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

SUPPLEMENTAL MEMORIAL OF THE INVESTOR INITIAL PHASE

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

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INVESTOR'S REPLY AND MEMORIAL
INITIAL PHASE

GENERAL INTRODUCTION

This Supplemental Memorial provides an overview of the full arguments made by the Investor, Pope & Talbot, Inc. ("Pope & Talbot"), which are contained in the Investor's Memorial of January 28, 2000 and makes specific arguments in response to those raised by Canada in its Counter-Memorial of March 31, 2000, the interpretative submission of the United Mexican States dated April 3, 2000 and the submission of the Government of the United States of America dated April 7, 2000.

This is a Claim about how the Government of Canada ("Canada") implemented a measure in a manner inconsistent with its obligations under Section A of Chapter 11 of the NAFTA. The *Export Control Regime* constitutes a measure that is contrary to both the terms of the NAFTA and those of other international trade agreements to which Canada is a party.

In summary, the Investor makes the following arguments:

The NAFTA must be interpreted according to its terms and in its proper context

A. The NAFTA must be interpreted in accordance with its objectives and international law. The NAFTA's objectives and principles are specified in NAFTA Article 102(1) which clearly demonstrate the trade and investment liberalizing objectives of the treaty. The interpretative principles of NAFTA include:

national treatment
most-favoured nation treatment; and
transparency.

The reason for the inclusion of these core principles is presumably to establish a trade and investment regime throughout North America that reduces the economic distortions caused by government measures based on discrimination, political accommodation or regional favouritism. The terms of the NAFTA also make clear that its Parties have agreed to restrict their making these kinds of economically inefficient measures or else pay compensation to affected investors from other NAFTA parties for their implementation. In light of the objectives and principles laid out in NAFTA Article 102 and according to its express terms, the NAFTA should be interpreted in a manner that enhances economic integration throughout North America.

The NAFTA applies to the facts in this Claim

B. While this Claim is clearly not about the *Softwood Lumber Agreement*, Canada has argued that it is excused from its obligations under NAFTA Articles 1102, 1106 and 1110 because they conflict with the terms of the *Softwood Lumber Agreement.* There is no conflict between the provisions of NAFTA Chapter 11 of the NAFTA and the *Softwood Lumber Agreement.* At best, all that Canada can demonstrate may be a conflict between Article II(2) of the *Softwood Lumber Agreement* and NAFTA Article 314 (which is clearly not at issue in this claim).

As Canada is the party relying upon a defence, it bears the burden of proof. For Canada to be able to successfully demonstrate that the *Softwood Lumber Agreement* modified Chapter 11 of the NAFTA, it must provide evidence to that effect. It has failed to do so. Canada has not even been able to show that there is any incompatibility between its NAFTA Chapter 11 obligations and its obligations under the *Softwood Lumber Agreement.* There is no reason that Canada cannot implement whatever measure it feels it must under the *Softwood Lumber Agreement* and compensate affected NAFTA investors to the extent that such measures fall below the standards set in NAFTA Chapter 11.

National Treatment has meaning in International Trade Law

C. Canada's argument that there is no meaning to the term national treatment arising from international trade and investment law is simply not credible. National treatment is a well-known concept in international law. It is simply preposterous to suggest that a concept that is used in four different chapters in the NAFTA and that constitutes an interpretive principle of the NAFTA is unknown or cannot be informed by its use in other international agreements to which Canada is a Party.

Canada has breached at least four NAFTA obligations through its measure

D. There are four NAFTA obligations that apply to this Claim:

(i) National treatment, requiring Canada to provide investors and investments from other NAFTA countries treatment no less favourable than the treatment given to other investments and investors in Canada in like circumstances.

Canada has spent a considerable amount of effort suggesting that the Investor and its Investment were in like circumstances only to lumber producers operating in British Columbia. The definition of the term "like circumstances" is an important one that cannot have the meaning ascribed to it by Canada.

(ii) A NAFTA Party may not impose performance requirements that would cause investments to make decisions that they would not have otherwise made in a free

market. Such requirements include relating an investment's sales to its export volumes or setting a given level for an investment's exports of a particular good.

(iii) There is an obligation upon governments to provide immediate compensation to investors whose investments have been expropriated. The NAFTA defines as expropriations three kinds of acts: expropriations, nationalizations and acts tantamount to expropriation or nationalization.

(iv) By its wording, it is clear that the NAFTA creates a *lex specialis*, which goes further than the customary international law of expropriation. These modifications include: the manner of compensating investors, the broad scope of protected property rights and the coverage of most regulatory takings. **Accordingly, the NAFTA broadly protects the government's right to expropriate and the Investor's right to be compensated.**

(v) A minimum standard of treatment in accordance with international law, requiring Canada to act in good faith, accord fair treatment and respect due process in regulating the investments of American investors operating in Canada. Arguments regarding Canada's violation of these most basic international law obligations will not be made during this initial phase of the arbitration, except as they relate to certain aspects of Canada's obligation to pay compensation to the Investor under Article 1110(1)(c).

Canada has violated its international law obligation of good faith regarding its duty to honour its treaty observation (known as *pacta sunt servanda*) by violating its *World Trade Organization Safeguards Agreement* obligations in imposing a measure that constitutes a voluntary export restriction. According to the *pacta sunt servanda* rule of international law, Canada is required not to impose measures that breach the obligations it undertakes under any international treaty, including the WTO *Safeguards Agreement.* When Canada imposed a measure tantamount to an expropriation of a significant portion of Pope & Talbot's investment, i.e. its access to the US market, it was obligated not to violate international law in the process, under NAFTA Article 1110(1)(c). Canada has failed to do so and therefore must accordingly compensate the Investor for its taking of a significant aspect of its Investment in Canada.

E. Canada failed to act in a manner consistent with these NAFTA Chapter 11 obligations.

(a) Canada imposed a discriminatory regime that harmed the operations of an American-based investment. The Export Control Regime quota allocation diverted this foreign Investor and its Investment from conducting their lawful business operations in Canada in an otherwise lawful manner so as to disrupt its market share for the benefit of other domestic companies competing in the same industry.

(b) Canada imposed a regime with an effective requirement for investments to export at given levels, and that related restrictions on the sales of certain investments to their export performance. This measure accordingly constituted two types of prohibited performance requirements under the NAFTA.

(c) Canada imposed a measure that had the immediate impact of depriving the Investor of the effective use of part of the principal purpose of its Investment. Canada imposed this measure with the intent to prevent the investment from being able to carry out its normal and primary business functions. Canada's argument that there cannot be an expropriation unless Canada actually took away the entire Investment for its own use is simply incorrect.

FACTS:

According to the Expert Supplemental Witness Statement of Craig Campbell, at paragraphs 35 through to 40 of his affidavit Mr. Vertinsky concludes that softwood lumber is not a homogenous commodity. This is incorrect as Mr. Vertinsky points to a variety of niche products and specialties, which indeed might not be homogeneous. The majority of SPF dimension and stud lumber, the items specifically covered and defined under the Export Control Regime, is a homogenous commodity. Spruce-pine-fir ("SPF") represents over 84% of Canadian production of softwood lumber lending further support to the view that Canadian softwood lumber is a commodity product.

Distinctions Between Listed and Non-listed Provinces were Caused by Canada's Export Control Regime

At paragraph 41 of his Affidavit, Mr. Vertinsky asserts that the impact of the *Softwood Lumber Agreement* did not create a distinction between listed and non-listed Provinces. The Export Control regime has in fact had a significant impact on the decline of British Columbia's softwood lumber production since 1996. The impact of the *Export Control Regime* on major BC softwood lumber producers supports this statement. In addition, there are numerous examples of companies that have closed down mills or announced extended shutdowns, downsized, or reconfigured mills because of the quota allocation.

The arbitrary and discriminatory management of the EB quota explains the provincial differences and not the historical circumstances as stated in paragraph 55 of Mr . Vertinsky's Affidavit. For example, over the four years since the Export Control Regime was implemented, BC's share of the total bonus has been 33.4% despite the Province's historic share of 59% of exports assigned by the Government of Canada. In contrast, each of the other Listed Provinces have received bonuses which exceed their historic percentage share of exports. In particular, Quebec has been allocated 45.1% of the total bonuses despite a historic share of only 23% of exports. This analysis does not include the impact of the bonuses allocated in the fourth quarter of 1999/2000

At paragraph 69 of his Affidavit, Mr. Vertinsky suggests that any shift in production to the Non-listed provinces reflects pre-existing market and investment trends. This is a very broad and simple statement. For example, Weyerhaeuser Canada and Ainsworth Lumber both maintain operations in Listed and Non-listed provinces. In these two examples the companies operate in British Columbia as well as Alberta and Saskatchewan. Each of them have recently made significant investments in the Non-listed province of Saskatchewan.

In addition MacMillian Bloedel and subsequently Weyerhaeuser Canada, both of whom operated in BC purchased Saskfor in Saskatchewan, a softwood lumber producer located in a Non-listed province. Finally, other examples include Tolko investing in operations in Manitoba. This supports our argument that these examples illustrate that companies with operations in BC have expanded and increased their investments in Non-listed provinces.

The Export Control Regime changed domestic softwood lumber production

At paragraph 20 and 21 of his Affidavit, Mr. Vertinsky argues that the changes in the provincial shares of Canadian exports of softwood lumber to the US are simply a continuation of trends in place before Canada implemented the Export Control Regime. In addition at paragraph 81 of his affidavit Mr. Vertinsky states that the shift in quota to Quebec is consistent with earlier market trends.

The impact of the implementation of the Export Control Regime has been the chief factor in production declines in the BC Interior. Mr. Vertinsky's market trend conclusions are based on market share. However, when volumes are considered the story is quite different. By removing the influence of the BC Coast (which ships most of its lumbar to the Japanese market), there is still a downward trend in exports to the US from BC Interior producers from 1992-1998. conversely, shipments from the rest of Canada to the US has increased over the same period. This suggests that the rest of Canada has experienced favourable outcomes as a result of the Export Control regime to BC's detriment.

THE ARGUMENT

SECTION ONE: THE NAFTA MUST BE INTERPRETED ACCORDING TO ITS TERMS AND IN ITS PROPER CONTEXT

1. The Investor submits that the NAFTA Investment Chapter must be interpreted in the manner set out by that Agreement. The NAFTA contains broad protections for the encouragement of investment between the three NAFTA countries. When interpreting the obligations contained in the NAFTA Investment Chapter, this Tribunal should be mindful of the directions contained specifically within the NAFTA as to how to interpret it. The NAFTA's objectives demonstrate that the Agreement's intent is to encourage investment opportunities. The applicable objectives, as set out in NAFTA Article 102, 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;

These objectives are given even further weight in that they are to be applied through the NAFTA interpretative principles of national treatment, most-favored nation treatment and transparency and in accordance with applicable rules of international law.

i. This Tribunal's obligation is to give effect to the expressed intention of the Parties when it interprets the NAFTA. As Sir Gerald Fitzmaurice states:

> *The object of interpretation is to give effect to the intention of the parties as expressed in the words expressed by them in light of the surrounding circumstances.*[1]

ii. The terms of the NAFTA provide a great deal of context, as well as objectives, to assist this Tribunal. For example, Canada recognized the importance of these basic principles in its *Statement of Implementation*, which it issued on the implementation of the NAFTA. Canada stated:

> *In deciding to implement the Agreement, the Government was persuaded by three overriding considerations:*
>
> *a) the importance of global trade and investment to the well-being of Canadians;*

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[1] G. Fitzmaurice "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" The *British Yearbook of International Law* (1957), at 204 - 208.

b) *the long-standing commitment of Canada to a fair and open international trade and investment regime; and*

c) *the critical role played by agreed rules and procedures in securing equal opportunities for Canadians in a world of much larger and more powerful trading entities.*

iii. Canada's broad objectives for the NAFTA can also be seen in other portions of the *Statement of Implementation*. For example, Canada viewed the NAFTA as part of a global and regional initiative to move towards more open markets that did not distort the efficient allocation of resources.

> *The NAFTA thus stands in the tradition of Canadian tradecraft, a tradecraft that carefully mixed bilateral, regional and multilateral initiatives into a coherent set of laws, regulations, policies and practices, attuned to the circumstances of the moment but good enough to endure. It allowed Canadians gradually to move towards more open markets based on the concept that measures that distort the efficient allocation of resources are likely to lower national and global welfare while the removal of such barriers is likely to raise them.*[2]

iv. Accordingly, when it became a Party to the NAFTA, Canada supported an interpretation of the NAFTA that would reduce measures that distort the efficient allocation of resources so as to raise national and global welfare. Clearly, Canada like the other NAFTA Parties, agreed to the NAFTA as it created a rules-based system that would increase investment opportunities by reducing the ability of governments to engage in inappropriate market-related behaviour.

2. The *Statement of Implementation* stands in stark contrast to the position now taken by Canada in its Counter-Memorial. It advocates that this Tribunal give a narrow and restrictive reading to the operative provisions of the NAFTA which do not support the goal of investor protection. Indeed, Canada goes so far as to say in paragraph 152 of its Counter-Memorial that the only objective of the NAFTA with regard to investment is to increase substantially investment opportunities in the territories of the Parties, and that this is quite different from investor protection. This position directly contradicts the text of the NAFTA and the very fact that the NAFTA contains an Investment Chapter focused on the protection of investors and their investments.[3]

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[2] Canadian *Statement of Implementation,* Canada Gazette, Part I, January 1, 1994, 68 at 72.

[3] It should be noted that Canada suggests that the NAFTA Preamble be used for interpretive assistance, however the Preamble cannot rule the NAFTA's internal interpretive directions set out in NAFTA Article 102. This is not to say that the Preamble is not a part of the NAFTA, only that the NAFTA's objectives and principles are the primary tools for its interpretation.

3. Canada also argues that this Tribunal should take no account of the rich contextual basis of international trade law instruments, such as the GATT, when this Tribunal gives meaning to key terms such as national treatment. Canada's recent position stands in contrast to its own statements made when it implemented the NAFTA[4]. For Example, in its *Statement of Implementation*, Canada stated:

> *.... Canada stands ready to work with the countries of Latin America, Asia-Pacific and the rest of the world. We will respond to their aspirations to modernize and open their economies to the same extent as Mexico has done under the NAFTA. Both the revitalized GATT and the NAFTA provide the means to achieve this objective.* ***From Canada's perspective, the aim is to broaden the scope of rules-based international trade and investment and to increase the opportunities for Canadian traders and investors around the world.***[5]
>
> *(emphasis added)*

4. It is difficult for this Tribunal to be able to give effect to the intention of the drafters of the NAFTA. Usually, under Article 32 of the *Vienna Convention on the Law of Treaties*, recourse is made to a preparatory work (a *travaux preparatoires*) of the treaty, however no such instrument was kept of the NAFTA negotiations[6]. Accordingly, the only document that this Tribunal can look to for context are documents such as Canada's *Statement of Implementation.*

At paragraph 149 of the Counter-Memorial, Canada inexplicably contends that "national treatment" is not an interpretive principle of the NAFTA, but rather it is "but one of the principles which elaborates the objectives listed at Article 102(1)(a) to (f)." Canada does so even though it explicitly approves of the application of Article 31 of the *Vienna Convention* to interpretation of the NAFTA's provisions. Article 31 of the *Vienna Convention* directs that:

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose.*

6. Article 102(1) provides the following:

The objectives of this Agreement, ***as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency****, are to:*

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[4] Article 31 (2) of the *Vienna Convention* permits this Tribunal to look at any instrument that was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[5] Canadian *Statement of Implementation* at 69. Schedule 4.

[6] Canada has confirmed that no *travaux preparatoires* was kept of the NAFTA negotiations. See letter of Howard Strauss, then DFAIT Access to Information Coordinator to Patrick Westaway, dated May 5, 1997 which stated that "apart from the actual NAFTA Agreement, which is in the public domain, there are no minutes or records of NAFTA negotiating meetings, or any mutually agreed negotiating texts, which have been or can be released publicly.

> 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. [emphasis added]

7. The wording of NAFTA Article 102(1) is unambiguous. The objectives of the NAFTA are to be "elaborated more specifically through its principles and rules, including national treatment". National treatment is a principle of the NAFTA. NAFTA Article 102(2) instructs that provisions of the NAFTA are to be interpreted and applied "in light" of the NAFTA's objectives, as set out in Article 102(1). National treatment is a principle to be applied in elaboration of the objectives of the NAFTA, and, accordingly, interpretation of the NAFTA's provisions is to be undertaken in light of those objectives. In other words, the principle of national treatment should inform this Tribunal's interpretation of the provisions of the NAFTA, in light of its objectives, including substantially increasing investment opportunities within the territories of the Parties.

8. The Investor submits that the interpretative approach suggested by Canada would not be appropriate and would constitute an extraordinary step in international treaty interpretation. **This Tribunal has a responsibility to interpret the NAFTA in light of its terms and its objectives so that the aims of the NAFTA can be effected**.

SECTION TWO: THE INVESTOR HAS MET THE REQUIREMENTS OF NAFTA CHAPTER 11

Pope & Talbot, Inc. has incurred losses as a result of the implementation of the Export Control Regime

9. Canada claims that the Investor has not proved that it has sustained any losses arising from the implementation of the Export Control Regime[7]. This allegation is incorrect.

10. Canada has mistaken the difference between the NAFTA Article 1116 requirement that an investor make an allegation of loss and the investor's burden to prove the extent of its loss following an adjudication of the merits of its claim. In its Award Dismissing Canada's Motion for Dismissal, dated January 26, 2000, the Tribunal accepted that the Investor had made out a *prima facie* claim under NAFTA Article 1116(1). In Procedural Order No. 7, this Tribunal further determined that the hearing of this Claim would be divided into three phases: (1) concerning the Investor's claims under NAFTA Articles 1102, 1106 and 1110; (2) concerning the Investor's claims under NAFTA Article 1105, if necessary; and (3) a hearing determining the damages of the Investor, if the Tribunal finds in favour of any of the Investor's claims for compensation. Canada appears to be attempting to import elements of the final phase of these proceedings into the present phase, without justification.

11. The Investor clearly has provided this Tribunal with evidence of the losses it has sustained as a result of Canada's imposition of the Export Control Regime. This evidence is contained within paragraphs 10 to 17 of the Affidavit of Mr. Kyle Gray. References to such loss are contained within paragraphs 168, 169 and 171 of the Memorial.

12. Canada has provided speculation as to what might have happened to the Investor and its Investment had the Export Control Regime never been imposed. Such idle speculation is irrelevant to the determination of whether Canada is in fact liable for breaches of its obligations under NAFTA Chapter 11. To the extent that such speculation might be useful or relevant, it could only go to a question of damages alone. It is not an appropriate matter for review in this phase of the Claim.

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[7] At paragraph 527 of the Counter-Memorial.

SECTION THREE:
CANADA MUST HONOUR ITS OBLIGATIONS UNDER BOTH THE *SOFTWOOD LUMBER AGREEMENT* AND THE NAFTA

7. Canada takes the position that, pursuant to Article 30(3) of the *Vienna Convention on the Law of Treaties*, various provisions of the *Softwood Lumber Agreement* effectively nullify Canada's obligations under NAFTA's Investment Chapter to pay compensation for the losses to the Investor caused Canada's imposition of the Export Control Regime in a manner inconsistent with the standards set in Articles 1102, 1106 and 1110. This argument is wrong for the following reasons:

A. Canada has misapplied the terms of the *Vienna Convention*;
B. The NAFTA provides specific interpretive rules;
C. The two agreements do not address the same subject-matter;
D. The obligations under each agreement are not incompatible; and
E. ***Pacta Sunt Servanda*** governs.

A. Canada has misapplied the terms of the *Vienna Convention*

Canada has misapplied the terms of the *Vienna Convention*. The drafters of the *Vienna Convention* directed that Article 30 is only to be used as a supplementary means of interpretation for allegedly overlapping treaty obligations. As Sir Ian Sinclair notes:

> *First, and perhaps most important, it is clear that the rules laid down in Article 30 are intended to be residuary rules – that is to say, rules which will operate in the absence of express treaty provisions regulating priority.*[8]

9. As such, recourse can only be had to Article 30 in absence of express provisions contained within the NAFTA and the *Softwood Lumber Agreement* specifying how their obligations are to be interpreted in light of alleged overlaps with other international agreements. While the *Softwood Lumber Agreement* contains no express terms dealing with other Agreements, the NAFTA does. NAFTA Article 103(1) deals with the relationship between the NAFTA and other multilateral agreements, such as the GATT. It states:

> *(1) The Parties affirm their existing rights and obligations to each other under the General Agreement on Tarriffs and Trade and other agreements to which such Parties are party.*

This NAFTA clause specifically affirms the **existing rights and obligations** of the NAFTA Parties (that is Canada, the United States and Mexico) to each other under the GATT and other agreements to which they are parties. This provision deals only with the confirmation of existing treaty rights and it demonstrates the close inter-relationship of the NAFTA and the GATT.

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[8] Sinclair, I., *Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984) at 97.

B. The NAFTA provides specific interpretive rules

10. Article 30(2) of the *Vienna Convention* provides that a treaty may specify how it will relate to other treaties. NAFTA Article 103(2) discusses the relationship between the NAFTA and other agreements to which the NAFTA Parties are party. This provision states:

> (2) In the event of an inconsistency between this Agreement and **such other agreements**, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided for in this Agreement. (emphasis added)

11. Canada argues that the use of the term "and such other agreements" in NAFTA Article 103(2) can only refer to an existing agreement between the NAFTA Parties in 1994. The Investor contends that this is not the natural nor the proper interpretation of this clause. For Canada's argument to be correct, the terms of Paragraph 2 of NAFTA Article 103 would have to say "such other existing agreements". The use of the term "existing" in paragraph 1 of NAFTA Article 103 modifies the term "rights and obligations" not the term "GATT and other agreements to which they are parties". What NAFTA Article 103(2) does is provide specific textual direction to interpreters of the NAFTA with relation to the hierarchy of the agreements.

12. NAFTA Article 104 provides that the trade provisions of a number of multilateral environmental agreements take precedence over those of the NAFTA, to the extent of any inconsistency. Paragraph 2 of this NAFTA Article specifically permits the Parties to add additional environmental agreements to this precedence list by an agreement in writing. By comparison, NAFTA Article 103 does not contain any such provision as its terms mandate that the NAFTA obligations are superior. In essence, because of the terms of the *Vienna Convention*, NAFTA Article 103 ensures that any change to the NAFTA must be to the NAFTA explicitly either by formal amendment or by abrogation according to its terms rather than be by way of a future treaty.

13. NAFTA Article 103(2) accordingly precludes NAFTA Parties from being able to use the excuse of some other treaty obligation to circumvent their responsibilities under the NAFTA. Accordingly, Canada cannot rely on the existence of the *Softwood Lumber Agreement* in order to ignore its obligations under the NAFTA.

14. Pursuant to the "golden rule" of treaty law, *pacta sunt servanda*, the NAFTA Parties are obliged to steadfastly honour each of their treaty obligations in good faith, including ensuring that obligations under the NAFTA will not be overridden by obligations contained within any other international agreement, unless explicitly permitted in the NAFTA text. *Pacta sunt servanda* is accorded a privileged place in the *Vienna Convention*,[9] and thus Article 30 cannot be applied in a manner that disregards the clear expression of the NAFTA Parties as to how NAFTA obligations are to be interpreted in relation to other treaty obligations.

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[9] For example, the preamble to the *Convention* states: "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized..."

15. Moreover, NAFTA Article 103(2) only applies in situations where there are **inconsistent** treaty obligations. The Investor submits that inconsistency means a situation where it is impossible to perform one treaty obligation while meeting the obligations of the other agreement. There is no reason why Canada cannot honour its obligation to compensate the investor for imposition of the Export Control Regime even if the manner in which the Regime was imposed was specifically and exactly dictated by the terms of the *Softwood Lumber Agreement* (which, the Investor contends, is not the case).

16. Canada made similar arguments about inconsistency in its motion to dismiss this Claim, concerning alleged inconsistencies between honouring its obligations under Chapter Three of the NAFTA while honouring its obligations under Chapter 11 of the NAFTA. The Investor submits that the same reasoning it applied to dismiss Canada's motion can equally be applied to demonstrate that even though multiple treaty obligations may impact upon a single measure, their mutual overlap does not in any way mean that one must overrule the other.[10]

17. However, if there is any inconsistency between the provisions of the *Softwood Lumber Agreement* and the provisions of the NAFTA, NAFTA Article 103 expressly provides that for purposes of interpreting the Parties' NAFTA obligations, any inconsistent obligations under the *Softwood Lumber Agreement* are simply not relevant..

The Two Agreements do not address the same Subject Matter

18. In the alternative, if this Tribunal determines that NAFTA Article 103(2) does not override any inconsistent provisions of the *Softwood Lumber Agreement* with respect to interpretation of NAFTA provisions, the Investor submits that Article 30 of the *Vienna Convention* clearly only applies in cases where two agreements have been made relating to the same subject matter. As the *Softwood Lumber Agreement* and the NAFTA clearly do not address the same subject matter, Article 30 cannot apply. Article 30 provides:

> 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 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 later treaty**.
> 4. When the parties to the latter 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...
>
> [emphasis added]

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[10] Pope and 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. Schedule 7.

19. Sir Ian Sinclair advises that the expression "relating to the same subject matter", contained within Article 30(1) of the *Vienna Convention*, must be construed strictly.[11] Professor Reuter agrees stating that Article 30 only applies "to treaties with subject-matters of a comparable degree of 'generality".[12] Certainly there is no plausible way in which the *Softwood Lumber Agreement* can be compared as an agreement of comparable degree of generality with the NAFTA. The *Softwood Lumber Agreement* is a specialised bilateral agreement designed to restrict the flow of Canadian exports of softwood lumber to the United States. The NAFTA is one of the most wide-ranging multilateral trade and investment agreements ever concluded. They simply do not have the same degree of generality in order to constitute treaties "relating to the same subject matter".

20. Canada appears to argue, at paragraph 492 of the Counter-Memorial, that the "imposition of export charges on softwood lumber" is also the subject matter of the NAFTA. It is difficult to contemplate how "imposition of export charges on softwood lumber" could constitute the "subject matter" of the NAFTA, given that Canada admits[13] that NAFTA Article 314 prohibits all such measures with respect to goods and that the NAFTA says nothing about softwood lumber in particular.

The obligations under each Agreement are not incompatible

In the further alternative, if this Tribunal determines that Article 30 of the *Vienna Convention* does apply and that the *Softwood Lumber Agreement* deals with the same subject matter as provisions in the NAFTA, the Investor submits that Canada must be put to the strict proof of demonstrating how its obligations under that Agreement are incompatible with each provision of the NAFTA that it argues is over-ruled.

22. Sir Ian Sinclair looks at the issue of incompatibility at some length in his treatise on the *Vienna Convention*. He states that first a Tribunal must determine whether the later treaty clearly provided that it was intended to terminate the provisions of the earlier treaty. If the later treaty intended to revoke the earlier treaty, one must look to Article 59, otherwise one should have recourse to Article 30[14].

23. Article 59(1)(b) of the *Vienna Convention*, which is clearly linked to Article 30,[15] directs that allegedly conflicting treaty provisions are only to be found to be "incompatible" if they "are not

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[11] Sinclair, *The Vienna Convention on the Law of Treaties*, at 99.

[12] Paul Reuter, *Introduction to the Law of Treaties* (London: Kegan Paul International, 1995) at 133.

[13] At paragraph 52 of the Counter-Memorial

[14] Sinclair, *The Vienna Convention on the Law of Treaties* at 184 -185 .

[15] This point is also made by Professor Sinclair, *The Vienna Convention on the Law of Treaties* at 184.

capable of being applied at the same time". As the Chairman of the *Vienna Convention* Drafting Committee, Ambassador Yasseen, noted:

> *In the view of the Drafting Committee, the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility within the last phrase of paragraph 3. In point of fact, maintenance in force of the provisions of the earlier treaty might be justified by circumstances or by the intention of the parties.*[16]

24. As Canada is the disputing party relying upon the application of Article 30 to modify this Tribunal's interpretation of Canada's obligations under the NAFTA, it bears the burden of proof. For Canada to be able to successfully demonstrate that the *Softwood Lumber Agreement* contains obligations that are incompatible with Canada's obligation to compensate the Investor under Chapter 11 of the NAFTA, it must show that the operative provisions of the two treaties cannot be complied with simultaneously. Canada has not been able to show that there is any incompatibility between NAFTA Chapter 11 and its obligations under the *Softwood Lumber Agreement* because there is no reason that Canada cannot compensate the Investor for imposing a measure that it believes was necessary to fulfil the obligations it undertook under the *Softwood Lumber Agreement.*

25. In its previous unsuccessful preliminary motion in this Claim, Canada advanced the proposition that obligations contained in NAFTA Chapter 11 could not apply in this Claim if the terms of Chapter 3 were operative. In its award on Preliminary Matters, this Tribunal determined that more than one chapter of the NAFTA could have operative effect at the same time and that the simultaneous operative effect of one NAFTA chapter did not render all other NAFTA obligations moot, except in the case of an actual conflict.[17] The Investor submits that these same principles enunciated by the Tribunal apply in relation to this question of the operation of the *Softwood Lumber Agreement* and the NAFTA.

26. Canada has provided absolutely no explanation as to why it cannot honour its obligation to compensate the Investor for a claim proved under NAFTA Chapter 11 for losses caused by Canada's imposition of the Export Control Regime. Rather, Canada has attempted to raise a diversion by claiming that its implementation of the *Softwood Lumber Agreement* may breach its obligations under NAFTA Article 314. Canada appears to be arguing that since the *Softwood Lumber Agreement* required Canada to implement a measure that was not consistent with NAFTA Article 314, it may similarly ignore all of its remaining NAFTA obligations with respect to that measure. This argument defies logic.

27. NAFTA Article 314 is not at issue in this arbitration. The fact that Canada has admitted breaching one of its obligations with respect to trade in goods is a matter of concern for the Parties to the NAFTA. As this Tribunal noted in its Award on the Interpretation of NAFTA

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[16] A/CONF. 39/11 Add.1 at 253 (paragraph 37).

[17] Pope and 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. Schedule 7.

Article 1101, the fact that a measure can relate to trade in goods, and thus be the subject of a Chapter 20 proceeding, does not mean that it cannot also relate to investors and their investments, and thus be subject to claims for compensation under Chapter 11.

***Pacta Sunt Servanda* Governs**

28. In the event that this Tribunal finds that Article 30 of the *Vienna Convention* does not apply (which the Investor submits would be correct), but that NAFTA Article 103 does not resolve the issue (which the Investor submits would be incorrect), it is submitted that the correct approach to the interpretation of potentially overlapping or conflicted treaty obligations is to apply the *pacta sunt servanda* rule. The *pacta sunt servanda* rule is a fundamental international law norm and a basic principle of the *Vienna Convention*[18]. Treaty parties are expected to carry out their obligations in good faith. The NAFTA requires a Party that has violated its Investment Chapter obligations to pay compensation to a harmed Investor from another NAFTA Party.

29. The *Softwood Lumber Agreement* makes no mention of NAFTA Chapter 11 at all, much less the issue of compensation for NAFTA investors such as Pope & Talbot. Accordingly, there is nothing "inconsistent" or "incompatible" between Canada's obligation to restrain exports of softwood lumber under the *Softwood Lumber Agreement* and Canada's obligation to compensate NAFTA investors should it impose a measure that does not meet certain standards under NAFTA Chapter 11. Under the *pacta sunt servanda* rule, Canada must fully perform all of its treaty obligations in good faith.

30. Canada suggests, at paragraph 463 of the Counter-Memorial, that neither it nor the United States could have intended NAFTA investors to be compensated for losses they incurred as a result of the imposition of the export restraints contemplated in the *Softwood Lumber Agreement*. The Investor submits that determining the intent of the Parties to the *Softwood Lumber Agreement* is wholly irrelevant to determining how the NAFTA should be interpreted.

31. Nonetheless, it is submitted that the United States was most likely fully aware that the *Softwood Lumber Agreement* did not contain the kind of provisions required under the NAFTA or alternatively Article 58 of the *Vienna Convention* to amend or annul the provisions of the NAFTA in respect of application of Chapter 11. Had Canada suggested to the United States that it agree to removing NAFTA protection for its investors for any losses incurred as a result of Canada's imposition of export restraint measures under the *Softwood Lumber Agreement*, it is submitted that the United States would never have agreed. Accordingly, it is not surprising that the *Softwood Lumber Agreement* is silent as to whether NAFTA investors should be compensated for losses incurred as a result of Canada's imposition of the Export Control Regime.

Conclusion

[18] *Vienna Convention* Article 26.

32. Under NAFTA Chapter 11, Canada is obliged to compensate investors such as Pope & Talbot whenever it imposes a measure that falls below the standards set in Articles 1102, 1106 and 1110. The Export Control Regime is such a measure. Canada claims it does not have to fulfil its obligation to compensate the Investor because of the *Softwood Lumber Agreement*. Canada's argument fails in every respect.

33. Canada has failed to provide a valid explanation as to why NAFTA Article 102(3) does not render the operation of the *Softwood Lumber Agreement* moot for the purposes of this Claim. Canada has also failed to demonstrate how Article 30 of the *Vienna Convention* applies to the NAFTA provisions that are the subject of this dispute – by either demonstrating how the NAFTA and the *Softwood Lumber Agreement* concern the same subject matter or how Canada's obligation to compensate Pope & Talbot under NAFTA Chapter 11 is incompatible with its obligations under the *Softwood Lumber Agreement*. In accordance with the fundamental rule of international law, *pacta sunt servanda*, Canada must honour its obligation to compensate Pope & Talbot under NAFTA Chapter 11, and avoid construing its obligations under the *Softwood Lumber Agreement* in an attempt to evade them. To act in any other way constitutes a violation of the principle of good faith.

SECTION FOUR: ESTOPPEL

34. Canada argues that the Investor is estopped from bringing this Claim as its conduct constitutes a waiver of its rights under Part B of NAFTA Chapter 11. Canada's argument is based upon a letter signed by Mike Flannery of Pope & Talbot, Inc. to the United States Department of Commerce on April 4, 1996.

35. Mr. Flannery's letter speaks for itself. It was never sent to Canada. It never waived the Investor's NAFTA Chapter 11 rights. The letter did not even mention NAFTA or its Investment in Canada. For this letter to constitute a waiver, Canada would have to show that the Investor explicitly surrendered its right to seek compensation under NAFTA Chapter 11 and that it was addressed to Canada. Canada cannot even prove that this letter evidenced Pope and Talbot's knowledge of its NAFTA rights, as the letter only makes reference to domestic US trade remedy law.

36. Canada argues that the Investor's letter somehow constitutes a waiver concerning the exact manner in which the Export Control Regime applied to its investment in Canada. This is impossible. The Export Control Regime was not in existence at the time the letter was drafted and sent.

SECTION FOUR: NATIONAL TREATMENT

37. Canada has confused a number of key concepts necessary to properly understand the principle of national treatment under NAFTA Article 1102. The Investor responds as follows to help clarify these issues for the Tribunal.

38. NAFTA Article 1102 provides a national treatment obligation to investors and investments from other NAFTA parties based on two fundamental tests:

(i) are investors or investments of another NAFTA Party "**in like circumstances**" with domestic investors and investments?

If (i) is the case, and "like circumstances" are determined to exist, then one proceeds to the second test:

(ii) are these investors or investments of another NAFTA Party accorded "**treatment no less favourable**" in comparison with the comparable domestic investor or investment. This involves treatment by a NAFTA Party through a measure, whether on a *de jure* or a *de facto* basis, with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

39. Canada has confused and blended together the above two tests by stressing that discrimination, or less favourable treatment, by Canada must be "motivated by or related to the nationality of the investment".[19] When comparing investments it is not, as Canada suggests, a sufficient defence to assert that a measure was implemented without a motivation to discriminate against investors and investments from other NAFTA Parties. The test advocated by Canada in its submissions, also known as the "aim and effect" test, is one which Canada has actually opposed in previous WTO cases, in particular the WTO Panel and Appellate Body decisions in *Japan – Taxes on Alcoholic Beverages*. The WTO Appellate Body has consistently rejected this view of the determination of like circumstances.

40. In addition, by collapsing the two tests Canada is attempting to use the question of treatment to base the comparison of investments as to whether they are in like circumstances. In other words, Canada is saying that it is simple enough that a respondent Party state that it had good and reasonable motivations to discriminate against investors and investments from other NAFTA Parties and that should be sufficient to justify there is no basis for comparison or saying that they are "in like circumstances". By collapsing the two tests, Canada is in effect suggesting a circular and self-referential test whereby the form of the measure itself establishes treatment "accorded" to investments.

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[19] For example, Counter-Memorial at para. 167, 177, 194, 200.

41. Canada also confuses the concepts of national treatment based on the discriminatory effect of a measure with that of national treatment by formal discrimination.[20] Even though Canada nominally accepts that a measure can have the effect of discriminating without it being intended, Canada completely ignores that a measure can affect an investment or investor of another Party in the absence of explicit motivation, intent or purpose by the Party according the treatment.

i Application of the National Treatment Principle

42. Canada also argues that this Tribunal should not consider GATT and WTO jurisprudence, the most extensive body of law available to inform the content of the principle of national treatment.[21] These arguments have been made notwithstanding Canada's reliance on WTO jurisprudence when it suits Canada in attempting to make its case.

43. The investor submits that this Tribunal may certainly consider the decisions of other international tribunals, such as WTO panels and the WTO Appellate Body, in determining the meaning of the principle of national treatment. This practice is clearly in accordance with customary international law, as embodied in Article 38 of the *Statute of the International Court of Justice*. Under NAFTA Article 102, the national treatment principle, as informed by the learned writings of the WTO Appellate Body, more specifically elaborates interpretation of the meaning of NAFTA's provisions, including NAFTA Article 1102.

44. Moreover, there is nothing unusual about using case law based on one expression of the national treatment obligation to assist the wording of another. In the WTO *Bananas* case, the Appellate Body drew on jurisprudence on trade in goods to help interpret analogous provisions of the GATS with respect to services.[22] This analogy was drawn despite the fact that the national treatment provisions compared contained different wording.

45. As noted at paragraph 50 of the Investor's Memorial, the NAFTA is built upon the development of the GATT and the two regimes are considered to be "complementary and mutually reinforcing." The investment provisions for national treatment are elaborated within this context. NAFTA Article 102 is clear that there is a single principle of national treatment that informs the objectives of the NAFTA and that the provisions of the NAFTA, including Article

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[20] To determine whether treatment is less favourable in form, one considers how the measure, on its face, applies to investors or their investments, compared to domestic investors and investments. To determine whether treatment is less favourable in effect, one compares how the effects of a measure, in application, impact upon investors and their investments. As stated by Professor Howse: "The issue is whether there are "like" enterprises being provided with more favorable treatment than the foreign enterprise; a scheme may well afford such more favorable treatment, **even if the formal criteria of the scheme are neutral or silent as to nationality.**" Statement of Robert Howse at para. 20.

[21] At paragraphs 174-178 of the Counter-Memorial.

[22] EC - *Regime for the Importation, Sale and Distribution of Bananas*, AB - 1997 - 3, WT/DS 27/AB/R, September 9, 1997.

1102, must be read in light of those objectives. There is no support for Canada's contention that application of national treatment principle within one context necessarily precludes its application in another.

46. The provisions of the GATT, GATS and NAFTA Article 1102 are not framed so differently that they cannot be considered to be analogous or of assistance in interpreting the NAFTA. Canada has asserted that national treatment for investments is so different from national treatment for trade in goods that this jurisprudence is of "no assistance" to the Tribunal. Canada makes this blanket statement, but offers no view as to what the fundamental difference is between the two. The Investor submits that these provisions use the same principle of international law and that similarities in the language of these provisions, and the application of these provisions in GATT and WTO panels, provides a base of comparison on which to interpret NAFTA Article 1102.

ii. Like Circumstances

47. The fundamental goal of the principle of national treatment is to ensure equality of competition, whether it is between "like products", "like services" or "like investments". As stated in the UNCTAD Series on Issues in International Investment Agreements on national treatment:

> *National Treatment can be described as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment it accords to national investors in like circumstances. In this way the* ***national treatment standards seek to ensure a degree of competitive equality*** *between national and foreign investors.*[23] [emphasis added]

48. The principle of national treatment has also been described as follows:

> *National treatment affords individuals and firms of foreign countries* ***the same competitive opportunities,*** *including market access, as are available to domestic parties.*[24] [emphasis added]

49. To have competitive equality for foreign investors and investments with domestic investors and investments, one must compare investments that are in fact competitive. Determining the competitive characteristics of the industrial sector in which the investment operates assists us to interpret the scope of the "like circumstances".

50. As stated at paragraph 67 of the Investor's Memorial, this would reasonably include a number of objective criteria, such as: the nature and purpose of the investment; the nature of competition between investments and the substitutability of the products and services they provided. There are many potential criteria in which to differentiate an investment, as enunciated by Canada, but

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[23] United Nations Conference on Trade and Development, *National Treatment* (1999) at 1 ("UNCTAD Report on National Treatment").

[24] *Dictionary of International Trade Terms* (1996) at 125.

to ensure competitive equality this comparison must be between competitive investments setting out the conditions of competition.[25]

51. Canada has failed to identify the basis on which comparison should be made for the purposes of determining "like circumstances". Canada states that the comparison depends on the facts of each case,[26] whether the investment is profitable or unprofitable or is large or small.[27] Canada then states that the "entire" focus of the comparison of treatment is "on comparing the treatment accorded to foreign investments as compared to the treatment of domestic investments."[28] Clearly, Canada is confusing the comparison of like investments with the comparison of the treatment of those investments. One must first determine if the investments are like before comparing the treatment itself.

52. Canada relies heavily on a single passage from the OECD commentary on national treatment in the *OECD Declaration on International Investment and Multinational Enterprises*[29] to justify its argument that national treatment must include an element of intent for there to be *de jure* and *de facto* discrimination.

53. What Canada is trying to do is establish an "aim and effects" test for the determination of like circumstances that was specifically rejected by both the Panel and the WTO Appellate Body – with Canada's full support – in *Japan – Taxes on Alcoholic Beverages*. At the urging of Japan and the United States, and contrary to the submissions of the European Communities and Canada, the Panel had been asked to find that a subjective element of intent must be found on the face of a measure in construction of the following sentence of the GATT national treatment provision, GATT Article III:2, sentence one:

> *The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.*

54. In a decision that was supported by Canada on appeal,[30] and sanctioned by the Appellate Body,[31] the Panel determined that consideration of whether products were "like" did not require

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25 Statement of Robert Howse at para. 21.

26 Counter-Memorial at para. 190.

27 Counter-Memorial at para. 195.

28 Counter-Memorial at para. 197.

29 Counter-Memorial at para. 193-194. OECD, *National Treatment for Foreign-Controlled Enterprises* (1993) at 22 ("OECD Commentary").

30 *Japan – Taxes on Alcoholic Beverages*, AB Report, at 7.

31 *Japan – Taxes on Alcoholic Beverages*, AB Report at Section H, beginning at 17-18.

consideration of whether the measure at issue was imposed "so as to afford protection" to domestic products – wording that was specifically included in the "chapeau" of the national treatment provision, GATT Article III:1. The Panel stated:

> *In the Panel's view, it is appropriate to conclude, as have other GATT panels including the 1987 Panel [on Japanese alcohol taxes], that it is not necessary to show an adverse effect on the level of imports, as Article III generally is aimed at providing imports with "effective equality of opportunities" in "conditions of competition". In line with these interpretations of Article III, the Panel concluded that it is not necessary to for complainants to establish the purpose or aim of tax legislation in order for the panel to conclude that dissimilar taxation affords protection to domestic production.* [32]

55. NAFTA Article 1102 does not even include an admonition such as that found in GATT Article III:1 that measures "should not be applied to imported or domestic products so as to afford protection to domestic production."[33] Rather, NAFTA Article 1102 is a far less circumscribed provision that merely requires the Tribunal to determine:

(i) whether the investors or investments are in like circumstances, from the standpoint of evaluating the equality of their competitive opportunities; and

(ii) whether the treatment afforded to them under the measure is no less favourable than that which has been accorded to their competitors.

56. When a measure is applied to a certain market, or a certain industry, there can be little doubt that all the competitors in that industry would be in "like circumstances". If the measure is applied in a manner that has the effect of providing a less satisfactory competitive position to a foreign company, can the state applying the measure use the very same elements of the measure that leads to the discriminatory treatment in question to justify why the competitors are actually not in "like circumstances"? The answer must be no. Otherwise a state could merely manipulate the definition of what is a "like investment" though the design of the measure itself. National treatment would be rendered meaningless as a principle.

57. Contrary to Canada's assertion in paragraph 195 of the Counter-Memorial, the Investor is not suggesting that there be a single criterion for determining like circumstances. The Investor submits that the concept of "like circumstances" is a legal test, which looks to criteria such as the conditions of competition and the identification of like investments in an industrial sector, because ensuring equality of competitive circumstances is a fundamental objective of the principle of national treatment.

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[32] *Japan – Taxes on Alcoholic Beverages*, Panel Report, at para. 6.33.

[33] See also *Bananas* (AB) at para. 241 where it is stated that whether in the GATT or GATS, national treatment and MFN treatment provisions do not contain the expression "so as to afford protection to domestic investments/ service providers." The Appellate Body is clearly indicating that in cases where discrimination is not specifically included in the text of a provision, there is no place for an aim and effects test or a subjective discrimination concept in within the context of a determination of likeness.

iii. Treatment No Less Favourable

58. As described in more detail at paragraphs 56 to 62 of the Investor's Memorial, the purpose of NAFTA Article 1102 is to provide the investors of NAFTA Parties and their investments **treatment no less favourable** than that which is accorded to domestic investors or investments in like circumstances, both in form and in effect. As noted above, while Canada seems to acknowledge that the treatment it accords to NAFTA investors and their investments can be measured both in terms of its form and its effect, the test it proffers contains a subjective element of discrimination that, if accepted, would ignore the test of *de facto* discrimination and seriously dilute investor protection under the NAFTA.

59. At paragraph 167 of the Counter-Memorial, Canada claims that for a breach of national treatment to occur, there must be evidence of a "distinction between circumstances" that "is motivated by or has the effect of discriminating by nationality". Canada appears to be arguing that if a measure does not directly discriminate on the basis of nationality, it cannot be found to have provided less favourable treatment to one investor, who happens to be foreign, as compared to other investors, who happen to be domestic.

A similar interpretation was also proffered by Canada to a WTO Panel considering another Canadian measure in *Canada – Certain Measures Affecting the Automotive Industry*. The panel in that case rejected Canada's proposition[34] with respect to the GATS MFN obligation. Although Canada neglected to mention that Panel's findings in the Counter-Memorial, it provides a clear indication of the narrowness of Canada's interpretation. Canada had essentially argued before the Panel that since its measure provided certain service providers from Japan and the European Union with treatment equivalent to the best treatment available to service providers from the United States, there was no evidence of discrimination on the basis of nationality and therefore no violation of the GATS most favoured nation treatment obligation. The Panel determined that by not offering the best treatment available to **all** service providers from Japan or Europe, rather than a closed list of service providers, Canada breached its obligation to accord "treatment no less favourable" to like service providers from foreign countries.

61. Focussing on treatment accorded both to services and to "service providers", the national treatment and most favoured nation treatment obligations contained within the GATS are appropriate examples from which to draw analogies to provisions respecting the treatment of investors and their investments. In fact, the United Nations Conference on Trade and

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[34] *Canada - Certain Measures Affecting the Automobile Industry*, WT/D5139/R, WT/D5142/R, January 31, 2000, at paras. 10.237 & 10.246, where the Panel states: "We note that both sets of measures allow some wholesale trade services suppliers to import and resell under more favourable conditions, while putting at competitive disadvantage other suppliers... [when compared to the quota allocation regime also found to provide less favourable treatment, in effect, to certain foreign nationals (by another panel), the *Canada - Auto Pact* Panel concluded that]... In both cases there is an economic disadvantage." The Panel concluded finally, at paras. 10.262 to 10.264 that differential treatment was, in effect, less favourable under GATS Article II.

Development has instructed that the national treatment obligation under investment treaties is generally regarded to be even broader than those found under "trade" agreements. It states:

> *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 under investment agreements than under trade agreements.*[35]

62. Canada argues that the wording of NAFTA Article 1102(3) supports its contention that its obligation to provide treatment "no less favourable" to NAFTA investors and their investments does not actually require Canada to ensure that those investors and their investments are treated as well as domestic investors and their investments.[36] Canada's position is untenable, based on the plain meaning of the text of Article 1102(3). Paragraph (3) of NAFTA Article 1102 merely condenses into one paragraph for sub-state governments what paragraphs (1) and (2) provide for national governments. In fact, this provision clarifies that the obvious meaning of being obliged to provide "treatment no less favourable" is to be required to provide the most favourable treatment available to investors and investments operating in like circumstances.

63. The GATT Panel in the *United States - Section 337 of the Tariff Act of 1930* addressed the concept of treatment "no less favourable" in Article III:4 and rejected the notion that a differential treatment of foreign products justified a standard based on the product with the least favourable treatment. The panel stated as follows:

> *The "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.*[37]

64. Similarly, simply because some US softwood lumber investments in competition with the Investment received the benefit of operating in Non-listed Provinces does not mean that the Investment and the Investor should not receive the same treatment. Again, because other

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

36 At paragraphs 180 and 181 of the Counter-Memorial.

37 "*United States - Section 337 of the Tariff Act of 1930*", BISD 36S/345, para. 5.14 (adopted on November 7, 1989). See also United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, May 20 1996, Appellate Body Report at paras. 6.14 to 6.15.

competitive US softwood lumber investments in BC receive the same treatment as the Investment does not mean that the Investment is only entitled to that lesser level of treatment.

iv. ***Application to the Facts in This Case***

65. Once the "like circumstances" of the investors and the investments are determined, national treatment requires that the best treatment in the state given to a domestic investment and investor be determined. For example, this better treatment is provided to Canadian softwood lumber investors and their investments in Non-listed Provinces, to Canadian softwood lumber investments and investors in Quebec, and to Canadian softwood lumber investments and investors not subject to the new "super fee base". The Investment and the Investor claim that they should receive treatment that is "no less favourable" than these better levels of treatment.

66. Canada has admitted in the Counter-Memorial that a distinction was made in its Export Control Regime between softwood lumber investments in Listed and Non-listed Provinces, providing more favourable treatment to investments in Non-listed provinces. Canada does not dispute that the Investor and its Investment, which are located in a Listed Province, receive less favourable treatment than investments in Non-listed Provinces. Accordingly, treatment is not at issue in dispute.

The sole basis of Canada's response to the Claim of the Investor is that the Investor and the Investment are not in like circumstances with investments in Non-listed Provinces. The grounds for Canada's defence are that it was not the intent of Canada to discriminate against foreign investors and investments based on their nationality, and because of this lack of "motivation" with respect to nationality, Canadian investments in Non-listed Provinces cannot be compared with the Investor and its Investment.

68. Canada states at paragraph 208 of its Counter-Memorial that softwood lumber investments in Listed Provinces are not in like circumstances with other provinces on three bases:

(i) the "*Softwood Lumber Agreement* itself";

(ii) the CVD trade disputes, which focussed on Listed Provinces; and

(iii) the volume of softwood lumber investments in Listed and Non-listed Provinces are different.

69. This Tribunal has already acknowledged that this Claim is not about the *Softwood Lumber Agreement,* but about the measures of the Export Control Regime.[38]

70. Secondly, Canada's distinction between Listed and Non-listed Provinces cannot be justified merely on the evidence that the *Softwood Lumber Agreement* was negotiated as a reaction to

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[38] See Pope & Talbot, Inc. and the Government of Canada, Preliminary Award Concerning the Interpretation of NAFTA Article 1101: "Measures Relating to Investment", NAFTA/UNCITRAL Tribunal, January 26, 2000, Schedule 37.

repeated US CVD actions over the past 20 years. This is a justification, and admission, of the discriminatory treatment that the Investor has complained of in this Claim. In its Counter-Memorial, at paragraphs 202-206, Canada has only explained why it entered into the *Softwood Lumber Agreement* and by implication suggests that it was bound to cover only Listed Provinces in theExport Control Regime for the same reason.

71. As Professor Howse states in his witness statement, if the *Softwood Lumber Agreement* was created to address the risk of future CVD actions, there is no reason why provinces that were un-targeted in the past could not be the subject of future countervailing duty action. Non-Listed Provinces have the "same **inherent** vulnerability to future countervailing duty actions as covered ones."[39] Accordingly, the explanation for why Non-Listed Provinces were not covered in the Export Control Regime provided by Canada is simply an inadequate basis on which to justify Canada's position that softwood lumber investments in Listed and Non-Listed Provinces are not in like circumstances.

72. Moreover, motivation and the good intent of Canada is not a justification for the *de facto* discrimination of which the Investor has complained. The "aim and effects" test, which Canada is advocating in this Claim, was rejected by a WTO Panel and Appellate Body with Canada's support. It is simply not tenable for Canada to have it both ways.

. The Investor does not concede that formal discrimination has not taken place. Because of the non-transparent nature of the Export Control Regime, this is one of those cases in which it is difficult to establish *de jure* discrimination. Moreover, the Investor submits that it is not necessary under the national treatment principle to establish formal or facial discrimination for the exact reason that measures such as the Export Control Regime are non-transparent, opaque and arbitrary leaving uncertainty as to what the purposes are behind the measure, overt or otherwise.

74. Thirdly, the mere fact that the volume of exports from Listed Provinces is greater than that in Non-listed Provinces does not mean that the softwood lumber investments in these provinces are not in competition with one another. Using the characteristic of volume of softwood lumber exports does not accord with the fundamental objective of national treatment, which is to assure the equality of competition between like investments. It perhaps relates to the reasons for the US targeting of CVD actions, but is not a characteristic relevant to comparing competitive investments.

75. At paragraphs 248 and 249 of the Counter-Memorial, Canada has suggested that the Investor's view of national treatment would have "immense" negative ramifications. The Investor submits that there are indeed situations in which investors and investments from another NAFTA Party would not be considered to be in "like" situations on account of what would appear to be locational considerations. This is not one of them.

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[39] Statement of Robert Howse at para. 19, Schedule 1.

76. For example, an environmental scheme might impose tighter emission controls on an enterprise located in a high pollution area than one, otherwise similarly situated, in a low pollution area. This is unlike the present arbitration in which location is not related to a neutral regulatory purpose but is used to arbitrarily establish and allocate rights under an export restraint scheme.[40]

77. In addition, recovery under NAFTA Article 1102 is limited in the NAFTA by exemptions, reservations, and the requirement to show proof of loss. For example, under NAFTA Article 1108 it is stated that Articles 1102, 1103 1106 and 1107 do not apply to existing non-conforming measures as set out in the sections and the reservations under Annexes I-IV.

78. The effect of the Export Control Regime has been to discriminate against a US Investor and its Investment. Since the Investor and its Investment are in "like circumstances" with Canadian investors and their investments, this discrimination has resulted in less favourable treatment to the Investor and its Investment which has resulted in a breach of Canada's NAFTA Chapter 11 national treatment obligation and should be compensated accordingly.

[40] Statement of Robert Howse at para. 23.

SECTION FIVE:

PERFORMANCE REQUIREMENTS

Performance Requirements Are Regulated Under the NAFTA Because They Generate Undesirable Trade Distortions

79. Canada has argued that Pope & Talbot has advanced as many as four theories concerning the application of NAFTA Article 1106 to the facts of this case. This argument is totally false. The Investor has made a single argument about the application of NAFTA Article 1106 to the manner in which the Export Control Regime has harmed its investment: that because performance requirements are a type of economic instrument that necessarily distort trade and investment, the NAFTA Parties have agreed to eliminate their use, or to compensate NAFTA Investors when such measures are nonetheless imposed.

80. The imposition of performance requirements by a government, whether or not made in connection with the provision of some sort of advantage to investments, is generally regarded as an economically inefficient activity that distorts markets and accordingly decreases public welfare.[41] Accordingly, the NAFTA Parties sought to discourage use of performance requirements in the NAFTA free trade zone by requiring Parties to pay NAFTA investors compensation for any losses sustained to their investments as a result of their imposition. Jeffrey Lang, then Deputy United States Trade Representative and Co-leader of the US Delegation to the OECD Negotiations on the Multilateral Agreement on Investment, has stated that performance requirement provisions such as those which exist in the NAFTA and more recent US bilateral investment treaties:

> *... limit the ability of host governments to require U.S. investors to adopt inefficient and trade distorting practices. In particular, BITs limit performance requirements, such as local content or export quotas. [Such provisions] may also open up new markets for U.S. producers and increase U.S. exports. U.S. investors protected by BITs can purchase competitive U.S.-produced components without restriction on inputs in their production of various products. They also can import other U.S.- produced products for distribution and sale in the local market. They cannot be forced, as a condition of establishment or operation, to export locally produced goods back to the U.S. market or to third-country markets.*[42]

81. Performance requirements are intended to cause firms to make economic choices that would otherwise not be made in the free market.[43] Accordingly, Daniel Price, former Principal Deputy

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41 Affidavit of Dr. Leonard Waverman at para's 5-6, Schedule 4 of the Memorial.

42 Jeffrey Lang, "Keynote Address" (1998) 31 *Cornell International Law Journal* 455 at 457.

43 Claude G. B. Fontheim & R. Michael Gabdaw, "Trade-related Performance Requirements Under the GATT-MTN System and U.S. Law" (1983) 14 *Law & Policy in International Business* 129 at 134.

General Counsel in the Office of the US Trade Representative, and a former negotiator of NAFTA Chapter 11, has written that NAFTA Article 1106 serves two goals:

> *First, it eliminates trade distortions that arise from the imposition of performance requirements. Hence a Party is prohibited from imposing such requirements even on its own investors. Second, it ensures a degree of entrepreneurial autonomy: sourcing and sales decisions are based on the investor's judgment, not by the dictates of the host government.*[44]

82. Because performance requirements are trade-distorting and generate economic inefficiencies, they are also specifically precluded from use in Article VIII of the Asia Pacific Economic Cooperation Model Contract Provisions for Projects Under the APEC Voluntary Investment Project Scheme.[45] In addition, Canada has agreed in the *APEC Non-Binding Investment Principles*, which also state that APEC Members accept that investment disputes will be settled "through procedures for arbitration in accordance with [their] international commitments, that:

> *Member economies will minimise the use of performance requirements that distort or limit expansion of trade and investment.* [46]

83. It is apparent from the facts upon the record that the imposition of the Export Control Regime has resulted in performance requirements being placed on the Investment that have distorted the trade in softwood lumber between Canada and the United States and significantly limited the expansion of trade and investment, causing particular harm to Pope & Talbot for which it should be compensated.

The Supposed Origins of NAFTA Article 1106

84. Canada has proffered certain arguments about the origins of various provisions of the NAFTA, particularly NAFTA Article 1106. For example, at paragraph 300, Canada claims that NAFTA Article 1106 is specifically derived from bilateral investment treaties to which the United States, but not Canada nor Mexico, was a party. Canada appears to conclude from this assumption, at paragraph 308 of the Counter Memorial, that the exclusive purpose of including Article 1106 in the NAFTA was to address performance requirements designed only to increase exports, rather than to set them at a particular level. This conclusion is neither accurate nor relevant.

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[44] Daniel M. Price, "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement" (1993) 27 *International Lawyer* 727 at 729.

[45] Set out at Schedule 8.

[46] See Schedule 9.

85. First, under the practice of bilateral investment treaties, it was actually common practice for investors to be forced to submit to a performance requirement assigning an export performance floor.[47]

86. Second, and more importantly, Canada interprets the term "to export a given level", in NAFTA Article 1106(1)(a), to only be a requirement to "increase" exports. This meaning cannot be supported on a plain reading of the text. The wording of NAFTA Article 1106(1)(a) is not "to export at no less than a given level", "to increase exports to any given level", or even "to export at no more than a given level". Rather, the provision is clearly worded so as to encompass **any** government attempt to impose a performance requirement having the effect of changing the export level from that which it would be if not for the imposition of the performance requirement.

87. Article 31(1) of the *Vienna Convention* specifies that a treaty provision is to be interpreted "in good faith in accordance with the ordinary meaning of the words in their context and in the light of its object and purpose". As Canada notes[48], Article 32 of the *Vienna Convention* permits consideration of supplementary means of interpretation, such as the *traveaux preparatoires*, only when interpretation under Article 31 results in an interpretation which is ambiguous or obscure, or leads to a manifestly absurd result.

. Despite arguing[49] that the ordinary meaning of Article 1106 is clear, Canada has attempted to argue, at paragraphs 299 to 308, about the specific origins of NAFTA Article 1106. Even if interpretation of NAFTA Article 1106 did require supplemental means of interpretation, which the Investor submits is not necessary, Canada could still not make claims as to the "origins" of NAFTA Article 1106 as it has provided counsel for the Investor with a written assurance that there exist no preparatory works in respect of negotiation of the NAFTA.[50]

89. Moreover Canada cannot credibly assert[51] that interpretation of NAFTA provisions should not include recourse to the *contra proferentum* rule because the United States apparently was the sole drafter of NAFTA Chapter 11, as it was supposedly based upon US bilateral investment treaties. Canada, the US and Mexico drafted the NAFTA. In light of the evidence to the contrary, Canada's argument must fail.

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47 See, for example, Fontheim & Gabdaw, "Trade-related Performance Requirements under the GATT-MFN System and US Law" (1983) 14, *Law & Policy in International Business*, 129 at 135-136.

48 At paragraph 137 of the Counter-Memorial.

49 At paragraph 158 of the Counter-Memorial.

50 Schedule 5.

51 As it attempts to at paragraph 144 of the Counter-Memorial.

90. Canada's further allegation that the *contra proferentum* rule is not applicable as between the Investor and Canada because the NAFTA was agreed between three Parties rather than two is simply not supportable on the basis of the authority provided by Canada at Tab 9, Volume One of its Book of Authorities: *McNair on the Law of Treaties*.

91. Canada was a Party to the drafting of the NAFTA, and has failed to provide any evidence that it was not responsible for any of the particular terms found therein, including the wording of NAFTA Article 1106. The Investor did not participate in the drafting of the NAFTA, or NAFTA Article 1106. Accordingly, if the Tribunal determines that the terms of Article 1106 are indeed ambiguous, for being capable of either of the interpretations submitted by the Investor and Canada, the Tribunal must choose the alternative advanced by the Investor as a matter of strict construction against one of the provision's drafters: Canada.

WTO Jurisprudence Can Be Helpful

92. Trade-related investment performance requirements, such as the Export Control Regime, are also regulated under the trade-in-goods provisions of the NAFTA and WTO. For example, trade-related investment performance requirements that restrain imports or exports are prohibited under NAFTA Article 304 and Article X:1 of the GATT. Unilaterally imposed, or coerced, performance requirements that limit export volumes (such as the Export Control Regime) are even forbidden under the WTO Agreement Safeguards Agreement because they unnecessarily restrict trade and thus threaten the principles of multilateralism and nondiscrimination.[52] Academics have referred to such export restrain mechanisms as "blatantly violative of the GATT",[53] and Professor Jackson has noted:

> *... few practices have posed as large a problem for the policy objectives and "rule" language of the GATT as those generally called "voluntary export restraints" (VERs), "voluntary restraint agreements" (VRAs) or "orderly marketing arrangements" (OMAs). In spite of extensive economic and policy criticism suggesting that, as an instrument of trade policy, ecport-restraint arrangments are usually a forth- or fifth-best choice (or worse), these arrangements have prolifferated to such an extent that it appears that some countries perfer them to all other trade-restricting devices.*[54]

93. When performance requirements are imposed in connection with the provision of an advantage such as a subsidy, they are also prohibited under the WTO Agreement on Subsidies.[55] Accordingly, it is eminently sensible to have regard to WTO case law in construing the

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[52] Statement of Professor Robert Howse at paras. 18, Schedule 1.

[53] Ernesto M. Hizon, "The Safeguard Measure / VER Dilemma: The Jekyll and Hyde of Trade" (1994) 15 *Northwestern Journal of Law and International Business* 105 at 105.

[54] John H. Jackson, *The Jurisprudence of GATT & the WTO: Insights on Treaty Law and Economic Relations* (New York: Cambridge University Press, 2000) at 69.

[55] Schedule 10. See, for example: *Indonesia – Certain Measures Affecting the Automotive Industry*, at WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, July 2, 1998, beginning at para. 14.153.

appropriate meaning of the provisions of NAFTA Article 1106 – and in accord with both the definition of "international law" under Article 38 of the *Statute of the International Court of Justice* which clearly includes "judicial decisions and the teachings of the most highly qualified publicists" as a subsidiary means for the determination of rules of law.

94. For Canada to suggest that WTO panel decisions in which trade-related investment performance requirements were found to be inconsistent with the WTO Agreement on Trade Related Investment Measures (TRIMS Agreement) or even other provisions of the GATT or GATS is somewhat self-serving.

95. Contrary to Canada's assertions, it would seem obvious that the experience of other international bodies considering measures that constitute performance requirements could be of assistance to this Tribunal. For example, In *Indonesia – Certain Measures Affecting the Automotive Industry*, a WTO panel concluded that an Indonesian measure that did not force investments to purchase certain local goods, but did condition the receipt of the advantage of qualification for tax and customs duty benefits upon their purchase, constituted a prohibited TRIM even though the local content requirement was not binding as such.[56] The Panel also rejected Indonesia's claim that because its measures were primarily aimed at trade in goods, they did not constitute "investment measures".[57]

e Requirement to Export at a Given Level

96. The relevant portion of Article 1106 provides as follows:

> 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;
>
> [emphasis added]

97. To make a finding that NAFTA Article 1106(1) has been breached, and accordingly that compensation is due to an Investor under NAFTA Article 1116, the measure at issue must constitute a requirement imposed in connection with a listed aspect of an investment of either a Party or a non-Party in the territory for which the measure is imposed.

98. Canada argues, at paragraph 318, that by imposing the Export Control Regime it did not actually impose a requirement to export softwood lumber at any given level. Apparently the Investment was perfectly free to export as little or as much as it wanted under the Regime. Obviously, if the Investment wanted to stay in business, it had to continue to export softwood lumber to the United States, its primary market. Canada has made, and lost, similar arguments about its

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[56] *Indonesia – Autos*, at para 14.90.

[57] *Indonesia – Autos*, at para's 14.80 to 14.81.

performance requirement investment measures before. In *Canada – Foreign Investment Review Act*, the Panel found that mere undertakings provided by investors or as a matter of course to satisfy local content requirements constituted "requirements" under GATT III:4.[58] The Panel in *Canada – Certain Measures Affecting the Automotive Industry*, went even further, stating:

> *... the word "requirement" has been defined to mean "1. The action of requiring something; a request. 2. A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3. Something called for or demanded; a condition which must be complied with." The word "requirement" in its ordinary meaning and in light of its context in Article III:4 clearly implies government action involving a demand, request or the imposition of a condition but in our view this term does not carry a particular connotation with respect to the legal form in which such government action is taken. In this respect, we consider that, in applying the concept of "requirements" in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a* ***broad variety of forms of government action that can be effective in influencing the conduct of private parties.***[59] (Emphasis added)

99. In *Canada – Certain Measures Affecting the Automotive Industry*, the Panel was concerned with a Canadian measure that constituted a domestic content requirement which, if performed, provided the advantage of receiving a given amount of duty-free imports. The given amount was determined by a formula related to the production of each investment. The Panel went to the heart of the matter in determining that the fundamental question in determining whether a requirement exists is to ask whether the measure would be effective in influencing the conduct of private parties. Clearly the Export Control Regime in this case was effective in influencing the conduct of private parties such as Pope & Talbot[60].

100. The text of NAFTA Article 1106(1)(a) specifies that the NAFTA Parties shall not impose a requirement to export "**a given level**" of goods on an investment of either a Party or a Non-Party. Pope & Talbot is an investment of a Party. It produces softwood lumber, which Canada admits is a "good" under the NAFTA. The word "given" is defined as meaning "to allot as a portion or share"[61]. Clearly, the Export Control Regime allots as a portion or share the amount of softwood lumber which may practically be exported by any given investment (whether owned by a domestic investor, foreign investor or an investor from a NAFTA Party).

101. Because of the high quota fees imposed under the Export Control Regime, investments such as Pope & Talbot are not able to export softwood lumber at the level they would prefer, if the market alone dictated how much could be shipped without paying a heavy penalty. Instead, they must export at a level determined through the operation of the Export Control Regime, which provides how much lumber can be exported at any given fee base, and therefore dictates how

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58 *Canada – Auto Pact,* at para 5.4.

59 *Canada - Auto Pact*, at para 10.107

60 Affidavit of Kyle Gray, at paragraph 15 .

61 See www.dictionary.com. Also, The Shorter Oxford English Dictionary at 796 and Roger's II, The New Thesaurus, 3rd at 439.

much lumber can economically be exported – thereby setting the "level" of exports of this particular good.

102. The Export Control Regime, and its requirements to export softwood lumber at a given level for each investment, is exactly the kind of scheme that NAFTA Article 1106(1)(a) was designed to either prevent, or require compensation for any losses it occasions for NAFTA investors. Its imposition caused market distortions that forced investments to act in a manner inconsistent than that which they would do, if not compelled to observe the requirements of the Regime.

103. Canada repeatedly suggests that the Investor has put forward alternative theories for how NAFTA Article 1106 works. For example, at paragraph 257 of the Counter-memorial, Canada misconstrues how the "use it or lose it" provisions of the Export Control Regime Allocation Policy are relevant for this Claim. The "use it or lose it" rule, rules on quota transfers, or rules governing "new entrants" quotas do not constitute individual requirements under NAFTA Article 1106, as Canada suggests. Rather, these rules merely demonstrate how the Export Control Regime, which as a whole constitutes a performance requirement, was made in connection with investments in Canada.

104. Under NAFTA Article 1106(1), the requirement must be imposed in connection with "the establishment, acquisition, expansion, management, conduct or operation" of an investment. The Investor listed the various rules imposed under the Export Control Regime to merely demonstrate how the Regime imposes a requirement to export softwood lumber at a given level **in connection** with the establishment, acquisition or expansion of an investment (e.g. transfer and new entrants rules), the conduct or operation of an investment (e.g. "use it or lose it" transfer and "speed bump"rules) as well as the management of an investment (demonstrated by how the Investment has had to change its business to maximise its business output based on the non-market rules imposed under the Regime)[62]. These individual rules make the Export Control Regime work. They do not, in and of themselves, constitute performance requirements under NAFTA Article 1106(1). They simply serve to ensure that the overall requirement to export goods at a given level – the raison d'être for the Export Control Regime – is actually imposed on the establishment, acquisition, expansion, management, conduct and operation of investments in the Canadian softwood lumber industry.

105. Finally, the Investor must take issue with Canada's bald assertion, at paragraph 309 of the Counter-Memorial, that the Parties to NAFTA have not, in effect, created a *per se* type of claim for compensation through the inclusion of Article 1106 in the NAFTA. Black's Law Dictionary defines *per se* as:

> *By itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation.*[63]

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62 Affidavit of Kyle Gray, at paragraph 15.

63 *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990) at 1142.

106. The Investor referred to the liability generated under NAFTA Article 1106 as being "*per se*" because it is fundamentally different than the liability generated under the remainder of the provisions of Part A of NAFTA Chapter 11. NAFTA Article 1106 stands alone as the only provision that generates liability for a measure applied to an investment that is not an investment of an Investor of another NAFTA Party. No other provision requires compensation to be paid to an Investor who experiences a loss (as required under NAFTA Article 1116) arising as a result of the imposition of a measure in connection with the investment of an investor of a non-Party, as does NAFTA Article 1106.

107. Canada appears to argue that for compensation to be payable under NAFTA Article 1106, a performance requirement must be imposed in relation to the investment which is owned by the Investor making the claim for loss or damage. Based on the plain meaning of the text of NAFTA Article 1106, this interpretation cannot stand. It would be impossible for a NAFTA Investor to make a claim for loss or damage caused in relation to an "investment of a non-Party" (as envisaged in paragraphs (1) and (3) of NAFTA Article 1106) if the measure had to be applied directly to the NAFTA Investor's investment as required under NAFTA Article 1116.

108. Canada interprets NAFTA Article 1106 as not generating a duty to compensate NAFTA Investors whenever any listed performance requirement is imposed on **any** investment in its territory (regardless of whether the loss is occasioned by direct application of the measure or arises indirectly from its application). This interpretation is only plausible if one completely ignore the words "or of a non-Party" in paragraphs (1) and (3) of NAFTA Article 1106. As indicated frequently by the WTO Appellate Body,[64] all of the words in a treaty text must be included in a proper interpretation in accordance with customary international law and Article 31 of the *Vienna Convention.*

The Requirement to Restrict Sales by the Investment in Canada by Relating Such Sales In Any Way to the Volume of Exports

109. The relevant portions of Article 1106 provide as follows:

> 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:
> (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**:

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[64] *Japan- Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R. WT/DS10/AB/R, WT/DS11/AB/R, October 4, 1996 at 11.

(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;

[emphasis added]

110. First, it must be noted that Canada completely misconstrues the obvious difference between paragraphs (1) and (3) of NAFTA Article 1106, while claiming that the Investor somehow fails to distinguish between the two. The difference between paragraphs (1) and (3) are that only certain performance requirements which condition the receipt of an advantage to an investment are eligible for the very broad exemption provided for under paragraph (4), which reads:

> 4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry our research and development, in its territory.

111. This significant exemption can be used when certain measures that constitutes performance requirements condition the receipt of an "advantage". As indicated at paragraphs 104 to 108 of the Memorial, the word "advantage" connotes a wide range of ways in which an investment can be made better off. The advantage needs only to be connected with an "investment" rather than the slightly more rigorous requirement under NAFTA Article 1106(1) that the performance requirement be connected to "the establishment, acquisition, expansion, expansion, management, conduct or operation" of an investment. While these terms may have the effect of widening the ambit of NAFTA Article 1106(3), they also have the effect of increasing the protection for certain performance requirements under NAFTA Article 1106(4).

112. With the inclusion of seven prohibited performance requirements under NAFTA Article 1106(1) the NAFTA Parties clearly intended to limit use of performance requirements as a public policy tool (or at least require compensation to be paid for their use), because of the deleterious economic effects of such measures. However, with the inclusion of NAFTA Article 1106(3), working in conjunction with NAFTA Article 1106(4), the NAFTA Parties appear to have provided a broad exemption for four of those seven performance requirements so long as they were imposed in order to provide an advantage to investments in furtherance of the economic and social policy goals listed in NAFTA Article 1106(4).

113. For NAFTA Article 1106(4) to apply to a measure covered under Article 1106(3), all that is needed is that the requirement, the performance of which results in the provision of an "advantage", forces any investment to "locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development in [Canada]." These exemptions are obviously very broad, although it appears clear that none apply within the context of this case. Canada has obviously neglected to mention the operation of the paragraph (4) exemption in understanding how NAFTA Article 1106 works, because the exemption is not of any use in its defence.

114. Canada argues, at paragraph 341 of the Counter-Memorial, that it is not possible to construe a measure that constitutes a performance requirement as falling under both paragraph (1) and

paragraph (3) of NAFTA Article 1106. There is nothing in the text of the NAFTA to support this view. Given the existence of NAFTA Article 1106(4), it is clear that the NAFTA Parties intended that if a performance requirement can in any way be said to condition the receipt of an advantage for a certain purpose, it may fit under both paragraphs (1) and (3). That is why the identical wording is used to describe the four requirements listed in both paragraphs (1) and (3). This repetition provides the Parties with easier access to the exemptions contained within paragraph (4). If their performance requirements can be connected with the granting of an advantage on any investment.

115. The plain wording of NAFTA Article 1106(5) demonstrates that it is of no assistance to Canada as it merely clarifies that the requirements listed in paragraphs (1) and (3) are an exclusive list. It says absolutely nothing that could be construed as limiting the application of the requirements so listed to cases of "form" as opposed to "effect". The very existence of the various requirements exempted under paragraph (4) reveals the weakness of Canada's argument with respect to NAFTA Article 1106(5).

`ree Special Performance Requirements

116. Canada correctly notes, at paragraph 268 of the Counter-Memorial, that "Three of the performance requirements prohibited by Article 1106(1) in connection with the establishment or operation of an investment are not prohibited under Article 1106(3), as a condition of the receipt of an advantage". The NAFTA Parties' explicit exclusion of these three types of requirements from qualification under NAFTA Article 1106(3) – and by extension, the exemptions contained within NAFTA Article 1106(4) is clear evidence of their determination that certain performance requirements are of such an onerous quality that their use should discouraged outright. These three types of requirements, listed in NAFTA Article 1106(1), were:

> (a) to export a given level or percentage of goods and services ...
> (f) to transfer technology, a production process or other propriety knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
> (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

117. The NAFTA Parties obviously considered these requirements so damaging to investment and trade, and so distorting of market-driven decision-making by investments, that they should either not be used, or that compensation should be made available under Chapter 11 for any instances of their use that result in demonstrable harm to a NAFTA investor. Accordingly the Parties ensured that these requirements would not be eligible for the NAFTA Article 1106(4) exemptions. This choice seems eminently sensible given that, for example, a measure constituting a requirement to export a given level of goods would most likely violate any number

of GATT provisions (regardless of whether it effectively reduced, or inflated, the exports involved).[65]

Performance Requirements in Form and Effect

118. The existence of the exemptions listed in paragraph (4) of NAFTA Article 1106 also make it abundantly clear that the performance requirements listed in paragraphs (1) and (3) concern not only performance requirements that have the specific form as described therein, but also the effect of the requirements as listed. If the Parties did not intend NAFTA Article 1106 to cover both *de jure* and *de facto* performance requirements, they would not have phrased each and every potential exemption listed in paragraph (4) so as to cover *de facto* requirements.

119. For example, the NAFTA Article 1106(4) exemption for requirements to "carry out research and development" would be meaningless unless the requirements listed in sub-paragraphs (a) to (d) of paragraph (3) could be construed as covering *de facto* situations. There is nothing in these sub-paragraphs that mentions "requirements to conduct research and development in the territory of a Party" and yet one of these requirements surely must encompass such a result – otherwise, the exemption would be pointless.

ıes of Softwood Lumber by Pope & Talbot in Canada

120. As described in paragraphs and 109 to 118 and 126 to 128 of the Memorial, the effect of Canada's imposition of the Export Control Regime has been to restrict the sales of Pope & Talbot's investment in Canada of the goods it produces (i.e. softwood lumber) by relating such sales to the volume of its exports to the United States. The Export Control Regime explicitly requires such performance in relation to the management, conduct and operation of the Investment, and also provides the advantage of exporting lumber fee free to certain investments in Canada in connection with the compliance of investors with the requirement that their sales be related to the volume of their exports.

121. Subparagraphs (1)(e) and (3)(d) of NAFTA Article 1106 provide considerable scope for inclusion of the many different ways in which a measure can constitute a requirement to relate the sales of an investment to its exports. They do so by using the words "relating such sales **in any way** to the volume or value of its exports...". Canada's use of a quota allocation scheme that is predicated on the historic sales and export figures of individual investments obviously qualifies under as broad a categorisation as "in any way".

122. The "sales" referred to in subparagraphs (1)(e) and (3)(d) of NAFTA Article 1106 cannot possibly be limited to the sale of goods intended solely for consumption in the domestic market, as Canada contends at paragraph 333 of the Counter-memorial. It is submitted that if the Parties intended use of the word "sales" to be restricted in such a manner, the provision would have

[65] See generally, John Jackson *The Jurisprudence of GATT*, from 69.

read: "sales intended for domestic consumption" or "sales **to** its territory". Instead, the more open-ended expression "sales in its territory" is used.

123. Use of the term "in its territory" in these provisions obviously refers to the fact that Article 1106 obligations govern the effect of performance requirements on investments **in** Canada only. Pope & Talbot operates **in** Canada. As a matter of law and fact, the sales that Pope & Talbot's Investment has watched fall as a result of the imposition of the Export Control Regime were sales transactions which took place **in** Canada. The Investor notes that Canada has not even gone so far as to argue that a "sale for export" is somehow not a sale made in Canada for purposes of domestic law and practice.

124. The Investor, like the vast majority of softwood lumber producers, sells its goods on an F.O.B. basis[66]. As a result, title to the softwood lumber exported by the Investment in Canada transfers when the lumber is first conveyed to the first transporter, which occurs in Canada at its mill.

125. The Investor has demonstrated the many ways in which the Export Control Regime, which constitutes the performance requirement at issue, affects the "establishment, acquisition, expansion, management, conduct or operation of an investment" of **an** investment of a Party **or** of a non-Party. Again, it is the Export Control Regime itself that effectively constitutes a performance requirement that relates the softwood lumber sales of Pope & Talbot's Investment in Canada to its exports – not each individual means through which the Regime is imposed upon, and thus is made "in connection with" the conduct of an investment. Given the multiplicity of rules and conditions governing how quota can be obtained, lost or transferred under the Export Control Regime, and the obvious impact it had on how investments such as Pope & Talbot are managed, it is obvious to see how the sales-to-exports requirement which the Export Control Regime effectively represents is made in relation to the "establishment, acquisition, expansion, management, conduct or operation of an investment" under NAFTA Article 1106(1)(e).

126. Under NAFTA Article 1106(3)(d), the same requirement – to restrict the sale of softwood lumber by investments in Canada in relation to their exports – is to be related to an advantage bestowed upon an investment. The advantage bestowed upon certain investments in Canada through Canada's imposition of the Export Control Regime is to export various amounts of the softwood lumber that they produce fee free, or for lower fees than which is available for other investments in other provinces (namely British Columbia). The requirement to relate sales to exports is imposed on some of the same investments upon which the benefit is bestowed, but not Pope & Talbot. Because Pope Talbot's investment is located in British Columbia, under the Export Control Regime Pope & Talbot receives no advantage and in fact suffers losses as a result of its imposition. This unfair and economically inefficient distribution of the ability to access the US market without paying as much, or any, fees is exactly the type of result that NAFTA Article 1106(3) was designed to remedy.

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[66] Statement of Howard Rosen at paragraph 12.

SECTION SIX:

EXPROPRIATION

NAFTA Creates a *Lex Specialis*

127. Article 31(4) of the *Vienna Convention* states that "a special meaning shall be given to a term if it is established that the parties so intended". The NAFTA has expanded its application beyond the customary international law definition of expropriation. NAFTA Article 1110 included the broad term "measures tantamount to expropriation" thereby expanding and giving a special meaning to the customary international law definition of expropriation.

128. Canada argues in its Counter-Memorial that the Export Control Regime is a measure not covered by customary international law definitions or interpretations of the term expropriation. The Investor agrees. However, NAFTA Article 1110(1), by expressly adding the term "measures tantamount to expropriation", in addition to indirect and direct expropriation, created a *lex specialis* for expropriation that covers the Export Control Regime.

129. The broad definition of expropriation under NAFTA Article 1110(1) creates a *lex specialis* which supercedes the *lex generalis* of expropriation established by customary international law.

The Use of Iran-US Claims Tribunal Jurisprudence

130. Canada claims[67] that the jurisprudence from the Iran-US Claims Tribunal (IUSCT) is of limited value because the jurisdiction of the Tribunal in determining whether an expropriation had occurred was overly broad. However, Canada actually relies upon Iran-US Claims Tribunal jurisprudence when it suits their purpose.[68] Canada cannot have it both ways.

131. Contrary to Canada's suggestion, the Investor submits that the jurisprudential value of the decisions of the Iran-US Claims Tribunal decisions are immensely valuable and relevant. According to Charles N. Brower and Jason D. Brueschke:

> *due to the large number of awards addressing this issue [expropriation], the area in which the Tribunal will have made perhaps its greatest contribution to public international law is its jurisprudence concerning the taking of property.*[69]

The Investor is therefore at a loss in understanding Canada's contention that the jurisprudence arising from the IUSCT is to be approached with "caution" by this Tribunal.

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[67] At paragraphs 395-400 of its Counter-Memorial.

[68] At paragraph 379 of its Counter-Memorial.

[69] Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* (1998) at 369.

Tantamount to Expropriation

132. Canada cites Dame Rosslyn Higgins, a judge of the International Court of Justice, to illustrate that the state of the law is contrary to what the Investor has argued in its Memorial. Canada has, however, not addressed the Investor's contention, which is supported by Judge Higgins that regulatory takings should be subject to compensation regardless of the intent of the government imposing the expropriatory measures.

133. Contrary to Canada's arguments, both the international law of expropriation and the *lex specialis* created by NAFTA Article 1110 clearly covers indirect expropriations and "other measures affecting property rights". For example, the Iran-US Claims Tribunal in *Tippets, Abbett, McCarthy, Stratton* concluded that "the Claimant has been subjected to 'measures affecting property rights' by being deprived of its property interest in TAMS-AFFA..."[70] In that case, the concept "measures affecting property rights" appears to have been used as a broad notion encompassing clearly expropriation but did not exclude the possibility of some "other" (lesser) measures also being included.[71] This is exactly the type of measure encompassed within the term "tantamount to expropriation" in NAFTA Article 1110 (1).

134. In *Foremost Tehran, Inc.* the Tribunal also provided a broad interpretation to measures affecting property rights of a claimant that fall short of an expropriation. The Tribunal held that the interference at issue, non-payment of cash dividends, was not far-reaching enough to constitute expropriation of the claimant's shareholder interest but nevertheless gave rise to compensation. The Tribunal, in assuming that Foremost's claim must be taken to include a claim for a lesser degree of interference, and after reviewing the *Sporrong and Lonnroth* case decided by the European Court of Human Rights,[72] stating:

> *It is open to the Tribunal to make a similar finding in the present Cases to the extent that the level of interference established here constitutes "other measures affecting property rights" as contemplated by Article II, paragraph 1, of the Claims Settlement Declaration, though it may have not risen to the level of an actual taking.*
>
> *Such interference, attributable to the Iranian Government or other state organs of Iran, while not amounting to an expropriation, gives rise to a right to compensation for the loss of enjoyment of the property in question.*[73]

135. Moreover, in the *Eastman Kodak Company* arbitration similar reasoning was applied when the interference with shareholder rights not found to be of such a nature as to constitute

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70 Tippetts, Abbett, McCarthy, Stratton case, at 225.

71 Lillich & Magraw, eds. *The Iran-US Claims Tribunal: Its Contribution to the Law of State Responsibility* at 259.

72 *Sporrong and Lonnroth*, 52 Eur. Ct. H.R. (1982).

73 *Foremost Tehran* case, at 251.

expropriation. Drawing on the *Foremost* and *Sporrong and Lonnroth* cases, the Tribunal determined that similar "interference...exists in the present Case, and that this interference is attributable to Iran". Therefore, in these cases the interference attributable to the State was beyond doubt. Although the interference did not amount to expropriation, it gave rise to compensation as "other measures affecting property rights".[74]

136. Therefore, it is clear that indirect measures that fall short of expropriation are compensable at international law. NAFTA Article 1110 goes even further by expressly providing that the Investor and its Investment have a right to compensation for Canada's discriminatory implementation of the Export Control Regime that can be characterized as a measure tantamount to expropriation of its "investment" in Canada.

The Definition of Investment

137. Canada, at paragraph 469 of the Counter-Memorial, incorrectly states the Investor's position in its Memorial. Canada has argued that the Investor suggested that the definition of Investment under Article 1139 is illustrative, when it is really exhaustive. Canada is clearly mistaken. In paragraph 145 of the Investor's Memorial, the Investor in no way suggests that the definition of Investment under Article 1139 is illustrative and not exhaustive. The Investor simply makes the point that NAFTA Article 1139 defines the term "investment" broadly given the wide variety of economic interests that are encompassed within the definition and that in defining "investment". The Parties have obviously gone beyond the traditional definition of expropriated "property" in international law, constituting another element of the *lex specialis* they intended for Article 1110 *vis-a-vis* the definition of expropriation in international law.

138. It is clear from the broad definition of "investment" in NAFTA Article 1139, as well as the broad definition of "enterprise" under Article 201, that investments considered to be compensable under the NAFTA are also broad.

139. A broad definition of investment rights has been recognized by the Tribunal in *Amoco International Finance Corp. and Iran* where the it stated:

> *Expropriation...may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought and thus has a monetary value.*[75]

140. Access to the US market is the way in which Pope & Talbot, Inc. generates cash flow. It is these cash flows that comprise the enterprise value which includes the value of the Investment's goodwill.[76] Access to the traditional market of the Investment is an obvious element of its value

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[74] Illich and Magraw at 261

[75] *Amoco International Finance Corp. v. Iran*, at 220

[76] Affidavit of Howard Rosen, at para. 6.

that can be taken by the imposition of a government measure. Expropriation of an "investment" is compensable under NAFTA Article 1110..

The Operation of NAFTA Article 1110

141. Canada, at paragraph 381, claims that the definition of expropriation under NAFTA Article 1110(1) is no different than customary international law, previous US bilateral investment treaties, and the Canada-US Free Trade Agreement (FTA). The expropriation provisions under the FTA were significantly different from Article 1110 of the NAFTA. Under the FTA, expropriation was entirely a state-to-state matter provision for the compensation of investors through investor-state arbitration. There was also no coverage for "measures tantamount to expropriation". NAFTA made further modifications to the FTA and customary international law of expropriation including: the manner of compensating investors; a broadened scope for the protection of Investor's rights; and increased coverage for most regulatory takings. Moreover, the expansive use of "measures tantamount to expropriation" under US bilateral investment treaties cited by Canada is further evidence that "measures tantamount to expropriation" considerably expands customary international law.

142. Article 38 of the *Statute of the International Court of Justice* provides a general rule in applying international law to disputes. Article 38(1)(d) allows the court to consider, *inter alia,* "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law".[77]

143. Canada relies on a domestic Canadian lawyer to support its proposition that the NAFTA's definition of expropriation is the same as under customary international law.[78] Mr. Johnson is a Canadian lawyer[79] who has written a practical guide on the NAFTA. While counsel for the Investor personally respect this author, it cannot be said that his writings constitute a "teaching of the most highly qualified publicists".[80] Since Mr. Johnson's view appears to directly contradict the actual express terms of the text of NAFTA Article 1110, the Tribunal should consider his statement of no persuasive value and attach little weight to Canada's reliance on it.

144. Canada provides evidence that because previous US bilateral investment treaties used an expansive definition of "measures tantamount to expropriation", the drafters of NAFTA

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77 *Statute of the International Court of Justice*, Article 38.

78 At paragraph 382 of the Counter-Memorial.

79 It should be noted that Mr. Johnson was indicated as one of nearly 20 counsel or representatives of record representing Canada at the jurisdiction hearing of the *Ethyl* NAFTA investor-state claim. Unfortunately, Mr. Johnson was never able to attend the NAFTA hearings.

80 Mr. Johnson is not a professional law teacher nor an expert on the international law of expropriation. He also has not served as a member of any arbitral tribunal dealing with any judicial decisions informing international jurisprudence as to the meaning of the term.

intended the same expression to be more restrictive because of their omission of a similar explanatory note in Article 1110(1).[81]

145. In a letter dated May 5, 1997, Canada has provided written confirmation to counsel for the Investor that there exist no preparatory works in respect of negotiation of the NAFTA.[82] Accordingly, Canada cannot now argue about the drafting origins of the NAFTA. Nevertheless, the Investor submits that, on a plain reading of NAFTA Article 1110(1), the expansive meaning given to "measures tantamount to expropriation" in other US investment treaties cited by Canada is clear evidence that the use of the term in the NAFTA is similarly expansive. Canada's recent position stands in contrast to its own statements made when it implemented the NAFTA. In its Statement of Implementation, Canada has stated:

> *...from Canada's perspective, the aim is to broaden the scope of rules-based international trade and investment and to increase the opportunities for Canadian traders and investors around the world.*[83]

146. Article 31 of the *Vienna Convention* provides that a treaty should 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. It is clear and unambiguous from the text of Article 1110(1) that the use of the term "or measures tantamount to expropriation" are measures in addition to indirect or direct expropriation. If it does not mean something broader than direct or indirect expropriation it would not have been necessary to include it separately.

147. Canada relies on the *Desona* NAFTA Award as an authority on expropriation and measures tantamount to expropriation.[84] The factual circumstances and relevance of the *Desona* claim are entirely different and uninformative in the instant case. In the *Desona* arbitration the Investor was found to have been in fundamental breach of its obligations under a Concession Contract with the Mexican authorities. After the Mexican authorities cancelled the contract due to lack of performance and numerous misrepresentations by the Investor, the Investor attempted to overturn the decision in the Mexican courts. After two appeals upholding the cancellation of the contract the Investor then pursued a claim under Chapter 11 of NAFTA.

148. The *Desona* Tribunal was mainly concerned with the facts surrounding numerous misrepresentations and breaches by the Investor, which ultimately led Mexican authorities to annul the Concession Contract. This case is about how Canada's implementation of the Export Control Regime caused harm to the Investor and its Investment. Due to the disparate facts of the *Desona* case compared to the present arbitration, Canada's reliance on it as an authority regarding the meaning of expropriation under NAFTA Article 1110 is entirely unconvincing.

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81 At paragraph 391 of the Counter-Memorial.

82 Schedule 5.

83 Canadian *Statement of Implementation* at 69.

84 At paragraph 394 of its Counter-Memorial.

149. Canada incorrectly claims that liability is possible only if the measure is discriminatory.[85] 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).

150. A breach of any one of these requirements will trigger a Party's obligation to compensate. For example, the Export Control Regime clearly breaches Article 11 of the WTO Agreement of Subsidies and countervailing Measures.[86] Canada is obliged, as a matter of good faith in international law, not to impose a measure upon the Investment that breaches treaty obligations it has taken upon itself at the WTO. When it breaches the *pacta sunt servanda* rule by imposing this measure, it breaches its obligation under NAFTA Article 1105 to treat the Investment in accordance with international law, as required under NAFTA Article 1110 (1)(c). Therefore, it is possible for a Party to be liable for compensation under NAFTA Article 1110 for non-discriminatory actions contrary to Canada's suggestion.

151. Moreover, NAFTA Article 1110(8) provides that even non-discriminatory measures of general application that interfere with investments of investors of NAFTA Parties are compensable. Article 1110(8) provides:

> *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.*

152. By expressly providing for this exception under Article 1110(8), the NAFTA Parties clearly gave the term "measures tantamount to expropriation" a broad interpretation by not providing further exceptions. This is in keeping with the well established interpretive principle *expressio unius est exclusio alterius*.[87]

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[85] At paragraph 426 of the Counter-Memorial.

[86] Statement of Robert Howse, at para. 16.

[87] It is a well established interpretive principle that the specific exclusion of one element means that the others are included.

Conclusion

153. Nothing in Article 1110 restricts Canada's ability to regulate the export of softwood lumber into the US. However, what Canada ignores is that under Article 1110 it must compensate the Investor and its Investment for the harm it has suffered.

154. NAFTA Article 1110 clearly expands the customary international law definition of expropriation by permitting compensation to be paid for "measures tantamount to expropriation". Canada's imposition of 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. This Regime constitutes both a measure tantamount to expropriation within the meaning of NAFTA Article 1110, as well indirect expropriation under international law.

PART EIGHT: SUBMISSIONS

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

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

156. Through the introduction and implementation of the *Softwood Lumber Agreement*, Canada has violated Article 1105 of the North American Free Trade Agreement.

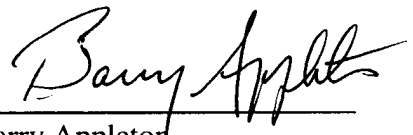
157. Through the introduction and implementation of the *Softwood Lumber Agreement*, Canada has violated Article 1102 of the North American Free Trade Agreement.

158. Through the introduction and implementation of the *Softwood Lumber Agreement* Canada has violated Article 1106 of the North American Free Trade Agreement and this violation was not justified under Article 1106(6).

159. 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.

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

Submitted this 14th day of April 2000 at Toronto, Canada.



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