
In The London Court Of International Arbitration

THE UNITED STATES OF AMERICA,

Claimant,

v.

CANADA

Respondent.

CANADA'S RESPONSE TO REQUEST FOR ARBITRATION

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February 18, 2008

**Attorneys for Respondent,
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RESPONSE OF THE RESPONDENT CANADA

In accordance with Article 2 of the London Court of International Arbitration ("LCIA") Rules, the Government of Canada ("Canada") respectfully submits the following Response to the Request for Arbitration (the "Request") filed on January 18, 2008 by the United States ("Claimant") under the 2006 Softwood Lumber Agreement (the "Agreement"). The Government of Canada reserves the right under Article 15.3 of the LCIA Rules to submit a full Statement of Defence in response to the U.S. Statement of Case.

INTRODUCTION

1. The Agreement, which came into force on October 12, 2006, concerns trade in softwood lumber. It allows for dispute settlement under the LCIA Rules as modified by the Agreement. Under the Agreement, Canada agreed to apply export measures to exports of softwood lumber from softwood lumber producing regions of Canada to the United States when the price of lumber is below U.S. \$355 per thousand board feet. The United States agreed not to initiate trade remedies proceedings or take other actions that would restrict trade in softwood lumber products from Canada, agreed to revoke the countervailing and antidumping duty orders that had been in place for five years, and agreed to return the estimated duties it had collected over that period on Canadian softwood lumber imports.

2. Article XVII of the Agreement provides that neither Canada nor the United States shall take action to circumvent the commitments under the SLA 2006, including action having the effect of reducing or offsetting the export measures.

3. The Request claims that certain actions of the provinces of Québec and Ontario reduce or offset the commitments under the Agreement, in breach of Article XVII.

I. **BACKGROUND**

4. The North American market for softwood lumber is highly integrated. The United States is a significant net importer of softwood lumber, with imports accounting for approximately 36 percent of U.S. consumption. Canada is the primary source of U.S. imports, historically supplying approximately one-third of the softwood lumber consumed in the United States.

5. Over the last 25 years the U.S. lumber industry has frequently sought the imposition of U.S. Government restrictions on Canadian lumber imports, chiefly through the application of U.S. countervailing and antidumping duty laws. The most recent countervailing and antidumping duty investigations were initiated in 2001 by the United States against imports of softwood lumber products from Canada, at the request of the U.S. industry. Canada challenged the imposition of duties by the United States on lumber imports from Canada pursuant to these investigations as inconsistent with both U.S. law and the rules of the World Trade Organization.

6. Throughout the pendency of these legal challenges, the United States collected, and held, deposits of estimated duties on Canadian shipments of softwood lumber to the United States. While U.S. courts and NAFTA and WTO tribunals found that the duties had been unlawfully imposed and required their return, the imposition of duties was highly detrimental to Canadian producers.

7. It was against this backdrop that the Governments of Canada and the United States negotiated and entered into the Agreement at issue here.

II. DENIAL OF CLAIMS

8. Canada denies all allegations of fact and law in the Request, except to the extent expressly admitted herein.

A. Parties to the Arbitration

9. With regard to paragraphs 7 and 8 of the Request, Canada states that it is the Respondent named in this proceeding and admits that it is represented by the counsel listed at paragraph 8 of the Request.

B. The Arbitration Agreement

10. With regard to paragraph 9 of the Request, Canada admits that the United States has complied with the consultation requirements of Article XIV of the Agreement with respect to the claims set out in the Request.

11. With respect to paragraph 10 of the Request, Canada admits that *United States v. Canada*, LCIA Arbitration No. 7941, an arbitration concerning unrelated claims under the SLA, is currently pending before the LCIA. Canada denies the characterization of the cause of the arbitration or the existence of any breach by Canada.

C. Matters Regarding the Arbitration

12. With respect to paragraphs 11 through 17, Canada states that the language of the Agreement speaks for itself, and controls over the Claimant's characterizations thereof.

D. Canada's Response to Statement of the Claims

13. With respect to paragraphs 18 through 20 of the Request, Canada denies all facts and legal interpretations alleged. Without limiting the generality of this denial, Canada specifically notes as follows:

(a) Canada denies that any actions of the governments of Québec and Ontario described in the Request circumvent or offset the commitments under the SLA 2006.

(b) The Claimant is not entitled to any relief because Canada has not breached the Agreement. Moreover, the remedies sought by the United States are not authorized under the Agreement.

14. With regard to paragraphs 21 through 33 of the Request, Canada denies all facts and legal interpretations alleged other than as admitted in the following:

(a) Canada agrees with the first sentence of paragraph 21. With regard to the second sentence of paragraph 21 and the entirety of paragraph 22, Canada notes that the Agreement provides for the settlement of a multifaceted dispute and involves interrelated concessions and obligations on the part of both Parties.

(b) With respect to paragraph 23, Canada states that the language of the Agreement speaks for itself, and controls over the Claimant's characterization thereof.

(c) Canada agrees with the first and second sentences of paragraph 24. Canada disagrees with the third sentence of paragraph 24. Volume restraints were not in effect until January 2007.

(d) With respect to paragraph 25, Canada notes that both Parties agreed not to take "any action to circumvent or offset the commitments under the SLA 2006, including any action having the effect of reducing or offsetting the Export Measures."

(e) Paragraphs 26 through 33 are denied.

E. Canada's Response to Claimant's Allegations that Certain Québec Programs Violate the SLA

15. With regard to paragraph 34 of the Request, Canada denies all facts, characterizations and legal interpretations alleged other than as admitted in the following:

(a) Québec provides a refundable tax credit for the construction and maintenance of forest access roads and bridges, which are part of the public road network in Québec.

(b) By law, Québec is the owner and steward of the public forests in Québec and as such is responsible for forest management measures, including reforestation, fire fighting, and pest control. Québec has long required industry to absorb a share of the costs associated with those forest management activities.

(c) Investissement Québec operates loan and loan guarantee programs used by all sectors of the Québec economy and has done so continuously for more than 20 years.

16. With regard to paragraphs 35 through 38 of the Request, Canada denies all facts, characterizations and legal interpretations alleged, other than as admitted in the following:

(a) With regard to paragraph 36, Canada acknowledges that Québec provides corporations other than financial institutions with a capital tax credit of 15 percent of eligible expenses related to the acquisition of manufacturing and processing equipment.

17. With regard to paragraphs 39 through 57 of the Request, Canada denies all facts, characterizations and legal interpretations alleged, other than as admitted in the following:

(a) With regard to paragraph 41, Canada admits that in March 2006 Québec issued its 2006-2007 Budget Plan, which included a refundable tax credit for the construction of, and repairs to, forest access roads and bridges, and other measures related to forest management, including silviculture and forest protection.

(b) With regard to paragraph 48, Canada admits that in March 2006 Québec issued its 2006-2007 Budget Plan, which included a supplement to Investissement Québec's general authorization to provide loans and loan guarantees.

F. Canada's Response to Claimant's Allegations that Certain Ontario Programs Violate the SLA

18. With respect to paragraphs 58 of the Request, Canada denies all facts, characterizations and legal interpretations alleged, other than as admitted in the following:

(a) Ontario has a program referred to as the "Forest Sector Prosperity Fund."

(b) Ontario has a program referred to as the "Forest Sector Loan Guarantee Program."

19. With regard to paragraphs 59 through 73 of the Request, Canada denies all facts, characterizations and legal interpretations alleged other than as admitted in the following:

(a) With regard to paragraph 59, Canada admits that Ontario instituted the Forest Sector Prosperity Fund in 2005.

(b) With regard to paragraph 67, Canada admits that Ontario instituted the Forest Sector Loan Guarantee Program in 2005.

(c) With regard to paragraph 69, Canada admits that Ontario's Natural Resources Minister issued a press release on September 4, 2007 regarding a paper mill.

(d) With regard to paragraph 70, Canada admits that in 2005 Ontario made an announcement regarding the construction and maintenance of primary and secondary forest access roads.

III. CLAIMANT'S REQUEST FOR RELIEF SHOULD BE DENIED

20. With regard to the Claimant's request for relief in paragraph 74, Canada denies that it has committed any breaches and that any relief or remedy for the United States is justified. Canada further notes that the United States requests relief that is not available under the Agreement and, accordingly, is outside the jurisdiction of the Tribunal.

IV. RELIEF REQUESTED

21. Canada respectfully requests that the Tribunal render an award in favour of Canada and against the United States:

(a) Declaring that Canada, through the provincial governments of Québec and Ontario, has not circumvented the Agreement in violation of Article XVII of the Agreement and therefore has not breached the Agreement,

(b) Denying and dismissing the claims of the Claimant in their entirety, with prejudice.

V. MATTERS REGARDING THE ARBITRATION

22. Canada admits the United States' representation that the Parties agreed in writing to matters regarding the Arbitration, including the selection of the Arbitral Tribunal, remuneration of the arbitrators, hearings of the Tribunal, the taking of evidence, and the award of the Tribunal.

VI. RESPONDENT'S NOMINATION OF ARBITRATOR (NAME, ADDRESS, TELEPHONE, FACSIMILE AND EMAIL)

23. Pursuant to Article XIV(9) of the Agreement, Canada nominates as arbitrator:

Albert Jan van den Berg
Hanotiau & van den Berg (HVDB)
IT Tower
480 Avenue Louise – B9
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Mr. van den Berg meets the requirements of independence and impartiality of Article 5.2 of the LCIA Rules. Mr. van den Berg's resumé and Statement of Disclosure are attached as Appendix A.

24. Pursuant to Section XIV(10) of the Agreement:

The 2 nominated arbitrators shall jointly nominate the Chair of the tribunal within 10 days after the date on which the second arbitrator is nominated. The nominated arbitrators may consult with the Parties in selecting the Chair. If the nominated arbitrators fail to nominate a Chair within 10 days, the LCIA Court shall endeavour to nominate the Chair within 20 days thereafter.

25. In the event that the co-arbitrators fail to nominate the Chair of the Tribunal, Canada respectfully requests that the LCIA designate a person who is not a national of those countries of which the co-arbitrators are nationals.

VII. CONFIRMATION OF SERVICE

26. As required by Article 2.1(e) of the LCIA Rules, this Response, together with attachments, is being simultaneously transmitted by email to the legal representatives of the Claimant. A courtesy copy is also being hand delivered to Reginald Blades on February 18, 2008.

Respectfully submitted,



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February 18, 2008

Attorneys for Respondent,
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Appendix A

Curriculum Vitae

ALBERT JAN VAN DEN BERG

1949, Amsterdam, The Netherlands

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EXPERIENCE

- 2001 – Attorney-at-Law, Hanotiau & van den Berg, Brussels (partner)
- 1999 – 2001 Attorney-at-Law, Freshfields Bruckhaus Deringer, Amsterdam (partner)
- 1988 – 1999 Attorney-at-Law, Stibbe Simont Monahan Duhot, Amsterdam (partner)
- 1982 Attorney-at-Law, Law Firm of Salah Hejailan, Riyadh (in association with Clifford-Turner/Van Doorne & Sjollemma)
- 1980 – 1988 Attorney-at-Law, Van Doorne & Sjollemma Advocaten, Rotterdam (partner)
- 1980 – 1988 Secretary-General, Netherlands Arbitration Institute
- 1978 – 1980 TMC Asser Institute for International and European Law, The Hague, department international commercial arbitration
- 1975 – 1978 Private assistant to Professor Pieter Sanders, Schiedam, The Netherlands.

EDUCATION

- 18.09.1981 Erasmus University, Rotterdam. Degree: Doctor of Laws. Thesis: *The New York Arbitration Convention of 1958 - Towards a Uniform Judicial Interpretation* (mention: *cum laude*). Thesis-director: Professor Pieter Sanders
- 26.11.1977 University of Aix-en-Provence. Degree: Docteur en droit. Thesis: *Etude comparative du droit de l'arbitrage commercial dans les pays de Common Law* (mention: *très bien*). Thesis-director: Professor René David
- 1974– 1975 New York University, Institute of Foreign Law. Degree: Master of Comparative Jurisprudence (composite grade: A)
- 1973 – 1974 University of Aix-en-Provence, Faculty of Law. Post-doctorate course in Comparative, European and International Law
- 1968 – 1973 University of Amsterdam, Faculty of Law. Degree: Master of Laws.

LANGUAGES

Dutch, English, French

Reading: German, Italian and Spanish.

PROFESSIONAL ACTIVITIES

- Professor at Law (arbitration chair), Erasmus University, Rotterdam
- President, Netherlands Arbitration Institute (NAI), Rotterdam; former Vice-President, London Court of International Arbitration (LCIA)
- General Editor, *Yearbook: Commercial Arbitration*
- FCI Arb (Fellow of the Chartered Institute of Arbitrators), London
- Member, International Council for Commercial Arbitration (ICCA); Commission on International Arbitration of the International Chamber of Commerce (ICC), Paris; LCIA Company, London; Board of Trustees, Dubai International Arbitration Centre (DIAC)
- Member, Board of Trustees, Foundation for International Arbitration Advocacy, Geneva; Advisory Board of the Geneva University Master in International Dispute Settlement; Academic Council, Institute for Transnational Arbitration, Texas
- Member of Editorial Board, *Global Counsel*, London; *Global Arbitration Review*, London; *Tijdschrift voor Arbitrage*, Rotterdam
- Arbitrator on the Arbitral Tribunal concerning the Bank for International Settlements (Hague Treaty of 20 January 1930)
- Various panels of arbitrators, including: American Arbitration Association (AAA), New York; Arbitral Centre of the Federal Economic Chamber, Vienna; Arbitral Tribunal for Football, World Cup Division for the 2002 FIFA World Cup, Geneva; China International Economic and Trade Arbitration Commission (CIETAC), Beijing; Hong Kong International Arbitration Centre (HKIAC); Indonesian Board of National Arbitration (BANI), Jakarta; International Centre for the Settlement of Investment Disputes (ICSID), Washington; Kuala Lumpur Regional Centre for Arbitration (KLRC); Singapore International Arbitration Centre (SIAC)
- Presiding and party-appointed arbitrator as well as counsel in numerous international arbitrations (*ad hoc*, ECT, ICC, ICSID, LCIA, NAFTA, NAI, SCC and UNCITRAL, relating to, *inter alia*, banking, broadcasting, construction, defense projects, distributorship, electricity and gas supply, fashion, futures and options, gambling, information technology, insurance and re-insurance, investments, joint ventures, licensing, media, mining, oil and gas, post M&A, professional associations, sales, sports, telecom, turnkey projects)
- Extensive publications and lectures on international arbitration (see list of publications)
- *The International Who's Who of Business Lawyers*, Arbitration Lawyer of the Year Award 2006.

Arbitration
The United States of America v. Canada

Disclosure Statement pursuant to Article 5.3 of the LCIA Rules of Arbitration

by

Professor Albert Jan van den Berg

With respect to my nomination by Canada as arbitrator in the arbitration filed by the United States by a Request for Arbitration of 18 January 2008 with the London Court of International Arbitration, I wish to make the following disclosure:

I know Mr. Guillermo Aguilar-Alvarez, counsel for Canada in the present matter, since he was General Counsel of the International Court of Arbitration of the International Chamber of Commerce in the 1980s. Mr. Aguilar-Alvarez, Professor Michael Reisman and I were arbitrators in the arbitration *Anheuser Busch v. Grupo Modelo* in 1996. Mr. Aguilar-Alvarez was Presiding Arbitrator in a case in which I was appointed as arbitrator by a European investor against a Latin American country (for reasons of confidentiality, the names of the parties cannot be disclosed at present). The final award in that matter was rendered recently. Mr. Aguilar-Alvarez and I are members of the International Council for Commercial Arbitration (ICCA).

I was the Presiding Arbitrator in the consolidated arbitration *Canfor et al. v. Canada*, which was terminated following the 2006 Softwood Lumber Agreement between Canada and the United States (hereinafter: "SLA"). The Consolidation Order of 7 September 2005, the Order for the Termination of the Arbitral Proceedings with respect to Tembec of 10 January 2006, the Decision on the Preliminary Question of 6 June 2006, and the Order on Costs of 19 July 2007 are published, *inter alia*, at: <http://www.state.gov/s/lc/14432.htm>.

I am a partner in the law firm Hanotiau & van den Berg, Brussels, Belgium. I am aware that my partner Bernard Hanotiau is the arbitrator nominated by Canada in the LCIA arbitration requested by the United States on 13 August 2007. As partners in the firm do not share any information concerning cases in which they act as arbitrator (except for the names of the parties for the purposes of avoiding conflicts of interest), I have no information on that case other than what is publicly available (see http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/2006_Softwood_Lumber_Agreement/Arbitration_on_Export_Measures/Section_Index.html). The firm operates to a large extent on a cost sharing basis.

To my conscience and belief, the above circumstances do not affect my impartiality or independence to act as arbitrator in the above captioned case.

Brussels, Belgium, 16 February 2008,


Albert Jan van den Berg