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Arbitration proceedings pursuant to the Softwood Lumber Agreement between Canada and the United States of America, entered into on 12 September 2006 (the SLA) and the LCIA Arbitration Rules (the LCIA Rules)

LCIA Arbitration 81010

In the matter between

THE UNITED STATES OF AMERICA

AND

CANADA

PROCEDURAL ORDER NO. 5

12 JUNE 2009

CONSIDERING:

- (A) That Procedural Order No. 1 of 18 April 2008 ("PO No. 1") provides that prior to the hearing on the merits (the "Hearing") the Tribunal and the Parties shall hold a pre-hearing telephone conference to address any outstanding issues with respect to the organization of the Hearing or other procedural matters (the "Pre-Hearing Telephone Conference");
- (B) That by communication dated 12 May 2009, the Tribunal confirmed that the Pre-Hearing Telephone Conference would take place on 3 June 2009;
- (C) That by letters of 22 May 2009, each Party submitted the lists of witnesses and experts whom it wished to examine at the Hearing, in accordance with paragraphs 3.1(j) and 6 of PO No. 1, as modified by the Tribunal's letter of 30 April 2009;
- (D) That in its letter of 22 May 2009 the Claimant further requested an expanded direct examination of its expert witnesses in order to address matters allegedly arisen after the filing of their reports;
- (E) That by letter of 26 May 2009 the Respondent objected to this latter request;

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- (F) That on 28 May 2009, the Tribunal invited the Claimant to submit a reply to the objections raised by the Respondent by 1 June 2009;
 - (G) That on 1 June 2009, the Claimant submitted its reply and raised, in addition, several issues of admissibility of evidence and arguments submitted with the Respondent's Rejoinder;
 - (H) That on 2 June 2009, the Respondent requested the postponement of the Pre-Hearing Telephone Conference scheduled for 3 June 2009 in order to reply to the additional issues raised in Claimant's letter of 1 June 2009;
 - (I) That on 3 June 2009, the Tribunal decided to hold the Pre-Hearing Telephone Conference as scheduled specifying that, if it so wished, the Respondent would be granted additional time to respond to the issues raised in the Claimant's letter of 1 June 2009;
 - (J) On the same day from 5:00 p.m. to 6:30 p.m. CET, the Tribunal and the Parties held the Pre-Hearing Telephone Conference during which the outstanding issues with respect to the organization of the Hearing were discussed. It was decided *inter alia* that the Respondent would reply by 5 June 2009 to the additional matters addressed in the Claimant's letter of 1 June 2009, and that the Tribunal would issue an order on the matters discussed at this conference;
 - (K) That on 4 June 2009, the Tribunal confirmed the deadline of 5 June 2009 for the Respondent to submit a reply, and allowed the Claimant and the Respondent to submit additional expert reports limited to the allegedly new analyses introduced in the rebuttal reports of Prof. Kalt, Mr. Reilly and Mr. Adam;
 - (L) That on 5 June 2009, the Respondent submitted its reply to the additional matters raised in the Claimant's letter of 1 June 2009.

The Tribunal hereby decides as follows:

1. Witnesses/Experts who will appear at the Hearing

1.1 The following fact and expert witnesses will be examined at the Hearing:

- (i) For the Claimant: Prof. Robert H. Topel (expert witness); Mr. Tom L. Beck (expert witness).
- (ii) For the Respondent: Prof. Joseph P. Kalt (expert witness); Mr. Robert F. Reilly (expert witness); Mr. François Trottier (fact witness); Mr. Jean-Pierre Adam (fact witness). Messrs. Trottier and Adam will give testimony in French. The Parties will arrange for simultaneous translation.
- (iii) The Tribunal notes that neither Party wishes to examine Prof. Michael Reisman

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- 1.2 Before they give testimony, fact witnesses shall not attend the Hearing. They will be admitted thereafter, subject to the possibility of their being recalled. Expert witnesses shall be allowed to attend the Hearing. The confidentiality requirements addressed in paragraph 5 below are reserved.

2. Sequence of the Hearing

- 2.1. Pursuant to paragraph 8.3 of PO No. 1, the Hearing will be structured as follows:

- (a) Opening statements by Claimant and Respondent;
- (b) Examination of Claimant's expert witnesses;
- (c) Examination of Respondent's expert witnesses;
- (d) Examination of Respondent's fact witnesses;
- (e) Closing statements by Claimant and Respondent.

- 2.2. The Parties are invited to confer and submit to the Tribunal by **22 June 2009 at 6:00 p.m. (CET)** a tentative schedule for the witness and expert examination (2.1b to d above). If the parties cannot agree on a joint schedule, each shall submit its own.

3. Time allocation

- 3.1. Pursuant to paragraph 8.4 of PO No. 1, the time allocation during the Hearing will be as follows:

- (i) Each Party shall have 2 hours for its opening statement and 2 hours for its closing statement.
- (ii) In addition, the Claimant shall have 9.5 hours and the Respondent 8.5 hours for fact and expert witness examinations.
- (iii) If the remaining available time permits and the circumstances justify it, the Tribunal may in its discretion grant a brief extension of the times set out in (ii).

4. Demonstrative exhibits

- 4.1 Each Party shall provide the other with a hard copy of any demonstrative exhibit that it intends to use in its opening statement by **17 July 2009 at 6:00 p.m. (CET)**.

5. Confidentiality of the proceedings

- 5.1 Pursuant to Article XIV(17) of the SLA and to paragraph 5 of Procedural Order No. 2 ("PO No. 2"), the following rules shall apply at the Hearing:

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- (i) During the examination of the expert witnesses, access to the Hearing room shall be restricted to Authorized Persons and originators;
 - (ii) Each Party shall bear the responsibility for ensuring that the confidentiality requirements set forth in PO No. 2 are fully respected by persons present on its side of the Hearing room;
 - (iii) During the examination of the fact witnesses and oral arguments, a Party may raise an issue of confidentiality, which will then be ruled upon by the Tribunal;

6. Transcript

- 6.1 The version of the Hearing transcript distributed every day will be a full version without redaction of possibly confidential passages. At the end of the Hearing, the Tribunal will set a date for the Parties to submit, if possible jointly, a version of the Hearing transcript in which Confidential Information has been redacted. In case of disagreement, the Tribunal will make a determination.
- 6.2 The Parties shall confer on the modalities of the transcript of testimony given in French and submit to the Tribunal a proposal, if possible jointly, by no later than **22 June 2009 at 6:00 p.m. (CET)**. In case of disagreement, the Tribunal will make a determination.
- 6.3 The transcript will remain confidential until the Tribunal confirms the establishment of a non confidential version of the transcript.

7. Post-hearing briefs

- 7.1 At the end of the Hearing, the Tribunal will discuss with the Parties whether post-hearing submissions will be filed and if so within what time limit.

8. Evidence/arguments submitted with the Respondent's Rejoinder

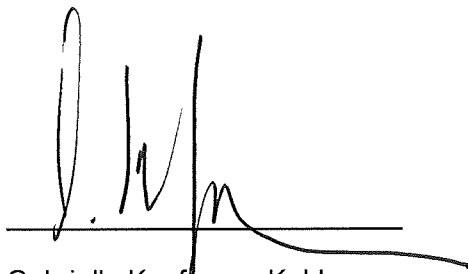
With respect to the arguments advanced by the Parties, especially in the letter of 1 June 2009 from the Claimant and the letter of 5 June 2009 from the Respondent, regarding the allegedly new remedy presented by the Respondent in its Rejoinder (8.1), the allegedly new evidence submitted by the Respondent in its Rejoinder (8.2), the allegedly new arguments submitted by the Respondent in its Rejoinder (8.3), and the admissibility of the expert report of Prof. Michael Reisman submitted by the Respondent in its Rejoinder (8.4), the Tribunal gives the following directions:

- 8.1 The concerns expressed by the Parties in this regard have been adequately addressed by the Tribunal's communication of 4 June 2009 allowing for the submission of additional expert reports by both Parties. For the avoidance of doubt, the Tribunal observes that such additional reports shall be limited to the

allegedly new analyses in the rebuttal reports of Messrs Kalt, Reilly, and Adams. These additional reports may attach documents but only to the extent the latter are needed to support the content of the additional reports;

- 8.2 The documentary evidence contained in (i) exhibits R-131, R-132, R-133 and R-137, (ii) exhibits R-123 and R-124, (iii) Appendices A-4A and A-4B to Prof. Kalt's Rebuttal Report (R-101), and (iv) exhibits 5 and 6 to Mr. Adam's second statement (R-125) was properly presented by the Respondent in rebuttal to assertions and evidence presented by the Claimant in its Reply. It is thus admitted into the record;
- 8.3 The Respondent's arguments in connection with (i) the definition of the term "non-discretionary" in Article XVII(2)(b), (ii) the fact that the Claimant has not demonstrated the actual exercise of discretion by Government officials in approving applications for program benefits, and (iii) that Canada's benefit programs are not the cause-in-fact or proximate cause of any damages suffered by the Claimant were properly presented by the Respondent in rebuttal to assertions made in the Claimant's Reply and are thus admitted.
- 8.4 In conformity with general practice in international arbitration, Prof. Reisman's expert report will be admitted into the record. The Tribunal will later consider the relevance of the report and assess the weight it wishes to give such report.

For the Arbitral Tribunal,



Gabrielle Kaufmann-Kohler
Tribunal Chair