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The Honourable Lord Dervaird

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

I write in response to the Presiding Arbitrator's letter dated 23 October 2001. Mexico wishes to make certain submissions prior to the hearing and reserves the right to make additional submissions should the need arise.

1. With respect to the first question posed by the Presiding Arbitrator, Mexico emphasizes that the Free Trade Commission, comprised of cabinet-level representatives of each Party, is an institution established by the NAFTA and given certain powers, duties and responsibilities. These include being the guardian of the operation of the NAFTA and the Treaty's highest and most authoritative interpreter, such that, in accordance with Article 1131, its interpretations form part of the governing law from which no tribunal can derogate.
2. Thus, each NAFTA Party has responsibilities arising in different contexts. Canada is of course the respondent disputing party in this proceeding. It is not the Free Trade Commission and the Free Trade Commission does not respond to Canada alone.
3. The Free Trade Commission speaks as one voice through the most senior trade representatives of the three NAFTA Parties. It represents the collective interests of the three States, not the individual ones of any single Party, much less those of a disputing Party. In acting as the Free Trade Commission, no NAFTA Party can be taken to be acting as judge in his own cause. That rule simply has no application to the acts of the Free Trade Commission.
4. It would not be correct to assume that in exercising a right and a duty in accordance with the positive Treaty law, the Free Trade Commission is not acting impartially or that it is impairing the right of **due process before an impartial tribunal**. Indeed, Article 1131, which is

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not temporally limited, is one of the constituent rules of the dispute settlement mechanism established under Section B of Chapter Eleven, which by the express terms of Article 1115 "assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal".

5. Moreover, when it filed a claim under Section B, the Claimant consented to arbitration in accordance with the procedures set out in the NAFTA, including the Commission's power to interpret its provisions, and a tribunal's obligation to apply such interpretations as governing law.

6. Therefore, not only is it correct, but obligatory, that this Tribunal apply the Free Trade Commission's interpretation, even if it affects an award previously made by the Tribunal.

7. With respect to the second question, as previously stated, this is not a question of retroactive application of the law, but rather one of the correct application of the governing law. The governing law has not changed. The Free Trade Commission has only clarified the proper interpretation of Article 1105. Mexico considers that the Tribunal has no choice but to find that the interpretation stated the law *as it existed at the time of the ruling*, and, therefore, the Tribunal must hold that its earlier ruling is "inconsistent with" or "contrary to" the interpretation of the Commission.

8. As for the question posed at the end of the paragraph, namely, by what standard is customary international law to be ascertained, the sources of international law are set out in Article 38 of the Statute of the International Court of Justice. Article 38 describes customary international law as: "(b) international custom, as evidence of a general practice accepted as law".

9. Over the course of this proceeding, reference has been made to certain "authorities" in support of certain propositions as to the content of customary international law. Customary international law results from the accretion and broadening of State practice until it assumes widespread acceptance. It usually takes many years to accrete and almost always lags behind the development of conventional international law (*i.e.*, treaties). This is not to say that customary law cannot emerge in a relatively short period of time. However, the shorter the period of time in which a customary rule is said to have emerged, the more necessary it is to ensure that there is at least substantial uniformity of State practice.

10. The burden is on the Claimant to establish the existence of the rule of customary international law that it says the respondent has breached. The International Court of Justice ("ICJ") made this clear when discussing customary international law relating to asylum in the *Asylum* Case:

...The party which relies on a custom...must prove that this custom is established in such a manner that it has become binding on the other party...that the rule invoked...is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as

law¹.

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law...¹

11. The ICJ's comments are equally applicable in ascertaining the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

12. To determine the content of customary international law, the ICJ looks to the *opinio juris* of States: that is, whether States by their conduct evidence a willingness to be bound by the rule of law that is being propounded². This requires the survey of many States and many different legal systems. While complete uniformity is not required, substantial uniformity is. Although customary international law can mature quickly on occasion (for example, rules relating to fishing zones³), generally States do not acknowledge the existence of a customary rule of international law in a short period of time.

13. Thus, only settled and well-accepted principles of law fall within this category of international law. By way of example, in the *Eletronica Sicula S.p.A. Case* (the "ELSI Case"⁴) the ICJ applied long-standing principles of customary international law in the context of a dispute arising under a bilateral investment treaty. The strict tests for proving a breach of the minimum standard of treatment formulated in the early part of the last century and applied since then are settled and well-accepted principles of customary law.

14. In particular, Mexico cautions the Tribunal not to rely on the different formulations of the fair and equitable standard in other treaties and, when analyzing other arbitral awards, urges it to examine carefully the applicable law governing those arbitrations. The substantive rights and obligations of investment treaties differ, as does the governing law, and excess of jurisdiction can result from the application to NAFTA disputes of treaty terms that are not contained in the NAFTA.

15. The Honourable Mr. Justice Tysoc of the Supreme Court of British Columbia identified this type of error during judicial review of the *Metalclad* Award. Counsel for *Metalclad* submitted this Tribunal's interim award in support of an argument that the *Metalclad* Tribunal's

1. The *Asylum Case*, I.C.J. (1950) at pp. 276-277.

2. See Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd ed., (Stevens & Sons Limited: London, 1957) at pp. 38-43. Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) at pp. 7-11.

3. *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, I.C.J. Reports [1974], 3 at pp. 23-26.

4. *Case Concerning Eletronica Sicula S.p.A. (ELSI) (United States v. Italy)* [1989] I.C.J. Rep. 15.

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Article 1105 determination fell within the scope of the submission to arbitration. Tysoe J. commented:

[64] After these Reasons for Judgment had been prepared in draft, counsel for Metalclad provided a copy of the arbitral award in *Pope & Talbot*... The *Pope & Talbot* tribunal concluded that “investors under NAFTA are entitled to the international law minimum, *plus* the fairness elements”. The tribunal based its interpretation on the wording of the corresponding provision of the Model Bilateral Investment Treaty of 1987, which has been adopted by numerous countries. The provision states that investment shall be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. The tribunal rejected the submission of the United States (as intervenor) that the language of Article 1105 demonstrated that the NAFTA Parties did not intend to diverge from the customary international law concept of fair and equitable treatment. The tribunal reasoned that the United States relied solely on the language of Article 1105 and did not offer any other evidence that the NAFTA Parties intended to reject the “additive” character of bilateral investment treaties.

[65] With respect, I am unable to agree with the reasoning of the *Pope & Talbot* tribunal. It has interpreted the word “including” in Article 1105 to mean “plus”, which has a virtually opposite meaning. Its interpretation is contrary to Article 31(1) of the Vienna Convention, which requires that terms of treaties be given their ordinary meaning...⁵

16. In accordance with the Free Trade Commission’s Note of Interpretation, the content of Article 1105 must be found in “the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party”.

17. The Statute of the International Court of Justice also makes clear that not all writings of commentators are to be considered authoritative in the search for the content of customary international law. Article 38 of the Statute directs the ICJ to use as a “subsidiary means for the determination of rules of law”, the teachings of the most highly qualified publicists. Therefore, the musings of academic commentators must be analyzed carefully before giving them any weight. Their credentials and experience should be of the highest level in order to be considered authoritative. While not disavowing the resort to writings of qualified publicists, particularly the most authoritative ones, Professor Brownlie has commented:

It is, however, obvious that subjective factors enter into any assessment of juristic opinion, that individual writers reflect national and other prejudices, and further, that some publicists see themselves to be propagating new and better views rather than providing a passive appraisal of law.⁷

5. *United Mexican States v. Metalclad Corporation*, (2001) 89 B.C.L.R. (3d) 359 at 378-379.
6. Free Trade Commission’s 31 July 2001 Interpretative Note at paragraph B.1.
7. Brownlie, *supra* note 9 at pp. 24-25.

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18. When seeking to establish the content of a rule of customary international law, the writings of qualified publicists who provide a passive appraisal of law are to be preferred over those who prescribe what the law should be.

19. With respect to the third question posed by the Tribunal, the role of the words "fair and equitable treatment and full protection and security" in Article 1105 is to provide a thematic illustration of the issues normally considered when international courts and tribunals have examined whether an alien has been accorded the minimum standard of treatment required by international law. In other words, fairness and equity fall within the rubric of the customary international minimum standard to illustrate the basic requirements of minimum treatment.

20. Finally, with respect to the Tribunal's invitation of views as to the applicability of Article 1102 to the verification issue on the basis of the facts found by the Tribunal, it is observed that the Tribunal has already made a determination that Canada did not breach Article 1102. In the Government of Mexico's respectful view, there is no legal or factual basis for the Tribunal to revisit that determination.



Attentively

c.c. Ms. Meg Kinnear, General Counsel, Trade Law Division, Government of Canada.
Mr. Barton Legum, Chief, NAFTA Arbitration Division, U.S. Department of State.
Mr. Barry Appleton.