LONDON COURT OF INTERNATIONAL ARBITRATION (LCIA)

UNITED STATES OF AMERICA
(CLAIMANT)

v.

CANADA
(RESPONDENT)

LCIA CASE NO. 81010

OPINION WITH RESPECT TO SELECTED INTERNATIONAL LEGAL PROBLEMS IN LCIA CASE NO. 7941

MAY 1, 2009

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I. INTRODUCTION

1. I am the Myres S. McDougal Professor of International Law at Yale Law School, where I have been on the faculty since 1965. I have published twenty books in my field, five of which focus specifically on international arbitration and adjudication; a sixth, which I edited, focuses on jurisdiction in international law. In addition to my teaching and scholarship, I have served as Editor in Chief of the *American Journal of International Law* and Vice-President of the American Society of International Law. I have also been elected to the *Institut de Droit International*, have served as an arbitrator in numerous international commercial and public international arbitrations, as counsel in other arbitrations, as well as in cases before the International Court of Justice ("ICJ"), and as an expert witness on diverse matters of international law. A *curriculum vitae* setting forth a complete list of my professional activities and publications is appended to this opinion. In particular, I note that I served as party-appointed arbitrator in an early Softwood Lumber arbitration under the CFTA.[1] That case concerned a matter unrelated to the instant case. I have also served as arbitrator in two NAFTA arbitrations. I have served or am serving in five ICSID arbitrations and in one non-supervised investment arbitration.

[1] United States-Canada Free Trade Agreement, Article 1904 Binational Panel Review (USA-92-1904-01), in http://www.worldtradelaw.net/cusfta19/lumber-cvd-cusfta19.pdf

2. Respondent, the Government of Canada ("Canada"), asked that I study and express an opinion on certain international law holdings in the Award on Remedies in LCIA Case No. 7941 (United States of America v. Canada) (the "Award"). In preparation of this opinion, I concentrated on the Award of 23 February 2009 and also reviewed some of the pleadings in that case. I have not, however, examined the entire record. In studying the Award, I have concentrated on its international law analysis and reasoning. In that regard, I would note that although the Award itself totals an imposing 149 pages, more than two-thirds of it is comprised of procedural histories, verbatim reproductions of the parties' submissions and long summaries of pleadings. For all of its length, it is actually a rather thinly reasoned award.

3. Overall, I find a series of very serious and entirely manifest misapplications of the law and errors in its reasoning. Had there been an arbitral review of the Award, these should have led to its annulment. There is, of course, no principle of *stare decisis* in international arbitration, but in the absence of a review and annulment phase, the errors in the Award under examination here work to deprive it of even the limited persuasive authority which a cogently reasoned arbitral award rendered by one tribunal might have for another tribunal which is seized with a cognate case. In my considered opinion, as set out below, the Award

is entitled to no persuasive authority because of its serious errors in misapplication of international law and its deficits in cogent reasoning.

II. SUMMARY OF CONCLUSIONS

4. For the reasons set forth below, I conclude that:

(a) The Award misconstrues and fails to apply the rules for interpretation of international instruments set out in the Vienna Convention on the Law of Treaties ("VCLT"). Were there a review of the award, this error would constitute an *excès de pouvoir*.

(b) The Award's application of the rules of interpretation produces an absurd construction of the relevant provisions of the SLA 2006. Were there a review of the award, this error would constitute an *excès de pouvoir*.

(c) The Award produces an incomprehensible holding with respect to burden of proof. Were there a review of the award, this error would constitute an *excès de pouvoir*.

(d) The Award improperly applies the International Law Commission's Articles on State Responsibility instead of applying the *lex specialis*. Were there a review of the award, this error would constitute an *excès de pouvoir* for application of the wrong law.

(e) Having decided to apply the Articles of State Responsibility, the Award applies them incorrectly.

(f) Having wrongly construed the SLA 2006 to render it retroactive, the Award produced a decision on damages which is unreasoned and, on its own terms, absurd.

(g) In its misinterpretation of the SLA 2006, the Award actually rewrote and applied a different treaty.

III. THE SLA PROVISIONS AT ISSUE

5. The provisions at issue in the Award are Sections 22 to 24 of Article XIV of the SLA. They provide:

> 22. If the tribunal finds that a Party has breached an obligation under the SLA 2006, the tribunal shall:
>
> > (a) identify a reasonable period of time for that Party to cure the breach, which shall be the shortest reasonable period of time feasible and, in any event, not longer than 30 days from the date the tribunal issues the award; and
> >
> > (b) determine appropriate adjustments to the Export Measures to compensate for the breach if that Party fails to cure the breach within the reasonable period of time.
>
> 23. The compensatory adjustments that the tribunal determines under paragraph 22(b) shall consist of:
>
> > (a) in the case of a breach by Canada, an increase in the Export Charge and/or a reduction in the export volumes permitted under a

volume restraint that Canada is then applying or, if no Export Charge and/or volume restraint is being applied, the imposition of such Export Charge and/or volume restraint as appropriate; and

(b) in the case of a breach by the United States, a decrease in the Export Charge and/or an increase in the export volumes permitted under a volume restraint that Canada is then applying.

Such adjustments shall be in an amount that remedies the breach.

24. Such adjustments may be applied from the end of the reasonable period of time until the Party Complained Against cures the breach.

On its face, these provisions provide a coherent regime in which breaches of the SLA are to be cured by the breaching party within a maximum of 30 days. If that is not done, compensatory adjustments may be ordered by a tribunal until the party in breach cures the breach. The thrust of the provisions on their face seems to be directed to securing a return to the behavior required by the treaty, i.e., changing future behavior so that it is henceforth consistent with the treaty obligation. The measures to compel that correction of behavior are spelled out in Section 23, which is subordinate to Section 22(b). Section 24 indicates the temporal extent of whatever means are determined under Section 22(b):"until the Party Complained Against cures the breach."

IV. THE AWARD'S MISCONSTRUCTION OF INTERNATIONAL LAW'S RULES FOR TREATY INTERPRETATION

6. No matter how much care parties may take in expressing with precision their commitments, the predictability of their commitments depends upon

commonly accepted rules of interpretation and, equally important, correct application of those rules by those called upon to construe the commitments in question. Thus, just as treaties facilitate cooperative behavior by stabilizing expectations with respect to reciprocal rights and duties, the rules of interpretation of treaties are designed to ensure that those stabilized expectations are respected.

7. International law's canons for interpreting international agreements have been codified in the Vienna Convention on the Law of Treaties.[2] Its provisions have become something of a *clause de style* in international arbitral awards, where they are often briefly referred to or, (as in the Award), solemnly reproduced verbatim, and then largely ignored. That, I believe, is what occurred in the Award. A failure to apply the rules of interpretation perforce distorts the resulting interpretation of the parties' agreement and is a species of the application of the wrong law.

8. The Vienna Convention has two major provisions on interpretation and I propose to examine the parts which are relevant to the Award. The first, Article 31, bears the title or *chapeau* "General rule of interpretation"; the second, Article 32, bears the title or *chapeau* "Supplementary means of interpretation." It is clear from the respective *chapeaux* and the mandatory character of the word "rule" in Article 31, as opposed to the subordinate language of the word "means" in

[2] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereafter VCLT].

Article 32, that Article 31 is dominant here, while Article 32 is auxiliary or supplemental to Article 31.

9. Even though Article 31 is a long and complex provision, its *chapeau* uses the singular, "rule," rather than the plural, "rules," thereby importing that its contents are both mandatory *and* integrated. The provision provides that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its [that is, the treaty's] object and purpose."[3] The method here is quite clear and can be summarized in tabular fashion:

> First, a good faith interpretation is to be made of the *ordinary* meaning of the terms of that part of the text in dispute, unless, as the fourth paragraph of Article 31 adds, "it is established" that the parties intended to give a term a "special meaning." Note that the default presumption is "ordinary meaning."
>
> Second, the *universe* of ordinary meanings to which the interpreter is instructed to repair, its "context," is the **text** of the rest of the treaty; other treaties of **all** of the parties to the treaty under construction; and "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty." Context requires construction of a particular part of a

[3] Vienna Convention, Art. 31(1).

treaty with reference to the rest of that treaty and precludes focusing only on a single word or phrase; that type of refraction would, quite literally, "take it out of context."[4] The point of emphasis is that for the interpreter who is governed by the Vienna Convention, context does not mean what it means to scholars, for whom the term may mean everything and anything they can unearth.

Third, object and purpose are to be used to illuminate the interpretation but it is the object and purpose as expressed **in the treaty** and not the subjectivities of the parties, whatever the word "subjectivities" may mean when we deal with complex social creations such as states.

10. The Vienna Convention's Rule thus emphasizes the text of the instrument as the critical part of the interpretative exercise. The text must be subjected to a rigorous examination in the context of the entire treaty, using the modalities set out in Article 31.

11. In contrast to the mandatory methodology of Article 31, the language of Article 32 is facultative and contingent. It **permits** recourse to "supplementary

[4] In its Commentary to this provision, the Commission stated: "Once it is established—and on this point the commission was unanimous—that the starting point of interpretation is the meaning of the text, logic indicates that 'the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' should be the first element to be mentioned." Yearbook of the International Law Commission (YBILC) 2001, vol. II, p. 220, para. 9. The International Court of Justice confirmed in 1991 in Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) that "the first duty of a tribunal, which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur." The Court stated as an implied corollary to this rule that "[w]here such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can validly placed on it." See ICJ Reports, 1991, p.69

means of interpretation, including the preparatory work of the treaty," the *travaux préparatoires*, "and the circumstances of its conclusion" in order to determine a provision's meaning. But this recourse may be exercised only where the application of Article 31 (i) "[l]eaves the meaning ambiguous or obscure"; or (ii) "[l]eads to a result which is manifestly absurd or unreasonable"; or (iii) "to confirm the meaning resulting from the application of article 31."[5] Note that the recourse to *travaux* under (iii) is for the purpose of confirming the meaning resulting from the application of Article 31; it is not for the purpose of displacing that meaning. Article 32 is, thus, not only supplementary to Article 31, but, in contrast to Article 31, contingent. Decision makers seized with a dispute are first obliged to construe the ordinary meaning of the text in application of Article 31[6] and to resort to supplementary means only if one of the contingencies specified in Article 32 is met.

12. Article 31 imposes on interpreters, as part of the "General Rule," an obligation of good faith. Surely that obligation follows the interpreter into Article 32. The point is of especial relevance with respect to the contingencies for bringing Article 32 into operation. The text which has been interpreted by application of Article 31 must still be ambiguous, obscure or absurd before the interpreter may proceed to Article 32. It would be bad faith to pretend that a text is ambiguous or

[5] VCLT *Art.* 32.

[6] See *Methanex Corp. v. United States*, First Partial Award on Jurisdiction and Admissibility, Aug. 7, 2002 (UNCITRAL), paras. 19-21.

obscure in order to open the door to *travaux* and then to rummage about for something to support a litigating position, when the application of the canons of Article 31 would produce an unambiguous interpretation, which is neither absurd nor unreasonable.

13. There are good reasons for an emphasis on texts as the proper international legal mode of treaty interpretation. The subjective views of a state are usually imagined and, even then, they are changing. And, *a fortiori* in multilateral treaties, where the quest for the "shared" subjectivities of the many states involved in any place other than in the text of the agreement is a pursuit of the *ignis fatuus*. It is the *text* which is the expression of the parties' shared subjectivities.

14. The Tribunal's application of VCLT Articles 31 and 32 departs in a breathtaking way from its provisions. In paragraphs 82 and 83, the Tribunal sets out its conception of its interpretative task. It commences with a declaration of fidelity to the principles of VCLT:

> First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the SLA and of arriving at the proper meaning to be given to those particular provisions in the context of the SLA in which they appear.[7]

But it no sooner makes this declaration than it adds:

> On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's "*preparation work*" and the

[7] Award para. 82

> "*circumstances of its conclusion*", but indicates by the word "*including*" that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as "*subsidiary means*". Therefore, these legal materials can also be understood to constitute "*supplementary means of interpretation*" in the sense of Art. 32 VCLT.[8]

15. The statement distorts Article 32 in two ways. First, it depreciates the primacy of the text as set out in Article 31 and moves immediately to the contingent "supplementary means" of determining the meaning of the text, even though the text as will be shown later in this opinion, does not suffer from any of the contingencies in VCLT Article 32. Second, and even more problematic, by leaping from the "supplementary means" in VCLT Article 32 to the words "subsidiary means" in Article 38(1)(d) of the Statute of the International Court of Justice, and introducing "judicial decisions and awards" in the interpretation, the Tribunal fabricates a methodology even further from that of VCLT Article 32.

16. ICJ Statute Article 38 is a choice-of-law clause for an international tribunal; the function of Article 38(1)(d), as the Statute states explicitly, is "the determination of rules of law" which the Court is to apply. The function of VCLT Articles 31 and 32, by contrast, is the interpretation of a specific text. The word "supplementary" in VCLT Article 32 directs the interpreter to material

[8] Award para. 83.

illuminating a part of a text of a specific international agreement. The word "subsidiary"in Statute Article 38(1)(d) authorizes the International Court, in trying to identify the content of "international custom" (Article 38(1)(b)) or "general principles" (Article 38(1)(c)) to consult "judicial decisions" and "highly qualified publicists" to help in determining rules of law. By jumping from "supplementary" to "subsidiary" (words which certainly sound similar), the Tribunal grafts something onto the VCLT's canon of rules for interpretation which is not – and should not – be there.

17. The Tribunal's theoretical discussion continues with an obscure non sequitur. In paragraph 84, it states that it is not evident "how far" these innovative "supplementary means of interpretation" are of "determinative relevance" (a concept whose purport is unclear). The Tribunal adds that while the decisions of other tribunals are not binding on it[9], they may be considered insofar as "they throw any useful light on the issues that arise for decision in this case."[10] The relation of these other, unnamed awards to the task of interpretation of the SLA 2006 remains obscure.

[9] Award para. 84.
[10] Award para. 85.

V. THE AWARD'S MISCONSTRUCTION OF *LEX SPECIALIS*

18. The notion of self-contained regimes or *lex specialis* is well known in customary international law. It is axiomatic in international law that parties, in creating a treaty, may establish for themselves a *lex specialis* which prescribes the law which will govern their relationship, displacing those rules of customary international law which, in the absence of the treaty, would otherwise apply to their relationship. Indeed, treaties are, by their nature, exercises in the option, through which international law allows states to create a *lex specialis*. While some parts of treaties may incorporate customary international law, other parts will displace it with a different regime. In codifying the law of State Responsibility, the International Law Commission recognized the importance of and confirmed the law's respect for a *lex specialis.*

19. Special arrangements which states may make, *leges speciales,* can establish, as between the states-parties to them, two distinct arrangements: (a) a breach of an international obligation or as the International Law Commission puts it, a "wrongful act," which is different from one prescribed by customary international law; and (b) the legal consequences of such a wrongful act which are different from those prescribed by customary international law. Each of these special arrangements displaces the customary international law that would otherwise apply. The distinction between (a) and (b) above is important. While

customary international law establishes default rules which will apply to the relations between two or more states in the absence of other arrangements between them, that same customary international law also permits states, as between themselves, to define not only what will constitute a wrongful act but also what the legal consequences of that wrongful act will be.

20. There is only one type of limitation which customary international law itself imposes on the parties' power to agree *inter se* to displace customary international law with a *lex specialis:* applicable peremptory norms or *jus cogens* from which derogation is not permitted. As the ILC Commentary to the Articles on State Responsibility puts it, states, as between themselves, may not prescribe "legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law."[11] When parties have established a *lex specialis* which is not contrary to a *jus cogens*, an interpreter should not repair to general "applicable rules and principles of international law" to justify displacing the terms of the parties' international agreement.

21. Customary international law, as codified by the International Law Commission, further allows states, who are creating a *lex specialis* as between themselves, two options. The first is to fashion an arrangement that is entirely self-contained and thus completely insulated from general international law; this is the

[11] ILCYB, supra note 4, (Part Two), p. 140, para. 2 of the Commentary to Article 55.

so-called "self-contained" regime. The second option is to make only some special provisions within a treaty; these might deal with the legal consequences of a breach (or a "wrongful act") of the obligations upon which they have agreed.

22. These aspects of customary international law are clearly set out in the text of Article 55 of the International Law Commission's Articles on State Responsibility. It provides:

Article 55. *Lex Specialis*

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.[12]

23. The International Law Commission's Commentary to this article is at pains to confirm the freedom of the parties to make special legal arrangements among themselves which then override the general customary international legal regime that would otherwise apply. The first paragraph of the Commentary provides:

> When defining the primary obligations that apply between them, **States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. ...**[13]

This understanding recurs in other parts of the Commentary to Article 55:

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[12] Id., p.140.
[13] Id.

> (2) Article 55 provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*...
>
> ...
>
> (6) The principle stated in article 55 applies to the articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.[14]

24. Article 55 further imports that there are "strong" forms and "weaker" forms of *lex specialis*. Paragraph (5) of the Commentary to article 55 provides:

> (5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution.[15]

25. The special legal arrangements between states determine the extent to which the general rules are displaced. Again the Commentary to Article 55 provides:

> (3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases, it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, **the consequence will be "determined" by the special rule** and the principle embodied in [*lex specialis*] will apply. **In other cases, one**

[14] Id., pp 140-141.
[15] Id.

> **aspect of the general law may be modified,** leaving other aspects still applicable.[16]

As an example, the Commentary refers to the prescription of certain remedies in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. I will return to the Commission's important comments in this footnote later in this opinion.

26. A *lex specialis* need not pronounce itself a *lex specialis* in order for it to benefit from the special treatment which international law affords it. All that is required is an **actual difference** between the special regime which has been established by the states-parties and the general regime of customary international law that would otherwise apply. The existence *vel non* of a *lex specialis* is determined by applying the canons of interpretation I reviewed earlier. Thus, the Commission's Commentary to Article 55 states:

> (4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation.....[17]

27. Having explicated the International Law Commission's codification of how *lex specialis* works in international law, I will turn to the Award and analyze how the Tribunal dealt with the *lex specialis*. As will be seen, the Award

[16] Id.
[17] Id.

erred in both its conception and application of the *lex specialis* rules of Article 55 of the Articles on State Responsibility to the SLA 2006 and its dispute settlement provisions.

28. The Award identifies as the first issue which it must decide whether Section 22 of the SLA "is designed to provide for prospective remedies only and therefore is not applicable in the present case where undisputedly the breach found in the early Award lasted only for six months in the past."[18] As will be recalled from my discussion of the Tribunal's erroneous application of the international canons of interpretation, the Tribunal, rather than explicating the text, as required by the VCLT, immediately invokes, as its starting point, Article 31 of the International Law Commission's Articles on State Responsibility which deals with "reparation." The Tribunal states:

> 274. For that examination [viz. the meaning of the SLA Section 22], the starting point is the general principle provided by **Art. 31 of the ILC Draft articles on State Responsibility** according to which the responsible state is under an obligation to make full reparation for the injury caused by its wrongful act..."

29. The Tribunal proceeds to a brief reference to the *Chorzow Case* and the Commission's Commentaries to Article 31. The Tribunal draws the legal conclusion that: "[t]he applicability of this principle [full reparation for the injury caused by a wrongful act] for the SLA, therefore must be accepted unless further

[18]Award, para. 273.

examination leads to a different conclusion."[19] The Tribunal then concludes that the later compliance by the Respondent did not "wipe out all consequences of the breach during the earlier six months"[20] and that "[t]his means that, also for the breach at stake in these proceedings, there is a **presumption in favour of retroactive remedies**."[21] Now I am not certain that this is a correct reading of Article 31 of the Articles on State Responsibility, but even assuming that it is, it is a reading of the *lex generalis,* i.e. of customary international law, in what should have been an inquiry about the meaning of a specific *lex specialis*, the provisions of the SLA.

30. The Award's immediate resort to ILC Article 31 for an answer to the first interpretative question without even determining whether the State Responsibility Articles, embodying *leges generales,* are applicable and override Section 22 of SLA, inverts the rule of *lex specialis derogat* and creates a strange new maxim of *lex generalis derogat*.

31. Only after concluding that Article 31 of the Articles on State Responsibility applies does the Award make a brief reference to Article 55 of the Articles on State Responsibility. The Award invokes a footnote in the Commentary to Article 55, in which the Commission refers to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes as

[19] Id., para.274.
[20] Id., para. 276
[21] Id., para. 277

an example of a *lex specialis* in which provisions relating to certain remedies specify that compensation refers to future and not past conduct. [22] Looking for similar explicit language in the SLA, the Award states:

> 280. Therefore, this Tribunal has to examine whether the SLA also must be interpreted as such as lex specialis, as is claimed by the Respondent.
>
> 281. Here again, the interpretation of the SLA has to apply Art.31 and 32 of the VCLT and first look for the "*ordinary meaning*" of Art. XIV section 22 in the "*context and in light of the object and purpose*" of the SLA.

32. The Award states summarily that the wording of Section 22 does not provide a clear answer regarding retrospective or prospective remedies. The Award then states: "The **term "cure"** is not used by the above mentioned provisions of the ILC Draft [sic]." The only provisions referred to by the Award were Article 31 on "reparation" and Article 55 on "*lex specialis*". Much seems to rest, in the Tribunal's thinking, on the absence of a reference to "cure" in the ILC Articles, yet the Award does not explain the relevance of the absence of the term "cure" in the two ILC provisions to the issue of the *lex specialis* character of Section 22.

33. As to whether the term "cure" was intended to apply retroactively or prospectively, the Award admits that: "It could **indeed be argued that the SLA speaks of curing the breach and not of curing the effects of the breach.**"[23] The Tribunal then says to "conclude that the provision [Section 22] is only applicable

[22] Award para. 279.
[23] Award para. 283, emphasis added.

to continuing breaches and not to past breaches, would require a **specific express language** to that effect – which cannot be found in Section 22."[24] Now "ordinary meaning" hardly requires explication. It is the ordinary meaning. But the Tribunal departs from the VCLT by evading the ordinary meaning and purporting to require "specific express language". This new threshold essentially ignores the notion of "ordinary meaning" and would, were it accepted, have the most mischievous consequences for the interpretation of international agreements. Lawyers can create arguments about anything, but the ordinary meaning of Section 22 could hardly be clearer; the text says "cure the breach" and does not say "cure the effects of the breach." But, in various formulations which I will set out below, the Tribunal actually imposes the second, unauthorized reading. Inexplicably, the Award ignores the *lex specialis* and turns to the *lex generalis*. Consider the Tribunal's words: "However, it has been seen above that a treaty does not need to expressly mention the duty of reparation and also that such reparation is to be understood as retroactively wiping out the effects of the breach."[25] Again in paragraph 285, the Award admits the ordinary understanding of the Section 22 as referring to breaches that continue at the time the Tribunal has to decide:

> 285. Nevertheless, **it does seem to the Tribunal that the rulings in that provision [section 22] are primarily shaped and are easier to be applied to deal with breaches that still continue at the time the Tribunal has to decide. This is particularly so for section (a) in so far as the breaching**

[24] Award para. 284.
[25] Id.

> **Party must be given a reasonable period of time up to 30 days "to cure the breach" and for subsection (b) providing that the determination of appropriate adjustments is due "if that party fails to cure the breach within the reasonable period of time".** (emphasis added)

34. Yet having made this admission with respect to the *lex specialis*, the Award decides to ignore the special rule in Section 22 and proceeds to apply customary international law's general rule dealing with legal consequences of a breach or a wrongful act. The Tribunal states: "[b]ut, as seen above, the language can also be understood to mean that retroactively the breach must be cured, i.e. by wiping out the effects of the breach in the past."[26] Note that this reflects the Tribunal's misunderstanding of the notion "ordinary meaning".

35. The Award repeats its admission of the more plausible meaning of the dispute settlement provisions of the SLA, but again veers off in the opposite direction, denying the special rule set up by SLA and imposing the *leges generales*:

> 294. **More persuasive** is Respondent's argument that the **procedures established by sections 22 to 24** function **logically** for prospective remedies and are ill-suited for retroactive remedies. As mention earlier, the Tribunal appreciates that the drafters primarily seem to have had in mind breaches continuing at the time of the arbitration. And, though there is no evidence from the negotiating history either way, it may even have been that the drafters did not even think of a case as the present one where a breach only lasted a certain period in the past.... (emphasis added)
>
> ....
>
> 306. The **conclusion of the Tribunal** regarding the issue of retroactivity of section 22: Due to Art. 31 of ILC Draft on State Responsibility there is a

[26] Award para. 285.

> presumption that section 22 also is applicable to past breaches. It is to be conceded that the procedure provided in sections 22 to 24 SLA seems to be primarily shaped in view of breaches still continuing at the time of the Award of the Arbitral Tribunal and is ill suited for application to past and completed breaches as at stake in the present case.

36. The Award thus steadfastly refuses to recognize the manifest special rules for dispute settlement and legal consequences of a breach of the obligations between the two states parties to the SLA. Paradoxically, the Tribunal concedes what seems to be the ordinary meaning of the text: "[i]t is to be conceded that the procedure provided in sections 22 to 24 SLA seems to be **primarily shaped** in view of breaches still continuing at the time of the Award of the Arbitral Tribunal and **is ill suited** for application to past and completed breaches as at stake in the present case."[27] The Tribunal seems to be possessed of the idea that unless the language of a treaty or an agreement states explicitly that it is a *lex specialis* or that certain general rules are not to apply, the treaty or agreement will not be deemed to be a *lex specialis* and its provisions will be interpreted, even in the face of the ordinary meaning, by reference to *leges generales*. This curious theory is not supported by international law and constitutes a gross misapplication of ILC Article 55 of the Articles on State Responsibility.

37. In my opinion, it is hard to see how one can resist reading the dispute settlement provisions of the SLA as a special regime for the legal consequences of

[27] Award para. 306, emphasis added.

a breach of that agreement. The fact that the SLA recognizes and provides for only specific legal consequences of breach would appear to testify to its *lex specialis* status. Indeed the Tribunal itself virtually concedes, in paragraph 306, that this is the ordinary meaning.

38. Section 22 (b) only allows for the adjustment of Export Measures "to compensate for the breach" in case the breaching Party fails to cure the breach. The term "Export Measures" has a specific meaning in the SLA. Adjustments to "Export Measures" apply to the exports from the breaching regions and, as such, have a wide trade impact which, by their nature, encourage or compel the breaching party to stop the breach. That is why on the ordinary interpretation of the text, adjustments apply only for the duration of the breach. Adjustments to "Export Measures" are not designed to function as compensation to individual persons or corporations that suffered damage; they are manifestly ill-tooled for such a function. If the SLA intended to provide for reparation, as understood under customary international law, namely reparation for injury already caused by the breach, it is reasonable to assume that the Parties, both of which are seasoned international actors with extensive experience in the conclusion of international agreements, would have crafted more effective mechanisms for reparation.

39. The Award does not address this important point nor does it discuss the implications of this exclusive choice of the Parties for any remedial measures

for uncured breach. A minimally reasoned award should have at least addressed this, particularly in view of the fact that the SLA excludes monetary damages as a remedy which can be ordered by the Tribunal under Section 22(b).[28]

40. Yet no sooner does the Award deny the *lex specialis* character of the SLA's dispute settlement provisions than it invokes that special character for a different aspect of **the same SLA Sections 22 to 24**. Those provisions, the Tribunal holds, do:

> 321. . . . provide specific instructions for [the determination of remedy] **which differ considerably from the general methods developed for the determination of a reparation of injury and damage under Art. 31 ILC Draft**. These instructions use the export measures provided by the SLA and qualify as to how these should be adjusted to compensate for the breach. It is obvious and does not need any further explanation that the Parties, having designed and implemented these export measures in the softwood lumber industry form many years, they possess a by far greater expertise than this Tribunal regarding their practicability and economic effect...

This paragraph is reminiscent of the capriciousness of Lewis Carroll's "Red Queen". Having rejected the *lex specialis* character of Sections 22 to 24, the Tribunal now pirouettes and, *mirabile dictu,* finds that they are *lex specialis.* This "blowing hot and cold," if I may borrow from the Common Law's colorful term for the predicate of estoppel, produces a contradictory and incoherent application of the *lex specialis* rule. The Tribunal's holding, in my opinion, subverts the ordinary meaning of the parties' agreement.

[28] Of course, what is denied the Tribunal is available to the parties if they so agree.

VI. THE AWARD'S MISAPPLICATION OF CUSTOMARY INTERNATIONAL LAW

41. In its interpretation of Section 22 of Article XIV, the Award purports to draw on the work of the International Law Commission on Responsibility of States for Internationally Wrongful Acts, a project which was completed in 2001(State Responsibility). The Articles on State Responsibility are part of the International Law Commission's mandate to codify customary international law. In Article 2, the Commission identifies the elements of an internationally wrongful act as an act or omission that constitutes a breach of an international obligation of a state and is attributable to that state. There follow 59 articles which together set forth a coherent regime of State Responsibility under customary international law. The Commission also identifies where the articles of the Commission do not apply as well as those issues that were not included in the Articles yet are still subject to application of customary international law.

42. Ignoring the *lex specialis* character of SLA Article XIV, Section 22 involves the application of the wrong law, which is an *exces de pouvoir* and a classic ground for annulment. But the Tribunal compounds its error by then proceeding to egregiously misapply the customary international law with which it displaces the *lex specialis.* Specifically, it misconstrues customary international law's requirement of proof of causality between a breach and a claimed injury and

it inverts the burden of proof of injury which reposes on the Claimant, as its *onus probandi,* imposing it, instead, on the Respondent; this is an innovation unsupported by international law.

43. As I noted, in its application of customary international law, the Award relied on the Articles on State Responsibility; to be more precise, it relied principally on Article 31 which deals with reparation. The Award, as I will show later in this opinion, actually misconstrues and misapplies even its own, indiosyncratic understanding of Article 31 of the Articles on State Responsibility. In sum, the Award has erred materially in the interpretation and application of customary international law with respect to the consequences of a breach by a state of an international obligation.

A. Cessation of an Internationally Wrongful Act or a Breach of an International Obligation

44. Under the customary international law of State Responsibility as codified by the International Law Commission, *cessation* of a wrongful act or a breach of an international obligation is the first requirement for eliminating the consequences of a wrongful act. The main focus of the requirement of *cessation* is to terminate a wrongful act of a continuing character or a wrongful act which, though not of a continuing character, is repeated by the responsible state. The ILC defines cessation in Article 30 of the Articles on State Responsibility:

Article 30. Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.[29]

45. In the Commentary to this article, the ILC explains that the function of cessation is "to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule."[30] The importance of cessation, in the ILC view, is that it protects the interests of the parties involved as well as the international community's abiding interest in upholding the rule of law: "[t]he responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law."[31]

46. The ILC further acknowledges that "cessation is often the main focus of the controversy produced by conduct in breach of an international obligation...[a]nd by contrast, reparation, important though it is in many cases, may not be the central issue in the dispute between States as to questions of

[29] YBILC Art. 30, p.88.
[30] Id., p. 89, para. 5 of the Commentary to Article 30.
[31] Id.

responsibility."[32]. As examples, the Commission refers to the WTO dispute settlement mechanisms and two judgments of the International Court of Justice: *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment,*[33] and *Gabcíkovo-Nagymaros Project (Hungary/Slovakia) Judgment.* [34]

47. The importance of securing the cessation of a wrongful act in the general international law of state responsibility has implications for the regime in Section 22. Even if section 22 were to be interpreted by reference to the normative ambit of general international law, the referent of its paragraph (a) would be the requirement of cessation, i.e., under Article 30 and not Article 31of the Articles on State Responsibility. Requiring a party that has breached an obligation under the SLA to "cure the breach" within a reasonable period of time and, in any event, no later than 30 days from the issuance of the award clearly falls under the requirement of cessation, as defined in ILC Article 30, rather than reparation for injuries caused, as defined in ILC Article 31. The brevity of the period of time for curing the breach is yet a further indication that curing the breach means to cease the breach of the SLA, for how could a hypothetical reparation be argued, proved, authoritatively liquidated and paid within that brief time frame?

B. Reparation for Injury Caused by an Internationally Wrongful Act or a Breach of an International Obligation

[32] YBILC, 2001, vol II (Part Two), para.4 of Commentary to Article 30, p. 89.
[33] *I.C.J. Reports 1974*, p. 175, at pp. 201–205, paras. 65–76.
[34] *I.C.J. Reports 1997,* at p. 81, para. 153.

48. It will be recalled that in defining the term, "cure the breach" in SLA Article XIV, Section 22 (a), the Award turns to Article 31 (on reparation) of the Articles on State Responsibility. Using that provision, the Award concludes that the term "cure the breach" means "wiping out the effects of the breach"[35] or "wiping out all the consequences of the breach"[36], definitions which the Tribunal uses interchangeably. The Award, in paragraph 275, refers to the *Chorzow* decision and then states:

> [T]he Commentary [of the ILC] adds that the responsible state must endeavour to "*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*". Thus, it is clear – and undisputed – that the general principle of Art. 31 provides for retroactive, and not only for prospective remedies.

49. But the Award does not explain how it reaches the conclusion that Article 31 provides for "retroactive, and ... prospective remedies"? Here, the Award misconstrues the concept of reparation in Article 31. Article 31 sets out the requirement of "full reparation". The various forms of reparation are addressed in Articles 34 to 39. There is nothing in any of these provisions categorizing reparation as "retroactive or prospective". It seems that the Tribunal was confusing the term "remedies" with the term "injuries", which is used in Article 31.[37] Article 31, in its paragraph 2, is very clear that an injury is "caused by the

[35] Award paras. 283, 285, 295, 296 and 297.
[36] Award paras. 276, 309 and 310.
[37] Award para. 321.

internationally wrongful act". The word "caused" is cast in the past tense, meaning that there must be a proof of injury at the time of the decision on reparation. Under this textual reading, an injury, if there is one, "has already been sustained" for which a Tribunal is called upon to award reparation. Now remedies for which the Articles of State Responsibility are relevant are elaborated in Articles 34 to 39 (dealing, respectively, with restitution, compensation, satisfaction, interest and contribution to injury). The Award does not discuss any of these remedial forms of reparation. As I explained earlier in the l*ex specialis* section of this opinion, the Award reverts to the SLA, conceding that Sections 22, 23 and 24 of the SLA

> 321. . . provide specific instructions for [the determination of remedy] which differ considerably from the general methods developed for the determination of a reparation of **injury and damage** under Art. 31 ILC Draft. These instructions use the export measures provided by the SLA and qualify as to how these should be adjusted to compensate for the breach. It is obvious and does not need any further explanation that the Parties, having designed and implemented these export measures in the softwood lumber industry for many years, they possess a by far greater expertise than this Tribunal regarding their practicability and economic effect." (emphasis added).

C. The Requirement of a Causal Link between Injury and an Internationally Wrongful Act or a Breach of an International Obligation and the Burden of Proof Therefor

50. Under customary international law, the state that claims compensation for injuries has the burden of proving that the injuries were caused by the breach of the obligation or the wrongful act. This requirement is, of course, an application of customary international law's requirement that in a bilateral dispute over breach of

an international obligation, the onus of establishing responsibility lies, in principle, on the claimant state. Thus Article 31 of the ILC State Responsibility provides:

Article 31. Reparation

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[38]

51. Now injury means injury to the party claiming reparation (see also paragraph 65 of this opinion below). Under Article 31, injury must be the consequence of the wrongful act. The Commentary to Article 31 elaborates on the requirement of a causal link:

> (9) Paragraph 2 addresses a further issue, namely the question of a causal link between the wrongful act and the injury. It is only "[i]njury ... caused by the internationally wrongful act of a State" for which **full reparation** must be made. **This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act**.[39]

52. After reviewing various terms for causal link, the ILC makes clear the intention of Article 31 is that "[t]he notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act,".[40]

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[38] Id., p. 91.
[39] Id., p. 92, emphasis added.
[40] Id., p. 93, para. 10 of the Commentary to Article 31.

53. Now there is nothing in the Award to indicate whether the Claimant has suffered injury as the result of the breach of the SLA for a period of six months. The Parties' experts may have argued various economic models in an attempt to prove injury but what is the reasoned view of the Tribunal as to whether injury was proved? Yet a demonstration of such injury is required under the customary international law which the Tribunal purports to be applying. Furthermore under customary international law, the Claimant has the burden of proving that it has suffered an injury which was caused by the wrongful act of the Respondent; a mere assertion by the Claimant of having suffered injury is insufficient.

54. In the *Mavrommatis Jerusalem Concessions Case*, the Permanent Court of International Justice dismissed the claim by the Greek Government for an indemnity on the ground that although it had been established that the action taken by the Mandatory for Palestine violated its international obligations, "no loss to M. Mavrommatis has been proved."[41] In the *Batchelder* case, the Italian-United States Conciliation Commission, in rejecting the claimant's claim for reparation for loss of property, held:

> [I]t is necessary for the claimant, or the Government claiming on his behalf to submit proof that such loss occurred as a result of the war or, at least, to submit sufficient evidence of a casual connection between the war and the loss that the burden of rebuttal would be shifted to the Italian Government.

[41] PCIJ, Ser. A, No. 5, p.51.

> In the instant case, an examination of the evidence submitted by the claimant leads to the conclusion that there is in the record neither proof that the loss was caused by the war nor evidence sufficient to oblige the Italian Government to prove the contrary.[42]

Similar views have been taken by the Iran-United States Claims Tribunal. In *H.A. Spalding, Inc* and *Ministry of Roads and Transportation of the Islamic Republic of Iran*, the Tribunal rejected the claim by the claimant for not being able to meet the burden of proof:

> Consequently, the Tribunal concludes that the Claimant had not carried its burden of proving its claim. To the extent the claim is based on alleged performance of services of which Respondents received the benefit Claimant has not satisfied the Tribunals either that such services were performed or, if any were rendered, requested by the Respondents so as to create a justified expectation of compensation. Insofar as the claim is based on explicit contractual rights the Tribunal notes that one contract may have been concluded but that **there is no evidence proving damages resulting from any breach of the contract**. Therefore Claimant's claim is dismissed.[43]

55. The customary international law requirement of proof of a causal link has been repeatedly upheld by arbitral tribunals. In the United States-German Mixed Claims Commission of 1922, the Umpire held in the *William R. Hier* Case that the claimant had failed to discharge his burden of proof: "the claimant failed to discharge the burden of proof resting upon him to prove pecuniary damages suffered by him for which Germany was liable".[44] The Arbitration Commission on

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[42] *Batchelder Claim*, (26, July 1954), 22 *International Law Reports*, pp.864-867

[43] Award No. 212-437-3 of 24 Feb. 1986, para. 35, see 10 *Iran-U.S. CTR*, 22, at 33, emphasis added.

[44] Report of Robert W. Bonynge, Mixed Claims Commission (United States and Germany) 1934, p.74. See also *Turner C. Gillenwatter* claim in which the Tribunal held that "the claimant had failed to discharge the burden resting upon him to establish the mal treatment complained of." Ibid., p. 76.

Property, Rights and Interests in Germany held in 1959 in *Levis & Levis v. Fed. Rep. of Germany* that:

> While recognizing the difficulties encountered by the victims of former National-Socialist persecution in supplying proof, mere allegations submitted by a complainant cannot be accepted as *prima facie* evidence, at least where facts basic to the establishment of the claim are concerned. A reversal of the burden of proof could only arise if it had been sufficiently shown that the defendant held documents of evidential value which it refused to submit.[45]

The United States Foreign Claims Settlement Commission took a similar view in the *Vaso Turajlich case* by holding that the claimant's unsupported assertion was insufficient to establish ownership of property particularly in the face of contrary documentary evidence submitted by Yugoslavia.[46]

56. The Award simply misses this crucial stage of legal determination. In paragraph 315, while invoking Article 31 of the Articles on State Responsibility to the effect that "the claiming party will have the burden of proof for the alleged '*injury caused by the internationally wrongful* act' ... including '*any damage, whether material or moral, caused*", the Tribunal simply skips Article 31's requirement of proof of causality and moves directly to the determination of compensatory adjustments :

> 318. In the Tribunal's view, §§ 22 to 24 do provide **specific guidance as to what compensatory adjustments are appropriate**. As Respondent has

[45] Decisions of the Arbitral Commission on Property, Rights and Interests in Germany, vol. II (Nos. 24-61), 1959, p. 206.
[46] Foreign Claims Settlement Commission of the United States, Decisions and Annotations, 1968, Decision, Y-53, p. 38.

> rightly pointed out, compensatory adjustments are limited to adjustments of trade measures rather than cash payments of monetary damages. Thus, they go beyond the identification of injury and damage required under Art. 31 ILC Draft by not giving a free hand regarding the choice of the reparation due for the breach, but mandating the determination of specific devices using and adapting the measures provided in the SLA by expressly requiring in subsection (b) "*adjustments to the Export Measures*" and by further details regarding such adjustments in case of a breach by Canada in subsection (a) of § 23.

Paragraph 319 of the Award further dilutes customary international law's requirement of proving the causal link between injury and the breach:

> 319. Therefore, though it is finally the responsibility of the Tribunal to make the determination under § 22 subsection (b), since that determination is limited to adjusting the specific export measures foreseen in the SLA, the Tribunal disagrees with Claimant's submission that neither Party bears the burden to demonstrate appropriate measures, but agrees with its further submission that to the extent that a party wishes the Tribunal to adopt a particular proposed remedy, it is that party's burden to demonstrate that the remedy is (as the SLA requires) "appropriate" (C III, §§ 25 and 26).

57. Again, there is nothing in the Award to indicate what harm or injury was suffered by the Claimant. Nor is there any indication as to what, if any, were the harmful effects on the Claimant, allegedly caused by the Respondent's breach of the SLA, which should, in the language of the Tribunal, be "wiped out" by imposition of compensatory adjustments. Yet these are essential legal links which are required by the customary international law which the Tribunal is purporting to apply. Paragraph 333 of the Award simply rejects the Respondent's contention that there has been no harm to Claimant. The Award states: "Regarding the economic effect, the Tribunal is not persuaded by Respondent's argument that the

breach resulted in no harm to Claimant because the overshipments during the breach period were offset by Region B shipments during the second half of 2007."[47] Customary international law has no presumption of injury that places the burden of proof on the Respondent. It is the Claimant that has to prove injury and sufficient causality between injury and the breach before any burden of proof can shift. There can be no presumption of injury to the Claimant by the Tribunal based on the mere breach of the SLA, even less on the mere assertion of injury by the Claimant.

58. In evaluating the 3rd and 4th proposals by the Claimant, the Award finds that those two proposals are "less convincing models to remedy the harm caused by Canada's breach in accordance with sections 22 and 23."[48] But even here, the Award never defines what it means by "harm".

59. In the absence of proof of any injury to or effects on the Claimant, the imposition of compensatory adjustments amounts to "punitive damages" a form of damages that is not recognized in international law. In the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights was very clear that international law does not recognize the concept of punitive or exemplary damages.[49]This, too, is the view of the ILC:

[47] Award para. 333.
[48] Award para. 329.
[49] Series C. No. 7 (1989).

> For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34, the function of damages is essentially compensatory.[50]

60. The Award must struggle to determine the most appropriate compensatory adjustments because it has no basis for designing such adjustments without abandoning its own theory that the purpose of the compensation is "wiping out all the consequences of the breach" or "wiping out the effects of the breach". Hence the failure of the Award to provide any meaningful reasons for selection of compensatory adjustments. The reader of the Award is left asking 'compensation to remedy what?'

61. In the end, the Tribunal has no alternative but to abandon its own definition of "cure the breach," for none of the Claimant's four proposed options establishes injury or, even assuming that one of them does prove injury, demonstrates that it was caused by the Respondent's action. But recall the conceptual framework of the SLA. The breach is cured by cessation, as prescribed by Section 22. What is this additional breach and what has it breached? How can one fashion a remedy without knowing the injury to be repaired? All the Award can say (almost plaintively) is that "there must be **at least one appropriate**

[50] YBILC, 2001, vol.II (Part Two), paragraph 5 of Commentary to Chapter III.

adjustment satisfying the requirements of that subsection [Section22(b)] and the further qualification in section 23."[51]

62. The Award's departure from its own definition of the term "cure the breach" as "wiping out [the effects]/[all the consequences] of the breach" is repeated again in paragraph 327: "[a]nd, irrespective of the issue of burden of proof, since neither the Respondent nor its expert have presented a model which they claim is better, it further implies that the **Tribunal may select the most convincing adjustment method** among the Proposals submitted as long as it is economically plausible and legally not contrary to the requirements established in §§ 22 and 23." There is no reference to how any of the options "wipe out [the effects]/[all the consequences] of the breach". Nor is there any explanation in the Award of how the finding in this paragraph is to be reconciled with the conclusion of the Tribunal in paragraph 310 that:

> Therefore, the Tribunal **concludes** in application of subsection (a) that, as soon as possible after its present Award, Respondent has to take the steps necessary to wipe out the consequences of its breach of the SLA during the period from January 1 to June 30, 2007, which the Tribunal found in its Award on Liability.

63. As one reconstructs the intellectual struggle of the Tribunal, it becomes clear that it had no alternative but to consider any possible financial benefit to the Respondent which may have occurred as a result of the six months

[51] Award para 323.

breach, as the "consequences of the breach" which are to be "wiped out". In paragraph 335, in commenting on Option B, the Award states: "The Tribunal finds it at least plausible that levying such an additional charge [CDN $63,9 million) against Option B regions would be a reasonable method to effectively undo the benefits they enjoyed during the six months of the SLA violation and thus restore, as much as possible in view of the difficulty of the task as discussed above, the SLA's economic effect to its intended state." Under this construct, the Tribunal's initial formulation of "wiping out [the effects]/[all the consequences] of the breach" now has morphed into something unrelated to any alleged injury suffered by the Claimant. Now the Tribunal's purpose is:

> 335. ... to effectively undo the benefits they [Respondent] enjoyed during the six months of the SLA violation and thus restore, as much as possible in view of the difficulty of the task as discussed above, the SLA's economic effect to its intended state.

Wholly apart from the regime of the SLA, the Tribunal's conclusion here bears no resemblance whatsoever to the legal notion of "reparation" under Article 31 of the Articles on State Responsibility. Nor can it find any support in customary international law.

64. In numerous decisions of international courts and tribunals, various forms of reparation have been awarded to claimants for the injury to them which was caused by a respondent's breach of an international obligation. In these

decisions, injury was assessed based on the loss to the Claimant. In the *Gabcikovo-Nagymaros Project* case, the ICJ declared "it is a well established rule of international law that an injured state is entitled to obtain compensation from the State which has committed an internationally wrongful act for damage caused by it."[52] Even in cases of restitution, which included the return of a territory, handing over to a state of an arrested individual and return of ships or other types of property, the purpose has been to make the claimant whole as much as possible. As the Umpire put it in the *"Lusitania"* case:

> The fundamental concept of "damages" is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.[53]

The term "judicial restitution" is sometimes used where it involves the modification of a legal situation within the legal system of the responsible state. These forms of restitution may require modification, revocation, annulment or amendment of legislation which is in breach of an international obligation of a breaching state. A binding decision by a tribunal reaffirming the legal relationship between the parties is equivalent to what amounts to restitution. A typical example is to found in the decision of the PCIJ in the *Legal Status of Eastern Greenland case,* where the Court decided that "the declaration of occupation promulgated by the Norwegian Government ... and any steps taken in this respect by that

[52] I.C.J. Reports, 1997 (Judgment), p. 81, para. 152.
[53] United Nations Reports of International Arbitral Awards, vol.VII, p. 32, at p. 39 (1923).

Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid."[54]

65. The Award confuses the function of reparation for breach of an international obligation, in both customary international law and the Articles of State Responsibility with the function of adjustments for failure to cure a breach in Section 22 (b). The function of reparation in customary international law, as the word used to designate this remedy indicates, is to repair an injury; hence the insistence that the injury be proved and the reparation then address it. By contrast, the function of the adjustments which are prescribed in Sections 22(b) and 23 is to incentivize and compel compliance by the recalcitrant violator of the SLA who has not voluntarily cured the breach within the prescribed period. Hence Section 24, which completes Section 22 and which must be incorporated in the interpretation of the former, provides that the adjustments contemplated in Section 22 "may be applied from the end of the reasonable period of time until the Party Complained Against cures the breach." The adjustments to the Export Measures, which are to be applied until compliance, are the specific and only sanctions available to the Tribunal under this part of the SLA. It is therefore perfectly understandable that the Award, in its paragraph 327, should confess to its own distress that "in view of the recognized extreme difficulty to take into account all criteria and varying

[54] P.C.I.J., Ser. A/B, No. 53, p.22, at p. 75.

circumstances of relevance, even the most distinguished experts in the field are not convinced to be able to come up with an adjustment which would be beyond any criticism." In this statement, at least, the Award is correct: the purpose of Section 22(b) and the provision for its assessment in Section 23 are to provide a tribunal seized of such a case with a set of authorized sanctions which are designed to compel compliance of the state that violated the SLA and has *not* ceased its breach or, as Section 22(a) puts it, cured the breach. But the point of emphasis is that there is no place in this *lex specialis* for an additional sanction "wiping out [the effects]/[all the consequences] of the breach", a mantra-like formula which the Tribunal keeps intoning.

66. Now, assuming that the Tribunal had to apply Section 23 in appropriate circumstances, would the Claimant bear the burden of proving that such compensatory adjustments as it sought from the Tribunal related to an actual injury being suffered as a result of the Respondent's failure to cure the breach? The characterization of *jus cogens* is, of late, often applied too liberally and I would not characterize the burden of proof as a *jus cogens*. But when the claim is for a non-consensual transfer of value from one party to another, proving actual injury as a result of the Respondent's violation of an obligation would certainly be a fundamental part of the due process of law.

67. The Award's problem here is not simply the failure to establish that a

specific damage was actually caused by a breach. Most important, the idea of reparation, whether it be secured by cessation or compensation, is restorative and not transformative. A remedy cannot be used to change a continuing legal relationship which the parties created for themselves.

68. In misapplying customary international law and Article 31of the Articles on State Responsibility, the Tribunal failed to show that

(i) the Claimant has proved that it has suffered any injury or harm caused by the Respondent's breach of the SLA and that there was a causal link between that alleged injury and the breach;

(ii) the remedies that it has awarded comply with the requirement of customary international law and of the ILC's Article 31 of "full reparation" for the injury caused by the Respondent's six months breach of the SLA .

It is telling that the Award neither makes mention of nor offers response to the Respondent's key criticism, viz., that the Claimant has failed to prove damage and causation. The Tribunal seeks to evade this issue by applying measures to the future behavior of the Respondent. This amounts to punitive damages, which are not permitted under customary international law.

69. In sum, the Tribunal not only fails to apply the correct law, the *lex*

specialis, but in applying the wrong law, the customary international law which the *lex specialis* had displaced, its Award produces its own version of international law that bears no resemblance to the international law of State Responsibility.

Respectfully submitted,

Appendix

Curriculum Vitae of W. Michael Reisman

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Summary Resume

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Curriculum Vitae

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member of the Editorial Board of the *Stockholm International Arbitration Review*, 2005-; member of the ASIL Advisory Committee for ICJ Nominations and Other International Appointments, 2005-; ICSID Arbitrators List (for Colombia) for the period effective February 15, 2006-2012; member of the Advisory Board of the Columbia Program on International Investment, 2006-; member of the International Editorial Board of the *Cambridge Review of International Affairs*, 2006-; Honorary Professor, Gujarat National Law University, 2007-; member of the International Advisory Board of the School of Law of City University of Hong Kong, 2007-; member, World Bank Administrative Tribunal Nominating Committee, 2007-2008; Honorary Professor in City University of Hong Kong, May 1, 2008 to April 30, 2011; member of the Advisory Board of the Latin American Society of International Law (LASIL), 2007-; member of the Advisory Board of *Journal of International Dispute Settlement*, 2009-; member of the Advisory Board of *Yearbook on International Investment Law and Policy*, 2009-.

Prizes and Awards: Gherini Prize, Yale Law School, 1964; International Organization Prize (Ginn Foundation), 1965; Fulbright Scholar, 1966-1967; O'Connell Chairholder, University of Florida, Law Center, Spring, 1980; World Academy of Art and Science, Harold Dwight Lasswell Award for Communication in a Divided World, April, 1981; Certificate of Merit, American Society of International Law, 1994; Order of Bahrain, First Class, 2001; Manley O. Hudson Medal, American Society of International Law, 2004; Human Rights Award, International Human Rights Law Review, St. Thomas University School of Law, 2008.

Endowed Lectureships

Myres S. McDougal Distinguished Lecture in International Law and Policy, University of Denver, 1982.

Distinguished Visiting Lecture, Cumberland Law School of Samford University, 1986.

Beam Distinguished Lecture, University of Iowa, College of Law, 1986.

Dunbar Lecture, University of Mississippi, College of Law, 1988.

Brainerd Currie Lecture, Duke University, School of Law, 1989.

Freiwillige Akademische Gesellschaft Lecture, University of Basel, 1991.

Sloan Lecture, Pace University Law School, 1992.

Siebenthaler Lecture, Salmon P. Chase College of Law, Northern Kentucky University, 1995.

Hague Academy of International Law, 1996.

Lauterpacht Lecture, Cambridge University, 1996.

Eberhardt Deutsch Lecture, Tulane University, 1997.

Order of the Coif Lecture, 1999.

Hugo L. Black Lecture, University of Alabama School of Law, Spring 2001.

The Johnson Lecture, Vanderbilt Law School, January 2002.

Adda B. Bozeman Lecture, Sarah Lawrence College, April 2002.

The Manley O. Hudson Lecture, American Society of International Law, April 2004.

The Klatsky Lecture in Human Rights, Case Western Reserve University School of Law, January 2008.

The Goff Arbitration Lecture, Freshfields Bruckhaus Deringer/City University of Hong Kong, Hong Kong, December 2008.

Human Rights Missions

1. Member, Independent Counsel on International Human Rights, Peshawar, Pakistan, 1987.
2. Member, OAS Observation Team for the Elections in Suriname, November, 1987.
3. Member, International Commission of Jurists Group, Budapest, Hungary, February, 1990.
4. Observer, Taiwan elections, International League for Human Rights, December, 1991.
5. On-site visit to Haiti, Inter-American Commission on Human Rights, 1990, 1994.
6. On-site visit to Peru, Inter-American Commission on Human Rights, 1990, 1992, 1994.
7. On-site visit to Colombia, Inter-American Commission on Human Rights, 1991, 1993.
8. On-site visit to Guatemala, Inter-American Commission on Human Rights, 1994.
9. On-site visit to Bahamas, Inter-American Commission on Human Rights, 1994.
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12. Report to the Constitutional Review Commission, Fiji, 1997.

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1. "The Future of Peace-keeping: Some Thoughts on the Prospects for the Lawful Use of the Military Instrument in Defense of World Order," to appear in German and to be published in Sicherheit und Stabilität (Security and Stability).

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3. Preface in a forthcoming book edited by Emmanuel Gaillard and Domenico Di Pietro entitled "Enforcement of Arbitration Agreements and International Arbitral Awards - The New York Convention 1958 I n Practice."

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List of Attachments

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