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

INVESTOR'S POST-HEARING SUBMISSIONS (DAMAGES PHASE)

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

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POST-HEARING SUBMISSION (DAMAGES PHASE)

PART ONE: INTRODUCTION

1. The Investor files this Post-Hearing Submission on Damages pursuant to the Tribunal's Procedural Order of November 17, 2001 to address issues arising out of the Damages Phase hearing held in Washington on November 13- 15, 2001 and with respect to the NAFTA Article 1128 submissions filed by the non-disputing NAFTA parties on December 3, 2001.

2. Within its claim for damages, the Investor has sought compensation for damages occasioned to its Investment for losses arising from the threats, disruption and unreasonable conduct of Canadian Softwood Lumber Division officials during the Verification Review Episode. Despite Canada's protestations to the contrary, the Investor submits that Canada is required by the terms of the NAFTA and the *Award* of this Tribunal to fully compensate the Investor for the damages caused to it and its Investment arising out of Canada's unlawful actions in the Verification Review Episode.

3. Within this Post-Hearing Submission, the Investor deals with the following issues in light of the testimony and argument raised at the Damages hearing:

   I. The correct approach to valuation
   II. Unrealistic Mitigation Arguments raised by Canada
   III. The appropriate cut-off date for damages
   IV. Issues with respect to the Free Trade Commission Interpretative Statement

PART TWO: Damages

The correct approach to Valuation

4. During the Damages hearing, the Tribunal heard evidence from Mr. Rosen and Mr. Harder in relation to the appropriate methodology to quantify damages suffered by Pope & Talbot arising out of the Verification Review Episode. Both experts restricted their submission of evidence to valuing the damages brought about by the delay resulting from the Investor's decision to shut down its three Canadian lumber mills for a seven-day period in December 1999.

5. The decision to take downtime in December 1999 resulted in the delay of the manufacture and sale of softwood lumber by Pope & Talbot into a market with declining prices. This failure to obtain high market prices for softwood lumber manufactured by Pope & Talbot's Canadian mills is the incremental loss that is detailed in Mr. Rosen's report.

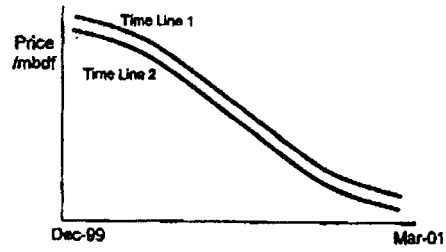
6. During Mr. Rosen's testimony at the Damages hearing, the Tribunal asked Mr. Rosen whether this claim was a damages claim or a delay claim. The Transcript records the exchange as follows:

> **ARBITRATOR BELMAN**: Does the economic analysis permit conceptually, looking at this quite different- in December 1999 there was an opportunity to sell wood and earn such and such a price and profit and what else. And because of the dynamics of the wood industry, that's an opportunity that once its's there and you don't take advantage of, it's forever lost.
> **MR. ROSEN**: Correct.
> **ARBITRATOR BELMAN**: Why do you- if you look at it conceptually that way, why do you characterize it as a delay claim at all?
> **MR. ROSEN**: It's not a delay claim. It's a delay that caused us to- the company to sell in a falling market. So I measured it in that way. You're quite correct. You could measure it as that lost opportunity.[1]

7. The Investor's claim is for damages for the delay resulting from the December 1999 shutdown. It is a damages claim that values the impact of Pope & Talbot's lost revenue on production using a delay claim methodology. A conventional delay claim compensates a harmed party for the delay in realizing the benefit associated with a sale. Because the delay occurs during a period of falling lumber prices, the result is that those incremental monthly losses can never be recovered. So while the time-value of the money lost in December 1999 may appear small, the effect of delaying each sale of physical property in a time of falling prices negatively impacts the company.

[1] Damages Hearing Transcripts at 209.

8. The theory behind the delay claim can be represented graphically as follows:



The Investor realized the sales prices for their products from Time Line 2 instead of Time Line 1. Since the cost of production should remain relatively unchanged throughout this period, the loss to the Investor should be measured as the difference between the revenue realized in the Time Line 2 versus Time Line 1. It is because the Tribunal need only to measure the differences in market prices that Mr. Rosen used the "Random Lengths" market reporter prices to establish the trend.[2] The absolute prices received by the Investor were not relevant; the only difference that occurred was a change in the market price from week to week.[3]

9. During the Damages hearing, Arbitrator Belman asked whether the damages that Pope & Talbot had suffered could be compared to a situation in which a hotel claims losses for rooms not rented out during a specific period of time.[4] The Pope & Talbot situation is not the same as the situation of a hotel that has a number of empty rooms. If those empty rooms go unrented, their income potential has vanished as they are time-limited items. In comparison, Pope & Talbot did not have time-limited goods. It had the very same timber to manufacture lumber after the shutdown as before, the only variations were price, the operation of the Export Control Regime and the effect of the seven-day delay.

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[2] Damages Hearing Transcripts at 393-394.

[3] During the questioning of Mr. Harder by Arbitrator Bellman, the Investor submits that it became clear that the use of this industry reporter best represents changes in softwood lumber market trends, irrespective of product mix. In particular, see the discussion between Arbitrator Bellman and Mr. Harder during the Damages Hearing located in the transcripts from 380 - 394.

[4] Damages Hearing Transcripts at 214.

10. Mr. Rosen's testimony confirms that Pope & Talbot's loss is not a "classic" delay claim.[5] In this case the Investor was not able to manufacture for a number of days and thus was effectively delayed access to higher market prices for its product. The Investor had the timber available to manufacture softwood lumber and was prevented by the mill shutdowns from manufacturing softwood lumber from those logs. When the mills re-opened, the Investor manufactured softwood lumber from those very same logs but obtained a lower price. This is why Pope & Talbot's claim cannot be compared to the lost hotel room analogy. [6] The lumber was manufactured from those logs, but the effect of a declining market resulted in the product receiving a lower price than would otherwise have been realized but for the December 1999 shutdown.

11. Because of the shutdown, the softwood lumber that the Investor could have produced was not processed at that time. Seven days later, the Investor's mills began to process the timber to produce lumber. As a result, softwood lumber that would have been available earlier, did not become available until later resulting in an ongoing delay to the Investor and an "incremental" loss. This delay continues to this day.

Addressing Canada's unrealistic Mitigation Arguments

12. At the Damages hearing it was suggested by Mr. Harder that Pope & Talbot could have mitigated its December 1999 shutdown by increasing production and/or invading its stockpile of inventory.[7] The evidence demonstrates that these two options were simply not available to Pope & Talbot.[8]

13. Mr. Friesen's testimony address these issues directly. Mr. Friesen testified that Pope & Talbot always ran their mills 'full-out'.[9] Therefore, the suggestion that somehow Pope & Talbot could make up the loss by increasing production does not reflect the reality of Pope & Talbot's operations.[10]

14. Canada's second argument that Pope & Talbot could have invaded inventory is equally unsatisfactory as even if it were possible, the effect of such a draw-down would have

[5] Damages Hearing Transcripts at 209.

[6] Damages Hearing Transcripts at 214.

[7] Damages Hearing Transcripts at 324.

[8] Damages Hearing Transcripts at 535-536

[9] Damages Hearing Transcripts at 60.

[10] Damages Hearing Transcripts at 59.

been to deplete inventory which would have been required to have been replenished at some other time. Because the mills operate at full-capacity when economically feasible to do so, there would be no opportunity to replenish the inventory during the operation of the Export Control Regime. Accordingly, Canada's second argument on mitigation must be rejected.

The Cut -Off Date

15. Pope & Talbot suffered a delay in receiving the proceeds on the sale of their product. This delay could only be caught-up at a time where there was no demand for Pope & Talbot's lumber or at a time when the company took additional voluntary downtime. Neither of these events occurred during the remainder of the operation of the Export Control Regime.[11]

16. Theoretically, the time respecting Pope & Talbot's loss is infinite if the Investor never took a voluntary shut-down. However, in practice, there was a critical market change that demarcates an appropriate "cut-off" when this Tribunal should quantify damages: the end of the Export Control Regime at March 31, 2001. The Investor submits that this is the only point in time when the Tribunal can properly assess its valuation before the present date. The change from a quota based scarcity regime to an open market added extraneous variables that simply did not exist during the pendency of the Export Control Regime when the damages were incurred by Pope & Talbot. Therefore, the appropriate and least speculative cut-off date is the termination of the Export Control Regime which occurred at the end of the Softwood Lumber Agreement after March 31, 2001.

17. An earlier date is not appropriate because prior to the expiration of the Export Control Regime, taking into account evidence related to the operations of the company and capacity, it was impossible for the Investor to be able to mitigate. The Investor did not have the opportunity to make up this lost production prior to the expiration of the Export Control Regime. Accordingly, this damage can only be initially measured at the time of the termination of the Export Control Regime at the end of March 2001.

18. At the time that the Investor submitted its Statement of Claim and Damages Memorial on June 15, 2001, it had no knowledge as to the potential occurrence of mill shutdowns. The first opportunity to mitigate would have occurred after the termination of the Export Control Regime, when the company could take voluntary down-time.

19. The termination of the Export Control Regime on March 31, 2001, marked the very first time that the Investor could have been able to mitigate its losses. Mr. Harder suggested

[11] Damages Hearing Transcripts at 99.

extending this analysis out to a later date such as June 2001.[12] It is interesting to note that as of the date of the damages hearing, if damages were calculated in the same fashion at November 2001 market prices, the damages according to the Joint Document (Exhibit "DC-3") would be $1,400,000 US dollars.

Conclusions on Valuation Issues

20. Further to the arguments raised by the Investor in its closing arguments, which the Investor hereby incorporates into this submission, the Investor submits that:

a) But for Canada's actions arising out of the Verification Review Episode, Pope & Talbot would not have taken downtime in December 1999 and would have realized the higher prices available during that time. Due to the shift in production into a period of declining prices for softwood lumber up and until March 31, 2001, Pope & Talbot suffered ongoing incremental losses which require compensation in order to make the Investment whole again.

b) This Tribunal should quantify the damages suffered by Pope & Talbot on the basis of the delay in attaining the higher market prices for softwood lumber from the time of the shutdown in December 1999 until at least the termination of the Export Control Regime; and

c) The Investor's loss should be determined by reference to the change in prices for softwood lumber expressed by the *Random Lengths* Industry Reporter during the relevant time period as this industry reporter best represents changes in softwood lumber market trends, irrespective of product mix.

[12] Damages Hearing Transcripts at 321.

21. The Investor submits that the damages should be set out as follows:

	Original	Revised
Management time	$ 208,000	$ 208,000
Out of pocket	12,295	12,295
Legal	617,626	327,118
LRTS	100,818	100,818
Public relations	8,778	8,778
other legal	26,413	28,413
Stoel Rives	5,200	5,200
Incremental Revenue	1,080,000	1,312,000
	$ 2,061,130	$ 2,002,622

This table illustrates an adjustment made to the incremental revenue loss calculation issued by the experts in the Joint Summary of Calculations, (Exhibit "DC-3"). The revised incremental revenue loss figure reflects an assumption of no-delay between the production and sale of the softwood lumber applying Random Lengths prices with a March 31, 2001 cut-off date.

PART THREE: Response to the Submissions of the Non-Disputing Parties on the NAFTA Free Trade Commission Interpretative Statement

22. On December 3, 2001, the Investor received submissions from the Governments of the United States of America and the United Mexican States on the impact of the NAFTA Free Trade Commission's Interpretive Statement on NAFTA Article 1105. In their Post-Hearing Submissions, the non-disputing Parties have largely reiterated the positions put forward in their earlier submissions.[13] The Investor will accordingly only summarize the key elements of its argument, before addressing certain issues that require clarification in light of the other NAFTA Parties' submissions.

23. For the reasons set out in the Investor's previous written and oral submissions to this Tribunal, the Investor rejects the submissions made by the non-disputing Parties.

24. The Investor submits that parts of the NAFTA Free Trade Commission's interpretative statement cannot be binding on this Tribunal as the Interpretive Statement cannot be reconciled with the applicable rules of international law concerning treaty interpretation. To this extent, and only to this extent, the Free Trade Commission statement cannot be a valid exercise under NAFTA Article 1131(2) and, therefore to that extent, it cannot have force or effect.

25. Further, the Investor submits that the NAFTA Free Trade Commission's Interpretative Statement cannot have a retroactive effect on legal findings made by this Tribunal because otherwise such an interpretation would violate basic principles of fairness and due process under international law. Indeed, speaking for Canada, at the Damages Hearing, Professor McRae confirmed that it is not the position of Canada that the NAFTA Free Trade Commission Interpretation has retroactive effect. Specifically, Professor McRae stated:

> **ARBITRATOR BELMAN:** And one of the issues would be does it have retroactive effect?
> **MR. MC RAE:** We're not arguing its retroactive effect.[14]

Professor McRae further confirmed Canada's position on retroactivity later on as well and stated:

> **MR. MC RAE:** But here, this is qualified by the direction in Article 1131 of the requirement that the decision of the commission is binding on Chapter 11 tribunals.
> **ARBITRATOR BELMAN:** But not retroactive.

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[13] For its part, the United States did not actually provide a NAFTA Article 1128 submission; instead providing a copy of its argument as a party to another unrelated NAFTA dispute. Its argument accordingly do not always appear to provide much salient commentary on the issues before this Tribunal.

[14] Damages Hearing Transcripts at 665

> MR. MC RAE: Not retroactive, but you are acting prospectively. It's not retroactive on what you have done, but you now have to act prospectively.[15]

Even if the NAFTA Free Trade Commission's statement requires this Tribunal to retroactively reconsider its findings with respect to Article 1105(1), the Tribunal is required under NAFTA Articles 102(1) and 1131(1) to interpret Article 1105 in a manner that respects the Most Favoured Nation ("MFN") principle. The MFN principle requires the Tribunal to consider whether Canada's actions breach a "fair and equitable" standard under either customary international law or under the general principles of international law.

26. Professor Georg Schwarzenberger confirms that the fair and equitable standard is a distinct standard from the "minimum standards" under the broader rubric of international economic law. The equitable standard could be considered to arise under either customary international law or general principles of international law. He notes that, in comparing the MFN standard to the equitable standard,

> ... in cases in which the object of equitable treatment is merely the avoidance of 'excessive, unnecessary or arbitrary' measures, the functions of the two standards may coincide in practice or beneficially supplement each other.[16]

27. The Investor submits that Canada's treatment of the Investment breached the "fair and equitable" standard regardless of whether it is regarded as an "additive" element to "treatment in accordance with international law" or not; or whether "treatment in accordance with international law is "interpreted" to only encompass treatment in accordance with the minimum standard of treatment available under customary international law.

28. Furthermore, consistent with NAFTA Article 1115 which requires that the disputing parties be treated in a fair and equal manner, if Canada can request that this Tribunal reconsider its findings under NAFTA Article 1105, in light of the application of the NAFTA Free Trade Commission's statement, the Investor is entitled to request the Tribunal to complete its analysis under NAFTA Article 1102. In particular, the Investor requests that this Tribunal complete it findings on whether Canada's conduct with respect to the Export Control Regime, including the Verification Review Episode, constituted a breach of NAFTA Article 1102.[17]

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[15] Damages Hearing Transcripts at 675.

[16] Prof. Georg Schwarzenberger, "The Most-Favoured-Nation Standard in British State Practice" (1948) Brit. Yearb. Int. L. 96 at 118.

[17] The Investor has made this request before the Tribunal. The Investor submits that Canada breached its obligations to the Investor and the Investment by according less favourable treatment to both during the Verification Review Episode than was available to local investors and investments operating under the same regulatory regime.

The Tribunal's Role in Interpreting the Meaning of the Text of NAFTA Article 1131

29. With their Post-Hearing Submissions, the Governments of the United States and Mexico have supported the arguments made by Canada before this Tribunal on November 15, 2001. Lord Dervaird summarized this position in the following manner:

> If the Commission says it is so, [as] far as any tribunal constituted under Chapter 11 [is concerned,] a Commission interpretation of Chapter 11, that is it. [This is so,] even if others applying [the text] -- to take Mr. Belman's example... say this is not a feasible interpretation on any view, any ordinary sense of that word of what has been done... but that's what they have done, and from now on the treaty has to be read in that way. They don't have to amend. They can simply interpret as widely, as bizarrely, if you like, as they had like, and that must be binding on all future tribunals.[18]

30. Within its Jurisdiction award in the *Ethyl* claim, the NAFTA Tribunal found that in interpreting the NAFTA, it was essential that an interpretation follow the international law rules to avoid a conclusion which is manifestly absurd or unreasonable. The Tribunal stated:

> Specifically, the Tribunal concludes that this results from interpreting those Articles in good faith in accordance with the ordinary meaning to be given to the terms thereof in their context and in the light of the object and purpose of NAFTA as prescribed by Article 31 of the *Vienna Convention*, and that considering particularly the circumstances of NAFTA's conclusion, any different interpretation would lead to a result which is manifestly absurd or unreasonable within the meaning of Article 32 of the *Vienna Convention*.[19]

31. Canada argues that there is simply no provision in the NAFTA that could authorize a Tribunal to consider whether an interpretation of Article 1105 by the NAFTA Free Trade Commission has been validly issued under Article 1131(2). Canada states that someone may have that responsibility under the NAFTA, but not this Tribunal. When pressed, Canada suggested that a NAFTA Chapter 20 panel might have such a responsibility.[20] It said so despite the fact that under NAFTA Article 2012 such panels receive their terms of reference from, and report to, the NAFTA Free Trade Commission. It said so despite the fact that an interpretation issued by the Commission requires unanimity (making it highly unlikely that one of the NAFTA Parties might turn around and challenge a position to which it had already agreed); and it said so despite the fact that the Commission's interpretive statements have no impact on Chapter 20 disputes.

32. In supporting Canada, the United States and Mexico apparently desire this Tribunal to ignore the plain wording of NAFTA Article 1131, which provides two statements of the

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[18] Damages Hearing Transcripts at 654.
[19] *Re: Ethyl Corp. and Canada* (Jurisdiction) at footnote 34.
[20] Damages Hearing Transcripts at 654-655.

"governing law" for this Tribunal.[21]

33. After having determined how the words of NAFTA Article 1131(1) establish the governing law of this arbitration, this Tribunal must then determine whether an "interpretation" has been issued by the NAFTA Free Trade Commission under which it must be bound. Just as it is not appropriate for any of the NAFTA Parties to unilaterally dictate to the Tribunal what "the applicable rules of international law" must mean under NAFTA Article 1131(1), it is also not appropriate for the Tribunal to be told what must constitute an "interpretation" under NAFTA Article 1131(2).

34. It is generally accepted in international law that a Tribunal may determine its own competence[22]. Supported by the other NAFTA Parties, Canada says that this Tribunal has no business considering whether the NAFTA Free Trade Commission's Interpretive Statement actually constitutes a valid "interpretation" under NAFTA Article 1131(2). It does so despite the obvious fact that it is for this Tribunal alone to determine whether it has the competence to hear the Investor's claim, and if so, to determine what the governing law of this arbitration shall be, in light of the specific terms of the NAFTA. This is why the very first NAFTA Tribunal to issue a substantive award began its analysis by examining Article 1131. In doing so, it determined that the customary international law rules of treaty interpretation are included in the applicable law of NAFTA Chapter 11, in absence of the existence of an applicable "interpretation" issued by the NAFTA Free Trade Commission.[23]

35. Just as this Tribunal has determined what "the applicable rules of international law" means under NAFTA Articles 102(2) (or NAFTA Article 1131(1)), this Tribunal must also determine what "interpretation" means under NAFTA Article 1131(2). In doing so, this Tribunal would likely juxtapose the meaning of "interpretation" under NAFTA Article 1131(2) with the terms "modification" and "addition" contained in NAFTA Article 2202(1). If this Tribunal determines that what the NAFTA Free Trade Commission calls an "interpretation" is actually a "modification" or an "addition" to the

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[21] The primary rule expressed in paragraph (1) of NAFTA Article 1131 is that the Tribunal must decide the issues in dispute "in accordance with [the NAFTA] and applicable rules of international law." A second rule expressed in paragraph (2) is that the Tribunal shall be bound by an "interpretation" by the Commission.

[22] See for example, Chapter 12 of Bin Cheng "*General Principles of Law*" entitled "Power to Determine the Extent of Jurisdiction" at 275 - 278. Not only is this doctrine a long-established customary rule of international law, this doctrine is endorsed by Article 21.2 of the UNCITRAL Arbitration Rules.

[23] Re: *Ethyl Corp. and Canada*, NAFTA/UNCITRAL Tribunal, Award on Jurisdiction, June 24, 1998 at para. 50. At para. 52, on the *Vienna Convention*, this NAFTA Tribunal stated that:

> Canada is a party to the *Vienna Convention*, having acceded to it on 14 October 1970, and the United States accepts it as a correct statement of customary international law. Moreover, given that 84 States are parties to the *Vienna Convention* (as of 15 April 1998) and that Articles 3 1 and 32 "were adopted without a dissenting vote," these Articles clearly "may be considered as declaratory of existing law". (Footnotes ommitted)

existing terms of NAFTA Article 1105(1), it is obliged ***not*** to allow its application of the "applicable rules of international law" to the interpretation of NAFTA Article 1105(1) to be affected by the NAFTA Free Trade Commission's attempted amendment. If the Commission wanted to make such a drastic change to NAFTA Article 1105 (1) it should have used the appropriate NAFTA provision contained in NAFTA Article 2202(1).

36. If the Tribunal were to accept the meaning of "interpretation" put forward by the Parties, which can be summarized as being that no matter what the effect may be, anything the NAFTA Free Trade Commission says is an "interpretation" must be an "interpretation," there would be a manifestly absurd result which would make the terms of NAFTA Article 2202(1) inutile. To do so would violate the customary international law of treaty interpretation, recalled in NAFTA Articles 102(2) and 1131(1), and codified within Article 31 of the *Vienna Convention on the Law of Treaties*. As the WTO Appellate Body noted in one of its earliest reports:

> An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. [24]

37. The NAFTA Parties chose to use the well-known international law term "international law" in NAFTA Article 1105. If the NAFTA Parties wanted to refer to the well-known but narrower area of "customary international law" they would have so specified that within NAFTA Article 1105(1).

38. The NAFTA Parties had a proper route available to them to modify the obligations undertaken by NAFTA Article 1105(1) in a narrower fashion to include only "treatment in accordance with the customary international law minimum standard of treatment" and ensure that "fair and equitable treatment" and "full protection and security" are not to be treated as thematically distinct standards of treatment. To do so, they would have to agree to make such additions or modifications by way of a NAFTA Article 2202(1) amendment. Otherwise, if the NAFTA Parties were permitted to make amendments through the NAFTA Article 1131 process, the terms of Article 2202(1) will be rendered superfluous and inutile.

The Minimum Standard of Customary International Law is Not Static

39. The Investor has already noted within this Post-Hearing Submission that the Government of Mexico has admitted that "conduct which may have not violated international law the 1920's [*sic.*] might very well be seen to offend internationally accepted principles today." The Investor is pleased not only to see that the Government of Mexico apparently

[24] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996 at 15.

recognizes international law "principles" to be a valid source of determining the minimum standard of treatment owed to NAFTA investments under NAFTA Article 1105(1) – in addition to custom – but that the Government of Mexico also has recognized that the standards of treatment required under international law were not frozen in the 1920's, a position that Canada has often argued before this Tribunal.

40. Without adopting Mexico's argument for an extremely high threshold for treatment that violates the international standards contained in NAFTA Article 1105 – which this and other tribunals have concluded are not correct – the Investor merely notes that the portion of the *ELSI* case emphasized by Mexico at paragraph 9 of its submission actually supports the Investor's contention that the Verification Review Episode constitutes a breach of Article 1105(1) even if the NAFTA Commission's "interpretation" is correct.

41. In the *ELSI* case, the International Court of Justice referred to arbitrary state conduct that represented "... a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety." The Investor submits that it is precisely because Canada's conduct during the Verification Review Episode shocked, or at least surprised, this Tribunal's sense of judicial propriety that it originally found that a breach of NAFTA Article 1105(1) had taken place.

42. In summary the Investor submits that:

a) this Tribunal should reject those arguments on interpretation made by the non-disputing Parties and by Canada with respect to the Interpretative Statement of the NAFTA Free Trade Commission; and that

b) this Tribunal should be permitted to complete its findings on substantive issues arising out of this claim, such as issues relating to NAFTA Article 1102, within its upcoming award.

All of which is respectfully submitted.

Submitted this 14th day of December, 2001

Barry Appleton
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