In The London Court Of International Arbitration

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA

Respondent.

REBUTTAL MEMORIAL OF THE RESPONDENT CANADA

GUILLERMO AGUILAR-ALVAREZ
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
UNITED STATES
Tel: +1.212.310.8981
Fax: +1.212.310.8007
guillermo.aguilar-alvarez@weil.com

MEG KINNEAR
Senior General Counsel & Director General, Trade Law Bureau
Department of Foreign Affairs and International Trade
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
CANADA
Tel: +1.613.943.2803
Fax: +1.613.944.0027
meg.kinnear@international.gc.ca

JOANNE E. OSENDARP
CHARLES E. ROH, JR.
Weil, Gotshal & Manges LLP
1300 Eye Street, NW, Suite 900
Washington, D.C. 20005
UNITED STATES
Tel: +1.202.682.7193 (Osendarp)
Tel: +1.202.682.7100 (Roh)
Fax: +1.202.857.0940
joanne.osendarp@weil.com
chip.roh@weil.com

December 6, 2007

Attorneys for Respondent, Canada

TABLE OF CONTENTS

REBUTTAL MEMORIAL

In accordance with the Tribunal's revised Procedural Order No. 1 dated October 28, 2007, the Government of Canada ("Canada") respectfully submits this Rebuttal Memorial in rebuttal to the Rebuttal Memorial filed on November 28, 2007 by the United States.

INTRODUCTION

1. The United States' claims in this proceeding in two respects are based on a misinterpretation of the requirements of paragraph 14 of Annex 7D. Contrary to the U.S. position:

(a) The adjustment in paragraph 14 does not apply to Option A Regions, for which quotas are never determined under the Agreement; and

(b) Canada was not required to calculate the difference between EUSC and actual U.S. consumption at any time before January 1, 2007, the first full Quarter following entry into force of the Agreement and for which quotas were in effect.

Both U.S. claims in this proceeding accordingly fail.

2. Canada's Statement of Defence demonstrated that the phrase "for which quotas are determined" in paragraph 14 limits the application of the adjustment mechanism under that paragraph to Option B Regions, the only Regions subject to quotas. Canada further demonstrated that U.S. arguments regarding the supposed "accuracy" of the adjustment mechanism and the similarities between Option A and Option B were not valid and could not, in any event, overcome the ordinary meaning of paragraph 14, in the context of the Agreement. Likewise, Canada demonstrated that evidence put forward by the United States did not show subsequent practice by Canada

consistent with the U.S. arguments and could not refute the proper interpretation of paragraph 14.

3. The U.S. Rebuttal Memorial takes two alternative and logically inconsistent approaches in attempting to rebut the proper interpretation of the Agreement. The first U.S. approach follows that of the U.S. Statement of Claim and insists that the phrase "for which quotas are determined" serves exclusively a timing purpose. The second U.S. approach is to argue that the reference to "quotas" should be reinterpreted to apply to Option A as well as Option B, even though the term "quota" is never once used in relation to Option A. Even ignoring the inconsistencies inherent in those two approaches, neither is persuasive, as Canada will show.

4. The second U.S. claim fares no better in the U.S. Rebuttal Memorial than it did in the U.S. Statement of Case. The United States has no textual or other support for its effort to require Canada to make adjustments for hypothetical differences between actual U.S. consumption and EUSC in 2006, for periods before the Agreement was in force and in which quotas were never in effect.

5. Canada's Rebuttal Memorial elaborates on these and other points in response to the U.S. Rebuttal Memorial. The responses follow the order of the U.S. Rebuttal Memorial.

I. PARAGRAPH 14 DOES NOT APPLY TO OPTION A

6. The United States spends considerable time belaboring that there is only one definition of EUSC in the Agreement.[1] Canada agrees and has never argued otherwise. Article XXI (21) provides that EUSC means "the expected level of U.S.

[1] U.S. Rebuttal Memorial ("U.S. Rebuttal') ¶¶ 8-16.

consumption as defined and calculated in accordance with paragraphs 12 through 14 of Annex 7D." This uncontroversial point is not the issue. Rather, it is whether the conditional terms of paragraph 14 of Annex 7D limit its application only to Option B Regions, as Canada contends, or whether paragraph 14 applies to both Option B and Option A, as argued by the United States.

7. An adjustment under paragraph 14 applies "for the following Quarter for which quotas are being determined." As Canada explained in the Statement of Defence, quotas apply only to Option B Regions and never to Option A Regions. If the Parties had wished paragraph 14 to apply to Option A Regions, they could readily have used other terms. Canada also noted that if all Regions chose Option A, as the Agreement would allow, paragraph 14 would never require application of an adjustment. The United States responds that "quota" means export measures under Article VII.[2] But, in fact, the term "quotas" in the Agreement has its ordinary meaning. Quotas are provided for under Option B only, and the adjustment, as a result, is limited to Option B Regions.

8. In its Rebuttal Memorial, the United States takes two different and conflicting approaches in attempting to explain away this limiting language of paragraph 14. The first approach, which is consistent with its Request for Arbitration and Statement of Case, is to assert that the clause "for which quotas are determined" is simply a timing provision, synonymous with saying that the Quarter must be one in which the price of lumber is below $355. The second, which the United States argues for the first time in the Rebuttal Memorial, is to claim that the term "quota" means *export measures under Article VII* and, therefore, applies equally to Option A and to Option B.

[2] U.S. Rebuttal ¶ 23.

This new alternative approach would nullify or make irrelevant all of the effort expended by the United States with respect to its first approach.

9. Canada will show that each of these alternative approaches fails, and that paragraph 14 is limited to Option B Regions.

A. THE TERM "QUOTAS" IN PARAGRAPH 14 MUST BE GIVEN EFFECT

10. Paragraph 14 must be interpreted to give effect to all of its terms, in particular, the limiting term "quotas," which under the Agreement only apply to Option B. At its core, the first U.S. approach to the interpretation of paragraph 14 requires ignoring rather than giving effect to the limiting word "quotas." This is inconsistent with the ordinary meaning of paragraph 14.

11. In a dispute that centers on the interpretation of a treaty provision, it is telling that the greatest weakness in the U.S. argument is the actual text of the disputed paragraph. The United States argues that "Canada persists in maintaining this language [for which quotas are being determined] somehow modifies 'calculation' to limit application of the adjustment in the calculation of Expected U.S. Consumption to only regional quota volumes."[3] In fact, Canada has never based its argument on the grammatical function of the clause "for which quotas are being determined."[4] The question is *not* what the clause modifies as a matter of grammar, but what the word "quotas" signifies when it appears in the Agreement, as in paragraph 14 of Annex 7D.

12. As Canada has previously pointed out, the U.S. emphasis on the grammatical function of the clause is a red herring – it changes the focus from the real

[3] U.S. Rebuttal ¶ 18.

[4] Nor has Canada disputed that timing is a function of this clause.

question to be decided, which is why does the specific word "quotas" appear twice in the provision for the actual consumption adjustment?[5] The answer is that it indicates that the adjustment will apply for the following Quarters for which quotas are being determined. If the term "Export Measures under Article VII" had been used instead, it would have indicated that the adjustment would apply to Export Measures under Article VII (Option A and Option B measures), for the following Quarters for which Export Measures under Article VII are being determined.

13. By using the specific term "quotas" instead of readily available broader alternatives, paragraph 14 dictates that any adjustment will be applied to quotas only. This is not a matter of grammar or a matter of what "[the] subordinate clause refers to."[6] Regardless of what the clause "refers" to, the word "quota" has its own particular significance and its own particular reference. To borrow a phrase used by the United States, the word "quotas" in paragraph 14 (as elsewhere) refers to quotas "and nothing else."[7]

14. Contrary to what the United States would like the Tribunal to believe, Canada's ordinary meaning interpretation of paragraph 14 does not require sentence acrobatics. Canada has made no suggestion to "alter" the text or to "move [a] clause from one portion of the text to another."[8] Canada only asks the Tribunal to read paragraph 14 in its entirety, give effect to all of its terms, and interpret the word "quotas"

[5] Stmt. of Defence ¶ 36.

[6] U.S. Rebuttal ¶ 18.

[7] *Id*.

[8] *Id*.

as a reference to Option B, which is the only Option that uses the word "quotas" in the Agreement.

15. The United States further argues that even if the words "for which quotas are determined" are words of limitation, "it is indisputable that the parties never intended the words at issue to be words of limitation when the words were first drafted" because they first appeared in a quota Annex where it would have been obvious that they applied to quota.[9] This argument highlights the difficulty the United States is having with the plain language of the provision.

16. The words "for which quotas are determined" were contained in original paragraph 14 of then Annex 5A because the adjustment was one that pertained to the calculation of EUSC for Option B Regions.[10] That quota adjustment calculation was contained in a quota Annex entitled "Calculation of Quota Volumes" and indisputably applied only to Option B.

17. What the United States cannot explain is 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,[11] evolved into something other than "quota" when, after the parties had signed the Agreements, the paragraph moved locations in the text, even though the language referring to "quotas" remained intact. The U.S. answer is that since the words served no function in the original Annex they were of no consequence and therefore did not need to be changed when they were

[9] U.S. Rebuttal ¶ 19.

[10] *See* Stmt. of Defence ¶¶ 92-100.

[11] U.S. Rebuttal ¶ 15.

moved to Annex 7D.[12] This, of course, is nonsensical. The word "quotas" indicates that the adjustment will apply only to quotas – Option B – in Quarters for which quotas are being determined. It had that meaning from the time it was introduced in then-Annex 5 by the United States and retained that meaning when the paragraph was moved to Annex 7D. The mere movement of the clause from one Annex to another cannot transform the plain meaning of the language.

18. The United States further argues that Annex 7D is not specific to Option A or Option B and therefore that all of its provisions must apply to Option A and Option B. This U.S. argument simply assumes its own conclusions. Nothing 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.

19. The United States also argues that the negotiating history of the placement of paragraph 14 indicates that the Parties did not intend the adjustment to be limited to Option B, and that the addition of the phrase "for which quotas are being determined" was inserted into the paragraph to "address only the administrability of the adjustment."[13] Neither argument has merit.

20. The negotiating history of what is now paragraph 14 is set out in the Statement of Defence at paragraphs 88 through 101. It shows that paragraph 14 was moved on July 19, 2006 into Annex 7D, where it was joined for the first time with provisions dealing with paragraphs 12 and 13 (which had been in a separate Annex), as part of a large package of changes proposed by the United States in the context of the

[12] U.S. Rebuttal ¶ 19.

[13] U.S. Rebuttal ¶ 16.

"legal scrub" of the text. No notes or explanations accompanied the "scrubbed" text or were exchanged between the Parties regarding the relocation of the paragraph to Annex 7D.

21. The United States argues that this history shows that the negotiators were making the quota-specific paragraph into one of common application by moving it to an Annex that the United States says (but does not demonstrate) is always of common application. There is 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. Rather, there is a logic for this move – it brings together in one Annex all provisions dealing with calculation of EUSC.

22. As previously noted, when the United States moved the provision, it retained in the paragraph the words "for which quotas are determined." Had the Parties "intended" by this move to make paragraph 14 applicable to both Option A and Option B, they would not have retained the Option B specific reference to quotas.

23. Six weeks after the paragraph was moved, Canada added the reference to "quotas" a second time. The United States dismisses this addition as one that "merely . . . enhance[d] the symmetry of the provision."[14] But like the placement argument, this argument does not stand up to scrutiny. The e-mail exchange introduced by the United States as Exhibit C-22 demonstrates a cooperative interchange among U.S. and Canadian officials in which the officials sought a workable formulation for calculating and applying the adjustment. None of the many parties to the exchange of e-mails refers to a "symmetry" purpose in the addition of the phrase a second time. Rather, the most

[14] U.S. Rebuttal ¶ 16, n.2.

telling points in this exchange are: (i) that in multiple drafts using (and moving) the term "for which quotas are determined" never once did the United States question the use of the word "quota" and (ii) that the word "quota" is used in reference to Option B and in contrast to "surge,"[15] belying any notion that those engaged in the exchange were thinking of the surge as a subset of "quotas." Thus, the e-mail exchanges in Exhibit C-22 appear overall to be far more consistent with Canadian positions in this dispute than those of the United States.

B. "QUOTA" DOES NOT MEAN "EXPORT MEASURES UNDER ARTICLE VII"

24. In paragraphs 21 to 25 of its Rebuttal Memorial, the United States introduces a new argument: the United States now contends that the word "quota" has meaning in paragraph 14, but that this meaning embraces Option B and Option A.

25. If the premise of this U.S. argument were true, the argument would be dispositive of the dispute about application to Option A. All the U.S. efforts to date to run around or away from the reference to "quotas" in paragraph 14 would have been totally unnecessary and even oddly contradictory to this new "cure-all" theory of the meaning of the term "quotas." However, as Canada will demonstrate, this redefinition of "quotas" to embrace Option A as well as Option B is without merit.

1. THE SLA 2006

26. The United States starts its argument from the premise that the term "quotas" in paragraph 14 must mean something different from "quota volumes" as used

[15] *See* E-mail from Brice MacGregor to Dennis Seebach (Sept. 6, 2006 at 11:57 pm) (Ex. C-22).

in Annex 7B.[16] Thus, according to the United States, when paragraph 14 calls for an adjustment "for the following Quarter for which quotas are being determined," the word "quotas" should not be interpreted to mean the same thing as "quota volumes." But, 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*.

27. The United States proceeds from this flawed premise to its new legal theory: that the term "quota" also refers to "Trigger Volumes" calculated under the "Surge Mechanism" of Option A. If the premise was questionable, the conclusion is completely without foundation. Critically, there is not a single instance where the Agreement uses the term "quota" in connection with Option A. In fact, not once in its submissions, until this Rebuttal Memorial, did the United States use the word "quota" in connection with the export tax applicable to Option A, and even its Rebuttal Memorial unsurprisingly slips into using the term "quota" in a way plainly limited to Option B.[17] Moreover, if the Parties had intended the term "quota" to encompass both Option B and Option A, as the United States now contends, 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.

[16] U.S. Rebuttal ¶ 23.

[17] *See* U.S. Rebuttal ¶ 35 ("[t]his obligation to compare exists regardless of whether quotas were in effect during the quarter for which Canada is actually performing the comparison") and ¶ 44 ("the SLA's definition of Quarter is not limited to quarters that occur after the SLA entered into force. Nor is the definition of Quarter limited to quarters in which a quota is in effect.").

28. There is no textual support for the U.S. contention that the term "quota" has two different meanings in the Agreement. According to the United States, "quota" means:

(a) quotas (*i.e.*, quotas in the ordinary sense of the word "quotas") when used in Annex 7B; and

(b) "Export Measure under Article VII" when it appears in paragraph 14 of Annex 7D.

29. The term "quota" also appears in Article XVII(6) of the Agreement, which provides: "Transfers of quota allocation between Persons in a particular Region shall not constitute circumvention of the SLA 2006." There is no such thing as a "quota allocation" under Option A, only under Option B; even the United States will admit that much. Thus, the term "quota" in "quota allocation" necessarily has the same meaning as the term "quota" in "quota volume." Likewise, the term "quota" in "quota amount" in Annex 7B also can only apply to quotas under Option B, not to any measures under Option A. In "quota volume," "quota allocation" and "quota amount," the word "quota," the United States concedes, refers to quotas under Option B. Yet somehow when it comes to the word "quota" in paragraph 14, the United States now says for the first time that "quota" has a different meaning. This is in no way credible.

30. The negotiating history of paragraph 14 also belies the U.S. theory about the intended meaning of quotas.[18] The United States does not dispute that paragraph 14 originated in paragraph 7 of Annex 5 of the text agreed upon by the Parties on July 1, 2006. This provision included the term "quotas," indisputably only applicable to Option B

[18] Paragraphs 88-101 of Canada's Stmt. of Defence set out the negotiating history of paragraph 14.

Regions. The United States provides no explanation as to why the meaning of the very same term changed merely by virtue of its migration to paragraph 14 of Annex 7D.

31. The United States has not identified a single instance in which the Agreement or the negotiating history uses the term "quotas" to have a meaning different from its ordinary meaning, and, in particular, there is no instance in which "quota" is used to describe Option A.

2. INTERNATIONAL TRADE

32. Lacking support for its new theory within the text of the Agreement or its negotiating history, the United States argues that international trade parlance may support its new theory. Specifically, the U.S. Rebuttal Memorial states that "[i]n international trade, the term 'quota' can refer to both absolute quantitative limitations and to 'tariff rate quotas,'"[19] and cites a U.S. Customs definition and a reference to a Canadian government website in connection with the SLA 1996 as support for the same proposition.[20] These sources provide no support for the U.S. argument, and in any event could not be used to overturn the proper interpretation derived from the terms of the Agreement. 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.[21]

---

[19] U.S. Rebuttal ¶ 24.

[20] U.S. Rebuttal ¶ 25.

[21] Indeed, the United States shows that it is grasping at straws in relying on these sources. If a web-site description is probative, then the Canadian Department of Foreign Affairs web-site description of the current Agreement should be taken into account. Canada clearly understands Option A to consist of an "export tax" and Option B to consist of a "quota" and an export tax. *See* http://www.dfait-maeci.gc.ca/trade/eicb/notices/ser153-en.asp attached as Exhibit R-16.

33. In reality, international trade parlance does not support the U.S. theory that a reference to quotas or quantitative restrictions automatically includes reference to tariff quotas. Rather, the more common view is that tariff quotas are not subsumed unless specifically mentioned. For example, Article XI of the GATT bans quotas and other non-tariff restrictions of trade, but is not considered to ban tariff quotas.[22] Likewise, Article 4.2 of the Agreement on Agriculture, which bans a long list of non-tariff barriers to trade, does not prohibit tariff quotas, and indeed tariff quotas are a common feature of agriculture regimes.[23] Article XIII of the GATT Agreement (1947)[24] lays down in four paragraphs certain rules applicable to the administration and allocation of quota regimes in international trade. The drafters of Article XIII found it necessary to specifically provide in paragraph 5 of Article XIII:

> The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

34. Clearly, if, as the United States suggests, the definition of "quota" includes "tariff rate quotas," paragraph 5 of Article XIII of the GATT Agreement would not be necessary. This is instructive of the need for express language – which does not exist – to extend the adjustment of paragraph 14 to Option A Regions.

35. Under the circumstances, evidence introduced by the United States in Exhibits C-25 and C-24 does not overcome the absence of express language in the

---

[22] *See* General Agreement on Tariffs and Trade ("GATT"), Article XI (RA-19).

[23] *See* WTO Agreement on Agriculture, Article 4(2) and n.1 (RA-20).

[24] *See* GATT, Article XIII (RA-19).

Agreement extending the adjustment of paragraph 14 of the Agreement to Option A Regions.

36. Article 31 of the Vienna Convention requires investigation of the *ordinary meaning* of a disputed term unless, as set forth in the fourth paragraph, "it is established" that the Parties intended to give the term a "special meaning." The default presumption is thus *ordinary meaning* and the burden is on the United States to prove that the *ordinary meaning* of "quota" should be displaced with a *special meaning*. For the reasons set forth in this section, the United States has failed to meet the burden of its allegation that the Parties intended "quota" to mean "Export Measure under Article VII".

C. THE NEGOTIATING HISTORY CONFIRMS CANADA'S INTERPRETATION OF PARAGRAPH 14

37. In the Statement of Case, the United States argued that "subsequent practice" supported the U.S. interpretation of the Agreement.[25] In the Statement of Defence, Canada demonstrated that the United States failed to show any practice at all by Canada, much less a "subsequent practice in the application of the treaty," the Vienna Convention standard.[26] In Paragraphs 26 to 32 of its Rebuttal Memorial, the United States largely retreats from its claim that its "evidence" shows subsequent practice. It now argues that actions of Canadian officials implementing the Agreement, somehow trump the proper interpretation of the treaty as actually implemented by Canada.[27] In this, the United States again errs.

[25] Stmt. of Case ¶ 50.

[26] Stmt. of Defence ¶ 85.

[27] U.S. Rebuttal ¶¶ 26-32.

38. As Canada stated in the Statement of Defence, the Vienna Convention, for good reason, emphasizes textual interpretation as the dominant canon over supplementary means. The views of a State are not established by internal documents used or exchanged by its officers in the course of negotiations, or by whatever actions might be contemplated. Even actual implementation of a treaty would not necessarily establish its proper interpretation; indeed the United States is here challenging Canada's actual implementation. Likewise, the position of a Government in negotiations is not extrapolated from what the United States has relied on in this dispute.

39. The e-mail communication introduced as Exhibit C-5 does not constitute "negotiating history" or "contemporaneous interpretation" on the issue for which the United States invokes them. Canada respectfully directs the attention of the Tribunal to treatment of this issue in paragraphs 88 to 102 of the Statement of Defence.

40. Exhibit C-22 no more supports the U.S. claim than Exhibit C-5. Once again, the issue discussed in this communication, exchanged in the course of the legal review of the text of the Agreement, is the frequency of the adjustment, not its scope. In the context of this issue and none other, the author (also the author of the e-mail at Exhibit C-5) referred to "quota and surge penalties," but only in passing. That same document then referenced a "carry-forward and back" mechanism that is exclusively a quota concept. Thus, the document from which the United States attempts to read support for its position also contains contrary references that the United States fails to mention.[28] Like Exhibit C-5, Exhibit C-22 provides no support for the U.S. claim that Canada understood that the paragraph 14 adjustment applied to both Options A and B.

[28] U.S. Rebuttal Ex. C-22. Exhibit C-22 and Exhibit C-5 also refer to "quota" and "quota level" in ways that clearly do not embrace Option A within the term "quota."

41. The United States no longer presses its earlier argument that Exhibit C-4 is evidence of Canada's "subsequent practice" under Article 31(3)(b) of the Vienna Convention. However the U.S. now claims that Canada actually *implemented* the Agreement as argued by the U.S. in this arbitration[29] and that "Canada's own conduct after the entry into force of the Agreement is 'further evidence that the United States interpretation is correct.'"[30]

42. Canada explained in its Statement of Defence that:[31]

(a) the internal B.C. memorandum establishes no practice at all by Canada, much less a "subsequent practice *in the application of the treaty*;"

(b) the memorandum describes a position that certain Canadian officials considered, but that Canada never in fact implemented; and

(c) Canada has always and only applied the Agreement in the manner now challenged by the United States in this arbitration.

43. The United States argues that, even if its evidence does not demonstrate subsequent practice, that evidence may still have weight. In this regard, the United States refers to the standards under international law for "representation" or "admission." However, the U.S. shows no "representation" or "admission" by Canada in the matter before this Tribunal.[32] The "representations" at issue in *International Status of South-*

[29] U.S. Rebuttal ¶ 28.

[30] U.S. Rebuttal ¶ 30 (quoting Stmt. of Case ¶ 50).

[31] Stmt. of Defence ¶ 85.

[32] And obviously no "conduct" of Canada "in carrying out the agreement" as discussed by Bowett in the article cited by the U.S. at footnote 5 of its Rebuttal Memorial, U.S. Rebuttal ¶ 31, n.5.

West Africa[33] were directly made by the Union of South Africa at the highest level, including official declarations of its representative (before the Assembly of the League of Nations) and Prime Minister (before a Committee of the U.N. General Assembly), and by letters to the Secretary General of the U.N. That is a far cry from the internal British Columbia memorandum relied upon by the United States. *International Status of South-West Africa*, not only fails to support the United States position on this issue, but in fact, it clearly shows that the evidentiary bar is high, as Canada has shown. The British Columbia internal memorandum does not rise to this level of official representation.

II. CANADA HAS TIMELY APPLIED PARAGRAPH 14 OF ANNEX 7D

44. In the Statement of Defence, Canada demonstrated that the ordinary meaning of paragraph 14 in its context does not support the U.S. claim that Canada should have made an adjustment to EUSC in the first two Quarters of 2007. Canada explained that the language of paragraph 14 is forward-looking and requires a two-step process: (1) a determination of whether there is a discrepancy exceeding 5% in the Quarter, and (2) if there is such a discrepancy, application of an adjustment that is a mirror image of that discrepancy in the following Quarter for which quotas are determined. Canada followed these requirements in calculating the discrepancy and applying the adjustment to the next Quarter for which quotas were determined – the Quarter beginning July 1, 2007. Canada further pointed out the invalidity of the U.S. arguments, including unfounded assertions regarding the purpose of the Agreement, the alleged "accuracy" of the adjustment, and the alleged subsequent practice of Canada.

[33] U.S. Rebuttal ¶ 31, n.6 (C-29).

45. In its Rebuttal Memorial, the United States largely retreats from the arguments in the Statement of Case regarding the object and purpose of the Agreement and the previously supposed "accuracy" of the adjustment. The United States nevertheless insists that the language of paragraph 14 "plainly" requires that Canada make adjustments looking back as if there were an obligation to have calculated the difference between EUSC and actual U.S. consumption in the third and fourth quarters of 2006. The Tribunal will find no such requirement in the language of paragraph 14.

A. THE UNITED STATES HAS FAILED TO OFFER ANY DEMONSTRATION THAT ITS INTERPRETATION IS REQUIRED BY THE ORDINARY MEANING OF PARAGRAPH 14, AND HAS IGNORED THE PLAIN LANGUAGE TO THE CONTRARY

46. The fundamental flaw of the U.S. argument is that paragraph 14 does not say what the United States argues. The United States asserts that:

> Paragraph 14 of Annex 7D plainly states that to calculate Expected U.S. Consumption for the first quarter of 2007, Canada was required to compare actual U.S. consumption to Expected U.S. Consumption for the most recent quarter for which data was available.[34]

Paragraph 14 does not so state, "plainly" or otherwise.

47. Paragraph 14 does *not* say that EUSC must be adjusted with respect to a Quarter if in a previous Quarter, regardless of whether the Agreement was in force at the time, there was a greater than 5% difference between actual U.S. consumption and EUSC. Paragraph 14 says, in relevant part:

> 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

[34] U.S. Rebuttal ¶ 36.

> 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.

48. Even the U.S. Rebuttal, when it is not attempting to persuade the Tribunal to require adjustments in the first Quarter of 2007 based on periods pre-dating Canada's obligations, unsurprisingly describes paragraph 14 as a process that begins with the requirement to determine whether there is a discrepancy between the EUSC and actual U.S. consumption for a Quarter[35] and then, once the comparison of data *for this Quarter* has occurred, any difference greater than 5% is applied to the "*following* Quarter for which quotas are being determined."[36] This two-step structure, beginning with the obligation to determine whether there is a difference between EUSC and actual U.S. consumption, is important in assessing Canada's obligation upon entry into force, and supports the forward-looking nature of the adjustment process.

49. Canada had no obligation to make the calculation set out in the first sentence of paragraph 14 in the third quarter of 2006, because the Agreement was not in force during that quarter. Since EUSC is a construct of the Agreement, there was accordingly no EUSC for that quarter from which actual consumption could differ. The Agreement did enter into force on October 12, 2006 (the fourth quarter of 2006), but paragraph 14 requires calculation of the adjustment on the basis of a Quarter, and the Agreement has no provision for calculating an adjustment based on a partial quarter.

[35] The United States itself insists at paragraphs 17 and 35 of its Rebuttal Memorial that paragraph 14 requires a determination of whether there is a difference between U.S. consumption and Expected U.S. Consumption in a Quarter and whether that difference is large enough to give rise to the subsequent obligation to make an adjustment to EUSC in a future Quarter.

[36] SLA, Annex 7D ¶ 14 (emphasis added).

Canada did make the calculation for the first Quarter of 2007, because that was the first full Quarter under the Agreement and the first Quarter in which quotas were in effect.

50. It is instructive to compare the structure and language of paragraph 12 of Annex 7D with that of paragraph 14. Paragraph 12 provides:

> 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.

51. Paragraph 12 is framed as a "look-back" calculation. The first step under sub-paragraph (a) is to compute for each month the total U.S. consumption in the 12 month period ending three months before the month for which monthly EUSC is being calculated. Paragraph 14, by contrast, is *not* framed as an obligation to examine whether there was a difference between actual U.S. consumption and the EUSC that would have been determined under paragraph 12 for a prior quarter. Rather, paragraph 14 obligates Canada to determine whether there is a difference greater than 5% between actual U.S. consumption and EUSC for that Quarter. If so, the second step is to make a mirror image adjustment in the next Quarter for which quotas are determined.

52. This difference in structure makes no practical difference for Canada's obligations after two full Quarters have passed under the Agreement, but it does with respect to Canada's obligations at the outset of the Agreement. The United States,

therefore, is rewriting paragraph 14 to suit its purpose, when the ordinary meaning of the terms of paragraph 14 supports Canada's position.

B. THE UNITED STATES FAILS TO FIND ANY SUPPORT IN THE CONTEXT AND PURPOSE OF THE AGREEMENT

53. Lacking support in the ordinary meaning of paragraph 14 or in its supposed "accuracy" purpose (discussed below in Section III), the United States reverts to using slogans and attacking positions never argued by Canada. To repeat what Canada has noted before, Canada in no way is claiming a "grace period." Canada agrees that there is data available to compute what EUSC would have been, if the Agreement had been in force, for more than ten years past. Canada agrees as well, as noted, that there are provisions of the Agreement, including paragraph 12 of Annex 7D, that create a current obligation to use pre-Agreement data. However, paragraph 14 is not one of those provisions.

54. Likewise, Canada has never argued that the definition of Quarter is restricted to Quarters under the Agreement. Quarters have begun each January 1, April 1, July 1, and October 1 for as many years as the United States might wish. None of that, however, is relevant. Rather, the issue is when – *i.e.*, for what Quarter – Canada was obligated to begin determining whether there was a difference between actual U.S. consumption and EUSC such that an adjustment would or would not be required for the following Quarter for which quotas were being determined. The first full Quarter of the Agreement, which is also the first Quarter for which quotas were in effect, is the first Quarter for which paragraph 14 requires Canada to determine whether there is a difference between EUSC and actual U.S. consumption.

55. The United States makes no response at all to the point that the very concept of “Expected U.S. Consumption” is prospective. An expectation is by nature anticipatory of an event that is to occur in the future. To "expect," as defined in the Oxford English Dictionary, is to “[r]egard as about or likely to happen; look forward to the occurrence of (an event).”[37] 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.

56. In paragraphs 35 and 44 of the U.S. Rebuttal Memorial, the United States contends that paragraph 14 does not operate to compensate for quotas that were too high or low in relation to consumption, because the paragraph requires calculation of the difference between actual U.S. consumption and EUSC in every Quarter, regardless of whether quotas are in effect during that Quarter, and requires application of the adjustment in the next Quarter for which quotas are determined. However, these U.S. contentions would not create or support an obligation for Canada to calculate an adjustment based on the third or fourth quarters of 2006. Even if the adjustment had to be calculated in Quarters when quotas are not in effect, that would not signify that EUSC or the adjustment had to be determined in or for quarters prior to the entry into force of the Agreement, or for quarters that are incomplete.

57. The U.S. argument implies that Canada should have been making adjustments in the first Quarter of 2007 based not only on the discrepancy in the quarter beginning July 1, 2006, but also for all other Quarters prior to January 1, 2007 in which there was a more than 5% difference between actual U.S. consumption and EUSC. The

[37] The New Shorter Oxford English Dictionary 884 (4th ed. 1993) (R-17).

United States insists that Quarters include all quarters prior to entry into force of the Agreement, and that there is no requirement that either the Agreement or quotas have been in effect for an adjustment to be applicable as soon as there is a Quarter for which quotas are being determined.

58. The U.S. theory would result in adjustments being made without regard to the Agreement being in force, so long as the data exists, for as many prior years in which the amount of adjustments up or down could be calculated. This potentially enormous amount of past "adjustments" would then be cumulated and applied to the EUSC for the first Quarter under the Agreement for which quotas would be calculated. Such a result would be absurd.

C. THE UNITED STATES HAS FAILED TO SHOW ANY RELEVANT CANADIAN "SUBSEQUENT PRACTICE"

59. The United States has also failed to show any relevant Canadian "subsequent practice." In its Statement of Defence, Canada pointed out that the United States' so-called evidence of subsequent practice by Canada in favor of the U.S. position in fact was not "subsequent practice" at all, and certainly not in the sense of the Vienna Convention. In its Rebuttal Memorial, the United States quibbles with Canada's statement that "Canada never made an adjustment in the first two Quarters of 2007."[38] The United States refers to a domestic lawsuit between a Canadian lumber producer and the Government of Canada – *Domtar Inc. v The Attorney General of Canada* – as evidence that "Canada calculated" an adjusted EUSC, because the plaintiff in that lawsuit complained that it was going to be restricted to a share of an adjusted EUSC.[39]

[38] U.S. Rebuttal ¶ 40 (quoting Stmt. of Defence ¶ 116).

[39] *See* U.S. Rebuttal ¶ 40 (Ex. C-20).

60. The original *Domtar* complaint related to the completion of arrangements necessary for the administration of the quota regime under Option B. Canadian officials initially wrote to Domtar indicating that Domtar would receive an adjusted EUSC for January but ultimately determined, consistent with the text of the Agreement, that no adjustment was to be made for January. This decision was timely communicated. The United States itself has acknowledged that no adjustment was made.

61. Canada notes that, even if Canada had implemented an adjusted EUSC and restricted exports on that basis, that would not constitute "subsequent practice" under the Vienna Convention, nor would that be a basis for deciding against Canada when the ordinary meaning of the treaty in its context leads to the conclusion that the position that Canada has implemented is the correct one.

III. THE UNITED STATES CONCEDES THAT ITS CLAIMS OF THE ACCURACY OF THE PARAGRAPH 14 ADJUSTMENT WERE INVALID AND OFFERS NO OTHER PURPOSE FOR THE ADJUSTMENT

A. THE ADJUSTMENT TO EXPECTED U.S. CONSUMPTION DOES NOT IMPROVE ACCURACY

62. In its Statement of Case, the United States used the words "accurate," "accuracy," or "inaccurate" no less than 29 times in asserting that the adjustment in paragraph 14 increased the accuracy of EUSC, and that this goal of accuracy supported the U.S. interpretation of paragraph 14.[40] However, the United States offered no justification for its claim of accuracy other than the effect that the adjustment would have had if applied in the first Quarter of 2007.[41] Canada, in its Statement of Defence, demonstrated that the U.S. assertions of accuracy were unfounded. Canada showed

[40] U.S. Rebuttal ¶¶ 24, 25, 28-29, 31, 38-40, 43-46, 48, 52, 56.

[41] Stmt. of Case ¶ 45 (presenting data for first quarter 2007).

that when monthly data for U.S. consumption are examined from the period January 1998 through August 2007 (the most recent month for which data were available), it is apparent that the adjustment to EUSC does not increase accuracy.[42]

63. In its Rebuttal Memorial, the United States largely retreats from its claims of accuracy, terming the demonstration of inaccuracy "irrelevant"[43] and contending that it never meant that the purpose of the adjustment to EUSC was to improve accuracy.[44] Despite this retreat, the United States still offers a series of arguments: (1) that the "adjustment improves the accuracy of this calculation when there has been a significant and sustained decline or increase in United States consumption";[45] (2) that the Parties would not have agreed to create an adjustment that promotes inaccuracy;[46] and (3) that Canada has not identified the basis for the analysis of inaccuracy.[47]

64. First, the U.S. effort to resurrect the accuracy of the adjustment is deficient in at least two respects. Even in periods of sustained rise or decline, the "accuracy" of the adjustment is erratic and accidental. For example, the United States offers no explanation at all as to why in the second Quarter of 2007, a period still of sustained decline in consumption, application of the adjustment nevertheless would have decreased the accuracy of EUSC. More importantly, the U.S. lumber market is

[42] Stmt. of Defence ¶¶ 77-80.

[43] U.S. Rebuttal ¶ 46.

[44] U.S. Rebuttal ¶¶ 43-44.

[45] U.S. Rebuttal ¶ 45.

[46] *Id.*

[47] *Id*.

volatile, and significant and sustained declines or increases are the exception, rather than the rule.[48]

65. Second, the United States complains that Canada has not explained why the Parties would have agreed to an adjustment that made EUSC less accurate. Canada does not have that burden, since Canada did not propose the adjustment and is not the claimant. Canada notes, however, that the emails submitted by the United States 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.

66. Third, the United States submits that the Tribunal should decline to rely on the information submitted by Canada because Canada did not provide any of the underlying data assumptions or other information supporting its illustrations.[49] It is disingenuous for the United States to claim prejudice in that the presented information was based on readily available data in accordance with the definitions and formulas in the Agreement. As the United States apparently did in its calculation to claim that the paragraph 14 adjustment improved accuracy,[50] Canada calculated U.S. consumption in accordance with the definition of U.S. consumption in Article XXI, paragraph 54.[51] Canada calculated EUSC in accordance with the formula specified in Annex 7D,

[48] Stmt. of Defence ¶¶ 77-80. Examples of periods during which the adjustment decreased the accuracy of EUSC are appended to this brief at Exhibit R-18.

[49] U.S. Rebuttal ¶ 45.

[50] Stmt. of Case ¶ 45, which includes no citations for data sources or methodology for calculations.

[51] Article XXI, paragraph 54 provides that "U.S. Consumption" means, in any period, (1) Canadian softwood lumber exports to the United States, plus (2) U.S. softwood lumber imports from countries other than the United States, plus (3) U.S. shipments of softwood lumber, minus (4) U.S. exports of softwood lumber, as set forth in Annex 7D.

paragraphs 12 and 13, and the adjustment to EUSC in accordance with Annex 7D, paragraph 14. And, apparently as did the United States, Canada relied on the data sources stipulated in Annex 7D, paragraph 8.[52] Unlike the United States, Canada performed these calculations over a sufficiently long period of time to test the U.S. hypothesis that the adjustment improved accuracy. The hypothesis failed the test, and the United States (with access to U.S. consumption data) offers no evidence to the contrary.

B. THE UNITED STATES OFFERS NO PURPOSE FOR APPLYING THE ADJUSTMENT TO OPTION A REGIONS

67. The United States claims its broad interpretation of paragraph 14 is supported by the paragraph's "beneficial purpose," but offers no other purpose, beneficial or otherwise, to replace its discredited accuracy claim.[53] The United States questions what it characterizes as Canada's contention that "paragraph 14 called for an adjustment merely to compensate for quotas that were too high or too low in relation to actual consumption."[54] The United States does not deny that paragraph 14 will require an increase or decrease in EUSC for the subsequent Quarter that will mirror a quota that was set too high or too low in a previous Quarter.

[52] Annex 7D, paragraph 8 provides that data sources for these calculations shall be: (a) Statistics Canada (Canadian softwood lumber exports to the U.S.); (b) U.S. Census Bureau (U.S. softwood lumber imports from countries other than Canada and U.S. softwood lumber exports); and (c) Western Wood Products Association's monthly publication "Lumber Track" (U.S. softwood lumber shipments). Data from these data sources were available for the period January 2005 through August 2007. For the preceding months, U.S. lumber shipments were derived from Western Wood Products Association data for the Western United States, and Southern Forest Products Association for the Southern United States, and U.S. Census Bureau data were relied on for U.S. exports and imports (including those from Canada).

[53] U.S. Rebuttal ¶ 43.

[54] U.S. Rebuttal ¶ 44.

68. Instead, the United States posits that if it had a compensatory purpose, "the paragraph would not call for adjustments to be made if the divergence between expected and actual consumption occurred in a quarter when quotas were not in effect, such as when the U.S. price of lumber is above $355."[55] Under the U.S. reading, when no quotas are in effect, any paragraph 14 adjustments (positive or negative) would carry forward to the next Quarter during which quotas were in effect.

69. The U.S. reading produces arbitrary and absurd results. For example, in accord with the U.S. reading, for an indeterminate number of quarters pre-dating the Agreement, all paragraph 14 adjustments would carry forward to the first Quarter 2007, *i.e.*, the next Quarter for which quotas were in effect. And during the term of the Agreement, any Quarter for which the U.S. reference price was above $355 would carry forward a paragraph 14 adjustment to the next Quarter for which quotas were in effect. In both situations, the quota amounts thus derived would bear no relation to contemporaneous U.S. consumption (*i.e.*, an accuracy purpose) or to quota amounts determined in previous Quarters (*i.e.*, a compensatory purpose). Instead, the amount thus determined would be a function of the vicissitudes of the U.S. lumber market amplified by the inaccuracy of the paragraph 14 adjustment.

70. The United States attributes to Canada the conclusion that the adjustment "makes sense for only Option B."[56] Canada, however, did not draw that conclusion. Rather, Canada observed that the adjustment functions to provide that, if the quota amount is more than 5% higher or lower than would have been the case if EUSC had predicted actual consumption, then a mirror image reduction or increase will

[55] *Id*.

[56] U.S. Rebuttal ¶ 47.

subsequently be applied to the next Quarter's quotas. The United States further mischaracterizes in claiming that Canada agrees that paragraph 14 "serves to update the estimate" of EUSC.[57] That is not correct factually, and it is not Canada's view.

C. WHERE THERE IS NO EXPRESSED OBJECT AND PURPOSE IN AN AGREEMENT THE WORDS OF THE PROVISION MUST BE CONSIDERED

71. The United States retreats significantly from the position advanced in the Statement of Case with respect to the object and purpose of the Agreement. It now acknowledges that there is no object and purpose clause and that Annex 5B does not operate as a purpose clause. It alternatively suggests that the object and purpose "may be gathered from its operative clauses taken as a whole as well as the reasons for which the parties agreed to negotiate a treaty."[58]

72. A review of the provisions of the Agreement indicates what the Parties' respective obligations are. For example, Article I gives the scope and coverage of the Agreement; Article II, the requirements for entry into force; Article III obligates the United States to revoke all antidumping and countervailing duty orders; Article IV obligates the United States to refund the cash deposits associated with those orders; Article V sets out the U.S. obligations not to initiate trade actions respecting lumber; Article VI obligates Canada to apply export measures; and, Article VII sets out what these export measures are. How the export measures operate is set out in the Annexes. 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.

---

[57] *Id*.

[58] U.S. Rebuttal ¶ 50.

73. The subject of this dispute is how these export measures operate, and in particular how the adjustment in paragraph 14 works and what it applies to. Contrary to the U.S. charge that Canada failed to identify alternative objects and purposes of the Agreement in its Statement of Defence, Canada stated that where, as in this instance, the Parties have failed to stipulate a clause setting forth their shared objectives, the Tribunal must necessarily focus on the particular treaty provisions that are in dispute. The words used by the Parties in the specific provision at issue operate as *lex specialis.*[59]

74. Even if a primary purpose of the Agreement was to regulate Canadian lumber exports, as the United States claims in its closing paragraph, there would still be no basis to read the Agreement to be as restrictive as possible of Canadian exports to the United States.

[59] *See* Stmt. of Defence ¶ 68.

AWARD SOUGHT

75. For the reasons set forth above, Canada respectfully reiterates its request for an award that:

(1) Canada has not breached the SLA 2006; and

(2) all claims of the United States must be dismissed.

Respectfully submitted,

MEG KINNEAR
Senior General Counsel & Director
General, Trade Law Bureau
Department of Foreign Affairs and
International Trade
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2
CANADA
Tel: +1.613.943.2803
Fax: +1.613.944.0027
meg.kinnear@international.gc.ca

GUILLERMO AGUILAR-ALVAREZ
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
UNITED STATES
Tel: +1.212.310.8981
Fax: +1.212.310.8007
guillermo.aguilar-alvarez@weil.com
JOANNE E. OSENDARP
CHARLES E. ROH, JR.
Weil, Gotshal & Manges LLP
1300 Eye Street, NW, Suite 900
Washington, D.C. 20005
UNITED STATES
Tel: +1.202.682.7193 (Osendarp)
Tel: +1.202.682.7100 (Roh)
Fax: +1.202.857.0940
joanne.osendarp@weil.com
chip.roh@weil.com

December 6, 2007

Attorneys for Respondent,
Canada

CONFIRMATION OF SERVICE

This Rebuttal Memorial is being submitted together with attachments pursuant to Article 15.3 of the LCIA Rules and the Tribunal's Procedural Order No. 1, and is being simultaneously transmitted by email to the legal representatives of the Claimant. A courtesy copy is also being hand delivered to Patricia McCarthy on December 6, 2007.

Respectfully submitted,

Alejandra Montenegro Almonte