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**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

COUNTER-MEMORIAL

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PART ONE - SUMMARY OF CANADA'S POSITION

1. The United States ("U.S.") and Canada have a long history of trade disputes respecting Canadian exports of softwood lumber to the U.S. The U.S. has persistently alleged that provincial forest management practices and stumpage fees confer countervailable subsidies. British Columbia ("B.C."), Alberta, Ontario and Quebec have invariably been perceived by the U.S. as conferring countervailable subsidies through their forest management practices.
2. On May 29, 1996, Canada and the U.S. entered into the Softwood Lumber Agreement ("SLA"). Under the SLA, Canada is obliged to impose fees on certain exports to the U.S. of softwood lumber first manufactured in B.C., Quebec, Ontario and Alberta (the "covered" provinces).
3. Following extensive consultations with the covered provinces, stakeholders and exporters of softwood lumber from those provinces, Canada added softwood lumber first manufactured in the covered provinces to the Export Control List. Canada implemented a non-discriminatory system to allocate quota for lumber first manufactured in the covered provinces and administered the allocation of quota and collection of fees required by the SLA. That scheme has regulated all exports of softwood lumber first manufactured in the covered provinces, both domestic and foreign-owned.
4. The Investor alleges that the implementation of the SLA constitutes a violation of Chapter Eleven of the North American Free Trade Agreement ("NAFTA"). In effect, the Investor contends that Chapter Eleven of NAFTA immunizes it and other U.S. investors from rules applicable to all exporters of softwood lumber first manufactured in the covered provinces. If the Investor's position is accepted, its investment would be exempt from the consequences of any agreement between Canada and the U.S. that regulates the trading relationship between the two countries.

5. In the eyes of the Investor, NAFTA Chapter Eleven overrides the sovereign right of the Parties to manage their trade relationship or to regulate the activities of investors of NAFTA Parties. Such a position is absurd. It has no basis in the provisions of NAFTA or international law. Canada's obligations under NAFTA are treaty obligations owed to the U.S. and Mexico. Any assessment of Canada's compliance with Chapter Eleven obligations must be measured in this context.
 6. Moreover, Canada's obligations to the U.S. under NAFTA can be altered by the agreement of the U.S and Canada. Treaty obligations are based on consent and can be changed by consent.
 7. The SLA and Canada's implementation of it are consistent with Canada's obligations under Articles 1102, 1106 and 1110 of NAFTA.
- A. Article 1102**
8. The "national treatment" provision in Article 1102(2) requires a NAFTA Party to accord treatment to an investment of another NAFTA Party which is no less favourable than the treatment it accords domestic investments. It prohibits treatment which discriminates on the basis of the foreign investment's nationality.
 9. The Export Control Regime for softwood lumber does not apply differently to domestic and foreign investments, and does not have the effect of discriminating against foreign investments. Pope and Talbot, Ltd., (the "Investment") receives no less favourable treatment under the Export Control Regime than domestic investments in like circumstances.
 10. Further, the circumstances surrounding the treatment of investments with which the Investor seeks to compare itself are not like the circumstances surrounding the treatment of the Investment. The Investment is a large, established B.C. softwood lumber producer. The Investor compares its Investment's treatment under the Export Control Regime to the treatment of investments located in provinces where different circumstances prevail, or

which are not subject to the SLA. Likewise, it compares its treatment to the treatment of new entrants and small producers. These comparisons are irrelevant for the purposes of Article 1102 because the investments compared are not in like circumstances.

B. Article 1106

11. As expressly provided in Article 1106(5), the only requirements prohibited by Article 1106 are those explicitly identified in Articles 1106(1) and (3). The specific requirements at issue in this case are those listed in Article 1106(1)(a), (e) and (3)(d).
12. Articles 1106(1)(a), (e) and (3)(d) relate to requirements designed to increase the benefits brought to a host NAFTA Party by increased exports and foreign exchange earnings. The Export Control Regime, which limits fee-free exports, clearly does not fall within these provisions.
13. Canada complied with its Article 1106(1)(a) obligation not to impose on an investment the requirement to export a given level. The Export Control Regime does not require the Investment to export any amount of its production.
14. Canada also complied with its Article 1106(1)(e) obligation not to restrict an investment's sales of goods in Canada by relating such domestic sales to the investment's export levels. The Export Control Regime imposes no restriction whatsoever on an investment's domestic sales.
15. Canada complied with the related obligation under 1106(3)(d) not to condition the receipt of an advantage on an investment's compliance with a requirement restricting domestic sales based on export levels. Again, the Export Control Regime does not restrict domestic sales.
16. The Investor misinterprets Article 1106 in a way that is in clear conflict with its ordinary meaning. Canada's Export Control Regime does not breach Article 1106, as properly interpreted.

C. Article 1110

17. Canada's obligation under Article 1110 is not to expropriate an investment of an investor of another Party except in accordance with the conditions identified in Article 1110(1)(a) to (d). The only question in this case is whether the impugned measure is, or amounts to, expropriation of an investment. The Export Control Regime does not expropriate the Investor's Investment and there is no breach of Article 1110. As a result, there is no need to consider Article 1110(1)(a) to (d).
18. The threshold for when interference amounts to expropriation at international law, and for the purposes of Article 1110, is not nearly as low as the Investor suggests. Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required. The Export Control Regime does not interfere with the Investment, nor does it deprive the Investment of any rights. The Investment is a thriving enterprise, which has continued to operate at a profit exporting lumber to the U.S. under the Export Control Regime.
19. In any event, the implementation of the SLA through the Export Control Regime is a good faith, valid regulatory measure within Canada's "police" or regulatory power. As such, any impact it has on an investment cannot be considered expropriation of the investment.
20. Accepting the interpretation and application of NAFTA Article 1110 proposed by the Investor leads to a conclusion that every regulatory measure of the NAFTA Parties that has an effect on an investment requires compensation, even though there has been interference with the investment's fundamental ownership rights. This position is inconsistent with the customary international law on expropriation and must be rejected.

D. The SLA Prevails Over NAFTA To The Extent That They Are Incompatible

21. Were the Tribunal to find that Canada has breached its obligations under NAFTA Articles 1102, 1106 or 1110, it would have identified an incompatibility between those obligations and Canada's obligations under the SLA. In such a case the *Vienna*

Convention provides that the SLA prevails to the extent of the incompatibility, and the Investor's claim must fail.

E. Loss or Damage

22. The Investor has not incurred loss or suffered harm and likely would have fared worse but for the SLA.

PART TWO - THE FACTS

23. This section outlines the softwood lumber industry, the history of softwood lumber trade disputes, negotiations leading to the conclusion of the SLA, the terms of the SLA, the implementation of the SLA, the quota allocation system and its application to the Investment.

A. Softwood Lumber Industry

24. Canada is one of the world's major forest product exporters. It accounts for almost 50% of global trade in softwood lumber. Canada exports about two-thirds of its annual production of softwood lumber.¹ Exports of softwood lumber to the U.S. from Canada's provinces and territories were worth over Cdn. \$10.7 billion in 1999.²
25. Softwood lumber is used mainly in home building and construction. It is not, however, a homogenous commodity as the Investor asserts.³ There are various grades and sizes of lumber.⁴ The predominant uses (such as decking, or framing) vary with the properties and characteristics of the different species of softwood.⁵
26. Under Canada's constitution, the management of forest resources is a provincial responsibility, while negotiation and conclusion of international trade agreements is within federal jurisdiction.⁶ As a result, federal-provincial co-operation is vital in managing issues related to softwood lumber exports.

1 Ilan Vertinsky Affidavit, para. 33.

2 Douglas George Affidavit, para. 8.

3 Investor's Memorial, para. 8.

4 Ilan Vertinsky Affidavit, paras 34-40.

5 Ilan Vertinsky Affidavit describes variety of products and prices para. 35.

6 The division of powers between the federal and provincial governments is stipulated in heads 91 and 92 of the Canadian Constitution. Tom MacDonald Affidavit, para. 27.

27. The provinces own 71% of forest resources of Canada. In the main softwood lumber exporting provinces, provincial ownership is even higher (B.C. (95%), Alberta (87%), Ontario (88%) and Quebec (88%)). While the provincial governments of Manitoba and Saskatchewan also own large tracts of forest land, those provinces export significantly less softwood lumber.⁷
28. The majority of softwood lumber resources in the Maritimes are privately owned, for example New Brunswick (51%), Nova Scotia (69%) and Prince Edward Island (98%).⁸ The forests of the Yukon and Northwest Territories are owned by the federal government, although the responsibility for management of these forests rests with various agencies.⁹
29. Whether forest resources are privately or provincially owned has significant implications for their management. Private landowners have more freedom in managing their forests and are subject to less regulation. They are generally able to make their own decisions regarding when and how much to harvest.¹⁰
30. On the other hand, producers harvesting provincially owned forests are subject to a variety of constraints such as annual allowable cuts (AAC's), provincially set rates charged for cutting standing timber ("stumpage"), and reforestation requirements.¹¹
31. The majority of Canada's softwood lumber exports to the U.S. are from the provinces of B.C. Alberta, Ontario and Quebec.¹² B.C. has the highest export levels of these four provinces.¹³

7 B.C., Alberta, Ontario and Quebec export 95% of Canadian softwood lumber to the U.S. "Request for public comment regarding softwood lumber practices in Canada and softwood lumber trade between the U.S. and Canada", (March 2, 2000) 65 Federal Register, 11,363-11,364 (Book of Authorities Vol. I, Tab 1), Ilan Vertinsky Affidavit, paras 27-28, Table 1.

8 Ilan Vertinsky Affidavit, Table 1.

9 Ilan Vertinsky Affidavit, Table 1.

10 Ilan Vertinsky Affidavit, para.30.

11 Ilan Vertinsky Affidavit, paras 30-32.

12 See the "Request for public comment regarding softwood lumber practices in Canada and softwood lumber trade between the U.S. and Canada", (March 2, 2000) 65 Federal Register, 11,363-11,364 (Book of Authorities Tab 1).

13 Ilan Vertinsky Affidavit, Table 6.

B. Two Decades of Trade Battles

32. Between 1982 and 1996,¹⁴ the U.S. softwood lumber industry repeatedly sought to have the U.S. government restrict imports of Canadian softwood lumber, alleging that the forest management practices of certain provinces, notably B.C., Alberta, Ontario and Quebec (“the four provinces”), conferred countervailable subsidies under U.S. countervailing duty (“CVD”) law.¹⁵
33. The U.S. has responded to the U.S. industry by conducting three CVD investigations in 1982 (“*Lumber I*”), 1986 (“*Lumber II*”) and 1991 (“*Lumber III*”).¹⁶ Further, in 1986 a Memorandum of Understanding was concluded between the U.S. and Canada¹⁷ and in 1994 the U.S. challenged rulings in Canada’s favour in 1994 rendered by a *Canada-U.S. Free Trade Agreement* (“FTA”) Chapter Nineteen Panel.¹⁸
34. In December 1994, the U.S. amended its CVD law aimed at ensuring that any future finding of countervailable subsidy by the U.S. Department of Commerce (“Commerce”) would survive a NAFTA challenge. This amendment made Canada’s prospects for a successful outcome of another CVD case uncertain, at best.¹⁹
35. This ongoing trade dispute created significant uncertainty for Canadian exporters and producers and jeopardized access to the U.S. market for exports of Canadian softwood lumber.²⁰
36. By the fall of 1995, the U.S. lumber industry was threatening to file yet another CVD petition respecting forest management practices in the four provinces.²¹ Consequently, Canada faced the uncertainty of yet another long CVD battle, inevitable interim

14 Joseph Kalt Affidavit, paras 8-10.

15 Joseph Kalt Affidavit, paras 8-9; Tom MacDonald Affidavit, para. 9.

16 Joseph Kalt Affidavit, para. 9; Tom MacDonald Affidavit, paras 11, 12, 15.

17 Joseph Kalt Affidavit, para. 9; Tom MacDonald Affidavit, para. 13.

18 Tom MacDonald Affidavit, paras 18-22; Joseph Kalt Affidavit, para. 9; Ilan Vertinsky Affidavit, para. 18.

19 Tom MacDonald Affidavit, para. 25; Joseph Kalt Affidavit, para. 9.

20 Tom MacDonald Affidavit, para. 10; Claudio Valle Affidavit, para. 16; Joseph Kalt Affidavit para. 7.

21 Tom MacDonald Affidavit, para. 24.

restrictions on market access and a significant risk that countervailing duties would be imposed on softwood lumber imports from Canada.²²

C. Negotiations and Conclusion of the SLA

37. Faced with these prospects, Canada, with the full participation of the four provinces and industry representatives from those provinces, began negotiations with the U.S. in the Fall of 1995 to resolve the dispute.²³
38. By February 16, 1996, Canada and the U.S. reached an agreement in principle. Its main elements were:
 - (a) an export fee charged on B.C. lumber exports exceeding 9 billion board feet annually;
 - (b) separate arrangements for each of Alberta, Ontario and Quebec concerning stumpage practices and monitoring of exports to ensure that certain export levels were not exceeded;
 - (c) use of the Federal *Export and Import Permits Act*²⁴ ("EIPA") to implement Canada's obligation to charge fees on exports of B.C. lumber over 9 billion board feet and monitor exports from Quebec, Alberta and Ontario;
 - (d) placing softwood lumber from the four provinces on the federal Export Control List.²⁵

22 Tom MacDonald Affidavit, para. 26; Joseph Kalt Affidavit, para. 11; Ilan Vertinsky Affidavit, para. 41.

23 Tom MacDonald Affidavit, paras 24, 27-34.

24 R.S.C. 1985, c. E-19.

25 Tom MacDonald Affidavit, para. 31 and Exhibit C.

39. The agreement in principle excluded the remaining provinces and territories. Their exclusion reflected the fact that they had either been excluded or had not been the target of the U.S. CVD actions, their comparatively minor level of softwood lumber production, and, in the case of the Maritime provinces, greater private land ownership.²⁶
40. Finalizing the agreement in principle required sound statistical data on lumber exports by province of origin. Gathering this data proved difficult and the numbers provided by each of the four provinces were estimates only. When the aggregate of these estimates significantly exceeded the actual total of all Canadian lumber exports to the U.S., the U.S. advised that it was unwilling to finalise an agreement.²⁷ As a result, negotiations took another direction.²⁸
41. Discussion within the group of provincial and industry stakeholders shifted to modelling a Canada – U.S. agreement on the B.C. export fee approach. For Quebec, Alberta and Ontario, this meant a shift to a federal border measure. For B.C. it meant replacement of a federal border measure covering exports from British Columbia only, to one that covered the four provinces, in which volumes of softwood lumber exports were expressed in aggregate, as opposed to provincial, terms.²⁹
42. Negotiations with the U.S. proceeded under Federal Government leadership with all four provinces, and usually their industry advisors, together at the table.³⁰ The Investment was consistently apprised of the status of negotiations by the Council of Forest Industries (“COFI”).³¹
43. Negotiations culminated in the conclusion of the SLA, announced on April 2, 1996. The SLA was signed on May 29, 1996, and made effective from April 1, 1996 onward.³²

26 Tom MacDonald Affidavit, paras 35-39; Ilan Vertinsky Affidavit, para. 46.

27 Tom MacDonald Affidavit, paras 40-42.

28 Tom MacDonald Affidavit, paras 44-47.

29 Tom MacDonald Affidavit, paras 44-46.

30 Tom MacDonald Affidavit, para. 47.

31 Douglas George Affidavit, Exhibit Y.

32 Tom MacDonald Affidavit, para. 48.

D. The SLA

44. The SLA is a five-year agreement that expires on March 31, 2001.³³

45. The principal elements of the SLA are:

- (a) a commitment by the U.S. to refrain from any CVD, anti-dumping (“AD”) or other trade-restrictive measures.³⁴ (SLA, Article I);
- (b) a commitment by Canada to impose export fees on exports of softwood lumber first-manufactured in B.C., Alberta, Ontario and Quebec above the annual specified threshold of 14.7 billion board feet. This threshold level is called the Established Base (“EB”).³⁵ All exports up to this EB level can be exported without a fee (SLA, Article II:2). Contrary to the Investor’s assertion,³⁶ producers of less than 10 million board feet are not exempt from the imposition of export fees;
- (c) Canada must impose an export fee of US\$ 50 per thousand board feet (subject to annual adjustment for inflation) on shipments between 14.7 billion board feet and 15.35 billion board feet (the Lower Fee Base or “LFB”)³⁷ (SLA, Article II:2);
- (d) Canada must impose an export fee of US\$ 100 per thousand board feet (subject to annual adjustment for inflation) beyond the LFB limit (the Upper Fee Base or “UFB”)³⁸ (SLA, Article II:2);

33 Article X of the SLA (Annexed to the Counter-Memorial: Treaties, Regulations and Notices to Exporters (“Book of Treaties”, Tab 3); Douglas George Affidavit, para. 8

34 Tom MacDonald Affidavit, para. 49.

35 Tom MacDonald Affidavit, para. 50.

36 Investor’s Memorial, para. 27.

37 Tom MacDonald Affidavit, para. 52.

38 Tom MacDonald Affidavit, para. 52.

- (e) Canada must allocate the EB and LFB among Canadian softwood lumber exporters³⁹ (SLA, Article II:4);
- (f) if the average target lumber price exceeds a certain threshold in each quarter, Canada earns an additional 92 million board feet of fee-free exports, called the “trigger price bonus”⁴⁰ (SLA, Article III). Canada earned trigger price bonuses in each of the 1st to 6th quarters and again in the 12th to 16th quarters of the SLA;⁴¹
- (g) orderly marketing provisions or “speed bumps”, limiting each quota holder’s fee-free exports to no more than 28.75% of its allocated EB in any given quarter, are included to prevent export surges that could disrupt the U.S. market. They ensure that annual exports will not be unduly concentrated in any particular time period⁴² (SLA, Article II:6);
- (h) speed bumps do not apply to exporters with less than 10 million board feet in annual output, because their exports do not have a noticeable effect on export surges and because it would be difficult to manage small amounts of quota under the additional constraint of quarterly speed bumps, particularly for seasonal producers⁴³ (SLA, Article II:9(a)). Of the roughly 500 quota holders, 276 are exempt from speed bumps under this provision.⁴⁴

46. These obligations are imposed directly by the SLA. The SLA is not silent on implementation as the Investor asserts⁴⁵ and Canada incorporated the fundamental principals of the SLA in the Export Control Regime. The implementation of the SLA was dictated by the terms of the SLA.⁴⁶

39 Claudio Valle Affidavit, para. 39 (f).

40 Tom MacDonald Affidavit, para. 51.

41 Douglas George Affidavit, para. 66.

42 Tom MacDonald Affidavit, para. 53.

43 Tom MacDonald Affidavit, para. 53; Douglas George Affidavit, paras 46-47; Ilan Vertinsky Affidavit, para. 82.

44 Douglas George Affidavit, para. 48.

45 Investor’s Memorial, para. 17.

46 Claudio Valle Affidavit, para. 39.

47. In return for agreeing to monitor exports and impose fees on exports over 14.7 billion board feet, Canada insisted that the U.S. agree to refrain from taking trade actions respecting softwood lumber for the five year period the SLA was in effect. In order for the U.S. to make this commitment, letters from U.S. softwood lumber producers representing at least 60% of the industry stating that the SLA removed any material injury or threat of material injury, were necessary.⁴⁷ These letters provided sufficient legal justification to dismiss any petition filed in the five year period, and enabled the U.S. to commit itself in advance to dismiss such petitions.⁴⁸ The letters are attached as Annex 1 to the SLA and are an integral part of the Agreement. This Annex includes a letter from Pope & Talbot Inc. dated April 4, 1996⁴⁹ and letters from other major U.S. softwood lumber producers.
48. The producer letters showed that U.S. industry was not concerned with any alleged injury that might be caused by exports from the non-covered provinces. Indeed, the producers were prepared to represent to Commerce that the SLA removed all alleged injury from Canadian imports based on an agreement that covered only four provinces.⁵⁰
49. Canada and the U.S. expressly excluded the Maritime provinces from the SLA through an exchange of letters on May 29, 1996.⁵¹

E. The Quota Allocation System

50. The quota allocation system for softwood lumber adopted the "best practices" of Canada's quota allocation systems for other goods.⁵² It was based on the Export and Import Controls Bureau's ("EICB") extensive experience with quota allocation systems and reflects well-established, long-standing practice in development of such systems.

47 Tom MacDonald Affidavit, para. 54.

48 Tom MacDonald Affidavit, para. 56.

49 Tom MacDonald Affidavit, paras 54 and 58, and Exhibit F.

50 Tom MacDonald Affidavit, para. 59.

51 Tom MacDonald Affidavit, para. 62 and Exhibit G.

52 Claudio Valle Affidavit, para. 12.

51. The EICB assists the Minister for International Trade (the "Minister") in the administration of quota allocation systems, the EIPA and the SLA.⁵³
52. The EICB manages the import tariff-rate quota (TRQ) system for Canada's supply-managed agricultural sectors pursuant to NAFTA and WTO commitments, administers an import monitoring programme for carbon and specialty steel products, and oversees the gradual liberalization of textile and clothing import quotas within the context of the WTO Agreement on Textiles and Clothing. Under the EIPA, the EICB also selectively controls trade in certain militarily and strategically important goods and commodities to implement international agreements that aim to preserve peace and security.⁵⁴
53. Between April 1, 1996 and October 31, 1996, the EICB developed the allocation system under the SLA.⁵⁵ Since the SLA prescribed many features of the quota allocation system, those aspects required no further elaboration or development. The SLA, and not the Export Control Regime, determined that such features would be part of the allocation system.⁵⁶
54. The quota allocation system for softwood lumber encourages fairness and efficiency and allows stakeholders to operate in a more equitable and predictable environment.⁵⁷ Whether the exporter of softwood lumber is foreign-owned or Canadian owned is irrelevant in Canada's allocation system.⁵⁸ Where the circumstances surrounding the treatment of investment alike, Canada treats the Investment like other Canadian or foreign-owned quota holder, Canadian or foreign-owned.

53 Douglas George Affidavit, para. 6.

54 Claudio Valle Affidavit, para. 7.

55 Claudio Valle Affidavit, para. 37.

56 Claudio Valle Affidavit, para. 39.

57 Claudio Valle Affidavit, para. 11.

58 Claudio Valle Affidavit, para. 157.

55. The EICB engages in wide consultations with stakeholders concerning all aspects of negotiation, implementation and administration of import and export controls. The EICB places prime importance on devising and maintaining export quota allocation systems that address and balance the circumstances of affected exporters throughout the country.⁵⁹
56. This is the case respecting the controls imposed on exports of softwood lumber first-manufactured in the covered provinces. The EICB develops and applies softwood lumber quota allocation policies in consultation with stakeholders, including provincial governments, industry members and associations,⁶⁰ such as the B.C. Interior Lumber Manufacturers' Association ("ILMA"), to which the Investment belongs,⁶¹ and the B.C. COFI, of which ILMA is a member association.⁶²
57. COFI held numerous meetings with its members prior to the conclusion of the SLA and during the consultations concerning the implementation of the SLA.⁶³ The Investment received relevant information through ILMA and COFI and, as the President of the Investment admitted, the Investment never complained to COFI or Canada about the SLA or the allocation system used to implement it.⁶⁴ In light of meetings and consultations involving EICB, COFI and ILMA, the Investment's participation was extensive.
58. The EICB consulted extensively with stakeholders affected by the SLA throughout the period of development and further elaboration of the quota allocation system and took their input into account.⁶⁵

⁵⁹ Claudio Valle Affidavit, para. 13.

⁶⁰ Douglas George Affidavit, paras 24-30, Claudio Valle Affidavit, paras 46-47, 49, 18-32.

⁶¹ Claudio Valle Affidavit, para. 19.

⁶² Claudio Valle Affidavit, para. 21.

⁶³ Douglas George Affidavit, Exhibit Y.

⁶⁴ *Pope and Talbot, Inc. v. Government of Canada*, Motion for Interim Measures (January 7, 2000) (Evidence, Cross-Examination of Abe Friesen) (Book of Authorities Vol. I, Tab 2).

⁶⁵ Claudio Valle Affidavit, paras 49-51; Douglas George Affidavit, Exhibit Y. See also Investor's Memorial, para. 30, where the Investor implicitly acknowledges indirect involvement in the drafting of industry associations' submissions.

59. To ascertain the nature of the activities of the industry nationally, questionnaires were developed in consultation with industry stakeholders.⁶⁶ They were sent to industry stakeholders on June 19, 1996, under Notice to Exporters No. 92.⁶⁷ The EICB received over 600 completed questionnaires.⁶⁸
60. Notice to Exporters No. 92 also solicited the industry's views on methods of quota allocation. The EICB received written submissions suggesting that the allocation system address various concerns. The industry in B.C. wanted a locked-in provincial share allocated on the basis of historic exports. Ontario's industry associations stressed the need to have a growth mechanism in place to ensure that quota that was not fully utilized would be reallocated to exporters that fully exported their allocations. Quebec industry stressed the need for a mechanism that would ensure that new mills receive a fair allocation.⁶⁹
61. Contrary to the Investor's assertion,⁷⁰ the quota allocation system could neither be implemented based on provincial allocations nor administered by provincial governments. The reason for this is that the SLA mandated the placement of softwood lumber first manufactured in B.C., Alberta, Ontario and Quebec on Canada's Export Control List⁷¹ under the EIPA. The EIPA is administered by the federal government.⁷²
62. By August of 1996, a general consensus had emerged regarding the principal elements of an allocation method. Stakeholders agreed that quota should be allocated on the basis of corporate shares rather than a covered province's share and that company allocations be based on a company's best export performance to the U.S.⁷³ They also recognized the need to provide for new entrants and a growth mechanism, and to finalize the

66 Claudio Valle Affidavit, paras 52-55.

67 Claudio Valle Affidavit, para. 56.

68 Claudio Valle Affidavit, para. 72.

69 Claudio Valle Affidavit, paras 57-64.

70 Investor's Memorial, para. 32.

71 Article II:1 of the SLA.

72 Claudio Valle Affidavit, paras 67-69.

73 Claudio Valle Affidavit, paras 79-80 and Exhibit K.

methodology of the allocation system so that it could be implemented within the time constraints of the SLA.⁷⁴

63. On September 10, 1996, the Minister announced the Softwood Lumber Plan,⁷⁵ including the elements of a softwood lumber quota allocation system. Contrary to the Investor's assertion,⁷⁶ quota would be allocated among Canadian softwood lumber exporters (SLA, Article II:4). The quota allocation system would include provisions for new entrants,⁷⁷ transitional reserve and Minister's reserve,⁷⁸ and no quota would be allocated directly to wholesalers.⁷⁹
64. The new entrants, transitional and Minister's reserves consisted of:
 - (a) 294 million board feet of the EB, 150 million board feet of the LFB and 184 million board feet in trigger price bonus for new entrants;⁸⁰
 - (b) a one-time transitional adjustment of 170 million board feet of the EB and 50 million of the LFB; and⁸¹
 - (c) 50 million board feet of EB to address hardship cases and to correct potential errors.⁸²
65. The Minister's reserve, which is intended to address cases of hardship and to correct errors, was 50 million board feet of EB quota in year 1 and 40 million board feet of EB quota in each of years 2, 3 and 4.⁸³

74 Claudio Valle Affidavit, para. 88.

75 Claudio Valle Affidavit, para. 89, Exhibit P.

76 Investor's Memorial, para. 32.

77 New entrants are defined by Notice to Exporters No. 94, para. 12.2 (Book of Treaties Tab 16).

78 Claudio Valle Affidavit, para. 90.

79 Claudio Valle Affidavit, para. 95.

80 Notice to Exporters No. 94, para. 12.1 (Book of Treaties Tab 16).

81 Claudio Valle Affidavit, para. 103.

82 Claudio Valle Affidavit, para 104.

83 Douglas George Affidavit, para. 61.

66. Allocations from the Minister's reserve are made on a case-by-case basis and not on the basis of provincial shares.⁸⁴
67. The Investment has never requested an allocation from the Minister's reserve.⁸⁵
68. Quota is allocated annually to primary manufacturers (sawmills that produce lumber from logs) and remanufacturers (companies that purchase lumber from primaries and perform "value added" processes).⁸⁶
69. The quota year runs from April 1st to March 31st of each year.⁸⁷
70. Exporters that fail to obtain a permit within 20 days of exporting softwood lumber first manufactured in the covered provinces are subject to a "liquidated damages" fee of US\$ 100 per thousand board feet by U.S. Customs.⁸⁸
- F. Year 1 (From April 1, 1996 to March, 31, 1997)**
71. After deducting the new entrants' reserve, the one-time transitional adjustment and the Minister reserve, the EB and LFB remaining to be allocated to companies was 14.186 billion board feet and 490 million board feet, respectively.⁸⁹
72. The allocations made with respect to exports of lumber first manufactured in B.C. were provided to companies in B.C. and to remanufacturers in Alberta, Manitoba, Ontario and Quebec as well. Similarly, a number of remanufacturers in B.C. were granted quota allocations to export lumber first manufactured in Quebec, Ontario and Alberta.⁹⁰

84 Douglas George Affidavit, paras 62 and 64.

85 Douglas George Affidavit, para. 65.

86 Douglas George Affidavit, para. 15.

87 Douglas George Affidavit, para. 16.

88 Douglas George Affidavit, para. 19.

89 Claudio Valle Affidavit, para. 106.

90 Claudio Valle Affidavit, para. 108.

73. The aggregate of the initial quota allocations to firms exporting lumber first manufactured in each covered province as a percentage of the 14.186 billion board feet of EB was: for B.C. - 59%; Alberta - 7.7%; Ontario - 10.3%; and Quebec - 23.0%.⁹¹
74. Contrary to the Investor's assertion,⁹² the percentage shares identified for lumber first manufactured in each covered province represented the consensus achieved by industry stakeholders with respect to what would be the starting points for allocating the corporate share.⁹³
75. In late September and early October of 1996, the EICB, in consultation with stakeholders, developed specific criteria and procedures for new entrants to provide access to export quota for producers and remanufacturers with new facilities, facilities under construction or major investments in their existing facilities.⁹⁴ Applications for new entrant quota were solicited by letter dated October 9, 1996.⁹⁵
76. Two hundred and eighteen applications in the new entrants category were received and rigorously assessed in accordance with strict criteria to determine eligibility,⁹⁶ as the 8.3 billion board feet in new entrants allocations they requested far exceeded the new entrants' reserve of 628 million board feet.⁹⁷
77. On October 31, 1996, letters were sent to all quota recipients⁹⁸ (over 500, two-thirds of which have EB allocations of 7 million board feet or less⁹⁹), including new entrants, informing them of their EB, LFB and, where applicable, trigger price bonus allocations.

91 Claudio Valle Affidavit, para. 91.

92 Investor's Memorial, para. 35. Generally, there is no such thing as a "provincial share" as asserted in the Investor's Memorial, paras 40 and 45; Claudio Valle Affidavit, paras 65-69, 90-91.

93 Claudio Valle Affidavit, paras 91-92.

94 Tom MacDonald Affidavit, paras 69-71, 73 and Exhibit I.

95 Claudio Valle Affidavit, para. 115, Exhibit T.

96 Tom MacDonald Affidavit, paras 69-71, 73 and Exhibit I.

97 Tom MacDonald Affidavit, para. 72; Claudio Valle Affidavit, paras 117-118.

98 Claudio Valle Affidavit, para. 123, Exhibit U (Letter to Pope & Talbot, Ltd.).

99 Douglas George Affidavit, para. 14.

The EICB also issued Notice to Exporters No. 94 which explained the features of the final allocation method.¹⁰⁰

78. The quota allocation system for softwood lumber covered by the SLA has a mechanism to adjust for under-utilization ("growth mechanism"), a feature common to most of Canada's tariff-rate quota regimes.¹⁰¹
79. Companies that do not fully utilize their EB and LFB allocations¹⁰² have their allocations redistributed among those that do fully utilize their allocations.¹⁰³ To the extent that companies underutilize their EB and LFB quota, the redistribution of underutilized quota ensures that the allocation of export levels remains market-driven.¹⁰⁴
80. New entrants' quota was allocated to 52 primary producers and 31 remanufacturers to export lumber first manufactured in B.C., Alberta, Quebec and Ontario in the first year of the SLA. Twenty-three recipients of new entrants' quota were located in B.C., 33 in Quebec, 17 in Ontario, 8 in Alberta and one each in New Brunswick and Manitoba.¹⁰⁵
81. The same criteria applied to all new entrants.¹⁰⁶ However, at the time the SLA came into force, a greater proportion of new mill investments was occurring in Quebec and Ontario than in B.C.¹⁰⁷ This accounts for the increased share of quota taken up by lumber first ~~manufactured in Quebec and Ontario~~¹⁰⁸ of which the Investor complains.¹⁰⁹

100 Claudio Valle Affidavit, para. 125.

101 Claudio Valle Affidavit, para. 127.

102 Smaller companies (those that exported 10 million board feet or less in 1995) were permitted to opt out of the growth mechanism and, in return for giving up their LFB allocations, were not subject to increase or decrease in their EB allocations due to the growth mechanism. (Douglas George Affidavit, paras 49-50).

103 Douglas George Affidavit, para. 44.

104 Claudio Valle Affidavit, para. 135.

105 Claudio Valle Affidavit, paras 136-137.

106 Claudio Valle Affidavit, para. 121; Tom MacDonald Affidavit, paras 73-74; see also Joseph Kalt Affidavit, paras 31, 34.

107 Claudio Valle Affidavit, para. 138; see also Joseph Kalt Affidavit, para. 32.

108 Claudio Valle Affidavit, para. 138; see also Joseph Kalt Affidavit, para. 33.

109 Investor's Memorial, paras 37, 38, 40, 45.

82. After consultations with stakeholders, the Minister decided to give new entrants additional quota derived from the trigger price bonuses earned in the first four quarters.¹¹⁰
83. Some companies experienced difficulty because their quotas were almost fully utilized in the period prior to the first allocation of quota on October 31, 1996. This period was called the "first come, first served" period. The EICB offered these companies the opportunity to borrow against their year two allocations. In effect, a company that accepted the offer and borrowed, would use more than the quota initially allocated to it in year one and would receive an allocation of quota in year two reduced by the amount it borrowed.¹¹¹

G. Year 2 (From April 1, 1997 to March 31, 1998)

84. Quota allocations in year 2 were based on quota utilisation in year 1. In addition, they were subject to reductions to accommodate the new entrant and Ministerial reserve amounts ("fit factor").¹¹²
85. Quota holders that had fully utilised their quota had their allocations of EB quota reduced by a "fit factor" of 0.06%. LFB levels increased going into year 2 by 21%.¹¹³
86. B.C. companies that had fully utilized their allocations in year 1, [REDACTED] experienced a decrease in their EB allocations of 3.14% and an increase in their LFB allocation of 21%. A 0.06% EB decrease was caused by the "fit factor". The remainder of the EB decrease was due to adjustments that were made to the allocations of B.C. companies at the request of the B.C. Softwood Lumber Advisory Committee.¹¹⁴

¹¹⁰ Claudio Valle Affidavit, para. 139.

¹¹¹ Claudio Valle Affidavit, paras 144-146; Douglas George Affidavit, para. 51.

¹¹² Claudio Valle Affidavit, paras 128, 141.

¹¹³ Claudio Valle Affidavit, paras 142, 143, 149, 150, 151.

¹¹⁴ Claudio Valle Affidavit, paras 149-151.

87. Overall, Pope & Talbot, Ltd. received the following allocations in year 2: [REDACTED] board feet of EB quota, which was [REDACTED] board feet of LFB quota, which was [REDACTED] and attracted fees of [REDACTED] board feet of fee-free trigger price bonus quota [REDACTED], and an additional one-time allocation of [REDACTED] board feet of EB from returned quota.¹¹⁵

H. Year 3 (From April 1, 1998 to March 1, 1999)

88. As a result of adjustments made during the first two years of the SLA, the quotas of most companies were adjusted for year 3. These adjustments were due to:

- (a) underutilization of EB and/or LFB quota;
- (b) return of the quota that had been "borrowed" in year 1;
- (c) adjustment to accommodate the allocations made to new entrants;
- (d) distribution of LFB recovered from 14 companies exporting less than 10 million board feet that had opted out of the growth mechanism in year 2;
- (e) use of the Minister's reserve to address hardship situations and to correct errors and omissions; and
- (f) the setting aside of a Minister's reserve for year 3.¹¹⁶

89. Permanent trigger price bonus allocations to new entrants that had been utilized in year 2 were converted to EB for year 3 allocations.¹¹⁷

¹¹⁵ Douglas George Affidavit, para. 84.

¹¹⁶ Douglas George Affidavit, para. 85.

¹¹⁷ Douglas George Affidavit, para. 86.

90. [REDACTED] B.C. companies that had fully utilized their EB and LFB levels and which had been subject to no other adjustments, [REDACTED], generally experienced overall decreases of 3.3% due to the circumstances outlined in the preceding paragraphs. This affected companies in all covered provinces.¹¹⁸
91. New entrants initially had received proportionately more of their initial allocations as LFB, when compared with other quota holders. After calculation of EB levels, new entrant's LFB levels were adjusted to bring their EB/LFB ratios into line with other quota holders. The surplus LFB was distributed among other quota holders, and the Investment received a share of this amount.¹¹⁹
92. The EICB provided explanations of the basis for year 3 calculations in response to inquiries concerning the quota reductions.¹²⁰ On June 12, 1998, it did so in reply to a letter from the Investment and requested that it contact the EICB if it had further questions. No employee of the Investor or the Investment sought any further explanation from the EICB.¹²¹
93. On July 10, 1998, ILMA wrote the Investment to indicate that an EICB official had offered assurances that "all operators in similar circumstances in Canada had received the same treatment" and to say that an official was available to any member who felt there had been errors or who wanted further explanations.¹²²
94. The Investment received a year 3 allocation of [REDACTED] board feet of EB quota and [REDACTED] board feet of LFB quota. The LFB shipments attracted fees of Cdn\$ [REDACTED]. In addition, the Investment exported [REDACTED] board feet of lumber in excess of its allocation in year 3. These UFB shipments attracted fees of Cdn\$ [REDACTED].¹²³

118 Douglas George Affidavit, paras 89-90.

119 Douglas George Affidavit, para. 87.

120 Douglas George Affidavit, para. 92.

121 Douglas George Affidavit, para. 96.

122 Douglas George Affidavit, para. 97.

123 Douglas George Affidavit, para. 103.

I. Year 4 (From April 1, 1999 to March 31, 2000)

95. Adjustments in year 4 were small. Most companies that had fully utilized their EB and LFB quotas, other than the 202 companies that had opted out of the growth mechanism, received slightly more fee-free quota and the same level of LFB quota in year 4 as they had received in year 3.¹²⁴
96. The Investment received an increase of [REDACTED] in its EB level. For the Investment, this meant an EB increase of [REDACTED] board feet.¹²⁵
97. Beginning with the trigger price bonus earned in the final quarter of year 3 (January to March 31, 1999),¹²⁶ bonuses have been earned in the first three quarters of year 4 (i.e. in the quarters ending June 30, September 30 and December 31, 1999).¹²⁷ To date, allocations have been made for the first three bonuses, and preparations are underway to allocate the December 31, 1999 bonus. The Investment received its share of pro-rata quota from the March bonus [REDACTED] board feet).¹²⁸
98. The Investment's year 4 allocation was [REDACTED] board feet of EB quota, [REDACTED] board feet of LFB quota, [REDACTED] board feet of Re-priced LFB (or "RFB") and [REDACTED] board feet of trigger price bonus. [REDACTED] Its LFB fees amounted to Cdn\$ [REDACTED] and its RFB fees amounted to Cdn\$ [REDACTED]. The Investment had also exported [REDACTED] board feet of lumber at the SFB level, [REDACTED].¹²⁹

124 Douglas George Affidavit, para. 104.

125 Douglas George Affidavit, para. 105.

126 Douglas George Affidavit, para. 98.

127 Douglas George Affidavit, para. 107.

128 Douglas George Affidavit, para. 107.

129 Douglas George Affidavit, para. 113.

J. B.C. Stumpage Dispute and New Export Fees

99. On January 26, 1998, the B.C. government announced that it would be reducing timber stumpage rates. The stumpage reductions were effective June 1, 1998. On June 22, 1998 the U.S. initiated dispute settlement under Article V of the SLA.¹³⁰
100. The Parties to the SLA settled the dispute by agreeing to amend the SLA. The settlement had the strong endorsement of both the softwood lumber industry and the government of British Columbia.¹³¹ This was formalized in an exchange of letters dated August 26, 1999.¹³² The agreement to amend the SLA included:
- (a) re-pricing of a portion (approximately 25%) of B.C. companies' LFB quota to the RFB rate of US \$105.86 per thousand board feet (the same rate charged for UFB exports);
 - (b) a ceiling on the amount of UFB lumber that can be shipped by B.C. exporters; and
 - (c) a new "SFB", or Super Fee Base, rate of US \$146.25 per thousand board feet for exports in excess of the UFB limit for B.C. exporters.¹³³
101. On September 3, 1999, the EICB advised exporters of the amendment to the SLA, explained the new fee structure and addressed certain administrative matters associated with implementation of the amendment. On October 21, 1999 regulations amending the Softwood Lumber Products Export Permit Fees Regulations implemented these changes.¹³⁴

¹³⁰ Douglas George Affidavit, para. 114.

¹³¹ Douglas George Affidavit, paras 118-119.

¹³² Book of Treaties, Tabs 6 and 7.

¹³³ Douglas George Affidavit, para. 117

¹³⁴ Douglas George Affidavit, para. 120.

102. On November 24, 1999, with the support of stakeholders, the EICB announced the modification of the policy with respect to the annual return of quota. Companies can now return up to 25% of their LFB (or combined LFB and RFB in B.C.) quotas without suffering underutilization penalties.¹³⁵

103. Companies that did not wish to pay the RFB rates could return that quota without penalty.¹³⁶ Virtually all of the returned quota was RFB. [REDACTED]

[REDACTED]¹³⁷

K. Year 5 (From April 1, 2000 to March 31, 2001)

104. Interim allocations were issued on March 24, 2000. Quota holders, [REDACTED] [REDACTED] received an interim allocation letter and explanatory background note.¹³⁸

105. The methodology for calculating the final quota allocations for year 5 is expected to be similar to year 4, with allocations planned for late May or early June, 2000.¹³⁹

L. SLA Implementation and the Investment

106. The fees paid annually by the Investment on its exports to the U.S. under the SLA are significantly less than the CVDs it paid following *Lumber III* and before the CVD order was revoked. The Investor alleges that the Investment pays fees approximating US [REDACTED] [REDACTED] per year under the SLA.¹⁴⁰ In the two years that CVDs were imposed following *Lumber III*, the Investment paid approximately US [REDACTED] per year.¹⁴¹

¹³⁵ Douglas George Affidavit, para. 121.

¹³⁶ Douglas George Affidavit, para. 121.

¹³⁷ Douglas George Affidavit, para. 121.

¹³⁸ Douglas George Affidavit, para. 122.

¹³⁹ Douglas George Affidavit, para. 123.

¹⁴⁰ Investor's Memorial, Schedule 1 Statement of Kyle Gray, para. 11.

¹⁴¹ Douglas George Affidavit, Exhibit W (1996 10-K of Pope & Talbot, Inc.). In 1994-95, the Investor received refunds of US \$29.9 million from countervailing duties ("CVD") paid during 1992-93 (fees plus interest) p. 25-26 of 32.

107. The Investment has always received its share of quota determined in accordance with allocation policy applicable to all quota holders.¹⁴²
108. [REDACTED]¹⁴³
[REDACTED]
109. The Investment's softwood lumber activities have been and continue to be profitable.¹⁴⁵
110. The Investment is the 17th largest producer of softwood lumber in Canada. Of the roughly 500 quota holders, it ranks [REDACTED] in terms of the size of its quota allocation.¹⁴⁶
111. The Investor has retained full control, management and ownership of the Investment. The Investment recently acquired Harmac Pacific Ltd., which acquisition received a positive response from analysts and prompted an increase in the value of the Investor's shares.¹⁴⁷
112. The Investor alleges the Export Control Regime has forced to undertake downtime.¹⁴⁸ Temporary mill downtime is a common occurrence in the softwood lumber industry.¹⁴⁹ Many factors can prompt a softwood lumber company, such as the Investment, to take the business decision¹⁵⁰ to shut down its mills. The quota allocated to the Investment is but

142 Douglas George Affidavit, para. 37 and Annex A.

143 Douglas George Affidavit, Annex A. See also Investor's Memorial, para. 28.

144 Douglas George Affidavit, Annex A.

145 Financial Statements of Pope & Talbot, Ltd., 1998 (as produced by the Investor on January 14, 2000 (Book of Authorities Vol. III, Tab 62).

146 Douglas George Affidavit, para. 13.

147 Steven Jones "With Pulp Prices Poised to Pop, Wood Products Makers Look Hot" *Wall Street Journal* (March 15, 2000) (Book of Authorities Vol. I, Tab 3).

148 Investor's Memorial, Schedule 1 Statement of Kyle Gray, para. 12.

149 Ilan Vertinsky Affidavit, para. 83.

150 Douglas George Affidavit, Exhibit T, (1997 Annual Report of Pope & Talbot, Inc., p.7, as produced by the Investor on January 14, 2000); Douglas George Affidavit, Exhibit U (1998 Annual Report of Pope & Talbot, Inc., p. 9, as produced by the Investor on January 14, 2000).

one of many such factors. Other factors include the location of the market and its strength.¹⁵¹

113. The SLA has affected exporters of softwood lumber first manufactured in the covered provinces less than would the realistic alternatives for such trade.¹⁵²

114. The Investor acknowledges that the SLA caused an increase in prices for softwood lumber that offset lower sales:

- ... the 1996 lumber revenues reflected 17 percent higher prices than 1995 which offset 14 percent lower lumber sales volume.¹⁵³

As was true in 1996, during 1997 a strong housing market, and to a lesser extent, lumber market uncertainties surrounding an implemented lumber quota arrangement between the U.S. and Canada combined to increase the Company's average lumber prices by 10 percent in 1997 following a 17 percent increase in 1996 from 1995.¹⁵⁴

151 Douglas George Affidavit, Exhibit T (1997 Annual Report of Pope & Talbot, Inc., p. 13 (as produced by the Investor on January 14, 2000); Douglas George Affidavit, Exhibit U; 1998 Annual Report of Pope & Talbot Inc., p. 9 (as produced by the Investor on January 14, 2000).

152 Joseph Kalt Affidavit, paras 11, 14, 15, 21-22, 24.

153 Douglas George Affidavit, Exhibit W (1996 10-K of Pope & Talbot, Inc.).

154 Douglas George Affidavit, Exhibit T (1997 Annual Report of Pope & Talbot Inc.) p.11 (as produced by the Investor on January 14, 2000)

115. The history of quota allocated to the Investment is set out in the chart below:¹⁵⁵

THE INVESTMENT: EXPORT HISTORY AS AT MARCH 24, 2000
(quota units measured in board feet)

		Allocation	% change	Utilization	Fees (Cdn\$)
Year 1	EB	[REDACTED]		[REDACTED]	
	LFB	[REDACTED]		[REDACTED]	[REDACTED]
	UFB			[REDACTED]	[REDACTED]
Year 2	EB	[REDACTED]	[REDACTED]	[REDACTED]	
	LFB	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	UFB			[REDACTED]	
	Q6 Bonus	[REDACTED]		[REDACTED]	
	Returned Allocations ¹⁵⁶	[REDACTED]		[REDACTED]	
Year 3	EB	[REDACTED]		[REDACTED]	
	LFB	[REDACTED]		[REDACTED]	[REDACTED]
	UFB			[REDACTED]	[REDACTED]
Year 4	EB	[REDACTED]		[REDACTED]	
	LFB	[REDACTED]		[REDACTED]	[REDACTED]
	RFB	[REDACTED]		[REDACTED]	[REDACTED]
	UFB				
	SFB			[REDACTED]	[REDACTED]
	Bonus	[REDACTED]		[REDACTED]	

¹⁵⁵ Douglas George Affidavit, Annex A.

¹⁵⁶ Quota holders are permitted to return up to 10% of their EB and/or LFB by December 31 of each year and have it considered utilized when calculating the next year's allocations. The returned quota was redistributed among quota holders, including the Investment.

PART THREE - ARGUMENT

A. Chapter Eleven of NAFTA

116. NAFTA is a treaty among three Parties¹⁵⁷, namely the sovereign states of Mexico, the U.S. and Canada.¹⁵⁸
117. Chapter Eleven of NAFTA deals with the general rules applying to investment. It is divided into two Sections. Section A of Chapter Eleven sets out the substantive obligations of each Party to the other Parties respecting measures relating to investors of other Parties and to their investments.
118. Section B of Chapter Eleven provides for investor-state dispute settlement procedures that may be invoked by investors of Parties under certain conditions. The Section B investor-state dispute settlement procedures are in addition to the state-to-state dispute settlement procedures in NAFTA Chapter Twenty.¹⁵⁹
119. The obligations in Section A of Chapter Eleven are owed by the Parties to one another and are subject to the dispute settlement procedures in Chapter Twenty, just like any other NAFTA obligation.

¹⁵⁷ In this Counter-Memorial, the expression "Party" means any of Canada, the United States or Mexico in its capacity as a party to NAFTA.

¹⁵⁸ *Azinian, Davitian & Baca v. United Mexican States ("Desona v. Mexico")*, November 1, 1999, ICSID ARB(AF)/97/2 (NAFTA Arbitral Tribunal), paras 80-81 (Book of Authorities Vol. I, Tab 4).

¹⁵⁹ Chapter Nineteen of NAFTA provides for binational panel review, in lieu of judicial review, of certain final determinations in antidumping and countervailing duty matters. These procedures are completely different from the investor-state procedures in Section B of NAFTA Chapter Eleven. A binational panel under Chapter Nineteen, in conducting its review, applies the domestic antidumping or countervailing duty law of the Party in question in accordance with the standard of review under the law of that party. A Tribunal in an investor-state proceeding must determine whether a breach of a provision of Section A of NAFTA Chapter Eleven has occurred and whether loss or damage has occurred as a result, all in accordance with principles of international law.

120. The obligations listed in Section A of Chapter Eleven are not owed directly to individual investors. Rather, the disputing investor must prove that the Party claimed against has breached an obligation owed to another Party under Section A¹⁶⁰ and that loss or damage has thereby been incurred.¹⁶¹
121. The grounds for bringing an investor-state dispute are set out precisely in Section B of Chapter Eleven. They are limited to the specific obligations enumerated in Article 1116 (1) and Article 1117(1).
122. These grounds do not include every conceivable grievance that an investor might have against a Party. Nor do they include the myriad of claims that may be pursued in domestic litigation. As the Tribunal noted in the first case decided under NAFTA Chapter Eleven, the *Desona* case:

It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many Mexican parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.

... NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.¹⁶²

160 *Desona v. Mexico*, November 1, 1999, ICSID ARB (AF)/97/2 (NAFTA Arbitral Tribunal), para. 84 where the Tribunal noted that the Claimants were required to "point to a violation of an obligation established in Section A of Chapter Eleven attributable to the Government of Mexico." (Book of Authorities Vol. I, Tab 4).

161 NAFTA Articles 1116(1) and 1117(1).

162 *Desona v. Mexico*, November 1, 1999, ICSID ARB (AF)/97/2 (NAFTA Arbitral Tribunal), paras 83 and 87 (Book of Authorities Vol. I, Tab 4).

123. Likewise, the fact that Pope and Talbot, Inc. now claims to have been disappointed with the quota received by its Investment pursuant to Canada's implementation of the SLA does not mean there has been a breach of NAFTA or that there is a basis for a claim under Chapter Eleven.
124. A Claim under Section B of Chapter Eleven must be based on a breach by a Party of an obligation under Section A.¹⁶³ If no breach of an obligation under Section A has occurred, there can be no claim.
125. The issue of whether a breach has occurred is determined in accordance with the provisions of NAFTA and the applicable rules of international law.¹⁶⁴ These rules include the interpretive rules set out in the *Vienna Convention on the Law of Treaties* ("*Vienna Convention* ").¹⁶⁵
126. To sustain a claim under Chapter Eleven, the Investor must have incurred loss or damage by reason of, or arising out of, the breach. The words "by reason of, or arising out of" used in Articles 1116(1) and 1117(1) establish that there must be a clear and direct nexus between the breach and the loss or damage incurred.
127. NAFTA is not a "no-fault compensation mechanism", as alleged by the Investor.¹⁶⁶ It is clear from Articles 1116(1) and 1117(1) that an investor's claim must always be based on a breach by a Party of a treaty obligation under Section A of Chapter Eleven.

¹⁶³ Or certain provisions of Chapter Fifteen, which are not relevant here.

¹⁶⁴ NAFTA Article 1131(1).

¹⁶⁵ May 23, 1969, 1155 U.N.T.S. 331 (in force January 27, 1980) (Book of Treaties, Tab 2).

¹⁶⁶ Investor's Memorial, para. 143; see also paras 130-131.

128. Nor does NAFTA create obligations which are compensable "*per se*".¹⁶⁷ This concept has no basis in the text of NAFTA or in international law and has no relevance to any of the obligations in Section A of Chapter Eleven. Caution must be taken not to import concepts into the treaty that were not intended.¹⁶⁸
129. The task of this Tribunal is to determine whether Canada is in breach of its treaty obligations to the U.S. in respect of national treatment (Article 1102), performance requirements (Article 1106) or expropriation (Article 1110) as they relate to the Investor's Investment.¹⁶⁹
130. In making this determination, the Tribunal must interpret Articles 1102, 1106 and 1110 of NAFTA as those provisions are understood and interpreted at international law.

B. Interpretation of NAFTA

131. NAFTA does not adopt unique rules of interpretation.¹⁷⁰ NAFTA is interpreted according to the customary rules of international law governing treaty interpretation.
132. The rules of international law governing treaty interpretation are specifically made applicable to disputes under Chapter Eleven of NAFTA by Article 1131(1) which states that:

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

¹⁶⁷ Investor's Memorial, para. 100.

¹⁶⁸ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, December 19, 1997, WT/DS50/AB/R (WTO Appellate Body) para. 45 (Book of Authorities Vol. I, Tab 5).

¹⁶⁹ The Investor has only made a claim on his own behalf under Article 1116 and not in respect of its investment under Article 1117.

¹⁷⁰ As suggested at para. 215 of the Investor's Memorial.

133. NAFTA Article 102(2) expressly adopts the rules of international law governing treaty interpretation. Article 102(2) provides:

The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

134. The applicable rules of international law relevant to the interpretation and application of international treaties are set out in the *Vienna Convention*, which is accepted as part of customary international law.¹⁷¹
135. NAFTA tribunals have recognized the *Vienna Convention* as the appropriate rules of treaty interpretation. For example, the NAFTA Panel in *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* recognized that Articles 31 and 32 of the *Vienna Convention* are “generally accepted as reflecting customary international law.”¹⁷²
136. Article 31 of the *Vienna Convention* provides:

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

¹⁷¹ *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/DS2/AB/R (WTO Appellate Body) pp. 17-18, (Book of Authorities Vol. I, Tab 6); *Japan – Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) pp. 11-13, (Book of Authorities Vol. I, Tab 7).

¹⁷² (1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel) para. 119 (Book of Authorities Vol. I, Tab 8).

- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

137. Article 32 of the *Vienna Convention* allows recourse to supplementary means of interpretation only if the application of the rules in Article 31 result in an interpretation which is ambiguous or obscure, or leads to a manifestly absurd or unreasonable conclusion.¹⁷³

138. In short, this Tribunal must give the relevant provisions of NAFTA their ordinary meaning in their context and in light of the object and purpose of NAFTA as a whole, in accordance with the fundamental rule of interpretation in Article 31 of the *Vienna Convention*.

¹⁷³ See Book of Treaties, Tab 2 for full text.

(i) Ordinary Meaning of NAFTA

139. The ordinary meaning of Chapter Eleven of NAFTA is found in the text of the Agreement. As noted by the Appellate Body of the WTO, “interpretation must be based above all on the text of the treaty.”¹⁷⁴
140. Treaty interpretation should give effect to the intention of the Parties as expressed in the words used by them in light of the surrounding circumstances.¹⁷⁵

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.¹⁷⁶

141. In *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*¹⁷⁷ the NAFTA Panel commenced its inquiry by identifying “the plain and ordinary meaning” of the words used in the Agreement, taking into consideration:

...the meaning actually to be attributed to words and phrases looking at the text as a whole, examining the context in which the words appear and considering them in the light of the object and purpose of the treaty.

142. The Investor also cites Article 31(4) of the *Vienna Convention*,¹⁷⁸ which provides that “a special meaning shall be given to a term if it is established that the parties so intended.”

174 *Japan – Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) p. 12 (Book of Authorities Vol. I, Tab 7).

175 Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 365 (Book of Authorities Vol. I, Tab 9).

176 *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, December 19, 1997, WT/DS50/AB/R (WTO Appellate Body), para. 45 (Book of Authorities Vol. I, Tab 5). See also *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/DS2/AB/R, (WTO Appellate Body), pp. 17-18 and 24 (Book of Authorities Vol. I, Tab 6).

177 (1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 120 (Book of Authorities Vol. I, Tab 8).

178 Investor’s Memorial, para. 215.

While this provision is helpful when interpreting defined expressions, it does not supplant Article 31(1) of the *Vienna Convention*.¹⁷⁹

143. Similarly, the *contra proferentum*¹⁸⁰ rule invoked by the Investor applies only as between Parties to a treaty. That rule has no relevance as between one Party to a trilateral treaty and a non-party and would not enable the resolution of an ambiguity against Canada and in favour of the Investor.¹⁸¹
144. In any event, the wording of the provisions of Chapter Eleven which the Investor claims should be interpreted according to the *contra proferentum* rule are based on the wording of the U.S. Model Bilateral Investment Treaty ("BIT") which was drafted by the U.S., the Party of the Investor.
145. Finally, the text of the provisions at issue must be applied as written. The Investor's paraphrasing of Articles 1102, 1106 and 1110 does not accurately reflect the text or the obligations agreed to by the Parties¹⁸², and cannot be the basis for their interpretation.

(ii) Object and Purpose of NAFTA

146. Article 31 of the *Vienna Convention* also mandates interpretation of a treaty in accordance with the object and purpose of the treaty. This requires examination of the treaty in light of the entirety of the agreement, including its Preamble and objectives.¹⁸³

179 In his treatise, Sir Ian Sinclair observes that the International Law Commission was of the view that, respecting special meaning, "there was a certain utility in laying down a specific rule on the point, if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term", *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), p. 126 (Book of Authorities Vol. I, Tab 10).

180 Investor's Memorial, para. 221.

181 Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) pp. 464-5 (Book of Authorities Vol. I, Tab 9).

182 For example, the Investor misstates the text of Article 1106(3)(d), at paras 109 and 110 of the Investor's Memorial.

183 *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, (1996), I.T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 122 (Book of Authorities Vol. I, Tab 8).

147. While object and purpose is one of the elements to be considered in interpreting a treaty, interpretation must be based above all on the text of the treaty. The object and purpose of the treaty cannot support an interpretation that is at variance with the text.

148. Ian Sinclair, in his treatise *The Vienna Convention on the Law of Treaties*, states as follows:

... reference to the object and purpose of the treaty is, as it were, a secondary or ancillary purpose in the application of the general rule on interpretation. The initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified.¹⁸⁴ (emphasis in original)

149. Article 102(1) states the objectives of NAFTA. These objectives are "elaborated more specifically through its principles and rules, including national treatment...". Contrary to the assertions of the Investor,¹⁸⁵ national treatment is not an interpretive principle of the Agreement. It is but one of the principles which elaborates the objectives listed at Article 102(1)(a) to (f).

150. The statement in NAFTA Article 102(2) that the Parties shall "interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1" merely affirms the rule of interpretation set out in Article 31(1) of the *Vienna Convention*.

151. Article 102(1) does not authorize novel interpretations of "national treatment" at variance with the text of Articles 1102(1) and (2). Nor does Article 102(1) of NAFTA licence interpretations of concepts such as "performance requirement" or "expropriation" at variance with their meaning in international law.

¹⁸⁴ Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984), p. 130 (Book of Authorities Vol. I, Tab 10).

¹⁸⁵ Investor's Memorial, para. 48.

152. The Investor maintains that NAFTA includes the “objective of investor protection”.¹⁸⁶ In fact, the only objective respecting investment referred to in Article 102(1) is to “increase substantially investment opportunities in the territories of the Parties”. This is quite different from “investor protection”.
153. Contrary to the submission of the Investor¹⁸⁷, the objective of increasing investment opportunities does not allow an interpretation of NAFTA that makes the rights of investors absolute. Nor does it support novel interpretations of obligations that are at variance with the NAFTA text.
154. For example, while the Panel in *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*¹⁸⁸ stated that it attached importance to the “trade liberalization background” of NAFTA and that any interpretation adopted by the Panel must promote NAFTA’s objectives, the Panel in that case interpreted NAFTA in a way that permitted Canada to continue to apply its over-quota tariff rates to U.S. agricultural goods.
155. The Investor has selectively applied a few statements of objective in the NAFTA text (notably those in Articles 102(1)(b) and 102(1)(c)) to advance its interpretation of the NAFTA provisions that it alleges have been breached.
156. Other statements of objective in the NAFTA text could be used to achieve a different purpose. For example, in the NAFTA Preamble,¹⁸⁹ the Parties resolve to:

CREATE an expanded and secure market for the goods and services produced in their territories; ...

ENSURE a predictable commercial framework for business planning and investment; ...

¹⁸⁶ Investor’s Memorial, para. 218.

¹⁸⁷ Investor’s Memorial, paras 217-218. See also paras 101, 102 & 147.

¹⁸⁸ (1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 122 (Book of Authorities Vol. I, Tab 8).

¹⁸⁹ Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), pp. 127-128. (Book of Authorities Vol. I, Tab 10).

PRESERVE their flexibility to safeguard the public welfare.

These objectives in the NAFTA text support interpretation in a manner that does not impair the power of Parties to regulate in the public interest. The point to be kept in mind is that when considering the objectives of a treaty, all objectives must be considered and not just a few selected ones that support a particular position.

157. Finally, NAFTA is not to be construed either broadly¹⁹⁰ or restrictively: the notions of broad or restrictive interpretation have been replaced by the rules in Articles 31 and 32 of the *Vienna Convention*.¹⁹¹

(iii) Conclusion

158. This Tribunal must consider the ordinary meaning of Articles 1102, 1106 and 1110, the context of these provisions within NAFTA and the object and purpose of NAFTA. Canada submits that such an interpretation will lead to the conclusion that there has been no breach of these obligations.

¹⁹⁰ As suggested at para. 217 of the Investor's Memorial.

¹⁹¹ *Ethyl Corporation v. Canada*, Award on Jurisdiction. (June 24, 1988) (NAFTA – UNCITRAL Panel), para. 55 (Book of Authorities Vol. I, Tab 11).

C. Burden of Proof

159. In international trade arbitration the Party asserting a claim bears the burden of proving that claim.¹⁹² Article 24(1) of the UNCITRAL Rules reinforces this rule: the Party asserting a claim has the burden of proving the facts upon which it relies to support its case.
160. To meet this burden, the Investor must present sufficient evidence and legal argument to demonstrate that Canada's actions were inconsistent with its obligations under Articles 1102, 1106 and 1110 of NAFTA. Canada submits that Pope & Talbot, Inc. has failed to meet its burden of proof.

¹⁹² *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, April 25, 1997, WT/DS33/AB/R, (WTO Appellate Body), pp.13, 14 and 16, (Book of Authorities Vol. I, Tab 12). In the NAFTA context see *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, (1996), 1 T.T.R. (2d) 975, paras 125-128 (Book of Authorities Vol. I, Tab 8); see also Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (London: Sweet & Maxwell, 1999), pp. 314-315, (Book of Authorities Vol. I, Tab 13).

D. National Treatment - Article 1102

(iv) Summary of Canada's Position Respecting Article 1102

161. The Investor has claimed that Canada breaches the national treatment obligations of Article 1102 because its American-owned lumber mills in B.C. are subject to a quota system for exports to the U.S., while some lumber mills located in non-covered provinces of Canada are not. Additionally, the Investor claims a breach because some other lumber mills in the covered provinces, while subject to the quota system, receive allegedly better treatment than the Investment's lumber mills in B.C.
162. The Investor does not claim that its lumber mills would have been treated differently had they been owned or controlled by Canadian investors. It does not claim that Canadian lumber mill owners in B.C. receive more favourable treatment with regard to quota allocations than it does. Nor does the Investor claim that its Investment would have been treated less favourably than Canadian investors in the provinces whose lumber mills are alleged to receive more favourable treatment if the Investor had invested in lumber mills in those provinces.
163. The Investor likewise makes no claim that the allocation formula in any way discriminates based on the nationality of the Investor or the Investment. In fact, the Investment's lumber mills are allocated quota according to the same formula that is applied to every lumber mill in like circumstances.
164. Making no claim that Canada's measures discriminate according to the nationality of the investor or investment, the Investor instead asks the Tribunal to "interpret" the national treatment obligation of Article 1102 to require NAFTA Parties to ensure that a NAFTA investor receives the best treatment that any investor in that industry obtains anywhere in that country. Thus, for example, a benefit accorded by a NAFTA Party to an investor in one region of the country would have to be granted to an investor of another NAFTA Party, even if that investor invested in a different region.

165. To state the claim is to show its absurdity. Article 1102(2) requires each NAFTA Party to treat investments of investors of another Party ("foreign investments") no less favourably than it treats investments of its own investors ("domestic investments") "in like circumstances." By alternately ignoring and misinterpreting the critical "in like circumstances" qualification, the Investor attempts to convert Article 1102 into a special right for a NAFTA investor to pick the best treatment given to any enterprise in the same sector anywhere in the country.
166. Article 1102(2) does not prevent a Party from implementing a measure that affects investments differently as long as the measure neither directly nor indirectly discriminates on the basis of nationality as between foreign and domestic investments.
167. Determination of "like circumstances" must be made on a case-by-case basis, depending on the facts and treatment at issue in each situation. However, there is no basis even for inquiring into a distinction between circumstances where, as here, there is neither an allegation nor evidence that the distinction is motivated by or has the effect of discriminating by nationality.
168. The Canadian measures implementing the SLA do not, either on their face or in practice, discriminate against foreign investments relative to domestic investments. The Export Control Regime in no way differentiates on the basis of foreign or domestic ownership nor does it have the effect of treating foreign and domestic investments differently.
169. To the extent that investments exporting softwood lumber first manufactured in a covered province have been differently affected by measures implemented in furtherance of the SLA, these differences are based on legitimate differences in circumstances which render their treatment not comparable under Article 1102.
170. The Investment, as a U.S.-owned company, is not affected any less favourably by the Export Control Regime than is any Canadian-owned company in like circumstances. Canada's obligations under Article 1102 have not been breached.

(v) **The Meaning of Article 1102**

171. The relevant provisions of NAFTA Article 1102 state:

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

Paragraph 1 relates to treatment received by an investor and paragraph 2 relates to the treatment received by an investor's investment. These provisions are otherwise identical.

172. Although the Investor cites both Articles 1102 (1) and (2), in fact the less favourable treatment alleged is the treatment that its Investment receives as a result of the SLA or its implementation. No allegation has been made in respect of the treatment accorded to the Investor and therefore Article 1102(1) is not relevant.

173. The obligation set out in Article 1102 is known, as the title to that Article states, as a "national treatment" obligation. The national treatment obligation:

... starts from the major postulate that the alien must accept the legal conditions which he finds in the country of residence, and that neither he nor his government can justifiably complain if he is accorded, like nationals, the benefit or application of these conditions.¹⁹³

¹⁹³ A.H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden: A.W. Sijthoff's Uitgeversmaatschappij N.V., 1949), p. 62 (Book of Authorities Vol. I, Tab 14).

174. A “national treatment” obligation is also found in different forms in other chapters of NAFTA¹⁹⁴ and in various of the WTO Agreements, including the *General Agreement on Tariffs and Trade* (“GATT”),¹⁹⁵ the *Agreement on Trade-Related Investment Measures* (“TRIMs”)¹⁹⁶ and the *General Agreement on Trade in Services* (“GATS”).¹⁹⁷ Those national treatment obligations do not pertain to investors, but rather to trade in products and trade in services. While the national treatment provisions of the other agreements share the general goal of ensuring non-discrimination on the basis of nationality, they are otherwise very different provisions from Article 1102.
175. The Investor bolsters its claims under Article 1102 by selective quotation from decisions under the WTO dispute settlement provisions.¹⁹⁸ However, the Investor’s effort fails on two general grounds.

194 For example, NAFTA Articles 301, 606, 1202 and 1405.

195 See GATT, October 30, 1947, 58 U.N.T.S. 187 (“GATT”), Article III (Book of Authorities Vol. I, Tab 15), in particular paragraph 4:

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

196 TRIMs Article 2:

- (1) Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

1. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Text* (Geneva – GATT Secretariat, 1994), p. 163 (Book of Authorities Vol. I, Tab 16).

197 GATS, Article XVII:

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Text* (Geneva – GATT Secretariat, 1994), p. 325 (Book of Authorities Vol. I, Tab 17).

198 Investor’s Memorial, paras 49-72.

176. First, the provisions of the WTO are framed almost entirely differently from those of Article 1102 of the NAFTA. For example, the WTO obligations are not qualified by the “in like circumstances” condition of Article 1102. As well, Article III of the GATT has both rules and exceptions that are more specific and clearly different with respect to trade in goods, than is Article 1102 with respect to investments and investors. The “most favoured nation” provisions of the WTO Agreements are even less apposite to the interpretation of Article 1102 of the NAFTA. This also reflects some difference in the purpose and intent of the provisions, and means that the jurisprudence for WTO obligations cannot simply be transposed to that of Article 1102.
177. Second, to the extent that the jurisprudence of the WTO has interpretative value for Article 1102, it undermines, rather than supports the Investor’s position. In every case where a violation of GATT Article III has been found, the measure has been found to discriminate in law or in fact on the basis of nationality. Either the “favoured” like product has been found to be wholly or overwhelmingly of domestic origin, or the disfavoured like product has been found to be wholly or overwhelmingly of foreign origin, and there has been no apparent reason other than discrimination by national origin to explain the difference.
178. In summary, the case law dealing with the national treatment obligation for trade in goods is of no assistance to the Investor. That case law confirms that the purpose of the national treatment obligation is not to prevent states from using their fiscal and regulatory power, nor from differentiating between products for policy purposes provided that, in doing so, they do not afford more favourable treatment to domestic production.¹⁹⁹

¹⁹⁹ U.S. – *Measures Affecting Alcoholic and Malt Beverages*, June 19, 1992, BISD 39S/206 (GATT Panel Report), para. 5.25 (Book of Authorities Vol. I, Tab 18).

(vi) Article 1102 Does Not Accord “Best Treatment”

179. Throughout its Memorial, the Investor characterises the requirement that “no less favourable” treatment be provided as a requirement that the “best treatment” be provided.²⁰⁰ However, the concept of “best treatment” is a creation of the Investor.
180. Articles 1102(1) and (2) say that the treatment of foreign investment must be “no less favourable” than that accorded in like circumstances to domestic investments. Article 1102 does not say “best treatment” and it certainly does not say best treatment regardless of circumstances. In fact, “treatment no less favourable” has never been interpreted as meaning “best treatment”.
181. The “most favourable treatment” concept cited by the Investor²⁰¹ can only be found in Article 1102(3). This Article expressly applies only to state or provincial measures. Its sole purpose is to deal with measures of states and provinces which treat in-province/state investors and their investments more favourably than out-of-province/state investors and their investments.²⁰²
182. Article 1102(3) addresses situations where a provincial or state measure may accord different treatment to in-state or in-province investors or investments than the province or state accords in like circumstances to investors or investments of the same country. Article 1102(3) makes clear that in such a situation, the state or province must, in like circumstances, accord foreign investors the better (not the worse) of the two treatments (in-state or province, or out of state or province). The obligation of Article 1102(3) does not apply to federal measures.

200 Investor’s Memorial, paras 18, 62, 80-84.

201 Investor’s Memorial, para. 58.

202 Jon Johnson, *The North American Free Trade Agreement* (Ontario: Canada Law Book Inc., 1994), p. 285 (Book of Authorities Vol. I, Tab 19).

183. The Investor refers to a GATT decision, *U.S. – Measures Affecting Alcoholic and Malt Beverages*,²⁰³ to support its “best treatment” theory. In that case, under the provisions of Article III of the GATT, the Panel referred to the “most-favoured domestic product” when it was analysing a state measure that discriminated as between in-state and out-of-state products. It specified that the foreign product should be treated no less favourably than the most-favoured domestic product, that is the in-state product. This discussion occurred after the Panel decided the products compared were “like products” within the meaning of Article III of the GATT.
184. Leaving aside the hazards of comparing very different treaty language applicable to goods rather than investment, the Investor’s reliance on *U.S. – Measures Affecting Alcoholic and Malt Beverages* in the present case is incorrect. The “most-favoured domestic product” test was only designed to address a situation which is at most comparable to the one envisaged in Article 1102(3), where measures of a sub-national unit are at issue. The Investor’s claim before this Tribunal, however, concerns a federal measure and hence neither *U.S. – Measures Affecting Alcoholic and Malt Beverages* nor Article 1102(3) are applicable.

(vii) Treatment Accorded “in like circumstances”

185. The requirement that foreign investors be accorded “treatment no less favourable” is subject to the further limitation that it applies only to treatment given “in like circumstances” to domestic investors or investments.
186. The starting point for interpretation is Article 31 of the *Vienna Convention* according to which the words are to be given their ordinary meaning in their context and in the light of the object and purpose of the NAFTA as a whole.

203 *U.S. – Measures Affecting Alcoholic Beverages and Malt Beverages* June 19, 1992, BISD 39S/206 (GATT Panel Report) (Book of Authorities Vol. I, Tab 18).

187. The Investor tries to borrow from WTO and GATT jurisprudence to argue that the “in like circumstances” test is fully satisfied if the investors or investments are producing like products or services. There is no basis in the text for such an interpretation. Obviously the “like product” test is not the same as the “in like circumstances” test under Article 1102.
188. Following the *Vienna Convention* approach to interpretation, the ordinary meaning of the word “circumstances” must be considered. According to the *New Shorter Oxford English Dictionary*,²⁰⁴ the term “circumstance” includes “that which stands around or surrounds; surroundings” or “the material, logical or other environmental conditions of an act or event”. The *Webster’s Dictionary*²⁰⁵ definition of “circumstance” includes “something attending, appendant, or relevant to a fact or case” and for the plural, “circumstances”, definitions include “situation”, “surroundings”, and “state of things”.
189. These definitions indicate that the term “circumstances” has to be determined in the light of the surrounding situation. Such an approach to comparison is universal. In *Japan Alcohol* the WTO Appellate Body set out the basic principles for the interpretation of the term “like”. Recognizing that determining whether products are “like” will always involve “an unavoidable element of individual discretionary judgement”, the Appellate Body went on to say:²⁰⁶

... there can be no one precise and absolute definition of what is “like”. The concept of “likeness” is a relative one that evokes the image of an accordion. The accordion of “likeness” stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term “like” is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

204 Lesley Brown, ed. (New York: Oxford University Press, 1993) Vols. I and II (Book of Authorities Vol. I, Tab 20).

205 Merriam-Webster’s Collegiate Dictionary, 10th ed. (Ontario: Thomas Allen & Sons Ltd., 1993) (Book of Authorities Vol. I, Tab 21).

206 *Japan – Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body), p. 22 (Book of Authorities Vol. I, Tab 7).

190. This is consistent with an UNCTAD report on issues in international investment agreements which notes that use of the term “like circumstances” implies that “business situations” are to be compared in light of the facts of each case.²⁰⁷

191. In its Memorial, the Investor asserts that:²⁰⁸

In considering whether foreign and domestic investors and investments are operating in like circumstances, the primary question is whether they are operating in the same industrial sector or towards the same economic purpose.

192. This conclusion is derived by the Investor from an OECD Commentary on the *OECD Declaration on International Investment and Multinational Enterprises*, which states:²⁰⁹

As regards the expression ‘in like situations’, the comparison between foreign-controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector.²¹⁰

193. However, the Investor fails to point out that the *OECD Declaration* goes on to state that the determination of “in like situations” involves a far wider range of considerations. The *OECD Declaration* continues:

More general considerations, such as the policy objectives of Member countries, could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of National Treatment. *In any case, the key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes an exception to National Treatment is to ascertain whether the discrimination is*

²⁰⁷ *National Treatment: UNCTAD Series on Issues in International Investment Agreements* (New York: United Nations, 1999), p. 33 (Book of Authorities Vol. I, Tab 22).

²⁰⁸ Investor’s Memorial, para. 72.

²⁰⁹ Investor’s Memorial, para. 70, as reported in *National Treatment for Foreign-Controlled Enterprises* (Paris: OECD, 1993), p. 22 (Book of Authorities Vol. I, Tab 23).

²¹⁰ The Investor also mistakenly asserts that “each NAFTA Party is obligated to adhere to OECD statements such as the *OECD Declaration*, citing Article 5(d) of the OECD Convention. That provision authorizes the Organization to make “recommendations” to members. It does not create obligation as the Investor seeks to imply.

motivated, at least in part, by the fact that the enterprises concerned are under foreign control. [emphasis added]

It is clear, therefore, that while operation in the same sector may be a *necessary* precondition for a finding of “likeness”, it was not intended in the *OECD Declaration* to be a sufficient, let alone exclusive, criterion as the Investor would suggest.

194. Indeed, the Comment on the *OECD Declaration*, based on virtually identical draft language to that of the NAFTA, captures the essential point of the national treatment obligation. Whether circumstances should be considered “like” so as to permit a difference in treatment of two investors, one of whom is foreign and the other domestic, involves an initial inquiry into whether that difference appears to have the intent or effect of discriminating by nationality. It is not even necessary to examine whether there is a sound reason for a distinction in treatment if the distinction in any event does not have the purpose or effect of discriminating based on the nationality of the investor. The purpose of the national treatment obligation is not to second-guess regulatory distinctions decided by sovereign NAFTA governments unless those distinctions discriminate on the basis of nationality without other legitimate rationale.
195. By contrast, if the determination of “like circumstances” were to be based on a single, exclusive criterion, this would render the term “like circumstances” meaningless,²¹¹ expand Article 1102 in fantastical ways and conflict with the ordinary meaning of the provision. Profitable foreign companies in the same business as unprofitable domestic companies would be exempt from taxes. Large foreign owned companies would obtain the privileges granted to small businesses in the same sector.
196. Likewise, in this case, the fact that exports of softwood lumber from covered and non-covered provinces all relate to softwood lumber or to the softwood lumber sector does not advance the discussion under Article 1102(2). Article 1102(2) compels consideration of whether the treatment accorded to investments is in “in like circumstances”. The focus is

²¹¹ Joseph Kalt Affidavit, paras 25-27.

not solely on the Investment or the Investor. Nor is the focus on whether the products are “like”.²¹²

197. The entire focus of the comparison of the treatment required by Article 1102 (2) is on comparing the treatment accorded to foreign investments as compared to the treatment of domestic investments. The expression “in like circumstances” is to make it clear that all treatment accorded in unlike circumstances is to be disregarded. Application of Article 1102 (2) begins by considering the treatment accorded by a Party to a foreign investment. Consideration is then given to the treatment that is accorded by that Party to an investment where all the circumstances of the according of the treatment are “like”, *except* that the investment is a domestic investment. There is a breach of Article 1102 (2) if, and only if, the foreign entity receives the less favourable of the treatments compared.

(viii) The Law Applied to the Facts: the Treatment Actually Accorded to the Investment

198. The Investor alleges that Canada failed to comply with Article 1102 in its treatment of the Investor’s investment in that the Investment was treated less favourably than:
- (a) investments in non-covered provinces;
 - (b) investments in Quebec, a covered province under the SLA;
 - (c) investments from covered provinces that produce less than 10 million board feet;
and
 - (d) investments that are not subject to the extra fees introduced on August 30, 1999 in respect of exports.

²¹² Softwood lumber made from different species of wood may not even be “like products”. See *Canada/Japan-Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, July 19, 1989, BISD 36S/167 (GATT Panel Report), para. 5.14 (Book of Authorities Vol. II, Tab 29).

199. The very comparisons complained of by the Investor evidence its misunderstanding of Article 1102. None of the comparisons are between the treatment of foreign and domestic investments in like circumstances. Rather, the Investor compares the Investment with all other investments, without regard to whether they are foreign or domestic. Further, the Investor compares the circumstances under which treatment is accorded to its Investment with the circumstances under which treatment is accorded to other investments (both foreign and domestic) that are clearly not “like”.
200. As noted, where there is no allegation and no evidence that the alleged difference in treatment is in any way motivated by or related to the nationality of the investment, there is no need for the Tribunal to inquire as to the reason for the difference in treatment. Article 1102 is directed at discrimination based on nationality, not at second-guessing the reasons sovereign governments make the myriad distinctions in regulations that they draw.
201. It is only necessary to inquire as to whether the difference in treatment reflects legitimately different circumstances if the Investor has shown that the differences in question have the effect of discriminating by nationality of the investor. Nevertheless, for the information of the Tribunal and to correct the record, Canada will describe below the actual allocation system and the basic reasons for the different treatment of investors in different circumstances.

(ix) Comparison of Operations in Covered Versus Non-Covered Provinces

202. The Investment operates in B.C., a province that is “covered” under the SLA. The “covered” provinces are those with forest management policies that have been the focus of repeated U.S. CVD actions over the last twenty years.²¹³

213 Tom MacDonald Affidavit, paras. 11-16; Joseph Kalt Affidavit, paras. 9-12.

203. The last such action, prior to the SLA being concluded, was *Lumber III*.²¹⁴ In that case Commerce found the provincial stumpage programs in the covered provinces and log export controls in B.C. to constitute countervailable subsidies.²¹⁵ Although some programs in the non-covered provinces were investigated, none were found to confer countervailable subsidies. The Maritime provinces were entirely excluded from the CVD investigation.²¹⁶
204. The Commerce determination was eventually overturned by an FTA binational panel requiring revocation of the CVD order and termination of the collection of duties.²¹⁷ As a result, the U.S. was required to refund approximately U.S. \$800 million in duties that had been illegally collected. However, the case prompted certain amendments to U.S. law specifically aimed at preventing a *Lumber III* result in a future case.²¹⁸
205. To ensure that the softwood lumber industry in the covered provinces would be protected from further trade actions, Canada entered into the SLA with the U.S. Since the SLA commits the U.S. to refrain from taking any trade actions while the SLA is in effect, it provides security of market access to the U.S. for Canadian producers of softwood lumber first manufactured in the covered provinces.²¹⁹
206. The negotiations leading to conclusion of the SLA concerned B.C., Alberta, Quebec and Ontario.²²⁰ Coverage of provinces other than B.C., Alberta, Ontario and Quebec was not considered by either the U.S. or Canada. This was explained by the fact that, in addition to the covered provinces having been the focus of the three previous CVD investigations, they were exporting 95% of all Canadian softwood lumber exported to the U.S.²²¹

214 Tom MacDonald Affidavit, paras. 15-17; Joseph Kalt Affidavit, para. 9.

215 Tom MacDonald Affidavit, para. 16.

216 Tom MacDonald Affidavit, para. 61; Ilan Vertinsky, para. 46.

217 Tom MacDonald Affidavit, paras 19-20; Joseph Kalt Affidavit, para. 9.

218 Tom MacDonald Affidavit, para. 25; Joseph Kalt Affidavit, para. 9.

219 Tom MacDonald Affidavit, para. 54, 64; Joseph Kalt Affidavit, para. 7.

220 Tom MacDonald Affidavit, para. 28.

221 See the "Request for public comment regarding softwood lumber practices in Canada and softwood lumber trade between the U.S. and Canada", (March 2, 2000) 65 Federal Register 11 363-11 364 (Book of Authorities Vol. I, Tab 1); see also Tom MacDonald Affidavit, paras 59, 35-39.

207. Without the protection of the SLA, the softwood lumber industry in the covered provinces would likely have faced further trade action being initiated by the U.S., with the focus of that trade action being the forest management programs in those provinces.²²²
208. Producers of softwood lumber in covered provinces, therefore, are not in like circumstances with producers of softwood lumber elsewhere in Canada. The SLA itself, the trade disputes focussing on the covered provinces and the volume of softwood exported from those provinces are all circumstances that render softwood lumber producers in covered and non-covered provinces not in like circumstances.
209. With respect to those producers in like circumstances, there has been no differentiation between domestic and foreign investments in any aspect of the SLA or its implementation.
210. Canada designed the quota allocation method in consultation with provincial representatives and industry stakeholders, both foreign and domestic-owned.²²³ All applicants for quota filled out the same questionnaires.²²⁴ Export quotas were calculated and granted without regard to the nationality of the quota seeker. No element of the allocation system has taken into consideration the nationality of the quota holders or of their owners.²²⁵ No aspect of the SLA and its implementation has ever made distinctions between foreign and Canadian investments.
211. No allegations have been made, for instance, that the quota allocation criteria favour domestic investments over foreign investments, that foreign investments are paying higher fees than domestic investments, that they get less quota than domestic investments or that the Export Control Regime is applied differently to them because they are foreign owned.

²²² Tom MacDonald Affidavit, paras 26, 66; Joseph Kalt Affidavit, para. 11; Claudio Valle Affidavit, para. 16.

²²³ Claudio Valle Affidavit, paras. 46, 47 and 49; Douglas George Affidavit, Exhibit Y.

²²⁴ Claudio Valle Affidavit, paras. 72, 117.

²²⁵ Claudio Valle Affidavit, para. 157.

212. On the contrary, the Investor has stated that it is treated just like any other quota holder. In its Annual Report for 1996, the Investor said that “[t]he company believes its volume allocations were determined consistently with other Canadian lumber companies”.²²⁶ Again, in its Annual Report for 1997, the Investor stated: “[t]he company believes its volume allocations were determined consistently with other B.C. lumber producers.”²²⁷
213. The Investor itself recognized and was well aware of the distinction between covered provinces and non-covered provinces. It represented, in a producer letter appended in Annex 1 of the SLA, along with letters from producers representing over 60% of the U.S. softwood lumber industry, that the SLA would remove all material injury or threat of injury while it was in effect. This representation was made with the knowledge that the SLA covered only B.C., Alberta, Ontario and Quebec.
214. The Investor’s producer letter was signed three days after the SLA was concluded. The Investment was well informed by COFI of the scope of the SLA during negotiations²²⁸ and would have been aware of the SLA’s provisions on signature. It could not, therefore, have expected that Canada would implement the SLA by applying its provisions to the industry both in the covered and non-covered provinces.
215. Moreover, given that the imposition of fees on the export of softwood lumber would not be in compliance with NAFTA Article 314 in the absence of the SLA, Canada could not have applied such measures to the industry in the non-covered provinces without contravening the NAFTA.
216. The Investor, therefore, cannot plausibly suggest that when it signed its producer letter representing that the SLA would remove all material injury, it understood or assumed that Canada would treat the industry in the non-covered provinces in the same way as the industry in the covered provinces. Now the Investor seeks to renege by arguing that this

226 Douglas George Affidavit, Exhibit S, (1996 Annual Report of Pope & Talbot, Inc. at p. 13).

227 Douglas George Affidavit, Exhibit T, (1997 Annual Report of Pope & Talbot, Inc. at p. 13).

228 Douglas George Affidavit, Exhibit Y.

regime, to which it agreed in order to benefit its U.S. business, does not apply to its Canadian subsidiary.

217. Accordingly, the Investor is now estopped from denying the relevance of the distinction between the covered and the non-covered provinces in the implementation of the SLA. Given that these letters provided the legal underpinning for the U.S. to make the commitment in Article I to refrain from initiating any trade actions respecting softwood lumber, and the importance of that commitment to Canada's entering into the SLA, Canada relied on the representation in the producer letters in order to conclude the SLA.
218. Estoppel and acquiescence are well-recognised principles at international law. The Investor accepts this in its Memorial²²⁹. Relying on the authoritative work of Professor Derek Bowett, the Investor asserts three conditions for the application of estoppel. They are: there must be a statement of fact that is clear and unambiguous; the statement must be made voluntarily, unconditionally and must be authorised; and there must be reliance in good faith on the statement.
219. All of these conditions are met in the present case. The Investor's letter is clear and unambiguous. It had to be clear to the Investor when it signed the letter that particular measures would be applied to the industry in the covered provinces because of the particular circumstances affecting that industry. The letter was voluntary, unconditional and signed by a person in authority. The letter was relied upon in good faith by Canada and was a necessary prerequisite to Canada's agreeing to conclude the SLA.
220. Thus, even on the basis of the Investor's own analysis of the law, it is now estopped from asserting that in respect of the implementation of the SLA the softwood lumber industry in the non-covered provinces is "in like circumstances" with the softwood lumber industry in the covered provinces.

²²⁹ Investor Memorial, para. 197.

(x) **Comparison of Treatment in Quebec and B.C.**

221. The Investor further alleges that softwood lumber producers in B.C. received less favourable treatment than softwood lumber producers in Quebec. The Investor's argument appears to disregard that in order for a national treatment violation to occur, the alleged differential treatment must be based on the nationality of the producer. Instead, the Investor argues that Canada breached Article 1102 because Quebec-based producers as a whole have received more bonus quota than B.C.-based producers as a whole, and the related allegation that exporters in Quebec collectively have experienced an overall increase in fee-free quota.²³⁰
222. The distinction identified by the Investor between Quebec producers and B.C. producers is a distinction between the circumstances of new entrants and the circumstances of established participants in the softwood lumber industry.²³¹ It also ignores the fact that allocations are made on a corporate, and not provincial, basis.
223. As is standard in quota administration,²³² Canada required some quota for the export of softwood lumber first manufactured in any of the covered provinces to be set aside for companies that were constructing or undertaking major expansions of their mills when Canada entered the SLA.²³³
224. Given that the allocation of quota was based on each company's historic export levels, if there were no "new entrant" provisions the new entrant companies would have received no quota or a disproportionately low amount of quota.²³⁴ Effectively, this would have shut new entrants completely out of the U.S. market. The companies that had a track

230 While the majority of the quota for the softwood lumber first manufactured in a province is allocated to quota holders in that very province, it is not always the case. Statistics used by the Investor do reflect *the distribution of quota for softwood first manufactured* in B.C. and Quebec. They do not illustrate the *location of the quota holders established in* B.C. and Quebec quota holders. Even if the data used by the Investor only track allocation of quota for softwood *first manufactured* in each province, the Investor interprets it as if it represented the quota allocated to quota holders *physically present in* B.C. and Quebec. The data are not properly used.

231 Joseph Kalt Affidavit, paras 32-33.

232 Claudio Valle Affidavit, para. 110.

233 Claudio Valle Affidavit, paras 90, 102.

234 Claudio Valle Affidavit, para 118; Tom MacDonald Affidavit, para. 70.

record on which to base their allocation were the established companies, like the Investment.

225. The method chosen for allocation to new entrants included setting aside 2 % of the 14.7 billion board feet EB and allocating the bonus fee-free quota that had been earned over the first four quarters as a result of the price of lumber exceeding the trigger price set out in the SLA.²³⁵ Given that the available amount of EB was fixed at 14.7 billion board feet, it followed that less EB quota would be available for distribution among established mills exporting softwood lumber first manufactured in B.C., Quebec, Alberta or Ontario.
226. The new entrant allocations were made from October 1, 1996 to March 31, 1998 on a corporate basis.²³⁶ If a mill qualified as a "new entrant" it received new entrant quota, regardless of where it was located.²³⁷
227. The overall increase of quota allocated collectively to producers of softwood lumber from Quebec and Ontario was due to the fact that the softwood lumber industry in those provinces was in a period of expansion when the SLA was executed.²³⁸ As a result, there were proportionately more "new entrants" to the softwood lumber industry in Quebec and Ontario than in B.C.²³⁹
228. This does not mean that all Quebec and Ontario mills experienced an increase in quota. Established mills in those provinces also experienced a shrinkage of quota to compensate for new entrants, as did established mills in B.C. and elsewhere. Similarly, new entrant mills in B.C. were accommodated the same way as new entrant mills in Ontario and Quebec.

235 Claudio Valle Affidavit, paras 102, 139; *Notice to Exporters No. 94*, "Item 5104: Softwood Lumber Products: The Assignment of Export Levels" (October 31, 1996) (Book of Treaties, Tab 16).

236 Claudio Valle Affidavit, paras 123, 146; Tom MacDonald Affidavit, para. 74.

237 Claudio Valle Affidavit, para. 122.

238 Ilan Vertinsky Affidavit, paras 69-81, Table 2.

239 Joseph Kalt Affidavit, para. 32; Claudio Valle Affidavit, para. 138.

229. Thus, the difference in treatment that the Investor identifies, and which it erroneously argues results in a breach of the national treatment obligation, is different treatment of new entrants which were in different circumstances than established participants in the industry.²⁴⁰ As an established mill, the Investment would not have been treated any more favourably had it been located in Quebec.²⁴¹
230. At most this evidences the well-established practice of setting aside quota for new entrants in a quota allocation regime.²⁴² This will necessarily involve redistributing quota from established participants. It certainly is not a violation of national treatment. The nationality of the new entrant is irrelevant to the decision as to who gets quota or how much it gets.²⁴³
231. The Investor also argues that B.C., as a province, was entitled to receive its “historic share”²⁴⁴ of the trigger price bonuses accrued. The concept of “historic provincial shares” in the context of allocating quota does not, and has never, existed.²⁴⁵
232. The corporate provincial shares used to distribute the quota in year 1, which the Investor takes to be “historic provincial shares”, were the result of a negotiation between the federal government and the provinces.²⁴⁶ As a result of that negotiation, it was decided that quota holders of softwood lumber first manufactured in B.C. would receive 59 % of the quota left after setting aside EB for new entrants, the one-time transitional adjustment and the Minister’s reserve.²⁴⁷ In addition, the criteria used to allocate trigger price bonus

240 Tom MacDonald Affidavit, para. 70; Claudio Valle Affidavit, paras 81, 110, 121-122; Joseph Kalt Affidavit, para. 34.

241 Claudio Valle Affidavit, para. 124.

242 Claudio Valle Affidavit, para. 110.

243 Claudio Valle Affidavit, paras 141, 121.

244 Investor’s Memorial, paras 35 and 86.

245 Claudio Valle Affidavit, paras 66-69, 90, 122, 124.

246 Claudio Valle Affidavit, para. 92.

247 Letter from Margaret Huber of DFAIT to Gary McGrath of Pope & Talbot Ltd., dated November 7, 1996, produced by the Investor, January 14, 2000 (Book of Authorities Vol. I, Tab 24); Claudio Valle Affidavit, paras 90-91.

quota to new entrants was applied nationally.²⁴⁸ Consequently, there were no “historic provincial shares”.

233. It is clear, therefore, that the difference in treatment that the Investor complains of between producers in B.C. and Quebec, resulted from the non-discriminatory application of a policy designed to deal with new entrants. The Investment was treated no less favourably than established investments in the covered provinces. The Investment was not treated differently from other softwood lumber producers on the basis of the Investor’s nationality.
234. The rules that were applied to the Investment were rules applicable to all softwood lumber producers in like circumstances.²⁴⁹ This did not mean that every lumber producer was treated in exactly the same way. Distinctions were made between those with historic export performances and new entrants without such records.²⁵⁰
235. Article 1102 does not prevent a NAFTA Party from making legitimate distinctions in the administration of its rules. What it prohibits is having one set of rules for domestic investors and another set of rules for foreign investors and investments. No such distinction was made in this case.

(xi) Comparison of Investments Producing Less Than and Greater Than 10 Million Board Feet Per Year

236. The Investor also asserts that its Investment is treated less favourably than investments that produce less than 10 million board feet per year because they are allegedly exempt from paying LFB and UFB fees.²⁵¹ In addition to being wrong that this is a breach of the national treatment obligation, the Investor is also wrong on the facts. No exporter of

248 Claudio Valle Affidavit, paras 81, 82, 121.

249 Claudio Valle Affidavit, para. 124.

250 Claudio Valle Affidavit, paras 119, 120.

251 Investor’s Memorial, para. 90.

lumber covered by the SLA is exempt from paying LFB and UFB fees once it has exceeded its EB.²⁵²

237. Under Article II (9) of the SLA, companies producing less than 10 million board feet annually do not have to comply with the “speed bump” provision, which limits the amount that an exporter may export to a maximum of 28.75% of its annual allocation of EB for any given quarter.²⁵³ This provision was included in the SLA to minimise export surges in any given quarter and thus to maintain supply and price levels.²⁵⁴
238. Not having to comply with the “speed bump” provision does not exempt an exporter from paying export fees. Under the SLA, exporters of softwood lumber producing a total of less than 10 million board feet annually (“small producers”) are still subject to eligibility requirements in order to obtain quota: they still must apply for permits, and they are still subject to LFB and UFB fees for exports in excess of their allocated EB quota.
239. That said, exporters that produce less than 10 million board feet annually are in different circumstances than larger producers. Small producers frequently have seasonal production.²⁵⁵ Exemption from the constraints imposed by the “speed bump” provision allows them to sell their production in a timely fashion.²⁵⁶
240. Further, the quota allocation for small producers is often so small that to require exports to be evenly distributed throughout the year would impose unreasonable constraints, such as limiting exports per quarter to what would amount to half a truckload.²⁵⁷
241. In summary, small producers are treated differently from larger producers in respect of the speed bump provision based on the different circumstances of the small producers, including: the seasonal character of their production, the unreasonable constraint the

252 Douglas George Affidavit, paras 45-48; Claudio Valle Affidavit, para. 39(g).

253 See the *Softwood Lumber Products Export Permit Fees Regulations*, S.O.R. 96-317 s. 4 (Book of Treaties Tab 10); see also Notice to Exporters No. 94 at para. 11.3 (Book of Treaties Tab 16).

254 Tom MacDonald Affidavit, para. 53.

255 Douglas George Affidavit, para. 46; Ilan Vertinsky, para. 85(8).

256 Douglas George Affidavit, para. 11; Ilan Vertinsky, para. 82..

257 Tom MacDonald, para. 53.

speed bumps would impose on their business, and the negligible amounts of their exports. They are not treated differently on the basis of their nationality. The exemption is offered to foreign and domestic investments without distinction.²⁵⁸

(xii) Comparison of Investments: "Super Fee Base"

242. The Investor maintains²⁵⁹ that the "extra fee" level introduced on August 30, 1999 results in its investment being treated less favourably than investments in other covered provinces. This fee is applicable to all investments, domestic or foreign, in British Columbia.
243. This allegation was not pleaded in the Statement of Claim and should not be addressed. If it is addressed, Canada offers the following response.
244. The extra fee level for B.C. was added to settle a claim initiated by the U.S. under the dispute settlement provisions of the SLA in respect of provincial stumpage fees, which B.C. had lowered on June 1, 1998. The U.S. alleged that lowering the stumpage fees breached the SLA.²⁶⁰
245. Before a finding was made by the arbitration panel hearing the dispute, Canada and the U.S. reached a settlement which was strongly supported by the government and the industry in B.C.²⁶¹ The terms of the settlement required increased fees for exports to the U.S. of B.C. softwood lumber as outlined in Notice to Exporters No. 120.²⁶² The fees were imposed, therefore, as part of the agreement to settle the B.C. stumpage dispute.

258 Ilan Vertinsky, para. 82.

259 Investor's Memorial, para. 89.

260 Douglas George Affidavit, para. 115.

261 Douglas George Affidavit, Exhibits K and L.

262 Notice to Exporters No. 120, "Softwood Lumber: Implementing the Agreement to Settle the B.C. Stumpage Dispute" (September 3, 1999) (Book of Treaties Tab 27); Exchange of Letters between Canada and the U.S. dated August 26, 1999 (Book of Treaties Tab 4 and 5).

246. Thus with respect to imposition of the super fee base, the circumstances surrounding the treatment accorded to softwood lumber companies in B.C. were different then the circumstances surrounding treatment of softwood lumber companies in other provinces. Stumpage rates had been lowered only in B.C. and the dispute and its outcome affected B.C. companies only. The consequences of a possible adverse finding would have affected only companies in B.C., not companies in the other covered provinces.

(xiii) Conclusion

247. It is clear that Canada, in implementing and administering the SLA, has accorded investments of other NAFTA Parties treatment no less favourable than it has accorded in like circumstances to its own investments. There is, therefore, no breach of Article 1102.
248. The Investor's interpretation would have the effect of allowing foreign investors to claim exemption from laws applicable in one part of the country because more favourable laws were available in another part of the country.
249. The ramifications of this interpretation are immense. If accepted, regional development programs in Canada would have to be applied to investors outside the designated regions. Similarly, it could have ramifications for programs of other NAFTA parties.²⁶³
250. In the instant case, this approach would entitle the Investment to different treatment than accorded to domestic investments in exactly the same circumstances as it. Hence, the Investment would not be subject to the Export Control Regime while other large producers in B.C. exporting lumber first manufactured in B.C. would be subject to the Export Control Regime. This is the opposite of what is mandated by Article 1102.

²⁶³ The "Final Rule" for the HUBZone Empowerment Contracting Program; published on June 11, 1998 in the Federal Register (Volume 63, Number 112); Small Business Administration 13 CFR Parts 121, 125, and 126. See www.sba.gov/hubzone (Book of Authorities Vol. II, Tab 26). The HUBZone Act of 1997, Title VI of Public Law 105-135, enacted on December 2, 1997 (111 Stat. 2592), created the HUBZone Empowerment Contracting Program (hereinafter "the HUBZone Program"). This final rule adds a new Part 126 to Title 13 of the Code of Federal Regulations to implement the HUBZone program.

251. Such an approach ignores the fact that the words “in like circumstances” are included in Article 1102 to deal with legitimate differences in regulation. What Article 1102 prohibits is a Party either *de jure* or *de facto* applying differential treatment to foreign investors or foreign investments in like circumstances with domestic investors or investments, on the basis of their nationality. The Investor’s argument ignores this.
252. The Investor has failed to show any *de jure* or *de facto* discrimination by Canada with respect to its investment relative to other investments in like circumstances. The Investment has not experienced treatment under the SLA or its implementation that is any way related to its status as an American-owned or controlled investment.
253. Any difference in treatment accorded the Investor’s investment relative to other investments in Canada is accorded not on the basis of foreign or domestic ownership but on the basis of legitimate differences in the circumstances of the treatment of investments. The Investor, therefore, has failed to establish that in implementing the SLA, Canada has breached its obligation under NAFTA Article 1102.

E. Performance Requirements - Article 1106

(i) Summary of Canada's Position Respecting Article 1106

254. Articles 1106(1) and (3) list the particular and clearly delineated "performance requirements" that NAFTA Parties are prohibited from imposing on investments in their territories.
255. Article 1106 (5) emphasizes the clear intent of the Parties that the prohibitions in Articles 1106(1) and (3) be limited to those expressly set out in each paragraph. A measure will not contravene Article 1106 unless Article 1106(1) or (3) explicitly prohibits it.
256. The Investor alleges that the Export Control Regime imposes requirements in connection with the operation of its Investment that are prohibited by Articles 1106(1)(a) and (e) and conditions the receipt of an advantage on compliance with the requirement listed in Article 1106(3)(d).
257. First, the Investor alleges that the "use it or lose it" provision is a *de facto* requirement to export under Article 1106(1)(a).
258. A use or lose provision falls outside the ambit of Article 1106 and therefore it is unnecessary to address this issue. However, even if the use it or lose it provision were considered an incentive to export the full amount of EB and LFB, that is irrelevant because it is clear that conditioning an advantage on export performance is not forbidden by Article 1106. The Investor has ignored the difference between the rules of Article 1106(1) – which forbid imposing or enforcing requirements – and 1106(3) – which forbids creating an incentive or conditioning an advantage on a narrower group of performance requirements that does not include export performance.

259. Second, the Investor advances an alternative interpretation of Article 1106(1)(a) that transforms Article 1106(1)(a) into a prohibition on export restrictions. However, that provision is directed at requirements to export more, not restrictions on how much can be exported. That is clear from the ordinary meaning of the provisions in their context and in the light of their object and purpose.
260. The second theory of the Investor is the converse of the first: that Article 1106 prohibits a restriction on exports. Article 1106 however, is plainly directed at requirements to export, not restrictions on exports.
261. The Investor offers a third theory, that the provisions of Article 1106(1)(e) and (3)(d), directed against restricting domestic sales by an investment to some relationship to its export sales, should instead or in addition be interpreted to preclude a restriction on export sales in relation to export restrictions. This too cannot stand up to legal or grammatical analysis.
262. Article 1106(1)(e) prohibits a Party from requiring an investment to restrict its sales within the Party's territory based on that investment's export levels or foreign exchange earnings. Article 1106 (3)(d) prohibits the conditioning of the receipt of an advantage on compliance with such a requirement. The Export Control Regime does not restrict the Investments' sales within Canada.
263. The Investor's fourth theory is that Article 1106 simply prohibits granting an advantage of any kind to any investment if any other investment is subject to any condition. That claim similarly ignores the text of Article 1106. Article 1106 precludes imposing certain specifically listed requirements on an investment or conditioning and investment's receipt of an advantage on such investment's compliance with specifically listed requirements.

264. Articles 1106(1)(a), (e) and (3)(d) relate to requirements designed to increase exports and foreign exchange earnings. The Export Control Regime, which allocates a finite amount of fee-free export quota, clearly does not do so. The Investor's attempt to bring the Export Control Regime within the scope of these provisions results in an interpretation of Article 1106 that clearly conflicts with its ordinary meaning.

(ii) The Law: Article 1106 Performance Requirements Are Specific and Limited

265. The Investor alleges that in implementing the SLA, Canada imposed requirements prohibited by Articles 1106(1)(a) and (e) and conditioned the receipt of an advantage on compliance with the requirement listed in Article 1106(3)(d). The relevant portion of Article 1106 provides:

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged

violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

...

- 5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

266. Article 1106(1) lists, in paragraphs (a) to (g), seven specific requirements, commitments or undertakings that a Party may not impose or enforce in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment in its territory.

267. Article 1106(3) lists, in paragraphs (a) to (d), four specific requirements, and provides that a Party may not condition an investment's receipt of an advantage on that investment's compliance with the requirements.

268. Three of the performance requirements prohibited by Article 1106(1) in connection with the establishment or operation of an investment are not prohibited under Article 1106(3), as a condition of the receipt of an advantage. Notably, there is no prohibition on conditioning the receipt or continued receipt of an advantage on a requirement to export a given level or percentage of goods or services.
269. As is emphasized by Article 1106(5), paragraphs 1 and 3 apply only to the requirements expressly set out in those paragraphs. Therefore, the explicit prohibitions set out in the provisions at issue, Articles 1106(1)(a), 1106(1)(e) and 1106(3)(d), must be identified.
270. The most basic requirement for any suggested interpretation of the scope of these provisions is that the interpretation be consistent with the ordinary meaning of the express wording of the provisions themselves, as informed by the context of the provisions. The interpretation offered by the Investor of the provisions of Article 1106(1)(a), (e) and 3(d) does not accord with their ordinary meaning and fails to consider their context.

(iii) Article 1106(1)(a)

271. Article 1106(1)(a) prohibits a Party from imposing a requirement that an investment achieve a given level of export. To breach Article 1106(1)(a), there must be a prescribed or identifiable level of export required. The *New Shorter Oxford English Dictionary* definition of “given” includes “assigned or posited as a basis for calculation or reasoning, fixed, specified.”²⁶⁴
272. For a measure to breach Article 1106(1), a Party must impose or enforce a requirement or enforce a commitment or undertaking. The ordinary meaning of all these words imports the notion of compulsion. The *New Shorter Oxford English Dictionary* defines “impose” as “lay or inflict (a tax, duty, charge, obligation, etc.) esp. forcibly; compel compliance with”. The definition of “enforce” is “compel the occurrence or performance of”.

²⁶⁴ Lesley Brown, ed. (New York: Oxford University Press, 1993), Vols I & II (Book of Authorities Vol. I, Tab 20).

“Requirement” is defined as “something called for or demanded; a condition which must be complied”. The definition of “commitment” is “the action of committing oneself or another to a course of action”. The definition of “undertaking” is “a pledge, promise; a guarantee”.²⁶⁵

273. For a requirement to breach Article 1106(1), a Party must compel the observance of a mandatory condition “in connection with the establishment, acquisition, expansion, management, conduct or operation” of an investment.

(iv) No “de facto” Breach of Article 1106

274. It is evident from the language of the provision that the notion of a “*de facto*” violation has no application in the context of NAFTA Article 1106(1). The words “requirement”, “imposed” and “enforced” indicate that a Party must compel an investment to export a prescribed level or percentage of goods, or that there must be recourse available to a Party if an investment does not comply with a commitment or undertaking to do so.
275. The *de facto* concept cannot be extended to a violation of Article 1106(1). Either an enforceable obligation to export is imposed, or it is not. A measure cannot have the “effect” of imposing an enforceable obligation.
276. The cases cited by the Investor in support of *de facto* violations²⁶⁶ demonstrate that *de facto* breaches are possible in the context of broadly worded non-discrimination obligations such as national treatment or most-favoured nation treatment²⁶⁷. They do not support the Investor’s contention²⁶⁸ that the “*de facto*” concept applies in the entirely different Article 1106 performance requirement context.

²⁶⁵ Lesley Brown, ed. (New York: Oxford University Press, 1993), Vols I & II (Book of Authorities Vol. I, Tab 20).

²⁶⁶ Investor’s Memorial, para. 101.

²⁶⁷ Such as Article III:4 of GATT 1994, which requires that imported products be treated no less favourably than like domestic products and Article I:1 of the GATT 1994, which requires that advantages accorded to products of one country be accorded to like products of all countries.

²⁶⁸ Investor’s Memorial, paras 101-103.

277. The Investor suggests that a measure that conditions an incentive is a “de facto requirement” covered by Article 1106(1). A provision that establishes a condition for obtaining an incentive falls outside Article 1106(1) because there is a separate provision – Article 1106(3) – that specifically addresses what may be conditioned on an incentive. The forbidden conditions on an incentive set out in paragraph 3 do not include all of the requirement forbidden by paragraph 1.
278. The Investor’s argument implies that conditioning the receipt of an advantage on compliance with a requirement is subsumed within the concept of Article 1106(1). Such an argument would make paragraph 3 redundant, since no additional conditions are
279. banned. The only plausible interpretation is that the Parties chose not to prohibit giving an incentive to export to an investment through the granting of an advantage, and the Investor’s claim must fail on this ground alone.
280. Were the Investor’s argument correct, then any export credit would *ipso facto* be illegal, since the “incentive” would be conditioned on exports. This is illogical.
281. The GATT Panel Report in *Canada – Administration of the Foreign Investment Review Act* (“FIRA case”)²⁶⁹ is cited by the Investor²⁷⁰ in support of the allegation that the *de facto* concept applies in the context of performance requirements. It supports no such conclusion. The FIRA case involved the interpretation of the national treatment obligation of Article III of the GATT, which is framed in different language in a different context.
282. In particular, Article III of the GATT does not refer to conditions on an incentive, or draw any separate explicit rules for that concept. The fact that an enforceable undertaking to purchase Canadian goods was found to violate the national treatment obligation under Article III:4 of the GATT by according a preference to domestic goods

269 *Canada – Administration of the Foreign Investment Review Act*, February 7, 1984, BISD 30S/140 (GATT Panel Report) (Book of Authorities Vol. II, Tab 27).

270 Investor’s Memorial, para. 101

over imported goods is of absolutely no relevance in the context of the inquiry to be made under Article 1106 regarding an alleged export performance requirement.

283. The Investor also cites²⁷¹ *European Economic Community – Imports of Beef from Canada*²⁷²; *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*²⁷³; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*²⁷⁴; and *EEC – Regulation of Parts and Components*.²⁷⁵ These cases all consider different types of national treatment or most-favoured nation treatment obligations pertaining to goods or services. None of them draw distinctions between requirements and incentives, and none are relevant to the interpretation of Article 1106.
284. The concept of *de facto* in these cases is not a rule of interpretation but, rather, a concept developed in the application of broadly worded anti-discrimination provisions. A measure must first fall within a provision of a trade agreement, interpreted in accordance with the rules set out in the *Vienna Convention*, before the question of breach can even be considered.
285. None of the cases cited by the Investor involves an analysis similar to that to be made under NAFTA Article 1106. There is nothing in any of these cases that justifies a reading of any of the provisions at issue which is at variance with their ordinary meaning.
286. Further, NAFTA Article 1106(5) clearly emphasizes that Articles 1106(1) and (3) are to be limited to the express prohibitions set out therein.
287. For a measure to fall within Article 1106(1), a Party must be “enforcing” or “imposing” a “requirement” or “enforcing” a “commitment” or “undertaking”. As discussed, the ordinary meaning of these words results in a conclusion that compliance with the impugned measure must be compellable by a Party in order for a measure to breach

271 Investor’s Memorial, footnotes 87 and 88.

272 March 19, 1981, BISD 21S/392 (GATT Panel Report) (Book of Authorities Vol. II, Tab 28).

273 July 19, 1989, BISD 36S/167 (GATT Panel Report) (Book of Authorities Vol. II, Tab 29).

274 September 9, 1997, WT/DS27/AB/R (WTO Appellate Body) (Book of Authorities Vol. II Tab 30).

275 May 16, 1990, B150 375/132 (GATT Panel Report) (Book of Authorities Vol. II Tab 31).

Article 1106(1). The reading of Article 1106(1) urged by the Investor violates the basic rule that interpretation of a treaty should, above all, be based on the ordinary meaning of the text.

(v) Ordinary Meaning of 1106(1)(e) and 1106(3)(d)

288. Both Article 1106(1)(e) and 1106(3)(d) provide that a party may not require an investment “to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.”
289. Article 1106(1)(e) prohibits the requirement in connection with the “establishment, acquisition, expansion, management, conduct or operation” of an investment. Article 1106(3)(d) prohibits the conditioning of the receipt or continued receipt of an advantage upon the investment’s compliance with the requirement.
290. Each of these provisions, by their readily discernible ordinary meaning, refer to requirements to restrict an investment’s sales of goods within that Party’s territory based on such investment’s export volume or value, or its foreign exchange earnings. The Export Control Regime imposes no restriction on sales within Canada.

(vi) Article 1106(3)(d)

291. The Investor confines its textual analysis of Article 1106(3)(d) to the meaning of one word, namely “advantage”. The Investor ignores other key words in Article 1106(3), such as “condition”, “receipt”, “compliance” and “requirements”.
292. The *New Shorter Oxford English Dictionary* defines the verb “condition” as “stipulate for; make (something) a condition; agree by stipulation to do something; make conditional.” The noun “condition” is defined as “a thing demanded or required as a prerequisite to the granting or performance of something else; a stipulation”. The definition of “receipt” is “the action of receiving something, or the fact of something being received, into one’s possession or custody”. The definition of “compliance” is “the

action of compliance with a request, command” As noted above, the definition of requirement is “something called for or demanded; a condition which must be complied with”.²⁷⁶

293. As is evident from the ordinary meaning of its terms, Article 1106(3) does not deal with “advantages” in a general or abstract way as the Investor has suggested.²⁷⁷ The word “receipt” clearly indicates that a Party must have given an “advantage” to someone. The “receipt” or “continued receipt” of the “advantage” must be subject to a prerequisite, a demand or a condition that must be complied with. Words such as “condition”, “compliance” and “requirement” are strong words that clearly convey the idea of compulsion. For a measure to fall within Article 1106(3), a Party must have given an advantage to an investment, subject to the prerequisite that that investment has complied with one or more of the requirements set out in paragraphs (a) to (d).

(vii) Context of 1106(1)(a), (e) and 3(d)

294. The interpretative principle set out in the *Vienna Convention* provides that, in addition to the ordinary meaning of the provisions themselves, the context in which they are found must be considered.
295. Article 1106(5) is crucial to the interpretation of Articles 1106(1)(a), (e) and (3)(d). The Parties have expressed a clear intent in Article 1106(5) that the obligations in paragraphs 1106(1) and (3) not be interpreted broadly. As previously noted, Article 1106(5) provides: “Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs”.²⁷⁸

²⁷⁶ Lesley Brown, ed. (New York: Oxford University Press, 1993), Vols I & II (Book of Authorities Vol. I, Tab 20).

²⁷⁷ Investor's Memorial, para. 106.

²⁷⁸ Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Ontario: Canada Law Book Inc., 1994), pp. 287-88: “NAFTA 1106(5) makes it clear that the prohibited performance requirements, whether as conditions of investment or receiving an advantage, are confined to those specifically identified.” (Book of Authorities Vol. I, Tab 19)

296. The Investor's attempts to broaden the scope of the requirements prohibited by Article 1106 must be rejected in the face of the explicit language of Article 1106(5).
297. The context provided by the provisions of Article 1106(1)(b) to (e) also informs the proper interpretation of Article 1106(1)(a). They include requirements to achieve a given level of domestic content (Article 1106(1)(b)); requirements to purchase, use or accord a preference to goods produced or services provided in a Party's territory, or to purchase goods or services from persons in the Party's territory (Article 1106(1)(c)) and requirements to relate the volume of imports to the volume of exports or foreign exchange inflows associated with the investment (Article 1106(1)(d)).
298. These prohibited requirements are clearly geared to maximizing use of domestic goods and services and minimizing the use of imported goods and services, thereby maximizing foreign exchange inflows and minimizing foreign exchange outflows. Article 1106(1) should be interpreted as prohibiting requirements to export designed to maximize foreign exchange inflows, and should not apply to measures such as the Export Control Regime.

(viii) The Origin of Article 1106

299. A proper interpretation of Article 1106 should reflect its object and purpose. Consideration of the origin of the performance requirements prohibition in NAFTA is useful to appreciate the object and purpose of Article 1106.
300. Article 1106 is derived from a provision contained in many U.S. BITs dating back to the 1980's²⁷⁹. This provision was a response to the practice of some host countries of imposing certain requirements on U.S. investments designed to boost the revenue the

²⁷⁹ For example, see Article II (7) of the January 11, 1982 Draft; Article II (7) of January 1, 1983 Draft; Article II (5) of September 1987 Draft in Kenneth Vandeveld, *United States Investment Treaties and Practice* (The Netherlands: Kluwer Law and Taxation Publisher, 1992) Annex A-1 to A-4 (Book of Authorities Vol. II, Tab 35).

investments brought to the host country, as a condition for their establishment or continued operation.²⁸⁰

301. Requirements prohibited by BITs include achieving a particular level of local content, giving preference to products or services of domestic origin, or requiring an investment to export (with a view to increasing foreign exchange earnings).²⁸¹
302. The requirements prohibited by Article 1106 are similar. For example, Articles 1106(1)(b) and (c) prohibit the imposition of domestic content requirements and requirements to use or accord a preference to local goods or services. Articles 1106(3)(a) and (b) prohibit a Party from conditioning the receipt of an advantage on an investment's compliance with these same requirements.
303. As noted by Jon Johnson, "the objective of prohibiting performance requirements is to prevent NAFTA countries from distorting investment decisions in their favour."²⁸²
304. Performance requirements are sometimes used in trade policy to displace imports or increase exports. The requirements are designed to cause foreign investors to produce for export with as little competitive harm to the domestic industry as possible. The aim generally is to raise the foreign exchange earnings of the host country and to increase employment in the export sector without introducing additional competition to the domestic industry.²⁸³

280 Giorgio Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Collected Courses of the Hague Academy of International Law* 1997, pp. 366-67 (Book of Authorities Vol. II, Tab 33); M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge: Cambridge University Press, 1994), p. 141 (Book of Authorities Vol. II, Tab 34); Kenneth Vandevelde *United States Investment Treaties Policy and Practice*, (The Netherlands: Kluwer Law and Taxation Publisher, 1992), p. 110 (Book of Authorities Vol. II, Tab 35); Joseph Kalt Affidavit, paras 42-43.

281 For example, see Article II (7) of the January 11, 1982 Draft; Article II (7) of January 1, 1983 Draft; Article II (5) of September 1987 Draft in Kenneth Vandevelde, *United States Investment Treaties and Practice* (The Netherlands: Kluwer Law and Taxation Publisher, 1992) Annex A-1 to A-4 (Book of Authorities Vol. II, Tab 35).

282 Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide*, (Ontario: Canada Law Book Inc., 1994), p. 28 (Book of Authorities Vol. I, Tab 19).

283 Joseph Kalt Affidavit, para. 43.

305. The provisions cited by the Investor, Articles 1106(1)(a), 1106(1)(e) and 1106(3)(d), are export requirements. Sornarajah identifies the object of such export requirements in his treatise, *The International Law on Foreign Investment*: “[Export requirements] are imposed to ensure that the foreign corporation earns revenue for the host state through exports.”²⁸⁴
306. The export requirements a Party might seek to impose which would be covered by Articles 1106(1)(a), (e) and (3)(d) are requirements which artificially promote higher levels of export, with a view to increasing foreign exchange revenue for the host Party.
307. The Export Control Regime has the exact opposite incentive effect on Canadian exports from a typical performance requirement. The SLA makes the use of quota that is rendered valuable because it restricts exports from Canada. Moreover, quota allocation pursuant to the SLA has the economic effect of raising the competitive pressure facing firms producing for the domestic market, and it tends to lower employment and economic activity used in producing for export.²⁸⁵
308. The purpose of including export performance requirement prohibitions in NAFTA, to address requirements aimed at increasing exports, supports the conclusion that the Export Control Regime does not breach Article 1106.

(ix) “Per Se Compensable”

309. The Investor has attempted to characterize the obligations in Articles 1106(1) and (3) as compensable *per se*.²⁸⁶ The concept of *per se* is not found in Article 1106, or indeed in NAFTA, and has no place in the interpretation of international trade agreements.
310. According to the ordinary meaning of Articles 1106(1), 1106(3), 1106(5) and 1116, a sustainable claim with respect to Article 1106 of NAFTA, and entitlement to an award of

²⁸⁴ M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 1994), p. 141 (Book of Authorities Vol. II, Tab 34).

²⁸⁵ Joseph Kalt Affidavit, paras 42-44.

²⁸⁶ Investor's Memorial, paras 99, 100, 104.

damages under Article 1135, requires that certain elements be proved by a claimant. An investor must have sustained loss or damage by reason of, or arising out of, a measure that its investment was required to comply with, either in connection with the investment's establishment or operation, or as a condition for the receipt of an advantage. Further, the measure must fall squarely within the specific prohibitions listed in Article 1106(1) or (3).

311. Nothing in any of the stated NAFTA objectives, whether in Article 102, the Preamble or elsewhere, justifies the conclusion that the imposition or enforcement of any requirement or any investment is compensable "*per se*". The objective of increasing investment opportunities in the free trade area does not justify interpreting the specific provisions of NAFTA in a manner that deviates from their ordinary meaning.

(x) The Law Applied to the Facts: No Breach of Article 1106

312. The Investor's argument is not a straightforward application of the law to the facts. Instead, the Investor attempts to manipulate and expand the provision to fit the Investor's assessment of the facts. In doing so, the Investor has invented prohibitions, and offered an interpretation of the existing prohibitions, that is completely removed from the actual wording and purpose of Article 1106.
313. This section will address the Investor's various misinterpretations of Articles 1106(1)(a), 1106(1)(e) and 1106(3)(d), and show that the measures implemented through the Export Control Regime are not prohibited by these provisions as properly interpreted.

(xi) Canada Has Not Breached Article 1106(1)(a)

314. The Investor does not allege that its Investment is subject to any legal requirement to export a given level of softwood lumber, as it is clear that Canada has not imposed any legal requirement or obligation on any lumber manufacturer to export a certain amount of lumber.

315. Rather, the Investor alleges that Canada has breached Article 1106(1)(a), by imposing three “*de facto* requirements” to export a given level of goods.²⁸⁷
316. Two of the “*de facto* requirements” to export are alleged restrictions on exports, namely to export less softwood lumber to the U.S. than the Investment might otherwise have exported, and to export no more than 28.75% of its annual quota allocation in any quarter. The Investor also alleges that Canada has imposed a “*de facto* requirement” on its Investment to export at least up to its annual allocated EB and LFB quota.
317. The Investment may export whatever amount of softwood lumber it chooses under the Export Control Regime. There is neither a minimum required level, nor a maximum allowable level. The Investment’s exports have obviously not been restricted to its EB and LFB levels. The Investment has, in fact, exported more than its allocated EB and LFB levels. In year three, for example, the Investment exported 31,213,334 board feet more than its EB and LFB levels.²⁸⁸ The Investment may also export more than 28.75% of its annual quota allocation in a given quarter if it chooses, and has in fact done so in certain quarters.²⁸⁹

(xii) Requiring a Given Level of Export Does Not Mean Restricting Exports

318. Even if Canada’s export fee system has the effect of reducing exports of softwood lumber to the U.S. by a foreign investment, this does not impose a requirement “to export a given level or percentage of goods”, as contemplated by Article 1106(1)(a).
319. Firstly, the Export Control Regime does not impose any requirement to export at a given level. The fact that no such requirement exists is apparent from the fact that the Investment has exported more than its allocated EB and LFB quota, and has exported in excess of its 28.75% “speed bump” in certain quarters.²⁹⁰

287 Investor’s Memorial, paras 120-122.

288 Douglas George Affidavit, para. 103 & Annex A.

289 Douglas George Affidavit, para. 12.

290 Douglas George Affidavit, para. 12 and Annex A.

320. Secondly, to include a restriction on fee-free export levels in the scope of 1106(1)(a) is not in accord with the object and purpose of export performance requirement prohibitions in Chapter Eleven of NAFTA. The purpose of such provisions is to prohibit measures designed to require an investment to export more than it might otherwise have exported, to increase foreign exchange inflows to the Party. The Export Control Regime is not such a measure.

(xiii) The “use it or lose it” Element of the Export Control Regime Could Not Form the Basis of any Claim by the Investor

321. The Investor alleges²⁹¹ that it is subject to a requirement to export up to its EB and LFB quota levels annually. The Investor does not allege that it is subject to a *de jure* requirement to do so, but that there is a “*de facto* requirement” to use its allocation in a given year, to maintain its quota levels in the following year.

322. The Investor’s description of the “use it or lose it” aspect of the Export Control Regime²⁹² is incomplete. The “use it or lose it” mechanism includes provisions to mitigate the effects of under-utilization of a quota. Investments that use 98% of their quota allocation are treated as having fully utilized their quota for the purposes of calculating their next year’s quota. Also, quota holders have been able to return a certain portion of their allocation of each year and that returned portion will be deemed utilized for the purpose of calculating the next year’s quota.²⁹³

323. In considering whether the “use it or lose it” mechanism contravenes Article 1106, the differences between the obligations under Article 1106(1) and Article 1106(3) are critical. The Investor understandably ignores those differences, because they are fatal to the Investor’s argument.

291 Investor’s Memorial, para. 121.

292 Investor’s Memorial, para. 121.

293 Douglas George Affidavit, paras 54, 56.

324. As previously mentioned, there are certain requirements that are prohibited, under Article 1106(1), in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment that are not prohibited under Article 1106(3), as a condition for the receipt of an advantage, or continued receipt of an advantage by an investment. The *expressio unius est exclusio alterius* maxim has clear application here, as specifically reinforced in this instance by Article 1106(5).
325. The ability to export fee-free, rather than having to pay export fees, is an advantage. In its Memorial²⁹⁴, the Investor identifies EB and LFB quota, or the ability to export softwood lumber at a reduced fee or no fee at all, as an “advantage”.
326. To the extent that an investment’s maintenance of EB and LFB quota levels in a given year is conditional on exporting the allocated quota levels in the preceding year, this would be conditioning the receipt or continued receipt of an advantage (the ability to export fee-free or at a reduced fee) on exporting a given level of goods.
327. Article 1106(3) and not Article 1106(1) covers measures that grant an advantage upon compliance with a requirement. There is no prohibition under Article 1106(3) on conditioning the receipt or continued receipt of an advantage on a requirement to export a given level. Article 1106(3) conspicuously lacks a prohibition equivalent to the Article 1106(1)(a) prohibition on requiring a given export level.
328. Therefore, and as reinforced by Article 1106(5), conditioning receipt of an advantage, such as fee-free quota, on a requirement to export a given level, is permitted.

(xiv) No Loss or Damage to the Investment

329. Furthermore, even if there had been a *de jure* requirement for the Investment to export up to its EB and LFB quota levels, and if this were found to breach Article 1106(1)(a), such a requirement could not form the basis for an Article 1116 claim by this Investor.

²⁹⁴ Investor’s Memorial, para. 112.

330. To sustain a claim under Article 1116, the Investor must incur loss or damage as a result of any alleged breach of Article 1106(1)(a).
331. Given that the Investment has exceeded 100% of its allocation in each of years 1, 3 and 4 of the SLA²⁹⁵, and that the Investment never made use of the return provision under the Export Control Regime,²⁹⁶ as well as the Investor's own repeated assertion that the Investment would have exported much more but for the fee system, it is evident that the Investment would not have suffered any loss or damage by being "required" to export up to its allocated quota levels and there would be no basis for a claim under Article 1116.
332. The Investment's behaviour demonstrates the lack of substance to its claim that it was required to export up to its allocated levels. The SLA and its implementation generally elevated the price softwood exporters to the U.S. were able to obtain.²⁹⁷ The Investment and other quota holders are motivated by their own rational profit incentive to export when allocated quota. The incentive to use quota is driven by supply and demand, not by an artificial requirement to export.²⁹⁸

(xv) The Investor's Distortion of the Meaning of 1106(1)(e) and 1106(3)(d)

(a) The sales that cannot be restricted by a Party under these provisions are sales within that Party's territory

333. As previously stated, the prohibition in Article 1106(1)(e) and 1106(3)(d) relates to the restriction of an investment's sales within the territory in which it has invested, i.e. its domestic sales in Canada, based on that investment's export performance, its level of exports from Canada. The Export Control Regime does not restrict the Investment's sales within Canada, nor does the Investor make such an allegation. As such, Articles 1106(1)(e) and 3(d) are of no application whatsoever in the context of this dispute.

295 Douglas George Affidavit, para. 55.

296 Douglas George Affidavit, para. 57.

297 Joseph Kalt Affidavit, para. 21.

298 Joseph Kalt Affidavit, paras 45, 14.

334. Despite the clear scope of Articles 1106(1)(e) and 1106(3)(d), the Investor offers a strained interpretation that conflicts with the ordinary meaning of the provisions.
335. The explicit terms of the provision are that a Party (in this case, Canada) may not impose on an investment a requirement “to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports”. This provision, by its ordinary meaning, would prohibit Canada from imposing a requirement on the Investment to restrict its sales within Canada based on its export level.
336. Contrary to its ordinary meaning, the Investor argues that this prohibits Canada from imposing a restriction on sales to the U.S. related to export level.
337. To make this leap, the Investor²⁹⁹ paraphrases the prohibition as “restricting the sales of an investment in its territory”, in an attempt to make plausible its interpretation that “in its territory” might modify “investment” rather than “sales”.
338. An examination of the provision itself makes it obvious that Canada, as a Party, is prohibited from restricting the level of sales within Canada of an investment based on a consideration of that investment’s export levels. The provision does not cover restrictions on all the sales of an investment, but only sales in the Party’s territory.
339. This is reinforced by a purposive interpretation of the prohibition. The more foreign exchange earnings are brought into the host country by a foreign investment, the better it is for the host country’s economy. To ensure a foreign investment exports its product, rather than merely sells it within the Party’s territory, a Party may seek to restrict permissible levels of sales within its territory based on the investment’s level of exports.

299 Investor’s Memorial, para. 110 and Statement of Claim, para. 84 (b).

340. The Investor attempts to distort the nature of the prohibition in Articles 1106(1)(e) and 3(d) by disregarding the meaning of the term “in its territory” within these provisions. In so doing, the Investor purports to add an entirely new prohibited requirement to Articles 1106(1) and (3), by which the Investor would have a Party prohibited from imposing a restriction on exports based on export level.

341. Not only is the suggested prohibition nonsensical, reading in such an additional requirement is in clear conflict with general rules of interpretation, as well as the express terms of Article 1106(5), which confines prohibited performance requirements to those specifically set out in paragraphs 1 and 3.

(b) The investment that is advantaged under Article 1106(3) must be the same investment that complies with the requirement

342. Another distortion of the ordinary meaning of the provision arises from the Investor’s allegation that Canada has breached Article 1106(3)(d) by granting an advantage to producers outside the covered provinces (exemption from export fees), conditioned by the “requirement” imposed on investments inside the covered provinces (to restrict U.S. sales based on export levels).³⁰⁰

343. One of the many problems with this argument is that the Investor must argue that, under Article 1106(3), the investment granted an advantage need not be the same investment that complies with the requirement in Article 1106(3)(d). This plainly contradicts the ordinary meaning of the provision.

344. Article 1106(3)(d) prohibits a Party from conditioning the receipt of an advantage in connection with an investment in that Party’s territory on compliance with a requirement “to restrict sales of goods or services in its territory that such investment produces or provides”. The wording of the provision makes it clear that the investment granted the advantage must be the same investment that complies with the requirement.

300 Investor’s Memorial, para. 129.

(xvi) Not All “advantages” Fall under Article 1106(3)(d)

345. The Investor also alleges³⁰¹ that the Export Control Regime “was designed to provide advantages to softwood lumber investments in the poorest provinces of the Canadian federation by requiring enterprises to establish themselves and operate in these locations in order to be entitled to the full benefits of the Export Control Regime”.
346. Nothing in Article 1106 prevents a Party from providing regional assistance. In this case, however, the issue does not arise. The suggestion that the Export Control Regime was somehow designed to benefit Canada’s “poorest provinces” is groundless, and completely disregards the context in which it was introduced.
347. The Export Control Regime was designed to implement the SLA³⁰² which, in turn, was designed to respond to U.S. concerns regarding softwood lumber exports from B.C., Alberta, Quebec and Ontario, and the resulting uncertainty of access to the U.S. market by softwood lumber producers in those provinces.³⁰³
348. Even if the non-payment of export fees were an “advantage” within the meaning of Article 1106(3), such an advantage is not “conditioned” on “compliance” with any “requirement”. The advantage was not given. There is no “receipt” of an advantage. There is no act of “conditioning”. There is no “compliance” and there is no “requirement”.
349. The assertion that investments in non-covered provinces are generally advantaged by not having to pay export fees demonstrates the general approach of the Investor to argue that any advantage available to an investment that is merely contemporaneous with the Export Control Regime is in some way prohibited by Article 1106(3), and specifically by Article 1106(3)(d). This argument is at odds with the provision itself, which contains a very specific prohibition.

301 Investor’s Memorial, para. 116.

302 Claudio Valle Affidavit, paras 38-39, 89-90.

303 Tom McDonald Affidavit, paras 26, 27, 66; Joseph Kalt Affidavit, paras 11-12; Claudio Valle Affidavit, para. 16; Ilan Vertinsky, paras 41, 48.

350. Article 1106(3) prohibits a Party from conditioning the granting of an advantage to an investment on that investment's compliance with the requirement "to restrict sales of goods...in its territory that such investment produces...by relating such sales in any way to the volume or value of its exports or foreign exchange earnings".
351. Even if the non-application of export fees to producers of softwood lumber from non-covered provinces were considered an advantage, no investment is required to comply with the requirement set out in Article 1106(3)(d) in order to receive this advantage.
352. The Investor refers to *Canada – Autos*³⁰⁴ within its discussion of Article 1106(3)(d). This Panel report is of no assistance in this context. *Canada - Autos* deals with the national treatment provision in GATT Article III:4 and expressly bases its conclusions on the language and prior interpretations of that national treatment provision.
353. The Investor provides the following excerpt from *Canada – Autos*³⁰⁵, absent the introductory phrase that explains the context in which the finding was made:

In light of our interpretation of the word "affecting" in Article III, we consider that a measure which provides that an advantage can be obtained by using domestic products but not by using imported products has an impact on the conditions of competition between domestic and imported products and thus affects the "internal sale...or use" of imported products, even if the measure allows for other means to obtain the advantage, such as the use of domestic services rather than products.³⁰⁶

354. The Panel finding is clearly made in the context of Article III:4 of the GATT and considers whether the offering of an advantage for the use of domestic products that cannot be obtained by using imported products infringes the national treatment provision of GATT Article III:4.

304 *Canada – Certain Measures Affecting the Automotive Industry*, February 11, 2000, WT/DS139/R (WTO Panel Report) (Book of Authorities Vol. II, Tab 36).

305 Investor's Memorial, para. 111.

306 *Canada – Certain Measures Affecting the Automotive Industry*, February 11, 2000, WT/DS139/R (WTO Panel Report) para. 10.82 (Book of Authorities Vol. II, Tab 36).

355. The findings are irrelevant to the issues raised by the Investor's allegation that the Export Control Regime breaches NAFTA Article 1106(3)(d). The scope of the inquiry here is limited to a determination of whether the Export Control Regime offers an investment an advantage conditional on that investment's compliance with a restriction on the sale of goods in Canada based on the investment's export levels. There is no such restriction.
356. The nature of the performance requirements covered by Articles 1106(1)(e) and 1106(3)(d) is apparent from their ordinary meaning. The Export Control Regime does not impose such requirements on the Investment and the Investor's strained attempts to argue that the implementation of the SLA violates these provisions must be rejected.

(xvii) Conclusion

357. The Export Control Regime does not impose any of the specifically delineated performance requirement prohibitions under Article 1106, a conclusion which is only reinforced by the attempts of the Investor to twist the ordinary meaning of its wording. This conclusion is further strengthened by a purposive interpretation of the provision, gained by an examination of the investment context of the provision, and the origin of and rationale for the inclusion of performance requirements prohibitions in NAFTA.
358. Unlike the performance requirements that the Parties intended to prohibit under NAFTA, the intent and the effect of the softwood permit system was not to artificially increase exports to the U.S., to bring more U.S. dollars to Canada, or to otherwise directly benefit Canada's economy. On the contrary, the system was implemented with a view to regulating exports to the U.S. The imposition of export fees was not designed to increase U.S. exports.

F. Expropriation – Article 1110

(i) Summary of Canada's Position Respecting Article 1110

359. A measure will not breach Article 1110 or require compensation unless it expropriates an investment of an investor or is a measure tantamount thereto.
360. The threshold requirement for finding a breach of Article 1110 is that there has been expropriation or a measure tantamount thereto. Where, as here, this requirement has not been satisfied, there is no need to proceed to the secondary question of whether the expropriation meets the requirements of Article 1110(1)(a) to (d).
361. Pope & Talbot Ltd. was not expropriated or nationalized directly, indirectly or by measure tantamount to expropriation, and the Investor's claim of a breach of Article 1110 must be dismissed. There has been no deprivation of fundamental ownership rights.
362. The implementation of the SLA through the Export Control Regime is a good faith, valid regulatory measure within Canada's regulatory power. As such, any effect it has on an investment cannot be considered expropriation of the investment.
363. Accepting the interpretation and application of NAFTA Article 1110 proposed by the Investor would amount to a conclusion that every regulatory measure within the regulatory power of the NAFTA Parties requires compensation.

(ii) What is "expropriation" in Article 1110?

(a) Expropriation at international law

364. The term "expropriation" is not defined in NAFTA. Consistent with Article 31(1) of the *Vienna Convention*³⁰⁷, expropriation must be interpreted in good faith in accordance with its ordinary meaning in the light of NAFTA's object and purpose.

³⁰⁷ Book of Treaties Tab 2.

365. NAFTA Article 1131(1) refers to international law:

“A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law”.

366. The dictionary defines “expropriate” as “take out of the owner’s hands, esp. for one’s own use; dispossess (a person) of ownership; deprive of property”.³⁰⁸

367. The term “expropriation” has also received extensive consideration in international jurisprudence and commentary. It is appropriate to refer to such authorities to determine the ordinary meaning of “expropriation” found in NAFTA Article 1110.

(b) There must be deprivation of the investment’s fundamental ownership rights

368. The basic concept of expropriation in international law is as follows:

“Expropriation” is the taking by a host state of property owned by an investor and located in the host state, ostensibly for a “public purpose”.³⁰⁹

369. When a state declares that an investor is no longer the owner of a property and takes title to that property, it is clearly expropriation.

370. In international law, the difficulty has been to address the reality that there are various means by which a state can effectively expropriate property without actually taking title to it. This explains the absence of exhaustive definitions in treaty provisions like NAFTA Article 1110. Dolzer and Stevens comment as follows:

Such apparent reluctance to attempt a definition of “expropriation” in the BITs may be explained by the fact that a host State, as is well

308 Lesley Brown, ed., *The New Shorter English Oxford Dictionary*, (New York: Oxford University Press, 1993), Vols I & II (Book of Authorities Vol. I, Tab 20).

309 Paul E. Comeaux and Stephan N. Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (New York: Oceana Publications Inc., 1997), p. 3 (Book of Authorities Vol. II, Tab 32).

known, can take a number of measures which have a similar effect to expropriation or nationalization, although they do not *de jure* constitute an act of expropriation; such measures are generally termed “indirect,” “creeping,” or “*de facto*” expropriation. The expropriation clause in most BITs therefore commonly includes expropriation and nationalization as well as a reference to indirect measures, and accords them all the same legal treatment.³¹⁰

371. As Brownlie explains:

The terminology of the subject is by no means settled, and in any case form should not take precedence over substance. The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control.³¹¹

372. It is evident from a review of the jurisprudence and literature, however, that an actual interference with fundamental ownership rights is the most rudimentary pre-requisite to a finding of expropriation.

373. The threshold for when interference amounts to expropriation is not as low as the Investor suggests in its Memorial.³¹² Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.

374. To support its theory of expropriation, the Investor relies on an excerpt from Sornarajah’s treatise, *The International Law on Foreign Investment*, but omits the key qualifying sentence. The excerpt, in full, reads:

Though it is clear that there are categories of takings outside the outright acts of nationalisation, the problem lies in formulating a single general principle that identifies all these takings. If one general criteria is to be attempted, it will have to involve some broad notion of governmental interference with the peaceful enjoyment of the rights of use, enjoyment and control of the property by the alien. *But it is clear that not all such interferences*

310 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Netherlands: Martinus Nijhoff, 1995), p. 99 (footnotes omitted) (Book of Authorities Vol. II, Tab 37).

311 Ian Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press, Inc., 1998), p. 534 (Book of Authorities Vol. II, Tab 38).

312 Investor’s Memorial, para. 136.

*amount to taking which attracts the concern of international law.*³¹³
[emphasis added on excerpt omitted by Investor]

375. Mere interference with an investment's use or enjoyment of the benefits associated with property is not the standard for expropriation at international law. The question is not whether the measures adopted by a state interfere with some benefit of property held by the investment, but whether the measures expropriate the investment.
376. Governments are not required to compensate investors for mere interference with their property rights. Neither will the denial of "some benefit" associated with property be sufficient for a finding of expropriation. Tribunals have consistently demanded much more than that for there to be an expropriation.
377. As Higgins states, "[t]he tendency is for a diminution in value to remain uncompensated, so long as the rights of use, exclusion and alienation remain."³¹⁴
378. Similarly, the *Harvard Draft* defines the standard as "*unreasonable* interference with the use, enjoyment, or disposal of property so as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of the interference."³¹⁵ [emphasis added]
379. In *Starrett Housing v. Islamic Republic of Iran*, the standard for expropriation was whether property rights had been interfered with to "such an extent that these rights are rendered so useless that they must be deemed to have been expropriated."³¹⁶ In *Tippetts*,

313 M. Sornarajah, *International law on Foreign Investment* (Cambridge: Cambridge University Press, 1994), p. 282 (Book of Authorities Vol. II, Tab 34).

314 R. Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 Rec. des Cours 259, p. 271, (Book of Authorities Vol. II, Tab 39).

315 Article 10(3) of *The Draft Convention on the International Responsibility of States for Injuries to Aliens* [hereinafter the "Harvard Draft"] as cited in L.B.Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens* (1961) 55 A.J.I.L. 545 at 553 (Book of Authorities Vol. II, Tab 40).

316 (1983), 4 Iran-U.S. C.T.R. 122, pp. 154-155 (Book of Authorities Vol. II, Tab 41). In this case, the government of Iran had appointed a manager for the company. Such appointment combined with the effects of a legislation restricting former owners to manage housing projects was considered as having "taken" the investment. See subsequent comments on the jurisprudence of the Iran-U.S. claims tribunal.

Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, the operative standard was deprivation of the “fundamental rights of ownership” for an extended period of time.³¹⁷ These formulations of expropriation are significantly more rigorous than the test of “denial of some benefit” proposed by the Investor.

(c) The Scope of Article 1110: Not a Novel Formulation

380. Recognising that the Investor could not prevail under any conventional international law definition of expropriation, the Investor incorrectly suggests that NAFTA Article 1110 modifies customary international law in a way that broadens what is covered by the expropriation of an investment.³¹⁸
381. The concept of expropriation under Article 1110 does not diverge from the customary principles of international law of expropriation and the ordinary meaning of the text does not suggest that the words chosen were intended to have a wider meaning. In fact, the language of the provision is not a novel formulation of expropriation. Similar provisions regulating expropriation existed before NAFTA, in BITs³¹⁹ and the

317 (1984), 6 Iran-U.S. C.T.R. 219, pp. 225-226 [*“Tippetts”*] (Book of Authorities Vol. III, Tab 42). In this case, the Government of Iran had appointed a manager for the investment and communications between the manager and representatives from the investment eventually ceased. The Tribunal found that the absence of communications deprived the Claimant of its property interest in the investment. See subsequent comments on the jurisprudence of the Iran-U.S. Claims Tribunal.

318 Investor’s Memorial, paras 132 and 141-142.

319 Article III of the February 1992 US Model BIT provides:

Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except: for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is the earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at the time; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable.

As reproduced in Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Netherlands: Kluwer Law International, 1995) p. 245 (Book of Authorities Vol. II, Tab 37). See also the January 11, 1982, the January 21, 1983, the February 24, 1984 and September 1987 drafts of the model in Kenneth Vandevelde,

FTA³²⁰, both of which also reflect the customary international law of expropriation.

382. As has been noted by Jon Johnson:

Like both the FTA and the Model BIT, NAFTA 1110(1) prohibits a NAFTA country from directly or indirectly nationalizing or expropriating an investment of an investor of another NAFTA country except for a public purpose, on a non-discriminatory basis, in accordance with due process and on payment of compensation. *This provision states the traditional view of customary international law respecting nationalization or expropriation.*³²¹ [emphasis added]

(d) The Language of the Provision

383. The Investor notes³²² that international law generally regards “expropriation” as “including concepts such as direct, indirect and ‘creeping expropriation’”. As this statement implies, these are not the only labels applied to various forms of expropriation.³²³

384. The terms “indirect” and “measure tantamount to” in Article 1110 simply reflect the accepted international law principle that measures that have the same effect as direct expropriation but differ as to their form should also be considered “expropriation”.

United States Investment Treaties Policy and Practice (The Netherlands: Kluwer Law and Taxation Publishers, 1992) Appendix A-1, A-2, A-3 & A-4 (Book of Authorities Vol. II, Tab 35).

320 Article 1605 of the FTA reads:

Neither Party shall directly or indirectly nationalize or expropriate an investment in its territory by an investor of the other Party or take any measure or series of measures tantamount to an expropriation of such an investment, except:

- (a) for a public purpose;
- (b) in accordance with due process of law;
- (c) on a non-discriminatory basis; and
- (d) upon payment of prompt, adequate and effective compensation at fair market value.

321 Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Ontario: Canada Law Book Inc., 1994), p. 289 (Book of Authorities Vol. I, Tab 19).

322 Investor’s Memorial, para. 149.

323 Others include, for example “disguised”, “constructive”, “*de facto*”, “concealed” or “surreptitious”.

385. The Investor's argument that the inclusion of "measure tantamount to" expropriation removes expropriation under NAFTA from the normal scope of expropriation at international law is without foundation.
386. To support its argument, the Investor attempts to draw a distinction between "creeping expropriation" and "measures tantamount to expropriation".³²⁴ International tribunals have developed the concept of "creeping expropriation". However, this phrase is not used in treaty drafting where "measure tantamount to expropriation" expresses the same idea:
- Article 1110 of the NAFTA Investment Chapter provides for the protection of foreign investments against nationalization, expropriation, and other forms of interference that are "tantamount to nationalization or expropriation." The Article covers direct, indirect, and "creeping expropriation." In accordance with traditional principles of international law, the Article provides that investments may not be expropriated except: for a public purpose; on a nondiscriminatory basis; in accordance with due process of law; and upon payment of compensation as specified in the Article.³²⁵
387. "Tantamount" is defined as "amount to as much as, be equivalent to".³²⁶ This meaning is confirmed by the French text of the NAFTA which uses "équivalent" and the Spanish text which uses "equivalente".³²⁷
388. A reasonable, plain meaning interpretation of the phrase "measure tantamount to" is that it refers to measures that are equivalent to expropriation. The phrase does not expand the customary scope of expropriation at international law.

324 Investor's Memorial, para. 149.

325 Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective* (1994) 27 *Vanderbilt Journal of Transnational Law*, 259, p. 317 (Book of Authorities Vol. III, Tab 43). (footnotes omitted) See also Jon Johnson, *The North American Free Trade Agreement* (Ontario: Canada Law Book Inc., 1994), p. 290, (Book of Authorities Vol. I, Tab 19).

326 Lesley Brown, ed., *The New Shorter English Oxford Dictionary* (New York: Oxford University Press, 1993), Vol. I & II, (Book of Authorities Vol. I, Tab 20).

327 NAFTA Article 206 provides that the English, French and Spanish texts of NAFTA are equally authentic.

389. The Investor supports its position that “tantamount to” involves a broader definition of the concept of expropriation with a quote taken from the text of Dolzer and Stevens.³²⁸ However, the quote in question does not refer only to the words “tantamount to” but to a broader provision found in several U.S. treaties. The complete quote reads:

Whereas the U.S. model treaty only mentions “measures tantamount to expropriation or nationalization (‘expropriation’)” several of the U.S. treaties exemplify what such measures might include:

... any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control or economic value)...

The latter provision represents possibly the broadest scope in investment treaties with respect to indirect expropriation insofar as the inclusion of measures that cause the “impairment ... of [the] economic value” of an investment, equate expropriation with a host of measures which might not otherwise be considered as such under general international law, let alone under liberal systems of domestic law.³²⁹

390. The Investor’s claim would certainly fail even under the expansive language of those treaties. The Investor seems to assume that if a series of measures could together add up to a taking, then one of them in isolation is likewise compensable. For that there is no support.
391. The NAFTA negotiators, who manifestly borrowed from the language of previous U.S. BITs, including those cited, elected not to incorporate the language in question. It is fair to surmise that the negotiators preferred not to suggest anything like the broader meaning of expropriation and measure tantamount to expropriation argued by the Investor.

328 Investor’s Memorial, para. 146.

329 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Netherlands: Kluwer Law International), p.102 (Book of Authorities Vol. II, Tab 37).

392. Canada's position has consistently been that the words "tantamount to expropriation" in Article 1110 reflect and do not expand the customary international law of expropriation. This position has been supported by the U.S. and Mexico in other Chapter Eleven disputes.³³⁰
393. Contrary to the Investor's proposition,³³¹ the objectives of NAFTA do not support a wide interpretation of NAFTA Article 1110. In particular, the objective in NAFTA Article 102(c) of substantially increasing investment opportunities does not support the position that the concept of "expropriation" should receive a wider interpretation than at international law.
394. Finally, and significantly, in *Desona v. Mexico*, the only final award to date under NAFTA case under Chapter 11, the Tribunal dismissed a claim of expropriation. The claimants in that case had alleged a harm far more serious than that stated by the Investor in this dispute. The claimants had lost their concession to provide waste management services to a Mexican city. The claimants argued that this constituted expropriation or a measure tantamount to an expropriation of their contract rights under Article 1110. The Tribunal observed that NAFTA did not elevate such an ordinary complaint to the level of an international dispute.³³²

330 In *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, the Government of the United States filed a NAFTA Article 1128 Submission stating that for the purposes of NAFTA Article 1110(1), NAFTA claimants may not seek damages for actions beyond those contemplated in the customary international law concepts of direct and indirect expropriation. In particular, it was the position of the Government of the United States that:

... the phrase take a measure tantamount to ... expropriation explains what the phrase indirectly expropriate means; it does not assert or imply the existence of an additional type of action that may give rise to liability beyond those types encompassed in the customary international law categories of direct and indirect nationalization or expropriation.

See the Submission of the Government of United States of America (November 9, 1999), ICSID Case No. ARB(AF)/91/1 at para. 9 (Book of Authorities Vol. III, Tab 44). See also *S.D. Myers Inc. v. Government of Canada*, Supplementary Submission of the United Mexican States (February 16, 2000), para. 48-49, (Book of Authorities Vol. III, Tab 45).

(e) Iran-U.S. Claims Jurisprudence

395. To support its position that expropriation is broadly defined in international law the Investor refers almost exclusively to jurisprudence of the Iran-U.S. Tribunal.³³³ Caution must be exercised when referring to this jurisprudence.
396. The circumstance that led to the establishment of the Iran-U.S. Tribunal was the coup that overthrew the Shah of Iran and led Ayatollah Khomeini to power. Various actions by the new authorities with respect to property and enterprises belonging to U.S. nationals located in Iran gave rise to disputes and claims that expropriation had occurred.³³⁴
397. Iran and the U.S. established a Tribunal to deal with the disputes. The “Claims Settlement Declaration” giving the Iran-U.S. Claims Tribunal jurisdiction was concluded in 1981.³³⁵
398. Under this agreement, the Iran-U.S. Claims Tribunal’s authority was broader than determining whether there had been expropriation of property. Its mandate was to decide claims that arose “out of debts, contracts ... expropriation *or other measures affecting property rights*.”³³⁶ [emphasis added]

331 Investor’s Memorial, paras 147-148.

332 *Desona v. Mexico*, paras 87, 99 (Book of Authorities Vol. I, Tab 4).

333 Investor’s Memorial, paras 133-137.

334 For a complete discussion of the facts, see Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal*, (The Netherlands: Martinus Nijhoff Publishers, 1994), pp. 1-6 (Book of Authorities Vol. III, Tab 46).

335 *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran* (“Claims Settlement Declaration”) January 19, 1981, (1981-1982) 1 Iran-U.S. C.T.R. 9 (Book of Authorities Vol. III, Tab 47).

336 “An international arbitral tribunal (the Iran-U.S. Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction, or occurrence that constitutes the subject matter of that national’s claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), *expropriation or other measures affecting property rights...*” [emphasis added]

399. Accordingly, any reliance the Investor places on jurisprudence of the Iran-U.S. Claims Tribunal in support of its lesser standard for determining expropriation under NAFTA must be qualified by the broader scope and context of that tribunal's authority.
400. The need for caution in relying on the jurisprudence of the Iran-U.S. Claims Tribunal is noted by Sornarajah:

The awards of the Iran-U.S. Claims tribunal have been a fruitful recent source for the identification of such takings ["indirect takings", or "disguised" or "creeping expropriation"]. But the Iran-U.S. Claims Tribunal dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events that attended the Iranian upheaval following the overthrow of the Shah of Iran. Also, one has to be cautious in the making of any generalisation on the basis of dicta in the awards of this tribunal as its constituent documents gave the tribunal power to deal not only with direct takings of physical assets but "all measures affecting property rights". *It is clear that such a wide definition of taking will not be acceptable in international law for the simple reason that many normal activities of states, such as taxation, affect property rights and cannot be expected to give rise to international concern.*³³⁷ [emphasis added]

401. It is noteworthy that of the 10 cases quoted by the Investor, only five concluded that expropriation had occurred. Further, these five cases dealt with egregious conduct which bears no relation to the facts of this case. The five cases which were not found to be compensable all involved behaviour by the State that by any measure was closer to being a taking or serious interference with property rights than any of the measures at issue in this dispute.

As cited in Allahyar Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* (The Netherlands: Martinus Nijhoff Publishers, 1994), p. 12 (Book of Authorities Vol. III, Tab 46).

³³⁷ M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge: Cambridge University Press 1994), pp. 282-3 (footnotes omitted) (Book of Authorities Vol. II, Tab 34).

402. In *Sola Tiles Inc. v. Iran*³³⁸, Iran impounded and took control of Sola's warehouse, took money from proceeds of a recent sale, arrested a warehouse manager and detained him until money was handed over to the Revolutionary Committee. The warehouse manager was forced to work under the supervision of the Revolutionary Committee and gather inventory so that the Committee could sell the tiles and confiscate the proceeds. As well, all the stock was removed from a warehouse and moved to another location. The Tribunal concluded that these actions constituted a progressive taking of the operations of the company.
403. In *Phelps Dodge Corp. Overseas Private Investment Corp. v Iran*³³⁹ and *Thomas Earl Payne v Iran*³⁴⁰, control of the companies was removed from the shareholders and management and was transferred to agencies of the Iranian government. No dividends were paid to the shareholders and they were not informed of the business activities of their company for long periods. The revolutionary conditions that had caused personnel to evacuate the country were also a factor in the determination that expropriation had occurred.
404. In *ITT Industries Inc. v Iran*³⁴¹, the Claimant had been totally deprived of its right to participate in the management of its company. The government had replaced the company's Board of Directors with government appointed members. The investor had not received any profit or information on the affairs of the company for 2½ years. It could not vote or attend meetings of shareholders or participate in the management of the business. Under those circumstances, it was concluded that the investor had been expropriated.

338 (1987), 14 Iran-U.S. C.T.R. 223 (cited at para. 133 of the Investor's Memorial), (Book of Authorities Vol. III, Tab 48).

339 (1986), 10 Iran-U.S. C.T.R. 121 (cited at para. 133 of the Investor's Memorial), (Book of Authorities Vol. III, Tab 49).

340 (1987), 12 Iran-U.S. C.T.R. 3 (cited at para. 133 of the Investor's Memorial), (Book of Authorities Vol. III, Tab 50).

341 (1983), 2 Iran-U.S. C.T.R. 349 (cited at para. 137 of the Investor's Memorial), (Book of Authorities Vol. III, Tab 51).

405. Finally, the facts of *Biloune and Marine Drive Complex Ltd. v Ghana Investments Centre and the Government of Ghana*³⁴² (not a decision of the Iran-U.S. Claims Tribunal) are of little assistance to the Investor's proposition that this case confirms a broad interpretation of expropriation.
406. Biloune had obtained a contract to remodel and construct the Marine Drive resort complex in Ghana. It had proceeded substantially to completion when government officials issued an order to stop work, citing the lack of a building permit. A few days later city authorities demolished part of the project. At this time, Biloune, and other investors were subjected to financial scrutiny by a "National Investigations Committee" charged with investigating alleged improprieties connected with the project. Biloune was subsequently arrested and detained without charge and deported two weeks later. The government then issued a notice stating that the site was closed except for access by security forces. Biloune was not permitted to return to Ghana or to carry out further work on the project. At best, this decision is a perfect example of acts that are tantamount to expropriation.
407. To compare the fact situation in Biloune with the claims of the Investor here is to show the frivolous nature of the Investor's complaint. The Biloune decision is a perfect example of acts that are tantamount to expropriation.
408. All cases relied on by the Investor, even those concluding that expropriation did not occur, concern extreme facts divorced from the situation of the Investor and other quota holders.

(iii) An Exercise of Regulatory Power is not Expropriation

409. A key aspect of the international law of expropriation is the exclusion of a state's regulatory or "police power" from the scope of expropriation.

³⁴² (1993), 95 I.L.R. 183 (Arbitration under the UNCITRAL Rules) (cited by the Investor at para. 139 of the Memorial), (Book of Authorities Vol. III, Tab 52).

410. Underlying the regulatory power is the basic principle that regulatory actions of governments do not constitute expropriation. This principle allows governments the necessary freedom to regulate without having to pay compensation for every effect of regulation. Otherwise, governments would be unable to tax, set standards, control imports or exports or carry on the functions that citizens expect from governments.
411. The non-arbitrary and non-discriminatory exercise of regulatory power by a state is referred to at international law as a state's regulatory or "police power".
412. The Investor suggests that Article 1110 is a no-fault compensation mechanism that creates an obligation for governments to compensate most regulatory takings.³⁴³ The Investor's position is that NAFTA Article 1110 departs from customary international law because a state's regulatory or police power is not recognized under Article 1110.³⁴⁴ If accepted, this means that Article 1110 would call for compensation for every effect that a regulation may have.
413. The Investor's position is untenable. The exercise by a state of its regulatory power does not amount to expropriation. This is noted in the comments found in §712 of the *Third Restatement of the Foreign Relations Law of the U.S.*
414. The Investor refers to this section in its Memorial³⁴⁵ but omits the portion dealing with regulatory power. The section, in its entirety, provides:

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

343 Investor's Memorial, para. 146.

344 Investor's Memorial, para. 156.

345 Investor's Memorial, para. 138.

or its removal from the state's territory. *Depriving an alien of control of his property, as by an order freezing his assets, might become a taking if it is long extended. A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory, Comment f, and is not designed to cause the alien to abandon the property to the state or sell it at a distress price. As under U.S. constitutional law, the line between "taking" and regulation is sometimes uncertain.*³⁴⁶
[emphasis added on excerpt omitted by Investor]

415. At international law, expropriation does not result from bona fide regulation. A state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure.
416. The Preamble of NAFTA indicates that NAFTA Parties have preserved "their flexibility to safeguard the public welfare". NAFTA parties intended to maintain their freedom to regulate; the "police power" remains unaltered by Article 1110.
417. The imposition of export measures for good cause by a state is a recognized example of a valid exercise of police power.³⁴⁷ As indicated by Dolzer:

Export regulations have been introduced in various fields by all states. It would serve no purpose here to spell out in detail the relevant complicated procedures and laws. Two different principles operate in this field. The fact that a right to export exists in the absence of specific legislation may be taken to indicate the principle of free export. On the other hand, states have enacted export restrictions whenever they felt that such measures were necessary to protect their economic or their security interests. Thus one may conclude that export restrictions are acceptable "for good cause" and will have to be qualified as indirect expropriation when taken as arbitrary measures. This would seem to be in accordance,

³⁴⁶ *Restatement of the Law, Third: The Foreign Relations Law of the United States*, as Adopted and Promulgated by the American Law Institute, (Minn.: American Law Institute Publishers, 1987), pp. 200-201 (Book of Authorities Vol. III, Tab 53). To the same effect, see also Article 10 of the *Harvard Draft*.

³⁴⁷ F.V. Garcia Amador, "State Responsibility" in 1959 Yearbook of the International Law Commission, Vol. II, pp. 11-12 (Book of Authorities Vol. III, Tab 54).

for instance, with the broad scheme contained in the Articles of Agreement of the International Monetary Fund.³⁴⁸

418. This is further confirmed by Brownlie:

State measures, *prima facie* a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, *trade restrictions involving licensing and quotas*, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.³⁴⁹ [emphasis added]

419. Government measures such as the refusal to grant export permits or the refusal to issue approvals or licenses have also been held to be within the police power of the state.

420. The facts in *Too v. U.S.*³⁵⁰ show the reluctance of international tribunals to find a state responsible for actions taken within the police power. The investor was an Iranian whose motel in California had been destroyed by arson. While Too was in Europe, the Internal Revenue Service sold the liquor license for his restaurant to pay overdue taxes. The liquor license was seized only fourteen days after the taxes were levied. Notice to object was sent to the Investor giving him only five days to object. As the letter was sent to Too in Switzerland, he obviously could not meet this deadline. The license was sold for \$20,000 while the investor claimed its value was \$300,000. The investor asserted that the license had been sold to friends of IRS officials.

421. Even in this fact situation, the majority of the Tribunal considered the actions of the IRS to be a valid exercise of police power by the state. This conclusion is telling, particularly when one considers the seriousness of the allegations.

348 R. Dolzer, "Indirect Expropriation of Alien Property," (1988) 1 ISCID Rev. 41, p. 64 (footnote omitted) (Book of Authorities Vol. III, Tab 55).

349 Ian Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press Inc., 1998), p. 535 (Book of Authorities Vol. II, Tab 38).

350 *Too v. United States*, (1989) 23 Iran-U.S. C.T.R. 378 (Book of Authorities Vol. III, Tab 56).

422. Likewise, in *Kügele v. Polish State*, the Tribunal dismissed the argument that licensing fees imposed by Poland had forced the claimant to close his brewery and were thus expropriatory:

... the increase of the license fee was not in itself capable of taking away or impairing the rights of the plaintiff (...) The increase of the tax cannot be regarded as a taking away or impairment of the right to engage in a trade (...) The trader may feel compelled to close his business because of the new tax (...). But this does not mean that he has lost the right to engage in the trade. For had he paid the tax, he would be entitled to go on with his business.³⁵¹

423. The failure to grant export permits has been held to be a taking only where there was a contractual obligation that required the permits to be issued. Thus, the U.S. Foreign Claims Commission has held that the “refusal to grant an export license for jewellery or to permit the transfer of funds abroad did not constitute a ‘taking’ under international law.”³⁵²
424. The “refusal by a state or its agents to permit the export of an alien’s property or to assist in the export of such property where a *contractual duty to give such assistance exists*, creates liability”³⁵³ [emphasis in original]. There is no liability where, as here, there is no contractual duty to issue the permit.

351 *Kügele v. Polish State* (1932), 6 Ann. Dig. 69 (Upper Silesian Arbitral Tribunal), p. 69 (Book of Authorities Vol. III, Tab 57).

352 G.C. Christie, “What Constitutes a Taking of Property under International Law?” (1962) 33 B.Y.I.L. 307, p. 318 citing *In the Matter of the Claim of Erna Speilberg*, Decision No. CZ-2,466 (1961); Foreign Claims Settlement Commission of the United States, Fourteenth Semiannual Report, p. 146; and *In the Matter of the Claim of Mitzi Schoo*, Decision No. CZ-279 (1960), Foreign Claims Settlement Commission of the United States Fourteenth Semiannual Report, p. 180 (Book of Authorities Vol. III, Tab 58).

353 George H. Aldrich, “What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal”, (July 1994) 88, No. 3, A.J. of International Law 585, p. 609 (Book of Authorities Vol. III, Tab 59).

425. International law clearly recognizes that the valid exercise of the police power does not constitute an expropriation. This is consistent with the Preamble of NAFTA which states that the Parties are resolved to preserve their flexibility to safeguard the public welfare. It is clear from this statement in the Preamble that the Parties had no intention of diminishing the scope of the police power that exists under international law.

426. At international law, liability is possible only if the measure is discriminatory. Garcia explains as follows:

Even though it has been contended that international law places limits on the State's power to impose taxes, rates and other charges on the property, rights or other interests of aliens, particularly when the measures taken discriminate against the latter, the fundamental lawfulness of this class of measures in the international context, regardless of their nature or scope, has very seldom been disputed. The possibility of the State incurring international responsibility can only arise if the measure is of a discriminatory nature, and practical experience has shown this eventuality to be highly unlikely. The same rule can be said to apply to rights of importers and exporters and to prohibition on import or export of specified merchandise: the State can only be held internationally responsible if the measure is not general but personal and arbitrary.³⁵⁴
[emphasis added]

(iv) NAFTA Article 1110(8)

427. The Investor's assertion that the NAFTA Parties intended the police power to be excluded from Article 1110 is based on Article 1110(8). However, the ordinary meaning of Article 1110(8) does not support this assertion.

428. Article 1110(8) expressly states that it is an example inserted for "greater certainty" with respect to a very particular situation (i.e. with respect to debt securities and loans). This provision in no way affects the general principle that measures taken by a state under its police powers do not amount to expropriation.

354 See F.V. Garcia Amador, "State Responsibility" in 1959 Yearbook of the International Law Commission, Vol. II, pp. 11-12 (footnotes omitted) (Book of Authorities Vol. III, Tab 54).

429. The *expressio unius* maxim cited by the Investor in support of its interpretation cannot be applied here because of the specific wording of Article 1110(8): it is included for “greater certainty”.
430. Further, the maxim should not be applied when it leads to injustice or inconsistency. Lord McNair cautions that the rule is a “valuable servant but a dangerous master”³⁵⁵ and that it should be applied with caution and not when it leads to injustice or inconsistency.³⁵⁶
431. NAFTA Article 1110(8) does not change the fact that the expropriation under Article 1110 must be interpreted in light of the existing international law concept of expropriation that does not recognize mere interference as expropriation.
432. In addition to ignoring the critical phrase “for greater certainty” the Investor transparently ignores that there are several elements to Article 1110(8), including that it is a debt instrument, that the state’s action is indirect, and that the entire value of the investment is destroyed.
433. The Investor’s interpretation would result in an absurdly broad definition of expropriation in Article 1110 of NAFTA. It would mean that the only regulation that would not constitute a measure tantamount to expropriation would be a measure imposing costs on a debtor causing the debtor to default on the debt. Every other regulation would be expropriation.

³⁵⁵ Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 400 citing from Lopes L.J. in *Colquhoun v. Brooks* (1888), 21 Q.B.D. 52 at 65 (Book of Authorities Vol. I, Tab 9).

³⁵⁶ See also: *Turgeon v. Dominion Bank* [1930] S.C.R. 67, pp. 70-71 (Book of Authorities Vol. III, Tab 60).

434. This proposed interpretation cannot be consistent with the intent of the Parties as it would remove any meaningful ability of a Party to regulate in the public interest.
435. Further, this interpretation contradicts the specific wording of Article 1110(8) which provides, for greater certainty, that a measure of general application that causes a debtor to be in default on a debt is not a measure tantamount to expropriation. This provision illustrates the high threshold an investor must meet to demonstrate that expropriation has occurred.
436. The Investor suggests that Professor Rosalyn Higgins supports compensation for virtually all regulatory takings and that this approach was adopted by the NAFTA drafters in Article 1110.³⁵⁷
437. However, in the same article Higgins acknowledges that the state of the law is otherwise:

... recent case law has made it clear that this is not to be regarded on all fours with a taking of property in pursuance of the so-called "police power", i.e. for regulatory purposes. It would seem to be the case that while it is acknowledged that property may be indirectly "taken" through regulation, this does *not* attract a duty to compensate.³⁵⁸

(v) The Discussion Paper

438. The Investor also relies³⁵⁹ on a press report containing an "issues paper" on expropriation circulated by Canada to the other NAFTA Parties. On its face, the document was prepared for "informal brainstorming". Clearly it has no authoritative status. The Investor's extensive reliance on this document is indicative of the lack of authority supporting its arguments. Mischievous speculation about the purpose of the paper (contrary to what it says on its face) is idle and adds little to the proceedings.

³⁵⁷ Investor's Memorial, para. 156.

³⁵⁸ R. Higgins, "The Taking of Property by the State: Recent Developments in International Law" (1982) 176 Rec. des Cours 259, p. 330, (Book of Authorities Vol. III, Tab 39). This quote introduces and qualifies the theoretical discussion cited by the Investor.

³⁵⁹ Investor's Memorial, paras 152-154.

(vi) The Law Applied to the Facts: The Export Control Regime Has Not Deprived the Investment of Any Fundamental Ownership Rights

439. Expropriation occurs only if the owner was deprived of fundamental rights of ownership and this deprivation is not merely ephemeral.³⁶⁰
440. The scope of the SLA and its implementation is limited. The SLA is effective for a five year period³⁶¹ and covers exports of softwood lumber to the United States.³⁶² Only specific softwood lumber products are covered by the agreement.³⁶³ Finally, the level of 14.7 billion board feet of fee-free quota provided for under the SLA is estimated to be equivalent to 92 percent of total lumber exports by the four covered provinces in the previous year (1995) and almost 98 percent when considering the average annual exports in the most recent three-year period before the SLA (1993-95).³⁶⁴
441. The Investor does not allege that the Investment's mills have been taken, its profits have been seized, the investment is unprofitable, its stock confiscated, that control of its operations was removed or that it has suffered any specific loss. Pope & Talbot, Ltd. has not been expropriated.
442. The Investor is claiming that Canada's system of distributing export quota does not allow the Investment to sell as much lumber as the Investor would wish under a different allocation system. The Investor simply thinks that the Investment would be more profitable if Canada implemented its SLA obligations in some different way (or not at all).
443. In fact, the export fees have not prevented Pope & Talbot, Ltd. from carrying on its usual business of exporting softwood lumber to the U.S. The Investment has continued to export large amounts of softwood lumber to the U.S., including at the UFB and SFB

360 See *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran* (1984), 6 Iran-U.S. C.T.R. 219, pp. 225-226 (Book of Authorities Vol. III, Tab 42).

361 See Article X of the SLA.

362 See Article II of the SLA.

363 See Article IX of the SLA.

364 Tom MacDonald Affidavit, para. 50.

rate.³⁶⁵ The Investor admits that exporting softwood lumber at the UFB rate can make “economic sense”.³⁶⁶

444. The Investor has retained full ownership in Pope & Talbot, Ltd. It has also retained control and management of its activities, and even expanded. For example, during these proceedings, it acquired Harmac Pacific Ltd.³⁶⁷ Public reports indicate that this acquisition received a positive response from analysts and the value of the shares of the Investor have increased since the acquisition was realized.³⁶⁸
445. Since the inception of the Export Control Regime in 1996, the Investment has made profits. Its year ending retained earnings since 1996 show that the Investment remains a profitable company operating pursuant to the SLA.³⁶⁹
446. In fact, the Investor has indicated publicly that the SLA caused an increase in prices for softwood lumber that offset lower sales.³⁷⁰ This is an admission that there has been no expropriation and no loss caused by the SLA.
447. The Investor has failed to identify any instance where an international tribunal has concluded that a company that is operating at a profit, and actually acquiring other companies, was at the same time expropriated because it was subject to a measure of general application. The effects of the Export Control Regime simply do not amount to a

365 Douglas George Affidavit, Annex A.

366 Investor's Memorial, Schedule 1, Statement of Kyle Gray, para.11.

367 Douglas George Affidavit, para. 112.

368 Steven Jones “With Pulp Prices Poised to Pop, Wood Products Makers Look Hot” *Wall Street Journal* (March 15, 2000) (Book of Authorities Vol. I, Tab 3).

369 Financial Statements of Pope and Talbot Ltd. 1998 p. 2 (as produced by the Investor on January 14, 2000) (Book of Authorities Vol. III, Tab 62).

370 The Investor indicates “the 1996 lumber revenues reflected 17 percent higher prices than 1995 which offset 14 percent lower lumber sales volume”, see Douglas George Affidavit, Exhibit S (1996 Annual Report of Pope & Talbot Inc., p. 11, 13, as produced by the Investor on January 14, 2000). In the 1997 Annual Report, the company states:

As was true in 1996, during 1997 a strong housing market, and to a lesser extent, lumber market uncertainties surrounding an implemented lumber quota arrangement between the United States and Canada combined to increase the Company's average lumber prices by 10 percent in 1997 following a 17 percent increase in 1996 from 1995...

See Douglas George Affidavit, Exhibit T (1997 Annual Report of Pope & Talbot Inc., p. 11, as produced by the Investor on January 14, 2000).

deprivation of the fundamental rights of ownership of Pope and Talbot Ltd. International law standards for expropriation are not met.

448. Further, the Investor completely disregards the beneficial effects the SLA and measures implementing the SLA have had on its Investment.³⁷¹ The implementation of the SLA has secured continued access to the U.S. market for its Investment.³⁷² The Investment has benefited from this secure access by exporting significant quantities of softwood lumber to the U.S. since the conclusion of the SLA.³⁷³

(vii) The Export Control Regime Measures Are Clearly within Canada's Regulatory Power

449. Even if the SLA effected a fundamental deprivation, which is denied, there can be no breach of Article 1110. The measures contained in the SLA and the Export Control Regime, specifically the imposition of export and permit fees, constitute a *bona fide* exercise of Canada's regulatory or "police" power. Therefore, they fall outside the scope of measures which may be expropriatory.
450. The adoption of the Export Control Regime to implement the SLA satisfies the requirements for a valid exercise of regulatory or police power, in that it was imposed for legitimate reasons, and is a non-discriminatory measure.
451. The measures at issue were imposed to fulfil Canada's obligations under the SLA.³⁷⁴ Canada executed those obligations in the public interest and in the interest of the softwood lumber industry in the covered provinces, whose forest management practices had been repeatedly challenged by the U.S.³⁷⁵

371 Joseph Kalt Affidavit, paras 21, 24.

372 Tom MacDonald Affidavit, paras 10, 50; Joseph Kalt Affidavit, para. 21.

373 Douglas George Affidavit, Annex A.

374 Claudio Valle Affidavit, paras 38-39.

375 Tom MacDonald Affidavit, para. 66.

452. The Investor disregards the context in which the SLA was concluded. For Canada, the SLA was the means chosen to secure access to the U.S. market for its softwood lumber exporters. In the absence of an agreement, the likely imposition of CVD and ensuing trade battles would have made access to this market extremely uncertain.³⁷⁶
453. Secure access to the U.S. market for softwood lumber produced in Canada is important to the Canadian economy. Those exports represented over Cdn\$ 10.7 billion in 1999, equivalent to the total value of Canada's exports to the U.K., France, Germany, Portugal and Sweden combined.³⁷⁷ The benefit of this trade to Canada's economy is indisputable. Secure access to the U.S. market is vital to the Canadian softwood lumber industry and the Investor. The SLA was executed, and the implementing measures were taken, to protect Canada from a loss of significant trade revenue, and to offer stability to the softwood lumber industry in the covered provinces.³⁷⁸ These are reasonable objectives for regulating exports.
454. The SLA and its implementing measures were designed to protect the industry, not to expropriate it.³⁷⁹ The industry, including the Investment, has benefited from the SLA by having secure access to the U.S. market since 1996.³⁸⁰
455. The imposition of the fees and export limits, which are the source of the Investor's claim of expropriation, were specifically mandated by the SLA. There was no way to implement the SLA without imposing fees and export limits and Canada had to do so to respect its international obligations.
456. The Export Control Regime is a non-discriminatory measure. It applies to all exporters of softwood lumber first manufactured in a covered province, regardless of nationality.³⁸¹

376 Tom McDonald Affidavit, paras 10, 26, 66; Claudio Valle Affidavit, para. 16; Joseph Kalt Affidavit, paras 7, 11.

377 Douglas George Affidavit, para. 8.

378 Tom MacDonald Affidavit, paras 10, 26, 66; Claudio Valle Affidavit, para. 16; Joseph Kalt Affidavit, paras 7, 11.

379 Joseph Kalt Affidavit, paras 21, 24, 12.

380 Tom MacDonald Affidavit, para. 66; Joseph Kalt Affidavit, paras 7, 12, 14, 21-24.

381 Claudio Valle Affidavit, paras 121, 124, 134, 142, 157.

(viii) No Reasonable Expectations to Unlimited Access to the U.S. Market

457. In the present case, given the climate in which the export fee measure was imposed, the Investor cannot assert that its Investment had a reasonable expectation that it would have unlimited, fee-free access to the U.S. market in the absence of the SLA.
458. The Investment did not historically have such unlimited access, nor could it reasonably have expected to have unlimited access in the future. Various duties or charges had been imposed on softwood lumber exports to the U.S. since the 1980s.³⁸² The Investment paid such charges in 1992-1993. The Investment was subsequently refunded approximately US- [REDACTED] in 1994 and 1995 for the CVDs paid during these years.³⁸³
459. It follows that the concept of unlimited access to the U.S. market is a stranger to Canadian exporters of softwood lumber first manufactured in the covered provinces. The suggestion that Pope & Talbot Ltd. enjoyed or had reasonable expectations of enjoying fee-free access is not sustainable on the facts.

(ix) Acceptance of the Investor's Argument Leads to Absurd Results

460. If the export fees charged pursuant to the SLA amount to expropriation, the result of the Investor's argument would be absurd and unreasonable.
461. The SLA compelled Canada to impose fees. Allegedly, the Investor does not challenge the SLA, only the manner of implementation. However, there was clearly no way to implement the SLA without charging export fees.

382 Tom MacDonald Affidavit, paras 8 – 17; Joseph Kalt Affidavit, para. 9.

383 Douglas George Affidavit, Exhibit Q (1994 Annual Report of Pope & Talbot Inc., pp. 2 & 6, as produced by the Investor on January 14, 2000); Douglas George Affidavit, Exhibit R (1995 Annual Report of Pope & Talbot Inc., p. 13, as produced by the Investor on January 14, 2000).

462. If the imposition of such fees were considered compensable expropriation, Canada would have to refund the fees to compensate the Investor. This is equivalent to not charging the fees. It would fly in the face of specific provisions of the SLA requiring Canada to collect the fees.³⁸⁴ It is impossible for Canada to do otherwise because the SLA specifically forbids it.³⁸⁵
463. Should compensation be paid to the Investor for the effects of the SLA, this would provide Pope & Talbot, Ltd. with a competitive advantage in the industry. The Investment would have the unique status of enjoying fee-free access to the U.S. market.³⁸⁶ These cannot be the results that Canada and the U.S. contemplated when they concluded the SLA.
464. Further, the Investor's theory that there is no "police power" exception means that all economic disadvantages resulting from measures of general application would *ipso facto* be compensable.
465. For the Investor, NAFTA Parties have to compensate under Chapter 11 for each and every regulation adopted because "[under] NAFTA Article 1110, expropriation is essentially treated as a no-fault compensation mechanism with a comprehensive scope that covers most regulatory takings."³⁸⁷ This "pay-to-regulate" theory is absurd.
466. Most legislation adopted by governments has an economic or financial impact. It is unrealistic to suggest that NAFTA Parties intended that the exercise of their sovereign power would necessarily result in the payment of money on a no-fault basis.

384 See Article II of the SLA.

385 Article VII(2) of the SLA provides that: "Neither Party shall take action to circumvent or offset the commitments set out in this agreement, *including action having the effect of reducing or offsetting the export fees* provided for in Article II(2) or undermining the commitments set out in Article I.

386 It should be noted that the Investor's belief that it would be able to export limitless quantities of softwood lumber to the U.S. fee free is wrong. The U.S. regulations provides that a charge of US \$ 100.00 per thousand board feet is to be charged for failure to obtain a permit. See Douglas George Affidavit, Exhibit B.

387 Investor's Memorial, para. 143.

467. The purpose of NAFTA Chapter 11 is to protect investors and ensure that they have certain remedies available. The novel theory advanced by the Investor has no relation to the purpose of this Chapter and illustrates the stretch of principles this Tribunal is asked to effect.

(x) Unlimited Access to the U.S. Market is Not an “investment”

468. The Investor advances an argument that Pope & Talbot, Ltd.’s access to the U.S. market has been expropriated.³⁸⁸
469. The definition of “investment” in NAFTA Article 1139 provides a list of investments covered by Chapter Eleven and, more particularly, NAFTA Article 1110. This definition is exhaustive, not illustrative, as the Investor suggests.³⁸⁹ As Antonio Parra notes:

In addition, in contrast to the all-inclusive definitions of covered investments found in most of the other treaties, the NAFTA’s definition provides an exhaustive (though admittedly very broad) enumeration, rather than an open-ended, illustrative list, of covered assets or investments that the NAFTA requires be related to an “enterprise,” to “business purposes” or to a “commitment of resources” to “economic activity” in the host State. In addition, the definition in the NAFTA specifically excludes from the scope of covered investments commercial contracts for the sale of goods or services. More than most of the other treaties, the NAFTA can in other words be seen as providing a definition of covered investments, and hence of covered investment disputes, that attempts clearly to distinguish them from trade and other non-investment assets and disputes.³⁹⁰

470. The Investor bears the onus of demonstrating that unlimited access to the U.S. market is an investment covered by subparagraphs (g) and (h) of the definition of “investment” in NAFTA Article 1139.

388 Investor’s Memorial, paras 157-173.

389 Investor’s Memorial, para. 145.

390 Antonio R. Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment” (1997) 12 No. 2 ICSID Rev. 287, pp. 355-356 (Book of Authorities Vol. III, Tab 63).

(xi) Definition of Investment in Article 1139(g)

471. Article 1139(g) refers to real estate or property, tangible or intangible. At public international law, the *lex situs* and the rules of private international law will determine whether property rights have been acquired.³⁹¹ As a result, it is property as defined in Canadian domestic law that is referred to in this provision.
472. An “unlimited access to the U.S. market” is obviously not tangible property.
473. Nor is an “unlimited access to the U.S. market” recognized as intangible property in Canadian law. Examples of intangible property rights recognized under Canadian law include trademarks, copyrights, patents and contract rights. Intangible property is capable of being acquired and owned by a person. An owner of intangible property is able to exclude others from its use.³⁹²
474. Unlimited access to a market, as opposed to a contractual right to access to a market, is not property. No one can acquire, own or alienate such a right.

(xii) Definition of Investment in Article 1139(h)

475. Article 1139(h) covers “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory”.
476. Unlimited access to the U.S. market is not an interest *arising from* the commitment of capital or other resources in Canada by the Investor or by its Investment. Access to a foreign market is not created by an investor’s commitment of capital or other resources in the territory of a Party.

³⁹¹ B.A. Wortley. *Expropriation in International Law* (Cambridge: Cambridge University Press, 1959), pp. 4-8, (Book of Authorities Vol. III, Tab 64).

³⁹² Bruce Ziff, *Principles of Property Law*, (Ontario: Carswell, 1996), p. 72, (Book of Authorities Vol. III, Tab 65). It should also be noted that an export level is not an asset, see para. 4.1 of the *Notice to Exporters No. 110*, “Softwood Lumber: Allocation Reassignment” (May 26, 1998) that explains: “An export level is not an asset of the individual applicant: an export level is granted contingent on mill production and export activity. For this reason an export level cannot be sold or transferred with company assets.” Douglas George Affidavit, para. 52.

477. The access to a market in the sense proposed by the Investor depends on the exercise by a state of its sovereignty. In the present case, the U.S. agreed under the SLA that specific quantities of softwood lumber from Canada be accepted on certain conditions.
478. The fact that the SLA was concluded illustrates that the U.S. has control over access to its market and that the Investor's access to this market does not arise from the Investment's commitment of capital or other resources. Should the U.S. decide not to accept softwood lumber from Canada upon the expiry of the SLA, the Investor could never claim a right of access to this market because of its investment.
479. A NAFTA Tribunal has expressed the view that NAFTA was not intended to provide foreign investors with blanket protection from disappointments resulting from government actions.³⁹³ The conclusion of the SLA and its implementation may disappoint the Investor, but they do not expropriate its investment.

(xiii) NAFTA Article 1110(1)(c) and (d) are Irrelevant

480. The Investor makes various allegations under NAFTA Article 1110(1)(c) and (d) in an attempt to demonstrate that Canada would be in breach of these provisions.³⁹⁴ Such arguments are irrelevant to the only question at issue in this case: whether expropriation occurred pursuant to Article 1110(1).
481. Canada notes that Chapter 11 of NAFTA does not grant investors the rights to adjudicate breaches of other international agreements. A mechanism for the resolution of conflicts arising from the *Agreement on Safeguards* is provided for in the *Dispute Settlement Understanding*. This mechanism is available to states only.³⁹⁵ A Tribunal established under Chapter 11 is not the appropriate forum.

393 *Desona v. Mexico*, November 1, 1999, ICSID ARB (AF)/97/2, (NAFTA Arbitral Tribunal), para 83 (Book of Authorities Vol. I, Tab 4).

394 Investor's Memorial, paras. 174-184.

395 Article 1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*:
The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as

482. Finally, the Investor is estopped from challenging Canada's measures to implement the SLA. The Investor's letter of April 4, 1996 is part of the SLA. This letter is clear and unambiguous. When the Investor signed the letter, it was necessarily acquiescing in the application of particular measures to the industry, including the imposition of quotas by the addition of softwood lumber to the Export and Import Controls List. The Investment has taken the benefit of this program. It is now impossible for the Investor to complain that these measures have expropriated its investment.

(xiv) Conclusion

483. Canada's implementation of the SLA through the Export Control Regime is not expropriatory as there is no interference with the Investment's fundamental ownership or property rights. In any event, it is clearly within the regulatory or "police" power of Canada, and as such its effects could not amount to expropriation.
484. The threshold question of whether there was expropriation within the meaning of Article 1110 must therefore be answered in the negative, and the Investor's claim that Canada is in breach of Article 1110 by its implementation of the SLA must be dismissed.

the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

...
APPENDIX 1
AGREEMENTS COVERED BY THE UNDERSTANDING

...
(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods [which includes the Agreement on Safeguards]

World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Text* (Geneva – GATT Secretariat, 1994), pp. 354, 376 (Book of Authorities Vol. III, Tab 66).

G. The SLA Prevails Over NAFTA To The Extent That They Are Incompatible

(i) Summary of Canada's Position Respecting Prevalence of the SLA

485. If this Tribunal finds that there is no breach of Articles 1102, 1106 and 1110, the Tribunal need not address the arguments in this section.
486. However, if this Tribunal finds that Canada has breached its obligations under Articles 1102, 1106 or 1110, then it has identified an incompatibility between Canada's obligations under the SLA and its obligations under NAFTA.
487. This incompatibility would exist solely to the extent that both the SLA and the NAFTA overlap. The SLA and NAFTA would be incompatible in that the SLA imposes export charges for softwood lumber³⁹⁶ first manufactured in the covered provinces which is exported from Canada to the U.S. between April 1, 1996 and March 31, 2001, while NAFTA Article 314 prohibits such charges.
488. In this circumstance, Article 30(3) of the *Vienna Convention provides* that the SLA (the later treaty) prevails over NAFTA to the extent of the incompatibility between the two treaties. The SLA is a treaty that modifies the regime that would otherwise apply under NAFTA.
489. As the SLA would prevail over NAFTA, there could be no breach of NAFTA as between Canada and the U.S. The Investor's claim derives solely from a breach of obligations between the Parties, and hence the Investor's claim must be dismissed.

³⁹⁶ Softwood lumber is a defined term in Article IX of the SLA, being lumber classified under tariff items 4407.10.10, 4409.10.10, 4409.10.20 and 4409.10.90 of the Harmonized Tariff Schedule of the United States (1996).

(ii) **International Law Concerning Precedence of Treaties**

490. Article 2(a) of the *Vienna Convention* defines a treaty as:

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

The SLA (which includes the 1999 Exchange of Letters amending the SLA)³⁹⁷ and NAFTA are treaties pursuant to Article 2(a) of the *Vienna Convention*.

491. The *Vienna Convention* recognizes that some Parties to a treaty may modify or suspend their obligations under a multilateral treaty.³⁹⁸ The application of successive treaties dealing with the same subject matter is set out in Article 30 of the *Vienna Convention*. Article 30(3) and (4) provides:

(3) When all parties to the earlier treaty are parties to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

(4) When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between the State parties to both treaties the same rule applies as in paragraph 3; ...

492. The SLA is a later treaty entered into by two of the NAFTA parties (Canada and the U.S.) dealing with the same subject matter that is dealt with in the NAFTA, the imposition of export charges on softwood lumber. In accordance with Article 30(4) of the *Vienna Convention*, as between Canada and the U.S., the provisions of the earlier treaty – NAFTA – apply “only to the extent that its provisions are compatible with those of the later treaty” – the SLA.

³⁹⁷ Referred to in this section collectively as “the SLA” (1996).

³⁹⁸ See for example, Articles 41 and 59 of the *Vienna Convention*.

(iii) Where Is The Incompatibility?

493. Generally, treaties are incompatible when they contain obligations that cannot be complied with simultaneously.³⁹⁹ In this case the SLA and Article 314 of NAFTA are incompatible.⁴⁰⁰ Equally, specific obligations imposed by the SLA and the Investor's version of Articles 1102, 1106 and 1110 of NAFTA are incompatible.
494. The actions taken by Canada under the SLA result from obligations incurred by Canada through agreement with the U.S. The SLA requires that each export from Canada to the U.S. of softwood lumber first manufactured in the covered provinces and exported between April 1, 1996 and March 31, 2001, be accompanied by a permit for each export.⁴⁰¹ In addition, it requires that fees be collected for each export over the fee free level for the relevant year.⁴⁰² The SLA amendments of 1999 require Canada to charge RFB and SFB on a portion of lumber exported from B.C. to the U.S. between August 30, 1999 and March 31, 2001.⁴⁰³ Article VII (2) of the SLA prohibits actions by the Parties which has the effect of reducing or offsetting the export fees.
495. In the absence of agreement by the U.S. to the imposition of fees under the SLA, such fees would constitute a charge on exports to the U.S. contrary to Article 314 of NAFTA. NAFTA Article 314 prohibits any Party from adopting or maintaining any duty, tax or other charge on the export of a good to the territory of another Party.⁴⁰⁴

399 *Encyclopedia of International Law*, Vol. 7 (The Netherlands: Elsevier Science Publishers B.V., 1984), p. 468 (Book of Authorities Vol. I, Tab 67)

400 In this context Canada also notes Article 1112(1) of NAFTA which provides that other chapters of NAFTA prevail over Chapter 11 to the extent of their inconsistency.

401 Article II (1) of the SLA.

402 Article II (2) of the SLA.

403 Douglas George Affidavit, para.120.

404 The full text of NAFTA Article 314 reads:

Article 314: Export Taxes

Except as set out in Annex 314, no Party may adopt or maintain any duty, tax or other charge on the export of any good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on:

- (a) exports of any such good to the territory of all other Parties; and
- (b) any such good when destined for domestic consumption.

496. However, the existence of an obligation of Canada in a subsequent agreement entered into with the U.S. to impose those export fees means that the U.S. has accepted that Canada can impose such fees notwithstanding the contrary provisions in Article 314. That is to say, by carrying out its obligations under the SLA, Canada does not violate its obligations under NAFTA. To that extent, the SLA has superseded NAFTA.
497. The reasoning that applies to NAFTA Article 314 applies equally to Articles 1102, 1106 and 1110. If compliance with the SLA involves a breach by Canada of Articles 1102, 1106, or 1110 of NAFTA, then the fact that the actions in question were taken pursuant to a later treaty between Canada and the U.S. would negate any claim by the U.S. that Canada is in violation of those provisions. In accordance with the provisions of Article 30 of the *Vienna Convention*, the SLA would prevail to the extent of the incompatibility.
498. This has implications for the Investor's claim. To establish its claim under Chapter Eleven, the Investor must show that Canada is in breach of its obligations under Article 1102, 1106 or 1110. Since under the SLA Canada can take measures that would otherwise be in breach of its obligations under those provisions, then no such breach can be established.
499. Since the U.S. could not now claim that there has been a NAFTA breach, the Investor equally cannot claim such a breach. And in the absence of a NAFTA breach by Canada in respect of Articles 1102, 1106 or 1110, there is no basis for a claim under Chapter Eleven.
500. Most of the breaches alleged by the Investor under Articles 1102, 1106 and 1110 arise out of Canada's compliance with the express provisions of the SLA. They do not arise by virtue of the implementation of the SLA. In these cases a finding of a breach of NAFTA creates a fundamental incompatibility with the SLA. These breaches of NAFTA occur only because Canada complies with the express provisions of the SLA.

501. The express provisions of the challenged by the Investor are:

- (a) coverage: the SLA applies to softwood lumber first manufactured in B.C., Alberta, Ontario and Quebec but does not apply to lumber manufactured elsewhere in Canada⁴⁰⁵;
- (b) the overall levels of exports at fee-free and at other fee rates⁴⁰⁶;
- (c) the requirement to obtain a permit for exports⁴⁰⁷;
- (d) the fees for exports that are not fee-free⁴⁰⁸;
- (e) the speed bump⁴⁰⁹.

502. If this Tribunal finds Canada has breached Article 1102 by applying the SLA only in covered provinces or by charging RFB and SFB only in B.C., there is clear incompatibility with NAFTA. The SLA expressly imposes the definition of covered provinces and requires the application of RFB and SFB. Canada could not comply with these provisions of the SLA while complying with its obligations (as defined by the Investor) under Chapter Eleven of NAFTA.

503. If a breach of Article 1106 is found by virtue of the speed bump provision, there is a further incompatibility with the SLA. SLA Article II(6) expressly requires this provision, which prevents export surges. Again it is impossible for Canada to comply with this express provision while complying with the Investor's version of Article 1106. There would be no breach because in each of these cases the SLA would prevail and there would be no basis for an investor-state claim.

405 Article II (1) of the SLA.

406 Article II (2) of the SLA; Douglas George Affidavit, Exhibit J (Exchange of Letters between Canada and the U.S. dated August 26, 1999).

407 Article II (2) of the SLA.

408 Article II (2)(b)-(c) of the SLA.

409 Article II (6) of the SLA.

504. More generally, Canada and the U.S. entered the SLA knowing that it obliged Canada to establish a quota allocation scheme. By definition, a quota allocation scheme involves distribution of a finite amount of quota to applicants for quota who want more quota than is available. Canada was simply doing that which was contemplated by the SLA and necessary to fulfil the SLA when it established the Export Control Regime. To suggest that the allocation of quota is expropriation is to say that Canada violates its NAFTA obligations by doing exactly what the Parties contemplated under the SLA. This suggestion is untenable.
505. In short, Canada suggests that the provisions complained about by the Investor are expressly and implicitly contemplated by the SLA and cannot be a violation of NAFTA.

(iv) Reply to Investor's Arguments

(a) Breadth of NAFTA

506. The Investor argues that the SLA and NAFTA are not treaties dealing with the same subject matter. The SLA, the Investor says, deals with "the export of softwood lumber from Canada to the U.S. and the application of U.S. trade remedy laws to such exports", but NAFTA is "far broader". As a result "these two 'treaties' cannot be said to relate to the same subject matter."⁴¹⁰
507. This is illogical. The SLA deals with the export of softwood lumber. So does NAFTA. The fact that NAFTA also deals with other goods is irrelevant. The application of Article 30 of the *Vienna Convention* is not conditioned on all of the provisions of one treaty being the same as the other. The words "relating to" in Article 30 indicate that the coverage of the two treaties does not have to be identical. The SLA prevails over NAFTA to the extent of the incompatibility.

⁴¹⁰ Investor's Memorial, paras 227-228.

(b) No Express Precedence Provision or Reservation

508. The Investor's argument that the failure of the SLA to stipulate expressly that it prevails over NAFTA lacks cogency.⁴¹¹ Article 30 of the *Vienna Convention* deals precisely with the circumstances where a later treaty does not specify its relationship to an earlier agreement. There was no need for Canada or the U.S. to include such an express provision in the SLA because this was already effected by Article 30 of the *Vienna Convention*.
509. This can be contrasted with the situation in 1989 under the FTA. Article 2009 of the FTA expressly addressed the MOU on softwood lumber because the MOU was a pre-existing treaty on the same subject-matter in force at the time and because Article 408 of the FTA (carried forward as Article 314 in NAFTA) prohibited export charges. This is the exact opposite of this case where the SLA did not exist when NAFTA was entered into.
510. NAFTA Article 2101 incorporating GATT Article XX also has no relevance to this case. When NAFTA was signed, the SLA was not even contemplated. Further, if such a future agreement were to come into effect, its precedence could be dealt with under Article 30 of the *Vienna Convention*.
511. Similarly, there was no reason for Canada to take reservations under NAFTA Article 1108(1)(a)(i) as suggested by the Investor.⁴¹² That Article applies only to existing measures and could not be invoked for a potential future agreement on softwood lumber. In the circumstances, no negative inference can be drawn from Canada's failure to take a reservation for a yet to be signed agreement.

⁴¹¹ Investor's Memorial, paras 229-232.

⁴¹² Investor's Memorial, para. 233.

512. Nor could Canada be expected to “grandparent” softwood lumber in NAFTA. It is not possible to “grandparent” prospectively as the concept applies only to things that already exist. The Investor’s suggestion that the failure to grandparent softwood lumber is indicative of the Parties’ intent is unfounded.

(c) NAFTA Article 103

513. Equally spurious is the Investor’s argument that Article 103 of the NAFTA asserts NAFTA’s priority over *subsequent* agreements. NAFTA Article 103 provides:

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

(2) In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

The term “existing”, in NAFTA Article 103(1) is defined under NAFTA Article 201 as “in effect on the date of entry into force of this Agreement”.

514. The Investor quotes only paragraph 2 of Article 103 and makes no attempt to explain the meaning of the words “such other agreements” in that paragraph. Of course, that reference can only be to “the *General Agreement on Tariffs and Trade* and other agreements to which such parties are Party” mentioned in paragraph 1. That reference in paragraph 1 is to the “existing rights and obligations” under those agreements.

515. It is impossible to have an “existing” right under a future agreement, and thus the yet-to-be-negotiated SLA could not have been included within the scope of Article 103.

516. Indeed, the NAFTA panel in *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*⁴¹³ took the view that the use of the word “existing” in respect of rights and obligations was a reference to rights and obligations in existence at the time the agreement entered into force.⁴¹⁴
517. The words “such other agreements” in Article 103(2) refer back to the agreements identified under Article 103(1).⁴¹⁵ The agreements identified under Article 103(1) are strictly those in existence on January 1, 1994. They do not include the SLA. The Investor manipulates Article 103(2) to imply that NAFTA is an agreement which takes precedence over all agreements, including future agreements.⁴¹⁶ This is simply not the case. It contradicts the plain language of the Article.
518. No provision in NAFTA gives it primacy over agreements brought into effect after January 1, 1994. Consequently, the general rules of international law apply to determine whether future agreements take precedence over NAFTA.⁴¹⁷ The SLA came into force after NAFTA and hence Article 103 of NAFTA does not give NAFTA primacy over the SLA.

413 (1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel) (Book of Authorities Vol. I, Tab 8).

414 When comparing the use of the word “retain” versus the word “existing” in Article 710 of the FTA the Panel stated “The use of the word “existing” would have made it clear that the “rights and obligations” referred to were only those in existence at the time that the agreement entered into force.” *Ibid.* para. 136.

415 One of the corollaries of the “general rule of interpretation” in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/D52/AB/R, (WTO Appellate Body), p. 22 (Book of Authorities Vol. I, Tab 6). The use of the word “such” in Article 103(2) is evidence that Article 103(2) must be read in light of Article 103(1). If Article 103(2) was not intended to refer back to Article 103(1), the inclusion of the term “such” would have been unnecessary. Jon Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Ontario: Canada Law Book Inc., 1994), p. 17 (Book of Authorities Vol. I, Tab 19).

416 Investor’s Memorial, para. 235.

417 Sinclair indicates that “it is clear that the rules laid down in Article 30 are intended to be residuary rules – that is to say, rules which will operate in the absence of express treaty provisions regulating priority.” *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), p. 97 (Book of Authorities Vol. I, Tab 10).

(d) Fees for Non-covered Provinces

519. The Investor seeks to avoid the precedence of the SLA by arguing that Canada could have prevented what it regards as discrimination between exporters from “covered” provinces and “non-covered” provinces, by imposing fees on exporters from “non-covered” provinces equivalent to those imposed on exporters from “covered” provinces.⁴¹⁸
520. In fact, Canada could not have done that consistently with its obligations under NAFTA. NAFTA Article 314 would have prohibited the imposition of such a fee. The SLA does not excuse Canada from its obligations under Article 314 in respect of “non-covered” provinces. Canada can implement only what the SLA requires.
521. In any event, it would have been impossible to apply the SLA to non-covered provinces as there is no basis in the SLA to do so. EB, LFB and UFB apply only to exports of softwood lumber first-manufactured in the covered provinces. RFB and SFB apply only to B.C. companies.

(e) Lack of Precedence Clause in SLA

522. The Investor’s suggestion that Canada’s failure to provide expressly for the precedence of a possible future softwood lumber agreement in NAFTA⁴¹⁹ is also illogical. Articles 30(3) and 30(4) of the *Vienna Convention* clearly state that later treaties prevail over earlier treaties, and hence no express provision on the issue was needed.

⁴¹⁸ Investor’s Memorial, para. 247.

⁴¹⁹ Investor’s Memorial, paras 230-234.

(f) Compensation

523. Equally, the suggestion that Canada would be absolved from the consequences of any breach of its obligations under Articles 1102, 1106 and 1110 simply by paying compensation⁴²⁰ to the Investor makes no sense. The consequence of Article 30(4) of the *Vienna Convention* is to negate any violation of incompatible NAFTA provisions. Thus, there is simply no violation of the relevant provisions that could give rise to an obligation to compensate.

(v) Conclusion

524. Based on the foregoing, should the Tribunal find that Canada has breached its NAFTA obligations, Canada asserts that the SLA must prevail over NAFTA to the extent of the incompatibility so as to prevent an unintended conflict between two international treaties. As a consequence, the Investor's claim should be dismissed.

⁴²⁰ Investor's Memorial, para. 239; see also Article VII (2) of the SLA.

H. Loss or Damage

(i) No Loss Sustained by the Investor

525. Quantification of damages may be addressed in the final phase of this arbitration if there is a determination of entitlement in favour of the Investor.⁴²¹ Canada will address quantification of damages extensively at that point.
526. However, NAFTA Chapter Eleven requires disputing parties to show loss or damage as part of the determination of breach. Articles 1116(1) and 1117(1) require the investor to prove that:
- (a) a NAFTA Party has breached Section A of Chapter Eleven, or Article 1503(2) or Article 1502(3)(a); and
 - (b) the investor incurred loss or damage by reason of, or arising out of, that breach.
527. These conditions must be addressed in this phase of the arbitration to establish breach. Such conditions ensure that NAFTA investor-state arbitration does not include every conceivable grievance that an investor might have against a Party or elevate every ordinary transaction to an international dispute.⁴²²
528. The Investor has failed to discharge its burden of proving that it sustained loss which would entitle it to damages. It is incumbent on the Investor to do so at this stage of the arbitration.

⁴²¹ Minutes of a procedural meeting held at the offices of Stikeman, Elliott on October 29, 1999, para. 10 (3) (Book of Authorities Vol. III, Tab 68).

⁴²² *Desona v. Mexico*, November 1, 1999, ICSID ARB(AF)/92/2 (NAFTA Arbitral Tribunal), paras 83, 84 & 87 (Book of Authorities Vol. I, Tab 4).

529. Moreover, the Investor cannot substantiate its many allegations that it sustained loss or was harmed by Canada's implementation of the SLA for the following reasons:

- (a) the SLA secured access to the U.S. market for the Investment's exports which it likely would not otherwise have had.⁴²³
- (b) Canada's administration of the SLA did not limit the amount of softwood lumber the Investment could export to the U.S.⁴²⁴
- (c) softwood lumber market conditions during the SLA were such that, by the Investor's own admission, it made "economic sense" for the Investment to "extensively [export] softwood lumber at the UFB rate".⁴²⁵
- (d) the Investment has taken measures motivated by its own rational profit incentive to export when allocated quota.⁴²⁶ It manages its business in light of the SLA and Canada's administration of the SLA.⁴²⁷ In the words of the Investment's President, the Investment has "managed reasonably well".⁴²⁸
- (e) the Investment would be worse off if it were exempt from the Export Control Regime. If the Investment simply exported to the U.S. without quota or permits, the U.S. Customs Service would charge it US \$100 for every 1000 board feet it exported to the U.S. If this fee had been levied on the Investments' exports from April 1, 1998 to March 31, 1999, it would have amounted to US \$38.8 million, well in excess of the LFB and UFB fees of \$US 4.1 million for the same period.⁴²⁹

423 Tom MacDonald Affidavit, paras 10, 50; Joseph Kalt Affidavit, para. 21.

424 Douglas George Affidavit, Annex A. For example, in year 3 █████ of the Investment's exports had fee-free access to the U.S. market, █████ of the Investment's exports were subjected to a US \$52.93 fee and █████ of the Investments exports were subjected to a US \$105.86 fee.

425 Investor's Memorial, Schedule 1, Statement of Kyle Gray, para. 11; Joseph Kalt Affidavit, para. 45.

426 Joseph Kalt Affidavit, para. 45.

427 Investor's Memorial, Schedule 1, Statement of Kyle Gray, para. 15.

428 Letter from Pope and Talbot Ltd. dated June 3, 1998 (Book of Authorities Vol. III, Tab 69).

429 Douglas George Affidavit, para. 19.

(f) the Investment would be worse off if the SLA did not exist⁴³⁰ as the U.S. likely would have initiated a CVD case,⁴³¹ which, if successful, would result in the U.S. imposing CVD on all imports of Canadian softwood lumber from the covered provinces.⁴³² An indication of the magnitude of CVD can be obtained by considering that the Investment received a refund of approximately US [REDACTED] [REDACTED] for 1992 and 1993 CVD paid – roughly US [REDACTED] per year.

530. The Investor's utopia in which there is free trade in softwood lumber unencumbered by CVD and other trade disputes does not accord with the reality of the last two decades of Canada-U.S. softwood lumber trade.⁴³³

531. The alleged loss or harm sustained by the Investor through the SLA or Canada's administration of the SLA must be viewed in full appreciation of reality.⁴³⁴ Reality means that the U.S. has made extensive use of trade remedies such as CVDs, at the behest of the U.S. softwood lumber industry, to protect this industry from allegedly injurious imports of Canadian softwood lumber.⁴³⁵ Compared to the likely alternatives, the SLA was extremely favourable to exporters of lumber first-manufactured in the covered provinces.⁴³⁶

532. There can be no determination of entitlement to damages as the Investor has not sustained harm or loss.

430 Joseph Kalt Affidavit, paras 21, 22, 24; Tom MacDonald affidavit, para. 66.

431 Joseph Kalt Affidavit, para. 11.

432 Joseph Kalt Affidavit, para. 11. See Douglas George Affidavit, Exhibit Q and R; Ilan Vertinsky Affidavit, paras 41, 48.

433 Joseph Kalt Affidavit, paras 9-11.

434 Joseph Kalt Affidavit, para. 11.

435 Joseph Kalt Affidavit, para. 10.

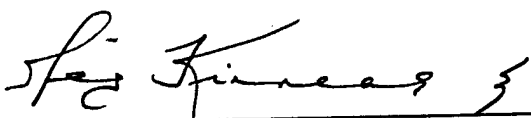
436 Joseph Kalt Affidavit, paras 21, 22, 24, 29, 41; Ilan Vertinsky Affidavit, para. 82.

PART FOUR - AWARD SOUGHT

Canada respectfully requests that this Honourable Tribunal:

- a) Dismiss the Investor's claims pursuant to Articles 1102, 1106 and 1110 of NAFTA; and
- b) Order Pope & Talbot, Inc. to pay all costs, disbursements and expenses incurred by Canada in the defence of these claims.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF MARCH, 2000,
OTTAWA, ONTARIO, CANADA.

 (per) B.R. Evernden

Of Counsel for Canada

TO: The Tribunal

AND TO: Barry Appleton,
Counsel for Pope & Talbot, Inc.