

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

**BETWEEN:**

**MERRILL & RING FORESTRY L.P.**

**AND:**

**GOVERNMENT OF CANADA**

**SUBMISSIONS  
of the  
UNITED STEELWORKERS,  
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA,  
and the BRITISH COLUMBIA FEDERATION OF LABOUR**

**September 26, 2008**

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## **PART 1: OVERVIEW**

1. These submissions are made on behalf of the United Steelworkers, the Communications, Energy and Paperworkers Union of Canada, and the British Columbia Federation of Labour. Together these unions and labour federation represent nearly a million Canadian workers, tens of thousands of whom work in Canada's forest industries. The overwhelming majority of these forest sector workers are employed in sawmills, pulp and paper mills, and other wood processing industries that depend upon a steady flow of logs from Canadian forests. Without log export controls, many of these jobs adding value to Canadian raw log resources would not exist.
2. As the figures cited by Canada illustrate, value-added processing and manufacturing accounts for well over 90% of the economic contribution made by Canada's forestry industry to the domestic economy.<sup>1</sup> Without effective log export controls, much of this economic activity could disappear from Canada.
3. Because of the ongoing and essential role that log export controls continue to play, Canada has negotiated key exceptions to NAFTA rules that preserve the prerogatives of both federal and provincial governments to impose controls they deem necessary to accomplish their respective policy goals. The claim by Merrill & Ring Forestry L.P. (the "Investor") makes no reference to these exceptions. Nevertheless, its claim must be assessed in light of the fact that under NAFTA rules Canada is entitled to prohibit log exports, and British Columbia law and policy is further reserved from key investment disciplines.
4. Instead of imposing a blanket log export prohibition, both levels of Canadian government have adopted a flexible approach that permits log exports so long as they

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<sup>1</sup> Canada's Counter Memorial paras.32-38

are surplus to Canadian needs. Moreover, rather than establish independent log export control regimes, the two levels of Canadian governments have adopted an integrated approach that avoids unnecessary overlap and duplication. These procedures ensure that domestic goals are achieved while permitting resource companies and traders to export raw logs when these are not required by domestic producers.

5. As a harvester of logs subject to federal regulation, the Investor complains that Canada's log export controls are unfair and deny it profits that could otherwise be earned selling logs on export markets. It does not explicitly contest the right of Canada to maintain log export controls, but nevertheless claims damages arising from the government having exercised its prerogative to do so. It claims that Canadian export controls favour Canadian companies but offers no evidence that domestic companies are treated any differently because of their nationality. Absent such evidence, the Investor's claim relies on exaggerated grievances concerning the administrative procedures established by Canada to inform export permitting decisions.
6. The Investor argues that Canada's log export controls are so egregiously unfair they offend international norms for the treatment of foreign investors, and represent the expropriation of the company's property in the logs its harvests. It claims damages it says are caused by the costs of having to comply with Canadian export regulations, the expropriation of its property rights, and the denial of access to export markets. Yet the right of both federal and provincial governments to establish and maintain log export controls is clear.
7. The Investor's claims have no merit, and we concur with the reasons for dismissing them set out in Canada's Counter Memorial and in particular with the position that access to export markets is not an investment right protected under NAFTA rules.

Accordingly, the following submissions are presented in addition those made by Canada and concern legal issues its does not address. These concern:

- (i) the exception of log export controls set out in NAFTA Annex 301.3; and
- (ii) the reservation for provincial non-conforming measures set out in NAFTA Annex I.

## **PART II: CANADA HAS PRESERVED THE RIGHTS TO IMPOSE LOG EXPORT CONTROLS**

8. Canada has listed an exception to NAFTA *Trade in Goods* rules in order to preserve the its right to impose log export controls. Thus Annex 301.3 to Chapter 3 of the Treaty sets out exceptions to Articles 301 and 309, including the following:

### *Section A - Canadian Measures*

1. *Articles 301 and 309 shall not apply to controls by Canada on the export of logs of all species.*

9. Article 301 requires Canada to provide National Treatment to the goods of other Parties, and Article 309: *Import and Export Restrictions*, provides in part that:

*Except as otherwise provided in this Agreement, no Party may adopt or maintain any prohibition or restriction on the importation of any good of another Party or on the exportation or sale for export of any good destined for the territory of another Party, except in accordance with Article XI of the GATT...*

10. Article 309:5 further stipulates that the Article shall not apply to the measures set out in Annex 301.3.

11. The right of Canada to establish and maintain such measures is not unqualified, and in doing so Canada must comply with other requirements of Chapter 3. But within these parameters, the Annex 301.3 exception is ‘unbound’ and Canada is free to modify its export control regime as it sees fit.
12. The question that arises then is whether a log export control as such, or the procedures developed to put it in place, can nevertheless be challenged as offending other NAFTA disciplines, including those concerning investment which are set out in Chapter 11 of the Agreement. As a general matter, trade panels and investment tribunals have held the requirements of various trade disciplines to be cumulative, not mutually exclusive, and this is true for the requirements of Chapter 3 and Chapter 11 of NAFTA as well.<sup>2</sup> Therefore one cannot, *a priori*, excuse from compliance with Chapter 11 measures that primarily concern trade in goods.
13. However, Chapter 11 qualifies this general principle. Thus Article 1112: *Relation to Other Chapters*, stipulates that:
  1. *In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*

The next question then is whether in relation to log export controls, the requirements of Chapters 3 and 11 are inconsistent, and if so, to what extent.

14. The effect of Article 1112 has been considered and commented on by several investor-State arbitral tribunals convened under Part B to Chapter 11. These have consistently recognized this Article as guarding against the overreaching application of NAFTA investment rules. For example in the *S.D. Myers* case, the Tribunal states:

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<sup>2</sup> *S.D. Myers Inc. v. Canada*, (UNCITRAL), First Partial Award, 13 November 2000 ¶ 291 and 292.

*The NAFTA Parties properly wanted to ensure that Chapter 11 could not be used to impugn government measures that are protected by other specific aspects of the NAFTA ....*<sup>3</sup>

15. The Tribunal in the *Canfor* case put it this way:

Article 1112(1) appears to constitute a form of an “underride clause.” It seems that the drafters of the NAFTA wished to have a safety-valve for overreaching interpretations of other Chapters of the NAFTA in relation to the investment provisions in Chapter Eleven.<sup>238</sup> In that respect, Article 1112(1) is an important guidance in interpretation of the NAFTA.<sup>4</sup>

16. In *S.D Myers*, Canada argued that Chapter 3 was inconsistent with Chapter 11. It contended that “even if the export ban appears to contravene Chapter 11, it would also be an export ban with respect to goods and controlled by Chapter 3.”<sup>5</sup> Canada argued that under Chapter 3 a ban on hazardous waste exports was permitted as an exception to the general prohibition on export controls, as necessary to protect human, animal or plant life [GATT Article XX(b)]. In other words, if the export measures were permitted under Chapter 3, they were not assailable under Chapter 11.<sup>6</sup>

17. The Tribunal rejected the argument on the ground that Canada had in fact failed to meet the requirements of the GATT exceptions it was seeking to rely upon.<sup>7</sup> Accordingly, Canada’s export controls were not consistent with either NAFTA

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<sup>3</sup> *Idem*, para. 298.

<sup>4</sup> *Canfor Corporation v. United States; Tembec et al. v. United States and Terminal Forest Products Ltd. v. United States* (Consolidated UNCITRAL) Decision on Preliminary Question, 6 June 2006, para. 103. This view is reinforced by the inclusion by the Tribunal of this footnote to the above cited paragraph: See also Department of External Affairs, *North American Free Trade Agreement: Canadian Statement of Implementation*, in *Canada Gazette* 68 (1 January 1994), p. 152: “[Article 1112]ensures that the specific provisions of other chapters are not superseded by the general provisions of this [the investment] chapter.”

<sup>5</sup> *S.D. Myers*, Partial Award *Supra* note 2, at para. 297.

<sup>6</sup> *Idem*, para. 298.

<sup>7</sup> *Idem*

investment or trade in goods rules. Therefore there was no inconsistency between the requirements of Chapters 3 and 11.

18. In the present case, Canada's right to impose log export controls is unqualified under Annex 301.3, and there can be no question that *Notice to Exporters No. 102* is such an export measure.
19. In sum, the fact that Notice 102 and the procedures established to implement it are measures concerning the trade in goods, does not *a priori* absolve Canada of complying with the requirements of Chapter 11 unless the provisions of the latter are found to be inconsistent with the former. If Canada's Chapter 11 obligations concerning such measures are inconsistent with those under Chapter 3, the latter is to prevail. The question addressed below is whether on the facts of this case, there is inconsistency between the rights and obligations of Canada concerning log export controls under Chapters 11 and 3 respectively.

### **PART III: BRITISH COLUMBIA'S RIGHT TO MAINTAIN LOG EXPORT CONTROLS**

20. Provincial measures that impose domestic use and processing requirements on logs harvested on Crown lands are also subject to the Annex 301.3.<sup>8</sup> These provincial statutory requirements are also expressly reserved from the application of certain Chapter 11 disciplines by reason of being listed to Annex I to NAFTA investment and services rules.
21. In this regard, Article 1108: Reservations and Exceptions provides:

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<sup>8</sup> The reference to provincial statutes in Annex 301.3 indicates the inclusion of both federal and provincial government measures under the umbrella of this Annex.

1. Articles 1102, 1103, 1106 and 1107 do not apply to:
  1. any existing nonconforming measure that is maintained by
    1. a Party at the federal level, as set out in its Schedule to Annex I or III,
    2. a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or
    3. a local government;
  2. the continuation or prompt renewal of any nonconforming measure referred to in subparagraph (a) ; or
  3. an amendment to any nonconforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.
2. Each Party may set out in its Schedule to Annex I, within two years of the date of entry into force of this Agreement, any existing non-conforming measure maintained by a state or province, not including a local government.
22. In 1996, Canada listed all non-conforming measures maintained at the time the NAFTA entered into force at the provincial and territorial level to Annex I.<sup>9</sup> While new measures that would be non-conforming may not be added under Annex I, measures already listed may be amended so long as they are not made more trade restrictive.
23. Sections 127 and 128 of the British Columbia *Forest Act 1996*, which set out the log export provisions of the Act, were in place as Sections 127 and 128 of the *Forest Act 1979*, on January 1, 1994, and were therefore ‘grandfathered’ pursuant to Canada’s Annex I reservation. Accordingly these measures are exempt from the obligations of Articles 1102, 1103, 1106, and 1107.

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<sup>9</sup> Foreign Affairs and International Trade Canada. Annex I: Reservations for Existing Measures and Liberalization Commitments; <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/anx1.aspx?lang=en>



24. While the explicit target of the Investor's claim is federal log export controls, its complaints repeatedly target or implicate provincial measures while ignoring the general and specific exceptions that shelter these measures from certain challenges. The relevance of these safeguards for provincial measures that require the domestic use or processing of logs harvested from provincial lands is addressed below.

#### **PART IV: CANADA'S RIGHT TO MAINTAIN LOG EXPORT CONTROLS PREVAILS IF INCONSISTENT WITH NAFTA INVESTMENT RULES**

25. The Investor does not explicitly challenge Canada's right to establish and maintain log export controls, *per se*. Rather, its attack on these measures is indirect but would, if successful, have the same effect. For the following reasons, the Investor's claims depend upon an interpretation of Chapter 11 rules that is clearly inconsistent with those of Chapter 3 and must, for that reason, be rejected. Its arguments are similarly flawed with respect to key reservations for provincial measures, and these deficiencies are considered in Part V below.
26. Stripped to their essence, the two essential targets of the Investor's claim are: 1) limitations on foreign market access imposed by log export controls and 2) the administrative procedures Canada has adopted to implement those controls.

#### **Loss of the 'Export Premium'**

27. The first of these claims is expressed as a repeated complaint about being "forced to sell" logs on the Canadian market, and a claim for damages arising from the difference between the domestic price for logs and the price that might be obtained on foreign markets.
28. For example, with respect to its claim under Article 1110 that Canada has expropriated its investments, the Investor complains that every time it is "forced to sell its logs to BC sawmills at artificially suppressed prices, it loses the difference in

value between that price and the fair market export price it could have received.”<sup>10</sup> It makes a similar complaint with respect to Canada’s *Minimum Standard of Treatment* obligations under Article 1105.<sup>11</sup>

29. The Investor’s claim for damages is also based on calculations based on the difference between domestic and international prices that it argues arise from it being denied unfettered access to export markets. At paragraph 423 the Investor’s Memorial states:

An important aspect of this claim involves the determination of the prices that Merrill & Ring could obtain for its logs in export markets if it was not forced to sell its timber. Mason, Bruce & Girard, provided its Expert Report with respect to the issues of: price taking; price elasticity and prices that Merrill & Ring could obtain for its logs in international markets. The Investor claims CDN \$23,976,806 in damages for losses allegedly sustained.

30. In fact, the core of the Investor’s damage claim is an alleged “export premium”. This figure is intended to represent “the prices Merrill & Ring could obtain for its logs in export markets if it was not forced to sell its timber [subject to Notice 102].”<sup>12</sup>
31. It is important to recognize that claims relating to being denied access to export markets are *independent* of the Investor’s complaints about the administrative processes Canada utilizes to determine whether to issue log export permits. The “export premium” argument takes direct aim at Canada’s right to maintain export controls regardless of how efficient and fair the export control regime may be. In this manner, the Investor seeks an interpretation of NAFTA rules that would entitle it to

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<sup>10</sup> Investor’s Memorial at paras. 11 and 369.

<sup>11</sup> Investor’s Memorial para. 356.

<sup>12</sup> Investor’s Memorial, para. 863.

compensation in any case where Canada exercises its right to impose log export controls.

32. Should this argument prevail, the result would impose monetary penalties on Canada for exercising a right it explicitly preserved under Chapter 3, and would entirely negate the purpose of the Annex 301.3 exception. This patent inconsistency between Chapter 11, as the Investor would have the Tribunal read it, and Chapter 3, must under Article 1112 be resolved in favour of the latter. Consequently the Investor's claims relating to the effects of being denied access to export markets must be rejected.
33. This leaves the Investor's arguments concerning the fairness, as distinct from the fact, of log export controls. In addition to Canada's submissions on this aspect of the Investor's claim, the Annex reservations noted above provide additional grounds for rejecting the Investor's claims under Articles 1110 and 1105 for the following reasons.

#### **Canada's National Treatment Obligations**

34. The Investor's National Treatment argument is essentially twofold: first, that companies harvesting logs from provincial land are treated more favourably than it is; and second, that no similar export controls are imposed on companies operating in other provinces.
35. The first of these arguments would require federal measures to provide the most favourable treatment accorded investors under the provincial regulatory regime. As Canada notes, this proposition ignores the fact that provincial and federal National Treatment are defined as being entirely distinct, and must fail for that reason.

36. The other and contradictory National Treatment argument made by the Investor would require Canada to provide the same treatment to investors in all provinces regardless of the differences in provincial regulatory regimes. It argues that in British Columbia, Canada must harmonize its standards with those of province, while at the same time asserting that in the national context it must adopt a one-size-fits-all approach that ignores provincial measures. The obvious contradiction between the positions being urged by the Investor need not, however, be addressed, as neither argument has merit for the reasons Canada sets out in its Counter-Memorial.
37. However, in addition to arguments made by Canada, the fallacy of the Investor's argument relating to the federal standard of National Treatment is underscored by taking into account the effect of the reservations for provincial measures under Annex 1. This issue is addressed below.

### **Log Export Permitting Procedures**

38. As noted, if the Investor's claims relating to the consequences of Canada's log export controls and Canada's National Treatment obligations are rejected, as we submit they must be, this would still arguably leave the company's claims relating to the fairness of the procedures adopted to give effect to those controls.
39. We acknowledge that it is possible for Chapter 3 and Chapter 11 obligations as these apply to log export regulation to coexist, with the important qualification that the application of Chapter 11 disciplines cannot impose either *de jure* or *de facto* constraints that effectively negate the prerogatives Canada explicitly preserved under Annex 301.3 and Annex 1. Where acceding to the Investor's arguments would have this effect, the provisions of Chapter 11 are inconsistent with and must give way to those of Chapter 3, which permit log export controls.

40. To support its complaints about the procedures Canada has adopted to inform the exercise of its log export permitting authority, the Investor conflates federal and provincial NAFTA obligations, as well as complaints about log export permitting procedures with those concerning the consequences of being denied an export permit.  
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41. In the absence of evidence that Canada's export regime discriminates against foreign investors on the basis of nationality, the Investor seeks to characterize its complaints in a manner that engages the rights and remedies established under NAFTA investment rules. The result is an exaggerated version of the complaints that companies often express about having to comply with government "red tape", whether for the purposes of securities regulation, environmental protection or other public purposes. No administrative regime is perfect, nor is it immune to manipulation or gaming by private interests that may seek to exploit the regime for competitive advantage.

42. Nevertheless, the Investor presents these complaints as so egregious as to elevate them to the status of offending international norms concerning the fair treatment of foreign investors, inviting this Tribunal to substitute its views for those of Canadian governments as to how best to implement log export controls which they have reserved the right to establish and maintain. This would expand the mandate of this Tribunal well beyond the parameters accorded by the Parties consent to arbitration under Chapter 11.

### **There is no "Less Trade Restrictive Test" for NAFTA Investment Rules**

43. In this regard the Investor invites the Tribunal to consider whether there are less restrictive measures for accomplishing Canada's policy objectives.<sup>14</sup> In so doing the

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<sup>13</sup> The conflation of provincial and federal regimes is most apparent with respect to the Investor's allegations concerning 1105 which are set out on pp. 97-104 of its Memorial.

<sup>14</sup> Investor's Memorial, paras. 138-140.

Investor is suggesting that this Tribunal adopt an analytical approach used by World Trade Organization dispute bodies to determine claims to the exceptions set out in Article XX, such as the exception under GATT Article XX(b) for measures “necessary to protect human, animal or plant life or health.” [emphasis added]

44. The “necessity test” as it became known, was developed and has evolved in WTO jurisprudence to determine claims to the protection afforded by certain GATT Article XX exceptions once a violation of GATT obligations has been determined.<sup>15</sup> The stipulation that measures be “necessary” has engaged trade adjudicative bodies in a consideration of the offending measures in light of the alternatives available for achieving the policy objective at hand. For complainants to prove that a measure is not necessary, they must be able to propose not only alternative, less trade restrictive measures that contribute as much to the objective pursued but also ones that are “reasonably available” to the respondent.<sup>16</sup>
45. However, there is no ‘necessity’ or analogous test mandated by Chapter 11 rules, and to propose such a standard is entirely without any textual or other support.
46. If the Investor’s views are adopted, this Tribunal would decide that alternative and less trade restrictive procedures can be used to inform Canada’s export permitting process. This result would presumably require the federal government to abandon the integrated model it and the provincial government have established and put in place its own independent process for determining whether export permits should be issued for logs harvested on federal land. This is not an outcome that can be reconciled with the exceptions established for log export controls, for this reason and those explored further below.

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<sup>15</sup> WTO, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, Report of the Appellate Body, 11 December 2000, paras 162, 163.

<sup>16</sup> WTO, Brazil – Measures Affecting Imports of Retreaded Tyres, 3 December 2007, Report of the Appellate Body, para 156

## **Damages**

47. As noted, the Investor conflates its claim for damages related to compliance with *Notice 102* procedures, with its claim for damages arising from being denied an export permit. But the procedural measures at issue may need to adhere to NAFTA investment rules, while export control measures, for the reasons noted, do not.
48. If this Tribunal were to agree that the procedures Canada has adopted to inform its export permitting decisions are inconsistent with NAFTA 11 disciplines, it must nevertheless acknowledge Canada's right to preserve export controls, albeit through procedures that are compliant with Chapter 11 disciplines. Accordingly, the Investor's damages would not be the difference between the domestic and export price for affected logs, but rather the difference in the cost of complying with federal regulations as they now are and the cost of complying with a more NAFTA-compliant approach. This would require this Tribunal to not only describe an alternative regulatory scheme with some precision, but to also assign costs for complying with it. The task is clearly not one for this Tribunal or this forum, and underscores the difficulties of dramatically expanding the scope of investor-State litigation as the Investor urges this Tribunal to do.

## **Provincial Non-conforming Measures**

49. Canada indicates that the Investor has advised that it is not challenging the B.C. *Forest Act*,<sup>17</sup> but this does not accord with the Memorial which not only takes direct issue with the provincial log export regime,<sup>18</sup> but in many respects represents a collateral attack on provincial measures.

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<sup>17</sup> Canada's Counter-Memorial para. 396

<sup>18</sup> Investor's Memorial paras. 147 and 148

50. For example, several of the arguments advanced by the Investor would impugn log export controls on grounds that apply equally to the exercise of federal permitting authority for logs harvested from provincial lands. These include the complaint that “Both the provincial and federal export application procedures create an unequal playing field in the industry and force Merrill & Ring to have to deal with commercial extortion as part of its day-to-day operations”. Much of Dr. Pearse’s critique which is quoted extensively throughout the Investor’s Memorial similarly applies to both provincial and federal regulatory regimes.
51. Equally important to an understanding of the true scope of the Investor’s claim is recognition that under Canadian constitutional arrangements, provincial requirements concerning domestic use and processing depend on the cooperation of the federal government in exercising its export permitting authority. If federal export measures are successfully impugned, the ability of the Province to sustain domestic value-added processing requirements would certainly be undermined, if not negated.
52. For these reasons, it is essential to consider the extent to which the Investor’s arguments implicate provincial measures so as not to abrogate rights explicitly reserved to the provinces under Annexes 301.3 and Annex I.
53. In addition to the collateral impact of this claim on provincial measures, the exceptions for such measures are also relevant to the determination of the Investor’s claim that Canada has failed to accord it National Treatment because it does not impose export controls on logs harvested from private lands in other Canadian provinces.
54. As noted, the Investor’s argument would ostensibly require the federal government to establish identical export controls for logs harvested in other provinces if it wishes to preserve those controls in any province. The result would mean export controls where



there is no rationale for them, or where they may actually negate provincial policies favouring export sales.

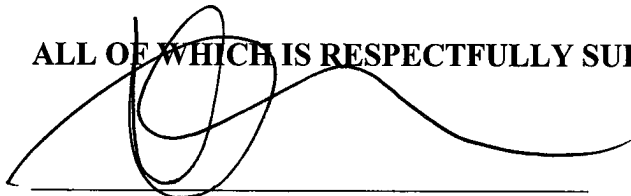
55. Conversely, where provincial measures depend upon restricting access to export markets, as they do in the province of British Columbia, denying the federal government the right to give effect to these policies would effectively negate the reservation established for such measures. This would be clearest in the case where provincial measures did, as they do not in the case of British Columbia, actually deny National Treatment to domestic investors.
56. These consequences point out the fallacy of addressing the Investor's claim without taking into account the reservations for provincial measures established under Annexes 301.3 and I, particularly in light of the "underride" provision of Article 1112.
57. As Canada points out, there are very significant variations among forestry sectors across the country. Each province has its own types of forests, forestry economics and forestry regulations that differ from those in British Columbia.<sup>19</sup> This, we submit, explains why Canada took steps to preserve the prerogatives of provincial governments to maintain their respective regulatory regimes notwithstanding NAFTA rules.
58. Under these reservations, Canadian provinces are accorded significant latitude to fashion their respective policies, including those that will determine the extent to which producers and traders will have access to export markets. As noted, the cooperation of the federal government is essential if effect is to be given to those provincial export policies.

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<sup>19</sup> Canada's Counter-Memorial, para. 373.

59. For these additional reasons we submit that the Investor's claim against the Government of Canada be dismissed.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

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