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London Court of International Arbitration No. 81010B

The United States of America

and

Canada

AWARD

Arbitral Tribunal:

Prof. Gabrielle Kaufmann-Kohler, Chair
Mr. David Williams QC, Arbitrator
Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal:
Ms. Sabina Sacco

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ABBREVIATIONS AND DEFINED TERMS

Award	Award of 20 January 2011 in LCIA Arbitration 81010
CAN-Reply	Canada's Reply dated 24 January 2014
CAN-SoC	Canada's Statement of Case dated 17 December 2013
Joint Expert Report	Joint Expert Report of Professors Joseph P. Kalt and Robert H. Topel dated 22 June 2010 in LCIA Arbitration No. 81010
Joint Request	The Parties' Joint Request for Arbitration dated 30 September 2013
LCIA	London Court of International Arbitration
LCIA Rules	LCIA Arbitration Rules effective 1 January 1998
P.O. 1B	Procedural Order No. 1B
SLA	Softwood Lumber Agreement 2006
Understanding	Exchange of Diplomatic Notes attached as Exhibit C to the Joint Request
US-Reply	The United States' Reply dated 24 January 2014
US-SoC	The United States' Statement of Case dated 17 December 2013

I. INTRODUCTION

A. BACKGROUND

1. In 2006, the Parties entered into the Softwood Lumber Agreement (the "SLA") in order to resolve an ongoing dispute related to the exports of Canadian softwood lumber to the United States. In the SLA, the Parties agreed, *inter alia,* that Canada would apply certain measures to exports of softwood lumber in order to level the playing field for U.S. producers of softwood lumber. Canada further agreed not to circumvent those measures.

2. In 2008, the United States initiated LCIA Case 81010, alleging that certain programs in Ontario and Quebec violated the SLA's anti-circumvention clause (Article XVII). In its Award of 20 January 2011 (the "Award"), the tribunal in that case found that five of the programs violated the SLA's anti-circumvention clause, and ordered Canada (i) to cure the breaches within 30 days or, (ii) if it did not cure the breaches within that period, to apply certain Compensatory Adjustments in the form of additional Export Charges[1] to be collected by Canada from Canadian exporters of softwood lumber. Canada did not cure the breaches and started applying the Compensatory Adjustments on 1 March 2011.

3. The present dispute arises in connection with the interpretation of the Award, specifically with respect to when Canada's obligation to collect the Compensatory Adjustments awarded in LCIA Case 81010 ceases. The Parties to LCIA Case 81010 have appointed the same tribunal to determine which of their respective positions, as explained further below, is the correct interpretation of the Award.

B. THE PARTIES

4. The Parties have submitted a Joint Request for Arbitration. Therefore, they are both technically claimant and respondent. That said, as this case turns on the interpretation of the Award, the Tribunal will identify the claimant and the respondent as done in the Award.[2]

1. The Claimant

5. The Claimant is the United States of America (the "United States").

6. The Claimant is represented in this arbitration by:

Reginald T. Blades, Jr.
Claudia Burke
Gregg M. Schwind
Katy M. Bartelma

[1] As defined in Article XXI(22) of the SLA.

[2] This was also the approach used in Procedural Order No. 1B.

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2. The Respondent

7. The Respondent is Canada.

8. The Respondent is represented in this arbitration by:

Michael Owen
Isabelle Ranger

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C. THE ARBITRAL TRIBUNAL

9. The Parties have appointed the Tribunal that rendered the Award. The Tribunal is composed by:

a. David Williams QC, with address at:

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Level 22, The Lumley Centre
88 Shortland St.
P.O. Box 405
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b. Professor Albert Jan van den Berg, with address at:

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480, Avenue Louise, Bte 9
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ajvandenberg@hvdb.com

c. Professor Gabrielle Kaufmann-Kohler, with address at:

Lévy Kaufmann-Kohler
3-5, rue du Conseil-Général
P.O. Box 552
CH-1211 Geneva 4
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Tel. +41 -22 809 6200
gabrielle.kaufmann-kohler@lk-k.com

10. The Tribunal, in accordance with the LCIA Rules and with the consent of the parties, has appointed Ms. Sabina Sacco as the Secretary to the Tribunal. Ms. Sacco's address is:

Lévy Kaufmann-Kohler
3-5, rue du Conseil-Général
P.O. Box 552
CH-1211 Geneva 4
SWITZERLAND
Tel. +41 -22 809 6200
sabina.sacco@lk-k.com

II. PROCEDURAL HISTORY

11. On 30 September 2013, the Parties submitted a Joint Request for Arbitration (the "Joint Request") to the LCIA under Article XIV(1) of the SLA in connection with a dispute concerning the interpretation of the Award in LCIA Case 81810. The Joint Request was accompanied by Exhibits A through E and a draft procedural order. In particular, the Parties attached an Exchange of Diplomatic Notes which detailed the Parties' understanding with respect to terms and procedures (the "Understanding", Exh. C to the Joint Request).

12. In the Joint Request, the Parties requested that this arbitration be conducted before the same tribunal as in LCIA Arbitration 81010. On 22 October 2013, the LCIA notified the Parties that, pursuant to Articles 5.4 and 5.5 of the LCIA Rules, it had appointed Mr. David Williams QC, Professor Albert Jan van den Berg and Professor Gabrielle Kaufmann-Kohler to be the tribunal in this arbitration (the "Tribunal"), with Prof. Kaufmann-Kohler presiding.

13. After consultation with the Parties, on 8 November 2013 the Tribunal issued Procedural Order No. 1B ("P.O. 1B"), which set out, *inter alia*, the procedural terms and calendar for the arbitration, and noted the appointment of Ms. Sabina Sacco as Secretary of the Tribunal. P.O. 1B also noted that in the Joint Request the Parties asked that the Tribunal "communicate to the Parties a determination as soon as possible with respect to whether Canada must continue to apply the Compensatory Adjustments beyond October 12, 2013, and that it issue its Award explaining the reasons for its determination as soon as practicable thereafter" (P.O. 1B, ¶ 6.1; Joint Request, ¶ 14).

14. On 17 December 2013, each Party submitted its Statement of Case.

15. On 24 January 2014, each Party submitted its Reply.

16. On 19 February 2014, the Parties submitted a joint letter to the Tribunal specifying their requests as to how the Tribunal's decision should be released.

17. On 26 March 2014, in accordance with the Parties' request, the LCIA communicated to the Parties the Tribunal's dated 21 March 2014 with respect to the issue in dispute (the "Determination"), specifying that "Canada has no obligation to continue to apply the Compensatory Adjustments beyond October 12, 2013" (Determination, ¶ 2).

III. THE CURRENT DISPUTE AND THE PARTIES' REQUESTS FOR RELIEF

18. The Parties request a clarification with respect to the relief awarded by the Tribunal in the Award, as a result of the following new facts:

    a. The SLA was scheduled to terminate on 12 October 2013. However, the Parties stipulate that they agreed to extend its duration until 12 October 2015 (Understanding, ¶ 8(a)).

    b. The United States maintains that the amounts collected by Canada are less than half of the remedy determined by the Tribunal. Canada stipulates that, as of May 31, 2013, it has identified $435,461 in tax revenue as a result of levying an additional 0.1 percent export charge on Ontario lumber exports, and $19,312,164 in tax revenue as a result of levying an additional 2.6 percent export charge on Quebec lumber exports (subject to variances going forward for late returns, refunds and future assessments). Canada has also stipulated that it would provide timely updates on collections to the United States or the Tribunal, upon request, during the pendency of these proceedings (Understanding, ¶ 8(b)).

19. As a result of these new facts, the Parties disagree on the date on which Canada's obligation to collect the Compensatory Adjustments ends:

    a. The United States' position is that "the Award requires Canada to continue to apply the Compensatory Adjustments for as long as the SLA remains in effect until Canada has collected the amounts identified in the Award to neutralize the change in U.S. producer surplus", and requests the Tribunal to find accordingly (US-Reply, ¶ 53).[3]

    b. Canada's position is that "Canada's obligation to apply the Compensatory Adjustments [...] terminated on October 12, 2013, the original termination date for the SLA." It requests the Tribunal to confirm this, and further requests that the Tribunal "direct that the Compensatory Adjustments collected from exporters between October 12, 2013 and the date of the Award should be reimbursed." (CAN-Reply, ¶ 47).[4]

20. The Parties request the Tribunal to determine which of the preceding positions is the correct interpretation of the Award (Joint Request, ¶ 22).

21. Should the Tribunal decide in Canada's favor, Canada requests "that the Tribunal specify that the Compensatory Adjustments set out in the Award expire on the

---

[3] In the Joint Request, the United States formulates its position as follows: "the Award requires Canada to continue to apply the Compensatory Adjustments for as long as the SLA remains in effect until Canada has collected the amounts of change in U.S. producer surplus identified in the Award because, based on Canada's reported collections referenced [in the Joint Request], Canada will not collect these amounts by October 12, 2013" (Joint Request, ¶ 21).

[4] In the Joint Request, Canada formulates its position as follows: "the Award in LCIA Arbitration No. 81010 requires Canada to apply the Compensatory Adjustments specified in paragraph 410 of the Award only until the expiration date of the SLA as it existed at the time of the Award (i.e., October 12, 2013)" (Joint Request, ¶ 20).

termination date for the SLA that was in effect when the 81010 Tribunal issued its Award —October 12, 2013. Canada further requests that, if an award is issued in this proceeding after October 12, 2013, it should provide that any Compensatory Adjustments collected from exporters between October 12, 2013 and the date of the Award should be reimbursed" (Joint Request, ¶ 23).

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

IV. SUMMARY OF PARTIES' POSITIONS

A. THE UNITED STATES' POSITION

23. The United States contends that the Award requires Canada to continue to collect Compensatory Adjustments until it has collected an amount equivalent to the lost U.S. producer surplus, or the SLA expires, whatever happens first.

24. In essence, the United States argues that the remedy imposed by the Tribunal in the Award consists in the collection of an amount of Compensatory Adjustments that is equivalent to the harm suffered by U.S. producers, measured in lost U.S. producer surplus. The United States recognizes that the remedy imposed by the Tribunal is effects-based, and that its purpose is to neutralize the effects of the breaching programs on U.S. lumber producers. In the United States' view, this neutralization can only be conceived as a requirement to collect duties in an amount equivalent to the lost U.S. producers surplus, which was quantified in the Award at approximately US$58.85 million. Thus, for the United States, "[t]he calculated amount of harm to U.S. producers is at the core of the Tribunal's remedy", while "[t]he [tax] rate is merely the means to implement the remedy" (US-SoC, ¶ 54).

25. According to the United States, the text of the Award is clear: the Tribunal quantified the remedy in the amount of lost U.S. producer surplus, and imposed on Canada the obligation to collect that quantum in Compensatory Adjustments, without specifying the time limit for Canada's obligation. Considering that the SLA has been extended and that Canada has admitted that it has collected less than that amount quantified by the Tribunal, the United States contends that Canada should be required to continue collecting Compensatory Adjustments until it has reached the amount or the SLA expires.

26. The United States argues that this is the only interpretation that is in line with the Award. It notes in this regard that the Award is *res judicata*, and submits that in its interpretation the Tribunal must examine the relevant language and reasoning of the Award. The United States criticizes Canada for failing to base its interpretation on the Award, and for relying on extrinsic evidence in an impermissible attempt to rewrite the Award. Indeed, according to the United States, "Canada's interpretation would disregard or render meaningless large swathes of the Tribunal's Award" (US-Reply, ¶ 26). The United States urges the Tribunal to reject Canada's arguments and focus on the actual content of the Award.

27. In support of its position, the United States asserts that "by its plain language, the SLA mandates that Compensatory Adjustments must be in an amount that remedies the breach and directs that the adjustments apply until the breaching party cures the breach" (US-SoC, ¶ 8). The United States notes that "Canada does not claim to have cured the breach" and argues that "[t]he only means to satisfy the SLA's requirements is to require the collection of the amounts that the Tribunal determined were necessary to remedy the breach" (*Id.*). It further contends that, "Canada's view, if implemented, would reduce by more than half the Compensatory Adjustments ordered by the Tribunal", allowing Canada to "avoid most of the remedy for its breach and to force U.S. producers to bear the burden for Canada's circumvention" (US-SoC, ¶ 9).

B. CANADA'S POSITION

28. Canada contends that its obligation to apply the Compensatory Adjustments imposed in the Award ended on 12 October 2013, the original termination date for the SLA. It argues that the Award "required Canada to collect from Ontario and Québec lumber producers an export tax at fixed percentage rates for a fixed period of time" (CAN-SoC, ¶ 2). As "that tax was collected, at the rates ordered by the Tribunal, for the time ordered by the Tribunal", Canada "has performed fully its obligations under the Award" (*Id.*).

29. Canada's case rests on one main premise: the Award does not require it to collect any particular amount of duties, but rather to apply the tax rates identified in the Award until the original termination date of the SLA. According to Canada, the remedy imposed by the Tribunal consists in additional export charges to restore the effectiveness of the Export Measures[5] in controlling Canadian lumber exports, specifically by raising the price of U.S. lumber. This is consistent with the logic and structure of the SLA, which imposes a system of controls on lumber exports (the Export Measures) which has the effect of raising U.S. lumber prices

30. More specifically, Canada denies that the Award requires it to collect an amount equivalent to the lost U.S. producer surplus. According to Canada, "the U.S. position is based on the misconception that the collection of export taxes results in a dollar-for-dollar gain in U.S. producer surplus and, consequently, that lower-than-expected tax revenue collections must mean that the intended increase in U.S. producer surplus has not been achieved" (CAN-SoC, ¶ 40). To the contrary, Canada contends that there is no equivalence between the amount of lost producer surplus and the amount of tax to be collected. It argues that the amount of lost producer surplus is merely an input in the economic model to calculate the appropriate Compensatory Adjustments to neutralize the effects of the breaching programs (specifically, by raising U.S. lumber prices). Canada further argues that the effect of the measures (the rise in U.S. lumber prices) bears no correlation to the amount of tax collected, which is not paid to U.S. producers but collected by the Canadian government.

31. Canada also contends that the Compensatory Adjustments were to be collected only until 12 October 2013. It argues that the Tribunal calculated the Compensatory Adjustments based on a termination date of 12 October 2013 and that applying them

[5] As defined in Article XXI(23) of the SLA.

beyond that date "would result in collections that would bear no relationship to the experts' calculations of the effects of the programs on U.S. producers" (CAN-SoC, ¶ 51).

32. Finally, Canada argues that extending the application of the Award beyond 12 October 2013 would be inconsistent with the principles of finality and predictability, and would undermine the SLA.

V. PRELIMINARY ISSUES

A. JURISDICTION AND LEGAL FRAMEWORK

33. There is no dispute about the Tribunal's jurisdiction in this matter. The Tribunal's jurisdiction arises from the SLA and the Understanding, which also set the main procedural parameters for these proceedings. The latter provides in relevant part as follows:

> In furtherance of the spirit of continuing cooperation between the United States and Canada with respect to the implementation of the SLA, including arbitration awards, and taking note of Article XIV(1) of the SLA, which provides for dispute settlement regarding "any matter" arising under the Agreement, the Parties seek resolution of their differences according to the terms set out below.
>
> (1) The Parties will submit to the LCIA the attached joint Request for Arbitration to resolve the question presented at paragraph (4) below. The Request will include a copy of this Understanding between the Parties on the terms and procedures for the arbitration.
>
> (2) The Parties will request that the LCIA appoint the original tribunal in LCIA Arbitration No. 81010. If either of the Party-nominated arbitrators in LCIA Arbitration No. 81010 is unavailable, the respective Party will nominate a replacement within 15 days. If the Chair is unavailable, the Party-nominated arbitrators shall agree on a replacement Chair within 15 days of the appointment of both of the Party-nominated arbitrators. If either of the Parties fails to nominate a replacement arbitrator within 15 days or if the arbitrators fail to decide upon a replacement Chair within 15 days, the LCIA will appoint the replacement. The Parties will endeavour to form the Tribunal as quickly as possible.
>
> (3) Only paragraphs 11, 12, 13, 15, 16, 18, 20, and 21 of Article XIV of the SLA apply to any proceedings necessary to resolve the question presented. In addition, such proceedings are to be conducted under the LCIA Arbitration Rules in effect on the date the SLA was signed, irrespective of any subsequent amendments (except that Article 21 of the LCIA Rules does not apply), as modified by the SLA and by the Understanding or as the Parties may decide in the future.
>
> (4) The Parties will request that the Tribunal determine which of the following positions is the correct interpretation of the Award:
>
> (a) Canada's position is that the Award requires Canada to collect the Compensatory Adjustments specified in the Award only until the expiration date of the SLA as it existed at the time of the Award (i.e., October 12, 2013.)

(b) The U.S. position is that the Award requires Canada to continue to apply the Compensatory Adjustments for as long as the SLA remains in effect until Canada has collected the amounts of change in U.S. producer surplus identified in the Award because, based on Canada's reported collections referenced in paragraph (8)(b) below, Canada will not collect these amounts by October 12, 2013.

(5) The Parties will ask that the Tribunal provide a determination as soon as possible, after the Parties file their final submissions, to the question of whether Canada must continue to apply the Compensatory Adjustments after October 12, 2013, and that the Tribunal issue its Award explaining the determination as soon as practicable thereafter.

(6) Canada will provide to the United States, within 3 business days of the date of entry into effect of the Understanding, the confidential information provided to the Tribunal in LCIA Arbitration No. 81010 (including confidential information contained in all confidential submissions, exhibits, expert reports, transcripts of the hearing and the confidential Award and any attachments). The Parties have decided that Procedural Order No. 2 (June 25, 2008) in LCIA Arbitration No. 81 010 will apply in this proceeding.

(7) As the question presented is one of clarifying the Award, each Party will rely only upon the facts and evidence that are already in the record of LCIA Arbitration No. 81010. For clarity, neither Party will use this proceeding to litigate the issue of whether the rates of export charges, or the amounts to be collected, identified in the Award should be increased or decreased, but will limit their submissions to the question stated in paragraph (4). Each Party will rely only upon exhibits and other evidence already in the record of LCIA Arbitration No. 81010. Further, neither Party will submit any additional exhibits or other evidence, including exhibits or other evidence from fact or expert witnesses, and the Parties agree that the Tribunal may consider only exhibits and other evidence already in the record of LCIA Arbitration No. 81010.

(8) Notwithstanding paragraph (7):

(a) the Parties stipulate that the SLA has been extended through October 12, 2015; and

(b) Canada stipulates that (i) as of May 31, 2013, it has identified $435,461 in tax revenue as a result of levying an additional 0.1 percent export charge on Ontario lumber exports, and $19,312,164 in tax revenue as a result of levying an additional 2.6 percent export charge on Quebec lumber exports (subject to variances going forward for late returns, refunds and future assessments); and (ii) it will provide timely updates on collections to the United States or the Tribunal, upon request, while the proceeding is underway.

The Parties understand that the extension of the SLA and the collection amounts are within the scope of the arbitration, but differ on their significance or relevance.

(9) Each Party will file two written submissions at the same time as the other Party. Each Party's first submission will not be longer than 50 pages and will be due approximately 50 days after the formation of

the Tribunal. Each Party's second submission will not be longer than 25 pages and will be due approximately 28 days later.

(10) Neither party will request a hearing, which should not be necessary to resolve the question presented. The Parties consider that any matter that could not be sufficiently addressed through consideration of the Parties' written submissions be addressed via written questions from the Tribunal and written responses or, if necessary, via teleconference or videoconference.

The Parties understand that each of them reserves all of its rights under the SLA, the LCIA Awards, and applicable provisions of domestic law. Nothing in this Understanding prevents or limits the United States or Canada from enforcing its rights, if either Party considers that the other Party has not abided by the Understanding.

34. In turn, Article XIV of the SLA provides in relevant part:

1. Either Party may initiate dispute settlement under this Article regarding any matter arising under the SLA 2006 or with respect to the implementation of Regional exemptions from Export Measures agreed upon by the Parties pursuant to Article XII.

[...]

11. The LCIA Court shall endeavour to appoint the 3 arbitrators thus nominated within 5 business days after the date on which the Chair is nominated.

12. Arbitrators shall be remunerated and their expenses paid in accordance with LCIA rates. Arbitrators shall keep a record and render a final account of their time and expenses, and the Chair of the tribunal shall keep a record and render a final account of all general tribunal expenses.

13. The legal place of arbitration shall be London, United Kingdom. All hearings shall be conducted in the United States or Canada as the tribunal may decide in its discretion.

[...]

15. If a Party wishes to designate information to be used in the arbitration as confidential, the tribunal shall establish, in consultation with the Parties, procedures for the designation and protection of confidential information. The procedures shall provide, as appropriate, for sharing confidential information for purposes of the arbitration with counsel to softwood lumber industry representatives or with provincial or state government officials.

16. Each Party shall promptly make the following documents available to the public, subject to Article XVI and any procedures established under paragraph 15:

(a) the Request for Arbitration;

(b) pleadings, memorials, briefs, and any accompanying exhibits;

(c) minutes or transcripts of hearings of the tribunal, where available; and

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

[...]

18. The tribunal shall give sympathetic consideration to domestic laws that:

(a) preclude a Party from disclosing information, when the tribunal determines whether that information is privileged from disclosure and whether to draw inferences from the Party's failure to disclose such information; or

(b) require a Party to disclose information subject to confidentiality procedures under paragraph 15.

[...]

20. The tribunal's award shall be final and binding and shall not be subject to any appeal or other review. An award may be enforced solely as provided in this Article.

21. The tribunal may not award costs. $US 10 million shall be allotted from the funds allocated to the binational industry council described in Annex 13 to pay the costs of arbitrations under this Article, including the costs of arbitrators, hearing facilities, transcripts, assistants to the tribunal, and costs of the LCIA. Each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel.

35. The scope of the Tribunal's mandate, as defined in the Understanding and in the Joint Request for Arbitration, is limited to the interpretation of the Award. That being said, this is not an interpretation of an award in the procedural sense of the word. Neither the LCIA Rules nor the English Arbitration Act of 1996, applicable in this case, provide for an opportunity to request an interpretation of a previous award.[6] This is a new arbitration where the dispute turns on the meaning of the Award, the Parties have chosen the same tribunal, and have given it the mandate to interpret the Award.

36. In discharging its task, the Tribunal will apply the Understanding, the relevant provisions of the SLA, which it has previously found operates as *lex specialis*,[7] and other relevant rules of international law as may be applicable.[8]

37. The United States has submitted that, to clarify the correct interpretation of the Award, which is *res judicata*, the Tribunal must examine the relevant language and reasoning of the Award in light of its context and rationale, and may clarify, but not change, the Award (US-SoC, ¶ 32). The Tribunal agrees with this approach, to the extent that there is express language to interpret. In the event of ambiguity of any express language or absent such express language, the Tribunal will rely on the context and rationale of the Award, as evidenced in the reasoning of the Award and in the record of LCIA Case 81010.[9]

---

[6] Both the LCIA Rules and the English Arbitration Act (1996) provide for an opportunity to correct an award and or make an additional award in respect of any claim presented to the tribunal but not dealt with in the award (*see* Article 27 of the LCIA Rules and Article 57 of the English Arbitration Act), but that is not the situation here. In any event, the time limit for this procedural step (30 days from the receipt of the award pursuant to Article 27 of the LCIA Rules) would have already elapsed.

[7] Award, ¶¶ 109-110, 326-327.

[8] Award, ¶¶ 109-111, 328.

[9] The Tribunal notes that the Parties have agreed that "the Tribunal may consider only exhibits and other evidence already in the record of LCIA Arbitration No. 81010" (Parties' Understanding, ¶ 7).

VI. ANALYSIS

A. ISSUE BEFORE THE TRIBUNAL

38. As noted by Canada, "[t]he Parties have agreed that the *only* issue before the Tribunal is which of the following two positions represents the correct interpretation of the 81010 Award" (CAN-SoC, ¶ 10, emphasis in original), Canada's position as set out in paragraph 4(a) of the Understanding or the United States' position as set out in paragraph 4(b) of the Understanding (see paragraph 33 above). The Understanding also specifies that the following issues are not in dispute: "the issue of whether the rates of export charges, or the amounts to be collected, identified in the Award should be increased or decreased" (Understanding, ¶ 7).

39. The Award does not address the issue before the Tribunal expressly (Section B below). The answer must thus be found in the nature, purpose and scope of the remedy imposed in the Award, which was premised on the provisions of the SLA and calculated in the Joint Expert Report (Section C below). On that basis, the Tribunal will address whether Canada is required to collect a specific amount of Compensatory Adjustments (Section D below), and whether Canada should be required to continue to collect Compensatory Adjustments because the SLA has been extended (Section E below).

B. THE AWARD

40. In the Award, the Tribunal found that Canada had breached the anti-circumvention clause in Article XVII(1) of the SLA through the implementation of five programs or measures in the provinces of Ontario and Quebec. In accordance with Article XIV(22) of the SLA,[10] the Tribunal (i) granted Canada "a period of 30 days from the notification of the Award to cure, through means of its own choosing, the identified breaches" and (ii) provided that, if Canada "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" (Award, ¶ 415).

41. The dispositive states:

> 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)

[10] Article XIV(22) of the SLA provides that "[i]f 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."

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;

[...]

(Award, ¶ 415)

42. As noted in the dispositive, the Compensatory Adjustments to be applied were set out in paragraphs 410-411 of the Award. The actual Compensatory Adjustments were specified at paragraph 410, in a table reflecting the final calculations of the Joint Expert Report that resulted after incorporating certain conclusions drawn by the Tribunal in an interactive spreadsheet (*see* Award, ¶¶ 407-409). In particular, the table set out the "Change in U.S. Producer Surplus", the applicable "Tax Rate", and the "Anticipated Duty Amount to be Collected" for the Ontario and Quebec programs, as follows:[11]

Attachment A
TRIBUNAL DECISION POINTS AND RESULTING OUTCOMES

Program (in $Millions)	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total	Post-2016
Ontario FSPF											
Benefit Amount ($CDN)	$0.00	$3.66	$0.00	$0.25	$1.46	$1.03	$1.83	$1.43	$10.66		--
Tax Rate	--	--	--	--	--	0.14%	0.14%	0.14%	--		--
Anticipated Duty Amount to Be Collected ($US)	--	--	--	--	--	$0.80	$0.80	$0.63	$2.23		--
Ontario LSP											
Benefit Amount ($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	$0.00		--
Quebec Tax Incentives											
Change in U.S. Producer Surplus ($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)	--	--	--	--	--	$0.66	$0.56	$0.44	$1.56	--	
Quebec Capital Tax Credit											
Benefit Amount ($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	$1.17		--
Quebec Roads Tax Credit											
Benefit Amount ($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	$52.10		--
Quebec FSP											
Benefit Amount ($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	$4.73		--
Quebec FSP/SR&ED											
Change in U.S. Producer Surplus ($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)	--	--	--	--	--	$20.62	$20.62	$16.20	$57.84	--	

43. At paragraph 411, the Tribunal stated that "[t]he 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."

[11] This table had originally been provided as Attachment A to the Joint Expert Report.

44. The dispositive part of the Award and the paragraphs to which it refers contain no express statements with respect to when Canada's obligation to collect the Compensatory Adjustments ceases, or whether the relief awarded requires the collection of a specific amount. This is not surprising: it is evident upon reading the Award that the Tribunal was not asked to address, and did not address, the potential application of Compensatory Adjustments beyond the original expiration date of the SLA as a result of the extension of the SLA.

45. As the Tribunal is tasked with interpreting the Award, it is bound by what was decided in that Award and cannot go beyond it. The Award did not address the current situation. The Tribunal cannot therefore draw from the Award an obligation upon Canada to continue to collect the Compensatory Adjustments beyond 12 October 2013. The dispositive part of the Award (paragraph 415) only requires that the Compensatory Adjustments determined in paragraphs 410 and 411 shall apply, and nothing in those paragraphs can be said to impose such an obligation.

46. The Award's silence on the matter is sufficient for the Tribunal to endorse Canada's interpretation, i.e., that Canada does not need to collect Compensatory Adjustments beyond 12 October 2013. Nevertheless, this conclusion is confirmed by the nature and purpose of the remedy imposed in the Award, including by the calculation parameters used in the Joint Expert Report, as explained below.

C. NATURE, PURPOSE AND COMPUTATION PARAMETERS OF THE REMEDY

1. Nature and purpose of the remedy

47. As noted in the Award, the SLA contains specific provisions on the remedies available in case of breach (Award, ¶ 319). Article XIV(22) of the SLA provides:

> 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[12] to compensate for the breach if that Party fails to cure the breach within the reasonable period of time.

48. Article XIV(23) further provides that "[t]he compensatory adjustments that the tribunal determines under paragraph 22(b) shall consist of: (a) in the case of a breach by Canada, an increase in the Export Charge and/or a reduction in the export volumes permitted under a volume restraint that Canada is then applying or, if no Export Charge and/or volume restraint is being applied, the imposition of such Export Charge and/or volume restraint as appropriate; [...]", adding that "[s]uch adjustments shall be in an amount that remedies the breach".

[12] "Export Measures" are defined in Article XXI(22) of the SLA as "the measures in Articles VII through IX, Article X(2), Article XII(2)(b)(i), and Article XVII(5)(a)". Essentially, these Export Measures encompass export charges and volume restraints (quotas) to exports of softwood lumber from Canada into the United States that apply when certain conditions are met (see US-SoC, ¶ 12; CAN-SoC, ¶ 5).

49. The SLA thus limits the form of Compensatory Adjustments to either (i) an increase in the Export Charge (defined in Article XXI(23) of the SLA as "the charge levied by Canada on the Export Price of Softwood Lumber Products exported to the United States at the rates specified in Articles VII through IX"), (ii) a reduction in the export volumes permitted under a volume restraint that is being applied by Canada, or (iii) a combination of the two. In the Award, the Tribunal chose to impose an increase in the Export Charge (Award, ¶ 411).

50. The purpose of the Compensatory Adjustments is to "neutralize the effects of the breach on the Export Measures" and "reestablish the level playing field created by means of the Export Measures" (Award, ¶ 352). In other words, the Compensatory Adjustments must offset the effect that the breaching programs had on U.S. producers, measured by the lost U.S. producer surplus. Since the Compensatory Adjustments are in the form of additional export taxes, they achieve this purpose by discouraging exports from Canada to the United States or increasing their costs, which causes a rise in U.S. lumber prices and generates U.S. producer surplus gains.[13]

51. The remedy provided in the Award is not damages that need to be paid to U.S. producers. As noted by Canada, "[w]hen Canada applies export taxes, including Compensatory Adjustments, the tax revenue collected goes to the Canadian Government, not the United States. U.S. producers, therefore, do not receive any payments when Canada collects the taxes from its producers. [...]." (CAN-Reply, 13).

2. Calculation parameters

52. The Compensatory Adjustments were calculated by the Parties' experts in the Joint Expert Report. Their final calculation was determined by decisions on certain legal issues made by the Tribunal and incorporated in the Interactive Spreadsheet provided with that report. The assumptions and inputs used by the experts and the Tribunal determine the scope of the remedy.

53. It is clear from the Award and from the Joint Expert Report that, in the alternative that was finally chosen by the Tribunal, the Compensatory Adjustments were computed according to the following parameters and assumptions:

a. The calculations used 12 October 2013 as the date on which the SLA would expire.

b. The calculation of the change in U.S. producer surplus (i) did not take into account benefits that might be provided by the breaching programs after the expiration of the SLA, and (ii) only took into account the effects of benefits provided by the breaching programs prior to the expiration of the SLA, which would be felt during the period in which the SLA was originally in effect (i.e., until 12 October 2013).

[13] As explained by Prof. Kalt, the additional export duty "taxes and, thus, discourages, exports. Resulting reductions in export supply put upward pressure on U.S. lumber prices, generating US producer surplus gains." (Joint Expert Report, ¶ 200).

c. In determining the reduction or offset of the Export Measures, the reduction or offset was calculated in terms of harm to U.S. producer surplus.

d. The calculation of the export tax rates designed to offset the effects of the breaching programs was a present value calculation as of the end of 2013. In other words, the experts' model calculated the appropriate tax rate to neutralize the effects of the breaching programs under the assumption that the additional export charge would be applied through 12 October 2013.

(Joint Expert Report, ¶¶ 12-14, 144, 166-169, 175, 183-185 ; Award, ¶¶ 348, 357, 358, 364, 376, 407-408).

D. DOES THE AWARD REQUIRE CANADA TO COLLECT A SPECIFIC AMOUNT OF DUTIES?

54. The Parties agree that the Award imposes an effects-based remedy intended to neutralize the effects of the breaching programs on U.S. softwood lumber producers. In particular, they agree that:

a. The Award imposes an "effects-based remedy to compensate for the harm to U.S. softwood lumber producers" (US-SoC, ¶ 7; CAN-Reply, ¶ 10).

b. The harm which the remedy was to compensate was "the effect of the breach [of the SLA] on U.S. producers – measured by lost U.S. producer surplus" (US-SoC, ¶ 38; CAN-Reply, ¶ 10).

c. The Tribunal "determin[ed] the effects of the breaching programs on U.S. lumber producers, then calculate[ed], with the assistance of the Parties' experts, the Compensatory Adjustments necessary to 'neutralize' these effects" (US-SoC, ¶ 37; CAN-Reply, ¶ 10).

55. The Parties disagree, however, on whether the Award requires Canada to collect the amount of lost producer surplus calculated by the experts in its equivalent in Compensatory Adjustments. Canada argues that it does not, because "[t]he remedy ordered by the Tribunal was the imposition of Compensatory Adjustments in the form of additional export taxes on lumber from Ontario and Québec for a fixed period of time" (CAN-Reply, ¶ 1), and because "the goal of those Compensatory Adjustments was not the collection of taxes by Canada, but rather to exert upward pressure on prices in the U.S. market to compensate for the downward pressure on those prices caused by the circumventing programs" (CAN-Reply, ¶ 2). The United States contends that it does, arguing that the SLA (a) requires that the Compensatory Adjustments "shall be in an amount that remedies the breach" (Article XIV(23) *in fine*), and (b) provides that "[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) (US-SoC, ¶¶ 65-73).

56. The Tribunal is mindful of these provisions but cannot follow the United States' interpretation. The Tribunal will address point (a) here, and point (b) in Section E below.

57. There is no doubt that the remedy envisaged by the SLA is compensatory in nature. As noted in the Award,[14] Article XIV(22)(b) directs the Tribunal to "determine appropriate adjustments to the Export Measures to compensate for the breach", while Article XIV(23) *in fine* provides that "[s]uch adjustments shall be in an amount that remedies the breach." However, this does not mean that the remedy requires Canada to collect a particular amount. The requirement is that the Compensatory Adjustments shall "compensate for the breach" or "be in an amount that remedies the breach." Because this is an effects-based remedy, the breach is compensated or remedied when the desired effect is achieved, not when a certain amount of duty is collected. The remedy imposed in the Award was thus calculated in such a way to achieve that effect (i.e., the neutralization of the harm caused by the breaching programs).

58. In the United States' view, the only way to achieve the desired effect is for Canada to collect the amount identified in the Award as the measure of lost U.S. producer surplus. It argues that, because the effect of the breach was to reduce U.S. producer surplus in a particular amount, to remedy the breach Canada must collect an equivalent amount in Compensatory Adjustments.[15] According to the United States:

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

59. This interpretation is at odds with the nature and purpose of the remedy. The United States confuses the effect of the breach with the effect of the remedy. The effect of the breaching programs was to provide an advantage to Canadian softwood lumber producers and boost Canadian exports, causing U.S. lumber prices to fall and generating losses in U.S. producer surplus. The effect of the remedy, by contrast, was to raise U.S. lumber prices and generate U.S. producer surplus gains, in order to neutralize the losses in U.S. producer surplus caused by the breaching programs. The collection of any particular amount by Canada is thus irrelevant.

60. It is true that, for the desired effect to be achieved, the remedy must be calculated in such a way as to produce an increase in U.S. producer surplus sufficient to neutralize the previous loss. But it does not follow that Canada must collect Compensatory Adjustments equivalent to the amount of lost U.S. producer surplus. As Canada has noted, the Tribunal could have decided to impose a volume restriction instead of an

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[14] *See* Award, ¶¶ 353-354.

[15] Specifically, the United States argues that "the Tribunal's remedy used the change in U.S. producer surplus as the measure of the effects of Canada's breach on the Export Measures. For this reason, the total amounts to be collected on lumber exports from Ontario and Quebec are the amounts of the change (loss) in U.S. producer surplus caused by the breaching programs through October 12, 2013." (US-SoC, ¶ 39).

additional export charge to discourage Canadian exports (CAN-Reply, ¶¶ 3, 16).[16] Had the Tribunal done so, the effects of the breaching program would have been neutralized without Canada collecting a single penny. Or, had the Tribunal imposed an export charge that was sufficiently high, exports would have ceased altogether, which would have had the effect of raising U.S. prices without Canada collecting any taxes at all (CAN-SoC, ¶ 43; CAN-Reply, ¶ 16).

61. The Tribunal imposed Compensatory Adjustments in the form of additional export charges. To produce the desired effect, the Tribunal, with the help of the Parties' experts, first "determine[d] the effects of the benefits provided by the programs or measures in breach of the SLA on the Export Measures" (measured by the change in U.S. producer surplus), and then determine[d] adjustments that compensate for such effects" (Award, ¶ 374). Thus, to determine what adjustments needed to be made to the export charges, the experts had to quantify the change in U.S. producer surplus. That quantification was relevant as an input in the experts' calculation; the Award did not impose on Canada the obligation to collect taxes in an equivalent amount. As explained by Canada:

> Once lost producer surplus has been calculated, it serves as an *input* in calculating the remedy needed to restore that amount. The model applies various assumptions about such variables as demand and pricing to calculate what tax rate would need to be applied in each Province in order to constrain exports to the point that the lost U.S. producer surplus would be restored. The amount of lost U.S. producer surplus was the target that the effects-based remedy was intended to achieve by October 12, 2013. The tax rate imposed by the Canadian government and the consequent restraint was designed to achieve that goal by that date (CAN-Reply, ¶ 15, emphasis in original).

62. The United States argues that "the calculated amount of harm to U.S. producers is at the core of the Tribunal's remedy", and that "[t]he rate is merely the means to implement the remedy" (US-SoC, ¶ 54). This is not so. The amount of harm to U.S. producers is relevant to calculate the tax rate; it is the "target" that the tax rate must "hit", to use Prof. Kalt's terminology.[17] But the remedy is the Compensatory Adjustment, i.e., the additional tax rate to be added to the Export Measures in order restore their efficacy.

63. Whether the Compensatory Adjustments awarded did in fact achieve the desired effect (i.e., whether they raised U.S. lumber prices sufficiently to neutralize the effects of the breaching programs) is irrelevant. The Parties' experts carefully calculated additional export charges which, in their expert opinion, would achieve the desired effect. Having accepted the experts' calculation, the Tribunal cannot second-guess it now. Forward-looking calculations are inherently uncertain but, as Canada argues, tribunals routinely award damages based on projections of the future and are not entitled to change them if reality ends up disproving them.

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[16] As noted by Canada, "[t]he logic of the SLA is that either form of control, whether a tax on Canadian exports or a limit on the quantity of such exports, will have the effect of raising lumber prices on the United States' side of the border, and thus will protect American lumber producers." (CAN-SoC, ¶ 5).

[17] *See* Joint Expert Report, ¶ 192.

64. In further support of its argument, the United States calls attention to the fact that the "anticipated duty amount to be collected" for each province calculated in the table included in paragraph 410 of the Award is almost identical to the amounts of change in U.S. producer surplus quantified in that table (US-SoC, ¶ 21). Specifically, with respect to the Ontario programs, the table indicates a change (loss) in U.S. producer surplus of US$1.54 million, and an "anticipated duty amount to be collected" of US$1.56 million. With respect to the Quebec programs, it indicates a change (loss) in U.S. producer surplus of US$57.31 million, and an "anticipated duty amount to be collected" of US$57.84 million. According to the United States, "[t]he 'anticipated duty amount' figures demonstrated that, if softwood lumber exports and prices had tracked the experts' predictions, the amounts collected at the rate prescribed would have been nearly exactly the amounts of change in U.S. producer surplus. Stated differently, the 'anticipated duty amounts' merely confirm that the Tribunal (and the experts) expected the remedy to fully 'neutralize' the effects of Canada's breach by collecting the full amounts of lost U.S. producer surplus within the period of the SLA" (US-SoC, ¶ 41).

65. By contrast, Canada contends that there is no equivalence between the "Anticipated Duty Amount to be Collected" and the change in U.S. producer surplus. The "Anticipated Duty Amount to be Collected" merely reflects the amounts of anticipated duty that the experts estimated would be collected as a result of the Compensatory Adjustments (CAN-SoC, ¶ 25). According to Canada, "[c]ollection of a smaller-than-anticipated amount of export taxes simply indicates that the actual volume or price (or some combination of both) of exports fell short of the projections about the future made by the economists in their Joint Expert Report" (CAN-SoC, ¶ 45). As a result, Canada contends that the "Anticipated Duty Amount to be Collected" does not serve as a proxy for the change in U.S. producer surplus (CAN-Reply, ¶¶ 21-24) and that "[t]he resemblance between the anticipated collection amounts and the amount of change in U.S. producer surplus was coincidental" (CAN-Reply, ¶ 21).

66. The evidence is on Canada's side. Figures 29A-29H of the Joint Expert Report reflect the different results reached by each of Professors Kalt and Topel, depending on the various alternatives available in the Interactive Spreadsheet, specifically whether the calculations should compensate for post-SLA effects or not, and whether they should include or exclude Article X producers. The results demonstrate that there is no correlation between the amount of lost U.S. producer surplus and the amount of anticipated duty to be collected.

67. For example, Figure 29E (Prof. Kalt's calculation of benefit amounts, U.S. producer surplus changes and compensatory tax rates and collections with post-SLA effects and without Article X Producers) shows, with respect to the Ontario programs, a "Change in U.S. Producer Surplus" of US$12.77 million, while the "Anticipated Duty Amount to be Collected" is US$13.16 million. With respect to the Quebec programs, the "Change in U.S. Producer Surplus" is US$78.37 million, while the "Anticipated Duty Amount to be Collected" is US$60.85 million. Although some of these numbers are not very far apart, they cannot be said to show an equivalence between the "Change in U.S. Producer Surplus" and the "Anticipated Duty Amount to be Collected."

68. The lack of equivalence between these two numbers is confirmed in other calculations. Figure 29F (Prof. Topel's calculation of benefit amounts, U.S. producer surplus changes and compensatory tax rates and collections with post-SLA effects and without Article X Producers) shows, with respect to the Ontario programs, a "Change in U.S. Producer Surplus" of US$41.92 million, while the "Anticipated Duty Amount to be Collected" is only US$36.12 million. With respect to the Quebec programs, the difference is even higher: the "Change in U.S. Producer Surplus" is US$224.94 million, while the "Anticipated Duty Amount to be Collected" is only US$142.73 million.

69. Similarly, Figure 29H (Prof. Topel's calculation of benefit amounts, U.S. producer surplus changes and compensatory tax rates and collections with post-SLA effects and with Article X Producers) shows, with respect to the Ontario programs, a "Change in U.S. Producer Surplus" of US$41.92 million, while the "Anticipated Duty Amount to be Collected" is US$36.12 million. With respect to the Quebec programs, the "Change in U.S. Producer Surplus" is US$230.77 million, while the "Anticipated Duty Amount to be Collected" is only US$146.36 million.

70. This demonstrates that, had the Tribunal chosen to use other assumptions in the Interactive Spreadsheet, the quantifications of the "Change in U.S. Producer Surplus" and "Anticipated Duty Amount to be Collected" shown in the table included at paragraph 410 of the Award may have differed considerably. In other words, the fact that they happened to be similar in the choice made by the Tribunal is indeed a coincidence.

71. In addition, as noted by Canada (CAN-Reply, ¶ 24), if the Tribunal had meant to order Canada to collect taxes equal to the change in U.S. producer surplus, the amounts of anticipated duty to be collected would not have been close to the change in U.S. producer surplus, but identical.

72. The United States further contends that "the focus *must* remain on [the] amount [of lost U.S. producer surplus] because any remedy amount must be reasonably definite. [...] The Tribunal's remedy simply cannot be [...] whatever variable amount happens to be collected as of a particular date, even as Canada continues to enjoy the benefits of the Agreement. To remain definite, the remedy must be to collect the particular amount of lost U.S. producer surplus calculated by the Tribunal" (US-SoC, ¶ 55, emphasis in original).

73. This argument appears to derive from a misconception of the nature of the remedy, which is not to order the payment of damages, but to order the collection of a tax. That remedy is defined by the tax rate, the taxable event (softwood lumber exports from Canada to the United States), and the time period during which the tax is levied. As a result of these specifications, the remedy appears reasonably definite.

74. These reasons lead to the conclusion that the Award does not require Canada to collect a specific amount of Compensatory Adjustments. Before reaching a final conclusion on this issue, the Tribunal must, however, still address three related aspects, specifically (i) a clarification regarding the contents of the Award, (ii) an alternative conclusion, and (iii) the United States' argument that the Tribunal should be guided by the decisions of other tribunals.

75. First, it is true that the Award and Procedural Order No. 6 refer to "amounts to be collected". Yet, none of these references imposes an obligation on Canada to collect a specific amount of duties.

76. As regards the section entitled "Measure of the amounts to be collected" (Award, Section IV.B.3(b)(i), ¶¶ 340-357), the content of this section is clear. It did not address whether Canada needed to collect a specific total amount of Compensatory Adjustments. Rather, the question was "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" (Award, ¶ 339). The Tribunal concluded 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" (Award, ¶ 348).

77. It arises from the nature and purpose of the remedy as discussed above that the Tribunal intended that the experts calculate the additional export taxes necessary to cause a rise in U.S. lumber prices and thus neutralize the effect of the SLA breaches. Thus, the reference in the Award to "measure of the amounts to be collected" is an input to be used by the experts to calculate the appropriate export tax.[18]

78. In the same vein, the Tribunal's directions to the experts in Procedural Order No. 6 do not reflect an understanding that Canada would be required to collect specific amounts of duty.[19] The Tribunal directed the experts, "[o]n the basis of the benefits estimated in accordance with paragraphs 1.1 and 1.2 [of that Order], to "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" (P.O. 6, ¶ 1.3). The Tribunal later clarified that the experts should "focus on the concept of harm to U.S. producers" (Letter from the Tribunal to the Parties of 15 April 2010; Award, ¶ 341). In other words, the experts were instructed to calculate the loss in U.S. producer surplus and then to calculate the compensatory adjustments that Canada would have to collect to neutralize that loss.

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[18] This is in particular confirmed in ¶ 406 of the Award. The issue was whether the Compensatory Adjustments (i) must be set in an amount equal to the production taxes, or (ii) whether such amount must be adjusted to represent an export rather than a production tax. The Tribunal concluded that the second option was the correct one. Specifically, the Tribunal stated:

> "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. [...]" (Award, ¶ 406).

[19] It goes without saying that, given its nature, Procedural Order No. 6 could not and did not impose an obligation to collect Compensatory Adjustments on Canada.

79. As reflected in the Joint Expert Report, this is exactly what the experts did.[20] Without making a reference to a total amount of duty to be collected, the experts explained that their economic model allowed them to:

> - Estimate the effects of the programs on US lumber prices;
> - Estimate lost US producer surplus;
> - Estimate export tax rates that offset the effects of the programs during the period the duty is imposed, as well as lost US producer surplus before and after the charge is imposed.
>
> (Joint Expert Report, ¶ 144).

80. It is true that in Procedural Order No. 6 the Tribunal requested the experts to specify certain overall amounts to be collected (P.O. 6, ¶ 13), and that this instruction could have been (mis)interpreted to mean that Canada would be required to collect an amount certain. However, such an interpretation would have been against the nature of the remedy, and the experts did not interpret Procedural Order No. 6 in this manner. It is clear from the Joint Expert Report that the experts used the amount of lost U.S. producer surplus as an input for their calculations, and that the overall amounts to be collected reflect an estimate of duties to be collected. Indeed, when describing their results as set out in Attachment A to the Joint Expert Report, the experts explained:

> The second page contains the results of our analysis and the answers to the various questions the Tribunal has posed, including program benefit amount, measurement of lost producer surplus, applicable rate of compensatory export duty, and *anticipated overall amount of export duty to be collected* for each of the programs and each of the provinces as defined in the Tribunal's order. (Joint Expert Report, ¶ 5; emphasis added).

81. Similarly, when describing the structure of the report, the experts state that the final section, Section IV, "contains a discussion of the mechanics of our model [and] the results of our analysis, including benefit amounts, estimates of the impact on US producer surplus, tax rates, and *anticipated amounts of tax collected.*" (Joint Expert Report, ¶ 8, emphasis added). This confirms that the experts understood the Tribunal's directions to specify overall amounts to be collected as an instruction to calculate anticipated or estimated overall amounts to be collected. Given the nature of the remedy, it could not have been otherwise.

82. Second, even if the experts had designed the Compensatory Adjustments so that a certain amount of duty (equivalent to lost U.S. producer surplus) would be collected, the fact that collection was beneath their expectations does not mean that collection must continue until that amount is reached. The experts used certain projections and assumptions as to price and market and calculated the export taxes needed to

[20] When describing the object of their report, the experts state: "[W]e have been asked to estimate the yearly benefits provided to Canadian softwood lumber producers by certain programs in Ontario and Quebec that are alleged to have violated the anticircumvention provisions of the SLA. We have also been asked to calculate the reduction or offset of the Export Measures caused by these benefits, including past effects, and to calculate the compensatory adjustments to be collected in order to neutralize the reductions or offsets. This document represents our joint report to the Tribunal on these matters." (Joint Expert Report, ¶ 1).

achieve a certain effect accordingly. If, applying those export taxes, Canada collected less duties than was anticipated, this may simply have been because the experts' projections about the future did not conform with actual figures, in particular because prices were lower or the market was smaller. As noted above, forward-looking calculations are inherently uncertain. However, having adopted the experts' calculation, the Tribunal cannot revisit it now.

83. Third and as a final matter, the Tribunal is aware that the arbitrators in LCIA Case 91312 interpreted the SLA to require collection of the full amount of Compensatory Adjustments. Yet, it cannot follow that solution. As set out in the Award, "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." (Award, ¶ 324). However, in the present case, one cannot speak of a consistent line of cases. To the Tribunal's knowledge, LCIA Case 91312 (which in turn interprets the award in LCIA Case 7491) is the only other case under the SLA in which this question has arisen. In addition, the Tribunal considers that the reasons set out in the preceding paragraphs are in any event sufficiently compelling to warrant a different solution.

84. On this basis, the Tribunal confirms its conclusion pursuant to which Canada is not required to collect a specific amount of duties.

E. SHOULD CANADA BE REQUIRED TO CONTINUE TO COLLECT COMPENSATORY ADJUSTMENTS BECAUSE THE SLA HAS BEEN EXTENDED?

85. The Tribunal has found that Canada was not required to collect a specific amount of Compensatory Adjustments. However, that does not resolve the matter. The Parties have stipulated that the SLA has been extended until 12 October 2015, which means that its system of Export Measures remains in effect until that date. The Parties' agreement extending the SLA (Exh. E to the Joint Request) says nothing with respect to the application of Compensatory Adjustments. The question thus remains whether Canada should continue to apply the Compensatory Adjustments imposed in the Award until the SLA's new expiration date.

86. Nowhere in the Award does the Tribunal explicitly address the duration of Canada's obligation to collect Compensatory Adjustments.[21] The United States recognizes this when it states that "the Award identifies a start date for the Compensatory Adjustments, but it does not contain an end date for applying the Compensatory Adjustments" (US-SoC, ¶ 44).

87. In the United States' view, "[i]n the absence of any statement in the Award of when Canada may cease applying the Compensatory Adjustments, the only direct and reasonable application of the Award is for Canada to apply the Compensatory

[21] The Award did devote a section to the "duration of the programs or measures" (Award, ¶¶ 358-364), but this referred to the question whether the experts should assume that the breaching programs would continue until the original date of expiration of the SLA (i.e., 12 October 2013). The fact that the Tribunal confirmed that they should assume so relates to the scope of the remedy and the inputs for the experts' calculations, which the Tribunal addresses in Section III.E.1 below.

Adjustments for the duration of the SLA until it has collected the total amounts of lost U.S. producer surplus caused by the breach" (US-SoC, ¶ 44).

88. The Tribunal does not share this view. It arises from the manner in which the Compensatory Adjustments were calculated by the experts that the latter should not be extended beyond 12 October 2013 (Section 1). This conclusion is in line with Article XIV(24) of the SLA (Section 2).

1. Method of calculation

89. Canada argues that "[t]he tax rate specified in paragraph 410 of the Award was based on the common understanding of the Parties, the economists, and the Tribunal that the SLA was to end as of October 12, 2013." (CAN-SoC, ¶ 48). The Tribunal agrees. It is clear from the Award and from the Joint Expert Report that the Compensatory Adjustments were to be calculated under the assumption that they would be applied only until 12 October 2013. As noted by Prof. Topel, the calculation of the export tax rates designed to offset the effects of the breaching programs was a present value calculation as of the end of 2013 (Joint Expert Report, ¶ 169). Consistent with this approach, the table included at paragraph 410 of the Award contains columns calculating tax rates only through 2013.

90. The record confirms that the Compensatory Adjustments were temporary, and that they were computed on the assumption that they would only be applied until 12 October 2013. In its letter of 15 April 2010, the Tribunal specified that the experts were to calculate the Compensatory Adjustments "to be applied from January 1, 2011, to October 12, 2013". Although the United States is right that this letter is not a part of the Award, it reflects Tribunal's understanding that the Compensatory Adjustments were to be applied for a specific time period. The fact that Canada did not begin to apply the Compensatory Adjustments until March 2011 does not negate this conclusion.

91. The experts also understood the remedy to be temporary. The Tribunal notes for instance the following statements by Prof. Topel:

a. "The model that Professor Kalt and I use calibrates a set of (temporary) percentage taxes to be imposed on the production of softwood lumber in Ontario and Quebec. These are then converted into a set of (temporary) duties to be imposed on exports of softwood lumber from Ontario and Quebec to the United States" (Joint Expert Report, ¶ 168).

b. "[T]he duties that the Tribunal might impose are temporary -- they will expire at the end of the SLA in 2013" (Joint Expert Report, ¶ 175).

92. Prof. Kalt made similar statements that point to the temporary nature of the Compensatory Adjustments:

a. "Our calculations of remedial export duties during the term of the SLA measure the effective offset or reduction to the SLA' s Export Measures during the term of the SLA" (Joint Expert Report, ¶ 183).

b. When discussing whether to incorporate post-SLA effects into the analysis, Prof. Kalt confirmed that the model calculates the "additional during-SLA duties that would generate additional US producer surplus between 2011 and the end of the SLA which is equal to the present value of the model's measure of post-SLA reduced US producer surplus" (Joint Expert Report, ¶ 185). Although Prof. Kalt is referring to a scenario that was rejected by the Tribunal, his statement confirms that the model is based on the calculation of duties applied only during the life of the SLA.

93. The above considerations confirm that the experts' model calculated the appropriate tax rate to neutralize the effects of the breaching programs under the assumption that that the additional export charge would be applied only through 12 October 2013. This means that it would not be appropriate to apply those additional export taxes beyond 12 October 2013, even if the SLA is still in place, because the calculations did not consider their application beyond that date. As Canada argues, "changing the termination date to 2015 would result in collections that would bear no relationship to the experts' calculation of the effects of the programs on U.S. producers" (CAN-SoC, ¶ 51).

2. Article XIV(24) of the SLA

94. Contrary to the United States' argument, the conclusion just reached conforms with Article XIV(24) of the SLA. The United States contends that, now that the SLA has been extended, Canada must collect the Compensatory Adjustments until it cures the breach. The United States relies on Article XIV(24) of the SLA, which provides that the Compensatory Adjustments "may be applied from the end of the reasonable period of time until the Party Complained Against cures the breach."

95. The Tribunal is not persuaded by the United States' argument. The Tribunal understands this provision to mean that, if the Party Complained Against (in this case, Canada) does not cure the breach within the reasonable period of time determined by the Tribunal (in this case, 30 days from the date of the Award), the Compensatory Adjustments shall apply until Canada cures the breach or until the SLA expires, whichever comes first. In other words, if after the Compensatory Adjustments have begun to be applied Canada cures the breach, it may request that the Compensatory Adjustments cease to be applied.[22] However, this provision cannot be read to require Canada to continue to collect Compensatory Adjustments beyond the date of expiration of the SLA if the breach has not been cured. As noted in the Award, the SLA does not deploy effects beyond its expiration, and no Compensatory Adjustments could be applied to Export Measures beyond that date because "no Export Measures are applicable under the SLA after the SLA's expiration" (Award, ¶ 374).

96. The Tribunal is aware that here the SLA has been extended, and so has its system of Export Measures. However, as noted above, the Parties' agreement extending the SLA says nothing with respect to the application of Compensatory Adjustments. From this silence the Tribunal can only conclude that the terms of the SLA apply

[22] As noted at paragraph 363 of the Award, "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'."

without modification. Thus, if the breaching programs are still in place, Compensatory Adjustments to the SLA's Export Measures may potentially be appropriate to compensate the harm to U.S. producers caused after the original expiry date of the SLA. These would be new Compensatory Adjustments which would have to be specifically calculated to neutralize the harm to U.S. producers during the period ranging from October 2013 to October 2015. Such Compensatory Adjustments are beyond the scope of this Tribunal's mandate. Be this as it may, as noted above, the Compensatory Adjustments imposed in the Award were calculated to neutralize the effect of the breaching programs until 12 October 2013 by means of Compensatory Adjustments to be collected until 12 October 2013.

F. CONCLUSION

97. For the reasons set out above, the Tribunal concludes that Canada's obligation to apply the Compensatory Adjustments imposed in the Award terminated on 12 October 2013, the original termination date for the SLA. As a result, Canada did not need to continue to apply Compensatory Adjustments beyond that date.

98. It follows from this conclusion that exporters who have paid Compensatory Adjustments after 12 October 2013 should be reimbursed. The Tribunal therefore grants Canada's request for an order that Compensatory Adjustments collected from exporters after 12 October 2013 be reimbursed.

VII. COSTS

99. In accordance with Article XIV(21) of the SLA, the tribunal may not award costs. The costs of these proceedings (including the costs of arbitrators, hearing facilities, transcripts, assistants to the tribunal, and costs of the LCIA) shall be paid from the funds allocated to the binational industry council for this purpose. Each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel.

100. 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 LCIA Rules to be as follows:

Registration fee	US$ 2,839.55
LCIA's administrative charges	US$ 14,452.18
Tribunal's fees and expenses	US$ 126,479.73
Tribunal Secretary's fees	US$ 23,805.64
Total costs of arbitration	US$ 167,577.10

101. This amount shall be paid from the funds allocated to the binational industry council.

VIII. DECISION

102. For the reasons set forth above, and with reference to the request for relief in the Joint Request, the Tribunal makes the following decision:

a. Paragraph 20 of the Joint Request, which reads "the Award in LCIA Arbitration No. 81010 requires Canada to apply the Compensatory Adjustments specified in paragraph 410 of the Award only until the expiration date of the SLA as it existed at the time of the Award (i.e., October 12, 2013)", is the correct interpretation of the Award;

b. Accordingly, the Compensatory Adjustments set out in the Award of 20 January 2011 in LCIA Case 81010 expired on the termination date for the SLA that was in effect when the tribunal in that case issued its Award (that is, on 12 October 2013), and any Compensatory Adjustments collected from exporters beyond 12 October 2013 shall be reimbursed;

c. Pursuant to Article XIV(21) of the SLA, the costs of these proceedings, which amount to US$167,577.10, shall be paid from the funds allocated to the binational industry council for this purpose;

d. Pursuant to Article XIV(21) of the SLA, each Party shall bear its own costs, including legal fees and other expenses;

e. All other claims are dismissed.

Seat of the arbitration: London, United Kingdom

Date: 2 APRIL 2014

Mr. David Williams QC
Arbitrator

Prof. Albert Jan van den Berg
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
Tribunal Chair