

London Court of International Arbitration

United States of America

CLAIMANT

v.

Canada

RESPONDENT

No. 81010

Award

Rendered by an Arbitral Tribunal composed of:

Professor Gabrielle Kaufmann-Kohler, Tribunal Chair

Mr. David Williams QC, Arbitrator

Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal: Dr. Jorge E. Viñuales

TABLE OF CONTENTS

I.	MAIN FACTS	7
A.	THE PARTIES	7
1.	The Claimant.....	7
2.	The Respondent	7
B.	HISTORY OF THE DISPUTE	7
1.	The 2006 Softwood Lumber Agreement	8
2.	The Ontario and Quebec programs	10
	a) The Ontario programs	10
	b) The Québec programs	14
3.	The Challenges to the Respondent's programs	16
II.	PROCEDURAL HISTORY	16
III.	POSITION OF THE PARTIES	21
A.	THE CLAIMANT'S POSITION AND REQUEST FOR RELIEF	21
B.	THE RESPONDENT'S POSITION AND REQUEST FOR RELIEF	24
IV.	ANALYSIS.....	25
A.	PRELIMINARY ISSUES	26
1.	Jurisdiction	26
2.	Attribution	26
3.	Governing law	26
4.	Burden of proof	27
5.	Weight of earlier awards	29
B.	LIABILITY.....	30
1.	Applicable provisions of the SLA.....	30
2.	Ontario's Forest Sector Prosperity Fund (FSPF) and Forest Sector Loan Guarantee (FSLGP) Programs	31
	a) The Claimant's position	31
	b) The Respondent's position	32
	c) The Tribunal's determination	33
3.	Ontario's Forest Access Road and Maintenance Program (FARMP)	36

a)	The Claimant's position	37
b)	The Respondent's position	38
c)	The Tribunal's determination	38
4.	Quebec's Silviculture Credits	42
a)	The Claimant's position	42
b)	The Respondent's position	42
c)	The Tribunal's determination	43
5.	Quebec's Silviculture Investment Measure	46
a)	The Claimant's position	46
b)	The Respondent's position	47
c)	The Tribunal's determination	47
6.	Quebec's SOPFIM and SOPFEU Programs	49
a)	The Claimant's position	49
b)	The Respondent's position	49
c)	The Tribunal's determination	50
7.	Quebec's Forestry Fund	52
a)	The Claimant's position	52
b)	The Respondent's position	52
c)	The Tribunal's determination	53
8.	Quebec's Forest Industry Support Program (PSIF)	53
a)	The Claimant's position	53
b)	The Respondent's position	54
c)	The Tribunal's determination	54
9.	Quebec's Capital Tax Credit	58
a)	The Claimant's position	58
b)	The Respondent's position	59
c)	The Tribunal's determination	59
10.	The Quebec's Road Tax Credit	64
a)	Claimant's position	64
b)	The Respondent's position	65
c)	The Tribunal's considerations	66
B.	REMEDIES	71
1.	Applicable Norms	71
2.	Reasonable time to cure the breach (Art. XIV(22)(a))	75
3.	Compensatory adjustments (Art. XIV(22)(b))	76
a)	General remarks	76
b)	Overall approach followed by the Joint Expert Report	77

c)	Other issues arising from the Joint Expert Report.....	84
d)	Compensatory adjustments to be collected by Canada	93
C.	COSTS	96
V.	SUMMARY OF FINDINGS AND FORMAL AWARD	97

TABLE OF ABBREVIATIONS

For the sake of convenience, the Tribunal will use the following abbreviations:

Att.	Attachment to the Claimant's Request for Arbitration
Authorized Person(s)	Persons who have signed a Confidentiality Undertaking in the form set out in Appendix 1 of PO 2.
Cabinet	Ontario Cabinet (government)
CAD	Canadian dollars
Claimant	United States of America
Comments Cl.	United States Comments on the Experts' Joint Report, 15 July 2010
Comments Resp.	Comments of Respondent Canada to the Joint Report of Professors Kalt and Topel, 15 July 2010
Compensatory Adjustments	Adjustments to the Export Measures as defined in Article XIV(23) of the SLA
Exh. [C-] [R-]	Exhibit [Claimant] [Respondent]
Export Measures	Measures defined in Article XXI(23) of the SLA
Hearing	Hearing on the merits held in Ottawa, Canada, from 20 to 24 July 2009
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration of 1 June 1999
Interactive Spreadsheet	Interactive Spreadsheet attached to the Joint Expert Report
Joint Expert Report	Revised & Final Report to the Tribunal pursuant to Procedural Order No. 6, by Professor Joseph P. Kalt & Professor Robert H. Topel, of 22 June 2010
LCIA	London Court of International Arbitration
MNR	Ministry of Natural Resources (Ontario)
MRNF	Ministère des Ressources Naturelles et de la Faune (Québec)
NAFTA	North American Free Trade Agreement of 1 January 1994
Parties	Claimant and Respondent
PHB Cl.	Claimant's Post-Hearing Brief of 8 October 2009
PHB Cl. Reply	Claimant's Post-Hearing Reply Brief of 13 November 2009
PHB Resp.	Respondent's Post-Hearing Brief of 8 October 2009
PHB Resp. Reply	Respondent's Post-Hearing Brief in Reply of 13 November 2009
PO 1	Procedural Order of 18 April 2008
PO 2	Procedural Order of 25 June 2008
PO 3	Procedural Order of 25 June 2008

PO 4	Procedural Order No. 4 of 23 July 2008 (amended on 28 July 2008)
RA	Request for Arbitration of 18 January 2008
Rej.	Rejoinder of 8 May 2009
Reply	Claimant's Reply Memorial of 23 March 2009.
Reply corr.	Claimant's corrected Reply Memorial of 3 April 2009
Request	Claimant's Request for Arbitration of 18 January 2008
Respondent	Canada
Response	Respondent's Response to the Request of 18 February 2008
SLA	Softwood Lumber Agreement between Canada and the United States of America of 12 September 2006
SoC 1	Claimant's Statement of the Case of 21 November 2008
SoC 2 corr.	Claimant's Corrected Statement of the Case of 26 November 2008
SoC 2 nd corr.	Claimant's Second Corrected Statement of the Case of 23 December 2008
SoD	Respondent's Statement of Defence of 20 February 2009
SoD corr.	Respondent's Corrected Statement of Defence of 27 February 2009
Tribunal Chair	The third and presiding arbitrator
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969
WS	Witness Statement
WTO	World Trade Organization

I. MAIN FACTS

A. THE PARTIES

1. The Claimant

1. The Claimant is the United States of America.
2. The Claimant is represented in this arbitration by Reginald T. Blades Jr., Assistant Director, United States Department of Justice (Commercial Litigation Branch), 1100 L Street N.W., Washington D.C. 20530, United States of America.

2. The Respondent

3. The Respondent is Canada.
4. The Respondent is represented in this arbitration by Joanne E. Osendarp and Charles E. Roh Jr., Weil, Gotshal & Manges LLP, 1300 Eye Street N.W., Suite 900, Washington D.C. 20005. Until 14 December 2010, it was also represented by Guillermo Aguilar Alvarez, Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, who notified the Tribunal on 15 December 2010 that he had ceased to act for the Respondent.

B. HISTORY OF THE DISPUTE

5. This section gives an overview of the main facts of the dispute. It is meant for reference purposes only and is not intended to settle factual divergences between the Parties. The specific facts relevant to the determination of dispute will be reviewed in the sections of this Award devoted to liability and, as relevant, quantum.
6. For several decades, there has been trade in softwood lumber between the Claimant and the Respondent (the "Parties"), as well as disputes concerning that trade (SoD corr., para. 9; SoC 2nd corr., para. 11).
7. In the context of such disputes, the United States imposed antidumping and countervailing duties on its imports of Canadian softwood lumber on the grounds that Canada was subsidizing its producers.

8. Such measures were challenged with varying success before the United States Court of International Trade, the North American Free Trade Agreement ("NAFTA") binational panels and extraordinary challenge committee, the World Trade Organization ("WTO"), other United States courts and other NAFTA arbitral panels (SoC 2nd corr., para. 12). One of the points of contention in these cases was the Claimant's refusal to refund more than US\$5 billion in collected cash deposits (SoC 2nd corr., para. 13; 22 SoD corr., para. 22).
9. The two Parties conducted negotiations to solve their disputes. As a result of this negotiation process, on 12 September 2006, the Parties adopted the Softwood Lumber Agreement or "SLA"¹ (Att. A). The SLA entered into force on 12 October 2006 (Request, para. 21). The dispute before the Tribunal arises from the implementation of the SLA.

1. The 2006 Softwood Lumber Agreement

10. The SLA applied to trade in "Softwood Lumber Products" (SLA, Art. I and Annex 1A). It created obligations for both Parties. The Claimant had three principal obligations: (i) to revoke antidumping and countervailing duty orders, (ii) to refund antidumping and countervailing duty cash deposits and (iii) to commit itself concerning trade remedy investigations and certain other actions. The Respondent, for its part, agreed to apply export measures in the form of a combination of volume restraints and export charges. In accordance with Article XVII of the SLA, neither Party was to take action to circumvent or offset the commitments under the SLA, such as grants or other benefits provided by a Party, including any public authority of a Party, on a *de jure* or *de facto* basis to producers or exporters of Canadian Softwood Lumber Products. Pursuant to Article XVI of the SLA, each Party was also to treat as confidential, in accordance with its laws, information provided to it under the SLA that was not otherwise publicly available.
11. Regarding the Claimant's obligations, Article III of the SLA provided for the revocation of antidumping and countervailing duty orders. More specifically, the Claimant was to revoke retroactively "the Orders" (as defined in SLA, Art. XXI(2) and (15)) in their entirety as of 22 May 2002 without the possibility of their reinstatement. The Claimant also undertook to terminate all U.S. Department of Commerce proceedings related to the Orders. On the date of entry into force of the SLA or no later than three days after

¹ Previous bilateral agreements between the Parties had been concluded, including the 1996 Softwood Lumber Agreement which expired in 2001 (SoD corr., para. 20-21).

such date, the U.S. Department of Commerce was to instruct U.S. Customs and Border Protection to cease collecting cash deposits, as of the aforementioned date, on imports of Softwood Lumber Products from the Respondent, and to liquidate all "Covered Entries" (as defined in SLA, Art. XXI(13)) made on or after 22 May 2002 without regard to antidumping or countervailing duties and to refund all deposits collected on such entries with all accrued interest pursuant to 19 U.S.C. § 1677g(b) to the "Importers of Record" (as defined in SLA, Art. XXI(30)) or their designates.

12. The Claimant's second main obligation was formulated in Article IV of the SLA. This Article provided, *inter alia*, that within ten days after the entry into force of the SLA, the Claimant was to begin to liquidate all Covered Entries made on or after 22 May 2002 without regard to antidumping or countervailing duties, and with interest pursuant to 19 U.S.C. § 1677g(b). The same Article provided that the Claimant or its agent was to purchase the rights to the amounts of the cash deposits for Covered Entries and accrued interest from the "Escrow Importers" (as defined in SLA, Art. XXI(19)) and make disbursements in accordance with Annex 2C.
13. The Claimant's third main obligation was formulated in Article V of the SLA. This Article provided, in essence, that for the duration of the SLA, the Claimant was to neither (i) self-initiate an antidumping or countervailing duty investigation under Title VII of the *Tariff Act of 1930*, as amended, or any successor law ("Title VII") with respect to imports of Softwood Lumber Products from the Respondent; nor (ii) initiate an investigation or take action as specified in Article V(1)(b), (c) and (d).
14. Regarding the Respondent's main obligation, Article VI of the SLA provided, in essence, that as of the entry into force of the SLA, the Respondent was to apply the "Export Measures" (as defined in SLA, Art. XXI(23)) to exports of Softwood Lumber Products to the United States. Article VII provided that, by the aforementioned date, each "Region" (as defined in SLA, Art. XXI(45)) was to elect to have the Respondent apply either (i) an Export Charge (as defined in SLA, Art. XXI(22)) collected by the Respondent or (ii) an Export Charge with a volume restraint. Other Export Measures included, *inter alia*, a surge mechanism and a third country adjustment provision as provided in Article VIII and Article IX, respectively. Exclusions as well as regional exemptions from Export Measures were specified in Article X and Article XII respectively.

15. In addition to being encouraged to create a Binational Industry Council, Article XIII of the SLA provided that the Parties were to establish a "Softwood Lumber Committee" (SLA, Art. XIII(B)) as well as "Technical Working Groups" (SLA, Art. XIII(C)).
16. Any matter arising under the SLA or with respect to the implementation of regional exemptions from Export Measures agreed upon by the Parties was to be solved through the dispute settlement mechanism contemplated in Article XIV. Except as provided for in this Article, for the duration of the SLA (including any extension pursuant to Article XVIII), the Parties were under the obligation not to initiate any litigation or dispute settlement proceedings with respect to any matter arising under the SLA.

2. The Ontario and Quebec programs

a) The Ontario programs

17. In November 2004, the Minister's Council on Forest Sector Competitiveness was established to advise the Ontario government on ways to strengthen Ontario's forest industry (Exh. R-11). The Council submitted its final recommendations to the Minister of Natural Resources on 27 May 2005 (Exh. R-11), released on 13 June 2005 (Exh. R-13).
18. Throughout the year 2005, the Ontario government announced a number of programs (Att. B), including the Forest Sector Loan Guarantee Program (Att. L), the Forest Sector Prosperity Fund (Att. J), the Ontario Forest Access Road Construction and Maintenance Program (Att. B) and the Ontario Wood Promotion Program (Att. I).
19. On [---] May 2005, the Ontario Cabinet (the "Cabinet") agreed that the Ministry of Natural Resources ("MNR") proceed with the Forest Sector Futures Initiative, which included the provision of loan guarantees of up to CAD 350 million for new investments in value-added manufacturing, improved fibre efficiencies, energy conservation and energy co-generation with a potential loan default cost of up to CAD [---] over 11 years (Exh. R-21).
20. On 27 May 2005, the Minister's Council on Forest Sector Competitiveness issued its Final Report (Exh. C-1, Att. S). It considered, *inter alia*, that the "forest industry in Ontario [was] in crisis" (Exh. C-1, Att. S, p. 1), that "delivered wood costs in general [were] higher in Ontario than in many competing jurisdictions" (Exh. C-1, Att. S, p. 2) and that the "softwood lumber dispute with the United States continue[d] to have an adverse impact on Canadian lumber producers and those who depend on sawmill

byproducts for their raw materials" (Exh. C-1, Att. S, p. 4). A number of recommendations were also submitted, including that the "provincial government assume its proportional share of the costs of building and maintaining the public access road network in provincial Crown forests; and that the proportion be defined as 100% of primary road costs, and 50% of secondary road costs" (Exh. C-1, Att. S, p. 20). Another recommendation was that "the forest industry be made eligible for a fuel tax credit amounting to 50% of the provincial fuel taxes paid when hauling fibre from the forest to the mill" (Exh. C-1, Att. S, p. 21).

21. On 13 June 2005, the Ontario government publicly announced that it would, *inter alia*, provide up to CAD 350 million in loan guarantees "to stimulate new investment in value-added manufacturing, improve energy efficiency and make better use of wood fibre" (Exh. R-12).
22. On [---] June 2005, the [-----] approved the Forest Sector Loan Guarantee Program, to provide 5-year loan guarantees up to CAD 350 million to qualifying firms (Exh. R-22). The parameters of the Forest Sector Loan Guarantee Program were modified on [---] June 2006 (Exh. R-25).
23. On [---] September 2005, the [-----] approved the Ontario Forest Sector Strategy, one component of which was the establishment of a Forest Sector Prosperity Fund as a three-year conditional program for forest products industry transformation and accelerated electricity transition initiatives not to exceed CAD 150 million. Another component of the Ontario Forest Sector Strategy was the provision of up to CAD 28 million annually, commencing in 2005-2006, for the maintenance of public primary forest access roads (Exh. R-28).
24. On [---] September 2005, the MNR estimated the annual industry road construction and maintenance costs to be CAD [---]; the forest industry was estimated to spend CAD [---] to maintain approximately [-----] of primary forest access roads and to spend an additional CAD [-----] on the maintenance of secondary forest access roads (Exh. R-29).
25. On [---] September 2005, the Cabinet approved: (i) the government's final response, prepared by the ministries, to the 26 recommendations of the May 2005 report of the MNR's Council on Forest Sector Competitiveness; (ii) the establishment of a 3-year, CAD 150 million Forest Sector Prosperity Fund as a conditional contribution (grant) transfer program, to target forest products industry capital transformation initiatives; (iii) a forest access roads cost-sharing program with the forest industry, with the province

contributing to the maintenance of public primary forest access roads at a mature cost of CAD 28 million annually (province share) (Exh. R-52).

26. On 29 September 2005, the Ontario government publicly announced the establishment of the CAD 150 million Forest Sector Prosperity Fund "to leverage new capital investments in the following areas: energy conservation and cogeneration, improved fibre efficiency, value-added manufacturing, environmental technologies and infrastructure needs associated with these priorities" (Exh. R-13). The government also announced, *inter alia*, that it would provide up to CAD 28 million annually to cover the costs of maintaining primary forest access roads (Exh. R-13). The parameters of the Forest Sector Prosperity Fund were modified on [---] June 2006 (Exh. R-25).
27. In 2006, the Ontario budget proposed a CAD 1.2 billion investment in "Move Ontario" which would support public transit and provide funding for roads and bridges (Exh. R-24).
28. On 23 January 2006, a road maintenance agreement was concluded between the MNR and Clergue Forest Management Inc. (Exh. R-43).
29. On [---] February 2006, the [-----] approved a forest sector assistance package which included CAD 47 million in [-----]

-----](Exh. R-34).
30. In a government press release of 22 February 2006, the Ontario Premier announced the investment of CAD 220 million over the following three years to strengthen Ontario's forest sector. The announcement included a total of CAD 75 million in road assistance to be provided to the industry, CAD 70 million in refunds to the industry as a result of reducing stumpage fees retroactively for 2005-2006, and CAD 3 million a year for the next three years by reducing stumpage fees for poplar veneer and white birch (Exh. R-35).
31. As of [---] June 2006, the Forest Sector Competitiveness Secretariat of the MNR had designated [---] applications as being [-----] and an additional [---] applications as being [-----] (Exh. R-14).
32. On [---] June 2006, the [-----] approved requests of the MNR to modify the Forest Sector Prosperity Fund and the Forest Sector Loan Guarantee Program (Exh. R-25).

33. On 30 June 2006, the MNR announced the provision of a CAD 2 million grant to Grant Forest Products Inc. from the Forest Sector Prosperity Fund (Exh. R-17).
34. On 13 July 2006, a road construction and maintenance agreement was concluded between the MNR and Clergue Forest Management Inc. (Exh. C-22).
35. On 22 September 2006, assistance under the Ontario Forest Sector Loan Guarantee Program was announced when Tembec Inc. was awarded a loan guarantee for a new facility to be located in northern Ontario (Exh. C-1, p. 63, and SoC 2 corr., para. 54).
36. On 11 June 2007, a road construction and maintenance agreement was concluded between the MNR and Domtar Pulp and Paper Products Inc. (Exh. R-45).
37. As of September 2007, the Forest Sector Competitiveness Secretariat had received 55 applications for funding from the Forest Sector Prosperity Fund and Loan Guarantee Programs (Exh. C-18). The Ontario government also announced that it was providing Thunder Bay Fine Papers Inc. with a CAD 1.5 million grant and supporting a CAD 12.7 million loan guarantee. This was reportedly the seventeenth announcement of an offer made by the province since the Forest Sector Prosperity Fund and Loan Guarantee Programs had been established, offers that it expected "[would] lead to about CAD 356 million in investment based on accumulated government support of CAD 89 million" (Exh. C-18).
38. On 27 September 2007, a guarantee agreement was concluded between the Minister of Finance, the National Bank of Canada, Olav Haavaldsrud Timber Company Limited and the MNR (Att. L).
39. On 28 November 2007, an agreement concerning a biomass boiler project in Fort Frances was concluded between the MNR and Abitibi-Consolidated Company of Canada (Exh. R-98).
40. In the course of November and December 2007, a forest management plan for the caribou forest, prepared by KBM Forestry Consultants Inc. and Bowater Canadian Forest Products Inc., was approved for implementation by the MNR for the 10-year period from 1 April 2008 to 31 March 2018. This plan replaced the previous contingency forest management plan that covered operations from 1 April 2007 to 31 March 2008 (Exh. R-48).
41. On or around 28 February 2008, an agreement concerning the installation of various projects in the locations of Chapleau, Cochrane, Hearst and Kapuskasing was

concluded between the MNR and Tembec Industries Inc. and Tembec Enterprises Inc. (Exh. R-6, Att. H).

42. On or near the 4 July 2008, an agreement concerning the construction and installation of a steam turbine generator and bark handling system project was concluded between the MNR and Terrace Bay Pulp Inc. (Exh. R-6, Att. E).

b) The Québec programs

43. In October 2003 and upon the mandate conferred by the Québec government, the Commission for the Study of Public Forest Management in Québec (the "Coulombe Commission") set out to examine the management of public forests and make recommendations in response to the needs and aspirations of the population of Québec (Exh. R-80, R-81).
44. The final report was submitted by the Commission on 14 December 2004 (Exh. R-82; R-83). Regarding the softwood forests, the Commission found a "worrisome decline in wood capital in the time between the last two forest surveys". The Commission recommended five priorities for the study of public forest management in Québec which were meant, *inter alia*, to "prepare the inevitable consolidation of the wood processing industry" (Exh. R-82).
45. During 2006, Québec announced a number of programs (Att. B).
46. On 23 March 2006, Michel Audet, Québec Minister of Finance, delivered the 2006/2007 budget speech of the Québec government (Exh. R-67; see also Exh. R-69, R-74, R-75).
47. That same day, a temporary refundable tax credit for the construction or major repair of public access roads and bridges in forest areas was reportedly implemented (Exh. R-58), with the purpose of fostering the development of the forest road network to make forested land in Quebec accessible to its many users and allow forest managers to harvest the most appropriate stands in a timely manner. Among other conditions, eligible corporations would have to incur their expenses after 23 March 2006 and before 1 January 2011 (Exh. R-60). Additional information was provided regarding the fiscal measures announced on 23 March 2006 (Exh. R-66).
48. On 21 July 2006, a road construction and maintenance agreement was concluded between Québec and Mckenzie Forest Products Inc. (Exh. C-47).

49. On 18 October 2006, a memorandum to the Council of Ministers (Québec government) was submitted whereby it was recommended, *inter alia*, to approve the plan for the support of the forestry sector, including the financing of companies and forestry management measures, and which would provide global assistance of CAD 729.8 million in addition to bank financing (Exh. R-94).
50. In press releases of 20 and 23 October 2006, the Québec government announced a plan for workers, affected communities and companies in the forest sector as well as a temporary refundable tax credit for the construction or major repair of public access roads and bridges in forest areas (Att. F). The government plan had four sections totaling investments of CAD 721.8 million: (i) support for workers of CAD 54.8 million; (ii) support for communities of CAD 45 million; (iii) an investment of CAD 197 million in a new approach to forest management; (iv) maintenance of an envelope of CAD 425 million to finance companies' modernization projects with certain adjustments, particularly by lifting the requirement to obtain countervailing duties as security.
51. In press releases of 6 and 26 June and 4 July 2007, the Québec government announced a contribution, in the form of a loan guarantee, to two joint ventures and investment plans for the development of the Québec private forest.
52. On 23 November 2007, an information bulletin was submitted to make public the application details of the new refundable tax credit for manpower training in the manufacturing sector. It also described the improvement to the capital tax credit regarding certain types of investment as well as the application details for relief relating to the payment of installments by manufacturing corporations (Exh. R-89).
53. On 13 March 2008, Monique Jérôme-Forget, Minister of Finance, delivered the 2008-2009 budget speech (Exh. R-90). This budget was to create "a fiscal environment that has never been more favourable to investment and productivity improvement". Regarding the first part of the speech which concerned the modernization of enterprises and stimulation of investment, a number of announcements were made including: (i) the immediate, complete elimination of the tax on capital for all Quebec manufacturing companies; (ii) a three-year extension of the accelerated capital cost allowance for manufacturing and processing equipment; (iii) a new investment tax credit of 5% for the purchase of manufacturing and processing equipment, for all businesses – to be raised on the basis of the remoteness of the regions as well as the maintaining of two other tax credits; (iv) an additional funding of CAD 50 million over five years to support regional county municipalities experiencing economic difficulty

and (v) various investments and assistance to promote the information technology, mining, agrifood and cultural sectors (Exh. R-90).

3. The Challenges to the Respondent's programs

54. In a letter dated 23 January 2007 addressed to the Respondent's Minister of International Trade, the United States Trade Representative expressed concerns regarding the Ontario and Quebec pledges of financial assistance to their lumber industries. An "immediate dialogue" on these funding programs was considered necessary and a preference was indicated to address these concerns through the Softwood Lumber Committee before consideration of any options under the SLA's dispute settlement process (Exh. C-50).
55. On 30 March 2007, the United States Trade Representative wrote to the Canadian Minister of International Trade, to request formal consultations with the Canadian government on two principal matters: (i) paragraph 14 of Annex 7D of the SLA and (ii) certain provincial (Ontario and Quebec) and federal assistance programs (Att. B).
56. The consultations between the Parties were unsuccessful, opening the way to the submission of the dispute to arbitration, in accordance with Article XIV(6) of the SLA.

II. PROCEDURAL HISTORY

57. In this section, the Tribunal summarizes the main procedural steps leading to the present award. This summary is only provided for basic reference purposes and does not include reference to the voluminous correspondence between the Parties and the Tribunal documenting a number of procedural matters that were raised by the Parties and decided by the Tribunal.
58. On 18 January 2008, the Claimant submitted a Request for Arbitration (the "Request") to the London Court of International Arbitration ("LCIA"), accompanied by an appendix of documents A to N. The Claimant had previously started arbitration proceedings concerning an independent and unrelated claim under the SLA relating to the Respondent's implementation of the export measures (Request, para. 10). The Claimant nominated Mr. David Williams QC, a national of New Zealand, as arbitrator in a letter dated 18 February 2008.

59. On 18 February 2008, the Respondent submitted its Response to the Request for Arbitration (the "Response"). In the Response, the Respondent appointed Professor Albert Jan van den Berg, a national of the Netherlands, as arbitrator.
60. By email of 28 February 2008, the party-nominated arbitrators notified the LCIA that they jointly nominated, as third and presiding arbitrator (the "Tribunal Chair"), Professor Gabrielle Kaufmann-Kohler, a national of Switzerland. On 29 February 2008, Professor Kaufmann-Kohler accepted her appointment as Tribunal Chair in the arbitration proceedings No. 81010 before the LCIA. On 5 March 2008, the Parties confirmed their non-objection to her appointment.
61. On 7 March 2008, the LCIA informed the Parties of the constitution of the Tribunal in the present arbitration.
62. On 11 March 2008 and in light of the expedited nature of this arbitration pursuant to Article XIV(19) of the SLA, the Tribunal invited the Parties to address several questions, including whether the parties agreed to the appointment of a Secretary to the Tribunal in the person of Dr. Jorge E. Viñuales, a national of Argentina. Moreover, the Tribunal notified that the period of time for submission of the Statement of Case had started to run as of 11 March 2008.
63. In a joint letter from the Parties dated 14 March 2008, it was agreed, *inter alia*, that Claimant should not be required to file its Statement of Case by 7 April and requested additional time to attempt to agree upon the procedures and a schedule for the proceedings. No objection was raised to the appointment of Dr. Viñuales as Secretary to the Tribunal. The Parties further recognized that it may not be possible to complete the proceedings within the 180-day time frame provided in Article XIV(19) of the SLA.
64. On 14 April 2008, the Tribunal and the Parties held a telephone conference. The discussions that took place during the telephone conference were reflected in a draft Procedural Order No. 1, circulated to the Parties for comments on 16 April 2008.
65. On 18 April 2008, after consultation with the Parties, the Tribunal issued Procedural Order No. 1 ("PO 1").
66. On 21 April 2008, the Claimant submitted its requests for the production of documents to the Respondent.
67. On 12 May 2008, the Respondent produced a number of documents and indicated objections to disclosure in the form of a "Redfern schedule". Subsequently, in a letter of

21 May 2008, the Respondent advised the Tribunal of the Parties' disagreement regarding matters of confidentiality and requested the Tribunal to convene a telephone conference.

68. On 26 May 2008, the Tribunal, represented by the Tribunal Chair, held a telephone conference and encouraged the Parties to reach an agreement on the issues of confidentiality and document disclosure. Despite the efforts of the Parties, no agreement was reached.
69. After receiving confirmation from the Parties that they had not been able to reach an agreement on the issues above, on 12 June 2008, the Tribunal advised the Parties of the need to amend the timetable initially contemplated in PO 1.
70. On 25 June 2008, the Tribunal issued Procedural Order No. 2 on confidentiality ("PO 2") and Procedural Order No. 3 on document production ("PO 3"). Exchanges of correspondence ensued between the Parties and the Tribunal regarding PO 3.
71. On 11 July 2008, the Parties submitted a joint proposed revised timetable for the proceeding, which was confirmed by the Tribunal.
72. On 23 July 2008, the Tribunal issued Procedural Order No. 4 on document production ("PO 4"). On 28 July 2008, upon request from the Parties, the Tribunal clarified the meaning of paragraph 1 of the operative part of PO 4 as well as the timing for production of documents covered by a number of requests.
73. On 21 November 2008, the Claimant filed its Statement of Case, accompanied by (i) the expert report of Tom L. Beck of the Beck Group (Exh. C-1), (ii) the expert report of Robert H. Topel, of Chicago Partners (Exh. C-2), (iii) exhibits C-3 to C-42, and (iv) authorities CA-1 to CA-9. On 26 November and 23 December 2008, the Claimant filed, respectively, a Corrected and a Second Corrected Statement of Case.
74. On 20 February 2009, the Respondent submitted its Confidential Statement of Defence, accompanied by (i) Exhibits R-1 to R-99 and (ii) Authorities RA-1 to RA-84. Exhibits R-2 and R-6 are expert reports of Joseph P. Kalt and Robert F. Reilly. Exhibits R-3 to R-5 are statements of Jean-Pierre Adam, François Trottier and Julie Fortin. On 27 February 2009, the Respondent submitted a Corrected Statement of Defence, as well as Exhibits R-25 and RA-44 marked 'Confidential' to replace Exhibits R-25 and RA-44 included in the submission of 20 February 2009.

75. In a letter of 6 March 2009, the Claimant requested, *inter alia*, that the Tribunal require the Respondent to supplement its document production. After a number of exchanges, on 30 March 2009, the Tribunal ruled on the Claimant's request, essentially rejecting the production of further documents.
76. On 23 March 2009, the Claimant submitted its Confidential Reply Memorial accompanied by (i) Exhibits C-43 to C-54 (Exhibits C-43 and C-44 are expert reports of Tom L. Beck and Robert H. Topel) and (ii) Authorities CA-10 to CA-48. Then, on 30 March 2009, the Claimant submitted a non-confidential version of its Reply Memorial. Later, on 3 April 2009, the Claimant filed corrected versions of its Confidential and Non-confidential Reply Memorial and exhibits (Exh. C-47 and C-49 to C-54).
77. On 30 March 2009, the Tribunal invited the Parties to revert to the venue and organization of the hearing due to take place in late July 2009 by no later than 6 April 2009. In a joint letter dated 6 April 2009, the Parties confirmed their arrangement for the hearing to be held at the Government Conference Centre in Ottawa, Canada.
78. On 9 May 2009, the Respondent filed its Rejoinder together with (i) Exhibits R-100 to R-147 and (ii) Authorities RA-85 to RA-129. Exhibits R-101 and R-102 are expert reports of Professor Joseph P. Kalt and Professor W. Michael Reisman. Exhibits R-124 and R-125 are statements from Revenu Québec and Jean-Pierre Adam. On 15 May 2009, the Respondent submitted a non-Confidential version of its Rejoinder.
79. On 3 June 2009, the Tribunal and the Parties held a pre-hearing telephone conference in which were addressed several issues in view of the organization of the Hearing. It was decided that the Tribunal would rule on the issues discussed at this conference by way of a procedural order.
80. On 12 June 2009, the Tribunal issued Procedural Order No. 5 ("PO 5") on the organization of the Hearing.
81. The Tribunal held a hearing on the merits from 20 to 24 July 2009 at the Government Conference Centre in Ottawa, Canada (the "Hearing"). At the Hearing, the following persons appeared before the Tribunal:
- (i) On behalf of the Claimant:
- Mr. Reginald Blades, United States Department of Justice
 - Ms. Antonia Soares, United States Department of Justice
 - Mr. David Silverbrand, United States Department of Justice

- Ms. Maame Ewusi-Mensah, United States Department of Justice
- Ms. Claudia Burke, United States Department of Justice
- Mr. Gregg Schwind, United States Department of Justice
- Mr. Stephen C. Tosini, United States Department of Justice

(ii) On behalf of the Respondent:

- Mr. Guillermo Aguilar Alvarez, Weil, Gotshal & Manges LLP
- Ms. Joanne Osendarp, Weil, Gotshal & Manges LLP
- Mr. Ralph Miller, Weil, Gotshal & Manges LLP
- Mr. Charles E. Roh, Jr., Weil, Gotshal & Manges LLP

The Hearing was transcribed and the transcript was distributed to the Parties at the end of each day. The complete version of the *verbatim* transcript was later distributed to the Parties.

82. At the end of the Hearing, after consultation with the Parties, the Tribunal issued directions regarding the further procedural steps.
83. On 31 July 2010, the Claimant informed the Tribunal of (i) the Parties' agreed schedule for the submission of their Post-Hearing Briefs and (ii) the Parties' refusal to waive the limitation in Article XIV(14) of the SLA regarding Tribunal-appointed experts under Article 6 of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"). By communication of 3 August 2003, the Tribunal confirmed the schedule proposed by the Parties.
84. On 8 October 2009, the Parties submitted simultaneously their Post-Hearing Briefs. The Claimant's Post-Hearing Brief ("PHB Cl.") was accompanied by (i) Exhibits C-63 to C-69 and (ii) Authority CA-49. The Respondent's Post-Hearing Brief ("PHB Resp.") was accompanied by Authorities RA-130 to RA-145. On 8 October 2009, the Respondent submitted a corrected version of its Post-Hearing Brief. On 15 October 2009, the Parties simultaneously submitted non-confidential versions of their Post-Hearing Briefs.
85. On 13 November 2009, the Parties submitted simultaneously their Post-Hearing Reply Briefs. The Claimant's Post-Hearing Reply Brief ("PHB Cl. Reply") was accompanied by (i) Exhibit C-70 and (ii) Authority CA-50. The Respondent's Post-Hearing Reply Brief ("PHB Resp. Reply") was accompanied by Authorities RA-146 to RA-149. On 20 November 2009, the Parties submitted simultaneously non-confidential versions of their Post-Hearing Reply Briefs.

86. On 21 January 2010, the Tribunal issued Procedural Order No. 6 ("PO 6") on Expert Assistance. The Tribunal requested Professor Topel and Professor Kalt to present a joint report on the calculation of Compensatory Adjustments for five specific programs.
87. On 15 April and 4 May 2010, upon request of the Experts, the Tribunal clarified the mandate of the experts as set forth in PO 6.
88. On 15 June 2010, the Experts submitted their joint report ("Joint Expert Report"). On 22 June 2010, the Experts submitted a revised version of the Joint Expert Report.
89. On 15 July 2010, the Parties submitted their comments on the Joint Experts Report. The Claimant's comments ("Comments Cl.") were accompanied by (i) Exhibits C-71 to C-72 and (ii) Authorities CA-51 to CA-58. The Respondent's comments ("Comments Resp.") were accompanied by (i) Exhibits R-151 to R165 and (ii) Authorities RA-150 to RA-161. On 22 July 2010, the Parties submitted non-confidential versions of their comments.
90. On 27 July 2010, the Parties advised the Tribunal that no further hearing would be needed to examine the experts. On 5 August 2010, the Tribunal confirmed that the hearing tentatively contemplated in paragraph 2.5 of PO 6 would not take place.
91. On 3 August 2010, the Claimant requested the Tribunal to disregard certain evidence included in the Respondent's Comments on the Joint Expert Report and the Respondent's comments that relied upon that material. Upon request of the Tribunal, the Parties commented. After a number of exchanges, on 7 September 2010, the Tribunal informed the Parties that it would take into account the positions of the Parties and rule on them in this Award.

III. POSITION OF THE PARTIES

92. The Tribunal has deliberated and thoroughly considered the Parties' written submissions on the merits and the oral arguments delivered in the course of the Hearing. It will now summarize the position of the Parties (III) and analyze the issues in dispute (IV) before setting forth the relief awarded (V).

A. THE CLAIMANT'S POSITION AND REQUEST FOR RELIEF

93. The Claimant's position is essentially the following:

“The evidence in the record establishes that each of the challenged programs provides grants or other benefits to softwood lumber producers or exporters. The benefits are provided in the form of loans, including no-interest loans and forgivable loans; loan guarantees; tax credits; waiver or removal of various fees and costs previously required of the lumber companies; or payments to lumber companies for performing tasks for which the lumber companies had previously borne the costs [...] Canada has not proven that any program is excepted. We, therefore, respectfully request the tribunal to find that each of the challenged programs violates the SLA and is a breach of that agreement. Because the providing of grants or other benefits circumvents the SLA, it is the providing of benefits that is the breach that must be remedied. Any remedy should, therefore, at a minimum, collect dollar for dollar the grants or other benefits that have been provided, otherwise the breach remains uncorrected and unremedied. An appropriate remedy is not limited to some measure of the effect or harm upon the U.S. market or the U.S. producers or an economic model of the effects upon the export measures. An appropriate remedy begins with collecting the grants or other benefits that have been provided. Canada cannot collect the export charges with one hand and give them back through grants or other benefits with the other. Further, the collection of the remedy, accomplished through adjustments to the export measures, should be completed within the remaining life of the SLA, that is, by October 2014.”
(Tr., 24 July 2009, 1090:5-15, 1091:1-25, 1092:1)

94. On the basis of these contentions, the Claimant requested the following relief in its Statement of Case:

“161. The United States respectfully requests that the Tribunal determine that Canada breached the SLA by enacting and administering the six Ontario and Québec programs discussed above and declare that each of these programs breaches the SLA.

162. If the Tribunal finds Canada has breached the SLA regarding any one of these programs, the United States respectfully requests that the Tribunal determine a reasonable period of time for Canada to cure the breaches and respectfully requests that the Tribunal also identify appropriate compensatory adjustments to the export measures that remedy Canada's breach.

163. With respect to the cure period, the United States has no objection to the Tribunal determining that 30 days would be a reasonable period of time for Canada to cure the breach.

164. With respect to compensatory adjustments to the export measures, the United States respectfully requests that:

a. The Tribunal determine that appropriate adjustments to export measures consist of additional export charges that will result in the collection of at least C\$123.7 million on Ontario softwood lumber exports and at least C\$288.0 million on Quebec softwood lumber exports; the Tribunal determine a rate at which the additional export charge is to be collected; and the Tribunal determine further adjustments to export measures should Canada not cease administering the programs the Tribunal finds to have breached the SLA (REMEDY I); or

b. The Tribunal determine that appropriate adjustments to export measures consist of imposing additional export charges on Canadian softwood lumber exports, in accordance with the remedies proposed by Professor Topel; and the Tribunal determine that appropriate adjustments to export measures also include additional export charges required to collect the lost U.S. producer surplus as calculated by Professor Topel (REMEDY II).”

(SoC 2nd corr., para. 161-164)

95. In its Reply, the Claimant requested the following relief:

“297. The United States respectfully requests that the Tribunal determine that Canada breached the SLA by enacting and administering the six Ontario and Québec programs discussed above and declare that each of these programs breaches the SLA.

298. If the Tribunal finds that Canada has breached the SLA regarding any one of these programs, the United States respectfully requests that the Tribunal determine a reasonable period of time for Canada to cure the breach and respectfully requests that the Tribunal also identify appropriate compensatory adjustments to the Export Measures that remedy Canada's breach.

299. With respect to compensatory adjustments to the Export Measures, the United States respectfully requests that:

a. The Tribunal determine that appropriate adjustments to Export Measures consist of additional export charges that will result in the collection of at least C\$217 million on Ontario and Québec exports of softwood lumber to the United States; the Tribunal determine a rate at which the additional export charge is to be collected; and

b. The Tribunal determine further adjustments to Export Measures, in addition to those requested above, should Canada not discontinue the programs the Tribunal finds to have breached the SLA.”

(Reply corr., para. 297-299)

96. In its Post-Hearing Brief, the Claimant requested the following relief:

“150. In light of the Parties' submissions, and the evidence, arguments, and testimony presented during the hearing, the United States respectfully requests that the Tribunal determine that Canada breached the SLA by enacting and administering the six Ontario and Québec programs discussed above and declare that each of these programs breaches the SLA. 151. If the Tribunal finds that Canada has breached the SLA regarding any of these programs, the United States respectfully requests that the Tribunal determine a reasonable period of time for Canada to cure the breach. The United States proposes 30 days as a reasonable period of time.

152. The United States also respectfully requests that the Tribunal also identify appropriate compensatory adjustments to the Export Measures that remedy Canada's breach.

153. With respect to compensatory adjustments to the Export Measures, the United States respectfully requests that:

a. The Tribunal determine that appropriate adjustments to Export Measures consist of additional export charges that will result in the collection of at least CDN \$267.87 million on Ontario and Québec exports of softwood lumber to the United States; the Tribunal determine a rate at which the additional export charge is to be collected; and

b. The Tribunal determine further appropriate adjustments to Export Measures, in addition to those requested above, should Canada not discontinue the programs the Tribunal finds to have breached the SLA.”

(PHB Cl., para. 150-153)

97. This conclusion was reiterated in the Claimant's Post-Hearing Reply Brief (PHB Cl.-Reply, para. 147).

98. In its comments to the Joint Expert Report, the Claimant reserved the relief requested in its previous submissions (Comments Cl., para. 84) and concluded as follows:

“85. The United States has established Canada's liability for breach of the SLA Anti-circumvention provision and entitlement to a remedy. Professors Topel and Kalt estimate in their joint report that Ontario and Québec have provided between \$188 million and \$273 million in benefits through five of the challenged government programs. For the reasons explained above and by Professor Topel in the joint report, the \$273 million benefits figure is more accurate, and should be the basis for calculating compensatory adjustments to the export measures.

86. On the basis of the experts' calculations, the United States respectfully requests that the Tribunal identify a reasonable period of time, not longer than 30 days, for Canada to cure its breach. We further request that the Tribunal determine that, should Canada fail to cure its breach within that period, appropriate adjustments to the export measures will consist of additional export charges of 2.3 percent on Ontario softwood lumber exports and 10.7 percent on Québec softwood lumber exports, to be applied until the amounts of \$36 million and \$237 million, respectively, are collected.”

(Comments Cl., para. 85-86).

B. THE RESPONDENT'S POSITION AND REQUEST FOR RELIEF

99. The Respondent's position is essentially the following:

"1. In its Statement of Case, the United States alleges that certain programs of Ontario and Québec breach Canada's obligations under the anti-circumvention provisions of Article XVII of the Softwood Lumber Agreement 2006. The United States alleges that each challenged provincial measure provides benefits to softwood lumber producers or exporters in its province, with the effect of reducing or offsetting export taxes imposed under the SLA, and thereby breaching the obligation not to circumvent other obligations of the Agreement. The United States further contends that none of the challenged measures falls within any safe harbour (what the United States calls "exceptions") provided in Article XVII.

2. In this Statement of Defence, Canada will demonstrate what may already have been obvious to the Tribunal: the U.S. allegations lack evidentiary basis, misunderstand the measures they challenge, and rely on unfounded assumptions and estimates. In advancing incorrect interpretations of the SLA, the United States pays lip service to the interpretive principles of the Vienna Convention on the Law of Treaties ("VCLT"), but provides no analysis of text, context or object and purpose. The remedies that the United States seeks, if it were to prevail, are based on wrong assumptions about the SLA, the programs at issue and their operations. One expert's gross overstatement of benefits becomes the basis for an economic model whose flaws further inflate the U.S. demands for compensation. The United States also asks the Tribunal to draw adverse inferences against Canada for failing to produce information that does not exist, that the United States never requested, or that the United States requested and received but does not appear to have read or comprehended.

3. The United States argues that Article XVII flatly prohibits any governmental measure that provides benefits to Canadian softwood lumber producers or exporters, unless the measure falls within what the United States views as five exclusive categories of exceptions. The United States provides virtually no discussion or explanation of its interpretation of Article XVII, but it is apparent that the United States assumes and asserts a broader view of what is prohibited and a narrower construction of the scope of the safe harbours than results from a proper interpretation predicated on the principles of the VCLT. With respect to the U.S. challenge to the particular measures before this Tribunal, the U.S. claims lack foundation and reflect a misunderstanding of the programs and the provincial systems within which they operate."

(SoD corr., para. 1-3)

100. On reliance of these contentions, the Respondent requested the following relief in its Statement of Defence:

"466. For the reasons set forth above, Canada respectfully requests an award:

(1) declaring that Canada has not breached the SLA 2006; and

(2) dismissing all claims of the United States for relief."

(SoD corr., para. 466)

101. In its Rejoinder, the Respondent requested the following relief:

"652. For the reasons stated above, Canada respectfully requests that the Tribunal dismiss all claims against Canada, on grounds that none of the challenged measures breach Canada's obligations under the SLA. If the Tribunal finds, contrary to Canada's view, that any of the challenged measures breach the obligations of the SLA, then Canada respectfully requests that the Tribunal determine that (1) Canada should be afforded thirty days from the date the Parties receive the award as the reasonable period of time in which to cure the breach; and (2) that the Tribunal determine the compensatory adjustments to be applied in the absence of a timely cure in accordance with Canada's proposal [...]

653. For the reasons set forth above, Canada respectfully reiterates its request for an award:

(1) declaring that Canada has not breached the SLA 2006; and

(2) dismissing all claims of the United States for relief."

(Rej., para. 652-653).

102. The Respondent's Post-Hearing Brief emphasized that:

"[I]f the Tribunal does find that any of the challenged Canadian programs breach the SLA, the proper way to determine the export tax adjustments to compensate for the breach is not the U.S. Beck "high case" or so called "low case" proposals, neither of which has a basis in law or economics, and both of which would impose punitive damages. Rather, the proper way to determine any compensatory adjustment, if necessary, is through a model constructed under sound economic principles that will calculate an adjustment to offset any economic effect on the Export Measures caused by the breach. That is what Canada has proposed in the event the Tribunal reaches this issue, supported by the work of Professor Kalt and, to a large degree, by the U.S. economic expert, Dr. Topel."

(PHB Resp., para. 2)

103. In its Post-Hearing Brief in Reply, the Respondent concluded as follows:

"294. For the reasons stated above, Canada respectfully requests that the Tribunal dismiss all claims against Canada, on grounds that none of the Challenged Programs breach Canada's obligations under the SLA. If the Tribunal finds, contrary to Canada's view, that any of the Challenged Programs breach the obligations of the SLA, then Canada respectfully requests that the Tribunal determine that (1) Canada should be afforded thirty days from the date the Parties receive the award as the reasonable period of time in which to cure the breach; and (2) compensatory adjustments to be applied in the absence of a timely cure, calculated in accordance with Canada's remedy proposal [...]

295. For the reasons set forth above, Canada respectfully reiterates its request for an award: (1) declaring that Canada has not breached the SLA 2006; and (2) dismissing all claims of the United States for relief."

(PHB Resp.-Reply, para. 294-295).

104. In its comments to the Joint Expert Report, the Respondent reserved the relief requested in its previous briefs (Comments Resp., para. 2) and requested the Tribunal to set any potential compensatory adjustments on the basis of an interactive spreadsheet prepared by Prof. Kalt, the quantum expert presented by the Respondent.

IV. ANALYSIS

105. After addressing a number of preliminary issues of general relevance for all the claims (A), the Tribunal will focus on the claims relating to each one of the programs challenged by the Claimant first for purposes of deciding liability (B), and thereafter, where applicable, will rule on remedies (C).

A. PRELIMINARY ISSUES

1. Jurisdiction

106. The jurisdiction of the Tribunal over the matters before it is based on Article XIV(6) of the SLA, according to which:

"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."

107. The jurisdiction of the Tribunal has not been disputed.

2. Attribution

108. It is common ground between the Parties that the acts of the provincial governments of Ontario and Quebec, or of their officials, can be attributed to Canada as regards the matters before this Tribunal.

3. Governing law

109. It is not contested that the Tribunal must decide this dispute on the basis of the SLA as *lex specialis* as well as of other relevant rules of international law, as may be applicable, in particular the Vienna Convention on the Law of Treaties ("VCLT").²

110. The Tribunal regards its task in these proceedings as the specific one of applying the relevant provisions of the SLA as far as necessary in order to decide on the relief sought by the Parties. In order to do so, the Tribunal must, as required by the general rule of interpretation of Article 31 VCLT, interpret the SLA's provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the SLA's object and purpose. The "ordinary meaning" as defined above applies unless a special meaning is to be given to a term if it is established that the parties to the treaty so intended, as it is stated in the fourth paragraph of Article 31.

111. As provided in Article 32 VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 VCLT, or (ii) when the interpretation according to Article 31 VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly

² Vienna Convention on the Law of Treaties of 23 May 1969.

absurd or unreasonable. Those supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Thus, recourse to the supplementary means of interpretation of Article 32 may only be had in the situations mentioned at (i) and (ii).

4. Burden of proof

112. A preliminary issue that must be considered by the Tribunal is the allocation of the burden of proof.

113. The Claimant argues in essence that it is only required to establish that the three requirements contained in the *chapeau* of paragraph 2 of Article XVII of the SLA are met, i.e. that the challenged programs constitute a "grant or benefit [...] provided by a party [...] to a producer or exporter of softwood lumber" (Tr., 24 July 2009, 1096:25, 1097:1-4). Once these requirements are fulfilled, the burden is said to shift to Canada to show that a given program does not fall within one of the exceptions provided in Article XVII(2) of the SLA:

"after those three requirements have been satisfied, the burden then shifts to Canada to demonstrate that the particular program does not satisfy one of the exceptions. We know this because of the presumption that once grants or benefits have been established they shall be considered to offset the export measures. Accordingly, Canada is incorrect that the United States must or even should demonstrate that a particular breach has offset the export measures."

(Tr., 24 July 2009, 1097:5-15)

114. The Respondent opposes this view, alleging that it mischaracterizes the exceptions in Article XVII(2) as affirmative defences when, according to the Respondent, Article XVII in its entirety "defines the wrongful conduct; and Article XVII(a)-(e) set forth the negative elements of the offense" (PHB Resp., para. 66). In support of its interpretation, the Respondent refers to the case law of the Dispute Settlement Body of the WTO (SoD, para. 30-33; PHB Resp., para. 66-69).

115. As a general rule, the burden of proving the elements triggering a presumption lies with the party which seeks to avail itself of such a presumption. This is a simple application of the general principle of *onus probandi incumbit actori*.³ In the same vein, the burden of proving an exception lies with the party which invokes such exception.⁴

³ The International Court of Justice recently referred to this principle in the Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, para. 162, and references cited therein.

⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (ILC Articles), Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, chapter V, para. 8, p. 72.

116. The Respondent argues, however, that such rule does not apply to the exceptions provided in Article XVII(2)(a)-(e) of the SLA because these are technically not exceptions but "negative elements" of the definition of the circumvention or offsetting offense. To determine whether this interpretation is the correct one, the Tribunal must resort to the rules contained in the aforementioned Articles 31 to 33 of the VCLT. In this connection, the Tribunal notes that the provisions of the agreements managed by the World Trade Organization (WTO), as interpreted by the Dispute Settlement Body, may only be referred to the extent that the interpretative techniques provided in the VCLT allow for such reference.
117. In interpreting Article XVII(2)(a)-(e) of the SLA in accordance with the provisions of the VCLT, the Tribunal must look to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".
118. Article XVII states the principle of the prohibition of circumvention or offsetting in its first paragraph. The second paragraph of the same article defines when a grant or benefit reduces or offsets export measures and when it does not:
- "Grants or other benefits that a Party, including any public authority of a Party, provides shall be considered to reduce or offset the Export Measures if they are provided on a *de jure* or *de facto* basis to producers or exporters of Canadian Softwood Lumber Products. Notwithstanding the foregoing, measures that shall not be considered to reduce or offset the Export Measures in the SLA include, without limitation: [letters (a) to (e)]".
119. The Tribunal understands the ordinary meaning of the first sentence just quoted to create a presumption pursuant to which grants or other benefits reduce or offset the commitments under the SLA, and therefore constitute a breach of Article XVII(1). The second sentence introduces exceptions to this presumption as shown by the introductory terms "[n]otwithstanding the foregoing". Accordingly, grants or other benefits which fall within the exceptions will not be considered to reduce or offset the commitments under the SLA even though they meet the criteria set forth in the first sentence of Article XVII(2).
120. This reading of the ordinary terms of Article XVII(2) is confirmed by the context of this provision. Indeed, Article XVII distinguishes between, on the one hand, the principle of the prohibition of circumvention or offsetting (stated in its first paragraph) and, on the other hand, the presumption of breach as well as the exceptions to such presumption (both stated in its second paragraph). The inclusion of the exceptions in the second paragraph of Article XVII just after the formulation of the presumption indicates that such exceptions relate to the presumption.

121. This interpretation has the following consequences on the allocation of the burden of proof. In order to avail itself of the presumption provided in the first sentence of Article XVII(2), the Claimant must establish that grants or other benefits have been provided and that these grants and benefits meet the criteria set forth in this same sentence (i.e., they are provided by a Party, including any public authority of a Party, on either a *de jure* or *de facto* basis, to producers or exporters of Canadian Softwood Lumber Products). Establishing these elements triggers the presumption formulated in the first sentence of the *chapeau* of Article XVII(2) that the first paragraph of this article has been breached. The Party providing the grants or other benefits may then rebut this presumption by proving that the grants or benefits are covered by one of the exceptions provided in the second sentence of the *chapeau* of Article XVII(2) and letters (a) to (e).
122. On the basis of the foregoing considerations, the Tribunal sees no reason justifying a departure from the general rules on the allocation of the burden of proof. Consequently, the Tribunal concludes that the burden of proving the elements of the presumption of circumvention lies upon the Claimant, whereas the burden of proving the availability of one of the exceptions in Article XVII(2)(a)-(e) lies upon the Respondent.

5. Weight of earlier awards

123. The question arose in these proceedings whether the cases *United States v. Canada* (LCIA 7941) and *Canada v. United States* (LCIA 91312), which were both rendered under the SLA, carried res judicata or collateral estoppel or persuasive effect with respect to the matters before the Tribunal, in particular to the issue of "retrospective remedies". Both Parties agreed – and rightly so – that these decisions do not bind the Tribunal (Tr. 24 July 2009, 1135: 6-8; PHB Resp, annex III).
124. The Claimant submits, however, that the approach adopted by the LCIA 7941 tribunal, allegedly confirmed in LCIA 91312, in respect of standards of reparation in general international law must be taken into consideration in the present case (PHB Cl. Reply, para. 79, 83-87).
125. By contrast, the Respondent argues that the SLA provides for a special legal regime and that general international law and retrospective remedies are thus inapplicable. In reliance on an opinion of Professor Michael Reisman (Exh. R-102), it submits that no persuasive effect attaches to the decisions of the tribunal in LCIA 7941 (PHB Resp, annex III). As to the decision in LCIA 91312, the Respondent contends that it is not a

confirmation of the decisions in LCIA 7941 and that, in any case, the decision in LCIA 91312 concerned an entirely different question and is therefore not relevant (PHB Resp. Reply, para. 293).

126. The Tribunal notes that in addition to those rendered in LCIA 7941 and LCIA 91312, both Parties have relied on previous decisions and awards of international tribunals, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a certain solution.
127. The Tribunal is not bound by any of these decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of other international tribunals in particular when they are issued under the same treaty. It also believes that, subject to the specific circumstances of an actual case and absent compelling reasons to the contrary, it should follow solutions which have been established in a consistent line of cases for the sake of the harmonious development of international law. If there exists no consistent line of cases, it should consider the views of other tribunals whenever they may shed light on issues of law which fall to be resolved in these proceedings.

B. LIABILITY

128. After certain clarifications regarding the legal framework under which the potential liability of the Respondent must be assessed (1), this section will analyze the merits of the claims in connection with Ontario's Forest Sector Prosperity Fund and Forest Sector Loan Guarantee Program (2), Ontario's Forest Access Road and Maintenance Program (3), Quebec's Silviculture Credits (4), Quebec's Silviculture Investment Measure (5), Quebec's SOPFIM and SOPFEU Programs (6), Quebec's Forestry Fund (7), Quebec's Forest Industry Support Program (8), Quebec's Capital Tax Credit (9), and Quebec's Road Tax Credit (10).

1. Applicable provisions of the SLA

129. Before undertaking the analysis of the claims advanced by the Claimant, the Tribunal deems it useful to clarify the legal framework within which liability must be assessed.
130. The Parties have argued their respective positions by focusing on the anti-circumvention clause of the SLA, namely Article XVII. More specifically, the Parties have concentrated on the application of Article XVII(2) of SLA, which, as discussed above (*supra* para. 112-122), involves both a presumption of breach of Article XVII(1)

and a number of exceptions to the operation of this presumption. Article XVII(2) explicitly enumerates five exceptions in letters (a) to (e). In addition, it contemplates the possibility of other exceptions, when it states that "measures that shall not be considered to reduce or offset the Export Measures in the SLA 2006 include, *without limitation*: [letters (a) to (e)]". This calls for two clarifications.

131. First, the Respondent has not invoked any exceptions beyond the ones stated in Article XVII(2). As a consequence, the fact that other exceptions may be available under the SLA is not pertinent here.

132. When asked about the role of the words "without limitation" quoted above, the Respondent answered by stating that it did not intend to rely on these terms:

"PROF. VAN DEN BERG: [...] what I noted from the submissions of Canada is they do not rely on the language 'include, comma, without limitation' [chapeau of paragraph 2 of Article XVII].

MR. AGUILAR ALVAREZ: Correct [...]

PROF. VAN DEN BERG: [...] Is it safe for the tribunal to leave this language aside in its considerations?

MR. AGUILAR ALVAREZ: Absolutely safe"

(Tr., 20 July 2009, 143: 22-25, 144: 5-8)

133. Second, the Respondent does not claim that the programs at issue in these proceedings are covered by the exceptions listed in letters (d) and (e) of Article XVII(2). It relies on the requirements of Article XVII(2) as well as on the availability of one or more of the exceptions provided in letters (a) to (c). For this reason, the Tribunal will only take account of the exceptions provided in letters (d) and (e) where they may assist in the interpretation of the other exceptions invoked by the Parties.

2. Ontario's Forest Sector Prosperity Fund (FSPF) and Forest Sector Loan Guarantee (FSLGP) Programs

134. The factual background regarding Ontario's Forest Sector Prosperity Fund (FSPF) and Forest Sector Loan Guarantee (FSLG) Programs is described in paragraphs 17 - 25 above.

a) The Claimant's position

135. The Claimant submits that Ontario's FSPF and FSLG programs are in breach of the anti-circumvention clause in Article XVII(1) of the SLA. It observes that the Respondent does not deny that the FSPF provides benefits to producers or exporters of Canadian softwood lumber and that the Ontario MNR has explicitly acknowledged that the FSPF

is a grant program (SoC 2 corr., para. 30; Tr. 24 July 2009, 1102: 2-12). Similarly, the Claimant argues that the FSLG program provides substantial benefits to softwood lumber producers by enabling them to obtain capital for investment at rates below the market (SoC 2 corr., para. 60; Tr. 24 July 2009, 1102: 2-12), and that the Respondent does not contest that the program provides benefits to producers or exporters of Canadian softwood lumber.

136. For both programs, the question is thus whether they fall within one of the exceptions set forth in Article XVII(2) and, more specifically, whether they meet the requirements of Article XVII(2)(b). The Claimant considers that these requirements are not fulfilled because the programs are discretionary, as they are administered by officials who exercise their own judgment in determining how to select eligible entities and whether to provide benefits to such entities. The Claimant also argues that the decision whether to provide benefits is discretionary because there is no prescribed or required outcome. Officials administering the program are not bound to grant benefits to every eligible applicant; they can use various subjective and flexible criteria (Reply corr., para. 25, 49). Moreover, Ontario program officials did in fact exercise discretion during the application review process (PHB Cl., para. 23-26).

137. The programs therefore do not fall under the exception set out in letter (b) of Article XVII(2) of the SLA, nor under any of the other exceptions.

b) The Respondent's position

138. The Respondent argues in essence that both the FSPF and the FSLG programs fall under the exception of Article XVII(2)(b) and that they were publicly 'in place' prior to 1 July 2006 (Rej., para. 13).

139. It notes that the Claimant admits that the programs satisfy all the criteria of Article XVII(2)(b) of the SLA, except for the requirement that benefits be awarded on a non-discretionary basis (Rej., para. 14). The Respondent for its part contends that the two programs provide benefits on a non-discretionary basis because their administration is subject to substantial constraints (Rej., para. 132). In support, it puts forward three main considerations.

140. First, the Claimant has not shown that these programs provided benefits other than on a non-discretionary basis (Rej., para. 81-100). Indeed, out of all the FSPF grant applications disclosed in the Ontario document production through 18 January 2008, only three were denied and in every instance such decision was due to the fact that the

mandatory program parameters were not satisfied (Rej., para. 88). As to the FSLG program, of all the applications filed since its inception, only one was rejected, again because it failed to meet mandatory program parameters (Rej., para. 96-97; PHB Resp., para. 41-63).

141. Second, the interpretation of the notion of discretion advanced by the Claimant is not sustainable. It would deprive the exception of letter (b) of any use. Indeed, any program which permits the government to grant applications other than in a mechanical manner would fall outside the exception (Rej., para. 79, 101-125; PHB Resp., para. 19-26, 36-40).

142. Third, under an interpretation consistent with the ordinary meaning of the words and the context of the SLA, "non-discretionary" means "decision making that is subject to reasonable constraint" This interpretation covers the two programs under review and was not rebutted (Rej., para. 80, 126-146; PHB Resp., para. 27-35).

c) The Tribunal's determination

143. At the outset, the Tribunal notes that the Parties have dealt with the FSPF and the FSLG programs together. For this reason and because of their similarity, it will proceed to their analysis in the same subsection of this Award (PHB Cl. Reply, para. 20-33, Tr. PHB Resp. Reply, para. 32-60).

144. In the course of their written and oral pleadings, the Parties have circumscribed the matters on which they disagree. They do not disagree on the fact that these programs provided "grants or other benefits" in the meaning of Article XVII(2). They do not diverge either on the fact that these programs were not covered by an exception of Article XVII(2) other than the one in letter (b).

145. Article XVII(2)(b) of the SLA exempts from the circumvention presumption "other government programs that provide benefits on a non-discretionary basis in the form and the total aggregate amount in which they existed and were administered on July 1, 2006".

146. As the Respondent has rightly observed in its Rejoinder (Rej., para. 14), the Claimant's argumentation with respect to this exception focuses on the allegedly discretionary nature of the programs (Reply, para. 45-68; Tr. 20 July 2009, 22:20-23; PHB Cl., para. 16-27; PHB Cl. Reply, para. 20-33).

147. In order to decide whether the two programs at issue fall within the exception of letter (b), the Tribunal must therefore determine whether or not such programs can be considered discretionary in the meaning of this provision. Before undertaking this inquiry, the Tribunal deems it useful to review the main characteristics of the programs.
148. The description of the programs, including eligibility requirements, targets, program criteria, and application procedures are found on the website of Ontario's MNR (Exh. C-1, Att. AJ; C-15).
149. The procedures to obtain benefits under both programs involve several layers at which the applications are assessed by different administrative or external bodies, which, in some cases, are tasked with making recommendations based on their assessment. For the Prosperity Fund, these bodies are the Ministry's Forest Sector Competitiveness Secretariat, a third-party due diligence provider, the Forest Sector Prosperity Fund Approval Committee, and the Ministers of Natural Resources and Finance (Exh. C-1, Att. AJ). For the Loan Guarantee Program, these bodies are the Ministry's Forest Sector Competitiveness Secretariat, a third-party due diligence provider, the Loan Guarantee Approval Committee, and the Ministers of Natural Resources and Finance (Exh. C-15).
150. The benefits provided by the Prosperity Fund are intended for projects that "[are] undertaken in forest industry dependent communities", "include Aboriginal involvement", "ensure and extend the viability of existing operations or establish new facilities targeting emerging markets", "successfully address energy issues faced by facilities". It is expressly stated that "[p]riority for consideration will be given to projects with demonstrable contributions to the socio-economic health of northern or rural Ontario, to the sustainability of the forest industry, and to enhanced diversification of the forest sector" (Exh. C-1, Att. AJ). The Loan Guarantee Program is intended *inter alia* for projects "with demonstrable socio-economic benefits to northern and rural Ontario", or "contributing to the longer-term health and sustainability of the Ontario forest products sector" or "enhanc[ing] the diversification of the Ontario forest products sector" (Exh. C-15).
151. The assessment of the applications is based on both eligibility requirements which refer *inter alia* to the above-mentioned purposes and targets, and on other selection criteria. Some of these criteria are open-ended in the sense that their consideration can lead to different conclusions. Applicants must for instance indicate "the contribution the project will have within the community and region in terms of the socioeconomic benefits

provided with the project" (Exh. C-1, Att. AK). Other criteria include the contribution to
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-----] (Exh. C-4), as well as the business case, the potential risk to government investment, the financial stability of the applicant and the availability of other government assistance programs (Exh. C-1, Att. AJ).

152. For both programs, the outcome of the process can take different forms depending on the circumstances of each case. For the Prosperity Fund, the Forest Prosperity Fund Approval Committee may recommend to grant either the requested level of funding, or an alternative level, or no funding at all (Exh. C-1, Att. AJ). Similarly, in the context of the loan guarantee program, if the proposal passes all the assessment layers, "[t]he form of the guarantee can be either Residual or 1st call, depending on the circumstances" and the "[t]erms for loans guarantees are generally a minimum of 2 years and maximum of 5 years" (Exh. C-15). Moreover, different combinations of funds and loan guarantees are also possible. The evidence in the record shows that the competent authorities did not confine themselves to what the applicants had requested and, instead, submitted different options for the Minister's approval (Exh. C-63, C-64, C-65, C-66, C-67, C-68, C-69; Tr. 22 July 2009, 811: 1-5, 820: 14-21; Tr. 23 July 2009, 840: 9-25, 841:1-14).
153. The question is thus whether programs with the characteristics just described are "non-discretionary" in the meaning in which this term is used in Article XVII(2)(b). The term "non-discretionary" is not defined by the SLA and the Tribunal must therefore resort to the rules of interpretation set forth in the VCLT.
154. In their attempt to clarify the ordinary meaning of the term "non-discretionary", the Parties have referred to a number of definitions, drawn from different sources, of the noun "discretion" and of the adjective "discretionary". In their post-hearing submissions, the Parties summarize their understanding of the ordinary meaning of the words "non-discretionary" as it emerges from the sources cited. According to the Claimant "'non-discretionary' means the absence of the opportunity to exercise judgment when evaluating applications for benefits under any given program" (PHB Cl., para. 16). By contrast, the Respondent argues, instead, that "a non-discretionary decision is one that is subject to reasonable constraints and that, in the particular context of the SLA, a non-discretionary program is one which ensures that any benefits to the softwood lumber industry are predictable" (PHB Resp, para. 12).

155. The Tribunal understands the ordinary meaning of the words "non-discretionary" used in Article XVII(2)(b) as excluding or drastically limiting the ability of the competent body to exercise judgment. The extent to which such ability must be restrained to equate an absence of discretion is disputed, but there seems to be some concurrence between the positions of the Parties. As noted above, the Claimant considers that the ability to select eligible entities on the basis of broad criteria and to decide whether to grant benefits squarely falls within the definition of discretion. In its Rejoinder, the Respondent admitted that the exercise of judgment is an indication of the discretionary character of a decision. It added, however, that a decision-making process ceases to be discretionary when it is restrained by a sufficient number of parameters (Rej., para. 138).
156. Whatever definition is chosen and whatever level of constraint may be present, the description set forth above shows that the programs were discretionary. Indeed, the applications were assessed at different stages by different bodies on the basis of objectives and criteria, some of which were fairly open. At the end of the process, the competent body made three recommendations for the Minister's choice. Throughout the process, the relevant authorities, including the Minister, were called to and did in part exercise judgment or discretion in the assessment of the applications and the determination of the outcome. To take but one example, the Minister was offered three options with no mandatory parameters limiting his choice. Moreover, the documents prepared to guide the decision of the Minister, including the recommendations as to which of the three possible options to retain, were themselves based on an assessment that took into account several criteria, including the recommendations from a third-party due diligence provider.
157. For the foregoing reasons, the Tribunal considers that the requirement set forth in Article XVII(2)(b) that programs be "non-discretionary" is not met here. As a result, the grants and other benefits provided by the Ontario FSPF and FSLG are in breach of the anti-circumvention clause in Article XVII of the SLA.

3. Ontario's Forest Access Road and Maintenance Program (FARMP)

158. The factual background regarding Ontario's Forest Access Road and Maintenance Program (FARMP) is described in paragraphs 27 - 42 above.

a) The Claimant's position

159. Claimant argues that the FARMP is an industry relief measure that reimburses Ontario lumber producers in costs associated with constructing and maintaining forest access roads in direct contravention of Article XVII(1) of the SLA (Reply corr., para. 69).
160. According to the Claimant, the Respondent does not dispute that this program provides a benefit (Tr. 24 July 2009, 1108:14-17), but argues that the program falls under Article XVII(2)(a) and (b) of the SLA. The Claimant contends that these two exceptions are not applicable for three reasons.
161. First, the program does not qualify as a "forest management system" in the meaning of Article XVII(2)(a) (Reply corr., para. 70). The Claimant notes, that the forest policy manual (Exh R-37) relied upon by the Respondent "never mentions any sort of reimbursement for the cost of building logging roads" (Tr. 24 July 2009, 1109:19-21). It further notes, with reference to Exhibit C-32, that forest management has nothing to do with "supporting industry, offsetting costs or reducing delivered wood costs, which are Ontario's stated reasons for reimbursing the cost of logging roads" (Tr. 24 July 2009, 1109: 25, 1110: 1-4). In support of its position, the Claimant specifically refers to (i) the Report of the Ontario Minister's Council on Forest Sector Competitiveness, which contemplates the reimbursement of the cost of logging roads as a step for closing a competitiveness gap (Exh. C-1, Att. S), (ii) the perception of this program as a benefit by the Canadian lumber companies (Exh. C-26), and (iii) the characterization of the program by the Ontario authorities as an industry relief program (Exh. C-33)(Tr. 24 July 2009, 1110: 5-25, 1111:1-5).
162. Second, the Claimant contends that the program was "administered" only after the 1 July 2006 cut-off date, as the evidence shows that the Ontario Ministry of Natural Resources did not make the 2006 road program benefits available to potential applicants until 14 July 2006 (Reply corr., para. 99; Tr. 24 July 2009, 1115:18-25, 1116:1-25, 1117:1-4; Exh. C-26, C-22, C-31, C-33, C-34).
163. Third, the Claimant also observes that the initial 2005 road program was markedly different from the version of the program that was administered after 1 July 2006 (Reply corr., para. 71 and 87)

b) The Respondent's position

164. Respondent submits that the FARMP falls under Article XVII(2)(a) and (b), and is therefore not in breach of the anti-circumvention clause in Article XVII(1) of the SLA.
165. First, the Respondent asserts that there is no purpose test in Article XVII(2)(a). As a result, the allegations of the Claimant regarding the competitiveness of the program are said not to be relevant (Tr. 24 July 2009, 1198: 7-24). Reading a purpose test into the provision would make it useless, and it would therefore be contrary to the interpretation rules of the VCLT. Such an interpretation would read Article XVII(2)(a) out of the SLA altogether. It would imply that any program in which the government increases its responsibility for forest management costs shared with the industry could qualify as part of a forest management system (PHB Resp., para. 75). Moreover, the Respondent stresses that its opponent has provided no definition of the term "forest management system" used in Article XVII(2)(a) (PHB Resp., para. 77).
166. Second, the Respondent alleges that the program existed prior to 1 July 2006 and that it was in fact administered as of 1 April 2006 in the same form and in the same total aggregate amount as after 1 July 2006, as evidenced by documents created for the program between 1 April and 30 June 2006 (Rej., para. 198-201; PHB Resp., para. 90-91).

c) The Tribunal's determination

167. In the course of their written and oral pleadings, the Parties have narrowed down the matters on which they disagree. As with the two Ontario programs discussed above, the Parties agree that the program under challenge in this section provided grants or other benefits in the meaning of Article XVII(2). They also concur that no exception other than those provided in letters (a) and (b) is pertinent.
168. Article XVII(2)(a) exempts the following category of measures from the circumvention presumption:

"provincial timber pricing or forest management systems as they existed on July 1, 2006, including any modifications or updates that maintain or improve the extent to which stumpage charges reflect market conditions, including prices and costs. Fluctuations in stumpage charges that result from such modifications or updates, including fluctuations resulting from changes in market conditions or other factors affecting the value of the province's timber, such as transportation costs, exchange rates, and timber quality and natural harvesting conditions, do not constitute circumvention. A provincial timber pricing or forest management system includes, without limitation, the data, variables, and procedures it employs".

169. It is undisputed that this program "existed on July 1, 2006" in the meaning of Article XVII(2)(a). The Claimant has expressly recognized that this program was launched before July 1, 2006 (SoC, para. 69; Tr. 20 July 2009, 34: 21-25, 35: 2-6) and has maintained this position throughout the proceedings (PHB Cl. Reply, para. 34-40). The only contentious point with respect to the applicability of Article XVII(2)(a) is whether or not the program can be deemed a "forest management system".
170. Before addressing this issue, it is again helpful to briefly summarize the main features of the FAMRP. In essence, the program establishes a budget envelope to reimburse all or part of the costs of eligible road construction and maintenance activities performed by the forest industry. Roads eligible for construction and maintenance funding are identified in the forest management plans. According to an internal memorandum circulated on 12 May 2006 by Mr. T. Harris, an official at Ontario's MNR, the key principle governing the program is that "[t]he forest industry is not required to provide an enhanced level of *construction or* maintenance on eligible primary *and secondary* forest access roads beyond what is currently be (sic) provided. MNR will provide available funding for reimbursement of costs of eligible road *construction and* maintenance activities performed by the forest industry" (Exh C-1, Att. AT, ON00617899, italics original).
171. The guiding principles of the program include the following aspects:
- "[r]eimbursement of road construction and maintenance costs must have a direct impact on delivered wood costs [...] [r]eimbursement of costs incurred is based on the fact that access to eligible primary and secondary forest access roads is not limited to the forest industry. As such this cannot be construed as a subsidy (i.e. avoid softwood lumber implications) [...] [r]oads eligible for construction and maintenance funding shall be those identified in the Forest Management Plans (FMP) as primary or secondary or roads in an FMP that meet the definition of a primary or secondary in the Forest Management Planning Manual [...] [e]stablishing primary and secondary road construction and maintenance priorities and activities for eligible roads is at the discretion of the forest industry" (Exh C-1, Att. AT, ON00617900 to ON00617905).
172. The Claimant has relied on a number of documents, including the ones referred to in the preceding paragraphs, which suggest that the purpose of the program was to support softwood lumber producers and not to manage forests. The Respondent has replied that there was again no purpose test in this exception and that the program clearly fell within the category of "forest management systems" in the meaning of Article XVII(2)(a).
173. In assessing the availability of this exception, the Tribunal will, first, analyze whether the exception involves a purpose test and, second, whether the measures challenged can be characterized as forest management systems.

174. The Tribunal thus starts by determining whether Article XVII(2)(a) implies a purpose test or, in other terms, whether in order to be exempted from the anti-circumvention presumption a program must have been adopted *for the purpose* of managing forests. This is a matter of treaty interpretation to which the Tribunal must apply the rules of the VCLT referred to in paragraphs 110 - 111 above.
175. Article XVII(2)(a) does not make any express reference to the purpose of the "systems" or programs which it addresses. This contrasts with the wording of Article XVII(2)(c), which specifically refers to "actions or programs undertaken by a Party, including any public authority of a Party, *for the purpose* of forest or environmental management". This difference in wording suggests that when they entered into the SLA the United States and Canada did not intend to provide for a purpose test. Otherwise they would have stated so expressly as for letter (c).
176. Another significant difference between letter (a) and letter (c) is that the systems covered by letter (a) must have existed on July 1, 2006, whereas letter (c) contains no such time requirement. In the Tribunal's view this difference suggests that the "actions or programs [...] for the purpose of forest or environmental management" in letter (c) do not have the same meaning as the "forest management systems" in letter (a). Otherwise, the reference to the date of July 1, 2006 in letter (a) would lack useful effect or *effet utile*, as any forest management system that would not meet the time requirement of letter (a) would be exempted by letter (c). Rather, the Tribunal understands the expression "actions or programs [...] for the purpose of forest or environmental management" as a category with a narrower substantive scope than that of "forest management systems". This understanding explains the need for a cut-off date in letter (a) to better circumscribe the scope of this latter exception.
177. Such understanding is further confirmed by the fact that Article XVII(2)(a) expressly accounts for changes that have no direct environmental purpose but nevertheless affect the management of forests, such as changes in transportation costs or in exchange rates, which are expressly referred to in letter (a).
178. Thus, a contextual reading of Article XVII(2)(a) shows that the FARMP does not need to meet a purpose test to fall under this exception. Specifically, the fact that a program may have been adopted to help the softwood lumber industry does not rule out that it may fall within the category of "forest management system" in the meaning of Article XVII(2)(a).

179. As a next step, the Tribunal must now review whether the program at issue is a "forest management system" under Article XVII(2)(a). As acknowledged by both Parties, the term "forest management" is not defined in the SLA. The Forest Management Planning Manual for Ontario's Crown Forests of June 2004 (Exh. R-37), defines "forest management" as follows:

"Generally, the practical application of scientific, economic and social principles to the administration and working of a forest for specified management objectives; more particularly, that branch of forestry concerned with the overall administrative, economic, legal and social aspects, and with the essentially scientific and technical aspects, especially silviculture, protection and forest regulation" (Exh. R-37, Glossary-8).

180. Thus defined, "forest management" does not exclude the type of activities encouraged by the FARMP. Indeed, "forest management" is said to be concerned with "the overall administrative, economic, legal and social aspects" of forests. The Tribunal finds that the construction and maintenance of roads is encompassed by this broad characterization of forest management. This view seems to be shared by the Claimant's forest industry expert, Mr. Beck. The Claimant indeed referred at the Hearing to the latter's testimony, acknowledging that "road building itself may be a part of a forest management system" (Tr. 24 July 2009, 1113:1-3).

181. The Claimant made the foregoing reference to stress the distinction between road building and the allocation of costs for road building. The Tribunal, however, discerns no such distinction in the text of Article XVII(2)(a), which speaks of "forest management systems" and specifically notes that a "forest management system includes, without limitation, the data, variables, and procedures it employs". In other words, there appears to be no basis in the SLA for the distinction advanced by the Claimant. A financial scheme specifically established to encourage the construction and maintenance of forest roads is thus a forest management system covered by Article XVII(2)(a).

182. The Tribunal's conclusion would perhaps be different if the financial scheme was not specifically devoted to forest roads. In the present case, however, the roads eligible for the program must be those identified in the forest management plans as primary or secondary roads or, at least, meet the definition of a primary or secondary road in the Forest Management Planning Manual (see paragraph 171 above).

183. The fact that such program may provide a financial advantage to producers of softwood lumber does not change this conclusion, as the supply of forest resources is explicitly contemplated in forest management plans. Indeed, according to a plan prepared by the MNR and referred to both by the Claimant (PHB Cl., para. 30) and the Respondent

(SoD, para. 144; Exh. R-47): "[t]he purpose of this plan is to direct the harvest, renewal, maintenance, and access operations required to promote the long-term health of the local forest and to provide for a sustainable supply of forest resources." (Exh. R-47, ON00074966).

184. As a result, the Tribunal considers that the FARMF falls within the exception contemplated in Article XVII(2)(a) and is therefore not in breach of the anti-circumvention clause in Article XVII(1). In the light of this conclusion, the Tribunal does not regard it as necessary to review the Parties' arguments on the applicability of Article XVII(2)(b).

4. Quebec's Silviculture Credits

185. The factual background regarding Quebec's Silviculture Credits is described in paragraphs 43 - 53 above.

a) The Claimant's position

186. The Claimant argues that the Respondent has conceded that the CAD 135 million program intended to provide silvicultural credits provides benefits, as it reduces the operating costs of lumber producers (Tr. 24 July 2009, 1126:15-19; Exh. C-1 Att. U).

187. It also asserts that this program is not covered by Article XVII(2)(a) because the Respondent has not established that the program is a forest management system, nor that it existed or was administered before 1 July 2006 (Tr. 24 July 2009, 1127: 1-4; PHB Cl., para. 51-53; PHB Cl. Reply, para. 68-70). The Claimant adds that "given the \$ 135 million magnitude of this benefit, it strains credibility to think that Quebec would not have made this expenditure clear in some sort of documentation at the time that it initiated this reimbursement program" (Tr. 24 July 2009, 1127:11-16).

b) The Respondent's position

188. The Respondent does not contest that increasing the value of existing silviculture credits and establishing new ones reduces the net cost of silviculture activities (PHB Resp., para. 136).

189. It argues, however, that the measure is covered by Article XVII(2)(a). It relies on the uncontested testimonies of Messrs. Trottier and Adam, which allegedly demonstrate that the measure under review was announced on 23 March 2006, became effective on 1 April 2006, and was therefore part of Quebec's timber pricing system before 1 July

2006. The Respondent further refers to Quebec's ministerial orders and a silviculture credit note that corroborate the evidence of Messrs. Trottier and Adam (PHB Resp., para. 135; Exh. R-148, Att. S; Exh. RA-97, RA-98, RA-99). Moreover, it alleges that the new silviculture credits were claimed, processed, and paid to forestry companies before 1 July 2006 (PHB Resp., para. 143-144; Exh. R-148, Att. S).

c) The Tribunal's determination

190. The Tribunal understands that the main issue disputed by the Parties is the applicability of Article XVII(2)(a) of the SLA. It is indeed undisputed that the program under review provided benefits in the meaning of Article XVII(2) (PHB Resp., para. 136). The Parties have also discussed, particularly at the Hearing and in their post-hearing submissions (Tr. 21 July 2009, 394-414; PHB Cl., para. 51-53; PHB Resp., para. 143-145), whether the program under review was administered before 1 July 2006. The Tribunal notes, however, that Article XVII(2)(a) does not contain such a requirement.

191. Article XVII(2)(a) reads as follows:

"Grants or other benefits that a Party, including any public authority of a Party, provides shall be considered to reduce or offset the Export Measures if they are provided on a de jure or de facto basis to producers or exporters of Canadian Softwood Lumber Products. Notwithstanding the foregoing, measures that shall not be considered to reduce or offset the Export Measures in the SLA 2006 include, without limitation:

(a) provincial timber pricing or forest management systems as they existed on July 1, 2006, including any modifications or updates that maintain or improve the extent to which stumpage charges reflect market conditions, including prices and costs. Fluctuations in stumpage charges that result from such modifications or updates, including fluctuations resulting from changes in market conditions or other factors affecting the value of the province's timber, such as transportation costs, exchange rates, and timber quality and natural harvesting conditions, do not constitute circumvention. A provincial timber pricing or forest management system includes, without limitation, the data, variables, and procedures it employs".

192. Hence, two requirements must be met for a given benefit to fall within the exception: (i) the measure must qualify as "provincial timber pricing or forest management systems" and (ii) it must have "existed on July 1, 2006".

193. Regarding the first requirement, the Tribunal recalls that Article XVII(2)(a) does not require that the measure's only or primary purpose be the preservation of the environment or the management of forests (paragraphs 174-178 above). The Claimant's arguments in connection with the purpose of the silviculture credits (PHB Cl., para. 49-50) thus lack relevance.

194. What is relevant is whether the silviculture credits are part of "provincial timber pricing or forest management systems". According to the budget speech 2006-2007, the

program is part of a series of measures for "[r]esponsible forest management" (Exh. C-1, att. T, pp. 12-13). The budget speech also prefaced the measures announced under this heading as a result of the recommendations of the Coulombe Commission (Exh. C-1, att. T., p. 12). The Coulombe Commission addressed the issue of "the management of silvicultural credits eligible for the payment of dues, hardwood forest rehabilitation, intensive silvicultural projects, and inhabited forest projects" (Exh. R-81). In his witness statement (Exh. R-4), Mr. François Trottier, an official of the Ministère des Ressources naturelles et de la Faune ("MRNF") of Quebec, confirmed that the silviculture credits under review, together with a number of other measures included in the CAD 210 million announced in the budget speech, were "all responsive to the recommendation of the Coulombe Commission" (Exh. R-4, translation, para. 9).⁵ Under these circumstances, the Tribunal concludes that the silviculture credits at issue are encompassed by the category of "provincial timber pricing or forest management systems" in the meaning of Article XVII(2)(a).

195. The witness statement of Mr. Trottier is also relevant in connection with the second requirement of Article XVII(2)(a). Indeed, Mr. Trottier gave evidence that "[t]he largest of these March 2006 measures (\$C135.00 M) was the estimated budget effect of adding new credits to Quebec's timber pricing system to account for the cost of silviculture planning and execution on public lands" and that "[t]hese credits were immediately added to the pricing system and became part of Quebec's timber pricing system on April, 2006" (Exh. R-4, translation, para. 7).
196. The allocation of the amount of CAD 210 million announced in the budget speech is discussed in further detail in a Cabinet memorandum discussing Quebec's plan for the forestry sector (Exh. C-1, att. AD). According to this memorandum, such amount is divided into two components, one of which is for "measures associated to the reduction of the operating expenses (135 M\$ over 4 years, of which 30 M\$ is in 2006-2007)" (Exh. C-1, att. AD, CAN CONF 0000002). The Cabinet memorandum further states that "the measures that have an impact on operating costs are [...] [an] annual revision of forestry royalties, especially the elimination as of April 1, 2006 of the dues of the agencies for the exploitation of private forests in the determination of forestry royalties (8.0 M\$) [...] New credits for the costs related to planning and follow-up of

⁵ The Claimant did not call Mr. Trottier to appear at the hearing for cross-examination. This said, nothing prevents the Tribunal from considering the written statement of a witness who was not called to testify at the hearing. Pursuant to paragraph 6.7 of PO 1, only the statement of a witness who "does not appear without a valid reason for testimony at the Final Hearing" shall, in principle, be disregarded. The fact that certain witnesses who provided written statements did not appear at the hearing in the present case was due to their not being called for cross-examination, which constitutes a "valid reason" in the meaning of paragraph 6.7. of PO 1.

forestry works (10.0 M\$) [...] Credit granted for gardening works, which was increased to 660 \$/ha (an increase of 330 \$/ha) (12 M\$)" (Exh. C-1, att. AD, CAN_CONF_0000002).

197. The increase from CAD 330/ha to CAD 660/ha mentioned in the Cabinet memorandum as an implementation of the measures announced in the budget speech appears to be reflected in two ministerial orders. Schedule II of ministerial order AM 2005-009 of 23 March 2005 establishes the prevailing credit rates (CAD 325/ha) for a number of selection and pre-selection cutting treatments applicable during the fiscal year running from April 2005 to April 2006 (Exh. RA-98, 716A-717A). Schedule II of Ministerial Order AM 2006-010 of 23 March 2006 establishes a rate of CAD 660/ha for these same categories of treatment applicable during the fiscal year from April 2006 to April 2007. The Respondent has argued that this is clear proof that the silviculture credits under challenge had been established and therefore "existed" before 1 July 2006.
198. The Claimant objects that the Cabinet memorandum mentions a rate of CAD 330/ha and not CAD 325/ha like the ministerial order AM 2005-009. The Claimant also relies on the expert testimony of Mr. Beck to argue that the expression "gardening works" used in the Cabinet memorandum does not cover the type of selection and pre-selection cutting treatments contemplated in the ministerial orders.
199. The Respondent concedes that there is a small difference between the rates mentioned in the Cabinet memorandum and in the ministerial orders, but it attributes this difference to either a typographical error or to a rounding-up operated by the drafters of the Cabinet memorandum. The Respondent further replies that Mr. Beck's opinion on the meaning of the expression "gardening works" is purely speculative and that, in all events, it cannot be opposed to the opinion of Mr. Adam, Chef du Service de la tarification et des évaluations économiques of the MRNF, who gave evidence pursuant to which the increase in credit for selection and pre-selection cutting to CAD 660/ha is the same as the one for "gardening works" mentioned in the Cabinet Memorandum (Exh. R-125, para. 11, 18-19).
200. The Tribunal notes that, as head of the relevant service, Mr. Adam was particularly well-positioned to know whether and how the silviculture credits under review were implemented. The testimony provided by Mr. Adam is consistent on this point with that of Mr. Trottier. The Tribunal further notes that both witness statements remained unrebutted by the Claimant and that the documentary evidence presented by the Respondent seems to corroborate the statements of these two witnesses. Under such

circumstances, the balance of the evidence suggests that the silviculture credits under review had been announced and implemented before 1 July 2006. As the Claimant itself recognizes (PHB Cl., para. 63), a measure that has been "legally authorized and implemented" cannot be said not to exist. The requirement of "existence" in the SLA may be broader than this definition, but, for the purpose of assessing whether the silviculture credits under review meet the second requirement of Article XVII(2)(a), the Tribunal does not consider it necessary to pursue this analysis further.

201. For the foregoing reasons, the Tribunal considers that Quebec's Silviculture Credits in the amount of CAD 135 million fall within the exception provided in Article XVII(2)(a) and are therefore not in breach of the anti-circumvention clause in Article XVII(1). In the light of this conclusion, the Tribunal does not deem it useful to determine whether other exceptions may also be available.

5. Quebec's Silviculture Investment Measure

202. The factual background regarding Quebec's Silviculture Investment Measure is described in paragraphs 43 - 53 au-dessusabove.

a) The Claimant's position

203. In essence, the Claimant submits that the CAD 75 million Silviculture Investment Measure benefits producers and exporters of Canadian softwood lumber and is not covered by Article XVII(2)(c). In its closing argument, the Claimant put forward the following contentions:

"Mr. Beck testified that benefits are present in the increased profits that result from increased harvests on public land. Canada maintains that this program was primarily for silviculture and hardwood forests and thus provides no benefits or little benefit. Canada relies on the witness statement of Mr. Trottier at paragraphs 8 through 11, Exhibit R-4. This statement refers to no source documents, and the only documentary evidence that Canada identifies involves a single \$ 10 million expense. In contrast, Canada included this program in the budget speech as part of 'funding of \$ 210' to reduce the cost of operations that also 'will help the imperatives of sustainable development of Quebec's forests while improving the financial position of forest companies'. Indeed, this statement demonstrates that Canada's contention that the \$75 million portion is an environmental measure shows that this contention is simply wrong. The silviculture measures also benefit producers and exporters of Canadian softwood lumber beyond any benefits that are included in the stumpage offsets. Canada proffered no evidence that contradicts Mr. Beck's reports and calculations demonstrating that increased stumpage fees only fractionally offset the benefit here".
(Tr. 24 July 2009, 1127:18-25, 1128:1-21).

b) The Respondent's position

204. The Respondent asserts that Quebec Silviculture Investment Measure does not provide a benefit to softwood lumber producers and that, in any case, it meets the requirements of Article XVII(2)(c). More specifically, the Respondent argues that the measure was primarily directed at hardwood stands and, therefore, did not remove any costs or relieve any financial burdens to companies in the forest sector (PHB Resp., para. 107-108; Exh. R-4).

205. In addition, the measure is covered by Article XVII(2)(c) as it was manifestly adopted for environmental protection and conservation purposes and was specifically recommended by the Coulombe Commission, a body consisting of environmental experts (PHB Resp., para. 106, 109-110; Exh. R-4).

c) The Tribunal's determination

206. The Parties' contentions regarding the amount of CAD 75 million announced in the budget speech as a Silviculture Investment Measure focus on two main issues, namely (i) whether this measure provided a benefit to softwood lumber producers in the meaning of the first sentence of Article XVII(2) and, if so, (ii) whether it is covered by the exception of letter (c) of Article XVII(2) as a measure taken "for the purpose of forest or environmental management".

207. At the outset, the Tribunal notes that, as discussed in paragraphs 112-122 above, the Claimant bears the burden of proving the elements triggering the presumption contemplated in the first sentence of Article XVII(2), namely that the measure falls within the category of "[g]rants or other benefits that a Party, including any public authority of a Party, provides [...] to reduce or offset the Export Measures if they are provided on a de jure or de facto basis to producers or exporters of Canadian Softwood Lumber Products".

208. The Claimant's expert, Mr. Beck, noted in his report, in connection with the measure under review, that "Canada has not established that softwood lumber producing companies did not receive any benefits from this program" (Exh. C-43, para. 93). Mr. Beck further stated that:

"[s]ilvicultural investments typically are directed at improving forest health and result in improved forest productivity (timber growth), the basis for the determination of allowable harvest volumes. Therefore, these investments provide a benefit to the forestry companies, assuring a long-term timber supply from these lands. While this program apparently did not involve payments to industry nor remove an expense or responsibility from the tenure holders, to the extent that it

did involve improvements in forestry on forest lands subject to forest licenses, it is an important benefit being provided to tenure holders" (Exh. C-43, para. 94).

Also, Mr. Beck acknowledged that the CAD 75 million constituted an "increase to the MNR's budget" (Exh. C-43, para. 93).

209. The Tribunal understands Mr. Beck's statements, by reference to which the Claimant has argued its position in connection with the Silviculture Investment Measure, as an acknowledgment that the amount of CAD 75 million was given to the MNR and not to the forest industry (of which softwood lumber producers are a component). Mr. Beck is wrong when he considers that it is for the Respondent to prove that this amount was not used to provide grants or other benefits to softwood lumber producers. The burden of proof in respect of the existence of grants and benefits lies on the Claimant.

210. The assertion of Mr. Beck that improving forests provides a benefit is not only unwarranted but, even if it was admitted *ratio arguendi*, it would not be sufficient to meet the burden of proof that lies on the Claimant. There is no evidence in the record suggesting that such grants or other benefits were provided. Indeed, Mr. Trottier, an official of the MNR⁶ stated the following:

"The other measures (totalling \$C 75.0 M) were increases to the prior year's operating budget of the MNR to fund MNR's increased silvicultural activities on private and public forest lands. On public forest lands, these supplemental silvicultural activities were performed under the direction of MNR and did not affect the regular obligations of tenure holders [...] These measures are all responsive to the recommendations of the Coulombe Commission. More than half of these activities and their funding were and are directed at silviculture activities in the deciduous (hardwood) forest or in private forest lands [...] None of these activities or funds involves payments to softwood lumber producers or other major consumers of public timber (e.g., pulp and paper mills, panel mills). None of the activities removes a burden or responsibility belonging to tenure holders" (Exh. R-4, translation, para. 8-10).

211. Under such circumstances, the Tribunal has no difficulty in concluding that the Claimant has not established that "grants or other benefits" were provided to "producers or exporters of Canadian Softwood Lumber Products". For this reason, the Tribunal does not see the need to analyze whether the exception contemplated in Article XVII(2)(c) would be applicable.

212. For the foregoing reasons, the Tribunal considers that Quebec's Silviculture Investment Measure (CAD 75 million) is not in breach of the anti-circumvention clause in Article XVII(1).

⁶ See footnote 5 above.

6. Quebec's SOPFIM and SOPFEU Programs

213. The factual background regarding Quebec's SOPFIM and SOPFEU Programs is described in paragraphs 43 - 53 au-dessusabove.

a) The Claimant's position

214. The Claimant argues that Quebec's decision to assume the costs of fire, insect and disease control in the context of the SOPFIM (insect and disease control) and SOPFEU (fire suppression) programs amounts to relieving the industry of the cost of doing business in breach of the SLA anti-circumvention clause.

215. It is the Claimant's case that these programs provided a benefit to softwood lumber producers, which is clear from the fact that the related expenses had been borne by softwood lumber companies since at least the 1990s (Reply corr., para. 149; Exh. R-3). It is also its case that the Respondent has not demonstrated that this benefit was offset by a change in the pricing formula for public standing timber and that the Respondent was in any event not entitled to unilaterally offset such benefit.

216. The Claimant further contends that the measure is neither covered by Article XVII(2)(a), as the assumption of a cost previously borne by industry is not an element of timber pricing nor a "forest management system" (Reply corr., para. 152-154), nor by Article XVII(2)(c) of the SLA (PHB Cl., para. 49).

b) The Respondent's position

217. The Respondent argues that the Claimant has failed to demonstrate that these programs provide a benefit to softwood lumber producers or to explain why the simplification of Quebec's timber pricing system falls outside of the scope of Article XVII(2)(a).

218. More specifically, the SOPFIM and SOPFEU programs relate to the longstanding legal obligation of Quebec's government as the owner of the natural resource to protect the public forests from insect, disease and fire, a fact known by the Claimant. The measures were therefore a return to the *status quo* before 1995. Moreover, the programs operate as a modification of timber pricing which improves the extent to which stumpage prices reflect market conditions including costs. As such, they are covered by Article XVII(2)(a) (PHB Resp., para. 171-178; Exh. R-3, R-125).

219. Regarding Article XVII(2)(c), the Respondent asserts never having claimed that this provision was applicable to the SOPFIM and SOPFEU programs in spite of the Claimant's contrary assertion (PHB Resp.-Reply, para. 153).

c) The Tribunal's determination

220. As with the Silviculture Investment Measure, the Parties' contentions regarding these programs raise two main issues, namely (i) whether these measures provided a benefit to softwood lumber producers in the meaning of the first sentence of Article XVII(2) and, if so, (ii) whether they are covered by the exception of letter (a) of Article XVII(2).

221. With respect to the first issue, the Claimant has argued, by reference to the expert testimony of Mr. Beck, that softwood lumber producers were relieved from a cost of doing business that they would otherwise have had to bear. The Respondent replies that such costs are part of the natural mandate of Québec's government and that, by assuming such costs, Québec was simply returning to a system that existed before. Moreover, the Respondent argues that the assumption of these costs was offset by an increase in stumpage fees, as explained in Mr. Adam's written statement. The Claimant objects to this latter argument noting that, even assuming that a set-off could be established, such set-off would be irrelevant because once a benefit is conferred it is not for the Respondent, but for the Tribunal, to determine what adjustments may offset the benefit.

222. The Tribunal considers that the crux of the Parties' contentions regarding this first issue lies in the allocation of the burden of proof. In this regard, the Tribunal notes that, as discussed in paragraphs 112-122 above, the Claimant bears the burden of proving the elements triggering the presumption contemplated in the first sentence of Article XVII(2) of the SLA, namely whether the measure under review falls within the category of "[g]rants or other benefits that a Party, including any public authority of a Party, provides [...] to reduce or offset the Export Measures if they are provided on a de jure or de facto basis to producers or exporters of Canadian Softwood Lumber Products".

223. The Claimant's argument starts from the observation that the programs under consideration provided a benefit. As evidence it relies in essence on the report of its forestry expert, Mr. Beck (Exh. C-1, pp. 47-50), and on the written statement of a witness presented by the Respondent, Mr. Adam, whom the Claimant understands to have conceded that the programs conferred a benefit on softwood lumber producers (Reply, para. 149, referring to Exh. R-3, para. 22-26). The Tribunal is not persuaded by this evidence.

224. Regarding the first piece of evidence, Mr. Beck seems to advance a legal conclusion when he notes that:

"[w]hile they could be considered programs that reduce wildfire risk and restore and enhance eco-systems (Par. 2(c)), the government of Quebec is 'taking charge' of responsibilities and costs previously borne by industry, thereby providing *'benefits that have the effect of undermining or counteracting movement toward the market pricing of timber.'*" (Exh. C-1, p. 50).

225. As the basis for his conclusion, Mr. Beck refers to a memorandum to the Council of Ministers of 18 October 2006 (Exh. C-1, att. AD, at 6). This memorandum does not support the position Mr. Beck appears to derive from it. Rather, it shows that the measures under review were adopted as part of the government's plan to "significantly improve the productivity of Quebec forests by forest management more adapted to the new conditions, in partnership with all forestry players of Quebec and in accordance with the resin softwood lumber agreement" (Exh. C-1, att. AD, at 5). More specifically, it states in connection with the measures under consideration that "in order to maintain the protection level of the forest territory, resort infrastructures and forest investments made by the state, the government of Quebec will cover the costs of the fight against fires and other forest disasters" (Exh. C-1, att. AD, at 6). In the Tribunal's reading, this evidence supports the argument advanced by the Respondent that the measures under consideration were not taken to provide benefits to softwood lumber producers, but as a part of the government's responsibility to protect forests.

226. With respect to the statement of Mr. Adam, the Claimant argues that it amounts to an admission that the programs confer a benefit to softwood lumber producers. It refers in this regard to paragraphs 22 and 26 of Mr. Adam's first witness statement (Reply, para. 149). However, in the opinion of the Tribunal, neither of these paragraphs nor the statement of Mr. Adam taken as a whole support the Claimant's contention. At paragraph 22 of his first statement, Mr. Adam links the obligation of industrial forest users to contribute to the costs of forest fire suppression and eradication of disease and insect infestation to the lower rates applicable to stumpage fees payable by the industry, compared to what would have to be paid if these contributions had not been required. Paragraph 26 of Mr. Adam's statement refers to the moment at which the measures under consideration took effect and discusses more generally the parity technique applied for the calculation of stumpage fees for each forest zone. Overall, this evidence is not only at odds with the Claimant's argumentation but rather supports the position of the Respondent to the effect that any potential benefits conferred to softwood lumber producers would have been neutralized by the interplay of the parity technique used in setting stumpage fees.

227. The Claimant has argued that Mr. Adam's statement is not adequately supported by documentary evidence and that the Tribunal should therefore not consider it. This argument is based on a misunderstanding of the allocation of the burden of proof. The Tribunal does not look to Mr. Adam's statement to assess whether the Respondent has established a fact for which it bears the burden of proof. The burden of proving a benefit lies with the Claimant. The latter has not adduced sufficient evidence to show that a benefit was provided. In addition, it has not persuaded the Tribunal that Mr. Adam's statement to the contrary carries no weight. Under the circumstances of the case and for the reasons mentioned in the foregoing paragraphs, the Tribunal considers that the Claimant has neither adduced sufficient evidence to prove its contention, nor rebutted the testimony of Mr. Adam.
228. On this basis, the Tribunal concludes that the SOPFIM/SOPFEU programs have not been proven to be in breach of the anti-circumvention clause in Article XVII(1). In the light of this conclusion, the Tribunal can dispense with reviewing whether the exception in Article XVII(2)(a) is available.

7. Quebec's Forestry Fund

229. The factual background regarding Quebec's Forestry Fund is described in paragraphs 43 - 53 au-dessusabove.
- a) The Claimant's position
230. The Claimant argues that Quebec's assumption of reforestation expenses (or "tree seedling" or "forestry fund" charges) amounts to relieving the industry of the cost of doing business in breach of the SLA anti-circumvention clause, for reasons similar to those explained in more detail in connection with the SOPFIM and SOPFEU programs (Reply corr., para. 155-157; see *supra* paragraphs 214-216).
- b) The Respondent's position
231. The Respondent answers in essence that the Claimant has failed to demonstrate that a benefit was provided to lumber producers and to explain why the simplification of Quebec's timber pricing system does not fall within the scope of Article XVII(2)(a) of the SLA, for reasons similar to those presented in connection with the SOPFIM and SOPFEU programs (PHB Resp., para. 179-181; see *supra* paragraphs 217 - 219)

c) The Tribunal's determination

232. The Tribunal notes that both Parties have argued their positions on Quebec's Forestry Fund by reference to their argumentation regarding the SOPFIM and SOPFEU programs.

233. For the reasons explained in paragraphs 220-228, the Tribunal considers that the Claimant has not established that the program under consideration provided benefits or other grants in breach of the anti-circumvention clause in Article XVII(1) of the SLA.

8. Quebec's Forest Industry Support Program (PSIF)

234. The factual background regarding Quebec's Forest Industry Support Program (PSIF) is described in paragraphs 43 - 53 au-dessusabove.

a) The Claimant's position

235. The Claimant submits that the PSIF, which was administered through the government corporation Investissement Québec, provides grants or other benefits on a *de jure* or *de facto* basis to softwood lumber producers in the meaning of Article XVII(2) of the SLA (Reply corr., para. 158, 164-172).

236. At the hearing, the Claimant pointed to what it views as evidence of loans with favourable interest rates and repayment terms and noted that "the PSIF loans, like the Ontario Forest Sector Prosperity Fund loans, generally funded projects with significant risk" at a time when, as shown by an internal ministerial memorandum of Quebec, banks were withdrawing from the forestry sector (Tr. 24 July 2009, 1130:16-25).

237. The Claimant further alleges that none of the exceptions provided in Article XVII(2) applies to this program. In particular, it contends that the program was not implemented until after 1 July 2006 (actually in the fall of 2006) and that this was admitted by Quebec's Finance Minister in his 2007-2008 budget (C-1, Att. W, p.34). At the hearing, the Claimant noted that:

"[T]his forest industry-specific program was first announced in October 2006 and enacted into law in December of that year. The Quebec finance minister further stated that this program was implemented in the fall of 2006. Also, because the PSIF was not a tax statute, Canada does not assert that the mention of its predecessor program in the March 2006 budget speech brought the program into existence, and therefore, Canada cannot meet this exception."
(Tr. 24 July 2009, 1131: 5-15).

238. The Claimant also asserted that pursuant to PSIF loans and guarantees from Investissement Québec are made on a discretionary basis (Reply corr., para. 163; Exh. C-1 at 54). The program is therefore not covered by Article XVII(2)(b) of the SLA.

b) The Respondent's position

239. The Respondent concedes that the PSIF loans were made available to the entire forestry sector (Rej., para. 308). It argues however, that not all government funding is by definition a "benefit" under the SLA and that the term "benefit" used therein is the description of a possible result that might arise from a loan as opposed to the act of making the loan itself. The expert evidence presented by Mr. Beck is limited to identifying a number of PSIF loans that he believed were made to softwood lumber producers without analyzing them to assess whether they in fact resulted in benefits to the recipients (Rej., para. 306; PHB Resp., para. 114-127). Therefore, the Respondent concludes that the Claimant has not proved the requirements of Article XVII(2), i.e. that "grants or other benefits" have been "provided by" the government to "producers or exporters of Softwood Lumber Products".

240. The Respondent also puts forward that, even if the Claimant could establish that the government of Québec provided benefits to softwood lumber producers through PSIF loans, the Claimant's allegation regarding the unavailability of Article XVII(2)(b) of the SLA is incorrect as *inter alia* it ignores that the PSIF funds were announced in March 2006 and that the purpose, focus, funding vehicles, amount, and administration of the PSIF were all known to the Claimant in March of 2006. The re-announcement of the program in October 2006 did not result in a new program being established, as the program remained directed at the same group of recipients and the same types of funding were made available (Rej., para. 375-378).

c) The Tribunal's determination

241. Again, the arguments of the Parties in connection with the PSIF program hinge upon two main issues, namely (i) whether grants or other benefits were provided to softwood lumber producers in the meaning of the first sentence of Article XVII(2), and, if so, (ii) whether this program is covered by the exception set forth in Article XVII(2)(b).

242. As discussed in paragraphs 112-122 above, the Claimant bears the burden of proving the elements triggering the presumption contemplated in the first sentence of Article XVII(2) of the SLA. To meet this burden, the Claimant must show not only that a benefit was *potentially* provided but that it was *indeed* provided.

243. The PSIF was announced in the March 2006 budget speech as a CAD 425 million loan envelope to be made available through Investissement Québec to companies in the forest sector (Exh. C-1, att. T, p. 13). According to the 2006-2007 budget plan, the purpose of the program was to "support investment and the modernization of forest sector companies, mainly sawmills and pulp and paper mills" (Exh. C-1, att. U, at section 6, p.7). It is not seriously disputed that loans were provided to softwood lumber producers. The Claimant's forestry expert, Mr. Beck, listed in his rebuttal report a number of loans made to softwood lumber producers (Exh. C-43, p. 47; C-61, pp. 31-33). Although the Respondent does not recognize that all these disbursements were made to softwood lumber producers or exporters in the meaning of Article XVII(2) of the SLA (PHB Resp. Reply, para. 176), it did state in its Rejoinder that "[w]hat Canada conceded was that the PSIF loans were made available to the entire forestry sector" (Rej., para. 308), which includes softwood lumber producers. Thus, the Tribunal sees no difficulty in concluding that the Claimant has established that loans were provided to Quebec's softwood lumber producers. The Respondent argues, however, that the Claimant has failed to establish that such loans amounted to a benefit in the meaning of Article XVII(2). This is so because, according to the Respondent, the Claimant has failed to show that the loans were not made on commercial terms.
244. In the view of the Tribunal, while the Claimant has the burden of proving that a benefit was indeed provided, such burden does not extend to proving that the alleged beneficiaries in fact took advantage of it, as the argumentation of the Respondent seems to imply. There are many reasons why a given company may not take advantage of what would otherwise constitute a benefit, including its own inability to put it to good use or other business variables that may offset such benefit.
245. There is no reference in Article XVII(2) to such a demanding showing. The first sentence simply refers to "[g]rants or other benefits that a Party, including any public authority of a Party, provides [...] to reduce or offset the Export Measures if they are provided on a *de jure* or *de facto* basis to producers or exporters of Canadian Softwood Lumber Products".
246. The mere fact that Québec's budget contemplated a substantial envelope specifically in order to provide financing to the forestry sector represents *per se* a strong indication that the PSIF amounted to a benefit in the meaning of the first sentence of Article XVII(2). The magnitude of the envelope, i.e. CAD 425 million, provides another indication in the same direction.

247. This is especially the case taking into consideration that there is evidence in the record that at the relevant time access to financing on usual commercial terms had become increasingly difficult. The memorandum to the Council of Ministers of October 2006 specifically mentions that the adjustments made to the PSIF were premised not only on the agreement reached between the United States and Canada but also "on the fact that the companies are facing such financial problems that they are not able to finance investment projects as previously planned in PSIF" (Exh. C-1, att. AD, p. 3). Also in October 2006, Quebec's Premier, Jacques Charest, made a statement in connection with the PSIF program, recognizing that "[t]he forest industry is currently experiencing the worst crisis in its history" (Exh. C-1, att. AB, p. 1). Minister Raymond Bachand reportedly declared that "[t]he government alone cannot make the necessary changes in Quebec's forest sector. Indeed, entrepreneurs, unions, native people and the government have agreed to work as a team" (Exh. C-1, att. AB, p. 3).

248. In addition, there is evidence that Investissement Québec does not only act as a commercial lender but also as a non-commercial one. In the annual report 2007/2008 of Investissement Québec, the section explaining how the economic impact of the activities of Investissement Québec is calculated expressly recognizes that the latter focuses on projects, including those funded through the PSIF, that would otherwise not receive financing and would be discontinued:

"The Corporation does not take credit for all the tax and quasi-tax revenues generated by the investment projects it finances and its clients' sales. Since its financing operations must complement those of financial institutions, the attribution model takes into account only the portion of the impact generated by companies whose financial structure exceeds the risk threshold usually tolerated by lending institutions. For economic development tools, such as the Private Investment and Job Creation Promotion Fund (FAIRE), Strategic Support for Investment Program (PASI), Support for the Forest Industry Program (PSIF) and government mandates, another method is used according to which economic impact is attributed to the Corporation based on the probabilities that supported projects would have been discontinued without the Corporation's financial assistance or relocated outside Québec. These two attribution methods were developed by the Corporation in cooperation with ISQ experts, Ministère des Finances representatives and academics."
(Exh. C-1, att. AQ, p. 119).

249. This is further confirmed by a powerpoint presentation of the activities of Investissement Québec in which the expertise of this institution is described as follows:

"In partnership with financial institutions [...] Projects that exceed the risk-taking capacity of financial institutions [...] We seek financial solutions specifically tailored to businesses' needs [...] By sharing risk, we enable businesses to carry out projects that would otherwise not get off the ground – 64% of our clients would have implemented a smaller project – 19% would not have completed their project" (Exh. C-53, p. 5).

250. In the light of the foregoing considerations and the evidence before it, the Tribunal has no hesitation in concluding that the PSIF program provided benefits to softwood lumber producers in the meaning of Article XVII(2).
251. The Tribunal must now consider whether, as argued by the Respondent, the PSIF program falls under the exception in Article XVII(2)(b). This provision exempts from the anti-circumvention clause "other government programs that provide benefits on a non-discretionary basis in the form and the total aggregate amount in which they existed and were administered on July 1, 2006".
252. The Claimant contends that the benefits of this program were granted on a discretionary basis. The Respondent disputes this contention and argues in essence that the PSIF has mandatory parameters for eligibility and that no loan or loan guarantee has been provided to a company that failed to meet these criteria (Rej. para. 375-378; SoD, para. 301, 314-315).
253. In connection with Ontario's Forest Sector Prosperity Fund and Loan Guarantee Programs, the Tribunal has already discussed whether the existence of eligibility criteria in the evaluation of an application for funding may render a program "non-discretionary" under Article XVII(2)(b) and rejected the argument (above paragraphs 147-155). The reasoning of the Tribunal in that connection is also applicable here.
254. Indeed, the criteria to be eligible for support under this program imply a measure of discretion. In particular, one of the "special requirements" is that the "business must have a sound financial structure, adequate management, qualified staff and a solid organization", Exh. C-1, att. AR, QC000001). These are all factors that call for assessment and judgment, in other words, discretion.
255. Moreover, there is a level of discretion in the determination of the form and extent of the benefit. As noted in the description of the program "[Investissement Québec] can provide a loan guarantee or a repayable contribution [...] The loan guarantee can cover up to 70% of the net costs [...] The maximum duration of the financial assistance is ten years. In the case of a loan or interest-free loan, the maximum duration is seven years [...]" (Exh. C-1, att. AR, QC000001).
256. Furthermore, it is not disputed that Investissement Québec assessed the risk level for each project on a multilevel scale (Exh. R-139; PHB Resp. Reply, para. 186, where the Respondent notes that "[i]n its Post-Hearing Brief, U.S. counsel again correctly notes the seven different risk ratings").

257. In addition, there is evidence that firms submitting applications received different scores according to a number of criteria such as "market or technical or commercial risk" or "administrative capacity", which could be assessed as "low", "average" or "high" ("élevée", "moyenne", "faible") (Exh. R-138). That assessment implied the exercise of discretion. At the Hearing, the expert presented by the Respondent, Prof. Kalt, confirmed this understanding (Tr. 23 July 2009, 854-857).
258. The Tribunal further notes that this evidence is consistent with the nature of Investissement Québec, which, as the Respondent itself has acknowledged, operates in part as a commercial lender, which means that it must assess the potential of each application before providing assistance.
259. Under such circumstances, the Tribunal considers that the PSIF required the exercise of discretion by the competent authorities. For the foregoing reasons, the Tribunal concludes that the requirement set forth in Article XVII(2)(b) that programs be "non-discretionary" is not met. As a result, the benefits provided by the PSIF are in breach of the anti-circumvention clause in Article XVII(1).

9. Quebec's Capital Tax Credit

260. The factual background regarding Québec's Capital Tax Credit is described in paragraphs 43 - 53 above.
- a) The Claimant's position
261. The Claimant argues that Québec's capital tax credit is a grant or other benefit provided on a *de jure* or *de facto* basis in the meaning of Article XVII(2) for purposes of increasing the softwood lumber producers' competitiveness (Reply corr., para. 108). In this regard, the Claimant notes that the Respondent "doesn't contest that Quebec's contribution to lumber companies' capital acquisition via this credit provided a benefit" (Tr. 24 July 2009, 1119: 7-9).
262. The Claimant further argues that none of the exceptions to the anti-circumvention provision applies (SoC 2 corr., para. 136). In particular, the Claimant rejects the Respondent's contention that the measure falls within Article XVII(2)(b) (Reply corr., para. 111). According to the Claimant, tax measures do not take effect upon announcement and the tax credit could not have been in existence or have been administered until it was legally authorized on 6 December 2006 (i.e. the date on which the legislation received final assent) (Reply corr., para. 112-113). Moreover, the

Claimant argues that nothing in the credit claims (filed after the 2006 Budget Speech but before parliamentary assent on 6 December 2006) indicates that the tax credit was being administered prior to December 2006. The Claimant finally contends that the retroactive grant of the tax credit does not demonstrate its existence before 1 July 2006 (Reply corr., para. 118-119).

b) The Respondent's position

263. The Respondent does not dispute that the measure under consideration provided benefits to softwood lumber producers (PHB Resp., para. 146).

264. It argues, however, that the measure was non-discretionary, and that it existed and was administered before 1 July 2006 regarding the forestry sector. The Respondent further argues that it is unchanged in form, amount, or administration. It therefore falls within the scope of Article XVII(2)(b) of the SLA (Rej., para. 203, 210). It notes that the Claimant did not produce credible evidence to counter the Respondent's showing that the measure both existed and was administered before 1 July 2006.

265. More specifically, the Respondent contests the Claimant's allegation that the implementation of new tax credits requires amendments to the Taxation Act. In this regard, the Respondent argues that it is the government's prerogative to give immediate effect to tax measures and that this was the case for Québec with respect to the Capital Tax Credit which was in effect since 2005 and the rate of which was merely increased in 2006 for companies in the forestry sector (Rej., para. 209). In this connection, the Respondent relies *inter alia* on the following elements: (i) Revenu Québec processed claims for the measure before legislative action was taken; (ii) Québec itself pledged that the measure was available as of the day following the budget speech, i.e. 23 March 2006; and (iii) Revenu Québec took the necessary steps to implement the measure and process claims before 1 July 2006 (Rej., para. 208-227; PHB Resp., para. 146-156; Exh. R-148, Att. P).

c) The Tribunal's determination

266. At the outset the Tribunal notes that it is undisputed that the measure under consideration provided a grant or other benefit to softwood lumber producers (PHB Resp., para. 146). The dispute focuses instead on the availability of the exception contained in Article XVII(2)(b).

267. In respect of the application of this exception, there is no serious disagreement on the fact that the measure provided benefits "on a non-discretionary basis". The debate hinges instead on whether the program provided such benefits "in the form and the total aggregate amount in which they existed and were administered on July 1, 2006". This requirement involves different elements. In order to understand these elements and their scope, the Tribunal will proceed in accordance with the rules of interpretation set out in the VCLT referred to in paragraph 110 - 111 above.
268. In this connection, the Tribunal notes that the ordinary meaning of the terms used to formulate the above requirement are not entirely clear. The text of Article XVII(2)(b) refers not only to the existence of the programs prior to July 1, 2006, but adds two specifications, namely that (i) the programs existed before July 1, 2006 in the same or a similar "form" and "aggregate amount", and that (ii) they were "administered" in the same or a similar "form" and "aggregate amount" prior to July 1, 2006.
269. When does a tax measure "exist"? The Parties have submitted extensive arguments on whether under Canadian law a tax measure "exists" from the moment it is announced or only from the moment it receives legislative assent. Both Parties have referred to a number of commentators on Canadian tax law. The Tribunal believes, however, that the inquiry that it must conduct here must not focus on the interpretation of Canadian law but on that of the SLA.
270. The ordinary meaning of the term "exist" is unclear, as suggested by the different the definitions that the Parties have advanced. This lack of clarity justifies resorting to the context of the provision, as directed by Article 31 of the VCLT. The wording of letters (a) and (b) of Article XVII(2) suggests that the "similarity" requirements (between the situation before and after 1 July 2006) and the meaning of the term "existed" used in both provisions are the same. Regarding the similarity requirements, the use in Article XVII(2)(a) of the term "as" immediately before the terms "they [systems] existed on July 1, 2006" conveys the same meaning as the (more precise) terms, used in Article XVII(2)(b), that the programs be "in the form and the total aggregate amount in which they [programs] existed [...] on July 1, 2006". As to the meaning of "existed" in both provisions, there is no indication that a different concept is being used respectively in letters (a) and (b) of Article XVII(2). Quite to the contrary, the addition in letter (b) of the term "administered" shows that the requirements entailed by the terms "existed" and "administered" are different. That said, the interpretation of the term "existed" as used in the SLA remains an open question.

271. More than one interpretation appears possible. Taking into account the argumentations of the Parties, the issue to be resolved is whether the public announcement of a program, followed by preparatory administrative work and reliance by beneficiaries satisfies the requirement of existence prior to 1 July 2006 as Canada argues. In the Tribunal's opinion, if factual elements such as preparatory administrative work and reliance by beneficiaries can be established, the requirement of existence must be deemed to be met, irrespective of whether the final step in the enactment of the measure was taken after 1 July 2006. As will be discussed in the next paragraphs, there is sufficient evidence to demonstrate that the measures under review "existed" before 1 July 2006 in the same or a similar "form" and "aggregate amount". A different question is whether they were "administered" in the same or a similar "form" and "aggregate amount".
272. Indeed, the precise meaning of the word "administered" is equally unclear. In particular, the Parties disagree on whether a measure for the administration of which the relevant government agencies have taken concrete steps (including as a follow-up of an existing program) and which has been relied upon by tax payers (and retroactively granted) can be considered as "administered" or not.
273. To the extent that different meanings of the term "administered" are conceivable, and that according to Article XVII(2)(b) the measures must have been administered in the same or a similar "form" and "aggregate amount", resort to the context of the provision under consideration seems again justified. The context of Article XVII(2)(b) and particularly the different wording of letters (a) and (c) of Article XVII(2) sheds some light on the meaning of the "similarity" requirements in connection with the "administration" of the programs. Whereas, as previously noted, such requirements do not seem to add much to the term "existed" as compared to what is required by Article XVII(2)(a), they do qualify the requirement that the programs must have been "administered" before and after 1 July 2006. Specifically, not every non-discretionary program existing prior to July 1, 2006 would be covered by Article XVII(2)(b). Only those programs would be covered that were already "administered" before that date, and that were administered in the same or in a similar "form" and "aggregate amount". Thus, compared to letter (a), letter (b) entails two additional time-related requirements. In order to assess whether these requirements are met in the case of the Capital Tax Program, the Tribunal must conduct both a legal and a factual inquiry.
274. To do so, it appears useful to provide an overview of the main facts concerning the program. The measure was announced by the Minister of Finance in the 23 March

2006 budget speech and was included in the 2006-2007 budget plan as a "15% capital tax credit on investments made until 2009 by primary wood processing manufacturing companies". It is a non-refundable Capital Tax Credit of 15% of the value of eligible investments, i.e. manufacturing and processing equipment acquired prior to 1 January 2010 and used in primary wood processing activities (Exh. C-1, att. U, at section 6, p.10). According to the 2006-2007 budget plan, the program's purpose was to "reduce the cost of acquiring manufacturing and processing equipment by 15%. It will be applied against the tax on capital" (Exh. C-1, att. U, at section 6, p.10). The 2006-2007 budget plan projected a total cost of CAD 120 million for the four year program, increasing from CAD 25 million in 2006-2007, to CAD 40 million in 2009-2010 (Exh. C-1, att. U, at section 6, p.5). The increase in the Capital Tax Credit to 15%, for forest companies, was to extend until 31 December 2009 (Exh. C-1, att. U, at section 6, pp.5 and 11). In the budget speech of 24 May 2007, the Minister of Finance announced, *inter alia*, a last extension of the 15% Capital Tax Credit for all investments in wood processing companies (Exh. C-1, att. X, pp.7-8).

275. Legislation in connection with the Capital Tax Credit was introduced on 8 November 2006, passed on 30 November 2006 and received final assent on 6 December 2006 (Exh. C-1, Att. V). Such legislation is referred to as "*Bill 41 – An Act to again amend the Taxation Act and other legislative provisions*". The Bill amends the Taxation Act (R.S.Q., chapter I-3) to introduce, amend or repeal certain fiscal measures specific to Québec (Exh. C-1, att V., p.2, 177-178).
276. The Respondent has argued that the program was being administered well before 1 July 2006. In support, it submitted that many steps had already been taken by Revenu Québec prior to 1 July 2006 to prepare for the administration of the program, including the acceptance of applications (filed on pre-printed forms still using the 5% rate, Exh. R-91), the adoption of a work schedule table by Revenu Québec (Exh. R-73), and the introduction by this latter agency of some adjustments to its computer system (Exh. R-124, Hudon, para. 7). Moreover, according to the Respondent, a capital tax credit of 5% was already being administered, before the announcement of the 15% Capital Tax Credit applicable to forest companies. It refers in this connection to the written statement of Mr. Bourque, of Revenu Québec (Rej., para. 223; Exh. R-124, Bourque, para. 5).
277. The Tribunal must examine whether the steps referred to by the Respondent satisfy the requirements identified above that the program be "administered" by 1 July 2006, in a similar "form" and "aggregate amount". One recalls in this context that the Respondent

bears the burden of proving that the elements of the exception set out in Article XVII(2)(b) are met (paragraphs 112-122 above).

278. As a general matter, the Tribunal is of the view that a program or a measure cannot be "administered" in a given "form" and "aggregate amount", if it has not started to operate. In the Tribunal's understanding, preparatory action even at an advanced stage does not amount to the program being in operation.
279. The Respondent produced evidence, including five affidavits from officials of Revenu Québec (Exh. R-124) as well as documents (Exh. R-73, R-74, R-91) showing that advanced preparatory work had been conducted both prior and after the budget speech of 23 March 2006 when the increase of the capital tax was announced. However, this evidence is not sufficient to establish that the program had started operations before 1 July 2006. As recognized by the Respondent itself, the first credit claim under this program was granted in November 2006 (PHB Resp., Annex IV, para. 9, footnote 15; Exh. R-123).
280. The fact that the processes and structures used to administer the Capital Tax Credit were to a large extent those already in place to administer the previous 5% capital tax credit for all companies does not change this conclusion. The officials of Revenu Québec who have provided affidavits recognize that the measure announced on 23 March 2006 was different from the previous capital tax credit both regarding the amount (15% as opposed to 5%) and the beneficiaries (wood processing manufacturing companies as opposed to all companies operating in the manufacturing sector). As noted by Mr. Bourque:
- "Revenu Québec had already undertaken the mass administration of the 5% capital tax, since its introduction in 2005. Above all, the new tax measure only increased this rate, beginning March 23, 2006, and only for certain clients, who where (sic) fewer in number than in the first case" (Exh. R-124, Bourque, para. 5).
281. It is therefore clear that the 15% Capital Tax Credit was not being administered in the same or a similar "form" and "aggregate amount" as the previous credit program, since both the rate and the beneficiaries were different.
282. For the reasons just discussed, the Tribunal considers that the requirement set forth in Article XVII(2)(b) that the measure be "administered" in the same or a similar "form" and "aggregate amount" is not met. Even if the measure under review can be deemed to have "existed" prior to 1 July 2006, the Respondent must prove that such measure was also "administered" by 1 July 2006, in the "form" and "aggregate amount" in which

it was administered after that date. The evidence in the record is not sufficient to establish this latter fact.

283. Therefore, the Tribunal concludes that Québec's Capital Tax Credit is not covered by the exception provided in Article XVII(2)(b) and, as a result, is in breach of the anti-circumvention clause of Article XVII(1).

10. The Quebec's Road Tax Credit

284. The factual background regarding Quebec's Road Tax Credit is described in paragraphs 43 - 53 au-dessusabove.

a) Claimant's position

285. The Claimant argues that this measure is in contravention of the anti-circumvention provision in Article XVII of the SLA. It is said to provide benefits in support of Québec's forest industry, because Québec assumes "the bulk of the cost of building logging roads, which are a cost of doing business, just like the export charges that exporters pay are a cost of doing business for those companies" (Tr. 24 July 2009, 1122: 11-14). More specifically, the Claimant argues that the offset of this benefit through increases in the stumpage fees alleged by the Respondent is not only unilateral, and therefore not permitted by the SLA, but it is also insufficient, as it covers only a fraction of the benefit granted (Tr. 24 July 2009, 1122: 15-25, 1123: 1-11).

286. Moreover, the Claimant contends that, contrary to the allegations of the Respondent, this measures does not fall within the scope of the exceptions in Article XVII(2)(a) to (c) for several reasons.

287. First, the Claimant refers to its argumentation regarding the Ontario FARMP (see *supra* para. 161) to the effect that Québec's Road Tax Credit cannot be characterized as a "forest management system" in the meaning of Article XVII(2)(a) (Tr. 24 July 2009, 1123: 12-20).

288. Second, with respect to the exception in Article XVII(2)b, the Claimant refers to its argumentation regarding Québec's Capital Tax Credit (see *supra* para. 261-262) to assert that Québec's Road Tax Credit cannot be deemed to have existed and have been administered before 1 July 2006. According to the Claimant, the uncontroverted evidence here is even more striking than that relating to the Capital Tax Credit measure:

"It's uncontroverted that Quebec announced a 40 percent tax credit for the building of logging roads in March of 2006, in the same budget speech as the capital tax credit. Quebec later announced an increase of this program from 40 percent to a 90 percent credit on October 20 of 2006, well after the cut-off date. The Quebec government then proposed the enabling legislation for both the 40 percent and 90 percent portions of the credit on November 8 of 2006 and, as with the 15 percent credit, the enabling legislation was passed on November 30 and received assent on December 6. Moreover, the 90 percent tax credit was announced well after the SLA's cut-off date, and Canada recognizes that, at the very least, this portion of the credit is not grandfathered under section 2(b)"
(Tr. 24 July 2009, 1124:3-20).

289. Third, regarding Article XVII(2)(c), the Claimant argues that the Road Tax Credit is not an "environmental measure" in essence because: (i) the purpose of this measure was to remove a cost of doing business from lumber companies to improve their financial position, a fact which was acknowledged by Québec, (ii) the Respondent provides no evidence of any environmental purpose (while the report of the Coulombe commission in Exh. R-81 may discuss assistance for the building of forest roads, it does not show that the measure under review is a separate environmental program), and (iii) Québec officials' statement in the budget speech, and the ministerial memorandum of 13 October 2006 (Exh. C-1 AD) demonstrate that the program was aimed at providing financial assistance to softwood lumber companies (Tr. 24 July 2009, 1124: 24-25; 1125: 1-23).

b) The Respondent's position

290. The Respondent replies mainly that the Road Tax Credit (i) does not constitute a grant or other benefit to the softwood lumber industry, and, in any case, (ii) falls within the scope of the exceptions stated in Article XVII(2) under letter (a) "as a modification of Quebec's timber pricing and forest management system", letter (b) "because it existed and was administered by July 1, 2006", and letter (c) "because its purpose was environmental forest management, protection, and conservation" (PHB Resp., para. 157).

291. More specifically, the Respondent argues that the Claimant has failed to establish an actual benefit accruing to Canadian lumber producers and that, even the Claimant's expert, Mr. Beck, conceded that the roads built as a result of the tax credit measures belong to the Province of Québec (PHB Resp., para. 158).

292. Regarding the applicability of Article XVII(2)(a), the Respondent alleges that road construction has long been a part of Quebec's forest management system and that, according to the un rebutted testimony of Mr. Adam, timber prices (stumpage fees) in Québec are determined by law according to the parity technique, which includes the costs of road building as a specific variable. Moreover, the United States Department of

Commerce had verified that costs of road building were specific variables of Québec's timber pricing system. Furthermore, Mr. Adam testified that the increase in the Road Tax Credit led to a reduction of the corresponding cost element in the parity equation, which calculates the market value of standing timber (PHB Resp., para. 159-161).

293. Second, concerning the letter (b) exception, the Respondent refers to its argumentation in connection with Québec's Capital Tax Credit (see *supra* para. 264-265) to conclude that Quebec's Road Tax Credit was in existence before 1 July 2006. It also argues that the 40 percent refundable tax credit was available on the day following the budget speech, as acknowledged by the Claimant's expert witness, Mr. Beck (PHB Resp., para. 163-165).

294. Finally, with respect to the third exception, the Respondent submitted that the evidence it has presented as well as Mr. Beck's own testimony confirm that the primary purpose of the measure under review was consistent with Article XVII(2)(c) of the SLA (PHB Resp., para. 166-170).

c) The Tribunal's considerations

295. In their pleadings, the Parties have referred to several arguments in connection with Québec's Road Tax Credit. In discussing these arguments, the Tribunal will proceed in two steps. First, it will review whether the Claimant has established that the program under challenge provides a grant or other benefits. Second, it will seek to determine, insofar as it is relevant, whether the program falls under one of the exceptions contained in letters (a), (b) or (c) of Article XVII(2).

296. Regarding the first aspect of the inquiry, as noted in paragraphs 112-122 above, the Claimant has the burden of proving that "grants or other benefits" were provided to softwood lumber producers. The Respondent has argued in this connection that the Québec's Road Tax Credit does not provide a grant or other benefit in the meaning of Article XVII(2) (SoD para. 214-221; Rej. para. 267-270, 285, 288-290; PHB Resp. para. 158). For the sake of consistency, the Tribunal will review the arguments of the Parties on the present issue taking into account their position on other measures allegedly in breach of the SLA, particularly Ontario's Road Construction and Maintenance Program and Quebec's SOPFIM/SOPFEU and Forestry Fund.

297. With respect to the first one of these other programs, the Tribunal notes that the Respondent did not dispute that Ontario's Road Program provided benefits to softwood lumber producers (see paragraph 167 above). It also notes that the facts involved in

Quebec's Road Tax Credit are different in the sense that any benefits granted by such program were allegedly offset by an increase in the stumpage fees charged to lumber producers.

298. As to the other programs to be considered for reasons of consistency, the Tribunal concluded that the evidence was not sufficient to show that the SOPFIM/SOPFEU and Forestry Fund provided benefits. In reaching this conclusion, the Tribunal took into account *inter alia* the testimony of Mr. Adam, as well as the absence of documentary evidence suggesting that a benefit had indeed been conferred on softwood lumber producers. To the extent that Mr. Adam's statement also addressed Québec's Road Tax Credit, the Tribunal must again keep it in mind when reviewing the evidence adduced by the Claimant here.
299. In order to prove the existence of a benefit, the Claimant has referred to documentary evidence, namely the reports of its forestry expert, Mr. Beck (Exh. C-1, C-43), the 2006-2007 budget plan (Exh. C-1, Att. U), and a ministerial memorandum of 18 October 2006 (Exh. C-1, Att. AD). Such evidence was also relevant to assess whether the SOPFIM/SOPFEU and the Forestry Fund provided benefits in the meaning of the SLA. The Tribunal sees a difference between such other programs, where the nature of the tasks rather points away from the existence of a benefit, and the Road Tax Credit, where the opposite would seem to apply.
300. This view finds support in the 2006-2007 budget plan, which is more assertive about the purpose of the Road Tax Credit than that of SOPFIM/SOPFEU and the Forestry Fund. The budget plan indeed states that "[t]o help forest companies reduce supply costs and forest managers to harvest the most appropriate stands in a timely manner, the government is setting up a new tax credit for the construction and major repair of forest access roads and bridges" (Exh. C-1, Att. U, at section 6, p.9). As rightly pointed out by the Claimant, a program intended "to help forest companies reduce supply costs" should be deemed to provide benefits. It is also difficult to see how this program could "help [...] reduce supply costs", if it was entirely offset by an increase in stumpage fees.
301. This conclusion is further confirmed by the fact that, as noted above, Canada did not take issue with the fact that financial assistance for the construction or the maintenance of forests in Ontario could be deemed to provide a benefit.

302. Moreover, although Mr. Adam gave evidence that the introduction of the Road Tax Credit implied a change in the stumpage fees, he did not state that the benefits were entirely offset through stumpage fees.
303. Thus, unlike the case of the SOPFIM/SOPFEU and the Forestry Fund, the balance of the evidence presented by the Claimant suggests that benefits were indeed provided to softwood lumber producers. However, this is not to say that the Road Tax Credit may not fall under one of the three exceptions invoked by the Respondent.
304. In connection with the availability of an exception, the Tribunal deems it useful to make a distinction between, on the one hand, the 40% refundable tax credit for the construction and major repair of forest access roads and bridges of the amount of expenditures incurred prior to 1 January 2011 (Exh. C-1, Att. U, at section 6, p. 9) announced in the March 2006 budget speech (Exh. C-1, Att. T, p.13) and, on the other hand, the increase from 40% to 90% announced on 20 October 2006 (Exh. C-1, Att. A-B), which was to apply to expenditures incurred from 23 October 2006 to 1 January 2010 (Exh. C-1, Att. AE, p.6). The Tribunal will hereafter refer to the first measure as the "40% tax credit" and to the second as the "increase in the tax credit".
305. The Tribunal will start by inquiring whether the 40% tax credit is covered by one of the exceptions of letters (a) to (c) of Article XVII(2) of the SLA.
306. Article XVII(2)(a) covers "provincial timber pricing or forest management systems as they existed on July 1, 2006". The Tribunal has already analyzed the meaning of the terms used in this provision in connection with other programs. In particular, the Tribunal has interpreted the terms "forest management systems" in connection with the Ontario Road Program (see paragraphs 169-183 above) and the requirement that such program must have existed, in the same or a similar manner, on 1 July 2006, in connection with Québec's Capital Tax Credit (see paragraphs 269-271 above).
307. The Tribunal's analysis of these two latter programs applies equally to the 40% tax credit. This is so because the 40% tax credit shares some important features with these other programs, namely it provides financial assistance for the construction and maintenance of forest access roads and it is a tax measure. The analysis of the two other programs is also relevant because the Claimant argued the 40% tax credit by reference to its argumentation regarding the Ontario Roads Program and Québec Capital Tax Credit.

308. As noted above, the 40% tax credit was announced in the budget speech of 23 March 2006. It was linked to the provincial forest management system, which in Québec is based on the parity technique. Or in Mr. Adam's words:

"[t]he parity technique uses three central data elements: price, which is the price of standing timber on private land; costs, which are the costs of operations on public land and on private land; and revenues, which are the revenues from the products expected from the processing of the public and private timber"
(Exh. R-3, para. 13).

Mr. Adam further explained that, out of the different cost elements that account for the total cost of operations on public land for any given tariffing zone, "[t]he first of those elements is Cfr, the cost of building and maintaining forest roads" (Exh. R-3, para. 20).

309. In addition, there is evidence in the record that Revenu Québec took a number of administrative steps before 1 July 2006 to give effect to the 40% tax credit announced in the budget speech of 23 March 2006. Mr. René Martineau, an attorney working for Revenu Québec and the head of the Interpretation Department for Companies, gave a written statement to the effect that "the credit for forest roads [...] was applied to expenses incurred as of the day following the budget. Effectively, certain expenses incurred after March 23, 2006 were already eligible for the tax credit" (Exh. R-124, Martineau, para. 3). This assertion is corroborated by a document entitled "Establishment of a temporary reimbursable tax credit for access roads and public bridges in forested areas" (Exh. R-74). The section of this document devoted to the 40% tax credit specifically states, under the heading "Application date", that the program will cover:

"[a]llowable expenses incurred after March 23, 2006 and before January 1, 2011, if: they are incurred in accordance with what appears in an annual forest intervention plan presented before the MNRF before January 1, 2010; and the construction or major repair of the allowable access path or bridge by the company or partnership firm, if required, or on behalf of one of them, had started before January 1, 2010"
(Exh. R-73)

310. On the basis of statements made by Messrs Adam and Martineau⁷ and of the other evidence on record taken as a whole, it is sufficiently established that the 40% tax credit is encompassed by the exception of Article XVII(2)(a) as a forest management system which existed before 1 July 2006.

311. Having held that the 40% tax credit is covered by Article XVII(2)(a), the Tribunal now turns to the analysis of the increase of the tax credit from 40% to 90%. It is undisputed that this measure was only announced in October 2006 (PHB Resp. Reply, Annex II, Liability Decision Points, Quebec Tax Credit for Road Building). It can thus not be

⁷ The remarks made by the Tribunal in footnote 5 above apply here *mutatis mutandis*.

considered that the measure existed "as" or in the same or a similar "form" and "total aggregate amount" before 1 July 2006, because an increase of more than 100% of a capital credit (from 40% to 90%) does not meet the similarity requirements as they were discussed in connection with Quebec's Capital Tax Credit. For this reason, the exceptions provided in letters (a) and (b) of Article XVII(2), which both require the measure to have "existed" "as" or in the same or a similar "form" and "total aggregate amount" before 1 July 2006, cannot shield the increase of the tax credit.

312. This being so, the Respondent has submitted that the increase of the tax credit was in any case within the scope of Article XVII(2)(c). This provision exempts from the presumption of Article XVII(2) those:

"actions or programs undertaken by a Party, including any public authority of a Party, for the purpose of forest or environmental management, protection, or conservation, including, without limitation, actions or programs to reduce wildlife risk; protect watersheds; protect, restore, or enhance forest ecosystems; or to facilitate public access to and use of non-timber forest resources, provided that such actions or programs do not involve grants or other benefits that have the effect of undermining or counteracting movement toward the market pricing of timber"

313. In its discussion of the different meaning of letters (a) and (c) of Article XVII(2) in the context of the Ontario Road Program, the Tribunal noted that the substantive scope of the expression "actions or programs [...] for the purpose of forest or environmental management" was narrower than that of "forest management systems". In the first case (letter (c)), the exception is based on a purpose test, while the second case (letter (a)) implies no purpose test. It was also said that the narrower scope of letter (c) would explain the lack of cut-off date (July 1, 2006) (unlike in letters (a) and (b)). For present purposes, this means that the Tribunal should not give a broad interpretation to the exception in letter (c).

314. The "actions or programs" covered by Article XVII(2)(c) must therefore have a clear purpose, i.e. forest or environmental management, protection, or conservation. The fact that they may qualify as "forest management systems" is not enough. Indeed, for Article XVII(2)(a) to have any effect, some forest management systems at least may not qualify as undertaken "for the purpose of forest or environmental management, protection, or conservation".

315. A difficult question arises in this context: does Article XVII(2)(c) exempt a measure with two or more purposes, one of which is forest or environmental management, protection, or conservation? In answering this question, three alternative interpretations are conceivable. First, it could be held that any measure with even a *secondary* forest or environmental management, protection, or conservation purpose falls under Article

XVII(2)(c), irrespective of its main purpose. Second, it could be considered that only those measures the *exclusive* purpose of which is forest or environmental management, protection, or conservation are exempted from the anti-circumvention clause by letter (c). Between these two extremes, a third interpretation may find that only measures the *primary* purpose of which is forest or environmental management, protection, or conservation are covered by letter (c). In the opinion of the Tribunal, this third interpretation must be preferred. It is the only one which is at the same time consistent with the context of the provision (and particularly with the formulation of the exception in Article XVII(2)(a)) and realistic in the sense that it protects environmental programs with ancillary purposes. The question becomes thus whether the primary purpose of the program under consideration was "forest or environmental management, protection, or conservation".

316. The Tribunal recognizes that at least one of the purposes of the measure was "forest or environmental management, protection, or conservation". It is not persuaded, however, that such was the primary purpose. As noted in paragraphs 300-302 above, the program was introduced for the purpose of helping "forest companies reduce supply costs and forest managers to harvest the most appropriate stands" (Exh. C-1, Att. U, at section 6, p.9). This is in conformity with the presentation of the measure in the budget speech of March 2006, which insisted on the competitiveness of the forest industry, as opposed to environmental protection:

"[t]o make our forest companies even more competitive, we are going to support them through concrete measures that will, among other things, make the price of fibre more competitive [...] A refundable tax credit for the construction of forest access roads and bridges will take effect as of tomorrow, and will enable forest companies to reduce their production costs." (Exh. C-1, Att. T, p. 13).

317. For the foregoing reasons, the Tribunal holds that the requirements of Article XVII(2)(c) are not met. Hence, the increase of the tax credit from 40% to 90% does not fall within any of the exceptions invoked by the Respondent, the Tribunal concludes that such increase is in breach of the anti-circumvention clause in Article XVII(1) of the SLA.

B. REMEDIES

1. Applicable Norms

318. In the preceding section, the Tribunal has concluded that the Respondent breached the anti-circumvention clause in Article XVII(1) of the SLA by reason of the following programs or measures: (1) Ontario's Forest Sector Prosperity Fund; (2) Ontario's Forest Sector Loan Guarantee Program; (3) Québec's Forest Industry Support

Program (PSIF); (4) Québec's Capital Tax Credit; and (5) Québec's Road Tax Credit (only in connection with the increase in tax credit from 40% to 90%).

319. In this section, the Tribunal must determine the legal consequences attached to such breaches (Article XIV (22) to (32) SLA). At the outset, the Tribunal notes that the SLA contains specific provisions on the remedies available in case of breach. Pursuant to Article XIV(22) of the SLA, the Tribunal must set a time period to cure the breach and determine adjustments to the export measures if the breach is not cured:

"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".

320. The legal consequences attached to a breach of the SLA by Article XIV(22) are further specified in other paragraphs of Article XIV. The Tribunal will review in detail a number of questions of interpretation which the Parties have raised in this respect in subsequent sections of this Award (see section 3 below). At this stage, it deems it useful to start by providing an overview of the remedies system and the related provisions of the SLA.

321. Overall, the system comprises three phases: (i) the breaching State is given a reasonable period to "cure" the breach (Article XIV (22)(a)); (ii) if the breach is not cured within the time allotted, the Compensatory Adjustments which the Tribunal will have set for this purpose become applicable in order to "compensate for" or "remedy" the breach (Article XIV(22)(b) and (23) in fine); (iii) in the event that the Parties disagree on whether the breaching State has "cured" the breach or whether it has complied with the Compensatory Adjustments determined by the Tribunal, the injured State may impose compensatory measures not exceeding the adjustments determined by the Tribunal in connection with phase (ii) (Article XIV (27) for the event that the US is the injured State).

322. In these proceedings, the Tribunal must only reach a decision on the first two phases just set out and determine (i) a reasonable period of time for Canada to cure the breaches and (ii) the Compensatory Adjustments, i.e. "an increase in the Export Charge" and/or a "reduction in the export volumes" (Article XIV(23)(a)), "in an amount that remedies the breach" (Article XIV(23) in fine), which will apply in the event that the Respondent does not voluntarily cure the breach. In determining such Compensatory

Adjustments, the Tribunal must take into account the following specifications set in the SLA: the adjustments may be in the form of an increase in Export Charges or a reduction in export volumes or both (Article XIV(23)(a)); they may be applied from the end of the reasonable period of time until Canada cures the breach (Article XIV(24)); and in the event of breaches attributable to a particular Region, the Tribunal must determine the compensatory adjustments applicable to that Region (Article XIV(25)).

323. The Claimant has argued that the remedies system of the SLA set forth in the foregoing paragraphs does not preclude the application of other rules of international law, in particular those governing reparation for internationally wrongful acts (Reply, para. 192-194). In support of its position, the Claimant has referred to the reasoning of the tribunal in the cases *United States v. Canada* (LCIA 7941) and *Canada v. United States* (LCIA 91312) (Reply, para. 194; PHB Cl., para. 77). In these two decisions, the same tribunal concluded that the customary obligation to provide full reparation for the injury caused by a wrongful act of a State, which is codified in Article 31 of the ILC Articles on State Responsibility, applied in addition to the remedies provided in the SLA (Exh. CA-12, para. 273-306; CA-49, para. 166). Specifically, the tribunal in LCIA 7941 derived from this conclusion a "presumption in favour of retroactive remedies" (Exh. CA-12, para. 274-277). The Respondent has challenged this interpretation, *inter alia*, by reference to an expert opinion of Prof. M. Reisman (Exh. R-102).
324. As mentioned earlier, this Tribunal is not bound by earlier decisions of other tribunals but considers that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases comparable to the one at hand, subject to the circumstances of the case. This is of particular relevance when the same treaty applies. In the present case, one cannot speak of a consistent line of cases. There are only two earlier decisions interpreting the SLA, and they were both issued by a tribunal composed of the same arbitrators. Moreover, the Tribunal considers that there are strong reasons in favour of a different solution with respect to the relationship between the remedies system set out in the SLA and other rules of international law as well as to the interpretation of the specific provisions of the SLA regarding remedies. Essentially, it sees no basis for applying a presumption of full reparation in the framework of the SLA. It further finds it in conformity with the SLA to focus on the effects caused by the circumvention rather than on the benefits awarded in the course of the circumvention. This said, it accepts that the remedies system of the SLA covers past effects (see paragraphs 350 - 357 below). In this respect, it reaches the same results as the tribunal in the earlier cases though it does so through different

avenues, i.e. through the interpretation of the SLA as opposed to the application of other rules of international law. In the following paragraphs, the Tribunal will thus set forth its understanding of the rules determining the legal consequences attached to the conduct of the Respondent in the present instance.

325. In doing so, the Tribunal will distinguish two questions, namely the relationship between the SLA and other rules of international law, and the interpretation of the provisions of the SLA in connection with a number of disputed issues. The first question is discussed in the present section. The matters covered by the second question will be discussed in the sections devoted to each specific issue.
326. The Tribunal considers that the remedy system set out in the SLA constitutes a *lex specialis* that prevails over other norms of international law, be they treaty or customary international law norms. The maxim *lex specialis derogat generali* is well spelled out in the conclusions of the work of the International Law Commission's Study Group on the Fragmentation of International Law⁸:

"The maxim *lex specialis derogat legi generali* is a generally accepted technique of interpretation and conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. *The principle may be applicable in several contexts: between provisions within a single treaty, between provisions within two or more treaties, between a treaty and a non-treaty standard, as well as between two non-treaty standards.* The source of the norm (whether treaty, custom or general principle of law) is not decisive for the determination of the more specific standard. *However, in practice treaties often act as lex specialis by reference to the relevant customary law and general principles*"⁹.

327. As rightly observed by the ILC's Study Group, the maxim *lex specialis* may operate between provisions of two or more treaties or between a treaty and a non-treaty standard. In this latter case, the treaty will in practice operate as *lex specialis* and prevail over customary law. These observations are particularly relevant here. While the Parties have referred to customary law and to other treaties in the area of international trade in support of their argumentation on remedies, they have primarily relied on the specific wording of the SLA (PHB Cl., para. 75-90; PHB Resp., 188-203). This is only natural since the SLA was concluded for the very purpose of providing a special legal framework to deal with the export of softwood lumber from Canada to the United States to the exclusion of other international rules embodied in particular in the NAFTA and WTO Agreements. That special legal framework contains a system of remedies that requires no supplementation by way of resort to other rules, be they

⁸ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II, Part Two ("Conclusions on Fragmentation").

⁹ Id., para. 5 (italics added)

customary rules on reparation of internationally wrongful acts as codified in the ILC Articles on State Responsibility or rules from more general treaties on trade matters. This conclusion is confirmed by Article 55 of the ILC Articles on State Responsibility, which states that the general rules on State responsibility for internationally wrongful acts do not apply "where and to the extent that [...] the content [...] of the international responsibility of a State are governed by special rules of international law".¹⁰

328. The preceding conclusion does not mean that norms of international law other than those embodied in the SLA may never come to bear. Such norms may still apply to the extent allowed by the rules of interpretation of treaties codified in Articles 31 to 33 of the VCLT and by the application of the *lex specialis* maxim. As noted by the ILC Study Group on Fragmentation:

"[t]he application of the special law does not normally extinguish the relevant general law. That general law will remain valid and applicable and will, in accordance with the principle of harmonization [...] continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter"¹¹

The extent to which general law remains relevant in the context of the SLA, if at all, will have to be assessed in light of the wording of each provision. The Tribunal will proceed to such assessment in the following sections.

329. With these considerations in mind, the Tribunal will now turn to the determination of a reasonable time to cure the breach (Article XIV(22)(a)) and of the Compensatory Adjustments to be applied if the Respondent does not cure the breach within the time prescribed (Article XIV(22)(b)).

2. Reasonable time to cure the breach (Art. XIV(22)(a))

330. Pursuant to Article XIV(22)(a):

"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."

331. In the present case, the Tribunal has found that Canada is in breach of the anti-circumvention clause in Article XVII(1) of the SLA. Given the nature of the programs

¹⁰ ILC Articles, *supra* note 4 The ILC Articles are widely recognized as a reflection, in many respects, of customary international law.

¹¹ Conclusions on Fragmentation, *supra* note 8, para. 9.

and measures that are in breach of Article XVII(1) of the SLA, the Tribunal considers that it would not be reasonable to require Canada to cure the breach in less than 30 days from the date of notification of this Award. The Tribunal notes, in this regard, that the Claimant itself has proposed a period of 30 days (PHB Cl., para. 151), and that the Respondent has agreed to such proposal (PHB Resp. Reply, para. 204).

332. The Tribunal further notes that, under the terms of the SLA, the Tribunal is not called to identify measures that could potentially cure the breach. Under the remedies system of the SLA, the choice of the means to cure the breach lies entirely in the hands of the Respondent. As the Claimant put it, "the SLA by its very terms, contemplates that the Tribunal determine only the reasonable period of time to cure, not the cure itself" (PHB Cl., para. 87).

333. On the basis of the foregoing considerations, the Tribunal hereby sets a period of 30 days from the notification of this Award for Canada to cure, through means of its own choosing, the breaches identified in the liability section of this Award. If Canada does not cure the breach within the aforesaid period, the Compensatory Adjustments determined in the following section of this Award will apply.

3. Compensatory adjustments (Art. XIV(22)(b))

a) General remarks

334. Article XIV(22)(a) provides that the Tribunal must set Compensatory Adjustments if it finds a breach like in the present case:

"If the tribunal finds that a Party has breached an obligation under the SLA 2006, the tribunal shall: [...]

(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"

335. As was already noted in connection with the applicable provisions of the SLA, in determining the Compensatory Adjustments contemplated in Article XIV(22)(b), the Tribunal must take into account the following specifications set by the SLA: such adjustments may be in the form of increases in Export Charges or reductions in export volumes or both; "[s]uch adjustments may be applied from the end of the reasonable period of time until the Party Complained Against cures the breach" (Article XIV(24)); and "[i]n the case of a breach by Canada attributable to a particular Region, the tribunal shall determine the compensatory adjustments applicable to that Region" (Article XIV(25)).

336. The Parties disagree on many aspects of the determination of the Compensatory Adjustments in accordance with the SLA, some of which are fundamental, namely whether the amounts to be collected are identical to the amounts of the benefits provided, whether compensatory adjustments cover past effects, and whether Compensatory Adjustments cover the effects accruing after the expiration of the SLA due to benefits distributed during the life of the SLA.
337. In order to decide these and other questions, the Tribunal must decide a number of legal questions underlying the determination of the form and the amounts of the Compensatory Adjustments and assess the expert evidence submitted by the Parties. As mentioned in paragraphs 86 - 91, after the Hearing on the merits and the submission of the Post-Hearing Briefs, the Tribunal requested additional assistance from the Parties' economic experts, Professors Topel and Kalt. As a result of the Tribunal's request, embodied in PO 6 and subsequent clarifications issued by the Tribunal, the experts submitted a Joint Expert Report quantifying the Compensatory Adjustments that would have to be imposed by Canada to neutralize the offsets to the Export Measures resulting from the adoption of the five programs or measures found in breach of the anti-circumvention clause.
338. The Joint Expert Report raises several questions that the Tribunal must analyze in order to determine the Compensatory Adjustments. First, the Tribunal must address certain matters relating *inter alia* to the approach followed in the Joint Expert Report as a result of the mandate entrusted to the experts in PO 6. In this context, the Tribunal will address the fundamental issues listed in paragraph 336 above (section (b) below). Second, the Tribunal will review a number of issues arising directly from the Joint Expert Report, particularly in connection with the different choices left open in the interactive spreadsheet submitted with the report (section (c) below). Third, after addressing these questions, the Tribunal will set out the Compensatory Adjustments to be collected by the Respondent (section (d) below).

b) Overall approach followed by the Joint Expert Report

339. In this section, the Tribunal will address four questions relating to the overall approach followed by the experts in the Joint Expert Report as a result of the mandate entrusted to them in PO 6 and its subsequent clarifications. These issues are the following: (i) whether the Compensatory Adjustments should allow the collection of sums in the amounts distributed as benefits by the programs or measures in breach of the SLA or only in amounts necessary to neutralize the offsets of the Export Measures resulting

from said benefits; (ii) whether the effects of the programs or measures in breach of the SLA prior to the issuance of the present Award (past effects) must be taken into account in setting the Compensatory Adjustments; (iii) whether, for purposes of setting the Compensatory Adjustments, one must assume that the programs or measures in breach of the SLA will continue until the expiration of the SLA; and (iv) what the appropriate proxy is for the benefits distributed as part of the two Ontario programs found in breach of the SLA. The Tribunal will address these questions in the order in which they were listed.

(i) Measure of the amounts to be collected

340. The Claimant has questioned the approach adopted by the experts in the Joint Expert Report as a result of the mandate entrusted to them in PO 6. Paragraph 1.3. of PO 6 directed the experts to proceed as follows:

"On the basis of the benefits estimated in accordance with paragraphs 1.1. and 1.2. supra, the experts shall calculate the reduction or offset of the Export Measures (as defined by the SLA) caused by such benefits, including the past effects of such benefits, and calculate the compensatory adjustments to be collected in order to neutralize such reductions or offsets"

341. Responding to a request for clarification submitted by the experts, the Tribunal noted in a letter of 15 April 2010 that "[i]n determining the compensatory adjustments, the experts shall focus on the concept of harm to US producers". The Tribunal left it open to Professor Topel, the expert designated by the Claimant, to suggest other approaches:

"[t]he Tribunal takes note of the request of Professor Topel to consider in addition alternative approaches. It invites Prof. Topel to specify, by 22 April 2010 = within one week from this clarification, which approaches he intends to use. Thereafter, the Tribunal will decide which, if any, of Prof. Topel's alternative approaches may be followed".

342. By letter of 22 April 2010, Professor Topel suggested three possible approaches, including the one specified in PO 6 and the Tribunal's letter of 15 April 2010. Subsequently, both Parties submitted comments on Professor Topel's suggested approaches. Having considered these submissions, the Tribunal made the following determination on the approach to be followed in its communication of 4 May 2010:

"in calculating the reduction or offsets of the Export Measures, the experts must therefore use the approach described under point 3 of Professor Topel's letter [the one retained in PO 6]. As a result, the Tribunal sees no need to request the experts to follow the two additional approaches as suggested by Professor Topel, respectively, under point 1 and point 2 of his letter. Such additional approaches are not encompassed by the mandate entrusted to the experts."

343. In its observations to the Joint Expert Report, the Claimant questioned the usefulness of this report "in the context of the terms of the underlying agreement and the scope of

the Tribunal's task in this proceeding." (Comments Cl., para. 7). According to the Claimant:

"The text of the SLA's Anti-circumvention provision agreed to by the parties straight forwardly defines the effect of a grant or other benefit. That is, the provision explains that program grants and benefits themselves are the reduction or offset to the export measures that the provision guards against. There is no reference, either express or implied, to effects of the grants and benefits on anyone or any group" (Comments Cl., para. 7).

344. The Tribunal is not persuaded by the Claimant's arguments. In determining the appropriate measure for the amounts to be collected, the Tribunal must look primarily at the provisions of the SLA dealing with the remedies system (particularly paragraphs 22 and 23). In this context, the anti-circumvention clause in Article XVII(1) is only relevant as part of the context (in the meaning of Article 31 of the VCLT) of the SLA's provisions on remedies.

345. Article XIV(22) directs the Tribunal to "determine appropriate adjustments to the Export Measures to compensate for the breach". Paragraph 23(a) of this Article adds:

"[t]he compensatory adjustments [...] shall consist of: (a) in 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 [...] Such adjustments shall be in an amount that remedies the breach".

Nothing in the wording of this provision directs the Tribunal to use a particular measure for the amounts to be collected. This provision implies that the Tribunal is granted a certain level of discretion to determine the measure of the adjustments that will remedy the breach.

346. This reading is confirmed by the context of Article XIV(22)-(23). Article XXI(22) defines the term "Export Measures" as encompassing "measures in Articles VII through IX, Article X(2), Article XII(2)(b)(i), and Article XVII(5)(a)". Given the variety of "Export Measures" that the Tribunal may be called to supplement by means of "Compensatory Adjustments", it can easily be understood that the Tribunal must benefit from some discretion in selecting a particular measure or proxy for the amounts to be collected.

347. This understanding is also consistent with the terms of Article XVII(2), to which the Claimant refers. This provision states that "[g]rants or other benefits that a Party, including any public authority of a Party, provides shall be considered to reduce or offset the Export Measures". Nothing in this provision suggests that the reduction or offset will necessarily be in the amount of the benefits provided. Whether this is the case is a matter that needs to be assessed in the light of the circumstances of each case.

348. In the present case, the Tribunal considers that the most appropriate measure for the amounts to be collected as Compensatory Adjustments is not the overall amount of the benefits but only the amounts necessary to neutralize the reduction or offsets to the Export Measures caused by the programs and measures in breach of the SLA. This approach is consistent with the concept of remedy followed by Professor Topel's first report and proposed by the Claimant in its Statement of Case in the following terms:

"two concepts of remedy to aid the Tribunal in determining appropriate compensatory adjustments to the export measures if Canada fails to cure its breach. First, we propose a straightforward remedy tied to the amount of the benefits conferred by Ontario and Québec under the breaching programs. Second, we propose a more complex remedy designed by economist Robert H. Topel to counteract the effects of the breaching programs on market prices" (SoC, para. 144).

The Claimant further noted that this latter concept of remedy "targets the effects of the programs on both capital formation and the marginal costs of lumber production, as well as the subsequent effect on market prices" (SoC, para. 153).

349. In the light of the facts of the case, the Tribunal considers that the more complex approach followed by Prof. Topel as well as by Prof. Kalt, the Respondent's expert, is better suited to assess the amounts to be collected by the Respondent as Compensatory Adjustments. The Tribunal believes, indeed, that disregarding the difference between the benefits provided by the programs in breach of the SLA and the offsetting effects of such benefits on the Export Measures would lead to collecting amounts in excess of those needed to restore the level playing field initially established by the Export Measures.

(ii) Past effects

350. Pursuant to paragraph 1.3. of PO 6, the experts were requested to take into account past effects in their calculation of the Compensatory Adjustments. As a result, the Joint Expert Report takes such effects into account (Joint Expert Report, para. 14).

351. The Respondent has disputed that the SLA allows to account for the past effects of the benefits provided by the programs or measures in breach of the SLA (PHB Resp., para. 227-245). It argues that, similarly to other trade agreements, the SLA focuses on the cessation of the measures and not on the reparation of the effects of such measures. The Respondent refers, in this regard, to the expert report of Prof. M. Reisman, according to whom "the ordinary meaning of Section 22 could hardly be clearer; the text says 'cure the breach' and does not say 'cure the effects of the breach'" (Exh. R-102, para. 33).

352. The Tribunal does not share this view. As discussed in connection with the measure of the amounts to be collected, Compensatory Adjustments must neutralize the effects of the breach on the Export Measures. The Tribunal understands these provisions as seeking to reestablish the level playing field created by means of the Export Measures. To the extent that the programs in breach of the SLA have reduced or offset the Export Measures and that the Respondent does not cure the breach within a reasonable time, the Compensatory Adjustments set by the Tribunal must be such that they reestablish the level playing field. In other words, they must be such that they neutralize the effects which the breaching programs had on the level playing field created by the Export Measures. Moreover, the Respondent cannot, on the one hand, contend (as it did in connection with the overall approach to be followed in assessing Compensatory Adjustments) that the compensatory adjustments must focus on the effects of the programs, and, on the other hand, argue that it is the breach itself and not its effects that are exclusively relevant to determine the appropriate remedy (which according to the Respondent would be the cessation of the programs or measures in breach of the SLA).
353. Article XIV(22)(b) directs the Tribunal to "determine appropriate adjustments to the Export Measures to *compensate* for the breach" (emphasis is added). The term "compensate" suggests that the remedies to be set by the Tribunal, which are precisely called "*Compensatory* adjustments", need not be limited to the cessation of the programs or measures in breach of the SLA, if such cessation is not sufficient to remedy the breach as required by Article XIV(23) *in fine*. The Tribunal does not rule out that in specific circumstances the mere cessation of a breach be considered a sufficient remedy. However, this is not the case under the present circumstances, where there is evidence that the programs or measures in breach of the SLA caused reductions and offsets of the Export Measures well before the date of this Award and that the effects of such past reductions and offsets are still being felt.
354. This reading is based on the ordinary meaning of paragraphs 22(b) and 23 of Article XIV of the SLA, taken in their context and in the light of the object and purpose of the SLA, which, in the Tribunal's understanding, is to maintain a level playing field between United States and Canadian producers. It is further confirmed by the French text of the SLA which is equally authentic, as stated on the signature page of the SLA, and uses the terms "ajustements qu'il convient d'apporter aux mesures à l'exportation *en guise de compensation*" in paragraph 22(b).

355. Contrary to the Claimant's argumentation, the Tribunal finds that there is no need to refer to the customary standard of full reparation to conclude that the remedies system of the SLA may cover the past effects of the breaching programs. This conclusion arises from the interpretation of the SLA itself.
356. The Tribunal further notes that it is not for it to decide whether the cessation of the programs or measures in breach of the SLA would be required to "cure" (Article XIV(22)(a)) or to "compensate" (Article XIV(22)(b)) for the breach. Under the terms of the SLA, the Respondent is allowed to cure the breach through means of its own choice within the reasonable period set by the Tribunal. The SLA only empowers the Tribunal to set such a period of time and to determine appropriate compensatory adjustments for the event that the breach is not cured within that period.
357. For the foregoing reasons, the Tribunal concludes that the Compensatory Adjustments must take into account the past effects of the programs or measures in breach of the SLA.

(iii) Duration of the programs or measures

358. Pursuant to paragraph 1.2(a) of PO 6, the experts were requested to assume that the programs identified in paragraph 1.1. of PO 6 (i.e., the programs found in breach of the SLA) "will continue until the date of expiration of the SLA pursuant to its Article XVIII". As a result, the calculations of the experts in the Joint Expert Report assume that the programs or measures in question will continue until 13 October 2013, the date on which the SLA will expire (Joint Expert Report, para. 11-12).
359. The Respondent has questioned this assumption, which has initially been suggested by Prof. Topel (Exh. C-2, para. 54), on the grounds that some of the challenged programs have fixed budgets and termination dates.
360. The Tribunal cannot follow the Respondent. Some of the observations made by the Tribunal in connection with past effects are also relevant to the present question. The effects of the benefits provided under a program do not cease when such program ceases. The Compensatory Adjustments must be set up to take into account all the effects (past, ongoing and future) of the programs during the life of the SLA.
361. In discharging its duties, the Tribunal finds it necessary to provide a roadmap of what would be required from Canada if the programs or measures found in breach of the SLA were to be continued. The Tribunal understands that, despite the difficulty of

disentangling the past, ongoing and future effects of a given program, the Compensatory Adjustments required to neutralize such effects would be lower if the program was discontinued before the date of expiration of the SLA than if the program continued until such date. It nevertheless decides to set the Compensatory Adjustments for the longer of the two periods, i.e. until the end of the SLA. It does so because the SLA contains no solution for the event that the Compensatory Adjustments are set for a shorter time and the programs are nevertheless extended.¹² By contrast, the SLA expressly provides two avenues through which the reverse situation may be either avoided or addressed, i.e. the situation in which the level of the compensatory adjustments might be too high.

362. First, pursuant to Article XIV(22)(a), the Respondent is offered the possibility to "cure" the breach and therefore avoid the imposition of Compensatory Adjustments. Despite the limitations inherent to the period set for the cure, counsel for the Respondent noted at the hearing that "a government can reasonably be asked to stop most non-conforming behaviour within 30 days" (Tr. 24 July 2009, 1185: 9-11).
363. Second, pursuant to Article XIV(29)(c), the Respondent is offered the possibility to commence a new arbitration if it "considers that it has cured the breach, in whole or in part, such that the compensatory adjustments or measures should be modified or terminated". The tribunal appointed to decide such a question would be empowered to "determine the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated" (Article XIV(31)).
364. For the foregoing reasons, the Tribunal confirms the assumption identified in paragraph 1.1. of PO 6.

(iv) Assumptions regarding the two Ontario programs in breach of the SLA

365. The Respondent has questioned the assumption made by both experts in the Joint Expert Report in connection with Ontario's Forest Sector Prosperity Fund and Loan Guarantee Program pursuant to which the budget allocated to these programs would be fully consumed during the remaining life of the SLA (Comments Resp., para. 155-162). The Respondent argues in particular that the assumption agreed upon by the experts stems from a misrepresentation of the Tribunal's instructions given to the experts and that it is contradicted by the facts.

¹² The situation is not clearly contemplated in Article XIV(29)(a).

366. The Tribunal cannot share this argument. It sees no basis to state that the experts' estimate of the benefits provided by the two programs in question is the result of a misunderstanding of the Tribunal's instructions. It also notes that the experts were given the possibility to request clarifications and that they availed themselves of this possibility in connection with other issues, but not this one.

367. In this context, the Tribunal is of the opinion that the consensus reached between the experts as to the benefits of the two Ontario programs in question must be considered not as a misunderstanding of their mandate but rather as the expression of their concurrent professional opinions, with which the Tribunal agrees. The fact that the Respondent may have asked one of the experts, Prof. Kalt, to perform new calculations to supplement the Respondent's comments on the Joint Expert Report does not change the Tribunal's conclusion.

c) Other issues arising from the Joint Expert Report

368. The Tribunal now turns to the analysis of a number of issues arising directly from the Joint Expert Report, particularly in connection with the different choices left open in the Interactive Spreadsheet submitted in such report. There are eight main issues that must be resolved in this regard: (i) whether the effects occurring after the expiration of the SLA but that are the result of benefits distributed during the life of the SLA should be taken into account; (ii) whether the Compensatory Adjustments should take into account the benefits provided to producers included in Article X(1)(c) and Annex A of the SLA; (iii) what is the most appropriate estimation of the "but-for" interest rate for the calculation of the benefits provided by the Ontario Loan and Guarantee Program; (iv) what is the most appropriate estimation of the benefits provided by Québec's Capital Tax Credit; (v) what is the most appropriate estimation of the benefits provided by Québec's Roads Tax Credit; (vi) issues in connection with PSIF; (vii) issues in connection with the model used by the experts to calculate the Compensatory Adjustments; (viii) whether Compensatory Adjustments should be set in an amount equal to the production taxes or in an adjusted amount transforming production taxes into export taxes. These issues will be analyzed in the order just listed.

(i) Post-SLA effects

369. The Tribunal must first assess whether the effects of the benefits granted during the term of the SLA but which will only materialize after the expiration of the SLA should be included in the calculation of the Compensatory Adjustments.

370. The Claimant argues in favor of the inclusion of such effects as part of its argumentation that the remedies granted by the Tribunal must fully compensate for all damages (Comments Cl., para. 64-74). The Respondent opposes this position in essence on the grounds that once the SLA expires any potentially beneficial effects of prior grants cease to be in breach of an international obligation (Comments Resp., para. 3-17).
371. Pursuant to paragraph 1.2. of PO 6, "[i]n estimating such benefits, the experts shall make the following assumptions: [...] b) Benefits that occur or accrue after the expiration of the SLA shall not be included in the estimate". In his letter of 15 April 2010, Prof. Topel suggested to include two scenarios in the calculations made in view of the Joint Expert Report:
- "Scenario I: compensatory adjustments (to be applied from January 1, 2011 to October 12, 2013) covering only program-induced lumber price effects that offset or reduce the Export Measures during the period of validity of the SLA; Scenario II: compensatory adjustments (to be applied from January 1, 2011 to October 12, 2013) that also take into account the effects of benefits (distributed during the period of validity of the SLA) after the expiration of the SLA".
372. The Joint Expert Report provides the Tribunal with the possibility of selecting one of these two scenarios. In the opinion of the Tribunal, the choice between these two options depends on a legal question, namely whether the SLA deploys effects beyond the date set for its expiration.
373. The Tribunal considers that this question must receive a negative answer. Indeed, any effects deployed after the expiration of the SLA, even those resulting from benefits distributed during the life of the SLA, could not be considered to reduce or offset the Export Measures applicable in accordance with the SLA for the simple reason that no such Export Measures apply once the SLA has expired.
374. Indeed, pursuant to Article XIV(22)(b) of the SLA, the Tribunal's mandate is to "determine appropriate adjustments to the Export Measures to compensate for the breach". As noted in paragraphs 340 - 349 above, in carrying out its mission, the Tribunal must determine the effects of the benefits provided by the programs or measures in breach of the SLA on the Export Measures, and then determine adjustments that compensate for such effects. No post-SLA consequence of a benefit provided during the life of the SLA could possibly reduce or offset Export measures because no Export Measures are applicable under the SLA after the SLA's expiration.
375. It is true that the United States and Canada may decide to extend the SLA beyond its stated date of expiration. However, doing so, they may negotiate terms different from

the ones presently in force. If at this stage the Tribunal were to incorporate post-SLA effects into the calculation of the Compensatory Adjustments, it would be assuming unchanged terms. These may not reflect those on which the Claimant and the Respondent may possibly agree to govern trade in softwood lumber products after the expiration of the SLA.

376. For the foregoing reasons, the Tribunal concludes that post-SLA effects must not be taken into account in the calculation of Compensatory Adjustments.

(ii) Producers included in Article X(1)(c) and Annex A of the SLA

377. The Tribunal must next determine whether the Compensatory Adjustments should take into account the benefits provided to producers included in Article X(1)(c) and Annex A of the SLA entitled "Exclusions from export measures".

378. According to the Claimant, the companies referred to in Article X(1)(c) are softwood lumber producers in the meaning of the anti-circumvention clause in Article XVII of the SLA, and any benefit provided to them must therefore be neutralized by Compensatory Adjustments (Comments Cl., para. 75-80). The Respondent replies that such companies are exempted from any Export Measures in the first place and, as a consequence, there are no Export Measures for which adjustments must be made by means of Compensatory Adjustments (Comments Cl., para. 128-134).

379. According to Article X(1)(c) of the SLA, which is entitled "Exclusions from Export Measures": "[t]he Export Measures shall not apply to the following products: [...] (c) Softwood Lumber Products produced by the companies listed in Annex 10". Annex 10 lists 32 companies, the majority of which is situated in Québec.

380. In order to decide whether the benefits provided to these companies must be taken into account, the Tribunal must, again, consider whether such benefits would have an effect on Export Measures that could be neutralized through the imposition of Compensatory Adjustments.

381. The ordinary meaning of the terms of Article X(1)(c) provide a clear answer to this question. As no export measures will apply to the products of such companies, no reductions or offsets could possibly be imposed on non-existing Export Measures.

382. For this reason, the Tribunal holds that the benefits provided to the producers in question must not be taken into account in the calculation of the Compensatory Adjustments.

(iii) Ontario Loan Guarantee Program – "But-for" interest rate

383. In the Joint Expert Report, the experts have expressed different views regarding the most appropriate approach to estimate the "but-for" (or market) interest rate to be used in the computation of the benefits provided by the Ontario Loan and Guarantee Program (LGP). This interest rate is needed to compute the benefits provided by the LGP loans.
384. The experts seem to agree on the overall trend followed by the market interest rate but apply different economic benchmarks. Prof. Kalt argues that the best proxy for the market interest rate faced by softwood lumber producers is the interest rate of secured loans, to the extent that LGP loans were not granted unsecured. More specifically, he uses as a benchmark the Merrill Lynch BB bond rate (Joint Expert Report, para. 35). Prof. Topel objects that this benchmark inadequately reflects the risks presented by the borrowers in question (Joint Expert Report, para. 53-54). Therefore, he prefers to use the market rate on yields to maturity for bonds issued by Canadian forest sector companies from 1 January 2005 to 30 April 2010. The supporting data consists of 46 bond offerings from 14 large publicly traded forest companies (Joint Expert Report, para. 73-74) and excludes companies likely to become insolvent (Joint Expert Report, para. 84-85). Each Party favors the benchmark proposed by the expert appearing on its behalf.
385. The Tribunal notes that the determination of the most appropriate benchmark for the "but-for" interest rate is not a legal but a factual, specifically an economic question. Both benchmarks proposed by the experts can be regarded as reasonable proxies for the economic fact to be valued. However, on the basis of its understanding of the facts in the record, the Tribunal finds the analysis of Prof. Topel more persuasive, as it better reflects the difficult financial situation which softwood lumber producers faced during the relevant times.

(iv) Québec's Capital Tax Credit – Benefits

386. The experts and the Parties disagree on how to measure the benefits provided by Québec's Capital Tax Credit. Prof. Kalt defines the benefits in the context of this program as the amount of the incremental tax credit that was *actually used as an offset* to investment by softwood lumber producers (Joint Experts Report, para. 115), whereas Prof. Topel defines such benefits as the amount of the incremental tax credit that softwood lumber producers *could expect or anticipate to be offset* against future taxes at the time of their investment (Joint Experts Report, para. 121-125).

387. The Claimant adheres to the position of Prof. Topel because it considers in essence that the tax credits were an incentive reducing the cost of capital (Comments Cl., para. 46-47) and that Prof. Kalt's estimate is based on an unreliable extrapolation of a small number of tax returns (Comments Cl., para. 49). By contrast, the Respondent considers that Prof. Kalt's estimate must be retained because the use of the tax credits was limited by the amounts of the tax against which it could be applied as well as by the repeal of the tax, which was a non-refundable tax (Comments Resp., para. 82). The Respondent also argues that Prof. Kalt's estimate is based on a representative set of tax returns initially selected by the Claimant's expert, Mr. Beck (Comments Resp., para. 88-90), whereas Prof. Topel grounds his estimate on speculation (Comments Resp., para. 78-79).

388. The Tribunal again notes that the selection of the methodology to estimate the benefits provided by the Capital Tax Credit is not a question of law, but one of fact to be assessed in the light of the evidence in the record. On the basis of such assessment, the Tribunal considers that Prof. Kalt's estimate better reflects the benefits provided by this particular program. Indeed, these benefits have already been distributed and their use is known to a reasonable extent.

(v) Québec's Road Tax Credit –Projected spending

389. Regarding Québec's Road Tax Credit, the Tribunal notes that the experts agree on the percentage of the spending attributable to roads that benefits softwood lumber producers and on the increase in the stumpage rate that applies to timber harvested in the areas serviced by the roads funded under the program (Joint Expert Report, para. 128). The experts disagree, however, on how to calculate the total spending in each year on roads eligible for the present tax credit. Although both experts rely on the same data, i.e. the projections established each year by the Government of Québec reflecting the budget impact of a tax credit in the future (Joint Expert Report, para. 130), they disagree on how these projections must be treated. According to Prof. Topel, these projections underestimate the impact of the tax credits and must therefore be adjusted, whereas Prof. Kalt considers that no adjustment is needed. The Parties' positions are aligned with the position of the experts presented by each one of them.

390. Again, the Tribunal considers that the decision whether to adjust the projections or not is not a question of law, but one of assessment in the light of the facts on the record. Having considered the reasons given by the experts and the Parties, the Tribunal finds Prof. Topel's explanation more persuasive, as it takes into account not only the

projections of Québec's tax authorities but also the subsequent revisions made to these projections on the basis of a sample of actual tax returns.

(vi) Issues in connection with the PSIF

391. The Joint Expert Report raises three separate but related matters in connection with the PSIF, namely (1) the appropriate proxy for the "but-for" interest rate to be taken into account to estimate the benefits provided by PSIF loans, (2) the inclusion of benefits provided to companies referred to in Article X(1)(c) of the SLA, and (3) the estimate of the benefits provided by PSIF loan guarantees.
392. The first question regarding the appropriate proxy for the "but-for" interest rate has already been addressed in connection with the Ontario Loan Guarantee Program. Both Prof. Topel and Prof. Kalt set forth their views in the context of their discussion of the "but-for" interest rate applicable to Ontario's Loan Guarantee Program (Joint Expert Report, para. 49.90 and 21-48, respectively), to which they refer for purposes of the PSIF (Joint Expert Report, para. 92).
393. The Tribunal takes note that the Respondent deems the analysis of both experts to be flawed (Comments Resp., para. 100), as the benchmark should be established for each company separately (Comments Resp., para. 104) and, according to the Respondent, the experts wrongfully assumed that the companies benefitting from the PSIF were not creditworthy (Comments Resp., para. 107). The Tribunal does not share the Respondent's views as to the need to establish rates for each company separately. Nothing in the provisions of the SLA requires the performance of a company by company analysis. Moreover, even if such an analysis could potentially be conducted on the basis of the information in the record, which neither one of the experts seems to consider possible, it would not necessarily result in a more accurate estimation of the "but-for" interest rate facing any potential beneficiary of the program at all relevant times. The calculation of the "but-for" interest entails, by definition, describing a hypothetical scenario that a company would have faced in the absence of the relevant benefits. A company by company analysis would therefore remain an estimate in the same way as those provided by each expert. This being so, as emphasized in connection with the experts' analysis of the Ontario's Loan Guarantee Program, both proxies put forward by the experts may constitute reasonable benchmarks to value the economic parameter in question. In conformity with the conclusion reached regarding Ontario's Loan Guarantee Program and on the basis of the Tribunal's understanding of the facts discussed in the context of the analysis of the compatibility of the PSIF with

the SLA, the Tribunal retains Prof. Topel's option. Indeed, that option better reflects the financial condition experienced by softwood lumber producers at the relevant time.

394. The second question regarding the inclusion of benefits provided to companies exempted under Article X(1)(c) of the SLA was already resolved in subsection (ii) above. There the Tribunal determined that the effects of the benefits provided to such exempted companies must not be included in the calculation of the amounts of the compensatory adjustments. It cannot but restate so here.
395. With respect to the third question dealing with the valuation of the benefits arising from PSIF loan guarantees, the Tribunal notes that Prof. Topel has provided an estimate (Joint Experts Report, para. 94-102), while Prof. Kalt has not done so because he considers that the information on record is not sufficient to put forward a reliable estimate (Joint Expert Report, para. 104). The Claimant has observed in this regard that the Tribunal should retain an estimate which is both reasonable and conservative and that Prof. Kalt's refusal to estimate loan guarantees is unreasonable, because it is not disputed that loan guarantees constitute a benefit arising from the PSIF (Comments Cl., para. 44). The Respondent replies that the Tribunal did not order the experts to examine PSIF loan guarantees, that such an assessment would be impossible to the extent that the terms of the loan guarantees and underlying loans are unknown (Comments Resp., para. 112) and that, in any event, Prof. Topel's approach is not standard and is based on speculation (Comments Resp., para. 114).
396. The position of the experts and the views expressed by the Parties raise two separate issues. The first addresses whether the experts' terms of reference included the estimate of the benefits provided by the PSIF loan guarantees. The Tribunal has no difficulty in concluding that this question was encompassed in the mandate given to the experts in PO 6, as subsequently clarified. Paragraph 1.2 of PO 6 expressly states that "[i]n estimating such benefits, the experts shall make the following assumptions: [...] d) The value of the benefits provided by government loans and loan guarantees shall be calculated in accordance with standard practice (i.e. difference in interest rates between public and commercial loans)".
397. The second issue concerns the reliability of the estimate provided by Prof. Topel in light of the information in the record and the instructions given by the Tribunal. As a preliminary matter, the Tribunal deems it useful to summarize the methodology followed by Prof. Topel to value the benefits provided by the PSIF loan guarantees. Prof. Topel considers the support provided by Investissement Québec to wood sector

entities as reported in the Annual Report of Investissement Québec for the years 2007-2009 (Joint Expert Report, para. 97). According to Prof. Topel, such data shows that, as of 31 March 2008, loan guarantees accounted for 40% of wood sector support. As a result, Prof. Topel assumes that loan guarantees under the PSIF would have accounted for 40% of the combination of the PSIF loans and loan guarantees through 31 March 2008 (Joint Expert Report, para. 98). During the crisis, the stock of outstanding loan guarantees declined, which suggests that no loan guarantees were financed by Investissement Québec in the period 2008-2009. For this reason, Prof. Topel assumes that no PSIF loan guarantee was granted during this time. As credit availability improved later in 2009, Prof. Topel uses the share of loan guarantees (29.3%) as compared to new commitments assumed as of 31 March 2009 to estimate the value of loan guarantees in that period (Joint Expert Report, para. 101).

398. On its face, this methodology appears reasonable. Two problems arise, however, in connection with the information available in the record and the instructions given to the experts. As recognized by both experts in the Joint Expert Report, "the record in this proceeding does not generally identify loan guarantees to softwood lumber producers or other recipients" (Joint Expert Report, para. 93). This is certainly an obstacle when seeking to estimate the benefits provided through such loan guarantees. The second problem seems to be a consequence of the first one, namely that the methodology used by Prof. Topel does not follow standard practice in the calculation of benefits provided by loan guarantees. As rightly stressed by the Respondent, Prof. Topel's methodology does not include a comparison of interest rates as required by paragraph 1.2(d) of PO 6 (Comments Resp., para. 114). Under such circumstances, the Tribunal shares the opinion of Prof. Kalt that the evidence on record is not sufficient to value any potential benefits provided by the PSIF loan guarantees (Joint Expert Report, para. 104).

399. For these reasons, the Tribunal concludes that the valuation of such benefits and a *fortiori* of the effects of such benefits and of the Compensatory Adjustments needed to neutralize them, would be speculative. As such, it cannot form the basis of relief awarded by this Tribunal.

(vii) Issues in connection with the model to calculate compensatory adjustments

400. The experts disagree on two issues in connection with the overall model used to calculate Compensatory Adjustments, namely on the characterization of "wood" as an

input parameter of the model and on the time when the benefits provided by some programs started to be felt (in-service date).

401. Regarding the first question, while Prof. Kalt characterizes "wood" as a log delivered to the mill (facilitating the construction of roads would therefore provide a benefit because it lowers transportation costs) (Joint Expert Report, para. 149-155), Prof. Topel views "wood" as a "log originating in the forest" (roads would therefore operate as a sort of productive capital in the production process of softwood lumber) (Joint Expert Report, para. 156-160). Approaching "wood" in one or the other manner has an impact on the model's representation of lumber production. The Parties' positions are aligned with those of the experts each of them produced.
402. Again, the Tribunal is called to resolve a technical question, namely how to characterize one parameter of the overall model developed by the experts. On the basis of its understanding of the operation of the model and, more importantly, of the evidence in the record, particularly on the operation of Québec's Road Tax Credit, the Tribunal finds Prof. Kalt's approach more persuasive. Indeed, it understands that the impact of Québec's Road Tax Credit is to lower the transportation cost of logs. It therefore appears unwarranted to ascribe to this program the effects implied in Prof. Topel's approach.
403. Regarding the second question, the Tribunal understands that, in light of the conclusion reached on the first question, the issue is moot, as the disputed in-service date was only used in Prof. Topel's definition of wood.

(viii) Export taxes v. production taxes

404. The experts disagree on whether the Compensatory Adjustments must be set in an amount equal to the production taxes or whether such amount must be adjusted to represent an export rather than a production tax.
405. To compute the amount of Compensatory Adjustments, both experts start by calculating the production taxes on all softwood lumber producers in Québec and Ontario which would be necessary to neutralize the effects of the grants and benefits. Thereafter, their views diverge. Prof. Topel considers that no further adjustment is needed to calculate the amount of the export taxes, which is equal to the amount of production taxes (Joint Experts Report, para. 164-177). Prof. Kalt is of the view that an adjustment is needed (Joint Experts Report, para. 178-205), because there are significant differences between production and export taxes, to the extent that the

former apply to all producers (whether they export or not), affect all softwood lumber production (output exported and output consumed locally), and raise the price of softwood lumber both in Canada and the United States (whereas an export tax would only raise such price in the United States).

406. Under the SLA, the Tribunal is only authorized to "determine adjustments to Export Measures" and not remedies in the form of production taxes. This said, the question raised by the Joint Expert Report is not about the form of the compensatory adjustments, but rather about the amounts that must be taken as a starting point to set the Compensatory Adjustments. Differently worded, the question is whether the initial step of calculating production taxes must be further adjusted in order to set the amount of any applicable Export Charges. Taking into account the different arguments advanced on this issue, the Tribunal finds that a further adjustment is needed. In other words, it finds Prof. Kalt's explanation more persuasive and more in line with the overall system established by the SLA. Indeed, the differences between production and export taxes set forth by Prof. Kalt and restated in the preceding paragraph call for an adjustment.

d) Compensatory adjustments to be collected by Canada

407. In the foregoing analysis on the determination of the Compensatory Adjustments under Article XVI(22)(b), the Tribunal has reached the following conclusions:

- the Compensatory Adjustments must neutralize the effects of the benefits provided by the five programs found in breach of the SLA;
- the Compensatory Adjustments must take into account the past effects of such programs;
- the assumption made by the experts regarding the duration of the programs found in breach of the SLA must be upheld;
- the assumption made by the experts regarding the benefits of the two Ontario programs in breach of the SLA is equally confirmed.

408. In addition, with respect to the issues on which the Joint Expert Report left an option for selection by the Tribunal, the latter made the following findings:

- (i) On post-SLA effects: post-SLA effects of benefits distributed during the life of the SLA shall not be taken into account in the calculation of the Compensatory Adjustments;
- (ii) On producers included in Article X(1)(c): the benefits provided to these producers shall not be taken into account in the calculation of the Compensatory Adjustments. For the purpose of the Interactive Spreadsheet, this conclusion is only relevant to the PSIF program (see Joint Expert Report, para 112);
- (iii) On the Ontario Loan Guarantee Program: the "but-for" interest rate to be used to estimate the benefits provided by the Ontario Loan Guarantee Program must be calculated following Prof. Topel's methodology;
- (iv) On Québec's Capital Tax: the estimate of the benefits provided by Québec's Capital Tax Credit must be carried out in accordance with Prof. Kalt's methodology;
- (v) On Québec's Road Tax Credit: the estimate of the projected spending of Québec's Road Tax Credit must be effected in accordance with Prof. Topel's methodology;
- (vi) On Québec's PSIF: benefits provided to companies referred to in Article X(1)(c) and Annex A of the SLA must not be taken into account; benefits must be estimated by using the "but-for" interest rate calculated by Prof. Topel and any potential benefits provided by PSIF loan guarantees must be disregarded in accordance with Prof. Kalt's solution;
- (vii) On the model parameter "wood": the characterization of wood as a parameter of the overall model must be carried out in accordance with Prof. Kalt's methodology;
- (viii) On the export duty calculation: Compensatory Adjustments must be set in an amount equal to that of adjusted production taxes in accordance with Prof. Kalt's methodology.

409. The Tribunal has incorporated these conclusions into the Interactive Spreadsheet attached to the Joint Expert Reports as follows:

Attachment A
TRIBUNAL DECISION POINTS AND RESULTING OUTCOMES

Issue/Program	Scenario
Post-SLA Effects	
	<input type="radio"/> Included <input checked="" type="radio"/> Not Included
Ontario LGP	
	<input type="radio"/> Interest Rate - Kalt <input checked="" type="radio"/> Interest Rate - Topel
Québec Capital Tax	
	<input type="radio"/> Total Credit Amount Available <input checked="" type="radio"/> Total Credit Amount Used
Québec Roads Tax Credit	
	<input type="radio"/> Revenu Québec Projections and Estimates, All Years – Kalt <input checked="" type="radio"/> Revenu Québec Projections and Estimates, Adjusted 2008-2010 - Topel
Québec PSIF	
	<input type="radio"/> Article X Producers - Included <input checked="" type="radio"/> Article X Producers - Excluded
	<input type="radio"/> Interest Rate - Kalt <input checked="" type="radio"/> Interest Rate - Topel
	<input checked="" type="radio"/> Loan Guarantees - Kalt <input type="radio"/> Loan Guarantees - Topel
Model Parameter	
	<input checked="" type="radio"/> Roads Tax Credit as Reduction in Delivered Wood Cost - Kalt <input type="radio"/> Roads Tax Credit as Subsidy to Capital in Lumber Production - Topel
Export Duty Calculation	
	<input checked="" type="radio"/> Derived Export Duty – Kalt <input type="radio"/> Production Tax as Export Duty – Topel

410. As a result of the answers entered into the Interactive Spreadsheet shown above, the following table provided with the model jointly proposed by the experts (Attachment A to the Joint Expert Report) specifies the Compensatory Adjustments which the Tribunal sets in this Award. The table distinguishes the amounts corresponding to Ontario and Québec as required by Article XIV(25) of the SLA:

Attachment A
TRIBUNAL DECISION POINTS AND RESULTING OUTCOMES

Program (\$ Millions)	2006	2007	2008	2009	2010	2011	2012	2013	Total	Post SLA
Ontario FSPF										
Benefit Amount (\$CDN)	\$0.00	\$3.86	\$0.00	\$0.25	\$1.46	\$1.83	\$1.83	\$1.43	\$10.65	--
Tax Rate	--	--	--	--	--	0.14%	0.14%	0.14%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$0.80	\$0.80	\$0.63	\$2.23	--
Ontario LGP										
Benefit Amount (\$CDN)	\$0.00	\$1.34	\$0.00	\$0.00	\$7.32	\$6.79	\$6.16	\$4.30	\$25.92	--
Tax Rate	--	--	--	--	--	0.00%	0.00%	0.00%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$0.00	\$0.00	\$0.00	\$0.00	--
ONTARIO PROGRAMS										
Change in U.S. Producer Surplus (\$US)	\$0.00	\$0.33	\$0.56	-\$0.29	\$0.22	\$1.32	-\$1.19	-\$2.48	-\$1.54	\$0.00
Tax Rate	--	--	--	--	--	0.10%	0.10%	0.10%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$0.56	\$0.56	\$0.44	\$1.56	--
Québec Capital Tax Credit										
Benefit Amount (\$CDN)	\$0.03	\$2.12	--	--	--	--	--	--	\$2.14	--
Tax Rate	--	--	--	--	--	0.05%	0.05%	0.05%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$0.42	\$0.42	\$0.33	\$1.17	--
Québec Roads Tax Credit										
Benefit Amount (\$CDN)	\$4.52	\$32.80	\$34.53	\$35.06	\$35.18	\$29.70	\$21.30	\$11.25	\$204.35	--
Tax Rate	--	--	--	--	--	2.35%	2.35%	2.35%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$18.76	\$18.76	\$14.59	\$52.10	--
Québec PSIF										
Benefit Amount (\$CDN)	\$0.31	\$1.83	\$3.84	\$2.52	\$1.67	\$1.55	\$1.41	\$0.98	\$14.12	--
Tax Rate	--	--	--	--	--	0.21%	0.21%	0.21%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$1.70	\$1.70	\$1.33	\$4.73	--
QUEBEC PROGRAMS										
Change in U.S. Producer Surplus (\$US)	-\$1.10	-\$6.48	-\$6.15	-\$5.00	-\$9.94	-\$12.19	-\$10.34	-\$6.10	-\$57.31	\$0.00
Tax Rate	--	--	--	--	--	2.60%	2.60%	2.60%	--	--
Anticipated Duty Amount to Be Collected (\$US)	--	--	--	--	--	\$20.82	\$20.82	\$16.20	\$57.84	--

411. The Compensatory adjustments as specified in the table appearing in the foregoing paragraph shall take the form of additional Export Charges and apply with immediate effect after the expiration of 30 days from the date of notification of this Award if the Respondent fails to cure the breaches of the SLA identified in this Award.

C. COSTS

412. In conformity with the SLA, the Parties have not requested an award of costs. Indeed, under Article XIV(21) of the SLA, "[t]he tribunal may not award costs". Pursuant to this provision, the costs of the arbitration, including the costs of arbitrators, hearing facilities, transcripts, assistants to the Tribunal, and costs of the LCIA, shall be covered by a reserve fund created for this purpose from the funds allocated to the binational industry council described in Annex 13 of the SLA, Article XIV(21) also provides that

each Party shall bear its own costs, including costs of legal representation, expert witnesses and travel.

413. The total amount of the costs of the arbitration (other than the legal or other costs incurred by the parties themselves), have been determined by the LCIA Court, pursuant to Article 28.1 of the applicable (1998) LCIA Rules to be as follows:

Registration fee:	US\$	3,000.00
LCIA's administrative charges:	US\$	52,414.50
Tribunal's fees and expenses:	US\$	764,064.17
Secretary to the Tribunal's fees:	US\$	170,870.80
Advisor's fees and expenses:	US\$	24,216.09
Hearing costs:	US\$	138,311.37
Total costs of arbitration	US\$	1,152,876.93

414. Such costs shall be paid from the funds as prescribed in Article XIV(21) of the SLA.

V. SUMMARY OF FINDINGS AND FORMAL AWARD

415. For the reasons set forth above, the Tribunal finds, declares and awards as follows:

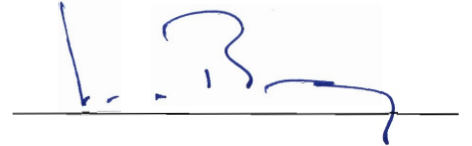
- The Respondent breached the anti-circumvention clause in Article XVII(1) of the SLA by reason of the following programs or measures: (1) Ontario's Forest Sector Prosperity Fund; (2) Ontario's Forest Sector Loan Guarantee Program; (3) Québec's Forest Industry Support Program (PSIF); (4) Québec's Capital Tax Credit; and (5) Québec's Road Tax Credit (only in connection with the increase in tax credit from 40% to 90%);
- The Respondent shall have a period of 30 days from the notification of this Award to cure, through means of its own choosing, the breaches identified in the preceding paragraph;
- If the Respondent does not cure the breaches within the period identified in the preceding paragraph, the Compensatory Adjustments determined in paragraphs 410 - 411 above of this Award shall apply;
- Pursuant to Article XIV(21) of the SLA, the costs of these proceedings, which amount to US\$ 1,152,876.93, shall be paid from the funds allocated to the binational industry council for this purpose;
- Pursuant to Article XIV(21) of the SLA, each Party shall bear its own costs, including legal fees and other expenses;
- All other claims are dismissed.

Place of arbitration: London

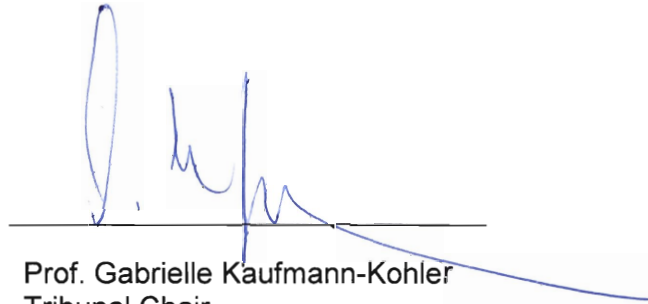
Date: 20 January 2011 (original version) and 28 January 2011 (redacted version)

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Mr. David Williams QC
Arbitrator

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Prof. Albert Jan van den Berg
Arbitrator

A handwritten signature in blue ink, appearing to read 'G. Kaufmann-Kohler', written over a horizontal line.

Prof. Gabrielle Kaufmann-Kohler
Tribunal Chair