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CONFIDENTIAL

**UNDER THE UNCITRAL ARBITRATION RULES AND
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**INVESTOR'S REPLY TO THE POST-HEARING SUBMISSIONS
OF MEXICO AND THE UNITED STATES**

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

**INVESTOR'S REPLY TO
THE POST-HEARING SUBMISSIONS OF
THE UNITED MEXICAN STATES, AND
THE UNITED STATES OF AMERICA**

The Investor makes the following submission with respect to the Second Interpretative submissions filed by the Governments of the United States of America ("US") and the United Mexican States ("Mexico"). In summary, the Investor makes the following points:

1. NAFTA obligations should be given an objective rather than a subjective interpretation; and
2. The US and Mexico have made errors in their interpretations of the international law of national treatment and of expropriation;

The Investor will not repeat arguments that it has previously made in its oral and written submissions to this Tribunal. However, the Investor will provide references to international legal decisions to support its positions where necessary.

Why should the NAFTA be interpreted in an objective fashion?

1. For NAFTA obligations to have real effect, they must apply to situations of differential treatment, where harm is both intentional and non-intentional. Otherwise, governments will be able to justify carefully designed schemes which have the incidental effect of being discriminatory as a mechanism to provide domestic protection that would otherwise be inconsistent with the NAFTA. It is for this reason, that WTO and GATT panels have found that mandatory government measures that hypothetically could be applied in a discriminatory fashion are *ipso facto* inconsistent with the WTO national treatment obligation.¹ This objective interpretation is the only mechanism that can give effective protection to foreign investors and their investments when they decide to invest within a NAFTA Party's territory.
2. The governments of Canada, the US and Mexico (the "NAFTA Parties") have all supported different positions before this Tribunal which would require some reference to subjective interpretation under the national treatment obligation. Not only would it be virtually impossible for a Tribunal to be able to accurately discern the subjective intention

¹ *United States - Measures Affecting Alcoholic and Malt Beverages* (1992), GATT Doc. DS23/R - 39S/206 at para. 5.39 citing with approval *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes* (1990), GATT Doc. DS10/R - 37S/200 at para. 84.

of any given government measure, but adopting such an interpretative mechanism could result in a lack of predictive capacity for investors and governments in future. If a subjective test were read into the NAFTA text, NAFTA Parties could accord less favourable treatment to certain foreign investors or investments so long as they could provide some proof that there was no intention to discriminate or if they could point to another domestic investor or investment who was also receiving a lesser quality of treatment.

3. While the NAFTA does not provide a remedy for domestic investors or investments that receive less favourable treatment than others operating in like circumstances, it clearly does provide a remedy for the investments of investors from other NAFTA Parties who receive less favourable treatment than others operating in like circumstances.² If a subjective "aims and effects" test were applied to NAFTA's Chapter 11 national treatment obligation, the resulting uncertainty could result in a diminution of investment opportunities throughout the territory covered by the NAFTA.

The US and Mexico have made errors in their interpretations

National Treatment

4. The term "national treatment" is a term of art in international law and was adopted explicitly in the NAFTA in light of the jurisprudence of the GATT/WTO. Even though the NAFTA Investment Chapter language may differ slightly from the wording in other national treatment obligations, the basic content of the principle remains the same. If the Tribunal were to adopt the positions advanced by Mexico and the US, advocating a lower standard of national treatment in the NAFTA than established in the GATT and WTO, the effect on global investment patterns would be disruptive and harmful to the development of a transparent rules-based investment system.
5. Both Mexico and the US make the erroneous argument that less favourable national treatment under NAFTA Article 1102 accorded to foreign investors and investments must be "on the basis of nationality". Accordingly, the ultimate question for Mexico and the US seems to be: has the investor or investment been singled out for less favourable treatment because of its nationality?

² See the Investor's Supplemental Memorial at para. 53-55 for a discussion of *Japan-Alcohol*. The WTO Appellate Body rejected an "aim and effects" test for the GATT National treatment obligation notwithstanding that the first paragraph of GATT Article III explicitly provides that measures "should not be applied to imported or domestic products so as to afford protection to domestic production". NAFTA Article 1102 contains no such terms. Accordingly, it is only appropriate to interpret NAFTA Article 1102 as not mandating an "aim and effects" test.

6. If the answer to this unduly narrow question was “yes”, and treatment was limited solely along national lines, a whole class of measures that represent *de facto* less favourable national treatment would be obscured from view. The national treatment principle as understood in international law would be almost meaningless: minimized to a tiny scope of application. This interpretation would also be impractical as it would be very difficult for a Tribunal to ever be provided with sufficient evidence to be able to speak of what a government did or did not “intend”. More importantly, however, governments would be able to pursue measures that would have the effect of treating some NAFTA investors or investments more poorly than domestic investors or investments are treated, so long as not all NAFTA investors or investments are treated as poorly.
7. The Investor submits that nationality does matter, but not in the way suggested by Mexico and the US. As a result of the Export Control Regime, the Investor and its Investments have experienced treatment less favourable than that provided to certain domestic investors and their investments. NAFTA Article 1102 provides that because the Investor is in fact not domestic, it is an “investor of another Party”, it and its Investments are entitled to be treated no less favourably than domestic investors and their investments. It does not provide that such entitlement is dependent upon the Investor’s ability to prove that a Party actually intended to provide it with less favourable treatment because it was foreign-owned or controlled. The GATT/WTO national treatment jurisprudence, which existed when the NAFTA was negotiated, does not require that the Investor and its Investments be explicitly singled out by Canada.³
8. Mexico makes the categorical statement that in every case where a violation of GATT Article III has occurred “the measure in question was found to discriminate in law or fact on the basis of nationality.”⁴ With the greatest respect, this is simply not correct. In the 1992 GATT Panel decision, *United States - Measures Affecting Alcoholic and Malt Beverages (“US Beer”)*,⁵ the Panel considered a US Federal Excise Tax on beer concluding that the measure was in violation of the national treatment provisions of GATT Article III. The measure accorded different levels of treatment to domestic and foreign beer depending upon the size of the brewery from which it came. The “more favourable” treatment was exclusively accorded to domestic brewers who represented only 1.5 per cent of total US production. The other 98.5 per cent of US domestic beer

³ See Investor’s Memorial at para. 55, 59 and 60 for discussion of *de facto* less favourable treatment in the *US-Section 337* case, *Bananas*, and *Canada - Certain Alcoholic Drinks*. In these cases, it is clear that GATT jurisprudence prohibited both *de jure* and *de facto* violations of national treatment.

⁴ Mexico Post-Hearing Submission at 7.

⁵ DS23/R - 39S/206, Report of the Panel adopted 19 June 1992, at para. 5.2 - 5.12.

production received the same less favourable treatment as imported Canadian beer. The US argued that, on its face, the measure did not discriminate against imported products or provide protection to domestic production.⁶ The Panel rejected the arguments of the US in finding that the measure was inconsistent with GATT Article III.⁷ The Panel found that the US accorded better treatment to a certain number of domestic producers, albeit a small number.⁸ The fact that other domestic producers were also receiving less favourable treatment did not matter.

9. The *US Beer* case directly contradicts Mexico as a situation where the “disfavoured product” was not found to be “wholly or overwhelmingly of foreign origin”. Virtually all US beer production received the same less favourable treatment as imported Canadian beer. Yet, the Panel found the less favourable treatment to Canadian imported beer was inconsistent with the national treatment provisions of Article III:2. This was not discrimination based on nationality or directed at Canadian beer products. Canadian beer was clearly not being singled out in the manner that Mexico and the US argue in their submissions is a requirement of national treatment under Chapter 11.
10. The Investor submits that the NAFTA Parties have failed to provide any justification for ignoring the impact of GATT/WTO jurisprudence on the development of the principle of national treatment in international law. This jurisprudence is an authoritative source on how the national treatment obligation should be interpreted to ensure true equality of competitive opportunities between goods, services and/or investments. According to NAFTA Article 102(2), and UNCITRAL Rule 33(3), the national treatment principle must be employed in interpreting and applying obligations such as NAFTA Article 1102.
11. The US advocates the imposition of an “aim and effects” test for the interpretation of NAFTA Article 1102 that has been soundly rejected by the WTO Appellate Body in its interpretation of similar national treatment obligations.⁹ For example, in *Japan – Taxes on Alcoholic Beverages*,¹⁰ the WTO Appellate Body specifically ruled that the obligation to accord national treatment is not limited to cases in which it can be established that treatment is only accorded on the basis of nationality. The test is simply whether a

⁶ At para. 3.14 - 3.18.

⁷ At para. 6.1(a).

⁸ At para. 5.6: The panel in the *US Beer* case held that there is no *de minimis* requirement that must be met by a party claiming a breach of the national treatment standard.

⁹ US Post-Hearing Submission at para. 2-3.

¹⁰ Discussed in Investor’s Supplemental Memorial at para. 54-56.

NAFTA investor or investment is accorded less favourable treatment than domestic investors or investments operating in like circumstances.

12. The US argues that the relevant factors for determining whether investors or investments are in like circumstances vary on a case by case basis¹¹. However, the United States fails to identify the objective basis upon which such relevance should be determined. GATT/WTO jurisprudence has consistently identified "equality of competitive opportunities" as an overriding goal of the national treatment principle.¹² Accordingly, in order to determine whether any particular factor is relevant in identifying if investors or investments are in like circumstances, one must focus on those factors that indicate whether the investors or investments to be compared are actually in competition with each other. The evidence before this Tribunal overwhelmingly demonstrates that softwood lumber producers are in direct competition with each other in a North American commodity market.¹³ This finding is supported by the conclusions of the GATT Panel in *Japan – SPF Lumber*.¹⁴
13. To permit the NAFTA Parties to define whether investors or investments are in like circumstances based on the trade policy threats of another Party or a measure designed to reply to those threats is to subvert the object of the "like circumstances" comparison – i.e. to examine whether competitors are afforded differential levels of treatment, in form or effect. It would be equally as arbitrary to permit the NAFTA Parties to identify differences between investors or investments that do not bear directly on whether they are, in fact, competitors. In essence, the Tribunal should avoid adopting an analysis of "like circumstances" that permits the parties to draw distinctions without a difference.
14. In response to paragraph 2 of the US Second Submission, the Investor submits that the US has mis-ordered the two tests in NAFTA Article 1102. The US suggests that the "less favourable treatment" be identified first before the question of whether domestic and foreign investors and investments are "in like circumstances". With respect to the US, it does not follow that one can compare treatment without knowing which investors or investments are being compared. It is foreign investors or investments that are the

¹¹ US Post-Hearing Submission at para. 4-5.

¹² Discussed in the Investor's Supplemental Memorial at para. 47-57 and in the Merits Hearing Transcripts, Vol. VII at 230-234 concerning the applicability of the WTO Panel and Appellate Body in *European Communities – Bananas* to the facts of this case.

¹³ See "Pope & Talbot, Ltd. and Canada's Implementation of the Softwood Lumber Agreement" attached to the Statement of W. L. Campbell in the Written Submissions of the Investor, Vol. I., Tab 2 at 4.

¹⁴ Canada's Counter-Memorial Book of Authorities Vol. II at Tab 29.

subject of the less favourable treatment and must be known to continue with any analysis of whether treatment is "no less favourable" than comparable domestic entities. The two step procedure enunciated by the Investor¹⁵ is supported by the WTO Panel Decision in the *Japan - Taxes on Alcoholic Beverages* case.¹⁶

15. Mexico says that for compensation to be triggered under NAFTA Article 1102, there must be more preferable treatment accorded to domestic investors operating in like circumstances to NAFTA investors.¹⁷ This is exactly what has happened in this case. Certain domestic lumber producers have received better treatment than Pope & Talbot, an American owned investment operating in like circumstances with those better treated domestic producers in non-listed provinces, and even those operating in other listed provinces.
16. This case is clearly analogous to two recent WTO cases: *Canada - Measures Affecting the Automotive Industry* and *European Communities - Bananas*.¹⁸ These two panels and the WTO Appellate Body found that a failure to accord the most favourable treatment available to foreign and domestic businesses, competing in the same industry sector, violated various WTO national treatment and most favoured nation treatment provisions. Neither Mexico nor the US can explain why this case should not be decided in the same manner, and therefore apparently have simply not addressed them in their submissions.
17. Mexico implies that the US and Canada are capable of deciding for themselves which investments in the Canadian softwood lumber sector are properly in "like circumstances", within the meaning of NAFTA Article 1102.¹⁹ With respect, it is the role of the Tribunal to determine – based on the evidence before it and in concert with the principle of national treatment as expressed in the decisions of other international tribunals – whether investments are operating in like circumstances with each other. If the NAFTA Parties could mutually or unilaterally determine what investments or investors are in like circumstances by writing their desired distinction into the measure, or agreeing *ex post facto* that a measure does not violate national treatment, they could forever avoid paying compensation for failing to live up to their obligations under NAFTA Article 1102. They

¹⁵ See the Investor's Supplemental Memorial at para. 38.

¹⁶ WT/DS8/R, WT/DS10/R, WT/DS11/R, Report of the Panel adopted 11 July 1996 at para. 6.14: "The panel noted in this respect, that the complainants have the burden of proof to show first, that products are like and second, that foreign products are taxed in excess of domestic ones."

¹⁷ Mexico Post-Hearing Submission at 3.

¹⁸ See the Investor's Supplemental Memorial at 22-24.

¹⁹ Mexico Post-Hearing Submission at 7.

would merely argue that the provisions they agreed to, or imposed in their measures, do not permit a "like circumstances" comparison to be made.

18. The Investor in this claim is entitled to receive the best treatment provided to other investors and investments in Canada in like circumstances. The evidence produced in this claim demonstrates that there is better treatment provided to other investors and investments in relation to:

- the allocation of quota;
- the requirement to produce a given level of wood for export;
- the rate of export fee assessed.

In each of these situations, Pope & Talbot, Ltd. has been treated less favourably than other like Canadian investments.

Expropriation

19. The US and Mexico have developed theories on the meaning of the NAFTA expropriation obligation which are inconsistent with the clear meaning of this obligation. These theories cover four themes:

- a) There is a *de minimis* threshold for expropriations;
- b) All NAFTA terms must be given meaning;
- c) The term "investment" in NAFTA is broadly defined;
- d) The facts do not support Mexico's floodgate analysis.

- a) **There is a *de minimis* threshold for expropriations to be compensable**

20. Mexico has argued that in order to establish the existence of an expropriation, the Investor must show that the effect of the impugned measure exceeds a threshold that is far higher than some *de minimis* level. Mexico has further argued that the Investor must show that there has been substantial deprivation of the Investor's ownership or control of the investment.²⁰ Mexico argues that for a measure to constitute a "measure tantamount to expropriation", it must "at a minimum (result in) a substantial and long-standing, if not complete and permanent, deprivation of the investor's ownership or control over the investment".²¹ In as much as a measure cannot constitute a measure tantamount to expropriation unless it results in a "substantial interference with, or deprivation of, an

²⁰ Mexico Post-Hearing Submission at 9-10.

²¹ Mexico Post Hearing Submission at 10.

investment", the Investor concurs with this statement. However, the Investor is at a loss to understand what the rationale or the authority could possibly be for Mexico's addition of words as "long-standing", "complete" or "permanent" to this test.

21. The issue of what constitutes substantial deprivation has been dealt with in several cases before the US- Iran Claims Tribunal. In these cases, the Tribunal has established a clear test for what constitutes a compensable deprivation. This test was first articulated in *ITT Industries* where the Tribunal stated that property may be deemed to have been taken if:

*... events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.*²²

22. This language was repeated in the *TAMS-AFFA* case when the Tribunal declared that compensation is warranted if the deprivation of fundamental ownership rights is anything other than "not merely ephemeral."²³ The *Oxford English Dictionary* defines "ephemeral" as "that is in existence, power, favour, popularity, etc. for a short time only; short-lived; transitory."²⁴ The Investor submits that if the fundamental ownership rights of the Investor have been interfered with in a manner that is more than short-lived or transitory in nature, then this would amount to substantial deprivation of the Investment. The evidence given in the Investor's pleadings and at the meeting of the Tribunal in May show that this test has been met. Accordingly, compensation is due to the Investor.
23. The testimony of the independent business valuator, Howard Rosen, has confirmed to the Tribunal that not only had the goodwill of the company been harmed by the Export Control Regime, but also many other components of the overall enterprise value, including the cash assets, the physical plant and the profitability of the company, had all been interfered with as a result of the Export Control Regime.²⁵ The Investor submits that complete enjoyment of the enterprise value is a fundamental right of ownership and that the Export Control Regime's interference with the enterprise value constitutes deprivation of the Investor's ownership rights that is more than ephemeral.

²² *ITT Industries Inc., and The Islamic Republic of Iran et al* (1983) 2 Iran-US CTR 348 at 351-2.

²³ *Tippets, Abbott, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran, et al* (1984) 6 Iran-US CTR 219 at 225-6 ("*TAMS-AFFA*").

²⁴ J.A. Simpson and E.S.C. Weiner, eds. *The Oxford English Dictionary*, 2d ed, Vol V, at 322.

²⁵ Merits Hearing Transcripts, Vol. V at 20.

b) All NAFTA Terms must be given meaning

24. The US argues that NAFTA Articles 1110(8) and 2103 do not support the proposition that NAFTA Article 1110 may require compensation for non-discriminatory regulatory measures of general application.²⁶ The Investor submits that these provisions speak for themselves. Article 2103 provides for a special regime covering taxation measures of general application that may constitute an expropriation or a measure tantamount to expropriation. Article 1110(8) clarifies the limited circumstances in which a non-discriminatory measure of general application shall not be considered a measure tantamount to expropriation.²⁷ These specific provisions all give textual support to the *lex specialis* on expropriation created by the NAFTA.²⁸
25. NAFTA Article 1110(1) does not speak of exemptions, which are contained in other provisions of the NAFTA. It clearly defines what types of measure constitute an expropriation, or a measure tantamount to expropriation, by clarifying the conditions under which Parties may impose such measures – when the measure is for a public purpose; not discriminatory; not in violation of international law; in accordance with due process; and upon the payment of adequate compensation. A “non-discriminatory measure of general application” that fits these criterion – or that falls within the various exemptions contained within the NAFTA such as Articles 1110(8) or 2103 – will not require a Tribunal to make an award based on NAFTA Article 1110.
26. All NAFTA terms must be given meaning. NAFTA’s expropriation obligation explicitly includes the term “measure tantamount to expropriation”. The customary international law of treaty interpretation does not permit this term to be reduced to inutility, which would occur under the US’ Canada’s interpretation.²⁹

²⁶ US Post-Hearing Submission at para. 6-7.

²⁷ Moreover, in making these arguments about non-discriminatory measures of general application the United States is implicitly acknowledging that Canada’s approach to interpretation of NAFTA Article 1110 is incorrect. Canada has argued that one must first determine whether a measure constitutes a direct or indirect nationalization or expropriation before examining whether the “exemptions” listed in sub-paragraphs (a) to (d) of NAFTA Article 1110(1) should be considered. The Investor has argued that NAFTA Article 1110(1) cannot be construed so narrowly.

²⁸ This *lex specialis* is contained in the black-letter text of the NAFTA and cannot be obviated by the expressions of respective counsel for the NAFTA Parties in this Claim.

²⁹ This well-known international law principle is discussed in Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1994) at 106, McNair, *The Law of Treaties* (1998) at 384, the *Cayuga Indians* case (1926) VI RIAA 173 and *Japan-Alcohol (AB)* at 11.

c) The Term "Investment" in NAFTA is broadly defined

27. Moreover, NAFTA Article 1110 speaks of the taking of an "investment", not just "real property" or "an enterprise". "Investment" is broadly defined under NAFTA Article 1139 as including: an enterprise; the holding of various types of interests in an enterprise; tangible or intangible property, and even "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory". Mexico's exclusive reference to the terms "ownership or control" in its discussion of expropriation indicates that Mexico has narrowly constrained the definition of "investment" to only include the term "enterprise" under the NAFTA.³⁰ This is an inaccurate reading of the definition of investment.
28. In this case, the Investor has been deprived of a substantial portion of its access to the US market – the intangible asset upon which the enterprise value of its business has been built. In other words, the Investor has committed a considerable amount of capital and other resources to the southern interior of British Columbia in order to produce lumber for export to the US. The Export Control Regime substantially interferes with this investment, significantly depriving Pope & Talbot of the opportunity to derive the benefits it should have been able to enjoy from its considerable investments in Canada.
29. Mexico argues that the compensation method stipulated in NAFTA Article 1110(2) somehow demonstrates that there must be a transfer or deprivation of property in, or control of, an investment for an expropriation to have occurred³¹. This interpretation is simply incorrect. NAFTA Article 1110(2) requires Parties to provide compensation equivalent to the fair market value of an "investment" as of the date on which the expropriation took place (or the measure tantamount to expropriation was imposed). Whatever the "investment" in question is, compensation for it must be based upon its fair market value as of the applicable valuation date.

d) The Facts do not Support Mexico's Floodgate Analysis

30. Mexico states that "if the claimant is right, not only it but all investors in the covered provinces have been expropriated".³² This statement misappreciates the meaning of the NAFTA. First, "investors" cannot be expropriated - only their investments in the territories of other NAFTA Parties. Second, the Tribunal has no evidence before it

³⁰ Mexico Post-Hearing Submission at 10.

³¹ Mexico Post Hearing Submission at 10.

³² Mexico Post-Hearing Submission at 11.

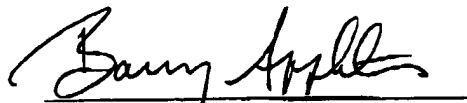
concerning how the Export Control Regime may have resulted in a substantial deprivation of, or interference with, other investments in Canada (whether generally, or in a manner specifically similar to the taking that has been experienced by the Investor in this case). Further, even if a number of Canadian investors have suffered from a substantial interference with their investments in Canada, as a result of the imposition of the Export Control Regime, the NAFTA does not provide them with a remedy. The Parties decided only to provide compensation to NAFTA investors for expropriations or measures tantamount to expropriation. It may be unfortunate that they did not provide their own investors with similar protection, but the Tribunal's role is restricted only to considering Pope & Talbot's claim for compensation.

31. Moreover, NAFTA Article 1116 also provides that other affected NAFTA investors have only three years from the date of the imposition of the measure in question to be able to bring a claim for compensation. If Mexico intended to evoke a "floodgates argument" with this final submission, the facts simply do not support its analysis. The NAFTA neither represents a threat to legitimate government decision-making, nor a "blank cheque" for undeserving investors. What the NAFTA does promise is the establishment and promotion of a continental market for free trade and investment. It does so by providing foreign investors with the security of being able to seek compensation for their losses when NAFTA Parties deem it necessary to act in manner inconsistent with their NAFTA obligations.

Scope of the Mexico Submission

32. NAFTA Article 1128 provides other NAFTA Parties an extraordinary right to be able to provide written submissions on the interpretation of NAFTA. This right does not make these Parties disputing parties to the Claim. NAFTA article 1128 neither affords Parties the right to provide oral submissions before the Tribunal, nor to even attend at NAFTA Tribunal meetings. All that a non-disputing NAFTA Party is permitted to do is to provide written submissions on the interpretation of NAFTA. Other interested parties, such as business competitors or non-governmental organizations do not have this special privilege.
33. Mexico has submitted a document to this Tribunal containing a wide-ranging commentary on the facts and law involved in this Claim. To the extent that Mexico's submission involves an application of the provisions of the NAFTA to the facts of this Claim, it exceeds the authority of Mexico to participate under NAFTA Article 1128. NAFTA Article 1128 provides only that a NAFTA Party may make submissions to a Tribunal on a question of the interpretation of NAFTA. NAFTA Article 1128 simply does not permit Mexico to delve into the facts of this Claim.

Submitted this 1st day of June, 2000.



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