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# **Exhibit E**

**London Court of International Arbitration (LCIA)  
CASE NO. 7941**

**THE UNITED STATES OF AMERICA,  
CLAIMANT,  
V.  
CANADA,  
RESPONDENT.**

**AWARD ON REMEDIES**

**Arbitral Tribunal:** Prof. Karl-Heinz Böckstiegel  
Chairman

Prof. Bernard Hanotiau  
Co-Arbitrator

V.V. Veeder QC  
Co-Arbitrator

Yun-I Kim  
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## Abbreviations

C I	Claimant's Statement of the Case on Remedy of May 29, 2008
C II	Claimant's Reply Memorial on Remedy of July 21, 2008
C III	Claimant's Post-Hearing Brief of October 31, 2008
CDN \$	Canadian Dollars
cf.	confer
CR	Exhibit/Authority to the United States
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
EUSC	Expected United States Consumption
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC Draft	
Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Association
p.	page
para.	paragraph
paras.	paragraphs
PCIJ	Permanent Court of International Justice
PO	Procedural Order
R I	Respondent's Statement of Defence on Remedy of June 30, 2008
R II	Respondent's Rebuttal Memorial of August 12, 2008
R III	Respondent's Post-Hearing Brief of October 31, 2008
RQV	regional quota volume
RR	Exhibit to Canada
RRA	Authority to Canada
SLA	2006 Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America of September 12, 2006
Tr	Transcript of Hearing on Liability of September 22-23, 2008
US \$	United States Dollars
VCLT	Vienna Convention on the Law of Treaties of May 23, 1969
WTO	World Trade Organization



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Appointed by the LCIA according to joint nomination by the Co-Arbitrators and agreement of the Parties:

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**GERMANY**

### **C. Short Identification of the Case**

1. The short identification below is made without derogation from the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions.

#### **C.I. Claimant's Perspective**

2. The following quotation from Claimant's Statement of the Case of Remedy of May 29, 2008 summarises the main aspects of Claimant's perspective of the dispute (C I, §§ 2-5):

"2. *This case concerns Canada's breach of the 2006 Softwood Lumber Agreement ("SLA" or "Agreement"), an international agreement between the United States and Canada that resolved a longstanding trade dispute regarding Canadian exports of softwood lumber to the United States.<sup>1</sup> See SLA (CR-1); Amendments (CR-2). The Agreement, among other things, requires certain Canadian regions to restrict the volume of softwood lumber exports to the United States by specific amounts. As the Tribunal found in its March 3, 2008 award, the SLA obligates Canada to perform a monthly calculation to determine the proper volume restrictions for those regions as of January 1, 2007.<sup>2</sup> Award, p. 97, ¶ I.2. It is undisputed that Canada did not commence performance of an adjustment to this monthly calculation until July 1, 2007. Accordingly, Canada breached the SLA and is responsible for the consequences of that breach. See Award, p. 97, ¶ I.3 ("[I]nsofar as ... Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.")*

3. *This statement of the case addresses the specific consequences of Canada's breach, first, by establishing*

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<sup>1</sup> A fuller explanation of this dispute's background appears in the United States' statement of the case, filed on November 30, 2007. We include in this statement of the case only those facts relevant to this phase of proceedings concerning remedy.

<sup>2</sup> The United States contended during the liability phase that Canada is required to apply this adjustment to regions choosing to be subject to only export measures. In its award, the Tribunal determined that the Agreement does not so require. Award, p. 97, ¶ I.1.

*the harm caused by the breach, and second, by proposing appropriate remedies to compensate the United States for the harm caused by the breach should Canada fail to cure the breach within the reasonable period of time established by the Tribunal.*

4. *Canada's breach distorted the volume limitations to which Canada agreed to adhere in the SLA. This, in turn, resulted in overshipments of over 180 million board feet of softwood lumber into the United States during the first six months of 2007. These overshipments harmed the United States because they thwarted the Agreement's limitations upon the volume of lumber that Canada would export to the United States – limitations that the Tribunal has found represent an economic effect of the SLA. The SLA requires Canada to remedy the breach.*
5. *Given current market conditions, certain remedies are more effective than others, but, at a minimum, any remedy should encourage Canada to limit its exports of lumber to the United States with the ultimate goal of placing the United States in the position it would have occupied absent the breach. With this in mind, the United States submits that the most efficient and appropriate remedy would be to assess additional export charges upon "breaching regions" (that chose to be subject to low export charges combined with volume restraints) in the amount that those regions would have paid had they chosen to be subject to higher export charges and no volume restraints. If the Tribunal determines that this proposal does not remedy the breach, the United States submits three alternative proposals to remedy the breach."*

## **C.II. Respondent's Perspective**

3. The following quotation from Respondent's Statement of Defence on Remedy of June 30, 2008 summarises the main aspects of Respondent's perspective of the dispute (R I, §§ 1-5):
  - "1. *This second phase of the arbitration is to determine what measures, if any, are the appropriate consequences under the SLA, in light of the Tribunal's Award on Liability of*

March 3, 2008.<sup>3</sup> In the liability phase, the United States challenged Canada's compliance with the SLA 2006 on the grounds that Canada (1) did not apply the adjustment factor in Annex 7D of the SLA with respect to Option A regions (a practice that was and is ongoing); and (2) did not apply the adjustment to Option B regions (a practice limited to the period January 1-June 30, 2007, after which Canada did apply the adjustment to Option B regions). In its Award on Liability the Tribunal determined that Canada had not breached the SLA with respect to the first U.S. claim, in that Canada had no obligation under the SLA at any time to apply the adjustment factor to Option A regions. However, the Tribunal determined that Canada had breached the SLA 2006 by failing to adjust "Expected United States Consumption" ("EUSC") with respect to regions operating under Option B during the period January 1, 2007 to June 30, 2007.

2. It is common ground that the Tribunal's powers upon finding a breach of the SLA are set out in Article XIV, paragraph 22 which 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 to compensate for the breach if that Party fails to cure the breach within the reasonable period of time.<sup>4</sup>*

3. *In its Statement of Case, the United States asserts that Canada has not cured the breach,<sup>5</sup> but the United States is silent as to what the United States would consider "cure the breach" to be. Instead, the United States seizes a single line from the Tribunal's Award on Liability to assert that the Tribunal has already decided that Canada bears additional responsibility for the consequences of its*

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<sup>3</sup> *The United States of America v. Canada, Case No. 7941, LCIA, Award on Liability, Mar. 3, 2008 ("Award on Liability").*

<sup>4</sup> *SLA 2006 Art. XIV(22) (Ex. RR-1). See also Art. XIV(19), which provides that Art. XIV provides the exclusive means to enforce the obligations of the SLA.*

<sup>5</sup> *Stmt. of Case ¶ 30.*

*breach beyond its action in applying the adjustment in Annex 7D since July 1, 2007. Seeking to avoid the central issue as to what “cure the breach” means, the United States argues that the only issue before the Tribunal is to determine “appropriate adjustments to the export measures to compensate for the breach” under paragraph 22(b).<sup>6</sup> The United States then proposes four alternative adjustments, all premised on the assumptions that: (1) Canada has not cured the breach in this dispute, and (2) compensatory adjustments are authorized and appropriate to compensate for effects or consequences of breaches occurring prior to the end of the reasonable period of time for cure.<sup>7</sup>*

4. *Both U.S. assumptions are false. The SLA is a “prospective” remedy dispute settlement system like that of the World Trade Organization (“WTO”), Chapter 20 of the North American Free Trade Agreement (“NAFTA”) and other similar intergovernmental trade agreements. Prospective systems are those that impose no penalty and require no compensation for infringement of obligations that occur prior to a dispute settlement decision, plus some reasonable period of time to comply with a panel’s ruling. Retaliatory or compensatory measures imposed under prospective systems are authorized to compensate for the continuation of a breach past the reasonable period of time and until such time as the breaching measures are terminated or brought into compliance with the obligations of the agreement. Unlike most commercial arbitrations and investor-state arbitrations under bilateral investment treaties or Chapter 11 of the NAFTA, there are no “retroactive” or “retrospective” remedies intended to compensate for past breaches.*
  
5. *Canada has cured the breach within the meaning of the SLA by applying the adjustment provided in Annex 7D since July 1, 2007 and therefore no compensatory adjustments are required or authorized by the SLA.<sup>8</sup> Like its counterparts in other international trade agreements between sovereigns, Article XIV of the SLA provides for countermeasures only if the breach is not cured by the end of the reasonable period of time identified in paragraph 22(a), and compensatory adjustments are not authorized for prior breaches under the SLA unless specifically so stated. There is no need for the Tribunal to consider the*

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<sup>6</sup> *Stmt. of Case ¶ 26.*

<sup>7</sup> *Stmt. of Case ¶¶ 48-64.*

<sup>8</sup> *SLA 2006 Art. XIV(22)(b) (Ex. RR-1).*

*alternative theories and rationales presented by the United States to justify the imposition of severely intensified export restrictions to compensate for a breach long cured.”*



## **D. Procedural History**

### **D.I. Procedure Leading to Award on Liability**

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

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

11. On October 9, 2007, a proposed timetable was sent to the Parties by the Chairman on behalf of the Tribunal, again giving them the opportunity to submit comments. On the same day, the Claimant proposed certain amendments to the proposed timetables as well as a bifurcation of the question of liability from the question of remedy. The Respondent by letter and email of October 10, 2007, suggested amendments to the proposed timetables and concurred to a bifurcation of the proceedings. Both Parties agreed that neither Party would submit witness or expert testimony for the first hearing.
12. On October 13, 2007, the Tribunal issued a new Draft Procedural Order No. 1, taking into account the comments received from the Parties by their letters of October 9 and 10, 2007.
13. On October 15, 2007, Procedural Order No. 1 (PO I) was issued by the Chairman on behalf of the Tribunal, confirming the agreed timetable and taking into account the results of the preceding discussions.
14. By email of October 28, 2007, PO I was resent to the Parties due to clerical and conforming corrections as revised, containing, however, no changes in substance:

*“1. Final Order*

*This Order takes into account the comments received from the Parties by their letters of October 9 and 10, 2007, with regard to the Draft Order communicated by the Tribunal to the Parties.*

*2. Applicable Procedural Rules*

*2.1. Pursuant to and subject to Art. XIV of the Softwood Lumber Agreement (SLA) the proceedings shall be conducted in accordance with the LCIA Arbitration Rules effective January 1, 1998.*

[N.b. These LCIA Rules were in effect on the date the SLA was signed, within the meaning of Article XIV(6) SLA cited in Part E below]

*2.2. For issues not dealt with in the SLA, the LCIA Rules, or agreement by the Parties, the Tribunal shall conduct the arbitration in such a manner as it*

*considers appropriate taking into account any views expressed by the Parties.*

2. *Communications*

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

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

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

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

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

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

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

2.6. *To facilitate that parts can be taken out and copies can be made, submissions of all documents shall be submitted separated from Memorials, unbound in binders and preceded by a list of such documents, consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant; R-1, R-2 etc. for Respondents) and with dividers between the documents. As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word to facilitate word processing and citations). In this context it is noted that the Parties have agreed not to submit witness or expert testimony during the first (liability) phase of this procedure.*

3. *Timetable for the Liability Phase*

*As indicated by their letters of October 9 and 10, 2007, the Parties have agreed on a bifurcated procedure to the effect that a first phase shall be restricted to the issue of liability (the liability phase) and, should liability be found by the Tribunal to exist, a second phase on remedies (the remedies phase). The Parties have also agreed that, in this first phase, neither of them shall submit statements of witnesses or experts or any requests for document disclosure.*

- 3.1. *By **October 19, 2007**, Claimant shall file its Statement of Case (LCIA Rule 15.2) together with all evidence (documents, law texts, authorities) it wishes to rely on.*
- 3.2. *By **November 19, 2007**, Respondent shall file its Statement of Defence (LCIA Rule 15.3) together with all evidence (documents, law texts, authorities) it wishes to rely on.*
- 3.3. *By **November 28, 2007**, Claimant shall file its Rebuttal Memorial with any further evidence, but only in rebuttal to Respondent's Statement of Defence or regarding new evidence.*
- 3.4. *By **December 6, 2007**, Respondent shall file its Rebuttal Memorial with any further evidence, but only in rebuttal to Claimant's Rebuttal Memorial or regarding new evidence.*
- 3.5. *Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.*
- 3.6. ***On December 12, 2007**, one day Hearing on Liability in New York. As agreed between the Parties, the Hearing shall consist of oral argument only, with no witness or expert testimony.*
- 3.7. *Parties shall not submit Post-Hearing Briefs unless agreed otherwise by the Parties or considered necessary by the Tribunal.*
- 3.8. *As a precaution, the period from **May 5 to 7, 2008**, shall be blocked by the Parties and the Tribunal in case a Hearing on the Remedies Phase becomes*

*necessary and no other date is agreed between the Parties or set by the Tribunal after consultation with the Parties.*

4. *Evidence and Confidentiality*

*The following paragraphs of Art. XIV SLA are recalled:*

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

5. *Documentary Evidence*

- 5.1. *All documents (including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.*
- 5.2. *All documents shall be submitted in the form established above in the section on communications.*

- 5.3. *New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.*
- 5.4. *Documents in a language other than English shall be accompanied by a translation into English.*
6. *Hearing on Liability in New York on December 12, 2007.*
  - 6.1. *The Parties shall try to agree regarding the location and other logistics of the Hearing taking into account the details of the Hearing mentioned in the following sections. **By November 26, 2007**, the Parties shall inform the Tribunal of the agreement reached and of the arrangements suggested. Insofar as the Parties have not agreed or prefer not to make the arrangements themselves, the Tribunal shall decide and the LCIA will make the necessary arrangements.*
  - 6.2. *It is recalled that Art. XIV.17 SLA provides as follows:*

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

*Changes to that principle may be applied for at the latest by **November 26, 2007.***

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

1. *Short Introduction by Chairman of Tribunal.*
2. *Opening Statement by Claimant of up to 90 minutes.*
3. *Opening Statement by Respondent of up to 90 minutes.*
4. *Questions by the Tribunal, and suggestions regarding particular issues to be addressed in more detail in Parties' 2<sup>nd</sup> Round Presentations.*
5. *2<sup>nd</sup> Round Presentation by Claimant of up to 1 hour.*
6. *2<sup>nd</sup> Round Presentation by Respondent of up to 1 hour.*
7. *Final questions by the Tribunal.*
8. *Discussion of any issues of the further procedure.*

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

7. *Extensions of Deadlines and Other Procedural Decisions*

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

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

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

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

15. On October 19, 2007, Claimant submitted its Statement of the Case on Liability according to Article 15(2) of the LCIA Rules including copies of the documents relied upon in the Memorial, conforming with § 3.1. of PO I.
16. On November 19, 2007, Respondent filed its Statement of Defence on Liability according to Article 15(3) of the LCIA Rules complying with § 3.2. of PO I. Attached were copies of the documents relied upon in the Memorial.
17. By joint letter of November 27, 2007, the Parties notified the Tribunal on the agreement reached regarding the logistics of the hearing on liability to be held on December 12, 2007 in New York, NY, United States of America.
18. By November 28, 2007, Claimant filed its Rebuttal Memorial on Liability according to § 3.3. of Procedural Order No. 1 (PO I) together with copies of the documents relied upon in the Memorial.
19. On November 30, 2007, Claimant submitted its Corrected Statement of the Case on Liability including a corrected version of its appendix of authorities and its appendix of exhibits.
20. By email of December 1, 2007, the Tribunal agreed to the logistics of the hearing on liability to be held on December 12, 2007, as stated in the joint letter of November 27, 2007 of the Parties. In view of the limited time available during the Hearing, the Chairman further invited the Parties on behalf of the Tribunal to provide for Hearing Binders at the Hearing, containing all documents to which the Parties intended to refer in their oral presentations.
21. By joint letter of December 4, 2007, the Parties notified the Tribunal on the respective points of contact for the Tribunal regarding the logistics of the hearing.
22. By December 6, 2007, Respondent submitted its Rebuttal Memorial on Liability according to § 3.4. of Procedural Order No. 1 (PO I). Attached were copies of the documents relied upon in the Memorial.
23. By joint letter of December 7, 2007, the Tribunal was notified that the Parties had made the necessary arrangements regarding



the logistics and especially the simultaneous transcription of the Hearing by a Court Reporter.

24. By their letters of December 7, 2007, and in addition, by Claimant's email of December 11, 2007, the Parties identified the persons attending the Hearing on Liability from their respective sides.
25. On December 12, 2007, the Hearing on Liability was held in New York City, NY, USA. In addition to the members of the Tribunal, the Secretary to the Tribunal, Yun-I Kim, and the stenographer (David A. Kasdan), it was attended (as recorded in the transcript of the Hearing and corrected by the Parties in their communications of January 11 and 15, 2008) as follows:

*“On behalf of the Claimant*

*MS. PATRICIA M. McCARTHY  
MR. REGINALD T. BLADES, JR.  
Assistant Directors (Advocates)  
MS. CLAUDIA BURKE  
MS. MAAME A.F. EWUSI-MENSAH  
MR. GREGG SCHWIND  
MR. STEPHEN C. TOSINI  
Trial Attorneys  
United States Department of Justice  
Commercial Litigation Branch  
Civil Division  
1100 L Street, N.W.  
Washington, D.C. 20530  
+1 (202) 514-7969*

*On behalf of the Respondent:*

*MR. GUILLERMO AGUILAR-ALVAREZ  
Weil, Gotshal & Manges, L.L.P.  
767 Fifth Avenue  
New York, New York 10153  
+1 (212) 310-8981*

*MS. JOANNE E. OSENDARP  
MR. CHARLES E. ROH, JR.  
Weil, Gotshal & Manges, L.L.P.  
1300 Eye Street, N.W.  
Suite 900  
Washington, D.C. 20005  
+1 (202) 682-7193*

*MS. MEG KINNEAR  
Senior General Counsel & Director General  
Trade Law Bureau  
Dept. of Foreign Affairs and International Trade  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
+1 (613) 943-2803”*

*On behalf of the United States Department of State:  
Mr. Timothy J. Feighery  
Ms. Selene Ko  
Ms. Heather Van Slooten Walsh*

*On behalf of the Office of the U.S. Trade Representative:  
Mr. John Melle  
Mr. J. Daniel Stirk*

*On behalf of the United States Department of Commerce:  
Mr. Quentin Baird  
Mr. Scott McBride  
Mr. Robert Copyak*

*On behalf of the United States Department of Justice:  
Ms. Tiffany Wooten*

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

*On behalf of the Government of Canada:  
Mr. John Ryan  
Ms. Alejandra Montenegro Almonte  
Ms. Maria Isabel Guerrero  
Mr. Santiago Montt  
Ms. Anupama Chettri  
Weil, Gotshal & Manges LLP*

*On behalf of the Canadian Department of Foreign Affairs and  
International Trade, Trade Law Bureau:  
Mr. Hugh Cheetham  
Mr. Michael Solursh*

*On behalf of the Canadian Department of Foreign Affairs and  
International Trade, Softwood Lumber Division:  
Mr. Jean-Marc Gionet  
Ms. Allison Young*

*Also present was Dr. David Reishus, Lexecon.”*

26. The Meeting followed the Agenda as provided in Section 6.6. of Procedural Order No. 1 (PO I) cited above.
27. The details of the Hearing of December 12, 2007, were provided in the Transcript delivered after the Hearing in electronic and paper format.
28. Since the final discussion at the end of the Hearing contains a number of agreements and decisions, the following passage is set out from the transcript of the Hearing (Transcript of December 12, 2007, p. 121-125):

*“CHAIRMAN BÖCKSTIEGEL: Well, we come to the last part of the Hearing I suppose. First of all, ... the good news is we don't have any further questions. We think the Parties have really exhausted all aspects of the case, both in writing and orally today, and there is certainly no need [for further questions]. It doesn't mean that we are clear on everything yet, but ... we don't need any further input from the Parties. That also means that we would close the file on this phase of the procedure now, and the only caveat would be that if in our deliberations we turn out to still have a question or so, then we would feel free to go back to the Parties, but I would consider that not very probable. So, the file basically is now closed.*

*In view of a certain situation in English law which is relevant for the seat of arbitration, as you know, we have taken note of Article XIV(21), if you just want to take a look of that, of the SLA which says the Tribunal may not award costs, and then it goes on. We are told by our QC on this side of the bench that we would need confirmation of the Parties that they still maintain this decision. Would that be the case?*

*MS. McCARTHY: Yes, yes.*

*MR. AGUILAR-ALVAREZ: Yes. I'm a little bit puzzled that the English arbitration law would apply to a trade dispute that is not commercial.*

*CHAIRMAN BÖCKSTIEGEL: The seat of arbitration is London, and so we want to be on the safe side.*

*MR. AGUILAR-ALVAREZ: Okay. We do not propose to depart from that ruling.*

*CHAIRMAN BÖCKSTIEGEL: All right. Then the usual question has ultimately to be posed: Are there any objections by the Parties as to how the Tribunal has conducted the procedure up to now?*

*MS. McCARTHY: No, sir.*

*MR. AGUILAR-ALVAREZ: None other than to express our thanks to the Tribunal.*

*CHAIRMAN BÖCKSTIEGEL: Thank you very much, indeed. Now, as I think--no, I don't think I indicated that before. We have looked at our Timetable and what is before us is the task*

*now to come to a decision, and Christmas is coming soon, as we all know, and in between we also have to do a few other things, but we feel that we would probably be in a position to come up with a decision by the end of February. Anything before that would be unrealistic. I don't have to tell you that the case is complex, and we want to be on the safe side. So, that is our--not a promise, but that is our definite intention.*

*Now, we are talking about the further procedure, which is also the last point on the agenda, as we know. If we--and, of course, nobody knows in this room, including us, how we will come out. It's too complex a case as to have any speculation in that regard. Now, if we find there is no breach, that is the end of the case. That, I think, is clear.*

*On the other hand, if we do find a breach on one of the two claims, the question is how do we go on. May I refer you to Article XIV(22), which provides in a mandatory way, it looks, the Tribunal shall [take] certain actions and consequences. Before we go into those details, our suggestion would be we hope that the Parties would agree because we think that is the most efficient and fairest way to deal with this matter would be that if we do come out in finding a breach that we would address the Parties at that stage and ask them for comments on how to proceed, also taking into account paragraph 22. You feel that is better than to discuss that matter now, we don't know, first of all, we don't know whether it will happen. Secondly, we don't know how the decision would be.*

*And on the other hand, we would need the Agreement of the Parties for that because the way paragraph 22 is phrased, it looks mandatory for the Tribunal, so that is our suggestion. Would that be agreeable to the Claimant?*

*MS. McCARTHY: Yes.*

*MR. BLADES: Yes, sir.*

*MR. AGUILAR-ALVAREZ: Yes, it would, Mr. Chairman.*

*CHAIRMAN BÖCKSTIEGEL: Thank you very much. So, we will have that on the record.*

*Well, this is all I think we have to do as far as housekeeping is concerned. Let me use this opportunity, as I did already, I think, in my short introductory remarks this morning to thank the Parties and the counsel and their teams for the most efficient preparation of this Hearing in extremely short time for such a complex case, to put a burden on all of you and on us, but of course you chose to accept the burden, so, we don't feel bad about it. And as you may recall, we had suggested today only to be a procedural meeting, but I think it was a good solution that you agreed to proceed that way. That obviously advanced the case much further than one had anticipated, and we thank you very much for these efforts, and you have really helped us very much in finding our task now before us.*

*Let me also thank those on the team, and they were very important, just looking at this room, to dealing with the logistics of this. This has been also an effort in logistics in many ways, and I think it worked very well, and I think somewhere the SLA said the Tribunal should take care of that, and you kindly took that burden away from us, and you obviously could do it much better, and we were also aware that just before Christmas, finding a place in New York to do this sort of thing is also not one of the easiest tasks, but it worked out very well.*

*Let me also again thank our Court Reporter as I have done quite a few occasions in the past. He is really very supportive. And even though Mr. Lee [the Hotel Manager] is not here, let me also put on record the gratitude that we have toward the hotel staff and Mr. Lee for doing his part of the logistics as well.*

*Now, have I forgotten anything more or less important? No? Well, then, thank you very much again, and have a good journey home.”*

29. On March 3, 2008, the Tribunal issued the Award on Liability resulting in the following Decisions:

- “1. The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA’s case to the contrary is dismissed.*
- 2. The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore Canada’s case to the contrary as to interpretation is dismissed.*
- 3. Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.*
- 4. As the Parties agreed at the end of the Hearing in New York on December 12, 2007 (Tr. 123/4), rather than the Tribunal deciding now on the specific consequences of any breach by Canada in accordance with paragraphs 22 et seq. of Art. XIV SLA, the Parties are invited to submit, within one month of the date of this Award, comments or*

*(if possible) an agreement on how to proceed in this regard.*

5. *According to paragraph 21 of Art. XIV SLA, the Tribunal does not award costs and each Party shall bear its own costs to date, including costs of legal representation and travel.”*

## **D.II. Procedure Leading to Award on Remedy**

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

*“Procedural Order (PO) No. 2  
Regarding the remedies phase of the proceeding  
May 2, 2008*

*considering:*

- (A) the October 28, 2007 Revision of Procedural Order No. 1 (PO-1);*
- (B) the Tribunal's Award on Liability of March 3, 2008;*
- (C) the Parties' April 3, 2008 responses to the Tribunal's Award;*
- (D) the Parties April 11, 2008 submissions;*
- (E) later submissions by the Parties.*

*The Arbitral Tribunal hereby decides as follows:*

*1. Revised Procedural Order No. 1 (PO-1)*

*The provisions of Revised PO-1 relating to the organization of the proceedings shall apply to organization of the proceedings under this Procedural Order No. 2 (PO-2), unless otherwise provided herein.*

*2. Calendar*

*As indicated in PO-1, the Parties agreed on a bifurcated procedure. This PO-2 sets out the schedule for the remedies phase of the proceeding as suggested by the Parties in their joint letter of April 22, 2008, and completed by the Tribunal.*

- 2.1. By **May 29, 2008**, Claimant shall file its Statement of Case with all evidence (documents, law texts, authorities, witness statements, expert reports) on which it intends to rely during the remedies phase.*
- 2.2. By **June 30, 2008**, Respondent shall file its Statement of Defence with all evidence (documents, law texts, authorities, witness statements, expert reports) on which it intends to rely during the remedies phase.*
- 2.3. By **July 21, 2008**, Claimant shall file its Reply Memorial with any further evidence, but only in rebuttal to Respondent's Statement of Defence or the accompanying evidence.*
- 2.4. By **August 11, 2008**, Respondent shall file its Reply Memorial with any further evidence, but only in rebuttal to Claimant's Reply Memorial or the accompanying evidence.*
- 2.5. By **September 1, 2008**, each Party shall submit a notification of the witnesses and experts presented by itself and by the other Party it wishes to examine at the Final Hearing.*

- 2.6. *On **September 5, 2008**, if considered necessary by the Tribunal, after consultation with the Parties, the Tribunal or its Chairman on behalf of the Tribunal shall hold a pre-Hearing telephonic conference to resolve any outstanding areas of disagreement.*
- 2.7. *By **September 13, 2008**, the Tribunal issues a Procedural Order regarding further details of the Final Hearing.*
- 2.8. *From **September 22 to 24, 2008**, a Final Hearing shall be held in New York City.*

3. *Written Submissions*

- 3.1 *No submissions shall be made other than those set forth in this Procedural Order unless ordered or approved by the Arbitral Tribunal.*
- 3.2. *Particular attention is recalled to section 2 of PO-1 including its section 2.6. in a slightly adapted version for this procedure on remedies:*

2. *Communications*

- 2.1. *The Tribunal shall address communications to the addresses indicated by the Parties as their representatives and counsel[.]*
- 2.2. *Counsel of the Parties shall address communications directly to each member of the Tribunal (with a copy to representative and counsel for the other Party and to the LCIA) by e-mail, to allow direct access during travel, and confirmed either by courier or by fax (but fax communications shall not exceed 15 pages).*
- 2.3. *Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.*
- 2.4. *Longer submissions shall be preceded by a Table of Contents.*



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

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

*To facilitate work for all concerned in this 2<sup>nd</sup> phase of the procedure on remedies, rather than referring to the documents submitted in the earlier phase on liability, all documents the Parties wish to rely on in this procedure on remedies shall be submitted in new ring binders starting with a new numbering (CR-1, CR-2, etc. for Claimant and RR-1, RR-2, etc. for Respondent).*

3.3. *The use of demonstrative exhibits (e.g., charts, tabulations, or computer presentations) is allowed at the hearing, provided that no new evidence is contained therein. Each Party shall provide the other Party with an electronic and hard copy of any demonstrative exhibit that it intends to use during the Final Hearing at least two business days before commencement of the Final Hearing.*

#### 4. *Documentary Evidence*

4.1 *All documentary evidence shall be submitted in the form provided above in subsection 2.6. of section 3.2.*

- 4.2 *No new evidence may be submitted after the dates set out in the above calendar.*
- 4.3 *Documentary evidence of a Party that is not filed by the dates set out in the calendar shall not be admissible absent agreement of the other Party or a showing of reasonable cause for the omission, as determined by the Arbitral Tribunal, or unless produced upon order of the Arbitral Tribunal.*
- 4.4 *Copies of documents submitted by a Party shall have the same evidentiary weight as originals, unless the opposing Party makes a challenge to authenticity promptly upon learning of the grounds for challenge.*

5. *Evidence of Witnesses and Expert Witnesses*

- 5.1 *On the date mentioned in the above calendar, each Party shall file the Witness Statements and Expert Reports on which it seeks to rely.*
- 5.2 *On the date mentioned in the calendar, each Party shall file Witness Statements and Expert Reports on which it seeks to rely in response to issues or allegations raised in the last written submission of the other Party.*
- 5.3 *Testimony of witnesses or experts for whom a Witness Statement or an Expert Report is not submitted by the dates set out in the calendar shall not be admissible.*
- 5.4 *Each Witness Statement or Report of an Expert Witness shall:*
  - (a) *set out the name and address of the witness and a description of his or her qualifications, including his or her competence to testify;*
  - (b) *state whether the witness is a fact or an expert witness;*
  - (c) *in the case of an expert witness, contain a description of the method, evidence and information used in arriving at the conclusions;*

- (d) *in the case of a fact witness, contain a full and detailed description of the source of the witness's information, sufficient to serve as that witness's evidence in the matter in dispute;*
- (e) *contain the evidence that the Party presents of that fact witness or expert witness in the form of a narrative; and*
- (f) *be signed by the fact witness or expert witness, with an indication of the date and place of signature.*

5.5 *The Witness Statements and Expert Reports shall come in lieu of direct examination of fact and expert witnesses at the hearing. The Party calling a fact witness or an expert witness will be deemed to have submitted that witness's direct testimony in his or her Statement or Report. Thus, absent leave of the Tribunal for reasonable cause, the direct examination of a fact witness or an expert witness will be limited to confirming his or her written testimony and comments on any new developments that have occurred after the Statement or Report was made.*

5.6 *On the date mentioned in the above calendar, each Party shall provide the opposing Party, with a copy to each member of the Arbitral Tribunal, the administrative Secretary, and the LCIA: (i) the names of any fact or expert witnesses whose Statement or Report has been submitted by the opposing Party, with the request that they be available for examination at the hearing; and (ii) as the case may be, a request for the Arbitral Tribunal to permit the appearance at the hearing of fact witnesses whose Witness Statements or expert witnesses whose Reports have been submitted by that Party. The Arbitral Tribunal shall rule on any outstanding issue in connection with the appearance of fact and expert witnesses in its Procedural Order regarding further details of the Hearing by the date set out in the calendar.*

5.7 *Failure to make a fact witness or expert witness available for cross-examination without good cause shall result in that witness's Witness Statement or Expert Report being disregarded by the Tribunal.*

5.8 *Subject to limited direct examination regarding any new developments after the Statement or Report was made, witnesses giving oral evidence shall first be asked to confirm their Statement or Report. Each fact witness and expert witness shall then be examined by counsel for the opposing Party (“cross-examination”) and subsequently by counsel for the Party offering the witness, with respect to matters that arose during cross-examination (“re-direct examination”). The Arbitral Tribunal may pose questions during or after the examination of any fact witness or expert witness.*

5.9 *The Arbitral Tribunal shall at all times have control over oral proceedings, including the right to limit or deny the right of a Party to examine a fact or expert witness when it appears to the Arbitral Tribunal that such examination is not likely to serve any further relevant purpose.*

5.10 *Fact and expert witnesses shall be heard on affirmation.*

## 6. *Status Conference*

*On the date mentioned in the above calendar, if considered necessary by the Tribunal after consultation with the Parties, the Arbitral Tribunal and the Parties will confer by telephone regarding any outstanding issues with respect to the organization of the hearing, or other procedural matters.*

## 7. *Hearing*

7.1 *On the date mentioned in the calendar, a hearing will be held in New York City, at a venue to be decided by the Arbitral Tribunal in consultation with the Parties. Hearing logistics shall be handled by the LCIA, in consultation with the Parties.*

7.2 *Unless otherwise determined by the Tribunal, the hearing will commence at 9:30 a.m. and conclude at 5:30 p.m., with a two hour break for lunch. On the last day, this schedule may have to be modified since members of the Tribunal may have to catch a plane that evening.*

7.3 *The **Agenda** of the hearing will be as follows:*

- (a) Introduction by the Chairman of the Tribunal*
- (b) Opening statement by Claimant;*
- (c) Opening statement by Respondent;*
- (d) Examination of expert and fact witnesses;*
- (e) Closing Statement by Claimant;*
- (f) Closing Statement by Respondent.*

7.4 *The Arbitral Tribunal shall provide the Parties with equal time periods during the hearing.*

7.5 *A Live Note transcript of the hearing in English shall be prepared each day, with the cost to be paid as set out in Article XIV(21) of the SLA.*

#### 8. *Post-hearing Submissions*

*If agreed by the Parties or requested by the Arbitral Tribunal, the Parties shall file post-hearing submissions.*

#### 9. *Language*

9.1 *As provided on its signature page, the SLA was executed “in duplicate . . . in the English and French languages, each version being equally authentic.”*

9.2 *Documentary evidence and legal authorities may be submitted in their original language. The Party wishing to rely on documentary evidence or legal authorities in a language other than English shall provide an English translation of the relevant document.*

9.3 *The hearing shall be conducted in English. Witnesses may testify in either English or French. The testimony of witnesses testifying in French shall be simultaneously interpreted into English. The cost of simultaneous interpretation shall be paid as set out in Article XIV(21) of the SLA.*

#### 10. *Confidentiality*

*The Parties should seek to agree promptly on rules required for the treatment of information or documents designated as confidential, or submissions containing information or documents designated as confidential.”*

37. By joint letter of May 21, 2008, the Parties agreed on the logistics of the Hearing on Remedy to be held in New York City from September 22-24, 2008.

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

*"1. Considering:*

*the recent communications between the Parties and the Tribunal and the resulting agreement that the pre-hearing telephone conference provided for provisionally in § 2.6 of PO-2 is not necessary, this PO was first sent as a draft to the Parties for any comments they may have and is thereafter issued in its final form as follows.*

**2. Earlier Rulings**

- 2.1. *The Parties are invited to take into account all **earlier rulings** in Orders of the Tribunal and letters of its Chairman, unless they have been changed by later rulings or rulings in this Order.*
- 2.2. *The Tribunal particularly recalls **from Procedural Order No. 2** dated May 2, 2008, the following Sections:*

**5. Evidence of Witnesses and Expert Witnesses**

- 5.5. *The Witness Statements and Expert Reports shall come in lieu of direct examination of fact and expert witnesses at the hearing. The Party calling a fact witness or an expert witness will be deemed to have submitted that witness's direct testimony in his or her Statement or Report. Thus, absent leave of the Tribunal for reasonable cause, the direct examination of a fact witness or an expert witness will be limited to confirming his or her written testimony and comments on any new developments that have occurred after the Statement or Report was made.*
- 5.8. *Subject to limited direct examination regarding any new developments after the Statement or Report was made, witnesses giving oral evidence shall first be asked to confirm their Statement or Report. Each fact witness and expert witness shall then be examined by counsel for the opposing Party ("cross-examination") and subsequently by counsel for the Party offering the witness, with respect to matters that arose during cross-examination ("re-direct examination"). The Subject to limited direct examination regarding any new developments after the Statement or Report was made, witnesses giving oral evidence shall first be asked to confirm their Statement or Report. The Arbitral Tribunal may pose questions during or after the examination of any fact witness or expert witness.*

5.9. *The Arbitral Tribunal shall at all times have control over oral proceedings, including the right to limit or deny the right of a Party to examine a fact or expert witness when it appears to the Arbitral Tribunal that such examination is not likely to serve any further relevant purpose.*

5.10. *Fact and expert witnesses shall be heard on affirmation.*

## **7. Hearing**

7.2. *Unless otherwise determined by the Tribunal, the hearing will commence at 9:30 a.m. and conclude at 5:30 p.m., with a two hour break for lunch. On the last day, this schedule may have to be modified since members of the Tribunal may have to catch a plane that evening.*

7.3. *The **Agenda** of the hearing will be as follows:*

- (a) Introduction by the Chairman of the Tribunal*
- (b) Opening statement by Claimant;*
- (c) Opening statement by Respondent;*
- (d) Examination of expert and fact witnesses;*
- (e) Closing Statement by Claimant;*
- (f) Closing Statement by Respondent.*

***In view of the recent communications between the Parties and the Tribunal, this Agenda is established in more detail later in this Order.***

7.4. *The Arbitral Tribunal shall provide the Parties with equal time periods during the hearing.*

7.5. *A Live Note transcript of the hearing in English shall be prepared each day, with the cost to be paid as set out in Article XIV(21) of the SLA.*

## **8. Post-hearing Submissions**

*If agreed by the Parties or requested by the Arbitral Tribunal, the Parties shall file post-hearing submissions.*

## **3. Further Rulings**

3.1. *In addition to and in implementation of these earlier rulings, the following is established:*



#### **4. Preparation of the Hearing**

- 4.1. **By September 15, 2008**, the Parties shall inform the Tribunal of the names and functions of the persons (including witnesses and experts) attending the Hearing from their respective sides.
- 4.2. **Also by September 15, 2008**, Claimant is invited to submit, if that is possible in such a limited period, a short further Report by its **expert Dr. Neuberger**, but only in rebuttal of the 2nd Kalt/Reisman Report submitted by Respondent. This would have the advantage of facilitating the evaluation of any such rebuttal presentation in substance and in advance of the Hearing rather than only after the direct examination of Dr. Neuberger during the Hearing. If such a submission is not made in advance, during the Hearing Respondent's expert Prof. Kalt will be given a 4 hour period or will only be heard the next day in order to enable him to prepare his reply to the rebuttal presentation of Dr. Neuberger.
- 4.2. The Tribunal has taken note of the many and voluminous exhibits submitted by the Parties together with their briefs. As only a limited number of these exhibits will be used in the time available at the Hearing, to avoid that all exhibits have to be transported to New York, the members of the Tribunal intend to bring to the Hearing what they consider the most relevant documents, but, in order to facilitate and speed up references to documents during the hearing, the Parties shall prepare and provide at the beginning of the Hearing:
- \* For the other Party and each member and the Secretary of the Tribunal "**Hearing Binders**" containing copies of those exhibits (including expert reports) or parts of exhibits to which they intend to refer in their oral presentations and expert examination at the Hearing,
  - \* one full set of all documents submitted in this procedure.

#### **5. Time and Place of the Hearing**

- 5.1. The Hearing shall be held at the New York Palace Hotel as agreed in more detail in earlier communications.

- 5.2. *As also agreed, the dates shall be from September 22 (starting at 9:30am) to 24, 2008.*

**6. *Final Agenda of Hearing***

*Taking into account the recent communications between the Parties and the Tribunal, the following Agenda is established for the Hearing:*

1. *Introduction by the Chairman of the Tribunal.*
2. *Opening Statements by the Parties of not more than 75 minutes each for the Claimant and the Respondent.*
3. *Examination of Dr. Neuberger, expert presented by Claimant, in the following format:*
  - a) *Affirmation of expert to tell the truth.*
  - b) *Short introduction by Claimant (This may include a short direct examination on new developments, if any, after the last written statement of the expert dated September 15, 2008.).*
  - c) *Cross examination by Respondent.*
  - d) *Re-direct examination by Claimant, but only on issues raised in cross-examination.*
  - e) *Remaining questions by members of the Tribunal, but they may raise questions at any time.*
4. *Examination of Prof. Kalt, expert presented by Respondent, in the same format vice versa as under a) to e) above. Respondent's direct examination may include examination of Prof. Kalt regarding the last report submitted by Dr. Neuberger on September 15, 2008. The Tribunal has taken note of Respondent's suggestion to finish Prof. Kalt's examination on Tuesday September 23, and of Claimant's expectation that this may be achieved. However, as a precaution, Respondent is invited to assure Prof. Kalt's availability also on Wednesday morning, if required.*
5. *In view of additional Report by Dr. Neuberger of September 15 and the oral examination of Prof. Kalt on this Report, the Tribunal does not consider it necessary that the two experts be recalled after their primary examination. However, if a Party insists on*

*such a recall, the experts may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced at the time of his primary examination in time to assure the availability of the expert during the time of the Hearing.*

6. *Remaining questions by the members of the Tribunal, if any.*
7. *Closing Statement by Claimant of not more than 60 minutes.*
8. *Closing Statement by Respondent of not more than 60 minutes.*
9. *Discussion regarding possible Post-Hearing Briefs and other remaining procedural matters.*

**7. Other matters**

- 7.1. *Unless otherwise agreed between the Parties or ruled by the Tribunal, the experts may be present in the Hearing room during the testimony of the other expert.*
- 7.2. *According to Section 7.4. of PO No. 2 where the agreement is recorded for the Tribunal to establish **equal maximum time periods** for the examination by the Parties, and taking into account the Calculation of Hearing time attached to this Order, the total maximum time available for the Parties (including their introductory statements) for the Hearing shall be as follows:*

*5 hours for Claimant  
5 hours for Respondent.*

*Except for their Opening and Closing Statements under Agenda items 2, 7 and 8, it is left to the Parties how much of their allotted total time they wish to spend on Agenda items 3. or 4., subsections b, c, and d. The parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established in this Procedural Order.*

- 7.3. *Each Party is free to use **audio visual equipment** at the Hearing as long as a large screen for general viewing or individual display screens are made available both to counsel of the other Party and each member and the secretary of the Tribunal. The Parties are invited to*

*coordinate their logistics in this regard before the hearing.*

7.4. *The Parties shall coordinate with the court reporting service and the service of the Hotel in advance of the Hearing to assure that the services are available, tested and ready to start at the beginning of the Hearing. This shall include that microphones are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker.*

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

49. On September 15, 2008, Claimant submitted Dr. Neuberger’s additional expert report in response to Respondent’s second expert report in lieu of direct testimony.
50. On September 22 and 23, 2008, the Hearing on Remedy was held in New York City, NY, USA. In addition to the members of the Tribunal, the Secretary to the Tribunal, Yun-I Kim, and the stenographer (John Phelps), it was attended (as recorded in the transcript of the Hearing and corrected by the Parties in their communications of October 17 and 23, 2008) as follows:

*“On behalf of the Claimant:*

*MS. JEANNE DAVISON  
Director*

*MS. PATRICIA M. McCARTHY  
Assistant Director*

*MS. CLAUDIA BURKE  
MS. MAAME A.F. EWUSI-MENSAH  
MR. GREGG SCHWIND  
Trial Attorneys*

*United States Department of Justice  
Commercial Litigation Branch  
Civil Division  
1100 L Street, N.W.  
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+1 (202) 514-7969*

*On behalf of the Respondent:*

*MR. GUILLERMO AGUILAR-ALVAREZ  
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767 Fifth Avenue  
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+1 (212) 310-8981*

*MS. JOANNE E. OSENDARP  
MR. CHARLES E. ROH, JR.  
Weil, Gotshal & Manges, L.L.P.  
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*MS. MEG KINNEAR  
Senior General Counsel & Director General  
Trade Law Bureau  
Dept. of Foreign Affairs and International Trade  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
+1 (613) 943-2803”*

51. On September 29, 2008, the Chairman on behalf of the Tribunal issued Procedural Order No. 4 (PO 4):

*“Procedural Order (PO) NO. 4  
Regarding the procedure after the Hearing on Remedies*

- 1. This Order puts on record the results of the discussion and agreement with the Parties at the end of the Hearing on Remedies in New York on September 22 and 23.*
- 2. The Parties shall try to agree as soon as possible in direct contact, and in contact with the court reporting service, regarding any corrections of the transcript of the hearing. The agreed corrected text of the transcript shall be circulated. Should any disagreement remain, they may apply to the Tribunal to deal with the matter.*
- 3. By October 31, 2008, the Parties shall simultaneously submit Post-Hearing Briefs containing the following:*
  - 3.1. An Evaluation of what they consider the most relevant results of the hearing for the relief sought in this case.*
  - 3.2. Separate sections in particular on the following:*

- a) *Has the Agreement of the Parties at the end of the Hearing on Liability, recorded in section I paragraph 4 of the Decisions in the Award on Liability, applied by parties' submissions of April 3, 2008, and later, and consequently by PO 2 on the further procedure on remedies, changed the provisions of Art. XIV paragraphs 22 seq. SLA, and if so, to which effect?*
  - b) *Which Party has the burden of proof for which aspects of the claims raised?*
  - c) *In case the Tribunal concludes that a retroactive compensation system has to be applied under Art. XIV paragraphs 22 seq., what are the results of the examination of the experts at the hearing regarding the possible models or the best model for determining appropriate adjustments according to paragraph 22 (b)?*
4. *The sections of the Post-Hearing Briefs requested under paragraph 3 above shall include references to all sections in the Parties' earlier submissions as well as to exhibits (including the expert reports and legal authorities) and to the corrected hearing transcript on which the Parties rely regarding the respective issues.*
  5. *No new exhibits (including authorities) may be attached to the Post-Hearing Briefs."*
52. On October 31, 2008, the Parties submitted their Post-Hearing Briefs.
  53. By a letter of November 7, 2008, Respondent raised procedural objections to allegedly new evidence introduced by Claimant with its Post-Hearing Brief. Claimant commented on the issue by a letter of November 10, 2008, Respondent replied by a letter of November 14, 2008, and Claimant replied again by letter of November 17, 2008.

## **E. Principal Relevant Legal Provisions**

### **E.I. Arbitration Agreement and the LCIA Rules**

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

*“Article XIV  
Dispute Settlement*

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

*or in lieu of, the arbitration procedures set out in this Article.*

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



14. *The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration as adopted in 1999, as modified by the SLA 2006, shall apply in the arbitrations held under the SLA 2006, except that Article 6 of those Rules shall not apply.*
15. *If a Party wishes to designate information to be used in the arbitration as confidential, the tribunal shall establish, in consultation with the Parties, procedures for the designation and protection of confidential information. The procedures shall provide, as appropriate, for sharing confidential information for purposes of the arbitration with counsel to softwood lumber industry representatives or with provincial or state government officials.*
16. *Each Party shall promptly make the following documents available to the public, subject to Article XVI and any procedures established under paragraph 15:*
  - (a) *the Request for Arbitration;*
  - (b) *pleadings, memorials, briefs, and any accompanying exhibits;*
  - (c) *minutes or transcripts of hearings of the tribunal, where available; and*
  - (d) *orders, awards, and decisions of the tribunal.*
17. *Hearings of the tribunal shall be open to the public. The tribunal shall determine, in consultation with the Parties, appropriate arrangements for open hearings, including the protection of confidential information.*
18. *The tribunal shall give sympathetic consideration to domestic laws that:*
  - (a) *preclude a Party from disclosing information, when the tribunal determines whether that information is privileged from disclosure and whether to draw inferences from the Party's failure to disclose such information; or*
  - (b) *require a Party to disclose information subject to confidentiality procedures under paragraph 15.*
19. *The tribunal shall endeavour to issue an award not later than 180 days after the LCIA Court appoints the tribunal.*
20. *The tribunal's award shall be final and binding and shall not be subject to any appeal or other review. An award may be enforced solely as provided in this Article.*

21. *The tribunal may not award costs. \$US 10 million shall be allotted from the funds allocated to the binational industry council described in Annex 13 to pay the costs of arbitrations under this Article, including the costs of arbitrators, hearing facilities, transcripts, assistants to the tribunal, and costs of the LCIA. Each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel.*
22. *If the tribunal finds that a Party has breached an obligation under the SLA 2006, the tribunal shall:*
  - (a) *identify a reasonable period of time for that Party to cure the breach, which shall be the shortest reasonable period of time feasible and, in any event, not longer than 30 days from the date the tribunal issues the award; and*
  - (b) *determine appropriate adjustments to the Export Measures to compensate for the breach if that Party fails to cure the breach within the reasonable period of time.*
23. *The compensatory adjustments that the tribunal determines under paragraph 22(b) shall consist of:*
  - (a) *in the case of a breach by Canada, an increase in the Export Charge and/or a reduction in the export volumes permitted under a volume restraint that Canada is then applying or, if no Export Charge and/or volume restraint is being applied, the imposition of such Export Charge and/or volume restraint as appropriate; and*
  - (b) *in the case of a breach by the United States, a decrease in the Export Charge and/or an increase in the export volumes permitted under a volume restraint that Canada is then applying.*

*Such adjustments shall be in an amount that remedies the breach.*
24. *Such adjustments may be applied from the end of the reasonable period of time until the Party Complained Against cures the breach.*

25. *In the case of a breach by Canada attributable to a particular Region, the tribunal shall determine the compensatory adjustment applicable to that Region.*
26. *If Canada considers that the United States has failed to cure a breach by the end of the reasonable period of time, Canada may make the compensatory adjustments that the tribunal has determined under paragraph 22(b).*
27. *If the United States considers that Canada has failed to cure a breach and has not made the compensatory adjustments that the tribunal has determined under paragraph 22(b) by the end of the reasonable period of time, the United States may impose compensatory measures in the form of volume restraints and/or customs duties on imports of Softwood Lumber Products from Canada, as follows:*
  - (a) *the amount of the volume restraints shall not exceed the adjustment to the volume restraints that the tribunal has determined; and*
  - (b) *the customs duties shall not exceed the adjustment to the Export Charges that the tribunal has determined.*
28. *Measures taken in accordance with paragraph 27 shall not be considered a breach of Article V. For greater certainty, the United States may initiate an investigation or take action with respect to Softwood Lumber Products under Sections 301 to 307 of the Trade Act of 1974, solely for the purpose of paragraph 27.*
29. *If, after the expiry of the reasonable period of time:*
  - (a) *the United States considers that the compensatory adjustments that Canada is applying reduce Export Charges or allow for export volumes beyond those that the tribunal has determined under paragraph 22(b);*
  - (b) *Canada considers that the compensatory measures the United States is applying exceed the levels authorized for those measures under paragraph 27; or*
  - (c) *the Party Complained Against considers that it has cured the breach, in whole or in part, such that the compensatory adjustments or measures should be*

*modified or terminated, and the Complainant Party does not agree,*

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

30. *In any arbitration initiated under paragraph 29, the LCIA shall appoint to the tribunal the arbitrators comprising the original tribunal, to the extent they are available, within 10 days after the Request for Arbitration is delivered. Any member of the original tribunal who is no longer available shall be replaced in accordance with Article 11 of the LCIA Rules and paragraph 8. The tribunal shall endeavour to issue its award within 60 days after delivery of the Request for Arbitration referred to in paragraph 29.*
31. *If in its award in an arbitration initiated under paragraph 29, the tribunal finds that the compensatory adjustments or measures that are the subject of the arbitration are inconsistent with the award in the original arbitration or that the breach has been cured in whole or in part, the tribunal shall determine the extent to which the compensatory adjustments or measures should be modified or whether they should be terminated.*
32. *An award under paragraph 31 shall be effective as of the date that the compensatory adjustments or measures were imposed and, accordingly, shall provide that:*
  - (a) *Canada shall collect any Export Charge that the tribunal finds it should have imposed and the United States shall refund any customs duties that the tribunal finds it should not have collected, retroactive to that date; and*
  - (b) *Canada shall impose additional export volume restraints to compensate for any excess export volumes that the tribunal finds that Canada has allowed and Canada may increase the export volumes permitted under the export restraints to compensate for any excess import restraints the tribunal finds that the United States has imposed since that date, with these adjustments to be applied to exports from the pertinent Region or Regions in equal monthly amounts during a period following the award as determined by the tribunal.”*

## **E.II. Vienna Convention On The Law Of Treaties**

55. The principal provisions of the VCLT relevant for this case (cf. CR-7; RRA-14) are as follows:

### *“Article 31*

#### *General rule of interpretation*

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
  - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
  - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
  - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
  - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
  - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

### *Article 32*

#### *Supplementary means of interpretation*

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

*(a) leaves the meaning ambiguous or obscure; or*

*(b) leads to a result which is manifestly absurd or unreasonable.”*

56. Both the USA and Canada acceded to the VCLT in 1970. Its relevant terms are also considered declaratory of customary international law. Both Parties referred the Tribunal to the VCLT in support of their respective cases in these arbitration proceedings.

### **E.III. ILC Draft Articles on State Responsibility**

57. The principal provisions of the ILC Draft Articles on State Responsibility relevant for this case (cf. CR-9; RRA-9) are as follows:

#### *“Article 31 Reparation*

- 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
- 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*

[...]

#### *Article 34 Forms of reparation*

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

[...]

#### *Article 36 Compensation*

LCIA case 7941 Softwood Lumber USA v Canada,  
Award on Remedies

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

[...]

*Article 55*  
*Lex specialis*

*These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”*

**F. Relief Sought by the Parties regarding Remedies for the Breach of the Softwood Lumber Agreement**

**F.I. Relief Sought by Claimant**

58. As identified in the Statement of the Case on Remedy (C I, p. 31) Claimant requested the Tribunal to award as follows:

*“The United States respectfully requests an award determining that:*

- (1) Pursuant to the SLA, art. XIV, ¶ 22(a), the reasonable period of time for Canada to cure the breach shall be 30 days from the date of the award on remedy; and*
- (2) Pursuant to the SLA, art. XIV, ¶ 22(b), the appropriate adjustments to the export measures to compensate for the breach if Canada fails to cure the breach within the reasonable period of time shall be as follows:*
  - (a) An additional export charge in the amount of CDN\$ 63.9 million plus interest, shall be collected on exports of softwood lumber products from Option B regions. This additional export charge shall be collected as an assessment equal to ten percent of the export price, which shall be over and above any export charge that may be in place by virtue of the normal operation of the SLA, and shall be collected on exports of softwood lumber products from Option B regions on an ad valorem basis until CDN\$ 63.9, plus interest, is collected; or, in the alternative*
  - (b) An additional export charge of US\$ 39.65 per thousand board feet plus interest, shall be imposed upon 2,187.76 million board feet of softwood lumber products exported to the United States from Option B regions; or, in the alternative*
  - (c) Canada shall lower the regional quota volume for each Option B region during each month of a six-month remedy period, in two stages. First, the regional quota volumes for each month/region of the remedy period shall be adjusted downward by the average amount by which the correctly calculated regional quota volume exceeded actual exports in the directly preceding three or six-month period. Second, regional quota volumes for each month/region of the six-month remedy period would*



*be further reduced by the amount of the corresponding overage for that month/region during the six-month breach period; or, in the alternative*

- (d) *Canada shall adjust the EUSC for each Option B region during each month of a six-month remedy period where Export Measures apply, in two stages. First, the EUSC for each region/month during the remedy period shall be correctly adjusted according to paragraph 14 of Annex 7D of the SLA. Second, EUSC for each region/month during the remedy period would be further adjusted downward by the amount of the miscalculation of EUSC during the breach period.”*

59. Claimant restated its request in its Reply Memorial on Remedy, requesting the Tribunal to award as follows (C II, § 96):

*“For all of these reasons, the United States respectfully repeats its request for an award under paragraph 22 of Article XIV determining (1) a reasonable period of time for Canada to cure the breach; and (2) appropriate adjustments to the export measures to[sic] if Canada fails to cure the breach.”*

60. In its Post-Hearing Brief of October 31, 2008, Claimant modified the relief sought requesting the Tribunal to award as follows (C III, §§ 92-98):

92. *We respectfully request that the Tribunal determine a reasonable period of time for Canada to cure the breach and respectfully request that the Tribunal also identify appropriate compensatory adjustments to the export measures in an amount that remedies Canada’s breach.*

93. *With respect to the cure period, we request that the Tribunal determine that 30 days would be a reasonable period of time for Canada to cure the breach.*

94. *With respect to appropriate compensatory adjustments to the export measures, we request that the Tribunal adopt one of the United States’ four remedy proposals. In particular, we respectfully submit that the first proposed remedy most effectively remedies the breach by treating Option B regions as Option A regions during the breach period. Under this remedy, Canada should be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until the entire remedy amount of CDN\$ 63.9 million, plus CDN\$ 4.36 million in interest (a total of CDN\$ 68.26*

million) has been collected. This remedy stays within the confines of the SLA itself and does not require the Tribunal to determine the economic effects of the breach.

95. *Alternatively, we request that the Tribunal adopt the second proposed remedy. Using the agreed-upon overshipment calculation of 216 MMBF, Canada should be required to collect an additional export charge of CDN\$ 47.30 per MBF upon softwood lumber shipments from Option B regions, until the entire remedy amount of CDN\$ 110.5 (including interest) is collected. This remedy appropriately considers the price effect of the breach and correctly reverses that price effect.*
96. *Alternatively, we request the Tribunal to adopt our third proposed remedy. Under this proposal, Canada should be required to adjust downward the RQV for each month/region of the remedy period, first, by the average amount by which the correctly calculated RQV exceeded actual exports in the preceding six-month period, and second, by the average amount of the corresponding overage for that month/region during the sixmonth breach period.*
97. *Alternatively, we request the Tribunal to adopt the fourth proposed remedy. Canada failed to identify any specific weakness in this remedy. This remedy perhaps most closely reverses the breach identified by the Tribunal. Canada failed to make the correct EUSC calculation for the first two quarters of 2007. Under this remedy, Canada should be required, for the two quarters of the remedy period, to make downward adjustments to EUSC in the amount that Canada should have for the two quarters of the breach period, in addition to any adjustments already required by the SLA. Specifically, in the first quarter following the expiration of the reasonable period of time to cure, Canada should adjust EUSC downward by 612.2 MMBF. In the second quarter following expiration of the reasonable period of time to cure, Canada should adjust EUSC downward by 890.5 MMBF. The remedy does not require the Tribunal to identify the economic effects of the breach, nor does it require the Tribunal to look beyond the terms of the SLA.*
98. *Finally, should the Tribunal prefer not to adopt any of these proposed remedies, we respectfully request the Tribunal to determine other appropriate compensatory adjustments to the export measures in an amount that remedies the breach.”*

## **F.II. Relief Sought by Respondent**

61. As identified in Canada's Statement of Defence (R I, p. 47) and reiterated in its Rebuttal Memorial on Remedy (R II, § 143) as well as in its Post-Hearing Brief (R III, p. 50) Respondent requested the Tribunal to award as follows:

*“For the reasons set forth above, Canada respectfully requests an award:*

- (1) declaring that Canada has cured its breach of the SLA 2006 by making the appropriate calculation of EUSC with respect to regions operating under Option B as of July 1, 2007; and*
- (2) dismissing all claims of the United States for compensatory adjustments to the export measures or other compensation as a result of Canada's failure to adjust EUSC from January 1, 2007 to June 30, 2007.”*

**G. Summary of Contentions regarding Remedies for the Breach of the Softwood Lumber Agreement**

**G.I. Summary of Contentions by Claimant**

62. Subject to later sections of this Award addressing particular issues, the main arguments of Claimant can best be summarised by quoting §§ 13 to 19 of Claimant's Statement of the Case on Remedy (C I, §§ 13-19):

*“13. Canada’s breach, which resulted in the overshipment of over 180 million board feet of softwood lumber into the United States, has disrupted the system of export measures to which the parties agreed – a system that limits the volume of exports either through explicit volume restrictions or through export charges that encourage producers to restrict exports (or both). If the system is disrupted, the premise upon which the United States agreed to forego remedies under domestic law is undermined. That is, absent the SLA’s volume restrictions (and export charges), the United States would have had no meaningful reason to enter into the Agreement. Canada should be held accountable for the consequences of this disruption.*

*14. When a Tribunal finds, as the Tribunal has here, that a party has breached an obligation under the SLA, the SLA directs the Tribunal to perform two tasks, simultaneously, in its award. First, the Tribunal is to identify a reasonable period of time for the breaching party to cure the breach. Second, the Tribunal is to determine the appropriate adjustments to the export measures to compensate for the breach if the breaching party fails to cure the breach within that reasonable period of time. Because we submit that Canada should receive the full amount of time contemplated by the SLA – 30 days – to determine and implement a cure for its breach, the period of time for Canada to cure the breach should not be an issue. Therefore, this statement of the case principally addresses the appropriate compensatory adjustments to the export measures that will remedy Canada’s breach should Canada fail to cure the breach within the reasonable time established by the Tribunal.*

15. *To that end, the United States attaches the expert report of Jonathan Neuberger. See CR-3. Dr. Neuberger, a recognized expert in economics, economic damages, econometrics, risk management, and corporate finance, explains that any compensatory adjustments must be commensurate with the breach, economically meaningful, and easily enforceable. Dr. Neuberger explores two categories of potential remedies: (1) price-based remedies that assess additional export charges; and (2) volume-based remedies that adjust the volume of lumber exported. As Dr. Neuberger explains, although both categories provide logical ways to redress the harm caused by Canada's breach, simply reducing the regional quota volume alone may have little or no effect upon the actual volume of lumber exported by Canada under current or reasonably anticipated future market conditions. Therefore, volume-based remedies that merely rely upon Canada's overshipment during the breach period may not, with any degree of certainty, remedy the breach. Accordingly, Dr. Neuberger concludes that price-based remedies, which are tied to the language and purpose of the SLA, would provide a more meaningful remedy under current circumstances.*
  
16. *Consistent with Dr. Neuberger's opinions, the United States proposes four remedies – two "price-based" remedies that monetize the effects of Canada's breach, and two "volume-based" remedies that would restrict meaningfully the volume of lumber exports to the United States. These choices recognize that, because current market conditions are not what they were in early 2007, a remedy should encourage Canada to export less lumber as a means of restoring the United States to the position it would have occupied absent the breach. As Dr. Neuberger explains, because of the nature of current market conditions, price-based remedies, or remedies that impose additional export charges rather than volume restraints, will remedy the breach more effectively.*
  
17. *First, the most straightforward remedy recognizes that, by overshipping during the six-month breach period, Option B regions effectively received all the benefits of Option A (i.e., no volume restraints) without bearing the costs of the higher Option A export charges. If those Option B regions had been treated as Option A regions during the breach period (that is, commensurate with their behavior during the breach period), then they would have been required to pay approximately CDN\$ 63.9 million in additional export charges. Assessed upon an ad valorem basis until*

*completely collected,<sup>9</sup> collection of this additional export charge owed would place the United States in the analogous position it would have occupied absent the breach. That is, if Option B regions must pay additional export charges upon future exports, these additional export charges presumably would impose a financial burden upon those regions to cause them to export less lumber. In turn, Option B regions would restrict exports to the United States in a way that replicates the meaningful restriction of exports to which they should have adhered in early 2007.*

18. *Alternatively, if the Tribunal determines that this proposal is not an appropriate remedy for the breach, Dr. Neuberger analyzes additional potential compensatory measures that would apply should Canada fail to cure the breach within the reasonable time period identified by the Tribunal. In the second remedy proposal, he describes a different price-based remedy grounded in the economic consequences of the breach. This remedy would be somewhat more complex to effectuate, but similarly would restore the United States to the analogous position it would have occupied absent the breach by encouraging Option B regions to restrict their volume of exports.*
19. *Finally, although Dr. Neuberger opines that price-based remedies are preferable to volume-based remedies, the United States proposes two volume-based remedies that, properly implemented, might effectively lower the current regional quota volumes to produce a palpable reduction in future Canadian exports to the United States.”*

## **G.II. Summary of Contentions by Respondent**

63. Subject to later sections of this Award addressing particular issues, the Respondent’s main arguments that Respondent has cured the breach and consequently all claims of the United States must be dismissed is best summarised by quoting §§ 3 to 8 of the Introduction to Respondent’s Statement of Defence (R I, §§ 3-8):

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<sup>9</sup> An “ad valorem” charge is one imposed upon the value of an entry when it enters the United States. See *BLACK’S LAW DICTIONARY* 33 (abr. 6th ed. 1991) (defining “ad valorem tax” as one “imposed on the value of property”). Export charges under the SLA are collected in this way.

LCIA case 7941 Softwood Lumber USA v Canada,

- “3. *In its Statement of Case, the United States asserts that Canada has not cured the breach,<sup>10</sup> but the United States is silent as to what the United States would consider “cure the breach” to be. Instead, the United States seizes a single line from the Tribunal’s Award on Liability to assert that the Tribunal has already decided that Canada bears additional responsibility for the consequences of its breach beyond its action in applying the adjustment in Annex 7D since July 1, 2007. Seeking to avoid the central issue as to what “cure the breach” means, the United States argues that the only issue before the Tribunal is to determine “appropriate adjustments to the export measures to compensate for the breach” under paragraph 22(b).<sup>11</sup> The United States then proposes four alternative adjustments, all premised on the assumptions that: (1) Canada has not cured the breach in this dispute, and (2) compensatory adjustments are authorized and appropriate to compensate for effects or consequences of breaches occurring prior to the end of the reasonable period of time for cure.<sup>12</sup>*
4. *Both U.S. assumptions are false. The SLA is a “prospective” remedy dispute settlement system like that of the World Trade Organization (“WTO”), Chapter 20 of the North American Free Trade Agreement (“NAFTA”) and other similar intergovernmental trade agreements. Prospective systems are those that impose no penalty and require no compensation for infringement of obligations that occur prior to a dispute settlement decision, plus some reasonable period of time to comply with a panel’s ruling. Retaliatory or compensatory measures imposed under prospective systems are authorized to compensate for the continuation of a breach past the reasonable period of time and until such time as the breaching measures are terminated or brought into compliance with the obligations of the agreement. Unlike most commercial arbitrations and investor-state arbitrations under bilateral investment treaties or Chapter 11 of the NAFTA, there are no “retroactive” or “retrospective” remedies intended to compensate for past breaches.*
5. *Canada has cured the breach within the meaning of the SLA by applying the adjustment provided in Annex 7D since July 1, 2007 and therefore no compensatory adjustments are required or authorized by the SLA.<sup>13</sup> Like*

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<sup>10</sup> *Stmt. of Case ¶ 30.*

<sup>11</sup> *Stmt. of Case ¶ 26.*

<sup>12</sup> *Stmt. of Case ¶¶ 48-64.*

<sup>13</sup> *SLA 2006 Art. XIV(22)(b) (Ex. RR-1).*

*its counterparts in other international trade agreements between sovereigns, Article XIV of the SLA provides for countermeasures only if the breach is not cured by the end of the reasonable period of time identified in paragraph 22(a), and compensatory adjustments are not authorized for prior breaches under the SLA unless specifically so stated. There is no need for the Tribunal to consider the alternative theories and rationales presented by the United States to justify the imposition of severely intensified export restrictions to compensate for a breach long cured.*

6. *In Part I of this submission, Canada will show, applying the interpretive provisions of the Vienna Convention on the Law of Treaties (“Vienna Convention”),<sup>14</sup> that ceasing the breach of the Agreement constitutes a “cure,” and that paragraph 22(b) does not contemplate or authorize compensatory measures for past breaches. It is not necessary to resort to negotiating history, but that history also confirms Canada’s position.*
7. *In Part II of the submission, Canada explains why, even if the SLA were interpreted to require, as part of a cure, some compensatory action for past breaches, the U.S. proposals are unjustified. First, no further action is warranted in the circumstance of this proceeding because the “excess” of lumber exported by Option B regions to the United States as a consequence of the breach has already been more than offset by the degree to which those regions exported less than their full quota entitlements in the period since July 1, 2007.*
8. *Second, even if Article XIV(22)(b) authorized a compensatory adjustment in the circumstances of this dispute, and even if Canada’s undershipments since that period were disregarded, there still would be no justification for the alternative measures proposed by the United States. Canada will show that none of the four alternatives presented by the United States provide a justifiable form or quantum of adjustment under the SLA. Indeed, the muddle of different rationales and speculations contrived in the four alternatives, and the wide range of effects they could have, only provide further evidence to reject the U.S. assumption that a right to compensation for past breaches can or should be implied under the Agreement. Canada attaches the expert report of Joseph*

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<sup>14</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (RRA-14).



*P. Kalt and David Reishus (the Kalt/Reishus Report) which provides an economic analysis of the four alternatives proposed by the United States and its expert Jonathan Neuberger.<sup>15</sup>”*

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<sup>15</sup> *Expert Witness Report of Joseph P. Kalt and David Reishus (June 27, 2008) (Ex. RR-2).*

## **H. Considerations of the Tribunal regarding Remedies for the Breach of the Softwood Lumber Agreement**

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

### **H.I. Preliminary Considerations**

#### **1. Submission to Arbitration and Jurisdiction of this Tribunal**

65. It is not in dispute between the Parties that they have properly submitted this case to LCIA arbitration, that this Tribunal is duly formed to decide that case and that this Tribunal has jurisdiction to decide on the relief requested by the Parties under their arbitration agreement.

#### **2. The Tribunal's Award on Liability**

66. Having agreed to a bifurcation of the proceedings (cf. PO I, § 3), the Tribunal by letter of March 3, 2008, issued the Award on Liability. The following quotation from the Tribunal's Award on Liability may be recalled regarding the further procedure:

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

67. By separate letters of April 3, 2008, the Parties submitted comments on further proceedings on Remedy, requesting the Tribunal to initiate the second phase of the proceedings (the remedies phase), and the procedure continued as described in the section on Procedural History above.

### **3. Applicable Law**

#### **a. Applicable Procedural Rules**

68. Regarding the procedural rules applicable by the Tribunal, **Art. XIV SLA** provides for detailed procedures which have been quoted above in this Award.
69. From the text of Art. XIV SLA, it should be particularly noted that, in so far as it provides no specific procedural rules, reference is made to:

The **LCIA Arbitration Rules** as in effect on the date the SLA was signed, and, in addition, by Art. XIV § 14, to the **IBA Rules on the Taking of Evidence in International Commercial Arbitration** as adopted in 1999, but as modified by the SLA.

70. Furthermore, Art. XIV § 13 SLA provides that the legal place of the arbitration shall be London, United Kingdom. According to Section 2(1) of the **English Arbitration Act 1996**, that Act is applicable “*where the seat of the arbitration is in England*”. Whether the effect of this provision is altered by the fact that the present arbitration takes place between two foreign governments under a treaty in the field of public international law need not here be considered further, beyond the limited subject of costs addressed separately later in this Award.

#### **b. Applicable Substantive Law**

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

**4. Possible Modification of the provisions of Art. XIV §§ 22 et seq. of the SLA**

72. With regard to a possible modification of the provisions of Art. XIV §§ 22 *et seq.* of the SLA the following quotation from PO 4 may be recalled:

“a) *Has the Agreement of the Parties at the end of the Hearing on Liability, recorded in section I paragraph 4 of the Decisions in the Award on Liability, applied by parties’ submissions of April 3, 2008, and later, and consequently by PO 2 on the further procedure on remedies, changed the provisions of Art. XIV paragraphs 22 seq. SLA, and if so, to which effect?”*

**a. Claimant’s Perspective**

73. Subject to later sections of this Award addressing particular issues, the main arguments of Claimant on this issue can best be summarised by quoting §§ 19 to 22 of Claimant’s Post-Hearing Brief (C III, §§ 19-22):

“19. *The parties’ agreement at the end of the hearing on liability did not change the provisions of Article XIV. The SLA was entered into and signed by the Governments of Canada and the United States, represented by the United States Trade Representative and Canada’s Department of Foreign Affairs and International Trade (“DFAIT”). If the parties wish to amend the Agreement, they must do so in writing. SLA, art. XIX. Counsel are not authorized to amend the Agreement, orally or otherwise.*

20. *Rather, at the close of the liability hearing, the parties actually confirmed the terms of the SLA and, in Canada’s case, did not inform the Tribunal that the particular posture of this case could obviate the need for any further proceedings. If the Tribunal finds that a party has breached the SLA, the SLA[sic] then the Tribunal “shall” identify a reasonable cure period and determine appropriate compensatory adjustments. The Chairman noted – and the parties did not disagree – that paragraph 22 was “mandatory.” Tr. of Hearing on Liability, 123:21, 124:9. However, because the proceedings were bifurcated, the parties would have to agree to an amended procedure. As the Chairman noted, “Now, if we find there is no breach, that is the end of the case. That, I think is clear. On the other hand, if we do find a breach on one of the two claims, the question is how do we go on. May I refer you to Article XIV(22), which provides in a mandatory*

*way, it looks, the Tribunal shall take certain actions and consequences.” Tr. 123:17 – 124:22. Accordingly, the parties agreed that, as a procedural matter, the Tribunal could undertake the tasks in paragraph 22 at some later date (after further submissions from the parties on remedy), but that the requirements of paragraph 22 could not be ignored.*

21. *Canada never stated that a remedy proceeding would be unnecessary or that paragraph 22(b) would be unnecessary. To the contrary, in April 2008, both parties responded to the Tribunal’s Liability Award and letter with proposed schedules. Canada proposed a Procedural Order with two rounds of briefing and a hearing for the presentation of fact witness testimony and expert witness testimony. Notably, Canada did not state its belief that no further proceedings were needed because Paragraph 22 was not operative, nor did it suggest that the Tribunal needed to decide whether Paragraph 22 was operative prior to a hearing on remedy.*
22. *Although Canada now contends that the first phase of this arbitration was “pointless,” Tr.67:17-18, it failed to allege this earlier. Rather, it agreed with the Tribunal that paragraph 22 was mandatory. Given the SLA’s text and the parties’ procedural agreement to accommodate a bifurcated proceeding, the Tribunal should decline to consider Canada’s recent and convenient position. Consistent with its earlier conclusion that paragraph 22 is mandatory, the Tribunal should undertake the two tasks set forth in the SLA.”*

#### **b. Respondent’s Perspective**

74. Subject to later sections of this Award addressing particular issues, the main arguments of Respondent on a possible modification of Art. XIV of the SLA can best be summarised by quoting §§ 1 to 12 of Respondent’s Post-Hearing Brief (R III, §§ 1-12):
  - “1. *Canada does not consider that the Parties, through the actions identified in this question, modified the provisions of Article XIV, paragraphs 22 et seq. of the SLA. Nor did the predicate for these actions – the Parties’ agreement to bifurcate the proceedings in October 2007 – have such effect. Instead, by agreeing to bifurcate the proceedings, and by agreeing to the procedures that decision precipitated, the Parties intended only that the Tribunal’s performance of its mandate under Article XIV, paragraph*

22, would be deferred until after the Tribunal's Award on Liability. Achieving that outcome did not require the Parties to modify Article XIV, paragraph 22, because, as explained below, that provision does not command the fulfillment of the Tribunal's mandate thereunder immediately upon the issuance of an interim or partial award on liability.

2. As Article XIV is structured, arguments regarding whether there has been a breach and, if so, the consequences of that breach, would normally be presented in a single proceeding. At the end of this single proceeding, the Tribunal would determine whether a breach has occurred, and, if so, identify a reasonable period of time (up to 30 days) for the breaching Party to cure the breach, and the appropriate adjustments to be made to compensate for the breach if that Party fails to cure the breach by the end of the reasonable period of time.
3. The original schedule proposed by the Tribunal for this proceeding would have resulted in such a single proceeding and a single award addressing liability and its consequences, if any.<sup>16</sup> If a single proceeding had taken place, Canada would have presented its position on liability and remedies with respect to both Option A and Option B Regions, including as outlined in Canada's Response to the Request for Arbitration of September 12, 2007.<sup>17</sup> In this single proceeding, Canada would have argued with respect to Option B Regions that it already had cured any breach by applying the adjustment to EUSC beginning July 1, 2007, and therefore that it was not necessary for the Tribunal either to identify a reasonable period of time for Canada to cure or to determine appropriate compensatory adjustments. With respect to Option A Regions, Canada would have argued that if the Tribunal found an ongoing breach, it should identify a reasonable period of time for Canada to cure the breach (by applying EUSC for Option A Regions) and also determine appropriate compensatory adjustments to apply

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<sup>16</sup> See Draft Procedural Order No. 1 attached to Chairman Böckstiegel's letter of September 25, 2007.

<sup>17</sup> Response to the Request for Arbitration ¶ 28(f) (Sept. 12, 2007) ("... even if Canada had breached its obligations for the period January 1 – June 30, which is denied, this breach has been cured by the timely application of the adjustment for Option B Regions effective July 1, 2007. Therefore, no adjustments may be required or authorized under Article XIV of the Agreement.").

*until Canada cured the breach if Canada did not cure the breach within that reasonable period of time.*<sup>18</sup>

4. *The Tribunal's award in such a case necessarily would have dealt with both liability and remedy. It would have included not only a finding of no breach with respect to Option A Regions (therefore rendering moot any argument about consequences in the event a breach had been found) and breach with respect to Option B Regions, but also would have addressed the consequences that should have resulted pursuant to paragraph 22 et seq., based on the arguments that the Parties would have made.*
  
5. *Rather than addressing liability and remedies in one proceeding, however, the Parties agreed to bifurcate the issues in order to enable an earlier award on liability.*<sup>19</sup> *In Canada's view, this agreement was possible without an amendment of paragraph 22 because that provision contains no timing requirement. Paragraph 22 does not compel the Tribunal to make its findings under paragraph 22 at the same time it determines that there has been a breach. Although the obligations in paragraph 22 are tied to the issuance of "the award," nothing in paragraph 22 or in Article XIV of the SLA mandates interpreting "the award" as meaning a partial or interim award on liability in the context of a bifurcated proceeding. This is especially true because Article XIV expressly incorporates the LCIA Arbitration Rules into the SLA, and Article 26.7 of those Rules expressly authorizes the Tribunal to issue*

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<sup>18</sup> *In paragraph 22(c) of its Response to the Request for Arbitration (Sept. 12, 2007), Canada argued that: "[t]he Claimant is not entitled to any relief because Canada has not breached the Agreement. Moreover, even if there were a breach of the Agreement, the United States asks for remedies that are not authorized under the Agreement. Article XIV, paragraph 22 of the Agreement provides that if the Tribunal finds that a Party has breached an obligation under the Agreement, the Tribunal shall 'identify a reasonable period of time for that Party to cure the breach' and '... if that Party fails to cure the breach within the reasonable period of time' determine '... adjustments to the Export Measures to compensate for the breach' (emphasis added). The Agreement does not allow compensation to a successful claimant, and provides for compensatory adjustments in the form of increased (or decreased) volume restrictions or export charges imposed or collected by Canada only if Canada does not cure the breach within the time period identified by the Tribunal. Even if there were a breach of the Agreement, which Canada denies, the Tribunal does not have power to award relief outside the specific terms of Article XIV, including most of the relief requested by the United States."*

<sup>19</sup> *See Ms. Patricia McCarthy's letter to the Tribunal of October 9, 2007 proposing bifurcation and Canada's reply of October 10, 2007.*

*separate awards in a single proceeding.<sup>20</sup> In context, the reference to “the award” in paragraph 22 should be read to mean the final award issued in a proceeding.<sup>21</sup>*

6. *Canada expressed its understanding of the agreement to bifurcate in a letter to the Tribunal dated October 10, 2007 as follows:*

*... Canada is in agreement with bifurcation of the proceedings and Canada further supports the “Proposed Timetables for Proposed Liability Phase” ... attached to Ms. McCarthy’s letter [of October 9, 2007]. Canada understands that both Parties agree that this liability phase is to deal solely with the issue of alleged breach of the SLA, and that a determination under Article XIV(22) of the SLA, if any, shall be reserved for the remedies phase.*

7. *In accordance with the Agreement, both Parties limited their submissions in the liability phase of the proceeding to the question whether there had been a breach of the Agreement in either of the respects claimed by the United States. This limitation of the arbitral debate to the issue of liability was consistent with Section 3 of Procedural Order No. 1 (revised on October 28, 2007):*

*As indicated by their letters of October 9 and 10, 2007, the Parties have agreed on a bifurcated procedure to the effect that a first phase shall be restricted to the issue of liability (the liability phase) and, should liability be found by the Tribunal to exist, a second phase on remedies (the remedies phase).*

8. *Bifurcation in this proceeding offered the same potential benefits that often lead Tribunals and parties to establish separate phases in an arbitration – it may eliminate the need for the parties to brief, and the Tribunal to consider,*

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<sup>20</sup> Article 26.7 of the LCIA Arbitration Rules provides that: “[t]he Arbitral Tribunal may make separate awards on different issues at different times. Such awards shall have the same status and effect as any other award made by the Arbitral Tribunal.” Article 26.9 of the LCIA Arbitration Rules further states that “[a]ll awards shall be final and binding on the parties.”

<sup>21</sup> The Tribunal may disagree with Canada’s interpretation of the SLA, and conclude that Article XIV, paragraph 22, imposes a mandatory obligation to make the determinations set forth in subparagraphs (a) and (b) concurrently with the issuance of an award on liability, even in the context of a bifurcated proceeding. If the Tribunal adopts this interpretation, then it would be reasonable for the Tribunal to construe from the Parties’ agreement to bifurcate, and the concomitant actions identified in the Tribunal’s question, that they authorized the Tribunal to depart from the timing requirements of Article XIV, paragraph 22.



*issues that may become moot depending on the Tribunal's resolution of threshold issues. In this case, bifurcation had the virtue of avoiding the need to argue the consequences of breaches that Canada considered had not occurred. With this in mind, Canada agreed, in response to the Tribunal's question at the close of the liability hearing of December 12, 2007,<sup>22</sup> that the Parties should convene after the Tribunal had made its Award on Liability to try to agree on what should be the next steps, if any, in the proceeding.*

9. *When the United States proposed bifurcation of the proceedings in October 2007, and when it agreed at the close of the December 12, 2007 hearing to provide comments to the Tribunal on how to proceed in the event of a finding of breach by the Tribunal, the United States was well aware of Canada's position that Canada had cured any breach with respect to Option B Regions, and that no compensatory adjustments were called for in these circumstances. At a minimum, the United States was aware of this because Canada so stated in its Response to the Request for Arbitration.<sup>23</sup>*
10. *Canada reiterated its position to the United States following the Tribunal's Award on Liability and indicated, as a result, that there was no need for further proceedings.<sup>24</sup> The United States disagreed, necessitating this second phase of the proceedings. Accordingly, on*

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<sup>22</sup> *Hearing on Liability, Tr. at 123:19 to 124:14 (Dec. 12, 2007).*

<sup>23</sup> *Response to the Request for Arbitration ¶ 28(f) (Sept. 12, 2007) (“... even if Canada had breached its obligations for the period January 1 – June 30, which is denied, this breach has been cured by the timely application of the adjustment for Option B Regions effective July 1, 2007. Therefore, no adjustments may be required or authorized under Article XIV of the Agreement”).* As discussed below at ¶¶ 54-56, Canada believes that both Parties shared the view that the SLA would not provide retrospective compensation, as was the view evinced by both Parties in regard to the final arbitration under the SLA 1996, from which the “cure the breach” language is derived.

<sup>24</sup> *See Letter from Guillermo Aguilar Alvarez to Patricia McCarthy (Mar. 14, 2008) (“Canada's position remains that Canada has cured the breach identified by the Tribunal. We understand from our conversation that the United States does not agree and wishes to present its case in the second phase of this proceeding.”) (CR-6). Canada has repeated this view throughout the proceedings. See Response to Request for Arbitration ¶ 28(f) (Sept. 12, 2007); Canada Rebuttal ¶¶ 11–15; Tr. at 59:4-7 (“Canada has cured[,] and its position that it has cured[,] has been known to the United States since the answer to the Request for Arbitration, long before the Tribunal was even constituted.”); Tr. at 67:13-16 (“In the case of the breach with respect to Option B Regions, Canada had already cured the breach, if any existed, in fact, about a month before the Request for Arbitration was even filed.”).*

*April 11, 2008 each Party submitted its proposal for a new procedural order and schedule, noting certain points of difference, which the Tribunal resolved in Procedural Order No. 2.*

11. *Both Parties agree that the Tribunal should now make the decisions required under paragraph 22, though obviously they disagree as to what those decisions should be. The United States, contending that Canada has not cured the breach (or that the Tribunal should ignore whether Canada has cured the breach), argues that the Tribunal should grant Canada 30 days to cure the breach and should order compensatory adjustments in one of four alternative ways and levels. By contrast, Canada considers that it has already cured the breach by correctly applying the adjustment provided in Annex 7D since July 1, 2007. Canada also considers that no compensatory adjustments are required or authorized because the SLA does not provide for compensatory adjustments in relation to past breaches.*
  
12. *However the Tribunal resolves these competing positions of the Parties, one thing is certain: the Tribunal will need to decide what it means to “cure” the breach under the SLA, and whether Canada has cured its breach in the context of this proceeding. As Canada explained in its Rebuttal Memorial, the Tribunal’s two tasks under paragraph 22 – setting a “reasonable” period of time to cure the breach and determining “appropriate adjustments” to the export measures to compensate for the breach if there is no cure – cannot be undertaken without deciding whether ceasing the breaching conduct constitutes a cure of the breach. There is nothing in the text of paragraph 22 that prevents the Tribunal, at this stage, from deciding what a cure would be.”*

### **c. The Tribunal**

75. The Tribunal agrees with the Parties to the effect that Art. XIV § 22 was not changed in substance and that the Tribunal still has to take the decisions mentioned in the provision. The agreement of the Parties recorded and discussed above only concerned the timing of the decisions and provided authorization to the Tribunal not to decide immediately after finding that a party had breached an obligation under the SLA which would have been together with the Tribunal’s Award on Liability, but to decide only after the further procedure on remedies agreed. But, at the end of this latter procedure, § 22 still provides a mandatory duty for the Tribunal to take the decisions mentioned in § 22.

## 5. Burden of Proof for the Claims Raised

76. The following quotation from PO 4 may be recalled with regard to the burden of proof for the claims at issue:

*“b) Which Party has the burden of proof for which aspects of the claims raised?”*

### a. Claimant’s Perspective

77. Subject to later sections of this Award addressing particular issues, the main arguments of Claimant on the issue of burden of proof can best be summarised by quoting §§ 23 to 28 of Claimant’s Post-Hearing Brief (C III, §§ 23-28):

*“23. As a general matter, the burden of proof rests upon the party asserting a claim or fact that, if not substantiated, will result in an adverse decision on the claim or fact. Therefore, depending upon the claim asserted, either the claimant or the respondent may bear the burden of proof.<sup>25</sup> Accordingly, regarding the proper interpretation of the SLA’s dispute resolution provision, the United States bears the burden of demonstrating that its interpretation is the more reasonable.*

*24. Regarding the merits of an appropriate remedy, the United States bears the burden of demonstrating first, a breach, and second, the consequences of the breach. The Tribunal already has found a breach. Award on Liability, p. 97, ¶ 1.3. And Canada agrees that, without carrying forward or carrying back excess lumber, the breach resulted in an overshipment of 216 MMBF. Tr. 201:3-14. This overshipment is the consequence of the breach. Accordingly, the United States has satisfied its burden.*

*25. Unlike other agreements that either do not include specific remedy provisions or contain different remedy provisions, paragraph 22 of Article XIV clarifies that neither party*

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<sup>25</sup> *The United States has omitted citations to new authorities in this section, and throughout this brief, because paragraphs 4 and 5 of Procedural Order No. 4 prohibit the parties from including any additional exhibits or authorities in their post-hearing briefs. We note, however, that the Tribunal has requested a response to a legal issue in question 3.2(b). Accordingly, should the Tribunal wish us to provide a copy of the legal authorities that support the statements made in the United States’ response to question 3.2(b), we will of course provide them immediately.*

*bears a burden to demonstrate “appropriate” compensatory adjustments to the export measures. Instead, paragraphs 22 and 23 explain that the Tribunal “shall determine” appropriate compensatory adjustments and that those adjustments “shall” be in an amount that remedies the breach. SLA, art. XIV, ¶¶ 22-23.*

26. *To the extent that one or the other party wishes the Tribunal to adopt a particular proposed remedy, it is that party’s burden to demonstrate that the remedy is (as the SLA requires) “appropriate,” and that the remedy comprises either adjustments to export charges and/or adjustments to quotas. However, because the SLA provides for a determination of appropriate compensatory measures regardless of whether a party has proposed a remedy, paragraph 22 of Article XIV mandates a remedy in the form of compensatory adjustments to the export measures in any event.*
27. *If a respondent is unable to rebut the prima facie evidence offered by a claimant in support of an issue on which the claimant bears the burden of proof, then the Tribunal may accept such prima facie evidence as satisfying the burden of proof. Here, Canada responded with specific criticisms of three of the United States’ four remedy proposals. As discussed further below, Canada failed to rebut the fourth and final remedy proposal. Accordingly, the Tribunal is free to adopt the United States’ fourth remedy proposal based solely upon the prima facie showing of appropriateness. Of course, regardless of whether the Tribunal resorts to this lower standard of proof, the United States has demonstrated that its fourth proposed remedy is appropriate and satisfies the requirements of the SLA. As stated, Dr. Neuberger’s testimony remained substantively unrebutted on this issue. CR-3, ¶ 43 n. 19 and CR-13 ¶ 71.*
28. *As demonstrated below, each of the United States’ four remedy proposals provides appropriate adjustments to the export measures in an amount that remedies the breach. Our first and preferred remedy treats Option B regions the way Canada should have treated them during the breach period. It requires nothing more than a recognition of the two-tiered export measure mechanism. Similarly, the remaining proposed remedies provide alternate, appropriate ways to remedy the breach. Canada has failed to rebut the appropriateness of these proposals, except to reiterate that any compensatory adjustments that affect future export measures are speculative and unreliable.”*

**b. Respondent's Perspective**

78. Subject to later sections of this Award addressing particular issues, the main arguments of Respondent on this issue can best be summarised by quoting §§ 13 to 24 of Respondent's Post-Hearing Brief (R III, §§ 13-24):

*"13. If, contrary to Canada's position, the Tribunal interprets the SLA as allowing some form of reparations as a cure for Canada's breach, the United States has the burden of proving its allegations of damages to U.S. interests, benefits to Option B exporters, and the quantum of compensatory adjustments it claims is justified as a consequence of Canada's breach."<sup>26</sup>*

*14. The U.S. has raised one claim for damage: that Canada's breach of the SLA during the first six months of 2007 resulted in the overshipment of approximately 180 million board feet of lumber<sup>27</sup> and that, as a result, U.S. producers suffered damage in the form of a decrease of \$1.94 per thousand board feet in the price of softwood lumber sold in the United States during that period.<sup>28</sup> Although the*

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<sup>26</sup> Canada interprets this question as pertaining to propositions of fact. Questions of law are to be decided by the Tribunal and are not subject to specific burdens of proof. For example, neither Party has the burden of proof with respect to the proper interpretation of Article XIV, paragraph 22 et seq. of the SLA. As the Tribunal recognized in its Award on Liability, the meaning to be given to the relevant terms of the SLA is a question of legal interpretation for the Tribunal, to be decided using the principles set forth in Articles 31 and 32 of the Vienna Convention of the Law of Treaties.

The allocation of the burden of proof to the complainant means that if the Tribunal considers that the United States has not carried its burden of proof in establishing facts requisite for damages to be awarded, then no award shall be made. The Panel does not have authority under the SLA nor under any rules of international law to assume the burden for the United States and craft an award on its own when the United States, as complainant, has failed to establish the proper factual basis itself for the remedy it now seeks.

<sup>27</sup> See, e.g., Stmt. of Case ¶ 37 ("...Canada's breach – its failure to adjust EUSC in calculating Option B Regional quota volume for six consecutive months in 2007 – caused over 180 million board feet of lumber to be shipped into the United States that otherwise would not have entered the United States market."). At the hearing Dr. Neuberger changed his mind, indicating that the amount of the overage should be 216 million board feet rather than 182 million board feet (Tr. at 96:24-97:3). But the calculations on the record are not based on this new number.

<sup>28</sup> See, e.g., Stmt. of Case ¶ 44 ("Canada's failure to apply these export measures resulted in over-exportation, which in turn affected the price of lumber and disrupted the specific balance of trade to which the parties agreed.").

Expert Witness Report of Jonathan A. Neuberger ¶ 57 (May 29, 2008) ("Neuberger Report") (CR-3) ("This means that the excess supply of softwood lumber products in the U.S. resulting from Option B regions' LCIA case 7941 Softwood Lumber USA v Canada,

*United States initially framed the alleged harm as harm to the United States as a whole, in response to Canada noting that overall U.S. interests benefited from the increased imports, the United States subsequently focused on the harm to U.S. lumber producers.<sup>29</sup> The United States did not present any evidence of damage to any U.S. interests other than the allegation of the \$1.94 price reduction alleged to harm U.S. lumber producers during a six month period.*

15. *Lacking any textual basis for asserting that compensatory adjustments are to address past harms to the U.S. industry, the United States relies on the Chorzów Factory case and the ILC Articles to support its position.<sup>30</sup> As the Permanent Court of International Justice articulated in Chorzów, two of the fundamental questions raised by Germany's claims were: (1) whether the non-breaching party suffered damage as a consequence of the breach, and (2) the extent of the damage.<sup>31</sup> In rejecting some of Germany's claims, the court found that such claims were "insufficiently proved"<sup>32</sup> or "discarded for want of evidence."<sup>33</sup>*
16. *In reaching these conclusions, the court recalled that in accordance with the jurisprudence of arbitral tribunals "possible but contingent and indeterminate damage ... cannot be taken into account."<sup>34</sup> The ILC Articles likewise reflect these principles. Article 36 makes clear that compensation is appropriate only when damage is*

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*exceeding their export quotas reduced prices in the U.S. below what they would have been if the quotas had been observed."*

*Neuberger Report ¶ 59 (CR-3) ("This economic simulation reveals that Canada's breach of the SLA by Option B Regions reduced U.S. lumber prices during the January – June 2007 period by approximately 0.7 percent. As the average U.S. price during this period, as measured by Random Lengths, was US\$ 290.66 per thousand board feet ("MBF"), this translates into a price reduction of US\$ 1.94 per MBF.")*

*Stmt. of Case ¶ 53 ("... the excess supply of lumber in the United States logically reduced prices in the United States below what prices would have been had Canada performed the correct EUSC calculation and properly restricted the volume of lumber entering the United States.")*

<sup>29</sup> *See, e.g., U.S. Reply ¶ 58 ("When the analysis concerns the functioning of the SLA, a primary concern is the effect of the breach upon American producers."); see also U.S. Reply ¶ 60; Rebuttal Expert Witness Report of Jonathan A. Neuberger ¶¶ 12, 27 (Jul. 21, 2008) ("Neuberger Rebuttal Report") (CR-13).*

<sup>30</sup> *See Stmt. of Case ¶ 31, n.9, ¶ 59; U.S. Reply ¶¶ 41-44.*

<sup>31</sup> *Case Concerning the Factory at Chorzów (Merits) (Germ. v. Pol.), 1928 P.C.I.J. 47 (ser. A) No. 17, at 29 (Sept. 13) ("Chorzów") (CR-8).*

<sup>32</sup> *Id.* at 56.

<sup>33</sup> *Id.* at 57.

<sup>34</sup> *Id.*

LCIA case 7941 Softwood Lumber USA v Canada,

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“financially assessable” and “established.”<sup>35</sup> The Commentary to ILC Article 34 further confirms that “[c]ompensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote.”<sup>36</sup>

17. As the Tribunal is aware, it is Canada’s position that the SLA contains a comprehensive and prospective-oriented dispute resolution regime that is *lex specialis*.<sup>37</sup> However, to the extent that the Tribunal disagrees, and concludes that Article XIV authorizes “retroactive compensation,” then the United States must be held to the standards international law imposes on parties seeking such compensation, as reflected in the findings of the authorities on which it has relied in this arbitration to claim an entitlement to compensation for damages: the burden of proving the damage that it alleges falls squarely on the United States<sup>38</sup> and speculative compensation must be denied. In addition, the Tribunal must adjudicate this dispute on the basis of the documentary evidence and expert testimony on the record, because Canada and the United States agreed in the SLA to modify the LCIA Arbitration Rules in a way that prevents the designation of a Tribunal expert.<sup>39</sup>
18. At the hearing, the United States contended that only the second of its four proposals was directed at compensating U.S. producers for the harm caused by the alleged temporary \$1.94 reduction in the U.S. lumber price,<sup>40</sup> though it also argued that each proposal would compensate the U.S. industry by discouraging exports to the United States.<sup>41</sup> The rationales that the United States has presented for its other alterative[sic] proposals are not based either in the text of the SLA or in customary international law. The first, third and fourth proposals

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<sup>35</sup> *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, International Law Commission, 53d Sess., pt. II, Art. 36, U.N. Doc. A/56/49 (Vol. 1) Corr. 4 (2001) (RRA-9).

<sup>36</sup> *Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, International Law Commission, 53d Sess., pt. II, Art. 34, Commentary 5, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (CR-9).

<sup>37</sup> Canada has explained why it believes that the SLA acts as a *lex specialis* which excludes the application of the ILC Articles and Chorzów Factory. *Stmt. of Defence* ¶¶ 51-57.

<sup>38</sup> See *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, ¶¶ 140-145 (January 2003) (CR-28), where the tribunal rejects certain claims as a result of claimant’s failure to meet its burden of proof.

<sup>39</sup> See SLA Art. XIV(6) (Ex. RR-1); LCIA Arbitration Rules, Art. 21.

<sup>40</sup> *Tr.* at 283:11-18.

<sup>41</sup> *Tr.* at 292:2-4.

*appear to be based on a U.S. theory that Option B exporters should be restricted by compensatory adjustments because they allegedly benefited from Canada's failure to apply the EUSC adjustment for six months.*

19. *If the Tribunal were to determine that benefit to Option B exporters was the appropriate measure of damages – as is the apparent rationale for the U.S. proposals other than Proposal No. 2 – the United States, as claimant, would have the burden of proving the benefit to Canadian producers and the quantum of that benefit, as well as proving that any of its proposed remedies appropriately redresses that benefit.*

20. *Dr. Neuberger testified that:*

*... it is clear that Canadian exporters benefited from the breach. By their actions, exporters in these regions revealed that it was in their economic best interests to exceed their quota volumes. It is thus reasonable to conclude that Canadian exporters earned incremental profits from their conduct, to the detriment of U.S. producers.<sup>42</sup>*

21. *However, when asked during cross-examination about the supposed benefit to Option B exporters, Dr. Neuberger admitted that a drop in U.S. lumber prices would have affected Option B exporters, and that he did not calculate the net effect on these exporters.<sup>43</sup> Dr. Neuberger thus failed to explain how Option B exporters “benefited,” which he admitted he did not verify.*

22. *Dr. Neuberger further failed to show how the amount he calculated as the harm to U.S. producers – US\$ 34.0 million<sup>44</sup> – puts the U.S. producers in the position they would have been but for the breach. In his third report, Dr. Neuberger calculates that export charges totaling US\$ 86.7 million are “necessary to ‘undo’ the \$34.0 million loss of U.S. producer surplus resulting from the breach.”<sup>45</sup> But as Professor Kalt testified, because the export charges would be imposed in the future, Dr. Neuberger’s model*

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<sup>42</sup> *Neuberger Report, n.13 (CR-3).*

<sup>43</sup> *Tr. at 100:14-102:6.*

<sup>44</sup> *Second Rebuttal Expert Witness Report of Jonathan A. Neuberger ¶ 13 (Sept. 15, 2008) (“Neuberger Second Rebuttal Report”) (CR-29).*

<sup>45</sup> *Neuberger Second Rebuttal Report ¶ 15 (CR-29); see also Tr. at 104:24-105:3.*



*actually “returns about 35 percent more than the \$34 million he says there.”<sup>46</sup>*

23. *Finally, Dr. Neuberger failed to explain just how the export charge he advocates would result in appropriate reparations to U.S. producers, or why this group should be his only target. The flaws in the U.S. remedy proposals, and the failure of any of the proposals to achieve the objectives stated, are discussed in greater detail below in Section II.B.*
24. *Canada’s position has at all times been that, consistent with other international trade agreements between the Parties, to “cure the breach” under the SLA means to cease the breaching conduct. Canada has demonstrated that the SLA does not authorize the retrospective relief sought by the United States in this arbitration, and it is undisputed that the breaching practice stopped even before the United States filed its Request for Arbitration: Canada correctly applied the adjustment to EUSC to Option B Regions as of July 1, 2007.<sup>47</sup> The issue of burden does not arise on Canada’s interpretation of the SLA, given the uncontested facts.”*

### **c. The Tribunal**

79. The Tribunal finds that the Parties’ approach and general remarks regarding the burden of proof are not in real contrast and are largely shared by the Tribunal’s general view of the issue of burden of proof.
80. The Parties’ disagreement in this context concerns rather the implementation of these general principles taking into consideration the specific disputed issues of the present case. This latter aspect of implementation, in the Tribunal’s view, can better be considered later in this Award when dealing with these separate issues.

## **6. Relevance of Decisions of Other Courts and Tribunals**

81. In the legal arguments made in their written and oral submissions, the Parties rely on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the

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<sup>46</sup> *Tr. at 144:11-15.*

<sup>47</sup> *See supra Part I.A.*

Tribunal to make certain general preliminary observations in this regard.

82. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the SLA and of arriving at the proper meaning to be given to those particular provisions in the context of the SLA in which they appear.
83. On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's "*preparatory work*" and the "*circumstances of its conclusion*", but indicates by the word "*including*" that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as "*subsidiary means*". Therefore, these legal materials can also be understood to constitute "*supplementary means of interpretation*" in the sense of Art. 32 VCLT.
84. That being so, it is not evident how far arbitral awards are of determinative relevance to the Tribunal's task. It is at all events clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
85. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.
86. Such an examination will be conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable SLA provisions, while taking into account the above-mentioned specificity of the SLA to be applied in the present case.

## **7. The Dispute regarding the Admissibility of Certain Evidence submitted by Claimant's Post-Hearing Brief**

87. In a letter of November 7, 2008, Respondent raised a procedural objection with regard to certain evidence in Claimant's Post-Hearing Brief, alleging that Claimant introduced evidence that

had purportedly already been ruled inadmissible by the Tribunal. In support of its contention, Respondent argued as follows:

*“Paragraphs 76, 78-80, and corresponding notes 16 and 19-23 of Claimant’s PHB now introduce the contents of the documentary evidence rejected by the Tribunal at the hearing. This is in violation of the Tribunal’s determination at the hearing, it is further inconsistent with sections 3.3 and 4.2 of PO No. 2 and it causes grave prejudice to Canada’s right to a fair proceeding. Canada therefore strongly objects to introduction of this new evidence and respectfully requests the Tribunal to strike from the record and disregard: (i) all information from and references to Professor Kalt’s 1988 publication in paragraphs 76, 78, 79 and 80 of the U.S. PHB; and (ii) all information from and references to publications listed in paragraph 80 of the U.S. PHB. Neither Professor Kalt’s 1988 publication nor the other four studies listed in paragraph 80 of the U.S. PHB are on the record.”*

88. Claimant rejected Respondent’s reproach submitting that there was no material off the record to strike from its Post-Hearing Brief with the exception of a reference to a 1988 paper of Respondent’s witness regarding the upper range of sensitivity. Hence, Claimant conceded that this upper range (1.8) was to be stricken from § 80 of the Post-Hearing Brief. Its arguments can best be summarized by quoting the following:

*“In our post-hearing brief, the United States has relied upon testimony from the hearing and exhibits and authorities in the record. We have not relied upon the contents of Dr. Kalt’s 1988 paper or the contents of any of the other academic papers to which Canada refers in its letter – we have relied upon testimony in which those papers were mentioned. However, upon reviewing our citations, we agree that the upper range of the sensitivity tested in Dr. Kalt’s 1988 paper is not reflected in the record; therefore, we agree that that upper range (1.8) should be stricken from paragraph 80 of our post-hearing brief. Accordingly, with this one exception, there is no extra-record material to strike from our brief.*

[...]

*Although Canada objected to the introduction into evidence of one of the documents listed in its letter, Canada never objected to Dr. Kalt’s lengthy testimony regarding issues surrounding any document, nor did Canada use its opportunity on redirect examination to correct or clarify Dr. Kalt’s testimony, or request that testimony be stricken. Canada now seeks to prevent*

*the Tribunal from considering any of that testimony, despite having agreed on October 26, 2008 to the corrected transcript.*

[...]

*Accordingly, we respectfully request the Tribunal decline to grant Canada's request, except insofar as we agree that the reference to "1.8" in paragraph 80 should be stricken."*

89. In response to Claimant's letter of November 10, 2008, Respondent in a letter of November 14, 2008 confirmed its procedural objection and requested that the evidence newly introduced be stricken from the record:

*"In light of the foregoing, the U.S. attempt to introduce the contents of papers that are not in the evidentiary record should be denied. While the substance at stake may be peripheral, as a matter of principle it is contrary to fair process. At the hearing, the United States attempted to introduce new documents which the Tribunal ruled were not admissible. This new attempt by the U.S. to introduce into evidence information allegedly included in those documents should also be rejected. Canada did not have the opportunity to review and respond to those documents, or to address them on re-direct, because the United States did not file them when it should have. None of the studies discussed in the challenged paragraphs of the U.S. Post-Hearing Brief are on the record. Canada respectfully confirms its request that the Tribunal strike from the record and disregard: (i) all information from and references to Professor Kalt's 1988 publication in paragraphs 76, 78, 79 and 80 of the U.S. Post-Hearing Brief; and (ii) all information from and references to publications listed in paragraph 80 of U.S. Post-Hearing Brief."*

90. In a further reply by letter of November 17, 2008, Claimant reiterated that the United States had complied with the Tribunal's orders, did not seek to introduce any new evidence, and relied only upon the testimony of witnesses at the hearing and exhibits already in the record. In particular, Claimant argued:

*"First (...) (1) Dr. Kalt authored the paper and generally recalled its contents; (2) Canada did not object to the examination of Dr. Kalt as to his recollection of the paper; and (3) Canada had an opportunity to examine him on it[sic] contents. (...)*

*Second, Canada expands upon its objection related to other published papers in the academic literature. However, the United States did not offer the papers themselves – papers that Dr. Kalt himself listed among the materials he reviewed in*

*preparing his reports – but only cross-examined Dr. Kalt with respect to his independent recollection of them (...). Finally, Canada has not raised a substantive objection to Dr. Kalt’s 1988 paper or the other references to the published academic literature.”*

91. The Tribunal, having examined the Parties exchange on this matter, concludes as follows:

Procedurally, the Tribunal considers Respondent’s objection as justified. Insofar as the disputed §§ 76, 78 to 80 and notes 16 and 19 to 23 of Claimant’s Post-Hearing Brief refer to and cite the Transcript of the Hearing, this is clearly admissible. However, insofar as they refer to and cite the contents of the documentary evidence rejected by the Tribunal during the Hearing, they are not admissible for the same reasons why they were rejected at the Hearing, particularly because such evidence could have been introduced at an earlier stage by Claimant or its expert in the several rounds of expert reports and replies, and because Respondent’s expert did not have an opportunity to re-read these documents and be prepared for comments in this regard at the Hearing.

92. On the other hand, since the Tribunal had to consider the disputed evidence in order to reach the above procedural conclusion, it should be added that the Tribunal, by taking into account the admissible written and oral evidence of both Parties’ experts, finds that the disputed additional evidence has no determinative value for the Tribunal’s considerations or conclusions in this Award.

## **H.II. Establishment of a Cure Period**

93. While Claimant asserts that the Tribunal is to identify a “*reasonable period of time for the breaching party to cure*” the breach and simultaneously “*determine the appropriate adjustments to the export measures*”, Respondent holds that there is no legal basis to do so since the breach has assertedly already been cured by applying adjusted EUSC to Option B regions as of July 2007 and thus no cure period needs to be established (C I, § 14; R I, § 5).

## 1. Arguments by Claimant

94. With regard to the determination of a reasonable time for cure Claimant states that it is “*willing to agree that Canada should be granted the maximum period allowable under the Agreement to cure its breach*”, namely 30 days (C I, § 28; cf. C II, § 5).
95. Claimant maintains that the wording of § 22 of Article XIV of the SLA obligates the Tribunal to simultaneously “*identify a reasonable period of time for the breaching party to cure its breach and to determine the appropriate adjustments to the export measures*” should the breaching party fail to cure the breach within the cure period established by the Tribunal (C I, §§ 14, 20, 26 and 30; C III, § 4).
96. However, Claimant also purports that “[*n*]othing in Article XIV of the Agreement contemplates that the Tribunal make a determination at this stage as to whether Canada has cured its breach”. According to Claimant “*by declining to opine upon the form of a possible cure (...) it honors Canada’s prerogative to take the first step in identifying a proper cure*”, since Respondent “*has the authority under the Agreement to identify in the first instance a possible cure for its breach*” (C II, § 16). In addition, Claimant asserts that “*the reasonable period of time does not necessarily contemplate a completed cure*” thus contending Respondent’s alleged argument “*that a six-month breach could not be cured within 30 days*” (C II, § 17).
97. In Claimant’s view “*this interpretation is the only interpretation that makes sense when read in the context of Article XIV*” of the SLA. To support its view, Claimant takes recourse to §§ 26 and 27 of Article XIV of the SLA which “*authorize the complaining party to take certain action [...] if the breaching party has not cured the breach and has not itself applied the compensatory measures directed by the Tribunal after the expiration of the reasonable period of time.*” Claimant insists that “[*o*]nly at that point would the Tribunal be called upon to determine whether the breaching party has cured the breach that was found” (C II, § 18).
98. To further back up this argumentation, Claimant draws upon the 1996 Softwood Lumber Agreement “*which provided for earlier intervention by the Tribunal*”, namely for the “*early determination of a cure*”. Claimant therefore pleads that “*the Tribunal should not indulge Canada’s desire to rewrite the Agreement*” (C II, § 19).

## 2. Arguments by Respondent

99. With regard to the possible establishment of a cure period Respondent persists that such a determination is not required under the SLA since the Agreement is assertedly designed to provide for prospective remedies only. Respondent submits that this is supported by the ordinary meaning and the structure of Article XIV SLA as well as by the negotiating history.
100. Furthermore, Respondent holds that the breach of the SLA has already been cured (R II, §§ 1 *et seq.*; R III, §§ 9, 11, 32 *et seq.*; Tr 59:4-7, 67:13-16). To support its case, Respondent submits that Claimant may well allege that Respondent has not cured the breach, but remains “*silent as to what the United States would consider “cure the breach” to be*”, an issue that Respondent considers to be crucial (R I, § 3; cf. R II, §§ 21-23; R III, §§ 12, 46).
101. Accusing Claimant of making a false assumption (R I, § 4) Respondent strongly maintains that by applying the adjusted EUSC factor provided in Annex 7D to Option B regions as of July 1, 2007, it has already cured the breach and “*therefore no compensatory adjustments are required or authorized by the SLA*” (R I, §§ 5, 6, 57). On the contrary, Respondent argues that “[*e*]very authorization of compensatory adjustments in Article XIV expressly is made conditional on there not having been a cure of the breach, and compensatory adjustments always must give way once there is a cure of the breach” (R II, §§ 19, 37). Therefore, according to Respondent “[*c*]ompensatory adjustments come into play *if and only if* there is no cure” (R II, §§ 35, 41).
102. Respondent thus challenges Claimant’s remedy proposals as *unjustified*, sustaining that “*the “excess” of lumber exported by Option B regions to the United States as a consequence of the breach has already been more than offset by the degree to which those regions exported less than their full quota entitlements in the period since July 1, 2007*” (R I, §§ 7, 58, 59; R II, §§ 9, 98; cf. R III, § 26). However, according to Respondent, Claimant “*has not even considered whether this has implications for the degree of harm*” and much less “*whether these below-quota shipments in the past already have mitigated harm*” (R II, § 101).
103. Furthermore, Respondent holds that countermeasures under Article XIV of the SLA are only provided for “*if the breach is not cured by the end of the reasonable period of time*” as identified in § 22(a), and “*compensatory adjustments are not authorized for prior breaches under the SLA unless specifically*

*so stated*” (R I, § 5). However, since “*the non-conforming conduct ha[s] ceased*” Respondent considers the present case to deal with “*a breach long cured*” (R I, §§ 5, 50; R III, § 24). Hence, Respondent argues, “[*if the party ceases the breach (cures) before the end of the reasonable period of time, there are no compensatory measures*”, but adjustments “*cease on the day that the Party cures by complying with the obligation in question*” (R I, § 21).

104. To underpin this argument, Respondent takes recourse to the principle of good faith as the “*cardinal principle*” that governs “*both U.S. and Canadian international trade operations*” as well as to the asserted characteristic of prospective remedy systems that “*member countries are not held to account for past violations, and prompt compliance will mean that there is no retaliation or compensation*” (R I, § 50).
105. Respondent also holds that “[*t]he U.S. denial that Canada has cured the breach indicates that the United States thinks that a cure does not exist without compensation for past breaches*” (R I, § 22; cf. § 49). Respondent further reproaches that Claimant “*seizes a single line from the Tribunal’s Award on Liability to assert that the Tribunal has already decided that Canada bears addition responsibility for the consequences of its breach*” based inter alia on the assumption that the breach has not been cured yet (R I, § 3; R II, § 15).
106. Moreover, Respondent persists that “*cure and compensatory adjustment are separate concepts in line with the terms of paragraphs 22 and 24 of Article XIV*” of the SLA, however, this “*distinction (...) is essentially obliterated under the U.S. theory, since both cure and compensatory adjustment involve compensating for past breaches in some way*” (R I, § 23; cf. R II, §§ 28 *et seq.*).
107. This being said, Respondent states that it “*never questioned the finality of the Tribunal’s finding that Canada had breached the SLA.*” However, “*Canada does not consider (...) that the Tribunal’s award in the liability phase extended beyond a finding of breach to the appropriate consequences under the SLA of that breach.*” Instead, Respondent had understood these consequences to be determined in the remedy phase (R III, § 57).
108. Reproaching that Claimant’s argument is a “*classic syllogistic error*”, Respondent argues that “[*w]hile it is true that one of the dictionary definitions of “cure” is “remedy,” it cannot be said that because “remedy” is part of a dictionary definition of “cure,” that “to cure” therefore means the same thing as*



*“remedy” under the SLA.”* Respondent submits that *“[p]aragraph 22(b) makes no sense if, as the United States contends, “cure” and “adjustments to compensate” are equivalent”* (R II, § 36) and that in doing this, Claimant *“ignores the context of Article XIV in which the word appears”* (R II, § 33). Respondent further argues that if cure and compensation were to be equivalent, § 22(b) would be *“superfluous contrary to the principle of effectiveness in treaty interpretation”* (R II, § 37).

109. In consequence, Respondent maintains that in any case the Tribunal only has to establish monthly compensatory measures to *“remedy the ongoing effects of the breach in the absence of a cure”* (R I, § 21; cf. R II, §§ 22, 42). However, since in Respondent’s view the breach has already been cured, there is no need to determine a cure period (R II, § 11; R III, § 32).
110. Strongly contesting Claimant’s *“far too myopic a reading of Article XIV,”* Respondent holds that the Tribunal *“has the authority and even the duty to decide this issue now”* (R II, §§ 16 *et seq.*; R III, § 53). Since in Respondent’s view *“there is nothing hypothetical about Canada’s defense, no facts are contested between the Parties, and nothing will change regarding the factual basis for Canada’s defense”* Respondent argues that *“the issue is ripe for decision”* (R II, § 25; R III, § 47). In support of this contention, Respondent further submits that it would prove *“difficult”* for the Tribunal to *“assess what is “reasonable” [under paragraph 22 of Article XIV of the SLA] without determining whether it thought that Canada needed to do more than eliminate the breach”* (R II, § 21). Considering these arguments, Respondent claims that Claimant *“strains to argue against a decision that the Tribunal has full authority to make and whose deferral in the circumstances would appear to make no practical sense”* (R II, § 26).

### **3. The Tribunal**

111. The above summaries of the Parties’ contentions with regard to the Tribunal’s decision according to Art. XIV § 22(a) on the establishment of the cure period are supplemented to a large extent by further arguments particularly regarding the general applicability of § 22 and its retroactive or prospective interpretation put forward regarding subsection (b) of § 22 which deals with the determination of compensatory adjustments. To most effectively deal with the relevant considerations, the Tribunal therefore feels that it should present its own determinative considerations and conclusions in one

common section after the summaries of the Parties' contentions regarding both subsections (a) and (b).

112. Therefore, the considerations and conclusions of the Tribunal regarding both subsections (a) and (b) are presented in the separate section H.IV. later in this Award.

### **H.III. Determination of Compensatory Adjustments**

113. It is not in dispute between the Parties in these proceedings that Respondent did not apply the adjustment factor to Option B regions from January 1, 2007 to June 30, 2007 (C I, § 11; R I, § 1) and the Tribunal has decided in its Award on Liability that Canada has in that respect breached the Softwood Lumber Agreement. However, the consequences of this breach are heavily contested. Claimant holds that the Agreement "*does not bar the Tribunal from ordering relief to compensate for a breach of the Agreement*" and thus requests the Tribunal to determine appropriate compensatory adjustments to export measures (C II, § 5; C III, §§ 47 *et seq.*) while Respondent maintains that the breach has already been cured and therefore there is no need neither to establish a cure period, nor a need to determine compensatory adjustments (R II, §§ 3, 20).

#### **1. Arguments by Claimant**

114. Claimant strongly contests Respondent's argument that the SLA provides for prospective remedies only. On the contrary, Claimant contends that "*nothing in the SLA provides that the consequences of past breaches should not be remedied*" and that if that were to be the case this would in fact "*permit the parties to breach the SLA with impunity as long as the breaching behaviour ceases just before an adverse award decision*" (C I, § 32; cf. C II, § 6). Therefore, Claimant maintains that the SLA does neither refer to nor distinguish between "*prospective*" and "*retrospective*" remedies (C II, § 6).
115. Furthermore, Claimant draws upon Article XIV SLA, § 23(a) to point out the consequences agreed upon should a breach by Respondent be found, which purportedly results in "*the imposition of or increase in export charges, or the imposition of or reduction in export volumes*" (C I, § 21, cf. SLA, Art. XIV, § 23(a)).

116. In this context, Claimant also underscores that in its view the task of the Tribunal is merely to determine appropriate compensatory measures to the export measures, and not “*to determine whether private parties have suffered a loss or whether government action is the proximate cause.*” Claimant asserts that Respondent “*cannot simply read the Tribunal’s obligations out of the SLA simply because the Tribunal’s task may be more difficult than it might be in a private-party action*” (C II, § 38; cf. C III, §§ 13, 17). Rather, according to Claimant, this argument results from a “*desire to avoid the consequences of the plain terms of the bargain to which it [i.e. Respondent] agreed*” (C II, § 50).
117. However, Claimant notes that “*it is arguably even easier to fashion a set of compensatory measures to remedy a breach that has ceased*” since it is “*discrete and quantifiable, and, therefore, more easily redressed*” (C II, § 50). In any case, Claimant alleges Respondent’s argument that the determination of adjustment measures would be subject to unknown changing market conditions to be void since this “*“problem” presents itself under either party’s interpretation*” and thus in Claimant’s view does not support Respondent’s position (C II, § 52). Furthermore, Claimant submits that Respondent “*fails entirely to recognize that its breach created the original market distortion that has contributed to the market’s current condition*” (C II, § 51). Therefore, Claimant submits that “*even if any of these adjustments would change the current “equilibrium” in the operation of the export measures, that “equilibrium” is a fiction created by Canada’s breach*” (C III, §§ 18, 70).

**a. Retroactive and Prospective Remedy System**

118. Respondent’s argument is allegedly based on a misinterpretation, since according to Claimant the term “retroactive” in § 32 of Article XIV of the SLA “*is not intended to distinguish “retroactive” from “prospective”;*” but is “*used to clarify at what point in the past the measures should commence: the time of the breach; the time of the Award; or the end of the reasonable period*” (C II, § 23).
119. Claimant asserts that Respondent’s witness “*never explained why a continuing breach would present substantively different remedy concerns than an historical breach*” since any remedy is purported to be “*by definition an adjustment to the current operation of the SLA’s export measures*” (C III, §§ 18, 56, 60 *et seq.*). Rather, according to Claimant “*the effect of a past violation is arguably clearer, since it occurred under a known set of supply and demand conditions*” while a continuing breach

will have to be assessed under “*continuously evolving and potentially volatile market conditions*” (C III; § 62).

120. Claimant further argues that “*if Dr. Kalt were to admit that even a continuing breach creates a market disturbance, he would reveal that Canada’s interpretation – taken to its logical conclusion – permits no remedy at all for any breach*” (C III, § 18). However, in Claimant’s view, “[i]t cannot be that an aggrieved party is entitled to a remedy only when the “remedy market” happens to match exactly the breach market because the breach market will likely never match the remedy market” (C III, § 61).

### **(1) Ordinary Meaning of the SLA**

121. Relying on the “*ordinary meaning of the SLA*” and thus taking into account customary international law as codified in the Vienna Convention on the Law of Treaties, Claimant holds that the two tasks set out in § 22 of Article XIV of the SLA of identifying a cure period and determining appropriate adjustments are to be made simultaneously. Thus in Claimant’s view the Tribunal has to “*include both findings in its award*” (C I, § 26; C II, § 15). Taking recourse to § 22 of Article XIV of the SLA Claimant submits that the wording of the provision obligates the Tribunal to “*identify a reasonable period of time for the breaching party to cure its breach and to determine the appropriate adjustments to the export measures*” should the breaching party fail to cure the breach within the cure period established by the Tribunal (C I, § 20).

### **(2) Structure and Context of the SLA**

122. Under these circumstances, Claimant purports that “*given that the term “prospective” does not appear in connection with “cure” or anywhere else in Article XIV, the absence of the term “retrospective” is meaningless*” (C II, § 23).
123. To further demonstrate that its interpretation is in entire conformity with the text of the SLA, Claimant then points out that “*there are other clearly “retroactive” provisions of the Agreement that also do not use the word “retroactive”*” such as the third country adjustment provisions which “*clearly contemplate a retroactive refund, but do not use the term “retroactive.”*” (C II, § 24).
124. Moreover, Claimant reasons that “*even the “retroactive” international agreements that Canada relies upon (such as the ICSID Convention and NAFTA Chapter 11) do not use the term “retroactive.”*” (C II, §§ 24, 30). By “*fail[ing] to acknowledge*

*key differences in the language*” Respondent allegedly “*ignores language in the SLA that expressly divorces dispute settlement under this Agreement from the WTO and NAFTA Chapter 20 processes*” allegedly for the mere fact that the SLA deals with trade matters between two states (C II, § 35). According to Claimant, “[r]ather than adopt the WTO DSU or NAFTA Chapter 20 frameworks, the SLA explicitly disavows them.” Purportedly, Respondent “*attempts to import wholesale*” provisions from the DSU and NAFTA (C II, § 11) and thus allegedly draws “*phantom parallels*” to these regimes (C II, § 6). However, Claimant asserts that these provisions are “*specialized dispute resolution provisions [...] with which both parties were highly familiar but explicitly rejected for purposes of dispute settlement under the SLA*” (C II, § 6).

125. Claimant further persists that “[w]hen the parties sought to incorporate rules or procedures from particular fora, they did so explicitly” (C II, § 28). However with regard to the DSU and NAFTA this was allegedly not the case. To illustrate its view, Claimant argues that the SLA discusses the terms “breach”, “cure the breach”, “compensatory adjustments”, and “compensatory measures” while the DSU and NAFTA Chapter 20 use the terms “inconsistent measure”, “bring a measure into conformity”, “non-implementation or removal”, “voluntary compensation”, “suspension of concessions or obligations”, and “suspension of benefits of equivalent effect” (C II, § 31). Claimant argues that Respondent is trying to “*replace the concept of “breach” in the SLA with the concept of “non-conforming measure” from the WTO DSU and NAFTA Chapter 20, and replace the concept of “cure” with the concept of “bringing a measure into conformity.”*” (C II, § 11; cf. C III, § 10). However, the “*decision not to use the tried-and-tested language from those systems in favor of new language, leads only to one conclusion: “cure the breach” must have a different meaning than “bring the [inconsistent] measure into conformity,” or “non-implementation or removal of a measure not conforming with this Agreement” – the language used in the WTO DSU and NAFTA*” (C II, § 29).
126. Relying on both the WTO Agreement as well as NAFTA which are purportedly construed to provide for the liberalisation of trade and a facilitated market access as their primary objective, Claimant points out the contrast to the SLA which “*is not intended to liberalize international trade in general, but to compromise specific litigation and regulate trade in one specific sector*” (C II, § 34). Claimant thus purports that the SLA is not a multilateral treaty like the NAFTA or the WTO Dispute Settlement Understanding (C III, § 9).

127. Claimant reproaches Respondent of going “*to great lengths to establish that within international law there is a strict taxonomy of “retroactive” and “prospective” systems and to show that a particular agreement’s placement within this taxonomy depends exclusively on whether it contains certain features*” (C II, § 34). However, according to Claimant there is no support for Respondent’s argument which allegedly “*ignores entirely that the question whether a particular agreement contains a remedy that contemplates reparation depends upon the text of the agreement, not upon whether it shares certain arbitrary features commonly associated with “retroactive” systems versus “prospective” systems*” (C II, § 36).

### **(3) Object and Purpose of the SLA**

128. According to Claimant by concluding the SLA “*the parties did not bargain for market access in exchange for market access*”, but rather concluded an agreement that is “*narrowly tailored to the softwood lumber markets in the two countries and [...] specifically tied to the real-world market conditions of the softwood lumber trade.*” Therefore, Respondent’s “*failure to honor its commitments under the SLA is wholly unlike a failure to abide by the trade liberalizing commitments of the WTO and NAFTA*” (C II, § 34).

129. In addition, Claimant criticises Respondent’s expert report, purporting that Respondent’s experts themselves concede that the report “*focuses upon the United States economic welfare more broadly, as opposed to the interests of the American softwood lumber industry*” (C II, § 58; cf. RR-2, § 41). However, Claimant submits in its rebuttal expert report that “*an economic analysis must respond to the policy question being asked, not operate in a vacuum.*” Therefore, “*when the analysis concerns the functioning of the SLA, a primary concern is the effect of the breach upon American producers*” (C II, § 58; cf. CR-13, § 12).

130. Claimant hence asserts that the SLA “*balances the interests, in part, of the Canadian softwood lumber industry against the American softwood lumber industry*” (C II, § 59). Claimant thus contends that “[*g*]*iven the unique nature of the SLA and its goals, and given the SLA’s primary focus upon price, the relevant inquiry is [...] the effect of Canada’s overshipment upon the price of lumber, not the effect of the price on the consumer*” (C II, § 60; cf. CR-13, § 27).

131. Claimant further contradicts Respondent’s argument that the SLA’s objective is to preserve future trading opportunities and not to redress past injuries or make the prevailing party whole.

In Claimant's view, Respondent thus fails to provide a "*justification for its self-serving assertion*" (C II, §§ 39 *et seq.*; cf. R I, § 41). Also, Claimant alleges that Respondent neither provides for an analysis "*suggesting that its softwood lumber industry [...] obtained no tangible benefit from its six-month breach of the Agreement*" nor does Respondent "*deny that the American industry was harmed by the breach*" (C II, § 61). According to Claimant, this opinion "*defies common sense, not to mention basic laws of economics*" (C III, § 53).

132. In support of its contentions Claimant relies upon the findings of the Award on Liability concluding that "*the only object and purpose*" of the SLA was "*the economic effects of the SLA*" (C II, §§ 39, 50) and that Respondent "*offers no analysis in its statement of defence to counter these conclusions*" (C II, § 61; C III, § 33).

#### **(4) Negotiating History**

133. In Claimant's opinion the negotiating history does not support Respondent's view of the SLA being a purely prospective remedy system. On the contrary, Claimant submits that it had argued in previous arbitration that "*the cure required a compensatory remedy*" so that when Respondent asserted that it "*borrowed the term 'cure the breach' from the SLA 1996*" Respondent was "*certainly aware when it proposed 'cure the breach' for inclusion in the SLA 2006 that the United States had previously expressed a particular understanding of the meaning of that term in the context of a prior softwood lumber agreement between the two parties*", even though the matter was subsequently settled prior to the release of the panel report. Therefore Claimant argues that "*in light of this, the ultimate decision to replace all instances of the term 'eliminate' with 'cure' undercuts, rather than supports, Canada's assertion that the term 'cure' has the meaning it desires*" (C II, §§ 47 *et seq.*).

#### **(5) Application of Other Provisions of International Law**

134. Claimant further reasons that according to the VCLT "*any relevant rules of international law applicable in the relations between the parties*" should be taken into account" (C I, § 27; cf. Art. 31 § 3(c) VCLT). Claimant especially refers to the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 drafted by the International Law Commission (CR-9), purporting that Respondent's breach "*has disrupted the system of export measures to which the parties agreed [...]. If the system is disrupted, the premise upon which the United States agreed to forego remedies under domestic law is*

*undermined. [...] Canada should be held accountable for the consequences of this disruption*” thus establishing Respondent’s responsibility under the Agreement (C I, § 13; cf. also § 31, note 9).

135. To support its view Claimant submits that *“it is axiomatic that states must generally provide reparations for breaches of international obligations”* (C II, § 41; ILC Draft Articles, CR-9; Case Concerning the Factory at Chorzów, CR-8). Contradicting Respondent’s statement that neither the ILC Draft Articles nor the Chorzów Factory Case are applicable in the case at hand, Claimant purports that the *“comprehensive remedy scheme of the SLA does not render the ILC Articles and Chorzów Factory inapplicable”* (C II, § 41). Claimant pleads that even in the case of existing *lex specialis* the *lex generalis* *“may be relied upon to clarify the meaning of terms”* (C II, § 42).
136. To back up this argument, Claimant takes recourse to the NAFTA Case ADF v. United States which stated that *lex generalis* *“[...] may frequently cast light on a specific interpretive issues; but it is not to be regarded as overriding and superseding the latter.”*” (C II, § 42; ADF Group Inc. v. United States, CR-28). From this, Claimant concludes that since *“[t]he ILC Articles and Chorzów Factory elucidate the meaning of the terms “cure” and “breach” that were chosen by the parties in their remedy scheme”* the principle of *lex specialis* *“does not bar this use of these authorities”* (C II, § 43).
137. Claimant assertedly finds support for this argument in the wording of § 4 of the Commentary to Article 55 of the ILC Draft Articles which for the application of the *lex specialis* principle demands that *“[...] it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other”* (ILC Draft Articles, CR-9). However, according to Claimant *“[t]here is no inconsistency between “cure the breach” and reparations under the United States interpretation, whereas the SLA explicitly provides that the WTO DSU and NAFTA Chapter 20 should not apply”* (C II, § 43).
138. Furthermore, Claimant draws support for its reasoning from fact that both the ILC Draft Articles as well as the Chorzów Factory Case *“like the SLA, use the term “breach” to discuss the wrongful act at issue”* while the DSU and NAFTA Chapter 20 *“concern [...] a “non-conforming measure [...]”*. Therefore, taking into account that the ILC Draft Articles and the Chorzów Factory Case *“apply to “breaches” and given the parties choice of the term “breach,” it is reasonable to use the reparation*



*principles*” of these sources “to interpret the term “cure the breach,” particularly where the principle of reparation is entirely consistent with the ordinary meaning of “cure”” (C II, § 44).

139. Citing the *Gabcikovo-Nagymaros Case* brought before the International Court of Justice (ICJ) Claimant contends that “even Canada must concede that state-to-state disputes arising from bilateral agreements do not require only prospective remedies”, but that “both parties were entitled to retrospective compensation” (C II, § 37; cf. CR-27). To further underpin this argument Claimant takes recourse to a claim for retrospective damage brought by Respondent against the Soviet Union under the Convention on International Liability for Damage Caused by Space Objects (cf. CR-14 to CR-16).
140. From all this, Claimant concludes that “apart from its flawed comparison of the SLA to the WTO and NAFTA” Respondent’s interpretation assertedly does not prove that the SLA “precludes retrospective remedy” (C II, § 37).

#### **b. Breach has Not Been Cured**

141. Claimant also strongly opposes Respondent’s assertion that the breach has been cured by applying the adjustment factor to Option B regions as of July 2007 thus contesting that the breach has been cured simply by stopping the breaching behaviour (C I, § 30; C II, § 10). In Claimant’s view, such a reading “if adopted, would also endanger the fundamental utility of the SLA as a means of resolving disputes between the parties” (R III, § 7).
142. Claimant holds that Respondent “contends that it is not liable for the consequences of its breach because it started making the calculation as of July 2007” and further that Respondent allegedly claims that “the arbitration is over because it [i.e. Respondent] ceased its breaching behavior before the United States submitted its request for arbitration initiating these proceedings” (C II, § 3). Nevertheless, Claimant insists that “no language in the SLA states or even implies that breaches that end before an award has been issued are exempt from the provisions of paragraph 22 of Article XIV of the SLA” and that “[n]othing in the SLA or its negotiating history suggests that the Agreement, by design, addresses only open-ended breaches and exempts all other breaches from any remedy” (C II, §§ 3, 10).
143. Claimant further argues, that if that were the case “any breaching party under the SLA would be permitted to unilaterally end an arbitration and to escape compensation simply by ceasing to engage in the breaching behavior before

*the award on remedy.*” Claimant emphasises that this was “*not the bargain into which the United States entered [into] when it agreed to refrain from imposing trade measures under its domestic law*” (C II, § 6). Moreover, in Claimant’s view the fact that “*Canada waited until its statement of defence on remedy to raise substantively what is clearly a threshold issue indicates the weakness of its interpretation*” (C II, § 4). Allegedly, “[r]ather than confront the actual provisions of the SLA and the appropriate cure of its breach, Canada instead redefines the breach as no breach at all.” However, Claimant purports that this is not supported by the language of the SLA and that Respondent is thus not allowed “*to escape the mandatory provisions of Article XIV*” of the SLA (C II, §§ 11, 55; R III, § 2).

144. Respondent’s interpretation of “cure” is allegedly running counter to the ordinary meaning of the word (C I, § 31). To underscore this argument, Claimant refers to the definitions of the word “cure” as contained in *Webster’s New International Dictionary of the English Language* (CR-11) as well as *The Oxford English Dictionary* (CR-12). According to the latter, using the term “cure” in the “*context of evil of any kind*” means “*to remedy, rectify, remove*” (C I, § 31; cf. CR-12, p. 1263, verb definition II.5). In addition, in the context of a malady, the meaning of “cure” is “*to subdue or remove by remedial means; remedy, remove; heal*” (C I, § 31, cf. CR-11, transitive verb definition 2.b). Claimant reproaches Respondent that its failure to apply adjusted EUSC to Option B regions for the first six months of 2007 is the “*malady*” or “*evil*” that needs to be rectified in these proceedings.
145. However, by applying in Claimant’s view a “*strained interpretation of the SLA*” (C II, § 21; cf. C III, § 6) Respondent “*isolates the narrowest possible part of the ordinary meaning of cure (“remove”) and insists upon conflating the concept of breach with the concept of breaching practice or non-conforming measure from other regimes*” (C II, § 20) and allegedly disregards that Respondent’s breach consisted of the failure to perform the calculation according to § 14 of Annex 7D of the SLA “*as of January 1, 2007, that is, in a timely manner*” (C II, §§ 12, 21). However, “[w]here cure means to remedy, rectify, and heal, the mere establishment of an endpoint for the breaching practice cannot constitute a cure for this breach” (C II, § 21).
146. Claimant further argues that the asserted “*substantial overshoot*” of lumber in the first half of 2007 has not been corrected and furthermore contradicts Respondent’s statement that the breach has resulted in no harm to Claimant because the

overshipments were “offset” by Option B region shipments during the second half of 2007 (C I, § 31; C II, § 55). Instead, Claimant submits that *“the SLA does not allow a region to exceed its quota in one month or a series of months, then “make up” for the excess shipments in later months by undershipping, either intentionally or unintentionally”* (C II, § 56). In Claimant’s view this would result in the possibility of Respondent to *“freely breach the Agreement at any time only to subsequently undership to “make up” for the overshipment”* and thereby *“undermine the very purpose of the volume restraints in the SLA”* and thus *“thwart the intent of the parties”* (C II, § 56; cf. C III, § 5). *“Subsequent practice,”* however, *“which itself is a product of the market disruption caused by the overshipment, cannot compensate for the overshipment”* (C II, § 56).

147. The argument that the alleged overshipments have already been “offset” is thus assertedly *“unpersuasive”* (C II, § 54). On the contrary, Respondent has made *“no effort to correct the improper calculations made during the prior six months or to address any harm caused by those improper calculations”* when it started applying adjusted EUSC as of July 2007. In consequence, Claimant concludes that even a proper calculation and application of EUSC as of that date *“could not – without more – remedy, rectify, or remove Canada’s improper calculation of monthly EUSC from January to June 2007”* (C I, § 31).
148. Thus maintaining that the required appropriate adjustments are to remedy the breach, as is stated in Article XIV § 23 of the SLA (C I, §§ 34, 41) Claimant thus asserts that *“to properly remedy, rectify, and heal Canada’s failure to timely apply the calculations, Canada must provide full reparation for its breach, that is compensate for the overshipment.”* In this context, Claimant further notes that *“to “cure” is to “remedy,” and, pursuant to the SLA, compensatory measures also “remedy.””* From this, Claimant draws the conclusion that *“compensation and remedy are equivalent concepts under the SLA. It follows then that a cure, which by definition must remedy the breach, includes some form of compensation”* (C II, § 21).
149. In addition, by contending that the breach has been cured, Respondent has in Claimant’s view *“fail[ed] to acknowledge that the Tribunal understood that Canada has begun to apply the EUSC adjustment, but is nonetheless responsible for the consequences of the breach.”* Claimant emphasises that it understands these consequences to go *“beyond mere compliance going forward”* (C I, § 33; C III, § 70).

**c. Appropriate and Meaningful Remedy**

150. Furthermore, relying on its expert report, Claimant holds that “*any compensatory adjustments must be commensurate with the breach, economically meaningful, and easily enforceable*” (C I, § 15). According to Claimant, Respondent has “*failed to demonstrate why any of these four proposed remedies is not “appropriate”*” (C III, § 16). In particular, Claimant is not of the opinion that any remedy needs to return lost producer surplus to affected producers, a view that has assertedly been voiced by Respondent (C III, § 59).
151. In Claimant’s view, it is upon the respective party to demonstrate that a remedy is appropriate to the extent that it wishes a particular remedy to be adopted (C III, §§ 26, 47 *et seq.*). Therefore, Claimant submits that if a respondent is “*unable to rebut the prima facie evidence [...] on which the claimant bears the burden of proof, then the Tribunal may accept such prima facie evidence as satisfying the burden of proof*” (C III, § 27).
152. In particular, Claimant does not share Respondent’s view that the proposed remedies result in “*any so-called “collateral effects”*” that would “*affect “other Parties beyond those who are the target of the proposed reparations.”*” (C III, § 65; Tr 141:17-142:17). Rather, in Claimant’s view any trade remedy will always affect other market participants beside the breaching party. In any case, Claimant submits that Respondent “*conceded on cross-examination that any so-called “collateral effects” actually benefit Canada*” (Tr 251:11-252:11) and that such a remedy “*that benefits Canada as a whole [...] cannot be considered punitive*” (C III, § 68).
153. Claimant alleges that Respondent incorrectly believes “*that compensatory measures apply only to the portion of the breach occurring after the reasonable period of time for curing the breach expires*” and thereby “*misinterpret[s] the provisions of the Agreement concerning compensatory measures*” (C II, § 26). However, according to Claimant this “*attempt to redefine the breach*” is not supported by the Softwood Lumber Agreement which “*unequivocally provides that compensatory measures shall be applied at the end of the reasonable period of time.*” Claimant thus holds that the term “breach” “*is not limited or qualified in any way to breaches that continue after the expiry of the reasonable cure period*” and that “*therefore, the plain meaning of paragraph 23 is that [...] the compensatory measures must remedy the entirety of the breach*” (C II, § 27).
154. Characterising the volume of exports of lumber as an “*economic effect*” of the SLA and relying on the Tribunal’s statement that

*“the economic effects of the SLA could be considered as its object and purpose”*, Claimant purports that the ordinary meaning of the SLA, read in its context and in light of its object and purpose, requires appropriate compensatory adjustments to *“comprise either increased export charges, more restrictive quota volumes, or both”* (C I, § 43; cf. Award on Liability, § 190). Furthermore, these adjustments should be *“tied to the economic effect of the SLA”* (C I, § 43).

155. Since Option B regions *“generally complied with the incorrect [regional quota volumes] during this [breach] period,”* the expert report assumes that if there had been no breach and if Respondent had correctly calculated and applied adjusted EUSC, Option B regions would have complied with these correctly calculated limitations (C I, § 39). Thus alleging that the breach of the Softwood Lumber Agreement resulted in over-exportation of lumber, Claimant contends that these overshipments have *“thwarted the Agreement’s limitations”* (C I, § 4).
156. In this context, Claimant contests Respondent’s criticism that its proposals fail to account for possible changed or changing inventory adjustments. According to Claimant *“there is no reason to expect such inventory behavior”* and purportedly, Respondent has not offered any evidence to the contrary neither with regard to Option B producers nor with regard to U.S. purchasers (C III, §§ 71, 89 *et seq.*).
157. Referring to its expert report, due to Respondent’s breach of the agreement a purported amount of over 180 million board feet of lumber was exported to the United States that would otherwise never have entered the United States market (C I, § 37; C II, § 89). Moreover, if contemporaneous data had been used, Respondent’s overshipment would assertedly have been even greater (C II, §§ 89 *et seq.*). In any case, the breach of the SLA involves an incorrect computation of regional quota volumes and this computation *“based on unadjusted EUSC resulted in incorrect [regional quota volumes]”* (C I, § 38). Claimant alleges that, in consequence, Respondent’s breach of the agreement changed the *“supply and price of lumber in the United States”* and increased profits for Respondent’s lumber industry to the detriment of Claimant’s lumber companies (C I, §§ 40, 44, 53).
158. At the Hearing on Remedy, Claimant quantified the amount of the overshipment to be 216 million board feet, based on a calculation using contemporaneous data (C III, § 30). Claimant further purports that the experts on both sides agreed that a

calculation using contemporaneous data is more accurate data for calculating RQVs (C III, § 36).

159. In addition, Claimant contests Respondent's view that Respondent was allowed to "carry forward" or "carry back" limited volumes of softwood lumber between consecutive months under the SLA indicating that this would equal "*an artificially-low overshipment calculation using a flawed application of the carry forward and carry back provisions of the SLA*" (C II, § 91; cf. C III, § 36). Relying on a letter of September 12, 2006, in which Respondent purportedly agreed to notify Claimant each month of any RQV volumes that would be carried forward or carried back, Claimant notes that "*Canada has never notified the United States that it intended to or did use carry forward or carry back.*" From this, Claimant concludes that Respondent never used the carry forward/carry back provisions of the SLA (C II, § 91; C III, § 38). According to Claimant, the quotas disclosed on the website of Respondent's Department of Foreign Affairs and International Trade are "*free of any adjustment for carry forward/carry back volumes*" (C III, § 40). Thus, in Claimant's view, Respondent cannot reduce its overshipment of assertedly 216 million board feet to 142 million board feet by applying the carry forward/carry back provisions (C III, § 36).
160. Furthermore, Claimant asserts that even if Respondent had been permitted to make use of the carry forward/carry back provisions retroactively, it "*improperly carrie[d] forward over 37 MMBF of volume from December 2006 to January 2007.*" However, Claimant notes that a carry forward from December 2006 to January 2007 "*is barred by paragraph 7 of Annex 7B,*" which states that regions can only carry forward or carry back between two months "*if "the Region's exports are subject to a volume restraint in both months"*" (C II, § 92; cf. Annex 7B, § 7, CR-13, § 67). According to Claimant, because of the "*SLA "transition period [...]"*" there was no volume restraint applicable to any SLA regions (Option A and Option B regions) from October to December 2006. Consequently, "*[b]ecause there was no volume restraint in December 2006, Option B regions were not permitted – and cannot be permitted now – to carry forward volume from December 2006 to January 2007*" (C II, § 94). Hence, "*Canada should not be permitted to use carry forward/carry back to reduce its overshipments during the first half of 2007*" (C II, § 95; C III, §§ 41 *et seq.*).
161. Claimant further holds that the overshipments at issue "*undermined the intended economic effect of the volume restraints,*" and thus "*any remedy consisting of changes to the export measures – whether volume-based remedies or price-*

*based remedies – should be sufficient to affect volume*” (C I, § 43). Claimant also notes that this kind of remedy “*falls squarely within the appropriate adjustments*” as contemplated in Article XIV of the SLA, since this provision “*articulates no preference for any particular kind of export measure*” (C I, § 46).

162. In support of its contention, Claimant argues that “*as the Tribunal found, the SLA’s purpose and economic effects include the limitations placed upon the volume of lumber*” exported from Canada to the United States (C I, § 47). As market conditions at present are deemed to be “*substantially different*” from the market conditions during the first half of 2007, the mere reduction of regional quota volumes as such in Claimant’s view “*may have little or no effect upon the actual volume of lumber exported by Canada*” and in consequence “*may not, with any degree of certainty, remedy the breach*” (C I, §§ 15, 47, 50).
163. However, Claimant questions Respondent’s approach “*that a remedy provide an exact offset to the breach under virtually the same market conditions*” and describes it as an “*unreasonable and artificial standard*” that is not supported by the SLA or other sources of law (C III, § 58). Claimant purports that the SLA does not require that a remedy is imposed “*under the exact same market conditions as those in which the breach occurred*” and even states that “*such a feat would be impossible*” (C III, § 58). Thus, a changing market can in Claimant’s view not bar the imposition of a remedy (C III, § 58).
164. Assertedly, Option B regions “*effectively received all the benefits of Option A (i.e. no volume restraints) without bearing the costs of the higher Option A export charges*” (C I, § 17; cf. § 36 and CR-3, § 48). Therefore, “*any remedy should encourage Canada to limit its exports of lumber[...] with the ultimate goal of placing the United States in the position it would have occupied absent the breach*” (C I, § 5; cf. §§ 44, 45, 63).
165. In application of this “*basic principle of international law*” (C I, § 44; cf. C II, § 41), Claimant presents four remedy proposals which purportedly provide “*a potential remedy for the breach and consist [...] solely of increases in the export charges and/or reduction in the export volumes*” thus giving “*full meaning to the Tribunal’s direction that Canada be “liable for the consequences of [its] breach”*” (C I, § 35). According to Claimant each remedy proposal imposes “*modest additional export measures, measures authorized by the SLA itself*” (C II, § 65) which are “*precisely linked to the magnitude of Canada’s breach, and each is implementable over time*” (C II, § 63).

166. Claimant's proposals assertedly consist of two "*components, or modules – an "effects" module and a "remedy" module.*" While the first module "*calculates the price effect in the United States caused by the overage*" during the breach period, the remedy module "*calculates the export charge needed to counteract this price effect.*" Since the effects module "*does not use an Option B region export supply elasticity at all*" and Respondent purportedly only challenges one of the six elasticity values of Claimant's remedy module, Claimant submits that Respondent's criticism regarding the elasticity values it used is without merit (C III, §§ 74 *et seq.*). In addition, Claimant contends that it used "*an accepted range of elasticities*" (C III, §§ 77 *et seq.*). On the other hand, Claimant notes that in the Hearing on Remedy Respondent's witness "*insisted upon using export supply elasticities greater than 1, relying exclusively upon unpublished sources*" (C III, § 81). However, according to Claimant the "*relevant export supply elasticity falls within a relatively narrow range of values*" (C III, § 84). Respondent's suggestions concerning elasticities purportedly range "*far outside [...] those endorsed by the academic literature*" (C III, § 88). Therefore, Claimant submits that "*regardless of which acceptable, peer-reviewed export supply elasticity is used, the range of increased export charge necessary to reverse the price effect of the breach is between US\$55.8 million to US\$ 86.7 million*" (C III, § 87).
167. The report distinguishes between two kinds of potential remedies, namely price-based remedies and volume-based remedies (C I, §§ 15 and 41). While price-based remedies "*monetize the effects*" of the breach and thus provide for an "*easily quantifiable regime*" for monetizing a breach, volume-based remedies "*meaningfully [restrict] the volume of lumber exports*" (C I, § 16).
168. In Claimant's view to appropriately and meaningfully remedy the "*harm caused by Canada's breach*" the remedy "*must reduce the actual volume of lumber exported by Canada under current or reasonably anticipated future market conditions*" (C II, § 62) and given "*the nature of current market conditions, price-based remedies, or remedies that impose additional export charges rather than volume restraints, will remedy the breach more effectively*" (C I, § 16). Thus asserting that "*the best, most direct way to restore the United States to the position it would have occupied absent the breach,*" Claimant in particular requests the Tribunal to determine appropriate adjustments in the form of additional export charges since such an *ad valorem* assessment is considered the "*most effective and easily administered remedy*" (C I, §§ 5, 36, 46, 57; cf. CR-3, § 52).



169. Such price-based remedies would purportedly conform with “*the language and purpose of the SLA*” and would in addition “*provide a more meaningful remedy under current circumstances*” than any volume-based remedies (C I, § 15; cf. § 47).
170. Since Respondent allegedly fails to “*recognize the close relationship between cure and compensatory measures*” it charges “*erroneously that the United States’ interpretation of “cure” is punitive*” (C II, § 25; cf. § 64). However, Claimant predicts that “*no punitive damages will result because the compensatory measures will cease as soon as Canada has appropriately compensated for its breach and therefore cured it*” (C II, § 25). Therefore, Claimant reasons that none of the remedy proposals are punitive since “*each would offset, but not exceed, the measured effect of Canada’s breach*” (C II, § 63; cf. CR-13, § 52).
171. Furthermore, to the extent that these remedies depress Respondent’s softwood lumber imports during the cure period, Claimant does not regard this “*as a “punitive” result, but rather the natural and intended market correction necessitated by Canada’s breach*” (C II, § 63). In Claimant’s view, in order to be punitive a remedy would have to “*fine Canadian producers from Option B regions a set amount unrelated to the magnitude of the overshipments, or reduce RQVs in excess of the Option B overshipments*” (C II, § 65; cf. CR-13, §§ 51-53).
172. Finally, Claimant notes that Respondent “*poses a series of ineffective criticisms*”, however does not offer any remedy “*in the alternative*” (C II, §§ 7, 53, 64; C III, §§ 2, 12, 71). From this, Claimant concludes that Respondent in an alleged attempt to present an “*overarching strategy to deny the existence of a remedy [...] effectively waives [...] [its] opportunity to object to the adoption of at least one of the proposed remedies*” (C II, § 57).
173. Overall, in Claimant’s view, Respondent has thus failed to “*rebut the appropriateness*” of Claimant’s remedy proposals (C III, §§ 28, 31).

**d. Price-Based Remedy Proposal I: Collection of Option A Export Charges**

174. Since Option B regions “*effectively operated as Option A regions*” during the first six months of 2007, Claimant persists that it is “*reasonable*” to impose as an additional export charge on Option B regions “*what these regions would have paid had they been treated as Option A regions*” (C I, § 48, cf. CR-3,

§§ 48-50; cf. CR-13, § 53; C III, § 48). In Claimant's view this approach would "*offset[...] the most direct economic effect of the overshipments*" and as such could not be regarded as neither "*draconian*" nor "*punitive*" reasoning that the agreed-upon Option A export charges "*can be reasonable*" as applied to an Option A region, but "*draconian*" and "*punitive*" when applied to a breaching Option B region (C II, §§ 68 *et seq.*; cf. CR-13, § 53).

175. Claimant reasons that this also "*makes practical sense when viewed in the context of the Agreement as a whole,*" referring to the "transition period" as laid down in SLA, art. VI n. 5 [sic; note 2] where "*the SLA itself assumes that Option B regions that exceed quota volumes effectively act like Option A regions and should bear the associated burdens of higher export charges*" (C I, § 52). Therefore, Claimant argues Respondent's criticism "*is beside the point*" (C II, § 54).
176. During the breach period, due to an incorrect computation of regional quota volumes, Option B regions allegedly failed to impose the required volume restraint upon their shipments and thus "*enjoyed a 10 percent lower tariff rate during the January – June 2007 period, and effectively circumvented the correctly calculated quotas they should have faced under the SLA*" (C I, § 48, CR-3, § 49).
177. Claimant further purports that according to its expert report the monthly amounts of missed export charges equals approximately 638,8 million Canadian Dollars (CDN \$), ten percent of which equal CDN \$ 63,9 million (C I, § 49). Levying such an additional charge against Option B regions "*[...] would effectively undo the benefits they enjoyed during the six months of the SLA violation*" (CR-3, § 50) and thus "*restore the SLA's economic effect to its intended state*" (C I, § 49). Claimant submits that the amount of CDN \$ 64 million "*is a small burden upon the Canadian industry whether measured against total Canadian imports to the United States, or Option B imports to the United States*" (C II, § 70; cf. CR-3, Ex. 3).
178. In order to create an "*incentive*" for Option B regions to reduce the volume of lumber they ship, Claimant furthermore holds that such a compensatory assessment should not be collected as a lump sum, but rather be assessed upon an "*ad valorem basis over time*" until the entire 10 percent sum has been recovered (C I, § 50; C II, §§ 70 *et seq.*). While Claimant concedes that "*Canada's 'lump sum' claim could be valid if there were a monopoly exporter, or very small numbers of exporters in the Option B regions [...] in reality, there are too many exporters in the Option B regions for any one exporter to take this effect into*

*account.*” Hence, “*the individual exporter would be affected by the amount of export charge it pays, not by the effect of its payment on the Government’s receipt of the total export charge*” (C II, § 72; cf. CR-13, §§ 13, 33-37).

179. Claimant’s expert report further provides for different possible assessment methods to account for the different weight of responsibility of each Option B region, taking into account that the region of Saskatchewan “*never exceeded its correctly calculated regional quota volume*” and the region of Manitoba “*exceeded its regional quota volume in only four [sic; three (cf. CR-3, § 54)] of the six months*” at issue (C I, § 51). Therefore, while Respondent is purportedly responsible for the breach as an entity, “*focusing the remedy upon those regions that overshipped regional quotas may be the most accurate way to calculate and apportion the export charges*” (C I, § 51, cf. C II, § 67; cf. CR-3, §§ 38, 54, note 22). According to Claimant this would also serve the purpose of the remedy proposal which purportedly “*is to treat Option B regions in a manner commensurate with their violation of fixed volume restraints*” (C II, § 68; cf. CR-13, § 54).
180. In addition, Claimant demands that any compensatory payments should “*account for the time value of money by including interest*” which would on May 29, 2008 have amounted to an additional CDN \$ 4,36 million (C I, § 51, CR-3, § 56, Table 2c).
181. Contending that the remedy proposal is “*tied directly to the amount of export charges not paid by the exporters within each Option B region*”, Claimant asserts that “*the link between the remedy and the benefit to Canadian exporters is clear*” (C II, § 73; cf. CR-13, §§ 52-53). Overall, Claimant therefore submits that – in its “*conceptual simplicity and its ease in implementation*” – this remedy proposal “*would provide the most appropriate remedy because it would recognize the reality that [Option B regions] assumed none of the burdens of the Option B volume restraint scheme*” (C I, § 65; cf. C II, §§ 67 *et seq.*).

#### **e. Price-Based Remedy Proposal II: Collection of Additional Export Charges**

182. Emphasising very clearly a preference for remedy proposal I, Claimant nevertheless presents an alternative compensatory adjustment to the export measures in question.
183. As the over-exportation of Respondent’s lumber resulted in an excess supply, Claimant asserts that these overshipments “*logically reduced prices in the United States*” (C I, § 53).

Claimant's expert report further states that this over-exportation decreased lumber prices in the United States by 0.7 percent during the first half of 2007 resulting in "*prices that were US \$ 1.94 per thousand board feet less than what they would have been absent the breach*" (C I, § 54). Furthermore, this reduction in lumber prices allegedly led to changes in quantities consumed and exported. Claimant purports that it led to United States producers decreasing their own shipments, United States consumers increasing their consumption and exporters from other countries than Canada decreasing their shipments as reaction to the lower United States price (C I, § 54, C II, § 76; cf. CR-3, § 60, Table 3).

184. In order to compensate these changes in quantities, Claimant invokes its expert report when claiming "*an additional export charge of US \$ 39.65 per thousand board feet*" as a compensation for the lower price due to Respondent's breach of the agreement. These compensation payments "*could be imposed over a six-month period of time in the future*" (C I, § 55). In Claimant's view this second remedy proposal "*meets its compensatory objective and is in no way punitive*" (C II, § 76). On the contrary, as stated in its expert report "*each remedy is intended to reduce exports by no more than the amount necessary to offset the original economic effect of the overage [...] and underscores Respondent's criticisms as 'unpersuasive'*" (C II, § 76; cf. CR-13, § 52).
185. However, Claimant also notes that depending on changing market conditions during a possible six-month compensation period, "*the effect of the additional charge could be negligible and, therefore, have no remedial effect*" (C I, § 55). Therefore, Claimant reasons that "*the adjustment will better approximate the market conditions absent the breach*" if the additional export charge to be imposed is assessed on the basis of "*the same volume of Canadian exports that were exported during the breach period, rather than simply upon a six-month time period*" (C I, § 56).
186. In conclusion, applying the compensatory charge of US \$ 39.65 per thousand board feet upon the total exports of Option B regions, Claimant's expert report calculation totals an amount of US \$ 86.7 million, plus interest in the amount of US \$ 5.9 million, totaling CDN \$ 91.5 million (C I, § 56; C II, § 74; cf. CR-3, §§ 61 *et seq.*). Thus, Respondent's "*exaggerated mathematical manipulation does not pass scrutiny*" (C II, § 80).

Claimant notes that this remedy Proposal is "*more complex*", but "*nevertheless similarly tied to the object and purpose of the SLA*" encouraging Option B regions to restrict the volume of

exports, thus restoring Claimant to the position it would have had absent the breach and like remedy Proposal I it is purported to be “*directly calibrated to compensate for injury incurred during the violation period by the United States lumber industry*” (C II, § 74; CR-13, §§ 24, 61). Moreover, Claimant, once more relying on its expert report, asserts that remedy Proposal II is “*directly tied to the economic effects of the breach in a way remedy proposal I is not*” (C I, § 57; cf. CR-3, §§ 57-58; cf. C III, § 49).

187. According to Claimant, Respondent has “*generated an inferior model (a model that does not consider the price effects of trade policy measures),*” and subsequently “*improperly borrowed price elasticities from their model into Dr. Neuberger’s work*” which renders Respondent’s criticism of Claimant’s remedy proposal “*as confusing as it is illegitimate*” (C II, § 77). While Claimant in its expert report defines elasticity as “*a measure of how one variable (supply or demand) changes with another variable (price)*”, Claimant also contends that its expert does not use “*extreme values*”, but instead “*bases his elasticity estimates on the most current, state of the art academic study [...] by Canadian economists Stennes and Wilson*”, thus assertedly correctly using elasticities for softwood lumber generally (C II, § 79; cf. CR-13, §§ 43-44).
188. Finally, Claimant notes that Respondent “*elected to offer the Tribunal no competing price-based proposal to those of Dr. Neuberger*” (C II, § 81).

#### **f. Volume-Based Remedy Proposal III: Adjusting, then Reducing RQVs**

189. While it “*may appear superficially appealing*” to simply reduce future softwood lumber exports from Canada by the amount of the overshipment, that is, 182.43 million board feet, Claimant asserts that this approach “*while attractive in its simplicity, would fail to remedy Canada’s breach*” since such a reduction would not “*account for the specific consequences of Canada’s overshipment at the time of the breach*” (C I, §§ 58, 59; cf. C II, § 82). In support of its contention, Claimant relies on the *Case Concerning the Factory at Chorzów* which established the principle of international law that, “*reparation [...] must so far as possible eliminate the consequences of the illegal act*” (C I, § 59; cf. *Germany v. Poland*, 1928 PCIL 47 (ser. A) No. 17).
190. However, Claimant purports that a mere reduction of future exports would not eliminate the consequences of Respondent’s breach, the reason being that while at the time of the breach “*regional quota volumes were effectively constraining Canada’s*

exports”, Respondent’s shipments by mid-2007 “*had decreased significantly and are currently in no danger of reaching regional quota volumes*” (C I, § 59). Claimant asserts that consequently a deduction of 182.43 million board feet from the current regional quota volumes “*over six months is likely to have little, if any, effect [...] and will not*” according to Claimant’s expert report “*provide any “compensatory relief for past SLA violations”*” (C I, § 60).

191. In addition, Claimant notes that “*reducing a particular region’s exports [...] by the amount that region overshipped during the breach period would be more appropriate, but it would be difficult to accomplish and may fail to remedy the breach with any certainty*” (C I, § 61; cf. C-3, §§ 42-43). Claimant points out though that in any case “*there is no way to reduce actual exports by a set amount unless the export levels are known in advance*” (C I, § 61). Such an estimate, is according to Claimant’s expert asserted to be “*speculative and, if exporters were asked to estimate their shipments, subject to manipulation as well*” (C I, § 61; cf. C-3, § 39).
192. Thus, remedy proposal III is crafted so as to “*redress[...] the effects of the breach at the time of the breach*”, first creating a “*benchmark [...] by approximating the current level of Canadian exports*” and in a second step deducting the over-exported amount from this benchmark in order to determine a new regional quota volume for the compensation period. Claimant asserts that this approach “*more closely approximates the market conditions under which the breach occurred*” (C I, § 62; cf. C II, § 82).
193. Since a lower forecast will lead to an adjustment of the regional quota volume, but a higher forecast of the regional quota volume will not be subject to an adjustment, Claimant further asserts that the adjustment mechanism of the regional quota volumes ensures a commensurate approach with regard to the supply and demand conditions that exist at the time the remedy is applied (C III, § 64; Tr 237:7-239:7).
194. On the whole Claimant notes that Respondent does not offer a competing remedy and regarding Claimant’s remedy proposal notes that “*while there may be prediction error, there is no a priori bias in the application of this remedy [...]*” (C II, § 84; cf. CR-13, § 70). This has in Claimant’s view been asserted during the cross-examination of Respondent’s witness has purportedly shown that “*the chance of the forecast [of regional quota volumes] being too high is the same as the chance of it being too low*” (C III, § 34; Tr 249:14-23; Tr 260:2-261:4).

**g. Volume-Based Remedy Proposal IV: Reducing EUSC by Making an Additional Downward Adjustment**

195. Claimant's fourth remedy proposal is assertedly "*directly linked to the breach*" and considers only "*Canada's failure to adjust EUSC and nothing more*", thus not taking into account that "*a remedy should encourage Canada to export less lumber in order to restore the United States to the position it would have been in absent the breach*" (C I, § 63; C III, § 51). Therein, on top of any adjustment made by Respondent in accordance with the SLA, an "*additional downward adjustment to EUSC*" is to be imposed, hence creating a further adjustment "*by the amount that Canada failed to adjust EUSC during the breach period*" (C I, § 64; C II, § 85). In this context, Claimant contends that "*[l]umber shipments from Option B regions following this breach period are irrelevant to the magnitude of the breach*" (C II, § 86).
196. Although Claimant purports that this proposal could "*remedy Canada's breach by encouraging an effectively constraining volume restraint*", it also notes that "*it is uncertain whether this remedy would have an actual constraining effect*" (C I, § 64). However, Claimant maintains that this remedy solely "*seeks to offset, but not exceed, the measured effect of a previous breach*" and thus cannot be considered to be punitive (C II, § 87). Claimant also stresses that Respondent "*failed to rebut*" this fourth proposal (R III, §§ 27, 35).

**2. Arguments by Respondent**

197. Respondent on the other hand contests Claimant's assertion that compensatory adjustments are "*authorized and appropriate to compensate for effects or consequences of breaches occurring prior to the end of the reasonable period of time for cure*" (R I, § 3; cf. C I, §§ 48-64; cf. R II, § 100). Moreover, Respondent holds that by submitting in its Response to the Request for Arbitration that "*the breach had been "cured by the timely application of the adjustment for Option B regions effective July 1, 2007" [...] "no [compensatory] adjustments [would] be required or authorized under Article XIV of the Agreement [...]"*" (R II, § 11; Response to Request for Arbitration, § 28). Hence, in Respondent's view Claimant's argument is void and does not stand up to scrutiny.

**a. No Compensatory Measures for Past Breaches**

198. Moreover, Respondent challenges Claimant’s assumption as “*false*” reasoning that the Softwood Lumber Agreement is purportedly a “*“prospective” remedy dispute settlement system*” like the systems of the World Trade Organization (WTO), of Chapter 20 of the North American Free Trade Agreement (NAFTA) and of “*other similar intergovernmental trade agreements*” (R I, §§ 4, 10 *et seq.*; R II, §§ 3 *et seq.*, §§ 8, 53; R III, § 11).
199. In this context Respondent characterises prospective systems as systems “*that impose no penalty and require no compensation for infringement or obligations that occur prior to a dispute settlement decision, plus some reasonable period of time to comply with a panel’s ruling*” (R I, § 4). Respondent claims that under such systems “*retaliatory or compensatory measures [...] are authorized to compensate for the continuation of a breach past the reasonable period of time and until such time as the breaching measures are terminated or brought into compliance with the obligations of the agreement*” (R I, § 4). However, in the present case there are allegedly “*no “retroactive” or “retrospective” remedies intended to compensate for past breaches*” (R I, § 4; cf. R II, §§ 39 *et seq.*; R III, § 36). According to Respondent, Claimant’s argument that there should also be some form of compensation for past breaches is hence “*not authorized by the terms of the Agreement and results in illogical and punitive effects [...]*” (R II, §§ 40, 42, 92).
200. Respondent therefore also notes that “*it is not surprising that the United States has avoided any examination of the terms of the Agreement; those terms simply do not fit with the theory now espoused by the United States*” (R I, § 24). In Respondent’s view, Claimant lacks “*any textual basis for asserting that compensator adjustments are to address past harms to the U.S. industry*” (R III, § 15).

**(1) Ordinary Meaning of Article XIV SLA**

201. Respondent agrees with Claimant that “*the Tribunal’s powers upon finding a breach of the SLA are set out in Article XIV, paragraph 22*”, namely to identify a reasonable period of time for the breaching party to cure the breach and to determine appropriate adjustments to the export measures to compensate for the breach should the breaching party fail to cure the breach within the reasonable period of time (R I, §§ 2, 11). However, Respondent strongly challenges Claimant’s interpretation of Article XIV of the SLA, asserting that Claimant’s interpretation “*requires the reader either to strain severely the ordinary meaning of the terms, given their context, or to ignore those*



*terms altogether*” (R I, §§ 10, 22). By doing this, Claimant assertedly “*read[s] into the SLA words that are not there*” (R II, § 31).

202. To support its view, Respondent draws upon the ordinary meaning of the term “to cure the breach”, which purportedly means “*to eliminate or remove the breach*” and “[I]ronically, each of the three dictionary definitions invoked by the United States supports this view” since every definition equates the term “cure” and the term “remove” which is assertedly “*consistent with the common understanding*” of the word cure “*in the context of its normal usage*” (R I, § 12). Additionally, Respondent reasons that “*it cannot be proper to disregard the one word – “remove” – that is common to all three definitions cited by the United States [...] and even if the word “remove” were to be disregarded “none of the remaining word – “remedy,” “rectify,” and “heal” – inherently implies compensation fo the past*” (R II, § 30).
203. Furthermore, Respondent states that the term cure is “*most often associated with disease or illness [which] in common parlance [...] is “cured” when it is removed or eliminated.*” Since “*curing a breach is closely akin to curing a disease*”, in Respondent’s view, it “*must mean removal or elimination of the breaching practice, and nothing more*” (R I, § 13; cf. R II, § 31). However, Respondent sustains that “*there is no implication or understanding that the cure also compensates for the past consequences of the disease, such as discomfort, lost days of work, or missed social engagements*” (R I, § 12; cf. R II, § 29).

## **(2) Structure of Article XIV SLA**

204. Respondent then argues that its view is also supported “*by the context of Article XIV and the Agreement as a whole*” as well as by “*the prospective nature of remedies in other international trade agreements to which Canada and the United States are parties*” (R I, § 13). Furthermore, Respondent reproaches that Claimant’s interpretation is based on the assumption “*that the drafters of the Agreement intended to establish a dispute settlement and remedy system modeled after the typical commercial arbitration or investor-state system*”, where compensatory damages for past breaches take the form of monetary remedies. Respondent maintains that Article XIV “*is not constructed to achieve such a result*” (R I, §§ 10, 22, 34; R II, § 52).
205. According to Respondent both the language of Article XIV of the SLA as well as the SLA as a whole show that “*where the Parties intended to provide for retroactive or retrospective*

*analysis, they included specific text to make that intent explicit*” (R I, § 19; cf. §§ 15 *et seq.*; R II, §§ 43 *et seq.*; R III, §§ 28, 36). To back up this argument Respondent firstly cites § 32 of Article XIV of the SLA which “*provides for retroactive correction of unilateral measures authorized under paragraphs 26 and 27 of Article XIV*”. If challenged before a Tribunal, to the extent that these measures are found to be insufficient or excessive “*there must be additional adjustments to make up for the excess or insufficiency from the moment the measures were imposed*” (R I, § 16; cf. R II, § 51). Respondent emphasises that the concept of retroactive rectification “*is stated expressly in paragraph 32, not just by the use of the word “retroactive” in subparagraph 32(a) but with equal clarity in the chapeau of paragraph 32 and in subparagraph 32(b)*” (R II, § 44). From this, Respondent draws the conclusion that “[*t*]here would have been no need in paragraph 32 to provide for retroactive remedies or compensation for past effects in the case of a remedial measures review if [...] those concepts are embraced implicitly in the terms “cure” and “compensate”” (R I, § 17). Respondent further notes that “[*i*]mportantly, Article XIV(32) does not inquire into the effects of the overshipment on the export market, nor does it consider the implications of the overshipment for the exporting industry” (R II, § 100; R III, § 29).

206. In support of its contentions, Respondent invokes four other provisions of the SLA where the term “retroactive” is explicitly mentioned, namely Article VIII(1)(b), Article XII(2)(b)(i), Article XVII(5) and Article XV(19)(c) of the SLA, “*all of which relate to application of the Export Measures in situations where softwood lumber shipments have exceeded those permitted under the Agreement or where data sources on which the calculation of Export measures rely have been proven biased or unreliable*”. By omitting a corresponding reference in § 22 of Article XIV, Respondent claims “*it is apparent that the drafters chose not to make the “cure” and “[compensatory] adjustments” provided under that paragraph retrospective*” (R I, § 19). With regard to Article XVII, Respondent states once more its opinion that the case at hand is “*distinguished from a circumvention case under Article XVII [...] In a circumvention case, an element of the substantive offense is whether the challenged measure or action had the effect of reducing or offsetting the export measure, whereas in this case the failure to make an adjustment to the EUSC affected the export measure directly*” (R III, § 31).
207. Respondent also notes that Article IX of the SLA – which does not contain the word ‘retroactive’, but was assertedly identified by Claimant as retroactive provision – nevertheless “*adopts*

*unambiguous language to define the retroactive reach of its application*". Therefore, "[t]o add the term "retroactive" would have been unnecessary and redundant" (R II, § 46).

208. Respondent further holds that the rules of §§ 22 to 24 of Article XIV of the SLA "*function logically for a prospective remedy system, but [...] are inconsistent with a system intended to remedy past breaches*". To underscore this assertion, Respondent firstly draws upon the wording of § 22(b) of Article XIV of the SLA which states that "*compensatory adjustments may be applied only "if [the breaching] Party fails to cure the breach within the reasonable period of time" established under paragraph 22(a)*" thus assertedly showing that "*a cure must mean something different from compensatory adjustments*" (R I, § 20). To stress its point, Respondent further purports that the surge mechanism as laid down in Article VIII of the SLA "*makes Canada's point. Had the Tribunal decided that Option A Regions were subject to the EUSC adjustment, Canada would have been obligated on a prospective basis to calculate the surge level based on the adjusted EUSC rather than the unadjusted EUSC for the remaining term of the SLA*" (R III, § 51). This is, in Respondent's opinion, proof that Article VIII is still enforceable even if there were only prospective remedies as is contested by Claimant (R III, § 51).
209. Respondent purports that this conclusion "*is reinforced by paragraph 24*" where it is stated that "*compensatory adjustments may be applied "from the end of the reasonable period of time until the Party Complained Against cures the breach."*" From this, Respondent concludes that in order to remedy a breach in conformity with § 23 of Article XIV of the SLA the breach must be remedied "*for the period between the end of the reasonable period of time and the cure of the breach, if any occurs*" (R I, § 20; cf. R II, §§ 39 *et seq.*). In addition, Respondent points out the language of § 24 of Article XIV SLA which "*stands in sharp contrast*" to § 32 of Article XIV SLA, providing that compensatory measures "*may be applied from the end of the reasonable period of time until the [cure]*" [*emphasis added*] (R I, § 18; cf. R II, §§ 39 *et seq.*).
210. In further support of its contentions, Respondent also asserts that "*Article XIV limits the form of compensation*" and that this form is "*ill-suited to remedy past breaches, as even the United States implicitly acknowledges*". However, Respondent also notes that adjustments to trade measures are "*well suited to encouraging prospective compliance*" and are thus "*routinely used as a remedy in agreements with prospective remedy systems*" (R I, § 25; cf. R II, §§ 52 *et seq.*, 62).

211. While Respondent concedes that “*monetary damages is generally the most efficient compensation where the intent is to compensate for past harms*”, it also purports that nevertheless “*Article XIV does not allow for cash compensation*” (R I, § 26; cf. R II, § 52; R III, § 34). This leads Respondent to the conclusion that under § 23 of Article XIV “*the Tribunal is restricted to directing Canada to collect a greater charge on exports to the United States, or impose tighter export quotas, or some combination*” (R I, § 25).
212. Sustaining that interpreting the term “cure the breach” as retrospective renders “*nonsensical the provision that allows a reasonable period of time no more than 30 days to cure the breach*”, Respondent asserts that “[t]here would be no reason to provide for any “reasonable period of time” to cure the breach if the breaching Party was required to compensate for the breach from the time it started” (R I, § 27; cf. R II, §§ 36, 47). To underscore its point, Respondent furthermore claims that this “*concept of a “reasonable period of time”*” was originally created in a prospective remedy system, namely that of the WTO (R I, § 27; R II, § 48).
213. Moreover, Respondent contends that a period of 30 days would never be “*compatible with an interpretation that cure requires action to undo breaches*” which assertedly proves to be “*almost always more complicated and time-consuming [...] than simply to cease non-conforming conduct*”. Hence, “[t]he U.S. proposed definition of “cure” simply does not fit within a 30-day box” (R I, § 28; cf. R II, § 51).
214. In addition, Respondent strongly contests Claimant’s argument that “*the SLA should be read to allow the breaching Party “to propose a plan for a cure, which in turn allows both Parties to agree upon an acceptable cure, if possible,”*” (R II, § 49; cf. C II, § 17). In Respondent’s view § 22 of Article XIV of the SLA “*does not grant a reasonable period of time to propose a cure, nor to attempt to agree on a plan for a cure”*. Therefore, according to Respondent “*nothing in the SLA [...] supports the U.S. invention of a new post-liability consultations process whose asserted goal is a mutually agreed upon installment “plan” to achieve a cure*” (R II, § 50; cf. R III, § 53).
215. The context as well as the ordinary meaning of the term “cure the breach” lead Respondent to the conclusion that “*“curing the breach” requires ceasing the breaching practice, but does not imply any requirement to undo or redress the consequences of the past breaching practice*”, therefore compensatory adjustments can “*logically [...] only be to compensate for the*

*ongoing breach, not past breaches*” (R I, § 14; cf. R II, § 43; R III, § 48).

216. In addition, Respondent submits that whenever the SLA does provide for past measures or actions to be redressed, “*that redress is always on a one-for-one basis with respect to the measure itself, not the effects of the measure*”. Hence, Respondent concludes that if there were a right to compensation under the SLA, which Respondent denies, “*that implied compensation should follow the SLA context and be done on a similar one-for-one basis*” (R II, § 100; R III, § 28; Tr 83:19-21).
217. Finally, Respondent points out that future adjustments would likely lead to market distortions, an effect that would be “*contrary to what is intended by the Agreement*”, namely that export measures follow the market conditions (R I, §§ 26, 29, 30; R III, § 59). According to Respondent this would then “*create [...] tremendous economic difficulty*” and lead to “*insurmountable difficulties*” (R III, § 60).
218. Respondent considers both the WTO Agreement as well as the NAFTA as relevant international agreements in the sense of Article 31(3) of the VCLT (R I, § 31; R II, § 53). Contrary to Claimant’s argument, Respondent does not agree that § 2 of Article XIV of the SLA implies a rejection of the dispute settlement principles applicable under the WTO and NAFTA. Respondent argues that Article XIV of the SLA “*simply reflects the Parties’ agreement that disputes under the SLA should be arbitrated exclusively under the dispute settlement process provided under the Agreement*”. However, Respondent claims that “*in no way does Article XIV(2) imply a rejection of these [WTO and NAFTA] models in a substantive sense*” (R II, § 57).
219. Thus, examining the structure of the dispute settlement provisions of these two multinational treaties, Respondent asserts that both agreements provide for prospective remedies only and that Article XIV of the SLA “*closely follows the structure of the WTO and NAFTA*” which purportedly confirms Respondent’s position in its interpretation of Article XIV of the SLA (R I, §§ 32 *et seq.*, § 40; R II, §§ 53 *et seq.*, §§ 80, 85). In support of this contention, Respondent makes a reference to case law (R I, § 35; cf. *Broom Corn Brooms*, § 78, RRA-5 and *Cross-Border Trucking*, §§ 295-299, RRA-3) and observes that “[u]nder prospective systems, in the event a breach is found, the breaching party is permitted a period of time (a “reasonable period of time” under the WTO and 30 days under the NAFTA) to bring the measure into conformity with the agreement” (R I,

§ 38; cf. DSU, Art. 22(4), RRA-10; NAFTA, Chapter 20, Art. 2019, RRA-7).

220. Respondent further notes that Claimant remains silent on the issue of “*why the dispute settlement provisions of the SLA look so different from the remedy regimes in bilateral investment treaties*” (R III, § 34).
221. Respondent further asserts that Claimant “*ridicules*” each element of similarity between the SLA and international dispute settlement systems “*as not dispositive*” (R II, § 64). However, by allegedly disregarding that “*the dispute settlement system of the SLA much more closely resembles the WTO/NAFTA prospective system than the retrospective systems of customary international law, private commercial law or investment treaties*”, Claimant provides in Respondent’s view evidence for its “*gross mischaracterization and oversimplification*” of Respondent’s argument (R II, § 65).
222. According to Respondent, differences in terminology do not imply differences in the structure of the dispute settlement provisions of the WTO, NAFTA and the SLA. Respondent asserts that this argument disregards “*the fact that NAFTA does not use identical terminology to that of the DSU of the WTO, and that even within the same WTO system, different terms are used in different WTO agreements for the same concept of ceasing the violation of obligations*” (R II, § 58). Respondent also submits that even without a reference to or a distinction between ‘prospective’ and ‘retrospective’ remedies in the WTO and NAFTA, “*those dispute settlement systems are properly interpreted to be prospective-only*” (R II, §§ 60, 85).
223. To further back up this reasoning, Respondent takes recourse to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) as well as to the General Agreement on Tariffs and Trade (GATT) 1947 and its succeeding agreement the GATT 1994, which assertedly established in its practice “*that the objective of dispute resolution was withdrawal of offending measures and that compensation was appropriate [...] only for the purpose of obtaining withdrawal of the offending measure*” (R I, § 33; cf. RRA-10, Art. 3(7), Art. 22(1) and (8)). Having said this, Respondent concludes that compensation under the WTO system and related trade agreements “*is not a payment to repair the damage or harm caused by the breaching action*”, but rather “*offers relief from the harm that the complaining party will suffer due to the defending party’s failure to conform or withdraw the breaching action*” (R I, § 35; cf. § 41; R II, § 48). Although Respondent concedes that both the DSU as well as the

NAFTA do permit some form of compensation, Respondent maintains that this compensation “*is considered only temporary, pending removal or withdrawal of the breaching action or measure*” (R I, § 39; cf. §§ 40, 41).

224. Ultimately, because only sovereign states are eligible for dispute settlement proceedings under the WTO and NAFTA Chapter 20 as well as under the SLA, Respondent claims that “*the arbitrators are not in a position to determine with confidence whether private parties have suffered damages, or if government conduct may be the proximate cause of any such damage*”. Furthermore, Respondent asserts that arbitration proceedings such as in the case at hand “*are not designed to put the arbitrators in a position to assess the existence of damages specific to a company or industry, or proximate causation*” (R I, § 42).
225. In its Post-Hearing Brief from October 31, 2008, Respondent further clarifies that it does not hold the opinion that the Agreement of the Parties at the end of the Hearing on Liability has modified or changed the provisions of Article XIV of the SLA (R III, § 1). Respondent upholds that following the structure of Article XIV of the SLA, “*arguments regarding whether there has been a breach and, if so, the consequences of that breach, would normally be presented in a single proceeding*” (R III, § 2). However, the Parties agreed on a bifurcation of the proceedings “*in order to enable an earlier award on liability*” and in Respondent’s view “*this agreement was possible without an amendment of paragraph 22 because that provision contains no timing requirement*” (R III, § 5).

### **(3) Object and Purpose of the SLA**

226. Respondent also contests Claimant’s view that “*the similarities between the dispute settlement systems of the SLA, the WTO and NAFTA are not significant because the overall purposes of the SLA and that of the WTO and NAFTA are different*” claiming that the SLA was not merely drafted to “*compromise specific litigation and regulate trade in one specific sector [...]*” (R II, § 70).
227. Furthermore, even if this were the case, Respondent contends that such differences do not “*suggest that the similarities of the dispute settlement systems should be disregarded*”. In this context, Respondent points out that “*an important aspect of the SLA was its provision calling for a working group to remove restrictions on lumber trade*” and that therefore it would be “*inaccurate to imply that there is no market access or trade-liberalizing intention in the SLA*”. In addition, Respondent holds

that it is also inaccurate to imply that there are “*no exceptions to the trade liberalizing aspects of the WTO and the NAFTA*” (R II, § 70).

#### (4) Negotiating History

228. Respondent further argues that the negotiating history of the provision confirms its ordinary meaning assigned to Article XIV of the SLA. Scrutinising the different drafts of the SLA between May 24, 2006 and June 12, 2006, Respondent notes that Claimant used the term “*until the breach is eliminated*” in its first full draft of May 24, 2006, while Respondent consistently used the term “*cure the breach*”.
229. However, Respondent notes that by the end of June “*the Parties used the words “cure” and “eliminate” interchangeably, without any hint that a cure would entail anything beyond removing or ceasing the offending practice*” (R I, §§ 13, 47; cf. R II, §§ 74 *et seq.*). Having borrowed the phrase “*cure the breach*” from the SLA 1996, it had by mid-July of 2006 become the exclusive phrase within the draft SLA, assertedly for terms of consistent terminology (R I, § 47; R II, §§ 74 *et seq.*).
230. Further examining the different drafts of the SLA between May 24, 2006 and June 12, 2006, Respondent purports that the use of the term “*until the breach is eliminated*” in Article IX(I) of Claimant’s first full draft of May 24, 2006, shows that there was “*a recognition by the United States of a distinction between the act of eliminating the breach and the compensatory measures to be taken until the breach is eliminated*” (R I, § 45).
231. At the same time Respondent remarks that the word “*eliminate*” is “*consistently [...] defined using the same word – “remove” – that is the common meaning ascribed to the word “cure”*” and that the choice of the word must hence “*be viewed as having had the same meaning as “cure”*”. In consequence, Respondent concludes that Claimant “*thus could not have contemplated that the “cure” called for in paragraph 22 went beyond removal of the offending measure or breaching action – and most certainly could not have contemplated that it would compensate for the harm caused by the breach*” (R I, § 45; cf. R II, §§ 72 *et seq.*).
232. Respondent contends that there is “*strong indirect evidence*” from arbitration proceedings under the 1996 SLA that “*neither Party understood the concept of cure to include any right to compensation for past breaches*”. On the contrary, assertedly “*the Parties and the Panel acted in a manner demonstrating that they did not consider that a cure would involve redress for past breaching conduct or anything more than prospective*



*compliance under the treaty*” (R II, § 77). Respondent claims that the award by stating that in light of the treaty’s imminent expiration no reasonable period of time to cure the breach was to be determined, “*reveals that the Panel and the Parties understood cure to consist of prospective compliance with the Parties’ treaty obligations*” (R II, § 78). Invoking the last arbitration under the SLA 1996, Respondent holds that Claimant “*knew or should have known [...] that Article XIV was a prospective-only dispute settlement system*” (R III, § 54). In these proceedings, Canada purportedly sought a determination of liability, but “*did not ask for any decision on how the United States must “cure the breach.”*”. Assertedly opined that Canada was not entitled to a cure, the U.S. “*either agreed with Canada that relief could only be prospective, or acquiesced fully in Canada’s decision not to claim the compensation that the United States thought was Canada’s entitlement, if Canada prevailed*” (R III, § 54).

233. In Respondent’s view it is also noteworthy that “*the concept of retroactive application of remedies was not raised at any time by either Party, except in the context of negotiating the provisions related to Tribunal review of remedial measures*” (R I, §§ 43, 48). However, Respondent also notes that no panel “*rendered a decision or interpretation of the term “cure”*” and furthermore Respondent “*never set out its views on the question of cure*” (R II, § 76).
234. Finally, Respondent opposes Claimant’s position that U.S. domestic contract law supports Claimant’s “*demand for compensation for past breaches*”. To support its view, Respondent claims that “*U.S. contract law has no probative weight under the Vienna Convention, since the SLA is not a contract and is not governed by U.S. law*”. In addition, Respondent holds that the term ‘cure’ “*has no consistent meaning, but rather depends on the context and what is being cured*”. Furthermore, Respondent argues that the case cited by Claimant – In the Matter of Clark – “*was not a contract case, but rather involved interpretation of a specific provision of U.S. bankruptcy statutes*” in contrast to the present case which “*is not under U.S. law, and does not involve default on payments, but rather a failure to comply with rules of an international agreement for assessing export adjustments*” (R II, § 79; R III, § 48).

### **(5) Applicability of the ILC Draft Articles on State Responsibility and Other Provisions of International Law**

235. Respondent also challenges Claimant's suggestion that the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (ILC Draft Articles, RRA-9) are applicable to the dispute at issue, persisting that Article XIV of the SLA "*clearly establish[es] a lex specialis regime which replace[s] the more general rules of remedy with a "prospective" remedy regime*" (R I, § 51; cf. R II, §§ 82, 91; R III, §§ 16 *et seq.*). This is assertedly also indicated in Article 55 of the ILC Draft Articles and the Commentaries which "*indicate that the articles are secondary obligations, applicable only in the absence of lex specialis*" (R I, § 52). Respondent alleges Claimant of "*ignor[ing] the principle function of the ILC Articles, which is to serve as "residual law," or to fill in gaps left open by special rules of international law*" (R II, § 81).
236. In addition, Respondent reproaches Claimant of misinterpreting the reference to the terms *lex specialis* and *lex generalis* in the case *ADF v. United States*. Respondent holds that this case "*does not stand for the loose proposition that any provision considered to be lex generalis applies where a lex specialis provision exists*". Rather, according to Respondent, the *ADF Case* "*relates to interpreting a treaty's object and purpose and the role of NAFTA's general objectives*", however, eventually "*properly concludes that lex generalis cannot override or supersede lex specialis*" (R II, § 83).
237. Furthermore, Respondent alleges Claimant to "*misuse[...] Commentary (4) to ILC Article 55 [...] to argue that there is no inconsistency between "reparation," as defined in ILC Article 31, and "cure the breach" in Article XIV(22) of the SLA*" concluding that 'cure the breach' involves 'reparation'. This reasoning, in Respondent's view "*simply assumes its own erroneous conclusion*" (R II, § 84).
238. Respondent also contradicts Claimant's assertion that the principle of reparation as laid down in the *Chorzów Factory Case* (CR-8) and codified in Article 31 of the ILC Draft Articles is applicable in the case at hand. Purporting that this principle is "*not applicable [...] to international trade agreements like the SLA, the WTO or NAFTA*", since these agreements "*all include rules relating to remedies for breach*", Respondent also claims that the *Chorzów Factory Case* is "*inapposite to this case for [...] the facts*" (R I, § 55, 56; cf. R II, §§ 86, 89 *et seq.*).
239. Citing the *Gabčíkovo-Nagymaros Case* brought before the ICJ, Respondent emphasises that the treaty at issue explicitly provided in its text – unlike the SLA – that "*Parties are to "compensate" and "pay" for damages*", and was therefore

“based on the retrospective model of customary international law” (R II, § 67). As for the case brought by Canada under the Convention on International Liability for Damage Caused by Space Objects, Respondent holds that “unlike the SLA, the Convention provides for compensatory damages” (R II, § 68).

240. According to Respondent, both cases thus contain “unambiguous language” with regard to compensation for damages, while this does assertedly not hold true for the SLA which hence “more closely resemble[s] [...] the WTO DSU and NAFTA prospective models” (R II, §§ 69, 80, 85).
241. Respondent further stresses that in interpreting a treaty the “[r]elevant rules of international law must be considered” and that in Respondent’s view trade agreements to which both Parties have acceded constitute such relevant rules of international law as has been elaborated above (R III, § 39).
242. Respondent contradicts Claimant’s view that “the SLA is a “settlement agreement,”” and instead purports that the SLA is a trade agreement which is “devoted to establishing the parameters of the Parties’ trading relationship in softwood lumber going forward” (R III, § 41). Respondent puts special emphasis on the fact that Claimant’s refund of approximately US\$5 billion was paid “not as consideration, but to return deposits that the U.S. Courts of International Trade, a NAFTA Chapter 19 Panel and the WTO had determined were illegally collected and held by the United States” (R III, § 42; Tr 325:9-326:8). Claimant’s distinction between the WTO and NAFTA Chapter 20 as opposed to the SLA is allegedly “based on a narrow notion of “trade liberalization.”” (R III, § 43). Respondent, however, holds that Claimant does not “explain why a trade agreement [...] cannot serve multiple purposes” and that “this one-dimensional characterization of the SLA as non-trade liberalizing is in any event inaccurate, particularly in relation to the trade regime in place at the time the SLA was executed” (R III, §§ 43, 44). Thus, Respondent concludes “[t]he SLA is far more trade liberalizing than the duty-regime it replaced” (R III, § 44).

#### **b. Respondent has Cured the Breach**

243. As has been elaborated above, Respondent maintains that it has already cured the breach so that no cure period needs to be established.

**c. U.S. Proposals reflect Mixed Perspectives and Unpredictable Effects**

244. Above all, Respondent argues that any compensatory measures are limited to adjustments to trade measures rather than monetary damages (R II, §§ 52 *et seq.*, 62; R III, § 34). Respondent further submits that even if the SLA did allow for compensatory measures in the present dispute, “*none of the four alternatives presented by the United States provide a justifiable form or quantum of adjustment under the SLA.*” Instead, Respondent persists that “*the muddle of different rationales and speculations contrived in the four alternatives, and the wide range of effects they could have, only provide further evidence to reject the U.S. assumption that a right to compensation for past breaches can or should be implied under the Agreement*” (R I, §§ 8, 90; cf. R II, §§ 92, 110; cf. R III, § 18). In its Rebuttal Memorial on Remedy, Respondent once more states that the U.S. remedy proposals “*would yield effects that are unpredictable, punitive and unrelated to the breach*” thus imposing measures “*with the most draconian effect*” (R II, § 110).
245. Respondent derives this argument first of all from Claimant’s Request for Arbitration of August 13, 2007, where Claimant purportedly requests the Tribunal to render an award ordering Respondent to reduce its quota volume in an amount equaling the excess exports (R I, § 60; R III, § 30). However, according to Respondent, Claimant now ignores “*that such a reduction was in fact the precise relief originally requested by the United States*” and while ignoring its past position instead claims that this form of compensatory measure would not constitute a satisfactory remedy (R I, § 61).
246. In addition, Respondent states that Claimant “*is plainly wrong that anything about the Agreement would require that such a remedy have a particular market effect*” (R I, §§ 62, 67). Challenging Claimant’s statement that the volume of exports of lumber could be characterised as an economic effect of the SLA, Respondent rather understood the subject “*to concern the identification of the appropriate starting date for quota calculation methodologies provided for under paragraph 14 of Annex 7D*” (R I, § 63).
247. Furthermore, Respondent holds that Claimant is “[u]nable to point to any support for such remedies in the text of the Agreement” and “[n]one of the proposed remedies [...] have the effect claimed or achieve the objective identified.” Instead, “*there is no connection in any of the proposals between the proposed remedy, the stated objective and the assumed effect, much less the text of the SLA*” (R I, §§ 65, 69; cf. R II, §§ 10, 92

*et seq.*; cf. R III, §§ 18 *et seq.*). Assertedly not supported by any economic principles, Respondent claims that the U.S. remedy proposals “*are designed to fulfill policy objectives set by non-economists*” (R II, § 95).

248. Respondent also contends that Claimant is not able to “*identify an economically coherent “harm to the U.S.”*” and is in all “*unclear about the intended effect of its proposed remedies*” (R I, §§ 66, 70; RR-2, § 38; cf. R II, § 94). Respondent maintains that “*the alleged “harm” represents a reduction in price of less than 1 percent on the average U.S. price of \$290.66 during the first six months of 2007*” (R III, § 71). Respondent further holds that the U.S. remedy proposals “*impose excessive penalties*” and “*bear no relationship to the claimed effect or objective of offsetting the harm suffered by U.S. producers or benefits enjoyed by Canadian producers*” (R II, § 96; R III, § 65). Respondent also claims that Claimant’s expert “*failed to explain just how the export charge he advocates would result in appropriate reparations to U.S. producers, or why this group should be his only target*” (R III, § 23).
249. With regard to the proposal of any alternative remedies, Respondent reasons that it has not done so “*because the SLA does not provide any remedy for breaches that have been cured at any point before the end of the reasonable period of time*” (R II, § 97).
250. Finally, Respondent claims that the excess exports amount to “*far less than the 180 million board feet advanced by the United States*” reasoning that Claimant “*did not account for available “carry forward” and “carry back” of monthly RQV, as provided for under Annex 7B of the Agreement*”. In the Hearing on Remedy, Respondent confirmed that it also disagreed with the newly presented figure of 216 million board feet presented by Claimant and that “*both figures are incorrect*” (cf. R III, § 69). Taking this into account Respondent’s calculation results in approximately 142 million board feet, which as a percentage assertedly totals 1.3 percent of Canadian exports of lumber “*and only 0.4 percent of total U.S. lumber consumption*”, in Respondent’s view a “*relatively insignificant*” number (R I, § 59; R II, §§ 9, 102 *et seq.*). Thus, Respondent argues, the “*totality of the breach was an extremely small event*” (R III, §§ 61, 85 *et seq.*). Respondent alleges that Claimant’s remedy proposals cannot absorb “*such a small, temporary event*” (R III, § 63).
251. Respondent further purports that “[*t*]he small size of the breach [...] places a high premium on the accuracy of the assumptions incorporated into the model” which in its opinion cannot be met

by Claimant's remedy proposals. Allegedly, "*Dr. Neuberger's admitted error in selecting the wrong parameter for the critical elasticity assumption, and the wide variations of outcomes based on small variations in that assumption, demonstrate the insufficiency of his model to deal with small magnitudes*" (R III, § 63; Tr 111:17-24, 107:11-25; Tr 152:5-18). In Respondent's view, "*Dr. Neuberger's model to consider changes in lumber inventories*" thus failed, which make his model "*highly suspect in this regard*" (R III, §§ 63, 87, 89).

252. Respondent also alleges that Claimant in its expert report "*used elasticity estimates for a general supply curve, rather than for a supply of exports for each of the Canadian regions in his model*" (R III, § 88; Tr 107:18). As a second alleged shortcoming, Respondent claims that Claimant's witness based its model "*on elasticity values outside the range that even he [Dr. Neuberger] identified in his evaluation of the relevant literature*" (R III, § 88; Tr 107:18-108:3). In consequence, Respondent purports this "*extreme sensitivity of the U.S. proposal to the range of elasticity highlights the speculative nature of the results*" and thus render the relevant estimates "*erroneous*" (R III, § 89; Tr 149:24-150:6).
253. In addition, Respondent alleges that Claimant's witness "*failed to conduct any sensitivity analysis of his results*" and on top of that "*failed to test the statistical confidence of these results*" (R III, §§ 64, 90; Tr 152:25-153:9).
254. Regarding the application of the carry forward/carry back provisions of the SLA, Respondent asserts having consistently and correctly applied these provisions. Respondent claims that from January 2007, it has posted "*data and other information concerning the operation of the SLA [...] on the official Department of Foreign Affairs and International Trade ("DFAIT") website*" (R II, § 106). Citing Article VI, note 2 of the SLA, which states that "*[i]n determining the volume restraint levels which would have applied to an Option B Region during the transition period, the carry-forward and carry-back rules laid out in Annex 7B shall be taken into account for all the months of the transition period.*" Respondent points out that December 2006 was the last month of the transition period and thus "*Canada carried forward the correct amount from December 2006 in determining maximum permissible export levels for January 2007*" (R II, § 109; R III, Annex 1).
255. Respondent according to its witness further contends that because the export charges would be imposed in the future "*Dr. Neuberger's model actually "returns about 35 percent more*

*than the \$34 million he says there.”*” (R III, § 22; cf. Tr 144:11-15).

**(1) U.S. Proposal I: Imposition of Option A Export Charges on Option B Regions**

256. Regarding Claimant’s remedy Proposal I Respondent firstly asserts that *“the proposal has no economic underpinnings but is instead based solely on a bare assertion that the higher Option A export tax should apply”* if Option B regions exceeded their permissible quota volume (R I, § 71; R III, § 73). However, Respondent holds that *“[e]xcept for its very explicit initial transition rules”* there is no requirement in the SLA to treat Option A exporters like Option B exporters and vice versa (R III, § 78).
257. Respondent further observes that the premise of remedy Proposal I is *“false”* since it is purportedly not true that Option B regions *“operated as if they were not subject to a quota for the first half of 2007”*. As Respondent points out, during the first half of 2007 the respective quota amount was *“established in accordance with unadjusted Expected U.S. Consumption and constrained shipments from Option B regions”*, thus, in Respondent’s view rendering Claimant’s argument *“absurd”* (R I, para, 72; R II, § 111; R III, § 77).
258. Moreover, Respondent criticises that remedy Proposal I *“does not depend on how large the RQV error was or how much lumber was exported beyond corrected RQVs”*. Hence, Respondent states that *“[t]he size of the proposed monetary penalty is arbitrary relative to the magnitude of any benefit purportedly garnered”* (R I § 73; cf. R II, §§ 114, 116). In Respondent’s view, *“neither the SLA nor customary international law provide for compensation without regard to quantum of injury to claimants”* (R III, § 78). Respondent further purports that Claimant’s witness instead of measuring the supposed benefit of Option B exporters made a mere assumption (R III, § 75). Maintaining that the remedy proposal is *“not related in any way to the U.S. claimed objective of compensating for the economic effects of the breach”* Respondent contends that *“[t]here is no logic to the U.S. preference for an export tax to remedy the effects of exceeding a volume quota”* (R I, § 74; R II, § 113, cf. § 118). Respondent hence holds that the main effect of this remedy proposal *“will be arbitrary punishment and significant market distortions”* (R II, §§ 115, 119).
259. Respondent asserts that its expert report shows that remedy Proposal I would equal a lump sum tax since *“payment of the*

*total fixed amount of tax [...] is fundamentally unavoidable*” (R I, § 75).

260. Also, Respondent alleges Claimant of apparently pursuing two objectives, namely of “*punitive tax and to make sure that the tax limits exports to the United States*”, which are assertedly unjustified. According to its expert report however, “*the primary effect of these proposals is rather to extract a penalty from Option B region reporters (...) through payments to the Canadian government*” (R I, § 76).

## **(2) U.S. Proposal II: Additional Export Fees**

261. With respect to remedy Proposal II, Respondent purportedly detects “*similar fundamental problems*” asserting that “*the simulation is based largely on subjectively assigned economic parameters regarding the operation of the lumber market(s) in North America*” (R I, § 77). Though Respondent concedes that the second remedy proposal is “*the only proposal for which the United States even attempted to quantify a harm or benefit from the breach*”, the alleged shortcomings of this proposal render it, in Respondent’s view, “*unreliable and speculative*” (R III, §§ 79, 81).
262. Respondent holds that remedy Proposal II – in contrast to the detailed specificity of Annexes 7A and 7D – has neither any “*legal or economic underpinnings*” nor “*achieve[s] the objectives identified or the effect claimed*”, but is “*unrelated to any relevant economic measurement*”. Assertedly not having any support within the text of the SLA, the sole objective of this “*tax-based remedy*” in Respondent’s view is thus to punish future Option B exporters (R I, §§ 78, 80, 82; R II, §§ 121 *et seq.*, § 125; R III, § 82). In fact Respondent alleges that this remedy proposal is “*highly punitive in that it imposes an export charge that is at least twice the value of the excess lumber that was shipped as a result of the quota miscalculation*” (R II, § 120).
263. Also, since this “*tax-based remedy*” would “*function like a lump-sum tax, there would be no effect on Canadian lumber exports*” (R I, § 82). Respondent’s experts thus conclude that “*the proposal is excessive and distortive, that the model cannot identify the effect on U.S. producers and that it suffers from fatal errors of internal inconsistency, specification errors, and speculative outcomes*” (R II, § 125). Respondent confirms this assertion when pointing out that Claimant’s adjustments to the export measures “*would cause collateral effects on multiple market participants*” and are “*unlikely to be related to any gain*”



*or loss that they experienced as a result of the breach*” (R III, § 84; Tr 137:14-25).

264. Criticising that the exercise used to generate the proposed tax rate and penalty amount is based on the assumption that the U.S. softwood lumber market “*was like it was in [the][sic] first half of 2007 and would remain so*” and that the proposed fee “*would effectively be permanently in place*”, Respondent’s experts purport that Claimant’s remedy proposal is “*incapable of predicting the effect of the proposed export taxes*” (R II, § 126; R III, § 81). According to Respondent this is due to a lacking adjustment “*to keep he U.S. remedies focused on their purported targets*” (R III, § 82; Tr 141:13-16). Additionally, Respondent argues that this problem does not arise when the adjustment to an export measure concerns an ongoing breach because purportedly in such a case “*[n]o distortion occurs because the effect of the breach, and the offset, is applied to the same market conditions*” (R III, § 83).
265. Respondent also notes that the estimated numbers calculated by Claimant’s expert could be reduced by 75 percent if intermediate values rather than extreme values were to be used (R I, para 79). Respondent’s experts assert that Claimant’s expert “*has understated the relevant elasticity and overstated any purported price effect and implied tax and penalty amount*” (R II, § 127).

### **(3) U.S. Proposal III: Projection of Future Exports, then Reduction of RQVs**

266. In its third remedy Proposal Claimant purportedly pursues the objective of redressing the effects of the breach at the time of the breach by “*imposing drastic revisions on future Regional Quota Volumes*” (R I, § 83; cf. C I, § 28; R II, § 129). Respondent however sustains, that this remedy is “*inconsistent*” with its purported objective and that Claimant’s primary concern seems to be “*that a quota reduction from Agreement levels may not sufficiently penalize Canadian producers*” (R I, § 83).
267. Respondent in its expert report further contends that the usual error in predicting the actual level of exports “*is likely to swamp the effect of excess exports*” (R I, § 84; cf. RR-2, § 69). Respondent confirms this position in its Rebuttal Memorial on Remedy, stating that “*the likelihood of extremely large errors in projecting future export quantities [...] relies on a poorly-defined predictive model that is prone to error*” (R II, §§ 131 *et seq.*).

268. Respondent finds that “*given the nature of the binding quota, an unbiased but unavoidably inaccurate forecast would be likely to result in a more than equal reduction in exports*” and thus “[o]n average (...) exports will be reduced by more than the intended amount” (R I, § 85; cf. RR-2, §§ 69-70). The difficulty in forecasting exports assertedly puts a “*significant risk on Canadian producers*” and is hence “*likely to result in a punitive restriction on future exports*”, a consequence that is not authorised under the SLA (R I, § 86). Asserting that “[u]nderutilization is fully built into the model, but overutilization is legally impossible and so ignored, lowering the overall average”, Respondent further submits that Claimant’s remedy proposal is a “*biased procedure*” (R III, §§ 92 *et seq.*).
269. Respondent emphasises that the establishment of RQVs necessarily has to follow the provisions as laid down in Annex 7B of the SLA which “*plainly and in great detail “specifies the method to be used in determining the quota volumes for Regions electing Option B (...)”*” (R II, § 130). In this context, Respondent sustains that the Agreement “*establishes RQVs based on EUSC*”, however, “*provides no basis to abandon RQVs based on EUSC in favor of an economist’s projection that reduces permissible export volumes by many times the volume of overshipments*” (R II, § 134). Respondent thus asserts that on the whole this proposal runs counter to the Agreement, since in Respondent’s view the SLA “*does not allow imposition of additional adjustments to compensate for the degree to which quotas are underutilized or expected to be underutilized*” (R III, § 91). In consequence, Respondent submits that irrespective of the alleged economic flaws the proposal “*should be rejected out of hand for legal reasons alone*” (R III, § 92).

#### **(4) U.S. Proposal IV: Reduction of Future EUSC**

270. Finally, Respondent scrutinises remedy Proposal IV and again observes that the offered remedy is “*inconsistent with its stated objective of approximating the economic effects of the breach*” and “*divorced from any economic effects of the miscalculation of RQV*” the reason being that an implementation of such a remedy would “*reduce future EUSC (...) without accounting for the underutilization of RQV’s during the second half of 2007*” (R I, §§ 87-89; cf. RR-2, § 33(iii); cf. R II, §§ 135-137, 139). According to Respondent, such a remedy would not be commensurate with the amount of the overshipment and thus “*does not reflect the amount of the overshipment about which the United States complains*” (R II, § 136; R III, § 95). Respondent further asserts that Claimant “*has failed to rebut this flaw*” (R III; § 95).

#### H.IV. The Tribunal

271. As mentioned above, the detailed analyses of these issues submitted by the Parties have been helpful for this Tribunal. The following considerations, without addressing all the arguments of the Parties, concentrate on what the Tribunal itself considers to be determinative on its decision regarding the general applicability of § 22, the establishment of the cure period according to subsection (a), and the determination of compensatory adjustments according to subsection (b).
272. At the outset, the wording of para 22 of Art. XIV SLA may be recalled:

*“22. If the tribunal finds that a Party has breached an obligation under the SLA 2006, the tribunal shall:*

- (a) identify a reasonable period of time for that Party to cure the breach, which shall be the shortest reasonable period of time feasible and, in any event, not longer than 30 days from the date the tribunal issues the award; and*
- (b) determine appropriate adjustments to the Export Measures to compensate for the breach if that Party fails to cure the breach within the reasonable period of time.”*

#### 1. Retroactive or prospective application of § 22

273. The first issue to be decided in this context is whether, as argued by Respondent, § 22 of the SLA is designed to provide for prospective remedies only and therefore is not applicable in the present case where undisputedly the breach found by the Tribunal in its earlier Award lasted only for six months in the past.
274. For that examination, the starting point is the general principle provided by **Art. 31 of the ILC Draft Articles on State Responsibility** according to which the responsible state is under an obligation to make full reparation for the injury caused by its wrongful act. As the ILC Commentary to that Article points out restating the PCIJ decision in the Chorzów Case, there is no necessity for this principle to be stated in the applicable treaty itself. The applicability of this principle for the SLA, therefore,

must be accepted unless further examination leads to a different conclusion.

275. And again by reference to the Chorzów Decision, the Commentary adds that the responsible state must endeavour to “*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*”. Thus, it is clear – and undisputed – that the general principle of Art. 31 provides for retroactive, and not only for prospective remedies.
276. For the present case this has to be applied to the breach found by this Tribunal in its earlier Award on Liability, i.e. the breach for the period of six months from January 1 to June 30, 2007. While it is undisputed that thereafter Respondent did not continue with the breach but complied with the SLA, it is also obvious that such later compliance did not wipe out all consequences of the breach during the earlier six months.
- 277.** This means that, also for the breach at stake in these proceedings, there is a **presumption in favour of retroactive remedies.**
278. The further question to be examined, and the actual dispute between the Parties, is whether the SLA has to be interpreted different to that presumption. Indeed, The ILC Draft itself provides for such an option in its Art. 55 *Lex Specialis*. As the ILC Commentary to that Article explains by way of introduction, “*States often make special provision for the legal consequences of breaches*” in the respective treaty.
279. And the Commentary and footnote to that Art. 55 expressly mention as an example the *WTO Understanding on Rules and Procedures governing the Settlement of Disputes* as it relates to certain remedies and that, “*for WTO purposes “compensation” refers to future conduct, not past conduct.*”
280. Therefore, this Tribunal has to examine whether the SLA also must be interpreted as such a *lex specialis*, as is claimed by Respondent.
281. Here again, the interpretation of the SLA has to apply Art. 31 and 32 of the VCLT and first look for the “*ordinary meaning*” of Art. XIV § 22 in the “*context and in light of the object and purpose*” of the SLA.
282. At the outset, the Tribunal finds that the wording of this provision does not provide a clear answer regarding retrospective or prospective remedies.

283. The term “*cure*” is not used by the abovementioned provisions of the ILC Draft. After considering the respective arguments of the Parties, the Tribunal still concludes that the term “cure” by itself does not have a clear meaning either as being retroactive or prospective. It could indeed be argued that the SLA speaks of curing the breach and not of curing the effects of the breach. However, it has been seen above that a treaty does not need to expressly mention the duty of reparation and also that such reparation is to be understood as retroactively wiping out the effects of the breach. Therefore, the fact that § 22 does not mention that the effects of the breach have to be “cured” is not by itself a sufficient reason to interpret that provision as providing only for prospective remedies. For that reason, after considering the respective arguments of the Parties, the Tribunal is not persuaded that the ordinary meaning of this term must be interpreted as prospective only.
284. Also beyond the term “cure”, if one considers the **ordinary meaning** of the language of § 22, that language gives no support to an interpretation that the provision is not at all applicable for a case as here where the breach only existed for a certain period and is no more continuing at the time of the Tribunal’s arbitral procedure. § 22 speaks of “breach” without any further qualification or limitation. Further, the introductory language of § 22 makes the consequences of subsections (a) and (b) applicable, if the Tribunal finds that “*a Party has breached*” an obligation, which is clearly referring to the past and not only to the case where a Party is still breaching an obligation at the time the Tribunal decides. To nevertheless conclude that the provision is only applicable to continuing breaches and not to past breaches, would require a specific express language to that effect – which cannot be found in § 22. Therefore, the Tribunal is not persuaded that, based on the ordinary meaning of § 22, the breach as contemplated in that provision has already been cured and that there is no basis for the Tribunal to still take the mandatory decisions according to subsections (a) and (b) of that provision.
285. Nevertheless, it does seem to the Tribunal that the rulings in that provision are primarily shaped and are easier to be applied to deal with breaches that still continue at the time the Tribunal has to decide. This is particularly so for subsection (a) in so far as the breaching Party must be given a reasonable period of time up to 30 days “to cure the breach” and for subsection (b) providing that the determination of appropriate adjustments is due “if that Party fails to cure the breach within the reasonable period of time”. But, as seen above, the language can also be understood to mean that retroactively the breach must be

“cured”, i.e. by wiping out the effects of the breach in the past. Such an interpretation is compatible with the rulings in § 22: Regarding a breach that occurred in the past and has in the meanwhile stopped, the decision required under subsection (a) can give the breaching party a period to compensate the past breach, and the decision required under subsection (b) can be interpreted to have to determine what is an appropriate adjustment to compensate for that past breach since the effects of that past breach have not yet been wiped out. Thus, even if primarily shaped for continuing breaches, § 22 does not exclude an application to – and indeed can be applied to – past breaches as well.

286. However, Respondent points out that the SLA is primarily a trade agreement and thus should be interpreted taking into consideration other trade agreements such as the WTO or NAFTA Chapter 20 which also deals with trade.
287. And indeed, as mentioned above, the ILC Commentary to Art. 55 particularly mentions the **WTO** as a *lex specialis* under which compensation refers to future conduct only and not to past conduct. In this context, though it is not quite clear from the information regarding the negotiations leading to the SLA, it is also the Tribunal’s impression that a number of sections of Art. XIV of the SLA were drafted in looking at samples from other trade agreements such as the WTO. However, it should be noted that Art. 22 of the WTO DSU provides express language as to what is understood by “compensation” from which it is clear – and undisputed – that not only compensation by the breaching party is voluntary, but also only concerns future conduct. Neither of this can be found in Art. XIV SLA. Its § 22, by the word “shall”, makes it mandatory for the Tribunal to take the decisions under subsections (a) and (b). It provides provides not for a recommendation for voluntary future conduct, but for a “cure”. And, contrary to the DSU, as seen above, no language is included limiting the “cure” to future conduct only. In addition, the SLA, though primarily similar to a trade agreement, presents a number of distinguishing characteristics such as being only a bilateral treaty, settling earlier disputes between the Parties, and providing for important obligations not found in trade agreements such as the payment by the United States of a lump sum of some 5 billion US \$ to Canada. Considering all these aspects, the Tribunal does not find that there is such a degree of similarity between the SLA and the WTO that would be sufficient to conclude that a merely prospective compensation such as in Art. 22 of the WTO Understanding must also be applied to the SLA.

288. The comparison to **Chapter 20 of NAFTA** shows that, despite certain formal and procedural similarities such as 30 day periods, its dispute settlement provisions differ widely from Art. XIV of the SLA. By referring to GATT dispute settlement (Art. 2005), it provides for a Commission Report (Art. 2007), only thereafter for an option for an Arbitral Panel (Art. 2008) whose Initial Report may only include recommendations (Art. 2016) and whose Final Report still is not binding. It also expressly provides only for future measures in case of non-implementation (Art. 2018 and 2019). This complicated prospective procedure of Chapter 20 is obviously so different from the procedure provided in Art. XIV SLA that it permits no conclusions in favour of a merely prospective interpretation of the latter.
289. Quite to the contrary, since both Parties of the SLA, as parties of the WTO and of NAFTA are very well familiar with the DSU and Chapter 20, one must conclude that they would have provided a similar express language in Art. XIV SLA had they intended to provide only for prospective “cure”. The Tribunal agrees with Claimant that the decision not to use the tried-and-tested language from those systems in favor of new language, must be seen as speaking in favour of an interpretation to the effect that “*“cure the breach” must have a different meaning than “bring the [inconsistent] measure into conformity,“, or “non-implementation or removal of a measure not conforming with this Agreement”*” – the language used in the WTO DSU and NAFTA.
290. However, since, for the interpretation of a treaty provision, Art. 31 VCLT also refers to the “**context**”, the Tribunal has also to examine whether other provisions of the SLA nevertheless speak in favour of interpreting § 22 only in a prospective way.
291. In that context, Respondent has pointed out to other SLA provisions where the retroactive application is expressly mentioned and has drawn the conclusion that this would also have been done in § 22, if that provision were supposed to be applied retroactively as well. In this context, the Tribunal finds unpersuasive Claimant’s argument that at least one other SLA provision, i.e. Art. IX, clearly provides for retroactive application without mentioning the word “retroactive”. For this provision does contain the word “*refund*” and a reference to the “*2 consecutive quarters from the preceding Year*” and thus is quite explicit on its retroactive application.
292. The closest of such other provisions is § 32 of the same Art. XIV SLA which indeed expressly mentions the word “retroactive” in its subsection (a) and also in its introductory sentence and subsection (b) uses language which in effect leads

to retroactive application. However, § 32 deals with quite a different situation than § 22. It does not deal with a breach of the SLA, but with the enforcement of a decision under § 22(b) by a new arbitration initiated under § 29 and an award under § 31 for the purpose of adjusting compensatory measures or adjustments by modification or termination. For such an obligation created by the first arbitral award, Art. 31 of the ILC Draft Articles and its presumption for retroactive reparation examined above are not applicable. Such a new award under § 31 deals with an ongoing process of implementing the earlier award under § 22(b) and subsections (a) and (b) of § 32 then provide at what point in the past the modification or termination is to start. The retroactivity mentioned in § 32 therefore does not permit conclusions regarding the lack of retroactivity of § 22.

293. The other SLA provisions explicitly mentioning retroactive application, i.e. Art. VIII(1)(b), XII(2)(b)(i), XV(19)(c) and XVII(5), similarly deal with situations quite differently from Art. XIV § 22, particularly since they are not part of the central provision on dispute settlement for breaches of the SLA which is only Art. XIV and are also not covered by the presumption of Art. 31 of the ILC Draft Articles.
294. More persuasive is Respondent's argument that the **procedures established by §§ 22 to 24** function logically for prospective remedies and are ill-suited for retroactive remedies. As mentioned earlier, the Tribunal appreciates that the drafters primarily seem to have had in mind breaches continuing at the time of the arbitration. And, though there is no evidence from the negotiating history either way, it may even have been that the drafters did not even think of a case as the present one where a breach only lasted a certain period in the past. But that would not be the first time in the long history of treaty drafting that the drafters were not aware of every possible future event of application of a provision. If such an unforeseen event occurs, that does not mean that the provision is not applicable at all, but the Parties – and the Tribunal in case of a dispute – have to find the most appropriate way of application of the provision taking into account its ordinary meaning, its context, and its object and purpose (Art. 31§ 1 VCLT).
295. Subsection (a) of § 22 shows that the longest grace period a breaching Party should be given is 30 days from the time of the Tribunal's award. The appropriate application of this provision regarding a past breach would seem to be that, while there is no need to determine that the breaching Party stop the breach because the breach in the present case already stopped by June 30, 2007, the breaching Party may be given that 30 day period



for “curing” the effects of that past breach by “*wiping out the effects of the breach*”.

296. Such an interpretation is in line with the last sentence of § 23 according to which the adjustments under § 22(b) “*shall be in an amount that remedies the breach*”. This wording can more easily be understood as requiring a *wiping out* of the full effects of the breach rather than only those of future breaches.
297. As well, § 24 can be seen as compatible with such an interpretation as it provides that the compensatory adjustments determined according to § 22(b) may be applied from the end of the 30-day period until the Party Complained Against cures the breach, thereby identifying the time by which the adjustments start being applicable. For the present case of a past and concluded breach this application can be interpreted as identifying the time by which the Party has to start “*wiping out the effects of the breach*”.
298. In view of the above considerations, an interim conclusion of the Tribunal is that the SLA’s context of § 22 does not provide a basis to change the presumption of retroactivity and does not require to interpret the provision as prospective only.
299. Both Parties have also referred to the **negotiating history** of the SLA. The Tribunal finds the information and arguments submitted by the Parties in this context as inconclusive with regard to the issue of a retroactive or prospective interpretation. It is clear that at no point of the negotiations the specific issue of past and concluded breaches has been expressly addressed. The various uses in connection with the successive drafts and communications, of terms such as *eliminate*, *remove*, and finally “*cure*” have not been defined clearly either way. The language borrowed and changed in comparison to the SLA 1996 leaves it unclear to what extent the interpretation of the Parties and of arbitration proceedings under that SLA are of relevance for the new SLA and its different rulings. At least it can be said that the negotiating history does not provide sufficient evidence to the effect that the presumption of Art. 31 ILC Draft in favour of retroactive reparation would have to be considered as reversed.
300. Art. 31 VCLT also requires that the interpretation of a treaty provision shall take into account the treaty’s “***object and purpose***”.
301. In this regard the Tribunal recalls from its Award on Liability (sections 130 and 187) that the SLA does not contain, as many other treaties do, a preamble or introductory provision expressly clarifying its object and purpose and that, also, Art. I, with the

title *Scope of Coverage*, does not provide any guidance in this context. Thereafter, the following sections of the Tribunal's Award on Liability also have a bearing on the issue of retroactivity:

*"179. Art. VI SLA provides: "As of the Effective Date, Canada shall apply the Export Measures to exports of Softwood Lumber Products to the United States."*

*180. And in Art. II.1(d) SLA Canada expressly certifies that it can administer the Export Charge and issue Export Permits as of the Effective Date.*

*181. The Tribunal understands these two provisions to convey what it considers the usual understanding of a treaty in general, if the effective starting date is clearly established in the treaty, and of the term "effective" in particular, namely that the new regime established by the treaty is applicable from that date. An important part of this new regime of the SLA was the adjustment according to paragraph 14, because it had considerable relevance as to the subject-matter of the SLA, i.e. the volume of exports of Softwood Lumber Products from Canada to the United States.*

*182. In view of the importance of this economic effect of the SLA, the Tribunal considers that it was to be applicable from the Effective Date, and in view of the explanation given above, certainly from January 1, 2007 as requested by Claimant, unless the SLA otherwise provided or at least implies that the adjustment was to start its application only at a later date.*

*183. Against this interpretation, Respondent points to what it considers forward looking language (Expected USC) in Annex 7D including paragraph 14. The Tribunal does not see why this language should require a change to its above-stated consideration. As a matter of fact, paragraph 14 itself is rather backward looking, because it refers to the calculation under paragraph 12 which itself takes into account the twelve-month period before the calculation is made.*

*184. ...*

*185. Paragraph 14 clearly requires Respondent to perform a certain activity, i.e. calculate the adjustment according to the criteria established in the provision. This activity, indeed, only had to be performed by Respondent after the*

*SLA was in force. But in view of the above-stated considerations, the Tribunal cannot find any wording in paragraph 14 or elsewhere in the SLA why the adjustment should or could not have been done by Canada starting with January 1, 2007. Quite to the contrary, since the economic effect of the SLA and particularly paragraph 14 was to be applied as from the beginning of the SLA, the adjustment was due as from January 1, 2007.”*

302. The Tribunal further recalls that, as is confirmed by the introductory wording of § 22 “*If the Tribunal finds that a Party has breached an obligation ...*”, the present Award on Remedies has the function to implement and determine the consequences of its above quoted conclusions regarding liability. This includes in particular that the economic effect of the SLA should be made effective as from January 1, 2007.
303. The mere prospective application of Art. XIV § 22 as suggested by Respondent cannot perform that function. It would leave the economic effect of the six month breach untouched and indeed would lead to the conclusion that the breach, since it has ended by July 1, 2007, remains without any consequences at all.
304. More generally, denying a retroactive application of § 22 would mean that both Parties could breach also all other provisions of the SLA without any consequences and could continue the breaching conduct even after objections by the other Party and during any arbitration proceedings as long as they stop the breaching conduct within the cure period of up to 30 days after the Tribunal’s Award.
305. Such an interpretation cannot be considered as complying with the object and purpose of the SLA and also would deprive the elaborate dispute settlement provision of Art. XIV SLA of most of its effect.
306. The **conclusion of the Tribunal** regarding the issue of retroactivity of § 22 is therefore: Due to Art. 31 of ILC Draft on State Responsibility there is a presumption that § 22 also is applicable to past breaches. It is to be conceded that the procedure provided in §§ 22 to 24 SLA seems to be primarily shaped in view of breaches still continuing at the time of the Award of the Arbitral Tribunal, and is ill suited for application to past and completed breaches as at stake in the present case. Taking into account the arguments speaking against and in favour of such a retroactive application and the interpretation of the provision according to Art. 31 and 32 VCLT, it would seem that the latter have more weight. But in any case, the weight of the arguments against retroactivity is not sufficiently strong to

outweigh those in favour to such an extent that the presumption of Art. 31 ILC Draft in favour of retroactive reparation must be considered as reversed. Particularly “*in the light of its object and purpose*” (Art. 31§ 1 VCLT) the SLA requires an interpretation to the effect that § 22 is to be applied retroactively to past breaches and in particular to the past and completed breach which the Tribunal has found in its Award on Liability was committed by the Respondent.

## **2. Identification of the cure period according to subsection (a)**

307. As mentioned earlier, the introductory wording of § 22, by the word “*shall*”, makes it clear that it is mandatory for the Tribunal to take the decision under subsection (a).
308. However, as also has been mentioned above, the procedure provided by §§ 22 to 24 is more easily suited for breaches continuing at the time of the Tribunal’s Award, but less suited for a breach in the past which has already been remedied by the breaching Party at the time of the Award. While, as seen above, this does not make § 22 inapplicable, this has to be taken into account by the Tribunal in its decision according to subsection (a).
309. As also already discussed above, “*for the Party to cure the breach*” according to subsection (a) has to be understood, in case of a past and completed breach as at stake here, as meaning a reparation “*wiping out all the consequences of the breach*”. It would seem obvious that this intended effect of the reparation must be considered as more important as its timing within the 30 day period. Therefore, if such a reparation is not possible within the maximum period of 30 days given by subsection (a), in the view of this Tribunal, the most appropriate interpretation within the object and purpose of § 22 and of the SLA is that the reparation should be started and performed as fast as possible after its Award, even if going beyond the 30 day period.
310. Therefore, the Tribunal **concludes** in application of subsection (a) that, as soon as possible after its present Award, Respondent has to take the steps necessary to wipe out the consequences of its breach of the SLA during the period from January 1 to June 30, 2007, which the Tribunal found in its Award on Liability.

## **3. Determination of compensatory adjustments according to subsection (b)**

311. The mandate for the Tribunal as provided by § 22 is twofold: It has to take a decision according to subsection (a), but at the same time, as is clearly indicated by the word “*and*” at the end of that subsection, it has to take as well a decision according to subsection (b) though this latter decision may only have to be implemented, as provided in the last part of subsection (b) if the breaching Party fails to cure the breach within the reasonable period of time.
312. Irrespective of the above mentioned dispute as to whether § 22 is at all applicable, it seems to be undisputed between the Parties if such applicability is found as has been done by this Tribunal in its conclusions above. And accordingly, the Parties have widely discussed and argued what appropriate adjustments should be determined by the Tribunal according to subsection (b).
313. For convenience, the wording of para 22(b) of Art. XIV SLA may be recalled:
- “22. If the tribunal finds that a Party has breached an obligation under the SLA 2006, the tribunal shall:*
- (a) (...)
- (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.”*
314. At the outset, a **preliminary consideration** regarding the Parties’ and the Tribunal’s role in this context may be appropriate.
315. Generally, in case a tribunal has found a party in breach and has to determine the reparation according to Art. 31 ILC Draft on State Responsibility, the claiming party will have the burden of proof for the alleged “*injury caused by the internationally wrongful act*” (Art. 31 § 1) including “*any damage, whether material or moral, caused*” (§ 2). And, as pointed out in the ILC Commentary (10), “*(t)he allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process.*”
316. In Art. XIV, §§ 22 to 24 SLA provide specific guidance as to what compensatory adjustments are due in case of a breach of the SLA. But the basic approach is still in line with that of Art. 31 ILC Draft, because subsection (b) of § 22 expressly provides

that it is the function of the compensatory adjustments “to compensate for the breach”.

317. In reply to the Tribunal’s specific question 3.2.(b) in Procedural Order No.4, the Parties disagree as to the **burden of proof** resulting therefrom. Claimant submits that “*neither party bears a burden to demonstrate “appropriate” compensatory adjustments to the export measures*”, and that, “*(i)nstead, paragraphs 22 and 23 explain that the Tribunal “shall determine”*” these (C III, § 25). On the other hand, Respondent submits that Claimant has the “*burden of proving its allegations of damages to US interests, benefits to Option B exporters, and the quantum of compensatory adjustments it claims is justified as a consequence of Canada’s breach*” (R III, § 13).
318. In the Tribunal’s view, §§ 22 to 24 do provide **specific guidance as to what compensatory adjustments are appropriate**. As Respondent has rightly pointed out, compensatory adjustments are limited to adjustments of trade measures rather than cash payments of monetary damages. Thus, they go beyond the identification of injury and damage required under Art. 31 ILC Draft by not giving a free hand regarding the choice of the reparation due for the breach, but mandating the determination of specific devices using and adapting the measures provided in the SLA by expressly requiring in subsection (b) “*adjustments to the Export Measures*” and by further details regarding such adjustments in case of a breach by Canada in subsection (a) of § 23.
319. Therefore, though it is finally the responsibility of the Tribunal to make the determination under § 22 subsection (b), since that determination is limited to adjusting the specific export measures foreseen in the SLA, the Tribunal disagrees with Claimant’s submission that neither Party bears the burden to demonstrate appropriate measures, but agrees with its further submission that to the extent that a party wishes the Tribunal to adopt a particular proposed remedy, it is that party’s burden to demonstrate that the remedy is (as the SLA requires) “appropriate” (C III, §§ 25 and 26).
320. On that basis, since the Parties and their experts have concentrated on discussing in great detail the four Proposals Claimant has submitted in this procedure for a possible adjustment, the Tribunal will now consider whether any one of these Proposals can be considered as being appropriate according to § 22 subsection (b).
321. In this context, the Tribunal feels it should first outline its **approach** to this examination. As seen above, §§ 22 to 24

provide specific instructions for this determination which differ considerably from the general methods developed for the determination of a reparation of injury and damage under Art. 31 ILC Draft. These instructions use the export measures provided by the SLA and qualify as to how these should be adjusted to compensate for the breach. It is obvious and does not need any further explanation that the Parties, having designed and implemented these export measures in the softwood lumber industry for many years, they possess a by far greater expertise than this Tribunal regarding their practicability and economic effect. The same is true for the two highly distinguished economic experts the Parties have engaged for these arbitral proceedings and who have submitted several rounds of written reports and given oral testimony at the Hearing. Rather than trying to be “wiser” than both the Parties and these experts in this regard, the Tribunal understands its task, at least primarily, as having to examine whether, taking into account the reasoning and comments by the Parties and the experts, the Tribunal finds any one of the four proposals submitted persuasive as being an appropriate compensatory adjustment under § 22.

322. The Tribunal notes that in the view of Claimant and its expert, each one of the four Proposals is appropriate, and that in the view of Respondent and its expert none of them is appropriate. The Tribunal finds that the reasoning and comments submitted by the Parties and their two experts regarding any one of the four Proposals provide good reasons in favour as well as against each Proposal and there is no need to repeat them at this stage.
323. It is obvious that, once a breach and the applicability of subsection (b) are established, as they are in view of the Tribunal in its considerations and conclusions above, there must be **at least one appropriate adjustment** satisfying the requirements of that subsection and the further qualification in § 23. And indeed, Respondents, though objecting to the four concrete Proposals of Claimant, have not argued that this be so and subsection (b) cannot be implemented at all. Respondent itself has not used its argument that “*the breach was an extremely small event*” and that “*the small scale of the breach imposes stringent demands on any attempt to engage in economic modeling of the breach’s effect*” (R III, §§ 61 and 63) to allege that application of subsection (b) is impossible. This argument only confirms the difficulty of such an application.
324. Indeed, both Parties and their experts agree that, in view of the many criteria and varying circumstances relevant at any given time for exports in the softwood lumber industry and in particular for the implementation of the SLA, and though it may be easier to find a quantifiable reparation for a breach which

only lasted a limited period in the past as in the present case, it is a very difficult task indeed to find an appropriate adjustment.

325. In reply to Claimant's criticism that Respondent or its expert, while objecting to all four US Proposals, have not come up with a concrete adjustment method of their own, Respondent has rightly pointed out that it does not have the burden of proof in that regard.
326. In this respect, the Tribunal recalls the discussion between Respondent's expert Prof. Kalt and the Chairman of the Tribunal recorded on pages 261 to 264 of the Transcript of the Hearing. In reply to the Chairman's question, the expert confirmed that it would be "*extremely difficult to come up with a model*" and provided further explanations. Then, in reply to the Chairman's question whether what one was really looking for "*is not a perfect solution, but the best you can do under the circumstances*", the expert confirmed that this would be "*[t]he best you can do without having to speculate in the technical sense of speculating*". And in reply to a further respective question by the Chairman as to whether "*whoever would come up with a model might be subject to discussion by peers*", the expert confirmed: "*If someone came up with a model, such as Professor Kalt, and said this is the most reliable number, I think, yes, we'd be subject to a kind of peer review, which says "Professor Kalt, how did you pick that as a single value in this context?"*"
327. The Tribunal's conclusion is that, indeed, in view of the recognized extreme difficulty to take into account all criteria and varying circumstances of relevance, even the most distinguished experts in the field are not convinced to be able to come up with an adjustment which would be beyond any criticism. This implies that, even if some of the criticisms submitted by Respondent and its expert regarding all four of Claimant's Proposals are to be considered as justified, they do not exclude a Proposal from being considered as a possible adjustment. And, irrespective of the issue of burden of proof, since neither the Respondent nor its expert have presented a model which they claim is better, it further implies that the **Tribunal may select the most convincing adjustment method** among the Proposals submitted as long as it is economically plausible and legally not contrary to the requirements established in §§ 22 and 23.
328. Taking the above considerations and conclusions into account, the Tribunal will now turn to the **four alternative Proposals** submitted by Claimant. For convenience, they are reproduced hereafter as identified in the last and modified relief sought in Claimant's Post-Hearing Brief:



- “1. *Under this remedy, Canada should be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until the entire remedy amount of CDN \$ 63.9 million, plus CDN \$ 4.36 million in interest (a total of CDN \$ 68.26 million) has been collected. This remedy stays within the confines of the SLA itself and does not require the Tribunal to determine the economic effects of the breach.*
2. *Alternatively, we request that the Tribunal adopt the second proposed remedy. Using the agreed-upon overshipment calculation of 216 MMBF, Canada should be required to collect an additional export charge of CDN \$ 47.30 per MBF upon softwood lumber shipments from Option B regions, until the entire remedy amount of CDN \$ 110.5 (including interest) is collected. This remedy appropriately considers the price effect of the breach and correctly reverses that price effect.*
3. *Alternatively, we request the Tribunal to adopt our third proposed remedy. Under this proposal, Canada should be required to adjust downward the RQV for each month/region of the remedy period, first, by the average amount by which the correctly calculated RQV exceeded actual exports in the preceding six-month period, and second, by the average amount of the corresponding overage for that month/region during the sixmonth breach period.*
4. *Alternatively, we request the Tribunal to adopt the fourth proposed remedy. Canada failed to identify any specific weakness in this remedy. This remedy perhaps most closely reverses the breach identified by the Tribunal. Canada failed to make the correct EUSC calculation for the first two quarters of 2007. Under this remedy, Canada should be required, for the two quarters of the remedy period, to make downward adjustments to EUSC in the amount that Canada should have for the two quarters of the breach period, in addition to any adjustments already required by the SLA. Specifically, in the first quarter following the expiration of the reasonable period of time to cure, Canada should adjust EUSC downward by 612.2 MMBF. In the second quarter following expiration of the reasonable period of time to cure, Canada should adjust EUSC downward by 890.5 MMBF. The remedy does not require the Tribunal to identify the economic effects of the breach, nor does it require the Tribunal to look beyond the terms of the SLA.”*

329. Of these four Proposals, the Tribunal finds that the two **volume-based remedies** sought by the 3<sup>rd</sup> and 4<sup>th</sup> Proposals are less convincing models to remedy the harm caused by Canada's breach in accordance with §§ 22 and 23. Legally, they are less in line with the wording of §§ 22 and 23, particularly the last sentence of § 23 providing that the adjustments "*shall be in an amount*" that remedies the breach. Economically, in view of the relevance of the economic effect found above to be determinative for the object and purpose of the SLA, the remedy should reduce the actual volume of lumber exported by Canada under current or reasonably anticipated future market conditions. Given the nature of current market conditions as identified by the two Parties' experts, it would seem that price-based remedies, or remedies that impose additional export charges, could remedy the breach more effectively rather than volume restrictions.
330. On the other hand, legally, such an amount as required by the last sentence of § 23 is identified by the two **price-based remedies** sought by the 1<sup>st</sup> and 2<sup>nd</sup> Proposals, i.e. CDN \$ 68.26 million by the first Proposal and CDN \$ 110.5 by the second. And economically, such price-based models, among the models presented, would seem to be the most direct way to restore the United States to the position it would have occupied absent the breach. Further, such appropriate adjustments in the form of additional export charges would also seem to be a more easily administered remedy.
331. Comparing these two price-based Proposals, the Tribunal agrees with Claimant and its expert that the **first Proposal** would provide the most effective compensatory adjustment in accordance with §§ 22 and 23.
332. Legally, this solution would seem to be in line with the context of the SLA, in view of the ruling for the "transition period" in the SLA by Art. VI footnote 2 where the SLA itself assumes that Option B regions that exceed quota volumes effectively act like Option A regions and should bear the associated burdens of higher export charges.
333. Regarding the economic effect, the Tribunal is not persuaded by Respondent's argument that the breach resulted in no harm to Claimant because the overshipments during the breach period were offset by Region B shipments during the second half of 2007. The SLA does not allow overshipments exceeding the set quota in one period and then make up for them in a later period. Such a calculation, therefore, can also not be applied to the compensatory adjustments according to § 22. Similarly, the

Tribunal does not agree with Respondent's argument that the provisions of Annex 7B SLA regarding "carry forward" and "carry back" of monthly RQV require a smaller volume of excess exports to be calculated under §§ 22 and 23. The footnote 2 to Art. VI SLA only provides for application of these provisions regarding the transition period before December 31, 2006. And for the later period at stake here, as Claimant has pointed out in reply, with reference to the disputed letter of September 12, 2006, Respondent never gave notification of an intent or in fact used the carry forward/carry back provisions of the SLA. Therefore, they cannot be used at a later stage for calculating the economic effect of adjustments under § 22. During the breach period of the first six months of 2007, Option B producers effectively operated as Option A producers. For the benefit they had, it would therefore seem appropriate to impose an additional export charge on Option B producers to make up what these producers would have paid had they been treated as Option A producers.

334. As plausibly explained by Claimant's expert Dr. Neuberger (CR-3, § 49), during the breach period, Option B producers effectively enjoyed a 10 percent lower tariff rate during the January – June 2007 period, and circumvented the correctly calculated quotas they should have faced under the SLA. Therefore, the Tribunal also finds the expert's conclusion plausible that as a result, an additional tariff charge equal to 10% of their exports during that period is an economically reasonable way to offset the benefits of this circumvention.
335. Further, according to Dr. Neuberger's 1<sup>st</sup> expert report, the monthly amounts of missed export charges equal approximately 638,8 million CDN \$ of which ten percent equal **CDN \$ 63,9 million**. The Tribunal finds it at least plausible that levying such an additional charge against Option B regions would be a reasonable method to effectively undo the benefits they enjoyed during the six months of the SLA violation and thus restore, as much as possible in view of the difficulty of the task as discussed above, the SLA's economic effect to its intended state.
336. Respondent has rightly objected to any **lump sum** compensation. But Claimant's 1<sup>st</sup> Proposal complies with this objection. Indeed, in order to create an incentive for Option B regions to reduce the volume of lumber they ship, the compensatory assessment found above should not be collected as a lump sum, but rather be assessed upon an ad valorem basis over time until the entire 10 percent sum has been recovered. This substantive conclusion regarding the compensatory adjustments which is more in line with the continuing expert measures foreseen in the SLA than a one time single lump sum

payment, however, implies that the continuing assessments cannot be completed within the 30 days cure period. Therefore, the Tribunal finds that an appropriate interpretation of the cure period for this situation is that the assessment should be started within the 30 day period after the date of this Award and be completed as soon as possible thereafter.

337. Legally, it is a regular feature of determining reparation both in commercial and public international law and arbitration that **interest** on any amounts found due should also be granted. Therefore, the Tribunal finds it legally correct and economically plausible that, as reasoned and calculated in Dr. Neuberger's 1<sup>st</sup> report (CR-3, § 56), interest has to be added to the amount found due according to §§ 22 and 23 in order to account for the time value of money between the time of the breach and the time the compensatory adjustments are implemented. In this context, the Tribunal has no difficulty in accepting the non-compounded interest calculated by Dr. Neuberger as 4.36 million CDN \$.
338. Thus, the total amount found due in accordance with the last sentence of § 23 is **68.26 million CDN \$**.
339. **In conclusion**, therefore, the Tribunal finds that Claimant's first Proposal can be accepted as an appropriate compensatory adjustment for Respondent's breach found in its Award on Liability.

#### **H.V. Considerations regarding Costs**

340. According to Art. XIV § 21 SLA, the Tribunal may not award costs. § 21 further states that each Party shall bear its own costs, including costs of legal representation, experts, witnesses and travel.
341. As to this special agreement on costs in Article XIV § 21 SLA, there was a potential issue as to its effectiveness by reason of Section 60 of the English Arbitration Act 1996, insofar as this "mandatory provision" applied by reason of Section 2 subsection 1 of the 1996 Act and the Parties' agreement on London as the legal place, or "seat", of the arbitration in Article XIV(13).
342. As in the procedure on liability, also in this procedure on remedies, neither have the Parties argued, nor does the Tribunal see any reason not to apply the specific provision in Art. XIV § 21 SLA.

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

## **I. Decisions**

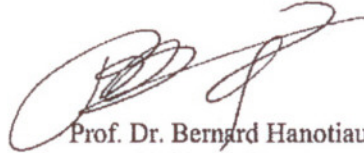
1. It is recalled that, in its Award on Liability of March 3, 2008, this Tribunal decided as follows:
  - “1. *The Softwood Lumber Agreement 2006 (SLA) does not obligate Canada to calculate expected United States consumption for purposes of determining trigger volumes of softwood lumber imports from Canada for Option A provinces pursuant to paragraph 14 of Annex 7D of the Softwood Lumber Agreement. Therefore, Canada has not breached paragraph 14 of Annex 7D of the Softwood Lumber Agreement and the USA’s case to the contrary is dismissed.*
  2. *The Softwood Lumber Agreement 2006 (SLA) obligates Canada to make this calculation for all export measures for softwood lumber as of January 1, 2007. Therefore Canada’s case to the contrary as to interpretation is dismissed.*
  3. *Insofar as, according to section 2 above, Canada breached the SLA by failing to make such calculation as of January 1, 2007, Canada is liable for the consequences of that breach.”*
2. With regard to Respondent’s breach found by the above decision, in accordance with Art. XIV § 22 subsection (a), the Tribunal identifies 30 days from the date of this Award as a reasonable period of time for Respondent to cure the breach.
3. In accordance with Art. XIV § 22 subsection (b), as an appropriate adjustment to compensate for the breach found above, Canada shall be required to collect an additional 10 percent ad valorem export charge upon softwood lumber shipments from Option B regions until an entire remedy amount of CDN \$ 63.9 million, plus CDN \$ 4.36 million in interest (a total of CDN \$ 68.26 million) has been collected.
4. All other claims raised in this arbitration are dismissed.
5. According to § 21 of Art. XIV SLA as confirmed by the Parties, the Tribunal does not award costs and each

Party shall bear its own costs related to this arbitration, including costs of legal representation and travel.

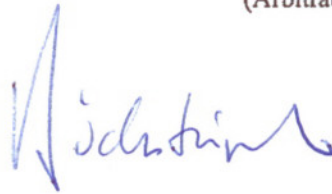
Legal Place of Arbitration: London (United Kingdom)  
Date of Award: 23 February 2009



V.V. Veeder QC  
(Arbitrator)



Prof. Dr. Bernard Hanotiau  
(Arbitrator)



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