

In the London Court of International Arbitration

LCIA # \_\_\_\_

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**JOINT REQUEST FOR ARBITRATION**

Submitted on Behalf of

Canada and the United States of America

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September 30, 2013

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## I. INTRODUCTION

1. Canada and the United States (“the Parties”) jointly request arbitration of a dispute between the Parties concerning the interpretation of the Award entered on January 20, 2011, by the Tribunal in LCIA Arbitration No. 81010 (the “Award”)<sup>1</sup> under Article XIV(1) of the Softwood Lumber Agreement 2006 (the “SLA” or “Agreement”).<sup>2</sup> Article XIV(1) provides that: “[e]ither Party may initiate dispute settlement under this Article regarding any matter arising under the SLA 2006.”

2. Canada and the United States disagree over when Canada’s obligation to collect the Compensatory Adjustments awarded by the Tribunal in LCIA Arbitration No. 81010 ceases. The Parties’ positions are described in more detail in Part VI, below.

3. The Parties would be grateful for the LCIA’s assistance in resolving this dispute. The Parties have attached an understanding, contained in an Exchange of Diplomatic Notes<sup>3</sup> (“the Parties’ Understanding”), which details the terms and procedures that have been agreed to by the Parties, including the application of Procedural Order No. 2

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<sup>1</sup> Exhibit A, *United States v. Canada*, LCIA No. 81010, Award (Jan. 20, 2011).

<sup>2</sup> Exhibit B, 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America.

<sup>3</sup> Exhibit C, Exchange of Diplomatic Notes between the Government of Canada and the Government of the United States of America, dated September 30, 2013.

(“PO No. 2”) in LCIA Arbitration No. 81010 (the Confidentiality Agreement and Undertaking) to this proceeding.<sup>4</sup>

## II. PARTIES TO THE ARBITRATION

### A. Canada

4. Canada’s legal representatives in this proceeding are:

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<sup>4</sup> Exhibit D, LCIA Arbitration No. 81010, Procedural Order No. 2 (June 25, 2008).

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**B. United States**

5. The United States' legal representatives in this proceeding are:

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**III. THE ARBITRATION AGREEMENT**

6. The Parties have engaged in extensive consultations and have now determined that further consultations will not resolve the dispute. The Parties therefore respectfully submit this Joint Request pursuant to Article XIV of the SLA and the Parties' Understanding. The arbitration should be conducted under the dispute settlement provisions in Article XIV of the SLA and the Parties' Understanding.

#### IV. MATTERS REGARDING THE ARBITRATION

##### A. Selection of the Arbitral Tribunal

7. The Parties request that this arbitration be conducted before the same Tribunal as in LCIA Arbitration No. 81010, if they are available to serve. The arbitrators who comprised the original Tribunal in the 81010 Arbitration are:

Prof. Gabrielle Kaufmann-Kohler, Tribunal Chair  
Lévy Kaufmann-Kohler  
3-5 Rue du Conseil Général  
P.O. Box 552  
CH-1211 Geneva 4  
Switzerland

Prof. Albert Jan van den Berg  
Hanotiau & van den Berg  
IT Tower – 9th Floor  
480 Avenue Louise-B9  
1050 Brussels  
Belgium

Mr. David Williams, QC  
Bankside Chambers  
Level 22, The Lumley Centre  
88 Shortland Street  
Auckland  
New Zealand

8. If either of the Party-nominated arbitrators in LCIA Arbitration No. 81010 is unavailable, the Parties have agreed that the respective Party will nominate a replacement within 15 days. If the Chair is unavailable, the Parties have agreed that the Party-nominated arbitrators will be asked to agree on a replacement Chair within 15 days of the appointment of both the Party-nominated arbitrators. If either of the Parties fails to nominate a replacement arbitrator within 15 days or if the arbitrators fail to decide upon a replacement

Chair within 15 days, the Parties have agreed that the LCIA will appoint the replacement. The SLA calls upon the LCIA to endeavor to appoint the three nominated arbitrators within five business days after the date the Chair is nominated.<sup>5</sup> No citizen or resident of either Canada or the United States may be appointed to the Tribunal.<sup>6</sup>

**B. Remuneration of the Arbitrators**

9. According to the SLA, the arbitrators will be remunerated and their expenses paid in accordance with LCIA rates.<sup>7</sup>

**C. Hearings of the Tribunal**

10. The Parties request that the Tribunal make its decision based on the Parties' written submissions and the existing record and that a hearing not be held.

**D. Evidence**

11. The Parties request that the Tribunal resolve this dispute based solely upon the existing record in LCIA No. 81010 and the Parties' written submissions, as specified in paragraph (7), and qualified by paragraph (8), of the Parties' Understanding.

12. The legal place of arbitration shall be London, United Kingdom.<sup>8</sup>

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<sup>5</sup> SLA Art. XIV(11).

<sup>6</sup> SLA Art. XIV(8).

<sup>7</sup> SLA Art. XIV(12).

<sup>8</sup> SLA Art. XIV(13).

**E. Applicable Rules**

13. The Parties agree that the arbitration shall be conducted under the LCIA Arbitration Rules in effect on the date the SLA was signed, as modified by the SLA and by the Parties' Understanding.<sup>9</sup>

**F. The Award of the Tribunal**

14. The Tribunal is requested to communicate to the Parties a determination as soon as possible with respect to whether Canada must continue to apply the Compensatory Adjustments beyond October 12, 2013, and that it issue its Award explaining the reasons for its determination as soon as practicable thereafter.<sup>10</sup> This Award shall be final and binding, with no appeals.<sup>11</sup> The Tribunal may not award costs. A portion of the funds allocated to the binational industry council established under Annex 13 of the SLA shall be used to fund arbitration costs other than those of the Parties.<sup>12</sup> Each Party shall bear its own costs, including costs of legal representation and related costs.<sup>13</sup>

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<sup>9</sup> SLA Art. XIV(6).

<sup>10</sup> Exhibit B.

<sup>11</sup> SLA Art. XIV(20).

<sup>12</sup> SLA Art. XIV(21).

<sup>13</sup> *Id.*



## V. FEE

15. The Parties have agreed that the fee prescribed in the LCIA Schedule of Costs can be taken from the balance of monies in the account for LCIA Arbitration No. 111790, and shall be forwarded to the Registrar of the LCIA together with this Joint Request.

## VI. NATURE OF THE CASE

16. The Parties request assistance in resolving a disagreement concerning the interpretation of the Award issued by the Tribunal in LCIA Arbitration No. 81010 on January 20, 2011. The Tribunal found, *inter alia*, that certain programs in the Canadian provinces of Ontario and Quebec were in breach of the SLA, and provided that Canada must cure the breaches or apply certain compensatory adjustments (the “Compensatory Adjustments”).

17. Canada began applying those Compensatory Adjustments on March 1, 2011, and, as of May 31, 2013, has identified \$435,461 collected in tax revenue as a result of levying an additional 0.1 percent export charge on Ontario lumber exports, and \$19,312,164 in tax revenue as a result of levying an additional 2.6 percent export charge on Quebec lumber exports (subject to variances going forward for late returns, refunds and future assessments).

18. Article XVIII of the SLA provides that the SLA remains in force during a period starting on the date of entry into force of the Agreement (October 12, 2006) and

ending seven years later (October 12, 2013), unless the Parties agree to extend the SLA.<sup>14</sup>

On January 23, 2012, the Parties agreed to extend the SLA through October 12, 2015.<sup>15</sup>

19. The Parties disagree over when Canada's obligation to collect the Compensatory Adjustments awarded by the Tribunal in LCIA Arbitration No. 81010 ceases.

20. Canada's position is that the Award in LCIA Arbitration No. 81010 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).

21. The U.S. position is 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 because, based on Canada's reported collections referenced above, Canada will not collect these amounts by October 12, 2013.

## VII. REQUEST FOR RELIEF

22. The Parties ask that the Tribunal decide which of the Parties' positions, set out above in paragraphs 20 and 21, is the correct interpretation of the Award.

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<sup>14</sup> SLA, Art. XVIII.

<sup>15</sup> Exhibit E, Agreement Between The Government of the United States of America and The Government of Canada Extending the Softwood Lumber Agreement, as Amended (January 23, 2012).


23. Should the Tribunal decide in Canada's favor, Canada respectfully requests that the Tribunal specify that the Compensatory Adjustments set out in the Award expire on the termination date for the SLA that was in effect when the 81010 Tribunal issued its Award – October 12, 2013. Canada further requests that, if an award is issued in this proceeding after October 12, 2013, it should provide that any Compensatory Adjustments collected from exporters between October 12, 2013 and the date of the Award should be reimbursed.

24. Should the Tribunal decide in the United States' favor, the United States respectfully requests that the Tribunal clarify that its Award in LCIA Case No. 81010 requires Canada to continue to apply the Compensatory Adjustments for as long as the SLA remains in effect until Canada has collected the respective amounts of change in U.S. producer surplus specified in the Award for Ontario and Quebec.

#### **VIII. SERVICE OF THE REQUEST**

25. This Joint Request is being transmitted by e-mail by the legal representatives of Canada on behalf of the Parties.

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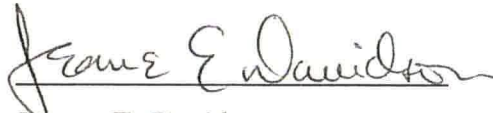
September 30, 2013

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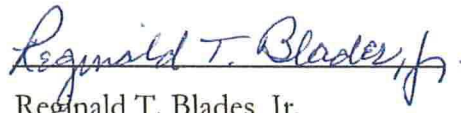
Respectfully submitted,

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### List of Exhibits

- Exhibit A            *United States v. Canada*, LCIA No. 81010, Award dated January 20, 2011.
- Exhibit B            2006 Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America as amended.
- Exhibit C            Exchange of Diplomatic Notes between the Government of Canada and the Government of the United States of America, dated September 30, 2013.
- Exhibit D            LCIA No. 81010, Procedural Order No. 2, dated June 25, 2008.
- Exhibit E            Agreement Between the Government of the United States of America and the Government of Canada Extending the Softwood Lumber Agreement, as Amended, dated January 23, 2012.