NON-CONFIDENTIAL

In the LCIA
No. 81010

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA,

Respondent.

UNITED STATES POST-HEARING REPLY BRIEF

TONY WEST
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

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1. Pursuant to the Tribunal's communication dated August 3, 2009, claimant, the United States, respectfully submits its Post-Hearing Reply Brief.

2. This Post-Hearing Reply Brief consists of the following sections: (1) an introduction; (2) a reply to Canada's submission regarding liability; (3) a reply to Canada's submission regarding remedy; and (4) a conclusion. Responses to Canada's six "Annexes" are included in the above sections, as appropriate.

INTRODUCTION

3. In its Post-Hearing Brief, the United States synthesized the abundant evidence demonstrating Canada's breach of the Anti-circumvention provision of the 2006 Softwood Lumber Agreement ("SLA" or "Agreement"). In contrast, Canada's Post-Hearing Brief ignores the documents demonstrating liability and offers instead unsupported characterizations of the Agreement, its history, and its purposes. Given that the Tribunal's goal is to determine the ordinary meaning of the SLA, and to apply that meaning to the evidence, Canada's disregard of the SLA's ordinary meaning and failure to grapple with the actual evidence at issue in this arbitration does nothing to aid the Tribunal.

4. As explained in the U.S. Post-Hearing Brief, with respect to liability, there are only a few, discrete issues that remain in dispute, all of which concern the Anti-circumvention provision's exceptions — the list of circumstances under which a grant or other benefit will *not* be considered to reduce or offset the export measures. First, regarding the question whether a program is "non-discretionary," Canada's submission fails to address any of the core evidence demonstrating the Ontario programs' inherently discretionary nature. To compensate for the lack of evidence supporting its position, Canada creates, for example, a series of charts intended

to convey the reasonableness of its counterintuitive interpretation of "non-discretionary." None of Canada's charts supports the dictionary definitions offered by the parties, nor do they have any basis in the SLA.

5. Similarly, concerning the question whether a program is a "forest management measure" that would be excepted from the Anti-circumvention provision, Canada ignores its own document that defines the scope and character of "forest management." That document does not discuss or even implicitly consider as "forest management" the kind of cost-reimbursement programs at issue in this arbitration. Again, Canada continues to rely upon a definition so broad, it would encompass virtually any activity that had any relationship to Canada's Crown Forests.

6. With respect to the question whether a program was "administered" on July 1, 2006, Canada ignores the multiple documents demonstrating that Ontario was simply incapable of processing or paying any reimbursements under the Ontario Forest Sector Road Construction and Maintenance Program (the Ontario road cost reimbursement program) until after July 1, 2006.

7. Finally, regarding the question of whether a program "existed" on July 1, 2006, Canada ignores entirely the very real effect of its own legislative processes. That is, until legislation such as the Québec Capital Tax Credit has received final legislative assent, it does not "exist" or otherwise have the power of law.

8. Despite the space Canada devotes to these issues, its submission does not meaningfully rebut or even address any of the relevant evidence demonstrating liability, nor does it establish that any of the exceptions applies.[1] And when it interprets the SLA's provisions,

[1] Canada contends that the United States has misunderstood its burden of proof as claimant, arguing that the United States bears the burden to demonstrate that a particular program breaches and that a particular program does not fall within any of the Anti-

Canada relies almost exclusively on unsupported assertions regarding the SLA's object and purpose. Accordingly, Canada has failed entirely to demonstrate that any of the exceptions applies. It is most certainly Canada's burden to do so, if it wishes to benefit from the Anti-circumvention provision's exceptions.

9. With respect to remedy, Canada's submission reveals continued and fundamental misinterpretation of both the dispute resolution and the Anti-circumvention provisions of the SLA. As a threshold matter, Canada said very little during the hearing about the SLA's retrospective cure provision, and made only passing mention during closing statements of its so-called "expert" report on international law. Tr. 1181:20-23; 1183:15-18. Nonetheless, Canada includes in its post-hearing submission another discussion of Professor Reisman's submission, even going so far as to call it "unchallenged." Canada's Post-Hr'g Br. at ¶ 195. Canada has failed to heed the Tribunal's direction that post-hearing briefing should provide an "assessment" of the events of the *hearing*. Tr. 1068:18-24,

10. As the United States has demonstrated, the ordinary meaning of the SLA's dispute resolution provision contemplates both retrospective and prospective remedies. This ordinary meaning has recently been confirmed by two Awards interpreting the SLA. *See* CA-12, CA-49. Although the parties agree that these Awards do not bind this Tribunal, the Awards nevertheless constitute increasingly persuasive authority regarding the meaning and context of the SLA's dispute resolution provision and a breaching party's obligations to wipe out all consequences of its breach.

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circumvention provision's exceptions. Canada Post-Hr'g Br. ¶¶ 64-69. Canada's criticism ignores the as-yet unrebutted evidence demonstrating that the challenged programs *both* breach the SLA *and* do not fall within any exceptions. It is now Canada's burden to demonstrate that an exception does apply. Canada has failed to do so.

11. Of course, Canada's breach is the providing of grants or other benefits to softwood lumber producers. By its very terms, the Anti-circumvention provision treats such grants or other benefits as *already having reduced or offset the export measures*. In other words, once a grant or other benefit has been provided, the claimant need not prove any particular effect upon the U.S. market to establish a breach; an effect is established by the parties' agreement. Similarly, and contrary to Canada's contention, an appropriate remedy should not consider the effect of the breach on the U.S. market. There is simply no basis in the provision or anywhere else in the Agreement for such consideration.

12. Rather, the Agreement requires that the Tribunal determine "appropriate" adjustments to the export measures "in an amount that remedies the breach." To remedy the breach, appropriate adjustments must wipe out all the consequences of the breach. The primary consequence of the breach, indeed, the very nature of the breach, is the distribution of grants or other benefits that effectively return to the Canadian softwood lumber industry a portion of the export charges — the same industry that is required to pay charges under the SLA. This return of export charges is precisely what Canada agreed not to do when it agreed to be bound by the Anti-circumvention provision.[2]

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[2] Canada devotes an entire Annex to respond to the United States' characterization of the nature of the bargain struck in the SLA. Canada Post-Hr'g Br. Annex VI. The United States stated during the hearing that, in exchange for the system of export measures in the SLA, the United States returned nearly US $5 billion in cash deposits. Tr. 1094:18-1095-6. Canada now contends that the US $5 billion was returned in exchange for only Canada's agreement to dismiss its multi-forum litigation. Of course, the settlement of claims was a critical element of the SLA, but the SLA was not merely a settlement of claims in exchange for money. It was a settlement of claims in exchange for money and the assurance that, in the future, Canada would self-police its exports to ensure that exports to the United States were balanced and, in some instances, limited. Canadian International Trade Minister Stockwell Day recently confirmed this when he stated that the "Agreement has brought stability, and has returned nearly C$5 billion[] to the industry." C-70. The export measures are the center of this stability. If Canada collects the export measures and then effectively returns that money to the very producers and exporters who paid it in the

13. Given the nature of the breach, any remedy must therefore, at the very least, recover the grants or other benefits distributed under the breaching programs. In addition, an appropriate remedy must also eradicate the remaining consequences of those grants or other benefits. If a softwood lumber producer would not have carried out a project or would have gone out of business without a government loan or loan guarantee, then the loan or loan guarantee provided more than just beneficial financing terms.

14. Moreover, in these unusual circumstances, the typical valuation calculus is inapplicable. That is, the normal comparison between the interest rate received and the interest rate otherwise available is impossible to perform. There were no other rates available that would have allowed the projects to go forward. Based upon the testimony of the only forest industry expert offered during this arbitration, the United States has demonstrated that many, if not all, of the projects at issue in this arbitration simply could not have proceeded without government loans and loan guarantees. Canada has been unable to identify one instance when a company *actually* received or could have received project financing in the absence of government assistance. Accordingly, the U.S. assessment of the benefit remains unrebutted and constitutes an appropriate manner in which to measure the benefits provided. The United States, therefore, respectfully requests that the Tribunal determine appropriate adjustments to the export measures that recover the grants and benefits provided and *all* consequences of those grants and benefits. In the alternative, the United States respectfully requests that the Tribunal determine appropriate adjustments to the export measures that recover all the grants and benefits found to breach the Agreement.

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first instance, the export measures are undermined, or, as the Agreement terms it, circumvented. Although Minister Day's statement is technically a new document, Canada also included a similarly new statement from the United States Trade Representative in its submission. Canada Post-Hr'g Br. ¶ 117 n.98.

15. Canada's remedy proposal, on the other hand, accounts for neither the amount of the grants or benefits nor the consequences of the grants or benefits. Instead, Canada attempts to redirect the Tribunal's attention to a remedy based upon lost U.S. producer surplus. According to Canada, the only question is the extent to which U.S. producers were harmed by Canada's breach. This approach is directly contrary to the approach taken by the Tribunal in *United States v. Canada*, LCIA No. 7941, Award on Remedies, in which the Tribunal determined appropriate adjustments to the export measures using the benefit to *Canadian* producers as the measure, not the loss to U.S. producers. This measure is the most efficient, appropriate, and direct means to remedy the breach here, given the nature of the breach and the Anti-circumvention provision's declaration that the benefit to the softwood lumber producers or exporters is itself the breach.

16. Insisting that its approach is correct, despite the lack of authority or basis, Canada offers Dr. Joseph Kalt's conclusions as the only viable remedy and offers to attempt to come to agreement with Dr. Robert Topel on appropriate adjustments. Canada's suggestion, if implemented, would leave a portion of the breach unremedied and would delay proceedings unnecessarily. It would fail to remedy the breach because it would not account for the value of the grants and benefits conferred upon Canadian producers and exporters. Although consideration of lost producer surplus is certainly one way to think about measuring an effect of *a* breach, it is by no means a complete way to think about measuring the effect of *this breach.* Our presentation of Dr. Topel's analysis merely represents an effort to respond to Canada's inevitable framing of the damages in this arbitration — it does not represent the full measure of damages. In any event, there are fundamental differences between Dr. Kalt's and Dr. Topel's methods and conclusions that cannot be easily resolved by Canada's suggested approach.

17. Accordingly, this reply brief assumes that the Tribunal will consider as its primary measure of damages the amounts of the grants and benefits conferred and additionally the valuation of the consequences of those grants and benefits. To the extent that lost producer surplus is considered, it should be considered only if the previous analysis does not provide a complete remedy.

LIABILITY

18. Despite the U.S. reliance upon a multitude of Canada's own documents demonstrating liability, Canada's submission barely addresses any of the relevant evidence for either the Ontario or the Québec programs. Instead, Canada repeats its unsupported assertions about the purpose of various parts of the Anti-circumvention provision and asks the Tribunal to rely upon those unsupported assertions rather than upon the concrete evidence demonstrating liability.

19. For the Tribunal's convenience, the following sections on liability address Canada's arguments in the same general sequence in which those arguments were raised in Canada's Post-Hearing Brief.

I. The Ontario Grant And Loan Guarantee Programs Are Discretionary

20. Canada contends, first, that the Ontario grant and loan guarantee programs were "non-discretionary" because "non-discretionary" programs involve the exercise of *some* judgment. Canada's interpretation of the term does not appear in any dictionary or in the SLA. Canada then contends that, this interpretation notwithstanding, it did not exercise any discretion in awarding grants and loan guarantees under these programs, despite the discretion created and actually exercised under the programs. In Canada's view, a program that requires a decision-maker to determine which criteria to apply is non-discretionary.

A. Canada's Interpretation Is Inconsistent With The Ordinary Meaning Of "Non-Discretionary" Read In Its Context

21. The dictionary definitions that Canada has offered support only one interpretation of the term "non-discretionary" — programs confer benefits on a "non-discretionary basis" when program officials are *not* required to exercise "judgment" in evaluating program applications. *See* RA-25 (in defining "discretionary," referring to "judgment"); RA-26 (in defining "discretion," referring to "judging," "judgment," and "acting according to one's own judgment or as one thinks fit"); RA-27 (defining "discretion" as "[i]ndividual judgment" and defining "administrative discretion" as "[a] public official's or agency's power to exercise judgment in the discharge of its duties").

22. Far from misinterpreting these definitions, *see* Canada Post-Hr'g Br. ¶¶ 20-21, the United States has remained true to the letter and spirit of all of the dictionary definitions offered by both parties. All of these definitions are simply variations on the same theme — the exercise of "discretion" entails the exercise of independent judgment by a program official. Although two definitions qualify the terms "judgment" or "decision-making" – as "uncontrolled" or "free" (*see* RA-26, RA-27) – it is inescapable that the exercise of "discretion" involves the exercise of *judgment* as discussed above.[3]

23. To avoid the U.S.'s straightforward interpretation drawn directly from the dictionary definitions Canada itself placed into evidence, Canada advances an interpretation of "non-discretionary" that bears no connection to the dictionary definitions — even going so far as to plot its novel interpretation on a continuum, on one end of which is the U.S.'s purportedly

[3] Canada again mentions the United States' inadvertent omission, during opening statements, of the word "free" from Black's Law Dictionary's definition of "discretion," which is defined as "the power of free decision-making." Canada Post-Hr'g Br. ¶ 20 (citing Tr. 26:1-3 and R-27). In any event, the United States offered an interpretation of "discretion" perfectly consistent with this and every other dictionary definition of the term.

"extreme" interpretation. *See* Canada Post-Hr'g Br. ¶¶ 22-26. Canada first calls the U.S. interpretation "extreme," but notably concedes that, even in its view, the interpretation is consistent with at least one dictionary definition. Canada Post-Hr'g Br. ¶¶ 26, 22.

24. Then, Canada advances a new interpretation, found nowhere in any dictionary or in the SLA. According to Canada, "non-discretionary" means decision-making "subject to reasonable constraints." Canada Post-Hr'g Br. ¶ 12. The notion of "reasonable constraints" appears nowhere in the dictionary definitions introduced into the record by Canada. Indeed, it is far from clear what Canada's interpretation even means; Canada's interpretation leaves the term "reasonable constraints" undefined. In any event, reasonably constrained decision-making is *discretionary*. That the decision-maker's discretion is not completely unfettered does not mean that the decision-making is without discretion.

25. Canada then takes this self-created, and undefined concept of "reasonable constraints" and suggests that the United States has never challenged the application of "non-discretionary" "*as Canada has interpreted that term*." Canada Post-Hr'g Br. ¶ 12 (emphasis in the original); *see also id.* ¶ 18. Canada is correct. But this is so because the United States simply does not accept Canada's interpretation of "non-discretionary," much less understand how it might be applied — under the SLA or in any other context. Canada has simply redefined "non-discretionary" to mean "discretionary," and now criticizes the United States for not applying Canada's interpretation to the facts.

26. Perhaps recognizing the weakness of its unsupported interpretation, Canada moves on to contend that the context of the term "non-discretionary" supports its "reasonable constraints" interpretation. First, Canada contends that exception 2(b)'s reference to "administered" and "total aggregate amount" support its contrived interpretation of "non-

discretionary" as decision-making "subject to reasonable constraints." Canada Post-Hr'g Br. ¶ 29. In reality, the requirement that a grant or other benefit have been both non-discretionary *and* administered (in the same aggregate amount on July 1, 2006), supports the U.S. reliance on the definition of "administrative discretion." *See* RA-27. Exception 2(b) does not merely require that a permissible program be non-discretionary. It requires that the program be non-discretionary and administered, among other things. Therefore, the provision itself contemplates not just a generic notion of discretion, but the sort of discretion exercised by governments.

27. Second, Canada continues to contend that the U.S. interpretation would preclude the "archetypal government grant program" which, according to Canada, exception 2(b) was designed to protect. Canada Post-Hr'g Br. ¶¶ 31. We do not agree that the program, which targets a specific industry and introduces many layers of government evaluation and discretion, is archetypal. Even if it were, Canada has given no reason why the archetypal government grant program should *not* be precluded by the SLA. Indeed, the ordinary terms of the SLA demonstrate quite the opposite — that it is precisely the archetypal program that the parties intended to prohibit. Under the chapeau of Article XVII's paragraph 2, "[g]rants or other benefits" are deemed to constitute a *per se* violation of the SLA unless one of the enumerated exceptions applies. Grants are perhaps the most distortive type of government assistance. Therefore, the Anti-circumvention provision explicitly precludes *all* grants, *unless* they satisfy certain, limited exceptions. Under Canada's reading, however, a program that would otherwise be deemed a *per se* violation under the chapeau of paragraph 2 would not be subject to any further analysis under exception 2(b). Such a reading effectively permits the exception to swallow the *per se* rule and renders exception 2(b) superfluous.

B. The Evidence Establishes That Program Officials Were Required To, And Did, Exercise Discretion

28. The record establishes unequivocally that the Ontario grant and loan guarantee programs required program officials to exercise discretion when evaluating program applications, and that the program officials actually did exercise discretion. *See e.g.,* C-1, Att. AJ; C-13; C-15; C-63; C-64; C-65; C-66; C-67; C-68; C-69. Confronted with this evidence, Canada has been forced to concede that the programs contemplate consideration of both mandatory and what Canada calls "supplementary guidelines," which are "subjective criteria." Canada Post-Hr'g Br. ¶¶ 50, 54. However, Canada contends – without citation to documentary evidence – that consideration of the "supplementary criteria" was optional. Specifically, Canada argues that program officials had the "option" to apply the subjective criteria or to decline to apply the subjective criteria. *See* Canada Post-Hr'g Br. ¶ 46 ("the administrators of the FSPF and LGP were allowed to, but did not in fact, use the supplementary guidelines"); *id.* ¶ 49 ("The FSPF and LGP allow for the use of supplementary guidelines. . . . But while these programs *allow* this, they do not require it.") (emphasis in the original); *id.* ("The program administrators had the authority to use the supplementary guidelines (and to reject applications meeting mandatory criteria) but in practice did not use them."); *id.* ¶ 51 ("the Ontario programs allow for the use of supplementary guidelines").

29. Significantly, even Canada's fictional account of the program criteria undermines its contention that the program provided benefits on a "non-discretionary basis." If program officials had the "authority" or "option" to apply the criteria or to decline to apply the criteria, those program officials were *exercising discretion* in choosing whether or not to do so. Thus, even under Canada's theory, program officials exercised discretion.

30. Furthermore, Canada ignores the key evidence demonstrating the actual application of the criteria. The MNR's "Ontario's Forest Industry" webpage explains the program application parameters. *See* C-1, Att. AJ (Forest Sector Prosperity Fund); C-15 (loan guarantee program). This evidence – which Canada has conspicuously avoided throughout these proceedings – does not even *suggest*, let alone establish, that program officials have the option of not applying the subjective criteria. Rather, the MNR documents categorically provides that "[c]onditional grant applications *will* undergo an assessment based on the program criteria." C-1, Att. AJ at 2 (emphasis added); *see also* C-15 at 2 (loan guarantee applications will undergo screening). Ontario even hired a third-party due diligence provider, Deloitte, to "review and comment" on aspects of the proposals such as the "[b]usiness [c]ase," "[p]otential risks to government investment," the "[f]inancial stability of [the] applicant," "[o]ther government assistance programs that may also be eligible sources," and "[r]ecommended terms and conditions for funding assistance." C-1, Att. AJ at 2; *see also* C-15 at 2 ("MNR reviews the comments and recommendations of the due diligence provider [Deloitte] prior to the submission of the application to the loan guarantee approval committee and the authorizing Ministers"). If Canada were correct that discretion was not exercised, Deloitte would have never had a role in the application process. Yet, Canada ignores Deloitte's role entirely, and in doing so, ignores the complex criteria that require program officials to make decisions based on the exercise of judgment.

31. To the extent Canada does address the evidence establishing discretion, it directs the Tribunal to irrelevant portions of the documents. For example, Canada quotes two portions of the "Minister's Seeking Approval Briefing Notes," the first of which states [

]. Canada Post-Hr'g Br. ¶ 51 (quoting Minister's Seeking Approval Briefing Note [

] (July 6, 2007) at ON-CONF-02828); Kalt Report, Appendix B, Item 16 (R-2); the second of which states, [

] *Id.* ¶ 52 (quoting Minister's Seeking Approval Briefing Note [

] (Aug. 18, 2006) at ON-CONF-02882; Kalt Report, Appendix B, Item 16 (R-2). Neither of these statements says anything about the purported "optional" nature of the "subjective criteria"; at best they consist of government assessments of public perception. Thus, Canada has failed to identify any specific evidence stating that program officials were permitted to or did disregard the "subjective criteria" in evaluating applications.

32. Rather, as discussed above, the record establishes that the subjective criteria were considered by Deloitte, whose recommendations were then considered by program officials. For example, contrary to Canada's contention that the Ontario MNR granted in full every application that it considered, the Minister's Seeking Approval Briefing Note for [

] demonstrates that the program officials recommended, and the Minister approved a different and less generous package than what was requested by the companies. The note includes a qualitative and quantitative risk analysis of the proposed project, as well as three proposed options:

[

]

C-64 at ON-CONF-02837-2838 (emphasis added); C-63 at ON-CONF-02828-2831.

33. Each option includes a discussion of associated advantages and risks. *Id.* Ultimately, the Forest Sector Competitiveness Secretariat recommended Option 1, which was qualitatively different and quantitatively less than what the applicants requested. C-64 at ON-CONF-02838; C-63 at ON-CONF-02828. Thus, even the evidence Canada relies upon establishes that discretion has been exercised through several means: (i) during proposal evaluation; (ii) when program officials propose funding options and set forth the pros and cons associated with each funding option; and (iii) when program officials make a final recommendation to the Minister for funding. *Id.* Of course, the Minister exercises ultimate discretion when he or she decides which, if any, of the options to accept.

II. The Ontario Road Cost-Reimbursement Program Does Not Fall Within Any Exceptions

A. The Ontario Road Cost-Reimbursement Program Is Not "Forest Management"

34. The definition of "forest management systems" relied upon by the United States is derived from *Canada's own evidence*. *See* Stmt. Defence ¶ 126 (quoting R-37). Pursuant to that evidence, the "sustainability" of the Crown Forests is the "primary objective of forest management." *See also* R-37 at i; *see also id.*, A-36; R-47 at ON00074966. Thus, only programs with this primary objective would satisfy exception 2(a)'s "forest management" requirement.

35. Canada has not identified a single document indicating that the road cost-reimbursement program was established to facilitate the management or sustainability of the forests. In fact, the road cost-reimbursement program has nothing to do with forest management

or sustainability. Voluminous record evidence and the testimony of industry expert Tom L. Beck demonstrate that the program was established, *not* to sustain the forests, but to sustain the troubled forest industry by decreasing its costs and thereby enhancing its global competitiveness. *See, e.g.*, C-1, Att. S at Executive Summary, 8-9, 20-21; C-1, Att. AG; C-32 at ON00618119-120, ON00618127, ON00618131; C-33 at ON00617883, ON00617896, ON00617900; Tr. 417:13-418:2. The MNR's own documents describe the road cost-reimbursement program as "industry relief." C-33 at ON00617898; *see also* C-32 at ON00618120 (describing the cost-reimbursement program as one of the MNR programs "[s]upporting industry").

36. Instead, Canada simply asserts, without documentary or other support, that "forest management" encompasses "cost-sharing" arrangements. Canada Post-Hr'g Br. ¶ 84-89; *see also id.* ¶¶ 84, 86, 88. The only purported evidence Canada has advanced in support of its theory is a misreading of Mr. Beck's testimony from the July hearing. Despite Mr. Beck's clear statement that cost reimbursements form no part of "forest management," Canada insists that Mr. Beck testified to the contrary, relying on a statement by Mr. Beck that *forest management planning* requires "an orderly progression to make sure that both from a *cost perspective* and an environmental perspective that certain conditions are met." Canada Post-Hr'g Br. ¶ 85 (citing Tr. 423:20-424:2) (emphasis in original). Canada latches onto Mr. Beck's reference to "cost," but that reference is taken out of context. Mr. Beck was discussing forest management planning, and it goes without saying that efforts to manage the Crown Forests entail costs to the *provincial governments*. When specifically discussing whether forest management involves cost reimbursements to industry, however, Mr. Beck made the unqualified statement that cost reimbursement "is a separate issue" from forest management. Tr. 417:23-24.

37. Canada goes on to accuse the United States of failing to view the analysis within the proper "context." Canada Post-Hr'g Br. ¶ 84. The context for the program is not Canada's unsupported statements made before this Tribunal. The context for the program is the document that sets forth the policy framework for the program — the Final Report of the Minister's Council on Forest Sector Competitiveness. *See* C-1, Att. S; *see also* C-4 at ON-CONF-07205; C-32 at ON00618119. Absent from this report is any equating of the cost-reimbursement program with forest management. This is to be expected — the Minister's Council's mandate was to enhance *forest sector competitiveness* as reflected in the Council's title — *not* to enhance forest management or forest sustainability. In fact, along with the road cost-reimbursement program, the Minister's Council's report also served as the basis for the Prosperity Fund and the Loan Guarantee Program (*see* C-1, Att. AJ at 1; C-15 at 1) and, thus, the cost-reimbursement program is no more forest management than the two other challenged Ontario programs.

38. Canada claims that the United States has created an artificial distinction between forest management activities and attendant costs, Canada Post-Hr'g Br. ¶ 82, fails to acknowledge that the Ontario program does not lead to forest management activity at all. Because the costs reimbursed under the program are for roads that were already part of existing forest plans, it follows that no roads were built as a result of the program. That is to say, road building and other forest management activities were not enabled, expanded, or enhanced by the Ontario road cost-reimbursement program. In fact, if the provincial government abandoned the program, management of the provincial forests would not be impacted. Because the Ontario program does not lead to increased or otherwise improved forest management activities, it is unreasonable to claim that it qualifies for the exception in paragraph 2(a).

39. Canada's remaining arguments are equally unavailing. First, Canada contends that reimbursements are forest management because reimbursements under the program were based upon approved, multi-year forest management plans. Canada Post-Hr'g Br. ¶ 86. The forest management plans and other documents did provide the information required to allocate funding under the cost-reimbursement program. C-4 at ON-CONF-07213. However, the program's reliance upon such plans as a convenient and equitable mechanism for determining which roads were eligible for reimbursements does not somehow convert the program into "forest management" in light of the overwhelming evidence to the contrary. In fact, the MNR program documents treat the road cost-reimbursement program independently from forest management planning considerations. *See* C-33 at ON00617908 ("Provision of primary and secondary road construction and maintenance funding must not change road construction or maintenance responsibilities or road ownership.").

40. Second, Canada contends that the cost-reimbursement program constitutes forest management because the only roads eligible for reimbursements were roads available to multiple users. Canada Post-Hr'g Br. ¶ 86. As a factual matter, Canada misreads the record; the program merely required that [ ] for reimbursement be given to multi-use roads. C-4 at ON-CONF-07208. In fact, Ontario left it to "the discretion of the forest industry" to establish priorities for primary and secondary road construction and maintenance. C-33 at ON00617905. In any event, if the roads in question were not logging roads used by the industry to access timber, those roads would fail to meet one of the eligibility requirements for reimbursements under the program. *See* C-4 at ON-CONF-07213 (listing among criteria for reimbursement that "[

] (emphasis added).

B. The Ontario Road Cost-Reimbursement Program Was Not Administered On July 1, 2006

41. Pursuant to the ordinary meaning of the term "administered," a program is "administered" when the program is ready for program beneficiaries to claim benefits and for those benefits to be distributed. *See, e.g.*, CA-14. The record before this Tribunal establishes that the public was unable to make such claims under the cost-reimbursement program until *after* July 1, 2006. *See* C-31 at ON617788-ON617817; C-34 at ON00617951. The MNR program documents also expressly state that the program benefits were not made available until July 14, 2006 when the legal agreement and reimbursement form were distributed to the forest industry and MNR regional staff. C-31. Accordingly, the cost-reimbursement program is not entitled to the protection of exception 2(b).[4]

42. As a preliminary matter, Canada persists that paragraph 2(b) "does not contain a separate 'administration' requirement." Canada Post-Hr'g Br. ¶ 90 n.69. As with its other muddled arguments, Canada overlooks its prior concession that exception 2(b) does in fact contain an "administered" element." *See id.* ¶ 47 (discussing the Prosperity Fund and the Loan Guarantee Program).

43. Canada then insists that the July 14, 2006 email to program beneficiaries and the MNR regional offices does not mark the point in time when the program was "administered" — when the public was first able to seek program benefits. Canada Post-Hr'g Br. ¶ 96. As the United States has explained in its submissions and at the hearing, the July 14 email expressly states that the program's "official[] rollout" occurred as of that date, that the reimbursement form

[4] Canada misstates the record when it contends that the United States has taken inconsistent positions. Canada Post-Hr'g Br. ¶ 97. While counsel for the United States appears to have referred to program administration as "actually providing reimbursements" (Tr. 1117:20), the United States wishes to clarify that counsel intended to state "actually *processing* reimbursements."

was made available to the public *for the first time* as of that date, and that the loan agreement form was made available to the public *for the first time* as of that date. C-31 at ON00617788-617817. Indeed, the program documents characterize the legal agreement as "

" and it had to be "

" before costs could be reimbursed. *See* C-38 at ON-CONF-07222 ("

"). Thus, the program was simply not operational until these program documents were made available to the forest industry so that the industry had a mechanism through which to seek reimbursements.

44. Despite the U.S. reliance upon the ordinary meaning of the term "administered," and despite the record evidence establishing that the program was not administered until after July 1, 2006, Canada asks this Tribunal to disregard the plain language of the SLA and the evidence. First, and in keeping with Canada's efforts to read "administered" out of exception 2(b) entirely, Canada insists that the program was administered as early as February 2006 when the program was announced; *or* in April 2006, when the MNR made presentations to the public about the program; *or* during the April through June 2006 period because program beneficiaries could later claim reimbursements for that quarter. Canada Post-Hr'g Br. ¶¶ 90, 96. None of these theories undercuts the core Ontario documents showing that the program was approved and "rolled out" on July 14, 2006.

45. Canada's reliance upon the February 2006 date underscores its continued conflation of the terms "existed" and "administered." That the program was announced in some form as of February 2006 does not address the required separate inquiry as to when the program was "administered." As for Canada's reliance on MNR's April 2006 activity in connection with program development, Canada has not pointed to any evidence showing that the program was

being "administered" as of that date — *i.e.*, that the public could seek reimbursements as of that date or that the program was capable of disbursing such reimbursements. Instead, the record establishes that program benefits could not be dispensed until the program was rolled-out on July 14, 2006. C-31.

46. Equally unavailing is Canada's assertion that the program was being administered during the April through June 2006 period because reimbursements could later be *claimed* for that period. Canada Post-Hr'g Br. ¶¶ 90, 96. That costs incurred during that period could be claimed does not change the record evidence establishing that reimbursements could neither be sought nor dispensed until the program was up and running on July 14, 2006. *See* C-31 at ON00617788 - 617817; C-34 at ON00617951. Canada now relies upon 19 invoices claiming reimbursements for work completed between the April through June 2006 period (Canada Post-Hr'g Br. ¶ 96 n. 76), but like the single invoice it relied upon in previous briefing, these invoices were not — indeed, *could not have been* — submitted until after July 14, 2006. Indeed, all 19 invoices cited by Canada bear post-July 2006 submission dates. *See id.*

III. The Québec Programs Circumvent The SLA

47. With regard to Quebec's Silvicultural Investment Measures, a $75 million addition to the provincial budget for silvicultural related expenditures, Canada contends that "the United States continue[s] to speculate that the $75 million allocation will indirectly benefit the softwood lumber industry by ensuring better quality of forests" and that the United States did not explain why benefits accrue to softwood lumber producers. Canada Post-Hr'g Br. ¶ 108. This is untrue. In his second rebuttal report, Mr. Beck fully explains how Quebec's additional investments in silviculture increase forest productivity, thereby increasing the annual allowable timber cut. and how both tenure holders (i.e., softwood lumber producers) and the province

benefit. C-61 at 43-44. The industry benefit is neither speculative nor indirect as Canada contends. Tellingly, Canada did not examine Mr. Beck on this matter at the hearing.

48. The parties dispute only a few issues regarding the Québec programs: first, whether certain programs (the C$75 million silvicultural investment program and the PSIF) provided benefits at all, such that the Anti-circumvention provision even applies;[5] second, whether the C$75 million silvicultural investment program and the Québec Capital Tax Credit "existed" on July 1,2006, despite lacking final legislative assent; third, whether the C$135 million silviculture program "existed" and was "administered" on July 1, 2006; and fourth, whether the Québec road cost reimbursement program and the silviculture programs are part of a forest management system such that it would be excepted under paragraphs 2(a) or 2(c) of the Anti-circumvention provision.

A. The $75 Million Silviculture Investment Program And PSIF Provided Benefits

49. With respect to whether the silvicultural investment program provides a benefit, Canada relies entirely upon Mr. Trottier's statement, in which he states that the $75 million program "fund[ed] MRNF's increased silvicultural activities on private and public forest lands [, and] [o]n public forest lands, these supplemental silvicultural activities were performed under the direction of MRNF and did not affect the regular obligations of tenure holders." R-4 at ¶ 8. Mr. Trottier further stated that "[m]ore than half of these *activities and their funding* were and are directed at silviculture activities in the deciduous (hardwood) forest or in private forest lands." *Id.* at ¶ 9 (emphasis added). Lastly, Mr. Trottier stated that "[n]one of these *activities or funds* involves payments to softwood lumber producers or other major consumers of public timber . . .

[5] As stated in the United States Post-Hearing Brief, this question involves remedy issues and, as such, was addressed in the remedy section of that brief. This reply brief will address the issue both in the liability section and the remedy section.

[and] [n]one of the *activities* removes a burden or responsibility belonging to tenure holders." *Id.* at ¶ 10 (emphasis added). These statements, taken together, fail to demonstrate that benefits did not flow to softwood lumber producers.

50. In fact, when read carefully, the statements say nothing at all. First, paragraph eight says nothing about any benefit provided to "tenure holders" or any other forest products industry member. Second, paragraph nine merely talks about a majority of *activities* being related to hardwood forests. *Funding* for those activities, however, need not be a majority of the total funding, and thus, total funding for hardwood forests could be a small fraction of the C$ 75 million total. Indeed, Canada did not demonstrate that a majority of funds went to hardwood programs. Third, paragraph 10 of Mr. Trottier's statement states that none of the "activities or funds" involves payments, whereas Mr. Trottier then states only that none of the "activities" removes a burden or responsibility. Of course, this statement leaves open the prospect of "funds" removing burdens borne by the softwood lumber industry. Nevertheless, at a minimum, Canada concedes that some of the funds went to softwood programs.

51. In contrast, Québec itself stated that "Funding of $210 million [including the $75 million program] will be allocated to reduce the cost of operations and silvicultural investments assumed by the forest sector. These measures will particularly target: the inclusion of certain costs associated with silvicultural work in stumpage credits; revitalization work in degraded deciduous forests; [and] the implementation of a silvicultural investment strategy. These measures will help meet the imperatives of sustainable development of Québec's forest *while improving the financial position of forest companies.*" C-1, Att. U, sec. 6 at 8 (emphasis added). Indeed, for the same reason that Canada cannot demonstrate that programs fall under exception 2(a), Canada cannot demonstrate that this program falls into the 2(c) exclusion for benefits

provided "for the purpose of forest or environmental management, protection, or conservation," given the purely "financial" purpose of the program. As discussed below, *see infra* ¶ 72-73, the government's assumption of costs traditionally borne by the industry is not "forest management" under paragraph 2(c) any more than it is under paragraph 2(a), particularly since paragraph 2(c) is even more restrictive, requiring "forest or environmental management, protection, or conservation" to be the sole purpose of a program.

52. Similarly, Canada has failed to rebut the evidence demonstrating that the PSIF provided benefits to softwood lumber producers by giving these producers loans and loan guarantees they could not otherwise obtain — loans and loan guarantees that permitted them to undertake capital investment they needed to survive. Specifically, Canada has not even attempted to rebut the evidence the United States presented demonstrating that the PSIF allowed struggling lumber companies to undertake new capital investment. Canada has also not attempted to rebut the testimony establishing that risk was a critical element of Québec's evaluation (by Investissement Québec, or "IQ") of each project and showing that these investments were risky. Further, a review of IQ documents with Dr. Kalt demonstrated that Québec companies obtained valuable benefits as a result of the program, namely that they needed government assistance to obtain financing. Tr. 856:23-857:6. Instead of responding to the evidence presented, Canada again repeats its unsupported contention that "the United States has failed to demonstrate that the [Canadian] government provided a benefit to any softwood lumber producer or exporter." Canada Post-Hr'g Br. ¶ 134. Canada cites no evidence that any of the softwood lumber producers who received PSIF loans and loan guarantees could have obtained project financing without government assistance.

53. Initially, contrary to Canada's contention, in order to prove a violation of the SLA under paragraph 2 of Article XVII, the United States need not prove that Canada provided a grant or other benefit "to a softwood lumber producer or exporter *subject to the agreement*." Canada Post-Hr'g Br. ¶ 114 (emphasis added). Rather, paragraph 2 of Article XVII prohibits grants or other benefits provided "to producers or exporters of Canadian Softwood Lumber Products."

54. Canada incorrectly contends that the United States has failed to demonstrate that Canada has provided grants or other benefits to producers or exporters of Canadian Softwood Lumber Products. Canada Post-Hr'g Br. ¶ 114. As the United States has repeatedly demonstrated, through PSIF, Québec has provided $47,684,750 in benefits to softwood lumber producers and exporters by making funds available to companies that would otherwise be unable to obtain financing. C-61 at 68 (Table 1 (revised)); C1-AD at 3-4 (Québec Ministers state in October 2006 that [

); C1-AQ at 18, 119-24; C53 at 5; Tr. at 463:1-3 ([

); *id.* at 468:15-470:1, 471:4-13, 478-81, 499-502, 505; *see id.* at 705-707; 742-743; 856:12-14

]. PSIF is a benefit program that Québec provides on a *de jure* or *de facto* basis to softwood lumber producers and, thus, is deemed to offset or reduce the export measures. SLA, art. XVII, ¶ 2.

55. Moreover, contrary to Canada's contention that the United States has failed to analyze any PSIF loans to producers or exporters of softwood lumber products, Canada Post-Hr'g Br. ¶¶ 118-120, as Mr. Beck explained, he examined the PSIF files and determined which projects would not have proceeded without the benefit of Québec assistance. Mr. Beck

"analyzed basically all the projects and concluded . . . . They are high-risk projects. . . . It was my conclusion that many, most of these projects wouldn't have proceeded." Tr. at 469:4-17. Canada incorrectly contends that "Mr. Beck never identified which loans and which projects he was referencing or even what documents he had reviewed." Canada Post-Hr'g Br. ¶ 120. However, Mr. Beck specifically identified in his reports the PSIF loans that he did analyze. *See, e.g.*, C-61 at p. 32. Indeed, Canada's counsel began to ask Mr. Beck about which PSIF files he did review and specifically referenced table 35 of Mr. Beck's third report in which Mr. Beck lists the PSIF loans that he analyzed, but then decided to change topics. Tr. 472:12-74:5; C-61 at 32 (table 35).

56. Further, Canada's contention that Mr. Beck inappropriately failed "to ma[k]e an independent examination to determine whether non-government financing was available to the specific companies receiving PSIF loans," Canada Post-Hr'g Br. ¶ 119, is specious. The transcript portion that Canada cites entails questions related solely to Ontario. Tr. 455:2-12. Canada did not pose questions to Mr. Beck relating to PSIF until later in the hearing. *Id.* at 458:14-15 ("Q. Let's change to the Subject of Québec companies for a moment."). As Mr. Beck testified, he "analyzed basically all the projects and concluded . . . there are many different reasons that these projects would not have proceeded. . . . The evaluation report done under the PSIF or done under the Ontario programs indicated they were higher-risk projects." Tr. 469:4-13.

57. Canada also misrepresents the testimony of its own witness. Specifically, contrary to Canada's contention that its "financial expert cited to a PricewaterhouseCoopers report explaining that there was significant and extensive debt financing in the forest sector during the relevant periods ($17 billion in 2007 and $8 billion in 2008)," when asked if he did

"any analysis of the projects receiving benefits from the Québec programs," Tr. at 544:7-9, Mr. Reilly testified that he did not because he "was retained by the Province of Ontario and not by the Province of Québec." *Id.* at 544:5-7.

58. Finally, contrary to Canada's contentions that the United States did not present evidence at the hearing supporting Mr. Beck's conclusions that PSIF loans were high-risk, Canada Post-Hr'g Br. ¶¶ 121-123, as demonstrated in our Post-Hearing Brief, the evidence that the PSIF allowed struggling lumber companies to undertake new capital investment where they otherwise could not, has gone unrebutted. *See* U.S. Post Hr'g Br. at ¶ 120. Further, the testimony established that risk was a critical element in the evaluation of each project. *Id.*

B. The Québec Capital Tax Credit And $75 Million Silvicultural Investment Program Did Not "Exist" On July 1, 2006

59. Canada does not offer any new arguments with respect to the Québec Capital Tax Credit. Again, Canada repeats its argument that the date of the existence of the Capital Tax Credit was the date the credit was announced in the March 2006 budget speech. Canada Post-Hr'g Br. ¶ 148. As demonstrated in our Post-Hearing Brief at paragraphs 62 through 68, as a legal matter, the Québec capital tax credit did not "exist" until legally authorized because it did not have "objective being" until final assent. U.S. Post-Hr'g Br. ¶ 66; C-1 at 34 (citing Att. V at 177-78) (indicating that final assent took place on December 6, 2006). The Québec capital tax credit could not have been in existence or have been administered until it was legally authorized and had the power of law in December 2006.

60. Canada contends that the question of when a particular measure first 'existed' should be viewed as a question of fact to be determined by applying the meaning of 'existed' to a particular set of facts or circumstances." Canada Post-Hr'g Br. Annex IV ¶ 4. Without any support, Canada then argues that "[i]n their normal meaning and application, the terms 'existed,'

'domain of reality,' and 'objective being' require application of these meanings to a particular set of facts." *Id.* ¶ 5.

61. Pursuant to Article 31 of the Vienna Convention, the term "existed" should be construed based upon its ordinary meaning. *See* U.S. Post Hr'g Br. ¶ 67. The Tribunal must first, as a matter of law, interpret the meaning of the term "exist" in the context of the SLA, and then determine, as a matter of fact, whether the Quebec Capital Tax Credit "existed" as of July 1, 2006. U.S. Post-Hr'g Br. ¶ 65; Canada Post-Hr'g Br. Annex IV, ¶ 4. As we stated in our Post-Hearing Brief, the Oxford English dictionary defines "exist" to mean "to have objective being." U.S. Post-Hr'g Br. ¶ 62; CA-50. Thus, pursuant to the plain meaning of "existed," a government program must have more than mere potential – it must have "objective being." In the context of the SLA, and specifically in the context of the Anti-circumvention provision, a government program cannot "exist" until it has legal force under the laws of the government administering the program. Canada offers no other definition or contextual meaning in its Post-Hearing Brief.

62. Thus, contrary to Canada's contentions otherwise, the subjective beliefs of those companies or individuals affected by programs *if* they are legally authorized are not relevant to the question of objective being or existence. Rather, in order to exist, a program must be legally authorized and implemented, with legal force under the laws of the relevant government.

63. Canada's contention that "[h]earing testimony confirmed what has been clear throughout the briefing: the change in the Capital Tax Credit rate was in existence as of the day following the Budget Speech, exactly as Québec's Finance Minister pronounced the change," Canada Post-Hr'g Br. ¶ 148, is without basis in the record. The testimony upon which Canada relies is simply Canada's attorney reading from a budget plan. Tr. at 320:22-321:9.

64. Similarly, contrary to Canada's contentions, Canada Post Hr'g Br. ¶¶ 149-151, the United States does not rely upon Mr. Beck's reports or testimony to establish that the program did not exist until legislatively enacted. Mr. Beck is not an expert on Canadian tax law.[6] Rather, the unrebutted evidence in the record establishes that, "during the period until the proposed legislation is enacted by Parliament with retroactive effect, the system is, in effect, voluntary and is not backed by the force of law. In the case of taxes provisionally collected, until the legislation is enacted there is no legal requirement to pay, nor any legal authority to collect, the proposed tax. . . . Revenue Canada has in the past declined to assess or to issue refunds where these are dependent on budget proposals that are incorporated in a Ways and Means Motion but are not yet law." CA-16 at 15, Michael H. Wilson, Minister of Finance, Dep't of Finance Canada, The Canadian Budgetary Process Proposals for Improvement (May 1985). Thus, it does not matter if a company chose to rely on a tax credit at its own risk, because "until the legislation is enacted there is no legal requirement to pay, nor any legal authority to collect, the proposed tax. . . ." *Id.*

65. Moreover, although Canada claims that it has offered "unquestioned testimony by other officials of Revenu Québec establish[ing] that . . . Revenu Québec has written policies and procedures to enable the immediate implementation of tax measures contained in budget speeches and that this process was followed to give immediate effect to both the Capital Tax Credit and the Road tax Credit at the time of announcement in March 2006," Canada Post-Hr'g Br. ¶ 52, it has failed to provide citation to any authority for such a proposition (*e.g.*, a lawful

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[6] Canada complains that Mr. Beck is not qualified to provide opinions as to tax law, government fiscal policy, or parliamentary processes. Canada Post-Hr'g. Br. ¶¶ 102, 146-150. Yet Mr. Beck never represented otherwise, and was not consulted for these subjects. He is an expert in the forest industry, forest management, and the production of forest products (chief among them softwood lumber).

regulation). Indeed, none of the transcript citations Canada provides demonstrate that companies acted in reliance on the proposed Capital Tax Measure before amendment of the Taxation Act. Further, Canada's expert did not perform any analysis of the Québec programs and, therefore, could not draw any conclusions regarding the Capital Tax Credit. Tr. 544, 705-06.

66. In any event, although Canada contends that it provided "evidence" demonstrating that taxpayers began claiming the 15 percent credit on capital purchases in March 2006, Canada has not demonstrated that any company applied for the Capital Tax Credit prior to July 31, 2006. *See* Canada's Post-Hr'g Br. ¶ 153.

67. Finally, regarding Canada's contention that the $75 million silvicultural investment program "administered," on July 1, 2006, Canada is able to say only that Canada *could*, after July 1, 2006, have reimbursed for expenses incurred before July 1, 2006. However, Canada presents no evidence of actual payments before the cutoff date, or that retrospective benefits equal prior existence.

C. The $135 Million Silviculture Program Is Not "Forest Management," Did Not "Exist," And Was Not "Administered" On July 1, 2006

68. To avail itself of the paragraph 2(a) exception, Canada must demonstrate that the $135 million silvicultural benefit program was a part of Quebec's timber pricing system" prior to July 1, 2006. Canada maintains that: (1) "$135M was the estimated budget effect of adding new credits to the Québec timber pricing system as of April 1, 2006"; (2) "[t]he increase in silviculture credits was incorporated fully into Québec's timber pricing system in April and May 2006"; and (3) "[t]he newly published credits were in fact applied prior to July 1, 2006." Canada Post-Hr'g Br. ¶ 136. For the reasons explained in our Post Hearing brief at paragraphs 49-53, none of these contentions demonstrates the programs to have existed or been administered on July 1, 2006.

69. The evidence upon which Canada relies fails to meet the required burden. Specifically, at the hearing, Canada could not explain how its proffered evidence was linked to the initiation of these benefits. Tr. 394:15-412:5. Mr. Beck carefully analyzed Canada's evidence and explained that Canada's documents did not establish this link. Tr. 380:15-24; 384:5-385:12; 390:13-393:9; 406:10-407:13. Further, the only documents that Canada proffers in its attempt to fall within the 2(b) exclusion, R-148, Ex. S (apparent screenshot from a provincial government database and government forms), do not reference the reimbursements announced in the March 2006 Budget Speech. Tr. 399:9-405:15. Likewise, no Canadian official with actual knowledge of the challenged benefit program attempted to introduce or to explain the late-filed screen shots and forms. The materials are, therefore, wholly unreliable. Lastly, the Québec ministerial memorandum explained that the new measures involved a "[c]redit granted for gardening works, which was *increased* to 660 $/ha (an increase of 330 $/ha)." C1-AD at 15 (emphasis added). There is no basis for concluding that any amount reflected in Canada's documents reflects the pre- or post- increase in credit.

70. Additionally, Canada contends at paragraphs 142-144 of its post-hearing submission, that the "gardening works" benefit existed and was administered before July 1, 2006, but never explains the increase in benefits from $330 to $660 per hectare, and never demonstrates that the late-filed documents account for the full $660 benefit. Lastly, Canada's statement that Mr. Beck did not understand Canada's late filed documents lacks merit, given counsel's inability to explain those documents at the hearing. Tr. 394:15-397:8. The documents simply fail to demonstrate Canada's argument.

D. The Québec Tax Credit Provides A Benefit, Is Not "Forest Management," And Did Not "Exist" On July 1, 2006

71. Canada contends that the United States did not demonstrate a benefit to Québec softwood lumber producers when it assumed 90 percent of this cost of business formerly borne by the forest industry. Although Canada never defines "benefit," it appears to equate "benefit" with the assumption of a cost of doing business. *See, e.g.,* Canada Post-Hr'g Br. ¶ 106 ("remove any costs or relieve any financial burdens"); R-125 ¶ 36 (Mr. Adam's statement that "Québec changed the costs associated with [various lumber harvesting] activities by creating a refundable credit for road building, eliminating the obligation to reimburse the protection agencies for a portion of their intervention costs, and eliminating the mandatory assessment for the Forestry Fund . . . ").

72. Canada's primary contention that the logging roads are owned by the province, is irrelevant. Indeed, although the province may own the logging roads, the forest products companies remain responsible for maintenance, construction, and replanting. *See, e.g.,* R-37 at 91 (Ontario manual explanation that "[o]perational roads are roads within areas of operations that provide short-term access for harvest, renewal and tending operations [and that] [o]perational roads are normally not maintained after they are no longer required for forest management purposes, and are often site prepared and regenerated."). Accordingly, the evidence leaves no doubt that the logging roads are built for the benefit of logging companies.

73. Canada's attempt to demonstrate that the 2(a) exclusion applies hinges upon its theory that the governmental assumption of any cost of doing business in a forest is a "forest management measure." Canada Post-Hr'g Br. ¶¶ 159-61. Moreover, Canada once again claims that this benefit involves "timber pricing" because of the slight offset to the costs assumed arising from increased stumpage costs. *Id.* at ¶ 161. However, even if a small portion of the

benefit is offset through changes to the stumpage system, the bulk of the program benefits remains a benefit to softwood lumber producers and exporters. C-61 ¶ 48 (detailed calculation of offset); *see also* R-148, R-149 (Canada's witnesses' concessions that offset only fractional).

74. Contrary to Canada's contention at paragraph 161 that the United States "presented no evidence" and "essentially ask[ed] the Tribunal to make assumptions about market distortion based on budget figures," the evidence is clear that the provincial government assumed a cost of doing business borne by industry, thereby offsetting export measures — collecting export charges with one hand and returning them with the other.

75. Canada further attempts to demonstrate that Québec's assumption of the costs of building logging roads was "for the purpose of forest or environmental management, protection, or conservation." However, as with Québec's assumption of silvicultural costs, the singular purpose of the "[r]efundable tax credit for the construction and major repair of forest access roads and bridges [was] [t]o help forest companies reduce supply costs and forest managers to harvest the most appropriate stands in a timely manner . . . ." C-1, Att. U, sec. 6 at 9. Indeed, that logging roads may have secondary benefits is irrelevant under exclusion 2(c), as demonstrated in our Post-Hearing Brief. U.S. Post-Hr'g Br. ¶¶ 35-36. Moreover, Canada's contention that the inclusion of the words "to harvest the most appropriate stands [groupings of trees] in a timely manner" in the budget speech renders this reimbursement program an environmental program, makes no sense. Canada Post-Hr'g Br. at ¶ 158. It would be pure speculation to assume that the "appropriate" stands are those whose harvest would benefit the environment. The "appropriate" stands of trees could just as easily be the most "profitable" or the "closest" or the "largest" stands. Canada's reliance upon this statement only highlights that

the singular purpose of the logging road credit was as a transfer of funds from the provincial government to lumber companies.

76. Finally, the road cost reimbursement program did not "exist" and was not "administered" on July 1, 2006. Québec announced a 40 percent tax credit in March of 2006, in the same budget speech as the capital tax credit. Québec then announced an increase of this credit from 40 percent to 90 percent on October 20, 2006. The Québec government then proposed the enabling legislation for both portions of the credit on November 8, 2006. The enabling legislation was then enacted on November 30 and received assent on December 6, 2006. Accordingly, neither the 40 nor the 90 percent credits "existed" as of July 1, 2006 because it did not have the force of law until December 6, 2006.

77. Nor has Canada shown that either credit was "administered" as of that date. Indeed, with the exception of some preparatory documents, every operational document that Canada cites post-dates the SLA cutoff date. *See* Canada Post-Hr'g Br. at ¶ 164. Accordingly, the Quebec Tax Credit circumvents the SLA.

E. SOPFIM And SOPFEU Are Not "Forest Management" Programs

78. Canada's submission on the SOPFIM and SOPFEU programs does little more than restate Canada's statements during the hearing. Canada Post-Hr'g Br. ¶¶ 171-78. Canada continues to maintain that its assumption of costs that had been traditionally borne by softwood lumber producers falls within the "forest management" exceptions to the SLA. As with the other programs, the provincial government relieved the industry of these costs of doing business, providing many millions of dollars in benefits that directly circumvented the SLA's export measures. Canada raises the same arguments that it raised with respect to the transfer of other industry costs of doing business, and its contentions should fail for the same reasons. Moreover,

Canada's theory that, because the provincial government bore some of these costs up until the 1990s, it was somehow permissible for the government to re-assume those costs after 2006 finds no support in the SLA. *Id.* at ¶ 175. The SLA speaks of programs as they "existed" and were "administered" on July 1, 2006. What happened in the 1990s is, therefore, of absolutely no moment.

REMEDY

79. Canada's position regarding remedy unreasonably eliminates or severely limits any meaningful remedy to which the United States is entitled. Canada's primary contention is that it need only cease breaching to comply with the SLA. As demonstrated during these proceedings and as confirmed by the text of the SLA, the Tribunal in *United States v. Canada*, LCIA No. 7941, and the Tribunal in *Canada v. United States*, LCIA No. 91312, the SLA requires breaching parties to wipe out *all* the consequences of the breach, including past consequences.

80. Alternatively, Canada unreasonably attempts in two ways to limit what those consequences have been and will be. First, Canada contends that it needs only to remedy its breach to the extent that the U.S. can prove that its producers were harmed by the breach, suggesting that this is the only standard condoned by international law. Canada ignores entirely that the SLA itself contradicts this position. The Anti-circumvention provision *declares* that grants or other benefits breach the Agreement by reducing or offsetting the export measures. It then *declares* such grants or benefits to have reduced or offset the export measures, and assumes that the amount of the benefit should be the starting point for any remedy.

81. Second, Canada challenges the U.S. valuation of the benefits for purposes of a remedy. Canada ignores the very unusual circumstances surrounding the granting of benefits in

this case, in particular the providing of loans, loan guarantees, and grants to companies unable to obtain other financing.

82. Canada's alternative approaches share a common theme — that the Tribunal should ignore the full amount of the benefits and other favorable consequences to the Canadian softwood lumber industry that resulted from the breach. Under each alternative, Canada would have the Tribunal impose a remedy for only a tiny fraction of Canada's breach. Thus, Canada's view is that it and its industry should profit from its breach of an international trade agreement. No principle of international law, provision of the SLA, or notion of logic supports such an inequitable result.

I. The SLA Requires Canada To Remedy Past Effects Of Its Breach

83. Although, during the hearing, Canada declined to respond to the U.S. statements on a required, retrospective remedy, it does so in its post-hearing submission, but largely repeats arguments from its prior submissions.

84. Canada's belief that the SLA prohibits retrospective remedies lies in its misreading of the SLA's requirement that the Tribunal determine a reasonable period of time within which Canada should "cure" the breach and determine appropriate compensatory adjustments to the export measures if Canada fails to cure the breach. Canada suggests that compensatory adjustments should be imposed only if it declines to cease breaching, and only for the period *after* the Tribunal issues its Award finding breach and *until* Canada ceases the breaching programs. Canada views the goals of a cure as inherently different from the goals of compensatory adjustments to the export measures. In other words, Canada interprets the SLA to allow it to ignore the terms of the Agreement and to breach the Agreement with impunity until the Tribunal declares the breach, at which point, in Canada's view, it may choose to continue to

breach and suffer adjustments to the export measures until it ceases breaching, or it may choose to cease the breach with no adverse consequences.

85. This interpretation is inconsistent with the SLA's text. As demonstrated in the U.S. Post-Hearing Brief, a "cure" must wipe out the consequences of the breach. Similarly, compensatory adjustments must be in an amount that "remedies" the breach. And as the Tribunal in *United States v. Canada*, LCIA No. 7941, and the Tribunal in *Canada v. United States*, LCIA No. 91312, concluded, the goal of a "cure" and the goal of compensatory adjustments are the same.

86. Without even addressing the *Canada v. United States* decision, in which the Tribunal explicitly determined that "cure" and compensatory adjustments share a common goal, Canada encourages the Tribunal to ignore the now-two prior Awards interpreting the SLA. Canada first acknowledges that at least one of these Awards should be considered, but suggests it should play only a "residual" role. Canada Post-Hr'g Br. Annex III, ¶ 10. Canada then goes so far as to suggest that alleged infirmities in the Award on Remedies in *United States v. Canada*, LCIA No. 7941, "should have led to its annulment." *Id.* at ¶ 12. The United States explained in its opening statement at the hearing, the various reasons why the Tribunal should disregard this so-called "expert" opinion from counsel criticizing the Award in LCIA No. 7941. Canada has done nothing to respond to those arguments except to raise the specter of annulment that was not sought, nor has it addressed the now-multiple Awards confirming the SLA's requirement to remedy past breaches.

87. In any event, the previous Tribunals' interpretations of the SLA in LCIA Nos. 7941 and 91312 are confirmed and borne out by the French text of the SLA, in which the parties used the verb "*remédier*" to mean both "cure" and "remedy." Canada superficially

acknowledges this, Canada Post-Hr'g Br. ¶ 231, but fails to face the true consequences of the word choice. If "cure" and "remedy" mean the same thing, and if a "cure" must remedy the breach, and compensatory measures must be in an amount that "remedies" the breach, then Canada's interpretation makes no sense.

88. Instead of addressing the meaning of the SLA's text, Canada focuses on its aversion to compensatory adjustments as a remedy. Canada calls the export measures a "clumsy and inaccurate way to try to provide compensation for past harms . . . " and suggests that they would have an "erratic and distortive effect" if used to remedy past effects of a breach, but would be an accurate way to remedy ongoing effects of a breach. Canada Post-Hr'g Br. ¶ 237. Canada has not offered any logical reason why crafting compensatory adjustments for the quantifiable portions of a breach would be more difficult than crafting compensatory adjustments for estimated, continuing portions of a breach — if anything, crafting adjustments for ongoing breaches is more complex and requires predictions regarding quantification of a breach that has not yet occurred.

89. In any event, the parties agreed to remedy breaches through export measures because the export measures are the heart of the Agreement. Unlike other agreements, the export measure system does not transfer money between the two parties. The Agreement operates entirely through Canada's obligation to calculate and collect export measures from its softwood lumber exporters. Therefore, it makes perfect sense that remedies should operate within that same scheme.

II. A Remedy Must Include At Least The Benefits Provided

90. Canada's baseline position remains that a remedy should not compensate for the benefits made possible by the breaching programs. Canada Post-Hr'g Br., ¶¶ 186-208. Canada

asserts that this is because a remedy must be limited to a "reduction or offset of the Export Measures." *Id.*, ¶ 188. This argument is built on the false premise that benefits provided by the breaching programs are somehow *distinct* from an offset of the Export Measures. *Id.*, ¶ 189. In fact, the parties agreed that benefits provided by Canada to softwood lumber producers or exporters result in at least a dollar for dollar offset of the export measures those same softwood lumber producers and exporters would pay. US Post-Hr'g Br., ¶¶ 94-96. Contrary to Canada's statements in its post-hearing brief, this fundamental provision is in no way contradicted by the SLA or international law.

91. Canada first purports to defend its position by looking to the "plain meaning of terms" in the SLA. Canada Post-Hr'g Br. ¶¶ 188-191. Yet, Canada cites no provision of the SLA for its position that a remedy must only "compensate for the reduction or offset of the Export Measures." *Id.* ¶ 189. Likewise, Canada's muddled statement that "a benefit is not itself a breach" but that "a benefit causes a breach insofar as it is considered to reduce or offset an export measure" is not found in any language in the SLA, and is in fact contradicted by the SLA. *Id.*

92. Program benefits in fact *do* breach the Anti-circumvention provision of the Agreement. Paragraph 1 of Article XVII bars Canada from taking "any action having the effect of reducing or offsetting the Export Measures." SLA, art. XVII, ¶ 1. Paragraph 2 states that "grants or other benefits" that Canada provides to its softwood lumber producers or exporters are considered – *with no further qualification or conditions* – to do exactly what is prohibited in paragraph 1, that is, "reduce or offset the Export Measures" in breach of the Agreement. SLA, Art XVII, ¶ 2.

93. A remedy for such a breach is equally straightforward. A remedy consists of "appropriate adjustments to the Export Measures to compensate for the breach," that is, an increase in the Export Measures "in an amount that remedies the breach." SLA Art XIV, ¶¶ 22(b), 23. Once again, there is no qualification or condition that can operate to circumscribe a remedy in the manner sought by Canada in this arbitration. Had Canada wanted to limit a remedy to its self-serving concept of "the extent to which the benefit reduces or offsets the Export Measures," it should have insisted upon such a limitation in the SLA. Canada Post-Hr'g Br. ¶ 190. It did not. Instead, Canada agreed to the logical proposition that it would not circumvent the Export Measures by providing government "grants or other benefits" to its softwood lumber industry, and, if it did do so, it agreed to "appropriate adjustments to the Export Measures" as a remedy. Yet, the effect of Canada's suggested remedy approach would be to rewrite the SLA to allow compensatory adjustments *only* when the export measures have been offset.

94. Canada then changes gears and claims that because (in its view), the SLA does not target individual producers and exporters, "the SLA was not designed to recoup benefits" from them. *Id.* ¶ 191. Canada fails to comprehend the implications of its observation. The United States agrees that neither Article XVII nor Article XIV targets specific companies. This is because the SLA is intended to regulate trade on an industry-wide basis. Thus, in defining a breach, the SLA focuses on "grants or other benefits" provided generally to producers or exporters of softwood lumber, regardless of which or how many producers or exporters receive the breaching benefits.

95. Similarly, a remedy – "appropriate adjustments to the Export Measures" – is borne by *all* exporters until the amount to be collected is fully recovered. Therefore, Canada

agreed in the SLA that a remedy for "grants or other benefits" provided to even a small number of companies will be felt by all if Canada does not cure its breach in some other fashion. Canada cannot use its agreement to these terms as a shield to avoid imposition of a remedy in this case. *Id.* at ¶ 191.

96. After having resisted the principle that any remedy must wipe out all consequences of the breach, Canada then attempts to use this principle to contend that the United States has not demonstrated causation. Specifically, after having insisted that the ILC Draft Articles on State Responsibility ("ILC Draft Articles") and the *Chorzów* decision are inapplicable to this case, it then attempts to use both of these authorities to support its position that a remedy should not recapture program benefits provided in breach of the SLA. Canada Post-Hr'g Br. ¶¶ 192-203. In doing so, Canada relies almost exclusively upon the opinion of Professor Reisman. *Id.*[7]

97. The Tribunal in LCIA No. 7941 carefully considered the same argument and determined that it was appropriate to consider the ILC Draft Articles and general principles of international law, together with the context of the Agreement, in concluding that the SLA's text provides both a remedy for a continuing breach and a remedy for the past consequences of a breach. CA-12, *United States v. Canada, Award on Remedies*, ¶¶ 273-277, 298, 306.

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[7] Canada states in its post-hearing brief that Professor Reisman has provided "unchallenged expert evidence" as to the interpretation of the remedy provisions of the SLA. Canada Post-Hr'g Br. ¶ 195, citing R-102. The United States has, both during the hearing and in its request to have Professor Reisman's report stricken, responded to Professor Reisman's opinions. The members of the Tribunal have been selected by the parties precisely for their ability to interpret the SLA, and because they know, understand, and can properly apply the applicable law in this case, and in particular international law and the SLA. Professor Reisman's opinion is not "evidence"; it should be received and treated by the Tribunal for what is, namely a pleading by a lawyer employed to act on behalf of a party.

98. As the Tribunal in LCIA No. 7941 noted, Article 31 of the ILC Draft Articles reflects the customary international law principle that, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." CA-19, *Case Concerning the Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. 47 (ser. A) No. 17 (Sept. 28); *see also* Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int'l Law Comm., 53d Sess., pt. II, ch. 1, art. 31, U.N. Doc. A/CN.4/L.602/Rev.1 (2001), CA-20.

99. Recouping the benefits provided to Canadian industry in breach of the SLA is fully consistent with these principles and with the context of the Agreement. Conversely, failure to recoup would not reestablish the situation that would have existed if Canada had not provided the prohibited grants or other benefits.

100. Although Canada selectively quotes portions of the ILC Draft Articles linking reparation to the injury to the non-breaching party, Canada Post-Hr'g Br. ¶¶ 196-198, it is clear that these portions relate only to the necessary "causal link" between the breach and the consequences. These portions of the Articles do not differ from the customary international law principle regarding restoring the *status quo ante*. Under the specific facts of this case, "wiping out" the consequences of Canada's breach and reestablishing the *status quo ante* requires recouping the benefits wrongly provided to its industry. As for the "causal link," as demonstrated, the Anti-circumvention provision *expressly declares* that link.

101. Canada's breach of the SLA has had several direct consequences, including (1) hundreds of millions of dollars in benefits to softwood lumber producers and exporters; (2) hundreds of millions more dollars in investments in the Canadian softwood lumber industry

that otherwise would not have occurred; and (3) a past, present, and continuing adverse impact on U.S. softwood lumber producers. *See, e.g.*, C-44, ¶ 7; C-61, Table 44; C-62, ¶¶ 18, 20.

102. Indeed, the most direct consequence of Canada's breach is the wrongful providing of benefits to the Canadian softwood lumber industry, benefits that only later adversely affect the United States. Thereafter, as Professor Topel has observed, the programs have the obvious and continuing effect of lowering the costs of production, not just in the year in which the benefits are disbursed, but in future years as well:

> An investment subsidy will increase investment in new capital and artificially raise the capital stock in Québec and Ontario. In turn, increased capital intensity due to new capital equipment will reduce incremental costs both currently and over the future productive life of the durable assets. This reduction in unit costs is the reason that investment subsidies for softwood lumber producers affect market prices, both at the time they are provided and in the future.

C-2, ¶ 39.

103. Canada admits as much later in its brief when its states: "It is not disputed that some types of financial benefits paid out by Canada today – principally benefits that lead to the acquisition of capital assets – will have effects over many years. An investment's improvements in efficiency are not limited to the moment of the capital investment, but accrue over its life." Canada Post-Hr'g Br. ¶ 224. Thus, the benefits and long-term investments made through the breaching programs are in no way indirect or remote as Canada would have the Tribunal believe. Moreover, simply recouping the benefit provided will be insufficient to remedy the breach when the benefit has led to further investment because, as Canada concedes, the benefits thus provided continue well into the future. Causation is established, and the direct and proximate consequences of Canada's breach must be remedied through the means agreed to by both parties in the SLA, "appropriate adjustments to the Export Measures."

104. In sum, if an "appropriate" remedy is one that is targeted to the direct consequences of the breach, commensurate with the breach, and permitted under the terms of the Agreement, then a remedy surely includes recouping, or "wiping away," the benefits and investments that Canada has wrongfully provided to its industry.[8] Only through the imposition of such a remedy can the Tribunal "reestablish the situation which would, in all probability, have existed" had Canada not breached its obligations under the Agreement.

III. Canada Misrepresents The SLA And The Evidence In Proposing Its "Six Issue" Remedy Approach

105. Canada claims that if the Tribunal adopts its position, it should then decide what it calls "six issues to permit an accurate calculation of remedy." Canada Post-Hr'g Br. ¶¶ 209-293. The end result of Canada's "six issue" remedy approach is to reduce the remedy, as proposed by Dr. Kalt, to recoup only a small fraction of the benefits and investments made possible by the breaching programs. If the Tribunal agrees with the United States that a remedy under the SLA consists of "appropriate adjustments to the Export Measures" calibrated to collect the benefits and investments made possible through Canada's breach, then the Tribunal need not address the steps Canada has set forth. Nonetheless, this reply will respond briefly to Canada's presentation of its "six issues."

A. The First Two Issues Relating To The Duration Of The Breaching Programs Are Easily Resolved

106. Canada first asks the Tribunal to decide whether to assume that (1) the breaching programs or (2) the effects of the breaching programs continue indefinitely or terminate at some

[8] Because the remedy proposed by the United States is limited to the amount of benefits and investments made possible by Canada's breach, the remedy is in no way punitive as Canada contends. Canada Post-Hr'g Br. ¶¶ 204-207. Moreover, as we demonstrated in our Post-Hearing Brief, there is no credible evidence that the remedy will "grossly compensate U.S. producers" as Canada claims. Canada Post-Hr'g Br. ¶ 207; US Post-Hr'g Br. ¶¶ 135-141.

earlier date. Canada Post-Hr'g Br. ¶¶ 213-220. We agree that the Tribunal should not determine a remedy for the continuation of the breaching programs or their effects beyond the life of the SLA. Thus, Canada has raised a non-issue. However, it is certainly important that the Tribunal's remedy consider the effects of Canada's breach that occur *during the duration of the SLA*, even if Canada ceases the programs found to breach the Agreement.

107. The Tribunal is required to "determine appropriate adjustments to the Export Measures to compensate for the breach if [Canada] fails to cure the breach within the reasonable period of time." SLA, Art. XIV, ¶22(b). A "cure" under the SLA includes both cessation and reparation. *See* U.S. Reply Mem., ¶¶ 184-186. To the extent Canada fails to cease the breaching programs within a reasonable period of time after the Tribunal's award, it is appropriate to impose an *additional* adjustment to the Export Measures *above and beyond* the adjustments imposed to compensate for the program benefits and investments made prior to the Award. These additional adjustments would remain in place for the life of the SLA or until Canada ends the breaching programs.

108. This is nothing new or astonishing, as Canada asserts. The United States has stated that:

> The United States' proposed remedies assume that Canada abolishes the breaching programs close in time following the Tribunal's award. Therefore, in order to anticipate the possibility that Canada does not discontinue administering the programs at that time and to provide Canada an incentive to discontinue the programs, the Tribunal should also determine appropriate additional adjustments to Export Measures based upon the estimates of future program disbursements calculated by Mr. Beck in his expert report. C-1, Tables 19-20, 24, 26. We propose that the Tribunal determine that an additional adjustment to Export Measures of 10 percent should be imposed if Canada does not discontinue the programs after 30 days, the maximum reasonable period of time under the SLA. This would be imposed in addition to any export charge assessed as a compensatory measure and

> would be intended to provide Canada with an incentive to comply with the Award.

U.S. Reply Mem., ¶ 276.

109. Canada can, of course, avoid these additional adjustments by ending the breaching programs. However, to the extent it does not, the Tribunal's Award should provide for the possibility that the breaching programs continue for the duration of the SLA.

B. The Third Issue And Canada's Request For Additional Work By The Parties' Economic Experts

110. Canada's third issue concerns the question of whether the SLA requires a retrospective remedy. As discussed above, the text of the SLA can only be read to require remedies for all parts of all breaches, not just remedies for prospective breaches.

111. Additionally, Canada requests that the Tribunal direct the parties' economic experts to calculate a remedy consistent with Canada's limited concepts of a remedy. Canada Post-Hr'g Br. ¶ 245; *see also id.* at ¶¶ 7-10. This is neither necessary nor workable. Such an approach would seriously delay the implementation of a remedy for Canada's breach. This would increase the risk that Canada's breach would go partially or fully unremedied before the expiration of the SLA. Moreover, the delay will not result in a more accurate remedy because, despite Canada's efforts to focus on harm to U.S. producers, this arbitration is about benefits unlawfully provided to a Canadian industry, not lost producer surplus.

112. Even if the Tribunal were to decide that its remedy should be linked to lost producer surplus, the Tribunal has enough information now to make its determination based upon the analysis of Dr. Topel. Dr. Topel calculates that the breaching programs have resulted in $105 million in lost U.S. producer surplus through 2009, with about $43 million in additional lost producer surplus for each year thereafter. *See* C-62 at Exhibit 4. A remedy based upon only

lost producer surplus can certainly collect or return the amount of lost producer surplus through adjustments to the export measures.

C. Program Benefits Provided To Pulp And Paper Operations Of Softwood Lumber Producers Breach The SLA

113. Canada's fourth issue relates to the treatment of grants and other benefits to the pulp and paper operations of companies that produce or export softwood lumber. Canada Post-Hr'g Br. ¶¶ 246-268. The SLA prohibits "grants or other benefits" to producers or exporters of softwood lumber products, regardless of the intended purpose of the benefits within the companies. SLA, Art. XVII, ¶ 2; US Post-Hr'g Br. ¶¶ 129-132. The exception sought by Canada – to allow grants and other benefits if the benefits are used for pulp and paper operations – exists nowhere in the SLA.

114. There is no distinction in the SLA between benefits provided to the softwood lumber operations of a softwood lumber producer and benefits provided to the pulp and paper operations of the same producer. This conclusion is confirmed by the French text of the SLA, which uses the phrasing "spécifiquement destinés." Canada Post-Hr'g Br. ¶ 248. The SLA thus unequivocally prohibits providing or targeting benefits "to producers or exporters of softwood lumber." SLA, Art. XVII, ¶ 2.

115. Canada's argument that the U.S. interpretation expands the prohibition to apply to the larger "forest products industry" is a misdirection. Canada Post-Hr'g Br. ¶ 248. Our position is that the Tribunal should apply the ordinary meaning of the terms of the SLA, which limits the prohibition to "producers or exporters of Canadian Softwood Lumber Products," not all forest sector companies. Also, the "legal issue of causation" raised by Canada, *id.*, ¶ 252, is no issue at all. Under the SLA, grants and other benefits provided to softwood lumber producers or exporters are declared to offset the Export Measures, unless the benefits fall into one of the

enumerated exceptions. SLA, Art. XVII, ¶ 2. Canada has not argued that benefits to pulp and paper operations fall under any of the exceptions.

116. Canada's argument would lead to the absurd result that grants or other benefits to a softwood lumber producer would be permitted if the producer simply could show the benefits were ultimately used for some ancillary corporate operation, such as janitorial services, employee health benefits, or employee vehicles. The straightforward prohibition in the SLA, agreed to by the parties does not allow this evasive result.

117. Moreover, a remedy that compensates for benefits to the pulp and paper operations of softwood lumber producers makes logical sense given the mutual dependency between pulp mills and softwood lumber mills. C-43 at 2-8; C-61 at 13-14. Evidence at the hearing from Canada's own documents reinforces Mr. Beck's opinion of the interdependent relationship between pulp mills and softwood lumber mills. *See, e.g.*, C-65 at 2 (noting that ["

;

]).

118. Canada's "evidence" disputing Mr. Beck's position that benefits provided to Canadian pulp and paper mills are properly considered as benefits to the Canadian softwood lumber producers is confined to the testimony of Dr. Kalt. However, Dr. Kalt is an economist,

not a lumber industry expert. Mr. Beck has responded to, and refuted, each and every issue raised by Dr. Kalt and repeated by Canada in its submissions. C-61 at 13-29. Canada has offered no testimony by an industry expert to dispute Mr. Beck's conclusions.

119. Canada complains that the United States has not offered examples of benefits provided to pulp mills flowing to sawmills. Canada Post-Hr'g Br. ¶ 266. In fact, because of the interdependence of pulp mills and sawmills, there are numerous ways that benefits provided to pulp mills will also benefit sawmills. For integrated companies (companies owning both sawmills and pulp mills), avenues for the flow of benefits are even more numerous. For the sake of brevity, the comments here are limited to three examples:

- As a part of Ontario's FSPF, the in received a grant helping them to complete an energy efficiency project. C-43 at 13. The project was expected to improve profitability at the pulp mill by]. R-149, Att. GGG (Confidential). After accounting for the FSPF grant, total investment was]. *Id.* Assuming the project returns were consistent with expectations,

  . *Id.* This profit, of course, could be reinvested in any of the company's operations, including numerous softwood sawmills. Beyond that time, the project would continue to yield annually, leading to ongoing capital investment opportunities for the company, again including its softwood sawmills.

- Also as part of Ontario's FSPF, grant helping them to install a biomass-powered energy plant at their C-1, Att. AZ; C-66; Tr. 440:20-441:21. In addition to boosting the pulp mill's financial performance, the biomass energy plant created a new market for hundreds of thousands of tons of sawmill residuals (bark, sawdust, etc). The FSPF project evaluation form indicates that expected to

  R-2, Att. J at ON-CONF-02525-6.

  [

  ] *Id.* While it is true that some of this additional sawmill revenue would be spent to cover the costs of transporting the biomass to the energy plant, it is also true that the sawmills would reduce their costs associated with disposing of the material, so the net benefit to regional sawmills will measure in the millions of dollars each year – funds that will be available for additional sawmill investment.

- A hypothetical third example could apply to any of the integrated forest products companies in Ontario and Quebec. Suppose an integrated forest products company has $20 million available in a given year for making capital investments. Management for one of the pulp mills has proposed a project costing $15 million and management for one of the sawmills has proposed a project costing $10 million. Because the company does not have enough financial resources for both projects, it decides to proceed with only the $15 million pulp mill investment, which also provides a better return. Therefore, the sawmill project is put on hold or cancelled altogether. However, if the cost of capital for the pulp mill project is reduced through a provincial grant, or financing with favorable terms is made possible through a government loan or loan guarantee, then the sawmill project could proceed and yield returns to the company in addition to the pulp mill project benefits.

120. As illustrated by these three examples, Canada's claim that benefits to pulp mills reduce benefits to sawmills is untrue. Canada Post-Hr'g Br. ¶ 266-268. Moreover, in each of the preceding examples, benefits provided to pulp mills flow directly to sawmills independent of the conditions in the broader financing environment, so Canada's claim that there is a conflict between the fungibility of funds and the challenges that forest companies were facing in obtaining financing is also incorrect. *Id.*

D. A Remedy Must Compensate For The Full Amounts Of The Loans And Investments Made Possible By The Breaching Programs

121. In the final two sections of its brief, Canada questions the methodology to remedy the consequences of its loan and loan guarantee programs, arguing that the U.S. "valuation of loans and loan guarantees is unsupported by doctrine or by common sense" and results in an "exaggeration" of program benefits. Canada Post-Hr'g Br. ¶¶ 269-293. Canada misrepresents the U.S. position.

122. We agree that if the only task before the Tribunal were to value the loan and loan guarantees as benefits to the recipient companies, the correct method (as Mr. Beck readily acknowledged in his reports and at the hearing) would be to compare the terms of the program

loans to the terms of loans that the companies could have obtained on the open market. C-1 at 54-55, 65; Tr. 467:18-20. However, the task before the Tribunal in deciding a remedy is not merely to determine if the loans and loan guarantees had value to the recipients (a liability issue that Canada concedes), but also to determine "appropriate" adjustments to the Export Measures "in an amount that remedies the breach." SLA, Art XIV, ¶¶ 22(b), 23. Canada's arguments cleverly attempt to divert the Tribunal from this critical distinction.

123. Canada claims that Mr. Beck treats the entire value of a loan "as an asset on the company balance sheet, with no offsetting liability." Canada Post-Hr'g Br. ¶ 270. This is untrue. Mr. Beck observes only that, for purposes of determining a remedy for Canada's breach, it is appropriate to consider the entire value of the loan, and indeed the entire value of the investment. C-61 at 3. This is because, as previously explained, the loans and investments (1) are the direct, intended consequences of the breaching programs, and (2) would not have been made in the absence of the breaching programs. *See, e.g.*, US Post-Hr'g Br. ¶¶ 103-128. Canada has never confronted or answered the question as to how to value a loan or loan guarantee when the recipient would not have gone forward with the project in the absence of the government assistance program, or to account for the continuing benefits that result from the investment made possible by the loan or loan guarantee, which Canada concedes exist. *See* Canada Post-Hr'g Br. ¶ 224.

124. The direct, intended result of the breaching programs (here the Ontario FSPF/FSLGP and the Québec PSIF) is that Canadian softwood lumber companies were provided access to capital they otherwise would not have had, and provided a means to make critical investments that were otherwise unachievable. *See, e.g.*, US Post-Hr'g Br. ¶¶ 103-128. Therefore, it is immaterial that a loan is not an asset on a company's balance sheet. A remedy in

this case nonetheless can and should compensate for the full value of the loans and the investments made possible through the breaching programs.

125. Canada then unjustifiably attacks Mr. Beck's credibility, claiming that he intentionally sought to "inflate his results" so that his estimate of industry benefits would not be "too low." Canada Post-Hr'g Br. ¶¶ 273-275. Even a cursory review of the hearing transcript demonstrates that Canada has grossly misstated Mr. Beck's testimony and misrepresented Mr. Beck's intent.

E. The Tribunal Should Rely Upon Mr. Beck's Testimony

126. In its Post-Hearing Brief, Canada attacks at length Mr. Beck's qualifications and opinions. Canada Post-Hr'g Br. ¶¶ 101-103, 112-113, 120-121, 149-155, 270-275. Canada's criticism of Mr. Beck's qualifications, raised for the first time in its post-hearing submission, deserves a brief response.

127. Mr. Beck is the only forest industry expert offered by the parties in this arbitration. His expertise is the result of his education and 35 years of experience in the industry assisting hundreds of companies not only in North America, his primary focus, but around the world. Tr. 302:1-4; C-1 at 1. Forestry companies on both sides of the United States/Canada border hire him and his firm, The Beck Group, to provide insight on capital project planning, industry benchmarking studies, timber valuation, and corporate acquisitions. Tr. 302:5-12, 303:3-305:2. His clients include small family-owned firms, well-known international forest products companies, and government agencies. Tr. 302:13-24.

128. Using his education and experience, Mr. Beck reviewed the history and administration of the challenged programs and concluded that each of the programs was intended to provide, and in fact did provide, benefits to the softwood lumber industry in Ontario and

Québec. Tr. 306:1-11. The program benefits allowed the companies in the two provinces to realize reduced operating costs and increased production capacity. Tr. 306:12-20.

129. Canada provided statements of an economist and an accountant, but elected not to offer any forest industry expert opinions on the Ontario and Québec programs. It is reasonable to infer that this is because no qualified forestry industry expert could deny that the challenged programs, consistent with the uncontroverted statements of provincial officials themselves, provide "grants and other benefits" to softwood lumber companies operating in the provinces. Certainly neither Dr. Kalt, a trained economist whose primary field of expertise is the oil and gas sector, nor Mr. Reilly, a general financial advisor, is a forest industry expert.

130. Thus, Canada's specific criticisms are unfounded. For example, Canada claims in its Post-Hearing Brief that "Mr. Beck has no familiarity with Québec's forest sector and certainly can claim no expertise in that regard." Canada Post-Hr'g Br. ¶103. Yet, it was Mr. Beck who provided an analysis of the Québec stumpage system and corrected the statements by Québec MNRF official Jean-Pierre Adam and Canada suggesting that adjustments to the stumpage system fully offset benefits provided by three of the Québec programs. *See* R-3 at 9-11 (First Adam Statement); Stmt. Defense, ¶¶ 202, 216-221; C-43 at 29-40 (Beck Rebuttal Report identifying flaws and omissions in Québec's stumpage offset claim); R-125 at 5-7 (Adam concession that changes in stumpage formula will not offset program benefits); C-43 at 45-53 (Second Beck Rebuttal Report); R-150 at 5 (Adam reduces stumpage offset). The result was that Mr. Beck, Mr. Adam, and Dr. Kalt all now agree that the changes to the stumpage system offset only a small fraction of program benefits. C-61 at 71; R-148 at 9; R-150 at 5.

131. Similarly, Mr. Beck's explanations of the Québec silvicultural investment measures, Québec forest management plans, and the benefits to both industry and the province

stand unrebutted. C-61 at 43-44. No Québec government official or industry expert disputes Mr. Beck's conclusions that the silvicultural measures increase forest productivity and, as a result, allow forest companies to harvest more timber and realize greater profits than in the absence of the program. *Id.*

132. Canada also argues in its Post-Hearing Brief that Mr. Beck never demonstrated that the PSIF program provided benefits to softwood lumber producers, and that Mr. Beck's conclusions in respect of the PSIF program are based only on "supposition about the overall nature of the industry and the program." Canada Post-Hr'g Br. ¶¶ 112-113, 121. This is untrue. In fact, Mr. Beck's opinions are based upon documents from the Québec government and its administering government corporation, Investissement Québec. C-1 at 50-56; C-43 at 45-58; C-61 at 6-13. There is no "supposition" required to recognize the accuracy of the statements of Québec's own officials describing the PSIF program.

133. Finally, Canada criticizes Mr. Beck for applying "common sense" in reaching certain conclusions. Canada Post-Hr'g. Br. ¶ 103, 274. Canada argues that "common sense" is not expertise. *Id.* Canada forgets, however, that certain aspects of the challenged programs are a matter of both expertise and "common sense," particularly when the conclusion is readily apparent from the face of the government documents themselves. Moreover, "common sense" to someone intimately familiar with the forest industry is far different than "common sense" to a layman.

F. Government Assistance Allowed Projects That Were Otherwise Impossible

134. After reviewing Canada's own documents and all of the evidence – including statements from the responsible government officials themselves and the evidence of the admitted precarious position of the softwood lumber industry – Mr. Beck concluded that, in the

context of designing a remedy, "many or most projects would not have proceeded without government support." Tr. 467:12-470:1. We have described this evidence in prior submissions. *See, e.g.*, U.S. Post-Hr'g Br., ¶¶ 106-108, 120-124. Canada has never directly responded to or disputed this evidence, except to claim that the statements of the company executives and its own government officials are not to be trusted.[9] *See* Canada Rejoinder, ¶ 73. This is not a credible or serious response.

135. In fact, as stated above, Canada declined to offer any industry expert of its own. Instead, Canada relies upon the opinion of Robert Reilly to critique the remedies proposed by the United States. Mr. Reilly has neither Mr. Beck's industry experience nor any actual evidence supporting his conclusions. Indeed, as his testimony revealed and as Canada must now admit:

- There is no doctrinal support for using Mr. Reilly's "valuation" methodology when a project would not have gone forward in the absence of government assistance. *See* Tr. 655:4-658:15.

- Canada *has not proved* that any project would have gone forward in the absence of government assistance.

- The documents demonstrate the opposite — the statements and analysis conducted by the companies themselves, government officials, and the third-party due diligence provider, Deloitte, all reached the conclusion that the programs could not have gone forward absent government assistance.

136. The United States will readily admit that the methodology it employed is not that which is typically employed when undertaking a valuation for damages purposes. Nevertheless, this is proper because this dispute does not present a typical valuation for damages purposes. The methodology is unusual because the problem is unusual: (1) the United States asserts that

[9] Notably, Canada has never offered any evidence disputing Mr. Beck's conclusion that the PSIF program provided real benefits by funding risky projects that otherwise would not have proceeded. C-1, Att. AD (revised) at 3-4; C-1, Att. AB at 1, 3; C-1, Att. AQ at 119; C-53. This omission is glaring given that Canada *did* offer written statements from Quebec employees related to other Quebec programs.

these projects would not have gone forward in the absence of government support; and (2) the SLA requires wiping out all consequences of the breach. Because this is a unique situation, it is appropriate that the United States would employ a unique methodology for determination of a remedy.

137. Given that Mr. Reilly can point to no doctrinal support for the use of his methodology under these circumstances, and given that Mr. Reilly cannot demonstrate that the projects would have gone forward in the absence of government support, his opinions are not useful on the question before the Tribunal concerning an appropriate remedy. The Tribunal must, of course, fashion a remedy to fit this breach within the confines of the SLA's remedy regime. In doing so, and in weighing the usefulness of the assistance offered by Mr. Reilly and Mr. Beck, the Tribunal should conclude that it defies logic to assert, as Canada does, that the financial condition of the company and the state of the industry are irrelevant to a company's ability to obtain project financing. *See* Canada Post-Hr'g Br. ¶ 292.

138. At the simplest level, because any loan repayment will come from the company's revenue stream (including the revenue stream generated by the project), a lender must be concerned about the company's likelihood of failure, the company's ability to make the most of the opportunity provided by the project, as well as the company's ability to find a profitable market for lumber. Mr. Reilly's premise that none of this matters casts serious doubt on his analysis.

139. Similarly, Deloitte, the companies themselves, and the provincial government, all reviewed the same material that Mr. Reilly reviewed (and likely more) and reached completely different conclusions, namely that the projects were highly risky. Given that the analyses of these other entities did not arise within the context of a dispute, their analyses in the record

should carry more weight than Mr. Reilly's opinion, which has arisen as a result of this arbitration. In addition, the absence of any evidence showing that alternative financing was available to benefit recipients undercuts the accuracy of Mr. Reilly's analysis.

140. Mr. Reilly's analysis, if it shows anything, shows only a *theoretical* possibility that a lender might find a given project profitable enough to invest in. His analysis cannot show the terms upon which the hypothetical lender would offer financing or whether the companies would have accepted these terms. This is the basis for the response to Canada's discussion in paragraph 278 of its Post-Hearing Brief. The United States never suggested that the government assistance induced banks to enter into loans they *could* not have made. Rather, the United States asserts that the government assistance induced banks to enter into loans they *would* not have made. Because Mr. Reilly's analysis ignores all consideration of whether companies and lenders would have been interested in entering into the hypothetical transactions he posits (which may have had prohibitively high interest rates), he cannot definitely say that these companies would have actually accepted any financing that they might have been offered in the absence of government assistance. As our analysis demonstrates, any other form of financing would likely have been prohibitively expensive, even if theoretically available.

141. Mr. Reilly has no hard evidence to support the market rates he chose, and he did not even speak to the companies to determine whether they had been offered other financing, and on what terms.[10] Notably, even in the hypothetical world, Mr. Reilly's analysis is not foolproof.

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[10] In fact, it is because it is nearly impossible to determine "market rates" under these circumstances (namely, when loans and loan guarantees have led to investments that would otherwise have not been made), that Dr. Topel used loan loss value rather than some estimate of "market rates" to value the loan guarantees for the purpose of his lost producer surplus analysis. *See* C-44, ¶¶ 9-10; C-62, ¶ 16. Canada criticizes Dr. Topel's use of loan loss value as being inaccurate, Canada Post-Hr'g Br. Annex I, ¶ 7, but as Dr. Topel's analysis demonstrates, because loan loss value is based in sound doctrine (acknowledged by Canada, Canada Post-Hr'g Br.,

Several of the projects that passed his profitability test later failed, and he could not explain why. *See* U.S. Post-Hr'g Br. ¶ 113.

142. In contrast, Mr. Beck's conclusions relied upon the actual and unrebutted evidence in the case — the very same evidence Ontario and Québec used to determine whether to provide loan guarantees.

143. Canada latches on to one example, [ ], to suggest that softwood lumber companies generally could have obtained project financing in the absence of the Ontario benefit programs.[11] Canada Post-Hr'g Br. ¶ 288. No such generalization can be made. Mr. Beck testified at the hearing that the [was unique in that it was the only FSPF/FSLGP softwood lumber project in which there was evidence that there was a loan made by a commercial bank for part of the project financing, Tr. 456:14-458:3, 489:17-491:17, and Canada has identified no other. Moreover, the commercial financing was secured earlier in 2006, prior to the onset of the major difficulties faced by the forest industry in obtaining credit, and did not cover the entire project cost. R-6, Att. T, at 14.

144. In addition, as Mr. Beck pointed out at the hearing in response to a question from the Tribunal Chair, the fact that [ ], one of the top lumber companies in the industry, was a parent of the company proposing the [ ], placed this project in a "different

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Annex I, ¶ 7 n. 4) and because he uses the government's own estimates as guarantor, the loan loss value approach is, in all probability, *more* accurate.

[11] The United States has become aware of an inadvertent misstatement in its post-hearing brief. In respect of the [ ] project described in paragraphs 116 and 118, Mr. Beck did include the project in his analysis. Our erroneous statement that Mr. Beck had excluded the project was the result of the fact that there were two very similar projects at two separate mills (one located at [ ), both mills operate under the name [ ], and both are owned by parent [ ] R-6, Att. T. The [ ] received project funding, the [ ] did not. Mr. Beck brought our misstatement to our attention after the filing of our post-hearing brief.

situation." Tr. 470:2-14. In its Post-Hearing Brief, Canada accuses Mr. Beck of being "misleading" in his response to the Tribunal chair. Canada Post-Hr'g Br. ¶ 288 n. 328 (accusing Mr. Beck of being misleading and erroneously citing to Reilly testimony at Tr. 607:1-611:2 as Beck testimony). Canada apparently believes Mr. Beck's response was misleading because Mr. Reilly's review of the documents allegedly showed that that "lenders to [had no recourse to other assets or operations of the [ ] corporate family." *Id.* There was nothing misleading about Mr. Beck's testimony at all. Mr. Beck never stated that [ ] *lenders* had recourse to other assets or operations of the [ ] corporate family. It is immaterial that the *lenders* did not have this recourse; [ ] itself certainly did, which made its project more likely to succeed and, therefore, more attractive to lenders, as Mr. Beck pointed out.

145. Finally, [ ] public statement, after receiving a FSPF grant for its [project, that "[t]he contribution from the Forest Sector Prosperity Fund is making it possible for us to move ahead with this important project" is confirmed by the project and company risks noted by Deloitte in its evaluation. C-1, Att. BA (press release); R-6, Att. T (Deloitte project evaluation noting that Deloitte was not provided current financial information on parent company [, the downturn in the softwood lumber market was continuing, and that [ ] recent financial results were poor.

146. Canada's mistaken reliance upon the [ ] relationship notwithstanding, all of the evidence Mr. Beck relied upon demonstrates that most, if not all, of the programs would not have gone forward absent government assistance. It is, therefore, appropriate to consider the full value of these loans and loan guarantees in the quantification of benefits.

CONCLUSION

147. In light of the parties' submissions, and the evidence, arguments, and testimony presented during the hearing, the United States respectfully requests that the Tribunal determine that Canada breached the SLA by enacting and administering the six Ontario and Québec programs discussed above and declare that each of these programs breaches the SLA.

A. If the Tribunal finds that Canada has breached the SLA, the United States respectfully requests that the Tribunal determine a reasonable period of time for Canada to cure the breach. The United States proposes 30 days as a reasonable period of time.

B. The United States respectfully requests that the Tribunal also identify appropriate compensatory adjustments to the export measures that remedy Canada's breach.

C. With respect to compensatory adjustments to the export measures, the United States respectfully requests that:

1. The Tribunal determine that appropriate adjustments to the export measures consist of additional export charges that will result in the collection of at least C $267.87 million on Ontario and Québec exports of softwood lumber to the United States; the Tribunal determine a rate at which the additional export charge is to be collected; and

2. The Tribunal determine further adjustments to the export measures, in addition to those requested above, should Canada not discontinue the programs the Tribunal finds to have breached the SLA.

Respectfully submitted,

TONY WEST
Assistant Attorney General

Jeanne E. Davidson

JEANNE E. DAVIDSON
Director

Reginald T. Blades, Jr.

REGINALD T. BLADES, JR.
PATRICIA M. MCCARTHY
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

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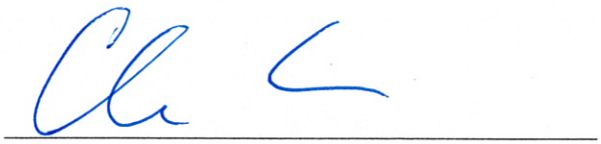
CERTIFICATE OF SERVICE

I certify that I caused to be sent, by electronic mail, the UNITED STATES POST-HEARING REPLY BRIEF (Non-Confidential), with exhibits on November 20, 2009. Paper copies of the briefs will be sent as a courtesy to the members of the Tribunal and the legal representative of Canada.



CLAUDIA BURKE