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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

KOCH INDUSTRIES, INC. AND KOCH SUPPLY & TRADING, LP
Claimants

v.

CANADA

Respondent

(ICSID Case No. ARB/20/52)

REPLY MEMORIAL ON JURISDICTION AND THE MERITS

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18 July 2022

Public Version.

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1. Koch Industries, Inc. (**Koch**) and Koch Supply & Trading, LP (**KS&T**) (collectively, the **Claimants**), submit this Reply Memorial on Jurisdiction and the Merits in this arbitration proceeding against the Government of Canada (the **Respondent** or **Canada**) under the North American Free Trade Agreement (**NAFTA**) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the **ICSID Convention**).

I. INTRODUCTION

2. This claim arises out of summary and arbitrary measures by the Province of Ontario (**Ontario**) that had the effect of wiping out KS&T's carbon allowances trading business in the Province and arbitrarily and illegally stripped KS&T of millions of dollars in inventory without any compensation. Ontario's measures were motivated by the sole purpose of seeking illegally to minimize the financial impact of cancelling the Ontario Cap and Trade Program,[1] in service of the incoming Ontario Progressive Conservative Government's political interests. These measures, for which the Respondent is responsible under the NAFTA and international law, violated Koch and KS&T's rights under NAFTA Chapter Eleven, giving rise to this claim and to a right to damages.

3. Rather than take responsibility for Ontario's wrongdoings as required under the NAFTA and provide the Claimants lawful and equitable compensation, the Respondent has sought to distort the narrative of the Claimants' investment, presenting only those facts that fit its story, omitting those that do not, in a shameful effort to avoid liability for itself at any cost. Its efforts are as unavailing as they are unbecoming.

4. The Respondent notably wilfully seeks to mislead the Tribunal about the nature and extent of the Claimants' investment activity in Canada. It seeks to depict KS&T as a mere "cross-border trader" engaged in a handful of purchases, lacking any investment in Canada. In so doing, the Respondent seeks to draw attention from the evidence of the Claimants' multi-year business undertaking as an Ontario market participant, and the tens of millions of dollars KS&T invested to that end. The Respondent engages in such tactics in an effort to deny the Tribunal's jurisdiction in this matter – in effect, seeking to perpetuate and to extend the denial of justice initially inflicted on the Claimants by Ontario through its measures in violation of the NAFTA. The Claimants' Ontario allowance trading business did not depend on a bricks-and-mortar presence. Instead, as Claimants confirm in this Reply, KS&T was engaged as an Ontario market participant over two years, on a daily basis, investing millions of dollars in Ontario allowances and dealing with dozens of counterparts on the primary and secondary markets both in Ontario and throughout the linked WCI jurisdictions, in the business of buying and selling emissions allowances and related futures and credits – in effect, performing exactly the role Ontario foresaw for Ontario market participants under the Program. KS&T would have continued in this economic role for the full life of the Cap and Trade Program, but for Ontario's illegal measures

[1] Comprising of the Climate Change Mitigation and Low-carbon Economy Act (the **Cap and Trade Act**) and the related Cap and Trade Regulation (the **Cap and Trade Regulation**) (collectively referred to as the **Cap and Trade Program** or the **Program**).

destroying its business. The notion that this does not constitute "carrying on business" in Canada is risible.

5. The Respondent to the same end seeks to downgrade the key role market participants like KS&T played under the Cap and Trade Program, a role that Ontario itself created in the knowledge that in doing so market participants would promote the cost-effectiveness and efficiency of Cap and Trade for all Ontarians. The Respondent does so with the unstated goal of demonstrating that the Claimants *deserved* the unfair and inequitable treatment they received through Ontario's measures. Indeed, the Respondent actively adopts Ontario's expressly pejorative labelling of market participants like KS&T as mere "speculators": in present day Canada, this is apparently the label applied to good faith investors who seek to deploy skill, experience, time and capital in the country in the pursuit of an economic activity, with the goal of earning a profit. The Claimants fundamentally reject the Respondent's suggestion that choosing to invest and do business in Canada made them open targets for illegal State measures. In relying on such an argument, Canada shamefully apes Ontario's political spin from the summer of 2018 and adopts the same ill-informed prejudice displayed by Ontario officials at that time. Documents produced by the Respondent in these proceedings have laid bare the discriminatory attitude of the Ontario Government vis-à-vis U.S. investors like the Claimants, at the time of its illegal measures.

In other words, the Claimants were specifically targeted at the time Cap and Trade was summarily cancelled, by high-level Ontario political officials who were appallingly ignorant of the Claimants' contributions to the effective functioning of the Cap and Trade Program, and who ignored the millions of dollars KS&T had paid in good faith into the Program, and who threw the Claimants under the bus for being "Americans" allegedly "attempting to take advantage of the system". Measures prompted by this kind of targeting are the reason NAFTA Chapter Eleven was enacted. This Tribunal should not allow Ontario's illegal behaviour to go unsanctioned, nor should it look kindly on Canada's current efforts to whitewash events, in an unedifying attempt to absolve itself of the resulting liability under international law.

[2]

6. The Respondent further argues in this same sense that the unjust and inequitable treatment the Claimants suffered through Ontario's measures were simply part of the "ordinary risks" that an investor in the Cap and Trade Act willingly undertook, in light of the structure of the Act itself and the State's sovereign right to alter its policy. In making these arguments, the Respondent ignores basic principles of its own law, which hold that such discretion as exists under an Act (and here, that discretion was limited and specific) must be exercised in a manner consistent with the object and purpose of the statute: such discretion does not grant the State *carte blanche* to destroy stakeholders' rights or indeed the entire statutory framework with impunity. To be clear, the Claimants take no position on whether or not Ontario acted correctly in abolishing the Program created by the Cap and Trade Act and the related Cap and Trade Regulation; that decision is indeed one of sovereign policy. What they object to is the unfair and inequitable manner in which that policy was forced upon the Program's participants, preventing a rational wind-down and stripping them of a valuable investment against no compensation. It is the latter that amounts to a violation of the NAFTA – not the decision to withdraw from the Cap and Trade Program *per se*.

7. The Respondent further seeks to exonerate itself from liability by arguing that the Claimants were warned in advance of the incoming government's plans to scrap the Program, and therefore willingly took on the risk of the losses they suffered. This is a blatant rewriting of history: as the Claimants have demonstrated and recall here, no one in the market foresaw that the incoming government would act in the reckless and unjust manner it did, nor were any details of the actual measures to be adopted invoked in the provincial election campaign of spring 2018.

8. Nor could the Claimants have predicted that the Premier-elect, in the first of the measures in violation of the NAFTA, would direct Ontario officials to "immediately take steps" to pull Ontario out of the Program – before his new government was even sworn in, in violation of Ontario law. The Respondent's attempt to sugar-coat these events as "business as usual" is as disturbing and unbecoming as it is false.

9. Equally unbecoming is the Respondent's effort to shift the blame for the damage Ontario caused to other jurisdictions, notably to California. What the Respondent cannot escape is that California (and Québec), in closing their markets to Ontario allowances as of the evening of 15 June 2018, were responding in a predictable and foreseeable manner to the Premier-elect's illegal and reckless announcement and related directions to Ontario officials of earlier that same day. As has been demonstrated through document disclosure in this arbitration, Ontario government officials were expressly advised of and acknowledged the likely consequences of acting on the Premier-elect's directions on the afternoon of 15 June 2018. Despite this, they proceeded that afternoon to publish the surprise notice of Ontario's immediate withdrawal from the Cap and Trade Program, in violation of Ontario's commitments to California and Québec to an orderly phase-out and overturning the expectations Ontario had cultivated regarding the likely longevity of the Program. The Respondent cannot credibly eschew responsibility at international law for the ensuing *de facto* freeze on trades both within and outside of Ontario, effectively wiping out the value of the Claimants' investment in one go.

10. Nor was there anything principled, orderly or fair about the cancellation process that followed. The Respondent in this regard relies on a bland narrative that essentially

parrots Ontario media lines from the summer of 2018, without providing any adequate response to the inequitable and unfair events as they occurred on the ground.

11. First, the notion that the Cap and Trade Cancellation Act, 2018 (**Cancellation Act**) was enacted for an "environmental purpose" is belied by the Ontario Progressive Conservative Party's campaign rhetoric, which made clear the real goal was to "take 10 cents off of each tank of gas". In light of the Federal backstop policy, the incoming government knew that by cancelling the Cap and Trade Program it was simply shifting the blame for internalised carbon emissions costs to the Federal Government. Certainly, nothing in that alleged "environmental purpose" required Ontario to impose its policy in a manner that failed to compensate the Claimants for their allowances – the only motivation for that was to illegally minimize the cost of Ontario's purely political gesture.

12. Second, the Respondent's suggestion that the Cancellation Act was enacted through a principled democratic process is belied by the reality that Ontario was sued in the Ontario Courts in 2018 for illegally failing to consult Ontarians about the environmental consequences of its proposed legislation. The (essentially court-ordered) consultation process that ensued, while generating thousands of complaints, was essentially ignored by Ontario. There was nothing principled or orderly about the cancellation process for the Cap and Trade Program. It was guerrilla policy by a populist government, pure and simple, regardless of legalities or solemn commitments.

13. Third, the Respondent puts forward no principled justification for the arbitrary and unjust denial of compensation the Claimants suffered pursuant to the Cancellation Act's express terms, nor does it have any cogent response to the manifestly incoherent outcomes of the Act's compensation scheme. Again, the Respondent mouths the language of "rationality", when in fact the compensation scheme devised resulted in the perverse outcome of laggards in the Program being rewarded for non-compliance, and good faith participants like the Claimants arbitrarily being denied compensation to illegally minimize the true cost of Ontario's pull-out from the Cap and Trade Program.

14. Finally, the Respondent attempts to limit its liability on the alleged basis that Ontario 'only' directly received (and failed to repay) about [redacted] of the roughly USD 30 million the Claimants paid for allowances in May 2018, right before Ontario summarily cancelled the Program. This argument is wilfully misleading. Based upon its own documentary evidence, Ontario received in the range of USD 368 million (CAD 472 million) as a direct result of the May 2018 public auction. All of that money went into Ontario coffers. None of it was directed to compensate good faith market participants like the Claimants.

15. The simple fact is that Ontario received a substantial windfall when cancelling the Program. The Ontario Government lied to Ontarians about the true cost of cancelling the Cap and Trade Program in the way that it did. Ontario (and now the Respondent) expressly left it to market participants like KS&T to engage in the costly and difficult process of pursuing recourse under the NAFTA.

16. Having little of any substance to say on the merits, the Respondent predictably falls back on jurisdictional objections. The Claimants have already evoked its attempt to

misstate the scope and nature of their investment in Canada. As set out in the Claimants' Memorial and in the present Reply, these characterisations are false.

17. The Respondent then resorts to denying that the millions of dollars' worth of allowances the Claimants acquired in good faith from Ontario were not an "investment" in Ontario. In support of this contention, it enlists the assistance of Professor Larissa Katz. Applying an idiosyncratic, results-driven theoretical framework devised a century ago, Professor Katz concludes that allowances are "not property" under Ontario law and therefore not an investment under the NAFTA. Yet as Professor de Beer demonstrates in response, applying the framework of analysis that an Ontario Court actually would apply in addressing this question (and not Professor Katz's academic theory), an Ontario Court would reach the opposite conclusion: allowances are indeed a form of intangible property right. As Professor Mehling confirms, that conclusion – that allowances are indeed a form of intangible property right – would be consistent with the outcome in jurisdictions around the world. These allowances are equally "interests" in the Province under the NAFTA. Overall, the Respondent's jurisdictional objection fails.

18. Nor are the Respondent's efforts to deny jurisdiction under the ICSID Convention any more effective. First, the ICSID Convention in effect defers to the relevant international investment agreement on this issue: a qualifying investment under the NAFTA, as here, by that very fact qualifies as an investment under ICSID. In any event, while ICSID establishes no rigid test for jurisdiction under Article 25(1) of the ICSID Convention, the Claimants clearly qualify under variously-cited criteria: their investment involved the commitment of capital, over a period of several years, in the expectation of profit and against the assumption of risk, and certainly contributed to the Ontario economy (in fulfilment of their statutorily assigned role under the Cap and Trade Program). Consequently, the ICSID jurisdictional question is nothing more than a red herring.

19. The Respondent's attempt to deny personal jurisdiction to the Claimant Koch Industries is equally frivolous: Koch indirectly through KS&T held the same (and indeed, further) investments in Canada, suffered the effects of Ontario's illegal measures, and thereby experienced loss. Koch also separately held substantial corporate investments in Ontario whose future requirements under the Cap and Trade Program were part of what prompted the Claimants to engage in Ontario's Program as a market participant.

20. All of these facts lead to the conclusion that the Respondent is liable for breaches of the NAFTA Chapter Eleven protections, as a result of Ontario's measures. Ontario violated Article 1105(1) by subjecting the Claimants to manifestly arbitrary treatment, unfair targeting, and express denial of justice. Ontario's measures first indirectly, and then directly expropriated the Claimants' investment in violation of Article 1110 of the NAFTA.

21. The Respondent has also failed to rebut the Claimants' demonstration that they are owed substantial compensation for Ontario's breaches of the NAFTA. The Claimants have properly evidenced their losses. The Respondent is fully responsible for these losses. The Claimants are owed interest properly calculated. The Respondent has nothing convincing to say on any of these fronts.

22. The Claimants address the Respondent's allegations as set out in its CounterMemorial on Jurisdiction and the Merits in the following sections:

- In Part II, the Claimants address the inaccurate and inconsistent factual allegations advanced by the Respondent, to demonstrate that its attempt to denigrate the role of market participants in the Cap and Trade Program and the investments of the Claimants are unsupported. Moreover, the Claimants will address the series of arguments aimed at deflecting blame from the Respondent to show that the actions taken by Ontario were reckless, abrupt, arbitrary and discriminatory. The *post hoc* narrative that the Respondent has tried to develop to demonstrate otherwise is entirely unsupported, including by Ontario's own internal documents.

- In Part III, the Claimants address the Respondent's efforts to deny this Tribunal's jurisdiction under the NAFTA and the ICSID Convention. In particular, the Claimants address the Respondent's assertions that they do not hold investments under the NAFTA or the ICSID Convention, and that the Claimants are not investors under the NAFTA.

- In Part IV, the Claimants address the Respondent's arguments on the merits, including to demonstrate that Ontario's actions are a clear breach of the fair and equitable treatment standard under Article 1105(1) and of the protection against uncompensated expropriation under Article 1110.

- In Part V, the Claimants address the Respondent's arguments on quantum. In particular, the Claimants address the Respondent's assertion that there is no legal or factual causation between Ontario's reckless actions and the Claimants' loss, and its attempts to avoid paying interest or additional costs with respect to the Claimants' claims.

23. In support of this Reply, the Claimants rely on all previous witness statements and expert reports (together with all accompanying factual exhibits and legal authorities), as well as the following:

- A Reply Witness Statement of Graeme Martin, signed on 18 July 2022 and submitted as **CWS-5**. In his statement, Mr. Martin responds to comments on the factual allegations made by the Respondent and its witnesses, based on his direct experience participating in the Ontario Cap and Trade Program, and his general experience as a trader in energy markets. In particular, Mr. Martin addresses the Respondent's allegations with respect to KS&T's contributions to the Ontario Cap and Trade Program; KS&T's expectations in investing in the Ontario Cap and Trade Program; and KS&T's loss and efforts to obtain compensation.

- A Reply Witness Statement of Frank King, signed on 17 July 2022 and submitted as **CWS-6**. In his statement, Mr. King also responds to comments on the factual allegations made by the Respondent and its witnesses, based on his role as Vice President, North American Gas Power and Renewables at KS&T. In particular, Mr. King responds to the Respondent's allegations with respect to KS&T's trades in allowances in the secondary market; KS&T's compliance with holding limits under Ontario regulations; and the impact of Ontario's cancellation of the Cap and Trade Program.

- A Reply Witness Statement of Michael Berends, signed on 16 July 2022 and submitted as **CWS-7**. In his statement, Mr. Berends responds to factual allegations made by the Respondent and its witnesses based on his direct experience in the Ontario Cap and Trade Program and the renewable energy industry as an advisory firm specializing in carbon pricing and market analysis during the lifetime of the Program. In particular, Mr. Berends comments on the Respondent's assertions with respect to the establishment and operation of Ontario's Cap and Trade Program, including the operation of the Ontario and joint auctions; the Respondent's attempted devaluation of the role and importance of market participants in secondary markets, including KS&T; and the Respondent's arguments with respect to the winding down of Ontario's Cap and Trade Program.

- A Witness Statement of Jonathan McGillivray, signed on 17 July 2022 and submitted as **CWS-8**. In his statement, Mr. McGillivray details the sustained efforts of the Claimants, with the assistance of Mr. McGillivray's firm Resilient LLP, to seek production of documents pursuant to the Ontario Freedom of Information and Protection of Privacy Act (**FIPPA**) and through ancillary requests, and how such efforts were frustrated by relevant Ontario officials, wrongly blocking access to evidence material to facts at issue in this arbitration. The Claimants will invite the Tribunal to draw adverse inferences in connection with this outcome.

- A Second Expert Report of Dr. Robert Stavins, Professor of Energy & Economic Development at Harvard University, dated 18 July 2022 and submitted as **CER-2**. In his report, Dr. Stavins confirms that the arguments of the Respondent and its appointed expert on the Western Climate Initiative (**WCI**) model of cap and trade, Mr. Franz Litz, concerning the functioning of cap and trade systems and the role of market participants specifically, are based on flawed arguments and unsupported assertions.

- The Expert Report of Professor Jeremy de Beer, Professor at the Faculty of Law, University of Ottawa, dated 15 July 2022 and submitted as **CER-3**. In his report, Professor de Beer demonstrates the extensive flaws in the theoretical analysis of the Respondent's appointed expert on Ontario property law, Professor Katz, and confirms that an Ontario judge applying the typical framework of analysis adopted in court proceedings would find that emission allowances constitute property under the law of Ontario.

- The Expert Report of Professor Michael Mehling, Deputy Director of the Center for Energy and Environmental Policy Research at the Massachusetts Institute of Technology, dated 15 July 2022 and submitted as **CER-4**. In his report, Professor Mehling addresses further flaws in the analysis of the Respondent's expert, Professor Katz, and notably confirms that international practices (as would likely be considered by an Ontario judge applying the framework of analysis typically adopted by Ontario courts), are consistent with Professor de Beer's conclusion that emission allowances constitute property under the law of Ontario.

24. This Reply Memorial is further accompanied by Exhibits **C-176 to C-218** and by legal authorities **CL-139 to CL-203**.

II. FACTUAL BACKGROUND

A. The Respondent's Efforts to Downplay the Importance of Market Participants in the Effective Functioning of the Cap and Trade Program Are Unavailing

1. The Respondent Misstates the Importance of Market Participants Like KS&T to the Ontario Cap and Trade Program

25. In the Memorial, the Claimants provided detailed background on the development of Ontario's Cap and Trade Program, including a review of the purpose of cap and trade programs, the establishment of the WCI, Ontario's linkage with California and Québec, and the importance of market participants in cap and trade programs.[3] As the Claimants confirmed, Ontario's Cap and Trade Program was carefully developed to incorporate best practice design principles, including providing for the involvement of market participants. From the outset, Ontario intended to link its Program with those of California and of Québec, and to that end align its regulatory regime with those jurisdictions. As in the case of California and of Québec, Ontario expressly included market participants as a core component of its Cap and Trade Program and encouraged market participants to register and participate in the Ontario market.[4]

26. In the Counter-Memorial, the Respondent and its expert Franz Litz together devote significant space to retelling the development of the Cap and Trade Program, including with respect to the WCI, and describing the Program's various components.[5] They do so notwithstanding the Claimants' detailed history of the Cap and Trade Program in the Memorial, including with respect to WCI.[6] Although not stated explicitly, the purpose of the Respondent's exercise is clear: it is an effort to downgrade the role of market participants in the effective functioning of the Cap and Trade Program and thereby attempt to rationalize and justify the arbitrary and discriminatory manner in which they were treated by Ontario.

27. The Respondent's attempt to downgrade the role of market participants fails, given that its underlying premise – that market participants are not critical to the effective functioning of cap and trade programs – bears no scrutiny. Ontario's decision to create the separate and distinct category of "market participants" was neither accidental, nor exceptional, nor of marginal significance; it was an intentional choice to capitalize on the multiple benefits market participants provide to cap and trade emissions controls systems, in a manner consistent both with the WCI Design principles developed by the WCI partners (including Ontario) and with the approach adopted by nearly every major cap and trade program.

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[3] Claimants' Memorial, Section II.A.

[4] *Id.*, para. 117.

[5] Respondent's Counter-Memorial, paras. 14-39; Expert Report of Franz Litz (15 February 2022), pp. 5-33, **RER-2**.

[6] Claimants' Memorial, paras. 37-67, 79-87.

28. In his second expert report, Dr. Stavins exposes the Respondent's and Mr. Litz's two-step strategy for downplaying the role of market participants. First, the Respondent and Mr. Litz downplay the role of the secondary market — where market participants such as KS&T do business — in the effective functioning of cap and trade programs. Second, they downplay the importance of the services provided by market participants specifically and the various ways in which they improve secondary market performance and support achievement of environmental policy objectives. In so doing, Dr. Stavins rebuts the Respondent's express argument that the Claimants "exaggerate" the role of market participants He also rebuts the Respondent's implicit argument that on account of the purportedly "limited extent" of their participation in the Cap and Trade Program, it was somehow reasonable for Ontario to deny market participants compensation upon termination of the Program.[7]

29. The Respondent notably asserts that "[i]n a cap and trade system like Ontario's, compliance entities can obtain allowances at quarterly auctions and do not need to seek them out on the secondary market."[8] As Dr. Stavins notes, this proposition is "exceptionally misleading" and unsupported.[9] As Dr. Stavins explains, "an emissions trading market", often referred to as a "secondary market", is instead an essential feature of a cap and trade system and is "literally the 'trade' in 'cap-and-trade.'"[10] Without a secondary market, regulated sources would be unable to respond in ways that would support achieving the full economic gains from cap and trade, because allowances would be tied to the entities initially purchasing or receiving them, rather than being traded to those that may value them more because they face higher costs of achieving emissions reductions.[11] Although auctions perform a useful function in the initial allocation of allowances, they eliminate neither the need for nor the value of secondary markets in cap and trade systems, including that of Ontario.[12]

30. The Respondent's claim that Ontario's quarterly public allowances auctions were alone sufficient for purposes of price discovery is similarly baseless.[13] As Dr. Stavins explains:

> Quarterly auctions provide price discovery and an opportunity to purchase allowances on *just four days per year*, but changes in market conditions and the business circumstances of capped entities that alter the cost-effective allocation of allowances occur *continuously throughout each and every year*. Thus, secondary markets are critical for updating market prices for new information between auctions as market conditions change, and for the ability of

[7] Respondent's Counter-Memorial, paras. 38, 37.

[8] *Id.*, para. 33.

[9] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 25, **CER-2**.

[10] *Id.*, para. 24.

[11] *Id.*, para. 26.

[12] *Id.*, para. 73.

[13] Respondent's Counter-Memorial, para. 38.

> participants to adjust their allowance holdings in response to such changes and changes in their compliance needs.[14]

31. In a further attempt to downplay the importance of the secondary market (and by extension, the role of market participants), the Respondent suggests that there were few "bilateral" trades in 2017.[15] What it fails to recall is that 2017 was the first year of the Ontario Cap and Trade Program, and the first year in a four-year compliance period. As Dr. Stavins explains, the volume of trades at the very outset of a cap and trade system is not indicative of trading in future periods. Moreover, since the Cap and Trade Program's initial compliance period was to last four years (*i.e.*, until 31 December 2020, requiring a "settling of accounts" only in 2021), this undercut any urgency for compliance entities to obtain allowances through trades in the first year of this period.[16] Dr. Stavins observes that where they have been allowed to function as planned, secondary markets have been highly active in WCI programs.[17]

32. In its effort to underplay the value of secondary markets (and by extension, market participants), the Respondent also fails to acknowledge the essential role secondary markets play in ensuring environmental compliance under cap and trade, *i.e.*, in achieving the core policy goals of the Program. Absent a secondary market, regulatory compliance with cap and trade would be highly inefficient and likely unworkable: entities subject to cap and trade requirements would be likely to hold either too many or too few allowances if they could only rely on the allowances they initially received.[18] Barring access to alternative sources in the secondary market, such entities would need to halt economic production once they had exhausted their initial allocation of allowances. Compliance entities would also be more exposed to

[14] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 26, **CER-2** (emphasis in original). *See also* Second Witness Statement of Graeme Martin (18 July 2022), paras. 9-13; **CWS-5** ("Canada's allegations are inconsistent with what I know about the operation of most environmental programs, which have both auctions *and* active secondary markets. For example, the European Union Emissions Trading System (**EU ETS**) holds daily auctions, and has one of the most active secondary markets in the world.", citing European Commission, EU Emissions Trading System: Auctioning, **Exh. C-177**; European Securities and Markets Authority, Final Report: Emission allowances and associated derivatives (March 28, 2022), **Exh. C-178**).

[15] Respondent's Counter-Memorial, para. 33. *See also* Second Witness Statement of Graeme Martin (18 July 2022), paras. 8-9; **CWS-5** ("[M]arket participants create a secondary market for direct purchases of title in carbon allowances and provide essential liquidity to other participants by acting as a ready source of supply. This role is particularly important to provide more flexibility to mandatory participants, who otherwise would be limited to purchasing allowances on only four occasions each year. These participants not only need the flexibility to purchase as required, but also rely on the daily "price discovery" role played by market participants to precisely quantify their allowances liabilities on an ongoing basis (something that auctions taking place only four times a year are unable to ensure)").

[16] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 25, **CER-2**.

[17] *Id.*, para. 15.

[18] *See*, *e.g.*, Second Witness Statement of Graeme Martin (18 July 2022), paras. 9-12, **CWS-5**.

the financial risks associated with cap and trade compliance, because there would be no futures or forward markets to hedge the risks associated with compliance.[19]

33. Thus, the Respondent's efforts to downplay the integral role of secondary markets in cap and trade systems, including by portraying them as an alternative rather than a complement to auctions, all fail.

34. The Respondent then turns to directly attack market participants as of only marginal importance to the functioning of secondary markets. It and Mr Litz assert that "a robust secondary market is not necessarily dependent on granting entities like KS&T 'market participant' status",[20] market participants were only critical to "earlier types of cap and trade programs";[21] and that "participation by market participants has "little or nothing to do with realizing the full benefits of linkage".[22] They further attempt to "take control" of the WCI narrative and reframe certain analyses and recommendations as reflecting a reluctance to authorize participation by market participants.[23] Again, the overall message appears to be that market participants "deserved" to be treated in an illegal manner.

35. The Respondent's arguments along these lines ignore evidence submitted by Dr. Stavins with his first report, and are themselves unsupported by any factual evidence.[24]

36. As Dr. Stavins explained in his first report, it is not enough that an emissions trading system have a secondary market; the secondary market must be a *well-functioning* market if the system is to achieve environmental and economic policy objectives by ensuring the availability of allowances needed for environmental compliance and achieving emissions reductions at the lowest possible cost.[25] In that regard, the contribution of market participants is essential.

37. Indeed, *contra* the Respondent's allegations, Dr. Stavins in his second expert report underlines how market participants contribute to each of the criteria necessary for a well-functioning market.[26] Well-functioning markets have "efficient" prices, reflecting economic fundamentals; sufficient liquidity to ensure that all participants can buy and sell allowances when needed at efficient prices; and trading opportunities

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[19] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 27, **CER-2**.

[20] Expert Report of Franz Litz (15 February 2022), para. 89, **RER-2**.

[21] Respondent's Counter-Memorial, para. 38; Expert Report of Franz Litz (15 February 2022), para. 52, **RER-2**.

[22] Expert Report of Franz Litz (15 February 2022), para. 117, **RER-2**.

[23] Respondent's Counter-Memorial, para. 37, citing Expert Report of Franz Litz (15 February 2022), para. 79, **RER-2**.

[24] Second Expert Report of Dr. Robert Stavins (18 July 2022), Section III, **CER-2**.

[25] *Id.*, para. 30, Expert Report of Dr. Robert Stavins (5 October 2021), para. 14, **CER-1**.

[26] Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 30-31, **CER-2**; Expert Report of Dr. Robert Stavins (5 October 2021), para. 14, Section IV.A, **CER-1**.

without high transaction costs.[27] Market participants contribute to efficient price discovery and greater market liquidity through their active purchasing and selling of allowances, and by facilitating transactions among other participants in the market. They also lower transaction costs by providing compliance entities with alternative means of buying and selling allowances to achieve compliance.[28] Given this important role, the Respondent's argument that market participants had no compliance obligations is irrelevant and deliberately sidesteps the key role they play in facilitating efficient functioning of the system.[29]

38. In his second expert report, Dr. Stavins again reviews the relevant materials concerning the evolution of the WCI and the role of market participants within that design. He confirms that WCI principles unequivocally endorse the inclusion of market participants in light of the benefits they provide, including increased liquidity, particularly in the early stages of an emissions trading market.[30]

39. In sum, *contra* the Respondent's false narrative, market participants make multiple contributions to a well-functioning emissions trading system. Given this, it is unsurprising the WCI Design developed by the WCI partners — including Ontario — recommended allowing market participants to participate in allowance markets. Nor is it any surprise Ontario authorized market participants to participate in its Cap and Trade Program. In so doing, Ontario made the same choice of every other major emissions trading system, aside from the Chinese National System.[31] Recognition of the important role filled by market participants is the norm in emissions trading systems, and the Ontario system was no exception.

40. The Respondent's unspoken attempt to suggest market participants like the Claimants were therefore "expendable" and deserved their ill-treatment by Ontario is simply an unedifying effort at victim-blaming.

2. The Respondent Seeks to Distance Itself from Ontario's Encouragement of Market Participants to Build its Cap and Trade Program

41. The Respondent also vainly attempts to downgrade the encouragement Ontario provided for market participants to take part in the system, presumably in an effort to undermine the Claimants' arguments relating to their legitimate expectations.[32]

42. The Respondent's arguments in this regard fall flat. As experts like Dr. Stavins have demonstrated, in light of the key role market participants play in generally enabling

[27] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 30, **CER-2**.

[28] *Id*., para. 31. *See also* Second Witness Statement of Graeme Martin (18 July 2022), paras. 11-12; **CWS-5**.

[29] Respondent's Counter-Memorial, para. 29.

[30] Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 54-55, **CER-2**.

[31] *Id*., para. 56.

[32] Respondent's Counter-Memorial, para. 39.

efficient functioning of cap and trade programs,[33] Ontario's inducement of market participant activity followed logically from the Province's decision to set up a cap and trade system.

43. The 2010 WCI Design itself established "no restriction on who can own emission allowances."[34] Following this recommendation, the Ontario Cap and Trade Program deliberately and expressly set up a specific category of "market participants", with the obvious intention of attracting participants whose sole role was to purchase and trade in allowances as an enterprise activity. It was a case of "if you build it, they will come". Market participants were admitted for good purpose: Ontario and its WCI partners understood perfectly well that if participation in emissions trading were limited to the sporadic trading activity of compliance entities, the ability of the cap and trade system to achieve emissions reductions cost-effectively would be reduced.[35]

44. Having been specifically invited and encouraged through Ontario's legislative program to participate in the Cap and Trade Program, market participants had no reason to suspect they would be summarily excluded from compensation if the Program were ever wound down.

45. Market participants were also induced through representations about the intended longevity and stability of the Program, making investments more attractive. In 2017, the then Minister of Environment and Climate Change Glen Murray publicly and directly advised market participants that the system was being constructed in such a way as to make it very difficult to unwind, with the clear implication that it was worthy of long-term investment.[36] As Dr. Stavins explains, the success of Ontario's Cap and Trade Program depended on cultivating the expectation among all participants, including market participants, that trading would continue and that demand for allowances would be sustained over the long-term.[37]

46. The specific role Ontario created for market participants and its consistent encouragement of their participation was radically at odds with the Ontario Progressive Conservative Government's sudden pejorative labelling of market participants as "mere spectators" in its ill-conceived roll-out of the Cancellation Act. The "speculator" epithet, adopted by both the Respondent in its Counter-Memorial and Mr. Litz in his report, ignores the wide variety of roles actually filled by market participants in emissions trading systems that have nothing to do with "speculation", including contributing to efficient price discovery and greater market liquidity through the active purchasing and selling of allowances, and by facilitating transactions among other participants in the market.[38] The radical change in tone of the Ontario Progressive Conservatives and the complete surprise of market

[33] Expert Report of Dr. Robert Stavins (5 October 2021), Section IV, **CER-1**.

[34] WCI, Design for the WCI Regional Program (July 2010), p. 6, **Exh. RS-19**.

[35] Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 54-55, **CER-2**.

[36] *See* para. 97 *infra*.

[37] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 69, **CER-2**.

[38] *Id*., paras. 31, 67.

participants — who up until that point had been invited and encouraged to participate in the Cap and Trade Program — belies the Respondent's attempt to portray the Cancellation Act as "rational" or anything less than a shocking policy reversal that arbitrarily targeted market participants in a grossly unfair manner.[39]

B. The Respondent's Denigration of the Claimants' Investments and Role in the Ontario Cap and Trade Program Must be Rejected

47. In addition to seeking to rewrite the facts about the role of market participants and the secondary market in Ontario, the Respondent then seeks to attack the Claimants' role in the Program more specifically. In this respect, it attempts to minimize the investments made by the Claimants in Ontario over a multi-year period. It then pivots to assert that – in any event – the Claimants should have been aware of the "risks" of investing in Ontario. The Respondent is wrong on both counts, as discussed in the remainder of this section.

1. The Respondent's Attempts to Minimize the Claimants' Investments is a Blatant Attempt to Support Its Jurisdictional Objections

48. In the Memorial, the Claimants described in detail how they participated in the Ontario Cap and Trade Program, as a natural expansion of their business strategy of investing in global energy markets. The Claimants explained how KS&T had built up specialized expertise to navigate environmental compliance, and established itself as a reliable specialist both for other companies in the Koch Group and for third party participants.[40] The Claimants then detailed their early efforts to establish KS&T as a market participant in Ontario throughout 2016 and 2017,[41] including marketing efforts and participation in the Ontario-only auctions and secondary market.[42] By the time Ontario linked its Cap and Trade Program with California and Québec on 1 January 2018, KS&T was as a result of these efforts in a strong and stable position to pursue its emissions allowances-based trading business over the full term of the Program.[43] Upon linkage, KS&T continued to invest in Ontario through participation in the joint auctions, and through continued investments by trading in the secondary market.[44] Overall, and as the Claimants confirmed in the Memorial, KS&T made significant investments in Ontario over a three-year period, including the cumulative total of [redacted] it disbursed to purchase allowances at six public auctions held by Ontario.[45]

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[39] Respondent's Counter-Memorial, para. 205.

[40] Claimants' Memorial, para. 122.

[41] *Id.*, paras. 125-137.

[42] *Id.*, paras. 138-155.

[43] *Id.*, para. 155.

[44] *Id.*, paras. 156-182.

[45] *Id.*, para. 183.

49. In its Counter-Memorial, the Respondent seeks to denigrate the Claimants' long-term investments in Ontario, by casting KS&T as merely a "cross-border trader".[46] In particular, it asserts that the Claimants' purchase of allowances in May 2018 was "nothing more" than part of a "series of transactions leading to a cross-border sale";[47] and that the Claimants "business" in Ontario is based on "unrelated and unidentified" interests in "cross-border sales".[48] The Respondent is wrong to mischaracterise the Claimants' business in this way to suit its ends. KS&T was engaged in a long-term enterprise in Ontario, and was an active participant in both the primary and secondary markets in Ontario throughout the length of the Program, as recalled below.

(a) The Respondent's Mischaracterization of Trading Activity by KS&T is Contradicted by the Evidence

50. The Respondent first attempts to suggest KS&T's overall trading activity in the Ontario market was *de minimis*.[49] Its submission in this regard is wrong.

51. First, despite its attempts to depict the May 2018 auction as an isolated event, the Respondent cannot deny that KS&T participated in all four Ontario-based auctions in 2017,[50] and that it also participated in the joint auctions in 2018 once California, Québec, and Ontario harmonized their cap and trade programs.[51] The Respondent likewise cannot deny that KS&T purchased a cumulative total of [redacted] in allowances through its Ontario Compliance Instrument Tracking System Service (**CITSS**) account over the course of the two years the Program was active.[52]

52. Beyond this, the Respondent's assertion that "KS&T's participation in the secondary market in Ontario amounted to a total of [redacted][53] is also wrong.

53. As described in the second witness statement of Frank King, KS&T's activities in tradeable compliance instruments (*i.e.*, emissions allowances and offset credits) was considerable, and certainly far greater than the Respondent wants the Tribunal to believe. To sum up:

- From 1 January 2017 to 31 December 2017, in addition to its purchases in the primary auction market, KS&T engaged in at least [redacted] on the secondary market through the

[46] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 2, 3, 127, 129, 156-158.

[47] *Id.*, para. 158.

[48] *See id.*, para. 3.

[49] *See*, *e.g.*, *id.*, paras. 51, 65, 121.

[50] *Id.*, para. 50.

[51] *Id.*, paras. 58, 63-65.

[52] *Id.*, para. 157, n. 301.

[53] *Id.*, para. 121. *See also id.*, paras. 51, 65.

InterContinental Exchange (**ICE**).[54] By engaging in these , KS&T traded a total of , and also effected physical delivery of [55]

- From 1 January 2017 to 15 June 2018, KS&T also entered into at least [56] In total, these , worth a combined amount of [57]

- From 1 January 2018, after the respective cap and trade programs of Ontario, California and Québec were formally linked, KS&T entered into a number of additional OTC trades involving WCI Instruments, which included OCAs on a blended basis and/or emissions offset credits, both of which could be used to satisfy compliance obligations in Ontario.[58] In total, there were at least such additional trades, which transacted .[59]

- As Mr. King also explained, KS&T's range of trade activity as an Ontario market participant (especially in) was in fact far broader than the specific examples above. First, , but were folded into trades in once the Ontario market became linked with California and Québec: in other words, in the linked environment of 2018 necessarily incorporated and contemplated . Second, the intrinsic anonymity of futures trading through an electronic exchange platform like the ICE meant that KS&T engaged in where the nationality of its counterpart in the trade could not be confirmed. This means it is likely that KS&T engaged in up to [60]

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[54] Claimants' Memorial, para. 34.

[55] *See* Second Witness Statement of Frank King (17 July 2022), paras. 16-18, **CWS-6**.

[56] *See* Claimants' Memorial, para. 123; Second Witness Statement of Frank King (17 July 2022), para. 23, Annex A, paras. 12-45, **CWS-6**. These involved at least one of the following: .

[57] *See* Second Witness Statement of Frank King (17 July 2022), para. 23 **CWS-6**.

[58] *See id.*, para. 26.

[59] *See id.*, paras. 25-27.

[60] *See* Witness Statement of Frank King (6 October 2021), para. 12, **CWS-4**; Second Witness Statement of Frank King (17 July 2022), paras. 13-14, **CWS-6**.

54. In sum, the Respondent's allegation that KS&T "only" transacted Ontario emission allowances [redacted] [redacted] is false to the point of being ridiculous.

55. The Respondent's further argument that KS&T did not use any of the 2017 allowances it purchased in the Ontario-only auctions to satisfy regulatory requirements in Ontario is non-sensical.[61] 2017 was the first of a four-year compliance period, meaning that regulatory requirements were only to be "fulfilled" at the end of this period (*i.e.*, 31 December 2020).

56. Indeed, KS&T was motivated to participate in the Ontario Cap and Trade Program in part because of the *future* anticipated compliance obligations of Koch's Ontario-based subsidiaries (such as INVISTA (Canada) Company (**INVISTA**)).[62] Since 2017 remained "early days" in the compliance period, the Respondent cannot possibly assert that KS&T would never have provided allowances for compliance obligations in Ontario, or that its failure to do so using 2017 allowances somehow "proves" that it was not an investor in Canada. The fact that Ontario arbitrarily cancelled the Program before it was even halfway through the compliance period does not change the nature of the Claimants' long-term investment in Ontario or the rationale for their commercial presence in the Province.

57. In any event, and in the second witness statement of Frank King, KS&T's business model included [redacted] [redacted].[63] As set out above, KS&T entered into at least [redacted] [redacted] over the period 1 January 2017 to 15 June 2018.[64] This is precisely the role Ontario intended KS&T to play, as an Ontario market participant: not to fulfil its own compliance obligations, but rather to make the Ontario market overall more efficient, by providing a flexible source of allowances and engaging in price discovery.[65]

58. Finally, the Respondent argues that throughout 2017, the secondary market in Ontario was largely inactive, on the basis that only [redacted] "bilateral" trades in Ontario emission allowances might have been recorded by the CITSS system.[66] In the first place, the truncated document excerpt the Respondent relies upon in this regard fails to make clear what exactly was meant by "bilateral".[67] In any event, the Respondent's assertion ignores the broader context and operation of the secondary market. As Dr.

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[61] Respondent's Counter-Memorial, paras. 49-51.

[62] *See*, *e.g*., Claimants' Memorial, para. 46.

[63] *See* Second Witness Statement of Frank King (17 July 2022), paras. 20-23, Annex A, paras. 12-45, **CWS-6**.

[64] *See* para. 53 *supra*.

[65] *See* paras. 27 to 40 *supra*.

[66] Respondent's Counter-Memorial, para. 47.

[67] Monitoring Analytics, LLC, "WCI Cap-and-Trade Program Ontario Market 2017 Annual Report" (31 January 2018), pp. 10-11 (excerpt), **Exh. R-10**.

Stavins explains, the volume of trades at the very outset of a cap and trade system is not indicative of trading in future periods.[68]

59. Consequently, the Respondent's assertions with respect to the length and scope of KS&T's engagement in Ontario-related trading is wholly inaccurate. KS&T purchased [REDACTED] from Ontario, engaged in multiple trades , with multiple Canadian counterparts, concerning Ontario allowances and related WCI compliance instruments over the course of 2017 and 2018, using its investment in Ontario allowances to turn a profit,[69] and would have continued to do so long-term if Ontario had not abruptly cancelled the Cap and Trade Program.[70]

(b) The Respondent's Focus on the Operation of KS&T's Investment Strategy is Unavailing

60. The Respondent's related strategy is to argue that KS&T's business – including its participation in the May 2018 auction – consisted of purchasing allowances in Ontario with the sole purpose of exporting them for compliance use in California.[71] It asserts on this basis that KS&T is thus merely a "cross-border trader" rather than an investor.[72] In support of its reasoning, the Respondent points to KS&T's decision to [REDACTED] to its California CITSS account following the linkage of Ontario, California and Québec on 1 January 2018.[73]

61. The Respondent's focus on transfers of allowances to California ignores KS&T's active presence as an Ontario registered market participant in both the primary and secondary markets in Canada; the express invitation by Ontario to work within a linked legal framework for the trade of carbon emissions allowances; the Respondent's own statements in this arbitration; and the practical realities of trading in the joint cap and trade market.

62. First, the Respondent's argument that KS&T only invested in Ontario to "resell" in the United States is demonstrably untrue. As demonstrated above, KS&T had multiple business counterparts in Ontario and in Québec as well as in the United States. Moreover, its business was far more complex than simply purchasing allowances for immediate export. By the time the May 2018 auction took place, KS&T had already been engaged as a market participant in Ontario since 2016 and

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[68] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 25, **CER-2**.

[69] Claimants' Memorial, paras. 125-182.

[70] *Id.*, para. 42. Indeed, as documents produced by Canada in this arbitration make clear, the Ontario government developed the Cap and Trade Act as [REDACTED]

[71] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 2, 57, 65.

[72] *See*, *e.g.*, *id.*, paras. 2, 3, 127, 129, 156-158.

[73] *Id.*, para. 57.

had consistently built up its investment in Ontario over the course of several years.[74] KS&T was registered as a market participant in Ontario; purchased allowances in multiple public auctions in Ontario; and traded on both the primary and the secondary market in Ontario, over the full two years the Ontario Program was active (and would have continued to do so for the full-length of the Program).[75] Indeed, the Respondent's own description of the Claimants' participation in the Ontario Cap and Trade Program, in the opening paragraphs of its Counter-Memorial, further confirms the Claimants' status as an investor over the long term, assuming risks in the expectation of profit.[76] In particular, it recognizes that the Claimants assumed risks in purchasing emission allowances from Ontario in 2017, in the expectation that they could profit if Ontario ultimately harmonized its Program with California and Québec.[77]

63. This position accords with the explanation that the Claimants provided in the Memorial: [redacted] KS&T's actions were intrinsically linked to its ownership of an Ontario CITSS account into which it deposited and held and through which it traded in OCA allowances and related compliance instruments, as an Ontario-registered market participant (as described above).

64. Second, the Respondent's argument fails to recognize that Ontario made express representations to participants in the Ontario market about the "fungibility" of allowances between Ontario, Québec and California. By signing the "Agreement on the Harmonization and Integration of Cap-and-Trade Programs For Reducing Greenhouse Gas Emissions" (the **OQC Agreement**), and implementing regulations,

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[74] Claimants' Memorial, para. 125-155; *See* para. 48 *supra*. *See also* Claimants' Memorial, para. 42. Indeed, as documents produced by Canada in this arbitration make clear, the Ontario government developed the Cap and Trade Act as [redacted]

[75] Claimants' Memorial, paras. 125-182.

[76] Respondent's Counter-Memorial, para. 4.

[77] *Id.*, para. 4 ("KS&T assumed []risks and purchased emission allowances in Ontario in 2017, wagering that Ontario would harmonize its cap and trade program with that of California.").

[78] Witness Statement of Graeme Martin (4 October 2021), paras. 35-36, **CWS-2**.

[79] *See*, *e.g.*, Witness Statement of Graeme Martin (4 October 2021), paras. 30-48, **CWS-2**; Witness Statement of Graeme Martin (18 July 2022), paras. 19-20 (citing Email from Glen Watson (IETA) to Graeme Martin (6 June 2016), IETA C&T Reg Summary and MOECC Webinar, **Exh. C-180**).

Ontario expressly and unambiguously represented to participants in the Ontario market that compliance instruments would be mutually recognized across the three jurisdictions, encouraging KS&T to treat the three jurisdictions as a single market. In good faith reliance on these representations, KS&T actively participated in the market in trading Ontario allowances, including the transfer of fungible allowances across the linked jurisdictions. Moreover, in the context of Ontario's invitation to participate in the linked market, KS&T also chose to [redacted] with the intention of continuing to transact in all three jurisdictions, in particular in Ontario.[80]

65. The Respondent itself admits that one of the goals of its Cap and Trade Program was linkage with California and Québec,[81] and that this harmonization was designed to "provide the opportunity to reduce emissions over a wider territory, thus improving market liquidity and reducing the likelihood of manipulation."[82] Documents produced by the Respondent in this arbitration further illustrate the strong desire of linkage by the Ontario Government, stating that [redacted][83] In light of these goals, the Respondent's complaint that the Claimants then proceeded to participate in the "wider" WCI market rings hollow: any market participant in Ontario was expected and encouraged to treat the linked jurisdictions as a single market. KS&T integrated its business across the three jurisdictions in reliance on Ontario's clear and unambiguous legal framework. That did not make an Ontario market participant like KS&T any less an investor "in Ontario", and the Respondent should be estopped from arguing otherwise.[84]

66. Finally, the Respondent's position fails to acknowledge operational aspects of the Cap and Trade Program and the realities of trading in the secondary market.

- As acknowledged by the Respondent,[85] Ontario imposed strict holding limits of allowances in Ontario CITSS accounts, and "KS&T was subject to [these] holding limits in Ontario's Cap and Trade Program in 2017 and 2018."[86] One way KS&T could maximize its investment in Ontario, while ensuring compliance with mandatory holding limits was to [redacted], given that it could thereafter [redacted] without issue under the terms of the OQC Agreement. [redacted] ironically helped KS&T

[80] *See* paras. 66-67, *infra*; *See* Second Witness Statement of Frank King (17 July 2022), paras. 33, 41-42, **CWS-6**.

[81] Respondent's Counter-Memorial, para. 52.

[82] *Id*., para. 53.

[83] [redacted]

[84] *See* paras. 330-340 *supra*.

[85] Respondent's Counter-Memorial, paras. 34-35.

[86] *Id*., para. 34.

maximize its participation in the Ontario Cap and Trade Program, as Frank King explains in his second witness statement:

> [T]he Respondent criticizes KS&T for transferring emission allowances from its Ontario CITSS account to its California CITSS account after participating in the Ontario and linked auctions.[87] In so doing, Canada wholly ignores that the reason KS&T made these transfers was to comply with Ontario's Regulation 144/16 which prescribed certain holding limits on these accounts [. . .] [B]ecause of Ontario's mandated holding limits, KS&T could only physically hold a certain amount of allowances in its Ontario CITSS account.[88] Subsequently, in order to comply with these regulations, [89]

- The fact that these allowances were sometimes "housed" in KS&T's California CITSS accounts also did not ultimately impact their utility as allowances to satisfy compliance obligations in Ontario. As Mr. King further explains:

> KS&T undertook these Additionally, .[90]

- In any event, for KS&T and other market participants, shifting emissions allowances between its CITSS accounts did not ultimately impact on the number of its trades conducted in Ontario using Ontario allowances. Trading on the linked secondary market limited the number of "hard deliveries" of allowances required: at this level, (*i.e.*, allowances actually transferred) For the most part, therefore, the for allowances was an indifferent consideration.

67. Overall, the Respondent presents a distorted view of the full range, length and extent of KS&T's enterprise activities, all with the goal of falsely denying KS&T the status of an investor in Ontario. This strategy is not only misleading based on the evidence submitted by the Claimants, but it is also inconsistent with the Respondent's own description of the Ontario Program and the Claimants' investment strategy, in light of Ontario's legal framework encouraging active participation across the linked WCI market and treatment of it as a single fully integrated market.

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[87] *See*, *e.g.*, *id.*, paras. 63, 122, n. 229. *See also* Witness Statement of Nadia Ramlal (15 February 2022), **RWS-2**, paras. 52-56.

[88] *See*, *e.g.*, Witness Statement of Frank King (6 October 2021), para. 26, **CWS-4**.

[89] Second Witness Statement of Frank King (17 July 2022), paras. 41-42, **CWS-6**.

[90] *Id.*, para. 33.

2. The Respondent's Focus on the "Risks" Associated with the Claimants' Investment is Self-Serving and Unsupported

68. At the same time the Respondent seeks to downplay the significance of the Claimants' investments, it simultaneously asserts that the Claimants took on a variety of "risks" when making its investment in Ontario. According to the Respondent, these risks included: (1) the operation of Section 70 of the Cap and Trade Act;[91] (2) the "non-binding" nature of the linkage agreement between Ontario, Québec, and California;[92] (3) the election campaign of Doug Ford;[93] (4) the alleged uncertainty of Ontario's Cap and Trade Program and environmental markets more generally;[94] and (5) the way in which Ontario, Québec and California structured the joint auctions.[95] In effect, the Respondent argues that these "risks" mean that the Claimants should have expected that the Ontario Government would illegally, abruptly, and arbitrarily cancel the Cap and Trade Program, with no compensation. Its arguments are self-serving and unsupported, as demonstrated in the following sections.

69. As a prefacing remark, it bears noting the Respondent's arguments conflate two types of risks: exogenous market risks that every trader faces in the market place; and the risk of that Ontario would cancel the Cap and Trade Program in an arbitrary and discriminatory manner. Every enterprise entering a market for goods or services assumes the risk that it may or may not be profitable depending on the course of that market. That is a risk that enterprises knowingly and willingly assume. Indeed, Graeme Martin explains:

> Part of investing in a cap and trade program is assuming the risk that the value of allowances will go up or down depending on the auction prices and the prices on the secondary market. However, for Canada to assert that KS&T should have been aware that Ontario's Premier-elect (not yet in power) would deprive KS&T of the totality of its investment without warning, and would go on to confirm through new legislation that the allowances KS&T had legitimately acquired and paid for in Ontario as a registered participant in Ontario's program were forfeited and worthless, goes beyond any expectations KS&T could have reasonably held.
>
> To draw a simple analogy, if a company owns a ship of oil which is docked off the coast of a country, it is reasonable to expect that the value of the oil will go up or down at any point. These are risks the business undertakes. However, it is not reasonable to expect that government to simply and abruptly confiscate the oil in its entirety. The latter scenario is essentially what occurred in Ontario, and was

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[91] *See*, *e.g*., Respondent's Counter-Memorial, paras. 40-41, 209, 245, 254.

[92] *See*, *e.g*., *id*., paras. 53-56, 206, 258.

[93] *See*, *e.g*., *id*., paras. 5, 66-68, 72-73, 83, 177, 201.

[94] *See*, *e.g*., *id*., paras. 69-71, 210, 322.

[95] *See*, *e.g*., *id*., paras. 53-54, 76.

> beyond KS&T's expectations as to any future orderly wind down of the Cap and Trade Program.[96]

70. As Mr. Martin notes, an enterprise most certainly does not undertake the risk of grossly arbitrary, unjust and inequitable behaviour on the part of the host government of its investment. To the contrary, a foreign investor legitimately expects a State to act consistently with the legislative framework it has adopted; and if that government decides to change course (as it of course has the right to do), to do so in a rational and orderly fashion. In fact, Ontario had explicitly agreed to commit to an orderly phase out of the Program (if any) when it became party to the OQC Agreement, discussed in paragraphs 95 to 99 below.[97] It did just the opposite, unlawfully depriving the Claimants of any compensation in the process. This was not an "ordinary risk that KS&T knowingly undertook" – unless the Respondent is saying that investors in Canada should be on notice that federal and provincial governments will act in an abusive, unfair and illegal manner towards foreign investors, and that is just "the risk of doing business in Canada".

71. There is of course a critical distinction to be made between the commercial risks that investors ordinarily face, and the risk of a host State acting illegally. The former are willingly taken on, the latter not, and gave rise to the present claim. The Claimants now turn to the Respondent's specific allegations concerning the alleged "risks" associated with the Claimants' investment.

(a) Section 70 of the Cap and Trade Act Did Not Serve to Insulate the Respondent from the Arbitrary and Wrongful Actions of Ontario

72. In its Counter-Memorial, the Respondent emphasizes that Section 70 of the Cap and Trade Act specified that there was "no right to compensation, no expropriation, and no amount payable by the Crown (*i.e.*, the Ontario Government) with respect to actions or inactions under the Act."[98]

73. The Respondent claims that participants in the Ontario Cap and Trade Program, including KS&T as a market participant, "were aware, or should have been aware, of these regulatory provisions at the outset".[99] As a result, it argues, the Claimants were put "on notice" that there was no right to compensation under the Cap and Trade Act and could not have any legitimate expectations otherwise.[100]

74. The fact that Section 70 of the Cap and Trade Act allowed Ontario to take certain steps in connection with its administration of the Program did not give Ontario *carte blanche* to destroy that same program with impunity. Section 70 was at best a limited grant of discretion to promote the ends of the Program, and related shield against

[96] Second Witness Statement of Graeme Martin (18 July 2022), paras. 26-27, **CWS-5**.

[97] *See also* Claimants' Memorial, paras. 156-161.

[98] Respondent's Counter-Memorial, para. 40.

[99] *Id.*, para. 41.

[100] *Id.*, para. 210.

liability from certain domestic remedies. Moreover, Section 70 is of course set out in an instrument distinct from the Cancellation Act actually used by the Respondent to terminate the Cap and Trade Program – the actions the Premier-elect and then the Ontario Government took in the summer of 2018 were not "under the [Cap and Trade] Act", they instead destroyed that Act and its related framework and policy goals. The Respondent's effort to reinterpret Section 70 as a grant of unfettered discretion that put the Claimants "on notice" that they had no right to compensation upon the termination of the Program is unjustifiable as a matter both of domestic and international law.

75. The specific language of Section 70 provides as follows:

> **No right to compensation**
>
> 70 (1) Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss of revenues, loss of profit or loss of expected earnings that would otherwise have been payable to any person in respect of any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts.
>
> **No expropriation, etc.**
>
> (2) Nothing done or not done in accordance with this Act or the regulations constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.
>
> **No payment**
>
> (3) No amount is payable by the Crown with respect to any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts.[101]

76. As Professor de Beer notes, the scope of Section 70 is narrow.[102] Section 70 addresses only the financial and legal consequences of the exercise of the government's powers within the four corners of the Cap and Trade Act (*i.e.*, actions "under" the Act or done or not done "in accordance with the Act").[103]

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[101] Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 70, **CL-5** (emphasis added).

[102] The restrictive nature of Section 70 is particularly evident when one compares the language of Section 70 to other Canadian statutes granting significantly greater discretion. *See* Expert Report of Professor de Beer (15 July 2022), para. 163, **CER-3** (contrasting the government's regulatory powers under the Cap and Trade Act with statutes vesting "absolute discretion" or comprehensive control in the regulatory authorities).

[103] In this regard, Section 70 is consistent with the approach taken in most other cap and trade systems, where "government intervention that affects ownership of allowances (for instance by

(continued)

77. Sections 70(1) and 70(3) refer specifically to "any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts". Removal of emissions allowances is expressly permitted under the Act in specified circumstances.[104]

78. Section 70(2) for its part refers specifically to the Ontario Expropriations Act. As Professor de Beer points out, under the Expropriations Act, "'expropriate' means the taking of <u>land</u> …" and " 'injurious affection' means, where a statutory authority acquires part of the <u>land</u> of an owner, (i) the reduction in market value … and (ii) … personal and business damages …". The main statutory purpose of Section 70(2), therefore, was not even to address government actions regarding emission allowances or trading accounts and transactions, the taking or injurious affection of would not have been covered by the Expropriations Act. Rather, the main purpose of Section 70(2) was to address government actions regarding a land-based facility that might have been injuriously affected by, for instance, GHG attributions and emissions caps.[105] In regard to the phrase "otherwise at law", Professor de Beer further observes that "this phrase could not have been intended to preclude recourse to international trade law, including *NAFTA*, which Ontario legislators do not have the jurisdiction to limit."[106]

79. Thus, it is clear on the face of Section 70 that this provision addresses the scope of the regulator's liability for actions taken under the Cap and Trade Act and in furtherance of its objectives, not the scope of its discretion to take action as part of the termination of the statutory scheme. Indeed, the actions taken against the Claimants' allowances were not even taken under the Section 70 – they were taken under completely distinct legal instruments, Ontario Regulation 386/18 of 3 July 2018 (**Regulation 386/18**), repealing the Cap and Trade Program Regulation, and the Cancellation Act, newly introduced with the goal of terminating the Cap and Trade Program. This alone should be dispositive of the Respondent's argument.

80. In any event, the fact Section 70 could not serve as a warning to participants of the risk that they would be summarily denied compensation upon the termination of the Cap and Trade Program is further confirmed by Canadian law, which requires that such discretion as may exist under a statute must be exercised to achieve the object and purpose of the statute. In short, Canadian law does not allowed ministerial discretion to be abused.

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restricting the ability to transfer allowances or to hold them in a registry account), is typically limited to carefully circumscribed conditions that warrant such intervention in order to protect the market or the integrity of the emissions trading system". Expert Report of Professor Michael Mehling (15 July 2022), Executive Summary, **CER-4**. Indeed, "[e]ven in the jurisdiction that seems to allow for the strongest possible government discretion to adjust allowance holdings, the United States, a federal agency has recognized the risks posed by arbitrary State intervention and urged against taking such action, while the federal judiciary has acknowledged proprietary interests in emission allowances. *Ibid.*

[104] *See* Ontario Regulation 144/16, The Cap and Trade Program, Sections 18, 43, 52, **CL-6**.

[105] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 195-196, **CER-3**.

[106] *Id.*, para. 196.

81. As is well-established under Canadian law, the doctrine of improper purpose limits executive statutory and regulatory discretion. In the seminal decision of *Roncarelli v. Duplessis*,[107] the Supreme Court of Canada evaluated whether the Premier of Québec had exercised his discretion unlawfully by intervening in an administrative proceeding. The Court explained the limits of statutory discretion as follows:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute . . . "Discretion" necessarily implies good faith in discharging public duties; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.[108]

82. In regard to the "good faith" exercise of statutory discretion, the Court further explained that this means "carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose".[109]

83. Following this opinion, Canadian courts, including Ontario courts, have "exercised the authority to ensure that executive discretion is not exercised for an improper purpose, *i.e.*, a purpose that is outside of the purposes for which the statute or regulation created the discretionary power that is purportedly exercised.[110] For example, the Ontario Superior Court of Justice has found the Ontario Government made a decision for an improper purpose where that decision was "arbitrary and unrelated to the purposes of the statutory or regulatory discretion being exercised."[111]

84. Notably, in applying the doctrine of improper purpose, the Supreme Court of Canada has found that the scope of discretion is constrained not only by the bounds of the statute but also the need to comply with international law. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Court elaborated on this additional layer of constraint as follows:

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[107] *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, [1959] S.C.J. No. 1, at p. 143 S.C.R, **Exh. LK-61**.

[108] *Id.*, p. 140.

[109] *Id.*, p. 143.

[110] *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062, para. 53, **CL-140**.

[111] *Id.*, para. 64 (examining Tesla's challenge to the terms upon which the Electric and Hybrid Vehicle Incentive Program was to be discontinued by the Ford government, which would have the effect of excluding Tesla, and finding that the government's "exercise of statutory and regulatory discretion was arbitrary; it was unrelated to the achievement of the supposed policy goal", "not related to any of the conservationist purposes of the electric car subsidy program" and "not related to any purposed under the Public Transportation and Highway Improvement Act … Therefore, it cannot stand.").

> That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted" …
>
> Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion …[112]
>
> We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with . . . the values and principles of customary and conventional international law …[113]
>
> It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law.[114]

85. Interpreting Section 70 as signalling to participants that their allowances could be expropriated without compensation, upon a radical change of policy to summarily throw out the Program altogether, is inconsistent with the above interpretative principles. The lawful exercise of any discretion granted under Section 70 cannot reasonably be understood to include *de facto* destroying the Program through irresponsible and reckless statements, such as the Premier-elect's sudden announcement of 15 June 2018; imposing a *de jure* freeze on the totality of allowances held in Ontario CITSS accounts, as Ontario did through Regulation 386/18; or arbitrarily picking and choosing candidates for compensation between different categories of participants, as expressed in the Cancellation Act itself. Indeed, as Graeme Martin notes:

> KS&T might have assumed regular business risk inherent in investing in emissions markets related to the value of the allowances it held, but it did not assume the risk that the entire Program would be abruptly cancelled with arbitrary compensation. In any event, it is difficult to reconcile Canada's argument with the fact that some participants were eligible for, and did receive, compensation under

[112] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 108, **JDB-11**.

[113] *Id.*, para. 114 (emphasis added).

[114] *Id.*, para. 182 (emphasis added).

> the wind-down scheme imposed by the incoming Conservative government. If the purpose of the Cap and Trade Act was to shield the Ontario government from any payment of compensation to participants, then it does not make sense that Ontario would subsequently choose to pay compensation and discriminate between participants in the Program.[115]

86. Thus, the Respondent's effort to reinterpret Section 70 as putting the Claimants "on notice" that they would not be compensated for their investments in Ontario is unavailing.

(b) The Respondent's Minimization of the Terms and Effect of the OQC Agreement is Unsustainable

87. In the Memorial, the Claimants described the manner in which Ontario, Québec and California signed the OQC Agreement on 22 September 2017, effectively linking their three jurisdictions into a single allowances market as of early 2018.[116] The OQC Agreement among other provisions expressly set out a withdrawal procedure at its Article 17, requiring any party deciding to withdraw from the Agreement to endeavour to provide 12 months' notice of intent to withdraw to the other Parties, and to match the effective date of withdrawal with the end of a compliance period.[117] The Claimants further described how the conclusion of this Agreement pointed to a stable commitment on the part of Ontario and an obligation to act in good faith to ensure an orderly exit, should the province ever seek to withdraw.[118] It was on the basis of these legitimate expectations that the Claimants continued to invest in the Ontario market in 2018.

88. In its Counter-Memorial, the Respondent seeks to disavow the OQC Agreement, claiming that it was "non-binding" and did "not link the three programs."[119] It further attempts to downplay the significance of the OQC Agreement by asserting that the Agreement was only "signed by the representatives of three subnational entities" and was not intended to "prevent any party to the agreement from withdrawing unilaterally."[120] The Respondent's attempts to resile Ontario from the plain terms of

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[115] Second Witness Statement of Graeme Martin (18 July 2022), para. 31, **CWS-5**.

[116] Claimants' Memorial, paras. 60-64.

[117] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 17, **CL-8** ("A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavour to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to match the effective date of withdrawal with the end of a compliance period. Withdrawal from this Agreement does not end a Party's obligations under article 15 regarding confidentiality of information which continue to remain in effect. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.").

[118] Claimants' Memorial, para. 161.

[119] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 55-56, 257.

[120] *Id.*, para. 257.

the Agreement *post hoc* are as unedifying as they are wrong. The OQC Agreement plainly and obviously promoted reasonable and legitimate expectations on the part of participants in the Cap and Trade Program (including the Claimants) that Ontario was committed to the long-term success of the Program with California and Québec, and that any withdrawal of one of the Parties to the OQC Agreement would be "orderly" and in accordance with its terms. Ontario's violation of these expectations was plain and obvious to any right-thinking observer.

89. First, the Respondent's attempt to distance itself from the OQC Agreement on the basis that it was only signed by "subnational entities" is unprincipled and ultimately inconsequential. The actions of subnational entities, including Ontario and Québec as provinces of Canada, are attributable to Canada.[121] The point is that the OQC Agreement itself created reasonable expectations both as to the stability of the Cap and Trade Program and to an orderly, phased-out exit from it, if any, through solemn commitments publicly made by the highest authorities in the three concerned jurisdictions. It is particularly troubling that notwithstanding these facts the Respondent should in effect assert the OQC Agreement was not worth the paper it was printed on. In clear contrast to the bad faith position the Respondent now articulates for the purposes of this arbitration, former Minister Glen Murray – the Ontario Minister of the Environment and Climate Change responsible for the introduction of the Cap and Trade Program – wrote at the time of the importance of subnational governments in the fight against climate change in 2015, referencing a number of subnational agreements such as the Regional Greenhouse Gas Initiative (**RGGI**), California's "Under 2" Memorandum of Understanding, and the Western Climate Initiative.[122] When Ontario, Québec and California signed the Agreement, the Premier of Ontario declared:

> Climate change is a global problem that requires global solutions. Now more than ever, we need to work together with our partners around the world and at home to show how our collaboration can lead to results in this international fight. Today's carbon market linking agreement will add to the success we have already seen in reducing GHG emissions in Ontario, California and Quebec. We are stronger together and by linking our three carbon markets we will achieve even greater reductions at the lowest cost. I look forward to continuing to work with Governor Brown and Premier Couillard on our common goals, including advocating for the adoption of carbon markets and emissions cap programs across North America and around the world.[123]

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[121] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article 4, **CL-51** ("1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.").

[122] Glen Murray, "A Call to Action" (2015), **Exh. C-182**.

[123] State of California, Office of the Governor, California, Quebec and Ontario Sign Agreement to Link Carbon Markets (22 September 2017), **Exh. C-183**.

90. With her declaration, the Ontario Premier at the time clearly stated the seriousness of Ontario's intention of working together with California and Québec, the importance of the commitments that were undertaken under the OQC Agreement, and the expectation that all three jurisdictions would continue to work together well into the future. Ontario was not signing a formal public agreement with its fingers crossed behind its back, nor could it have entered into such an agreement in good faith expecting to rely on the Respondent's current argument that "sub-national entities cannot enter into binding nation agreements". That is not how Ontario sold the Agreement to the public, nor should the Tribunal accept this line of argument now. The Respondent's attempt to trivialise the importance of the OQC Agreement between Ontario, Québec and California as merely an agreement between "subnational entities" is both unbecoming and of no effect.

91. The Respondent's attempt to minimize the importance of the OQC Agreement is equally unavailing in light of the "backstop" carbon pricing jurisdiction it has legislated and affirmed through the Supreme Court of Canada. The Respondent expressly recognized Québec's and Ontario's cap and trade programs as sufficiently stringent approaches to price industrial GHG emissions. Consequently, it did not apply the "backstop" carbon pricing regulations in lieu of the continuing Québec cap and trade program pursuant to the Federal Government's Greenhouse Gas Pollution Pricing Act.[124] The Québec cap and trade program is therefore effectively endorsed by, and incorporated into the federal approach, and is not the standalone approach of a subnational entity. The Respondent similarly contemplated recognizing Ontario's Cap and Trade Program for the purposes of the federal backstop during early development of the policy, prior to Ontario's cancellation and termination of the Cap and Trade Program and subsequently endorsed Ontario's new carbon pricing system. In other words, the Respondent itself through its actions was signalling support for these frameworks and their related linkage functions, despite now taking the position they were not to be trusted.

92. Second, the Respondent's assertion that the OQC Agreement "did not link the three programs" and its related arguments that each jurisdiction therefore had "regulatory autonomy" over its participation in the linked program miss the key point.[125] While each jurisdiction was required to implement its own statutory and regulatory framework for the creation and administration of each of the Programs in their respective jurisdictions, the OQC Agreement provided the basis for the mutual recognition of the Parties' compliance instruments,[126] the agreement to hold joint auctions with harmonized procedures,[127] and the agreement to use a common registry system and auction platform. As such, it was the foundation of the "single market" in allowances. Linkage and interdependence were in fact legislated features of the Ontario Cap and Trade Program from the early days of its elaboration and are

[124] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, Schedule 1, **Exh. MB-30**.

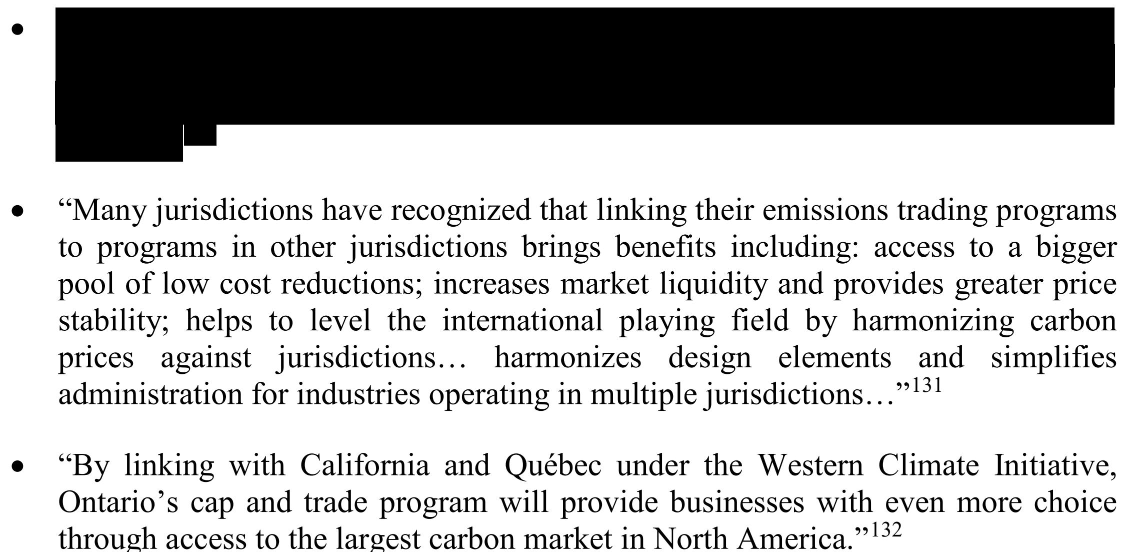
[125] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 55, 257.

[126] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 6, **CL-8**.

[127] *Id.*, Article 9.

accepted as such by the Respondent for the purposes of equivalency with the federal backstop.[128] The ability to achieve GHG emissions reductions more efficiently through purchases outside of the home jurisdiction of a cap and trade program is also widely accepted. The Respondent's argument of "regulatory autonomy" is consequently at odds with the design and intention of the Cap and Trade Program and its own actions under the Federal Government's Greenhouse Gas Pollution Pricing Act.

93. Moreover, the Respondent's attempts to minimize the role of the OQC Agreement in Ontario's Cap and Trade Program is contradicted by its own submissions, and documents produced during the document production phase of these proceedings. The Respondent makes clear throughout its Counter-Memorial that one of the purposes of the Cap and Trade Act was eventual linkage with California and Québec.[129] The importance of linking with California and Québec was also reiterated numerous times in internal documents of the Ontario Government, including the following:



- "Many jurisdictions have recognized that linking their emissions trading programs to programs in other jurisdictions brings benefits including: access to a bigger pool of low cost reductions; increases market liquidity and provides greater price stability; helps to level the international playing field by harmonizing carbon prices against jurisdictions… harmonizes design elements and simplifies administration for industries operating in multiple jurisdictions…"[131]

- "By linking with California and Québec under the Western Climate Initiative, Ontario's cap and trade program will provide businesses with even more choice through access to the largest carbon market in North America."[132]

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[128] See, e.g., "Article 6 and North American Linkage: Finding Synergies", Workshop held in Toronto, ON (22 March 2018), **Exh. C-218**.

[129] Respondent's Counter-Memorial, para. 52.

[131] Ontario Government, Cap and Trade Design Options (5 November 2015), p. CAN-0119 ("Linking with Québec and California"), **Exh. C-185**.

[132] Ontario Government, Cap and Trade Linking Statute (28 August 2017), p. CAN-0387, **Exh. C-186**.

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94. These sentiments were also reflected in public statements by Ontario,[134] and the care taken by Ontario officials to match Ontario's own regulatory framework as much as possible with the existing California and Québec regulations, [135]

95. Third, the Respondent's argument that the OQC Agreement was "incapable of supporting any legitimate expectations, including with regard to how and when a party could withdraw"[136] is flatly contradicted by the express terms of that Agreement. As the Claimants explained in the Memorial, and set out above, Article 17 of the OQC Agreement expressly set out a withdrawal procedure, requiring any party deciding to withdraw from the Agreement to endeavour to provide 12 months' notice of intent to withdraw to the other parties, and to match the effective date of withdrawal with the end of a compliance period.[137] Moreover, the very fact that Ontario had entered into a formal agreement with California and Québec to link their respective jurisdictions into a single market, clearly was intended to and did generate expectations as to the intended longevity and stability of Ontario's Program.

96. The Respondent seeks to minimize the effect of Article 17, stating that the OQC Agreement did not provide for any "fixed term", and that Article 17 of the Agreement was simply a "best efforts" provision.[138] These arguments are not credible and no

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[133]

[134] *See*, *e.g.*, MOECC, Cap and Trade Program Design Options (16 November 2015), p. 4, **Exh. C-20**; Ontario Newsroom, "Québec, Ontario and California Join Forces to Fight Climate Change" (22 September 2017), **Exh. C-188** ("Today's carbon market linking agreement will add to the success we have already seen in reducing greenhouse gas emissions in Ontario, Québec and California. We are stronger together, and by linking our three carbon markets we will achieve even greater reductions at the lowest cost. I look forward to continuing to work with Premier Couillard and Governor Brown on our common goals, including advancing carbon markets and emissions cap programs across North America and around the world.").

[135] Cape and Trade Program Design Options Report Back to Stakeholders (January 2016), p CAN-1939, **Exh. C-189**; Ontario Government, Cap and Trade Linking Statute (28 August 2017), **Exh. C-186**; As the Claimants will note, one notable distinction between Ontario and Californian regulations was the former's decision not to deny allowances the status of property rights, as California did in its equivalent framework. *See* Section III B (1)(a)(4), paras. 285-290 below for discussion.

[136] Respondent's Counter-Memorial, para. 179.

[137] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 17, **CL-8**.

[138] Respondent's Counter-Memorial, para. 56.

answer to the legitimacy of the Claimants' expectations. The purpose of Article 17 of the OQC Agreement was clearly to signal that Ontario would pull out of the Agreement, if at all, in a rational and orderly manner. In its own internal documents, Ontario repeatedly highlighted Article 17 as a "major component" of the OQC Agreement, stating that

97. Contrary to the Respondent's current attempt to rewrite history, Ontario entered into the OQC Agreement fully aware of its commitments, commenting that it would be "difficult to undo" the Cap and Trade Program to participants. Graeme Martin recalls to this effect:

> At the time the Cap and Trade Program was being introduced by Ontario and linked with California and Québec, I recall attending a conference where the then-Minister of the Environment, Glen Murray, was speaking. As I reported to my team at the time, a participant in the conference asked what would happen in the event of a "divorce" between the three jurisdictions, and the former Minister providing strong assurances that the government had gone to "great lengths" to make it difficult to unwind the program, including a 12 month notice period. I note that this is consistent with contemporaneous public statements made by then-Minister that were reported in the press at the time. For example, in an interview conducted on September 27, 2017, Former Minister Murray stated:
>
> > We're tracking to be a zero waste and zero carbon society within 30 years which is the time frame we have to do it in. Last Friday, when Governor Brown, Premier Wynne and Premier Couillard announced the formalization of this huge carbon market economy in Germany… with California's Governor Brown, that's historic. That's going to create a foundation. It's very hard to undo cap and tra[de]. When you have it linked to across North America, that may be the biggest thing that's working to save this planet…[140]

[139]

[140] Second Witness Statement of Graeme Martin (18 July 2022), para. 22, **CWS-5** (citing: Email from Graeme Martin to KS&T, Ontario C+T Forum Notes (April 28, 2017), **Exh. C-194, Exh. C-195** ("per Minister Murray – C&T program difficult to undo, and Conservative opposition not in agreement that a carbon tax should be put in place instead."); Tvo Today, Transcript: "Turning Over a New Leaf" (September 27, 2017), **Exh. C-196** (emphasis added)."). An article by "specialized international media" submitted by Canada itself with its Counter-Memorial confirms the efforts of the Ontario government to ensure that the Cap and Trade Program would remain in place in the long term. *See* Argus Media, "Carbon auction suggests optimism over Ontario" (24 May 2018), **Exh. R-46** ("Former environment minister Glen Murray, who oversaw the creation of Ontario's cap-

(continued)

98. These sentiments are also supported by Ontario's own documents produced in this arbitration. In a "Question and Answer" document prepared by Ontario, the Government considered the precise scenario of a change of government in one of the joint jurisdictions, stating as follows:

99. Clearly, the factual arguments developed by the Respondent for the purposes of this arbitration to downplay the significance of the OQC Agreement are completely at odds with the evidence it itself has produced, and what was represented to the participants of the Cap and Trade Program by Ontario at the relevant time.

100. To the extent that the Respondent argues that the Claimants bore the risk that Ontario would simply disregard its publicly-stated agreement with California and Québec, because it was only a "best efforts" provision, this argument is disingenuous. The Claimants, like all participants in the Ontario market, held reasonable and legitimate expectations that Ontario would act in good faith in relation to its undertaking to endeavour to provide 12 months' notice of withdrawal from the program. If participants had lacked confidence in Ontario's good faith, there would be limited participation in the joint market as a general matter and specifically in May 2018. That was not the case. Unfortunately, Ontario betrayed their confidence.

101. In any event, despite its protestations that Ontario was only required to make "best efforts" to comply with the OQC Agreement, the Respondent has been unable to produce any evidence showing that the Ontario government even considered its obligations at all when proceeding to destroy Cap and Trade, let alone tried to make "best efforts" to respect them. For the avoidance of doubt, the Claimants do not assert that Ontario had no right to exit the OQC Agreement or to exit the Program more generally. However, the Claimants – along with California and Québec – held reasonable and legitimate expectations that Ontario would act in good faith with the terms of the OQC Agreement to withdraw in an orderly fashion over the course of 12 months. Ontario did exactly the opposite.

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and-trade system, has said that it will be "almost impossible" for someone to undo the program and warned they would "pay a very difficult price" to do it.").

[141]

(c) The Respondent's Reliance on the Ford Election Campaign as "Notice of Risk" to Participants in May 2018 is Unsupported

102. In the Memorial, the Claimants explained that KS&T was conscious of the Ontario Progressive Conservative Party's platform opposing the Cap and Trade Program and of the upcoming election, but concluded that these circumstances should not reasonably preclude participation in the May 2018 auction, because: (1) the auction was held prior to the election; (2) even if the Party were elected in Ontario, the formal swearing in of the new government would not be until well after the election; and (3) Ontario had committed in good faith to endeavour to provide no less than 12 months' notice if it decided to withdraw from the OQC Agreement.[142] As further explained in the Claimants' Memorial, these conclusions were also held by the cap and trade industry as a whole.[143]

103. In its Counter-Memorial, the Respondent asserts that the Claimants were aware that the Ontario Progressive Conservative Party opposed the Cap and Trade Program, and that the Claimants therefore bore the risk of participating in the May 2018 auction.[144] It goes so far as to assert that "[a] sophisticated entity like KS&T would have been aware of the risks associated with participating in the May auction in these circumstances."[145] This argument is unsustainable, and seeks to both distort the timeline of events and distract from the illegality of the Premier-elect's actions.

104. First, and as described at length in the Claimants' Memorial, the auction held on 15 May 2018 occurred before the election was held on 7 June 2018. The Respondent grudgingly admits that it "is true" that the auction was held *prior* to the election, but in the same breath asserts that "the Claimants were also well aware that the transfer of the allowances into winning bidders' CITSS account would only occur on June 11, 2018, after the election."[146] This argument is baffling. In essence, the Respondent seems to assert that the Claimants should have expected that its allowances would be cancelled without compensation, because the time it took for Ontario to process the Claimants' payment and to distribute the allowances between 15 May 2018 and 11 June 2018 covered a date of an election by four days, even though the transfer of power between the two governments was not scheduled to occur until much later. In short, it asserts that the Claimants should have expected a "wild west" post-election period, and assumed that Ontario would not abide by its own laws in making an unorderly transition of power. The Respondent's position – if taken at face value – also insinuates that California and Québec should have been on notice that Ontario might not transfer the allowances from the joint auction in good faith, because the transfer of those allowances was scheduled after the election. This line of argument should be dismissed out of hand.

[142] Claimants' Memorial, paras. 185-188.

[143] *Id.*, para. 189; Witness Statement of Michael Berends (5 October 2021), paras. 79, 95, **CWS-1**.

[144] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 66-68, 72-74.

[145] *Id.*, para. 73.

[146] *Ibid*.

105. Second, while the Progressive Conservative Party in Ontario may have opposed the Cap and Trade Program during the election campaign, the Party at no point represented that if elected it would recklessly and unilaterally disregard and breach their agreement with California and Québec and rush to exit the Program in the way that they did. Ontario courts have also confirmed that an election platform does not constitute notice. As the Ontario Superior Court of Justice noted in the context of a challenge to the legality of the Cancellation Act, in the absence of adequate public consultations:

> There is no argument that the general election gave the electorate notice of the precise way in which the government intended to repeal cap and trade, when it intended to do this, or what, if anything, it intended to enact in its place.[147]

106. In other words, the Ontario Government did not even attempt to argue in its defence to the Ontario Superior Court that it had provided sufficient particulars on its election promise to cancel the Cap and Trade Program. Even if the Progressive Conservative Party were expected to win by a landslide and control a majority of seats in the legislature (which was not a certainty during the election campaign), it was not clear how long the withdrawal would take nor indeed whether or not it would even occur. In these circumstances, it is difficult to see how the Claimants (or the industry more broadly) could have anticipated that a government not yet in power could destroy the Program in the disorderly and unlawful manner it did.[148]

107. In fact, to the extent that the Progressive Conservative Party in Ontario made statements on how they intended to cancel the Cap and Trade Program, it confirmed its intention that "[i]n transitioning away from cap-and-trade and into a carbon pricing system, the government of Ontario should ensure that businesses are kept whole for credits purchased in good faith prior to the transition…. [and] that a 'smooth transition' … is entirely feasible."[149] While this statement was made by the previous leader of the Progressive Conservative Party, and not Mr. Ford, it was made just six months before the election, expressed as a Party position, and not expressly denounced by the Ford campaign. It was therefore eminently reasonable for the Claimants and all market participants to expect that any cancellation of the Cap and Trade Program by the Progressive Conservative Party (whoever the leader) would be orderly and "smooth".

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[147] *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, para. 59, **CL-33**.

[148] Second Witness Statement of Michael Berends (16 July 2022), para. 23, **CWS-7** ("In short, while Ontario's potential pull-out of Cap and Trade was something increasingly looming in 2018, based upon the extensive contacts I had with participants of all types throughout the life of the Ontario Cap and Trade Program, no one foresaw Ontario pulling out in the hasty and destructive manner it ultimately did.").

[149] Conservative Progressive Party, "People's Guarantee" (November 2017), p. 74, **Exh. C-197**.. *See also* Ontario PC, "Patrick Brown and the Ontario PCs release the People's Guarantee" (November 2017), **Exh. C-198**.

108. Third, in its Counter-Memorial, the Respondent barely mentions the actions taken by the Premier-elect on 15 June 2018 in abruptly cancelling the Cap and Trade Program before he was even sworn in to government. It nonetheless effectively maintains that it is the Claimants who should have assumed the risk that the Premier-elect would act illegally and *ultra vires* once the election results were known.[150] In fact, the Respondent goes so far as to defend the Premier-elect's actions, stating that the Claimants "fail to explain why it was 'out of bounds' for a Premier-Designate to announce his government's intention" before entering into power in Ontario.[151] As discussed in paragraphs 133 to 138, and 402 to 410 below, the Premier-elect did far more than merely announce a policy intention: he provided an express direction to government officials to act with immediate effect, in a manner contrary to Ontario law.[152] Moreover, those government officials acted further to that express *ultra vires* direction. With respect, the Claimants consider these facts speak for themselves, and do not require further explanation as to why such behaviour might be out of bounds in a democratic society, or why could it not be held within the reasonable contemplation of the Claimants.

109. In sum, while it was clear in May 2018 that the future of Ontario's Cap and Trade Program was uncertain, as the Claimants demonstrated in the Memorial, no one in the market reasonably expected Ontario to behave in the rash and irresponsible manner in which it did, when it suddenly and unilaterally threw out the Program altogether.[153]

(d) The Respondent's Own Evidence Undercuts its Argument of Alleged "Uncertainty" of Cap and Trade Markets

110. The Respondent further asserts that KS&T "knew that the future of cap and trade programs was inherently uncertain due to political opposition and regulatory challenges."[154] In this respect, it argues that: (1) Ontario's Cap and Trade Program entered a period of uncertainty in late 2017;[155] and (2) that the U.S. State of New Jersey's withdrawal from the RGGI demonstrated the uncertainty surrounding cap and trade programs.[156] Consequently, the Respondent asserts, the Claimants could have had no legitimate expectations when it "decided to participate in the May 2018

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[150] Respondent's Counter-Memorial, para. 73.

[151] *Id.*, para. 277. *See also id.*, para. 78 ("The date for the formal transition of power and swearing-in of the new government was set for June 29, 2018.").

[152] *See* Sub-Section II C.1(a) below; Email from Paul Evans, Deputy Minister of MOECC to Jeff Hurdman, "Direction – cap and trade auction" (15 June 2018, 12:04:10), **Exh. C-199**.

[153] Second Witness Statement of Michael Berends (16 July 2022), para. 24, **CWS-7** ("In any event, such statements are disingenuous and borderline cynical – no one in the industry (including 'sophisticated' players such as banks, and the partner jurisdictions California and Québec) could have reasonably expected or somehow 'prepared' for a contingency whereby Ontario would sell allowances in auctions, collect the proceeds, and then simultaneously render those allowances worthless *as well as* refuse to reimburse participants for what they had paid for.").

[154] Respondent's Counter-Memorial, para. 255.

[155] *Id.*, paras. 66-71, 210.

[156] *Id.*, paras. 210, 255.

auction."[157] These arguments are undermined by the evidence on the record of these proceedings, including from documents produced by the Respondent during the course of this arbitration.

111. First, the Respondent's assertion that "[i]n late 2017, analysts started to connect poor auction performance with the uncertainty about the future of the Ontario's [*sic*] cap and trade program" is flatly contradicted by Ontario's own comments from around that time. In August 2017, the Ontario Government confirmed that it had held two successful auctions,[158] while simultaneously noting that [159] For this reason, Ontario forecasted an 80 percent subscription rate for overall participation in the Ontario Cap and Trade Program, explaining as a "key message" for government that:

> Auction results are not indicative of the overall strength of the market and can be affected by a number of factors including business decisions related to the market signal provided by the carbon price … The real measure of success is greenhouse gas reductions and not the number of allowances that sell at any particular auction.[160]

112. In any event, the last Ontario-only auction held in November 2017 resulted in an 82 percent rate of sale for 2017 "current vintage" allowances, and 100 percent rate of sale for 2020 "future vintage" allowances.[161] Indeed, the rate of bids for 2020 "future vintage" allowances was listed by Ontario as *145 percent*, meaning that the total qualified bids vastly outweighed the number of allowances available.[162] Even though the purchase of 2017 "current allowances" was still over 80 percent (the rate anticipated by Ontario due to the fact that it was early in the compliance period, as noted above), Michael Berends provides further insight into why the bids were less for this category of allowances at that time:

> Based upon my direct engagement in Ontario's Cap and Trade Program market in 2017, I can confirm that Ontario's failure to sell all of its emissions allowances at the final 2017 auction was mainly due to the unexpected absence (or very limited involvement) of one of the largest fuel distributors, a major player who had participated in the first three 2017 auctions. I note that future vintages at that same

[157] *Id.*, para. 210.

[158]

[159]

[160] Ontario Government, Cap and Trade Linking Statute (28 August 2017), p. CAN-0387, **Exh. C-186**.

[161] Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances November 2017 Ontario Auction #4, **Exh. C-69** (the total 2017 current vintage allowances available for sale was 25,296,369, while the total sold was 20,898,000; while the total 2020 future vintage allowances available for sale, and sold, was 3,116,700).

[162] *Ibid*.

> auction were fully sold out – that is not behaviour consistent with participants wary of a sudden future pull-out from the Program.[163]

113. Overall, and in direct contradiction to the Respondent's arguments in the present proceedings, Ontario itself clearly did not consider that there was "poor auction performance" nor that it could be linked with the "uncertainty" of the Cap and Trade Program. This is unsurprising given that, at the same time the Respondent asserts that there was "uncertainty" in the future of cap and trade programs, Ontario was in the process of finalizing its linkage with California and Québec to broaden and strengthen its Program and ensure its success over the longer term.[164]

114. Second, the Respondent's reliance on one report of "[s]pecialized international media" to support the uncertainty of the future of cap and trade in Ontario in late 2017/early 2018 does little to support its argument. The report was published nearly two weeks *after* the auction was held on 15 May 2018, and came out too late to depict perceptions of Ontario's Cap and Trade Program in late 2017/early 2018. Instead, it amounts to nothing more than commentary speculating on past motivations with the benefit of hindsight.[165] Moreover, the Respondent's select excerpts from this article neglects to include the following commentary:

> <u>The latest results from the Western Climate Initiative (WCI) carbon allowance auction [*i.e.* that of May 2018] indicate that industry officials are betting on the survival of Ontario's cap-and-trade program</u>.
>
> [. . . .]
>
> <u>Ontario started its carbon market in 2017 and linked with the California and Québec programs this year, significantly expanding the market and adding to the number of trading partners available to companies</u>. Girod noted that 45 Ontario companies qualified for bidding in the latest auction, 10 more than in February.
>
> <u>Numbers like that suggest that Doug Ford, leader of Ontario's Progressive Conservative Party, could find it difficult to disentangle the province from a climate policy that industry has already invested in</u>. More interests than ever have committed to the program, at least for the next two years covered by the current vintage allowances sold at this week's auction.

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[163] Second Witness Statement of Michael Berends (16 July 2022), para. 17, **CWS-7**. *See also* Second Witness Statement of Graeme Martin (18 July 2022), paras. 19-20, **CWS-5** ("While some traders may have decided to wait until this occurred just a month or so after the November 2017 auction, I note Canada's evidence showing that KS&T made its largest purchase of allowances in the Ontario-only auctions in the fourth and final auction held on 29 November 2017. It was certainly not the case as of the end of 2017 that KS&T considered the survival of the Ontario Cap and Trade Program to be uncertain, as Canada posits.").

[164] *See* para. 87 *supra*.

[165] Respondent's Counter-Memorial, para. 70, citing Argus Media, "Carbon auction suggests optimism over Ontario" (24 May 2018), **Exh. R-46**.

> [. . . .]
>
> Former environment minister Glen Murray, who oversaw the creation of Ontario's cap-and-trade system, has said that it will be "almost impossible" for someone to undo the program and warned they would "pay a very difficult price" to do it.
>
> Key components of the province's climate strategy and market structure are enshrined in legislation and could be particularly difficult to repeal.[166]

115. If anything, therefore, the Respondent's own evidence only serves to support the Claimants' expectations in May 2018.

116. Third, the Respondent points to the withdrawal of New Jersey from the RGGI program as its sole example of "States' decision in recent years to leave regional initiatives", as "proof" of the uncertainty surrounding cap and trade programs.[167] In fact, New Jersey's withdrawal from RGGI was undertaken far more deliberately than Ontario's, on a much longer calendar, and in a manner that generated far fewer risks of adverse consequences to partner systems. Far from proving the Respondent's point, this example only serves to confirm that the Claimants had reasonable and legitimate expectations that any withdrawal from the Cap and Trade Program would be orderly, and in line with the commitments made to trading partners California and Québec.

117. The RGGI program was established in 2005 by way of a Memorandum of Understanding (**MOU**) between seven signatory U.S. States (Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont). Similarly to the OQC Agreement, that MOU included a provision guiding the withdrawal of a signatory state:

> Withdrawal of a Signatory State. A Signatory State may, upon 30 days written notice, withdraw its agreement to this MOU and become a Non-Signatory State. In this event, the remaining Signatory States would execute measures to appropriately adjust allowance usage to account for the corresponding subtraction of units from the Program.[168]

118. In his second report, Dr. Stavins contrasts New Jersey's withdrawal from the RGGI program against Ontario's exit from the OQC Agreement, which only serves to highlight how such a process could be accomplished on a reasonable and non-destructive timetable despite the RGGI MOU stipulating a much shorter notice of withdrawal:

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[166] Argus Media, "Carbon auction suggests optimism over Ontario" (24 May 2018), **Exh. R-46**.

[167] Respondent's Counter-Memorial, paras. 210, 255.

[168] Regional Greenhouse Gas Initiative, Memorandum of Understanding (December 20, 2005), Article 5.B, **Exh. FK-2**.

> First, while New Jersey quickly provided notice to the market about compliance requirements for capped entities in New Jersey, Ontario was slow to provide such notice, creating uncertainty for other affected jurisdictions. On May 26, 2011, Governor Chris Christie announced that New Jersey planned to withdraw from RGGI. Five days later, on May 31, he clarified that the withdrawal would occur at the end of the first compliance period, December 31, 2011, thus providing seven months of notice prior to withdrawal and clarifying that New Jersey entities would be required to fulfill their compliance obligations through the end of the compliance period. Hence, within five days of the initial announcement, Governor Christie provided other RGGI states with a clear understanding of New Jersey's intentions and time to modify their programs, as needed, given the withdrawal.
>
> By contrast, on June 15, 2018, with two and a half years remaining in the compliance period, Premier-Designate Ford announced that his government's first act following the swearing in would be the cancellation of Ontario's cap-and-trade program, to be effective immediately, including that Ontario would not be participating in the WCI auction two months later or in future WCI auctions. This announcement was abrupt and in tension with the California-Ontario-Quebec linkage agreement provisions that a withdrawing jurisdiction would endeavor to give notice of withdrawal one year in advance and to coordinate withdrawal with the end of a compliance period. Mr. Ford did not provide any clarity concerning Ontario entities' compliance obligations at that time, and it does not appear that any was provided until at least July 25, when a draft of the cancellation legislation was released.[169]

119. Dr. Stavins also shows that the potential risks created by Ontario's withdrawal vastly exceeded those created by New Jersey's withdrawal:

> Ontario entities' CITSS accounts held approximately 220 million allowances at the time of Ontario's cancellation. This represents approximately *53 percent* of California's and Québec's total annual compliance obligations for 2018, the year of Ontario's abrupt announcement. This is nearly an order of magnitude larger than the proportional excess supply caused by New Jersey's withdrawal from RGGI, which I estimated above to be just *6 percent*. Put simply, as a result of Ontario's abrupt announcement, California and Québec faced the prospect of an enormous influx of allowances from Ontario entities, and thus an enormous excess supply of allowances relative to the demand for allowances by California and Québec entities.[170] … the decision by Governor Christie to provide notice of compliance expectations and the relatively small risk the withdrawal therefore had on RGGI's environmental integrity stands in stark contrast to the failure of Premier-Designate Ford to provide such

[169] Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 88-89, **CER-2** (emphasis added).

[170] *Id.*, para. 93 (emphasis original).

> notice given the large risk Ontario's abrupt cancellation posed for the linked WCI systems.[171]

120. Moreover, as Dr. Stavins notes, from a timing perspective, New Jersey's orderly withdrawal approach would have been similarly feasible for Ontario:

> Chris Christie was sworn in as Governor of New Jersey on January 19, 2010. … [H]e did not announce New Jersey's withdrawal from RGGI until May 2011, nearly a year and a half later, and the withdrawal was not effective until the end of the then-current RGGI compliance period in December 2011. Thus, New Jersey continued to participate in RGGI for nearly two years after Mr. Christie's swearing in. By contrast, Mr. Ford announced before he had even been sworn in as Premier of Ontario that Ontario's cap-and-trade program would be cancelled as his government's first act of business. The time from his announcement on June 15, 2018 to the end of the then-current WCI compliance period in December 2020 – and thus the time that Ontario would have continued participating in the WCI system if it had followed New Jersey's orderly withdrawal approach – was just over two and a half years. This is only slightly longer than the period for which New Jersey continued to participate in RGGI after Mr. Christie's swearing in.[172]

121. Frank King had the same reaction to the Respondent's reliance on New Jersey's withdrawal from RGGI, noting that "KS&T indeed had expectations about what an 'orderly' withdrawal from regional cap and trade programs would entail, based on its experience in RGGI" and that "[u]nfortunately, the government of Ontario's abrupt and unprecedent actions departed from this experience, were not foreseeable, and caused KS&T significant harm."[173]

122. Finally, the Respondent's assertion that the "Claimants' fact witnesses in this arbitration acknowledge that they knew in early 2018 that Ontario's cap and trade program might be cancelled" is misleading.[174] As is clear from the witness statements submitted with the Claimants' Memorial, KS&T was conscious of the election and of the Progressive Conservative Party's platform, but concluded that even if that Party were to take power, and potentially change the course of Ontario's Cap and Trade Program, this should not preclude participation in the May 2018 allowances auction because any ultimate pull-out would take place in a fair and orderly fashion, if at all.[175] Indeed, the Respondent's attempt to distort the evidence provided by the Claimants' witness statements is disingenuous when compared with the statements themselves, excerpted below for the avoidance of any doubt.

- Graeme Martin stated:

[171] *Id.*, para. 95 (emphasis added).

[172] *Id.*, para. 97 (emphasis added).

[173] Second Witness Statement of Frank King (17 July 2022), para. 54, **CWS-6**.

[174] Respondent's Counter-Memorial, para. 71.

[175] Claimants' Memorial, paras. 186-190.

> Doug Ford represented the Ontario Conservative Party, which we knew had included opposition to the Cap and Trade Program as part of its campaign platform. However, KS&T expected that any incoming Ontario government – even if the Conservatives were elected – would only exit the Program, if at all, in an orderly manner, respecting the existing rights of all participants. The terms of Ontario's linkage agreement with California and Québec provided that each party would endeavour to provide 12-months' notice if any party to that agreement decided to withdraw from the Cap and Trade Program. Moreover, any such withdrawal was to take place only at the end of a compliance period (which in this case meant late 2020). Indeed, even after the Conservatives won the election, participants in the market expected that there would be a grace period before the new government was actually sworn in, meaning that there would not be any changes to the Program until July 2018 at the earliest. This notably meant that KS&T would be able to participate in the May 2018 auction and to use the credits to satisfy KS&T's delivery obligations between then and the end of June 2018."[176]

- Likewise, Paul Brown recalled:

> The first time I heard that the Ontario Cap and Trade Program might be cancelled was early in 2018, when the Ontario Progressive Conservative (**PC**) Party signalled that they were not supportive of the Ontario Cap and Trade Program and that if they were to win the election they might repeal it. As with any election promise, I believed that this announcement was by no means guaranteed to become policy should the PC Party win the election. In any event, it was certainly not possible to foresee that the scheme would be scrapped in the way that it was, notably without any compensation for market participants. Ontario had engaged with California and Québec in 2017 to endeavour to respect a 12-month phase out of any withdrawal from the joint cap-and-trade program. . . . KS&T reasonably concluded from this language that any withdrawal from the joint cap-and-trade program would be given on a year's notice, on the understanding that Ontario would seek to fulfil its commitments under the OQC Agreement in good faith. Moreover, the language of endeavouring to "match the effective date of withdrawal with the end of a compliance period" in practice meant that Ontario would presumably pull out, if at all, at the end of 2020 (i.e. the end of the current compliance period). In either case, KS&T would be able to take part in the May 2018 auction and dispose of any allowances it acquired through that process in an orderly fashion, regardless of the potential ultimate termination of the program.[177]

123. Consequently, the Respondent's statement that the Claimants' fact witnesses "acknowledge[d]" that the Cap and Trade Program might be cancelled, and therefore bore the risk of participating in the May 2018 auction, is based on misrepresentations and is completely unfounded.

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[176] Witness Statement of Graeme Martin (4 October 2021), para. 49, **CWS-2**.

[177] Witness Statement of Paul Brown (5 October 2021), para. 35, **CWS-3**.

(e) The Respondent Has Been Unable to Deny that Ontario Retained Jurisdiction and Control over Ontario CITSS Accounts and Allowances Contained Therein

124. Finally, throughout its Counter-Memorial, the Respondent argues that the Claimants accepted a "risk" that allowances purchased in the joint auctions were supplied by "the three jurisdictions", as if this somehow reduces Ontario's and the Respondent's liability. [178] Furthermore, it seems to assert that because KS&T paid for the allowances it purchased from Ontario through the "Financial Services Administrator subcontracted by WCI, Inc." which then "remitted the proceeds to Ontario", that this somehow means that Ontario was not responsible for the Claimants' loss following its arbitrary cancellation of the Cap and Trade Program.[179] These arguments are contrary to Ontario's legislative provisions and own internal documents, as described below.

125. First and foremost, the Respondent's arguments are unavailing in light of its acknowledgement that KS&T purchased these allowances as an Ontario market participant and the allowances all were held in KS&T's Ontario CITSS account.[180] The fact remains that KS&T paid USD 30,158,240.95 into bank settlements accounts as directed by Ontario, and received [redacted] allowances into its CITSS for this payment, all of which Ontario thereafter purported to annul without compensation.

126. Second, the Respondent's position is contrary to the terms of the OQC Agreement, and Ontario's own legislative provisions. For example, and as the Respondent itself points out, the Preamble to the OQC Agreement was clear that each Party retained its "sovereign right and authority" over its program regulations or enabling legislation.[181] That is, Ontario, California and Québec agreed that each was to manage the allowances held within their respective jurisdictions, in accordance with their respective rules. Ontario retained ultimate power and authority over all allowances held in Ontario CITSS accounts, including the Claimants'. The most striking illustration of Ontario's assertion of regulatory jurisdiction over all allowances held in Ontario CITSS account was of course its enactment of the Cancellation Act itself. The Cancellation Act, *inter alia*, purported to annul without compensation all allowances held by Ontario market participants in their respective CITSS accounts. There was no attempt by Ontario to parse out whether Ontario CITSS accounts held allowances originally contributed by Québec, or California, or Ontario: Ontario simply seized and destroyed them all. Moreover, despite undertaking to do so during the document

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[178] *See*, *e.g*., Respondent's Counter-Memorial, paras. 53-54 76.

[179] *See*, *e.g*., *id*., paras. 46, 284.

[180] *Id*., para. 76.

[181] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Preamble (Sixth Recital), **CL-8**. *See also id*., Article 14 ("Jurisdiction", which states "The Parties acknowledge that this Agreement does not modify any existing statutes and regulations nor does it require or commit the Parties or their respective regulatory or statutory bodies to create new statutes or regulations in relation to this Agreement, and agree that the provisions of the Agreement shall not be interpreted by the Parties as amending any agreement or provision of an agreement entered into or to be entered into by any Party.").

production phase,[182] the Respondent has been unable to produce evidence of any attempt by Ontario to reimburse either California or Québec for allowances released by the latter into the May 2018 public auction, held in Ontario CITSS accounts, and which Ontario had proceeded to annul *en masse*, retaining all monies paid to it.[183] The Respondent cannot credibly deny Ontario's and its own responsibility for the fate of these same allowances now.

127. Moreover, Regulation 144/16 to the Cap and Trade Act expressly provided that Ontario allowances were fungible with allowances provided by California and Québec.[184] As Dr. Stavins explained in his first expert report, this meant that "[a]ccount holders could not identify the system of origin for individual allowances and the WCI, Inc., the CITSS administrator, selected the allowances to transfer when

[182] The Claimants requested – and the Respondent agreed to search for – documents relating to any distribution of the allowances or funds amongst the linked jurisdictions, following the cancellation of the Cap and Trade Program. Yet, Canada failed to produce any responsive material responsive to the following requests: Documents (including records of transfers, receipts, or communications) relating to transfers to California and/or Québec following the cancellation of the Cap and Trade Program, and specifically:

a. documents relating to the transfer of any funds from the Government of Ontario to the jurisdictions of California and Québec relating to the cancellation of the emissions allowances provided to KS&T by those jurisdictions (as alleged by the Respondent) on 11 June 2018.

b. documents relating to any broader agreement reached between the Government of Ontario with the governments of California and Québec with respect to the withdrawal of Ontario from the Harmonization Agreement, and the cancellation of allowances issued by those jurisdictions.

See Claimants' Requests for Document Production, Annex A to Procedural Order No. 2 (12 April 2022), Request No. 11.

[183] The Claimants have also attempted to further substantiate their understanding of the distribution of the allowances and transfer of funds amongst the linked jurisdictions, as well as the earlier development of policy surrounding the "market participant" category of the Cap and Trade Program. This was done through requests submitted on 19 December 2019 pursuant to Ontario's *Freedom of Information and Protection of Privacy Act* (**FIPPA**) for access to documents held by relevant provincial ministries: *see* Witness Statement of Jonathan Eric Ockwell McGillivray (17 July 2022), para 6., **CWS-8**. The requests sought documents related to communications and decision-making by Ontario in and around the cancellation and termination of the Cap and Trade Program, as well as the earlier design of the market participant category: *see* Witness Statement of Jonathan Eric Ockwell McGillivray (17 July 2022), paras. 9-12, **CWS-8**. The Claimants have experienced protracted periods of no communication, prejudicial delay and excessive fee estimates in relation to the FIPPA requests submitted to the Ministry of Environment, Conservation and Parks and Ministry of Finance: *see* Witness Statement of Jonathan Eric Ockwell McGillivray (17 July 2022), paras. 21-40, **CWS-8**. The requests have been appealed to the Information and Privacy Commissioner of Ontario and remain outstanding and unresolved: *see* Witness Statement of Jonathan Eric Ockwell McGillivray (17 July 2022), paras. 31 and 40, **CWS-8**. This Tribunal is entitled to draw an adverse inference as to the content of the supporting documentation previously described, in light of the Respondent's failure to provide responsive material pursuant to the Claimants' request in this proceeding and Ontario's failure to appropriately respond to the Claimant's FIPPA requests.

[184] Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, s. 10(1), **CL-6**.

bilateral market trades were executed, thus standardizing the allowance product in the context of the trading markets."[185] In the course of its business in a linked environment, KS&T could not identify whether it was purchasing Ontario, California or Québec originated allowances. KS&T was entitled to regard its purchased inventory as Ontario allowances, since KS&T acquired them through Ontario as an Ontario market participant; held them for varying lengths of time in Ontario; they were subject to Ontario regulatory control when held in an Ontario CITSS account; and they could be resold for use to satisfy compliance obligations inter alia in Ontario. Ontario certainly treated the allowances KS&T held as attached to the province, when it imposed a freeze on transactions involving allowances held in Ontario accounts (regardless of origin), and went on to purportedly annul all allowances held in Ontario CITSS accounts, in the Claimants' case against no compensation.

128. Third, Ontario's internal documents produced by the Respondent for the purposes of this arbitration confirm that even if the funds were routed through the WCI Financial Services Administrator, WCI Inc. was formally Ontario's agent. In an Ontario Cap and Trade submission to the Minister, Ontario noted:

129. Consequently, the Claimants' payment to the Financial Services Administrator was in effect a payment to Ontario, and Ontario retained authority over the conduct of the auctions and the transfer of allowances within its CITSS account.

C. The Respondent's Strategy of Blame for the Actions Taken by Ontario on 15 June 2018 is Baseless

130. In the Memorial, the Claimants detailed the abrupt announcement of the Premier-elect on 15 June 2018, and its immediate negative impact on the market.[187] To recall,

[185] Expert Report of Dr. Robert Stavins (5 October 2021), para. 87, **CER-1**.

[186]

[187] Claimants' Memorial, paras. 185-206.

despite not yet being in power and having no authority to take action until he was sworn in as Premier on 29 June 2018, the Premier-elect "directed officials to immediately take steps to withdraw Ontario from future auctions" and announced Ontario's withdrawal from the Cap and Trade Program.[188] The media release stated in relevant part:

> Premier-designate Doug Ford today announced that his cabinet's first act following the swearing-in of his government will be to cancel Ontario's current cap-and-trade scheme, and challenge the federal government's authority to impose a carbon tax on the people of Ontario. "I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down," said Ford. "Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax's days are numbered."
>
> Ford also announced that Ontario would be serving notice of its withdrawal from the joint agreement linking Ontario, Québec and California's cap-and-trade markets as well as the pro-carbon tax Western Climate Initiative. The Premier-designate confirmed that he has directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits. The government will provide clear rules for the orderly wind down of the cap-and-trade program.[189]

131. The suddenness of the Premier-elect's announcement came as a shock to all involved in the carbon industry, including from Ontario's WCI partners,[190] and triggered a chain of immediate and foreseeable negative consequences, in the result rendering KS&T's inventory in its Ontario CITSS account worthless.[191] Notably, the Premier-elect's announcement directly prompted a *de facto* freeze on all trades within Ontario effective immediately, and directly triggered the immediate closure of the other two OQC jurisdictions to any Ontario-held allowances.[192]

132. In its Counter-Memorial, the Respondent largely avoids discussing the Premier-elect's actions on 15 June 2018 in any detail. Instead, it attempts to distance itself from the Premier-elect's actions by engaging in blame-shifting: arguing that the Claimants' loss was in fact the result of a routine "political process" of which the Claimants themselves should have been aware; or in the alternative, that it was California's reaction to Ontario's announcement that caused the Claimants' loss; or worse, that the Claimants themselves were to blame for failing to take pre-emptive action, in anticipation of the Premier-elect's unlawful and arbitrary behaviour. These

[188] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

[189] *Ibid*.

[190] *See* Claimants' Memorial, paras. 195-199.

[191] *See id*., paras. 200-206.

[192] *See id*., paras. 213-214.

attempts to excuse Ontario's actions are unsustainable, as demonstrated in the remainder of this section.

1. The Respondent's Attempt to Escape Liability by Relying on its Domestic Political Practices is Unavailing

133. In its Counter-Memorial, the Respondent advances two primary arguments in its attempt to justify the actions of the Premier-elect on 15 June 2018. First, it asserts that the Premier-elect's announcement on 15 June 2018 was simply a statement on "priorities and intentions" for when the Party assumed office on 29 June 2018.[193] Second, the Respondent argues that providing a notice of participation in the August 2018 joint auction was not a "routine or ongoing administrative decision[]" and therefore that it would have been contrary to the "caretaker principles" for Ontario to issue such notice.[194] These arguments are specious, and simply serve to demonstrate that both the Premier-elect and Ontario government officials acted *ultra vires* of the law.

(a) The Respondent's Assertion that Premier-elect Ford's Statement on 15 June 2018 Was "Routine" is Belied by its Own Evidence

134. The Respondent presents a simplistic narrative of the Premier-elect's actions on 15 June 2018 and attempts to gloss over the devastating effects of the sudden announcement that Ontario would not be taking part in the next auction by stating that "[d]uring the transition period, it is routine for the Premier-Designate to make statements outlining the incoming government's priorities and intentions for once it assumes office."[195]

135. The Premier-elect's sudden announcement of 15 June 2022 was not a statement on future "priorities and intentions":[196] it was a calculated, deliberate and immediate intervention to halt the ongoing functioning of Ontario's Cap and Trade Program. As highlighted by the Claimants in the Memorial and ignored by the Respondent in its Counter-Memorial, Premier-elect Ford confirmed in his News Release on 15 June 2018 that he had "<u>directed officials</u> <u>to immediately take steps to withdraw Ontario from future auctions</u> for cap-and-trade credits."[197] That is not a "statement of intention": it is specific act, at a time when the Premier-elect lacked all authority to take such a step.

136. The *ultra vires* nature of the Premier-elect's action is confirmed by documents the Respondent itself produced during the course of this arbitration. At midday on 15 June 2018, the Deputy Minister of MOECC sent an email entitled "Direction – cap

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[193] Respondent's Counter-Memorial, para. 78.

[194] *Id.*, paras. 79-81.

[195] *Id.*, para. 78.

[196] *Id.*, para. 78.

[197] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

and trade auction" to Jeff Hurdman (the Director of the Cap and Trade Branch), which stated in full:

> I am writing to confirm the direction from Premier-Designate Ford that Ontario will not be participating in the August auction.
>
> Formal notice to the parties of this decision to not participate in the August auction should wait until after the Premier-Designate has made the formal announcement.
>
> Thank you for your attention to this direction.[198]

137. Thus, the Respondent's assertion that the Premier-elect was simply "outlining the incoming government's priorities and intentions for once it assumes office" is clearly false. The Premier-elect gave *specific direction* to government officials to act contrary to the regulations in place and to withdraw from participating in the August 2018 joint auction. The Premier-elect had no authority to do this, as he was not officially sworn in to government until 29 June 2018.[199]

138. The Respondent's attempt to cloak this wrongdoing in legality by arguing that it was merely a "policy statement" is therefore a blatant fabrication. The action taken by Premier-elect Ford on 15 June 2018 was major and immediate intervention in the functioning of the Cap and Trade Program, that had predictably devastating effects on all Ontario Cap and Trade participants, as recalled in what follows.

(b) The Respondent's Attempt to Blame Ontario's Caretaker Period Only Serves to Support the Claimants' Position

139. The Respondent further asserts that providing a notice of participation in the August 2018 joint auction was not a "routine or ongoing administrative decision[]" and therefore that issuing the notice would have been contrary to the "caretaker convention" in place in Ontario at the time.[200] The Respondent and its witness, Mr. Alexander Wood, explain that "it would have been contrary to the caretaker principles for the Minister or his delegate to issue the auction notice because to do so would have frustrated the incoming government's policy intentions."[201] These arguments

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[198] Email from Paul Evans, Deputy Minister of MOECC to Jeff Hurdman, "Direction – cap and trade auction" (15 June 2018, 12:04:10), **Exh. C-199**.

[199] As explained by the Claimants, and not challenged by Canada, the Liberal Government remained in power up until 11:00am on 29 June 2018, at which time the Conservative Party was sworn in. The Premier and the Premier-elect had specifically agreed that this transition of power would not occur until the precise time of the swearing in. *See* Claimants' Memorial, para. 364; Ontario Media Advisory, "UPDATED: Doug Ford and New Government to be Sworn-in by Lieutenant Governor" (28 June 2018), **Exh. C-101**; Ontario News Release, "Doug Ford to Become Ontario's 26th Premier" (8 June 2018), **Exh. C-102**.

[200] Respondent's Counter-Memorial, paras. 79-81.

[201] *Id*., paras. 79, 81; Witness Statement of Alexander Wood (16 February 2022), paras. 10, 15, **RWS-1**.

are wrong in light of the regulations in place and the principles of the caretaker convention itself.

140. First, as the Claimants explained in the Memorial and as recognized by the Respondent in its Counter-Memorial,[202] Section 60 of the Cap and Trade Regulation required "the Minister" of the Environment and Climate Change to confirm the number and vintage of allowances it would be releasing into public auctions at least 60 days in advance.[203] In light of this existing legal provision in the regulations, making this announcement was the precise type of "routine or ongoing" decision that the Respondent claims is permissible under the caretaker convention.[204] Yet despite internal work to prepare CITSS for Ontario's participation in the August 2018 joint auction, "as part of [the MOECC's] normal activity",[205] as reviewed below, Ontario departmental officials abandoned these "normal" efforts to take express "direction" from a Premier-elect not in power to take radical steps contrary to Ontario law.[206]

141. Ontario's complete failure to abide by the laws in place shocked both the Claimants and the broader cap and trade industry.[207] As explained by Graeme Martin:

> While KS&T may have expected that, ultimately, a newly elected Conservative government might wind down the Cap and Trade Program, we did not expect it to occur in the reckless and discriminatory way that it did. Nor did we expect it to occur before that government had even entered into power in July 2018; we simply did not think that was possible. <u>KS&T understood that – at the very least – until a new government officially came into power, Ontario had to play by the rules already in place</u>. It never occurred to me, at least, that Ontario could make a radical – and ultimately, devastating – policy change under the guise of bureaucratic process related to government's "caretaker" period.[208]

142. The "rules already in place" were clear, but the Premier-elect and Ontario chose to ignore them, acting in flagrant disregard of statutory authority and the arrangements for the transition of power on 29 June 2018.

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[202] Respondent's Counter-Memorial, para. 59, citing Ontario Regulation 144/16, Section 60, **CL-6**.

[203] Ontario Regulation 144/16, Section 60, **CL-6**.

[204] *See*, *e.g*., Respondent's Counter-Memorial, paras. 79-81.

[205] Email from Jeff Hurdman to Alex Wood, "Preventing Auction Registration" (15 June 2018, 4.21pm), p. CAN-0609, **Exh. C-200**.

[206] *See* paras. 148-156 *infra*.

[207] Second Witness Statement of Michael Berends (16 July 2017), para. 24, **CWS-7** ("[N]o one in the industry (including 'sophisticated' players such as banks, and the partner jurisdictions California and Québec) could have reasonably expected or somehow 'prepared' for a contingency whereby Ontario would sell allowances in auctions, collect the proceeds, and then simultaneously render those allowances worthless *as well as* refuse to reimburse participants for what they had paid for.").

[208] Second Witness Statement of Graeme Martin (18 July 2022), para. 28, **CWS-5**.

143. Second, the Respondent have not demonstrated how providing a notice of participation would have been contrary to caretaker principles that it now claims applied to constrain action by the Ontario Government.

144. In relying upon the "caretaker convention" to defend Ontario's actions on 15 June 2018, the Respondent relies heavily on the statement of Mr. Alexander Wood, explaining:

> Only routine or ongoing administrative decisions may be made during the caretaker period. In addition, urgent or time sensitive decisions may need to be made during this period. To ensure that caretaker principles are observed, senior members of the public service identify the time sensitive decisions that must be made during the caretaker period. To perform this role, "the bureaucracy must be particularly aware of any issues that arise during the election campaign and that may affect the implementation of future policies of the next government."

145. Mr. Wood's statement is a weak foundation for the Respondent's arguments in this proceeding and is problematic in several ways:

a. By invoking the passive voice – "only routine or ongoing administrative decisions *may be made* during the caretaker period" and "the time sensitive decisions that *must be made* during the caretaker period" – Mr. Wood takes no position on the question of who is empowered to make decisions. In other words, while the Respondent appears to rely on Mr. Wood's statement for the proposition that the bureaucracy may take decisions independent of the sitting government or minister, at no point does Mr. Wood actually say this, and neither does he cite any authority to that effect.

b. In fact, the Respondent is unable to cite any delegation authority that would supersede the language of statutes like the ones at issue in this proceeding, whereby authority is expressly given to a Minister of the Crown, not to unspecified and unelected officials.

c. In that sense, Mr. Wood's statement is affirmation of the principle that the caretaker convention should be understood primarily from the perspective of the sitting government. The convention, which under some interpretations can begin to apply before the writ period, serves as a guideline or potential constraint on the sitting government's proper exercise of its continuing authority, but certainly not as authority for the unelected bureaucracy to take decisions independently (or even contrary to the position of the sitting government).

d. Relatedly, Mr. Wood's general failure to provide clarity or authority as to the distinction between routine and urgent matters is problematic for the purposes of the Respondent's position. Whether a decision is "urgent" is properly understood from the perspective of the elected government entrusted by the public to make decisions under existing legal frameworks, not from the unauthorized perspective of the unelected bureaucracy acting without properly delegated authority to usurp a determination that must be made by an elected official. A terrorist attack is an obvious example where urgent decisions could

be required from a sitting government during the caretaker period. A less dramatic example is the determination of whether to appeal a court decision, when the window to appeal closes during an extended caretaker and writ period. The fact that the decision that must be taken is "urgent" or "routine" does not enhance or detract from the ability of the unelected bureaucracy and elected officials to act contrary to the express text of existing legislation – it simply underscores that the proper functioning of government requires the sitting cabinet (functioning as the executive) to take certain types of decisions even through a caretaker period (as set out in the discussion of the Federal Government guidelines below).

e. As a result, Mr. Wood's statement provides very little guidance for the purposes of this proceeding and should be weighted accordingly. His statement underscores the important role of the bureaucracy in identifying the areas where government will need to remain engaged in its proper functioning. He similarly suggests that there may be constraints on certain kinds of decisions by a future government to act once it has been asked by the Crown to form the next government is affected.

f. However, Mr. Wood does nothing to justify the bureaucracy's *ultra vires* decision to act on a matter where it clearly considered that action was urgently necessary, but nonetheless chose not to consult with the sitting minister that had to make the decision to act in accordance with the relevant statute. In no way, shape or form does the caretaker doctrine provide a bureaucrat the authority to usurp statutory requirements and the decision-making functions assigned to an elected official under these requirements.

g. The failure of Mr. Wood and his staff to seek the requisite auction decision and authority from the sitting Minister of Environment and Climate Change prior to the swearing in of the new government was not only contrary to the law, but indicative of bureaucrats making an urgent, non-routine decision that, in fact, reversed the sitting government's previous commitments, lawfully undertaken, to participate in the upcoming linked auction. Under no interpretation can the caretaker convention enable an incoming government to reverse a historical, ministerial decision which was properly taken in accordance with the law – especially before the government elect is sworn in and asked by the Crown to form the next government.

146. Mr. Wood submits an Ontario memorandum on the caretaker convention in these proceedings, discussed below. This memorandum is largely mirrored by the "Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election" (the **Guidelines**) released by the Respondent in August 2021. While these are Federal Government guidelines, the Claimants presume that they apply *mutatis mutandis* at the provincial level, and – if not inconsistent with the Ontario memorandum – can provide further support as to the breadth of the caretaker convention in Canada and the duties of the incumbent government.

147. The memorandum prepared by Ontario and the Guidelines prepared by the Respondent set forth a number of key principles. First, Ontario recognizes that the "caretaker role requires that there be <u>no new policy</u> or program initiatives, and restricts ongoing work, consultations, appointments, regulatory postings, public

engagement, announcements and ministry events."[209] These examples are also reflected in the Guidelines, which provides examples of matters which should be deferred "to the extent possible", including "appointments, policy decisions, new spending or other initiatives, announcements, negotiations or consultations, non-routine contracts and grants and contribution." Second, Ontario and the Respondent both then acknowledge that Ministers remain members of the Executive Council, and thus retain the rights, privileges and responsibilities of their office during and after an election.[210] Finally, both Ontario and the Respondent stress the need for the "routine" operation of government to continue throughout the caretaker period.[211]

148. Reflecting on these key principles, the Claimants make the following observations:

- Announcing the participation of Ontario in a joint auction in compliance with Section 60 of Regulation 144/16 does not constitute the type of action to be deferred as envisaged in either the provincial or federal guidance (to the contrary). It did not relate to an appointment, new spending, a new policy decision, announcements of policy or initiatives, negotiations, grants, or non-routine contracts. Indeed, the policy was already in place as a matter of law, and did not require the Ministry to "launch new regulatory initiatives, or proactively engage stakeholders on regulatory development" as the federal Guidelines expressly mention.[212] Nor did it require Cabinet or Treasury Board approval.[213] In short, and based on the guidelines published by both the Respondent and Ontario, the duties of the incumbent Minister as set out in the legislation should have "continue[d] to be fulfilled" as "set out in legislation."[214]

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[209] Memo from Secretary Steve Orsini to Deputy Ministers, "Public Service Responsibilities and Procedures Leading To and During the Election Period" (28 February 2018), **Exh. AW-2**.

[210] *Id*. *See also* Government of Canada, Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election (August 2021), **Exh. C-201**.

[211] Memo from Secretary Steve Orsini to Deputy Ministers, "Public Service Responsibilities and Procedures Leading To and During the Election Period" (28 February 2018), **Exh. AW-2**. *See also* Government of Canada, Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election (August 2021), **Exh. C-201**.

[212] Government of Canada, Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election (August 2021), **Exh. C-201**.

[213] Government of Canada, Guidelines on the conduct of Ministers, Ministers of State, exempt staff and public servants during an election (August 2021), **Exh.C-201**; Memo from Secretary Steve Orsini to Deputy Ministers, "Public Service Responsibilities and Procedures Leading To and During the Election Period" (28 February 2018), **Exh. AW-2**.

[214] *See*, *e.g*., Memo from Secretary Steve Orsini to Deputy Ministers, "Public Service Responsibilities and Procedures Leading To and During the Election Period" (28 February 2018), **Exh. AW-2** ("Ministers remain members of the Executive Council until the Premier submits, and the Lieutenant Governor accepts, their resignations. Any minister who is not re-elected remains a member of the Executive Council until their resignation is submitted to the Lieutenant Governor. This means that Ministers retain the rights, privileges and responsibilities of their office during and after an election, although these rights, privileges and responsibilities must now be exercised in accordance with the caretaker role of government. It is our responsibility as public servants to continue to serve them in that capacity.").

- Indeed, the incumbent Minister of the pre-election Government should have remained in contact with the Deputy Minister to provide direction to the department with respect to its duties under Section 60 of the Cap and Trade Regulation until the new government was sworn in. As described in paragraphs 135 to 138 above, however, the only "direction" provided to the Deputy Minister and the department on 15 June 2018 was that of the Premier-elect, acting *ultra vires* and without any support in law or convention.

- In other words, the confirmation that Ontario would participate in the joint auction in August 2018 was precisely the type of "routine or ongoing administrative" decision, made by the Minister in accordance with the law, which the Respondent itself states was permissible. Mr. Woods, however, maintains that the "policy position of the incoming government to end the cap and trade program" meant that the department could not "frustrate" those "policy intentions" and therefore could empower itself to effectively reverse a decision of a sitting Minister.[215] It is inconceivable, however, that what the Respondent itself characterizes as a mere statement on future "priorities and intentions",[216] would overcome the express legal requirements under Ontario law in place at a time when the incumbent Minister "retain[ed] their full legal authority within the executive."[217]

149. Further, the Respondent has not provided *any* evidence that the withdrawal from the joint auctions on 15 June 2018 was even considered or assessed by the Ontario Government under the caretaker principles. In his witness statement, Mr. Wood simply cites an internal government memorandum reminding the public service of its responsibilities and procedures during the caretaker period.[218] That memorandum states in relevant part:

> In assessing whether ongoing work is consistent with the caretaker role of government, ask the following relevant questions:
>
> - Is the proposed work truly routine or urgent?
> - Is there a potential for the work to be raised as a political issue during the election?
> - Have all the necessary policy, funding and human resource approvals been received?
> - Is there a legislative or legal requirement to provide the program or service?

[215] Respondent's Counter-Memorial, para. 81; Witness Statement of Alexander Wood (16 February 2022), para. 15, **RWS-1**.

[216] Respondent's Counter-Memorial, para. 78.

[217] Philippe Lagassé, Clarifying the Caretaker Convention (9 October 2015) POLICY OPTIONS POLITIQUES, **Exh. C-202**.

[218] Memo from Secretary Steve Orsini to Deputy Ministers, "Public Service Responsibilities and Procedures Leading To and During the Election Period" (28 February 2018), **Exh. AW-2**.

- Do any of the next steps require further political decision or direction?
- Is there any reason why the activity cannot wait?
- Does the program or service need to be communicated to the public?
- Would the work limit or impair the decision-making freedom of a future government?
- Would any future government agree the work was necessary during the writ period?[219]

150. Mr. Wood does not provide any evidence that these questions were either asked or answered in the assessment of whether Ontario should take the ministerial decision to withdraw from the joint auction. The Respondent's production of documents on this topic was equally unresponsive. To be clear, if the department had asked the questions it itself says are required, the answer would have left no doubt that Ontario should have issued the joint auction notice:

- The proposed work was clearly routine, in light of the express legal provisions in place at the time, as described above.
- All the necessary policy, funding and human resource approvals (to the extent even required) were in place, and did not require additional approvals or expenditure.
- There was a legal requirement to provide the notice, and no further political decision was required for "next steps".
- The activity could not wait, in light of the OQC Agreement in place with California and Québec, the regulations in place, and the agreed timing of the joint auction in August 2018.
- The activity needed to be communicated to the public, due to the obligations and engagement of participants in the Ontario Cap and Trade Program, as well as California and Québec.
- The announcement would not have limited or impaired the decision-making freedom of the Ford Government, once in power, to then cancel the Cap and Trade Act because proper notice under the OQC Agreement would have encompassed the auction scheduled for at least 12 months.
- While the future of the Cap and Trade Program was a political issue more generally, this political position could not take precedence over the legal requirements in place. For this reason, and out of respect for the rule of law (assuming the Ontario Progressive Conservative Party were actually respectful of

[219] *Ibid*.

its obligations under domestic and international law), any future government should have agreed the work was necessary during the caretaker period.

151. The above conclusions are confirmed by documents released by the Respondent itself as part of this arbitration, which demonstrate that Ontario government officials considered the participation in the August 2018 joint auction part of the Government's "normal activity" up until the Premier-elect's abrupt announcement on 15 June 2018. In an email sent from Jeff Hurdman (the Director of the Cap and Trade Branch who received the "direction" from the Premier-elect not to participate in the August auction) to Mr. Wood on 15 June 2018, at 4.21pm, he writes:

> Just FYI. As part of our **normal** activity, we had begun the process of preparing CITSS for Ontario's participation in the August 14 auction. Upon receiving the direction from Premier Designate's announcement we have completed the necessary actions to reverse the process. Ontario participants will not be able to register to participate in the auction.[220]

152. That is, on the afternoon of the day the Premier-elect gave his direction, even the Director of Ontario's Cap and Trade Branch believed that participating in the August 2018 auction would have been a "normal" and routine activity during the caretaker period, and expressly admitted that this "normal activity" had been reversed as a direct result of the Premier-elect's (*ultra vires*) intervention. Mr. Wood himself directly received this email, belying his own current testimony. In light of this newly-disclosed message, Mr. Wood's allegation that the 15 June 2018 announcement was "carefully considered under caretaker principles" must be treated with great scepticism and appears to be contradicted.

153. The Claimants have attempted to further substantiate their understanding of the sequence of events that led to Ontario's withdrawal from the auction on 15 June 2018 through requests submitted on 19 December 2019 pursuant to Ontario's FIPPA for access to documents held by relevant provincial ministries.[221] To date, the Claimants have not had their request honoured and have experienced unusually prejudicial delay in relation to the FIPPA requests submitted to the Ministry of Environment, Conservation and Parks and Ministry of Finance. The Claimants have experienced prejudicial delay in relation to the FIPPA requests submitted to the Ministry of Environment, Conservation and Parks and Ministry of Finance.

154. To date these requests have been appealed to the Information and Privacy Commissioner of Ontario and remain outstanding nearly two years after they were made.[222] In these circumstances, this Tribunal is entitled to draw an adverse inference as to the content of the supporting documentation and find that it, if disclosed, it

[220] Email from Jeff Hurdman to Alex Wood, "Preventing Auction Registration" (15 June 2018, 4.21pm), p. CAN-0609, **Exh. C-200**.

[221] *See* n. 181 *supra*; Witness Statement of Jonathan Eric Ockwell McGillivray (17 July 2022), para 1, **CWS-8**.

[222] Witness Statement of Jonathan Eric Ockwell McGillivray (17 July 2022), paras 31 and 40, **CWS-8**.

would provide a further basis for the Claimant's understanding of the sequence of events leading into 15 June 2018.

155. In sum, the Respondent's current position is a bad faith interpretation of the policy neutrality that ought to characterize the actions of the bureaucracy during the transition of power and the caretaker period, one which stands contrary to its own guidelines and internal documents and is flatly contradicted by contemporary written evidence of the leading Ontario official responsible for implementation of the routine announcement. While Doug Ford's incoming government may have had policy intentions, those intentions did not and could not trump the existing legal obligations of the Ontario Government. Moreover, while the bureaucracy may be required to consider these policy intentions, it does not afford opposition leaders or department officials the ability to veto clear legal frameworks in place before the transition of power. In fact, up until the Premier-elect's unlawful "direction" to government officials, those officials believed that preparing for the August 2018 auction fell within the scope of the "routine and ongoing administrative" work of government. In these circumstances, the Respondent's attempt to hide behind its domestic political processes to avoid its international liability must be rejected.

156. In any event, the issue of the (dubious) legality of the Premier-elect's intervention of 15 June 2018 is clearly moot. From the perspective of NAFTA Chapter Eleven, what matters is that this was a measure attributable to the Respondent that amounted to a shocking repudiation of the framework of Ontario's Cap and Trade Program and of Ontario's formal obligations to Québec and to California, in a manner that (as set out below) had devastating consequences on the value of the Claimants' investment.

2. The Respondent's Attempt to Blame California and Québec for its Unlawful Actions Is Unbecoming and Unsustainable

157. After unsuccessfully trying to excuse Ontario's arbitrary and unlawful actions through unprincipled reliance on the "caretaker convention", the Respondent then attempts to point the finger at California as the cause of the Claimants' loss,[223] blandly stating:

> [I]t was the decision of the California Air Resources Board on June 15 to de-link the California system from Ontario that prevented the Claimants from transferring the emission allowances to California. That prohibition of transfers by California, which was fully within California's sovereign right, caused the specific loss claimed by the Claimants, not any action of Ontario.[224]

158. The Respondent's attempts to shirk its international responsibility for the impact of Ontario's measures are not only unbecoming, but unsustainable in light of the true course of events.

159. As an initial point, the Counter-Memorial is striking for the facts it fails to mention. The Respondent skips directly from discussing the caretaker convention to a section

[223] *See*, *e.g*., Respondent's Counter-Memorial, paras. 288, 297, 301.

[224] *Id*., para. 301.

entitled "California de-links its CITSS Accounts from Ontario CITSS Accounts".[225] Neatly omitted from this narrative is the abrupt and arbitrary announcement of the Premier-elect at 11am on 15 June 2018, which directly precipitated the California and Québec market notice of that same evening. The Respondent's attempt to shift the blame to California (yet apparently not to the Canadian province of Québec, conveniently) while ignoring the root cause of this action is remarkable: the primary measure in question here was adopted by Premier-elect Ford, when he recklessly and without any notice announced Ontario's immediate pull-out from the Cap and Trade Program, on 15 June 2018.

160. The trigger for California and Québec's actions to de-link their markets was clearly the *ultra vires* actions of the Premier-elect, as evidenced by the documents produced by the Respondent in this arbitration. In an email trail between the Governments of Ontario, Québec and California, Ontario forwards the announcement of Premier-elect Ford to California and Québec at 10.57am on 15 June 2018 and states: [226]

161.

162. Yet, Ontario gave no warning to its trading partners, who were left to speculate on the province's course of action based solely "on a press release". So much for good faith respect for engagements with one's partners.

[225] *Id.*, Section II.B.7.

[226]

[227]

[228]

163. Further emails demonstrate that California and Québec's likely defensive reaction to the Premier-elect's announcement was not simply a reasonable assumption, but was actively known to Ontario officials on the afternoon of Friday 15 June 2018. Despite this, Ontario proceeded with its announcement, reckless to the consequences. In an email from the Respondent's witness Mr. Wood to David Harth (whom the Claimants understand was placed in the Deputy Minister's office at that time), dated 15 June 2018 at 1.31pm, Mr. Wood recounts:

> Jim and I are just off the call with California (Matt Rodriguez and Mark Wenzel from EPA, Rajinder Sahotra and Richard Corey from ARB).
>
> We gave them the news from this morning, specifically that we would not be participating in the upcoming August auction, and that the incoming government would be winding down the cap and trade program in an 'orderly fashion'.
>
> From them, some key points we (and CO) need to be aware of:
>
> - The notice that goes out later today will be accompanied by a statement from QC and California emitters that Ontario emitters will not be able to register for the August auction.
>
> - <u>WCI Inc. will likely be holding a call later today to give WCI Inc. the authority to put in place the "firewall" in CITSS that take away the ability of Ontario emitters to transfer allowances into California or Québec accounts (and so remove the ability to transact business to business trade in the secondary market)</u>. Jim indicated that we would likely be recusing ourselves from that decision . . .

164. Curiously, an email in response to this report has been redacted for "solicitor-client privilege" though appears to be less than a paragraph, sent to a large group of people, and there is no indication that an assistant in the Deputy Minister's office was a solicitor providing legal advice. The Claimants can only imagine the "legal advice" expressed by Ontario government officials in this terse response: "We're going to be sued", likely.

165. In any event, the documents produced by the Respondent confirm that Ontario was fully aware participants in its Cap and Trade Program would be adversely impacted by the fallout from the Premier-elect's announcement. On 15 June 2018, at 4.24pm, Mr. Wood wrote to Mr. Jeff Hurdman (Director of the Cap and Trade Branch) requested "a quick summary of market activity today." Upon request by Mr. Hurdman to his team, the following answer was provided:

> Only one participant looks to have made any transfers today. These were from its ON account to its CA account (so not sales but true $0 transfers). Total allowances [redacted] moved in three transfers. <u>This was the participant that called Nadia several times today</u>. The participant still has [redacted] in its accounts, which is [redacted] that it likely requires to meet its compliance obligation for 2017 and

2018. All three transfers occurred after the Premier Designate's announcement, for what that is worth.[229]

166. As of 5pm on 15 June 2018 (still three and a half hours before California and Québec issued its Market Notice), the Ontario Government: (1) knew that California and Québec had been taken by surprise by the Premier-elect's announcement and the subsequent confirmation email by department officials at the Ministry of the Environment and Climate Change; (2) knew that these jurisdictions, and potentially WCI Inc., would be taking action to place a "firewall" in CITSS to prevent Ontario emitters from transferring allowances out of the province; and (3) knew that participants in the Ontario Cap and Trade Program would want to make such transfers to avoid loss, by shifting their allowances holdings to jurisdictions where they would retain their value. Yet the Ontario Government did nothing; did not try to mitigate the loss participants in the Ontario Cap and Trade Program would face in just a few hours; and made no attempt to deal with the situation thrust upon the Program by the Premier-elect and department officials in less damaging ways to its OQC Agreement partners or its stakeholders.

167. The Respondent wholly ignores the evidence submitted confirming what precipitated closure of the California and Québec systems to Ontario-held allowances.[230] California and Québec's joint decision to de-link their respective cap and trade programs from the Ontario Cap and Trade Program was an inevitable and entirely predictable consequence of the Premier-elect's ill-considered, hasty and illegal announcement, to protect their own systems from the disruption that would have arisen from large transfers of emission allowances by holders of Ontario CITSS accounts into California and/or Québec CITSS accounts.[231] As noted by Dr. Stavins in his second expert report, Ontario entities' CITSS accounts held approximately 220 million allowances at the time of Ontario's cancellation, representing approximately 53 percent of California's and Québec's total annual compliance obligations for 2018.[232] As anyone with any knowledge of cap and trade programs would have understood at the time, letting Ontario allowances flood into California and Québec in light of the Premier-elect's announcement would have had a drastic impact on the viability of their programs.

168. In light of these circumstances, the Respondent's attempts to blame California for the Claimants' loss is in the worst bad faith, a shocking and craven effort to shirk responsibility for Ontario's actions in violation of the NAFTA.

169. The Premier-elect's announcement of 15 June 2018 had an immediate devastating effect on the value of the Claimants' allowances on this date. It generated an immediate *de facto* freeze within the Province, and precipitated the entirely

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[229] Email from Jeff Hurdman to Alex Wood, "Preventing Auction Registration" (15 June 2018, 4.21pm), p. CAN-0609, **Exh. C-200**.

[230] Claimants' Memorial, paras. 196-199.

[231] *See id.*, para. 199; Witness Statement of Graeme Martin (4 October 2021), paras. 51, 52, **CWS-2**; Witness Statement of Michael Berends (5 October 2021), paras. 84, 94, **CWS-1**.

[232] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 93, **CER-2**.

predictable closure of California and Québec markets to Ontario-held allowances as of the evening of 15 June 2018. Together, both impacts effectively rendered allowances held by the Claimants worthless. As Graeme Martin confirms in his second witness statement:

> [T]he Premier-elect's announcement immediately triggered a response from California and from Québec blocking the transfer to their systems of any Ontario-held allowances. This was entirely predictable, given that the Premier-elect's announcement could otherwise have triggered a flood of allowances out of Ontario to Québec and California, undermining the integrity of their respective systems. KS&T therefore could not transfer allowances out of its Ontario account to California or to Québec. Moreover, for all intents and purposes, trade even within Ontario was effectively frozen as of the time of the Premier-elect's announcement. This is because Ontario's announcement plunged the Program into uncertainty. No-one knew what would become of existing compliance obligations or how or when Ontario would exit the Program. Consequently, there was in effect no trade on the internal Ontario market as of that date.

170. This impact was followed in short order by a *de jure* freeze on 3 July 2018, when Ontario formally introduced Regulation 386/18, which officially froze all Ontario CITSS accounts, legally forbidding participants like KS&T from undertaking any purchase, sale, trade or transfer carbon emissions allowances held in Ontario CITSS accounts, effectively immediately.[233] On that same day, entities with Ontario CITSS accounts received a notification by email that the status of their CITSS accounts had been changed to restricted, and that they no longer had the ability to transfer or receive emission allowances into or out of them.[234] Graeme Martin further recounts the damage inflicted on the Claimants by Ontario by both its *de facto* and *de jure* actions:

> [W]e had spent months negotiating agreements with [redacted] [redacted] regarding prospective purchases from KS&T, and were informed by both of them as of Monday June 18, 2018 that signature of these agreements was put off indefinitely until there was more clarity about the Program wind-down conditions. In the end, with the formal freeze on transfers on July 3, 2018 and subsequent termination of the Program by the Cancellation Act, these Agreements with Ontario counterparties came to nothing.
>
> For Canada to argue that a *de facto* freeze on the market did nothing to deprive KS&T of the economic value of the [redacted] carbon allowances in its Ontario CITSS account is totally disingenuous. It is akin to saying that goods in a warehouse are still available for sale, even though the door has been padlocked with no information on if or when the goods will be released. No sane buyer would pay for those goods, in the same way that no one in Ontario was willing to

[233] *See* Claimants' Memorial, paras. 213-214, 408.

[234] *See ibid*.

buy the allowances KS&T held in its Ontario CITSS account as of June 15, 2018.[235]

171. In sum, Respondent's attempt to blame California as the cause of the Claimants' loss cannot be sustained. The trigger for California and Québec's actions to de-link their markets was clearly the *ultra vires* actions of the Premier-elect followed by its confirmation by department officials, as evidenced by the documents produced by the Respondent in this arbitration. As understood by Ontario officials at the time, California and Québec's action was an inevitable and entirely predictable consequence of the Premier-elect's ill-considered, hasty and illegal announcement, to protect their own systems. The Respondent's attempt to blame California for its own unlawful behaviour cannot be accepted.

3. The Respondent's Attempt to Blame the Claimants for Failing to Predict the Reckless Behaviour of the Premier-Elect is Unfounded

172. Finally, after exhausting all of its efforts to blame the caretaker convention and California for its arbitrary and unlawful actions (to no avail), the Respondent pivots to blaming the Claimants themselves for failing to predict the Premier-elect's reckless behaviour.

173. The Respondent engages in victim-blaming by arguing that the Claimants "could have insulated" itself from loss by "transferring the emission allowances to California at any time between June 11 (the day the allowances were deposited into its Ontario CITSS account) and June 15 (the day California delinked its CITSS accounts from Ontario)."[236] The Respondent asserts, *inter alia*, that any damages ultimately awarded to the Claimants must be "diminished or disallowed" as a result of the Claimants' "role" in their loss.[237] While the Claimants will address the Respondent's flawed legal position in Part V of this Reply, the latter's response that the Claimants "should have" transferred all of its allowances within a four-day period (11 June to 15 June) is disingenuous and unsupported by the facts.

174. The Respondent effectively asserts that the Claimants should have predicted the Premier-elect's reckless and irresponsible announcement on 15 June 2018, and taken steps to avoid it. But as the Claimants demonstrated in the Memorial, confirmed by industry-wide witnesses and Ontario's own internal documents, no one expected that the Premier-elect would abruptly cancel the Cap and Trade Program and immediately pull Ontario out of its agreement with California and Québec, in the manner he did on 15 June 2018.

175. As outlined in paragraphs 148 to 156 above, the Ministry of the Environment and Climate Change itself had been preparing for Ontario's participation in the August 2018 auction until it became aware of the Premier-elect's statement on 15 June

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[235] Witness Statement of Graeme Martin (18 July 2022), paras. 35-36, **CWS-5**.

[236] Respondent's Counter-Memorial, paras. 290, 298.

[237] *See*, *e.g.*, *id.*, paras. 323.

2018.[238] If Ontario government officials could not have predicted – and did not predict – the Premier-elect's actions, why should the Claimants or any other participant in the Ontario market have been able to do so?

176. Finally, whether the Claimants transferred these allowances or not does not detract from the core point that Ontario's behaviour was unlawful. Moreover, there is no small irony in the Respondent's contradictory position. On the one hand, it expends a significant amount of effort (unjustifiably) criticising KS&T for transferring allowances between its Ontario and California CITSS account.[239] On the other hand, in an improper effort to exculpate itself from the damage Ontario caused, the Respondent asserts that the KS&T should have transferred more allowances to its California CITSS account – on an urgent basis. It cannot have it both ways. As discussed in paragraphs 64 to 65 above, as an Ontario market participant, KS&T had every right to decide when and in what amounts it might transfer allowances it held in its Ontario CITSS account to its equivalent accounts in California, and indeed was encouraged by Ontario to treat the three OQC Agreement jurisdictions as a wholly integrated, single market.

177. Consequently, the Respondent's attempts to blame the Claimants for the abrupt and arbitrary actions of the Premier-elect on 15 June 2018 must be rejected. As with its attempts to place blame on its domestic political processes and the preventative actions taken by California and Québec on the night of 15 June 2018, the Respondent's position does not bear scrutiny.

D. The Respondent's Portrayal of the Cancellation of the Cap and Trade Program as "Orderly", "Fair" and "Principled" is Belied by the Actual Events

178. In the Memorial, the Claimants demonstrated that Ontario acted in an arbitrary manner in introducing the Cancellation Act, pushing through the legislation without due consideration and in violation of its own legal requirements.[240] The Claimants further demonstrated that, ultimately, Ontario's cancellation of the Cap and Trade Program served no purpose, because cancelling the Program simply led to the entry into force of the Federal Government's backstop carbon pollution pricing system.[241] Finally, the Claimants demonstrated how Ontario ignored their good faith attempt to engage on substantive problems with the legislation during the phase of parliamentary considering leading to the adoption of the Cancellation Act,[242] and ultimately confirmed its summary and arbitrary denial of any compensation to KS&T.[243]

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[238] Email from Jeff Hurdman to Alex Wood, "Preventing Auction Registration" (15 June 2018, 4.21pm), p. CAN-0609, **Exh. C-200**.

[239] Respondent's Counter-Memorial, paras. 48, 57, 63, 65, 122-124 and 323.

[240] Claimants' Memorial, paras. 213-220, 237-257.

[241] *Id.*, paras. 258-268.

[242] *Id.*, paras. 221-236.

[243] *Id.*, paras. 269-286.

179. In its Counter-Memorial, the Respondent ignores most of these facts, in favour of a bland, featureless and largely fictitious narrative to the effect that cancellation of the Cap and Trade Program was "orderly", "fair", and "principled" – in effect, aping Ontario's media lines from the summer of 2018, without providing any substantive response to the issues the Claimants have raised.[244] It notably asserts that: (1) cancellation of the Cap and Trade Program was in pursuit of a "legitimate environmental policy"; (2) cancellation of the Program was the product of a "legitimate democratic process"; (3) Ontario's compensation scheme provided compensation on a "principled" basis; (4) KS&T should not have applied for compensation because it was "ineligible" under the Cancellation Act; and (5) Ontario only "received [redacted]" as a result of cancelling KS&T's allowances, not the full USD 30 million that the Claimants paid for these allowances in May 2018.

180. As discussed in the remainder of this section, the Respondent's factual positions and its self-serving attempts to gloss over facts are untenable.

1. The Respondent's Attempts to Portray the Cancellation of the Cap and Trade Program as for a Legitimate Environmental Policy is Unsupported

181. In the Memorial, the Claimants explained that the cancellation of the Cap and Trade Program was purely political, taken for an ulterior motive, to serve the political interests of the Ontario Progressive Conservative Party by illegally and unfairly minimizing the amount of compensation the Government would need to pay as a result of its measures.[245]

182. In its Counter-Memorial, the Respondent now asserts that one of the "key features" of the Cancellation Act was "the establishment of a new made-in-Ontario environmental plan to fight climate change",[246] maintaining that the Act was "instrumental in the development of a new solution to the challenges posed by climate change."[247] Its framing of the Cancellation Act as the instrument of a legitimate environmental policy is a transparent and cynical attempt to rewrite history, and is contradicted by the weight of the evidence submitted in this proceeding.

183. First, the Respondent's newly-minted "environmentalist" narrative is belied by the evidence which shows that, at the time, the Premier-elect was solely concerned with bringing "gas prices down" and "lowering taxes" through the cancellation of Cap and Trade, in support of his own political agenda. The media release issued by the Premier-elect on 15 June 2018, does not pretend otherwise:

> Premier-designate Doug Ford today announced that his cabinet's first act following the swearing-in of his government will be to cancel Ontario's current cap-and-trade scheme, and challenge the federal government's authority to impose a carbon tax on the people of

[244] Respondent's Counter-Memorial, Section II.C.

[245] *See*, *e.g.*, Claimants' Memorial, para. 414.

[246] Respondent's Counter-Memorial, para. 92.

[247] *Id.*, para. 102.

> Ontario. "I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down," said Ford. "Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax's days are numbered."
>
> [. . . .]
>
> Finally, Ford announced that he will be issuing specific directions to his incoming attorney general to use all available resources at the disposal of the government to challenge the federal government's authority to arbitrarily impose a carbon tax on Ontario families.
>
> "Eliminating the carbon tax and cap-and-trade is the right thing to do and is a key component in our plan to bring your gas prices down by 10 cents per litre," said Ford. "It also sends a clear message that things are now different. No longer will Ontario's government answer to insiders, special interests and elites. Instead, we will now have a government for the people. Help is here."[248]

184. Similarly, in announcing the passing of the Cancellation Act, the Ontario Government characterized its action as follows:

> The elimination of the cap and trade carbon tax will reduce gas prices, save the average family $260 per year, and remove a costly burden from Ontario businesses, allowing them to grow, create jobs and compete around the world.[249]

185. In fact, Premier-elect Ford made clear during his election campaign that the cancellation of the Cap and Trade Program was *not* for environmental reasons.

> Where Ford was pressed for details [on the opposition to Ontario's Cap and Trade Program] reporters asked him to explain how he will handle environmental issues in lieu of a penalty on carbon emissions. Ford often told interviewers it was an issue most people didn't care about.
>
> For example, on Breakfast Television in Toronto, when Kevin Frankish described the environment as a No. 1 issue, Ford interrupted to say, "Well, it's not No. 1."
>
> "Let's disagree on that fully, because I've talked to thousands and thousands of people across this province (and) guess what, Kevin? Not once, not once has anyone ever come up and said, 'My No. 1 concern is environment. To the contrary (peoples') No. 1 issue is the high Hydro rates," Ford said. "Another (No. 1) one [sic] issue is jobs, they want good paying jobs. They're tired of the government

[248] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

[249] Ontario Government, "Relief on the Way: Ontario Passes Legislation to End Cap and Trade Carbon Tax" (31 October 2018), **Exh. C-125**.

> taxing them to death. Those are the three top issues, I can assure you, and anything else falls under that…"[250]

186. Most of this evidence was presented by the Claimants in the Memorial, yet the Respondent chose to ignore it and state for their own purposes that the Cancellation Act was designed to develop new solutions for climate change.[251] Its attempt to cloak the Ontario Government's actions in something resembling a legitimate public purpose is as blatant as it is unsupported.

187. The Respondent's position in this proceeding is also particularly shocking given that Ontario's actions were a clear and blatant violation of the Federal Government's own avowed focus on addressing climate change, which contrasts starkly with the position taken for the purpose of these proceedings.

188. The traditional position of the Federal Government is much more accurately represented by the contemporaneous public statements of the Respondent's then environment minister, Catherine McKenna, who issued a statement denouncing the Ford Government's policy on climate immediately following her first meeting with the Ontario's new environment minister in July 2018:

> Today I met with my Ontario counterpart, Minister Rod Phillips. I'm disappointed to see the new government in Ontario has no plan to help families, schools and businesses reduce emissions, save money and create good jobs. Climate change doesn't stop with a change in government. 252 In the months following, Canada's Prime Minister similarly articulated the position that Ontario's actions on carbon pricing was damaging to progress on climate change, when he criticized the Ontario Government for taking a "step backwards" by scrapping the province's cap and trade regime and imposing its own plan to curb emissions that did not include a tax on emissions.[253]

189. One of the Prime Minister's most senior advisors, Principal Secretary Gerald Butts, was even more scathing at the time in his criticism of Ontario's regression on climate change under the newly elected government:

> Ford withdrew from cap & trade with Quebec, weakened ON's target, cancelled funding for schools to reduce emissions, and made pollution free again. That's moving the goalposts.[254]

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[250] Trish Audette-Longo, "How Doug Ford skated around the media in his first week as Ontario Tory leader" (16 March 2018), **Exh. C-204**.

[251] Respondent's Counter-Memorial, para. 102.

[252] Global News, Canada "Catherine McKenna, Ontario environment minister trade barbs in carbon tax spat" (18 July 2018), **Exh. C-215.**

[253] Toronto Star, "Ford and Trudeau trade shots on climate change plans at first ministers' summit in Montreal" (7 December 2018), **Exh. C-216.**

[254] Gerald Butts Tweet (7 December 2018), **Exh. C-217.**

Faced with the prospect of liability under NAFTA for Ontario's illegal measures, the Respondent's in-house legal team in these proceedings appear to be afflicted with selective memory syndrome.

190. Second, the notion that the cancellation of the Cap and Trade Program was undertaken in pursuit of a legitimate and "new" environmental policy rather than primarily for arbitrary political reasons is further undermined by the fact Ontario merely replaced one carbon pricing regime with another – and one that imposed a higher cost on Ontario taxpayers. Again, the Respondent effectively ignores the evidence submitted by the Claimants in the Memorial that the Ontario Cap and Trade Program was swiftly replaced by the Federal Government's backstop program – as was anticipated at the time of its cancellation – meaning that Ontario was simply subject to a similar and equally stringent carbon pricing regime.[255] The Financial Accountability Office of Ontario (**FAO**) confirmed in the autumn of 2018 that the backstop program was likely to impose a larger carbon price than Ontario's cancelled Cap and Trade Program.[256] The only difference was, politically, Ontario could blame the costs of that program on the Federal Government (ironically, now forced to defend Ontario's cynical gesture through the present claim).

191. Instead of engaging with this evidence, at all, the Respondent simply asserts that the Claimants "fail to put the Ontario measures in their proper context."[257] Yet it fails to demonstrate what the "proper context" is for the Claimants and this Tribunal to understand the rationale for abruptly and arbitrarily cancelling the Cap and Trade Program with no notice or phase out, and facing the prospect that Ontario would be subject to the Federal Government's backstop program in any event. The Respondent was obliged to put forward its "full case" with its Counter-Memorial. Bland and meaningless phrases such as "proper context" are no case at all – and the Respondent cannot at the Rejoinder phase suddenly invent new policy justifications. Clearly, the only "context" here was the cynical political calculations of the Ontario Progressive Conservatives who wanted to crow to Ontario suburbanites that they have reduced the cost of gas by 10 cents a litre, while blaming the federal government when the backstop kicked in. Nor can the Respondent with a straight face call this an "environmental policy".

192. Third, and in an attempt to demonstrate the legitimacy of Ontario's actions, the Respondent asserts that the Cancellation Act "required the Minister to prepare, with the approval of the Lieutenant Governor in Council, a climate change plan", which it states ultimately "included several elements for addressing the challenges posed by climate change."[258] It recounts that on 29 November 2018, Ontario released its plan to reduce GHG emissions and to "help[] communities and families prepare for climate

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[255] Claimants' Memorial, paras. 259-265.

[256] *See id.*, para. 267. *See also* Expert Report of Dr. Robert Stavins (5 October 2021), Section VI, **CER-1**.

[257] Respondent's Counter-Memorial, para. 272.

[258] *Id.*, paras. 102, 104.

change."[259] This plan, on the Respondent's own evidence, came into effect on 1 January 2022.[260]

193. If one of the "key features" of the Cancellation Act were truly to address environmental issues, issues acknowledged by the Respondent as "a real and urgent threat",[261] then the gap of over three and a half years between the enactment of the Cancellation Act and the operation of the new "Made-in-Ontario" environmental plan is absurd and strains credulity. Similarly, the fact that the Respondent determined that Ontario's leisurely response to claimant change was sufficient, and that the Federal Government's Greenhouse Gas Pollution Pricing Act backstop had to apply in Ontario, confirms the Respondent's actual contemporary assessment of Ontario's alleged "environmental" plan. This is unsurprising, given that the Premier-elect at the relevant time repeatedly stated that the true purpose of cancelling the Cap and Trade Program was to reduce the cost of gas at the pump, reckless to the impact of his measure on climate change and in the total absence of a back-up environmental policy, and with the sole goal of shifting the blame for carbon capture costs to the Federal Government.

194. Finally, the Respondent's argument that the Cancellation Act was "instrumental in the development of a new solution to the challenges posed by climate change" is imaginative to say the least. As a review by "Environmental Defence" (a leading Canadian environmental advocacy organization) of Ontario's climate change policies makes clear:

> Ontario's new provincial government promised to fight climate change without a carbon price in 2018. But how? Their first actions after inauguration were to destroy the programs in place to fight climate change, with no new initiatives to replace them. In fall 2018, Ontario released the Made-In-Ontario Environment Plan. This was hot on the heels of the IPCC's stunning 2018 report outlining the consequences of climate inaction. Instead of responding to this report by scaling up ambition, Ontario weakened its 2030 greenhouse emissions reduction target when compared with the previous government's target and presented a superficial and unsubstantiated vision for how the province would meet this new, weakened target. The plan had major flaws, including back-of-the-napkin calculations that didn't hold up to scrutiny. For example, "Innovation" was tasked with achieving 15 percent of Ontario's emission reductions. There was no clear explanation of how "innovation" would happen, and the category appeared to include no government actions. Also missing from the plan were any significant actions to cut emissions from transportation, the biggest source of greenhouse gas emissions in Ontario.[262]

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[259] *Id.*, para. 103.

[260] *Id.*, para. 104.

[261] *Id.*, para. 273.

[262] Environmental Defence, "A Review of the Past Four Years of Ontario's Climate Change (In)Action" (2022), p. 12, **Exh. C-205**.

195. The Review also noted that a report by Ontario's own Auditor General had revealed that the Minister of Environment, Conservation and Parks presented "inflated emissions reduction estimates" in Ontario's new "Made-in-Ontario" environmental plan. More specifically, "the calculations included were presented by Ministry staff as part of an 'Extended Policy Case' which required enhanced policies beyond the final plan," a "bait and switch [that] meant a drastic overstatement of the impact of Ontario's new climate action plan."[263]

196. The aforementioned report by Ontario's Auditor-General concluded that "the Ministry's projected emissions forecast for 2030, and the estimated emissions reductions for all eight areas, are not yet supported by sound evidence."[264] The Auditor-General's office carried out their own more thorough modelling which showed that the Made-in-Ontario environment plan would fall well short of Ontario's new weaker target to cut greenhouse gas emissions, even if all promised actions in the plan were implemented.[265] While Ontario acknowledged the Auditor-General's scathing report and pledged to update and improve the plan in line with their suggestions, as of 2021 only 27 percent of actions recommended to improve the climate change plan had been fully implemented.[266]

197. The Claimants do not question Ontario's right to make policy decisions including to eliminate the Cap and Trade Program. But, they do take exception to Ontario and the Respondent's effort to seek to excuse Ontario's behaviour by blanket reference to "public policy" and empty statements about the importance of addressing challenges posed by climate change. And in any event, the pursuit of a public policy (however bad, ill-intentioned or poorly conceived), does not give a government a blank cheque to treat investors with impunity and in contravention of international law, as happened here.

2. The Respondent's Attempt to Present Ontario's Actions as Being the Result of a Democratic Legal Process is Unavailing

198. In the Memorial, the Claimants demonstrated that the manner in which the Cap and Trade Program was ultimately wound down, and the Cancellation Act introduced, was contrary to Ontario's own law. In particular, the Claimants recalled that Ontario's newly elected Progressive Conservative Government refused to pursue public consultations in respect of Bill 4, despite such consultations being mandated by Ontario law. Following a challenge launched by Greenpeace Canada (which alleged – *inter alia* – that the Ford Government had unlawfully failed to engage in public

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[263] *Ibid*.

[264] Office of the Auditor General of Ontario, "Follow-up on Value-for-Money Audit: Climate Change, Ontario's Plan to Reduce Greenhouse Gas Emissions" (November 2021), pp. 2-4, **Exh. C-206**.

[265] *Ibid*.

[266] *Id*., p. 2.

consultations over the cancelling of the Program), Ontario hastily backed down and reluctantly proceeded to summary public consultations.[267]

199. In its Counter-Memorial, the Respondent seeks to ignore the evidence presented by the Claimants in favour of its bland and featureless account of the alleged "democratic legal process" by which the new Government "began the orderly wind-down" of the Cap and Trade Program.[268] In so doing, it attempts to portray the actions of the Ontario Government once it actually legally took office (*i.e.* after its swearing-in of late June 2018) as predictable, orderly and rational.[269] Nothing could be further from the truth.

200. First, Regulation 386/18 came into force on 3 July 2018, just *four days* after the Ford Government came into power on 29 June 2018. The hastily introduced regulation ensured that Ontario's *de facto* freeze on all trades and transfers of emission allowances held in Ontario CITSS accounts, as of the Premier-elect's illegal measure of 15 June 2018, suddenly became a *de jure* freeze. In a manner consistent with the Premier-elect's abrupt announcement of the end of the Cap and Trade Program on 15 June 2018, Regulation 386/18 was not accompanied by any explanation or assurances for participants in the Cap and Trade Program as to the government's plan for an "orderly" wind down. Instead, and as the Respondent itself acknowledges, participants with Ontario CITSS accounts simply received an email notification that same day advising them that they were prevented from transferring and receiving instruments in their Ontario CITSS account.[270] As of this date, participants remained in the dark (as they had been since 15 June 2018) as to the manner in which the wind-down would be enacted and notably, about what compensation (if any) they would receive further to the summary cancellation of Cap and Trade.

201. Second, three weeks later, on 25 July 2018, the Ford Government introduced Bill 4. The Respondent's narrative of Ontario's "orderly" process for the introduction of Bill 4 and ultimate adoption of the Cancellation Act is notable for what it omits. In particular:

- The Respondent recounts that Bill 4 was introduced on 25 July 2018, and was posted for public comment on 11 September 2018. Its narrative entirely skips over the legal challenge to Bill 4 under the Environmental Bill of Rights, 1993, through which the Ontario Government was challenged for having acted *ultra vires* in its actions to revoke the Cap and Trade Program, having failed to conduct public consultations in respect of the legislation (as required under Ontario environmental law). In a footnote, the Respondent asserts that the legal challenge involved an "academic determination" that the repeal of Regulation 144/16 did not meet public participation requirements, blandly stating that the case was dismissed by a majority decision of the Ontario Court.[271] It fails to acknowledge

[267] *See* Claimants' Memorial, paras. 237-242.

[268] Respondent's Counter-Memorial, paras. 83-92.

[269] *Id.*, paras. 83-92.

[270] *Id.*, para. 85.

[271] *Id.*, n. 148.

that the case was only dismissed as moot following the Ontario Government's decision to proceed to summary public consultations, after the claim was filed, and in face of the almost certain condemnation of its action by the Ontario Court.[272] Moreover, the Respondent fails to mention that Justice Mew, in the majority of the Court, nonetheless held that "the government failed to comply with its legal obligations" as a matter of domestic law.[273] It also ignores the damning comments of Justice Corbett, who separately stated that the Government "failed to comply with the law" and "since sought to justify that illegality by its election victory and has passed legislation purporting to preclude judicial review of what it has done."[274] These actions, for Justice Corbett, raised "serious concerns – not about whether the government had the lawful authority to repeal the Cap and Trade Act, but of its respect for the Rule of Law and the role of the courts, as a branch of government".[275]

- The Respondent then states that "[i]nterested stakeholders" had the opportunity to comment on Bill 4, and that the Ministry received 11,222 comments that it "reviewed, analysed and summarized."[276] After receiving these thousands of comments, however, the Respondent's witness recalls only two changes to the draft legislation: "ensuring that free allowances were deducted once (rather than twice) when calculating the amount of compensation" and "removing duplication in regulation making authority".[277] In other words, Ontario rectified two administrative mistakes in the original draft of the legislation, while admitting to "not retain[ing]" those comments "that were in direct contradiction with the clear policy decisions made by Ontario" (in other words, ignoring thousands of comments opposed to Ontario's reckless new policy).[278] Moreover, Ontario's summary of the comments received on the Cancellation Act on 15 November 2018,[279] were released over two weeks *after* the Bill had already received Royal Assent. Clearly, Ontario was simply "going through the motions" to give the appearance of a legitimate, democratic process, and only after the Ontario Court had essentially ordered it to do so.

- The Respondent explains over the course of two paragraphs that, "[i]n addition to 'substantial lobbying efforts' by KS&T" to meet with Ontario officials, the Claimants also made significant efforts to provide comments on Bill 4, the proposed alternatives that would address the Claimants' concerns, and the letters

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[272] Claimants' Memorial, para. 239.

[273] *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, para. 84, **CL-33**.

[274] *Id*., para.3.

[275] *Id*., para. 75.

[276] Respondent's Counter-Memorial, para. 87.

[277] Witness Statement of Mr. Alexander Wood (16 February 2022), para. 29, **RWS-1**.

[278] *Id*., para. 28.

[279] Environmental Registry of Ontario, "Bill 4, Cap and Trade Cancellation Act, 2018", 15 November 2018, **Exh. C-12**.

the Claimants wrote to the Government.[280] Yet it is unable to point to any written response of the Ontario Government to the Claimants' correspondence, confirming the Claimants position as set out in the Memorial[281] that Ontario largely ignored the Claimants' good faith attempt to engage on substantive issues during the passage of the Cancellation Act.[282]

202. Finally, the Respondent's assertion that "the government received a strong mandate from the people of Ontario to cancel the cap and trade program" is both disingenuous and in no way exculpates itself from the wrongful actions actually undertaken by Ontario. As noted, during the election campaign the Ontario Progressive Conservatives failed to provide any details regarding the reckless, abrupt, arbitrary and unfair manner in which they actually threw out the Cap and Trade Program after the elections. The Claimants do not dispute Ontario's rights to make policy decisions as an elected government. However, in its election campaign, the Progressive Conservative Party was silent on the abrupt and arbitrary manner in which the Ford Government would ultimately cancel the Cap and Trade Program, acting *ultra vires* before it was even in power to blindside all participants in the market as well as its trading partners.[283] Moreover, the Ford Government lied about the true cost of cancelling the Program to its constituents, affirming that it would cost Ontarians only in the range of CAD 5 million at exactly the same time Ontario Progressive Conservative's high-level political representatives were privately admitting the cancellation would give rise to tens of millions of dollars in claims.[284] And as noted, the Ontario Court confirmed that passing the legislation as adopted without consulting the people of Ontario was plainly illegal, regardless of the election – so much for a "strong mandate".

203. Overall, the Respondent's portrayal of the winding down of the Cap and Trade Program as a principled democratic outcome amounts to a dispiriting whitewashing of events, designed solely to exculpate it for Ontario's reckless and illegal actions, regardless of the truth.

3. The Respondent's Depiction of a "Principled" Compensation Approach and Treatment of the Claimants is Unsustainable

204. In the Memorial, the Claimants described how Ontario effectively picked "winners and losers" in cancelling the Cap and Trade Program, unfairly and arbitrarily targeting market participants for no compensation, despite having invited companies like KS&T to take part in the Cap and Trade Program in the first place through the creation of a specific category of market participants.[285] Moreover, the Claimants

[280] Respondent's Counter-Memorial, paras. 88-89.

[281] Claimants' Memorial, paras. 221-236.

[282] *Id*., paras. 221-236.

[283] *See* paras. 105-109 and 133-138 *supra*.

[284] *See* Claimants' Memorial, paras. 220, 359.

[285] *See*, *e.g.*, *id*., paras. 290, 371; Expert Report of Dr. Robert Stavins (5 October 2021), para. 18, **CER-1**; Witness Statement of Michael Berends (5 October 2021), paras. 102-113, **CWS-1**.

described how the Ontario Government knew that its approach to compensation would be "likely to turn into" a NAFTA claim, but cynically proceeded in the expectation that the expense of such as claim would be "on the Federal Government."[286]

205. In its Counter-Memorial, the Respondent follows its previous tactic when faced with unpalatable evidence, once again simply ignoring it and leaving it unanswered. Instead, it blandly parrots Ontario media lines, asserting in thin air that Ontario's compensation scheme was logical and reasonable, and provided compensation on a "principled basis",[287] and criticising KS&T for seeking compensation under the Cancellation Act.[288] As described in the following sections, neither of these propositions withstand scrutiny.

(a) The Respondent's Position is Contradicted by the Plain Language and Operation of the Cancellation Act

206. The Respondent's assertion that Ontario adopted a "principled" compensation approach is contradicted by the arbitrary and discriminatory provisions plain on the face of the Cancellation Act itself. None of the arguments submitted by it in its Counter-Memorial or accompanying expert reports and witness statements can alter the fact that Ontario implemented a compensation scheme designed to maximize the benefit to Ontario, at the Claimants' cost, regardless of legalities and inequitable outcomes.

207. First, the Respondent's own internal documents demonstrate that the design of the Cancellation Act

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[286] Claimants' Memorial, para. 223.

[287] Respondent's Counter-Memorial, paras. 83, 93-101.

[288] *Id.*, paras. 105-107.

[289] The exclusion of market participants from compensation was especially arbitrary and unfair when contrasted with the treatment of participants such as fuel and natural gas distributors, who could have recouped the costs of their purchased allowances by passing

(continued)

208. The large gap between Ontario's revenue and its compensation pay-outs reflects the fact that many allowance holders were excluded from compensation altogether, notably market participants, and the illogical "matching" process by which the Government determined compensation.[290] Candidly, in its internal documents produced for purposes of these proceedings, Ontario recognized the concern that "[t]he up to $5 million in the compensation framework is not enough to cover the almost $3 billion in purchased offsets and allowances".[291] Indeed, Ontario was well-aware of the potential risk of a NAFTA claim as a result of its actions, stating internally that [redacted] .[292] However, Ontario ultimately considered that it could rely on the immunity provision in the Cancellation Act to "protect the government from lawsuits to help minimize the impact on taxpayer dollars".[293]

209. Second, the Respondent's assertion that the exclusion of market participants from compensation was because they had "no compliance obligations and chose to participate in the cap and trade program at their own risk" is as non-sensical as it is unprincipled. In its Counter-Memorial, it makes no effort to provide any logical rationale for this position, merely parroting without analysis the cursory rationale offered by Ontario at the time, *i.e.*, that KS&T "chose to participate in the cap and trade program at their own risk" as "market traders and speculators".[294]

210. As the Claimants emphasized with the support of its experts and witnesses in its Memorial, in uncontested evidence, the stated explanation for non-compensation is irrational, in that it effectively assumes the Claimants undertook the risk that Ontario would act in a reckless and irresponsible manner by abruptly terminating the Cap and Trade Program, in breach of its undertakings to California and Québec and in contempt of domestic law prohibitions against abuse of ministerial discretion and of the Respondent's international obligations under the NAFTA. The risk of such illegal and unequitable State behaviour is fundamentally different than the types of exogenous market risks that investors regularly do accept. As Dr. Stavins explains in his second expert report,

> [N]ot only does Ontario's statement provide no clear foundation or justification for its decision to exclude market participants from compensation, but there is no obvious foundation or justification for

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them on at the retail level: see Witness Statement of Michael Berends (5 October 2021), paras. 105-107, **CWS-1**.

[290] Expert Report of Dr. Robert Stavins (5 October 2021), paras. 124-126, **CER-1**.

[291] *See*, *e.g.*, Ontario Government, "Bill 4, Cap and Trade Cancellation Act, 2018, Key Debate Themes Against the Bill" (12 October 2018), p. CAN-00969, **Exh. C-208**.

[292] [redacted] Ontario Government, "Climate Change – Combined QAs: Key Messages and Qs and As (25 September 2018 – updated), p. CAN-0977, **Exh. C-209**.

[293] *See*, *e.g.*, Ontario Government, "Climate Change – Combined QAs: Key Messages and Qs and As (25 September 2018 – updated), p. CAN-0977, **Exh. C-209**.

[294] Respondent's Counter-Memorial, para. 97.

> the decision from the standpoint of economics or finance. Instead, after authorizing market participants to participate in its cap-and-trade system given the benefits they provide, Ontario withheld compensation to those experiencing financial losses. Moreover, the risk to traders that Ontario might cancel the cap-and-trade program is distinguishable from exogenous market risks that traders face in the marketplace by the fact that Ontario itself controlled whether the program would be cancelled, whereas other market risks were outside of Ontario's (and traders') control.[295]

211. As noted above in Part II A.2, in his second expert report, Dr. Stavins further explains that the Ontario Cap and Trade Program would not have functioned effectively had participants in fact anticipated that Ontario would abruptly cancel the Cap and Trade Program in the manner that it did, as such expectations would naturally destroy any confidence in the system and preclude any rational investment:

> It is well understood that the design of an effective cap-and-trade system requires that market participants have confidence in the function of the market and the commitments made by governments to sustain demand for allowances … A cap-and-trade program in which participants expect that they will not be "successful in transferring allowances between … accounts" will suffer from inefficient decisions about when to trade allowances, where to hold allowances, and when to make emissions-reducing investments. Similarly, a cap-and-trade program in which participants are "without any commitment … that the program would last" would lead to inefficient capital investment decisions, with capped entities expected to refrain from large capital investments requiring sustained carbon prices to provide sufficient returns to investment. In both examples, uncertainty is detrimental to the environmental and economic performance of the policy. Thus, in adopting a cap-and-trade system, <u>Ontario policymakers relied on a policy in which successful achievement of economic and environmental outcomes depends on the belief by all participants in the market that regulatory consistency means that trades can be made, allowances can be moved when needed, and demand for allowances will be sustained</u>.[296]

212. Graeme Martin confirms this same point from the perspective of an actual market participant:

> [T]his is part of a bigger problem I have with Canada's submissions – their repeated assertion that KS&T in investing in Ontario through the Cap and Trade Program willingly "undertook the risk" that Ontario might act as it in fact did. I frankly find this assertion shocking. Businesses regularly undertake the risk that the services or products they deal in might fail to generate a profit. But they do not willingly or fairly undertake the risk that the host government of their investment will treat them in a completely arbitrary and unfair manner, as in fact occurred here. KS&T certainly did not expect a

[295] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 65, **CER-2**.

[296] *Id*., para. 69 (emphasis added).

western government to confiscate its assets and only compensate certain participants, not all.[297]

213. Third, the Respondent's assertion that KS&T was a "mere speculator", aping Ontario's language from the summer of 2018, casts aspersion on KS&T simply because it is a private sector enterprise seeking to generate profit through the diligent application of its specialist expertise in a market. The Respondent's response to enterprises such as KS&T is, apparently, that they "deserved" to be expropriated without compensation and to be subject to arbitrary and discriminatory treatment, because they took the risk of doing business in Canada, since market activity is inherently "speculative". This is a particularly dispiriting and indeed shocking proposition for any developed State to express, vis-à-vis any reputable business. It is all the more inequitable a proposition in light of the range of valuable services provided by market participants under Cap and Trade, detailed in Dr. Stavins first expert report.[298]

214. Indeed, it appears that common sense was not the prevailing attitude within the Ontario Government, as of June 2018, and that the treatment of the Claimants may have been due to the discriminatory attitude of the Office of the Premier.

215. This candid reasoning of the Office of the Premier for its treatment of the Claimants – and other like market participants – speaks volumes. For the avoidance of any doubt, this depiction of KS&T's legitimate enterprise activity, encouraged and indeed designed by Ontario's own legislation, is offensive. Recalling this language

[297] Second Witness Statement of Graeme Martin (18 July 2022), para. 25, **CWS-5**.

[298] Expert Report of Dr. Robert Stavins (5 October 2021), Section IV.A, **CER-1**. Moreover, as Dr. Stavins points out, "setting aside that labeling a given purchase as 'speculative' provides no credible justification for exclusion from compensation", "Ontario's compensation scheme does not sensibly distinguish between types of market traders and the purpose of trades they engage in, such as 'speculative' trading". Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 70, **CER-2**. Ontario's scheme ignores the fact that compliance entities could just as easily engage in "speculative" activity by purchasing more allowances that would have been sufficient to fulfil that their compliance obligations. *Id.*, para. 71.

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nonetheless starkly illustrates the ignorant, deliberate and frankly discriminatory negative targeting of the Claimants by the high political direction of Ontario's newly-elected government. The NAFTA was designed to protect against precisely this kind of illegal government decision-making.

216. Finally, in addition to failing to provide any logical justification for the exclusion of market participants from any compensation, the Respondent's review of the compensation scheme set forth in the Cancellation Act is self-serving and superficial.[300] At the outset of its description of the compensation scheme, it adopts Ontario's misleading description of "cancelled" allowances as limited to "participants who held emissions allowances in excess of their attributed emissions".[301] In so doing, the Respondent deliberately ignores the allowances holdings of *inter alia* market participants, who purchased and held allowances at Ontario's invitation and were also therefore in need – and equally deserving – of compensation, at least under a principled approach.

217. The Respondent also does not engage with Dr. Stavins' detailed critiques of the perverse outcome of the compensation scheme. Instead, Mr. Wood largely parrots the provisions of the Cancellation Act[302] and maintains that the "wind-down of the program followed a principled and rational approach".[303] Mere repetition of an untruth does not make it any more true.

218. Nowhere does Mr. Wood, or the Respondent, engage with the evidence of Dr. Stavins, or explain any detailed assessment of the real impacts of the arbitrary and discriminatory compensation policy adopted by Ontario. Dr. Stavins demonstrated that Ontario's scheme did not require all sources deemed eligible for compensation to obtain allowances to cover their actual emissions, but only compensated those with allowance quantities that exceeded their actual emissions. As a result, the burden of "compliance" was applied unevenly across capped sources, with those that purchased allowances losing the value of all allowances required to cover emissions, while those that did not purchase sufficient allowances perversely avoided a similar cost for some of their emissions. Ontario's own Environmental Commissioner acknowledged that this approach "reward[ed] laggards and punish[ed] the rest."[304] The Respondent's silence in the face of these critiques speaks for itself.

219. Moreover, the Respondent and Mr. Wood fail to engage with evidence submitted with the Claimants' Memorial that this arbitrary distinction between participants in the Cap and Trade Program was a key concern of KS&T and Koch, and one that was raised

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[300] Respondent's Counter-Memorial, paras. 93-97.

[301] *Id.*, para. 95.

[302] Witness Statement of Mr. Alexander Wood (16 February 2022), paras. 19-25, **RWS-1**.

[303] *Id.*, para. 19.

[304] Expert Report of Dr. Robert Stavins (5 October 2021), para. 130, **CER-1**, citing Environmental Commissioner of Ontario, "Climate Action in Ontario: Opportunities for Cleantech," October 1, 2018, p. 32, **Exh. RS-114**.

with Ontario on multiple occasions.[305] As Graeme Martin explains in his second witness statement:

> In particular, KS&T highlighted the fact that companies that did not meet their compliance obligations in a timely manner were going to be "unfairly rewarded in a manner that is entirely antithetical to the purpose and intent or the statutory scheme and any other legitimate purpose." Based on my conversations with counter-parts at large energy companies subsequent to the cancellation of the Cap and Trade Program, this is exactly what happened: some companies received windfalls of tens of millions of dollars while others – like KS&T – were punished in the same magnitude.
>
> In fact, I am aware from discussions with at least two major fuel providers that they received a windfall from the cancellation of the Cap and Trade Program. These companies had previously moved their allowances to their California/Québec CITSS accounts, where the allowances were able to be sold, yet then had their compliance obligations waived by Ontario under the Cancellation Act. The companies recouped the cost of their allowances through the sale of fuel, and were then able to sell these allowances in the open market in California and Québec to generate a windfall profit.[306]

220. This perverse outcome of the Cancellation Act, together with the significant further critiques of Ontario's approach generally and discriminatory actions against the Claimants specifically, clearly belies the narrative that Ontario took a "principled and rational approach" to compensating allowance holders.[307]

(b) The Respondent's Criticism of the Claimants for Seeking Compensation for Ontario's Unlawful Action is Unwarranted

221. In the Memorial, the Claimants demonstrated their good faith efforts to obtain compensation for Ontario's wrongdoing,[308] and recounted Ontario's arbitrary approach in summarily denying KS&T's application for compensation under the Cancellation Act.[309]

222. In its Counter-Memorial, the Respondent largely ignores this evidence and instead appears to criticise the Claimants for: (1) pointing out that KS&T's specific circumstances reinforced the merits of according it compensation; and (2) applying

[305] *See*, *e.g.*, Witness Statement of Graeme Martin (4 October 2021), paras. 58-64, **CWS-2**.

[306] Second Witness Statement of Graeme Martin (18 July 2022), paras. 32-33, **CWS-5** (citing Koch, Comments to Ontario Environmental Registry on Bill 4 (11 August 2018), **Exh. C-113**).

[307] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 37, **CER-2**; Expert Report of Dr. Robert Stavins (5 October 2021), paras. 126-134, **CER-1**.

[308] Claimants' Memorial, paras. 221-263.

[309] *Id.*, paras. 275-286.

for compensation under the Cancellation Act, at all.[310] Its responses reinforce the contempt with which Ontario viewed the Claimants as foreign investors in Canada.

223. First, as the Claimants have explained, KS&T launched its enterprise in the Ontario Cap and Trade Program in order to fulfil this specialist market role on behalf of the broader Koch group, thereby helping all relevant affiliates (including mandatory participants in Ontario, such as INVISTA) participate efficiently in the Program while turning a profit.[311] The Claimants can hardly be faulted for attempting to flag to Ontario the double absurdity of failing to compensate market participants whose engagement in the Program sought to promote efficient compliance for a broader corporate group, as an adjunct benefit to its broader business plan.[312] Indeed, as Dr. Stavins confirmed in his initial report, Ontario's treatment of participants forming part of a group of related corporate entities such KS&T clearly illustrates the arbitrary nature of Ontario's compensation scheme.[313]

224. Moreover, as described in paragraphs 213-215 above, the Claimants efforts to engage in good faith with the Ontario Government, including to provide tangible amendments to Bill 4 that would have had the effect of allowing compensation to stakeholders like KS&T,[314] were in vain in light of the clearly discriminatory position of the Office of the Premier.[315] The Respondent's position that Ontario's actions were not arbitrary or discriminatory, and that it was the Claimants who were acting outside the scope of the Cancellation Act, cannot bear scrutiny in such circumstances.

225. Second, the Respondent ignores the Claimants' arguments on Ontario's *pro forma* rejection of KS&T's compensation,[316] instead chastising the Claimants for even daring to apply for compensation, through the process established by Ontario for that purpose. It states, in relevant part:

> On February 14, 2019, KS&T submitted an application for compensation. One of the fields on the form asked the applicant to confirm that it was "eligible to apply for compensation under s.8 of the *Cap and Trade Cancellation Act*"." KS&T – undisputedly registered as a "market participant" and thus ineligible for compensation – nevertheless indicated that it fulfilled this criterion.[317]

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[310] Respondent's Counter-Memorial, paras.105-107.

[311] Claimants' Memorial, paras. 120-124.

[312] *Id.*, paras. 125-184, 408-418.

[313] Expert Report of Dr. Robert Stavins (5 October 2021), paras. 127-128, **CER-1**.

[314] Claimants' Memorial, paras. 229-235.

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[316] Respondent's Counter-Memorial, paras. 105-107.

[317] *Id.*, para. 105.

226. The Claimants do not understand the logic behind the Respondent's position, if there is any at all. If the Claimants had not applied for compensation, no doubt the Respondent also would have criticised them – as it does for failing to challenge the enactment of the Cancellation Act before domestic courts, despite no remedies being available (discussed in Part IV.B.3(b) below). Ontario's failure to respond to the Claimants' letters and suggestions left the Claimants with little option to pursue remedies for the loss Ontario's actions had caused. The Claimants cannot be blamed for attempting to remedy that loss by writing to the Government to request compensation.

227. In short, the Respondent has nothing of substance to say in defence of Ontario's arbitrary and discriminatory approach to compensation upon terminating the Cap and Trade Program. Documents placed on the record by the Claimants and produced by the Respondent in this proceeding confirm that Ontario was well aware of the legal risk engendered by this approach and proceeded regardless. Ontario then ignored the Claimants' request for compensation and failed to engage with the Claimants in good faith. The reason for this is now clear, and stems from the contempt with which the Office of the Premier viewed the Claimants as foreign investors in Canada. The risks Ontario foresaw have now been realized, and the Respondent cannot shrug off the consequences by merely repeating the hollow justifications offered by Ontario at the time.

4. The Respondent's Assertion that Ontario "Only" Received [REDACTED] of the Claimants' Money is Specious

228. In the Memorial, the Claimants explained that Ontario profited in a substantial way from KS&T's investment, and other investments like it in the Ontario Cap and Trade Program. Over the course of Ontario's Cap and Trade Program, Ontario received – by its own account – CAD 2,873,158,143.54 in revenues from the auction of emissions allowances.[318] Of this, Ontario received CAD 472,138,014.12 from the May 2018 joint auction alone.[319]

229. In its Counter-Memorial, however, the Respondent asserts that the Claimants' position is a "gross exaggeration" because "the sum that Ontario received as proceeds from KS&T's purchase of emission allowances at the May 2018 auction is less than [REDACTED]"[320] This position is misleading.

230. First, the Claimants recall that the figures for Ontario's total receipts, as cited in the Memorial, were obtained from Ontario's own "Post-Auction Public Proceeds Report" which it published after each single and joint auction.[321] In accusing the Claimants of

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[318] Claimants' Memorial, para. 291, citing Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**.

[319] *Ibid.*

[320] Respondent's Counter-Memorial, para. 128.

[321] Claimants' Memorial, para. 291, n. 386 ("Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**. After each single and joint auction, Ontario published a "Post-Auction Public Proceeds Report", reporting on the proceeds to the Province of Ontario from the sale of allowances. *See* Ontario Post-Auction Public Proceeds Report (March 2017, Ontario Auction

(continued)

a "gross exaggeration", it is telling that despite its bluster the Respondent does not – and cannot – deny the accuracy of the figures cited.

231. Second, the Respondent's assertion that Ontario "only" received [redacted] of the USD $30M paid by KS&T (even if taken at face value as accurate),[322] is an admission that Ontario received at least that size of windfall directly as a result of KS&T's participation in the May 2018 joint auction, and Ontario's subsequent illegal and unprincipled refusal to return such funds upon cancellation of the Cap and Trade Program.

232. Third, in any event, by focusing on the millions of dollars Ontario allegedly "only" (!) received as a direct result of KS&T's payment of USD 30,158,240.95, the Respondent ignores the fact that in that joint auction of May 2018, Ontario *actually* received in the range of CAD 472 million (or USD 368 million) that was supposed to be invested in green projects in Ontario but that instead went into the Ontario treasury. As Michael Berends explains in his second witness statement:

> [F]urther to the May 2018 joint auction, Ontario received all the money for the 2018 vintage allowances which it put into auction, as they were fully sold. This was regardless of whether or not they were sold to Ontario market participants. Ontario also received additional proceeds from the 'advance' auction of 2021 vintage allowances on the same occasion. As a result, Ontario must have received roughly USD 368,000,000 by way of total proceeds from the May 2018 auction alone. It is therefore misleading to focus in isolation on the proceeds Ontario received from KS&T alone from the May 2018 public auction – Ontario nonetheless received a significant pay-out from that auction overall, far in excess of the mere [redacted] it mentions in relation to KS&T's purchase. All of that vast amount of money went into Ontario's public coffers. None of it was paid out to market participants like KS&T who had paid for their allowances and taken part in the Cap and Trade Program in good faith.[323]

233. Finally, regardless of the amount it received directly from KS&T's purchase in the May 2018 joint auction, Ontario was in any event directly responsible for the destruction of value of KS&T's allowances held in its Ontario CITSS account and the related destruction of KS&T's allowances through its measures in violation of the NAFTA.

#1) **Exh. C-131**; Ontario Post-Auction Public Proceeds Report (June 2017, Ontario Auction #2) **Exh. C-132**; Ontario Post-Auction Public Proceeds Report (September 2017, Ontario Auction #3) **Exh. C-133**; Ontario Post-Auction Public Proceeds Report (November 2017, Ontario Auction #4) **Exh. C-134**; Ontario Post-Auction Public Proceeds Report (February 2018, Joint Auction #14) **Exh. C-135**; Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**.

[322] Respondent's Counter-Memorial, para. 64.

[323] Second Witness Statement of Michael Berends (16 July 2022), para. 13, **CWS-7**.

III. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

234. In their Memorial, the Claimants demonstrated that this Tribunal has jurisdiction over this dispute, as the conditions of jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae* of the NAFTA, the United States-Mexico-Canada Agreement (**USMCA**) and Article 25 of the ICSID Convention have all been met.[324]

235. In its Counter-Memorial, the Respondent does not challenge the Claimants' assertion that its case meets the requirements of jurisdiction *ratione voluntatis*[325] and *ratione temporis*[326] under both the NAFTA and the USMCA. Nor does the Respondent challenge KS&T's standing as a qualifying investor that meets the requirements of jurisdiction *ratione personae* under the NAFTA, the USMCA and the ICSID Convention.

236. Instead, the Respondent asserts that this Tribunal lacks jurisdiction *ratione materiae* under both the NAFTA and the ICSID Convention, and lacks jurisdiction *ratione personae* with respect to Koch's standing under the NAFTA. The objections are entirely unsupported, as both as a matter of law and as a matter of fact. The Claimants respond to the Respondent's objections in the following sections: first, the Claimants demonstrate that the Respondent's approach on determining the burden of proof for questions of jurisdiction is unsupported (Section III.A); second, the Claimants demonstrate that the Respondent's objections to the Tribunal's jurisdiction *ratione materiae* under the NAFTA and the ICSID Convention are unavailing as both a matter of international and domestic law (Sections III.B and III.C, respectively); and third, the Claimants demonstrate that Respondent's assertion that the Tribunal lacks jurisdiction *ratione personae* with respect to the Claimant Koch Industries is erroneous (Section III.D).

A. The Claimants have Complied with the Overarching Principles of Law Applicable to Determining that this Tribunal has Jurisdiction

237. In the Memorial, the Claimants properly set out its position that the Tribunal has jurisdiction over this dispute, including the requirements of jurisdiction *ratione voluntatis*, *ratione temporis*, *ratione personae*, and *ratione materiae*.[327] The Claimants both explained the applicable legal standards, and then demonstrated how – based on the facts of this case – requirements of jurisdiction had been met.

238. In its Counter-Memorial, the Respondent states the general proposition that "the Claimants bear the burden of proving that the Tribunal has jurisdiction",[328] and that "[t]he burden of proof to establish the facts supporting its claim to standing lies with

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[324] Claimants' Memorial, paras. 295-335.

[325] *Id.*, paras. 297-305.

[326] *Id.*, paras. 306-312.

[327] *Id.*, Section III.

[328] Respondent's Counter-Memorial, para. 109.

the Claimant".[329] After conflating these two separate issues (legal and factual burden), the Respondent concludes that "if there is any ambiguity as to whether or not a claimant has met its burden, the tribunal should decline jurisdiction."[330] The Respondent's position on the legal standards applicable to determining jurisdiction cannot be accepted, for the reasons that follow.

239. In conflating the legal and factual burden of proof, the Respondent has misstated both standards. With respect to the *legal* burden of proof, a tribunal must determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all relevant facts and arguments submitted by the parties.[331] In other words, neither a claimant nor a respondent bears the legal burden of proving jurisdiction.[332]

240. However, with respect to the *factual* burden of proof, that burden is shared by the parties. As noted by the tribunal in *Spence v. Costa Rica* (a legal authority submitted by the Respondent):

> The Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.[333]

241. It is therefore for a claimant to adduce evidence in order to establish jurisdiction, and it is for a respondent to adduce evidence in order to challenge the claimant's substantiated assertion of that a tribunal has jurisdiction.[334] In the Memorial, the Claimants demonstrated that – legally and factually – the Tribunal has *prima facie* jurisdiction. The Respondent's objections fail to rebut this position, and thus it fails to support its assertion that the Tribunal lacks jurisdiction to hear this dispute.

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[329] *Id*., para. 109.

[330] *Id*., para. 109.

[331] *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) (13 February 2015), para. 119, **CL-143**.

[332] *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34, Decision on Respondent's Jurisdictional Objections (30 September 2020), para. 93, **CL-142**. A tribunal has the responsibility to determine the scope of its own jurisdiction, even that matter is not raised by a party: *see Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award (3 April 2020), para. 151, **CL-144**.

[333] *See Spence International Investments, LLC, Berkowitz, et al. and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017), para. 239, **RL-6**.

[334] *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. 2017-30, UNCITRAL, Award (28 November 2019), para. 264, **CL-141**.

242. Moreover, the Respondent's assertion that "[i]f a jurisdictional objection is raised by the respondent, the onus is on the claimant to show that jurisdictional requirements have been satisfied" is simply wrong.[335] There is no rebuttable presumption with regard to jurisdictional objections. Likewise, the Respondent's assertion that "[i]f there is any ambiguity as to whether or not a claimant has met its burden, the tribunal should decline jurisdiction" clearly has no legal foundation.[336] General principles require the respondent party to produce sufficient evidence to establish its objections to jurisdiction.[337] The Respondent has failed to do so.

B. The Respondent Has Failed to Demonstrate its Objection to the Tribunal's Jurisdiction *Ratione Materiae* under the NAFTA

243. In the Memorial, the Claimants explained how the requirements for jurisdiction *ratione materiae* under the NAFTA have been satisfied, including under Article 1139(g) ("property tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes") and Article 1139(h) ("interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory").[338] The Claimants further demonstrated that they had also made qualifying investments under the USMCA, and Article 25(1) of the ICSID Convention, as further discussed in Part III.C below.[339]

244. With respect to the Claimants' investments under the NAFTA, the Respondent in its Counter-Memorial asserts that: (1) emission allowances purchased by KS&T were not "property" under Article 1139(g) of the NAFTA; (2) the Claimants did not hold any other "interests arising from the commitment of capital" under Article 1139(h) of the NAFTA; and (3) the Claimant Koch Industries does not hold any other protected investments under Article 1139 as a general matter.

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[335] Respondent's Counter-Memorial, para. 109, citing: *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (5 March 2013), para. 48, **RL-4**: "[a]s a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase"; *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (3 April 2014), para. 118, **RL-5**; and *Spence International Investments, LLC, Berkowitz, et al. and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected) (30 May 2017), para. 239, **RL-6**.

[336] Respondent's Counter-Memorial, para. 109, citing *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic*, UNCITRAL, Award on Jurisdiction (10 February 2012), para. 280, **RL-7** ("[t]he burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined").

[337] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), para. 176, **CL-103**; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award (10 December 2014), para. 299, **CL-145**.

[338] Claimants' Memorial, paras. 319-323.

[339] *Id.*, paras. 328-334.

245. None of these objections are sustainable, in light of the applicable standards under Article 1139 of the NAFTA and principles of domestic law.

1. The Respondent's Assertion that the Emission Allowances Held by KS&T Were Not Investments Under Article 1139(g) of the NAFTA is Unsupported

246. In the Memorial, the Claimants explained that both Claimants made qualifying investments under Article 1139(g) of the NAFTA through the purchase of emission allowances directly on the primary market at Ontario-organised auctions using its CITSS account.[340] These purchases were made in the context of the Claimants' ongoing business enterprise as an Ontario market participant engaged in the long-term business of purchasing and selling allowances under Ontario's Cap and Trade Program, both in the primary and in the secondary markets.

247. In its Counter-Memorial, the Respondent argues that: "[t]he emission allowances do not qualify as an 'investment' as defined in Article 1139(g) because they are not 'real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes'."[341] As described in the remainder of this section, emission allowances are property under Article 1139(g) of the NAFTA (Sub-Section III.B.1(a)), and these allowances were acquired by the Claimants in and from Ontario in the expectation of, and used them for the purpose of, economic benefit and other business purposes (Sub-Section III.B.1(b)).

(a) The Emission Allowances Held by KS&T Are "Property" under Article 1139(g) of the NAFTA

248. The Respondent first asserts that "property" is not defined in the NAFTA, and therefore that a tribunal must look to Ontario law.[342] The Claimants do not dispute this point, though note that – as a general matter – international law has considered that "property" should be given expansive content.[343] The Claimants also agree with the Respondent that whether emission allowances amount to "property" under Ontario law is a question that has not yet been considered by Ontario courts, but which stands

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[340] *Id.*, para. 323.

[341] Respondent's Counter-Memorial, para. 134.

[342] *Id.*, paras. 135-136.

[343] *See*, *e.g.*, *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, UNCITRAL, Award (12 January 2011), para. 79, **CL-20**; OECD, Draft Convention on the Protection of Foreign Property, Article 9(c) (16 October 1967), **CL-146**; *Starrett Housing Corp. v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122 (1983), **CL-148**, X Yearbook of Commercial Arbitration 231,233 (1985) (interests in a project which included land, buildings, equipment and the rights and obligations connected to them); *Amoco International Finance Corporation v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, paras. 107-09 (1987) (proprietary interest in a joint venture), **CL-96**; *Phillips Petroleum Iran v. Islamic Republic of Iran and National Iranian Oil Company*, 21 Iran-U.S. Cl. Trib. Rep. 106 (1989), paras. 105-06 (contractual rights), **CL-147**.

to be determined in accordance with the interpretative rules followed by judges in Ontario.[344]

249. In an effort to support its jurisdictional objection, the Respondent relies on the report of Professor Larissa Katz, which concludes "emission allowances do not count as property rights in Ontario because they have not been legislatively deemed or declared to be property rights and they otherwise lack essential common law characteristics of property rights."[345] In this section, the Claimants will demonstrate that this conclusion is incorrect, and that Professor Katz's report is fundamentally flawed, notably in that it seeks to impose a results-driven theoretical framework in answering this question, rather than consider the question in light of the analytical approach Ontario courts would themselves adopt.

250. As Ontario property law expert Professor Jeremy de Beer explains in his report,[346] the approach that an Ontario court would take to determine the proprietary status of allowances bears little resemblance to the idiosyncratic theoretical framework adopted by Professor Katz. Among other things, the approach of an Ontario court, summarized below, would include careful consideration of the relevant context, including *inter alia* any relevant international practice. The considerable relevant international practice, which Professor Katz largely ignores, is described and analysed by international emissions trading system design and implementation expert Professor Michael Mehling in his separate expert report.[347]

251. In the discussion that follows, the Claimants highlight the key findings and conclusions from Profs. de Beer and Mehling's respective responses to the arguments of the Respondent and Professor Katz concerning the proprietary status of emission allowances. In sum, Professor de Beer concludes unreservedly that emission allowances are property in Ontario,[348] a conclusion that Professor Mehling finds to be consistent with international practice.[349]

(1) The Respondent Does Not Apply the Analytical Framework that an Ontario Court Would Apply to Determine Whether Emission Allowances Constitute Property

252. As Professor de Beer explains in his report, to determine in Ontario whether an object is or is not "property", the most recent authoritative cases from the Supreme Court of Canada and the Ontario Court of Appeal follow a predictable template. These cases, notably the Supreme Court of Canada's decision in *Saulnier v Royal Bank*

[344] Respondent's Counter-Memorial, para. 138.

[345] Expert Report of Dr. Larissa Katz (16 February 2022), para. 83, **RER-1**.

[346] Expert Report of Professor Jeremy de Beer (15 July 2022), **CER-3**.

[347] Expert Report of Dr. Michael Mehling (15 July 2022), **CER-4**.

[348] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 213, **CER-3**.

[349] Expert Report of Dr. Michael Mehling (15 July 2022), para. 59, **CER-4**.

(***Saulnier)***,[350] in which the Court decided whether a fishing license is property, and the Ontario Court of Appeal's decision in *Tucows.com Co v Lojas Renner S.A.* (***Tucows)***, [351] in which the Court decided whether a domain name is property, establish the legal methodology an Ontario court would follow in determining whether emission allowances are property under Ontario law.[352] This methodology consists of four main steps:[353]

1) First, an Ontario court would describe the context, including the statutory context, the context in which the dispute arises, and the practical commercial context. In *Saulnier*, the Supreme Court described the commercial context in which fishing licences are used for marketable loan collateral, the environmental context in which fishing licences are issued by the government, and the statutory contexts in which property is secured and administered. In *Tucows*, the Ontario Court of Appeal described the international context in which domain names are issued and governed, and the commercial litigation context in which domain name disputes are resolved.

2) Second, an Ontario court would describe the object. In *Saulnier*, the Supreme Court described the statutory nature of fishing licences. In *Tucows*, the Court of Appeal described the technical nature of domain names.

3) Third, an Ontario court would describe the applicable law. In *Saulnier*, the Supreme Court described different possible approaches and legally settled "The Preferred Approach" under Canadian law, which looks for a "bundle of rights" constituting "a good deal more than merely permission to do that which would otherwise be unlawful".[354] The Court articulated this test without deciding what is necessary to characterize something as 'property' at common law or in other statutory contexts.[355]

   In *Tucows* the Court of Appeal reviewed selected Canadian and international jurisprudence on property in domain names and analogous intangibles, and academic commentary on domain names specifically as well as a leading Canadian property law texts. The Court expressly elaborated on what this fuller "bundle of rights" at common law entails and found that the "exclusivity" of a right is essential.[356] In addition to exclusivity, other common law characteristics are indicative of property, including being definable, identifiable, capable of

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[350] *Saulnier v Royal Bank of Canada*, [2008] SCC 58, **LK-19.**

[351] *Tucows.Com Co. v Lojas Renner SA*, 2011 ONCA 548, **LK-7.**

[352] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 34, **CER-3**.

[353] *Id*., para. 35.

[354] *Id*., para. 35, citing *Saulnier v Royal Bank of Canada*, 2008 SCC 58, para. 43, **LK-19**.

[355] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 90, **CER-3**.

[356] *Id*., para. 35.

assumption (*i.e.*, transferable), and having some degree of permanence or stability, but not always necessary.[357]

Thus, "*the legal test in Ontario for property requires a bundle of rights, with exclusivity at the core*." [358]

4) Finally, an Ontario court would apply the legal test to the object in context. In *Saulnier* the Court concluded a fishing licence is property. In *Tucows*, the Court concluded a domain name is property.[359]

253. Applying this four-step methodology and legal test (which, in contrast to the approach adopted by Professor Katz, is drawn solely from the specific legal tests and indicia of property set out by the Supreme Court of Canada and Ontario Court of Appeal), Professor de Beer concludes that under Ontario law, emissions allowances are property.[360]

(2) The Respondent Misconstrues or Ignores the Context that Would Inform an Ontario Court's Analysis

254. In reaching the conclusion that emission allowances are property under Ontario law, Professor de Beer's first step, in line with the methodology set out above, is to examine the relevant context, including the statutory and commercial context.[361] With regard to the statutory context, Professor de Beer finds that "[t]he key conclusions an Ontario court is likely to draw from a review of the statutory context are that an express purpose of the statute and regulations was to create a market mechanism to achieve environmental policy goals, and that emission caps and allowance trading were equally key to achieving this purpose."[362] He further finds that "an Ontario court would interpret the status of emission allowances under the Cap and Trade Act in a way that best achieves the statutory and practical purposes of a market mechanism", including "environmental and economic purposes."[363]

255. Professor Katz, by contrast, emphasizes the "compliance function" over the "market function" of allowances, which does not reflect the balanced and holistic way in which an Ontario court would interpret the context provided by the Cap and Trade Act.[364] Professor Katz's imbalanced interpretation of the statutory context reflects her chosen theoretical framework — "Hohfeldian analysis" — based on the more than

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[357] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 93-95, **CER-3**.

[358] *Id.*, para. 134 (emphasis added).

[359] *Id.*, para. 35.

[360] *Id.*, para. 213.

[361] *Id.*, Section IV.A.

[362] *Id.*, para. 62.

[363] *Id.*, paras. 79, 75.

[364] *Id.*, para. 54, citing Expert Report of Dr. Larissa Katz (16 February 2022), para. 63, **RER-1.**

a century old scholarship of American jurist W.N. Hohfeld.[365] Yet, as Professor de Beer points out, no Ontario court would likely cite or rely on this analysis to frame what a property right is or is not. Indeed, no Canadian property case that Professor de Beer or Professor Katz have reviewed in their respective reports refers to or adopts the language of Hohfeld's concepts.

256. Premising the analysis on Hohfeld's theoretical dichotomy between a right and an immunity contributes to Professor Katz's conclusion that it is the "immunity from penalty" or "compliance function" that gives emissions allowances their "dominant legal character".[366] That, however, is inconsistent with the conclusion of the only relevant case to even mention "Hohfeldian" concepts, in which the court concluded that an emissions allowance issued under the European Union (**EU)** emissions trading system (**ETS**) is "property".[367]

257. Professor Mehling similarly finds that the Hohfeldian concepts adopted by Professor Katz do not inform the legal treatment of allowances internationally, explaining in his report that:

> [I]n my two decades of experience engaging on emissions trading with policy makers in multiple jurisdictions, neither the academic economists who initially advanced the notion of emissions trading as an instrument of environmental policy, nor the legislators eventually passing relevant legislation, nor the civil servants elaborating and implementing the regulatory frameworks of emissions trading systems, have been aware of or sought to reflect the conceptual systematization proposed by a scholar of jurisprudence over a century ago. Instead, they have been guided by other priorities, all of which support the conclusion that allowances amount to a property right ...[368]

258. Continuing his analysis of the context that would be considered by an Ontario court, Professor de Beer addresses Professor Katz's core argument that "Canadian courts take an even more cautious and constrained approach to the recognition of an interest as property rights in contexts of government-individual relations".[369]

259. Professor de Beer finds no support for this argument in Canadian property jurisprudence.[370] Moreover, even if there were a distinct interpretative approach required in cases of government-individual relations (*quod non*), Professor de Beer considers that this "would be an inaccurate or at least incomplete characterization of

[365] Expert Report of Dr. Larissa Katz (16 February 2022), para. 25, **RER-1**.

[366] *Id*., para. 61.

[367] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 39, **CER-3** (emphasis added).

[368] Expert Report of Professor Michael Mehling (15 July 2022), para. 47, **CER-4**.

[369] Expert Report of Dr. Larissa Katz (16 February 2022), paras. 46-47, **RER-1**.

[370] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 67-68, **CER-3**.

the interpretative context of this dispute".[371] Rather, an Ontario court would follow the interpretative approach of the Ontario Court of Appeal in the *Tucows* decision, in which the term "property" was similarly found in a legal instrument (the Ontario Rules of Civil Procedure) that was used to determine access to and jurisdiction over a dispute resolution process, as outlined above.[372] Katz's novel theory that the interpretative context of this dispute is one of "government-individual relations", and that this undermines the characterization of allowances as property, is simply that – a novel theory that does not shed any real light on whether emission allowances are, in fact, property under Ontario law.

260. Relevant context for an Ontario court examining the legal status of emission allowances under Ontario law would also include international practice in other emissions trading systems. As noted above, this topic is explored in the report of Professor Mehling. On the basis of a comprehensive review of practices in major emissions trading systems concerning the legal status of allowances, Professor Mehling finds that most emissions trading systems *de facto* or *de jure* recognize the status of emission allowances as property.[373] Professor Mehling further finds that "any restrictions imposed on proprietary rights of allowance holders require an explicit legislative declaration", and that "the lack of such a declaration – as was the case in the Ontario emissions trading system – implies that the legislator sought to avoid narrowing the proprietary rights of allowance holders. In this way, such jurisdictions seek to promote the achievement of the environmental objectives of the emissions trading system."[374]

261. In addition to examining the relevant statutory and commercial context, an Ontario court would also consider any relevant international jurisprudence and academic commentary. Both Professors de Beer and Mehling emphasize the decision in *Armstrong DLW GmbH v Winnington Networks Ltd*, which the Respondent and Professor Katz try unsuccessfully to distinguish,[375] in which the High Court of England and Wales concluded that an emissions allowance issued under the EU ETS is "property". Indeed, Professor de Beer states that this decision is one that an Ontario court "could not possibly ignore".[376] Moreover, Professors de Beer and Mehling both confirm that, contrary to Professor Katz's argument, the Court's conclusion in *Armstrong* that an emissions allowance issued under the EU ETS is property was based on the same common law test (discussed below) applied by the

[371] *Id*., para. 71.

[372] *Id*., para. 73-74.

[373] Expert Report of Professor Michael Mehling (15 July 2022), para. 59, **CER-4**.

[374] *Id*., Executive Summary.

[375] Respondent's Counter-Memorial, para. 147; Expert Report of Dr. Larissa Katz (16 February 2022), paras. 78-80, **RER-1**.

[376] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 100, **CER-3**.

Ontario Court of Appeal in *Tucows* to determine that domain names are property under Ontario law.[377]

262. In regard to relevant academic commentary, on the basis of exhaustive research and review, Professor de Beer find that "academics generally have little or no difficulty accepting that emission allowances can be legally classified as property. Indeed, in my review, I have not found any books, articles, or chapters arguing that emission allowances are not, or should not be, property of some sort."[378] The general academic consensus that emission allowances are property would be a "key point" for an Ontario court, yet Professor Katz ignores this body of commentary.

(3) The Respondent Fails to Properly Apply Ontario Law to Emission Allowances

263. Moving to the second step of the methodology that would be applied by an Ontario court, Professor de Beer describes the features of the "object", an emissions allowance, and the relevant provisions of the Cap and Trade Act and Regulation that an Ontario court would consider, and then describes and applies Ontario law to that object. In her zeal to apply her idiosyncratic theoretical framework, Professor Katz does not meaningfully engage with the statutory features of allowances, and neither describes nor applies the correct legal test under Ontario law to determine whether an object is property.

264. In regard to the "object" at issue, an emissions allowance, Professor de Beer observes that "[a]llowance holding was not subject to any general government discretion, but was under the control of participants within the prescribed limits"; "[b]oth mandatory and voluntary participants could control how many emission allowances they would be required to use by controlling their emissions"; and "[w]ithin the parameters of [the Cap and Trade Program], participants were generally free to control the terms of their transactions, such as which other participants to transact with, when transactions would take place, how to structure transactions, and the pricing and other terms and conditions of transactions."[379]

265. Professor Katz (unsurprisingly, given her "Hohfeldian analysis") skates over the various ways in which allowances were subject to the control of participants, stating, for example, that the fact that market participants can trade allowances "does not change [her] view that the dominant character of an emission allowance itself is an immunity".[380]

266. Professor de Beer then describes and applies the test for property rights in Ontario summarized above, *i.e.*, "a bundle of rights, with exclusivity at the core", to the object, *i.e.*, an emissions allowance. Professor de Beer finds that "only the holder of

[377] *Id.*, paras. 106-109; Expert Report of Professor Michael Mehling (15 July 2022), para. 24, **CER-4**.

[378] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 128.

[379] *Id.*, para. 83.

[380] Expert Report of Dr. Larissa Katz (16 February 2022), para. 64, **RER-1.**

allowances could generally control, outside of a few prescribed circumstances, whether and how to use the allowances. The decision about whether and how to use emission allowances, *i.e.* to hold them, submit them, sell them, trade them, or otherwise deal with them, was a decision the allowances holder exclusively could make. *These rights to exclusive control and use made emission allowances, under Ontario law, property*."[381]

267. Professor de Beer further finds that "[a] participant's exclusive rights to control and use — to hold, submit, trade, or otherwise deal with — emission allowances conferred under the statute, subject only to specifically prescribed regulatory limits and no general government discretion, was already 'a good deal more' than 'merely permission to do that which would otherwise be unlawful,' *satisfying the Supreme Court's legal test for property*."[382]

268. In her report, Professor Katz misapplies the core legal requirement of "exclusivity", relying on "flawed logic" that is "tautological and circular."[383] As Professor de Beer explains:

> To determine whether emission allowances are property, the key legal question is not what a participant could not do with allowances. Nor is the key legal question what the government could do to regulate allowances. The key question to apply the legal test—does a participant acquire in emission allowances "a good deal more" than "merely permission" to emit greenhouse gasses—is what a participant could exclusively do to control and use emission allowances.[384]
>
> [T]he Katz report does not actually consider how, under the statute, emission allowances could be and were used. The focus of the Katz report, like the Respondent's Counter-Memorial, is on what a participant could not do or what the Minister could do. That approach, in my opinion, contradicts the approach set out by the Supreme Court of Canada and Ontario Court of Appeal.[385]

269. As part of his analysis of the exclusive control and exclusive use enjoyed by allowance holders, Professor de Beer also rebuts Professor Katz's assertion that restrictions on entry in Ontario's Cap and Trade Program "are indicia of a restricted market, tending to weaken the exclusive control over the tradability of emission allowances as compared with other property-like intangibles, like domain names".[386] Reviewing all relevant precedents, Professor de Beer draws an important distinction

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[381] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 170, **CER-3** (emphasis added).

[382] *Id*., para. 171 (emphasis added).

[383] *Id*., para. 136.

[384] *Id*., para. 137.

[385] *Id*., para. 145.

[386] Expert Report of Dr. Larissa Katz (16 February 2022), para. 68, **RER-1.**

between the reservation of discretion to the regulator under the Cap and Trade Act, and the absolute discretion conferred by other Canadian statutes:

> The government's regulatory powers to constrain a participant's control and use of emission allowances were limited under the *Cap and Trade Act*. The Minister could only do what the statute or regulations specified. The participant could do everything else. Contrary to the governing legislation in the few cases denying the proprietary status of things like fishing, tobacco, or dairy quota, the statute here did not grant the Minister or any board or agency absolute discretion or comprehensive regulatory control.[387]
>
> …
>
> It would be fair to acknowledge there is a spectrum of control and use rights that a statute might both confer and limit. At some point along the spectrum absolute regulatory discretion or comprehensive regulatory control could be (but even then is not always) inconsistent with the degree of exclusive control and use needed to have a property right. The specifically prescribed government regulatory powers and correlated limits on an emission allowance holder's exclusive control and use under the *Cap and Trade Act* and *Cap and Trade Regulation* were, in my opinion, far from that tipping point.[388]

270. Professor Mehling similarly finds that:

> [J]urisdictions generally confer some form of authorization – with varying scope and conditions – to enable intervention by the regulator in order to protect the integrity of the market. The situation in Ontario was no different, with the Minister of the Environment and Climate Change given discretionary powers to prescribe restrictions and conditions for participation in the allowance market. It is common, however, for a regulator to have the power to exercise oversight and supervisory functions and, if necessary, to intervene in other markets, such as markets for commodities or securities, without putting to question the property rights of the owners of the commodities or securities traded in those markets…[389]

271. Having determined that the legal requirements under Ontario law for property are met,[390] Professor de Beer goes on to examine additional common law indicia of property referenced by the Ontario Court of Appeal in *Tucows*. These indicia were

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[387] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 160, **CER-3**.

[388] *Id.*, para. 169.

[389] Expert Report of Professor Michael Mehling (15 July 2022), para. 52, **CER-4**.

[390] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 144, **CER-3** ("There is a likelihood, in my opinion, that recognizing a registered participant's exclusive right to control emission allowances held in the participant's account *would be both the beginning and end of an Ontario's court's analysis, leading to the conclusion that emissions allowances are property*.") (emphasis added).

articulated in *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175 (H.L.).[391] The *Ainsworth* test, which formed the basis of the High Court of England and Wales' decision in *Armstrong*, states: "[b]efore a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."[392] Professor de Beer demonstrates with reference to the specific relevant provisions of the Cap and Trade Act and Regulation that *all* of these indicia are present in emission allowances, reinforcing the conclusion that emission allowances are property under Ontario law.[393]

272. Professor Katz does not address the *Ainsworth* indicia as cited in *Tucows*. Rather, she addresses only certain criteria and in a manner that does not track the Ontario Court of Appeal's approach, and adds others not even referenced by the Court, such as "locability".[394] Even accepting, *arguendo*, that Professor Katz's selected characteristics are all common law attributes of property that could be considered by an Ontario court, Professors de Beer and Mehling show that emission allowances possess all of the attributes she identifies.[395]

(4) The Respondent Draws Incorrect Inferences Regarding the Proprietary Status of Allowances from the Absence of an Express Disclaimer of Property Rights in the Cap and Trade Act

273. In its Counter-Memorial, the Respondent argues that the "broader context" supports its view that emission allowances do not constitute property rights, asserting that "[t]he conclusion that emission allowances did not confer property rights is consistent with the fundamental policy objectives of the WCI model of cap and trade."[396] In this regard, the Respondent emphasizes the provision of the WCI Design which states that an allowance "does not constitute a property right for any purpose",[397] as well as similar express disclaimers of property rights found in the RGGI Model Rule and in California's cap and trade regulation.[398]

274. First, the Respondent's argument demonstrates a fundamental misunderstanding of the policy objectives of the WCI model of cap and trade and cap and trade systems more generally, and the manner in which recognizing property rights in allowances facilitates the achievement of those objectives. The fundamental policy objectives of these systems – as explicitly recognized in Ontario's own cap and trade legislation –

[391] *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175 (H.L.), **LK-34.**

[392] *Id.*, pp. 1247-1248.

[393] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 173-191, **CER-3**.

[394] *Id.*, paras. 176, 188.

[395] Expert Report of Professor Jeremy de Beer (15 July 2022), Section IV.D.2, **CER-3**; Expert Report of Professor Michael Mehling (15 July 2022), Sections 4.4-4.8, **CER-4.**

[396] Respondent's Counter-Memorial, para. 149.

[397] *Id.*, para. 149.

[398] *Id.*, para. 150.

is to create a market mechanism to achieve environmental policy goals, utilizing emissions caps and allowance trading as its instrument. As Professor de Beer explains:

> Section 2 of the *Cap and Trade Act* stated that the purpose of the regulatory scheme is to reduce greenhouse gas, to protect the environment, and to assist Ontarians to transition to a low-carbon economy and to enable Ontario to collaborate and coordinate its actions with similar actions in other jurisdictions. The *Cap and Trade Act* was also clear about how it would encourage Ontarians to change behaviour by influencing their economic decisions: "The cap and trade program is a market mechanism".
>
> The "market mechanism" explicitly set out in section 2 was facilitated through two equally important, mutually reinforcing features: cap and trade. The regulations accompanying the statute did not create just a cap program nor just a trade program; the regulations were titled "*The Cap and Trade Program*". Compliance with emission caps and tradability of allowances were both integral. Without the cap, there would be no point trading allowances; without trading, there would be no efficient, workable way to meet the cap.[399]

275. The effectiveness of the allowance trading component of the cap and trade market mechanism depends on the market's ability to reallocate allowances to those entities that value them most given their compliance needs and their marginal cost of achieving compliance.[400] Recognizing that emissions allowances confer property rights facilitates the reallocation of allowances among participants necessary for cap and trade systems to function effectively and achieve the overarching policy objective of reducing emissions by enhancing certainty and confidence in the market. By contrast, as Professor Mehling explains, restricting proprietary rights "narrow[s] the legal position of allowance holders and their ability to participate meaningfully in the market for allowances, which is critical to achieving the environmental objectives of the emissions trading system."[401]

276. The Respondent's suggestion that recognizing property rights in emission allowances is somehow incompatible with providing sufficient flexibility to regulators to ensure the achievement of environmental objectives, for example, by adjusting the parameters of the emissions trading system such as the overall amount of allowances issued, is also belied by the fact that the majority of jurisdictions *de facto* or *de jure* recognize such rights. Evidently, regulators have not found the proprietary status of allowances to "fetter their discretion to regulate in the public interest", as the Respondent and Professor Katz assert.[402]

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[399] Expert Report of Jeremy de Beer (15 July 2022), paras. 55-56, **CER-3**.

[400] Expert Report of Dr. Robert Stavins (5 October 2021), para. 44, **CER-3**.

[401] Expert Report of Professor Michael Mehling (15 July 2022), para. 42, **CER-3**.

[402] Respondent's Counter-Memorial, para. 151.

277. The Respondent's arguments in this regard ignore the historical development and contemporary reality of emissions trading system policy. As Professor de Beer points out, the question of whether acknowledging property rights in emission allowances is consistent with achieving environmental objectives is not a subject of debate:

> The idea behind cap and trade schemes like Ontario's—that environmental regulatory or policy aims could be achieved by creating property-based markets—emerged in the 1960s. This idea of using property rights for environmental purposes was popularized, practically implemented, and extensively analyzed in subsequent decades. As property-based environmental regulatory schemes have become more widespread in practice, the academic discussion has moved on to accept that emission allowances, like various other statutory rights, can be objects of property rights and to instead explore the legal implications of that classification.[403]

278. Second, in regard to the express disclaimer of property rights in the WCI Design emphasized in its Counter-Memorial, the Respondent fails to note that in adopting the WCI Design, Ontario expressly chose *not* to follow the approach of incorporating an express disclaimer of property rights, instead omitting any such disclaimer, in contrast to California.[404] Ontario's approach is consistent with the fact that, as the Respondent's own expert Franz Litz points out:

> The Detailed Design attached to the 2010 WCI Design Document expressly states that it is not a model rule … The WCI partner jurisdictions considered issuing a model rule, as the RGGI states and the U.S. Environmental Protection Agency had done for RGGI and the multi-jurisdictional Ozone Transport Commission NOx Budget Program, respectively. After considering the different needs of the provinces and states, the partners decided the Detailed Design that is part of the 2010 WCI Design Document could serve a similar purpose as a model rule *while also recognizing partners might take very different approaches to legal implementation of the detailed design*.[405]

279. The explicit disclaimer of property in the WCI Design and other U.S. instruments cited by the Respondent,[406] merely confirm that if Ontario had wanted to specify that

[403] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 61, **CER-3**.

[404] Respondent's Counter-Memorial, para. 23; Expert Report of Dr. Larissa Katz (22 February 2022), para. 58. Nor, contrary to Professor Katz's argument, does Ontario's intention to harmonize its cap and trade program with California's support the construction of Ontario's emission allowances as non-proprietary in nature, as Prof. Mehling shows. Expert Report of Professor Michael Mehling (15 July 2022), paras. 44-45, **CER-4**. *See also*

[405] Expert Report of Franz Litz (15 February 2022), n. 10, **RER-2**.

[406] Counter-Memorial, para. 151, citing Expert Report of Franz Litz (15 February 2022), paras. 49, 51, **RER-2**.

an emission allowance is not property, it would have been very simple to say so. In all likelihood, the omission of an express disclaimer of property rights was an intentional choice by Ontario legislators designed to further entrench the Cap and Trade Program.

280. Indeed, Professor de Beer finds that the "conspicuous omission" of an explicit disclaimer of property rights similar to that found in the California cap and trade regulation may well have been intended to ensure the long-term stability of the Cap and Trade Program:

> It is more plausible that the government that was in power when the *Cap and Trade Act* was enacted intended the scheme to be difficult or impossible to repeal by subsequent governments with different views on climate change or different political priorities. One of the most effective legal ways to do that would be to confer through the statute a bundle of rights in emission allowances having the status of property rights. Doing so would prevent subsequent governments from scraping the Cap and Trade Program and outright cancelling existing allowances, or oblige the government to pay compensation to investors under *NAFTA*.[407]

281. Professor Mehling concurs. As noted above, his survey of international emissions trading systems confirms that "the absence of a clear legislative declaration denying proprietary rights to allowance holders – as was the case in Ontario – could be interpreted as an expression of legislative intent precisely not to weaken the legal status of allowances, perhaps acknowledging the destabilizing effect that doing so would have on the functioning of the emissions trading system."[408]

282. The observations of Professors de Beer and Mehling regarding the apparent intention of Ontario legislators to ensure the long-term effective functioning of the Cap and Trade Program is consistent with the fact that, as discussed in Sub-Section II A.2 above, in 2017 then Minister of Environment and Climate Change Glen Murray publicly and directly advised market participants that the system was being constructed in such a way as to make it very difficult to unwind.

283. The Respondent further argues based on the express disclaimers of property rights found in other legal instruments that: "[t]he fact that emission allowances in Ontario's cap and trade program were not property is not unique."[409]

284. First, the claim that emission allowances in Ontario were not property is not a "fact" at all, but an argument that the Respondent makes based on Professor Katz's report. As the Claimants and its experts have demonstrated, emissions allowances constitute property under Ontario law.[410]

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[407] Expert Report of Professor Jeremy de Beer (15 July 2022), para. 203, **CER-3**.

[408] Expert Report of Professor Michael Mehling (15 July 2022), para. 62, **CER-4**.

[409] Respondent's Counter-Memorial, para. 150.

[410] *See* paras. 252-282 *supra.*

285. Moreover, denying property rights in emission allowances is by no means the majority practice, as the Respondent's argument implies. On the contrary, as noted above, Professor Mehling finds that "a majority of emissions trading systems do not explicitly address whether or not allowances are property rights, with most nonetheless *de facto* or *de jure* recognizing their status as property. Such recognition is consistent with the central role fulfilled by allowances in emissions trading systems and the achievement of their policy objectives."[411]

286. This finding is unsurprising when one considers the fact that the few emissions trading systems whose underlying legal instruments contain an express disclaimer of property rights were designed for the distinct American legal context.[412]

287. As explained by Professor de Beer, if legislation in the United States purported to deny compensation, as Section 70 of the Cap and Trade Act did, rather than deny the existence of a property right, such legislation could be unconstitutional and invalid pursuant to the Fifth Amendment to the United States Constitution, which provides that "[n]o person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Thus, the unique American constitutional context explains why the WCI Design recommendations confirm a jurisdiction's flexibility to deem emission allowances property or not, and the choice by California and the states cooperating on the RGGI to explicitly disclaim that allowances in those jurisdictions are not property.[413] Ontario had no reason to adopt an approach designed to accommodate the U.S. constitutional context.

288. Professor Mehling similar notes that California's express disclaimer of property rights "closely resembles earlier statutory language found in federal U.S. environmental legislation, notably in the Clean Air Act, and is thus specific to the U.S. context and its legislative history."[414]

289. Moreover, notwithstanding the express terms of U.S. emission trading system legislation, Professor de Beer shows that U.S. courts have gone to "remarkable [] lengths" to find that emission allowances are property despite express statutory language to the contrary, concluding from this "[i]n the absence of a statutory disclaimer, an Ontario court would find it much simpler to conclude that emission allowances are property."[415] Professor Mehling similarly finds that even in jurisdictions that seem to allow for the broadest possible government discretion over the stability of allowances, notably the United States, "*de facto* practice by authorities has seen treatment of emissions allowances as if they were property rights".[416]

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[411] Expert Report of Professor Michael Mehling, (15 July 2022), para. 59, **CER-4**.

[412] Respondent's Counter-Memorial, para. 150.

[413] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 199-201, **CER-3**.

[414] *Id*., para. 124, **CER-3**

[415] *Id*., para. 124.

[416] *Id*., para. 57.

290. Thus, contrary to the Respondent's argument, the fact that a minority of emissions trading systems *include* an express disclaimer of property rights in their underlying legislation certainly does not prove that Ontario, whose cap and trade legislation expressly *omits* such a disclaimer, similarly sought to deny the existence of property rights. Rather, it suggests that Ontario regulators intended to recognize property rights in allowances in order to ensure the effective functioning and long-term stability of the Cap and Trade Program.

(5) The Respondent Draws Incorrect Inferences from Section 70 of the Cap and Trade Act Regarding the Proprietary Status of Allowances

291. The Respondent further errs when it infers that the language of Section 70 of the Cap and Trade Act is inconsistent with recognizing property rights in allowances. The Respondent's inference rests on an incorrect interpretation of the Cap and Trade Act.

292. To recall, Section 70 of the Cap and Trade Act states in relevant part:

> **No right to compensation**
>
> 70 (1) Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss of revenues, loss of profit or loss of expected earnings that would otherwise have been payable to any person in respect of any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts.
>
> **No expropriation, etc.**
>
> (2) Nothing done or not done in accordance with this Act or the regulations constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.
>
> **No payment**
>
> (3) No amount is payable by the Crown with respect to any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts.[417]

293. According to the Respondent, "[t]his provision demonstrates that there was no legislative intent to imbue these interests with a proprietary nature, in line with the broader environmental policy regarding cap and trade."[418] Yet, if anything, an Ontario court is more likely to read Section 70 as *consistent* with a decision by

[417] Climate Change Mitigation and Low-carbon Economy Act, 2016, **CL-5**, Section 70.

[418] Respondent's Counter-Memorial, para. 146, citing Expert Report of Dr. Larissa Katz, para. 59, **RER-1**.

Ontario legislators to acknowledge emission allowances as property. As Professor de Beer explains:

> Regardless, at most section 70 is indirectly relevant to the question of whether an emission allowance is property, in that an Ontario court could conceivably draw an inference from this provision as part of the statutory context. The inference drawn by the Katz report is that section 70 "lends some support to the view that that [sic] there was no legislative intent to imbue these interests with a proprietary nature, consistent with other linked jurisdictions' express disclaimers to the effect that emission allowances are not property rights."
>
> In my view, an Ontario court is likely to draw the opposite inference—there would be no need to deny compensation, expropriation, or payment if emission allowances were not property. I believe an Ontario court would infer from section 70 that Ontario legislators knew that the statutory provisions created, in purpose and effect, a bundle of rights in emission allowances that constitute property, and because of that felt the need to limit the government's liabilities.[419] …
>
> [I]n Ontario it is possible to for a statute to both establish a bundle of rights that qualify as property rights and purport to limit rights under Ontario law to compensation, expropriation claims, or monetary payments.[420]

294. Nor would interpreting Section 70 in the manner proposed by the Respondent be, as it asserts, consistent "with broader environmental policy regarding cap and trade". As Professor Mehling explains:

> Section 70 of the Climate Change Mitigation and Low-carbon Economy Act shielded the regulator from compensation claims for damages and expropriation under domestic law.[421] International practice with emissions trading suggests that such limitations of liability fail to confer unlimited discretion to the regulator (for instance, to revoke the emissions trading system without substantive cause). Putting in place unlimited discretionary power would seriously undermine the environmental objectives pursued with the emissions trading system; instead, limitations on liability are more aptly understood as enabling a circumscribed exercise of discretion, where authorized by the legal framework of the emissions trading system, to achieve its goals.[422]

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[419] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 197-198, **CER-3** (emphasis added).

[420] *Id.*, para. 201 (emphasis added).

[421] Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, c. 7, s. 70, **RS-46**.

[422] Expert Report of Professor Michael Mehling (15 July 2022), para. 39, **CER-4** (emphasis added). *See* the discussion of *Roncarelli v. Duplessis*, **Exh. LK-61,** at paras. 81 and 82 *supra* vis-à-vis establishing as a fundamental principle of Canadian law that Ministerial discretion must be

(continued)

(6) Conclusion

295. The Claimants have also shown that the Respondent has failed to properly analyse whether emission allowances constitute "property" under Ontario law. Professor Katz's report, upon which the Respondent relies, does not apply the methodology that an Ontario court would apply to determine whether emission allowances are "property" under Ontario law. This methodology is described and applied by Professor de Beer in his report. Professor Katz's conclusion that "emission allowances do not count as property rights in Ontario" therefore does not accurately reflect how an Ontario court would determine the as yet unresolved question of whether emissions allowances are property. Rather than apply the framework that an Ontario court would follow, Professor Katz adopts a highly theoretical, idiosyncratic approach that contributes to her ultimate incorrect conclusion. Properly analysed, emission allowances constitute property rights under Ontario law, a conclusion that is consistent with the legal treatment of emission allowances in the majority of emissions trading systems.

296. Accordingly, the Claimants have shown that the emission allowances that KS&T held were tradeable intangible property, both as commodities and under futures contracts, and were capital assets. As previously explained in the Claimant's Memorial[423] and in Sub-Section II B.1 above, KS&T used the emission allowances to generate a return while also assisting a number of arm's-length Koch affiliates to efficiently comply with their emissions-related compliance obligations. The emissions allowances KS&T acquired and held and that Ontario first rendered valueless, and then purported to annul without compensation, therefore fulfil all of the requirements of an "investment" under Article 1139(g) of the NAFTA.

(b) The Claimants Acquired Emission Allowances in the Expectation that the Property be used for Economic Benefit under Article 1139(g)

297. As the Claimants established in the Memorial: (i) KS&T acquired emission allowances created and sold by Ontario (and, from 2018 onwards, fungible WCI emissions allowances that incorporated Ontario allowances, through auctions jointly held by Ontario[424]) as part of doing business in Ontario; and (ii) the acquisition of such emission allowances was part and parcel of KS&T's commitment of both capital and resources to an economic activity in the territory of Ontario over many years, *i.e.*, engagement as an Ontario market participant in Ontario's Cap and Trade Program.[425]

298. In its Counter-Memorial, the Respondent takes the position that the emission allowances purchased by the Claimants were not acquired in the context of an

exercised in "good faith", and further that such exercise of statutory discretion, means "carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose".

[423] Claimants' Memorial, paras. 121, 323.

[424] *See* para. 51 *supra*.

[425] *See* para. 48 *supra*.

ongoing Ontario enterprise, but were instead merely occasional purchases destined for immediate export for use by KS&T's sister companies, and therefore most properly characterised as "cross-border purchases".[426] In particular, the Respondent (erroneously) asserts that KS&T's participation in the secondary market in Ontario amounted to a total of [redacted] during the course of 2017 and 2018.[427] It also alleges to the same effect that that KS&T's purchase of emission allowances at the May 2018 auction was in the context of the latter acting as a "cross-border trader"[428] merely engaged in "a series of transactions leading to a cross-border sale".[429]

299. These claims are flatly contradicted by the evidence,[430] and should be rejected because: (1) KS&T's participation in the primary market in Ontario was consistent and considerable, forming part of the Claimants' complex, long-term business plan; and (2) KS&T's overall trading activity in the secondary market in Ontario was substantial and far greater than the Respondent would wrongly have the Tribunal believe.

(1) KS&T's Participation in the Ontario Cap and Trade Program was Consistent and Considerable

300. In its Counter-Memorial, the Respondent attempts to denigrate the Claimants' long-term participation in the Ontario Cap and Trade Program by arguing that the Claimants were nothing more than "cross-border" traders.[431] This position ignores the long-term and substantial participation of the Claimants in the Ontario Cap and Trade Program.

301. As demonstrated in the Memorial, and discussed in paragraphs 48 to 59 above, KS&T participated in every single auction held by Ontario over the two-year period the Cap and Trade Program was in place. Through its participation in six emission allowance auctions over 2017 and 2018 (four held by Ontario pre-linkage, and two jointly held by Ontario, California and Québec post-linkage), KS&T committed a cumulative total of [redacted][432] These included the [redacted] allowances purchased for USD 30,158,240.95 on 25 May 2018.[433] KS&T's investment in

[426] Respondent's Counter-Memorial, paras. 124, 157-158.

[427] *Id.*, para. 121.

[428] *Id.*, paras. 2, 158, 164.

[429] *Id.*, para. 158

[430] *See* paras. 48-67 *supra.*

[431] Respondent's Counter-Memorial, para. 164, citing *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, paras. 207-208, 221, 224, 233, **RL-30**.

[432] Claimants' Memorial, paras. 183, 287.

[433] On 25 May 2018, KS&T deposited USD 30,158,240.95 into the Deutsche Bank auction settlements account as directed by Ontario: *see* Claimants' Memorial, para. 182, n. 253). *See also*

(continued)

Ontario was substantial, which – but for Ontario's abrupt cancellation and termination of its Cap and Trade Program – would have continued for at least a decade longer until 2030[434] and possibly even further to 2050.[435] The Respondent does not deny these facts, and nor could it.

302. These repeated and large-scale acquisitions were intrinsic to a complex business plan that involved far more than simple, immediate export to meet compliance obligations of other Koch companies. KS&T's consideration of, and active involvement as a market participant in, Ontario's Cap and Trade Program since 2016 was a deliberate and long-term business strategy in emission allowance trading.[436] The Respondent largely ignores the evidence demonstrating these facts in its Counter-Memorial, instead seeking to mischaracterise the Claimants' business model to suit its ends. As recalled below, these business activities conducted in both the primary and secondary markets in Ontario were predicated on KS&T's Ontario CITSS account and its status as an Ontario-registered market participant.

(2) KS&T's Overall Trading Activity in the Secondary Market in Ontario was Substantial

303. The Respondent's related assertion that KS&T's overall trading activity in the Ontario market was *de minimis*, and amounted to a total of [redacted] in 2017 and 2018, is simply wrong.[437] To the contrary, KS&T was engaged in a range of secondary market and futures allowances trades, as well as related offset contracts, with a range of counterparties in Canada and across the WCI common space, deploying its status as an Ontario market participant in pursuit of a profit-making business.[438]

304. As described in paragraphs 48 to 67 above, and restated here, KS&T's activities in tradeable compliance instruments (*i.e.*, emissions allowances and offset credits) was considerable, and certainly far greater than the Respondent would wrongly have the Tribunal believe. Frank King, Vice President, North American Gas Power and Renewables at KS&T, has reviewed all of the evidence documenting KS&T's extensive trading activity and has summarized this activity for the benefit of the Tribunal.[439]

305. In sum, this evidence (all of which has been submitted with Mr. King's statement) shows:

Confirmation of Payment from KS&T (25 May 2018), **Exh. C-98**; *See also* WCI, Inc., May 2018 Joint Auction #15 – Summary Results Report (23 May 2018), **Exh. C-99**.

[434] Claimants' Memorial, para. 126, citing Witness Statement of Michael Berends (5 November 2021), paras. 47, 49, **CWS-1**.

[435] *See* paras. 59, 64 *supra*.

[436] Claimants' Memorial, paras. 122 and 125.

[437] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 51, 65, 121.

[438] *See* paras. 48-49 *supra*.

[439] *See* Second Witness Statement of Frank King (17 July 2022), paras. 16-31, **CWS-6**.

- From 1 January 2017 to 31 December 2017, in addition to its purchases in the primary auction market, KS&T engaged in at least on the secondary market through the ICE. As explained in the Memorial, futures contracts allow a participant to purchase a certain quantity of emissions allowances from another participant, to be sold at predetermined prices and delivered on a specified date.[440] By engaging in these throughout 2017, KS&T traded by the end of that year.[441]

- From 1 January 2017 to 15 June 2018, KS&T also entered into at least through bilateral contracts all of which were with Canadian counterparties.[442] In total, these

- From 1 January 2018, after the respective cap and trade programs of Ontario, California and Québec were formally linked, KS&T entered into both of which could be used to satisfy compliance obligations in Ontario.[444] In total, these additional trades transacted .[445]

- As Mr King also explained, KS&T's range of trade activity as an Ontario market participant (especially in) was in fact far broader than the specific examples above, for at least two reasons. First, continued in 2018, but were folded into trades in generic WCI compliance instruments once the Ontario market became linked with California and Québec, meaning that such trades in WCI instruments necessarily incorporated and contemplated trades in OCAs in the linked environment. Second, the intrinsic anonymity of futures trading through an electronic exchange platform like the ICE meant that KS&T likely engaged in many additional transactions which involved a Canadian (including Ontarian) counterparty. In other words, KS&T likely

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[440] Claimants' Memorial, para. 34.

[441] *See* Second Witness Statement of Frank King (17 July 2022), paras. 16-18, **CWS-6**.

[442] *See* Claimants' Memorial, para. 123; Second Witness Statement of Frank King (17 July 2022), paras. 20-23; Annex A, paras. 12-45, **CWS-6**. These involved

[443] *See* Second Witness Statement of Frank King (17 July 2022), para. 23, **CWS-6**.

[444] *See id.*, paras. 25-27.

[445] *See id.*, para. 26.

engaged in up to [redacted] in pursuit of its enterprise activity.[446]

- KS&T would have pursued its trading enterprise for at least the full length of Ontario's Cap and Trade Program (i.e. at least a decade from the date of launch), but for Ontario's decision to cancel Cap and Trade.

306. In addition to these transactions, in the spring of 2018, KS&T was also negotiating [redacted] These agreements envisaged [redacted], but the negotiations fell through upon the announcement of Ontario's abrupt plan to cancel the Cap and Trade Program.[447]

307. In sum, therefore, the Respondent's allegation that KS&T "only" transacted Ontario emission allowances once in 2017 and once in 2018 is false. As explained in the Memorial, and confirmed by the above, KS&T engaged in multiple business development and reputation-building activities in Ontario,[448] and in trading on the secondary market with both Ontario and other entities.[449]

2. The Respondent's Assertion that the Emission Allowances Held by KS&T Were Not Investments Under Article 1139(h) of the NAFTA is Unsupported

308. In the Memorial, the Claimants also argued that they held qualifying interests under NAFTA Article 1139(h) which included the emission allowances that KS&T purchased at Ontario auctions through its Ontario CITSS account.[450]

309. In its Counter-Memorial, however, the Respondent argues that the Claimants do not hold "interests" in these emission allowances, which arise from a "commitment of capital" in the "territory of Ontario". The Respondent then asserts that – in any event – the purchase falls outside the scope of Article 1139(h).[451] These arguments fare no better than the Respondent's position under Article 1139(g), as demonstrated in the remainder of this section.

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[446] *See* Witness Statement of Frank King (6 October 2021), para. 12, **CWS-4**; Second Witness Statement of Frank King (17 July 2022), paras. 13-14, **CWS-6**.

[447] Claimants' Memorial, para. 170, citing [redacted], **Exh. C-76**; [redacted] **Exh. C-77**; [redacted] **Exh. C-78**.

[448] Claimants' Memorial, paras. 138, 140-141, citing Witness Statement of Graeme Martin (4 October 2021), paras. 18-20, 33, **CWS-2**.

[449] Claimants' Memorial, para. 139; Witness Statement of Frank King (6 October 2021), paras. 9-12; Second Witness Statement of Frank King (17 July 2022), paras. 16-31, **CWS-6**.

[450] Claimants' Memorial, para. 323.

[451] See, *e.g.*, Respondent's Counter-Memorial, para. 153.

(a) The Claimants Hold Interests from its Commitment of Capital in Ontario

310. The Respondent's primary position is that "[f]ar from being a 'commitment' of capital, KS&T's acquisition of emission allowances was a purchase and sale transaction, which is excluded from protection under Article 1139(h)."[452] In support of this proposition, the Respondent relies on a series of incorrect assertions, which mischaracterize the Claimants' position and which are contrary to the legal standards applicable to determining jurisdiction under the NAFTA. The Claimants address the three features of the Respondent's claims as follows: (1) that the Claimants hold "an interest" under Article 1139(h); (2) that this interest arose from the commitment of capital; and (3) that this commitment of capital arose in Ontario.

(1) The Claimants Hold "Interests" Under Article 1139(h)

311. In the Memorial, the Claimants argued that the emission allowances amounted to interests that arose from the commitment of capital and other resources to economic activity in Ontario's territory.[453]

312. In its Counter-Memorial, the Respondent asserts that "[t]he Claimants have not identified any 'interests' arising from the purchase of the emission allowances such as to elevate it beyond a mere expenditure of funds".[454] However, the Respondent has failed to adequately articulate its objection to the Claimants' position that it holds interests under Article 1139(h), and does not even address the meaning of the term "interest" itself.

313. The term "interest" carries a broad ordinary meaning that extends far beyond the realm of contracts. A dictionary definition for this term points to a "legal share in something" and to any right, privilege, power or immunity (taken individually or in aggregate).[455] NAFTA Article 1139(h) is understood to operate as a "catch-all" category of investment.[456] NAFTA tribunals have accordingly construed the provision broadly, such that it is understood to cover anything amounting to "an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument".[457]

314. Emission allowances clearly fall within such a broad definition, and the Respondent does not appear to deny that emission allowances, in and of themselves, may constitute "interests" under NAFTA Article 1139(h). Instead, the Respondent asserts

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[452] *Id.*, para. 153.

[453] Claimants' Memorial, para. 323.

[454] Respondent's Counter-Memorial, para. 158.

[455] "Interest", in Bryan A. Garner (Editor in Chief), Black's Law Dictionary, 11th ed (2019), **CL-171**.

[456] UNCTAD, Scope and Definition, UNCTAD Series on Issues in International Investment Agreements II, U.N. Doc. No. UNCTAD/DIAE/IA/2010/2 (2011), p. 33, **CL-172**.

[457] *See*, *e.g.*, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award (31 March 2010), para. 142, **CL-19** (emphasis added).

that "the purchase price of the emission allowances" cannot be a protected interest arising out of the commitment of capital or resources under NAFTA Articles 1139(h).[458] The Respondent's focus on the purchase price is wrong. The Claimants' position – despite the Respondent's attempt to reframe it to serve its ends[459] – is that the emission allowances (and not the purchase price of the emission allowances) are the qualifying interests for the purposes of Article 1139(h). The Respondent has done nothing to displace this position.

(2) The Claimants' Interests Arose from the Commitment of Capital

315. In the Memorial, the Claimants argued that for the purpose of Article 1139(h) the emission allowances (the "interests") arose from the commitment of capital and other resources.[460] The capital and other resources that KS&T committed to economic activity in Ontario's territory from which the purchase of these emission allowances arose included: (i) the monies used to purchase the emission allowances; and (ii) KS&T's business development, marketing and trading activities in Ontario over the course of several years as part of a sustained, long-term business plan.

316. In its Counter-Memorial, the Respondent argues Article 1139(h) "[r]ead in its context" requires a commitment of capital that amounts to something more than a claim to money arising from a purchase and sale transaction."[461] The Respondent argues in support of this position that its conclusion has been confirmed by NAFTA tribunals, and that the purchase price used to buy the emission allowances are not an "investment" under the NAFTA.[462] The Respondent's position is based on a self-serving analysis of the NAFTA cases, and is unsupported as a matter of fact.

317. First, the Respondent relies on the tribunals' findings in *Apotex v. United States*, *Canadian Cattlemen*, and *Bayview v. Mexico* to assert that Article 1139(h) excludes cross-border trade interests.[463] However, the Respondent conveniently refrains from engaging with the facts of the disputes in which tribunals made these findings, and their specific jurisdictional findings. This is precisely because these cases lend no support to the jurisdictional objections that it puts forward in the present dispute. For example:

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[458] Respondent's Counter-Memorial, para. 159.

[459] Canada wrongly asserts that "[t]he Claimants allege that the monies KS&T used to buy emission allowances through its Ontario CITSS account in 2017 and 2018 constitute an "investment" under Article 1139(h)". *See*, *e.g.*, Respondent's Counter-Memorial, paras. 157-158. Canada also argues that "KS&T also alleges that its 'investment' under NAFTA Article 1139(h) 'included KS&T's broader carbon trading business, and the efforts on the part of KS&T to build an enterprise of trading in Ontario emission allowances over the course of several years as part of a sustained, long-term business plan.'" *See*, *e.g.*, *id.*, n, 302. Both of these propositions are inaccurate and misleading.

[460] Claimants' Memorial, para. 323.

[461] Respondent's Counter-Memorial, para. 155.

[462] *Id.*, para. 157.

[463] *Id.*, para. 156.

- In *Canadian Cattlemen v. United States*, the claimants were Canadian beef farmers who owned and operated cattle ranches in Canada and whose business was adversely affected by a U.S. border closure. In contrast to the present dispute, the claimants did not actively conduct business in the United States, did not commit capital or other resources directly to economic activity in the territory of the United States, nor were the operations of the claimants primarily regulated by the United States. The tribunal in that dispute declined jurisdiction because the claimants conceded that they were only domestic Canadian investors, that they were not actual or prospective foreign investors in the United States, that they had made investments in Canada only, and that they had not made or planned to make an investment in the territory of the United States.[464] The Claimants have made no such concessions in the present dispute, nor do the facts of the present dispute lend themselves to making any concession of the sort. Accordingly, any attempt to draw an analogy between the facts and findings in *Canadian Cattlemen v. United States* would be misplaced.

- In *Apotex Inc. v. United States*, the tribunal found that the claimant had conducted all of its activities related to its pharmaceutical products in Canada, not in the territory of the United States, with the aim of eventually selling its products in the United States as an exporter.[465] The tribunal further found that the claimant developed pharmaceutical products in Canada for export to a large number of other countries, including the United States.[466] In line with those facts, the tribunal found that the claimant's activities with respect to the contemplated sales of its pharmaceutical products in the United States were "those of an exporter, not an investor".[467] This is not our case here.

- In *Bayview Irrigation v. Mexico*, the tribunal found that the claimants were domestic U.S. investors that did business in the United States and had made investments in the United States in the form of infrastructure for water distribution and water rights granted by the State of Texas. None of these amounted to an investment in Mexico, nor did the claimants hold any personal property rights in the physical waters of rivers flowing in Mexican territory.[468] Again, this is not our case.

318. The facts at issue in the *Canadian Cattlemen v. United States*, *Apotex v. United States* and *Bayview Irrigation v. Mexico* disputes stand in sharp contrast to those of the present dispute. As explained in sub-section III.B.2 above, the emission allowances that KS&T purchased at Ontario from Ontario-held auctions, including those purchased at Ontario's 15 May 2018 auction, exhibit the features specific to

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[464] *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction (28 January 2008), para. 111-112, **RL-31**.

[465] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013), para. 160, **RL-30**.

[466] *Id.*, para. 168.

[467] *Id.*, paras. 244-246.

[468] *Bayview Irrigation District v* Mexico, ICSID Case No ARB(AF)/05/1, Award (19 June 2007), paras. 113-, 114, 122, **RL-32**.

qualifying interests under NAFTA Article 1139(h). They extend far beyond either cross-border trade interests, a claim to money arising from a purchase and sale transaction or exports of goods. Rather, in the present dispute KS&T: (i) sought and obtained registered status as an Ontario market participant in accordance with Ontario law; (ii) possessed an Ontario CITSS account; (iii) retained the services of an Ontario-resident Koch company employee as its Ontario-based representative; (iv) bid for Ontario-created emissions allowances at six auctions held and regulated by Ontario; (v) paid monies destined for the public coffers of Ontario in exchange for emission allowances; (vi) held emission allowances in its Ontario CITSS account for varying amounts of time over a period of more than 18 months following their purchases; and (vii) entered into contracts for the supply of offsets and/or emission allowances from its Ontario CITSS account to Canadian purchasers.

(3) The Claimants' Interests Arose from the Commitment of Capital in the Territory of Ontario

319. As the final limb of its objection under Article 1139(h), the Respondent argues that KS&T's business strategy merely involved purchasing emission allowances from auctions "almost exclusively for transfer to its California CITSS account … for resale in that jurisdiction".[469]

320. Once again, the Respondent's position is unsupported in light of the evidence demonstrating KS&T's active presence as an Ontario registered market participant. Moreover, and even assuming the Respondent's argument was tenable (*quod non*), having expressly established a legal framework allowing for the fungible treatment of allowances across WCI jurisdictions, Canada should be estopped from asserting that the Claimants have not invested in the territory of Ontario based on transfers between these same jurisdictions.

i. KS&T Actively Participated in Ontario in Both the Primary and Secondary Markets

321. As described in paragraphs 62-63 above, and incorporated here by reference, the Respondent's argument that KS&T only invested in Ontario to "resell" in the United States is demonstrably untrue.

322. First, KS&T had business counterparts in Ontario and in Québec as well as in the United States, and its business was far more complex than simply purchasing allowances for immediate export. KS&T was registered as a market participant in Ontario, with an Ontario CITSS account; purchased allowances in multiple public auctions in Ontario; and traded on both the primary and the secondary markets in

[469] Respondent's Counter-Memorial, para. 122, citing the following: *see* Witness Statement of Nadia Ramlal (15 February 2022), para. 52 and Attachment 1, transfers No. , **RWS-2**; (ii) in March-April 2018, *see id.*, para. 54 and Attachment 1, transfers No. ; and Respondent's Counter-Memorial, para. 124.

Ontario, over the full two years during which the Ontario Cap and Trade Program was active (and would have continued to do so for the full-length of the Program).[470]

323. KS&T built up an inventory of allowances which in turn facilitated its entry into a range of secondary market OTC and futures transactions with counterparts in Ontario, Québec and California, both internally within the Koch group and externally with third parties.[471] Consequently, as described in detail above, while sales in California and Québec did form one aspect of its broader business strategy, KS&T's actions were intrinsically linked to its ownership of an Ontario-based CITSS account into which it deposited and held and through which it traded in [redacted] as an Ontario-registered market participant.[472] This activity clearly falls within the scope of what tribunals have considered as an investment in the territory of a host State: what matters is that the economic effect of the investment is felt in the host State's territory.[473] KS&T's years-long contribution to the Ontario Cap and Trade Program, including direct transfer of millions of dollars to Ontario in connection with that activity, clearly meets that standard.

324. Second, in trading as an Ontario-registered market participant, KS&T complied in good faith with the legal framework established by Ontario. Notably, and as acknowledged by the Respondent,[474] this included KS&T abiding by the strict holding limits of allowances in Ontario CITSS accounts.[475] As described in paragraphs 66-67 above, one way KS&T could maximize its investment while ensuring compliance with these holding limits was to [redacted] [redacted], given that it could thereafter [redacted] without issue under the terms of the OQC Agreement. Ironically, [redacted] [redacted] helped KS&T maximize its participation in the Ontario Cap and Trade Program.[476]

325. Moreover, the fact that these allowances were sometimes "housed" in KS&T's California CITSS account also did not ultimately impact their utility as allowances to satisfy compliance obligations in Ontario. As Mr. King further explains, this was both because "emissions allowances and offset credits for any [WCI] jurisdiction … could be treated as generic 'WCI Instrument' which could be deployed in the other [WCI] jurisdictions (*e.g.* Ontario) for the purpose of satisfying obligations",[477] and because trading on the linked secondary market meant that the 'physical' storage place for allowances and offset credits was an indifferent consideration.[478]

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[470] Claimants' Memorial, paras. 125-182.

[471] *See* para. 63 *supra*.

[472] Second Witness Statement of Frank King (17 July 2022), paras. 32-34, **CWS-6**.

[473] Christoph Schreuer, The Unity of an Investment, 19 ICSID Reports 3-24 (2021), **CL-150**.

[474] Respondent's Counter-Memorial, paras. 34-35.

[475] *Id.*, para. 34.

[476] Second Witness Statement of Frank King (17 July 2022), paras. 33, 42-43, **CWS-6**.

[477] *Id.*, para. 25.

[478] *Id.*, para. 34.

326. Third, the Respondent points to the fact that the Claimants acquired the emission allowances in the May 2018 auction for the purpose of selling them to Flint Hill Resources (**FHR**), a U.S. company with compliance obligations in California.[479] This argument is a red herring. As Frank King confirms, the Claimants' purchases of allowances on the primary market – including from the May 2018 auction – "was merely one of the latest activities by a registered market participant which regularly traded and transacted in the Ontario Cap and Trade Program over the course of 2017 and 2018", which in total saw [480] Moreover, of the total trades and transactions in which KS&T engaged as a registered market participant in the Ontario Cap and Trade Program."[481] In any event, given the Claimants' substantial business activity in Ontario, whether the May 2018 emission allowances were intended to be transferred to FHR does not impact the fact that the Claimants clearly committed capital and other resources in Ontario itself.

327. Finally, and regardless, there is no debate that throughout 2017 and 2018 Ontario received the proceeds of its emissions allowances purchased by KS&T, which constituted continuing and regular commitments of capital made directly to the Ontario Government and to economic activity in the territory of Ontario.[482] Tribunals considering financial investments, such as sovereign bonds or hedging agreements,[483] have been satisfied that a sufficient territorial nexus exists as long as funds were made available to host States and served to finance their economy or needs. These tribunals all assigned weight to the fact that the States themselves had ultimately benefited from the disbursement of funds even if these funds had never entered their territories directly.

328. Here, and as explained in paragraph 227 above, over the course of the Cap and Trade Program, Ontario received – by its own account – CAD 2,873,158,143.54 in revenues from the auction of emissions allowances.[484] Of this, Ontario received CAD 472,138,014.12 from the May 2018 joint auction alone, including USD 30,158,240.95 from KS&T's allowances.[485] Canada takes the position that it only received

[479] Respondent's Counter-Memorial, para. 158.

[480] Second Witness Statement of Frank King (17 July 2022), para. 16-31, **CWS-6**.

[481] *Id*., para. 11.

[482] *See* para. 48 *supra*.

[483] *See*, *e.g.*, *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), para. 374, **CL-155**; *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), paras. 498–499, 508–510, **CL-156**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), paras. 288, 292, **CL-44**.

[484] Claimants' Memorial, para. 291, citing Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**.

[485] *Ibid*.

█████ of the Claimants' payment of USD 30,158,240.95 for the allowances purchased in May 2018.[486] Even taking this position at face value (*quod non*), this amounts to an admission that Ontario received at least that size of windfall directly as a result of KS&T's participation in the May 2018 joint auction. This is a clear commitment of funds in the territory of Ontario, for the benefit of the host State.[487]

329. Consequently, the Respondent's position that the Claimants have not invested "in the territory" of Canada is specious and entirely unsupported.

ii. In Any Event, the Respondent is Estopped from Denying Jurisdiction on the Basis of Territorial Objections

330. In any event, while the Claimants have previously demonstrated that their business activities and their commitment of capital and other resources were made in the territory of Canada and to economic activity in Canada's territory, the Respondent is estopped from denying jurisdiction under NAFTA Article 1139 as a result of its actions. By entering into the OQC Agreement and achieving and operationalising linkage of the Ontario Cap and Trade Program with those of California and Québec, the Respondent expressly represented that the emission allowance markets of Ontario, California and Québec had become a seamless single market. The Respondent being responsible for creating, fostering and inducing this way of operating among market participants, the Respondent is now estopped from arguing that KS&T should be denied jurisdiction under the NAFTA on the basis that its economic activities were purportedly not sufficiently conducted in the Respondent's territory.

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[486] Respondent's Counter-Memorial, para. 128.

[487] *Fedax NV and The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction (11 July 1997), paras 41–43, **CL-153**; *Československá Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999), paras. 77-78, 90,**CL-154**; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), para. 374, **CL-155**; *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), paras 498–499, 508–510, **CL-156**; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012), paras 288, 292, **CL-44**; *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award (19 December 2014), paras 206 and 207, **CL-157**. A tribunal applied the same reasoning in finding that to a series of contracts for the renovation and operation of a sailing ship owned by Ukraine: "[i]n the Tribunal's view, an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself. Here, the benefits of Claimants' investments, considered as an integrated whole, were received by Respondent": *see Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010), para. 124, **CL-158**.

331. The principle of estoppel is recognized as a general principle in international law,[488] with roots in the principles of good faith.[489] The doctrine of estoppel has been described in the following terms:

> Representations of a state of fact may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct pre-supposes a certain state of fact to exist. Assuming that another party to whom the statement is made acts to his detriment in reliance upon that statement, or from that statement the party making the statement secures some advantage, the principle of good faith requires that party adhere to its statement whether it be true or not. It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of fact, or as a necessary assumption of the risk of another party acting upon the statement.[490]

332. At the International Court of Justice (**ICJ**), Judge Spender in his dissenting opinion in the *Case Concerning the Temple of Preah Vihear* articulated the principle of estoppel in similar terms, stating:

> In my opinion the principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.[491]

333. The principles enunciated by Judge Spender have been reiterated in subsequent judgments of the ICJ,[492] which have acknowledged that the doctrine of estoppel can

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[488] See Respondent's Counter-Memorial, para. 452, citing James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (9th ed., 2019), p. 407, **RL-81**; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada / US)*, Judgment (12 October 1984), I.C.J. Reports 1984, p. 246, 305, para. 130, **RL-56**.

[489] *See* W. Michael Reisman and Mahnoush H. Arsanjani, "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes" (2004), ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL, Vol. 19(2), p 328 at 339,.**CL-173**.

[490] *See* D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957), 33 BRIT. Y.B. INT'L L. 176, pp. 183-184, **CL-162**. *See also* Bin Cheng, *General Principles of Law as Applied by International Tribunals* (1953, republished 2006), p. 141, **CL-102** (quoting from *Cave v. Mills* (1862) 7 Hurlstone & Norman, p. 313, at p. 927).

[491] *See Case Concerning Temple of Preah Vihear (Cambodia v. Thai.)* 1962 I.C.J. 6, Judgment (15 June), at pp. 143-144 (dissenting opinion of Judge Spender), **CL-163**.

[492] *See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, I.C.J. Reports 1969, Judgment (20 February 1969, p. 26, **CL-164** ("[T]he existence of a situation of estoppel … that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever …"); *Case Concerning Delimitation of*

(continued)

apply to issues of fact and to law.[493] The three elements of the doctrine of estoppel are as follows:

(a.) an express or implied statement of fact that is clear and unambiguous;

(b.) the statement must be voluntary, unconditional and authorised; and

(c.) there must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[494]

334. The effect of the doctrine is that if these three elements are established, the representing party is estopped from adopting different, subsequent statements on the same issue, whether or not those subsequent statements may be true or accurate.

335. Numerous investment treaty arbitration tribunals have recognised and applied the doctrine of estoppel.[495] A classic example of an investment treaty tribunal applying it

the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), 1984 I.C.J. 246 (12 October 1984), p. 309, **CL-165** (which confirmed the statement of principle as enunciated in *North Sea Continental Shelf*; *Case Concerning the Land, Island and Maritime Frontier Dispute*, Application by Nicaragua to Permission to Intervene, Judgment (El Salvador v. Honduras) 1990 I.C.J. 92 (13 September), p. 118, ("[E]ssential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.").

[493] *See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, I.C.J. Reports 1969, Judgment (20 February 1969, paras. 25-27, **CL-164** (where the ICJ applied the doctrine of estoppel even though it concerned issues of law. However, on the facts it concluded that no such estoppel arose).

[494] *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award (28 October 2019), para. 423, **CL-166** ("The essentials of estoppel in international law are: (i) An unambiguous statement of fact; (ii) Which is voluntary, unconditional and authorized; and (iii) Which is relied on in good faith to the detriment of the other party or to the advantage of the party making the statement.").

[495] *See Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999), para. 47, **CL-154**; *Pope & Talbot Inc. v. Government of Canada*, NAFTA, Interim Award (26 June 2000), para. 111, **CL-86**; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 April 2002), paras. 82, 134 and 135, **CL-129**; *Canfor Corporation v. United Stated of America*, UNCITRAL, Order of the Consolidation Tribunal (7 September 2005), para. 168, CL-167; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 October 2005), n. 161, **RL-10**; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006), paras. 159-160, **CL-168**; *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction (6 July 2007), paras. 191, 192, 194, **CL-44**; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 228, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 November 2009), paras. 286-288, **RL-16**; *Chevron Corporation* (USA) *and Texaco Petroleum Corporation* (USA) *v. Republic of Ecuador*, PCA Case No. AA 227, Partial Award on the Merits (30 March 2010), paras. 350-351, **CL-169**; *ATA*

(continued)

can be found in the case of *ADC v. Hungary*, in which Hungary alleged that the agreements between it and the claimants were unlawful. The tribunal did not accept that the agreements were unlawful. In any event, it stated that even if they were unlawful, Hungary had conducted itself as if the agreements were lawful. Therefore, it was now too late for Hungary to assert otherwise. The tribunal stated:

> Even if the Respondent was correct in any of its submissions on the miscellaneous points dealt with in Section D above [allegations of illegality/unlawfulness at pp. 81-88 of the Award], they would nevertheless fail on them simply because they have rested on their rights. These Agreements were entered into years ago and both parties have acted on the basis that all was in order. Whether one rests this conclusion on the doctrine of estoppel or a waiver it matters not. Almost all systems of law prevent parties from blowing hot and cold. … it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements. They are prevented from so doing by their own conduct.[496]

336. Likewise, it lies ill in the mouth of the Respondent, having created a single, fully-integrated and seamless emission allowance market across all three linked jurisdictions, and having induced market participants to structure their emission allowance-related activities in a way that does not distinguish between all three jurisdictions, to now argue that this Tribunal does not have jurisdiction under the NAFTA on the basis that KS&T's economic activities were purportedly not sufficiently conducted in the Respondent's territory.

337. The three elements of estoppel listed in paragraph 333 above are met on the facts of this case.

338. First, the Respondent made express or implied statements of fact that were clear and unambiguous. As previously explained,[497] Ontario's regulation of its Cap and Trade Program encouraged the active movement of emission allowances between various CITSS accounts in different linked jurisdictions once the emission allowance markets of Ontario, California and Québec were linked on 1 January 2018. In particular: (i) Ontario legislated that the carbon allowances purchased in Ontario were "fungible"

Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award (18 May 2010), para. 122, **CL-170**; *Bernhard von Pezold & others v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), paras. 411 and 416, **CL-103**.

[496] *See ADC Affiliate Ltd & ADC & ADMC Management Ltd v. Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 475, **CL-92** (emphasis added).

[497] *See* para. 63, 85, 86, 92, *supra*.

with those allowances purchased in California and Québec,[498] while the OQC Agreement itself provided the basis for the mutual recognition of the Parties' compliance instruments;[499] (ii) the OQC Agreement set out the agreement to hold joint auctions with harmonized procedures,[500] and the agreement to use a common registry system and auction platform; and (iii) linkage and harmonization of Ontario's Cap and Trade Program with those of California and Québec was achieved with the stated aim of improving market liquidity and fluidity among all three linked jurisdictions. Accordingly, post-linkage any market participant in Ontario was expected and encouraged to treat the emission allowance markets of Ontario, California and Québec as a single market. Ontario represented that the "linked carbon market" amounted to a single market.[501] There is nothing unclear or ambiguous about these statements.

339. Second, the Respondent's statements on the linked jurisdictions being fully and seamlessly integrated into a single emission allowance market were voluntary, unconditional, and authorized. There is no suggestion by the Respondent that any of these statutes, regulations or public statements were somehow involuntary or unauthorized, nor that the Ontario legislature or government were passing "conditional" legislative or regulatory provisions.

340. Third, the Claimants relied in good faith upon the Respondent's statements both to its detriment and to the advantage of the Respondent.

a. In reliance on these representations in good faith, KS&T did actively participate in the market in trading Ontario allowances, including the transfer of fungible allowances across the linked jurisdictions. Moreover, in the context of Ontario's invitation to participate in the linked market, KS&T also chose to "store" all of its allowances in a single jurisdiction post-purchase, with the intention of continuing to transact in all three jurisdictions, in particular in Ontario. However, the Claimants now face jurisdictional objections in this dispute based upon this very action.

b. Conversely, the Respondent seeks to benefit on the Claimants' detrimental reliance on Ontario's position under the OQC Agreement and implementing regulations. If the Respondent's arguments are to be accepted, it would avoid liability for the clearly wrongful actions of Ontario, in circumstances where

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[498] Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, s. 10(1), **CL-6**.

[499] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 6, **CL-8**.

[500] *Id.*, Article 9.

[501] *See* Ontario Government, Cap and Trade Design Options (5 November 2015), p. CAN-0119 ("Linking with Québec and California"), **Exh. C-185**; Ontario Government, Cap and Trade Linking Statute (28 August 2017), p. CAN-0387, **Exh. C-186**; [redacted]

Ontario itself created the framework expressly allowing the Claimants' actions.

341. Consequently, even if the Claimants did not conduct sufficient economic activity in the Respondent's territory in order to establish jurisdiction *ratione materiae* under the NAFTA (*quod non*), the Respondent would in any event be estopped through the application of general principles of international law from denying the Claimants access to international relief, simply as a result of the Claimants having complied with the Respondent's own laws, regulations and public statements. The Respondent's jurisdictional objections based on territorial requirements is a vain attempt to avoid international responsibility, one that contradicts the Respondent's own prior legislative and regulatory provisions and public statements. The Respondent's argument is one that it should not be making, nor should the Tribunal accept it in the present case.

(b) The Claimants' Investments Do Not Fall Outside the Scope of Article 1139(h)

342. In yet another bid to avoid facing liability for its unlawful actions, the second limb of the Respondent's jurisdictional objection in relation to the emission allowances is that the Claimants' investment is excluded from protection under Article 1139(h)(i) and (ii).

343. Article 1139(h) provides that:

> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> > (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
> >
> > (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

344. The Respondent argues that Article 1139(h)(i) and (ii) "illustrate which type of 'interests arising out of the commitment of capital or resources' are protected" under the NAFTA,[502] asserting that: (1) these provisions both refer to "contracts" as a "common feature";[503] and (2) the Claimants have failed to demonstrate how their investment accords with these illustrative contracts.[504] These arguments are entirely unsupported.

345. First, the Respondent wrongly attempts to shift focus away from operative term "interests" by arguing that NAFTA Article 1139(h) relates only to contracts. The Respondent's attempt at confining the scope of NAFTA Article 1139(h) to contracts

[502] Respondent's Counter-Memorial, para. 159.

[503] *Id*., paras. 160-162.

[504] *Id*., para. 163.

is doomed to fail based on the clear wording of NAFTA Article 1139(h) and the ordinary meaning of the terms used in that provision. The term "contractual" does not precede the term "interests", and the chapeau of NAFTA Article 1139(h) is indeed devoid of any reference to contracts. The absence of such wording strongly militates against the Respondent's proposed interpretation aimed at confining Article 1139(h) to contracts. The fact that sub-subsections (i) and (ii) of NAFTA Article 1139(h) are merely illustrative examples of "interests" that fall within the scope of NAFTA Article 1139(h) is clearly conveyed by the inclusion of the terms "such as" at the end of the chapeau of NAFTA Article 1139(h).

346. Second, the Respondent's assertion that "the Claimants do not address how KS&T's alleged investment accords with the illustrative examples of interests protected under subparagraphs (h)(i) and (ii)" is inapposite.[505] The Claimants do not need to argue that the emission allowances correspond to either of the illustrative examples set out in NAFTA Article 1139(h)(i) or (ii). The emission allowances do not need to correspond to either such illustrative examples in order to fall within the scope of NAFTA Article 1139(h).

347. Moreover, the Respondent's attempt to argue that qualifying interests must amount to contracts that "implicate substantial investments and long-term commitment of capital contributing to the economic development of the host state" is unsupported under the NAFTA.[506] Instead, the Respondent is inappropriately trying to read into NAFTA Article 1139(h) an expansive understanding of the disputed "*Salini* criteria" that have arisen under Article 25(1) of the ICSID Convention (and which are addressed in paragraphs 364-366 below).

348. The Claimants have demonstrated that emission allowances clearly fall within the broad definition of the ordinary meaning of the term "interest" under NAFTA Article 1139(h), and within the broad understanding of that term as acknowledged by NAFTA tribunals. The fact that emission allowances do not fall within the illustrative examples of Article 1139(h)(i) and (ii) does not change this outcome. Nor do these illustrative examples constrict the meaning and scope of "interests" that qualify under Article 1139(h).

3. The Respondent's Assertion that Koch Industries Does Not Hold Protected "Investments" Under the NAFTA is Inaccurate

349. In the Memorial, the Claimants demonstrated that Claimant Koch Industries holds the following investments: (a) its 100 percent shareholding in KS&T and INVISTA; (b) its interests in enterprises entitling Koch to the income or profits of these enterprises; and (c) real estate or other property, tangible or intangible, that was acquired in the expectation or used for the purpose of economic benefit or other business purposes.[507]

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[505] *Id.*, para. 160.

[506] *Id.*, para. 160.

[507] Claimants' Memorial, para. 322.

350. In its Counter-Memorial, the Respondent asserts that none of these investments "is sufficient to establish subject-matter jurisdiction in this dispute".[508] These arguments are equally unavailing, for the following reasons.

351. First, the Respondent argues that "[t]he Claimants have abandoned the argument that Koch Industries indirectly held KS&T's emission allowances under the cap and trade program, as initially alleged in the Request for Arbitration".[509] Thus, according to the Respondent, "[t]he Claimant Koch Industries does not assert subject-matter jurisdiction on the basis of Article 1139(h)."[510]

352. The Respondent's statements are wrong. The Claimants did not abandon this argument.[511] Through its 100 percent shareholding in KS&T, Koch indirectly acquired the emission allowances that KS&T held. Through KS&T, Koch indirectly did business in Ontario and committed capital and resources to economic activity in the territory of Ontario. Therefore, Koch indirectly holds intangible property and/or an interest (the emission allowances) that was acquired in the expectation or used for the purpose of economic benefit or other business purposes and which arose from the commitment of capital and other resources to economic activity in the territory of Ontario. These emission allowances are qualifying investments under NAFTA Article 1139(g) and/or NAFTA Article 1139(h).[512]

353. Second, the Respondent argues that the Claimants do not identify any particular interests or enterprises that Koch held which entitled Koch to the income or profits of these enterprises under NAFTA Article 1139(e).[513] The Respondent is wrong. It ignores Koch's indirect ownership of those emissions allowances from the May 2018 auction by reason of its "100 percent shareholding in KS&T".[514]

354. In any event, Koch also owned Canadian enterprises entitling Koch to the income or profits of these enterprises. For example, Koch held a range of other bricks-and-mortar investments in Ontario, as well as intangible investments, notably through two of Koch's 100%-owned subsidiaries: INVISTA and Georgia Pacific.[515] Koch's 100 percent shareholdings in INVISTA and Georgia Pacific are interests in enterprises that entitle Koch to the income or profits of those enterprises. Ontario's measures related in particular to INVISTA, as INVISTA was a mandatory participant under Ontario's Cap and Trade Program, and the cancellation and termination thereof impacted its compliance obligations.

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[508] Respondent's Counter-Memorial, para. 165.

[509] *Id.*, n. 323. *See* Claimants' Request for Arbitration, para. 18.

[510] Respondent's Counter-Memorial, n. 296, citing Claimants' Memorial, para. 322.

[511] Claimants' Memorial, para. 322.

[512] *See* Section II.B 1&2, *supra*.

[513] Respondent's Counter-Memorial, para. 169.

[514] Claimants' Memorial, para. 322(a).

[515] Koch, Map of Canadian Locations, **Exh. C-211.**

355. Third, the Respondent argues that "[t]here is no evidence of contribution by KS&T to compliance obligations of related entities in Ontario".[516] With such arguments, the Respondent is attempting to read additional, unwritten jurisdictional requirements into the NAFTA. There is no requirement for a physical presence in Canada nor is there a need for the Claimants to establish any kind of activity that goes beyond the making of the investment. Even less so is there a requirement to contribute to compliance obligations of other Koch or non-Koch entities in Ontario. This is absolutely irrelevant to the question of whether the Claimants made an investment under the NAFTA.

356. Moreover, the Respondent is considering the Claimants' participation in Ontario's Cap and Trade Program and the operation of such Program only in the very short term. In the longer term, had Ontario's Cap and Trade Program remained in place for an additional decade as originally intended, Koch affiliates such as INVISTA foresaw having to rely on KS&T to provide it with emission allowances for prospective compliance purposes.[517] KS&T became an investor in Ontario as part of a strategy to efficiently address the Cap and Trade compliance needs of all members of the Koch Group, including those based in Ontario, and in the process turn a profit. In this regard, too, the measures at issue were "in relation to" these other Koch investments in Ontario, since these investments formed part of the rationale for KS&T's presence in Ontario and investment in the Ontario Cap and Trade system, leaving KS&T exposed to the measures at issue in this claim.

C. The Respondent Has Failed to Demonstrate its Objection to the Tribunal's Jurisdiction *Ratione Materiae* under the ICSID Convention

357. In the Memorial, the Claimants demonstrated that they fulfil the requirement of an "investment" under Article 25(1) of the ICSID Convention.[518] In particular, the Claimants noted that it is widely accepted that jurisdiction will be presumed to exist if a claimant has an "investment" within the meaning of that term under the applicable investment treaty or other legal instrument under which a claim is brought.[519] As explained by the Claimants, and reiterated above, the requirements of the NAFTA and the USMCA have been fulfilled. In any event, the Claimants further noted that their economic activity and contributions in Canada equally fulfil commonly-accepted requirements for an "investment" under the ICSID Convention, notably (1) contribution of money or assets; (2) of a certain duration; (3) an element of risk; and (4) a contribution to the economic development of the host State.[520]

358. In its Counter-Memorial, and largely ignoring the Claimants' arguments, the Respondent argues that the Claimants have "failed to establish that they meet the

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[516] Respondent's Counter-Memorial, para. 122, citing Witness Statement of Mr. Alexander Wood (16 February 2022), para. 13, **RWS-1**.

[517] Witness Statement of Graeme Martin (4 October 2021), para. 40, **CWS-2**.

[518] Claimants' Memorial, paras. 328-334.

[519] *Id.*, para. 329.

[520] *Id.*, paras. 330-334.

requirements of an 'investment' under Article 25 of the ICSID Convention."[521] Canada's arguments are unsupported, because: (1) there is no double-barrelled test under the ICSID Convention; and (2) in any event, the Claimants have fulfilled the criteria set out by the Respondent with regard to having an investment for the purposes of Article 25(1) of the ICSID Convention.

1. There is No Double-Barrelled Test Under the ICSID Convention

359. In the Memorial, the Claimants explained that the ICSID Convention does not add any binding requirement regarding the existence of an investment additional to those set out under the NAFTA.[522] To the contrary, many arbitral decisions have held the opposite to be true, concluding instead that a covered investment meeting the relevant definition under an applicable investment treaty by that same token meets the test for a covered investment under the ICSID Convention.[523]

360. However, in its Counter-Memorial, the Respondent insists that "[t]he Claimants must establish both that that the present dispute arises directly out of an 'investment' within the meaning of Article 25 of the ICSID Convention and that the impugned measures related to the Claimants' 'investment' in the territory of Canada within the meaning of NAFTA Chapter Eleven."[524] Furthermore, the Respondent argues that "[i]n a number of well-known cases, tribunals have articulated 'objective criteria' for the definition of the term 'investment' that flow from the object and purpose of the ICSID Convention. These [ICSID Convention] criteria cannot be set aside by a consent given in another legal instrument, such as a bilateral investment treaty (**BIT**)".[525]

361. While these cases may be well-known, that does not mean that they are authoritative (they are not) or can otherwise purport to have settled the jurisprudence (they have not).[526] Notably, the *Biwater Gauff v Tanzania* tribunal warned against privileging a

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[521] Respondent's Counter-Memorial, para. 117.

[522] Claimants' Memorial, paras. 328-329.

[523] *See*, *e.g.*, *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009), paras 73–79, **CL-175**; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010), para. 129, **CL-158**; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010), paras 311–312, **CL-178**; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), paras 204–206, **CL-179**; *Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015), paras 197–199, **CL-180**; *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010), para. 93, **CL-159**.

[524] Respondent's Counter-Memorial, para. 116.

[525] *Id*., paras. 114-115.

[526] *See* Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, OUP, 2nd ed (2012), p. 69, **CL-151**. *See also* Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, Principles of International Investment Law, OUP, 3rd ed (2022), p. 95, **CL-152**.

gloss on Article 25(1) of the ICSID Convention over what has been specially and expressly agreed upon in the underlying investment protection agreement:

> This risks the arbitrary exclusion of certain types of transaction from the scope of the [ICSID] Convention. It also leads to a definition that may contradict individual agreements (as here), as well as a developing consensus in parts of the world as to the meaning of "investment" (as expressed, e.g., in bilateral investment treaties)…[527]

362. In other words, the clear wording of the underlying investment protection instrument (like the NAFTA) on what amounts to an "investment" cannot be superseded by any unwritten "objective criteria" which may have been applied by certain *ad hoc* arbitral tribunals:

> The negotiating history of the ICSID Convention speaks in favour of a party-defined approach. From this viewpoint, there is no justification of criteria beyond the terms of the Convention or the BIT. The concrete terms by which an 'investment' is understood are those laid down by the parties, be it in a BIT or in a special agreement between the host state and the investor, and no further interpretative search for the proper meaning of the term is required.[528]

363. Therefore, the Claimants disagree with the Respondent's fundamental position on the interaction between the NAFTA and the ICSID Convention. The Claimants have

[527] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 314, **CL-174** (emphasis added). *See also Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009), paras. 73, **CL-175** ("It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution.); and *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), para. 42, **CL-176** ("For ICSID arbitral tribunals to reject an express definition desired by two -States-party to a treaty seems a step not to be taken without the certainty that the [ICSID] Convention compels it").

[528] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, OUP, 2nd ed (2012), p. 74, **CL-151**. As confirmed in the third edition of this same publication: "[The history of the ICSID Convention] does reflect the fact that in the end a conscious decision was made not to define the term 'investment' [in Article 25] and to leave the parties flexibility to decide which transactions they wished to submit": *see* Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, Principles of International Investment Law, OUP, 3rd ed (2022), p. 90, **CL-152**. It is noteworthy that one of the "well known" authorities relied upon the Respondent on this point – *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015), **RL-14** – expressly refused to endorse superimposing any purported "objective criteria" to define an investment onto the definition set out in the applicable investment treaty (the "objective criteria" approach); see para. 359: "… this is a controversy that this Tribunal does not need to resolve. The Tribunal has considered both approaches, but does not need to choose between the 'objective' approach, which would give the term 'investment' an inherent meaning, and a 'subjective' approach based on the will of State parties, as expressed in the BIT".

demonstrated that they hold investments under the NAFTA, meaning that jurisdiction is presumed to exist.

2. In Any Event, the Claimants Fulfil the Criteria Set Out by the Respondent

364. As noted above, both parties agree that commonly-accepted criteria for an "investment" under the ICSID Convention generally include: (1) contribution of money or assets; (2) of a certain duration; (3) an element of risk; and (4) a contribution to the economic development of the host State.[529] However, the Claimants disagree with Canada's sweeping statement that these criteria (often referred to as the *Salini* criteria) "must be met" in order to demonstrate the existence of an "investment" under Article 25(1) of the ICSID Convention.[530]

365. The ICSID Convention nowhere establishes a requirement that criteria be complied with. The "*Salini* criteria" are merely non-binding characteristics that may assist a tribunal in exercising its discretion when deciding whether or not it has jurisdiction, and that ultimately cannot supersede or substitute the plain language of the instrument pursuant to which the investment dispute arises. As noted above, multiple arbitral tribunals have rejected applying any additional *Salini*-based criteria, at all, and have confirmed that is the investment treaty definition that should prevail as the ultimate expression of Contracting Parties' consent.[531]

366. Consequently, many tribunals have referred to the *Salini* criteria as mere guidance, and certainly not strict jurisdictional requirements capable of depriving a tribunal of its jurisdiction where they are not fully satisfied.[532] Many tribunals also simply pick and choose between elements of the *Salini* test, having found that its criteria (notably, pertaining to duration and contribution to economic development of the host State) are too subjective to serve as requirements for ascertaining the existence of a

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[529] Claimants' Memorial, para. 330; Respondent's Counter-Memorial, para. 117.

[530] Respondent's Counter-Memorial, para. 117

[531] *See*, *e.g.*, *Malaysian Historical Salvors v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009), paras 73–79, **CL-175**; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010), para. 129, **CL-158**; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 November 2010), paras 311–312, **CL-178**; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), paras 204–206, **CL-179**; *Hassan Awdi, Enterprise Business Consultants Inc and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015), paras 197–199, **CL-180**; *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (12 February 2010), para. 93, **CL-159**.

[532] *See*, *e.g.*, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award (6 May 2022), para. 562, **CL-149**; *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), paras. 479, 481, **CL-156**; *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), para. 165, **CL-177**.

qualifying investment.[533] In any event, even if such criteria were binding or even relevant (they are not), the Claimants' investments meet the "*Salini* characteristics", as recalled below.

(a) The Claimants Have Clearly Made a Contribution of Money or Assets in Canada

367. As the Claimants explained in their Memorial, ICSID tribunals have interpreted the criterion of contribution broadly, to encompass not only payments of money, but also other kinds of non-pecuniary contributions of value, such as "materials, works, or services".[534] The Respondent appears to agree with this point, noting that "[i]n order to qualify as an 'investment', there must be 'a contribution of money or other assets of economic value'."[535]

368. The Claimants easily fulfil this criterion. As described in paragraph 301 above, over the life of Ontario's Cap and Trade Program, the Claimants have paid a cumulative total of [redacted] to purchase Ontario emissions allowances and fungible WCI allowances.[536] These purchases included the [redacted] emission allowances that KS&T purchased from an emissions allowance auction held jointly by Ontario (together with California and Québec) by paying USD 30,158,240.95 on 25 May 2018,[537] of which the Respondent concedes Ontario pocketed roughly [redacted] at least.[538] These commitments of capital were in addition to its vital contributions to the effective functioning of the Program as one of a limited number of Ontario-registered market participants.[539]

369. The Respondent seeks to contradict this plain evidence by mischaracterizing the nature of the Claimants' economic activity, asserting that "in the absence of a

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[533] *See*, *e.g.*, *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), paras. 36, 43, **CL-176**; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), paras. 110–112, **CL-42**; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), paras. 220, 223, 235, **CL-48**.

[534] Claimants' Memorial, para. 330, citing *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006), para. 73(i), **CL-43**.

[535] Respondent's Counter-Memorial, para. 118, citing *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 99, **CL-46**.

[536] Claimants' Memorial, paras. 183, 287.

[537] On 25 May 2018, KS&T deposited USD 30,158,240.95 into the Deutsche Bank auction settlements account as directed by Ontario: *see* Claimants' Memorial, para. 182, n. 253). *See also* Confirmation of Payment from KS&T (25 May 2018), **Exh. C-98**; *See also* WCI, Inc., May 2018 Joint Auction #15 – Summary Results Report (23 May 2018), **Exh. C-99**.

[538] Respondent's Counter-Memorial, paras. 64, 76, 128, 158.

[539] *See* paras. 36-39, *supra*. *See also* Expert Report of Dr. Robert Stavins (5 October 2021), paras. 106-111, **CER-1**; Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 46-52, **CER-2**.

contribution to an economic venture, there could be no investment."[540] The Respondent bases its arguments on the finding of the tribunal in *Postova banka v. Greece*, which explained that an economic venture is distinct from a sale, the latter of which does not qualify as an 'investment'".[541] However, the Respondent's reliance on this case is misguided, and its factual mischaracterisations are wrong.

370. First, as an initial point, in *Postova banka v. Greece*, the tribunal explicitly acknowledged that its statements regarding the ICSID Convention were *obiter dicta* and not decisive for its findings under the applicable investment treaty.[542] Moreover, the facts at issue in the *Postova banka v. Greece* dispute entailed sovereign bonds that were purchased on the secondary market, outside the territory of the respondent State, with payments made only to third parties rather than to the respondent State, and whose funds were intended for general funding and budgetary purposes (as opposed to bonds that raise funds for use in respect of specific public work projects or to pay for services rendered to the government).[543] In stark contrast to those facts, KS&T: (i) purchased emission allowances issued by Ontario; (ii) from a primary market created by, and at auctions held by, Ontario (both individually and, post-linkage, jointly with California and Québec); and (iii) made payments which were received into the public coffers of Ontario. Moreover, as set out in Ontario's Cap and Trade Act, the capital that KS&T committed to Ontario was directed by statute to the GGRA which was specifically intended to contribute to government-funded, environmentally-friendly economic projects.[544]

371. Second, the Respondent's attempts to assert that the Claimants contributed nothing of value to Ontario wilfully ignores the evidence submitted by the Claimants in the Memorial demonstrating the long-term financial contribution of the Claimants' to Ontario's public funds, as well as its contributions to the operation of the Cap and Trade Program.[545] In particular, and as outlined in detail in this Reply:

- The Respondent's position that KS&T was simply a cross-border trader,[546] buying allowances for resale in California, is simply incorrect.[547]

- The Respondent's assertion that KS&T's investment in the emissions allowances somehow required a "bricks and mortar" presence in Ontario to qualify as

[540] Respondent's Counter-Memorial, paras. 118-122.

[541] *Id.*, para. 118, citing *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic,* ICSID Case No. ARB/13/8, Award (9 April 2015), para. 361, **RL-14**.

[542] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic,* ICSID Case No. ARB/13/8, Award (9 April 2015), paras. 351, 359, **RL-14**.

[543] *Id.*, paras. 54, 266, 267, 339, 364.

[544] Claimants' Memorial, paras. 49, 291, citing the Climate Change Mitigation and Low-carbon Economy Act, 2016, Sections 71(1) and 71(2)(2), **CL-5**.

[545] *See* paras. 47-59, *supra.*

[546] Respondent's Counter-Memorial, para. 119.

[547] *See* paras. 6-67, *supra.*

contributing for purposes of the ICSID Convention is wholly unsupported.[548] Having a physical presence or fixed place of business is irrelevant and unnecessary to demonstrate that KS&T contributed through its commitment of capital and resources in Ontario through holdings in intangible property and its emissions allowances business.[549]

- The Respondent's attempts to denigrate the role of market participants as contributing to the smooth functioning of Ontario's Cap and Trade Program is rejected by leading experts in the field.[550]

- The Respondent's claim that KS&T's participation in the secondary market amounted to a total of [redacted] has been completely discredited.[551]

372. In sum, the Respondent's laundry list of mischaracterizations fail to support its claim that the Claimants did not contribute to the host State through its investments in Ontario.

(b) The Claimants Contributed to Canada Over Many Years

373. As the Claimants explained in the Memorial, ICSID tribunals have recognized that "[duration] is a very flexible term … [and] could be anything from a couple of months to many years."[552] The Claimants fall into the latter category, having spent several years investing in Ontario's Cap and Trade Program and doing business in Ontario's territory from 2016 to 2018. As the Claimants previously explained in paragraphs 62-63 above, KS&T's purchase of emission allowances at the Ontario-held May 2018 auction formed part of KS&T's business activities carried out in Ontario's territory since at least 2016.[553]

374. In its Counter-Memorial, the Respondent asserts in response that: "[s]ome tribunals and commenters have indicated that a duration of two to five years is required".[554] However, the Respondent ultimately argues that "[h]ere, there is no need to set a specific minimum duration" since "KS&T's participation in Ontario's cap and trade

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[548] Respondent's Counter-Memorial, para. 120.

[549] *See*, *e.g.*, *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013), para. 429, **CL-156**.

[550] Respondent's Counter-Memorial, para. 121. *See* paras. 36-39, *supra*. *See also* Expert Report of Dr. Robert Stavins (5 October 2021), paras. 106-111, **CER-1**; Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 46-52, **CER-2** (elaborating on the contributions of KS&T as a market participant to the effective functioning of the Cap and Trade Program).

[551] Respondent's Counter-Memorial, para. 121; Second Witness Statement of Frank King (17 July 2022), paras. 16-31, CWS-6.

[552] Claimants' Memorial, para. 332, citing *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012), para. 303, **CL-44**.

[553] *See* para. 59, *supra*.

[554] Respondent's Counter-Memorial, para. 123.

program fails to meet the duration requirement based on KS&T's stated intent and the nature of the transaction at issue".[555] These arguments are entirely unsupported.

375. First, the Respondent's passing reference to a minimum duration of two to five years [556] reflects an exaggeratedly restrictive and non-treaty-based criterion put forward in decisions of a minority of prior *ad hoc* arbitral tribunals. The element of duration is neither crucial nor decisive: no investment tribunal thus far has ever found that a transaction does not qualify as an investment based solely on the absence of a long-term transfer of financial resources.[557] Many tribunals have found that the *Salini* criterion pertaining to duration is too subjective to serve as a requirement for ascertaining the existence of a qualifying investment.[558]

376. Second, the Respondent argues that "KS&T acquired emission allowances with the intention of transferring them to California as soon as possible for resale in that jurisdiction",[559] and therefore that the "purchase of an item for resale is inherently limited in time" and does not fulfil the duration criteria.[560] As the Claimants have already explained, the Respondent's attempt to paint the Claimants as mere "cross-border traders" must be rejected. The same attempts to recycle this argument to assert that the Claimants have not met the "certain duration" requirement must be rejected. The Claimants invested in Ontario over a period of three years (2016 to 2018, well within the "two to five years" Canada asserts), and accumulated emission allowances into its Ontario CITSS account over the course of 2017, to the point of holding [redacted] allowances by 1 January 2018,[561] and transacted in [redacted] [redacted].[562]

377. Moreover, were it not for Ontario's abrupt cancellation and termination of its Cap and Trade Program, KS&T would have continued to do business in Ontario, and would have continued to acquire emission allowances in Ontario as part of doing business in Ontario, for the full duration of Ontario's Cap and Trade Program which was

[555] *Ibid.*

[556] *Ibid.*

[557] Michael Waibel, Subject Matter Jurisdiction: The Notion of Investment, 19 ICSID Reports (2021), 25, para. 60, **CL-181**.

[558] *See*, *e.g.*, *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), paras. 36, 43, **CL-176**; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), paras. 110–112, **CL-42**; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), paras. 220, 223, 235, **CL-48**.

[559] Respondent's Counter-Memorial, para. 124.

[560] *Ibid.*

[561] A fact that the Respondent acknowledges: *see* Respondent's Counter-Memorial, para. 57, n. 95.

[562] *See* para. 53 *supra*.

expected to continue for at least a decade longer, until at least 2030,[563] and possibly even further to 2050.[564]

378. The "duration" criterion, even if it were necessary to comply with it (it is not) is thus clearly satisfied in the present dispute.

(c) The Claimants' Investments in Canada Entailed Multiple Types of Risks

379. In the Memorial, the Claimants clearly demonstrated that they exposed themselves to financial risk in order to develop KS&T as a profitable enterprise in Ontario over the long-term, including participating in auctions and on the secondary market, while seeking to develop business and turn a profit.[565]

380. In the Counter-Memorial, the Respondent rejects this position, arguing that the Claimants "fail to establish that KS&T was establishing an economic venture in Ontario over the long-term and that it undertook any risk in relation to that objective."[566] These arguments are equally unavailing.

381. The Respondent first attempts to elevate the importance of this factor, and to impose boundaries that find no support in law. As the Claimants explained in their Memorial, ICSID tribunals have been clear that an element of risk is inherent in any long-term investment.[567] As Dolzer and Schreuer have stated:

> The criterion of risk has also turned out to be of limited value in the characterization of an "investment". Practically every business deal which extends beyond the day of its conclusion will in some way involve circumstances that endanger the certainty that both sides are able and willing to comply with what was agreed. In other words, the existence of a "duration" for an investment will, in practice,

[563] Claimants' Memorial, para. 126, citing Witness Statement of Michael Berends (5 November 2021), paras. 47, 49, **CWS-1**.

[564] *See* paras. 59, 64, *supra*.

[565] Claimants' Memorial, para. 333.

[566] Respondent's Counter-Memorial, para. 125.

[567] Claimants' Memorial, para. 333, citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), para. 56**, CL-39** ("A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor"); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 136, **CL-45** ("Besides the inherent risk in long-term contracts, the Tribunal considers that the very existence of a defect liability period of one year and of a maintenance period of four years against payment, creates an obvious risk for Bayindir."); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), para. 109, **CL-46** ("In the present case, the undisputed stopping of the works which took place… and the necessity to renegotiate the completion date constitute examples of inherent risks in long-term contracts").

imply the existence of a risk, and the operational significance of "risk" and "duration" practically coincides.[568]

382. The Respondent attempts to address this point by relying on the tribunal's *obiter dicta* in *Postova banka v. Greece* to state that KS&T bore a "commercial risk", not an "operational risk". As discussed in paragraphs 369-370, Canada's reliance on this case is inapposite in light of the very different set of facts at the heart of the present dispute, and is based on its incorrect position that KS&T was merely a cross-border trader. In any event, the Claimants clearly exposed themselves to risk of the type envisaged by the *Postova banka* tribunal.[569]

383. As elaborated in paragraphs 48-59 above, the Claimants exposed themselves to financial risk in order to develop KS&T as a profitable enterprise in Ontario over the long-term, including by: (i) taking all steps necessary to open a CITSS account and qualify as an Ontario-registered market participant; (ii) participating in six Ontario-held auctions and committing a cumulative total of [redacted] in capital to Ontario over a two-year period; (iii) transacting on the secondary market using its Ontario CITSS account; (iv) developing and conducting business in Ontario's territory, all in an attempt at turning a profit. In other words, there was no certainty that KS&T would be able to generate a profit in light of all the capital and resources that KS&T expended in order to develop and to run its business in Ontario. It was as a result of considerable effort and determination, KS&T "traded for profit in Ontario's secondary market",[570] and in 2017 alone reaped almost [redacted] in combined revenue and "the appreciation of [their] inventory".[571]

384. Finally, the Respondent's assertion that KS&T "accepted the risks inherent in Ontario's cap and trade program" through Section 70 of the Cap and Trade Act is untenable. As described in paragraphs 497 to 498, Section 70 is fundamentally concerned with limiting the liability of the regulator in relation to certain actions taken within the four corners of the Cap and Trade Program, not giving the regulator

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[568] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, OUP, 2nd ed (2012), p. 75, **CL-151**. As confirmed in the third edition of this same publication: "[t]he better approach would be to look at the various forms of risk in combination and with some degree of flexibility. Any form of risk, commercial, operational, or sovereign, is part of the typical features of an investment even though not every type of risk will necessarily materialize in every investment": *see* Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, Principles of International Investment Law, OUP, 3rd ed (2022), p. 95, **CL-152**.

[569] In relation to economic activities in Ontario's territory, it is trite that KS&T (or any other market participant in an analogous position) could have been affected by: (i) an investment or operational risk, from the overheads associated with running an emission allowance/offset credit trading business, in a novel economic venture itself operating in a nascent business environment (Ontario's Cap and Trade Program and the related primary and secondary markets that it spawned); (ii) financial risk, from the commitment of significant capital and other resources to purchase emission allowances without knowing when or whether such investment would generate return; (iii) commercial risk, from the uncertainty of whether KS&T would be able to trade emission allowances and/or offset credits, and whether any profit would arise from such transactions.

[570] Witness Statement of Graeme Martin (4 October 2021), para. 17, **CWS-2**.

[571] Witness Statement of Frank King (6 October 2021), para. 20, **CWS-4**.

carte blanche to act in a discriminatory and arbitrary manner upon its termination.[572] Upon entering into the May 2018 purchase of emission allowances, the Claimants did not anticipate and even less so accept the risk that Ontario might destroy the value of its emission allowances without any compensation.[573]

(d) The Claimants' Investments in Canada Undoubtedly Contributed to Canada's Economic Development

385. As the Claimants explained in the Memorial, the contribution to the host State's economic development is arguably implicit in the criteria of contribution, duration and risk, and therefore need not be established separately.[574] In any event, the Claimants noted that they had substantially contributed to Canada's economic development by raising millions of dollars to deposit in the GGRA to be re-invested in so-called "green projects".[575]

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[572] *See* Section II.B.2, *supra*.

[573] *See also* Witness Statement of Michael Berends (16 July 2022), para. 24, **CWS-7** (recalling that "no one in the industry … could have reasonably expected or somehow 'prepared' for a contingency whereby Ontario would sell allowances in auctions, collect the proceeds, and then simultaneously render those allowances worthless as well as refuse to reimburse participants for what they had paid for.").

[574] Claimants' Memorial, para. 334, citing, *e.g.*, *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case no. ARB/06/5, Award (15 April 2009), para. 85, **CL-47** ("[T]he contribution of an international investment to the development of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes "development." A less ambitious approach should therefore be adopted, centred on the contribution of an international investment to the economy of the host State, which is indeed normally inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk, and should therefore in principle be presumed." (emphasis in original)); *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), para. 111, **CL-42** ("[W]hile the preamble refers to the "need for international cooperation for economic development," it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording… [The] objective is not in and of itself an independent criterion for the definition of an investment. The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects". (emphasis in original)); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), para. 220, **CL-48** ("[S]uch contribution may well be the consequence of a successful investment, it does not appear as a requirement."); *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 October 2013), para. 171, **CL-49** "[S]uch contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State's economy, that cannot mean that there has been no investment").

[575] Claimants' Memorial, para. 334.

386. In its Counter-Memorial, the Respondent argues that "[i]n order to qualify as an 'investment', a project 'should be significant to the State's development'",[576] and then asserts that the Claimants have not met this threshold.

387. First, the Respondent's threshold whereby "a project should be significant to the State's development" is a standard entirely of its own making. Canada fails to engage with the Claimants' explanation that many tribunals have found that the *Salini* criterion regarding a contribution to the economic development of the host State is too subjective to serve as a requirement for ascertaining the existence of a qualifying investment.[577] As Dolzer and Schreuer have stated: "[a]s long as the investment is lawful, under the host [S]tate's laws, there is no room for an investment tribunal to deny protections under a BIT with the argument that the host State's development stands in the way".[578]

388. Second, the Respondent's assertion that the Claimants' stated contribution to Ontario's economic development is "gross[ly] exaggerated"[579] is contradicted by its own evidence. As described in paragraphs 229-233, the Claimants reject this position for the following reasons:

- the Claimants recall that the figures for Ontario's total receipts, as cited in the Memorial, were obtained from Ontario's own "Post-Auction Public Proceeds Report" which it published after each single and joint auction.[580] In accusing the Claimants of a "gross exaggeration", it is telling that the Respondent does not – and cannot – deny the accuracy of the figures cited.

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[576] Respondent's Counter-Memorial, para. 128, citing *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 137, **CL-45** ("[l]astly, relying on the preamble of the ICSID Convention, ICSID tribunals generally consider that, to qualify as an investment, the project must represent a significant contribution to the host State's development. In other words, investment should be significant to the State's development").

[577] *See*, *e.g.*, *Pantechniki SA Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009), paras. 36, 43, **CL-176**; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010), paras. 110–112, **CL-42**; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012), paras. 220, 223, 235, **CL-48**.

[578] Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, OUP, 2nd ed (2012), p. 75, **CL-151**.

[579] Respondent's Counter-Memorial, para. 128.

[580] Claimants' Memorial, para. 291, n. 386 ("Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**. After each single and joint auction, Ontario published a "Post-Auction Public Proceeds Report", reporting on the proceeds to the Province of Ontario from the sale of allowances. *See* Ontario Post-Auction Public Proceeds Report (March 2017, Ontario Auction #1) **Exh. C-131**; Ontario Post-Auction Public Proceeds Report (June 2017, Ontario Auction #2) **Exh. C-132**; Ontario Post-Auction Public Proceeds Report (September 2017, Ontario Auction #3) **Exh. C-133**; Ontario Post-Auction Public Proceeds Report (November 2017, Ontario Auction #4) **Exh. C-134**; Ontario Post-Auction Public Proceeds Report (February 2018, Joint Auction #14) **Exh. C-135**; Ontario Post-Auction Public Proceeds Report (May 2018, Joint Auction #15) **Exh. C-136**.

- the Respondent's assertion that Ontario "only" received [redacted] of the USD $30M paid by KS&T (even if taken at face value as accurate),[581] is an admission that Ontario received at least that size of windfall directly as a result of KS&T's participation in the May 2018 joint auction, and Ontario's subsequent illegal and unprincipled refusal to return such funds upon cancellation of the Cap and Trade Program.

- in any event, by focusing on the millions of dollars Ontario allegedly "only" (!) received as a direct result of KS&T's payment of USD 30,158,240.95, the Respondent ignores the fact that in that joint auction of May 2018, Ontario *actually* received in the range of CAD 472 million (or USD 368 million) that was supposed to be invested in green projects in Ontario but that instead went into the Ontario treasury.

389. In a bid to distract from these significant contributions, the Respondent further maintains that "the mere fact that KS&T purchased mission allowance[s] in Ontario does not mean that KS&T made a contribution to the economic development of Ontario. Traders are not necessarily investors."[582] However, KS&T's contribution included not only its considerable financial contributions directly to Ontario, but also its provision of increased fluidity to Ontario's Cap and Trade Program as one of the few registered market participants, thereby contributing to Ontario's overall economy.[583]

D. The Respondent Has Failed to Demonstrate its Objection to the Tribunal's Jurisdiction *Ratione Personae* under the NAFTA

390. In the Memorial, the Claimants demonstrated that the Claimants satisfied the requirements of jurisdiction *ratione personae* under both the NAFTA and Article 25 of the ICSID Convention.[584]

391. In its Counter-Memorial, the Respondent argues that: "[t]he Claimants make no allegation of damage to Koch Industries' shareholding in KS&T or Invista", and that accordingly, the Tribunal lacks personal jurisdiction over Koch.[585] This position is unsupported.

392. Koch has indirectly suffered loss or damage by reason of the drop in value of its 100%-owned affiliate KS&T and the latter's directly-held investment in Ontario as a result of Ontario's measures. By this measure alone, Koch has a stake in the present proceedings and an independent right to compensation for breaches of NAFTA Chapter Eleven for which the Respondent is responsible under the NAFTA and

[581] Respondent's Counter-Memorial, para. 64.

[582] *Id.*, para. 129.

[583] *See* paras 47-67, *supra*.

[584] Claimants' Memorial, paras. 313-317.

[585] Respondent's Counter-Memorial, paras. 8, 173-174.

international law.[586] The fact that Koch's damages overlap with those of KS&T is of no issue from the point of view of standing, as long as the Tribunal avoids awarding double recovery.

393. Moreover, the Respondent's position that Koch's shareholding in Invista and Georgia Pacific is irrelevant to the Tribunal's jurisdiction is unsupported.[587] Both INVISTA and Georgia Pacific are Koch affiliates with a presence in Canada consisting of both tangible and intangible property.[588] One Koch enterprise, INVISTA, was required to participate as mandatory participant under the Ontario Cap and Trade Program.[589] As its document production confirms, the Respondent previously had in its possession a document which provides information about Koch's investments (including but not limited to INVISTA and Georgia Pacific) in Ontario as well as across Canada.[590]

394. In accordance with NAFTA Article 1101(1)(b), INVISTA and Georgia Pacific are investments of Koch in Canada's territory "relating to" Ontario's measures that are at issue in the present dispute. NAFTA tribunals have found this to mean "something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them".[591] This, however, does not mandate the measure to have been the legal cause of loss for the investor or the investment.[592] The Ontario Superior Court of Justice has in turn found that "the term 'related' requires only some connection and does not require that the measure be

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[586] *See id.*, para. 172. The Respondent further argues that: "[u]nder Article 1116(1), an investor may only submit a claim to arbitration if that investor has suffered loss or damage as a result of the alleged breach of Section A of the NAFTA." The point is that Koch did suffer such loss or damage, as outlined above: the fact that Koch's damages overlap with those of KS&T is of no issue from the point of view of standing, as long as the Tribunal avoids awarding double recovery.

[587] Respondent's Counter-Memorial, paras. 168, 170, 173.

[588] Claimants' Memorial, para. 322(c), n. 412. INVISTA is a Koch subsidiary that produces chemicals, polymers, fabrics and fibres in two factories in Ontario located in Maitland and Kingston. At the time the Cap and Trade Program was introduced, Koch's Ontario-based enterprises employed approximately ███ people in the Province.

[589] Claimants' Memorial, para. 119.

[590] Koch, Map of Canadian Locations, **Exh. C-211.**

[591] *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility) (7 August 2002), para. 147, **RL-8**; *see also Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/l, Award (19 June 2007), para. 101, **RL-32**; *Bilcon of Delaware et al v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), para. 240, **CL-182**; *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 174, **CL-54**; and *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014), paras. 6.8-6.13, **CL-183**.

[592] *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 August 2014), para. 6.28, **CL-183**.

adopted with the express purpose of causing loss".[593] As recently stated by the tribunal in *Resolute Forest v. Canada*:

> [NAFTA] Article 1101(1) requires that the questioned measure 'relate to' an investor or an investment. Having regard to the preponderant case-law and the convergent views of the three NAFTA Parties … the Tribunal concludes that there must exist a 'legally significant connection' between the measure and the claimant or its investment … the Tribunal should ask whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment. In doing so, the tribunal should ordinarily accept *pro tem* the facts as alleged. It is not necessary that the measure should have targeted the claimant or its investment—although if it did so, the necessary legal relationship will be established. Nor is it necessary that the measure imposed legal penalties or prohibitions on the investor or the investment itself. However, a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.[594]

395. KS&T did business in Ontario and committed capital and other resources to economic activity in Ontario, as an Ontario-registered market participant, in part to serve the longer-term emission allowance and compliance needs of both INVISTA and Georgia Pacific under Ontario's Cap and Trade Program. The Claimants' witnesses have given (uncontested) evidence highlighting that relevant Koch entities (including, in particular, INVISTA) foresaw having to rely upon KS&T's allowance holdings to help them fulfil their prospective compliance obligations.[595] In light of these facts, Ontario's cancellation of its Program, as well as all Ontario CITSS account holdings, certainly had "an immediate and direct effect" and constituted "a legal impediment"[596] on any emissions allowance transactions between Ontario CITSS accounts holders, including KS&T and INVISTA. This satisfies the "legally significant connection" threshold for the purpose of founding jurisdiction pursuant to NAFTA Article 1101(1)(b).

396. In its Counter-Memorial, the Respondent argues incidentally that: "[i]n fact, [redacted] [redacted].[597] The Claimants note that KS&T did business and invested in Canada on the basis of a long-term plan, with Ontario's Cap and Trade Program anticipated to remain in place until

[593] *United Mexican States v Cargill Inc*, 2010 ONSC 4656 (26 August 2010), para. 57, **CL-184**.

[594] *Resolute Forest Products Inc. v Government of Canada,* UNCITRAL, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (30 January 2018), para. 242, **CL-185**.

[595] Witness Statement of Graeme Martin (4 October 2021), para. 40, **CWS-2**.

[596] *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 175, **CL-54**.

[597] Respondent's Counter-Memorial, n. 320, citing 2018 Free Ontario Emission Allowance Distribution Summary for INVISTA (Canada) Company, CITSS Entity ID ON 2261, GHGID 1081, 25 January 2018, **Exh. R-74**.

2030. As the end of the initial compliance period approached in 2021, and *a fortiori* as the Program continued in time, the amount of annual [redacted] was scheduled to progressively decline.

397. In light of these factors, over time [redacted]

398. Thus, the measures at issue "relate to" Koch's bricks-and-mortar investment in Ontario, notably INVISTA, as much as they do to the direct engagement of KS&T as a market participant in the Ontario Cap and Trade Market.

E. Conclusion on Jurisdiction

399. The Claimants have demonstrated, and the Respondent has not objected to the following assertions: (i) the Claimant's case meets the requirements of jurisdiction *ratione voluntatis* and *ratione temporis* under both the NAFTA and the USMCA; and (ii) KS&T qualifies as a foreign investor under the NAFTA, the USMCA and the ICSID Convention (jurisdiction *ratione personae*).

400. In the present Reply, the Claimants have demonstrated that the Respondent's objections to the Tribunal's jurisdiction *ratione materiae* and *ratione personae* are unfounded. The Claimants' emission allowances constitute covered investments under Articles 1139(g) and 119(h) of the NAFTA, as well as under Article 25(1) of the ICSID Convention, thus meeting the requirements of jurisdiction *ratione materiae*. Through KS&T, INVISTA and Georgia Pacific, Koch has standing as a qualifying investor under NAFTA Articles 1101 and 1116, thus meeting the requirements of jurisdiction *ratione personae*.

401. Therefore, this Tribunal has jurisdiction over this dispute, as the conditions of jurisdiction *ratione voluntatis, ratione temporis*, *ratione materiae* and *ratione personae* of the NAFTA, the USMCA and Article 25 of the ICSID Convention have all been met.

IV. CANADA IS LIABLE FOR BREACHES UNDER NAFTA CHAPTER ELEVEN

A. Canada has Taken "Measures" Within the Meaning of Articles 201 and 1101 of the NAFTA

402. In the Memorial, the Claimants demonstrated that the Respondent had taken the following "measures" within the meaning of Articles 201 and 1101 of the NAFTA:

a. The Premier-elect's announcement of 15 June 2018.

b. Ontario Regulation 386/18 of 3 July 2018.

c. Bill 4 submitted to the Ontario Legislature on 25 July 2018, and adopted as the Cap and Trade Cancellation Act, 2018 (enacted on 31 October 2018).

d. Ontario's formal denial of compensation on 14 March 2019.[598]

403. In its Counter-Memorial, the Respondent does not appear to deny that (b) to (d) are "measures" taken under the NAFTA. However, the Respondent asserts that "as a threshold issue, the June 15, 2018 announcement of the Premier-Designate was not a 'measure'."[599] To recall, on 15 June 2018 the Premier-elect (not yet formally sworn in) suddenly released a statement announcing Ontario's intention to cancel the Cap and Trade Program, and in connection with this confirmed that Ontario would not be taking part in the next joint auction, in August 2018, and that he had directed officials to immediately take steps to withdraw from future auctions.[600] Recall that the media release stated in relevant part:

> Premier-designate Doug Ford today announced that his cabinet's first act following the swearing-in of his government will be to cancel Ontario's current cap-and-trade scheme, and challenge the federal government's authority to impose a carbon tax on the people of Ontario. "I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down," said Ford. "Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax's days are numbered."
>
> Ford also announced that Ontario would be serving notice of its withdrawal from the joint agreement linking Ontario, Québec and California's cap-and-trade markets as well as the pro-carbon tax Western Climate Initiative. The Premier-designate confirmed that he has directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits. The government will provide clear rules for the orderly wind down of the cap-and-trade program.[601]

404. The Respondent asserts that the action of the Premier-elect is not a measure but that "[a]ll Ontario did on June 15, 2018 was decline to issue notice of participation in a subsequent joint auction."[602] The Respondent does not provide any authority or support for this allegation, which is unsupported by the terms of the NAFTA.

405. Article 201 of the NAFTA provides that the term "measure includes any law, regulation, procedure, requirement or practice." NAFTA tribunals have recognised that "the term 'measures' in Article 201 must be understood broadly"[603] and that the

[598] Claimants' Memorial, para. 336.

[599] Respondent's Counter-Memorial, para. 261.

[600] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

[601] *Ibid.*

[602] Respondent's Counter-Memorial, para. 261.

[603] *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award (24 March 2016), para. 256, **CL-59** (citing *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (5 January 2001), para. 53, **CL-186**).

definition is broad and "inclusive".[604] As the tribunal in *Loewen v. United States* explained:

> The purpose of Chapter Eleven, 'Section B - Settlement of Disputes between a Party and an Investor of Another Party' is to establish 'a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an arbitral tribunal'. The text, context and purpose of Chapter Eleven combine to support a liberal rather than a restricted interpretation of the words 'measures adopted or maintained by a Party', that is, an interpretation which provides protection and security for the foreign investor and its investment . . . .[605]

406. As the tribunal in *Ethyl Corporation v. Canada* noted, the Respondent has previously taken the view that "measure" is a "non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions", highlighting:

> In addressing what constitutes a measure the Tribunal notes that Canada's Statement on Implementation of the North American Free Trade Agreement, Can. Gaz. Part IC(1), Jan 1994 (hereinafter Canadian Statement on Implementation of NAFTA) (at 80) states that:
>
>> The term "measure" is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions.
>
> This is borne out by Article 201(1), which provides that:
>
>> measure includes any law, regulation, procedure, requirement or practice.
>
> Clearly something other than a "law," even something in the nature of a "practice," which may not even amount to a legal stricture, may qualify.[606]

407. In light of these considerations, it would be contrary to the purpose of Chapter Eleven, Section B if the Respondent's current restrictive interpretation of the term "measure" were to be adopted. The announcement by the Premier-elect clearly falls within the scope of Article 201 of the NAFTA as a procedure, requirement or practice,[607] as does the express direction provided to government officials by the

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[604] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction (5 January 2001), para. 40, **CL-186**.

[605] *Id.*, para. 53.

[606] *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998), para. 66, **CL-187**.

[607] As the tribunal noted in *Canfor v. United States*, "[w]ithin the terminology used in the NAFTA, 'measure' is indeed broader than 'law'." *See Canfor Corporation and others v. United States of America*, UNCITRAL, Decision of Preliminary Question (6 June 2006), para. 258, **CL-188**.

Premier-elect that "Ontario will not be participating in the August auction"[608] and to "immediately take steps to withdraw Ontario from future auctions for cap-and-trade-credits."[609] Regardless of whether these measures were taken by the Premier-elect *ultra vires* given that he was not yet even in office, such actions are still attributable to the Respondent under principles of international law.[610] Furthermore, measures can be either acts or omissions:[611] given this, it is irrelevant that Ontario was simply "declin[ing] to issue notice of participation".

408. This interpretation is consistent with Article 1101(1) of the NAFTA, which provides:

> 1. This Chapter applies to <u>measures adopted or maintained by a Party relating to</u>:
>
> (a) investors of another Party;
>
> (b) <u>investments of investors of another Party</u> in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

409. NAFTA tribunals have considered that there must be a "legally significant connection" between a measure which affects an investment or investor, and the State creating and applying those measures under Article 1101.[612] There is no doubt that such a connection exists in this dispute. As demonstrated at length in the Claimants' Memorial and accompanying witness statements, the measure taken by the Premier-elect on 15 June 2018 "directly affected" the Claimants through the *de facto* freeze it immediately imposed on their Ontario allowances, amounting to an indirect taking of the investment.[613]

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[608] Email from Paul Evans, Deputy Minister of MOECC to Jeff Hurdman, "Direction – cap and trade auction" (15 June 2018), **Exh. C-199** ("I am writing to confirm the direction from Premier-Designate Ford that Ontario will not be participating in the August auction.").

[609] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

[610] Article 7 of the ILC Articles and its Commentary make clear that unauthorized or ultra vires acts of State organs or entities are attributable to the State. *See* Claimants' Memorial, para. 341, n. 434 (citing Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article 7 and Commentary, **CL-51**).

[611] *See*, *e.g.*, ILC Articles on State Responsibility, Article 2, **CL-125**; *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006), n. 155, **CL-88**.

[612] *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/l, Award (19 June 2007), para. 101, **RL-32**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 174, **CL-54**; *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award (31 January 2022), para. 212, **RL-131** ("[T]he challenged measure must "directly address, target, implicate, or affect the claimant" or have a "direct and immediate effect on the claimant.").

[613] *See*, *e.g.*, Claimants' Memorial, paras. 185-206.

410. Consequently, the Respondent's assertion that the actions taken by Ontario on 15 June 2018 – and specifically, the statement and express direction of the Premier-elect, prompting "immediate steps" on the part of Ontario officials – are not "measures" under the NAFTA must be rejected. The actions of Ontario fall within the broad scope of application of Article 201. There is a "legally significant connection" between those actions and the Claimants' investment under Article 1101. Therefore, Chapter Eleven Section B applies equally to the actions taken by Ontario on 15 June 2018 as it does the remainder of the measures in issue that the Respondent does not contest (Regulation 386/18, Bill 4 and the Cancellation Act, and Ontario's ultimate formal denial of compensation).

B. The Measures Amount to a Breach of NAFTA Article 1105(1)

411. In the Memorial, the Claimants demonstrated that the Respondent has violated the fair and equitable treatment (**FET**) standard as set out under Article 1105(1) of the NAFTA with respect to its treatment of the Claimants and their investment. In particular, the Claimants demonstrated that Ontario's actions for which the Respondent is responsible were manifestly arbitrary and discriminatory,[614] and included an express denial of justice.[615] Ontario's violation of the Claimants' legitimate expectations in taking these actions further confirm a breach of the NAFTA has occurred.[616]

412. In its Counter-Memorial, the Respondent denies these claims, and asserts that the Claimants' interpretation of Article 1105(1) is "overly broad" and that, in any event, Ontario's actions do not give rise to a breach of the NAFTA.[617]

413. As demonstrated in the following sections, the Respondent's response is unsustainable. As explained in Part IV.B.1, the Respondent wholly ignores the weight of authority supporting the Claimants' articulation of the FET standard, and adopts an approach inconsistent with its own policy on this issue. Moreover, the Claimants' claims are supported both as a matter of law and as of fact: the Respondent has failed to adequately address the Claimants' claims with respect to Ontario's arbitrary and discriminatory conduct (Part IV.B.2); the Respondent misstates the standard applicable for denial of justice claims under the NAFTA, and is unable to overcome Ontario's complete denial of a system of justice to the Claimants (Part IV.B.3); and the Respondent misrepresents the Claimants' claims with respect to the relevance of legitimate expectations, in an attempt to detract from evidence supporting Ontario's violation of Article 1105(1) of the NAFTA (Part IV.B.4).

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[614] *Id.*, paras. 352-374.

[615] *Id.*, paras. 375-387.

[616] v, paras. 388-399.

[617] Respondent's Counter-Memorial, Part IV.A.

1. The Respondent Misstates the FET Standard Under NAFTA Article 1105(1)

414. In the Memorial, the Claimants acknowledged that Article 1105(1) prescribes the customary international law minimum standard of treatment as highlighted by the Free Trade Commission (**FTC**).[618] Further, the Claimants carefully considered NAFTA tribunals' findings on the modern content of the FET standard, as reflected in the Respondent's own published approaches, and demonstrated each claim within this framework.[619]

415. Instead of considering and addressing the specific arguments advanced by the Claimants within the framework of Article 1105(1), the Respondent simply repeats that the standard to be applied is the customary international law minimum standard of treatment as interpreted by the FTC, and then advances a series of inapposite arguments about the content of that standard. In particular, and as a general matter, the Respondent: (1) advocates an inconsistent position on the legal standard applicable to FET claims under the minimum standard of treatment;[620] and (2) advances arguments on the burden and standard of proof that do not appear to be in dispute between the parties.[621] The Claimants address these broader arguments at the outset, and then each of the Respondent's arguments on the particular claims in issue in the following sections.

416. First, the Respondent argues that the *Neer* standard, as articulated by the tribunal in *Glamis Gold v. United States*, requires conduct of the State to be "sufficiently egregious and shocking"[622] in order to give rise to a breach of the minimum standard of treatment.[623] Not only does this position wholly ignore the Claimants' submission on the modern content of the FET standard under the customary international law minimum standard of treatment, as explained by numerous NAFTA tribunals,[624] but it is obviously inconsistent with the Respondent's own practice on this issue.

417. As explained by the Claimants in their Memorial, NAFTA tribunals have consistently acknowledged that the fundamental protections contained in the minimum standard include protection against denial of justice, a fundamental breach of due process,

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[618] *See* Claimants' Memorial, paras. 344-345; Respondent's Counter-Memorial, paras. 181-182.

[619] Claimants' Memorial, Part IV.B.

[620] Respondent's Counter-Memorial, paras. 181-184.

[621] *Id.*, paras. 185-186.

[622] *Id.*, para. 184.

[623] The Respondent also relies on the finding of the tribunal in *Thunderbird v. Mexico* in support of its assertion that the threshold to establish a violation of this standard is high. Notably, however, the *Thunderbird* tribunal clearly stated that "the content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law". *See* Respondent's Counter-Memorial, para. 184, n. 332; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006), para. 194, **CL-17**.

[624] *See*, *e.g.*, Claimants' Memorial, paras. 346-348, including nn. 437-438.

manifest arbitrariness, targeted discrimination, or the abusive treatment of investors.[625] These standards are consistent with the Respondent's own model investment agreement and its more recent free trade agreements[626] which – on the basis of the Respondent's own arguments – may be taken into account by this Tribunal in interpreting the NAFTA.[627]

418. Indeed, in 2021, the Respondent published its Model Foreign Investment Promotion and Protection Agreement ("FIPA") which included a provision on the minimum standard of treatment as follows:

> 1. Each Party shall accord in its territory to a covered investment of the other Party and to an investor with respect to their covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens. A Party breaches this obligation only if a measure constitutes:
>
> (a) denial of justice in criminal, civil or administrative proceedings;
>
> (b) fundamental breach of due process in judicial and administrative proceedings;
>
> (c) manifest arbitrariness;[1]
>
> (d) targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs;
>
> (e) abusive treatment of investors, such as physical coercion, duress and harassment; or
>
> (f) a failure to provide full protection and security.[2]
>
> > 1. A measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact.

[625] *Id.*, para. 348 (citing *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability (17 March 2015), paras. 442-444, **CL-52**; *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award (24 March 2016), para. 501, **CL-59** ("Having considered the Parties' positions and the authorities cited by them, the Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105.")).

[626] *See*, *e.g.*, Canada's Model Foreign Investment Promotion and Protection Agreement (2021) ("FIPA"), Article 8, **CL-60**; Canada-European Union Comprehensive Economic and Trade Agreement, Article 8.10, **CL-61**.

[627] Respondent's Counter-Memorial, paras. 231-232. For the avoidance of doubt, the Claimants consider that State practice cannot displace the actual terms of the treaty itself.

> 2. For greater certainty, full protection and security refers only to the physical security of an investor and their covered investment.[628]

419. Notably, the underlined provisions in the Respondent's 2021 FIPA are precisely those articulated by the Claimants in this case.[629] Moreover, it is clear from the FIPA that the Respondent itself does not consider the standard to be a "gross" denial of justice, or a "complete lack" of due process – standards that it now asserts are required in this case.[630]

420. Perhaps recognizing the difficulty with its conflicting positions, the Respondent relies on the tribunal's findings in *Perenco v. Ecuador* to argue that the use of words such as "grossly" and "complete" "serves a purpose" in determining whether the minimum standard of treatment has been breached.[631] However, in *Perenco*, the tribunal noted that the FET standard in the treaty in question "is not tethered to the international minimum standard of treatment under customary international law",[632] unlike the NAFTA. Moreover, the *Perenco* tribunal went on to expressly endorse the standards as set out in the tribunal's decision in *Waste Management v. Mexico*,[633] upon which the Claimants relied in their Memorial,[634] and which the Respondent in its Counter-Memorial wholly ignored.

421. Consequently, the Respondent's attempts to unduly restrict the content of the FET standard under Article 1105(1) of the NAFTA and the minimum standard of treatment should be rejected, as further elaborated with respect to the standards for each particular violation below.

422. Second, the Respondent asserts that the Claimants bear the burden of demonstrating that they rely on recognized rules of customary international law or prove the emergence of a new rule under customary international law.[635] The Respondent made

[628] Canada's Model Foreign Investment Promotion and Protection Agreement (2021) ("FIPA"), Article 8, **CL-60** (emphasis added).

[629] Claimants' Memorial, para. 348.

[630] Respondent's Counter-Memorial, para. 184. *See also*, *e.g*., Patrick Dumberry, "Denial of Justice under NAFTA Article 1105: A Review of 20 Years of Case Law", ASA Bulletin, Vol. 32(2) (Kluwer Law International 2014) p. 263, **CL-189** ("In the present author's view, a claimant does not need to show the existence of a 'gross' denial of justice in order to convince a NAFTA tribunal that a breach of Article 1105 has occurred. Customary international law prohibits 'simple' denial of justice by States.").

[631] Respondent's Counter-Memorial, para. 184.

[632] *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (ICSID Case No. ARB/08/6) Decision on Jurisdiction (30 June 2011), para. 557, **RL-2**.

[633] *Id.*, para. 558.

[634] Claimants' Memorial, para. 346.

[635] Respondent's Counter-Memorial, para. 185.

these same arguments before the tribunal in *Windstream v. Canada*, which also involved a breach of the FET standard by the government of Ontario.[636]

423. In *Windstream*, the tribunal rejected these arguments, stating:

> The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the relevant rule of customary international law exists; the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist – the minimum standard of treatment in Article 1105(1) of NAFTA – should be established. The Tribunal is therefore unable to accept the Respondent's argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence.[637]

424. While the *Windstream* tribunal tacitly accepted the Respondent's argument that the content of the minimum standard of treatment must be established on the basis of evidence of actual State practice and *opinio juris* – the same arguments the Respondent advances in this dispute[638] – it noted that neither the claimant nor the Respondent had produced such evidence.[639] The *Windstream* tribunal then stated:

> In the circumstances, the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.
>
> The Tribunal notes that other NAFTA tribunals have adopted a similar approach when seeking to determine the contents of the minimum standard of treatment in Article 1105(1) of NAFTA. Both Parties have also extensively cited to NAFTA awards and legal scholarship…[640]

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[636] *See*, *e.g.*, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Government of Canada Counter-Memorial (20 January 2015), paras. 370-379, **CL-62**.

[637] *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 350, **CL-63** (emphasis added).

[638] Respondent's Counter-Memorial, para. 186.

[639] *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016), para. 351, **CL-63**.

[640] *Id.*, paras. 351-352.

425. The same circumstances apply in this dispute. Despite the fact that the Respondent appears to have recycled its earlier (rejected) submissions on this issue, it has failed to provide evidence of the content of the customary international law minimum standard of treatment that it states is required: State practice and *opinio juris*. The Respondent instead largely relies upon findings of other NAFTA tribunals and commentary in order to make its arguments, as indirect evidence properly recognized by NAFTA tribunals.[641]

426. In any event, the overall purpose of the Respondent's submissions on this point is unclear, as there appears to be little debate that the standards articulated by the Claimants are, in fact, recognized rules of customary international law.[642] The Respondent appears to accept that the fair and equitable minimum standard of treatment includes those claims advanced by the Claimants in this case (*i.e.*, manifest arbitrariness, targeted discrimination and a denial of justice).[643] In addition, the Respondent also appears to agree with the Claimants that "legitimate expectations are 'a factor to be taken into account by a tribunal when assessing an allegation of breach of another element of the standard.'"[644] This is consistent with the findings of NAFTA tribunals examining customary international law standards.[645] It is also consistent with the Respondent's own articulation of the minimum standard of treatment in 2021, as excerpted above.[646]

427. Thus, the Respondent's arguments on this point bear no discernible relevance to the issues actually in dispute,[647] which turn on how the standard is applied to the facts in

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[641] In this respect, the Claimants note the irony of Canada's extensive citations to NAFTA awards and legal scholarship, despite its inconsistent position that "[a]n investor cannot resort to decisions from arbitral tribunals to prove the existence of a customary rule, without relying on actual evidence of State practice". *See* Respondent's Counter-Memorial, para. 186.

[642] It is not contested that, as a general matter, a party alleging a violation of international law has the burden of proving that assertion, whether a claimant or respondent. *See Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (16 March 2017), para. 109, **CL-190** ("The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving it. If that party adduces evidence that *prima facie* supports its allegation, the burden of proof may shift to the other party when the circumstances so justify.").

[643] Respondent's Counter-Memorial, para. 184.

[644] *Id.*, para. 192; Claimants' Memorial, para. 348.

[645] *See*, *e.g.*, *Mobil Investments Canada Inc. v Canada* (ICSID Case No ARB(AF)/07/4) Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-55**; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**. *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006), para. 147, 194-196, **CL-17**; *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), paras. 621, 627, **CL-18**.

[646] *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009), para. 603, **CL-18** ("The evidence of such 'concordant practice' undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (*e.g.* Model BITs), and sometimes pleadings.").

[647] The Claimants of course reserve their rights to further address these issues if the Respondent does demonstrate the relevance of its arguments.

issue in these proceedings. As outlined in detail in the following sections, it is clear that the Respondent is in breach of Article 1105(1) by virtue of Ontario's unfair and inequitable actions.

2. The Respondent's Measures are Manifestly Arbitrary and Discriminatory

(a) The Respondent Fails to Address the Legal Standards in Issue

428. In the Memorial, the Claimants articulated two distinct claims under Article 1105(1) – that the Respondent's measures are manifestly arbitrary and discriminatory – and set out the clear legal tests applicable to both, demonstrating how the facts in dispute met these tests. To recall, the Claimants first set out the findings of NAFTA tribunals on the scope of "manifestly arbitrary" measures,[648] and demonstrated that the measures in question are manifestly arbitrary because they are not rationally connected to any legitimate policy objective, and are based on prejudice and bias rather than on reason or fact (the test that the Respondent itself espoused in Article 8(1) of its FIPA 2021).[649] With respect to their claims of discrimination, the Claimants demonstrated that the FET standard includes targeted (other than nationality-based) discrimination, where the State has no "legitimate justification" for such targeting. The Claimants discussed these legal standards, and then demonstrated how Ontario's conduct was discriminatory in light of its arbitrary targeting of a specific class of investors.[650]

429. In its Counter-Memorial, the Respondent essentially ignores all of the Claimants' arguments on the applicable legal standards, failing to address the meaning of "manifestly arbitrary" or what is required to be "discriminatory", as considered by NAFTA tribunals. Based on the Respondent's failure to directly respond to the Claimants' submissions on these standards, the Claimants understand that the Respondent does not object to the Claimants' articulation of these standards *per se*.[651]

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[648] Claimants' Memorial, paras. 352-353.

[649] *See* paras. 416-419 *supra*.

[650] Claimants' Memorial, paras. 367-374.

[651] To the extent that the Respondent intends to ambush the Claimants by addressing, for the first time, any argument with respect to these legal standards, this would be procedurally improper under Rule 31(3) of the ICSID Arbitration Rules (which provides that "A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law *in the last previous pleading*; a statement of law in answer thereto; and the submissions." (emphasis added)). As made clear by these emphasized portions, the Counter-Memorial should have addressed statements of law as filed in the Memorial (as the "last previous pleading"). Any attempt on the part of the Respondent to address issues in its Rejoinder should be rejected as depriving the Claimants of due process. *See Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum (30 December 2016), para. 380, **CL-191** ("The Tribunal is aware that the provisions relating to written submissions contained in Rule 31 of the ICSID Arbitration Rules are closely related to a party's fundamental procedural right to be heard…").

430. Instead, the Respondent simply asserts that Article 1105(1) does not: (1) allow a tribunal to second-guess government policy decisions; and (2) protect against changes in the regulatory environment. As demonstrated below, these arguments are both inapposite to the issues actually in dispute between the parties, and incorrect as articulated by the Respondent.

431. First, the Respondent asserts that international law "generally recognizes a high level of deference to States with respect to their domestic policy choices" and therefore that Article 1105(1) cannot "serve as a basis for reviewing the sufficiency of the policy rationale" underlying a State's choices.[652]

432. As an initial and fundamental point, the Claimants are *not* asking this Tribunal to review Ontario's policy choices, and notably, Ontario's decision to repeal the Cap and Trade Program. Rather, they seek redress for the arbitrary and discriminatory manner in which Ontario executed these choices, in violation of Article 1105(1) of the NAFTA. This is clear from the Claimants' Memorial, which focuses on the Respondent's breach of the FET standard because of the *manner* in which Ontario abruptly and arbitrarily cancelled the Cap and Trade Program, cancelled all emissions allowances held in Ontario CITSS accounts, provided compensation in an arbitrary and discriminatory manner, and expressly denied participants in the Cap and Trade Program access to justice.[653] The Respondent's attempt to reframe the content of the Claimants' claims as challenging Ontario's policy choice itself is therefore misleading, and should not be accepted by the Tribunal.

433. In any event, it is not sufficient for a State to flatly assert that a tribunal cannot "second-guess" governmental policy decisions and therefore that there is no breach of the minimum standard of treatment. Indeed, the majority of cases that the Respondent references in support of its argument make clear that deference to the primary decision-makers cannot be unlimited. For example:

- In *Saluka v. Czech Republic*, the tribunal stated: "It is clearly not for this Tribunal to second-guess the Czech Government's privatization policies … This, however, did not at the same time relieve the Czech Government from complying with its obligation of non-discriminatory treatment … The Czech Republic, once it had decided to bind itself by the Treaty to accord 'fair and equitable treatment' to investors of the other Contracting Party, was bound to implement its policies, including its privatization strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty."[654]

- In *Crystallex v. Venezuela*, the tribunal considered that while it was not for an investor-State tribunal to second-guess the substantive correctness of a policy decision it is "equally clear that deference to the primary decision-makers cannot

[652] Respondent's Counter-Memorial, para. 188.

[653] *See*, *e.g.*, Claimants' Memorial, para. 351 *et seq*.

[654] *Saluka Investments B.V. (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award (17 March 2006), para. 337, **RL-33** (cited in Respondent's Counter-Memorial, n. 342).

be unlimited, as otherwise a host state would be entirely shielded from state responsibility…".[655]

- In *Eco Oro v. Colombia*, the tribunal further confirmed that "deference to the State's powers cannot require the Tribunal to condone actions that would otherwise comprise a breach of [the FET standard] … regulatory changes effected by Colombia will therefore amount to a breach of [that standard] if Colombia has acted in a way which is 'arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law standard'".[656]

434. Consequently, the Respondent's arguments that Article 1105(1) does not allow a tribunal to second-guess government policy decisions is erroneous and in any event is inapposite when considered in light of the Claimants' actual arguments in this dispute.

435. Second, and perhaps implicitly recognizing the weakness of its primary position of the deference to be afforded to States under international law, the Respondent claims that Article 1105(1) "also does not guarantee to foreign investors that host States will 'maintain a stable legal and business environment'."[657] These arguments suffer similar, fundamental flaws.

436. In the first instance – and once again – it is not the Claimants' position that Article 1105(1) incorporates an obligation of regulatory stability: the Claimants' Memorial is devoid of any mention of such a claim. What is in dispute is not whether States have the right to impose regulatory change, but whether the particular actions taken by the State in the course of imposing such change are arbitrary or discriminatory in light of the international legal standards in question. The Respondent has not adequately addressed this fundamental question, and instead seeks to distract this Tribunal by unilaterally asserting that Article 1105(1) is not a guarantee against regulatory change.

437. Moreover, the authorities that the Respondent relies upon in support of its assertion that "States can 'chang[e] the regulatory environment to take account of new policies and needs'"[658] ultimately support the Claimants' argument. For example, in *Mobil v. Canada*, the tribunal was clear that while a State is not required to maintain a stable legal and business environment for investments, Article 1105(1) may protect an investor from changes that "may be characterized as arbitrary or grossly unfair or discriminatory, or otherwise inconsistent with the customary international law

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[655] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016) paras. 583-584, **CL-115** (cited in Respondent's Counter-Memorial, n. 342).

[656] *Eco Oro Minerals Corp. v. The Republic of Columbia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), paras. 751-752, **CL-58** (cited in Respondent's Counter-Memorial, n. 342).

[657] Respondent's Counter-Memorial, para. 190.

[658] *Id.*, para. 191.

standard."[659] This point was highlighted by Professor Dumberry and his discussion of *Parkerings v. Lithuania*, another authority relied upon by the Respondent.[660] Furthermore, while the Claimants consider that the Respondent's discussion of non-NAFTA cases applying an autonomous standard to be of little relevance,[661] even those cases recognize that "the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably".[662]

438. In short, the Respondent's arguments are wholly inapposite to the Claimants' actual claims and are, in any event, undermined by the authorities upon which it relies. The Respondent has made no attempt to address the legal standards applicable to determining whether Ontario's measures were manifestly arbitrary or discriminatory, and instead simply seeks to change the narrative for its own benefit. This cannot be accepted.

(b) The Respondent Fails to Rebut the Claimants' Demonstration of Arbitrary and Discriminatory Treatment in Breach of Article 1105(1) of the NAFTA

439. Having ignored the actual legal standards in issue, the Respondent then makes two broad arguments which – although not totally clear – appear to respond to the Claimants' arguments on arbitrary and discriminatory treatment: (1) Ontario's decision to wind down the Cap and Trade Program was not abrupt and followed a legitimate democratic process;[663] and (2) Ontario's policy choices to replace the Cap and Trade Program were made in good faith and in pursuit of legitimate policy objectives.[664] Both of these assertions are belied by the factual evidence on the record

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[659] *Mobil Investments Canada Inc. v Canada* (ICSID Case No ARB(AF)/07/4) Decision on Liability and on Principles of Quantum (22 May 2012), para. 153, **CL-55** (cited in Respondent's Counter-Memorial, nn. 348-350).

[660] Patrick Dumberry, "The Protection of Investor's Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105" 31:1, JOURNAL OF INTERNATIONAL ARBITRATION, 47, pp. 69-70, **RL-45**; *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award (11 September 2007), para. 332, **RL-46** (where the tribunal recognized a State's right to enact, modify or cancel a law, but when on to clarify in that same paragraph that "[w]hat is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.").

[661] Respondent's Counter-Memorial, n. 350.

[662] *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Final Award [Unofficial English Translation] (21 January 2016), para. 500, **RL-47**. *See also Philip Morris Brand Sàrl, Philip Morris Products S.A.* and *Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), para. 423, **RL-48** (stating that changes to general legislation will not exceed the exercise of the host State's normal regulatory power unless the modification is "outside of the acceptable margin of change."); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 372, **RL-17** (finding that there is no legitimate expectation for anyone that the legal framework will remain unchanged "unless the alteration of the legal framework is total.").

[663] Respondent's Counter-Memorial, paras. 200-204.

[664] *Id.*, paras. 205-206.

of these proceedings, and fail to rebut the Claimants' claims of breach under Article 1105(1) of the NAFTA.

(1) Ontario's Decision to Abruptly Cancel the Cap and Trade Program Did Not Follow a Legitimate Democratic Process

440. In the Memorial, the Claimants demonstrated that the measures instituted by Ontario were manifestly arbitrary, grossly unfair and amount to a breach of Article 1105(1) of the NAFTA, for the following reasons:

- Ontario's measures were not rationally connected to any legitimate policy objective, and were based on prejudice and bias rather than on reason or fact.[665] In particular, the Cap and Trade Program specifically provided for the inclusion of market participants, and Ontario required KS&T to be linked with Koch compliance entities for the purposes of regulation. Then, when dismantling the Program, Ontario suddenly and completely arbitrarily distinguished between the same entities it had itself grouped together, notably refusing to compensate KS&T.[666]

- The true rationale underpinning Ontario's approach to compensation was purely political: it was a bid to arbitrarily limit the amount of compensation payable as a result of cancelling the Cap and Trade Program, as a way to garner support for the abrupt implementation of its cancellation measure.[667] This conclusion is supported by the fact that the cancellation of the Program ultimately served no public purpose, given that as a direct result of cancellation Ontario was simply subject to an alternative carbon pricing regime, through the Federal backstop program.[668]

- The manner in which Ontario cancelled the Cap and Trade Program was also manifestly arbitrary in light of the clear legal framework in place requiring that Ontario endeavour to provide at least 12 months' notice of any intention to withdraw from the OQC Agreement and preferably at the end of a compliance period, a framework Ontario wilfully ignored.[669]

- In addition, Ontario's actions violated its own laws by ignoring the agreed transition of power scheduled to occur on 29 June 2018, which only serves to reinforce the arbitrariness of Ontario's conduct.[670]

[665] *See* Claimants' Memorial, paras. 352-353.

[666] *Id.*, paras. 355-356.

[667] *Id.*, para. 359.

[668] *Id.*, para. 360.

[669] *Id.*, paras. 362-363.

[670] *Id.*, paras. 364-364.

441. The Respondent wholly ignores these arguments, and instead simply asserts that Ontario's decision to "wind down the cap and trade program was not abrupt and followed a legitimate democratic process".[671] In support of this argument, the Respondent presents a bland and featureless account of the Ontario government's measures, in just three paragraphs. First, the Respondent asserts that the leader of the Progressive Conservative Party of Ontario, Mr. Doug Ford, had made clear during his election campaign that he intended to cancel the Cap and Trade Program.[672] Second, the Respondent recalls that, "[o]nce in power", the Ontario Ford government passed Regulation 396/18 on 3 July 2018.[673] Finally, the Respondent states that Bill 4 was introduced into the Ontario Legislature on 25 July 2018, was posted on the Environmental Registry for public comment on 11 September 2018, and received Royal Assent on 31 October 2018.[674]

442. Because of this legislative process, and the fact that stakeholders were provided the "opportunity" to provide comments on Bill 4, the Respondent summarily concludes that the Claimants cannot credibly argue that Ontario's decision to cancel the Cap and Trade Program was manifestly arbitrary.[675]

443. The Respondent's attempt to whitewash Ontario's actions falls apart upon quick recollection of the facts.

444. As an initial point, and as highlighted in paragraph 432 above, the Claimants do not argue that Ontario's *decision* to cancel the Program was arbitrary, but that the way in which the decision was implemented breached Article 1105(1) of the NAFTA. Perhaps conscious of this mischaracterization, the Respondent in its narrative omits key events, all of which confirm the manifest arbitrariness of Ontario's actions.

445. First, the Respondent's focus on Doug Ford's statements of his intentions during his electoral campaign are irrelevant to the question of whether Ontario acted in an arbitrary manner in cancelling the Cap and Trade Program. While the Ontario Progressive Conservatives expressed their opposition to the Cap and Trade Program in the election and their intention to exit the Program, they never once set out the exact manner in which this policy would be implemented.[676] They certainly did not suggest they would immediately exit the OQC Agreement (in violation of Ontario's undertaking to provide a year's notice to California and Québec before pulling out of that Agreement). They did not confirm that they would fail to compensate some participants for their engagement in the Program. Indeed, as referenced below, the Ontario Progressive Conservatives' plan to push through the Cancellation Act on the basis that the election itself led to sufficient "public consultation" on the actual content of the Act, was the subject of an immediate challenge before the Ontario

[671] Respondent's Counter-Memorial, Section IV.A.3(a) (Heading).

[672] *Id.*, para. 201.

[673] *Id.*, para. 202.

[674] *Id.*, para. 203.

[675] *Id.*, para. 204.

[676] *See* para. 105 *supra*.

Courts, through which the Government was forced to conduct a public consultation in September 2018, to ensure compliance with Ontario law.[677]

446. Second, the Respondent's attempt to suggest that Ontario's measures cancelling the Cap and Trade Program began with the Regulation 386/18 of 3 July 2018 wilfully ignores reality. As set out in the Claimants' review of events, it is plain and obvious that the first devastating step in the Ontario Government's actions came with the Premier-elect's sudden and wholly unexpected announcement of 15 June 2018, which had the immediate and predictable effect of precipitating a *de facto* freeze on allowances held in Ontario CITSS accounts, including the Claimants', effectively destroying their value.[678] The Respondent's discomfort with the events of 15 June 2018 is palpable, and the fact that it barely even acknowledges the Premier-elect's announcement of that date in its narrative of events speaks volumes. In the Memorial, the Claimants explained how the announcement of the Premier-elect on 15 June was unexpected and abrupt, and had devastating effects.[679] Moreover, the Claimants explained how this announcement altered the legal framework in a manifestly arbitrary way (notably, by ignoring Ontario's agreement with California and Québec on a 12-month transition period, precipitating an immediate freeze on Ontario-held allowances), and provided participants in the Program with zero notice of the sudden abrogation of their rights. The Claimants further noted in this regard that the measure was in violation of Ontario's own law, in that it was made at a time when the Ontario Conservatives had not yet officially been transferred power. The Respondent makes no attempt to even acknowledge these claims, and completely omits any discussion of the Premier-elect's announcement of the cancellation of the Cap and Trade Program, in this section of its Counter-Memorial.

447. Third, the Respondent's bland assertion of "good democratic process" is ironic in circumstances where Ontario's attempt to push Bill 4 through Parliament without public consultation was found to be illegal by the Ontario courts, in violation of Ontario law on public consultation in relation to environmental measures.[680] The Respondent refers to this serious finding by Ontario courts only in a footnote, stating that it was only an "academic determination" that the repeal of the Cap and Trade Program "did not meet the public participation requirements of the Environmental Bill of Rights."[681] The Respondent has no answer, however, to the findings of Justice Mew (in the majority) that "the government failed to comply with its legal obligations" as a matter of domestic law.[682] Likewise, the Respondent ignores the damning comments of Justice Corbett, who stated that the government "failed to comply with the law" and "since sought to justify that illegality by its election victory and has passed legislation purporting to preclude judicial review of what it has

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[677] *See* paras. 198 to 203 *supra*.

[678] *See* paras. 131, 169 *supra*.

[679] *See*, *e.g.*, Claimants' Memorial, paras. 185-201.

[680] *Id.*, paras. 238-241.

[681] Respondent's Counter-Memorial, n. 148.

[682] *Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, para. 84, **CL-33**.

done."[683] These actions, for Justice Corbett, raised "serious concerns – not about whether the government had the lawful authority to repeal the Cap and Trade Act, but of its respect for the Rule of Law and the role of the courts, as a branch of government".[684] It is little wonder that the Respondent sought to omit these facts from its narrative that Ontario "followed a legitimate, democratic process".

448. Finally, the Respondent's claim that over 10,000 comments on Bill 4 were received and "considered" by Ontario is misleading.[685] As made clear by the evidence on the record, Ontario only released its summary of the comments received on the Cancellation Act on 15 November 2018,[686] over two weeks *after* the Bill had already received Royal Assent. Moreover, after receiving these thousands of comments, the Respondent's witness recalls two superficial changes to the draft legislation: "ensuring that free allowances were deducted once (rather than twice) when calculating the amount of compensation" and "removing duplication in regulation making authority".[687] In other words, Ontario rectified two administrative mistakes while admitting to "not retain[ing]" those comments "that were in direct contradiction with the clear policy decisions made by Ontario".[688]

449. Clearly, the Respondent's narrative of an "orderly" wind down of the Cap and Trade Program through a "legitimate democratic process" is a fiction invented to improperly deflect liability in these proceedings.

(2) Ontario's Policy Decision to Cancel the Cap and Trade Program was Executed in an Arbitrary and Discriminatory Manner

450. In the Memorial, the Claimants demonstrated that the cancellation of the Cap and Trade Program was carried out in an arbitrary and discriminatory manner. In addition to those arguments advanced with respect to Ontario's manifestly arbitrary treatment toward the Claimants (discussed in paragraph 440 above), the Claimants demonstrated that Ontario had arbitrarily targeted a specific class of investors, and then had effectively picked "winners and losers" amongst entities participating in the Cap and Trade Program.[689] Furthermore, and as explained by Dr. Stavins, Ontario had no legitimate justification for such targeting, because the action taken by Ontario constituted an unexpected and shocking repudiation of the goals and legal framework

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[683] *Id.*, para.3.

[684] *Id.*, para. 75.

[685] Respondent's Counter-Memorial, para. 87.

[686] *See* para. 201 *supra*; Environmental Registry of Ontario, "Bill 4, Cap and Trade Cancellation Act, 2018", 15 November 2018, **Exh. C-12**.

[687] Witness Statement of Mr. Alexander Wood (16 February 2022), para. 29, **RWS-1**.

[688] *Id.*, para. 28.

[689] Claimants' Memorial, paras. 370-372.

of the Cap and Trade Program, taken for ulterior motives to serve political interests.[690]

451. In its Counter-Memorial, the Respondent does not directly address the Claimants' submissions on discrimination, but includes two paragraphs under the heading "Ontario's policy choices to replace the cap and trade program were made in good faith and in pursuit of legitimate policy objectives." [691] These arguments are unsustainable.

452. First, the Respondent relies on the witness statement of Mr. Wood to assert that "[t]he decision to exclude certain categories of participants from compensation was based on rational policy aims informed by the purpose of cap and trade system, and not on discriminatory grounds."[692] As described in the Claimants' Memorial and again in paragraphs 206 to 220 above, the Respondent's position in this respect is contradicted by the plainly arbitrary and discriminatory provisions on the face of the Cancellation Act itself, and on the weight of the evidence. Ontario's own internal documents make clear that the design of the Cancellation Act [redacted] ,[693] as Ontario recognized the concern that "[t]he up to $5 million in the compensation framework is not enough to cover the almost $3 billion in purchased offsets and allowances".[694]

453. Moreover, Mr. Woods evidence is circular, and the Respondent makes no effort to provide any logical rationale for this position, merely repeating the cursory rationale offered by Ontario at the time, *i.e.*, that KS&T "chose to participate in the cap and trade program at their own risk" as "market traders and speculators".[695] As explained by Dr. Stavins, Ontario's position "provide[s] no clear foundation or justification for its decision to exclude market participants from compensation, but there is no obvious foundation or justification for the decision from the standpoint of economics or finance." [696] Furthermore, the Respondent's attitude towards enterprises such as KS&T is, in effect, that they "deserved" to be expropriated without compensation and to be subject to arbitrary and discriminatory treatment, because they took the risk of doing business in Canada. The Respondent's attitude makes no sense, particularly in light of the range of valuable services provided by market participants to the Ontario

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[690] *Id.*, paras. 373-374.

[691] *See* Respondent's Counter-Memorial, p. 77.

[692] *Id.*, para. 205.

[693] [redacted]

[694] Ontario Government, "Bill 4, Cap and Trade Cancellation Act, 2018, Key Debate Themes Against the Bill" (12 October 2018), p. CAN-00969, **Exh. C-208**.

[695] Respondent's Counter-Memorial, para. 97.

[696] Second Expert Report of Dr. Robert Stavins (18 July 2022), para. 65, **CER-2**.

Cap and Trade Program (and by extension, to all Ontarians), as detailed in Dr. Stavins first expert report.[697]

454. Second, the Respondent argues that there is no basis upon which to allege that Ontario acted in bad faith with respect to the OQC Agreement, because that Agreement was "non-binding" and did not prevail over Ontario's "sovereign right" to "adopt, maintain, modify, repeal or revoke any of their respective program regulations or enabling legislation."[698] As described in paragraphs 87 to 101 above, this argument is unprincipled, and should be given little weight.[699] While each jurisdiction was required to implement its own statutory and regulatory authority, it was the OQC Agreement itself that provided the basis for the mutual recognition of the Parties' compliance instruments,[700] the agreement to hold joint auctions with harmonized procedures,[701] and the agreement to use a common registry system and auction platform.

(c) Conclusion on Arbitrary and Discriminatory Treatment

455. Overall, the Respondent's Counter-Memorial fails to adequately address the legal standards and the facts in issue in these proceedings. A full picture of the actions taken by Ontario in cancelling the Cap and Trade Program clearly demonstrates that Ontario acted in a manifestly arbitrary and discriminatory way, in clear violation of Article 1105(1) of the NAFTA.

3. The Respondent's Measures Amount to a Denial of Justice

456. In the Memorial, the Claimants demonstrated that, under the minimum standard of treatment set out under Article 1105(1) of the NAFTA, the Respondent has an obligation not to deny justice, and to afford due process of law.[702] In particular, the Claimants highlighted that a denial of justice will arise where a national legal system fails to provide minimum standards of administration of justice, including –

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[697] Expert Report of Dr. Robert Stavins (5 October 2021), Section IV.A, **CER-1**. *See also* Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 60-61, **CER-2** (explaining that compliance entities could just as easily engage in "speculative" activity by purchasing more allowances that would have been sufficient to fulfil their compliance obligations, further underscoring that labeling market participants as "speculators" does not rationalize Ontario's decision to exclude market participants from compensation).

[698] Respondent's Counter-Memorial, para. 206.

[699] *See*, *e.g.*, *id.*, paras. 55, 257.

[700] Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 6, **CL-8**.

[701] *Id.*, Article 9.

[702] *See* Claimants' Memorial, paras. 375-387.

fundamentally – a denial of access to the courts.[703] In this respect, the Claimants recall:

- The Cancellation Act specifically denied the Claimants access to the courts, by prohibiting any proceeding for any remedy or relief across a broad range of legal avenues including both statutory and equitable relief. The Act also purported to deny the Claimants access to any other system of justice, by imposing sweeping prohibitions on enforcing judgments or orders made by courts or tribunals outside Canada.[704]

- The measures instituted by Ontario pursuant to the Cancellation Act resulted in gross unfairness to the Claimants, as the Respondent failed to provide access to courts or even a process for administrative review of the decision to deny the Claimants compensation.[705]

- This denial of justice was only further confirmed by the substantive lack of due process in Ontario's passage of the Cancellation Act and its treatment of the Claimants' applications and correspondence requesting compensation.[706]

457. In its Counter-Memorial, the Respondent agrees that the protection of foreign investors against a denial of justice forms part of the minimum standard of treatment under customary international law,[707] while failing to comment on any of the cases or commentary the Claimants rely upon regarding the application of that standard.[708] As with respect to the standards applicable to arbitrary and discriminatory treatment, the Claimants therefore understand the Respondent not to contest these standards. Nor could it, in light of the fact that the Respondent's own legal authorities clearly recognize the existence of a denial of justice where access to the courts is denied. For example:

- Professor Paulsson writes that "[t]he right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice. Legal

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[703] *Id.*, paras. 376-378, citing, *inter alia*, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 221, **CL-75**; *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award (12 January 2011), para. 223, **CL-20**; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 132, **CL-68**; and *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 98, **CL-12**.

[704] Claimants' Memorial, para. 382.

[705] *Id.*, paras. 383-384.

[706] *Id.*, paras. 385-386.

[707] Respondent's Counter-Memorial, para. 196.

[708] For example, the Respondent does not appear to contest the findings by the NAFTA tribunal in *Lion v. Mexico*, rendered in September 2021, which held that the procedural denial of justice is "uncontroversial". *See*, *e.g.*, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), paras. 221-225, **CL-75**.

rights would be illusory if there were no entitlement to a procedural mechanism to give them effect."[709]

- Professor Dumberry observes that NAFTA case law has provided "several examples of what concretely constitutes a denial of justice under Article 1105", and states that first and foremost, "a clear situation of denial of justice arises when the host State does not provide the investor with a 'fair trial'."[710] "The concept of 'denial of justice' is closely interconnected with that of 'due process'",[711] and therefore it "includes the actions of all agents of the State in the maladministration of justice, and not only actions of judicial officers *per se*."[712] That is, denial of justice is not limited to a court's refusal to entertain a suit, but will extend to the total denial of access to the courts through measures taken by both the executive and legislative branches of government.[713]

- Professor Bjorklund considers that "[t]he international minimum standard, as expressed through the doctrine of denial of justice, requires that aliens have access to impartial courts to vindicate certain fundamental rights. Access alone is not enough; national laws must give the alien some right of redress for certain wrongs."[714] Furthermore:

  > At its most basic, a procedural denial of justice is a denial of access to a court. This definition commanded universal adherence during the codification attempts of the 1920s. Courts themselves may deny access, or what might be termed a failure of legislation may deny access: the legislative branch has either failed to pass a law that would permit redress or has passed a law that prevents or unduly limits access to the courts.[715]

- In discussing what constitutes a denial of justice, Professor Amerasinghe notes that a "narrow view would have it that it is only refusal of access to the courts or undue delay by the courts in the disposition of a case that could be termed a denial of justice. A further narrow view which is reflected in the 1927 resolution of the Institut de droit international is that a denial of justice occurs when tribunals capable of doing justice do not exist or function, when access is denied to

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[709] Jan Paulsson, "Denial of Justice in International Law" (Cambridge University Press, 2005), p. 134, **CL-192** (excerpts of the same source submitted by the Respondent as **RL-52**).

[710] Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Kluwer Law International, 2013), p. 257, **RL-51**.

[711] *Id.*, pp. 231-232.

[712] *Id.*, p. 232.

[713] *See also International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006), para. 197, **CL-17** (making findings with respect to the "alleged failure to provide due process (constituting an administrative denial of justice)…").

[714] Andrea K. Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims", 45:4 VIRGINIA JOURNAL OF INTERNATIONAL LAW 809, p. 837, **RL-53**.

[715] *Id.*, pp. 843-844.

tribunals or when tribunals do not offer guarantees which are indispensable to the proper administration of justice."[716]

458. In sum, taking only the Respondent's legal authorities on this issue, it is abundantly clear that a denial of justice exists where an investor has been denied access to the courts.

459. Instead of engaging with these legal standards, the Respondent advances two primary arguments: (1) that State immunity provisions allow for limitations on the right to access courts;[717] and (2) that the exhaustion of local remedies is a condition precedent to a finding of denial of justice.[718] Neither of these arguments are persuasive, for the following reasons.

(a) State Immunity Provisions Cannot Immunize a State Against Unlawful Behaviour as a Matter of International Law

460. In the Memorial, the Claimants described the way in which the Cancellation Act specifically denied the Claimants access to the courts. Section 10 of that Act provides sweeping prohibitions on any proceeding for any remedy or relief, as follows:

> **Section 10**
>
> **(1) No cause of action**. No cause of action arises against the Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown as a direct or indirect result of,
>
> > (a) the enactment, operation, administration or repeal of any provision of this Act or the enactment, operation, administration or repeal of the *Climate Change Mitigation and Low-carbon Economy Act, 2016*;
> >
> > (b) the making or revocation of any provision of a regulation made under this Act or made under the *Climate Change Mitigation and Low-carbon Economy Act, 2016;*
> >
> > (c) anything done in accordance with or under this Act or a regulation made under this Act or anything not done in accordance with this Act or a regulation made under this Act, including any decision related to participants' eligibility to receive compensation or the amount of such compensation;
> >
> > (d) the retirement or cancellation of any cap and trade instrument in accordance with this Act; or

[716] Chittharanjan F. Amerasinghe, "Local Remedies in International Law" (Cambridge University Press, 2nd ed. 2004), p. 90, **RL-54**.

[717] Respondent's Counter-Memorial, paras. 196-197.

[718] *Id.*, paras. 198-199.

> (e) any act or omission related to the wind down of the cap and trade program established under the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, including the decision to have no further distribution of cap and trade instruments by auction.
>
> **(2) Proceedings barred**. No proceeding, including but not limited to any proceeding for a remedy in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, and any remedy under any statute, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against the Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown.
>
> **(3) Application.** Subsection (2) applies to any action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief, and includes a proceeding to enforce a judgment or order made by a court or tribunal outside of Canada.
>
> **(4) Retrospective effect.** Subsections (2) and (3) apply regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day this subsection comes into force.
>
> **(5) Proceedings set aside.** Any proceeding referred to in subsection (2) or (3) commenced before the day this subsection comes into force shall be deemed to have been dismissed, without costs, on the day this subsection comes into force.
>
> **(6) No expropriation or injurious affection.** Nothing done or not done in accordance with this Act or the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, or any regulation under this Act or the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.

461. In its Counter-Memorial, the Respondent argues that domestic laws limiting State liability do not necessarily amount to a denial of justice,[719] and that because Section 10 of the Cancellation Act is "*prima facie* constitutional and valid" it does not rise to the level of a denial of justice.[720] The Respondent's arguments in this respect are underwhelming and largely inapplicable.

[719] *Id.*, para. 196.

[720] *Id.*, para. 215.

462. First, it is trite to point out that the fact that a domestic law is "constitutional and valid" as a matter of domestic law does not protect it from being held to violate principles of international law.[721] As the tribunal in *Cargill v. Mexico* explained:

> [T]he *lawfulness* of a domestic law does not presuppose its lawfulness under international law. Indeed, this is the very rationale for the customary international law minimum standard of treatment of aliens: regardless of the views of each State, there is a minimum, a floor below which a State will be held internationally responsible for its conduct.[722]

463. Despite the Respondent expressly acknowledging that "the fact that [Section 10 of the Cancellation Act] is *prima facie* constitutional and valid in Canada is not determinative for this Tribunal",[723] it nonetheless spends the vast majority of its section on denial of justice providing examples of findings of domestic courts on the historical development of Crown immunity provisions in Canada.[724] This lengthy disposition is irrelevant in light of the question before this Tribunal: whether Section 10 of the Cancellation Act, and its sweeping denial of access to courts for any remedy relating to the cancellation of the Cap and Trade Program, violates Article 1105(1) of the NAFTA. It most certainly does.

464. Second, the Respondent's heavy reliance on the findings of the tribunal in *Mondev v. United States* does not provide support for its position.[725] In *Mondev*, one of the issues raised by the claimant was that the Massachusetts Tort Claims Act improperly shielded a regulatory authority (Boston's planning and economic development

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[721] *See*, *e.g.*, *Canfor Corporation and others v. United States of America*, UNCITRAL, Decision of Preliminary Question (6 June 2006), para. 307, **CL-188** ("How each State Party assures that the mandates of Article 1902(2) are respected may depend on its domestic law, but it is also well-established as a principle of international law that particular provisions of a State Party's domestic legal system cannot be invoked to avoid that State's responsibility to fulfill its binding international obligations."); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 120, **CL-84** ("An Act of State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – even if under that law, the State was actually bound to act that way."); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 94, **RL-99** ("International law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law.").

[722] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 303, **CL-54** (emphasis in original). *See also Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), para. 120, **CL-84** ("That the actions of the Respondent are legitimate or lawful or in compliance with the law form the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement or to international law: 'An Act of State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – even if under that law, the State was actually bound to act that way.'").

[723] Respondent's Counter-Memorial, para. 215.

[724] *Id.*, paras. 216-217.

[725] *Id.*, paras. 197, 218.

agency, the "BRA") from liability for intentional tort. The tribunal ultimately considered that it was "not persuaded" that the extension to a statutory authority of a limited immunity for interference with contractual relations amounted in that case to a breach of Article 1105(1).[726]

465. A cursory review of the decision makes clear that the *Mondev* tribunal's finding was limited and does not apply to the circumstances at issue in this dispute:

- In the very first paragraph of its analysis, the *Mondev* tribunal noted that "circumstances can be envisaged where the conferral of a general immunity for suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA."[727] This is the precise circumstance in question in the present case. Ontario, through Section 10 of the Cancellation Act, sought general immunity from *any* suit, including laws against expropriation, contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligations. Moreover, the immunity provision was not just for the conduct of one specialised public authority (*cf.* the BRA in *Mondev*), but covers "[the] Crown or any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown".[728] Such an all-encompassing provision, which confers general immunity for suit for conduct affecting a NAFTA investment, clearly amounts to a denial of justice as envisaged by the *Mondev* tribunal.

- Moreover, the content of the *Mondev* tribunal's analysis of the claims in issue focused on the specific immunity in question, expressly acknowledging that there was no uniformity of practice among the major legal systems as to the existence of immunities from suit for public authorities.[729] The tribunal recognized the specific functions of the BRA as a specialized regulatory authority mandated to deal with commercial redevelopment plans, and the limited immunity against claims of tortious interference in circumstances where the authority had both detailed knowledge of the relevant contractual relations and the power to grant or deny permits.[730] This is a far cry from the broad prohibitions contained in Section 10 of the Cancellation Act.

- The *Mondev* tribunal recognized that, because of these highly specific functions, if the specialized regulatory authority was sued in relation to the grant or denial of commercial redevelopment plans, then this would be a "consequent distraction to the work of the Authority".[731] The Respondent seizes on this statement to

[726] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 154, **CL-56**.

[727] *Id.*, para. 151 (emphasis added).

[728] Cap and Trade Cancellation Act, 2018, Section 10(1), **CL-1**.

[729] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), paras. 141-144, **CL-56**.

[730] *Id.*, para. 153.

[731] *Ibid.*

advance the argument that allowing liability claims under the Cancellation Act "could result in 'a distraction to the work of the [Government].'"[732] In other words, the Respondent argues that the broad prohibition on *any* proceeding for *any* remedy or relief across a broad range of legal avenues and against *any* member of the Crown, or current or former employees, agents or advisors to the government, is necessary so as not to "distract" the work of the Ontario government. This argument is simply not credible, and wholly distinguishable from the specific and narrow circumstances in *Mondev*.

466. Therefore, the Respondent's dependence on the findings by the *Mondev* tribunal does not support its contentions. Moreover, and what the Respondent omitted from its discussion of this case, the *Mondev* tribunal ultimately concluded its analysis by stating:

> After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1). Of course such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards – but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA's entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply.[733]

467. The *Mondev* tribunal's findings with respect to statutory immunities of specialized local government agencies is therefore inapposite in this dispute.

468. Finally, the Respondent's assertion that Section 10 of the Cancellation Act is "also in furtherance of a legitimate aim, is non-discriminatory, and is in keeping with the associated regulatory regime" is unsupported as a matter of law and of fact. The Claimants first observe that in espousing this "test", the Respondent has been unable to point to any legal authority which supports its existence or relevance to the question of whether statutory immunity provisions protect it from a finding of breach of Article 1105(1) of the NAFTA. Moreover, even if it were the applicable standard (*quod non*), the Respondent is wholly unable to fulfil the test of its own making. Section 10 of the Cancellation Act is:

a. not in "furtherance of a legitimate aim". As highlighted in the Claimants' Memorial and in paragraphs 202 and 207 above, in July 2018 (*i.e.*, prior to the Cancellation Act coming into force), the Ontario Government had promised that cancelling the Cap and Trade Program would only result in "minimal"

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[732] Respondent's Counter-Memorial, para. 218.

[733] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), para. 154, **CL-56** (emphasis added).

compensation costs, and limited to CAD 5 million.[734] Tellingly, Ontario claimed that the Cancellation Act "insulates Ontario from any legal liability in the cancellation of the cap and trade program",[735] including for NAFTA claims.[736] The only way Ontario could live up to these political promises was to prohibit participants in the Cap and Trade Program from accessing redress through the courts, as Ontario openly admitted.[737] In other words, Ontario cynically adopted its legislation with impunity, expecting that liability for its illegal measure would through the working of the anti-suit clause simply be shifted to the Federal Government, given the latter's responsibility for measures of sub-national governments as a result of Article 105 of the NAFTA. Section 10 is therefore not the product of a "legitimate" purpose of government, but was designed for purely political reasons.

b. clearly discriminatory. As explained in paragraphs 206 to 220 above, the provisions contained in the Cancellation Act were on its face arbitrary and discriminatory. Notably, market participants such as the Claimants affected by these measures were expressly prevented from pursuing any domestic claims against Ontario under Section 10 of the Cancellation Act.

c. distinguishable from Section 70 of the Cap and Trade Act and is therefore separate from the "associated regulatory regime". As explained in paragraphs 76 to 79 above, the scope of Section 70 was narrow and provided the Minister with limited discretion to adjust allowance levels held by participants in order to achieve the benefits of the program. The operation of Section 70 of the Cap and Trade Act allowed Ontario to take certain steps in connection with its administration of the Program; it did not give Ontario *carte blanche* to destroy that same Program with impunity, as confirmed by Canadian law.[738] Nor does it provide any support for the introduction of Section 10 of the Cancellation Act, despite the Respondent's unsupported claims.

469. The Respondent's argument that the Claimants have not established a denial of justice because Section 10 of the Cancellation Act is "*prima facie* constitutional and valid in Canada" as a Crown immunity provision is unsustainable. This is true even on the application of the Respondent's own "test" of determining statutory immunity provisions (which, as noted above, is unsupported at law).

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[734] Claimants' Memorial, para. 359, citing Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112**; Ontario Government, Stakeholder Briefing Questions and Answers (26 and 27 July 2018), **Exh. C-110**.

[735] Ontario Government News Release, Cap and Trade Cancellation Act (26 July 2018), **Exh. C-112**.

[736] *See* para. 208 read with para.78, *supra*.

[737] *See* para. 456, *supra*; Claimants' Memorial, para. 382.

[738] *See* paras. 73-74 *supra*.

(b) The Requirement to Exhaust Local Remedies is Not Absolute

470. The second strand of the Respondent's argument in response to the Claimants' claim of a denial of justice is to argue that the "exhaustion of local remedies is a condition precedent to a finding of denial of justice by a State."[739] The Respondent then states, in just one paragraph that, "[h]ere the Claimants could have challenged the wind-down of the program and the enactment of the Cancellation Act in domestic court, as have other market participants."[740] In absence of this action, the Respondent asserts, the Claimants' denial of justice claim should be rejected.

471. The Respondent's arguments are overly simplistic, inconsistent, and fail to account for the appropriate legal standards required.

472. The Respondent provides an extremely limited discussion on the applicable standards for considering the exhaustion of local remedies in denial of justice claims. In fact, the Respondent essentially holds itself to describing select excerpts of the tribunal's findings in *Loewen v. United States* in two short paragraphs, without elaborating on how that case is relevant in these proceedings, or the general framework for this Tribunal's assessment of the Respondent's defences. These submissions fail to justify the Respondent's position.

473. Most recently, the tribunal in *Lion v. Mexico* (a 2021 decision finding denial of justice under the NAFTA, wholly ignored by the Respondent in its discussion of the standard) considered Mexico's arguments that exhaustion of local remedies is a requirement for a finding of denial of justice,[741] and surveyed a range of legal authorities on this issue.[742] The *Lion* tribunal concluded:

> In the Tribunal's opinion, the exhaustion rule is subject to two categories of exceptions: an aggrieved alien is only required to pursue remedies
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> - which are reasonably available (i), and
>
> - which have an expectation that they will be effective, i.e. the measure or appeal has a reasonable prospect of correcting the judicial wrong committed by the lower courts (ii).[743]

474. Both of these exceptions apply here.

475. First, the Respondent bears the burden of demonstrating that there are "reasonably available" local remedies for the Claimants to pursue.[744] The Respondent has made

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[739] Respondent's Counter-Memorial, para. 187.

[740] *Id.*, para. 213.

[741] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 562, **CL-75**.

[742] *Id.*, paras. 557-574.

[743] *Id.*, para. 562.

no effort to fulfil this burden, except to assert in one paragraph that the Claimants "could have" challenged the actions of the Ontario government in domestic court.[745] The Respondent has not explained which actions the Claimants could have pursued, or how these actions would have remedied the Claimants' losses.[746] Instead, the Respondent is simply asserting that the Claimants "should have" exhausted all remedies in the face of a clause which seeks to comprehensively bar any and all claims against any possible individual bearing any connection to the Cancellation Act and its effects. Even Ontario's Superior Court recognized this point in a case brought against the Ontario Government arising from its failure to comply with domestic law in cancelling the Cap and Trade Program, with Justice Myers making clear that the court could not provide declaratory relief because "it is barred by s10 of the Cap and Trade Cancellation Act".[747]

476. Moreover, the requirement of "reasonable availability" of a remedy does not require the Claimants to pursue all possible remedies.[748] Indeed, as noted by Professor Paulsson in a legal authority submitted by the Respondent in these proceedings:

> The victim of a denial of justice is not to pursue improbable remedies. Nor is he required to contrive indirect or extravagant applications beyond the ordinary path of a frontal attempt to have the judgment by which he was unjustly treated set aside, or to be granted a trial he was denied.[749]

477. There is no "ordinary path" for the Claimants to pursue in Ontario, and the Respondent has not even attempted to demonstrate otherwise. Instead, Canada simply footnotes a statement of claim in a class action challenging the Cancellation Act in domestic courts without comment.[750] To the extent that the Respondent posits that

[744] *See*, *e.g.*, United Nations, Yearbook of the International Law Commission (2002), Documents of the fifty-fourth session, Volume II, Part One, A/CN.4/SER.A/2002/Add.1(Part 1), para. 19, **CL-193** ("the burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective or futile.").

[745] Respondent's Counter-Memorial, para. 213.

[746] Canada simply footnotes a class action filed in the Ontario Superior Court of Justice, but makes no further comment on the actual availability of remedies to the plaintiffs in that case, or the legislation under which the Claimants in this case could have effectively pursued. See Respondent's Counter-Memorial, para. 213, citing SMV Energy Solutions, Notice of class proceeding including a claim for damages pursuant to s. 18(1) of the Crown Liability and Proceedings Act (16 December 2020), **Exh. R-81**; *SMV Energy Solutions v. Ontario*, ONSC, Amended Statement of Claim (28 July 2021), **Exh. R-82**.

[747] *See Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, para. 107, **CL-33**.

[748] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 564, **CL-75**.

[749] Jan Paulsson, "Denial of Justice in International Law" (Cambridge University Press, 2005), p. 113, **CL-192** (excerpts of the same source submitted by the Respondent as **RL-52**).

[750] Respondent's Counter-Memorial, n. 396.

the Claimants "could have" brought a dispute under the Crown Liability and Proceedings Act (the **CLPA**, the act referred to in the class action), it is unclear how this would assist the Claimants to remedy the fundamental rights denied by Section 10 of the Cancellation Act. Indeed, the CLPA was introduced in 2019 by the same Ontario government responsible for the denial of access to the courts in the Cancellation Act. Section 11 of the CLPA notably provides broad immunity for the Crown, or an officer, employee or agent of the Crown, in respect of actions brought against it arising out of acts of a legislative nature, in the making of regulatory decisions, and in the making of policy decisions.[751] It is no coincidence that this legislation was introduced *after* the enactment of the Cancellation Act and a challenge against the Government of Ontario before the Ontario Superior Court of Justice, who considered Ontario had failed to comply with public consultation requirements in introducing the Cancellation Act.[752] As described by legal commentators at the time of its introduction, the legislation "operates retroactively against existing actions, fundamentally limits the circumstances under which the Government of Ontario can be found liable in a private action and introduces significant procedural hurdles to actions against it."[753] Thus it appears that any claim (let alone any satisfactory remedy) is far from "reasonably available" or on the "ordinary path" to access justice for Ontario's unlawful actions.

478. Consequently, the Respondent has failed at the first hurdle to demonstrate that there are reasonably available remedies for the Claimants to exhaust. Thus, the Respondent's arguments on the Claimants' failure to exhaust local remedies is moot and need not be entertained further by the Tribunal.

479. Second, and to the extent they exist, the Claimants are only required to exhaust local remedies which will be effective, and which have a reasonable prospect of remedying the international wrong.[754] Interestingly, despite ignoring this legal standard in these proceedings, the Respondent in *Lion v. Mexico* appears to have expressly acknowledged this exception to the requirement of exhaustion of local remedies, as the tribunal in that dispute notes:

> Canada also acknowledges that the rule gives way whenever it would be "demonstrably futile" to pursue local remedies; whether recourse to further appeals of a domestic court judgment is futile is "a fact-specific inquiry taking into consideration the availability, adequacy and effectiveness of the remedy."[755]

[751] *See* Crown Liability and Proceedings Act, 2019, Section 11, **Exh. C-212**.

[752] *See* Claimants' Memorial, paras. 238-241.

[753] Cassels, "Ontario's Crown Liability and Proceedings, Act, 2019 and its effects on Class Actions", **Exh. C-213**.

[754] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 575, **CL-75**. *See also id*., para. 554 ("The requirement that local remedies be exhausted is subject to an exception: an alien cannot be required to take a measure or lodge an appeal which will not remedy the international wrong.").

[755] *Id.*, para. 556.

480. While the Respondent may have omitted any discussion of the customary international law doctrine of futility in its Counter-Memorial, it has been codified by the International Law Commission (**ILC**) in its Draft Articles on Diplomatic Protection (**Draft Articles**). In particular, Articles 14 and 15 of the Draft Articles codified the customary international law doctrine of exhaustion of local remedies and the concept of "futility" as follows:

> **Article 14. Exhaustion of local remedies**
>
> 1. A State may not present an international claim in respect of an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.
>
> 2. "Local remedies" means legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury. . . .
>
> **Article 15. Exceptions to the local remedies rule**
>
> Local remedies do not need to be exhausted where:
>
> > (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;
> >
> > (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;
> >
> > (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;
> >
> > (d) the injured person is manifestly precluded from pursuing local remedies; or
> >
> > (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.[756]

481. Commentary of the ILC to Article 15 makes clear that there is an exemption from the local remedies rules where "there is no reasonable possibility of effective redress" before local courts of the respondent State.[757] In addition, the Commentary states that "the test is supported by judicial decisions which have held that local remedies need

[756] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries (2006), Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, Articles 14 and 15, **CL-194**.

[757] International Law Commission, Draft Articles on Diplomatic Protection with Commentaries (2006), Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, **CL-194**, Article 15, Commentary at para. 3.

not be exhausted where":[758] (1) "the local court has no jurisdiction over the dispute in question;"[759] and (2) there is a consistent and well-established line of precedents adverse to the alien".[760] These factors are present in this dispute:

- As a result of the express provisions of the Cancellation Act, one of the measures directly at issue in these proceedings, Canadian courts have no jurisdiction to consider a claim for the arbitrary cancellation and expropriation of the Claimants' investment. As described in paragraphs 460 to 469 above, Section 10(2) of the Cancellation Act totally bars any proceedings for any remedy under any statute that is "directly or indirectly based on or related to" the cancellation of the Claimants' investment under that Act. That is, Section 10 of the Cancellation Act is clearly directed at immunizing the provincial Crown (and any servants or agents) from claims for damages or financial compensation. Consequently, the Act itself extinguishes any jurisdiction of domestic courts to consider the Claimants' claim, as recognized by Justice Myers in a case brought in the Supreme Court of Ontario against the Ontario Government arising from its failure to comply with domestic law in cancelling the Cap and Trade Program.[761]

- There is also a consistent and well-established line of domestic precedents adverse to the Claimants further confirming the futility of pursuit of any claim before

[758] *Ibid.*

[759] *Ibid.* (citing *Panevezys-Saldutiskis Railway*, Judgment 1939, PCIJ, Series A/B, No. 76 at p. 18; *Arbitration under Article 181 of the Treaty of Neuilly*, AJIL, Vol. 28 (1934), p. 760 at p. 789; *Claim of Rosa Gelbtrunk*, Award of 2 May 1902 and "*Salvador Commercial Company" et al. ("El Triunfo Company")*, Award of 8 May 1902, UNRIAA, Vol. XV (Sales No. 1966.V.3), pp. 463-466 and pp. 467-479 respectively; *The Lottie May Incident (arbitration between Honduras and the United Kingdom)*, Arbitral Award of 18 April 1899, UNRIAA, Vol. XV, p. 23 at p. 31; Judge Lauterpacht's separate opinion in *Certain Norwegian Loans, Judgement*, I.C.J. Reports 1957, p. 9 at pp. 39-40; and *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war ("Finnish Ships Arbitration")*, Award of 9 May 1934, UNRIAA, Vol. III (Sales No. 1949.V.2), p. 1535).

[760] *Ibid.* (citing *Panevezys-Saldutiskis Railway*, Judgment 1939, PCIJ, Series A/B, No. 76 at p. 18; *S.S. "Lisman"*, Award of 5 October 1937, UNRIAA, Vol. III, p. 1767 at p. 1773; *S.S. "Seguranca"*, Award of 27 September 1939, *ibid*., p. 1861 at p. 1868; *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war ("Finnish Ships Arbitration")*, Award of 9 May 1934, UNRIAA, Vol. III (Sales No. 1949.V.2), p. 1495; *X v. Federal Republic of Germany*, Application No. 27/55, Decision of 31 May 1956, European Commission of Human Rights, Documents and Decisions, 1955-1956-1957, p. 138; *X v. Federal Republic of Germany*, Application No. 352/58, Decision of 4 September 1958, European Commission and European Court of Human Rights, Yearbook of the European Convention on Human Rights, 1958-1959, p. 342, at p. 344; and *X v. Austria*, Application No. 514/59, Decision of 5 January 1960, Yearbook of the European Convention on Human Rights, 1960, p. 196 at p. 202).

[761] Justice Myers considered that "this case is deemed dismissed by the Cap and Trade Cancellation Act, 2018", finding that "[e]ven if s.10 set out above could read as merely a precatory privative clause, it is a most powerful indication that the Legislature intends to ratify all steps in the wind down process, including, specifically, steps associated with the revocation of regulations, and to limit judicial review of those steps for, among other thangs *(sic)*, breach of any statute.". *See Greenpeace Canada v. Minister of the Environment (Ontario)*, 2019 ONSC 5629, paras. 97-103, **CL-33**.

Canadian courts. The Respondent's own submissions prove this very point, when it spends the majority of its section on denial of justice demonstrating that Section 10 of the Cancellation Act is *prima facie* constitutional and valid as a matter of domestic law.[762] The Respondent's detailed explanation of general Crown immunities is irrelevant to the question of whether it is in breach of international law,[763] but does serve the purpose of further confirming the futility of the Claimants seeking to challenge the Cancellation Act (even if possible) in a bid to remedy the wrongs thrust upon them by Ontario's arbitrary and discriminatory actions.

482. Indeed, even the Respondent's sole NAFTA case on the issue of exhaustion of local remedies, *Loewen v. United States*, makes clear that a claimant's obligation to seek a remedy from higher courts is subject to reasonable practical limitations.[764] In fact, the majority of the *Loewen* tribunal's analysis turned on whether the alternatives raised by the respondent in that case were "reasonably available" to the claimant.[765]

483. The United States had argued that the claimant in *Loewen* "should have" pursued three different remedies before it could establish a violation of Article 1105(1).[766] On review of two of those three remedies, the *Loewen* tribunal found that they were not reasonably available to the claimant.[767] On the third and final remedy, the tribunal could not make the same finding because, critically, the claimant had "failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option."[768] In fact, the *Loewen* tribunal confirmed that if the claimant had demonstrated that entry into the settlement agreement was the only reasonable course, "that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy."[769] However, because the tribunal was left to "speculate", they could not make a finding that the remedy proposed by the United States was not reasonably available.

484. The Respondent's heavy reliance on the findings of the tribunal in *Loewen v. United States* is therefore unwarranted in these proceedings, for a number of reasons. The facts in issue are vastly different. Unlike in *Loewen*, the Claimants in this case had no recourse for review, at all. This was not a case where the Claimants "opted" to pursue an arbitration under the NAFTA in lieu of pursuing local remedies, or where the

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[762] Respondent's Counter-Memorial, paras. 215-218.

[763] *See*, *e.g.*, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009), para. 303, **CL-54**; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), para. 120, **CL-84**.

[764] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 167, **CL-68**.

[765] *See*, *e.g.*, *id.*, paras. 207-217.

[766] *Id.*, para. 207.

[767] *See*, *e.g.*, *id.*, paras. 207-217.

[768] *Id.*, para. 215.

[769] *Ibid.*

complained of measure was a single act by a lower court member of the judiciary: the Ontario legislature expressly removed the availability of judicial redress, and denied the Claimants fundamental access to justice. Put simply, there was no local remedy for the Claimants to pursue. Moreover, even if there were remedies available to the Claimants (which the Respondent has failed to prove), pursuing these remedies would be futile, as Canada itself confirms by citing the defensibility at domestic law of such limitations on access to justice.

(c) Conclusion on Denial of Justice

485. Ontario's actions constitute a blatant case of denial of justice. The Cancellation Act eliminates the opportunity for redress by the Claimants and flatly bars any access to the courts. The Respondent's attempt to avoid its liability by arguing that statutory immunity provisions are valid at domestic law is unsupported as a matter of international law. Moreover, the Respondent's attempts to escape the consequences of Ontario's blatant denial of justice by asserting that the Claimants' "failed" to exhaust local remedies is indefensible in light of the Respondent's own failures to demonstrate that there are any reasonably available remedies, and that such remedies would be effective. In sum, Ontario's measures in denying any access to courts or administrative review, as well as its failure to accord both procedural and substantive due process to the Claimants, clearly violates Article 1105(1) of the NAFTA.

4. The Respondent Violated the Claimants' Legitimate Expectations, a Relevant Factor in Demonstrating its Breach of Article 1105(1) of the NAFTA

486. In the Memorial, the Claimants argued that legitimate expectations are a relevant factor for the Tribunal to take into account in assessing a breach of Article 1105(1),[770] and demonstrated that Ontario's conduct undoubtedly created reasonable and justifiable expectations on the part of the Claimants, who acted in reliance of this conduct and suffered significant damages as a result.[771]

487. In response, the Respondent asserts that "Article 1105 does not protect an investor's legitimate expectations, and in any event the evidence shows that Ontario did not make specific commitments to the Claimants to induce an alleged investment."[772] These arguments are misleading and erroneous, as described in the following sections.

(a) The Respondent's Articulation of the Legal Standards and the Claimants' Claim Is Misleading

488. First, the Respondent argues that "Article 1105 does not contain an autonomous FET obligation, and the protection of investors' legitimate expectations is not a recognized rule under customary international law."[773] It then asserts that "[s]ince the Claimants

[770] Claimants' Memorial, para. 388.

[771] *See id.*, paras. 391-399.

[772] Respondent's Counter-Memorial, para. 179.

[773] *Id.*, para. 194.

do not even attempt to present evidence sustaining an argument that legitimate expectations are indeed protected under customary international law, this argument must fail."[774]

489. The Respondent's position is completely irrelevant, in light of the fact that the Claimants have not asserted that the protection of legitimate expectations is a stand-alone rule under customary international law. Instead, and as explicitly acknowledged by the Respondent,[775] the Claimants' position is that legitimate expectations are "a relevant factor" for the Tribunal to take into account, when considering other evidence of breach of Article 1105(1). This is made clear by the first paragraph of the Claimants' Memorial addressing this standard, which states: "*in addition* to the manifestly arbitrary nature of Canada's measures, and the complete denial of justice thrust upon the Claimants, *it is relevant* that Canada *also* violated the Claimants' legitimate expectations, *further demonstrating* Canada's violation of Article 1105(1) of the NAFTA."[776] As made clear by the italicised portions of this statement, the Claimants did not argue that a violation of legitimate expectations constituted a stand-alone breach of Article 1105(1) of the NAFTA. In fact, the Claimants excerpted findings from a number of tribunals confirming that legitimate expectations are a "relevant factor" to take into account in assessing a breach under Article 1105(1).[777] The Respondent's attempt to reframe the narrative to create a straw man is unavailing and wastes the Tribunal's time.[778]

490. Second, the Respondent argues that "even tribunals that have recognized that an investor's legitimate expectations may be a 'relevant factor' to consider have narrowly qualified this concept".[779] In making this argument, the Respondent conducts a cursory review of the findings of the tribunal in *Glamis Gold v. United States*, summarily concluding that "legitimate expectations must be based on specific assurances given by Ontario to them in order to induce an investment."[780] The Respondent does not elaborate further on the standards this Tribunal should apply, going on to present a simplistic and self-serving factual narrative. In this respect, the Respondent's submissions are wholly deficient.

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[774] *Ibid.*

[775] *Id.*, para. 192.

[776] Claimants' Memorial, para. 388 (emphases added).

[777] *Id.*, paras. 389-390.

[778] This is particularly the case where the Respondent has itself previously recognized that legitimate expectations may be relevant to the assessment of a breach of the fair and equitable treatment obligation. *See*, *e.g.*, Canada-European Union Comprehensive Economic and Trade Agreement, Article 8.10.4, **CL-61** ("When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.").

[779] Respondent's Counter-Memorial, para. 194.

[780] *Id.*, para. 195.

491. With regard to the legal standard applicable to legitimate expectations, the Respondent ultimately simply repeats the standards articulated by the Claimants themselves in their Memorial. For example, the Claimants have been clear in articulating the standards that a number of tribunals have applied, including *Glamis Gold*,[781] and highlighted that these standards were summarized by the tribunal in *Mobil Investments v. Canada* as follows:

> (3) in determining whether that [fair and equitable treatment] standard has been violated it will be a relevant factor if the treatment is made against the background of
>
> (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
>
> (ii) were, by reference to an objective standard, reasonably relied on by the investor, and
>
> (iii) were subsequently repudiated by the NAFTA host State.[782]

492. As the Claimants set out in their Memorial,[783] the *Mobil* tribunal factors (i) through (iii) have been met in this case, as discussed in what follows.

(b) The Respondent Has Failed to Adequately Address Ontario's Interference with the Claimants' Legitimate Expectations

493. In the Memorial, the Claimants demonstrated a range of express, long-term, and specific representations made by the Ontario Government, including:

a. representations made by Ontario in designing its Cap and Trade Program to promote WCI principles, and to expressly incorporate market participants and future linkage with WCI jurisdictions;[784]

b. express written commitments entered into by Ontario, Québec and California on 22 September 2017 wherein these jurisdictions explicitly agreed that if any of its parties sought to withdraw from the arrangement, they would endeavour to provide at least a years' notice;[785] and

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[781] Claimants' Memorial, paras. 389-390.

[782] *Id.*, para. 347, citing *Mobil Investments Canada Inc. v Canada* (ICSID Case No ARB(AF)/07/4) Decision on Liability and on Principles of Quantum (22 May 2012), para. 152, **CL-55**.

[783] *See* Claimants' Memorial, paras. 391-399.

[784] *See id.*, paras. 392-393.

[785] *See id.*, paras. 394-396.

c. statements that Ontario would wind down the Cap and Trade Program in an "orderly" manner, once the government abruptly announced the cancellation of the Program.[786]

494. The Respondent's response to these assertions is superficial, and – once again – provides no real response to the main issues in dispute between the parties.

(1) Representations Made by Ontario in Designing its Cap and Trade Program

495. In the Memorial, the Claimants described how they had legitimate expectations that their position within the structure of the Cap and Trade Program would be respected, even in the case of a withdrawal, and that they would not be the subject of unfair targeting (as in fact occurred), because Ontario had for years acknowledged and promoted the role of market participants in Cap and Trade.[787] In particular, Ontario had itself "played a key role in drafting" the WCI principles in 2008 to include the key role of market participants,[788] had designed its program to include market participants to ensure that it would link with California and Québec,[789] and expressly adopted provisions providing for market participants in the Cap and Trade Act.[790] All of these acts, including express representations by the Ontario government at the time the Cap and Trade Act was introduced, created reasonable and justifiable expectations which the Claimants relied upon to invest in Ontario at the outset of the Cap and Trade Program in 2016.

496. The Respondent largely ignores the Claimants' detailed factual account of the representations made by the government of Ontario in expressly including market participants in the Cap and Trade Program (*i.e.*, the first factor articulated by the *Mobil* tribunal). Instead, the Respondent blithely states that Ontario simply published guidance materials and held information sessions, which did not amount to "specific assurances".[791] Even if this were the case (*quod non*), there is evidence of specific representations about the long-term nature of the Cap and Trade Program, and the role market participants would play in the secondary market of that program. As explained in paragraph 97 above, the Minister of the Environment and Climate Change at the time publicly stated to assembled participants in the Program that the Cap and Trade Act had been designed to be difficult to undo and that it would be around in the long term.[792] Indeed, the structure of the Cap and Trade Act and Regulations itself constituted a specific inducement to private parties like KS&T to engage in the Program as market participants, on the understanding that by attracting

[786] *See id.*, paras. 397-398.

[787] *Id.*, paras. 392-393.

[788] Ontario Government, Cap and Trade Linking – Decision (31 August 2017), p. CAN-0438, **Exh.C-187**.

[789] *Ibid.*

[790] Claimants' Memorial, para. 392.

[791] Respondent's Counter-Memorial, para. 208.

[792] *See* para. 97 and n. 139 *supra*.

market participants, through their market engagement the Program would function optimally and at the lowest cost to Ontarians.

497. With respect to the Claimants' reliance on these express representations in making their investment (*i.e.*, the second factor articulated by the *Mobil* tribunal), the Respondent argues that such reliance was not reasonable because "when KS&T registered as a market participant in Ontario, it knew it was a highly regulated and uncertain program".[793] In support of this argument, the Respondent points to: (1) Section 70 of the Cap and Trade Act, which it said put KS&T "on notice" that there was no right to compensation;[794] (2) inherent uncertainty of cap and trade programs due to political opposition in Canada and elsewhere (and specifically, New Jersey's withdrawal from RGGI);[795] and (3) "clear indications" starting at the end of 2017 that the Cap and Trade Program could be terminated.[796] The Respondent's riposte is inaccurate on each count, and merely confirms that the Claimants reasonably relied on Ontario's express representations.

498. First, the Respondent's reliance on Section 70 is abusive and unavailing. As explained in detail in paragraphs 72 to 86 above, Section 70 of the Cap and Trade Act accorded to the Minister a limited ability to remove allowances from accounts in order to promote the proper functioning of the Program. Such discretion is typically reserved in cap and trade programs and seeks to address circumstances such as those in which an excess of allowances has been issued free of charge to a mandatory participant. Section 70 on its face was not conceived to allow the Minister the right to summarily eliminate the entire Program against no compensation. Rather, it was limited to address the financial and legal consequences of the exercise of the government's powers within the four corners of the Cap and Trade Act (*i.e.*, actions "under" the Act or done or not done "in accordance with the Act").[797] In accordance with well-established Canadian law, the doctrine of improper purpose limits executive statutory and regulatory discretion,[798] as does the need to comply with international law.[799] Interpreting Section 70 as signalling to participants that their allowances could be expropriated without compensation, in a targeted and arbitrary fashion (as in fact occurred) is inconsistent with such principles. The Respondent's effort to reinterpret Section 70 as a grant of unfettered discretion that put the Claimants "on notice" of Ontario's pending measures, rather than a limited shield from liability from certain domestic remedies to promote the Act itself, fails.

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[793] Respondent's Counter-Memorial, paras. 208-209.

[794] *Id.*, para. 209.

[795] *Id.*, para. 210.

[796] *Ibid.*

[797] *See* para. 76 *supra*.

[798] *See*, *e.g.*, *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, [1959] S.C.J. No. 1, at p. 143 S.C.R, **LK-61**; *Tesla Motors Canada ULC v Ontario (Ministry of Transportation)*, 2018 ONSC 5062, para. 53, **CL-140**.

[799] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, paras. 114, 182, **JDB-11**.

499. Second, the New Jersey withdrawal from RGGI underscores the legitimacy of the Claimants' expectations, rather than serving as any warning of Ontario's actual measures. As described in paragraphs 116 to 122 above, New Jersey's withdrawal from RGGI was undertaken in a staged and progressive fashion, in a manner that imposed less risk of adverse consequences to the system's integrity. Dr. Stavins contrasted New Jersey's notice of withdrawal with the actions taken by Ontario, confirming that New Jersey was quick to provide notice to the market about compliance requirements (while Ontario was slow); New Jersey gave seven months' notice prior to withdrawal (while Ontario gave none); and New Jersey confirmed that entities would be required to fulfil their compliance obligations through the end of the compliance period (while Ontario still had two and a half years of the compliance period left when it abruptly withdrew from the program).[800] Moreover, Dr. Stavins confirmed that the potential risks created by Ontario's withdrawal vastly exceeded those created by New Jersey's withdrawal from RGGI.[801] In sum, and as Frank King notes, while "KS&T indeed had expectations about what an 'orderly' withdrawal from regional cap and trade programs would entail, based on its experience in RGGI", "[u]nfortunately, the government of Ontario's abrupt and unprecedent actions departed from this experience, were not foreseeable, and caused KS&T significant harm."[802]

500. Third, The Respondent's assertion that there were "clear indications" of the uncertainty of the Cap and Trade Program at the end of 2017 is belied by evidence demonstrating both industry-wide expectations, and Ontario's own position at that time. As discussed in detail in paragraphs 111 to 113 above, internal documents from Ontario confirm *contra* the Respondent's allegations that it did not consider that there was "poor auction performance" at the end of 2017, nor that the level of performance was linked with any uncertainty concerning Ontario's commitment to its Cap and Trade Program. To the contrary, evidence submitted by the Respondent in these proceedings indicate that the strengthening numbers in early 2018 "suggest that Doug Ford, leader of Ontario's Progressive Conservative Party, could find it difficult to disentangle the province from a climate policy that industry has already invested in."[803] Moreover, and as described in paragraph 112 above, the evidence from Ontario itself demonstrates that the rate of bids for 2020 "future vintage" allowances was listed by Ontario as 145 percent, meaning that the total qualified bids in the final Ontario auction of 2017 vastly outweighed the number of allowances available.[804]

501. With respect to the subsequent repudiation by Ontario of its express representations (*i.e.*, the third factor articulated by the *Mobil* tribunal), the Respondent has not even

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[800] Second Expert Report of Dr. Robert Stavins (18 July 2022), paras. 87-89, **CER-2**.

[801] *Id.*, para. 92.

[802] Second Witness Statement of Frank King (17 July 2022), para. 54, **CWS-6**.

[803] Argus Media, "Carbon auction suggests optimism over Ontario" (24 May 2018), **Exh. R-46**.

[804] Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances November 2017 Ontario Auction #4, **Exh. C-69**. *See also* Second Witness Statement of Michael Berends (16 July 2022), para. 17, **CWS-7**.

attempted to dispute this point. As described in detail in the Claimants' Memorial[805] and in sub-Section IV.B.2(b) (paragraphs 439 to 454) above, Ontario's abrupt, arbitrary and discriminatory cancellation of the Cap and Trade Program wholly repudiated its representations that the initiative was intended to be a long-term program and that market participants in the Cap and Trade Program would not be the subject of unfair targeting in the event that the Cap and Trade Program was eventually wound down. The results of Ontario's actions not only violated the legitimate expectations of the Claimants, but caused the Claimants' significant loss.

(2) Representations Expressly Made Through the Finalization of the OQC Agreement

502. In the Memorial, the Claimants described how they held legitimate expectations based on the express written commitments entered into by Ontario, Québec and California on 22 September 2017 through the OQC Agreement, and relied on the provisions contained in that Agreement to invest in the joint auctions of these WCI jurisdictions.[806] In particular, Ontario's express agreement to endeavour to provide at least a year's notice if it sought to withdraw from the arrangement reasonably and justifiably gave rise to an expectation that Ontario would act in good faith to ensure that any exit from the Cap and Trade Program would be long term and orderly. These legitimate expectations formed the basis of the Claimants' decision to further invest in the joint auctions, including USD 30,158,240.95 in Ontario for the May 2018 joint auction.

503. It is telling that the Respondent largely ignores these arguments, and simply asserts in a footnote that the Agreement did not create "binding obligations", or "any rights for third parties".[807] The Respondent makes no attempt to address the fact that the OQC Agreement gave rise to express assurances, reasonably relied upon by the Claimants, which were repudiated by the unlawful and arbitrary actions of the Ontario government (*i.e.*, the three factors articulated by the *Mobil* tribunal).

504. However, and as discussed in paragraphs 95 to 101 above, the Respondent's attempt to distance itself from the terms of the OQC Agreement should be rejected. The purpose of Article 17 of the OQC Agreement was clearly to provide a level of certainty and predictability to the harmonized cap and trade program. In its own internal documents, Ontario repeatedly highlighted Article 17 as a "major component" of the OQC Agreement,[808] and further relied upon Article 17 to explain how a change of government in any of the three jurisdictions would be addressed. In a "Question and Answer" document prepared by Ontario, the Government considered

[805] Claimants' Memorial, paras. 392-393.

[806] *Id.*, paras. 394-396.

[807] Respondent's Counter-Memorial, n. 394.

[808] *See also*, *e.g.*,

the precise scenario of a change of government in one of the joint jurisdictions, stating as follows:

505. Moreover, it is not the Claimants' argument that the OQC Agreement created "third party rights", as the Respondent insinuates, but rather that it created legitimate and reasonable expectations on the part of the Claimants when making their investment that Ontario would endeavour to provide at least 12 months' notice of any withdrawal from the Cap and Trade Program. This reasonable expectation was further compounded by express statements of the Ontario government at the time, in reiterating that it would be "difficult to undo" the Cap and Trade Program to participants.[810]

506. Clearly, the factual arguments developed by the Respondent for the purposes of this arbitration to downplay the significance of the OQC Agreement are completely at odds with its own evidence, and what was represented to the participants of the Cap and Trade Program.

(3) Ontario's Repeated Refrain of an "Orderly" Withdrawal

507. In the Memorial, the Claimants described how they maintained the legitimate expectation that Ontario would wind down the Cap and Trade Program in an "orderly" manner, based on the express statements of the Premier-elect and Ontario's repeated refrain.[811]

508. The Respondent asserts in response that the phrase "'orderly wind down' is not a promise or assurance that every participant will be compensated".[812] The Claimants never asserted that it was. Instead, and as is clear from the Claimants' Memorial, the Claimants had legitimate expectations that the Ontario government would wind down

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[810] *See* para. 97 and n. 139 *supra*.

[811] Claimants' Memorial, para. 397.

[812] Respondent's Counter-Memorial, para. 211.

the Cap and Trade Program and withdraw from the OQC Agreement in an "orderly" way.[813] For the Claimants, the promise of an "orderly" withdrawal meant proper public consultation (which did not occur), a fair and equitable compensation structure (which failed to be put in place), and real engagement with key stakeholders (which never happened). Once again, the Respondent's attempts to misrepresent the scope of the Claimants' arguments must be dismissed.

509. The Respondent also asserts that the referenced statements made by Ontario with regard to an "orderly wind down" were "made after any alleged investment from KS&T".[814] The Claimants have never denied this, and in their Memorial simply pointed to the fact that "KS&T relied on these statements, and engaged with Ontario in good faith to promote approaches ensuring an 'orderly exit' from the Cap and Trade Program."[815] In considering the sum of the Respondent's breach of Article 1105(1) of the NAFTA, these expectations are a relevant factor to take into account, particularly in light of the arbitrary and discriminatory way in which Ontario refused to compensate the Claimants and denied them any avenue for judicial or administrative review.

510. Consequently, the Claimants' decision to invest in Ontario (from 2016, culminating in the investment in the May 2018 joint auction) was premised on the reasonable and legitimate expectations arising from Ontario's express representations, both as set out in the Cap and Trade Act itself, confirming the place market participants would have in the Program, in its public assurances at the Ministerial level that the Program had been hard-wired to last, and by Ontario's public formal commitments to California and to Québec that any withdrawal from the Program would take place in an orderly fashion. The Claimants' continued good faith engagement with Ontario after its abrupt and arbitrary cancellation of the Cap and Trade Program was similarly premised on the repeated, specific representations made by Ontario that notwithstanding the brutal impact of the Premier-elect's statement of 15 June 2018, Ontario would ensure an orderly exit from the Program (which the Claimants naturally understood would include fair compensation). However, far from being a progressive and orderly exit, Ontario made no effort to comply with its commitments. As described in the Claimants' Memorial and further in sub-section IV.B.2(b) (paragraphs 439 to 454) above, the repudiation by Ontario of its earlier representations and commitments, reasonably relied upon by the Claimants as well as other industry participants, directly resulted in significant loss to the Claimants.

5. Conclusion to Article 1105(1) of the NAFTA

511. The Respondent's arguments on the Claimants' claims under Article 1105(1) of the NAFTA have done little to displace the clear evidence that Ontario's measures were manifestly arbitrary, amounted in a discriminatory targeting of KS&T as an investor

[813] Claimants' Memorial, paras. 397-398.

[814] Respondent's Counter-Memorial, para. 211.

[815] Claimants' Memorial, para. 398, citing Witness State of Graeme Martin (4 October 2021), para. 56, **CWS-2**. *See also* Witness Statement of Michael Berends (5 October 2021), para. 79, **CWS-1**.

and, through it, Koch itself, and amounted to a clear denial of justice. Moreover, the Respondent has been unable to demonstrate that the legitimate expectations held by the Claimants should not be "taken into account" in the Tribunal's assessment of Ontario's overall conduct in breach of Article 1105(1). Ontario's breaches give rise to compensation obligations on the part of the Respondent, as discussed in Part V.

C. The Measures Amount to an Expropriation of the Claimants' Investment Contrary to NAFTA Article 1110

512. In the Memorial, the Claimants described how the Respondent also indirectly and, subsequently, directly expropriated the Claimants' investments in violation of Article 1110 of the NAFTA. In particular, the Claimants set out the legal standards applicable to both forms of expropriation, and then demonstrated that: (1) the announcement of the Premier-elect on 15 June 2018, and the subsequent introduction of Regulation 386/18 on 3 July 2018 amounted to indirect expropriations of their investment;[816] and (2) the enactment of the Cancellation Act on 31 October 2018 (following the introduction of Bill 4 on 25 July 2018) amounted to a direct expropriation, through its purported nullification of the rights KS&T held in the emissions allowances held in its Ontario CITSS account at the time of the measures.[817]

513. In its Counter-Memorial, the Respondent rejects these claims, responding through a range of overlapping and erroneous arguments. In seeking to address these arguments in the most efficient way, the Claimants will first respond to the Respondent's overarching assertion that the Claimants held no rights capable of being expropriated (Part IV.C.1). The Claimants will then address the Respondent's arguments that are responsive to the claim of indirect expropriation (Part IV.C.2), before addressing the Respondent's arguments on the Claimants' claim of direct expropriation (Part IV.C.3). Finally, the Claimants will address the Respondent's failure to respond to the Claimants' primary case on the unlawfulness of the expropriations under Article 1110 of the NAFTA (Part IV.C.4).

1. The Claimants Held Investments Capable of Being Expropriated

514. In the Memorial, the Claimants highlighted the express language of Article 1110(1) of the NAFTA, which provides:

> 1. No Party may directly or indirectly nationalize or expropriate <u>an investment</u> of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;

[816] *See* Claimants' Memorial, paras. 401, 407-411.

[817] *See id.*, paras. 401, 420-421.

> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6. (emphasis added).

515. Consequently, in articulating their claims of direct and indirect expropriation, the Claimants described their investments under Article 1139 of the NAFTA,[818] and expressly referred back to those investments in demonstrating the Respondent's violation of Article 1110 of the NAFTA.[819] Specifically, the Claimants argued that:

- the economic impact of the Premier-elect's announcement on 15 June 2018 indirectly expropriated both: (1) the Claimants' ability to "use, enjoy, or dispose of its investment" in carbon allowances;[820] and (2) KS&T's investment in a carbon trading business, which included the emission allowances that KS&T purchased at Ontario auctions through its Ontario CITSS account.[821] These *de facto* takings were subsequently confirmed *de jure* by the introduction of Regulation 386/18 on 3 July 2018.[822]

- the Cancellation Act went on to directly expropriate the Claimants' investment in the emissions allowances held in KS&T's Ontario CITSS account.[823]

516. In its Counter-Memorial, the Respondent asserts that the Claimants have failed to "identify the specific investment alleged to have been expropriated and determine whether there is a valid property right capable of being expropriated."[824] In support of this position, the Respondent makes a series of inaccurate legal arguments, which can be grouped into two broad categories: (1) the Respondent mischaracterizes the standard provided in Article 1110 of the NAFTA, and therefore misstates the order and structure of analysis for determining whether the Claimants hold rights capable of being expropriated; and (2) relying on this misstated standard, the Respondent erroneously concludes that – as a substantive matter – the Claimants did not hold rights capable of being expropriated under Article 1110 of the NAFTA. Neither claim is sustainable, as demonstrated in the following sections.

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[818] Claimants' Memorial, paras. 319-324. In particular, Koch held its investments through its 100 percent shareholding in KS&T, its interests in enterprises entitling it to the income or profits of these enterprises, and real estate or other property that was acquired in the expectation or used for the purpose of economic benefit or other business purposes.

[819] *See*, *e.g.*, Claimants' Memorial, paras. 400-401, 405, 408-409, 420-421.

[820] *Id.*, paras. 323(c), 408; North American Free Trade Agreement (1994), Chapter Eleven, Article 1139, **Exh. CL-2** (definition of "investment", item (g)). *See* sub-section III.B.1 above.

[821] Claimants' Memorial, paras. 323(a) and (b), 409; North American Free Trade Agreement (1994), Chapter Eleven, Article 1139, **Exh. CL-2** (definition of "investment", item (h)). *See* sub-section III.B.2 above.

[822] Claimants' Memorial, paras. 408-409.

[823] *Id.*, para. 420; North American Free Trade Agreement (1994), Chapter Eleven, Article 1139, **Exh. CL-2** (definition of "investment", item (h)).

[824] Respondent's Counter-Memorial, para. 233.

(a) The Respondent Mischaracterizes the Standard Expressly Provided in Articles 1110 and 1139 of the NAFTA

517. In its Counter-Memorial, the Respondent first argues that the Claimants have "ignore[d]" the "critical threshold" of demonstrating that they held an investment *and* a property right capable of being expropriated.[825] According to the Respondent, the Claimants' "failure" to conduct these independent analyses is "fatal" to their expropriation claim.[826] However, the Respondent's position is not supported under the NAFTA, or cases and commentary addressing the scope of Article 1110.

518. First, while not express, the Respondent appears to rely upon the contents of Annex 14-B (Expropriation) of the United States-Canada-Mexico Agreement (**CUSMA**), in formulating this argument.[827] Indeed, the Respondent highlights that Annex 14-B demonstrates that the Parties "'confirm[ed] their shared understanding' that '[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible *property* right or *property* interest in an investment.'"[828] However, the Claimants' claim of expropriation arises under Article 1110 of the NAFTA, which contains no such language. Instead, and as excerpted above, Article 1110 prohibits the expropriation of "an investment", which is broadly defined in Article 1139 (and not limited to *property* rights or interests).

519. Moreover, in the Memorial, the Claimants already addressed the "interpretative annexes" set out in subsequent Canadian and U.S. investment treaties, which are not limited to the CUSMA but also include Canada's 2021 Model FIPA.[829] The Respondent has not addressed these arguments, instead opting to rely on its boilerplate submissions on this issue.[830] However, the Claimants reiterate that the Respondent's later stated approaches should not take precedence over the *actual language* of the treaty in issue in this dispute, as the Respondent seems to claim.[831]

520. Second, the Respondent has been unable to point to any NAFTA case in support of its proposition. Instead, the Respondent relies on three cases to assert that a party

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[825] *Ibid.*

[826] *Ibid.*

[827] *Id.*, paras. 231-232.

[828] *Id.*, para. 232.

[829] Claimants' Memorial, paras. 416-417.

[830] *See*, *e.g.*, *id.*, para. 416 (citing *Windstream Energy, LLC v. Government of Canada*, UNICTRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 475, **CL-87**. *See also* Respondent's Counter-Memorial, n. 424 (citing, *inter alia*, *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Rejoinder Memorial (6 November 2015), para. 9, **CL-62**; *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Non-Disputing Party Submission of the Government of Canada pursuant to NAFTA Article 1128 (2 November 2021), paras. 28, 31 and nn. 39, 45, **RL-71**).

[831] Indeed, the Respondent itself notes this point. *See* Respondent's Counter-Memorial, para. 231 ("They 'do not change the nature of the substantive obligations that existed under […] prior agreements; instead, they merely elucidate, for the benefit of tribunal's charged with interpreting the treaty, the Parties' intent in agreeing to those obligations.'").

"alleging a violation of Article 1110(1) must therefore demonstrate the existence of an 'investment capable of being expropriated', *independently* of whether the claimant's investment is an 'investment' within the meaning of Article 1139".[832] Yet none of these cases – *European Media Ventures v. Czech Republic*; *Emmis v. Hungary*; and *Accession Mezzanine v. Hungary*[833] – support the Respondent's proposition. Notably, none of these cases were brought under the NAFTA, and none of them actually discuss the interaction between Articles 1110(1) and 1139 of the NAFTA. Moreover, in *European Media Ventures*, the sole cited case discussing expropriation on the merits, the tribunal ultimately rejected the argument that the Respondent makes, stating:

> [T]he Tribunal is not persuaded by the Respondent's arguments on this point. Nothing in the text of Article 3(1) suggests, let alone compels, the conclusion that some investments are simply incapable of expropriation or of being subjected to other measures of similar effect. Nor is such a conclusion dictated by considerations of logic. Once it is accepted that rights to performance under a contract between an investor and a private party constitute an investment (as the Tribunal has decided), then if the State intervenes to abrogate those rights, it follows that the State has taken, or at least destroyed the economic value of, that investment.[834]

521. This conclusion can equally apply here – nothing in the NAFTA suggests or compels the conclusion that some investments defined in Article 1139 are simply incapable of expropriation. Indeed, as the Secretary-General of ICSID, Ms. Kinnear, and Professor Bjorklund note:

> Article 1110(1) states that no Party may nationalize or expropriate an investment. As a result, a tribunal must satisfy itself that the interest allegedly expropriated is one which fits within the definition of investment in Chapter 11. This can be a difficult task, as investment is defined broadly but exhaustively in Article 1139. . . .[835]

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[832] Respondent's Counter-Memorial, para. 235, n. 434 (emphasis added).

[833] *Id.*, n. 434, citing *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability, (8 July 2009), para. 63, **RL-82**; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation (13 June 2013), para. 43, **RL-77**; *Accession Mezzanine et al. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation (8 August 2013), para. 39(2)(a), **RL-83**.

[834] *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability, (8 July 2009), para. 64, **RL-82**.

[835] "Article 1110 – Expropriations and Compensation", in Meg Kinnear, Andrea Kay Bjorklund, et al., Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1 (Kluwer Law International 2006) p. 1110-36, **RL-23**.

522. Thus, if an investment by a claimant is held to fall within the definition of Article 1139, it is *prima facie* capable of being expropriated.[836] For example, in *Chemtura v. Canada* – a case relied upon by the Respondent throughout its discussion on expropriation[837] – the tribunal approached its analysis of Article 1110 in the following way:

> The first issue is whether the Claimant had an investment in Canada capable of being expropriated. Despite some initial disagreement as to the identification of the Claimant's investment, the Parties agree that the investment allegedly expropriated is Chemtura Canada (or its predecessors in title) (Reply, para. 537: C.-Mem., para. 504ff). Such investment falls squarely under the definition of "investment" given in Article 1139 of NAFTA, according to which "investment means: (a) an enterprise [...]". The Tribunal also considers, as noted in the foregoing section, that elements such as goodwill, customers or market share, or those covered under the more generic heading of the Claimant's "lindane business" in Canada, are part of the overall investment which Chemtura Canada represented. Therefore, the Tribunal concludes that the first part of the test is satisfied.[838]

523. The Respondent's approach to Article 1110 is therefore unfounded: in the Memorial, the Claimants appropriately put forward its positive case by demonstrating that they held investments under Article 1139,[839] which were the subject of both an indirect and direct expropriation under Article 1110.[840] The Respondent's assertion that the Claimants "did not even attempt" to address the concerns only subsequently raised by the Respondent in its Counter-Memorial is thus specious.[841]

(b) The Respondent's Assertion that the Claimants' Investments Did Not Constitute Rights Capable of Expropriation is Erroneous

524. On the foundation of its flawed approach to Article 1110 of the NAFTA, the Respondent then broadly asserts that the concept of "expropriation" is limited to property under customary international law, and is "not broadened by the definition of the term 'investment' in Article 1139" of the NAFTA.[842] The Respondent then argues that the Tribunal must undertake a *renvoi* to domestic law to determine the

[836] *See*, *e.g.*, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 258, **CL-67**.

[837] *See*, *e.g.*, Respondent's Counter-Memorial, para. 233, n. 431.

[838] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 258, **CL-67**.

[839] Claimants' Memorial, Section III.D.1.

[840] *Id.*, Section IV.C.

[841] Notably, at the time the Claimants submitted their Memorial, the Respondent had not yet raised its objections to jurisdiction on the basis of *ratione materiae*, nor had it submitted its report disputing the nature of the Claimants' investments as a matter of domestic law.

[842] Respondent's Counter-Memorial, para. 235.

property interests in question, and concludes that the Claimants' investments were not property rights and therefore were not capable of being expropriated.[843]

525. However, for the reasons outlined in paragraphs 514 to 523 above, the starting point for the analysis of an expropriation under Article 1110 is the text of the NAFTA itself. While the Claimants do not dispute that Article 1110(1) incorporates customary international law rules on expropriation, it is well-established that principles of customary international law, codified by the ILC Articles, only apply "save to the extent that they are excluded by provisions of the NAFTA as *lex specialis*."[844] As the tribunal in *ADM v. Mexico* explained:

> The Tribunal finds that Section A of Chapter Eleven offers a form of *lex specialis* to supplement the under-developed standards of customary international law relating to the treatment of aliens and property. . . .
>
> Chapter Eleven of the NAFTA constitutes *lex specialis* in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven. In the context of Chapter Eleven, customary international law – as codified in the ILC Articles – therefore operates in a residual way. This is confirmed by Article 1131.1 of the NAFTA, endorsing the Tribunal's mandate to complement the provisions of Chapter Eleven and to *"...decide the issues in dispute in accordance with [the NAFTA] and applicable rules of international law."*[845]

526. Indeed, the Respondent has itself previously argued that propositions of customary international law are displaced by the specific terms of the NAFTA.[846] Thus, while the Claimants do not dispute the Respondent's position that Article 1110 incorporates customary international law rules, this does not mean that customary international overcomes the *lex specialis* of Chapter Eleven and, particularly, the express language of Article 1110 itself.

527. Rather, as an UNCTAD report submitted by the Respondent makes clear, it is widely recognized that "[t]he scope of assets whose expropriation can be challenged under an investment treaty depends on how broad or narrow the definition of an investment is

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[843] *Id.*, para. 238.

[844] ILC Articles, Article 55, **CL-194** *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), para. 76, **RL-58**.

[845] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007), paras. 117, 119, **CL-79** (emphasis added). *See also*, *e.g.*, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007), paras. 62-63, **CL-195** (finding that the customary international law rules of attribution have been modified by the NAFTA).

[846] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits (24 May 2007), para. 54, **CL-195**; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Government of Canada, Counter-Memorial (Merits Phase) (22 June 2005), paras. 804-806, **CL-196**.

in that treaty."[847] As outlined in detail in the Claimants' Memorial and above in Section III.B, Article 1139 of the NAFTA is broad and encompasses the Claimants' investments.[848]

528. Specifically, the Claimants in the Memorial asserted that the Respondent expropriated: property in the form of emissions allowances purchased in May 2018, and as an investment acquired in the expectation or used for the purpose of economic benefit or other business purposes (Article 1139(g) of the NAFTA); and interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory (Article 1139(h) of the NAFTA) through – *inter alia* – the Claimants' broader carbon trading business.[849] In its Counter-Memorial, however, the Respondent barely distinguishes between these claims, and advances a series of confused and unsustainable arguments. In the interests of efficiency, the Claimants address the Respondent's assertions under each category of investment as follows.

(1) The Claimants Held Rights Capable of Being Expropriated Under Article 1139(g) of the NAFTA

529. The Claimants demonstrated in the Memorial that their purchase of emissions allowances in May 2018 constituted intangible property rights under Article 1139(g) of the NAFTA, which were expropriated by Ontario.[850] The Respondent asserts in response that: (1) an emission allowance is not a "property right" capable of being expropriated;[851] and (2) Section 70 of the Cap and Trade Act "further confirm[s]" Canada's "understanding of the rights in issue."[852] The Respondent's position is unsustainable as a matter of law.

530. First, the Respondent argues that domestic law applies to determine the existence, nature, and scope of the property interests in question, and asserts that – as a matter of Canadian law – emission allowances are not a "property right".[853] The Claimants agree that the term "property" is not defined under Article 1139(g) of the NAFTA,[854]

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[847] UNCTAD Series on International Investment Agreements II, "Expropriation: A Sequel", (2012), pp. 17-18, **RL-84**.

[848] *See* paras. 243 to 356 *supra*.

[849] For the avoidance of any doubt, the Claimants confirm that should the Tribunal find that the Claimants' annulled allowances do not amount to "property" under Article 1139(g) of NAFTA, they together with the Claimants' broader carbon trading business in any event also constitute "interests arising from the commitment of capital" under 1139(h) and are therefore in any event capable of being expropriated. *See* paras. 308 to 329 *supra*.

[850] Claimants' Memorial, para. 323(c).

[851] Respondent's Counter-Memorial, para. 244.

[852] *Id.*, para. 245.

[853] *Id.*, paras. 238, 244.

[854] *See*, *e.g.*, Monique Sasson, "Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law", 2nd ed. (Kluwer Law International, 2017), p. 147, **RL-87** ("A tribunal must first determine whether the relevant treaty defines property right or provides for a renvoi to municipal law for the substantive regime of property

(continued)

and that – because international law does not create property rights[855] – recourse to domestic law is appropriate.[856]

531. However, and as outlined in detail in paragraphs 248 to 296 above, emission allowances *are* property rights in Ontario. To recall, Professor de Beer applies the analytical approach that would be applied by an Ontario court in determining whether emission allowances are property under Ontario law and concludes that they are indeed property.[857] Drawing on insights from the legal treatment of allowances in emissions trading systems globally, Professor Mehling similarly concludes that the lack of express disclaimer of property rights in Ontario's cap and trade legislation may be interpreted as a conscious decision by Ontario to acknowledge the property rights of allowance holders.[858] Thus, for the purposes of Article 1139(g) and the Claimants' claim under Article 1110, these rights are capable of being expropriated.

532. Second, the Respondent asserts that the Claimants "ignore" Section 70 of the Cap and Trade Act, which it asserts "further confirm[s]" the position that emissions allowances are not property rights.[859] However, the alleged "confirmation" is entirely untethered from the content of Section 70, which provided that nothing done under the Cap and Trade Act could give rise to compensation or constitute an expropriation under domestic law.[860] Notably, Section 70 did not address whether emissions allowances constitute property rights, nor does an exclusion of domestic expropriation law have any bearing on a State's responsibility under international law. As

rights. The treaty's wording is fundamental; although customary international law lacks a general definition of property, States are free to define the content of property rights for the purpose of a particular treaty.").

[855] *See*, *e.g*., Respondent's Counter-Memorial, para. 238.

[856] *See Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction (30 July 2018), para. 231, **RL-24** ("NAFTA does not offer a definition of the term 'intangible real estate' used in its Art. 1139(g). Absent such definition, to determine whether an investor holds 'intangible real estate', it is necessary to refer to the law of the host state."). However, and as Canada's legal authority further clarifies: "municipal law should not be interpreted in a formalistic way, and the host State cannot rely on its own law to prevent an investor from benefiting from the bilateral protection… Municipal law cannot subordinate the concept of investment to the sovereign's will." Monique Sasson, "Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law", 2nd ed. (Kluwer Law International, 2017), p. 148, **RL-87**.

[857] *See* paras. 252 to 272 *supra*. For a specific reference to Professor de Beer's conclusion, *see* paras. 271-272 and nn. 382, 385, 387.

[858] *See* para. 281 *supra*.

[859] Respondent's Counter-Memorial, para. 245.

[860] Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 70, **CL-5** ("(1) Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss of revenues, loss of profit or loss of expected earnings that would otherwise have been payable to any person in respect of any action taken by the Minister or the Director under this Act, or by any person acting on their behalf, including any action relating to the removal of emission allowances and credits from a participant's cap and trade accounts. (2) Nothing done or not done in accordance with this Act or the regulations constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.").

explained by Professor De Beer, the *Expropriation Act* refers to the taking of "land" specifically, and Section 70(2)'s primary purpose was thus to address government actions regarding a land-based facility that might have been injuriously affected by, for instance, greenhouse gas attributions and emissions caps.[861] In regard to the phrase "otherwise at law", Professor de Beer further observes that "this phrase could not have been intended to preclude recourse to international trade law, including *NAFTA*, which Ontario legislators do not have the jurisdiction to limit."[862]

533. It is therefore difficult to see any link between Section 70, and the arguments advanced by the Respondent. Moreover, Ontario could have included a provision in the Cap and Trade Act to address whether or not emissions allowances amount to property (as other WCI jurisdictions have done), but expressly chose not to. The Respondent's *post hoc* proclamation that any provision in the Cap and Trade Act can somehow "confirm" its dubious legal position on property rights should therefore be rejected.

(2) The Claimants Held Rights Capable of Being Expropriated Under Article 1139(h) of the NAFTA

534. The Claimants demonstrated in the Memorial that they also held rights in a broader carbon trading business in Ontario under Article 1139(h) of the NAFTA, investments which were expropriated by Ontario.[863] The Respondent rejects this position on two primary grounds, arguing that these rights: (1) do not amount to property rights, and therefore were not capable of being expropriated; and (2) are otherwise not "vested rights" and therefore were likewise not capable of being expropriated. These arguments are unfounded, for the following reasons.

535. First, and as discussed above, a finding by the Tribunal that the Claimants' interests qualify as investments under Article 1139(h) of the NAFTA is sufficient to bring them within the scope of Article 1110.[864] The question of whether a claimant has *investments* capable of being expropriated does not always require an analysis of whether those investments are *property* rights under domestic law, contrary to the Respondent's current position. Indeed, in *Merrill & Ring* (a case cited by the Respondent), the tribunal stated:

> The first question the Tribunal must decide is whether the Investor's claim concerning expropriation relates to an investment as defined under the NAFTA treaty. NAFTA Chapter Eleven contains a broad definition of "investment" as Article 1139 makes quite evident. As provided by Article 1139(h), this includes contractual interests and contractual rights, which accords with a well-established view of

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[861] Expert Report of Professor Jeremy de Beer (15 July 2022), paras. 195-196, **CER-3**.

[862] *Id.*, para. 196.

[863] *See*, *e.g.*, Claimants' Memorial, paras. 322-323, 409.

[864] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 258, **CL-67**.

international law about rights that are capable of being expropriated.[865]

536. In many other (non-NAFTA) cases cited by the Respondent, tribunals have been clear that a range of rights may be capable of expropriation. For example, the tribunal in *Bayindir v. Pakistan* referred to "assets", including contractual rights as well plant and equipment;[866] in *Crystallex v. Venezuela*, the tribunal referred to "rights capable of being expropriated", noting that the definition of investment is "broad" and includes "rights conferred by law or under contract to undertake economic or commercial activity";[867] and in *Emmis v. Hungary*, the tribunal recognised that "tribunals have held that the rights protected from expropriation [are] not limited to rights *in rem*" and that the test is "substantive, not technical".[868]

537. The Respondent's position that investments under Article 1139(h) (or indeed, many of the sub provisions of Article 1139, such as an enterprise, an equity security of an enterprise, an interest in an enterprise that entitles the owner to share in income, profits, or assets *etc*.) separately and independently requires an analysis as to whether that asset amounts to property rights under domestic law is therefore incorrect.[869] Thus, if the Tribunal finds that the Claimants hold investments under Article 1139(h) of the NAFTA (which they do), then these rights are *prima facie* capable of being expropriated under Article 1110.

538. Second, the Respondent's assertion that the Claimants' investments under Article 1139(h) were not "vested property rights" and therefore not capable of being expropriated is unsupported.[870] NAFTA tribunals have clearly recognized that an investment including market share, customers, and goodwill can be recognized as part of the overall investment in question. For example:

- In *Pope & Talbot v. Canada*, the tribunal considered that the "[i]nvestment's access to the U.S. market is a property interest subject to protection under

[865] *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award (31 March 2010), para. 139, **CL-19**.

[866] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009), para. 442, **RL-76**.

[867] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award (4 April 2016), paras. paras. 662-663, **CL-115**.

[868] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), para. 163, **CL-10**.

[869] Indeed, as the tribunal in *European Media Ventures* so eloquently stated in rejecting the same arguments as submitted by the Respondent here, "the Respondent's attempts to force the actual decisions into the framework of its own legal analysis begins to resemble the attempts to force an ungainly foot into Cinderella's glass slipper and is no more successful." *See Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability (8 July 2009), para. 64, **RL-82**.

[870] Respondent's Counter-Memorial, para. 242.

Article 1110",[871] given that the ability to sell softwood lumber from British Columbia to the United States was an important element of the business.[872] The tribunal therefore assessed the impact of the loss of the export business on the investor's enterprise as a whole.

- In *Methanex v. United States*, the tribunal recognized that "items such as goodwill and market share may … 'constitute [] an element of the value of an enterprise and as such may have been covered by some of the compensation payments.' Hence in a comprehensive taking, these items may figure in valuation."[873] While the tribunal considered it "difficult" to see how such investments might stand alone,[874] it nonetheless acknowledged that these investments formed part of the value of the enterprise.

- In *Chemtura v. Canada*, the tribunal also considered that goodwill, customers and market share should be seen as part of the "overall investment" (in this case, the investor's enterprise).[875]

- In *Merrill & Ring v. Canada*, the tribunal stated that it was "in agreement with the view expressed in *Pope & Talbot* to the effect that access to the United States' market was an important aspect of the business concerned in that case. So too, the Tribunal has no doubt that in this case, the right to access the international market is a fundamental aspect of the log export business of the Investor. Were this right impeded or prohibited it would certainly qualify for protection under NAFTA because it is the very objective of the investment made."[876] The tribunal noted that while such a business might be subject to appropriate regulation, "the business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect".[877]

539. In the same way, the Claimants' business development, marketing and trading activities (including KS&T's broader carbon trading business, and the efforts on the part of KS&T to build an enterprise of trading in Ontario emission allowances over the course of several years as part of a sustained, long-term business plan), and *a fortiori* the emissions allowances held in the Claimants' CITSS account, form part of the value of its investment which was expropriated by Ontario.

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[871] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para. 96, **CL-86**.

[872] *Id.,* para. 98.

[873] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part IV, Chapter D, para. 17, **CL-89**.

[874] *Ibid.*

[875] *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 243, **CL-67**.

[876] *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, ICSID Administrated, Award (31 March 2010), para. 143, **CL-19**.

[877] *Id.*, para. 144.

540. Ignoring these authorities, the Respondent relies on the NAFTA tribunals' findings in *Feldman v. Mexico* and *Thunderbird v. Mexico*.[878] However, both of these cases are inapposite to the facts in this dispute, and can be dispensed with quickly. In *Feldman*, the tribunal found that the denial of tax rebates did not amount to an unlawful expropriation, because the claimant was never entitled to the rebates under Mexican law.[879] In *Thunderbird*, the tribunal's analysis revolved around whether the claimant had a legitimate expectation that its business would be considered legal by the Mexican authorities.[880] These situations can be clearly contrasted with the express legal framework provided by the Ontario Cap and Trade Program, in which the Claimants invested significant capital and resources. There is no question of the legality of the Claimants' investments or the structure of the Cap and Trade Act, nor any ambiguity that the Claimants' investments in its cap and trade business formed an essential part of its overall enterprise. In such circumstances, the Respondent's cursory treatment of the Claimants' investments under Article 1139(h) must be dismissed.

2. The Respondent Indirectly Expropriated the Claimants' Investment

541. In the Memorial, the Claimants outlined the recent approaches of NAFTA tribunals in determining claims of indirect expropriation, which turns on whether the governmental measures have deprived the owner of substantially all the benefits of its investment.[881] The Claimants then demonstrated that Ontario's actions amounted to an indirect expropriation because of the objective impact of the measure on the economic benefit of the Claimants' investment, as well as the relative impact of the measure on the Claimants' reasonably held expectations.[882] Moreover, the Claimants demonstrated that there was no legitimate justification for Ontario's actions under any theory of police powers under international law.[883]

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[878] Canada also cites to *Generation Ukraine v. Ukraine* and *Emmis v. Hungary* in support of its proposition. *See* Respondent's Counter-Memorial, para. 241, nn. 445-446 (*Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003, para. 22.1, **RL-75**; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (16 April 2014), para. 168, **CL-10**). These cases are likewise inapposite to the circumstances of this dispute. In *Generation Ukraine*, the reference in question was discussing the claimant's right to use an adjoining property as a construction staging area, however there was no proof that the lessee of that property had even consented to the claimant's use of the land. In *Emmis*, the tribunal was recounting the findings of other tribunals to conclude that a "claimant must own the asset at the date of the alleged breach [because] [i]t is the asset itself – the property action or chose in action … that is the subject of the expropriation claim." *See id.*, para. 169. There is no question in this dispute that the Claimants were the lawful owners of their investments, including at the time of breach.

[879] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No ARB(AF)/99/1) Award (16 December 2002), paras. 118-119, **RL-90**.

[880] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award (26 January 2006), paras. 145-166, 208, **CL-17**.

[881] Claimants' Memorial, paras. 403-406.

[882] *Id.*, paras. 407-411.

[883] *Id.*, paras. 412-418.

542. In its Counter-Memorial, the Respondent rejects the Claimants' claim, arguing that: (1) nothing Ontario did on 15 June 2018 substantially deprived KS&T of the economic value of its property rights;[884] (2) Ontario's measures did not interfere with the Claimants' distinct, reasonable investment-backed expectations;[885] and (3) in any event, Ontario's measures constitute a valid exercise of police powers under international law.[886] The Claimants address each of these arguments in the following sections.

(a) The Respondent Substantially Deprived the Claimants' the Benefits of Its Investments

543. In the Memorial, the Claimants explained how the announcement of the Premier-elect on 15 June 2018 amounted to a *de facto* taking of the Claimants' investment, and amounted to a substantial deprivation of the economic value of the Claimants' investment in Canada.[887] In particular, the Claimants described that the manner in which Ontario abruptly withdrew from the Cap and Trade Program *de facto* stranded all of the Claimants' Ontario-held emissions allowances immediately, such that KS&T was not able to use, enjoy or dispose of its investment. This *de facto* taking was confirmed by the introduction of Regulation 386/18 on 3 July 2018, which officially froze all Ontario CITSS accounts, and prohibited KS&T from undertaking any purchase, sale, trade or transfer of emissions allowances. As a result of both these *de facto* and *de jure* actions, KS&T was substantially deprived of the ownership rights held in its investments, on a permanent basis.[888] In addition, Ontario's measures effectively and permanently devastated KS&T's business model, by barring any Ontario Cap and Trade registrants from participating in any future WCI auctions.[889]

544. In its Counter-Memorial, the Respondent does not dispute the legal standards articulated by the Claimants, and agrees that "substantial deprivation" is the requisite threshold for a finding of an indirect expropriation.[890] However, the Respondent argues that "nothing Ontario did on June 15, 2018 substantially deprived the Claimants of the economic value of the emission allowances."[891] The Respondent bases this position on three primary arguments: (1) that the action of the Premier-elect on 15 June 2015 was not a "measure"; (2) that neither the emission allowances held in KS&T's CITSS account, nor the business of KS&T in Ontario constitute property rights; and (3) that even if these investments did constitute property rights, Ontario

[884] Respondent's Counter-Memorial, paras. 259-264.

[885] *Id.*, paras. 248-258.

[886] *Id.*, paras. 265-278.

[887] Claimants' Memorial, para. 408.

[888] *Id.*, para. 408.

[889] *Id.*, para. 409.

[890] Respondent's Counter-Memorial, para. 259.

[891] *Id.*, para. 264.

did not "substantially deprive" KS&T of the value of these rights. These arguments, spanning only three paragraphs, with little evidentiary support, are not sustainable.

545. First, and as explained in paragraphs 403 to 410 above, the actions of Ontario on 15 June 2018 clearly constitute a "measure", falling within the broad scope of application of Articles 201 and 1101 of the NAFTA.

546. Second, and as explained in paragraphs 524 to 540 above, Canada's assertions that the Claimants' investments did not constitute "property rights" capable of being expropriated are manifestly incorrect. Article 1110 protects "investments", and the Claimants have demonstrated that they held investments under Articles 1139(g) (intangible property rights, as confirmed by domestic law) and 1139(h) of the NAFTA.

547. Third, the Respondent's argument that the actions of Premier-elect Ford on 15 June 2018 did not substantially deprive KS&T of the economic value of its investment is belied by the clear evidence on the record of these proceedings.

548. As an initial point, the Respondent's assertion that the actions taken by Premier-elect Ford could not have permanently "taken" KS&T's investments because his actions "did not, and could not, change the law of Ontario, cancel compliance obligations of capped participants, or prohibit participants from transferring emission allowances"[892] is wilfully simplistic and misleading and smacks of bad faith, from a factual perspective, in that it obviously sidesteps the actual import of the measures adopted on 15 June 2018. In any event, in advancing this argument, the Respondent ignores the applicable legal standards to determine whether there has been a substantial deprivation of a claimant's investment for the purposes of establishing an indirect expropriation under Article 1110 of the NAFTA. In particular, and as recognized by a number of NAFTA tribunals, there does not need to be a formal transfer of title in order for a substantial deprivation of the economic use and enjoyment of the rights of the investment to exist.[893] Determining whether there has been a "substantial deprivation" is a "fact-sensitive exercise" to be conducted in light of the circumstances of each case.[894]

[892] *Id.*, para. 114.

[893] *See*, *e.g.*, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 143, **CL-12**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007), para. 244, **CL-79**; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (27 September 2016), para. 284, **CL-63**.

[894] *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award (2 August 2010), para. 249, **CL-67**.

549. Under the legal standards at issue, Ontario's reckless and deliberate measure deprived the Claimants "of all or most of the benefits of the investment",[895] as demonstrated in the Claimants' Memorial and in Section II.C of this Reply.[896] In particular:

- The actions taken by the Ontario Premier-elect on 15 June 2018 directly led to the "the market for Ontario-held carbon allowances [being] essentially frozen as of 15 June 2018", both externally (vis-à-vis California and Québec) and internally (within Ontario).[897]

- While Canada asserts that it was the actions of California in de-linking that caused the Claimants' loss,[898] these attempts to shirk its international responsibility are unsupported. As outlined in paragraphs 157 to 171 above, and as Ontario's own internal documents make clear, Ontario blindsided California and Québec and wilfully ignored the inevitable and predictable consequence of the Premier-elect's ill-considered and *ultra vires* announcement. The Respondent cannot hide behind blame-shifting, in circumstances in which any informed observer could have predicted the immediate impact of the Premier-elect's announcement on linkage with California and Québec.

- Moreover, and as explained in paragraphs 163 to 166 above, the Ontario Government had positive knowledge on the afternoon of 15 June 2018 of the effect that its announcement would have on the linked market, rendering its protestations all the more hollow. As of 5pm on 15 June 2018 (still three and a half hours before California and Québec issued its Market Notice), the Ontario government: (1) knew that it had blindsided California and Québec with the Premier-elect's announcement; (2) knew that these jurisdictions, and potentially WCI Inc., would be taking action to place a "firewall" in CITSS to prevent Ontario emitters to transfer allowances; and (3) knew that participants in the Ontario Cap and Trade Program would want to make transfers to avoid loss. Yet the Ontario government did nothing, did not try to mitigate the loss participants in the Ontario Cap and Trade Program would face in just a few hours, and made no attempt to deal with the situation thrust upon the Program by the Premier-elect in less damaging ways to its OQC Agreement partners or its stakeholders. To suggest all of this was "California's fault, not Ontario's", is supreme bad faith, and as unbecoming an argument for Canada to make as it is ill-considered and false.

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[895] *See* Respondent's Counter-Memorial, n. 477 (citing *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007), para. 240, **CL-79**).

[896] *See* Claimants' Memorial, paras. 191-206.

[897] *See*, *e.g.*, Witness Statement of Graeme Martin (4 October 2021), paras. 51 and 52, **CWS-2**.

[898] *See*, *e.g.*, Respondent's Counter-Memorial, paras. 288, 297, 301.

- The economic impact of Ontario's actions was effectively rendering the Claimants' investment "useless".[899] In withdrawing from future WCI auctions immediately on 15 June 2018, Ontario effectively, and permanently destroyed KS&T's business model in Ontario, and totally impaired the use, enjoyment and disposal of its investment in emissions allowances in Ontario.[900]

550. The Respondent has been unable to rebut these facts and instead points to the tribunal's decision in *Waste Management v. Mexico* for the proposition that it is "not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking."[901] Yet the application of this threshold only serves to support the Claimants' case: the arbitrary and *ultra vires* intervention of the Premier-elect had the direct economic effect of wiping out the value of the Claimants' investments in Ontario. This was not a circumstance of a "failed business venture"; indeed, far from it, and it is shocking for the Respondent to even suggest as much.[902]

551. Moreover, the Ontario Government's *de facto* freeze of 15 June 2018 on all trades and transfers of emission allowances held in Ontario CITSS accounts became a *de jure* freeze on 3 July 2018, when Regulation 386/18 was formally introduced.[903] On this

[899] *See id.*, n. 478 (citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award (8 June 2009), para. 357, **CL-18**).

[900] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 262, cited by Canada in *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 477, **CL-87**. *See also Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), para. 102, **CL-86** (citing *Harvard Draft Convention on the International Responsibility of States for Injury to Aliens*, Article 10(3) and the American Law Institute, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986), § 712, Comment (e)).

[901] Respondent's Counter-Memorial, n. 479. The Respondent also points to *Fireman's Fund* and *CMS Gas Transmissions*, both of which confirm that the essential question is whether the economic use and enjoyment of the rights to the property have been substantially deprived or effectively neutralized. *See Fireman's Fund Insurance Company v. The United States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006), para. 176(c), **CL-88**; *CMS Gas Transmission Company v. Argentine* Republic, ICSID Case No. ARB/01/8, Award (12 May 2005), para. 262, **RL-97**.

[902] *See, e.g.*, Claimants' Memorial, para. 141. *See also* Witness Statement of Frank King (6 October 2021), para. 20, **CWS-4** ("Overall, KS&T gradually built up its inventory over the course of 2017 through participating in the first four Ontario-sponsored auctions. We traded those allowances in the secondary market over the course of 2017, realizing a profit of [redacted], and generating about [redacted] from our participation in the Ontario auctions in that year.").

[903] To recall, Regulation 386/18 officially froze all Ontario CITSS accounts, legally forbidding participants like KS&T from undertaking any purchase, sale, trade or transfer emissions allowances held in Ontario CITSS accounts, effectively immediately. *See* Office of the Premier, Premier Doug Ford Announces the End of the Cap-and-Trade Carbon Tax Era in Ontario (3 July 2018), **Exh. C-107**. *See also* Ontario Regulation 386/18: Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances and Credits filed 3 July 2018 Under the Climate Change Mitigation and Low-carbon Economy Act, 2016, S.O. 2016, C. 7, **CL-9**; Email from MOECC, Notice: Ontario's Cap and Trade Program (3 July 2018), **Exh. C-108** ("As a result, the status of the general account in the Compliance Instrument Tracking System Service (CITSS) belonging to each

(continued)

date, entities with Ontario CITSS accounts received a notification by email that the status of their CITSS accounts had been changed to restricted, and that they no longer had the ability to transfer or receive emission allowances into or out of this account.[904] As set out in the Claimants' Memorial and in paragraphs 541 and 543 above, this action forms part of the Claimants' claims of indirect expropriation. The measure confirmed legally what was already factually the case – that no trades could take part in allowances held in Ontario, either within or outside of the Province. For a business like that of the Claimants', whose essence was to trade in allowances, the *de jure* measure simply confirmed the devastation of their business.

552. The Respondent has ignored the Claimants' exposition of the *de jure* freeze Ontario imposed on 3 July 2018, and the supporting evidence submitted by the Claimants in the Memorial.[905] In fact, the only reference to the *de jure* actions taken by Ontario in this section of the Respondent's Counter-Memorial is in reference to the actions taken by the Premier-elect on 15 June 2018 that "[u]ntil July 3, 2018, emission allowances retained their essential characteristics of a limited authorization to emit GHG coupled with immunity from penalty."[906] The Respondent's dry statement serves little purpose: it does not address Ontario's indirect *de facto* taking of the Claimants' investment on 15 June 2018, nor does it address Ontario's indirect *de jure* taking of the Claimants' investment on 3 July 2018.

553. Consequently, the Respondent has failed to rebut the Claimants' claims that Ontario's actions substantially deprived the Claimants of the economic use and enjoyment of its investments, leading to an indirect expropriation.

(b) In So Doing, Ontario's Measures Interfered with the Claimants' Distinct, Reasonable Investment-Backed Expectations

554. In the Memorial, the Claimants described how the actions taken by Ontario not only amounted to a permanent substantial deprivation of the Claimants' investment, but that these actions also interfered with the Claimants' distinct, reasonable, investment-backed expectations. In particular, the Claimants argued that these expectations included: (1) Ontario's long-held acknowledgement and promotion of the role and importance of market participants in the Cap and Trade Program; (2) Ontario's express written commitments in the OQC Agreement; and (3) Ontario's obligation to act in a legal manner even as a matter of domestic law, including with respect to the agreed upon process for the transition of power between two parties of the

participant registered in Ontario's cap and trade program will be changed to 'Restricted: Cannot Transfer or Receive'. This means that all Ontario participants will be prevented from both transferring and receiving instruments (including emissions allowances and credits) in their general account in CITSS.").

[904] Claimants' Memorial, para. 213.

[905] For example, Mr. Graeme Martin notes in his witness statement that "the introduction of Regulation 386/18 had little practical effect, since any transfers or trades in Ontario allowances had been effectively frozen since 15 June 2018." *See* Claimants' Memorial, para. 214, citing Witness Statement of Graeme Martin (4 October 2021), para. 56, **CWS-2**.

[906] Respondent's Counter-Memorial, para. 263.

government, and the obligation of an incoming Premier-elect not to act *ultra vires* before he was officially sworn in.[907]

555. In its Counter-Memorial, the Respondent rejects these arguments as a factual matter, and asserts that NAFTA Chapter Eleven "does not guarantee that the regulatory regime governing an investment will not change"[908] and that Article 1110 "does not eliminate the normal commercial risks of a foreign investor".[909] The Respondent's arguments in this respect are inapposite to the circumstances in this dispute (Part IV.C.2(b)(1)), and it has failed to adequately address Ontario's interference with the Claimants' reasonable investment-backed expectations, which further demonstrate the existence of an indirect expropriation (Part IV.C.2(b)(2)).

(1) The Respondent's Arguments on the Applicable Legal Standards are Inapposite

556. The Respondent agrees with the Claimants that "NAFTA tribunals have considered claimants' distinct investment-backed expectations as a relevant factor in determining whether there has been an indirect expropriation",[910] but asserts two (irrelevant) caveats.[911]

557. First, the Respondent asserts that a NAFTA Party does not bear "the burden of compensating for the failure of a business plan that was not prudent", and that it is "not reasonable" for a claimant to seek compensation for a "speculative investment".[912] The Respondent's argument amounts to a startling admission that it is "not prudent" to engage in enterprise activity, because such activity is at risk of the arbitrary and illegal intervention of Canadian Federal or Provincial Governments, which Canadian governments will apparently justify on the basis that businesses run for profit (such as KS&T's) are "deserving of" and "at risk" of being summarily destroyed without compensation, on the basis that they are "mere speculators". This is unworthy of any comment. As the Claimants have emphasized, they reasonably expected to be treated in a lawful manner by Ontario in connection with their investment; their reasonable expectations manifestly could not have included the entirely lawless behaviour they in fact experienced at the hands of the Ontario Progressive Conservative Government. Beyond these obvious factual points, the cases relied upon by the Respondent in asserting this position are clearly distinguishable from the issues arising in this case, as follows:

- In *Waste Management v. Mexico*,[913] the tribunal considered that the claimant's business plan was "founded on too narrow a client base and dependent for its

[907] Claimants' Memorial, para. 410.

[908] Respondent's Counter-Memorial, para. 251.

[909] *Id.*, para. 249.

[910] *Id.*, para. 248.

[911] *Id.*, paras. 249-251.

[912] *Id.*, paras. 249-250.

[913] *See id.*, n. 454.

success on unsustainable assumptions about customer uptake and contractual performance."[914] Indeed, the *Waste Management* tribunal held that the enterprise had not been seized nor had its activity as a whole been blocked, but that the operation was "persistently uneconomic."[915] This is clearly not the case with respect to the Claimants' enterprise, which – as outlined in the Claimants' Memorial and the first witness statement of Frank King – was profitable and would have carried on doing business for the full anticipated length of the Cap and Trade Program (*i.e.* at least a decade longer until 2030[916] and possibly even further to 2050[917]), but for Ontario's measures in violation of Chapter Eleven.[918]

- In *Fireman's Fund v. Mexico*,[919] the tribunal noted that the claimant's investment was "essentially worthless" at the time of the alleged expropriation, and that in fact the government intervention was aimed at *rescuing* the claimant's investment rather than taking it away.[920] Moreover, at the time the claimant invested in Mexico, the country "was in the process of recovering from a major financial crisis",[921] such that there was a clear *commercial* (rather than sovereign) risk that the claimant's investment in financial services would be affected. Finally, the tribunal considered that the claimant was not forced to use its investment to further the government's recapitalization plan since it still could have sold its debentures at that time.[922] None of these propositions are true for the Claimants in this case: the Claimants' investment was far from "worthless", and it had no reasonable opportunity to sell or transfer the emissions allowances before the Ontario government abruptly and arbitrarily took measures which effectively froze the Claimants' CITSS account. The Claimants likewise expected that the Respondent as a G7 economy, certainly not in the throes of a financial crisis, would abide by the rule of law, and its commitments.

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[914] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), para. 177, **CL-12**.

[915] *Id.*, para. 157.

[916] Claimants' Memorial, para. 126, citing Witness Statement of Michael Berends (5 November 2021), paras. 47, 49, **CWS-1**.

[917] *See* paras. 59, 64, *supra*.

[918] *See*, *e.g.*, Claimants' Memorial, para. 141. *See also* Witness Statement of Frank King (6 October 2021), para. 20, **CWS-4** ("Overall, KS&T gradually built up its inventory over the course of 2017 through participating in the first four Ontario-sponsored auctions.

[919] *See* Respondent's Counter-Memorial, n. 454.

[920] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006), paras. 188-189, 207, **CL-88**.

[921] *Id.*, para. 179.

[922] *Id.*, para. 191.

- In *Nelson v. Mexico*,[923] the key issue in contention was whether the claimant had a right capable of being expropriated, which the claimant asserted arose out of an ambiguously-worded resolution issued by a state entity with limited statutory authority.[924] In finding that the resolution in question did not give rise to any alleged rights, the tribunal considered that the claimant's claims were not substantiated by any of its business records, and its actions in relying on the resolution and unexecuted draft agreements amounted simply to a "bet based on its own interpretations and speculations".[925] This finding was supported by the fact that the claimant's interpretation would have resulted in the state entity acting *ultra vires* of its statutory powers under Mexican law.[926] Once again, this factual situation is entirely distinct from these proceedings. The Claimants did not make a "bet" based on nothing but speculation and draft documents. Rather, the Claimants systematically invested a cumulative total of through the purchase of Ontario allowances,[927] based on the rules and regulations Ontario had itself put in place. Ironically (and in stark contrast to the factual circumstance in *Nelson v. Mexico*), the Claimants are seeking to hold the Respondent to account because of the *ultra vires* actions of Ontario in abruptly and arbitrarily cancelling the Cap and Trade Program. In other words, while in *Nelson* the claimant sought to subvert domestic law, here the Claimants seek to uphold it.

- In *Olguin v. Paraguay*,[928] the claimant had transferred capital to a Paraguayan financial institution, which ultimately went bankrupt during Paraguay's financial crisis. The claimant subsequently argued to the tribunal that Paraguay was liable for failing to *supervise* the activities of the financial institution, which led to its bankruptcy. However, the tribunal considered that the claimant, an accomplished businessman, should have been aware of the shortcomings of the Paraguayan legal system and the functioning of various State agencies before making a "not very prudent" investment.[929] If the Respondent's reliance on the tribunal's finding in *Olguin v. Paraguay* is an admission that its legal system and functioning of various State agencies was subject to severe shortcomings, then the Claimants can only agree, although the Claimants disagree that Ontario's wilful disregard for the rule of law was predictable. In any event, this is where the similarities between this dispute and that in *Olguin* end: the present case is not one of a claimant losing money because a private financial service went bankrupt during a financial crisis,

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[923] *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award (5 June 2020), **CL-69**.

[924] *See*, *e.g.*, *id.*, paras. 264-281.

[925] *Id.*, para. 281.

[926] *Ibid.*

[927] *See* Claimants' Memorial, para. 183. This calculation is based on CAD converted to USD using the exchange rate on the final date of transfer from KS&T, on 25 May 2018. This figure encompasses for 2018. The exchange rate used has been taken from <https://www1.oanda.com/currency/converter/>: *see* **Exh. C-100**.

[928] *Eudoro Armando Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5) Award (6 July 2001), **RL-94**.

[929] *Id.*, para. 64(b).

but of the Claimants investing in a State-run Cap and Trade Program in a reasonable, long-term and prudent way. The Claimants considered the business risks associated with investing in Canada, and reasonably expected – based on the express representations of Ontario – that Ontario would uphold the rule of law if it sought to withdraw from the Cap and Trade Program in the longer-term. This is in sharp contrast to the factual circumstances in *Olguin*.

558. Thus, the loss incurred by the Claimants in this case was not a result of a "persistently uneconomic" business model, questionable investments during financial crises or an attempt to take advantage of an ambiguous decision with no underlying rationale. In fact, and as clearly evidenced in the Claimants' Memorial, the Claimants' business was profitable, and thriving.[930] Unlike the cases cited above, it was Ontario's own arbitrary, abrupt and discriminatory actions that interfered with the Claimants' reasonable investment-backed expectations, as described in the following section.

559. Second, the Respondent asserts that the NAFTA "does not guarantee that the regulatory regime governing an investment will not change."[931] However, and as explained in paragraphs 430 to 438 above with respect to the Claimants' claim under Article 1105(1), this is not the Claimants' argument. What is in dispute is not whether States have the right to impose regulatory change, but whether the particular actions taken by the State in imposing such change interfered with an investor's reasonable investment-backed expectations. Consequently, the Respondent's reliance on the tribunals' findings in *Feldman v. Mexico* and *Methanex v. United States* to assert that KS&T could not have had any "expectation of regulatory stability" is misplaced and of no import.[932]

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[930] *See* Claimants' Memorial, para. 141; Witness Statement of Graeme Martin (4 October 2021), paras. 33-34, **CWS-2**; Witness Statement of Frank King (6 October 2021), para. 20, **CWS-4**.

[931] Respondent's Counter-Memorial, para. 251.

[932] *Id.*, paras. 251-252. Nonetheless, and for the avoidance of doubt, the Claimants consider that the circumstances in *Feldman* and *Methanex* are not analogous to the issues in dispute before this Tribunal. In *Feldman*, the tribunal considered that a denial of tax rebates did not amount to an unlawful expropriation where the claimant was never entitled to the rebates under Mexican law, and noted that the claimant remained in control of its investment which continued to export a range of other items. Thus, for the tribunal, the fact that regulatory changes make "certain activities less profitable or even uneconomic" was insufficient to reach the threshold of a "substantial deprivation" for the purposes of Article 1110. *See Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No ARB(AF)/99/1, Award (16 December 2002), paras. 111-112, **RL-90**. In *Methanex*, there had been nearly ten years of "legislation, scientific study, public hearing, executive order and initiatives" on the effects of a gasoline additive as opposed to ethanol in California, the uncertainty of which was well-known to the claimant in that case. Moreover, the legislative change in question occurred only after a comprehensive study by the University of California (which the tribunal considered "objective and scientific"), and a lead in time of over a year between when the study was finalized and the state regulations first entered into force for the provision of warning labels, and four years between when the study was finalized and the ban came into place. *See Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part II, Chapter D, paras. 13-18, Part III, Chapter A, para. 101, Part IV, Chapter D, para. 14, **CL-89**. Neither of these circumstances apply in this case: the Claimants' activity is not simply "less

(continued)

(2) The Respondent Has Failed to Adequately Address the Evidence Supporting the Claimants' Reasonable, Investment-Backed Expectations

560. In its Counter-Memorial, the Respondent makes a series of unsustainable arguments to assert that Ontario did not interfere with the Claimants' reasonable, investment-backed expectations with respect to assessing their claim of indirect expropriation under Article 1110 of the NAFTA. These arguments largely repeat the same arguments the Respondent made under Article 1105(1), and – in the interests of efficiency – the Claimants incorporate their response to those arguments here by reference.[933]

561. In brief, the Respondent's argument that the reasonableness of the Claimants' expectations must be assessed at the time the Claimants invested in Canada ultimately only serves to support the existence of the Claimants' reasonable, investment-backed expectations. As outlined at length in the Claimants' Memorial and in paragraphs 493 to 510 above:

- Ontario had been gradually and consistently working toward the introduction of a cap and trade program since it assisted to draft the WCI Design programme in 2008.[934]

- Ontario made a series of express representations that the Cap and Trade Program was designed to form part of a "long-term" climate change strategy, including through its own legislation, and through the OQC Agreement.

- Ontario expressly incorporated the role of market participants in its Cap and Trade Program, and benefitted from the important role that market participants play in the "trade" element of the Cap and Trade Program.

- Therefore, the Claimants had legitimate expectations that their position within the structure of the Cap and Trade Program would be respected, even in the case of a withdrawal, and that they would not be the subject of unfair targeting (as in fact occurred), because Ontario had for years acknowledged and promoted the role of market participants in Cap and Trade.

562. The announcement of the Premier-elect on 15 June 2018, and the subsequent introduction of Regulation 386/18 on 3 July 2018 directly interfered with the Claimants' reasonable, investment-backed expectations, further demonstrating the existence of an indirect expropriation under Article 1110 of the NAFTA.

profitable", but was entirely taken by Ontario. Moreover, the legislative changes in question were abrupt, arbitrary and not backed by any scientific study or careful consideration.

[933] *See* paras. 486 to 510 *supra*.

[934] *See* para. 495 *supra*.

(c) Ontario's Measures Do Not Constitute a Valid Exercise of Police Powers Under International Law

563. In the Memorial, the Claimants demonstrated that Ontario's taking was not justified under the police powers doctrine at international law, which is subject to certain limitations. In particular, the Claimants argued that the measures taken by Ontario were not designed to protect legitimate public welfare objectives such as health, safety and the environment, and did not amount to reasonable government regulation for the public interest.[935] Moreover, the Claimants argued that even if the measures were introduced for a public purpose (*quod non*), the actions in dispute were not a valid exercise of the Respondent's police powers.[936]

564. In its Counter-Memorial, the Respondent asserts that police powers are recognized by customary international law as reflected in Article 1110 of the NAFTA,[937] and that Ontario's measures were a valid exercise of these powers.[938] While the first part of the Respondent's argument largely amounts to a restatement of the Claimants' Memorial,[939] Canada fails to address the additional legal standards identified by the Claimants as to the standards a tribunal should use to make an assessment of the measure in question (Part IV.C.2(c)(1)). Moreover, the second limb of the Respondent's argument is not sustainable in light of these standards, and the facts in issue in this dispute (Part IV.C.2(c)(2)).

(1) The Respondent's Articulation of the Legal Standards is Incomplete

565. In the Memorial, the Claimants demonstrated that the police powers doctrine applies to measures adopted by States to protect "public order, health or morality" but that its application is subject to certain limitations.[940]

566. In its Counter-Memorial, the Respondent largely ignores these arguments, except to state that "NAFTA Chapter Eleven does not limit the State's police powers."[941] In support of this argument, the Respondent relies on commentary by Ms. Kinnear and Professor Bjorklund, which simply states that:

> NAFTA does not expressly address the distinction between regulation and expropriation. As a result, the issue is governed by customary international law, which recognizes that certain measures exist which interfere, perhaps significantly, with property or investment rights and yet cannot be considered expropriation, and

[935] Claimants' Memorial, paras. 412-414.

[936] *Id.*, para. 415.

[937] Respondent's Counter-Memorial, paras. 267-270.

[938] *Id.*, paras. 271-278.

[939] *See*, *e.g.*, Claimants' Memorial, paras. 412-413.

[940] *Id.*, paras. 412-413.

[941] Respondent's Counter-Memorial, para. 268.

> hence there is no obligation to compensate for loss attributable to such measures.[942]

567. However, in the very next sentence of that paragraph, which the Respondent omits from its quotation, the authors explain that "[t]he hard question is how to determine which measures will fall within this group and thus do not constitute expropriation and do not trigger a requirement to compensation."[943]

568. This "hard question" is one that has not been adequately addressed by the Respondent, which instead simply asserts that "NAFTA tribunals have recognized that the police powers doctrine applies to Chapter Eleven claims."[944] That statement is not disputed between the Parties, rendering the Respondent's lengthy citations on cases supporting this point largely moot.

569. Instead, at the very end of its response on police powers, the Respondent concludes:

> The role of the Tribunal is not to second-guess the Ontario government's policy decisions on how best to address the challenges posed by climate change. The Tribunal's role in analysing police powers is limited to distinguishing measures that constitute a valid exercise of police powers from those that are manifestly incoherent or constitute a disguised form of protectionism. Ontario's measures were non-discriminatory, were designed and applied to protect legitimate public welfare objectives, and constituted a legitimate exercise of police powers.[945]

570. Setting aside the factual inaccuracies of this statement, discussed immediately below, the Respondent's self-serving test of "manifestly incoherent" or "a disguised form of protectionism" is unsupported as a matter of law.[946] Moreover, the Respondent's broad position that the Tribunal cannot "second guess" a State's policy decisions fails to account for the relevant factors a tribunal *should* consider in determining whether a

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[942] *Id.*, n. 490 (citing Meg Kinnear, Andrea Kay Bjorklund, et al., "Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1", (Kluwer Law International; Kluwer Law International 2006), p. 1110-50, **RL-23**).

[943] Meg Kinnear, Andrea Kay Bjorklund, et al., "Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1", (Kluwer Law International; Kluwer Law International 2006), p. 1110-50, **RL-23**.

[944] Respondent's Counter-Memorial, para. 268.

[945] *Id.*, para. 278.

[946] *See*, *e.g.*, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013), paras. 492-493, **CL-15** ("[D]eference to the State's regulatory powers cannot amount to condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process. As a consequence, although the role of an international tribunal is not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.").

State has validly exercised its police powers. As the tribunal in *Pope & Talbot v. Canada* found in response to similar arguments:

> Canada appears to claim that, because the measures under consideration are cast in the form of regulations, they constitute an exercise of 'police powers,' which, if non-discriminatory, are supposedly beyond the reach of the NAFTA rules regarding expropriations. While the exercise of police powers must be analysed with special care, the Tribunal believes that Canada's formulation goes too far. Regulations can indeed be exercised in a way that would constitute creeping expropriation [. . . .] Indeed, much creeping expropriation would be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation.[947]

571. In a case cited by the Respondent, *El Paso v. Argentina*, the tribunal referred to this finding and further explained:

> No absolute position can be taken in such delicate matters, where contradictory interests have to be reconciled. In this sense, the Tribunal subscribes to the decisions which have refused to hold that a general regulation issued by a State and interfering with the rights of foreign investors can *never* be considered expropriatory because it should be analysed as an exercise of the State's sovereign power or of its police powers. . . .
>
> [. . . .]
>
> If general regulations are unreasonable, *i.e.* arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor's property rights. The need for reasonableness and proportionality of State measures interfering with private property has been stressed by the tribunal in *LG&E* [another case relied upon by the Respondent in this dispute]:
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>> "With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed."[948]

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[947] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), para. 99, **CL-86**.

[948] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), paras. 234-235, 241, **RL-17** (citing *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), para. 121, **CL-84**; *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), **CL-86**, para. 99; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award (17 March 2006), para. 258, **RL-33**).

572. The idea that reasonableness (including arbitrariness and discrimination) and proportionality form the basis of a tribunal's assessment of the alleged exercise of the police powers doctrine has been reiterated by many other tribunals and commentators.[949] For example, as the tribunal recognized in *Tecmed v. United States*:

> After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality ... There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.[950]

573. Indeed, even the Respondent itself appears to have recognized this proposition, arguing in 2015 that:

> "[A] non-discriminatory measure, designed to protect legitimate public welfare objectives such as health, safety and the environment, is not an indirect expropriation <u>except in the rare circumstance where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith</u>. Such a principle is also reflected in the police powers doctrine which

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[949] *See*, *e.g.*, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I*, PCA Case No. 2012-07, Final Award (23 December 2019), para. 230, **CL-197** ("With respect to an allegation of expropriation, the police powers defence is not a *carte blanche*; a State's actions must be justified, meet the international standards of due process, and *inter alia* be proportional to the threat of public order to which it purports to respond."); *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006), para. 176(j), **CL-88** (where the tribunal considered "the proportionality between the means employed and the aim sought to be realized" is a factor be taken into account when assessing the exercise of police powers); *Olympic Entertainment Group AS v. Republic of Ukraine*, PCA Case No. 2019-18, Award, 15 April 2021, para. 90, **CL-198** ("the Tribunal is of the view that the condition of proportionality must be included in the test for a valid exercise of the police powers doctrine. Proportionality has become an important factor in international investment law and the substantive protections that it provides for investors. It is bound up in the concepts of fairness and equity which are commonly reflected in the substantive standards included in investment treaties."); *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award (9 November 2021), para. 637, **CL-199** ("When scrutinizing the purported regulatory conduct, the Tribunal must focus its analysis on the evidence (or the lack thereof) of the connection between the impugned measures and the investor's unlawful activities. It should also analyze whether the measures were arbitrary, discriminatory, disproportionate and contrary to the requirements of due process.").

[950] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 122, **CL-84**.

> applies to expropriations which are carried out by States to protect public health and the environment."[951]

574. Thus, based solely on the Respondent's own statements and legal authorities, a tribunal should assess the following criteria in determining whether a measure is taken in exercise of the police powers doctrine and therefore is non-compensable:

    a. The measure *must be* designed to protect public welfare objectives such as health, safety and the environment, and non-discriminatory in application.

    b. The measure *must not* result in impacts "so severe" in light of its purpose that it cannot reasonably be viewed as having been adopted and applied in good faith.

575. Ontario's measures failed to fulfil these criteria, as discussed in the following part.

(2) Ontario's Measures Did Not Constitute an Exercise of its Police Powers

576. In the Memorial, the Claimants demonstrated that the measures taken by Ontario were not designed to protect legitimate public welfare objectives such as health, safety, and the environment, and did not amount to reasonable governmental regulation.[952] Moreover, the Claimants demonstrated that even if the measures *were* introduced for a legitimate public purpose (*quod non*), the actions in dispute were not an exercise of the Respondent's police powers.[953]

577. In its Counter-Memorial, the Respondent asserts that the Claimants "fail to put the Ontario measures in their proper context",[954] and that the measures were non-discriminatory, designed and applied to protect legitimate public welfare objectives, and thus constituted a legitimate exercise of police powers.[955] The Respondent's arguments are unconvincing.

578. First, the Respondent has failed to demonstrate that Ontario's measures were taken for a legitimate public purpose. The Respondent argues that the Claimants "concede that the protection of the environment is a legitimate public welfare objective", but then awkwardly attempts to shoehorn the actions of Ontario into this category. To be clear, the Claimants do not dispute that the protection of the environment is a legitimate public welfare objective. However, it is not sufficient for a State to simply assert that a measure is "environmental", especially in circumstances where – as here

[951] Emphasis added. *See* Claimants' Memorial, para. 413, citing *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 495, **CL-87**.

[952] Claimants' Memorial, para. 414.

[953] *Id.*, para. 415.

[954] Respondent's Counter-Memorial, para. 272.

[955] *Id.*, para. 278.

– the effect of the measure was arguably to reverse steps taken to protect the environment in the long term.

579. In reviewing the cases and commentary cited by the Respondent which opine on what constitutes a legitimate public welfare objective,[956] it is clear that Ontario's measures fall short of what is expected. For example, measures touching upon the protection of the environment have included measures with respect to the development and operation of hazardous waste landfills,[957] measures relating to the use of methanol as a fuel additive,[958] and measures relating to the prevention of export of toxic waste across the Canada-United States border.[959] There is a significant difference between these types of measures, and the arbitrary and unjustifiable cancellation of the Cap and Trade Program by a Premier-elect who had not formally entered into power, and whose stated purpose was to reduce the cost of gas at the pump.[960]

580. Yet the Respondent persists in arguing that while "Ontario's new government acknowledged that climate change is a real and urgent threat", it considered that "carbon pricing was not the preferred policy approach due to its cost for Ontario's households and the economy."[961] In an effort to smooth over the fact that Ontario's policy bore no relationship to protecting the environment, the Respondent then asserts that these policy decisions should not be "subjected to undue second-guessing" by the

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[956] UNCTAD enumerated some examples of the types of non-compensable measures taken in legitimate public interests, including "taxation, trade restrictions involving licenses and quotas, or measures of devaluation" as well as "anti-trust, consumer protection, securities, environmental protection, [and] land planning." *See* OECD, "Indirect Expropriation" and the "Right to Regulate" In International Investment Law, OECD Working Papers on International Investment, No. 2004/4, p. 4, **RL-98**. The Commentary to the American Law Institute's Restatement (Third) of Foreign Relations – relied upon by prior NAFTA tribunals – provides examples of bona fide regulations, including "general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory…". *See*, *e.g.*, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 196, **RL-99**; Meg Kinnear, Andrea Kay Bjorklund, et al., "Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1", (Kluwer Law International; Kluwer Law International 2006), p. 1110-50, **RL-23**.

[957] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), paras. 105-106, **CL-16**; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 117, **CL-84**.

[958] *See Methanex Corporation v. United States of America*, UNCITRAL, Final Award on Jurisdiction and Merits (3 August 2005), Part III, Chapter A, **CL-89**.

[959] *See*, *e.g.*, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award (13 November 2000), paras. 90-107, **CL-64**.

[960] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**. *See* para. 193 *supra*.

[961] Respondent's Counter-Memorial, para. 273.

Tribunal,[962] so long as "the reasons given are valid and bear some plausible relationship to the action taken."[963]

581. As explained in paragraphs 570 to 572 above, and as the tribunal in *Pope & Talbot* found, this formulation by the Respondent "goes too far".[964] In any event, the Respondent fails even its own test: the reasons provided by Canada for Ontario's unlawful and arbitrary measures are far-removed from any legitimate public purpose of protecting the environment. The Respondent tries to cover this fact by asserting that the Cancellation Act required Ontario to prepare a "climate change plan" which was released for public consultation on 29 November 2018.[965] Yet this statement simply serves to undermine the Respondent's point. If the indirect expropriation of the Claimants' investment on 15 June 2018 and 3 July 2018 was taken for a legitimate public purpose for the protection of the environment, then why did Ontario only address the need for a plan on climate change some *five months later*? The Claimants further note that no such plan actually came into effect until January 2022, some three and a half years after the relevant measures.[966] Clearly, Ontario's measures bore no plausible relationship to the protection of the environment at the time of the indirect expropriation, as the Respondent now claims.

582. Instead, and as the Claimants explained in the Memorial and in paragraphs 11, 178 and 0 above, the notion that the cancellation of the Cap and Trade Program was undertaken in pursuit of a legitimate and "new" environmental policy rather than primarily for political reasons is further undermined by the fact Ontario merely replaced one carbon pricing regime with another – and one that imposed a higher cost on Ontario tax payers. Again, the Respondent effectively ignores the evidence submitted by the Claimants in the Memorial that the Ontario Cap and Trade Program was swiftly replaced by the Federal backstop program, meaning that Ontario was simply subject to a similar and equally stringent carbon pricing regime.[967]

583. Second, even if the Tribunal considered that Ontario's measures were taken for a legitimate public purpose (*quod non*), the Respondent has failed to demonstrate that the measures were non-discriminatory. The Respondent simply asserts that because some "[o]ther types of participants were also excluded" and because there is "no allegation of nationality-based discrimination", then Ontario's measures were non-discriminatory. As demonstrated in the Memorial and in paragraphs 204 to 220 above, Ontario had arbitrarily targeted a specific class of investors, and then had effectively picked "winners and losers" amongst entities participating in the Cap and Trade Program.[968] Furthermore, and as explained by Dr. Stavins, Ontario had no

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[962] Respondent's Counter-Memorial, paras. 274, 278.

[963] *Id.*, para. 274.

[964] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award (26 June 2000), para. 99, **CL-86**.

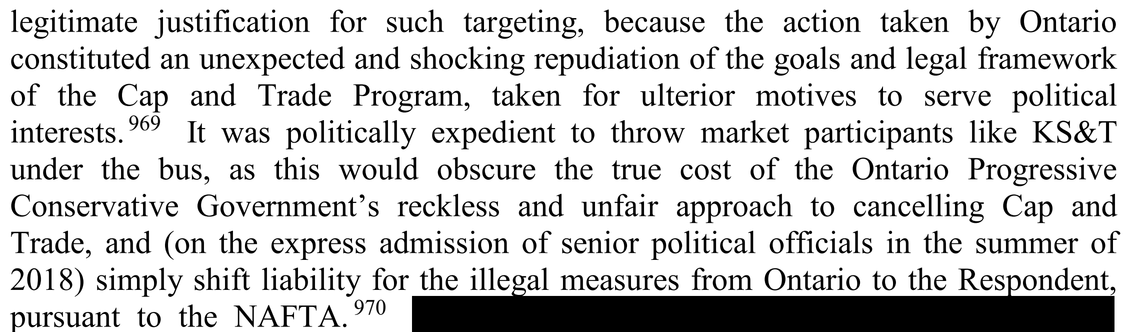
[965] Respondent's Counter-Memorial, para. 275.

[966] *Id.*, para. 104.

[967] Claimants' Memorial, paras. 259-265.

[968] *Id.*, paras. 370-372.

legitimate justification for such targeting, because the action taken by Ontario constituted an unexpected and shocking repudiation of the goals and legal framework of the Cap and Trade Program, taken for ulterior motives to serve political interests.[969] It was politically expedient to throw market participants like KS&T under the bus, as this would obscure the true cost of the Ontario Progressive Conservative Government's reckless and unfair approach to cancelling Cap and Trade, and (on the express admission of senior political officials in the summer of 2018) simply shift liability for the illegal measures from Ontario to the Respondent, pursuant to the NAFTA.[970]



584. Third, and even if the Tribunal considered that Ontario's measures were taken for a legitimate public purpose and were non-discriminatory (*quod non*), the Respondent has failed to demonstrate that the measures were proportionate. In fact, the Respondent has not even attempted to address this point, despite its own articulation of this standard in 2015.[972] Indeed, as the *Tecmed* tribunal stated:

> [W]e find no principle stating that regulatory administrative actions are *per se* excluded from the scope of the Agreement, even if they are beneficial to society as a whole —such as environmental protection—, particularly if the negative economic impact of such actions on the financial position of the investor is sufficient to

[969] *Id.*, paras. 373-374.

[970] *See*, *e.g.*, *id.*, para. 223; Witness Statement of Paul Brown (5 October 2021), para. 46, **CWS-3** ("Mitch Davidson then went on to say that, "this is likely to turn into a North American Free Trade Agreement (NAFTA) claim, and will be on the Federal Government." In fact, Mitch Davidson continually suggested that Koch pursue its rights as a foreign corporation conducting business in Canada on multiple occasions.").

[972] *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 495, **CL-87** (that a measure will not be a valid exercise of police powers where "its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.").

> neutralize in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever. . . .[973]

585. Instead of conducting this analysis, the Respondent again simply asserts that the Claimants "fail to put the Ontario measures into their proper context", stating that this policy decision "must be viewed in the context of the conclusion of Ontario's Auditor General in her 2016 report that 'the cap-and-trade system will result in only a small portion of the required greenhouse-gas reductions needed to meet Ontario's 2020 target' and 'at significant cost to Ontario businesses and households'."[974]

586. As an initial point, and somewhat ironically, it is the Respondent that fails to put the Auditor-General's remarks, and the long-term strategy of the Ontario Government in introducing the Cap and Trade Program, in its proper context. Moreover, while the Respondent attempts to paint the Cancellation Act as a "key feature" to address the challenges of climate change, by paving the way for the new "Made-in-Ontario" environmental plan, it flatly ignores the Auditor-General's findings in 2019 that this plan was itself unsound.[975] This is despite the fact that Ontario acknowledged the Auditor-General's scathing report and pledged to update and improve the plan in line with their suggestions, though as of 2021 Ontario had only fully implemented 27 percent of actions recommended.[976]

587. Moreover, and even setting these considerations to one side, Ontario's actions on 15 June 2018 and 3 July 2018 (*i.e.*, the measures challenged as individually and collectively amounting to an indirect expropriation) were wholly disproportionate in terms of Ontario's so-called policy objective and the impact it had on the Claimants and other participants in the Ontario Cap and Trade Program. There was absolutely no reason for the Premier-elect's political grandstanding and his *ultra vires* direction to the Ministry to ignore the legislative requirements in place on 15 June 2018. The significance of the Ontario Government's disproportionate approach is clearly demonstrated in *OEG v. Ukraine*. In that case, the *OEG* tribunal found that while the Gambling Law Ban in question was passed for reasons of public health and morality, it nonetheless considered that the Ban could not be regarded as a proportionate measure, and therefore that it was not a valid exercise of the police powers

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[973] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 121, **CL-84**. *See also Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland* (UNCITRAL) Final Award (14 February 2012), para. 568, **RL-61** ("[In] [e]valuating Poland's actions … the Tribunal must accord due deference to the decisions of specialized Polish administrators interpreting and applying laws and regulations governing their area of competence. In doing so, however, the Tribunal will also consider the manner in which these decisions were taken and their effect on the Claimants' investments.").

[974] Respondent's Counter-Memorial, para. 273.

[975] *See* para. 196 *supra*.

[976] Office of the Auditor General of Ontario, "Follow-up on Value-for-Money Audit: Climate Change, Ontario's Plan to Reduce Greenhouse Gas Emissions" (November 2021), pp. 2-4, **Exh. C-206**.

doctrine.[977] In making this finding, the *OEG* tribunal noted that it was "troubled" not only by the severe impact of the measure on the claimant's investments in that case "but also by its immediate effect."[978] The tribunal further noted:

> Foreign investors, and local investors for that matter, were not consulted. There was no adjustment period. There was no dialogue of any substance with those businesses who would be immediately affected by the ban. Had there been an adjustment period, the gambling business sector could have mitigated some losses or negotiated an amelioration of the ban on acceptable terms. However, the ban's immediate entry into force deprived the gambling business sector of that opportunity. Moreover, as explained in more detail below, once the Gambling Ban Law entered into effect, the Claimant's investments, specifically Olympic's licensing rights, were immediately extinguished. While the Respondent's expert, Mr David Clifton, has highlighted that various states, including Brazil, Israel and India, prohibit certain gambling activities, he could not refer the Tribunal to even one example where the whole gambling industry was dismantled with immediate effect. The Respondent did not bring any current or former government witnesses to explain the need for a total ban with immediate effect.[979]

588. A similar situation exists here. There was no consultation, no adjustment period, and no opportunity for the Claimants to mitigate their loss. Moreover, the alleged "costs to consumers" that Ontario was acting to reduce were not even formally addressed until the introduction of the Cancellation Act on 31 October 2018, some *four months* later. Such a situation was also considered and rejected by the tribunal in *OEG v. Ukraine*:

> Although the Law contemplated the establishment of a new regime within three months, this zoning system was not established until the adoption of the New Gambling Law in July 2020. The Tribunal cannot be expected to ignore the reality as it existed immediately after the adoption of the Gambling Ban Law. Indeed, in order to properly establish the existence of expropriation, tribunals must look into the effects of the impugned measure. Such examination requires the Tribunal to look beyond the date of the impugned measure. In the present case, such examination also leads the Tribunal to reject the submission that the special zoning system (that was in the event not established within the three month period as contemplated by the Gambling Ban Law) was proportional.[980]

589. In sum, Ontario failed to consider – let alone assess – whether the impact of its actions on 15 June 2015 and 3 July 2015 would be so "severe in light of its purpose

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[977] *Olympic Entertainment Group AS v. Republic of Ukraine*, PCA Case No. 2019-18, Award (15 April 2021), para. 101, **CL-198**.

[978] *Id.*, para. 99.

[979] *Id.*, para. 101.

[980] *Id.*, para. 100.

that it cannot be reasonably viewed as having been adopted and applied in good faith."[981] Indeed, the impact upon the Claimants and many other Cap and Trade participants was shockingly disproportionate to the "public purpose" Ontario's policy was purporting to achieve.

590. *Finally*, the Respondent has failed to rebut the Claimants' proposition that the Ontario measures were not made in good faith. Instead, the Respondent asserts that it is the Claimants' "burden of proving that Ontario's actions constitute one of the rare cases of regulatory measures that are not a valid exercise of police powers", and that the Claimants "fail to explain why it was 'out of bounds' for a Premier Designate to announce his government's intention, upon swearing-in, to implement certain environmental policies that had been a central part of his electoral platform."[982] There are a host of problems with these statements.

591. As an initial point, the Respondent's reliance on *Servier v. Poland* to assert that the Claimants bear the burden of demonstrating that Ontario's measures were not a valid exercise of police powers is unavailing.[983] Indeed, in addressing the applicable burdens of proof under a police powers analysis in that case, the *Servier* tribunal expressly observed that it had sought to strike a balance between the competing approaches of the parties,[984] and split up its analysis – and the relevant burdens of proof – into three components: first, it held that Poland had a *prima facie* burden to show that its conduct was justifiable by reference to a public purpose;[985] second, it held that the claimants then had the burden of proving that Poland had acted in bad faith, in a discriminatory way or disproportionately such that its conduct was "inconsistent with a legitimate exercise of Poland's police powers";[986] and finally, assuming that the claimants could discharge their burden, the tribunal held that Poland then had the burden of rebuttal.[987] Consequently, the Respondent's reliance on *Servier* is erroneous: while the Claimants may bear the burden of demonstrating Ontario acted in a manner inconsistent with a legitimate exercise of its police powers, the burden to show that Ontario's conduct was *prima facie* justifiable by reference to a public purpose, and to rebut the Claimants' claims, falls on the Respondent, which has failed to demonstrate either.

592. Moreover, the Respondent's assertion that there was nothing "out of bounds" about a "Premier Designate [] announc[ing] his government's intention, upon swearing in, to

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[981] *Windstream Energy, LLC v. Government of Canada*, UNCITRAL, Government of Canada, Counter-Memorial (20 January 2015), para. 495, **CL-87**.

[982] Respondent's Counter-Memorial, para. 277.

[983] *Id.*, para. 277, n. 513 (*Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland* (UNCITRAL) Final Award (14 February 2012), paras. 582-584, **RL-61**).

[984] *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland,* UNCITRAL, Final Award (14 February 2012), para. 581, **RL-61**.

[985] *Id.*, para. 582.

[986] *Id.*, para. 584.

[987] *Ibid.*

implement certain environmental policies" is baseless. As described in paragraphs 133 to 138 above, the Premier-elect's sudden announcement of 15 June 2018 was not a statement on future "priorities and intentions";[988] rather, it was a calculated, deliberate and immediate intervention in the functioning of the Cap and Trade Program. Documents produced by Ontario in this arbitration confirm that the Premier-elect took *ultra vires* action on 15 June 2018, by expressly directing unelected officials working in the Ministry of the Environment and Climate Change to not participate in the August auction,[989] at a time when the Liberal Government remained in power. The Respondent's attempt to cloak this wrongdoing in legality by arguing that it was merely a "policy statement" is as implausible as it is false.[990]

593. Finally, and as elaborated in paragraphs 181 to 186 above, the Premier-elect was not announcing an "environmental policy" on 15 June 2018, but was singularly concerned with bringing "gas prices down" and "lowering taxes" as a political measure. In the media release issued by the Premier-elect on 15 June 2018, he confirmed that "I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down" and that "[e]liminating the carbon tax and cap-and-trade is the right thing to do and is a key component in our plan to bring your gas prices down by 10 cents per litre."[991] Furthermore, in announcing the passing of the Cancellation Act, the Ontario Government characterized its action as follows:

> The elimination of the cap and trade carbon tax will reduce gas prices, save the average family $260 per year, and remove a costly burden from Ontario businesses, allowing them to grow, create jobs and compete around the world.[992]

594. In fact, Premier-elect Ford made clear during his campaign that the cancellation of the Cap and Trade Program was not for environmental reasons.

> Where Ford was pressed for details [on the opposition to Ontario's Cap and Trade Program] reporters asked him to explain how he will handle environmental issues in lieu of a penalty on carbon emissions. Ford often told interviewers it was an issue most people didn't care about.
>
> For example, on Breakfast Television in Toronto, when Kevin Frankish described the environment as a No. 1 issue, Ford interrupted to say, "Well, it's not No. 1."

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[988] Respondent's Counter-Memorial, para. 78.

[989] Email from Paul Evans, Deputy Minister of MOECC to Jeff Hurdman, "Direction – cap and trade auction" (June 15, 2018, 12:04:10), **Exh. C-199**.

[990] *See* paras. 133 to 138 *supra*.

[991] Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax" (15 June 2018), **Exh. C-7**.

[992] Ontario Government, "Relief on the Way: Ontario Passes Legislation to End Cap and Trade Carbon Tax" (31 October 2018), **Exh. C-125**.

> "Let's disagree on that fully, because I've talked to thousands and thousands of people across this province (and) guess what, Kevin? Not once, not once has anyone ever come up and said, 'My No. 1 concern is environment. To the contrary (peoples') No. 1 issue is the high Hydro rates," Ford said. "Another (No. 1) one [sic] issue is jobs, they want good paying jobs. They're tired of the government taxing them to death. Those are the three top issues, I can assure you, and anything else falls under that…"[993]

595. Most of this evidence was presented by the Claimants in the Memorial, yet the Respondent chose to ignore it and state for their own purposes that the Cancellation Act was designed to develop new solutions for climate change.[994] The Respondent's attempt to cloak the Ontario Government's actions in something resembling a legitimate public purpose is clearly unsupported and a flimsy and unconvincing whitewashing of manifestly different motivations.

596. Consequently, Ontario's measures were not taken for a legitimate public purpose, and were discriminatory, unreasonable and disproportionate and thus lacking in good faith. In these circumstances, the Respondent's argument that Ontario validly exercised its police powers must be rejected.

3. The Respondent Directly Expropriated the Claimants' Investment

597. In the Memorial, the Claimants demonstrated that Ontario's measures directly expropriated the Claimants' investment, for the benefit of Canada as the host State. The Cancellation Act outright cancelled the emissions allowances held in KS&T's Ontario CITSS account, and the permanent and irreversible cancellation of these rights were for the benefit of the State, which received a substantial amount of profit.[995]

598. In its Counter-Memorial, the Respondent argues that there was no compulsory transfer of property or outright physical seizure of property,[996] and neither was there any benefit to Ontario or a third party.[997] In these circumstances, the Respondent asserts, there was no direct expropriation.[998] The Respondent's arguments are legally and factually flawed, for the reasons that follow.

599. First, the Respondent's argument that there was no compulsory transfer or seizure of the property because Claimants' emissions allowances were only "cancelled", but not "transferred", is tenuous at best.[999] In making this argument, the Respondent seeks to

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[993] Trish Audette-Longo, "How Doug Ford skated around the media in his first week as Ontario Tory leader" (16 March 2018), **Exh. C-204**.

[994] Respondent's Counter-Memorial, para. 102.

[995] Claimants' Memorial, paras. 420-421.

[996] Respondent's Counter-Memorial, paras. 280-282.

[997] *Id.*, paras. 283-384.

[998] *Id.*, para. 285.

[999] *Id.*, paras. 281-282.

narrowly define the *manner* in which a State might appropriate an investment, asserting that a direct expropriation "requires a compulsory transfer or outright physical seizure of property."[1000] The Respondent does not provide any NAFTA support for its contentions, but instead heavily relies on a series of cases against Argentina arising from its financial crisis in the 2000s.[1001]

600. The Respondent's reliance on these cases is curious, given that many of the cited tribunals expressly acknowledged that there was no claim of direct expropriation in issue (unlike the case here).[1002] Moreover, it is clear from the reasoning of these tribunals that if a claim of direct expropriation were in issue, the key concern was determining whether there had been a "coercive appropriation" by the State of a claimant's investment. For example, in *LG&E v. Argentina*, the tribunal noted that "[t]he parties admit that the claim at issue does not involve a direct expropriation" because Argentina had not "appropriated Claimants' investment, which is the indispensable requirement if one is to talk of direct expropriation."[1003] Likewise, in *El Paso v. Argentina*, the tribunal relied on the definition provided by Professor Sacerdoti that direct expropriation means "the coercive appropriation by the State of private property, usually by means of individual administrative measures."[1004] Thus, the question for this Tribunal is not an exercise in determining whether the "cancellation" of the Claimants' investment amounts to a "transfer" as the Respondent claims, but whether there has been a "forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action."[1005]

601. Here, there can be no doubt that there has been a forcible appropriation of the Claimants' investment by means of legislative action. The Cancellation Act expressly purported to cancel the emissions allowances held in KS&T's Ontario CITSS account, and specifically provided that these allowances were deemed by Ontario to have been "never distributed" in the first place.[1006] Ontario then refused to

[1000] *Id.*, para. 280.

[1001] *See*, *e.g.*, *id.*, nn. 518-521.

[1002] *See*, *e.g.*, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (3 November 2008), para. 145, **CL-37** (where the tribunal expressly found that there had been no deprivation of title to property, and in fact the claimant had been able to sell its shares); Respondent's Counter-Memorial, n. 518, citing *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 September 2003, para. 20.21, **RL-75** (where it was clear that the claimant in that case "never sought to characterise the disputed measure as a direct expropriation", given that the acts in question were the failure of a state administration to issue amended lease agreements); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 187, **RL-99**.

[1003] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 187, **RL-99**.

[1004] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 265, **RL-17**.

[1005] *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007), para. 259, **CL-78** (cited by the Respondent in its Counter-Memorial at n. 518).

[1006] Cap and Trade Cancellation Act 2018, Section 7, **CL-1**.

compensate the USD 30,158,240.95 KS&T had paid for those same allowances. It is difficult to imagine a more blatant "taking" or "appropriation" of an investor's intangible property.[1007]

602. Second, the Respondent agrees with the Claimants' position in its Memorial that to constitute direct expropriation, the taking "must be for the benefit of the host State or a State-mandated third party."[1008] However, the Respondent then makes an incredible argument that because KS&T "received only" [REDACTED] from the Claimants' investment, that it did not "benefit" from the cancellation of the Cap and Trade Program.[1009]

603. The Respondent's arguments in this respect border on frivolous. Regardless of whether the Respondent benefited from "only" [REDACTED] (which, as discussed in paragraphs 228 to 233 above is not accurate), the Respondent has not denied that Ontario simply kept the funds received from the joint auctions, even after it cancelled the Cap and Trade Program.[1010] The Respondent has also not denied that Ontario profited in a substantial way from the cancellation of the Claimants' investment, and the investments like it in the Ontario market. Indeed, the Respondent does not deny that it received over CAD 470 million from the May 2018 joint auction alone, and that these funds were deposited into Ontario's general revenue account.[1011] Moreover, and as Michael Berends explains:

> [Canada] fails to acknowledge that, further to the May 2018 joint auction, Ontario received all the money for the 2018 vintage allowances which it put into auction, as they were fully sold. This was regardless of whether or not they were sold to Ontario market participants. Ontario also received additional proceeds from the 'advance' auction of 2021 vintage allowances on the same occasion. As a result, Ontario must have received roughly USD 368,000,000 by way of total proceeds from the May 2018 auction alone. It is therefore misleading to focus in isolation on the proceeds Ontario received from KS&T alone from the May 2018 public auction – Ontario nonetheless received a significant pay-out from that auction overall, far in excess of the mere [REDACTED] it mentions in relation to

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[1007] This situation can be contrasted with, for example, the circumstances in *Enron v. Argentina* and *Sempra v. Argentina*. In those cases, the tribunals noted that no "essential component of property" had been given to the State, instead finding that "it can be argued that economic benefits might have been transferred to an extent from industry to consumer or from industry to another industrial sector". *See Enron Creditors Recovery Corporation v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), para. 243, **RL-113**. *See also Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007), para. 280, **CL-114** (cited by the Respondent in its Counter-Memorial at n. 518). These situations can clearly be distinguished from the outright cancellation of the Claimants' investment, and the State keeping the proceeds.

[1008] Respondent's Counter-Memorial, para. 283. *See* Claimants' Memorial, paras. 420-421.

[1009] Respondent's Counter-Memorial, para. 284.

[1010] Claimants' Memorial, para. 421.

[1011] *See ibid.*.

> KS&T's purchase. All of that vast amount of money went into Ontario's public coffers. None of it was paid out to market participants like KS&T who had paid for their allowances and taken part in the Cap and Trade Program in good faith.[1012]

604. Finally, the Respondent's argument that it would have received the proceeds from the Claimants' investment "whether or not Ontario enacted the Cancellation Act" is misleading.[1013] As described in paragraphs 124 to 129 above, in cancelling the Cap and Trade Program, Ontario made no attempt to make any distinction between allowances held in Ontario CITSS accounts based upon their origin: instead, Ontario asserted regulatory authority over all allowances held in Ontario, without discrimination, including to the extent of ultimately purporting to cancel them without compensation. Indeed, while the Claimants requested – and the Respondent agreed to search for –documents relating to any distribution of the allowances or funds amongst the linked jurisdictions following the cancellation of the Cap and Trade Program, Canada failed to produce any responsive material.[1014] Thus, the Respondent's assertion that it did not benefit from cancelling the Cap and Trade Program remains unverified.

605. In sum, the Respondent's assertion that it has not violated Article 1110 of the NAFTA following the direct expropriation of the Claimants' investment by virtue of the Cancellation Act must be rejected. Ontario clearly appropriated the Claimants' property for its own benefit without compensation, wholly and permanently depriving the Claimants of the value of their investments as of 31 October 2018, when the Cancellation Act received royal assent.

4. The Respondent's Expropriation of the Claimants' Investment Was Unlawful

606. In the Memorial, the Claimants demonstrated that the Respondent's actions constituted an unlawful expropriation, which failed to meet the cumulative conditions set out in Article 1110(1)(a)-(d) of the NAFTA.[1015] In particular, the Claimants demonstrated that Ontario's measures:

    a. were not taken for a public purpose.[1016] As discussed in the Claimants' Memorial and in paragraphs 576 to 596 above, there is no evidence to suggest that Ontario was acting for a public purpose. Even if the cancellation of the Cap and Trade Program was to serve a legitimate public welfare objective (*quod non*), there is no nexus between that objective and the discriminatory provision of compensation between entities as distinguished by Ontario under the Cap and Trade Act.

[1012] Second Witness Statement of Michael Berends (16 July 2022), para. 13, **CWS-7**.

[1013] Respondent's Counter-Memorial, para. 284.

[1014] Claimants' Requests for Document Production, Annex A to Procedural Order No. 2 (12 April 2022), Request No. 11.

[1015] Claimants' Memorial, paras. 422-424.

[1016] *Id.*, paras. 425-433.

b. was not conducted in accordance with due process and Article 1105(1) of the NAFTA.[1017] As described in detail in the Claimants' Memorial, and again in Sub-Section IV.B above, the Respondent failed to act in accordance with Article 1105(1) of the NAFTA. Moreover, Canada also failed to accord due process to the Claimants, including by failing to provide basic legal mechanisms (both for administrative and judicial review) to the Claimants for review of its decision to expropriate the Claimants' investment and deny them any compensation.[1018]

c. was not accompanied by compensation in accordance with Article 1110(2) to (6) of the NAFTA.[1019] The Respondent has not denied its failure to pay *any* compensation to the Claimants (let alone the fair market value compensation required under the NAFTA), which is sufficient to render the expropriation unlawful under Article 1110.[1020]

607. Consequently, the expropriation of the Claimants' investment is unlawful under the NAFTA, giving rise to a compensation obligation.

608. In its Counter-Memorial, the Respondent does not directly respond to these arguments and thus has acquiesced to the Claimants' submission that the expropriations were unlawful under the NAFTA. To the extent that the Respondent intends to ambush the Claimants by addressing, for the first time, any argument with respect to these legal standards, this would be procedurally improper under Rule 31(3) of the ICSID Arbitration Rules, which provides that:

> A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law *in the last previous pleading*; a statement of law in answer thereto; and the submissions.[1021]

609. As made clear by these emphasized portions, the Counter-Memorial should have addressed statements of law as filed in the Memorial (as the "last previous pleading"). Any attempt on the part of the Respondent to address issues in its Rejoinder should be rejected as depriving the Claimants of due process.[1022]

[1017] *Id.*, paras. 434-442.

[1018] *See id.*, paras. 436-441.

[1019] *Id.*, paras. 443-445.

[1020] This is true even if the expropriation is for a public purpose, not discriminatory and completed in accordance with due process. *See* NAFTA, Art. 1110(1); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 308, **CL-64**.

[1021] Emphasis added.

[1022] *See Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum (30 December 2016), para. 380, **CL-191** ("The Tribunal is aware that the provisions relating to written submissions contained in Rule 31 of the ICSID Arbitration Rules are closely related to a party's fundamental procedural right to be heard…").

5. Conclusion to Article 1110 of the NAFTA

610. The Respondent's arguments on Claimants' claims under Article 1110 of the NAFTA have done little to displace the clear evidence that Ontario indirectly and, subsequently, directly expropriated the Claimants' investments. The actions taken by the announcement of the Premier-elect on 15 June 2018, and the subsequent introduction of Regulation 386/18 on 3 July 2018 individually and collectively amounted to an indirect expropriation of their investment;[1023] while the enactment of the Cancellation Act on 31 October 2018 (following the introduction of Bill 4 on 25 July 2018) amounted to a direct expropriation through its purported nullification of the rights KS&T held in the emissions allowances held in its Ontario CITSS account at the time of the measures.[1024] Ontario's breaches give rise to compensation obligations on the part of the Respondent, as discussed immediately below.

V. THE CLAIMANTS HAVE ESTABLISHED THAT THEY ARE ENTITLED TO COMPENSATION FOR THE LOSSES CAUSED BY THE RESPONDENT'S UNLAWFUL MEASURES

611. In the Memorial,[1025] the Claimants argued that the Respondent's breaches of international law as pleaded in the Memorial caused the Claimants to suffer loss and damage, in the following amounts: **(i)** USD 30,528,785.89 (alternatively, USD 30,158,240.95) for the allowances; **(ii)** USD [redacted] in relation to the [redacted]; **(iii)** [redacted] in [redacted] [redacted]; plus **(iv)** interest and arbitration costs. While the Claimants consider that they are entitled to damages for the loss of their Ontario emission allowance trading business, they have elected not to seek such damages.[1026]

612. As a result, the valuation evidence is fairly straight-forward. The value of the allowances was dictated by the market, which is proven by contemporary documents and the auction sale itself.[1027] Meanwhile, the amount of the other losses is based on evidence of actual expenditures.[1028] Thus, neither party has presented an expert valuer.

613. Significantly, much of the Claimants' analysis remains unchallenged. In particular, the Respondent has not challenged the Claimants' articulation of the legal principles that apply to the assessment of compensation and damages, except for certain discrete points that are addressed below (*e.g.*, entitlement to compound interest). Further, and crucially, the Respondent does not challenge the Claimants' valuation of the expropriated allowances, which comprise the vast majority of the amount claimed. It does, however, challenge the sufficiency of the evidence relied upon by the Claimants

[1023] *See* Claimants' Memorial, paras. 401, 407-411.

[1024] *See id.*, paras. 401, 420-421.

[1025] *See e.g.*, *id.*, paras. 446 and 510.

[1026] *See id.*, paras. 491-492.

[1027] *See id.*, paras. 179-182; 493-494.

[1028] *See id.*, paras. 496-505.

to prove their losses in relation to the [redacted] and remedial actions – as will be seen below, those arguments are baseless.

614. The Respondent's main objections to the Claimants' case on remedies comprise shameless attempts to attack causation. In particular, it argues that the Claimants' losses were not caused by Ontario, but instead by California's resulting decision to de-link. In the alternative, the Respondent then engages in victim-blaming, asserting that the Claimants should have known to terminate their Ontario business (thereby abandoning their investment), before the Cap and Trade Program was slated for cancellation. As will be seen, both arguments are wholly unfounded.

615. Before proceeding with the analysis, it is necessary to recall that the issue of causation of damages necessarily arises only after a treaty breach has been upheld: the question is whether the breaches found caused the loss claimed. This frames the context for how causation should be addressed.

616. The remainder of this section largely follows the order in which the Respondent raised its objections. Thus, it addresses: (A) causation under the expropriation claim; (B) causation under the minimum standard of treatment claim; (C) the Claimants' position in terms of the loss of their emission trading business; (D) the Claimants' losses in relation to the [redacted]; (E) the Claimants' losses in relation to their remedial actions; (F) the Respondent's contributory fault arguments; and (G) interest.

A. The Respondent's Own Unlawful Measures Caused the Losses Claimed under the Expropriation Claim

617. The Respondent's first attempt to evade responsibility for its actions attack the Claimants' expropriation claim in respect of the emission allowances purchased in the May 2018 auction, for which the Claimants seek USD 30,528,785.89.[1029] The Respondent objects that it was not Ontario's actions which caused this loss, but rather the actions of California in de-linking its system from Ontario.[1030] Later in its analysis, the Respondent appears to connect this argument to denying the Claimants' other heads of loss also.[1031] These arguments are unfounded.

618. Starting with the applicable legal principles, the parties appear to be largely agreed on the broad principles concerning causation. Per Article 31 of the ILC Articles, a State that has committed a wrongful act "is under an obligation to make full reparation for

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[1029] At least, that is how it is characterised at paragraph 291 of the Respondent's Counter-Memorial and the heading that immediately precedes it. *See also* Respondent's Counter-Memorial, para. 288.

[1030] *See* Respondent's Counter-Memorial, paras. 288 and 291-301. The Respondent further argues that the Premier-elect's 15 June 2018 announcement is not a "measure": *see id.*, para. 288. The Claimants have already established in Section IV.A above that the 15 June 2018 announcement was indeed a "measure" and so will not repeat those argument here. Accordingly, the Respondent's argument that "[a]ny measure of Ontario that could constitute a breach of Article 1105 or 1110 took place *after* California de-linked its system from Ontario", therefore "Claimants would be in the same situation with or without a NAFTA breach by Canada", fails.

[1031] *See* Respondent's Counter-Memorial, paras. 312 and 314.

the injury *caused* by the internationally wrongful act."[1032] The Claimants agree that causation has two aspects: factual and legal.

619. Factual causation is relatively simple. For the Respondent, the issue is whether "an identified breach was a 'but for' cause in the chain of causation".[1033] Similarly, Ripinsky and Williams posit that "the issue is whether the wrongful conduct played *some* part in bringing about the harm or injury or was irrelevant to its occurrence."[1034] Like any other fact, this need only be established on a balance of probabilities.[1035]

620. Legal causation is more complex, and has been framed using various adjectives. For example, the Respondent quotes Ripinsky and Williams's reference to the need for conduct to be "a *sufficient*, *proximate*, *adequate*, *foreseeable* or *direct* cause of the injury".[1036] The remainder of the Respondent's analysis takes matters no further: it goes no further than these vague adjectives, and makes no attempt to explain what they actually mean or how they should be assessed.

621. In this regard, the award in *Lemire v. Ukraine* is particularly helpful. There, the tribunal began by observing that causation requires "cause" (*i.e.*, breach), "effect" (*i.e.*, injury) and "a logical link between those two".[1037] As to the latter, the tribunal observed:

> The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (…) to the final effect (…); while the negative aspect permits the offender to break the chain by showing that the effect was caused – either partially or totally – not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like *force majeure*).[1038]

622. As for proximity, the tribunal held that the existence of intermediate links between breach and injury ("transitive" links) does not exclude responsibility, so long as the

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[1032] ILC Draft Articles on State Responsibility with Commentary, Art. 31, **CL-51**. (emphasis added).

[1033] *See* Respondent's Counter-Memorial, para. 294. (underlining added).

[1034] S. Ripinsky, "Damages in International Investment Law", (London, British Institute of International and Comparative Law: 2008), p. 135, **RL-120**.

[1035] *Id.*, p. 163 (noting "preponderance of evidence" or "balance of probabilities" standard as "the prevalent standard in international arbitration", and that this standard is met "if the tribunal considers, on the basis of the evidence produced, that the fact is more probable than not").

[1036] *See* Respondent's Counter-Memorial, para. 294, quoting S. Ripinsky, "Damages in International Investment Law", (London, British Institute of International and Comparative Law: 2008), p. 135, **RL-120**. (underlining added).

[1037] *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 157, **CL-200.**

[1038] *Id.*, para. 163 (emphasis added).

chain is "neither too remote nor too aleatory".[1039] (The term "aleatory" foreshadows the role of predictability of the events, which is addressed further below.) For the tribunal, the "classic definition" was to be found in a 1923 decision of the U.S.-German Mixed Commission, which emphasised that "there [must be] no breach in the chain and the loss can be clearly, unmistakeably and definitely traced, link by link, to [the wrongful State's] act".[1040]

623. By way of example, the tribunal posited the situation where a State wrongfully arrests a vessel, the shipping company is then forced into bankruptcy, and the shareholders ultimately suffer loss. Applying the tests described above, the tribunal explained that the victim would have to prove: "[i] that the arrest of the ship led to losses for the shipping company, [ii] that the losses led to its bankruptcy and [iii] that, as a consequence of the bankruptcy, the shareholders lost their investment".[1041] The tribunal added: "the State could escape responsibility if it could prove that some other cause (e.g. mismanagement) provoked the bankruptcy and the shareholders loss".[1042] This example demonstrates that causation requires a showing that each link in the chain flows from the preceding link, and that in order to qualify as an intervening cause, the event (*e.g.*, mismanagement) must not flow from the original breach.

624. The tribunal later discussed the relationship between proximity and foreseeability in the following terms:

> [O]ffenders must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused. Proximity and foreseeability are related concepts: <u>a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage</u>. As the Portuguese-German Arbitral Tribunal said in the Angola case: 'It would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links'.[1043]

625. Other tribunals have reached the same conclusion as to the role of foreseeability, further emphasising that the test is an objective one.[1044]

[1039] *Id.*, para. 166.

[1040] *Ibid.*

[1041] *Id.*, paras. 165 and 167.

[1042] *Id.*, para. 167.

[1043] *Id.*, para. 170.

[1044] *See*, *e.g.*, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015), para. 383, **CL-201** ("In other words, a wrongful act may cause a particular damage as a matter of fact. However, *if the factual link between the act and the damage is composed of an atypical chain of events that could objectively not have been foreseen to ensue from the act, the damage may not be recoverable*. It can be left open here whether the requirement of legal causation limits only the categories of damages claimed, e.g. lost profits, or whether it also goes to the magnitude (certainly not

(continued)

626. Further, contrary to the Respondent's assertion,[1045] it bears responsibility for proving its objections to causation.[1046] Indeed, this follows from the general principle that he who asserts must prove.[1047] Ultimately, this is decisive: the Respondent has failed to meet its burden for the reasons set out below, so its defence must be rejected.

627. Turning to the facts, the Respondent argues that Premier-elect Ford's announcement on 15 June 2018 was not the "direct legal cause of the Claimants' inability to transfer their emission allowances to California", but rather it was California's decision to de-link its system from Ontario that did so.[1048] This is wrong.

628. The Claimants' primary position is that their investments were indirectly expropriated on 15 June 2018 (see Sub-Section IV.C.2 above). If the Tribunal agrees with that, it will necessarily have found that the Respondent caused the Claimants' investments to suffer a substantial deprivation in value, since that is an ingredient of an indirect expropriation. To put it another way: Premier-elect Ford's announcement coupled with the immediate, direct, foreseeable and foreseen consequence of that announcement (*i.e.*, California and Québec de-linking) rendered the Claimants' emission allowances worthless, thereby breaching the NAFTA, and the effect of such breach was that the Claimants held worthless allowances; the causal chain is one-step, the injury is an ingredient of the breach.

629. In any event, California's decision to de-link was not the independent, intervening event that the Respondent appears to suggest. To the contrary, as further elaborated below, it was a direct and foreseeable consequence of Ontario's action and thus forms part of the causal chain.

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the precise amount) of the loss within a given category. *What matters in any event is that the wrongful act was objectively capable of causing the damage incurred in the ordinary course of events*. …") (emphasis added); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017), para. 333, **CL-202** ("It is true that factual causation is not sufficient, and that an additional element linked to the exclusion of injury that is too remote or indirect (sometimes referred to as legal or adequate causation) is required, and it is in this context where foreseeability plays a role. If an injury was not objectively foreseeable because it was caused by an unusual chain of events that could not foreseeably derive from the act, legal causation may be absent and recovery may be excluded. However, *if the injury was objectively foreseeable (i.e., because the act was objectively capable of causing the injury), then the test for both factual and legal causation will normally be met*.") (emphasis added).

[1045] Respondent's Counter-Memorial, para. 292.

[1046] *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award (28 March 2011), para. 163 (quoted above) and n. 158 on p. 51, **CL-200** ("If the offender claims that other intervening causes exist, which are the superseding cause for the damage, it is for such offender to marshal the necessary evidence.").

[1047] S. Ripinsky, "Damages in International Investment Law", (London, British Institute of International and Comparative Law: 2008), pp. 161-162, **RL-120**; *Siag v Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 315, **CL-203** ("As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences").

[1048] Respondent's Counter-Memorial, paras. 298-301.

630. As shown in the Memorial and in Section II.C.1 above, Premier-elect Ford's abrupt announcement that Ontario would "cancel" the Cap and Trade Program and immediately withdraw from future allowance auctions forced California *and Québec*[1049] to act to safeguard the integrity of their linked cap and trade programs, in particular by suspending transfers of emission allowances between entities registered in Ontario and those registered in either California or Québec.

631. Importantly, such an outcome was objectively foreseeable. As Dr. Stavins explained in his first expert report, "the responses by California and Québec were *reasonable responses to Ontario's suspension of trading and, moreover*, *would have been reasonably expected to be the likely reaction to Ontario's announcement*."[1050]

632. Indeed, Dr. Stavins confirmed in his first report that had Ontario not acted in such an abrupt manner and instead complied with the de-linking provisions of the OQC Agreement, California and Québec would not have needed to suspend emission allowances transfers:

> If Ontario had followed these delinking provisions, compliance entities would have had sufficient warning and time to move allowances to CITSS accounts outside of Ontario, where they would retain value for compliance purposes. Similarly, California and Quebec could have taken steps to reduce the risk that allowances from Ontario would flood the California and Quebec markets, thus reducing the actual emission reductions achieved in those regions. For example, if Ontario entities' compliance obligations had been specified when cancellation was announced, California and Quebec could have allowed trading with Ontario entities to continue and determined whether they needed to reduce the number of allowances they would issue in the future to mitigate any risk to their cap's integrity due to excess allowances Ontario had issued (above those needed by Ontario entities for compliance).
>
> Instead, with the unexpected news of Ontario's impending cancellation, the lack of information on how Ontario would manage the termination, and potentially severe consequences for the integrity of their cap-and-trade programs (given the potentially large number of excess allowances), California and Quebec had to take decisive action to suspend trading with Ontario entities. Without such action, Ontario entities with no apparent compliance obligations would be holding allowances with little value to themselves but greater value to Quebec and California entities, which still faced compliance obligations. Thus, these allowances would have flowed from Ontario entities to California and Quebec entities, depressing prices in California and Quebec markets and compromising these programs' emissions reductions goals.[1051]

[1049] It is curious that the Respondent simply ignores that Québec de-linked also.

[1050] Expert Report of Dr. Robert Stavins (5 October 2021), para. 118, **CER-1**. (emphasis added).

[1051] *Id*., paras. 120-121 (emphasis added).

633. Dr. Stavins elaborates on this point in his second expert report:

> Eight days after being elected, Premier-Designate Ford announced that his administration would cancel the cap-and-trade program. This announcement, in turn, led to predictable reactions by administrators of the linked systems in California and Quebec. Premier-Designate Ford's sudden announcement, which provided no clarity regarding compliance obligations for Ontario capped entities, created the risk that allowances would flood into the California and Quebec systems. "To ensure that the environmental integrity and stringency of our cap-and-trade program and market is maintained," administrators of both the California and Quebec systems suspended trading with Ontario accounts, thus stranding allowances in those Ontario accounts. This outcome was a predictable response to Ontario's actions. Given the risks to linked systems brought about by an abrupt withdrawal like Ontario's, the California-Ontario-Quebec linkage agreement explicitly stated that a withdrawing party should instead endeavor to give notice at least a year ahead of withdrawal and arrange for any withdrawal to be at the end of a compliance period. Ontario did neither of these, triggering through its unexpected announcement the swift and predictable response by California and Quebec regulators, which were responding to the uncertainty Ontario had created about Ontario entities' compliance obligations.[1052]

634. In fact, not only were California and Québec's actions objectively foreseeable, they were actually foreseen by the Ontario Government. Following the document production process in this proceeding, it is now clear that on the afternoon of Friday 15 June 2018 Ontario Government officials were fully aware of the likely consequences of the Premier-elect's pre-emptive announcement and proceeded regardless, reckless to the consequences of their action.[1053] That evidence is damning and dispositive of the Respondent's causation defence.

635. Thus, factual causation is established. Premier-elect Ford's 15 June 2018 announcement led to California and Québec de-linking their systems from Ontario, and together those actions led to Ontario allowances becoming worthless. Certainly, the Respondent's unlawful conduct "played *some* part in bringing about the harm or injury" (per Ripinsky and Williams, quoted above).

636. Legal causation is established also. The causal chain is short: Premier-elect Ford's announcement, de-linkage, loss. The *Lemire* test is met: there is no breach in the chain and the loss can be clearly, unmistakeably and definitely traced, link by link, to

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[1052] *Id.*, para. 35 (emphasis added).

[1053] *See* paras. 163 to 166 *supra* (showing that Ontario officials were aware that California and Quebec, and potentially WCI Inc., would be taking action to place a "firewall" in CITSS to prevent Ontario emitters from transferring allowances, and also knew that participants in the Ontario Cap and Trade Program would want to make transfers to avoid loss); [redacted] ; Email from Jeff Hurdman to Alex Wood, "Preventing Auction Registration" (15 June 2018, 4.21pm), p. CAN-0609, **Exh. C-200.**

the Respondent's act. De-linkage was not an independent, intervening event such as to break the causal chain, but rather a direct, foreseeable and *foreseen* consequence of the Ford announcement: de-linkage followed directly from Premier-elect Ford's announcement and led directly to the Claimants' loss. To recall *Lemire* (and the other decisions cited above), "a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage" – that is plainly the case here. Had it been California's plan all along to de-link when it did, regardless of what was occurring in Ontario, that could well have broken the causal chain, but that is not what happened.

637. This analysis applies with equal force to the other losses claimed:

a. To recall, the Claimants had planned to use some of the expropriated allowances to meet their obligations to ███ such that, upon their expropriation, the Claimants had to obtain replacement allowances from the secondary market and suffered loss in doing so.[1054] Such loss is a further link at the end of the causal chain described above. Further, it was foreseeable: a reasonable person would have foreseen that *market* participants might have ongoing contractual commitments in *linked* jurisdictions, which they intended to fulfil using allowances purchased in Ontario. Losses incurred in meeting those obligations by other means cannot be considered "remote".

b. Further, the Claimants claim the costs of: **(i)** an external consultant, in connection with the Claimants' efforts to lobby the Ontario Government to revise the bill which became the Cancellation Act; **(ii)** external Canadian counsel, in connection with *inter alia* the lobbying efforts, seeking compensation under the Cancellation Act, and advice in relation to that Act; and **(iii)** initial legal counsel, in connection with initial fact gathering and preparation of the Notice of Intent under the NAFTA, along with associated provision of advice.[1055] But for the Respondent's expropriation of the Claimants' investments, such costs would not have been incurred. Further, they are foreseeable: a reasonable person would have foreseen that the Claimants would take lobbying and legal action to protect their investments. While the test is objective, the fact that the Cancellation Act denied access to the courts suggests that the Ontario Government foresaw that such actions would be taken also.

638. There is a further aspect to the Respondent's argument which must be addressed. In its view, if there was an expropriation, it occurred on 3 July 2018.[1056] That is when Regulation 386/18 was introduced, and officially froze all Ontario CITSS accounts. The Respondent argues that it was California's decision to de-link (on 15 June 2018) which caused the Claimants' loss, and that any expropriation took place after that had happened.[1057] This is wrong. First, if the expropriation only occurred on 3 July, it

[1054] Claimants' Memorial, paras. 496-501.

[1055] *Id.*, para. 503.

[1056] Respondent's Counter-Memorial, para. 316 and n. 575.

[1057] *Id.*, para. 297.

must follow that the substantial deprivation of value occurred on that date (since that is an ingredient of an expropriation claim); the Respondent's argument is thus self-contradictory. Second, the Respondent's measure of 15 June 2018 had already destroyed the value of the Claimants' investment. Third, in any event, international law does not permit a reduction of value in circumstances where the expropriation became known earlier, thereby reducing the market value of the asset. For example, Article 1110(2) of the NAFTA requires that compensation upon a lawful expropriation "be equivalent to the fair market value … immediately before the expropriation took place … *and shall not reflect any change in value occurring because the intended expropriation had become known earlier*". Customary international law is to substantially the same effect.[1058] The Respondent has not challenged these principles.

639. Consequently, the Respondent's attempt to evade its responsibility must fail.

B. The Claimants Have Established Legal Causation Between the Respondent's Breach of Article 1105(1) of NAFTA and the Claimants' Losses

640. Contrary to the Respondent's assertion, the Claimants have proven legal causation in respect of their claim for damages under NAFTA Article 1105(1), including by demonstrating that the Respondent's specific breaches of Article 1105(1) caused the specific losses that the Claimants seek to recover.

641. The Claimants demonstrated in the Memorial that the Respondent failed to accord the Claimants the minimum standard of treatment due to them under customary international law as required by Article 1105(1) as a result of Ontario's abrupt and arbitrary cancellation of the Cap and Trade Program, and its cancellation of all emissions allowances held in Ontario CITSS accounts; provision of compensation in an arbitrary and discriminatory manner; and express denial of access to justice for participants in the Cap and Trade Program.[1059] The Claimants also identified the specific measures giving rise to these breaches, including Premier-elect Ford's announcement of 15 June 2018; Ontario Regulation 386/18; the Cancellation Act; and Ontario's formal denial of compensation to the Claimants on 14 March 2019.[1060]

642. The Claimants further identified the losses that were caused by these measures, including the loss of KS&T's Ontario emissions trading business, the loss of the emissions allowances held in KS&T's Ontario CITSS account as at the date of expropriation, the costs incurred by KS&T in obtaining [redacted], and the [redacted].[1061]

[1058] Claimants' Memorial, paras. 484 and 485.

[1059] *Id.*, para. 351.

[1060] *Id.*, para. 336.

[1061] *Id.*, para. 490.

643. Finally, the Claimants proved that these measures caused these losses. Individually and collectively, the Respondent's measures gave rise to parallel breaches of NAFTA Articles 1105(1) and 1110. Through these measures, the Respondent failed to accord fair and equitable treatment to the Claimants' investment and denied justice to the Claimants, and said measures also had the effect of destroying the value of the Claimants' investment in Ontario, giving rise to a right of "full reparation" for that loss.[1062]

644. The Respondent nevertheless asserts that "refunding the purchase price of the emission allowances is not a correct quantification of what was 'lost' as a result of the specific breaches of Article 1105 alleged by the Claimants."[1063] As an example, the Respondent points to the Crown immunity provision in the Cancellation Act and argues that "there is no causal link between that specific breach [of Article 1105(1)] and the specific loss claimed", and "[a]ny damage caused was, at most, a lost opportunity to challenge the legislation in an Ontario court."[1064] According to the Respondent, the Claimants are obligated to have put forward in their Memorial different quantifications of damages caused by each of the specific measures of the Respondent that together resulted in a breach of Article 1105(1), or else they are not entitled to damages under Article 1105(1) at all.[1065]

645. The Respondent misconstrues the legal causation requirement under the NAFTA, as well as the cumulative effect of the Respondent's measures.

646. The NAFTA requires an investor to demonstrate it "has incurred loss or damage, by reason of, or arising out of" a breach of the NAFTA.[1066] The NAFTA does not require a claimant to have quantified in its memorial the specific loss caused by each *measure* alleged to have resulted in the specific breach of the respondent's legal obligations, especially in this scenario, where the Claimants argue that the Respondent's unlawful measures have *cumulatively* caused the total destruction of the Claimants' investment. Prior tribunals have recognized that breaches of multiple NAFTA provisions may each result in the total destruction of a claimant's investment

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[1062] *See Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, Judgment No. 8, PCIJ (1927) Ser A, No.9, p. 21, **CL-124**; ILC Articles on State Responsibility, Articles 31, 34, 36(1), **CL-125**. *See also Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021), para. 624, **CL-75** ("Customary international law thus mandates that breaches by the host State of the obligations assumed under NAFTA Art. 1105, should be remedied by granting the wronged investor full reparation for the injury caused.").

[1063] Respondent's Counter-Memorial, para. 289.

[1064] *Id*., para. 289.

[1065] *Ibid*. ("The Claimants simply invite the Tribunal to award the same damages amount as for its expropriation claim. However, refunding the purchase price of the emission allowances is not a correct quantification of what was "lost" as a result of the specific breaches of Article 1105 alleged by the Claimants").

[1066] NAFTA Article 1116(2); 1117(2).

and therefore the amount of compensation due for each breach is the same.[1067] Similarly, multiple measures that breach a singular NAFTA provision may together result in the total destruction of a claimant's investment and therefore the specific loss following from each measure is the same.

647. The Claimants' claim for damages under NAFTA Article 1105(1) is based on the Respondent's breaches of that provision in the form of measures that were manifestly arbitrary and discriminatory, as detailed in the Memorial and elaborated above in Section IV.B. These measures cumulatively had the effect of destroying the Claimants' investment. Thus, the Claimants have established legal causation between the Respondent's breach of Article 1105(1) and their claimed loss of the value of the Claimants' emission allowances.

648. If the Tribunal were to find that only some of the actions giving rise to the Respondent's breach of Article 1105(1) are unlawful, the Claimants would request that the Tribunal seek further submissions on quantum at that stage. Doing so would be more efficient and avoid unnecessarily increasing the costs of this proceeding by having the Claimants attempt to pre-emptively quantify the damages incurred by the Claimants in all possible scenarios in which the Tribunal could in theory find a breach of Article 1105(1).

C. The Respondent Misconstrues the Claimants' Arguments Concerning the Loss of KS&T's Ontario Emissions Trading Business

649. In the Memorial, the Claimants explained that in order to wipe out the consequences of the Respondent's unlawful conduct, the Claimants should be paid damages corresponding to the fair market value of KS&T's lost Ontario emissions trading business.[1068] The Claimants further explained that, because of the complexities involved in this valuation, in the interests of seeking an efficient and cost-effective resolution of the dispute, the Claimants would not pursue their damages claim for the loss of KS&T's Ontario emissions trading business, while reserving their right to amend their claim to include a claim for KS&T's lost business.[1069]

[1067] *See*, *e.g.*, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 113, **CL-16** ("In this instance, the damages arising under NAFTA, Article 1105 and the compensation due under NAFTA, Article 1110 would be the same since both situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000), para. 318, **CL-64** ("When both Article 1102 and 1105 have been breached, as the Tribunal has found in this case, the usual principle to be applied is that rights and remedies under trade agreements are cumulative unless there is actual conflict between different provisions. The fact that a host Party has breached both Articles 1102 and 1105 cannot be taken to mean that the investor is entitled to less compensation than if only Article 1102 were breached. A host Party does not reduce the extent of its liability by breaching more than one provision of the NAFTA.").

[1068] Claimants' Memorial, paras. 491-492.

[1069] *Id.*, paras. 491-492.

650. In its Counter-Memorial, the Respondent attempts to turn the Claimants' good faith effort to find a cost-efficient resolution to this dispute against them by arguing that the Claimants have not provided the particulars of the loss that KS&T's emissions trading business in Ontario suffered, and therefore their claim must be rejected.[1070] However, the Respondent's argument that the Claimants have failed to support their claim for KS&T's lost business ignores the Claimants' explanation that they have elected not to pursue this claim, and the reasons they gave in that regard.

651. In addition to misconstruing the Claimants' position regarding the damages caused by the loss of KS&T's Ontario emissions trading business, the Respondent presents several technical arguments, evidently hoping to distract from the fact that it has no meaningful response to the loss of the Claimants' investment.[1071]

652. The Respondent first alleges that the "Claimants have not explained how the same allowances can simultaneously be promised to its related entity to satisfy compliance obligations, as well as forming the basis of an 'emissions trading business' in Ontario".[1072] This allegation confirms that the Respondent fundamentally misunderstands the nature of KS&T's business enterprise.[1073] Allowances sold to related entities through arm's length transactions for profit but which also assisted these entities with their compliance obligations formed a critical part of KS&T's emissions trading business in Ontario.[1074] The fact that the allowances were to be transferred to a related entity outside of Ontario does not change the fact that they were purchased from Ontario by an Ontario-registered market participant and CITSS account holder. KS&T's trading business in Ontario included transfers outside of Ontario because Ontario chose to link its system with those of Québec and California. It is ironic that, as explained below, the Respondent argues that the Claimants should have transferred allowances to California to preserve the value of their investment, while at the same time claiming that making such transfers is inconsistent with an investment in Ontario.

653. The Respondent further argues that the Claimants have failed to specify whether the loss of KS&T's Ontario emissions trading business resulted from Article 1110 or 1105(1).[1075] It is clear from the Claimants' discussion of their claims in their Memorial that the loss of KS&T's business followed from the breaches of both Article 1110 and Article 1105(1), both of which served to destroy the value of the Claimant's investment.[1076] This is further elaborated below.

[1070] Respondent's Counter-Memorial, para. 307.

[1071] *Id.*, paras. 307-310.

[1072] *Id.*, para. 309.

[1073] *Id.*, para. 309.

[1074] Claimants' Memorial, paras. 163-165; Witness Statement of Graeme Martin (4 October 2021), paras. 39-43, **CWS-2**.

[1075] Respondent's Counter-Memorial, para. 307.

[1076] *See Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), para. 113, **CL-16** ("In this instance, the damages arising under NAFTA, Article 1105 and the compensation due under NAFTA, Article 1110 would be the same since both

(continued)

654. In regard to Article 1110, the effect of the Respondent's measures was not only such as to expropriate the emission allowances held in KS&T's Ontario CITSS account as of 15 June 2018, but also to destroy KS&T's broader emission trading business in Ontario.[1077] The allowances purchased by KS&T at the May 2018 auction were, as the Claimants have demonstrated, KS&T's property.[1078] KS&T purchased the allowances as a registered market participant in the Ontario Cap and Trade Program and as part of its investment in its broader emission trading business enterprise in Ontario. Ontario first destroyed the entire value of the Claimants' property through its indirect expropriation, then went on to confirm the destruction of value through Regulation 386/18 and the Cancellation Act, destroying KS&T's broader emission trading business in the process.

655. In regard to Article 1105(1), the effect of the Respondent's measures was similarly to destroy the value of the KS&T's business. Ontario abruptly and arbitrarily cancelled the Cap and Trade Program, and cancelled all emissions allowances held in Ontario CITSS accounts, then provided for compensation to participants in an arbitrary and discriminatory manner and denied them access to justice. The sudden termination of the Cap and Trade Program and cancellation of KS&T's allowances held in its Ontario CITSS account rendered worthless KS&T's broader emission trading business in Ontario.

656. Thus, the Claimants are entitled to "full reparation" for the value of KS&T's emission trading business in Ontario, as a result of the Respondent's breaches of Articles 1110 and/or 1105(1). Nevertheless, the Claimants maintain their decision not to claim for this loss, and have focussed instead on the loss of their emissions allowances and costs of taking remedial action.

D. The Claimants Have Established that they are Entitled to Damages for the Costs Incurred by KS&T in Purchasing Replacement Emissions Allowances

657. In its Counter-Memorial, the Respondent argues that the Claimants have failed to establish their loss with respect to their contract with [redacted]. In this regard, the Respondent asserts that the Claimants' evidence is insufficient and that in presenting their claim in the Memorial, the Claimants should have cited to the underlying contract with [redacted] and explained its provisions.[1079]

658. Contrary to the Respondent's allegations, the Claimants have provided evidence of the costs to KS&T to purchase allowances to sell to [redacted] The Claimants' witness

situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment.").

[1077] Claimants' Memorial, para. 402 ("The effect of Ontario's actions was not only such as to expropriate the carbon allowances held in KS&T's Ontario CITSS account as of 15 June 2018, but also to destroy KS&T's broader carbon trading business in Ontario."), para. 409 (same).

[1078] *See* Sub-Section III.B.1.

[1079] Respondent's Counter-Memorial, para. 312.

Frank King described the purchase of the replacement allowances in his first witness statement, including the submission of Exhibit C-146 by the Claimants as evidence of this purchase, explaining that this exhibit contains extracts of the raw data downloaded from the Claimants' CITSS accounts and from Symphony (their internal records system), as well as calculations to demonstrate the total allowances transferred and total price paid.[1080] Frank King further elaborates on the process of purchasing the replacement allowances in his second witness statement.[1081]

659. The Respondent dismisses this evidence on the grounds that it was "prepared for the purposes of this arbitration".[1082] This is a baseless critique. As Frank King confirms in his second witness statement, the Claimants have not manipulated this evidence in any manner. It is a record of the details of the purchase that confirms the total allowances transferred and price paid.[1083]

660. The Respondent suggests that the Claimants should instead have cited to KS&T's contract with ███ and explained whether the parties acted in accordance with its terms.[1084] To the contrary, that contract does not show the replacement cost of the allowances that the Claimants were forced to purchase on account of the Respondent's unlawful actions, which is the pertinent issue here, and which is documented in Exhibit C-146. The Claimants did not discuss the specific provision of the underlying contract cited by the Respondent because the purchase did not implicate that provision, as Frank King explains in his second witness statement.[1085]

E. The Claimants' Evidence of the Costs Incurred in Taking Remedial Action in Response to the Respondent's Unlawful Measures Stands Unrebutted

661. The Respondent's efforts to deny the Claimants compensation for costs reasonably incurred in taking remedial action likewise fall short. At the outset, the Claimants observe that the Respondent's assertion that "[l]obbying costs fall outside the full reparation standard" is unsupported.[1086] By contrast, the Claimants' claim is well supported by the jurisprudence cited in their Memorial, which the Respondent ignores.[1087]

662. Moreover, contrary to the Respondent's contention, the Claimants have established causation with respect to their claim for the costs they incurred in taking remedial action. As detailed in their Memorial, the Claimants incurred significant management, administrative, overhead and legal costs, including the costs of an

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[1080] Claimants' Memorial, para. 498 and nn. 597, 598.

[1081] Second Witness Statement of Frank King (17 July 2022), para. 38, **CWS-6**.

[1082] Respondent's Counter-Memorial, para. 312.

[1083] Second Witness Statement of Frank King (17 July 2022), para. 36, **CWS-6**.

[1084] Respondent's Counter-Memorial, para. 312 and n. 572.

[1085] Second Witness Statement of Frank King (16 July 2022), para. 39, **CWS-6**.

[1086] Respondent's Counter-Memorial, para. 313.

[1087] Claimants' Memorial, paras. 506-508.

external consultant, external Canadian counsel, and initial legal counsel in preparing their claim.[1088] The Claimants expended these additional funds in an effort to eliminate or at least mitigate the impact of Ontario's illegal measures on the value of their investment. These expenditures were incurred directly in response to Ontario's illegal measures and would not otherwise have been required. As such, they are directly causally linked to Ontario's illegal measures and there is no principled basis to exclude them.

663. In an attempt to deny the Claimants full reparation for the harm Ontario caused, and for which it is responsible under the NAFTA, the Respondent argues that the Claimants have failed to prove causation with respect to remedial costs because "[i]t is not reasonable to assume that the but-for scenario is one in which the Ontario government did not exercise its sovereign right to change its policy direction and cancel the cap and trade program. Nor is it reasonable to assume that the but-for scenario is one in which the Claimants obtain compensation from a process that expressly excluded them from participating in the first place."[1089] The Respondent's articulation of the "but for" scenario is not the scenario underlying the Claimants' damages claim.

664. The Claimants do not and have not questioned Ontario's sovereign right to change its policy direction. As the Respondent has acknowledged, "[t]he Claimants do not allege that Ontario withdrawing from cap and trade in and of itself is a violation of NAFTA Article 1105..."[1090] Rather, what underlies the Claimants' damages claim is the *unlawful* manner in which the Respondent cancelled the Cap and Trade Program and arbitrarily discriminated against market participants and denied them access to justice, not the decision to withdraw in and of itself.[1091] Thus, the correct "but for" scenario is one in which Ontario did not breach its international legal obligations in cancelling the Cap and Trade Program. Specifically, but for Ontario's unlawful actions, Ontario would have:

- Provided 12 months' notice of its withdrawal from the OQC Agreement and endeavoured to withdraw toward the end of the first compliance period, scheduled to terminate on 31 December 2020, thereby avoiding the need for Québec and California to immediately freeze all transfers of allowances from Ontario;

- Developed an orderly withdrawal process in consultation with its WCI partners and participants in the Ontario Cap and Trade Program intended to avoid market disruption and the need for any freezes on allowance transfers;[1092]

[1088] *Id.*, para. 503.

[1089] Respondent's Counter-Memorial, para. 314.

[1090] *Id.*, n. 565.

[1091] *See* para. 432 *supra*.

[1092] As Professor Stavins explains in his first report, such a pathway was open to Ontario. Expert Report of Dr. Robert Stavins (5 October 2021), paras. 120-121, **CER-1**.

- Adopted a framework to compensate participants for any allowances remaining in their Ontario CITSS accounts upon Ontario's withdrawal from the OQC Agreement that did not discriminate against market participants;

- Compensated the Claimants for the value of any allowances remaining in their Ontario CITSS account upon Ontario's withdrawal from the OQC Agreement;

- Provided access to the Claimants to the Ontario courts and/or an administrative review process that provided for an avenue to appeal any decision to deny the Claimants compensation in whole or in part for any allowances remaining in their Ontario CITSS account; and

- Accorded procedural and substantive due process to the Claimants by meaningfully engaging with any efforts by the Claimants to ensure they would be compensated for the value of any allowances remaining in their Ontario CITSS account under the applicable compensation framework.

665. Ultimately, the Claimants do not see how it can be unreasonable to claim for losses that indisputably would not have been incurred had Ontario acted in accordance with its legal obligations in cancelling the Cap and Trade Program and withdrawn in an orderly manner, without discriminating against the very same market participants it had invited to join the Program so as to reap the benefits of their participation, rather than in the reckless, irresponsible and unlawful manner in which it did.

666. Further, the Respondent argues that the Claimants' claim for their remedial costs should nevertheless be rejected because "[the] Claimants have failed to identify the relevant persons, entities, and activities for which they now claim reimbursement from Canada."[1093] This is incorrect. The Claimants provided in Exhibits C-155 to C-160 the invoices for the costs incurred in relation to their external lobby consultant, external Canadian counsel, and initial NAFTA legal counsel. The Claimants explained in relation to this evidence that they had redacted the name of the external lobbying consultant and external Canadian legal counsel retained by KS&T at the lobbyist's and counsel's request, and that such information is irrelevant in any event to the question of costs incurred.[1094] The Respondent has not offered any reason why the names of the specific lobbyist or counsel must be disclosed in order for the Tribunal to properly evaluate the costs incurred by the Claimants in engaging these individuals, which are clearly documented in Exhibits C-155 to C-160.

F. The Respondent is Responsible for the Losses Caused by Its Unlawful Measures in their Entirety

667. Next, the Respondent seeks to evade full liability to the Claimants by engaging in an outrageous attempt at victim-blaming, essentially arguing that the Claimants should have terminated their business in Ontario prior to Ontario's abrupt announcement that it would be serving notice of its withdrawal from the OQC Agreement and the WCI, and taking immediate steps to withdraw from future auctions, triggering the

[1093] Respondent's Counter-Memorial, para. 313.

[1094] Claimants' Memorial, nn. 601 and 602.

immediate freeze on allowances transfers external to Ontario and *de facto* internal to the Province. As will be seen, this argument is unfounded.

668. At the outset, the Claimants recall that they acted expeditiously and reasonably to mitigate their loss by purchasing replacement allowances. As explained in the Memorial and in the witness statement of Frank King,[1095] the Claimants entered into an arrangement with a third-party seller to purchase the necessary allowances at the market price. They did not simply sit on their hands and later seek to have the Respondent held responsible for damages flowing from a breach of contract caused by its actions.

669. The Respondent ignores this, and proposes three courses of action that the Claimants could have purportedly taken to mitigate their losses, none which were reasonably available to the Claimants. Specifically, the Respondent asserts that: KS&T could have bid in the May 2018 auction from its California CITSS account; KS&T could have transferred their emission allowances to their California CITSS account at any time between 11 June and 15 June; and KS&T could have transferred the allowances to related entities.[1096] Each of these assertions is without merit.

670. First, the Claimants acted reasonably in bidding from their Ontario CITSS account. The parties are agreed that: the announcement for the 2018 general election in Ontario was made on 8 May 2018;[1097] the auction was held on 15 May 2018;[1098] and the election itself concluded on 7 June 2018.[1099] Thus, at the time that the Claimants participated in the auction, the election had not concluded.[1100] The new government would not be sworn in until 29 June 2018, and no substantial policy change legally could be enacted until then.[1101] Further, as noted above, Ontario had committed in the OQC Agreement to endeavour to provide no less than 12 months' notice if it decided to withdraw from the Agreement.[1102] Thus, the Claimants had a legitimate expectation that they would have a sufficient period of time after the May 2018 auction to deal with their allowances, regardless of the Progressive Conservative Party's election platform (which set out no details of the precipitous and illegal manner in which the Cap and Trade Program in fact was terminated). In any event,

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[1095] *Id*., para. 208; Witness Statement of Frank King (6 October 2021) paras. 35-37, and n. 34, **CWS-4**; ███ Trades Extract, **Exh. C-146**; Second Witness Statement of Frank King (17 July 2022), paras. 36-39, **CWS-6**.

[1096] Respondent's Counter-Memorial, paras. 321-324.

[1097] *Id*., para. 66.

[1098] Claimants' Memorial, para. 180; Respondent's Counter-Memorial, paras. 72-73.

[1099] Respondent's Counter-Memorial, para. 66; **Exh. R-30**; Claimants' Memorial, para. 185.

[1100] Respondent's Counter-Memorial, para. 73.

[1101] *See* Sub-Section II.C.1 (discussing permissible actions prior to the swearing in of the Premier-elect).

[1102] Claimants' Memorial, para. 63; Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec (22 September 2017), Article 17, **CL-8**.

the electoral landscape for the June 2018 election was more uncertain and competitive than that alleged by the Respondent as the foundation for this argument.[1103]

671. It is particularly unreasonable for the Respondent to argue that the Claimants, registered market participants in *Ontario's* Cap and Trade Program, should have simply decided to bid from their *California* CITSS account. The Claimants invested significant time and energy in setting up their Ontario CITSS account at the invitation of the Respondent. Now the Respondent proposes that to mitigate its losses, the Claimants should have decided not to capitalize on that investment but rather pre-emptively abandon it. That is an unreasonable proposal, unsupported by the facts at the time.

672. In the circumstances, the Claimants did not act imprudently by bidding from their Ontario account in the May 2018 auction.

673. Second, it is unreasonable for the Respondent, with the benefit of hindsight, to demand that the Claimants should have transferred the allowances within four days of receiving them. It should be borne in mind that the Respondent's contributory negligence arguments necessarily arise only if the Respondent is found to have breached its obligations: yet, the Respondent is entirely wrong to (implicitly) assert that the Claimants should have guessed on 11 June that Ontario would breach its obligations. For the reasons stated above, the Claimants' legitimate understanding at the time was that there was no immediate urgency to transfer the allowances abroad even after the election had concluded.[1104] Frank King confirms this in his reply witness statement:

> We didn't have any specific incentive to transfer allowances at this time, given our understanding that any transition away from Cap and Trade would be orderly; our knowledge that Ontario had committed to providing California and Québec a year's notice of its intention to withdraw from the linkage; and the absence of any specific details in the Ontario election campaign suggesting that the Program would be thrown out in the hasty and discriminatory way it was.[1105]

674. This is victim-blaming, pure and simple. Based on the information available to them at the time, the Claimants cannot be faulted for not jumping ship prior to 15 June. In the circumstances, the Claimants did not act imprudently by not transferring their allowances before 15 June.

[1103] *See* Respondent's Counter-Memorial, para. 322, where the Respondent does not cite any source to substantiate its assertion that the Progressive Conservative Party "was widely forecast to win the election set for June 7". The Claimants' witnesses have given evidence which challenges that account: see Witness Statement of Paul Brown (5 October 2021), para. 36, **CWS-3**; ClearBlue Markets, WCI Cap & Trade Special Market Report, WCI Cap & Trade in the crosshairs of the Ontario election, June 6, 2018, **Exh. MB-020** (which shows that between 1 and 15 May (the auction date), the Progressive Conservative Party was losing support whereas the New Democratic Party were experiencing a "surge" of support).

[1104] *See* paras. 176-177 *supra*.

[1105] Second Witness Statement of Frank King (18 July 2022), para. 44, **CWS-6.**

675. Third, the Respondent's assertion that KS&T should have transferred the allowances to related entities is also without merit. In the first place, following 15 June 2018, KS&T could not transfer to related entities outside of Ontario. Further, as Frank King explains in his reply witness statement, "KS&T had no reason to think it should transfer allowances to such entities, regardless of their actual compliance needs. [T]he courses of action Respondent claims KS&T should have taken all assume Koch would have believed that Ontario would effect program termination in an arbitrary and discriminatory manner, when instead Koch took Ontario on its word that the program winddown would be orderly."[1106]

676. To the extent the Respondent is alleging that a transfer should have been effected to a related Ontario-based entity so as to bring KS&T's allowances within the sphere of the compensation regime (which is far from clear), this too would be unfounded: first, KS&T had no reason to expect that Ontario would adopt a compensation framework that provided compensation to mandatory participants only; and second, it had no guarantee that full compensation for the purchased allowances would have been awarded to any related entity that could have theoretically received the allowances even under the framework that was ultimately adopted. As Dr. Stavins has demonstrated in his expert reports, the compensation methodology deployed by Ontario pursuant to the Cancellation Act and accompanying regulation involved an arbitrary "matching" process that discriminated among similarly situated firms, denying some full compensation for allowances purchased.[1107]

677. In the circumstances, the Claimants did not act imprudently by not transferring their allowances to a related entity.

678. Accordingly, the Respondent's demand to reduce its liability to the Claimants must be rejected. It is the Respondent who is responsible for the losses, not the Claimants.

G. The Respondent Has Failed to Rebut the Claimants' Request for Interest

679. In their Memorial, the Claimants detailed the basis for their claim for interest at a rate of 5%, compounded annually from the date of breach (15 June 2018) until the date of payment.[1108] As the Claimants demonstrated, their claimed rate is well-supported by investment treaty tribunals and international courts. In this regard, the Claimants pointed out that the Respondent has typically been ordered to pay a compound interest rate in the region of 5-6% where NAFTA claims have been upheld against it, and that the Respondent itself has previously advocated a rate of 5% by reference to its statutory rate.[1109]

[1106] *Id.*, para. 45**.**

[1107] Expert Report of Dr. Robert Stavins (5 October 2021), paras. 132-133, **CER-1**.

[1108] As the Claimants have explained, although KS&T generated an average return on capital consumed of 23%, they are willing to accept a compound rate of 5% in order to narrow the range of issues in this dispute. Claimants' Memorial, para. 531.

[1109] *Id.*, para. 533.

680. In response to the Claimants' detailed arguments, the Respondent has provided just two short paragraphs in response. In essence, the Respondent makes three points. First, it makes a bare assertion that the Claimants have failed to meet their burden of proof, but there is no indication of how the detailed analysis in the Memorial is somehow lacking. Second, the Respondent asserts that simple interest is sufficient to ensure the Claimants are fully compensated for their loss due to the Respondent's expropriation of their investment, but it cites no jurisprudence in support of this position, and completely ignores the ample authority to the contrary cited in the Memorial.[1110] Third, the Respondent repeats its position that no damages whatsoever are owed for the Respondent's breach of the minimum standard of treatment, and asserts that interest cannot be awarded either; for the reasons explained above, the Claimants have established their claim for damages with respect to the Respondent's breaches of both NAFTA Articles 1110 and 1105(1).

681. Thus, the substance of the Claimants' request for interest at a rate of 5% compounded annually for all damages sought stands unrebutted.

H. Conclusion on Damages

682. For the reasons stated, the Respondent's arguments on damages must fail. Thus, the Claimants maintain their claim to damages. As set forth in the Memorial, the value of the loss claimed by the Claimants for the Respondent's breaches of Articles 1105(1) and 1110 is USD 30,528,785.89 for the expropriated emission allowances, [redacted] in relation to [redacted], and [redacted] in [redacted], for an overall total of USD 31,322,474.62 (plus interest and arbitration costs).

VI. RELIEF REQUESTED

683. The Respondent has failed to answer the Claimants' case as presented in their Memorial. In any event, as set forth above, the Claimants have comprehensively rebutted its Counter-Memorial on every level.

684. Accordingly, maintaining the request for relief set out in their Memorial, the Claimants respectfully request that the Tribunal render an Award:

a. Declaring the Tribunal as having jurisdiction *ratione materiae* pursuant to the NAFTA (and, in the alternative, concurrently pursuant to both the NAFTA and the ICSID Convention) to adjudicate the Claimants' claims against the Respondent;

b. Declaring the Respondent in breach of NAFTA Articles 1105(1) and 1110 in light of the impugned measures;

c. Awarding monetary damages to Koch and to KS&T pursuant to Article 1116 in the amount of USD 31,322,474.62 for all injuries and losses by reason of, or arising out of, Canada's breaches of NAFTA Articles 1105(1) and 1110;

[1110] *Id.*, paras. 524-528.

d. Awarding pre- and post-Award compound interest on the amount of damages awarded, at a rate of 5%, compounded annually;

e. Awarding compensation to the Claimants for all of their costs of the arbitration and costs of legal representation, plus compound interest thereon at the same rate and interval as on the damages; and

f. Granting such other relief as the Tribunal may deem just.

Dated: 18 July 2022
London, UK

Respectfully submitted,

Steptoe & Johnson, UK LLP
Christophe Bondy