IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE *NORTH AMERICAN FREE TRADE AGREEMENT*

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

GOVERNMENT OF CANADA

SUPPLEMENTAL COUNTER-MEMORIAL

(PHASE TWO)

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TABLE OF CONTENTS

PART ONE: BURDEN OF PROOF

1. The Investor re-argues its position concerning burden of proof. Canada's reply appears in its Phase One[1] and Phase Two[2] Counter-memorials. The UNCITRAL Rules clearly state that the Investor bears the burden of proof.[3] Further, mere allegations are not to be considered as *prima facie* evidence.[4] The Investor's unsubstantiated allegations have not established a *prima facie* case, and therefore the burden of proof has not shifted to Canada.

2. The Investor attempts to shift the burden of proof to Canada and urges adverse inferences be drawn from Canada's failure to produce evidence, supporting its theory of the case on the unique ground that there are "inherent imbalances...and inequality in relation to the possession and production of evidence".[5] In essence, the Investor urges the Tribunal to place the burden on Canada to "prove a negative" because the Investor has failed to prove its allegations of fact affirmatively.

3. Not only does the Investor's novel theory ignore the burden of proof, it also ignores the fact that the Investor received full disclosure in response to questions which it framed - presumably based on its theory of the case. In addition, the Investor has had disclosure of documents and information pursuant to the responses to the questions of the Tribunal and in the seven volumes of documents responding to the Tribunal's requests for documents.[6]

4. The Investor urges adverse inferences to be drawn based on the non-disclosure of 12 documents containing Cabinet confidences. The Investor speculates that the documents for which Canada claimed Cabinet confidence included attachments that were also not produced under the guise of the Certificate of the Clerk of the

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[1] Paras 159-160.
[2] Paras 192-203.
[3] UNCITRAL Rules, Article 24(1).
[4] M. Kazazi, *Burden of Proof and Related Issues* (The Hague: Kluwer Law International, 1996) at 331 (Attachments to Supplemental Counter-memorial (Phase 2-Tab 1).
[5] Supplemental Memorial, p. 2, (para. 1).
[6] Counsel for the Investor also received various documents following its *Access to Information Act* request.

Privy Council. This is incorrect. The only documents not produced were the 12 specific documents certified by the Clerk as confidences. A document does not become a Cabinet confidence merely because it is attached to a document certified as a Cabinet confidence.

5. Canada further submits that the adverse inferences urged by the Investor on the basis of the absence of these 12 documents ought not be drawn. The UNCITRAL Rules,[7] provide that the Tribunal should first try to resolve the case on the record before it. There is an ample record before the Tribunal on which to do so. As Kazazi states: "if the Tribunal is able to base its decision on other documents and grounds, it should do so".[8]

6. Further, adverse inferences are not appropriate in this case as none of the prerequisites[9] for making such an inference are met. In particular:

   (a) The 12 documents are not relevant to the unproved allegations of the Investor. The executive, at the apex of which is Cabinet, entered the SLA and approved the settlement of the B.C. Stumpage dispute. The record is also clear that the Governor-in-Council passed regulations placing softwood lumber on the Export Control List and imposing fees. All of these decisions are manifested in public materials and hence no inference should be drawn.

   (b) Cabinet was not involved in the day to day implementation of the SLA. The SLA was implemented by officials and there is a public record of this which has been placed before this Tribunal. Further, officials have testified about implementation of the Export Control Regime and will do so again at the Phase Two hearing.

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[7] UNCITRAL Rules, Article 28(3).
[8] Kazazi, *Burden of Proof and Related Issues*, *supra* note 4, at 322.
[9] Kazazi, *Burden of Proof and Related Issues*, *supra* note 4, at 320-322.

(c) The Investor has not established a *prima facie* case. This is a precondition to drawing adverse inferences.

(d) Adverse inferences should not be drawn where the non-production is justified or explained.[10] In this case the non-production has been explained.[11] Canada acknowledges that the Tribunal did not uphold the claim of Cabinet confidence. On the other hand, it is clear that Canada did not withhold production frivolously, but rather did so because domestic law and practice prohibited it from disclosing the twelve documents. In this circumstance Canada submits that an adverse inference should not be drawn.

7. Finally, Canada notes that the Investor asks for numerous adverse inferences to be drawn throughout its Supplementary Memorial to prove wild speculation and sinister motivation. The type of inference this Tribunal is asked to make is that Canada made decisions for regional or other political reasons as opposed to rational policy reasons.[12] This type of inference is not proof of a fact, but rather an assumption about Canada's reasons for adopting a scheme which subsequently has been implemented in public. Canada submits that a Tribunal should be very wary of inferring this type of assumption and labelling it a fact when the record is to the contrary.

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[10] *Ibid*, p. 321

[11] See materials filed on the motion concerning Cabinet confidence, in particular the d'Ombrain Affidavit, sworn August 25, 2000 and filed by Canada.

[12] Supplementary Memorial, p. 2 (para. 2), page 3 (para 1), paras 82 & 150.

PART TWO: ARTICLE 1105

A) Introduction

8. The Supplemental Memorial misstates Canada's position and the evidence regarding Article 1105. It includes obvious misstatements of the law and advances an impossibly expansive interpretation of Article 1105, totally isolated from its context.

9. The Investor's most extreme assertion is that Canada's entire administrative law system, functioning exactly as it was designed to function, fails to provide investments with the minimum standard of treatment required under Article 1105. First, the Investor equates discretionary decisions with arbitrary decisions,[13] thereby impugning all administrative decision-making that involves Ministerial or other discretion. Second, in acknowledging the existence of the judicial review mechanism for the first time, the Investor now contends the judicial review process of the Federal Court of Canada is an inadequate review mechanism that "does not meet Canada's international law obligations under NAFTA Article 1105".[14]

10. Canada maintains all arguments advanced in its Counter-memorial (Phase 2), as expressed in that submission. In this submission, Canada will address those subsections of the Supplemental Memorial on Article 1105 that misstate Canada's position or offer new allegations of fact or law.

11. The Investor, in its Memorial, avoided referring to the Minimum Standard of Treatment obligation by its actual title. Rather, the Investor referred to the Article 1105 obligation as the "International Law Standard of Treatment." In the body of its argument, however, it clearly acknowledged the existence of the international

[13] Supplemental Memorial (Phase 2), para. 47, offering a dictionary definition that defines "arbitrary" as "discretionary".
[14] Supplemental Memorial (Phase 2), para. 52.

law concept of the minimum standard of treatment, calling it "a well-respected concrete precept of international law"[15]

12. In its Supplemental Memorial, the Investor avoids any reference to the obligation as being related to a "standard" of treatment and now renames the Article 1105 obligation "Treatment in Accordance with International Law."

13. At the same time, in the Supplemental Memorial, there is a notable glossing over of the minimum standard of treatment concept at international law. The Investor ignores Canada's position that the provision incorporates the international law minimum standard of treatment concept, preferring to mischaracterize Canada's position as simply an argument that the title suggests that Article 1105 only requires minimal protections for foreign investors,[16] or to disingenuously state that:

> Canada has suggested that the title over the obligation "minimum standard of treatment" somehow suggests that NAFTA Article 1105(1) should be interpreted minimally.[17]

14. The Investor suggests that one of the rules of treaty interpretation is that recourse may only be had to the title of a provision if there is uncertainty as to the meaning of the provision. There is no such rule in the *Vienna Convention*, which instead explicitly provides[18] that the terms of a treaty are to be interpreted according to their ordinary meaning *in context*. As the Investor itself acknowledges "titles over NAFTA obligations are not to be ignored in the context of the article."[19]

15. The Investor's dismissal of the importance of the Article 1105 title "Minimum Standard of Treatment" is in sharp contrast with its treatment of the Article 1102

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[15] Memorial (Phase 2), para. 105.
[16] Supplemental Memorial (Phase 2), para. 2.
[17] Supplemental Memorial (Phase 2), para. 16.
[18] In Article 31(2).
[19] Supplemental Memorial (Phase 2) para. 16.

title "National Treatment".[20] In both cases, the title is not found in the body of the obligation but informs its interpretation.

16. The Investor asserts that Canada's position relates only to the term international law in isolation.[21] As is clear from Canada's Counter-memorial, Canada has never interpreted the term "international law" in the decontextualized manner preferred by the Investor. Rather, Canada has considered it in the context in which it is found in NAFTA: within the phrase "treatment in accordance with international law" and under the heading "minimum standard of treatment". Canada's approach is consistent with Article 31 of the *Vienna Convention*.

17. There exists a customary international law concept relating to the treatment of foreign investments known as "minimum standard of treatment" that includes "full protection and security" and "fair and equitable treatment. It is not a coincidence that Article 1105 is also called "minimum standard of treatment" and deals with the treatment of investments in accordance with international law, including "full protection and security" and "fair and equitable treatment".

18. The Investor refers to the words "international law" in Article 1105 out of context. It thereby makes the leap to interpreting the provision as a mechanism by which NAFTA Parties contemplated making any allegation regarding any element of international law arbitrable before Chapter Eleven tribunals.

19. The Supplemental Memorial now explicitly states that the entire corpus of international law, including all other treaty obligations, is incorporated by reference into Article 1105:

> ...treaty obligations in general, and those within the NAFTA in particular, form a part of international law and thus are covered by the scope of NAFTA Article 1105.[22]

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[20] In the first phase of this hearing, the Investor placed heavy reliance on the title "National Treatment". See, for example, Memorial (Phase 1), paras 48-49, 73-74; Investor's Reply to Post-Hearing Submissions, para 4.

[21] Supplemental Memorial (Phase 2), para. 6.

[22] Supplemental Memorial (Phase 2), para 8.

20. In advancing this argument, the Investor is apparently uninhibited by the express wording of Articles 1116 and 1117 which explicitly limits the scope of claims arising under:

> (a) Section A or Article 1503(2) (State Enterprises), or
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> (b) Article 1503(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A... [23]

21. If Section A, through Article 1105, already incorporates every international law obligation, including all treaty obligations, Articles 1116 and 1117 would be devoid of meaning.

22. The Investor would effectively have this Tribunal read into Articles 1116 and 1117 that an Investor may also claim for any breach of any obligation under this or any treaty or any allegation that a Party has acted inconsistently with any principle of international law.

23. The Investor's theory that by including Article 1105, NAFTA Parties intended to throw open Chapter Eleven arbitrations to any and all allegations of international law transgressions, whether related to general principles of international law, or very specific treaty obligations, cannot be seriously entertained.

B) Evolution of the Content of the International Minimum Standard of Treatment:

24. The Investor asserts that the *Neer* case[24] is an outdated 1926 decision,[25] notwithstanding that it relied on this same case in its Memorial.[26]

25. While accepted legal norms in reasonably developed legal systems have evolved since 1926, the test for judging conduct as articulated in *Neer* remains valid. That

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[23] Excerpt found in both Article 1116 and Article 1117 of NAFTA.
[24] *United States (L.F. Neer)* v. *United Mexican States* (1926), IV R.I.A.A. 60 (Mexico-U.S. General Claims Commission) (Canada's Phase 2 Authorities-Tab 13).
[25] Supplemental Memorial (Phase 2), paras 12, 21.
[26] Memorial (Phase 2), para. 141.

test has been reflected in subsequent decisions.[27] Canada reiterates its position[28] that, regardless of whether the *Neer* test is specifically cited, egregious circumstances must exist for a Tribunal to find a breach of the minimum standard of treatment.

C) Additional U.S. - Mexico Claims Tribunal Cases Cited

26. The Investor cites several additional decisions of the U.S. - Mexico Claims Commission[29] in an attempt to divert attention from the five basic decisions of the Commission on which the international minimum standard is founded. These cases, *Neer*[30]; *Faulkner*[31]; *Roberts*[32]; *Hopkins*[33] and *Way,*[34] are described by the scholar Andreas Roth as the "backbone" of the evidence in support of the international minimum standard.[35] *Neer* provided the core principle upon which the remaining four cases expanded.

27. Roth goes on to point out that, "other international tribunals have confidently followed this doctrine..."[36] Moreover, as Canada has already noted, other publicists[37], many of whom are cited by the Investor, also cite *Neer* and echo Roth's position that it is the seminal case respecting the international minimum standard.

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[27] Counter-memorial, paras. 258-281.
[28] Counter-memorial (Phase 2), para. 266.
[29] Supplemental Memorial, para. 20
[30] *United States (L.F. Neer) v. United Mexican States* (1926), 4 R.I.A.A. 60 (Canada's Phase 2 Authorities – Tab 13).
[31] *United States (Faulkner) v. United Mexican States* (1927), 21 A.J.I.L. 349 (Canada's Phase 2 Authorities – Tab 27)
[32] *United States (Roberts) v. United Mexican States* [1927] Op. Of Com. 77 (Canada's Phase 2 Authorities – Tab 29)
[33] *United States (Hopkins) v. United Mexican States* (1927), 21 A.J.I.L. 160 (Attachments to Canada's Supplemental Counter-memorial (Phase 2) – Tab 2).
[34] *United States (Way) v. United Mexican States* (1929), 23 A.J.I.L. 466 (Canada's Phase 2 Authorities – Tab 29)
[35] A.H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Geneva: Unitversity of Geneva thesis, 1949) at 95 (Canada's Phase 2 Authorities, Vol. II – Tab 26)
[36] *Ibid*, at 98
[37] For example, see: P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London: Routlege, 1997)at 261 (Canada's Phase 2 Authorities – Tab 12); I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1999) at 527-528 (Canada's Phase 2 Authorities – Tab 2); B.E. Carter & P.R. Trimble, *International Law* (Boston: Little, Brown and Company, 1991) at 828 (Canada's Phase 2 Authorities – Tab 17); J. Brierly, *The Law of Nations,* 6th ed. (Oxford: Clarendon Press, 1963) at 279-280 (Canada's Phase 2 Authorities – Tab 39).

28. In any event, the cases referred to by the Investor in its Supplementary Memorial are all examples, in one form or another, of egregious conduct by a government. Thus, the Investor's random selection of additional cases decided by the Commission adds nothing to the core doctrine of the international minimum standard and should not serve to distract this Tribunal.

29. In addition, within the Investor's discussion of the additional cases decided by the U.S.-Mexico Claims Tribunal, it asserts that Canada's position is that there must be a finding of some "intent" on the part of a government to find a breach of the minimum standard of treatment. It does not cite any portion of Canada's argument that asserts an "intent" requirement, or the content of the intent. However, the Investor concludes that, as a result of the inapplicability of this phantom requirement, Canada's argument regarding the threshold required to find a breach of Article 1105 is "simply incorrect".[38] Canada never asserted a finding of "intent" was required and sees no connection between intent and threshold of harm in any event.

D) The *Metalclad* Decision

30. The Investor's Supplemental Memorial makes extensive use of the *Metalclad*[39] decision. Canada submits that it is clear from the decision in *Metalclad* that, on the facts as found by the tribunal, the government conduct amounted to an outrage and to bad faith, and to egregiously unfair treatment of the American Investor. The findings of the tribunal in *Metalclad* must be considered in the factual context in which they were made. The egregious circumstances that supported the tribunal's findings in *Metalclad* simply do not exist here.

31. The factual background of the denial of permits and the contradictory and incorrect information supplied to the investor regarding the need for permits from the various levels of government in order to construct and operate its investment

[38] Supplemental Memorial (Phase 2), para. 20.
[39] *Metalclad Corp.* v. *United Mexican States* (2000), ARB/AF/97/1 (ICSID Tribunal)(Canada's Phase 2 Authorities-Tab 10).

is especially important to give context to the quote cited by the Investor[40] from *Metalclad* on the subject of transparency. The Metalclad tribunal found the government conduct unacceptable as all relevant legal requirements for the purposes of initiating, completing and successfully operating investments were not capable of readily being known to affected investments.[41]

32. In this case, the Investment knew all legal requirements for successfully operating its business under the Export Control Regime and had the same access as all quota holders to internal administrative review and formal judicial review.

E) Minimum Standard of Treatment Incorporates both "Full Protection and Security" and "Fair and Equitable Treatment" Concepts

33. The Investor asserts that Canada limits Article 1105 to the requirement to afford "full protection and security."[42] This is inconsistent with Canada's explicit submission.[43] Canada stated that the minimum standard of treatment obligation subsumes both the concept of "full protection and security" and "fair and equitable treatment."

34. The Investor complains that the cases cited by Canada are "full protection and security" cases.[44] The cases cited by Canada are minimum standard of treatment cases, some of which consider the subsumed concept of "full protection and security". The Investor's disdain for the cases cited is surprising, given that they were cases also cited by the Investor.

35. The Investor also complains that the sources cited by Canada are outdated. This too is an odd complaint, given that they are the same sources cited by the Investor. It is also interesting to note that both quotes cited by the Investor from *Akehurst's*

[40] Supplemental Memorial (Phase 2), para. 42.
[41] *Metalclad, supra,* at para. 76 (Canada's Phase 2 Authorities-Tab 10).
[42] Supplemental Memorial (Phase 2), para. 27.
[43] Counter-Memorial (Phase 2), paras 210, 221-224.
[44] Supplemental Memorial, para. 28.

Modern Introduction to International Law,[45] refer to the international minimum standard of treatment and support Canada's interpretation.

36. In any event, whether one looks at older or more recent cases or older or recent writings of publicists, the result is the same. The minimum standard of treatment requires egregious conduct for a breach to be found. A government's treatment of a foreign investment must be such that it would be considered unacceptable in reasonably developed legal systems.

F) *Pacta Sunt Servanda* and Good Faith

37. Canada's position regarding the *pacta sunt servanda* principle is obviously not as set out by the Investor.[46] Canada recognizes that it is obliged according to the principle of *pacta sunt servanda* to carry out its treaty obligations in good faith. As Canada explicitly stated in considering the Investor's use of the good faith argument:

> To the extent that the Investor is simply restating the proposition that international obligations are owed by states to one another and are to be fulfilled in good faith, then it is a proposition that is non-contentious, but irrelevant to this case. To the extent that the Investor is seeking to expand the concept of the international minimum standard to something that is not part of customary international law, then its argument has no basis.[47]

38. Its application in the NAFTA context is that Canada is obliged to carry out its NAFTA obligations in good faith, including its Chapter Eleven obligations with respect to the treatment of the investors and investments of the other NAFTA Parties. It does not, however, sweep all international law treaty obligations into the scope of a claim that may be brought under Article 1105.

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[45] Supplemental Memorial (Phase 2), paras 10, 32 (in footnote no. 37). Note that this edition was published in 1997.
[46] Supplemental Memorial (Phase 2), paras 30-32.
[47] Counter-memorial (Phase 2), para. 314.

39. All treaties creating obligations between States provide specific routes for redress of alleged breaches of those obligations. The specifically listed obligations in Articles 1116 and 1117 of NAFTA are the only ones that may form the basis of a claim by an investor of a NAFTA Party. An allegation of breach of any other treaty obligation of Canada, whether owed under the NAFTA, or another treaty, cannot be adjudicated by a Chapter Eleven Tribunal.

G) Expropriation

40. The Investor further misstates Canada's explicit position in stating that "Canada has argued that obligations regarding expropriation are not part of international law".[48] Canada obviously does not take this position, as demonstrated by its frequent reference to the meaning of expropriation at customary international law in the phase of this arbitration dealing with Article 1110. The point made by Canada with respect to expropriation is that although it developed from the international law minimum standard of treatment, under customary international law, it has been carved out as distinct obligation under Article 1110.[49]

H) Investor's Misuse of Chapter Eighteen's Transparency Provisions

41. The Investor submits[50] that Canada's publication of information on the workings of the quota system is insufficient to meet the "substantive" element of transparency regarding the review and appeal of administrative decisions, as set out in Article 1805.

42. Specifically, the Investor states the following:

> The language contained under Article 1805 specifically refers to both "tribunals" and "procedures". Thus, Canada's blanket assertion that the Investor could have availed itself of the Federal Court review process does not satisfy the obligations under Article 1805, which includes not only

[48] Supplemental Memorial (Phase 2), para. 34.
[49] This issue has already been disposed of by the Tribunal.
[50] Supplemental Memorial (Phase 2), paras 43-44.

> tribunals such as the Federal Court of Canada, but also "procedures" that must contain an adequate review or appeal process within the application of the measure itself.[51]

43. What Article 1805 actually says is that Parties shall adopt judicial or quasi-judicial or administrative tribunals **or** procedures for the purpose of prompt review. NAFTA clearly does not require that there be more than one review mechanism for every administrative measure.

44. In this case, therefore, where there is both opportunity for internal review and a judicial review mechanism, the requirements of Article 1805, and by extension, any "substantive" transparency obligation that the Investor claims is owed under Article 1105, are exceeded.

I) The Minimum Standard of Treatment and "Reasonably Developed Legal Systems"

45. The Investor offers another serious misstatement of Canada's position when it states[52]:

> Canada apparently believes that since it has a 'reasonably developed legal system' that it is completely insulated from its obligation to provide treatment in accordance with international law ....

Canada asserts no such position, nor was any statement made in its Counter-memorial that would support such an inference.

46. Rather, Canada stated that developed countries imposed the minimum standard on developing legal systems to ensure that aliens would receive a certain "minimum standard" of treatment – a standard that would apply in "reasonably developed legal systems."[53]

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[51] Supplemental Memorial (Phase 2), para. 44.
[52] Supplemental Memorial (Phase 2), paras 48-49.
[53] Counter-memorial (Phase 2) paras 239-240.

47. Canada agrees that, in principle, no matter how developed a State's domestic legal system may be, it may suffer from a lapse such that, in a particular case, treatment falls below the minimum standard required by reasonably developed legal systems. This may happen in any of the legal systems of NAFTA Parties, hence the inclusion of Article 1105. However, in this case, such a lapse did not occur.

J) Judicial Review in the Federal Court of Canada

48. The Investor's next misstatement[54] is the contention that Canada has advanced an exhaustion of local remedies argument. Canada never asserted that the Investor is precluded from bringing a Chapter Eleven claim until it has exhausted all of its possible domestic remedies. Canada's position is simply that the Investor cannot successfully assert that Canada has denied its Investment justice when it has not sought justice. The Investor cannot claim it has been denied justice by Canada when it has failed to pursue the avenues of redress open to it within Canada's domestic legal system. The availability of an impartial review by a superior court of record, and the failure of the Investment to seek that remedy, precludes a claim under Article 1105 that the Investment has suffered a denial of justice with respect to quota allocation decisions.

49. The recognition of this fact is presumably what leads the Investor, for the first time, to make the incredible assertion that "the Federal Court review does not meet Canada's international law obligations under NAFTA Article 1105."[55]

50. The three reasons the Investor supplies for this contention – (1) that Canadian courts do not consider whether Article 1105 has been breached; (2) that compensation is not an available remedy under judicial review; and (3) that cabinet confidences are not produced on judicial review – are all absurd.

[54] Supplemental Memorial (Phase 2), paras 50-51.
[55] Supplemental Memorial (Phase 2), para. 52.

51. The determination of Canadian courts does not have to be based on Article 1105 to produce a just result. Canada does not argue that judicial review is a substitute for adjudication of an alleged breach of Article 1105. Rather, Canada is asserting that an investment cannot credibly claim denial of justice by Canada where it has not availed itself of the safeguards within the Canadian domestic legal system that afford due process. The existence of judicial review is evidence that Canada, as a sovereign State, has created mechanisms which ensure that those affected by governmental decisions have access to just adjudication of their grievances.

52. The Federal Court of Canada provides a fast and efficient process to remedy deficiencies in decision-making, reviews according to broad grounds (section 18.1 *Federal Court Act*) and has extensive remedial powers. These remedial powers include the power to grant interim relief and to reverse or substitute a decision, likely preventing an investment from incurring damages in the first place.

53. It should also be noted that neither NAFTA Article 1805 nor Article X:3 of *GATT 1994*, both of which are referred to by the Investor, require that administrative review mechanisms provide for compensation. Rather, they require mechanisms that provide for review and where warranted, correction of administrative action. The Federal Court provides this. This would be an absurd result.

54. Finally, the Investor's claims concerning section 39 of the *Canada Evidence Act* would require a NAFTA Chapter Eleven Tribunal to accept that a breach of the international minimum standard occurs whenever a certificate is filed.

55. Further, this case is about implementation of the Export Control Regime. The implementation of the regime, and in particular the allocation of quota to the investment, was by officials (and not by Cabinet) and is completely a matter of public record. Cabinet does not implement the Regime on a day-to-day basis.

K) Investor's Application of Law to Facts

56. The Investor has largely re-argued its case in Part VIII of the Supplemental Memorial (Phase 2), while mischaracterizing the responsive evidence and argument submitted by Canada. Canada maintains the arguments put forth in its Counter-memorial (Phase 2), and offers the following response to the submissions made by the Investor.

1) Consultation and Decision-Making Process

57. The Investor asserts[56] that Canada's discussion of the consultation and decision-making process in the allocation methodology is inconsistent. Specifically, the Investor claims that it is inconsistent for Canada to state that it consulted with quota-holders in an attempt to achieve consensus, achieved consensus on the main points, then left final determinations on areas that remained contentious to the Minister's informed discretion. This process was outlined by Claudio Valle.[57]

58. There is nothing inconsistent about this position, and nothing improper about the process. Rather, it demonstrates Canada's attempts to consult and determine the views and concerns of the various affected sub-groups with a view to implementing the quota system in a manner that balanced the various concerns.[58]

2) Deduction of "Discretionary Reserves"

59. The Investor's allegation that Mr. Valle's affidavit "suggests that there really was no consensus on the key element of whether discretionary allocations would be

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[56] Supplemental Memorial (Phase 2), paras 58-62.
[57] In particular paras 15-19 of Valle Affidavit #2.
[58] See, for example, Memo to MINT dated Oct. 24, 1997 re: Visit of B.C. Lumber Industry Representatives (Canada's Production to Investor-Request #3) (Attachments to Supplemental Counter-memorial-Tab 11); Notice of cross-Canada seminars by EICB to inform to inform stakeholders of SLA implementation) (Canada's production to Investor request #27) (Attachments to Canada's Supplemental Counter-memorial-Tab 12); Information Package re: August 19, 1996 Ad Hoc Softwood Lumber meeting (Canada's production to investor request #3) (Attachments to Supplemental Counter-memorial-Tab 14).

deducted first before the provincial corporate allocations were made"[59] is incorrect.

60. Further, as pointed out in Canada's Counter-memorial,[60] the heated debate along provincial lines about the amount of quota that should be reserved for new entrants shows that stakeholders understood that allocation of new entrant quota would not be based on provincial historic share. If B.C. believed its new entrants were guaranteed 59% of the new entrant reserve in any event, then the amount of the reserve for new entrants would not have been such a hot issue for B.C.

61. Canada has already responded to the Investor's suggestion that the industry understood that the other "discretionary reserves" would have been allocated accorded to provincial historic share.[61]

62. The Investor cites paragraph 186 of Mr. Valle's Phase 2 affidavit as support for its statement that: "Canada's viewpoint on the allocation of softwood lumber quota...is that it is sufficient for it to provide 'informal review mechanisms'."[62] This is a gross misstatement of Canada's position and the evidence of Mr. Valle. Mr. Valle does discuss the opportunity for internal review whereby quota holders are encouraged to seek explanations, or to bring errors or concerns to the attention of the Bureau.[63] However, Mr. Valle explicitly states that this "was never presented as the only option available to companies for review of their quota allocation."[64] He explains:

> In addition to the ability of all companies to approach the Bureau directly, or through their advisory committee, to seek explanations, revisions or additions to quota allocation, an additional or concurrent option available to all quota holders who were dissatisfied with their allocation of the quota allocation process was to institute an application for judicial review by the Federal Court of Canada – Trial Division.[65]

[59] Supplemental Memorial (Phase 2), para. 62.
[60] Counter-memorial (Phase 2), para. 373.
[61] Counter-memorial (Phase 2), paras 372-377.
[62] Supplemental Memorial (Phase 2), para. 63.
[63] Valle Affidavit #2, paras 186-190.
[64] Valle Affidavit #2, para. 189.
[65] Valle Affidavit #2, paras 190.

3) Access to EICB

63. The Investor next states, with respect to access to internal review:

> ...Point made by the Investor is that a pro-active requirement of political-style lobbying, whether to the Minister or department officials, whether through committee or direct access to the officials was a tacit requirement of Canada's allocation system, rather than the provision of an independent and internal appeal mechanism.[66]
>
> ...
>
> Because Canada's administration relies so completely on the ability and inclination of the softwood lumber manufacturers to complain to the EICB or the Minister, the Investor submits that a distinct advantage would be given to those mainly Canadian softwood lumber manufacturers who understood that Canada operated under the "squeaky wheel" philosophy.[67]

64. To the extent that the Investor submits again, that political-style lobbying was necessary to have concerns addressed by the Bureau, Canada notes that the evidence is to the contrary.[68]

65. To the extent that the Investor is claiming that Canada's encouragement to quota holders to bring errors, questions and concerns to the attention of the Bureau, or their Advisory Committee, is unreasonable or unfair, Canada disagrees. It is not unreasonable or surprising that companies that had specific problems would be asked to bring them to the attention of officials. The Bureau recognized that there might be errors they failed to catch, or companies with specific questions or unique problems.

66. All quota holders were encouraged, when information was provided, whether by Notices to Exporters, allocation letters and attached backgrounders, or on the web site, to direct inquiries to the EICB.[69] Further, the documents provided by the

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[66] Supplemental Memorial (Phase 2), para. 66
[67] Supplemental Memorial (Phase 2), paras 67-68.
[68] George Affidavit #3; paras 35, 38; Valle Affidavit #2, para. 200.
[69] For example, Notice to Exporters No. 94, p. 35 (Book of Treaties, Tab 16); Allocation letter; Year 1

Investor in response to Canada's document request show that the Investment was also told by its industry associations that it could contact the EICB with questions or concerns.[70] The Investor acknowledges that its Investment was aware of what it was advised through government notices[71] and through the industry associations of which it was a member.[72]

4) The Wholesaler Issue

67. The Investor continues to mischaracterize the evidence regarding the wholesaler issue in its Supplemental Memorial (Phase 2). Canada has described the process whereby quota was allocated to primaries and remanufacturers based on exports through wholesalers.[73] The contentious issue that arose with respect to this allocation was how to deal with the lack of precise data regarding exports by wholesalers of a particular primary's or remanufacturer's mill. No precise data was available to Canada as no such data existed, for the reasons set out in Claudio Valle's Phase 2 affidavit.[74]

68. As discussed in the Counter-memorial (Phase 2),[75] various options were considered, stakeholders were consulted and a reasonable course of action was selected. The Investor's assertion that Canada's contentions about its analysis of the wholesaler data are unsubstantiated is incorrect. The evidence of Claudio

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Allocation letter, p.3 (George Affidavit #2, Exh. "E"); Letter dated August 27, 1999 from Canada to the Investment (Investor's production #170) (Attachments to Supplemental Counter-memorial-Tab 15).

[70] For example, see Letter from Mike Epsey to B.C. industry indicating that companies should check for allocation errors and contact the EICB with any questions (Attachment to September 5, 2000 Witness Statement of Howard Rosen-Tab 33 Schedules to Memorial (Phase 2), also at Tab 64 of Canada's Book of Documents (Phase 1); letter of July 10, 1998 from Bob Friesen of the Interior Lumber Manufacturer's Association. This letter gives the name, phone and fax number of an EICB official to contact if they felt there was an error in their allocation, or for further explanation, and indicates that hardship applications will be considered for an allocation from the Minister's Reserve. George Affidavit #2 Exhibit "H").

[71] For example, Attachment to November 7, 1996 Letter from Margaret Huber to the Investment detailing the quota allocation method as produced by the Investor; (Attachments to Supplemental counter-memorial-Tab 17).

[72] Supplemental Memorial (Phase 2), para. 70. See e-mail dated July 21, 1999 from Kyle Gray to "Roger" listing various associations to which the Investment belongs, including COFI and ILMA. (Supplemental Counter-memorial-Tab 16).

[73] Counter-memorial (Phase 2), paras 401-406; Valle Affidavit #2, paras 58-83.

[74] Valle Affidavit #2, paras 62-63.

[75] Counter-memorial (Phase 2), paras 402-405.

Valle,[76] as well as the memorandum of September 26, 1996, produced by the Investor itself[77] support Canada's statement.

69. The Investor's suggestion that Canada should have consulted specifically with the Investment and with all other quota holders individually[78] is totally unrealistic. Canada disagrees with the position of the Investor[79] that operational concerns are inappropriate for a government implementing a quota system. In the administration of a complex quota system such as this one, Canada had to be concerned with issues that the Investor dismisses as operational concerns. Furthermore, as discussed more fully below, the Investor's contention (again, not grounded in any affidavit or documentary evidence) that its interests were not represented by the B.C. Advisory Committee is not credible.

70. The Investor complains of a lack of disclosure by Canada with respect to the wholesaler numbers. Canada has never refused to provide wholesaler information to the Investment for the purposes of this arbitration. The chart provided to the Investor and used by Mr. Rosen[80] was a document provided in response to a request by the Investor.[81] Canada advised the Investor, by letter accompanying the document production,[82] that it was not producing the questionnaires of all primaries, remanufacturers and wholesalers, but that the table showed "aggregate numbers based on the information received from primary manufacturers, remanufacturers and all wholesalers whose questionnaires would have been used to determine Pope & Talbot Ltd's quota allocation".[83] The Investor did not indicate that it was dissatisfied with the documents produced, or request that additional questionnaires be produced.

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[76] Valle Affidavit #2, para. 73.
[77] Schedules to Memorial (Phase Two), Tab 5.
[78] Supplemental Memorial (Phase 2), para. 79, 82, and 86.
[79] Supplemental Memorial (Phase 2), para. 81.
[80] (Attachments to Supplemental Counter-memorial-Tab 13).
[81] Investor's Request for Documents, dated Feb. 15, 2000, Request #19 (Attachments to Supplemental Counter-memorial-Tab 3).
[82] Canada's letter to Investor dated July 25, 2000 (Schedules to Supplemental Memorial (Phase 2)-Tab 10).
[83] *Ibid*, p. 2.

71. The Investor invokes Article 28(3) of the UNCITRAL Rules to request that the Tribunal draw an inference that the margin of error that the Investor asserts it has identified with respect to its wholesaler numbers was similarly large for all wholesaler data. Article 28(3) provides:

> If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

72. This Article is of no application to the wholesaler issue. Canada produced what the Investor has requested and has not been invited to produce further documentary evidence regarding the wholesaler numbers, nor has it failed to produce evidence on the issue. Further, Canada's affiants are prepared to respond to any relevant questions.

5) B.C. Year 2 Adjustment

73. The Investor continues to characterize the B.C. re-allocation in Year Two as related to the wholesaler issue. As Canada has stated in its Counter-memorial,[84] supported by the affidavit evidence of Claudio Valle,[85] the re-allocation was not a solution to the same wholesaler "problem". It was to assist specific companies that were adversely affected by the base year formula chosen by B.C. or to remedy specific problems identified by companies.

6) The Investment was Represented by the B.C. Advisory Committee

[84] Counter-memorial (Phase 2), paras 539-544.
[85] Valle Affidavit #2, paras 75-80 and 170-180.

74. The Investor makes various unsupported allegations[86] regarding the establishment of the B.C. Advisory Committee and the Committee's alleged failure to adequately represent the interests of its Investment.

75. The B.C. Advisory Committee was composed of four representatives from the primary mill sector, two representatives of the remanufacturing sector, two representatives of the wholesale sector, two representatives of the provincial government and alternates.[87] Canada did not establish or select the members of the B.C. Advisory Committee. Rather, it invited each province to establish a provincial advisory body incorporating all elements of the softwood lumber industry (primary producers, remanufacturers, and wholesalers).[88]

76. The Investor alleges that the representative groups with whom Canada consulted did not adequately represent the Investment's interests, and that the Investment was not aware of the status or content of those consultations. The documents produced by the Investor regarding the communication between the Investment and various representative groups regarding the development and workings of the quota system show this is not a credible assertion.[89]

7) The Super-Fee Base

77. The Investor's Supplemental Memorial dealing with the SFB and Article 1105 reiterates the argument presented in its initial Memorial. Canada has responded fully to the issue in its Counter-memorial (Phase 2)[90] and will not reiterate its arguments here.

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[86] Supplemental Memorial (Phase 2), paras 86-88.
[87] George Affidavit #2, para. 29.
[88] Softwood Lumber Allocation Draft Principal Elements, Valle Affidavit #1, Exhibit "K".
[89] See for example, the documents collected as Exhibit "Y" of George Affidavit #2.
[90] Counter-memorial (Phase 2), paras 416-427.

L) Conclusion

78. The Investor's Supplemental Memorial as it relates to Article 1105 attempts to retreat from its acknowledgement and treatment of the minimum standard of treatment concept at international law, and declares the same sources it relied upon in its first Memorial to be outdated and inapplicable. Further, the Investor adds new and outrageous allegations that Canada's entire administrative law system, functioning properly, fails to meet the minimum standard of treatment that would be required of a reasonably developed legal system.

79. Canada submits that the content of the Investor's Supplemental Memorial only reveals the extremity of the Investor's position, and confirms that this Tribunal must reject the Investor's claim that Canada has breached the minimum standard of treatment under Article 1105.

PART THREE: ARTICLE 1102

A) Introduction

80. In its Supplemental Memorial the Investor proposes an interpretation of national treatment that is completely unsupported by the wording of Article 1102 of NAFTA or by WTO and GATT case law. At the same time the Investor has misstated and misrepresented Canada's interpretation of the national treatment obligation.

81. Canada's legal position is clear:

(a) the intent of the host country is not relevant in determining a breach of national treatment;

(b) the core of the national treatment obligation is discrimination based on national origin;

(c) the assessment of treatment is not constrained by looking at its effect on the disputing investment only, but is based on the treatment at issue and the effects generally of the treatment;

(d) the test of like circumstances is broader than a simple comparison of whether the disputing investment competes with other investments in the same sector; and

(e) Article 1102 does not entitle an investment to "the best available treatment".

B) Intent Is Not The Test

82. The Investor repeatedly claims that Canada's position is that the Investor must prove intent to discriminate.[91] That is not Canada's position. Canada agrees that intent is not relevant in determining a breach of national treatment.

[91] Supplemental Memorial (Phase 2) at paras 104, 106 – 110, 116 & 122.

83. Canada's position is, and has consistently been, that discrimination may be either *de jure* or *de facto*.[92] *De jure* discrimination occurs when the discrimination is explicit in the measure itself. For example, Canada cited *U.S. - Section 337*[93] as an example of *de jure* discrimination.[94] Canada has not stated that the *Section 337* case established that a breach of national treatment requires a finding of intent to discriminate.[95]

84. There is no question of *de jure* discrimination in the present case as the measures at issue do not discriminate on their face between foreign and domestic investments. The Investor intimates in its Supplemental Memorial that it may be claiming *de jure* discrimination.[96] However, the Investor does not articulate, much less explain, how there could be *de jure* discrimination in this case. There is no *de jure* discrimination in the measures at issue.

85. *De facto* discrimination occurs when the measure has the effect of discriminating between investors or investments on the basis of national origin. This is the only type of discrimination alleged in the pleadings and is at the heart of the determination this Tribunal must make.

86. Contrary to the Investor's assertion,[97] Canada did not cite the *Bananas* case for the proposition that a breach of national treatment requires intent to discriminate. Rather, that case stands for the proposition that discrimination must be based on national origin. In the *Bananas* case there was *de facto* discrimination based on national origin in that favourable licenses were awarded disproportionately to

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[92] See for example: Counter-memorial (Phase 1), paras 166, 168, 177; Canada's Submission on Article 1128, paras 10–11; Counter-memorial (Phase 2), paras 441, 450, 464–492.

[93] *United States Section 337 of the Tariff Act of 1930*, 16 January 1989, L/6439-365/345 (GATT Panel Report)(Canada's Phase 2 Authorities-Tab 67).

[94] Counter-memorial, (Phase 2), paras 465 – 467.

[95] As the Investor incorrectly states at para. 108 of its Supplemental Memorial (Phase 2).

[96] Supplemental Memorial, para. 115. The allegation that there might be *de jure* discrimination is not particularized in any of the Investor's Memorials or pleadings, and hence Canada is unable to reply more specifically to it.

[97] Supplemental Memorial (Phase 2), para. 109 & footnote 130.

service providers of EC countries while less favourable licenses were awarded to service providers of third countries.[98]

87. The entire point of Canada's discussion of jurisprudence dealing with *de facto* discrimination is that the effect of the measure must be discriminatory. To establish this the Investor must prove that the measure wholly or disproportionately favours domestic investments over foreign investments.

C) The Core of the Obligation is Discrimination Based on National Origin

88. The Investor incorrectly asserts that a breach of national treatment does not require discrimination on the basis of national origin.[99] For the Investor, any differentiation in treatment on any basis whatsoever is sufficient to find a breach of national treatment.

89. Canada disagrees with the Investor's proposition. Canada's position, shared by the United States and Mexico,[100] is that the core of the national treatment obligation is discrimination based on national origin. This is fundamental.

90. Every WTO and GATT case cited in these proceedings supports Canada's position. In particular, the Investor is incorrect in asserting that the *Section 337* case means that once products are determined to be like, any difference in treatment is a breach of national treatment.

91. The *Section 337* case did not even debate whether the products were "like". Rather, it began from the undisputed premise that the discrimination was based on national origin because the imported products were subject to a different legal regime than the domestic products. As the Panel said in paragraph 5.4 of the Findings, "the central and undisputed facts before the Panel are that, in patent infringement cases, proceedings before the USITC under Section 337 are only

[98] See paras. 473-475 of Counter-memorial (Phase 2) which is ignored by the Investor.
[99] Supplemental Memorial (Phase 2), paras 108–116.
[100] Second Submission of the United States, May 25, 200, pp. 2 – 3; Submission of the United Mexican States, May 26, 2000, pp. 2 – 11.

applicable to imported products."[101] The real issue in the case was whether the legal process for imported products was less favourable than the legal process for domestic goods.

92. Nor does the discussion from the *Bananas* case referred to by the Investor[102] stand for the proposition that discrimination based on nationality is not required for a breach of national treatment. The quote relied on by the Investor is extracted from a discussion concerning the unique issue of the relationship between Articles III:1 and III:4 of GATT 1994.[103] It has no relevance to this case.

93. The Investor's reference to *Canada - Beer*[104] is also misleading. The minimum price requirement that the Investor cites was tied to a question of nullification and impairment of tariff concessions, rather than breach of obligation. The Panel commented that:

> ...the case before it did not require a general finding of consistency of minimum prices with Article III:4. However, it did consider that the above considerations justified the conclusion that the maintenance by an import and sales monopoly of a minimum price for an imported product at a level at which a directly competing, higher-priced domestic product was supplied was inconsistent with Article III:4.[105]

The *Canada-Beer* case also reaffirms that a breach of national treatment requires discrimination on the basis of national origin.

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[101] Section 337, *supra* note 90 (Canada's Phase 2 Authorities-Tab 67).
[102] Supplemental Memorial, (Phase 2), para. 109.
[103] See the discussion at paras 215-216, EC-Bananas (AB) (Investor's Supplementary Authorities, Tab 16). In summary, Article III:1 of GATT 1994 states that measures should not be applied to imported or domestic products so as to afford protection to domestic production. The Panel held that Article III:1 informed the balance of Article III, including Article III:4. The Appellate Body held that Article III:1 informed Article III:2, second sentence because of the specific reference to Article III:1, but not Article III:2, first sentence because of the absence of reference. As Article III:4 does not refer to Article III:2, Article III did not require a separate determination that the measure at issue "afford protection to Domestic production."
[104] Supplemental Memorial, (Phase 2), para. 109.
[105] *Canada Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, 18 February 1992, DS17/R-395/27, para. 5. 31 (Attachments to Supplemental Counter-memorial (Phase 2)-Tab 4).

94. The Investor correctly notes[106] that in *Japan- Alcohol*[107] the measure was facially neutral with respect to nationality. However, the discrimination found was *de facto*, again on the basis that the measures wholly or disproportionately had the effect of favouring domestic goods. In other words, once again the key was discrimination based on national origin.[108]

95. In *US - Alcohol*[109] some of the findings related to *de jure* discrimination, where the measures were not facially neutral with respect to national origin. For example, there was facial discrimination on the basis of national origin in the excise tax differential[110] providing that domestic beer from qualifying small breweries was subject to a lower rate that wasn't available to imported beer. *De jure* discrimination also existed with respect to a similar low rate for small producers of domestic wine that was not available to imports.[111] Again, this was a difference based on national origin.

96. Nor were local state measures in *US – Alcohol* neutral with respect to nationality. By definition, measures in a state that favour a product produced in-state favour domestic (i.e., U.S.) products and can never include foreign products. This is clearly a difference based on national origin. Hence, state excise tax differentials,[112] tax credits to small domestic in-state producers,[113] state excise taxes based on the origin of the wine,[114] and taxes on wine made from a grape grown only in the southeastern United States[115] are all examples of discrimination based on national origin.

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[106] Supplemental Memorial, para. 111.
[107] *Japan-Taxes on Alcoholic Beverages*, 4 October 1996, WT/DS 8/AB/R, WT/DS10/AB/R, WT/DS 11/AB/R (WTO Appellate Body)(Canada's Phase 2 Authorities-Tab 8).
[108] See paras 482-484 of Counter-memorial (Phase 2).
[109] *United States – Measures Affecting Alcoholic and Malt Beverages*, 19 June 1992, DS 23/R-395/206 (GATT Panel Report) (Canada's Phase 2 Authorities, Tab 68), cited in Supplemental Memorial, para. 111.
[110] *Ibid*, para 5.2.
[111] *Ibid*, para. 5.13.
[112] *Ibid*, para 5.16.
[113] *Ibid*, para. 5.18.
[114] *Ibid*, para. 5.22.
[115] *Ibid*, para. 5.23 – 5.26.

97. Similarly, in *Canada - Asbestos*[116] the discrimination was based on national origin of the product. The ban on asbestos products was facially neutral, but asbestos products are produced only outside France, whereas an asbestos substitute was produced in France. As a result, the measure had the effect of discriminating against the foreign product and there was *de facto* discrimination based on nationality.[117]

98. In short, the national treatment obligation is not a general decree of equal treatment. It is only directed at discrimination based on national origin. Discrimination based on nationality is required for breach of the national treatment obligation, whether it is found *de jure* or *de facto*.

D) The Effect is not Measured Solely by Looking at the Investment

99. The Investor incorrectly states that the effect of a measure is assessed solely by looking at the disputing Investment.[118] This ignores the wording of Article 1102.

100. Article 1102(2) requires comparison of the treatment accorded to investments (in the plural) of other NAFTA Parties with the treatment accorded to domestic investments (again, in the plural form). Article 1102 would have been worded differently had it intended that only the circumstances of the disputing investment[119] were the relevant comparator. If the Investor were correct, Article 1102(2) would require comparison of the treatment accorded to a disputing investment with the treatment accorded to domestic investments, or even to a single domestic investment. Article 1102(2) does not provide for this, nor is it reflected in WTO or GATT jurisprudence on national treatment.

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[116] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, 18 September 2000 WT/DS 13 5/R, (GATT Panel Report). (Attachments to Supplemental Counter-memorial-Tab 5).

[117] The Panel characterized the discrimination as *de jure*. In any event, it was clear that the ban in question applied only to imported products because there were no domestic asbestos products. As such, the ban discriminated on the basis of national origin.

[118] Supplemental Memorial, paras 110-116.

[119] As defined in NAFTA Article 1139.

101. WTO and GATT case law is clear in considering the need to look at the effect of the measure generally. Where there is *de jure* discrimination that task is easy because it simply requires an examination of the measure without considering its effect.

102. However, where the issue is *de facto* discrimination, the adjudicator must look at the effect of the measure. In all such cases, discrimination has been found only where the measure wholly or disproportionately discriminates against the foreign origin goods or services. No such case has found discrimination based on a lesser record of discrimination, much less discrimination against a single entity.

103. Indeed, it is hard to imagine a realistic situation where a measure that affects multiple entities[120] could be found to discriminate *de facto* based on evidence of different treatment accorded to a single company. To conclude that a measure of general application discriminates *de facto* requires an assessment of its effect generally.

104. The Investor also suggests that Canada advocates a balancing test to determine whether there is discrimination on the basis of nationality.[121] Canada does not advocate such a test.

105. Rather, Canada has said that to find a facially neutral measure is discriminatory, the measure must have the effect of subjecting all or most imported goods, foreign services or investments to less favourable treatment than is accorded to their domestic counterparts. An assessment of the overall impact of the measures, and not a balancing of them, is required.

106. In any event, the WTO and GATT jurisprudence cited by the Investor[122] discredits the notion of balancing in a very different context. In these cases balancing was argued with respect to whether one treatment could be found less favourable than

[120] As in this case where there are approximately 500 quota-holders.
[121] Supplemental Memorial, paras 111-113.
[122] Supplemental Memorial, paras 112-114.

another. It did not relate to an assessment of whether different treatment on the basis of national origin was accorded in the first place.

107. Hence, the *Section 337* case[123] was not about balancing the effects of a measure on domestic goods as compared to the effects of the same measure on foreign goods. The case started from the undisputed premise that there was different treatment of domestic and foreign goods.

108. The only real debate in the *Section 337* case was whether one legal recourse was more favourable than another. The United States argued that any unfavourable results of the different procedures for imported goods was offset by the more favourable aspects of the procedure. It was in this context that the Panel rejected the notion of balancing.[124] The holding did not relate to the question of whether there was *de facto* discrimination.

109. *Canada – Patent Term*[125] is even more inapposite. The issue there was whether Canada had complied with the obligation in the *TRIPS Agreement* to provide a patent term of at least 20 years from the date of filing. Canada's former patent legislation (which continued to apply to patents applied for before October 1, 1989) provided for patent terms of 17 years from the date of grant, which in practice could result in patent protection of more or less than 20 years and in the majority of cases, did have this result.

110. The WTO Panel and Appellate Body rejected Canada's argument that Canada satisfied the *TRIPS* requirement because, on average, patent terms under the old legislation exceeded 20 years. Again, as in the *Section 337* case, none of this is relevant to a determination of whether there has been *de facto* discrimination.

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[123] *United States-Section 337 of the Tariff Act of 1930, supra.*

[124] The standard in the *Section 337* case, referred to in the passage from *Canada-Patent Term* quoted by the Investor at para. 113 of the Supplemental Memorial (Phase 2), relates to whether the different treatment accorded to imported goods was less favourable, and not at all to the question of whether domestic and foreign origin goods were treated differently.

[125] *Canada-Term of Patent Protection*, 18 September 2000, WT/DS 170/AB/R (WTO Appellate Body) (Attachments to Supplemental Counter-memorial-Tab 6), cited in Supplemental Memorial, para. 112.

111. Finally, Canada submits that the Investment has not suffered damage as it has not been discriminated against on the basis of national origin and it has been accorded treatment in like circumstances to a domestically owned or controlled investment. Hence, even if the Tribunal accepted the Investor's argument that discrimination can be found on the basis of the impact of the measures on the investment alone, the record does not support an affirmative finding of this nature.

E) Like Circumstances is Broader than Whether Affected Investments are in the Same Sector

112. Canada and the Investor[126] differ on the factors considered in a like circumstances analysis. This has been canvassed thoroughly in Canada's Counter-memorials in Phase One[127] and Phase Two.[128]

F) There is no Obligation to Provide the Best Available Treatment

113. The Investor continues to argue that treatment "no less favourable" accorded in like circumstances creates an obligation to accord "the best available treatment".[129] In fact, application of the best available treatment theory in this case gives the Investment superior competitive opportunities as compared to domestic investments in the same circumstances.

114. Applying the Investor's theory of national treatment, quota in the covered provinces would have to be first allocated to U.S. (and Mexican) owned products until these producers had all the quota they could use or there was no quota left. Only then could Canadian producers receive any quota. The competitive opportunities available to U.S. (and Mexican) producers would clearly be superior to those available to Canadian producers. It is inconceivable that the NAFTA

[126] Supplemental memorial, paras 117 – 119.
[127] Paras 185 – 197.
[128] Paras 493-497.

Parties could have intended this absurd result and there is no GATT or WTO case that remotely suggests that this should be the result.

115. The "best available treatment" theory contradicts the words of Article 1102. Nor is there any basis whatsoever in the GATT or WTO jurisprudence to support this theory. Canada's position on this is set out in its Counter-memorials in Phase One[130] and Phase Two.[131]

G) National Treatment Applied to the Facts

116. None of the distinctions discussed by the Investor concern differentiation or discrimination on the basis of national origin. In all cases of different treatment raised by the Investor, the Investment was accorded the same treatment in like circumstances as investments.

117. The Investor misrepresents and misconstrues the facts on the record in its Supplemental Memorial.

118. For example, in paragraph 126 alone the Investor makes various misrepresentations concerning the evidence.

(a) The Investor states that the Minister made decisions "regardless of outside inputs". Canada has been consistent throughout in explaining that decisions on quota allocation were ultimately made by the Minister, however they were made after consulting with and taking into account industry representation.[132] As Mr. George clearly stated, "These recommendations [of industry] are not determinative, but are

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[129] Supplemental Memorial, paras 120 – 124.
[130] Paras 178 – 184.
[131] Paras 451 – 492.
[132] Valle Affidavit, #1, paras 12, 18, 21, 28 – 29, 46 - 88; Valle Affidavit #2, paras 13, 15 – 19; George Affidavit #2, paras 24 – 30, 92 - 97; George Affidavit # 3, paras 14 – 28.

factors considered by the Minister in the decision-making process".[133] There is nothing inconsistent or unusual about this.

(b) The Investor states there was an arbitrary system with no internal review mechanism. The evidence indicates that there was a formal judicial review mechanism for quota decisions[134] and an informal administrative review system,[135] both of which were used by numerous quota-holders.

(c) The Investor claims Canada used confidentiality about the wholesaler allocation and the 1997 BC reallocation to ensure "non-transparency". In fact, Canada discussed both of those issues with industry associations.[136] Further, Canada's respect for quota holder confidentiality was not a guise for non-transparent decision-making. Rather, it reflected the very real concerns of the industry that sharing confidential information could be prejudicial to their operations.[137]

This blatant disregard for the evidence continues throughout the Supplemental Memorial.

1) Definition of Covered Provinces

119. The Investor reargues its position that the definition of covered provinces breaches national treatment.[138] The definition of covered provinces in the SLA was based on very real concerns arising from the fact that the covered provinces, exporting 95% of softwood lumber to the U.S., had been the focus of repeated

[133] George Affidavit #3, para. 22.
[134] Valle Affidavit #2, paras 14, 191 – 198; George Affidavit #3, paras 43 – 51.
[135] Valle #2, paras 181, 186 – 190, 208; George Affidavit # 2, para. 92; George Affidavit # 3, paras 29 – 34, 39 – 42.
[136] Valle Affidavit #1, Exh. N; Valle Affidavit # 2, paras 75 – 77, 80 – 83, 170 - 180; George Affidavit # 2, paras 89 – 91, Exh. C.
[137] Valle Affidavit #2, paras 9, 33 – 35;George Affidavit # 3, paras 9 - 12.
[138] Supplemental Memorial, paras 128 – 131.

CVD actions. These actions caused significant uncertainty and were likely to continue without an agreement between the Parties.[139] Canada's position on this is set out in its Counter-memorials in Phase One[140] and Phase Two.[141]

120. The Investor's statement that the non-covered provinces should be defined by treaty in the SLA ignores the Maritime Side Agreement, which is also a treaty.[142]

121. The Investor expresses concern that the definition of covered provinces by the United States and Canada in the SLA is tantamount to a pre-emptive definition of like circumstances.[143] It should be recalled that Canada's position with respect to covered provinces is based not only on their definition in the SLA, but also on the surrounding circumstances leading to the negotiation and conclusion of that agreement.

122. More fundamentally, the Investor's comments require the Tribunal to accept that obligations between States which are governed by NAFTA are frozen forever and can never be altered by the very States that undertook and defined these obligations in the first place. Of course, this is incorrect.

123. The obligations between the U.S. and Canada in NAFTA can be altered by agreement of those Parties. Hence, Article 30 of the *Vienna Convention* provides the rule of interpretation for precedence where a subsequent treaty provision is incompatible with an earlier one. As the Investor's rights under Chapter Eleven derive solely from the obligations concluded between Canada and the United States, it cannot assert a right that these obligations be forever entrenched.

2) Super Fee Base Levy

[139] MacDonald Affidavit, paras 8 – 26, 66; Valle Affidavit # 1, paras 14 – 16.
[140] Paras 202 - 220.
[141] Paras 498 - 514.
[142] MacDonald Affidavit, para. 62 & Exh. G.
[143] Supplemental Memorial, paras 127 – 131.

124. The Investor's argument in this respect also repeats its position in the Memorial. Canada's reply is in its Counter-memorial in Phase One[144] and Phase Two.[145]

3) Cumulative Impact of Discretionary Quota Allocation

125. In this version of its argument the Investor frames the issue as the cumulative impact of discretionary quota allocation.[146] Canada submits that national treatment must be assessed based on the relevant evidence. The evidence related to transitional reserve, trigger price bonus, ministerial reserve and new entrants reserve differs. The Investor cannot cumulate an array of differing treatments to conclude that there is a breach of Article 1102.

126. The Investor has adduced no evidence concerning the operation or effect of discretionary quota except to aver that it did not believe it got its fair share of that quota. The evidence submitted by Canada on these allocations is not answered by the Investor.

127. Instead, the Investor misstates the record or urges inappropriate adverse inferences to compensate for its failure to prove its case. The Investor has had full disclosure in response to its questions and additionally has had disclosure in relation to questions posed by the Tribunal and documents requested by the Tribunal. Canada addresses Investor's various misstatements and unsupported allegations.

(a) Discretionary awards of quota were not directed by lumber producers.[147] As noted above, the Minister exercised his ultimate decision-making authority after having consulted industry. Industry did not direct the Minister. Nor were industry representatives selected

[144] Paras 242 - 246.
[145] Paras 515 - 524. See also George Affidavit # 2, paras 114 - 121; George Affidavit # 3, paras 123 – 150.
[146] Supplemental Memorial, paras 134 - 135
[147] Supplemental Memorial, para. 135.

by the Minister. Representatives to the Minister's National Advisory Committee were selected by their industry associations[148].

(b) The Investor dismisses Canada's assertion that the B.C. adjustments made at the end of year one were related to specific errors or problems experienced by the individual quota holders concerned, largely due to the outcome of B.C.'s averaging formula used to calculate initial allocations. Nothing on the record evidences an entitlement to re-allocation or that the Investment was in like circumstances to those companies that received allocation adjustments. Further, nothing on the record evidences that the Investment received an inadequate allocation due to the wholesaler component.

(c) Nor was the Investor entitled to a *pro rata* share of all bonus quota. When *pro rata* allocations were made the Investor received the bonus quota it was entitled to in accordance with the same criteria as applied to all quota holders receiving such quota.[149]

(d) Mr. Valle explains that the concerns about a potential "rush to the border" proved to be insubstantial and that a mere 1.16% of total EB in year one was required as the one time transitional adjustment.[150] The Investor's claim that 1.16% is substantial is unsupportable.[151] Further, the Investor ignores the fact that the Investment received some of this quota in that at the end of year one transitional allocations were returned to the general pool and every quota holder, including the investment, got a share of that quota.[152]

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[148] April 24, 1996 Memo to Mint (Schedules to Memorial (Phase 2)-Tab 1; December 29, 1997 Memo to MINT, para. 5 (Attachments to Canada's Supplemental Counter-memorial (Phase 2)-Tab 7).
[149] George Affidavit # 2, para. 69.
[150] Valle Affidavit #2, paras 131 – 134. See also Valle Affidavit #1, paras 40-45, 144 – 145.
[151] Supplemental Memorial, para. 138.
[152] Responses to Tribunal Question 4; Valle Affidavit #1, para. 147-148;Valle Affidavit # 2, para. 133.

(e) The decision to take reserve quota from the overall allocation had nothing to do with which companies received transitional quota.[153] There is no evidence of any connection between the two issues. The Issues Checklist cited in this respect shows no evidence that there was any connection between the decision to deduct reserve quota from overall EB and the provincial origin of the companies that received the transitional quota.

(f) The Investor continues to cite Mr. Valle's "Issues Checklist" of October 6, 1996 as the first evidence that "new entrants would not be subject to provincial corporate shares"[154] despite Mr. Valle's express explanation of the list.[155]

(g) The Investor alleges that B.C. was entitled to 59% of total EB and that there was no consultation concerning deduction of reserves before allocation of quota.[156] This ignores the information sent by Canada to the Investor on November 7, 1996, expressly showing that new entrants quota, Minister's reserve and transitional adjustment quota would be deducted from the established base of 14.7 billion board feet before setting the provincial corporate share.[157] It also ignores Notice to Exporters No. 94 that clearly shows new entrants quota was deducted before allocating quota to individual companies. Further, the whole issue of whether discretionary quota was deducted from total quota is irrelevant to the question of national treatment: the setting aside of reserves was clearly not done on the basis of nationality and was applied in the same way to all covered provinces. New entrants were in all covered provinces, as were recipients of bonus, Minister's Reserve and transitional adjustment.

[153] Supplemental Memorial, para. 140.
[154] Supplemental Memorial, paras 140 – 141.
[155] Valle Affidavit #2, paras 91 – 93.
[156] Supplemental Memorial, paras 140 – 143.
[157] Valle Affidavit #2, paras 84 – 87, Exh. 7; see also Valle Affidavit #1, paras 102-108.

(h) The Investor speculates that the question of provincial shares was one that would have been addressed "by the Minister and his Cabinet colleagues from Quebec."[158] This is ridiculous supposition and cannot be used as a substitute for evidence.

(i) The Investor asserts that the allocation of new entrant quota was of substantial benefit to central Canadian producers.[159] The clear implication is that the allocation of new entrant quota was a manipulation to favour Quebec and Ontario over B.C. and Alberta. There is no evidence of this. To the contrary, it is undisputed that new entrant quota is a normal feature of quota regimes, that the amount of new entrant quota in this case was minimal and that there was an industry trend which evidenced more new entrants in the eastern provinces than in the western ones.[160]

(j) The Investor's suggestion that B.C. producers qualified for 59% of new entrant quota[161] is without foundation - they did not. B.C. producers were allocated the new entrant allocation that they were entitled to based on new entrant criteria applied to all new entrants in the same manner.[162] The suggestion that new entrant quota be allotted based on historical market share is self-serving and ridiculous – the very purpose of these allocations is to give quota to those without historical performance records.[163]

(k) The Investor complains that Canada imposed "B.C. specific solutions".[164] In fact, Canada tried to address real problems where they arose. Hence, it also implemented specific solutions for Alberta,

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[158] Supplemental Memorial, para. 145.
[159] Supplemental Memorial, para. 146.
[160] Valle Affidavit #1, paras 109 – 122, 136 – 139; Valle Affidavit #2, paras 88 - 98.
[161] Supplemental Memorial, para. 146.
[162] MacDonald Affidavit, paras 73 – 74. See also Valle Affidavit # 1, paras 120 – 121 and Valle Affidavit #2, paras 73 – 74. This issue is academic in this case as the Investment was clearly not a new entrant.
[163] Valle Affidavit # 2, para 88; Valle Affidavit # 1, paras 81, 119; Answers to Tribunal Questions, # 1.
[164] Supplemental Memorial, para. 147.

Quebec and Ontario problems. This is appropriate and clearly does not breach national treatment.

(l) The documents cited by the Investor do not support the conclusion that "direct lobbying and access to the Minister did in fact result in some softwood lumber producers obtaining more quota even in cases where they clearly were not entitled to it."[165] The documents referring to [redacted] show that [redacted] had a particular problem, beyond its control, whereby its allocation was reduced by approximately [redacted] board feet, almost one-third of its total allocation, due to the effects of [redacted] revised quota allocation methodology. In order to mitigate the effects of the adjustment and alleviate hardship, the Minister, after reviewing [redacted] representations,[166] allocated [redacted] board feet of trigger price bonus quota.[167]

128. The Investor notes that the document regarding Norbord was provided in response to an Access to Information request and not in response to the Investor's document request. This is because the document is outside of the scope of Investor's specific document requests..

129. The unredacted version of the document attached as schedule 6 to the Supplemental Memorial[168] shows simply that consideration was being given to a particular hardship application in order to make an informed recommendation to the Minister.

130. In sum, the Investor urges the Tribunal to draw the adverse inference that deducting discretionary allocations from the national allocation was made for

[165] Supplemental Memorial, para. 149.
[166] Attachments to Canada's Supplemental Counter-memorial-Tab 8.
[167] See the unredacted version of the Norbord Memo supplied by the Investor at Schedule 5 of its Supplemental Memorial (Attachments to Canada's Supplemental Counter-memorial-Tab 9).
[168] Attachments to Canada's Supplemental Counter-memorial, Tab 10.

regional political considerations.[169] There is no basis upon which to draw such an adverse inference.

131. At paragraphs 151 to 152 the Investor complains about a gross-up of 0.26% in the Quebec share for purposes of determining provincial corporate shares. Further, it quotes selectively from a memorandum[170] to suggest that Canada set the shares in this manner to benefit Quebec. The Investor reproduces the entire page, with the notable exception of the following two paragraphs that clearly show that the decision to use the 59% figure for B.C. and 23% for Quebec was a compromise that took into account the interests of both B.C. and Quebec:

> - In verifying questionnaire inputs, a number of data entry errors were identified. This has led to significant changes to provincial shares with B.C., in particular, taking a significant loss of 1.2% if we were to continue with the 1995 base. The three other provincial shares increase, with Quebec gaining most.
>
> ...
>
> - There is no simple statistical basis that would yield a number that B.C. and Quebec would find acceptable.

132. The various estimates of provincial share of exports to the U.S. from the covered provinces showed that the percentage exported by B.C. and Quebec varied depending on the base year used.[171] The percentages selected were reasonable based on all available evidence, including the responses to questionnaires.

133. The Investor's assertion that B.C. bonus quota allocations were the only exception to *pro rata* allocations is incorrect.[172] In fact, only the two smaller covered provinces, Ontario and Alberta, usually receive *pro rata* allocations. Quebec generally favoured inverse *pro rata* allocation whereby companies with lower quota-to-production ratios received larger allocations.[173] Further, the Investor's suggestion ignores that the allocations within B.C. reflected the advice of B.C.

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[169] Supplemental Memorial, para. 150.
[170] Schedule 44, Memorial (Second Phase).
[171] Valle # 1, para. 93, Exh. J.
[172] Supplemental Memorial, para. 154.
[173] Reply to Tribunal Question #7; tabs 77-80 of Documents Requested by Tribunal.

industry associations. It also ignores the fact that problems such as the B.C. stumpage dispute and the B.C. rougher headed lumber dispute affected only B.C. companies and were part of the reason B.C. specific solutions were recommended to and accepted by the Minister.

PART FOUR: CONCLUSION

134. Canada has not breached the obligations in Articles 1102 or 1105, and this case should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF NOVEMBER, 2000.

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