B-2

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

BETWEEN:

POPE & TALBOT, INC.

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

GOVERNMENT OF CANADA

COUNTER-MEMORIAL

(PHASE TWO)

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PART ONE – FACTS

A) Introduction

1. Canada reiterates the facts in paragraphs 23 through 115 of its Counter-memorial (Phase 1), in paragraphs 7 through 28 of its Reply to the Investor's Motion for Interim Measures and in Canada's responses to Tribunal questions, submitted on August 8, 2000.

B) Legislative Framework

2. The *Export and Import Permits Act*[1] ("EIPA") provides for the creation of an Export Control List of goods subject to export restrictions (the "List").[2]

3. The EIPA authorises the Minister to issue permits. In practice, the Minister provides undertakings respecting fees payable for exports of goods included on the List. These undertakings are called "quota allocations".[3]

4. All EIPA decisions are taken in the name of the Minister and are decisions of the Minister.[4]

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[1] R.S.C. 1985, C. E-19
[2] Valle Affidavit #1, paras 7 through 11; Valle Affidavit #2, para. 10, 13; Tribunal Request for Documents, "New Entrants" Q1.
[3] Valle Affidavit #1, paras 7-11; See Valle Affidavit #2, para. 11.
[4] Valle Affidavit #2, para. 13.

C) Overview of the Canadian Administrative System Allocating Softwood Lumber Quota

5. Canadian Tariff Rate Quotas ("TRQ") are largely market-based allocation regimes. These regimes encourage fairness and efficiency and allow stakeholders to operate in an equitable and predictable environment. They allocate quota to individual companies with a history of participation in the relevant market while providing for unforeseen circumstances, new entrants, and adjustments for under-utilisation of quota.[5]

6. The SLA is a treaty between the United States ("U.S.") and Canada, which was subsequently modified by the SLA Amendment. It was implemented through a TRQ regime, many aspects of which were dictated by the treaty. It is described in greater detail at paragraphs 44, 45, 49 and 100 of Canada's Counter-memorial (Phase 1).

7. The policies, procedures, and regulations promulgated to administer quota are collectively referred to as the Export Control Regime.[6]

8. The Investor erroneously suggests that Canada could implement the SLA in any way it chose "so long as exports from the four largest provinces were included under this restraint mechanism".[7] Canada could not. The fact is that the SLA imposed a "restraint" of 14.7 billion board feet specifically and exclusively on exports of softwood lumber first-manufactured in the four covered provinces.

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[5] Valle Affidavit #2, para. 22.
[6] Tribunal Request for Documents, "New Entrants" Q1.
[7] Investor's Memorial, (Phase 2) (hereinafter "Memorial"), para. 12.

ns ation and Communication with Stakeholders

9. Canada designs and administers quota allocation regimes in consultation with interested groups and other levels of government.[8] This enables affected stakeholders to participate in policy development, understand the regime and plan their business affairs.[9]

10. Canada uses various methods to obtain and disseminate information about the softwood lumber quota scheme. These include meetings with industry advisory committees, communications with industry associations, provincial governments, individual companies, Members of Parliament and other individuals representing companies, and regular monitoring of sources such as industry publications.[10]

11. The Export and Import Controls Bureau (hereinafter "EICB") also informs stakeholders about the relevant rules and policies by publication in the *Canada Gazette*, Notices to Exporters, the EICB internet site, and direct mailings to stakeholders.[11]

1) Consultations prior to September 10, 1996 Minister's Announcement

2. EICB consultations with industry and provincial governments before mid-April 1996 identified various groups interested in quota allocation issues and surveyed their preliminary views on export levels and access to allocations by wholesalers and new entrants.[12]

Valle Affidavit #1, paras 13, 46-48; Valle Affidavit #2, para. 16; George Affidavit #3, para. 14.
Valle Affidavit #2, paras 16-17.
George Affidavit #3, para. 14; Valle Affidavit #2, para. 17.
George Affidavit #3, para. 15. Valle Affidavit #1, paras 17-22, 27-33, 46-50, 51, 58-69, 73-88. Valle Affidavit #2, para. 8.
George Affidavit #2, Exhibit. "Y"; Valle Affidavit #1, Exhibits. "E", "F", "G"; Valle Affidavit #2, para. 25.

13. It became clear from these consultations that there was no reliable source of empirical data about softwood exports to the United States. The consultations also disclosed that various primary producers and re-manufacturers were expanding production of softwood lumber products across Canada, and particularly in eastern Canada. [13]

14. Given the lack of existing reliable data, the EICB developed a questionnaire in consultation with industry and audit professionals. The questionnaire was circulated to primary producers, remanufacturers and wholesalers in June 1996 (the "June Questionnaire"). It was to be the basis for calculation of quota allocations.[14]

15. The softwood lumber industry insisted that the information in the June Questionnaire be held in confidence as it was commercially sensitive.[15]

16. The Investment completed and submitted the June Questionnaire. It claimed no new or expanded production in 1995 and no proposed expansion or investment in 1996 and 1997.[16]

17. The June Questonnaire identified the volume of direct exports of softwood lumber products to the U.S. by primary producers, wholesalers and re-manufacturers between the beginning of 1994 and the end of the first quarter (March 31) of 1996.[17]

18. Overall the responses to the June Questionnaire showed that, on a percentage basis, B.C. lost market share to Eastern Canada between 1994 and the end of the first quarter of 1996. In addition, the responses indicated that industry in Canada, and particularly in Eastern Canada, had made substantial investments in new or expanded facilities.[18]

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[13] Valle Affidavit #2, para. 26.
[14] Valle Affidavit #1, paras 52-56; Valle Affidavit #2, paras 27, 33.
[15] Valle Affidavit #2, para. 33.
[16] Valle Affidavit #2, para. 37.
[17] Valle Affidavit #2, para. 27 & 30.
[18] Valle Affidavit #2, paras 41-42.

19. On August 19, 1996, an *ad hoc* committee of industry representatives met with the Minister and EICB officials (hereinafter "August 19 meeting") to discuss the outcome of the data-collection exercise and potential quota allocation principles.[19]

20. The issue of new entrants was discussed extensively during this meeting, including topics such as eligibility for New Entrants' reserve quota, participation of industry representatives in the drafting of questionnaires for new entrants, and the timing of new entrant allocations.[20]

21. The August 19 meeting resulted in a general consensus about the basic features of the allocation system, including provision for new entrants and a growth mechanism. Not surprisingly, some "sensitivities" remained, for example about how to define new entrants, the size of the New Entrants, reserve and the existence of a "growth mechanism". The government resolved these sensitivities by further consultation.[21]

22. On September 10, 1996, the Minister announced the principal elements of the quota regime, including the criteria for allocations to new entrants. He also announced that wholesalers would not receive direct allocations.[22]

2) Consultations after the September 10, 1996 Minister's Announcement

23. A number of issues were discussed and resolved between September 10, 1996 and October 31, 1996, the date on which allocations of quota were communicated to companies. In particular, questions concerning the allocation of export sales by wholesalers, deduction of reserves from EB and design of the New Entrant reserve were addressed.

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[19] Valle Affidavit #2, para. 40-42; Valle Affidavit #1, Exhibit "J".
[20] Valle Affidavit #2, para. 43; Valle Affidavit #1, Exhibits "J" & "K".
[21] Valle Affidavit #2, paras 45, 49-52.
[22] Valle Affidavit #2, paras 57; Valle Affidavit #1, Exhibit "P".

c) New Entrants

33. In early October 1996 the EICB distributed a second questionnaire to primary producers and remanufacturers across Canada inviting them to identify themselves as potential "new entrants" and describing the new entrant categories in detail.[35]

34. The EICB reviewed the applications and made recommendations on the amount of quota each eligible applicant should receive. Every eligible new entrant received new entrant quota.[36]

3) Consultations Subsequent to Initial Allocation of Quota

35. A National Advisory Committee of industry and government representatives from each covered province was established after the initial allocations of quota were made on October 31, 1996. This supplemented existing consultation mechanisms.[37]

36. At Canada's invitation, the B.C. industry and provincial government established another group, the British Columbia Softwood Lumber Advisory Committee ("B.C. Advisory Committee") to make recommendations to the Minister. There is regular communication between the EICB and the B.C. Advisory Committee through telephone calls, letters and faxes.[38]

37. Advisory Committee recommendations are not determinative, but are factors considered by the Minister in the decision-making process.[39]

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[35] Valle Affidavit #2, paras 94, 95. Valle Affidavit #1, para 115 and Exhibit "T".
[36] Valle Affidavit #1, paras 117-125. Response to Tribunal Question, #7. Tribunal Request for Documents "New Entrants", Q-5, 7, 9.
[37] George Affidavit #2, paras 25-27; George Affidavit #3, paras 16-19;
[38] George Affidavit #3, para. 20.
[39] George Affidavit #3, para. 22.; Valle Affidavit #2, paras 18 & 19.

29. In the end, Canada determined that the best available option was to apply a wholesaler co-efficient (a mathematical calculation derived from taking a wholesaler's exports to the U.S. through its distribution facilities and dividing that number by the volume of lumber purchased by the wholesaler and sold to the U.S. through its distribution facilities and directly from the primary mill during the same period) to determine what proportion of sales to wholesalers by primary mills or remanufacturers were exported to the U.S.[29]

b) Agreement to Deduct Reserves from EB

30. The Investor tenders no evidence to support its assertion that "Canada unilaterally decided, without consultation or announcement, to first deduct the discretionary allocations from the national allocation...,". [30] The evidence is to the contrary.

31. In letters to industry associations in the four covered provinces, Canada confirmed "the agreed upon methodology" for allocating quota to primary producers and remanufacturers.[31] Initially, there would be a provincial corporate allocation of the quota left after the EICB deducted reserves from the established base.[32] Thereafter annual quota was to be allocated based on individual company utilisation.[33]

32. This letter was sent to the Investment on November 7, 1996.[34]

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[29] Valle Affidavit #2, paras 76, 77. Notice to Exporters No. 94, para 9.3 (Book of Treaties - Tab 16).
[30] Memorial, para. 30; Valle Affidavit #2, paras 83-87, 139 – 143, 161 – 168.
[31] Valle Affidavit #2, paras 84-86.
[32] Valle Affidavit #2, paras 85 & 87.
[33] George Affidavit #2, para. 36; Notice to Exporters No. 94, para. 11.6 (Book of Treaties – Tab 16).
[34] Valle Affidavit #2, para. 84 & Exhibit 7.

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[35] Valle Affidavit #2, paras 94, 95. Valle Affidavit #1, para 115 and Exhibit "T".
[36] Valle Affidavit #1, paras 117-125. Response to Tribunal Question, #7. Tribunal Request for Documents "New Entrants", Q-5, 7, 9.
[37] George Affidavit #2, paras 25-27; George Affidavit #3, paras 16-19;
[38] George Affidavit #3, para. 20.
[39] George Affidavit #3, para. 22.; Valle Affidavit #2, paras 18 & 19.

38. In addition to consultation with advisory committees and industry associations, Canada continued to have extensive direct communication with individual quota holders regarding various aspects of the quota allocation process.[40] Individual quota holders receive detailed Notices to Exporters and extensive background notes that explain the allocation methodology.[41]

39. The EICB's internet site[42] also contains extensive information on the softwood lumber quota allocation process, including the Notices to Exporters, statistics on quota usage and exports (updated each working day) and public reports on arbitration awards. The web site further identifies all quota holders, including new entrants.[43]

40. When information is provided to exporters, there is an invitation to seek clarification or further explanation along with the EICB's telephone and fax numbers and mailing address.[44]

41. The EICB receives many inquiries daily. It ensures that each inquiry is addressed and that further steps to resolve problems are taken where necessary.[45] EICB officials also meet with company officials or their representatives, on request, to discuss specific quota allocation issues.[46]

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[40] George Affidavit #3, para. 24. Valle Affidavit #2, paras 109, 123, 188-190, 206-210; Valle Affidavit #1, paras 22, 29, 30, 126.
[41] George Affidavit #3, paras 25-26. Valle Affidavit #2, paras 99, 202. Valle Affidavit #1, paras 123-126, Exhibits "U" and "V".
[42] http://www.dfait-maeci.gc.ca/eicb/softwood/lumber-e.htm
[43] George Affidavit #3, para. 27; Valle Affidavit #1, Exhibit "U". Notices to Exporters identified in Tribunal Request for Documents, "New Entrants" Q1.
[44] George Affidavit #3, para. 28.
[45] George Affidavit #3, para. 29.
[46] George Affidavit #3, para. 29.

42. Quota holders unsatisfied with the response they receive from the EICB have pursued the matter with a phone call or additional correspondence.[47] They have also, on occasion, addressed comments or concerns to more senior officials or to the Minister. A few have approached the Department through their elected Member of Parliament.[48]

43. Requests for reviews of allocation levels are given the same attention regardless of whether the request is made to the EICB, the Minister, or through a Member of Parliament. Furthermore, when requests are made, the source of the request, or political support for the request, does not affect the assessment of a company's case.[49]

44. Moreover, the Investor tenders no evidence that only investments with the best lobbyists had "access" to the Minister and had their concerns addressed.[50] Canada flatly denies this allegation.[51]

45. The EICB responds to all inquiries regarding quota allocation methodology and requests for additional quota, regardless of the source of the inquiry.[52] EICB staff discuss the Minister's Reserve and how one might apply for an allocation from that reserve. They also ensure that callers are aware of the existence and purpose of provincial advisory committees and associations.[53]

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[47] George Affidavit #3, para. 31.
[48] George Affidavit #3, para. 32.
[49] George Affidavit #3, para. 38; Response to Tribunal Question, #5; Valle Affidavit #2, para. 200.
[50] Memorial, paras 19, 197, 281, 284-6; George Affidavit #3, paras 35, 38.
[51] George Affidavit #3, paras 35, 38; Valle Affidavit #2, para. 200.
[52] George Affidavit #3, para. 34; Valle Affidavit #2, para. 207.
[53] George Affidavit #3, para. 33.

46. The Investment wrote to the EICB once, objecting to the reduction in the Investment's year 3 quota allocation. An explanation was provided, with an invitation to Mr. Friesen to contact the EICB if he had further questions.[54] The Investment sought no further explanation from Canada.[55]

E) Review or Appeal Mechanisms

47. In addition to the mechanisms described above, an aggrieved quota holder could pursue judicial review of quota allocation decisions. The Investor's assertion that the Export Control Regime "was designed to operate in the absence of any independent review mechanism"[56] is plainly incorrect.

48. The *Federal Court Act*,[57] and the *Supreme Court Act*,[58] provide for judicial review and subsequent appeals of quota allocation decisions.[59] The Federal Court of Canada reviews decisions concerning quota allocation on a record compiled in accordance with the Federal Court Rules.[60] The Court reviews on broad grounds and may reverse or revise an erroneous or improper decision.[61]

49. Therefore, the avenue of independent review available to all softwood lumber producers was and remains judicial review of quota allocation decisions by the Federal Court of Canada. Four quota holders commenced judicial review proceedings to review their allocation of softwood lumber quota.[62] The Investment never availed itself of this option.[63]

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[54] George Affidavit #2, paras 95-97; George Affidavit # 3, para. 40.
[55] George Affidavit #3, para. 40.
[56] George Affidavit #2, para. 96. Memorial, paras 16, 195(a), 195(c), 196, 219.
[57] R.S.C. 1985, c. F-7, as am. (Phase 2 Authorities – Tab 46).
[58] R.S.C. 1985, c. S-26, as am. (Phase 2 Authorities – Tab 56).
[59] Valle Affidavit #2, paras. 14, 194-197.
[60] SOR/ 98-106 (Phase 2 Authorities – Tab 55).
[61] *Federal Court Act*, R.S.C. 1985, c. F-7.
[62] George Affidavit #3, para. 44; Valle Affidavit #2, para. 195.
[63] George Affidavit #3, para. 51; Valle Affidavit #2, para. 198.

F) Quota Allocation

1) Base Year

50. In year 1, quota allocation was made on the basis of the average of 1994 or 1995 export volumes for B.C. and the better of 1994 or 1995 or a third period for Alberta, Ontario, and Quebec.[64] The B.C. industry expressly requested a base year formula different from the one used by the other covered provinces.[65]

2) One Time Transitional Adjustment

51. The transitional adjustment applied only to year 1 of the SLA.[66] It was required because the SLA was in force for several months before exporters had quota allocations.[67] Hence, from April 1 to September 30, 1996 ("first come, first served period") companies were required to obtain export permits, which enabled Canada to track exports during the first come, first served period.

52. Canada advised companies that the allocations ultimately received would take into account "any adjustments necessary to reflect shipments by exporters who have already exceeded their expected annual allocation and shipments by firms not eligible for an allocation."[68]

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[64] Notice to Exporters No. 94, paras 9.1 – 9.6 (Book of Treaties – Tab 16); Tribunal Request for Documents, "Allocation to Established Businesses in 1st Year".
[65] Notice to Exporters No. 94, paras 9.1 – 9.6; Tribunal Request for Documents, "Allocation to Established Businesses in 1st Year".
[66] Response to Tribunal Question, #4; Valle Affidavit #2, para. 133.
[67] Response to Tribunal Question, #4; Valle Affidavit #2, para. 135.
[68] This was further explained in para. 10.1 of Notice to Exporters No. 94 (Book of Treaties – Tab 16); Response to Tribunal Question, #4.

53. Contrary to the Investor's suggestion,[69] Canada did not institute the permit system for exports of softwood lumber during the first-come, first-served period as a basis to calculate quotas. Rather, Canada instituted such a system to meet obligations under the SLA to account for exports and collect fees.[70]

54. During the first-come, first-served period, a number of shipments were made by primary mills or remanufacturers who ultimately received no allocation and by wholesalers that had shipped lumber that could not be traced back to a quota holder. As well, a number of quota holders made shipments in the initial six months at levels that exceeded their entire annual allocation. A pool of quota was needed for those exports.[71]

55. The Investor suggests, with no evidence, that there was a "border rush" intended "to influence any calculation of quota allocation...".[72] To the contrary, a minimal amount of quota was required to make the transitional adjustment.

56. The entire transitional adjustment required only 170 million board feet of EB quota and 50 million board feet of LFB, equivalent to 1.16% of the year 1 EB and 7.69% of the year 1 LFB.[73] These amounts were deducted from the 14.7 billion board feet of EB and the 650 million board feet of LFB before corporate provincial shares were allocated.[74]

57. Contrary to the Investor's assertion, the transitional adjustment was not a gift of extra quota to companies that rushed the border in excess of their initial quota allocation.[75] Rather, it was used to correct situations identified by the permit data. Companies that received transitional adjustment had no fee free exports left for the quota year.

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[69] Memorial. para. 36.
[70] Valle Affidavit #2, para. 135; Response to Tribunal Question, #4.
[71] Response to Tribunal Question, #4.
[72] Memorial, para. 37.
[73] Response to Tribunal Question, #4; Valle Affidavit #2, para. 132.
[74] Response to Tribunal Question, #4. Valle Affidavit #2, para. 134.
[75] Memorial, para. 39.

58. Furthermore, transitional adjustment was not allocated on the basis of the company's location, nor was it allocated based on the nationality of the exporter or its investors.[76]

59. The one-time transitional adjustment was not a factor in calculating year 2 allocations. These quantities (170 million board feet of EB and 50 million board feet of LFB) were returned to the national quota "pool" for general distribution in year 2 and therefore mitigated the effect of any quota reductions going into year 2.[77] The Investment and other companies benefited, in year 2, from the return of this transitional quota to the national quota "pool".[78]

60. The Investment did not receive a share of the transitional reserve because it had not exported in excess of its allocation during the first-come, first-served period.[79]

3) New Entrants

61. The Quebec and Ontario industry associations were particularly concerned that mills which had recently come into operation, were expanding or were about to begin production in 1996 or 1997 would get no, or insufficient, quota to be economically viable. Such mills had little or no historical record of U.S. exports, the basis for determining allocations under the general methodology used for established companies.[80]

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[76] Response to Tribunal Question, #4.
[77] Notice to Exporters No. 94. (Book of Treaties – Tab 16); Response to Tribunal Question, #4; Valle Affidavit #2, para. 133.
[78] Response to Tribunal Question, #4; Valle Affidavit #2, para. 133.
[79] Response to Tribunal Question, #4.
[80] Response to Tribunal Question, #6; Valle Affidavit #1, paras 62-63.

62. Generally, Quebec and Ontario industry associations strongly urged that provision be made for new entrants to receive sufficient quota to justify and protect their investments. The Quebec industry had proposed that at least 4% of EB be set aside for new entrants.[81]

63. On the other hand, the B.C. and Alberta industries agreed that 2% of EB be allocated to new entrants but proposed narrower eligibility criteria; they did not support the proposal that trigger price bonus quota be allocated to new entrants.[82]

64. Canada's solution resulted from the August 19 and subsequent consultations. It provided for a New Entrant's reserve of 2% of 14.7 billion board feet of EB quota (294 million board feet); bonus quota available under the SLA trigger price bonus mechanism, which Canada expected would amount to the first two bonuses, at a minimum (184 million board feet);[83] and, 150 million board feet of LFB quota.[84]

65. The Investor erroneously suggests that Canada expanded the New Entrant's reserve by adding LFB to new entrant allocations in spite of a consensus reached to limit it to EB.[85] The fact is that the consensus on the amount of New Entrant's reserve was reached only after LFB was added.[86]

66. The Export Control Regime set aside quota for "new entrants".[87] New entrants were firms that began operation in 1995 or 1996; had "bricks and mortar in the ground" by April 1, 1996; had made verifiable investment commitments by April 1, 1996; and companies that had undertaken "major" capital investments in new production

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[81] Response to Tribunal Question, #1 & #6; Valle Affidavit #1, para. 64.
[82] Response to Tribunal Question, #1 & #6.
[83] Valle Affidavit #1, Exhibit "K", Tab 16; Valle Affidavit #2, para. 89.
[84] Response to Tribunal Questions, #2 & #6; Valle Affidavit #2, para. 89.
[85] Memorial, para. 44.
[86] Response to Tribunal Question, #2.
[87] Notice to Exporters No. 94, para. 8.1, & 12.1. (Book of Treaties – Tab 16). 628 mmbf was set aside for them - 294 mmbf of which came from a 2% reduction in Canada's EB; 184 mmbf of which came from the fee-free trigger price bonus; and 150 mmbf of which came out of the LFB.

capacity since January 1, 1995.[88] New entrants could make use of this quota from October 1, 1996 through March 31, 1998. These categories applied to both primary mills and remanufacturers.[89]

67. The deadline for applications for new entrant quota was October 18, 1996.[90] Applications far exceeded the amount set aside, with 218 companies requesting nearly 8.3 billion board feet of quota.[91] Only 7.5 % of the quantity requested could be accommodated.[92]

68. Each application was reviewed according to national criteria, without regard to the province in which the applicant operated.[93] The review process is described in detail in Canada's Response to Tribunal Question, #7.

69. Every new entrant that submitted complete information by the specified deadline and satisfied the criteria received an allocation, regardless of the province in which they were located and regardless of their nationality. This amounted to 83 companies of the original 218 that submitted applications.[94]

70. The Investment was sent a new entrant questionnaire, but did not submit an application or otherwise request an allocation of new entrant quota. It therefore was never considered for new entrant quota allocation.[95] Neither the Investment nor the Investor made representations regarding the allocation of quota to new entrants.[96]

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[88] Notice to Exporters No. 94, para. 12.2. *ibid.* "Major" investment was considered a plant capacity expansion of not less than 50%, in part because the requested new entrant quota totalled 8.3 billion board feet (or more than thirteen times the established new entry quota allocation of 628 mmbf); Response to Tribunal Question, #7.
[89] Response to Tribunal Question, #7.
[90] Valle Affidavit #2, para. 97.
[91] Response to Tribunal Question, #7.
[92] Response to Tribunal Question, #7.
[93] Response to Tribunal Question, #7. See also paragraph 106 of the Amended Statement of Defence.
[94] Response to Tribunal Question, #7.

71. The Investor asserts that it was "led to assume" that new entrant quota would be allocated by provincial share.[97] This is unsubstantiated and incorrect.[98]

72. Contrary to the Investor's suggestion,[99] it was impossible for New Entrant's reserve to be available to coastal producers affected by the collapse of the Japanese market. New entrants self-identified in October 1996. All eligible new entrants were allocated quota from the New Entrant's reserve on October 31, 1996. In 1997, when the Japanese market collapsed, applications for New Entrant's reserve were no longer being accepted, at the strong urging of industry, especially B.C. industry.[100]

73. If Canada had re-opened the allocation system to additional new entrants, the quota would have had to come from other quota holders, including the Investment.[101] The Investor's suggestion is curious as it appears to suggest that Canada should have taken quota from established companies, including the Investment, during the entire period of the SLA to accommodate new exporters at any time.

74. Finally, new entrants were not entitled to "significant advantages vis-a-vis established producers" as suggested by the Investor.[102] By comparison, new entrants received quota allocations greatly inferior to that of the Investment and other established exporters.[103] The subsequent allocation of the additional two trigger price bonuses did not substantially change this situation.

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[95] Response to Tribunal Question, #7; Valle Affidavit #2, para. 96.
[96] Responses to Tribunal Questions, #1, 2 ,3, 6, 8.
[97] Memorial, para. 43.
[98] Valle Affidavit #2, paras 92-93.
[99] Memorial, para. 42.
[100] George Affidavit #3, para. 157.
[101] George Affidavit #3, para. 157.
[102] Memorial. para. 45.
[103] For example, the Investment's average production for 1994 and 1995, as reported in its questionnaire, was [redacted] Its EB and LFB allocations were [redacted] or [redacted] of its production. A review of the documents provided by Canada in response to the Tribunal's Request for Documents "New Entrant" Q3 (Tab 20) show that new entrants did not receive allocations even approaching this proportion; Valle Affidavit #2, para. 153

4) The B.C. Adjustment

75. At the end of year 1, the B.C. Advisory Committee recommended that the Minister adjust the quota allocated to certain B.C. companies. The Minister gave effect to this B.C.-specific recommendation, resulting in increased allocations to some companies and decreases in the order of 3 % to most companies.[104]

76. There were concerns in B.C., Alberta and Quebec that some companies may have gained higher quotas at the expense of other companies as a result of the application of their provincial formula.[105]

77. Canada indicated to the provincial industries that it was prepared to address their concerns when calculating the final 1997/98 allocations as long as they accepted the requirement that any adjustments to the allocations to companies would be fit back within the year 1 provincial corporate share (as was done in the case of Ontario).[106] The B.C. Advisory Committee indicated that it was prepared to accept this condition.[107]

78. In April 1997, the B.C. Advisory Committee provided Canada with a list of companies that it proposed should have their allocations adjusted.[108] The B.C. Advisory Committee also made recommendations for allocations of Trigger Price Bonus.[109]

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[104] Valle Affidavit #1, paras 149-153; Response to Tribunal Question, #7.
[105] Tribunal Request for Documents, "New Entrants" Q12; Memorandum to MINT dated May 27, 1997 (Tab 50). Response to Tribunal Question, #7.
[106] Response to Tribunal Question, #7.
[107] Response to Tribunal Question, #7.
[108] A facsimile from the B.C. Advisory Committee dated April 17, 1997 (Tab 50) includes the committee's recommendations for adjustments and summary sheets for each company. Tribunal Request for Documents, "New Entrants" Q12. Valle Affidavit #1, Exhibit "W"; Valle Affidavit #2, paras 171-179; Response to Tribunal Question, #7.
[109] See facsimile from the B.C. Advisory Committee dated April 17, 1997, *Ibid.* Response to Tribunal Question, #7.

79. Most of B.C.'s proposed adjustments related to problems stemming from the application of the B.C. averaging formula. While Canada disagreed with the B.C. Advisory Committee's characterisation of the cases as wholesaler issues, Canada agreed that adjustments for these companies were warranted and it therefore adjusted their year 2 allocations by a total of 209.5 million board feet,[110] with a corresponding reduction in quotas for other B.C. companies.[111]

80. Contrary to the Investor's assertion, Canada did not "impose" a reallocation to accommodate companies that "complained the loudest."[112] Rather, Canada resolved issues raised by the B.C. Advisory Committee and made adjustments to the quota of companies suggested by the B.C. Advisory Committee.[113]

81. The B.C. Advisory Committee sent a letter on July 16, 1997 to the Investment[114] that explained the basis for the 1997/98 allocations and recognised that the adjustments the B.C. Advisory Committee recommended resulted in allocation decreases for certain B.C. companies, including the Investment.[115]

82. Adjustments recommended by the B.C. Advisory Committee were not made on the basis of the nationality of the ownership of the investment.[116]

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[110] Response to Tribunal Question, #7; See Annex C to Memorandum to MINT dated May 27, 1997 at Tab 50; Tribunal Request for Documents, "New Entrants" Q12.
[111] Response to Tribunal Question, #7; Valle Affidavit #2, paras 171-179.
[112] Memorial, para. 215.
[113] Valle Affidavit #2, para. 179.
[114] Response to Tribunal Question, #7; Tribunal Request for Documents, Tab 98, contains a letter provided by the Investor at Tab 251 of its document production.
[115] Response to Tribunal Question, #7.
[116] Response to Tribunal Question, #7.

5) Minister's Reserve

83. The Minister's Reserve was set aside to enhance fairness and flexibility. Allocations from the Minister's Reserve are made to correct errors and omissions and address hardship situations in individual allocations. Other companies' allocations are unaffected, thereby promoting predictability for quota holders.[117]

84. Such reserves are found in other Canadian quota regimes. While there are no express limits on the size of such reserves, they seldom exceed 1% percent of the total quota.[118] In the case of the softwood lumber quota regime, the Minister's Reserve has always been approximately one third of 1% of the 14.7 billion board feet of EB available for annual distribution.[119]

85. In Year 1 of the SLA, the Minister retained 50 million board feet of EB quota (.34% of the total amount of EB) for the Minister's Reserve. This was supplemented by an additional 8.4 million board feet of EB quota (.05% of the total EB) that became available as a result of two questionnaire verification reviews in which exports had been overstated.[120]

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[117] Response to Tribunal Question, #5. George Affidavit #3, para. 56; Valle Affidavit #2, para. 103. For example, companies that had been in operation too long to qualify as new entrants but which had not yet achieved full production or export levels were considered for Minister's Reserve allocations if the standard methodology failed to fully take into account their circumstances. Memoranda to MINT dated April 3, 1997 and May 27, 1997. Tribunal's Request for Documents Tabs 17, 18 explain the bases for allocations from the Minister's Reserve in greater detail. The memorandum at Tab 18 lists the companies receiving allocations from the Minister's Reserve in Year 1; Tribunal Request for Documents "New Entrants" Q1.

[118] Response to Tribunal Question, #5.

[119] George Affidavit #3, para. 57.

[120] Response to Tribunal Question, #5.

86. In Years 2, 3 and 4, the Minister's Reserve was reduced to 40 million board feet of EB quota (.27% of total EB) per year.[121] The year 2 reserve was supplemented with quota from the Q5 and Q6 trigger price bonuses.[122] The bonus quota remaining toward the end of year 2 was added to returned quota for re-allocation.[123]

87. In Year 5, no EB was reserved, but 10 million board feet of trigger price bonus quota was set aside for the Minister's Reserve.[124]

88. The Minister uses this reserve to make adjustments to quota allocations on a case-by-case basis after assessing requests submitted by or on behalf of individual companies.[125] EICB also advises aggrieved quota holders of the potential for an allocation from the Minister's Reserve.[126]

89. In addition, Canada frequently consults provincial governments and/or provincial advisory committees, and considers their recommendations in making Reserve allocations,[127] though these are not determinative.

90. Each request for Minister's Reserve is assessed on its merits.[128] Verification reviews are conducted where warranted to confirm the accuracy of representations made in support of the request for quota from the Minister's Reserve.[129]

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[121] Response to Tribunal Question, #5.
[122] Tribunal Request for Documents "New Entrants" Q8. Memorandum to MINT dated November 20, 1997 (Tab 38). Response to Tribunal Question, #5.
[123] Tribunal Request for Documents "New Entrants" Q9. Memorandum to MINT dated February 10, 1998 (Tab 40). Also, see Response to Tribunal Question, #5 & 10.
[124] Response to Tribunal Question, #5. George Affidavit #2, paras 61-65, 77-79, 100-102 & 109; Tribunal Request for Documents "New Entrants" Q8 & 9. Memoranda to MINT dated August 1, 1997 (Tab 37), November 20, 1997 (Tab 38), February 10, 1998 (Tab 40), June 4, 1998 (Tab 41) and November 24, 1998 (Tab 39).
[125] Valle Affidavit #2, paras 103-106.
[126] George Affidavit #3, para. 59.
[127] Response to Tribunal Question, #5. George Affidavit #3, para. 59.
[128] George Affidavit #3, para. 59; Valle Affidavit #2, para. 105.
[129] Response to Tribunal Question, #5.

91. Starting in mid-November, 1996, the EICB considered several requests for Minister's Reserve quota by individual companies writing to the EICB or to the Minister.[130]

92. In most cases, the EB allocations made from the Minister's Reserve are "permanent," in the sense that utilization of Reserve quota is part of the calculation of the next year's allocation. Permanent allocations from the Minister's Reserve correct errors or hardship situations permanently. However, allocations from the Minister's Reserve are made on a one-time basis only where it would be inappropriate to allocate it on a permanent basis.[131]

93. Allocations from the Minister's Reserve are made without regard to a company's location or the nationality of its investors. The Minister's Reserve is not used to secretly direct quota to companies first manufacturing softwood lumber in Quebec.[132]

94. The Investment never sought an allocation from the Minister's Reserve.[133]

6) Trigger Price Bonus

95. A trigger price bonus of an additional 92 million board feet of fee-free quota[134] is earned when U.S. softwood lumber prices stay above a certain level in a calendar quarter. Such bonuses were earned in the 1st to 6th quarters and again in the 12th to 16th quarters of the SLA.[135]

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[130] Valle Affidavit #2, para. 109.
[131] George Affidavit #3, paras 67 & 68. Valle Affidavit #2, paras 107 & 108.
[132] George Affidavit #3, para. 60; Valle Affidavit #2, paras 150, 152, 154-156.
[133] George Affidavit #3, paras 71; Response to Tribunal Question, #5.
[134] SLA, Article III
[135] George Affidavit #3, para. 71.

96. The exemption from the "speed bump" provision was for trigger price bonus quota only, and not, as the Investor asserts, for New Entrant's reserve.[136] Canada reiterates that this exemption was the same for all quota holders, including the Investment.

97. The bonuses earned in Q1 and Q2 were set aside for new entrants consistent with the consensus that the first two trigger price bonuses, at a minimum, would be allocated to new entrants.[137]

98. The allocation of the trigger price bonus and LFB quota to new entrants was designed to allow a bigger distribution of EB in year 1 to established companies with historical export performance.[138] Stakeholders were advised that utilisation of bonus quota in year 1 of the SLA would count in the calculation of EB quota in year 2.[139]

99. Given the limited amounts of quota available to new entrants relative to their need, the Minister decided to take additional measures to assist new entrants. New entrants received a total 628 million board feet (EB, LFB and Bonus) or 4.27% of total EB (14.7 billion board feet). The two additional trigger price bonuses amounted to an additional 1.25% of total EB. They received quota derived from the trigger price bonuses in Q3 and Q4.[140]

100. The Q3 bonus was allocated to specific new entrants that had been identified as needing assistance, with the balance also going to new entrants, based on the average ratios of original allocations to their respective investment levels.[141]

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[136] Memorial, paras 45 & 50.
[137] Response to Tribunal Question, #6.
[138] Response to Tribunal Questions, #2 & #6.
[139] This was explained in paragraphs 11.2 and 12.3 of Notice to Exporters No. 94 (Book of Treaties – Tab 16) and in various cross-Canada seminars held in November 1996 to explain the allocation policy; Response to Tribunal Question, #6.
[140] Valle Affidavit #1, para. 139; Response to Tribunal Question, #9.
[141] Response to Tribunal Question, #9. Tribunal Request for Documents "New Entrant" Q1. Memorandum to MINT dated April 3, 1997 (Tab 17).

101. The Q4 allocations to new entrants were based on concerns about the continued viability of certain companies if they were not able to increase their fee-free access to the U.S. With regard to B.C. new entrants, the allocations were made on the recommendation of the B.C. Advisory Committee.[142]

102. The first four bonuses were allocated on a "permanent" basis. In other words, if utilised, the trigger price bonus was included in the calculation of the company's EB allocation for the next year.[143]

103. The "Smyth Report" contains errors with regard to allocation of the trigger price bonus. Unfortunately, the Investor relies on passages that are erroneous.[144] Only the first 4 trigger price bonuses earned were allocated to new entrants. The fifth and sixth bonuses were not allocated to new entrants.[145]

104. The quarter 5 bonus allocation was based on recommendations from consultative groups.[146] In three provinces, the bonus allocations were made to specific companies based on recommendations received from advisory groups. In Alberta, the allocations were made on a modified *pro rata* basis, with a minimum allocation of 35,000 board feet for smaller companies. The quarter 5 bonus allocations were also made on a "permanent" basis.[147]

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[142] Tribunal Request for Documents "New Entrant" Q1. Memorandum to MINT dated May 27, 1997, Tab 18 and the "New Entrants" Q12, Tab 50. Response to Tribunal Question, #9.
[143] Response to Tribunal Question, #9.
[144] The Investor submits unsworn extracts from the "Smyth Report" to support its case. This deprives Canada of an opportunity to cross-examine the author of the report and reduces its value. Investor's Memorial, para. 59.
[145] George Affidavit #3, para. 159; Response to Tribunal Question, #9.
[146] Tribunal Request for Documents "New Entrants" Q8; Response to Tribunal Question, #9. Memorandum to MINT dated August 1, 1997, Tab 37.
[147] Response to Tribunal Question, #9.

105. In quarter 6, approximately 11 million of the 92 million board feet bonus earned was used to replenish the Minister's Reserve. The remainder was allocated on a non-permanent, *pro rata* basis to all quota holders, including the Investment, with smaller quota holders receiving a minimum allocation of 60,000 board feet.[148] It was not set aside for allocation to new entrants.[149]

106. From quarter 12 onward, the Minister generally allocated the bonus by first calculating the percentage of EB quota held by companies in each province, and hence the aggregate volume available, and then allocating to individual quota holders after considering the recommendations of the provincial advisory committees and associations.[150] This bonus was allocated on a non-permanent basis taking into account the advice of consultative groups.[151]

107. Lengthy consultations took place with respect to the bonus allocation methodology in quarters 12 and 13.[152] These two bonuses were allocated simultaneously.[153]

108. The Minister accepted the proposals from Ontario and Alberta that bonus quota in those provinces be allocated on a *pro rata* basis with a 30,000 board foot minimum for each of the two trigger price bonuses earned.[154]

109. In Quebec, there was a *pro rata* allocation for remanufacturers, with the minimum allocation being 30,000 board feet per quarter. For Quebec primaries, the Minister adopted the Quebec Lumber Manufacturers Association ("QLMA") proposal to use a

[148] George Affidavit #3, paras 74 & 159.
[149] George Affidavit #3, paras 74 & 159.
[150] George Affidavit #3, para. 75; Response to Tribunal Question, #9.
[151] Response to Tribunal Question, #9.
[152] Tribunal Request for Documents "Discretionary Allocations" Q1. Memoranda to MINT dated September 2, 1999 (Tab 77) and December 9, 1999 (Tab 78); Response to Tribunal Question, #9.
[153] Response to Tribunal Question, #9.
[154] Response to Tribunal Question, #9.

formula that gave more quota to companies with low quota-to-sales ratios. No bonus quota was allocated to companies with a greater than 50% quota-to-sales ratio.[155]

110. For B.C., the Minister adopted the recommendation of the B.C. Advisory Committee that allocations be made to: non-tenure holders (i.e. companies that did not benefit from provincial stumpage fee reduction but were affected by the Canada-U.S. settlement); companies that were assessed SFB fees for late August 1999 exports, when they expected to pay only UFB fees; companies affected by U.S. reclassification of rougher headed lumber; and for other companies, a *pro rata* share of the balance, with a 30,000 board foot minimum allocation per quarter.[156]

111. Consultations also took place respecting Q14 (July-Sept. 1999) bonus. These formed the basis for the allocation methodology recommended.[157]

112. For Ontario and Alberta, the Minister accepted the recommendations that bonus quota be allocated on a *pro rata* basis with a 30,000 board foot minimum allocation (i.e. the same allocation policy as in Q12-Q13.[158]

113. For Quebec, the Minister accepted the QLMA proposal to repeat the same formula as was used for quarters 12-13, i.e. a *pro rata* allocation for remanufacturers, making a minimum allocation of 30,000 board feet and, for Quebec primaries, a formula that gave more quota to companies with low quota-to-sales ratios and no quota to companies with a greater than 50% quota-to-sales ratio including previous bonus allocations.[159]

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[155] Response to Tribunal Question, #9.
[156] Response to Tribunal Question, #9.
[157] Tribunal Request for Documents "Discretionary Allocation" Q1. Memorandum to MINT dated February 1, 2000 (Tab 79). Response to Tribunal Question, #9.
[158] Response to Tribunal Question, #9.
[159] Response to Tribunal Question, #9.

114. In B.C., the B.C. Advisory Committee contracted an accounting firm (KPMG) to conduct a survey to determine hardship. KPMG requested information from B.C. companies and assessed companies against criteria agreed upon with the B.C. Advisory Committee. The B.C. Advisory Committee then submitted recommendations to the Minister.

115. KPMG had collected quota, shipment and production levels up to March 31, 1999 from B.C. companies. As a result, KPMG was unaware of year 4 allocation levels and bonus allocations assigned to companies since March 31, 1999. Based on this updated information, the Minister added six companies judged to be eligible according to information available to the EICB.[160]

116. The Investment was not recommended for an allocation either by KPMG or by the B.C. Advisory Committee.[161]

117. Respecting Q15-Q16 (Oct.-Dec. 1999 and Jan.-Mar. 2000),[162] consultations with provincial advisory committees and stakeholders took place and formed the basis for the allocation methodology recommended.[163] From the total 184 million board feet available, 10 million board feet was set aside for the Minister's Reserve for year 5 prior to distribution among the provinces.[164]

118. Alberta and Ontario companies continued, as in previous allocations, to receive bonus quota based on a *pro rata* allocation with a 30,000 board foot minimum allocation.[165]

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[160] Response to Tribunal Question, #9.
[161] Response to Tribunal Question, #9.
[162] Tribunal Request for Documents "Discretionary Allocation" Q1. Memorandum to MINT dated May 17, 2000 (Tab 80).
[163] Response to Tribunal Question, #9.
[164] Response to Tribunal Question, #9.
[165] Response to Tribunal Question, #9.

119. The allocations to Quebec companies also mirrored previous allocations, i.e. *pro rata* for remanufacturers, with a 30,000 board foot minimum and, for Quebec primaries, a formula that gave more quota to companies with low quota-to-sales ratios and no quota to companies with a greater than 50% quota-to-sales ratio including previous bonus allocations.[166]

120. The Minister adopted the recommendation of the B.C. Advisory Committee for quarters 15 and 16. Ninety million board feet of bonus quota was allocated to companies with a lower than 45% quota-to-sales ratio. The amount was split equally between coastal and interior companies on a *pro rata* basis with a 100,000 board foot minimum, as recommended by the B.C. Advisory Committee.[167]

121. No trigger price bonus allocation has ever been made or denied on the basis of the nationality of a company or of its Investors. [168]

122. The Investment never requested a trigger price bonus allocation, nor has an advisory committee ever specifically recommended it for a bonus allocation. [169] The Investment was included in all general pro rata allocations of trigger price bonus to B.C. companies. [170]

123. To date, the Investment has received the following trigger price bonus allocations: in quarter 6 it received [redacted] in quarter 12 it received [redacted] and in quarter 13 it received [redacted].[171]

[166] Response to Tribunal Question, #9.
[167] Response to Tribunal Question, #9.
[168] Response to Tribunal Question, #9.
[169] Response to Tribunal Question, #9.
[170] Response to Tribunal Question, #9.
[171] Response to Tribunal Question, #9.

7) Allegation that allocations from discretionary reserves manifest a Quebec bias

124. Canada did not design an export quota regime or administer it in such a way that Minister's Reserve,[172] discretionary reserves, trigger price bonus or any other aspect would bestow an advantage on Quebec exporters.[173] This was never discussed nor was the EICB ever directed to devise a quota allocation regime for that purpose.[174]

125. Discretionary reserves and trigger price bonus were allocated where appropriate without regard to the province in which the recipient was located or to the nationality of the recipient's investor.[175]

126. New entrants identified themselves by responding to the new entrant's questionnaire. When eligibility for new entrant status was subsequently determined, it reflected the trend that was generally known in the industry - new entrants, for the most part, were located in Quebec and Ontario.[176]

127. The allegation concerning a Quebec focus in briefing notes is equally ridiculous. EICB officials prepare memoranda to brief senior officials in advance of meetings with provincial officials. Such memoranda normally discuss the concerns of companies from the province in question. They are not prepared because EICB officials believe that companies from the province require special treatment. In such memoranda, EICB officials have emphasised the benefits of the SLA to the province of the officials who will be meeting senior official of the Department.[177]

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[172] Memorial, paras. 55, 201-3; Valle Affidavit #2, paras 136, 150-60
[173] Valle Affidavit #2, para. 156.
[174] Valle Affidavit #2, para. 156.
[175] Response to Tribunal Questions, #5 & #9; George Affidavit #3, para 55.
[176] Valle Affidavit #2, paras 26, 42, 152, and Exhibit 2; Valle Affidavit #1, Exhibit "F".
[177] Valle Affidavit #2, para. 151.

128. The memoranda that discuss Quebec are of this ilk. Quebec exporters cannot be said to have been singled out for favourable attention with regard to implementation of the SLA.[178]

8) Allegation that Wholesaler's Issue in B.C. Affected the Investment's Quota

129. On April 17, 1997 the B.C. Advisory Committee recommended that twelve companies receive increases to their 1997/98 softwood quota allocation. It attributed the need for increased quota to "exports via wholesalers".[179]

130. In fact, in most cases, "exports via wholesalers" and wholesaler errors were not the basis for the adjustments. Rather, most of the companies on the list suffered hardship because of the averaging formula selected by the B.C. Advisory Committee to determine the initial allocations.[180]

131. In other cases, the adjustments responded to errors submitted by primary mills. In another case, a wholesaler itself identified purchases from a primary producer that had not been reported on the wholesaler's questionnaire.[181]

132. Neither the Investment nor any wholesaler purchasing lumber from it reported errors in their statement of direct exports of softwood lumber produced by the investment to the United States.[182]

133. The Investment did not suffer a reduced allocation because of the averaging formula. On the contrary, the averaging formula was advantageous to the Investment.[183]

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[178] Valle Affidavit #2, para. 151.
[179] Valle Affidavit #2, para. 172.
[180] Valle Affidavit #2, para. 174.
[181] Valle Affidavit #2, para. 177.
[182] Valle Affidavit #2, para. 178.

G) Verification Review

134. Canada conducts verification reviews of softwood lumber quota holders to ascertain that the information on which allocations were based was accurate and that companies are using their allocations correctly. [184]

135. Companies providing questionnaires for the purpose of obtaining a quota allocation, including the Investment, signed an undertaking that they would make their records available if so requested. [185]

136. In its questionnaire, the Investment reported exports in excess of production for two consecutive years. The EICB asked the Investment for an explanation. [186]

137. The Investment admitted that its questionnaire contained errors. The EICB opted to investigate the matter further through a verification review conducted along similar lines as for other companies. [187]

138. In good faith, Canada agreed to limit the initial review to a six-month rather than a two-year review; to conduct the verification review at the law office proposed by the Investor; and to waive the usual requirement of a tour of production facilities. [188]

139. Canada offered the Investor meetings, explanations and assistance on at least seven occasions prior to the six-month review. [189]

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[183] Valle Affidavit #2, para. 180.
[184] George Affidavit #3, para. 79. The Verification review is discussed at Memorial, para 226-34.; George Affidavit #3, paras 78-122.
[185] George Affidavit #3, para. 80; George Affidavit #1, Exhibit "B" (Pope & Talbot Ltd.'s questionnaire, with the signed undertaking on the fourth page).
[186] George Affidavit #3, para. 85.
[187] George Affidavit #3, para. 86.
[188] George Affidavit #3, para. 118.
[189] George Affidavit #3, para. 119.

140. Officials conducted reviews in a transparent fashion. Representatives of the Investor were present at all times during the four-day review and were aware of the kinds of errors that the team identified. They also participated in discussions with regard to the said errors.[190]

1) The Alleged "Audit Agreement"

141. In the course of Canada's efforts to schedule the verification review, Counsel for the Investment wrote to propose conditions under which it would agree to a review. The Investor calls this the "audit agreement".[191] It was Canada's intention to clearly explain to the Investor the nature of errors it might find but not to provide precise data in order to be able to assess the validity of a revised questionnaire, should one eventually be required of the Investment.[192]

142. At no time was there an "agreement" governing the verification review. Moreover, Canada gave no undertakings to the Investor.[193]

2) The verification report

143. A report of the verification was prepared by a EICB official, Mr. Greig Lund.[194] The analysis in the report was only meant to indicate what might possibly be the outcome once a full review was completed. The data-collection exercise was no less valid.[195] Mr. Lund's report correctly indicated that there was a need to obtain a revised

[190] George Affidavit #3, para. 95.
[191] Memorial, para. 85; George Affidavit #3, para. 96.
[192] George Affidavit #3, para. 100.
[193] Memorial, para. 6; George Affidavit #3, para. 98.
[194] George Affidavit #3, paras 104, 106.
[195] George Affidavit #3, paras 104, 106.

questionnaire to determine the magnitude of any errors. This conclusion is unaffected by the single minor mathematical error and the two classification errors discussed at the interim measures hearing. [196]

144. New evidence was introduced at the interim measures hearing that had not been provided to Mr. Lund either at the verification review or prior to the hearing. Because this information was not available to Mr. Lund, the report's analysis of a possible outcome of a full verification review was incorrect. [197]

3) After the initial review

145. Canada considered the errors made by the Investment in its original questionnaire to be significant.[198] The Investor's admitted errors accounted for 5,052,398 board feet of quota. [199]

146. Based on the verification report, Canada asked the Investment to provide a revised questionnaire for the two-year period. This would provide the most accurate data possible since it would give the Investment the opportunity to provide revised data on 100% of its sales for that period. [200]

147. Canada twice offered to hold a meeting in Ottawa after the verification review at which the Investment could pose questions and receive answers.[201] Neither the Investment nor the Investor ever responded to Canada's offer.

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[196] George Affidavit #3, para. 102, 103.
[197] George Affidavit #3, para. 104.
[198] George Affidavit #3, para. 107. These amounts are significant, considering that approximately 66 percent of Canada's softwood lumber quota holders have allocations of seven million board feet or less and approximately 61% have allocations of 5 million board feet or less. Indeed, there are 171 companies holding allocations of less than one million board feet (88 in British Columbia).
[199] George Affidavit #3, para.108.
[200] George Affidavit #3, para. 111.
[201] Memorial, para. 86 (i.); George Affidavit #3, para. 99.

148. While Canada did not provide a list detailing the actual errors, [202] it did provide the Investment with a clear description of the kinds of errors that had been made. Canada also offered to answer any questions the company might have with regard to completing a revised questionnaire.

149. Canada indicated to the Investor the various options available to the Minister in addressing the company's failure to cooperate to ensure that the Investor was fully aware of possible outcomes of non-cooperation. [203] Canada never "threatened" to cancel the Investment's allocation of quota.[204]

150. The Investment's allocation has not been adjusted as a consequence of the initial verification review. [205]

151. In an attempt to circumvent legal processes available in Canada, the Investor invoked the jurisdiction of this Tribunal under NAFTA Article 1134 to "freeze" its quota allocation, despite admitted errors. The Tribunal dismissed that application, albeit with *obiter* statements about the sufficiency of the Lund Report. The Tribunal did not hold that Canada could not conduct verification reviews. Nor did the Tribunal hold that verification in this case violated NAFTA Articles 1102 or 1105.

152. In any event, verification was not required of the Investment because of the nationality of its Investor. Nor was the Investment deprived of a reasonable opportunity to know the reasons the Bureau proposed to proceed with verification review and was informed of the potential consequences of refusing to comply.

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[202] George Affidavit #3, paras 112 & 113.
[203] George Affidavit #3, para. 116.
[204] Memorial, para. 87; George Affidavit #3, para. 116.
[205] George Affidavit #3, para. 122.

H) Super Fee

153. On June 1, 1998 B.C. reduced the stumpage rates charged for the harvesting of timber on provincial Crown lands, which comprise approximately 94% of the forest land in British Columbia.[206]

154. On the recommendation of the B.C. industry, the B.C. Government split the stumpage reduction, which amounted to a total of $293 million, equally between the coast and the interior (a $146.7 million reduction for each region). This resulted in a reduction of $8.10 per cubic metre to the average stumpage rate charged harvesters on the coast and $3.50 per cubic metre charged harvesters in the interior.[207]

155. The U.S. requested consultations and then arbitration under the SLA.[208] The U.S. alleged that the stumpage rate change constituted a breach of Canada's obligations under Article VII(2) (the anti-circumvention provision) of the SLA.[209]

156. The settlement of the dispute was without prejudice to either party's position on the coverage of forest management practices under the SLA. The imposition of a super fee on over quota exports did not, therefore, reflect the relative reductions in stumpage rates.[210]

1) The Settlement

157. Canada initiated settlement discussions with the U.S. at the urging of the Government of B.C., supported by B.C.'s softwood lumber industry. The industry, in particular,

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[206] George Affidavit #3, para. 123.
[207] George Affidavit #3, para. 124.
[208] George, Affidavit #2, para. 115; George Affidavit #3, para 126.
[209] George Affidavit #3, para. 126.
[210] George Affidavit #3, para. 130.

was concerned that a decision favouring one side or the other would result in strong political pressure to terminate the SLA.[211]

158. At a meeting between Canada and the U.S. in Washington, D.C. on July 2, 1999, Canada presented a proposal that reflected the views of the B.C. Government and industry. The proposal consisted of two main elements: a reassessment of B.C.'s LFB shipments at the UFB fee, and a repricing of UFB shipments in excess of a specified amount. These elements formed the basis of what was to be the final agreement between the parties.[212]

159. The amounts of LFB to be repriced and the total amount of B.C. UFB were based on year 1 and 2 export levels from B.C. with an adjustment for exports in year 3. The price of repriced LFB was set at the existing UFB rate. The price of SFB was the result of a compromise reached through negotiation. Initial proposals for a SFB were US$ 175 per thousand board feet from the U.S. and US $ 119 from Canada. Negotiation resulted in a final SFB rate of US $ 146.25 per thousand board feet for year 4.[213]

160. The changes imposed by the settlement affected approximately 1% of B.C.'s total lumber exports to the United States. The Investment was one of 132 B.C. companies that had been utilizing LFB quota in years 1 through 3 of the SLA and had been allocated LFB quota for year 4.[214]

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[211] George Affidavit #3, para. 132; Tribunal Request for Documents "Super Fee" Q1 (Tab 57).
[212] George Affidavit #3, paras. 133-135.
[213] George Affidavit #3, para. 136.
[214] George Affidavit #3, para. 138.

161. The B.C. government and industry strongly supported the agreement.[215] The B.C. Government and representatives of a vast majority of the industry advised Canada that the settlement represented the best and least disruptive resolution for the industry in that it would address the concern about the outcome of a panel decision and would allow B.C. companies to continue to benefit from the stumpage reduction.[216]

2) Implementation of the Settlement

162. On receipt of the requisite support of the B.C. industry and government, the Minister implemented the agreement by way of an Exchange of Letters. In addition, the *Softwood Lumber Products Export Permit Fee Regulations* were amended to provide for the repricing of a portion of B.C. LFB export quantities and the imposition of the SFB levy on exports in excess of UFB exports of 110 million board feet.[217]

163. Canada did not have "a number of options available to it in allocating the SFB quota" as the Investor suggests.[218] The SFB is not a quota but a fee level. Exporters can ship as much lumber as they wish at this level. Canada had no options in assigning the fee level because it was an amendment to the SLA.[219]

164. There was no discrimination, differential treatment or arbitrariness in terms of the design or implementation of the SFB fee. All companies in possession of LFB quota had a portion of that quota repriced, and all companies exporting at the UFB level were subject to the new SFB fee, whether they were owned by Canadians, Americans or others.[220]

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[215] George Affidavit #3, para. 141.
[216] George Affidavit #3, para. 139.
[217] George Affidavit #3, para. 144.
[218] Memorial, para. 8.
[219] George, Affidavit #3, para. 156.
[220] George Affidavit #3, para. 145.

165. The approach to implementation was dictated by the terms of the amendment to the SLA, which required that the various fee levels be applied uniformly to all B.C. softwood lumber exporters. The approach recommended to the Minister adhered to Canada's international obligations and represented a neutral approach to companies affected by the amendment to the SLA.[221]

166. Notice to Exporters No. 120, issued on September 3, 1999, announced the amendment to the SLA, explained the new fee structure to exporters and addressed certain administrative matters associated with the implementation of the amendment.[222]

167. The EICB issued a subsequent Notice to Exporters No. 121 on November 24, 1999. It announced a modification of the policy on the annual return of quota that allowed companies to return up to 25% of their LFB quotas (in B.C., 25% of combined LFB and R-LFB quotas) without suffering underutilisation penalties. This meant that companies that did not wish to pay the R-LFB rates could return that quota without penalty. The Investment did not take advantage of the quota return option and chose to export large volumes at the SFB level.[223]

168. Canada also provided Trigger Price Bonus quota to B.C. exporters that had not received the stumpage reduction but were still subject to the new fee levels. Bonus quota was also used to compensate exporters who were subject to SFB fees incurred in late August 1999. These allocations were made after considering the recommendations of the B.C. Advisory Committee.[224]

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[221] George Affidavit #3, para. 146.
[222] George Affidavit #3, para. 147.
[223] George Affidavit #3, para. 148.
[224] George Affidavit #3, para. 150.

169. The balance of trigger price bonus available to B.C. exporters, including the Investment, was allocated on a modified *pro rata* basis (i.e. with a minimum allocation of 60,000 board feet).[225]

170. The Investor says "Canada knew" the SFB would reduce its Investment's export quota.[226] The SFB did not reduce the quota (i.e. EB or LFB) allocated to any B.C. exporter, including that allocated to the Investment.[227] The decision of how much softwood lumber to export over and above an allocation of quota is a decision made by each quota holder. The imposition of the SFB as stipulated by the SLA Amendment did not reduce the Investment's quota of EB or of LFB including R-LFB. Canada did not and could not know.

171. Canada had no way of knowing the Investment [redacted][228] The Investment's over quota or UFB export pattern was erratic – 4.7 million board feet in Year 1, [redacted] in Year 2 and [redacted] in the Year 3.[229]

172. The Investor provides no evidence to support its claim that SFB more than offset any benefit of reduced stumpage.[230] The fact is that B.C.'s softwood lumber industry, including companies from B.C.'s interior, urged and supported the settlement. They determined that the imposition of an SFB as stipulated by the SLA amendment was of greater benefit than having the B.C. provincial government rescind the stumpage reduction.[231]

[225] George Affidavit #3, para. 150.
[226] Memorial, paras 8, 93, 239, 242 & 245.
[227] George Affidavit #3, para. 156.
[228] Memorial. paras. 8, 93 , 95(e) & 195.
[229] George Affidavit #3, Annex A.

I) WTO Request for Consultations

173. On May 19, 2000, Canada requested WTO consultations with the U.S. concerning U.S. measures that treat a restraint on exports of a product as a subsidy to other products. [232] The WTO Dispute Settlement Body formally established a panel in September 2000. [233] At issue in the dispute are various U.S. measures, some of which were not in existence in 1995-96, when the SLA was being negotiated. [234]

174. The WTO challenge would not guarantee success in a future softwood lumber CVD case, as the Investor suggests.[235] The WTO dispute concerns export restraints. It does not address, nor can it address, stumpage rates.

175. A WTO ruling in Canada's favour might rule that programmes such as Canada's log export restraints do not constitute a countervailable subsidy. Such a ruling could only hope to reduce Canada's vulnerability but certainly not eliminate it. It would still be open to the U.S. to investigate and determine that the stumpage rates charged by certain provinces constitute countervailable subsidies.[236] Further, there is no evidence to support the contention that Canada imposed export controls to manage the softwood lumber trade within its borders.[237]

J) Confidentiality of Company Information

176. Canada extended a pledge of confidentiality to companies providing business information to the EICB with their questionnaire. This undertaking was given at the

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[230] Memorial, para. 98.
[231] George Affidavit #3, Exhibit "T" ("News Release – B.C.").
[232] George Affidavit #3, para. 151.
[233] George Affidavit #3, para. 155.
[234] George Affidavit #3, para. 152.
[235] Memorial, para. 15.
[236] George Affidavit #3, para. 154.
[237] Memorial, para. 15.

insistence of industry.[238] Companies were very concerned that information on their production, export or quota levels, or the fact that they were in a hardship situation, not be released to their competitors.[239]

177. Canada did not use the confidentiality guarantee it gave companies as an excuse to withhold information on quota allocation.[240]

178. Canada has not revealed company-specific quota information to another company, an advisory committee, an elected representative or any other third party without the consent of the company whose information was being shared.[241]

179. The criteria used by Canada in determining eligibility for new entrants quota were public as they were clearly outlined in the New Entrant's questionnaire.[242]

180. The identities of new entrant recipients were made public contrary to the Investor's assertion.[243] The EICB published a list of all quota holders. Hence, it included new entrants although they were not identified as such.[244]

181. The Investor shares this concern over keeping quota allocation confidential.[245]

K) Allocations based on "historic provincial share"

182. Beyond the year 1 allocation, which was loosely based on historic provincial share of exports, no quota allocations were made on the basis of historic provincial share of exports.[246]

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[238] George Affidavit #3, para. 10; Valle Affidavit #2, para. 33.
[239] George Affidavit #3, para. 11; Valle Affidavit #2, paras 33-35.
[240] George Affidavit #3, para. 11; Valle Affidavit #2, para. 34.
[241] George Affidavit #3, para. 12.
[242] Memorial, para. 46; Response to Tribunal Question, #7
[243] Memorial, para. 51. Valle Affidavit #2, para. 36, Exh. 5; George Affidavit #3, para. 27.
[244] Valle Affidavit #2, para. 36. Exh. 5 & 7; George Affidavit, para 11-13.
[245] George Affidavit #3, para. 13.

183. The Investor submits that all quota allocations throughout the life of the SLA, including New Entrant's and Minister's Reserve, should have been based on the "historical provincial share", as fixed at year 1. In other words, B.C. should have received 59% of all allocations made from any source for the life of the SLA.

184. Had the allocations been made as proposed by the Investor, there would have been no allowance for existing growth trends, and the purpose of the transitional adjustment and the Minister's Reserve, to address problems wherever they arose, would have been thwarted.

185. It was, therefore, never Canada's intention to base all quota allocation on a fixed historic share and companies were clearly told that the historic corporate provincial share was only used for initial year 1 allocations.[247]

L) Pope & Talbot's Quota Utilisation

186. The Investment's quota utilisation as at September 20, 2000 is set out in Annex "A" of the Third Affidavit of Douglas George.

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[246] Valle Affidavit #2, paras 141-142.
[247] Valle Affidavit #1, para. 123, Exhibit "V"; Notice to Exporters No. 94, paras 6.2 & 11.6 (Book of Treaties – Tab 16).

PART TWO – ARGUMENT

A) Introduction

187. Canada reaffirms its submissions concerning general principles at paragraphs 116 through 160 of its Counter-memorial in the first phase of this arbitration.

188. In this phase of the arbitration, the Tribunal must determine whether Canada is in breach of its NAFTA obligations to the U.S. in respect of the minimum standard of treatment (Article 1105) or national treatment (Article 1102), as these obligations relate to the Investor's Investment.

1) Governing Law

189. The governing law for such an inquiry is found in the relevant provisions of NAFTA[248] and applicable rules of international law.

190. The applicable rules of international law include the interpretive rules set out in the *Vienna Convention on the Law of Treaties*.[249] Article 31 of the *Vienna Convention* [250]

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[248] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, (entered into force 1 January 1994) [hereinafter "NAFTA"], Article 1131(1).

[249] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (in force January 27, 1980) [hereinafter "*Vienna Convention*"] (Book of Treaties, Tab 2)

[250] *Vienna Convention*, *ibid.* Article 31; General rule of interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

requires a Chapter Eleven tribunal to give the relevant provisions of NAFTA their ordinary meaning in its context and in light of the object and purpose of NAFTA as a whole.[251] The ordinary meaning of Chapter Eleven of NAFTA is found in the text of the Agreement.

191. A treaty should also be interpreted in accordance with the object and purpose of the treaty. Interpretation in accordance with the object and purpose requires examination of the treaty in light of the entirety of the agreement, including its preamble and objectives.[252] However, the object and purpose of the treaty cannot support an interpretation that is at variance with the text.[253]

2) Burden of Proof

192. NAFTA Article 1120(2) provides that "the applicable arbitration rules shall govern the arbitration ...".[254] Article 24(1) of the UNCITRAL Rules assigns the burden of proof to the claimant: "the Party asserting a claim has the burden of proving the facts upon which it relies to support its case." This is consistent with practice in international trade arbitration whereby the party asserting a claim bears the burden of proving that claim.[255]

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[251] The rule of interpretation set out in Article 31(1) of the *Vienna Convention* is affirmed in NAFTA Article 102(2), which states the Parties shall "interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1."

[252] *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* (1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel) at para. 122 (Canada – Phase 1 Authorities - Tab 8); (excerpts in Phase 2 Authorities – Tab 1)

[253] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1999) at 631-2 (Phase 2 Authorities – Tab 2)

[254] NAFTA Article 1131 instructs the Tribunal to apply the Agreement, which includes NAFTA Article 1120.

[255] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, 25 April 1997, WT/DS33/AB/R (WTO Appellate Body) at 13-14 & 16. (Phase 1 Authorities - Tab 12; excerpt at Phase 2 Authorities – Tab 3) In the NAFTA context see: *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, *supra*, at paras, 125-128 (Phase 2 Authorities – Tab 1); see also A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed. (London: Sweet & Maxwell, 1999) at 314-315 (Phase 1 Authorities – Tab 13).

193. The Investor has failed to present sufficient evidence and legal argument to demonstrate that Canada's actions were inconsistent with its obligations under NAFTA Article 1105 or 1102. In fact, the Investor has produced absolutely no evidence relating to the core requirement of Article 1102: that the Investor or Investment has been discriminated against, *de jure* or *de facto*, on the basis of nationality. The Investor has also failed to discharge its burden of proving that it sustained loss that would entitle it to damages.

194. The Investor attempts to divert attention from its failure to meet its burden of proof by making numerous completely unsubstantiated allegations in its Memorial. If supportive evidence exists, the Investor had the obligation to tender that evidence with its Memorial. It has not done so. Canada submits that the Tribunal should give unsubstantiated allegations no weight whatsoever in its deliberations.

195. The Investor asserts that it has made a *prima facie* case that Canada violated Article 1102 and 1105. In Canada's submission, unsupported allegations do not constitute evidence capable of making out a *prima facie* case. The Investor has not made out a *prima facie* case.

196. Nor can the Investor complain about Canada's alleged failure to tender evidence. The Investor has had fulsome disclosure pursuant to its own request and the requests of the Tribunal: over 20 volumes of documents have been provided. It is the Investor who has provided meagre documentary evidence and few affidavits to support its case. There is no "absence of production" that would justify shifting the burden of proof to Canada.[256]

[256] Memorial at paras 296 & 298.

197. Moreover, there is no basis upon which to draw adverse inferences. Adverse inferences should not be drawn unless, *inter alia*, the documents are relevant and material to the proceeding, the claimant has made a *prima facie* case, and the non-producing party has not provided any justification for its failure to produce. Tribunals should be especially cautious in drawing adverse inferences against government.[257]

198. While Canada respectfully declined to disclose the twelve documents for which it claimed cabinet confidence, this fact alone does not justify drawing adverse inferences. This is not an appropriate case in which to draw such inferences for several reasons.

199. First, in this case there is no logical basis upon which the materials at issue could be relevant or material. The Investor has made no allegations relevant to the conduct or deliberations of Cabinet. As Cabinet did not implement the SLA, its deliberations could not logically be relevant to the findings which this Tribunal must make. The claim addresses implementation of the Export Control Regime. What is relevant is whether the Export Control Regime as implemented breached Article 1105 or 1102.

200. Second, there is an ample record upon which this Tribunal can assess this claim. The Investor and the Tribunal have a complete record of how the Export Control Regime was implemented. It does not need to resort to adverse inferences.

201. Third, the Investor has not established a *prima facie* case of breach of Article 1102 or 1105. This is a pre-condition to the drawing of adverse inferences.

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[257] M. Kazazi, *Burden of Proof and Related Issues* (The Hague: Kluwer Law International, 1996) at 318-322 (Phase 2 Authorities – Tab 4).

202. Fourth, Canada has explained its failure to produce the 12 cabinet confidence documents. Notwithstanding the decision of the Tribunal that s. 39 of the *Canada Evidence Act* is inapplicable in a NAFTA Chapter Eleven arbitration, it is undisputed that Canada acted in good faith and in accordance with its invariable practice concerning this type of document.

203. In short, this is the Investor's claim. It bears the burden to prove its claim. It has failed to meet its burden of proof and, consequently, the applicable arbitration rules under NAFTA Article 1120 require that its claim be dismissed.

3) Investor Must Show Loss Or Damage

204. In determining whether a breach of a Chapter Eleven obligation has occurred, the Tribunal must have regard to NAFTA Articles 1116 and 1117.[258] These Articles require the Tribunal to find that the Investor incurred loss or damage by reason of, or arising out of, the alleged breach of NAFTA Articles 1105 and 1102. An investor must, therefore, prove loss or damage as part of the determination of breach.

205. Many of the Investor's allegations of breach amount to an attempt to acquire standing on behalf of all investors and investments affected by the implementation of the SLA. An arbitration of a claim submitted by one investor cannot become a Commission of Inquiry into the SLA and its implementation generally. The Tribunal must be vigilant to limit its inquiry to whether the treatment afforded by Canada to the Investor's Investment through implementation of the *SLA* breached Canada's obligations under NAFTA Article 1105 or 1102.

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

4) Incompatible Treaty Obligations

206. Finally, if this Tribunal finds that the limitation to covered provinces or the super-fee constitute a breach of Article 1105 or 1102, it will have identified an incompatibility between NAFTA and the SLA.

207. The governing law to be applied by the Tribunal in such a circumstance would include Article 30(3) of the *Vienna Convention*, which provides that the SLA (the later treaty) prevails over NAFTA.[259] As the SLA would prevail over NAFTA, there could be no breach of NAFTA as between Canada and the U.S. The Investor's claim derives solely from a breach of obligations between the Parties, and hence the Investor's claim must be dismissed.

[259] The *Vienna Convention* is part of the governing law as NAFTA Article 1131 incorporates "applicable rules of international law."

B) Minimum Standard of Treatment – Article 1105

1) Summary of Argument

208. The minimum standard of treatment guaranteed by NAFTA Article 1105 is not a catch-all for every grievance that a foreign investment may raise. The international minimum standard of treatment is a defined concept at customary international law. Article 1105 expressly adopts the minimum standard of treatment as defined by international law.

209. The minimum standard of treatment established in Article 1105 is a stand-alone obligation, independent of the other obligations enumerated in Chapter Eleven. It is also an absolute standard in that it is not contingent on how a State subjectively treats its own nationals. It does not include, nor does it relate to, the comparative standard of treatment found in non-discrimination provisions such as national treatment. Nor does it include expropriation, which NAFTA Article 1110 has isolated as a distinct obligation. In any event, expropriation has been fully dealt with by this Tribunal.

210. The concepts of "fair and equitable treatment" and "full protection and security" found in Article 1105 are aspects of the international minimum standard. They are expressly subsumed in the international minimum standard adopted by Article 1105. They do not expand the scope of the international minimum standard developed at customary international law.

211. At customary international law, a breach of the minimum standard of treatment requires a finding that the conduct in question falls below the standards that are applied by States with reasonably developed legal systems. As its name suggests, the standard is the minimum standard that States have demanded for treatment of their nationals operating abroad, and has been employed as a safety net in cases where the treatment extended by certain States to their nationals has fallen below the international minimum.

212. A State's conduct has been held to fall below this standard where its treatment of non-nationals amounts to an outrage, to wilful neglect of duty or to an insufficiency of governmental action that every reasonable and impartial person would recognise as insufficient. A State's conduct will also fall below the minimum standard when it is determined that there has been a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process or a failure to provide guarantees which are generally considered indispensable to the proper administration of justice.

213. The Investor's expansive legal theory of the international minimum standard is untenable because it ignores the scope of the minimum standard at customary international law. In this case, the Investor ignores the recognised international minimum standard that currently exists and that has developed over the last two hundred years.

214. The Investor also ignores important facts, including the mechanisms put into place by Canada which more than meet the international minimum standard: the provision of notice of the method by which quota is allocated, an opportunity to comment on the method of quota allocation, the details respecting individual quota allocations, reasons for a change in quota allocation if such occurs and the ability to consult with government officials respecting quota allocation. Most significantly, the Investor completely ignores the opportunity provided to Investors to challenge decisions respecting quota allocation by way of judicial review in the Federal Court of Canada.

215. In its argument below, Canada:

- reviews the ordinary meaning and context of Article 1105;
- discusses the threshold for application of the international minimum standard;
- traces the development of the customary international law minimum standard of treatment;
- examines denial of justice as an element of the minimum standard;

- addresses the errors in the Investor's theory of Article 1105; and
- addresses the seven specific breaches of Article 1105 pleaded in the Memorial.

2) Ordinary Meaning of Article 1105

216. Paragraph 1 of Article 1105 provides:

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

217. Article 1105 is titled "Minimum Standard of Treatment" and mandates that investments are entitled to "treatment in accordance with international law". Hence, a NAFTA Party must accord to investments of other NAFTA Parties the treatment that international law requires for the treatment of foreign investments. As Canada discusses below, there is a body of international law relating to the minimum standard of treatment of foreign persons and property. It is to that body of law that Article 1105 makes reference.

218. Article 1131(1) already provides that Chapter Eleven of NAFTA is to be interpreted in accordance with applicable principles of international law. In the context of Article 1105, it is clear that the applicable principles are those contained in the specific body of international law relating to the minimum standard of treatment of foreign investments.

219. Article 1105 is not a generic statement that NAFTA Parties have an obligation to comply with all rules of international law. To read Article 1105 in this way would void it of any specific content and transgress the fundamental rule of treaty interpretation that all provisions of a treaty must be given meaning.[260] Further, it

[260] This flows from Article 31 of the *Vienna Convention*. See also *Japan - Taxes on Alcoholic Beverages,*

would ignore the context provided by the NAFTA text and would render Articles 1116 and 1117 inutile.

220. The *Canadian Statement of Implementation* for NAFTA confirms that Article 1105 incorporated that particular body of customary international law concerning the treatment of foreign investments. It states:

> Article 1105, which provides for treatment in accordance with international law, is intended to assure a minimum standard of treatment of investments of NAFTA investors. National treatment provides a relative standard of treatment, while this article provides for a minimum absolute standard of treatment based on long-standing principles of customary international law.[261]

221. The international minimum standard in Article 1105 expressly subsumes the concepts of "fair and equitable treatment" and "full protection and security".[262] To suggest that these concepts broaden the customary international law definition of minimum standard of treatment is inconsistent with the ordinary wording of the article, contrary to the interpretive provision of the *Vienna Convention*.

222. Dolzer and Stevens[263] affirm this interpretation. As they note, some have suggested that the term "fair and equitable treatment" envisages conduct that goes beyond the minimum standard and affords a greater breadth of protection to investments than does the customary international law minimum standard.

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4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) at 13 (Phase 2 Authorities – Tab 8).

[261] *Canadian Statement of Implementation for NAFTA*, Canada Gazette, Part I, January 1, 1994 at 149 (Phase 2 Authorities – Tab 5). The American equivalent simply says that "[a]rticle 1105 provides that each country must also accord NAFTA investors treatment in accordance with international law": *American Statement of Administrative Action Accompanying the North American Free Trade Agreement*, H.R. 3450, H.R. Doc. No. 159, Vol. 1, 103d Cong. ,1st Sess., 140 at 141 (Phase 2 Authorities – Tab 6).

[262] Article 1105 states "...*including* fair and equitable treatment and full protection and security" (emphasis added).

[263] R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, (The Netherlands: Martinus Nijhoff, 1995) at 60 (Phase 2 Authorities – Tab 7).

223. However, Dolzer and Stevens recognise that such a debate is irrelevant in the context of NAFTA Chapter Eleven where the express words of Article 1105 make it clear that fair and equitable treatment is but one aspect of the international minimum standard of treatment. They conclude: "[I]n NAFTA, the fair and equitable standard is explicitly subsumed under the minimum standard of customary international law."[264]

224. In interpreting the scope of Article 1105, it is not necessary to look any farther than its express text. The words in Article 1105(1) mean that investments of investors of NAFTA Parties must be treated in accordance with customary international law relating to the treatment of foreign investments, including "fair and equitable treatment" and "full protection and security to the extent that these concepts compromise part of customary international law."

3) Ordinary Meaning Informed by Context

225. That this is the correct approach to Article 1105 is also affirmed by looking at the immediate context in which that article is situated. Article 31(2) of the Vienna Convention enshrines the textual approach to interpretation of treaties that requires that effect be given to all parts of a treaty, including the headings.[265]

226. The heading of Article 1105 is "Minimum Standard of Treatment". The standard of treatment under international law applicable to foreign investment is referred to in the same way as the heading of Article 1105: the international minimum standard.

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[264] *Ibid.*

[265] For an example of reliance on a heading in a treaty see: *Tariffs Applied by Canada to Certain U.S. – Origin Agricultural Products, supra*, para. 137 (Phase 2 Authorities – Tab 1).

227. Article 1105 is located in Section A of Chapter Eleven, the section defining the obligations of NAFTA Parties related to protection of foreign investment. The other specific obligations relate to national treatment (Article 1102), most favoured nation treatment (Article 1103), performance requirements (Article 1106) and expropriation (Article 1110).

228. Article 1105 is a stand-alone provision, distinct from the other obligations in Chapter Eleven. The presumption against redundancy in treaties means that Article 1105 must be given a meaning that is independent from the national treatment standard in Article 1102 or the disciplines on expropriation in Article 1110.[266]

229. The distinction between a claim under Article 1105 and a claim under Article 1110 was made clear in *Azinian v. United Mexican States*.[267] There, the tribunal pointed out that the only allegation of violation of international law made by the claimant related to the taking of property in contravention of Article 1110. Thus, there could be no allegation of a breach of Article 1105 separate from the claim in respect of Article 1110. Since the tribunal found there was no violation of Article 1110, there was no basis for any independent finding of a violation of Article 1105.

230. While the relevant facts grounding claims under Article 1110 and 1105 might be similar, the content of each obligation, and hence the proof required for a breach are quite distinct.[268]

231. The context provided by NAFTA Article 1108 and the carefully negotiated reservations to the obligations in NAFTA Articles 1102 and 1103 set out in the NAFTA Annexes also indicate that the standard provided for in Article 1105, from which there are no reservations, was intended as a minimum standard. If the standard of treatment required by Article 1105 were as high as the standard of treatment

[266] For example see *Japan – Taxes on Alcoholic Beverages*, *supra*, at 13 (Phase 2 Authorities – Tab 8).
[267] *Azinian v. United Mexican States* (1999), ARB/AF/97/2 (ISCSID Tribunal) para. 92 (Phase 2 Authorities – Tab 9).
[268] *Metalclad Corp* v. *United Mexican States* (2000), ARB/AF/97/1 (ICSID Tribunal) (Phase 2

required by NAFTA Articles 1102 and 1103, the reservations set out in the NAFTA Annexes would be reduced to inutility.

232. The expression "international law" in NAFTA Article 1105 must be interpreted in the context of the NAFTA text. This context clearly indicates that the expression "international law" in NAFTA Article 1105 was not intended to include treaty provisions. If the expression "international law" included treaty provisions, the effect would be to make breaches of all NAFTA provisions actionable under Chapter Eleven, notwithstanding that the Parties were very specific in Articles 1116 and 1117 as to which NAFTA provisions could, if breached, form the basis for a claim. A number of NAFTA articles (such as Articles 301 and 309) incorporate GATT provisions by reference, and other NAFTA provisions (such as those respecting sanitary and phytosanitary measures in Section B of Chapter Seven and intellectual property rights in Chapter Seventeen) were based on drafts of their WTO counterparts. As Articles 1116 and 1117 clearly indicate, none of these NAFTA provisions incorporating or based upon GATT/WTO provisions were to be actionable under Chapter Eleven. Accordingly, it would be absurd to conclude that the Parties intended that breaches of the corresponding or any other GATT/WTO provisions be actionable under Chapter Eleven.

233. In short, contrary to the submission of the Investor,[269] the ordinary meaning and context of Article 1105 create a distinct obligation for a NAFTA State to provide the minimum standard of treatment as defined by customary international law.

Authorities - Tab 10).

[269] Memorial, paras 106-107.

4) Customary International Law Definition of the Minimum Standard of Treatment

234. The principal question for this Tribunal in interpreting and applying Article 1105 is: what does international law require of states in their treatment of foreign investments?

a) Threshold for Breach of the International Minimum Standard

235. The concept of an international minimum standard has been well accepted by international legal scholars although, as Brownlie points out, "there is no single standard."[270] While there is a lack of precision concerning what is included in the international standard, it is clear from its evolution that the standard was intended to provide a basic level of protection - a "minimum" standard.

236. Brownlie also notes:

> ...[a] source of difficulty has been the tendency of writers and tribunals to give the international standard a too ambitious content, ignoring the odd standards observed in many areas under the administration of governments with a 'Western' pattern of civilisation within the last century or so.[271]

237. Other publicists who have written on the issue have confirmed the high threshold for application of the international minimum standard. *Oppenheim's International Law*[272] describes the standard as having "a fairly high threshold". Likewise, Malanczuk

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[270] I. Brownlie, *Principles of Public International Law, supra* at 29 (Phase 2 Authorities – Tab 2).
[271] *Ibid.* at 528-9.
[272] R. Jennings & A. Watts eds., *Oppenheim's International Law*, Vol. 1, 9th ed. (United Kingdom: Longham Group, 1996) at 570 (Phase 2 Authorities – Tab 11).

writes in *Akehursts's Modern Introduction to International Law*[273] that the threshold for the breach of the international minimum standard is the very high one cited in *Neer v. United Mexican States*[274]: an outrage, bad faith, wilful neglect of duty or insufficiency of governmental action so far short of international standards that every reasonable and impartial person would recognise its insufficiency.

238. Decisions of international tribunals dealing with various alleged breaches of the minimum standard of treatment also consistently affirm that the threshold for a violation of the minimum standard is extremely high. There must be outrageous or egregious conduct to breach the international minimum standard.

239. Others have expressed the standard as that required by "civilised states". The benchmark for the international minimum standard, according to Elihu Root, is the conduct of "civilised nations"[275] – it is the "established standard of civilisation."[276] The *American Law Institute's Restatement* echoes this by founding the standard on what "reasonably developed legal systems"[277] would do. Mann refers to "customary standards of behaviour."[278]

240. The standard should not be interpreted to require a higher level of treatment than is required under the domestic law of states with "reasonably developed legal systems". Therefore, no single State sets the standard, and in all cases conduct must be measured against the norms of reasonably developed legal systems.

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[273] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London: Routlege, 1997) at 261 (Phase 2 Authorities – Tab 12).

[274] *United States (L.F. Neer)* v. *United Mexican States* (1926), 4 R.I.A.A. 60 (Mexico-U.S. General Claims Commission) [hereinafter "*Neer*"] (Phase 2 Authorities – Tab 13).

[275] E. Root, "The Basis of Protection of Citizens Abroad" (1910), 4 Am. J. Int. Law 517 at 521 (Phase 2 Authorities – Tab 14).

[276] *Ibid.*

[277] The American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn: American Law Institute Publishers, 1987) § 711 – 712 (Phase 2 Authorities – Tab 15).

[278] F. A. Mann, *The Legal Aspect of Money with Special Reference to Comparative Private and Public International Law*, 5th ed. (Oxford : Clarendon Press, 1992) at 273 (Phase 2 Authorities – Tab 16).

b) Development of International Minimum Standard of Treatment

241. The international minimum standard grew out of the obligations imposed on a state by international law with respect to the treatment of aliens in its territory.[279] It was designed to provide the foreigner with protections that were regarded as basic to "civilised" society – hence an international minimum standard. Over the years the standard has evolved, with its content becoming more clearly delineated.

242. Although the standard was developed over a period of more than two hundred years, it was elaborated in the wake of substantial expansion of transnational business operations from Western Europe and North America (the "developed countries") into the developing countries, and therefore came to be known as a standard that was imposed on developing countries by developed countries. [280]

243. Faced with the prospect that their investors would not receive a minimum standard of treatment, even if the developing countries extended the same treatment to foreign investors that they extended to their own nationals, the developed countries rejected the doctrine (known as the "Calvo" doctrine) advocated by these developing countries.[281] Instead, the developed countries accepted national treatment of their investors only if the protection which the host country afforded its own citizens conformed to the established norms of civilisation.

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[279] B.E. Carter & P.R. Trimble, *International Law* (Boston: Little, Brown and Company, 1991) at 825 (Phase 2 Authorities – Tab 17).

[280] B. E. Carter & P.R. Trimble, *supra* (Phase 2 Authorities – Tab 17).

[281] Emphasizing the absolute prerogatives stemming from State sovereignty, the Calvo doctrine argued for the exclusivity of local remedies and advocated the national treatment doctrine supplant the international minimum standard as the applicable rule. See T. Carbonneau "The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement" (1984), 25 Va. J. Int. Law 99 at 107-106 (Phase 2 Authorities – Tab 18).

244. It was clear that "fair and equitable treatment" and "full protection and security" in the bilateral investment treaties ("BITs") were to be measured as international standards of treatment and not according to national treatment or MFN standards. Foreigners and their property were not to be accorded treatment less than that required by international law.

245. The content of the minimum standard can best be determined by reviewing its development in state practice, as evidenced in treaties, its application by international tribunals and as discussed in the views of writers on international law.

(i) Treaties

246. The obligations of States with respect to the treatment of foreign investment developed from two principal sources: bilateral treaties of friendship, commerce and navigation ("FCN's") and the decisions of international tribunals. These sources dealt with the treatment of the foreigner's person and property.

247. The international minimum standard was articulated in the early part of the last century by the American Secretary of State, Elihu Root, as follows:

> Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilisation.
>
> *There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilised countries as to form a part of the international law of the world.* The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live

> under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens...[282] (emphasis added)

248. Similarly, the American State Department stated the need for an international standard in 1928 as follows:

> The United States finds it constantly necessary to invoke the international law test in dealing with countries whose treatment of their own nationals is arbitrary and unjust.[283]

This statement reflects the rationale for the standard. The American initiative was to ensure that U.S. investments in other countries were protected by a standard that was independent of the standard applied by the host country to its nationals. In the result, this standard was not as high as the U.S. domestic standard but a standard that was "very simple, very fundamental, and of such general acceptance by all civilised countries as to form a part of the international law of the world."[284]

249. The distinction between a national law standard of treatment and an international law standard was made clear in the FCN treaties. For example, in the 1923 treaty on friendship, commerce and consular rights between the United States and Germany, the following provision was included:

> The nationals of the High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.[285]

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[282] Portion in italics omitted by Investor at para. 181 of its Memorial. E. Root, " The Basis of Protection of Citizens Abroad", *supra*, at 521-22 (Phase 2 Authorities – Tab 14)

[283] R.R. Wilson, *The International Law Standard in Treaties of the United States* (Cambridge: Harvard University Press, 1953) at 97 (Phase 2 Authorities – Tab 19)

[284] Root, "The Basis of Protection of Citizens Abroad", *supra*, 521 (Phase 2 Authorities – Tab 14)

[285] R.R. Wilson, *The International Law Standard in Treaties of the United States*, *supra* at 92 (Phase 2 Authorities – Tab 19).

250. There are three important aspects to this provision. First, it is clear that the standard being imposed was an international standard applicable to both the person and property of foreigners. It is not a domestic law standard. Second, the parties believed that they were giving content to the standard by referring to "constant protection" for persons and property and to compensation for the taking of property. Third, this international standard applied as well to the taking of property, something that eventually developed into a separate body of law relating to expropriation (and is not at issue in this phase given that a decision has been rendered respecting Article 1110).

251. In later treaties entered into by the United States, the term "constant protection" became "full protection and security required by international law". The obligation to provide for fair and equitable treatment of nationals of the other party also found its way into such agreements.

252. By the time the United States commenced its program of concluding BITs in 1977, the concepts of "fair and equitable treatment" and "full protection and security" were found consistently in these treaties.

253. For example, the 1987 Model BIT provided that each investment:

> ... shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.[286]

254. This standard has been included in a variety of modern investment agreements,[287] and not just FCNs and American BITs. This approach is also common in Canadian

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[286] The United States Model BIT (1987), reprinted in J.J. Vandelvelde, *United States Investment Treaties*: Policy and Practice (Phase 2 Authorities – Tab 20).

[287] See for example, the *CARICOM Guidelines for Use in the Negotiation of Bilateral Treaties* (1984), reprinted in U.N. UNCTAD: International Investment Instruments: A Compendium, Vols, I-III, U.N. Doc. UNCTAD/DSCI/30 (1996), CTC (Phase 2 Authorities – Tab 21); *Draft United Nations Code of Conduct on Transitional Corporations* [1983 version] (1983), reprinted in U.N. UNCTAD; International Investment Instruments: A Compendium, Vols. I-III, U.N. Doc. UNCTAD/DTCI/30 (1996) (Phase 2 Authorities – Tab 22); ICC, *International Code of Fair Treatment for Foreign*

foreign investment protection agreements and bilateral investment agreements entered into by the United Kingdom, Belgium, Luxembourg, France and Switzerland.[288]

255. Thus, even independently of their express inclusion in Article 1105, the concepts of "fair and equitable treatment" and "full protection and security" are integral parts of the minimum standard of treatment at international law.

(ii) Decisions of International Tribunals

256. Parallel to these developments in the bilateral treaties were decisions of international arbitral tribunals that applied an international standard to the treatment of foreigners. The best guide to understanding what is encompassed by the international minimum standard is to consider the type of conduct that has been held by these tribunals to fall below that standard.

257. In particular, the cases decided by the United States-Mexico Claims Commission are "the backbone of our evidence in support of the international standard."[289] These arise from the United States-Mexico Claims Commission in the 1920's, which concerned events occurring during a series of rebellions in Mexico.

258. The classic decision was that of the Mexico-United States Claims Commission in the *Neer*[290] claim. In that case, Paul Neer, an American citizen and superintendent of a mine in Mexico was murdered by a group of armed men on the way home from the

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Investments, No. 129 (1949), reprinted in U.N. UNCTAD; International Investment Instruments: A Compendium, Vols. I-III, U.N. Doc. UNCTAD/DTCI/30 (1996) (Phase 2 Authorities – Tab 23); ICC, *Guidelines for International Investment*, No. 272 (1972), reprinted in U.N. UNCTAD International Investment Instruments: A Compendium, Vols. I-III, U.N. Doc. UNCTAD/DTCI/30 (1996) (Phase 2 Authorities – Tab 24); World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, (1992) 31 I.L.M. 1363 (Phase 2 Authorities – Tab 25).

[288] R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, *supra* at 58 (Phase 2 Authorities – Tab 7).

[289] A.H. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949) (Geneva: University of Geneva Thesis) at 95 (Phase 2 Authorities – Tab 26).

[290] *Neer*, *supra* (Phase 2 Authorities – Tab 13).

mine. His wife filed a claim charging that the Mexican authorities had shown an unwarranted lack of diligence in prosecuting the murders.

259. The Claims Commission found there was no denial of justice because Mexican authorities had acted with sufficient diligence. The tribunal noted that "[I]t is not for an international tribunal...to decide, whether another course of procedure taken by the local authorities...might have been more effective."[291]

260. Commenting on the conduct of Mexican authorities, the Commission said:

> The propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency should **amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.**[292] (emphasis added)

261. Thus, the Commission postulated a standard for the treatment of foreigners that was clearly a basic standard, meant to protect aliens from outrageous and patently unreasonable government conduct. The test in *Neer* was applied consistently by the United States-Mexico Claim Commission in claims brought before it.[293]

262. In *Faulkner*,[294] the Commission found a breach of the international minimum standard where an American citizen was arrested while waiting for transportation, brought to a police station, searched without being advised of the charges against him, imprisoned in appalling conditions for a month and then released on the basis there was no sufficient evidence against him.

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[291] *Ibid.* para. 5 (Phase 2 Authorities – Tab 13).
[292] *Ibid.* para. 4 (Phase 2 Authorities – Tab 13).
[293] The Investor also relies on these cases, apparently recognizing that these cases define the minimum standard of treatment at customary international law.
[294] *United States (Faulkner)* v. *United Mexican States* (1927), 21 A.J.I.L. 349 (Mexico-U.S. General Claims Commission) (Phase 2 Authorities – Tab 27).

263. In *Chattin*,[295] a breach of the international minimum standard was established where the Commission found there was a lack of proper investigation, grave irregularities in court proceedings, undue delay in commencing court proceedings and an intentionally severe sentence was imposed.

264. In *Roberts*,[296] an American citizen was arbitrarily and illegally arrested, then detained for 19 months before being given a hearing. The jail in which he was kept had no sanitary accommodation, 30 or 40 men to a room and no opportunity for physical exercise. A breach of the international minimum standard was found in these circumstances.

265. In *Way*,[297] the minimum standard of treatment was found to have been breached where *Way* was arrested without knowing the charge against him and suffered "gross mistreatment" while in custody.

266. Other international bodies have applied the *Neer* standard, referring to it as the "standard habitually practised among civilised nations"[298] or even "general principles of law."[299] The formulation of the standard in *Neer* continues to be the seminal statement of the meaning of the international minimum standard. As the cases below demonstrate, an egregious set of circumstances is required to found a breach of the minimum standard.

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[295] *United States (Chattin)* v. *United Mexican States* (1928), 22 A.J.I.L. 677 (Mexico-US General Claims Commission) (Phase 2 Authorities – Tab 28).

[296] *United States (Roberts)* v. *United Mexican States*, [1926] Op. Of. Com. 77. (Mexico-US General Claims Commission) (Phase 2 Authorities – Tab 29).

[297] *United States (Way)* v. *United Mexican States* (1929) 23 A.J.I.L. 466 (Mexico-U.S. General Claims Commission)(Phase 2 Authorities – Tab 30).

[298] *France (J. Chevreau) v. Great Britain* (1931), 27 A.J.I.L. 153 (Tribunal) (Phase 2 Authorities – Tab 31).

[299] *Amco Asia Corp. v. Indonesia* (1984), 24 I.L.M. 1022 (ICSID Tribunal) at 1032 (Phase 2 Authorities – Tab 32), [hereinafter "*AMCO*"].

267. For example, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*[300], the United States argued that Iran's failure to protect private American citizens (as opposed to the diplomatic staff) from being taken hostage violated Article II(4) of the Treaty of Amity which provided that "nationals...shall receive the most constant protection and security within the territories of the other High Contracting Party." The Court, agreeing with the United States, held that Iran's failure to prevent the militants from taking illegal actions did constitute a violation of "most constant protection and security".

268. In *AMCO*[301] on the urging of a business adversary of the investor, the armed forces of the Government of Indonesia took full ownership and control of a hotel owned by an American citizen while the government regulatory body in charge of investment revoked his investment licence – without any warning or notice. The courts of Indonesia upheld these actions. Again, in these egregious circumstances, where the consequences were "heavy" and "irremediable", a breach of the minimum standard was found.

269. In the *Case Concerning Electtronica Sicula S.p.A ("ELSI")*[302] the Mayor of Palermo, Italy had requisitioned an American plant into bankruptcy and allowed the employees to occupy the plant. After the requisition period, the plant was allowed to go into bankruptcy. Despite this, and a 16-month delay in ruling on an administrative appeal of the Mayor's action, the International Court of Justice found that there was no breach of the international minimum standard.

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300 *Case Concerning United States Diplomatic and Consular Staff in Tehran*, [1979] I.C.J. 3 (Phase 2 Authorities – Tab 33).

301 AMCO, *supra*, (Phase 2 Authorities – Tab 32).

302 *Case Concerning Elettronica Sicula S.p.A. (United States v. Italy), ("ELSI")*, [1989] I.C.J. Rep. 15 (I.C.J.) (Phase 2 Authorities – Tab 34).

270. In rejecting the U.S. claim, the Court took the view that the requirement that "the most constant protection and security" be provided did not mean that "property shall never in any circumstances be occupied or disturbed". Equally, it concluded that the 16-month delay did not constitute any denial of procedural justice. Thus, "the full protection and security" required by international law had not been denied.

271. Among the factors considered relevant by the International Court of Justice in determining whether there had been arbitrary conduct on which to found a breach of the minimum standard was the fact that the claimant had not availed itself of a domestic administrative decision process which was available to address the issue.[303] Again, there will not be a breach of the international minimum standard unless the remedial process is woefully inadequate.

272. As the Court noted:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law."[cite omitted] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.[304]

273. In *Emmanuel Too v. Greater Modesto Insurance* Association[305], an Iranian motel owner in California, argued that the United States had violated the international law minimum standard when local police failed to stop arsonists from burning his property. Prior to this, the U.S. Internal Revenue Service sold Too's liquor licence to pay taxes that were only 14 days overdue. A notice to object was sent to Too in Switzerland, giving him only 5 days from the date of the letter to object. The

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303 *ELSI*, para. 109 (Phase 2 Authorities – Tab 34).
304 *Ibid*, para 128.
305 *Emmanuel Too v. Greater Modesto Insurance Association* (1989), 23 Iran-U.S. C.T.R. 378 (Iran-U.S. Claims Tribunal) (Phase 2 Authorities – Tab 35).

tribunal, with little discussion, found that the due diligence shown by the police satisfied the international law standard.

274. A government's failure to provide proper protection to an investor's property from interference by individuals or groups was the subject of a claim in *Asian Agricultural Products, Ltd v. Sri Lanka.*[306] The claimant argued that the destruction of its property during a battle between government forces and guerrillas was a denial of "full protection and security" guaranteed by the BIT between Sri Lanka and the United Kingdom.

275. The arbitrators rejected the notion that "full protection and security" turned government into a guarantor or insurer of a foreign investment. Rather, the claimant was required to prove causation for its claim to succeed. The Tribunal therefore refused to impose strict liability on a government.

276. However, the Arbitral Tribunal found Sri Lanka responsible on the basis of principles of international law. The Arbitral Tribunal obviously viewed the obligation to provide "full protection and security" as being part of the minimum international law standard when they held:

> Once failure to provide "full protection and security" has been proven (under Article 2.(2) of the Sri Lanka/U.K. Treaty or under a similar provision existing in other Bilateral Investment Treaties extending the same standard to nationals of a third State), the host State's responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the State's failure to comply with its "due diligence" obligation under the *minimum standard* of customary international law." (emphasis in original)[307]

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[306] *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka* (1991), 30 I.L.M. 577 (ICSID Tribunal) [hereinafter "*AAPL*"](Phase 2 Authorities – Tab 36)

[307] *AAPL, Supra*, para 67 (Phase 2 Authorities – Tab 36).

277. In *American Manufacturing & Trading Inc. v. Zaire*[308] an ICSID tribunal found the minimum standard was breached when Zairian government forces combating guerrillas looted and destroyed an American investment, then refused to pay any compensation for the loss. Zaire admitted to the looting but argued that the "fair and equitable treatment" and "protection and security" clauses in the BIT had not been breached because Zaire had not treated the investment any differently than other investments.

278. The arbitrators disagreed, holding that the comparative standards of national treatment and MFN operated independently of the international minimum standard. They concluded that the conduct was contrary to the requirement that the investment be granted "fair and equitable treatment" and "protection and security" not less than "that recognised by international laws". The tribunal described the international minimum standard as "an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law."[309]

279. In the *Case Respecting the Communication Submitted by R. Gauthier*, pursuant to the optional protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee of the United Nations concluded that no effective remedies were available to Mr. Gauthier. The Committee stated that, in the absence of a competent authority to conduct an independent review of Mr. Gauthier's application, there was a denial of justice. The Committee states: "The state party is under the obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application...".[310]

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[308] *American Manufacturing & Trading* v. *Republic of Zaire*, (1997) 36 I.L.M. 1531 (ICSID Tribunal) (Phase 2 Authorities – Tab 37).

[309] *Ibid.*, at 1549

[310] United Nations, International Covenant of Civil and Political Rights, Human Rights Committee, Views under Article 5, para. 4 of the Optional Protocol Respecting the Communication submitted by Robert G. Gauthier. Doc. No. CCPR/C/65/D/633/1995, at paras. 13.7, 14,15 (Phase 2 Authorities – Tab 38).

280. Finally, in the recent *Metalclad*[311] NAFTA Chapter Eleven claim, the tribunal found that Mexican federal officials had assured the U.S. – owned investment that all permits had been obtained, and that the investment relied on this representation. It further held that after the investment completed its building project, municipal authorities denied the required municipal permit on environmental grounds despite their lack of jurisdiction to do so, thereby closing the entire operation. The denial of the permit was accomplished at a Town Council meeting to which the investment was not invited, of which it received no notice and before which it had no opportunity to appear. In these cumulative circumstances, the tribunal found a breach of Article 1105.

281. In summary, all tribunals that have applied or commented on the minimum standard have held that a breach may only be found where the facts are extreme and government conduct is egregious.

(iii) Views of Publicists

282. Scholars have suggested that the failure to comply with the international law standard will occur only in circumstances where conduct is egregious. Brierly states that "misconduct must be extremely gross."[312]

283. Similarly, Mann has said that, while a state is entitled at its discretion:

> ... there comes a point when the exercise of such discretion so unreasonably or grossly offends against the alien's right to fair and equitable treatment or so clearly deviates from customary standards of behaviour, that international law will intervene.[313]

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[311] *Metalclad Corp.* v. *United Mexican States, supra* (Phase 2 Authorities – Tab 10), Mexico has announced its intent to seek judicial review of this decision; online > www.insidetrade.com.

[312] J. Brierly, *The Law of Nations*, 6th ed. (Oxford: Clarendon Press, 1963) at 276 – 287 (Phase 2 Authorities – Tab 39).

[313] F. A. Mann, *The Legal Aspect of Money, supra* at 472-473, (Phase 2 Authorities – Tab 16).

284. Contrary to what the Investor suggests, Mann never described the standard or limitless. In fact, his perspective accords with the *Neer* standard and is consistent with the position of publicists and international tribunals.

285. Further, there is consensus that the domestic law of the host state is unrelated to the international minimum standard for the treatment of aliens

286. Werner Levi has summarised the international minimum standard as follows:

> A basic principle has been that the alien must be treated according to the ordinary standard of civilised states. Depending upon how a state treats its own nationals, this principle obligates a state to treat aliens better or entitles it to treat them worse. Not equality of treatment of national and aliens, but "whether aliens are treated in accordance with ordinary standards of civilisation" is "the ultimate test of the propriety of acts of authorities in the light of international law."[314]

287. An UNCTAD report relates the "fair and equitable treatment" standard to the traditional standard of due diligence.[315] In a further formulation, UNCTAD suggests that a state will not meet the minimum standard if its acts amount to bad faith, wilful neglect, clear instances of unreasonableness or lack of due diligence.[316] Scholars have suggested that the failure to comply with the international law standard will occur only in circumstances where conduct is egregious. Brierly states that "misconduct must be extremely gross."[317]

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[314] W. Levi, *Contemporary International Law*, 2nd ed., (Boulder, Col.: Westview Press) at 169 (Phase 2 Authorities – Tab 40).

[315] U.N. UNCTC, *Bilateral Investment Treaties*, (1988), U.N. Doc. ST/CTC/65 (Phase 2 Authorities – Tab 41). See also R. Dolzer & M. Stevens, *supra* at 61 (Phase 2 Authorities – Tab 7).

[316] UNCTAD Series on Issues in International Investment Agreement, *Fair and Equitable Treatment*, UN Doc. UNCTAD/ITE/JIT/11 (1999) at 40 (Phase 2 Authorities – Tab 42).

[317] J. Brierly, *supra* at 287 (Phase 2 Authorities – Tab 39).

c) Denial of Justice

288. Most of the Investor's allegations of breach of the international minimum standard relate to a purported denial of justice or procedural fairness. For example, the Investor alleges that its Investment was not given a fair hearing respecting quota allocation, that it was not informed as to the process of quota allocation, that Canada provided inadequate reasons respecting quota allocation and that there was no review procedure available for quota allocation.[318]

289. The idea that the international minimum standard might encompass principles of procedural fairness or denial of justice has long been debated. Even where this is accepted, there has been no uniformity on the precise ambit of the notion. However, there appears to be consensus that there is no breach of the international minimum standard where an aggrieved party has timely access to an impartial adjudication of its grievance.

290. For example, the Third Restatement of International Law[319] refers to the lack of an "effective administrative or judicial remedy" as the basis for determining that there has been a denial of justice or arbitrary or discriminatory behaviour by the State.

291. The Harvard Research Draft on International Law, described by Brownlie as the "best definition"[320], defines denial of justice as follows:

> Denial of justice exists where there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust

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[318] These are the sole allegations of breach of Article 1105 pleaded in the Claim. See Investor's Statement of Claim para. 82, March 25, 1999.

[319] *The American Law Institute Restatement (Third) of International Law, supra,* in particular commentary to para. 712 (Phase 2 Authorities – Tab 15).

[320] I. Brownlie, *Principles of International Law, supra* at 532 (Phase 2 Authorities – Tab 2).

> judgment. An error of a national court which does not produce manifest injustice is not a denial of justice. [321]

292. Roth, who devotes an entire section to the subject in his treatise on the minimum standard, concludes that:

> ...where faithful application of the local law has been established, responsibility can only be incurred when it is evident that the minimum requirements of international law have been left unsatisfied, that the very law itself fails to provide those sanctions of justice which the law of nations prescribes in the treatment of aliens.[322]

The procedural rights cited by Roth are "freedom of access to court, the right to fair, non-discriminatory and unbiased hearing, [and] the right to a just decision rendered in full compliance with the laws of the State within a reasonable time."[323]

293. In *The Law of Nations*, Brierly describes denial of justice as being properly limited to "an injury involving the responsibility of the state committed by a court of justice."[324] A court may fall below the standard fairly demanded of a civilised state if there are instances of:

> ...corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive or so manifestly unjust that no court which was both competent and honest could have given it.[325]

Brierly concludes by stating that even if the term "denial of justice" is interpreted broadly, the "misconduct must be extremely gross."[326]

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[321] *Ibid.*
[322] A. Roth, *The Minimum Standard of International Law Applied to Aliens*, *supra* at 184-5 (Phase 2 Authorities – Tab 26).
[323] *Ibid.*
[324] J. Brierly, *supra* at 286 (Phase 2 Authorities – Tab 39).
[325] *Ibid*, 287.
[326] *Ibid.* at 287.

294. Von Glahn has described denial of justice as failure on the part of authorities to observe due process of law in the prosecution and punishment of the alien offender. Broadly interpreted, this would include matters such as denial of access to local courts, inefficiency in the performance of police and judicial processes or an obviously unfair treatment of a judicial decision.

> In so far as courts are concerned, international responsibility of the state would arise if the judicial acts in question had been incompatible with international law, or represented a denial of justice in a strict sense (no access to courts, undue delay and so on) or created an obvious injustice – if, for instance, the acts were flagrant, were the work of the highest court in the land and were done in bad faith and with intent to discriminate.[327]

295. In his treatise *The International Responsibility of States for Denial of Justice*[328], Alwyn Freeman comments as follows:

> Australia, India and New Zealand associated themselves with the views of His Majesty's Government for Great Britain that although no merely erroneous decision of its courts engages the State's responsibility, this consequence would follow where a decision was so erroneous that no properly constituted court could honestly have arrived at it; where it was due to corruption or executive pressure; or, where caused by procedure so faulty as to exclude all reasonable hope of just decisions.

296. Publicists have cautioned against a broad interpretation of denial of procedural justice given that the minimum standard is intended to represent the standard of all civilised nations. Brownlie in particular has noted that with respect to denials of justice, the international minimum standard has been applied ambitiously by tribunals and writers, causing difficulties as follows:

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[327] G. von Glahn, *Law Among Nations: An Introduction to Public International Law*, 4th ed. New York: MacMillan Publishing Co. Inc. 1981) at 240 (Phase 2 Authorities – Tab 43).

[328] A. Freeman, *The International Responsibility of States for Denial of Justice* (London: Longmans, Green & Co. 1970) at 3-4 (Phase 2 Authorities – Tab 44).

> First, the application of the standard may involve decisions upon very fine points of national law and the quality of national remedial machinery. Thus, in regard to the work of the courts, a distinction is sought to be made between error and 'manifest injustice'. Secondly, the application of the standard seems to contradict the principle that the alien, within some limits at least, accepts the local law and jurisdiction. Thirdly, the concept of denial of justice embraces many instances where the harm to the alien is a breach of local law only and the denial is a failure to reach a non-local standard of competence in dealing with the wrong in the territorial jurisdiction. Thus, the concept of the foreign state wronged in the person of its nationals is extended to cases where the primary wrong is a breach of municipal law alone.[329]

297. Fitzmaurice summarizes the rules as follows:

> ...the rule may be stated that the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice and, moreover, does not involve the responsibility of the state. To involve the responsibility of the state the element of bad faith must be present, and it must be clear that the court was actuated by bias, by fraud, or by external pressure, or was not impartial; or the judgement must be such as no court which was both honest and competent could have delivered.[330]

298. The standard to which a NAFTA Party is to be held under Article 1105 is an international law standard, which, as pointed out earlier, is a standard that would be applied in a "reasonably developed legal system". Clearly, it is not a standard of perfection – rather, it engages only for egregious errors or abuses in the administration of justice.

[329] I. Brownlie, *Principles of Public International Law*, *supra* at 533 (Phase 2 Authorities – Tab 2).

299. If follows that a single NAFTA Party cannot claim that its system alone should be the benchmark for what is a reasonably developed legal system. However, the practice of NAFTA Parties collectively may provide some guidance as to what meets or exceeds the standards of "reasonably developed legal systems".

300. In this regard, guidance on what the NAFTA Parties themselves consider appropriate to meet standards of procedural fairness is found in NAFTA Chapter Eighteen. That chapter deals with issues of transparency in the development and application of laws and in the operation of administrative proceedings. These standards clearly meet or exceed what would be required under the international minimum standard.

301. The *Overview and Description of the NAFTA*, prepared by all three NAFTA Parties at the end of the NAFTA negotiations, describes Chapter Eighteen as providing:

> ...rules designed to ensure that laws, regulations and other measures affecting [NAFTA] traders and investors will be accessible and will be administered fairly and in accordance with notions of due process by officials in all three countries. Each country will also ensure, under its domestic laws, independent administrative or judicial review of government action relating to matters covered by the NAFTA.[331]

302. Article 1802 requires that laws, regulations, procedures and administrative rulings of general application be published. In this case, Canada published relevant treaties, laws, regulations, procedures and administrative rulings of general application.

303. Article 1804 deals with administrative proceedings. It states that in administrative proceedings each Party shall, wherever possible, provide: reasonable notice that a proceeding is initiated; a reasonable opportunity to present facts and arguments before administrative action is taken when time, the nature of the proceeding and the public

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[330] G.G. Fitzmaurice *"The Meaning of the Term Denial of Justice"* (1932), 13 Brit. Y.B.I.L. 92 at 110-111 (Phase 2 Authorities – Tab 73).

[331] Canada, Mexico, United States, *North American Free Trade Agreement, An Overview and Description*, August 1992 (Phase 2 Authorities - Tab 45)

interest permit; and, procedures in accordance with domestic law. Canada met these standards in its extensive consultations and communications with stakeholders.

304. Article 1805 deals with review and appeal of administrative action. It requires Parties to provide judicial, quasi-judicial or administrative processes to review final administrative actions. These must offer a reasonable opportunity for parties to support or defend their positions and a decision based on the record. This was clearly provided in the instant case as all investments affected by administrative decisions have access to judicial review pursuant to the *Federal Court Act* ("FCA")[332] by the Federal Court of Canada, an impartial superior court of record.

305. NAFTA imposes no additional obligation on a Party to provide for a specific appeal mechanism in specific programs, over and above judicial review.

306. Furthermore, there can be no denial of justice where an Investment refuses to pursue the mechanisms available for court review of administrative action.

307. NAFTA Chapter Eighteen reflects in some detail the high standard the Parties themselves considered appropriate for the operation of administrative processes. They reflect what the Parties themselves believed ensured full accessibility of all laws, regulations and other measure and the fair administration and review of those measures in accordance with due process of law in all three NAFTA countries. Chapter Eighteen is not expressly incorporated in Chapter Eleven. This is only logical as Article 1105 incorporates the lower international minimum standard.

[332] *Federal Court Act*, R.S.C. 1985, c. F-7, as am (excerpts) (Phase 2 Authorities – Tab 46).

308. Hence, if a Party complies with Chapter Eighteen it would have exceeded the requirements of Article 1105.

309. In conclusion, the same high threshold applies to alleged denials of justice as to other allegations of breach of the minimum standard. The conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the wilful neglect of duty.

5) Investor's Version of Article 1105

310. The Investor postulates a version of Article 1105 that is virtually boundless. Its version would extend a guarantee of what the Investor terms "a sense of legal security".[333] This would dramatically expand the scope of the international minimum standard established by customary international law. In putting forth this thesis, the Investor ignores both the definition and the very high threshold for application of the international minimum standard that is universally recognised. Indeed, the Investor would have Article 1105 regulate any and every grievance or sense of dissatisfaction with government that an Investor might raise.[334]

311. The Investor's interpretation of Article 1105 would transform Chapter Eleven into a judicial review mechanism that could review all administrative actions of Parties, contrary to the clear intention of the parties as evidenced by the wording of Article 1105 itself and the express requirement in NAFTA Article 1805 that the Parties establish their own procedures for judicial review.

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[333] Memorial, para. 117.

[334] Recall the comments of the Chapter Eleven tribunal in *Azinian v. United Mexican States*, *supra* at para. 83: "It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints....NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides." (Phase 2 Authorities – Tab 9).

312. In addressing the scope of Article 1105 the Investor recognises, as it must, that there is a body of customary international law defining the minimum standard of treatment that is incorporated by Article 1105. However, the Investor simultaneously attempts to argue that an assessment of compliance with Article 1105 requires compliance with the entire body of international law.

313. The logical result of the Investor's position is that a breach of other treaties, of any other provision of Chapter Eleven or of any other chapters of NAFTA would be a breach of Article 1105. Such an interpretation gives Article 1105 no independent meaning and ignores both its ordinary meaning and the context in which it is found.

314. The Investor devotes considerable attention to the concept of "good faith", consistent with its view that the term "international law" in Article 1105 refers to the whole body of international law. To the extent that the Investor is simply restating the proposition that international obligations are owed by states to one another and are to be fulfilled in good faith, then it is a proposition that is non-contentious, but irrelevant to this case. To the extent that the Investor is seeking to expand the concept of the international minimum standard to something that is not part of customary international law, then its argument has no basis.

315. Further, at international law, government is presumed to act in good faith. Bad faith is not to be presumed. A Party alleging bad faith by government must present clear and unambiguous evidence showing the government acted in bad faith. As Schwarzenberger, cited by the Investor on the topic of good faith, notes:

> The suggestion of bad faith is highly odious. Even if a State is reasonably convinced of the bad faith of another State, the presumptions in favour of good faith and law-abidingness impose such a heavy burden of proof on any claimant that this line of argument is but rarely advisable.[335]

[335] G. Schwarzenberger, *International Law and Order*, (London: Stevens & Sons, 1971) at 88 (Phase 2 Authorities – Tab 47)

a) Pacta Sunt Servanda

316. At paragraphs 119 to 125 of its Memorial, the Investor elevates the principle of *pacta sunt servanda* expressed in Article 26 of the *Vienna Convention* into a substantive obligation of NAFTA. *Pacta sunt servanda* is a descriptive statement of the obligation of states to comply with their treaty obligations. This obligation is only owed to other signatories of the treaty. It does not create or define substantive obligations susceptible of prosecution under NAFTA Chapter Eleven.

317. No authority supports the use of *pacta sunt servanda* as a separate substantive obligation of NAFTA. This approach is contrary to Articles 1116 and 1117 of NAFTA, which limits investor-state arbitration to alleged breaches of Section A of Chapter Eleven. To include any violation of international law as an actionable wrong under Chapter Eleven would render the limitation of Articles 1116 and 1117 meaningless.

318. Nor is this approach supported by the cases cited by the Investor. In the *North Atlantic Coast Fisheries*[336] case, *pacta sunt servanda* was used as a principle of interpretation and was not regarded as a substantive obligation. Further, the case was concerned simply with whether a treaty had been breached, and did not establish that States are prevented from entering subsequent treaties overriding obligations in an earlier treaty.

[336] *North Atlantic Coast Fisheries Case* , [1910] XI RIAA 169 (Permanent Court of Arbitration) (Phase 2 Authorities – Tab 48).

319. Similarly, *U.S. – Sections 301 – 310 of the Trade Act of 1974* [337] deals with the consistency of American obligations under the WTO treaty and the potential for unimplemented domestic legislation to violate these treaty obligations. The Panel there expressly stated that the WTO Agreement did not have direct effect and was not automatically part of domestic law. Neither the GATT nor the WTO create legal rights except between States. The relevance of the effect on individuals in that case was simply in determining whether one WTO member had breached a treaty obligation to another WTO member.

320. Based on its flawed statement of law, the Investor asserts that Parties may not override treaty obligations in NAFTA by obligations in any other international agreement "unless expressly permitted in the NAFTA text."[338] NAFTA is not some kind of "super-treaty" that inhibits the Parties from entering subsequent overriding or modifying treaties. NAFTA does not inhibit the sovereignty of the Parties in this way.

321. The NAFTA rule of prevalence deals only with existing NAFTA obligations – it contains no rule of prevalence for subsequent agreements.[339]

322. To the contrary, NAFTA, like all international treaties, is a consensual instrument that can be modified or suspended by subsequent expressions of consent between the signatories. Article 30 of the Vienna Convention expressly recognises that parties may modify or suspend their treaty obligations by subsequent treaties.[340]

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[337] *U.S. – Sections 301 – 310 of the Trade Act of 1974*, December 22, 1999, WT/DS152/R (WTO Panel) see 7.72 – 7.73. in particular (Phase 2 Authorities – Tab 49).

[338] Memorial, para. 120.

[339] Counter-Memorial Phase 1, paras 513 to 518.

[340] Canada refers to its argument in this respect at paras 485 – 524 of its Counter-Memorial (Phase 1) and Part C of this Argument.

323. Moreover, to accept the Investor's argument concerning the meaning of *pacta sunt servanda* would be to vest a NAFTA Chapter Eleven tribunal with jurisdiction to arbitrate compliance with every treaty to which Canada, the United States and Mexico are Parties, all on the thesis that allegations of breach of treaty obligations are equivalent to breach of Article 1105 of NAFTA. Such an interpretation of Article 1105 renders it absurdly expansive and well beyond the intent of the drafters.

b) Fair and Equitable Treatment

324. Obviously "fair and equitable treatment" is subsumed within the international minimum standard – Article 1105 so provides. Fair and equitable treatment is not an unlimited notion available to address every conceivable grievance of a NAFTA Investor.

325. As Canada's review of relevant cases demonstrates, where a breach of the international minimum standard has been found, it is based on facts that show egregious behaviour, totally different from the facts on the record in this case. The wrong alleged in this case amounts to the Investment's displeasure with the amount of quota it received and with the administrative methods used to allocate quota.

326. The additional cases cited by the Investor concerning the meaning of "fair and equitable treatment" bear no relationship to the facts of this case. The *Claim of the Salvador Commercial Company* [341] is a case where an investor was deprived of its entire interest in the investment by illegal and fraudulent usurpation of the powers of the Board of Directors, an official presidential decree closing the port in which the investor operated, bankruptcy procedures that the tribunal found to be part of a "fraudulent conspiracy" and intentional destruction of the investment by the government of the Republic of Salvador. In that case the Tribunal found in favour of the claimant.

[341] *Claim of the Salvador Commercial Company*, [1902] XI R.I.A.A. 467 (Arbitral Panel) (Phase 2 Authorities – Tab 50).

327. Similarly, in *De Sabla*,[342] Panama made grants of land to the public notwithstanding that it knew the land was owned by the de Sabla family and therefore it had no right to give it away. The Panamanian process provided to the *De Sabla* family to oppose such grants was inadequate in that it listed lands with only vague descriptions of boundaries, did not give any notice of licence applications, provided a woefully inadequate remedial process with unreasonably short periods to file oppositions and required oppositions to be filed for every petition. Mrs de Sabla lost her entire property. In this case the Tribunal found in her favour.

328. In the *Boffolo* Case[343], the claimant, Boffolo, was expelled because he wrote an article that appeared in a socialistic periodical that was critical of the local judiciary and the President. The Venezuelan authorities apparently plundered Boffolo's house, and subjected him to escalating persecution that ultimately drove him out of Venezuela permanently. The tribunal found in favour of Boffolo. Again, this type of persecution and abuse of authority is clearly not even remotely similar to the treatment accorded to the Investment.

c) Transparency

329. Transparency is not a separate obligation of NAFTA, nor is it an interpretive principle stated in the agreement.[344] To the extent that Article 1105 contemplates transparency requirements, Canada submits that the basic norms reflected in Articles 1802 to 1805 more than meet these requirements. In addition, Chapter 18 itself does not impose the extensive, inflexible procedural requirements of the type alleged by the investor.

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[342] *De Sabla (United States)* v. *Panama*, [1955] VI R.I.A.A. 358 (Arbitral Panel) (Phase 2 Authorities – Tab 51).

[343] *Boffolo* v. *Venezuela*, [1903] R.I.A.A. 528 (Umpire) (Phase 2 Authorities – Tab 52).

[344] Contrary to the Investor's assertion in its Memorial, para. 154.

330. In the only case to date applying Article 1105[345], *Metalclad*,[346] the tribunal found a breach of the minimum standard of treatment. The approach taken by the Tribunal was to look at the totality of the circumstances to determine whether the treatment of the Investment constituted a breach of Article 1105.

331. Among the relevant circumstances found by the Tribunal were that :

a) the Investor had no way of determining the municipal requirements for a permit;

b) the federal government had represented to the Investor that all permit requirements had been met;

c) the Investor had detrimentally relied on the federal government's representation and on the strength of these representations had established its business in Mexico;

d) again, relying on the federal representations, the Investor had committed substantial funds to build a waste disposal site;

e) the municipality abruptly halted construction on the basis that required permits had not been obtained;

f) construction was renewed when the Investor applied for a municipal permit;

g) well after construction was virtually complete, the Investor's application for a municipal permit was denied at a closed meeting that the Investor was not invited to, did not know of and at which it had no opportunity to appear;

h) immediately after the denial of the permit, the municipality took legal proceedings which the tribunal construed as affirmation that the municipality knew it lacked authority to deny the permit in the first place;

i) the effect of these actions was to completely deprive the Investor of its Investment.

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[345] Although pleaded in *Azinian*, the Tribunal did not find a breach of Article 1105.
[346] *Metalclad*, *supra* at paras. 75-101 (Phase 2 Authorities – Tab 10).

332. No parallel can be drawn between the Metalclad case and the instant case. The facts in this case are completely different. Far from depriving the Investor of its Investment, the SLA and its implementation have provided the Investment secure access to the U.S. market which enabled it to thrive.[347]

333. Further, Canada's administration of the export control regime exceeded the basic norms of due process in a reasonably developed legal system.

334. The SLA, the Maritime Side Agreement and the 1999 Amendment to the SLA are publicly available. The *Export and Import Permits Act* and regulations made thereunder are publicly available in the statutes of Canada and on the EICB website. Each new or amended regulation is published in the Canada Gazette with a Regulatory Impact Analysis Statement (RIAS). In the case of regulations which implement the *Softwood Lumber Products Export Permits Fees Regulations*, the Export Permits Regulations (Softwood Lumber Products) and the Export Control List, when these regulations were first made and each time they were amended, the RIAS indicated that the measure was undertaken after consultation, that comments would be received for a period of months, and that amendments may be made as a result of comments received. Canada received no comments concerning the regulations from either the Investor or the Investment.

335. Notices to Exporters were also publicly available and were sent directly to quota-holders, including the Investment. Additionally, every interim and final quota allocation was accompanied by a background note explaining the methodology for the allocation and inviting quota-holders to phone the administrators of the system if they had concerns or questions. In fact, as Mr. George has attested, many quota-holders did so, and apparently received satisfactory assistance.[348]

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[347] Note the testimony of Kyle Gray to the effect that Pope made U.S.$33 million last year in profit: Transcript, May 3, 2000 (p.m.), pp. 11-12.

[348] George Affidavit #3, para. 25, 26, 28, 29; George Affidavit #2, para 92,93

336. Additionally, government officials consulted extensively with provincial governments and industry associations during the negotiation of the SLA, design of the allocation system and with respect to discretionary and non-discretionary allocations of quota. Once the initial allocations were made, a National Advisory Committee composed of industry representatives and provincial governments was formed.[349]

337. In assessing the level of procedural due process, the Tribunal should not lose sight of the circumstances surrounding implementation of the SLA. Officials had 7 months between signing and implementation of the SLA to design and implement a large quota system to distribute a finite amount of quota. That there would be differences of perspective among stakeholders and dissatisfaction with the amount of quota received or the method in which it was allotted is obvious.[350] However, the concerns raised by the Investor do not even approach the threshold of outrageous behaviour required to engage the international minimum standard of treatment.

338. In the usual operation of a quota system, the types of quota allocation concerns raised by the Investor are usually resolved with officials or, if not satisfied, the Investor may go to domestic court for judicial review. It is revealing that the Investor does not even mention the availability of domestic remedies of judicial review of quota allocation decisions.[351]

339. The type of complaint raised by the Investor in these proceedings would have been dealt with fully, promptly and fairly by the Federal Court of Canada. A transparent process was provided to the Investor. Arbitration under Chapter Eleven is not an alternative to, or the equivalent of, domestic judicial review.

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[349] George Affidavit #3, paras 16-19, Valle Affidavit #1, paras 17-32, 50-52, 54, 58-61, 64-66.
[350] Valle Affidavit #2, paras 17-19.
[351] The Investor was put on notice of Canada's position concerning judicial review in para. 139 of Canada's Statement of Defence. Oddly, it has not even mentioned, much less addressed the concept and its importance in providing an avenue for judicial review by a neutral, impartial court.

340. An Investor cannot claim a denial of justice where it has not availed itself of available domestic mechanisms which could remedy any errors or unfairness. The contrast of Article 1105 with Article 1904 shows that Chapter Eleven of NAFTA does not replace judicial review. Article 1904 expressly states that binational review of antidumping and countervailing duty determinations replaces judicial review and sets out the machinery for such review. Article 1105, and Chapter Eleven generally, do none of these things. Further, that Chapter 11 is not a substitute for judicial review is clear from the waiver contemplated by Article 1121, which allows the continuation of proceedings in the nature of judicial review simultaneously with Chapter Eleven proceedings.

341. The Investor places great reliance on GATT Article X. GATT Article X requires publication of laws, regulations, judicial decisions and administrative rulings of general application. It also requires a party to maintain judicial, arbitral or administrative tribunals for prompt review and correction of administrative action. As the Investor notes[352], NAFTA Articles 1802 to 1805 are similar to GATT Article X. They are both specific treaty provisions that do not incorporate the international minimum standard. Neither is applicable to NAFTA Chapter Eleven arbitrations. The procedures set up under the Export Control Regime meet the standard in GATT Article X and Chapter Eighteen of NAFTA. Even if they were applicable, Canada's conduct in this case has met or exceeded the requirements of GATT Article X and NAFTA Chapter Eighteen.

342. In all cases involving GATT Article X, the factual circumstances have been very different from those in the instant case.

[352] Memorial, para 164.

343. For example, in *United States – Imports Prohibition of Certain Shrimp and Shrimp Products* [353]("*Shrimp-Turtle*") the WTO Appellate Body applied GATT Article XX. It found that the certification process consisted of *ex parte* inquiry with no opportunity to be heard, no written decision, no notice of denial of an application and no procedure to review or appeal a denial of one's application.

344. It should be noted that *Shrimp-Turtle* was dealing with a concept of "arbitrary" discrimination that appears as qualifying language in the chapeau of GATT Article XX, which set out certain exceptions to GATT obligations. These exceptions have always been strictly construed and the burden rests upon the defending party of proving that an exception applies. Findings of arbitrariness in this case must be placed in this context, which is very different from the present case.

345. The factual circumstances are also clearly different in this case. Under the Export Control Regime applicable laws, regulations and administrative notices are public. Quota holder allocations were based on information they provided in their questionnaires, the allocation methodology was applied to everyone in the same manner, there was extensive consultation with stakeholders, applicants received written explanations of their quota allocations and dissatisfied quota holders could speak with officials and if left dissatisfied, could request judicial review of decisions concerning quota allocation by the Federal Court of Canada.

d) Abuse of Rights

346. The Investor's discussion of abuse of rights is unrelated to the international minimum standard, if the principle exists at all. The principle of abuse of rights is not well established in international law. In fact, its status is quite controversial. Brownlie notes that "as a general principle it [abuse of rights] does not exist in positive law."[354]

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[353] *United States – Imports Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, October 12, 1998 (WTO App. Body) [hereinafter "Shrimp-Turtle"] (Phase 2 Authorities – Tab 53).

[354] I. Brownlie, *Principles of International Law*, 447-8 (Phase 2 Authorities – Tab 2).

347. As noted by Schwarzenberger:

> Even as a working hypothesis, the doctrine of abuse of rights appears to be rather loosely formulated. If it is not itself to become an abuse, it requires to be severely pruned of its exuberances. It must be restricted to the hard core of situations in which it constitutes the only alternative to manifest injustice and inequity.[355]

348. Further, the quotation from *Azinian*[356] cited by the Investor as evidence that abuse of rights is part of Article 1105 is in fact taken out of context. That discussion is under the heading of expropriation, and relates to the ability of a tribunal to find a state liable internationally for judicial decisions. In any event, there is no basis for finding that there was malicious or intentional misapplication of the law in this case.

e) National Treatment

349. At paragraphs 178 to 189 of its Memorial, the Investor argues that Article 1105 includes a guarantee of national treatment. As noted above, the standard of treatment provided by Article 1105 is the minimum standard of treatment under customary international law. The position that the minimum standard is inclusive of national treatment is contrary to the views of international writers and tribunals, including those cited by the Investor,[357] which reaffirm the difference between the two standards.[358]

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[355] A Schwarzenberger, *International Law and Order*, 88 (Phase 2 Authorities – Tab 47).

[356] *Azinian* v. *United Mexican States*, *supra*, paras 102 - 3 (Phase 2 Authorities – Tab 9).

[357] Elihu Root, *The Basis of Protection of Citizens Residing Abroad*, *supra* at 521 - 522 (Phase 2 Authorities – Tab 14) that an alien is entitled to the general (international minimum) standard regardless of the standard its own citizens are compelled to live with. The *Case of Certain Norwegian Loans* [1957] C.J. Reports 9 (I.C.J.) (Phase 2 Authorities – Tab 54) was discussing the consistency of national currency law with international obligations and does not address whether national treatment obligations are part of the international minimum standard of treatment.

[358] See for example, R. Dolzer & M. Stevens, *Bilateral Investment Treaties*, *supra* at 58 (Phase 2 Authorities – Tab 7): "Although it is generally accepted that international law requires a minimum of fairness in the treatment of foreigners and foreign investment, there is no requirement that a State treat all aliens equally, let alone treat aliens as favorably as nationals."

350. The national treatment standard is a comparative one, whereas the international minimum standard is an absolute standard defined by customary international law and not in any way dependent on the treatment a state accords its nationals.

351. The only apparent basis for the Investor's unique theory is Article 102(1) of NAFTA. That article sets out national treatment as a principle that reflects the objectives of NAFTA listed in Article 102(1)(a) to (f). It does not create a substantive obligation different from the rules set out in the Agreement. In fact, it refers treaty interpreters to the substantive rules that elaborate the objectives of NAFTA, in this case Article 1102.

352. If this Tribunal is inclined to address the relationship between the Chapter Eleven obligation of national treatment and the minimum standard of treatment, it must look to the express words of the text.

353. The Investor's proposed version of "national treatment" contradicts the express wording of Article 1102[359]: "treatment no less favorable that it accords, in like circumstances, to investments of its own investors". The Investor's preferred version, unlike Article 1102, would not require a comparison of investments in like circumstances. Conveniently, the Investor asserts that this interpretation of national treatment would entitle it to the best treatment that Canada accords anywhere.

354. The express words of NAFTA Articles 1102 and 1105 in the context of Chapter Eleven make it clear that two different standards are at issue.[360] The only national treatment standard which can be adjudicated in Chapter Eleven proceedings is that expressly found in Article 1102. If there is a breach of national treatment in this Chapter Eleven case, it must be proved under Article 1102 and the test set out in that article.

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[359] See in particular Memorial, para. 179.

[360] This is confirmed by the *Canadian Statement of Implementation for NAFTA, supra*, (Phase 2 Authorities – Tab 5 at 149).

355. If a breach of Article 1102 were also a breach of Article 1105, Article 1102 would be rendered redundant, contrary to basic principles of treaty interpretation. Further, such an approach would make the permitted reservations of Article 1102 meaningless.

356. Finally, the principle of *diligentia quam in suis*,[361] which the Investor admits applies in times of war, insurrection or mob violence, does not apply in this case. Implementation of the SLA is clearly not equivalent to war, insurrection or mob violence. Nor does this maxim import "best treatment" into national treatment.

357. It should also be noted that Brownlie does not stand for the proposition alleged at paragraph 187 of the Memorial.

f) International Economic Law

358. At paragraphs 190 to 193 of its Memorial, the Investor states that the principles of international human rights law are applicable to international economic agreements. This proposition is unsubstantiated.[362] More fundamentally, it fails to shed light on the definition of the customary international minimum standard of treatment beyond that set out in the cases, referred to earlier.

6) Application of the Law to the Facts

359. The Investor specifies seven alleged breaches of the international minimum standard. Canada's reply to these follows. In general, Canada submits that no aspect of its conduct in the implementation of the SLA meets the standard of outrageous or egregious conduct required for a breach of Article 1105 to be found.

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[361] Memorial, paras 180, 187

[362] I. Brownlie, *Principles of Public International Law*, *supra* comments at page 530 that the synthesis of international human rights law and the international minimum standard is unconscionably vague and one that the majority of states would not accept. (Phase 2 Authorities – Tab 2).

360. Canada also notes that the facts relied on by the Investor are largely unjustified supposition or plainly incorrect. The Investor has not filed affidavits with its Memorial to support such allegations, despite having the opportunity to do so and having the burden of proof in this case.

a) Lack of Administrative Fairness

361. The Investor asserts there was a lack of administrative fairness because there was no administrative appeal or review available to quota-holders. This position is plainly wrong: all allocations of quota were judicially reviewable by the Federal Court of Canada.

362. The Federal Court of Canada is an impartial superior court with extensive remedial power to correct any errors or unfairness that might exist in quota administration. The Investment never availed itself of judicial review, although this option was always open to it. Other producers did commence judicial review proceedings in the Federal Court of Canada.[363]

363. Sections 18 and 18.1 of the *FCA*[364] give the Federal Court of Canada, an independent, impartial, superior court of record, jurisdiction to judicially review the decisions or orders of any federal board, commission or tribunal. This latter phrase includes decisions by a Minister allocating quota under an administrative scheme such as the export control regime for softwood lumber.

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[363] George Affidavit #3, paras 42,43,44

[364] *FCA, supra* (Phase 2 Authorities – Tab 46) See in particular s.2 *FCA*: in this capacity the Minister is a "federal board, commission or tribunal."

364. The existence of judicial review under section 18.1 goes to the very heart of whether there has been a violation of Article 1105. Not everyone will be happy with the results of an administrative proceeding. However, where the system provides for rectification of errors or of unfairness, and the applicant has not availed itself of that remedy, there can be no basis for complaint under Article 1105.

365. The Federal Court of Canada does provide for rectification of errors and broad review of the manner in which decisions were made. The grounds for judicial review by the Federal Court of Canada are comprehensive. The Court can grant relief where it finds:

(a) an error of jurisdiction;

(b) failure of natural justice including procedural fairness;

(c) error in law;

(d) error of fact;

(e) acting by reason of perjured evidence, or

(f) acting in any other way that was contrary to law.[365]

366. Where the Court grants relief it can order the decision-maker to do what it should have done, quash, set aside or refer a decision back to the administrator with directions it considers appropriate.[366]

[365] The same standard of review is used by binational panels under Chapter 19 of NAFTA when reviewing Canadian administrative anti-dumping or countervailing duty determination.

[366] *FCA, supra*, at section 18.1 (Phase 2 Authorities – Tab 46)

367. The *Federal Court Rules*[367] set out the procedure for judicial review, which guarantee an aggrieved party the opportunity to know the case to be met, obtain documents from the decision-maker being challenged, cross-examine on the opponent's case and make submissions to the court. The Federal Court issues a decision on the record which may be appealed to the Federal Court of Appeal[368] and further appealed, with leave, to the Supreme Court of Canada.[369]

368. Five judicial review cases concerning the implementation of the SLA were commenced by softwood lumber exporters dissatisfied with their quota allocation.[370] Similarly, exporters and importers have availed themselves of sections 18 and 18.1 of the FCA to apply for judicial review of the Minister's EIPA decisions in connection with other controlled goods.[371]

369. These comprehensive mechanisms are ignored by the Investor. To suggest that these procedures do not meet the standards of due process in a civilised nation is absurd.

370. Additionally, informal review mechanisms were available to all producers. As noted in all Notices to Exporters and background notes attached to allocation decisions, a quota holder was encouraged to call EICB for explanations and assistance. EICB constantly gave information and advice to quota holders in this manner. The Investor received all of these materials and had the same opportunity as other quota holders to avail itself of the informal review mechanisms. The Investor contacted officials only

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[367] Federal Court Rules SOR/98-106 (excerpt attached) (Phase 2 Authorities – Tab 55).
[368] *FCA, supra,* at section 27 (Phase 2 Authorities – Tab 46).
[369] *Supreme Court Act*, R.S.C. s. S-26 as am, ss.1, 35-45 (Phase 2 Authorities – Tab 56).
[370] *Valle Affidavit* #2, paras 194-196, George Affidavit #3, para 44, 46
[371] See for example *Parker Cedar Products Ltd.* v. *R.* (1988), 20 F.T.R. 208;(T.D.): (1988) 92 N.R. 318 (Fed. C.A.)(Phase 2 Authorities – Tab 57), *Canada* v. *Dantex Woolen Co.* , [1979] 2 F.C. 585 (T.D.); [1979] 2 F.C. 598 (C.A.)(Phase 2 Authorities – Tab 58); *Maple Lodge Farms Ltd.* v. *Canada*, [1982] 2 S.C.R. 2 (Phase 2 Authorities – Tab 59); *Canadian Association of Regulated Importers* v. *Canada (A.G.)*, [1994] 2 F.C. 247 (C.A.), leave to appeal to SCC refused (1994) 21 Admin. L.R. (2d) 159n (Phase 2 Authorities – Tab 60); *R V. Green River Log Sales* (1988), 92 N.R. 319 (Fed. C.A.) (Phase 2 Authorities – Tab 61); *K.F. Evans Ltd.* v. *Minister of Foreign Affairs*, [1997] 1 F.C. 405 (T.D.): (1998), 223 N.R. 212 (Fed. C.A.) (Phase 2 Authorities – Tab 62).

once, and received a prompt reply answering its question and inviting it to pursue the matter further if it had additional questions.[372]

371. The allegation that only vocal and politically connected producers had access to discretionary reserves and trigger price bonus is not substantiated and is simply untrue. There was no preferred access for vocal or "politically connected" producers. Reserves and bonus were allocated according to need and after careful review of the circumstances. The review often included extensive consultation with industry representatives, including the B.C. Advisory Committee, the association speaking for the Investment.[373] The Investment received trigger price bonus in years 2 and 4 on the basis of industry recommendations.[374]

b) Misallocation of Discretionary Reserves and Trigger Price Bonus

372. The Investor complains about the allocation of quota from discretionary reserves and trigger price bonus based on the Investment's alleged "understanding" that all quota would be allocated strictly according to provincial historical shares. This is the first time such an understanding has been communicated by the Investor.

373. Nor has such an understanding ever been conveyed to Canada by industry groups or provinces. To the contrary, there were heated debates between provincial associations as to the amount of new entrant quota that would be required. The existence of such debates is inconsistent with what the Investor claims is a "shared" understanding that strict provincial historical shares would be the basis for allocation of quota.[375]

[372] George Affidavit #3, paras 25-26, 27, 31.
[373] George Affidavit #3, paras 20, 38, 59, 75.
[374] George Affidavit #3, Annex A.
[375] Valle Affidavit #2, para. 139.

374. Further, there is no credible basis for the understanding that the reserves or trigger price bonus would be allocated based on provincial historical shares. The only allocations that were even loosely based on provincial historic share were the annual allocations in year 1, after deducting a share for the reserves. Officials made it clear that subsequent annual allocations were to be based on individual corporate utilisation in the previous year, and that reserves were to be allocated on an as needed basis. [376]

375. The Investment's "misunderstanding", is unreasonable in the face of announcements of EICB officials as the program was implemented and the relevant Notices to Exporters and the on-going availability of EICB officials to clarify any questions.[377]

376. The Minister's Reserve was not a secret. The Investor obviously knew about it was pleaded in the March 1999 claim. Industry was advised about it and made recommendations to the Minister to address deserving cases. It was mentioned in background notes to allocations and was specifically discussed at a NAC meeting in 1998. As well, EICB officials told individual quota holders about it.[378]

377. Further, the allocation of Minister's Reserve according to historic provincial share would be illogical given the purpose of these reserves. The Minister's Reserve was to address individual cases of hardship or errors, which do not occur on a provincial historic basis. A reserve of this sort is a common feature of quota systems.[379]

378. New entrant allocations were to provide quota to those with no record of performance or insufficient records of historical performance when the SLA was concluded. Again, historical provincial share would bear no relationship to where new entrants were establishing themselves and would be an illogical basis for allocation.

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[376] Valle Affidavit #2, para. 139-140.
[377] Valle Affidavit #2, paras 84-86, Exh. #7, Notice to Exporters No. 94, para. 11.6 (Book of Treaties – Tab 16).
[378] George Affidavit #3, paras. 26, 33.
[379] Response to Tribunal Question, #5.

379. To ensure new entrant quota was allocated to whomever most needed it was precisely the reason new entrant applicants were required to file evidence of their investment and to meet criteria that were clearly and publicly delineated in the New Entrant's questionnaire and Notice to Exporters No. 94.[380]

380. It is clear that at the time of implementing the SLA there were trends in the industry that were altering the historic patterns of exports of softwood to the U.S. from the covered provinces.[381] In the first phase of this arbitration, Professor Vertinsky explained how new growth and new investment have been concentrated in Quebec and Ontario.[382] This is confirmed by the Smyth Report cited by the Investor and the materials by submitted by Canada to the Tribunal.[383] Given these trends, one would expect that a fair system for new entrant quota would distribute quota where the new entrants operated, regardless of provincial origin. This is what the Export Control Regime did.

381. Even if new entrant quota were divided on historical provincial share, it would not have enured to the benefit of the Investment. The Investment is not a new entrant and never applied for new entrant status. Hence all allegations concerning the allocation of new entrant quota are entirely irrelevant to its claim. The Investment did not self-identify as a new entrant no led evidence has been led that it could be so considered based on any possible definition of a new entrant.

382. There are only two possible ways this Tribunal could find that the Investor or the Investment suffered damage attributable to new entrant quota. First, it could hold that there should not have been any new entrant category. In such case, this would leave quota otherwise reserved for new entrants to be distributed among established companies (i.e. non new entrants) such as the Investment.

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[380] Response to Tribunal Question, #7.
[381] Valle Affidavit #1, Exhibit J; Valle Affidavit #2, para. 41.
[382] Vertinsky Affidavit, paras 69-81; Tribunal Request for Documents " Statistics"», Tabs 53 & 54.
[383] Memorial, para. 11.

383. New entrant provisions are common in quota systems in Canada and elsewhere.[384] Indeed, Article 3(j) of the WTO *Agreement on Import Licensing Procedures,*[385] which prescribes international rules respecting import quotas, requires consideration be given to a reasonable distribution of licences for new importers. Indeed, failure to make provision for new entrants would work an injustice on those companies who had made new investment commitments at the time of implementation of the export control regime. As a result, Canada submits that there is no basis to hold that no allowance should have been made for new entrants.

384. Second, the Tribunal might find that an excessive amount of quota was allocated to new entrants. In fact, the new entrant quota under the SLA was minimal, especially in light of the huge demand for it: 628 million board feet was available to the 218 companies that applied cumulatively for a total of 8.3 billion board feet of new entrant quota.[386] This means that the new entrant quota available could only meet 7.5% of the quota requested by new entrant applicants. Clearly, there were more than enough new entrants to fully utilise the available new entrant quota. Eligible new entrants received small amounts of quota relative to their production capacity.[387] [redacted]

385. Given the negligible amount of quota reserved for new entrants relative to the total quota available, Canada submits that a finding that the amount of new entrant quota set aside was excessive would not be supported by the evidence.

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[384] Valle Affidavit #1, para. 110.

[385] *Agreement on Import Licencing Procedures*, accessed online at www.wto.org (Phase 2 Authorities – Tab 63).

[386] MacDonald Affidavit, para. 72.

[387] Valle Affidavit #3, para. 153; Response to Tribunal Question, #7.

386. In these circumstances, it is clear that neither the Investor nor the Investment were harmed by new entrant quota, regardless of how it was allocated. As a result, it is not properly part of this Claim. To inquire into this aspect of the Export Control Regime would be to turn this Tribunal into a Commission of Inquiry.

387. The policy regarding transitional adjustment quota was outlined in Notice to Exporters No. 94.[388] Contrary to the Investor's suggestion, the allocation of this quota was not a reward to those who rushed the border before the quota system went into effect. It was a necessary feature so that Canada could meet its obligations both to account for all exports by those who received no quota or had used their entire quota and to issue permits for all exports during the first-come, first-served period. (even if the exporter had no quota or had used its entire quota) Further it was a one-time adjustment-quota allocated in the transitional adjustment was returned to the EB pool for distribution to all quota-holders in year 2.[389]

388. The purpose of the transitional adjustment quota was to address a particular problem. To allocate according to fixed provincial shares would have been nonsensical.

389. Transitional adjustment quota was given to every quota holder that needed it. If the computer identified a permit for which quota was not available from a quota holder, a transitional adjustment was required.[390] One did not "apply" for it. The Investment would have received transitional quota had it required it. This was a reasonable response to the problem posed by having a quota system starting in the middle of the quota year.

390. Finally, no aspect of the allocation of trigger price bonus could possibly breach the minimum standard of treatment. Allocation of trigger price bonus in Q1 - Q4 went to new entrants on a permanent basis. Given the vast demand for new entrant quota, this was a reasonable approach. In Q5, Q6, and Q12 - 16, the vast majority of trigger price

[388] Notice to Exporters No. 94, para. 10.1 (Book of Treaties – Tab 16).
[389] Valle Affidavit #2, para. 146.

bonus was in fact allocated on the basis of aggregate volume by province, with allocations to specific companies made based on the recommendation of advisory committees and industry associations.[391]

391. In sum, the methods chosen to distribute the New Entrant and Minister's Reserves, transitional adjustment quota and trigger price bonus quota were all reasonable approaches to develop a fair yet flexible quota system.

392. The allocation of the discretionary reserves should be kept in perspective: the amount of quota allocated through the discretionary reserves was minimal. The transitional adjustment was a one-time allocation equivalent to 170 million board feet of EB and 50 million board feet of LFB. The Minister's Reserve consisted of 50 million board feet of EB in year 1 and 40 million board feet in years 2 to 4. In year 5, the Minister's Reserve consisted of 10 million board feet of bonus quota.[392] This is less than 1/3 of 1% of the EB quota available annually to Canada under the SLA. New Entrant's EB quota was 2% of available EB. While new entrants did receive a larger share of LFB in year 1, their year 2 LFB levels were the same as for established companies. The excess amount was returned to the national pool for allocation to all companies. Hence, in year 2, the Investment's LFB increased by [redacted][393]

393. The Investor alleges that the trigger price bonus and discretionary allocations were secretive. In fact, Canada advised quota holders that allocations were made from these reserves and trigger price bonus quota.[394]. Industry representatives were also advised about all reserves and they made recommendations to the Minister to address deserving cases. The reserves were specifically discussed at a NAC meeting in 1998

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[390] Valle Affidavit #2, para. 147.
[391] Response to Tribunal Question, #9.
[392] Response to Tribunal Question, #5.
[393] Valle Affidavit #2, para. 52.
[394] George Affidavit #3, para. 55.

and officials individual quota holders about the reserves where this might be of assistance.[395]

394. Contrary to the allegations of the Investor, confidentiality was not an excuse by Canada to avoid transparency.[396] Companies were sincerely concerned that information about their quota allocations not be publicly available to their competitors. The EICB's undertaking of confidentiality in the questionnaire was as a result of the deep concern of industry that confidential business information not be shared. Respecting this undertaking, Canada published a list of all quota recipients without identifying the amount or type of quota given.[397] To publicise the amount of quota or type of quota allotted to an individual producer would violate Canada's pledge of confidentiality and could put companies at a competitive disadvantage.

395. The Investor's concern about maintaining the closed nature of these proceedings is evidence that it shared this concern. The Investor insisted on redacting pleadings for public distribution, on redacting the Tribunal's award in the first phase and on *in camera* hearings.

396. The Investor also makes unsubstantiated allegations that Canada intentionally designed the discretionary reserves and trigger price bonus to advantage Quebec. There is no basis for this inflammatory allegation.[398] The documents cited by the Investor in paragraphs 202 and 203 of its Memorial do not support its position.

397. The Moroz memorandum to the Minister referred to as proof of a Quebec bias[399] is in fact a memo summarising discussions among industry, provincial and federal representatives at the 1997 NAC meeting.[400] It clearly relates to the debate between primary producers and remanufacturers, and not to allocation to Quebec quota holders

[395] George Affidavit #3, para 18.
[396] Memorial, para. 66.
[397] George Affidavit #3, para 27; Valle Affidavit #2, para 36.
[398] George Affidavit #3, paras. 3, 55, 60.
[399] Memorial, para. 202.
[400] Valle Affidavit #2, para. 160.

in preference to other provinces. In fact the memorandum states that all provinces sought to advance their own particular best interest and that the system would not be altered because there was no consensus on change. To construe this type of material as evidence of intent to favour Quebec or of a bias in favour of one province is misleading.[401]

398. The memorandum dated July 15, 199[7] is nothing more than a statement of Quebec's interests in the SLA. It is customary to provide this type of note when federal and provincial officials meet. To isolate one memorandum that discusses Quebec's interests and infer that Canada was preoccupied with that province strains credulity.[402]

399. Similarly, the allegation that the new entrant quota allocation was a ruse to favour Quebec is without basis. New entrant allocations went to new entrants, wherever they were located and regardless of their province of origin. [403]

400. In sum, the Investor has failed to establish that the treatment of its Investment through the allocation of discretionary reserves or trigger price bonus was arbitrary, a denial of justice or shocking to the conscience of a reasonable observer.

c) Wholesaler Issue

401. The Investor alleges Canada acted in an arbitrary and unfair manner with respect to allocation of quota to the Investment.[404]

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[401] Valle Affidavit #2, para. 160.
[402] Valle Affidavit #2, para. 151.
[403] Valle Affidavit #2, para. 160.
[404] Memorial, para. 207.

402. When the Minister decided that wholesalers would not receive quota allocations, it became evident that Canada would have to devise a way of ensuring that primary producers and remanufacturers received credit for exports of their lumber by wholesalers. While these primaries and remanufacturers could, and did, report their sales to Canadian wholesalers on their questionnaires, they were not in a position to report how much of their lumber these Canadian wholesalers actually exported to the United States Canada relied on the questionnaires of wholesalers for this information. For a number of reasons, described by Claudio Valle in his affidavit,[405] there was not always a good match between the data provided by the primaries and remanufacutrers and the data provided by wholesalers.

403. Officials explained this situation to provincial and industry representatives and sought their views and suggestions on how to respond to it. Each province had a different perspective on the correct approach and, as evidenced by the Memorandum to Minister dated September 26, 1996,[406] these views were carefully considered.

404. There were "pros" and "cons" to the various proposed approaches. B.C. suggested that Canada consider continuing the current system of first-come, first-served until the end of year one. The Investor cites some of the "pros" of such a system as outlined in the September 26 memorandum. Among the "cons" was a concern that it might be difficult to obtain U.S. support for what would have to be an amendment to the SLA and, furthermore, that delaying allocations might cause Quebec and Ontario to re-open the argument that their provincial corporate shares were too low.[407]

405. The international minimum standard does not guarantee an investment the administrative mechanism of its choice. As noted in the *Neer* claim, "[It] is not for an international tribunal...to decide whether another course of procedure taken by local authorities...might have been more effective."[408] The methods chosen in this case

[405] Valle Affidavit #2, paras 58-83.
[406] Memorial, Tab 5.
[407] Valle Affidavit #2, para. 73.
[408] *Neer, supra*, para. 5 (Phase 2 Authorities – Tab 13).

cannot be considered outrageous, shocking or manifestly unjust behaviour in breach of Article 1105. The minimum standard is met where, as here, officials consult with stakeholders, weigh policy options and select a reasonable course of action.

406. The wholesaler co-efficient was based on data that was certified by professional accountants and supplied by the industry itself. It took into account the differences in data found in questionnaires and was applied uniformly to all quota recipients.

407. Similarly, the allocations to twelve B.C. companies complained of by the Investor were reasonable administrative responses to problems raised with officials by the industry.

408. As a matter of fact, most of the twelve situations were not wholesaler allocation problems. Rather, they reflected problems due to the averaging formula selected by the B.C. industry. If B.C. had chosen the "best year" approach to determining year 1 allocations, most of these cases would not have required adjustment. The remaining cases concern questionnaire errors where companies omitted information or placed it in the wrong categories. Canada disagreed with the Committee's assessment that the adjustments were required because of a wholesaler "problem", but did agree that adjustments were warranted.[409]

409. The B.C. Committee wrote to its members to explain these adjustments. Further, as with all its allocations, the Investment always had the right to judicial review of the 3.1% reduction in quota it received as a result of the B.C. adjustments. The B.C. Advisory Committee explained its recommendations to all B.C. companies at the time. Despite this, the Investment did not commence a judicial review application. On such a review, it could have raised whatever errors or unfairness it believed were responsible for its reduced quota.

[409] Valle Affidavit #2, para. 179.

d) Verification Review

410. The Investor alleges that Canada's conduct during the verification review breached Article 1105. The conduct of the verification review has been extensively canvassed in the interim measures hearing and in affidavits 1 and 3 of Douglas George.

411. Canada submits that the following aspects of the verification review are relevant in considering the nature of the treatment of the Investment :

a. verification reviews are normal and necessary facets of the fair administration of any quota system. It is unreasonable to expect that allocations, once made, could never be verified or reviewed. Softwood lumber quota holders were on notice from the moment they applied for quota that they could be required to allow access to their data for the purpose of verification.[410] This is a term agreed to by the Investment when it signed its questionnaire. Such verifications were conducted on a regular basis during the SLA;[411]

b. Canada never unilaterally determined to cancel or revise the Investment's quota or "build a case" against the Investor. Canada's only goal was to obtain accurate data to ensure that the Investment's quota was proper;

c. The issue arose when Canada examined the Investment's questionnaire to determine if the Investor was correct in its allegations in this Claim that its Investment received inadequate quota. The questionnaire showed reported exports exceeded reported production. The Investment was asked to cooperate with a verification review because its explanation for this anomaly was that it had made errors in its questionnaire;

d. Canada followed usual procedure in carrying out this verification review, and acceded to the Investment's particular requests to commence with only a 6 month review, not to require a site visit and to conduct the review at the premises selected by the Investment;

e. The 6 month review was only an interim step, intended to indicate if a problem existed which would require a revised questionnaire for the entire two year base period;

[410] George Affidavit #3, para. 80.
[411] Valle Affidavit #2, para. 78.

f. The 6 month review was undertaken on a consensual basis;[412]

g. When the 6 month verification clearly indicated there were mistakes that required correction, Canada sought a revised 2 year questionnaire to provide the most accurate and complete data possible to assess the Investment's quota allocation;

h. The Investment refused this request to submit a revised questionnaire. Hence, it was incumbent on Canada to advise that it might have to adjust quota based on the 6 month review, the only figures it had available to it. This does not constitute a threat as characterised by the Investor;

i. The Investor has still not provided a revised questionnaire and has indicated it is not able to do so based on Canada's summary of the type of errors of the 6 month review;

j. Canada offered to discuss any problems the Investor might have or to meet with it to clarify problems in completing the questionnaire. The Investor has not accepted these invitations;

k. The Investment's quota has not been amended to this date.[413]

412. It is not unreasonable to expect a quota holder to cooperate with reasonable requests of the quota administrators. The request to submit a revised questionnaire was reasonable given the clear indication from the 6 month review that there were problems with the Investment's original questionnaire.

413. In the totality of these circumstances, Canada submits that it acted in a fair, responsible manner. It was not arbitrary to seek to verify the accuracy of the Investment's quota. The methods used to do so were consistent with usual practice and were reasonable; they were certainly not shocking to the conscience of a reasonable person.

[412] Memorial, para. 231.
[413] George Affidavit #3, para 122.

414. A finding that Canada's treatment of the Investment was arbitrary, shocking or manifestly unjust would be extreme in these circumstances. Even if the Tribunal believes that this "episode" could have been handled differently, that is not a reason to find a breach of Article 1105. The fact remains that it is simply not conduct that breaches the minimum standard of treatment.

415. Further, Canada submits that neither the Investor nor the Investment have suffered loss or damage as a result of the verification issue. Canada has not modified the Investment's quota in any respect whatsoever. At most, the Investment has been inconvenienced by being asked to file a revised questionnaire and undergoing review of a 6-month sample of data. This hardly qualifies as loss or damage, especially in light of the Investment's own admission that it made errors in its questionnaire,[414] its lack of cooperation with the verification and the fact that it always knew that a term of receiving quota was to permit verification.[415] Furthermore, if Canada had modified the Investment's quota, the Investment would have had a complete remedy through judicial review in the Federal Court of Canada.

e) SFB Issue

416. The Investor complains about the existence of the SFB, its application to B.C. companies without differentiation between interior and coastal producers and the fee levels imposed by the SFB Agreement. None of this is a question of implementation – it is all required by the SFB Amendment to the SLA. In effect, the Investor's argument concerning the SFB is a challenge to provisions in a treaty between sovereign states. As such, it is beyond the scope of this Claim and outside the jurisdiction of a NAFTA Chapter Eleven tribunal.

[414] George Affidavit #3, para. 86.
[415] George Affidavit #3, para. 80.

417. In any event, the SFB does not breach the international minimum standard of treatment. It reflects a rational, non-discriminatory policy choice by government to end a dispute that arose out of facts pertaining only to B.C. producers.

418. NAFTA Chapter Eleven tribunal ought not second-guess the rational policy choice made in implementation of the export control regime, by which various categories of quota were arrived at, particularly where these choices became obligations in a treaty to which the Party of the Investor, the U.S, was a signatory.

419. The SFB Amendment was strongly urged by B.C. industry and the B.C. government. These stakeholders endorsed a negotiated settlement of the dispute because they found it preferable to the potential outcome of the on-going arbitration. Among the relevant factors was a concern that an arbitral win for either party might precipitate the termination of the SLA by the losing state. Clearly the majority of stakeholders felt the negotiated settlement was the best option available in the circumstances.[416]

420. The terms of the agreement were developed in close consultation with these stakeholders and the final agreement was strongly supported by them. These terms were explained to industry by its representatives, including in a memorandum from B.C. Lumber Trade Council to various members including Abe Friesen of the Investment.[417] They were also published in regulations and Notices to Exporters. The Investor and its Investment always had access to relevant information.

421. The rates agreed upon in the SFB agreement did not reflect differences between coastal and interior lumber producers, nor were they ever intended to do so. There was no demonstrable correlation between the stumpage reduction and increased exports to the U.S., and therefore such a differentiation would be illogical. In any

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[416] See for example Tribunal Request for Documents, (Tab 55 - comments by B.C. Premier Clark), (Tab 62 - B.C. Lumber Trade Council News Release), (Tab 67 - B.C. Softwood Lumber Trade Council, COFI, B.C. Lumber Trade Council, Government of B.C.)

[417] Tribunal Request for Documents (Tab 75).

event, Canada submits that the international minimum standard was never intended to impose this type of detailed policy choice on government.[418]

422. The suggestion that the SFB levy targeted the Investment is ludicrous. In fact the levy affected 132 B.C. companies, each to varying degrees depending on their production in any given year, their costs and prevailing economic circumstances. Overall, the charges imposed affected about 1% of B.C.'s total lumber exports to the U.S. The increased fees were applied uniformly to B.C. producers.[419]

423. Nor could Canada have even predicted in August 1999 how the Investment might be affected by the SFB levy. The Investment had an erratic record of shipping at the higher fee levels over the course of the SLA. It shipped [redacted] board feet of UFB in year 1, [redacted] in year 2, and [redacted] board feet of UFB in year 3.[420]

424. Further, although the Investor complains that the SFB makes exports at that level "virtually impossible", it exported [redacted] board feet in year 4 at the SFB level. [redacted] the Investment [redacted] the enhanced return policy provided for in Notice to Exporters No. 121 to mitigate any adverse affects of the SFB.[421]

425. The fact that the Investor's claim was mentioned in a memorandum to the Minister outlining potential impacts of the SFB agreement does not prove arbitrary conduct or an intent to harm the Investor or Investment. It was only logical for officials to note the potential impact the SFB Agreement might have on this case, which was the only case then pending concerning the SLA.

426. Finally, the Investor states that the bonus [redacted] in Q12 and Q13 was unrelated to the SFB. Canada agrees. The record shows that a small portion of this bonus allocation was to assist B.C. exporters who had not benefited from

[418] George Affidavit #3, para. 129.
[419] George Affidavit #3, para. 138
[420] George Affidavit #3, Annex A
[421] George Affidavit #3, para. 148.

stumpage reduction but were still subject to the new fee levels. The balance of the B.C. bonus was allocated on a *pro rata* basis with a minimum of 60,000 board feet per quota holder; [redacted][422]

427. In sum, the SFB did not violate the international minimum standard, not did it cause the Investor or its Investment loss or harm.

f) Canada's Alleged Failure to Follow its International Treaty Obligation

428. The Investor alleges that all international treaty obligations are subsumed in Article 1105, including the WTO *Safeguards Agreement.*[423]

429. As noted above, *pacta sunt servanda* is not relevant to the minimum standard of treatment defined by customary international law. Further, treaty obligations are not actionable because Articles 1116 and 1117 identify specific Chapter Eleven obligations. As a result, the argument made by the Investor to the effect that the SLA violates the WTO *Safeguards Agreement* is irrelevant in this case.

430. Further, the Investor's concern in this respect has nothing to do with implementation of the Export Control Regime. Rather, it complains that the mere existence of a voluntary export regime (the SLA) violates a WTO treaty. This argument directly contradicts the Investor's repeated assertion that it is not challenging the SLA itself. If the Tribunal were to find liability on this basis, it would have to address the question of treaty precedence raised in Part C of this Counter-memorial.

431. The Investor's argument that the SLA is a violation of Article 11 of the *Safeguards Agreement* is pure conjecture. Any determination of this would, at a minimum, involve consideration of Article 11(1)(c) of the *Safeguards Agreement* (which

[422] George Affidavit #3, para. 150.
[423] Memorial paras 247-51.

provides that the *Safeguards Agreement* does not apply to measures maintained pursuant to GATT 1994) as well as GATT 1994 Articles XI (which expressly permits export charges) and XXIV.

432. More importantly, the existence of a breach of the *Safeguards Agreement* must be adjudicated by a WTO panel. The Dispute Settlement Understanding ("DSU") established by the WTO Agreements provides the forum for adjudicating allegations of breach of a WTO agreement. Further, the remedial measures available are also prescribed by the DSU. Member states are not entitled to make a determination that a measure violates the WTO Agreement according to (Article 23 DSU).

433. An arbitral tribunal established under Chapter Eleven of NAFTA does not have jurisdiction to determine whether there has been a breach of the WTO Agreements. Its jurisdiction is strictly to arbitrate breaches of the NAFTA provisions specifically identified in Articles 1116 and 1117.

434. No finding of breach of the international minimum standard could be made in relation to the Investor's *pacta sunt servanda* claim without this Tribunal concluding that the *Safeguards Agreement* was breached. This Tribunal does not have jurisdiction to make such a finding.

435. Nor is the international minimum standard in Article 1105 a vehicle for an arbitral panel to determine that a State ought to make a given policy decision. In other words, even if this panel thinks that Canada could have commenced a WTO action under the *Agreement on Subsidies and Countervailing Measures* in lieu of entering the SLA, it is not for the Tribunal to find a breach of the international minimum standard based on the failure to choose one option over another.

436. The decision to enter the SLA was a rational policy choice given the long history of trade wars, the commercial instability these engendered, the fact that a WTO action, even if successful, could result in retaliatory measures or compensation rather than

compliance, and the fact that CVD duties collected in the interim were highly unlikely to be refunded.

g) Inequitable Allocation between Producers

437. Finally, the Investor urges the Tribunal to find a breach of Article 1105 on the basis that it is simply unfair for the Investor to be subject to the Export Control Regime when producers in non-covered provinces are not.

438. The international minimum standard does not provide a tool to second-guess treaty or legislative schemes. The Investor's frustration with the regime does not constitute evidence demonstrating the type of unfairness or denial of justice which customary international law addresses under the minimum standard.

C) National Treatment – Article 1102

1) Summary of Argument

439. The core of the national treatment obligation is that investors or investments of another NAFTA Party must not be discriminated against because they are foreign-owned. Without proof of this, no claim of denial of national treatment can be established. All three NAFTA Parties agree that this is the correct interpretation of Article 1102.[424]

440. There is no question of *de jure* discrimination in this case as it is clear that no aspect of the Export Control Regime discriminates on its face against American-owned investments. The alleged discrimination could only be *de facto*. However, whether a *de jure* or *de facto* breach is claimed, the Investor must establish discrimination based on nationality.

441. Hence, it is insufficient for the Investor simply to assert that some producers were not subject to the Export Control Regime or that other producers who were subject to the regime received more quota than the Investment unless it can prove the Investment was treated less favourably due to its nationality. Unless the Investor can show that the effect of the Export Control Regime is to disproportionately favour Canadian investors or investments, it cannot succeed in establishing a *de facto* violation of Canada's national treatment obligation. In this case, there is no evidence upon which such a finding could be made.

442. The Tribunal may only proceed to the next step in the analysis if it finds conclusively that there has been discrimination based on nationality. If the Tribunal makes such a finding, it must determine whether the less favourable treatment accorded to the

foreign investment was accorded "in like circumstances" relative to the domestic investment. This inquiry requires an examination of the circumstances in which the treatment was accorded. It is largely a factual determination.

443. It is not sufficient that the Investment sells like products as other softwood lumber producers. Article 1102 requires comparison of all the circumstances surrounding the treatment accorded.

444. In this case, even if the Investor had met the threshold question, the treatment of its Investment is clearly not accorded in like circumstances to the treatment of the investments with which it seeks comparison. Therefore there could be no breach of Article 1102 in any event.

2) Applicable Law

445. Canada adopts the submissions it made at paragraphs 161 to 250 of the Counter-memorial in Phase 1 and in its reply to the Article 1128 submissions dated June 1, 2000. The submissions below summarise applicable law and address the issues specifically raised by the Investor in this phase of the arbitration.

446. Virtually all of the Investor's claims of a violation of Article 1102 are based on actual or alleged distinctions in the treatment of investors or investments depending on the province in which the investment is located. There is no legal basis for this claim. Nothing in Article 1102 or any other NAFTA provision prohibits the Federal Government of the United States, Mexico or Canada, respectively, from making distinctions between states or provinces.

[424] See Canada's Counter-memorial (Phase 1); Mexico's Submission pursuant to Article 1128, May 25,

a) Summary of Law

(i) Discrimination on the Basis of Nationality

447. All national treatment obligations, including Article 1102, share one fundamental feature: they prohibit discrimination on the basis of national origin. Every case dealing with national treatment cited by the Investor and by Canada turns on the finding that a good, service or investment was treated differently on the basis of its national origin.

448. In this dispute, the Investor has no basis whatsoever for a claim of discrimination based on the nationality of the Investor. The Investor has never alleged, nor led evidence, with respect to any aspect of this case that shows its Investment was treated differently based on its status as an American investor. Such a finding would be perverse in this case.

449. Indeed, it is clear that the Investment's treatment would have been the same if it were owned or controlled by a Canadian investor. The Investor has not even tried to argue that treatment of lumber mills in other provinces was in any way related to the nationality of ownership of those mills or had the effect of disproportionately favouring Canadian-owned mills.

450. There has been no discrimination based on nationality, either *de jure* or *de facto*. The Investment would not have been accorded any different treatment had it been Canadian-owned.

2000; U.S. Submission pursuant to Article 1128, May 25, 2000.

(ii) The Investor's Theory of Best Treatment

451. The Investor does not complain that its Investment was treated differently because it is an American-owned investment. Rather, the Investor is aggrieved because its Investment did not receive the best treatment available in Canada.

452. In claiming that this resulted in a breach of Article 1102, the Investor attempts to convert that provision into a privilege for NAFTA investors to pick and choose the best treatment available to any enterprise in the same sector in Canada.

453. Thus, the Investor asks this Tribunal to convert Article 1102 from a provision directed against discrimination by a NAFTA Party against other NAFTA Parties' investors based on their nationality into an entitlement for every NAFTA investor to have the finest treatment available to any same sector investment anywhere in the host country.[425]

454. There is no basis in either the text of Article 1102 or the cases addressing national treatment which supports the Investor's argument that a foreign investor is entitled to the best treatment available to any other investor in the same sector in the same country.

(iii) Best Treatment Theory Conflicts With Ordinary Meaning of Article 1102

455. The proper scope of the national treatment obligation in this case is based on the ordinary meaning of the words in Article 1102. Specifically, Article 1102(2) states:

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[425] Confronted with the absurdity of such a thesis in earlier exchanges before this tribunal, the Investor acknowledges vaguely that "non-market" factors such as "environmental externalities" (sic) could justify differential treatment of investors. However, the Investor sternly admonishes that, by its thesis, "[d]ifferential treatment of actors operating in the same market place raises a strong presumption that discriminations exists", which the Investor contends must be rebutted by the defending party. There is no basis for the claim that any differential treatment is presumptively illegal discrimination.

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

456. In contrast, Article 1102(3) of NAFTA incorporates "most favourable treatment" in the following manner:

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. (emphasis added)

457. The obligation in Article 1102(3) applies to provincial or state measures, and not to federal measures. No provincial measures are at issue in this case and therefore Article 1102(3) is of no application.

458. In the Canadian context, Article 1102(3) addresses situations where a provincial measure treats its provincially-owned investments more favourably than extra-provincially-owned investments. Article 1102(3) makes it clear that in such a situation, the province must, in like circumstances, accord Mexican or U.S. investments the most favourable in-province treatment. Hence a B.C. taxation measure that favours B.C.-owned companies only must be applied to Mexican and U.S.-owned investments operating in B.C.

459. Had the drafters of NAFTA intended a similar guarantee for federal measures, they would have used the same language ("most favourable treatment") in Articles 1102(1) and (2). They did not do so.

460. This thesis that the national treatment obligation gives a foreign investor the right to the best treatment available anywhere in the nation is completely unfounded. If accepted, it would broaden the scope of national treatment drastically beyond what is provided by Article 1102 and beyond what was intended by the Parties. It would also lead to a result that was manifestly absurd and unreasonable and which the interpretative principles of Article 32 of the *Vienna Convention* precludes.

b) Investor's version of National Treatment is not supported by the case law

461. The Investor argues that its theory is supported by various GATT and WTO dispute settlement cases. In fact, there is no case adopting the best treatment standard.

462. The jurisprudence under both the GATT and the WTO respecting the most-favoured-nation (MFN) and national treatment non-discrimination provisions in GATT 1994 and other WTO agreements supports the proposition that the core objective of national obligations such as Article 1102 is to prohibit discrimination based on nationality.

463. In the case of goods, national treatment provisions compare the treatment of imported goods with domestic goods, while MFN obligations compare the treatment of goods from different countries. In the case of services and investments, national treatment obligations compare the treatment of foreign services or service suppliers or investors or investments with their domestic counterparts, while MFN obligations compare the treatment of foreign services or service suppliers or investors or investments of differing national origins.

464. In a number of instances, GATT and WTO panels have found that measures contravene non-discrimination provisions on the basis of *de jure* discrimination. In each of these cases, the discrimination is explicit in the measure itself. For example, a measure may explicitly provide that domestic goods or services or investors receive

more favourable treatment than imported goods or foreign services or investments. There is not a single measure implementing the SLA that explicitly discriminates on the basis of nationality. The Investor has made no allegation and has produced no evidence of *de jure* discrimination. *De jure* discrimination is simply not an issue in this case.

465. Notwithstanding this, the Investor has cited several cases in support of its arguments that involved *de jure* findings of discrimination. One such case is *United States – Section 337 of the Tariff Act of 1930*,[426] cited by the Investor in paragraph 263 of the Memorial. This case involved certain U.S. procedures relating to patent infringement that applied only to imported goods and not to domestic goods. As the panel stated:

> The central and undisputed facts before the Panel are that, in patent infringement cases, proceedings before the USITC under Section 337 are only applicable to imported products alleged to infringe a United States patent; and that these proceedings are different, in a number of respects, from those applying before a federal district court when a product of United States origin is challenged on the grounds of patent infringement.[427]

466. Unlike the present case, there was clearly a difference in treatment in the *Section 337* case based on nationality, namely the national origin of goods. Imported goods were, on the face of the U.S. law, subject to a different procedure in patent infringement matters than were domestic goods. Having determined that the treatment of imported goods was different from that of domestic goods (which was undisputed); the only issue was whether the treatment of the imported goods was less favourable or whether any of the GATT exceptions applied.[428]

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[426] *United States – Section 337 of the Tariff Act of 1930*, L/6439-365/345, 16 January, 1989 (Phase 2 Authorities – Tab 64).

[427] *Ibid*, at para. 5.4

[428] The Panel found that the treatment was less favourable and that none of the exceptions applied.

467. The "differential treatment" referred to in the passage the Investor cites from the *Section 337* case[429] refers to the differential treatment based on nationality that was explicit in the U.S. measures at issue which subjected imported goods to different patent infringement procedures than domestic goods. Differential treatment based on nationality was necessary before there could be any breach of the non-discrimination provisions under consideration. In sum, the *Section 337* case has no relevance to the facts in the case before this Tribunal.

468. The Investor also refers to *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* ("*Canada – Beer*").[430] *Canada – Beer* was clearly a *de jure* case, with imported alcoholic beverages being subject to different treatment (through pricing, points of sale, and so on) than domestic alcoholic beverages. The only issue was whether the different treatment accorded to imported alcoholic beverages was less favourable. The Panel concluded that it was. This case has no relevance to the facts in the case before this Tribunal.

469. In paragraph 8 of the Investor's Reply to the Post-Hearing Submissions of Mexico and the United States, the Investor refers to the case of *United States – Measures Affecting Alcoholic and Malt Beverages*[431] in an attempt to refute the statement made in the Supplemental Submission of the United States and Mexico to the effect that in every case involving a violation of GATT Article III, "the measure in question was found to discriminate in law or in fact on the basis of nationality."

470. The measure at issue, which provided for a more favourable tax rate for small domestic U.S. producers, expressly favoured U.S. domestic beer over imported beer. As the discrimination in this case was explicit, this was a *de jure* and not a *de facto* case. It was clearly irrelevant that the expressly discriminatory measure in this case only applied to a small portion of the total volume of U.S. beer. The Panel found

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[429] Memorial. para. 263.
[430] Memorial. para. 262.
[431] *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R-395/206, 19 June 1992 hereinafter "Beer"] (Phase 2 Authorities – Tab 65).

differential treatment on the basis of nationality, as was clear from the express wording of the measure, and, as the products in question were "like", the measure was found to violate GATT Article III. This case has no relevance to the facts in the case before the Tribunal.

471. GATT and WTO Panels have also found discrimination on the basis of nationality to have occurred even though the measure at issue does not, on its face, discriminate on the basis of national origin. If the measure has the effect of discriminating on the basis of national origin, a breach of a non-discrimination requirement can occur even though the measure is neutral on its face. This is referred as *de facto* discrimination. All the cases in which *de facto* discrimination has been found have involved situations in which:

(a) there has been differential treatment under the measures at issue, with one category of treatment being more favourable; and

(b) those subject to the more favourable treatment have been entirely or, at the very least, mostly of domestic origin in a national treatment case or of a particular national origin in an MFN case; and

(c) those subject to the less favourable treatment or treatments has or have been entirely or, at the very least, mostly of foreign origin in a national treatment case or of other national origins in an MFN case.

472. The Investor refers[432] to *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas Case*").[433] The quote in paragraph 272 of the Memorial – Phase 2 was in reference to an aspect of the *Bananas Case* in which there was clear *de jure* discrimination on the basis of national origin. The tariff treatment that applied to bananas imported from twelve specific countries (ACP countries) was more favourable than tariff treatment of bananas imported from third countries (i.e.

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[432] Memorial, para. 272.

[433] *European Communities – Regime for the imporation, Sale & Distribution of Bananas*, WT/DS27/R/USA, 22 May 1997 [hereinafter *"Bananas Case"*] (Phase 2 Authorities – Tab 66).

non-ACP countries).[434] The language quoted is in reference to a regime that expressly provided for differential treatment on the basis of national origin, and therefore has no relevance to this case.

473. However, the findings of the Panel in the *Bananas Case* in respect of non-discrimination provisions of the *General Agreement on Trade in Services* ("GATS") (MFN under Article II and national treatment under Article XVII) involved *de facto* discrimination and are, therefore, instructive in this case.[435] The EU regime provided for several categories of licences for banana distributors. Category A licences were for distributors who marketed third country or non-traditional ACP bananas and Category B licenses were for distributors who marketed EC and/or traditional ACP bananas.[436] Category B licences were clearly preferable because, in addition to receiving the exclusive right to import traditional ACP bananas, the recipients of these licences also received the right to import 30% of the non-traditional ACP and third country bananas. This came at the expense of the holders of the Category A licenses, who could only import 66.5% of the non-traditional ACP and third country bananas, with the remainder going to Category C, a "newcomer" category.

474. The allotment of licences was formally neutral as regards the origin of the service or the service supplier. However, the Panel made the following finding in respect of the licenses:

> In respect of the EC market for EC and ACP bananas, the Complainants submit that prior to the introduction of the EC

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[434] *Ibid* at paragraphs III.7 to III.11. "ACP" means "African, Caribbean and Pacific', being the parts of the world in which the countries in question are located. The tariff regime had some other dimensions, but was based throughout on differential treatment on the basis of national origin.

[435] The Investor refers to the *Bananas Case* in paragraph 261 of the Memorial and refers to *de facto* discrimination. However, the Investor proceeds to make statement relating the decision in the *Bananas Case* to the notion of "best available" treatment. The *Bananas Case* stands for no such proposition.

[436] *Ibid.* at paras. 3.16 to 3.21. The expression "ACP bananas" refers to bananas from the ACP countries. The expression "traditional ACP bananas" refers to imports of bananas from the ACP countries within certain volumes, and "non-traditional ACP bananas" refers to imports of bananas from ACP countries at specified volumes over and above those traditional volumes. third country bananas refers to bananas imported from non-ACP countries.

> common market organization, the share of the three large banana companies (i.e., Chiquita, Dole and Del Monte) in the EC/ACP market segment was only 6 per cent and that the share for all non-ACP foreign-owned companies was less than 10 per cent. While the EC states that in 1994, 28 per cent of the EC/ACP production was controlled by three large banana companies, for our purposes what is important is the relative share of service suppliers of the Complainants' origin of the EC market for EC/ACP bananas. On either view, we conclude that most of the suppliers of Complainants' origin are classified in Category A for the vast majority of their past marketing of bananas, and that most of the suppliers of EC (or ACP) origin are classified in Category B for the vast majority of their past marketing of bananas.
>
> In light of the foregoing, we now consider whether the rules establishing operator categories (and activity functions) have an impact on the conditions of competition for foreign-owned or controlled service suppliers. Under the EC rules, based on their marketing during a preceding three-year period of EC and traditional ACP bananas, Category B operators are eligible for 30 per cent of the licences required for the importation of third-country (i.e., Latin American) and non-traditional ACP bananas at lower in-quota duty rates, regardless of whether they have previously traded in the latter market segment. Therefore, most beneficiaries of this allocation to Category B operators are service suppliers of EC origin. At the same time, most Category A operators, who historically traded third-country and non-traditional ACP bananas but who are eligible to receive only 66.5 per cent of the licences allowing in-quota imports of bananas from these sources, are service suppliers of third-country origin. Furthermore, we also note that there is no allocation of an EC/ACP market share for Category A operators equivalent to the allocation of 30 per cent of the third-country and non-traditional ACP import licences to Category B operators. Thus, at first sight it appears that the operator category rules would seem to modify conditions of competition in the EC wholesale services market for bananas in favour of service suppliers of EC origin. (emphasis added)[437]

475. In addressing the complaint in this case, the Panel first made the finding that most of the recipients of the more favourable Category B licences were of a particular national origin (EC or ACP) and that most of the recipients of the less favourable Category A licenses were of another national origin. Only after having made a

factual finding of differential treatment on the basis of national origin did the Panel consider the effects of the different treatment on competitive opportunities.[438] The Appellate Body upheld the Panel's finding.[439]

476. The Investor refers to *Canada – Measures Affecting the Automotive Industry* ("*Canada–Autos*") and relates it to its "best available treatment" argument. Aside from having no relevance whatsoever to that argument, *Canada – Autos* provides a further demonstration of what evidence must exist in order for there to be a finding of *de facto* discrimination.

477. In *Canada – Autos*, Japan and the European Union filed a complaint respecting Canadian measures providing that, upon the fulfilment of prescribed conditions, certain specific automotive producers were permitted to import finished vehicles duty-free. Other producers had to pay the 6.1% duty on imports of vehicles (other than vehicles imported from NAFTA countries meeting NAFTA origin requirements). Thus the automotive import regime provided for differential treatment, with the more favourable treatment (the import duty exemption) being applied to vehicles of any origin imported by the qualifying producers and the less favourable treatment (vehicles subject to 6.1% duty) being applied to vehicles imported by the non-qualifying producers. As the import duty exemption applied to vehicles of any origin, there was clearly no *de jure* discrimination. Any finding of discrimination had to be on a *de facto* basis.[440]

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[437] *Ibid*, paras. 7.334 and 7.335.

[438] There was no issue over whether the services and the service providers covered by each category of licence were "like". They clearly were.

[439] *Canada – Measures Affecting the Automotive Industry*, 11 February, 2000, WT/DS139/R, WT/DS142/R (Panel Report); WT/DS27/AB/R, 31 May 2000 at paras 242-244 (WTO Appellate body) [hereinafter "*Canada-Autos*"] (Phase 2 Authorities – Tab 70)

[440] The only finding of *de facto* discrimination in *Canada – Autos* was made under Article I.1 of GATT 1994. There was no finding of *de facto* discrimination under either GATS Articles II (MFN) or XVII (national treatment).There were certain findings of *de jure* discrimination in respect of the Canadian value added requirement, which are irrelevant here (Phase 2 Authorities – Tab 70).

478. In considering whether the import duty exemption violated the most favoured nation obligation under Article I:1 of the GATT, the Panel observed that

> General Motors in Canada imports only GM motor vehicles and those of its affiliates; Ford in Canada imports only Ford motor vehicles and those of its affiliates; the same is true of Chrysler and Volvo. These four companies all have qualified as beneficiaries of the import duty exemption. In contrast, other motor vehicles in Canada, such as Toyota, Nissan, Honda, Mazda, Subaru, and BMW, all of which import motor vehicles only from related companies, do not benefit from the import duty exemption. [441]

The Panel continued:

> We conclude from this analysis that the limitation of the eligibility for the import duty exemption to certain importers in Canada who are affiliated with manufacturers in certain countries affects the geographic distribution of the imports of motor vehicles under the import duty exemption. While these eligible importers are not in law or in fact prevented from importing vehicles under the exemption from any third country, in view of their foreign affiliation and the predominantly, if not exclusively, "intra-firm" character of trade in this sector, imports will tend to originate from countries in which the parent companies of these manufacturers, or companies related to these parent companies, own production facilities. Whether or not a like product of a WTO Member in practice benefits from the import duty exemption depends upon whether producers in the territory of that Member are related to any of the eligible Canadian motor vehicle manufacturers. Thus, in reality the conditions on which Canada accords the import duty exemption on motor vehicles entail a distinction between exporting countries depending upon whether or not producers in such countries related to the eligible manufacturers. We therefore consider that, in a context of intra-firm trade, the limitation of the availability of the import duty exemption to certain manufacturers, including fully-owned subsidiaries of firms based in a very limited number of third countries, discriminates as to the origin of products which will benefit from the import duty exemption.(emphasis added)[442]

[441] *Ibid*, Panel Report, WT/DS139/R,WT/DS142/R para. 10.43.
[442] *Ibid*, Panel Report, para. 45.

479. Based on the foregoing factual findings to the effect that automotive producers almost invariably import from affiliates and, therefore, only from those countries where affiliates are located, the Panel found *de facto* discrimination. The Appellate Body made specific reference to the Panel's findings and upheld the finding.[443]

480. The determination in *Canada – Autos* that an origin-neutral provision constituted *de facto* discrimination was based on a factual finding that, because of the intra-firm character of trade in the automotive industry, each importing producer imported vehicles *only* from those countries in which it had affiliated operations and not from other countries. The result was that, while the import duty exemption was origin neutral on its face, invariably the only vehicles that benefited were those imported from the countries where the qualifying producers had affiliates.

481. As in the *Bananas Case*, there was differential treatment. All or virtually all of the vehicles that benefited from the more favourable treatment were imported only from countries where the qualifying producers had affiliates. While some of the vehicles imported from these countries were also subject to the less favourable treatment, none of the vehicles imported from other countries benefited from the more favourable treatment.

482. The Investor cites *Japan – Taxes on Alcoholic Beverages* in paragraph 11 of its post-hearing Reply, and states that the Appellate Body "specifically rules that the obligation to accord national treatment is not limited to cases in which it can be established that treatment is only accorded on the basis of nationality." All that the Panel and the Appellate Body did in *Japan – Alcohols* was to reject Japan's argument that in order to contravene Article III:2 of GATT 1994, the aim and effect of a measure had to be to protect domestic production.[444]

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[443] *Ibid.* WT/ DS139/AB/R,WT/DS142/AB/R paras 64 to 86 (WTO Appellate Body).

[444] *Japan – Taxes on Alcoholic Beverages, supra,* Panel Report WT/DS8/R, paras 6.11 to 6.19. The Appellate Body agreed (Phase 2 Authorities – Tab 8).

483. The underlying facts of the *Japan – Alcohols* case are consistent with the pattern of *de facto* discrimination cases described above. The Japanese liquor taxation law divided alcoholic beverages into a number of categories. The most favourable set of tax rates applied to a distilled spirit called shochu. A much less favourable set of rates applied to spirits, which included vodka, while an even more unfavourable set of rates applied to whisky.[445] While shochu was a product that was produced in other Asian countries as well as Japan, imports of shochu into Japan were minuscule (1.7% of sales in 1994) and sales of domestically produced shochu accounted for almost 80% of total domestic sales of domestically produced distilled spirits and authentic liqueurs.[446] By contrast, imports from third countries accounted for 27% of whisky sales, 29% of brandy sales, 18% of sales of spirits and 78% of sales of liqueurs.

484. The result was that, while the tax laws were neutral on their face as regards origin, virtually no imports were subject to the more favourable treatment accorded to shochu and virtually all imports were subject to the less favourable treatments that applied to whisky and spirits. Furthermore, as shochu accounted for almost 80% of domestic production of distilled spirits and authentic liqueurs, domestic production was disproportionately subject to the more favourable treatment. Thus, *Japan Alcohols* follows the pattern for *de facto* discrimination cases described above.

485. The case of *Spain – Tariff Treatment of Unroasted Coffee* ("*Spain-Coffee*") is another example of a *de facto* discrimination case. In 1979, Spain established a number of tariff classifications for unroasted coffee. Several categories, including "Colombian mild", were subject to no duty but other categories, including "Unwashed Arabica" were subject to a 7% duty. The tariff provisions on their face were neutral as to

[445] *Ibid*, paras 2.2 and 2.3.
[446] *Ibid*, paras 4.176.

origin. However, as the Panel report states, "Spain's imports of unroasted coffee from Brazil were constituted almost entirely of "unwashed Aribica".[447] The coffee imported from countries that produced categories such as "Colombian mild" were subject to no duty. As the products were found to be "like", the Panel concluded that there was a violation of GATT Article I:1.

486. Following the pattern of *de facto* discrimination cases, the measures under dispute in *Spain-Coffee* provide for differential treatment, with one treatment being more favourable and the other less favourable. The imports of one national origin, namely, Brazil, were "almost entirely" subject to the less favourable treatment and products from other countries were subject to the more favourable treatment.

487. Somewhat surprisingly, the Investor refers to *Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*[448] in support of its argumentation. In this case, Japan applied different tariff rates to various categories of lumber. Canada complained that one category of lumber that Canada exported (namely SPF dimension lumber) was subject to an 8% rate of duty while dimension lumber made from other species entered Japan duty free. In its argumentation, Japan pointed out that, unlike in *Spain – Coffee*, where coffee from Brazil was "'almost entirely' subject to a higher duty", Canada exported large quantities to Japan duty free.[449] Canada accepted that Japan did "not discriminate in the application of the tariff on SPF dimension lumber as between different countries of supply" but based its complaint solely on the point that "SPF and Hem-fir dimension lumber are in fact 'like products' that are being treated differently in the Japanese tariff, and this constitutes a breach of the Article I.1 obligation."[450] The panel found no breach of Article I:1.

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447 *Spain – Tariff Treatment of Unroasted Coffee*, L/5135-28S/102, 11 June, 1981 (GATT Panel Report) (Phase 2 Authorities – Tab 71).

448 *Japan: Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, BISD36S/167, 19 July, 1989 (GATT Panel Report) (Phase 2 Authorities – Tab 72).

449 *Spain – Coffee, supra*, Panel Report BISD 36S/167 – 200 para. 3.48 (Phase 2 Authorities – Tab 71).

450 *Ibid*, para. 3.54.

488. It is clear from the GATT/WTO jurisprudence that countries are entitled to provide for differential treatment so long as that treatment does not discriminate on the basis of national origin. It is only when the application of the different treatments discriminates on the basis of national origin that questions of "likeness" (like products, like services or service suppliers, like circumstances) become relevant.

489. In the present case, there are different treatments. One treatment, which is less favourable, applies to investments in covered provinces regardless of nationality of ownership. Another treatment, which is more favourable, applies to investments in uncovered provinces, regardless of nationality of ownership. Within the treatment of investments in covered provinces, there is a subset of treatment that applies to investments in British Columbia. There is clearly no *de jure* discrimination in this case.

490. In order to establish *de facto* discrimination, the Investor must establish that "virtually all" (*Canada – Autos*) or "most" (*EC – Bananas*) of the investments in the covered provinces (particularly British Columbia), who receive the less favourable treatment, are of U.S. origin and that "virtually all" or "most" of the investments in the non-covered provinces, who receive the more favourable treatment, are of domestic origin.

491. There is not a scintilla of evidence before the Tribunal that this is the case. Therefore, the Investor cannot establish, as it must in order for there to be a breach of the national treatment obligation in Article 1102, that there is *de facto* discrimination in favour of investments of domestic investors as compared to their U.S. counterparts.

492. As no *de jure* discrimination exists and there is no evidence whatsoever upon which to base a finding of *de facto* discrimination, there can be no breach, and considerations of "like circumstances" are irrelevant.

(i) Treatment Accorded In Like Circumstances

493. Nevertheless, it should be noted that the Investor's claim under Article 1102 could also be rejected simply because the Investor seeks comparison with investments which are not accorded treatment in like circumstances.

494. The inquiry into like circumstances must be pursued on a case-by-case basis. The inquiry requires a consideration of all the circumstances of the according of treatment. As noted at paragraph 188 of Canada's Counter-memorial in Phase 1, the ordinary meaning of the phrase "like circumstances" is that the conditions or situation surrounding an event are alike.

495. The Investor asserts that only one circumstance is to be considered in this case:[451] that its Investment is a softwood lumber producer in Canada. It therefore maintains that it must be accorded the best treatment of any softwood lumber producer in Canada.

496. The fact that the Investment is in the same sector as other softwood lumber producers means only that it may produce like products as other softwood lumber producers. But this is not the test under Article 1102(2) – what must be addressed is whether all the circumstances surrounding the according of treatment are "like". By focusing on the single circumstance of the producers being in the same sector, the Investor ignores the circumstances that are clearly relevant to the treatment accorded in this case.

497. As noted, there is no need for this Tribunal to attempt to define "like circumstances" for purposes of this dispute, since the Investor has neither alleged nor proven any discrimination based on nationality between any investors, regardless of whether they are in like circumstances. Nevertheless, Canada in the following sections will also address the main flaws in the Investor's arguments regarding the basis for the SLA quota allocation system.

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[451] Memorial, para. 262.

3) Investor's Allegations of Breach of National Treatment

a) Covered vs. Non-Covered Provinces

498. The Investor maintains that its Investment in B.C. should be accorded the treatment given to an exporter of softwood lumber first manufactured in a non-covered province. The distinction between exporters in covered and non-covered provinces is not on its face or in its application a distinction based on national origin. The U.S. and Canada agreed that softwood lumber first manufactured in the covered provinces would be subject to restrictions on export to the U.S. This does not discriminate against American-owned investments.

499. The key and conclusive differentiating circumstance of the treatment accorded investments in covered provinces versus that accorded to investments in non-covered provinces is that the SLA expressly applies only to the four covered provinces.

500. Moreover, Canada could not have applied the SLA to all provinces for various reasons. First, the SLA defines the covered provinces and provides for measures to apply only to those provinces. It does not provide for measures to be applied to non-covered provinces. Second, the Maritime side agreement, also a treaty, exempted Newfoundland, Nova Scotia, New Brunswick and Prince Edward Island from the SLA. Third, if Canada subjected non-covered provinces to the measures provided for in the SLA, it would violate Article 314 of NAFTA.

501. If the Tribunal is inclined to look behind the SLA, other like circumstances include:

a. trade remedy actions between the U.S. and Canada focussed predominantly on the four covered provinces for the past 20 years;

b. covered provinces cumulatively export roughly 95% of softwood first manufactured in Canada and continue to do so;

c. the U.S. entered the SLA based on this definition of covered provinces showing that these, and not other provinces, were of concern;

d. U.S. producers, including the Investor, were willing to sign letters concerning injury based on the covered provinces being subject to the scheme without the need to restrict other provinces;

e. The agreement was negotiated in full consultation with the industry and provincial governments and with their full support.

502. For Canada, the purpose of the SLA was to protect against CVD and other trade actions for the five-year period in which it was in effect, while accepting as little trade restriction as possible. The SLA achieved this purpose, and the Investment has benefited from it.

503. The most recent CVD investigation prior to the conclusion of the SLA was *Lumber III*.[452] In that case Commerce found that the provincial stumpage programs in the covered provinces and log export controls in B.C. constitute countervailable subsidies.[453] Although some programs in the non-covered provinces were investigated, Commerce chose not to complete its investigation and analysis of those programs. The Maritime provinces were entirely excluded from the CVD investigation.[454]

504. It is also clear on the evidence before the Tribunal that the U.S. softwood lumber industry would have likely succeeded in getting the U.S. administration to initiate further trade action, with the focus of that trade action being the forest management programs in the covered provinces.[455]

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[452] MacDonald Affidavit, paras 15-17; Kalt Affidavit, para. 9.
[453] MacDonald Affidavit, para. 16.
[454] MacDonald Affidavit, para. 61; Vertinsky Affidavit, para. 46.
[455] Testimony of Craig Campbell, Transcript of Hearing (First Phase), May 2000, Volume 4, page 36;

505. In 1996, the Investor had a very different appreciation of the circumstances of provinces whose U.S.-bound exports constituted a risk of injury to the American softwood lumber industry. Its view then, as demonstrated by the letter appended to Annex 1 of the SLA, was that controlling exports from the provinces responsible for 95% of U.S. bound exports (as the SLA does) would remove all material injury or threat of injury.

506. The Investor suggests[456] that Canada could have addressed the policy dilemma caused by continuous disputes over exports of softwood lumber to the U.S. by commencing an action in the WTO. The apparent basis for this is the opinion of Professor Howse in 2000 that Canada would have a strong argument under the WTO *Agreement on Subsidies and Countervailing Measures*.[457] This is irrelevant. NAFTA is not a vehicle for an arbitral tribunal to second-guess the wisdom of a policy choice made by government in full consultation with and supported by the industry and provincial governments implicated. The function of the Tribunal is to assess whether the measures adopted to implement the treaty (and not the treaty) breached an obligation in Chapter Eleven.

507. Additionally, while it is a matter of pure speculation as to whether Canada would prevail in a case under U.S. CVD law, it is clear that in 1996 the decision to enter the SLA involved wide consultations and judgements about an array of considerations, including the time, expense and uncertainty involved in U.S. domestic and WTO legal proceedings, as well as the relative costs and benefits of the SLA, which benefits the Investor has enjoyed.

MacDonald Affidavit, paras 26, 66; Kalt Affidavit, para. 11; Valle Affidavit #1, para. 16.

[456] Memorial (Second Phase), paras 273 to 279.

[457] *Agreement on Subsidies and Countervailing Measures*, WTO, *The Result of the*

508. The Investor places great reliance on the current case being commenced by Canada at the WTO concerning export restraints. The same observations pertain to these comments: it is irrelevant to the Investor's claims of a violation of Article 1102 that, in 2000, Canada decided to initiate a WTO case against an aspect of American CVD laws – the American interpretation of the definition of subsidy to encompass export restrictions such as the restrictions on logs from Canada.

509. Further, there have been developments in WTO law since 1996, while there was no jurisprudence in 1996. As well, the WTO challenge is limited, covering only one element of past CVD actions (log exports).[458]

510. The Investor also suggests that other provinces, notably Saskatchewan and Manitoba, were equally at risk for CVD actions because the CVD investigation against them was dismissed on the basis of their low volume of exports rather than findings regarding subsidisation. This ignores the simple fact that *Lumber III* targeted the four covered provinces, and not Manitoba or Saskatchewan. Whether this was based on an assessment of subsidisation or the fact that exports were *de minimus* (or any other ground) does not change the fact that the covered provinces were the focus of the U.S. actions. The fact that the investigation against Manitoba and Saskatchewan was dismissed is evidence that they were not real concerns for the United States.

511. Further, these allegations are irrelevant to this dispute. Again, Article 1102 does not require NAFTA Parties to refrain from distinctions on the basis of the state or province in which the investment is located. As a matter of simple common sense, it is difficult to see why Canada should have insisted on restricting softwood lumber manufactured in other provinces notwithstanding that neither the U.S. nor U.S. industry, including the Investor, sought such restrictions as a condition of the agreement.

Uruguay Round of Multilateral Trade Negotiations, accessed online > http.www.wto.org. (Phase 2 Authorities – Tab 70).

[458] George Affidavit #3, paras. 151-155

512. During the term of the SLA no province has an inherent risk of attracting CVD action – not because covered provinces are in any way like non-covered provinces. but simply because the U.S. has promised not to commence any trade actions against imports of softwood lumber from Canada (SLA, Article I

513. The view adopted by the Investor in this phase contradicts the testimony provided by one of its own witnesses at the first phase hearing. Mr. Craig Campbell testified as follows:

> Craig Campbell ("CC") : ... non-listed provinces would not be subject to any such unfavourable trade decisions. They haven't been in the past specifically singled out and they're relatively minor in the whole scheme of things."
>
> The Honourable Benjamin Greenberg ("BG") : So all the non covered provinces together account for five percent (5%)?
>
> CC : Right.
>
> BG: So if Saskatchewan accounts for one or two (1% - 2%) of those five percent (5%), doubling will not make a heck of a lot of difference in the grand scheme?
>
> CC: That's correct. That's correct.
>
> Mr. Murray Belman ("MB"): So that would suggest that they remain uncovered?
>
> BG : That's the point.
>
> CC : That's correct. ...[459]

514. In short. the distinction between covered and non-covered provinces is a real distinction imposed by Canada's treaty obligations.

[459] Transcript of Hearing (First Phase), May 2000, Volume 4, page 36.

b) Investments Unaffected by Super Fee Base

515. The Investor claims that its Investment should be treated as if it were an exporter in another covered province where only an upper fee levy is applied to exports in excess of quota. This argument is essentially the same as the Investor's argument regarding the distinction between covered and non-covered provinces, and it must fail for the same reasons.

516. The U.S. and Canada negotiated an amendment to the SLA in settlement of an arbitration under the SLA. The amendment to the SLA stipulated that a super fee would be levied on U.S.-bound exports of B.C. softwood lumber that exceeded quota.

517. Again, it is not necessary to look beyond the treaty: the SFB Amendment to the SLA is in itself a treaty and not merely a question of implementation.

518. Alternatively, if the Tribunal perceives the SFB Amendment to be a question of implementation, it is necessary for the Tribunal to find that Canada's implementation of the amendment to the SLA discriminated either in law or in fact on the basis of the nationality of the Investment's owner.

519. The Investor has tendered no evidence, nor can it, that Canada's implementation of the SLA amendment, that is the imposition of a super fee on exports exceeding quota, discriminated either in law or in fact on the basis of the nationality of an investment's owner.

520. Canada does not dispute that, as a result of the U.S.-Canada agreement, softwood lumber first manufactured in British Columbia faces a SFB levy that is higher than in other provinces. The reason that the settlement applied only to BC was that the U.S. had only challenged BC practices in the dispute that was settled. The SFB levy, by the terms of the settlement between the U.S. and Canada, applied to all BC producers, regardless of the nationality of their ownership, and does not apply to any other lumber producers, regardless of their nationality, in any other province. Since Article

1102 does not prohibit distinctions based on province or region in which the investment is located, and since there is no allegation of any less favourable treatment by nationality of the investor or investment, there is no violation of Article 1102.

521. In a curious twist, the Investor also claims a violation of Article 1102 because the Investor's exports from the interior of British Columbia are subject to the same level of SFB levy as lumber from a coastal mill in British Columbia. In this dispute, the Investor normally (and wrongly) argues that investors must be treated identically if they compete or are in the same sector, regardless of all other differences in circumstances, such as location. However, ironically, the Investor's complaint about the SFB levy agreed between the U.S. and Canada is precisely that the levy is the same as between producers in different parts of BC.

522. Apparently, the Investor thought that the BC provincial measures attacked by the U.S. had favoured coastal producers relative to interior producers like the Investor's Investment, and that the SFB levy should have varied depending on whether the producer was coastal or located in the interior. While there was no such finding in the underlying dispute nor was there any finding regarding stumpage practices in the settlement that resulted in the SFB, that does not stop the Investor from charging a violation of Article 1102 because his own government and that of Canada did not make such a distinction in the settlement.

523. To the extent that the Investor claims that producers in other provinces were treated differently, those producers were clearly not in like circumstances because they were not the subject of the dispute leading to the SLA Amendment.

524. The evidence before the Tribunal clearly indicates that all producers in B.C., including those owned by Canadians and those owned by Americans, are subject to the same measures that apply to the Investor. Canadian-owned producers in B.C. are treated no more favourably than the Investor and other U.S.-owned producers in B.C.

c) Trigger Price Bonus Allocations

525. The Investor makes the unsubstantiated allegation[460] that "greater Trigger Price Bonus allocations were made to producers who were operating in similar circumstances to the Investment, merely because they were located in another province or had better access to the Minister or his staff."

526. The Investor does not assert that any allocation of Trigger Price Bonus was made to a company because it was Canadian-owned, or not made to the Investment because it was American-owned. Mr. Valle and Mr. George have stated that no allocation decisions were made on the basis of a company's nationality.[461]

527. There is also no assertion that any allocation of Trigger Price Bonus had the effect of treating American-owned investments as a group, including the Investment, less favourably than Canadian-owned investments.

528. The question of whether there has been *de jure* or *de facto* less favourable treatment of the Investment because of the nationality of its owner must therefore be answered in the negative, and there is no basis for asserting a breach of Article 1102.

529. In any event, and as set out below, whenever additional or greater Trigger Price Bonus allocations were made to other companies, such allocations were made in different circumstances

[460] Memorial (Second Phase), para. 281.
[461] George Affidavit #3, para 53 and Valle Affidavit #1, para 121; Responses to Tribunal Question, #9.

(i) Quarters 1 through 4:

530. In Q1 - Q4, Trigger Price Bonus allocations were made to new entrants.[462] As discussed previously, new entrants had no, or insufficient, export history on which to base their allocations, and therefore were accorded treatment different than that accorded to the established mills.

531. The Investor raises a specific concern with respect to the allocation of Trigger Price Bonus quota earned in Q3 of the SLA.[463] By the time these allocations were made, it was clear that the circumstances of new entrants differed from those of established mills not only because their quota allocation was not based on historic exports, but because, as a group, they continued to receive much less quota relative to production than that received by established mills. In some cases, this difference in circumstance was so pronounced that the allocations were based on concerns about the continued viability of the new entrant companies if they were not able to increase their fee-free access to the U.S. [464]

532. Further, the Investor's concern with the Q3 bonus allocations[465] is that B.C. new entrants did not receive their "historic provincial share" of the bonus. As previously noted, the option of allocating new entrant quota by province, based on the historic exports of established mills in the province, was not considered viable, as this would ignore the growth trends in the industry.[466]

533. More importantly for the purposes of this claim, there is no allegation or evidence that new entrant bonus in any way depended on nationality. In any event, no matter what percentage of new entrant quota went to B.C. producers, the effect on the Investment would be the same. The Investment never identified itself as a potential new entrant, and therefore was not in the new entrant pool. Nor could it be a new entrant under

[462] Valle Affidavit #2, paras 137-9, Responses to Tribunal Question, #9.
[463] Memorial . paras 61-66.
[464] Response to Tribunal Question, #9.
[465] Memorial, para 65.

any possible definition. It would not therefore have received new entrant quota no matter how much went to B.C. Further, wherever the new entrant quota went, the "fit factor" effect on the Investment, like all established investments, would have been identical.

(ii) Quarter 5, 6 and 12-16

534. The remainder of Trigger Price Bonuses earned (Q5, Q6 and Q12-16) were distributed either on a *pro rata* basis (Q6)[467], or to companies in the four covered provinces based on the amount of EB quota held by companies in each covered province. In the latter case, the specific companies that received quota allocations were determined after recommendations were received from the provincial advisory groups.

535. Generally, where other companies within B.C. received a greater proportionate share of the corporate provincial share of bonus than did the Investment, those companies had been specifically identified by the B.C. Advisory Committee, and confirmed by the EICB, as being in need of additional quota due to special circumstances. These companies were therefore not in like circumstances to the Investment.

536. The various special circumstances that led to the recommendation and allocation of bonus quota to identified companies within B.C. are set out in various memoranda to the Minister already provided to the Tribunal in Canada's response to the Tribunal's document request.[468]

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[466] Valle Affidavit #2, para. 145.
[467] After a transfer of 10, 986,000 bf to replenish the Minister's Reserve; a minimum of 60,000 mbf was allocated in each case so that the bonus would be usable: George Affidavit #3, para 74.
[468] Memorandum to MINT, August 1, 1997 re: Q5, Tribunal Document Request, (Tab 37).

537. Such different circumstances included:

- companies that started up or increased production such that application of either the base period formula or the new entrant criteria for the initial allocations did not fully take into account their circumstances;[469]
- companies that did not receive the benefit of reductions in stumpage rates but were affected by the Canada-U.S. settlement;[470]
- traditional rougher-headed lumber exporters adversely affected by the U.S. Customs Service re-classification of rougher-headed lumber and;[471]
- companies that, due to short notice of changes or misunderstandings related to the implementation of the amendments to the SLA, shipped lumber in late August, 1999 that was assessed at the SFB rate instead of the expected UFB rate.[472]

538. There was no discrimination based on nationality in the allocations of Trigger Price Bonus, and there was, therefore, no breach of Article 1102. Further, the allocation of Trigger Price Bonus has even satisfied the Investor's own test for compliance with Article 1102, in that there has been no differential treatment of any company in like circumstances to the Investment.

d) Wholesaler Allocations

539. The Investor asserts[473] that it was treated less favourably than other B.C. companies with respect to the allocation of quota to account for exports through wholesalers. This is not a difference in treatment that on its face, or in application, differentiates on the basis of the nationality of ownership. Therefore, there can be no breach of the national treatment obligation.

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[469] *Ibid.*
[470] Memorandum to MINT, dated September 2, 1999, Tribunal Document Request (Tab 77).
[471] Memorandum to MINT dated December 9, 1999, Tribunal Document Request (Tab 78)
[472] *Ibid.*
[473] Memorial para. 282-7.

540. Further, those B.C. companies that received additional quota in year 2 received it because of their special circumstances, [redacted]

541. The B.C. Advisory Committee recommended those companies that should receive additional quota in year 2. The Investment was not one of the companies recommended. It should be noted that the B.C. Advisory Committee included representatives of the B.C. industry, who themselves would be affected negatively by the redistribution of quota to these companies.

542. In most cases, and as indicated in the Memorandum to the MINT of May 27, 1997,[474] the particular circumstance of the companies that received an adjustment was that they were adversely affected by the B.C. averaging formula. For example, one company, [redacted] received [redacted] board feet less than it would have if the best year formula had applied[475]. This circumstance clearly differed from that of the Investment, which benefited from the B.C. averaging formula.[476]

543. In other cases, the adjustments were in response to questionnaire errors made and identified by the primary mills. For example, one company placed wholesaler sales in the wrong questionnaire category. Another provided an incomplete schedule of wholesalers, and a third company indicated no sales to the U.S. in its original questionnaire. In another case, a wholesaler itself identified purchases from a primary mill that had not been reported.[477]

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[474] Tribunal Document Request – Tab 18.
[475] Valle Affidavit #2, Exh. 10.
[476] Tribunal Document Request, Tab 96.
[477] Valle Affidavit #2, paras 170-180.

544. These circumstances differed from the circumstances of the Investment, which did not report any errors. Nor did any wholesaler report errors with regard to its exports of the Investment's lumber.[478]

545. According to the Investor's theory of national treatment, the only matter at issue when the measures of a Party provide for more than one category of treatment and one is more favourable than the others is whether the investments affected by the treatments are in like circumstances.

[478] Valle Affidavit #2, paras 178-180.

D) SLA v NAFTA

546. For the purposes of this phase of the arbitration, Canada adopts the arguments it advanced at paragraphs 485 to 524 of its Counter-Memorial (Phase 1), dealing with the precedence of the SLA over NAFTA to the extent of any incompatibility.

547. As this Tribunal and the Investor have noted, the implementation of the SLA, not the SLA itself, is at issue. However, if this Tribunal finds that Canada, in implementing the SLA in accordance with its terms, has acted inconsistently with its obligations under Article 1102 or 1105 of NAFTA, principles of international law dictate that the obligations under the SLA prevail. As such, the obligations under Articles 1102 and 1105 do not apply to the measures at issue. Canada is in compliance with its international obligations, and there is no breach of NAFTA.

548. NAFTA, including Chapter Eleven, is an agreement between State Parties, and not between Canada and an investor of another State. Contrary to the assertions of the Investor, which have no basis in international law, NAFTA is an international agreement like any other. It is not a "super treaty". It has no "quasi-constitutional" status. The obligations of the Parties to NAFTA only exist because the Parties agreed to them.

549. Just as the Parties agreed to the obligations, they can agree to modify or suspend them. To the extent that there is an incompatibility between the provisions of NAFTA and those of the SLA, the U.S. and Canada must be understood to have done exactly that.

550. As found by the Tribunal in its June 26, 2000 Interim Award:[479]

[479] Paragraphs 65-66

65... "...NAFTA is a treaty, and the principal international law rules on the interpretation of treaties are found in the *Vienna Convention on the Law of Treaties*."

66. The authoritative status of the *Vienna Convention* in respect of NAFTA has been recognized by other NAFTA Tribunals. As an example, the NAFTA Tribunal in *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* confirmed that Articles 31 and 32 of the Vienna Convention are "generally accepted as reflecting customary international law."

551. The *Vienna Convention* expressly provides, in Article 30, that a subsequent treaty dealing with the same subject matter as an earlier treaty prevails over the earlier treaty to the extent of any inconsistency. This is an authoritative principle of international law. It applies if there is an inconsistency between the provisions of the SLA and those of the earlier agreement, NAFTA. The overlap in subject matter exists here because both these agreements cover the imposition of charges on the export of a specific commodity from Canada to the U.S.

552. The Investor has repeatedly characterized its Claim as being directed at the implementation of the SLA, rather than impugning the SLA itself. This is a reasonable approach, given the clear power of States to enter, modify, suspend or terminate agreements among themselves.

553. However, an examination of the Investor's Claim reveals that the substance of the Claim is in fact an attack on the very measures that Canada, by the terms of the SLA, was under an international obligation to adopt. Referring to these features as implementation options seriously mischaracterises them.

554. The obligations under the SLA that are mischaracterised as aspects of "implementation" of the SLA are those listed at paragraph 501 of Canada's counter-memorial (Phase 1). Those most relevant for the purposes of this phase are the coverage of the SLA (softwood lumber first manufactured in a covered province) and the charging of R-LFB and SFB fees in B.C.

555. The commodity covered by the SLA is softwood lumber first manufactured in a covered province. The SLA mandates that export charges be levied on exports of softwood lumber first manufactured in a covered province. The SLA does not apply to lumber first manufactured elsewhere. Therefore, it only modifies the obligation (in Article 314 of NAFTA) not to charge export fees with respect to exports of that specific commodity. It does not modify the obligation to refrain from charging export fees on exports of softwood lumber first manufactured elsewhere.

556. Similarly, the SLA was amended to provide for repriced LFB and the SFB in B.C. only. Under the terms of the agreement, Canada is obligated to apply such charges to all exports of softwood lumber from B.C. to the U.S. beyond the levels listed in the agreement. The amended SLA was applied according to its terms. To the extent that this Tribunal finds that applying the charges to exports from B.C. only, or applying the same charge to exports from coastal and interior mills, is inconsistent with Canada's obligations under NAFTA, its obligations under the amended SLA, as an international agreement later in time, must prevail.

557. An attack pursuant to Chapter Eleven of NAFTA on the aspects of the SLA's implementation that were mandated by the terms of the SLA itself must be seen for what it is: a claim that NAFTA obligations trump SLA obligations. This is exactly the opposite result than that dictated by the authoritative principles of international law reflected in the *Vienna Convention*.

558. To the extent that this Tribunal concludes that Canada's implementation of the SLA according to its express terms is inconsistent with its obligations under NAFTA article 1102 or 1105, it will have identified an incompatibility between two international treaties. According to authoritative principles of international law on the precedence of treaties, the provisions of the later treaty, the SLA, must prevail, and there can be no breach of Article 1102 or 1105.

PART FOUR – IMPLICATIONS OF THE INVESTOR'S CLAIM

559. If the Investor succeeds in its Claim that the application of the Export Control Regime to covered provinces breaches either Article 1102 or 1105, then it would have unintended and serious implications. In particular:

a) All U.S. and Mexican-owned companies exporting lumber first manufactured from the covered provinces would be exempt from paying fees on any volume of exports. All their exports would be fee-free. They would, therefore, be in a much better position than Canadian companies in like circumstances in the covered provinces;

b) The obligations under the SLA would remain intact. There would still only be 14.7 billion board feet of EB available for distribution. This would first be used to cover all exports by U.S. and Mexican-owned companies. Remaining EB, if any, would go to Canadian exporters of softwood lumber in the covered provinces. If no EB were left, Canadian exporters would pay LFB, UFB and SFB.

c) If Mexican and U.S.-owned companies used the entire 14.7 billion bf of annual quota, the SLA could not be implemented at all.

In short, the intent of Canada and the U.S. in entering the SLA would be frustrated.

PART FIVE - CONCLUSION

560. Canada submits that there has been no breach of Articles 1105 or 1102. The Investor's Claim is neither factually or legally supported. Canada respectfully requests that this Honourable Tribunal:

a) Dismiss the Investor's claims pursuant to Article 1102 and 1105 of NAFTA, and

b) Order the Investor to pay all costs, disbursements and expenses incurred by Canada in the defence of these claims.

THE WHOLE RESPECTFULLY SUBMITTED THIS 10TH DAY OF OCTOBER, 2000, OTTAWA, ONTARIO, CANADA.

"Brian Evernden"

Brian Evernden

"Meg Kinnear"

Meg Kinnear

"Boris Ulehla"

Boris Ulehla

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Of Counsel for Canada