IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 1976 UNCITRAL ARBITRATION RULES

between

THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN EINARSSON, AND GEOPHYSICAL SERVICE INCORPORATED

(the "Claimants")

-and-

GOVERNMENT OF CANADA

(the "Respondent", and together with the Claimants, the "Disputing Parties")

ICSID CASE NO. UNCT/20/6

GOVERNMENT OF CANADA

STATEMENT OF DEFENCE

June 9, 2022

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I. PRELIMINARY STATEMENT

1. Pursuant to Procedural Order No. 1, Canada submits this Statement of Defence as a preliminary response to the Notice of Arbitration ("NOA") dated April 18, 2019 filed by the Claimants against Canada, which the Claimants designated as their Statement of Claim on March 9, 2022.[1]

2. The Claimants Theodore David Einarsson, Harold Paul Einarsson and Russell John Einarsson bring this claim under Chapter Eleven Articles 1116(1) and 1117(1) of the *North American Free Trade Agreement* ("NAFTA")[2] on behalf of themselves and an enterprise incorporated in Canada, Geophysical Service Incorporated ("GSI"), respectively. The claim is in connection with seismic data from Canada's offshore which the Claimants allegedly own. The Claimants seek damages of no less than US $2,529,000,000 for alleged violations of NAFTA Articles 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements) and 1110 (Expropriation and Compensation).

3. This claim is a meritless attempt to challenge the offshore seismic data regulatory regime in Canada that has been in place for decades. The Claimants were well aware of the applicable legal rules and regulations when they made the business decision in 1993 to acquire old seismic data shot by other companies during the 1970s and 1980s. The Claimants also knew the rules when they decided more than two decades ago to apply for geophysical program authorizations to acquire new seismic data. They cannot now challenge the very conditions under which they made their investment in Canada and were authorized to do business in Canada's offshore.

4. In Canada, the Crown is the owner of the land and resources in Canada's offshore.[3] As such, private exploration companies cannot simply go to sea and collect seismic data without government authorization: they must apply for a geophysical program authorization and comply with all of the

[1] *Theodore David Einarsson, Harold Paul Einarsson, Russell John Einarsson, and Geophysical Service Incorporated v. Government of Canada* (UNCITRAL), Procedural Order No. 1, 10 May 2022; Notice of Arbitration, 18 April 2019 ("NOA"). Pursuant to Procedural Order No. 1 (Annex II: Procedural Calendar), this Statement of Defence "is understood as a preliminary response to the Notice of Arbitration/Statement of Claim, which will not engage Article 21(3) of the UNCITRAL Arbitration Rules (the reference to "Statement of Defence" in that provision being taken as a reference to the Respondent's Counter-Memorial on Jurisdiction, Merits and Damages)." Canada reserves the right to raise other defences and arguments on jurisdiction, admissibility, merits and damages in its Counter-Memorial.

[2] *North American Free Trade Agreement*, 17 December 1994, (1993) 32 I.L.M 289, 605 ("NAFTA").

[3] By constitutional and historical convention in Canada, the "Crown" is used to refer to the sovereignty of the Canadian State. For example, "Crown land" is used to refer to publicly-owned lands as opposed to private land. Throughout this and subsequent submissions, Canada will use the phrase "Crown land" to refer to all publicly-owned land, whether owned by the federal government or a provincial or territorial government.

conditions stipulated therein and in applicable laws and regulations. At issue in this NAFTA arbitration is the regulatory regime that governs the treatment of marine seismic data collected by exploration companies under geophysical program authorizations and the rules on the public disclosure of certain seismic materials submitted to regulatory agencies.

5. For decades, two critical rules have governed the treatment of seismic data collected by exploration companies. First, as a condition of being authorized to collect seismic data in Canada's offshore, the exploration company has the legal obligation to submit certain seismic data materials in specified formats to the responsible regulatory agency with jurisdiction over the geographic area in question. The regulatory agency would keep those materials confidential for a specific period of time as set out in legislation and regulatory instruments. Second, the responsible regulatory agency has the legal authority to release certain seismic materials to the public upon the expiration of the statutory confidentiality period.

6. These rules reflect two policy objectives that Canada's regulatory regime aims to achieve. The first policy objective is to attract investment by exploration companies in the acquisition of geophysical data regarding petroleum and other resources in Canada's offshore. The statutory confidentiality period provides the exploration company with a reasonable amount of time to recoup its investment by commercializing the seismic data it has collected through selling or licensing it to others for profit, or using the data in support of its own hydrocarbon exploration efforts.

7. The second policy objective is to widely disseminate certain seismic materials after the expiration of the confidentiality period to encourage further offshore exploration and the safe and efficient development of the petroleum resources for the benefit of the public as a whole through increased economic activity. Public release of certain seismic materials gives hydrocarbon exploration companies, government entities and scientists open source material to make their own initial assessments of the geology in a particular area and the resources' potential. If the publicly available information shows promise for further exploration, customers can approach the company from which the seismic materials originated in order to license the more detailed and valuable digital field data and other materials that the company has collected, and which are not subject to public disclosure under the applicable regulatory regime.

8. The rules governing the public release of seismic data materials in Canada are long-standing and widely-known as they apply to all industry participants that collect marine seismic data, including on behalf of a particular client ("exclusive") or on their own behalf in order to market to potential customers ("non-exclusive" or "speculative") for use, among other things, in offshore hydrocarbon exploration. Since 1982, certain exclusive seismic data materials have been subject to a five-year confidentiality period for all offshore jurisdictions in Canada, including Newfoundland and Labrador ("C-NL Offshore Area"), Nova Scotia ("C-NS Offshore Area") and areas that fall within exclusive federal jurisdiction, including the Beaufort Sea, Arctic Islands, Eastern Arctic offshore, Hudson Bay, Bay of Fundy, Gulf of St. Lawrence and the west coast offshore area ("Federal Offshore Area").[4] In other words, any company which applied for a geophysical program authorization to collect seismic data on behalf of a customer in the C-NL, C-NS or Federal Offshore Areas understood from the start that certain materials submitted to the Regulatory Boards would be released to the public five years later.

9. Non-exclusive seismic data materials have benefited from a longer confidentiality period in order to give the company more time to commercialize collected seismic data and recoup its investment before certain materials are released to the public. Since 1988, non-exclusive seismic materials collected in the Federal Offshore Area have been subject to a fifteen-year confidentiality period, while in the C-NS Offshore Area (since 1992) and C-NL Offshore Area (since 1999) non-exclusive seismic materials are subject to a ten-year confidentiality period. In other words, if a company receives regulatory authorization to collect seismic data on its own behalf so it can market and license the data to multiple customers, certain materials which are required to be submitted to the Regulatory Boards will be held in confidence for ten or fifteen years, depending on the jurisdiction, before public release.

[4] Collectively, the C-NL Offshore Area, C-NS Offshore Area and Federal Offshore Area are known as the "Frontier Lands." The Federal Offshore Area is regulated by the Canadian Energy Regulator ("CER"), formerly known as the National Energy Board ("NEB"), a federal regulatory agency which enforces applicable Canadian laws regarding interprovincial and international hydrocarbons and energy. The C-NL Offshore Area is regulated by the Canada-Newfoundland and Labrador Offshore Petroleum Board ("CNLOPB") and the C-NS Offshore Area is regulated by the Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB"), which are joint federal-provincial agencies with responsibility for regulating offshore hydrocarbon exploration and production in the areas offshore Newfoundland and Labrador and Nova Scotia, respectively. Collectively, the NEB/CER, CNLOPB and CNSOPB are referred to as the "Regulatory Boards."

10. The Claimants made their investments on the basis of these regulatory seismic data submission requirements, the confidentiality periods that attached to the submitted material and the provisions for public disclosure of certain materials at the end of the confidentiality period. Nonetheless, starting in the early 2000s, the Claimants initiated multiple domestic lawsuits against the Government of Canada, various Provinces and the Regulatory Boards in an effort to stop the public disclosure of certain GSI seismic materials. The allegations in those lawsuits are largely the same as the claims in this NAFTA arbitration: that GSI's seismic data materials were being wrongly disclosed to third-parties; that GSI's copyright and trade secrets in such material were being violated; that the Regulatory Boards were acting unfairly in the exercise of their statutory mandates; and that the Claimants' business and rights have been expropriated by Canada, all of which entitled them to compensation and damages.

11. The Claimants also sued their existing and prospective customers and other third-parties in Canadian and United States courts for alleged violations of GSI's copyrights and trade secrets, demanding that they pay GSI licensing fees or monetary damages for accessing and copying publicly-available seismic data materials from the Regulatory Boards.

12. After years of litigation by the Claimants, the Alberta Court of Queen's Bench confirmed in 2016 that Canada's regulatory regime permitted the disclosure, including access and copying, of certain seismic materials to the public after the expiration of the applicable confidentiality period.[5] The Court did not consider that the existence of a copyright in the disclosed materials affected the regulatory regime's public disclosure provisions. Having failed in their efforts to challenge the regulatory regime through Canadian domestic courts, the Claimants are now recycling the same arguments with respect to the same laws and regulations and the same seismic data and materials in this NAFTA Chapter Eleven arbitration.

[5] **R-001**, *Geophysical Service Incorporated v. Encana Corporation, et al.*, 2016 ABQB 230. The judgment was upheld by the Alberta Court of Appeal (**R-002**, *Geophysical Service Incorporated v. Encana Corporation, et al.*, 2017 ABCA 125) and leave to appeal to the Supreme Court of Canada was denied (**R-003**, *Geophysical Service Incorporated v. Encana Corporation, et al.*, 2017 SCC 37634). Together, these three judgments are referred to as the "Alberta Court Judgments."

13. The numerous flaws in the Claimants' claim – on jurisdiction, admissibility, the merits and a massively inflated quantum of damages sought – are insurmountable and fatal. The Tribunal should dismiss this claim in its entirety and award Canada its costs.

II. JURISDICTION AND ADMISSIBILITY

14. The Claimants have the burden of establishing the Tribunal's jurisdiction and that every aspect of their claim is admissible. Based on the factual allegations contained in the Claimants' NOA, the claim appears to be outside the Tribunal's jurisdiction and inadmissible for at least five reasons.[6]

A. The NAFTA Does Not Apply Retroactively to GSI's Seismic Materials That Had Already Been Made Publicly Available Prior to the NAFTA's Entry into Force

15. Under established principles of public international law and the NAFTA, this Tribunal has no jurisdiction *rationae temporis* to consider measures relating to the public release of GSI's seismic data materials that occurred prior to January 1, 1994, the date when NAFTA came into force. In 1993, Claimant Theodore David (T.D.) Einarsson acquired a substantial portion of GSI's seismic data library from another company. The confidentiality periods for much of that seismic data, which had been collected by other companies in the 1970s and 1980s, had already expired and was already available to the public through the Regulatory Boards pursuant to pre-existing laws and regulations. Since the NAFTA cannot be applied retroactively, the Tribunal has no jurisdiction over any aspect of the claim with respect to seismic data which had already been made publicly available prior to January 1, 1994.

B. The Claimants Failed to Comply with the Three-Year Limitations Period for Submitting a Claim to Arbitration Under NAFTA Articles 1116(2) and 1117(2)

16. Pursuant to NAFTA Article 1122(1), Canada only consents to an investor's submission of a claim to arbitration "in accordance with the procedures set out in this Agreement." These procedures

[6] Canada reserves the right to request bifurcation of the proceedings pursuant to Procedural Order No. 1 ¶ 10.3, including a request that the Tribunal rule on a plea concerning its jurisdiction as a preliminary question pursuant to Article 21(4) of the UNCITRAL Arbitration Rules.

include a requirement that a claim must be filed within the strict three-year time limitations period set out in NAFTA Articles 1116(2) and 1117(2).[7]

17. The Claimants submitted their claim to arbitration on April 18, 2019 through their NOA. Thus, the critical date for assessing compliance with the limitations period in Articles 1116(2) and 1117(2) is *April 18, 2016*. If the Claimants knew or ought to have known of the alleged breaches of NAFTA and that they or the enterprise GSI had incurred loss or damage as a result of the alleged breaches prior to that date, then Canada has not consented to arbitrate and the claim falls outside the Tribunal's jurisdiction *rationae temporis*.

18. There is voluminous evidence of the Claimants' actual and constructive knowledge of the alleged breaches and alleged loss many years prior to April 18, 2016. For example, GSI's own domestic lawsuits which predate April 18, 2016 and contain the same allegations as those contained in the NOA demonstrate that this claim falls outside NAFTA Chapter Eleven's limitations period:

- On August 10, 2011, GSI sued the CNLOPB and the Province of Newfoundland and Labrador ("NL") for wrongful appropriation, conversion of trade secrets, breach of confidentiality and infringement of copyright because the CNLOPB allowed third-parties to access and copy GSI's seismic data materials after the applicable confidentiality period.[8] GSI sought compensatory damages for the violation of its intellectual property rights. GSI amended its statement of claim against the CNLOPB and NL on January 7, 2013 to include a claim of "expropriation of GSI's business assets, including its intellectual property rights," for which it was entitled damages;"[9]

[7] NAFTA Article 1116(2) states: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." Article 1117(2) states: "An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."

[8] **R-004**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General)), Statement of Claim, 10 August 2011.

[9] **R-005**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General)), Amended Statement of Claim, 7 January 2013.

- On December 19, 2012, GSI sued Canada (on behalf of the NEB) and various third-parties for, among other things, copyright infringement, conversion, unjust enrichment and expropriation for which GSI alleged it was owed damages;[10]
- On March 6, 2013, GSI sued Canada (on behalf of the NEB and CNLOPB) again and various third-parties for, among other things, copyright infringement, conversion, unjust enrichment and expropriation for which GSI alleged it was owed damages.[11] In that claim, GSI particularized the specific seismic data it was claiming damages for,[12] which overlaps with the same seismic data GSI is again claiming damages for in this NAFTA arbitration;
- On June 4, 2013, GSI amended a statement of claim that it had originally filed against a third-party on June 2, 2009 to include claims against Canada (on behalf of the NEB), again alleging that Canada's actions had violated GSI's copyright, conversion, unjust enrichment and expropriation.[13] GSI appended a list of its entire collection of seismic data it claimed had been expropriated,[14] which is the same seismic data that GSI is alleging again in this NAFTA claim has been expropriated; and
- On May 14, 2014, GSI sued Canada again, alleging that, pursuant to the same Canadian laws and regulations that GSI now challenges as a violation of NAFTA Chapter Eleven, the NEB, CNLOPB and CNSOPB, "after the expiration of applicable Privilege Periods […] without the consent or authorization of GSI, have systematically" disclosed GSI's seismic data to the public, allowed third-parties to copy GSI's seismic materials and violated GSI's intellectual property rights.[15] GSI made the same allegations in that lawsuit as it does in this NAFTA arbitration: "*As a result of the Legislation and/or the Wrongful Acts, the Defendants have acquired GSI's intellectual and other property rights in respect of the Seismic Materials and in respect of the Business, and have deprived GSI of all reasonable uses of its private property rights* […] the foregoing conduct constitutes an expropriation of one or more of the Business or the Seismic Materials, by the Defendants and GSI is entitled to compensation or damages for the expropriation" (emphasis added).[16] In that domestic lawsuit, GSI again appended a list of its entire collection of seismic data whose copyright it alleged had been violated and had been expropriated,[17] all of which is the subject of this NAFTA arbitration.

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[10] **R-006**, *Geophysical Service Incorporated v. Olympic Seismic Ltd., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; and Companies A-Z* (Case No. 1201-16166), Statement of Claim, 19 December 2012.

[11] **R-007**, *Geophysical Service Incorporated v. Arcis Seismic Solutions Corp., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; Canada-Newfoundland and Labrador Offshore Petroleum Board and Companies A-Z* (Case No. 1301-02933), Statement of Claim, 6 March 2013 ("GSI Case No. 1301-02933").

[12] **R-007**, GSI Case No. 1301-02933, ¶ 14.

[13] **R-008**, *Geophysical Service Incorporate and Lynx Canada Information Systems Ltd*. (Case No. 0901-08210), Amended Amended Statement of Claim, 4 June 2013 ("GSI Case No. 0901-08210"); **R-009**, *Geophysical Service Incorporate and Lynx Canada Information Systems Ltd*. (Case No. 0901-08210), Statement of Claim, 2 June 2009.

[14] **R-008**, GSI Case No. 1901-08210, Schedule 1.

[15] **R-010**, *Geophysical Service Incorporated v. Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada itself, and on behalf of the Department of Natural Resources Canada; and the National Energy Board* (GSI Claim Case No. 1401-05316), Statement of Claim, 14 May 2014 ("GSI Claim Case No. 1401-05316").

[16] **R-010**, GSI Claim Case No. 1401-05316, ¶¶ 23-26.

[17] **R-010**, GSI Claim Case No. 1401-05316, Schedule 1.

19. The foregoing examples demonstrate conclusively that, pursuant to Articles 1122(1), 1116(2) and 1117(2), this Tribunal has no jurisdiction over any claim regarding measures by Canada, the Provinces and the Regulatory Boards with respect to the submission and public disclosure of the Claimants' seismic data materials, all of which occurred prior to April 18, 2016. The Claimants' entire claim can be dismissed based on the limitations period alone.

20. In their NOA, the Claimants attempt to evade the fatal jurisdictional impediment of the limitations period by suggesting the Alberta Court Judgments are the measure which violated GSI's copyrights and expropriated GSI's business and seismic data. This fatuous argument is belied by the fact that the Claimants have long alleged, many years before the Alberta Court Judgments were rendered, that the actions of the Regulatory Boards pursuant to laws and regulations enacted by the Canadian Parliament and Provincial legislatures violated GSI's copyrights, impermissibly disclosed its trade secrets and expropriated GSI's business and seismic data and for which GSI was owed damages. The gravamen of the Claimants' claim is not directed at the Alberta Court Judgments: it is aimed at the regulatory regime which provided for the submission and public disclosure of certain seismic data materials by the Regulatory Boards after the statutory confidentiality period expired.

21. The Alberta Court Judgments did not impose the regulatory regime; legislate what seismic data materials needed to be submitted to the Regulatory Boards and in what form; set limits on the confidentiality period of that material; or release GSI's seismic materials to the public after the expiry of that confidentiality period. The Alberta Courts Judgments merely interpreted the existing laws and regulations and affirmed that the regulatory regime permitted the disclosure of seismic materials by the Regulatory Boards, and consequently access to and copying of the seismic material by the public, without payment of a license fee to GSI. While the Claimants are not time-barred under Articles 1116(2) and 1117(2) from claiming that the court proceedings constitute a denial of justice under international law, they have made no such claim (which would fail in any event). The Claimants cannot extend or renew the NAFTA Chapter Eleven limitations period for a claim about a decades-old measure merely by challenging it in domestic courts. As NAFTA tribunals and all three NAFTA Parties have confirmed in the past, this is not the correct interpretation of Articles 1116(2) and 1117(2) as it would render the limitations period provision ineffective.

C. The Claimants Have Acted Inconsistently with NAFTA Articles 1121(1) and (2) by Continuing to Pursue Claims for Damages with Respect to the Measures Alleged to Breach the NAFTA

22. NAFTA Articles 1121(1) and (2) require that, as a condition of Canada's consent to arbitrate under Chapter Eleven, the Claimants must:

> [W]aive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[18]

23. If the Claimants failed to terminate all litigation for damages "with respect to" measures alleged to violate the NAFTA as of the date they filed their NOA (in this case, April 18, 2019), there is no consent to arbitrate under Article 1122(1) and the Tribunal has no jurisdiction to hear the claim.

24. The Claimants have not confirmed and furnished evidence that they, as of the date of the NOA, terminated all proceedings seeking damages against Canada, the Provinces or the Regulatory Boards with respect to the measures at issue in this NAFTA arbitration. Furthermore, after filing the NOA, GSI continued numerous domestic lawsuits in Canadian and U.S. courts against third-parties seeking damages because they allegedly accessed from the Regulatory Boards the same seismic data materials that the Claimants are simultaneously alleging have been expropriated by Canada in this NAFTA arbitration.[19] These ongoing domestic claims for damages overlap with the allegations and measures at issue in this NAFTA arbitration: the NOA alleges that Canada's measures have enabled GSI's licensees to violate the terms of their license agreements and that GSI is unable to collect licensing

[18] Pursuant to NAFTA Article 1117(2), the same obligation applies with respect to an investment of an investor.

[19] Examples of GSI's litigations involving the payment of damages which it continued after filing its NOA on April 18, 2019 include: **R-011**, *Geophysical Service Incorporated v. Total S.A. and Total E&P Canada Ltd.*, 2020 ABQB 730, Judgment. 25 November 2020 (GSI was awarded US $970,174.68 with respect to seismic data claimed in this NAFTA arbitration); **R-012**, *Geophysical Service Incorporated v. Anadarko Petroleum Corporation* (Case No. 4:15-cv-02765, U.S. Dist. Tx), Complaint, 22 September 2015; **R-013**, *Geophysical Service Incorporated v. Anadarko Petroleum Corporation* (Case No. 4:15-cv-02765, U.S. Dist. Tx), Agreed Motion to Lift Stay and Join Stipulation of Dismissal With Prejudice, 18 March 2021 (GSI and Anadarko reached a confidential settlement agreement with respect to GSI's seismic data claimed in this NAFTA arbitration).

fees under those agreements because of Canada's measures. This allegation appears to account for a significant portion of the damages sought by the Claimants against Canada.[20]

25. In view of the Claimants' numerous ongoing domestic litigations and lack of clarity as to their status after filing the NOA, the burden falls on the Claimants to establish the Tribunal's jurisdiction by demonstrating that they satisfy the jurisdictional requirement in NAFTA Articles 1121(1) and (2). In particular, they must show that, as of April 18, 2019, the Claimants terminated all ongoing or outstanding damages claims involving GSI's seismic data at issue in this NAFTA arbitration.[21] This is a fundamental condition to Canada's consent to arbitration and consistent with the purpose of Articles 1121(1) and (2), which is to prevent conflicting outcomes, legal uncertainty and double recovery. If the Claimants cannot prove they have fully complied with their waiver obligations under Articles 1121(1) and (2), then the Tribunal must dismiss the entire claim for lack of jurisdiction.

D. H.P. Einarsson Cannot Establish Personal Jurisdiction as He Was Not an "Investor of another Party" Under NAFTA Articles 1101(1), 1116(1), 1117(1) and 1139 at the Relevant Times

26. Under NAFTA Article 1101(1) (Scope and Coverage), NAFTA Chapter Eleven applies to measures adopted or maintained by a Party relating to "investors of *another* Party" as well as "investments of investors of *another* Party in the territory of the Party" (emphasis added). Article 1116(1) permits a claim to arbitration by "an investor of a Party" that "*another* Party" has breached NAFTA Chapter Eleven (emphasis added).[22] These provisions stipulate that a claim can only be made by an investor of *one* Party against a *different* Party – in other words, a claimant cannot bring a claim against his or her own State of nationality. In cases of dual nationality, consistent with the provisions of NAFTA and public international law, a claimant can bring a claim under NAFTA

[20] *See* NOA, ¶¶ 11, 24-25, 27. The Claimants state that their "estimated outstanding returns from existing license agreements with third parties for the Seismic Data [is] worth approximately USD $2,529,000,000", which is the same amount claimed as "as compensation for the direct and indirect damages caused by or arising out of Canada's measures that are contrary to its obligations contained in Part A of Chapter 11 of the NAFTA." NOA, ¶ 29(a). The Claimants have confirmed that they are including third-party license fees in their claim against Canada. *See* **R-014**, Letter from M. Lemmens, Borden Ladner Gervais to M. Luz, Trade Law Bureau, 15 July 2019.

[21] To demonstrate compliance with NAFTA Articles 1121(1) and (2), the Claimants need to provide in their Memorial a full accounting of all claims, including those against third-parties, involving GSI's seismic materials at issue in this NAFTA arbitration, which includes not only GSI's litigations before Canadian, U.S. or Mexican courts, but any "other dispute settlement procedures" (e.g., commercial arbitrations) wherever located.

[22] Article 1117(1) similarly refers to an "investor of a Party" regarding "an enterprise of another Party."

Chapter Eleven only if his or her dominant and effective nationality is not of the respondent State both at the time of the alleged breach and at the time of submitting its claim.

27. In this case, Canada understands from publicly available information that Claimant Harold Paul (H.P.) Einarsson is a dual Canadian-U.S. national whose dominant and effective nationality was Canadian at the time of the alleged breaches by Canada. Under such circumstances, Mr. H.P. Einarsson cannot use NAFTA Chapter Eleven to make a claim against Canada. As a result, the Tribunal lacks personal jurisdiction over H.P. Einarsson's claims, including the claims he is bringing on behalf of GSI.[23]

E. The Claimants Have Not Demonstrated That They Have Standing for Their Claims Under NAFTA Articles 1116(1) and 1117(1)

28. NAFTA Chapter Eleven has two strictly separate standing provisions, in Articles 1116(1) and 1117(1). Article 1116(1) permits claims solely by an investor of a Party "on its own behalf" for loss that "the investor has incurred." Article 1116(1) does not allow claims for reflective loss, that is, where a shareholder or creditor seeks to personally recover damages based on an alleged breach of an obligation owed to, and loss allegedly incurred by, an enterprise that led to a diminution in the investor's share value or debt repayments. A claim for damages based on an alleged wrong done to, and loss allegedly incurred by, the enterprise can be advanced only on behalf of the enterprise under Article 1117(1), with any damages paid to that enterprise under Article 1135(2)(b). Only an investor of a Party that owns or controls the enterprise may bring a claim on behalf of the enterprise under Article 1117(1).

29. The claims in the Claimants' NOA appear solely to concern measures relating to GSI and its alleged losses. However, under Article 1117(1), it is unclear whether any of the Claimants can bring a claim on behalf of GSI. Even if it is established that H.P. Einarsson controls GSI (no evidence has been furnished), he has no standing to bring a claim on behalf of GSI because he is not an "investor of a Party", as explained above. The interests of T.D. Einarsson and Russell John (R.J.) Einarsson are similarly unclear and have not been established. Unless Messrs. H.P. Einarsson, T.D. Einarsson and R.J. Einarsson establish their ownership interests with respect to GSI, none of them will have

[23] Publicly available information is insufficient to establish clarity on the dominant and effective nationality of Messrs. T.D. Einarsson and R.J. Einarsson. Canada expects that the Claimants will clarify this issue in its Memorial, along with that of Mr. H.P. Einarsson, in order to establish their standing to bring claims under NAFTA Chapter Eleven.

standing to bring an Article 1117(1) claim. Moreover, it appears that none of the Claimants have standing for an Article 1116(1) claim because the claims in the NOA do not appear to allege any breaches and resulting losses incurred directly by the Claimants themselves.

30. As the NOA does not provide sufficient detail or evidence to establish the Claimants' standing under Articles 1116(1) and 1117(1), the Claimants must clarify these issues in order to establish standing to bring claims under NAFTA Chapter Eleven.

III. MERITS

31. The Claimants allege that Canada's measures violate NAFTA Articles 1105, 1106 and 1110. Canada's position is that the Tribunal has no jurisdiction to consider the merits of this NAFTA claim due to the fundamental defects described above. The Alberta Court Judgments themselves cannot be challenged as a breach of NAFTA Chapter Eleven, in the absence of a denial of justice. The Claimants have never made such an allegation. Nevertheless, even if the merits of the claims were considered by the Tribunal, they should be entirely rejected as not violating any provision of NAFTA.

32. First, the Claimants have no credible basis to argue that Canada's measures, including the Alberta Court Judgments, violated the customary international law minimum standard of treatment of aliens, which is the only standard applicable under NAFTA Article 1105.[24] From the Claimants' NOA, it appears that the only basis for their Article 1105 claim is an alleged concealment and misrepresentation by the Regulatory Boards of the extent of disclosures of certain seismic materials.[25] The Claimants provide no particulars of any such measures, including when such alleged breaches occurred or how they could amount to a violation of customary international law.

33. Second, there is no merit to the argument that Canada's measures violate Article 1106(1)(f). The Alberta Court Judgments did not impose or enforce any requirement to transfer proprietary knowledge to any person. The Alberta Court Judgments merely interpreted the existing laws and regulations regarding the public disclosure of certain seismic material after the expiry of the applicable confidentiality period. Furthermore, the Claimants have not explained how a violation of

[24] **RLA-001**, NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter Eleven Provisions" (July 31, 2001) ("FTC Note of Interpretation"). The FTC Note of Interpretation is binding on the Tribunal pursuant to NAFTA Article 1131(2).

[25] NOA, ¶ 28(a).

Article 1106(1)(f) can occur when the Claimants, at the outset of their business pursuits in Canada, voluntarily participated in a pre-existing regulatory regime that stipulated confidentiality over certain seismic materials would last only for a limited period of time, after which those materials would become publicly available. Only material whose statutory confidentiality period has elapsed is publicly released by the Regulatory Boards. Neither the Alberta Court Judgments nor the regulatory regime required transfer of proprietary knowledge to third-parties within the meaning of Article 1106(1)(f).

34. Third, there has been no expropriation within the meaning of Article 1110. Even if court decisions could be challenged as breaches of Article 1110 (they cannot), the Alberta Court Judgments themselves cannot be viewed as having been the cause of any alleged expropriation. The Alberta Court Judgments merely interpreted the existing regulatory regime, which had been in place for many years and therefore could not constitute an expropriation under Article 1110. Virtually all public releases of GSI's seismic data materials occurred long before the first Alberta Court ruling in 2016. Indeed, as explained above, the Claimants claimed that their investments had been expropriated by Canada's regulatory regime in many other domestic court proceedings before 2016. Again, the Claimants cannot reinvent their expropriation claim based on the Alberta Court Judgments to circumvent the NAFTA Chapter Eleven limitations period.

35. Moreover, GSI's submission of certain seismic materials to the Regulatory Boards and the disclosure of this material at the end of the confidentiality period were voluntarily accepted by GSI as the basis upon which a geophysical program authorization to acquire the seismic data would be granted in the first place. This cannot constitute an expropriation as understood under NAFTA Article 1110 and international law.

36. In any event, neither the regulatory regime nor the Alberta Court Judgments amounted to a substantial deprivation of GSI's business, or of the value of its seismic data, its copyright or its license agreements so as to have an effect equivalent to an expropriation. Only certain seismic materials – not the more valuable underlying digital data and materials that are of primary interest to hydrocarbon exploration companies and which seismic data companies like GSI retain and remain free to license – is disclosed to the public by the Regulatory Boards at the end of the confidentiality period. As a result, companies like GSI have a fulsome opportunity to recoup their investment and profitably

commercialize the seismic data materials in the interim. For decades, many other companies have profitably collected and licensed seismic data in Canada's offshore under the same regulatory conditions to which GSI was subject, including the same requirements that certain seismic materials would be disclosed to the public after the confidentiality period expires. The Claimants cannot use NAFTA Chapter Eleven as an insurance policy for their own business failings and other industry, technological and economic conditions which affected their business and which had nothing to do with Canada's measures.

37. Given that there has been no expropriation, alleged violations of NAFTA Chapter Seventeen (Intellectual Property) are irrelevant in this dispute.[26] The only basis for a NAFTA Chapter Eleven tribunal to evaluate the consistency of a measure with Chapter Seventeen is through NAFTA Article 1110(7),[27] which can only be invoked by a NAFTA Party *as a shield* against a finding of an expropriation under NAFTA Article 1110. In other words, unless the Claimants can first establish that an expropriation under NAFTA Chapter Eleven and in international law has occurred (which they cannot do), the question of compliance with Chapter Seventeen is inapposite. Since there has been no expropriation of GSI as an enterprise, and no expropriation of copyright in the GSI's seismic data material, an assessment of consistency with NAFTA Chapter Seventeen pursuant to Article 1110(7) is unnecessary. In any event, such an assessment would confirm the legality of Canada's measures pursuant to its obligations under Chapter Seventeen.

IV. DAMAGES

38. The Claimants have not provided any detailed explanation supporting their massively inflated claimed quantum of damages of at least US $2,529,000,000, other than to allege a cost of US $781,000,000 to create the seismic data material and "estimated outstanding returns from existing

[26] While the Claimants allege violations of the *Berne Convention for the Protection of Literary and Artistic Works* (1886) (as amended on September 28, 1979) (*see* NOA, ¶ 19), a NAFTA Chapter Eleven Tribunal has no jurisdiction to determine a breach of a separate international treaty. Furthermore, by virtue of NAFTA Articles 1116(2) and 1117(2), this Tribunal has no jurisdiction to make a determination that Canada has violated its obligations under Articles 1705 and 1711: only a tribunal constituted under NAFTA Chapter Twenty can make such a determination (see NAFTA Article 2004 (Recourse to Dispute Settlement Procedures)).

[27] NAFTA Article 1110(7) states: "This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property)."

license agreements with third parties for the Seismic Data worth approximately USD$2,529,000,000."[28] The alleged damages are neither particularized, nor substantiated and are wholly without basis. Canada expects that the Claimants will fully detail and quantify their damages calculation and include all supporting evidence underlying any expert valuation of damages submitted with their Memorial.

V. REQUEST FOR RELIEF

39. For the reasons outlined above and for reasons that will be further elaborated in Canada's Counter-Memorial on Jurisdiction, Merits and Damages, Canada respectfully requests that the Tribunal:

(a) dismiss the Claimants' claims in their entirety;

(b) require the Claimants to jointly and severally bear all the costs of the arbitration, including Canada's costs of legal assistance and representation, pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Arbitration Rules; and

(c) grant any other relief the Tribunal deems appropriate.

June 9, 2022

Respectfully submitted on behalf of the Government of Canada,

[Signed]

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[28] NOA, ¶ 11.