

Archived Content

Information identified as archived on the Web is for reference, research or recordkeeping purposes. It has not been altered or updated after the date of archiving. Web pages that are archived on the Web are not subject to the Government of Canada Web Standards. As per the [Communications Policy of the Government of Canada](#), you can request alternate formats by [contacting us](#).

Contenu archivé

L'information archivée sur le Web est disponible à des fins de consultation, de recherche ou de tenue de dossiers seulement. Elle n'a été ni modifiée ni mise à jour depuis sa date d'archivage. Les pages archivées sur le Web ne sont pas assujetties aux normes Web du gouvernement du Canada. Conformément à la [Politique de communication du gouvernement du Canada](#), vous pouvez obtenir cette information dans un format de rechange en [communiquant avec nous](#).

CONFIDENTIAL

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

**INVESTOR'S STATEMENT OF CLAIM
(DAMAGES PHASE)**

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

STATEMENT OF CLAIM

A. INTRODUCTION

This Statement of Claim arises out of this Tribunal's *Award on the Merits of Phase 2* ("Award") dated April 10, 2001 and its subsequent Procedural Order dated April 20, 2001. In its Merits Award (Phase 2), the Tribunal made a finding that Canada acted in a manner inconsistent with its international law obligations contained in NAFTA Article 1105. The Investor sets out its claim for damages as a result of Canada's breach of its international law obligation in this Statement of Claim (Damages Phase).

This Statement of Claim (Damages Phase) does not commence a new claim in this arbitration but continues the existing claim of the Investor being heard by this Tribunal between the respective disputing parties. Accordingly, this Statement of Claim (Damages Phase) incorporates the contents of all pleadings, submissions and other documents, including all subsidiary and auxiliary documents, filed by the Investor in connection with the previous phases of this arbitration.

B. THE FACTS

Introduction

1. This Damages Phase of the arbitration deals with the matters relating to quantifying those damages occasioned to Pope and Talbot, Inc. and Pope & Talbot Ltd. arising from Canada's failure to meet international law standards of treatment. In particular, this Claim details the nature of damages caused to the Investor and the Investment arising out from the Verification Review Episode in 1999 and 2000. The Verification Review Episode consumed the first year of this arbitration process. The character of the unfair conduct of Canada and its officials in the Softwood Lumber Division ("SLD"), and the direction of the arbitration arising from the Verification Review Episode, drove the dynamics of the relationship of the disputing parties for the remainder of the arbitration.
2. In light of Canada's conduct towards the Investment during the Verification Review Episode, the possibility of losing quota appeared very real. This threat of quota being reduced or cancelled by Canada was confirmed through the June and November, 1999

memoranda of Douglas George to the Minister of International Trade.¹ As the Tribunal concluded in its *Award*, the relations between the disputing parties during the Verification Review Episode were:

... more like combat than cooperative regulation, and the Tribunal finds that the SLD bears the overwhelming responsibility for this state of affairs.²

3. The Investor made business decisions with respect to its Investment relying on, and motivated directly by, the conduct of Canada with respect to the Verification Review Episode. Due to the Interim Measures Decision of this Tribunal, the verification review was thrown into disrepute³ and Canada did not reduce or cancel the Investment's quota allocation. If not for the Interim Measures Decision of the Tribunal, it is now certain that the Minister of International Trade would have reduced the Investment's quota based on the "misrepresentations and omissions" of officials at the SLD, as seen in the two memoranda recounted in the Tribunal's *Award*.⁴ Though a major injustice was averted, the Investor was nevertheless harmed by Canada's unfair conduct during the Verification Review Episode. The Investment incurred damages as a result of this harm.

Harm to Pope & Talbot Caused by Canada's Unfair Conduct

4. The Tribunal concluded in its *Award* that the relationship between the disputing parties deteriorated into a state of regulatory "combat" rather than "cooperation". The Tribunal found this result to be the "overwhelming responsibility" of the SLD. The end result for the Investment after the Verification Review Episode was that it was harmed by:
- being subjected to threats;
 - being denied reasonable requests for pertinent information;
 - being required to incur unnecessary expense and disruption in meeting SLD's requests for information;
 - being forced to expend legal fees; and

¹ *Award* at para. 178, regarding the Memorandum from SLD to the Minister, dated June 2, 1999.

² *Award* at para. 181.

³ As the Tribunal notes in its *Award* at para. 179, footnote 203: "... the verification review and report w 'seriously flawed...'"

⁴ *Award* at paras. 177-179.

-
- probably suffering a loss of reputation in government circles.⁵
5. The Tribunal has also established a number of facts in its *Award* regarding the conduct of Canada during the Verification Review Episode that are directly related to the harm suffered by the Investor and its Investment. What follows is a summary of the relevant factual conclusions that can be drawn from the Tribunal's findings of fact in the *Award*:
- (i) The verification review of Pope & Talbot was not justified based on the original review of its allocation by the SLD concerning the 3% imbalance in sales and production numbers for 1994 and 1995;⁶
 - (ii) The verification review was linked to the NAFTA case;⁷
 - (iii) Pope & Talbot was cooperative at all times and acted in good faith throughout the Verification Review Episode;⁸
 - (iv) Canada provided no legal justification for its insistence that the Verification Review be conducted in Canada.⁹ Furthermore, there was no legal impediment to holding it in Portland, Oregon;¹⁰
 - (vi) The SLD misrepresented the conduct of Pope & Talbot to the Minister of International Trade when recommending a reduction in quota;¹¹

⁵ *Award* at para. 181.

⁶ *Award* at paras. 156-7.

⁷ *Award* at para. 156, footnote 157.

⁸ *Award* at para. 161.

⁹ *Award* at para. 174.

¹⁰ *Award* at paras. 172-173, quoting testimony of Douglas George, Transcripts, November 2000, Vol. VI at 105:5 - 116:24.

¹¹ The Tribunal noted that it was "troubled by the tenor and lack of forthrightness of [the SLD's] internal communications with the Minister": *Award* at para. 177.

- (vii) The conduct of Canada was "more devoted to catching the investment in further errors" than developing any understanding between the disputing parties.¹²
- (viii) The treatment of the Investment "stands in stark contrast" to the "open and cooperative spirit" in which the regime was administered with respect to other softwood lumber companies.¹³
6. In response to the conduct of Canada during the Verification Review Episode, the Investor and the Investment were in a vulnerable state that threatened the economic viability of its Canadian mills. Mr. Abe Friesen, President of Pope & Talbot Ltd., testified that :

... we started negotiation [with the SLD in May 1999] of how we could get a compromise audit accomplished. By that time we were very concerned and felt very vulnerable about our quota situation with the numerous threats we received that a quota could be either canceled, amended or suspended, that we acceded because we felt vulnerable.¹⁴

7. With the weight of government authority behind it, the SLD waged combat against a model corporate citizen exercising its legal rights under the NAFTA to seek answers and reasonable compensation for an unexplained loss of quota allocation. Canada placed the Investment in this vulnerable position and the Investment was harmed as a result.
8. The harm arising out of the verification review threats was recognized by Abe Friesen in his Statement in support of the Investor's *Motion for Interim Measures* dated November 10, 1999. In his Statement, Mr. Friesen outlines the implications of Canada's threats during the Verification Review Episode on the economic viability of the Investment's Canadian mills. More specifically, Mr. Friesen noted:

The company has always strived to avoid layoffs or temporary shutdowns...The withdrawal, suspension or reduction of the company's softwood lumber quota would be a serious disruption of

¹² Award at para. 179.

¹³ Award at para. 180-181.

¹⁴ Testimony of Abe Friesen at the Motion for Interim Measures Hearing, Transcripts January 7, 2000, Vol. II at 331 [emphasis added].

our Canadian operations resulting in economic harm to the Investor and the Investment decreasing the value of the Investor's investments in Canada...¹⁵

9. During the course of the Verification Review Episode, counsel for the Investor repeated the position that the reduction or cancellation of quota placed its Canadian mill operations in a position that could result in significant economic harm. In a letter to Canada dated April 29, 1999, the Investor highlighted the potential harm that Canada's threats would cause to its operations. Specifically, the letter stated:

We find Mr. George's letter precipitous and inflammatory. His threat to cancel or suspend our clients' export permits places the jobs of over 900 people in jeopardy and endangers the economies of three British Columbia communities.¹⁶

10. The tenuous position that the Investor was being placed in by Canada was further reiterated to Mr. George in a letter from counsel for the Investor on May 3, 1999. Again, while attempting to be fully co-operative with Canada, it was made clear to Canada that its threats were being taken seriously by the Investor and the Investment. More specifically, the letter stated:

Pope & Talbot has no interest in, and no intention of, acting in any way which would jeopardize the jobs of the 900 British Columbians who work in its mills. It is for that reason that it has been, and continues to be, cooperative with your verification request...We urge you in the strongest possible way to not act in any fashion which would jeopardize the employment of those who rely upon Pope & Talbot to provide it.¹⁷

11. After the disputing parties had mutually agreed to conduct the verification review, the Investment advised Canada by letter on June 9, 1999 that its most pressing concern was

¹⁵ Statement of Abe Friesen, November 10, 1999 at paras. 30 and 33. Kyle Gray also stated that: "It is a general policy of the Company to keep mills running and to avoid downtime as much as economically possible." Statement of Kyle Gray, January 27, 2000, at para. 12.

¹⁶ Letter from Barry Appleton to Joseph de Pencier, April 29, 1999.

¹⁷ Letter from Barry Appleton to Douglas George, May 3, 1999. This letter was followed by a Letter from Barry Appleton to Joseph de Pencier, May 11, 1999, stating that: "...the EICB has steadfastly demanded what constitutes an unfettered audit of our clients' records -in Canada- and repeatedly threatened that anything less than full and immediate compliance with his demand constitutes a denial which permits it to recommend to the Minister that our clients' quota allocation be eliminated. Such conduct may not only warrant an award of censure or additional damages against Canada but also places at risk, unfairly, the hundreds upon hundreds of jobs in British Columbia's Southern Interior of those who rely upon Pope & Talbot." [emphasis added]

“the EICB’s refusal to provide it with notification of its final allocation for the 1999-2000 period.”¹⁸ The letter went on to state that:

We understand that virtually every other major producer has received a letter providing notice of its final allocation.¹⁹

Canada continued to delay its provision of the Investment’s final quota allocation, resulting in a follow-up letter from the Investment on June 15, 1999, advising Canada that:

Unfortunately, we may be placed in a position where we will have to provide notice to our workforce that we will be closing our mills due to a shortage of softwood lumber quota. You have already met with our client’s local Member of Parliament who has explained to you that the jobs of over two thousand four hundred workers in three British Columbia communities depend on the continuation of this softwood lumber quota. Your continued delay, despite our concessions to your requirements on your terms, recklessly imperils the livelihoods and security of these communities.²⁰

12. The evidence from the Investor’s submissions, the correspondence and the testimony of the Investor’s officials make it clear that the conduct of Canada during the Verification Review Episode placed the Investment in a very vulnerable position, and created an atmosphere of considerable uncertainty for the Investor and its Investment. Canada made its position clear to members of the public, in particular through the Member of Parliament who represents the three communities where the Investment operates. Canada’s denial of the Investment’s quota allocation in a timely fashion was evidence of the different treatment being provided to the Investment and contributed to the atmosphere of uncertainty.
13. On November 10, 1999, the SLD informed the Investment that it would be recommending to the Minister of International Trade that its quota allocation be unilaterally “revised” without further comment or input from the Investment.²¹ At this time, the Investment was considering a shutdown of its Canadian mills. The Investment

¹⁸ Letter from Barry Appleton to John Clifford, June 9, 1999.

¹⁹ Letter from Barry Appleton to John Clifford, June 9, 1999.

²⁰ Letter from Barry Appleton to Douglas George, June 15, 1999.

²¹ Letter of November 9, 1999 from Douglas George to Barry Appleton.

was in a position at that time to continue to produce softwood lumber economically and pay the required maximum levy under the Export Control Regime. However, in light of Canada's conduct and correspondence, Abe Friesen, the President of the Investment, concluded that the Investment was in serious danger of losing its quota allocation.²²

4. In light of the uncertain regulatory environment created by Canada's conduct during the Verification Review Episode, which was the critical factor for the decision to take the downtime,²³ the Investment decided to be cautious. As stated by Mr. Friesen in his statement:

Although we were on the price "bubble", where we may have been able to produce lumber in December rather than take downtime, the general uncertainty concerning the events of the previous few months and the upcoming hearing on the Motion on Interim Measures convinced me to avoid the risk of producing more softwood lumber than necessary. Accordingly, I made the decision to shut down for a seven day period in December, 1999. The decision to take downtime was announced on November 15, 1999.²⁴

By further letter to the Tribunal dated November 19, 1999, Canada advised the Tribunal that Canada was seeking to reduce the Investment's quota allocation by 5%.²⁵ This letter from Canada further confirmed the Investment's decision to take downtime in December, 1999.²⁶

6. In previous years during the Export Control Regime, the Investment had taken shutdowns on the basis that it was uneconomical to continue operating in the face of the requirements of the Export Control Regime and softwood lumber prices. As Kyle Gray stated in cross-examination by counsel for Canada before this Tribunal, prior to the Export Control Regime:

A.- ... the only downtime that we would take, as a practical matter, at least, would be when market conditions would not allow us to economically run.

²² Statement of Abe Friesen, June 15, 2001 at paras. 7-8.

²³ Statement of Abe Friesen, June 15, 2001 at para. 9.

²⁴ Statement of Abe Friesen, June 15, 2001 at para. 10.

²⁵ Letter to Tribunal from Eric Harvey, November 19, 1999.

²⁶ Statement of Abe Friesen, June 15, 2001 at para. 12.

Q- And market conditions would include lower prices?

A - Yes.

Q - And in nineteen ninety-eight (1998) the company experienced lower prices?

A - In nineteen ninety-seven (1997), nineteen ninety-eight (1998), and nineteen ninety-nine (1999), all three (3) of those years, because of the export regime - the Softwood Lumber Agreement regime - or the implementation of the Softwood Lumber Agreement, when you look at prices and export fees – export fees that we would incur, it was not economical to operate the facilities.

Q - So it was those two (2) features together that would have caused Pope & Talbot Limited to take down-time?

A - Yes.

Q - So, it would not be exclusively the Softwood Lumber Agreement that caused that?

A - No, correct. I believe that's correct.²⁷

17. In 1999, however, the Investment did not decide to shut down due to declining market conditions, but due to the hostile conditions imposed by Canadian officials implementing the Softwood Lumber Agreement. Although softwood lumber market prices had decreased, the Investment could have economically operated were it not for the unfair conduct of the SLD. With the imminent threat of its quota being cut by a "substantial" amount,²⁸ the Investment was not prepared to continue production of softwood lumber at its three mills.
18. In summary, the uncertainty of the regulatory environment, and the vulnerability of the Investment, had the direct effect of the Investment taking downtime in December, 1999. As outlined in detail in the *Independent Valuers' Report*, the conduct harming the Investor and the Investment has resulted in damages for which Canada is liable.

Summary of Valuation of Damages to the Investment of the Investor

19. The Investor is entitled to full compensation from Canada for all damages caused to its Investment arising from Canada's unlawful conduct during the Verification Review
-

²⁷ *Pope and Talbot and the Government of Canada*, Transcripts, May 2, 2000, Vol. 2, at 102-103.

²⁸ Statement of Abe Friesen, June 15, 2001, at para. 11.

Episode. The calculation of damages should take into account losses arising from the unnecessary expense and disruption caused by the Verification Review Episode, including management time, out-of-pocket costs, and professional fees. This calculation of damages should also take into account losses due to the incremental downtime taken by the Investment at its three mills in December, 1999, caused by Canada's actions.

20. The Investment suffered damages relating to the Verification Review Episode. The Investment expended company resources, such as the time of its employees and senior management from the Investor and the Investment, as well as monies to comply with the requests of Canada during the Verification Review Episode. Professional service providers were engaged to address issues related to the Verification Review Episode involving expertise in public affairs, public relations, and auditing practice. Substantial legal costs were also incurred as a result of the Verification Review Episode and have been included. Legal costs relating to the conduct of the arbitration have been separated from legal costs relating to the Verification Review Episode. Legal costs of the arbitration have not been included in this Claim, in light of the Tribunal's Order that matters related to the costs of this arbitration be addressed in a later submission.²⁹

29. The Investment took downtime in December, 1999 due to the uncertainty surrounding of its quota allocation connected to the Verification Review Episode. At that time, the softwood lumber market was experiencing a decline in prices which continued until December 2000. Due to the downtime taken by the Investment in December, 1999, and the fact that prices were declining in the softwood lumber market, the Investment in effect experienced a delay of seven days in its production and sale into the softwood lumber market. As noted in the *Independent Valuators' Report*, this delay had:

... the effect of 'shifting' all of the production by seven days; that is to say product that would have been produced, processed or sold in a particular day was in effect produced and sold seven days later as a result of the verification review process.³⁰

30. The effect of this delay, in a declining price market, was that the Investment experienced a loss of revenue. To quantify this loss of revenue, the *Independent Valuators' Report* states:

²⁹ *Procedural Order*, April 20, 2001, at para. 7.

³⁰ *Independent Valuators' Report* at 5.

.. we have recalculated the gross incremental revenue the Investment and the Investor would have generated if the actual sales of product had been made seven days earlier for the period from seven days after the incremental down time at the sawmills to the expiry of the softwood lumber agreement....

The actual time from production to market varies, however, the sales are generally made one month subsequent to production. In an effort to simplify and not factor in price changes that may be due to the expiry of the softwood lumber agreement, we have examined the period from the incremental closing in December 1999 through March 31, 2001.³¹

The following chart is a summary of the Investor's claim for damages arising out of the Verification Review Episode (as expressed in US dollars):

Management Time		\$208,000
Out-of-Pocket Costs regarding management and Verification Review		\$12,295
Legal Expenses regarding Verification Review		\$617,626
Experts' Fees		
- LRTS re: Verification Review	100,818	
- Public Relations	8,778	
- Additional legal services	28,413	
- Stoel Rives	<u>5,200</u>	<u>\$143,209</u>
Sub Total		\$981,130
Loss of Incremental Revenue due to Verification Review		\$1,080,000
Total Losses		<u>\$2,061,130</u>
Interest Thereon		\$143,413
Total Losses plus Interest		\$2,204,543

³¹ *Independent Valuers' Report* at 6-7.

C. CLAIM FOR DAMAGES

31. The Investor claims damages resulting from Canada's failure to abide by international law standards in its administration of the Export Control Regime with respect to the Investor's Canadian investment, Pope & Talbot Ltd. during 1999 until the expiry of that Export Control Regime in April 2001.
32. Under international law and pursuant to NAFTA Article 1135, this Tribunal is permitted to issue a final award requiring Canada to provide either restitution to a harmed investor or, in the alternative, granting monetary compensation. In the event that this Tribunal awards restitution, then Canada may chose to pay a monetary amount in lieu of making restitution.
33. Resulting from this Tribunal's finding that Canada failed to provide treatment in accordance with international law to Pope & Talbot Ltd. and is liable to the Investor, the Investor seeks US\$2,204,543 as compensation for:
 - (i) Out of pocket damages;
 - (ii) Damages for loss of revenue caused by the Verification Review Episode;
 - (iii) Interest; and
 - (iv) The costs of this arbitration.

(i) Out of Pocket Damages
34. The Investor seeks compensation for out of pocket damages caused to it arising from Canada's failure to meet international law treatment obligations during the Verification Review Episode in the amount of US\$981,130.
35. In order to meet Canada's demands with respect to the Verification Review Episode, the Investor incurred significant expenses, including:
 - a) Professional fees;
 - b) Associated cost for communications, travel and hotels for those officers, employees and advisors required to travel in order to prepare for and attend the Verification Review Episode.

(ii) Damages for Loss of Revenue

36. Pope & Talbot Ltd. changed its manner of business operations as a result of the conduct of SLD officials surrounding the Verification Review Episode and suffered damages for a loss of revenue in the amount of US\$1,080,000. In order to meet Canada's demands with respect to the Verification Review Episode, the Investor incurred impairment of its operational efficiencies. The losses attributable to this impairment include:
- a) Lost management and operational time from Pope & Talbot Ltd. and Pope & Talbot, Inc.;
 - b) Making the decision to take downtime at the Canadian mill operations in December, 1999.

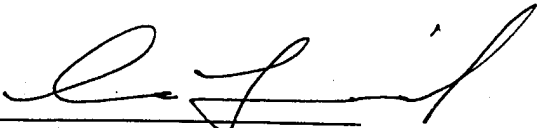
(iii) Interest

37. The Investor is entitled to interest on all amounts awarded by this Tribunal at a pre-judgment rate and a post-judgment rate based on the commercial rate extended by Canadian commercial banks to their customers at the date of the making of the final award. The Investor claims pre-judgment interest in the amount of US\$ 143,413.

(iv) Costs

38. The Investor seeks its costs for this arbitration, and reserves the right to make further submissions on this point separately, as ordered by this Tribunal.

Submitted this 15th day of June, 2001


per Barry Appleton
for APPLETON & ASSOCIATES INTERNATIONAL LAWYERS

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

Counsel for the Investor, Pope & Talbot, Inc.

CONFIDENTIAL

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

**INVESTOR'S MEMORIAL
(DAMAGES PHASE)**

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

MEMORIAL ON DAMAGES**PART ONE: SUMMARY**

1. Pope & Talbot, Inc., the Investor, is a United States company with its head office in Portland, Oregon. Pope & Talbot, Inc., through a wholly-owned subsidiary, owns Pope & Talbot Ltd. (the "Investment"), which operates three softwood lumber mills in the southern interior of British Columbia. A large percentage of the Investment's softwood lumber sales have traditionally been to the United States market. All sales of the Investment are handled and marketed through the Investor at its head office in Portland, Oregon.³²
2. In its *Award on the Merits of Phase 2* (the "*Award*"), the Tribunal decided that the Government of Canada ("Canada") breached its international obligations under NAFTA Article 1105 as a result of the events surrounding what the Tribunal has termed as the "Verification Review Episode". The Tribunal stated that Canada is liable to the Investor for the resultant damages. This "Episode" relates to events that occurred between the disputing parties beginning in January, 1999, until the hearing of the Interim Measures Motion in Florida in early January, 2000.
3. Under international law, the Investor is entitled to full compensation from Canada for all harm caused to it and to its Investment arising from Canada's unlawful actions in relation to the Verification Review Episode. The calculation of damages should take into account those cash flows that would have been earned by the Investor and the Investment but for the operation of Canada's unlawful Verification Review Episode.
4. But for the shutdown in December, 1999 caused by the ongoing threat of unilateral action by Canada to the detriment of the Investor and Investment's operations, the Investor and its Investment would have enjoyed different prices for softwood lumber that it manufactured for export to the United States.
5. As set out in Appendix I of the *Independent Valuators' Report*, as a result of the shutdown, the Investor and the Investment have foregone valuable management and administrative time in order to comply with Canada's Verification Review Episode. The

³² Statement of Abe Friesen, June 15, 2001 at paras. 1-2.

value of compensation attributable to the Investor for this wasted time and expense should be set at US\$981,130.

6. The *Independent Valuators' Report* sets out their expert opinion as to how the Tribunal should quantify the damages caused by Canada's unlawful Verification Review Episode to the Investor and the Investment. As more fully set out in Appendix II of the *Independent Valuators' Report*, as a result of the December, 1999 shutdown the Investment has received prices for softwood lumber different from what it would have received but for the shutdown. This difference represents losses arising out of Canada's NAFTA-inconsistent actions. The total value of compensation to the Investor, should be set at US\$2,204,543.
7. The Investor is entitled to interest on its damages from Canada. The rate of interest should be based on a rate of return equal to, or greater than, the available commercial interest rates, and be set at the amount of US\$143,413.

PART TWO: INTERNATIONAL LAW OF DAMAGES

8. The Investor submits that the international law principle of compensation requires Canada to provide compensation for all harm occasioned to the Investor and its Investment arising out of Canada's violation of international law obligations expressed by NAFTA Article 1105. Having found that a state has acted in violation of an international obligation to the detriment of an investor and its investment, the objective of an international Tribunal is to place the investor and its investment in the position it would have enjoyed but for the occurrence of the illegal act. In the words of the NAFTA Chapter 11 Tribunal in *S.D. Myers, Inc. and the Government of Canada*, "Compensation should undo the material harm inflicted by a breach of an international obligation."³³
9. The principle underlying the international law of compensation was enunciated in the decision of the Permanent Court of International Justice in the *Chorzow Factory case*. The Court held that:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.³⁴

This compensation principle has been supported by a number of international tribunal decisions³⁵ that have applied the compensation rule to lost profits and any consequential

³³ *S.D. Myers, Inc. and the Government of Canada, Partial Award*, November 13, 2000 at para. 315 ("*S.D. Myers (Partial Award)*").

³⁴ *Case Concerning the Factory at Chorzów (Merits)* PCIJ, Series A, No. 7, September 13, 1928 at 47.

³⁵ See, for example, paras. 313 - 317 of *S.D. Myers (Partial Award)*. At para. 311 the Tribunal stated, "The principle of international law stated in the *Chorzow Factory (Indemnity)* case is still recognised as authoritative on the matter of general principle". Similarly, at para. 317 the Tribunal stated, "In summary, the Tribunal will assess the compensation payable to SDMI on the basis of the economic harm that SDMI legally can establish." See also the ICSID Tribunal award in *Amco Asia Corp. v. Indonesia (Merits Award)* ("*Amco Asia*") 1 ICSID Reports 377 at 500, in which the Tribunal adopted the reasoning of the *Chorzow Factory* case, calling it the "basic precedent" in international law on compensation.

damages resulting from harm caused to investors who were denied economic benefits that would otherwise have been available to them "but for" a country's unlawful conduct.

Causation, Foreseeability and Remoteness

10. Reparation for internationally unlawful acts is dependent upon proving a direct and foreseeable causal link between the impugned act and the alleged damage. In *Amco Asia*, the Tribunal recognized this general principle, when it declared:

...according to principles and rules common to the main national legal systems and to international law, the damages to be awarded must cover the *direct* and *foreseeable* prejudice. The requirement of *directness* is but a consequence of the requirement of a causal link between the failure and the prejudice; and the requirement of *foreseeability* is met practically everywhere.³⁶

11. To be foreseeable, the damages claimed must have been reasonably anticipated by the disputing parties at the time of the breach.³⁷

³⁶ *Amco Asia*, at 501. See also *S.D. Myers (Partial Award)*, which stated at para. 316:

... compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes.

This finding was further confirmed in para. 325 of the *Partial Award*, which stated:

CANADA shall pay to SDMI compensation for such economic harm as is established legally by SDMI to be directly as a result of CANADA's breach of its obligations under Articles 1102 or 1105 of the NAFTA. [emphasis added].

See also *Asian Agricultural Products v. Republic of Sri Lanka* (1991) 6 ICSID Rev.-FILJ 526 at para. 104 ("*Asian Agricultural Products*") and *Shufeldt v. Guatemala* (1930) II RIAA 1081 at 1099 ("*Shufeldt*"). This principle of compensation is a critical element in the international case law. While the decisions adopt different terminology, all the cases address the same compensation concepts. The cases variously refer to terms such as causality, remoteness and foreseeability.

³⁷ As the sole arbitrator's award in the *Shufeldt* claim states, the damages should be direct and "reasonably supposed to have been in the contemplation of both parties as the probable result of the breach." *Shufeldt* at 1099. Professor Whiteman states that the assessment of prospective profits requires proof that they are "reasonably anticipated." M. M. Whiteman, *Damages in International Law*, Vol. 3 at 1836-7. Her statement was approved in the Tribunal award in *Asian Agricultural Products* at para. 104.

-
12. Damage claims will not be upheld if they are considered to be too remote.³⁸ There is an exception to this rule, however, where there can be demonstrated any special intention by a government to harm an investor. In such a case, international law permits the Tribunal to award damages even if they would otherwise be considered to be too remote.³⁹

Consequential Damages

13. The international law of damages provides that an aggrieved party may be compensated not only for actual losses suffered, but also for consequential damages such as the loss of possible business profits. Compensation for consequential damages may be awarded when the loss is a foreseeable consequence of the breach and when such losses can be calculated with reasonable certainty.⁴⁰
14. The Tribunal in the *May Case* held that in cases where the claimant suffered damages and prejudice, which result directly or indirectly from the nonfulfillment or infringement by default or fraud of the party concerned, the compensation payable includes both the damage suffered and the profits lost: *damnum emergens* and *lucrum cessans*.⁴¹ The Tribunal in the *Shufeldt Claim* relied on this proposition in awarding damages. The arbitrator stated that the lost profits:

³⁸ In *Amoco International Finance Corp. and the Government of the Islamic Republic of Iran, et al.* (1987), 15 Iran-US CTR 189 ("*Amoco*") at paras. 238-9, the Tribunal was concerned about the speculative nature of long term profit projections sought by the claimant. In *Metalclad Corp. and the United Mexican States, Final Award*, September 2, 2000, at paras. 120-2 ("*Metalclad*"), the Tribunal dealt with the question of the speculative nature of future profits while *Asian Agricultural Products* at para. 104, confirms that "uncertain" or "speculative" profits are generally disallowed.

³⁹ In the *Dix Claim* (1903) IX RIAA 119, the US-Venezuelan Mixed Claim Commission focussed on the relationship of intent to the remoteness of damages. While this Tribunal found that Venezuela lacked the intent to injure Mr. Dix on the basis of his nationality, the Tribunal upheld the principle that remote damages can be awarded when government measures were intended to harm an investor because of nationality.

⁴⁰ In the *Greek Telephone Company Award* (1964) BYIL 216 at 221, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State. In *Sea-Land Service, Inc. v. Iran* (1984) 6 Iran-US CTR 149 at 203, the Tribunal cited the decision in *Pomeroy* (1983) 2 Iran-US CTR 372 as a basis for this determination.

⁴¹ *May Case* (1900) XV RIAA 55 at 72. In this case, the investor was "entitled to all the profit to be derived from the railroad until the completion of the term."

...must be the direct result of the contract and not too remote or speculative ... (but as) may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it.⁴²

Similarly, in *Sapphire International Petroleum Arbitration*, the Tribunal found that:

This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.⁴³

15. In its discussion of international compensation law, the *Amco Asia* Tribunal noted that the basic principles of international compensation law are comparable with the methods used to quantify damages in contract law. The Tribunal stated:

The legal basis of calculation of damages will be set up according to the principles governing the matter, where the prejudice to be compensated results from the failure of a party to a contract to fulfil its obligations under the contract.

This method is justified in the instant case, in spite of the relationship between the host state and the investor not being strictly identical to a private law contract, as earlier shown, but merely comparable to such a contract....

Moreover, it could by no means be contended that if the illegal acts of the State were of delictual nature, the damages to be awarded in compensation of the prejudice should be a lower amount than damages awarded in the framework of contractual liability.⁴⁴

16. In *Amoco case*, Judge Charles Brower observed that the principle enunciated in *Chorzow Factory* extends to consequential damages:

In my view *Chorzow Factory* presents a simple scheme: If an expropriation is lawful, the deprived property is to be awarded damages equal to 'the value of the undertaking' which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of

⁴² *Shufeldt* at 1099.

⁴³ (1967) 35 ILR 136 at 186.

⁴⁴ *Amco Asia* at 498-499.

information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages.⁴⁵

17. In *Amoco*, Judge Brower supported the proposition that under international law an investor should receive damages for its "probable performance" in the market. In order to have such damages, it is necessary to obtain a valuation date with respect to restitution value under the *Chorzow Factory case* standard based on the current value of the damages incurred proximate to the date of the Tribunal's award.⁴⁶

Opportunity Loss: Interest and Costs

18. NAFTA Article 1135(1) provides that a Tribunal may award monetary damages and "any applicable interest."⁴⁷ It is not sufficient for this Tribunal to award the Investor the actual amount of its loss at the time of Canada's breach as such an award cannot take into account the harm occasioned to the Investor for being denied its compensation after the time of the breach. Accordingly, international tribunals retain broad discretion to take into account all relevant circumstances, including equitable considerations on a case by case basis, to ensure that full compensation ensues.⁴⁸ These types of considerations usually take the form of an award dealing with opportunity loss (that is interest of some form) and awards of costs.
19. Under international law, tribunals can award damages for opportunity loss to a successful party. For example, in its decision in the *Aminoil* case, the Tribunal acknowledged that "...the reasonable rate of return, assessed on a somewhat more liberal scale, constitutes

⁴⁵ *Amoco*, Concurring Opinion of Judge Brower, at 300-1, paras. 18.

⁴⁶ *Amoco*, Concurring Opinion of Judge Brower, at 300.

⁴⁷ In the case of an award of expropriation, NAFTA Article 1110(4) explicitly states that compensation "shall include at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment." NAFTA Article 1105 is silent on the question of compensation with respect to interest.

⁴⁸ *Compania Del Desarrollo De Santa Elena, S.A. and The Republic of Costa Rica* (2000) ICSID Rev.-FILJ 169 ("*Santa Elena*") at paras. 90-92. This view was also maintained by a number of Iran-US Claims Tribunal awards such as those in the *American International Group, Inc. v. Iran* (1983) 4 Iran-US CTR 96; *Phillips Petroleum Co. Iran v. Iran* (1989) 21 Iran-US CTR 79; and *Starrett Housing Corp. v. Iran* (1983) 4 Iran-US CTR 112.

one of the elements of compensation."⁴⁹ The *Asian Agricultural Products* case supports the principle that "interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility is engaged."⁵⁰ The Tribunal in the *Santa Elena* case supported the award of compound interest to the investor in that case, as follows:

... where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for delay in the payment made to the expropriated owner; it is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances.⁵¹

20. International tribunals have long recognized that it is appropriate to ensure that full restitution ensue when a government engages in wrongful conduct targeted at a foreign investor. This principle is recognized in the *Chorzow Factory* compensation rule, as well as in other decisions.

⁴⁹ *Award in the Matter of an Arbitration Between Kuwait and the American Independent Oil Company ("Aminoil")* (1982) 21 ILM 976 at para. 163.

⁵⁰ *Asian Agricultural Products*, at para. 114, quoted in *Metalclad* at para. 128. The Tribunal in *Asian Agricultural Products* quotes R. Lillich, "Interest in the Law of International Claims" in *Essays in Honour of Voitto Saario and Toivo Sainio* (Helsinki: International Law Association, 1983) at 55-56.

⁵¹ *Santa Elena*, at para. 104 [emphasis added]. Other international arbitral awards have expressly allowed compound interest to be paid on the award of damages. See *Fabiani's Case* (1905) X RIAA 83 at 93; *Affaire des Chemins de Fer Zeltweg-Wolfsberg*, III RIAA 1795 at 1808. Dr. Mann has similarly concluded that compound interest should be awarded to the claimant as an integral part of damages awards by international tribunals: F.A. Mann, "Compound Interest as an Item of Damage in International Law", *Further Studies in International Law* (Oxford: Clarendon Press, 1990) at 380.

PART THREE: INTERNATIONAL LAW APPLIED TO THE FACTS

21. The purpose of the Verification Review Episode was to review alleged discrepancies in the Investment's softwood lumber questionnaire responses and, if determined to be necessary, to reduce the Investment's quota allocation on that basis. Such a reduction would, of course, harm the Investor and the Investment by decreasing production volumes. Thus, harm to the Investor and the Investment by Canada's actions was entirely foreseeable at the point when the decision to initiate a Verification Review Episode was made, if not earlier.
22. As a result of a discrepancy in the Investment's questionnaire, the SLD wrote to the Investment on January 26, 1999, requesting an explanation. This letter was sent approximately one month after Mr. Douglas George first became aware of the Investor's NAFTA claim. Furthermore, Mr. George testified to the Tribunal that this letter was "triggered by his awareness of the Investor's claim".⁵² Thus, harm to the Investor was foreseeable by Canada at this point.
23. Between this time and April 7, 1999, the Investor replied to a series of further inquiries from SLD with respect to alleged questionnaire discrepancies. These exchanges formed the foundation of the coming Verification Review Episode.
24. On April 7, 1999, Canada issued notice to the Investor that it was to be subject to a verification review.⁵³ Given that the purpose of the verification review was to justify reducing the Investment's quota allocation, the harm to the Investor and the Investment by SLD's actions was clearly foreseeable at this point, if not several months earlier.
25. The remedy for a breach of contract under international law includes reasonably foreseeable and anticipated profits. The Investor's damages were certainly reasonably foreseeable to Canada in August, 1999, after the verification review which took place in July. For example, Canadian officials had ongoing knowledge of the potential negative

⁵² *Award*, para. 156 footnote 157.

⁵³ *Award*, para. 160.

economic impact that a change in the Super Fee Base Quota would have upon the Investment.⁵⁴

26. While the Investor submits that its damages are direct and foreseeable, even damages that would otherwise be considered remote could be included in the compensation in this claim given the blatant intent of Canada's officials to harm the Investor and the Investment. This Tribunal has the equitable jurisdiction to take into account the factual background surrounding Canada's actions during the Verification Review Episode. In this case, this Tribunal has found that Canada's actions were intended to harm the Investor and the Investment. Therefore, the Tribunal can use its equitable jurisdiction to award damages arising out of Canada's actions during the Verification Review Episode.
27. The downtime taken by the Investor and the Investment in December 1999 resulted in economic harm which was a direct result of the threats from Mr. George about the uncertainty of their quota allocation. But for these threats of a reduction in quota, the Investment's three Canadian mills would not have taken downtime and therefore would not have suffered the losses that were occasioned by the delay of its production of approximately one week.⁵⁵
28. The Investor suffered direct, foreseeable and consequential damage to itself and its Investment from Canada's NAFTA-inconsistent conduct in the amount of US\$2,061,130. The Investor and the Investment are entitled to recover the full value of their losses, including the loss of revenue that would have been realized but for Canada's unlawful conduct which forced it to take downtime in December 1999.

Interest

29. If Canada had not acted unlawfully by repeatedly threatening the Investment and the Investor in 1999 and 2000, the Investor and the Investment would not have made the decision to take downtime in December 1999 and would therefore have been able to generate greater revenue from their Investment.

⁵⁴ Mr. George testified that he had intimate knowledge that the Investment was the second largest exporter in B.C. of Upper Fee Base softwood lumber prior to the Super Fee Base being introduced. See Merits Hearing (Phase 2) Transcripts, November 14, 2000, vol. 6 at 22.

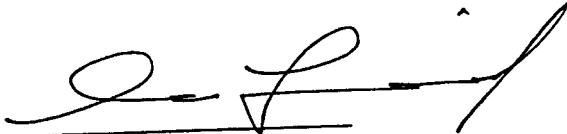
-
30. The award of interest should compensate the Investor and the Investment from December 1999 to the date of the award in this phase. The award of interest should accurately reflect the damages incurred by the Investor and the Investment directly arising from Canada's breach of its NAFTA obligations under Article 1105 with respect to the Verification Review Episode.
 31. The payment of interest reflects the principle that the wrongdoing must make the harmed party whole for its loss. But for Canada's actions, the Investor and the Investment would have been able to generate an investment rate of return with the cash flow from the Canadian operations, which would have been set at available commercial interest rates, in the amount of US\$143,413.

PART FOUR: SUBMISSIONS

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

Canada be hereby ordered to pay compensation to the order of the Investor in an amount NOT LESS THAN US\$2,204,543, plus the appropriate pre and post-judgement interest on these amounts at a commercial rate of interest.

Submitted this 15th day of June, 2001



Barry Appleton
for APPLETON & ASSOCIATES INTERNATIONAL LAWYERS

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

Counsel for the Investor, Pope & Talbot, Inc.