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

_____

POPE & TALBOT, INC.,

Claimant/Investor,

-and-

THE GOVERNMENT OF CANADA,

Respondent/Party.

FIFTH SUBMISSION OF THE UNITED STATES OF AMERICA

---

1. Pursuant to Article 1128 of the North American Free Trade Agreement (the "NAFTA"), the United States of America makes this submission in order to comment on certain questions of interpretation of the NAFTA in this case. 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 position it offers below apply to the facts of this case.

2. After the United States filed its Fourth Submission on November 1, 2000, the tribunal in the NAFTA Chapter Eleven case of *S.D. Myers, Inc. v. Government of Canada* rendered a partial award in which it addressed, *inter alia*, Articles 1105 and 1102. Though that decision does not constitute binding precedent, *see* NAFTA art. 1136(1) ("[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case"), it deserves comment as one of the few final awards in a Chapter Eleven arbitration.

3. The United States does not take a position here on any aspect of the *S.D. Myers* award's analysis and application of the NAFTA not addressed below. However, the

United States disagrees with the *S.D. Myers* panel majority's treatment of Article 1105(1). The panel majority incorrectly defines the scope of Article 1105(1) and incorrectly links Article 1102 to Article 1105(1).

4. The *S.D. Myers* panel majority's correctly finds that Article 1105(1) incorporates certain rules of customary international law. *S.D. Myers, Inc. v. Government of Canada* (Nov. 12, 2000) (Award) ¶ 262. After noting this essential point, two of the arbitrators inexplicably ignore the logical consequences of this conclusion by suggesting that a violation of standards that do not arise out of customary international law – i.e., the standards of Article1102 – may establish a breach of Article 1105(1). *Id.* ¶¶266-68.

5. As the United States noted in its Fourth Submission, Article 1105(1) requires that Parties accord investment of another Party the international minimum standard of treatment, which is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. *See* United States' Fourth Submission at ¶ 8. National treatment and most-favored-nation treatment, however, are not such customary international law obligations. Rather, these are treaty obligations binding on the NAFTA Parties only by virtue of the Parties' agreement to the NAFTA. Thus, concluding that Article 1102 has been breached does not establish a breach of Article 1105(1). To the extent that the *S.D. Myers* panel majority suggests otherwise, it is incorrect.

6. The sole authority offered by the two arbitrators who formed the majority on this point is a citation to Professor Mann. They quote Mann's statement that:

> "[I]t is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment. . . . so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty."

S.D. Myers Award ¶ 265 (quoting F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 243 (1981)).

7. Reliance on this citation by the panel majority on this point is misplaced. First, Mann's statement is that of an academic arguing for what he thinks should be the appropriate construction of the terms "fair and equitable treatment" in British investment treaties; it does not purport to be a statement of accepted principles of treaty law, still less of principles so universally accepted by States that they have crystallized into rules of customary international law. Second, Mann provide no support for his construction of the terms in British investment treaties. Third, as demonstrated in the United States' Fourth Submission at ¶¶ 6-7, the drafters of Chapter Eleven specifically excluded Mann's

thesis by selecting language in Article 1105(1) that clearly stated fair and equitable treatment to be a subset of customary international law, not an overarching duty that subsumes all other instances of substantive protection.

8. The *S.D. Myers* award itself acknowledges that modern commentators might consider Professor Mann's statement on the fair and equitable treatment to be "an overgeneralisation." *S.D. Myers* Award ¶ 266. The *S.D. Myers* arbitrators who formed the majority on this point should not have relied on authority so at variance with the NAFTA's clear direction that "fair and equitable treatment" be constructed to require compliance only with customary international law obligations. Determining that alleged violations of other NAFTA provisions, whether found within or without Section A of Chapter Eleven, are caught within the ambit of Article 1105(1) would increase the scope of that provision and of Chapter Eleven as a whole far beyond that contemplated by the NAFTA Parties.

9. In short, *S.D. Myers* arbitrator Chiasson was correct in concluding, as recorded in the award, as follows:

> [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 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 in a violation of another provision of Chapter 11.

S.D. Myers Award ¶ 267.

Dated: Washington, D.C.
December 1, 2000

Respectfully submitted,

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Office of the Legal Adviser
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037