BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

POPE AND TALBOT, INC.

v.

THE GOVERNMENT OF CANADA,

SUBMISSION OF THE UNITED MEXICAN STATES PURSUANT TO ARTICLE 1128 OF THE NAFTA

I. Introduction

1. Pursuant to Article 1128 of the NAFTA, the United Mexican States wishes to register its views on certain points made in the Government of Canada's Preliminary Motion to Dismiss the Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven.

2. Article 1128 entitles a Party to the NAFTA, on written notice to the disputing parties, to make submissions on a question of interpretation of the NAFTA. On 30 November 1999, Mexico gave notice of intention to make this submission to the disputing parties.

3. In Mexico's view, Canada's motion raises an important question of interpretation of the NAFTA. Mexico takes no position on the factual aspects of this dispute. It concurs, however, with the general interpretation of the NAFTA propounded by the Government of Canada.

II. Mexico's Interest in this Proceeding

4. It is of critical importance to the NAFTA Parties that Chapter Eleven tribunals carefully characterize and distinguish between disputes which properly fall within the scope and coverage of Chapter Eleven and those which do not.

5. The NAFTA Parties have an interest in ensuring that complaints against governmental action that do not fall within the defined class set out in Section A are not characterized as such and advanced at considerable cost to a Party in terms of time and resources. This is of particular concern where claimants' counsel advance novel arguments that seek to test the limits of Section A.

6. Mexico restricts its submission to the distinction between measures relating to trade in goods and measures relating to investment. The fact that it does not make submissions on other matters raised in the Motion should not be taken to mean that Mexico agrees or disagrees with the propositions advanced by Canada.

III. It is a Serious Act to Attempt to Elevate Complaints Against a State to the Level of International Responsibility

7. Section B of Chapter Eleven of the NAFTA confers an extraordinary right on private parties to directly challenge alleged breaches of the obligations set forth in Section A of that chapter, without the need to enlist the diplomatic intervention of their respective governments. Thus, attempts to characterize ordinary complaints against governmental

action to the level of the breach of an international treaty must be examined with great care.

8. In the sole Chapter Eleven Award rendered to date, *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB/(AF)/97/2, a distinguished NAFTA Tribunal observed:

> It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many *Mexican* parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protections from this kind of disappointment, and nothing in its terms so provides[1]. [Emphasis in original]

9. Although made in the context of a discussion which concluded that an alleged breach of a concession agreement by a municipal government could not be elevated to the international level, the Tribunal's reasoning is instructive to other NAFTA Tribunals.

IV. Many Actions of Government Affect an Investment or an Investor but do not Constitute Measures Relating to Investment or Investors

10. A measure of a Party that may have some effect on investors or investments of investors but which does not relate to such persons cannot properly be advanced as a Chapter Eleven claim. Article 1101 uses the more rigorous "relating to" test as opposed to a broad "effects" test; the distinction is a well-established one in international trade regulation. (See paragraphs 30-43 of the Government of Canada's Motion.)

11. Thus, governmental action that affects an investor or investment does not necessarily relate to the investor or investment in the sense of the term as used in Article 1101.

12. The distinction can be illustrated by reference to the plain language of the NAFTA and the subject-matters which it regulates.

13. By its express terms and in its legal structure, the NAFTA distinguishes between measures relating to trade in goods and services and investment. Part Two deals with Trade in Goods and Parts Three and Four deal with related areas of technical standards affecting trade in goods and government procurement of goods (and services). The treaty's investment protection obligations and the private right of action are found in Part Five. (See the Government of Canada's Motion at paragraphs 22-25.)

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1. *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB/(AF)/97/2, at paragraph 83. Messrs. Jan Paulsson (President), Benjamin R. Civiletti and Claus von Wobeser comprised the Tribunal.

14. A measure such as an allocation of quota, which entitles the recipient to import or export goods, is, obviously on its face a measure relating to trade in goods. As recognized by Article XIII of the General Agreement on Trade and Goods 1994 ("GATT 1994"), quotas may be applied by WTO Members to restrict trade. GATT Article XIII imposes certain obligations upon Members in the administration of any quotas that they may maintain. A failure to comply with such obligations could give rise to complaint by another WTO Member, and only by another Member, because the WTO is an international agreement whose rights and obligations accrue only to States.

15. By definition, quotas limit private parties' ability to import or export particular goods and therefore affect them. Governments must make difficult decisions on quota allocation. They are required to balance many competing interests and to make decisions such as what period of time will be considered to be sufficiently representative of the pattern of trade and therefore a reasonable basis on which to determine producers' quota allocations.

16. It is axiomatic in international trade regulation that where trade is restricted, all producers wish to maximize their quota allocations. The demand for allocations is inevitably greater than the supply. Allocation of scarce quota inevitably causes disappointment. So long as a WTO Member adheres to the rules set out in the GATT 1994 and related WTO agreements, there is no basis for complaint at the international level.

17. In Mexico's view, where a private party bases a Chapter Eleven claim on actions relating to the allocation of quota, *prima facie*, the claim falls outside the scope and coverage of Chapter Eleven. If the gravamen of the complaint is that the claimant has not received what it considers to be its "fair share" of quota in comparison to other producers, this must be seen to be a claim against a trade measure masqueraded as an investment claim. It should be rejected without the need to proceed to a hearing.

18. It is not open to a private party to characterize trade measures as relating to investment simply because they have had an adverse effect on it.

19. Trade restrictions necessarily treat different producers differently. As Mexico understands the Canadian scheme, a producer of softwood lumber that exported all of its production to the United States would likely receive a higher allocation of U.S. quota than a producer who exported most of its production to off-shore markets. While the latter might consider an allocation scheme based purely on shipments to the U.S. to be unfair and urge the government to instead base the allocation on total production, the government's decision not to do so is not a measure relating to an investment or investors.

V. Conclusion

20. To read Article 1101 so broadly as to receive claims based on mere effect would negate the Parties' clear intention to confine the extraordinary right of direct action to

measures relating to investors or investments that are alleged to contravene Section A of Chapter Eleven. The allegation that a Party has breached the investment protections of the NAFTA is an extremely serious one, not to be made lightly. It is important that Tribunals such as the instant one carefully scrutinize claims to ensure that complaints about trade measures are not advanced in the guise of an investment claim.

All of Which is Respectfully Submitted:

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the United Mexican States

2 December 1999