

**London Court of International Arbitration (LCIA)
CASE NO. 91312**

**CANADA,
CLAIMANT,
V.**

**THE UNITED STATES OF AMERICA,
RESPONDENT.**

Award

Arbitral Tribunal:

Prof. Karl-Heinz Böckstiegel
Chairman

Prof. Bernard Hanotiau
Co-Arbitrator

V.V. Veeder QC
Co-Arbitrator

Yun-I Kim
Secretary of Tribunal

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ABBREVIATIONS

C I	Claimant's Request for Arbitration of April 2, 2009
C II	Claimant's Statement of Case of May 12, 2009
C III	Claimant's Post-Hearing Note of June 19, 2009
C-	Exhibit to Canada
CDN \$	Canadian Dollars
cf.	confer
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
EUSC	Expected United States Consumption
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Association
p.	page
PCIJ	Permanent Court of International Justice
PO	Procedural Order
R I	Respondent's Response to Canada's Request for Arbitration of April 17, 2009
R II	Respondent's Statement of Defence of June 1, 2009
R III	Respondent's Post-Hearing Note of June 19, 2009
RQV	regional quota volume
R-	Exhibit to the United States of America
SLA	2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America of September 12, 2006
Tr	Transcript of Hearing on Second Award on Remedy
US \$	United States Dollars
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969
WTO	World Trade Organization

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B. The Tribunal

Appointed by the LCIA according to nomination by Claimant:

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Hanotiau & van den Berg

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UNITED KINGDOM

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GERMANY

C. Short Identification of the Case

1. A short identification of the case is made below. This outline is without prejudice to the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions.

C.I. Claimant's Perspective

2. The following quotation from Claimant's Statement of Case of April 17, 2009 summarises the main aspects of Claimant's perspective of the dispute (C II, §§ 11-17; cf. also C III, § 29):

"11. *On March 3, 2008, the Tribunal, in its LCIA 7941 Award on Liability, determined that Canada had breached the SLA by failing to adjust "Expected United States Consumption" ("EUSC") with respect to Regions operating under Option B for the period of January 1, 2007 to June 30, 2007.*¹⁰

12. *In its Award on Remedies in LCIA 7941,¹¹ the Tribunal determined that Canada was liable for the consequences of its breach and that Canada had not cured its breach as of the date of its Award. In accordance with Article XIV(22)(a) and (b) of the SLA, the Tribunal identified 30 days from the date of the Award as the reasonable time for Canada to cure its breach,¹² and determined compensatory adjustments, to be applied in the event that Canada failed to cure the breach within the 30 day cure period, in the amount of an additional 10 percent ad valorem export charge on softwood lumber shipments from Option B Regions until CDN\$68.26 million has been collected.*¹³

13. *By agreement of the Parties, the reasonable period of time ended on March 28, 2009.*

¹⁰ *Award on Liability, The United States v. Canada, Case No. 7941, LCIA, Mar. 3, 2008 (hereinafter, "Award on Liability"), Section I.3 (Ex. C-4).*

¹¹ *Award on Remedies, The United States v. Canada, Case No. 7941, LCIA, Feb. 23, 2009 (hereinafter, "Award on Remedies") (Ex. C-5).*

¹² *Id.* Section I.2 (Ex. C-5).

¹³ *Award on Remedies, Section I.3 (Ex. C-5).*

14. On March 27, 2009, prior to the expiration of the reasonable period of time, Canada tendered a cash payment to the United States of USD\$34 million found by the Tribunal.¹⁴ Canada requested that the United States accept or reject this tender by 4:00 pm on March 30, 2009. The United States failed to do so.
15. On April 2, 2009, Canada received a letter from the United States Trade Representative ("USTR") Kirk stating: "the United States cannot accept Canada's proposed tender of payment. The United States has never represented, and does not consider, that such a payment cures the breach found by the Tribunal. In particular, the payment Canada has proposed neither provides a remedy for Canada's breach nor wipes out the consequences of that breach, as the Softwood Lumber Agreement requires."¹⁵ Mr. Kirk also noted that "under the terms of the SLA, Canada's failure to impose the compensatory adjustments determined by the Tribunal authorizes the United States to impose compensatory measures in the form of customs duties on imports of softwood lumber products from Canada in an amount that shall not exceed the adjustments to the export charges determined by the Tribunal."¹⁶ On that same day, Canada filed its Request for Arbitration.
16. On April 10, 2009, USTR issued a notice of initiation of a Section 302 investigation and determination, focused on imposing duties on softwood lumber from Canada.¹⁷
17. According to the notice, the USTR "(i) determined that Canada is denying U.S. rights under the SLA; (ii) found that expeditious action is required to enforce U.S. rights under the SLA; and (iii) determined that appropriate action under Section 301 of the Trade Act is to impose 10 percent ad valorem duties on imports of softwood lumber products from

¹⁴ Letter of Canadian Ambassador to the United States, Amb. Michael Wilson, to the United States Trade Representative, Ambassador Ronald Kirk dated Mar. 27, 2009 (Ex. C-6).

¹⁵ Letter of United States Trade Representative, Amb. Ronald Kirk, to the Canadian Ambassador to the United States, Amb. Michael Wilson dated Apr. 2, 2009 (Ex. C-7).

¹⁶ *Id.* (Ex. C-7).

¹⁷ See SLA Initiation of Section 302 Investigation (CA-2). This Notice confirms what the United States repeatedly denied in the 7941 proceeding—that the SLA is a trade agreement. Article XIV(28) authorizes the United States to initiate an investigation or take action under Sections 301-307 of the Trade Act of 1974. Those provisions of U.S. law authorize USTR to take action to enforce U.S. rights under a "trade agreement." The United States initiated this investigation under Section 302. The Notice clarified that Section 302 of the Trade Act "authorizes the Trade Representative to initiate an investigation of any matter covered under Section 301, including whether the rights of the United States under a trade agreement are being denied." 74 Fed. Reg. at 16, 437 (emphasis added) (CA-2).

the provinces of Ontario, Québec, Manitoba, and Saskatchewan.”¹⁸ The notice indicated that the duties were to apply to articles entered for consumption or withdrawn from warehouse for consumption on or after April 15, 2009, and to remain in place until the U.S. has collected USD\$54 million in duties.¹⁹”

C.II. Respondent’s Perspective

3. The following quotation from Respondent’s Response to Canada’s Request for Arbitration of April 17, 2009, summarises the main aspects of Respondent’s perspective of the dispute (R I, §§ 3-10):

“3. On February 23, 2009, the Tribunal issued its Award on Remedies in *United States v. Canada*, LCIA No. 7941. The Award on Remedies was made available to the parties on February 26. In that Award, the Tribunal determined that 30 days was a reasonable period of time for Canada to cure the breach found in the Tribunal’s Award on Liability. See Request, Exhibit D, Award on Remedies at I.1 (p. 148). The Tribunal also determined that “as an appropriate adjustment to compensate for the breach found above, Canada shall be required to collect the additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN\$63.9 million, plus CDN\$4.36 million in interest (a total of CDN\$68.26 million) has been collected.” *Id.* at I.3 (page 148).

4. During the 30-day period of time determined by the Tribunal, the United States and Canada engaged in discussions regarding a possible cure of the breach.
5. By letter dated March 27, 2009, Canada offered the United States a lump sum payment of US\$34 million, plus simple interest, expressly contingent on the United States’ acceptance of the following four conditions: first, that the United States would no longer “claim that Canada has failed to ‘cure the breach;’” second, that the United States “will not claim that Canada has any obligation to impose compensatory adjustments under paragraphs 22-25 of Article XIV of the SLA and Canada may refund in full any compensatory adjustments that Canada has collected pursuant to those provisions;” third, that LCIA No. 7941 be “terminated,” and that “the United States will have no right to, and will not, impose compensatory

¹⁸ See *SLA Initiation of Section 302 Investigation* 74 Fed. Reg. at 16, 437 (CA-2).

¹⁹ See *Id.* (CA-2).

measures of any kind . . . and will refund in full any import duties it may have collected as a compensatory measure, and will not request a new arbitration under Article XIV(29) of the SLA"; and fourth, that the United States "will not re-file any Request for Arbitration under Article XIV(1) with respect to Canada's failure to adjust Expected United States Consumption" Request Exhibit E.

6. *Canada expressed its intention to initiate this arbitration should the "United States decline [] to consider this payment a full cure of the breach" Id. Canada also requested that the United States respond by 4:00 p.m. on March 30, 2009, and advise "where [Canada] may send this payment."*
7. *The United States did not respond to Canada with the requested information. Rather, by letter dated April 2, 2009, the United States informed Canada that "the United States has never represented, and does not consider, that such a payment cures the breach found by the Tribunal. In particular, the payment Canada has proposed neither provides a remedy for Canada's breach nor wipes out the consequences of that breach, as the Softwood Lumber Agreement requires." Exhibit A.*
8. *The United States informed Canada that, because Canada did not cure the breach within the 30-day period prescribed by the Tribunal, Canada must now impose the compensatory adjustments determined by the Tribunal. The United States reminded Canada that, if Canada refused to impose the compensatory adjustments, then the United States would possess the right under the SLA to impose compensatory measures "in an amount that shall not exceed the adjustments to the export charges determined by the Tribunal." Id.*
9. *Canada sent its request for arbitration to the LCIA on April 2, 2009. At the time Canada sent its request, the United States had not yet determined to impose its own compensatory measures. The United States merely declined to accept Canada's offer, which meant that Canada had made no payment and the United States had not, as of the date of Canada's request for arbitration, imposed any compensatory measures, nor had the United States stated an intention to do so. Canada filed its request notwithstanding this, asking that this Tribunal be appointed to advise whether Canada's offer constitutes a cure of the breach.*
10. *In the absence of any compensatory measures implemented by Canada, on Tuesday, April 7, 2009, the United States announced that it had taken action under section 301 of the*

Trade Act of 1974. Exhibit B. Specifically, the United States stated that it would impose compensatory measures in the same amount determined by the Tribunal. On Friday, April 10, 2009, the United States published notice of this action under section 301 of the Trade Act of 1974. Exhibits C-D. The notice announced that the United States will assess a 10 percent ad valorem charge upon imports of Canadian softwood lumber until US\$54.8 million is collected.¹ Id. The first such charges were collected on April 15, 2009.”

¹ *US\$54 million is the equivalent of CDN\$68.26 million based on the exchange rate at the time the Award on Remedies was issued.*

D. Procedural History

D.I. Procedure in LCIA Case 7941 leading to Award on Liability

4. In February 2007, the Claimant (i.e. here the United States of America) held informal discussions with the Respondent (i.e. here Canada) about possible breaches of the 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America (SLA).
5. By letter of March 30, 2007, the Claimant initiated formal consultations with the Respondent in accordance with Art. XIV § 4 SLA which were held in Ottawa, Canada, on May 9, 2007.
6. On May 9, 2007, the consultation period of 40 days provided for in Art. XIV § 6 SLA expired (although consultations continued for three more months).
7. On August 13, 2007 the Claimant submitted its Request for Arbitration to the London Court of International Arbitration (LCIA) according to Article 1 of the LCIA Rules, forming part of the Parties' arbitration agreement. Attached were copies of the documents relied upon in the Request for Arbitration. The Claimant nominated V.V. Veeder, Q.C. as its arbitrator and suggested that the legal place of arbitration should be London, United Kingdom, but that hearings should take place in the United States or Canada and be open to the public, as required in the arbitration agreement, namely Article XIV §§ 13 and 17 SLA.
8. On September 12, 2007, the Respondent filed its Response to Request for Arbitration in accordance with Article 2 of the LCIA Rules. The Respondent nominated Professor Dr. Bernard Hanotiau as its arbitrator and agreed that the legal place of arbitration was London, United Kingdom.
9. After the Party-nominated Arbitrators had jointly agreed on Professor Dr. Karl-Heinz Böckstiegel as Chairman of the Tribunal, the Parties had consented thereto and Professor Böckstiegel had accepted that nomination, by letter of September 19, 2007, the LCIA confirmed the appointment and constitution of the Tribunal under the LCIA Rules.
10. By email of September 25, 2007, a draft of the first Procedural Order (PO) was sent by the Tribunal to the Parties in view of the restricted

time limits set out in Article XIV SLA, giving them the opportunity to submit comments.

11. On October 9, 2007, a proposed timetable was sent to the Parties by the Chairman on behalf of the Tribunal, again giving them the opportunity to submit comments. On the same day, the Claimant proposed certain amendments to the proposed timetables as well as a bifurcation of the question of liability from the question of remedy. The Respondent by letter and email of October 10, 2007, suggested amendments to the proposed timetables and concurred to a bifurcation of the proceedings. Both Parties agreed that neither Party would submit witness or expert testimony for the first hearing.
12. On October 13, 2007, the Tribunal issued a new Draft Procedural Order No. 1, taking into account the comments received from the Parties by their letters of October 9 and 10, 2007.
13. On October 15, 2007, Procedural Order No. 1 was issued by the Chairman on behalf of the Tribunal, confirming the agreed timetable and taking into account the results of the preceding discussions.
14. By email of October 28, 2007, Procedural Order No. 1 was resent to the Parties due to clerical and conforming corrections as revised, containing, however, no changes in substance.
15. On October 19, 2007, Claimant submitted its Statement of the Case on Liability according to Article 15(2) of the LCIA Rules including copies of the documents relied upon in the Memorial, conforming with § 3.1. of Procedural Order No. 1.
16. On November 19, 2007, Respondent filed its Statement of Defence on Liability according to Article 15(3) of the LCIA Rules complying with § 3.2. of Procedural Order No. 1. Attached were copies of the documents relied upon in the Memorial.
17. By joint letter of November 27, 2007, the Parties notified the Tribunal on the agreement reached regarding the logistics of the hearing on liability to be held on December 12, 2007 in New York, NY, United States of America.
18. By November 28, 2007, Claimant filed its Rebuttal Memorial on Liability according to § 3.3. of Procedural Order No. 1 together with copies of the documents relied upon in the Memorial.
19. On November 30, 2007, Claimant submitted its Corrected Statement of the Case on Liability including a corrected version of its appendix of authorities and its appendix of exhibits.

20. By email of December 1, 2007, the Tribunal agreed to the logistics of the hearing on liability to be held on December 12, 2007, as stated in the joint letter of November 27, 2007 of the Parties. In view of the limited time available during the Hearing, the Chairman further invited the Parties on behalf of the Tribunal to provide for Hearing Binders at the Hearing, containing all documents to which the Parties intended to refer in their oral presentations.
21. By joint letter of December 4, 2007, the Parties notified the Tribunal on the respective points of contact for the Tribunal regarding the logistics of the hearing.
22. By December 6, 2007, Respondent submitted its Rebuttal Memorial on Liability according to § 3.4. of Procedural Order No. 1. Attached were copies of the documents relied upon in the Memorial.
23. By joint letter of December 7, 2007, the Tribunal was notified that the Parties had made the necessary arrangements regarding the logistics and especially the simultaneous transcription of the Hearing by a Court Reporter.
24. By their letters of December 7, 2007, and in addition, by Claimant's email of December 11, 2007, the Parties identified the persons attending the Hearing on Liability from their respective sides.
25. On December 12, 2007, the Hearing on Liability was held in New York City, NY, USA. In addition to the members of the Tribunal, the Secretary to the Tribunal, Yun-I Kim, and the stenographer (David A. Kasdan), it was attended (as recorded in the transcript of the Hearing and corrected by the Parties in their communications of January 11 and 15, 2008) as follows:

"On behalf of the Claimant

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On behalf of the United States Department of State:

*Mr. Timothy J. Feighery
Ms. Selene Ko
Ms. Heather Van Slooten Walsh*

On behalf of the Office of the U.S. Trade Representative:

*Mr. John Melle
Mr. J. Daniel Stirk*

On behalf of the United States Department of Commerce:

*Mr. Quentin Baird
Mr. Scott McBride
Mr. Robert Copyak*

On behalf of the United States Department of Justice:

Ms. Tiffany Wooten

*Also present was Ms Paula Hodges, Herbert Smith LLP
as consultant to the United States*

On behalf of the Government of Canada:

*Mr. John Ryan
Ms. Alejandra Montenegro Almonte*

*Ms. Maria Isabel Guerrero
Mr. Santiago Montt
Ms. Anupama Chettri
Weil, Gotshal & Manges LLP*

*On behalf of the Canadian Department of Foreign Affairs and
International Trade, Trade Law Bureau:*

*Mr. Hugh Cheetham
Mr. Michael Solursh*

*On behalf of the Canadian Department of Foreign Affairs and
International Trade, Softwood Lumber Division:*

*Mr. Jean-Marc Gionet
Ms. Allison Young*

Also present was Dr. David Reishus, Lexecon."

26. The Meeting followed the Agenda as provided in Section 6.6. of Procedural Order No. 1.
27. The details of the Hearing of December 12, 2007, were provided in the Transcript delivered after the Hearing in electronic and paper format.
28. The final discussion at the end of the Hearing contains a number of agreements and decisions.
29. On March 3, 2008, the Tribunal issued the Award on Liability resulting in the following Decisions:
 - "1. *The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA's case to the contrary is dismissed.*
 2. *The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore Canada's case to the contrary as to interpretation is dismissed.*
 3. *Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.*

4. *As the Parties agreed at the end of the Hearing in New York on December 12, 2007 (Tr. 123/4), rather than the Tribunal deciding now on the specific consequences of any breach by Canada in accordance with paragraphs 22 et seq. of Art. XIV SLA, the Parties are invited to submit, within one month of the date of this Award, comments or (if possible) an agreement on how to proceed in this regard.*
5. *According to paragraph 21 of Art. XIV SLA, the Tribunal does not award costs and each Party shall bear its own costs to date, including costs of legal representation and travel."*

D.II. Procedure in LCIA Case 7941 leading to an Award on Remedy

30. With the Award on Liability, the Tribunal sent out a letter, inviting the Parties to submit comments with regard to further proceedings on Remedy.
31. By separate letters of April 3, 2008, the Parties submitted comments on further proceedings on Remedy, each Party attaching a proposed schedule to be inserted into Draft Procedural Order No. 2.
32. By email of April 5, 2008, the Tribunal invited the Parties to submit comments regarding the nature of the issues in dispute and any other matters relevant for establishing a timetable.
33. In its letter dated April 11, 2008, Claimant again submitted comments on its views regarding the further proceedings, especially the issues of a submission schedule, expert submission, disclosure, advance notice of use of demonstratives, treatment of fact witnesses and expert witnesses, and agenda of the hearing.
34. By email of April 15, 2008, the Tribunal issued a Draft Procedural Order No. 2, taking into account the comments submitted by the Parties.
35. By joint letter of April 22, 2008, the Parties commented on Procedural Order No. 2, attaching a calendar with specific dates for all procedural events leading up to the hearing.
36. On May 2, 2008, the Tribunal issued Procedural Order No. 2.
37. By joint letter of May 21, 2008, the Parties agreed on the logistics of the Hearing on Remedy to be held in New York City from September 22 to 24, 2008.

38. By joint letter of June 4, 2008, the Parties informed the LCIA that the Parties' preferred venue for the September 22 to 24, 2008 hearing was not available during the scheduled date and requested the LCIA to secure another suitable hearing venue.
39. By June 30, 2008, Respondent filed its Statement of Defence on Remedy according to § 2.2. of Procedural Order No. 2 together with all evidence relied upon in its Memorial.
40. On July 21, 2008, Claimant submitted its Reply Memorial on Remedy according to § 2.3. of Procedural Order No. 2 together with copies of the documents relied upon in the Memorial.
41. By July 23, 2008, the Parties confirmed their agreement on a suitable venue for the hearing to be held from September 22 to 24, 2008 in New York City, New York, United States of America.
42. By email and letter of August 5, 2008, Respondent requested a one day extension for the filing of its Rebuttal Memorial originally due on August 11, 2008.
43. The extension was granted by email of August 6, 2008, by the Chairman on behalf of the Tribunal.
44. By August 12, 2008, Respondent submitted its Rebuttal Memorial on Remedy attaching copies of the documents relied upon in the Memorial.
45. On September 1, 2008, in accordance with § 5.6 of Procedural Order No. 2 Claimant submitted by email and telefacsimile its notification of the factual and expert witnesses to be presented by itself and by Respondent to be examined at the Hearing.
46. By letter of September 2, 2008, Respondent notified the Tribunal and the LCIA of the witnesses it wished to examine at the Hearing.
47. On September 5, 2008, the Tribunal issued draft Procedural Order No. 3, inviting the Parties to submit any comments by September 9, 2008.
48. By letters of September 9 and 10, 2008, the Parties submitted their comments which were taken into account by the Tribunal when issuing Procedural Order No 3 on September 15, 2008.
49. On September 15, 2008, Claimant submitted Dr. Neuberger's additional expert report in response to Respondent's second expert report in lieu of direct testimony.

50. On September 22 and 23, 2008, the Hearing on Remedy was held in New York City, NY, USA. In addition to the members of the Tribunal, the Secretary to the Tribunal, Yun-I Kim, and the stenographer (John Phelps), it was attended (as recorded in the transcript of the Hearing and corrected by the Parties in their communications of October 17 and 23, 2008) as follows:

"On behalf of the Claimant:

*MS. JEANNE DAVISON
Director*

*MS. PATRICIA M. McCARTHY
Assistant Director*

*MS. CLAUDIA BURKE
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51. On September 29, 2008, the Chairman on behalf of the Tribunal issued Procedural Order No. 4.
52. On October 31, 2008, the Parties submitted their Post-Hearing Briefs.
53. By a letter of November 7, 2008, Respondent raised procedural objections to allegedly new evidence introduced by Claimant with its Post-Hearing Brief. Claimant commented on the issue by a letter of November 10, 2008, Respondent replied by a letter of November 14, 2008, and Claimant replied again by letter of November 17, 2008.
54. By letter of December 8, 2008, Respondent advised the Tribunal that Meg Kinnear would no longer be acting as attorney for Respondent in these proceedings.
55. By email of February 12, 2009, the LCIA informed the Parties that the Award would be issued with advance notice of at least two days as had been requested by the Parties by joint letter of October 17, 2008.
56. The Tribunal, by email of February 24, 2009, informed the Parties that the Award on Remedies was ready for release by the LCIA and the Parties after having conferred on the matter requested that the Tribunal issue the Award to the Parties on February 26, 2009.
57. On February 26, 2009, the Tribunal issued its Award on Remedies resulting in the following Decisions:
 - "1. *It is recalled that, in its Award on Liability of March 3, 2008, this Tribunal decided as follows:*
 - "1. *The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA's case to the contrary is dismissed.*
 2. *The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore*

Canada's case to the contrary as to interpretation is dismissed.

3. *Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach."*
2. *With regard to Respondent's breach found by the above decision, in accordance with Art. XIV § 22 subsection (a), the Tribunal identifies 30 days from the date of this Award as a reasonable period of time for Respondent to cure the breach.*
3. *In accordance with Art. XIV § 22 subsection (b), as an appropriate adjustment to compensate for the breach found above, Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN\$ 63.9 million, plus CDN\$ 4.36 million in interest (a total of CDN\$ 68.26 million) has been collected.*
4. *All other claims raised in this arbitration are dismissed.*
5. *According to § 21 of Art. XIV SLA as confirmed by the Parties, the Tribunal does not award costs and each Party shall bear its own costs related to this arbitration, including costs of legal representation and travel."*

D.III. Procedure in the present new LCIA Case 91312 requesting a Second Award on Remedy

58. On April 2, 2009, Claimant (i.e. here Canada) submitted its Request for Arbitration in the present proceedings to the LCIA according to Article 1 of the LCIA Rules, forming part of the Parties' arbitration agreement. In accordance with § 30 of Art. XIV of the SLA, Claimant requested that the LCIA appoint to the Tribunal the arbitrators comprising the original Tribunal within 10 days after delivery of the Request for Arbitration, to the extent that they were available. Together with the Request for Arbitration, Claimant attached a proposed timetable.
59. By letter of April 3, 2009 to the LCIA, Respondent (i.e. here the United States of America) voiced objections to Claimant's proposed timetable.

60. By email of April 9, 2009, the LCIA informed the Parties of the constitution of the Tribunal comprising all three members of the original Tribunal.
61. By email of the same day, the Chairman on behalf of the Tribunal sent a Draft Procedural Order No. 1 to the Parties, inviting them to submit comments by April 15, 2009.
62. Respondent submitted an alternative schedule in its comments on Draft Procedural Order No. 1 to the Tribunal by email of April 15, 2009. On the same date, Claimant presented a new proposed timetable by letter to the Tribunal pointing out possible time conflicts with different proceedings involving the same Parties.
63. By email of April 17, 2009, the Chairman on behalf of the Tribunal suggested to the Parties that a Hearing should be held in Washington, D.C. on June 11 and 12, 2009. Taking into account the date of the Hearing, the Chairman further suggested a timetable for the submissions of the Parties and invited them to submit joint comments on the issue by April 21, 2009.
64. Also by letter of April 17, 2009, Respondent filed its Response to Canada's Request for Arbitration together with its Requests for Disclosure of Documents. Attached were the exhibits that Respondent relied on in its Response.
65. Claimant by letter of April 20, 2009 to the Tribunal, again voiced its concerns regarding the timetable due to conflicts with different proceedings involving the same Parties.
66. By email of April 21, 2009, Claimant informed the Tribunal that due to one outstanding item the Parties would not be able to submit their joint comments before April 22, 2009. By email of the same date, Respondent advised the Tribunal that a joint agreement still needed review and approval by Claimant and would thus be filed by April 22, 2009.
67. By email of April 22, 2009, the Parties submitted their joint letter regarding comments to draft Procedural Order No. 1 to the Tribunal.
68. By email of April 27, 2009, Procedural Order No. 1 (PO-1) was issued by the Charman on behalf of the Tribunal to the Parties:

"Procedural Order No. 1 (PO-1)

A draft for this PO-1 has been communicated to the Parties for comments and this final version is issued taking into account the comments and particularly the joint letter of April 22, 2009, received from the Parties. This PO includes wording on which the Parties and

the Tribunal agreed as PO-1 in the earlier LCIA case 7941, subject to adaptations which seem to be necessary for the present case.

1. *Applicable Procedural Rules*

1.1. *Pursuant to and subject to Art. XIV of the Softwood Lumber Agreement (SLA) the proceedings shall be conducted in accordance with the LCIA Arbitration Rules effective January 1, 1998. In the present procedure, particularly §§ 29 to 32 of Art. XIV apply.*

1.2. *For issues not dealt with in the SLA, the LCIA Rules, or agreement by the Parties, the Tribunal shall conduct the arbitration in such a manner as it considers appropriate taking into account any views expressed by the Parties.*

2. *Communications*

2.1. *The Tribunal shall address communications to the addresses indicated by the Parties as their representatives and counsel.*

2.2. *Counsel of the Parties shall address communications directly to each member of the Tribunal (with a copy to representative and counsel for the other Party and to the LCIA)*

by e-mail, to allow direct access during travel,

and confirmed either by courier or by fax (but fax communications shall not exceed 15 pages).

2.3. *Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.*

2.4. *Longer submissions shall be preceded by a Table of Contents.*

2.5. *To facilitate word-processing and citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of memorials and substantial or longer submissions shall be in Windows Word, or in a PDF document that can be word-searched and from which text can be copied and pasted into Windows Word.*

2.6. *To facilitate that parts can be taken out and copies can be made, submissions of all documents shall be submitted separated from Memorials, unbound in binders and preceded by a list of such documents, consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant; R-1, R-2 etc. for Respondent) and with dividers between the documents. As far as possible, in addition,*

documents shall also be submitted in electronic form (preferably in Windows Word to facilitate word processing and citations).

3. Timetable

- 3.1. *By April 24, 2009, a Party may request disclosure of documents not in its possession that are relevant and material; notwithstanding the terms of any disclosure request, the Parties' disclosure obligations extend only to documents and other responsive materials created on or before April 28, 2009;*
- 3.2. *By April 28, 2009, a Party receiving a request under 3.1, or any previous disclosure request, will submit any objections to the Requesting Party's disclosure requests and produce all documents to whose disclosure it does not object;*
- 3.3. *By May 4, 2009, each Requesting Party will submit to the Tribunal and to the Producing Party, in the form of a completed Redfern Schedule, its responses to any objections to disclosure posed by the Requesting Party;*
- 3.4. *By May 8, 2009, the United States will produce all responsive documents, as ordered by the Tribunal;*
- 3.5. *By May 12, 2009, Canada will produce all responsive documents, as ordered by the Tribunal;*
- 3.6. *By May 12, 2009, by 5:00 p.m. EDT, Canada will submit its Statement of the Case;*
- 3.7. *By June 1, 2009, by 5:00 p.m. EDT, the United States will submit its Statement of Defence.*
- 3.8. *In any submission or testimony provided by a Party pursuant to Section 3.6. or 3.7. of this procedural order, if the Party includes or relies on any economic analysis or other related quantitative analysis, it shall include with the submission or testimony a complete description of the methodology used to perform the analysis, the calculations performed, the data and documentation relied upon to derive the calculations or conclusions, and electronic versions of all spreadsheets, data, procedures, and algorithms used. The parties agree that this obligation is distinct from a Party's obligation under 3.4 and 3.5 to produce documents ordered by the Tribunal pursuant to its review of a completed Redfern schedule, and distinct from a Party's obligation to produce documents to which it does not object under 3.2. Each Party must comply with each obligation.*

- 3.9. *Thereafter, no new evidence may be submitted, unless otherwise agreed between the Parties or expressly authorized by the Tribunal;*
- 3.10. *By June 3, 2009, the Tribunal may issue a Procedural Order regarding further details of the hearing if it considers that necessary;*
- 3.11. *Each Party is entitled to use as exhibits during the hearing any documentary evidence filed by the Parties as required by section 5.1. Each party shall notify the other by 10:00 a.m. EDT on June 9, 2009, of any exhibits it wishes to use during the hearing. Further to section 6.6(4) of this Procedural Order and for the avoidance of doubt, each Party is entitled to call and examine their expert witness at the hearing, even if not called for cross examination by the other Party;*
- 3.12. *From June 11 to 12, 2009, Hearing in Washington D.C.;*
- 3.13. *Parties shall not submit Post-Hearing Briefs unless agreed otherwise by the Parties or considered necessary by the Tribunal.*

4. Evidence and Confidentiality

The following paragraphs of Art. XIV SLA are recalled:

14. *The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration as adopted in 1999, as modified by the SLA 2006, shall apply in the arbitrations held under the SLA 2006, except that Article 6 of those Rules shall not apply.*
15. *If a Party wishes to designate information to be used in the arbitration as confidential, the tribunal shall establish, in consultation with the Parties, procedures for the designation and protection of confidential information. The procedures shall provide, as appropriate, for sharing confidential information for purposes of the arbitration with counsel to softwood lumber industry representatives or with provincial or state government officials.*
16. *Each Party shall promptly make the following documents available to the public, subject to Article XVI and any procedures established under paragraph 15:*
 - (a) *the Request for Arbitration;*
 - (b) *pleadings, memorials, briefs, and any accompanying exhibits;*
 - (c) *minutes or transcripts of hearings of the tribunal, where available; and*

(d) orders, awards, and decisions of the tribunal

5. Documentary Evidence

- 5.1. *All documents (including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.*
- 5.2. *All documents shall be submitted in the form established above in the section on communications.*
- 5.3. *New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.*
- 5.4. *Documents in a language other than English shall be accompanied by a translation into English.*

6. Hearing in Washington D.C.

- 6.1. *The Parties shall try to agree regarding the location and other logistics of the Hearing taking into account the details of the Hearing mentioned in the following sections. By May 8, 2009, the Parties shall inform the Tribunal of the agreement reached and of the arrangements suggested. Insofar as the Parties have not agreed or prefer not to make the arrangements themselves, the Tribunal shall decide and the LCIA will make the necessary arrangements.*
- 6.2. *It is recalled that Art. XIV.17 SLA provides as follows:*

Hearings of the tribunal shall be open to the public. The tribunal shall determine, in consultation with the Parties, appropriate arrangements for open hearings, including the protection of confidential information.
- 6.3. *The Hearing shall be simultaneously transcribed using a live transcription software system, with the delivery to the Parties and members of the Tribunal of daily transcripts each evening after the close of the hearing.*
- 6.4. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable.*
- 6.5. *Subject to further agreement between the Parties and the Tribunal, taking into account the time available during the one day for the Hearing after deduction of the time needed for breaks and lunch, the Tribunal intends to establish equal*

maximum time periods both for the Claimant and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest by May 22, 2009.

6.6. *Unless otherwise agreed between the Parties and the Tribunal, the Hearing shall start at 9:30 a.m. and end no later than 6:00 p.m. The Agenda of the Hearing shall be as follows:*

1. *Short Introduction by Chairman of Tribunal.*
2. *Opening Statement by Claimant of up to 90 minutes.*
3. *Opening Statement by Respondent of up to 90 minutes.*
4. *Examination of experts if expert statements have been submitted and a Party has called for their oral examination.*
5. *Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.*
6. *2nd Round Presentation by Claimant of up to 1 hour.*
7. *2nd Round Presentation by Respondent of up to 1 hour.*
8. *Final questions by the Tribunal.*
9. *Discussion of any issues of the further procedure.*

The members of the Tribunal may raise questions at any time, if considered appropriate.

7. Extensions of Deadlines and Other Procedural Decisions

7.1. *Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.*

7.2. *In view of the very limited time available for the procedure, extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.*

7.3. *The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.*

7.4. *Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone."*

69. (In the circumstances, the Parties also agreed to an extension of time for the Tribunal's award beyond the sixty-day target required by their Arbitration Agreement: see § 30 of Article XIV of the SLA cited in full below).
70. By letter of April 28, 2009, Claimant submitted its response to Respondent's Requests of Documents and Respondent filed its reply containing a Redfern Schedule on April 30, 2009.
71. On May 1, 2009, Claimant submitted its Amended Response to Respondent's Disclosure Requests. By letter of May 2, 2009, Respondent informed the Tribunal that the Parties had resolved the dispute concerning the documents as set forth in the Redfern Schedule filed by Respondent on April 30, 2009.
72. By joint letters of May 8 and 11, 2009, the Parties informed the Tribunal on the arrangements made for the Hearing to be held in Washington, D.C. on June 11 and 12, 2009.
73. On May 23, 2009, the Chairman on behalf of the Tribunal sent Draft Procedural Order No. 2 to the Parties, inviting them to submit comments by June 1, 2009 at the latest.
74. Respondent filed its Statement of Defence on June 1, 2009. Attached were copies of the documents relied upon in the Statement of Defence.
75. By joint letter of June 1, 2009, the Parties submitted their comments on Draft Procedural Order No. 2.
76. Taking the comments by the Parties into account the Chairman on behalf of the Tribunal issued Procedural Order No. 2 on June 3, 2009 regarding further details of the Hearing to be held in Washington, D.C. on June 11 and 12, 2009. Also attached was a Calculation of Hearing Time.

"1. Place and Time of Hearing:

1.1. A draft for this PO-2 has been communicated to the Parties for comments and this final version is issued taking into account the comments received from the Parties. This PO includes wording on which the Parties and the Tribunal agreed as PO-3 in the earlier LCIA case 7941, subject to adaptations which seem to be necessary for the present case.

1.2. As agreed with the Parties, the Hearing shall take place at the

*World Bank – Room MC13-121
In Washington D.C.*

on June 11 and 12, 2009.

- 1.3. *Unless otherwise determined by the Tribunal, on its 1st day, the hearing will commence at 9:00 a.m. and conclude at 6:00 p.m., on its 2nd day, will commence at 9:00 a.m. and conclude at 5:00 p.m., with lunch and coffee breaks at appropriate times.*
2. *Earlier Rulings*
 - 2.1. *The Parties are invited to take into account all earlier rulings in PO-1 of the Tribunal and letters of its Chairman, unless they have been changed by later rulings or rulings in this Order.*
 - 2.2. *The Tribunal particularly recalls from Procedural Order No. 1 dated April 27, 2009, the following Sections:*
 3. *Timetable*
 - 3.8. *In any submission or testimony provided by a Party pursuant to Section 3.6. or 3.7. of this procedural order, if the Party includes or relies on any economic analysis or other related quantitative analysis, it shall include with the submission or testimony a complete description of the methodology used to perform the analysis, the calculations performed, the data and documentation relied upon to derive the calculations or conclusions, and electronic versions of all spreadsheets, data, procedures, and algorithms used. The parties agree that this obligation is distinct from a Party's obligation under 3.4 and 3.5 to produce documents ordered by the Tribunal pursuant to its review of a completed Redfern schedule, and distinct from a Party's obligation to produce documents to which it does not object under 3.2. Each Party must comply with each obligation.*
 - 3.9. *Thereafter, no new evidence may be submitted, unless otherwise agreed between the Parties or expressly authorized by the Tribunal;*
 - 3.10. *By June 3, 2009, the Tribunal may issue a Procedural Order regarding further details of the hearing if it considers that necessary;*
 - 3.11. *Each Party is entitled to use as exhibits during the hearing any documentary evidence filed by the Parties as required by section 5.1. Each party shall notify the other by 8:00 p.m. EDT on June 9, 2009, of any exhibits it wishes to use during the hearing. Further to section 6.6(4) of this Procedural Order and for the avoidance of doubt, each Party is entitled to call and examine their*

expert witness at the hearing, even if not called for cross examination by the other Party;

Added:

3.11.a. *By June 9, 2009, the Parties shall inform the Tribunal of the names and functions of the persons (including experts) attending the Hearing from their respective sides.*

3.11.b. *The Tribunal has taken note of the many and voluminous exhibits submitted by the Parties together with their briefs. As only a limited number of these exhibits will be used in the time available at the Hearing, to avoid that all exhibits have to be transported to Washington, the members of the Tribunal intend to bring to the Hearing what they consider the most relevant documents, but, in order to facilitate and speed up references to documents during the hearing, the Parties shall prepare and provide at the beginning of the Hearing:*

** For the other Party and each member and the Secretary of the Tribunal "Hearing Binders" containing copies of those exhibits (including expert reports) or parts of exhibits to which they intend to refer in their oral presentations and expert examination at the Hearing,*

** one full set of all documents submitted in this procedure.*

3.13. *Parties shall not submit Post-Hearing Briefs unless agreed otherwise by the Parties or considered necessary by the Tribunal.*

6. *Hearing in Washington D.C.*

6.2. *It is recalled that Art. XIV.17 SLA provides as follows:*

Hearings of the tribunal shall be open to the public. The tribunal shall determine, in consultation with the Parties, appropriate arrangements for open hearings, including the protection of confidential information.

6.3. *The Hearing shall be simultaneously transcribed using a live transcription software system, with the delivery to the Parties and members of the Tribunal of daily transcripts each evening after the close of the hearing.*

6.4. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable.*

Added:

- 6.4.a. *Copies of demonstrative exhibits to be used during the opening statements shall be made available by a Party to the other Party and the members of the Tribunal no later than 8:00 p.m. EDT on June 9, 2009. Demonstrative exhibits to be used in closing statements shall be made available by a Party to the other Party and to members of the Tribunal no later than 2 hours prior to delivery of the first closing statement.*
- 6.5. *Subject to further agreement between the Parties and the Tribunal, taking into account the time available during the one day for the Hearing after deduction of the time needed for breaks and lunch, the Tribunal intends to establish equal maximum time periods both for the Claimant and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest by May 22, 2009.*
- 6.6. *Unless otherwise agreed between the Parties and the Tribunal, the Hearing shall start at 9:30 a.m. and end no later than 6:00 p.m. The Agenda of the Hearing shall be as follows:*
1. *Short Introduction by Chairman of Tribunal.*
 2. *Opening Statement by Claimant of up to 1 hour.*
 3. *Opening Statement by Respondent of up to 1 hour.*
 4. *Examination of experts if expert statements have been submitted and a Party has called for their oral examination.*
 5. *Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2nd Round Presentations.*
 6. *2nd Round Presentation by Claimant of up to 1 hour.*
 7. *2nd Round Presentation by Respondent of up to 1 hour.*
 8. *Final questions by the Tribunal.*
 9. *Discussion of any issues of the further procedure.*

The members of the Tribunal may raise questions at any time, if considered appropriate.

3. *Evidence of Experts*
- 3.1. *Further to 3.11 of Procedural Order No. 1, each Party may call and conduct a direct examination of their expert witness at the hearing that may include a rebuttal of the testimony of the opposing Party's expert. Following direct examination, each expert witness shall be examined by counsel for the opposing Party ("cross-examination") and subsequently by counsel for*

the Party offering the expert, with respect to matters that arose during cross-examination ("re-direct examination"). The Arbitral Tribunal may pose questions during or after the examination of any expert.

- 3.2. *The Arbitral Tribunal shall at all times have control over oral proceedings, including the right to limit or deny the right of a Party to examine an expert when it appears to the Arbitral Tribunal that such examination is not likely to serve any further relevant purpose.*
- 3.3. *Experts shall be heard on affirmation.*
- 3.4. *Unless otherwise agreed between the Parties or ruled by the Tribunal, the experts may be present in the Hearing room during the testimony of other experts.*

4. Other Matters

- 4.1. *According to Section 6.5. of PO No. 1, where the agreement is recorded for the Tribunal to establish equal maximum time periods for the examination by the Parties, and taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (including their Opening Statements and 2nd Round Presentations) for the Hearing shall be as follows:*

*5 hours for Claimant
5 hours for Respondent.*

Except for the agreed length of their Opening Statements and 2nd Round Presentations under Agenda items 2, 3, 6 and 7, it is left to the Parties how much of their allotted total time they wish to spend on the examinations of the experts. The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established in this Procedural Order.

- 4.2. *Each Party is free to use audio visual equipment at the Hearing as long as a large screen for general viewing is made available both to counsel of the other Party and each member and the secretary of the Tribunal. The Parties are invited to coordinate their logistics in this regard before the hearing.*
- 4.3. *The Parties shall coordinate with the court reporting service and the service of ICSID in advance of the Hearing to assure that the services are available, tested and ready to start at the beginning of the Hearing. This shall include that microphones are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker.*

4.4. *The Tribunal may change any of the rulings in this order, after consultation with the Parties, if considered appropriate under the circumstances.*"

77. By letters of June 9, 2009, Claimant and Respondent in accordance with § 3.11(a) of Procedural Order No. 2 notified the Tribunal of the names and functions of the persons attending the hearing on their behalf.
78. On June 11 and 12, 2009, the Hearing on Remedy was held in Washington, D.C., USA. In addition to the members of the Tribunal, the Secretary to the Tribunal, Yun-I Kim, and the stenographer (David A. Kasdan), it was attended (as recorded in the transcript of the Hearing) as follows:

"On behalf of the Claimant:

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"On behalf of the Respondent:

*MS. PATRICIA M. McCARTHY
MR. REGINALD T. BLADES, JR.
Assistant Directors (Advocate)
MS. CLAUDIA BURKE
Senior Trial Counsel
MS. MAAME A.F. EWUSI-MENSAH
MR. DAVID S. SILVERBRAND
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79. At the end of the Hearing the Parties and the Tribunal agreed that, though no Post-Hearing Briefs should be submitted, Post-Hearing Notes containing the redacted manuscripts of their Closing Statements and replies to the questions raised by the Tribunal during the Hearing should be submitted within one week after the end of the Hearing and not exceeding 25 pages.
80. By June 19, 2009, the Parties submitted their Post-Hearing Notes.

E. Principal Relevant Legal Provisions

E.I. The Arbitration Agreement

81. Art. XIV of the 2006 Softwood Lumber Agreement provides as follows:

*“Article XIV
Dispute Settlement*

1. *Either Party may initiate dispute settlement under this Article regarding any matter arising under the SLA 2006 or with respect to the implementation of Regional exemptions from Export Measures agreed upon by the Parties pursuant to Article XII.*
2. *Except as provided for in this Article, for the duration of the SLA 2006, including any extension pursuant to Article XVIII, neither Party shall initiate any litigation or dispute settlement proceedings with respect to any matter arising under the SLA 2006, including proceedings pursuant to the Marrakesh Agreement Establishing the World Trade Organization or Chapter Twenty of the NAFTA. For purposes of this paragraph, “litigation or dispute settlement proceedings” does not include actions related to alleged civil or criminal violations, including USICE/USCBP investigations or administrative penalty actions, or any proceedings related to such investigations or penalty actions.*
3. *Dispute settlement under this Article shall be conducted as expeditiously as possible.*
4. *A Party may initiate dispute settlement under this Article by requesting in writing consultations with the other Party regarding a matter arising under the SLA 2006. Unless the Parties agree otherwise, the Parties shall consult within 20 days of delivery of the request. The Parties shall make every attempt to arrive at a satisfactory resolution of the matter through consultations and shall exchange sufficient information to enable a full examination of the matter.*
5. *The Parties also may agree to submit the matter to non-binding mediation by a neutral third party in addition to, or in lieu of, the arbitration procedures set out in this Article.*

6. *If the Parties do not resolve the matter within 40 days of delivery of the request for consultations, either Party may refer the matter to arbitration by delivering a written Request for Arbitration to the Registrar of the LCIA Court. The arbitration shall be conducted under the LCIA Arbitration Rules in effect on the date the SLA 2006 was signed, irrespective of any subsequent amendments, as modified by the SLA 2006 or as the Parties may agree, except that Article 21 of the LCIA Rules shall not apply.*
7. *An arbitral tribunal shall comprise 3 arbitrators.*
8. *No citizen or resident of a Party shall be appointed to the tribunal.*
9. *Each Party shall nominate one arbitrator within 30 days after the date the arbitration commences pursuant to LCIA Article 1.2. Unless the Parties otherwise agree, if a Party fails to nominate an arbitrator within 30 days, the LCIA Court shall nominate that arbitrator.*
10. *The 2 nominated arbitrators shall jointly nominate the Chair of the tribunal within 10 days after the date on which the second arbitrator is nominated. The nominated arbitrators may consult with the Parties in selecting the Chair. If the nominated arbitrators fail to nominate a Chair within 10 days, the LCIA Court shall endeavour to nominate the Chair within 20 days thereafter.*
11. *The LCIA Court shall endeavour to appoint the 3 arbitrators thus nominated within 5 business days after the date on which the Chair is nominated.*
12. *Arbitrators shall be remunerated and their expenses paid in accordance with LCIA rates. Arbitrators shall keep a record and render a final account of their time and expenses, and the Chair of the tribunal shall keep a record and render a final account of all general tribunal expenses.*
13. *The legal place of arbitration shall be London, United Kingdom. All hearings shall be conducted in the United States or Canada as the tribunal may decide in its discretion.*
14. *The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration as adopted in 1999, as modified by the SLA 2006, shall apply in the arbitrations held under the SLA 2006, except that Article 6 of those Rules shall not apply.*

15. *If a Party wishes to designate information to be used in the arbitration as confidential, the tribunal shall establish, in consultation with the Parties, procedures for the designation and protection of confidential information. The procedures shall provide, as appropriate, for sharing confidential information for purposes of the arbitration with counsel to softwood lumber industry representatives or with provincial or state government officials.*
16. *Each Party shall promptly make the following documents available to the public, subject to Article XVI and any procedures established under paragraph 15:*
 - (a) *the Request for Arbitration;*
 - (b) *pleadings, memorials, briefs, and any accompanying exhibits;*
 - (c) *minutes or transcripts of hearings of the tribunal, where available; and*
 - (d) *orders, awards, and decisions of the tribunal.*
17. *Hearings of the tribunal shall be open to the public. The tribunal shall determine, in consultation with the Parties, appropriate arrangements for open hearings, including the protection of confidential information.*
18. *The tribunal shall give sympathetic consideration to domestic laws that:*
 - (a) *preclude a Party from disclosing information, when the tribunal determines whether that information is privileged from disclosure and whether to draw inferences from the Party's failure to disclose such information; or*
 - (b) *require a Party to disclose information subject to confidentiality procedures under paragraph 15.*
19. *The tribunal shall endeavour to issue an award not later than 180 days after the LCIA Court appoints the tribunal.*
20. *The tribunal's award shall be final and binding and shall not be subject to any appeal or other review. An award may be enforced solely as provided in this Article.*
21. *The tribunal may not award costs. \$US 10 million shall be allotted from the funds allocated to the binational industry council described in Annex 13 to pay the costs of arbitrations under this Article, including the costs of arbitrators, hearing facilities, transcripts, assistants to the tribunal, and costs of the*

LCIA. Each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel.

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.*

25. *In the case of a breach by Canada attributable to a particular Region, the tribunal shall determine the compensatory adjustment applicable to that Region.*

26. *If Canada considers that the United States has failed to cure a breach by the end of the reasonable period of time, Canada may make the compensatory adjustments that the tribunal has determined under paragraph 22(b).*

27. *If the United States considers that Canada has failed to cure a breach and has not made the compensatory adjustments that the tribunal has determined under paragraph 22(b) by the end*

of the reasonable period of time, the United States may impose compensatory measures in the form of volume restraints and/or customs duties on imports of Softwood Lumber Products from Canada, as follows:

- (a) the amount of the volume restraints shall not exceed the adjustment to the volume restraints that the tribunal has determined; and*
 - (b) the customs duties shall not exceed the adjustment to the Export Charges that the tribunal has determined.*
28. *Measures taken in accordance with paragraph 27 shall not be considered a breach of Article V. For greater certainty, the United States may initiate an investigation or take action with respect to Softwood Lumber Products under Sections 301 to 307 of the Trade Act of 1974, solely for the purpose of paragraph 27.*
29. *If, after the expiry of the reasonable period of time:*
- (a) the United States considers that the compensatory adjustments that Canada is applying reduce Export Charges or allow for export volumes beyond those that the tribunal has determined under paragraph 22(b);*
 - (b) Canada considers that the compensatory measures the United States is applying exceed the levels authorized for those measures under paragraph 27; or*
 - (c) the Party Complained Against considers that it has cured the breach, in whole or in part, such that the compensatory adjustments or measures should be modified or terminated, and the Complaining Party does not agree,*

the Party may commence a new arbitration to address the matter, by delivering a written Request for Arbitration to the Registrar of the LCIA Court.

30. *In any arbitration initiated under paragraph 29, the LCIA shall appoint to the tribunal the arbitrators comprising the original tribunal, to the extent they are available, within 10 days after the Request for Arbitration is delivered. Any member of the original tribunal who is no longer available shall be replaced in accordance with Article 11 of the LCIA Rules and paragraph 8. The tribunal shall endeavour to issue its award within 60 days after delivery of the Request for Arbitration referred to in paragraph 29.*

31. *If in its award in an arbitration initiated under paragraph 29, the tribunal finds that the compensatory adjustments or measures that are the subject of the arbitration are inconsistent with the award in the original arbitration or that the breach has been cured in whole or in part, the tribunal shall determine the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated.*
32. *An award under paragraph 31 shall be effective as of the date that the compensatory adjustments or measures were imposed and, accordingly, shall provide that:*
 - (a) *Canada shall collect any Export Charge that the tribunal finds it should have imposed and the United States shall refund any customs duties that the tribunal finds it should not have collected, retroactive to that date; and*
 - (b) *Canada shall impose additional export volume restraints to compensate for any excess export volumes that the tribunal finds that Canada has allowed and Canada may increase the export volumes permitted under the export restraints to compensate for any excess import restraints the tribunal finds that the United States has imposed since that date, with these adjustments to be applied to exports from the pertinent Region or Regions in equal monthly amounts during a period following the award as determined by the tribunal."*

E.II. Vienna Convention on the Law of Treaties

82. The principal provisions of the VCLT relevant for this case are as follows:

"Article 31

General rule of interpretation

1. *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 object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

- (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
 - (b) *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.*
3. *There shall be taken into account, together with the context:*
- (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) *leaves the meaning ambiguous or obscure; or*
 - (b) *leads to a result which is manifestly absurd or unreasonable.”*
83. Both the USA and Canada acceded to the VCLT in 1970. Its relevant terms are also considered declaratory of customary international law. Both Parties referred the Tribunal to the VCLT in support of their respective cases in these arbitration proceedings.

E.III. ILC Draft Articles on State Responsibility

84. The principal provisions of the ILC Draft Articles on State Responsibility relevant for this case are as follows:

*“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.*

[...]

*Article 34
Forms of reparation*

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

[...]

*Article 36
Compensation*

1. *The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*
2. *The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”*

F. Relief Sought by the Parties in the present LCIA Case

F.I. Relief Sought by Claimant

85. As identified in the Request for Arbitration (C I, §§ 30-32) Claimant requested the Tribunal to award as follows:

"30. Canada respectfully requests an award in its favour, finding that:

- (a) Canada's payment of USD \$34 million to the United States before the expiry of the Reasonable Period of Time plus simple interest at 4 percent fully cured the breach found by the Tribunal in LCIA 7941;*
- (b) the United States must accordingly terminate any compensatory measures imposed under Article XIV(27);*
- (c) the United States, pursuant to Article XIV(32), must refund all customs duties collected retroactive to the date that the compensatory measures were imposed; and*
- (d) Canada may terminate any compensatory adjustments imposed pursuant to the Award on Remedies in LCIA Case No. 7941 and may refund any tax collected pursuant to the Award.*

31. *If the Tribunal finds that Canada's payment has not cured the breach in full, Canada respectfully requests that the Tribunal identify in its Award the amount of a payment to the United States from Canada that the Tribunal would consider sufficient to fully cure the breach.*

32. *Alternatively, if the Tribunal determines that a cash payment cannot cure the breach found in this case, Canada advises the Tribunal that Canada will impose the compensatory adjustments identified in the February 23, 2009 Award.²⁶ If so, Canada respectfully asks the Tribunal to clarify whether Canada may allocate the total amount of additional charge to be collected either by region, or by individual exporters from the Option B Regions, in proportion either to the amount that region or exporter shipped to the United States from January 1, 2007 to June 30, 2007 (the breach period) or in the amount that they shipped in excess of what their correctly calculated quota would have been. Further, Canada requests*

²⁶ See, Statement of Canada's Minister of International Trade, the Hon. Stockwell Day, March 31, 2009 (Exhibit K).

confirmation that any customs duties collected as compensatory measures by the United States under Article XIV(27) would be deducted from the total amount of compensatory adjustments Canada would be required to collect.

86. Claimant restated its request in its Statement of Case of May 12, 2009, requesting the Tribunal to award as follows (C II, §§ 62-68):

“62. Canada respectfully requests an Award finding that:

- 1) A payment to the United States of USD\$34 million plus simple interest at 4 percent fully cures the breach found by the Tribunal in LCIA 7941;*
- 2) The United States, upon receipt of the payment, must terminate any compensatory measures imposed under Article XIV(27); and*
- 3) The United States, pursuant to Article XIV(32), must refund all customs duties collected, plus simple interest at 4 percent retroactive to the date that the compensatory measures were imposed.*

- 63. If the Tribunal finds that Canada’s payment has not cured the breach in full, Canada respectfully requests that the Tribunal identify in its Award the amount of a payment to the United States from Canada that the Tribunal would consider sufficient to fully cure the breach.*

- 64. The Tribunal’s mandate under Article XIV(29)(c) includes determining whether Canada has cured the breach in whole or part. If the Tribunal finds that Canada’s payment cures the breach only in part, paragraph 31 requires the Tribunal to determine the extent by which compensatory adjustments or measures should be modified, in accordance with paragraph 32. A determination by the Tribunal of the extent to which the compensatory adjustments or measures should be modified will necessarily require a determination of the additional amount over USD\$34 million necessary to effectuate a full cure of the breach. In addition, if the Tribunal finds that Canada’s payment cures the breach only in part, the Tribunal must also determine the extent to which Canada has cured the breach before it can determine an appropriate adjustment to the export charge that Canada would collect under paragraph 32. Given that the Tribunal will necessarily have to determine the amount necessary to cure the breach in its determinations under Article XIV(31) and (32), Canada respectfully requests that the Tribunal advise Canada of any additional amount*

necessary, if the Tribunal considers that Canada's tender does not fully cure the breach.

65. Determining the additional amount required for a full cure of the breach will assist in achieving an expeditious and satisfactory end to this dispute, as required by Article XIV(3). An objective of the dispute settlement system under the SLA is the fast and final resolution of disputes.⁶⁸ The timeframe for proceedings under Article XIV(19) provides that "the tribunal shall endeavour to issue an award not later than 180 days after the LCIA Court appoints the tribunal." The timeframe for arbitrations commenced under Article XIV(29) is just 60 days from the Request for Arbitration. Advising of the amount necessary to effectuate a full cure is consistent with this objective of efficient and expeditious dispute settlement, because it will obviate the need to return to the Tribunal for a determination on this issue.
66. Alternatively, if the Tribunal determines that a cash payment cannot cure the breach found in this case, Canada will impose the compensatory adjustments identified in the February 23, 2009 Award.⁶⁹ In this event, Canada respectfully asks the Tribunal to clarify whether Canada may allocate the total amount of the additional charge to be collected either by Region, or by individual exporters from the Option B Regions, in proportion either to the amount that Region or exporter shipped to the United States from January 1, 2007 to June 30, 2007 (the breach period) or in the amount that they shipped in excess of what their correctly calculated quota would have been.
67. In answering this request, the Tribunal would be acting consistently with the administrative efficiency principles mentioned above. As discussed, an objective of the Parties in creating the dispute settlement system was to ensure that the system resolved matters expeditiously. This implies bringing finality to matters.⁷⁰ Without the Tribunal determining how Canada may or should allocate the export charge, there is a significant risk that the United States may disagree with the

⁶⁸ This latter goal is expressed in Article XIV(4), which although pertains to consultations, makes it clear the Parties are expected to use the dispute settlement process to arrive "at a satisfactory resolution of the matter."

⁶⁹ See Statement of Canada's Minister of International Trade, the Hon. Stockwell Day (Mar. 31, 2009) (Ex. C-11).

⁷⁰ As noted above, Article XIV(3) requires "[d]ispute settlement shall be conducted as expeditiously as possible" and paragraph 19 further buttresses this notion by establishing the aspiration that an award be issued no later than 180 days after a Tribunal is appointed. This timeframe is further shortened for arbitrations commenced under Article XIV(29) to 60 days.

allocation method Canada chooses resulting in an additional arbitration under Article XIV(29), significantly delaying a final resolution of this matter.

68. *Finally, Canada requests that the Tribunal exercise its jurisdiction under paragraphs 31 and 32 to modify the award in LCIA 7941, if it finds that Canada has not cured the breach, by deducting any customs duties collected as compensatory measures by the United States under Article XIV(27) from the total amount of compensatory adjustments Canada would be required to collect. This will ensure that Canada is not paying more compensatory adjustments than necessary to fully cure the breach found by the Tribunal."*

F.II. Relief Sought by Respondent

87. As identified in Respondent's Response to Canada's Request for Arbitration of April 17, 2009 (R I, § 38), Respondent requested the Tribunal to award as follows:

"The United States respectfully requests that the Tribunal issue an award in favor of the United States and against Canada:

- a. Declaring that, even if the United States had received Canada's offer of a lump sum cash payment, that such a payment would not have cured the breach in whole or in part; and*
- b. Denying and dismissing Canada's claims in their entirety."*

88. This request was reiterated in the Statement of Defence (R II, § 67):

"The United States respectfully requests that the Tribunal issue an award in favor of the United States and against Canada:

- a. Declaring that Canada's offer does not cure the breach in whole or in part;*
- b. Declaring that Canada has not cured the breach in whole or in part; and*
- c. Denying and dismissing Canada's claims in their entirety."*

89. Respondent requested the Tribunal to award again as follows in its Post-Hearing Note (R III, p. 15):

“We therefore respectfully request that the Tribunal determine that Canada has failed to cure the breach.”

G. Summary of Contentions of the Parties

G.I. Summary of Contentions by Claimant

90. Subject to later sections of this Award addressing particular issues, the main arguments of Claimant can best be summarised by quoting §§ 18 to 29 of Claimant's Request for Arbitration of April 2, 2009 (C I):
18. *On March 27, 2009 Canada tendered a payment to the United States of USD\$34 million plus simple interest at 4 percent as a full cure of Canada's breach found by the Tribunal in LCIA Case No. 7941.*¹⁸
 19. *The United States did not accept Canada's tender of payment as a full cure by the date and time set out in Canada's letter of March 27, 2009.*¹⁹
 20. *Canada understands that the United States intends to impose compensatory measures in the form of customs duties on all imports of Softwood Lumber Products from Option B Regions in the near future.*
 21. *Canada considers that its tender of payment of USD\$34 million plus interest to the United States constitutes a full cure of the breach.*
 22. *The Tribunal's Award on Remedies found, contrary to Canada's position, that cessation of the breach did not constitute a full cure. Paragraph 22(b) did not require the Tribunal to determine an alternative cure, nor did either Party request the Tribunal to make such a determination.*
 23. *In contrast, paragraph 29(c) of the SLA directly calls for the Tribunal to determine whether Canada's tender of payment has cured the breach such that any compensatory adjustment or measure must be modified or terminated, and any monies collected in the interim, be refunded in full.*

¹⁸ Letter of Canadian Ambassador to the United States, Ambassador Michael Wilson, to United States Trade Representative, Ambassador Ronald Kirk, March 27, 2009 (Exhibit F).

¹⁹ *Id.*

24. *When determining compensatory adjustments under paragraph 22(b), an arbitral tribunal is limited to determining appropriate adjustments to the Export Measures. The tribunal may not award cash compensation under that provision. Unlike compensatory adjustments, however, the SLA places no limitation on the form that a cure must take.*
25. *In both its written submissions and its oral statements at the Hearing on Remedies, the United States recognized that a “cure” need not be in the form of adjustments to the Export Measures, and that it could take the form of a cash payment.²⁰*
26. *At the September 22, 2008 Hearing on Remedies, the United States agreed that a cash payment to the U.S. government was one way for Canada to cure its breach.²¹*
27. *Since the Award was issued, the United States has reaffirmed that the form of cure is flexible. In a public statement about the award issued on February 26, 2009, the United States Trade Representative stated that:*

Under the provisions of the SLA, while Canada has some flexibility in determining an appropriate means of curing the breach, Canada must implement the compensatory adjustments determined by the tribunal unless Canada cures the breach some other way. If Canada does not take action in accordance with the tribunal’s decision or otherwise cure the breach within 30 days, the United States is authorized by the SLA to impose the additional charges itself.²² (emphasis added)

28. *The United States, through its expert Dr. Neuberger, recognized that changes in producer surplus could be used as a measure of economic harm to U.S. softwood lumber producers resulting from Canada’s breach.²³ Dr. Neuberger calculated the “lost producer surplus” for the breach period to be US\$34 million.²⁴ That sum was the amount that Dr. Neuberger, in testimony presented by the United States, represented as “the change in [US] producer surplus that arises as a direct consequence of the price-reducing impact of Canada’s breach of the SLA.”²⁵*

²⁰ See, e.g., U.S. Post-Hearing Brief at Note 3 and ¶ 56 (Exhibit G); Hearing on Remedies at Tr. 31:10-13 (Exhibit H).

²¹ See, e.g., Hearing on Remedies at Tr. 290:25-291:2 and 301:4-10 (Exhibit H).

²² USTR News Release: Tribunal Orders Canada to Cure Breach of the Softwood Lumber Agreement, February 26, 2009 (Exhibit I).

²³ Neuberger Second Rebuttal Report ¶ 13 (Exhibit J).

²⁴ *Id.*

²⁵ *Id.*

29. *The US\$34 million plus interest tendered by Canada is a full cure of the breach.*"

G.II. Summary of Contentions by Respondent

91. Subject to later sections of this Award addressing particular issues, the Respondent's main arguments are best summarised by quoting §§ 2 to 8 of the Introduction to Respondent's Statement of Defence (R II, §§ 2-8):

2. *By offering to settle the dispute in United States v. Canada, LCIA No. 7941, with a conditional lump sum payment of US\$34 million, Canada has not cured the breach found by the Tribunal in its Award on Liability. The 2006 Softwood Lumber Agreement ("SLA" or "Agreement") permits the breaching party to commence a new arbitration if it "considers that it has cured the breach in whole or in part," and if the nonbreaching party disagrees. C-1, SLA, art. XIV, ¶ 29. The SLA then contemplates that the Tribunal determine whether the "breach has been cured in whole or in part." Id., ¶ 31 (emphasis added). On the most basic level, Canada's settlement offer did nothing at all — it resulted in no payment and would have depended upon actions of the United States to have any effect. Even if Canada had done more than merely offer a settlement proposal, its alleged action contravenes the remedy principles set forth in the Tribunal's Award on Remedies, is inconsistent with the provisions of the SLA, and has not cured the breach.*
3. *The ordinary meaning of the SLA makes clear that in an Article XIV, paragraph 29 proceeding, such as this, the breaching party must have already taken an action that can be determined either to have cured the breach in whole, cured the breach in part, or failed to cure the breach. Here, Canada took no steps to cure the breach — indeed, took no action whatsoever — and therefore cannot be deemed to have "cured the breach."*
4. *Instead, Canada merely sent a settlement offer to the United States. Now, Canada asks the Tribunal to determine whether its condition-laden offer (which it misleadingly terms a "tender" or a "payment") would have constituted a cure if the United States had accepted it. Canada goes so far as to seek an award that would effectively force the United States to retract its rejection and accept Canada's offer, despite the offer's inadequacies and overt disregard for the Tribunal's Award on Remedies. As justification for this request, Canada relies entirely upon misrepresentations of the United States' position*

during the remedy proceedings in *United States v. Canada*, LCIA No. 7941 ("remedy proceedings"). Contrary to Canada's operating premise, the SLA does not contemplate a new arbitration to determine the merit of such a settlement offer.

5. Even if Canada's offer of a conditional payment could be considered an attempted cure as opposed to a settlement offer, and even if an attempted cure could be a valid basis for a paragraph 29 arbitration, a lump sum payment of \$US34 million still would not cure the breach.
6. In its *Award on Remedies*, the Tribunal explained that a breaching party must provide complete reparation for any breach. Thus, any cure or compensatory measures must "wip[e] out all the consequences of the breach." C-5, ¶¶ 309, see also 295-96. The Tribunal then described the characteristics that remedies should possess, explaining that any remedy must affect the volume of lumber exported by Option B regions, which is, as the Tribunal concluded, the very purpose of the SLA. C-5, ¶¶ 329-335. The Tribunal chose the United States' preferred remedy, which assesses an additional export charge on Option B regions, as a means to encourage those regions to decrease exports. This ultimately would achieve the necessary effect upon the volume of exports that is central to the Agreement and to remedying the breach. C-5, ¶¶ 335-36.
7. Canada's proposed conditional payment would do nothing whatsoever to encourage Option B regions to decrease their exports. In fact, the lump sum payment would not even originate from Option B regions. Rather, it would originate from the Canadian federal government and essentially act as a subsidy to Option B regions, thus providing no incentive for Option B regions to decrease exports. Additionally, a lump sum payment would not remedy the harm to United States producers in any way. On any level, then, the offer is substantially inferior to the compensatory adjustments ordered by the Tribunal, which provided a mechanism to wipe out the consequences of the breach by encouraging Option B regions to reduce exports, thus benefiting United States producers, and honoring the core structure and economic effect of the export measures. To force the United States to accept such an inferior remedy – one that disregards the effect of the Tribunal's award and necessarily does not wipe out the consequences of the breach – would be to render entirely meaningless the remedy proceedings.

8. *Aware of this fundamental flaw, Canada mischaracterizes its proposal as merely the "lump sum" version of Dr. Neuberger's second preferred remedy, but no such version exists. Canada seizes upon one aspect of the model supporting that proposal, takes that aspect out of context, and claims that a lump sum payment of US\$34 million is tantamount to the relief described in the remedy proposal. In reality, Canada's offer of a conditional lump sum payment is wholly different from Dr. Neuberger's second preferred remedy and reflects only Canada's attempt to revisit issues that were addressed and disposed of during the remedy proceedings."*

H. Considerations and Conclusions of the Tribunal

92. The Tribunal has given consideration to the extensive factual, expert and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Award, the Tribunal discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal itself considers to be the determinative factors required to decide the issues of remedies in this case.

H.I. Preliminary Considerations

1. Applicable Law

a. Applicable Procedural Rules

93. Regarding the procedural rules applicable by the Tribunal, **Art. XIV SLA** provides for detailed procedures which have been quoted above in this Award.
94. From the text of Art. XIV SLA, it should be particularly noted that, in so far as it provides no specific procedural rules, reference, in its § 6, is made to:
- the **LCIA Arbitration Rules** as in effect on the date the SLA was signed, and, in addition, by Art. XIV § 14 of the SLA, to the **IBA Rules on the Taking of Evidence in International Commercial Arbitration** as adopted in 1999, but as modified by the SLA.
95. Furthermore, Art. XIV § 13 of the SLA provides that the legal place of the arbitration shall be London, United Kingdom. According to Section 2(1) of the **English Arbitration Act 1996**, that Act is applicable "*where the seat of the arbitration is in England*". Whether the effect of this provision (the two phrases being legally synonymous) is altered by the fact that the present arbitration takes place between two foreign states under a treaty in the field of public international law need not here be considered further, beyond the limited subject of costs addressed separately later in this Award.

b. Applicable Substantive Law

96. While the Parties have taken it for granted that, in addition to the SLA, the Vienna Convention on the Law of Treaties (VCLT) is applicable to the current dispute (cf. C II, § 14; R II, §§ 1, 53), there is some dispute between the Parties as to what extent further provisions of public international law such as the ILC Draft Articles on State Responsibility apply in the present case, the Parties' reasoning being discussed in more detail later in this Award.

2. Relevance of Decisions of Other Courts and Tribunals

97. The arguments brought forth by the Parties make reference to decisions of other courts and tribunals. It is thus appropriate for the Tribunal to make certain general preliminary observations in this regard. As the Tribunal has not changed its views since its Award on Remedies in the earlier case between the same Parties (see the references above in the Procedural History), this can best be done by quoting from §§ 82 to 86 of that earlier Award:
98. 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.
99. On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's "preparatory work" and the "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.
100. That being so, it is not evident how far arbitral awards are of determinative relevance to the Tribunal's task. It is at all events clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
101. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties derived from

them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.

102. Such an examination will be conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable SLA provisions, while taking into account the above-mentioned specificity of the SLA to be applied in the present case.

3. The Tribunal's Awards in Case 7941 on Liability and Remedies as a Starting Point to present LCIA Case

103. Having agreed to a bifurcation of the proceedings (cf. liability proceedings, Procedural Order No. 1, § 3), the Tribunal by letter of March 3, 2008, issued the Award on Liability. The following quotation from the Tribunal's Award on Liability may be recalled regarding the further procedure:

"4. As the Parties agreed at the end of the Hearing in New York on December 12, 2007 (Tr. 123/4), rather than the Tribunal deciding now on the specific consequences of any breach by Canada in accordance with paragraphs 22 et seq. of Art. XIV SLA, the Parties are invited to submit, within one month of the date of this Award, comments or (if possible) an agreement on how to proceed in this regard." (Award, p. 97, I.4.)

104. By separate letters of April 3, 2009, the Parties submitted comments on further proceedings on Remedy, requesting the Tribunal to initiate the second phase of the proceedings (the remedies phase), and the procedure continued as described in the section on Procedural History above.

105. As the Award on Remedies issued to the Parties on February 26, 2008 has led to and to some extent is the subject of the present new LCIA case and procedure, its Decisions should be recalled again as a starting point for the further considerations of the Tribunal:

"1. It is recalled that, in its Award on Liability of March 3, 2008, this Tribunal decided as follows:

"1. The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not

breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA's case to the contrary is dismissed.

2. *The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore Canada's case to the contrary as to interpretation is dismissed.*
3. *Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach."*
2. *With regard to Respondent's breach found by the above decision, in accordance with Art. XIV § 22 subsection (a), the Tribunal identifies 30 days from the date of this Award as a reasonable period of time for Respondent to cure the breach.*
3. *In accordance with Art. XIV § 22 subsection (b), as an appropriate adjustment to compensate for the breach found above, Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN \$ 63.9 million, plus CDN \$ 4.36 million in interest (a total of CDN \$ 68.26 million) has been collected.*
4. *All other claims raised in this arbitration are dismissed."*

H.II. Jurisdiction

106. The Parties have exchanged arguments regarding jurisdiction in their briefs and early in the Hearing, though the respective issues became more limited later in the hearing in reaction to discussion with the Tribunal. In particular, the Parties disagree on the question whether consent between the Parties is a necessary requirement for a remedy to constitute a "cure" under the SLA.

1. Arguments by Respondent

107. Respondent argues that it rejected Claimant's settlement offer of a lump sum payment of US\$ 34 million plus simple interest submitted by the Canadian Ambassador's letter of March 27, 2009 (R I, § 21), since "*a lump sum cash payment*" can only cure the breach at issue if

there is prior agreement of the Parties that such payment remedy the breach (R I, § 30).

108. Respondent strongly opposes the idea that Claimant's letter could constitute a tender. In support of its contention, Respondent emphasises that a tender is "*an unconditional offer of payment*" (Tr 62:10-13; R III, pp. 3, 19, 20). However, Respondent contends that Canada's letter did not merely state consequences flowing from the SLA, but contained several conditions such as the Respondent's acceptance of the payment "*as a full cure*" and Respondent having to concede its legal position during any additional proceedings under the SLA (R III, p. 3). To further support its contention, Respondent draws upon the hypothetical that if it accepted the US\$34 million, it would then be barred from bringing a claim (for example) that this amount constituted a partial cure only (R III, p. 4).
109. Respondent agrees with Claimant that a cure as such does not require the consent of the non-breaching party (R II, § 33). Respondent goes on to argue that some actions such as a settlement proposal, would require the consent of the Parties (R II, § 33). According to Respondent, this is precisely the reason why Claimant's proposal has not cured the breach, since it constitutes nothing more than a settlement offer and thus would have required Respondent's acceptance (R II, § 35; R III, p. 2).
110. Respondent further submits that if it were forced to accept Claimant's settlement proposal, it would "*effectively allow Canada to provide a subsidy to the very same Option B regions and producers or exporters that overshipped during the breach period*" (R II, § 44).
111. As far as the jurisdiction of the Tribunal is concerned, Respondent, in its Closing Statement at the Hearing, made it clear that nevertheless, it does "*not contend that the Tribunal should dismiss the proceeding for lack of jurisdiction*" or dismiss the claims brought forward as unripe (R III, pp. 5, 17).

2. Arguments by Claimant

112. Claimant strongly contests Respondent's objection that in order to cure a breach the agreement of the Parties is required, stating that Article XIV of the SLA does simply not provide for a requirement of prior agreement (C II, § 8, § 37; C III, §§ 30, 32). Rather, in Claimant's submission, it is solely up to the Tribunal to determine whether the breach has been cured (C II, § 37).

113. Looking at the wording of Art. XIV § 22(a) and § 29(c) SLA, Claimant concludes that regardless of an agreement of the complaining party a cure “*may be effectuated by the Party found to be in breach of the SLA*” if it considers it has cured the breach (C II, § 38; cf. C III, § 33, §§ 53 *et seq.*).
114. In this context, Claimant also emphasises that, although Respondent might have a preference for the compensatory measures determined in the Award on Remedies, it is not “*a basis for refusal of a cure*” (C II, § 8). On the contrary, Claimant submits that “[*n*]othing in the SLA provides that cures in the form of cash payments require agreement of the Parties while other forms of cure do not” (C II, § 41; cf. C III, § 65).
115. According to Claimant, Respondent’s interpretation *would render the dispute resolution mechanism in Article XIV(29)(c) meaningless* (C II, § 37) since the requirement of a prior agreement would make no sense “*because there would be no disagreement for the Tribunal to resolve*” (C II, § 38, § 40).
116. Claimant submits that the Tribunal has broad jurisdiction to address both issues of cure and compensatory adjustments under paragraphs 29 to 32 of Article XIV of the SLA (C III, § 68) and that this arbitration on the issue of cure “*suffers from no procedural or jurisdictional infirmities*” (C III, § 56).

3. The Tribunal

117. In view of Respondent’s submission later in the Hearing not insisting on a dismissal of Claimant’s claims merely on jurisdictional grounds (as recorded above), the Tribunal can deal with the issue of jurisdiction more shortly than otherwise might have been necessary.
118. The Tribunal appreciates this approach by Respondent, because indeed it would be an unsatisfactory conclusion to end the present proceedings by a mere jurisdictional decision with the consequence that the substantive issues disputed between the Parties would remain undecided by this Tribunal and require either Party to start a further and new arbitration in order to have them decided, possibly by a different tribunal.
119. The Tribunal therefore only notes that it agrees with Claimant to the effect that its jurisdiction under §§ 29 to 32 of Art. XIV of the SLA must be interpreted to be rather broad in order to meet the obvious purpose of these provisions to reach a meaningful decision for the Parties. This jurisdiction, therefore, must be seen to include both the issues of cure and compensatory adjustments.

120. On the other hand, while the Parties remain the masters of their dispute and – by way of a settlement – could have agreed on another cure or other compensatory measures replacing those provided by the Award on Remedy, the present Tribunal does not have such a wide authority. The jurisdiction of this Tribunal is limited by the Award in the earlier arbitration and the options given in §§ 29 and 31 of Art. XIV SLA: It may decide that a Party has cured the breach in whole or in part, or that any compensatory adjustments by a Party are inconsistent with the Award in the earlier arbitration, and thereafter the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated. These limitations on its jurisdiction will have to be taken into account by the Tribunal in its further considerations of the relief sought by Claimant.

H.III. The Form of Cure under the SLA

121. The form of “cure” under Art. XIV of the SLA is the subject of considerable disagreement between the Parties. While Claimant submits that the SLA “*places no limitation on the form that a cure must take*” (C I, § 24; C II, § 5), Respondent asserts that the SLA contains some constraints with regard to the form of the cure.

1. Arguments by Claimant

122. With regard to compensatory adjustments under Art. XIV § 22(b) of the SLA, Claimant points out that the Tribunal may not award cash compensation, but is limited to compensatory measures (C I, § 24; C II, § 3; cf. C III, § 41). To support its contention, Claimant draws upon the language of Art. XIV §§ 22(b), 23, and 24 SLA, which “*contain express language to constrain the mode or quantum that compensatory adjustments may take*” (C II, § 29). Thus, while compensatory adjustments under § 22(b) of Art. XIV SLA determine the “*form, timing, and amount*” of the appropriate remedy, such a constraint is purposefully absent from § 29(c) of Art. XIV SLA.
123. Therefore, with regard to the cure of a breach of the SLA, Claimant asserts that the agreement does not limit the form of such a cure (C I, § 24; C II, § 30; C III, § 42). In fact, Claimant submits that it “*may choose how to allocate responsibility for paying the tax*” as long as that allocation is consistent with the Award on Remedies (C III, § 67). Claimant further contends that a cash payment would in many respects be “*the most efficient and logical form*” of a cure (C II, § 35, § 43, § 56; C III, § 50). To support this contention, Claimant argues

that by way of a cash payment, market distorting consequences would be avoided and that "*monetary damages offer certainty*" (C II, § 36, § 56; cf. C III, § 61 *et seq.*). In contrast, export taxes as a remedial means are said to be "*inherently inferior*" to a direct cash compensation (C II, § 57). Whilst such measures may have an effect to a certain extent, Claimant also alleges that "*both Parties recognized that trying to compensate for a past breach through future imposition of export taxes produces inherently uncertain results*" (C II, § 58). Therefore, Claimant had argued in LCIA Case 7941 that trade-restricting compensatory measures should be imposed in a prospective manner only to provide an incentive to the breaching party to stop its breaching behaviour (C III, § 46).

124. Claimant further contends that Respondent has confirmed that there are no limitations as to what form a cure may take and that it "*recognized that a "cure" need not be in the form of adjustments to the Export Measures, and that it could take the form of a cash payment*" (C I, § 25; C II, § 5, § 33). In addition, Respondent purportedly agreed that a cash payment to the U.S. Government (C I, § 26).
125. Invoking a public statement of the United States Representative of February 26, 2009, Claimant further asserts that Respondent "*reaffirmed*" that the form of a cure is flexible when the United States Representative stated that "*Canada has some flexibility in determining an appropriate means of curing the breach*" and that the compensatory measures determined in the Award on Remedies would have to be implemented "*unless Canada cures the breach some other way*" (C I, § 27; cf. C II, § 32, § 34).

2. Arguments by Respondent

126. Respondent maintains that while it has never received any funds from Claimant that could possibly be considered a cure, and, even if such funds had been received, they would not cure the breach found by the Tribunal, neither wholly nor in part (cf. R I, § 2). Respondent further notes that Claimant's letter dated 27 March 2009 could not justify the Tribunal in providing any such relief (R III, p. 5).
127. Although Respondent concedes having acknowledged that a cure could be made in the form of a cash payment, Respondent points out that it thought this possible only "*if the parties agreed that such payment remedied the breach*" (R I, § 30). In addition, Respondent submits that up to now it has not proposed that a cash payment equaling lost producer surplus could possibly cure the breach in question (R III, 13). All Respondent has done was refer to a "*potential cure*" (R III, 14).

128. Respondent further notes that the Tribunal did not determine the form of a cure in its Award on Remedies, but instead identified certain goals that the compensatory adjustment measures should achieve in order to wipe out the consequences of its breach (R II, § 9). And while Claimant “*initially appeared inclined*” to impose the compensatory measures ordered by the Tribunal in its Award on Remedies, Respondent concludes that eventually Claimant “*attempted to negotiate a settlement*” (R II, § 25).
129. Respondent further asserts that Claimant even went so far as to “*state that the Award on Remedies is not binding*” (R III, p. 2) and that Claimant’s proposal provides “*none of the assurances*” of the Award on Remedies (R III, p. 7).
130. Moreover, with regard to potentially reviewable actions, Respondent submits that it could for example have implemented different compensatory measures from the measures determined in the Award on Remedies and submitted these measures to review by the Tribunal (R II, § 31). Another possibility would have been to collect a lump-sum export charge from Option B regions and to request the Tribunal to examine whether this constituted a cure of the breach (R II, § 31).

3. The Tribunal

131. The Tribunal considers that it is not its mandate in the present proceedings nor is there a need in this context to deal with the definition of a “*cure*” according to § 22(a) of Art. XIV SLA in a general way. Rather, its mandate is limited by the relief sought by the Parties in the present proceedings and the definition of “*cure*” in so far as it is relevant in that specific context. Therefore, the Tribunal will deal with the issue in later sections of this Award examining the primary relief sought by Claimant focusing on the question whether the letter of March 27, 2009, or the proposed payment of a lump sum provided a “*cure*”.

H.IV. Claimant’s Primary Relief Sought

132. For convenience, the primary relief sought by Claimant is recalled again (C II, § 62):

“Canada respectfully requests an Award finding that:

- 1) *A payment to the United States of USD\$34 million plus simple interest at 4 percent fully cures the breach found by the Tribunal in LCIA 7941;*
 - 2) *The United States, upon receipt of the payment, must terminate any compensatory measures imposed under Article XIV(27); and*
 - 3) *The United States, pursuant to Article XIV(32), must refund all customs duties collected, plus simple interest at 4 percent retroactive to the date that the compensatory measures were imposed."*
133. Even if, as seen above, the letter of March 27, 2009, by itself was not a cure, it is much debated between the Parties whether a payment of US\$ 34 million plus interest of March 27, 2009, would have constituted a full cure of the breach.

1. Arguments by Claimant

134. Claimant submits that by offering a payment of US\$ 34 million plus simple interest on March 27, 2009, it fully cured the breach that was found in the Award on Remedies (C I, § 15, § 21, § 29; C II, § 1, § 4, § 6, § 10, § 31; C III, §§ 25, 54, 58).
135. In support of its argument, Claimant asserts that “[s]uch a lump-sum payment provides the United States with full reparation for the only harm that the United States attempted to demonstrate” in the preceding arbitration on remedies where Respondent allegedly focused solely on the harm for U.S. producers during the breaching period (C II, § 4; C III, §§ 10, 14). Claimant contends that “*there is no basis to disqualify Canada’s cure because there might be new elements of injury that the United States now says might exist*” (C III, § 14).
136. Claimant also contends that its offer was unconditional stating that “*the so-called ‘conditions’ really amount simply to confirmation that the United States would not accept the cash proffered as a cure and then act as if there had been no cure*” (C III, § 30). Claimant insists that its letter is solely describing the consequences that automatically flow from a cure under the SLA (C III, § 57). Therefore “[n]one of the so-called conditions imposed any burden on the United States, and none of the so-called conditions diminish or qualify the value of the compensation that was offered by Canada” (C III, § 57).
137. In addition, Claimant rejects the assertion that they tendered an “11th hour” offer”, but stresses that “*the two Governments met for*

an extended period of time and discussed this issue on at least four occasions” prior to the delivery of the letter dated March 27, 2009 (C III, § 28).

138. Claimant also contends that Respondent itself “*treats Canada’s letter as a tender payment and not as a settlement offer*” (C III, § 60). Claimant points out that Respondent does not in its reply letter of April 2, 2009, reject the “*tender [...] because it is a settlement offer that is unacceptable to the U.S., but specifically because the U.S. believes that it does not cure the breach*” (C III, § 60).
139. Claimant further asserts that its proposal accords with the objective of a cure as identified by the Tribunal, since it wipes out the consequences of the breach “*with much greater certainty and fewer collateral distortions than any remedy the LCIA 7941 Tribunal could determine within the SLA’s constraints with respect to compensatory adjustments*” (C II, § 4). Claimant also submits that the expert witnesses from both sides were agreed that market-based remedies “*do not wipe out all the consequences of the breach*” (C III, § 23; Tr 102:14-16 and 185:1-14; cf. C III, § 40). In addition, to support its argument Claimant relies on the testimony of its expert witness (C III, § 24; Tr 152:6-11).
140. Claimant further argues that for the question of cure it is irrelevant whether Canadian exporters benefited from the overshipments. The effects of the overshipments, in Claimant’s submission, have no bearing on the issue (C III, § 15). Moreover, even if this were a legal threshold issue, Claimant submits that it has successfully demonstrated that Canadian exporters did not benefit from the overshipments in the relevant time period (C III, §§ 16 *et seq.*).
141. In addition, Claimant rebuts Respondent’s argument that a cure must provide market incentives to export less lumber in order to constitute a cure (C III, §§ 20, 21). Furthermore, Claimant objects to Respondent’s assertion that a cure has to have a penal effect on Canadian exporters deterring them from overshipments in the future in order to constitute a cure (C III, § 22).
142. Claimant also objects strongly to Respondent’s expert witness’s apparent statement that Canadian producers exported larger quantities of lumber than the amount allocated to them, making clear that every lumber export subject to a quota had been approved by the Canadian Government beforehand (C III, § 22; Tr 174:15-24).
143. In reference to Article 31 of the ILC Draft Articles on State Responsibility, the *Gabčíkovo-Nagymaros Project Case* and the *Lusitania Case*, Claimant contends that reparation in international law is to be made for the injuries suffered by the non-breaching party (C II, §§ 47 *et seq.*). Furthermore, Claimant points out that the

Chorzów Factory Case, cited by Respondent, “is about reparation due by Poland to Germany – nothing more, not any and all conceivable consequences that may flow from any action” (C III, § 38).

144. In this context, Claimant submits that Respondent’s expert had himself acknowledged that “*changes in producer surplus*” could serve as a measure of economic harm to Respondent’s softwood lumber producers as result of Canada’s breach (C I, § 28; C II, §§ 53 *et seq.*; cf. C III, § 39). In fact, Claimant asserts that producer surplus is “*the standard measure of economic effects on a market’s producers [sic]*” (C II, § 6). This “*lost producer surplus*” had purportedly been calculated by Respondent’s expert to be US\$ 34 million (cf. C I, § 28; Claimant’s Exhibit J, § 13; C II, § 6, § 54; C III, § 8, § 10), a sum derived from a model which allegedly tends to “*overstate the effects*” of Claimant’s overshipments (C II, § 60, § 61).
145. In its Post-Hearing Note, Claimant further asserts that Respondent is now claiming that lost producer surplus is no longer the standard to measure the purported harm done to the United States (C III, § 11). Instead, according to Claimant, Respondent now introduces “*supposed additional effects*” that assertedly measure harm going beyond lost producer surplus (C III, § 11). Claimant also asserts that such additional effects have not been dealt with in any of Respondent’s previously submitted expert reports (C III, § 11). Moreover, Claimant submits that there is no evidence to base additional harm going beyond lost producer surplus on (C III, §§ 12 *et seq.*). Furthermore, Claimant contends that it has demonstrated that additional harm is “*highly unlikely*”, contending that the effect on United States’ supply was too small (C III, § 12).
146. Claimant emphasises that while the Tribunal found that merely ceasing the breaching behaviour did not constitute a “*full cure*” under the SLA, there was no requirement in Art. XIV § 22(b) of the SLA that required the Tribunal to determine an alternative cure. Claimant further notes that neither Party requested such a determination (C I, § 22).
147. Because in Claimant’s view the breach has been fully cured, Claimant submits that the compensatory adjustments determined in the earlier Award on Remedies should cease to have an effect, that compensatory measures imposed by Respondent under Art. XIV § 27 SLA must be terminated and that custom duties collected by Respondent on Softwood lumber imports must be refunded retroactively (C I, § 15; cf. C II, § 7).

2. Arguments by Respondent

148. Respondent submits that Claimant's proposal of a "*lump sum payment*" did not cure the breach of the SLA found earlier by the Tribunal in its Award on Remedies (R I, § 2, § 35; R II, § 2).
149. In support of its arguments, Respondent first points out that it has never received any funds from Claimant that could be considered a cure and, as has been elaborated above, even if they had been received, such funds could not possibly have cured the breach (R I, § 2; cf. R II, § 2 *et seq.*, § 5). Thus, according to Respondent, Claimant never took any action that could have been considered a cure (R I, § 21; R II, § 3; R III, p. 4). Respondent contends that Claimant's rationale (to consider its offer as constituting a cure) is "*incorrect and relies on a profoundly flawed understanding*" of the Award on Remedies as well as Respondent's expert's testimony during the remedy proceedings (R I, § 2). Respondent asserts that Claimant "*seizes upon one aspect of the model supporting [Claimant's] proposal, takes that aspect out of context, and claims that a lump sum payment of US\$34 million is tantamount to the relief described in the remedy proposal*" (R II, § 8, § 37, § 52). However, Respondent also alleges that Canada has not offered any evidence why US\$ 34 should cure the breach (R III, p. 13).
150. Respondent further emphasises that Claimant's letter dated March 27, 2009, was contingent on four conditions, namely that first, Respondent would no longer "*claim that Claimant has failed to 'cure the breach;*", second, that Respondent "*will not claim that Canada has any obligation to impose compensatory adjustments under paragraphs 22-25 of Article XIV of the SLA and Canada may refund in full any compensatory adjustments that Canada has collected pursuant to those provisions;*", and third, that the proceedings in LCIA No. 7941 would be "*terminated*" and that Respondent would waive its right to impose compensatory measures of any kind and would not impose such measures and instead "*refund in full any import duties it may have collected as a compensatory measure, and will not request a new arbitration under Article XIV(29) of the SLA*". Fourth, Respondent states that Claimant demanded that Respondent would not "*re-file any Request for Arbitration under Article XIV(1) with respect to Canada's failure to adjust Expected United States Consumption*" (R I, § 5; Respondent's Exhibit E; R II, § 14; R III, p. 18).
151. While Claimant assertedly voiced its intention to initiate arbitration proceedings if Respondent declined to consider the offered payment as a full cure, Respondent submits that it informed Claimant that it "*has never represented, and does not consider, that such a payment cures the breach found by the Tribunal*" (R I, § 7; Respondent's Exhibit A). For this reason, Respondent did not respond to

Claimant's request by March 30, 2009, as requested to advise "*where [Canada] may send this payment*" (R I, § 6, § 24; R II, § 15).

152. Furthermore, Respondent contends that Claimant's proposal neither constitutes a remedy for the breach found nor wipes out the consequences of the breach, as required by the SLA (cf. R I, § 7; R II, § 36). Respondent particularly emphasises that Respondent's proposal "*would do nothing whatsoever to encourage Option B regions to decrease their exports*", therefore not affecting the volume of lumber exported by these regions (R II, § 6, § 7; cf. R III, pp. 1 and 8). Respondent asserts that since no incentive would be provided for Option B regions to decrease exports, Claimant's proposal is "*substantially inferior*" to the compensatory adjustments ordered by the Tribunal in the Award on Remedies (R II, § 7, § 30, § 40 *et seq.*, § 46 *et seq.*). Moreover, Claimant's proposal is also said to be inferior to Respondent's second preferred remedy (R II, § 50 *et seq.*). Hence, according to Respondent no "*complete reparation*" for the breach is possible through Claimant's proposal (R II, § 6).
153. As far as market-based remedies are concerned, they are in Respondent's view preferable since they affect the incentives of the producers who overshipped (R III, p. 12). According to Respondent this holds true for a changed market as well (R III, p. 20). Respondent also contends that Claimant has not been able to explain "*why a cash payment from government to government, that neither comes from Option B regions, nor goes to United States producers, wipes out all the consequences of the breach*" (R III, p. 2). Since Claimant's payment was not directed to U.S. producers, Respondent submits that there is no compensation for the breach. Respondent further submits that this has been confirmed by Claimant's expert witness himself who stated that there was no compensation for a breach if the payment cannot reach the producers (Tr 117:21-118:8).
154. Respondent further argues that such a cash payment would induce numerous "*mechanical*" obstacles and put immense burdens on Respondent, e.g. the enactment of legislation and devising a claims system for the allocation of the payment to competing United States producers, with the attendant risk of legal and political controversies. (R III, p. 11). This was said not to have been considered by Claimant's expert witness (Tr 115:4-10).
155. In addition, Respondent strongly contests Claimant's assertion that Respondent had stated an intention to impose compensatory measures as of the date of Claimant's Request for Arbitration (R I, § 35). Respondent maintains that it "*merely declined to accept Canada's offer, which meant that Canada had made no payment*" (R I, § 9). Respondent further states that it did not announce its intention to impose compensatory adjustments until April 7, 2009,

i.e. four days after the submission of Claimant's Request for Arbitration (R I, § 25).

156. Respondent claims to have declined Claimant's offer of a lump sum payment of US\$ 34 million plus simple interest and that subsequently, Claimant had refused to impose the compensatory measures as had been determined in the Award on Remedies (R I, § 21). Respondent submits that if Claimant failed to do so, the SLA entitled Respondent to impose these measures. Respondent asserts to have informed Claimant accordingly. Thus, since in Respondent's view Claimant had failed to cure the breach within the 30-day time period as set down in the SLA, Claimant assertedly had to impose the compensatory measures itself as determined in the Award on Remedies (R I, § 8).
157. Respondent submits that because Claimant had failed to impose compensatory measures by April 7, 2009, Respondent was entitled to take action under section 301 of the Trade Act of 1974 and it acted accordingly, starting to collect "*a 10 percent ad valorem charge upon imports of Canadian softwood lumber until US\$54.8 million is collected*" as of April 15, 2009, that sum being the equivalent of CDN\$68.26 million based on the exchange rate at the time of issuance of the Award on Remedies (R I, § 10; R II, § 16).

3. The Tribunal

158. For convenience, the full text of the disputed letter of March 27, 2009, is quoted hereafter:

"Dear Ambassador Kirk:

Re: Tender of Payment by Canada to the United States – LCIA Case No. 7941 – Canada-US Softwood Lumber Agreement of 2006

Canada writes further to the conversations of our respective governments held on March 25 and 26, 2009 between Don Stephenson and John Melle, and to their conversations earlier this month concerning the arbitration award in LCIA Case No. 7941.

Canada hereby tenders a payment of USD\$34 million plus simple interest at 4 % (currently amounting to USD\$36.66 million) to the United States as a full cure of Canada's breach of the Softwood Lumber Agreement found by the Tribunal in LCIA Case. No. 7941. Kindly advise us in writing by no later than 4 p.m. on Monday March 30, 2009 where we may send

this payment. On receipt of your instructions, Canada will wire transfer the funds in accordance with your instructions and will advise the LCIA that this matter has been consensually resolved between Canada and the United States. This payment fully discharges all Canadian obligations and all U.S. rights and claims arising from the Tribunal award in LCIA Case No. 7941.

For greater certainty, your acceptance of this payment constitutes your agreement that:

The United States will no longer claim that Canada has failed to "cure the breach" found by the Tribunal in LCIA Case No. 7941 within the "reasonable period of time" identified under paragraph 22 of Article XIV of the SLA;

The United States will not claim that Canada has any obligation to impose compensatory adjustments under paragraphs 22-25 of Article XIV of the SLA and Canada may refund in full any compensatory adjustments that Canada has collected pursuant to those provisions;

LCIA Case No. 7941 is thereby terminated, and, accordingly, the United States will have right to, and will not, impose compensatory measures of any kind pursuant to Article XIV(27) and will refund in full any import duties it may have collected as a compensatory measure, and will not request a new arbitration under Article XIV(29) of the SLA;

The United States will not re-file any Request for Arbitration under Article XIV(1) with respect to Canada's failure to adjust Expected U.S. Consumption ("EUSC") for regions operating under Option B during the period January 1, 2007 to June 30, 2007.

Canada notes that the amount tendered is the amount that the United States presented to the Tribunal as "directly calibrated to compensate for injury incurred during the violation period by the United States lumber industry" (\$34 million) plus simple interest at 4% per annum. Canada further notes that while it is tendering this amount to resolve all remaining arising from LCIA Case No. 7941, it continues to maintain that the actual harm to U.S. producers resulting from Canada's breach was far less than USD\$34 million.

This tender, whether or not accepted by the United States, is made without prejudice to Canada's position regarding the

proper interpretation of the SLA, including in any pending or future dispute settlement proceedings under the SLA. It is also made without prejudice to the position Canada may take in any further dispute settlement proceedings or other actions in regard to the award in LCIA Case No. 7941 if the United States does not consider the payment a full cure of the breach.

If the United States declines to consider this payment a full cure of the breach, Canada intends to commence immediately a new arbitration under Article XIV(29) of the SLA. In addition, Canada will ask the LCIA Secretariat to confirm the availability of the original panel members so that the matter can proceed as quickly as possible. Further, even if the United States declines this payment at this time, Canada's tender will remain open during the pendency of tribunal proceedings considering the adequacy of Canada's cure.

Yours sincerely,

[signature]

*Michael Wilson
Ambassador" (footnote omitted)*

159. The Tribunal disagrees with Claimant regarding the qualification of the letter of March 27, 2009. This letter cannot be considered by itself as a cure according to § 22(a) of Art. XIV of the SLA.
160. In this context, the Tribunal does not have to consider in detail whether a "tender letter" may be such a cure under certain circumstances. In the present case, considering the breach identified in the Award on Liability, it would seem difficult to imagine circumstances in which a mere letter could cure this breach and wipe out the consequences of that breach.
161. Considering the text of the letter sent on March 27, 2009, the Tribunal is more inclined to consider the letter as an offer for a settlement subsequently to be agreed between the Parties. First of all, the letter contains wording suggesting an offer only ("*...your acceptance of this payment constitutes your agreement that: ...*"). Moreover, the following paragraphs – irrespective of whether these may be considered to be "conditions" or not – go beyond mentioning automatic consequences of a cure according to the SLA, likewise suggest an offer only, subject to further agreement between the Parties.
162. But more importantly in the present context is the fact that the letter suggested a change to the Decisions regarding cure and compensatory adjustments issued by the Tribunal in its Award on

Remedies. The decisions issued under sections I.2. to 4. of the Award, seen in the context of the reasoning in its section H.IV and particularly §§ 307 to 310 and 311 to 339, did not provide for the payment of a lump sum. Though the character of the cure mentioned in section I.2 was not identified, the context of the above mentioned sections of the Award on Remedies did not permit Claimant to consider that, in spite of the different character of the compensatory measures identified in section I.3, the payment of a lump sum – and especially a mere letter offering such a payment subject to certain detailed “understandings” – would be acceptable as a cure, unless, of course, the US subsequently agreed thereto, which has not been the case.

163. In this context, the Tribunal recalls §§ 309 and 310 of the Award on Remedies:

“As also already discussed above, “for the Party to cure the breach” according to subsection (a) has to be understood, in case of a past and completed breach as at stake here, as meaning a reparation “wiping out all the consequences of the breach”. It would seem obvious that this intended effect of the reparation must be considered as more important as its timing within the 30 day period. Therefore, if such a reparation is not possible within the maximum period of 30 days given by subsection (a), in the view of this Tribunal, the most appropriate interpretation within the object and purpose of § 22 and of the SLA is that the reparation should be started and performed as fast as possible after its Award, even if going beyond the 30 day period.

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.”

164. Since – besides informal exchanges between the Parties – the only official action which occurred during the 30 day period was Claimant’s letter of March 27, 2009, and since that letter is not a cure and not even the start of a cure during the 30 day period, according to subsection (b) of § 22 Art. XIV SLA the Claimant has the obligation to comply with the compensatory adjustments provided in § I.3. of the Award on Remedies.
165. However, Claimant’s primary relief sought (quoted above) goes beyond requesting the recognition of the letter of March 27, 2009 as a cure. In its subsection 1), it seeks a finding from the Tribunal to the effect that, irrespective of the letter, a payment by the Canadian

Government to the US Government of US\$ 34 million plus interest would be a full cure, with further consequences requested in subsections 2) and 3).

166. The very first question in this context is whether a payment between the two governments can be a cure of the breaches found in the Award on Liability. The test is again whether such a payment by Canada would *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*. In this regard, the Tribunal shares the doubts raised by Respondent.

As the Tribunal in the Award on Remedies pointed out with regard to compensatory adjustments, §§ 22 to 24 of Art. XIV SLA provide guidance to the effect that such adjustments should be trade measures rather than payments of monetary damages. While it may be true that the “cure” according to § 22(a) must not necessarily be of the same character as “*compensatory adjustments*” according to subsection (b), what both require in common is that they must be able to “*wipe out the consequences of the breach*”. If, notwithstanding the fact that the Tribunal has put the focus on market measures in its Award on Remedies, Claimant considers that a payment from government to government also has that effect, Claimant has the burden to show that such a payment has the same effect in that regard. The Tribunal does not consider that Claimant has satisfied this burden.

167. In this context, the Tribunal stated in § 329 of its Award on Remedies what it considered the chief purpose and effect that a remedy should have:

“Economically, in view of the relevance of the economic effect found above to be determinative for the object and purpose of the SLA, the remedy should reduce the actual volume of lumber exported by Canada under current or reasonably anticipated future market conditions.”

168. The Claimant’s written and oral submissions and the testimony of the experts have not persuaded the Tribunal that the payment of US\$ 34 million between the two governments, suggested by Claimant, would have that effect. In particular, the Tribunal does not perceive how such a government to government payment would have any impact on the export of lumber by Option B regions which are specifically and expressly addressed in the core decision of the Tribunal in section I.3 of the Award on Remedies.
169. Therefore, Claimant’s primary relief sought in subsection 1) for the Tribunal to accept a payment of US\$ 34 million as a cure must be denied. As a consequence, the further relief sought from the Tribunal in subsections 2) and 3) of Claimant’s primary relief become moot.

H.V. Claimant's 1st Alternative Relief Sought

170. For convenience, the 1st alternative relief sought by Claimant is recalled again (C III, § 63):

"If the Tribunal finds that Canada's payment has not cured the breach in full, Canada respectfully requests that the Tribunal identify in its Award the amount of a payment to the United States from Canada that the Tribunal would consider sufficient to fully cure the breach."

1. Arguments by Claimant

171. Since according to Claimant, § 29(c) of Art. XIV of the SLA does not impose any constraint on the appropriate remedy, there is no limitation as to the form a cure may take and thus a cash payment remains "[t]he most effective means to restore lost producer surplus" (C II, §§ 56 *et seq.*; also cf. C II, § 35, § 43, § 56; C III, § 50).
172. Claimant further maintains that "a damages cash payment cures the breach" (C III, § 50) with certainty and avoids distorting the market (C II, § 36, § 56; cf. C III, § 61 *et seq.*).

2. Arguments by Respondent

173. Respondent objects to Claimant's requests that they exceed the authority of the Tribunal and that the SLA "does not contemplate that the Tribunal identify a payment that would cure the breach" (R II, § 61). Respondent contends that all the Tribunal can do is to determine whether the breach has been fully or partially cured and if that is found to be the case, the Tribunal could decide on the modification or termination of the compensatory adjustments or measures (R II, §§ 61, 62).
174. With regard to Claimant's first alternative relief sought, Respondent points out that it is not within the Tribunal's power to determine what would constitute an additional amount fully to cure the breach of the SLA (R II, § 62). Respondent submits that this would first require the Tribunal to determine that a lump sum payment partially cured the breach of the SLA and that Respondent would be "forced to accept that payment"; and second that Respondent "should be

forced to accept an additional lump sum payment" (R II, § 62). However, in Respondent's view such a determination is simply not contemplated by the SLA (R II, § 62).

175. Respondent submits that a payment of funds from government to government cannot possibly be considered a cure of the breach found, neither wholly nor in part (cf. R I, § 2; R II, §§ 5 *et seq.*; R III, p. 2, pp. 6-7). To support its argumentation, Respondent claims that such a payment would neither affect the volume of lumber exported from Option B regions nor would it relate to the benefits enjoyed by producers in those regions (R III, p. 8, 10).
176. Respondent also indicates that a cash payment would burden it immensely by forcing it to enact appropriate legislation and devise a claims system for the allocation of such a cash payment to United States producers; and that, in any case, Respondent had not agreed on such a payment to constitute a remedy (R III, p. 11).

3. The Tribunal

177. The Tribunal's reasoning on this 1st alternative relief sought by Claimant can be short.
178. The Tribunal's reasoning regarding Claimant's primary relief sought and the payment of US\$ 34 million applies here as well. The Tribunal cannot see any good reason why a government to government payment of any other and higher amount would have an impact on the exports of lumber by Option B regions, as specifically and expressly addressed in the core decision of the Tribunal in section I.3 of the Award on Remedies. It is not the amount which makes such a payment unfit as a cure of the breach, but the absence of any effect on the export of lumber by Option B regions.
179. Therefore, Claimant's 1st alternative relief sought must be denied as well.

H.VI. Claimant's 2nd Alternative Relief Sought

180. For convenience, the 2nd alternative relief sought by Claimant is recalled again (C II, §§ 64-65):

"The Tribunal's mandate under Article XIV(29)(c) includes determining whether Canada has cured the breach in whole or part. If the Tribunal finds that Canada's payment cures the

breach only in part, paragraph 31 requires the Tribunal to determine the extent by which compensatory adjustments or measures should be modified, in accordance with paragraph 32. A determination by the Tribunal of the extent to which the compensatory adjustments or measures should be modified will necessarily require a determination of the additional amount over USD\$34 million necessary to effectuate a full cure of the breach. In addition, if the Tribunal finds that Canada's payment cures the breach only in part, the Tribunal must also determine the extent to which Canada has cured the breach before it can determine an appropriate adjustment to the export charge that Canada would collect under paragraph 32. Given that the Tribunal will necessarily have to determine the amount necessary to cure the breach in its determinations under Article XIV(31) and (32), Canada respectfully requests that the Tribunal advise Canada of any additional amount necessary, if the Tribunal considers that Canada's tender does not fully cure the breach.

Determining the additional amount required for a full cure of the breach will assist in achieving an expeditious and satisfactory end to this dispute, as required by Article XIV(3). An objective of the dispute settlement system under the SLA is the fast and final resolution of disputes. The timeframe for proceedings under Article XIV(19) provides that "the tribunal shall endeavour to issue an award not later than 180 days after the LCIA Court appoints the tribunal." The timeframe for arbitrations commenced under Article XIV(29) is just 60 days from the Request for Arbitration. Advising of the amount necessary to effectuate a full cure is consistent with this objective of efficient and expeditious dispute settlement, because it will obviate the need to return to the Tribunal for a determination on this issue." (footnote omitted)

I. Arguments by Claimant

181. In support of its arguments, Claimant refers to the mandate of the Tribunal under Article XIV, § 29 lit. c of the SLA which extends to determining whether the breach of the SLA has been cured in full or in part. Claimant asserts that if the Tribunal finds that the breach of the SLA has only been partially cured, it will have to determine in accordance with § 32 of Art. XIV of the SLA the modifications to be made to the compensatory adjustments or measures. In Claimant's submission, this necessarily implies that before such determination can be made, the Tribunal has to examine the extent to which the breach in question has been cured (C II, § 64).

182. Claimant further submits that the Tribunal's advice on the additional amount of payment necessary to constitute a full cure of the breach is in line with the objective of the SLA to resolve disputes in a fast and final manner and will thus "*assist in achieving an expeditious and satisfactory end to this dispute*" (C II, § 65).

2. Arguments by Respondent

183. Respondent contends that Claimant has not been able to demonstrate that a cash payment would constitute a cure of the breach or that the payment of US\$ 34 million would have a relationship to the breach of the SLA enabling it to constitute a cure (R III, p. 2). On the contrary, in Respondent's submission, the proposed payment does not have any of the characteristics needed to constitute a cure under the SLA (R III, p. 6). Respondent argues that the payment would be disconnected from Option B regions (R III, p. 8) and United States producers would not be on the receiving end of Claimant's proposed payment (R III, p. 10).
184. However, in Respondent's view "*an alleged cure must bear some relationship to the Award and must provide at least equivalent reparation*" (R III, pp. 7, 8). In view of the framework of the SLA which is based on export measures and taking into account that the Parties had agreed on adjustments to exports measures as the only form of compensatory measures, anything else would be contrary to the SLA (R III, p. 8). Respondent thus maintains that "*it would be absurd to approach the question of cure unconstrained by the Agreement, as Canada suggests*" (R III, p. 8; cf. Tr 32:23-33:1).

3. The Tribunal

185. Again, in the circumstances, the Tribunal's reasoning regarding this 2nd relief sought can be short.
186. As indicated above, the Tribunal concludes that, by themselves, neither the letter of March 27, 2009, nor any government to government payment qualifies as a cure. Therefore, up to this point, the condition expressed by Claimant in this relief sought, i.e. that *the Tribunal finds that Canada's payment cures the breach only in part*, is not fulfilled.
187. As a consequence, this relief also cannot be granted.

H.VII. Claimant's 3rd Alternative Relief Sought

188. For convenience, the 3rd alternative relief sought by Claimant is recalled again (C II, §§ 66-67):

“Alternatively, if the Tribunal determines that a cash payment cannot cure the breach found in this case, Canada will impose the compensatory adjustments identified in the February 23, 2009 Award. In this event, Canada respectfully asks the Tribunal to clarify whether Canada may allocate the total amount of the additional charge to be collected either by Region, or by individual exporters from the Option B Regions, in proportion either to the amount that Region or exporter shipped to the United States from January 1, 2007 to June 30, 2007 (the breach period) or in the amount that they shipped in excess of what their correctly calculated quota would have been.

In answering this request, the Tribunal would be acting consistently with the administrative efficiency principles mentioned above. As discussed, an objective of the Parties in creating the dispute settlement system was to ensure that the system resolved matters expeditiously. This implies bringing finality to matters. Without the Tribunal determining how Canada may or should allocate the export charge, there is a significant risk that the United States may disagree with the allocation method Canada chooses resulting in an additional arbitration under Article XIV(29), significantly delaying a final resolution of this matter.” (footnotes omitted)

1. Arguments by Claimant

189. Claimant considers that it is free to choose how to administer the compensatory adjustments and allocate responsibility for paying the additional export charge of 10 % as stated in the Award on Remedies, as long as it acts consistently with the latter (C III, §§ 66, 67).
190. Claimant seeks guidance from the Tribunal in this matter in order to prevent future disputes on this issue and to obtain the Tribunal's approval as to the consistency with the Award on Remedies of Claimant's conception of the allocation of the export charge (C III, § 68). With this perspective, Claimant proposes five alternative approaches to allocate the additional export charge.

191. Claimant's first approach would be to "*assess the charge on all Option B shipments without regard to the Region from which the shipment originated*" which is purportedly the approach of the current duty collected by Respondent (C III, § 69). However, Claimant points out that this approach does "*not take into account the breach period shipments in any way*" (C III, § 69).
192. Alternatively, Claimant proposes that the additional export charge be allocated to each region in proportion to the amount of shipments made during the period of the breach (C III, § 70). In consequence, "*[i]ndividual Regions would graduate from the extra tax at different times as their regional allotment was satisfied*" (C III, § 70).
193. Claimant's third approach is similar to the second approach in that it would allocate the additional export charge to each region, but differs in that this allocation would be made based on the overshipment with regard to the regional quota that would have been in effect during the period of the breach (C III, § 71).
194. Claimant's fourth approach would allocate the total amount of the export charge to individual softwood lumber producers on the basis of their shipments during the period of the breach. In consequence, producers who had not shipped softwood lumber during the breach period would not be subject to the tax and each producer would graduate at different times from the tax (C III, § 72).
195. Claimant's last approach relates to individual producers who shipped softwood lumber exceeding "*what their quota would have been if Canada had assigned them quota based on the properly determined regional quota*" (C III, § 73). The amount of the additional export charge would then be allocated to each producer on the basis of their percentage share of the total overshipments of their particular region. In consequence, producers would graduate at different times from the additional export charge (C III, § 73).
196. In addition, Claimant asserts that these are options available for the allocation of the additional export charge and points out that these options do not consider the possibility of hybrids between them (C III, § 74). In Claimant's view, the options demonstrate that "*Canada's cure is the best Option to fully wipe out the consequences of the breach*" as it is "*simple to administer [...], provides for immediate reparation, and it avoids the risk of relitigating the question of whether Canada has cured*" (C III, § 74).

2. Arguments by Respondent

197. Respondent disputes Claimant's position considering that Claimant is proposing to impose the compensatory adjustments as ordered by the Tribunal, but "*not without conditions*" (R II, § 63). Respondent asserts that Claimant is requesting clarification of the Award on Remedies, while, in Respondent's submission, neither paragraph 29 nor 31 permit such action on Claimant's part (R II, § 63). In particular, Respondent points out that the allocation of the additional export charge is not permitted among provinces or exporters (R III, p. 21).
198. Respondent further contends that had Claimant wanted to request clarification, it would have been required to do so in the course of the remedy proceedings, which it allegedly did not do (R II, § 64). Furthermore, "*[b]ecause the SLA does not permit appeals, Canada must now bear the consequences of its strategic decision to remain silent on the details of the proposals*" (R II, § 64; cf. Art. XIV, § 20 SLA).
199. In addition, Respondent claims that Claimant's request does not actually refer to a clarification, but in essence is a request for a different remedy award "*that allows it to assess the export measure on a producer level to reduce the incremental effect of the charge*" (R II, § 65). However, Respondent maintains that in the absence of a cure within a reasonable period of time, namely the 30 day period as stipulated in the SLA, Claimant was ordered to assess the additional export charge to Option B regions. Respondent further submits that "*[a]ny request to change that determination is tantamount to an appeal, which is prohibited by the SLA*" (R II, § 65).
200. Even if the Tribunal were to decide to review its prior Award on Remedies, Respondent submits that it would be unacceptable to allow Claimant to allocate the additional export charge based on an exporter-specific basis. In Respondent's submission, this has been conceded by Claimant's expert witness; this would effectively constitute a lump-sum payment; and it would therefore "*not affect the marginal incentives of the exporters and producers*" (R III, p. 22; cf. Tr 146:8-18). In consequence, according to Respondent, Option B producers would not be encouraged to reduce their exports, thus undermining the Tribunal's determination (R III, p. 22).
201. If the Tribunal decided that it had the power to review its prior Award on Remedies, Respondent submits that the Tribunal could only consider the allocation of the additional export charges based on regions (R III, p. 22).

3. The Tribunal

202. Since Respondent argues that a request for clarification as submitted here by Claimant is not admissible or otherwise within the power of the Tribunal, a preliminary note on its jurisdictional aspects is appropriate.
203. As mentioned above in this Award, on the one hand, the jurisdiction of this Tribunal under §§ 29 to 32 of Art. XIV of the SLA must be interpreted in a rather broad manner in order to meet the obvious object and purpose of these provisions to reach a meaningful and effective decision for the Parties' dispute. The Tribunal's jurisdiction, therefore, must be interpreted to include both the issues of cure and compensatory adjustments.
204. But, on the other hand, the jurisdiction of this Tribunal is limited by the awards in the earlier arbitration and the options provided in §§ 29 and 31 of Art. XIV SLA: This Tribunal may decide that a Party has cured the breach in whole or in part, or that any compensatory adjustments by a Party are inconsistent with the Award in the earlier arbitration, and thereafter the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated.
205. These options do not include the authority to clarify the earlier Award. And contrary to what other arbitration rules – such as Art. 29 of the ICC Arbitration Rules – provide, there are no other provisions in the SLA that grant a tribunal authority to clarify or interpret the Award. The same is true for the LCIA Rules which only, in Art. 27, grant authority to correct errors in computation, clerical or typographical errors or any errors of a similar nature of an Award or make an additional award on any claims or counter-claims not decided in the original Award. Both of these options are not applicable here.
206. However, it should also be taken into account that, contrary to the other arbitration rules referred to above, the very provisions of the SLA, i.e. §§ 29 and 31, which give jurisdiction to the present Tribunal, are unique. Indeed, they provide for a process of examining performance of earlier awards on liability and remedies and they even permit modifying or even terminating earlier rulings under certain conditions. This can only be understood as an expression of the Parties' common intention to promote an efficient and expeditious settlement of the overall dispute existing between the Parties.
207. In view of these specific features of the SLA dispute settlement procedure and having regard to the context and the object and

purpose of these provisions (Art. 31.1 VCLT), the Tribunal considers that it has a discretion to give certain guidance to the Parties regarding the cure or compensatory adjustments decided in the Award on Remedies, if it can be assumed that such guidance may help the Parties to avoid or mitigate an existing or future dispute.

208. In this regard, the Tribunal agrees with Respondent's argument that the "clarification" sought by Claimant cannot in fact lead to a different remedy award. Any clarification which this Tribunal can give using its discretion mentioned as above may thus only clarify, but not change the rulings made in the Award on Remedies.
209. Claimant is right that the ruling in section I.3 of the Award on Remedies did not consider the details of the allocation of the export charges ordered. However, the ruling expressly said that the ad valorem export charges should be charged upon "*softwood lumber shipments from Option B regions*". At first sight, this wording may still leave room for a possible interpretation that the charges may be allocated to individual exporters from the Option B regions which Claimant mentions, as the 2nd option in its relief. Therefore, the question raised by Claimant in this respect may be justified and the Tribunal's guidance may be appropriate as part of the arbitral discretion mentioned above.
210. However, the reference only to *regions* and not to individual exporters in the above ruling was not accidental, but was intended to convey a particular meaning. It may be recalled that, for the reasons set forth in §§ 329 to 339 of the Award on Remedies, the Tribunal accepted without any change the 1st of the United States' four proposals submitted to the Tribunal. This proposal had been elaborated by Dr. Neuberger who explained in §§ 33 to 36 of his Rebuttal Expert report of July 21, 2008 (adduced by Respondent), the reasons why this proposal must be understood as requiring that the charges should be assigned to specific provinces and not to specific exporters.
211. In view of this background, in answer to the question raised by Claimant in this third alternative relief sought, the Tribunal clarifies that the export charges ordered in section I.3 of the Award on Remedies are to be collected by region (i.e. provinces), and not by allocation to individual exporters.
212. Claimant also requests a clarification in this third alternative relief sought whether the charges should be collected in proportion either to the shipments during the breach period or to the excess shipments only. In the view of the Tribunal, this alternative has not been expressly addressed in the ruling in section I.3 of the Award on Remedies, the relevant part of which provides:

“...Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN \$ 63.9 million, plus CDN \$ 4.36 million in interest (a total of CDN \$ 68.26 million) has been collected.”

213. This wording does not provide for any allocation of the charges with respect to any particular Option B regions or with regard to the volume of shipments or excess shipments during the breach period. It is however quite clear – and the Tribunal here so confirms its ruling – that the charges are to be applied to all shipments from Option B regions during the remedy period until the remedy amount has been collected.
214. That clarification is indeed the first of the five “approaches” identified by Claimant in its Closing Statement at the Hearing (C III, § 69). And the Tribunal notes that Claimant, in the same Closing Statement (§ 74), pointed out that it had no preferred option at that time. The Tribunal also notes that Respondent, in its Closing Statement (R III, p. 21) also indicated that it considered that this first option was what the Tribunal had ordered. With the above confirmation, the Tribunal considers that there are no further obstacles to the implementation of the ruling in section I.3 of the Award on Remedies.

H.VIII. Claimant’s Final Relief Sought

215. For convenience, the final relief sought by Claimant may be recalled again (C II, § 68):

“Finally, Canada requests that the Tribunal exercise its jurisdiction under paragraphs 31 and 32 to modify the award in LCIA 7941, if it finds that Canada has not cured the breach, by deducting any customs duties collected as compensatory measures by the United States under Article XIV(27) from the total amount of compensatory adjustments Canada would be required to collect.”

1. Arguments by Claimant

216. Claimant lastly submits that should the Tribunal find that Claimant has not cured the breach, the deduction of any customs duties already collected by Respondent under Article XIV(27) from the total amount of additional export charges to be collected by Respondent is

necessary to ensure that Respondent is not paying more than the amount of additional export charges, which will fully cure the breach of the SLA (C II, § 68).

2. Arguments by Respondent

217. In Respondent's view, Claimant's request is outside the scope of the SLA as it is said to be contrary to the terms of paragraph 31 of Article XIV of the SLA (R II, § 66). Respondent maintains that should the Tribunal find that Claimant has not cured the breach, the Tribunal would not be entitled to modify the compensatory adjustments or measures. Respondent submits that such action could only be conducted if the Tribunal was to find that the breach of the SLA has been cured in whole or in part (R II, § 66).

3. The Tribunal

218. Regarding this final relief sought by Claimant, it seems appropriate to recall the wording of § 31 of Art. XIV SLA on which Claimant relies in this context:

"31. If in its award in an arbitration initiated under paragraph 29, the tribunal finds that the compensatory adjustments or measures that are the subject of the arbitration are inconsistent with the award in the original arbitration or that the breach has been cured in whole or in part, the tribunal shall determine the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated."

219. The provision enunciates two conditions under which the Tribunal may modify or terminate compensatory adjustments ordered in an earlier award:
220. Either the compensatory adjustments or measures must be found to be inconsistent with the earlier award. This condition is not applicable here because the compensatory adjustments ordered in the Award on Remedies have not started.
221. Or the Tribunal finds that *the breach has been cured in whole or in part*. This condition is also not applicable here, because, as decided above in this Award, the Tribunal has found that the breach has not been cured, either fully or in part.
222. Therefore, the Tribunal does not have jurisdiction to decide this final relief sought by Claimant.

223. On the other hand, in view of the provision in § 32(a) of Art. XIV of the SLA, though it is not applicable here due to lack of jurisdiction under § 31 – and thus the Tribunal cannot issue any ruling in this regard – the Tribunal expresses the hope that the Parties to the present dispute will make reasonable and timely efforts in good faith to agree on an amicable settlement which takes into account the 10 % ad valorem duties on imports of softwood lumber products from the provinces of Ontario, Québec, Manitoba, and Saskatchewan imposed by the United States since April 2009 under Section 301 of the Trade Act relying on § 27 of Art. XIV of the SLA.

H.IX. Considerations Regarding Costs

224. According to Art. XIV § 21 SLA, the Tribunal may not award costs. § 21 further states that each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel. As with the Award on Liability and the Award on Remedies in LCIA Case 7941, the Parties have confirmed in this LCIA Case 91312, after their dispute arose, the legal efficacy of their costs agreement. Accordingly, it is unnecessary for the Tribunal to consider the application and effect of Section 60 of the Arbitration Act 1996, if any. Moreover, given that neither Party made any claim for such costs in these proceedings, no further decision is here required from the Tribunal.

(The Decisions and Signatures of the Tribunal appear on the following separate pages of this Award)

I. Decisions

1. It is recalled from LCIA Case No. 7941 between the same Parties as in the present case that, in its **Award on Liability** of March 3, 2008, this Tribunal decided as follows:

- “1. The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA’s case to the contrary is dismissed.*
- 2. The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore Canada’s case to the contrary as to interpretation is dismissed.*
- 3. Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.”*

2. It is further recalled from LCIA Case No. 7941 between the same Parties as in the present case that, in its **Award on Remedies** of February 26, 2009, this Tribunal decided as follows:

- “2. With regard to Respondent’s breach found by the above decision, in accordance with Art. XIV § 22 subsection (a), the Tribunal identifies 30 days from the date of this Award as a reasonable period of time for Respondent to cure the breach.*
- 3. In accordance with Art. XIV § 22 subsection (b), as an appropriate adjustment to compensate for the breach found above, Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN \$ 63.9 million, plus CDN \$ 4.36 million in interest (a total of CDN \$ 68.26 million) has been collected.*

4. *All other claims raised in this arbitration are dismissed.*
3. In the **present LCIA Case 91312**, the Tribunal decides as follows:
 - 3.1. In response to Claimant's 3rd alternative relief sought, the Tribunal clarifies that the Award on Remedies in LCIA case 7941 does not provide for any allocation of the charges with respect to any particular exporter or Option B region or with regard to the volume of shipments or of excess shipments during the breach period. The Award is to be understood to the effect that the charges are to be applied to all shipments from Option B regions during the remedy period until the remedy amount has been collected.
 - 3.2. Claimant's final relief sought, i.e. that the Tribunal "*exercise its jurisdiction under paragraphs 31 and 32 to modify the award in LCIA case 7941*", is dismissed for lack of jurisdiction. But the Tribunal draws attention to its recommendation for the Parties to make reasonable and timely efforts in good faith to agree on an amicable settlement taking into account the 10 % ad valorem duties on imports imposed by the United States since April 2009 as indicated in paragraph 223 of this Award.
 - 3.3. All other claims raised in this arbitration are dismissed on the merits.

Legal Place of Arbitration:

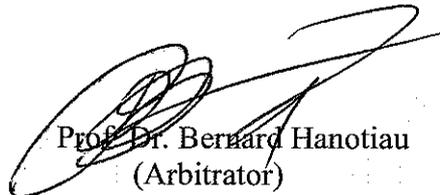
London (United Kingdom)

Date of Award:

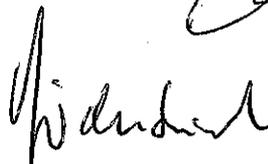
September 27, 2009



V.V. Veeder QC
(Arbitrator)



Prof. Dr. Bernard Hanotiau
(Arbitrator)



Prof. Dr. Karl-Heinz Böckstiegel
(Chairman of Tribunal)