In The LCIA
No. 7941

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA,

Respondent.

UNITED STATES REBUTTAL MEMORIAL

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REBUTTAL MEMORIAL OF THE UNITED STATES OF AMERICA

1. Pursuant to the Tribunal's revised Procedural Order No. 1 dated October 28, 2007, claimant, the United States, respectfully submits its rebuttal memorial in support of its statement of the case regarding liability and in response to the statement of defence of the respondent, Canada.

INTRODUCTION

2. The parties agree that only two issues are before the Tribunal: (1) whether the 2006 Softwood Lumber Agreement ("SLA" or "Agreement") requires Canada to apply the complete calculation of "Expected U.S. Consumption" to all exporting regions, that is, to Option A regions in addition to Option B regions; and (2) whether Canada was required to begin to apply the complete calculation as of the Agreement's effective date. The parties agree further that there are no factual disputes, that Articles 31 and 32 of the Vienna Convention apply, and that the Tribunal may resolve both issues by determining the correct interpretation of the Agreement. Stmt of Defence ¶¶ 1-2.

3. Canada has breached the Agreement, and continues to breach the Agreement, by refusing to apply the complete calculation of Expected U.S. Consumption to all regions. Canada refuses to acknowledge that the Agreement contains only one definition of Expected U.S. Consumption. Rather than addressing the Agreement's ordinary meaning or offering a competing interpretation that might account for Canada's position, Canada focuses almost exclusively upon the use of the undefined word "quota," in what Canada concedes is only a subordinate clause on timing. Canada proffers an ungrammatical interpretation of "quota" at the

expense of the entirety of the Agreement's text and, therefore, fails to support its position. The ordinary meaning of the text supports the United States' position.

4. Additionally, Canada breached the Agreement by failing to apply timely the export measures. Nothing in the text of the Agreement delays Canada's obligation to apply the complete calculation of Expected U.S. Consumption from the effective date of the Agreement. Nonetheless, Canada appears to read words into the text of the Agreement that are not there, purportedly to allow it to avoid implementing the complete calculation for nine consecutive months. There is no basis in the Agreement for such a grace period.

5. Rather than respond to the core of the United States' arguments, which are firmly grounded in the text of the Agreement, Canada expends considerable effort in its statement of defence selectively focusing upon side issues in an apparent attempt to cast doubt regarding the central questions of this dispute. Canada distorts the United States' unremarkable observation that a primary purpose of the provision at issue is to enhance the accuracy of the calculation and similarly misconstrues the United States' argument concerning the Agreement's object and purpose.

6. Canada's interpretation of the Agreement is inconsistent with the ordinary meaning of the text, read in its context and in light of the object and purpose. In sections I and II, the United States addresses the ordinary meaning of the Agreement in its context. In section III, the United States addresses why its interpretation in both cases is consistent with the SLA's object and purpose.

ARGUMENT

I. The SLA Requires Canada To Apply The Properly Calculated Expected U.S. Consumption To Option A And Option B Regions

7. "Expected U.S. Consumption" is defined 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. To calculate Expected U.S. Consumption, Canada must include the requirements of paragraph 14 of Annex 7D. Canada breached the Agreement, and continues to breach the Agreement, by failing to apply paragraph 14 of Annex 7D when calculating Expected U.S. Consumption for Option A regions. Article 31(1) of the Vienna Convention provides that "[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 light of its object and purpose." When the text of an agreement is unambiguous, its terms must be applied "as they stand."[1] Canada cannot escape the ordinary meaning of the operative term at issue in this case – Expected U.S. Consumption. In fact, Canada does not offer any justifiable interpretation of the Agreement that would excuse its continuing failure to comply with its obligations under the Agreement.

A. The SLA Contains Only One Definition Of Expected U.S. Consumption

8. In the SLA, Canada agreed to impose certain export measures to regulate Canadian exports of lumber when the United States price of lumber is at or below US$355. As Canada correctly recites, Canadian lumber-producing regions may choose the export measures that Canada will apply to them – Option A or Option B. Of course, as Canada explains, the two options are necessarily different. Stmt of Defence ¶¶ 38-47.

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[1] See LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 494 (June 27) ("The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand . . . .").

9. Nevertheless, both options involve export charges and volume limits. Under both options, Canada agreed to impose export charges when the United States price of lumber is at or below US$355, and to increase the charges as the price of lumber declines. SLA, art. VII, ¶ 2. Under Option A, Canada agreed to impose an additional export charge – 50 percent of the existing export charge – if the region's exports exceed the region's "trigger" volume by more than one percent. SLA, art. VIII, ¶ 1(b). Under Option B, in addition to the export charge, Canada agreed to apply a volume restraint (or "quota volume") to each region, which limits the volume that region may export.

10. Critically, both options identically require Canada to calculate Expected U.S. Consumption. The Agreement contains only one definition of Expected U.S. Consumption: "the expected level of U.S. Consumption defined and calculated in accordance with paragraphs 12 through 14 of Annex 7D." SLA, art. XXI, ¶ 21. The mathematical formulas for calculating the volume limits under each option, both use the identical expression for Expected U.S. Consumption: "EUSC." Canada does not, and cannot, identify another definition of Expected U.S. Consumption that might apply to only Option A regions.

11. The formula for calculating a region's trigger volume under Option A is:

$$RTV = EUSC \times RS \times 1.1.$$

SLA, Annex 8, ¶ 3. That is, a region's trigger volume ("RTV") is equal to Expected U.S. Consumption ("EUSC"), multiplied by the region's assigned market share ("RS"), multiplied by 1.1. Id. "EUSC" is "as calculated in accordance with Annex 7D." Id.

12. Similarly, the formula for calculating a region's quota volume under Option B is:

$$RQV = EUSC \times RS \times PAF.$$

SLA, Annex 7B, ¶ 2. That is, a region's quota volume ("RQV") is equal to Expected U.S. Consumption ("EUSC"), multiplied by the region's assigned market share ("RS"), multiplied by an assigned price adjustment factor ("PAF"). Id. "EUSC" is "as calculated in Annex 7D." Id.

13. That is, both trigger volumes and quota volumes are determined by multiplying Expected U.S. Consumption ("EUSC") by a market share value multiplied by an adjustment factor. There is only one value for Expected U.S. Consumption that may be used in the Agreement's calculations.

14. Canada's lengthy recitation of the differences between Option A and Option B does nothing to justify Canada's claim that it may calculate Expected U.S. Consumption one way for Option A and another way for Option B. Notably, in many instances, the particular annexes that apply to each option memorialize the differences between the two options. Stmt of Defence ¶¶ 41-45. Annex 7B provides specific Option B characteristics. Article VIII and Annex 8 provide specific Option A characteristics. The calculation for Expected U.S. Consumption, however, appears nowhere in any of these option-specific provisions. Rather, Annex 7D, which is not option-specific, provides the calculation for Expected U.S. Consumption. Annex 7D applies to both options for purposes of calculating Expected U.S. Consumption.

15. Moreover, as Canada admits, the parties' placement of paragraph 14 in Annex 7D was intentional. See Stmt of Defence ¶¶ 99-101. In earlier drafts of the Agreement, the adjustment to Expected U.S. Consumption originally appeared in what became Annex 7B – the provision specific to Option B. Id. ¶ 95. The parties agreed, however, to move the language that became paragraph 14 into Annex 7D, entitled "Calculation of U.S. Consumption and Market Share." Id. ¶¶ 99-100. By moving the adjustment provision from an Option B-specific

provision to a general provision regarding the calculation of United States consumption, the parties intended the adjustment not to be limited to only Option B, but to apply to the calculation for Expected U.S. Consumption for both Option A and Option B.

16. Canada makes much of the fact that the words "for which quotas are determined" were added a second time to what became paragraph 14 of Annex 7D on September 8, 2006. Stmt of Defence, ¶ 100. Even assuming that these words were capable of plausibly being construed as words of limitation, the documents attached at Exhibits C-21 through C-23 demonstrate that the parties did not intend the addition of these words to limit the application of paragraph 14 to only Option B regions. Rather, the parties added these words to address only the administrability of the adjustment.[2]

B. Paragraph 14 Contains No "Limiting Language"

17. Further, the text of paragraph 14 does not contain "limiting language" as Canada contends. Canada suggests that the words "for which quotas are being determined" are a

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[2] On September 6, 2006, Canada proposed to add language to clarify when the application of paragraph 14 should apply. See Exhibit C-21, Email from Colin Bird to James Terpstra (Sep. 6, 2006, 10:09 a.m.). After an exchange between the parties, Canada expressed concern that, as then written, Canada would apply paragraph 14 only four months out of the year, rather than monthly, and this "might add volatility/uncertainty to the EUSC monthly data series." Exhibit C-22, Email correspondence between US representatives and Canada representatives (Sep. 6, 2006, 7:25 p.m.), at 2; compare with Exhibit C-23, Draft 2006 Softwood Lumber Agreement (Sep. 5, 2006). Canada stated, "Obviously the result you describe would be undesired," because "[i]t would be totally inconsistent with quota and surge penalties applied on a monthly basis." Exhibit C-22 (Sep. 6, 2006, 11:57 p.m.), 1-2. To avoid this, Canada proposed adding the words "for which quotas are determined" to the beginning of the paragraph to mirror their existing placement at the end of paragraph 14 and to clarify that the calculation would be made monthly. See Exhibit C-22, Email correspondence between US representatives and Canada representatives (Sep. 6, 2006, 10:09 a.m. to Sep. 7, 2006, 3:36 p.m.).

Thus, Canada proposed to add the second clause, "for which quotas were determined" to paragraph 14 of Annex 7D merely to enhance the symmetry of the provision, or in Canada's words, to make the paragraph "more precise." Id. The emails upon which Canada relies do nothing to advance Canada's position.

remnant of the clause's original placement in what became Annex 7B. See Stmt of Defence ¶¶ 91-103. According to Canada, the subordinate phrases "for which quotas are being determined" are words of limitation:

> 14. 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 as follows. Specifically, the difference (in MBF) between U.S. Consumption and Expected U.S. Consumption for the Quarter shall be divided by 3 and the amount derived shall be added to (if U.S. Consumption was more than expected) or subtracted from (if U.S. Consumption was less than expected) the monthly Expected U.S. Consumption calculated under paragraph 12 for each month in the next Quarter for which quotas are determined.

SLA, Annex 7D, ¶ 14 (emphasis added). Canada is incorrect; the subordinate clauses are not "limiting" language.

18. First, as a grammatical matter, there is absolutely nothing that is "limiting" about the subordinate clause upon which Canada justifies its failure to apply the full extent of the export measures to which it agreed. This subordinate clause refers to the timing of the adjustment and nothing else. Canada concedes that the phrase "for which quotas are being determined" is a subordinate clause that modifies "quarter." More importantly, Canada explicitly concedes that the adjustment's application to the following quarter "for which quotas are being determined" refers merely to the timing of when Canada must apply the adjustment. Stmt of Defence ¶ 36. Id. Nevertheless, Canada persists in maintaining that this language somehow modifies "calculation" to limit application of the adjustment in the calculation of Expected U.S. Consumption to only regional quota volumes and not regional trigger volumes. This alteration of the text to move the clause from one portion of the text to another, done to suit

Canada's current needs, violates the integrity of the phrase and, therefore, the ordinary meaning of the provision.

19. Second, even assuming the plausibility of Canada's reading of the subordinate clause as words of limitation, it is indisputable that the parties never intended the words at issue to be words of limitation when the words were first drafted. As Canada itself notes, the so-called "limiting language" first appeared in what became Annex 7B, which is limited to Option B. In that context, the word "quota" could not have been meant to limit the application of the adjustment to Option B. Canada fails to explain why and how this word assumed this limiting role when the parties moved the paragraph into Annex 7D, particularly, when in Canada's view, the moved language serves no other purpose than to justify its limited reading of its obligations under the Agreement. See Stmt of Defence ¶¶ 99-101. Although Canada makes much of the fact that the word "quota" was never changed after the language was moved to Annex 7D, there was never any need to change the language. Canada's reliance upon the absence of an unnecessary revision to language, therefore, is of no moment. Accordingly, the language cannot have the meaning that Canada ascribes to it.

20. Canada does note that the paragraph 14 adjustment is "conditional." Stmt of Defence ¶ 52. Canada misstates, however, the nature of the condition. Although Canada is required to make the adjustment required by paragraph 14 only if a comparison of United States consumption and Expected U.S. Consumption reveals a difference exceeding five percent, Canada is always required to make the comparison in the first instance. There is absolutely nothing "conditional" about Canada's obligation to make the comparison, and if the comparison reveals a difference of more than five percent, Canada is required to make the adjustment.

C. Canada's Interpretation Of The Word "Quota" Is Incorrect

21. Canada asks the Tribunal to ignore the language and context of paragraph 14 and, instead, isolate the word "quota" from the text of the Agreement and construe that lone word contrary to the remainder of the Agreement, which provides the word's context. The crux of Canada's defense appears to lie in its suggestion that "quota," an undefined term in the Agreement, means the same thing as "quota volume," which, although also an undefined term, applies only to Option B regions. Stmt of Defence ¶ 35. That is, Canada contends that when paragraph 14 requires an adjustment "for the following Quarter for which quotas are being determined," the adjustment is somehow required for only Option B regions.

22. First, Canada's contention that paragraph 14 of Annex 7D provides for an adjustment to a quota volume is simply incorrect. See Stmt of Defence ¶ 80. Rather, paragraph 14 of Annex 7D unambiguously requires Canada to adjust Expected U.S. Consumption, which, as the United States has demonstrated, is a defined term that is unambiguously a part of the calculation for both regional trigger volumes and regional quota volumes.

23. Second, Canada has failed to establish that two different terms, "quota" and "quota volume," both of which are undefined in the Agreement, have identical meanings for purposes of the Agreement. It is more logical to interpret "quota" and "quota volume" – different terms with different applications – as having different meanings. Indeed, both Option A and Option B rely upon "quotas," or volume limits. As the United States has explained, both options involve export charges and volume limits. Under both options, Canada agreed to impose export charges when the United States price is at or below US$355, and the charges increase as the price declines. SLA, art. VII, ¶ 2. Under Option A, Canada agreed to impose an additional export charge – 50 percent of the existing export charge – if the region's exports exceed the

region's "trigger" volume by more than one percent. SLA, art. VIII, ¶ 1(b). Under Option B, in addition to the export charge, Canada agreed to apply a volume restraint (or quota volume) to each region, which limits the volume that region may export. The volume limit under Option A, which if exceeded by more than one percent precipitates additional export charges, is no less a "quota" than the volume restraint that limits exports under Option B. In both instances, once a region reaches an agreed-upon volume limit, in the form of a regional trigger volume or regional quota volume, it must either pay additional export charges or limit exportation.

24. In international trade, the term "quota" can refer to both absolute quantitative limitations and to "tariff rate quotas." Indeed, Canada has previously agreed with this interpretation of "quota." The 1996 Softwood Lumber Agreement between the United States and Canada subjected certain Canadian lumber exports that exceeded 14.7 billion board feet a year to a "lower base fee" for the first 650 million board feet and an "upper base fee" for greater quantities. The Canadian government referred to this as a "quota." See Exhibit C-25, http://www.dfait-maeci.gc.ca/eicb/softwood/sla-en.asp. That is, Canada understood that the 1996 SLA contemplated that a quota need not be limited to absolute volume limitations but can include limits that, if met, can result in the imposition of fewer or additional charges. Accordingly, Canada's newly narrow view of the term "quota" is simply incorrect.

25. Similarly, the United States Customs and Border Protection has recognized a broader definition of "quota" than that suggested by Canada:

> United States import quotas may be divided into two types: absolute and tariff rate. Absolute quotas strictly limit the quantity of goods that may enter the commerce of the United States for a specific period. Tariff rate quotas permit a specified quantity of imported merchandise to be entered at a reduced rate of

> duty during the quota period. Once the tariff-rate quota limit is reached, goods may still be entered, but at a higher rate of duty.

See Exhibit C-24, http://www.cbp.gov/xp/cgov/import/textiles_and_quotas/guide_import_goods/quota_admin. xml (emphasis added). In this regard, even if all Canadian provinces had chosen Option A, contrary to Canada's hypothesis, Stmt of Defence ¶ 37, Canada still would have determined quotas and still would be required to apply the complete calculation of Expected U.S. Consumption, including paragraph 14 of Annex 7D.

D. The Negotiating History And Canada's Conduct Confirm The Ordinary Meaning Of Paragraph 14

26. The United States has demonstrated that the ordinary meaning of paragraph 14 of Annex 7D, read in the context of the Agreement, is clear. Supplemental means of interpretation confirm the United States' interpretation of the Agreement.

27. First, Canada itself (as represented by at least one of the participants to the negotiations), understood at the time it signed the Agreement that the complete calculation of Expected U.S. Consumption, including paragraph 14, applies to both Option A and Option B regions. Stmt of Defence ¶ 90; see also Stmt of the Case at Exhibit C-5 (formerly Exhibit E).[3] Canada attempts to minimize the significance of its prior interpretation of the Agreement by suggesting that it "does not purport to state the opinion of the Canadian government on whether paragraph 14 should apply to surge triggers." Stmt of Defence ¶ 90. Of course, the referenced interpretation is in the form of an assumption that the adjustment applies to both options made by someone who was directly communicating Canada's position internally. This interpretation

[3] Exhibit C-5 was formerly Exhibit E to the United States Statement of the Case. The United States will be submitting a corrected Statement of the Case and appendices. In the corrected Statement of the Case, the exhibits have been renumbered to comply with the revised Procedural Order No. 1.

was ultimately communicated, without qualification, to the United States. Canada fails to explain why its representative interpreted the Agreement in a manner now rejected by Canada, and it also fails to offer any evidence that its other representatives held a contrary view. To the contrary, there is additional evidence that other Canadian representatives shared this view. See Exhibit C-22 (apparently recognizing that the proposed language for what became paragraph 14 of Annex 7D applied to both "quota and surge penalties . . . ." (emphasis added)).

28. In fact, Canada acknowledges that it shared the United States' interpretation of the Agreement until early 2007, when it changed its "consideration" of the issue. Stmt of Defence ¶ 85. As the United States has demonstrated in its statement of the case, Canada did not merely change its "consideration" of the correct application of Expected U.S. Consumption. Rather, Canada notified one of its provincial governments, British Columbia, that it was about to reach its regional trigger volume. Stmt of the Case at Exhibit C-5. This notification was not an internal airing of possible interpretations. Rather, it was an implementation of the export measures. This implementation demonstrates that Canada already had decided to apply the adjustment to Option A regions, already had calculated the Option A regional trigger volumes using the adjustment, and was informing British Columbia that it was nearing its regional trigger volume based upon that calculation.[4]

29. Even assuming that Canada had merely "considered" the issue, its consideration, at the very least, undermines Canada's contention that the ordinary meaning of the provision supports its conclusion. If the meaning were so plain, the meaning should have been apparent to

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[4] See G. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 1957 BRIT. Y.B. INT'L L. 203, 223 n.2 (explaining that the way in which both parties have conducted themselves affords legitimate evidence as to the treaty's correct interpretation but that "[n]aturally, the conduct of one party may be evidence *against* that party . . . ." (emphasis in original)).

Canada from the outset. In any event, Canada's hair-splitting reliance upon its characterization of its actions as so-called "consideration" (as opposed to its "implementation") exposes the weakness of the distinction.

30. Finally, Canada denies that it has engaged in any activity that could constitute "subsequent practice" in the application of the Agreement. Stmt of Defence ¶¶ 84-87. Canada's response misses the point made by the United States, which is simply that Canada's own conduct after the entry into force of the Agreement is "further evidence that the United States interpretation is correct." Stmt of the Case ¶ 50.

31. In fact, the United States' point is unassailable. It is well-settled that the subsequent practice or conduct of a party in relation to an agreement affords evidence of the meaning that party ascribes to the agreement.[5] Relevant conduct in this regard can include interpretations and representations, whether by action or words.[6] It can also be the conduct of one party, not necessarily both; the issue is one of probative value. [7]

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[5] See, e.g., Bowett, Estoppel Before International Tribunals and Its Relation to Acquiescence, 1957 BRIT. Y.B. INT'L L. 176, 177 ("[I]n cases of doubt as to the meaning of an agreement, the subsequent conduct of the parties in carrying out the agreement affords evidence of its meaning. This principle has been accepted by international tribunals and is now well recognized. . . ."); LORD MCNAIR, THE LAW OF TREATIES 424 (1961).

[6] See International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 135-36 (July 11) ("Interpretations placed upon the legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."); Bowett, supra note 5, at 195 ("Where one or other of the foregoing essentials of a binding estoppel is absent the representation, whether by words or conduct, does not lose all value for, although lacking conclusive effect, it may still be adduced in evidence as an admission to show a lack of consistency or weakness in a party's opposition.").

[7] See Fitzmaurice, supra note 4, at 223 n.2; MCNAIR, supra note 5, at 427 ("[E]vidence that both Parties adopted the same meaning of a treaty provision before a dispute arises is of higher probative value than evidence as to the view of one party only."); see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 605 (6th ed. 2003) ("[R]eference may be had to 'subsequent practice in the application of the treaty which clearly establishes the understanding

32. Tellingly, Canada does not deny that its contemporaneous interpretation of the Agreement was that paragraph 14 of Annex 7D applies to the calculation of Expected U.S. Consumption for both Option A and Option B regions, as evidenced by Exhibit C-4 (formerly Exhibit D) to the statement of the case. See also Exhibits C-22, C-24. Nor does Canada deny that it previously did not perceive the "limiting words" it now urges upon the Tribunal, as evidenced by Exhibit C-5 to the statement of case. Just as telling is Canada's failure to identify any contemporaneous interpretation it articulated that differs from the United States' interpretation. The documents appended to the Statement of the Case as Exhibits C-4 and C-5 stand unrefuted as evidence of Canada's contemporaneous interpretation of the Agreement, an interpretation that is consistent with the ordinary meaning of the terms of the Agreement read in their context. See also Exhibits C-21-22.

II. Canada Agreed To Apply The Export Measures Immediately As Of The Effective Date

33. Canada separately breached the Agreement by failing to apply timely the export measures. In the SLA, Canada agreed to apply the export measures "as of the Effective Date." SLA, art. II, ¶1(d); VI. Nevertheless, Canada waited approximately nine months before beginning to make the agreed-upon adjustment to Expected U.S. Consumption set forth in paragraph 14 of Annex 7D. Given the clear text of the Agreement, Canada's delay constitutes a breach of the Agreement.

34. In Annex 7D of the Agreement, Canada agreed to calculate Expected U.S. Consumption every month. See SLA, Annex 7D, ¶¶ 11-14. This calculation required Canada to

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of all the parties regarding its interpretation.'" (citing G. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 1957 BRIT. Y.B. INT'L L. 203, 223)).

perform an initial calculation based upon data from a prior 12-month period and then compare actual United States consumption with Expected U.S. Consumption for a prior quarter. If the comparison revealed a difference of more than five percent, Canada was required to complete the calculation in accordance with paragraph 14:

> 14. 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 as follows. Specifically, the difference (in MBF) between U.S. Consumption and Expected U.S. Consumption for the Quarter shall be divided by 3 and the amount derived shall be added to (if U.S. Consumption was more than expected) or subtracted from (if U.S. Consumption was less than expected) the monthly Expected U.S. Consumption calculated under paragraph 12 for each month in the next Quarter for which quotas are determined.

SLA, Annex 7D, ¶ 14.

35. Thus, the ordinary meaning of the Agreement's text plainly provides that, to determine Expected U.S. Consumption, Canada was obligated to compare recent actual United States consumption and Expected U.S. Consumption. This obligation to compare exists regardless of whether quotas were in effect during the quarter for which Canada is actually performing the comparison, and regardless of whether an adjustment to Expected U.S. Consumption is ultimately necessary based upon the comparison. Id. That is, even if paragraph 14 ultimately does not require Canada to adjust Expected U.S. Consumption in the following quarter for which quotas are being determined, paragraph 14 still requires Canada to perform the comparison in the first instance to ascertain whether an adjustment is necessary. The adjustment would apply in a quarter for which quotas are being determined.

36. Canada agrees that it determined quotas (as Canada defines that term) for the first quarter of 2007. See Stmt of Defence ¶¶ 4. Paragraph 14 of Annex 7D plainly states that to calculate Expected U.S. Consumption for the first quarter of 2007, Canada was required to compare actual U.S. consumption to Expected U.S. Consumption for the most recent quarter for which data was available. Canada further agrees that the most recent available data was from the third quarter of 2006. See Stmt Of Defence ¶ 107. Thus, Canada was in possession of all of the data it needed to make the comparison for which paragraph 14 of Annex 7D called, and to apply the necessary adjustment to the monthly Expected U.S. Consumption calculated for each month in the first quarter of 2007 — the "next Quarter for which quotas are determined." Annex 7D, ¶ 14.[8]

37. Nevertheless, Canada refused to adjust Expected U.S. Consumption for the first quarter of 2007 simply because the quarter of the required comparison, the third quarter of 2006, was prior to the effective date of the SLA. Stmt of Defence ¶¶ 104, 106. Significantly, Canada fails to identify any text in the Agreement that could be read to authorize this delay, and there is none. Instead, Canada essentially adds words of temporal limitation to the Agreement's definition of "Quarter" that simply are not there. That is, in Canada's view, "Quarter" means the first full quarter under the Agreement.

38. The ordinary meaning of the Agreement's text is plain and contrary to Canada's view. Canada agreed to perform the initial comparison between actual and expected United States consumption "during a Quarter." SLA, Annex 7D, ¶ 14 (emphasis added). "Quarter" is

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[8] To be clear, Canada was still obligated to make the comparison between expected and actual United States consumption in the fourth quarter of 2006. However, no adjustment was necessary for that quarter because actual United States consumption for the second quarter 2006 did not differ by more than five percent from Expected U.S. Consumption.

defined 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. The Agreement defines "Year" as, "unless otherwise specified, the 12-month period commencing on January 1 of any year." SLA, art. XXI, ¶ 57 (emphasis added). Thus, "Quarter" literally applies to a three-month period in "any" year, and does not purport, in any way, to limit its application to a period after the SLA came into force. Nowhere does Canada contend that the definition of "Quarter" for purposes of paragraph 14 of Annex 7D is "otherwise specified." Accordingly, the Agreement's definition of "Quarter," which incorporates the Agreement's definition of "Year," governs and undermines Canada's argument.

39. Indeed, the United States' interpretation of the timing of paragraph 14 comports entirely with the several provisions of the Agreement that require Canada to use pre-Agreement data to make calculations. Canada concedes, as it must, that the Agreement contemplates using pre-Agreement data. Stmt of Defence ¶ 107. Canada's graphs (set forth on page 35 of the Statement of Defence), provide, if anything, proof of Canada's ability to compare retrospectively U.S. consumption and Expected U.S. Consumption, even years before the SLA went into force. Accordingly, contrary to Canada's contentions, Stmt of Defence ¶110, nothing in the SLA excused Canada from performing the comparison required by paragraph 14 of Annex 7D as of the date the Agreement went into force.

40. Finally, contrary to Canada's contention that it "never made an adjustment to EUSC in the first two Quarters of 2007," Stmt of Defence ¶ 116, Canada's conduct after the parties entered into the Agreement reveals otherwise. Sometime before January 2007, Canada calculated Expected U.S. Consumption, including application of paragraph 14, in the calculation of regional quota volumes for an Ontario producer. That producer, Domtar Inc., sued the

Canadian federal government on January 15, 2007, see Exhibit C-20, ¶ 20, and Canada subsequently reversed course. Thus, from the outset, Canada recognized that paragraph 14 of Annex 7D required it to adjust Expected U.S. Consumption beginning in January 2007. Canada reversed its position, however, under pressure from this major lumber producer. Canada thus was fully capable of making this adjustment, Stmt of Defence ¶ 107, and as explained above, Canada actually did determine the adjustment. Canada simply failed to apply timely the adjustment, and that failure was a breach of the Agreement. Canada's conduct confirms the ordinary meaning of the text of the Agreement, read in light of its context and the Agreement's object and purpose.

III. The Remainder Of Canada's Contentions Are Unavailing

41. Canada further attempts to divert attention from the ordinary meaning of the Agreement by criticizing the United States' characterization of paragraph 14 of Annex 7D as promoting a more accurate calculation of Expected U.S. Consumption and by misunderstanding the United States' reliance upon the Agreement's object and purpose. Stmt of Defence ¶ 114; ¶ 64-67. Neither of these arguments bears upon the ultimate questions at issue in the case.

A. Canada's Contention That The Adjustment Is Inaccurate Is Irrelevant

42. Canada misconstrues the United States' uncontroversial observation that adjustment to Expected U.S. Consumption enhances the accuracy of the calculation. First, the relative accuracy achieved by paragraph 14 determines neither the point in time at which Canada agreed to begin to impose the full extent of the export measures nor whether the calculation of Expected U.S. Consumption should be applied to all exporting regions.

43. To the extent that the United States discussed the adjustment's purpose, it did so only to demonstrate that the United States' interpretation of the Agreement as providing for a

timely and broad application of paragraph 14 is supported by paragraph 14's beneficial purpose. Nevertheless, Canada takes issue with the United States' unremarkable observation that paragraph 14 promotes accuracy — proposing that paragraph 14 serves a narrower purpose, that is, to compensate for "a quota that was set at too high or too low a level in relation to actual consumption in a previous Quarter." Stmt of Defence ¶ 80. Consistent with its premise, Canada reasons that paragraph 14 does not call for a "compensating" adjustment to be applied in the initial quarters after the SLA came into force because no quotas were in effect before the SLA entered into force. However, the text of paragraph 14 contradicts Canada's interpretation.

44. If, as Canada contends, paragraph 14 called for an adjustment merely to compensate for quotas that were too high or too low in relation to actual consumption, then the paragraph would not call for adjustments to be made if the divergence between expected and actual consumption occurred in a quarter when quotas were not in effect, such as when the United States price of lumber is above US$355. The text of paragraph 14 contains no such limitation. Instead, paragraph 14 provides that an adjustment shall be made "If U.S. consumption during a Quarter, differs by more than 5% from Expected U.S. Consumption during that Quarter . . . ." SLA, Annex 7D, ¶ 14 (emphasis added). As demonstrated, the SLA's definition of Quarter is not limited to quarters that occur after the SLA entered into force. Nor is the definition of Quarter limited to quarters in which a quota is in effect. Accordingly, the text of paragraph 14 contradicts the "compensatory" purpose Canada attributes to this provision.

45. In contrast, the definition of Expected U.S. Consumption, which includes the text of paragraph 14, supports the United States' contention that the adjustment improves the accuracy of this calculation when there has been a significant and sustained decline or increase in United States consumption. Yet, Canada takes the counterintuitive position that the

adjustment actually increases, rather than decreases, the inaccuracy of Expected U.S. Consumption without ever addressing the logical rejoinder that the parties would not have agreed to a provision that promotes inaccuracy. Rather, Canada relies upon a series of graphs that purport to illustrate the inaccuracy of the adjustment to Expected U.S. Consumption. Stmt of Defence at p. 35. Because Canada has not provided any of the underlying data assumptions or other information supporting its illustrations, the United States is unable to comment upon the accuracy of these graphs, and the Tribunal should decline to rely upon them.

46. Even assuming for purposes of argument that these graphs are reliable, they are nevertheless ultimately irrelevant. They purport to demonstrate that, when the lumber market is highly volatile, the paragraph 14 adjustment renders Expected U.S. Consumption no more accurate than unadjusted Expected U.S. Consumption. Nevertheless, Canada acknowledges that when the lumber market is not volatile, and when the increase or decrease in the consumption of lumber in the United States is sustained, as has been the case since the SLA came into force, the adjustment works well to ensure that the estimate of Expected U.S. Consumption does not lag significantly behind movements in the market. Stmt of Defence ¶ 74. That is, Canada agrees that the adjustment enhances the accuracy of Expected U.S. Consumption when there is a sustained upward movement in the market or a sustained downward movement in the market, as has been the case for the past year. This makes practical sense — in the absence of an adjustment, the use of a 12-month moving average as the basis for the estimate would result in an estimate that lags behind such movements in actual United States consumption. See, e.g., Stmt of the Case at Exhibit C-5.

47. Ultimately, Canada summarily concludes that paragraph 14 makes sense for only Option B regions, Stmt of Defence ¶ 80, but fails to explain why. Even Canada's own

explanation of the function served by paragraph 14 demonstrates that the paragraph works to improve the calculation for both Option A and Option B. Id. That is, Canada appears to agree that paragraph 14 serves to update the estimate of Expected U.S. Consumption. As demonstrated, Expected U.S. Consumption is the foundation of both Option A trigger volume and Option B quota volume calculations. Accordingly, the adjustment serves the same function for each calculation.

B. Canada's Interpretation Of The Agreement's Object And Purpose Is Excessively Limited

48. Canada similarly misunderstands the United States' contention that its interpretation is consistent with the Agreement's object and purpose. In its statement of the case, the United States noted that the ordinary meaning of the text, read in its context, is consistent with an object and purpose of the Agreement — to "ensure that there is no material injury or threat thereof to an industry in the United States from imports of Softwood Lumber Products from Canada." SLA, Annex 5B. [9]

49. Contrary to Canada's contention, the absence of a preamble does not render the Agreement purposeless.[10] Canada takes issue with the United States' position that a primary

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[9] In denying that material injury can be an objective of the SLA, Canada protests too much. As Canada itself concedes, "Article V and Annex 5B of the SLA 2006 replicate provisions of the SLA 1996 . . . ." Stmt of Defence ¶ 61. Although Canada acknowledges that it agreed in both SLAs to "impose export measures" in exchange for a United States commitment to lift its antidumping orders, Canada fails to acknowledge that an express purpose of the SLA 1996 was "to ensure that there is no material injury or threat thereof to an industry in the United States from imports of softwood lumber from Canada." SLA 1996, Stmt of Defense, R-3. And, although the parties did not agree to include this language in the SLA 2006, even Canada notes that the very same language was proposed during negotiations. Stmt of Defence at R-6.

[10] Canada also mislabels the United States' interpretation as "restrictive" and contends incorrectly that it "maximize[s] restrictions on Canadian trade." Stmt of Defence ¶ 71. Canada implies that paragraph 14 requires only an adjustment downward when actual United States consumption falls below Expected U.S. Consumption. As the text of that paragraph makes plain,

objective and purpose of the SLA was to prevent material injury or the threat of such injury to the United States softwood lumber industry. Stmt of Defence ¶¶ 58-71. The United States never referred to this objective, however, as the only objective of the SLA, but merely as a primary objective. Id. Notably, Canada not only fails to demonstrate how the United States' interpretation is incompatible with other objects and purposes of the Agreement, but also effectively fails to identify any alternative objects and purposes at all, other than to make the circular observation that the object and purpose of paragraph 14 is the text of paragraph 14. Stmt of Defence ¶ 69.

50. Canada makes much of the parties' inability to agree upon a preamble that expressly states the SLA's object and purpose. Stmt of Defence ¶¶ 64-67. Although language in a preamble might be the "normal" or "natural" place to find "an express or explicit general statement of the treaty's object and purpose," that is not the only source for an agreement's object and purpose.[11] Rather, the object and purpose of a treaty "may be gathered from its operative clauses taken as a whole,"[12] as well as the reasons for which the parties agreed to

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however, Canada also agreed to make an upward adjustment when actual United States Consumption exceeds Expected U.S. Consumption. See SLA, Annex 7D, ¶ 14. In any event, just three paragraphs later, Canada concedes that the adjustment enhances accuracy when applied upward or downward. Stmt of Defence ¶ 74.

[11] SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 128 (2d ed. 1984) (quoting G. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points, 1957 BRIT. Y.B. INT'L L. 201, 228).

[12] Id.; see also Case Concerning Oil Platforms (Iran v. U.S.), Preliminary Objection, 1996 I.C.J. 803, 813-14 (Dec. 12) (examining other provisions of treaty to interpret scope of general provision); Case Concerning Sovereignty of Palau Ligitan and Palau Sipadan (Malay. v. Indon.), 2002 I.C.J. 625, 652 (Dec. 17) (examining the structure of the boundary treaty in dispute and the interaction of its provisions to confirm the scope of the boundary demarcation of island territory in dispute).

negotiate a treaty. [3]1

51. Notably, during negotiations, Canada suggested that the purpose of the Agreement should be to end the multi-forum litigation and to "foster predictable conditions in the . . . market." Stmt of Defence R-5. Although the parties never agreed to this language, the text of the Agreement implements all of the purposes articulated by Canada: first, virtually all of the lumber litigation in the World Trade Organization, the North American Free Trade Agreement tribunals, and the United States domestic courts has either been mooted or has otherwise ended by agreement of the parties; second, the United States has refunded US$5 billion in past-collected antidumping and countervailing duties; and third, the parties have agreed that Canada would impose certain export measures to regulate Canadian lumber exports to the United States.[14] Those export measures are designed to protect United States industry from a level of Canadian exports that would cause material injury.

52. Regulating Canadian lumber exports is a primary purpose of the Agreement that the parties must still accomplish. Canada's interpretation of paragraph 14 of Annex 7D as being (1) limited only to Option B regions, and (2) being inoperable for nine months, conflicts with this objective. Canada's interpretation continues to exempt Option A exports from a key adjustment mechanism indefinitely and did exempt all exports from this key adjustment mechanism for nine months.

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[13] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23-27 (May 28) (looking to reasons why parties negotiated convention to determine its object and purpose).

[14] Moreover, it is commonly recognized that "most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes." SINCLAIR, supra note 11, at 130. Canada's introduction of the various objectives considered by the parties illustrates this precept. Stmt of Defense ¶¶ 64-67.

CONCLUSION

53. Accordingly, for all of these reasons, Canada has breached the SLA by failing to apply timely the calculation of Expected U.S. Consumption and by failing to apply completely the calculation to Option A and Option B.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 28th day of November, 2007, I caused to be sent via electronic mail and by overnight mail (Federal Express) the foregoing "United States Rebuttal Memorial" addressed to:

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