Public Version

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Koch Industries, Inc. and Koch Supply & Trading, LP

v.

Government of Canada

(ICSID Case No. ARB/20/52)

GOVERNMENT OF CANADA

POST-HEARING SUBMISSION

January 19, 2023

Trade Law Bureau
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CANADA

1. By letter dated December 13, 2022, the Tribunal instructed the disputing parties to submit post-hearing briefs addressing: "the evidence given at the Hearing and any conclusions drawn from such evidence relevant to each Party's case." Canada has cleaved to this instruction, focusing on evidence newly adduced at the hearing (as opposed to already on the record in witness statements, expert reports, and exhibits) that is truly evidence (as opposed to lengthy and often misleading characterizations by the Claimants).

2. Canada's post-hearing submission follows the structure of its Opening presentation.[1] After showing that the Claimants continued to inaccurately portray the regulatory context of the alleged investments in **Part I**, Canada then explains that the Claimants have failed to discharge their burden to establish that KS&T held any investments under NAFTA Chapter Eleven (**Part II**),[2] that the June 15, 2018 press release constitutes a "measure" (**Part III**), that Canada breached NAFTA Chapter Eleven (**Part IV**), or that they are entitled to damages (**Part V**).

I. The Claimants Continue to Misconstrue the Regulatory Context of the Alleged Investments

A. The Evidence at the Hearing Confirmed that the "Market Mechanism", Which Included Auctions, Was a Means to a Regulatory End

3. At the hearing, the Claimants maintained their inaccurate portrayal of the market mechanism that supported the Ontario cap and trade program and improperly characterized it as the purpose of the *Climate Change Act*. The Claimants continue to be wrong on both points.

4. First, the Claimants have consistently downplayed the primary market mechanism in the Ontario cap and trade program: auctions. Auctions were the main mechanism by which emission allowances were distributed to compliance entities. As Mr. Litz explained: "The allowance auction is a core element of program design and implementation because it is a highly efficient way to get

[1] **RD-001**, Canada's Opening Presentation, 5 December 2022.

[2] At the hearing, the Claimants did not elicit any evidence relevant to the Tribunal's lack of jurisdiction *ratione personae* over one of the two Claimants in this arbitration, Koch Industries. As set out in Canada's Counter-Memorial (¶¶ 172-174) and Rejoinder (¶¶ 172-176), the Claimants have not met that burden and the Tribunal must decline jurisdiction over Koch Industries. Nor have the Claimants established jurisdiction *ratione materiae* with respect to Koch Industries. *See* Canada's Counter-Memorial, ¶¶ 165-169; Canada's Rejoinder, ¶¶ 168-171.

allowances into the hands of compliance entities who need them."[3] Indeed, Mr. Litz confirmed that "over time, the regular auctions allow compliance entities to tailor their auction participation to reflect changes in their business operations."[4]

5. Canada acknowledges that the secondary market had a role to play in the Ontario cap and trade program. However, that role must be understood in light of the primacy of auctions as an efficient market mechanism for the allocation of emission allowances.[5] Similarly, although entities without compliance obligations were able to participate in the cap and trade program, they were not at its core, including with respect to trading activity. As Mr. Litz pointed out, Professor Stavins' emphasis on the importance of market participants was predicated on the assumption that compliance entities were unwilling to trade – [redacted]

6. Second, the Claimants erroneously equate the "market mechanism" with the "secondary market" – and then take a step further, insisting that the market mechanism was itself the purpose of the *Climate Change Act*.[7] The hearing evidence confirmed that the market mechanism was not the purpose of the *Act* or indeed of the cap and trade program. Rather, it was a means to achieve the regulatory objectives of the *Act*: to change Ontarians' behaviour so as to reduce greenhouse gas ("GHG") emissions.[8] Emission allowances "would have to be tradable to achieve regulatory

[3] **Day 4 Transcript**, Litz, p. 1108:11-14.

[4] **Day 4 Transcript**, Bondy/Litz, p. 1133:9-11; Day 4 Transcript, Litz, p. 1110:18-20.

[5] **Day 4 Transcript**, Litz, p. 1108:6-10 ("As I detail in my reports, more recent North American Cap and Trade Programs have largely chosen to auction allowances as the primary means of allowance distribution. This is true for WCI jurisdictions, including Ontario as well."); **Day 4 Transcript**, Litz, p. 1117:1-4 ("The secondary market is important because it enables compliance entities to obtain allowances that they need to cover their emissions, that they were unable to attend – to obtain in the primary market.")

[6] **Day 4 Transcript**, Bondy/Litz, pp. 1167:16-1168:6 ("I think the data from Ontario [redacted]) *See also* **Day 4 Transcript**, Bondy/Litz, pp. 1171:22-1172:13 ([redacted]); **Day 4 Transcript**, Bondy/Litz, pp. 1166:20 to p. 1167:6 ("I mean, when we look at the numbers again, we have, in participation in the auction in Ontario, over 90 percent of the allowances on average purchased by compliance entities, [redacted]

[7] **Day 1 Transcript**, Bondy, pp. 13:12-16, 294:11-15, 295:11-14. The Claimants' persistent attempts to equate the *Climate Change Act* and *Regulation 144/16* – for example, by referring to a non-existent "Cap and Trade Act" – must be rejected. *See, e.g.*, **Day 1 Transcript**, Bondy, pp. 32:10, 39:7-8, 40:21, 83:19, 84:15-16, 87:10-11, 299:1 and **Day 2 Transcript**, Bondy, p. 312:2-3.

[8] **R-006**, *Climate Change Act*, s. 2.

objectives by the means that the policymakers have chosen, which is a market mechanism."[9] But both from the perspective of WCI system design in general[10] and the Ontario cap and trade program in particular,[11] trading in emission allowances was not an end in itself.

B. The Evidence at the Hearing Confirmed that the CITSS System Recorded All Transfers of Emission Allowances

7. At the hearing, the Claimants suggested that that the Compliance Instrument Tracking System Service ("CITSS") "didn't reflect the trades"[12] and that CITSS data "is only capturing… a fraction of the total trades during that period."[13] They are incorrect.

8. The CITSS recorded "all movements of emission allowances from one registered participants' CITSS account to another registered participants' CITSS account", whether or not the movement occurred on the primary market or resulted from an over-the-counter ("OTC") transaction or from physical settlement of a trade on an exchange such as the Intercontinental Exchange ("ICE").[14] Indeed, trading in emission allowances was only possible within the CITSS. As Mr. Litz said, "allowances don't exist except in the tracking system; right? […] Nor can one transfer allowances from one account holder to another outside of the tracking system. It has to happen in CITSS."[15]

9. Participants were free to enter into contracts agreeing to trade emission allowances on a certain date at a certain price in the future, but as Mr. Litz explained, if those contracts were actually performed, the trading data would appear in CITSS.[16] The CITSS system was a "pretty good indicator of what's going on".[17] In short, CITSS recorded all primary and secondary market transfers of emission allowances.

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[9] **Day 4 Transcript**, Bondy/Katz, p. 1021:4-8.
[10] **RER-4**, Litz – Second Expert Report, ¶ 3.
[11] **Day 4 Transcript**, Katz, pp. 888:7-21.
[12] **Day 4 Transcript**, Bondy/Litz, p. 1173:7-13.
[13] **Day 4 Transcript**, Bondy/Litz, p. 1174:21-22. 1173:7-13
[14] **RWS-4**, Ramlal – Second Witness Statement, ¶ 42.
[15] **Day 4 Transcript**, Bondy/Litz, 1173:15-21.
[16] **Day 4 Transcript**, Dosman/Litz, p. 1224:2-8; *see also* **Day 4 Transcript**, Litz, pp. 1228:19-1229:20.
[17] **Day 4 Transcript**, Bondy/Litz, p. 1176:4-9.

C. The Evidence at the Hearing Confirmed that Harmonization Did Not Change Each Jurisdiction's Sovereignty Over Its Own Program

10. The hearing confirmed that harmonization recognized both the international nature of the challenge of climate change while respecting and maintaining the primacy of each program's laws and regulations.

11. As Ontario recognized through its participation in the WCI design process and in the *Act*, responding to climate change requires action by multiple jurisdictions.[18] One of the purposes of the *Climate Change Act* was to allow Ontario to "collaborate and coordinate" with other like-minded jurisdictions seeking to reduce greenhouse gas emissions.[19] In particular, the cap and trade program was designed to allow for harmonization with other WCI jurisdictions.

12. What harmonization did not do, however, was to merge the three jurisdictions' programs or alter each jurisdiction's powers over its own program, as is clear from the agreement itself.[20] At the hearing, the Claimants left unanswered evidence that the agreement "did not link the three programs" and that the intent of the agreement was to "endeavour to continue coordinating… as each jurisdiction moved forward managing its own program".[21] Mr. Litz confirmed that, "The way that we knew that the linking would occur was the language and rules duly adopted in each of the jurisdictions."[22]

13. The Claimants chose to ignore this evidence. They even asserted that California, Quebec, and Ontario were "the same jurisdiction".[23] At the hearing, the Claimants' witness Mr. Martin acknowledged the opposite – that each of Ontario's, California's, and Quebec's cap and trade programs was subject to different rules.[24]

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[18] **R-006**, *Climate Change Act*, Preamble, 8th paragraph.

[19] **R-006**, *Climate Change Act*, s. 2(1)(b).

[20] **Day 1 Transcript**, Dosman, p. 169:18-21; **RD-001**, Canada's Opening Presentation, Slide 26; **NR-006**, Harmonization Agreement, Preamble.

[21] **Day 1 Transcript**, Dosman, p. 170:6-11; **RD-001**, Canada's Opening Presentation, Slide 28; **R-076**, *United States v. California*, Declaration of Rajinder Sahota, ¶¶ 66-67, 70.

[22] **Day 4 Transcript**, Bondy/Litz, p. 1177:19-21.

[23] **Day 1 Transcript**, Bondy, pp. 291:22-292:4.

[24] **Day 2 Transcript**, Zeman/Martin, p. 321:8-12.

II. The Claimants Have Not Established that They Had Protected Investments

14. The hearing confirmed that the Claimants have not met their burden to establish the Tribunal's jurisdiction. As at the hearing, Canada focuses its comments on the evidence pertaining to whether the Tribunal has jurisdiction *ratione materiae* with respect to KS&T under the NAFTA.[25] Indeed, the evidence at the hearing centered on KS&T and its alleged investments.

15. The Claimants continued to lack precision in their articulation of KS&T's alleged investments, referring repeatedly to KS&T's trading activity as "enterprise activity",[26] and its "engagement in the Ontario cap-and-trade market" as "part of an ongoing enterprise investment".[27] Canada has never denied that KS&T conducted business activities (including trades), or that it was an enterprise. Instead, Canada has posited, and the evidence establishes, that KS&T conducted its business activities from, and was an enterprise formed in, the United States. Not all business activities are captured by the definition of investment in NAFTA Article 1139, and the Claimants have failed to find a category of investment that fits.

A. The Evidence at the Hearing Confirmed that the Claimants Have Failed to Establish that Emission Allowances Are Property Under NAFTA Article 1139(g)

16. At the hearing, the disputing parties confirmed their agreement that recourse to Ontario law is necessary for the Tribunal to determine whether the emission allowances that KS&T purchased in the May 2018 auction constitute "property" that qualifies as an investment under NAFTA Article 1139(g).[28] The disputing parties further confirmed their agreement that no Ontario court has addressed the issue.[29] Accordingly, as Canada explained at the hearing, the vast majority of the

[25] Issue A.1 from the Parties' Joint Submission on Dramatis Personae, Chronology and Issues (1 December 2022) reads in full: "Whether the Tribunal has jurisdiction *ratione materiae* with respect to KS&T under the NAFTA, and in particular: a. whether the emission allowances held by KS&T constitute 'property' under NAFTA Article 1139(g). b. whether KS&T held 'interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory' under NAFTA Article 1139(h)." The hearing evidence reaffirmed Canada's position with respect to the Tribunal's lack of jurisdiction under the ICSID Convention. *See* Canada's Counter-Memorial, ¶¶ 117-130; Canada's Rejoinder, ¶¶ 98-120.

[26] **Day 1 Transcript**, Bondy, pp. 37:3-4 and 45:2-4.

[27] **Day 1 Transcript**, Bondy, p. 28:9-11.

[28] **Day 1 Transcript**, Genest, p. 81:10-12; **Day 1 Transcript**, Zeman, p. 198:7-12.

[29] **Day 3 Transcript**, Kuuskne/de Beer, p. 736:20-21 ("A. What a court would do is simply put an open question."); **Day 4 Transcript**, Katz, p. 887:1-4 ("There is no legal authority in Ontario that would allow me to assert as a clear, factual matter that emission allowances currently have the legal status of property rights in Ontario.")

evidence before the Tribunal pertains to the speculative task of ascertaining whether an Ontario court *might* find emission allowances to be property.[30] This Tribunal cannot base its jurisdiction on speculation. It must decide whether the Claimants have discharged their burden to establish jurisdiction under NAFTA Article 1139(g), and thus have provided sufficient persuasive evidence to establish that emission allowances are property under Ontario law.

17. While the hearing confirmed that Professors Katz and de Beer agree on certain aspects of the appropriate analysis, in many instances they continue to put forward competing interpretations of various provisions of the *Climate Change Act* and case law, and views as to the consequences of both for the property analysis in this case. Professor Katz's approach is correct on both methodology and substance, and demonstrates that the Claimants have failed to discharge their burden. The Tribunal should accept Professor Katz's expert evidence. However, in the event the Tribunal finds both experts' explanations equally plausible, the Claimants have still failed to meet their burden. If the answer is inconclusive under Ontario law, the Tribunal does not have jurisdiction under NAFTA Article 1139(g).

18. Canada addresses the evidence establishing and applying the correct methodological approach.

1. The Correct Methodological Approach

19. The hearing confirmed three points with respect to the methodological approach an Ontario court would likely take to the question of whether emission allowances are property under Ontario law.

20. First, in Ontario, "what counts as property" is determined by the law, not by "commercial realities", "ordinary intuition", or "common sense".[31] This stands in contrast to the approach taken by the experts put forward by the Claimants. For example, Professor de Beer explained that he took "a very common sense view" of the question,[32] and Professor Mehling admitted repeatedly that his discussion of Professor Katz's property law analysis was concerned with common sense, rather than

[30] **Day 1 Transcript**, Zeman, p. 202:2-10.

[31] *See* **Day 4 Transcript**, Katz, pp. 878:18-20 and 880:12-14.

[32] *See e.g.*, **Day 3 Transcript**, Kuuskne/de Beer, p. 659:5-7.

legal principles.[33] While the Claimants attempted to cast Canada as "trying to make this [property] point extremely complex and somehow beyond this Tribunal",[34] their own expert confirmed that "property law is complex, nebulous".[35]

21. Second, the "meaning of property is not reducible to a single test in a single case, or even two cases, nor is it frozen for all statutory or other legal purposes by a single Court of Appeal decision, or Supreme Court of Canada decision that interprets the statutory meaning of property for the purposes of that particular statutory context."[36] The Claimants and Professor de Beer continued at the hearing to mistake the Supreme Court of Canada's summary of its Stage Two analysis in one paragraph in *Saulnier* as a standalone "test" for property that can be carbon-copied in any other case.[37]

22. Professor Katz confirmed in her testimony that the approach she set out in her reports is drawn from "what Canadian courts actually do."[38] The essence of that approach is: "In the absence of a legislative declaration, does this statutory creature, given its nature and character, have the common law attributes of property? Or, if the question arises in the context of Ontario or Federal legislation, does the novel interest have sufficient common law attributes for the purposes of a particular statute."[39] This approach was taken by both the Supreme Court of Canada in *Saulnier*[40] and the Ontario Court of Appeal in *Tucows*,[41] and would be taken by an Ontario court considering the

[33] **Day 3 Transcript**, Zeman/Mehling, pp. 801:1-804:5.

[34] **Day 1 Transcript**, Bondy, p. 292:19-21.

[35] **Day 3 Transcript**, Zeman/Mehling, p. 863:6-9.

[36] **Day 4 Transcript**, Katz, pp. 880:19-881:3.

[37] *See e.g.*, **Day 1 Transcript**, Genest, pp. 82:13-83:3; **Day 3 Transcript**, de Beer, pp. 642:4-643:8. Paragraph 43 of *Saulnier* is not laying out a test for property that is whether or not emission allowances grant their holders "a good deal more than that which is otherwise illegal"; it is describing the substance of what the *Fisheries Act* conferred on the holder of a fishing licence, at Stage Two of its analysis. *See* **LK-19**, *Saulnier v Royal Bank of Canada*, [2008] 3 SCR 166 ("*Saulnier*"), ¶ 43.

[38] **Day 4 Transcript**, Katz, p. 885:5-8 ("Now, you heard yesterday that I created these three stages; however, this is what Canadian courts actually do. I break these down for ease of understanding into the three stages.")

[39] **Day 4 Transcript**, Katz, p. 883:7-13; **RER-1**, Katz – First Expert Report, ¶ 16; **RER-3**, Katz – Second Expert Report, ¶¶ 4, 11-12.

[40] **LK-19**, *Saulnier*, ¶ 43.

[41] **LK-7**, *Tucows.com Co. v. Lojas Renner S.A.*, 2011 ONCA 548 ("*Tucows*"), ¶¶ 55-56

question of whether emission allowances constitute property. As Professor Katz explained, this "is not a presumption against property, but it's a description of what Ontario courts do."[42]

23. Third, Professor Mehling's evidence would be of limited relevance to an Ontario court's analysis of an Ontario statute under Ontario property law, and is thus of limited relevance to the Tribunal's task in this case. As Professor Mehling agreed, the question is a domestic property law question that is jurisdiction-specific.[43] His instruction was based on *Tucows,*[44] where the Ontario Court of Appeal surveyed certain other jurisdictions' treatment of domain names as property or not, and was critical of the fact that "most of the jurisprudence to which [it had] referred [did] not consider the attributes of property in any depth."[45] Ultimately, the Court found that "to properly determine" whether an interest constitutes property, "it is necessary to consider the attributes of property for the purposes of the rule and whether a domain name has those attributes."[46]

24. Applying the Ontario Court of Appeal's guidance, Professor Mehling's evidence does not assist the Tribunal. Unlike in *Tucows,* where the court identified that a "consensus" surrounding the issue of domain names as property rights had emerged, Professor Mehling confirmed that there remains wide variation in the approach to the legal question raised in this case across jurisdictions.[47] The variety of language that different legislators use when establishing their cap and trade programs requires a very careful look at the legislative schemes as a whole, and decreases the utility of direct comparisons almost entirely.[48] Even Professor Mehling, the purported expert in "the design and implementation of emissions trading systems",[49] admitted he misunderstood the language of one the emissions trading systems he cited.[50]

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[42] **Day 4 Transcript**, Katz, p. 883:19-21.

[43] **Day 3 Transcript**, Zeman/Mehling, p. 791:10-17. *See also* **Day 4 Transcript**, Katz, p. 898:7-10.

[44] **Day 3 Transcript**, Zeman/Mehling, pp. 804:7-809:10. *See also* **CER-4**, Mehling – Expert Report, 15 July 2022, ¶ 9.

[45] **LK-7**, *Tucows*, ¶ 55.

[46] **LK-7**, *Tucows*, ¶ 55.

[47] **Day 3 Transcript**, Zeman/Mehling, p. 810:5-16.

[48] *See e.g.* **Day 3 Transcript**, Zeman/Mehling, p. 811-821.

[49] **Day 3 Transcript**, Zeman/Mehling, pp. 788:20-789:1.

[50] **Day 3 Transcript**, Zeman/Mehling, p. 838:11-21 (at line 19: "A. … When navigating 12 different regulatory frameworks and 'units' tends to have one meaning, I really misunderstood the use of unit."). For the full exchange, *see* **Day 3 Transcript**, Zeman/Mehling, pp. 835:16-838:21.

25. Nor does Professor Mehling's discussion of judicial decisions meet the standard set out by *Tucows*. Other than *Armstrong*,[51] no other court at any level has either addressed the question of whether emission allowances are property,[52] or considered the attributes of property in any depth.[53] With respect to *Armstrong*, Professor Mehling's views must be rejected he refers to himself as a "layman" with respect to them, and admitted both that he ignored "intricate questions" that "were not relevant for [him] to make the argument [he] wanted to make"[54] and that his conclusions "may be erroneous".[55] The Claimants and Professor de Beer also suffer from myopia in their reading of *Armstrong*, focusing on paragraph 50 to the exclusion of the remainder of the Court's analysis, including its "Conclusion" section. As Professor Katz explained, a full reading of the case shows that the court "based its conclusion that EUAs were property on the basis of the three-part test set out by Lord Morritt in *In re Celtic*",[56] which is grounded in the commercial realities approach that the Supreme Court of Canada has rejected.[57] Moreover, "it is a decision about EUAs, which are not Ontario emission allowances created by an Ontario Act".[58] As a result, it would be of limited utility to an Ontario court assessing whether emission allowances created under Ontario's *Climate Change Act* bear the characteristics of common law property in Ontario law.

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[51] **LK-40**, *Armstrong DLW GmbH v. Winnington Networks Ltd*, [2012] EWHC 10 (Ch) ("*Armstrong*").

[52] **Day 3 Transcript**, Zeman/Mehling, pp. 833:4-9 and 832:15-833:1 (confirming that the European Court of Justice did not decide the property question under either EU or Luxembourg law in **MM-25**, *ArcelorMittal Rodange et Schifflange SA v État du Grand-duché de Luxembourg*, Judgment of the Court (Fifth Chamber) of 8 March 2017, ECLI:EU:C:2017:179, cited by Professor Mehling at **CER-4**, Mehling – Expert Report, ¶¶ 17, 63).

[53] **LK-7**, *Tucows*, ¶ 55. *See e.g.*, **MM-28**, *Ormet Primary Aluminium Corp. v. Ohio Power Co.* 98 F. 3d 799 (4th Cir. 1996), ¶ 4; **CER-4**, Mehling – Expert Report, ¶ 57, which considered very different language in the U.S. *Clean Air Act* that Professor Mehling confirmed does not exist in Ontario's cap and trade legislation. *See* **Day 3 Transcript**, Zeman/Mehling, pp. 849:10-851:16. Professor de Beer further confirmed that no jurisdiction's highest court has weighed in on the issue: **Day 3 Transcript**, Kuuskne/de Beer, p. 735:3-8.

[54] **Day 3 Transcript**, Zeman/Mehling, pp. 863:10-864:8.

[55] **Day 3 Transcript**, Zeman/Mehling, p. 862:14-16 ("As a layman, that seems to be sort of—but I'm not speaking as an expert on common law or property concepts at common law.") and p. 864:11-14.

[56] **Day 4 Transcript**, Bondy/Katz, pp. 936:8-937:16. Professor Katz further explained that, in paragraph 50, "the court, as part of its attempt to ground commercial realities in traditional common law thinking, is checking off the boxes of the *Ainsworth* test quickly without analysis." *See* **Day 4 Transcript,** Bondy/Katz, pp. 938:22-939:7. Canada encourages the Tribunal to take into account the questions raised in the following exchange as it reviews the *Armstrong* decision as a whole: **Day 3 Transcript**, Zeman/Mehling, pp. 854:12-864:20. *See also* **LK-40**, *Armstrong*, ¶¶ 48-61.

[57] *See* **Day 4 Transcript**, Zeman/Katz, p. 1057:3-22; **LK-19**, *Saulnier*, ¶ 42.

[58] **Day 4 Transcript**, Bondy/Katz, pp. 937:17-938:3.

2. Emission Allowances Are Not Property Rights in Ontario Because They Have Not Been Added to the Category of Property

26. Turning to Stage One of the Canadian Approach, inferences and speculation dominated the discussion at the hearing about the absence of an express declaration that emission allowances either are or are not property. Canada recalls that the Claimants must establish with *positive evidence* the Tribunal's jurisdiction, and that inferences and speculation do not suffice.

27. The Claimants and their experts ask the Tribunal to infer from the fact that Ontario did not declare emission allowances to be property in the *Climate Change Act* that they are property. For example, Professor de Beer asserted that it "wasn't necessary" for Ontario to declare emission allowances to be property because the "government knew what it did, in effect".[59] But this position ignores that Ontario knows how to include an express declaration that a statutory interest is property, having done so in the *Securities Transfer Act, 2006*.[60] It could have done so in the *Climate Change Act*,[61] and it is significant that it did not.[62]

28. The Claimants and their experts also ask the Tribunal to infer from the absence of a disclaimer that emission allowances are not property that "Ontario wanted this to be property for all kinds of purposes."[63] This inference disregards the fact that no party has pointed to any legislation in Ontario – or elsewhere in Canada[64] – that contains an express disclaimer that a statutorily created interest is not property. Rather than indicating that "Ontario wanted this to be property for all kinds of

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[59] **Day 3 Transcript**, de Beer, p. 750:14-20.

[60] **Day 3 Transcript**, Zeman/Mehling, p. 821:4-8; **LK-76**, *Securities Transfer Act*, SO 2006, c 8, ss. 1 and 97.

[61] **Day 3 Transcript**, Zeman/Mehling, p. 821:13-16.

[62] This is particularly the case in light of the Federal Court's admonition that the absence of the language of property "cannot be ignored". *See* **Day 1 Transcript**, Zeman, pp. 205:4-206:7; **RD-001**, Canada's Opening Presentation, Slide 100, citing **LK-012**, *Anglehart c Canada*, ¶ 23. Canada notes that, while Professor de Beer latched on to the word "own" in s. 28(2) of the *Climate Change Act* to support his argument that the statute used the language of property (*see e.g.* **Day 3 Transcript,** de Beer, p. 659:1-7), both Professor Katz and Professor Mehling disagreed that the term "own" is a technical term establishing property rights. *See* **Day 4 Transcript**, Bondy/Katz, p. 926:3-6 ("…I mention in my reports, is that the term 'own' here is not a legal term of art in the common law system. It refers to a relations of belonging."); **Day 3 Transcript**, Zeman/Mehling, p. 834:20-21 ("…I referred to ownership interest, which is a fuzzy concept") and p. 824:5-6 ("…indicates ownership interest, again, as fuzzy as that term may be."). *See also* **Day 1 Transcript**, Zeman, pp. 205:17-206:7, citing **RER-3**, Katz – Second Expert Report, ¶¶ 32-33.

[63] **Day 3 Transcript**, de Beer, pp. 749:21-750:3.

[64] **Day 3 Transcript**, Alvarez/de Beer, pp. 754:20-75:11.

purposes", it is at least equally, if not more, likely that the Ontario legislature considered it was not necessary to disclaim because it knew it was not creating a property interest.

29. The fact that Ontario modeled its cap and trade program on the WCI Design Document, which expressly considers emission allowances not to be property, is relevant context for the Tribunal to consider in weighing the significance of the absence of declarations or disclaimers. The Claimants attempted to distinguish the WCI and California approach to the issue by raising the unique Constitutional protections provided to property in the United States, however they argue that Ontario's "deliberate" decision not to follow the California example means it viewed allowances as property. Canada agrees that the U.S. Constitutional context is different, and that is precisely why no conclusions can be drawn with respect to the absence of a disclaimer in the Canadian legislation. The absence of any other example where an Ontario statute disclaims property indicates that this type of provision is neither typical nor necessary in Ontario, and certainly does not indicate on its own that the interest is property.

30. Professor Katz's testimony best summarizes the result of the Stage One analysis:

> There is no legal authority in Ontario that would allow me to assert as a clear, factual matter that emission allowances currently have the legal status of property rights in Ontario. There is no authoritative case that I could point to that would ground such an assertion of fact, nor is there clear legislative declaration that would support it.[65]

31. Canada has explained that this provides a full answer for the Tribunal's jurisdiction under Article 1139(g): it does not exist.[66]

3. Emission Allowances Are Non-Proprietary, Non-Compensable Regulatory Interests

32. Should the Tribunal proceed to Stage Two, it must ascertain the precise nature of emission allowances as created under the *Climate Change Act*. In Professor Katz's view, emission allowances are "regulatory interests that lack the status of property in Ontario. Rather than a property right, Ontario's *Climate Change Act* created noncompensable regulatory interests that were made tradeable

[65] **Day 4 Transcript**, Katz, p. 887:1-7.

[66] **Day 1 Transcript,** Zeman, p. 207:2-20.

for regulatory purposes consistent with the overall regulatory objectives of the *Climate Change Act.*"[67] Canada highlights three issues arising out of the hearing testimony with respect to Stage Two.

33. First, the Claimants identified an incorrect and narrow reading of the purpose of the *Climate Change Act,* which infiltrates the lens through which they assessed the various provisions of the *Act.*[68] Rather than a purpose of the *Act* being to "create a market mechanism", Professor Katz explained that "[w]e need to see the market mechanism in context as a means to a regulatory end. This is not a commercial statute with commercial objectives. It is, rather, a regulatory statute with regulatory objectives that uses market mechanisms to modify Ontarians' behaviour so as to reduce greenhouse gas emissions."[69]

34. Second, Professor Katz confirmed from her review of the statute that the core nature of emission allowances is "immunit[y] from penalty for emissions equivalent to emission allowances held and submitted."[70] As she explained, this core nature "gives emission allowances their entire purpose within the regulatory framework. It also makes it possible for them to have value for capped and market participants alike."[71] Importantly, "[f]or emission allowances to have any value for anyone, they must remain an immunity from penalty for someone within the regulatory system."[72] This conclusion with respect to the core nature of emission allowances is at Stage Two of the analysis, and is then assessed against the common law attributes of property at Stage Three.

35. The hearing further confirmed that the Claimants' continued attempts[73] to discredit Professor Katz by attacking her use of Hohfeldian language must be rejected. Hohfeld's conceptualization of legal relationships was focused on judicial reasoning,[74] was used by the High Court of England and

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[67] **Day 4 Transcript**, Katz, p. 877:15-21.

[68] *See e.g.* **Day 3 Transcript**, de Beer, p. 655:12-15 (describing his approach as looking "through the lens of a market mechanism") and pp. 656:8-657:7.

[69] **Day 4 Transcript**, Katz, p. 888:4-14. *See also* **Day 4 Transcript**, Litz, pp. 1106:19-1107:5.

[70] **Day 4 Transcript**, Katz, p. 889:19-22.

[71] **Day 4 Transcript**, Katz, pp. 889:22-890:4; *see also* p. 890:5-8 ("While market participants lack compliance obligations, what they trade to others remains an interest that conveys immunity from penalty for an equivalent amount of greenhouse gas emissions.")

[72] **Day 4 Transcript**, Katz, p. 890:9-12.

[73] *See e.g.* **Day 1 Transcript**, Genest, p. 84:17-22; **Day 3 Transcript**, de Beer, p. 657:7-11; **Day 3 Transcript**, Zeman/Mehling, p. 853:3-8.

[74] **Day 3 Transcript**, Zeman/Mehling, p. 853:9-18.

Wales in *Armstrong* (a case the Claimants are particularly fond of),[75] and is entirely appropriate to use in a legal analysis seeking precision in the description of a legal interest.

36. Finally, the hearing confirmed that it is not necessary for emission allowances to be property rights in order to have an effective market mechanism,[76] the means to the *Climate Change Act's* regulatory end. In particular, Professor Katz and Professor de Beer agree that "property rights are not the only way to support a market mechanism".[77]

4. Emission Allowances Lack the Core Common Law Characteristics of Property, Most Notably Exclusive Control and Use

37. The hearing also confirmed several points of agreement between Professors Katz and de Beer with respect to what is required at Stage Three. For example, both experts agree that the statute that creates the interest at issue – here the *Climate Change Act* – creates the statutory bundle of rights that are assessed against the common law attributes of property.[78] They also agree that there is no comprehensive list of required attributes of property at common law.[79] Importantly, they agree on the essential attributes of property that are required for an interest to be property in any context in Ontario: exclusivity and enforceability against others.[80] Indeed, Professor de Beer described exclusivity as the "sine qua non of property".[81]

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[75] **Day 3 Transcript**, Zeman/Mehling, pp. 854:12-856:18; **LK-40**, *Armstrong*, ¶ 48 (under the heading "The precise nature of an EU", reflecting that Court's conclusions at Stage Two).

[76] *See* **Day 4 Transcript**, Bondy/Katz, p. 1021:9-12; Zeman/Katz, pp. 1058:5-1059:4.

[77] **Day 4 Transcript**, Bondy/Katz, p. 1021:9-12; Zeman/Katz, pp. 1058:5-1059:4, citing **CER-3**, Expert Report of Prof. Jeremy de Beer, 15 July 2022, ¶ 184.

[78] **Day 3 Transcript**, Kuuskne/de Beer, p. 722:10-16 ("So to use the language of 'bundle of rights,' the bundle of rights that an emission allowance holder could possibly acquire consist of – sorry, are derived from the *Climate Change Act* and its accompanying regulations; correct? A. Yes. The Act and the regulations create the statutory bundle of rights."); **Day 4 Transcript**, Bondy/Katz, pp. 913:19-914:4 ("A. So when I am speaking about property rights, I am speaking as Justice Binnie did in the Saulnier decision – Q. Right. A. – about whether emission allowances have the statutory bundle that could be treated by a Court as property, that is sufficiently close to common law property rights.")

[79] **Day 3 Transcript**, Kuuskne/de Beer, p. 714:6-9 ("A. Yes, but before we do, can I just point out that Paragraph 57, the top, there's no agreed list of required attributes at common law. That's important; right?"); **Day 4 Transcript**, Katz, p. 880:15-18 ("To add to the complexity, there is no single authoritative source where we find the complete common law attributes of common law property rights for all legal contexts.")

[80] **Day 4 Transcript**, Katz, p. 881:8-22; **Day 3 Transcript**, Kuuskne/de Beer, p. 688:2-6. *See also* **LK-7**, *Tucows*, ¶ 58; **LK-30,** *Manrell v Canada*, [2003] FCA 128, ¶ 53.

[81] **Day 3 Transcript**, Kuuskne/de Beer, p. 719:13-20.

38. Additional indicia, such as those set out in *Ainsworth* and locability, may be additional indications that a property right exists.[82] The Claimants spent a significant amount of time with Professor Katz at the hearing discussing the *Armstrong* court's treatment of the *Ainsworth* indicia. Setting aside the fact that *Armstrong* did not reach its conclusion on the basis of the *Ainsworth* indicia,[83] simply assessing the *Ainsworth* indicia is not an approach this Tribunal can take. The Canadian property law experts agree that the *Ainsworth* indicia may provide additional indications that a property right exists, but without exclusivity, there can be no property right in Ontario. Canada focuses the remainder of its comments on the evidence at the hearing relevant to exclusivity.

39. First, Professors Katz and de Beer appear to agree on the meaning of exclusivity.[84] They diverge, however, in their application of the attribute to the provisions of the *Climate Change Act*. Professor Katz offers a more reliable interpretation of the *Act*, grounded in its purpose, properly read, and in principles of common law. The Tribunal should accept her analysis and her conclusion that "[e]mission allowances, given their statutorily created nature and character, lack essential common law attributes of property required to constitute property rights in Ontario in any legal context."[85]

40. Second, emission allowances are not characterized by an exclusive right to make a claim against others. In particular, Professor Katz explained at the hearing that "[t]here are no provisions in the *Climate Change Act* that I found that would establish that emission allowances are properly characterized as rights enforceable against someone else. None of provisions in the *Climate Change Act* raised by Professor de Beer indicate otherwise."[86] The *Climate Change Act* can be contrasted against the *Securities Transfer Act, 2006*, which expressly established enforceability of a statutorily-

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[82] *See* **RER-3**, Katz – Second Expert Report, ¶¶ 20-21; **CER-3**, Prof. de Beer – Expert Report, ¶ 95; **Transcript Day 3**, de Beer, p. 648:11-16. However, as Professor Katz explained, an indicator like locability is not determinative of emission allowances' status as property. **Day 4 Transcript**, Bjorklund/Katz, pp. 1065:18-9 and 1066:15-17. *See also* **Day 4 Transcript**, Bondy/Katz, p. 964:4-13 (explaining Professor Katz displayed "agnosticism on the issue.")

[83] *See* discussion at ¶ 25 above; **Day 4 Transcript**, Bondy/Katz, p. 935:11-22.

[84] That is: "Property rights are fundamentally rights that give the owner not only a privilege to use herself but exclusive control over a thing or domain of human activity, protected against interference by others, including government." *See* **Day 1 Transcript**, Zeman, p. 217:10-18; **Day 3 Transcript**, Kuuskne/de Beer, pp. 688:16-689:2; **RD-001**, Canada's Opening Presentation, 5 December 2022, Slide 119, referring to **RER-1**, Katz – First Expert Report, ¶ 28 and **CER-3**, de Beer – Expert Report, ¶ 135.

[85] **Day 4 Transcript**, Katz, p. 898:11-14.

[86] **Day 4 Transcript**, Katz, pp. 895:16-896:2.

created property right against others,[87] and demonstrates that the Ontario legislator knows how to expressly establish enforceability against others.[88] It could have done so with respect to emission allowances in the *Climate Change Act*. It did not.

41. Third, the holders of emission allowances lack exclusive control and use, as evidenced by: (i) the reservation of extensive government discretion to act with respect to emission allowances – representing significant limitations on the holder's exclusive right to control and use allowances; (ii) restrictions on the enforcement of the right against the government, as set out in section 70 of the *Act*; and (iii) restrictions on the holder's ability to include any others.

42. Reservation of extensive government discretion:[89] The Claimants and Professor de Beer attempted to illustrate that the scope of discretion reserved to the government in the *Climate Change Act* and its regulations was limited, narrow, and used only "to protect the efficiency of the system and the integrity of the market".[90] But the hearing established that the Claimants' critique of Professor Katz's conclusion that "emission allowances are subject to extensive government discretion"[91] was misplaced. Contrary to the Claimants' insinuations, Professor Katz has never said the *Act* conferred "absolute discretion";[92] only that there is "extensive discretion" for the reasons she explained in her cross-examination.[93] Unlike Professor de Beer, who insisted on the presence of the word "discretion" in the statute to evidence the reservation of discretion,[94] Professor Katz correctly explained that

[87] **Day 3 Transcript**, Zeman/Mehling, pp. 819:5-821:2; **LK-76**, *Securities Transfer Act*, SO 2006, c 8, ss. 97(3) to (6).

[88] **Day 3 Transcript**, Zeman/Mehling, p. 821:9-12.

[89] **RD-001**, Canada's Opening Presentation, 5 December 2022, Slides 120-121; **Day 4 Transcript**, Katz, pp. 893:2-894:7; **RD-002**, Katz Summary Presentation, 8 December 2022, Slide 20. Professor Katz also confirmed that the evidence pertaining to the reservation of extensive government discretion points to an interest that lacks stability, another key characteristic of common law property. **Day 4 Transcript**, Katz, pp. 1010:20-1011:3. *See also* **RER-1**, Katz – First Expert Report, ¶ 73.

[90] *See e.g.* **Day 4 Transcript**, Bondy/Katz, p. 1009:1-8; **Day 3 Transcript**, Kuuskne/de Beer, pp. 672:19-673:2.

[91] **Day 4 Transcript**, Katz, p. 893:2-3.

[92] **Day 4 Transcript**, Bondy/Katz, p. 1009:11-15 ("A. So, Counsel, I don't believe we live in a country, or at least I live in a country, where there is carte blanche on the part of government. So what I am not describing in my reports is absolute discretion.")

[93] **Day 4 Transcript**, Bondy/Katz p. 1009:17-22 ("A. I wouldn't describe the discretion under the Climate Change Act as absolute, and I would hesitate to describe the discretion under any Act as absolute. That said, there is extensive discretion for the reasons that I have set out in answer to your questions today already.")

[94] *See e.g.* **Day 3 Transcript**, de Beer, p. 761:11-13; **Day 3 Transcript**, Kuuskne/de Beer, p. 684:2-12 (denying that the term "may" conferred discretion).

"[d]iscretion is evidenced by a conferral of power to make a decision, using language like 'may' in a statutory provision."[95] Relying on the Supreme Court of Canada's guidance in *Saulnier,* Professor Katz recognized that there "are no clear criteria to determine how much fetter on the issuing authority's discretion is enough to transform, like to transform a mere license into a property right."[96]

43. Keeping this in mind, and again grounding herself in cases like *Saulnier* and *Anglehart*, Professor Katz properly examined "the power that the Act granted the government … not to speak to what they did, but the power they had … what authority did the Act grant."[97] Professor de Beer agrees that there was some discretion reserved to the government under the Act,[98] but overlooked in his report important both the power the government reserved, and provisions that he agreed at the hearing point to the government's extensive discretion.[99] Viewing the *Act* through the proper lens of what power was conferred reveals a regulatory system where the government retained a central role, and reserved extensive discretion over emission allowances.[100] These features indicate the absence of allowance holders' exclusive control and use.

44. Restrictions on the ability to exclude all others: The hearing confirmed that emission allowances lack a key component of exclusivity: the right to enforce that exclusivity against all others,

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[95] **Day 4 Transcript**, Katz, p. 893:2-5.

[96] **Day 4 Transcript**, Katz, pp. 897:15-898:2, citing **LK-19**, *Saulnier*, ¶ 38.

[97] **Day 4 Transcript**, Bondy/Katz, p. 978:10-21. *See also.* **LK-12**, ¶ 31 ("… in this case it must be addressed by taking into consideration the *Fisheries Act* and more specifically the discretion that *Act* grants to the Minister" (*emphasis added*))

[98] *See e.g.* **Day 3 Transcript**, Zuleta/de Beer, p. 761:6-14.

[99] For example, Professor de Beer did not refer in his report to the government's reservation of regulation making authority with respect to the cancellation of emission allowances in s. 78 in his report, but admitted at the hearing the provision "is quite broadly worded": **Day 3 Transcript**, Kuuskne/de Beer, pp. 675:9-676:5. Professor de Beer also did not refer in his report to the government's ability to impose conditions on accounts set out in s. 22(3), but admitted at the hearing that "A. … the provision in isolation does not restrict the ability to impose requirements and restrictions with accounts": **Day 3 Transcript**, Kuuskne/de Beer, pp. 683:20-684:1. This was the same type of discretion the court referred to in *Anglehart* under the *Fisheries Act* (*see* **Day 3 Transcript**, Kuuskne/de Beer, p. 680:17-22), and referred to as a "right to participate" in *Saulnier* (**LK-19**, *Saulnier*, ¶ 34). Nor did Professor de Beer refer in his report to the Director's discretion to refuse to register an applicant for any matter the Director considers appropriate in s. 17(4), but agreed that this provision is "what gives the right to participate in an exclusive program", rendering this discretion again akin to the kind of discretion reserved to the government under the *Fisheries Act*: **Day 3 Transcript**, Kuuskne/de Beer, p. 686:3-20. *See also* **RER-3**, Katz -- Second Expert Report, fn. 104 (explaining that s. 7 of the *Fisheries Act* is not a basis for distinguishing *Anglehart*, given the presence of s. 70 in the *Climate Change Act*.)

[100] In addition to the provisions highlighted in fn. 99, *see e.g.* **Day 4 Transcript**, Bondy/Katz, p. 989:7-18 (on s. 16(1)); **Day 3 Transcript**, Kuuskne/de Beer, p. 679:2-6 (on s. 33, discretion to make and prescribe circumstances in which the Minister may cancel emission allowances); **Day 4 Transcript**, Bondy/Katz, p. 979:10-15 (on ss. 27(1) and (2)); **RER-1**, Katz – First Expert Report, ¶¶ 66-68; **RER-3**. Katz – Second Expert Report, ¶¶ 8, 46-64.

and, in particular, against the government.[101] Professor Katz has explained that "what it means to have exclusive control vis-à-vis the government is to have a presumptive right against expropriation without compensation."[102] That presumptive right exists at common law, and can only be displaced by clear language to the contrary, as the Supreme Court of Canada confirmed in *Annapolis.*[103]

45. Professor de Beer agreed at the hearing that "enforcement of a property right as against the State would typically take the form of claims for compensation in accordance with that presumptive right,"[104] and that the right to compensation from the Crown was not one of the sticks in the bundle that emission holders received under the *Act*.[105] Despite these agreements, Professor de Beer treated section 70 entirely separately from his exclusivity analysis,[106] and invites the Tribunal to infer from section 70 that Ontario intended emission allowances to be property.[107] This inference is not supported by *Annapolis,* or any other authority.[108] As Professor Katz explained, this "is not a case where we start with a presumptively compensable property right, and then later confront a taking or expropriation, coupled with the express intention to override that common law right to compensation. … Rather, through section 70, emission allowances are created as noncompensable from the get go."[109] Taken together with the other statutory provisions reserving discretion over emission allowances, Professor Katz concludes that Section 70 "is evidence of an intention to create not a property right, but a noncompensable regulatory interest."[110]

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[101] Professor de Beer agreed that the ability to "enforce those rights against all others" is an important element of exclusivity: **Day 3 Transcript**, Kuuskne/de Beer, p. 717:10-15. *See also* **LK-7**, *Tucows*, ¶ 62; **LK-30**, *Manrell*, ¶ 53.

[102] **RER-3**, Katz – Second Expert Report, ¶ 63.

[103] **Day 4 Transcript**, Katz, pp. 890:15-891:4; **Day 3 Transcript,** Kuuskne/de Beer, p. 723:7-16. *See also* **CL-238**, *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36, ¶ 21.

[104] **Day 3 Transcript**, Kuuskne/de Beer, p. 723:16-20.

[105] **Day 3 Transcript**, Kuuskne/de Beer, pp. 730:10-14 and 732:21-733:4.

[106] **CER-3**, de Beer – Expert Report, ¶ 158 (explaining he will address s. 70 separately) and ¶¶ 192-198 (where he discusses it outside of his discussion of common law exclusivity).

[107] *See e.g.* **Day 3 Transcript**, Kuuskne/de Beer, p. 747:13-21; **Day 1 Transcript**, Bondy, p. 295:17-21.

[108] *See* **Day 4 Transcript**, Katz, pp 891:20-892:4 (explaining that *Annapolis* "simply affirms that a common law property right in land, undeniably a compensable property right, entails a common law right to compensation that can only be overridden later by express, legislative intention.")

[109] **Day 4 Transcript**, Katz, p. 891:8-12 and 17-19. *See generally* pp. 890:13-892:13.

[110] **Day 4 Transcript**, Katz, p. 892:8-13.

46. Restrictions on the ability to include any others: The hearing further confirmed that the *Climate Change Act* limits emission holders' ability to include others – a key component of common law exclusivity. Professors Katz and de Beer agreed that, as a matter of fact, section 28(2) of the *Act* prohibits the creation of trusts.[111] But, by disregarding the significance of this fact for the property analysis, Professor de Beer falls into the "trap" that respected Canadian property scholar James Penner explains awaits property analysts who understand exclusivity as only the ability to exclude.[112] As Professor Katz explains, section 28(2) "eliminates a kind of exclusive control typical of property rights",[113] and as such, provides a further indication that they are non-compensable regulatory interests, rather than property rights.

47. Rather than undermine this conclusion as the Claimants will argue, section 28(3) bolsters the point that the holders of emission allowances lack the exclusive control to determine the circumstances under which they might create a trust. Under section 28(3), it is the *government*, not the emission allowance holder, who holds the power to decide the limited circumstances under which trusts may in the future be created and by whom.[114] This confirms serious restrictions on allowance holders' exclusive control over their emission allowances. Nor does the theoretical possibility of a third party holding a security interest in an emission allowance undermine the conclusion. As the court in *Taylor* explained, "being able to hold a security interest in something does not establish it as property".[115] The Claimants have failed to displace Professor Katz's conclusion, which the Tribunal should accept.

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[111] **Day 3 Transcript**, Kuuskne/de Beer, p. 698:14-19; **Day 4 Transcript**, Katz, p. 896:16-21.

[112] *See* **LK-38**, J.E. Penner, "The Idea of Property in Law" (Oxford: Oxford University Press, 1997) [Revised Excerpt], p. 74. Professor de Beer was familiar with Professor Penner: **Day 3 Transcript**, Kuuskne/de Beer, p. 692:17. *See also* **LK-14**, Hope Johnson et al, "Statutory Entitlements as Property: Implications of Property Analysis Methods for Emissions Trading," (2017) 43 *Monash Law Review* 421, p. 458 ("Instead of expressly declaring that emission entitlements are not capable of constituting property, Canadian schemes tend to prevent holders of such entitlements from dividing their interests.")

[113] **Day 4 Transcript**, Katz, p. 896:16-21. Indeed, the High Court of England and Wales in *Armstrong* found the ability to create a trust an indicium of property. *See* **Day 3 Transcript,** Kuuskne/de Beer, p. 706:5-11, discussing **LK-40**, *Armstrong*, ¶ 59. Professor de Beer stated that an Ontario court would find this case "highly persuasive" when it suited his purposes. **Day 3 Transcript**, Kuuskne/de Beer, pp. 703:22-704:1.

[114] **Day 3 Transcript**, Kuuskne/de Beer, p. 708:2-12.

[115] **LK-27,** *Taylor v. Dairy Farmers of Nova Scotia*, 2010 NSSC 436 ("Taylor") affirmed 2012 NSCA 1, ¶ 68,

48. In conclusion, the hearing confirmed that the Claimants have failed to establish with persuasive evidence that emission allowances are property under Ontario law. The Tribunal lacks jurisdiction *ratione materiae* with respect to KS&T under NAFTA Article 1139(g).

B. The Evidence at the Hearing Confirmed that the Claimants Have Failed to Establish that KS&T Held an Investment Under NAFTA Article 1139(h)

49. As Canada explained at the hearing, the Tribunal has two questions to answer with respect to jurisdiction *ratione materiae* under NAFTA Article 1139(h): "One, whether Article 1139(h) includes interests that are not in any way analogous to those illustrated by the subparagraphs; and two, whether the Claimants have established that KS&T held interests contemplated by Article 1139(h), properly understood."[116] Canada's view after the hearing, as before, is that the answer to both is no. The Claimants have failed to establish the Tribunal's jurisdiction *ratione materiae* under Article 1139(h).

1. The Claimants Ask the Tribunal to Read Out Parts of Article 1139(h) That Do Not Suit Their Purposes

50. At the hearing, the Claimants continued to either overlook entirely or downplay the significance of the language of Article 1139(h). For example, the Claimants did not even mention the existence of the sub-paragraphs to Article 1139(h) – which provide important context for the interpretation of the chapeau that cannot be ignored – in their opening argument.[117] The only time the Claimants came close to implicitly referencing the sub-paragraphs was on rebuttal, when they posited for the first time in the proceeding that an auction purchase is "a contractual type situation."[118] It is far too late for new arguments. Canada recalls the Claimants' position in its Reply that any new argument that Canada might raise in it Rejoinder – at least two procedural stages prior to now – would qualify as an "ambush" and would be procedurally improper.[119]

51. Both the chapeau and its subparagraphs refer to the location of the activities they contemplate: in the territory of the host State. The chapeau refers twice to the territory of the host State, once in

[116] **Day 1 Transcript**, Zeman, p. 227:17-22.

[117] **Day 1 Transcript**, Genest, pp. 90:1-93:21; **CD-001**, Claimants' Opening Presentation, 5 December 2022, Slide 110 (presenting only the chapeau of Article 1139(h)).

[118] **Day 1 Transcript**, Bondy, pp. 296:19-297:1.

[119] Claimants' Reply, ¶ 608 and fn. 651. *See also* **Day 1 Transcript**, Dosman, p. 303:13-19.

connection with the commitment of capital or other resources, and again in connection with the "economic activity" to which the commitment of capital must be made. The sub-paragraphs indicate that the types of interests captured by the provision include interests arising out of economic activity "involving the presence of an investor's property in the territory of the Party", or where there is a local enterprise. Accordingly, for an interest to meet the requirements of the provision, they must be longer-term and include an important commitment of capital in the territory of the host State to economic activities in the host State. The evidence at the hearing confirmed that KS&T's business activities were not located in the territory of the host State.

2. The Claimants Have Not Established that KS&T Held An Investment Under NAFTA Article 1139(h)

52. The only conclusion from the evidence at the hearing is that KS&T's business activities were based in the United States and do not fall within the meaning of NAFTA Article 1139(h). In particular, at the hearing, the Claimants argued that KS&T's "investment activity was to trade in Ontario allowances for profit",[120] asserting that KS&T's business was "not just the primary market. It's the secondary market, and it's what traders do."[121] Canada explained that the contemporaneous documentary evidence established that these business activities were conducted from, and based in, the United States.[122] The testimonial evidence at the hearing confirmed these facts.

53. First, the hearing evidence confirmed, in the words of Mr. Graeme Martin, that KS&T "didn't have any employees in Ontario".[123] Instead, all of the employees with decision-making power pertaining to the company's participation in Ontario's cap and trade program and its trading in the secondary market were based in the United States.[124] These included Mr. Martin, Mr. Frank King,

[120] **CD-001**, Claimants' Opening Presentation, 5 December 2022, Slide 4.

[121] **Day 1 Transcript**, Bondy, p. 54:17-19.

[122] **Day 1 Transcript**, Zeman, pp. 179:8-195:21; **RD-001**, Canada's Opening Presentation, 5 December 2022, Slides 48-89; Canada's Rejoinder, ¶¶ 32-59.

[123] **Day 2 Transcript**, Zeman/Martin, p. 371:21-22.

[124] For example, Mr. Martin testified that his "day-to-day sort of responsibilities were marketing and trading of primarily offsets, but also allowances to other third parties", and that Mr. King and Mr. Locke (both based in Houston) had authority for trading in emission allowances. **Day 2 Transcript**, Martin, pp. 340:16-18, 340:19-341:2. Mr. King confirmed that he "was responsible for strategy, analysis, and trading in environmental markets". **Day 2 Transcript**, King, p. 381:8-13.

and Mr. Kellen Locke, all based in Houston.[125] Mr. Sam Porter, who implemented many of these decisions with respect to KS&T's Ontario CITSS account, was also located in the United States.[126]

54. Second, the hearing evidence confirmed that the following activities with respect to KS&T's registration and participation in the primary market in Ontario took place in the United States:

- Registration activities: Mr. Martin confirmed that he took "primary responsibility for ensuring that KS&T could register as a market participant in Ontario", including identifying the Ontario account representatives.[127]

- [redacted] This evidence all stands in stark contrast to the Claimants' counsel's assertion that "KS&T purchased, not on a cross-border basis, but within the province".[132]

[125] **Day 2 Transcript**, Zeman/Martin, pp. 325:21-326:2; **Day 2 Transcript**, Galagan/King, p. 392:3-8.

[126] **Day 2 Transcript**, Zeman/Martin, p. 329:1-6. *See also* **Day 1 Transcript**, Zeman, pp. 180:13-185:10; **RD-001**, Canada's Opening Presentation, 5 December 2022, Slides 55-65.

[127] **Day 2 Transcript**, Zeman/Martin, pp. 326:15-327:8.

[128] **Day 2 Transcript**, Zeman/Martin, p. 331:1-6.

[129] **Day 2 Transcript**, Zeman/Martin, p. 331:13-15.

[130] **Day 2 Transcript**, Zeman/Martin, p. 341:17-22. Mr. Martin also had a role. **Day 2 Transcript**, Zeman/Martin, p. 342:1-4.

[131] *See e.g.*, **RD-001**, Canada's Opening Presentation, 5 December 2022, pp. 63-64, citing **R-114**, Email from Sam Porter to Graeme Martin, "RE: Ontario bid schedule", 22 March 2017; and evidence cited at Canada's Rejoinder, ¶ 40.

[132] **Day 1 Transcript**, Bondy, p. 291: 17-18.

Mr. Martin further confirmed that KS&T participated in the primary market in Ontario [redacted] program."[134]

- [redacted]

55. Third, very few of KS&T's secondary market transactions themselves had any meaningful connection with Ontario.[138] At the hearing, the Claimants [redacted] However, the mere fact that a transaction might have included allowances originally purchased in Ontario does not automatically mean that the transaction is economic activity in the territory of Ontario. More of a connection is required, and the Claimants have failed to establish that connection. In particular, the evidence at the hearing confirmed that [redacted] As Mr. King explained:

[133] **Day 2 Transcript**, Baldwin/Martin, p. 321:22-322:5.

[134] **Day 2 Transcript**, Martin, 377:6-10.

[135] *See* **RD-001**, Canada's Opening Presentation, 5 December 2022, Slide 73, citing **R-127**, Email from Graeme Martin to Frank King and Kellen Locke, "FW: CA Cap-and-Trade – Corporate Assocations Disclosure Update for Ontario Program Linkage", 6 October 2017.

[136] **Day 2 Transcript**, Robertson/Martin, p. 368:17-21. *See also* **Day 2 Transcript**, Robertson/Martin, pp. 367:22-368:8; Lee/King, p. 388:13-21 [redacted]

[137] **Day 2 Transcript**, Martin, p. 371:6-19.

[138] In its written submissions, Canada explained that the Claimants attempt to inflate KS&T's involvement in the secondary market in Ontario [redacted] Canada's Counter-Memorial, ¶¶ 51, 65, 121; Canada's Rejoinder, ¶¶ 46-55.

- [redacted]

[139] **Day 2 Transcript**, King, pp. 394:6-10, 400:7-12, 401:14-18; Canada's Rejoinder, ¶ 53.

[140] *See e.g.* **Day 2 Transcript**, King, pp. 397:2-5, 394:11-20, 396:13-397:1. *See also* **CWS-6**, King – Reply Witness Statement, ¶ 21; Canada's Rejoinder, fn. 128. *See also* **Day 2 Transcript**, King, pp. 405:4-8, 406:17-20, 408:12-16 ([redacted] **CWS-6**, King – Reply Witness Statement, Annex A, ¶¶ 14, 17, 30, 32; **FK-6**; **FK-14**; **FK-19**; **FK-23**; **FK-25**. [redacted] **Day 2 Transcript**, King, pp. 398:22-399:8, 399:18-400:6, 405:4-408:16, 409:14-18, 410:14-412:11, 413:9-18; **FK-9**; **FK-10**; **FK-16**; **FK-17**; **FK-21**. [redacted] *See* **Day 2 Transcript**, King, p. 399:8-12; **FK-12**; **FK-25**.

[141] Even though Mr. King [redacted] he agreed that no offset credits have been created under Ontario's regulations. **Day 2 Transcript**, King, pp. 394:11-396:12, 403:13-405:3, 410:14-411:10, 412:17-413:8, 419:11-420:14; **CWS-6**, King – Reply Witness Statement, Annex A, ¶¶ 14, 16-17, 19, 23-24, 30; **FK-6**, **FK-9**, **FK-10**, **FK-12**, **FK-16**, **FK-17**, **FK-23**; Canada's Rejoinder, ¶ 53 and fn. 129. [redacted]'. **CWS-6**, King – Reply Witness Statement, Annex A, ¶¶ 14, 21, 26, 28, 32; **Day 2 Transcript**, King, pp. 409:19-22, 412:1-15; **FK-6**; **FK-14**; **FK-19**; **FK-21**, **FK-25**.

[142] Canada's Rejoinder, ¶ 53 and fn. 130.

[143] Canada's Counter-Memorial, ¶ 65; Canada's Rejoinder, ¶ 54.

[144] [redacted] Canada's Rejoinder, ¶ 54 and fn. 132; **Day 2 Transcript**, King, pp. 438:10-442:4; **CWS-6**, King – Reply Witness Statement, Annex A, ¶¶ 36, 38 and fn. 71.

[145] [redacted]'. **CWS-6**, King – Reply Witness Statement, Annex A, ¶¶ 34, 36, 40, Canada's Rejoinder, ¶ 54 and fn. 133; **FK-27**, **FK-30**, **FK-35**. [redacted] **CWS-6**, King – Reply Witness Statement, Annex A, ¶¶ 38, 42, 44; **FK-33**, **FK-37**, **FK-41**. [redacted] **Day 2 Transcript**, King, pp. 437:16-438:9; **CWS-6**, King – Reply Witness Statement, Annex A, ¶ 36; **FK-30**.

[146] Canada's Rejoinder, ¶ 54 and fn. 134.

[redacted]

- [redacted] There was no activity in Ontario.

56. Nor was KS&T's trading in [redacted] a business activity in Ontario.[150] As the hearing confirmed, an OCA futures contract was a standardized contract, traded on a U.S.-based exchange, in which the seller agreed to deliver emission allowances at a specified future date, and the buyer agreed to pay the specified price.[151] Mr. King confirmed that trading in futures contracts is entirely anonymous and, at the contract settlement date, the ICE – not the trader – matches net buyers and net sellers in order to arrange physical delivery.[152] Buying and selling anonymous promises to deliver in the future on a U.S. exchange is not a business activity in Ontario, even if the derivative product could involve the future delivery of an Ontario emission allowance. Accordingly, KS&T's [redacted] do not evidence business activity in Ontario.

57. The evidence at the hearing thus confirmed that KS&T's business activities were based in the United States, not in Ontario. All key personnel were located in the United States; decisions with respect to its registration and participation in Ontario's cap and trade program, including its purchases

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[147] **Day 2 Transcript**, King, pp. 435:6-11, 436:8-18. [redacted] **Day 2 Transcript**, King, pp. 432:22-433:3, 433:20-435:5; **Day 2 Transcript**, King, pp. 427:18-429:6, 432:8-433:3, 435:2-437:9; **CWS-6**, King – Reply Witness Statement, ¶ 34; Canada's Rejoinder, ¶ 54 and fn. 135.

[148] **Day 2 Transcript**, King, pp. 445:4-21.

[149] [redacted] *See* Canada's Rejoinder, ¶ 55 and fns. 136-139; **Day 2 Transcript**, King, pp. 442:15-446:7.

[150] The Claimants maintain that KS&T "frequently engaged in secondary market transactions", [redacted] **Day 1 Transcript**, Genest, p. 92:10-16 and **Day 2 Transcript**, King, p. 382:7-9. *See also* **Day 1 Transcript**, Bondy, p. 53:8-20 and Zeman, pp. 186:5-188:1; Canada's Rejoinder, ¶¶ 48-51.

[151] **Day 2 Transcript**, King, pp. 447:2-448:8; Canada's Rejoinder, ¶ 49 and fn. 117.

[152] At the moment when a person buys or sells an OCA futures contract, the buyer or seller does not know who the counter-party seller or buyer is. **Day 2 Transcript**, King, pp. 448:9-449:16; Canada's Rejoinder, ¶ 51. *See also* **Day 2 Transcript**, Martin, p. 372:4-10.

of allowances in auctions, were both made in and implemented from the United States; and the vast majority of its secondary market activity was conducted from the United States, [redacted]

58. With the business itself stripped away, all that remains is an Ontario CITSS account and the purchase of allowances through that account for onward transfer to California. At the hearing, the Claimants argued with respect to Article 1139(h) that "Canada can't get around the fact that allowances were purchased in Ontario through an Ontario account and paid millions of dollars to Ontario".[154] But as Canada has explained, not only was the purchase of emission allowance conducted from the United States, but the mere expenditure of funds is not sufficient to qualify an interest as an investment under NAFTA Article 1139(h) – more is required, as illustrated by the text of the chapeau and the illustrative examples of the sub-paragraphs.[155] The Claimants have failed to establish the Tribunal's jurisdiction.

3. The Claimants' Estoppel Argument Must Be Rejected

59. Finally, as Canada explained at the hearing, the Tribunal cannot base its jurisdiction on estoppel.[156] It must be satisfied that the conditions to Canada's consent to arbitrate have been satisfied. The Claimants have failed to establish that KS&T's alleged investments meet the requirements of Article 1139(h), and it does not have jurisdiction.

60. Nor does any of the evidence at the hearing displace the reasons why the Claimants' estoppel arguments must be rejected.[157] In particular, while Ontario's market was harmonized with California's and Quebec's, harmonization did not do away with territoriality – either from a regulatory perspective (see Part I.C) or from the perspective of NAFTA Chapter Eleven. Despite their insistence throughout the written phase and the hearing on the linked markets eviscerating borders when it suits their purposes, the Claimants recognized at the hearing that jurisdiction, and territory,

[153] *See also* **RD-001**, Canada's Opening Presentation, 5 December 2022, Slide 141.

[154] **Day 1 Transcript**, Bondy, p. 296:8-13.

[155] *See e.g.* **Day 1 Transcript**, Zeman, pp. 236:2-239:6. Canada also recalls its arguments with respect to what is excluded from the definition of NAFTA Article 1139, including claims to money that arise solely from commercial contracts for the sale of goods or services. *See* Canada's Counter-Memorial, ¶ 132; Canada's Rejoinder, ¶ 151.

[156] **Day 1 Transcript**, Zeman, pp. 233:18-234:10.

[157] *See* **Day 1 Transcript**, Zeman, pp. 233:18-236:1; Canada's Rejoinder, ¶ 158 and fn. 380.

continued to matter after harmonization: "And the fact that we made a logical choice *in the face of the different regulatory regimes* in that place";[158] "whilst the [Ontario market] rules were really similar to California and Quebec's rules, we thought it would be an opportunity to more easily participate in auctions."[159] The hearing evidence pertaining to KS&T's choice to participate in joint auctions through its Ontario account thus confirmed that it understood that there were differences in the rules put forward by each jurisdiction, even in a harmonized world. It's no different with respect to the territoriality requirements of NAFTA Chapter Eleven.

61. The mere fact that trading in emission allowances was possible in the harmonized market does not mean that all trading activity would, or could, qualify as an investment under NAFTA. Nor does KS&T's own business perception that "it didn't matter where [emission allowances] were stored"[160] transform its emission allowances into an investment in Ontario. Indeed, taken to its logical conclusion, the Claimants' arguments would mean that emission allowances held in any account in any jurisdiction could, and should, qualify as an investment in Ontario. This is simply untenable, and the argument must be rejected.

III. The Claimants Have Not Established that the June 15 Press Release Was a "Measure" Within the Tribunal's Jurisdiction

62. Throughout these proceedings, and again at the hearing, the Claimants failed to establish that a press release issued by Premier-Designate Ford on June 15, 2018 (the "press release") constituted a "measure" within the scope of this Tribunal's jurisdiction.

63. As a factual matter, the press release did not cancel the cap and trade program.[161] At the hearing, the Claimants continued to misrepresent the content of the press release, asserting that cap and trade was "summarily cancelled by Ontario in June of 2018."[162] The Claimants' depiction of the press

[158] **Day 1 Transcript**, Bondy, p. 290:4-8 (emphasis added).

[159] **Day 2 Transcript**, Martin, p. 321:8-12.

[160] **Day 1 Transcript**, Bondy, p. 51:1-2.

[161] The press release outlines the incoming government's intention to cancel cap and trade once in power – "cabinet's first act following the swearing-in of [Mr. Ford's] government will be to cancel Ontario's current cap-and-trade scheme" (emphasis added). **C-007**, 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.

[162] **Day 1 Transcript**, p. 18:4.

release is unsustainable: Ontario officials were not "directed" to cancel the cap and trade program or withdraw from harmonization, and took no action to do so.[163]

64. As a jurisdictional matter, the Claimants have failed to prove that the press release satisfies the requirements of Article 1101(1).[164] At the hearing, the Claimants maintained their silence on how the press release falls within, or shares characteristics with, the illustrative list of governmental acts that outline the meaning of "measure" in the NAFTA.[165] The Claimants simply assume that the definition is, by default, all encompassing.[166] But the Tribunal cannot simply assume; it must decide on the basis of the evidence. The evidence at the hearing confirmed that the press release was a public statement by a government-in-waiting: it imposed no "law", "regulation", "procedure", "requirement", "practice", or related discipline. [redacted]

65. Nor can the Claimants explain why the press release should be considered as having been "adopted or maintained" by Canada.[168] This aspect of Article 1101(1) is entirely absent from the Claimants' written submissions. At the hearing, the Claimants again simply asserted that Ontario officials complied with the Premier-Designate's "direction" (*quod non*).[169] In this regard, the

[163] The Claimants argued that the Premier-Designate "directed officials to withdraw from the WCI program […] with immediate effect." **Day 1 Transcript**, pp. 22:19 to 23:1. This is inaccurate; "Ford also announced that Ontario would be serving notice of its withdrawal from the joint agreement linking Ontario, Quebec and California's cap-and-trade markets as well as the pro-carbon tax Western Climate Initiative" **RD-001**, Canada's Opening Presentation, Slide 153.

[164] The chapeau to Article 1101 sets out three criteria that must be satisfied in order for Chapter Eleven to apply: the impugned conduct must be a "measure"; that measure must be "adopted or maintained by a Party"; that measure must "relat[e] to" one of the enumerated subparagraphs in Article 1101.

[165] NAFTA Article 201 provides: "measure includes any law, regulation, procedure, requirement or practice."

[166] Claimants' Reply, ¶ 407.

[167] **Day 2 Transcript**, Innes/Wood, p. 521:3-8. Mr. Wood also noted [redacted] **Day 2 Transcript**, Innes/Wood, pp. 523:9-524:8. *See also* **Day 2 Transcript**, Innes/Wood, p. 531:9-21 and pp. 540:8 to 541:2.

[168] Unlike NAFTA's State-to-State dispute settlement mechanism, Chapter Eleven does not extend to "proposed measure[s]". **Day 1 Transcript**, Robertson, pp. 242:12 to 243:9; **RD-001**, Canada's Opening Presentation, Slide 152; Canada's Rejoinder, ¶ 184.

[169] The Premier-Designate's "direction" was not binding on Ontario decision-makers and was not considered as such. As Mr. Wood explained, the Premier-Designate's view was sought and taken into account by officials in deciding whether to issue the auction notice. Given that participation in the next auction was controversial and could not be considered routine, the Minister's delegate (in consultation with senior officials) refrained from committing the new administration

Claimants appear to conflate the only present-oriented statement in the press release[170] with the actual measure adopted by Ontario on June 15: the Minister's Delegate's decision not to issue a notice for the August auction. This was strictly limited to the issue of Ontario's participation in the next joint auction and preserved flexibility for the new government to set policy once in power.[171]

66. In the absence of a contested "measure" within the Tribunal's jurisdiction, the Claimants' primary arguments alleging NAFTA breaches on June 15, 2018 and damages arising from those alleged breaches must fail.

IV. The Claimants Have Not Established a Breach of NAFTA Chapter Eleven

A. The Evidence at the Hearing Confirmed that the Claimants Have Failed to Establish a Breach of NAFTA Article 1110

67. At the hearing, the Claimants maintained their allegations that "Ontario indirectly and then directly expropriated KS&T's investment" on three occasions, via the Premier-Designate's announcement on June 15, 2018; Regulation 386/18 on July 3, 2018; and, the *Cancellation Act* on October 31, 2018.[172] The Claimants' arguments at the hearing suffered from the same flaws as their written submissions. First, the Claimants failed to prove that they held a property right capable of being expropriated. Second, the Claimants failed to show that Ontario directly expropriated their alleged investments. Third, there was no indirect expropriation.

1. The Claimants Have Not Demonstrated the Existence of a Property Right Capable of Being Expropriated

68. At the hearing, the Claimants maintained their position that NAFTA constitutes *lex specialis* and an investment that falls within the definition of "investment" under Article 1139 is *prima facie*

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to participation in the auction. **Day 2 Transcript**, Innes/Wood, p. 514:10-13, p. 530:1-12, and pp. 532:19 to 533:21. *See also* Canada's Rejoinder, Section II.D.3.

[170] The press release states that Mr. Ford "directed officials to immediately take steps to withdraw Ontario from future auctions." Again, this statement is vague. For instance, it is unclear whether Mr. Ford was referring to the August 2018 auction, all future auctions or auctions after a certain date. Similarly, it is unclear what "steps" Mr. Ford envisioned. *See* **Day 1 Transcript**, Robertson, pp. 244:10 to 245:1. *See also* Canada's Rejoinder, ¶ 181.

[171] **Day 2 Transcript**, pp. 523:9 to 524:8. Mr. Wood explained the public service's "sense that we need to maintain as many options as possible" for the new government once in power. **Day 2 Transcript**, Innes/Wood, p. 533:14-21.

[172] **Day 1 Transcript**, Bondy, pp. 26:19-27:7. *See* Claimants' Memorial, ¶ 401; Claimants' Reply, ¶ 512; **RD-001**, Canada's Opening Presentation, Slide 168.

capable of being expropriated under Article 1110.[173] In doing so, the Claimants ignore the fact that the question whether there exists an investment capable of being expropriated is distinct from the question whether there is an investment that falls within the scope of the treaty.[174] Nothing in the NAFTA suggests that something that is not capable of being expropriated under customary international law may be expropriated under Article 1110, and the NAFTA Parties have consistently agreed that a measure cannot constitute an expropriation unless it interferes with a tangible or intangible property right.[175]

69. At the hearing, the Claimants argued that their allegedly expropriated investments are "property in the form of emission allowances" and "emission allowances in the Claimants' broader carbon trading business".[176] The disputing parties agree that the Tribunal must consider the law of Ontario in order to determine the existence, nature and scope of the alleged property rights,[177] and evidence adduced at the hearing supports the conclusion in Canada's written submissions that neither of the Claimants' alleged investments is, under the law of Ontario, property capable of being expropriated.[178]

70. First, the Claimants have not established that emission allowances are property under Ontario law.[179] To the contrary, and as set out in detail in Part II.A above, emission allowances created under

[173] **Day 1 Transcript**, Baldwin, p. 117:8-19 and Bondy, p. 297:10-17.

[174] Canada's Counter-Memorial, ¶¶ 235-237; Canada's Rejoinder, ¶¶ 223-227; **Day 1 Transcript**, Galagan, pp. 250:19-251:14. *See* **RL-54**, *Cargill – Award*, ¶ 351: "The Tribunal … views the issue as involving two distinct questions: first, whether the 'HFCS business' is an investment in and of itself under Article 1139; and second, whether the 'HFCS business,' as an investment under Article 1139, can be the subject of a claim for expropriation within the meaning of Article 1110."

[175] **Day 1 Transcript**, Galagan, pp. 251:15-252:10; Canada's Counter-Memorial, ¶¶ 231-232; Canada's Rejoinder, ¶¶ 228-229; *Koch – United States 1128 Submission*, ¶ 29. It is well-established that, under customary international law, the concept of expropriation is limited to property rights that are capable of being expropriated. Canada's Counter-Memorial, ¶¶ 221, 228-233; Canada's Rejoinder, ¶¶ 222-230; **Day 1 Transcript**, Galagan, pp. 249:14-250:18; **RD-001**, Canada's Opening Presentation, Slides 171-176.

[176] **Day 1 Transcript**, Baldwin, p. 118:3-14.

[177] Canada's Counter-Memorial, ¶ 238; Canada's Rejoinder, ¶ 232; **Day 1 Transcript**, Genest, p. 81:10-12: "The parties agree that it is appropriate to look to the law of the host State for a determination of property, and in this case, this is Ontario law." and Zeman, p. 198:7-21; **RD-001**, Canada's Opening Presentation, Slides 96-97.

[178] *See* Canada's Counter-Memorial, ¶¶ 233-234, 243-247; Canada's Rejoinder, ¶¶ 231-240; **Day 1 Transcript**, Galagan, pp. 252:11-253:13.

[179] Canada's Counter-Memorial, ¶¶ 134-151, 233-234, 243-245; Canada's Rejoinder, ¶¶ 122-141, 233; **Day 1 Transcript**, Zeman, p. 177:3-10 and pp. 196:16-224:11; **RD-001**, Canada's Opening Presentation, Slides 99-128, 178.

the *Climate Change Act* are "non-compensable regulatory interests" that "lack the status of property" in Ontario.[180]

71. Second, although the Claimants repeated their claim that market share, customers and goodwill "have been confirmed by NAFTA tribunals as being capable of being expropriated",[181] they failed to identify, either in their written submissions or at the hearing, any vested property rights in Canada in connection with KS&T's alleged "carbon trading business".[182]

72. In the absence of a property right, the Claimants' expropriation claim fails and no further analysis under Article 1110 is required. For the sake of completeness, Canada explains that the Claimants' claim would fail regardless because it does not meet the international law requirements for either a direct or an indirect expropriation.

2. The Claimants Have Not Established that Ontario Directly Expropriated Any of Their Alleged Property Rights

73. At the hearing, the Claimants repeated their claims that KS&T's alleged investments had been directly expropriated "when Ontario formally voided KS&T's allowances without compensation under the Cancellation Act."[183] In its written submissions, Canada explained that a direct expropriation involves either an outright physical seizure or a compulsory transfer of the investor's property to a State or a State-mandated third party, and the Claimants' direct expropriation claim fails on this test.[184]

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[180] **Transcript Day 4**, Katz, p. 877:15-21; *see also* pp. 887:8-12, 892:8-13, 898:3-899:9, 994:1-11.

[181] **Day 1 Transcript**, Baldwin, p. 118:14-18. This statement mischaracterizes the NAFTA jurisprudence: several NAFTA tribunals merely held that "market share, customers or goodwill" may be taken into account as an element of the value of an enterprise. KS&T had an enterprise in the United States, not in Ontario, and the Claimants continue to confuse (i) the requirement that a finding of a breach of NAFTA Article 1110 requires that the claimant had a vested property right capable of being expropriated, and (ii) the possibility that, if a claimant's *enterprise* has been expropriated, items such as goodwill or market share may be taken into account for valuation purposes. *See* Canada's Counter-Memorial, ¶ 167; Canada's Rejoinder, ¶¶ 34, 153, 174, 230, 238-239; **Day 1 Transcript**, Galagan, p. 253:5-9.

[182] *See* Canada's Counter-Memorial, ¶¶ 233-234, 239-242, 246-247; Canada's Rejoinder, ¶¶ 230-232, 234-240.

[183] **Day 1 Transcript**, Bondy, pp. 26:19-27:7 and Baldwin, pp. 125:9-127:9.

[184] Canada's Memorial, ¶¶ 280, 283; Canada's Rejoinder, ¶¶ 276-277; **Day 1 Transcript**, Galagan pp. 253:14-254:14; **RD-001**, Canada's Opening Presentation, Slide 180.

74. The Claimants' insistence on "coercive or forcible appropriation by the State"[185] rather than "forcible transfer" as the applicable criterion does not save their direct expropriation claim. Under the *Cancellation Act*, the emission allowances held by KS&T in its Ontario CITSS account were cancelled, and Ontario's cap and trade program was to be replaced with new environmental policies. None of KS&T's emission allowances were transferred either to Ontario for the government's own use (i.e. "appropriated" by Ontario) or to another cap and trade participant mandated by Ontario.[186]

75. Further, as Canada previously explained, the Government of Ontario did not benefit from the alleged "appropriation" of KS&T's emission allowances. Ontario received its share of proceeds from KS&T's purchase of emission allowances at the May 2018 auction (USD [redacted] and the three jurisdictions deposited emission allowances into KS&T's CITSS account on June 11, 2018.[187] Ontario would have received this amount whether or not it subsequently enacted the *Cancellation Act*.

3. The Claimants Have Not Established that Ontario Indirectly Expropriated Any of Their Alleged Property Rights

76. In the absence of an outright physical seizure or a compulsory transfer of the investor's property to a State or a State-mandated third party, the only remaining question is whether Ontario indirectly expropriated the Claimants' alleged investments. This inquiry requires the Tribunal to consider the economic impact of the measure; the extent to which the measure interferes with distinct, reasonable investment-backed expectations; and the character of the measure.[188] Evidence adduced at the hearing supports the conclusion that Ontario's measures did not constitute an indirect expropriation.

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[185] **Day 1 Transcript**, Baldwin, pp. 125:14-20.

[186] Canada's Counter-Memorial, ¶¶ 281-282; Canada's Rejoinder, ¶ 276.

[187] Canada's Counter-Memorial, ¶ 284; Canada's Rejoinder, ¶ 277; **Day 1 Transcript**, Bondy, p. 29:2-7 and Zeman, p. 237:11-17.

[188] Canada's Counter-Memorial, ¶¶ 230-232, 248-252, 259, 271; Canada' Rejoinder, ¶¶ 241-243, 248, 251, 255-260. **Day 1 Transcript**, Galagan, pp. 254:18-255:16; **RD-001**, Canada's Opening Presentation, Slides 182, 184-185.

(a) Ontario's Measures Did Not Interfere with the Claimants' Distinct, Reasonable Investment-Backed Expectations

77. At the hearing, the Claimants repeated their allegations that the challenged measures interfered with their "direct, reasonable, investment-backed expectations".[189] In reality, KS&T participated in Ontario's cap and trade program in the absence of any specific commitments from the Government of Ontario.[190]

78. The Claimants' counsel stated that, "[w]ith regard to the fact that the [Harmonization Agreement] was not binding, … the point was not whether or not it was binding, but what kind of reasonable expectations it engendered."[191] The Claimants, however, offered no explanation as to how a non-binding document could give rise to any reasonable expectations that Ontario would not amend its laws and regulations or would not replace its cap and trade program with a different regime.[192]

79. The Claimants' witnesses [redacted] caused by the Progressive Conservative Party's electoral commitment to cancel Ontario's cap and trade program,[193] and Mr. Martin testified that "there was a good possibility that if the administration changed, that Ontario would be leaving the linked market."[194] Mr. Martin also confirmed that, despite "the fact that KS&T had the option to elect to pursue auctions through either its registration in California or its registration in Ontario",[195] KS&T decided to participate in the May 2018 auction as an Ontario-registered market

[189] **Day 1 Transcript**, Baldwin, pp. 120:12-122:5.

[190] **Day 1 Transcript**, Zeman, pp. 179:20-182:16 and Galagan, pp. 255:17-257:8; Canada's Counter-Memorial, ¶¶ 48-51, 57, 124, 248-256; Canada's Rejoinder, ¶ 244; **RD-001**, Canada's Opening Presentation, Slides 53, 188. *See also* **R-006**, *Climate Change Act*, s. 70; Canada's Counter-Memorial, ¶¶ 40-41, 99-100, 142, 146, 209, 245, 254; Canada's Rejoinder, ¶¶ 22, 134, 138, 206, 245, 247; **RD-001**, Canada's Opening Presentation, Slides 124-125, 186; **Day 1 Transcript**, Zeman, p. 219:19-220:21 and **Day 4 Transcript**, Katz, pp. 890:13-15, 891:5-19, 892:8-13.

[191] **Day 1 Transcript**, Bondy, p. 299:6-10.

[192] **Day 1 Transcript**, Dosman, pp. 168:11-170:21; Canada's Counter-Memorial, ¶¶ 55-56, 179, 206, 257-258; Canada's Rejoinder, ¶¶ 29-31, 67, 203, 211-212, 245; **RD-001**, Canada's Opening Presentation, Slides 25-29, 187. *See also* **Day 4 Transcript**, Litz, pp. 1212:9-1213:18.

[193] **Day 1 Transcript**, Baldwin, p. 121:2-7. *See* **Day 1 Transcript**, Zeman, pp. 191:18-192:18 and Galagan, p. 258:4-19; Canada's Counter-Memorial, ¶¶ 66-74, 76, 201; Canada's Rejoinder, ¶¶ 245, 270; **RD-001**, Canada's Opening Presentation, Slides 83, 189.

[194] **Day 2 Transcript**, Bjorklund/Martin, p. 370:4-16.

[195] **Day 1 Transcript**, Bondy, pp. 289:22-290:8.

participant [redacted] The Claimants "had a strategy in place" to transfer [redacted] to its California CITSS account [redacted]

(b) Nothing Ontario Did on June 15, 2018 Substantially Deprived KS&T of the Economic Value of Its Alleged Property Rights

80. The Claimants repeated their allegations that an indirect expropriation occurred when the Premier-Designate issued a press release on June 15, 2018.[198] However, a vague, non-binding statement issued by the leader of the Progressive Conservative Party before being officially sworn in as Ontario's Premier did not change the regulatory framework governing KS&T's participation in Ontario's cap and trade program and did not change the rules concerning transfers of emission allowances.[199]

81. Mr. Martin explained that "California and Quebec, they de-linked their registries", so that the allowances KS&T held in its Ontario CITSS account "were effectively frozen".[200] [redacted]

[196] **Day 2 Transcript**, Robertson/Martin, pp. 367:16-368:21 and Alvarez/Martin, pp. 371:2-19. *See also* **Day 1 Transcript**, Zeman, pp. 188:12-190:7; Canada's Rejoinder, ¶¶ 1, 39, 113, 244; **RD-001**, Canada's Opening Presentation, Slides 74-76.

[197] **Day 1 Transcript**, Baldwin, pp. 121:21-122:2. *See* **Day 1 Transcript**, Innes, p. 149:10-22; Canada's Memorial, ¶¶ 63-65, 124; Canada's Rejoinder, ¶¶ 6, 41-42, 58-59, 105-106, 110, 113, 119, 244; **RD-001**, Canada's Opening Presentation, Slides 67, 69-72, 77-79, 84-90.

[198] **Day 1 Transcript**, Bondy, pp. 26:19-27:7 and Baldwin, pp. 118:19-119:9.

[199] **Day 1 Transcript**, Robertson, pp. 240:20-246:1 and Galagan, pp. 259:8-260:9; Canada's Counter-Memorial, ¶¶ 77-78, 260-264; Canada's Rejoinder, ¶¶ 252-254; **RD-001**, Canada's Opening Presentation, Slides 151-157.

[200] **Day 1 Transcript**, Baldwin/Martin, p. 323:5-7. *See* Canada's Rejoinder, ¶ 253; **Day 1 Transcript**, Innes, pp. 132:20-134:2 and Zeman, 185:11-186:4, 187:20-188:11, 190:8-18, 192:18-195:17.

[201] Canada's Rejoinder, ¶¶ 7-8, 253; **RD-001**, Canada's Opening Presentation, Slides 44-45, 191, 226. Mr. Litz also explained that California had other options to safeguard the integrity of its system in light of Ontario's announced future withdrawal. *See* **Day 4 Transcript**, Litz, pp. 1106:6-17, 1118:2-1125:13; Canada's Rejoinder, ¶¶ 76-78, 253

[202] **Day 1 Transcript**, Robertson/Martin, pp. 357:18-359:6. Mr. Litz agreed that California could re-link its program with Ontario. **Day 4 Transcript**, Litz, pp. 1118:16-22 and 1190:5-18; **RD-001**, Canada's Opening Presentation, Slide 227.

(c) Ontario's Measures Constituted a Valid Exercise of Police Powers

82. At the hearing, the Claimants reiterated their allegations that Ontario's measures were not a valid exercise of police powers,[203] but the evidence supports Canada's position that the orderly wind-down of Ontario's cap and trade program and its replacement with new environmental policies did not constitute an indirect expropriation and did not require payment of compensation.[204]

83. First, Canada demonstrated that Ontario's measures had a legitimate public welfare objective: to pursue new environmental protection policies while reducing costs for Ontario households.[205] The Claimants repeated their allegations that the 2018 Environment Plan and the EPS program "are divorced from the measures in dispute in this case" and "occurred between five months and three-and-a-half years after the measures in issue."[206] However, Mr. Wood explained that the Claimants are incorrect "to question Ontario's willingness to address key environmental issues" as the EPS regulation "was actually created as of July 2019" and Ontario, without delay, "entered into a negotiation with the Federal Government for our regulation to be recognized" as an acceptable alternative to the federal output-based pricing system (OBPS).[207]

84. Second, Ontario's measures were non-discriminatory and "[m]arket participants were not the only ones not compensated under the regulation."[208] The *Climate Change Act* established a regulatory

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[203] **Day 1 Transcript**, Baldwin, pp. 122:6-125:8.

[204] Under customary international law, as reflected in NAFTA Article 1110 and as understood by all three NAFTA Parties, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations, except in rare circumstances. *See* Canada's Memorial, ¶¶ 231-232, 265-271, 274, 277-278; Canada's Rejoinder, ¶¶ 255-261; **Day 1 Transcript**, Galagan, pp. 260:10-261:21; **RD-001**, Canada's Opening Presentation, Slides 193-195, 197.

[205] Canada's Counter-Memorial, ¶¶ 272-275; Canada's Rejoinder, ¶¶ 9, 79-85, 92, 262-266. *See* **C-175**, Hansard Transcript, Legislative Assembly of Ontario, 31 July 2018, pp. 485, 487; **RD-001**, Canada's Opening Presentation, Slides 158-163, 196, 206-207, 209-211.

[206] **Day 1 Transcript**, Baldwin, p. 123:9-18.

[207] **Day 2 Transcript**, Genest/Wood, pp. 569:16-571:2, referring to **AW-30**, Greenhouse Gas Emissions Performance Standards, O. Reg. 241/19 ("Regulation 241/19"), made on June 27, 2019 and filed on July 4, 2019; **RWS-3**, Wood – Second Witness Statement, ¶¶ 30-33. The Claimants ignore the fact that the *Cancellation Act* required the Minister to prepare a new climate plan, and that the EPS program was one of the elements included in Ontario's 2018 Environment Plan. Ontario also challenged the constitutionality of the federal carbon tax. *See* Canada's Counter-Memorial, ¶¶ 92, 102-104; Canada's Rejoinder, ¶¶ 91, 93, 265; **Day 2 Transcript**, Wood, pp. 505:19-506:10; **RD-001**, Canada's Opening Presentation, Slide 208.

[208] **Day 2 Transcript**, Innes/Wood, p. 562:3-7 and pp. 562:19-563:1. *See also* **Day 1 Transcript**, Bondy, pp. 70:13-71:4 and Dosman, pp. 268:11-272:19; Canada's Counter-Memorial, ¶¶ 95-97, 205, 276; Canada's Rejoinder, ¶¶ 86-89, 250, 267-268; **RD-001**, Canada's Opening Presentation, Slides 212-215.

scheme "intended to encourage Ontarians to change their behaviour" in order to reduce GHG emissions.[209] When winding down that program, Ontario decided to compensate only those participants that had compliance obligations and had contributed to the statutory goal.[210] Mr. Wood explained that market participants "have had no emissions in Ontario, would not be reporting on their emissions in Ontario, [and] would have no compliance obligation in Ontario."[211] Even though fuel suppliers and natural gas distributors had compliance obligations, they were also ineligible for compensation as "[t]hey were able to recover", directly from their customers, "the cost of compliance they faced."[212]

85. Third, Ontario's measures were adopted and applied in good faith.[213] The Claimants agree that they cannot "dictate policy to the government of Ontario" and that Ontario "can decide in its sovereign ability whether or not it wants to have a cap-and-trade system".[214] However, they repeated their claims that Ontario's measures were "wholly disproportionate and not taken in good faith"[215] and that there was "no legitimate reason for the Premier-elect's ultra vires direction" and "no consultation, no adjustment period, and no opportunity for the Claimants to mitigate their loss."[216]

86. These allegations are not supported by the evidence. Mr. Wood's testimony confirmed that Ontario did not cancel the cap and trade program on June 15, and that its decision not to participate in the August 2018 joint auction was made *bona fide* in accordance with applicable regulations and the caretaker convention.[217] Regulation 386/18 was validly made under the *Climate Change Act*[218]

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[209] **Day 4 Transcript**, Katz, pp. 888:4-889:4. *See also* **Day 1 Transcript**, Zeman, pp. 208:9-210:2; **Day 4 Transcript**, Katz, pp. 1016:9-1018:11, 1019:8-1023:11, 1025:21-1026:17; and **RD-001**, Canada's Opening Presentation, Slides 4-9, 106-108.

[210] Canada's Counter-Memorial, ¶ 205; Canada's Rejoinder, ¶ 87; **RWS-3**, Wood – Second Witness Statement, ¶ 22. *See also* **Day 4 Transcript**, Litz, pp. 1106:18-1107:4 and 1109:9-19.

[211] **Day 2 Transcript**, Innes/Wood, pp. 499:15-500:11.

[212] **Day 2 Transcript**, Genest/Wood, pp. 559:18-560:20. *See also* **Day 1 Transcript**, Bondy, pp. 70:13-71:4; **Day 2 Transcript**, Genest/Wood, pp. 563:9-564:1.

[213] Canada's Memorial, ¶¶ 277-278; Canada's Rejoinder, ¶¶ 269-273; **Day 1 Transcript**, Galagan, pp. 261:2-263:15.

[214] **Day 1 Transcript**, Bondy, pp. 74:20-75:1.

[215] **Day 1 Transcript**, Baldwin, pp. 123:19-124:1.

[216] **Day 1 Transcript**, Baldwin, pp. 124:22-125:5.

[217] **Day 2 Transcript**, Innes/Wood, pp. 514:4-13, 529:5-541:2. *See also* Canada's Memorial, ¶¶ 79-81, 261; Canada's Rejoinder, ¶¶ 60-73, 185, 198, 270.

[218] Canada's Counter-Memorial, ¶¶ 85, 177, 263; Canada's Rejoinder, ¶¶ 81, 204, 254 and fn. 462; **RD-001**, Canada's Opening Presentation, Slides 158-159; **Day 1 Transcript**, Robertson, p. 246:10-20; **Day 4 Transcript**, Katz, pp. 1101:3-

and the *Cancellation Act* was enacted in accordance with the usual legislative process following an extensive debate in light of information available at the time, including the 2016 Auditor General's report.[219] Further, the Claimants agree that, prior to June 15, 2018, KS&T had the opportunity to transfer emission allowances from its Ontario CITSS account to California,[220] and that KS&T engaged in extensive lobbying activities as it "had meetings with senior officials of Ontario" and "proposed various amendments" to Bill 4.[221]

87. Because Ontario's measures were non-discriminatory and designed and applied in good faith to protect a legitimate public welfare objective, there was no indirect expropriation of the Claimants' alleged investments.

B. The Evidence at the Hearing Confirmed that the Claimants Have Failed to Establish a Breach of NAFTA Article 1105

88. In its written submissions, Canada explained that the Claimants' allegations do not reach the high threshold for a violation of NAFTA Article 1105: Ontario's decision to wind down its cap and trade program was based on rational policy objectives;[222] the wind-down followed a normal legislative and regulatory process;[223] Ontario's decisions with respect to compensation were based on rational and consistent distinctions between different classes of participants in the cap and trade program;[224] and Ontario did not deny the Claimants justice.[225]

89. The hearing evidence confirmed that the Claimants have failed to discharge their burden to establish a violation of NAFTA Article 1105. In particular, the challenged measures were not manifestly arbitrary because Ontario had a legitimate policy rationale for exiting the cap and trade

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1002:8, 1003:11-22, 1009:17-1010:3, 1011:19-1012:6; **R-55**, Regulation 386/18; **R-006**, *Climate Change Act*, ss. 21(3), 70, 78(1)(1), 78(6)-(7),(14).

[219] Canada's Counter-Memorial, ¶¶ 68, 272-273; Canada's Rejoinder, ¶¶ 248, 269-271; **Day 1 Transcript**, Robertson, pp. 246:20-247:8 and Dosman, p. 266:6-21.

[220] **Day 1 Transcript**, Innes, pp. 150:15-151:5. *See* Canada's Memorial, ¶¶ 290, 298, 323; Canada's Rejoinder, ¶¶ 6, 58-59, 110, 246, 272; **Day 1 Transcript**, Zeman, 193:20-195:8 and Dosman, pp. 279:19-280:15.

[221] **Day 1 Transcript**, Bondy, pp. 69:16-19 and 71:17-72:4. *See* Canada's Counter-Memorial, ¶¶ 88-89; Canada's Rejoinder, ¶¶ 10, 194-195, 272, 319; **Day 1 Transcript**, Dosman, pp. 271:11-272:6.

[222] Canada's Counter-Memorial, ¶ 68, 205; Canada's Rejoinder, ¶¶ 191, 201.

[223] Canada's Counter-Memorial, ¶¶ 200-206; Canada's Rejoinder, ¶¶ 196-199, 203-207.

[224] Canada's Counter-Memorial, ¶ 205; Canada's Rejoinder, ¶ 201.

[225] Canada's Counter-Memorial, ¶¶ 213-219; Canada's Rejoinder, ¶¶ 213-218.

program, followed a rational process in winding down the program, and made legitimate distinctions between categories of participants in the cap and trade program in its decisions on compensation.[226]

1. Ontario's Wind-Down of the Cap and Trade Program Had a Legitimate Policy Rationale

90. Measures that are rationally connected to legitimate policy goals will not meet the threshold of manifest arbitrariness.[227] In its written submissions, Canada illustrated that Ontario had a legitimate policy rationale for exiting the cap and trade program. Along with the Auditor General of Ontario,[228] the new government believed that the program imposed economically inefficient burdens on Ontarians.[229] Ontario's government was of the view that replacing Ontario's cap and trade program with a different program would lower fuel costs, decrease the burden on Ontario taxpayers, and boost economic growth and employment.[230] Indeed, the Claimants themselves supported Ontario's rationale for cancelling the cap and trade program, [redacted]

91. The Claimants now rely on two assertions: that the policy was illegitimate because it was "political"; and that the policy was irrational because the new environmental plan adopted in its place had not been fully implemented and/or because the federal backstop applied in Ontario.

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[226] The Claimants did not elicit any evidence relating to their denial of justice allegations. *See* Canada's Counter-Memorial, ¶¶ 213-219; Canada's Rejoinder, ¶¶ 213-218; **Day 1 Transcript**, Dosman, pp. 273:11-275:22; **RD-001**, Canada's Opening Presentation, Slides 216-219. *See also* **R-058**, *Greenpeace v. Ontario*, ¶ 40 (Corbett J., dissenting): "First, my colleagues place an emphasis on s.10 that counsel for Ontario did not during argument. Ontario's position on this issue, before us, was appropriately circumscribed: it recognized that s.10 could not be used to insulate the government from judicial review based on illegality: the high standard of deference owed to a Minister of the Crown remains, of course, but subject to that high standard, judicial review is available." (emphasis added)

[227] Canada's Counter-Memorial, ¶ 196.

[228] **R-036**, Minister of the Environment and Climate Change, 2016 Annual Report of the Office of the Auditor General of Ontario, Chapter 3 Section 3.02, pp. 149, 150, 167 and 174-175; **R-037**, Office of the Auditor General of Ontario, News Release "Ontario's Cap and Trade Will Not Significantly Lower Emissions Within the Province by 2020: Auditor General" ("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".)

[229] *See* **RD-001**, Canada's Opening Presentation, Slides 205-206; **C-175**, Hansard Transcript, Legislative Assembly of Ontario, 31 July 2018, per Minister Phillips, p. 485; **C-111**, Ontario Government News Release, "Ontario Introduces Legislation to End Cap and Trade Carbon Tax Era in Ontario", 25 July 2018; **AW-026**, Ministry of the Environment, Conservation and Parks, "Technical briefing", 25-27 July 2018, p. 7.

[230] Canada's Counter-Memorial, ¶¶ 68, 102-104, 273 and fns. 118, 503; **R-062**, Ontario, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan, 29 November 2018, p. 3.

[231] [redacted]

92. With respect to the first point, as other tribunals have recognized, policies are often "political" and even controversial – this does not render them arbitrary or illegitimate.[232] Nothing at the hearing disrupts the conclusion that while Ontario's decision to cancel the cap and trade program was controversial (and indeed a major issue in the provincial election campaign in May-June 2018), it was not manifestly arbitrary in violation of customary international law.

93. With respect to the second point, the Claimants at the hearing pointed to criticisms of the Ontario government's environmental initiatives in one document issued years later, in 2021.[233] But hindsight is irrelevant. At the time of the contested measures, the Ontario government viewed the federal backstop as unconstitutional[234] and was in the process of developing new province-wide environmental policies.[235]

94. Finally, in marked contrast to their position in this arbitration, at the time of the contested measures the Claimants agreed with Ontario's policy rationale. Indeed, the Claimants supported the cancellation of the cap and trade program [redacted] The Claimants cannot now reasonably suggest that this very policy rationale was irrational or manifestly arbitrary.

2. Ontario's Process for Winding Down its Cap and Trade Program Was Not Manifestly Arbitrary

95. Canada's written submissions illustrated that Ontario's wind-down of its cap and trade program was lawful and legitimate.[237] Nevertheless, at the hearing the Claimants maintained three core

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[232] Canada's Rejoinder, ¶ 197; **CL-085**, *Electrabel S.A.* v. *Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("*Electrabel – Decision on Jurisdiction*"), ¶ 8.23 ("Politics is what democratic governments necessarily address; and it is not, *ipso facto*, evidence of irrational or arbitrary conduct for a government to take into account political or even populist controversies in a democracy subject to the rule of law."); *see also* **CL-054**, *Cargill – Award*, ¶ 292.

[233] **C-206**, 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); *see also* **Day 2 Transcript**, Genest/Wood, pp. 578:1-3 and 579:11-15.

[234] **R-183**, Government of Ontario News Release, "Ontario Announces Constitutional Challenge to Federal Government's Punishing Carbon Tax Scheme", 2 August 2018; **Day 2 Transcript**, Genest/Wood, p. 506:5-11.

[235] **R-062**, 2018 Environment Plan; **AW-30**, Greenhouse Gas Emissions Performance Standards, O. Reg. 241/19 ("Regulation 241/19"); **RWS-1**, Wood – First Witness Statement, ¶ 35.

[236] [redacted]

[237] Canada's Counter-Memorial, ¶¶ 83-94; Canada's Rejoinder, ¶¶ 80-85.

complaints, focusing on: the events of June 15, the enactment of Regulation 386, and the consultation process for Bill 4. The hearing did not provide any support for the Claimants' baseless assertions that Ontario's process in winding down its cap and trade program was "wrongful" or "illegal"[238], let alone "bonkers"[239].

96. First, as set out in Part III of Canada's Opening Statement and this submission, all Ontario did on June 15, 2018 was decline to participate in an auction of emission allowances in August. Ontario's actions to wind down the program began after the new government took office on June 29, 2018.[240]

97. Second, Regulation 386/18 was properly made under the *Climate Change Act*, and the Claimants have not even attempted to prove otherwise.[241] The *Climate Change Act* authorized the Lieutenant Governor in Council (the Cabinet) to make regulations in respect of a wide range of matters, including the "purchase, sale, trade and other dealings with emission allowances".[242] The Claimants put forward no evidence regarding Ontario law on regulation-making authority, either before or during the hearing.[243]

98. Third, the consultation process on Bill 4 was straightforward: it was posted on the Environmental Registry; the public provided comments; the government considered those comments. Mr. Wood confirmed that all comments received from the public (including those of Koch Industries) were reviewed and considered.[244] However, as Mr. Wood testified, Ontario did not adopt any comments or proposed changes that would have undermined the clear policy goals of the Ontario government.[245] The government had promised to wind down the cap and trade program swiftly and with minimal additional costs to participants, and it did not depart from those policy objectives. Far

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[238] Claimants' Reply, ¶ 202.

[239] **Day 1 Transcript**, Bondy, p. 57:5.

[240] To the extent that the Claimants suggest that [redacted] was improper, Mr. Wood's testimony provides a complete answer. **Day 2 Transcript**, Innes/Wood, p. 547:9-21.

[241] **AW-5**, Regulation 386/18, titled "Ontario Regulation 386/18 made under the *Climate Change and Low-carbon Economy Act*".

[242] **R-006**, *Climate Change Act*, s. 78(1); *see also* s. 21(3).

[243] *See, e.g.*, Claimants' Reply, ¶¶ 79, 200.

[244] **RWS-1**, Wood – First Witness Statement, ¶ 28.

[245] **Day 2 Transcript**, Genest/Wood, pp. 575:2-576:7.

from evidencing arbitrariness, the fact that Koch Industries' proposal was not adopted shows that the Ontario government's policy implementation was consistent with its policy goals.[246]

99. Finally, as part of the consultation and legislative process, the government did in fact implement numerous meaningful changes to Bill 4, including: "allowing the minister for the purpose of taking any steps with respect to the climate change plan; "ensuring that free allowances were deducted once (rather than twice) when calculating the amount of compensation removing duplication in regulation making authority"; "technical amendments to ensure accurate reference to participants such as natural gas distributors as well as electricity transmission and distribution providers"; and "making electricity generators ineligible for compensation as they had the ability to recover their costs under the program."[247]

100. For these reasons and those set out in Canada's written submissions, the Claimants have not established that Ontario's wind-down of its cap and trade program was manifestly arbitrary.

3. Ontario's Compensation Decisions Were Not Manifestly Arbitrary or Discriminatory

101. The crux of the Claimants' dissatisfaction is that they were not awarded compensation under the *Cancellation Act*. In its written submissions and Opening Statement, Canada demonstrated that Ontario's decisions with respect to compensation fell far short of the high threshold required to establish a breach of NAFTA Article 1105.[248] The evidence at the hearing confirmed that conclusion.

102. As set out above in Part II.A, the Minister created non-compensable regulatory interests in the form of emission allowances under the *Climate Change Act*. Those emission allowances did not carry any right to compensation with respect to actions taken under that *Act*, including Regulation 386.[249]

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[246] **Day 1 Transcript**, Dosman, p. 272:12-19.

[247] **C-12**, MOECC, *Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario* (15 November 2018), p. 2. At the end of his lengthy cross-examination, Mr. Wood was unable to recall these other amendments beyond the exclusion of electricity importers. **Day 2 Transcript**, Genest/Wood p. 552:6-16. Canada notes that the other amendments are itemized on page 2 of **C-12**.

[248] Canada's Counter-Memorial at ¶¶ 93-96; Canada's Rejoinder at ¶¶ 86-89; **RWS-3**, Wood – Second Witness Statement, ¶¶ 21-25; **Day 1 Transcript**, Dosman, pp. 268:19-270:19; **RD-001**, Canada's Opening Presentation, Slides 210-212.

[249] **AW-4**, *Climate Change Act*, s.70; **AW-5**, Regulation 386/18, titled "Ontario Regulation 386/18 made under the *Climate Change and Low-carbon Economy Act*".

103. Even though it was not required to do so, Ontario opted to provide compensation in one circumstance: when compliance entities had over-purchased emission allowances and had not directly recovered costs from consumers. As part of the wind-down process, Ontario first created a new obligation for capped participants to submit reports for their GHG emissions for the period January 1, 2017 to July 3, 2018.[250] Emission allowances in entities' CITSS accounts were then "retired" to account for greenhouse gases emitted in Ontario during that period. Any emission allowances in excess of actual emissions would be "cancelled" – these were the only allowances that were eligible for compensation under the *Cancellation Act*.

104. The Claimants' thesis is that all participants were due compensation. They ignore that entities received compensation not for participating in the system, but for emitting less than their holdings of emission allowances in fact allowed. That principle guided the wind-down process, along with the policy goals of ending the program as soon as possible without the imposition of additional costs.[251]

105. At the hearing, the Claimants' counsel speculated that natural gas distributors and fuel suppliers unduly benefited from the compensation regime. Mr. Wood responded, "I don't know if that's true or not".[252] After numerous questions in the same vein, Mr. Wood confirmed that the *Cancellation Act* did not "specifically" either include or exclude the possibility of certain categories of participants benefitting more than others as a result of the compensation formula in the *Cancellation Act*.[253] This does not render the compensation regime manifestly arbitrary.

106. The Claimants similarly failed to elicit any evidence of discrimination that could sustain a claim for violation of Article 1105. There is no evidence that Ontario "arbitrarily target[ed] KS&T"[254]. Nor

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[250] **AW-7**, *Greenhouse Gas Emissions: Quantification, Reporting and Verification*, O. Reg. 390/18, historical version for the period of 1 August 2018 to 31 January 2019.

[251] **RWS-2**, Wood – Second Witness Statement, ¶¶ 20-21; *see also* [redacted]

[252] **Day 2 Transcript**, Genest/Wood, p. 567:18.

[253] **Day 2 Transcript**, Genest/Wood, pp. 569, 7:15.

[254] **Day 1 Transcript**, Bondy, p. 26:16. Despite such a suggestion during their Opening, Canada notes that the Claimants have previously agreed that Article 1105 does not include a protection against nationality-based discrimination. *See* Claimants' Memorial, ¶ 368 (asserting that fair and equitable treatment "covers certain forms of 'discrimination' (*other* than nationality-based)" (emphasis in original). The other NAFTA Parties concur. *See* U.S. Article 1128 Submission, ¶ 26; Canada's Rejoinder, ¶ 193. In any event, there is no evidence of nationality-based discrimination here. **Day 1 Transcript**, Dosman, p. 272:2-6 (explaining that [redacted]

is there evidence to support the argument that customary international law requires that every category of participant in a regulatory regime be treated equally. The Ontario cap and trade program prescribed different rules and obligations to market participants from the outset, reflecting the fact that they did not have compliance obligations.[255]

107. Consistent with differential treatment at the outset of the program, Ontario drew distinctions between different categories of participants in its compensation decisions. Along with market participants, categories such as electricity importers were excluded from eligibility for compensation. As a result, only participants that held non-cost recovered emission allowances in excess of their actual emissions of greenhouse gas in Ontario received compensation.

4. The Claimants Could Not Have Had Any Relevant Expectations That Ontario Would Participate in the August 2018 Auction

108. The Claimants continue to insist that they had "legitimate expectations" relevant to their Article 1105 arguments. In particular, they rely on the Harmonization Agreement to assert that Ontario was required to participate in the August 14, 2018 auction of emission allowances.

109. At the hearing, the Claimants relied on a schedule posted by Ontario in an attempt to show that they could reasonably expect "auctions to take place on a regular basis."[256] In essence, the Claimants argued that, while Ontario may not legally have been required to participate in any auction, the "expectation" was that Ontario was "committing to take part in each of these auctions"[257] and would participate in the August 2018 auction.

110. However, the Claimants' witness Mr. Martin acknowledged that the online schedule "specifically states that dates are subject to change and are confirmed through an official auction

[redacted]

[255] **RD-001**, Canada's Opening Presentation, Slide 8; **Day 1 Transcript**, Dosman, p. 162:4-9; s*ee also* **Day 4 Transcript**, Litz, p. 1113:2-10.

[256] **Day 1 Transcript**, Bondy, p. 51:11-18.

[257] **Day 1 Transcript**, Bondy, pp. 51:19 -52:4. The Claimants also suggest that Ontario officials expected to participate in the August auction. **Day 1 Transcript**, p. 52:13-15. However, Mr. Wood has explained that [redacted] **Day 2 Transcript**, Innes/Wood, p. 513:3-18.

notice."[258] Mr. Martin also agreed that relevant provisions of Ontario's regulations "do[] not include a schedule of dates."[259] Mr. Wood underlined that "confirmation of those dates is subject to an auction notice to be published by Ontario, as is required by our regulations."[260]

111. Given the specific warning on Ontario's webpage that auction dates were set by official notice, the fact that Ontario was not legally required to participate in any auction, and the incoming government's repeated pledges to cancel cap and trade, it was simply not reasonable to conclude that Ontario was committed to participating in the August auction. Indeed, [redacted] Contrary to a reasonable expectation, the Claimants appear to have operated based on unfounded assumptions about what Ontario could and could not do during a transition period – without any evidence that they conducted diligence on Ontario's caretaker requirements.

V. The Claimants Have Not Established that the Alleged NAFTA Breaches Caused Their Alleged Losses

112. The evidence at the hearing focused on the Claimants' primary argument that an alleged NAFTA breach on June 15 caused the Claimants' loss. As the Premier-Designate's June 15 press release was not a measure subject to Chapter Eleven dispute settlement,[262] it cannot constitute a breach of the NAFTA that caused the Claimants' loss. Nor have the Claimants pled that Ontario's

[258] **Day 2 Transcript**, Robertson/Martin, pp. 355:22-356:4; **C-30**, Ontario Government, "What you need to know about Ontario's carbon market using a cap and trade program, including how it works and who is required to register" (2 June 2016) ("Dates shown are subject to change and will be confirmed through the official Auction Notice.")

[259] **Day 2 Transcript**, Robertson/Martin, p. 356:5-8. While acknowledging that the "exact details come out in the auction notice", Mr. Martin tried to explain – largely based on what he "recall[ed]" of California and Quebec's practice – that he did not have "any expectation that--once the schedule is announced" dates would change. **Day 2 Transcript**, Robertson/Martin, pp. 354:10 to 355:14. This is difficult to square with the specific warning in Ontario's online schedule. Unlike Ontario's legal framework, in California a schedule of auction dates is set in advance by regulation.

[260] **Day 2 Transcript**, Innes/Wood, p. 545:2-4; *see also* p. 545:5-15 ("But we can do our own auctions whenever we want to do them, and that's what that footnote is reminding folks of.")

[261] [redacted]

[262] *See* Part III, above. *See also* **Day 1 Transcript**, Robertson, pp. 243:10-246:1; Canada's Counter-Memorial, fn. 245; Canada's Rejoinder, ¶¶ 181-186.

decision not to participate in the August 2018 auction breached the NAFTA or caused the Claimants' loss. Thus, the Claimants' primary case for damages fails.

113. Even if the Tribunal considers that Canada breached NAFTA Chapter Eleven on June 15, the evidence demonstrates that the Claimants have failed to establish: causation of loss; an entitlement to compensation for alleged losses related to the Flint Hills Resources ("FHR") contract, or legal and lobbying costs; and that the Claimants' contributory fault should be disregarded.

A. The Evidence at the Hearing Confirmed that the Claimants Have Failed to Establish Legal Causation

114. The evidence from the hearing largely relates to legal causation.[263] On this point, the Claimants rely heavily on Professor Stavins' conclusion that California and Quebec's decision on June 15 was the only reasonable – and therefore foreseeable – option.[264] This conflicts with both the contemporaneous evidence [redacted] and the evidence presented by Mr. Litz[266] Indeed, the evidence demonstrates that there were reasonable grounds to expect that the other jurisdictions would take a less disruptive approach.

115. According to the Claimants and Professor Stavins, California's actions were predictable because a possible influx of allowances from Ontario (potentially amounting to 53% of California's and Quebec's annual compliance budgets) posed a threat to the environmental integrity of their emission caps.[267] However, Mr. Litz demonstrated that emission cap adjustments are a typical feature of cap and trade programs[268] and that, even accepting Professor Stavins' numbers, a cap adjustment would have been "smaller than adjustments that have been made on two occasions in the RGGI

[263] The Claimants declined to articulate a link between the particular breaches alleged under Article 1105 and the particular loss incurred. Instead, they insist that the causation analysis can proceed as one because the cumulative effect of these alleged breaches results in the same loss as the alleged breach of Article 1110. **Day 1 Transcript**, Innes, p. 130: 14-20. This is incorrect. The Claimants bear the burden of establishing factual and legal causation between each specific breach alleged and the alleged loss arising from that breach. **Day 1 Transcript**, Dosman, p. 278:19 to 279:3. *See also* Canada's Counter-Memorial, ¶ 289 and Canada's Rejoinder, ¶ 309.

[264] **Day 1 Transcript**, Bondy, pp 60:18-61:22.

[265] Canada's Rejoinder, ¶¶ 300; [redacted]

[266] **Day 4 Transcript**, Bondy/Litz, pp. 1187:15-1189:4; **RER-4**, Litz – Second Report, ¶¶ 35-54.

[267] **Day 4 Transcript**, Stavins, pp. 1084:20-1085:1; *see also* **Day 1 Transcript**, Bondy, p. 146:5-10.

[268] **Day 4 Transcript**, Bondy/Litz, pp. 1187:15-1189:4.

program. So I don't see that as an insurmountable task. They could take that 53 percent, spread it out over five years."[269]

116. RGGI's first adjustment was taken to respond to New Jersey's withdrawal and predated Premier-Designate Ford's announcement.[270] The Claimants unsuccessfully attempt to distinguish this example by noting that, five days after announcing his intended withdrawal, Governor Christie clarified that New Jersey would withdraw at the end of a compliance period – suggesting that Ontario could have done the same.[271] However, [redacted]

117. Finally, in an apparent effort to demonstrate that delinkage by California and Quebec was foreseeable, the Claimants suggest that Section 95942(i) of California's cap and trade regulation[273] "enabled delinkage to take place"[274] and that Ontario officials would have been "aware of such an important provision on […] linkage."[275] However, at the relevant time, that provision did not exist. As is evident from the face of the document, the provision invoked by the Claimants was added to California's regulation effective March 29, 2019.[276]

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[269] **Day 4 Transcript**, Bondy/Litz, p. 1193:9-14; *see also* pp. 1188-9-1189:4. Mr. Litz explained that when RGGI states become aware of a partner's withdrawal, they do not take action and continue to honour allowances without limitation. Ultimately, the RGGI states "address any excess allowances that remain after a state leaves the program by adjusting the remaining states' emissions cap to soak up any excess allowances." **Day 4 Transcript**, Litz, pp. 1119:15-1120:6. Mr. Litz noted that RGGI states appear to be following the same approach in response to Virginia's pending withdrawal. **Day 4 Transcript**, Litz, p. 1119:7-12.

[270] **Day 4 Transcript**, Litz, p. 1119:8-10.

[271] **Day 4 Transcript**, Bondy/Litz, p. 1189:5-11 and p. 5-9.

[272] **Day 4 Transcript**, Bondy/Litz, p. 1189: 12-22 and 1190:10-13. *See also* **Day 2 Transcript**, Innes/Wood pp. 523:9-524:8 ([redacted]).

[273] **MM-5**, California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 10 – Regulation for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (April 1, 2019).

[274] **Day 2 Transcript**, Innes, p. 527:11-13. *See also* **Day 2 Transcript**, Innes, p. 526:11-21.

[275] **Day 2 Transcript**, Innes, p. 527:20-22.

[276] **RS-059**, California Code of Regulations, Title 17, Division 3, Chapter 1, Subchapter 10, Article 5 – California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, § 95814 [Excerpt], PDF page 258; "History […] 4. New subsections (i)-(i)(2)(D) and amendment of Note filed 3-29-2019; operative 3-29-2019 pursuant to Government Code section 11343.4(b)(3) (Register 2019, No. 13)"). (emphasis added). *See also* [redacted]

B. The Evidence at the Hearing Demonstrates that KS&T Has Not Established an Entitlement to Compensation for Alleged Loss in Relation to the FHR Contract, Legal, and Lobbying Costs

118. The evidence does not support the Claimants' claim for damages related to the FHR contract or for legal and lobbying costs. Even if the Tribunal finds that these claims are not too remote, the evidence shows that KS&T overpaid for replacement allowances, and that it could have purchased allowances at the August 2018 auction at a significantly lower price.[277] According to Mr. Martin, KS&T understood that auction prices were typically [redacted] However, KS&T chose not to participate in auctions using its California CITSS account [redacted]

119. [redacted]

C. The Evidence at the Hearing Demonstrates that KS&T's Actions Contributed to its Alleged Loss

120. As an experienced trader that was [redacted] posed by Ontario's anticipated withdrawal from cap and trade, KS&T could have taken steps to insulate itself from loss. However, the evidence demonstrates that, [redacted]

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[277] **Day 2 Transcript**, Robertson/Martin, p. 364:7-15. *See also* **C-146**, FHR Trades Extract; **Day 2 Transcript**, Robertson/Martin, pp. 365:17-366:1.

[278] **Day 2 Transcript**, Robertson/Martin, p. 376:5-8.

[279] **Day 2 Transcript**, Robertson/Martin, p. 368:16-21. [redacted] **Day 2 Transcript**, Alvarez/Martin, p. 371:6-11. If KS&T's practices were surprising to Mr. Martin, it is unreasonable to consider that KS&T's refusal to participate in auctions using its California CITSS account would have been foreseeable to Ontario.

[280] **Day 1 Transcript**, Dosman, p. 283:5-9. *See also* **RD-001**, Canada's Opening Presentation, Slide 235 and exhibits **C-153** through **C-174**.

[281] Claimants' Memorial, fns. 601-602; **RD-001**, Canada's Opening Presentation, Slide 235.

[282] See e.g., **Day 1 Transcript**, Dosman, p. 283:8-15; **RD-001**, Canada's Opening Presentation, Slide 236; **R-189**.

[283] [redacted]

[redacted]

121. For instance, KS&T was unable to transfer all of the allowances it purchased at the May auction in a single transaction [redacted] At the hearing, Mr. Martin recognized that "you need two representatives to transfer allowances out of your account, [redacted]

122. The Claimants attempt to brush away KS&T's failed transfer by noting that [redacted] Implementing this practice would have been particularly prudent in June

[284] [redacted]

[285] **Day 1 Transcript**, Zeman, p. 194:8-11.

[286] [redacted]

[287] **Day 2 Transcript**, Zeman/Martin p. 329:11-15.

[288] Mr. Martin confirmed that allocation of the Koch group's holding and purchase limits was a matter for KS&T and related entities to determine. **Day 2 Transcript**, Zeman/Martin pp. 331:1-6. *See also* **Day 2 Transcript**, Zeman/Martin, pp. 338:18-339:4.

[289] **Day 1 Transcript**, Innes, p. 152:2-6. The Claimants' description is misleading. On March 20, 2018, California, Ontario and Quebec deposited allowances into winning bidders accounts. [redacted]

[290] [redacted]

2018 given the [redacted] arising from the uncertainty surrounding Ontario's cap and trade program and the recent election of Mr. Ford.

123. The Claimants' argument that "there was no good reason to think that we needed" to transfer allowances to California as quickly as possible in June 2018[291] is undermined by the fact that [redacted] The Claimants have provided no evidence that they conducted any diligence whatsoever to determine what type of activity the Government of Ontario could or should conduct during a caretaker period. Despite the Claimants' rhetoric, the evidence paints a picture of KS&T recklessly making one final attempt to purchase allowances at auction rates without appropriate diligence and effective procedures in place.[292]

VI. Request for Relief

124. For the reasons set out in its Counter-Memorial, Rejoinder, Opening Statement, Opening Presentation, and this submission, Canada respectfully requests that the Tribunal:

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

(b) require the Claimants to bear all costs of the arbitration, including Canada's costs of legal assistance and representation; and

(c) grant any other relief that it deems appropriate.

January 19, 2023

Respectfully submitted on behalf of Canada,

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[291] **Day 1 Transcript**, Innes, pp. 151:16-152:1.

[292] If the Tribunal finds contributory fault, it could reduce the quantum of damages by a set percentage, or it could reduce by a number informed by KS&T's specific contributions to its alleged loss (for instance, by subtracting [redacted] **Day 1 Transcript**, Dosman, pp. 280:7-281:7 and **RD-001**, Canada's Opening Statement, Slide 232.