
In The London Court Of International Arbitration

CANADA

Claimant,

v.

THE UNITED STATES OF AMERICA

Respondent.

REQUEST FOR ARBITRATION

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April 2, 2009

**Attorneys for Claimant,
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INTRODUCTION

1. Canada respectfully requests arbitration pursuant to paragraph 29(c) of Article XIV of the 2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America (“SLA” or “Agreement”).¹ Paragraph 29(c) provides that,

...[i]f after expiry of the reasonable period of time ... the Party Complained Against considers that it has cured the breach, in whole or in part, such that the compensatory adjustments or measures should be modified or terminated, and the Complaining Party does not agree, the Party may commence a new arbitration to address the matter, by delivering a written Request for Arbitration to the Registrar of the LCIA Court.

2. Canada considers that it has fully cured the breach found by the Tribunal, in LCIA Case No. 7941, by tendering payment of USD\$34 million plus interest to the United States on March 27, 2009. The United States has not agreed that Canada has cured the breach. The purpose of the arbitration, therefore, is for the Tribunal to determine whether Canada has cured the breach. If the Tribunal confirms that Canada has cured the breach found, the compensatory adjustments determined by the Tribunal in LCIA Case No. 7941 cease to have any effect and any compensatory adjustments or measures that may have been imposed between the end of the reasonable period of time and the date of the Tribunal’s decision in this arbitration should be modified or terminated, and any monies collected should be refunded with retroactive effect to the date of their imposition.

¹ Exhibit A. The Amendments to the SLA are attached at Exhibit B.

II

PARTIES TO THE ARBITRATION

A. The Claimant

3. The claimant in this proceeding is Canada. The claimant's legal representatives in this proceeding are:

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B. Respondent

4. The respondent in this proceeding is the United States of America (United States). The respondent's legal representatives in this proceeding are:

Michael F. Hertz
Acting Assistant Attorney General

Jeanne E. Davidson
Director

Reginald T. Blades, Jr.
Patricia M. McCarthy
Assistant Directors

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III

THE ARBITRATION AGREEMENT

5. Canada respectfully submits this Request pursuant to the dispute settlement provisions in Article XIV of the SLA. In particular, Canada requests this arbitration under Article XIV(29).

IV

MATTERS REGARDING THE ARBITRATION

Under the SLA, the Parties have agreed to the following:

A. Selection of the Arbitral Tribunal

6. The Parties have agreed that for any arbitration initiated under Article XIV(29) of the SLA, the LCIA shall appoint to the Tribunal the arbitrators comprising the original Tribunal within 10 days after receipt of the Request for Arbitration, to the extent they are available.² The arbitrators for the original Tribunal were:

Prof. Dr. Karl-Heinz Böckstiegel (Chairman)
Parkstrasse 38
D-51427
Bergisch-Gladbach
Germany

V. V. Veeder QC (Co-Arbitrator)
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

² SLA Art. XIV(30).

Prof. Dr. Bernard Hanotiau (Co-Arbitrator)
Hanotiau & van den Berg
IT Tower – 9th Floor
480 Avenue Louise-B9
1050 Brussels
Belgium

7. If any member of the original Tribunal is unavailable, that member shall be replaced in accordance with Article 11 of the LCIA Rules.³ No citizen or resident of either Canada or the United States shall be appointed to the Tribunal.⁴

B. Remuneration of the Arbitrators

8. The SLA provides that the arbitrators will be remunerated and their expenses paid in accordance with LCIA rates.⁵

C. Hearings of the Tribunal

9. The legal place of arbitration shall be London, United Kingdom, but the hearings of the Tribunal shall be held in Canada or the United States, and shall be open to the public.⁶

D. Applicable Rules

10. The SLA provides that the arbitration shall be conducted under the LCIA Arbitration Rules in effect on the date the SLA was signed, as modified by the SLA or by agreement among the Parties, except that Article 21 of the LCIA Rules shall not apply.⁷

³ SLA Art. XIV(30).

⁴ SLA Art. XIV(8).

⁵ SLA Art. XIV(12).

⁶ SLA Art. XIV(13), (17).

⁷ SLA Art. XIV(6).

The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, as modified by the SLA, shall generally apply, except that Article 6 of these rules shall not apply.⁸

11. The Tribunal shall give sympathetic consideration to domestic laws relating to the disclosure of privileged or confidential information.⁹

E. The Award of the Tribunal

12. Article XIV(30) of the SLA provides that the Tribunal shall endeavor to issue its award within 60 days after delivery of the Request for Arbitration.¹⁰ This award shall be final and binding, with no appeals.¹¹ The Tribunal may not award costs. A portion of the funds allocated to the binational industry council established under Annex 13 of the SLA shall be used to fund arbitration costs other than those of the Parties.¹² Each Party shall bear its own costs, including costs of legal representation and related costs.¹³

Article XIV(31) of the SLA provides:

If in its award in an arbitration initiated under paragraph 29, the tribunal finds that the compensatory adjustments or measures that are the subject of this arbitration are inconsistent with the award in the original arbitration or that the breach has been cured in whole or in part, the tribunal shall determine the extent to which the

⁸ SLA Art. XIV(14).

⁹ SLA Art. XIV(18).

¹⁰ SLA Art. XIV(30).

¹¹ SLA Art. XIV(20).

¹² SLA Art. XIV(21).

¹³ SLA Art. XIV(21).

compensatory adjustments or measures should be modified or whether they should be terminated.¹⁴

Article XIV(32) of the SLA provides:

An award under paragraph 31 shall be effective as of the date that the compensatory adjustments or measures were imposed and, accordingly, shall provide that:

- (a) Canada shall collect any Export Charge that the tribunal finds it should have imposed and the United States shall refund any customs duties that the tribunal finds it should not have collected, retroactive to that date; and
- (b) Canada shall impose additional export volume restraints to compensate for any excess export volumes that the tribunal finds that Canada has allowed and Canada may increase the export volumes permitted under the export restraints to compensate for any excess import restraints the tribunal finds that the United States has imposed since that date, with these adjustments to be applied to exports from the pertinent Region or Regions in equal monthly amounts during a period following the award as determined by the tribunal.

V

FEE

13. Canada transmitted the fee prescribed in the LCIA Schedule of Costs to the Registrar of the Court on April 2, 2009.

VI

TIMETABLE

14. Canada has attached a proposed timetable for this proceeding as Exhibit C.

¹⁴ SLA Art. XIV(31).

VII

NATURE OF THE CASE

A. Statement of Claim

15. Canada considers that its tender to the United States of US\$34 million plus interest on March 27, 2009 fully cured the breach found by the Tribunal in LCIA Case No. 7941. Accordingly, (i) the compensatory adjustments determined by the Tribunal in LCIA Case No. 7941 should cease to have effect, (ii) any compensatory measures in the form of customs duties imposed by the United States under Article XIV(27) must be terminated, and (iii) any customs duties collected by the United States on imports of Softwood Lumber from Canada must be refunded, retroactive to the date they were imposed. Similarly, once the compensatory adjustments determined by the Tribunal in LCIA Case No. 7941 cease to have effect, any compensatory adjustments that Canada may impose under Article XIV(24) would be terminated and refunded to Option B exporters.

B. Summary

16. On March 3, 2008 the Tribunal in its Award on Liability in LCIA Case No. 7941 determined that Canada had breached the SLA by failing to adjust “Expected United States Consumption” (“EUSC”) with respect to regions operating under Option B for the period January 1, 2007 to June 30, 2007.¹⁵ In its Award on Remedies dated February 23, 2009, the Tribunal identified 30 days as the reasonable period of time

¹⁵ Award on Liability, Section I.3 (Exhibit D).

within which Canada was to cure its breach.¹⁶ By agreement of the Parties, the reasonable period of time ended on March 28, 2009.

17. The Tribunal also determined that if Canada failed to cure its breach within the reasonable period of time, “Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B Regions until an entire remedy amount of CDN \$63.9 million, plus CDN \$4.36 million in interest (a total of CDN \$68.26 million), had been collected.”¹⁷

Canada Has Cured the Breach

18. On March 27, 2009 Canada tendered a payment to the United States of USD\$34 million plus simple interest at 4 percent as a full cure of Canada’s breach found by the Tribunal in LCIA Case No. 7941.¹⁸

19. The United States did not accept Canada’s tender of payment as a full cure by the date and time set out in Canada’s letter of March 27, 2009.¹⁹

20. Canada understands that the United States intends to impose compensatory measures in the form of customs duties on all imports of Softwood Lumber Products from Option B Regions in the near future.

¹⁶ Award on Remedies, Section I.2 (Exhibit E).

¹⁷ Award on Remedies, Section I.3 (Exhibit E).

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

¹⁹ *Id.*

21. Canada considers that its tender of payment of USD\$34 million plus interest to the United States constitutes a full cure of the breach.

22. The Tribunal's Award on Remedies found, contrary to Canada's position, that cessation of the breach did not constitute a full cure. Paragraph 22(b) did not require the Tribunal to determine an alternative cure, nor did either Party request the Tribunal to make such a determination.

23. In contrast, paragraph 29(c) of the SLA directly calls for the Tribunal to determine whether Canada's tender of payment has cured the breach such that any compensatory adjustment or measure must be modified or terminated, and any monies collected in the interim, be refunded in full.

24. When determining compensatory adjustments under paragraph 22(b), an arbitral tribunal is limited to determining appropriate adjustments to the Export Measures. The tribunal may not award cash compensation under that provision. Unlike compensatory adjustments, however, the SLA places no limitation on the form that a cure must take.

25. In both its written submissions and its oral statements at the Hearing on Remedies, the United States recognized that a "cure" need not be in the form of adjustments to the Export Measures, and that it could take the form of a cash payment.²⁰

26. At the September 22, 2008 Hearing on Remedies, the United States agreed that a cash payment to the U.S. government was one way for Canada to cure its breach.²¹

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

27. Since the Award was issued, the United States has reaffirmed that the form of cure is flexible. In a public statement about the award issued on February 26, 2009, the United States Trade Representative stated that:

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

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

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

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

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

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

²⁴ *Id.*

²⁵ *Id.*

VIII

CLAIMANT'S REQUEST FOR RELIEF

30. Canada respectfully requests an award in its favour, finding that:
- (a) Canada's payment of USD \$34 million to the United States before the expiry of the Reasonable Period of Time plus simple interest at 4 percent fully cured the breach found by the Tribunal in LCIA 7941;
 - (b) the United States must accordingly terminate any compensatory measures imposed under Article XIV(27);
 - (c) the United States, pursuant to Article XIV(32), must refund all customs duties collected retroactive to the date that the compensatory measures were imposed; and
 - (d) Canada may terminate any compensatory adjustments imposed pursuant to the Award on Remedies in LCIA Case No. 7941 and may refund any tax collected pursuant to the Award.
31. If the Tribunal finds that Canada's payment has not cured the breach in full, Canada respectfully requests that the Tribunal identify in its Award the amount of a payment to the United States from Canada that the Tribunal would consider sufficient to fully cure the breach.
32. Alternatively, if the Tribunal determines that a cash payment cannot cure the breach found in this case, Canada advises the Tribunal that Canada will impose the

compensatory adjustments identified in the February 23, 2009 Award.²⁶ If so, Canada respectfully asks the Tribunal to clarify whether Canada may allocate the total amount of additional charge to be collected either by region, or by individual exporters from the Option B Regions, in proportion either to the amount that region or exporter shipped to the United States from January 1, 2007 to June 30, 2007 (the breach period) or in the amount that they shipped in excess of what their correctly calculated quota would have been. Further, Canada requests confirmation that any customs duties collected as compensatory measures by the United States under Article XIV(27) would be deducted from the total amount of compensatory adjustments Canada would be required to collect.

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

IX

SERVICE OF THE REQUEST

33. This Request, together with Exhibits A – K, is being simultaneously transmitted to the legal representatives of the Respondent by email. A courtesy copy of this Request will also be served, by overnight delivery, upon the LCIA and upon the Respondent's legal representatives.

Respectfully submitted,



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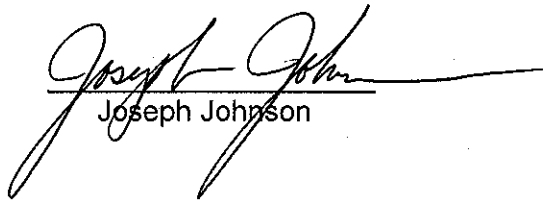
April 2, 2009

Attorneys for Claimant,
Canada

CONFIRMATION OF SERVICE

I, Joseph Johnson, hereby certify that pursuant to Article 1 of the LCIA Rules, I caused a copy of this Request for Arbitration, together with Exhibits, to be simultaneously transmitted by e-mail to the legal representatives of the Respondent on April 2, 2009. A copy is also being hand delivered to Patricia M. McCarthy.

Respectfully submitted,


Joseph Johnson