

IN THE ARBITRATION PURSUANT TO CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES BETWEEN

POPE & TALBOT, INC.,

Claimant/Investor,

-and-

THE GOVERNMENT OF CANADA,

Respondent/Party.

**FOURTH 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 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 positions it offers below apply to the facts of this case.

Minimum Standard of Treatment

2. Article 1105 (1) requires a NAFTA State Party to accord to “investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Thus, the obligation of Article 1105 (1), by its plain terms, is to provide “treatment *in accordance with international law.*”

3. “[F]air and equitable treatment” and “full protection and security” are provided as examples of the customary international law standards incorporated into Article 1105 (1). The plain language and structure of Article 1105 (1) require those concepts to be applied as and to the extent that they are recognized in customary international law. They are not to be applied in a subjective and undefined sense without reference to international custom.

4. The plain language of Article 1105 (1) is reinforced by the historical context of the words “fair and equitable.” The most direct antecedent to the use of “fair and equitable treatment” in international investment agreements is the OECD Draft Convention on the Protection of Foreign Property (“OECD Draft Convention”), which was first proposed in 1963 and revised in 1967.¹ The commentary to Article 1 of the OECD Draft Convention, which incorporated the standard of “fair and equitable treatment,” noted that: “The phrase ‘fair and equitable treatment’ . . . indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nations. . . . The standard required conforms in effect to the ‘minimum standard’ which forms part of customary international law.”²

5. In addition, in 1984, the OECD’s Committee on International Investment and Multinational Enterprise surveyed the OECD member States on the meaning of the phrase “fair and equitable treatment.” The committee confirmed that the OECD’s members – the world’s principal developed countries - continued to view the phrase as referring to principles of customary international law.³ Thus, from its first use in investment agreements, “fair and equitable treatment” was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United States incorporated “fair and equitable treatment” into its various bilateral investment treaties (“BITs”).⁴

¹ See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, BILATERAL INVESTMENT TREATIES IN THE MID-1990s 54(1998) (“The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the protection of Foreign Property.”).

² OECD, 1967 Draft Convention on the Protection of Foreign Property, *reprinted in* 7 INT’L L. MATERIALS 117, 120 (1968).

³ OECD, COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, INTERGOVERNMENTAL AGREEMENTS RELATING TO INVESTMENT IN DEVELOPING COUNTRIES ¶ 36 at 12 Doc. No 84/14 (May 27, 1984) (“According to all Member countries which have commented on the point, fair and equitable treatment introduced a substantive legal standard referring to general principles of international law even if this is not explicitly stated. . . .”).

⁴ See, e.g., Message from the President of the United States Transmitting Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, Signed at Washington on September

29, 1999, S. Treaty Doc. 105-35 (May 23, 2000) (“Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law.”).

6. In the ensuing years, as international investment treaties incorporating variants of the OECD Draft Convention's formulation of "fair and equitable treatment" became more common, an academic debate emerged concerning the meaning of the phrase as it appears in the those agreements without express reference to customary international law.⁵ The prevalent view was that, in such circumstances, the phrase should be viewed as having its traditional meaning as a reference to the international minimum standard of treatment.⁶ A few scholars contended that the requirement of "fair and equitable" treatment announced a new, undefined conventional standard distinct from customary international standards - a subjective standard that left it to arbitrators to determine in each case whether "in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."⁷

7. Against this backdrop, the drafters of Chapter Eleven excluded any possible conclusion that the parties were diverging from the customary international law concept of fair and equitable treatment. Accordingly, they chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than to some subjective, undefined standard. Article 1105 (1)'s provision for "treatment in accordance with international law, *including* fair and equitable treatment" (emphasis

29, 1999, S. Treaty Doc. 105-35 (May 23, 2000) ("Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law.").

⁵ See RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 59 (1995) ("Some debate has taken place over whether reference to fair and equitable treatment is tantamount to the minimum standard required by international law or whether the principle represents an independent, self-contained concept."); see also UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *BILATERAL INVESTMENT TREATIES IN THE MID-1990s* 53-54 (1998) (noting debate); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, *KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS AND THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES* 12-13 (1990) (same); Mahmoud Salem, *Le développement de la protection conventionnelle des investissements étrangers*, 113 J. DROIT INT'L 579, 607-08 (1986) (same).

⁶ See Swiss Department of Foreign Affairs, *Mémoire*, 36 ANN. SUISSE DE DROIT INT'L 174, 178 (1980) ("On se réfère ainsi au principe classique du droit des gens selon lequel les Etats doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du 'standard minimum' international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques."); see also PAUL E. COMEAUX & N. STEPHAN KIINSELLA, *PROTECTING FOREIGN INVESTMENT UNDER INT'L LAW* 106 (1996) (standard U.S. BIT provision on fair and equitable treatment "relies upon already-existing requirements of international law, which binds each state to 'international minimum standards' of treatment even when there is no BIT in place."); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS & INTERNATIONAL CHAMBER OF COMMERCE, *BILATERAL INVESTMENT TREATIES 1959-1991* at 9 (1992) ("fair and equitable treatment. . . is a general standard of treatment that has been developed under customary international law").

⁷ F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, in *FURTHER STUDIES IN INTERNATIONAL LAW* 234, 238 (1990); see also UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS, *KEY CONCEPTS IN INTERNATIONAL INVESTMENT ARRANGEMENTS AND THEIR RELEVANCE TO NEGOTIATIONS ON INTERNATIONAL TRANSACTIONS IN SERVICES* 12-13 (1990).

supplied) clearly states the primacy of customary international law.⁸ Finally, a further indication that this was the Parties' intent may be found in Canada's Statement on Implementation of the NAFTA, which unequivocally notes that Article 1105(1) "provides for a minimum absolute standard of treatment, *based on long-standing principles of customary international law.*"⁹

8. The international minimum standard is a umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. The relevant principles are part of the customary international law of state responsibility for injuries to aliens.¹⁰ Unlike national treatment, the international minimum standard is an absolute, rather than relative, standard of international law that defines the treatment a State must accord aliens regardless of the treatment the State accords to its own nationals.¹¹

¹² UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *BILATERAL INVESTMENT TREATIES IN THE MID-1990* 53 & n. 58 (1998).

National Treatment

⁸ See DOLZER & STEVENS, *supra* n.5, at 60 ("[I]n the North American Free Trade Agreement (NAFTA), the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law.").

⁹ Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE 68, 149 (1994) (emphasis supplied).

¹⁰ A number of rules traditionally grouped under the heading of state responsibility for injury to aliens address the relationship between States and natural persons of foreign nationality. Such rules are not relevant here.

¹¹ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *BILATERAL INVESTMENT TREATIES IN THE MID-1990* 53 & n. 58 (1998).

9. The United States addressed National Treatment in its First and Second Submissions. It invites the Tribunal to refer to those documents for its views in that subject.

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Respectfully submitted,

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