In The London Court Of International Arbitration

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA

Respondent.

REBUTTAL MEMORIAL ON REMEDY OF THE RESPONDENT CANADA

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August 12, 2008

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REBUTTAL MEMORIAL ON REMEDY

In accordance with the Tribunal's Procedural Order No. 2, dated May 2, 2008, the Government of Canada ("Canada") respectfully submits this Rebuttal Memorial on Remedy in response to the Reply Memorial on Remedy ("Reply" or "U.S. Reply") submitted on July 21, 2008 by the United States.

INTRODUCTION

1. The threshold issues in this proceeding after two rounds of Party briefs are: (1) whether Canada, by applying the Expected U.S. Consumption ("EUSC") adjustment properly since July 1, 2007, has "cured the breach" found by this Tribunal in the liability phase of this proceeding; and (2), if not, whether the dispute settlement rules of Article XIV of the SLA 2006 authorize adjustments to Export Measures to compensate for effects of past breaching conduct. Canada has cured the breach within the meaning of the Softwood Lumber Agreement ("SLA" or "Agreement") and no compensatory adjustments can be applied under the SLA in any event for past breaches. The United States disagrees. Applying the principles of the Vienna Convention on the Law of Treaties ("Vienna Convention"), the Tribunal must resolve this dispute. If the Tribunal concludes that Canada is correct, then the issue will be resolved and the U.S. claims for compensatory adjustments must be dismissed. If the Tribunal agrees with the United States, then the Tribunal must determine appropriate adjustments to the Export Measures.

2. In its Statement of Case, the United States argued that Canada would have to apply the adjustments found appropriate by the Tribunal if Canada failed to cure the breach within the 30-day reasonable period of time. The United States acknowledged that Canada claimed to have cured the breach already, but summarily dismissed Canada's position and requested the Tribunal (1) to accord Canada 30 days

as the reasonable period of time to "cure the breach;" and (2) to establish one of four alternative adjustments to the Export Measures as compensation for the effects of Canada's past breach.

3. Canada demonstrated in its Statement of Defence that it had cured the breach in the sense of Article XIV by properly calculating EUSC since July 2007, long before the Tribunal's Award on Liability. Accordingly, there is no need for the Tribunal to set a reasonable period of time to cure a breach that has already been cured. Nor may compensatory adjustments be applied under paragraph 22 of Article XIV, since that paragraph provides for compensatory adjustments only if the breach has not been cured. Canada demonstrated that these outcomes were consistent with the dispute settlement system provided under Article XIV, which is a "prospective-only" system like those of other trade agreements such as the WTO and NAFTA Chapter 20,[1] and like those systems does not provide compensation for the effects of a past breach, the only breach at issue in this proceeding.

4. Canada showed in its Statement of Defence that its interpretation of Article XIV is supported by the ordinary meaning of the terms of Article XIV, in their context and in light of the object and purpose of the SLA's dispute settlement provisions. Canada pointed specifically to several elements of support:

(a) the ordinary meaning of the term "cure the breach," read in its context, is to remove or cease the breaching conduct and does not imply an additional obligation to compensate for consequences of past breaching conduct;

[1] Unless otherwise indicated, all references to NAFTA are to NAFTA Chapter 20.

(b) Canada's interpretation of Article XIV is fully consistent with the text of Article XIV, while the interpretation advocated by the United States requires disregarding or distorting the terms of Article XIV, and reading new terms into the text;

(c) paragraphs 22 to 24 of Article XIV make clear that "cure" and "compensatory adjustments" are not synonymous as the United States asserts; and that the negotiators considered compensatory adjustments allowed under the SLA not as a cure, but as a means to encourage the breaching Party to cure the breach;

(d) when the drafters of the SLA wanted provisions to have retroactive effect, they adopted unambiguous language expressing that intent; in contrast, no intent to require redress for the effects of past conduct can be implied from the text of Article XIV(22);

(e) the structure and operation of Article XIV, including its provision for "a reasonable period of time" to cure the breach, its preference for cure over compensation, and its limitations on the form of compensatory adjustments manifest an intent to provide only prospective remedies;

(f) the SLA dispute settlement system is closely similar to that of the WTO, NAFTA and other state-to-state dispute settlement systems in trade agreements, which the United States agrees do not provide "retroactive" or "retrospective" remedies intended to compensate for past breaches;

(g) the SLA does not allow for the award of monetary damages, the common form of compensation in dispute settlement systems that are intended to compensate for past consequences;

(h) the SLA limits the form that compensation may take to adjustments to Export Measures, which is compatible with Canada's view that Article XIV allows only prospective remedies, but incompatible with the U.S. theory that Article XIV provides retroactive remedies; and

(i) the negotiating history of the SLA confirms that the Parties equated "cure" with "eliminate," which is defined using the same word – "remove" – that dictionaries most frequently use in defining "cure."

5. The U.S. Reply contests Canada's Statement of Defence and purports to justify the U.S. request for compensatory adjustments. As this Rebuttal Memorial will show, the U.S. Reply fails to refute the overwhelming evidence in the language and context of Article XIV demonstrating that Article XIV establishes a prospective-only dispute settlement system modeled after that of the WTO and NAFTA. Curing the breach did not require Canada to compensate for the past effects of the breach addressed before this proceeding, and Article 22(b) does not authorize adjustments to Export Measures to compensate for the consequences of a past breach that Canada has cured. In its Reply, the United States agrees with Canada that the WTO and NAFTA, like other trade agreements between sovereign nations, have prospective-only dispute settlement systems. However, its insistence that the SLA is not such a system fails to address the textual and contextual evidence adduced by Canada.

6. In Part I of this Rebuttal Memorial, Canada responds to the substantive U.S. arguments concerning (1) the Tribunal's authority to decide the question of whether Canada has cured the breach, (2) the language and context of Article XIV(22), (3) the similarity in structure between the dispute settlement systems of the SLA, the WTO and NAFTA, (4) the negotiating history of Article XIV, and (5) the applicability of the ILC

Articles on the Responsibility of States for Internationally Wrongful Acts (the "ILC Articles").

7. In Part II, Canada responds to arguments in the U.S. Reply that the Tribunal need consider only if it disagrees with Canada's position that it already has cured the breach and that no compensatory adjustments are appropriate. As the Tribunal will recall, the U.S. Statement of Case proposed that the Tribunal, under paragraph 22(b) of Article XIV, choose one of four alternative adjustments to Export Measures that Canada would have to apply if Canada failed to cure the breach – all based on the erroneous U.S. assumptions that Canada had not already cured the breach and that the SLA contemplated adjustments to compensate for past breaches of the Agreement. The United States argued that each of its alternatives was supported by the report of its expert, Dr. Neuberger.

8. In response to these proposals, Canada's Statement of Defence made three main points. First, Canada has cured the breach by ceasing the breaching conduct, and no compensatory adjustments for the effects of past breaches are authorized in the prospective-only dispute settlement system of the SLA.

9. Second, even if Canada had not cured the breach and even if compensatory adjustments for the effects of past breaches were authorized under the SLA, no further action would be warranted in this proceeding because Canadian undershipments of lumber to the United States relative to permitted export quotas since July 1, 2007 have more than offset the small degree of overshipments that resulted from the breach in the period of January 1 through June 30, 2007. In this regard, the United States also overstated the amount of overshipments, by failing to account for Canada's right to use the available "carry-forward" and "carry back" of monthly regional quota volumes as provided for in Annex 7B of the SLA.

10. Third, assuming for purposes of argument that the Tribunal moves beyond the first two points above, none of the four U.S. alternative proposals is justified. Each has a different stated objective, but none of the objectives is based in the SLA. In different ways, each would distort the lumber market and restrict Canadian exports in a degree and manner likely or certain to be more harmful than the consequences of the minor breach found by the Tribunal. The report of Professor Kalt and Dr. Reishus showed the likely punitive effect of the U.S. proposals in relation to the breaches they purported to address. The report also showed that, even if the stated objectives of the U.S. proposals were justified under the SLA, and they are not, each proposal was unlikely to meet its own stated objective and would, in fact, result in unaccounted for adverse effects. The divergent objectives and effects of the U.S. proposals underscore the lack of any basis in the SLA for any of the proposals and that none is based on economic principles.

11. Before turning to the substance of the United States' Reply, Canada wishes to dispense with two points the United States raises in its effort to disparage Canada's position that it has already cured the breach. First, the United States asserts in the introduction of its Reply that Canada has "for the first time in these proceedings"[2] proposed its understanding of the term "cure" and accuses Canada of making a "strategic decision to delay proceedings by raising this threshold issue at a very late stage."[3] These assertions are false. In its Response to the Request for Arbitration, Canada noted that the breach had been "cured by the timely application of the

[2] U.S. Reply ¶ 3.

[3] U.S. Reply ¶ 4.

adjustment for Option B regions effective July 1, 2007" and therefore "no [compensatory] adjustments [would] be required or authorized under Article XIV of the Agreement."[4]

12. The United States acknowledges this statement but seeks to undermine its obvious import by noting that Canada made no further mention of this issue during the liability phase of the proceeding.[5] This is true, and Canada's action was appropriate. Having noted its position in the Response to Arbitration, Canada properly reserved further argument for this phase of this proceeding consistent with the approach of the United States, which likewise devoted no arguments in any of its submissions on liability to the issue of remedy.

13. It is important to recall that at the time the Parties agreed to the bifurcation of these proceedings (a proposal suggested by the United States), two challenges were before this Tribunal: Canada's decision not to make an adjustment to "Expected United States Consumption" ("EUSC") for Option B regions, which was limited to the period of time from January 1, 2007 to June 30, 2007, and its decision not to apply the adjustment to Option A regions (which was ongoing). Had the United States succeeded on this latter challenge, which it did not, then this phase of the proceeding would have required the Tribunal, after briefing and argument by the Parties, to determine the reasonable period of time for Canada to cure the breach and the compensatory adjustments to be applied if it did not. As Canada has explained, in its view this is not necessary in this case because the breach found by the Tribunal already has been cured.

[4] Response to Request for Arbitration ¶ 28(f).

[5] U.S. Reply ¶ 4, n.1.

14. Canada reiterated its position to the United States on the meaning of the term "cure" at the beginning of the remedy phase of this proceeding. Indeed, Canada went so far as to tell the United States that this phase was unnecessary because Canada had already cured the breach found in relation to Option B regions.[6] Thus, in both the liability stage and at the outset of the remedy stage of this proceeding, the United States was well aware of Canada's position.

15. Second, the United States continues to assert that the Tribunal has already decided that Canada bears additional responsibility for the consequences of its breach beyond its action in applying the adjustment in Annex 7D since July 1, 2007 and despite any claimed distortion being alleviated by undershipments made by Option B regions in the second half of 2007. As it did in its Statement of Case, the United States relies on a single line in the Tribunal's Award on Liability that Canada is "liable for the consequences" of its breach to argue that the Tribunal has determined that "cure the breach" means more than stopping the breaching practice.[7] The Tribunal is the best judge of the intent of its own words, but it is Canada's understanding that the Tribunal's Award in the liability phase of this proceeding was limited to a finding that Canada had breached the Agreement and that the determination of what consequences are appropriate under the SLA would take place during this phase of the arbitration.

[6] Canada's position was conveyed by telephone and in writing. In a letter dated March 14, 2008 Canada noted "[a]s … stated during our teleconference yesterday, Canada's position remains that Canada has cured the breach identified by the Tribunal. We understand from our conversation that the United States does not agree and wishes to present its case in the second phase of this proceeding." Letter from Guillermo Aguilar Alvarez to Patricia McCarthy (Mar. 14, 2008) (CR-6).

[7] U.S. Reply ¶ 12.

PART I. CANADA HAS CURED THE BREACH AND THE TRIBUNAL CANNOT DETERMINE ANY ADJUSTMENTS TO THE EXPORT MEASURES UNDER THE SLA

A. THE TRIBUNAL HAS AUTHORITY TO DECIDE IN THIS PROCEEDING WHETHER CANADA HAS CURED THE BREACH

16. In an apparent effort to prevent the Tribunal from even addressing Canada's primary defense, the United States insists throughout its Reply that the Tribunal cannot determine at this stage whether Canada has cured the breach by eliminating the breaching conduct.[8] The United States does not contest that Canada has ceased the breaching conduct, but asserts that the Tribunal should ignore this uncontested fact and Canada's contention that Canada has thereby cured the breach. The United States argues that the Tribunal must, without regard to Canada's contentions: (1) identify 30 days as the reasonable period of time within which Canada should cure the breach; and (2) determine the compensatory adjustments to the Export Measures that Canada must apply if it does not cure the breach within the reasonable period of time.

17. The United States appears to assume that the Tribunal will agree with the U.S. contention that there should be adjustments to compensate for past breaching conduct, forcing Canada to apply the compensatory adjustments or have the United States exercise its right under Article XIV(27) of the SLA to impose import measures on Canada at the level of the authorized compensatory adjustments, unless and until Canada obtains a new dispute settlement ruling from the Tribunal on the question whether Canada has already cured the breach.

18. The only basis for the United States' remarkable contention that this Tribunal is without authority to address now whether Canada has cured the breach is its

[8] U.S. Reply ¶¶ 16, 18.

assertion that "[n]othing in Article XIV of the Agreement contemplates that the Tribunal make a determination at this stage as to whether Canada has cured its breach."[9] This is far too myopic a reading of Article XIV. As demonstrated below, the structure of Article XIV and several of its provisions establish that the Tribunal has the authority and even the duty to decide this issue now.

19. First, Article XIV manifests a clear preference that disputes that lead to arbitration and a finding of breach be resolved by the party complained against curing the breach. Every authorization of compensatory adjustments in Article XIV expressly is made conditional on there not having been a cure of the breach, and compensatory adjustments always must give way once there is a cure of the breach.[10] A ban on the Tribunal deciding whether there has been a cure of the breach at this stage of the proceeding cannot plausibly be implied in such a context.

20. Second, paragraph 22 directs the Tribunal, having determined that there has been a breach, to make two determinations: the length of the reasonable period of time to be allowed to cure the breach; and the adjustments to be applied to compensate for the breach if the party complained against has not cured the breach by the expiration of that period of time. Both of these determinations would be unnecessary if, as Canada contends, it already has cured the breach.

21. The explicit requirement in paragraph 22 that the period of time to implement a cure be "reasonable" necessarily requires the Tribunal to assess what type of action the breaching Party must take in order to cure the breach. It is difficult to see

[9] U.S. Reply ¶ 16.

[10] SLA 2006 Art. XIV (22)-(24), (29) (Ex. RR-1).

how the Tribunal could assess what is “reasonable” without determining whether it thought that Canada needed to do more than eliminate the breach.

22. Making a determination under paragraph 22(b), which the United States agrees is required, will in any event require the Tribunal to determine whether that paragraph contemplates adjustments to compensate for the effects of past breaching conduct. Paragraph 22(b) directs the Tribunal to determine the “appropriate” adjustments to export measures that will be applied if Canada fails to cure the breach within the reasonable period of time. Canada’s view is that to be appropriate, the adjustments authorized in paragraph 22 may compensate only for the effects on the ongoing breach in the absence of a cure, while the United States argues that they must compensate both for the ongoing breach and for the effects of past conduct in breach of the SLA.

23. Accordingly, even if the Tribunal took the position that it would not decide whether Canada had cured the breach at this stage, the Tribunal would still have to make the determination under paragraph 22(b) whether the SLA contemplates adjustments to compensate for the only breach that is at issue in this proceeding, the breach that ended as of July 1, 2007. It is difficult to conceive of a basis on which the Tribunal could decide whether any compensatory adjustment is appropriate that would not also effectively indicate whether the Tribunal considered that Canada had cured the breach by ceasing the breaching conduct.

24. Third, there is no issue that pursuant to paragraph 29 of Article XIV the Tribunal is the ultimate arbiter of whether Canada has cured the breach, where there is a disagreement. The U.S. argument is not that the Tribunal should not decide this issue, but rather that the Tribunal should not decide the issue at this stage of the proceeding.

25. Fourth, the issue is ripe for decision. In the current dispute there is nothing hypothetical about Canada's defense, no facts are contested between the Parties, and nothing will change regarding the factual basis for Canada's defense. There is also no reason to expect, absent a decision from the Tribunal, that either Party will change its legal position regarding what constitutes a cure of the breach.

26. The United States thus strains to argue against a decision that the Tribunal has full authority to make and whose deferral in the circumstances would appear to make no practical sense. Parties are not going to engage in further burdensome litigation for no practical purpose. The temporary restriction on Tribunal powers urged by the United States should not be lightly imputed to any agreement. Nor is it justified under the ordinary meaning of the terms of the SLA, read in its context and in light of the object and purpose of the dispute settlement provisions.

27. For all these reasons, the Tribunal should dismiss this U.S. argument and render a decision on the question of whether Canada has cured the breach.

B. THE LANGUAGE AND CONTEXT OF ARTICLE XIV SHOW THAT "CURE" AND "COMPENSATORY ADJUSTMENTS" ARE SEPARATE CONCEPTS THAT APPLY PROSPECTIVELY

28. The U.S. arguments that Canada has not cured the breach and that compensatory adjustments are required for the effects of that past breach depends on a misreading of the ordinary meaning, in their context, of the terms "cure the breach" and "compensate for the breach." Canada, in its Statement of Defence, demonstrated the numerous textual and contextual elements that make plain that both curing the breach and compensating for the breach are prospective only. These individual elements also work together to ensure the smooth and straightforward operation of Article XIV on a prospective basis, strongly supporting Canada's view. In its Reply Memorial, the United States puts forth various arguments in an attempt to refute Canada, and this section

addresses the separate arguments ventured by the United States. In examining each disputed point, however, the cumulative effect of so many contextual elements supporting the same reasonable interpretation of the ordinary meaning of the text should not be lost.

1. The Ordinary Meaning of the Terms of Article XIV in Their Context Show That Neither a Cure of the Breach nor Compensatory Adjustments Requires Redress for Effects of Past Breaches

a. The Ordinary Meaning of "Cure" Does Not Imply Compensation for Past Effects

29. In its Statement of Defence, Canada pointed out that the dictionary definitions of "cure" invoked by the United States do not support the U.S. contention that "cure" of a breach implies compensation for effects that the breach may have caused prior to its removal, just as curing a disease does not imply compensation or redress for effects that the disease may have had (such as lost weight or missed work).[11]

30. The three dictionary definitions proposed by the United States were: "to subdue or remove by remedial means; remedy; remove; heal" or "to remedy, rectify, remove;" and "to remove or rectify."[12] The United States now argues in its Reply that Canada has somehow improperly focused on the "narrowest possible part" of the definition of cure, "to remove."[13] The United States effectively strikes "to remove" from

[11] The United States argues that the appropriate analogy for curing the breach is not to curing a disease, but rather to curing toxic waste dumping, which the United States asserts would mean cleaning up the effects of the toxic dumping. *See* U.S. Reply n.3. The U.S. analogy, however, does not assist the United States. Leaving aside that the term "cure" is not conventionally used in conjunction with toxic dumping, Canada does not agree that "curing" toxic dumping necessarily or even normally would mean curing the *effects* that toxic dumping has had, as opposed to ceasing toxic dumping. The U.S. hypothetical of "curing" the dumping of toxic substances as requiring cleaning up after the toxic dump and compensating for its effects is analogous to its effort to read the term "cure the breach" as if it said "cure the effects of the breach" or "cure the breach and compensate for its past effects".

[12] Stmt. of Case ¶ 31, n.8.

[13] U.S. Reply ¶ 20.

the definition of cure, leaving only to "remedy," "rectify," and "heal." The U.S. argument fails for two reasons. First, it cannot be proper to disregard the one word – "remove" – that is common to all three definitions cited by the United States, and that informs the sense of the other terms used in the definitions. Second, even if the word "remove" is disregarded, none of the remaining words – "remedy," "rectify," and "heal" – inherently implies compensation for the past.

31. The United States attempts to disguise the fact that the ordinary meaning of "cure" does not support its position by reading into the SLA words that are not there. The United States insists that "Canada's setting of proper quotas for later months outside the breach period did not remedy, rectify, or heal the *effects* of its overshipment of millions of board feet of lumber."[14] The SLA, however, does not require that a Party cure "the effects" of a breach, a phrase that arguably might apply to effects from past breaches. Instead, the phrase is "cure the breach," and its ordinary meaning is that removal or cessation of the conduct that breaches is required, without any implication that redress for effects of the breach is also required. This ordinary meaning is confirmed by the language and context of the SLA.

b. "Cure" and "Compensatory Adjustments" Do Not Mean the Same Thing

32. In an effort to find support for the U.S. theory that a cure of the breach should be read to require compensation for past breaches, the United States invokes the last sentence of paragraph 23 to argue that "cure" and "compensatory adjustments" are "equivalent concepts" under the SLA. Specifically, the United States argues that:

[14] U.S. Reply ¶ 21. (emphasis added). By repeatedly referring to millions of board feet of lumber being shipped to the United States as a result of Canada's breach, the United States seeks to convey the sense that the United States was flooded with lumber. This impression is another U.S. fiction. The excess volume shipped during January through June 2007 amounted to a scant 0.5% of U.S. lumber consumption in that period, less than one day's demand spread over 182 days.

> Given that the ordinary meaning of "cure" includes to "remedy," it is particularly instructive that the Agreement, read in its context, defines compensatory measures as measures that "remedy" the breach. That is, to "cure" is to "remedy," and, pursuant to the SLA, compensatory measures also "remedy." SLA, Art. XIV, ¶ 23. Accordingly, compensation and remedy are equivalent concepts under the SLA. It follows then that a cure, which by definition must remedy the breach, includes some form of compensation.[15]

33. The U.S. analysis does not stand up to scrutiny. The United States effectively argues that because cure means remedy and compensatory adjustments means remedy, "cure the breach" must necessarily mean the same thing as (or at least include) "compensatory adjustments." This line of reasoning is a classic syllogistic error. While it is true that *one* of the dictionary definitions of "cure" is "remedy,"[16] it cannot be said that because "remedy" is part of a dictionary definition of "cure," that "to cure" therefore means the same thing as "remedy" under the SLA. The United States focuses on one of the words used to define cure, and ignores the context of Article XIV in which the word appears.

c. The Rest of the Terms and Structure of Article XIV Also Do Not Support the U.S. Position That a Breaching Party Must Compensate Retroactively for Past Breaching Conduct

34. The United States misconstrues paragraphs 22 through 24 to say that if a Party has been found to breach the agreement, it must compensate for *past* effects and future consequences of its breach if it does not stop the breaching conduct, and for any past effects of its breach even if it does stop the breaching conduct, as is the case here. This is not what the drafters provided, nor can the terms they used be forced to fit the U.S. objectives. The terms of paragraphs 22 through 24 reinforce that the negotiators

[15] U.S. Reply ¶ 22.

[16] Stmt. of Case ¶ 31.

did not view compensatory adjustments as equivalent to (or part of) "cure" and did not provide compensation for past breaches.

35. Paragraph 22(b) provides that the Tribunal shall:

> determine appropriate adjustments to the Export Measures to compensate for the breach *if that Party fails to cure* the breach (emphasis added).

Compensatory adjustments come into play *if* and only *if* there is no cure.

36. Paragraph 22(b) makes no sense if, as the United States contends, "cure" and "adjustments … to compensate" are equivalent. If that were the case, the effective reading would be that the Party must apply "adjustments … to compensate" if it has not applied "adjustments … to compensate." This is nonsensical and renders superfluous the entire clause "if that Party fails to cure the breach within the reasonable period of time."

37. This critical "if" clause makes plain that adjustments to Export Measures are conditional upon a Party failing to cure a breach within the reasonable period of time prescribed under paragraph 22(a). The significance of this is passed over by the United States, but cannot be ignored if paragraph 22 is to be given its full effect. The clause makes plain that a Party's obligation to compensate is triggered only in the event of a failure to cure by the end of the reasonable period of time established under paragraph 22(a). Within that period, the breaching Party may cure the breach without compensation or penalty. To read that clause out of the text, as the United States has done, would authorize the imposition of compensatory measures under conditions not contemplated by the Parties. If cure and compensation are equivalent, the final clause of paragraph 22(b) becomes superfluous, contrary to the principle of effectiveness in treaty interpretation.

38. The United States also relies on paragraph 23 to argue that the compensatory adjustments under paragraph 22 must have retroactive effect. The United States argues that:

> The term "breach" as used in paragraph 23 is not limited or qualified in any way to breaches that continue after the expiry of the reasonable cure period. Accordingly, the plain meaning of this term "breach" is that it is the same "breach" to which paragraph 22 refers, that is, the "breach" the Tribunal has found. Therefore, the plain meaning of paragraph 23 is that, when a party has breached, the compensatory measures must remedy the entirety of the breach.[17]

39. The U.S. logic is facile, but unpersuasive in the context. The last sentence of paragraph 23 provides that the adjustment to Export Measures must be in an amount that remedies the breach. That sentence does not provide that remedying the breach must include compensation for past effects of the breach, and the context of the entirety of paragraphs 22 through 24 demonstrates the contrary.

40. Paragraph 24 provides that the adjustments (that must be in an amount to remedy the breach pursuant to paragraph 23) apply from the end of the reasonable period of time "until the Party Complained Against cures the breach." Because the latter date is unknowable, paragraph 24 allows the adjustment to monthly Export Measures to continue indefinitely, until the breaching Party cures the breach, at a date that may be very soon or far away. This structure is logical and harmonious, as in the case of retaliation or compensation in disputes under the WTO or NAFTA, if the adjustment is in an amount equivalent to the effect of the ongoing breach. On the other hand, if the adjustment must be set at a level to compensate also for the effect of past breaches, as the United States argues, then the adjustment will be punitive if it continues at the original level past the point where the compensation for the prior breach has offset that

[17] U.S. Reply ¶ 27.

breach. That punitive result is likely, since the agreement provides that the adjustment to the Export Measures will be set once and will continue until the Party complained against has cured the breach.

41. In short, the U.S. interpretation of paragraph 22 to require compensation for past breaches necessarily would lead to the imposition of arbitrary compensatory adjustments because, without knowing how long they will be applied, the Tribunal will never be able to calibrate them appropriately, as it is required to do. This problem does not arise under the proper interpretation advanced by Canada. If and when the breach is cured, the adjustments cease and there is no potential for the compensatory adjustments to over-compensate for the failure of the breaching party to cure following the expiration of the reasonable period of time.

42. Accordingly, the logical and proper reading of the requirement to set an amount for the monthly adjustment that remedies the breach is to set an amount that is equivalent to the current effect of any ongoing breach. By contrast, the U.S. argument that the adjustments should also compensate in some way for past breaches is not authorized by the terms of the Agreement and results in illogical and punitive effects in the context of Article XIV.

2. The Parties Knew How to Give Provisions Retroactive Effect and Did Not Do so for "Cure the Breach," or "Compensatory Adjustments" Under Paragraph 22

43. As Canada explained in its Statement of Defence, when the drafters of the SLA intended for measures to apply retroactively they did so expressly either through use of the word "retroactive" or by using language that evinces a retroactive application.[18] Canada cited numerous examples of such explicit language, including the

[18] *See* Stmt. of Defence ¶¶ 15-18.

provisions of paragraphs 29 through 32 of Article XIV. The drafters omitted retroactive language from paragraphs 22 through 24, and thus did not provide that either curing the breach or applying compensatory adjustments should redress past actions.

44. Lacking any cogent response to Canada's point, the United States replies with obfuscation and diversion. The United States suggests that the word "retroactive" in paragraph 32 was not intended to distinguish between "prospective" and "retroactive," but only to define at what point the measures should commence.[19] This distinction brings no meaning to the point. Paragraph 32 specifies that if a Tribunal finds that the measures applied by a Party under paragraph 26 or 27 are unjustified, those measures must be rectified retroactive to the date that they were applied. This is stated expressly in paragraph 32, not just by the use of the word "retroactive" in subparagraph 32(a) but with equal clarity in the chapeau of paragraph 32 and in subparagraph 32(b). If the Parties intended for the compensatory adjustments under paragraph 22(b) to compensate for past effects, they would have expressly stated that intent as they did in paragraph 32(b). But that is not the case. Paragraphs 22 through 24 say nothing about curing or compensating for the effects of past breaches.

45. The U.S. likewise fails in its effort to diminish the significance of the multiple other instances Canada identified in the SLA where the Parties explicitly used the term "retroactive" by claiming that "there are other clearly 'retroactive' provisions of the Agreement that also do not use the word 'retroactive.'"[20] Ironically, the only example the United States is able to cite – Article IX of the SLA – is another example where the text of the SLA proves Canada's point that when the drafters wanted the Agreement to have retroactive effect, they provided for that result expressly. Although Article IX does

[19] U.S. Reply ¶ 23.

[20] U.S. Reply ¶ 24.

not use the term “retroactive,” it adopts unambiguous language to define the retroactive reach of its application. Article IX states:

> Under either Option A and Option B, Canada shall *refund* to exporters in a Region in the amounts specified in paragraph 2, Export Charges they *have paid* during any 2 consecutive Quarters if all of the following circumstances have occurred in each such Quarter when compared with the same 2 consecutive Quarters *from the preceding Year*. (emphasis added).

46. The phrase “from the preceding year,” as well as the words “refund” and “have paid,” establishes the retroactive reach of the provision to a past year. To add the term “retroactive” would have been unnecessary and redundant. Therefore, where the Parties wanted a provision to have retroactive effect they used either the word “retroactive” or used language that clearly defined retroactive application. Paragraph 22 contains neither of these elements.

3. Provisions of Article XIV Only Function Logically for a Prospective Remedy System

47. The implausibility of the U.S. interpretation of Article XIV is nowhere more evident than in the inability of the United States to explain why the Parties provided a reasonable period of time to cure if they intended the breaching party to use that period to compensate for the past breach and not just to cease the breaching conduct. In its Statement of Defence, Canada provided two illustrations of the illogic of the U.S. interpretation. First, if the U.S. were correct that the SLA required a cure to compensate for the breach from the time it started, there would be no reason for a cure period at all, since any delay in payment would lead to an increase in the compensation owed, thus making illusory the benefit one reasonably would expect from having a grace period in which to cure. Second, Canada noted that providing compensation within 30 days could lead to the imposition of draconian compensatory adjustments to the Export Measures,

where under the U.S. view, Canada might have to curtail multiple months' worth of overshipments in a single month to provide a "cure."[21]

48. The U.S. Reply offers no credible response to these arguments. First, the United States makes no effort to confront the fundamental contradiction inherent in having a reasonable period of time for cure in the retrospective system it envisions. Its silence on this point is telling. As Canada observed, the concept of a reasonable period of time, which originated in WTO dispute resolution, is designed to encourage prospective compliance with a party's obligations, rather than provide compensation for past breaches, and is perfectly compatible with Canada's interpretation of Article XIV. It makes no sense to include such a concept in a regime requiring a party to compensate for the past consequences of its breach because, as noted above, the cure period merely leads to the payment of additional compensation thereby rendering the cure period a nullity.

49. Second, with respect to Canada's argument that it would have been irrational for the Parties to allow only 30 days for a breaching party to provide compensation for past breaches, given the draconian effects that could result, the United States' response depends on a wholesale redrafting of the text of the SLA. Recognizing the untenable implications of its interpretation that a "cure" must provide compensation within 30 days, the United States now re-writes the text of the Agreement and contends that the SLA's provision for curing the breach within the maximum of 30 days "does not necessarily contemplate a completed cure." According to the United States, the SLA should be read to allow the breaching Party "to propose a plan for a cure, which in turn

[21] Stmt. of Defence ¶¶ 27-28.

allows both Parties to agree upon an acceptable cure, if possible," which could avoid the need to impose compensatory adjustments.[22]

50. There is nothing in the SLA that supports the U.S. invention of a new post-liability consultations process whose asserted goal is a mutually agreed upon installment "plan" to achieve a cure. Paragraph 22 does not grant a reasonable period of time to *propose* a cure, nor to *attempt to agree on a plan* for a cure. It provides quite clearly that the tribunal shall "identify a reasonable period of time for that Party *to cure* the breach," and determine the appropriate compensatory adjustments to be imposed "if that Party fails *to cure* the breach within the reasonable period of time." (emphasis added). The text makes clear that there are two outcomes at the expiration of the reasonable period of time: the breaching party either will have cured its breach or failed to do so.

51. This is confirmed in Paragraphs 26 and 27, which allow a non-breaching party to impose compensatory adjustments if it considers that the breaching party has "*failed to cure* a breach by the end of the reasonable period of time." (emphasis added). That the United States felt compelled to redraft Paragraph 22 by replacing the actual purpose of the 30 day reasonable period of time – to cure the breach – with a far more benign goal – attempting to agree on a "plan for a cure" – betrays its discomfort with the harsh consequences that would flow if "cure" is interpreted as it proposes; to include compensation for past effects. But, Article XIV must be interpreted as drafted, and the Parties' decision to include a maximum 30-day period in which to cure a breach can only be reconciled with Canada's interpretation that Article XIV establishes a prospective-only remedy regime in which "cure" means to remove or cease the breaching conduct.

[22] U.S. Reply ¶ 17.

52. The decision of the negotiators to allow only adjustments to trade measures as a means to compensate for a breach also strongly supports the view that the SLA does not provide for compensation for the effects of past breaches.[23] In circumstances where redress for past conduct in violation of an obligation is intended, monetary damages are the normal mode of compensation.[24] The SLA does not provide for monetary damages.

C. THE UNITED STATES CANNOT REFUTE THAT THE SLA DISPUTE SETTLEMENT SYSTEM IS DERIVED FROM THE PROSPECTIVE-ONLY SYSTEMS OF THE WTO AND NAFTA

53. As discussed, Article 31(3) of the Vienna Convention provides that "any relevant rules of international law applicable to the relations between parties" shall be taken into account when a treaty is interpreted. International agreements can provide such relevant rules. The SLA is a trade agreement between Canada and the United States. Other trade agreements between the two countries such as the WTO and NAFTA are relevant rules of international law applicable to the trade relations between Canada and the U.S. and under VCLT Article 31(1) must be taken into account when interpreting provisions of the SLA.[25] The SLA contains rules and structures similar to the prospective remedy systems of the WTO and NAFTA, particularly with respect to the according of a reasonable period of time to cure a breach, the provision that compensatory measures will not apply if the breach is cured, and perhaps most

[23] Stmt. of Defence ¶ 25.

[24] *See, e.g.*, North American Free Trade Agreement, Investment, Services and Related Matters, Art. 1135(1), Dec. 17, 1992, 32 I.L.M. 639 (1993) ("Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.") (RRA-15).

[25] *See* Stmt. of Defence ¶ 31, n.16.

importantly, the limitation of compensatory measures to adjustments to trade measures rather than monetary damages.

54. In its Reply, the United States agrees with Canada that the WTO and NAFTA are prospective-only dispute settlement systems.[26] The United States also emphatically denies that it considers that prospective-only systems are particularly open to abuse.[27] It is thus common ground that NAFTA and WTO are prospective systems, and further that both governments support those systems.

55. The United States nevertheless denies that Article XIV is such a prospective-only system, based on what appear to be two main contentions. First, the United States argues that Article XIV(2), which requires that any litigation or dispute settlement proceedings relating to a matter arising under the SLA be conducted exclusively under SLA Article XIV constitutes a rejection or disavowal of the dispute settlement principles that apply under the WTO and NAFTA.[28] Second, the United States argues that the use of different terminology in the SLA, the WTO and the NAFTA means that the drafters did not intend the same prospective-only system to apply to the SLA as admittedly applies to the WTO and NAFTA.[29] Neither of these contentions is correct.

56. With respect to the first argument, an examination of Article XIV(2) is sufficient to demonstrate that it is by no means a rejection of any model for dispute settlement, let alone a rejection, divorce or disavowal of the prospective-only model of

[26] U.S. Reply ¶ 36, n.6.

[27] *Id*.

[28] U.S. Reply ¶ 28.

[29] U.S. Reply ¶¶ 29-32.

dispute settlement in the WTO and NAFTA. Article XIV(2) provides in relevant part as follows:

> 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.

57. Plainly, Article XIV(2) manifests the Parties' agreement that matters arising under the SLA 2006 must not be litigated in any other dispute settlement forum, including the WTO, NAFTA, national courts or other venues, but in no way does Article XIV(2) imply a rejection of these models in a substantive sense.[30] Article XIV(2) says nothing about what model of dispute settlement is intended to apply under Article XIV; it simply reflects the Parties' agreement that disputes under the SLA should be arbitrated exclusively under the dispute settlement process provided under the Agreement and bars the Parties from using forums other than the SLA for matters arising under the SLA.

58. The second U.S. argument – that differences in terminology imply differences in the structure of dispute settlement under these agreements, and in particular differences with respect to the retroactivity of the remedies provided from the WTO and NAFTA – is also unpersuasive. According to the United States, choosing different terminology than that used in the WTO or NAFTA, such as using the term "cure the breach" to express the concept of ceasing the violation of obligations, as opposed to the different terms that are used to express this concept in the WTO and the NAFTA,[31] indicates that the negotiators of the SLA meant something different than was meant by

[30] The specific reference to NAFTA embraces all dispute settlement under NAFTA, including Chapter 11, which the Parties agree does afford retroactive remedies. Thus, Article XIV(2) rejects or divorces the SLA from so-called retroactive dispute settlement systems as well.

[31] U.S. Reply ¶¶ 28-34.

the drafters of the WTO and NAFTA under these agreements. This argument ignores the fact that NAFTA does not use identical terminology to that of the DSU of the WTO, and that even within the same WTO system, different terms are used in different WTO agreements for the same concept of ceasing the violation of obligations.[32]

59. The United States further asserts that "unlike the specialized dispute resolution provisions of the WTO and NAFTA, … the SLA contains absolutely no reference to, much less a distinction between, 'prospective' and 'retrospective' remedies."[33] This statement is flatly wrong. Neither the WTO nor the NAFTA use the terms "retroactive" or "prospective," nor do they describe themselves as "prospective only."[34] In fact, Article XIV in this respect makes it clearer than the WTO or NAFTA that it is a prospective-only agreement, because of the contrast between the explicitly retroactive remedies provided in paragraph 32 and the absence of such retroactivity in paragraphs 22 through 24 of Article XIV.

60. Even without the use of such terms in the WTO and NAFTA, those dispute settlement systems are properly interpreted to be prospective-only, precisely because their structure and rules function harmoniously as a prospective-only system and are ill-suited to function as a retrospective damages system.

61. Just as important as the similarities between the dispute settlement system of the SLA and those of the WTO and NAFTA, are the differences between the

[32] *See* Stmt. of Defence ¶ 38, nn.26-29; ¶ 39, nn.30-31.

[33] U.S. Reply ¶ 6.

[34] Even article 3.7 of the DSU, which is conventionally referred to, including by the Commentary to the ILC Articles (*see* infra ¶ 85), as meaning that the DSU is a prospective system, does not use the terms retrospective or prospective, and unlike the SLA 2006, is not even written in a way that, by itself, would preclude retrospective relief.

SLA's system and the dispute settlement systems of agreements that have retroactive dispute settlement systems.

62. The limitation on remedies is an important manifestation that Article XIV does not contemplate compensation for past breaches. The common remedy of investment arbitrations and commercial arbitrations is monetary damages.[35] That remedy is excluded from the SLA for reasons that the United States cannot explain. The United States notes that the term "breach" is sometimes used in international investment arbitration and commercial arbitration, but "breach" is a common term in many contexts.[36] What the United States sidesteps is that it cannot cite a single example where the term "cure the breach" is used in other international dispute settlement systems.

63. The United States' argument with respect to the import of the Parties' "explicit" choice of LCIA and IBA Rules of Evidence rather than WTO or NAFTA rules similarly misses the mark.[37] The LCIA Rules apply with respect to the conduct of this arbitration, as modified by the SLA or as the Parties may agree. The IBA Rules apply with respect to the presentation of evidence. Choice of these rules by the Parties to conduct arbitrations under the Agreement does not indicate a rejection by the Parties of the WTO DSU and NAFTA structures. Indeed, the United States points to no LCIA or IBA rule that provides for retroactive relief as a condition of the use of those procedural rules.

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[35] *See* supra n.24 (North American Free Trade Agreement, Investment, Services and Related Matters, Art. 1135(1), Dec. 17, 1992, 32 I.L.M. 639 (1993)) (RRA-15).

[36] *See* infra ¶¶ 88-91.

[37] U.S. Reply ¶ 28.

64. In its Statement of Defence, Canada noted other elements of similarity between the SLA and international dispute settlement systems understood to be prospective only. In response, the United States ridicules each element as not dispositive. For example, the United States says that "Canada insists upon placing the SLA within the WTO/NAFTA framework simply because the SLA concerns trade matters between two states."[38] It describes Canada as going to "great lengths to establish that within international law there is a strict taxonomy of 'retroactive' and 'prospective' systems and to show that a particular agreement's placement within this taxonomy depends exclusively on whether it contains certain features (including state-to-state disputes settlement, pre-arbitration consultations, and limitations on remedies)."[39]

65. These, again, are a gross mischaracterization and oversimplification of Canada's argument. Canada argued that a review of the similarities in each stage of the dispute settlement processes under the SLA, the WTO DSU and NAFTA, contrasted with the provisions common in private commercial contracts or investment treaties, leads to the conclusion that the dispute settlement system of the SLA much more closely resembles the WTO/NAFTA prospective system than the retrospective systems of customary international law, private commercial law or investment treaties. If the Parties had intended to create a dispute settlement system that was consistent with public international law or private commercial law they would have included provisions that more closely resembled retrospective systems of private commercial law or investment treaties. The Parties did not do so here.

66. In paragraph 37 of its Reply, the United States cites two state-to-state disputes for the proposition that breaches of treaties may involve retrospective claims for

[38] U.S. Reply ¶ 35.

[39] *Id*.

damages.[40] Canada's position is not that a state-to-state dispute can never involve retrospective relief. Rather, Canada more specifically argues that state-to-state disputes under international trade treaties, such as the WTO, do not lead to the imposition of retrospective relief, and the United States has offered nothing to the contrary. The state-to-state disputes on which the United States relies instead illustrate Canada's point that if the Parties wanted to lay out a retrospective dispute resolution system that provided "damages" to "compensate" for the consequences of a breach, Article XIV would have looked markedly different.

67. With respect to the ICJ decision in *The Gabčíkovo-Nagymaros Project* arbitration between Hungary and Slovakia, the treaty at issue in this case contained provisions explicitly establishing that Parties are to "compensate" and "pay" for damages.[41] The language of these provisions shows that the damages model in the treaty that underlies the *Gabčíkovo-Nagymaros* decision, unlike Article XIV of the SLA, was based on the retrospective model of customary international law. In addition, this case does not stand for the proposition that the ILC Articles should always apply as the application of customary international law was not disputed.

68. Second, the United States cites a claim made by Canada against the Soviet Union arising out of the Convention on International Liability for Damage Caused by Space Objects (the "Convention") for the proposition that state-to-state disputes can

[40] U.S. Reply ¶ 37.

[41] *See* Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks and Hungarian Termination of Treaty, Czechoslovakia-Hungary, Sept. 16, 1977, 32 I.L.M. 1247 (1993) (Article 25(2) provides that where the Parties are jointly liable, they must "jointly and in equal measure: (a) Make compensation for damage resulting from acts giving rise to their joint liability and pay the costs arising from such compensation; (b) Compensate a third party for damage suffered by him as the result of acts giving rise to their joint liability." Article 26(2) addresses the exclusive liability of the Parties also refers to "[m]ak[ing] compensation for damage" and "pay[ing] the costs arising from such compensation.") (RRA-16).

give rise to compensatory damages.[42] The fact that Canada claimed compensatory damages in that case is not surprising given that, unlike the SLA, the Convention explicitly provides for compensatory damages. Article II of the Convention, under which Canada claimed damages, states as follows: "A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight." Similar language referring to "compensation" and obligations to "pay" is used in Articles III through XIII and Article XVIII. Specific provision was made therefore for compensatory damages. No such language was included in paragraph 22 of Article XIV and therefore discussion of the Convention does not aid the Tribunal in this case.

69. Both of these cases illustrate a fundamental point. Had the SLA drafters intended to create a regime that included a retrospective dispute settlement system that provided "damages" to "compensate" for the consequences of the breach, as found for the most part in customary international law and private commercial law, they could have so provided, as the Parties did in the treaties at issue in the arbitrations cited by the United States. Neither treaty incorporates a concept of "cure." Each of the treaties at issue in the two cases contain unambiguous language holding the Parties liable for "damages" flowing from their conduct, and the obligation for the breaching Party to "compensate" for those damages in such a way as to make the complaining Party whole. The SLA contains no such language. Rather, its dispute settlement provisions more closely resemble those of the WTO DSU and NAFTA prospective models.

70. Finally, the United States argues that the similarities between the dispute settlement systems of the SLA, the WTO and NAFTA are not significant because the overall purposes of the SLA and that of the WTO and NAFTA are different. The United

[42] U.S. Reply ¶ 37.

States characterizes the intent of the WTO and NAFTA as "to liberalize international trade in general" and of the SLA as to "compromise specific litigation and regulate trade in one specific sector."[43] Canada does not agree with the U.S. characterization of the Agreement, nor does that characterization, in any event, suggest that the similarities of the dispute settlement systems should be disregarded. An important aspect of the SLA was its provision calling for a working group to remove restrictions on lumber trade. The WTO and NAFTA, while trade liberalizing agreements, nevertheless have elements of permitted restrictions. Thus, it is inaccurate to imply that there is no market access or trade-liberalizing intention in the SLA and that there are no exceptions to the trade liberalizing aspects of the WTO and the NAFTA.

D. THE NEGOTIATING HISTORY CONFIRMS CANADA'S INTERPRETATION OF ARTICLE XIV

71. The United States attempts to dismiss its use of the phrase "eliminate the breach" in its first tabled texts of the Agreement by arguing that the Parties ultimately chose to replace all instances of the term "eliminate" with the term "cure."[44] The United States further argues that Canada was aware that the U.S. understood "cure" to be retroactive in application based on a response given by the United States to a panel's question in a 1998 arbitration under the SLA 1996.[45] Neither of the U.S. arguments has merit.

72. As Canada explained in its Statement of Defence, the term "eliminate" was introduced by the United States in the first text which it tabled in May of 2006.[46]

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[43] U.S. Reply ¶ 34.

[44] U.S. Reply ¶ 48.

[45] U.S. Reply ¶ 47.

[46] Stmt. of Defence ¶¶ 44-46.

That text provided that "[i]f in its award the tribunal finds that a Party has breached an obligation under this Agreement, *the tribunal shall make a separate finding of compensatory measures the complaining Party may take until the breach is eliminated.*"[47] As used by the United States in this context, it is not surprising that Canada understood that the United States intended that the term "eliminate" have its ordinary meaning – to "remove." No explanatory notes or communications from the United States indicated otherwise.

73. Canada's first text and all texts that it tabled during the same period used the term "cure," which Canada had borrowed from the SLA 1996. There is no evidence that either Party considered that the term had a different meaning from the U.S. "eliminate the breach," or than its ordinary meaning – remove. Canada's text provided that "If [in its award] the tribunal finds that a Party has breached an obligation under this Agreement the tribunal shall … determine appropriate adjustments to the Canadian export measures to compensate for the breach if that Party fails to cure the breach within the reasonable period of time."[48] Canada's text also provided that "[s]uch adjustments may be imposed from the end of the reasonable period of time until the breach is cured."[49] The U.S. and Canadian texts, therefore, contemplated the same process: in the event that the Tribunal found a breach, the Tribunal was to issue a separate finding of compensatory adjustments to be applied in the event that the Party failed to remove the breach, until the breach was removed.

74. Both versions of the text were included in the merged texts until June 12, 2006, when the Parties agreed to adopt Canada's version. This conformance of the

[47] SLA U.S. Text Draft (May 24, 2006) (emphasis added) (Ex. RR-11).

[48] SLA Canada Text Draft (June 26, 2006) (emphasis added) (Ex. RR-21).

[49] *Id*.

texts did not represent a structural change in the process proposed by both Parties. The process remained the same. All that changed was the substitution of the phrase "until the breach is cured" for "until the breach is eliminated." Until July 17, the Parties continued to use "eliminated" when describing the grounds on which a Party could request a remedial measures review – "If after the expiry of the reasonable period of time, the Party complained against considers that … (c) *the breach has been eliminated*, in whole or in part, such that the compensatory adjustments or measures should be modified or terminated … the Party complained against may commence a new arbitration …"[50] On that date, they replaced the word "eliminated" with "cured" as follows: "If after the expiry of the reasonable period of time (c) the Party complained against considers that i*t has cured the breach*, in whole or in part, such that the compensatory adjustments or measures should be modified or terminated."[51]

75. There is nothing in the texts, or in any communications accompanying the texts, that indicates that the Parties decided to replace the term "eliminate" with "cure" because they agreed that the remedy for a breach under the Agreement should be retrospective in application, or that "cure" of a breach included retroactive relief. There is also no indication whatsoever from any of the negotiating texts exchanged during this period that the adoption of the substitution of the word "cure" for "eliminate" was done because of any perceived difference in meaning of the two words or for a reason other than to make the language in Article XIV consistent throughout. Further, no changes were made to the structure of the mechanism, which should have occurred if the Parties believed that they were moving from a prospective system to a retrospective system by agreeing to use the term "cure" rather than "eliminate."

[50] SLA Merged Text Draft (June 27, 2006) (emphasis added) (Ex. RR-24).

[51] SLA Revised Scrub with U.S. (July 17, 2006) (emphasis added) (Ex. RR-22).

76. The United States rests its claim that Canada "understood" that the United States considered the phrase "cure the breach" to entail reparations for past harms entirely on two comments the United States made in response to a question posed by an arbitral panel in a 1998 dispute under the SLA 1996. In none of the memorials filed in any of the three arbitrations that arose out of the SLA 1996 did the United States set out its "understanding" of "cure." The only references to the term at any point in those proceedings (including in post-hearing briefs and answers provided to panels' questions) were those two quoted by the United States – one tangential comment contained in an answer which the United States provided in response to a panel question regarding the alleged value of the offset of export fees and a subsequent comment made with respect to a Canadian answer on the value of the stumpage reduction. As the United States notes, none of the panels in these proceedings rendered a decision or interpretation of the term "cure." Further, Canada never set out its views on the question of cure. In its reply to the responses given by the United States to the panel's questions Canada indicated that the answers provided by Canada and the replies to the U.S. responses were directed solely toward the question of breach and did not address the issue of cure (since that issue was not before the panel).[52]

77. There is strong indirect evidence in a later arbitration under the 1996 SLA, however, that despite those self-serving comments in the 1998 arbitration, neither Party understood the concept of cure to include any right to compensation for past breaches. While the United States is correct in saying that no panel under the SLA 1996 issued a decision on cure, the last arbitration under the SLA 1996, the only one that resulted in an award (two were settled including the 1998 case in which the U.S. made its comments), the Parties and the Panel acted in a manner demonstrating that they did

[52] *In the Matter of British Columbia's June 1, 1998 Stumpage Reduction*, Canada's Reply to the U.S. Response to the Panel Questions dated May 12, 1999 (June 14, 1999) (Ex. RR-28).

not consider that a cure would involve redress for past breaching conduct or anything more than prospective compliance under the treaty. In that arbitration Canada had challenged the reclassifications of certain products by the United States that caused those products to be subject to the quantitative restrictions under that agreement, without expanding the size of the tariff quotas involved. In its award, the Panel found that this reclassification constituted a breach of the SLA 1996. It also noted the following:

> 5.3 Since the Softwood Lumber Agreement is due to expire soon, the Parties did not include in the Panel's terms of reference an obligation under Article V(14) to set a reasonable period of time for curing any breach of the Agreement. Accordingly, the Panel makes no finding on that issue.

78. This award reveals that the Panel and the Parties understood cure to consist of prospective compliance with the Parties' treaty obligations. Had the Parties or the panel considered that a cure included compensation for the past consequences of a breach, Canada would have been entitled to such compensation for the extended period of breaching conduct by the United States. As this Tribunal is well aware, even if a bilateral investment treaty were to expire, the Parties would still seek, and the Tribunal would render, a decision on the amount of compensation due to the non-breaching Party. However, as the meaning of "cure" under the SLA 1996, like its meaning under the SLA 2006, was limited to prospective compliance, no determination of a reasonable period of time to cure was necessary in light of the treaty's imminent expiration.

79. Finally, the United States refers to a footnote contained in the set of comments filed in the 1999 stumpage arbitration to suggest that U.S. domestic contract law supports the U.S. demand for compensation for past breaches. This argument does not withstand scrutiny. First, U.S. contract law has no probative weight under the Vienna Convention, since the SLA is not a contract and is not governed by U.S. law. Second, even if U.S. law had any relevance, cure has no consistent meaning, but rather depends

on the context and what is being cured. Third, the case that the United States cites as proving its view of U.S. contract law – *In the Matter of Clark*[53] – is not a contract case, but rather involved interpretation of a specific provision of U.S. bankruptcy statutes that used the term "cure" not in isolation but rather "as the term relates to defaults" as used in the bankruptcy statute. Within this narrow context, where the thing being cured is a default, or a failure to pay money owed, the term "cure the default" necessarily entails the restoration of matters to the status quo ante through the actual payment of this money. This current dispute is not under U.S. law, and does not involve default on payments, but rather a failure to comply with rules of an international agreement for assessing export adjustments. Hence, neither U.S. contract or bankruptcy law is applicable and the situations are not analogous.

E. THE ILC ARTICLES ARE NOT APPLICABLE TO THE DETERMINATION OF REMEDY UNDER THE SLA

80. Article XIV of the SLA sets out a dispute settlement mechanism described and analyzed in Part I of Canada's Statement of Defence and in Part I of this Memorial. The provisions of this mechanism specifically address remedy in a way that demonstrates the intent of the Parties to adopt the NAFTA-WTO trade model and their rejection of a retrospective damages-based model. In particular, Article XIV:

(a) does not provide for participation in the proceedings of U.S. producers;

(b) limits the form of compensation that may be awarded to adjustments to the Export Measures;[54]

(c) *does not* provide for the payment of damages to the U.S.;

(d) *does not* provide for the payment of damages to U.S. producers;

[53] *In the Matter of Hugh R. Clark*, 738 F.2d 869 (7th Cir. 1984) (RRA-17).

[54] SLA 2006 Art. XIV(22)(b) and XIV (23).

(e) provides the breaching party "a reasonable period of time" to cure the breach;

(f) provides that arbitrators may only determine appropriate adjustments to the Export Measures if the breaching party fails to cure the breach within a reasonable period of time;[55]

(g) only allows for the application of adjustments "from the end of the reasonable period of time until the Party Complained Against cures the breach;"[56] and

(h) mandates that "[a]n award may be enforced solely as provided in [Article XIV]."[57]

81. Notably, the United States "agree[s] that the SLA provides a comprehensive remedy scheme."[58] However, rather than following the ordinary meaning of the text of Article XIV in the context of the SLA, a trade agreement, the United States attempts to force application of the ILC Articles. The U.S. position ignores the principle function of the ILC Articles, which is to serve as "residual law," or to fill in gaps left open by special rules of international law:

> These [ILC] articles *do not apply* where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State *are governed by special rules of international law*.[59]

82. As explained in Commentary (1) to ILC Article 55, "[w]hen defining the primary obligations that apply between them, States often make *special provision for the legal consequences of breaches* of those obligations, and even for determining whether

[55] SLA 2006 Art. XIV(22)(b).

[56] SLA 2006 Art. XIV(24).

[57] SLA 2006 Art. XIV(20).

[58] U.S. Reply ¶ 41.

[59] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary 306 (Cambridge University Press 2002) (emphasis added) (Ex. RR-26).

there has been such a breach."[60] The principle of *lex specialis derogat legi generali* ensures that the special provisions agreed to by States remain controlling over more general provisions of international law. Here, where the Parties to the SLA agreed on special rules governing the consequences of a breach that differ from those provided for in the ILC Articles, the ILC Articles do not apply because they conflict with the *lex specialis*.[61]

83. The arguments offered by the United States do not contradict this straightforward analysis. First, the United States misinterprets the reference to terms *lex specialis* and *lex generalis* made by the Tribunal in *ADF v. United States*.[62] That case does not stand for the loose proposition that any provision considered to be *lex generalis* applies where a *lex specialis* provision exists. The discussion in *ADF* relates to interpreting a treaty's object and purpose and the role of NAFTA's general objectives (characterized by the Tribunal as the *lex generalis* of that Treaty) versus the detailed text contained in specific provisions.[63] In the end, the ADF Tribunal properly concludes that *lex generalis* cannot override or supersede *lex specialis*.

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[60] *Id*. (emphasis added). Commentary (1) further explains: "The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded."

[61] The United States argues that "Canada's resort to *lex specialis*, if accepted, would eviscerate completely Canada's arguments relying upon the WTO DSU and NAFTA Chapter 20." *See* U.S. Reply ¶ 41 n.10. This argument does not make sense. Canada is not drawing parallels between these texts on the basis of *lex specialis*, but rather on the basis of Article 31(1) of the Vienna Convention. *See* Stmt. of Defence ¶ 31.

[62] *See* U.S. Reply ¶ 42.

[63] A more lengthy quotation of ¶ 147 of *ADF* than cited by the United States in ¶ 42 of its Reply Memorial elucidates the Tribunal's real point:

> The object and purpose of the [P]arties 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. This is in line with Article 102(1) which states that *NAFTA's objectives are "elaborated more specifically through its* principles and *rules*" such as "national treatment, most-favored-nation treatment

84. Second, the United States misuses Commentary (4) to ILC Article 55, which states that for the *lex specialis* principle to apply, *i.e.*, for a specific provision to override a general provision, "there must be some actual inconsistency between [the specific and general provisions], or else a discernible intention that one provision is to exclude the other."[64] The United States uses this Commentary to argue that there is no inconsistency between "reparation," as defined in ILC Article 31, and "cure the breach" in Article XIV(22) of the SLA and concludes that, therefore, "cure the breach" must involve "reparation."[65] This argument simply assumes its own erroneous conclusion.

85. It is not disputed by the Parties that the WTO and NAFTA provide for prospective only remedies, even if their text does not include the term "prospective". It is also a fact that the Commentary to Article 55 of the ILC Articles cites to Article 3(7) of the WTO DSU as the kind of special rule (*lex specialis*) that justifies not applying the general rule in Article 31. Canada has already pointed to the fact that, if anything, Article XIV of the SLA makes it clearer than the WTO or NAFTA that Article XIV is a prospective-only dispute settlement provision.[66]

> and transparency." The provision under examination must of course be scrutinized in context; but that context is constituted chiefly by the other relevant provisions of NAFTA. We do not suggest that the general objectives of NAFTA are not useful or relevant. Far from it. Those general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis*. The former may frequently cast light on a specific interpretive issue; but it is not to be regarded as overriding and superseding the latter. *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (January 2003) (Ex. CR-28).

[64] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary 307 (Cambridge University Press 2002) (emphasis added) (Ex. RR-26).

[65] *See* U.S. Reply ¶¶ 43–44.

[66] *See* supra ¶ 59.

86. Third, the U.S. suggests that because the SLA, the ILC Articles and *Chorzów Factory* use the word "breach," "it is reasonable to use the reparation principles of the ILC Articles and *Chorzów Factory* to interpret the term 'cure the breach'"[67] This is absurd. The word "breach" is commonly used by legal practitioners and scholars, and its appearance in the ILC Articles or *Chorzów Factory* by no means displaces the special regime included by Canada and the United States in Article XIV of the SLA.

87. In fact, the term "breach" appears in NAFTA and WTO disputes to describe a party's failure to comply with its obligations. For instance, in *Cross-Border Trucking Services and Investment*, a dispute between Mexico and the United States under NAFTA, the Tribunal found:

> 295. On the basis of the analysis set out above, the Panel unanimously determines that the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains *a breach* of the U.S. obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1202 (national treatment for cross-border services), and Article 1203 (most-favored nation treatment for cross-border services) of NAFTA.
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> . . .
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> 297. The Panel further unanimously determines that the United States was and remains *in breach* of its obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1102 (national treatment), and Article 1103 (most-favored-nation treatment) to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States.[68]

88. In *Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products*, another NAFTA dispute, the United States argued that Canada had *breached* its NAFTA

[67] U.S. Reply ¶ 44.

[68] *In the Matter of Cross-Border Trucking Services*, USA-MEX-98-2008-01, Final Report of the Panel ¶¶ 295, 297 (Feb. 6, 2001) (emphasis added) (RRA-3).

obligations by imposing customs duties on certain U.S.-origin agricultural products. The Tribunal framed the U.S. position and the issue in dispute as follows:

> 18. As existing customs duties were those which, pursuant to NAFTA Article 201(1), were "in effect on the date of entry into force of this Agreement", any increase in tariffs above the rate in effect on December 31, 1993 - the day preceding the entry into force of the NAFTA on January 1, 1994 - constitutes *a breach* of NAFTA Article 302(1).
>
> . . .
>
> 113. The issue in this case is whether the customs duties imposed by Canada on certain U.S.-origin agricultural products following "tariffication" in accordance with the agreements reached as a result of the Uruguay Round are *in breach* of the relevant provisions of the NAFTA. The United States argues that these duties are *in breach* of NAFTA Article 302 paragraphs (1) and (2).[69]

89. Reference to the term "breach" therefore does not lead to the conclusion advocated by the United States: its appearance in the ILC Articles or in *Chorzów Factory* does not displace the special regime included by Canada and the United States in Article XIV of the SLA.

90. The inapplicability of the ILC Article 31 reparation regime to the SLA is also evident from the facts of the *Chorzów Factory* case, as discussed in paragraph 56 of Canada's Statement of Defense. In *Chorzów*, the claimant introduced evidence of the damage specifically suffered by the expropriated investor. The respondent had an opportunity to rebut that evidence and challenge the causal link between the breach and the alleged damage. At the time that the case settled, the PCIJ had commenced its investigation of damages and causation. At stake was the payment of monetary damages by one party to the other.

[69] *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products,* CDA-95-2008-01, Final Report of the Panel ¶¶ 18, 113 (Dec. 2 1996) (emphasis added) (RRA-4).

91. This is in stark contrast with Article XIV of the SLA. As indicated earlier, the SLA (i) does not provide for participation in the proceedings of U.S. producers; (ii) limits the form of compensation that the arbitrators may award; (iii) does not provide for the payment of damages to the U.S.; (iv) provides the breaching party "a reasonable period of time" to cure the breach; (v) does not provide for the payment of damages to U.S. producers; (vi) provides that arbitrators may only determine appropriate adjustments to the Export Measures if the breaching party fails to cure the breach within a reasonable period of time; (vii) only allows for the application of adjustments "from the end of the reasonable period of time until the Party Complained Against cures the breach;"[70] and (viii) mandates that "an award may be enforced solely as provided in [Article XIV]."[71] We recall here Article 55 of the ILC Articles:

> These [ILC] articles *do not apply* where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State *are governed by special rules of international law*.[72]

Under the SLA, "the conditions for the existence of an internationally wrongful act" and "the content or implementation of the international responsibility of a State" *are* governed by special rules of conventional international law which displace Article 31 of the ILC Articles.[73]

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[70] SLA 2006 Art. XIV(24).

[71] SLA 2006 Art. XIV(20).

[72] James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary 306 (Cambridge University Press 2002) (emphasis added) (Ex. RR-26).

[73] In fact, the United States has not found a single trade case (NAFTA, WTO or other) that relies on 31 of the ILC Articles in relation to compensation.

PART II. THE UNITED STATES' REMEDY PROPOSALS ARE NOT BASED ON THE TEXT OF THE SLA NOR ON SOUND ECONOMIC ANALYSIS

92. The United States, in its Reply, continues to advocate the four remedies proposed by its expert Dr. Neuberger. These remedies are unsupported by the text of the SLA, do not achieve the objectives claimed by the United States, are punitive in effect and are unworkable in administration. The shortcomings of these proposals are manifest and addressed in Section C below, and in the Kalt/Reishus Rebuttal Report, appended.[74]

93. More fundamental is the U.S. claim that it is entitled under the SLA to a remedy, beyond the cessation of the breach, that addresses the effects of Canada's past breach. The United States points to no provision in the text of the SLA in support of this claim. Indeed, the United States points to no provision that requires that a remedy must be applied to achieve an economic effect at all – whether it is the variety of effects identified in the U.S. Statement of Case, or compensating U.S. lumber producers for the alleged harm suffered from Canada's past breach, as the United States argues in its Reply.[75]

94. Even if the Tribunal were to accept the U.S. position that the SLA provides for remedies to compensate for the effects of the breach, the United States has not provided any credible evidence that the overshipment has caused any consequential negative effects. Further, although the United States claims that a remedy must address

[74] Rebuttal Expert Witness Statement of Joseph P. Kalt and David Reishus (Aug. 11, 2008) ("Kalt/Reishus Rebuttal Report") (Ex. RR-27).

[75] In response to the United States arguing that the object and purpose of the SLA was to prevent material injury to the U.S. lumber industry, the Tribunal concluded in the liability phase of this arbitration, that all economics effects of the treaty could be considered its object and purpose. Award on Liability ¶ 190. As such, the U.S. proposed remedies' effect on the U.S. economy and the severe punitive effect on Canadian softwood lumber producers must be considered as of equal concern to any effect of the breach on U.S. lumber producers. Professor Kalt and Dr. Reishus likewise note that the United States "also disingenuously distorts our analysis" regarding economic effects on the U.S. economy. Kalt/Reishus Rebuttal Report ¶ 6 (Ex. RR-27).

the current economic effects of the past overshipment,[76] the United States fails to show, or even attempt to show, that there are continuing economic effects on U.S. lumber producers.[77]

95. In addition to a lack of support in the text of the Agreement, no economic principles underlie the U.S. claims. As Professor Kalt and Dr. Reishus show in their report, Dr. Neuberger's remedies are not designed to achieve traditional economic policy objectives. Instead, they are designed to fulfill policy objectives set by non-economists. Dr. Neuberger describes "the effect of the Option B overages on U.S. softwood lumber producers" as the "policy question of primary interest in this matter."[78] Such U.S. policy objectives are supported neither by the Agreement nor by economics.

96. In Remedy Proposal No. 1 the United States focuses on Canadian exporters, suggesting that they enjoyed an unwarranted benefit during the time of the breach and so should now be subjected to a prohibitively high tax to atone for that benefit. In Proposal No. 2 the United States switches its focus to lumber prices and suggests that a tax should be imposed at some point in the future that corresponds to the effect of the breach on lumber prices at the time of the breach. In Proposal No. 3 the United States focuses neither on taxing a supposed benefit nor on offsetting price

[76] U.S. Reply ¶ 51 ("Canada fails entirely to recognize that its breach created the original market distortion that has contributed to the market's current condition. It is the job of expert economists to recommend options for how best to place the United States in the position it would have occupied absent the breach."); *see* U.S. Reply ¶ 55 ("The breach in this case allowed the flow of approximately 200 MMBF of softwood lumber into the United States. This disruption in the softwood lumber market remains uncorrected to this day"); *see also* U.S. Reply ¶ 56 ("Subsequent practice, which itself is a product of the market disruption caused by the overshipment, cannot compensate for the overshipment.").

[77] By contrast, Professor Kalt and Dr. Reishus conclude that any adverse effect that the modest overshipment of Canadian exports may have had on any U.S. interest at that time has dissipated in the fluid and rapidly changing lumber market. The lack of any current or future effect of the past breach further demonstrates that the remedy need not be applied now to compensate for the past breach that has been cured by discontinuing the practice found to be contrary to the SLA.

[78] Neuberger Rebuttal Report ¶ 28 (Ex. CR-13) and U.S. Reply ¶ 58.

effects, but on the volume of projected Canadian exports to compensate for excessive volumes shipped. Here the United States also imposes a second concept – that quotas must be subject to a downward adjustment based on an initial extraordinary forecast of projected market conditions, with that resulting quota then being subject to further downward adjustment for past excess shipments. Finally, in Proposal No. 4 the United States focuses exclusively on the operations of the calculation of EUSC and the error Canada made in that calculation, not any potential effects that may have occurred because of that error, be they price changes, benefits to Canadian exporters, harm to U.S. producers or volumes over-shipped. Contrary to the U.S. assertions, all the proposals impose excessive penalties on Canadian lumber producers and bear no relationship to the claimed effect or objective of offsetting the harm suffered by U.S. producers or benefits enjoyed by Canadian producers.

97. The United States spends considerable time in its Reply chiding Canada for not proposing "its own remedy" and goes so far as to suggest that "Canada's election not to propose an appropriate remedy effectively waives Canada's opportunity to object to the adoption of at least one of the proposed remedies provided by the United States."[79] Canada has not proposed any alternative remedy because the SLA does not provide any remedy for breaches that have been cured at any point before the end of the reasonable period of time, as explained above in Part I.

A. CANADA HAS ALREADY OFFSET THE OVERSHIPMENTS BY UNDER RQV SHIPMENTS IN THE SECOND HALF OF 2007

98. Below-quota shipments in the second half of 2007 from Option B Regions more than offset the regional quota volumes that were miscalculated in the first half of 2007, and Option B region exporters have continued to ship well below quota in 2008.

[79] U.S. Reply ¶ 57.

As Canada showed in its Statement of Defence, for 2007 as a whole, Option B regions shipped to the United States no more than the amount of lumber allowed under the SLA.

99. The United States does not contest that Canada shipped lumber in quantities substantially below the amounts allowed under the SLA in the second half of 2007, nor that the quantity of these undershipments was greater than the quantity of the overshipments for each of the Option B regions during the first half of 2007. Rather, the United States argues that below regional quota volume (RQV) shipments in the second half of 2007 constitute "mere compliance" with the SLA. Canada did not merely comply with the SLA. The SLA allows full utilization of RQVs in every month. For some months, Option B region exporters did not fully utilize the RQVs in the second half of 2007.

100. Canada disagrees that a right to compensation for past overshipments can be implied into the SLA. Nevertheless, if such a right were implied, Canada notes that when the SLA does require that past measures or actions be redressed, that redress is always on a one-for-one basis with respect to the measure itself, not the effects of the measure. Notably, paragraphs 29 through 32 of Article XIV impose a straightforward one-for-one offset of excess export volumes or excess import restraints in the event that the Tribunal finds that a Party has misapplied compensatory adjustments or measures. Canada noted in its Statement of Defence that this one-for-one offset of excess export measures, or adjustments, is applied, regardless of the effect on the market and regardless of whether the original unjustified action had any particular market effect or caused any harm or benefit. Thus, even if, contrary to Canada's view, a right to compensation for past breaches were implied into the SLA, that implied compensation should follow the SLA context and be done on a similar one-for-one basis.

101. The implications of Canada's undershipments in the quarters after the breach are significant. First, Option B regions have shipped to the United States, over

the entire span of the SLA to date, less lumber than the Option B quotas allow. In fact, in the four quarters subsequent to the breach, Option B regions shipped 808 mmbf less lumber to the United States than the quotas allowed. Viewed in the context of the 142 mmbf overshipment in the first half of 2007, that means that subsequent undershipments were nearly six times greater than the total amount of overshipments as a result of the breach. The United States has not even considered whether this has implications for the degree of harm it alleges its producers have suffered, or for its economic arguments about lingering effects. Second, the United States has urged this Tribunal to take subsequent economic events into account in fashioning a remedy, most transparently in Proposal No. 3, where the U.S. urges that the Tribunal undertake an extraordinary reduction of quota to reflect slack lumber demand in the current market. At no point has the United States confronted the question of whether these below-quota shipments in the past already have mitigated harm. The United States cannot have it both ways: if the Tribunal is to consider real economic developments over time in fashioning a remedy, the Panel must also consider whether those developments have made a remedy moot.

B. THE UNITED STATES AGAIN MISREPRESENTS THE QUANTITY OF ABOVE RQV SHIPMENTS IN THE FIRST HALF OF 2007

102. In its Statement of Case, the United States argued that exports from Option B Regions exceeded RQVs by 182 mmbf in the first half of 2007.[80] This overstates the amount of excess exports resulting from the breach. As Canada explained in its Statement of Defence, the U.S. calculation did not account for the available "carry-forward" and "carry-back" of monthly RQV, as provided for in Annex 7B of the SLA. When Dr. Neuberger's calculations are adjusted to account for the available "carry-forward" and "carry-back" of the monthly RQV, a difference between actual

[80] Stmt. of Case ¶ 39.

shipments and maximum RQVs of 106 million board feet results.[81] In addition, aside from ignoring the permissible carry-forward and carry-back amounts, Dr. Neuberger relied on revised export data, rather than contemporaneously available data to arrive at the 182 mmbf number. If contemporaneously available data are used, the amount that exports exceeded RQVs in the first half of 2007 is 142 million board feet. Canada provided the United States the data used to arrive at these figures.[82]

103. As an initial matter, Canada notes that whether the number is 106 mmbf, 142 mmbf or even 182 mmbf, the amount of the overshipment is relatively insignificant. Measured at 142 mmbf of lumber exported in the first six months of 2007, the overshipment amounted to only 1.3 percent of total Canadian lumber exports to the United States during that period, and only 0.4 percent of total U.S. lumber consumption.[83] And while that fact sheds useful light on this dispute, in the interest of accuracy the Tribunal should recognize that when the carry forward and carry back provisions are taken into account, the overshipment amount is 142 mmbf (based on data contemporaneously available when the RQVs were calculated for the first six months of 2007), or 106 mmbf (if Dr. Neuberger's revised data set is used).[84]

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[81] *See* Stmt. of Defence ¶ 59, n.56.

[82] Letter from Guillermo Aguilar Alvarez to Patricia McCarthy, July 3, 2008 (response to July 2, 2008 U.S. request for data) (Ex. RR-29).

[83] Kalt/Reishus Report ¶¶ 30-31 (Ex. RR-2).

[84] In its Reply, the United States apparently advocates reliance on revised shipment data, rather than reliance on contemporaneously available data. In practice, of course, calculation of RQV's is done contemporaneously to determine allowable export levels in any given month. But if the United States prefers later revised data to calculate overshipments, the overshipment calculation will necessarily be revised downward to 106 mmbf, as noted above. The U.S. Reply also misrepresents Canada's calculations as indicating that the correct overshipment amount is 182 mmbf. U.S. Reply ¶ 90 ("We agree with Canada's first observation that Canada's overshipment was actually greater than 182 MMBF, if contemporaneous data is used."). In fact, as made clear here and at ¶ 59 of Canada's Statement of Defence, Canada argues that the United States has considerably *overstated* the excess shipments.

104. Canada has consistently applied the carry-forward and carry-back provisions of the SLA starting with the first RQV calculations for Option B regions in January 2007. The United States concurs that the SLA permits Option B Regions to carry-forward or carry-back a quantity of RQV between consecutive months.[85]

105. In its Reply, the United States alleges that Canada is not entitled to apply the carry-forward and carry-back provisions of the SLA because the United States has not been "notified" each month of any RQVs that were carried forward or carried back.[86] To the contrary, Canada has disclosed to the United States, on a regional basis for each Option B region, the total volume of quota carried-forward from the month and the total volume of quota carried-back for each month since the inception of the Agreement.

106. Beginning in January 2007, data and other information concerning the operation of the SLA has been posted on the official Department of Foreign Affairs and International Trade ("DFAIT") website and is updated regularly in a timely fashion. The September 12, 2006 side letter to which the United States refers,[87] lists several data elements, including, for example, the total volume of softwood lumber shipped from each region. Regarding these other data elements, the United States has relied on data disclosed on DFAIT's official website.[88]

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[85] U.S. Reply ¶ 91.

[86] *Id*.

[87] *Id*.

[88] In addition to the information posted on the web-site, Canadian officials explained and illustrated the calculations to U.S. officials, demonstrated how the carry-forward and carry-back volumes readily could be derived from data publicly available on the official Department of Foreign Affairs and International Trade website and further shared the volumes of carry-forward/carry-back used by each region on a monthly basis in a bilateral meeting in Washington on November 15 and 16, 2007.

107. Simply, the maximum permissible export level in any given month is the RQV for that month, plus 12 percent, initially based on carry-forward from the previous month, if available, and if not, then by carrying back from the following month. There is no magic, nor is there a genuine issue regarding the applicability of Annex 7B to the calculation of permissible export volumes from Option B regions.

108. The United States alternatively argues that Canada improperly carried forward 37 mmbf from December 2006 to January 2007.[89] The United States posits that "[b]ecause there was no volume restraint in December 2006, Option B regions were not permitted – and cannot be permitted now – to carry forward volume from December 2006 to January 2007."[90]

109. The United States is plainly wrong. The SLA explicitly addresses this situation. Article VI, n.2, provides that "[i]n determining the volume restraint levels which would have applied to an Option B Region during the transition period, the carry-forward and carry-back rules laid out in Annex 7B shall be taken into account for all the months of the transition period." December 2006 was the last month of the transition period. Accordingly, Canada carried forward the correct amount from December 2006 in determining maximum permissible export levels for January 2007.

C. THE U.S. REMEDY PROPOSALS ARE PUNITIVE, INCONSISTENT WITH STATED U.S. OBJECTIVES AND WITH EACH OTHER, AND WITHOUT BASIS IN THE AGREEMENT OR IN SOUND ECONOMIC PRINCIPLES

110. The United States continues to promote the four remedy proposals described in its Statement of Case and to prefer remedies with the most draconian effect

[89] U.S. Reply ¶ 92.

[90] U.S. Reply ¶ 94.

on Canadian lumber producers.[91] The United States has now narrowed the objectives it wishes to achieve down to one – compensation of the U.S. lumber industry. Despite this, the proposals remain divorced from the U.S. objective and would yield effects that are unpredictable, punitive and unrelated to the breach identified by the Tribunal. As noted by Professor Kalt and Dr. Reishus, each of the four proposals would have widely divergent effects on future markets, prices, and U.S. producers.[92] While this section, of necessity, focuses on the individual flaws of the proposals, all share fundamental flaws, most particularly that they seek to redress past effects when the SLA does not provide for such redress.

1. U.S. Proposal No. 1: Imposition of Higher Option A Export Fees on Option B Exporters

111. In its first proposal, the United States suggests that Option B regions that overshipped be subjected to the higher tax rate of Option A regions, because, in the United States' view, Option B regions were operating like Option A regions. In addition to the proposal being highly punitive and unrelated to any level of economic benefit obtained from the overshipments or effect on U.S. producers, its stated premise is false. Option B region exporters are subject to a binding quota at the RQV level (a binding hard cap) and therefore can never export an amount of softwood lumber greater than the monthly RQV limit. In comparison, Option A region exporters are not subject to a monthly quota and can export as much lumber as they like in any given month.

112. It is absurd to suggest that simply because the unadjusted RQV limit was set at a level higher for the first half of 2007 than it should have been for Option B regions, this resulted in Option B region exporters acting like Option A regions. Under

[91] U.S. Reply ¶ 65 ("All four remedies rely upon the imposition of modest additional export measures, measures authorized by the SLA itself.").

[92] *See* Kalt/Reishus Rebuttal Report ¶ 16 (Ex. RR-27).

the regime established for Region B exporters, it was impossible for Option B regions to export lumber above the published adjusted RQV. In early 2007, a significant number of Option B region exporters shipped the maximum available under their quotas, and might have shipped more if not restrained by quotas as calculated at that time.[93] They did not act like Option A exporters, subject to a higher tax but no quota, because they could not.

113. Dr. Neuberger does not even pretend the effect of this proposed remedy bears any relationship to the alleged economic harm to the U.S. industry because of the overshipment. There is no logic to the U.S. preference for an export tax to remedy the effects of exceeding a volume quota.

114. Dr. Neuberger contends that under the Option 1 approach "the size of the surcharge [i.e., the penalty amounts under the export tax proposals] is calibrated to eliminate the economic benefit that Option B producers enjoyed" as a result of the purported overage.[94] But as Professor Kalt and Dr. Reishus point out, "there is no analysis in Dr. Neuberger's framework of the level of economic benefit Option B exporters obtained from the purported overage. Indeed, were Dr. Neuberger's model to be believed, Option B region exporters obtained no material economic benefit from any overage."[95]

115. This proposal would also result in severe market distortions. It would impose a tax based on all shipments during the first six months of 2007, rather than the overshipments that form the basis of the U.S. complaint. As Professor Kalt and Dr. Reishus explained in their affirmative report, the tax that would be imposed on Canadian

[93] The United States acknowledged the binding effect of the quotas on Option B exports during the first half of 2007. Stmt. of Case ¶ 60.

[94] Neuberger Rebuttal Report ¶ 52 (Ex. CR-13).

[95] Kalt/Reishus Rebuttal Report ¶ 22 (Ex. RR-27).

lumber exporters in Manitoba under this Option, for example, would amount to C$2000 for each thousand board feet of excess lumber shipped in the first half of 2007, when the prevailing price of lumber was less than US$300 per thousand board feet.

116. The proposal causes such an extreme result because the tax bears no reasonable or consistent relationship to any conceivable notion of benefit from the overshipments.[96] In fact, it bears no relationship to the level of overshipments whatsoever. It is calculated based on *total* shipments during the time period. By the U.S. logic, this same amount of tax would be due even if Canada overshipped only a single mbf in each quarter.

117. Beyond these effects (which, despite U.S. protestations, may fairly be called "draconian"), the proposal reflects a set of objectives that the United States promptly abandons in its other proposals. Professor Kalt and Dr. Reishus explain that a comparison of the alleged "calibration" of the two U.S. export tax proposals (Proposals No. 1 and 2) demonstrates that neither proposal is valid even for the purpose that the United States claims to seek, which itself has no justification in the SLA. They note that:

> "the period over which the surcharges would be in effect under the first proposal (the 10% tax rate) would depend on the lumber price. Such is not the case with the second approach (a fixed rate). Similarly, the volume of U.S. production sold during the period in which the surcharges apply may bear no economic relationship to the volume sold during the past period of the overages. These 'calibrations' appear to be designed more to punish Canadian exporters than to compensate U.S. producers through future market price effects."[97]

[96] Kalt/Reishus Report ¶¶ 55-56 (Ex. RR-2).

[97] Kalt/Reishus Rebuttal Report ¶ 24 (Ex. RR-27).

118. The United States concludes that this proposed remedy will result in a "commensurate reduction in exports."[98] The United States, however, does not even attempt to relate the supposed effect on export volume to the amount of the overshipments.

119. Even if it is assumed that the SLA provides for compensation to U.S. producers for past effects of Canada's breach via future adjustments to measures imposed on Canadian exporters, the first U.S. proposal is not designed to do that, as proper economic analysis shows. Instead, the main effect will be arbitrary punishment and significant market distortions among Canadian producers with little of the benefit to which the United States, wrongly, claims to be entitled and to seek.

2. U.S. Proposal No. 2: New Export Fees to Offset Supposed Past Price Effects

120. In its second proposal, the United States asks the Tribunal to determine the amount of an alleged reduction in U.S. lumber prices supposedly caused by Canadian overshipments during the time that the quota was improperly calculated. The United States then proposes that the Tribunal calculate and impose an export tax that would have the effect of raising U.S. lumber prices by that amount. This remedy is highly punitive in that it imposes an export charge that is at least twice the value of the excess lumber that was shipped as a result of the quota miscalculation.[99]

121. By continuing to advocate this proposal, the United States, in its Reply, is advancing a proposition – measuring compensation by the effects of Canadian exports on price – for which the SLA offers neither any justification nor any mechanism to assist in its execution. In its Statement of Defence, Canada challenged the United States to

[98] U.S. Reply ¶ 70.

[99] Kalt/Reishus Report ¶ 57 (Ex. RR-2).

identify where, in the SLA, support for the purported objectives of its remedies can be found, including specifically the objective of redressing the supposed price effects that lie behind the second remedy proposal.[100] The United States not only has failed to meet that challenge, it has failed even to respond to it.

122. In instances where the Parties wanted to assess an economic magnitude, such as the calculation of U.S. Consumption, they spoke with great specificity. Annex 7D to the Agreement specifies formulae, units of calculation, approved sources of data and seasonal adjustment factors. Further, where the Agreement does deal with price, in Annex 7A, it specifies the products to be priced, the data source, the averaging methodology and even provides guidance for the rounding of figures.

123. The debate on the most basic questions being conducted by the Parties' economists – whether a model which pretends that there is only one product called "lumber" can accurately estimate the price effects at issue;[101] whether a model which combines all Option B regions into a single entity can account for different overages from those regions;[102] which of the many contradictory estimates of price elasticities should be used,[103] and whether a fundamental error like the confusion of supply elasticities with export elasticities has been committed[104] – is in contrast to the specificity of Annexes 7A and 7D.

124. It is difficult to imagine that the drafters of the Agreement would specify that the price trigger for the export tax must be based on a weighted average of pricing

[100] Stmt. of Defence ¶ 67.

[101] Kalt/Reishus Report ¶ 64 (Ex. RR-2).

[102] *Id*.

[103] *Id*.

[104] Kalt/Reishus Rebuttal Report ¶ 37 (Ex. RR-27).

products detailed to the specificity of "Green Douglas Fir (Portland rate) #2&Btr 2x10 random,"[105] but at the same time intend that this Tribunal estimate the past effects of overshipments on U.S. prices without even a hint of direction how to do so.

125. Addressing the substance of the economic debate, the U.S. relies on Dr. Neuberger to (1) estimate the effect on U.S. lumber prices of the overshipments in the first half of 2007, and (2) to project a future export fee that would have the opposite price effect. After a thorough review of Dr. Neuberger's methods and results, Professor Kalt and Dr. Reishus conclude that the proposal is excessive and distortive, that the model cannot identify the effect on U.S. producers and that it suffers from fatal errors of internal inconsistency, specification errors, and speculative outcomes.

126. Professor Kalt and Dr. Reishus identify two fundamental errors that render Dr. Neuberger's model incapable of predicting the effect of the proposed export taxes: (1) the exercise used to generate the proposed tax rate and penalty amount for the second proposal effectively assumes that the U.S. softwood market was like it was in first half of 2007 and would remain so, and (2) that the proposed fee would effectively be permanently in place.[106] They conclude that the market response in terms of quantity and prices will not be that which would result from Dr. Neuberger's static analysis, and that the reduction in exports during the period the temporary tax is in place would likely be different from (and likely greater than) the Neuberger static supply-demand model would predict.[107]

[105] SLA 2006 Annex 7A para. 3(a) (Ex. RR-1).

[106] Kalt/Reishus Rebuttal Report ¶ 33 (Ex. RR-27).

[107] Kalt/Reishus Rebuttal Report ¶ 37 (Ex. RR-27).

127. It is telling that the United States takes the position that Canada "generated an inferior model" in examining the conclusions of the U.S. expert.[108] The model used by Professor Kalt and Dr. Reishus was in fact the same model used by the United States. In effect, the United States here is criticizing its own expert – and Canada agrees that the Tribunal should not base a remedy on such speculative analysis. Regarding Dr. Neuberger's defence of his model, Professor Kalt and Dr. Reishus conclude that "[t]here are only two plausible economic interpretations of Dr. Neuberger's model and his attempted defense. … In either case, Dr. Neuberger has understated the relevant elasticity and overstated any purported price effect and implied tax and penalty amount."[109]

128. There is in fact a serious question whether any economic model is up to the task the United States is urging. Professor Kalt and Dr. Reishus note that both buyers and sellers readily can manage inventories to smooth out small changes in market supply and demand, and these inventory decisions could override completely any price effects caused by such a minor change in supply.[110] The economic model on which the United States so relies to calculate price effects down to the penny[111] is incapable of considering these inventory decisions. Neither can it account for market reactions to changes in expected future prices as a result of a tax, or any other market adjustment to a proposed remedy.[112] Dr. Neuberger himself stresses the importance of

[108] U.S. Reply ¶ 77.

[109] Kalt/Reishus Rebuttal Report, Appendix ¶ 12 (Ex. RR-27).

[110] Kalt/Reishus Rebuttal Report ¶ 34 (Ex. RR-27).

[111] U.S. Reply ¶ 74.

[112] Kalt/Reishus Rebuttal Report ¶ 31 (Ex. RR-27).

individual firm reaction to policy changes,[113] but he relies upon an economic model that is blind to such effects.

3. U.S. Proposal No. 3: Projecting Future Exports, Then Reducing Setting RQVS at Some Level Below That Amount

129. In its third proposal, the United States suggests imposing drastic revisions on future Regional Quota Volumes (which would translate into drastic reduction in quota) to supposedly account for the amount of overshipments and the amount by which each Option B region's exports would otherwise have been below the RQV based on a forecast of future exports. It suggests that the Tribunal rely on Dr. Neuberger to project the amount of lumber Canada would export in some future period and first, "off-the-top" reduce the Regional Quota Values to Dr. Neuberger's projected export level, and second reduce that amount by the amount of the overshipment in the first half of 2007.[114]

130. The United States points to no authority – and the Agreement does not provide any – for the extraordinary proposition that Regional Quota Volumes initially be established at the amount of projected Canadian softwood lumber exports. Annex 7B of the Agreement plainly and in great detail "specifies the method to be used in determining the quota volumes for Regions electing Option B."[115] The United States, however, suggests calculating RQVs based on the subjective market projections of its own economic consultant. The Agreement does not permit the establishment of RQVs in this manner. In the one instance where the SLA does contemplate market projection, namely in the calculation of EUSC in Annex 7D, the calculation is set forth in detail and based on data that are expressly identifyed.

[113] Neuberger Rebuttal Report ¶ 13 (Ex. CR-13).

[114] U.S. Reply ¶ 82.

[115] SLA 2006 Annex 7B para. 1 (Ex. RR-1).

131. Another fundamental problem with this proposal is that the likelihood of extremely large errors in projecting future export quantities, compared to the relatively small amount of export overshipments. As Professor Kalt and Dr. Reishus explain, this proposal (like the second proposal) relies on a poorly-defined predictive model that is prone to error.[116] Consequently, the remedy and reductions in future exports will primarily reflect projection errors, and not the overshipment.

132. The direction of the error will be to overstate the reduction in exports. This is true because any underestimate of future exports will necessarily affect export volumes, but an overestimate of future exports will not result in exports above the amount that would otherwise prevail. Dr. Neuberger's assertion that there is no *a priori* bias in the application of this remedy is incorrect. The remedy is driven by projection errors, which in all likelihood will exceed the amount of export overages, and such errors are inherently biased against Canadian lumber exporters.

133. The following example illustrates the magnitude of the possible error. If this proposal were applied to Manitoba, which exported more than its RQV based on EUSC in only one month, June 2007, in the amount of only 0.154 mmbf, the United States would first reduce Manitoba's RQV's to what Manitoba "*might* export during the six-month compensation period and deduct its overshipment from that predicted number."[117] Taking the first six months of 2008 as its compensation period, and assuming for the moment that the United States predicted exactly Manitoba's exports during that six month period – which Professor Kalt and Dr. Reishus have demonstrated would not be the case – Manitoba's RQVs in the first half of 2008 would have been

[116] Kalt/Reishus Rebuttal Report ¶¶ 27-29 (illustrating that the forecasting errors "would result, on average, in a greater reduction in Option B exports than targeted by the proposal.") (Ex. RR-27).

[117] Stmt. of Case ¶ 61.

reduced off-the-top by 20.541 mmbf – or by 133 times the quantity of Manitoba's overshipment. The grossly disproportionate magnitude of the off-the-top RQV reduction would be magnified by the unavoidable errors and inherent bias in projecting Manitoba's (or any other Option B region's) future exports.

134. The United States argues that the reason RQVs must be reduced in this manner is that "market conditions now are substantially different from those present in early 2007 (the breach period) because Option B regions are exporting volumes substantially less than those permitted under the current and recent RQVs."[118] The Agreement, however, establishes RQVs based on EUSC. That is the only measure of market conditions that is relevant. The Agreement provides no basis to abandon RQVs based on EUSC in favor of an economist's projection that reduces permissible export volumes by many times the volume of overshipments.

4. U.S. Proposal No. 4: Reduce Future EUSC

135. While the final U.S. proposal feigns a certain parity between the EUSC miscalculation and a future adjustment in EUSC, it fails to account for the fact that, during some months of the first half of 2007, Option B region exporters did not fully utilize the RQVs they were allocated. Here again, the United States refuses to recognize that its remedy proposal overshoots its own mark. After proposing three remedies that fail to meet even its own criteria for a reasonable remedy, the United States asks that if these remedies are rejected, the Tribunal simply reduce future EUSC by the amount of the error in Canada's EUSC calculation in the first six months of 2007. Canada pointed out in its Statement of Defence that this proposal fails to account for the underutilization of RQVs in the first six months of 2007, during which Option B regions

[118] U.S. Reply ¶ 82.

shipped 205 mmbf less than the available RQVs calculated in accordance with unadjusted EUSC.

136. Had Option B regions fully utilized the available RQVs calculated in accordance with unadjusted EUSC, reducing future EUSC by the miscalculation in EUSC would reflect the amount of overshipments. But simply adjusting future EUSC because Canada miscalculated past EUSC does not reflect the amount of the overshipment about which the United States complains.

137. In response, the United States asserts that "[l]umber shipments from Option B regions following this breach period are irrelevant to the magnitude of the breach."[119] What is relevant here is the underutilization of the amount of lumber shipments during the so-called "breach period." Because Option B region exporters did not ship the full amount of the albeit-incorrectly calculated RQV, a reduction in future RQVs by the full amount of the error would not be commensurate with the amount of the overshipment. Adjusting future EUSC as proposed by the United States would do precisely that – reduce RQVs by the full amount of the calculation error without accounting for the reality that RQVs were underutilized.

138. In its Request for Arbitration, the United States asked that the Tribunal adjust future RQVs by the amount of the overshipment in exports during the first half of 2007.[120] While the United States now proposes four alternative remedies, it has yet to explain why it abandoned the remedy it had in mind when it requested this proceeding. As explained above, the overshipment amount during the first six months was 142 mmbf

[119] U.S. Reply ¶ 86.

[120] U.S. Request for Arbitration ¶ 61 ("[t]he United States respectfully requests an award in its favor…(d) [o]rdering Canada, with respect to Option B regions, to make additional downward adjustments to quota volumes (or maximum volumes) in future months in an amount equal to the amount by which shipments from Option B regions exceeded the properly calculated quota volumes (or maximum volumes) for January through June 2007.")

based on contemporaneously available data, or 106 mmbf based on the later-revised data espoused by the United States. The original U.S. remedy proposal would call for a reduction in future RQVs by the amount of overshipment.

139. The U.S. remedy proposals fail to meet the criteria the United States itself has established for suitable remedy options. Among other things, the United States argued that any remedy should abide by principles of conceptual simplicity and ease of implementation, and be commensurate with the amount of overshipments.[121] The first three remedy proposals fail on all accounts, while the fourth remedy proposal is unrelated to the amount of overshipments.

CONCLUSION

140. As Canada demonstrated in its Statement of Defence and again in Part I of this Memorial, the SLA does not provide any additional remedy when, as here, a Party has cured the breach by terminating the breaching conduct. The prospective-only dispute settlement provisions of Article XIV likewise do not provide compensatory adjustments for past breaching conduct. On either or both bases, the Tribunal should dismiss the U.S. claim for any additional remedy.

141. Canada also pointed out in its Statement of Defence and in Part II of this Memorial that, even if a right to redress for a past breach were implied into paragraph 22 of Article XIV, the context demonstrates that, whenever the negotiators provided for retroactive application, it was to mirror the effect on the export measures, not the hypothetical effect that the export measures might have on the market or on the U.S. or Canadian industries. By that standard, Canada's undershipments since July 1, 2007 have more than compensated for the minor overshipments that resulted from Canada's

[121] U.S. Reply ¶ 68.

temporary breach of the Agreement. Assisted by its economic experts, Professor Kalt and Dr. Reishus, Canada also showed, in Part II of this Memorial, that the U.S. alternative remedies did not even meet the tests that the United States set for itself regarding the alleged effects on its industry or the Canadian industry, leaving aside that the tests themselves were not justified. The United States has not provided an economically valid basis for imputing to the breach of the SLA the effects that the United States claims to redress through its divergent proposals.

142. The Tribunal should dismiss the U.S. claims for an additional remedy because of the absence of any legal basis for those claims. If the Tribunal disagrees with Canada regarding the proper legal interpretation of Article XIV, the Tribunal should still dismiss the U.S. claims for want of any valid economic justification for any of its proposed additional remedies.

AWARD SOUGHT

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

(a) declaring that Canada has cured its breach of the SLA 2006 by making the appropriate calculation of EUSC with respect to regions operating under Option B as of July 1, 2007; and

(b) dismissing all claims of the United States for compensatory adjustments to the Export Measures or other compensation as a result of Canada's failure to adjust EUSC from January 1, 2007 to June 30, 2007.

Respectfully submitted,

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August 12, 2008

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