In the LCIA
No. 91312

CANADA,

Claimant,

v.

THE UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO CANADA'S REQUEST FOR ARBITRATION

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

PATRICIA M. McCARTHY
REGINALD T. BLADES, JR.
Assistant Directors
CLAUDIA BURKE
Senior Trial Counsel
MAAME A.F. EWUSI-MENSAH
GREGG M. SCHWIND
DAVID S. SILVERBRAND
ANTONIA R. SOARES
STEPHEN C. TOSINI
Trial Attorneys
United States Department of Justice
Commercial Litigation Branch
Civil Division
1100 L Street, N.W.
Washington, D.C. 20530
UNITED STATES
Tel: +1 (202) 514-7300
Fax: +1 (202) 514-7969
national.courts@usdoj.gov;
Patricia.McCarthy@usdoj.gov

Attorneys for Respondent,
The United States of America

Of Counsel:

TIMOTHY M. REIF
General Counsel
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508
UNITED STATES

JOAN E. DONOGHUE
Principal Deputy Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
UNITED STATES

April 17, 2009

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 2

III. DENIAL OF CLAIMS 4

A. Parties To The Arbitration 4

B. The Arbitration Agreement 5

C. The Award of the Tribunal 6

D. Fee 6

E. Timetable 6

F. The United States' Response To Canada's Statement Of The Claim 6

IV. CLAIMANT'S REQUEST FOR RELIEF SHOULD BE DENIED 9

V. RELIEF REQUESTED 10

VI. CONFIRMATION OF SERVICE 10

I.

INTRODUCTION

1. The United States respectfully submits the following response to the request for arbitration filed by the claimant, Canada, on April 3, 2009. The United States reserves the right pursuant to Article 15.3 of the LCIA Rules to submit a full statement of defence in response to Canada's statement of the case.

2. Canada's offer to make a lump sum payment directly from Canada's Federal Government to the United States Government does not cure the breach found by the Tribunal in its Award on Remedies, either in whole or in part. Contrary to Canada's suggestion that it has made a "payment" to the United States, the United States is not in receipt of any funds from Canada that could be considered a cure. Even assuming that the United States were in receipt of the funds Canada characterizes as a cure, such funds would not cure this breach, even in part. The rationale offered by Canada for why Canada considers its offer to have constituted a cure is incorrect and relies on a profoundly flawed understanding of both the Tribunal's Award on Remedy and the United States' expert's testimony during remedy proceedings.

II.

BACKGROUND

3. On February 23, 2009, the Tribunal issued its Award on Remedies in *United States v. Canada*, LCIA No. 7941. The Award on Remedies was made available to the parties on February 26. In that Award, the Tribunal determined that 30 days was a reasonable period of time for Canada to cure the breach found in the Tribunal's Award on Liability. *See* Request, Exhibit D, Award on Remedies at I.1 (p. 148). The Tribunal also determined that "as an appropriate adjustment to compensate for the breach found above, Canada shall be required to

collect an additional 10 percent *ad valorem* export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN$63.9 million, plus CDN$4.36 million in interest (a total of CDN$68.26 million) has been collected." *Id.* at I.3 (page 148).

4. During the 30-day period of time determined by the Tribunal, the United States and Canada engaged in discussions regarding a possible cure of the breach.

5. By letter dated March 27, 2009, Canada offered the United States a lump sum payment of US$34 million, plus simple interest, expressly contingent on the United States' acceptance of the following four conditions: *first*, that the United States would no longer "claim that Canada has failed to 'cure the breach;'" *second*, that the United States "will not claim that Canada has any obligation to impose compensatory adjustments under paragraphs 22-25 of Article XIV of the SLA and Canada may refund in full any compensatory adjustments that Canada has collected pursuant to those provisions;" *third*, that LCIA No. 7941 be "terminated," and that "the United States will have no right to, and will not, impose compensatory measures of any kind . . . and will refund in full any import duties it may have collected as a compensatory measure, and will not request a new arbitration under Article XIV(29) of the SLA"; and *fourth*, that the United States "will not re-file any Request for Arbitration under Article XIV(1) with respect to Canada's failure to adjust Expected United States Consumption . . . ." Request Exhibit E.

6. Canada expressed its intention to initiate this arbitration should the "United States decline[] to consider this payment a full cure of the breach . . . ." *Id.* Canada also requested that the United States respond by 4:00 p.m. on March 30, 2009, and advise "where [Canada] may send this payment."

7. The United States did not respond to Canada with the requested information. Rather, by letter dated April 2, 2009, the United States informed Canada that "the United States has never represented, and does not consider, that such a payment cures the breach found by the Tribunal. In particular, the payment Canada has proposed neither provides a remedy for Canada's breach nor wipes out the consequences of that breach, as the Softwood Lumber Agreement requires." Exhibit A.

8. The United States informed Canada that, because Canada did not cure the breach within the 30-day period prescribed by the Tribunal, Canada must now impose the compensatory adjustments determined by the Tribunal. The United States reminded Canada that, if Canada refused to impose the compensatory adjustments, then the United States would possess the right under the SLA to impose compensatory measures "in an amount that shall not exceed the adjustments to the export charges determined by the Tribunal." *Id.*

9. Canada sent its request for arbitration to the LCIA on April 2, 2009. At the time Canada sent its request, the United States had not yet determined to impose its own compensatory measures. The United States merely declined to accept Canada's offer, which meant that Canada had made no payment and the United States had not, as of the date of Canada's request for arbitration, imposed any compensatory measures, nor had the United States stated an intention to do so. Canada filed its request notwithstanding this, asking that this Tribunal be appointed to advise whether Canada's offer constitutes a cure of the breach.

10. In the absence of any compensatory measures implemented by Canada, on Tuesday, April 7, 2009, the United States announced that it had taken action under section 301 of the Trade Act of 1974. Exhibit B. Specifically, the United States stated that it would impose compensatory measures in the same amount determined by the Tribunal. On Friday, April 10,

2009, the United States published notice of this action under section 301 of the Trade Act of 1974. Exhibits C-D. The notice announced that the United States will assess a 10 percent *ad valorem* charge upon imports of Canadian softwood lumber until US$54.8 million is collected.[1] *Id.* The first such charges were collected on April 15, 2009.

III.

DENIAL OF CLAIMS

11. The United States denies all allegations of fact and law in the request, except to the extent expressly admitted below.

A. Parties To The Arbitration

12. The United States has no reason to dispute Canada's statement in paragraph 3 of the request regarding Canada's legal representatives.

13. Regarding paragraph 4 of the request, the United States agrees that it is the respondent named in this proceeding. The United States is represented by the following counsel:

Michael F. Hertz
Acting Assistant Attorney General
Jeanne E. Davidson
Director
Patricia M. McCarthy, counsel of record
Assistant Director
Reginald T. Blades, Jr.
Assistant Director
Claudia Burke
Senior Trial Counsel
Maame A.F. Ewusi-Mensah
Gregg M. Schwind
Antonia R. Soares
David S. Silverbrand
Stephen C. Tosini
Trial Attorneys

[1] US$54 million is the equivalent of CDN$68.26 million based on the exchange rate at the time the Award on Remedies was issued.

The United States admits the remainder of the contact information contained in paragraph 4.

B. The Arbitration Agreement

14. Regarding paragraph 5 of the request, the United States admits that Canada has submitted its request pursuant to the dispute settlement provisions contained in Article XIV of the SLA. The United States denies that Canada met the requirements for this action at the time of filing.

15. Regarding paragraph 6 of the request, the United States admits that Article XIV, paragraph 29 of the SLA states that the LCIA shall appoint to the Tribunal the arbitrators comprising the original Tribunal, to the extent they are available. The United States notes that the SLA requires the LCIA to appoint the Tribunal within 10 days after the request for arbitration is delivered, rather than 10 days after "receipt" of the request, as Canada states in paragraph 6. The United States admits to Canada's recitation of the original Tribunal members and notes that, as of April 9, 2009, the Tribunal has been appointed.

16. Regarding paragraph 7 of the request, the United States admits that Article XIV, paragraph 29 states that any member of the original Tribunal "who is no longer available shall be replaced in accordance with Article 11 of the LCIA Rules and paragraph 8." The United States admits that paragraph 8 of Article XIV prohibits any citizen or resident of either Canada or the United States from being appointed to the Tribunal.

17. Regarding paragraphs 8 through 11 of the request, the United States admits Canada's characterization of the SLA's provisions on remuneration of the arbitrators, hearings of the Tribunal, and applicable rules.

C. The Award of the Tribunal

18. Regarding paragraph 12 of the request, the United States admits that Canada's recitation of SLA, art. XIV, paragraph 30 is correct. For the remainder of paragraph 12, the United States states that the SLA is the best evidence of its contents, but admits that Canada has correctly quoted paragraphs 31 and 32 of Article XIV.

D. Fee

19. Regarding paragraph 13 of the request, based upon the LCIA's communication to the parties dated April 3, 2009, the United States admits that Canada has transmitted the fee prescribed in the LCIA schedule of costs. However, the United States has no knowledge of the precise date upon which Canada transmitted the fee.

E. Timetable

20. Regarding paragraph 14 of the request, the United States did not agree to the timetable proposed by Canada in Exhibit C of its request and so informed the Tribunal in its letter dated April 15, 2009. On April 17, 2009, the Tribunal issued a proposed schedule requested that the parties comment by April 21, 2009.

F. The United States' Response To Canada's Statement Of The Claim

21. Regarding paragraph 15 of the request, the United States denies all facts, characterizations, and legal interpretations alleged. The United States has rejected Canada's offer to settle the matter with a lump sum payment of US$34 million plus simple interest. *See* Exhibit A. Canada has refused to timely implement the adjustments to the export measures determined by the Tribunal. Therefore, Canada has failed to take any action to date that could be considered a cure of the breach either in whole or in part.

22. Regarding paragraphs 16 and 17 of the request, the United States admits Canada's recitation of the Tribunal's Award, notes that the Award is the best evidence of its contents, and admits that the parties agreed that the reasonable period of time ended on March 28, 2009.

23. Regarding paragraph 18 of the request, the United States denies Canada's characterization of Exhibit F to the request subject to the following limited admission: the United States admits that on March 27, 2009, Canada made an offer to settle this dispute, in the amount of a lump sum payment of USD$34 million plus simple interest at four percent.

24. Regarding paragraph 19 of the request, the United States denies Canada's characterization of Canada's offer as a "tender of payment," and denies Canada's characterization of the United States' response. The United States admits that it did not respond to Canada's letter within the time requested by Canada. The United States responded to Canada's letter within one week from the date on which Canada's offer was received, and its letter was dated the same day as Canada's request for arbitration — April 2, 2009.

25. Regarding paragraph 20, the United States denies knowledge of Canada's understanding regarding the United States' intentions to impose compensatory measures. As noted earlier, the United States did not announce until April 7, 2009 – four days after Canada filed its request – that it would impose compensatory measures in accordance with the SLA and in accordance with United States law. *See* Exhibit B-D.

26. Regarding paragraph 21 of the request, the United States denies all facts, characterizations, and legal interpretations alleged.

27. Regarding paragraph 22 of the request, the United States denies all facts, characterizations, and legal interpretations alleged subject to the following limited admission: the United States admits that the Tribunal's Award on Remedies determined that mere cessation of

the breach "did not wipe out all consequences of the breach during the earlier six months." Request, Exhibit E, ¶ 276.

28. Regarding paragraph 23 of the request, the United States denies all facts, characterizations and legal interpretations alleged.

29. Regarding paragraph 24 of the request, the United States denies all facts, characterizations and legal interpretations alleged subject to the following limited admission: the United States admits that paragraph 22(b) of Article XIV of the SLA is limited to the imposition of appropriate adjustments to the export measures and does not contemplate the Tribunal awarding cash compensation.

30. Regarding paragraph 25 of the request, the United States denies all characterizations and legal interpretations alleged subject to the following limited admission: the United States admits that it recognized, in its briefs and in its oral statements at the Hearing on Remedies, that a "cure" could take the form of a cash payment *if the parties agreed that such payment remedied the breach*. *See, e.g.*, Request, Exhibit H, 31:7-:13; 301:2-10. Absent such agreement of the parties, a lump sum cash payment cannot cure this breach.

31. Regarding paragraph 26 of the request, the United States denies all facts, characterizations, and legal interpretations alleged.

32. Regarding paragraph 27 of the request, the United States denies all facts, characterizations, and legal interpretations alleged.

33. Regarding paragraph 28 of the request, the United States denies all facts, characterizations and legal interpretations alleged.

34. Regarding paragraph 29 of the request, the United States denies all facts, characterizations and legal interpretations alleged.

IV.

CLAIMANT'S REQUEST FOR RELIEF SHOULD BE DENIED

35. Regarding Canada's request for relief in paragraph 30, the United States denies that any of Canada's four requests for relief (a-d) is appropriate because Canada's offer of US$34 million plus simple interest – which does not constitute an actual payment – does not in any way cure the breach found by the Tribunal, nor has Canada imposed any compensatory adjustments that could be terminated, as it assumes in paragraph 30(d). In addition, as noted earlier, with respect to Canada's requests for relief in paragraph 30(b) and (c), at the time Canada submitted its request for arbitration, the United States had not imposed any compensatory measures or collected any customs duties.

36. Regarding Canada's request for relief in paragraph 31, the United States denies all characterizations and legal representations upon which the request relies. The SLA does not contemplate that the Tribunal identify what amount of payment would cure the breach. SLA, art. XIV ¶ 31. Rather, the SLA contemplates only that the Tribunal determine that, if the breach has been cured in whole or in part, whether the compensatory adjustments or measures should be modified or terminated. *Id.*

37. Regarding Canada's request for relief in paragraph 32, the United States denies all characterizations and legal representations upon which the request relies and states that Canada's request for relief is inconsistent with the terms of the Award on Remedies and inconsistent with the SLA, which does not provide for reconsideration or clarification of Awards, and which specifically prohibits "any appeal or other review." SLA, art. XIV ¶ 20. In addition, the SLA does not contemplate arbitrations to address hypothetical questions such as whether, if Canada were to impose the compensatory adjustments in a manner that "allocate[s] the total amount of

the additional charge," that action would constitute a cure of the breach. The SLA contemplates only the following: if the Tribunal in this action finds that the breach has been cured in whole or in part, "the Tribunal shall determine the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated." SLA, art. XIV ¶ 31.

V.

RELIEF REQUESTED

38. The United States respectfully requests that the Tribunal issue an award in favor of the United States and against Canada:

a. Declaring that, even if the United States had received Canada's offer of a lump sum cash payment, that such a payment would not have cured the breach in whole or in part; and

b. Denying and dismissing Canada's claims in their entirety.

VI.

CONFIRMATION OF SERVICE

39. This response, together with Exhibits A-D, is being simultaneously transmitted to both legal representatives of the Respondent by email. A copy of this request will also be served upon the LCIA, the Tribunal, and Canada's legal representative by overnight mail on April 17, 2009.

Respectfully submitted,

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEANNE E. DAVIDSON
Director

PATRICIA M. McCARTHY
REGINALD T. BLADES, Jr.
Assistant Directors
CLAUDIA BURKE
Senior Trial Counsel
MAAME A.F. EWUSI-MENSAH
GREGG M. SCHWIND
DAVID S. SILVERBRAND
ANTONIA R. SOARES
STEPHEN C. TOSINI
Trial Attorneys
United States Department of Justice
Commercial Litigation Branch
Civil Division
1100 L Street, N.W.
Washington, D.C. 20530
UNITED STATES
Tel: +1 (202) 514-7300
Fax: +1 (202) 514-7969
national.courts@usdoj.gov;

Attorneys for Claimant,
The United States of America

OF COUNSEL:

TIMOTHY M. REIF
General Counsel
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508
UNITED STATES

JOAN E. DONOGHUE
Principal Deputy Legal Adviser
United States Department of State
2201 C Street, N.W.
Washington, D.C. 20520
UNITED STATES

April 17, 2009

CERTIFICATE OF SERVICE

I certify that I caused to be sent, by overnight courier, RESPONSE TO CANADA'S REQUEST FOR ARBITRATION, to the members of the Tribunal and to the legal representative of Canada on April 16, 2009.

CLAUDIA BURKE