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

**BETWEEN**

**POPE & TALBOT INC**

**and**

**THE GOVERNMENT OF CANADA**

**INTERIM AWARD**

**BY**

**ARBITRAL TRIBUNAL**

**The Hon Lord Dervaird  
(Presiding Arbitrator)**

**The Hon Benjamin J Greenberg Q.C.**

**Mr Murray J Belman**

## INTRODUCTION

1. The parties to this arbitration under Chapter 11 of NAFTA are Pope & Talbot, Inc. the Claimant Investor and The Government of Canada. Respondent/Party, hereafter normally referred to as the Investor and Canada respectively.
2. The Investor is a publicly traded corporation incorporated under the laws of the State of Delaware in the U.S. It has a wholly owned subsidiary Pope & Talbot International Ltd., a corporation organised under the law of the Province of British Columbia, which in turn has a wholly owned subsidiary, also a British Columbia corporation, Pope & Talbot Ltd. (the "Investment").
3. The Investor prior to 2000 controlled Harmac Pacific Inc ("Harmac") a publicly traded pulp and paper company incorporated under the laws of British Columbia. Since 2000 Harmac has been a wholly owned subsidiary of the Investor.
4. The Investment is a wood products company that manufactures and sells softwood lumber. It harvests timber in the province of British Columbia and it operates three softwood lumber mills in the southern interior of British Columbia, at Castlegar, Grand Forks and Midway. The Investment obtains the timber to produce the softwood lumber from two sources: (1) Forest Licences and other rights to cut timber it obtains from the Province of British Columbia and (2) third parties using their own rights to cut timber.
5. By far the greater part of the total sales of the softwood lumber made by the Investment are exported to customers in the U.S.
6. On May 29, 1996 Canada and the U.S. entered into a bilateral agreement, the Softwood Lumber Agreement ("SLA"). It was retroactive to April 1, 1996 and lasts until March 31, 2001, and established a limit on the

free export of softwood lumber first manufactured in the provinces of British Columbia , Alberta, Ontario, and Quebec (“the covered provinces”) into the U.S. . Exports to the U.S. of softwood lumber first manufactured in a non covered province were not restricted and attracted no export fee.

7. This arbitration arises from the Investor’s contention that the manner in which Canada has chosen to implement the SLA constitutes a breach by Canada of certain of its obligations under Section A of Chapter 11 of NAFTA and that the Investor is entitled to claim against Canada in respect thereof under Section B of Chapter 11.

#### **PROCEDURAL HISTORY**

8. On December 24, 1998 the Investor served upon Canada a Notice of Intent to Submit a Claim to Arbitration under Article 1119 of NAFTA.
9. The Claim was submitted on March 25, 1999, less than 3 years from the date when the Investor first acquired (or should have acquired) knowledge of the breach by Canada and knowledge that the Investor had incurred loss or damage in compliance with Article 1116 of NAFTA. It was, in compliance with Article 1120 of NAFTA, submitted more than 6 months after the events giving rise to the Claim.

10. Along with the submission of the Claim, the Investor and the Investment (and Harmac at a later date) filed waivers under Article 1121 (1)(b) of NAFTA.
  
11. The Claim as originally presented was based on alleged breach by Canada of five separate obligations under Section A of Chapter 11 of NAFTA:
  - (1) Article 1102 "National Treatment"
  - (2) Article 1103 "Most Favoured Nation Treatment"
  - (3) Article 1105 "Minimum Standards of Treatment"
  - (4) Article 1106 "Performance Requirements"
  - (5) Article 1110 "Expropriation"
  
12. The Tribunal was constituted on August 19, 1999 by the Secretary-General of ICSID, the appointing authority. The arbitration is under the UNCITRAL Arbitration Rules.
  
13. Canada submitted its Defence on October 8, 1999.
  
14. The Tribunal held a procedural meeting with the parties in Montreal on October 29, 1999. At that meeting the Investor withdrew that part of its claim (2) based on Article 1103 of NAFTA.
  
15. In accordance with the Tribunal's direction Canada brought Preliminary Motions before the Tribunal on November 12, 1999. The first such motion contended that the claims fell outside the scope of Chapter 11 of NAFTA and should be dismissed. It was agreed that this contention should be dealt with on written submissions and after certain procedure in that respect the Tribunal made an award on January 26, 2000 rejecting the motion at that stage. The second motion related to the position of

Harmac. Canada sought to have paragraphs 34 and 103 of the claim struck out insofar as relating to that company. After written submissions in that respect the Tribunal rejected that motion also at that stage by an award dated February 24, 2000.

16. The Tribunal held an oral hearing in Fort Lauderdale, Florida on January 6 and 7, 2000 to deal with matters not relevant to this award. However, after discussion as to further procedure at that time it was decided that the next hearing would be confined to the Investor's claims in respect of Articles 1102, 1106 and 1110. Issues as to quantification of loss in respect of any of these claims, if successful, was to be deferred as was any consideration of the Investor's claim under Article 1105 "Minimum Standards of Treatment." The issue of estoppel raised by Canada in its Statement of Defence was also to be dealt with at the next hearing.
17. The Investor accordingly submitted a Memorial dealing with Articles 1102, 1106 and 1110 only together with the issue of estoppel on January 28, 2000. Canada submitted its Counter-Memorial on March 29, 2000, and the Investor a Supplemental Memorial on April 14, 2000.
18. Each party also filed, prior to the hearing, various documents and authorities and lodged affidavits of the witnesses on whose evidence it wished to rely.
19. Mexico and the U.S. each exercised its right under Article 1128 to make written submissions to the Tribunal on questions of interpretation of NAFTA.
20. The hearing on these issues took place in Montreal between May 1 and May 4, 2000.

21. The Investor was represented by Mr Barry Appleton and Mr Keith Mitchell. Canada was represented by Mr Brian Evernden, Ms Meg Kinnear and Maitre Eric Harvey. Representatives of the U.S. and Mexico attended as observers.
22. The Investor submitted affidavits by Kyle Gray, Craig Campbell, Allan Rozek, Professor Leonard Waverman, Howard Rosen and Professor Robert Howse. Canada exercised its right to cross-examine these witnesses in the course of the hearing.
23. Canada submitted affidavits by Douglas George, Professor Joseph Kalt, Thomas MacDonald, Claudio Valle and Professor Ilan Vertinsky. The Investor waived its right to cross examine any of these witnesses. The Tribunal required the attendance of Mr George, Professor Kalt and Professor Vertinsky in order that certain questions be put to them.
24. At the close of the hearing on May 4, 2000 each of the observers, the U.S. and Mexico, was given until May 25, 2000 to make further submissions confined to the interpretation of NAFTA provisions, and the parties were given one week to make written comments upon such submissions.
25. Each of the U.S. and Mexico exercised its right to make submissions, which were received by the Tribunal on May 25, 2000.
26. The Investor and Canada each made submissions in response to those of the U.S. and Mexico, both received on June 1, 2000.

## FACTUAL BACKGROUND

27. The undernoted matters appear to the Tribunal to be relatively uncontroversial, and can properly be made the subject of findings of fact at this stage.

28. The Investor has been operating a lumber business in Canada since 1969. The Investment, a wholly owned subsidiary (through another wholly owned subsidiary) owns and operates three softwood lumber mills in the southern interior of British Columbia, at Castlegar, Midway and Grand Forks with a total annual capacity in excess of                   board feet of softwood lumber. Capacity was calculated on the basis of a 5-day working week. Between 1993 and 1995 its annual average sales were some                   board feet.

29. In recent years prior to 1996, the Investment exported about 90% of its softwood lumber to the U. S.<sup>1</sup>. 'It did so on terms described as F.O.B. delivered to the U.S., by which the Investment in fact meant that title to the goods was transferred to the purchaser at the mill, but the Investment paid for the freight to destination and the insurance of all the goods in transit.'<sup>2</sup>

30. On May 29, 1996 Canada and the U.S. signed the SLA. In terms of Article 1 the U.S. undertook not to take certain specified actions under the laws of the U.S. with respect of imports of softwood lumber from Canada. In terms of Article 2, 1 Canada was required to place softwood lumber on the Export Control List under the Export and Import Permits Act and to require a Federal export permit for each exportation to the U.S.

of softwood lumber first manufactured in the covered provinces. By Article 2.2 Canada was bound to collect a fee on issuance of a permit for export to the U.S. of softwood lumber first manufactured in the covered provinces for quantities above the established base in a given year. The Established Base ("EB") was 14.7 billion board feet, and up to that level the export was free of charge. Between 14.7 and 15.35 billion board

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<sup>1</sup> Gray Testimony, Vol 4, p. 86

<sup>2</sup> Rosen Testimony, Vol. 5, p. 50-54

feet, it could be exported to the U.S. at the Lower Fee Base ("LFB") of U.S.\$50 per thousand board feet. For amounts in excess of 15.35 billion board feet the Upper Fee Base ("UFB") of U.S.\$100 per thousand board feet applied. Those fees were subject to adjustment for inflation on April 1 of each year beginning April 1997.

By Article 2.4 Canada was to allocate the EB and the LFB for each year prior to its beginning among Canadian softwood lumber exporters.

By Articles 2.5 and 2.6 Canada was obliged in effect to collect fees under the LFB or the UFB from each exporter of softwood lumber first manufactured in the covered provinces whose exports to the U.S. in that quarter exceeded 28.75% of the exporters' yearly allocation of the Established Base (the "speed bump" provision).

By Article 2.9 Canada was not required to collect a fee under 2.5 or 2.6 from an exporter whose production of softwood lumber in the previous calendar year was less than 10 million board feet.

By Article 3 for each calendar quarter in which the average price per thousand board feet of specified lumber exceeded the trigger price as defined, a further 92,000,000 board feet of softwood lumber first manufactured in the covered provinces could be exported to the U.S., fee free, during the following four quarters.

31. The SLA was retroactive to April 1, 1996. Canada added Softwood Lumber Products where the province of first manufacture was any of the covered provinces to the Export Control List until March 31, 2001.
32. By a Notice to Exporters No. 90 issued on March 25, 1996, Canada informed exporters that, as of April 1, 1996, softwood lumber products would be placed upon the Export Control List and as of that date, where the province of (first) Manufacture was British Columbia, Alberta, Manitoba or Quebec, all exports to the U.S. would require an export permit. As to Ontario, the Notice stated that the application of an export permit remained under discussion and would be decided shortly.
33. By a Notice to Exporters No. 92 issued on June 19, 1996 Canada amended the information in Notice to Exporters No. 90 (inter alia by deleting Manitoba from the list of provinces and substituting Ontario). It also invited softwood lumber stakeholders from the covered provinces to complete a questionnaire on production and exports of softwood lumber for the years 1994 and 1995 and the period January 1 to March 31, 1996 and invited views from softwood lumber stakeholders as to methods of allocation.
34. On June 21, 1996 Canada issued Softwood Lumber Products Export Permit Fees Regulations which introduced an administrative fee to be paid by an exporter for the issuance of a permit in respect of exports of softwood lumber products in the established fee base, and for export fees to be paid for permits in the lower fee base of U.S.\$50 and in the upper fee base of U.S.\$100 per thousand board feet.

35. On the same date Canada issued Export Permit Regulations (Softwood Lumber Products) setting out the requirements of and procedure for issuing a permit to export softwood lumber to the U.S. In terms of the Regulations it was a condition of the issuance of a permit in respect of exports in the established base or the lower fee base that the exporters had been assigned an export level, i.e. a share of the established base or the lower fee base.
36. By a further Notice to Exporters No. 94 dated October 31, 1996 Canada set out the method of allocation, and also updated the matters contained in Notices to Exporters Nos. 90 and 92.
37. In terms of Article 6.2 of Notice to Exporters No. 92, until a system of allocation was designed and implemented for which the due date was September 30, 1996, softwood lumber export controls were administered on a "first-come, first-served" basis. Limits were set for each of the first two quarters at 4,226,250,000 board feet (28.75% of the annual established base) . Once that total had been reached in each quarter, exporters faced a fee of U.S.\$50 per thousand board feet for the next 186;875,000 board feet (28.75% of the annual LFB) and U.S.\$100 per thousand board feet beyond that level. This was changed to an allocation regime under Notice to Exporters No. 94.
38. According to Notice to Exporters No. 94 the allocation is a national corporate - based system, under which EB levels (attracting no fee) and LFB levels (with a fee of U.S.\$50 per thousand board feet) were allocated to primary producers and remanufacturers including new entrants. Exports to the U.S. above the EB and LFB levels fell into the UFB and attracted a fee of U.S. \$ 100 per thousand board fee. The process was based on their recent export shipments, and on special criteria in the case

of new entrants. The system was to be reviewed annually, with adjustments to allocations then being made. Allocations were normally to be valid for one year at a time. Unused amounts at the end of a year did not carry forward. The policy of Canada was stated to be that the allocation system be a flexible and responsive one. One of the four important elements of market responsiveness was stated to be a growth mechanism for companies whose sales exceed their EB level, and another an under-utilization provision allowing the reallocation of quantities away from those unable to ship their allocated levels.

39. In order to allocate the EB to which the SLA refers in relation to the four covered provinces Canada appears to have proceeded in the first year as follows:
- (1) The 14.7 billion board feet EB referred to in the SLA was reduced by 2% i.e. 294,000,000 board feet so as to make provision for new entrants.
  - (2) Other deductions, namely a one-time transitional adjustment of 170,000,000 board feet and a ministerial reserve of 50,000,000 board feet were reserved from the EB figure.
  - (3) The balance, 14,186,000,000 board feet was allocated to companies, either primary mills or remanufacturing facilities in the four covered provinces. Canada claims that as a consequence firms based in British Columbia received 59% of the EB available, in Alberta 7.7%, in Ontario 10.3% and in Quebec 23%.
  - (4) In arriving at the EB allocation different methods were applied in different provinces for the calculation of the base.

In relation to British Columbia the base for remanufacturing concerns was the better of 1994 or 1995 calendar year direct exports to the U.S. For the primary mills, the basis was the average of direct exports in each of 1994 and 1995, with a saving for cases where the average showed a diminution over 1995 alone in excess of 35%. in which case the 1995 figure was used. In all the other covered provinces the base was taken as the best of any of the years 1994 or 1995 or a twelve month figure consisting of the latter six months of 1995 and two times the first quarter of 1996.

- (5) In relation to the allocation of LFB, the original amount that would be available was 650,000,000 board feet. It was reduced by 1 50,000,000 board feet for new entrants and by a further 50,000,000 board feet for a one-time transitional adjustment.

40. The allocation actually made to the Investment by Canada in each of the first four years of operation of the SLA was as follows:

The Investment fully utilised its EB and LFB quotas in all of these years. In each of years 1, 3 and 4 it exported in excess of these levels. It also exported in excess of the 28.75% "speed bumps" in each of years 2, 3 and 4.



**THE CLAIM UNDER ARTICLE 1102  
“NATIONAL TREATMENT”**

41. Article 1102(1) of NAFTA provides: “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.”
42. Article 1102 (2) of NAFTA provides: “Each Party shall accord to investments of investors of another Party treatment no less favourable than 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.”
43. Many issues were canvassed by the parties in relation to national treatment. Having regard to the nature of the questions raised and to the present state of the evidence on them, the Tribunal has decided that it would not be fair to either party to come at this stage to a concluded view upon Article 1102. It appears to the Tribunal that upon a consideration of the questions posed by the claim made under Article 1105 (Minimum Standard of Treatment) matters may well arise which have a relevant bearing on questions arising in relation to Article 1102.
44. In these circumstances the Tribunal has come to the view that it would be inappropriate and could be unfair to either party to come to a final decision on the Article 1102 claim without being able to take into account evidence and submissions relative to Article 1105 . In reaching that view the Tribunal considers that there are a number of matters upon which it is not at present satisfied. These issues should be addressed at or prior to any further hearing. Accordingly, there is appended to this interim award a series of requests for documents and information, the responses to which the Tribunal believes will better enable it to deal fully with the issues posed, both in relation to Article 1102 and (it may be) Article 1105.

## PERFORMANCE REQUIREMENTS

### Contentions of the Investor

45. The Investor has stated and reiterated that it does not take issue with the SLA as such.<sup>3</sup> It does, however, attack the implementation of the SLA by Canada via its Export Control Regime (“ECR” or “the Regime”), *inter alia* as it relates to performance requirements. Specifically, the Investor contends that the Regime requires its Investment “to export a certain amount of softwood lumber at the EB and LFB levels each year or face a reduction of its EB or LFB in future years.”<sup>4</sup> The Investor further states: The Regime also requires the Investment to restrict its sales of lumber bound for the United States by relating such sales to the volume of exports at which no permit fee will be charged.”<sup>5</sup> The Investor submits that these requirements are “prohibited” by NAFTA Article 1106,<sup>6</sup> and that those prohibitions “apply to all government measures, regardless of whether they result in de jure or de facto requirements.”<sup>7</sup>

46. The relevant provisions of NAFTA Article 1106 for our purposes stipulate as follows:

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

(a) *to export a given level or percentage of goods or services;*

\* \* \*

(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*

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<sup>3</sup> Statement of Claim, p. 1 and ¶25.

<sup>4</sup> Ibid., ¶ 85.

<sup>5</sup> Ibid.

<sup>6</sup> Memorial, ¶ 119.

<sup>7</sup> Memorial, ¶ 101.

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:*

\* \* \*

(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.*

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

\* \* \*

47. The Investor contends that “Canada has regulated the Investor’s activity in a manner that violates NAFTA Article 1106(1)(a) because the Export Control Regime requires the Investment to export a given level of goods” that is “lower than that which the Investment would export if it were not forced to pay export fees on exports above its fee-free allocation.”<sup>8</sup> The Investor further argues that the Regime violates that provision “because it penalizes softwood lumber producers for under-utilization of export quotas” under “use it or lose it” provisions; these provisions create a *de facto* requirement to export up to quota levels.<sup>9</sup> Finally, the Investor characterizes the “speed bump” mechanism of the Regime as a “*de facto* requirement to export [in each quarter] at a level not greater than ... 28.75% [of the] annual level [of EB] set by the [Export and Import Controls Bureau],” again contrary to Article 1106(1)(a).<sup>10</sup>

48. The Investor submits that the granting of fee free or reduced fee quotas to a producer is an “advantage” within the meaning of Article 1106(3).<sup>11</sup> The Investor moreover contends that “(t)he Export Control Regime regulates the initial and continuing receipt of the advantage of being allowed to export at EB or LFB rates” and that “Canada has related sales by the Investment of its products to customers from the United States to its

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<sup>8</sup> Memorial, ¶ 120.

<sup>9</sup> Ibid., ¶¶ 101, 121.

<sup>10</sup> Ibid., ¶ 122.

<sup>11</sup> Memorial, ¶¶ 109, 112.

volume of exports by restricting sales above a certain level and by imposing a punitive export permit fee.”<sup>12</sup>

49. As noted, the Investor claims that the several requirements imposed and conditioned by Canada violate NAFTA Articles 1106(1)(a) and (e) and 1106(3)(d).

#### Canada’s Response

50. In response to the Investor’s claims, Canada first points to Article 1106(5), which states: “Paragraphs 1 and 3 [of Article 1106] do not apply to any requirement other than the requirements set out in those paragraphs.” That language, Canada argues, 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.<sup>13</sup>
51. Canada also asserts that 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.”<sup>14</sup>
52. Citing the “ordinary meaning” of the words in Article 1106(1), Canada contends that the only requirements that are prohibited are those that “compel the observance of a mandatory condition.”<sup>15</sup> Applying that concept, Canada argues that there can be no *de facto* violations of Article 1106(1), since they would not, by definition, embody an obligation subject to enforcement by Canada.<sup>16</sup> Moreover, a measure conditioning an incentive, *de facto* or otherwise, must be analyzed under Article 1106(3).
53. As to Article 1106(1)(a), Canada argues 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%

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<sup>12</sup> Statement of Claim, ¶ 86.

<sup>13</sup> Counter-Memorial, ¶ 255.

<sup>14</sup> Ibid., ¶ 258.

<sup>15</sup> Ibid., ¶ 273.

<sup>16</sup> Ibid., ¶ 275.

‘speed bump’ in certain quarters.”<sup>17</sup> Secondly, Canada asserts that “to include a restriction on fee-free export levels in the scope of Article 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.”<sup>18</sup>

54. Canada further submits that “the Investor advances an alternative interpretation of Article 1106(1)(a) that transforms Article 1106(1)(a) into a prohibition on export restrictions.<sup>19</sup> Canada contends that this “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.”<sup>20</sup>
55. Regarding the other NAFTA provisions (Articles 1106(1)(e) and 1106(3)(d)) alleged by the Investor to be prohibited performance requirements, Canada states: “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 Investment’s sales within Canada.<sup>21</sup> Based upon the provisions’ “readily discernable ordinary meaning.”<sup>22</sup> Canada asserts that they are inapplicable to the Investment’s status under the Regime.
56. In summary, Canada argues that: “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

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<sup>17</sup> Ibid., ¶ 319.

<sup>18</sup> Ibid., ¶ 320.

<sup>19</sup> Ibid., ¶ 259.

<sup>20</sup> Ibid., ¶ 260.

<sup>21</sup> Ibid., ¶ 262.

<sup>22</sup> Ibid., ¶ 290.

ordinary meaning.<sup>23</sup>

57. Finally, Canada contends that: "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<sup>24</sup> and that "(t)he 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).<sup>25</sup>

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<sup>23</sup> *Ibid.*, ¶ 264. Based on paragraph 43 of Professor Joseph Kalt's first Affidavit dated March 27, 2000 filed in support of its Counter-Memorial, Canada also submits: "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." *Ibid.*, ¶ 304.

<sup>24</sup> *Ibid.*, ¶ 295.

<sup>25</sup> *Ibid.*, ¶ 296.

Investor's Reply

58. In its reply, the Investor contests as “totally false” Canada’s argument that the Investor had advanced four theories concerning the application of Article 1106 of NAFTA. It asserts that it has “made a single argument about the application of NAFTA Article 1106 to the manner in which the Export Control Regime has harmed its investment; that because performance requirements are a type of economic instrument that necessarily distort trade and investment, the NAFTA parties have agreed to eliminate their use, or to compensate NAFTA Investors when such measures are nonetheless imposed.”<sup>26</sup>
59. The Investor asserts that Canada’s interpretation of the term “to export at a given level” in Article 1106(1)(a) limits its application to “a requirement to ‘increase’ exports, which meaning cannot be supported on a plain reading of the text”. It continues: “The wording of NAFTA Article 1106(1)(a) is not ‘to export at no less than a given level’, ‘to increase exports to any given level’, or even ‘to export at no more than a given level’. Rather, the provision is clearly worded so as to encompass *any* government attempt to impose a performance requirement having the effect of changing the export level from that which it would be if not for the imposition of the performance requirement.”<sup>27</sup>
60. The Investor also argues: “The Export Control Regime, and its requirements to export softwood lumber at a given level for each investment, is exactly the kind of scheme that NAFTA Article 1106(1)(a) was designed to either prevent, or require compensation for any losses it occasions for NAFTA investors. Its imposition caused market distortions that forced investments to act in a manner inconsistent than (sic) that which they would do, if not compelled to observe the requirements of the Regime.”<sup>28</sup>

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<sup>26</sup> Supplemental Memorial, ¶ 79

<sup>27</sup> Ibid., ¶ 86.

<sup>28</sup> Ibid., ¶ 102.

61. The Investor asserts as well that the Export Control Regime “as a whole constitutes a performance requirement<sup>29</sup> and is thus in violation of Article 1106 of NAFTA.
62. The Investor also submits: “With the inclusion of seven prohibited performance requirements under NAFTA Article 1106(1) the NAFTA Parties clearly intended to limit use of performance requirements as a public policy tool (or at least require compensation to be paid for their use), because of the deleterious economic effects of such measures.<sup>30</sup>
63. Finally, the Investor agrees with Canada’s statement that “(t)hree 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.<sup>31</sup> They are Articles 1106(1)(a), (f) and (g).

#### DECISION

64. Having considered all the submissions and the testimony and documentary evidence adduced by the disputing parties, the Tribunal concludes as follows:
65. Article 102(2) of NAFTA decrees that its provisions shall be interpreted and applied “in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.” NAFTA is a treaty, and the principal international law rules on the interpretation of treaties are found in the *Vienna Convention on the Law of Treaties*.
66. The authoritative status of the *Vienna Convention* in respect of NAFTA has been recognized by other NAFTA Tribunals. As an example, the NAFTA Tribunal in *In the Matter of Tariffs Applied by Canada to Certain U.S. -Origin Agricultural Products* confirmed that Articles 31 and 32 of the Vienna Convention are “generally

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<sup>29</sup> Ibid., ¶ 103.

<sup>30</sup> Ibid., ¶ 112.

<sup>31</sup> Ibid., ¶ 116, referring to Counter Memorial ¶ 268.

accepted as reflecting customary international law.<sup>32</sup>

67. Article 31 of the *Vienna Convention* provides:

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;*
  - (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.*

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<sup>32</sup> (1996) 1 T.T.R. (2d) 975 (NAFTA Arbitration Tribunal) par. 1 19; found in Canada's Book of Authorities, Vol. 1, Tab. 8.

68. Article 32 of the *Vienna Convention* permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning resulting from the application of Article 31 or to discern that meaning when the application of Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.
69. Accordingly, the analysis and interpretation of Article 1106 of NAFTA is initially informed by the ordinary meaning of its terms. As the Appellate Body of the World Trade Organization expressed it: "Interpretation must be based above all on the text of the treaty."<sup>33</sup>
70. The Tribunal endorses Canada's contention that Article 1106(5) is vital to the interpretation of Articles 1106(1) and (3). Consequently, the ambit of those two Articles may not be broadened beyond their express terms. The enumeration of seven requirements in Article 1106(1) and four in Article 1106(3) is limiting in each case.
71. Article 1106(1) provides that each of the Parties to NAFTA may not impose or enforce any of the seven performance requirements stipulated therein, 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. Article 1106(3) declares that each of the Parties may not 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 four performance requirements cited therein.
72. Those four requirements of Article 1106(3) are identical to four of the seven requirements found in Article 1106(1). Consequently, three of the seven requirements that may not be imposed or enforced under Article 1106(1) may nonetheless be stipulated as conditions for the receipt or continued receipt of an advantage. They are Articles 1106(1)(a), (f) and (g).

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<sup>33</sup> Japan - Taxes on Alcoholic Beverages, October 4, 1996 at p. 12. See Tab 7, Vol I, Canada's Book of Authorities.

73. It is common ground between the disputing parties herein<sup>34</sup>, and the Tribunal agrees, that the granting and maintaining of EB and/or LFB quotas to exporters under the provisions of the ECR is an “advantage” within the meaning of Article 1106(3).
74. The Investor claims that the Regime imposes a requirement to export a given level or percentage of goods. Canada argues that “the aim generally [of performance requirements] is to raise the foreign exchange earnings of the host country and to increase employment in the export sector,<sup>35</sup> that is, to increase exports. The Tribunal accepts that Canada’s position may reflect what is generally the aim of such requirements. However, the Tribunal is not prepared to rule that the language of Article 1106(1)(a) adopts that general approach. The language of that Article is not expressly limited to the imposition or enforcement of a *higher* level or percentage of exports of goods and services, but could admit equally the imposition or enforcement at *any* given level or percentage of those exports.
75. However, the Tribunal concludes that the Investor has not made out a valid claim under Article 1106(1)(a), because the Regime does not “impose or enforce \* \* \* requirements.” Rather, it is a tariff-rate export restraint regime fixing only the level up to which covered products may be exported fee-free (EB), then at a lower fee (LFB) up to a given higher level, and thereafter in unlimited quantities at a higher fee (UFB).<sup>36</sup> The Regime functions on the basis of the allocation of EB and/or LFB quotas to specific exporters, employing a system of permits and, where applicable, the payment by the exporter to Canada of export fees, which are later remitted by Canada to the respective covered provinces. While the Regime undoubtedly deters increased exports to the U.S., that deterrence is not a “requirement” for establishing, acquiring, expanding, managing, conducting or operating a foreign owned business in Canada.
76. For all those reasons, the Investor’s claim under Article 1106(1)(a) has not been made out and is dismissed.

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<sup>34</sup> Memorial, ¶ 112 and Counter-Memorial, ¶ 325.

<sup>35</sup> Counter-Memorial, ¶ 304.

<sup>36</sup> Subject, for British Columbia, since August 26, 1999 with effect for years four and five of the SLA, to the application of a “Super Fee Base” (S-UFB) in accordance with the terms of Notice to Exporters No. 120, September 3, 1999, which is filed as Tab 27 of Canada’s Annex to the Counter-Memorial.

77. The Tribunal proposes to treat together the Investor's claims pursuant to Articles 1106(1)(e) and 1106(3)(d), the texts of which are identical. Under those provisions, a NAFTA party may not "restrict sales of goods or services in its territory \* \* \* by relating such sales in any way to the volume or value of [the investment's] exports." The prohibition in Article 1106(1) is addressed to imposing or enforcing requirements, commitments or undertakings, while that of Article 1106(3) is addressed to conditioning the receipt or continued receipt of an advantage.
78. Those provisions refer to restrictions on the sales made by an investment "in its territory" that are related to the "volume or value of . . . (such investment's) . . . exports or foreign exchange earnings". Based on all the submissions and the evidence adduced, the Tribunal concludes that, as regards Canada, "sales of goods in its territory" means sales made in Canada of softwood lumber first manufactured in a covered province, for use or consumption within Canada. Sales of such products for export to the U.S., even where title to the goods passes to the U.S. purchaser while the lumber is still in Canada<sup>37</sup> or where the lumber is sold to a Canadian party for export to the U.S., are "exports" within the meaning of Articles 1106(1)(e) and 1106(3)(d).
79. The Investor ignores the distinction between domestic sales and sales for export, where in its Statement of Claim,<sup>38</sup> Memorial<sup>39</sup> and Supplemental Memorial,<sup>40</sup> it employs the terms "exports" and "sales" interchangeably, in fact relating or comparing "exports" to "exports." This does violence to the text of Articles 1106(1)(e) and 1106(3)(d), standing those provisions on their head.
80. Applying the proper interpretation of- the relevant test, the Export Control Regime imposes *no* restrictions or limitations on domestic sales of softwood lumber. For these reasons, the Investor's claims under Articles 1106(1)(e) and 1106(3)(d) have not been made out and are also dismissed.

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<sup>37</sup> As was suggested by the witness, Howard Rosen, due to the fact that the Investment's sales to U.S. purchasers are shipped "F.O.B. delivered to the U.S.". See para. 12 of his Affidavit of April 12, 2000, Document 2 of the Schedules forming part of the Supplemental Memorial, and his testimony at the hearing transcript, Vol. 5, pp. 50-

<sup>38</sup> At ¶¶ 85 and 86.

<sup>39</sup> At ¶¶ 113 and 126.

<sup>40</sup> At ¶ 120.



## EXPROPRIATION

### Contentions of the Investor

81. The Investor claims that Canada's Export Control Regime implementing the SLA "has deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market."<sup>41</sup> The Investor points to April 1, 1996 as the "initial date of expropriation," and suggests that "each time Canada reduced the Investment's allocation of free quota, a further expropriation occurred."<sup>42</sup> The Investor claims that these actions violate NAFTA Article 1110.

82. Article 1110(1) provides:

*No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory, or take a measure tantamount to nationalization or expropriation of such investment ("expropriation"), except:*

- (a) for a public purpose;*
- (b) on a nondiscriminatory basis;*
- (c) in accordance with due process of law and Article 1105(1); and*
- (d) in payment of compensation in accordance with paragraphs 2 through 6.*

83. The Investor claims that Article 1110 "provides the broadest protection for the investments of foreign investors who may suffer harm by being deprived of their fundamental investment rights."<sup>43</sup> The Investor further claims that there exists a "well-recognized international legal principle that expropriation refers to an act by which governmental authority is used to deny *some* benefit of property."<sup>44</sup> Under the terms of NAFTA and under general international law, limitations on a state's right to expropriate private property include so-called "creeping" expropriation, a process that has the effect of taking property through staged measures.<sup>45</sup>

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<sup>41</sup> Claim, ¶ 93.

<sup>42</sup> Ibid. ¶ 94.

<sup>43</sup> Memorial, ¶ 132.

<sup>44</sup> Ibid. ¶ 136 (emphasis supplied).

<sup>45</sup> Ibid. ¶¶ 1137-138.

84. The Investor reads NAFTA Article 1110 as creating a *lex specialis* going beyond customary international law. Specifically, the Investor believes that the phrase “measure tantamount to expropriation” appearing in Article 1110 comprehends a measure beyond an outright taking or creeping expropriation.<sup>46</sup> It contends that the term includes “even nondiscriminatory measures of general application which have the effect of substantially interfering with the investments of investors of NAFTA Parties .<sup>47</sup>
85. The Investor notes that, since Article 1110 applies to actions against an “investment,” the prohibitions bring into play the broad definitions of that term found in NAFTA Article 1139. The Investor concludes that that broad definition “clearly indicates that a wide variety of economic interests, both tangible and intangible, are covered by the scope of Article 1110.”<sup>48</sup>
86. The Investor argues that under the proper interpretation of “expropriation” in Article 1110, Canada’s Export Control Regime has expropriated its Investment. Specifically, the Investor points to the following limitations on its Investment’s ability to carry out its business of exporting softwood lumber to the U.S.:

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<sup>46</sup> Ibid., ¶ 142.

<sup>47</sup> Ibid., ¶ 150.

<sup>48</sup> Ibid., ¶ 146.

- a) The Regime has limited its ability to run at full capacity and sell a larger volume of softwood lumber;<sup>49</sup>
- b) Reductions of the Investment's fee free quota have required it to reduce its business operations significantly;<sup>50</sup>
- c)
- d) Since August 30, 1999, with respect to British Columbia producers, the fee on a certain portion of the LFB exports has been increased to the UFB level and an increased fee has been applied for certain exports previously made at the UFB level;<sup>51</sup> and
- e) By virtue of the foregoing limitations, the Investment has suffered injury to its business operations, its expansion and management, and its overall profitability.<sup>52</sup>

#### Canada's Response

87. In response to the Investor's contentions, Canada argues that the property claimed to have been expropriated is not an "investment of an Investor of another Party" as required by Article 1110, since the "ability to alienate its product to [the U.S.] market" is not a property right.<sup>53</sup> Canada further argues that the Investor has not been deprived of its Investment, since it has exported softwood lumber to the U.S. from the inception of the SLA and continues to do so.<sup>54</sup>

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49 Ibid. ¶157.

50 Ibid. ¶158.

51 Ibid. ¶164.

53 Defence ¶¶ 155-156.

54 Ibid, ¶ 160.

88. Canada also argues that, while there is no definition of the term “expropriation” in NAFTA, international law requires “an actual interference with fundamental ownership rights.”<sup>55</sup> “Mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required.”<sup>56</sup>
89. Canada also contests the Investor’s view that the term “measure tantamount to expropriation” expands the protections in NAFTA beyond the customary scope of expropriation under international law. Canada argues that the word “tantamount” simply means equivalent, which is rendered in the equally authentic French and Spanish texts of NAFTA as “equivalent” and “equivalente.” Consequently, the term is no broader than the ordinary concept of “creeping expropriation,” which is a term not employed in treaty drafting.<sup>57</sup>
90. Canada also asserts that its Regime implementing the SLA is an exercise of regulatory power and that, at international law, a “state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure.”<sup>58</sup> Indeed, according to Canada, “at international law, liability is possible only if the measure is discriminatory.”<sup>59</sup>
91. Canada contends that the Export Control Regime has not deprived the Investment of any fundamental ownership rights. Specifically, invoking criteria that have emerged from international jurisprudence on expropriation, Canada points to the following:
- a) There is no allegation that the Investment’s mills have been taken, its profits seized, it has become unprofitable, its stock has been confiscated or that it no longer controls its operations.<sup>60</sup>
  - b) While the Investor believes its Investment would be more profitable if freed from the Regime, it has carried on its usual business of exporting large amounts of softwood lumber to the U.S., and

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<sup>55</sup> Counter-Memorial ¶3 72.

<sup>56</sup> Ibid, ¶ 373.

<sup>57</sup> Ibid, ¶ 386.

<sup>58</sup> Ibid, ¶ 415.

<sup>59</sup> Ibid, ¶ 426.

<sup>60</sup> Ibid. ¶441.

remains a profitable company.<sup>61</sup>

- c) The Investor retains full ownership and control of its Investment and the value of its shares has increased.<sup>62</sup>
- d) The SLA has caused an increase in prices for softwood lumber exported to the U.S., which offsets lower sales volumes.<sup>63</sup>
- e) Finally, Canada argues that, without the SLA and the implementing Regime, the Investment might have even more limited access to the U.S. market.<sup>64</sup>

92. Canada asserts as well that unlimited access to the U.S. market does not fall within the definition of an Investment in Article 1139(g) or (h). Access to the U.S. market is not property, tangible or intangible, nor is it an interest arising from the commitment of capital or other resources in Canada.<sup>65</sup>

93. For these reasons, Canada submits that there has been no expropriation, direct or indirect, of the Investment.

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<sup>61</sup> Ibid. ¶¶ 443, 445

<sup>62</sup> Ibid. ¶444.

<sup>63</sup> Ibid. ¶446.

<sup>64</sup> Ibid. ¶448.

<sup>65</sup> Ibid. ¶11471-476.

Investor's Reply

94. In its reply to Canada's Counter-Memorial, the Investor accepts the proposition "that the Export Control Regime is a measure not covered by customary international law definitions or interpretations of the term expropriation."<sup>66</sup> However, the Investor argues that the term "measure tantamount to expropriation" broadens the customary definitions to include the Regime.<sup>67</sup> In this sense, the Investor likens NAFTA Article 1110 to the expanded jurisdiction conferred on the Iran-U.S. Claims Tribunal, whose authority extends beyond cases involving direct or indirect expropriation to include "measures affecting property rights."<sup>68</sup>
95. The Investor also challenges Canada's suggestion that unlimited access to the U.S. market is not property included within the definition of an investment under Article 1139. The Investor points out that access to the U.S. market is the means by which its Investment generates cash flow that comprises its value; therefore, interference with the access to the U.S. market has a direct effect on the value of its Investment.<sup>69</sup>

DECISION

96. Based upon these submissions, as well as the testimony and evidence submitted by the Parties, the Tribunal concludes that the Investment's access to the U.S. market is a property interest subject to protection under Article 1110 and that the scope of that article does cover nondiscriminatory regulation that might be said to fall within an exercise of a state's so-called police powers. However, the Tribunal does not believe that those regulatory measures constitute an interference with the Investment's business activities substantial enough to be characterized as an expropriation under international law. Finally, the Tribunal does not believe that the phrase "measure tantamount to nationalization or expropriation" in Article 1110 broadens the ordinary concept of expropriation under international law to require compensation for measures affecting property interests without regard to the magnitude or severity of that effect.

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Supplemental Memorial, ¶ 128.

Ibid.

Ibid. ¶¶11133-136.

Ibid. ¶140.

97. As noted, Article 1110 sets requirements that must be met by Parties expropriating “an investment of an investor of another Party.” The Investor is acknowledged to be an “investor of another Party,” but Canada claims that the ability to sell lumber to the U.S. market is not an investment within the meaning of NAFTA. Article 1139(g) defines investment to include, among other things, “property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.”
98. While Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the “business” of the Investment. Interference with that business would necessarily have an adverse effect on the property that the Investor has acquired in Canada, which, of course, constitutes the Investment. While Canada’s focus on the “access to the U.S. market” may reflect only the Investor’s own terminology, that terminology should not mask the fact that the true interests at stake are the Investment’s asset base, the value of which is largely dependent on its export business. The Tribunal concludes that the Investor properly asserts that Canada has taken measures affecting its “investment,” as that term is defined in Article 1139 and used in Article 1110.
99. Canada appears to claim that, because the measures under consideration are cast in the form of regulations, they constitute an exercise of “police powers,” which, if nondiscriminatory, are supposedly beyond the reach of the NAFTA rules regarding expropriations.<sup>70</sup> While the exercise of police powers must be analyzed with special care, the Tribunal believes that

Canada’s formulation goes too far. Regulations can indeed be exercised in a way that would constitute creeping expropriation:

Subsection (1) [relating to responsibility for injury from improper takings] 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

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See Counter-Memorial, ¶¶1141 1, 413, 426.

enjoyment of an alien's property or its removal from the state's territory.<sup>71</sup>

Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.<sup>72</sup> For these reasons, the Tribunal rejects the argument of Canada that the Export Control Regime, as a regulatory measure, is beyond the coverage of Article 1110.

100. The next question is whether the Export Control Regime has caused an expropriation of the Investor's investment, creeping or otherwise. Using the ordinary meaning of those terms under international law, the answer must be negative. First of all, there is no allegation that the Investment has been nationalized<sup>73</sup> or that the Regime is confiscatory.<sup>74</sup> The Investor's (and the Investment's) Operations Controller<sup>75</sup> testified at the hearing that the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment.<sup>76</sup>

101. The sole "taking" that the Investor has identified is interference with the Investment's ability to carry on its

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<sup>71</sup> Third Restatement of the Foreign Relations Law of the U.S. §7 1 2, comment (g), emphasis added.

<sup>72</sup> This is not to say that every regulatory restraint can be likened to expropriation. The *Restatement* recognizes that the distinction between taking and regulation is not always clear but may rest on the degree of interference with the property interest. See *Restatement* § 7 1 2, comment (g) and note 6. Canada's suggestion that regulations can run afoul of international legal requirements only if discriminatory is inconsistent with the *Restatement*: "[A] state is responsible for expropriation of alien property without just compensation even if property of nationals is treated similarly." *Ibid.* comment (i).

<sup>73</sup> See Article 1110 (1).

<sup>74</sup> See *Restatement* § 7 1 2 comment (g).

<sup>75</sup> Gray Testimony, Vol. 4, p. 75.

<sup>76</sup> *Ibid.*, pp. 146-148

business of exporting softwood lumber to the U.S.<sup>77</sup> While this interference has, according to the Investor, resulted in reduced profits for the Investment, it continues to export substantial quantities of softwood lumber to the U.S. and to earn substantial profits on those sales.<sup>78</sup>

102. Even accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment's operations due to the Export Control Regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been "taken" from the owner. Thus, the *Harvard Draft* defines - the standard as requiring interference that would "justify an inference that the owner \* \* \* will not be able to use, enjoy, or dispose of the property..."<sup>79</sup> The *Restatement*, in addressing the question whether regulation may be considered expropriation, speaks of "action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property."<sup>80</sup> Indeed, at the hearing, the Investor's Counsel conceded, correctly, that under international law, expropriation requires a "substantial deprivation."<sup>81</sup> The Export Control Regime has not restricted the Investment in ways that meet these standards.

103. As noted, the Investor expressly agreed that "the Export Control Regime is a measure not covered by customary international law definitions or interpretations of the term expropriation."<sup>82</sup> It contends that NAFTA goes beyond those customary definitions and interpretations to adopt broader requirements that include under the purview of Article 1110 "measures of general application which have the effect of

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<sup>77</sup> Memorial ¶157.

<sup>78</sup> Gray Testimony, Vol. 4, pp. 154-156, Vol. 6 pp. 11-13.

<sup>79</sup> Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 10(3).

<sup>80</sup> Restatement, §712 comment (g). The *Restatement* also suggests that one test is "the degree to which the government action deprives the investor of effective control over the enterprise," and another is whether the government has made it "impossible for the firm to operate at a profit." *Ibid.* note 6.

<sup>81</sup> Vol. 7, pp. 57-58

<sup>82</sup> Supplemental Memorial ¶128.

substantially interfering with the investments of investors of NAFTA Parties.<sup>83</sup> The Investor discerns this additional requirement because of the use of the phrase “measure tantamount to \* \* \* expropriation” in Article 1110.

104. The Tribunal is unable to accept the Investor’s reading of Article 1110. “Tantamount” means nothing more than equivalent.<sup>84</sup> Something that is equivalent to something else cannot logically encompass more. No authority cited by the Investor supports a contrary conclusion. References to the decisions of the Iran-U.S. Claims Tribunal ignore the fact that that tribunal’s mandate expressly extends beyond expropriation to include “other measures affecting property rights.”<sup>85</sup> And, to the extent the Investor is correct in urging that the comments of Dolzer and Stevens suggest that measures “tantamount” to expropriation can encompass restraints less severe than expropriation itself (creeping or otherwise), those comments would not be well-founded under a reasonable interpretation of the treaties that the authors analyze.<sup>86</sup>
105. Based upon the foregoing, the Tribunal rejects the Investor’s claim under Article 1110.

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<sup>83</sup> Memorial ¶ 150.

<sup>84</sup> Indeed, as noted above, the French text uses the word “equivalent” and the Spanish text “equivalente.”

<sup>85</sup> *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, Jan. 19, 1981, Article

<sup>86</sup> The authors suggest that treaty provisions that define “measures ~ \* \* tantamount to expropriation” to include “impairment ~ \* \* of economic value” represent the broadest scope of indirect expropriation. *Bilateral Investment Treaties*, (The Netherlands: Kluwer Law International), p. 102. But it has long been accepted that measures should be subject to the requirements of international law if they impair the economic value of an investment to a degree that is equivalent to expropriation. “[A] state may seek to achieve the same result [as outright expropriation] by taxation and regulatory measures designed to make continued operation of the project uneconomical.” *Restatement*, § 712, note 7. Thus, the authors’ analysis does not change the basic concept at work in the treaties, NAFTA included: measures are covered only if they achieve the same results as expropriation.

**ESTOPPEL**

106. In its Statement of Defence, Canada claims that the Investor is estopped from bringing its claim. The basis upon which that claim is made is that by virtue of a letter by the Claimant detailed in Annex 1 to the SLA, and also the conduct of the Investment, in participation and consultations and acquiescence in SLA implementation, both indicated their intention to abide by the SLA and the SLA implementation. Canada claims that it relied on the conduct and representations of both the Investor and the Investment to conclude the SLA and implement it.
107. The letter upon which Canada relies is dated April 4, 1996. It was written by the Investor to two Americans, Ambassador Kantor, the U.S. Trade Representative and Secretary of Commerce Brown, and was written by the Investor as a U.S. producer of softwood lumber. It represented that the Agreement removed any alleged material injury or threat thereof to the U.S. softwood lumber industry from imports of softwood lumber from Canada. The letter also contained agreements not to take proceedings and to concur in the dismissal of proceedings under specified U.S. statutes in relation to the import of softwood lumber from Canada.
108. The Agreement to which reference is made in that letter cannot be the SLA, which was made on May 29, 1996. It is presumably the Agreement in principle concluded by Canada and the U.S. on February 16, 1996 referred to in the Regulation made by Canada on March 26, 1996 amending the Export Control List.
109. The letter, which is not addressed to Canada, makes no reference to the implementation by Canada of any matter under the SLA. It nowhere states that it waived any rights to compensation under Chapter 11 of NAFTA.
110. Canada claims that the Investment "as evidenced through its participation in consultations and acquiescence in its (Canada's) SLA implementation indicated its intention to abide by the SLA and the SLA implementation." This relates to a meeting attended by representatives of the Interior Lumber Manufacturers Association (of British Columbia) of which the Investment is a Member on March 25, 1996. One of the representatives was an officer of the Investment, Mr. Abe Friesen.
111. In international law it has been stated that the essentials of estoppel are (1) a statement of fact which is clear

and unambiguous; (2) this statement must be voluntary, unconditional, and authorised; and (3) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.<sup>87</sup> That statement is cited without disapproval by Professor Brownlie in *Public International Law* 5th Ed. 646. At the same place Brownlie suggests that the essence of estoppel is the element of conduct which causes the other party in reliance on such conduct detrimentally to change its position or to suffer some prejudice.

112. In light of these tests, Canada's claim that the Investor is estopped from presenting claims under Chapter 11 of NAFTA fails. No representation was made by the Investor to Canada of any sort, and insofar as representation which was made to the U.S. may be regarded as representation to Canada on which Canada could rely, none were made as to the implementation by Canada of the SLA. So far as the Investment is concerned, the Tribunal

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Bowett, *British Yearbook International Law* (1957) 175 at 202).

does not consider that simple presence of an officer of the company at a meeting constitutes a representation of any sort. Lastly Canada made no attempt by evidence to show that it changed its position in any way by reason of reliance on the conduct of either the Investment or the Investor.

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The Honourable Lord Dervaird, Presiding Arbitrator

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The Honourable Benjamin J. Greenberg, Q.C., Arbitrator

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Murray J. Belman, Arbitrator

**Dated:** June 26, 2000

## Requests for Documents and Information Related to the Next Stage of Proceedings.

### Documents

In accordance with paragraph 44 of its Interim Award of June 26, 2000, the Tribunal requests the Government of Canada to provide all documents in its possession that address the following matters. In making this request, the Tribunal uses the term “documents” in its broadest sense, including memos, notes, electronic documents and any other form of retaining records relating to the subjects addressed in this request. If the Government of Canada wishes clarification of the coverage of this request, it should raise the matter with the Tribunal within 14 days of the date of the Interim Decision, identifying the documents about which it seeks clarification. Any documents reasonably subject to this request not so identified should be submitted to the Tribunal.

### New entrants

1. Summarizing or otherwise describing the rules and policies relating to the allocation of new entrant quota and for determining what number of board feet would be assigned to the new entrant program.
2. Identifying the individuals responsible (in whole or in part) for determining the allocation of new entrant quotas and the size of the individual and total allocations.
3. Summarizing or otherwise describing applications for new entrant status, not including the actual submissions.
4. Summarizing or otherwise describing the number of applications from each covered province and the quota requested by producers in that province.
5. Summarizing or otherwise describing the amount of new entrant quota granted for applicants in each province.
6. Describing any statistical program used to select winners of new entrant quota and the output of such program(s).
7. Summarizing or otherwise describing any discretionary elements of decision making in applying the rules and policies for the new entrant quotas.
8. Providing any internal analysis of results of the new entrant program, e.g., comparisons of grants per province, descriptions of any differing treatment of applicants with similar qualifications.
9. Summarizing or otherwise describing additions to new entrant quotas after the initial allocations were made.
10. Summarizing or otherwise describing the background and the process of the decision to use first four trigger price bonuses for new entrants.

11. Summarizing or otherwise describing the whole process whereby decisions were taken to adjust new entrants' EB and LFB ratios after the initial allocations had been made to them in year 1 .
12. Summarizing or otherwise describing any representations re new entrants made to the Minister or staff from legislators, provincial authorities or other members of the federal or provincial governments and, in addition, any changes made in relation to new entrants in consequence thereof.

#### Statistics

1. Summarizing or otherwise describing statistical data on softwood lumber production and exports to the United States from the various provinces, covered and non-covered, since 1993.
2. Summarizing or otherwise describing statistical data or other information regarding the alleged misreporting of provincial softwood lumber exports to the United States prior to the SLA, as discussed by Professor Vertinsky (Transcript Vol. 5, pp. 63-65, 84-93).
3. Summarizing or otherwise describing statistical data or other information relating to trend lines of provincial sales of softwood lumber to the United States (see Waverman testimony, Vol. 2, pp. 76-92 and Vertinsky testimony, Vol. 5, pp. 71-80).

#### Super fee

1. Summarizing or otherwise describing the basis for arriving at super fee agreed with the United States.
2. Summarizing or otherwise describing the reasons for allocating the super fee -uniformly among British Columbia producers, rather than on the basis of the relative reductions in stumpage charges for coastal and interior producers.

#### Discretionary allocations

1. Summarizing or otherwise describing the basis for allocating trigger price bonuses after the allocations for new entrants.
2. Summarizing or otherwise describing the bases for use of the Minister's discretionary allocation.  
Non covered provinces
  1. Summarizing or otherwise describing softwood lumber production and exports to the United States from the non covered provinces since 1993.
  2. Summarizing or otherwise describing any countervailing determinations made by U.S. government authorities with regard to softwood lumber imports from the non covered provinces.
  3. Summarizing or otherwise describing the proposal made to include Manitoba softwood lumber exports for purposes of tracking.

## Allocation to established businesses in first year

1. Summarizing or otherwise describing the reasons why quota allocation in British Columbia came to be changed from that applicable across the rest of the covered provinces in relation to the first year.
2. Summarizing or otherwise describing the effect that the adoption of the different initial allocation regime had on the allocation actually made the Investment compared with what it would have received in other covered provinces.

Questions

Please provide detailed written answers to the following questions:

1. What was the basis (including policy criteria) for allocating 2% of the EB to new entrants in year 1 of the Regime?
2. What was the basis (including policy criteria) for allocating 23.08% of the LFB to new entrants in year 1 of the Regime?
3. What was the basis (including policy criteria) for allocating EB and LFB to new entrants in year 2 of the Regime?
4. What was the basis (including policy criteria) for allocating the one-time transitional reserve of 170 mmbf in year 1 of the Regime?
5. What was the basis (including policy criteria) for fixing and then allocating the Minister's reserve in years 1 - 4 of the Regime?
6. What was the basis (including policy criteria) for allocating the trigger price bonuses for the first two quarters in 1996 to new entrants?
7. Describe the companies referred to in paragraphs 106 and 112 of the Amended Statement of Defence, including for each their volume of production and the reasons they were chosen to receive an allocation.
8. What was the basis (including policy criteria) for determining and applying the adjustment of EB and LFB quotas for new entrants in year 2 of the Regime. Were the adjustments identical for each new entrant? If not, what was the basis (including policy criteria) for differentiating in making those adjustments?
9. What was the basis (including policy criteria) in making allocations of trigger price bonuses after the first two quarters of the Regime?
10. What was the basis (including policy criteria) in making re-allocations of returned EB and unused export quotas?

Witnesses

The Tribunal expects to call the following as witnesses (if the Investor does not do so) at the next hearing:

Douglas George

Thomas MacDonald

Claudio Valle

A senior official in Canada's office charged with acquiring and producing statistics on softwood lumber production and exports.