—or of a single investor where the relevant class of foreign investors consists of a single entity—requires a finding that the investors of another Party were disproportionately disadvantaged in comparison to domestic investors in like circumstances.

If a measure is "blind to nationality"[1] on its face, a finding of denial of national treatment could only be made if, on a proper appraisal of cogent evidence, it is found to have the effect of disproportionately favoring domestic investors over investors of the other Parties.

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.

The requirement in Article 1102 (3) to accord treatment, in the case of a state or province, "no less favorable than the most favorable treatment" accorded to domestic investors does not imply that the Article 1101 paragraphs 1 and 2 require a Party to accord "best" treatment in the land to investors of the other Parties. Rather, it stands in

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1. A phrase used by counsel for Canada in closing argument to describe the export control regime used to implement Canada's obligations under the Softwood Lumber Agreement

contradistinction to paragraphs 1 and 2 which require a Party to accord treatment "no less favorable" than the treatment it accords its own investors and their investments.

The Parties did not intend Article 1102 to require a Party to accord any investor of another Party the "best" treatment that it accords any investor in its territory. It is a non-discrimination requirement that requires a comparison between the treatment a Party accords to foreign investors and the treatment it accords, in like circumstances, its own investors.

The interpretation propounded by the Investor would expose the Parties to unforeseeable claims based on the incidental effects of measures that have no discriminatory effect. That is not what the Parties intended in undertaking a non-discrimination obligation in respect of each others' investors.

B. Article 1105 – Minimum Standard of Treatment

Mexico concurs in the Third Submission of the United States and adopts the following passages:

> 3. "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated in Article 1105(1). The plain language and structure of Article 1105(1) requires those concepts to be applied as and to the extent that they are recognized in customary international law. They are not to be applied in a subjective and undefined sense without reference to international law standards.
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> ...
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> 8. The international law minimum standard is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law of state responsibility for injuries to aliens. Unlike national treatment, the international law that defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals. [footnotes omitted]

Mexico does not agree with finding of the majority of Tribunal in *S.D. Myers v. Canada* "that on the facts of this particular case the breach of Article 1102 establishes a breach of Article 1105 as well" and considers that that part of the Award is clearly wrongly decided. However, Mexico does agree with certain comments of that Tribunal:

> 261. When interpreting and applying the "minimum standard", a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or

counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.

262. Article 1105(1) expresses an overall concept. The words of the article must be read as a whole. The phrases ...*fair and equitable treatment*... and ...*full protection and security*... cannot be read in isolation. They must be read in conjunction with the introductory phrase ...*treatment in accordance with international law.*

263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case.

Mexico also agrees with the following remarks of Mr. Chiasson, the dissenting Member of the Tribunal:

267. ....a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirements of international law. Breach of another provision of the NAFTA is not a foundation for such a conclusion. The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter Eleven."

Mexico submits that this Tribunal would exceed its jurisdiction if it were to include within the scope of Article 1105, obligations found in other provisions of Section A of Chapter Eleven, other Chapters of the NAFTA or treaties other than the NAFTA, or principles and objectives found in NAFTA's preambular language.

Mexico concurs in Canada's submission that the threshold for finding a breach of Article 1105 (1) is a high one. Mexico observes that the jurisprudence applying the standard to administrative action (or inaction, as the case may be) have described it as follows:

a) in *Neer* –acts or omissions amounting to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency; and

b) in *ELSI* – arbitrariness amounting to a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.

The Tribunal must apply an international standard, not one based on domestic legal principles of the host country or the investor's country of origin. Mexico acknowledges that the standard is adaptable; what did not shock a sense judicial propriety 100 years ago might well offend the contemporary international standard. But the threshold must necessarily be high if violation of the standard can only be found upon a clear breach of universal legal

principles or universal standards of conduct. It is noted that there is a paucity of international jurisprudence finding a breach of the minimum standard. The inference to be drawn is that tribunals have been loath to do so.

Moreover, it is not enough that a particular measure, viewed in isolation, could be seen to violate the international standard. The host country's legal system as a whole must be considered. The availability of administrative or judicial remedies to rectify the effects of impugned measures and the disputing investor's resort (or failure to resort) to such remedies must be examined as part of the determination of whether, in a particular case, the host country failed to accord treatment in accordance with international law.

C. The *Metalclad* Decision

Mexico respectfully advises the Tribunal not to place any reliance on the *Metalclad* Award. Viewed objectively, in light of the record evidence and legal submissions which are in no way reflected in the Award, the Award is unintelligible and patently unreasonable.

Pursuant to NAFTA Article 1136(2) Mexico has now initiated proceedings in the Supreme Court of British Columbia to set aside the *Metalclad* Award and reiterates its caution against relying on that Tribunal's findings or reasoning for any sense of persuasive guidance until the matter has been finally concluded.

All of which is respectfully submitted,