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

STATEMENT OF DEFENCE

(Phase 3 - Damages)

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and International Trade
Trade Law Division/JLT
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Statement of Defence

The Respondent, in answer to the Statement of Claim submitted by Pope & Talbot, Inc. ("Investor") on June 18, 2001 (hereinafter the "Damage Claim") says as follows:

General

1. For the reasons set out in the annexed Counter-Memorial, Canada:

   a) says that by virtue of NAFTA Articles 1135, 1116, 1117 and 1105 the loss and damage claimed are not recoverable;

   b) denies that the breach found by the Tribunal in its award released April 10, 2001 (the "Award") caused the loss or damage alleged in the Damage Claim or any loss or damage;

   c) says that in any event, the loss or damage claimed is unsubstantiated, unreasonable, grossly exaggerated, excessive or too remote to be recovered;

   d) contends that the Investor failed to meet the burden of adducing evidence supporting its claim; and,

   e) contends that the Investor failed to take any reasonable steps to mitigate any loss or damage.

Interest

2. If the Tribunal finds that the Investor is entitled to recover all or part of the damages claimed, it should nevertheless award no interest or, in the alternative, should confine any award of interest to simple interest calculated at the rate of 5% per annum from September 5, 2000.

Costs

3. The Respondent requests that the Tribunal order the Claimant to pay all costs, disbursements and expenses incurred by Canada to date including, but not restricted to, legal, consulting, and witness fees and expenses, and travel and administrative expenses, as well as the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULY SUBMITTED

DATED in the City of Ottawa, the Province of Ontario, this 18th day of August 2001.

OF COUNSEL FOR THE GOVERNMENT OF CANADA

Brian R. Evernden, General Counsel, Department of Justice
Meg Kinnear, General Counsel, Department of Justice
Boris Ulehla, Counsel, Department of Justice

TO: The Tribunal

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

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GOVERNMENT OF CANADA

COUNTER-MEMORIAL

(Damages Phase)

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PART A: INTRODUCTION

1. In its award released April 10, 2001 (the "Partial Award"), the Tribunal held that:

> ... the [Softwood Lumber Division]'s treatment of the Investment during 1999 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105, and the Tribunal finds Canada liable to the Investor for the resultant damages.[1]

2. The Tribunal issued a Procedural Order on April 20, 2001 establishing the dates for filing submissions respecting damages. The Tribunal expressly excluded submissions related to costs from this phase.[2]

3. Canada submits that:

   a) the damages claimed by the Investor are not recoverable;

   b) the Investor has not proved the loss claimed;

   c) the Investor has not proved that such loss was caused by the verification review; and

   d) the damages claimed by the Investor are grossly exaggerated, excessive and unreasonable.

4. In addition to the facts found by the Tribunal, the following, uncontradicted facts are relevant to this phase of the arbitration.

5. In its response to the questionnaire submitted to support its application for quota, the Investment reported exports in excess of production for two consecutive years.[3] The Investment admitted that its questionnaire contained errors.[4]

6. Export and Import Control Bureau officials conducted a verification review.[5] It was not a comprehensive audit of the two years on which all quota allocations

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[1] Partial Award dated April 10, 2001 at para. 181; more generally see paras 156 to 181.
[2] Procedural Order dated April 20, 2001.
[3] George Affidavit #3, para. 85.
[4] Ruling by Tribunal on Claimant's Motion for Interim Measures dated July 13, 2000 ("Interim Measures Ruling").
[5] George Affidavit #3, para. 86.

were based. Rather, at the request of the Investor, the SLD reviewed a sample period of 6 months.[6]

7. A report of the verification review was prepared. The report indicated that there was a need to obtain a revised questionnaire to determine the magnitude of any errors.[7] Canada asked the Investment to provide a revised questionnaire for the two-year period on which quota allocations were based. The Investment never provided a revised questionnaire.[8]

8. Allocations of quota and adjustments to allocations of quota are at the discretion of the Minister of International Trade ("Minister"). It is not "now certain that the Minister would have reduced the Investment's quota..." as asserted by the Investor.[9] This is pure speculation. The Minister's decision is discretionary. Moreover, Minister's decisions may change following further Ministerial or judicial review.

9. The salient fact is that the Investment never lost quota as a consequence of the verification review.[10]

10. While the Tribunal did not explicitly state the starting date of the breach, it appears to have found that breach of Canada's Article 1105 obligation commenced with the SLD's refusal to review documents in Portland, Oregon and its insistence that documents be made available in Canada. This treatment began with a letter dated April 13, 1999 in which the SLD stated that it required the information to be made available in Canada. As the Tribunal noted:

> 160. ... On *April 12*, the Investor responded by inviting the verification team to its head office in Portland Oregon, where the records to be reviewed were located, ...
>
> 161. *At that juncture*, one could not reasonably conclude that the Investment had been anything less than fully cooperative with the SLD. It made no complaints that the production/sales issue had been resolved previously, it

[6] George Affidavit #1, para. 66 and George Affidavit #3, paras 89-90.
[7] George Affidavit #3, paras 104, 106.
[8] George Affidavit #1, paras 80-85.
[9] Investor's Statement of Claim (Damages Phase), para. 3.
[10] George Affidavit #3, para. 122.

> promptly responded to broad inquiries going beyond that issue, it volunteered minor corrections to its questionnaire responses and it willingly accepted a very extensive verification exercise. Unfortunately, *matters thereafter took a substantial turn for the worse.*
>
> 162. On *April 13, 1999, the SLD wrote the Investment stating that "we require this information to be made available in Canada.*" Further, the requested information expanded to include bank statements and accountants' working papers. At that point, the Investment turned the matter over to its lawyer in this NAFTA Chapter 11 proceeding and asked that further discussion of verification be through him. ...
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> 171. The Investor contends that Canada's conduct during this "verification episode" was a denial of fair and equitable treatment in violation of Article 1105. For the following reasons, the Tribunal agrees.
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> 172. *A major sticking point on verification was the unwillingness of the SLD to conduct its review at the place where the documents were located.* [11] (footnotes omitted; italics added).

11. In light of these facts, losses to the Investor or its Investment that occurred prior to April 13, 1999 should not be included in any compensation calculations.

12. The verification visit took place between July 13 and 16, 1999 at the offices of Davis & Company in Vancouver, British Columbia.[12]

13. On October 6, 1999, the SLD informed the Investment that the verification review revealed systemic errors, discrepancies and possible double counting. The SLD asked the Investment to submit a revised questionnaire so that the Investment's quota could be recalculated on complete and accurate information.[13]

14. On November 2, 1999, Kyle Gray of the Investor told Douglas George of the SLD that the Investment would not have to close its operations and that Gray believed the quota allocation of the Investment might have to be reduced by 1 to 2% as a result of the verification.[14]

15. The Investor brought a motion for interim measures pursuant to Article 1134 of NAFTA on November 11, 1999. It never sought relief from the verification in a domestic court.

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[11] Partial Award dated April 10, 2001, paras 160-172.
[12] George Affidavit #1, para. 72.
[13] Partial Award dated April 10, 2001, para. 166.
[14] George Affidavit #1, para. 110.

16. On November 15, 1999, the investment announced it would take down time over Christmas 1999 and New Year 2000.[15]

17. By letter dated November 19, 1999,[16] Canada advised the Tribunal, the Investor and the Investment that, at most, a 5% reduction to its quota allocation for 1999 and subsequent years was possible.

18. At the hearing on January 7, 2000, the Tribunal dismissed the interim measures motion. The motion was rejected for want of jurisdiction. On January 13, 2000, the Tribunal issued its written Ruling on the motion. The Tribunal found that the verification review and report were "seriously flawed and ... not a reliable basis for further action".[17]

PART B: GOVERNING LAW AND BURDEN OF PROOF

19. NAFTA[18] and applicable rules of international law, including the interpretive rules of the *Vienna Convention*, govern this arbitration.[19] The *Vienna Convention* requires that treaty provisions be interpreted in accordance with their ordinary meaning in their context and in light of the object and purpose of the treaty.

20. The Investor bears the burden of proof with respect to both liability and damages.[20] This means that the Investor must prove both that it incurred the loss claimed and that the loss arose from the breach found by the Tribunal. The burden of proof includes the duty to produce evidence in support of the claim.[21]

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[15] November 15, 1999 Memo, Investor's Productions, July 10, 2001; see also Friesen Affidavit #3, June 15, 2001, para. 10.
[16] Letter from Eric Harvey, Counsel, Trade Law Division to Tribunal dated November 19, 1999.
[17] Interim Measures Ruling, paras 1 and 3.
[18] NAFTA Article 1131(1).
[19] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (in force January 27, 1980) (Book of Treaties, Tab 2)
[20] Article 24 of the UNCITRAL Rules.
[21] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Grotius Publications, 1987), at 328-9; The *Queen Case* (1872) and the *Taft Case* (1926) are cited for the proposition that the burden of proof includes "a duty to produce evidence, and to disclose the facts of the case". Cheng notes that the burden of proof is tied to the duty to produce evidence. The party having the "burden of proof must not only bring evidence to support the allegations, but also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof". [Authorities – Tab 1]

21. The standard of proof that must be met is the "balance of probability."[22] However, where the Investor controls access to the evidence, the Tribunal should require a more rigorous degree of proof on matters that are improbable, far-fetched or unsupported by evidence. Where a claimant fails to produce documents or withholds relevant information or documents in its possession, the opponent cannot test the claim, and the tribunal is unable to make objective or accurate determinations. By providing the tribunal with all relevant evidence at their disposal, the parties assist the tribunal in deciding the case on the facts.[23]

22. The Investor and its Investment failed to produce documents or other credible evidence that Canada and its experts requested.[24] Canada requested production of relevant documents that would assist the Tribunal in determining whether items claimed as damages relate to the breach found by the Tribunal. Canada properly sought such information and the Investor's refusal to produce tells against the credibility of the heads of damage and the reasonableness of the amount claimed.

23. The documents produced by the Investor (with its Damages Claim and in response to Canada's requests for documents) do not assist in understanding the basis upon which various amounts are included in the Damages Claim. The Investor has not proved its claims regarding the loss of incremental revenue from the December 1999 down time and out of pocket, management, legal and expert fees. The evidence tendered to support these claims is based on flawed assumptions and irrelevant documents. The Investor and its Investment control

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[22] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1999), at 314-315. [Authorities – Tab 2].

[23] M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence in International Tribunals* (Kluwer Law International, 1996), at 322. [Authorities – Tab 3] For example, in *INA Corp* v. *Government of the Islamic Republic of Iran* (1985), 8 Iran-U.S. C.T.R., 373 [Authorities – Tab 4] the respondent expert's report received little weight because the claimant failed to produce the materials supporting assertions made in the report.

[24] Canada's First Request for Documents relevant to Damages Phase, dated June 26, 2001; Investor's Response to Canada's First Request for Documents relevant to Damages Phase, letter from Barry Appleton dated July 10, 2001; Canada's letters of July 18, 2001 (seeking the Investor's clarification and confirmation of certain responses provided to Canada's First Request for Documents (Damages Phase), of July 30, 2001 (seeking a document missing from Tab 1 of Volume 1 of the documents produced by the Investor on July 11, 2001), of August 1, 2001 (seeking a copy of the Appleton & Associates Invoice No. 99-008 dated January 1999 missing from Tab 13 of the Investor's Statement of Claim and Memorial (Damages Phase)), of August 13, 2001, and August 14, 2001 (seeking confirmation that

access to the necessary evidence and are obliged to produce it to vouch for their claim.[25]

24. For example, Appendix 2 of the Rosen Report contains calculations based on weekly periods. To better understand the claim, Canada requested documents showing lumber production and sales value realized for each week corresponding to the weekly periods set out in the Rosen Report. The Investor produced no documents showing lumber production and sales value realized for each week. Therefore, Canada and the Tribunal must proceed on the basis that no documents meeting that description exist.

25. The documents reviewed by Mr. Rosen to support claims related to the verification review were inadequate to understand or prove the claim. As a result, Canada sought documents that would indicate the actual "time spent" by management, counsel, experts and others on matters relating to verification review ("dockets" or similar information). The Investor's production omitted such documents. The Investor claimed it did not possess such dockets, that counsel dockets were confidential on account of lawyer-client privilege, and that no existing documents are available.[26] In the event, there is no evidence that the amounts claimed were incurred for verification review work.

26. Many of the invoices submitted do not relate to the verification review and bear no connection to the breach found by the Tribunal. The documents do not prove that the verification review caused the damages claimed.[27]

27. In particular, many of the documents relate to the prosecution of the NAFTA arbitration generally. They do not relate to verification. The Investor has not provided the Tribunal or Canada with information segregating claims related to

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further productions were not available).

[25] Procedural Order, April 20, 2001, para. 1(a).

[26] See Investor's Response dated July 10, 2001 concerning requests 6, 8 and 10.

[27] Canada takes the position that the Investor's failure to provide substantiating evidence as part of its claim indicates that no such evidence exists. Any attempts by the Investor to explain the connection now would not be proper reply but would constitute splitting the case – a tactic which the Tribunal should discourage as an approach that wastes the precious time of both the Respondent and the Tribunal

the breach from other claims. The Tribunal (and Canada) is left to guess or assume what might be related to verification and what value could be attributed to such items. No credible assessment of damages can be made on this basis.

28. Finally, Canada notes that it requested the relevant documents on June 26, 2001 and pressed the Investor for production of these.[28] Despite the clear urgency of these requests, the Investor refrained from producing until the last possible moment. In particular, the Investor delivered a 4-inch binder on Tuesday, August 14, 2001 and 26 further pages were received on Thursday, August 16, 2001 at 3:10 p.m. This prejudiced Canada in the preparation of its response. Canada expects that all documents have been produced and that the Tribunal will draw adverse inferences from the Investor's bald refusal to produce relevant documents.

29. The Tribunal should dismiss the Damages Claim given that the Investor failed to meet its burden of proof.

PART C: DAMAGES CLAIMED BY INVESTOR ARE NOT RECOVERABLE

30. NAFTA addresses the scope of damages for violations of a NAFTA Chapter Eleven obligation. NAFTA Chapter Eleven and international law[29] define a Tribunal's authority to award damages. Canada submits that the claims advanced by the Investor are not compensable given Articles 1135, 1116 and 1117, and 1105.

1. Article 1135

31. Article 1135 provides that a Tribunal may award "only" monetary damages and any applicable interest or restitution of property. Article 1135 reads, in part:

> Article 1135: Final Award
>
> 1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

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time.

[28] See footnote 24 citing these requests.

[29] Article 1131.

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with applicable arbitration rules.

2. [...]

3. A Tribunal may not order a Party to pay punitive damages.

a) No Punitive Damages

32. As stated expressly by Article 1135(3), the Tribunal cannot award punitive damages of any kind. Article 1135(3) imposes a significant limit on damage awards by NAFTA Chapter Eleven tribunals.

33. Despite this express provision (or perhaps because of it), the Investor invites the Tribunal to award punitive damages. The Investor suggests that "where there can be demonstrated any special intention by a government to harm an investor ... international law permits the Tribunal to award damages even if they would otherwise be considered too remote."[30] The Investor further submits that even remote damages should be compensated "given the blatant intent of Canada's officials to harm the Investor and the Investment."[31]

34. An award of damages motivated by the intent of the Respondent is nothing more than punitive. Were the Tribunal to accept the Investor's propositions, it would be making an award of punitive damages. This would violate Article 1135(3) and would ignore the meaning of "only" in Article 1135(1). Such an award falls outside the Tribunal's jurisdiction and is contrary to the practice of international arbitration tribunals.[32] There is no ambiguity and this provision should be given its full effect.[33]

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[30] Investor's Memorial (Damages Phase), para. 12.
[31] Investor's Memorial (Damages Phase), para. 26.
[32] See J. Y. Gotanda, *Supplemental Damages in Private International Law* (Kluwer, 1998), at 226-229 [Authorities – Tab 5]; also see B. Cheng, *supra*, at 234-235 [Authorities – Tab 1].
[33] J. Y. Gotanda, "Awarding Punitive Damages In International Commercial Arbitrations In The Wake Of Mastrobuono *v. Shearson Lehman Hutton, Inc.*", (1997) 38 Harv. Int'l L.J. 59 at 76: "...thus when the parties *expressly* provide in the arbitration agreement that the arbitrator shall have, or shall not have

b) No Equitable Jurisdiction

35. The Investor also suggests that the Tribunal has "equitable jurisdiction" to award damages that might otherwise be considered too remote because there was a "special intention" by government to harm an investor.[34]

36. The Tribunal has no such equitable jurisdiction. NAFTA Chapter Eleven does not confer equitable jurisdiction on tribunals.

37. Additionally, Article 33 of the UNCITRAL Rules states that an "arbitral tribunal shall decide ... *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so ...".[35] Neither disputing party provided the Tribunal with such authorization in this case and hence the Tribunal does not have equitable jurisdiction.

38. A damages award that redresses a "deliberate intention to injure" on an equitable basis would be an award that punishes the offender contrary to Article 1135(3). The Tribunal cannot, under the guise of "equitable jurisdiction", award punitive damages.

2. Only Damages Caused Directly By The Breach Can Be Compensated

a) By Reason of, Or Arising Out of, the Breach

39. Articles 1116 and 1117 also address the scope of damages under NAFTA Chapter Eleven. These articles require that any award must be in respect of "loss or damage by reason of, or arising out of, that breach".

40. Due to Articles 1116 and 1117, only damages with a direct and causal relation to the breach found by the Tribunal are compensable. Article 1116 requires a clear and direct nexus between the breach and the loss by expressly stating that damages must be "by reason of, or arising out of" the breach.

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the authority to award such damages, that express provision shall be conclusive on the availability of such relief." [Authorities – Tab 6].

[34] Investor's Memorial (Damages Phase) paras 12, 18 and 26.

[35] UNCITRAL Rules, Article 33(2). Similar provisions are found in Article 42 (3) of the ICSID Rules,

41. International law also requires that damages be the proximate, direct and immediate consequence of the breach.[36] Damages arising from causes other than the breach should not be allowed[37]. "Damages are disallowed when they are not a natural consequence of the wrongful act for which the respondent government is liable under international law."[38]

42. For example, in *Peruvian Guano Company (Great Britain)* v. *Chile*,[39] the Tribunal rejected a claim for lost profits when war prevented a company from performing its contract with an Investor. The Tribunal reasoned that the damages were a consequence of, but not directly caused by, the operations of land or sea forces of a foreign power.

43. Here, the damages must occur by reason of or arising out of the verification review episode, which is the only breach found by the Tribunal.[40] Only direct damages caused by Canada's verification review, and not by other causes such as the exhaustion of quota, low prices, holiday down time, or reaching a quota speed-bump, can be compensated.

44. For the same reason, costs attributable to litigating the Investor's NAFTA claim were not caused by the breach and are not compensable. Litigation costs of the NAFTA claim, including those arising out of the unsuccessful interim measures will be addressed at the next phase of this arbitration.

b) Non-Foreseeable, Remote or Speculative Damages

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and Article 38 of the *Statute of the International Court of Justice* and Article 28(3) of the *Commercial Arbitration Code*.

[36] See generally M. M. Whiteman, *Damages in International Law*, Volume III, U.S. Government Printing Office, Washington, 1943, at 1765, 1830-31, 1837-8, 1871-2 [Authorities – Tab 7]. Also B. Cheng, *supra,* at 241 ff [Authorities – Tab 1].

[37] See *Southern Properties (Middle East) Ltd. (Hong Kong),* v. *Arab Republic of Egypt* (*SPP*), ICSID Case No. ARB/84/3, (1983) 8 ICSID Review 328 where the tribunal recognized that an international convention that came into effect after the breach and limited the development of the tourism project would have limited the future profits of the project [Authorities – Tab 8].

[38] *Whiteman*, *supra,*at 1830-1831 [Authorities – Tab 7].

[39] *Ibid.*

[40] The Investor agrees with this limitation. See *Investor's Statement of Claim (Damages Phase)* at para. 1 and Investor's Memorial (Damages Phase) at paras 2 and 30.

45. International tribunals refrain from compensating a party where the injury or harm could not have been foreseen, where it is too remote or speculative and where a claimant fails to mitigate its loss.[41] The *Percy Shufelt (U.S.)* v. *Guatemela*[42] award addresses this issue:

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

46. The disputing parties agree that only damages anticipated by the disputing parties at the time of the breach are recoverable and that international tribunals reject claims for remote and speculative damages.[43] However, the disputing parties diverge on the application of forseeability and remoteness in this case. At the time of the verification review, the damages claimed for loss of incremental revenue resulting from down time were not in the contemplation of either of the disputing parties. Neither disputing party could contemplate that down time would be taken due to a verification review.

47. The Investor implicitly admits that its damages claim is remote and urges the Tribunal to invoke the *Dix Claim* as authority to depart from international law.[44]

48. The *Dix Claim*[45] is inapposite. First, the *Dix Claim* was not decided under NAFTA. Articles 1116 and 1117 of NAFTA expressly preclude recovery for remote claims by requiring loss or damage to arise out of the breach. Second, the exception in *Dix* was *obiter* to the finding and is clearly a departure from the general international law rule. Third, the facts here are unlike those in the *Dix Claim* (allegation of a "taking" and injury on the basis of nationality). Finally, in this case, unlike in *Dix*, the Tribunal dismissed the Investor's expropriation claim

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[41] See also: *Amco Asia Corp. v. Republic of Indonesia*, (1984) 24 I.L.M. 1022 where the Tribunal found that damages reimbursable are only those which are direct and foreseeable. [Authorities – Tab 9].
[42] (1930) 2 R.I.A.A. 1081, at 1099.
[43] Investor's Memorial (Damages Phase) at para. 11.
[44] Investor's Memorial (Damages Phase) at para. 12.
[45] *Dix Claim* (1903) IX R.I.A.A. 115 at 121. [Authorities – Tab 11).

and found that the Investment's nationality was irrelevant to its treatment by the SLD.[46]

3. Articles 1116 and 1117

49. A further limit on damage awards is the article pursuant to which an investor submits a claim. NAFTA Chapter Eleven allows an investor to bring a claim either on its own behalf for losses it incurred related to its investment (Article 1116), or on behalf of its investment (Article 1117) if the investment is a juridical person owned or controlled by the investor. Canada's *Statement on Implementation* notes:

> Under Article 1116, a claim may be submitted to arbitration under [Section B] if an investor believes that another Party ... has breached an obligation under Section A ... and that the investor has incurred a loss or damage as a result of the alleged breach of an obligation in question. ...
>
> On the same basis as in the case of a claim under article 1116, article 1117 provides that an investor may submit a claim under [Section B] on behalf of an enterprise incorporated in the jurisdiction of another Party where the investor owns or controls directly or indirectly that enterprise.[47]

50. Each article serves a distinct purpose and relates to different losses. Article 1116 provides for claims for loss or damage incurred by an investor. Article 1117, on the other hand, addresses claims for loss or damage to an enterprise owned or controlled by an investor. Confirmation of these distinct purposes is found in the U.S. *Statement of Administrative Action*[48]:

> Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor.

51. Article 1116 addresses the customary international law prohibition on shareholders recovering for injuries suffered by a corporation – the so-called *Barcelona Traction* rule. It is well established in customary international law that

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[46] Partial Award, June 26, 2000, paras 93 and 103.
[47] Canadian Statement of Implementation, North American Free Trade Agreement, Canada Gazette, Part I, January 1, 1994 at 153.
[48] North American Free Trade Agreement Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I (1993) at 145.

corporations have a legal existence separate from that of their shareholders. Article 1116, enables investors (those that own or control an investment) to seek relief for injuries that are direct but not derivative.[49]

52. The drafters of NAFTA included Article 1117 to provide a remedy for injuries to enterprises that would otherwise be barred from bringing a claim by the customary international law rule prohibiting claimants from filing international claims against their own governments.[50] It supplements customary international law by creating a derivative right of action for the benefit of an investor. By doing so, Article 1117 addresses the situation where the alleged violation of Chapter Eleven directly affects a locally-incorporated subsidiary and also ensures that the claimant will be of a nationality different from that of the respondent State.

> Article 1117 is intended to resolve the Barcelona Traction problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.[51]

53. The Investor submitted its Notice of Arbitration and Statement of Claim pursuant to Article 1116. The Investor may not recover damages derived from injuries to its Investment occasioned by a breach of a NAFTA Chapter Eleven obligation unless the investor submits its claim pursuant to Article 1117.

54. The Investor's damages claim in this case is a derivative claim respecting injuries that its Investment allegedly suffered. The damages claimed are solely a

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[49] See *Barcelona Traction*, 1970 I.C.J. 3 at 35, para. 41 and 44 [Authorities – Tab 12]. See also Aréchaga, "Diplomatic Protection of Shareholders in International Law", Phillipine International Law Journal, Vol. IV, Jan.-June 1965, 71-98 at 75. [Authorities – Tab 13].

[50] The I.C.J. in *Barcelona Traction, supra*, at para 41 held that Belgium had no standing to bring a claim against Spain for the alleged expropriation of assets of a Canadian limited liability company, the shareholders of which were overwhelmingly Belgian. The Court held that the Belgian shareholders had no right to take action on behalf of the corporation; if the corporation was injured, the corporation alone could act. Because the place of incorporation of Barcelona Traction Light & Power Co., Ltd. was Canada, the corporate entity was deemed to be Canadian: Canada alone had the right to advance the claim.

[51] See Daniel M. Price & P. Bryan Christy III, "An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement", in *The North American Free Trade Agreement: A New Frontier in International Trade and Investment in the Americas* (Judith H. Bello et al. eds., 1994 165, at 177). [Authorities – Tab 14].

consequence of the purported effect of the verification review on its Investment's operations and sales. It is not a claim of independent injury that is permissible under Article 1116. Where a claim concerns loss or damage incurred by an investment, the investor can only recover for claims that are derived from or depend on the injury to its investment if it submits its claim pursuant to Article 1117.

4. Article 1105

55. The Tribunal must also consider any limits placed on awards of damages by the specific article found to have been breached. The Tribunal in *S.D. Myers* v. *Canada* provides guidance on the significance of the particular article breached when considering damages. It stated:

> ...[c]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed ... must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes ... the Tribunal will assess the compensation payable to [the Investor] on the basis of the economic harm that [the Investor] legally can establish.[52]

56. The specific NAFTA provision at issue here is Article 1105. Article 1105 requires NAFTA State Parties to accord a minimum standard of treatment to "investments of investors" -- not to "investors". Canada submits that Article 1105 bars recovery of damages incurred directly by the Investor. It is an obligation that relates only to investments.

57. The Tribunal found Canada liable for its treatment of the Investment in relation to the verification review process. In its view, such treatment amounted to a denial of the fair treatment required by Article 1105.

58. There has been no finding of harm to the Investor under Article 1105, nor could there be. Article 1105 is about treatment of investments. It is not about treatment of investors. The causal link respecting a breach of Article 1105 can only be

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[52] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL – NAFTA Chapter 11 Tribunal, Partial Award dated November 13, 2000 ("S.D. Myers Partial Award") at paras 316-317. [Authorities – Tab 15].

between the treatment in question and the investment. It is, therefore, impossible for the Investor to establish that any alleged economic harm it suffered (as opposed to the harm suffered by its Investment) has a sufficient causal link to Canada's breach of Article 1105.

5. International Law Applicable to Damages

a) Mitigation

59. International law recognizes the obligation of an investor to mitigate its losses.[53] The consequences of the obligation to mitigate are that:

- where the Investor failed to mitigate its damages, compensation must be reduced accordingly; and
- where the Investor did mitigate its losses, the amount recovered through mitigation should be deducted from the claim itself to avoid double compensation.

60. The Investor had various mitigation options available to it. For example, it could have challenged the verification process in the Federal Court of Canada,[54] or it could have sold its lumber in Canada or countries other than the United States. It did not do so.

61. Furthermore, there is no evidence that the Investment informed or reminded the SLD that it had discussed and resolved the discrepancies giving rise to Canada's request for a verification review with Claudio Valle, the previous Director of the SLD.[55] There is no evidence that Douglas George knew of the discussion the Investment had with Claudio Valle.

b) Management Time

62. Damage awards do not include compensation for the time company officials spend on disputes. International arbitral tribunals view management or executive

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[53] Whiteman, *Damages in International Law*, Vol. I, U.S. Government Printing Office, Washington, 1937 at 199 [Authorities – Tab 7].

[54] See Canada's Counter-Memorial, Phase 2, paras 361-369, 415 in particular, and 47-49, 214, 304-306, 339-340, 338.

[55] See Partial Award dated April 10, 2001, 157, 178 & 179 for relevant passages.

time as a non-recoverable cost of business because companies would incur salary costs in any event.

63. As Redfern and Hunter note in a section devoted to a discussion of costs:

> If it is possible to recover the legal costs and expenses of bringing or defending a claim in arbitration, why is not possible to recover the cost of executive time ...? The answer ... [is] that traditionally such costs have been regarded as part of the normal cost of running a government department or a business enterprise.[56]

64. The Investor and its Investment paid their employees, whether or not Canada conducted a verification review. Such an expense is part of the normal cost of operating the Investor and the Investment.

65. While different considerations apply to discretionary expenditures such as bonuses, the principle remains the same. The bonuses allegedly paid are not recoverable because they lacked any connection to the verification review.

66. The Investor's claim in respect of time that its officials spent on the verification review is not recoverable.

c) Loss Of Reputation

67. The Investor does not advance a claim respecting loss of reputation.[57] Consequently, no award respecting this head of damages can issue.

PART D: DAMAGES CLAIMED ARE EXAGGERATED, EXCESSIVE AND UNREASONABLE

a) Loss of Incremental Revenue due to verification

Down-time Was Not Caused By Verification

68. The Investor's claim for loss of incremental revenue is not recoverable because it was not caused by the verification review. Mr. Friesen's assertion that the

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[56] Redfern and Hunter, *supra*, at 406 [Authorities – Tab 2].

[57] Investor's Damages Memorial, Tab 15, p. 4, shows no claim for loss of reputation. The Tribunal surmised that "the Investment ... probably suffer[ed] a loss of reputation in government circles," Partial Award dated April 10, 2001, para. 181 on 87.

verification review was the key consideration or critical factor in deciding to take down time in December 1999 is not credible.

69. Mr. Friesen's Third Statement dated June 15, 2001,[58] is the first time in these proceedings that the verification review been cited as the cause of the December 1999 down time. With the benefit of both hindsight and knowledge of the specific breach found by the Tribunal, Mr. Friesen conveniently introduces the 'key consideration' or 'critical factor' that prompted his decision to take down time: the verification review episode.[59] The Tribunal must reject such self-serving evidence in favour of the contemporaneous evidence and all other evidence on record in this matter related to the down time.

70. The contemporaneous comments of Pope & Tabot officials do not cite the verification review as a cause of the December 1999 shut down and contradict Mr. Friesen's June 15, 2001 assertions. When Mr. Friesen announced the Christmas 1999 down time (November 15, 1999), Mr. Gray had already told Doug George that he expected only a 1 - 2% loss in quota.[60] On November 19, 1999, Mr. Friesen and the Tribunal were advised by Canada that at most, a 5% reduction was possible.[61] Mr. Friesen knew the magnitude of any potential quota reduction was 5% or less, far from substantial.

71. It is obvious from the Investment's own documents that Pope & Talbot Ltd. to shut down in December 1999 because its' expected production would substantially exceed its' remaining quota for the quota year.

72. On October 26, 1999, the Investment calculated that it had exceeded its quota and was required to shut down for 24 days. On December 21, 1999, Gary McGrath of

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[58] Statement of Abe Friesen dated June 15, 2001 at paras. 4, 7 and 13.
[59] Statement of Abe Friesen dated June 15, 2001 at paras.9, 10, 12 and 13.
[60] George Affidavit #1, para. 110.
[61] Letter from Eric Harvey, Counsel, Trade Law Division to Tribunal dated November 19, 1999. Compare this to paras 7 and 8 of Friesen's June 15, 2001 statement that asserts he expected a "substantial" cut due to verification.

the Investment advised Mr. Friesen and other company officials that the Investment was short 25 days of production due to insufficient quota.[62]

73. It is impossible to attribute the December 1999 down time to verification review. All of the Investment's documents show that the real problem was insufficient quota remaining available to the Investment for the balance of the quota year.

74. In January 2000, three days after the Investment took the relevant down time, Mr. Friesen testified that prices and quota utilisation motivated the Investment's decision to take down time. He did not say the verification review caused or contributed to the decision to shut down in December 1999.

75. In January 2000, Mr. Friesen testified that the declining price for lumber in the United States was the "exact reason" for the Investment taking down time during December 1999:

> Q: What is the price for lumber in the United States?
>
> A: Right today we would be getting 300, and we would have mill returns of 360, possibly.
>
> Q: So in fact, you would be taking a loss?
>
> A: We would be taking down—yes, we would be taking a loss, and we would be taking down time. Which in fact we did during the Christmas vacation for that exact reason.[63]

76. Mr. Gray and Mr. Friesen stated that the investment takes down-time when market conditions and export fees triggered by speed bumps conspire to make it uneconomical to continue production.

77. The decision to take down time in 1999 was obviously informed by the fact that the Investment had exported up to its "speed bumps" imposed by softwood lumber export quota regime. Mr. Friesen testified that the Investment had exported up to the speed bumps in the first three quarters of its quota year in

[62] Investor's Productions, Tab. 70 [Authorities – Tab 16].
[63] Testimony of Abe Friesen, Transcript of January 7, 2000 at 326.

1999.[64] In fact, it had utilised [redacted] of its fee free quota.[65] Hence, when it took down time in December 1999, it had utilized [redacted] of its maximum EB (fee free) quota available in the first three quarters of the quota year.

78. Mr. Gray also testified that the Investment took down time for several reasons: labour disruption, low prices and export fees:

> Q: Now, saw mills take down-time for any numbers of reasons?
>
> A: Pope & Talbot, whether it be our saw mills, or our pulp mills, don't take down-time unless we absolutely have to ... Prior to the SLA ... we had a five (5) month strike .... But prior to that the only down-time that we would take, as a practical matter, at least, would be when market conditions would not allow us to economically run.
>
> Q: And market conditions would include lower prices?
>
> A: In [1997, 1998 and 1999], all three of those years, because of the export regime – the Softwood Lumber Agreement regime – or the implementation of the Softwood Lumber Agreement, when you look at prices and export fees --- export fees that we would incur, it was not economical to operate the facilities.
>
> Q: So it was those two (2) features together that would have caused Pope & Talbot Limited to take down time?
>
> A: Yes.[66]

79. The Investment's announcements and memoranda concerning down time invariably cite low prices for softwood lumber, high costs of production and quota imposed by the SLA as the reason for taking down time. The Investment's announcements and memoranda blame down time on the "falling lumber market", "depressed lumber market", "declining lumber prices", "poor lumber market conditions", or "the weakening lumber market".[67]

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[64] Testimony of Abe Friesen, Transcript January 7, 2000 at 323
[65] Affidavit of Dennis Seebach, para. 7.
[66] Testimony of Kyle Gray, Transcript of Phase I Hearing, May 2, 2000 at pp. 102-103.
[67] Investor's productions [Authorities – Tab 17].

80. The Investment traditionally took down time around Remembrance Day[68] and Christmas time in the "hope that this extended time away from the workplace will allow [employees and their families] to enjoy a Happy Holiday Season."[69] In fact, the Investor took Christmas down time in each of 1998, 1999 and 2000.[70]

81. In May 2000, Mr. Gray testified about the Investment's practice of taking "holiday down-time":

> Q: Now you have something called holiday down time?
>
> A: Well, when it says extended holidays, when we go down for Christmastime, they normally take, depending on how the days of the week fall, two or three (2-3) days of down time. ... In ninety-seven ('97), just like in this last year, we extended it. We just didn't – no one came back to work that week.[71]

82. The announcement of the 1999 Christmas down time is consistent with all of the other announcements and down time. It is titled "Lumber Manufacturing Operating Plans – Christmas 1999 and New Year 2000". The announcement attributes down time to the "Impact of the Softwood Lumber Agreement". It notes that the Investment would be "reviewing market conditions and the quota issues" and that further down time might be necessary.[72] It never cites verification review.

83. The Christmas 1999 down time was reported by Madison's, an industry publication. The Madison's article reports that: "Pope & Talbot blames the softwood lumber agreement and the recently imposed 'super tariff' of $146.00 for

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[68] See announcement by Roy Helmkay on October 27, 1999 stating "in order to be consistent with previous years, company policy and to allow employees to participate in community sponsored ceremonies, the plant will not operate on Remembrance Day, Thursday, November 11, 1999. The plant will remain closed on Friday, November 12, 1999 to allow for an extra long weekend." [Authorities – Tab 17].

[69] *Ibid.*

[70] Investor's Productions [Authorities – Tab 17].

[71] Testimony of Kyle Gray, Transcript of Phase I Hearing, May 2, 2000 at pp. 127-128.

[72] Pope & Talbot Ltd. Memo, November 15, 1999, from Investor's Productions. {Authorities – Tab 17].

closures".[73] Of course, this is consistent with all records in this case other than Mr. Friesen's affidavit in this damages phase of the arbitration.

84. Moreover, the Investment's decision to take down time in December 1999 is consistent with rational business behaviour. Six other major B.C. quota holders announced that they would take down time over the Christmas holidays in 1999.[74] None of these quota holders was subject to verification at this time.

85. These six quota holders had utilized between 81.68% and 85.78% of their fee free quota by the end of the third quarter of year 4. As a result, they were in the same position as the Investment and they too opted for Christmas down time. Obviously, the down time for the Investment, as for these 6 companies, was rational business behaviour related to quota use.

86. Clearly, the down time was not taken in response to the verification review. In December 1999, the Investment faced circumstances that normally prompt it to take down time: declining prices, its quota speed bump and the Christmas holidays. The Christmas 1999 down time was consistent with the Investment's usual practice. It was also consistent with the practice of competitors, which had also exported up to their speed bumps for the first three quarters. The down time in 1999 was not taken by reason of, or arising out of the verification episode.

87. In the alternative, even if the verification review played some role in deciding to shut down, it clearly was not a critical factor. Any award for loss of incremental revenue should be substantially discounted to reflect the role of salient factors such as low prices, the speed bump, quota utilization and holiday down time.

The Rosen Report is Seriously Flawed

88. The Rosen Report is seriously flawed and not a reliable basis upon which this Tribunal could award damages.

[73] Seebach Affidavit, Annex C.
[74] Affidavit of Dennis Seebach, para. 10.

89. The Rosen Report claims US$ 1,080,000[75] for loss of incremental revenue attributable to 7 days of delayed production. These losses are calculated for the period of December 1999 to March 31, 2001.

90. The model used by Rosen to calculate loss of incremental revenue has three fundamental flaws:[76]

a) The Rosen model includes 6 days of production in the week of January 21, 2001, when in fact there were only 5 production days in that week. This adds an extra day of production to the calculations. The effect of this error is to increase weekly production to [redacted] when in fact it should have been [redacted]

b) The 1-day error in production days also means that all production must be moved forward by one day.

c) For the week ending March 2, 2001, the Rosen model uses the wrong formula, thereby understating expected production.

91. If one corrects these three fundamental flaws in the Rosen model, the net lost revenue calculation is US$ 1.191 million rather than US$ 1.08 million (See Harder Report, Schedule 2).

92. Having corrected the mechanical flaws in the Rosen Report, there are additional flaws in the information used to generate the calculation of lost revenue. Each of these errors results in a calculation that does not best reflect what the loss of incremental revenue would have been for the Investment.

93. In particular, three errors should be corrected to make the Rosen model a more accurate reflection of incremental loss to the Investment. [77]

a) The Rosen model assumes that the Investment received the prices in Random Lengths for its lumber. These prices reflect weekly industry averages (Western SPF 2 x 4 standard and better, kiln dried, random lengths). However, based on the actual realised prices of the Investment, taken from its own financial statements, it is clear that the Investment has

[75] Rosen Report, paras 5 to 7 and Appendix 2.
[76] Harder Report.
[77] Harder Report.

realised prices that exceed the industry average.[78] Actual realised prices of the Investment are obviously a more accurate assessment of revenue loss than the weekly industry averages used by Rosen. When one substitutes the Investment's actual realised prices (rather than the Random Lengths prices), the effect is to reduce the loss claimed to US$ 908 thousand (see Harder Report, Schedule 3 for calculation).

b) In addition, the Rosen Report assumes that lumber sales coincide with production. In fact, as Rosen himself notes[79], in real life lumber sales occur roughly one month after production. As a result, the assumption that sales occur 4 weeks after production will produce a more accurate picture of revenue loss than the simplifying assumption of Rosen. The effect of correcting this assumption, but using Random Lengths prices, is to reduce incremental revenue loss to US$ 654,000 (see Harder Report, Schedule 4 for calculation).

c) If one corrects the Rosen model using the Investment's actual realised prices rather than Random Length prices and using the actual delay of one month from production to sales rather than an assumed sale immediately upon production, the revenue loss is reduced to US$ 338,000 (see Harder Report, Schedule 5 for calculation).

94. In short, even assuming the far-fetched assumption that verification caused a seven day delay in production, a more accurate assessment of revenue loss resulting from this delay would be US$ 338,000, not the US$ 1,080,000 claimed by the Investor.

b) Other Claims

95. The Rosen Report is also flawed in respect of its conclusions concerning management time, out of pocket costs, legal expenses and expert fees.

96. The Rosen Report assumes that predominantly all costs incurred between April 1999 and January 2000 were verification costs.[80] From a reading of the supporting materials reviewed by Mr Rosen,[81] it is clear that many of the costs claimed in the

[78] Canada requested actual sales prices per week from the Investor but it refused to produce these prices. In the absence of this information, Canada used actual realized monthly prices as reported in the financial statements produced by the Investor for its Investment.
[79] Rosen Report, para. 7.
[80] Although the Rosen Report makes this assumption, it in fact includes items incurred before or after this window. For example, the Stoel Rives invoice (found at Canada's Authorities – Tab 18) is included in the Rosen calculations yet it was for services rendered before April 1999.
[81] The documents provided by the Investor to Canada on production further confirm that various items

April 1999 to January 2000 period were not incurred for or in any way connected to the verification episode.

97. The loose and inaccurate approach reflected in the Rosen Report results in an exaggerated and incorrect claim for loss. The Tribunal cannot award damages based on the Rosen Report.

98. For an accurate damage award to issue, the Tribunal must tally only those costs that arise by reason of the verification review episode. Unfortunately the Investor has not provided the evidence required by the Tribunal to make this objective assessment.

99. The Investor bears the burden of proving that the verification review caused every expense claimed. It is not for Canada to disprove that the claims made relate to verification. If the Investor fails to prove its exact loss and that the loss was caused by the verification episode, the Tribunal cannot award the expense claimed.

100. The claims for management, out of pocket, legal and expert fees submitted by the Investor are replete with items that are unrelated to the verification review episode. Other claims alleged to be related to verification are unsupported by evidence.[82]

101. Many of the claims are based on unsubstantiated assumptions about time spent on verification. Although Canada requested supporting documentation concerning these items, the Investor failed to provide any probative evidence that the expense was incurred for that purpose and in the amount alleged.

102. The Investor and the Rosen report never identify which invoices relate to verification. They never segregate verification expenses (compensable) from expenses for other aspects of the Chapter 11 claim (not compensable).

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being claimed have no relation to and do not arise out of the verification review episode.

[82] See Harder Report.

103. On the face of the invoices produced, numerous of the amounts claimed explicitly relate to costs not incurred in the verification. The Tribunal cannot award damages based on records that clearly show the work is not attributable to the breach found.

104. For the sake of brevity, Canada gives only a few examples of these problems in the paragraphs below.

Management Time - US$ 208,000

105. Even if the Tribunal departs from the traditional view that management time is not recoverable because it is part of the normal cost of operating a business,[83] there is no basis to make such an award in this case.

106. The schedule of management time included in the scope of review and summary of losses tendered by the Investor is based on unsupported assertions about the time spent on verification.[84]

107. The Investor has failed to produce documentary, affidavit or other evidence sufficient to prove the time actually spent by Pope & Talbot's management on the verification review.[85]

108. Canada attempted to obtain specific data concerning the management time spent on verification. The Investor responded by referring Canada to Tab 15 of the Investor's Damages Claim.[86] At Tab 15, under the heading "Management Time", and without reference to any records such as time sheets, agendas or day planners, the Investor provides an "estimate" and indicates "detail coming". No such records ever arrived.

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[83] See paras 62 to 66 of this Counter-Memorial.
[84] The Rosen Report is based on a review of certain documents, including "a schedule of management time as prepared by Pope & Talbot". See Investor's Claim and Memorial at Tab 3, no. 13.
[85] Canada's First Request for Documents (Damages Phase) dated June 26, 2001 and Investor's Response dated July 10, 2001.
[86] Response to Request No. 9 in Investor's Response to Canada's First Request for Documents (Damages Phase) dated July 10, 2001.

109. The assertions regarding the amount of management time spent on verification are not credible. For example, the Investor claims that Mr. Friesen spent 30 % of his time in 2000 on the verification review despite the fact that the Investment was shut down until January 2, 2000 and the interim measures motion was heard and decided by January 7, 2000.

110. Similarly, the Investor suggests that Mr. Gray spent 50% of his time in June and July 1999 on verification review when it was conducted during 4 days in July 1999. It also suggests that Mr. Gray spent 100% of his time in December 1999 on verification review (when the Investment took down time and vacation).

111. The claim regarding management time also fails to prove that the management time claimed had any causal link to verification, much less that it was caused by the verification. For example, the Investor claims 3 days for Mike Flannery's attendance at a NAFTA Chapter Eleven hearing that is distinct from the verification review episode.[87] It further claims that Mr. Flannery spent 1 day per month for ten months on verification review, without indicating which 10 months.

112. The claims for management time also include time before April 13, 1999, the start date of the breach found by the Tribunal. For example the claim includes 5% of Mr. Gray's time in February 1999 and 10% of Mr. Gray's time in March 1999 – these periods are not compensable.

113. The Tribunal should also disallow the Investor's claim of interest on management time. Costs relating to management time are fixed costs. The Investor or the Investment would have paid such costs in any event. It did not forego an opportunity to use or invest management compensation in other ways. Consequently, an award of interest on such monies is inappropriate.

Out-of-Pocket Expenses – US$ 12,295

114. The claim for US$ 12,295 out of pocket expenses lacks support. At Tab 15 of the Investor's Damages Memorial, a claim is asserted for US$ 10,000 for "AA Co

[87] Canada notes the interim measures motion took only 2 days.

services regarding preparation for verification". Absolutely no invoice, bills, or explanation is provided. AACo is not identified and no information about what they did has been provided. This is not recoverable.

115. The additional US$ 2,295 consists of selected invoices found in a myriad of invoices at Tab 6 of the Investor's Damage's Memorial. It is unclear which items are claimed and how, or if, they relate to verification. The Investor itself attributes two of these items (US$ 1,069.00 and US$ 39.00)[88] to the NAFTA hearing, which is not recoverable in this phase.

Legal Expenses - Appleton & Co. - US$ 617,626

116. The Investor's claim of US$ 617,626 in legal expenses for Appleton & Co. is unsupportable. This amount includes large sums related to services provided by Counsel for the Investor in connection with the NAFTA Chapter Eleven arbitration and not related to verification.

117. The invoices for services rendered in April, May, June, July and August 1999 are claimed *in toto* as services rendered in those months related exclusively to the verification review. This is irreconcilable with the descriptions of services rendered in the invoices for those months. While some of the work may have been verification related, it is impossible to say which items were, or to attribute a value to these.

118. The descriptions in these invoices provided by Counsel for the Investor are especially revealing given the Investor's refusal to provide documents (such as dockets) that would indicate precisely how much time was spent providing services in connection with the verification review (as opposed to the NAFTA arbitration).[89] The descriptions found in the invoices for April, May, June, July and August 1999 include references to numerous services rendered by Counsel for the Investor that are unrelated to the verification review. Examples of such references include "research and preparation of a NAFTA Investor-State Claim",

[88] Investor's Damages Memorial, Tab 15.
[89] Canada requested such materials but the Investor has refused to provide them.

"research on international law and issues relating to the operation and implementation of the Canada-U.S. Softwood Lumber Agreement", and "for the appointment of arbitrators and review of the panel".[90]

119. The claim for services rendered in September, October, November and December 1999 refer to services "for matters relating to the Softwood Lumber Agreement audit of Pope & Talbot, Ltd."[91] For the first time, the claim for September to December 1999 attempts to segregate legal expenses related to the verification review from those that were related to the NAFTA arbitration. This attempt is quite telling. It shows that the Investor has the ability and has the documents in its possession, such as dockets, to determine the exact time spent on verification. Unfortunately, the Investor has refused to provide this documentation in productions or the Rosen report and hence neither Canada nor the Tribunal can be satisfied it is correct. What is clear is that the Investor claims that roughly 10% of Counsel's services for September, October, November and December 1999 relate to the verification review, as opposed to the NAFTA arbitration.[92]

120. The legal expenses incurred by the Investor in January 2000 do not relate to the verification review. The descriptions of services rendered in these months contain references to the Investor's "motion for interim measures", "preparations of supplementary materials regarding a motion on interim measures" and "attendance at a Tribunal hearing regarding an interim measure preserving your quota".[93] The Rosen Report notes that a "significant amount" of the January invoice related to "the Fort Lauderdale trial".[94]

121. The January 2000 costs are part of the arbitration costs to be dealt with in phase 4. The Investor brought its motion for interim measures pursuant to NAFTA Article 1134, in the context of the claim it submitted to NAFTA Chapter Eleven

[90] Investor's Damages Memorial, Tab 13
[91] In contrast to April-August 1999 invoices. Se Investor's Damages Memorial, Tab 15.
[92] The amount included in legal expenses related to verification review (the "subtotal" column at Tab 13 of the Investor's Claim) expressed as a percentage of total fees and disbursements is 8.15% for September 1999, 14.54% for October 1999 and 7.23% for November.
[93] See Invoice Nos. 00-02 and 00-03 at Tab 13 of the Investor's Claim Damages Memorial.
[94] Investor's Memorial on Damages, Tab 15, page 2.

arbitration. It cannot be characterized as part of the verification review process, which the Tribunal determined was the only breach of Canada's NAFTA Article 1105 obligation. Rather, it is part of the NAFTA arbitration.

122. Further, that the Investor would bring a motion that was patently without jurisdiction[95] cannot be considered a foreseeable loss, nor one for which the Investor ought to be compensated.

123. The Tribunal's Procedural Order dated April 20, 2001 states that it "does not intend to deal with questions of costs at this stage."[96] Consequently, Canada submits that all legal expenses, disbursements and other costs or fees claimed in connection with the Investor's Motion for Interim Measures (the Investor claims US$ 326,832 for such legal expenses and disbursements incurred in December 1999 and January 2000)[97] must be addressed in phase 4 of this arbitration that will consider costs.

124. Neither Canada, nor the Tribunal, can accurately attribute any of the legal expenses to the verification review breach.

Experts Fees

Expert Fees – LRTS - US$ 100,818

125. The Investor attributes well over one-third of the total expenses of LRTS (US$ 100,818 of a total of US$ 284,068) to the verification episode, but again, provides no verifiable proof of this. No time dockets or detailed invoices have been produced to support this assertion or to explain which invoices are attributable to verification, although such documents are obviously available to Mr. Rosen (and the Investor).[98]

[95] The Tribunal held the interim measures motion was without jurisdiction at the hearing, without reserving for further deliberation.
[96] Procedural Order dated April 20, 2001 at para. 7.
[97] See "Subtotal" Column and Invoices Nos. 00-02 and 00-03 at Tab 13 of the Investor's Claim.
[98] Investor's Damage Memorial, Tab 14.

126. As the Tribunal knows, Mr. Rosen testified for the Investor in back phases of its unsuccessful claim concerning the NAFTA compatibility of the Softwood Lumber Agreement. In fact, his retainer deals exclusively with that aspect of his work. The claims made at this phase related to verification are unsubstantiated and cannot be accepted.[99]

127. The only evidence before the Tribunal are invoices from Mr. Rosen totalling US$ 281,434 and US$ 284,067.[100] Nothing indicates which invoices, if any, total US$ 100,818, or how they arise out of the verification review episode. This is an unacceptable basis to award a claim for LRTS costs.

Expert Fees – Apco Canada - US$ 8778

128. Apco Canada is a public affairs and strategic communications firm that was apparently engaged by the Investor to "consult with various government officials in different departments", to "prepare media clippings and analysis", to "cultivate third party allies among affected stakeholders" and the like. The invoices produced for the work of Apco make it impossible to discern the link, if any, of their work to the verification episode.[101]

129. US$16,000 of Apco fees relate to February and March 1999, well before the April 13, 1999 breach identified by the Tribunal, and is not recoverable.

130. More generally, the retainer of Apco makes it clear they were providing general lobbyist services which cannot be attributed to verification.[102]

131. Given the Investor claimed more than US$ 500 million related to the operation of the Softwood Lumber Agreement (and not verification of its quota), the claim that this work related exclusively or even predominantly to verification strains credulity.

Expert Fees – Additional Legal – Barnes & Thornberg - US$ 5,232

[99] Investor's Production [Authorities – Tab 18].
[100] Investor's Damage Memorial, Tabs 13 & 14.
[101] Investor's Damages Memorial (Tab 7).
[102] Investor's Production [Authorities – Tab 18].

132. The Investor claims fees of Barnes & Thornberg, a law firm in Indianapolis, Indiana, for services rendered between June 1 and 11, 1999. Again, the Investor produced a general invoice, but no detailed dockets are provided to support these claims despite Canada's request for such documents, which clearly would have been obtainable by the Investor. There is no explanation of how the services relate to the breach found, if at all.

133. The Barnes & Thornberg invoice shows that the work performed by that firm was remote from the verification review. It appears to be linked to lobbying efforts with U.S. government officials, in particular officials with the United States Trade Representative. The invoice includes times spent on "review [of] congressional committee jurisdiction for softwood lumber agreement", "telephone call with ... Associate U.S. Department of Agriculture General Counsel regarding U.S. Trade Representative contacts", a phone call with Mr. Flannery about "association with American Forest & Paper Association" and "review of letters to Members of Congress".

134. In addition, the Barnes invoice cites frequent calls with Maria Pope. The schedule of management time in the Rosen Report states the Investor was "unable to identify any effort with verification" by Maria Pope.[103] Given this admission, calls to Maria Pope by the Barnes firm can hardly be related to verification.

Expert Fees – Additional Legal – Davis & Co. - US$ 23,181

135. Davis & Co. is a Vancouver law firm that apparently worked with Appleton & Co. on this arbitration. As the Tribunal will recall, Keith Mitchell of Davis & Co. cross-examined various of Canada's witnesses in Phase 2 of this arbitration. Mr Mitchell did not participate in the hearing of the interim measures motion and his other activities are unknown.

136. In this phase the Investor claims for over half of the total bill rendered by Davis & Co. (US$ 23,181 of US$ 45,660 total). No supporting dockets are provided,

[103] Damages Memorial, Tab 15, p. 1.

although it is common practice for law firms in Canada to maintain detailed dockets. Canada requested such material but the Investor has refused to produce it.

137. It is impossible to tell from the general invoices relied on by the Investor whether the time billed by Davis & Co. related to verification. For example, there are bills for "advising and assisting Mr Appleton with your NAFTA claim", "all governmental relations", "all communications with Ministers' offices" and the like.[104]

138. Other items make no sense given the proceedings. For example, the bill dated August 30, 1999 charges for "preparation of materials for injunction application and related judicial proceedings". As the tribunal knows, only the interim measures application under Article 1134 of NAFTA (for which Mr Appleton has also submitted a claim in this phase) might fit this vague description.

Expert Fees – Stoel Rives - US$ 5,200

139. Stoel Rives appear to be attorneys in Portland, Oregon. Their firm never appeared on record concerning the verification matter and is not known to the defendant.

140. The Investor bases its claim in this phase on bills from Stoel Rives listing various items unrelated to the verification episode.[105] For example, a claim is made for services of Stoel Rives concerning a "draft letter to Oregon Congressional Delegation" (1-28-99), "review proposed press release of Mr Appleton" (1-8-99) and "review of documents related to government relations and media relation issues concerning possible challenge of softwood lumber agreement quotas in British Columbia" (1-5-99). Such claims are not causally linked to the breach in issue, or at best are remote and cannot be recovered.

141. Further, Stoel Rives performed all its work between January and March 1999. It is highly improbable that any of this work relates to the verification episode.

[104] Investor's Damage Memorial, Tab 9.
[105] Investor's Damages Memorial, Tab 12.

Claims for work before the breach began are not causally linked to the breach found by the Tribunal and cannot be recovered.

PART E: INTEREST

142. The Investor has claimed interest on any award granted.[106]

143. Article 1135 (1) of the NAFTA provides that a Tribunal "may award ... monetary damages and any applicable interest." Hence, interest is a matter within the discretion of the Tribunal. Neither the NAFTA nor the UNCITRAL Rules provide further detail concerning awards of interest.

144. As a result, if the Tribunal chooses to award interest, it should be guided by the applicable domestic law[107] and the practice of courts in the place of arbitration. Given that this arbitration is against the Government of Canada, and the place of arbitration is Montreal, Quebec, interest should be dealt with as it would be in Canada.

a) Interest Rate

145. The Investor's Damages Statement of Claim[108] asks for "the commercial rate extended by Canadian commercial banks", although its expert applies the U.S. government 5 year bond rate. Canada submits that if the Tribunal finds that the Investor incurred compensable loss or injury, the Tribunal should apply a simple rate of 5% interest in its award.

146. The *Interest Act* of Canada sets the legal rate.[109] It states, in relevant part, that:

> ... whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.[110]

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[106] Investor's Second Claim, para. 37; Investor's Memorial (Damages Phase), paras 29-31.
[107] P. Cerina, "Interest As Damages In International Commercial Arbitration", American Review of International Arbitration, vol. 4 at 272 [Authorities – Tab 19].
[108] Para. 37.
[109] Interest *Act*, R.S. 1985, ch. I-15 [Authorities – Tab 20].
[110] *Ibid.*, s. 3.

147. Similarly, the *Civil Code of Quebec* (C.C.Q.) states that damages "bear interest ... at the rate agreed by the parties, or, in the absence of agreement, at the legal rate ...".[111]

148. Rule 332 of the *Federal Court Act* also states that the legal rate of interest[112] (5%) applies to foreign judgments and arbitral awards unless the Court orders otherwise.[113]

149. There is no agreement between the Investor and the Government of Canada on the interest rate in this case, nor is the rate fixed by law or agreement. The Tribunal should therefore apply the 5% legal rate if it awards interest.

b) Starting Date

150. The *Civil Code of Quebec* provides that damages bear interest from the date of default or any other date the court considers appropriate.

151. Canada submits that the earliest possible date in this case from which to calculate interest is September 5, 2000, when the Investor first gave notice that it was asking for damages related to verification.

152. The verification review was never a part of the Claim. Nowhere in the Investor's Notice of Intent to submit a claim to arbitration, Notice of Arbitration and Statement of Claim, does the Investor allege that Canada's conduct during the verification review breached its obligation under Article 1105.

153. Counsel for the Investor unequivocally put on the record that the verification review episode was not covered by the Investor's Claim. As Counsel for the

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[111] *Civil Code of Quebec* (C.C.Q.), Article 1618: "Damages other than those resulting from delay in the performance of an obligation to pay a sum of money bear interest at the rate agreed by the parties, or, in the absence of agreement, at the legal rate, from the date of default or from any other later date which the court considers appropriate, having regard to the nature of the injury and the circumstances." [Authorities – Tab 21].

[112] *Federal Court Act*, section 37 [Authorities – Tab 22].

[113] Rule 332(2) of the *Federal Court Rules* provides for post-judgment interest on foreign judgments (which includes arbitral awards under sections 34 and 35 of the *Commercial Arbitration Act* according to Rule 326) after registration. This rule provides for the payment of post-judgement interest on an award at the rate prescribed in section 3 of the *Interest Act* (i.e. simple interest of 5% per annum) unless

Investor explained to the Tribunal at the hearing into the Investor's Interim Measures Motion:

> In this particular case there has never been an issue with the verification process. That is not part of the claim. The verification process is not a part of the measure complained about by the Investor.[114]

154. Further, the Investor never amended its Claim, although it recognized it was required to do so if it wished to include verification in the claim. Counsel for the Investor acknowledged that a claim regarding the verification would require an amendment to the Investor's initial claim. As he stated:

> But this motion that we are here about today is about a specific aspect of Canada (sic) softwood lumber export regime; a part that was not covered by the investor's initial claim, though a question of treatment which has clearly arisen and may in fact entail an amendment of that claim.[115]

155. The Investor never sought the Tribunal's leave to amend[116] its claim to add the allegation that Canada's conduct during the verification review breached Article 1105. Rather, it simply raised verification review as a breach of Article 1105 in paragraph 222 of its Memorial dated September 5, 2000. As a result, interest payable in respect of the breach found by the Tribunal should begin to run no earlier than September 5, 2000.

156. If the Tribunal does not accept September 5, 2000 as an appropriate date from which to calculate interest:

a) This tribunal held that the "default' or breach concerning the verification review started, at the earliest, on April 13, 1999. Neither damages nor interest should be awarded for claims respecting loss allegedly incurred prior to this date.

b) The Tribunal should consider a later date appropriate for the loss of incremental revenue claim. The Investment took down time, allegedly caused by the verification review, from December 20, 1999 to January 2, 2000. No interest on any award in respect of the alleged loss of

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the court orders otherwise. [Authorities – Tab 23].

[114] Closing Argument of Counsel for the Investor, Transcript of Interim Measures Hearing, January 7, 2000 at page 433.

[115] Closing Argument of Counsel for the Investor, Transcript of Interim Measures Hearing, January 7, 2000 at page 411.

[116] See Article 20 of the UNCITRAL Rules.

incremental revenue should be applied prior to the date the mills were closed.

c) Simple or Compound Interest

157. International tribunals have generally been wary to award compound interest. For example, in *Anaconda-Iran, Inc.* v. *Iran*,[117] the tribunal refused to award compound interest even though contractual stipulations allowed such interest.

158. In Canada, generally speaking interest accrued on principle is not available. The *Crown Liability and Proceedings Act*[118] deals with pre-judgment interest on awards against the Federal Crown in Canada. It provides that where interest is to be included on an award, it should be simple interest "at such rate as the court considers reasonable in the circumstances."

159. Section 36 of the *Federal Court Act*[119] and section 31 of the *Crown Liability and Proceedings Act* provides that there is no compound interest on awards for the payment of money.[120]

160. The *Civil Code of Quebec* similarly indicates that interest accrued on principal does not itself bear interest.[121]

161. The Tribunal should therefore apply simple interest if it awards interest. The circumstances here do not support an award of compound interest.

162. In summary, Canada submits that the Tribunal should apply a simple interest rate of 5% on any damage award, commencing September 5, 2000 and continuing after the date of issue of the Tribunal's award with one exception.

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[117] (1986), 13 Iran-U.S. C.T.R. 199, 234 [Authorities – Tab 24].
[118] *Crown Liability and Proceedings Act*, R.S. 1985, c. C-50, s. 31. [Authorities – Tab 25].
[119] R.S.C. 1985, c.F-7. [Authorities – Tab 22].
[120] *Supra*, [Authorities – Tab 25].
[121] C.C.Q. Article 1620: "Interest accrued on principal does not itself bear interest except where that is provided by agreement or by law or where additional interest is expressly demanded in a suit." [Authorities – Tab 21].

PART F: COSTS

163. Canada notes that the Tribunal ordered that costs be dealt with in Phase 4 or "the Costs Phase" of this arbitration. Certain claims respecting management time, lawyers' fees and costs of the arbitral panel, accordingly, should be dealt with in Phase 4.[122]

164. The Investor has claimed management time and lawyers' fees that relate to the Investor's interim measures motion under Article 1134 held in January 2000. Such claims arise in the context of the arbitration of the Investor's claim pursuant to NAFTA Chapter Eleven and are only properly considered in the next phase of this arbitration.

165. Canada notes that Article 40 of the UNCITRAL Rules[123] states that in general, the unsuccessful party shall bear the costs of arbitration. Consequently, Canada, which was wholly successful on the Claim initially submitted by the Investor and was found liable respecting a verification review episode that was not even pleaded, should be reimbursed for its costs.

166. Further, Canada will submit that it should be awarded its costs for the interim measures motion both because Canada was successful on that motion and because it was clearly a futile motion beyond the jurisdiction of a Chapter Eleven Tribunal.

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[122] Article 38 of UNCITRAL gives an exhaustive list of what constitutes "costs". It does not include the cost of executive time. Travel and other expenses of witnesses and costs for legal representation are included. In assessing an award of costs, if any, the Tribunal is limited to award only costs which are enumerated in Article 38.

[123] Article 40 of the UNCITRAL Arbitration Rules provides:

1. Except as provided in paragraph 3, the costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

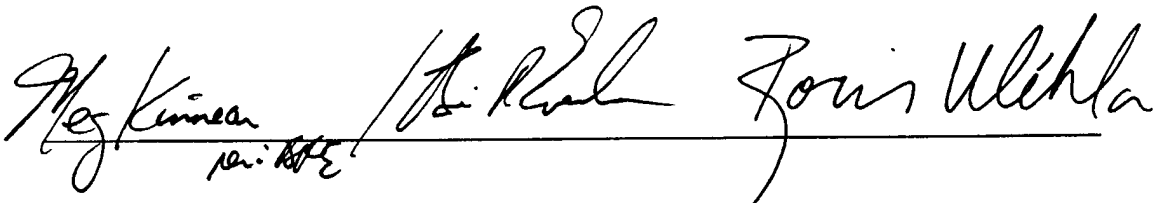
2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear reasonable costs or may apportion such costs between the parties if it

PART G: CONCLUSIONS

167. For the foregoing reasons, Canada respectfully requests that this Tribunal dismiss the Investor's damages claim and award Canada its costs of this phase of the proceedings.

ALL OF WHICH IS RESPECTFULY SUBMITTED

DATED in the City of Ottawa, the Province of Ontario, this 18th day of August 2001.



OF COUNSEL FOR THE GOVERNMENT OF CANADA

Meg Kinnear

Brian Evernden

Boris Ulehla

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determines that apportionment is reasonable.