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In The LCIA

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA,

Respondent.

REQUEST FOR ARBITRATION

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I

INTRODUCTION

1. The United States respectfully requests arbitration pursuant to Article XIV of the 2006 Softwood Lumber Agreement between Canada and the United States of America (SLA or Agreement). Attachment A.

2. The SLA requires Canada to impose “Export Measures” (charges and volume limitations as defined in the SLA) upon shipments of softwood lumber into the United States when the United States price of softwood lumber falls below certain levels. SLA, Arts. VI - VIII. Canada agreed not to circumvent the SLA by taking any action that would reduce or offset the Agreement’s export measures. SLA, Art. XVII, ¶ 1. This commitment binds “any public authority of” Canada, including the provincial governments. SLA, Art. XVII, ¶ 2.

3. The SLA establishes that “[g]rants or other benefits that a Party, including any public authority of a Party, provides shall be considered to reduce or offset the Export Measures if they are provided on a de jure or de facto basis to producers or exporters of Canadian Softwood Lumber Products.” SLA, Art. XVII, ¶ 2. Accordingly, a government grant or benefit provided to producers or exporters of Canadian softwood lumber is deemed to circumvent the Agreement unless the program meets the criteria for certain specific, enumerated exceptions. Id.

4. Canada has violated the Agreement because its provincial governments in Québec and Ontario have implemented certain benefit programs that circumvent the SLA. Specifically, the following six programs, which provide grants, loans, loan guarantees, tax credits, and other financial incentives that benefit Canadian softwood lumber producers and exporters, circumvent the Agreement because, under SLA Art. XVII, ¶ 2, they “shall be considered to reduce or offset

the [SLA's] Export Measures:"

- Québec's Capital Tax Credit, which targets the forest industry by providing financial incentives in the form of a tax credit of 15 percent for the purchase price for new manufacturing and processing equipment;
- Québec's so-called "Forest Management Measures," which provide C\$700 million in financial benefits to forest industry companies in the form of a tax credit of 90 percent for investments in access roads and bridges and other funding for reforestation, fire fighting, and pest control;
- Québec's C\$425 Million Forest Sector Financing "Envelope," which provides financing to forest industry companies at non-market terms in the form of loan guarantees and interest-free loans;
- Ontario's Forest Sector Prosperity Fund, which provides grants to forest industry companies to support and leverage new capital investment projects;
- Ontario's Forest Sector Loan Guarantee Program, which provides financing to forest industry companies at non-market terms to support and leverage new capital investment projects; and
- Ontario's Forest Road Building Program, which pays forest industry companies to facilitate their extraction of additional lumber.

5. Each of these government programs provides a benefit to the Canadian softwood lumber industry by reducing costs or artificially encouraging the increased extraction of timber. This benefit, in turn, reduces or offsets the export measures by encouraging overproduction and artificially high levels of exportation, in violation of the Agreement.

6. The United States, therefore, respectfully requests that the LCIA award to it the remedy requested in Section VII, Claimant's Request for Relief.

II

PARTIES TO THE ARBITRATION

A. The Claimant

7. The claimant in this proceeding is the United States of America (United States).

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

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III

THE ARBITRATION AGREEMENT

9. The United States respectfully submits this request pursuant to the dispute settlement provisions contained in Article XIV of the Agreement. In February 2007, the United States informally raised with Canada concerns that several provincial assistance programs breach the Agreement. After informal discussions failed to resolve these concerns, the United States initiated formal consultations with Canada by letter dated March 30, 2007, in accordance with the dispute resolution provisions of the Agreement. Attachment B; SLA, Art. XIV, ¶ 4. Formal consultations occurred in Ottawa on April 19, 2007. The 40-day consultation period expired on May 9, 2007. SLA, Art. XIV, ¶ 6. Still hoping to resolve the dispute, the United States continued to consult with Canada beyond the period established by the Agreement. However, having determined that further consultations are unlikely to resolve the dispute, the United States requests this arbitration before the LCIA, in accordance with Article XIV of the Agreement.

10. The United States previously requested arbitration concerning an independent and unrelated breach of the SLA due to Canada's partial implementation of the export measures. That arbitration request, filed on August 13, 2007, is currently pending before the LCIA. United States v. Canada, LCIA Arbitration No. 7941.

IV

MATTERS REGARDING THE ARBITRATION

The parties have agreed in writing to the following matters:

A. Selection Of The Arbitral Tribunal

11. The parties have agreed to submit any disputes concerning the Agreement to the LCIA. The Arbitral Tribunal shall consist of three arbitrators, and no citizen or resident of either the United States or Canada shall be appointed to the Tribunal. SLA, Art. XIV, ¶ 7-8. Under Article 1.2 of the LCIA Rules, the arbitration commences on the date on which the Registrar receives the Request for Arbitration. Each party shall nominate one arbitrator within 30 days after the commencement of the arbitration. SLA, Art. XIV, ¶ 9. Within 10 days of the nomination of the second arbitrator, the two nominated arbitrators shall jointly nominate the Chair. SLA, Art. XIV, ¶ 10. If the two nominated arbitrators cannot nominate a chair within 10 days, the Agreement asks the LCIA to endeavor to nominate a chair within 20 days thereafter. Id. The Agreement calls for the LCIA to endeavor to appoint the three nominated arbitrators within five business days after the date on which the Chair is nominated. SLA, Art. XIV, ¶ 11.

B. Remuneration Of The Arbitrators

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

C. Hearings Of The Tribunal

13. The legal place of arbitration shall be London, United Kingdom, but the hearings of the Tribunal shall be held in the United States or Canada, and shall be open to the public.

SLA, Art. XIV, ¶¶ 13, 17. In addition, the record of the arbitration and underlying documents shall be made available to the public. SLA, Art. XIV, ¶ 16.

D. Taking Of Evidence

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

E. Award Of The Tribunal

15. The Tribunal is to endeavor to issue a final award within 180 days after appointment. SLA, Art. XIV, ¶ 19. This award shall be final and binding, with no appeal. SLA, Art. XIV, ¶ 20. The Tribunal may not award costs. A portion of the funds allocated to the binational industry council established under Annex 13 of the Agreement shall be used to cover arbitration costs other than those of the parties. SLA, Art. XIV, ¶ 21. Each party shall bear its own costs, including costs of legal representation and related costs. SLA, Art. XIV, ¶ 21.

16. If the Tribunal finds that Canada has breached the Agreement, it is to:
- (a) identify a reasonable period of time for Canada to cure the breach or breaches, which is to be the shortest period of time feasible and, in any event, not longer than 30 days from the date of the award; and

- (b) determine appropriate adjustments to the SLA's export measures to compensate for the breach if Canada fails to cure its breaches within the reasonable period of time.

SLA, Art. XIV, ¶¶ 22-25.

V

FEE

17. The United States transmitted the fee prescribed in the LCIA Schedule of Costs to the Registrar of the Court on January 17, 2008.

VI

NATURE OF THE CASE

A. Statement Of Claims

18. Canada, through its provincial governments of Québec and Ontario, has breached the SLA by providing grants and other benefits that circumvent Canada's commitments under the SLA.

19. The grants, loans, loan guarantees, tax credits, and other benefit programs target the forest products industry in Québec and Ontario, the largest component of which is the softwood lumber industry. Through these provincial programs, Canada has provided millions of Canadian dollars in benefits to softwood lumber companies whose products are subject to the export measures required by the SLA. Consequently, the programs reduce or offset the export measures and, therefore, circumvent Canada's commitments under the SLA in violation of Article XVII of the SLA.

20. The United States respectfully requests that the Tribunal direct Canada to cease

operation of Québec’s and Ontario’s benefit programs immediately. If legislation is required to end the programs, the provinces must nevertheless immediately cease administering the programs. Moreover, a meaningful cure of the breach will include requiring the recovery of the amounts of the grants or other benefits provided or the imposition of additional export measures to compensate for benefits awarded or disbursed in violation of the SLA, or both. See SLA, Art. XIV, ¶¶ 22-23.

B. Summary

21. The SLA entered into force on October 12, 2006. The Agreement resolved the decades-long dispute over Canadian softwood lumber imports into the United States. As part of the SLA, the United States agreed to cease the collection of antidumping and countervailing duties upon softwood lumber from Canada and to refund US\$5 billion in deposits of duties collected since May 2002. See SLA, Art. III-IV.

22. In exchange, Canada agreed, among other things, to apply export measures – export charges and volume limitations – to shipments of softwood lumber from Canada into the United States when the price of softwood lumber products falls below a certain level. See SLA Arts. VI-VIII. Under the Agreement, Canada retains all export charges collected. Id.

23. The Agreement ties the export measures directly to the “prevailing monthly price” of lumber and to United States’ consumption of lumber. When the prevailing monthly price of lumber is at or below US\$ 355 per thousand board feet (MBF), each Canadian exporting region (Alberta, British Columbia (B.C.) Coast, B.C. Interior, Manitoba, Ontario, Québec, and Saskatchewan) is subject to one of two options for imposing export measures: (a) an export charge combined with a “surge mechanism” (Option A); or (b) a lower export charge combined

with a fixed “volume restraint” (Option B). SLA Arts. VII and VIII.

24. Québec and Ontario elected to be subject to Option B. The prevailing monthly price of lumber has remained below US\$ 355 since the inception of the Agreement in October 2006. Accordingly, Canada has been required to collect export charges and to apply volume restraints to the provinces’ softwood lumber exports in every month that the SLA has been in force.

25. Canada agreed not to take “any action to circumvent or offset the commitments under the SLA 2006, including any action having the effect of reducing or offsetting the Export Measures.” SLA, Art. XVII, ¶ 1.

26. Any “[g]rants or other benefits” that Canadian federal, provincial, or local governments provide de jure or de facto to the softwood lumber industry are deemed to offset or reduce the export measures, SLA, Art. XVII, ¶2, and thereby circumvent the commitments Canada made under the SLA, in violation of Article XVII, ¶ 1.

27. Canada’s circumvention of the export measures – which are only imposed when the price of softwood lumber drops below certain defined levels – exacerbates the downward turn in the market that triggered the export measures in the first place. In other words, Canada is providing its exporters with a trade advantage that permits them to maintain a higher level of exports at lower prices than they otherwise could in a declining market.

28. The Agreement contains the following five narrow exceptions to the general rule that “[g]rants or other benefits” are deemed to offset or reduce the export measures:

- Provincial timber pricing or forest management systems as they existed on July 1, 2006. This refers to the license or “stumpage” fee charged to companies by Canadian provincial governments for the right to cut timber on public lands. SLA, Art. XVII, ¶ 2(a).

- Programs that “provide benefits on a non-discretionary basis in the form of and in the total aggregate amount in which they existed and were administered on July 1, 2006.” SLA, Art. XVII, ¶ 2(b).
- Programs “undertaken for the purpose of forest or environmental management, protection, or conservation . . . or to facilitate public access to and use of non-timber resources, [that do not] have the effect of undermining or counteracting movement toward the market pricing of timber.” SLA, Art. XVII, ¶ 2(c).
- Payments or other compensation to First Nations (indigenous peoples). SLA, Art. XVII, ¶ 2(d); and
- Measures “not specific to the forest products industry.” SLA, Art. XVII, ¶ 2(e).

29. The Québec and Ontario programs do not meet any of the exceptions set forth in subparagraphs (a) through (e) of Article XVII, ¶ 2. To qualify for the Article XVII, ¶ 2(b) exception, which appears to be the exception that Canada may assert, a program must meet multiple tests.

30. First, the program must have both “existed” and been “administered” as of July 1, 2006 (the cutoff date). Benefit programs that, on July 1, 2006, had only been proposed and lacked implementing legislation, an administrative apparatus, or dedicated funding, did not “exist” and had not been “administered” for purposes of the SLA.

31. Second, the program must have the same form and total aggregate amount that it possessed on July 1, 2006. “Form” includes the application process and award requirements, the types of benefits provided, and other conditions attached to the program. “Total aggregate amount” refers to the total aggregate amount of benefit legally authorized for award as of July 1, 2006.

32. Third, the program must “provide benefits on a non-discretionary basis.” That is, for Canada to establish that this exception applies, government officials can exercise no discretion in providing benefits.

33. Thus, a government benefit program qualifies for the Article XVII, ¶ 2(b) exception only if it actually “existed” and was being “administered” in the same form on July 1, 2006; the aggregate amount of the program has not been increased since that cutoff date; and, it provides benefits on a non-discretionary basis. As explained below, none of the six challenged provincial programs meets the plain requirements for this, or any other, exception.

C. Québec Programs That Violate The SLA

34. Three programs implemented by the government of Québec violate the SLA’s anti-circumvention provision:

- Québec’s so-called “Forest Management Measures,” which provide C\$700 million in financial benefits to forest industry companies in the form of a tax credit of 90 percent for investments in access roads and bridges and other funding for reforestation, fire fighting, and pest control;
- Québec’s C\$425 Million Forest Sector Financing “Envelope,” which provides financing to forest industry companies at non-market terms in the form of loan guarantees and interest-free loans; and,
- Ontario’s Forest Sector Prosperity Fund, which provides grants to forest industry companies to support and leverage new capital investment projects.

1. Capital Tax Credit

35. On November 8, 2006, four months after the SLA’s cutoff date of July 1, 2006, the Québec government proposed legislation allowing forest sector companies a tax credit of 15 percent of the purchase price for new manufacturing and processing equipment through 2009. The legislation received final assent on December 6, 2006, and applies retroactively to capital

assets purchased after March 23, 2006. Attachment C at 176-78. The Québec Finance Minister announced in February 2007 that the capital tax credit would be extended through December 31, 2012. Attachment D at 26.

36. The stated purpose of the capital tax credit is to “reduce the cost of acquiring manufacturing and processing equipment by 15%” by “offset[ting] the tax on capital normally paid on new investments” and “offset[ting] or substantially reduc[ing] this tax on all other existing assets.” Attachment E at 10. Québec estimated that the measure would reduce taxes paid by companies by C\$120 million over four years. Id.

37. The capital tax credit circumvents Canada’s commitments under the SLA by providing a benefit targeted to the forest products industry. The credit was first proposed in Québec’s 2006 budget, in which the Finance Minister expressly identified the targeted purpose of the credit. Attachment E at 10-11. He stated: “[I]n the case of forest companies, the government is sending a clear message to the heads of these companies: if they invest, they can eliminate their tax on capital for many years, not just on new investments, but on all their assets. . . . By making available funds forest companies need to carry out their projects, the government is contributing to a speedy return to profitability. . . .” Id. at 11. Thus, these incentives provide financial benefits to Canadian softwood lumber companies, which, under SLA Art. XVII, ¶ 2, reduce or offset the export measures, in contravention of the SLA Art. XVII, ¶ 1.

38. No exception in the SLA applies to exempt this program from the anti-circumvention provision in Art. XVII, ¶ 1. The only exception that might be considered is contained in subparagraph 2(b), but the program does not meet the requirements of that

provision. The tax credit was enacted after the July 1, 2006 cutoff date. See Attachment F at 3. That the premier proposed the credit in March 2006 is immaterial. The tax credit could not have been in existence or have been administered until it was legally authorized in December 2006.

2. Québec’s So-Called “Forest Management Measures”

39. On October 20, 2006, the Government of Québec unveiled a multi-pronged plan for improving the profitability of the forest sector in the province. The plan consists of more than C\$700 million in government “investments” in various aspects of the forest sector. The primary purposes of the plan are to assist forest industry companies in modernizing their operations and to stimulate investment in the industry.

40. The plan includes (1) a refundable tax credit of 90 percent for forest sector companies making investments in forest access roads and bridges, corresponding to an estimated C\$132 million in benefits to companies; and (2) a reduction of the cost of logging operations by providing benefits estimated at C\$65 million for reforestation, fighting forest fires, and pest control.

41. The plan, announced in October 2006, echoed Québec’s March 2006 proposed budget announcing “financial incentives to support the forest sector” by “enhanc[ing] the profitability of forest sector activities.” Attachment F at 5, 8. Among the programs proposed in March 2006 were C\$210 million in “[m]easures to reduce the cost of operations and silvicultural investments” and C\$100 million for a “[r]efundable tax credit of 40% for construction of and major repairs to forest access roads and bridges.” Id. at 8-9. As of July 1, 2006, however, Québec had not implemented any of these programs.

42. Québec's budgets have not disclosed the statutory authority for the programs, but presumably authority is derived from the Act Respecting the Ministère des Ressources Naturelles et de la Faune. Section 15 of this act provides, "The Minister may, in the exercise of his functions, grant subsidies. He may also, with the authorization of the Government, grant any other form of financial assistance." Legislation to increase the tax credit did not receive final assent until December 2006. Attachment C at 112.

43. These programs breach the SLA's anti-circumvention provisions by targeting "forest companies" with financial benefits. The proposed budget expressed that "[f]unding of \$210 million will be allocated to reduce the cost of operations and silvicultural investments assumed by the forest sector." Attachment E at 8. Similarly, the stated rationale for the tax credit was "to help forest companies reduce supply costs." *Id.* at 9. Thus, these incentives provide financial benefits to Canadian lumber companies, which, under SLA, Art. XVII, ¶ 2, reduce or offset the effect of the export measures, in contravention of SLA, Art. XVII, ¶ 1.

44. Despite Québec's contention when it announced these programs that these programs comply with the SLA, see Attachment F at 3, these incentives do not fall within any exception to the application of the anti-circumvention article.

45. First, although the programs are labeled "forest management," they do not appear to be directed at forest management. The programs are designed to increase the profitability of companies in the forest sector industry, including softwood lumber companies. Therefore, the "forest management system" exception in Article XVII, ¶ 2(a) does not apply.

46. Second, the measures did not exist and were not administered on July 1, 2006, and, therefore, do not qualify for the Art. XVII, ¶ 2(b) exception. An October 2006 press release

accompanying the announcement and the 2007-2008 Québec Budget make this clear.

Attachment C; Attachment G at 34. In fact, the Finance Minister's 2007-2008 budget admitted, "To foster the rapid recovery of Québec's forest sector, the government implemented, in the fall of 2006, a support plan providing \$1.4 billion in assistance over the period 2007-2010."

Attachment G at 34. Additionally, the 90 percent tax credit was not enacted into law until December 2006 in a bill passed and assented to in the National Assembly. Attachment C at 112.

47. Québec's announcement suggested also that these programs comply with the SLA because they do not "specifically target the softwood lumber sector" and are "rooted in government policies that existed prior to July 1, 2006." Attachment F at 3. Both contentions are flawed. The relevant test is not whether the program targets the "softwood lumber industry," but rather, whether the program is "not specific to the forest products industry." SLA, Art. XVII, ¶ 2(e). Québec's Finance Minister has admitted that the program targets the forest products industry. Attachments E, F, G. Moreover, consistency with existing policies and goals is immaterial. The programs were not implemented until the fall of 2006 and, therefore, did not exist and were not administered before the SLA's cutoff date of July 1, 2006.

3. Québec's C\$425 Million Forest Sector Financing "Envelope"

48. Along with the measures described above, in October 2006, Québec implemented a plan to make C\$425 million available to assist forest sector companies in financing capital projects and asset acquisition projects. Attachment F at 3. The program, called a loan or financing "envelope" in various government documents, was originally included as part of the Finance Minister's March 2006 proposed budget. However, the program was not implemented until the fall of 2006. See Attachments E, F.

49. The measure as proposed in March 2006 was designed to offset antidumping and countervailing duties and intended to “foster investment and modernization projects that will improve the productivity and competitiveness of Québec forest companies.” *Id.* Shortly after the presentation of the March 2006 budget, however, the United States Trade Representative and the Canadian Trade Minister announced an agreement on the core terms of a new softwood lumber agreement that would eventually become the SLA. No loans were ever made under the Québec forest sector loan program pending finalization of the Agreement, an event that did not occur until October 12, 2006.

50. On October 20, 2006, following the SLA’s entry-into-force, the Government of Québec announced that it was making available \$425 million in financing. Attachment F. Québec changed the focus of the program described in March 2006, from assisting companies affected by duties, which were returned by the United States pursuant to the SLA, to providing financing to forest sector companies for (1) “working capital financing projects and consolidation projects;” and (2) “investment and asset acquisition projects.” Attachment F at 3. The United States is not aware of any project that obtained financing under the program before October 12, 2006. Further, the Québec Finance Minister admitted in his 2007-2008 budget that the program was not “implemented” until the fall of 2006. Attachment G at 34.

51. The favorable, non-market-term financing provides a benefit to Canadian softwood lumber producers and exporters. The press release specified that C\$150 million in working capital financing will help companies obtain loans from financial institutions; that is, it will induce lenders to take actions that they would not otherwise take. Attachment F at 4. The remaining C\$275 million includes other forms of non-market financing, including interest-free

loans. These are benefits targeted at the forest products industry. Such benefits reduce or offset the export measures under the SLA, under the terms of Art. XVII, ¶ 2 and, therefore, circumvent Canada's obligations under the SLA, in violation of Art. XVII, ¶ 1.

52. Again, the Art. XVII, ¶2(b) exception for benefits on a "non-discretionary basis in the form of and in the total aggregate amount in which they existed and were administered on July 1, 2006" does not apply. This program awards benefits on a discretionary basis. The minister has discretion under the Act Respecting the Ministère des Ressources Naturelles et de la Faune to award or not to award benefits. In addition, all programs administered by Investissement Québec make the provision of benefits discretionary. The Act Respecting Investissement Québec and La Financier du Québec provides that the government may mandate the agency to grant assistance to programs that the government considers of major economic significance and allows Investissement Québec to make financial assistance dependent upon conditions or contractual obligations.

53. Decisions regarding which projects to fund, what type of assistance to provide, what fees and interest to charge, and whether to defer interest, are necessarily discretionary. The substance and evaluation of these undefined criteria are left to government officials.

54. Beyond the discretionary nature of the benefits it provides, the program was not implemented until the fall of 2006, and no funds were disbursed before that time. Attachments F, G. Although the province announced in March 2006 that it would pay C\$425 million, that benefit was originally designed to offset antidumping and countervailing duties, and no funds were expended. After the SLA was signed in October 2006, the province announced that it still intended to pay out C\$425 million, but for different purposes, as discussed above. Thus, even if

the program somehow “existed,” it was not “administered” until well after the cutoff date. Certainly, the form of the program changed markedly after the cutoff date, with different objectives, different award criteria, and a new administrative mechanism. Because programs are excluded from the SLA’s anti-circumvention provision only if they exist in the form they took on or before July 1, 2006, this program cannot qualify for an exception.

55. Québec’s announcement of the forest sector financing “envelope” program claims that the program is consistent with the SLA because it is “consistent with government policy set prior to July 1, 2006, drawing [its] funds from the spring 2005 and spring 2006 budgets.” Attachment F at 3. However, whether it is consistent with government policy is irrelevant. The relevant test is whether the program is non-discretionary and in existence and administered in the same form as on July 1, 2006. SLA Art. XVII, ¶ 2(b). This program fails this test. First, providing benefits under the program is discretionary. Further, the program was not implemented before the SLA’s cutoff date. There is no evidence that loan program funds were available before October 2006, as opposed to merely “announced” as a future program in an as-yet unapproved provincial budget. Lastly, the program goals and conditions were changed after the signing of the SLA. Under these circumstances, the program did not exist and was not administered in October 2006 “in the form of and in the total aggregate amount in which it existed and was administered on July 1, 2006.” Thus, the “loan envelope” is not exempt from the anti-circumvention prohibition in the SLA.

56. Québec’s forest sector programs have already provided significant benefits for the province’s softwood lumber industry. The Québec Finance Ministry stated that, as a direct result of its plan, “business projects valued at \$500 million have been filed,” “projects worth almost

\$80 million have been submitted to build and repair forest bridges and roads,” and “the government has entered into twenty diversification and development projects.” Attachment M.

57. Since Québec implemented the programs in the fall of 2006, the province has provided numerous benefits under this program. Attachment H.

D. Ontario Programs That Violate The SLA

58. Ontario has also implemented three programs that violate the SLA’s anti-circumvention provision:

- Ontario’s Forest Sector Prosperity Fund, which provides grants to forest industry companies to support and leverage new capital investment projects;
- Ontario’s Forest Sector Loan Guarantee Program, which provides financing to forest industry companies at non-market terms to support and leverage new capital investment projects; and
- Ontario’s Forest Road Building Program, which pays forest industry companies to build roads in order to extract additional lumber.

1. Forest Sector Prosperity Fund

59. The Forest Sector Prosperity Fund (FSPF) provides millions of Canadian dollars in targeted grants to Ontario’s forest industry. Attachments I, J. The Ontario Ministry of Natural Resources announced the program in 2005, stating that it would “provide a total of \$150 million in conditional grants to the forest sector over three years” and that “the funding grants will be issued to the forest industry to support and leverage new capital investment projects.” Attachment J at 1. This program provides grants of up to 30 percent of project value or C\$25 million for approved forest sector projects.

60. No projects were funded before the July 1, 2006 cutoff date established in SLA Art. XVII. Since then, however, the government of Ontario has begun to provide grants to

softwood lumber companies seeking to expand their operations. Attachment J at 1.

61. The FSPF violates the anti-circumvention article of the SLA because it is specific to the forest industry and provides “grants or other benefits” to lumber producers, with the stated intent to “strengthen the industry’s future.” SLA, Art. XVII, ¶ 2; Attachment J at 1. FSPF grants provide a benefit to their recipients and, therefore, offset market restraints that flow from the SLA’s export measures.

62. The Ontario Ministries of Natural Resources and Finance possesses discretion to approve or to reject any qualifying application for FSPF benefits. Thus, the Art. XVII, ¶2(b) exception for benefits provided on a “non-discretionary basis in the form of and in the total aggregate amount in which they existed and were administered on July 1, 2006” does not apply. The application for benefits requires applicants to provide extensive information allowing decisionmakers to exercise judgment to select among competing proposals. For example, applicants must identify the number of new jobs created, predicted export revenues, other “economic benefits to the province,” as well as information related to the financing, scope, and viability of the project. Attachment K at 2. Likewise, applicants must provide “a complete Transition Plan/Business Case/Project Proposal.” *Id.* at 1.

63. In fact, once a forest industry company files an application, outside consultants and a ministry committee evaluate the “business case” for the grant or loan guarantee, potential risks to government investment, and the applicant’s financial stability. Attachment J at 2. Based upon the subjective committee recommendations, the Ministries of Natural Resources and Finance, then, decide whether to approve all, part, or none of the project. *Id.*

64. That applicants must meet certain criteria to be selected does not remove the

government's discretion. Indeed, FSPF envisions that cabinet-level officials make individualized assessments concerning whether a proposal will receive funding.

65. Moreover, the FSPF program did not "exist" and was not "administered" in the same "aggregate amount" and "form" before July 1, 2006. Although Ontario announced the FSPF in 2005, no funding had been provided before July 1, 2006. Rather, it was only on June 30, 2006, that Ontario even announced the award of the first grant under the program, a C\$2 million grant to a softwood lumber manufacturer. This grant, as well as all other grants and loan guarantees granted under the program, were not made until well after July 1, 2006.

66. Lastly, since announcing the first grant on the eve of the cutoff date, Ontario has provided more than C\$13 million in grants and loan guarantees to softwood lumber producers to leverage industry investments totaling over C\$40 million, far exceeding the form and aggregate amount in existence on July 1, 2006.

2. Forest Sector Loan Guarantee Program

67. The Ontario Ministry of Natural Resources announced the Forest Sector Loan Guarantee Program (FSLGP) in 2005, with the intent to "address[] the competitiveness challenges faced by the Ontario forest sector." Attachment L at 1. The program is designed to provide Ontario companies a series of loan guarantees up to C\$350 million over five years. As of May 2007, the ministry had received 50 applications for benefits under the FSPF and FSLGP that, if approved, will translate into more than C\$1.4 billion in new forest sector investments.

68. Like the FSPF, the FSLGP circumvents the SLA by providing a financial benefit to softwood lumber mills and manufacturers. Canada cannot establish that the FSLGP is exempt from application of the SLA's anti-circumvention provisions. The program is based upon the

same discretionary statute, employs the same subjective criteria, and uses the same discretionary approval process as the FSPF. Attachment L. Moreover, Ontario had announced no FSLGP awards before July 1, 2006. Since then, Ontario has announced more than C\$4 million in loan guarantees.

69. In a September 4, 2007 press release announcing a grant and loan guarantee to re-open a paper mill, Ontario's Natural Resources Minister stated, "This is the 17th offer we have announced since the Prosperity Fund and Loan Guarantee programs were established. . . . All told, the announced offers of support will lead to about \$356 million in investment based on accumulated government support of over \$89 million, a substantial achievement and commitment to our northern communities." Attachment M. While this particular grant and loan guarantee benefitted a paper producer, the press release further details other grants to softwood lumber producers of \$22.5 million, \$700,000, and \$600,000 for capital investments and mill modernization. Id.

3. Forest Road Building Program

70. Ontario announced in 2005 and early 2006 that it will provide approximately C\$75 million annually for construction and maintenance of primary and secondary forest access roads used for commercial timber harvesting. Attachment I. The program will reportedly fund 100 percent of the cost for primary road construction and maintenance and 50 percent of the cost of secondary road construction, with some support for secondary road maintenance. Attachment H.

71. The Ministry of Natural Resources has advised that the road program, together with other measures, "will reduce the cost of wood delivery by \$4 per cubic meter on average

over the next three years” and “will measurably reduce delivered wood costs (the cost of forest industry activities related to supplying wood fibre to processing facilities).” Attachment I. One softwood lumber producer estimated that the benefit of the road building program alone would be C\$2.90 per cubic meter. Attachment N.

72. The Ontario road building program provides a benefit to the softwood lumber industry that reduces or offsets the export measures under the SLA. Construction and maintenance of primary and secondary forest roads constitutes “grants or other benefits” provided “on a de jure or de facto basis to producers of Canadian softwood lumber products.” SLA, Art. XVII.2.

73. Despite Canada’s agreement not to circumvent its commitments under the Agreement, Ontario is paying softwood lumber producers and other forest industry companies to build, for the benefit of the companies, a system of forest roads in the companies’ choice of locations to give the companies improved access to their primary resource, softwood timber. This benefit does not “facilitate public access to and use of non-timber resources” pursuant to the exception contained in Art. XVII, ¶ 2(c). Rather, this program provides a benefit to the forest products industry by reducing delivered wood costs and, therefore, constitutes an impermissible “action having the effect of reducing or offsetting the Export Measures.” SLA, Art. XVII.

VII

CLAIMANT'S REQUEST FOR RELIEF

74. The United States respectfully requests an award in its favor:
- (a) Declaring that Canada has breached the Softwood Lumber Agreement by implementing the government programs identified above, in violation of the anti-circumvention article of the Agreement.
 - (b) Ordering Canada to cure its breaches by immediately ending the programs, recovering the benefits conferred upon the softwood lumber sector as a result of the programs, imposing additional export measures to compensate for its breach, and taking any additional steps, retrospective and prospective, necessary for Canada to fully cure its breaches of the Agreement and to compensate the United States for Canada's circumvention.
 - (c) Determining the reasonable period of time for Canada to fully cure all of its past breaches (in any event not to exceed 30 days).
 - (d) Determining appropriate adjustments to export measures to compensate for Canada's breaches if Canada fails to cure its breaches within the reasonable period of time.
 - (e) Ordering any further relief as may be available and appropriate in the circumstances.

VIII

SERVICE OF THE REQUEST

75. This Request, together with Attachments A through N, is being simultaneously transmitted to Canada's legal representatives by email. A copy will also be served, by overnight delivery, upon the LCIA and upon Canada's legal representatives.

Respectfully submitted,

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