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.

SEVENTH SUBMISSION 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 damages-phase memorials of Pope & Talbot, Inc. and the Government of Canada. No inference should be drawn from the absence of comment on any issue not addressed here.

NAFTA Articles 1116 and 1117

2. The United States agrees with Canada that an investor that submits a claim under Article 1116 – and not under Article 1117 – can recover only those losses or damages proximately caused by a breach and incurred by it in its capacity as an investor. An investor that submits a claim under Article 1116 – and not under Article 1117 – cannot recover any losses or damages incurred by "an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." NAFTA art. 1117(1).

3. Articles 1116 and 1117 of the NAFTA serve distinct purposes. Article 1116 provides recourse for an investor to recover for loss or damage suffered by it. Article 1117 permits an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment.

4. Where the investment is a separate legal entity, such as an enterprise, any damage to the investment will be a derivative loss to the investor, and the investor will have standing to bring a claim under Article 1117. Where the investment is not a separate legal entity, any damage to the investment will be a direct loss to the investor, and the investor will have standing to bring a claim under Article 1116.

5. When an investor files a claim under Article 1116 for direct losses suffered by it, only those losses that were sustained by that investor *in its capacity as an investor* are recoverable.

6. Examples of direct losses sustained by an investor in its capacity as an investor that would give rise to a claim under Article 1116 are, for example, losses suffered as a result of an investor's stockholder shares having been expropriated or losses sustained as a result of the investor having been denied its right to vote its shares in a company incorporated in the territory of another NAFTA Party.

7. Under Article 1135(2)(a) and (b), where a claim is made under Article 1117(1), the award must provide that any restitution be made, or monetary damages be paid, to the enterprise. This prevents the investor from effectively stripping away a corporate asset – the claim – to the detriment of others with a legitimate interest in that asset, such as the enterprise's creditors.[1] Moreover, under Article 1135(2)(c), where a claim is made under Article 1117(1), the award must provide that it is made without prejudice to any person's right (under applicable domestic law) in the relief. If an investor could bring a claim under Article 1116 for losses or damages incurred by an enterprise, both Articles 1117 and 1135(2) would be rendered ineffective, contrary to the customary international law principle of effectiveness.[2]

8. Nothing prevents an investor, in an appropriate case, from submitting claims under both Articles 1116 and 1117. For example, if a NAFTA Party violated Article 1109(1)'s requirement that "all transfers relating to an investment of an investor of another Party in the territory of the Party . . . be made freely and without delay," the

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[1] Indeed, international tribunals have rejected shareholder claims in part because of the difficulty in determining what relief can fairly be granted in light of potential claims by creditors and other interested parties. *See, e.g.,* Eduardo Jiménez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 Phil. Int'l L.J. 71, 77, 78 (1965).

[2] *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (rejecting construction that was "contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness.") (collecting authorities); *accord Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.").

investor might be able to claim under Article 1116 an injury stemming from interference with its right to be paid corporate dividends, and the investor might be able to claim under Article 1117 an injury relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations.

9. Thus, while harm to an investment may very well result in harm to the investor, this does not support the contention that – despite the plain language of the NAFTA – an investor can bring a claim under Article 1116 for loss or damage incurred by an enterprise because an enterprise is an investment. Rather, as reflected in Article 1121(1)(b), where an investor incurs loss or damage to its "interest in an enterprise" because of loss or damage incurred by that enterprise, the investor's recourse is to bring a claim under Article 1116 for the loss or damage to its "interest," and a claim under Article 1117 on behalf of the enterprise to recover for the loss or damage incurred by the enterprise.

10. In sum, an investor can make a claim for loss or damage incurred by an enterprise only if the investor submits a claim under Article 1117 on behalf of the enterprise.

NAFTA Article 1135

11. Article 1135(1) limits the final award to monetary damages and applicable interest or restitution, and costs in accordance with the applicable arbitration rules. Article 1135(3) expressly provides that "[a] Tribunal may not order a Party to pay punitive damages."

12. Under Article 1131(1), in fixing the appropriate amount of monetary damages, Chapter Eleven tribunals must apply "applicable rules of international law."

13. Accordingly, if applicable rules of customary international law do not permit a claimant to recover for particular losses because those losses were not proximately caused by the subject breach, then no damages may be awarded with respect to those losses whether intended or not.

Respectfully submitted,

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