

IN THE ARBITRATION PURSUANT TO CHAPTER 11 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.

**THIRD 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.
2. Compliance with each of the NAFTA’s procedural requirements for submitting a claim to arbitration is necessary for a Chapter 11 tribunal to have jurisdiction over the claim. A tribunal has no authority under the NAFTA to permit amendment of a pleading to assert a claim over which the tribunal lacks jurisdiction, whether for failure to meet procedural prerequisites or other reasons.
3. It is fundamental in international arbitration that no claim may be amended so as to bring into consideration matters outside the jurisdiction of a tribunal. This is reflected in the UNCITRAL Model Law. *See, e.g., Analytical Commentary, Report of the Secretary General, UNCITRAL, 18th Sess., [1985] 16 UNCITRAL Y.B. 104, 128, at ¶ 5,*

U.N. Doc. A/CN.9/264 (“[T]here is one important point in respect of which the arbitral tribunal has no discretion at all: The amendment or supplement must not exceed the scope of the arbitration agreement. This restriction . . . seems self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement.”);¹ Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 649 (1989) (“One absolute limit on amendments that is not stated in Article 23(2) . . . is that an amendment cannot expand the dispute to matters beyond the scope of the arbitration agreement, which is the source of the arbitral tribunal’s jurisdiction.”).

4. This bedrock principle is also reflected in the rules of each of the arbitration regimes contemplated by NAFTA Article 1120(1). Article 20 of the UNCITRAL Arbitration Rules provides that “a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.” The ICSID Convention states: “Except as the parties otherwise agree, the Tribunal shall . . . determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute *provided that* they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.” ICSID Convention art. 46 (emphasis added); *accord* ICSID Arbitration Rules art. 40(1). In similar fashion, Article 48(1) of the ICSID Arbitration (Additional Facility) Rules states that “a party may present an incidental or additional claim or counter-claim,” again “*provided that* such ancillary claim is within the scope of the arbitration agreement of the parties.” (Emphasis added.)

5. Section B of Chapter 11 provides that “[t]he applicable arbitration rules *shall* govern the arbitration except to the extent modified by this Section.” NAFTA art. 1120(2) (emphasis supplied). Each of the above-mentioned rules, including, most pertinently for this arbitration, Article 20 of the UNCITRAL Arbitration Rules, is clear – a claim properly before an arbitral tribunal may not be amended to include an additional or incidental claim that is outside the scope of the parties’ consent to arbitration. Therefore, determining whether such an amendment is permissible necessarily requires an examination of the arbitration agreement between the parties.

6. In the case of NAFTA Chapter 11, an agreement to arbitrate is formed by the consent given by each State Party “to submission of a claim to arbitration in accordance with the procedures set out in this Agreement” and the investor’s corresponding consent to arbitrate in accordance with those procedures. NAFTA art. 1122(1); *see id.* art. 1121(1)(a); *id.* art. 1121(2)(a). As Article 1122(2) makes clear, the exchange of consents contemplated by the Chapter constitutes a valid agreement to arbitrate under each of the

¹ The United States notes that the Canadian federal Commercial Arbitration Act, which is based on the UNCITRAL Model Law, expressly recognizes the authoritative nature of the Secretariat’s analytic commentary. Commercial Arbitration Act, R.S.C., ch. 34.6, art. 4(2)(b) (1985) (Can.).

ICSID, New York and Inter-American Conventions (as those terms are defined in Chapter 11).

7. The *content* of the agreement to arbitrate under Chapter 11 clearly includes the procedural prerequisites for submitting a claim to arbitration. *See* NAFTA art. 1122(1) (stating consent to arbitrate “in accordance with the procedures set out in this Agreement”). The procedural requirements in question are principally set forth in Section B of Chapter 11, which “establishes a mechanism for the settlement of investment disputes.” NAFTA art. 1115. (Other procedures applicable to Chapter 11 claims are found elsewhere in the NAFTA. *See, e.g.,* NAFTA art. 2103(6)). No Chapter 11 claim may be submitted unless the prerequisites for submitting a claim to arbitration specified in the NAFTA have been satisfied. *See Waste Management, Inc. v. United Mexican States*, ARB(AF)/98/2 ¶¶ 16-17 (June 2, 2000) (Award) <<http://www.worldbank.org/icsid/cases/awards.htm>> (tribunals must ensure prerequisites of Chapter 11 are fulfilled because Parties consented to arbitration only in accordance with the procedures set forth in Section B of Chapter 11). The Parties did not consent in advance, through the NAFTA, to the automatic supplementation of the scope of arbitrations unless the procedural prerequisites of Chapter 11 are satisfied for any new claims. In any Chapter 11 arbitration, the respondent Party’s positions with respect to selection of an arbitral panel, place of arbitration, and procedures for the arbitration are premised on the scope of the arbitration being as originally presented to it by the investor. The supplementation of an arbitration through new claims, after a tribunal is empaneled and the arbitral procedures are agreed upon by all disputants, could well prejudice the respondent Party.

8. Thus, under fundamental principles recognized by each of the arbitration regimes contemplated by the NAFTA, a Chapter 11 tribunal confronted with a new claim may not permit amendment unless that claim is properly within the tribunal's jurisdiction in all respects.

Dated: Washington, D.C.
July 24, 2000

Respectfully submitted,

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