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UNDER THE UNCITRAL ARBITRATION RULES AND THE NORTH AMERICAN FREE TRADE AGREEMENT

MEMORIAL OF THE INVESTOR
INITIAL PHASE

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

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MEMORIAL OF THE INVESTOR
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TABLE OF CONTENTS

INVESTOR'S MEMORIAL
INITIAL PHASE

GENERAL INTRODUCTION

1. This Claim arises out of the failure of the Government of Canada ("Canada") to act in a manner consistent with its international obligations arising out of the NAFTA as it implemented the *Softwood Lumber Agreement* through its Export Control Regime. This Claim does not challenge the *Softwood Lumber Agreement* itself, but it does challenge the arbitrary and discriminatory treatment of Pope & Talbot, Inc. ("Pope & Talbot" or the "Investor") and Pope & Talbot Ltd. (the "Investment") by Canada through its implementation of *Softwood Lumber Agreement.*

2. The arguments of the Investor are contained in this Memorial. Within this Memorial, the Investor will establish its case as well as clarify issues raised by Canada in its Statement of Defence.

3. In summary, the Investor states that Canada failed to act in a manner consistent with four of its obligations contained within NAFTA Chapter 11, namely:

   (a) Canada imposed the Export Control Regime which failed to provide "treatment no less favourable" than that provided to similar businesses in Canada. Canada has failed to provide the best treatment in Canada to the Investor and the Investment with regard to:

      (i) The best treatment provided in those provinces not covered by Canada's Export Control Regime (the "Non-listed Provinces") which export softwood lumber quota-free; or

      (ii) The best treatment provided in those provinces which are subject to Canada's Export Control Regime (the "Listed Provinces") in which either softwood lumber manufacturers may export quota-free or where many softwood lumber manufacturers pay the highest level of quota fee at a rate of US $104.18 per thousand board feet rather than at the rate of US$146.25 per thousand board feet charged to the Investment.

(b) Canada's imposition of the Export Control Regime has resulted in a preference for Canadian softwood lumber producers operating in Non-listed Provinces. Canada imposed two *de facto* performance requirements which are prohibited under the NAFTA. As a result of these performance requirements, production in Non-listed Provinces has jumped to record levels, and investments have been forced to make economically inefficient decisions, further harming the position of the Investor and its Investment.

(c) Canada's Export Control Regime has unreasonably interfered with the ongoing business operations of the Investor's Investment in Canada and deprived the Investment of its ordinary ability to sell its product to its traditional and natural markets. Canada imposed a measure that had the immediate impact of depriving the Investor of the effective use of part of the principal function of its Investment: the sale of softwood lumber to the United States of America ("US"). Canada has implemented the *Softwood Lumber Agreement* in a manner that is inconsistent with its NAFTA obligation in NAFTA Article 1110(1)(c) as the Export Control Regime violates Canada's obligations under Article 11 of the WTO Agreement on Safeguards. Canada's failure to compensate the Investment or the Investor for this harm in the manner set out in NAFTA Article 1110(1)(d) is also inconsistent with Canada's NAFTA obligations.

4. Canada has argued that the terms in NAFTA Chapters 3 and 11 are inconsistent and that Chapter 3 must overrule the NAFTA's Investment Chapter provisions. This argument is incorrect as the provisions within these two NAFTA Chapters are not inconsistent with each other. Furthermore, there is no incompatibility between the NAFTA and the *Softwood Lumber Agreement*. Thus there is no need to determine whether the *Softwood Lumber Agreement* amends the terms of the NAFTA.

5. Finally, Canada has argued that both the Investor and the Investment are somehow estopped from bringing this Claim under equitable principles of international law. The Investor submits that Canada is clearly mistaken on the facts which support this conclusion as well as being incorrect in law. The Investor and the Investment have not engaged in any conduct or representations which could form the basis of the estoppel defence advanced by Canada.

Procedural History of the Dispute

6. On December 24, 1998 Pope & Talbot, Inc., the Investor in this Claim, served upon Canada, a Notice of Intent to Submit a Claim to Arbitration in accordance with Article 1119 of the NAFTA.

7. On March 25, 1999, the Investor submitted its Notice of Arbitration and Statement of Claim.[1]

8. The Tribunal was finally constituted on August 19, 1999, by the appointing authority, the Secretary General of the ICSID.

9. By order of the Tribunal, Canada submitted its Statement of Defence on October 8, 1999.

10. By letter to the Tribunal on November 18, 1999 and pursuant to Procedural Order No. 2, the Investor amended its Claim by withdrawing its allegations regarding Canada's failure to act consistently with its NAFTA Article 1103 Most-Favored Nation Treatment obligation.

11. On November 11, 1999, Canada brought a Preliminary Motion to this Tribunal on matters dealing with the ability of this Tribunal to hear this Claim which would have had a dispositive effect on the outcome of this arbitration. On January 26, 2000, the Tribunal issued an award rejecting Canada's arguments in this Preliminary Motion.[2]

12. In accordance with Procedural Order No. 7, the Investor and the Investment submit this Memorial on January 28, 2000 relating to NAFTA Articles 1102, 1106 and 1110 only. By written direction of this Tribunal, the Investor was instructed to deal with the issue of estoppel set out in Section II of Canada's Statement of Defence, but nothing else raised in that section.

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[1] A copy of which is included as Schedule 5 to this Memorial.

[2] Schedule 29.

PART ONE: THE FACTS

Who is Pope & Talbot?

1. Pope & Talbot, Inc. (the "Investor") commenced its lumber business in the US in 1849 and has been operating in Canada since 1969. Pope & Talbot Ltd., its wholly-owned Canadian subsidiary, is a primary producer that almost entirely manufactures commodity-grade softwood lumber for the North American softwood lumber market.[3]

2. The Investment owns three softwood lumber mills in the southern interior of British Columbia located at Castlegar, Grand Forks and Midway, as well as a pulp mill located in Nanaimo. The Nanaimo mill formed part of the assets of Harmac Pacific Inc., a Canadian publicly- traded pulp company that was amalgamated with Pope & Talbot Ltd. on December 31, 1999.[4]

3. The Investment primarily obtains the timber used to manufacture softwood lumber from two sources:

   (a) Forest licences and other rights granted by the Province of British Columbia; and
   (b) Third parties using their own rights to cut timber.[5]

4. Generally speaking, a significant factor in determining the net sales price which a softwood lumber producer receives for its products is the proximity of the mill to the market. Because of the proximity of the Investment's mills, in the southern British Columbia interior, to rail and highways accessing primarily US markets, the majority of the Investment's lumber sales have historically been to the US market. Shipping to non-US markets is normally at a distinct freight disadvantage in comparison.[6]

5. In 1994, the Investment had total sales of softwood lumber of approximately [redacted] board feet ("MMBF"). This included an estimated [redacted] in sales to the US. In 1995, the Investment had total sales of softwood lumber of approximately [redacted]

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3 Statement of Kyle Gray at para.'s 1 and 2, Schedule 1.

4 Statement of Kyle Gray at para. 2, Schedule 1.

5 Statement of Kyle Gray at para. 3, Schedule 1.

6 Statement of Kyle Gray at para. 4, Schedule 1.

This included an estimated [redacted] in sales to the US. Over 90% of the total sales of the Investment are exported to customers in the US.[7]

6. The Investment's annual average total sales of softwood lumber have decreased from an average of [redacted] between 1993 and 1995 to [redacted] for the 1996 to 1999 period.[8] By year 4 of the implementation of the Export Control Regime, the Investment's fee-free export of softwood lumber to the US has decreased to [redacted].[9]

What is the Nature of the Softwood Lumber Industry?

7. Softwood lumber is a standardized product that represents one of the primary materials used in the North American construction industry. New residential housing accounts for approximately 40% of softwood lumber consumption while repair and remodelling accounts for slightly over 30% of overall consumption. The remaining consumption is accounted for through nonresidential construction and materials handling.[10]

8. The North American softwood lumber market is a commodity market. There is virtually no market differentiation for standard commodity softwood lumber based on where the product is harvested or where it is manufactured.[11] In Canada, all softwood lumber producers, regardless of region, sell their products based on the same universal grading system.[12]

9. The North American softwood lumber industry is a stable and mature industry with an established base of customers, markets and products. Purchasers in the North American market generally expect and receive a standard commodity product. Since the market for

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7 Statement of Kyle Gray at para. 6, Schedule 1.

8 Statement of Kyle Gray at para. 5, 7, Schedule 1.

9 Statement of Kyle Gray at para. 8, Schedule 1.

10 Statement of Craig Campbell, Schedule 2.

11 Statement of Craig Campbell, Schedule 2.

12 National Lumber Grades Authority, *Standard Grading Rules for Canadian Lumber* (N.L.G.A., Vancouver B.C.: 1990), an excerpt is included as Schedule 7 to this Memorial. Also see Statement of Allan Kenneth Rozek at para. 3, Schedule 3; statement of Craig Campbell, Schedule 2. The definition of "softwood lumber" is set out in Appendix 1: Questionnaire Preamble, *Notice to Exporters No. 92*, a copy of which is included as Schedule 8 to this Memorial. The specific listing of the tariff items covered in this definition are provided in the *Handbook of Export and Import Commodity Codes - 1998*, see: www.dfait-maeci.gc.ca/~eicb/general/Bluebook/Handbook-e.htm, also included as Schedule 9 to this Memorial.

softwood lumber is a commodity market, there is no premium for the actual product from a specific company or region. Price is the main criteria for purchases of standard graded softwood lumber products.[13]

10. Canadian participation in the North American market for softwood lumber is significant. Over the past 10 years, Canada has exported between 53% and 68% of its lumber production to the US.[14]

11. In 1998, US softwood lumber consumption reached a record high of over 52 billion board feet (BBF) with over 18 billion board feet being imported from Canada. This represented approximately a 35% share of the US softwood lumber market for imports from Canada.[15]

12. Despite record US consumption, British Columbia's softwood lumber production has declined over the past three years from a pre-*Softwood Lumber Agreement* high in 1995 of 13.8 BBF to 12.8 BBF in 1998.[16] British Columbia has been the "only major producing region in North America to experience a decline in softwood lumber production between 1996 and 1997".[17]

13. A commentator on the softwood lumber industry has further noted that:

> *While a few sawmill closures and curtailments have taken place in the United States over the past year, (statistics) show that the British Columbia industry was the clear loser. Between calendar year 1996 and October 1998 BC softwood lumber production plummeted by 1.139 billion board feet ... the BC interior still lost close to 400 million board feet, in spite of the fact that 80-90% of regional output is shipped to the United States.*[18]

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13 Statement of Craig Campbell, Schedule 2.

14 Statement of Craig Campbell, Schedule 2.

15 Statement of Craig Campbell, Schedule 2.

16 Statement of Craig Campbell, Schedule 2.

17 Statement of Craig Campbell, Schedule 2. Doug Smyth, *The Impact of US and Canadian Softwood Lumber Production, Consumption and Shipments to Japan on Prices, 1996 To 1998 - Part 2*, I.W.A. Canada, January 1999 (hereafter referred to as the "I.W.A. Report") at 5, Schedule 11.

18 I.W.A. Report at 25, Schedule 11.

14. Dramatic declines in production of softwood lumber in the coastal region of British Columbia can be attributed in large part to the collapse of the Japanese market.[19] However, this collapse cannot explain declines in consumption of softwood lumber from the southern interior region of British Columbia. The primary market for these producers is the north-western and mid-western US. Given the geography of British Columbia, softwood lumber produced in the southern interior of the province is seldom shipped to Japan or more distant regions in the US or Canada because it would not be price-competitive.[20]

15. Since Canada imposed the Export Control Regime, producers in the Province of British Columbia have experienced a declining share of the US softwood lumber market even though Canada's overall share has remained in the 33-36% range. In the calendar year prior to Canada implementing these measures (1995) softwood lumber produced in British Columbia accounted for 19.78% of total US consumption of softwood lumber. By the end of 1998, the British Columbia share had declined to 16.71%. The share for Non-listed Provinces over the same period has increased from 3 to 4%.[21]

Softwood Lumber Agreement

16. The export of Canadian softwood lumber to the US has been an important and highly contentious issue in the Canada-US trading relationship. Disputes between these countries over softwood lumber exports have been ongoing for 20 years. The most recent bilateral attempt to address this issue was the *United States - Canada Softwood Lumber Agreement*,[22] signed on May 29, 1996. This five-year Agreement, retroactive to April 1, 1996, established a limit on the fee-free export of softwood lumber by Canadian producers into the US.

17. Under the *Softwood Lumber Agreement*, the US committed to suspending the use of its domestic trade remedy laws against softwood lumber imports from Canada. In turn, Canada committed under the Agreement to monitor and restrain exports of softwood lumber to the US from its four largest provinces (Quebec, Ontario, Alberta and British Columbia - "the Listed Provinces"). The Agreement accorded to both parties the exclusive responsibility for implementing their respective obligations. The Agreement

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19 Statement of Craig Campbell, Schedule 2.

20 Statement of Craig Campbell, Schedule 2.

21 Statement of Craig Campbell, Schedule 2.

22 A copy of which is included as Schedule 12 to this Memorial.

was silent as to the impact of its terms including their chosen means of implementation, and the obligations owed by the Parties under the NAFTA.

18. Under the Agreement, Canada agreed to restrain exports of softwood lumber in the following manner:

(a) 14,700,000,000 board feet of softwood lumber products from the Listed Provinces per year could be exported to the US without payment of a permit fee (the "established base" or "EB");

(b) 650,000,000 board feet per year could be exported with payment of a US$50 per thousand board feet permit fee (the "lower fee base" or "LFB"); and

(c) all other exports would be subject to a fee of US$100 per thousand board feet (the "upper fee base" or "UFB").[23]

19. The *Softwood Lumber Agreement* also contains a trigger price mechanism, which could result in an additional 92 million board feet of "fee-free" quota being made available after every quarter in which the price of selected softwood lumber benchmark products reaches a predetermined market value.[24]

20. The Investor and the Investment are not parties to the *Softwood Lumber Agreement* nor did they participate as negotiators on behalf of the softwood lumber industry. The Investor's only direct involvement with the *Softwood Lumber Agreement* was its consent to waive its right to use domestic trade remedy legislation against imported Canadian lumber in the US.[25]

Canada's Implementation of the *Softwood Lumber Agreement*

21. Canada took its first steps toward implementing the *Softwood Lumber Agreement* before it was even signed. On March 26, 1996, following an exchange of diplomatic letters on March 19, 1996, Canada added softwood lumber products to the *Export Control List*.[26] This action required exporters of softwood lumber products originating from five

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[23] Under Article II(3), these fees are adjusted annually for inflation.

[24] Article III(1).

[25] A copy of this waiver is included as Schedule 13 to this Memorial. This issue is discussed at length in Part Five of this Memorial.

[26] SOR/96-175, a copy of which is included as Schedule 14 to this Memorial.

provinces (Quebec, Ontario, Manitoba, Alberta and British Columbia) to obtain an export permit in order to qualify to export such products to the US.

22. After the *Softwood Lumber Agreement* was signed, Canada devised an Export Control Regime to implement its obligations under the *Softwood Lumber Agreement*. The Export Control Regime requires that producers of softwood lumber from four provinces (Quebec, Ontario, Alberta and British Columbia) obtain an export permit and pay fees before exporting their softwood lumber products to the US. Although affected by the initial *Export Control List* amendment, Manitoba softwood lumber producers were excluded from the operation of this new regime.

23. The Export Control Regime was established through introduction of the following measures:

(a) Amendment of the *Export Control List*[27] to require exporters of softwood lumber products originating from the provinces of Quebec, Ontario, Alberta and British Columbia to obtain an export permit to export such products to the US;

(b) Promulgation of the *Export Permits Regulations (Softwood Lumber Products)*[28] to provide for a permit application regime for softwood lumber exporters;

(c) Promulgation of the *Softwood Lumber Products Export Permits Fees Regulations*[29] to require the payment of fees for the issuance of export permits for softwood lumber products; and

(d) Development of a discretionary allocation policy authorizing the Canadian Minister of Foreign Affairs and International Trade (the "Minister") to exempt certain producers from paying the full fee for export permits, based upon the annual quota levels fixed under the *Softwood Lumber Agreement*.[30]

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27 SOR/96-315, a copy of which is included as Schedule 15 to this Memorial.

28 SOR/96-319, as amended by SOR/96-480, enacted under para.'s 12(a) and (b) of the *Export and Import Permits Act*, R.S.C. 1985, c. E-19, as amended by S.C. 1994, c. 47, s. 112(1), copies of which are included as Schedule 16 to this Memorial.

29 SOR/96-317, as amended by SOR/96-481, enacted under paragraphs 19(1)(a) and 19.1(a) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, copies of these provisions are included as Schedule 17 to this Memorial.

30 As per Article II (2) of the *Softwood Lumber Agreement*.

24. On October 31, 1996, the Minister issued *Notice to Exporters No. 94*,[31] which outlined Canada's policy regarding who would qualify for a limited exemption from paying fees to obtain the mandatory export permits. *Notice No. 94* stated that only certain softwood lumber producers in the Listed Provinces would qualify for allocation of the annual quota levels fixed under the *Softwood Lumber Agreement* and that export permits would only be issued at the discretion of the Minister. Prior to imposition of this policy, fee-free quota was being allocated on a first-come, first-served basis.

25. In addition to *Notice No. 94*, a number of other notices[32] have been issued by Canada. As with *Notice No. 94*, these notices govern how the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of the businesses of lumber producers are affected by Canada's allocation of quota, including:

(a) How Canada treats the acquisition or expansion of a softwood lumber producer's business with respect to quota allocation;

(b) How Canada treats the transfer of quota already allocated based on a "business as usual approach"; and

(c) How work stoppages and other uncontrollable events impacting on a producer's business or investment affect Canada's decisions regarding allocation of quota.

26. The current fee that must be paid by all producers of softwood lumber from the Listed Provinces to export to the US is US$104.18 per thousand board feet. However, should the Minister determine that a producer qualifies under Canada's quota allocation policy, the producer is permitted to export a limited amount of softwood lumber to the US "fee-free" (i.e. without the US$104.18 permit charge) and to export a lesser amount of softwood lumber at the LFB rate, which is currently US$52.09 per thousand board feet.[33]

27. Softwood lumber producers located in the Non-listed Provinces and Territories (i.e. Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, Nova Scotia , Newfoundland, and the Yukon and the Northwest Territories) do not require permits to export to the US. In addition, section 5(a) of the *Softwood Lumber Products Export*

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31 A copy of which is included as Schedule 18 to this Memorial.

32 Copies of which are included as Schedule 19 to this Memorial.

33 *Notice to Exporters No. 116* included as Schedule 20 to this Memorial. Also see: www.dfait-maeci.gc.ca/~eicb/notices/ser116-e.htm.

Permit Fees Regulations[34] provides softwood lumber manufacturers in Listed Provinces that produce less than 10 million board feet of softwood lumber to be exempt from paying LFB and UFB fees under Canada's Export Control Regime. Accordingly, these producers do not have to pay any export permit fees.

28. The Investment has fully utilized and exported its EB and LFB quota allocations since its initial allocation and has extensively exported softwood lumber at the UFB rate. The Investment has paid permit fees to be allowed to export this softwood lumber, which is in addition to the fee-free EB quota allocation.[35]

The Development of Canada's Quota Allocation Policy

29. On June 19, 1996, Canada issued *Notice to Exporters No. 92*, containing a questionnaire concerning the historic export performance of softwood lumber producers, secondary manufacturers and wholesalers in the Listed Provinces (between 1994 and the first quarter of 1996). The Investor and Investment submitted a completed questionnaire on July 19, 1996.[36]

30. A coalition of industry associations from British Columbia, Alberta and Quebec sent a joint submission to the Minister on June 19, 1996, concerning the issue of a quota allocation method. The Investor was not directly involved in its drafting. Among the eight points of agreement contained within this submission were that quota must be allocated by province, and that allocations must be made for the complete term of the implementation of the *Softwood Lumber Agreement* (i.e. for five years).[37]

31. On August 9, 1996, the Quebec Association of Softwood Lumber Manufacturers provided the Minister with a separate submission that argued for a single quota allocation scheme, rather than one based on provincial allocations related to historic export levels. It also argued for a 4% reserve of the EB quota to be set aside for "new entrants", rather than producers with established markets and existing capacity, such as the Investor.

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[34] Regulation SOR/96/317, June 21, 1996, a copy of which is included as Schedule 17 to this Memorial.

[35] Statement of Kyle Gray at para. 11, Schedule 1.

[36] A copy of which is included as Schedule 6 to this Memorial.

[37] Affidavit of Claudio Valle, Director of Trade Controls Policy Division, Export and Import Control Bureau, Department of Foreign Affairs and International Trade, dated January 15, 1997 at 8-9. A copy of which is included as Schedule 22 to this Memorial.

32. Canada unveiled the basic framework of its quota allocation policy on October 31, 1996, with *Notice to Exporters No. 94*. Under the policy, allocation was purportedly to be made on a provincial basis. The provincial share of available EB and LFB quota was calculated by:

(a) determining the total exports to the US from each Listed Province for 1995;

(b) adding the total for all four Listed Provinces combined; and

(c) dividing the total exports for each Listed Province by the total.

33. Using this formula, British Columbia producers should have received 59% of the available EB and LFB quota. However, the initial amounts of available EB and LFB quota were reduced by the Minister through the creation of a number of reserves:

(a) 294 million board feet for the Minister to allocate to "new entrants";

(b) 170 million board feet for the Minister to award as one-time, transitional adjustments; and

(c) 50 million board feet for the Minister's reserve.

34. Initial allocation of the 650 million board feet of LFB quota was subject to the following reserves that were at the discretion of the Minister:

(a) 110 million board feet to allocate to "new entrants"; and

(b) 50 million board feet to award as one-time, transitional adjustments.

35. Accordingly, British Columbia did not receive its historic 59% share of 14.7 billion board feet of EB, or 59% of 650 million board feet of LFB quota, and as such, softwood lumber producers in British Columbia did not receive their full historic share of the overall EB and LFB quotas. Instead, they received their pro-rata share of British Columbia's portion, after the reserves were deducted.

36. The Minister failed to clarify the criteria used for allocation of the transitional or discretionary reserves. The specific criteria for allocation of the new entrants reserve was not revealed either. As stated in paragraph 106 of the Statement of Defence, Canada has only indicated that applications for new entrants, quota were "subjected to rigorous review according to national criteria". What is clear, however, is that the allocation of these reserves was not made on a provincial basis. British Columbia producers could not have received their historic share of any of these reserves (i.e. a cumulative share equal to

59% of the available reserve). It is the only explanation for the significant overall drop in British Columbia allocations.

37. Canada has also failed to allocate bonus amounts of EB quota (derived either from extra "fee-free" quota awarded under the trigger price mechanism or from a redistribution of unused quota from other companies) on a provincial basis. From 1996 to 2000, Quebec received 268 MMBF in bonus quota compared to 198.5 MMBF for British Columbia.[38] Quebec's share over the entire period represents 45% of the overall bonus allocation, while British Columbia's bonus allocation represents only 33%.[39] British Columbia producers were entitled to 59% of the bonus quota based on their historic share but only received 33%.

38. In determining EB and LFB quota allocations for the second and third years of the operation of the Export Control Regime, the Minister also departed from a formula that would guarantee British Columbia producers an allocation reflecting their historic export performance. The departure took place because the Minister included utilisation of reserve allocations in the calculation of each producer's export performance for the coming year.

39. The Minister used the preceding year of exports for each producer as the basis for his allocation in the following year.[40] For example, a producer's 1996/97 export totals would be used to calculate that producer's *pro rata* share of the total 1997/98 allocations. Under the Minister's formula, not only were reserve allocation recipients given the benefit of extra EB and LFB quota over the first 18 months of the Export Control Regime, they could also claim to have exported more than those who were given no extra EB or LFB quota. Accordingly, these recipients were given an even greater share of the EB and LFB quota for the following years than they were entitled to. The effect of the Minister's inclusion of reserve allocations in calculation of entitlement for future years was to redistribute EB and LFB quota among the Listed Provinces in a discriminatory and inequitable manner.

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38 Canada, Export and Import Control Bureau, Quarterly Statistical Monitor. See copies of statistical materials as Schedule 23 to this Memorial.

39 This is based on a total bonus allocation of 593.7 MMBF for years one to four (as of January 19, 2000).

40 Canada admits at para. 109 of the Statement of Claim that after year one, quota allocations were based on company quota utilization from the previous year.

The Impact of Canada's Export Control Regime

40. As a result of the inequitable allocation of reserve and bonus quota, compounded by the formula for allocations in years two and three of the Export Control Regime, British Columbia's share of fee-free softwood lumber exports fell from 59% prior to Canada's imposition of the Export Control Regime to 57% by January 2000. This decline is depicted in Table 4.[41]

41. As indicated in Table 2, the Investment, [redacted] has suffered a loss o[redacted]n allocated EB quota over the first four years of the Export Control Regime.[42]

42. This decrease o[redacted]is significantly worse than the 3.3% decrease of other companies in the Listed Provinces that Canada admits in its Statement of Defence.[43] British Columbia producers, such as the Investment, lost quota over the first three years of the Export Control Regime due to Canada's failure to allocate quota reserves on a provincial basis. Reports from other industry members in the Investment's region indicate that they too have been harmed far worse than what Canada has claimed.[44]

43. As indicated in Table 3, softwood lumber exports to the US from producers in Non-listed Provinces have increased by 130%, from under 1 BBF in 1994 to 2.3 BBF in 1998.[45]

44. During the same period in which British Columbia producers, and in particular the Investment, experienced significant erosion of their allocation of EB quota, softwood lumber producers in Non-listed Provinces have been dramatically increasing their fee-free exports to the US.

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41 Canada, Export and Import Control Bureau, Quarterly Statistical Monitor. See copies of statistical materials as Schedule 23 to this Memorial. Also, see Statement of Craig Campbell, Schedule 2.

42 Statement of Kyle Gray at para. 10, Schedule 1.

43 At paragraph 116.

44 See letter of the Interior Lumber Manufacturers' Association, June 16, 1998 indicating in a survey of interior companies that the surveyed companies on average experienced a 4.4% reduction in their fee-free allocations during the operation of the Regime's first two years. A copy of this letter is included as Schedule 24 to this Memorial.

45 Statement of Craig Campbell, Schedule 2.

45. In contrast to the Investment and other producers in British Columbia, producers in Quebec, who were attributed with only 23.0% of the historic share of the total exports, were responsible for exporting 25% of fee-free quota lumber to the US by the fourth quarter of year four (i.e. by January 19, 2000).[46] As demonstrated in Table 5, this represents an increase of approximately 10% of the allocation of EB quota to Quebec.

CHRONOLOGY OF EVENTS

Date	Event
December 30, 1986	Canada - US Memorandum of Understanding on softwood lumber signed
April, 1994	Canada and US become parties to WTO Agreement on Safeguards
May 29, 1996	Canada and the US sign the *Softwood Lumber Agreement* (it applies retroactively as of April 1, 1996)
June 19, 1996	Canada issues *Notice to Exporters No. 92*
June 21, 1996	Canada promulgates the *Export Permits Regulations (Softwood Lumber Products)*
July 19, 1996	Pope & Talbot files its softwood lumber questionnaire.
September 10, 1996	Minister announces Softwood Lumber Plan
September 30, 1996	Deadline for Canada to allocate EB and LFB quotas, set out in *Softwood Lumber Agreement*
October 31, 1996	Minister issues *Notice to Exporters No. 94*
November 1996	Canada allocates EB and LFB quotas
June 3, 1998	Pope & Talbot writes to Canada to complain about the fairness of its quota allocation under the Export Control Regime.
August 30, 1999	Canada establishes new "extra fee level" solely for British Columbia softwood companies

[46] Canada, Export and Import Control Bureau, Quarterly Statistical Monitor. See copies of statistical materials as Schedule 23 to this Memorial.

PART TWO: NATIONAL TREATMENT

I. THE INTERNATIONAL LAW OF NATIONAL TREATMENT

A. THE NAFTA AND NATIONAL TREATMENT

46. Canada's Export Control Regime restricts exports of softwood lumber to the US from Listed Provinces, while permitting the unfettered export of softwood lumber from investments located in Non-listed Provinces. The Export Control Regime violates Canada's national treatment obligation under NAFTA Article 1102 because it constitutes a policy that prefers some investors and their investments over others, including those of investors from NAFTA Parties.

47. NAFTA Article 1102 states:

> *1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*

48. NAFTA Article 102(1) states that national treatment is one of three interpretive principles of the entire Agreement. The concept of "national treatment" is a "term of the trade." It is used in several parts of the NAFTA without any further definition.[47] In order to understand the meaning of "national treatment" it is necessary to examine international jurisprudence interpreting the term.

B. THE WORLD TRADE ORGANIZATION ("WTO") AND NATIONAL TREATMENT

49. The meaning of the term "national treatment" has been canvassed by a number of WTO panels. The general meaning of the term "national treatment" is based on its generally ascribed meaning derived from WTO reports with appropriate changes depending on its context in the NAFTA.

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[47] For example, there are national treatment obligations for goods (Article 301), for energy (Article 602), for services (Article 1202) and for financial services (Article 1405). In addition, national treatment is a general "principle" of the NAFTA through which all its provisions should be interpreted (Article 102(2)).

50. In the Canadian *Statement of Implementation*, Canada acknowledged the relationship between the GATT/WTO and the NAFTA, by stating:

> *The NAFTA and the Uruguay Round agreements cover much of the same ground and the two sets of rules are largely complementary and mutually reinforcing. In many respects, the NAFTA built on progress that had been made in the Uruguay Round while the Round in turn profited from the experience of Canada, the United States and Mexico in negotiating the NAFTA.*[48]

51. The concept of national treatment is contained in the GATT. For example, the national treatment obligation in Article III:4 reads:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*

52. The national treatment obligation is also contained within Article XVII of the GATS:

> *... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own like services and service suppliers...*
>
> *... Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.*[49]

53. GATT obligations only apply to measures affecting trade in goods, whereas GATS obligations apply to measures affecting trade in services. The NAFTA's Article 1102 national treatment obligation deals with measures relating to investors and their investments. The basic obligation under each Agreement is similar, and therefore the interpretation given to the national treatment provision under the GATT or GATS should be applicable *mutadis mutandis* to the NAFTA Investment Chapter's national treatment provision. The national treatment obligation ensures all companies, whether domestic or foreign, are treated equally and without discrimination.

54. The interpretation of "national treatment" within the goods and services context is instructive. However, within the investment context, the national treatment obligation is even wider in scope. For example, the United Nations Conference on Trade and Development has stated:

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[48] *Canadian Statement of Implementation ,Canada Gazette Part I,* January 1, 1994, 68 at 75.

[49] Article XVII of the GATS.

> *The scope of national treatment in the investment field goes well beyond its use in trade agreements. In particular, the reference to "products" in article III of the GATT is inadequate for investment agreements in that it restricts national treatment to trade in goods. The activities of foreign investors in their host countries encompass a wide array of operations, including international trade in products, trade in components, know-how and technology, local production and distribution, the raising of finance capital and the provision of services, not to mention the range of transactions involved in the creation and administration of a business enterprise. **Hence, wider categories of economic transactions may be subjected to national treatment disciplines under investment agreements than under trade agreements.**[50]* (emphasis added.)

55. Cases decided under the WTO have determined that national treatment is not provided when a government provides differential treatment to like products. The panel report on *Section 337 of the Tariff Act of 1930*[51] made clear that the "no less favourable treatment" standard is far more broad than merely requiring Parties to ensure that their measures apply equally to domestic foreign goods:

> *[The] "no less favourable" treatment requirement set out in Article III:4 is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use or products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable ... In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment.*

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50 United Nations Conference on Trade and Development, *National Treatment* (New York: United Nations, 1999) at 9.

51 *United States - Section 337 of the Tariff Act of 1930*, 36 B.I.S.D. (1989) at 345.

C. *TREATMENT NO LESS FAVOURABLE*

56. To grant an investment treatment no less favourable under NAFTA Article 1102 means the foreign investment must be allowed to operate in the country as other similar domestic investments operate in that country. An investor from another NAFTA Party and its investments are entitled to the best treatment provided to a domestic investor and its investments in like circumstances. Any government measure that has a disproportionate or discriminatory effect on foreign investors and their investments, relative to similar domestic investors and their investments, constitutes a violation of this NAFTA obligation.

57. Canada has violated its obligations under Article 1102(1) of the NAFTA by permitting exports of softwood lumber from Non-listed Provinces to be exempt from the quota. Canada has not provided the Investment or the Investor with the best treatment available to like domestic producers in Canada. For the purpose of determining the level of treatment owed by Canada to the Investor and its Investment, the basis of comparison should be with the best treated investment or investor operating in Canada, otherwise the treatment would be 'less favourable'.[52]

58. At paragraphs 130 to 133 of its Statement of Defence, Canada implies that it is only obligated to ensure that the Export Control Regime applies equally to all investments operating in like circumstances. In light of the considerable amount of WTO jurisprudence on the term "national treatment", this interpretation is wholly unsustainable. The accumulated wisdom of a great number of WTO and GATT panel reports supports an interpretation of national treatment which ensures that foreign investors and their investments are entitled to the best treatment provided to any domestic investors or their investments in like circumstances. For example, the Panel in *United States - Measures Affecting Alcoholic and Malt Beverages* interpreted the national treatment obligation as follows:

> *...The Panel did not consider relevant the fact that many of the state provisions at issue in this dispute provide the same treatment to products of other states of the United States as that provided to foreign products. The national treatment provisions require contracting parties to accord to imported products treatment no less favourable than that accorded to any like domestic product, whatever the domestic origin. Article III consequently requires national treatment of imported products no less favourable than that accorded to the* ***most-favoured domestic products.***[53] (emphasis added)

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52 UNCTAD, "National Treatment" at 26.

53 *United States - Measures Affecting Alcoholic and Malt Beverages*, Report by the Panel adopted on June 19, 1992 (DS23/R) at para. 5.17.

59. More recently, in its report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, the WTO Appellate Body expressly dealt with the ordinary meaning of the term "treatment no less favourable" as applied in various WTO provisions. Its conclusion was that in the absence of more restrictive language, a "treatment no less favourable" provision should be read as applying to both *de jure* and *de facto* discrimination. The report states:

> *The obligation imposed by [GATS] Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination. Moreover, if Article II was not applicable to de facto discrimination, it would be difficult - and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods - to devise discriminatory measures aimed at circumventing the basic purpose of that Article.*
>
> *For these reasons, we conclude that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include de facto, as well as de jure, discrimination. We should make it clear that we do not limit our conclusion to this case.*[54]

60. In the GATT Panel decision in *Canada - Certain Alcoholic Drinks,*[55] Canada argued that, even though its measure had a discriminatory effect on imported products, it was nonetheless consistent with Canada's national treatment obligation because the measure was applied equally to both domestic and imported products. The Panel rejected Canada's argument, determining that a Party fails to accord national treatment if its measures have the discriminatory effect of according more favourable treatment to domestic businesses than to those from another country.

61. As indicated most recently by the WTO panel report in *Canada-Certain Measures Affecting the Automotive Industry*, the goal of "no less favourable treatment" obligations is to remove any impediments to substantive equality among foreign and domestic competitors:

> *The "no less favourite treatment obligation" in Article III:4 has been consistently interpreted as a requirement to ensure effective equality of opportunities between imported products and domestic products. In this respect, it has been held that, since a fundamental objective of Article III is the protection of expectations on the competitive relationship between imported and domestic products, a measure can be found to be inconsistent with Article III:4 because of its* ***potential***

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[54] WT/DS27/AB/R, September 9, 1997 at para.'s 233-234.

[55] *Canada -Certain Alcoholic Drinks* (DS17/R -39S/27), February 18, 1992 at para. 5.3. The Panel in that case noted that while minimum prices applied equally to imported and domestic beer, they did not necessarily accord equal conditions of competition to imported and domestic beer. The measure prevented imported beer from being supplied at a price below that of domestic beer, thereby according less favourable treatment on a *de facto* basis. In the present case, Canada has argued that if a measure is only discriminatory in effect, rather than form, the national treatment obligation under Article 1102 is not breached.

> *discriminatory impact on imported products. The requirement of Article III:4 is addressed to "relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in that market"* (emphasis added).[56]

62. The Panel's concern for preserving an equality of competitive opportunities is reflected in the dangers associated by economists with measures that have a discriminatory impact on competitors within the marketplace. Such measures encourage inefficiencies and cause market distortions that result in a "waste of economic resources."[57] The Panel accordingly determined that the "treatment no less favourable" obligation meant that a measure would be discriminatory if it brought about circumstances that provided a material advantage to certain Canadian firms that was not made available to some of the foreign-based firms competing in the same sector:

> *In our view, the import duty exemption, as provided in the [measure], results in less favourable treatment accorded to services and service suppliers of any other Member within the meaning of Article II:1 of the GATS, as such benefit is granted to a limited and identifiable group of manufacturers/wholesalers of motor vehicles of some members, selected on the basis of criteria such as the manufacturing presence in a given base year. We also note that the manufacturing presence requirements in the [measure] explicitly exclude suppliers of wholesale trade services of motor vehicles, which do not manufacture vehicles in Canada, from qualifying for the import duty exemption. In addition, the fact that in 1989 the Government of Canada stopped granting [a classification under the measure] makes the list of the beneficiaries of the import duty a closed one. As a result, manufacturers/wholesalers of other Members are explicitly prevented from importing vehicles duty free into Canada.*[58]

Canada is obliged to provide foreign investors and their investments operating in the same industry the best treatment available anywhere in Canada.

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[56] *Canada - Certain Measures Affecting the Automotive Industry*, WT/D5139/R, WT/D5142/R, January 31, 2000, at para. 10.78; citing: *US - Section 337*, at para's. 5.11 and 5.13 and *US - Malt Beverages*, at para. 5.31.

[57] Affidavit of Dr. Leonard Waverman at para. 7, Schedule 4.

[58] At para. 10.262. Essentially, the Panel determined that Canada's practice of only providing certain foreign-owned or controlled enterprises with exemptions from paying customs duties on their automobile imports (contingent upon their manufacturing a certain number of cars in Canada), constituted a violation of Canada's obligation under the GATS to provide most favoured nation treatment to enterprises from all GATS Members. The "best treatment" available to enterprises from GATS members was to be able to qualify for the advantage of importing cars duty free if the domestic-manufacturing performance requirement could be met.

D. IN LIKE CIRCUMSTANCES

63. Article 1102 of the NAFTA compares the "treatment" accorded to investors and their investments from the perspective of the investor and investment. NAFTA Article 1102 further provides that such comparisons should be limited to considering the treatment of investors or investments operating "in like circumstances". In other words, the treatment received by a foreign investor or its investment is only comparable to treatment received by a domestic investor or investment if the foreigner operates in like circumstances with the domestic entity. **The focus of comparison is clearly upon the investor and the investment.**[59]

64. This interpretation of NAFTA Article 1102 is in keeping with the approach used in the *Ethyl Award on Jurisdiction* and in the NAFTA Panel decision in *Certain U.S. - Origin Agricultural Products.*[60] In both cases, the panels broadly interpreted the NAFTA Parties' obligations, in accordance with the trade and investment-liberalising objectives of the NAFTA.

65. This interpretative approach has also been consistently adopted by the WTO Appellate Body, which has stated:

> *The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures...Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products....Moreover, it is irrelevant that the "trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.*[61]

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[59] Canada admits that the focus of the comparison should be on investors and investments at para.'s 130 to 131 of its Statement of Defence.

[60] NAFTA Arbitration Panel Established Pursuant to Article 2008. *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (Secretariat File no. CDA-95-2008-01) Final Report of the Panel, December 2, 1996 at 36. In its award on jurisdiction, the *Ethyl* Claim Tribunal ruled that these NAFTA objectives must be used to interpret the investment provisions of the NAFTA (at para's. 56 & 83).

[61] *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, October 4, 1996; Cited in *Korea - Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, Appellate Body Report, January 18, 1999 at para. 119.

66. Any interpretation of the"like circumstances" concept must begin with an analysis of the meaning of the term "like." The concept "like circumstances" is an adoption of the term "like products" used in the GATT. As stated in *Japan-Taxes on Alcoholic Beverages*, when considering the term "like products":

> *... the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": [1] the product's end-uses in a given market; [2] consumers' tastes and habits, which change from country to country; [3] the product's properties, nature and quality.*[62]

67. Similarly, an objective test - using criteria such as the nature and purposes of the investors or investment; who the investor and investment regard as their competitors; or indications of competition for the products or services that the investors or investments provide - must be used to identify whether investments or investors are "in like circumstances".

68. The basis of a finding of what "like circumstances" means cannot be determined by a government in defining the application of its measure. This approach was advanced by Canada and rejected by the Appellate Body in its *Periodicals* report.[63] Canada argued that its measure could differentiate between competing periodicals because of the national origin, and therefore the editorial content, of the publishers.[64] The Appellate Body held that it was not possible to distinguish between goods that were clearly marketed in competition with each other. Accordingly, a tax on Canadian editions of American-originating periodicals that impeded market access violated Canada's national treatment obligation under Article III of the GATT.

69. Other international agreements support a broad interpretation of national treatment in the context of investment. The wording of the NAFTA Chapter 11 national treatment obligation is similar to that found in the *OECD Declaration on International Investment and Multinational Enterprises* ("*OECD Declaration*"), issued on June 21, 1976.[65] The *OECD Declaration* deals with national treatment with respect to investments. Paragraph II.1 of the *OECD Declaration* says the standard of treatment owed to investors and their

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62 *Japan - Taxes on Alcoholic Beverages* at 20-21.

63 *Canada - Periodicals*, Appellate Body Report, WT/DS31/AB/R adopted July 30, 1997.

64 Canada had argued for a far more narrow comparison that would permit it to protect Canadian-originating periodicals from foreign competition.

65 *Organization for Economic Co-operation and Development: Declaration on International Investment and Multinational Enterprise* (Paris: OECD June 21, 1976).

investments is that which is "no less favourable than that accorded in like situations to domestic enterprises."

70. In 1993, the OECD clarified this national treatment obligation by noting:

> *As regards the expression "in like situations", the comparison between foreign-controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector.*[66]

71. The three NAFTA Parties are all members of the OECD. As members, each NAFTA Party is obligated to adhere to OECD statements such as the *OECD Declaration*.[67] Accordingly, these OECD statements concerning the scope of the national treatment obligation in relation to investors and investments provide an indication of the Party's understanding of the meaning of Article 1102 of the NAFTA.

72. The focus of a comparison required under NAFTA Article 1102 is on the investor and the investment. In considering whether foreign and domestic investors and investments are operating in like circumstances, the primary question is whether they are operating in the same industrial sector or towards the same economic purpose. After examining whether the Investor or Investment is in like circumstances with others in Canada, this Tribunal should examine whether there is any difference in the treatment afforded to these investors or investments. If any investors or investments operating in like circumstances with the Investor or its Investment have received better treatment under the Export Control Regime, the national treatment obligation under NAFTA Article 1102(1) and (2) have been violated.

E. A NATIONAL STANDARD OF TREATMENT

73. Canada must provide an investment and investor from another NAFTA Party, in like circumstances, the best level of treatment available in Canada. The national treatment obligation imposes a standard that must be applied throughout the territory of the government that has taken a measure.[68] Similarly, for the purposes of national treatment of investments, a Tribunal must look to whether similarly-situated investments and investors receive differential treatment.

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66 Organization for Economic Co-operation and Development, *National Treatment for Foreign-controlled Enterprises* (1993: OECD, Paris) at 22.

67 This obligation is contained in Article 5(b) of the 1960 *Convention on the Organization for Economic Co-operation and Development.*

68 This approach has been followed by a number of WTO panels including: *Japan -- Taxes on Alcoholic Beverages*; Canada-Periodicals and *Korea – Taxes on Alcoholic Beverages.*

74. The *Oxford English Dictionary* defines the term "national" as

> *Of or belonging to a (or the) nation; affecting or shared by, the nation as a whole.*[69]

The Investor submits that the ordinary meaning of the term "national" as dealing with the nation as a whole, must be applied in these circumstances.

75. NAFTA Article 1102(3) specifically provides an exception from the national treatment rule that in the case of subnational government measures (i.e. states and provinces and their sub-entities), the national treatment standard will be based on the treatment provided within that jurisdiction.

76. NAFTA Parties did not intend subnational boundaries to be a factor in the comparison of how their measures related to investors and investments under NAFTA Articles 1102(1) and (2). They have explicitly provided in NAFTA Article 1102(3) the cases in which comparison should be made on a subnational basis.

F. EXPANSION, MANAGEMENT, CONDUCT OR OPERATION OF AN INVESTMENT

77. Parties must accord equal treatment to foreign and domestic investors and their investments. When equal competitive opportunities are not granted on a sectoral basis, a violation of the national treatment obligation is created wherever there is an impact on the expansion, management, conduct and operation of investors and their investments.

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[69] *Oxford English Dictionary* (2ed) 1989, Vol. X at 232.

II. THE INTERNATIONAL LAW OF NATIONAL TREATMENT APPLIED TO THE FACTS OF THIS CLAIM

A. POPE & TALBOT LTD. IS IN LIKE CIRCUMSTANCES WITH OTHER CANADIAN INVESTMENTS

78. Pope & Talbot Ltd. is in like circumstances with other Canadian softwood lumber manufacturers throughout Canada. It manufacturers a commodity product that is sold without distinction, other than grade, throughout North America.[70] Pope & Talbot Ltd. uses similar production techniques to produce commodity softwood lumber products which are sold to similar sorts of purchasers for the same end users as other softwood lumber producers in Canada.[71] Simply, there is no appreciable difference between the business of the Investment and the business of other softwood lumber producers in Canada.

79. The only difference between the Investor and its Investment in comparison with its Canadian competitors operating in Non-listed Provinces is geographical location. Softwood lumber companies operating in the Non-listed Provinces are all directly competitive in the same softwood lumber industry and the same continental market for similar commodity goods, regardless of the location of their operations in Canada.[72]

B. THE BEST TREATMENT AVAILABLE IN CANADA IS FOR INVESTMENTS OUTSIDE OF BRITISH COLUMBIA, ALBERTA, ONTARIO OR QUEBEC

80. Canada's implementation of the *Softwood Lumber Agreement,* through its Export Control Regime, accords more favourable treatment to Canadian investors and their investments operating in Non-listed Provinces who may export an unlimited amount of fee-free softwood lumber to the US. This best treatment is not provided to the investments of investors of other NAFTA Parties operating in Listed Provinces - even though they are operating in like circumstances. By failing to provide the best treatment in Canada to US-based investors and their investments in British Columbia, Canada has violated its national treatment obligations under NAFTA Article 1102.

81. The Export Control Regime is a federal, not a provincial, measure. NAFTA Article 1102(3) explicitly allows for a subnational level of treatment in cases involving the measures of subnational governments. This NAFTA provision cannot apply to a federal

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70 Statement of Allan Kenneth Rozek at para. 5, Schedule 3.

71 Statement of Craig Campbell, Schedule 2 and Statement of Kyle Gray at para. 2, Schedule 1.

72 Statement of Allan Kenneth Rozek at para. 5, Schedule 3. Statement of Craig Campbell, Schedule 2.

measure, even though it may have divided the country on a subnational basis. To permit Canada to determine the standard of treatment arbitrarily, on an *ex post facto* basis could allow Parties to simply design their measures so as to circumvent their NAFTA obligations.

82. The NAFTA does not permit a Party to discriminate against manufacturers in the same industry and market sector. Canada has denied the Investor and its Investment the ability to effectively compete on an equal basis with Canadian-based investors and investments in the Non-listed Provinces even though both are in the same industry, market sector and produce the same goods for the same market.

83. On a provincial basis, British Columbia's share of fee-free softwood lumber exports substantially decreased (from 59% to 57%) from 1996 to the present while fee-free softwood lumber exports of the Non-listed Provinces increased by 130% over the same period.[73] For its part, over the first four years of the Export Control Regime, the Investment experienced a loss of [redacted] in its ability to export softwood lumber fee-free.[74] These are exactly the kinds of discriminatory effects that economists consider to be "artificial distortions". These distortions have arisen as a result of softwood lumber producers making economic decisions about their investments in Canada based on the impact of the Export Permit Regime, rather than proper economic factors, such as comparative advantage.[75]

84. In preparing the Export Control Regime, Canada had to have known that softwood lumber manufacturers in Listed Provinces would be adversely affected by the Export Control Regime. Canada intervened in the softwood lumber market on a provincial, rather than an industry basis. This violates the principle of national treatment and clearly contravenes the explicit terms of NAFTA Article 1102.

C. *THE NEXT-BEST TREATMENT AVAILABLE IN CANADA IS FOR INVESTMENTS IN QUEBEC*

85. Alternatively, if the Tribunal determines that investments operating in Listed and Non-listed Provinces are not in "like circumstances", the Export Control Regime still violates Canada's national treatment obligations set out in NAFTA Article 1102. Canada's treatment of the Investor and its Investment is less favourable than that accorded to domestic investors and investments operating in other Listed Provinces.

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73 Statement of Craig Campbell, Schedule 2.

74 Statement of Kyle Gray at para. 10.

75 Affidavit of Dr. Leonard Waverman at para.'s 10-13, Schedule 4.

86. British Columbia producers were entitled to 59% of the bonus quota based on their historic share but only received 33%.[76] Canada has failed to allocate bonus amounts of EB quota on an objective provincial or historical basis. From 1996 to 2000, Quebec producers received 268 MMBF in bonus quota compared to only 198.5 MMBF for British Columbia producers. Quebec's share over the entire period represents 45% of the overall bonus allocation while the overall bonus allocation to British Columbia producers such as the Investment received only 33%.

87. Moreover, during the first two years of the Export Control Regime (1996-97 and 1997-98), Quebec received 50% of the overall bonus while British Columbia received only 27%. These initial years of bonus allocations had a compound effect on the overall quota allocation in successive years. This has resulted in British Columbia producers receiving a lower allocation than that to which they were actually entitled based on their historic export performance.

88. Softwood lumber producers in Quebec have experienced a net increase of approximately 10% in their ability to export softwood lumber fee-free to the US.[77] The most favourable treatment available to softwood lumber producers operating in the Listed Provinces is available to those who are located in Quebec. Under NAFTA Article 1102(1) the Investment is, at a minimum, entitled to the treatment that has been accorded to its competitors from Quebec – not the discriminatory decreases it has experienced along with most other producers from British Columbia.

D. BETTER TREATMENT WOULD STILL BE AVAILABLE TO ANY INVESTMENT OUTSIDE OF BRITISH COLUMBIA

89. On August 30, 1999 Canada introduced a new measure establishing an "extra fee level" solely applicable to exports of softwood lumber from British Columbia mills, thereby treating other Listed Provinces more favourably than British Columbia.[78] This new measure discriminates between British Columbia investors and investments and those investors and investments operating in the other Listed and Non-listed Provinces. This constitutes further evidence of the ongoing breach by Canada of its national treatment obligations under the NAFTA to investments in the Listed Provinces.

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[76] Canada. Export and Import Control Bureau, Quarterly Statistical Monitor, Schedule 23.

[77] Table 5.

[78] Extra Fee Level for British Columbia producers only, September 3, 1999 - *Notice to Exporters No. 120.* Schedule 25.

E. BETTER TREATMENT IS ALSO AVAILABLE TO ANY INVESTMENT PRODUCING NO MORE THAN 10 MMBF PER YEAR

90. Section 5(a) of Regulation SOR/96/317[79] provides that investments in Listed Provinces that produce less than 10 million board feet are exempt from paying LFB and UFB fees under Canada's Export Control Regime. This is the best treatment provided to softwood lumber producers in the Listed Provinces. By not allowing all producers to export up to 10 million board feet free of LFB and UFB fees, Canada has yet again failed to provide the best treatment available to an investment in a Listed Province.

F. CONSEQUENTIAL LOSSES OF THE INVESTOR

91. Finally, Canada's Export Control Regime has resulted in harm to the Investor by damaging the pulp and paper operations of Pope & Talbot Ltd., which formerly were operated by Harmac-Pacific Inc. As a result of the implementation of Canada's Export Control Regime, there has been a shortage of residual wood chips from softwood lumber mills which has forced pulp producers to use costlier alternatives and increase their costs of production.[80] This increase in cost has resulted in harm to the pulp aspect of the Investor's business[81] and would have been avoided if Canada had implemented its obligations under the *Softwood Lumber Agreement* in a manner which was consistent with its obligations under NAFTA Article 1102.

G. CONCLUSION

92. Many Canadian-based softwood lumber producers have received better treatment than the Investment and the Investor as a result of Canada's implementation of the Export Control Regime. These include every producer of softwood lumber exporting to the US from a Non-listed Province as well as the softwood lumber producers of other Listed Provinces such as Quebec, who have seen their exports increase directly at the expense of competitors from British Columbia, including the Investment.

93. As a result of Canada's imposition of the Export Control Regime, the key factor in determining the general profitability of a softwood lumber investment in Canada is its geo-political location, rather than mill efficiency or proximity to markets and transportation. A Canadian softwood lumber producer operating in a Non-listed Province

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79 Schedule 17.

80 Statement of Craig Campbell, Schedule 2.

81 Statement of Kyle Gray at para. 16, Schedule 1.

does not pay duty and may export as much softwood lumber as it can produce.[82] A Canadian softwood lumber producer operating in Quebec must pay fees, but would have experienced an average increase of 10% in the amount of fee-free lumber it could have exported since the Export Control Regime was imposed.[83]

94. The Export Control Regime has adversely affected the expansion, management, conduct and operation of the Investor and its Investment by not providing them national treatment. As a result of this unfair and discriminatory measure, the Investor, investments of the Investor such as the company previously known as Harmac-Pacific Inc., and its Investment have been harmed and have incurred damages.

95. The Investment operates softwood lumber mills that are fundamentally similar to softwood lumber producers operating in the other Listed Provinces and in the Non-listed Provinces.[84] Pope & Talbot Ltd. accordingly finds itself in like circumstances with these other investments.

96. The best treatment in Canada has not been provided to Pope & Talbot, Inc. and its Investment in Canada. The best treatment has been provided to other Canadian-based softwood lumber investors and investments operating in like circumstances to Pope & Talbot, Inc. and its Investment.[85] Accordingly, Canada has breached its national treatment obligations under NAFTA Article 1102. Since the Investment is in like circumstances with other softwood lumber mills operating in the country, **Canada has failed to provide the best treatment in Canada to the Investor and the Investment by failing to provide the best treatment provided in the Non-listed Provinces which exports softwood lumber quota-free.**

97. Moreover, Canada has not even provided the Investor and its Investment with the best treatment provided in the Listed Provinces which is:

(a) Entitlement to a fair share of the quota that should have been allocated to British Columbia producers, based on their historic export performance;

(b) An exemption from the payment of export fees for production up to 10 MMBF; and

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82 Statement of Craig Campbell, Schedule 2.

83 Statement of Craig Campbell, Schedule 2.

84 Statement of Craig Campbell, Schedule 2.

85 Statement of Craig Campbell, Schedule 2.

(c) Paying UFB quota at a rate of US$104.18 per thousand board feet rather than at the rate currently charged to the Investment of US$146.25 per thousand board feet.[86]

[86] This is not to say that Canada would meet its national treatment obligation by providing the best treatment provided in a Listed Province. This comparison only illustrates how poor the treatment received by the Investor and its Investment is in comparison to the best treatment provided by Canada.

PART THREE: PERFORMANCE REQUIREMENTS

I. THE INTERNATIONAL LAW OF PERFORMANCE REQUIREMENTS

98. NAFTA Article 1106 prohibits a number of specified governmental activities collectively referred to as performance requirements. The relevant portions of NAFTA Article 1106 read:

> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of goods or services;
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
>
> (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
>
> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
>
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

99. Under NAFTA Article 1106(1), a Party may not impose or enforce certain requirements, commitments or undertakings in connection with the "establishment, acquisition, expansion, management, conduct or operation" of an investment in its territory. It does not matter whether the investment is owned or operated by an investor from a Party or non-Party; performance requirements are absolutely compensable if they cause harm to the investments of NAFTA Party investors.

100. Accordingly, under NAFTA Article 1106(1) the imposition or enforcement of a requirement made in connection with various aspects of an investment is compensable *per se*. The imposition or enforcement of a requirement does not need to be connected with the investment harmed by such activity. The harm can be caused by the imposition or enforcement of a requirement in connection with any investment, regardless of whether it is owned or controlled by a NAFTA Party investor.

101. Moreover, there is no indication in NAFTA Article 1106 that the requirements it contemplates are somehow restricted to *de jure* requirements imposed or enforced by governments. The requirements listed in NAFTA Article 1106 apply to all government measures, regardless of whether they result in a *de jure* or *de facto* requirements. This interpretation is in keeping with the NAFTA Article 102 objective, described below, of substantially increasing investment opportunities within the free trade area and of promoting conditions of open competition in the free trade area. This is no different from the approach regularly adopted by international tribunals to the *de facto* character of anti-discrimination provisions,[87] or the approach adopted by WTO panels in relation to performance requirements and national treatment.[88]

102. The purpose of NAFTA Article 1106 is to provide compensation to investors who are harmed by the imposition or enforcement of certain enumerated performance requirements, or the granting of advantages conditioned upon such requirements.[89] Trade and investment liberalization in the NAFTA free trade area would be undermined if such compensation could be precluded by a government whose measure had the effect of a requirement listed in NAFTA Article 1106, but not the specific form.

103. For example, a measure that has the effect of requiring an investment to operate in a specific region within the territory of a Party will have the effect of making that investment purchase or use goods and services in that region. While the measure might not specifically require the investment to purchase or use goods locally, it would nonetheless enforce such a requirement if it effectively dictated where the investment should be located (i.e. a *de facto* requirement to use goods in that locality). If such a measure were imposed, and harm was caused to an investment as a result, compensation would be required under NAFTA Article 1106(1)(c).

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87 See: *European Economic Community - Imports of Beef from Canada*, adopted March 10, 1981, BISD 285/92; *Japan - Tariff on Imports of Spruce- Pine-Fir (SPF) Dimension Lumber*, adopted July 19 1989, BISD 365/167; *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, September 9,1997.

88 *Canada - Administration of the Foreign Investment Review Act*, adopted February 7, 1984, L/5504 - 305/140. In this case, while the measure was not found to be subjectively discriminatory, practices that arose under the administration of the measure were found to have a discriminatory effect. These practices had the character of performance requirements not unlike those found in NAFTA Article 1106. See, also: *EEC - Regulation of Imports of Parts and Components*, adopted May 16, 1990, B150 375/132, at para. 5.21 and *EC - Bananas*, at para. 211.

89 In its *Statement on Implementation*, at 149, Canada makes no mention that Article 1106 is in any way restricted to *de jure* requirements, as opposed to requirements having a discriminatory trade effect.

104. Under NAFTA Article 1106(3), a Party may not condition the receipt, or continued receipt, of "an advantage" in connection with "an investment" on compliance with certain prohibited performance requirements. As in NAFTA Article 1106(1), NAFTA Article 1106(3) renders certain governmental activities compensable *per se*. If the investment of a NAFTA investor is harmed by a NAFTA government's granting an advantage to the investment of a foreign or NAFTA investor, conditioned upon compliance with a performance requirement listed in NAFTA Article 1106(3), compensation must be paid.

105. There is no definition of "advantage" in the NAFTA. The term "advantage" has a meaning in the context of trade agreements. In *Brazil – Export Financing Programme for Aircraft*, the WTO Appellate Body confirmed that "the ordinary meaning of the word 'advantage' is 'a more favourable or improved position or a 'superior position".[90] The *Oxford English Dictionary* defines "advantage" as "the position, state, or circumstance of being in advance or ahead of another" and that to bestow an advantage is "to further, promote, advance [or] contribute to the progress" of something.[91] That the drafters of the NAFTA chose a term as broad as "advantage" for use in NAFTA Article 1106(3), rather than using words such as "subsidy" or "economic incentive", is demonstrative of the wide scope of government activities meant to be covered under NAFTA Article 1106(3).

106. Although paragraphs (1) and (3) of NAFTA Article 1106 share many similarities, they also contain significant differences. Under paragraph (1), the "requirement, commitment or undertaking" is to be imposed or enforced in connection with the "establishment, acquisition, expansion, management, conduct or operation of an investment". Under paragraph (3) a connection is to be drawn between the "advantage" to be granted and an "investment". The "connection" to be drawn under paragraph (3) is far broader than the "connection" to be made under paragraph (1), which itself is very broad.

107. That a connection is to be made between the advantage and the investment under paragraph (3) is further evidence that the drafters intended this provision to encompass a wide array of government measures, not only as to form, but also as to their effects on investment. In other words, the focus of an inquiry under NAFTA Article 1106(3) is on whether the measure results in an advantage being granted to an investment, on compliance with an enumerated performance requirement. If a NAFTA government grants an advantage in connection with an investment, on compliance with a requirement having either the form or effect of a requirement listed under NAFTA Article 1106(3), NAFTA investors will be entitled to seek compensation for any harm caused to their investments as a result.

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90 AB-1999-1, WT/DS46/R, August 2, 1999 at para. 177.

91 *Oxford English Dictionary* (2ed.) Vol. I at 184.

108. Moreover, under paragraph (3) an advantage needs only to be connected with an "investment", rather than with the "establishment, acquisition, expansion, management, conduct or operation of an investment", as in paragraph (1). This wording indicates that the drafters intended that compensation should be available whenever the investment of a NAFTA investor is harmed by a government measure that effectively bestows an advantage upon any "investment" if that investment complies with any one of a specific list of performance requirements set out in NAFTA Article 1106(3). The provision is obviously designed to permit NAFTA investors to hold governments accountable when they engage in the activity of granting an advantage upon compliance with certain requirements, because such activity historically distorts markets and interferes with an investor's ability to derive a fair return from its investment.[92]

[92] Affidavit of Dr. Leonard Waverman at para.'s 5-6, Schedule 4.

II. THE INTERNATIONAL LAW OF PERFORMANCE REQUIREMENTS AS APPLIED TO THE FACTS OF THIS CLAIM

A. ADVANTAGES CONFERRED IN CONNECTION WITH COMPLIANCE WITH REGIME REQUIREMENTS

109. NAFTA Article 1106(3)(d) pertains to a government's granting an advantage in connection with an investment, when an investment complies with a requirement restricting the sale of goods it produces that the government has related "in any way" to the volume of the investment's exports. Canada has granted the advantage of exporting softwood lumber without fees to enterprises that produce and export softwood lumber from provinces other than British Columbia, Alberta, Ontario or Quebec. It has also granted the advantage of not having to pay higher export fees to producers located in Alberta, Ontario and Quebec, as opposed to British Columbia.

110. NAFTA Article 1106(3)(d) addresses circumstances in which a government conditions the receipt of an advantage on compliance with a requirement having the effect of restricting the "sales" of an investment in its territory in relation to the exports of that investment. As the NAFTA does not provide a definition of what constitutes a "sale", the ordinary meaning of the term should be used in interpretation of this provision. The *Oxford English Dictionary* defines "sale" as follows:

> *The action of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration. Also, with qualification: (Ready, slow, etc.) disposal of goods for money; opportunity of selling* [93]

111. In *Canada – Automotive Industry*, the Panel found that the measures at issue affected the sale of goods in Canada because they provided an advantage to certain enterprises upon compliance with requirements imposed under the measures. The advantage was to import a certain amount of goods duty free. The requirement was to produce goods with a certain amount of Canadian content. Canada argued that since the requirements imposed under its measure did "not affect 'the internal sale, ... or use" of imported products because they [did] not in law or fact require the use of domestic products and therefore [played] no role in the parts sourcing decisions of manufacturers".[94] The Panel saw "no merit" in Canada's argument, finding that:

> *... a measure which provides that an advantage can be obtained by using domestic products but not by using imported products has an impact on the conditions of competition between domestic*

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93 *Oxford English Dictionary* (2ed), Vol. XIV at 388.

94 *Canada – Automotive Industry*, at para. 10.79.

and imported products and thus affects the 'internal sale, ... or use" of imported products, even if the measure allows for other means to obtain the advantage.[95]

In the Panel's opinion, it was not necessary to measure the actual impact of the imposition of the requirements, as their very existence affected the balance of competitive opportunities for manufacturers operating in the affected sector.[96]

112. Under the Export Control Regime, a softwood lumber producer's opportunity to dispose of the lumber it produces, by selling it to a US-based consumer, is related to the volume of softwood lumber exports attributed to it by the Export and Import Control Bureau (EICB). This requirement governs the extent to which the producer will qualify for the advantage of exporting its lumber at a reduced fee, or for no fee at all. So long as producers operate in the Listed Provinces, and British Columbia in particular, their sales of softwood lumber will be restrained by operation of the export volume restraints imposed under the Export Control Regime.

113. When a softwood lumber producer's exports reach the level prescribed by the EICB corresponding to its EB quota allocation, onerous export fees of US$52.09 (per thousand board feet) are charged, which has the effect of restricting its sales. When export volumes reach the LFB quota levels, a greater-sales-restricting export fee of US$104.18 is charged, and if the producer is located in British Columbia a prohibitive export fee of US$146.25 is charged, seriously restricting sales.[97]

114. Under NAFTA Article 1139, the definition of "investment" includes an "enterprise". Under NAFTA Article 201, "enterprise" includes "any entity constituted or organized under applicable law... including any corporation, trust, partnership, sole proprietorship, joint venture or other association". To an enterprise competing as a primary producer in Canada's softwood lumber sector, the ability to avoid paying any export fees is undoubtedly a commercial benefit that affords a "superior position".[98]

115. Because the Panel in *Canada – Automotive Industry* determined that the performance requirements imposed under Canada's measure violated GATT Article III, it decided not to go on to make a similar finding in respect of Canada's TRIMS obligations. Nonetheless, the reasoning in its report clearly demonstrates why the imposition of performance requirements under NAFTA Article 1106 are *per se* compensable. The

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95 *Canada – Automotive Industry*, at para's. 10.82 & 10.83.

96 *Canada – Automotive Industry*, at para. 10.83.

97 Statement of Craig Campbell, Schedule 2.

98 Statement of Craig Campbell, Schedule 2; Affidavit of Dr. Leonard Waverman at para.'s 6-8.

imposition of a performance requirement, or the granting of an advantage contingent upon compliance with a performance requirement, causes investments to make decisions they would otherwise not have made in the normal course of business, in addition to altering the competitive relationship which should exist between investments.[99] To the extent that the imposition or enforcement of these requirements alter an otherwise level playing field, investments are to be entitled to be compensated for harm caused as a result.

116. Judging by its impact, the Export Control Regime was designed to provide advantages to softwood lumber investments in the poorest provinces of the Canadian federation by requiring enterprises to establish themselves and operate in these locations in order to be entitled to the full benefits of the Export Control Regime. As Table 1 illustrates, the Non-listed Provinces each have significantly lower gross domestic product figures than those of the Listed Provinces.

117. A primary effect of the Export Control Regime has been to encourage softwood lumber production in these disadvantaged provinces.[100] Some softwood lumber producers have shifted production to these provinces and even made new investments – at a time when production and investment activity in the British Columbia softwood lumber sector has plummeted.[101] These investment decisions have been seriously affected by the advantages made available, and performance requirements imposed, under the Export Control Regime. The result of this kind of market intervention has been to encourage softwood lumber producers in Canada to engage in "socially inefficient behaviour", to the detriment of producers and consumers in the North American market, including the Investor and its Investment.[102]

118. As demonstrated in Table 3, exports from the Non-listed Provinces have increased since the imposition of the Export Control Regime. This growth appear to be directly related to the advantages made available to investors who shifted their investments and production to the Non-listed Provinces as dictated by the requirements enforced, and advantages made available, under the Export Control Regime.[103]

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99 Affidavit of Dr. Leonard Waverman at para. 5, Schedule 4.

100 Statement of Craig Campbell, Schedule 2.

101 Statement of Craig Campbell, Schedule 2.

102 Affidavit of Dr. Leonard Waverman at para. 8, Schedule 4.

103 Statement of Craig Campbell, Schedule 2; Affidavit of Dr. Leonard Waverman at para. 8, Schedule 4.

B. REQUIREMENT TO EXPORT AT A PRESCRIBED LEVEL

119. With its imposition of the Export Control Regime, Canada has regulated the Investor's activity in a manner that violates NAFTA Article 1106, by imposing a set of prohibited performance requirements on the Investment. These performance requirements have had the effect of altering the competitive relationship between the Investment and other domestic producers.

120. Canada has imposed a performance requirement on the Investor in contravention of NAFTA Article 1106(1)(a) because the Export Control Regime requires the Investment to export a given level of goods. The "level" of export required under the Regime is lower than that which the Investment would export if it were not forced to pay export fees on exports above its fee-free allocation.[104]

121. Canada's Export Control Regime also contravenes NAFTA Article 1106(1)(a) because it penalizes softwood lumber producers for under-utilization of export quotas.[105] If softwood lumber producers export below levels allocated for EB and LFB quotas, EB and LFB allocations will be reduced in the corresponding year under Canada's "use it or lose it" regime. This threat of reduction for under-utilization represents enforcement of a *de facto* requirement to export up to EB and LFB quota levels.

122. The Export Control Regime further contravenes NAFTA Article 1106(1)(a) by penalizing the Investment if its exports in any particular quarter exceed 28.75% of its total allocation for that year (the "speed bump" mechanism). The penalty for contravening the speed bump mechanism is the payment of additional fees.[106] Imposition of the speed bump results in a *de facto* requirement to export at a level not greater than the 28.75% annual level set by the EICB.

123. These requirements to export at a given level are clearly imposed in connection with the establishment, acquisition, expansion, management, conduct and operation of the Investment. For example, in order to observe these requirements, the Investor and its Investment have altered product mixes and production methods; made changes in capital expenditures, and altered acquisition and expansion plans.[107] In addition to these changes in the management and operation of the Investment, restrictions on sales and exports have

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104 Statement of Kyle Gray at para. 8, Schedule 1.

105 *Notice to Exporters No. 94*, at para. 11.7, Schedule 18.

106 *Notice to Exporters No. 94*, at para. 11.3, Schedule 18.

107 Statement of Kyle Gray at para. 15, Schedule 1.

clearly affected the Investment's conduct, dramatically altering its traditional sales patterns.[108] Thus, while it is not necessary for any performance requirements to be enforced directly against the Investment for it to be entitled to compensation for harm caused by their imposition, in this case it is clear that the requirements did apply to the Investment, in connection with its management, conduct and operation.

124. Further, the Export Control Regime even contains built-in mechanisms to respond to issues such as the establishment, acquisition and expansion of investments. The Export Control Regime addresses such matters as: reviewing quota allocation transfers between investments;[109] increasing allocation based on increased capacity (under the "new entrants" reserve);[110] and making allocation changes due to sudden interruptions in the management of an investment (caused by intervening events such as employment disputes or natural hazards).[111]

125. Under NAFTA Article 1106(a), imposing a requirement for an investment to export at a *given level* entitles the investment of a NAFTA investor to be compensated for harm caused as a result of the requirement being imposed or enforced. Entitlement to compensation for imposition or enforcement of this kind of requirement was designed to eliminate unnecessary or discriminatory intervention in the marketplace that all too often results in favouritism for a domestic investor or investment. While Chapter 11 does not outlaw this kind of conduct, it permits NAFTA investors to seek compensation for the harm it causes.

C. REQUIREMENT TO RESTRICT SALES TRANSACTIONS BY RELATING THEM IN ANY WAY TO EXPORTS

126. As described above, the Export Control Regime relates the sales of softwood lumber producers to the volume of their exports. Under NAFTA Article 1106(3)(d), a connection must exist between the advantage offered by the measure and an Investment. Under NAFTA Article 1106(1)(e), a connection must exist between the sales/export requirement and the "establishment, acquisition, expansion, management, conduct or operation of an investment".

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108 Statement of Kyle Gray at para. 17, Schedule 1.

109 *Notice to Exporters No. 94*, at para. 19.0, Schedule 18.

110 *Notice to Exporters No. 94*, at para. 12.1, Schedule 18.

111 *Notice to Exporters No. 94*, at para. 11.8, Schedule 18.

127. The Export Control Regime requirement that sales be related to export volumes is explicitly connected to the management, conduct and operation of a particular investment because the EICB sets different export levels for every individual producer operating under the Regime. The conduct and operation of each investment is strictly regulated by the award, or withdrawal, of fee-free quota. If any one producer fails to ensure that its sales of lumber destined for the US does not relate properly to the export volume levels established for it by the EICB, the producer will be subject to some form of administrative action under the Regime. The various requirements established under the Regime were obviously intended to bring about a change in the sales of producers in relation to the volume of exports of their products to the US (i.e. to restrict sales for production taking place in certain provinces). Sales restrictions have had the concordant effect of bringing about changes in the way these investments have been managed and operated. Mills have been idled for significant periods of time or simply closed, and where possible, production has been shifted to outside of the Listed Provinces.[112]

128. In general, as a result of the imposition and enforcement of this requirement, investment activity in the Non-listed Provinces has increased, including the expansion, acquisition or increased utilisation of production facilities.[113] In particular, imposition of this sales-to-export-volumes requirement has caused the Investment to change its production methods and processes, and has even had a negative impact on its expansion and acquisition plans.[114]

D. CONCLUSION

129. The Export Control Regime generates a significant advantage for softwood lumber producers who can produce and export their products outside of the Listed Provinces, conditioned by a requirement that restricts sales in relation to exports for producers inside the Listed Provinces. The Export Control Regime also imposes performance requirements upon investments to export their products at a given level. These advantages and requirements altered the conditions of competition existing between softwood lumber producers, seriously affecting their day-to-day decision-making, including the management, conduct and operation of the Investor. Canada is therefore obligated to compensate the Investment for the harm caused by the imposition of this Regime.

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112 Statement of Craig Campbell, Schedule 2.

113 Statement of Craig Campbell, Schedule 2.

114 Statement of Kyle Gray at para. 15, Schedule 1.

PART FOUR: EXPROPRIATION

I. THE INTERNATIONAL LAW OF EXPROPRIATION

130. The NAFTA Investment Chapter protects the investments of investors from other NAFTA Parties from uncompensated expropriations. This obligation recognizes the importance now given to the protection of international investment flows. At the same time, the NAFTA does not restrict the ability of governments to engage in regulatory acts which could deprive investors of their investments. The NAFTA does not restrict expropriatory behaviour -- all that it requires is compensation under its terms to be paid to the affected investors. NAFTA Article 1110 states:

> *1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*
> *(a) for a public purpose;*
> *(b) on a non-discriminatory basis;*
> *(c) in accordance with due process of law and Article 1105(1); and*
> *(d) on payment of compensation in accordance with paragraphs 2 through 6.*
>
> *2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.*
>
> *3. Compensation shall be paid without delay and be fully realizable.*

131. The goal of NAFTA Chapter 11 is to ensure that governments compensate investors for harm caused to their investments, while permitting governments to maintain their freedom to regulate. In particular, NAFTA Article 1110 does not restrict the sovereign powers of a government to engage in policy making. It only requires the payment of compensation if such a policy is an expropriation or a measure tantamount to an expropriation of the investment of an investor from another NAFTA Party.

"Expropriation" is Broadly Defined in the NAFTA and under Customary International Law

132. Canada has interpreted expropriation in its Statement of Defence in terms that seriously circumscribe the scope of NAFTA Article 1110. This approach is inconsistent with the NAFTA and Canada's international law obligations. Although the NAFTA does not define the term expropriation, it is clear that under the terms of NAFTA Article 1110, it provides the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights.

133. The meaning of the concept of expropriation is the result of extensive decisions of international tribunals which have provided considerable guidance as to what types of governmental action constitute an expropriation. For example, in the *Sola Tiles* case[115] the Iran-US Claims Tribunal gave the following definition of expropriation:

> *It is well settled in the practice of the Tribunal, as elsewhere, that property may be taken under international law through interference by a State in the use of that property or the enjoyment of its benefits amounting to a deprivation of the fundamental rights of ownership.*[116]

134. In essence, for there to be an expropriation under international law it is necessary to establish that a government has interfered unreasonably with the use of private property.[117] This principle of unreasonable interference was recognized in the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens*, which states:

> *3(a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.*

135. In addition to establishing that any unreasonable interference with a property right constitutes an expropriatory act, the US-Iran Claims Tribunal also considered the act of deprivation to constitute a taking. For example, the Tribunal sated in the *TAMS-AFFA* case that it preferred:

> *...the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required.*[118]

136. It is a well recognized international legal principle that expropriation refers to an act by which governmental authority is used to deny some benefit of property. Professor M. Somarajah has examined expropriation in his treatise *The International Law on Foreign Investment*. He states:

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115 *Sola Tiles Inc.* v. *Iran (1987)*, 14 Iran-US C.T.R. 223.

116 *Sola Tiles*, at 230-231, para. 29. The Tribunal went on to cite the following cases as support for this proposition: *Foremost Tehran. Inc* v. *Islamic Republic of Iran*; *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA, Phelps Dodge Corp* v. *Iran*; and *Thomas Earl Payne* v. *Iran.*

117 See *Harza Engineering Co.* v. *Iran*, (1982) 1 Iran-US C.T.R. 499 at 504.

118 *Tippets, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran* (1984), 6 Iran-US C.T.R. 219 at 225. *Motorola, Inc.* v. *Iran National Airlines Corporation* (1988), 19 Iran-US C.T.R. 73 at 95.

> *Though it is clear that there are categories of takings outside the outright acts of nationalization, the problem lies in formulating a single general principle that identifies all these takings. If one general criteria [sic] is to be attempted, it will have to involve some broad notion of governmental interference with the peaceful enjoyment of the rights of use, enjoyment and control of the property by the alien.*[119]

137. Under international law the principle of expropriation is now accepted as going beyond absolute takings to include "creeping expropriation". For example, Sornarajah writes:

> *The treaties indicate that the provisions relating to expropriation apply not only to outright takings but also to "creeping expropriation" or the slow erosion of the alien's ownership rights through regulatory measures ...*[120]

Accordingly, as evidenced in the findings of various international tribunals, there is no longer any distinction between direct, indirect or creeping expropriations.[121]

138. The expansion of an accepted definition and application of expropriation in international law is also demonstrated in Section 712(g) of the American Law Institute's *Third Restatement of the Foreign Relations Law of the United States*[122] on "State Responsibility for Economic Injury to Nationals of Other States". It contains wording similar to NAFTA Article 1110 in its statement of state responsibility for a taking by a state. When commenting on this rule, the *Restatement* provides:

> *Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation"). A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory.*

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119 M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994) at 282.

120 Sornarajah at 254.

121 *Harza Engineering Co. v. Iran* (1982) 1 Iran-US CTR, 499 at 504. *ITT Industries Inc. v. Iran* 2. Iran-US CTR at 349. *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFIA Consulting Engineering of Iran (1984)*, 6 Iran-US CTR 219 at 255.

122 The Third Restatement of the Foreign Relations Law of the United States at 712 (g).

139. The broad interpretation of expropriation is also confirmed in the *Biloune* case where under the UNCITRAL Rules an international tribunal determined that no distinction should be drawn between direct and creeping expropriations stating:

> *This Tribunal must determine whether the above facts constitute, as the Claimants charge, a constructive expropriation of MDCL's assets and Mr. Bilounes interest in MDCL. The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case. What is clear is that the conjunction of the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry had the effect of causing the irreparable cessation of work on the project. Given the central role of Mr. Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the Tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL's contractual rights in the project and, accordingly, the expropriation of the value of Mr. Biloune's interest in MDCL.*[123]

NAFTA Creates a Lex Specialis for Expropriation

140. In NAFTA Article 1110(1), three kinds of acts are defined as expropriations. The NAFTA permits these expropriations to occur as long as governments observe four conditions:

(a) That the expropriation is taken for a public purpose;

(b) That the expropriation be taken in a non-discriminatory fashion;

(c) That the expropriation be taken with due process of law and in accordance with NAFTA Article 1105; and

(d) That compensation be paid as required by NAFTA Articles 1110(2) - (6).

141. These requirements clarify the broad protection of investment that was intended by the drafters of the NAFTA Investment Chapter. On its face, it is clear that NAFTA Article 1110 creates a *lex specialis* that goes beyond those concepts enshrined in the customary international law of expropriation. The inclusion of each of these requirements means that NAFTA Article 1110 is violated, and the duty to compensate operates under the terms of NAFTA Article 1110(2), whenever an expropriation occurs that is not for a public purpose, in a discriminatory manner, or not executed in accordance with both the principles of due process and the Party's obligations under NAFTA Article 1105. This means that even if an expropriatory measure purports to compensate for interfering with

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123 *Biloune v. Ghana Investment Centre*, 95 I.LR (1993) 183 at 209.

an investment, the presence of such factors as discrimination or a breach of some other element of international law, as provided under NAFTA Article 1105, would lead to an award for compensation granted under the terms of NAFTA Article 1110(2).

142. These modifications of the customary international law of expropriation include: the manner of compensating investors; a broadened scope for the protection of property rights; and increased coverage for most regulatory takings. In particular, the NAFTA modifies existing customary international law in four ways:

(a) the NAFTA establishes a specific level of compensation under NAFTA Article 1110(2);

(b) the NAFTA establishes a very broad concept of "property" through its definition of "investment" in NAFTA Article 1139, which is the focus of the NAFTA expropriation provisions;

(c) NAFTA expands the coverage of international responsibility from direct and indirect expropriations to include "measures tantamount to expropriation".

(d) Through the operation of NAFTA Article 1110(8), the NAFTA amends customary international law by applying all non-discriminatory measures of a general application that are tantamount to expropriation other than a loan or debt security.

Specific Compensation

143. NAFTA Article 1110 creates an obligation upon governments to provide immediate compensation to investors whose investment has been expropriated or interfered with to the detriment of the investor. Under NAFTA Article 1110, expropriation is essentially treated as a no-fault compensation mechanism with a comprehensive scope that covers most regulatory takings. It does not outlaw a government's right to take or interfere with the private rights of an investor. NAFTA only establishes a specialized international obligation to compensate the investor for the harm caused as a result of such takings or interference.

144. The NAFTA was carefully drafted to ensure that there were no exceptions from the compensation rule. No "standard" GATT Article XX exceptions apply to the requirement to pay compensation.[124] Canada has reserved thousands of existing non-conforming measures from the operation of the NAFTA Investment Chapter through Annexes I, II, III

[124] These standard public policy exceptions were permitted for some NAFTA Chapters but not for the Investment, Services or Financial Services Chapter obligations.

and VII of the NAFTA. The NAFTA did not permit governments to make any reservations to the obligation of compensation (or to the obligation to meet minimum standards of treatment) due to their special status as objectives and obligations, which all NAFTA Parties are obliged to meet.

Broad Coverage of Property Rights

145. NAFTA Article 1110 deals with the requirement to pay compensation whenever a government takes on expropriatory act, or an act tantamount to expropriation, of an investment of an investor from another NAFTA Party. NAFTA Article 1139 defines the term "investment" broadly. This definition includes the following:

> *(a) an enterprise;*
> *(b) an equity security of an enterprise;*
> *(c) a debt security of an enterprise ... ;*
> *(d) a loan to an enterprise ...;*
> *(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;*
> *(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);*
> *(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*
> *(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory such as under*
> *(i) contracts involving the presence of the investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or*
> *(ii) contracts where renumeration depends substantially on the production, revenues or profits of an enterprise*

This broad definition of investment clearly indicates that a wide variety of economic interests, both tangible and intangible, are covered by the scope of NAFTA Article 1110.

Extension to Measures Tantamount to Expropriation

146. NAFTA Article 1110(1) expands upon the existing range of customary international law definitions of expropriation to their broader category of measures tantamount to expropriation. In their study of Bilateral Investment Treaties, Dolzer and Stevens have commented that the inclusion of this term has had the effect of broadening the coverage of expropriation provisions in which it is included. They state:

> *The latter provision represents possibly the broadest scope in investment treaties with respect to indirect expropriation insofar as the "impairment...of [the] economic value" of an investment, equates expropriation with a host of measures which might otherwise be considered as such*

under general international law, let alone under liberal systems of domestic law (emphasis added).[125]

147. The meaning of "expropriation" in NAFTA Article 1110 must also be interpreted in accordance with the general objectives of the NAFTA set out in NAFTA Article 102(1), particularly the following paragraphs:

> *(b) promote condition of fair competition in the free trade area;*
>
> *(c) increase substantially investment opportunities in the territories of the Parties;*

148. The goal of NAFTA Article 1110(1) is obviously that of investor protection, not state protection. As such, it is not necessary to examine what the purported intention of the government was in taking or interfering with an investment. International Tribunals have generally found the *ex-post facto* explanations by governments of their "motivations" for an expropriatory measure to be a less satisfactory tool than reviewing the impact of a measure. In its consideration of this issue in the *TAMS-AFFA* case, the US-Iran Claims Tribunal stated:

> *The intent of the government is less important than the effects of the measures on the owner and the form of the measures of control or interference is less important than the reality of their impact.* [126]

Most Measures of General Application are Covered

149. International law generally regards "expropriation" as including concepts such as direct, indirect, and "creeping expropriation". The drafters of the NAFTA went further, however, by requiring compensation to be paid for "measures tantamount to expropriation."

150. It is submitted that the inclusion of the term "measures tantamount to expropriation" expands the scope of measures subject to NAFTA Article 1110 to include even non-discriminatory measures of general application which have the effect of substantially interfering with the investments of investors of NAFTA Parties. This interpretation is clear on the face of NAFTA Article 1110, particularly with regard to paragraph (8), which provides:

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125 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Boston: Martinus Nijhoff, 1995) at 102.

126 *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* at 225-226.

> *For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.*

151. Under the *expressio unius est exclusio alterius* principle,[127] by expressly providing for this exception under paragraph (8) of NAFTA Article 1110, the NAFTA Parties indicated their intention that the term "measures tantamount to expropriation" should be given the broad interpretation provided for in that provision, with no further exceptions.

152. An expropriation will take place whenever there is a substantial interference with the enjoyment of an investment right. Mindful of the scope of its obligations under NAFTA Article 1110, Canada has even prepared a paper for discussion with the other NAFTA Parties on the subject of expropriation, entitled *Chapter Eleven: Operational Review-Issues Paper on Expropriation* ("*Expropriation Paper*").[128] With this paper, Canada unsuccessfully attempted to convince the other NAFTA Parties to engage in a *de facto* amendment of the NAFTA expropriation provisions.[129] This attempt would have purported to remove or restrict the ability of this NAFTA Investor-State Arbitration Tribunal to decide many of the issues raised in this Claim without permitting the Claimant or the Tribunal any opportunity to be heard.[130]

153. The *Expropriation Paper* provides some understanding as to whether regulatory takings are compensable under the NAFTA. In this paper Canada states:

> *Furthermore, the NAFTA use of "measures tantamount to expropriation" is explicitly qualified with respect to certain intellectual property matters subject to NAFTA Chapter Seventeen and with respect to debt securities. While this may lessen some uncertainty about the scope NAFTA*

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127 It is a well established interpretive principle that the specific exclusion of one element means that the others are included (see the discussion in Part Six of this Memorial on the *expressio unius* interpretive rule). In addition, the International Court of Justice and the US-Iran Claims Tribunal have both recognized that a special provision overrides a general one (*specialia derogant generalibus*) (see Case A/2, Iran-US C.T.R. 101 at 104).

128 Prepared on November 13, 1998 by John Gero, Director General Trade Policy Bureau II, NAFTA Coordinator for the Department of Foreign Affairs and International Trade attached at Schedule 27.

129 "NAFTA trade meeting fails to yield results" Heather Scoffield, *The Globe and Mail*, April 23, 1999 at A1, set out in Schedule 28.

130 Canada's attempt to circumvent this fair and impartial NAFTA process proved to be unsuccessful. Canada was unable to obtain agreement from the other NAFTA Parties.

Parties accorded to an application of "tantamount to expropriation", it may give rise to the argument that these words are otherwise to be given a full and limited interpretation.[131]

154. The terms of the NAFTA as reinforced by Canada's own statements in the *Expropriation Paper* make it clear that the obligation to pay compensation for a regulatory taking exists. NAFTA Article 1110 states that it applies to all expropriations. However, NAFTA Article 1110(8) specifically addresses the situation of a regulatory taking and exempts the circumstances mentioned therein from the application of the expropriation provisions. This NAFTA provision clearly envisions the situations in which a measure effectively constitutes a measure tantamount to expropriation and those situations that do not apply. It is a specific clarification of the customary law in this area.

155. The NAFTA also clarifies the meaning of expropriation by expressly providing that any expropriatory act must be accompanied by compensation as provided in NAFTA Article 1110(1)(d) and NAFTA Article 1110(2). Regardless of the justifications or purpose of the expropriatory act, NAFTA clearly states that compensation is the general rule for all expropriations by NAFTA governments.

156. Professor Rosalyn Higgins (as she then was) examined the question of whether regulatory takings needed to be compensated in her lectures at the Hague Academy in 1982. Professor Higgins considered the argument that just compensation should only be paid when private property is diverted to public use, but not paid when a government's "police power" is used to allow for a "regulatory taking". She wrote:

> *It would seem to be the case that while it is acknowledged that property may be indirectly "taken" through regulation, this does not attract the duty to compensate. The position seems to be (and the present writer finds the underlying policy difference hard to appreciate) that a taking for public use requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the purposes of the taking.... Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of in the general, rather than for a private, interest). And just compensation would be due.*[132]

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131 Set out in Schedule 27.

132 R. Higgins, "The Taking of Property by the State" (1982) Receuil des Cours 267 at 330-331.

Dame Higgins' rationale for compensating for virtually all takings, regardless of the government's *post facto* rationale for acting, is clearly the approach intended by those who drafted the NAFTA provisions on expropriation and "measures tantamount to expropriation".

II. THE INTERNATIONAL LAW OF EXPROPRIATION APPLIED TO THE FACTS OF THIS CLAIM

The Export Control Regime Expropriates Pope & Talbot, Inc.'s Investment in Canada

157. The Export Control Regime substantially interfered with the Investment's ability to carry on its business of exporting softwood lumber to the US market. Prior to the implementation of the *Softwood Lumber Agreement,* the Investment had unrestricted access to the US market. Under these circumstances the Investment was able to run at full capacity and sell a larger volume of softwood lumber.[133]

158. As a result of the implementation of the Export Control Regime, the Investment has suffered serious harm. The initial date of expropriation was April 1, 1996. Since that date, the Investment has experienced additional expropriations on each occasion that Canada has reduced the Investment's ability to export lumber without paying a fee. As a producer with very close proximity to US markets, including direct rail and road links, the imposition of the Export Control regime forced Pope & Talbot, Inc. to significantly reduce its business operations, including the manufacturing and export of its product.

159. Prior to the implementation of Canada's Export Control Regime, the Investment had sales of [redacted] and [redacted] to the US in 1994 and 1995 respectively. Over 90% of the Investment's production is destined for its traditional markets in the US. Since the implementation of the Export Control Regime Pope & Talbot, Inc. has been significantly deprived of its both its market and growth potential. Although softwood lumber producers in the coastal region of British Columbia experienced dramatic declines in sales due to the collapse of the Japanese market, producers such as the Investment, located in the southern interior of British Columbia, have not been affected because geography, US market proximity and transportation links have always prevented them from efficiently accessing the Japanese market.[134]

160. The inability of the Investment to export its products without being subject to an export permit fee constitutes a substantial interference with its business operations. From a 1994 high of [redacted], the Investment was restricted to the annual fee free export of only [redacted] following the imposition of the Export Control Regime in 1996. The Investment's allocation of fee free quota was further reduced in 1997 and 1998 to a total of only [redacted] per year. There was no further reduction in 1999.

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133 Statement of Kyle Gray, at para. 8.

134 Statement of Craig Campbell, Schedule 2.

(b) Damages to the expansion, management and conduct of the Investment's business operations due to the loss of US market for its product and the need for restructuring mill and production

(c) Damages to overall profitability due to significant market adjustments and restrictions of export volumes to the US market with penalties

165. In paragraph 155 of its Statement of Defence, Canada claims that "the property which the Claimant alleges was expropriated is not an 'investment of an investor of another NAFTA Party as required under Article 1110". The Investor submits that Canada is wrong in its interpretation of NAFTA Article 1110. The requirements for compensation under NAFTA have clearly been met as a result of the Investment qualifying under the definition of "investment", as set out in NAFTA Article 1139.[138] Pope & Talbot Ltd. is an enterprise that constitutes an investment owned or controlled directly by an investor of another NAFTA Party.

166. Canada also alleges at paragraph 156 of its Statement of Defence that access to the US market is not a "property right" that is capable of being expropriated by Canada. The Investor submits that its access to market is an intangible property interest upon which its business is dependant. Absent this market access, the value of its investment has been seriously diminished. This market access is exactly the type of property interest that is covered by NAFTA's broad definition of Investment in NAFTA Article 1139.

167. The Investor submits Canada's interpretation of the "investment" at issue under NAFTA Article 1110, which appears restricted to only certain types of property, is incorrect. The Investor's ability to carry out awful business operations, including alienate its product to the US market are found under NAFTA's definition of investment, as set out in NAFTA Article 1139. In particular, these activities can be seen in the following paragraphs of that provision:

> *(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*
> *(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory such as under*
> *(i) contracts involving the presence of the investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or*
> *(ii) contracts where renumeration depends substantially on the production, revenues or profits of an enterprise*

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[138] *Pope & Talbot, Inc. and The Government of Canada*, Preliminary Award Concerning the Interpretation of NAFTA Article 1101: "Measures Relating to Investment", NAFTA/UNCITRAL Tribunal, 26 January 2000, at para. 18.

168. Contrary to Canada's allegation at paragraph 159 of its Statement of Defence, the Export Control Regime has resulted in a substantial interference with the Investment of Pope & Talbot, Inc.[139] The impact of the Export Control Regime has deprived the Investment of the ability to manage and conduct its business, requiring it to change its expansion plans, alter its production processes, and even idle its production facilities.[140] The fact that the Investor still operates a business of exporting softwood lumber under these conditions does not preclude it from seeking compensation for the substantial harm that it continues to suffer as a result of the enforcement of the Export Control Regime.

169. As the effect of the Export Control Regime was to cause substantial harm to the investment, the imposition of this measure constitutes indirect expropriation under customary international law. Moreover, it is clear that the Export Control Regime has resulted in significant harm to the day-to-day – as well as the medium-term – conduct, operation and management of the Investment. As such, the Export Control Regime has deprived the Pope & Talbot, Inc. of the benefits of its Investment. Under the *lex specialis* created by NAFTA concerning expropriation, this measure accordingly constitutes a measure tantamount to expropriation. Despite the fact that it has imposed an expropriatory measure, Canada has failed to compensate the Investor without delay, as required under NAFTA Article 1110(3).[141]

170. It is not necessary to determine that Canada actually intended to expropriate the business of the Investment for it to be required to pay compensation under NAFTA Article 1110,[142] although it is clear that Canada was aware that its measure would have an expropriatory effect on the investments of NAFTA investors within its territory. The dispositive factor in determining the existence of an indirect expropriation, or a measure tantamount to expropriation, is the effect of the measure - not the intent of the government responsible for its imposition.

171. Paragraph 93 of the Claim states that Canada's Export Control Regime has expropriated the Investment of the Investor by depriving the Investment of its "ordinary ability to alienate its product to its tradition and natural market." The Investor does not take issue

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139 The Affidavit of Dr. Leonard Waverman at para.'s 10 and 13 demonstrates that a regulatory regime such as the Export Control Regime interferes with the ability of companies such as the Investment to conduct their business in a normal manner.

140 Statement of Kyle Gray, at para's. 12, 15 and 17.

141 Statement of Kyle Gray, at para. 18.

142 However, under Article 1110(1)(b), if an expropriation occurs on discriminatory grounds compensation must be paid under Article 1110(2).

with measures "expressly prescribed" by the *Softwood Lumber Agreement*, as claimed by Canada in its Statement of Defence at paragraph 169. The *Softwood Lumber Agreement* simply does not authorize Canada to refuse compensation to NAFTA investors whose investments are expropriated as a result of Canada's implementation of the *Agreement*.

172. NAFTA Article 1110(1) sets out that a NAFTA Party may expropriate an investment on the basis of four conditions, including the payment of compensation. Assuming that the requirements of NAFTA Article 1110(1)(a)-(d) are met, Canada is merely required to pay compensation for any such expropriation. NAFTA Article 1110 does not prohibit Canada from implementing the Export Control Regime in a manner that expropriates the investment of a NAFTA investor, so long as the appropriate compensation is paid.

173. In imposing the Export Control Regime, Canada failed to comply with at least two requirements set out in NAFTA Article 1110(1). These are the requirements to act consistently with NAFTA Article 1105, and to pay compensation in the manner provided for in paragraphs (2) to (6) of NAFTA Article 1110.

NAFTA Article 1110(1)(c) - Meeting International Law Obligations

174. As ordered by the Tribunal in *Procedural Order No. 7*, paragraph 1, the Investor has restricted its arguments in this Initial Memorial to those issues relating to NAFTA Articles 1102, 1106 and 1110. Claims made under NAFTA Article 1105, with respect to the manner in which the measure was implemented, will be addressed in a later phase of this arbitration, if necessary. Under NAFTA Article 1110(1)(c), if the application of an expropriatory measure also breaches either the principle of due process or the provisions of NAFTA Article 1105, Canada must compensate the Investor under the conditions set out in paragraph (2).

175. In addition to its breaches of NAFTA Article 1105, with respect to the implementation of the Export Control Regime, Canada has also fundamentally breached its obligations in international law by imposing the measure. Under the NAFTA, Canada is obligated to grant an investment of a NAFTA investor treatment in accordance with international law. NAFTA Article 1105 provides:

> *1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*

176. The NAFTA does not define the extent of treatment required to be given to the investment of a NAFTA investor other than to state that it must be in accordance with international law. Accordingly, the minimum standard is international law. Canada's *Statement on Implementation* provides that NAFTA Article 1105 is "intended to assure a

180. In April 1994, the *Final Act of the Uruguay Round and the Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") was signed at the Marrakesh Ministerial Meeting. Canada and the US are both Members of the WTO and attended those meetings. Annex 1A of the *WTO Agreement* contains the *Agreement on Safeguards* which both Canada and the US ratified. The *Agreement on Safeguards* provides for the prohibition and elimination of certain measures. Article 11(1)(b) of the *Agreement on Safeguards* provides as follows:

> *1. (b) **Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.** These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.*[147] (Emphasis added)

181. The Export Control Regime is an export restraint, imposed voluntarily by Canada in implementation of the *Softwood Lumber Agreement*. Article 1(b) of the *Agreement on Safeguards* clearly prohibits WTO Members, including Canada and the United States, from even ***seeking*** voluntary export restraints, much less taking or maintaining such measures. Canada designed and imposed the Export Control Regime in order to give effect to the *Softwood Lumber Agreement*, an agreement that Canada acknowledges in its Statement of Defence, at para. 67, is a "voluntary restraint arrangement". The Export Control Regime works to reduce the volume of softwood lumber exported from Canada to the United States, in clear contravention of Article 1(b) of the *Agreement on Safeguards*.

182. Perhaps the most fundamental pre-emptory norm of international law is the rule that treaty obligations must be followed, known as *pacta sunt servanda*. *Pacta sunt servanda* is an element of the international law obligation of countries to act in good faith. In accordance with the principle of *pacta sunt servanda*, Canada is obligated to comply fully with its obligations under the WTO *Agreement on Safeguards*. In implementing a measure that clearly breaches its obligation under Article 1(b) of that Agreement, Canada has violated an "indisputable rule of international law".[148] NAFTA Article 1105 clearly provides that the Investment of a NAFTA Party may seek compensation for harm to its investment arising as a result of it not being treated in accordance with international law.

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147 *Agreement on Safeguards*, Annex 1A to the Final *Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA (15 December 1993), 33 I.LM. 9 (1994).

148 Bin Cheng at 113.

183. The Investor and the Investment is entitled to expect that Canada will act in good faith in accordance with its treaty obligations and it had this expectation.[149] By implementing a measure having the effect of restraining exports, i.e. the Export Control Regime, Canada breached the *pact sunt servanda* principle by not observing Article 1(b) of the *Agreement on Safeguards*, and therefore failed to treat the Investment in accordance with international law. As the Export Control Regime constitutes both an indirect expropriation and a measure tantamount to expropriation, Canada's implementation of this measure was clearly not in accordance with NAFTA Article 1110(1)(c), which requires, among other things, that any expropriation must be executed in accordance with NAFTA Article 1105.

NAFTA Article 1110(1)(d) - Canada's Obligation to Compensate

184. While the *Softwood Lumber Agreement* may obligate Canada to expropriate investments in the softwood lumber industry, it makes absolutely no mention of whether compensation should be paid to such investments. Canada admits in its Statement of Defence[150] that it entered into the *Softwood Lumber Agreement* with the "full knowledge of [its] pre-existing NAFTA obligations." Canada was obviously aware that its duties may have included the obligation to compensate affected NAFTA investors under Chapter 11, and has yet to provide any explanation as to why the obligation to consult is in any way not compatible with those contained in the *Softwood Lumber Agreement*. Essentially, Canada knew the bargain it made in agreeing to the *Softwood Lumber Agreement*. Canada knew that its NAFTA obligations still applied, and that it would be required to compensate certain NAFTA investors under NAFTA Article 1110, as a result of its implementation of the *Softwood Lumber Agreement*.

III. CONCLUSION

185. The Export Control Regime has deprived Pope & Talbot, Inc. of the benefits of its Investment, in addition to substantially interfering with its conduct, management and operation. The Regime therefore constitutes both a measure tantamount to expropriation within the meaning of NAFTA Article 1110, and an indirect expropriation under international law.

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149 Statement of Kyle Gray at para. 19, Schedule 1.

150 Statement of Defence at para. 166.

186. Whether Canada intended to expropriate the Investment is not an issue. The Export Control Regime is expropriatory in effect and yet was not accompanied by appropriate compensation. Canada also failed to impose the Regime in accordance with international law. Canada is therefore obligated to pay compensation to the Investor without delay, in accordance with its obligation under NAFTA Article 1110(3), for damages suffered to its Investment as a result of these expropriations.

PART FIVE: ESTOPPEL

187. Canada pleads that the Investor is estoppel from bringing this Claim. The Investor denies that the international legal concept of estoppel can apply as a defence in this Claim and holds Canada to the strict proof thereof.

The US Trade Remedy Waiver Letter

188. Canada claims that the Investor through its conduct indicated its intention to abide by the *Softwood Lumber Agreement* and its implementation[151] because the Investor signed a letter agreeing to waive certain domestic legal remedies under US domestic law. The Investor's waiver of its legal rights is clear and speaks for itself.[152] Nowhere did the Investor in this waiver, or elsewhere, support or even comment upon Canada's implementation of the *Softwood Lumber Agreement.*

189. Pope & Talbot, Inc.'s letter was addressed to the American Secretary of Commerce and the United States Trade Representative and was signed by Michael Flannery, the President of Pope & Talbot, Inc. This letter provided that Pope & Talbot, Inc. commended the spirit of cooperation in which the United States and Canada negotiated the *Softwood Lumber Agreement.* The letter made specific representations and commitments to the US Government, including that :

(a) Pope & Talbot, Inc. was a producer of softwood lumber.

(b) Pope & Talbot, Inc. represented that:

(i) the *Softwood Lumber Agreement* removed any alleged material injury or threat of material injury from imports of softwood lumber from Canada.

(ii) This representation would be the basis for the US Department of Commerce to disregard any petition made by Pope & Talbot, Inc. to the US Government under US domestic trade law that Canadian companies were causing material injury to Pope & Talbot, Inc. arising from Canadian softwood lumber imports.

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151 Statement of Defence at para. 28.

152 This letter is set out at Schedule 13 to this Memorial.

(iii) At the same time, Pope & Talbot, Inc. agreed not to file any petitions under specific sections of US domestic trade remedy laws with respect to imports of softwood lumber from Canada.

(c) The representations and commitments made to the US Government contained in the letter would only have force or effect during the effective life of the *Softwood Lumber Agreement*.

190. At no place in this letter did Pope & Talbot, Inc. ever make representations to the Government of Canada about the *Softwood Lumber Agreement* or Canada's implementation of the *Softwood Lumber Agreement*. Indeed, at the time that Mr. Flannery drafted this letter, Canada had not even announced how it was going to implement the *Softwood Lumber Agreement*.

191. At no place in this letter did Pope & Talbot, Inc. ever make representations to the Government of Canada or the Government of the United States that it even supported the *Softwood Lumber Agreement*, much less Canada's plans for its implementation.

192. At no place in this letter did Pope & Talbot, Inc. ever make representations to the Government of Canada or the Government of the United States that it waived its rights to seek compensation under Chapter 11 of the NAFTA.

Alleged Waiver by the Investment

193. Canada claims that the conduct of the Investment indicated its intention to abide by Canada's implementation of the *Softwood Lumber Agreement*.[153] The Investment never expressed its support for Canada's implementation of the *Softwood Lumber Agreement*. Canada argues that, since an officer of the Investment, Abe Friesen, attended an information meeting held by Canada with a large number of industry representatives and representatives of other levels of government, the Investment can somehow be said to have voiced support for the *Softwood Lumber Agreement* and Canada's plans to implement the *Softwood Lumber Agreement*.[154] The fact that Mr. Friesen attended a meeting does not mean that Pope & Talbot, Inc. or Pope & Talbot Ltd. in any way supported Canada's implementation of the *Softwood Lumber Agreement*.

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[153] Statement of Defence at para. 28.

[154] Statement of Defence at para. 83.

194. The Investor submits that it is unreasonable for Canada to rely on the mere attendance of an officer of the Investment at an information meeting to constitute a waiver of the Investor or the Investment's rights to seek compensation under the NAFTA Investment Chapter.

195. Canada also asserts that the Investor's waiver of its US domestic trade remedy rights somehow represents the Investor's support and approval of the *Softwood Lumber Agreement* and its implementation. The *Softwood Lumber Agreement* was implemented by legislation and regulation and not by the Investor's conduct or lack of conduct. The Investor was not a party to the *Softwood Lumber Agreement* nor was the Investor a member of any of the legislative or regulatory bodies that possessed the necessary authority to implement the *Softwood Lumber Agreement.*

The International Law of Waiver and Estoppel

196. The concept of waiver and estoppel is well-known under international law. For estoppel to apply under international law, there must be "an element of conduct that causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice."[155]

197. Canada has suggested a definition of estoppel at paragraph 27 of its Statement of Defence which does not exactly accord with the definition of estoppel under international law. Perhaps the best definition of estoppel is provided by Professor Derek Bowett as :

(a) A statement of fact which is clear and unambiguous;

(b) This statement must be made voluntarily, unconditionally and must be authorized; and

(c) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[156]

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[155] Brownlie, *Principles of Public International Law*, 5th ed (1998) at 645-647.

[156] Derek Bowett, "Estoppel Before International Tribunals & its Relation to Acquiescence", 33 British Yearbook of International Law (1957) at 202. This definition is cited as being authoritative by Professor Brownlie in the 5th edition of his treatise, *Principles of Public International Law* at 646.

198. The International Court of Justice has followed these principles in at least three cases: the *North Sea* Continental Shelf case,[157] the *Gulf of Maine* case[158] and the *Temple* case.[159] Indeed, in the *Temple* case, the International Court of Justice stated that it was inappropriate to apply domestic principles of estoppel to international law.[160]

199. Canada is unable to rely upon the Investor's representations to the US Government as constituting an act where the investor is estoppel from bringing its NAFTA Claim for the following reasons:

(a) The representation did not support Canada's implementation of the *Softwood Lumber Agreement* nor did it support the *Softwood Lumber Agreement* at all. There was no clear and unambiguous statement about any of the issues raised in this Claim.

(b) Mr. Flannery's letter was limited to only dealing with specific clearly described issues under US domestic trade remedy law and was only made to US government representatives. At no time were these representations made to Canada and there is nothing which relates to the Investor's NAFTA rights within these statements.

(c) There is no evidence that Mr. Friesen's attendance as an observer at an information session describing the proposed Softwood Lumber Agreement constituted any representation of any kind on behalf of the Investor or the Investment. Indeed, it is patently unreasonable for this Tribunal to believe that Mr. Friesen's attendance as an observer to a meeting had any dispositive legal effect for his employer.

(d) There is no evidence that either Pope & Talbot, Inc. or Pope & Talbot Ltd. knew about their respective rights arising out of the NAFTA Investment Chapter, let alone voluntarily and unambiguously waiving these rights.

(e) There is no evidence that Canada relied on the specific statement of Pope & Talbot in implementing its Export Control Regime. Even if, *ex post facto*, Canada claimed that it relied on this specific representation for implementing the Export Control Regime, it could not reasonably demonstrate that this was a reasonable

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157 ICJ Reports (1969) 26 at para. 30.

158 ICJ Reports (1984) 309 at para. 145.

159 ICJ Reports (1962) at 4.

160 ICJ Reports (1962) at 39.

and good faith act that had a true nexus to Canada's decision to implement the *Softwood Lumber Agreement* in Canada.

200. The Investor submits that Mr. Flannery's letter could never constitute a representation of Pope & Talbot's support for Canada's implementation of the *Softwood Lumber Agreement*. Furthermore, it is simply wrong in law and in fact for Canada to interpret as acquiescence the Investor's lack of verbal or written disapproval of the implementation of the *Softwood Lumber Agreement* as having the legal effect of constituting a waiver of the Investor's rights to NAFTA dispute settlement under Chapter 11.

201. Canada claims in its Statement of Defence at paragraph 32 that the Investor has acted inconsistently by supporting the *Softwood Lumber Agreement* while challenging the *Softwood Lumber Agreement* by its NAFTA Claim. The Investor's Claim does not challenge the *Softwood Lumber Agreement* at all. Canada's argument is simply incorrect.

202. Finally, for the international legal concept of estoppel to apply, it would be necessary for Canada to demonstrate that the Investor was a party to the implementation of the *Softwood Lumber Agreement* through Canada's Export Control Regime. The Investor denies that it was a party to the implementation of the *Softwood Lumber Agreement* and puts Canada to the strict proof thereof.

203. In conclusion, the Investor requires that Canada strictly prove its allegation that the Investor and the Investment engaged in activities that would act as a waiver of its ability to bring this Claim. The Investor submits that Canada cannot adduce this evidence and that it must abandon this untenable position.

PART SIX: INTERPRETIVE ISSUES

I. THE INVESTOR HAS MET THE REQUIREMENTS OF NAFTA CHAPTER 11

204. On January 26, 2000, the Tribunal rendered on award dealing with certain preliminary issues raised by Canada in a Preliminary Motion. The Investor submits that this award dispositively deals with the issues incidental to that Motion, however out of an abundance of caution, the Investor presents argument on the following issues:

(a) Can measures apply to multiple NAFTA chapters at the same time?; and

(b) Is there a conflict between NAFTA Chapters 3 and 11?

A. MEASURES CAN APPLY TO MULTIPLE NAFTA CHAPTERS

205. Government measures can apply to multiple NAFTA Chapters. The simple fact that a measure may be related to the subject matter of one NAFTA chapter does not mean that this same measure cannot be related to, or otherwise affect, rights and obligations contained within other chapters. If measures could not attract liability under multiple obligations, the broad liberalizing goals of the NAFTA would be frustrated.

206. In paragraph 17 of its Statement of Defence, Canada states that the Export Control Regime is a measure that relates to trade in goods and therefore the Claim is invalid and not arbitrable under NAFTA Chapter 11.

207. Even if this Tribunal concludes that Canada's measures respecting the implementation of the *Softwood Lumber Agreement* apply to trade in goods, Canada is not relieved of its obligations respecting the treatment of investors. It is possible for an overlap of treaty obligations to exist. Where there is an overlap between treaty obligations, Canada is required to comply with both obligations.

208. The issue of conflicting treaty obligations was explored by the WTO Appellate Body in its decision in *EC-Bananas*.[161] In the *EC-Bananas* case, the Appellate Body had to determine what the legal consequences were of an overlap between obligations contained in the GATT 1994 and the GATS. The Appellate Body concluded that the obligations in both treaties were broadly worded and it was likely that some overlap would occur. The Appellate Body stated:

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161 AB-1997-3, WT/DS27/AB/R, September 9, 1997.

> *There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. [. . .] Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in Canada - Periodicals.*[162]

209. The WTO Panel decision in *Canada - Certain Measures Concerning Periodicals*[163] addressed the very same issue and decided against Canada (upheld by the Appellate Body). The Panel stated:

> *...Canada also argues that overlaps between GATT 1994 and GATS should be avoided. We disagree. Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system. In fact, certain types of services such as transportation and distribution are recognized as a subject matter of disciplines under Article III:4 of the GATT 1994...[I]n any event, since Canada admits that in the present case there is no conflict between its obligations under GATS and under GATT 1994, there is no reason why both GATT and GATS obligations should not apply to the Excise Tax Act.*[164]

210. A similar conclusion was reached by the panel in *Indonesia - Measures Affecting the Automobile Industry*,[165] concerning overlapping obligations contained within the GATT, the WTO *Agreement on Trade Related Investment Measures* and the WTO *Agreement on Subsidies and Countervailing Measures*. In that case, the panel ruled that a measure could simultaneously attract obligations concerning goods, subsidies and investment.

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162 *EC-Bananas*, WT/DS27/AB/R, September 9, 1997 at 97. Referring to *Canada - Periodicals*, Appellate Body Report, WT/DS31/AB/R adopted July 30, 1997 at 19.

163 WT/DS31//R, March 14, 1997.

164 At para. 5.18 - 5.19.

165 WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, July 2, 1998 at para. 14.56. The panel concluded:

> *... we reject Indonesia's general defence that the only applicable law to this dispute is the SCM Agreement. We consider rather that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement.*

211. Thus, Canada's assertion that the Export Control Regime only relates to trade in goods, under NAFTA Chapter 3, is incorrect. Canada's measure certainly does affect the trade in goods under Chapter 3, but it simultaneously affects investments in the softwood lumber industry in Canada, and therefore violates the provisions of NAFTA Chapter 11.

B. THERE IS NO CONFLICT BETWEEN NAFTA CHAPTERS 3 AND 11

212. In paragraph 17 of its Statement of Defence, Canada implies that there is a conflict between Chapters 3 and 11 of the NAFTA and that, as a consequence, only Chapter 3 applies to the settlement of this dispute. The Investor submits that there is no conflict between Chapters 3 and 11.

213. The NAFTA contains 22 chapters covering a range of topics. Some chapters contain obligations that are contradictory. In the event of a conflict, one chapter must prevail. The Investment Chapter states that in the event of any inconsistency between Chapter 11 and any other chapter, the other chapter will prevail.[166] However, this rule only applies in the event of an inconsistency.

214. There is no inconsistency between NAFTA Chapters 3 and 11. NAFTA Chapter 3 prohibits export restrictions such as those required by Canada's implementation of the *Softwood Lumber Agreement*.[167] NAFTA Chapter 11 does not prevent a Party from taking such action but it requires a Party to compensate harmed investors if such action occurs in a way that violates an Investment Chapter obligation. Therefore, the two chapters are complimentary and not inconsistent as Canada claims.

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166 NAFTA Article 1112.

167 NAFTA Article 309.

II. INTERPRETATION OF THE NAFTA

A. GENERAL GUIDELINES

215. The NAFTA contains its own rules of interpretation, which require taking note of its objectives in accordance with applicable rules of international law.

216. In the *Canadian Marketing Practices* case, the first interpretative panel organized under NAFTA, the panel specifically addressed the principles to be applied in the interpretation of the NAFTA, by stating:

> *The Panel also attaches importance to the trade liberalization background against which the agreements under consideration must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favoured nation treatment and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit the NAFTA's objectives.*[168]

217. A broad interpretation of the scope and coverage provisions of the Investment Chapter is consistent with the interpretive principles of the NAFTA. NAFTA Article 102 reads:

> *Objectives*:
>
> *1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:*
>
> *(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;*
> *(b) promote conditions of fair competition in the free trade area;*
> *(c) increase substantially investment opportunities in the territories of the Parties;*
> *(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;*
> *(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and*
> *(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.*
>
> *2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*

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168 NAFTA Arbitration Panel Established Pursuant to Article 2008. *In the Matter of Tariffs Applied by Canada to Certain U.S. - Origin Agricultural Products* (Secretariat File No. CDA-95-2008-01). Final Report of the Panel, December 2, 1996 at 36.

218. The NAFTA includes the objective of investment protection, which holds the same level of protection under the NAFTA as the objective of trade liberalization referred to in the *Canadian Marketing Practices* decision. Any interpretation of the NAFTA must promote rather than inhibit these stated objectives. Therefore, a broad interpretation of the scope and coverage of the NAFTA Investment Chapter is warranted. Such an interpretation would accord with the principle that treaties must be interpreted in good faith.[169]

B. INTERNATIONAL INTERPRETIVE PRINCIPLES

219. It is a generally accepted rule of international treaty interpretation that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[170]

220. Article 31 (4) of the *Vienna Convention on the Law of Treaties* provides that "a special meaning shall be given to a term if it is established that the parties so intended."

221. In the event that a specific term in a treaty remains ambiguous, the Investor submits that it is appropriate to apply the interpretative principle of *contra proferentem.* As stated by Lord McNair in his treatise, *The Law of Treaties*, this principle states:

> *. . . that in case of ambiguity a provision must be construed against the Party which drafted or proposed that provision which appears to mean that in case of doubt the other Party should have the benefit of the doubt.*[171]

Where ambiguity exists in the terms of a treaty, this ambiguity should be resolved against the drafting Party. In accordance with this long-established principle, since Canada was a drafter of the NAFTA, any ambiguity in the terms of the treaty should be resolved against the drafter and in favour of the Investor.

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169 McNair, A.D. *The Law of Treaties* (Oxford: Clarendon Press, 1986) at 465.

170 This obligation is codified in Article 31(1) of the *Vienna Convention on the Law of Treaties.*

171 McNair, A.D. *The Law of Treaties* (Oxford: Clarendon Press, 1986) at 464. Cases cited to support this principle include, *Brazilian Federal Loans*, P.C.I.J., Ser. A, Nos. 20/21, at 93 and 114; *Lusitania Claim*, United States-Germany Mixed Claims Commission, A.D. 1923-4, No. 198; 18 A.J. (1924), R.I.A.A., Volume 7, 32 at 43.

III. THE NAFTA AND THE *SOFTWOOD LUMBER AGREEMENT*

224. Canada argues in its Statement of Defence that if compliance with its *Softwood Lumber Agreement* obligations puts it in violation of its NAFTA Chapter 11 obligations, then the *Softwood Lumber Agreement* must prevail to the extent of any inconsistency as an international agreement later in time.[174] Canada cites no authority but appears to base its argument upon Article 30 of the *Vienna Convention*, which provides:

> *Article 30 - Application of successive treaties relating to the same subject-matter*
>
> *1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.*
>
> *2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*
>
> *3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.*
>
> *4. When the parties to the later treaty do not include all the parties to the earlier one:*
>
> *(a) as between States parties to both treaties the same rule applies as in paragraph 3;*
>
> *(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*
>
> *5. Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.*

225. Canada's argument presumes that the *Softwood Lumber Agreement* and the NAFTA are both treaties and that they both relate to the same subject matter. It also presumes that the obligations generated under these "treaties" are not compatible with each other. While the *Softwood Lumber Agreement* may be a "treaty", within the meaning of the *Vienna Convention*, it is not at all clear that the Agreement relates to the same subject matter as the NAFTA or that its provisions are in any way incompatible with obligations owed by Canada to the Investor under NAFTA Chapter 11.

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[174] Statement of Defence at para. 9 and 170.

226. The *Softwood Lumber Agreement* is an international agreement between Canada and the US. While the Agreement did not take the form of a treaty under US domestic law,[175] under the *Vienna Convention*, it is to be treated like a treaty. Article 1(a) of the *Vienna Convention* states that:

> *'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*

227. The *Softwood Lumber Agreement* permits Canada to impose an export fee on exports of softwood lumber from the four Listed Provinces exceeding 14.7 billion board feet per year. The subject of the *Softwood Lumber Agreement* is the export of softwood lumber from Canada to the US and the application of US trade remedy law to such exports.

228. The subject of the NAFTA is far broader: liberalized trade and investment in the North American market. As such, these two "treaties" cannot be said to relate to the same subject matter. Accordingly, Article 30 of the *Vienna Convention* does not apply in this case. Canada is therefore obliged by the principle of good faith to observe all of the obligations contained within both treaties, unless either provides otherwise.

229. The *Softwood Lumber Agreement* does not contain any wording that would give its terms priority over inconsistent obligations in other agreements, particularly the NAFTA or the WTO's Agreement on Trade Related Investment Measures (the "TRIMS Agreement"). The provision of the NAFTA that addresses its relationship to other international agreements, Article 103, does not mention the *Softwood Lumber Agreement* or any predecessor agreement. It simply provides that:

> *In the event of any inconsistency between this agreement and such other agreements, this agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this agreement.*

230. If Canada had intended any agreement it entered into with the US concerning softwood lumber exports to supercede all of the provisions of the NAFTA, it could have included an express provision in the NAFTA or in the *Softwood Lumber Agreement* to that effect. Despite existing precedent, it chose not to do so.

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[175] The *Softwood Lumber Agreement* was not ratified as a treaty by the US Senate but, it was given force as an Executive Agreement under the President's constitutional powers to conduct foreign affairs.

231. When Canada concluded the 1989 *Free Trade Agreement* ("FTA") with the US, it expressly provided for the continued application of the 1986 *Canada – United States Memorandum of Understanding on Softwood Lumber* ("MOU").[176] Article 2009 of the FTA expressly provided for the inconsistency between the two Agreements as follows:

> *The Parties agree that this Agreement does not impair or prejudice the exercise of any rights or enforcement measures arising out of the Memorandum of Understanding on Softwood Lumber of December 30, 1986.*

232. When the NAFTA came into force in 1994, Canada chose not to provide for the operation of possible successor agreements on softwood lumber, as it did in NAFTA Article 2101(1) concerning successor provisions to Article XX of the GATT 1947.

233. In its Statement of Defence, Canada admits that it was concerned in early 1994 "that costly litigation and marketplace uncertainty would continue"[177]. Nonetheless, Canada chose not to include any provisions relating to a bilateral understanding on softwood lumber exports. Canada also chose not to take any reservations for measures affecting the trade in softwood lumber between itself and the US or for measures relating to investment in the softwood lumber sector.

234. Canada has admitted in its Statement of Defence that it entered into the *Softwood Lumber Agreement* with the US with the "full knowledge of [its] pre-existing NAFTA obligations."[178] The fact that Canada chose to grandparent other areas within the NAFTA, such as certain agricultural products[179], but chose not to do so with softwood lumber, is clear evidence of Canada's intent. Canada and the US obviously did not evidence any intention that the terms of any successor agreements to the 1986 MOU on softwood lumber should supercede the NAFTA.

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176 *Memorandum of Understanding between the Government of Canada and the Government of the United States of America* (1986), Schedule 21.

177 Statement of Defence at para. 63.

178 Statement of Defence at para. 166.

179 This issue was central to Canada's success in the NAFTA Panel decision *Tariffs Applied by Canada to Certain U.S. -Origin Agricultural Products*. The Panel concluded that NAFTA Annex 702.1 expressly incorporated FTA Article 710. NAFTA Annex 702.1 subparagraph (4) states:

> *The Parties understand that Article 710 of the Canada - United States Free Trade Agreement incorporates the GATT rights and obligations of Canada and the United States with respect to agricultural, food, beverage and certain related goods, including exemptions by virtue of paragraph 1(b) of the Protocol of Provisional Application of the GATT and waivers granted under Article XXV of the GATT.*

235. Article 103(2) of the NAFTA confirms that the terms of the NAFTA prevail over those of any other agreement to the extent of the inconsistency, except as provided elsewhere in the NAFTA. As Canada has not expressly incorporated any provisions respecting the *Softwood Lumber Agreement* or any of its predecessors, any inconsistency between the *Softwood Lumber Agreement* and the NAFTA shall be governed by the terms of the NAFTA.

The Softwood Lumber Agreement and the NAFTA are not Incompatible

236. Alternatively, if this Tribunal determines that the NAFTA does not supercede the *Softwood Lumber Agreement*, by virtue of NAFTA Article 103, but that the *Softwood Lumber Agreement* and the NAFTA actually relate to the same subject matter, it is nonetheless clear that the obligations contained within the *Softwood Lumber Agreement* are not incompatible with the obligations contained within NAFTA Chapter 11.[180] Accordingly, the obligations of both treaties apply, *mutatis mutandis*.

237. Canada, the US and Mexico are Parties to the NAFTA. Only Canada and the US are Parties to the *Softwood Lumber Agreement*. Under Article 30 paragraph (4)(a) of the *Vienna Convention*, Parties to an earlier treaty are obliged to honour all of that earlier treaty's obligations to the extent that they are not incompatible with those of any later treaty made between them.

238. The *Softwood Lumber Agreement* obliges Canada to collect fees on exports made in excess of 14.7 BBF of softwood lumber originally produced in the four Listed Provinces. This may constitute a quantitative restriction on goods, which is prohibited under Article 309 of the NAFTA. Article 309 is supposed to prevent NAFTA Parties from imposing new quantitative restrictions on goods exported to another NAFTA Party. Accordingly, if the *Softwood Lumber Agreement* and the NAFTA relate to the same subject matter, the application of NAFTA Article 309 to Canada's Export Control Regime may be affected.

239. However, the obligation to impose a quantitative restriction on softwood lumber exports is not inconsistent with Canada's NAFTA Chapter 11 obligations. Unlike NAFTA Chapter 3, concerning goods, NAFTA Chapter 11 does not prohibit the imposition of export quota regimes. Chapter 11 simply requires that Canada compensate NAFTA investors for actions that cause damage to these investors or their investments.

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180 The Investor does not agree with Canada's argument in its Statement of Defence at para. 165 that a breach of Canada's Chapter 11 NAFTA obligations, as claimed in this case, is at odds with Canada's obligations under the *Softwood Lumber Agreement*.

240. Canada is therefore free to impose an export control regime that relates to the investment of a NAFTA investor and that causes harm. However, if Canada chooses to do so, it is required to compensate eligible NAFTA investors for the harm caused, regardless of why such measures were imposed.

241. To show the incompatibility, Canada identifies in its Statement of Defence[181] four instances of complaints in the Claim through which Canada alleges the Investor "attacks *SLA* measures expressly prescribed by the *Softwood Lumber Agreement* itself..." The Investor does not challenge the *Softwood Lumber Agreement* but the specific manner in which Canada has implemented the Export Control Regime. The measure established by Canada to implement the *Softwood Lumber Agreement* was not "expressly prescribed" in the Agreement as Canada states. The Export Control Regime goes above and beyond the basic terms of the *Softwood Lumber Agreement*. It is in these aspects that the Export Control Regime extends beyond the minimum "prescribed" obligations of the *Softwood Lumber Agreement* that the Investor is challenging in its Claim.

242. Paragraphs 76 and 87 of the Claim relate to the Investor's arguments concerning national treatment and performance requirements regarding the application of the Export Control Regime to certain provinces and not other provinces. In particular, Canada made it explicit that certain provinces would not be subject to its Export Control Regime. The *Softwood Lumber Agreement* did not "prescribe" the exclusion of the Non-listed Provinces from the application of the Export Control Regime.

243. The *Softwood Lumber Agreement* states in Article II(1) that:

> *Canada shall place softwood lumber on the Export Control List under the Export and Import Permits Act, as amended, and require a federal export permit for each exportation to the United States of softwood lumber first manufactured in the province of Ontario, Quebec, British Columbia or Alberta....*

The *Softwood Lumber Agreement* makes no mention of Non-listed Provinces.[182]

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181 Statement of Defence at para. 169.

182 For example, the Listed Provinces are also mentioned in paragraphs II(2),(5), (6),(11) with no mention of the exclusion of the Non-listed Provinces.

244. *Notice to Exporters No. 94*, at paragraph 2.0, refers specifically to the "softwood lumber products" as set out in Item 5104 of the *Export Control List*. It goes on to say that:

> *This means softwood lumber products first manufactured in British Columbia, Alberta, Ontario or Quebec that are exported to the United States ... **Shipments of softwood lumber first manufactured in the territories, in other provinces or in another country, are not covered by Item 5104**... "[emphasis added]*

245. In contrast to the *Softwood Lumber Agreement*, *Notice to Exporters No. 94* makes the positive statement that Canada shall not require a permit for the export of softwood lumber first manufactured in the Non-listed Provinces. The *Softwood Lumber Agreement* requires application to the Listed Provinces as a minimum level of application to which Canada and the US agreed. The *Softwood Lumber Agreement* does not limit, nor does it exclude, application or implementation by Canada of the Export Control Regime to the Non-listed Provinces. Canada has taken an extra step in its implementation of the Export Control Regime by explicitly excluding Non-listed Provinces from the Export Control Regime.

246. When Canada originally defined the measure in Regulation SOR/96-175,[183] the province of Manitoba was initially included on the *Export Control List* with the other Listed Provinces. Manitoba's initial inclusion in the measure demonstrates that Canada was perfectly capable of including all provinces if it so chose. Canada cannot say it was obligated to include only the four Listed Provinces in its measure because the *Softwood Lumber Agreement* does not impose such a requirement. Rather, the *Softwood Lumber Agreement* clearly indicates that it was for Canada to implement the obligations contained in it.

Canada Could Have Implemented the Softwood Lumber Agreement Consistently with its International Obligations

247. Canada could have implemented the *Softwood Lumber Agreement* consistently with its NAFTA obligations by requiring softwood lumber mills in Non-listed Provinces to be treated in the same manner as those in Listed Provinces. This equal treatment of all provinces would have been consistent with Canada's national treatment and performance requirement obligations.

248. Further, Canada could have applied the new "extra fee level" to all provinces instead of just to British Columbia in order to be consistent with its national treatment and performance requirement obligations. While Canada could have implemented its

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183 See Schedule 14 of this Memorial.

obligations under the *Softwood Lumber Agreement* in a manner consistent with its NAFTA obligations, it chose not to. It was this decision to implement the obligations of the *Softwood Lumber Agreement* in a manner that violated Canada's pre-existing national treatment and performance requirement obligations under NAFTA that caused harm to the Investor and the Investment.

249. Canada's Export Control Regime became inconsistent with Canada's obligation to pay compensation under NAFTA Article 1110(1)(d). If Canada had paid compensation in the manner set out in Article 1110 then the Export Control Regime would be consistent with the terms of NAFTA Article 1110.

PART SEVEN: SUBMISSIONS

In view of the facts and arguments set out in this Memorial, may it please the Tribunal to declare and adjudge the following:

250. Through the introduction and implementation of the *Softwood Lumber Agreement*, Canada has violated Article 1110 of the North American Free Trade Agreement.

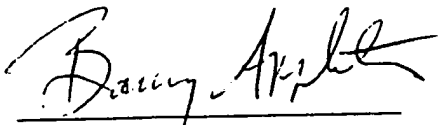
251. Through the introduction and implementation of the *Softwood Lumber Agreement*, Canada has violated Article 1102 of the North American Free Trade Agreement.

252. Through the introduction and implementation of the *Softwood Lumber Agreement*, Canada has violated Article 1106 of the North American Free Trade Agreement.

253. Due to Canada's breach of the North American Free Trade Agreement, Canada is liable to pay compensation to the Investor, in such amount as will be determined in the Damages Phase of this proceeding.

254. The Investor requests an order that Canada pay all the costs of these proceedings, including all fees and expenses incurred by the Investor.

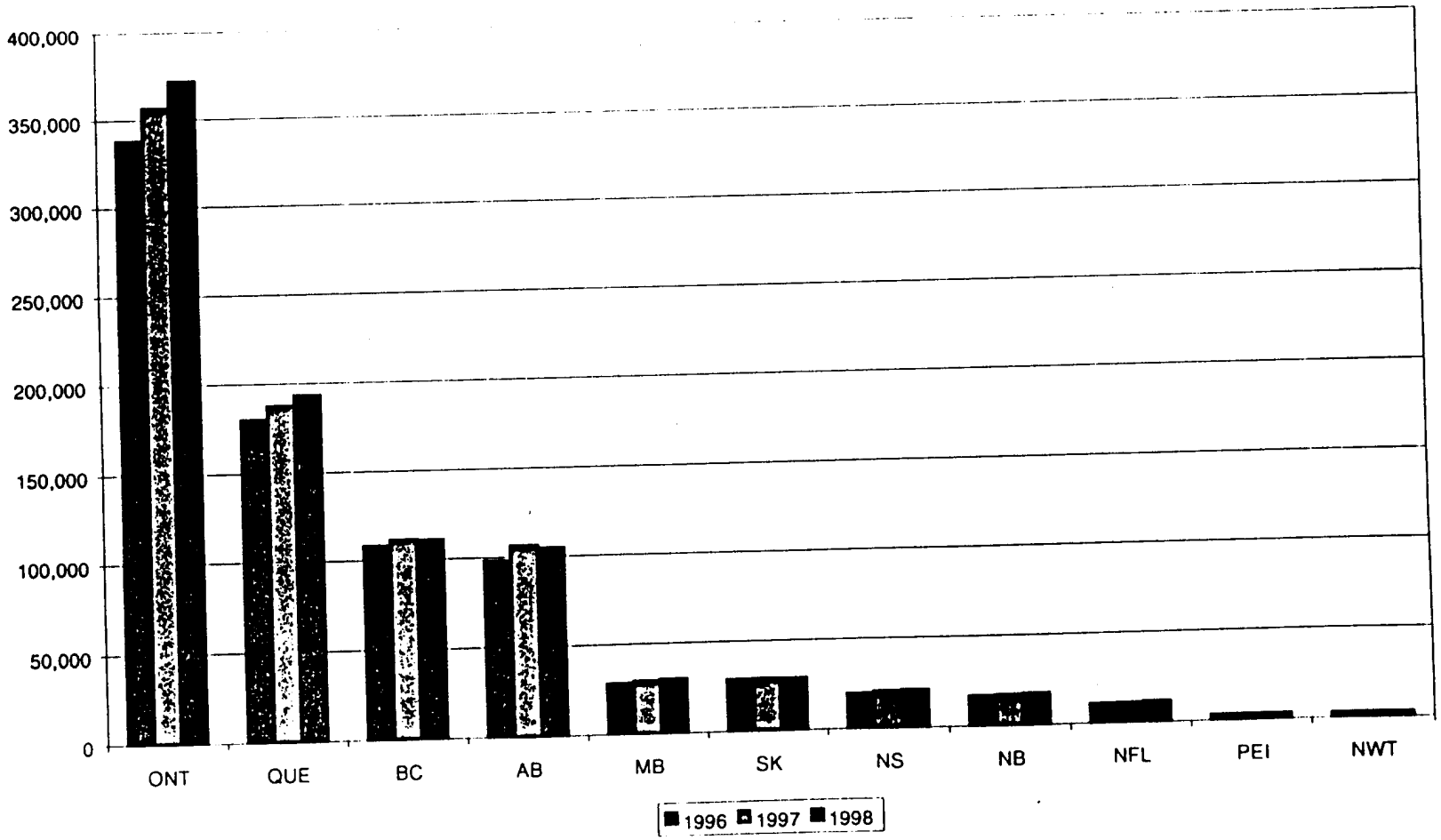
255. Submitted this 28th day of January 2000 at Toronto, Canada.



for APPLETON & ASSOCIATES INTERNATIONAL LAWYERS
Barry Appleton
Counsel for the Investor, Pope & Talbot, Inc.

1140 Bay Street, Suite 300
Toronto, Ontario M5S 2B4

Table 1: Canada's Export Control Regime Helps Canada's Poorest Provinces



Gross Domestic Product for Canadian Provinces and Territories, in CDN$ Millions.
Source: Statistics Canada, CANSIM, Matrices 9015-9026.

Table 2: Removing Pope & Talbot Ltd.'s Ability to Export Fee Free (EB Quota)

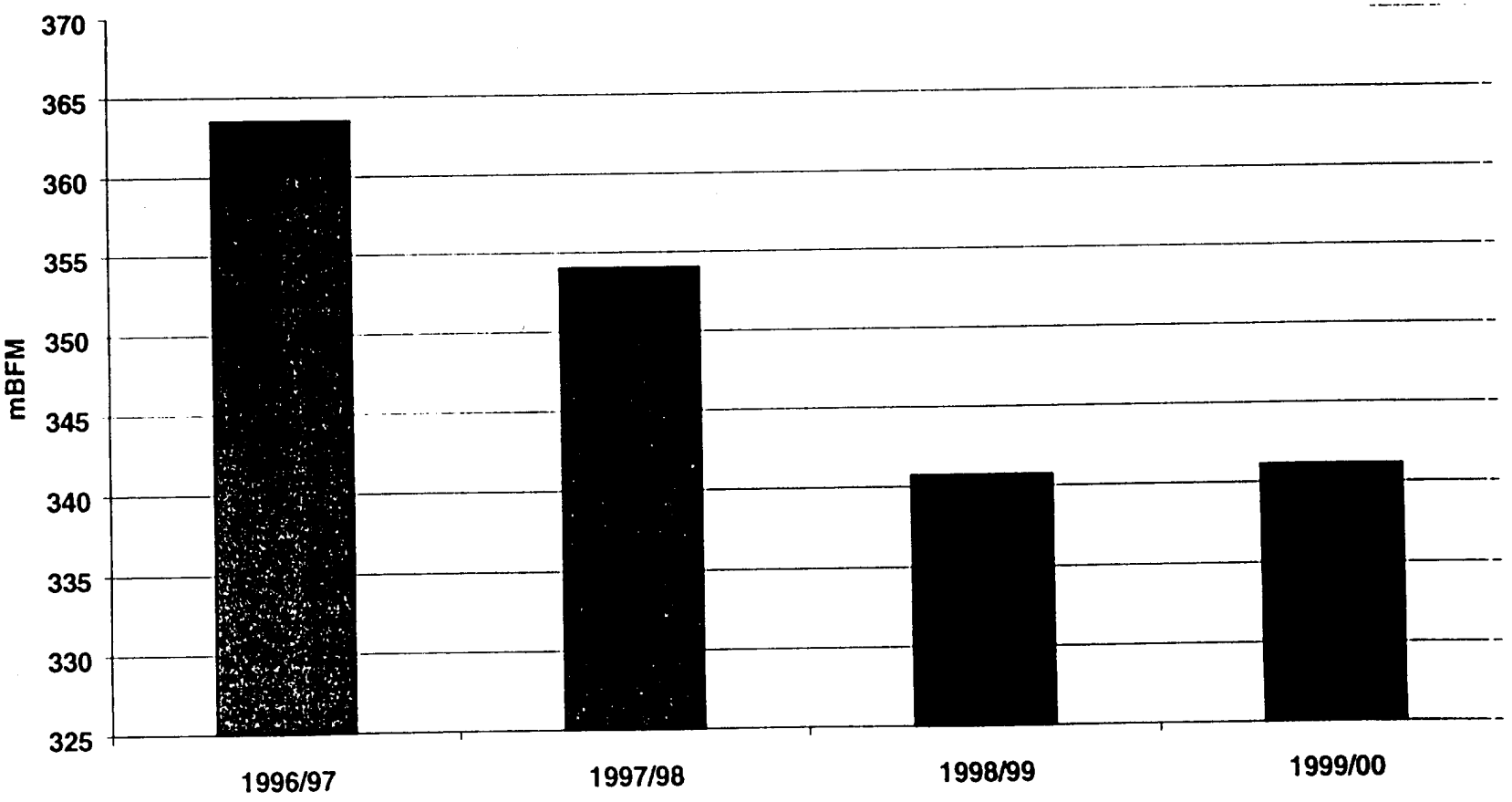
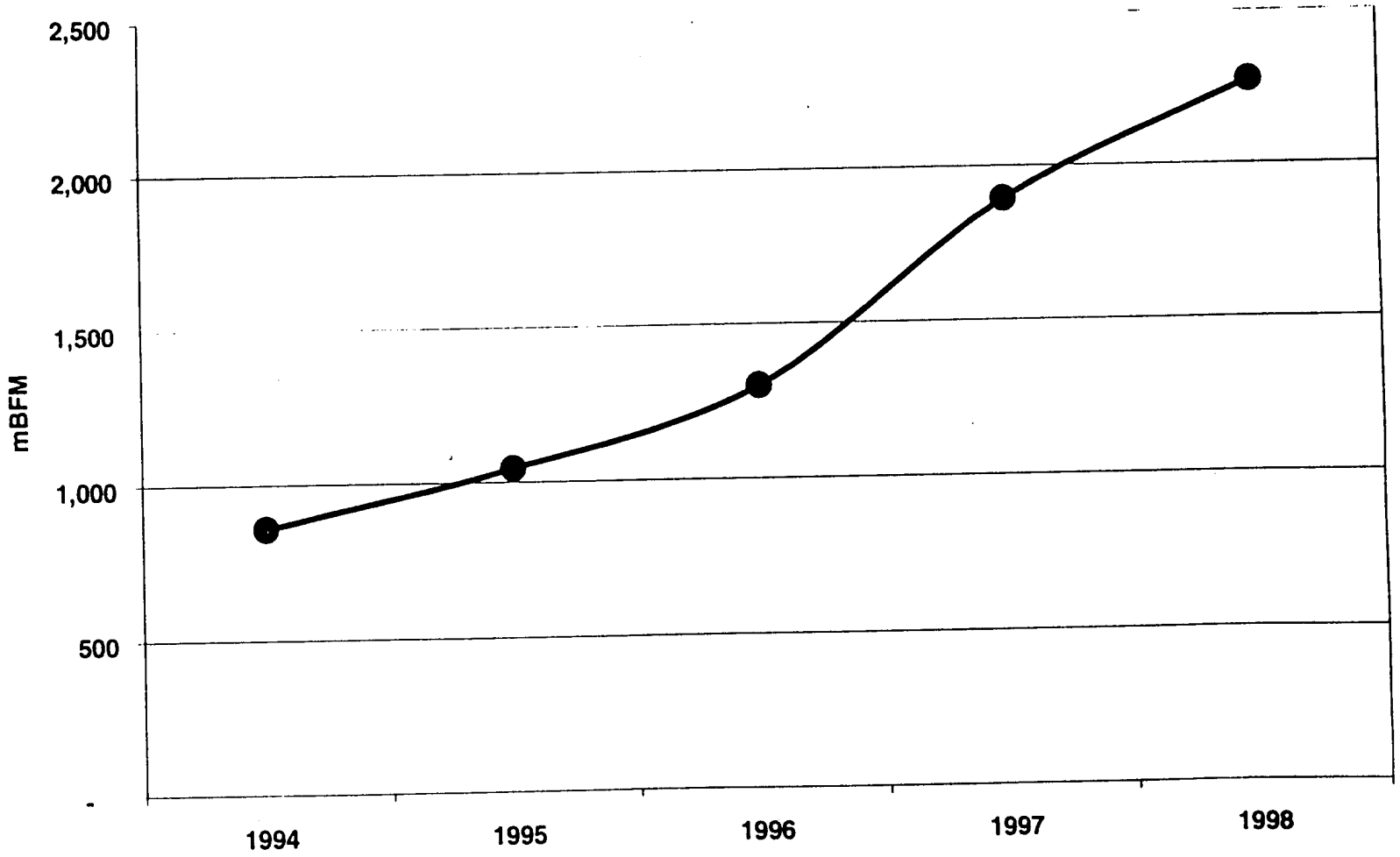
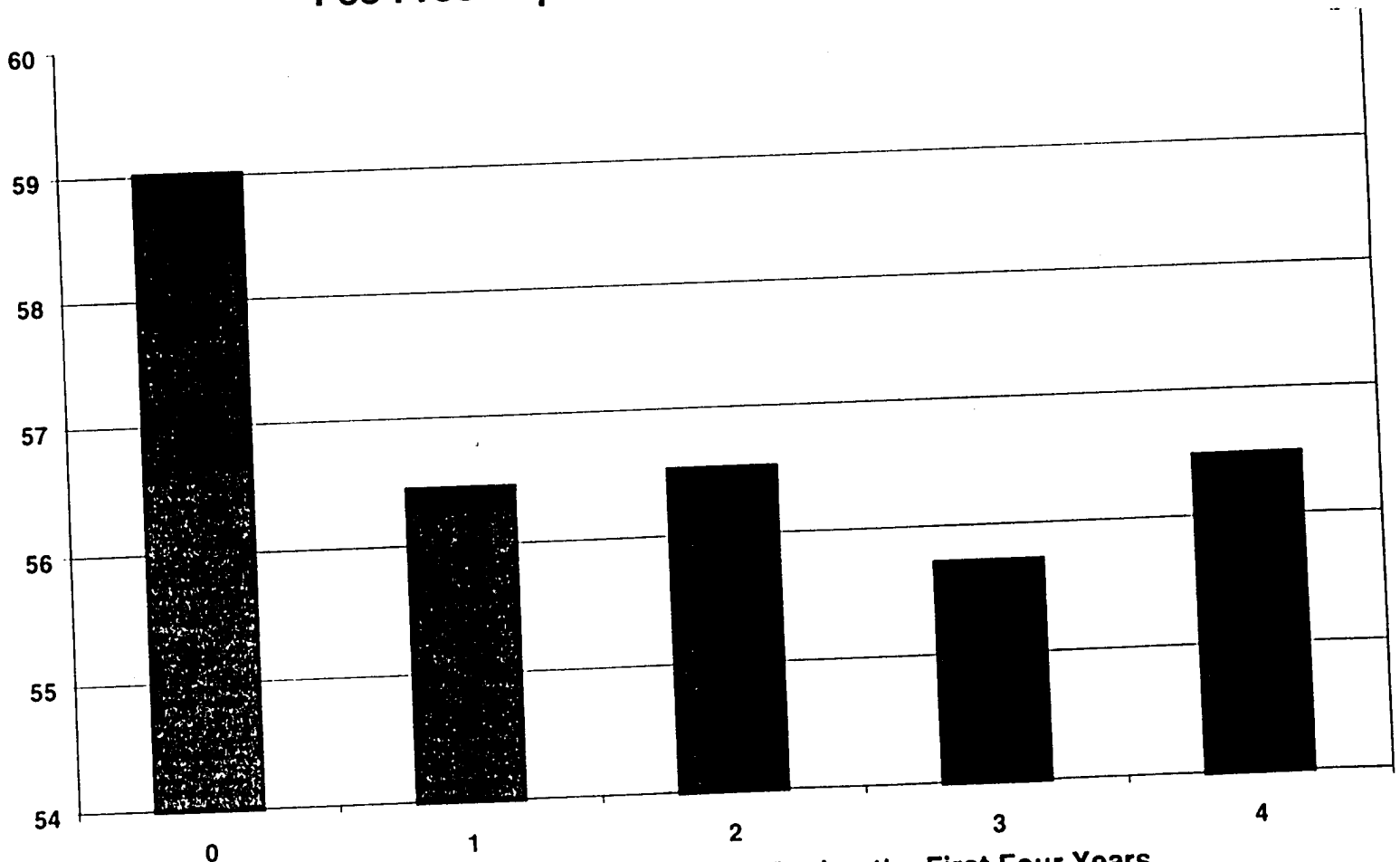


Table 3: Increasing US Consumption of Softwood Lumber from Non-listed Provinces



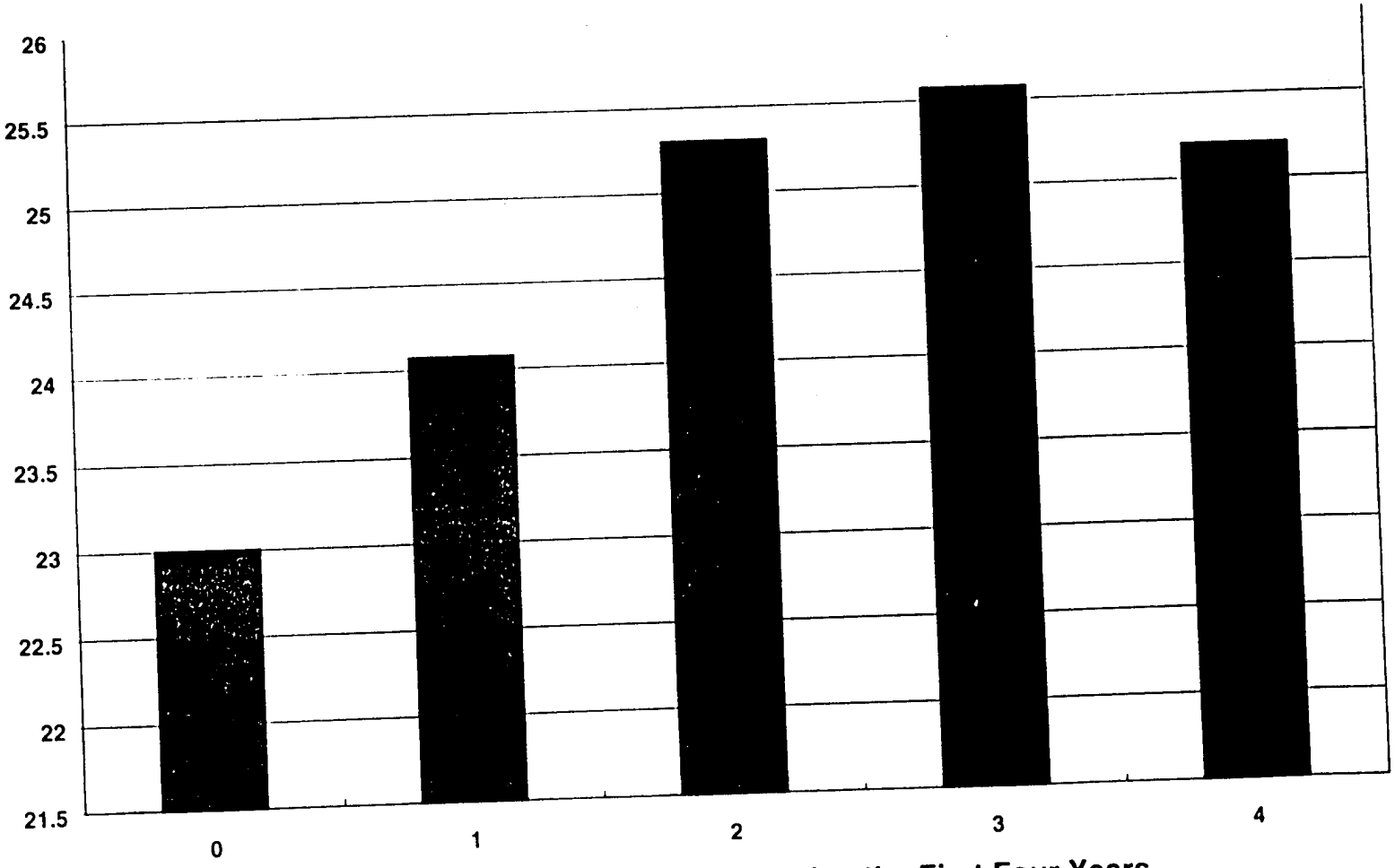
Source: Canada/US SLA Quarterly Statistical Monitor

Table 4: Impact of the Export Control Regime on Fee Free Exports from British Columbia



Source: Canada, Export and Import Control Bureau

Table 5: Impact of the Export Control Regime on Fee Free Exports from Quebec



Overall Percentage Increases During the First Four Years

Source: Canada, Export and Import Control Bureau

APPLETON & ASSOCIATES

INTERNATIONAL LAWYERS

Washington DC *Toronto*

Memorial of the Investor - Initial Phase

Pope & Talbot, Inc. and Government of Canada

INDEX OF SCHEDULES

Document	Schedule
United States - Canada Softwood Lumber Agreement	12
Investor's Waiver of Domestic United States Trade Remedy Rights	13
Export Control List, amendment, SOR/96-175, March 26, 1996	14
Export Control List, amendment, SOR/96-315, June 21, 1996	15
Export Permits Regulations (Softwood Lumber Products) - SOR/96-319, June 21, 1996, as amended by SOR/96-480	16
Softwood Lumber Products Export Permits Fees Regulations - SOR/96-317, as amended by SOR/96-481	17
Notice to Exporters No. 94	18
Notices to Exporters No. 98, 107, 110, 112.	19
Notice to Exporters No. 116	20
Canada-U.S. Memorandum of Understanding on Softwood Lumber (1986)	21
Affidavit of Claudio Valle, Director of Trade Controls Policy Division, Export and Import Control Bureau, Department of Foreign Affairs and International Trade, January 15, 1997	22
Statistical Materials, Canada, Export and Import Control Bureau, Quarterly Statistical Monitor	23
R.S. Friesen, President of the Interior Lumber Manufacturers' Association, letter to John Allan, British Columbia Deputy Minister, British Columbia Ministry of Forests, June 16, 1998	24
Notice to Exporters No. 120	25