London Court of International Arbitration (LCIA)

CASE NO. 7941

THE UNITED STATES OF AMERICA,

CLAIMANT,

V.

CANADA,

RESPONDENT.

Award on Liability

Arbitral Tribunal:	Prof. Dr. Karl-Heinz Böckstiegel Chairman Prof. Dr. Bernard Hanotiau Co-Arbitrator V. V. Veeder QC Co-Arbitrator Yun-I Kim Secretary of Tribunal
Claimant:	**The United States of America**
Represented by :	Jeffrey S. Bucholtz Acting Assistant Attorney General Jeanne E. Davidson Director Patricia M. McCarthy Reginald T. Blades, Jr. Assistant Directors Claudia Burke Maame A. F. Ewusi-Mensah Gregg M. Schwind Stephen C. Tosini

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Respondent: **Canada**

Represented by:

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ABBREVIATIONS

C I	Claimant's Request for Arbitration of August 13, 2007
C II	Claimant's Statement of the Case of October 19, 2007, in its Corrected Version of November 30, 2007
C III	Claimant's Rebuttal Memorial of November 28, 2007
cf.	confer
EUSC	Expected United States Consumption
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Association
p.	page
para.	paragraph
paras.	paragraphs
PO	Procedural Order
R I	Respondent's Response to Request for Arbitration of September 12, 2007
R II	Respondent's Statement of Defence of November 19, 2007
R III	Respondent's Rebuttal Memorial of December 6, 2007
SLA	2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America of September 12, 2006
Tr	Transcript of Hearing on Liability of December 12, 2007
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969

A. The Parties

The Claimant The United States of America

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B. The Tribunal

Appointed by the LCIA according to nomination by Claimant:

V.V. Veeder Q.C.

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London WC2A 3EG

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Appointed by the LCIA according to nomination by Respondent:

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Appointed by the LCIA according to joint nomination by the Co-Arbitrators and agreement of the Parties:

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GERMANY

C. Short Identification of the Case

1. The short identification below is made without derogation from the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions.

C.I. Claimant's Perspective

2. The following quotation from the Claimant's Request for Arbitration summarises the main aspects of Claimant's perspective of the dispute (C I, paras. 12-26):

> *"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] 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*

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[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, para. 7.

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

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 [sic]. 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, paras. 22-23."*

C.II. Respondent's Perspective

3. The following quotation from the Respondent's Response to Request for Arbitration of September 12, 2007 summarises the main aspects of Respondent's perspective of the dispute (R I, paras. 22-23):

> *"22. With respect to paragraphs 12 through 14 of the Request, Canada denies all facts and legal interpretations alleged. Without limiting the generality of this denial, Canada specifically notes as follows:*
>
> *(a) Paragraph 14 of Annex 7D, by its own terms, relates only to Regions "for which quotas are being determined." Paragraph 14, therefore, can apply only to Option B Regions, as Option A Regions are not subject to quotas.*
> *(b) No adjustment under paragraph 14 of Annex 7D was required for Option B Regions until July 1, 2007.*
> *(c) The Claimant is not entitled to any relief because Canada has not breached the Agreement. Moreover, even if there were a breach of the Agreement, the United States asks for remedies that are not authorized under the Agreement. Article XIV, paragraph 22 of the Agreement provides that if the Tribunal finds that a Party has breached an obligation*

under the Agreement, the Tribunal shall "identify a reasonable period of time for that Party to cure the breach" and "...that Party fails to cure the breach within the reasonable period of time" determine "... adjustments to the Export Measures to compensate for the breach" (emphasis added). The Agreement does not allow compensation to a successful claimant, and provides for compensatory adjustments in the form of increased (or decreased) volume restrictions or export charges imposed or collected by Canada only if Canada does not cure the breach within the time period identified by the Tribunal. Even if there were a breach of the Agreement, which Canada denies, the Tribunal does not have power to award relief outside the specific terms of Article XIV, including most of the relief requested by the United States.

23. *With regard to paragraphs 15 through 26 of the Request, Canada denies all facts and legal interpretations alleged other than as admitted in the following:*

(a) *Canada disagrees with the Claimant's characterization of the Agreement and its obligations and denies all factual and legal allegations in paragraphs 15 and 16 of the Request, except for the first sentence of paragraph 15 which is admitted.*

(b) *Paragraph 17 is admitted.*

(c) *Paragraph 18 is admitted, except that the characterization of the "'trigger'" volume as a "soft volume cap" is denied.*

(d) *Paragraph 19 is denied as a mischaracterization of the Agreement.*

(e) *Paragraph 20 is denied. Canada was not required under paragraph 14 of Annex 7D to make the downward adjustment to EUSC for Option A Regions and was not required to make any adjustments for Option B Regions until July 1, 2007. Thus, Canada has not exceeded its regional trigger volumes or regional quota volumes and has not breached the Agreement.*

(f) *The legal allegations in paragraph 21 are denied.*

(g) *Paragraph 22 is admitted, except for the last sentence, which is denied.*

(h) *Paragraph 23 is denied. As noted above at paragraph 5 of this Response, the documents to which the United States refers in its Request in arguing that "Canada originally interpreted the Agreement correctly" reflect a position that was considered during the planning for the administration of the Agreement, but was never the position adopted or implemented. Canada did not apply*

paragraph 14 to Option A Regions because paragraph 14 does not apply to Option A.

(i) *Paragraphs 24 through 26 are denied."*

D. Procedural History

4. In February 2007, the Claimant held informal discussions with the Respondent about possible breaches of the 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America (SLA).

5. By letter of March 30, 2007, the Claimant initiated formal consultations with the Respondent in accordance with Art. XIV para. 4 SLA which were held in Ottawa, Canada, on May 9, 2007.

6. On May 9, 2007, the consultation period of 40 days provided for in Art. XIV para. 6 SLA expired (although consultations continued for three more months).

7. On August 13, 2007 the Claimant submitted its Request for Arbitration to the London Court of International Arbitration (LCIA) according to Article 1 of the LCIA Rules, forming part of the Parties' arbitration agreement. Attached were copies of the documents relied upon in the Request for Arbitration (C A-F). The Claimant nominated V.V. Veeder, Q.C. as its arbitrator and suggested that the legal place of arbitration should be London, United Kingdom, but that hearings should take place in the United States or Canada and be open to the public, as required in the arbitration agreement, namely Article XIV paras. 13 and 17 SLA.

8. On September 12, 2007, the Respondent filed its Response to Request for Arbitration in accordance with Article 2 of the LCIA Rules. The Respondent nominated Professor Dr. Bernard Hanotiau as its arbitrator and agreed that the legal place of arbitration was London, United Kingdom.

9. After the Party-nominated Arbitrators had jointly agreed on Professor Dr. Karl-Heinz Böckstiegel as Chairman of the Tribunal, the Parties had consented thereto and Professor Böckstiegel had accepted that nomination, by letter of September

19, 2007, the LCIA confirmed the appointment and constitution of the Tribunal under the LCIA Rules.

10. By email of September 25, 2007, a draft of the first Procedural Order was sent by the Tribunal to the Parties in view of the restricted time limits set out in Article XIV SLA, giving them the opportunity to submit comments.

11. On October 9, 2007, a proposed timetable was sent to the Parties by the Chairman on behalf of the Tribunal, again giving them the opportunity to submit comments. On the same day, the Claimant proposed certain amendments to the proposed timetables as well as a bifurcation of the question of liability from the question of remedy. The Respondent by letter and email of October 10, 2007, suggested amendments to the proposed timetables and concurred to a bifurcation of the proceedings. Both Parties agreed that neither Party would submit witness or expert testimony for the first hearing.

12. On October 13, 2007, the Tribunal issued a new Draft Procedural Order (PO) No. 1, taking into account the comments received from the Parties by their letters of October 9 and 10, 2007.

13. On October 15, 2007, Procedural Order No. 1 (PO I) was issued by the Chairman on behalf of the Tribunal, confirming the agreed timetable and taking into account the results of the preceding discussions.

14. By email of October 28, 2007, PO I was resent to the Parties due to clerical and conforming corrections as revised, containing,however, no changes in substance:

> *"1. Final Order*
>
> *This Order takes into account the comments received from the Parties by their letters of October 9 and 10, 2007, with regard to the Draft Order communicated by the Tribunal to the Parties.*
>
> *2. Applicable Procedural Rules*

2.1. *Pursuant to and subject to Art. XIV of the Softwood Lumber Agreement (SLA) the proceedings shall be conducted in accordance with the LCIA Arbitration Rules effective January 1, 1998.*

[N.b. These LCIA Rules were in effect on the date the SLA was signed, within the meaning of Article XIV(6) SLA cited in Part E below]

2.2. *For issues not dealt with in the SLA, the LCIA Rules, or agreement by the Parties, the Tribunal shall conduct the arbitration in such a manner as it considers appropriate taking into account any views expressed by the Parties.*

2. *Communications*

2.1. *The Tribunal shall address communications to the addresses indicated by the Parties as their representatives and counsel.*

2.2. *Counsel of the Parties shall address communications directly to each member of the Tribunal (with a copy to representative and counsel for the other Party and to the LCIA)*

by e- mail, to allow direct access during travel,

and confirmed either by courier or by fax (but fax communications shall not exceed 15 pages).

2.3. *Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.*

2.4. *Longer submissions shall be preceded by a Table of Contents.*

2.5. *To facilitate word-processing and citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of memorials and substantial or longer submissions shall be in Windows Word, or in a PDF document that can be wordsearched and from which text can be copied and pasted into Windows Word.*

2.6. *To facilitate that parts can be taken out and copies can be made, submissions of all documents shall be*

submitted separated from Memorials, unbound in binders and preceded by a list of such documents, consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant; R-1, R-2 etc. for Respondents) and with dividers between the documents. As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word to facilitate word processing and citations). In this context it is noted that the Parties have agreed not to submit witness or expert testimony during the first (liability) phase of this procedure.

3. *Timetable for the Liability Phase*

As indicated by their letters of October 9 and 10, 2007, the Parties have agreed on a bifurcated procedure to the effect that a first phase shall be restricted to the issue of liability (the liability phase) and, should liability be found by the Tribunal to exist, a second phase on remedies (the remedies phase). The Parties have also agreed that, in this first phase, neither of them shall submit statements of witnesses or experts or any requests for document disclosure.

3.1. *By **October 19, 2007**, Claimant shall file its Statement of Case (LCIA Rule 15.2) together with all evidence (documents, law texts, authorities) it wishes to rely on.*

3.2. *By **November 19, 2007**, Respondent shall file its Statement of Defence (LCIA Rule 15.3) together with all evidence (documents, law texts, authorities) it wishes to rely on.*

3.3. *By **November 28, 2007,** Claimant shall file its Rebuttal Memorial with any further evidence, but only in rebuttal to Respondent's Statement of Defence or regarding new evidence.*

3.4. *By **December 6, 2007,** Respondent shall file its Rebuttal Memorial with any further evidence, but only in rebuttal to Claimant's Rebuttal Memorial or regarding new evidence.*

3.5. *Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.*

3.6. ***On December 12, 2007**, one day Hearing on Liability in New York. As agreed between the Parties, the*

Hearing shall consist of oral argument only, with no witness or expert testimony.

3.7. *Parties shall not submit Post-Hearing Briefs unless agreed otherwise by the Parties or considered necessary by the Tribunal.*

3.8. *As a precaution, the period from* ***May 5 to 7, 2008****, shall be blocked by the Parties and the Tribunal in case a Hearing on the Remedies Phase becomes necessary and no other date is agreed between the Parties or set by the Tribunal after consultation with the Parties.*

4. *Evidence and Confidentiality*

The following paragraphs of Art. XIV SLA are recalled:

14. *The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration as adopted in 1999, as modified by the SLA 2006, shall apply in the arbitrations held under the SLA 2006, except that Article 6 of those Rules shall not apply.*

15. *If a Party wishes to designate information to be used in the arbitration as confidential, the Tribunal shall establish, in consultation with the Parties, procedures for the designation and protection of confidential information. The procedures shall provide, as appropriate, for sharing confidential information for purposes of the arbitration with counsel to softwood lumber industry representatives or with provincial or state government officials.*

16. *Each Party shall promptly make the following documents available to the public, subject to Article XVI and any procedures established under paragraph 15:*

(a) the Request for Arbitration;
(b) pleadings, memorials, briefs, and any accompanying exhibits;
(c) minutes or transcripts of hearings of the tribunal, where available; and
(d) orders, awards, and decisions of the tribunal.

5. *Documentary Evidence*

5.1. *All documents (including texts and translations into English of all substantive law provisions, cases and*

authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.

5.2. All documents shall be submitted in the form established above in the section on communications.

5.3. New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.

5.4. Documents in a language other than English shall be accompanied by a translation into English.

6. Hearing on Liability in New York on December 12, 2007.

6.1. The Parties shall try to agree regarding the location and other logistics of the Hearing taking into account the details of the Hearing mentioned in the following sections. ***By November 26, 2007****, the Parties shall inform the Tribunal of the agreement reached and of the arrangements suggested. Insofar as the Parties have not agreed or prefer not to make the arrangements themselves, the Tribunal shall decide and the LCIA will make the necessary arrangements.*

6.2. It is recalled that Art. XIV.17 SLA provides as follows:

Hearings of the tribunal shall be open to the public. The tribunal shall determine, in consultation with the Parties, appropriate arrangements for open hearings, including the protection of confidential information.

6.3. The Hearing shall be simultaneously transcribed using a live transcription software system, with the delivery to the Parties and members of the Tribunal of daily transcripts each evening after the close of the hearing.

6.4. No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable.

6.5. Subject to further agreement between the Parties and the Tribunal, taking into account the time available during the one day for the Hearing after deduction of the time needed for breaks and lunch, the Tribunal

intends to establish equal maximum time periods both for the Claimant and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest ***by November 26, 2007.***

6.6. Unless otherwise agreed between the Parties and the Tribunal, the Hearing shall start at 9:00 a.m. and end no later than 6:00 pm. The ***Agenda of the Hearing*** *shall be as follows:*

1. *Short Introduction by Chairman of Tribunal.*
2. *Opening Statement by Claimant of up to 90 minutes.*
3. *Opening Statement by Respondent of up to 90 minutes.*
4. *Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.*
5. *2nd Round Presentation by Claimant of up to 1 hour.*
6. *2nd Round Presentation by Respondent of up to 1 hour.*
7. *Final questions by the Tribunal.*
8. *Discussion of any issues of the further procedure.*

The members of the Tribunal may raise questions at any time, if considered appropriate.

7. Extensions of Deadlines and Other Procedural Decisions

7.1. Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.

7.2. In view of the very limited time available for the Liability Phase, extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.

7.3. The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travel and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.

7.4. Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone".

15. On October 19, 2007, Claimant submitted its Statement of the Case (C II) according to Article 15(2) of the LCIA Rules including copies of the documents relied upon in the Memorial (C A to C L (authorities); exhibits C A to C G), conforming with paragraph 3.1. of PO I.

16. On November 19, 2007, Respondent filed its Statement of Defence (R II) according to Article 15(3) of the LCIA Rules complying with paragraph 3.2. of PO I. Attached were copies of the documents relied upon in the Memorial (RA-1 to RA-18 (authorities); R-1 to R-15 (exhibits)).

17. By joint letter of November 27, 2007, the Parties notified the Tribunal on the agreement reached regarding the logistics of the hearing on liability to be held on December 12, 2007 in New York, NY, United States of America.

18. By November 28, 2007, Claimant filed its Rebuttal Memorial (C III) according to paragraph 3.3. of Procedural Order No. 1 (PO I) together with copies of the documents relied upon in the Memorial (C-20 to C-37).

19. On November 30, 2007, Claimant submitted its Corrected Statement of the Case (C II) including a corrected version of its appendix of authorities (C-1 to C-12) and its appendix of exhibits (C-13 to C-18).

20. By email of December 1, 2007, the Tribunal agreed to the logistics of the hearing on liability to be held on December 12, 2007, as stated in the joint letter of November 27, 2007 of the Parties. In view of the limited time available during the Hearing, the Chairman further invited the Parties on behalf of the Tribunal to provide for Hearing Binders at the Hearing, containing all documents to which the Parties intended to refer in their oral presentations.

21. By joint letter of December 4, 2007, the Parties notified the Tribunal on the respective points of contact for the Tribunal regarding the logistics of the hearing.

22. By December 6, 2007, Respondent submitted its Rebuttal Memorial (R III) according to paragraph 3.4. of Procedural Order No. 1 (PO I). Attached were copies of the documents relied upon in the Memorial (RA-19 to RA-20; R-16 to R-18).

23. By joint letter of December 7, 2007, the Tribunal was notified that the Parties had made the necessary arrangements regarding the logistics and especially the simultaneous transcription of the Hearing by a Court Reporter.

24. By their letters of December 7, 2007, and in addition, by Claimant's email of December 11, 2007, the Parties identified the persons attending the Hearing on Liability from their respective sides.

25. On December 12, 2007, the Hearing on Liability was held in New York City, NY, USA. In addition to the members of the Tribunal, the Secretary to the Tribunal, Yun-I Kim, and the stenographer (David A. Kasdan), it was attended (as recorded in the transcript of the Hearing and corrected by the Parties in their communications of January 11 and 15, 2008) as follows:

"On behalf of the Claimant:

MS. PATRICIA M. McCARTHY
MR. REGINALD T. BLADES, JR.
Assistant Directors (Advocates)
MS. CLAUDIA BURKE
MS. MAAME A.F. EWUSI-MENSAH
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On behalf of the United States Department of State:

Mr. Timothy J. Feighery
Ms. Selene Ko
Ms. Heather Van Slooten Walsh

On behalf of the Office of the U.S. Trade Representative:
Mr. John Melle
Mr. J. Daniel Stirk

On behalf of the United States Department of Commerce:
Mr. Quentin Baird
Mr. Scott McBride
Mr. Robert Copyak

On behalf of the United States Department of Justice:
Ms. Tiffany Wooten

Also present was Ms Paula Hodges, Herbert Smith LLP
as consultant to the United States

On behalf of the Government of Canada:
Mr. John Ryan
Ms. Alejandra Montenegro Almonte
Ms. Maria Isabel Guerrero
Mr. Santiago Montt
Ms. Anupama Chettri
Weil, Gotshal & Manges LLP

On behalf of the Canadian Department of Foreign Affairs and International Trade, Trade Law Bureau:
Mr. Hugh Cheetham

Mr. Michael Solursh

On behalf of the Canadian Department of Foreign Affairs and International Trade, Softwood Lumber Division:

Mr. Jean-Marc Gionet

Ms. Allison Young

Also present was Dr. David Reishus, Lexecon.

26. The Meeting followed the Agenda as provided in Section 6.6. of Procedural Order No. 1 (PO I) cited above.

27. The details of the Hearing were provided in the Transcript (Tr) delivered after the Hearing in electronic and paper format.

28. Since the final discussion at the end of the Hearing contains a number of agreements and decisions, the following passage is set out from the transcript of the Hearing (Tr, p. 121-125):

> *"CHAIRMAN BÖCKSTIEGEL: Well, we come to the last part of the Hearing I suppose. First of all, ... the good news is we don't have any further questions. We think the Parties have really exhausted all aspects of the case, both in writing and orally today, and there is certainly no need [for further questions]. It doesn't mean that we are clear on everything yet, but ... we don't need any further input from the Parties. That also means that we would close the file on this phase of the procedure now, and the only caveat would be that if in our deliberations we turn out to still have a question or so, then we would feel free to go back to the Parties, but I would consider that not very probable. So, the file basically is now closed.*
>
> *In view of a certain situation in English law which is relevant for the seat of arbitration, as you know, we have taken note of Article*

XIV(21), if you just want to take a look of that, of the SLA which says the Tribunal may not award costs, and then it goes on. We are told by our QC on this side of the bench that we would need confirmation of the Parties that they still maintain this decision. Would that be the case?

MS. McCARTHY: Yes, yes.

MR. AGUILAR-ALVAREZ: Yes. I'm a little bit puzzled that the English arbitration law would apply to a trade dispute that is not commercial.

CHAIRMAN BÖCKSTIEGEL: The seat of arbitration is London, and so we want to be on the safe side.

MR. AGUILAR-ALVAREZ: Okay. We do not propose to depart from that ruling.

CHAIRMAN BÖCKSTIEGEL: All right. Then the usual question has ultimately to be posed: Are there any objections by the Parties as to how the Tribunal has conducted the procedure up to now?

MS. McCARTHY: No, sir.

MR. AGUILAR-ALVAREZ: None other than to express our thanks to the Tribunal.

CHAIRMAN BÖCKSTIEGEL: Thank you very much, indeed.

Now, as I think--no, I don't think I indicated that before. We have looked at our Timetable and what is before us is the task now to come to a decision, and Christmas is coming soon, as we all know, and in between we also have to do a few other things, but we feel that we would probably be in a position to come up with a decision by the end of February. Anything before that would be unrealistic. I don't have to tell you that the case is complex, and we want to be on the safe side So, that is our--not a promise, but that is our definite intention.

Now, we are talking about the further procedure, which is also the last point on the agenda, as we know. If we--and, of course, nobody knows in this room, including us, how we will come out. It's too complex a case as to have any speculation in that regard. Now, if we find there is no breach, that is the end of the case. That, I think, is clear.

On the other hand, if we do find a breach on one of the two claims, the question is how do we go on. May I refer you to Article XIV(22), which provides in a mandatory way, it looks, the Tribunal shall [take] *certain actions and consequences. Before we go into those details, our suggestion would be we hope that the Parties would agree because we think that is the most efficient and fairest way to deal with this matter would be that if we do come out in finding a breach that we would address the Parties at that stage and ask them for comments on how to proceed, also taking into account paragraph 22. You feel that is better than to discuss that matter now, we don't know, first of all, we don't know whether it will happen. Secondly, we don't know how the decision would be.*

And on the other hand, we would need the Agreement of the Parties for that because the way paragraph 22 is phrased, it looks mandatory for the Tribunal, so that is our suggestion. Would that be agreeable to the Claimant?

MS. McCARTHY: Yes.

MR. BLADES: Yes, sir.

MR. AGUILAR-ALVAREZ: Yes, it would, Mr. Chairman.

CHAIRMAN BÖCKSTIEGEL: Thank you very much. So, we will have that on the record.

Well, this is all I think we have to do as far as housekeeping is concerned. Let me use this opportunity, as I did already, I think, in my short introductory remarks this morning to thank the Parties and the counsel and their teams for the most efficient preparation of this Hearing in extremely short time for such a complex case, to put a burden on all of you and on us, but of course you chose to accept the burden, so, we don't feel bad about it. And as you may recall, we had suggested today only to be a procedural meeting, but I think it was a good solution that you agreed to proceed that way. That obviously advanced the case much further than one had anticipated, and we thank you very much for these efforts, and you have really helped us very much in finding our task now before us.

Let me also thank those on the team, and they were very important, just looking at this room, to dealing with the logistics of this. This has been also an effort in logistics in many ways, and I think it worked very well, and I think somewhere the SLA said the Tribunal should take care of that, and you kindly took that burden away from us, and you obviously could do it much better, and we were also aware that just before Christmas, finding a place in New York to do this sort of thing is also not one of the easiest tasks, but it worked out very well.

Let me also again thank our Court Reporter as I have done quite a few occasions in the past. He is really very supportive. And even though Mr. Lee [the Hotel Manager] is not here, let me also put on record the gratitude that we have toward the hotel staff and Mr. Lee for doing his part of the logistics as well.

Now, have I forgotten anything more or less important? No? Well, then, thank you very much again, and have a good journey home."

E. Principal Relevant Legal Provisions

E.I. Arbitration Agreement and the LCIA Rules

29. Art. XIV of the 2006 Softwood Lumber Agreement provides as follows:

> *"Article XIV*
> *Dispute Settlement*
>
> *1. Either Party may initiate dispute settlement under this Article regarding any matter arising under the SLA 2006 or with respect to the implementation of Regional exemptions from Export Measures agreed upon by the Parties pursuant to Article XII.*
>
> *2. Except as provided for in this Article, for the duration of the SLA 2006, including any extension pursuant to Article XVIII, neither Party shall initiate any litigation or dispute settlement proceedings with respect to any matter arising under the SLA 2006, including proceedings pursuant to the Marrakesh Agreement Establishing the World Trade Organization or Chapter Twenty of the NAFTA. For purposes of this paragraph, "litigation or dispute settlement proceedings" does not include actions related to alleged civil or criminal violations, including USICE/USCBP investigations or administrative penalty actions, or any proceedings related to such investigations or penalty actions.*
>
> *3. Dispute settlement under this Article shall be conducted as expeditiously as possible.*
>
> *4. A Party may initiate dispute settlement under this Article by requesting in writing consultations with the other Party regarding a matter arising under the SLA 2006. Unless the Parties agree otherwise, the Parties shall consult within 20 days of delivery of the request. The Parties shall make every attempt to arrive at a satisfactory resolution of the matter through consultations and shall exchange sufficient information to enable a full examination of the matter.*
>
> *5. The Parties also may agree to submit the matter to non-binding mediation by a neutral third party in addition to, or in lieu of, the arbitration procedures set out in this Article.*

6. *If the Parties do not resolve the matter within 40 days of delivery of the request for consultations, either Party may refer the matter to arbitration by delivering a written Request for Arbitration to the Registrar of the LCIA Court. The arbitration shall be conducted under the LCIA Arbitration Rules in effect on the date the SLA 2006 was signed, irrespective of any subsequent amendments, as modified by the SLA 2006 or as the Parties may agree, except that Article 21 of the LCIA Rules shall not apply.*

7. *An arbitral tribunal shall comprise 3 arbitrators.*

8. *No citizen or resident of a Party shall be appointed to the tribunal.*

9. *Each Party shall nominate one arbitrator within 30 days after the date the arbitration commences pursuant to LCIA Article 1.2. Unless the Parties otherwise agree, if a Party fails to nominate an arbitrator within 30 days, the LCIA Court shall nominate that arbitrator.*

10. *The 2 nominated arbitrators shall jointly nominate the Chair of the tribunal within 10 days after the date on which the second arbitrator is nominated. The nominated arbitrators may consult with the Parties in selecting the Chair. If the nominated arbitrators fail to nominate a Chair within 10 days, the LCIA Court shall endeavour to nominate the Chair within 20 days thereafter.*

11. *The LCIA Court shall endeavour to appoint the 3 arbitrators thus nominated within 5 business days after the date on which the Chair is nominated.*

12. *Arbitrators shall be remunerated and their expenses paid in accordance with LCIA rates. Arbitrators shall keep a record and render a final account of their time and expenses, and the Chair of the tribunal shall keep a record and render a final account of all general tribunal expenses.*

13. *The legal place of arbitration shall be London, United Kingdom. All hearings shall be conducted in the United States or Canada as the tribunal may decide in its discretion.*

14. *The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration as adopted in 1999, as modified by the SLA 2006, shall apply in the arbitrations held under the SLA 2006, except that Article 6 of those Rules shall not apply.*

15. *If a Party wishes to designate information to be used in the arbitration as confidential, the tribunal shall establish, in consultation with the Parties, procedures for the designation and protection of confidential information. The procedures shall provide, as appropriate, for sharing confidential information for purposes of the arbitration with counsel to softwood lumber industry representatives or with provincial or state government officials.*

16. *Each Party shall promptly make the following documents available to the public, subject to Article XVI and any procedures established under paragraph 15:*

    (a) the Request for Arbitration;
    (b) pleadings, memorials, briefs, and any accompanying exhibits;
    (c) minutes or transcripts of hearings of the tribunal, where available; and
    (d) orders, awards, and decisions of the tribunal.

17. *Hearings of the tribunal shall be open to the public. The tribunal shall determine, in consultation with the Parties, appropriate arrangements for open hearings, including the protection of confidential information.*

18. *The tribunal shall give sympathetic consideration to domestic laws that:*

    (a) preclude a Party from disclosing information, when the tribunal determines whether that information is privileged from disclosure and whether to draw inferences from the Party's failure to disclose such information; or

    (b) require a Party to disclose information subject to confidentiality procedures under paragraph 15.

19. *The tribunal shall endeavour to issue an award not later than 180 days after the LCIA Court appoints the tribunal.*

20. *The tribunal's award shall be final and binding and shall not be subject to any appeal or other review. An award may be enforced solely as provided in this Article.*

21. *The tribunal may not award costs. $US 10 million shall be allotted from the funds allocated to the binational industry council described in Annex 13 to pay the costs of arbitrations under this Article, including the costs of arbitrators, hearing*

facilities, transcripts, assistants to the tribunal, and costs of the LCIA. Each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel.

22. *If the tribunal finds that a Party has breached an obligation under the SLA 2006, the tribunal shall:*

    (a) *identify a reasonable period of time for that Party to cure the breach, which shall be the shortest reasonable period of time feasible and, in any event, not longer than 30 days from the date the tribunal issues the award; and*

    (b) *determine appropriate adjustments to the Export Measures to compensate for the breach if that Party fails to cure the breach within the reasonable period of time.*

23. *The compensatory adjustments that the tribunal determines under paragraph 22(b) shall consist of:*

    (a) *in the case of a breach by Canada, an increase in the Export Charge and/or a reduction in the export volumes permitted under a volume restraint that Canada is then applying or, if no Export Charge and/or volume restraint is being applied, the imposition of such Export Charge and/or volume restraint as appropriate; and*

    (b) *in the case of a breach by the United States, a decrease in the Export Charge and/or an increase in the export volumes permitted under a volume restraint that Canada is then applying.*

    Such adjustments shall be in an amount that remedies the breach.

24. *Such adjustments may be applied from the end of the reasonable period of time until the Party Complained Against cures the breach.*

25. *In the case of a breach by Canada attributable to a particular Region, the tribunal shall determine the compensatory adjustment applicable to that Region.*

26. *If Canada considers that the United States has failed to cure a breach by the end of the reasonable period of time, Canada may make the compensatory adjustments that the tribunal has determined under paragraph 22(b).*

27. *If the United States considers that Canada has failed to cure a breach and has not made the compensatory adjustments that the tribunal has determined under paragraph 22(b) by the end of the reasonable period of time, the United States may impose compensatory measures in the form of volume restraints and/or customs duties on imports of Softwood Lumber Products from Canada, as follows:*

    (a) the amount of the volume restraints shall not exceed the adjustment to the volume restraints that the tribunal has determined; and

    (b) the customs duties shall not exceed the adjustment to the Export Charges that the tribunal has determined.

28. *Measures taken in accordance with paragraph 27 shall not be considered a breach of Article V. For greater certainty, the United States may initiate an investigation or take action with respect to Softwood Lumber Products under Sections 301 to 307 of the Trade Act of 1974, solely for the purpose of paragraph 27.*

29. *If, after the expiry of the reasonable period of time:*

    (a) the United States considers that the compensatory adjustments that Canada is applying reduce Export Charges or allow for export volumes beyond those that the tribunal has determined under paragraph 22(b);

    (b) Canada considers that the compensatory measures the United States is applying exceed the levels authorized for those measures under paragraph 27; or

    (c) the Party Complained Against considers that it has cured the breach, in whole or in part, such that the compensatory adjustments or measures should be modified or terminated, and the Complaining Party does not agree,

    the Party may commence a new arbitration to address the matter, by delivering a written Request for Arbitration to the Registrar of the LCIA Court.

30. *In any arbitration initiated under paragraph 29, the LCIA shall appoint to the tribunal the arbitrators comprising the original tribunal, to the extent they are available, within 10 days after the Request for Arbitration is delivered. Any member of the original tribunal who is no longer available*

shall be replaced in accordance with Article 11 of the LCIA Rules and paragraph 8. The tribunal shall endeavour to issue its award within 60 days after delivery of the Request for Arbitration referred to in paragraph 29.

31. *If in its award in an arbitration initiated under paragraph 29, the tribunal finds that the compensatory adjustments or measures that are the subject of the arbitration are inconsistent with the award in the original arbitration or that the breach has been cured in whole or in part, the tribunal shall determine the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated.*

32. *An award under paragraph 31 shall be effective as of the date that the compensatory adjustments or measures were imposed and, accordingly, shall provide that:*

(a) Canada shall collect any Export Charge that the tribunal finds it should have imposed and the United States shall refund any customs duties that the tribunal finds it should not have collected, retroactive to that date; and

(b) Canada shall impose additional export volume restraints to compensate for any excess export volumes that the tribunal finds that Canada has allowed and Canada may increase the export volumes permitted under the export restraints to compensate for any excess import restraints the tribunal finds that the United States has imposed since that date, with these adjustments to be applied to exports from the pertinent Region or Regions in equal monthly amounts during a period following the award as determined by the tribunal."

E.II. Substantive Provisions of the 2006 Softwood Lumber Agreement

1. Export Measures: Option A and Option B

30. The principal legal provisions of the Softwood Lumber Agreement concerning export measures relevant for the present dispute are as follows:

"Article VII
Export charge and export charge plus volume restraint

1. *By the Effective Date, each Region shall elect to have Canada apply the measures in either Option A or Option B to exports of Softwood Lumber Products to the United States from the Region. Option A is an Export Charge collected by Canada, the rate of which varies based on the Prevailing Monthly Price, as provided in the table in paragraph 2. Option B is an Export Charge with a volume restraint, where both the rate of the Export Charge and the applicable volume restraint vary based on the Prevailing Monthly Price, also as provided in the table in paragraph 2. The Export Charge shall be levied on the Export Price. The Prevailing Monthly Price is defined in Annex 7A.*

2. *Subject to paragraphs 3 through 9, the Export Measures that Canada applies under Option A and Option B shall be based on the following table:*

Prevailing Monthly Price	***Option A – Export Charge (Expressed as a % of Export Price)***	***Option B – Export Charge (Expressed as a % of Export Price) with Volume Restraint***
Over $US 355	*No Export Charge*	*No Export Charge and no volume restraint*
$US 336-355	*5%*	*2.5% Export Charge + maximum volume that can be exported to the United States cannot exceed the Region's share of 34% of Expected U.S. Consumption for the month*
$US 316-335	*10%*	*3% Export Charge + maximum volume that can be exported to the United States cannot exceed the Region's share of 32% of Expected U.S. Consumption for the month*
$US 315 or under	*15%*	*5% Export Charge + maximum volume that can be exported to the United States cannot exceed the Region's share of 30% of Expected U.S. Consumption for the month*

3. *Under Option A, Canada shall collect from the Region's exporters on a monthly basis a charge on each export of Softwood Lumber Products to the United States equal to the percentage of the Export Price set out in the table in paragraph 2 that corresponds to the Prevailing Monthly Price.*

4. *Under Option B, Canada shall, on a monthly basis:*

   (a) collect from the Region's exporters a charge on each export of Softwood Lumber Products to the United States equal to the percentage of the Export Price set out in the table in paragraph 2 that corresponds to the Prevailing Monthly Price; and

(b) *limit the Region's exports of those products during the month to the volume determined in accordance with Annex 7B.*

5. *An export of Softwood Lumber Products shall be deemed to occur in the same month as the Date of Shipment for that export.*

6. *For the purposes of calculating Export Charges, a Softwood Lumber Product that has an Export Price of $US 500 per MBF or more shall be deemed to have an Export Price of $US 500 per MBF.*

7. *The Export Charge on exports from Independent Manufacturers of Remanufactured Softwood Lumber Products that have been certified pursuant to Annex 7C shall be assessed on the basis of the definition of Export Price in Article XX1(25)(b) or (d).*

8. *Canada shall notify the United States of each Region's original Option election no later than 10 days after the Effective Date.*

9. *After the Effective Date, each Region shall have 2 opportunities to change the Option it has elected to apply to its exports of Softwood Lumber Products to the United States:*

(a) *the first opportunity to change Options shall be effective on the 1st day of January following the 3rd anniversary of the Effective Date; and*

(b) *the second opportunity to change Options shall be effective on the 1st day of January following the 6th anniversary of the Effective Date.*

Canada shall provide written notice to the United States that a Region has elected to change its Option at least 30 days in advance of the January date referred to in subparagraphs (a) and (b). Softwood Lumber Products from a Region shall continue to be subject to the same Option as in the preceding period if Canada does not provide timely notice.

10. *Canada shall require an Export Permit on each entry of Softwood Lumber Products exported to the United States.*

Article VIII
Surge mechanism

1. *This Article shall apply when the volume of exports of Softwood Lumber Products to the United States in any month from a Region that has elected Option A under Article VII exceeds the Region's Trigger Volume:*

   (a) *if the volume of exports from the Region exceeds the Region's Trigger Volume by 1% or less in a month, Canada shall reduce the applicable Trigger Volume for that Region during the following month by the total MBF amount of the overage (i.e., the amount by which actual exports exceeded the Trigger Volume);*

   (b) *if the volume of exports from the Region exceeds the Region's Trigger Volume by more than 1% in a month, Canada shall apply retroactively to all exports to the United States from the Region during that month an additional Export Charge equal to 50% of the applicable Export Charge determined under Article VII(3) for that month.*

2. *For the purposes of this Article, a Regional Trigger Volume shall be calculated in accordance with Annex 8."*

2. Expected United States Consumption

31. Regarding Expected United States Consumption ("EUSC") the principal relevant legal provisions of the Softwood Lumber Agreement are as follows:

"Article XXI
Definitions

For purposes of the SLA 2006:

[...]

21. *"Expected U.S. Consumption" means the expected level of U.S. Consumption defined and calculated in accordance with paragraphs 12 through 14 of Annex 7D;*

[...]"

"Annex 7B
Calculation of Quota Volumes for Option B

[...]

2. *The formula for calculating a Region's monthly quota volume shall be,*

RQV = EUSC x RS x PAF

where RQV = the Region's monthly quota volume;

EUSC = monthly Expected U.S. Consumption (as calculated in Annex 7D);

RS = the Region's share of U.S. Consumption from Table 1 of this Annex; and,

PAF = the price adjustment factor from Table 2 of this Annex."

"Annex 7D
Calculation of U.S. Consumption and Market Shares

[...]

12. *Monthly Expected U.S. Consumption shall be calculated as follows:*

(a) *first, U.S. Consumption shall be determined for the 12-month period ending 3 months immediately before the month for which monthly Expected U.S. Consumption is being calculated;*

(b) *second, U.S. Consumption during that 12-month period shall be divided by 12 to produce a monthly average; and*

(c) *third, the monthly average U.S. Consumption volume shall be multiplied by the seasonal adjustment factor for the relevant month as specified in Table 1 of this Annex.*

[...]

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."*

"Annex 8
Calculation of Regional Trigger Volumes

[...]

2. *A Region's Trigger Volume for a particular month shall be determined by multiplying the total monthly Expected U.S. Consumption by the Region's U.S. market share, and then multiplying that product by 1.1. Each Region's U.S. market share is set out in Table 1 of this Annex.*

3. *Specifically, a Region's Trigger Volume for a particular month shall be calculated as follows:*

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

where RTV = the Region's Trigger Volume

EUSC = monthly Expected U.S. Consumption, as calculated in accordance with Annex 7D

RS = the Region's U.S. market share from Table 1 of this Annex."

E.III. Vienna Convention On The Law Of Treaties

32. The principal provisions of the VCLT relevant for this case (C-12, p. 2, 3; RA-18, p. 13, 14) are as follows:

> *"Article 31*
> *General rule of interpretation*
>
> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32
Supplementary means of interpretation

> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> *(a) leaves the meaning ambiguous or obscure; or*
>
> *(b) leads to a result which is manifestly absurd or unreasonable."*

Both the USA and Canada acceded to the VCLT in 1970. Its relevant terms are also considered declaratory of customary international law. Both Parties referred the Tribunal to the VCLT in support of their respective cases in these arbitration proceedings.

F. Relief Sought by the Parties regarding the Alleged Breaches of the Softwood Lumber Agreement

F.I. Relief Sought by Claimant

33. As identified in the Statement of the Case (C II, p. 32) Claimant requested the Tribunal to award as follows:

> *"The United States respectfully requests an award determining that:*
>
> *(1) The SLA obligates Canada*
>
> *(i) to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports for Option A provinces pursuant to paragraph 14 of Annex 7D of the Agreement; and*
>
> *(ii) to make this calculation for all export measures for softwood lumber as of January 1, 2007;*
>
> *(2) Canada breached the SLA by failing to make such calculation as of January 1, 2007 and is liable for the consequences of that breach; and*
>
> *(3) The consequences of Canada's breach shall be determined in a second phase of this arbitration."*

34. At the Hearing on Liability, Claimant confirmed its earlier request, requesting the Tribunal to award as follows (Tr, p. 64 *et seq.*):

> *"the United States respectfully requests an award determining that, one, the Softwood Lumber Agreement obligates Canada to calculate Expected United States Consumption for purposes of determining trigger volumes of softwood lumber imports for Option A Provinces pursuant to paragraphs 12 through 14 of Annex 7D of the Agreement, and, two, to make this calculation for all Export Measures for softwood lumber as of the Effective Date and specifically to apply to required adjustments as of January 1st, 2007.*
>
> *Secondly, that Canada breached the Softwood Lumber Agreement by failing to make the calculation from the Effective Date and is liable for the consequences of that breach.*

And, thirdly, the consequences of Canada's breach shall be determined in the second phase of this arbitration."

F.II. Relief Sought by Respondent

35. As identified in Canada's Response to Request for Arbitration (R I, p. 16 *et seq.*) and restated in the Statement of Defence (R II, p. 50) the Respondent requested the Tribunal to award as follows:

> *"For the reasons set forth above, Canada respectfully requests an award that:*
>
> *(1) Canada has not breached the SLA; and*
>
> *(2) all claims of the United States must be dismissed."*

36. At the Hearing on Liability, Respondent confirmed its earlier request, requesting the Tribunal to award as follows (Tr, p. 92):

> *"On behalf of the Government of Canada, I [Counsel for Canada] respectfully request the Tribunal to dismiss the claims brought by the United States."*

G. Summary of Contentions regarding the Alleged Breaches of the Softwood Lumber Agreement

G.I. Summary of Contentions by Claimant

37. Subject to later sections of this Award addressing particular issues, the main arguments of Claimant can best be summarised by quoting paragraphs 28 to 34 of Claimant's Statement of the Case (C II, para. 28-34):

> *"I. Canada's Failure To Apply Timely The Calculation*
>
> *28. As the calculations demonstrate, the Agreement provides for a mechanism to increase the accuracy of estimated (or expected) United States consumption. In paragraph 14 of Annex 7D, the Annex that defines expected United States consumption for all purposes, Canada agreed to adjust expected United States consumption by comparing an earlier quarter's expected United States consumption with that same quarter's actual consumption. Given its paramount importance as a variable in the calculation of export measures in response to a dynamic United States market, the parties agreed that the calculation of expected United States consumption should be as accurate as possible. This is precisely what paragraph 14 of Annex 7D accomplishes.*
>
> *29. Nevertheless, Canada has ignored its agreement and applied an adjusted expected United States consumption figure to some regions but not others and has accomplished even that partial effort only belatedly. This is a breach of the Agreement. Contrary to Canada's contention, the Agreement does not entitle Canada to wait at least nine months after the Agreement's October 2006 effective date before beginning to adjust the calculation for accuracy. See Resp. ¶ 23(e). No provision of the Agreement provides for such a grace period. Rather, paragraph 14 of Annex 7D must be applied from the first month in which expected United States consumption calculations are made. Indeed, there would be no rational purpose for a grace period in light of a primary purpose of the Agreement, which is "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, and to avoid litigation under Title VII of the Tariff Act of 1930 on this issue." SLA, Annex 5B.*

II. Canada's Failure To Apply Accurately The Full Calculation

30. In addition, Canada has breached the Agreement by failing to apply the adjustment for expected United States consumption to calculations under both Option A and Option B. Resp. ¶ 23(e) (conceding that Canada has not adjusted expected United States consumption for Option A regions). Each Canadian region (the regions correspond to Canadian provinces with the exception of British Columbia, which is divided into the B.C. Coastal region and the B.C. Interior region under the Agreement), may choose the measures to which they prefer to be subject. For example, high volume producing regions may take advantage of Option A, which combines an export charge with what is, in effect, a soft volume cap that increases export charges when the export volume of that region exceeds a trigger amount determined under the Agreement. In turn, lower volume producing regions that can easily limit their exports are able to select export measure Option B, which assesses lower export charges in combination with a hard cap on exports.

31. Regardless of which option a region chooses, however, the substantive and central calculation remains the same – each export measure, regardless of its type, relies indispensably upon an accurate calculation of expected United States consumption. Annex 7D of the Agreement defines the only calculation of expected United States consumption, and, for each type of export measure applied, the Agreement refers without qualification to Annex 7D. Nothing in Annex 7D refers to the two options; rather, the Agreement provides for one, and only one, calculation of expected United States consumption for determining export measures.

32. Canada has breached the Agreement by refusing to calculate and to apply the adjustment to expected United States consumption to the calculation of regional trigger volumes under Option A. Instead, Canada has selectively applied the calculation to benefit impermissibly Option A regions, thus reading into the Agreement a self-styled "bifurcation" of the calculation as between Option A and Option B. That distinction exists neither in the text of Annex 7D nor elsewhere in the Agreement. Specifically, as of the third quarter of 2007, Canada has begun to apply the full calculation to Option B regions; however, it applies only part of the calculation to Option A regions. By not applying the expected United States consumption to all exporting regions, Canada has failed to impose the required export measures. As a consequence, Canada failed to impose the required export disincentive upon Canadian producers, and Canadian lumber exports have flooded the United States market when that market has been indisputably depressed, disrupting the carefully-considered balance struck in the SLA.

33. *In defense of its actions, Canada offers an unreasonable, post hoc interpretation of Annex 7D, asserting that one word – "quota" – in one sentence of one paragraph (paragraph 14), justifies this distinction between Option A and Option B, at the expense of the remainder of the provision and the Agreement as a whole. Canada suggests that the two types of export measures involve two different calculations for expected United States consumption. They do not. In fact, the Agreement provides that expected United States consumption is a universal equation that must be applied to each export measure.*

34. *Indeed, Canada admits that at the time the Agreement came into force in October 2006, it did not interpret the Agreement as it does now. See Resp. ¶¶5, 23(h); Exhibit D. Rather, Canada developed its current interpretation of paragraph 14 in Annex 7D some time after the parties entered into the Agreement. See id. Canada's new interpretation, however, conflicts with the ordinary meaning of paragraph 14 in Annex 7D in its context and in light of a primary object and purpose of the Agreement, which is to implement the agreed-upon mechanisms 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."*

G.II. Summary of Contentions by Respondent

38. Subject to later sections of this Award addressing particular issues, the Respondent's main arguments that all claims of the United States must be dismissed is best summarised by quoting paragraphs 1 to 4 of the Introduction to Respondent's Statement of Defence (R II, paras. 1-4):

"1. *The issue before the Tribunal is whether Canada properly and timely applied the adjustment factor set out in paragraph 14 of Annex 7D of the Agreement ("paragraph 14"). The U.S. Statement of Case alleges that Canada has restricted its exports of softwood lumber to the United States to a lesser degree than the United States believes is required under the Agreement because Canada has not followed what the United States thinks is the proper interpretation of paragraph 14. More specifically, the United States asserts that paragraph 14 required, and requires, that Canada make an adjustment to "Expected United States Consumption" ("EUSC") in two situations. There is no dispute on the facts. This dispute concerns exclusively whether the Agreement*

(a) *requires Canada to apply the adjustment in paragraph 14 to Option A Regions of Canada, and*

(b) *required Canada to make the adjustment in paragraph 14 in the period between January 1 and June 30, 2007, by applying the adjustment methodology to time periods before the Agreement or the relevant export measures were in effect.*

2. *Applying the principles in Article 31 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") to the disputed provisions of the Agreement, the U.S. claims should be dismissed because Canada has complied with the Agreement according to its correct interpretation. Canada made, and is making, the adjustments that the Agreement requires.*

3. *Section A of Part II of this Statement of Defence addresses the U.S. claim that paragraph 14 requires an adjustment not only for Option B Regions of Canada, but also for Option A Regions. Applying the principles of Article 31(1) of the Vienna Convention, Canada will show that the U.S. Statement of Case*

(a) *does not follow the ordinary meaning of the terms of the Agreement in their context, and particularly the exclusive reference to Quarters for which quotas are in effect;*

(b) *improperly characterizes Annex 5B of the Agreement ("Annex 5B") as stating "a primary purpose" of the Agreement;*

(c) *relies on an erroneous assumption that the paragraph 14 adjustment enhances the accuracy of export measures in relation to actual consumption;*

(d) *claims support in alleged "subsequent practice" but fails to show any practice at all by Canada, much less a "subsequent practice in the application of the treaty"; and*

(e) *ignores the negotiating history of the Agreement.*

4. *Section B of Part II of this Statement of Defence deals with the U.S. claim that the Agreement required Canada to make an adjustment to the monthly EUSC applied in the period January 1-June 30, 2007, which Canada indisputably did not do. However, contrary to the U.S. claim, paragraph 14 did not require Canada to make adjustments based on how the adjustment formula would have affected EUSC in the first two Quarters of 2007 of the Agreement and quotas had been in effect in the last two Quarters of 2006. Canada did what paragraph 14 required as of January 1, 2007: Canada calculated the difference between EUSC and actual U.S. consumption in the first Quarter of*

2007 – the first full Quarter under the Agreement and the first Quarter in which there were quotas. When Canada determined that the difference between EUSC and actual U.S. consumption was greater than 5%, Canada reduced EUSC for Option B Regions in the next Quarter for which quotas were determined. The U.S. claim amounts to an attempt to require Canada to make adjustments beginning January 1, 2007 to offset the fact that, if the Agreement had been in force earlier in 2006, there would have been a difference between EUSC and actual U.S. consumption that have required an adjustment beginning January 1, 2007. The U.S. claim that Canada should have adjusted beginning on January 1, 2007 is not based on the language of the treaty, but rather on the flawed assumption that the adjustment is a mechanism that enhances the accuracy of EUSC."

H. Considerations of the Tribunal regarding the Alleged Breaches of the Softwood Lumber Agreement

39. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Award, the Tribunal considers only the most relevant arguments of the Parties for its decisions, and the Tribunal's reasons, without repeating all the arguments advanced by the Parties, only address what the Tribunal itself considers to be the most relevant factors required to decide on the issues of liability in this case.

H.I. Preliminary Considerations

1. Submission to Arbitration and Jurisdiction of this Tribunal

40. It is not in dispute between the Parties that they have properly submitted this case to LCIA arbitration, that this Tribunal is duly formed to decide that case and that this Tribunal has jurisdiction to decide on the relief requested by the Parties under their arbitration agreement.

41. The Tribunal agrees with the Parties' approach: Art. XIV SLA, as quoted above in this Award, provides for LCIA arbitration, the Parties have complied with the procedural steps required thereunder to submit this case to arbitration, and – as is recorded in the section on procedural history above – the members of the Tribunal have been correctly nominated by the Parties and appointed by the LCIA as provided in Art. XIV SLA and the LCIA Arbitration Rules.

2. Bifurcation of Proceedings

42. The following quotation from Procedural Order No. 1 may be recalled since it summarises the agreement regarding the bifurcation of the proceedings (PO I, para. 3):

> *"3. Timetable for the Liability Phase*
>
> *As indicated by their letters of October 9 and 10, 2007, the Parties have agreed on a bifurcated procedure to the effect that a first phase shall be restricted to the issue of liability (the liability phase) and, should liability be found by the Tribunal to exist, a second phase on remedies (the remedies phase). The Parties have also agreed that, in this first phase, neither of them shall submit statements of witnesses or experts or any requests for document disclosure".*

3. Applicable Law

a. Applicable Procedural Rules

43. Regarding the procedural rules applicable by the Tribunal, **Art. XIV SLA** provides for detailed procedures which have been quoted above in this Award.

44. From the text of Art. XIV SLA, it should be particularly noted that, in so far as it provides no specific procedural rules, reference is made to:

> The **LCIA Arbitration Rules** as in effect on the date the SLA was signed, and, in addition, by Art. XIV para. 14, to the **IBA Rules on the Taking of Evidence in International Commercial Arbitration** as adopted in 1999, but as modified by the SLA.

45. Furthermore, Art. XIV paragraph 13 SLA provides that the legal place of the arbitration shall be London, United Kingdom. According to Section 2(1) of the **English Arbitration Act 1996,** that Act is applicable *where the seat of the arbitration is in England.* Whether the effect of this provision is altered by the

fact that the present arbitration takes place between two foreign governments under a treaty in the field of public international law need not here be considered further, beyond the limited subject of costs addressed separately later in this Award.

b. Applicable Substantive Law

46. The primary substantive source for consideration and decision in this arbitration is the **SLA** itself. The SLA does not contain a specific provision regarding the applicable substantive law. However, in their pleadings, the Parties have taken it for granted that **public international law** and particularly the **Vienna Convention on the Law of Treaties (VCLT)** are applicable to the implementation and interpretation of the SLA.

47. The Tribunal agrees with this approach. The provisions of the VCLT particularly relevant in this case are **Art. 31 and 32,** the text of which has been quoted above.

4. Relevance of Decisions of Other Courts and Tribunals

48. In their written and oral submissions regarding a number of legal arguments, the Parties relied on a large number of decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make a general preliminary observation.

49. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of arriving at the proper meaning to be given to those particular provisions in the context of the SLA in which they appear. It should be added that the SLA, both regarding its object and its purpose, is a very special treaty. There does not seem to have been any similar bilateral treaty in international treaty practice and in particular any similar previous treaty between the United States and Canada.

50. On the other hand, Art. 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's *preparatory work* and *circumstances of its conclusion* of the treaty, but indicates by the word *"including"* (in the second line) that, beyond these two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Art. 38 paragraph 1.d. of the Statute of the International Court of Justice, provides that judicial decisions and awards are applicable for the interpretation of public international law as "subsidiary means". Therefore, these legal materials can also be understood to constitute *supplementary means of interpretation* in the sense of Art. 32 VCLT.

51. That being so, it is not obviously clear how far arbitral awards are of decisive relevance to the Tribunal's task. It is at all events plain that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict that conclusion.

52. This does not however preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.

53. Such an examination may be conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the NAFTA provisions at stake. However, the above mentioned specificity of the SLA may well make it very difficult to draw any guidance from such other decisions on treaties very different from the SLA.

H.II. Application of Adjusted Expected United States Consumption to Option A

54. While the application of paragraph 14 of Annex 7D to Option B Regions has never been questioned by the Parties, it is highly disputed between the Parties

whether the adjusted Expected United States Consumption ("EUSC") calculation as laid down in paragraph 14 of Annex 7D is applicable to Option A regions as well.

1. Arguments by Claimant

55. Claimant contends that Respondent was required under paragraph 14 of Annex 7D to make the adjustment to EUSC with regard to both Options A and B (C I, paras. 22 *et seq.*; C II, paras. 30 and 53; Tr, p. 17 and 22), since *Annex 7D of the Agreement defines the only calculation of expected United States consumption, and, for each type of export measure applied, the Agreement refers without qualification to Annex 7D* (C II, para. 31). Claimant thus submits that Respondent agreed to calculate EUSC for both types of export measures (C II, para. 56; C III, paras. 3, 7; Tr, p. 49) and that Respondent's interpretation of paragraph 14 of Annex 7D is *fundamentally inconsistent with basic principles of treaty interpretation* (C II, para. 60 *et seq.*).

a. Ordinary Meaning of the Provision

56. To support its view, Claimant firstly draws upon the ordinary meaning in the context of the SLA, referring to Article XXI, para. 21 SLA which states that EUSC *means the expected level of U.S. Consumption defined and calculated in accordance with paragraphs 12 through 14 of Annex 7D,* thus declaring EUSC to be *the cornerstone of determining how certain provisions of Option A and Option B are applied* (C II, para. 53). To support its case, Claimant puts special emphasis on the fact that the definition of EUSC in paragraph 21 of Article XXI SLA is in the singular, thus contemplating only one level of U.S. consumption (Tr, p. 22, 32, 46). Furthermore, Claimant contends that the SLA *does not contemplate that there will be two different volumes of softwood lumber that are going to be expected to be consumed in the United States in a particular month,* but rather that paragraph 11 of Annex 7D of the SLA provides for a single monthly volume to be consumed in the United States (Tr, p. 23 and 32).

Therefore, Claimant submits that this *singular value [...] is not affected by Canada's attempt to isolate, elevate, and ungrammatically distort the Agreement because the word "quota" simply appears within paragraph 14* (Tr, p. 48).

57. Thus, Claimant emphasises that the SLA contains only one definition of EUSC for both options which are *necessarily different*, but *nevertheless both [...] involve export charges and volume limits* (C II, para. 31; C III, paras. 8 *et seq.*, Tr, p. 34). Claimant asserts that *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* and notes that the mathematical formulas for the calculation of the adjustment *both use the identical expression for Expected U.S. Consumption: "EUSC"* (C II, para. 31; C III, paras. 10 and 13; Tr, p. 17 and 32 *et seq.*). From this, Claimant draws the conclusion that *there is only one value for Expected U.S. Consumption that may be used in the Agreement's calculations* (C II, para. 31; C III, para. 13; Tr, p. 31, 34). Additionally, Claimant alleges that Respondent *does not, and cannot identify another definition of Expected U.S. Consumption that might apply to only Option A regions* (C III, para. 10; Tr, p. 31, 43 *et seq.*).

Claimant further contends that *whenever a calculation of expected United States consumption is required, the terms of the Agreement require that the calculation include the adjustment required by paragraph 14* of Annex 7D (C II, para. 53; cf. C III, para. 7). To support its case on this ordinary meaning of the treaty wording, Claimant refers to the ICJ Judgment in the *LaGrand Case* (C-30) citing that *when the text of an agreement is unambiguous, its terms must be applied "as they stand"* (C III, para. 7). Therefore, the ordinary meaning cannot justify Respondent's interpretation and excuse Respondent's breach of the SLA.

58. Claimant further submits that according to Art. VIII para. 2 SLA the trigger volume for Option A is to be calculated following the directions of Annex 8, which (in its paragraph 3) explicitly includes EUSC in the calculation of regional trigger volumes, referring to Annex 7D for the calculation of EUSC for Option A regions. Similarly, for Option B regions, paragraph 2 of Annex 7B includes

EUSC in the calculation of quota volumes (C III, para. 10; Tr, p. 30 *et seq.*). In this context, Option A which "triggers" the imposition of an additional export charge, is advanced as a soft volume cap, while Option B limits the export volume and is thus is advanced as a hard volume cap (C I, para. 16; C II, paras. 30, 38 and 55).

59. Claimant therefore maintains that since *there are no provisions in Annex 7D or elsewhere that allude to or even contemplate the idea that the expected United States consumption for Option A regions will ever differ from that for Option B regions* (C II, para. 65; cf. Tr, p. 34 *et seq.*), with regard to both Option A and Option B *the Agreement does not qualify or limit in any way the reference to Annex 7D* (C II, para. 58; C III, para. 14). Claimant submits that *as a grammatical matter, there is absolutely nothing that is "limiting" about the subordinate clause* (i.e. "for which quotas are determined") (C III, para. 18). Rather, as Claimant asserts, this clause refers merely to the timing of the adjustment *and nothing else* (C I, para. 42; C III, para. 18; Tr, p. 36).

60. Additionally, Claimant contends, by virtue of the marked absence of any provision in paragraph 14 of Annex 7D limiting its application to Option B when other provisions explicitly limit their applicability to one region or the other, that if the Parties had wanted such a limitation, *they would have done so explicitly* (C I, para. 41; C II, para. 65; C III, para. 14). While as an example Annex 7B is said to provide *specific Option B characteristics* and Article VIII SLA and Annex 8 to provide for *specific Option A characteristics*, Claimant maintains that the calculation for EUSC *appears nowhere in any of these option-specific provisions* (C III, para. 14).

61. Claimant reproaches Respondent of having applied solely paragraphs 12 and 13 of Annex 7D of the calculation to Option A regions. Asserting that *the Agreement provides that, for each and every calculation of export measures, Canada must calculate expected United States consumption in accordance with the Agreement's definition of that term and in accordance with the Annex dedicated to the calculation*, Claimant contends that Respondent has violated this

obligation by not applying paragraph 14 of Annex 7D when making the respective calculation (C II, para. 59; C III, para. 3; Tr, p. 105).

62. According to Claimant, Respondent *misstates* the conditional nature of the paragraph 14 adjustment. Although Claimant concedes that Respondent need only apply the adjustment if the difference between actual consumption and EUSC exceeds five percent, Respondent is always obliged to make the comparison in the first place. Therefore *there is nothing "conditional" about Canada's obligation to make the comparison* (C III, para. 20; Tr, p. 98 *et seq.*).

63. In Claimant's view, the clause *Quarter for which quotas are being determined* in paragraph 14 of Annex 7D is said to be a mere specification as to <u>when</u> Respondent is to apply adjusted EUSC (C II, para. 63; C III, para. 18; Tr, p. 37). Claimant insists that the clause does not indicate the circumstances under which Respondent must make the adjustment since the wording does not introduce a *"bifurcation"* between Option A and Option B with regard to the calculation of EUSC (C II, para. 63). Rather, Claimant states that, *as a grammatical matter, there is absolutely nothing limiting about the subordinate clause* (C III, para. 18). As asserted by Claimant, the *modifying clause "for which quotas are determined"* can therefore not modify the formula for the calculation which has to be done pursuant to Annex 8 for Option A and according to Annex 7B, for Option B (C II, para. 64).

64. Lastly, Claimant submits that Respondent's interpretation of the word "quota" is incorrect, asserting that "quota" does not mean the same thing as "quota volume" (C III, paras. 21 *et seq.*). Claimant further complains that Respondent *has failed to establish that two different terms, "quota" and "quota volume" [...] have identical meanings for purposes of the Agreement* (C III, para. 23). Claimant argues that *[t]he volume limit under Option A [...] is no less a "quota" than the volume restraint that limits exports under Option B* (C III, para. 23).

65. Moreover, Claimant contends that Respondent's reliance on the word "quota" in paragraph 14 of Annex 7D is arbitrary and that Respondent thus *proffers an*

ungrammatical interpretation of "quota" (C III, para. 3) at the expense of *the remainder of the provision and at the expense of the Agreement's purpose* (C II, para. 61; cf. C III, para. 3; Tr, p. 36). Respondent is thus constrained to present its case *by ignoring grammar, the ordinary meaning of the text, and its context* (Tr, p. 37).

66. To support its interpretation as to the ordinary meaning of the term "quota", Claimant further refers to the general use of the term in international trade, to the definition of the term by the United States Customs and Border Protection and to the 1996 Softwood Lumber Agreement. According to Claimant allegedly, *in international trade, the term "quota" can refer to both absolute quantitative limitations and to "tariff rate quotas";* and Respondent *understood that the 1996 SLA contemplated that a quota need not be limited to absolute volume limitations but can include limits itself that, if met, can result in the imposition of fewer or additional charges* (C III, para. 24).

b. Object and Purpose of the Softwood Lumber Agreement

67. Furthermore, Claimant alleges that Respondent has circumvented the object and purpose of the SLA stating that the *selective application of correct export measures unfairly benefits certain regions and undermines the very purpose of the export measures* (C II, paras. 32 and 52; cf. C III, para. 5; cf. Tr, p. 39).

68. Claiming that the SLA is *the result of years of painstaking negotiations aimed at finally resolving the protracted trade disputes concerning exports of Canadian lumber to the United States*, Claimant argues that the system of the SLA is intended 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; C II, paras. 30 and 54; C III, para. 52; cf. Tr, p. 20 and 26 *et seq.*). Hence, the SLA *requires Canada to determine the expected United States consumption precisely to ensure that Canada's imposition of export measures tracks as closely as possible the United States market* (C II, para. 56).

69. According to Claimant allegedly, Respondent *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* (C III, para. 49; cf. Tr, p. 27).

70. In support of its contentions, Claimant argues that the Parties agreed to both types of export measures with the aim of *discouraging* exports, in order to *"catch up" to the market* and be *more responsive to market changes* (C II, paras. 32 and 55; Tr, p. 102, 103). Respondent's *exceedingly narrow, post hoc interpretation* of the wording of paragraph 14 of Annex 7D runs counter to this purpose and is *fundamentally inconsistent with basic principles of treaty interpretation* (C II, paras. 33, 60 *et seq.*).

71. In Claimant's submission, the absence of a preamble *does not render the Agreement purposeless* since a preamble is not the only source for the object and purpose of an agreement (C III, paras. 49 *et seq.*). To underscore this argument, Claimant cites Sir *Ian Sinclair*'s work, *The Vienna Convention on the Law of Treaties*, stating that the object and purpose of a treaty "may be gathered from its operative clauses taken as a whole" as well as from the reasons for which the parties entered into treaty negotiations in the first place (C-36; C III, para. 50).

72. However, Claimant submits that the adjustment to EUSC is not at the discretion of Respondent, but has to be applied regardless of the type of export measure at issue. Any other interpretation would conflict with the principle of effectiveness *(ut res magis valeat quam pereat)* reducing the effect of adjusted EUSC substantially (C II, para. 62). To support its position, Claimant relies on the award in Iran v. United States, AWD ITL63-A15-FT at 46 (Aug. 20, 1986) (C-3).

c. Negotiating History and Subsequent Practice

73. To support its case on interpretation, Claimant also invokes the negotiating history of the SLA quoting an email from Canada to the United States regarding changes to paragraph 14 of Annex 7D (C-17; C II, para. 66 *et seq.*; C III, para. 27).

74. Claimant also refers to Respondent's communications to the provincial government of British Columbia following the entry into force of the SLA (C-16), where *the Federal Government of Canada had informed its provincial governments that it would apply the full calculation, the complete calculation of Expected United States Consumption, including the paragraph 14 requirements to the Option A trigger volumes* (C I, para. 55; Tr, p. 41).

75. Furthermore, Claimant notes that Respondent concedes having devised its current interpretation during *the planning of the administration* of the SLA (R I, paras. 5, 23(h)). Claimant contends that *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* (C III, para. 27). Claimant argues that Respondent has *otherwise not challenged the authenticity or the accuracy or any of the substantive content of the communications* (Tr, p. 102).

76. Claimant maintains that the Parties never had the intention to limit the application of paragraph 14 by adding the words "for which quotas are determined" while drafting the provision. This assertion is said to be supported by email correspondence between US and Canadian representatives at the beginning of September 2006, as well as a draft of the SLA from September 5, 2006 (C-21 to C-23) (C II, para. 67; C III, paras. 16, 19; Tr, p. 103 *et seq.*).

77. In addition, Claimant contends that *the parties' placement of paragraph 14 in Annex 7D was intentional*, purposively moving paragraph 14 from a provision in now-Annex 7B – specific for Option B – to Annex 7D (C III, para. 15; Tr, p. 46 *et seq.*). Claimant submits that *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 (C III, para. 15).

78. Claimant contests Respondent's assertion that paragraph 14 contains any *limiting language* (C III, para. 17) submitting that *[i]f the "limiting words" are as plain as Canada contends, it is unclear why Canada did not perceive them as such at the time it signed the Agreement* (C II, para. 27; C III, para. 29).

79. Claimant thus argues that Respondent has developed an *exceedingly narrow, post hoc interpretation of one word of one provision* and has thus breached the SLA by failing to apply the calculation to both Option A and Option B (C II, paras. 60, 68). In Claimant's view this unjustified behaviour contradicts Respondent's alleged subsequent practice since *relevant conduct in this regard can include interpretations and representations, whether by action or words* (C III, para. 31).

2. Arguments by Respondent

80. Respondent strongly opposes Claimant's interpretation, maintaining that Respondent has always correctly and accurately applied an adjusted EUSC to Option B regions only since paragraph 14 of Annex 7D is not applicable to Option A (R I, para. 23(e)).

a. Ordinary Meaning of the Provision

81. To support its case, Respondent first submits that Claimant *fails to explain why the drafters chose twice to use the limiting word "for which quotas are determined"* instead of using a broader term that would unmistakeably refer to both Options A and B (R I, paras. 4 and 27(f); R II, paras. 32(a), 35 *et seq.*; R III, paras. 7, 12, 22; Tr, p. 76). Respondent contends that Claimant cannot legitimately *contort the meaning of the word "quota" to try to make the U.S.*

problem go away (Tr, p. 77). Rather, *[i]n trying to give quotas a broader meaning, the United States has implicitly recognized that the word [...] has a limiting meaning, and that the only way to save the U.S. case concerning the application of this provision to Option A is to conjure a new meaning that would cover both Options* (Tr, p. 78). In contrast, Respondent maintains that *"[q]uota" means the same thing throughout the Agreement* and is *used 23 times in relation to Option B, but not once with reference to Option A* in the SLA (Tr, p. 77 *et seq.*; cf. C III, para. 27).

82. Thus, according to Respondent, the wording of paragraph 14 of Annex 7D in its ordinary meaning does not support Claimant's interpretation since no quotas are determined under Option A. That is why Respondent submits that *the use of the term "quotas" in paragraph 14 only makes sense if its application is limited to Option B Regions, the only Regions subject to quotas"* (R I, paras. 22(a) and 27(b); R II, paras. 35, 40, 52; R III, paras. 7, 13). In consequence, if all regions chose Option A, there would be no quarter for which quotas are determined (R II, para. 37; Tr, p. 77).

83. Although Article XXI SLA defines EUSC to be *calculated in accordance with paragraphs 12 through 14 of Annex 7D*, Respondent disputes Claimant's assumption that paragraphs 12 to 14 need to be applied to the calculation of each and every export measure (R II, para. 48). Respondent argues on the contrary that *paragraph 14 contains its own set of limitations as to when and in what circumstances it will apply* (R II, para. 49). Furthermore, from the fact that Annex 8 does not contain *any language that would suggest that the adjustment factor must be applied to calculations under Annex 8*, Respondent submits that the limited wording of paragraph 14 needs to be taken into account and must not be ignored as a matter of interpretation (R II, para. 53 *et seq.*; Tr, p. 71).

84. At the Hearing on Liability of December 12, 2007, Respondent concurred with Claimant *that there is only one definition of EUSC* (cf. also R III, para. 6). Respondent however comes to a different conclusion than Claimant, maintaining its position that *just because paragraph 12 through 14 exists in a single annex*

does not mean that every aspect of what is defined and calculated in those paragraphs must fall uniformly on all Regions, all exporters, and all producers (Tr, p. 68 *et seq.*). Therefore, according to Respondent, EUSC is used *to calculate different measures on the basis of different formulas* (Tr, p. 71).

85. Respondent submits that paragraphs 12, 13 and 14 serve different functions and are framed differently (R II, paras. 50 *et seq.*). Therefore paragraph 14 of Annex 7D is *conditional*, the condition being a quarter under the SLA in which EUSC differs more than 5% from actual U.S. consumption; and thus quotas are being determined (R I, para. 2; R II, para. 52; Tr, p. 69, 71, 75).

86. Due to the absence of any clause setting forth the primary object and purpose of the SLA, Respondent cites the NAFTA award in *ADF Group v. U.S.* to demonstrate that in such cases *the object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph*, thereby operating as a form of *lex specialis* (R II, para. 68 *et seq.*; R III, paras. 38, 73).

87. Respondent also objects to Claimant's statement that "quota" must have a different meaning than the term "quota volumes" (C III, paras. 21 *et seq.*) submitting that *as one would naturally expect, the word "quota" means the same thing throughout the Agreement, whether it is the "quota" in "quota volume," the "quota" in "quota allocation, the "quota" in "quota amount," or "quota" simpliciter* (R III, para. 26; cf. Tr, p. 78).

88. Respondent further submits that Claimant cannot find any support for its interpretation of the term "quota" in international trade, since (according to Respondent) *the more common view is that tariff quotas are not subsumed unless specifically mentioned* (R III, para. 33). Contending that Claimant has not demonstrated the existence of express language or usage proving its interpretation of the word "quota", Respondent therefore maintains that "quota" cannot equal "export measure under Article VII". Furthermore, *the fact that the United States is forced to search so far afield for support for its reading shows*

just how far it has strayed from the ordinary meaning of the term (R III, para. 32; Tr, p. 79 *et seq.*).

b. Principle of Effectiveness

89. Additionally, Respondent claims that its position is supported by the principle of effectiveness which is asserted to have *nothing to do with maximizing the effect of a provision* – of which Respondent alleges Claimant to be guilty (R II, para. 55). Maintaining that Respondent has and is *giving full effect to each word of paragraph 14*, Respondent submits that Claimant's invocation of that principle is here inapposite. It also ignores the limiting word "quota" (R II, para. 55 *et seq.*): *[n]othing in Annex 7D says that its provisions apply equally to both Options, and the words of paragraph 14 specifically limit the application to Option B* (R III, para. 18). Respondent emphasises, in particular, that the term "quota" is not equivalent to the term "export measures under Article VII" as Claimant suggests (R III, paras. 7, 26; cf. C III, para. 23). Rather, in Respondent's submission *[t]he SLA gives the Regions in Canada an effective Option, which the United States tries to blur* (Tr, p. 69).

90. To support its case, Respondent draws upon the Advisory Opinion of the ICJ on the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania* (RA-9) and its judgment in *The Ambatielos Case* (RA-2) where the ICJ stated that *the principle of effectiveness cannot justify ascribing to the provisions of treaties a meaning that "would be contrary to their letter and spirit"* (R II, para. 57). Respondent further refers to the Iran-U.S. Claims Tribunal which has decided that *"reliance on the maxim ut res magis valeat quam pereat (the principle of effectiveness)... could not justify the Tribunal... going beyond what the text of [the treaty]... warrant[ed], thereby creating a novel... obligation"* (R II, para. 57). Respondent maintains that *the principle of effective interpretation cannot be the engine to expand treaty provisions beyond their stated scope*, thus contending that Claimant's recourse to that principle is fruitless in this case (R II, para. 33, 57).

c. Object and Purpose of the Softwood Lumber Agreement

91. Respondent contests Claimant's assertion that Annex 5B of the SLA promotes the object and purpose of the SLA. According to Respondent, Claimant mischaracterises the SLA's object and purpose as preventing *material injury or threat thereof to an industry in the United States from imports of softwood lumber products from Canada* (R II, para. 32(b), 58 *et seq.*; R III, paras. 71 *et seq.*). Respondent submits that the labelling as *"Finding of the U.S. Department of Commerce"* is merely a domestic legal basis for Claimant to reject petitions initiating new antidumping or countervailing duty investigations. In Respondent's submission, it is *in no way an expression of the Parties' shared object and purpose* of the SLA (R II, paras. 21 *et seq.*, 59, 62 *et seq.*).

92. As far as the primary object and purpose of the SLA is concerned, Respondent argues that *it would be highly anomalous for negotiators of any treaty to tuck away a "primary object and purpose" of an agreement into one of several annexes at the back of the agreement* (R II, para. 60).

93. Furthermore, Respondent contends that the Annexes merely set out how the export measures operate. In Respondent's view *none of these provisions read as a whole or separately, will tell you what the purpose of the Agreement is. Rather they will tell you what the obligations of the Parties are and how the provisions operate* (R III, para. 72).

94. Respondent also denies Claimant's statement of Option A being a "soft volume cap" and Option B being a "hard volume cap" which is allegedly supposed to *create the impression of similarity between Options A and B* (R I, para. 23(c); R II, para. 43; Tr, p. 69; cf. C I, para. 16; C II, para. 30). To support this argument Respondent submits that Option A and Option B are *fundamentally different in structure, operation and effect* (R II, para. 38; Tr, p. 69). Respondent contends that the *primary restraint of Option B is plainly the quota* (R II, para. 44) while the regional trigger volume for Option A *does not vary according to the prevailing monthly price* (R II, para. 42). Further, Option A and B *use different reference periods in allocating each Region's share* (R II, para. 45) and

differ *significantly* in their economic effects (R II, para. 46; Tr, p. 117). Respondent particularly emphasises that Option B provides more flexibility which allows it better to *cope with the further unpredictability* caused by the adjustment (Tr, p. 119 *et seq.*). Therefore, Respondent maintains *Option A is an export tax ... Option B is an export quota with a significantly lower export tax* (Tr, p. 70).

95. Lastly, Respondent argues that, contrary to Claimant's contention, the adjustment factor in paragraph 14 of Annex 7D does not enhance the accuracy of EUSC (R II, paras. 32(b), 70, 73 *et seq.*, 115 ; Tr, p. 80 *et seq.*). Respondent notes that paragraph 14 of Annex 7D is not designed to ensure that the adjustment will make EUSC closer to actual U.S. consumption, but that *the adjustment must be made, regardless of the trend of actual consumption, simply on the basis of what was happening in relation to EUSC two Quarters previously.* Therefore, Respondent submits, adjusted EUSC is only more accurate when EUSC is *in an extended period of either rapid decline or increase* (R II, para. 74; R III, para. 63). From this Respondent concludes that *whether greater accuracy results [...] is an accident of the particular Quarter selected* (R II, para. 76; R III, para. 64).

96. At the Hearing on Liability of December 12, 2007, Respondent further submitted that Claimant has now *largely retreated from three of its key supporting arguments*, one of them being that a primary purpose of the SLA is to prevent material injury to the U.S. industry (Tr, p. 67, 80 *et seq.*).

d. Negotiating History

97. Respondent further denies Claimant's assertion that the negotiating history of paragraph 14 of Annex 7D strengthens Claimant's position (R II, paras. 32(c), 83). In Respondent's submission, Claimant fails to explain how *this provision, which was in its view so clearly limited to the ordinary meaning of "quota" when the Agreement was signed by Canada and the United States on July 1, 2006, evolved into something other than "quota" when [...] the paragraph moved locations in the text, even though the language referring to "quotas" remained*

intact. The relocation of the provision occurred in the context of a final *"legal scrub"* and was not accompanied by any notes or explanations. Respondent therefore maintains that *the mere movement of the clause from one Annex to another cannot transform the plain meaning of the language* (R III, paras. 17, 19 *et seq.*, 30; Tr, p. 78 *et seq.*, 85 *et seq.*).

98. In addition, Respondent asserts that the negotiating history establishes the existence of a proposal for an object and purpose clause which however did not become part of the final SLA (R II, paras. 59, 64 *et seq.*). Respondent further emphasises that even during these discussions, on an object and purpose clause setting forth the objectives of the SLA, there had never been any provision clause referring to material injury (R II, para. 66).

99. Respondent moreover submits that it has never been suggested that the parallel provision in the Softwood Lumber Agreement of 1996 established the object and purpose of the SLA (R II, para. 61).

100. Respondent submits that the email of September 6, 2006 (C-17) from a Canadian government economist *cannot be stretched to constitute "negotiating history" of the scope of paragraph 14* with regard to Option A regions. Rather, with regard to the contents of the email, Respondent argues *[t]he issue is frequency, not scope* (Tr, p. 85).

101. In addition, Respondent contends that the email in question *does not purport to state the opinion of the Canadian government on whether paragraph 14 should apply to surge triggers* since *the views of a State are not established by internal documents used or exchanged by its officers in the course of negotiations* (R II, para 90; R III, para. 38).

102. In the context of the SLA's negotiating history Respondent asserts that on June 6, 2006, Claimant *introduced the adjustment factor in connection with the quota calculation annex, "Calculation of Quota Volume and Quota Limits"* where no reference is made to a possible application of the adjustment factor to Option A

(R II, para. 92; R-9). According to Respondent, there is thus *no evidence reflecting any mutuality of intention to expand the application of paragraph 14 beyond Option B by moving it from one Annex to another* (R III, para. 21). Respondent contends that *if the Parties had intended the term "quota" to encompass both Option B and Option A [...] there would have been no need to create a specialized term of art – "Trigger Volume" – for purposes of applying the Surge Mechanism of Article VIII* (R III, para. 27).

103. Respondent also quotes a draft from June 8, 2006, and an *"Alternative Carry-Forward Proposal"* from June 19, 2006 which was allegedly to be applied to Option B only (R II, para. 93 *et seq.*; R-10). In addition, Respondent cites the SLA Merged Text Draft from June 28, 2006 (R-12) which *indisputably was only applicable to Option B quota Regions* (R II, para. 95). Subsequently Annex 5 was renumbered to what is today Annex 7D, being entitled *"Calculation of Quota Volumes for Option B"*. Claimant's versions of draft Annexes 7D and 8 of July 19, 2006, were entitled *"Calculation of U.S. Consumption and Market Shares"* and included in paragraph 14 of Annex 7D the adjustment factor of (then) Annex 5 (R II, para. 99).

104. Respondent submits that while editing the SLA on September 8, 2006, the Parties inserted the phrase *"for which quotas are being determined"* to paragraph 14 a second time, thereby demonstrating that the SLA's negotiating history confirms Respondent's interpretation (R II, paras. 100, 102).

e. Subsequent Practice

105. As to Claimant's case on Respondent's subsequent practice, Respondent disputes that the internal B.C. memorandum (C-16) constituted any state practice at all, much less a subsequent practice in the application of the treaty within the meaning of Article 31(3)(b) VCLT. Respondent maintains that the memorandum *describes a position that Canadian officials considered, but that Canada never in fact implemented* (R II, para, 85). With reference to the standards under international law for "representation" and "admission", Respondent submits that

the B.C. internal memorandum *does not rise to this level of official interpretation* (R III, para. 43; Tr, p. 85). The same position is maintained for all other documents invoked by Claimant which *do not by any stretch constitute subsequent practice [...] and they most certainly [do] not meet other evidentiary standards under international law* (Tr, p. 85).

106. To support this case, Respondent also cites Sir *Ian Sinclair*'s work on the VCLT: *[a] practice... cannot in general be established by one isolated fact or act or even by several individual applications*. Respondent further relies on the ICJ's judgment in *Certain Expenses of the United Nations* where regarding the treatment of unusual expenses the ICJ *stressed the importance of the consistent treatment of these expenses over a 12-year period* (R II, para. 86; RA-5; RA-3). Respondent denies ever having acted in a way inconsistent with any of the provisions of the SLA (R II, para. 87).

107. Respondent furthermore contends that, even if Respondent's behaviour amounted to actual implementation, this would not necessarily *establish its proper interpretation* under the VCLT (R III, para. 38).

3. The Tribunal

a. Introduction

108. As mentioned above, the detailed analyses of the relevant provisions of the SLA and related instruments submitted by the Parties have been helpful for this Tribunal. The following considerations of the Tribunal, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be the most decisive on liability.

109. First of all, at least regarding the issues in this arbitration, the Tribunal has found the provisions of the SLA to be less clear and consistent than one might hope for in a bilateral treaty so long negotiated and so closely scrutinised and debated by the Contracting States. This is not intended as any form of criticism of the

drafters or negotiators representing Canada or the USA. We are all familiar with the difficult process of how treaty wording is prepared, negotiated and finally agreed.

110. It is a regrettable but historical fact that treaties are not always expressed in precise terminology ensuring legal certainty and predictability in the event of later dispute. A bilateral treaty is often the product of prolonged and complicated negotiations. It is, sometimes, an instrument where there may be no actual common intention of the Contracting Parties on a point of interpretation, save only their consent to difficult wording which may cloak or postpone their differences.

111. Therefore, the Tribunal records at the outset that the different positions submitted by the Parties are far from unreasonable or frivolous and that both Parties advanced their respective cases in manifest good faith. Ultimately, however, only one Party's case can prevail; and the Tribunal is thus obliged to decide between the Parties' cases by rejecting the case of the losing Party, albeit that its arguments may not be wholly unpersuasive or devoid of any merit.

112. Below, as with the Parties' arguments summarised above, the Tribunal's interpretation will follow as closely as possible the guidance given by the criteria, and the relative importance and order of these criteria, established by Art. 31 and Art. 32 VCLT.

b. Ordinary meaning of paragraph 14 of Annex 7D SLA

113. For convenience, the full text of paragraph 14 is again recalled, here divided into its separate sentences by numbered sub-paragraphs:

> *"14. [1] 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.*

> *[2] 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."*

114. Firstly, this wording does not expressly make any references either to Option A or Option B regions or to both. It thus needs interpretation regarding its scope of application, as both Parties have submitted different views regarding its applicability.

115. Next, as also differently submitted by the Parties, the term "*for which quotas are being determined*", must as well be interpreted. In particular in view of the same term being mentioned twice at the end of the first and second sentences, the Tribunal cannot conclude that the term should have no meaning to convey. Both uses of the term must add something to paragraph 14; and such meaning must be drawn from other parts of the SLA unless reasons are found to the effect that the terms have a different and unique meaning in paragraph 14.

116. The Tribunal notes that, while Art XXI of the SLA contains a great number of definitions, the term *quota* or *quotas* is not defined there. It is also, of course, not a word of English or Anglo-Saxon or French origin.

117. The Tribunal does not see how, as Claimant argues (C III paras 24 *et seq.*), the use of the term "quota" in international trade, by the US Costums and Border Protection and in the 1996 SLA supports its interpretation regarding the specific use in paragraph 14. Rather, as relevant for the interpretation of the present SLA, the Tribunal acknowledges Respondent's forceful argument that the term *quota* is used no less than 23 times in the SLA and that it is used every time with regard to Option B regions and never regarding Option A regions. This is particularly so in the two Annexes dealing with the two groups of regions: the title of Annex 7B uses expressly the term *quota* when providing the details of calculation for Option B and continues to use the term in its text, while the title of Annex 8

(which provides the details for Option A) does not use the term either in its title or its text.

118. The Tribunal is not persuaded by Claimant's view that the terms "*Quarter for which quotas are being determined*" must be understood grammatically and in content to be a mere specification of the time when the adjusted EUSC is to be applied. If that were so, other wording could have been much more easily and clearly chosen since quotas were only relevant for Option B regions and the time relation should therefore have been expressed in wording fitting both Options A and B.

119. From all this, the Tribunal concludes that the ordinary meaning of the term *for which quotas are being determined* in paragraph 14, at least at first sight, can only be understood to refer to Option B regions. However, that provisional interpretation must be tested to check whether a different conclusion is mandated by further means of interpretation to the effect that the term in paragraph 14 must be understood to have a different and unique meaning.

c. Context of paragraph 14

120. Art. 31.1 VCLT provides that the ordinary meaning to be given to the terms of a treaty shall be established by taking into account *the context* of such terms.

121. Art. 31.2 VCLT then explains further what the *context* of the treaty comprises:

> "*the text, including its preamble and annexes* (introductory sentence of Art. 31.2),
>
> *any agreement relating to the treaty* ...(subsection (a)),
>
> *any instrument which was made by one [party] ... and accepted by the other [party] as an instrument related to the treaty* (subsection (b))."

122. There is no argument between the Parties in this case that there is any agreement or instrument fulfilling the second and third criteria above. Therefore, the only question before the Tribunal is whether the first criteria, the context of *the text,*

including its preamble and annexes of the SLA lead to a different interpretation of paragraph 14 to that provisionally found above.

123. The closest "context" is provided by paragraphs 12 and 13 of Annex 7D because they, together with paragraph 14, provide the details of the calculation of the Expected U.S. Consumption (EUSC). There is no dispute that paragraphs 12 and 13 are applicable for both Option A and B regions and that the definition of EUSC in paragraph 21 of Art. XXI SLA is only defined in the singular. Thus there is some weight in Claimant's argument that paragraph 14 also should be applicable to both Option A and B regions.

124. Is that consideration sufficient to lead to a different interpretation of the meaning of paragraph 14 to the one found above? The Tribunal considers that it does not. The position might be otherwise if an application of paragraph 14 only to Option B regions could not be understood given the different scope of application of paragraphs 12 and 13. However, it is clear from their wording that paragraphs 12 and 13 deal with the *calculation* of the EUSC, while paragraph 14 deals with the *adjustment* of that calculation.

125. Further, applying the scope of application of paragraphs 12 and 13 automatically also to paragraph 14 would not explain why paragraph 14 twice expressly refers to the same term *(for which quotas are being determined),* while this is not so in paragraphs 12 and 13. In the Tribunal's view, the "context" cannot deprive wording of having any meaning, particularly (as indicated already above) if that same wording is used twice in the same paragraph 14.

126. This approach is supported by the fact that Annex 8 (which provides the details of calculation of the Regional Trigger Volumes of Option A regions) does not contain any language indicating that the adjustment factor should also be applied to Option A regions.

127. In this context, the Tribunal notes further support for its interpretation from the fact that Art. IX SLA on *third country adjustment*, in its paragraph 2, also provides for a different treatment regarding Option A and Option B regions.

128. Accordingly, the Tribunal does not see a reason why, in context, its provisional interpretation above regarding the limited ordinary meaning of paragraph 14 cannot be maintained to the effect that such adjustment should only be limited to Option B regions and should not be used for Option A regions.

d. Object and Purpose of the SLA

129. Art. 31.1 VCLT further provides that the interpretation of the ordinary meaning of a treaty should be done *in the light of its object and purpose*.

130. First, it should be noted that the SLA does not contain, as many other treaties do, a preamble or an introductory provision expressly clarifying its object and purpose. Art. I with the title *Scope of Coverage* does not provide any guidance in this context.

131. In an early stage of the arbitral proceedings, Claimant argued that the object and purpose of the SLA could be identified from Annex 5B, where the introductory sentence expressly states: "*The SLA 2006 is intended 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*". First, as a general matter, it would seem unusual that the object and purpose of a treaty be defined in one of many annexes of a treaty. Second, the title of Annex 5B is "*Finding of the U.S. Department of Commerce*" and thus does not even claim to identify the treaty's object and purpose on behalf of both the US and Canada. Third, Claimant has not been able to provide any reason why the object and purpose were identified in this specific location in an Annex of the SLA. Finally, even if the quoted wording in Annex 5B were accepted as an indication of the treaty's object and purpose, it is phrased in such general and one-sided terms that it would not justify any interpretation of other treaty wording if that interpretation conflicted with its ordinary meaning.

e. Subsequent Agreement and Practice

132. Art. 31.3 VCLT further provides that, in the interpretation of a treaty, "*any subsequent agreement between the parties*" (subsection (a)), and "*any subsequent practice in the application of the treaty*" shall be taken into account.

133. There is no dispute between the Parties that they concluded any further *agreement* regarding the disputed interpretation of paragraph 14.

134. However, regarding *subsequent practice,* Claimant points to steps taken in Canada which, in Claimant's submission, establish a practice confirming its interpretation to the effect that paragraph 14 must also be applied to Option A regions.

135. As already summarised above, Claimant refers to Respondent's communication to the Provincial Government of British Columbia of January 16, 2007 (it is agreed between the Parties that the 2006 in the title of that document is an error and should be *2007,* as can easily be seen from its contents). This communication evidences the opinion of its author within the Canadian administration that paragraph 14 should be applied fully, i.e. including Option A regions. However, Respondent rightly points out that this internal communication within the Canadian administration was neither communicated to the US nor actually implemented by Canada. Accordingly, it must be noted that Art. 31.3(b) VCLT not only requires a subsequent practice in the application of the treaty by a party, but expressly requires further that this practice "*establishes the agreement of the parties regarding its interpretation*". This latter requirement is obviously not fulfilled in the present case, because in view of the lacking communication to the US and the non-implementation of the memorandum a respective agreement between the two governments cannot be considered as established.

f. Negotiating History

136. For convenience, Art. 32 VCLT is here quoted again in full, since it contains a number of criteria directly relevant in the present case:

> *"Supplementary means of interpretation*
>
> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> *(a) leaves the meaning ambiguous or obscure; or*
>
> *(b) leads to a result which is manifestly absurd or unreasonable."*

137. First of all, its limited scope should be noted: the negotiating history can only be used in interpretation for two purposes: first *in order to confirm the meaning resulting from the application of article 31.* And second, *to determine the meaning when the interpretation according to article 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*

138. As regards the hierarchy of means of interpretation, Art 32 VCLT clearly places negotiating history on a lower level of interpretation than the means under Art. 31 VCLT; and it presents two possibilities for its application.

139. The first possibility raises the question whether the interpretation can be confirmed by the negotiating history. Thus, under this possibility, a result found under Art. 31 VCLT cannot be changed, but only be "confirmed" by the negotiating history.

140. Only the second possibility permits a change in the result determined under Art. 31 VCLT. However, it is clear that high thresholds are required for such a conclusion by virtue of sub-paragraphs (a) and (b). As decided above, the Tribunal's provisional interpretation according to Art. 31 VCLT leads to the firm

conclusion that paragraph 14 is inapplicable to Option A regions. Accordingly, as regards that second possibility, the Tribunal cannot consider that such provisional interpretation under Art. 31 VCLT is either *ambiguous or obscure* or *leads to a result which is manifestly absurd or unreasonable.* Therefore, no change in the result of the Tribunal's interpretation under Art. 31 VCLT can be derived by any application of Art. 32 VCLT, sub-paragraphs (a) and (b).

141. Nevertheless, the Tribunal has considered what information the Parties have supplied regarding the negotiating history under Art. 32 VCLT.

142. There are no official "travaux préparatoires" of the SLA. However, the Parties have provided materials on the negotiating history.

143. First, there is agreement between the Parties that the present paragraph 14 was originally placed in what is now Annex 7B which deals only with Option B regions and that, in what is described as a *legal scrub* late in the negotiations, it was moved to its present place in Annex 7D. There is no contemporaneous documentation why this was done. But, as summarised above, there is considerable disagreement between the Parties regarding the implied intention and effect of that change.

144. From the information available, the Tribunal does not see any clear indication of the express or implied intention of the Parties for the change .With hindsight, the explanation of both Parties seems plausible: moving the present paragraph 14 from what is now Annex 7B and clearly only dealing with Option B regions, to the present Annex 7D which is similarly clearly dealing with both Options A and B, could mean that paragraph 14 should now apply to both regions as well – as do paragraphs 12 and 13. But it is equally plausible that the move was simply putting paragraph 14 as the adjustment clause after the calculation clauses of paragraphs 12 and 13 in view of their obvious context, but maintaining the limited application to Option B regions only as was the case in what is now Annex 7B. The latter explanation would seem to be more in conformity with the fact that, while moving the present paragraph 14, the Parties maintained the terms

for which quotas are being determined twice in the text of the provision, although these terms, as seen above, speak in favour of an application to Option B regions only.

145. As pointed out by Respondent (R II paras 92 *et seq.*), it seems that on June 6, 2006, the Claimant, for the first time proposed an adjustment factor equivalent to the one now found in paragraph 14. The respective Annex 5 (R-9) was entitled *Calculation of Quota Limits* and, in its text, only mentions Option B, but contains no reference to Option A. The same is true for the text exchanged on June 8, 2006, (R-10) and for the Claimant's proposed text of June 19, 2006 (R-11) which, at its end, notably includes the language "*for which quotas are determined*" which we now find in paragraph 14.

146. As Respondent reports (R II para. 97) without objection by Claimant, on July 1, 2006, both governments agreed on the SLA and initialed its text, and the location of the respective ruling for the adjustment factor was in paragraph 7 of then Annex 5 which undisputedly was only applicable to Option B regions while no similar adjustment factor language was contained in any of the provisions dealing with Option A regions.

147. Regarding the further development and negotiations, the Parties debated the email of August 31, 2006 from Canada to the United States regarding the changes in paragraph 14 (C-17). Respondent objects to this email being considered as part of the negotiating history. Indeed, it may be doubted that this email of a senior economist represents any authoritative view of Canada's actual understanding of the wording in issue. In addition, the Tribunal feels that it does not have to decide that question of attribution because, in any event, the contents of the email do not give a sufficiently clear picture regarding the disputed applicability to Option A regions. It speaks in favour of Claimant's argument that the email says: "*This would result in quotas and surge trigger volumes that are persistently higher and lower than they should be during periods ...*" That wording seems to assume that quotas (for Option B) as well as trigger volumes (for Option A) are at stake. However, the email concentrates on the time factor

and frequency and not the scope of adjustment; and the above quoted sentence, therefore, cannot be given much weight regarding the disputed issues.

148. Another debate between the Parties concerns one email of September 6 (C-21) and several of September 6 and 7, 2006 (C-22) and the draft SLA of September 5, 2006 (C-23).

149. Of these, the first in time is the draft SLA. Its page 82, entitled "*DRAFT WITHOUT PREJUDICE...CANADA SCRUB – REVIEWED WITH US – September 5, 2006*", shows a paragraph 14 which, in its first sentence, does not contain the quota language disputed in this arbitration. It refers to EUSC *for each of the 3 following months,* and in its final sentence it does state: *for each of the next 3 months for which quotas are determined.*

150. Next in time, the email of September 6, 2006 contains a proposed change of paragraph 14 which is not identical to the above text in the draft. But again, in the first sentence of paragraph 14, it does not include the quota language, but rather refers to the EUSC *for the following month.* However, it does contain the term *for which quotas are determined* in the final sentence, as it is later found in the text of the treaty. In the email it is mentioned that the suggested revisions are underlined, and in the text of the provision the only underlined terms are *for the following month* in the first sentence, and *for the next month* in the last sentence. These underlined sections seem to confirm that it was the timing, not the scope of application (to Options A or B) which was the subject of the communications and revisions.

151. The email of the next day, September 7, 2006, concludes a number of several emails starting on September 6, 2006. In this collection, the first email of September 6 at 10:09 a.m. includes a text of paragraph 14 where the quota language is only in the last sentence, but not in the first sentence. The last email of September 7 at 3:36 p.m. then includes a proposed change of paragraph 14 containing the quota language (*for which quotas are being determined*) in both sentences as it is later found in the treaty itself. The related comments from

various persons participating in the email exchange do not provide any clear explanation of this change. However, an email of September 6, 2006 at 7:25 p.m. from the Canadian side talks of "*a wrinkle in their Option A text*" which could possibly be taken as an indication that the writer thought of applying paragraph 14 to Option A regions. But, in the view of the Tribunal, this ambiguous reference is not sufficient to establish that this was in fact the writer's actual understanding, still even less the view of other participants from both the USA and Canada. In particular, it is not sufficient to explain why the Option B specific quota language was included once in the first text exchanged and later included twice in the final text exchanged in these email communications. This change would rather speak in favour of an understanding that the change of language was intended to apply paragraph 14 only to Option B regions.

152. After reviewing exhibits C-21, C-22 and C-23 and reviewing the Parties' submissions, the Tribunal decides that these materials are no more than inconclusive regarding the issues in dispute under Article 32 VCLT.

g. The Tribunal's Conclusion on this Issue

In view of the above considerations, the Tribunal concludes that the Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada's Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement, and the Tribunal rejects Claimant's case to the contrary.

H.III. Timing of the First Application of the Adjustment to Expected United States Consumption

153. Agreeing that the SLA entered into force on October 12, 2006, there is a second considerable dispute between the Parties as to when the adjustment in paragraph 14 of Annex 7D is to apply to calculations of EUSC. Claimant asserts that

Respondent was obliged to adjust export measure calculations as soon as the SLA went into effect (C I, paras. 48 *et seq.*; C II, para. 38; C III, para. 33; Tr, p. 17). Respondent denies this contention, submitting that the start of the calculation of the EUSC adjustment in paragraph 14 of Annex 7D begins with the first quarter of 2007, i.e. the first full quarter after the entry into force of the SLA.

1. Arguments by Claimant

a. Ordinary Meaning

154. To support its case that the adjustment in paragraph 14 of Annex 7D is to apply to EUSC from the beginning of the SLA, Claimant refers to Article VI SLA which states that *[a]s of the Effective Date, Canada shall apply the Export Measures to exports of Softwood Lumber Products to the United States* and to Article VII(1) SLA which stipulates that each region shall have chosen its option *[b]y the Effective Date* (C II, paras. 38, 41; C III, para. 33). Furthermore, Claimant points out that its Article II paragraph 1(d) SLA states that *Canada has certified to the United States that it can administer the Export Charge and issue Export Permits as of the Effective Date* and that there is no caveat attached with regard to the full and complete calculation of EUSC as of the SLA's effective date (cf. Tr, p. 51 *et seq.*).

155. According to Claimant, Respondent agreed to calculate EUSC every month as laid down in Annex 7D paras. 11 to 14 and thus Respondent was required to perform an initial calculation on the basis of data from a prior twelve-month period ending three months immediately before the month for which EUSC is being calculated which would then serve to compare actual U.S. consumption with EUSC for a prior quarter. Claimant asserts that Respondent had the obligation to compare actual U.S. consumption and EUSC and that *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 (C III, paras. 35, 39; Tr, p. 23 *et seq.*, 54 *et seq.*).

156. Claimant complains that Respondent has refused to adjust EUSC for the first quarter of 2007 because the quarter of comparison – the third quarter of 2006 – was prior to the effective date of the SLA. Claimant also complains that Respondent *fails to identify any text in the Agreement that could be read to authorize this delay, and there is none* (C I, paras. 52 *et seq.*; C III, paras. 37, 44; R II, paras. 104, 106). According to Claimant, neither the definition of the term "Quarter" in paragraph 44 of Article XXI SLA nor the definition of "Year" in paragraph 57 of Article XXI SLA indicate *that Quarter is in any way limited to the time within which the Agreement was in force* (Tr, p. 59, 113). Rather, as Claimant argues, its interpretation is entirely in conformity with *several provisions of the Agreement that require Canada to use pre-Agreement data to make calculations* (C III, para. 39). Therefore, Claimant concludes that paragraph 14 of Annex 7D came into effect as of the SLA's effective date, so that Respondent was obligated to calculate adjusted EUSC as of October 2006 (C II, para. 42).

157. Claimant further submits that even if the Tribunal decided that Respondent's reasoning was correct (which is disputed by Claimant), Respondent's argument *does not in any way justify its failure to apply the adjustment required for the second Quarter of 2007* since the relevant data for comparison in order to calculate adjusted EUSC for the second quarter of 2007 was the fourth quarter of 2006, *and of course the Agreement was in force during the fourth Quarter of 2007* [sic] [2006] (Tr, p. 58 *et seq.*).

b. Primary Object and Purpose

158. With regard to the mechanism provided for in paragraph 14 of Annex 7D, Claimant submits that the immediate calculation of adjusted EUSC prevents material injury to U.S. industry, thus meeting a primary object and purpose of the SLA. The adjustment in paragraph 14 of Annex 7D is asserted to optimise

accuracy of EUSC, therefore carefully maintaining the balance of Respondent's exports in the United States (C I, para. 34; C II, paras. 39, 43, 46, 49; Tr, p. 36). By not applying the adjusted EUSC in a timely manner Claimant reproaches Respondent to having subverted the SLA's efforts to obtain and preserve the market balance regarding Softwood Lumber exports into the United States (C II, paras. 46 *et seq.*; Tr, p. 60).

159. Claimant challenges Respondent's statement that the adjustment procedure is inaccurate and further contends that *the relative accuracy achieved by paragraph 14* is irrelevant for the correct timing of adjusted EUSC application, as well as for the full application of paragraph 14 of Annex 7D to all regions (C III, para. 42). Furthermore, Claimant submits that the Parties *would not have agreed to a provision that promotes inaccuracy* (C III, para. 45; Tr, p. 99).

c. Subsequent Practice

160. Asserting that Respondent's interpretation of the timing of paragraph 14 of Annex 7D is unreasonable, Claimant further submits that the subsequent practice of Respondent supports Claimant's interpretation. Claimant refers in particular to Respondent's communications to the Provincial Government of British Columbia following the entry into force of the SLA, which *states that there has been discussion about whether surge triggers for January should be adjusted* (Tr, p. 61 *et seq.*). From this Claimant concludes that Respondent was well aware and *understood that it was required to make the adjustments required by paragraph 14 of Annex 7D as soon as the effective date of the Agreement* (C I, para. 45; C II, para. 50 *et seq.*).

161. Additionally, Claimant refers to a lawsuit between the Canadian Federal Government and a local lumber producer ("Domtar Inc.") where Respondent allegedly made the adjustment to regional quota volumes *sometime before January 2007*, but *subsequently reversed course* faced with this private litigant (C-20; C I, para. 55; C III, para. 40; Tr, p. 62 *et seq.*).

162. Referring to Bin Cheng's *General Principles of Law as Applied by International Courts and Tribunals*, Claimant submits that Respondent *should not be permitted to "blow hot and cold – to affirm at one time and deny at another", in particular when* Claimant undisputedly fulfilled all of its own obligations assumed under the SLA (C II, para. 51; C III, para. 40).

2. Arguments by Respondent

163. Respondent contests that the SLA constitutes any obligation to apply the adjustment as laid down in paragraph 14 of Annex 7D to the first quarter of 2007, submitting that only *the first full Quarter for which quotas were in effect*, namely January 1 to March 31, 2007, required Respondent to make the calculation for the first time in that period and only then to apply *the resulting adjustment to the next quarter for which quotas were being determined* (R II, para. 104).

a. Ordinary Meaning

164. Though agreeing that the SLA entered into force on October 12, 2006, Respondent argues that it has complied with the obligations it was required to implement under paragraph 14 of Annex 7D, since *the Agreement did not require Canada to make adjustments for discrepancies that would have been found to exist in periods before the Agreement was effective* (R II, para. 104; Tr, p. 89). With regard to the fourth quarter of 2006, Respondent submits that *there was no full Quarter for which Canada had to calculate EUSC under paragraph 12* and the SLA *makes no provision for calculation of the adjustment on the basis of a partial Quarter* (Tr, p. 90). Respondent thus maintains that all its obligations under paragraph 14 of Annex 7D were fulfilled (R II, para. 106; Tr, p. 89 *et seq.*). Since Respondent submits that all requirements with regard to paragraph 14 of Annex 7D were met, it emphasises that the availability of pre-SLA data cannot be the decisive factor for calculating and applying the adjusted EUSC (R II, para. 107).

165. Respondent further emphasises that the plain language of Annex 7D supports its position as it is not only expressed in future forward looking and conditional terms, but because *the very concept of "Expected U.S. Consumption is prospective,* thus treating EUSC as *a prediction of data that is not yet available* (R I, paras. 6 and 28; R II, paras. 108 *et seq.*; R III, paras. 44, 48, 55). This approach, according to Respondent, is supported even more so given the language of paragraph 14 which uses the present tense and *requires a two step process*, first, determining whether actual U.S. consumption and EUSC differ more than 5% and only then making the adjustment in the next Quarter for which quotas are determined. In view of this interpretation, Respondent submits that it was not obliged to calculate adjusted EUSC as from July 1, 2007 (R I, para. 28(c); R II, para. 110; Tr, p. 87).

166. Respondent also notes that in the first proposal for the adjustment mechanism, EUSC was referred to as *"forecasted level of U.S. consumption"* (R II, para. 110). To further support its view, Respondent refers to the verb "to expect" as defined in the Oxford English Dictionary, which is said to mean to *[r]egard as about or likely to happen; look forward to the occurrence of (an event)* (R III, para. 55). Respondent draws the conclusion that *it would be inconsistent with this universally-understood definition of the term to apply an adjustment to a Quarter based on a purported "disparity" between a retrospectively-calculated EUSC and actual U.S. consumption for a period of time that was never governed by the Agreement* (R III, para. 55). Thus, against Claimant's case *that Quarters include all quarters prior to entry into force of the Agreement*, Respondent contests that interpretation contending that *the U.S. reading produces arbitrary and absurd results* (R III, paras. 57, 69).

b. Object and Purpose

167. Respondent further submits that Claimant's argument is based on the false assumption that the adjustment mechanism enhances the accuracy of EUSC. Denying that the agreed object and purpose of the SLA was to prevent material injury, according to Respondent, there was no need to have recourse to any

allegedly accurate EUSC to avoid such material injury. Additionally, the assumption that an adjusted EUSC would be more accurate is challenged by Respondent, as summarised above (and R II, para. 112 *et seq.*). The adjustment can merely reflect *an exact mirror reduction or increase in the quota levels two Quarters later*, regardless of the actual U.S. consumption in the quarter to which the adjustment is actually applied (R II, para. 115; R III, para. 70; Tr, p. 116).

168. Respondent also invokes that the emails submitted by Claimant as C-22 *do not support the theory that the adjustment was to enhance accuracy; rather, the only motivation evident is the U.S. desire to ensure that deficits exceeding 5% are "accounted for" in full in a future Quarter* (R III, para. 65; cf. Tr, p. 116). In Respondent's submission, the Parties' intention was thus to achieve *an effect of balancing out in the operation of paragraph 14. But there were no Quarters and no EUSC to make up for prior to January 1st, 2007* (Tr, p. 116).

169. Lastly, Respondent states that Claimant fails to offer another purpose *to replace its discredited accuracy claim* (R III, para. 67).

c. Subsequent Practice

170. With regard to alleged subsequent practice, Respondent maintains for the above reasons there never were any signs of such subsequent practice. Respondent concedes that *it is apparent [...] that the two reported communications from the Federal Government referenced in the documents were based on a position inconsistent with what Canada considers to be the proper interpretation of paragraph 14* (Tr, p. 91). However, Respondent emphasises that in any case Canada never made any adjustments to EUSC during the first two quarters of 2007 (R II, para. 116; Tr, p. 91).

171. As for the domestic lawsuit concerning *Domtar Inc.*, Respondent submits that *Canadian officials initially wrote to Domtar indicating that Domtar would receive an adjusted EUSC for January but ultimately determined [...] that no adjustment was to be made for January* – which has assertedly also been

acknowledged by Claimant (R III, para. 60). Furthermore, Respondent submits that even if it had restricted exports due to an adjusted EUSC *that would not constitute "subsequent practice" under the Vienna Convention* (R III, para. 61; Tr, p. 91 *et seq.*).

3. The Tribunal

a. Introduction

172. As mentioned above, the detailed analyses of the relevant provisions of the SLA and related instruments submitted by the Parties have been helpful for this Tribunal, and the above summaries are only provided regarding what the Tribunal considers to be the most relevant arguments of the Parties. The following considerations of the Tribunal, without repeating all the arguments of the Parties, concentrate on what the Tribunal itself considers to be the most decisive arguments necessary for this Award.

173. First of all, the Tribunal notes that the relief sought in this context has been identified by Claimant in two prayers which are not fully identical.

As identified in the Statement of the Case (C II, p. 32) Claimant asks the Tribunal to award as follows:

> *(2) Canada breached the SLA by failing to make such calculation as of January 1, 2007 and is liable for the consequences of that breach;*

At the Hearing on Liability, Claimant confirmed its request, asking the Tribunal to award as follows (Tr, p. 64 *et seq.*):

> *Secondly, that Canada breached the Softwood Lumber Agreement by failing to make the calculation from the Effective Date and is liable for the consequences of that breach.*

174. Art. XXI(18) provides: *"Effective Date" means the date of entry into force of the SLA pursuant to Art. II(1).*

175. Art. II(1) provides that *"the SLA shall enter into force on a date designated by the Parties in an exchange of letters (the "Effective Date").*

176. There is agreement between the Parties that, by the respective exchange of letters, the SLA came into force on October 12, 2006.

177. Therefore, if one looks at the two versions of the relief sought by Claimant quoted above, the first would request the adjustment with effect starting January 1, 2007, while the second would request to do so with effect starting October 12, 2006. The difference is, however, clarified by what Claimant explained at the Hearing (Tr, p. 56): according to Claimant itself, if one does the calculation for the period from October 12 to December 31, 2006, it turns out that there was not a more than 5% discrepancy, so Canada was not required in the fourth Quarter of 2006 to apply the adjustment for which paragraph 14 applies. Accordingly, Claimant only seeks to apply the adjustment as from January 1, 2007 and that is the issue on which the Tribunal has to decide in this section of the Award.

b. Ordinary Meaning in Context

178. Applying again Art. 31 VCLT, the Tribunal will first of all try to establish what it considers to be the ordinary meaning of the terms of the treaty in their context regarding this issue.

179. Art. VI SLA provides: "*As of the Effective Date, Canada shall apply the Export Measures to exports of Softwood Lumber Products to the United States.*"

180. And in Art. II.1(d) SLA Canada expressly certifies that it *can administer the Export Charge and issue Export Permits as of the Effectice Date.*

181. The Tribunal understands these two provisions to convey what it considers the usual understanding of a treaty in general, if the effective starting date is clearly established in the treaty, and of the term "effective" in particular, namely that the new regime established by the treaty is applicable from that date. An important part of this new regime of the SLA was the adjustment according to paragraph 14, because it had considerable relevance as to the subject-matter of the SLA, i.e. the volume of exports of Softwood Lumber Products from Canada to the United States.

182. In view of the importance of this economic effect of the SLA, the Tribunal considers that it was to be applicable from the Effective Date, and in view of the explanation given above, certainly from January 1, 2007 as requested by Claimant, unless the SLA otherwise provided or at least implies that the adjustment was to start its application only at a later date.

183. Against this interpretation, Respondent points to what it considers forward looking language (*Expected USC)* in Annex 7D including paragraph 14. The Tribunal does not see why this language should require a change to its above-stated consideration. As a matter of fact, paragraph 14 itself is rather backward looking, because it refers to the calculation under paragraph 12 which itself takes into account the twelve-month period before the calculation is made.

184. Moreover, this backward as well as forward looking aspects of paragraph 14 do not lead to a change of the interpretation decided above. Respondent itself concedes that *the availability of pre-SLA data is not the decisive factor for calculating and applying the adjusted EUSC* (R II, para. 107). It seems to the Tribunal that the fact that, after the Effective Date of October 12, 2006, there was not a full quarter under the regime of the SLA to include in the calculation, does not prevent an adjustment according to paragraph 14, because the twelve-month period under paragraph 12, anyhow, started much earlier than that date. Further, there is agreement between the Parties both that other provisions of the SLA contemplate using pre-SLA data to make calculations, and also that, as Respondent put it, *there was and is ample data to compute what the EUSC and*

the adjustment would have been going back more than a decade (C III, para. 39 and R II para. 107).

185. Paragraph 14 clearly requires Respondent to perform a certain activity, i.e. calculate the adjustment according to the criteria established in the provision. This activity, indeed, only had to be performed by Respondent after the SLA was in force. But in view of the above-stated considerations, the Tribunal cannot find any wording in paragraph 14 or elsewhere in the SLA why the adjustment should or could not have been done by Canada starting with January 1, 2007. Quite to the contrary, since the economic effect of the SLA and particularly paragraph 14 was to be applied as from the beginning of the SLA, the adjustment was due as from January 1, 2007.

c. Object and Purpose

186. Next, the Tribunal considers whether any conclusions on the present issue can be drawn from the *object and purpose* (Art. 31.1 VCLT).

187. First, as the Tribunal has already noted earlier in this award, the SLA does not contain, as many other treaties do, a preamble or an introductory provision expressly clarifying its object and purpose. Art. I, with the title *Scope of Coverage,* does not provide any guidance in this context.

188. As has also been noted and explained earlier, Annex 5B (where the introductory sentence expressly says: *"The SLA 2006 is intended 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")* cannot be considered as an indication of the object and purpose of the SLA in general or in particular of paragraph 14.

189. The Parties have spent much time debating whether paragraph 14 has the object of assuring a relative accuracy of the calculation and that should be considered in this context, one way or the other. From the submissions of the Parties and also

from the exchange at the Hearing, the Tribunal has the impression that neither factually nor legally can such accuracy be provided by paragraph 14. In any event, the Parties' diverging arguments in this regard have shown that such accuracy cannot be considered as an object and purpose of the provision or part of any common understanding of the Parties. In particular, the Tribunal cannot see how this criteria would be of special relevance to the time factor discussed in this section of the Award.

190. As discussed above at the beginning of this section, general treaty interpretation would speak in favour of all economic effects of a treaty to be applicable from the date of its coming into force, unless otherwise clearly provided. If that is so, the economic effects of the SLA could be considered as its object and purpose which, in turn, would then speak in favour of an interpretation to apply paragraph 14 without a time lag, contrary to the case advanced by Respondent.

d. Subsequent Practice

191. Finally, the Parties debated whether there is any subsequent practice (Art. 31.3(b) VCLT) relevant to the present issue.

192. In so far as Claimant relies on Respondent's communication to the Government of British Columbia dated January 16, 2007 (C-16), the Tribunal has already concluded above that this cannot be considered as relevant subsequent practice because it does not qualify under Art. 31.3(b) VCLT. It was never implemented; and thus it is neither a *practice in the application of the treaty,* nor does it establish *the agreement of the parties regarding its interpretation.* If that conclusion, in the above section, was used in favour of Respondent regarding the application of paragraph 14 of Annex 7D, it must also stand with equal effect in the present section.

193. Further, Claimant referred to the lawsuit between the Canadian Federal Government and a local lumber producer, *Domtar Inc.* (C-20) in which allegedly Respondent first started with an early application of the adjustment and then later

reversed course to an application later in time. Be that as it may, the Tribunal does not have to go into the details of these court proceedings because, again, whatever the conduct by Respondent in this single lawsuit, it cannot possibly meet the above-mentioned requirements of Art. 31.3(b) VCLT as to the high threshold requiring a practice in the application of the treaty or *the agreement of the parties regarding its interpretation.*

194. Therefore, the Tribunal concludes that there is no relevant subsequent practice which could be of assistance in interpreting the timing of paragraph 14 discussed in this section of the Award.

e. Conclusion on the Timing Issue

195. As a result of the above considerations regarding the timing issues, and taking into account the relief sought by Claimant in this respect, the Tribunal concludes that the Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007.

196. The Tribunal also wishes to record that, whilst rejecting Respondent's case, the latter's arguments were manifestly advanced in good faith and, moreover, were not devoid of merit.

H.IV. Considerations regarding Costs

197. According to Art. XIV (see text above in this Award) para. 21 SLA, the Tribunal may not award costs. Paragraph 21 further states that each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel. This decision was confirmed by the Parties in the Hearing on Liability of December 12, 2007 (Tr, p. 122, as recited above).

198. As to this special agreement on costs in Article XIV(21) SLA, there was a potential issue as to its effectiveness by reason of Section 60 of the English Arbitration Act 1996, insofar as this "mandatory provision" applied by reason of Section 2(1) of the 1996 Act and the Parties' agreement on London as the legal place, or "seat", of the arbitration in Article XIV(13). (As earlier indicated, Respondent queried whether the 1996 Act had any application to this agreement and/or arbitration: see Tr, p. 122). This potential issue does not raise a difficulty in the present arbitration proceedings because the Parties expressly confirmed their special agreement after their dispute arose and was referred to arbitration, as recorded (with the Parties' authority) in the written transcript of the hearing on December 12, 2007, within the meaning of the proviso to Section 60 and Section 5(4) of the 1996 Act (Tr, p 122). Accordingly, on any possible view of the application, non-application and interpretation of Section 60 of the 1996 Act, the Parties' special agreement is valid and effective in accordance with its terms.

(The Decisions and Signatures of the Tribunal appear on the following separate page of this Award)

I. Decisions

1. **The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA's case to the contrary is dismissed.**

2. **The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore Canada's case to the contrary as to interpretation is dismissed.**

3. **Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.**

4. **As the Parties agreed at the end of the Hearing in New York on December 12, 2007 (Tr. 123/4), rather than the Tribunal deciding now on the specific consequences of any breach by Canada in accordance with paragraphs 22 *et seq.* of Art. XIV SLA, the Parties are invited to submit, within one month of the date of this Award, comments or (if possible) an agreement on how to proceed in this regard.**

5. **According to paragraph 21 of Art. XIV SLA, the Tribunal does not award costs and each Party shall bear its own costs to date, including costs of legal representation and travel.**

Legal Place of Arbitration: London (United Kingdom)

Date of Award: March 3, 2008

V.V. Veeder QC (Arbitrator)

Prof. Dr. Bernard Hanotiau (Arbitrator)

Prof. Dr. Karl-Heinz Böckstiegel (Chairman of Tribunal)