
In The London Court Of International Arbitration

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA,

Respondent.

REQUEST FOR ARBITRATION

PETER D. KEISLER
Assistant Attorney General

JEANNE E. DAVIDSON
Director

OF COUNSEL:

WARREN H. MARUYAMA
General Counsel
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508
UNITED STATES

RONALD J. BETTAUER
Deputy Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
UNITED STATES

PATRICIA M. McCARTHY
Assistant Director
REGINALD T. BLADES, JR.
Senior Trial Counsel
CLAUDIA BURKE
MAAME A.F. EWUSI-MENSAH
GREGG M. SCHWIND
STEPHEN C. TOSINI
Trial Attorneys
United States Department of Justice
Commercial Litigation Branch
Civil Division
1100 L Street, N.W.
Washington, D.C. 20530
UNITED STATES
Tel: +1 (202) 514-7300
Fax: +1 (202) 514-7969
national.courts@usdoj.gov;
Patricia.McCarthy@usdoj.gov

August 13, 2007

Attorneys for Claimant,
The United States of America

TABLE OF CONTENTS

I	INTRODUCTION	1
II	PARTIES TO THE ARBITRATION	2
	A. The Claimant	2
	B. The Respondent	3
III	THE ARBITRATION AGREEMENT	3
IV	MATTERS REGARDING THE ARBITRATION	4
	A. The Selection Of The Arbitral Tribunal	4
	B. Remuneration Of The Arbitrators	5
	C. Hearings Of The Tribunal	5
	D. The Taking Of Evidence	5
	E. The Award Of The Tribunal	5
V	FEE	6
VI	NATURE OF THE CASE	6
	A. Statement Of The Claims	6
	B. Summary	7
	C. Breach Of The 2006 Softwood Lumber Agreement	10
	The Export Measures: Option A and Option B	12
	Expected United States Consumption	13
	Application Of Adjusted Expected United States Consumption To Option A Regional Trigger Volumes	14
	Timing Of The First Application Of The Adjustment To Expected United States Consumption	20

VII CLAIMANT’S REQUEST FOR RELIEF 25

VIII SERVICE OF THE REQUEST 27

APPENDIX

I

INTRODUCTION

1. The United States respectfully requests arbitration pursuant to Article XIV of the 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America (“SLA” or “Agreement”). Exhibit A¹ In the Agreement, Canada agreed to impose certain export charges upon exports from certain Canadian regions to the United States, when exports exceeded the agreed-upon share of the United States market. Canada also agreed to limit the volume of certain exports from other regions when the United States price dropped below a certain level. Canada has failed to impose the agreed-upon export charges, and it has failed to limit the volume of exports in a timely manner. Accordingly, Canada has breached the Agreement.

¹ For completeness, we attach a copy of the Amendments to the Agreement as Exhibit B, although the Amendments are not at issue in this dispute.)

II

PARTIES TO THE ARBITRATION

A. The Claimant

2. The claimant in this proceeding is the United States of America (“United States”).

The claimant’s legal representatives in this proceeding are:

Peter D. Keisler
Assistant Attorney General
Jeanne E. Davidson
Director
Patricia M. McCarthy, counsel of record
Assistant Director
Reginald T. Blades, Jr.
Senior Trial Counsel
Claudia Burke
Maame A.F. Ewusi-Mensah
Gregg M. Schwind
Stephen C. Tosini
Trial Attorneys

Address: United States Department of Justice
Commercial Litigation Branch
Civil Division
1100 L Street, N.W.
Washington, D.C. 20530
UNITED STATES

Telephone: +1 (202) 514-7300
Facsimile: +1 (202) 514-7969
Email: national.courts@usdoj.gov; Patricia.McCarthy@usdoj.gov

B. The Respondent

3. The respondent in this proceeding is Canada. The respondent's legal representatives in this proceeding are:

Meg Kinnear
Senior General Counsel & Director
Address: General Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
CANADA
Telephone: + 1 (613) 796-2803
Facsimile: + 1 (613) 944-0027
Email: meg.kinnear@international.gc.ca

Joanne Osendarp
Address: Weil Gotshal & Manges LLP
1300 Eye Street, N.W.
Suite 900
Washington, D.C. 20005
UNITED STATES
Telephone: +1 (202) 682-7193
Facsimile: +1 (202) 857-0939
E-mail: joanne.osendarp@weil.com

III

THE ARBITRATION AGREEMENT

4. The United States submits this requests pursuant to Article XIV of the Agreement, which sets forth the dispute settlement provisions. The United States has complied with the formal requirements of Article XIV. In February 2007, the United States informally raised with Canada its concern about Canada's breach of the Agreement, with the hope that the matter could be resolved without resorting to the Agreement's dispute settlement provisions.

After informal discussions did not resolve the matter, the United States, by letter dated March 30, 2007, initiated formal consultations with Canada, in accordance with the dispute resolution provisions of the Agreement. *See* Exhibit C; SLA, art. XIV, ¶ 4. Formal consultations occurred in Ottawa on April 19, 2007. The 40-day consultation period for which the Agreement provides expired on May 9, 2007. SLA, art. XIV, ¶ 6. Still hoping to resolve the dispute, the United States continued to consult with Canada for an additional three months. Having now determined that further consultations are unlikely to resolve the dispute, the United States requests this arbitration before the London Court of International Arbitration (“LCIA”), in accordance with Article XIV of the Agreement.

IV

MATTERS REGARDING THE ARBITRATION

The parties have already agreed in writing to the following matters:

A. The Selection Of The Arbitral Tribunal

5. The parties have agreed to submit any disputes concerning the Agreement to the LCIA. The Arbitral Tribunal shall consist of three arbitrators, and no citizen or resident of either the United States or Canada shall be appointed to the Tribunal. SLA, art. XIV, ¶ 7-8. Under Article 1.2 of the LCIA Rules, the arbitration commences on the date on which the Registrar receives the Request for Arbitration. Each party shall nominate one arbitrator within 30 days after the commencement of the arbitration. SLA, art. XIV, ¶ 9. Within 10 days of the nomination of the second arbitrator, the two nominated arbitrators shall jointly nominate the Chair. SLA, art. XIV, ¶ 10. The Agreement calls for the LCIA to endeavor to appoint the three

nominated arbitrators within five business days after the date on which the Chair is nominated.
SLA, art. XIV, ¶ 11.

B. Remuneration Of The Arbitrators

6. According to the Agreement, the arbitrators will be remunerated and their expenses paid in accordance with LCIA rates. SLA, art. XIV, ¶ 12.

C. Hearings Of The Tribunal

7. The legal place of arbitration shall be London, United Kingdom, but the hearings of the Tribunal shall be held in the United States or Canada, and shall be open to the public. SLA, art. XIV, ¶¶ 13, 17. In addition, the record of the arbitration and underlying documents shall be made available to the public. SLA, art. XIV, ¶ 16.

D. The Taking Of Evidence

8. The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration shall generally apply, with the exception of the provisions regarding experts. SLA, art. XIV, ¶ 14. The LCIA rules regarding experts also do not apply. SLA, art. XIV, ¶ 6. The Tribunal shall establish, in consultation with the United States and Canada, procedures for the designation and protection of confidential information. SLA, art. XIV, ¶ 15. In addition, the Tribunal shall give “sympathetic consideration” to domestic laws regarding the disclosure of certain information. SLA, art. XIV, ¶ 18.

E. The Award Of The Tribunal

9. The Tribunal shall endeavor to issue an award within 180 days after appointment. SLA, art. XIV, ¶ 19. This award shall be final and binding, with no appeals. SLA, art. XIV, ¶ 20. The Tribunal may not award costs. A portion of the funds allocated to the binational

industry council established under Annex 13 of the Agreement shall be used to cover arbitration costs other than those of the parties. SLA, art. XIV, ¶ 21. Each party shall bear its own costs, including costs of legal representation and related costs. SLA, art. XIV, ¶ 21.

10. If the Tribunal finds that Canada has breached the Agreement, it shall identify a reasonable period of time for Canada to cure the breach or breaches, which shall be the shortest period of time feasible and, in any event, not longer than 30 days from the date of the award. If Canada fails to cure its breaches within the reasonable period of time, the Tribunal shall determine appropriate adjustments to the export measures provided for in the Agreement to compensate for the breach. SLA, art. XIV, ¶¶ 22-25.

V

FEE

11. The United States transmitted the fee prescribed in the LCIA Schedule of Costs to the Registrar of the Court on August 9, 2007.

VI

NATURE OF THE CASE

A. Statement Of The Claims

12. Canada failed to calculate regional trigger volumes using expected United States consumption as adjusted pursuant to paragraph 14 of Annex 7D of the Agreement.

13. Canada failed to impose the agreed-upon export measures for each month in 2007, beginning in January 2007.

14. Canada is now required to impose additional export measures to compensate for its failure to impose the agreed-upon export measures since January 2007. The United States

should be granted additional relief, retrospective and prospective, to fully compensate the United States for Canada's failure to impose the agreed-upon export measures since January 2007.

B. Summary

15. The 2006 Softwood Lumber Agreement between Canada and the United States entered into force on October 12, 2006. At the heart of the Agreement is a commitment by Canada to apply certain export measures (export charges, volume controls, or both) to control exports of softwood lumber from Canada to the United States in exchange for the United States' termination of certain import measures. In accordance with the Agreement, the United States revoked unfair trade orders governing softwood lumber imports from Canada and returned approximately \$US5 billion in collected duties. This dispute concerns Canada's failure to properly impose the export measures required by the Agreement. Canada has neither properly applied the export measures to the full volume of exports, nor applied the exports measures at the times required by the Agreement.

16. The Agreement ties the export measures directly to the "prevailing monthly price" of lumber and to United States consumption of lumber. Canada agreed to impose more stringent measures as the market price of lumber in the United States declines. When the prevailing monthly price of lumber, determined as provided in the Agreement, rises above US\$355 per thousand board feet ("MBF")², Canadian exports are unrestricted. If prices fall below that level, however, each Canadian exporting region (Alberta, B.C. Coast, B.C. Interior,³

² A board foot is the lumber volume equal to a one-inch board that is 12 inches in width and one foot in length. SLA, art. XXI, ¶ 7.

³ B.C. Interior and B.C. Coast are defined in the Agreement. SLA, art. XXI, ¶¶ 5-6.

Manitoba, Ontario, Quebec, and Saskatchewan) is subject to one of two options for imposing export measures: (a) an export charge combined with, what is, in effect, a soft volume cap (Option A); or (b) a lower export charge combined with, what is, in effect, a hard volume cap, or “volume restraint” (Option B).

17. Each region chose the option that will apply to it. Alberta, B.C. Coast, and B.C. Interior elected Option A. Manitoba, Ontario, Quebec, and Saskatchewan elected Option B.

18. The regions that chose Option A, such as British Columbia, are subject additionally to a “surge mechanism.” SLA, art. VIII. Under this provision, if exports of softwood lumber products from an Option A region to the United States exceed the soft volume cap, known as the “trigger” volume, by more than one percent in a particular month, Canada must retroactively collect an additional export charge, equal to 50 percent of the primary export charge, upon all softwood lumber products from that region exported to the United States during the month in question. *Id.*

19. To ensure that Canada adjusts its export measures in accordance with changing market conditions, the Agreement bases the relevant calculations, in part, upon expected United States lumber consumption. Expected United States consumption is essential to calculating the volume of lumber exports subject to export measures and to determining whether an additional export charge, under the surge mechanism, is to be imposed.

20. Beginning in January 2007, Canada repeatedly failed to make the downward adjustment to expected United States consumption that is required by paragraph 14 of Annex 7D of the Agreement. Canada, therefore, failed to make the downward adjustment to the Option A

regional trigger volumes and the Option B quota volumes. Consequently, Canada failed to apply the export measures to the full extent required under the Agreement.

21. In July and August 2007 (and presumably going forward), Canada reported, in the “Softwood Lumber Export Reports” published on the internet, an expected United States consumption that failed to reflect the downward adjustment required by paragraph 14 of Annex 7D. The reported Option A regional trigger volumes appear to have been calculated improperly, without using an adjusted expected United States consumption. The reported Option B regional quota volumes, however, which until July, had also been calculated incorrectly, now appear to have been calculated correctly, using an adjusted expected United States consumption.

22. In discussions seeking to resolve this dispute, Canada maintained that the Agreement does not require it to apply the adjustment to expected United States consumption to the calculation of Option A regional trigger volumes at all. It also contended that, for the purpose of calculating Option B quota volumes, the Agreement did not require it to adjust expected United States consumption before July 2007. However, Canada’s assertions are incorrect.

23. Evidence that the United States is providing to the Tribunal demonstrates that Canada originally interpreted the Agreement correctly. *See* Exhibits D-E. Canada’s own documents demonstrate that Canada originally understood that it was required to make the downward adjustment to the expected United States consumption calculated for January 2007, *see* Exhibit D, and intended to use that adjusted expected United States consumption to calculate both the Option A regional trigger volumes and the Option B quota volumes. *See* Exhibit E. At some point, Canada shifted course.

24. As a result of Canada's failure to make the required downward adjustment to expected United States consumption, Canada calculated Option A regional trigger volumes and Option B quota volumes (or maximum values) for January through June 2007 that were higher than permitted by the Agreement called. Consequently, Canada failed to collect additional export charges required when export volumes exceeded Option A regional trigger volumes. Through the first six months of 2007, Canada under-collected nearly US\$75 million. This is a breach of Canada's obligation under paragraph 1(b) of Article VIII of the Agreement.

25. As a consequence of Canada's failure to properly calculate expected United States consumption, Canada failed also to limit softwood lumber exports to the United States from Option B regions. Export volumes exceeded the Option B quota volumes by hundreds of millions of board feet between January and June 2007. This is a breach of Canada's obligation under paragraph 4(b) of Article VII of the Agreement.

26. As a result of these breaches, the Tribunal should determine the reasonable period of time for Canada to cure its past breaches (not to exceed 30 days), and the appropriate adjustments to the export measures to fully compensate for Canada's failure to impose the agreed-upon export measures beginning in and since January 2007, as well as any additional steps, retrospective and prospective, necessary for Canada to fully cure its breaches of the Agreement and to compensate the United States for Canada's failure to impose the agreed-upon export measures beginning in and since January 2007. *See* SLA art. XIV, ¶¶22-23.

C. Breach Of The 2006 Softwood Lumber Agreement

27. Softwood lumber is wood sawn from coniferous trees that is used primarily for home building. The United States and Canada both have significant softwood lumber industries.

The majority of Canada's softwood lumber production is exported to the United States.

Canadian lumber producers' share of the United States softwood lumber market has risen substantially in the past few decades.

28. Canada and the United States have long disputed the effect of the Canadian system of timber pricing, which the United States considers to be unfair. United States trade laws, like Canadian trade laws, provide for the imposition of special duties upon imports (called countervailing and antidumping duties) that, because of foreign government subsidies or artificially low prices, threaten to injure domestic industries. Following investigations by the United States Department of Commerce and the United States International Trade Commission, the United States determined that Canadian softwood lumber imports were being subsidized and were being sold at less than fair value. To redress these unfair trade practices, the United States imposed countervailing duties and antidumping duties upon Canadian softwood lumber imports.⁴ This led to several years of legal disputes in various fora.

29. In early 2006, the Governments of the United States and Canada entered into negotiations seeking to amicably resolve these many disputes. By the time the parties convened their negotiations, the United States had collected approximately US\$5 billion in duties. The central compromise of the Agreement was this: the United States agreed to refund billions of dollars in duties it had collected and to refrain from imposing additional duties so long as the Agreement remained in force, SLA, arts. III-V; in exchange, Canada agreed, among other things,

⁴ The General Agreement on Tariffs and Trade ("GATT"), the Agreement on Subsidies and Countervailing Measures of the World Trade Organization ("WTO") ("SCM Agreement"), the Antidumping Agreement of the WTO ("Antidumping Agreement"), and the North American Free Trade Agreement ("NAFTA"), are all multinational agreements that recognize the authority of each nation to protect its industries from unfair trade through the imposition of countervailing duties, antidumping duties, or both.

to impose certain “Export Measures” on its softwood lumber producers, SLA, art. VI. These export measures are described in Articles VII through IX, paragraph 2 of Article X, paragraph 2(b)(i) of Article XII, and paragraph 5(a) of Article XVII of the Agreement. SLA, art. XXI, ¶ 23 (defining “Export Measures”). Annexes 7A, 7B, 7D, and 8 of the Agreement further describe the export measures.

The Export Measures: Option A And Option B

30. As noted above, Canada agreed to impose export measures when lumber prices fall below a certain level. When the prevailing monthly price of lumber, determined as provided in Annex 7A of the Agreement, rises above US\$355 per MBF, Canadian exports to the United States are unrestricted. If prices fall below that level, however, Canada must impose export measures. Each Canadian exporting region is subject to one of two options for imposing export measures. The Agreement refers to those options as either Option A or Option B. The Agreement required each lumber-producing region in Canada to elect, within 10 days of the Agreement’s effective date, the option that would apply to its exports. SLA, art. VII, ¶¶ 1, 9. Alberta, B.C. Coast, and B.C. Interior elected Option A. Manitoba, Ontario, Quebec, and Saskatchewan elected Option B.

31. Under Option A, Canada applies a primary export charge on softwood lumber exports in an amount determined under Article VII of the Agreement. SLA, art. VII, ¶¶ 2 (table) and 3. The amount of the export charge increases as the market price of softwood lumber products declines, with the most stringent export measures imposed when the market price is below US\$315 per MBF. SLA, art. VII, ¶¶ 2 (table). In addition, Option A regions are subject to a “Surge Mechanism.” SLA, art. VIII. Under this mechanism, Canada is required to levy an

additional export charge when the volume of exports from an Option A region exceeds that region's "Regional Trigger Volume" by more than one percent. SLA, art. VIII, ¶ 1(b). The amount of the additional export charge is equal to 50 percent of the primary export charge.

32. Under Option B, Canada applies a primary export charge, which is lower than the Option A export charge, together with a "Quota Volume," which the region may not exceed.⁵ SLA, art. VII, ¶¶ 2 (table) and 4. Under Option B, the amount of the export charge increases and the level of the quota volume decreases as the market price of softwood lumber products declines, with the most stringent export measures imposed when the market price is below US\$315 per MBF. SLA, art. VII, ¶¶ 2 (table).

Expected United States Consumption

33. The Agreement requires Canada to use expected United States consumption to calculate the Option A regional trigger volume and the Option B quota volume. SLA, Annex 7B, ¶ 2, and Annex 8, ¶¶ 2-3. Expected United States consumption is a proxy for the size of the United States market for softwood lumber; it is an estimate of the volume of lumber that the United States will consume in a given month. Canada agreed to determine monthly expected United States consumption by calculating the average actual consumption for a prior 12-month period (the 12-month period ending three months prior to the month for which expected United States consumption is being calculated). SLA, Annex 7D, ¶ 12.

⁵ In accord with paragraphs 4 through 7 of Annex 7B, a region that has selected Option B may carry forward from the previous month or carry back (or borrow) from the next month up to 12 percent of its monthly quota volume (or maximum volume), meaning that, subject to the carry forward/carry back provisions, a region may, in fact, exceed its quota volume (or maximum volume) in a given month. It is not alleged in this dispute that Canada has misapplied the carry forward/carry back provisions. However, if the tribunal finds that Canada breached its obligations of the Agreement in calculating the quota volumes (or maximum volumes), the carry forward/carry back provisions would be relevant to determine the extent by which exports exceeded the quota volumes (or maximum volumes).

34. The required adjustment operates to make expected United States consumption estimates more accurate and, consequently, to improve the calculation of the Option A regional trigger volumes and the Option B maximum volumes (or quota volumes).⁶ SLA, Annex 7D, ¶ 14. Had Canada complied with the Agreement, the adjustment for which paragraph 14 of Annex 7D provides would have resulted in calculations of expected United States consumption that were quite close to actual United States consumption. For example, Canada calculated unadjusted expected United States consumption estimates for January, February, and March 2007 that differed from actual consumption during those months by 13.72 percent, 20.58 percent, and 11.62 percent, respectively. Had Canada properly adjusted the expected United States consumption estimates for those months pursuant to paragraph 14 of Annex 7D, the expected United States consumption estimates would have differed from actual consumption by only 0.51 percent, 4.75 percent, and 1.76 percent, respectively.

**Application Of Adjusted Expected United States
Consumption To Option A Regional Trigger Volumes**

35. In the consultations aimed at resolving this dispute, Canada maintained that the adjustment of expected United States consumption required by paragraph 14 of Annex 7D of the Agreement applies only to the calculation of the Option B quota volumes (or maximum volumes), and not to the Option A regional trigger volumes. Canada's interpretation violates the text of the Agreement, contravenes the purpose of the Agreement, and is belied by actions Canada took after the Agreement came into force.

⁶ As a practical matter, because of delays in collecting the data necessary to determine actual United States consumption for a given quarter, if data for a quarter requires an adjustment to expected United States consumption, Canada cannot make the adjustment in the next chronological quarter, but must make it in the quarter after that, if quota volumes (or maximum volumes) are to be determined at that time.

36. The Agreement defines expected United States consumption as “the expected level of U.S. Consumption defined and calculated in accordance with **paragraphs 12 through 14** of Annex 7D” SLA, art. XXI, ¶ 21 (emphasis added). That is, the exclusive definition of expected United States consumption includes paragraph 14 of Annex 7D, and unless expressly provided, any reference to expected United States consumption in the Agreement necessarily refers to paragraphs 12 through 14 of Annex 7D.

37. Paragraphs 12 through 14 of Annex 7D explain the calculation of expected United States consumption. Paragraph 14 of Annex 7D provides for an adjustment to expected United States consumption: “If U.S. Consumption during a Quarter differs by more than 5% from Expected U.S. Consumption during that Quarter, as calculated under paragraph 12, the calculation of Expected U.S. Consumption for the following Quarter for which quotas are being determined shall be adjusted”

38. There is no reference in Annex 7D to Option A or Option B, and nothing in the Agreement suggests that Canada may calculate expected United States consumption differently for purposes of applying export measures under Option A or Option B. Critically, paragraph 14 of Annex 7D does **not** provide for adjustment of Option A regional trigger volumes and the Option B quota volumes (or maximum volumes) themselves. Rather, Canada is required to adjust the expected United States consumption under this paragraph. Canada then calculates the regional trigger volumes and the quota volumes (or maximum volumes) using the adjusted expected United States consumption (if an adjustment is required for the given month). Accordingly, Canada has no basis under the Agreement for calculating expected United States

consumption differently for purposes of calculating Option A regional trigger volumes or Option B quota volumes (or maximum volumes).

39. Furthermore, Annexes 7B and 8 each make nearly identical references to expected United States consumption and Annex 7D, while they make no reference whatsoever to the application or non-application of the adjustment to expected United States consumption.

40. After setting forth the equation for the calculation of the regional trigger volume, paragraph 3 of Annex 8 provides that “EUSC = monthly Expected U.S. Consumption, as calculated in accordance with Annex 7D.” Likewise, after setting forth the equation for the calculation of the quota volume (or maximum volume), paragraph 2 of Annex 7B provides that “EUSC = monthly Expected U.S. Consumption (as calculated in Annex 7D).” These two Annexes, which virtually mirror one another in this respect, require Canada to use the same expected United States consumption estimate in both calculations. Their language further establishes that the adjustment to expected United States consumption does not apply differently to the calculation of the Option A regional trigger volumes and the Option B quota volumes (or maximum volumes).

41. Absent an express provision to the contrary, any reference to expected United States consumption in the Agreement necessarily refers to paragraphs 12 through 14 of Annex 7D, in which the required calculations for the defined term are set forth. Although neither Annex 7B nor Annex 8 contains any express provision to the contrary, paragraph 14 of Annex 7D itself does contain an express provision, which refers to “Expected U.S. Consumption . . . as calculated under paragraph 12” This limitation makes sense, as without it, adjusted expected United States consumption would be compared to actual United States consumption.

As indicated above, experience under the Agreement has shown that adjusted expected United States consumption tends to be within five percent of actual United States consumption, while unadjusted expected United States consumption has differed from actual United States consumption by far more than five percent. Thus, comparing adjusted expected United States consumption with actual United States consumption for purposes of paragraph 14 of Annex 7D would mask the rapid market changes that are still affecting the pre-adjustment calculation of expected United States consumption (“as calculated under paragraph 12”), undermining the purpose of paragraph 14. The inclusion of this express limitation on the general meaning of expected United States consumption in paragraph 14 of Annex 7D demonstrates that the negotiators of the Agreement chose to include such a limitation when it was necessary. In this context, the absence of any similar limitation in Annexes 7B and 8 must have meaning.

42. Nothing in paragraph 14 of Annex 7D refers to Option A or Option B, or otherwise limits the application of paragraph 14 to either option. Paragraph 14 provides the timing of the application of the adjustment. The adjustment to expected United States consumption, when required, is to be made “in the next Quarter for which quotas are to be determined.” This simply means that Canada is not to make the adjustment in a quarter for which quotas are not to be determined, such as when Canada is not applying export measures because the prevailing monthly price of softwood lumber is above US\$355 per MBF.

43. The reference to “quotas” in paragraph 14 cannot limit the application of the expected United States consumption adjustment to the calculation of Option B quota volumes (or maximum volumes), as Canada has maintained during consultations. Canada’s suggestion is inconsistent with the remainder of the Agreement, namely, the definition of expected United

States consumption in Article XXI of the Agreement (which requires the calculations set forth in paragraphs 12 *through* 14) and the references in Annexes 7B and 8 to Annex 7D as a whole (which do not limit expected United States consumption to specific paragraphs of Annex 7D).

44. In addition, an argument that an adjustment to expected United States consumption, which is intended, among other things, to enhance the export measures during a period of market decline in the United States, would not apply to an Option A region such as B.C. Interior subverts the purpose of the Agreement. B.C. Interior is the largest softwood lumber producing region in Canada.⁷ A primary purpose of the export measures under the Agreement is to control exports from B.C. Interior. Given this, the Agreement cannot possibly be interpreted to provide for less stringent restrictions upon exports from B.C. Interior than it does on exports from Option B Regions Manitoba and Saskatchewan, two of the smallest lumber producing regions in Canada.

45. Canada's actions following the entry into force of the Agreement demonstrate that Canada originally interpreted the Agreement correctly, but then changed its course. A report prepared by the B.C. Ministry of Forests and Range, Economics and Trade Branch, dated January 16, 2007,⁸ admitted:

There has been discussion about whether the surge triggers for January should be adjusted for the difference between expected US consumption and actual US consumption in July-Sept 2006 (Annex 7D, paragraph 14). [The Department of Foreign Affairs and International Trade] DFAIT has informed BC that the surge

⁷ This is demonstrated in the monthly "Softwood Lumber Export Reports" published by Canada, as well as by the Agreement itself, which assigns to B.C. Interior a "Share of U.S. Consumption" more than three times larger than the next largest Canadian region under either Option A or Option B. SLA, Annex 7B, Table 1, and Annex 8, Table 1.

⁸ The document contains the date "January 16, 2006." This appears to be a clerical error as the report discusses January 2007 data. *See* Exhibit D.

limit for January will have the negative adjustment, but has not officially published the surge limits for January, nor January export volume statistics on its website.

Exhibit D, at p. 1. The report went on to explain that:

BC calculations prior to January 2007 assumed that this adjustment did not apply to surge limit calculations. However, the federal government has stated it will apply the adjustment to surge limit calculations. BC has obtained legal arguments that the adjustment should only apply to quota calculations and has forwarded to the federal government.

Id. at 3. Despite its recent posture, Canada was aware of and understood the commitments that it made in the Agreement. Subsequently, however, it reversed course with respect to the application of the expected United States consumption adjustment to the calculation of the Option A regional trigger volumes.

46. As a result, Canada breached its obligations under the Agreement by failing to calculate Option A trigger volumes using properly adjusted expected United States consumption estimates for the months of January through August 2007, and for any future months in which Canada continues to fail to make the proper adjustment.

47. Also, as a consequence of Canada's failure to correctly calculate the Option A trigger volumes, and, in light of the volume of exports from B.C. Interior, which exceeded the correctly calculated trigger volumes in January, March, April, May, and June, and the volume of exports from Alberta, which exceeded the correctly calculated regional trigger volumes in April and May, Canada violated its obligation under the Agreement to collect the additional export charge from softwood lumber producers in those regions for those months. Accordingly, Canada has breached paragraph 1(b) of Article VIII.

**Timing Of The First Application Of The
Adjustment To Expected United States Consumption**

48. Pursuant to the Agreement, Canada should have made downward adjustments to expected United States consumption beginning in January 2007. During the third quarter of 2006, the United States softwood lumber market contracted rapidly. Actual United States consumption for the third quarter of 2006 was more than five percent lower than expected United States consumption for that quarter. Therefore, when Canada calculated the expected United States consumption for January 2007, it was required by the Agreement to make a downward adjustment to the expected United States consumption of 609,442,345 board feet. It did not make that adjustment. Nor did it make a downward adjustment for February or March 2007, as required by the Agreement. Consequently, in those months, Canada calculated regional trigger volumes and quota volumes (or maximum volumes) that were higher than permitted by the Agreement.

49. During the fourth quarter of 2006, actual United States consumption was again more than five percent lower than the expected United States consumption for that quarter. Canada was required to make a downward adjustment to expected United States consumption in April, May, and June 2007, in the amount of 878,988,017 board feet per month. Canada failed to make the adjustments. Canada improperly calculated the regional trigger volumes and quota volumes (or maximum volumes) for those months using an unadjusted expected United States consumption, which resulted, again, in volumes that were higher than allowed under the Agreement.

50. Finally, during the first quarter of 2007, actual United States consumption was once again more than five percent lower than the expected United States consumption for that

quarter. Canada, therefore, was required to make downward adjustments to expected United States consumption in July, August, and September 2007. Although, in July and August, Canada did not make downward adjustments to expected United States consumption in its published reports, the Option B quota volumes (or maximum volumes) that Canada published for those months were, nevertheless, calculated using a properly adjusted expected United States consumption. Canada appears to have calculated the Option A regional trigger volumes using an unadjusted expected United States consumption; thus, the calculated regional trigger volumes are higher than those allowed by the Agreement.

51. To date, Canada has maintained that it was not required make any adjustment to expected United States consumption pursuant to paragraph 14 of Annex 7D of the Agreement prior to July 2007. Again, however, Canada's recent position is not supported by the text or context of the Agreement, the purpose of the adjustment, or its own initial implementation of the Agreement.

52. At its root, the current disagreement between the United States and Canada with respect to the timing of the first application of the adjustment to expected United States consumption appears to rest upon the meaning of the word "Quarter" under the Agreement. Canada appears to read "Quarter" to mean "Quarter subsequent to date upon which the Agreement entered into force." This reads into the Agreement words that appear nowhere in the text.

53. The Agreement defines "Quarter" as "unless otherwise specified, the three-month periods commencing January 1, April 1, July 1 and October 1 of each Year" SLA, art. XXI, ¶ 44. This definition of "Quarter" is not limited to the quarters after which the Agreement

entered into force. Paragraph 14 of Annex 7D of the Agreement does nothing to limit or “otherwise specif[y]” the meaning of the word “Quarter” to some meaning different from the definition. Further, the context in which the term “Quarter” is used in Annex 7D illuminates its meaning. Annex 7D, paragraph 12, describes the initial calculation of expected United States consumption, before any adjustment is made. As an initial matter, before the adjustment in paragraph 14 is applied, Canada is to calculate expected United States consumption as the monthly average of United States consumption for the 12-month period ending three months before the month for which expected United States consumption is being calculated, multiplied by a seasonal adjustment factor provided in Table 1 of Annex 7D. This is, without question, a complex calculation. What is relevant for our purposes here, though, is the explicit use in that calculation of data from prior months to calculate expected United States consumption. Consequently, in October 2006, the month in which the Agreement entered into force, Canada calculated expected United States consumption using data from a period prior to and entirely outside of the period during which the Agreement was in force. In fact, only when Canada calculates the expected United States consumption for February 2008 will the initial calculation of unadjusted expected United States consumption be based on data from a period entirely subsequent to the Agreement’s entry into force. There is no suggestion, however, that Canada is unable to calculate any expected United States consumption at all prior to February 2008, and in fact Canada has been calculating expected United States consumption monthly since October 2006, albeit improperly since January 2007. Thus, Canada cannot credibly suggest that the Agreement does not contemplate that it use data from a time period before the Agreement entered into force to calculate expected United States consumption.

54. In this context, in which Canada uses data that predated the Agreement to calculate expected United States consumption, paragraph 14 of Annex 7D plainly requires the use of pre-Agreement data to determine whether the adjustment to expected United States consumption is required. It is illogical not to read paragraph 14 this way. As explained above, expected United States consumption is a proxy for the size of the United States market for softwood lumber and the paragraph 14 adjustment is a data correction mechanism intended to result in an estimate made before a given month that is as close as possible to actual consumption during that month. As noted previously, when the paragraph 14 adjustment is applied for January through March 2007, as it should have been, the adjusted expected United States consumption estimates are much closer to actual United States consumption values for those months than the unadjusted expected United States consumption estimates calculated by Canada. Expected United States consumption could not be as accurate as possible if paragraph 14 did not apply until, at the earliest, nine months into the operation of the Agreement, as Canada has asserted. The Agreement did not provide for intentionally inaccurate estimates of expected United States consumption.

55. Again, though, Canada's actions after the Agreement entered into force indicate that it correctly interpreted the Agreement at first. As previously explained, before reversing course, Canada had informed B.C. that it intended to apply the adjustment to expected United States consumption in paragraph 14 of Annex 7D to the calculation of Option A regional trigger volumes for January 2007. *See* Exhibit D. Canada likewise informed an Ontario producer that it intended to apply the adjustment to expected United States consumption in the calculation of Option B quota volumes (or maximum volumes). That producer, Domtar Inc., sued the

Canadian Federal Government on January 15, 2007, and Canada subsequently reversed course with respect to Option B regions as well. *See* Exhibit E, ¶ 20. Thus, from the outset, Canada took the view that paragraph 14 of Annex 7D required that a downward adjustment be made to expected United States consumption beginning in January 2007, but it reversed its position under pressure from major lumber producing provinces. That Canada initially interpreted the provision correctly demonstrates that it has strayed far from the parties' mutual understanding at the time the Agreement was signed.

56. For these reasons, Canada has breached its obligations under the Agreement by failing to adjust expected United States consumption as required by paragraph 14 of Annex 7D of the Agreement in each month since January 2007.

57. As a consequence of this breach, Canada has breached its obligations under the Agreement by failing to calculate Option A regional trigger volumes using properly adjusted expected United States consumption estimates for the months of January through August 2007, and for any future months during which Canada continues to fail to make the proper adjustments. Canada has also breached its obligations under the Agreement by failing to calculate Option B quota volumes (or maximum volumes) using properly adjusted expected United States consumption estimates for since January 2007.

58. As a consequence of its failure to correctly calculate the Option A regional trigger volumes, and in light of the volume of exports from B.C. Interior, which exceeded the correctly calculated regional trigger volumes in January, March, April, May, and June, and the volume of exports from Alberta, which exceeded the correctly calculated regional trigger volumes in April and May, Canada breached its obligation under paragraph 1(b) of Article VIII of the Agreement

to collect the additional export charge from softwood lumber producers in those regions for those months.

59. As a consequence of its failure to correctly calculate the Option B quota volumes (or maximum volumes), Canada has further breached its obligation under paragraph 4(b) of Article VII of the Agreement to limit the exports of Option B regions in accordance with Annex 7B.

60. Accordingly, the United States respectfully requests the Tribunal to determine the reasonable period of time for Canada to cure its breaches (not to exceed 30 days) and determine the appropriate adjustments to the export measures to compensate for Canada's failure to impose the agreed-upon export measures beginning in and since January 2007, as well as determine any additional steps, retrospective and prospective, necessary for Canada to fully cure its breaches of the Agreement and to compensate the United States for Canada's failure to impose the agreed-upon export measures beginning in and since January 2007.

VII

CLAIMANT'S REQUEST FOR RELIEF

61. The United States respectfully requests an award in its favor:

(a) Declaring that Canada has breached the Agreement as follows:

- (i) Canada has breached paragraph 1(b) of Article VIII by failing to properly collect additional export charges from softwood lumber producers in Option A regions.
- (i) Canada has breached paragraph 4(b) of Article VII by failing to properly limit the exports of softwood lumber from Option B regions.

(b) Ordering Canada to cure its breaches by imposing additional export measures to compensate for its failure to impose the agreed-upon export measures beginning in and since January 2007, as well as take any additional steps, retrospective and prospective, necessary for Canada to fully cure its breaches of the Agreement and to compensate the United States for Canada's failure to impose the agreed-upon export measures beginning in and since January 2007.

(c) Ordering Canada, with respect to Option A regions, to collect additional export charges from exporters for all months in which export volumes exceeded (or will exceed in the future) the properly calculated regional trigger volumes.

(d) Ordering Canada, with respect to Option B regions, to make additional downward adjustments to quota volumes (or maximum volumes) in future months in an amount equal to the amount by which shipments from Option B regions exceeded the properly calculated quota volumes (or maximum volumes) for January through June 2007.

(e) Determining the reasonable period of time for Canada to fully cure all of its past breaches (in any event not to exceed 30 days).

(f) Determining the appropriate adjustments to the export measures to compensate for the breaches if Canada fails to cure the breach within the time specified by the Tribunal.

(g) Ordering any further relief as may be available and appropriate in the circumstances.


VIII

SERVICE OF THE REQUEST

62. This Request, together with Exhibits A-F, is being simultaneously transmitted to both legal representatives of the Respondent by email. A courtesy copy of this request will also be served upon Joanne Osendarp, by hand delivery, on August 13, 2007. Attached as Attachment F is a Certificate of Service confirming service.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General


JEANNE E. DAVIDSON
Director



PATRICIA M. McCARTHY
Assistant Director
REGINALD T. BLADES, JR.
Senior Trial Counsel
CLAUDIA BURKE
MAAME A.F. EWUSI-MENSAH
GREGG M. SCHWIND
STEPHEN C. TOSINI
Trial Attorneys
United States Department of Justice
Commercial Litigation Branch
Civil Division
1100 L Street, N.W.
Washington, D.C. 20530
UNITED STATES
Tel: +1 (202) 514-7300
Fax: +1 (202) 514-7969

OF COUNSEL:

WARREN H. MARUYAMA
General Counsel
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508
UNITED STATES

RONALD J. BETTAUER
Deputy Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
UNITED STATES

August 13, 2007

Attorneys for Claimant,
the United States of America