In the LCIA
No. 81010B

THE UNITED STATES OF AMERICA

v.

CANADA

UNITED STATES' STATEMENT OF CASE

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1. Pursuant to Procedural Order No. 1B, the United States respectfully submits the United States' Statement of the Case, together with evidence and authorities.

INTRODUCTION

2. This arbitration is the direct result of Canada's effort to avoid collecting most of the remedy determined by the Tribunal in its award in LCIA Arbitration No. 81010 (Award).

3. In the Award, the Tribunal determined that Canada breached the 2006 Softwood Lumber Agreement (SLA or Agreement) when the provinces of Ontario and Québec implemented five government programs that provided benefits to Canadian softwood lumber producers through grants and other financial assistance. The five programs breached Canada's obligation under the SLA to take no action to circumvent the agreed-upon system of Export Measures designed to regulate softwood lumber exports to the United States.

4. To remedy Canada's breach of the Agreement, the Tribunal required Canada to assess and to collect Compensatory Adjustments in the form of additional export charges on softwood lumber exports to the United States from Ontario and Québec. The Tribunal carefully calculated these Compensatory Adjustments to compensate for the harm to the U.S. industry – referred to as the change in U.S. producer surplus – caused by the breaching programs. In doing so, the Tribunal determined the overall amounts that must be collected in order to remedy the breach and the rates at which the overall amounts are to be collected until the expiration of the SLA.

5. Having failed to cure the breach within the reasonable time allowed by the Award, Canada began collecting the additional export charges as the Tribunal directed. Canada now asserts, however, that the Award allows it to cease collecting the additional export charges

as of October 12, 2013, the date on which the SLA was set to expire at the time the Tribunal issued the Award. Canada takes this position notwithstanding two uncontested facts:

(1) the SLA has been extended by agreement of the Parties until October 12, 2015; and

(2) Canada reports that it has collected *less than half* of the remedy determined by the Tribunal.

6. In Canada's view, as of October 12, 2013, it was permitted to cease collecting the additional export charges. Canada's narrow focus on October 12, 2013, is a distraction. Although the Tribunal used the October 12, 2013 date to calculate the Compensatory Adjustments, the Award does not state that Canada's obligation to apply the Compensatory Adjustments ceases on October 12, 2013, or at any time prior to the collection of the overall amounts of the remedy awarded. Nothing in the Award even implies that Canada's obligation ceases on that date.

7. Rather, the Award and the SLA are clear that the purpose of the Compensatory Adjustments is to remedy in full the harm to the United States caused by Canada's breaching programs so long as the SLA is in effect. In the Award, the Tribunal deliberately crafted the effects-based remedy to compensate for the harm to U.S. softwood lumber producers. The references in the Award to the original expiration date of the SLA merely affirm that the Tribunal was aware of that date (as well as the possibility of an extension). Had the Tribunal intended that date to limit the duration of the Compensatory Adjustments, it would have done so in its Award.

8. Equally important, by its plain language, the SLA mandates that Compensatory Adjustments must be in an amount that remedies the breach and directs that the adjustments apply until the breaching party cures the breach. Canada does not claim to have cured the

breach. The only means to satisfy the SLA's requirements is to require the collection of the amounts that the Tribunal determined were necessary to remedy the breach.

9. Egregiously, Canada's view, if implemented, would reduce by more than half the Compensatory Adjustments ordered by the Tribunal. By asking the Tribunal to read words into the Award and the SLA that are not there, Canada seeks both to avoid most of the remedy for its breach and to force U.S. producers to bear the burden for Canada's circumvention. As long as the SLA is in effect, neither the Award nor the SLA permits Canada to collect less than the full remedy. Indeed, it would be ironic, as well as inconsistent with the Award and the SLA, if Canada were permitted to circumvent the remedy imposed in response to Canada's original circumvention of the Agreement.

10. For these reasons, the United States respectfully requests that the Tribunal reaffirm that the Award requires Canada, for the duration of the SLA, to enforce and collect the full remedy awarded by the Tribunal.

I. Relevant Provisions Of The SLA

A. The SLA Contains The Parties' Bargain For A System Of Enforceable Export Measures

11. The SLA entered into force on October 12, 2006, resolving a longstanding series of disputes concerning Canadian softwood lumber exports to the United States. Under the SLA, the United States agreed not to exercise its right to apply its own domestic trade remedy laws in return for Canada's agreement to self-regulate the export of softwood lumber to the United States.

12. Specifically, the United States agreed to cease collecting antidumping and countervailing duties imposed under its domestic laws and to refund duties that it had previously

collected on Canadian softwood lumber.[1] In exchange, Canada agreed to apply Export Measures – export charges and volume restraints – to shipments of softwood lumber from Canada into the United States when certain conditions are met.[2] Under the anti-circumvention provision, the Parties further agreed not to take any action to offset or to reduce the Export Measures.[3]

13. The Export Measures, and their enforceability, are at the heart of the bargain the Parties struck in the SLA. In the words of the Tribunal, the "object and purpose" of the SLA is "to maintain a level playing field between United States and Canadian [softwood lumber] producers."[4]

B. The SLA Provides A Dispute Resolution Process And Remedies

14. The Agreement provides for dispute resolution regarding "any matter arising under the SLA."[5] If a matter is not resolved through consultations,[6] the SLA permits the referral of the dispute to arbitration for resolution by an arbitral tribunal.[7] If the tribunal finds that a

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[1] 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America, Sept. 12, 2006 (hereinafter "SLA"), arts. III-IV (Ex. C-3). In accordance with Procedural Order No. 1B, dated November 8, 2013 (Ex. C-73), the United States has included its legal authorities and record exhibits with its Statement of the Case. To avoid confusion, we have used the same authorities and exhibits designations as we used in LCIA No. 81010. Thus, the United States' authorities and exhibits are marked as "CA - ___" and "C- ___," respectively, even though the United States is not the claimant in this proceeding.

[2] *Id.*, arts. VI-VIII.

[3] *Id.*, art. XVII.

[4] United States v. Canada, LCIA No. 81010, Award (Jan. 20, 2011) (hereinafter "Award"), ¶ 354 (CA-59).

[5] SLA, art. XIV(1).

[6] *Id.*, art. XIV(4).

[7] *Id.*, art. XIV(6).

party has breached an obligation under the Agreement, the SLA provides that the tribunal "shall" make two determinations: first, it determines a reasonable period of time for the party to cure its breach; and, second, it determines appropriate Compensatory Adjustments to the Export Measures to compensate for the breach if the breaching party fails to cure the breach within the reasonable period of time.[8]

15. Of importance to this case, the SLA's remedy provisions also set forth the parameters for the tribunal's determination of appropriate Compensatory Adjustments in the event of a breach of the Agreement. Compensatory Adjustments may take the form of an adjustment to the export charges, volume restraints, or both.[9] Regardless of the form, the adjustments "shall be in an amount that remedies the breach."[10] The SLA also provides that Compensatory Adjustments may be applied "until the [p]arty [c]omplained [a]gainst cures the breach."[11]

II. LCIA 81010 Proceedings

16. The current matter emanates from the Award issued in LCIA 81010, in which the Tribunal determined that Canada breached the anti-circumvention provision of the SLA. The Tribunal determined that Canada breached the SLA when the provincial governments of Ontario

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[8] *Id.*, art. XIV(22).

[9] *Id.*, art. XIV(23)(a); *see* Award, ¶ 322.

[10] SLA, art. XIV(23); *see* Award, ¶ 322.

[11] SLA, art. XIV(24); *see* Award, ¶ 322. The Agreement further provides that, if a breach is attributable to a particular region, the tribunal must determine the compensatory adjustment applicable to that region. SLA, art. XIV(25); *see* Award, ¶ 322.

and Québec implemented five government programs that provided assistance to Canada's softwood lumber industry.

17. In SLA terms, the Ontario and Québec programs in question provided "[g]rants and other benefits" to "producers or exporters of Canadian Softwood Lumber Products" that had "the effect of reducing or offsetting the Export Measures[.]"[12] The Tribunal further determined that none of the five programs fell within the limited exceptions in the anti-circumvention provision.[13]

18. As a remedy for Canada's breach, the Tribunal concluded that Canada was required to cure its breach within 30 days of the Award.[14] If Canada did not cure its breach within this period, the Tribunal ordered Canada to apply Compensatory Adjustments to the Export Measures in an amount that compensated for its breach.[15] The Tribunal decided that the most appropriate measure of the remedy was "the amounts necessary to neutralize the reduction or offsets to the Export Measures caused by the programs . . . in breach of the SLA."[16] The remedy, therefore, focused on the effects of the breaching programs on U.S. producers instead of the benefits realized by Canadian producers.[17]

19. The Tribunal also held that the "Compensatory Adjustments must be set up to take into account all the effects (past, ongoing and future) of the programs during the life of the

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[12] SLA, art. XVII (1), (2).

[13] *Id.*

[14] Award, ¶¶ 333, 415.

[15] *Id.*

[16] *Id.* at ¶ 348.

[17] *Id.* at ¶¶ 348-49.

SLA[,]" and that the adjustments should not account for post-SLA effects.[18] This means that, to compensate for the harm to U.S. producers caused by Canada's breaching programs, the adjustments had to factor in the harm done prior to the Award and through October 12, 2013, the then-anticipated end of the SLA.

20. To arrive at the Compensatory Adjustments ordered in the Award, the Tribunal issued Procedural Order No. 6, directing the party expert economists Robert Topel and Joseph Kalt to calculate the reduction or offsets to the Export Measures.[19] The experts determined the reduction or offset to the Export Measures by calculating the overall change, or loss, of U.S. producer surplus[20] resulting from the program grants and other benefits.[21] The experts also provided a rate at which additional Export Measures could be assessed on softwood lumber products from Ontario and Québec in order to collect the overall amount by the original end date of the SLA.[22]

21. As a check on the rate provided, the experts also provided the "anticipated" amount to be collected, using expected lumber exports and prices.[23] These "anticipated" figures

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[18] *Id.* at ¶ 360.

[19] LCIA No. 81010 Procedural Order No. 6 (Jan. 21, 2010) (hereinafter "Procedural Order No. 6"), ¶1.3 (Ex. C-74).

[20] Revised and Final Report to the Tribunal pursuant to Procedural Order No. 6, Joseph P. Kalt and Robert H. Topel, LCIA No. 81010 (June 22, 2010) (hereinafter "Joint Expert Report"), ¶ 14 (stating that the experts "calculate[d] the reduction or offset in terms of harm to U.S. producers as measured by lost U.S. producer surplus") (Ex. C-75); *see* Email from Tribunal to Parties (May 4, 2010) (Ex. C-76); *see also* Letter from Prof. Topel to Tribunal (April 22, 2010), at page 2 (Ex. C-77); Letter from Canada to Tribunal (April 28, 2010), at page 3 (Ex. C-78).

[21] *See* Award, ¶ 410.

[22] *Id.*

[23] *Id.*

showed that the experts expected the rate for the Compensatory Adjustments they calculated would collect almost exactly the amounts of the change in U.S. producer surplus resulting from the breaching programs.[24] For example, the Tribunal found that the breaching Ontario programs caused a loss to U.S. producers of $1.54 million by October 12, 2013, and the additional export charge of 0.10 percent was expected to collect $1.56 million.[25] Similarly, the Tribunal found that the breaching Québec programs caused a loss to U.S. producers of $57.31 million by October 12, 2013, and the additional export charge of 2.60 percent was expected to collect $57.84 million.[26]

22. Relying on the experts' calculations, the Tribunal concluded that, in the absence of a cure, Canada would be obligated to apply the Compensatory Adjustments specified in the Award.[27]

III. The Parties' Request For Arbitration In This Matter

23. On September 30, 2013, the United States and Canada submitted to the LCIA a Joint Request for Arbitration, seeking the Tribunal's assistance in resolving a dispute concerning the interpretation of the Award.[28] In particular, the Parties disagree as to when Canada's

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at ¶ 415.

[28] Joint Request for Arbitration submitted on behalf of Canada and the United States, LCIA No. 81010B (Sept. 30, 2013) (hereinafter "Joint Request for Arbitration"), ¶ 1 (Ex. C-79).

obligation to collect the Compensatory Adjustments awarded by the Tribunal in LCIA 81010 is satisfied.[29]

24. As explained above, the Award requires Canada to cure the breach or to apply Compensatory Adjustments to compensate the United States for the breach. Canada did not cure the breach within the time allotted and, consequently, began to apply the Compensatory Adjustments on March 1, 2011.[30] Canada reports that, as of May 31, 2013, it has collected $435,461 as a result of levying an additional 0.10 percent export charge on Ontario lumber exports, and $19,312,164 as a result of levying an additional 2.60 percent export charge on Québec lumber exports.[31] These collections are less than half of the $1.54 million that the Award requires to be collected on Ontario exports and the $57.31 million that the Award requires to be collected on Québec exports,[32] and Canada has not informed the United States that it has since reached these amounts. Thus, Canada has not remedied its breach because it has not collected the amounts necessary to neutralize the offsets or reductions to the Export Measures caused by the five breaching programs.

25. The SLA – including its core system of Export Measures – remains in effect today. By its terms, the SLA entered into force on October 12, 2006, for a period of seven years (until October 12, 2013), with the possibility of an extension for an additional two years.[33] On

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[29] *Id.* at ¶ 2.

[30] Exchange of Diplomatic Notes between Canada and the United States (Sept. 30, 2013) (hereinafter "Parties' Understanding"), at 1 (Ex. C-80); Joint Request for Arbitration, ¶ 17.

[31] *Id.* Canada stated that these were the most updated figures it could provide at that time and has agreed to provide updated amounts on request. Parties' Understanding, ¶ 8.

[32] Award, ¶ 410.

[33] SLA, art. XVIII; Parties' Understanding, ¶ 18.

January 23, 2012, pursuant to its terms, the Parties agreed to extend the SLA through October 12, 2015.[34]

26. The Parties' disagreement arises because, even though Canada has not collected the full remedy amounts and the SLA remains in effect, Canada nevertheless contends that it may cease collecting the Compensatory Adjustments specified in the Award. The Parties engaged in unsuccessful consultations,[35] and agreed to jointly seek arbitration under Article XIV of the SLA,[36] which provides that "[e]ither party may initiate dispute settlement . . . regarding any matter arising under the SLA 2006 . . . ."[37] The Parties have further agreed on terms and procedures to be employed in this particular proceeding (the Parties' Understanding).[38] Consequently, this arbitration is submitted pursuant to Article XIV of the SLA and the Parties' Understanding.[39]

27. The Parties have agreed that this proceeding will not be used to relitigate the rate of the export charges or the remedy amounts that the Tribunal identified in the Award.[40] Accordingly, without prejudice to our position with regard to the correct interpretation and application of the SLA for any other proceeding, we accept for the purposes of this proceeding

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[34] SLA, art. XVIII; Agreement Between the Government of the United States and the Government of Canada Extending the Softwood Lumber Agreement (Jan. 23, 2013) (Ex. C-81); *see* Parties' Understanding at 1.

[35] Joint Request for Arbitration, ¶ 6.

[36] *Id.* at ¶ 1.

[37] SLA, art. XIV(1).

[38] Joint Request for Arbitration, ¶ 3; *see generally* Parties' Understanding.

[39] Joint Request for Arbitration, ¶ 6.

[40] Parties' Understanding, ¶ 7.

that the Tribunal correctly found that the change in U.S. producer surplus represents the appropriate measure of the amounts to be collected as Compensatory Adjustments. We also accept for the purposes of this proceeding that the amounts of change in U.S. producer surplus identified in the Award are the amounts that, if fully collected, would neutralize the reduction or offsets to the Export Measures caused by the five programs found to breach the SLA.[41]

28. The Parties have agreed to limit the record in this proceeding to the record compiled in LCIA 81010, as well as two stipulations by the Parties: (1) the SLA has been extended and remains in effect until October 12, 2015, and (2) as of May 31, 2013, Canada reported that it had assessed and collected only $435,461 on Ontario softwood lumber exports, and only $19,312,164 on Québec softwood lumber exports.[42]

29. Against this background, the Parties entrust the Tribunal to render a decision as to which of the following positions is the correct application of the Award:[43]

a. Canada's position that the Award requires Canada to apply the Compensatory Adjustments specified in paragraph 410 of the Award only until the expiration date of the SLA as it existed at the time of the Award (i.e., October 12, 2013); or

b. The United States' position that the Award requires Canada to continue to apply the Compensatory Adjustments for as long as the SLA remains in effect until Canada has collected the amounts of change in U.S. producer surplus identified in the Award.

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[41] *See, e.g.*, Award, ¶¶ 337, 348, 352.

[42] Parties' Understanding, ¶ 8; Procedural Order No. 1B, ¶ 4.2.

[43] *See, e.g.*, Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1991 I.C.J. 53 (Nov. 12), ¶ 49 (CA-60) ("[W]hen states sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits. In the performance of the task entrusted to it, the tribunal 'must conform to the terms by which the Parties have defined this task.'") (quoting Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, 1984 I.C.J. 246 (Oct. 12), ¶ 23) ("The Chamber concludes that, in the task conferred upon it, it must conform to the terms by which the parties have defined its task.") (CA-61)).

IV. Governing Law And Principles To Be Applied

30. This arbitration is governed by the SLA, the Joint Request for Arbitration, and the Parties' Understanding.[44]

31. The Tribunal previously found that the SLA operates as *lex specialis*.[45] The Parties further defined the scope and purpose of this particular proceeding in the Joint Request for Arbitration and the Parties' Understanding. By means of these instruments, the Parties have consented to this arbitration for the purpose of determining which of the Parties' respective positions reflects the correct interpretation of the Award. In discharging its task, the Tribunal should apply the relevant provisions of the SLA and the Parties' Understanding,[46] as well as other relevant rules of international law when applicable, including the customary rules of interpretation reflected in the Vienna Convention on the Law of Treaties.[47]

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[44] Joint Request for Arbitration, ¶ 6; *see* Procedural Order No. 1B, ¶¶ 4-7.

[45] Award, ¶¶ 109, 327.

[46] *See* Award, ¶ 110; Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1991 I.C.J. 53 (Nov. 12), ¶ 48 ("An arbitration agreement (compromis d'arbitrage) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties.").

[47] *See* Award, ¶¶ 110, 328. Canada ratified the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("VCLT") (CA-3) on October 14, 1970, and the treaty entered into force on January 27, 1980. Although the United States is not a party to the VCLT, it has recognized since at least 1971 that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter from Secretary of State Rogers to President Nixon Transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, *reprinted in* 65 DEP'T OF ST. BULL, 684-89 (1971) (CA-62). The International Court of Justice has determined that Article 31 of the VCLT is reflective of customary international law. *See, e.g.*, Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1059 (Dec. 13) (CA-4).

The VCLT applies by its terms to "treaties between States." VCLT, art. 1. The Convention defines a "treaty" as "an international agreement concluded between States in written form and governed by international law." VCLT, art. 2, ¶ 1. Although the Agreement is not a "treaty" for purpose of Article II, § 2 of the United States Constitution, the cited provisions

32. To clarify the correct interpretation of the Award, which is *res judicata*, the Tribunal examines the relevant language and reasoning of the Award.[48] Although not directly analogous, in a prior SLA arbitration, Canada sought a clarification of a previously-issued arbitral award. Specifically, Canada requested (among other relief) a clarification as to how it could allocate the total amount of the additional export charges to be collected under the award.[49] The tribunal in that arbitration determined that, under paragraphs 29 and 31 of Article XIV of the SLA (under which the proceeding was brought), the tribunal could clarify, but not change, the award to help the parties avoid or mitigate an existing or future dispute.[50] To provide the requested clarification, the tribunal examined the express language of the award in light of its context and rationale.[51] Similarly, here, the Tribunal should follow the same approach.

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of the VCLT nonetheless should be used to interpret the Agreement because they reflect customary international law on the interpretation of international agreements.

[48] It is well-established that an award's reasons also have *res judicata* effect to the extent those reasons are relevant to the decision at issue. *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 47 (Feb. 26), ¶¶ 125-26 (CA-63); United States of America v. Islamic Republic of Iran, 132-A33-FT (Sept. 9, 2004), ¶ 29 ("The reasons the Tribunal provided in its Decision in Case No. A28, too, have binding force as between the Parties to the extent those reasons are relevant to the actual decision on the question in issue.") (CA-64).

[49] Canada v. United States, LCIA No. 91312, Award (Sept. 27, 2009) (hereinafter "LCIA No. 91312 Award"), ¶ 188 (reproducing Claimant's 3rd Alternative Relief Sought) (CA-65).

[50] *Id.* at ¶¶ 207-08.

[51] *Id.* at ¶¶ 209-14.

ARGUMENT

I. The Award Requires Canada To Collect The Entire Remedy Amounts Determined By The Tribunal

33. The Award establishes that, because Canada has not cured its breach,[52] Canada must apply the Compensatory Adjustments for the duration of the SLA until it collects the entire remedy amounts determined by the Tribunal.

A. The Award Requires Canada To "Neutralize" The Effects Of Its Breach By Collecting The Entire Remedy Amounts Determined By The Tribunal

34. In its summary of findings, the Tribunal recited its conclusion that Canada breached the SLA's anti-circumvention provision.[53] As a result, Canada had a period of 30 days within which to cure its breach.[54] In the event that Canada failed to cure its breach, the Tribunal ordered Canada to apply Compensatory Adjustments to the Export Measures to compensate for the breach.[55] The Compensatory Adjustments were to take the form of additional export charges to be collected on softwood lumber exported into the United States from the provinces of Ontario and Québec.[56]

35. The Compensatory Adjustments are shown in the table at paragraph 410 of the Award and reproduced below. The table specifies for each province: (1) an amount of "change in U.S. producer surplus" caused by the breaching programs; (2) a "rate" at which each amount

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[52] Canada does not contend that it has cured its breach or otherwise should be relieved of its obligations under the Award.

[53] Award, ¶ 415.

[54] *Id.*

[55] *Id.*

[56] *Id.*

is to be collected; and (3) an estimate ("anticipated duty amount") of how much the experts expected would be collected, assuming certain future exports over time.[57] The table also contains a "benefit amount" for each breaching program.[58]

Attachment A
TRIBUNAL DECISION POINTS AND RESULTING OUTCOMES

Program ($ Millions)	2006	2007	2008	2009	2010	2011	2012	2013	Total	Post SLA
Ontario FSPF										
Benefit Amount ($CDN)	$0.00	$3.86	$0.00	$0.25	$1.46	$1.83	$1.83	$1.43	$10.65	–
Tax Rate	–	–	–	–	–	0.14%	0.14%	0.14%	–	–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$0.80	$0.80	$0.63	$2.23	–
Ontario LGP										
Benefit Amount ($CDN)	$0.00	$1.34	$0.00	$0.00	$7.32	$6.79	$6.16	$4.30	$25.92	–
Tax Rate	–	–	–	–	–	0.00%	0.00%	0.00%	–	–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$0.00	$0.00	$0.00	$0.00	–
ONTARIO PROGRAMS										
Change in U.S. Producer Surplus ($US)	$0.00	$0.33	$0.56	-$0.29	$0.22	$1.32	-$1.19	-$2.48	-$1.54	$0.00
Tax Rate	–	–	–	–	–	0.10%	0.10%	0.10%	–	–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$0.56	$0.56	$0.44	$1.56	–
Québec Capital Tax Credit										
Benefit Amount ($CDN)	$0.03	$2.12	–	–	–	–	–	–	$2.14	–
Tax Rate	–	–	–	–	–	0.05%	0.05%	0.05%		–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$0.42	$0.42	$0.33	$1.17	–
Québec Roads Tax Credit										
Benefit Amount ($CDN)	$4.52	$32.80	$34.53	$35.06	$35.16	$29.70	$21.30	$11.25	$204.35	–
Tax Rate	–	–	–	–	–	2.35%	2.35%	2.35%	–	–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$18.76	$18.76	$14.59	$52.10	–
Québec PSIF										
Benefit Amount ($CDN)	$0.31	$1.83	$3.84	$2.52	$1.67	$1.55	$1.41	$0.98	$14.12	–
Tax Rate	–	–	–	–	–	0.21%	0.21%	0.21%	–	–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$1.70	$1.70	$1.33	$4.73	–
QUEBEC PROGRAMS										
Change in U.S. Producer Surplus ($US)	-$1.10	-$6.48	-$6.15	-$5.00	-$9.94	-$12.19	-$10.34	-$6.10	-$57.31	$0.00
Tax Rate	–	–	–	–	–	2.60%	2.60%	2.60%	–	–
Anticipated Duty Amount to Be Collected ($US)	–	–	–	–	–	$20.82	$20.82	$16.20	$57.84	–

36. The Award establishes that the operative figures for the Compensatory Adjustments are (1) the *total amounts* to be collected on each province's exports and (2) the *rates* at which these amounts are to be collected.[59] According to the Tribunal, the Compensatory Adjustments "must neutralize" the reduction or offset of the Export Measures caused by

[57] *Id.* at ¶ 410.

[58] *Id.*

[59] *Id.*

Canada's breach.[60] This conclusion springs from the Tribunal's understanding that the SLA's remedy provisions should focus on the economic effects caused by a breach, rather than on the benefits provided to softwood lumber producers.[61] Thus, the Tribunal "determine[d] the effects of the benefits provided by the [breaching] programs . . . on the Export Measures, and then determine[d] adjustments that compensate for such effects."[62]

37. The Tribunal further determined that the "object and purpose of the SLA . . . is to maintain a level playing field between United States and Canadian producers."[63] The Tribunal, therefore, adopted a remedy "to restore the level playing field initially established by the Export Measures" in the SLA.[64] The Tribunal accomplished this by determining the effects of the breaching programs on U.S. lumber producers, then calculating, with the assistance of the Parties' experts,[65] the Compensatory Adjustments necessary to "neutralize" these effects.[66] Thus, the Tribunal's remedy is "effects-based;" it is necessarily focused on the effects on U.S. producers harmed by Canada's breach.

38. The remedy's design to compensate for the effect of the breach on U.S. producers – measured by lost U.S. producer surplus – is further confirmed by the evidence before the Tribunal at the time of its Award. Canada specifically argued in favor of an effects-based

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[60] *Id.* at ¶¶ 348, 352.

[61] *Id.* at ¶ 324.

[62] *Id.* at ¶ 374.

[63] *Id.* at ¶ 354.

[64] *Id.* at ¶ 349; *see also id.* at ¶ 352.

[65] *See* Procedural Order No. 6 (discussed in more detail in Argument section I.C., *infra*).

[66] Award, ¶¶ 407, 410.

remedy.[67] When the Tribunal requested that the Parties' experts calculate the compensatory adjustments to be collected in order to neutralize such reduction or offset, it specifically instructed the experts to focus on the concept of harm to U.S. producers.[68] The experts duly calculated the "reduction or offset [to the Export Measures] in terms of harm to U.S. producers as measured by lost U.S. producer surplus."[69] The resulting economic model, upon which the Tribunal relied, then used the lost U.S. producer surplus calculations to derive the total amounts to be collected in order to remedy the breach.[70]

39. Accordingly, the Tribunal's remedy used the change in U.S. producer surplus as the measure of the effects of Canada's breach on the Export Measures.[71] For this reason, the total amounts to be collected on lumber exports from Ontario and Québec are the amounts of the change (loss) in U.S. producer surplus caused by the breaching programs through October 12, 2013.[72]

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[67] *See, e.g.*, United States v. Canada, LCIA No. 81010, Corrected Post-Hearing Brief of the Respondent Canada (Oct. 8, 2009) (hereinafter "Canada Post-Hg. Br."), ¶¶ 186-191 (Ex. C-82).

[68] *See* Award, ¶ 341 (quoting Letter from Tribunal to Parties (Apr. 15, 2010) ("In determining the compensatory adjustments, the experts shall focus on the concept of harm to US producers.") (Ex. C-83)); *see also* Procedural Order No. 6, ¶ 1.3.

[69] Joint Expert Report, ¶ 14; *see* Email from Tribunal to Parties (May 4, 2010); *see also* Letter from Prof. Topel to Tribunal (April 22, 2010), at page 2; Letter from Canada to Tribunal (April 28, 2010), at page 4.

[70] *See* Award, ¶ 410.

[71] *See* Joint Expert Report, ¶ 14; *accord* Canada Post-Hg. Br., ¶¶ 187-190.

[72] Award, ¶ 410 (The amount of change in U.S. producer surplus totals US$58.85 million); *see id.* at ¶ 360 (finding the Compensatory Adjustments must be set up to take into account all the effects (past, ongoing, and future) of the programs during the life of the SLA).

40. Once the Tribunal determined the amount of change in U.S. producer surplus caused by the breaching programs, it was merely a ministerial question to determine the rate at which to collect that amount.[73] The clear purpose of the Tribunal's remedy was to determine the effects of Canada's breach (measured as the change in U.S. producer surplus), and to "neutralize" the effects through Compensatory Adjustments to the Export Measures designed to collect back those amounts.

41. To illustrate the Tribunal's calculations, the table also provided the "anticipated duty amount to be collected" for each province.[74] The "anticipated duty amount" figures demonstrated that, if softwood lumber exports and prices had tracked the experts' predictions, the amounts collected at the rate prescribed would have been nearly exactly the amounts of change in U.S. producer surplus. Stated differently, the "anticipated duty amounts" merely confirm that the Tribunal (and the experts) expected the remedy to fully "neutralize" the effects of Canada's breach by collecting the full amounts of lost U.S. producer surplus within the period of the SLA.

42. The table also reports the benefits to Canadian producers resulting from each program, but these figures are not the operative remedy amounts. The breaching programs provided significantly greater benefits to the Canadian industry – C$35 million to Ontario producers and C$220 million to Québec producers.[75] Although the United States had originally

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[73] Because compensatory adjustments can only be imposed while the SLA's Export Measures remain in effect, the experts used October 12, 2013 as the SLA's end date for the purpose of calculating the rate of collection. *See* Joint Expert Report ¶ 167. As addressed below, the use of October 12, 2013 as the SLA end date for this purpose does not extinguish Canada's obligation to apply the Compensatory Adjustments.

[74] Award, ¶ 410.

[75] *Id.*

sought to collect, dollar for dollar, the grants and other benefits bestowed on Canadian lumber producers and exporters, the Tribunal determined that the United States' approach would result in an over-collection.[76] The Tribunal instead found that the remedy should target the effects of the breaching programs and set its remedy at the amount necessary to neutralize the reduction or offset to the Export Measures caused by the breaching programs.[77] Thus, even though the table includes other amounts and figures, the Tribunal selected the change in U.S. producer surplus as the remedy amount to be collected.

43. The "change in U.S. producer surplus" figures are the *amounts* the Tribunal found necessary to "neutralize" the reduction or offset to the Export Measures caused by Canada's breach.[78] The identified *rates* of collection are simply the means to accomplish the collection of those amounts. Consistent with the effects-based focus of the Tribunal's remedy, the Award requires Canada to "neutralize" the effects of its breach by collecting the amounts of change in U.S. producer surplus.[79] Anything short of those amounts would undermine the remedy by not compensating for the effects of Canada's breach.[80]

44. The Tribunal further stated in the Award that the Compensatory Adjustments were to "apply with immediate effect after the expiration of 30 days from the date of notification

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[76] *Id.* at ¶ 349. As explained in paragraph 27, *supra*, we do not challenge the Tribunal's determination in this proceeding.

[77] *See id.* at ¶¶ 348, 410.

[78] *See id.* at ¶¶ 340-49, 410; *see also* Letter from Tribunal to Parties (Apr. 15, 2010) ("In determining the compensatory adjustments, the experts shall focus on the concept of harm to US producers.").

[79] Award, ¶¶ 340, 348.

[80] *See id.* at ¶ 374.

of this Award[.]"[81] Thus, the Award identifies a start date for the Compensatory Adjustments, but it does not contain an end date for applying the Compensatory Adjustments. In the absence of any statement in the Award of when Canada may cease applying the Compensatory Adjustments, the only direct and reasonable application of the Award is for Canada to apply the Compensatory Adjustments for the duration of the SLA until it has collected the total amounts of lost U.S. producer surplus caused by the breach.

45. For these reasons, the Award requires Canada to collect the full amount of the remedy for the duration of the SLA.

B. Canada's Position Reflects A Misreading Of The Award

46. Canada argues that the Award absolves it of responsibility to continue to apply the Compensatory Adjustments after October 12, 2013, even though it concedes that the SLA remains in force and that it has not collected the amount of change in U.S. producer surplus identified in the Award. Canada's position reflects a misreading of the Award.

47. Canada's position appears rooted in a misplaced emphasis on the original end date of the SLA. It asks the Tribunal to find that Canada's obligation to remedy its breach was extinguished by the passing of the SLA's original date, rather than by when the Compensatory Adjustments actually neutralize the effects of its breach. Canada misunderstands the significance of October 12, 2013. The date itself has no significance other than to demonstrate that the SLA has remained in constant effect – which means that all of the rights and obligations of the Agreement remain in effect. Nothing about the date relieves Canada of its obligations under the SLA, including its obligation to comply with the remedy ordered pursuant to the SLA's disputes provision.

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[81] *Id.* at ¶ 411.

48. The Award did not condition Canada's obligation to collect the Compensatory Adjustments on the original expiration date of the SLA. Instead, the Tribunal refers to October 12, 2013, in only one context: the calculation of the amount and rate of the Compensatory Adjustments necessary to address the harm to U.S. producers. Specifically, the Tribunal concluded that, for purposes of calculating the Compensatory Adjustments, it would assume that the breaching programs "continue until the date of expiration of the SLA."[82] The Tribunal also stated that it would not consider the effects of the breaching programs that might materialize after October 12, 2013, because any effects incurred after that date could not be said to offset SLA Export Measures when the Tribunal could not be certain that the same Export Measures would apply after that date.[83] Finally, as discussed above, the Tribunal implicitly referred to October 12, 2013, in its calculation of the rate of collection for the Compensatory Adjustments.[84]

49. Those are the only references to October 12, 2013, in the Award. The Award does not provide that Canada may cease to apply the Compensatory Adjustments as of that date, or even suggest that Canada's obligation to apply the Compensatory Adjustments ends while the SLA remains in effect and Canada has not yet collected the full remedy amount. The Award states only that the Compensatory Adjustments are to "apply with immediate effect after the

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[82] *Id.* at ¶ 358; *see id.* at ¶ 361; Joint Expert Report ¶¶ 11-12. Although paragraph 358 of the Award lists October 13, 2013, as the date upon which the SLA would expire, this appears to be a typographical error. The Joint Expert Report, cited by the Award, states "[The experts] use October 12, 2013, as the date on which the SLA expires." Joint Expert Report, ¶ 12.

[83] Award, ¶¶ 373, 375.

[84] *See* paragraph 40, *supra*. As addressed below, the use of October 12, 2013 as the SLA end date for this purpose is not relevant to Canada's obligation to apply the Compensatory Adjustments.

expiration of 30 days from the date of notification of this Award[.]"[85]

50. Further, the date used to calculate the Compensatory Adjustments has no bearing on the date Canada's obligation to collect Compensatory Adjustments ends; they are separate and distinct issues. The end date used to calculate the compensatory Adjustments is not subject to dispute, and the Parties have agreed not to relitigate the remedy amounts or the collection rates calculated using that date.[86] The Parties disagree only whether, during the life of the SLA, Canada may cease applying the Compensatory Adjustments prior to collecting the full remedy amounts.

51. On that question, Canada's interpretation is inconsistent with the effects-based remedy determined by the Tribunal. As discussed above, the Tribunal devised the Compensatory Adjustments to neutralize the reduction or offset to the Export Measures caused by Canada's breach. Canada's interpretation, however, would be certain to leave a significant portion of Canada's breach uncompensated and unneutralized. The Parties have stipulated that Canada's collection of the Compensatory Adjustments has fallen far short of the amounts of change in U.S. producer surplus identified by the Tribunal in its Award.[87] Consequently, Canada's position is inconsistent with the remedy ordered in the Award and its stated goal of neutralizing Canada's breach.

52. The counterfactual situation exposes the fundamental flaw of Canada's view. If Canada's application of the Compensatory Adjustments had resulted in the collection of $58.85 million (the amount of change in U.S. producer surplus identified in the Award) before October

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[85] Award, ¶ 411.

[86] *See* Parties' Understanding, ¶ 7.

[87] *See* Joint Request for Arbitration, ¶ 17; Award, ¶ 410.

12, 2013, Canada certainly would have taken the position that it had satisfied its obligation under the Award and would have ceased applying the Compensatory Adjustments. Canada would have undoubtedly recognized that – although the Compensatory Adjustments were anticipated to collect the remedy amount by October 12, 2013 – it was obligated to collect only the remedy amount, not merely blindly to apply the Compensatory Adjustments for a certain fixed period of time without regard to whether the total amount had been collected. Canada's position now, however, would have required it to continue to apply the Compensatory Adjustments until October 12, 2013, regardless of whether it had already collected the amount of change in U.S. producer surplus identified in the Award.

53. In other words, if Canada had collected the remedy amount early before the original end date of the SLA, Canada would not maintain, as it does here, that it nevertheless was required to continue to apply the Compensatory Adjustments until October 12, 2013. This point is reinforced by the Tribunal's finding that Canada could return to the Tribunal to seek a modification or termination of the Compensatory Adjustments in the event of an over-collection.[88] Over-collecting could only be an issue if the remedy is to actually collect a specific amount – in this instance, the $58.85 million of change in U.S. producer surplus. The time period over which the Compensatory Adjustments are applied simply cannot be determinative as to when Canada has satisfied the requirements of the Award. This hypothetical situation makes clear that the Award mandated that the *amounts* had to be collected from each province; not that *rates* of collection had to be applied for a certain period of time.

54. To be sure, any contention by Canada that its obligation is fulfilled solely by reference to the rate of collection noted in the table is incorrect. If it were necessary only for the

[88] *See id.* at ¶¶ 361-363.

Tribunal to set forth a rate of collection to be applied, then the Tribunal need not have calculated the overall amount of change in U.S. producer surplus at all. Yet that is clearly not the case; the Tribunal determined an effects-based remedy, specifically directing that the focus be on the harm to U.S. producers.[89] The calculated amount of harm to U.S. producers is at the core of the Tribunal's remedy. The rate is merely the means to implement the remedy. Thus, even though the rate of collection was derived from the amount of change in U.S. producer surplus, the heart of the remedy remains the amount of change in U.S. producer surplus.

55. Indeed, the focus *must* remain on that amount because any remedy amount must be reasonably definite. In devising its remedy in this case, the Tribunal calculated a particular quantum – $58.85 million – of lost U.S. producer surplus to be collected in order to neutralize the effects of Canada's breach.[90] Yet Canada's position would necessarily mean that the remedy was whatever Canada collected as of October 12, 2013, without regard to what that amount might actually be and whether it fully compensates for the harm found. The Tribunal's remedy simply cannot be, as Canada apparently contends, whatever variable amount happens to be collected as of a particular date, even as Canada continues to enjoy the benefits of the Agreement. To remain definite, the remedy must be to collect the particular amount of lost U.S. producer surplus calculated by the Tribunal.

C. Procedural Order No. 6 Confirms Canada's Obligation To Collect The Entire Remedy Amounts Determined By The Tribunal

56. That the Award requires the collection of the full amount of change in U.S. producer surplus is further confirmed by Procedural Order No. 6, issued prior to the issuance of

[89] *Id.* at ¶ 341 (quoting Letter from Tribunal to Parties (Apr. 15, 2010) ("In determining the compensatory adjustments, the experts shall focus on the concept of harm to US producers.")).

[90] *Id.* at ¶¶ 348, 410.

the Award. Procedural Order No. 6 reflects the Tribunal's determination that the required Compensatory Adjustments were "overall amounts to be collected" in order to neutralize the reduction or offset of the Export Measures caused by Canada's breach of the SLA.[91] The order confirms that – consistent with the text of the Award – the change in U.S. producer surplus shown in the table is the operative amount to be collected to remedy Canada's breach.[92]

57. On January 21, 2010, following preliminary deliberations, the Tribunal issued Procedural Order No. 6, setting forth the scope and procedure to obtain additional expert evidence before reaching a final conclusion on the merits.[93] In paragraph 1.3, the Tribunal directed the Parties' expert witnesses as follows:

> On the basis of the benefits estimated in accordance with [the above paragraphs], the experts shall calculate the reduction or offset of the Export Measures (as defined by the SLA) caused by such benefits, including the past effects of such benefits, and calculate the compensatory adjustments to be collected in order to neutralize such reductions or offsets. The calculation of the compensatory adjustments shall be made in a manner that spells out the following items:
>
> a) The overall amount to be collected for Ontario;
>
> b) The overall amount to be collected for Québec;
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> c) The overall amount to be collected for each of the programs identified [above];
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> d) The amount to be collected yearly for each one of the programs identified [above]…[.][94]

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[91] Procedural Order No. 6, ¶ 1.3.

[92] *See* Award, ¶ 410.

[93] Procedural Order No. 6, ¶¶ (G), (J).

[94] *Id.* at ¶ 1.3.

58. This text reflects the Tribunal's effort to arrive at a final decision on an amount that, if collected, would neutralize the offset to export measures resulting from the breaching programs. In fact, as its primary request, the Tribunal explicitly instructed that "the experts shall calculate the reduction or offset of the Export Measures . . . and calculate the compensatory adjustments to be collected in order to neutralize such reductions or offsets."[95] Notably, the Tribunal expressly directed the experts to specify "the overall amount to be collected" for Ontario and for Québec.[96]

59. Thus, the plain language of the procedural order evidences the Tribunal's determination that the Compensatory Adjustments be overall amounts that, if collected, would neutralize the harm to U.S. producers caused by Canada's breach. The language also reflects the Tribunal's understanding that the Compensatory Adjustments – in the overall amount calculated by the experts – had *to be collected* in order to neutralize the harm. Accordingly, the Tribunal issued an award that mandated the collection of the amounts necessary to neutralize the effect on U.S. producers.

60. The Tribunal would not have requested this information to enable it to "reach a final conclusion on the merits,"[97] only to disregard these facts in issuing its final decision. To the contrary, the Tribunal requested the information to use in the Award. The requested "overall amount[s] to be collected" for each province must, therefore, have meaning to the Tribunal's decision, and the Award properly requires the collection of these amounts. Indeed, this is the

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[95] *Id.*

[96] *Id.* at ¶ 1.3(a), (b); *see* SLA, art. XIV, ¶¶ 23, 25.

[97] Procedural Order No. 6, ¶ (G).

only means by which the Compensatory Adjustments would, as the Tribunal requested, neutralize the offset to the Export Measures caused by Canada's breach.

61. Further, the Tribunal, in responding to a request for clarification submitted by the experts, stated that "[i]n determining the compensatory adjustments, the experts shall focus on the concept of harm to U.S. producers."[98] This reiteration of the primacy of the change in U.S. producer surplus demonstrates that the Tribunal considered those amounts to be the appropriate measure of the amounts to be collected to neutralize the offset to the Export Measures. Thus, the procedural order confirms that the Award requires the collection of the change in U.S. producer surplus.

62. The information that the Tribunal requested from the experts was then explicitly integrated into the Award.[99] In the Award, the Tribunal found that the "most appropriate measure for the amounts to be collected as Compensatory Adjustments is not the overall amount of the benefits but only the amounts necessary to neutralize the reduction or offsets to the Export Measures caused by the programs and measures in breach of the SLA."[100] This language is effectively identical to the language that the Tribunal used in its request to the experts in the procedural order.[101]

63. That the Tribunal also requested that the experts specify the amounts to be "collected yearly" for each of the five breaching programs[102] does not transform those estimates

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[98] Award, ¶ 341 (quoting Letter from Tribunal to Parties (Apr. 15, 2010)).

[99] *See* Award, ¶ 410.

[100] *Id.* at ¶ 348.

[101] Procedural Order No. 6, ¶ 1.3.

[102] *See id.* at ¶ 1.3(d).

into the operative collection amounts. Notably, the SLA does not require an annual collection figure, and the Award does not discuss this figure. Instead, as the Award recites, the SLA demands that the Compensatory Adjustments be in an amount that remedies the breach.[103]

64. Further, there is no basis to infer that the Tribunal's request for anticipated collection amounts negates the requirement that the Compensatory Adjustments be in an amount to remedy the breach. Nor does the fact that the anticipated collection amount was not collected by October 12, 2013, absolve Canada of its obligation to collect the actual amounts determined. Rather, the anticipated collection amounts merely provide a convenient method by which to confirm that the rate of collection has been calculated correctly. In contrast, the Tribunal's request for a total amount to be collected from each province in order to neutralize the offset to the Export Measures conforms to the effects-based remedy crafted by the Tribunal.

II. The SLA Requires Canada To Collect The Entire Remedy Amount Determined By The Tribunal

65. Importantly, the Award carries out the requirements of the SLA, the terms of which require Canada to continue to apply the Compensatory Adjustments until it has collected the remedy amount identified in the Award. Any tribunal convened under the SLA must, of course, render its decision in accord with the applicable SLA provisions. Indeed, as mentioned above, the Tribunal concluded that the SLA operates as *lex specialis*[104] and repeatedly acknowledged that it must apply the provisions of the SLA in deciding the dispute.[105] Of particular import, the Tribunal recognized that its remedy must conform to the SLA's remedy

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[103] Award, ¶ 345 (quoting SLA, art. XIV(23)).

[104] Award, ¶ 109; *see id.* at ¶ 327.

[105] *See, e.g., id.* at ¶¶ 110, 335, 344.

provisions.[106] The Tribunal, therefore, rendered its decision and crafted its remedy in accordance with what the SLA requires, and its decision must now be read to adhere to those requirements and to comply with the SLA's terms. Accordingly, the Award must be read to require Canada's continued application of the Compensatory Adjustments until it has collected the amount of change in U.S. producer surplus identified in the Award.

66. The SLA's remedy provisions govern the application of Compensatory Adjustments to remedy a breach. The SLA directs the Tribunal to "determine appropriate adjustments to the Export Measures to compensate for the breach."[107] While the Tribunal determined that the wording of the provision left it with discretion to select "a particular measure or proxy for the amounts to be collected,"[108] the Tribunal also recognized that the SLA requires any Compensatory Adjustments to be "in an amount that remedies the breach."[109] The SLA further provides that Compensatory Adjustments are to be applied "until the [p]arty [c]omplained [a]gainst cures the breach."[110] Thus, by its plain language, the SLA mandates that the Compensatory Adjustments must be in an amount sufficient to remedy the breach found, regardless of the measure of the adjustment selected by the Tribunal.[111]

67. When the Tribunal issued the Award, it must have expected that these total amounts would be collected. Any other result would not be consistent with the ordinary meaning

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[106] *See, e.g., id.* at ¶¶ 335, 344.

[107] SLA, art. XIV(22); Award, ¶ 345.

[108] *Id.* at ¶¶ 345-346.

[109] SLA, art. XIV(23).

[110] *Id.* at art. XIV(24).

[111] Award, ¶ 410. The Tribunal's focus on remedying the harm to U.S. producers is discussed in greater detail in Argument section I.A., *supra*.

of the SLA. The SLA demands that Compensatory Adjustments be in an amount that remedies the breach.[112] The Tribunal determined, for its part, that the amounts necessary to remedy Canada's breach are the "amounts necessary to neutralize the reduction or offsets to the Export Measures[.]"[113] Those specific amounts, therefore, must be collected. Collection of only a fraction of the amount of the Tribunal's remedy could not possibly fulfill the SLA requirement that the Compensatory Adjustments "be in an amount that remedies the breach"[114] or, as expressed by the Tribunal, "restore[s] the level playing field."[115]

68. Likewise, the Tribunal could not have expected that the amounts that it carefully calculated were merely advisory and need not actually be collected. Any interpretation of the Award that makes collection discretionary is unreasonable and, in fact, would contravene the SLA. Therefore, if as Canada contends, the Tribunal set only a rate and an anticipated duty amount without regard to the actual collection of the amount necessary to remedy the breach, then the Award would not satisfy the mandates of the SLA. The Tribunal confirmed that it read the SLA to require collection of the amount necessary to "neutralize" the offset to the Export Measures.[116] A rate, by itself, does not fulfill this requirement, nor does including an anticipated duty amount that is merely advisory. Of course, the Award included a rate, and anticipated duty amounts, but only in conjunction with the *actual amounts* to be collected.

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[112] SLA, art. XIV(23)

[113] Award, ¶ 348.

[114] SLA, art. XIV(23).

[115] Award, ¶ 349.

[116] *Id.* at ¶ 348.

69. The only means by which to satisfy the SLA's requirement that Compensatory Adjustments "shall be in an amount that remedies the breach"[117] is to require the actual collection of the amount necessary to remedy the breach. Canada's position to the contrary is inconsistent with the SLA, in light of its "object and purpose" "to maintain a level playing field between United States and Canadian producers."[118] By leaving a portion of the remedy uncollected, Canada's position would not restore the "level playing field" disturbed by Canada's breach.[119] To give effect to the SLA's requirements, the Award is properly read to compel the actual collection of the full remedy amount identified in the Award.

70. Indeed, the SLA has already been interpreted to require collection of the full amount of Compensatory Adjustments to the Export Measures. In LCIA 91312, the tribunal determined that the SLA's remedy provision required Canada to apply the Compensatory Adjustments set in LCIA 7491 until the entire remedy amount was collected.[120] In that matter, Canada requested arbitration under the SLA, alleging that it had cured the breach by offering payment in an amount less than the compensatory adjustments and seeking (among other relief) a clarification regarding the allocation of the compensatory adjustments to be collected under the LCIA 7941 Award on Remedies if it had not cured its breach.[121] The LCIA 91312 tribunal determined that the SLA requires the breaching party, in the absence of a cure, to apply the

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[117] SLA, art. XIV(23).

[118] Award, ¶ 354.

[119] *Id.* at ¶¶ 349, 352.

[120] LCIA No. 91312 Award, ¶¶ 212-14; *see id.* at page 86 (quoting United States v. Canada, LCIA No. 7491, Award on Remedies (Feb. 23, 2009) (CA-12)).

[121] *See id.* at ¶ 90.

Compensatory Adjustments.[122] Accordingly, the tribunal concluded that, because Canada had not cured its breach, it was required to apply the Compensatory Adjustments as awarded in LCIA 7941 until the full remedy amount was collected.[123] Thus, an LCIA tribunal has already interpreted the SLA to require the application of the Compensatory Adjustments until the total amount has been collected. This Tribunal should apply the reasoning of the LCIA 91312 tribunal and confirm that Canada is required to collect the full amounts identified in the Award.

71. Canada's position that it may cease applying the Compensatory Adjustments impermissibly disregards the terms of the SLA. In the absence of a cure, the SLA does not specify an end date, time period, or other termination point for the application of Compensatory Adjustments.[124] Because Canada does not contend that it has cured its breach, the SLA prohibits Canada's position that it now may cease to apply the Compensatory Adjustments as of a date upon which the SLA could have ended but, in fact, did not.

72. Canada simply cannot be excused from applying the Compensatory Adjustments and still be viewed to be in compliance with its obligations under the Agreement. Compensatory Adjustments must be applied so long as the SLA's Export Measures apply and a party has not cured its breach.[125] The Tribunal's remedy implicitly acknowledged that there can be no Compensatory Adjustments when the Export Measures no longer apply.[126] By logical extension, however, as long as the Export Measures *do* apply, the Compensatory Adjustments apply as

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[122] *Id.* at ¶ 164.

[123] *Id.* at ¶ 213.

[124] *See* SLA, art. XIV(22), (23), (24).

[125] SLA, art. XIV(24).

[126] Award, ¶ 410.

well. Indeed, the SLA directs that the adjustments "may be applied from the end of a reasonable period of time until the party complained against cures the breach."[127] Thus, until Canada has collected the full remedy amounts, it remains obligated under the SLA to apply the Compensatory Adjustments.

73. Finally, as the Tribunal recognized, the SLA provides multiple avenues to address Compensatory Adjustments that may be too high, such as when a party believes that the Compensatory Adjustments should be modified or terminated because it has cured the breach.[128] In contrast, the SLA does not provide a similar option to increase the Compensatory Adjustments if they prove inadequate.[129] Thus, for so long as the Export Measures remain in effect, a breaching party must, *at a minimum*, apply the Compensatory Adjustments until it has collected the full remedy amounts required by the Award. Anything less fails to compensate for Canada's breach, and constitutes a violation of the SLA.

REQUEST FOR RELIEF

74. The United States respectfully requests that the Tribunal find that the Award requires Canada to continue to apply the Compensatory Adjustments for as long as the SLA remains in effect until Canada has collected the amounts of change in U.S. producer surplus identified in the Award.

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[127] SLA, art. XIV(24).

[128] Award, ¶¶ 361-63. While the SLA provides these avenues of potential relief, this proceeding has not been brought under these provisions.

[129] *Id.* at ¶ 361.

Respectfully submitted,

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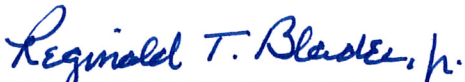

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