Public Version

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

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

Claimants

and

CANADA

Respondent

ICSID Case No. ARB/20/52

AWARD

Members of the Tribunal
Professor Andrea K. Bjorklund, Arbitrator
Mr. Henri C. Alvarez, K.C., Arbitrator
Mr. Eduardo Zuleta, President

Secretary of the Tribunal
Ms. Martina Polasek

Assistant to the President of the Tribunal
Ms. María Marulanda

Date of dispatch to the Parties: March 13, 2024

REPRESENTATION OF THE PARTIES

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

Mr. Christophe Bondy
Mr. Thomas Innes
Mr. Alexandre Genest
Mr. Emmanuel Giakoumakis
Mr. Michael Lee
Ms. Lindsey Dimond
Steptoe International (UK) LLP
5 Aldermanbury Square
London, EC2V 7HR
United Kingdom
and
Ms. Chloe Baldwin
Ms. Claire Schachter
Steptoe LLP
1330 Connecticut Avenue NW
Washington, D.C. 20036
United States

Representing Canada:

Ms. E. Alexandra Dosman
Ms. Krista Zeman
Mr. Stefan Kuuskne
Mr. Dmytro Galagan
Mr. Brendan Robertson
Mr. Benjamin Tait
Ms. Marianna Maza Pinero
Trade Law Bureau | Direction générale du droit commercial
international - JLTB
Lester B. Pearson Building
125 Sussex Drive
Ottawa, ON K1A 0G2
Canada

TABLE OF CONTENTS

DEFINED TERMS

¶(¶)	Paragraph(s)
§(§)	Section(s)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	Claimants' Exhibit
Memorial or Mem.	Claimants' Memorial on Jurisdiction and the Merits dated October 6, 2021
Claimants' PHB	Claimants' Post Hearing Brief dated 19 January 2023
Claimants' Statement of Costs	Claimants' Statement of Costs dated 14 April 2023.
Reply	Claimants' Reply on Jurisdiction and the Merits dated 18 July 2022
CL-[#]	Claimants' Legal Authority
CER-[#]	Claimants' Expert Report
CWS-[#]	Claimants' Witness Statement
FK-[#]	Exhibit of Claimants' witness Frank King
JdB-[#]	Exhibit of Expert Jeremy de Beer
Hearing	Hearing on Jurisdiction and the Merits held 5-8 December 2022
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
MM-[#]	Exhibit of Expert Michael Mehling
MB-[#]	Exhibit of Claimants' witness Michael Berends
NAFTA	North American Free Trade Agreement
NR-[#]	Exhibit of Respondent's witness Nadia Ramlal

R-[#]	Respondent's Exhibit
Counter-Memorial or C-Mem.	Respondent's Counter-Memorial on Jurisdiction and the Merits dated 17 February 2022
Respondent's PHB	Respondent's Post Hearing Brief dated 19 January 2023
Respondent's Statement of Costs	Respondent's Statement of Costs dated 14 April 2023.
Rejoinder	Respondent's Rejoinder on Jurisdiction and the Merits dated 30 September 2022
RL-[#]	Respondent's Legal Authority
RER-[#]	Respondent's Expert Report
RS-[#]	Exhibit of Expert Robert Stavins
RD-[#]	Respondent's Demonstrative Exhibit
RWS-[#]	Respondent's Witness Statement
Hearing Tr. Day [#] [page:line]	Transcript of the Hearing
LK-[#]	Exhibit of Expert Larissa Katz
Tribunal	Arbitral tribunal constituted on 27 April 2021
USMCA	United States-Mexico-Canada Agreement

I. INTRODUCTION

A. OVERVIEW OF THE ARBITRATION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (**ICSID** or the **Centre**) on the basis of the North American Free Trade Agreement (the **NAFTA**), the United States-Mexico-Canada Agreement (the **USMCA**), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the **ICSID Convention**).

2. This dispute relates to the cancellation without compensation by the Province of Ontario of emission allowances which had been acquired in a joint auction (Ontario, Québec, and California) established under the so-called "Cap and Trade Program".

B. PARTIES

3. The claimants are Koch Industries Inc. (**Koch Industries**), a privately held company with its principal registered place of business in Wichita, Kansas, USA, and Koch Supply & Trading, LP (**KS&T**), a company organized under the laws of Delaware, USA, which is a wholly owned subsidiary of Koch Industries (together, **Claimants**).

4. The respondent is Canada (**Respondent**).

5. The Claimants and the Respondent are collectively referred to as the "**Parties**". The Parties' representatives and their addresses are listed above on page (ii).

II. PROCEDURAL HISTORY

6. On 7 December 2020, ICSID received a request for arbitration dated 7 December 2020 from the Claimants against Canada (**Request**).

7. On 17 December 2020, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties. In the absence of such agreement, the Secretary-General of ICSID would appoint the presiding arbitrator in accordance with a default appointment procedure that the Parties agreed on within the scope of Article 1123 of NAFTA.

9. On 22 December 2020, in accordance with the method agreed by the Parties, the Claimants appointed Mr. Henri C. Alvarez, K.C., a national of Canada. Mr. Alvarez accepted his appointment on 4 January 2021.

10. On 6 January 2021, the Respondent appointed Professor Andrea K. Bjorklund, a national of the United States of America. Professor Bjorklund accepted her appointment on 13 January 2021.

11. On 12 March 2021, the Parties requested that the Secretary-General of ICSID appoint the presiding arbitrator in accordance with a list procedure agreed by the Parties. The Parties specified that the candidates must have experience in the field of public international law and international investment treaty arbitration but did not need to be subject to any nationality restrictions.

12. On 2 April 2021, in accordance with the Parties' agreement concerning the list procedure, ICSID proposed nine candidates to the Parties for ranking. On 19 April 2021, the Parties returned their complete lists which resulted in three candidates being tied as highest ranked candidates. In accordance with the agreed method, the Secretary-General drew lots to determine the presiding arbitrator. Mr. Eduardo Zuleta, a national of Colombia, was thus selected to act as the President of the Tribunal. Mr. Zuleta accepted his appointment on 27 April 2021.

13. On 27 April 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (**Arbitration Rules**), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Randi Ayman, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Ms. Ayman was subsequently succeeded by Ms. Martina Polasek, Deputy Secretary-General.

14. On 26 May 2021, with consent of the Parties, the Tribunal appointed Ms. María Camila Rincón, an associate with the President's law practice, as an Assistant to the President of the Tribunal.

15. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session on 24 June 2021. In view of the Parties' agreement on all procedural items except two matters, the Tribunal decided, in consultation with the Parties, to hold the first session without the presence of the Parties.

16. Following the first session, on 29 June 2021, the Tribunal issued Procedural Order No.1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out the agreed Procedural Calendar for the proceedings and restates the transparency regime set out in the NAFTA, subject to a Confidentiality Order to be agreed by the Parties.

17. On 5 October 2021, pursuant to paragraph 23.1 of Procedural Order No. 1, the Parties informed the Tribunal of their agreement on a Confidentiality Order.

18. In accordance with the Procedural Calendar, on 6 October 2021, the Claimants filed their Memorial on Jurisdiction and the Merits (**Memorial**), together with witness statements of Mr. Michael Berends (with Exhibits MB-001 to MB-030), Mr. Graeme Martin, Mr. Paul Brown (with Exhibits PB-001 to PB-009), and Mr. Frank King, the expert report of Dr. Robert Stavins (with Appendices A and B and Exhibits RS-001 to RS-126), Exhibits C-012 through C-175, and Legal Authorities CL-022 through CL-138.

19. On 7 October 2021, the Tribunal approved and issued the Confidentiality Order agreed by the Parties.

20. On 21 January 2022, the Tribunal approved the Parties' agreement to revise the Procedural Calendar.

21. On 28 January 2022, ICSID informed the Parties that, in accordance with paragraph 25.1 of Procedural Order No. 1, it would invite non-disputing parties to file *amicus curiae* briefs by posting a public notice on the ICSID web site. The notice was posted on 1 February 2022 and invited any such briefs by 17 March 2022. No *amicus curiae* briefs were received.

22. On 17 February 2022, the Respondent filed its Counter-Memorial on Jurisdiction and the Merits (**Counter-Memorial**) together with witness statements of Mr. Alexander Wood (with Exhibits AW-001 to AW-014) and Ms. Nadia Ramlal (with Exhibits NR-001 to NR-024), expert reports of Professor Larissa Katz (with Appendix A and Exhibits LK-001 to LK-063) and Mr. Franz Litz (with Appendix A and Exhibits FL-001 to FL-024), Exhibits R-001 through R-087, and Legal Authorities RL-001 through RL-131.

23. On 1 April 2022, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents.

24. On 12 April 2022, the Tribunal issued Procedural Order No. 2 concerning production of documents.

25. On 18 July 2022, the Claimants filed a Reply on Jurisdiction and the Merits (**Reply**), together with reply witness statements of Mr. Graeme Martin, Mr. Frank King (with Exhibits FK-1 to FK-68), and Mr. Michael Berends (with Exhibits MB-31 to MB-36), witness statement of Mr. Jonathan McGillivray (with Exhibits JMG-1 to JMG-55), second expert report of Dr. Robert Stavins (with Appendices A and B and Exhibits RS-127 to RS-147), expert reports of Professor Jeremy de Beer (with Appendices A and B and Exhibits JdB-001 to JdB-046) and Professor Michael Mehling (with Appendices A and B and Exhibits MM-001 to MM-55), Exhibits C-176 through C-218, and Legal Authorities CL-139 through CL-203.

26. On 28 July 2022, with consent of the Parties, Ms. María Marulanda, an independent attorney, replaced Ms. Rincón as the Assistant to the President of the Tribunal.

27. On 30 September 2022, ICSID notified State representatives of the United States of America (the **U.S.**) and the United Mexican States that, in accordance with NAFTA Article 1128, non-disputing NAFTA Parties were invited to file submissions by 28 October 2022.

28. Also on 30 September 2022, the Respondent filed a Rejoinder on Jurisdiction and the Merits (**Rejoinder**), together with second witness statements of Mr. Alexander Wood (with Exhibits AW-015 to AW-030) and Ms. Nadia Ramlal (with NR-025 to NR-035), second expert reports of Professor Larissa Katz (with Exhibits LK-064 to LK-089) and Mr. Frank Litz (with Exhibits FL-025 to FL-029), Exhibits R-088 through R-193 and Legal Authorities RL-132 through RL-200.

29. On 28 October 2022, the U.S. filed a written submission as a non-disputing State Party pursuant to NAFTA Article 1128 (the **U.S. 1128 Submission**).

30. On 8 November 2022, following the Parties' exchange of comments on the draft agenda for the Pre-Hearing Organizational Meeting, the Tribunal provided directions to the Parties regarding the issues to be addressed during the Hearing and the experts the Tribunal would be calling.

31. On 10 November 2022, the Tribunal held a Pre-Hearing Organizational Meeting with the Parties by video conference. The meeting was attended by the following persons:

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal
Mr. Henri C. Alvarez, K.C., Arbitrator
Professor Andrea K. Bjorklund, Arbitrator

ICSID Secretariat

Ms. Martina Polasek, Secretary of the Tribunal
Mr. Carlos Molina Esteban, ICSID Legal Analyst

Assistant

Ms. María Marulanda, Assistant to the President of the Tribunal

For the Claimants

Mr. Christophe Bondy, Steptoe & Johnson LLP
Ms. Chloe Baldwin, Steptoe & Johnson LLP
Mr. Alexandre Genest, Steptoe & Johnson LLP
Ms. Claire Schachter, Steptoe & Johnson LLP

For the Respondent

Ms. Alexandra Dosman, Trade Law Bureau, Government of Canada
Mr. Benjamin Tait, Trade Law Bureau, Government of Canada
Ms. Marianna Maza Pinero, Trade Law Bureau, Government of Canada
Mr. Michael Solursh, Ministry of Economic Development, Job Creation and Trade, Government of Ontario
Ms. Rana Arbabian, Ministry of Economic Development, Job Creation and Trade, Government of Ontario

Ms. Laura Nemchin, Ministry of the Environment, Conservation and Parks, Government of Ontario

32. On 11 November 2022, each Party filed its observations on the U.S. 1128 Submission. The Claimants attached Legal Authorities CL-204 through CL-237 to their submission and the Respondent attached Legal Authorities RL-201 through RL-210 to its submission.

33. On 16 November 2022, ICSID received a request from the U.S. requesting the Tribunal's leave to attend the Hearing. On the same date, ICSID, following the Tribunal's instructions, notified the Parties of the non-disputing Party's request and invited their comments on any protocols needed to protect confidential information.

34. On 17 November 2022, both Parties submitted their comments on the U.S.'s request to attend the Hearing. The Parties also submitted their comments on the Hearing schedule and the COVID protocol.

35. The Parties provided further comments on the proposed hearing protocols on 17 and 18 November 2022.

36. On 19 November 2022, the Tribunal issued Procedural Order No. 3 concerning hearing organization.

37. On 23 November 2022, ICSID notified the U.S. state representatives that the Tribunal granted the non-disputing Party's request to attend the Hearing.

38. On 25 November 2022, in accordance with the Parties' agreed extension, the Parties submitted the Joint Consolidated Hyperlinked Index.

39. On 28 November 2022, the U.S. confirmed its attendance at the Hearing and advised that it intended to make a short oral submission at the Hearing, with the Tribunal's leave. The Tribunal invited the Parties to comment on the request and the proposed briefing schedule on the first day of the Hearing.

40. On the same date, the Respondent indicated that it had no objection to the U.S. providing a brief oral submission.

41. On 29 November 2022, the Claimants submitted their view on the non-disputing Party's request, objecting to the U.S. making any oral submissions during the Hearing.

42. On 30 November 2022, the Tribunal invited the U.S. and the Respondent to submit any comments to the Claimants' objection. The comments from the U.S. and the Respondent were received on 1 December 2022.

43. Also on 30 November 2022, the Parties informed the Tribunal that disagreements remained with respect to some entries to the Joint Submission on Dramatis Personae, Chronology of Events and List of Disputed Issues. The Tribunal provided directions on these disagreements on 1

December 2022, and the Parties submitted their finalized Joint Submission on Dramatis Personae, Chronology of Events and List of Disputed Issues on the same day.

44. On 4 December 2022, the Tribunal issued Procedural Order No. 4 concerning the request by the U.S. to make a brief oral submission at the Hearing.

45. A Hearing on Jurisdiction and the Merits was held in Washington, D.C. from December 5 to 8, 2022, with the following participants:

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal
Mr. Henri C. Alvarez, K.C., Arbitrator
Professor Andrea K. Bjorklund, Arbitrator

ICSID Secretariat

Ms. Martina Polasek, Secretary of the Tribunal
Mr. Carlos Molina Esteban, ICSID Legal Analyst (remote participation)
Ms. Ekaterina Minina, ICSID Paralegal
Ms. Lamiss Al-Tashi, ICSID Hearings & Events Organizer

Assistant

Ms. María Marulanda, Assistant to the President of the Tribunal

For the Claimants

Counsel:

Mr. Christophe Bondy, Steptoe & Johnson LLP
Mr. Thomas Innes, Steptoe & Johnson LLP
Ms. Chloe Baldwin, Steptoe & Johnson LLP
Ms. Claire Schachter, Steptoe & Johnson LLP
Mr. Alexandre Genest, Steptoe & Johnson LLP
Mr. Emmanuel Giakoumakis, Steptoe & Johnson LLP
Mr. Michael Lee, Steptoe & Johnson LLP
Ms. Lindsey Dimond, Steptoe & Johnson LLP

Parties:

Mr. Kyle Krywko (remote participation)
Mr. John Wingate
Ms. Jackie Williams

External:

Ms. Lise de Marco, Resilient LLP
Dr. Todd Schatzki, Analysis Group (remote participation)
Electronic Presentation of Evidence:
Mr. Arif Ahmad, Opus (remote participation)

For the Respondent

Counsel:

Ms. Alexandra Dosman, Trade Law Bureau, Government of Canada
Ms. Krista Zeman, Trade Law Bureau, Government of Canada
Mr. Stefan Kuuskne, Trade Law Bureau, Government of Canada
Mr. Dmytro Galagan, Trade Law Bureau, Government of Canada
Mr. Brendan Robertson, Trade Law Bureau, Government of Canada
Mr. Benjamin Tait, Trade Law Bureau, Government of Canada
Ms. Marianna Maza Pinero, Trade Law Bureau, Government of Canada
Mr. Edward Flick, Core Legal Concepts
Mr. Alexander Wood (also a fact witness), Ministry of Environment, Conservation and Parks, Government of Ontario
Ms. Evelyne Bolduc, Investment Trade Policy, Government of Canada (remote participation for Days 3 and 4)

Attendees:

Ms. Laura Nemchin, Ministry of the Environment, Conservation and Parks, Government of Ontario
Mr. Michael Solursh, Ministry of Economic Development, Job Creation and Trade, Government of Ontario
Mr. Jay Lipman, Ministry of Environment, Conservation and Parks, Government of Ontario (remote participation)
Mr. Tom Johnson, Ministry of the Environment, Conservation and Parks, Government of Ontario (remote participation)
Mr. Liam Harris, Ministry of the Environment, Conservation and Parks, Government of Ontario (remote participation)
Ms. Saroja Kuruganty, Ministry of Economic Development, Job Creation and Trade, Government of Ontario (remote participation)
Mr. Brandon Antony, Ministry of Economic Development, Job Creation and Trade, Government of Ontario (remote participation)
Ms. Adrianna Militano, Ministry of Economic Development, Job Creation and Trade, Government of Ontario (remote participation)
Mr. Tyler Hunt, Ministry of Economic Development, Job Creation and Trade, Government of Ontario (remote participation)
Mr. Scott Little, Trade Law Bureau, Government of Canada (remote participation)
Ms. Sylvie Tabet, Trade Law Bureau, Government of Canada (remote participation)
Ms. Heather Squires, Trade Law Bureau, Government of Canada (remote participation)
Mr. Rodney Neufeld, Trade Law Bureau, Government of Canada (remote participation)
Mr. Mark Klaver, Trade Law Bureau, Government of Canada (remote participation)
Ms. Brigid Martin, Trade Law Bureau, Government of Canada (remote participation)
Mr. Gabriel Jean-Simon, Investment Trade Policy, Government of Canada (remote participation)
Mr. Patrick Hamilton, Ministry of the Environment, Conservation and Parks, Government of Ontario (remote participation)

Non-Disputing Party

Ms. Lisa J. Grosh, U.S. State Department
Ms. Nicole C. Thornton, U.S. State Department
Mr. Nathaniel E. Jedrey, U.S. State Department

Ms. Melinda E. Kuritzky, U.S. State Department (remote participation)
Mr. Alvaro J. Peralta, U.S. State Department (remote participation)
Mr. David J. Stute, U.S. State Department (remote participation)
Ms. Elizabeth A. Donnelly, U.S. State Department (remote participation)
Ms. Catherine H. Gibson, U.S. Trade Representative (remote participation)
Ms. Susie P. Hodge, U.S. Trade Representative (remote participation)

Court Reporter

Ms. Marjorie Peters

46. The following persons were examined during the Hearing:

For the Claimants:

Witnesses:

Mr. Frank King
Mr. Graeme Martin (remote participation)

Experts:

Mr. Jeremy de Beer
Mr. Michael Mehling
Dr. Robert Stavins

For the Respondent:

Witnesses:

Mr. Alexander Wood (also a party representative)
Ms. Nadia Ramlal

Experts:

Mr. Franz Litz
Professor Larissa Katz

47. On the second day of the Hearing, 6 December 2022, the Tribunal accepted Legal Authority CL-238 into the record of the case.

48. On 23 December 2022, the Parties submitted their joint transcript corrections to the court reporter.

49. Following the Tribunal's directions at the Hearing, the Parties filed simultaneous post-Hearing briefs on 19 January 2023.

50. The Parties filed their statements of costs on 14 April 2023.

51. The proceeding was closed on 28 February 2024.

III. REQUESTS FOR RELIEF

52. Claimants' claims arise out of the measures taken by Respondent which allegedly "had the effect of wiping out KS&T's carbon allowances trading business" in Ontario under the Cap and Trade Act, without compensation, thus breaching Respondent's obligations under NAFTA. According to Claimants, the Tribunal has jurisdiction under Chapter 11 of NAFTA because they are investors holding protected investments. Claimants argue that the emission allowances of KS&T constitute "property" and "interests" under NAFTA Article 1139(g)[1] and (h).[2] Moreover, Koch Industries holds the following investments under NAFTA Article 1139(e): a 100 percent shareholding in KS&T and INVISTA, interests in enterprises entitling Koch Industries to the income or profits of these enterprises, and real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.[3] Claimants argue that the measures taken by Respondent amount to an expropriation under NAFTA Article 1110,[4] and to a breach of the fair and equitable treatment clause in NAFTA Article 1105.[5]

53. Respondent contends that the Tribunal lacks *ratione materiae* jurisdiction with respect to KS&T and Koch Industries because (i) emission allowances are neither "property" nor "interests" that may qualify as an investment under NAFTA Articles 1139(g) and (h),[6] (ii) Koch Industries' shareholding in KS&T and in Canadian entities INVISTA and Georgia Pacific does not qualify as an "enterprise" under Article 1139(a),[7] and (iii) the emission allowances purchased by an enterprise are not an interest in such an enterprise under Article 1139(e).[8] Respondent also contests the Tribunal's *ratione personae* jurisdiction over Koch Industries under NAFTA Article 1116, because there is no *prima facie* claim to loss or damages.

54. On the merits, the Respondent says Claimants have not established a breach of NAFTA Articles 1110 and 1105.[9]

A. CLAIMANTS

55. In their Memorial, Claimants request the following relief:

---

[1] Claimants' PHB, ¶¶ 45-78.

[2] Reply, ¶ 313; Claimants' PHB, ¶¶ 79-86.

[3] Reply, ¶¶ 349-350.

[4] *Id.*, ¶ 610.

[5] *Id.*, ¶ 511.

[6] Rejoinder, ¶¶ 141, 147-150, 167; Respondent's PHB, ¶¶ 16-17, 50-51.

[7] C-Mem., ¶¶ 166-168; Rejoinder, ¶¶ 168-170.

[8] Rejoinder, ¶¶ 164.

[9] Respondent's PHB, ¶¶ 67 ff, 88 ff.

> "For the reasons stated, the Claimants respectfully request that the Tribunal render an Award:
>
> a. Declaring Canada in breach of Articles 1105(1) and 1110 of NAFTA in light of the impugned measures;
>
> b. Awarding monetary damages to Koch and to KS&T pursuant to Article 1116 in the amount of USD 31,322,474.62 for all injuries and losses by reason of, or arising out of, Canada's breaches of Articles 1105(1) and 1110 of NAFTA;
>
> c. Awarding pre- and post-Award compound interest on the amount of damages awarded, at a rate of 5%, compounded annually;
>
> d. Awarding compensation to Koch and to KS&T for all of their costs of the arbitration and costs of legal representation, plus compound interest thereon at the same rate and interval as on the damages; and
>
> e. Granting such other relief as the Arbitral Tribunal may deem just".[10]

56. In their Reply, the Claimants request the following relief:

> "The Respondent has failed to answer the Claimants' case as presented in their Memorial. In any event, as set forth above, the Claimants have comprehensively rebutted its Counter-Memorial on every level.
>
> Accordingly, maintaining the request for relief set out in their Memorial, the Claimants respectfully request that the Tribunal render an Award:
>
> a. Declaring the Tribunal as having jurisdiction *ratione materiae* pursuant to the NAFTA (and, in the alternative, concurrently pursuant to both the NAFTA and the ICSID Convention) to adjudicate the Claimants' claims against the Respondent;
>
> b. Declaring the Respondent in breach of NAFTA Articles 1105(1) and 1110 in light of the impugned measures;
>
> c. Awarding monetary damages to Koch and to KS&T pursuant to Article 1116 in the amount of USD 31,322,474.62 for all injuries and losses by reason of, or arising out of, Canada's breaches of NAFTA Articles 1105(1) and 1110;

[10] Memorial, ¶ 538.

d. Awarding pre- and post-Award compound interest on the amount of damages awarded, at a rate of 5%, compounded annually;

e. Awarding compensation to the Claimants for all of their costs of the arbitration and costs of legal representation, plus compound interest thereon at the same rate and interval as on the damages; and

f. Granting such other relief as the Tribunal may deem just".[11]

B. RESPONDENT

57. In its Counter-Memorial and Rejoinder, Respondent requests the following relief:

> "For the foregoing reasons, Canada respectfully requests that this 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". [12]

IV. FACTUAL BACKGROUND

58. In their joint submission of 1 December 2022,[13] the Parties agreed on a chronology of relevant facts summarized below. For the sake of clarity, the Tribunal has divided the chronology into four sections: Antecedents of the Ontario Cap and Trade Program (A); Ontario's Cap and Trade Program (B); KS&T's participation in the Cap and Trade Program (C); and Cancellation of the Cap and Trade Program (D). Where necessary, the Tribunal has supplemented the facts described jointly by the Parties based on evidence from the record and will elaborate on these facts in the relevant sections of the award.

A. ANTECEDENTS OF ONTARIO'S CAP AND TRADE PROGRAM

59. In 2008, Ontario joined the Western Climate Initiative (**WCI**). The initiative involved regional governments of the United States of America, the United Mexican States and Canada with the purpose of designing a regional and market-based approach for reducing greenhouse gas

[11] Reply, ¶¶ 683-684.

[12] C-Mem., ¶ 327; Rejoinder, ¶ 332.

[13] Parties' Joint *Dramatis Personae*, Chronology, and List of Disputed Issues, 1 December 2022.

emissions. While in 2007 it was only comprised by the states of Arizona, California, New Mexico, Oregon and Washington, by 2008 Montana, Utah, and the Canadian provinces of British Columbia, Manitoba, Ontario and Québec had joined the initiative. On 2 June 2008, the Governments of Ontario and Québec signed a Memorandum of Understanding, agreeing to collaborate on a provincial greenhouse gas Cap and Trade initiative, seeking to reduce the costs of emission reductions.[14]

60. That same year, the WCI partner jurisdictions published the *Design Recommendations for the WCI Regional Cap-and-Trade Program*.[15] They suggested the design of a broad program that would maximize total benefits throughout the region by reducing air pollutants, diversifying energy sources, and advancing economic, environmental, and public health objectives, while also avoiding localized or disproportionate environmental or economic impacts.

61. On 15 December 2009, the Ontario Government enacted the *Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading), 2009*, which authorized the Government of Ontario to make regulations establishing programs and other measures for the purposes of maintaining or improving existing environmental standards, protecting the environment, and achieving environmental quality goals in a cost-effective manner.[16]

62. In July 2010, the WCI partner jurisdictions issued the *2010 Design for the WCI Regional Program*.[17] This Design offered a roadmap to implement the program's regulations. The document stressed its goal of reducing greenhouse gas emissions to 15 percent below 2005 levels by 2020. This goal would be reached by using market power to trade permits that provide companies and inventors with incentives to create new technologies that increase efficiency, promote the use of renewable or lower-polluting fuels, and foster process improvements that reduce dependence on fossil fuels. Further, the Design mentioned the need to address the effects of climate change on water resources, natural ecosystems, air quality and environment dependent industries. The program was summarized in the following terms:

> "The WCI Cap-and-Trade Program will be composed of the individual jurisdictions' cap-and-trade programs implemented through state and provincial regulations. Each WCI Partner jurisdiction implementing the cap-and-trade program design will issue "emission allowances" to meet its jurisdiction-specific emissions goal. The total number of available allowances serves as the "cap" on emissions. The allowances can be bought and sold ("traded"). A regional allowance market is created by the Partner jurisdictions recognizing one another's allowances for compliance. Through this

---

[14] **RS-037**, Ontario Office of the Premier, Memorandum of Understanding Between the Government of Ontario and the Government of Québec: A Provincial-Territorial Cap and Trade Initiative, 2 June 2008.

[15] **C-014**, WCI, Design Recommendations for the WCI Regional Cap-and-Trade Program,23 September 2008; **RS-039**, WCI, Design Recommendations for the WCI Regional Cap-and-Trade Program, 23 September 2008; **R-005**, WCI, Design Recommendation for the WCI Regional Cap-and-Trade Program, 23 September 2008.

[16] **RS-038**, David V. Wright, Enforcement and withdrawal under the California-Québec (and not Ontario) Cap-and-Trade Linkage Agreement, 25-26 October 2018.

[17] **C-015**, WCI, Design for the WCI Regional Program,2010; **RS-019**, WCI, Design for the WCI Regional Program, July 2010; **MM-052**, Western Climate Initiative, Design for the WCI Regional Program, July 2010.

> recognition, the emissions allowances issued by each jurisdiction will be usable throughout the jurisdictions for compliance purposes".[18]

63. At the time, WCI partner jurisdictions were also in discussions with other greenhouse gas reduction initiatives such as the Regional Greenhouse Gas Initiative (**RGGI**) and the Midwestern Greenhouse Gas Reduction Accord. The RGGI program relies almost exclusively on auctions for allowance distribution, whereas for the WCI, auctions are just one component among others.

64. On 31 May 2011, the Governor of New Jersey announced that the state planned to withdraw from the RGGI at the end of the first compliance period ending on 31 December 2011.[19]

65. In 2012, California launched its Cap and Trade program. Compliance obligations would be enforced from 2013.[20] That same year, KS&T registered to participate in the California Cap and Trade program as a market participant and was assigned a California Compliance Instrument Tracking System Service (**CITSS**) account.[21]

66. A year later, in 2013, Québec launched its Cap and Trade program.[22]

67. On 25 September 2013, the California Air Resources Board and the *Gouvernement du Québec* signed the Agreement Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions.[23]

68. In January 2014, Québec formally linked its system with California's program.[24]

69. On 13 April 2015, Ontario announced its intention to set up a provincial Cap and Trade program and link it to the Québec and California programs under the WCI model.[25]

B. ONTARIO'S CAP AND TRADE PROGRAM

70. On 18 May 2016, Ontario enacted the Climate Change Mitigation and Low-Carbon Economy Act[26] (**Cap and Trade Act** or **Climate Change Act**) and Ontario Regulation 144/16, the Cap

---

[18] **C-015**, WCI, Design for the WCI Regional Program,2010, p. 6.

[19] **RS-116**, State of New Jersey, Letter to Mr. Jonathan Schrag, 31 May 2011.

[20] **RS-022**, ICAP, USA - California Cap-and-Trade Program, ETS Detailed Information, 9 August 2021.

[21] **CWS-002**, Witness Statement of Graeme Martin, ¶¶ 18-20.

[22] **RS-024**, ICAP, Canada - Québec Cap-and-Trade System, ETS Detailed Information, 9 August 2021.

[23] **R-025**, Ontario Newsroom, Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between the Gouvernement du Québec, the Government of California and the Government of Ontario, 22 September 2017; **CL-025**, Agreement between the California Air Resources Board and The Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions,25 September 2013.

[24] **RS-024**, ICAP, Canada - Québec Cap-and-Trade System, ETS Detailed Information, 9 August 2021.

[25] **C-019**, Ontario Government, Cap and Trade System to Limit Greenhouse Gas Pollution in Ontario, 13 April 2015.

[26] **R-006**, Cap and Trade Act; **CL-005**, Cap and Trade Act.

and Trade Program[27] (**Regulation** or **Regulation 144/16**) (collectively also referred to as the **Cap and Trade Program**).

71. Ontario's Cap and Trade Program commenced on 1 January 2017.[28]

72. In 2017, Ontario held four Ontario-only auctions of emission allowances on March 22, June 6, September 6, and November 29.[29]

73. On 22 September 2017, Ontario, California, and Québec signed the Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (**OCQ Agreement**).[30]

74. On 24 November 2017, Ontario adopted Ontario Regulation 450/17 amending Regulation 144/16 to harmonize Ontario's Cap and Trade Program with California's and Québec's.[31]

75. On 1 January 2018, Ontario linked its program with California's and Québec's.[32]

76. Following the linkage, Ontario participated in two joint auctions with California and Québec in February and May 2018. As detailed in subsections C and D below, after the second joint auction, Ontario held elections, which were won by the Ontario Progressive Conservative Party whose election platform had included the cancellation of the Cap and Trade Program. On 15 June 2018, the premier-designate announced that Ontario would withdraw from the program. The same day, California and Québec issued an auction notice for a third joint auction, specifying that Ontario would not participate. Following the premier's swearing-in on 29 June 2018, Regulation 386/18 (defined below) was enacted prohibiting transactions involving emission allowances.

---

[27] **R-007**, Regulation 144/16; **CL-006**, Regulation 144/16.

[28] **RS-006**, Environmental Commissioner of Ontario, Introduction to Cap and Trade in Ontario, Appendix A to the ECO's Greenhouse Gas Progress Report 2016, November 2016.

[29] **C-056**, Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances March 2017 Ontario Auction #1, 22 March 2017; **C-061,** Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances June 2017 Ontario Auction #2, 6 June 2017; **C-066**, Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances September 2017 Ontario Auction #3, 6 September 2017; **C-069,** Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances November 2017 Ontario Auction #4, 29 November 2017.

[30] **R-025,** Ontario Newsroom, Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between the Gouvernement du Québec, the Government of California and the Government of Ontario, 22 September 2017; **CL-008**, Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec, 22 September 2017.

[31] **R-013**, Regulation450/17.

[32] *See*, **NR-005**, Regulation 450/17; **MB-016**, Proposed Amendments to the Cap and Trade Program and Reporting Regulations & Proposed Service Regulation,22 September 2017, p. 5; **RS-050**, Government of Ontario, Proposed Amendments to the Cap and Trade Program and Reporting Regulations & Proposed Service Regulation, Stakeholder Webinar, October 2017, pp. 3, 4, 22.

C. KS&T'S PARTICIPATION IN ONTARIO'S CAP AND TRADE PROGRAM

77. As detailed below, in 2017 Ontario held four Ontario-only auctions of emission allowances. KS&T bid in all four auctions [redacted] acquiring a total of [redacted]:

77.1. On 20 January 2017, Ontario issued an auction notice for its first Ontario-only auction of 2017 and 2020 vintage emission allowances.[33] The auction was held on 22 March 2017.[34] [redacted] KS&T paid this amount through the designated Financial Services Administrator (Deutsche Bank National Trust Company) on 10 April 2017,[36] and received the allowances into its Ontario CITSS account on 20 April 2017.[37]

77.2. On 7 April 2017, Ontario issued an auction notice for its second Ontario-only auction of 2017 and 2020 vintage emission allowances.[38] The auction was held on 6 June 2017.[39] [redacted].[40]

77.3. On 6 July 2017, Ontario issued an auction notice for its third Ontario-only auction of 2017 and 2020 vintage emission allowances.[41] The auction was held on 6 September 2017.[42] [redacted][43] KS&T paid this amount through the Financial Services Administrator on 20 September 2017,[44] and received the allowances into its Ontario CITSS account on 28 September 2017.[45]

---

[33] **C-037**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on March 22, 2017, 20 January 2017.

[34] **C-056**, Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances March 2017 Ontario Auction #1, 22 March 2017**.**

[35] **C-055,** [redacted]); **C-057,** [redacted]**.**

[36] **C-058**, [redacted]

[37] **C-037**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on March 22, 2017, 20 January 2017; **C-059**, [redacted].

[38] **C-060**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on June 6, 2017, 7 April 2017.

[39] **C-061**, Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances June 2017, Ontario Auction #2, 6 June 2017.

[40] Memorial, ¶ 148; **C-065**, [redacted]

[41] **C-039**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on September 6, 2017, 6 July 2017.

[42] **C-066**, Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances September 2017 Ontario Auction #3, 6 September 2017.

[43] **C-067**, [redacted]

[44] **C-068**, [redacted]

[45] **C-038**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on June 6, 2017, 7 April 2017; **CWS-004**, Witness Statement of Frank King, ¶ 18.

77.4. On 29 September 2017, Ontario issued an auction notice for its fourth Ontario-only auction of 2017 and 2020 vintage emission allowances.[46] The auction was held on 29 November 2017.[47] [redacted].[48] KS&T paid these amounts through the Financial Services Administrator on 13 December 2017,[49] and received the allowances into its Ontario CITSS account on 21 December 2017.[50]

78. [redacted][51]

79. On 10 January 2018, California, Ontario, and Québec issued an updated auction notice for the first joint auction of emission allowances to be held on 21 February 2018.[52] The previous auction notice had been sent on 21 December 2017.[53]

80. On 21 February 2018, California, Ontario, and Québec held the first joint auction of emission allowances, which included a "Current Auction" of 2016 and 2018 vintage allowances and an "Advanced Auction" of 2021 vintage allowances.[54] [redacted].[55] KS&T paid this amount through the Financial Services Administrator on 8 March 2018[56] and received allowances from each jurisdiction into its Ontario CITSS account on 20 March 2018.[57] Of the total allowances that KS&T acquired, [redacted] were Ontario emission allowances, priced at [redacted][58]

---

[46] **C-040**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on November 29, 2017, 29 September 2017.

[47] **C-069**, Ontario Government, Summary Results Report: Ontario Cap and Trade Program Auction of Greenhouse Gas Allowances November 2017 Ontario Auction #4, 29 November 2017.

[48] **C-071**, [redacted]

[49] **C-072**, [redacted]

[50] **C-040**, Ontario Government, Auction Notice: Ontario Cap and Trade Program – Auction of Greenhouse Gas Allowances on November 29, 2017, 29 September 2017; **CWS-004**, Witness Statement of Frank King, ¶ 19.

[51] **RWS-002**, Witness Statement of Nadia Ramlal, Attachment 1. As detailed in ¶ 77 of this Award, [redacted]

[52] **R-026**, Auction Notice: California Cap-and-Trade Program, Québec Cap-and-Trade System, and Ontario Cap-and-Trade Program Joint Auction of Greenhouse Gas Allowances on February 21, 2018, 10 January 2018.

[53] *Id.*

[54] **C-086**, Summary Results Report: Joint Auction #14, 23 February 2018, p. 1.

[55] **C-089**, [redacted]

[56] **C-090**, [redacted]

[57] **R-026**, Auction Notice: California Cap-and-Trade Program, Québec Cap-and-Trade System, and Ontario Cap-and-Trade Program Joint Auction of Greenhouse Gas Allowances on February 21, 2018, 10 January 2018, p. 8.

[58] **RWS-002**, Witness Statement of Nadia Ramlal, Attachment 1.

81. On 16 March 2018, California, Ontario, and Québec issued an auction notice for the second joint auction of emission allowances, to be held on 15 May 2018.[59]

82. [redacted] KS&T transferred [redacted] emission allowances acquired in the first joint auction from its Ontario CITSS account to its California CITSS account.[60]

83. [redacted] from its California CITSS account to its Ontario CITSS account.[61] [redacted] KS&T transferred [redacted] from its Ontario CITSS account to [redacted][62]

84. On 8 May 2018, the then Premier of Ontario Kathleen Wynne formally announced that Ontario's next election would take place on 7 June 2018.[63] Nonetheless, since November 2017, the Progressive Conservative Party (**PC**) had started promoting its political platform, the "People's Guarantee", as one of its plans for the upcoming elections. The People's Guarantee, released on 25 November 2017, put forth 130 policy resolutions following a public consultation said to have been conducted starting in May 2016. One of the resolutions titled "Change that works for the environment" had as an objective to "protect our environment without making life unaffordable for families".[64] It included a plan to "dismantle Cap-and-Trade" and "withdraw from the Western Climate Initiative".[65]

85. On 15 May 2018, California, Ontario, and Québec held the second joint auction of emission allowances, which included a "Current Auction" of 2016 and 2018 vintage allowances and an "Advanced Auction" of 2021 vintage allowances.[66] KS&T purchased a total of [redacted] allowances (current auction) for USD 30,158,240.95.[67] KS&T paid this amount through the Financial Services Administrator on 25 May 2018[68] and received allowances from each jurisdiction into its Ontario CITSS account on 11 June 2018.[69] Of the total allowances that KS&T acquired, [redacted][70]

---

[59] **C-043**, Ontario Government, Joint Auction of Greenhouse Gas Allowances on May 15, 2018, 16 March 2018; **R-047**, Auction Notice, California Cap-and-Trade Program, Québec Cap-and-Trade System, and Ontario Cap-and-Trade Program Joint Auction of Greenhouse Gas Allowances on May 15, 2018, 16 March 2018.

[60] **RWS-002**, Witness Statement of Nadia Ramlal, Attachment 1. [redacted].

[61] **RWS-002**, Witness Statement of Nadia Ramlal, Attachment 1.

[62] *Id.*

[63] **R-030**, Ontario Newsroom, Ontario Election on June 7, 2018, 8 May 2018.

[64] **R-032**, PC Party of Ontario, People's Guarantee, p. 25.

[65] *Id.*, p. 25.

[66] **C-099**, California-Ontario-Québec May 2018 Joint Auction #15 – Summary Results Report, 23 May 2018.

[67] **C-096**, [redacted]

[68] **C-098**, [redacted]

[69] **C-043**, Ontario Government, Joint Auction of Greenhouse Gas Allowances on May 15, 2018, 16 March 2018, p. 8.

[70] **RWS-002**, Witness Statement of Nadia Ramlal, Attachment 1.

86. On 7 June 2018 —that is after KS&T had purchased allowances in the May 2018 joint auction, but before they were delivered into its Ontario CITSS account—— Ontario's PC party obtained the majority of seats in the Legislative Assembly of Ontario, and elected Doug Ford, leader of the party, as Premier of Ontario.[71]

87. On 11 June 2018, Ontario transferred emission allowances to winning bidders' CITSS accounts as previewed in the auction notice issued on 16 March 2018.[72] KS&T had planned, as with previous auctions, to move the emission allowances it had acquired to the California CITSS account.

88. [redacted][73]

89. On 15 June 2018, Premier-Designate Ford made the announcement that Ontario would no longer take part in the upcoming auction for emission allowances.[74]

90. On that day, at 10:42 a.m. Eastern Time or before, the Office of the Premier Designate issued a news release titled "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax".[75] In relevant part, the news release read as follows:

> "TORONTO — Premier-designate Doug Ford today announced that his cabinet's first act following the swearing-in of his government will be to cancel Ontario's current cap-and-trade scheme and challenge the federal government's authority to impose a carbon tax on the people of Ontario.
>
> 'I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down,' said Ford. 'Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax's days are numbered.'
>
> Ford also announced that Ontario would be serving notice of its withdrawal from the joint agreement linking Ontario, Quebec and

---

[71] **C-101**, Ontario Media Advisory, UPDATED: Doug Ford and New Government to be Sworn-in by Lieutenant Governor, 28 June 2018; **C-102**, Ontario News Release, Doug Ford to Become Ontario's 26th Premier, 8 June 2018.

[72] **C-043**, Ontario Government, Joint Auction of Greenhouse Gas Allowances on May 15, 2018, 16 March 2018, p. 8.

[73] [redacted]

[74] **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.

[75] *Id.*; **C-203** [redacted]

> California's cap-and-trade markets as well as the pro-carbon tax Western Climate Initiative. The Premier-designate confirmed that he has directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits. The government will provide clear rules for the orderly wind down of the cap-and-trade program.
>
> Finally, Ford announced that he will be issuing specific directions to his incoming attorney general to use all available resources at the disposal of the government to challenge the federal government's authority to arbitrarily impose a carbon tax on Ontario families.
>
> 'Eliminating the carbon tax and cap-and-trade is the right thing to do and is a key component in our plan to bring your gas prices down by 10 cents per liter,' said Ford. 'It also sends a clear message that things are now different. No longer will Ontario's government answer to insiders, special interests and elites. Instead, we will now have a government for the people. Help is here.'"[76]

91. Later that day, California and Québec issued an auction notice for a joint auction of emission allowances, to be held on 14 August 2018.[77] The auction notice explained that Ontario had chosen not to participate in the August 2018 auction and, as a result, Ontario emission allowances would not be offered for sale at that auction and Ontario participants would not be eligible to participate in it.[78]

92. Also, on 15 June 2018, at approximately 8:45 pm Central Time, California and Québec communicated their decision to delink their CITSS registries with Ontario.[79] In relevant part, the market notice reads as follows:

> "The Premier-designate of Ontario announced on Friday, June 15, 2018, his intention to end Ontario's greenhouse gas Cap-and-Trade Program. California and Québec are working together to ensure that the environmental integrity and stringency of our cap-and-trade program and market is maintained. Our goals are to make certain that the program continues to reduce emissions of climate-changing gases as a crucial part of our efforts to combat the existential threat of climate change, while also continuing the smooth operation and integrity of our joint carbon market. To achieve these objectives, the Compliance Instrument Tracking System Service (CITSS) has been modified to

[76] **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.

[77] **R-187**, Auction Notice, California Cap-and-Trade Program and Québec Cap-and-Trade System Joint Auction of Greenhouse Gas Allowances on August 14, 2018, 15 June 2018.

[78] *Id.*, pp. 2 and 5.

[79] **C-103**, Email from CACITSSHelpdesk, 15 June 2018. *See also*, **C-104**, California Air Resources Board, Market Notice, 15 June 2018.

> prevent transfers of compliance instruments between entities registered in Ontario and entities registered in either California or Québec".[80]

93. On 18 June 2018, KS&T again attempted to move allowances to California, but the system no longer accepted the transfer from Ontario as the account had been delinked from California and Québec. [redacted] California had blocked transfers of emission allowances to and from Ontario CITSS accounts.[81]

D. ONTARIO'S CANCELLATION OF THE CAP AND TRADE PROGRAM AND SUBSEQUENT EVENTS

94. On 21 June 2018, the Greenhouse Gas Pollution Pricing Act (**GGPPA**) was enacted, establishing the federal backstop system for regulating greenhouse gas emissions in Canada.[82]

95. On 29 June 2018, Ontario's new premier, Premier Ford, was sworn into office.[83] On the same day, Ontario Regulation 38668/18, "Prohibition Against the Purchase, Sale and Other Dealings with Emission Allowances" (**Regulation 386/18**) was made.[84]

96. On 3 July 2018, Ontario Regulation 386/18 came into force. Regulation 386/18 (i) prohibited Ontario registered participants from purchasing, selling, trading or otherwise dealing in emission allowances and credits, and (ii) revoked Regulation 144/16.[85]

97. On 25 July 2018, Ontario introduced Bill 4, the Cap and Trade Cancellation Act, which went on to receive Royal Assent on 31 October 2018 (**Cancellation Act**).[86] Bill 4 and the Cancellation Act provided, *inter alia*, that unlike other participants, market participants under the Cap and Trade Program would receive no compensation for unused emission allowances remaining in their CITTS accounts; no cause of action arose against the Crown from the cancellation of the Cap and Trade Program; and any proceedings against the Crown or for enforcement of any judgment or order made by a court or tribunal outside Canada were prohibited.[87]

---

[80] **C-103**, Email from CACITSSHelpdesk, 15 June 2018; **C-104**, California Air Resources Board, Market Notice, 15 June 2018 (emphasis added).

[81] **R-088**, [redacted].

[82] **RS-104**, Environment and Climate Change Canada, Pan-Canadian Approach to Pricing Carbon Pollution: Interim Report 2020, 2021, p. 8; **MB-030**, GGPA.

[83] **C-101**, Ontario Media Advisory, UPDATED: Doug Ford and New Government to be Sworn-in by Lieutenant Governor, 28 June 2018.

[84] **CL-009**, Regulation 386/18.

[85] Id.

[86] **R-057,** [redacted]; **R-181**, Cancellation Act, Legislative History.

[87] **CL-032**, Cancellation Act, ss. 9-10.

98. On 25 and 27 July 2018, Ontario hosted technical briefings for stakeholders about Bill 4.[88]

99. On 27 July 2018, KS&T purchased emission allowances purportedly to fulfil its obligations under KS&T's agreement with [redacted].[89]

100. Between 31 July and 3 October 2018, the second reading and debates of Bill 4 took place in the Legislative Assembly of Ontario.[90]

101. On 2 August 2018, Ontario announced that it would challenge the constitutionality of the GGPPA before the Court of Appeal for Ontario.[91]

102. On 11 September 2018, Greenpeace Canada filed a Notice of Application for Judicial Review, *Greenpeace Canada (2471257 Canada Inc.) v. Minister of the Environment, Conservation and Parks and the Lieutenant Governor in Council*,[92] legally challenging Bill 4 under the 1993 Environmental Bill of Rights (**EBR**) that required the government "to publish prior notice of *the Cancelling Regulation in the Environmental Registry* […], consult with Ontarians by inviting them to submit comments on the proposed regulation […], consider any comments made by the public as a result of this process […], and advise publicly of the effect, if any, public participation had on the government's decision-making on the proposal".[93]

103. Also on 11 September 2018, Ontario posted Bill 4 on the Environmental Registry for public comments.[94]

104. On 2 October 2018, KS&T transferred emission allowances to [redacted].[95]

105. On 11 October 2018, KS&T presented Comments on Bill 4 to the Ontario Environmental Registry, which alleged arbitrariness and unjustified distinction between entities through the operation of the Bill.[96]

106. On 24 October 2018, KS&T wrote to the Attorney General of Ontario and Premier Ford, proposing amendments to Bill 4 that would allow Ontario to compensate stakeholders like

---

[88] **AW-026**, Ministry of the Environment, Conservation and Parks, Technical briefing, 25-27 July 2018; **C-110**, Ontario Government, Stakeholder Briefing Questions and Answers, 25 and 27 July 2018.

[89] **C-146**, [redacted]

[90] **R-181**, Cancellation Act, Legislative History.

[91] **R-183**, Government of Ontario News Release, Ontario Announces Constitutional Challenge to Federal Government's Punishing Carbon Tax Scheme, 2 August 2018.

[92] **C-118**, The Globe and Mail, Ontario government promises public consultations on cap and trade after facing legal action, 12 September 2018.

[93] **CL-033**, *Greenpeace Canada v. Minister of the Environment* (Ontario), 2019 ONSC 5629, ¶ 11.

[94] **C-012**, MOECC, Bill 4, Cap and Trade Cancellation Act, 2018, Environmental Registry of Ontario, 15 November 2018).

[95] **C-146**, [redacted]

[96] **C-113**, Koch, Comments to Ontario Environmental Registry on Bill 4, 11 October 2018.

KS&T. Particularly, they commented on Section 6(2) about Retirement and Section 8(4) about No compensation, specified participants.[97]

107. On 31 October 2018, Bill 4 passed the third reading and received Royal Assent as the "Cap and Trade Cancellation Act, 2018".[98]

108. On 5 November 2018, Premier Ford sent a reply letter to KS&T stating that he was forwarding a copy of the company's letter to the Minister of Environment, as the issue fell within his area of responsibility.[99]

109. On 14 November 2018, KS&T wrote to Premier Ford to request that the government exercise its discretion under section 15 of the Cancellation Act to compensate KS&T for the emission allowances it held in its Ontario CITSS account that were cancelled under the Cancellation Act.[100]

110. On 29 November 2018, the Minister for Environment, Conservation and Parks posted "*Preserving and Protecting Our Environment for Future Generations: A Made-in-Ontario Environment Plan*" on the Environmental Registry.[101]

111. On 1 January 2019, the Output-Based Pricing System (**OBPS**), one of the two parts of the federal backstop mechanism established under the GGPPA, went into effect in Ontario.[102]

112. On 1 February 2019, Ontario Regulation 9/19, made under the Cancellation Act, came into force.[103]

113. On 14 February 2019, KS&T submitted an application for compensation for the emission allowances it held in its Ontario CITSS account that were cancelled under the Cancellation Act.[104]

114. On 4 March 2019, Ontario issued a "Proposed Determination" to KS&T denying its application for compensation.[105]

---

[97] **C-114**, Letter from KS&T to the Attorney General of Ontario (24 October 2018); **C-115**, Letter from KS&T to the Premier's Office (24 October 2018).

[98] **R-059**, Cancellation Act, c. 13; **CL-001**, Cancellation Act.

[99] **C-116**, Letter from Premier Doug Ford to Koch Industries, 5 November 2018.

[100] **C-126**, Letter from KS&T to the Attorney General of Ontario, 14 November 2018.

[101] **R-062**, Ontario, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan, 29 November 2018; **C-205**, Environmental Defence, A Review of the Past Four Years of Ontario's Climate Change (In)Action, 2022.

[102] **RS-104**, Environment and Climate Change Canada, Pan-Canadian Approach to Pricing Carbon Pollution: Interim Report 2020, 2021.

[103] **R-061**, Compensation, Ontario Regulation 9/19.

[104] **C-127**, KS&T Compensation Application Form,14 February 2019.

[105] **C-128**, Letter from the Ministry of the Environment, Conservation and Parks to KS&T, 4 March 2019.

115. On 11 March 2019, KS&T submitted comments on Ontario's "Proposed Determination", asking that the Government reconsider its position and compensate KS&T.[106]

116. On 14 March 2019, Ontario issued a "Final Determination Notice" to KS&T denying its application for compensation.[107]

117. On 1 April 2019, the federal fuel charge, one of the two parts of the federal backstop mechanism established under the GGPPA, went into effect in Ontario.[108]

118. On 17 April 2019, Kelly Kraft, U.S. ambassador to Canada, met with Premier Ford and the Chief of Staff to the Ontario Premier to discuss KS&T's application for compensation.[109]

119. On 4 July 2019, Ontario's Greenhouse Gas Emissions Performance Standards regulation (**O. Reg. 241/19** or the **EPS Regulation**) came into effect.[110]

120. On 11 October 2019, the Ontario Superior Court of Justice (Divisional Court) issued a decision in *Greenpeace Canada (2471257 Canada Inc.) v. Minister of the Environment, Conservation and Parks and the Lieutenant Governor in Council*,[111] deeming the application moot as the Cancellation Act had already been enacted, resulting in lack of efficacy of the declaratory relief sought by Greenpeace. Nevertheless, Justices Mew[112] and Corbett[113] commented on the Government's breach of Ontario's EBR by adopting the Cap and Trade Cancellation Act without public consultation.

121. On 21 September 2020, Ontario announced that the provincial Emission Performance Standard (**EPS**) program would be accepted as an alternative to the federal OBPS.[114]

122. On 1 January 2022, approximately one year after Claimants had submitted their Request for Arbitration, Ontario's EPS program entered into force.[115]

---

[106] **C-129**, Ministry of the Environment, Conservation and Parks, Email Confirmation of Correspondence, 11 March 2019; **C-130**, Letter from KS&T to Ministry of the Environment, Conservation and Parks, 11 March 2019.

[107] **C-141**, Letter from KS&T to the Premier's Office, 14 February 2019.

[108] **RS-104**, Environment and Climate Change Canada, Pan-Canadian Approach to Pricing Carbon Pollution: Interim Report 2020, 2021.

[109] **CWS-003,** Witness Statement of Paul Brown, 5 October 2021, ¶ 57.

[110] **AW-030**, EPS Regulation; **RS-104**, Environment and Climate Change Canada, Pan-Canadian Approach to Pricing Carbon Pollution: Interim Report 2020, 2021.

[111] **CL-033**, *Greenpeace Canada v. Minister of the Environment* (Ontario), 2019 ONSC 5629.

[112] *Id.*, ¶ 87.

[113] *Id.*, ¶¶ 74-75.

[114] **AW-012**, Ontario, Emissions Performance Standards Program, 21 September 2020.

[115] *Id.*

V. JURISDICTION

123. As further detailed below, Respondent has made several objections to the Tribunal's jurisdiction:

123.1. First, Respondent claims that the Tribunal lacks jurisdiction *ratione materiae* with respect to KS&T under the NAFTA. Specifically, Respondent submits that (i) the emission allowances held by KS&T do not constitute "property" under NAFTA Article 1139(g),[116] and (ii) KS&T did not hold "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).[117]

123.2. Second, Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* with respect to Koch Industries as it did not hold relevant investments under NAFTA Articles 1101, 1116, and 1139.[118]

123.3. Third, Respondent contends that the Tribunal lacks jurisdiction *ratione personae* over Koch Industries under NAFTA Article 1116.[119]

123.4. Fourth, Respondent claims that the Tribunal lacks jurisdiction under the ICSID Convention.[120]

123.5. Fifth, Respondent contends that the Premier-Designate's announcement of 15 June 2018 was not a "measure" that was "adopted or maintained" by Respondent within the scope of NAFTA Article 1101.[121]

124. The Tribunal will next consider Respondent's objections. As a preliminary matter, however, the Tribunal will briefly address the Parties' discussion of the burden of proof applicable to jurisdictional matters.

A. BURDEN OF PROOF

1. Respondent's Position

125. Respondent claims that the onus to show that jurisdictional requirements have been satisfied is on the claimant and "[i]f there is any ambiguity as to whether or not a claimant has met its

[116] C-Mem, § III.D.1; Rejoinder, § III.C.1.
[117] C-Mem., § III.D.2; Rejoinder, § III.C.2.
[118] C-Mem., § III.D.3; Rejoinder, § III.D.1.
[119] C-Mem., § III.E; Rejoinder, § III.D.2.
[120] C-Mem, § III.C; Rejoinder, § III.B.
[121] Rejoinder, § III.E.

burden, the tribunal should decline jurisdiction".[122] According to Respondent, Claimants have failed to meet their burden of proof with respect to jurisdiction.[123]

126. Respondent further contends that "[a] *prima facie* standard does not apply to factual issues upon which a tribunal's jurisdiction depends"[124] and "Claimants must 'positively establish key jurisdictional facts'".[125]

2. Claimants' Position

127. Claimants claim that the factual burden of proof is shared by the parties, while the legal burden of proof rests with neither.[126] According to Claimants, "[i]t is […] for a claimant to adduce evidence in order to establish jurisdiction, and […] for a respondent to adduce evidence in order to challenge the claimant's substantiated assertion of [sic] that a tribunal has jurisdiction".[127] Likewise, "a tribunal must determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all relevant facts and arguments submitted by the parties".[128]

128. Claimants further contend that there is no rebuttable presumption regarding jurisdictional objections, and that Respondent's assertion that "[i]f there is any ambiguity as to whether or not a claimant has met its burden, the tribunal should decline jurisdiction" lacks any legal foundation.[129] Claimants maintain that they have "demonstrated that – legally and factually – the Tribunal has *prima facie* jurisdiction",[130] while Respondent has failed to substantiate its objections to jurisdiction.[131]

3. The Tribunal's Analysis

129. It is an accepted principle of international law that a claimant in an arbitration bears the burden of proving that the tribunal has jurisdiction to hear its claims.[132] Furthermore, consistent with international practice, a party bears the burden of proving the facts it asserts.[133] Accordingly, if jurisdiction is based on specific facts, the claimant must prove them at the jurisdictional stage.[134] Conversely, if the respondent's jurisdictional objections are based on specific facts, the

---

[122] C-Mem., ¶ 109.

[123] *Id.*, ¶ 111.

[124] Rejoinder, ¶ 96.

[125] *Id.*, ¶ 96.

[126] Reply, ¶¶ 239-240.

[127] *Id.*, ¶ 241.

[128] *Id.*, ¶ 239.

[129] *Id.*, ¶ 242.

[130] *Id.*, ¶ 241.

[131] *Id.*, ¶¶ 241-242.

[132] **RL-001**, *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Award on Jurisdiction, 18 June 2020, ¶ 248.

[133] **CL-045**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 190.

[134] **RL-003**, *Vito G. Gallo v. The Government of Canada*, UNCITRAL, Award, 15 September 2011, ¶ 277.

respondent must provide proof. Ultimately, the tribunal will decide whether it has jurisdiction and the extent of that jurisdiction based on the proven facts.[135]

B. JURISDICTION UNDER NAFTA ARTICLE 1139(G)

1. Respondent's Position

130. Respondent claims that the emission allowances held by KS&T do not qualify as an "investment" because they are not property under Ontario law, as required by NAFTA Article 1139(g).

131. Respondent submits that the existence of property rights for purposes of Article 1139(g) must be determined by reference to the relevant domestic law, in this case the law of Ontario.[136] In Ontario, however, neither the legislature nor the courts have declared emission allowances to be property.[137] In Respondent's view, "[w]here there is a new interest created by statute, it ought to be clear either that the legislature intended to imbue it with proprietary status or that the interest shares the core features of common law property".[138] In the absence of a conclusive answer with respect to property under Ontario law, the Tribunal cannot find that property exists for purposes of the NAFTA.[139]

132. Respondent relies on Professor Katz's expert report to explain the stages of analysis that an Ontario court would typically go through when assessing a new claim that an interest is property in any context.[140] Following this approach, Professor Katz concludes that emission allowances lack the core common law characteristics of property rights and are therefore not considered property rights in Ontario.[141]

133. Respondent further takes issue with the evidence on the status of emission allowances under Ontario law put forward by Claimants. According to Respondent, that evidence was not only late in arriving (Claimants only submitted it with their Reply), but it also suffers from significant flaws.[142] Respondent claims that the Claimants' expert on Ontario law, Professor de Beer, "presents an oversimplified 'legal test' that he draws from only two Canadian cases in which the interests in question were found to constitute property",[143] while Professor Mehling's

---

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

[136] C-Mem, ¶ 136.

[137] Hearing Tr. Day 1, 202:12-15.

[138] *Id.*, 201:21 – 202:3.

[139] *Id.*, 199:5-7.

[140] *Id.*, 203:4-8.

[141] C-Mem, ¶ 139.

[142] Hearing Tr. Day 1, 199:19-20.

[143] Rejoinder, ¶ 123 (footnotes omitted). *See also*, Hearing Tr. Day 1, 199:21 – 200:4.

evidence on international practice is of limited relevance to an Ontario court and, thus, to this Tribunal, considering the jurisdiction-specific nature of the inquiry.[144]

134. In any event, Respondent asserts that "the vast majority of the evidence before this Tribunal pertains to the speculative task of ascertaining whether an Ontario court *might* find emission allowances to be property",[145] and "[t]his Tribunal cannot base its jurisdiction on speculation".[146]

135. As to Professor Katz's methodology, Respondent submits that an Ontario court approaching a novel claim to property would proceed through three stages of analysis: at the first stage, an Ontario court would consider "whether there is a legislative declaration or a judicial decision that adds the interest to the category of property rights".[147] Here, the Parties agree that (i) neither the Cap and Trade Act nor its regulations declare emission allowances to be property,[148] and (ii) there is no court decision addressing this issue in Ontario.[149]

136. With respect to (i), Respondent submits that courts view the absence of property language in a statute creating a new interest as significant, as evidenced in the *Anglehart v. Canada* case (***Anglehart***).[150] The fact that the Cap and Trade Act does not use the nomenclature "property" with respect to emission allowances is particularly important when paired with Section 70 of the Act, which specifies that these interests are non-compensable.[151] In Respondent's view, this indicates that the legislature did not intend to create a proprietary interest.[152] By contrast, such a conclusion cannot be drawn from the absence of an express disclaimer as to the non-proprietary nature of emission allowances because the creation of a new property right cannot be presumed.[153]

137. With respect to (ii), Respondent contends that Claimants' position that it is the statute that creates the property right, and that a court merely confirms or rejects its legal status as property, "denies the judicial role in a common law system in deciding whether an interest has the legal status of property rights in a particular statutory or common law context".[154]

138. It is Respondent's case that "the absence of any legislative declaration or judicial decision that confers property status on emission allowances is sufficient to conclude that the emission

---

[144] Respondent's PHB, ¶ 23; Hearing Tr. Day 1, 200:5-17.
[145] Respondent's PHB, ¶ 16.
[146] *Id.*, ¶ 16.
[147] Hearing, Tr. Day 1, 203:13-17.
[148] *Id.*, 205: 2-4.
[149] *Id.*, 207:1-2.
[150] *Id.*, 205:18 – 206:8.
[151] *Id.*, 206: 9-21.
[152] *Id.*, 206: 9-21.
[153] *Id.*, 205: 2-17.
[154] *Id.*, 207: 7-11.

allowances are not at present property rights in Ontario"[155] and "[t]he Tribunal need not proceed to the further stages of analysis",[156] as considering whether an Ontario court might in the future admit emission allowances to the category of property rights "is not a matter of fact but of speculation".[157] For the sake of completeness, however, Respondent explains stages two and three of an Ontario court's inquiry.

139. At stage two, an Ontario court would examine the nature and character of a statutory interest, considering the provisions of the statute in their entire context within the statute's object and purpose.[158] Based on Professor Katz's analysis, Respondent contends that "as it is created in the Climate Change Act and regulations, the nature and character of an emission allowance is that of a compliance instrument: a non-compensable, regulatory interest conferring an immunity from penalties for an amount of GHG emissions".[159]

140. At stage three, an Ontario court would consider whether the interest at issue bears the characteristics of common law property.[160] Respondent submits that the legal context in which the question arises is highly relevant to a court's analysis, and indicates that, unlike the statutes at issue in *Saulnier v. Royal Bank of Canada*, the Cap and Trade Act is not a commercial statute, but a regulatory statute that created a market mechanism to achieve its regulatory purpose.[161]

141. Respondent further contends that the emission allowances created by the Cap and Trade Act lack the core common law characteristics of property, most notably exclusivity, which both legal experts agree is a necessary attribute of property in Ontario.[162] According to Respondent, "[a]t common law, exclusivity entails both the ability to exclude interference from all others, including the government, and the ability to include others as and on the terms that the holder wishes".[163] Based on Professor Katz's expert testimony, Respondent argues that emission allowances lack exclusivity for three main reasons:

141.1. The government reserved discretion to act with respect to emission allowances (e.g., Sections 27, 14(7), 14(8), 33, 25(3), 32, 21, 22(3) of the Act) and make additional regulations to achieve its policy goals (as evidenced in the use of the phrase "as may be prescribed" throughout the Act and in Section 78.1, items 6 to 8);[164]

---

[155] *Id.*, 207:16 – 208:5.

[156] *Id.*, 207:16 – 208:5.

[157] *Id.*, 208:9-12.

[158] *See*, Rejoinder, ¶ 124; Hearing Tr. Day 1, 203:18 – 204:1, and 208:13-22.

[159] Hearing Tr. Day 1, 212:13-18. *See, generally*, Hearing Tr. Day 1, 209:1 – 212:18.

[160] Rejoinder, ¶ 124; Hearing Tr. Day 1, 204:2-15.

[161] *See*, Hearing Tr. Day 1, 215:7 – 217:12.

[162] Respondent's PHB, ¶ 37.

[163] Hearing Tr. Day 1, 218:11-14.

[164] *Id.*, 219:2 – 220:14; **RD-001**, slide 121.

141.2. The holder of emission allowances lacks exclusive control vis-à-vis the government as it does not have a presumptive right against expropriation without compensation under Section 70 of the Act;[165] and

141.3. Holders of emission allowances cannot include anyone else in their interest under Section 28.2 of the Act.[166]

142. Finally, Respondent submits that the Tribunal should adopt Professor Katz's approach and conclude that emission allowances do not constitute property under Ontario law. However, Respondent further contends that, "to the extent that the Tribunal finds both experts' explanations of the provisions and their import in an Ontario property analysis equally plausible, that, too, means that the Claimants have failed to meet their burden. If the answer is inconclusive under Ontario law, the Tribunal does not have jurisdiction under NAFTA Article 1139(g)".[167]

2. Claimants' Position

143. Claimants maintain that the emission allowances that KS&T acquired are intangible property acquired for economic benefit or other business purposes under NAFTA Article 1139(g).[168]

144. Claimants argue that international law has considered that the term "property" should be given expansive content, and that the same applies to the definition of "property" under the NAFTA.[169] Claimants further agree with Respondent that (i) it is appropriate to look at Ontario law for a determination of what constitutes property, and (ii) the question of whether emission allowances are property under Ontario law has not yet been considered by Ontario courts.[170] Thus, according to Claimants, the question for the Tribunal is whether, "[o]n a balance of probabilities, applying the interpretative rules followed by judges in Ontario, […] emission allowances created and held under the Cap and Trade Program [are] property under NAFTA Article 1139(g)?".[171]

145. Contrary to Respondent's contention, Claimants are not asking the Tribunal to "base its jurisdiction on speculation", but instead asking it to make a finding of fact based on expert evidence, and note that Canada itself agreed that asking how an Ontario court would answer the question of whether emission allowances are property under Ontario law is an appropriate analytical tool for this purpose.[172] Also, Respondent's contention that the fact that the experts

[165] Hearing Tr. Day 1, 220:14 – 222:17.
[166] *Id.*, 222:18 – 223:18.
[167] *Id.*, 224:11-18.
[168] Memorial, ¶ 323(c); Reply, ¶¶ 246-296.
[169] Reply, ¶ 248.
[170] *Id.*, ¶ 248.
[171] Hearing Tr. Day 1, 82:1-5.
[172] Claimants' PHB, ¶ 46.

have reached opposite conclusions implies that their opinion cancel each other out is incorrect.[173]

146. First, Claimants maintain that "the Ontario courts provide the appropriate analytical framework, the application of which confirms that emission allowances are indeed property".[174] Claimants rely on Professor de Beer's expert testimony for their contention that emission allowances qualify as property under Ontario law. Claimants explain that Professor de Beer derives the legal test to determine the existence of property from "the most recent authoritative Canadian cases:" "first, *Saulnier v. Royal Bank of Canada*, which found that a fishing license was property, and second, *Tucows.com v. Lojas Renner, SA*, where the Ontario Court of Appeal found a domain name to be property".[175] The test from *Saulnier* is whether the exclusive rights that an emission allowances holder had were "a good deal more than merely permission to do what would otherwise be illegal" in the relevant statutory context.[176] For its part, *Tucows* elaborates on what constitutes a bundle of rights at common law for the purpose of defining what constitutes property and confirms that, in Ontario, exclusivity is necessary for property to exist.[177]

147. According to Claimants, exclusive control and use —a necessary attribute of property rights under Ontario and common law— is "clearly demonstrated here by the many different things that a participant could exclusively do to control and use emission allowances", including "holding, purchasing, selling, trading, and otherwise dealing with emission allowances".[178] Indeed, Professor de Beer found ample evidence of "exclusive control and use" in Sections 22(1) and 28(2) of the Cap and Trade Act and Section 15 of Regulation 144/16,[179] and accordingly concluded that "the exclusive rights that an emission allowance holder had were 'a good deal more' than merely permission to do what would otherwise be illegal".[180]

148. Claimants submit that Respondent's and Professor Katz's contention that emission allowances are not property because "they have not yet been added to the category of property"[181] is incorrect because "the status of emission allowances as property does not require an Ontario judicial decision affirming this fact, but instead is inherent in the Cap and Trade Act".[182] Moreover, a legislative declaration expressly stating the proprietary status of allowances was unnecessary.[183] As explained by Professor de Beer, (i) governments typically take a minimalist approach in that regard, and (ii) Ontario courts have recognized multiple statutory creations as

---

[173] *Id.*, ¶ 48.

[174] *Id.*, ¶ 47.

[175] Hearing Tr. Day 1, 82:20 – 83:5.

[176] *Id.*, 83:6-10.

[177] *Id.*, 83:11-14.

[178] *Id.*, 84:6-13. *See also*, Claimants' PHB, ¶ 54.

[179] Claimants' PHB, ¶ 55.

[180] *Id.*, ¶ 55.

[181] Rejoinder, ¶ 126; **RER-003**, Second Expert Report of Professor Katz, ¶ 6.

[182] Hearing Tr. Day 1, 84:19 – 85:1; Claimants' PHB, ¶ 54.

[183] Claimants' PHB, ¶ 53.

property, even though legislative declarations on the property status of statutory rights is rare.[184] This is consistent with Professor Mehling's evidence explaining that "there is consistent administrative or judicial practice in many jurisdictions recognizing property rights in allowances *without* explicit recognition in law".[185]

149. Second, Claimants contend that the Respondent's position is not supported by principles of statutory interpretation or the application of the Ontario court framework,[186] for the following reasons:

149.1. Professor Katz did not analyze objectively the statutory features of allowances, maintaining a results-driven approach that focused only on the use of allowances for compliance purposes.[187] Moreover, framing emission allowances as immunities based on Hohfeld's terminology is not based on the text of the Cap and Trade Act, or on any principle of statutory interpretation that an Ontario court would likely apply.[188]

149.2. Respondent and Professor Katz sought to deny the significance of Ontario's express choice of a "market mechanism" as part of the Cap and Trade Program and the commercial context inherent in the Cap and Trade Act and Regulation.[189] As confirmed by Professor de Beer, an Ontario court would likely consider the importance of secondary markets as part of the commercial realities that provide an appropriate context for interpreting the status of emission allowances under the Cap and Trade Act.[190]

149.3. Respondent and Professor Katz did not engage in any meaningful analysis of the relevant context in which the question of allowances as property arise, namely, a jurisdictional dispute under the NAFTA.[191] Instead, Respondent and its expert sought to analogize the present dispute to *Anglehart* — which is entirely distinguishable from this case — and refused to accept its similarities with *Tucows*.[192]

149.4. Professor Katz's contention that emission allowances lack exclusivity is based on arguments that contradict principles of statutory interpretation and common sense.[193] First, "merely ensuring the ability of *the Minister* to take various circumscribed actions under the Act to further its objectives is insufficient to show a lack of exclusive

---

[184] *Id.*, ¶ 53.
[185] *Id.*, ¶ 53, *referencing* Hearing Tr. Day 3, 769:4 – 773:17.
[186] *Id.*, ¶ 47.
[187] *Id.*, ¶ 57.
[188] *Id.*, ¶ 58.
[189] *Id.*, ¶ 59.
[190] *Id.*, ¶ 60.
[191] *Id.*, ¶ 61.
[192] *Id.*, ¶ 61.
[193] *Id.*, ¶ 62.

control/use by *allowance holders*".[194] The government did not have "absolute discretion" under the statute, and none of the examples indicated by Respondent show "extensive discretion" with respect to the treatment of allowances.[195] Second, Professor Katz's interpretation of Section 70 of the Act is inconsistent and flawed.[196] Contrary to her analysis, Section 70 as drafted supports the inference that allowances are property; if they were not, an express declaration of "no compensation" would be unnecessary to protect against domestic law expropriation claims.[197] Third, Professor Katz's contention that the ability to fragment is part of the concept of exclusivity under Ontario law is unsupported; Section 28(2) of the Act only prevents one type of fragmentation (the creation of a trust), and, in any event, other types of fragmentation of intangible rights, such as security interests, could have been possible in the case of emission allowances under the Act.[198]

150. Third, Claimants contend that, in contrast with those of Professor Katz's, Professor de Beer's conclusions are supported by international cases and practice on the legal treatment of allowances —as demonstrated by Professor Mehling's report—, which are likely to be considered by an Ontario court faced with the question of whether allowances are property in Ontario.[199] Claimants emphasize the relevance of the English High Court decision in the *Armstrong DLW GmbH v. Winnington Networks Ltd* case (***Armstrong***),[200] where a leading common law jurisdiction, applying the same criteria that would be applied by an Ontario court (the *Ainsworth* criteria), found that emission allowances under the EU Emission Trading System (**EUA**) —an instrument for all purposes the same as an Ontario emission allowance— were property under common law.[201] Respondent and Professor Katz have failed to satisfactorily rebut Claimants' contentions on the weight of international case law and practice, in general, and of the *Armstrong* case, in particular, in the analysis of an Ontario court and of this Tribunal.[202]

3. The Tribunal's Analysis

(a) The legal issue before the Tribunal

151. Article 1139(g) defines investment for purposes of NAFTA as "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes".

---

[194] *Id.*, ¶ 63.

[195] *Id.*, ¶¶ 63-64.

[196] *Id.*, ¶ 65.

[197] *Id.*, ¶ 66.

[198] *Id.*, ¶ 67.

[199] *Id.*, ¶ 47.

[200] **LK-040,** *Armstrong DLW GMBH v. Winnington Networks Ltd*, [2012] EWHC 10(Ch).

[201] Claimants' PHB, ¶¶ 69; 74. **LK-040,** *Armstrong DLW GMBH v. Winnington Networks Ltd*, [2012] EWHC 10(Ch).

[202] *See*, Claimants' PHB, ¶¶ 71-74.

152. The Parties extensively debated the burden of proof for purposes of jurisdiction. However, the Tribunal has already established that it is for each Party to prove the facts on which it bases its claim or its jurisdictional objection.[203] The facts that Claimants must prove to succeed on jurisdiction on the basis of Article 1139(g) are (i) that they had property in Ontario, tangible or intangible; and (ii) that such property was acquired in the expectation or used for the purpose of economic benefit or other business purposes.[204]

153. In their Memorial, Claimants identified the following investments held by Koch Industries and KS&T, respectively, as qualifying under NAFTA Article 1139(g):

> "[R]eal estate or other property, tangible or intangible, that was acquired in the expectation or used for the purpose of economic benefit or other business purposes. For example, Koch held a range of other bricks-and-mortar investments in Ontario, as well as intangible investments".[205]

> "[I]ntangible property rights 'acquired with the expectation or used for the purpose of economic benefit or other business purposes' through carbon allowances issued by Ontario. The carbon allowances that KS&T held were tradeable property rights, both as commodities and under futures contracts, and were capital assets".[206]

154. No evidence was filed to support the ownership of real estate by Claimants and no substantial allegation was made as to how real estate owned by Claimants was affected by measures taken by Respondent. In their Reply, during the Hearing, and in their Post-Hearing Brief, Claimants focused on the emission allowances as the property affected by the measures taken by Respondent.[207] The expert evidence submitted by Claimants focuses exclusively on emission allowances and does not refer to the real estate mentioned in the Memorial. Claimants seem to have abandoned their position that they had real estate that was affected by measures of the State. But even if that allegation is not considered abandoned, Claimants have failed to provide convincing evidence that they held real estate in Ontario that is relevant for the purposes of the claims submitted in this arbitration.

155. The Tribunal therefore must focus on whether the emission allowances held by KS&T constituted property in Ontario for purposes of Article 1139(g) of NAFTA.

156. The analysis of the Tribunal, however, is limited in its scope, fact specific, and framed by the evidence submitted in this arbitration for the purpose of determining jurisdiction under NAFTA. Therefore:

---

[203] *See Supra.* §V(A)(3)

[204] **CL-002**, North American Free Trade Agreement (1994), Chapter Eleven, Article 1139(g) "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes".

[205] Memorial, ¶ 322 (c).

[206] *Id.*, ¶ 323 (c).

[207] Reply, ¶¶ 2, 17, and §III(B)-III(C); Hearing Tr. Day 1, 18:15-22, 19:1-22, 26:21 – 27:22; Claimants' PHB, ¶¶ 2, 5.

156.1. The Tribunal needs to determine only whether allowances constitute property exclusively to determine its jurisdiction under Article 1139(g) of NAFTA. A determination of this Tribunal as to the nature of the allowances is not intended to create a general rule of interpretation or a general definition of whether or not allowances are property under Ontario, Canadian or common law —or for that matter, under any other law— and cannot be deemed as establishing principles or rules as regards the legal nature of allowances for purposes other than establishing its jurisdiction under the aforementioned article of NAFTA in the specific circumstances of this case.

156.2. Any such determination is based on the allegations and evidence submitted in this arbitration for the exclusive purposes of determining jurisdiction, and therefore, does not analyze other arguments or evidence not submitted by the Parties or that may be relevant for other purposes or in other circumstances as regards emission allowances.

157. The Tribunal is mindful that the efforts to reduce greenhouse gas emissions and protect the environment require cooperation between public and private actors, the creation of novel instruments and legal tools, and predictability and depoliticization in the technical and economic management of such instruments, as well as tools to avoid the possibility that internal political conflicts undermine the efforts made to cooperate in the reduction of greenhouse gas emissions. The ambiguities in the Cap and Trade Act as to its main purposes, the role of market participants, the nature of the allowances and the powers of Ontario's authorities, coupled with the manner in which the regime was terminated, the decision not to indemnify market participants and to restrict their access to Canadian courts, do not, in the Tribunal's view, contribute to the creation of a predictable scheme to control emissions. Rather, they may appear to discourage the participation of private actors in positive actions towards climate change.

158. The first analysis the Tribunal must undertake is limited to determining whether it has jurisdiction for the exclusive purposes of Article 1139(g) of NAFTA, which involves a novel issue under Ontario law in the particular circumstances that arise from the actions and omissions of Ontario in drafting, implementing, and revoking the Cap and Trade Act.

(b) Applicable legal framework

159. First, the Parties agree that there is no express definition of "property" in NAFTA and therefore, that emission allowances as property "should be examined principally on the basis of Ontario law".[208]

160. In their Response to the U.S. 1128 NAFTA Submission, Claimants argued that domestic laws are "not dispositive of the question whether a particular right or interest qualifies as 'property' for the purposes of Article 1139(g)" because NAFTA does not expressly provide that the term "property" is governed by domestic laws.[209] Therefore, the term "property" in Article 1139 must

[208] Claimants' Response to the U.S. 1128 NAFTA Submission, ¶ 39. *See also* Claimants' PHB, ¶ 45; Reply, ¶ 248; C-Mem, ¶¶ 134-135.

[209] Claimants' Response to the U.S. 1128 NAFTA Submission, ¶¶ 40-41.

also be interpreted under international law. In Claimants' view, international law has assigned an expansive content to the term "property".[210] Also, the term "investment" in Article 1139 was meant to have a "broad meaning" in light of the object and purpose of NAFTA reflected in the Preamble and Article 102.[211]

161. Respondent does not appear to dispute that Article 1139 should also be analyzed under international law but contends that Claimants have provided no grounds to conclude that property should be given expansive content under international law, because the cases cited as legal authorities differ from this case, since they involved a locally established enterprise with a physical presence in the host state.[212]

162. The Tribunal does not disagree that Article 1139(g) must be interpreted pursuant to international law, which includes considering the object and purpose of NAFTA.

163. However, the Tribunal's first task is to determine the definition of the term "property" in Article 1139(g). No express definition is found in NAFTA, and the Parties have not provided a definition of property in international law. Therefore, before assessing whether "property" should be given an expansive or restricted content in light of the object and purpose of NAFTA, the Tribunal must first find the definition of that term in the law of the host State and determine whether the object in question satisfies that definition.

164. The Tribunal considers that, as a rule, a claimant who claims the existence of a property right under the legal system of a state must prove that the asset over which the claimant alleges property rights is considered as property in that legal system, and that, according to the corresponding laws or rules of that legal system, the property right is vested in the claimant. This approach, far from novel, was adopted in other NAFTA cases, including *Lion v. Mexico:*

> "(i) NAFTA does not offer a definition of the term 'intangible real estate' used in its Art. 1139(g). Absent such definition, to determine whether an investor holds 'intangible real estate', it is necessary to refer to the law of the host state. As the tribunal stated in Emmis:
>
> 'Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law'".[213]

---

[210] Reply, ¶ 248.

[211] Claimants' Response to the U.S. 1128 NAFTA Submission, ¶¶ 32, 35-36.

[212] Rejoinder, ¶ 122, ft. 299.

[213] **CL-217**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, ¶ 231.

165. Second, the Parties also agree that there is no statutory provision under Ontario law that considers emission allowances as "property" and that the courts of Ontario have not considered whether emission allowances amount to "property" under Ontario law.[214]

166. Respondent and its expert submit that, in the absence of a statutory provision or a court decision, the Tribunal must conclude, without further analysis, that emission allowances are not property, and therefore, that this Tribunal lacks jurisdiction because Claimants had no property in Ontario.[215] According to Respondent, any further analysis, and particularly a determination of how an Ontario court may decide the matter, when and if seized with the question, would be mere speculation.[216]

167. Claimants submit that the absence of a court decision is not an indication that emission allowances are not property.[217] Claimants further submit that it was Canada who suggested that an analysis of how an Ontario court would approach the issue is a proper test to determine whether emission allowances are property.[218] Claimants also contend that they are not requesting this Tribunal to speculate on what an Ontario court would do, but rather they are "asking the Tribunal to make a finding of fact based on the expert evidence".[219]

168. In this case it is undisputed that there is no rule —statutory or judicial— in Ontario which expressly provides for emission allowances as property rights. This Tribunal cannot and will not substitute itself for the courts to create an Ontario rule, binding in Ontario, declaring that emission allowances are property under the laws of Ontario. What this Tribunal must analyze in this arbitration is whether the allowances created by the Cap and Trade Act and Regulations constitute property under existing Ontario common law, for the purposes of finding jurisdiction under NAFTA.

169. In the Tribunal's view, there is no need for a previous Ontario court judgment in this regard. Moreover, it was Respondent who first suggested in its Counter Memorial, based on the First Expert Report of Professor Katz, that the Tribunal should consider the interpretative approach

---

[214] C-Mem, ¶ 135; Reply, ¶ 248.

[215] Respondent's PHB, ¶¶ 16, 30-31. For Respondent's expert, Professor Katz, the position of Claimants' expert that the absence of a court decision does not bear on the analysis of whether emission allowances are property "*denies the judicial role in a common law system in deciding whether an interest, given its nature and character, has the legal status of property rights in a particular statutory or common law context. There is a clear "before" and "after" quality to a court's ruling that affects the legal status of the interest in a given context. In this case, the absence of any legislative declaration or judicial decision that confers property status on emission allowances is sufficient to conclude that emission allowances are not at present property rights in Ontario*" **RER-003**, Second Expert Report of Professor Katz, ¶ 35.

[216] Rejoinder, ¶ 131.

[217] According to Claimants' expert, Professor de Beer, "*that an Ontario court has not yet confirmed emission allowances 'status as property does not mean they lack such status. A court deciding the issue would not confer proprietary status upon emission allowances; a court would confirm such status which already did or did not exist. The statute, not the court, conferred this status by establishing rights to allowances that are property rights even if they were not expressly labelled as such. The court interprets the statute*". **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 32.

[218] Claimants' PHB, ¶ 46.

[219] Claimants' PHB, ¶ 46.

taken by Ontario courts to address novel property claims. Respondent cannot now claim that such an approach is speculative.

170. In sum, absent a definition of property both in NAFTA and in a statutory provision of Ontario or Canadian law, and absent a court decision in Ontario or Canada that determines whether emission allowances are property, the Tribunal must determine —based on the evidence submitted by the Parties in this arbitration— whether the courts of Ontario or the courts of Canada have developed general interpretative principles that, applied to allowances, may allow this Tribunal to conclude that allowances are property in this context and for the purposes of the dispute at hand to find jurisdiction under the treaty.

(i) Whether the Ontario or Canadian Courts have established a general "legal test" or general interpretative principles for property

171. The Parties debate whether there is a general "legal test" for property under Ontario common law that the Tribunal should follow for purposes of its decision on jurisdiction.

172. Professor de Beer –Claimants' expert– proposes a three-step analysis that Ontario courts would follow to determine whether allowances are property: first, a description of the applicable statute (in this case the Cap and Trade Act and the Regulation); second, a description of the allowances as the object in question; and third, a description of "the law of property" [220] and the "legal test".[221]

173. The Claimants' expert argues that a "legal test for property" under "Canadian and Ontario legal precedents"[222] is found in what he considers to be the most recent authoritative cases from the Supreme Court of Canada and the Ontario Court of Appeal: *Saulnier v. Royal Bank*[223] (***Saulnier***), where the Supreme Court decided whether a fishing license was property, and *Tucows.com Co v. Lojas Renner SA*[224] (***Tucows***), where the Ontario Court of Appeal decided whether a domain name was property[225]. In the words of Professor de Beer, "[t]he governing legal principles in Ontario, however, are **clearly and authoritatively** established in *Saulnier* and *Tucows*".[226]

174. Respondent contends that a legal test to find property does not exist as such under Ontario common law. Professor Katz argues that *Saulnier* and *Tucows* do not set any test to determine the existence of property in Ontario and that "there is no single authoritative 'list' of attributes or indicia of property at common law".[227] Professor Katz further argues that Ontario courts

---

[220] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 35-36.

[221] *Id.*, ¶ 35 (a), (b) and (c).

[222] *Id.*, ¶¶ 85-86, 204

[223] **LK-019**, *Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166.

[224] **LK-007**, *Tucows.com Co. v. Lojas Renner S.A.*, [2011] ONCA 548.

[225] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 34.

[226] *Id.*, ¶ 98 (emphasis added).

[227] **RER-003**, Second Expert Report of Professor Katz, ¶ 21. Hearing Tr. Day 4, 880:15 – 881:1-7.

would not limit their analysis to those two cases,[228] but would instead consider additional decisions that clarify the evolution of the Canadian approach to property, which is what the *Tucows* court did in its judgment.[229]

175. Thus, in the absence of a statutory definition or juridical determination of emission allowances as property in Ontario, both Parties refer to prior decisions of Canadian courts dealing with novel property claims over intangible objects such as licenses and quotas[230] but disagree on whether a "test" or a clear set of interpretative principles may be derived from such decisions that in turn may be applied to the definition of emissions allowances as property for the purposes of NAFTA Article 1139(g).

176. The Tribunal will therefore review in the following sub-sections the Canadian decisions relied upon by the Claimants and their expert to invoke the existence of a general legal test derived from decisions of Ontario and Canadian courts to determine the existence of property and the decisions on which the Respondent and its expert rely to support the conclusion that there is no such legal test.

a. The *Saulnier* decision

177. Mr. Saulnier was a fisherman who held fishing licenses granted to him under the Fisheries Act. The Royal Bank granted a loan to Bingo Queen, Mr. Saulnier's company, and Mr. Saulnier entered into a general security agreement in which four fishing licenses were granted as collateral for the loan. Bingo Queen also signed a general security agreement over all personal property, including "intangibles" as defined in the Personal Property Security Act.[231]

178. Mr. Saulnier later applied for bankruptcy under the federal Bankruptcy and Insolvency Act, where the fishing licenses were deemed part of the bankruptcy estate and valued in an amount that would discharge all debts.[232] Therefore, the receiver and trustee in the bankruptcy proceedings sold the fishing licenses to a third party. Mr. Saulnier refused to sign the documents required to transfer the licenses. The trustee and the Royal Bank sued Mr. Saulnier before the Nova Scotia courts to obtain relief.[233] Mr. Saulnier opposed by arguing that the fishing licenses were not property but a permission to do something that would otherwise be illegal and, therefore, they could not be transferred to the trustee to cover the liabilities, nor to the bank to enforce the general security agreement.[234]

179. The question in *Saulnier* was whether fishing licenses created by the Fisheries Act could be deemed property for purposes of their sale to a third party by the trustee in bankruptcy

---

[228] **RER-003**, Second Expert Report of Professor Katz, ¶ 14.

[229] *Id.*, ¶¶ 14-16, 21.

[230] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 85.

[231] **LK-019**, *Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166, ¶ 5.

[232] *Id.*, ¶ 6.

[233] *Id.*, ¶ 7.

[234] *Id.*, ¶ 2.

proceedings, to cover the liabilities under the federal Bankruptcy and Insolvency Act, or for purposes of their transfer to a bank as a creditor with a registered a general security agreement under the Nova Scotia Personal Property Security Act.

180. At first instance, the court found that the fishing licenses were property for the purposes of the bankruptcy proceedings on the basis of the commercial realities approach. The decision was challenged and the Nova Scotia Court of Appeal upheld the finding of property, but on the different basis of the existence of a "bundle of rights" under the fishing license, which included the holder's right to renewal of the license as opposed to the Minister of Fisheries and Ocean's discretion to grant or reject that renewal under the Fisheries Act.[235] On appeal, the Supreme Court delivered a judgment in which Justice Binnie upheld the finding of property through the bundle of rights approach, but "for different reasons and on a more limited basis".[236]

181. First, the Supreme Court disagreed with the "variant" of the regulatory approach adopted by the Nova Scotia Court of Appeal. The regulatory approach was established in the *Re National Trust Co. and Bouckhuyt* case (***Bouckhuyt***), where "licenses and quotas were held to be intangible property (or not) according to the degree of renewal discretion vested in the issuing authority".[237] Under the variant proposed by the Nova Scotia Court of Appeal, the holder's right to renewal of a license, as opposed to the government's discretion to renew, was "part of the 'bundle of rights' which collectively constitute a type of property in which a security interest can be taken".[238] The Supreme Court rejected this variant considering that "[u]ncertainties of renewal do not detract from the interest presently possessed by the holder, but nor does an expectation of renewal based on a Minister's policy which could change tomorrow, transform a licence into a property interest".[239]

182. The Fisheries Act, as the statute that created fishing licenses, provided that the Minister had "absolute discretion" to issue, suspend or cancel them.[240] However, the Supreme Court found that the "broad scope and discretion of the Minister" over the fishing licenses[241] was not "determinative" to establish whether the licenses constituted property.[242] Rather, fishing licenses had to satisfy "the statutory definition of the BIA and PPSA", and it was unclear what degree of discretion was required "to transform a mere license into some sort of interest sufficient to satisfy" the definitions of property found in those statutes.[243] The Supreme Court added that anyone could apply for a fishing license and have a right to a fair ministerial decision

---

[235] *Id.*, ¶ 3.
[236] *Id.*, ¶ 4.
[237] *Id.*, ¶ 36.
[238] *Id.*, ¶ 36.
[239] *Id.*, ¶ 37.
[240] *Id.*, ¶ 8.
[241] *Id.*, ¶ 33.
[242] *Id.*, ¶¶ 37, 40.
[243] *Id.*, ¶ 38.

over such application; therefore, those elements could not be "capable, as such, of constituting a licence 'property' in the hands of a holder".[244]

183. Second, the Supreme Court clarified that the question was whether fishing licenses granted the holder a "bundle of rights" that qualified as property "for the purposes of the statutes", that is to say, bankruptcy and insolvency laws, even if they did not "wholly correspond with the full range of rights necessary to characterize something as 'property' at common law".[245] The "preferred approach" of the Supreme Court to answer the question was to satisfy the elements of property within the scope of bankruptcy and insolvency legislation,[246] not within the scope of general common law.

184. Section 2 of the Bankruptcy and Insolvency Act defined "property" as:

> "any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and **profit, present or future, vested or contingent**, in, arising out of or incident to property"[247]

185. According to the Supreme Court this "very wide" definition "unambiguously signalled an intention to sweep up a variety of assets of the bankrupt not normally considered 'property' at common law". [248] The Supreme Court analyzed the bundle of rights associated with fishing licenses and found that they satisfied the statutory definition of property for the purposes of bankruptcy and insolvency laws because the "subject matter of the license (i.e. the right to participate in a fishery that is exclusive to license holders) coupled with a proprietary interest in the fish caught" bore a "reasonable analogy to a common law *profit á prendre* which is undeniably property right" and therefore could be framed within the element of "profit" found in the definition of property of section 2 of the Bankruptcy and Insolvency Act.[249] Accordingly, the Supreme Court held that "the property in question is the fish harvest". [250]

186. The Supreme Court further analyzed the other applicable definition of "property", found in section 2 of the Personal Property Security Act, as follows:

> "(w) "intangible" means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money;

---

[244] *Id.*, ¶ 38.

[245] *Id.*, ¶ 43.

[246] *Id.*, ¶ 1, ¶ 43, and § (iv)(A).

[247] *Id.*, ¶ 18 (emphasis added).

[248] *Id.*, ¶ 44.

[249] *Id.*, ¶ 34.

[250] *Id.*, ¶ 34.

> (ad) "personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible".[251]

187. The Supreme Court found that fishing licenses were also property under this definition, since "intangible" personal property encompassed statutory creations capable of being "coupled with an interest at common law as in the case of a *profit à prendre*". The Supreme Court clarified that a fishing license did not "constitute a *profit à prendre* at common law" but went on to find that "exclusively with the extended definitions of 'personal property' in the context of a statute that seeks to facilitate financing by borrowers and the protection of creditors", the grant of a fishing license coupled with a proprietary interest in the fish caught was sufficient to meet the definition under the BIA and the PPSA.[252]

188. Third, the Supreme Court explicitly clarified that the concept of property was not being analyzed "in the abstract", but rather in the specific and restricted context of the Bankruptcy and Insolvency Act in order to "fulfill certain objectives in the event of a bankruptcy which require, in general, that non-exempt assets be made available to creditors".[253] The Supreme Court stated that "a fishing license may not qualify as 'property' for the general purposes of the common law", which did not mean that they were "excluded from the reach of the statutes". [254]

The Tribunal's conclusions on Saulnier

189. The Tribunal is not persuaded that *Saulnier* "legally settled" the approach to find property under Ontario law, so as to make of "the bundle of rights with exclusivity at the core" the "test", as proposed by Claimants' expert.[255] The decision of the Supreme Court in *Saulnier* is clear in that it does not intend to settle a general test to find property under Ontario common law, but rather answers the more limited question of property for the specific purposes of insolvency proceedings and personal property security. Claimants' expert seems to recognize this limited scope of the *Saulnier* decision when he acknowledges that "[t]he Court left the question of whether a fishing licence is property in other statutory contexts".[256] Justice Binnie clearly and expressly limited his findings to the definitions found in the Bankruptcy and Insolvency Act and the Personal Property Act, for the purposes of bankruptcy proceedings and the protection of creditors.[257]

190. *Saulnier* does not establish a binding property test or a binding approach to assert a definition of property under Ontario law in the circumstances of this case. However, there are some general principles in *Saulnier* that can provide guidance to solve the question of property in this case.

---

[251] *Id.*, ¶ 51.

[252] *Id.*, ¶ 51.

[253] *Id.*, ¶46.

[254] *Id.*, ¶ 16.

[255] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 134.

[256] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 69.

[257] **LK-019**, *Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166, ¶¶ 8, 51.

191. First, *Saulnier* confirms that there is not a fixed list of criteria to find property in general common law and that the finding of property in a specific statutory context and under a statutory definition does not imply a finding of property under general common law.

192. Second, the "bundle of rights" in *Saulnier* was an interpretative approach to determine if an intangible object not defined as property in the statute that created it (the Fisheries Act) satisfied a given definition of property under another specific statute (Bankruptcy and Insolvency Act and Personal Property Security Act). This approach involves jointly analyzing the rights associated with the asset in question under the applicable statutory definition, while giving full effect to the purposes of the statute. In other words, the question of property is to be answered in consideration of any applicable statutory definition, and the corresponding statutory context, while giving full effect to the purposes of such statute. However, in the case before this Tribunal there is no statutory definition of property, either in NAFTA or in Ontario law. NAFTA protects "investments", and contains a broad list of the types of assets that can constitute investments, one of which is "property" under Article 1139(g), but contains no definition of property as such. Answering that question, as both Parties have acknowledged, is referred to national law.

193. Third, the Supreme Court did not establish the characteristics required of the rights in "the bundle" to find property, but it did compare them with a traditional type of property such as a *profit à prendre*, finding that there was "some analogy" with the bundle of rights of fishing licenses. In *Saulnier*, only a resemblance, and not an analogy, was justified because the element of "profit" was part of the definition of property under the Bankruptcy and Insolvency Act and the Personal Property Security Act. The Supreme Court even recognized that fishing licenses were clearly not a *profit à prendre* as such.[258]

194. In this case, the Tribunal can consider a comparative analysis between the bundle of rights of emission allowances and other traditional forms of property, including the *profit à prendre.* However, absent a statutory definition of property providing specific characteristics, such as that of profit, the Tribunal cannot make a finding of property solely on the basis of "some" resemblance or analogy.

195. Fourth, the Supreme Court excluded from the bundle of rights analysis the right of renewal as opposed to the government's discretionary powers. This approach was justified by the Supreme Court in light of the specific statutory definition of property that existed in *Saulnier*, and to fulfill the purposes of the applicable statutes, *i.e.* the protection of creditors. The Supreme Court even clarified that their approach and the finding of similarities with the *profit à prendre* type of property did not alter or "encumber" the Minister's discretion under the Fisheries Act. In this case, there are no specific statutory contexts or definitions such as those found in *Saulnier,* and the question of property is to be answered under Ontario general common law, where exclusive control is an essential characteristic of property. The Tribunal sees no grounds to exclude the analysis of the government's discretion as part of the analysis of exclusive control in this case.

[258] *Id.*, ¶¶ 28, 33 34.

196. In sum, the Tribunal is not persuaded that *Saulnier* established a general test, much less that the conclusions in *Saulnier* can be replicated in this arbitration. This Tribunal is not called to answer the question of property for the purposes of insolvency proceedings or for protecting creditors and neither NAFTA Article 1139(g) nor Ontario law provides for a statutory definition of property such as those in section 2 of the Bankruptcy and Insolvency Act and the Nova Scotia Personal Property Security Act, which were key in the findings of the Court.

b. The *Anglehart* decision

197. Roland Anglehart Jr. et al. (**Anglehart Appellants**) were a community of traditional crab fishers at the Gulf of St. Lawerence. To preserve crab stocks since 1984 the Department of Fisheries and Oceans (**DFO**) established an annual total allowable catch (**TAC**), and beginning in 1990, the TAC was distributed among crabbers in individual quotas (**IQ**).[259]

198. Between 2003 and 2006, pursuant to a Supreme Court judgment, the DFO had to integrate aboriginal peoples into commercial fisheries by reacquiring IQs from crabbers (**Marshall Initiative**).[260] In 2003, the Minister of Fisheries and Ocean implemented a 3-year fishing plan to remove certain fishers from Fishing Area No. 18 and transition them to different activities. This "rationalization" process involved the participation of fishers from Fishing Area No. 18 in 15% of the TAC for the fishers of Fishing Area No. 12, but the latter refused to sign a joint project with the DFO.[261] Absent such agreement, between 2004 and 2006, the DFO used parts of the TAC for the rationalization process and its own operations.[262]

199. In 2007, the Anglehart Appellants brought a claim against the Crown for certain omissions of the Minister and the DFO, and argued, *inter alia*, that the Marshall Initiative, the fishing plan, and the use of the TAC by the DFO amounted to expropriation.[263] In their view, the fishing licenses with the IQs were intangible property because they were a permanent and commercial asset "assignable and transferrable" that granted them the right to fish in a portion of the annual TAC.[264] Moreover, while fishing licenses and IQs were not normally covered by the 1985 Expropriation Act, and the Fisheries Act granted broad discretionary powers to the government, it did not explicitly exclude expropriation claims.[265] Also, the *Saulnier* decision had already recognized fishing licenses as property.[266] Therefore, the removal of 35% of the TAC for other uses by the DFO, and the resulting reductions in their IQs, amounted to an expropriation giving rise to compensation.[267]

---

[259] **LK-012**, *Anglehart v. Canada*, [2018] CAF 115, ¶ 4.
[260] *Id.*, ¶ 5.
[261] *Id.*, ¶ 6.
[262] *Id.*, ¶ 7.
[263] *Id.*, ¶¶ 8, 14.
[264] *Id.*, ¶ 14.
[265] *Id.*, ¶31
[266] *Id.*, ¶ 16.
[267] *Id.*, ¶¶ 13, 16.

200. At first instance, the Federal Court judge dismissed the expropriation claim because the fishing licenses did not give a right of ownership in the fishery resource or a vested right to an IQ as a share of the TAC, and there was no legitimate expectation that the TAC would not vary.[268] In 2018 the Federal Court of Appeal decided the appeal against this judgment, addressing the question of whether fishing licenses and IQs were "property" capable of being expropriated.[269]

201. The Court first clarified that the "bundle of rights" analysis in *Saulnier* was a "statutory interpretation" of the Supreme Court made in the very "specific and narrow legislative context" of the Bankruptcy and Insolvency Act and the Personal Property Security Act as "primarily commercial instruments", and "[t]herefore, the concepts of *profit à prendre* and of the market value of licences addressed by the Supreme Court in *Saulnier* depend on the definition of 'property' set out in the legislation at issue". [270] In this sense, the finding of fishing licenses as property in *Saulnier* was intended to "give effect to the Parliament's intention in a specific legislative context",[271] which is why it could not be extrapolated to a different case and under a different statute, such as the Fisheries Act.[272]

202. The Federal Court of Appeal then analyzed the ministerial discretion over fishing licenses and IQs under the Fisheries Act and the 1993 Regulations, finding that the government's "broad" or "wide" discretion did not allow the conclusion that the licenses or the IQs could constitute property capable of being expropriated.[273] Such discretionary powers included those related to the annual expiration of the licenses, the uncertainties of the right of renewal, the fact that licenses were deemed property of the Crown, the limitations to their transfer, and the conditions related to the species and quantities of fish.[274] In particular, the Federal Court of Appeal noted that the predictability of the annual renewal of licenses "cannot be interpreted as conferring a right similar to a property right that may be expropriated",[275] and that social, economic and commercial factors were relevant in managing the fisheries but did not limit the FO Minister's discretion.[276]

203. Its analysis of the ministerial discretion led the Court to uphold the Federal Court judge's finding that that the IQs granted "no legal right to any particular amount of quota. This flows from the nature of fishing licenses, in respect of whose issuance the Minister has the broadest discretion. […] if there is no vested right to a given quota, there can be no right to compensation arising purely from the fact of loss of quota. […] The exercise of the minister's discretion to issue

---

[268] *Id.*, ¶ 9.
[269] *Id.*, § VI (A).
[270] *Id.*, ¶ 18.
[271] *Id.*, ¶ 19, 23.
[272] *Id.*, ¶¶ 19, 23-24.
[273] *Id.*, ¶¶ 25, 27, 32, 42.
[274] *Id.*, ¶¶ 28-29.
[275] *Id.*, ¶ 40.
[276] *Id.*, ¶ 47.

fishing licenses with reduced quota under section 7 of the Act did not result in a public legal duty to pay compensation for the lost quota".[277]

204. Even though the IQs and fishing licenses were included together in the claim for expropriation, the Court apparently recognized a difference between them: licenses can be coupled with proprietary interests, while this does not seem to be the case for IQs. The Anglehart Appellants invoked the Manitoba Fisheries decision to argue that IQs were commercial assets similar to the boats and equipment of a fisher. However, the Court agreed with the Federal Court judge's statement that "a parallel cannot be drawn between the rights of the appellants claim to have in their IQs and the goodwill of a business as an asset because the appellants do not 'own' their IQs".[278] Further, the Court referred to other cases involving mining licenses, and distinguished them from IQs because the former "confer on the owners of mineral claims **personal or property rights over land** owned by another";[279] therefore "there can be no question of expropriation with regard to IQs because they do not grant any **property rights or real interest** akin to the rights of mineral claims holders".[280]

The Tribunal's conclusions on Anglehart

205. Nothing in the language of *Anglehart* suggests that the Federal Court of Appeal established a general test to define or find property under Ontario common law. Nonetheless, given that the Court addressed the question of whether or not intangible statutory creations constituted property "in the common law sense",[281] this decision may provide some guidance to the Tribunal in this arbitration.

206. The *Anglehart* decision is clear in that: (i) *Saulnier* did not establish a general test for the finding of property but rather found property for the limited purposes of a specific statute, and (ii) that such findings cannot be extrapolated to different statutes or to establish a general concept of property.

207. The *Anglehart* decision does not determine which are the elements that an intangible object must necessarily fulfill to be deemed property in Ontario. This supports the conclusion that there is no definitive list of requirements of property under common law determined by the courts of Ontario.

208. The analysis of the Court focuses on the attributes of a statutory creation for the purposes of ruling out expropriation claims under a specific statute, the Fisheries Act. In this regard, there is at least one attribute of property that clearly emerges: the ability to exclude others, particularly the State, from appropriation or taking over the right in question, which includes the ability to bring expropriation claims.

---

[277] *Id.*, ¶ 44.

[278] *Id.*, ¶ 35.

[279] *Id.*, ¶ 37 (emphasis added).

[280] *Id.*, ¶ 38 (emphasis added).

[281] *Id.*, ¶ 13.

209. From the analysis of this attribute in *Anglehart*, it appears that in the case of a statutory creation of an asset or a right, the mere absence of a provision in the statute excluding expropriation claims is not sufficient to conclude that such creation is property and that it can provide a basis for expropriation claims. In the absence of an explicit exclusion, the analysis of the State's discretionary powers becomes relevant to assess the degree of exclusivity held by the holder of the right in question and to determine whether the State's powers are broad enough to exclude proprietary rights and expropriation claims. In this case, the Cap and Trade Act explicitly excludes expropriation claims in connection with emission allowances, the implications of which will be further developed in the following sections.

210. Finally, the Court identified the "bundle of rights" as an interpretation of the Supreme Court in *Saulnier*, and while it did not follow *Saulnier*'s findings, it did rule that "there can be no question of expropriation with regard to IQs because they do not grant any property rights or real interest" similar to the "personal or property rights over land owned by another" granted by mining licenses.[282] This appears to suggest the possibility that coupling certain rights with those of a statutory creation which would not otherwise constitute property may give rise to expropriation claims and a finding of the existence of property.

c. The *Tucows* decision

211. Tucows.com Co. (**Tucows**) brought a claim against Lojas Renner S.A. (**Renner**) to keep the domain name <renner.com>. Renner was the registered owner of the trademark "Renner".[283]

212. The issue before the Ontario Court of Appeal in *Tucows* was related to the validity of the service of process of the statement of claim on Renner outside Ontario and the stay of the claim in the face of ongoing administrative proceedings before the World Intellectual Property Organization.[284]

213. The question of property arose in connection with the first claim: the validity of service of process. Rule 17.02 of the Rules of Civil Procedure required prior leave from a court to serve the statement of claim outside Ontario, unless it pertained to "personal property in Ontario".[285] Renner brought a motion to set aside the service of process on the grounds that Tucows had failed to obtain prior leave to serve outside Ontario, which was required in that case.[286] The motions judge set aside the service of the statement of claim because a domain name was not "personal property" and, being intangible, it was not "located in Ontario".[287]

---

[282] *Id.*, ¶¶ 37-38.

[283] **LK-007**, *Tucows.com Co. v. Lojas Renner S.A.*, [2011] ONCA 548, ¶ 1.

[284] *Id.*, ¶¶ 8-11.

[285] *Id.*, ¶¶ 4, 17-18.

[286] *Id.*, ¶¶ 4, 16.

[287] *Id.*, ¶ 20.

214. The question before the Ontario Court of Appeal was whether a domain name was (i) "personal property" within the meaning of Rule 17.02 of the Ontario Rules of Civil Procedure, and (ii) whether the domain name was located in Ontario for the purposes of the same Rules.[288]

215. The Court first provided a definition and a description of a domain name as an "intangible or ideational thing consisting of two parts, one being numerical and the other being a distinctive readable address".[289] The first part is the Internet Protocol (**IP**) number, and the second is the distinctive readable address in Uniform Resource Locators (**URL**), both being functionally necessary.[290] The Court further noted that a domain name must be unique, and when used to identify and distinguish a business "the value of maintaining an exclusive identity has become critical […] Because of this, domain names have value on the secondary market".[291]

216. The Ontario Court of Appeal then held that as a "relatively new innovation" the legal status of domain names was undetermined in Canada, and they were thus compared with "other types of intellectual property".[292] In this regard, a 2001 decision of the Ontario Superior Court had explicitly acknowledged that domain names could be intangible property similar to a copyright or a trademark, despite not being considered "personal property" for the purposes of the Ontario Rules of Civil Procedure.[293] The Court then recognized that the dominant view in the "international jurisprudence" and the "emerging consensus" was that domain names were a new form of intangible property.[294]

217. After this overview, the Ontario Court of Appeal delved into the "attributes of property" for the purposes of Rule 17.02, finding that (i) there was no definition of personal property in the Ontario Rules of Civil Procedure; thus, the common law attributes of property applied, and (ii) "there is no agreed list of required attributes of 'property' at common law".[295] Therefore, the Court analyzed multiple sources of doctrine and "judicial decisions" to conclude that domain names satisfied all the possible attributes of property as identified in such cases.[296]

218. The Court referred to *Saulnier* and its analysis on the bundle of rights and the *profit à prendre*, recognizing that the exclusive right to fish "was coupled" with property rights over the fish and revenues from their sale, as well as the license's ability to unlock the value of other assets. The Court found that the bundle of rights associated with a domain name satisfied the attributes of property "in that at present **Tucows can enforce those rights against all others**".[297] That bundle of rights included the owner's ability to derive income from holding the rights in the

---

[288] *Id.*, ¶ 23.
[289] *Id.*, ¶ 65.
[290] *Id.*, ¶ 42.
[291] *Id.*, ¶ 44.
[292] *Id.*, ¶¶ 46-47.
[293] *Id.*, ¶ 48.
[294] *Id.*, ¶¶ 50-52, 55.
[295] *Id.*, ¶¶ 56-57.
[296] *Id.*, ¶¶ 58-66.
[297] *Id.*, ¶ 62 (emphasis added).

domain name, with subscribed clients, and the domain name's ability to unlock the value of a business or of other assets.[298]

219. The judgment also recognized that *Saulnier* was limited to the specific statutory context of bankruptcy laws, and that to give a "purposive" interpretation to the statute, it had "rejected the traditional common law approach" followed in *Bouckhuyt*, under which "[t]he notion of 'property' imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right. This is distinct from a revocable license, which simply enables a person to do lawfully what he could not otherwise do".[299]

220. The Court adopted no position on the differences between *Saulnier* and *Bouckhuyt*, and simply analyzed domain names under the attributes of property set out in the latter, finding that they fulfilled the element of exclusive control because domain names granted the right to exclusively direct traffic to a website and "to exclude anyone else" from using it.[300] The court added that "unlike the situation of the tobacco quota in Bouckhuyt" the renewal of domain names was subject to the UDRP and its rules, and not to unfettered discretion.[301]

221. Finally, the *Tucows* decision also referred to *National Provincial Bank Ltd. v. Ainsworth*, [1965] A.C. 1175 (H.L.) (***Ainsworth***). In that case, the English House of Lords held that "other requirements must be met",[302] to constitute property. The Court found that "a domain name also satisfies" *Ainsworth's* definition of property because it is definable, identifiable, capable of assumption by third parties, and has some degree of permanence.[303]

The Tribunal's conclusions on Tucows

222. Professor de Beer, Claimants' expert, holds that *Tucows* settles a general legal test for property that "requires a bundle of rights, with exclusivity at the core".[304] However, nothing in the wording or the structure of the decision suggests that the Ontario Court of Appeal intended to, or in fact did, establish a definitive test or rule.

223. If the intention had been to settle or identify an existing "test" to find property, the Ontario Court of Appeal would have likely done so explicitly, as it did when analyzing the applicable tests "developed by the Supreme Court" to identify the relevant connecting factors required to determine if the domain names were located in Ontario;[305] but it did not. Instead, the Court simply approached a novel property claim by referring to multiple definitions of property found in the doctrine and the "definitions from Canadian and other common law jurisprudence" and concluded that the "bundle of rights in the domain name" met the criteria set forth in those

---

[298] *Id.*, ¶¶ 60, 63.

[299] *Id.*, ¶¶ 60-61.

[300] *Id.*, ¶¶ 63-66; **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 152.

[301] **LK-007**, *Tucows.com Co. v. Lojas Renner S.A.*, [2011] ONCA 548, ¶ 63.

[302] *Id.*, ¶ 64.

[303] *Id.*, ¶ 64.

[304] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 134.

[305] **LK-007,** *Tucows.com Co. v. Lojas Renner S.A.*, [2011] ONCA 548, ¶ 69-70.

definitions, without making any statement, and even less any assessment, as to whether such definitions —as a whole or in part— constitute a general rule or test that must be satisfied to find property under Canadian common law.[306]

224. Even though the Court in *Tucows* did not recognize a general "test" in the decisions it referred to, it did recognize in the *Bouckhuyt* decision the "traditional common law approach" to finding property, which requires "the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right".[307] The Court also used the "bundle of rights" approach proposed in *Saulnier,* and, while it did not rule which rights must necessarily be included in the bundle to find property, it did recognize a common element among them: that the holder "can enforce those rights against all others".[308]

225. In sum, even though there is no evidence of an "agreed list of required attributes of 'property' at common law", the foregoing appears to confirm the agreement of the experts of both Parties that exclusivity is an essential core attribute of common law property.[309] Moreover, the "bundle of rights" approach and the decisions applying it may provide valuable guidance to answer the question of whether emission allowances satisfy the element of "exclusivity" to be deemed property in Ontario for the purposes of this arbitration.

226. As for the *Ainsworth* decision, which Claimants' expert refers as a "test",[310] the same considerations apply. At no point does the Ontario Court of Appeal refer to or adopt the *Ainsworth* decision as establishing a general test or a rule. *Ainsworth* adopts another definition of property,[311] providing for elements in addition to those considered by the Canadian court decisions. However, those other elements do not include the element of "exclusivity" and there is no indication that the House of Lords considered it as an element of property. Therefore, while *Ainsworth* could provide some further "indicia" of property,[312] the element of exclusivity remains an essential element for the finding of property in the Canadian decisions.

d. The *Bouckhuyt* decision

227. The Bouckhuyts owned a farm that was linked to a tobacco basic production quota (**Tobacco Quota**). Tobacco Quotas were allocated by the Ontario Flue-cured Tobacco Growers' Marketing Board (**Tobacco Board**) to specified lands and could not be sold independently until a change in the Farm Product Marketing Act regulations in 1974, when they were no longer allocated to lands but to persons.[313]

---

[306] *Id.*, ¶ 66.

[307] *Id.*, ¶¶ 60-61.

[308] *Id.*, ¶ 62.

[309] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 133-134; Respondent's PHB, ¶ 37.

[310] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 171-172.

[311] **RER-003**, Second Expert Report of Professor Katz, ¶¶ 14, 20, ft. 14.

[312] *Id.*, ¶ 21.

[313] **LK-023,** *National Trust Co. v. Bouckhuyt,* [1987] CarswellOnt 141, ¶¶ 1-2.

228. The Bouckhuyts sold their farm in 1977 and transferred their quota at the same time. As part of the consideration, the buyers gave back a mortgage over the farm in favor of the Bouckhuyts. The mortgage included the Tobacco Quota as part of the land, and subjected its transfer to the Bouckhuyts' consent. The Bouckhuyts' Notice of Transfer to the Tobacco Board included the mortgage. The Board approved the transfer and recorded that the Bouckhuyts had an interest in and against the Tobacco Quota.[314] The Bouckhuyts' mortgage was registered under the land registry system, but not under the Personal Property and Securities Act.

229. Three years later, without the consent of the Bouckhuyts, the buyers executed a chattel mortgage over the Tobacco Quota in favor of a trust company and registered it under the Personal Property Security Act.[315] The trust company was a second mortgagee of the farm property. With the chattel mortgage, it intended to be a first mortgagee over the Tobacco Quota in the absence of registration by the Bouckhuyts of their mortgage under the Personal Property Security Act, despite knowing that the Bouckhuyts' mortgage required their consent to transfer the Tobacco Quota.[316]

230. The trial judge found that Tobacco Quotas were intangible personal property within the Personal Property Security Act, and under that regulation, actual notice of the Bouckhuyts' prior unregistered interest was irrelevant to determine the priorities of security interests.[317] According to the trial judge, Tobacco Quotas were property because in practice they were successfully traded in the market if they fulfilled the regulatory requirements, despite the broad discretionary powers of the Tobacco Board.[318]

231. On appeal, the Ontario Supreme Court found that Tobacco Quotas were not intangible property; thus registration by the trust company under the Personal Property Security Act was irrelevant.[319] To determine if a Tobacco Quota satisfied "the notion of property" understood as "the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right" distinct from a "revocable license, which simply enables a person to do lawfully what he could not otherwise do", the Court analyzed the scope of the discretionary powers of the Tobacco Board.[320]

232. The Court concluded that Tobacco Quotas could not satisfy the notion of property because they were transitory and ephemeral and subject to the absolute and complete control of the Tobacco Board.[321] Section 2 of the Farms Products Marketing Act provided "for the control and regulation in any or all respects of the producing and marketing within Ontario of tobacco,

---

[314] *Id.*, ¶¶ 3-5.
[315] *Id.*, ¶ 6.
[316] *Id.*, ¶ 11.
[317] *Id.*, ¶ 13, ¶ 15.
[318] *Id.*, ¶¶ 13-14.
[319] *Id.*, ¶ 31.
[320] *Id.*, ¶ 24.
[321] *Id.*, ¶¶ 21, 22, 23, 27.

including the prohibition of such producing and marketing, in whole or in part".[322] Accordingly, under such regulations no one could produce or market tobacco without a license, or in excess of an allocated Tobacco Quota. Moreover, the Tobacco Board had discretion to allot, cancel or reduce Tobacco Quotas, and it could seize, remove or destroy tobacco produced in violation of the regulations.[323] Finally, although transactions over Tobacco Quotas were possible and even a market among licensed producers existed, all transactions pertaining to the Tobacco Quota were still subject to the approval and unfettered discretion of the Tobacco Board.[324]

233. Considering these statutory features, the Court in *Bouckhuyt* classified a Tobacco Quota as "a license to produce which can, in turn, be granted only to a licensed producer" which "does no more than permit the licensed producer to grow tobacco, something which would otherwise be prohibited",[325] and "the mere fact that it could be exchanged, sold, pledged or leased does not in itself make it property".[326] The Court held that "[t]he notion of 'property' imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right which is distinct from a revocable licence".[327] It went on to find that the Tobacco Board regulations not only created the basis for legislative control over every aspect of the sale, production and marketing of tobacco in Ontario, but also vested complete authority in the Board "to prohibit, restrain, or reduce the production and marketing of tobacco and the absolute discretion as to how that control is to be exercised". In the Court's view, the *Farm Products Marketing Act* and the applicable regulations made it clear that a tobacco quota was a privilege "granted at the discretion of the board to do that which [was] otherwise prohibited".[328]

The Tribunal's conclusions on Bouckhuyt

234. The Supreme Court in *Saulnier* described the approach adopted in *Bouckhuyt* as the "traditional common law" approach,[329] where the Ontario Court of Appeal found that the Tobacco Quota at issue "is by its nature subject to such discretionary control and is so transitory and ephemeral in its nature" that it could not "constitute intangible personal property as that term is utilized in the P.P.S.A".[330]

235. The Supreme Court further noted that, although the *Bouckhuyt* approach had been adopted in some Ontario cases involving the PPSA, and had given rise to a line of cases in which the degree of renewal discretion was the determining basis for deciding whether licenses and quotas constituted property, it had also been criticized as being "insufficiently sensitive to the particular context of personal property security legislation, which (so the critics say) commands a broader

---

[322] *Id.*, ¶ 20.

[323] *Id.*, ¶ 21.

[324] *Id.*, ¶¶ 22-23.

[325] *Id.*, ¶ 28.

[326] *Id.*, ¶ 22, ¶ 26.

[327] *Id.*, ¶ 24.

[328] *Id.*, ¶ 29.

[329] **LK-019,** *Saulnier v Royal Bank of Canada*, [2008] 3 SCR 166, ¶ 27.

[330] **LK-023,** *National Trust Co. v. Bouckhuyt,* [1987] CarswellOnt 141, ¶¶ 21, 22, 23, 29.

concept of intangible property if the purposes of that legislation are to be achieved".[331] In this sense, the Supreme Court held that "[u]ncertainties of renewal" and the authorities' degree of renewal discretion were of "limited value" to find property.[332] The Supreme Court also noted that the application of *Bouckhuyt's* "regulatory approach" entailed a difficulty due to the absence of "clear criteria to determine how much 'fetter' on the issuing authority's discretion is enough to transform a 'mere licence' into some sort of interest to satisfy the statutory definitions in the BIA and the PPSA".[333]

236. The Tribunal agrees that the degree of discretion held by an issuing authority to renew a license or quota is of limited value, and that, overall, there is no clear criterion to determine the degree of discretion that becomes "inconsistent with the degree of exclusive control and use needed to have a property right".[334] While *Saulnier* and *Bouckhuyt* addressed whether property existed in the context of definitions contained in specific legislation, the concern relating to the difficulty in determining the relevant degree of restriction or "fetter" on a regulatory authority's jurisdiction also appears valid in the broader context of property under general common law.

237. Due to the different facts and the specific nature of tobacco quotas under the scheme established by the Farm Products Marketing Act and regulations, the Tribunal finds that *Bouckhuyt* is distinguishable from this case and of limited assistance. However, the Tribunal does note that "exclusivity" or the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right, is a key element of property at common law. On the basis of this factor, the Court in *Bouckhuyt* found that the absolute discretion of the Tobacco Board was an obstacle to finding property. However, as noted in *Saulnier*, the Court did not identify a criterion or limit to determine how much discretion, or how much fetter or restriction on the exercise of that restriction, is relevant.

e. Conclusions on whether the Ontario or Canadian Courts have established a general "legal test" or "interpretative principles" for property

238. In the Tribunal's view, none of these cases has settled the approach for finding property under Ontario law, nor have they identified a test, general rule, or interpretative principle to determine the existence of property. Rather, they address a much more limited question in regard to particular assets under different statutory schemes or instruments. Although reference is made to property at common law, none of the decisions sets out a definitive list of attributes of property under common law or examines the nature and scope of such attributes in any detail. As a result, on the basis of the case law and authorities submitted, the Parties have not identified any general test for the finding of property under Ontario law.

---

[331] **LK-019,** *Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166, ¶¶ 26-27.

[332] *Id.*, ¶ 37.

[333] *Id.*, ¶ 38.

[334] **CER-03**, Expert Report of Professor Jeremy de Beer, ¶ 169.

a) In *Saulnier*, the Supreme Court adopted a purposive approach to the broad definitions of property and personal property in the federal BIA and the Nova Scotia PPSA to find that a fishing license granted under the federal Fisheries Act constitutes property for the purposes of those statutes. It reached this conclusion despite the very broad scope of the powers and discretion of the Minister under the Fisheries Act and its view that a simple license in and of itself may not constitute property at common law.

b) In *Anglehart*, the Federal Court of Appeal distinguished *Saulnier* on the basis that the Supreme Court's decision depended on the definition of property in two commercial statutes made in a context different from that of a fishing license under and for the purpose of the Fisheries Act itself. The Federal Court of Appeal examined the Fisheries Act and accompanying regulations and their intended purpose and found that on the basis of the scope of the powers and "absolute discretion", including the power not to renew a license, a fishing license or an individual fishing quota did not constitute property "in the common law sense" under the Fisheries Act for the purpose of a claim of expropriation under the federal Expropriation Act.

c) In *Tucows*, the Ontario Court of Appeal decided that a domain name constituted personal property under the Ontario Rules of Civil Procedure for the purpose of service of legal process outside of Ontario. In the absence of a definition of "personal property" in the Rules, the Court examined the common law attributes of property. It found that the bundle of rights associated with the domain name in question satisfied the attributes of property, enforceable against all others, which had been referred to as "exclusivity" by academic commentators and in other decided cases. In addition, the Court found that the rights associated with a domain name also satisfied the definition of property in other cases, including the House of Lords decision in *Ainsworth*, which held that "[b]efore a right or an interest can be admitted into the category of property, or a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".[335]

d) In *Bouckhuyt*, the Ontario Court of Appeal found that a tobacco quota under the Farm Products Marketing Act and regulations did not constitute personal property for the purpose of the PPSA on the basis of the broad powers and control of the Tobacco Board in its "absolute" and "unfettered" discretion in their exercise and the transitory and ephemeral nature of production quotas.

239. In sum, there is no general test derived from the aforementioned decisions; yet the Parties agree,[336] and the cited Canadian decisions seem to confirm, that the element of "exclusive control" is an essential attribute to find property under general common law in Ontario. The court decisions that the Tribunal has reviewed in the preceding paragraphs of this Award do not establish a general rule in Ontario that clearly determines the scope and extent of the rights that

[335] **LK-007**, *Tucows.com Co. v. Lojas Renner S.A.*, [2011] ONCA 548, ¶ 64; **LK-034,** *National Provincial Bank, Ltd. v. Ainsworth*, [1965] 2 All E.R.472, p.494.

[336] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 133; Respondent's PHB, ¶ 37.

must be associated to a statutory creation to satisfy the "exclusive control" attribute of property under general common law. However, a common element that the Canadian decisions have considered is the discretionary power of the government over the rights of the holder of the corresponding asset.

240. In *Anglehart* the question of property and the right to bring expropriation claims was answered on the basis of "the discretion that [the Fisheries Act] grant[ed] Minister" as opposed to the existence of "the exclusive right of fishing".[337] In *Bouckhuyt* the notion of property involved "the right to exclude others from the enjoyment of, interference with, or appropriation of a specific legal right"[338], and such exclusion was analyzed in connection with the discretionary powers of the Tobacco Board over the Tobacco Quota. In *Tucows*, the notion of property also involved "some exclusive right to make a claim against someone else" and it was found that a domain name "satisfies the attributes of property as described by Harris and Ziff in that at present Tucows can enforce those rights against all others".[339]

241. These decisions do not determine the extent of governmental discretion required to preclude a finding of property, but they do provide some general parameters: (i) the express statutory recognition of "absolute" or "unfettered" governmental discretion has been deemed inconsistent with a finding of property under general common law; (ii) even if a statute does not expressly grant "absolute" or "unfettered" discretion to the government, such discretion may still be broad enough to amount to an "interference with or appropriation of a specific legal right" or to be "inconsistent with the degree of exclusive control and use needed to have a property right;"[340] (iii) the right to renewal or the predictability of allocation of a statutory creation does not fetter the government's statutory discretion, and it cannot confer property rights in itself; and (iv) the government's discretionary powers over statutory creations permitting the taking, removal or modification of rights without compensation, or the exclusion of expropriation claims, may be indicative of the absence of "exclusive control", and thus the absence of property.

242. The similarities between an intangible statutory creation and traditionally recognized forms of property may provide indicia of the existence of property, but such similarities cannot in themselves support a finding of property under general common law. This standard may be different in the presence of a statutory definition of property, where only "some analogy" may suffice as found in *Saulnier* where the Court considered the bundle of rights associated with fishing licenses coupled with a proprietary interest falling within the scope the relevant statutory definitions.

243. In sum, there is no settled legal test for the finding of property, as proposed by Claimants, but the decisions of the Canadian courts provide some guidance on the question of whether the emission allowances created by the Cap and Trade Act are property under the laws of Ontario,

---

[337] **LK-012,** *Anglehart v. Canada*, [2018] CAF 115, ¶ 31.

[338] **LK-023,** *National Trust Co. v. Bouckhuyt*, [1987] CarswellOnt 141, p. 4.

[339] **LK-007**, *Tucows.com Co. v. Lojas Renner S.A.*, [2011] ONCA 548, ¶¶ 58, 62.

[340] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 169.

in the absence of an established list of attributes of property.[341] Specifically, the courts seem to agree that if the statute grants discretionary powers to the government that allow it to interfere with or appropriate the assets —in this case emission allowances— it is an indication that the given asset does not qualify as property.

(ii) The non-Canadian decisions

244. In the absence of Canadian decisions dealing specifically with emission allowances, the Parties have submitted other non-Canadian decisions that do refer to similar instruments.

245. The experts appear to agree that, while not binding, such non-Canadian cases may have some persuasive value.[342] Claimants' expert analyzed five non-Canadian cases referring to emission allowances in connection with the issue of property in this arbitration: two cases of the United States (**US**), two cases of the Court of Justice of the European Union (**CJEU**), and one English case.

246. The Tribunal agrees with the experts that some guidance can be found in these decisions given that, unlike the Canadian cases, they do refer to emission allowances and cap and trade systems in other common law jurisdictions. For completeness, the Tribunal will analyze these non-Canadian decisions to identify whether there are relevant interpretative principles additional to those found in the Canadian decisions, and only insofar as they are "consistent with the Canadian approach",[343] since the question of property is to be answered under Ontario law.

a. The CJEU cases

247. The CJEU cases that involved allowances are *Holcim (Romania) SA v. European Commission*[344] and *ArcelorMittal Rodange et Schifflange SA v. Luxembourg*.[345] Professor de Beer holds that they are "tangentially relevant cases",[346] and the Tribunal agrees with that assessment. In *Holcim* there was no analysis of the notion of property in general, or specifically in connection with allowances.[347] In *ArcelorMittal*, the question at stake concerned the legality of the decision of an authority to require a company to surrender, without compensation, unused greenhouse gas emission allowances. While the question tangentially referred to the issue of property, the CJEU issued its decision without referring to the debate, and no position was taken on the legal nature of allowances.[348]

---

[341] **RER-001,** First Expert Report of Professor Katz, ¶ 40; **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 29.

[342] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 85, 99.

[343] **RER-003**, Second Expert Report of Professor Katz, ¶ 21.

[344] **JdB-014,** *Holcim (Romania) SA v. European Commission*, [2016] C 556/14.

[345] **JdB-015**, *ArcelorMittal Rodange et Schifflange SA v. État du Grand-duché de Luxembourg*, [2017] C-321/15.

[346] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 126.

[347] *Id.*, ¶ 113.

[348] *Id.*, ¶ 115.

b. The US cases

248. The US cases involving allowances that were submitted by the Parties are *Ormet Corp v. Ohio Power Co*[349] and *California Chamber of Commerce v. State Air Resources Board.*[350] Professor de Beer holds that those cases may provide guidance but may also be distinguishable from the case before this Tribunal because they were based on "statutory language disclaiming allowances as 'not' property, due to the distinct complex American constitutional context of the Fifth Amendment".[351] The Tribunal agrees with this distinction and adds that those cases did not answer the question of whether allowances are property under general common law.

249. *Ormet* decided whether a contractual claim of partial ownership over certain emission allowances could be a question of federal law establishing federal jurisdiction.[352] There was no analysis of the common law characteristics of property.[353] *Ormet* only referred to the "nature of the ownership interest" emerging in the context of a private commercial relationship for the purposes of jurisdiction but did not issue a ruling on the nature of allowances.[354]

250. *California Chamber of Commerce* decided that the allowances auction system could not be equated to a tax,[355] because allowances were "valuable property rights –albeit only as between private parties",[356] and since they had "value to the holders" they could not constitute a tax.[357] Allowances were deemed property despite a statutory regulation expressly indicating that they were not, "only" in the context of private parties, but not in the context of "property rights against the state".[358] Therefore, allowances could simultaneously be property in the context of private relationships but not property against the State: "a 'property right' can mean different things in different contexts".[359] To support this conclusion, the court referred to the *Bronco Wine Co v Jolly* case,[360] and held that "[t]his distinction between property rights for purposes of a takings analysis—that is, property rights as between the government and an individual—and property rights as between private individuals, has been articulated in cases analogous to this one". [361]

---

[349] **JdB-016,** *Ormet Corp v. Ohio Power Co*, [1996] 98 F3d 799.

[350] **LK-052**, *California Chamber of Commerce v. State Air Resources Bd*, [2017] 216 CalRptr3d 694.

[351] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 125-126.

[352] **JdB-016,** *Ormet Corp v. Ohio Power Co*, [1996] 98 F3d 799, ¶¶ 8-9. Another relevant difference to consider was that the allowances in *Ormet* could be owned by more than one individual, unlike the allowances in the Cap and Trade Act. *See* Hearing Tr. Day 3, 851: 1-13, Cross-examination of Professor De Beer.

[353] Hearing Tr. Day 3, 852: 10-16, Cross-examination of Professor De Beer.

[354] **JdB-016,** *Ormet Corp v. Ohio Power Co*, [1996] 98 F3d 799, ¶¶ 4, 8. *See* also **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 119.

[355] **LK-052**, *California Chamber of Commerce v. State Air Resources Bd*, [2017] 216 CalRptr3d 694, p. 17.

[356] *Id.*, pp. 19-20.

[357] *Id.*, p. 25.

[358] *Id.*, pp. 19, 20, 23.

[359] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 122.

[360] **JdB-017**, *Bronco Wine Co v. Jolly*, [2005] 129 CalApp4th 988 at 1031 [Bronco].

[361] **LK-052**, *California Chamber of Commerce v. State Air Resources Bd*, [2017] 216 CalRptr3d 694, p. 24.

251. While *California Chamber of Commerce* does not offer guidance on the common law attributes of property, it does provide an interesting interpretative principle: a right can be simultaneously deemed property and not property depending on the nature of the claim and its context, weighing in favor of finding property in private commercial claims, and against in claims involving "property rights against the state".[362] Although Respondent's expert argues that "Canadian courts have been more restrictive in finding an interest is a property right in the context of government-individual relations than in the context of a private commercial legal relations, even when the same interest, a commercial asset, is involved",[363] there is no evidence in this arbitration that Canadian courts have addressed the principle proposed in *California Chamber of Commerce*.[364]

c. The *Armstrong* case

252. The English case referring to emission allowances was the *Armstrong* decision, identified by Claimants' expert as "the most relevant to an Ontario court" and the one case "an Ontario court could not possibly ignore".[365] In *Armstrong*, the High Court of England and Wales determined the proprietary status of European Union allowances under the European Union (**EU**) cap and trade scheme, which, similar to the Cap and Trade Act, does not define whether an emission allowance constitutes property.[366]

253. The claimant, Armstrong DLW GmbH, requested relief over certain EU carbon emission allowances (**EU Allowances**) that were transferred to the defendant, Winnington Networks Limited, as a result of an email fraud perpetrated by an unrelated third party.[367] The defendant, who had already sold the EU allowances, argued it was a *bona fide* purchaser and that claimant had been negligent for giving the password to its account in response to a phishing email, allowing the fraudulent third party to make the transfer.[368] The claimant argued that the defendant failed to follow through a sufficient due diligence procedure, overseeing the risk of the fraud.[369] Therefore, the core issue in dispute was who should bear the loss for the fraud of the third party.[370]

---

[362] *Id.*, pp. 19, 20, 23.

[363] **RER-003,** Second Expert Report of Professor Larissa Katz, ¶ 82, footnote 129.

[364] **CER-003,** Expert Report of Professor Jeremy de Beer, ¶ 110 "there is no authority in Canadian law stating a distinction between the test for 'property' in private law and government-individual contexts. The academic article by Professors Kelvin Low and Jolene Lin cited at the end of that statement in the Katz report says nothing about such a distinction"; *See also* ¶ 122 "[in *California Chamber of Commerce* was found that] [a] 'property right' can mean different things in different contexts. If presented with the creative argument that an Ontario court should be less willing to recognize property rights in a government-individual context than in the context of private parties, **which is a novel proposition in Canadian law**, I believe an Ontario court would reject such an argument" (emphasis added).

[365] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 100, 125-126.

[366] *Id.*, ¶¶ 100, 125-126.

[367] **LK-040,** *Armstrong DLW GMBH v. Winnington Networks Ltd*, [2012] EWHC 10(Ch), ¶ 22.

[368] *Id.*, ¶ 25.

[369] *Id.*, ¶ 26.

[370] *Id.*, ¶ 1.

254. The claim was brought on three alternative bases: restitution of proprietary rights, restitution for unjust enrichment, and a personal claim in equity for the "unconscionable" receipt of the EU allowances.[371] For the first bases, the defendant contended that EU allowances were a form of intangible property, but they were not a chose in possession or a chose in action, and therefore, there were no grounds for a proprietary restitution claim.[372] In *Armstrong*, the parties did not dispute "that EUAs are capable of constituting, and do constitute, property as a matter of law",[373] but rather which kind of property they constituted and the kind of claim that could be made over them.[374]

255. To answer these questions, the Court in *Armstrong* first conducted an assessment of the "characteristics of property" at common law defined in the *Ainsworth* case as "definable, identifiable by third parties, capable in its nature of assumption by third parties and having some degree of permanence or stability".[375] Then, the court defined the features of a chose in action, as a category of property, and of documentary intangibles, as a sub-category of property.[376] In this context, the Court analyzed the nature of an EU emission allowance, finding that it satisfies the characteristics of "property" in general, under the so-called *Ainsworth* test, because "[i]t is definable, as being the sum total of rights and entitlements conferred on the holder pursuant to the ETS. It is identifiable by third parties; it has a unique reference number. It is capable of assumption by third parties, as under the ETS, an EUA is transferable. It has permanence and stability since it continues to exist in a registry account until it is transferred out either for submission or sale and is capable of subsisting from year to year". [377]

256. After finding EU allowances were "property", the English court characterized them in the sub-category of "intangible property" on the basis of one case related to trust property, and three cases of "particular relevance" for the issue of intangible property "*A-G for Hong Kong v Nai-Keung* [1987] I WLR 1339, *In Re Rae* [1995] BCC 102, and most significantly *In re Celtic Extraction* [2001] Ch 487" (the "*Nai Keung*", "*In Re Rae*" and "*Celtic*" cases, respectively).[378]

257. The English court applied the three-fold test of *Celtic* to find property, which required (i) "a statutory framework conferring an entitlement on one who satisfies certain conditions", (ii) that "the exemption must be transferable", and (iii) that "the exemption or licence have value".[379] According to the British court, EU allowances satisfied *Celtic*'s test because

> "First, there is, here, a statutory framework which confers an entitlement on the holder of an EUA to exemption from a fine.

---

[371] *Id.*, ¶ 2.
[372] *Id.*, ¶¶ 35-36.
[373] *Id.*, ¶ 40.
[374] *Id.*, ¶¶ 38(1), 40.
[375] *Id.*, ¶ 42.
[376] *Id.*, ¶¶ 43-47.
[377] *Id.*, ¶ 50.
[378] *Id.*, ¶ 52.
[379] *Id.*, ¶ 56.

> Secondly, the EUA is an exemption which is transferable, and expressly so, under the statutory framework. Thirdly the EUA is an exemption which has value […]". [380]

258. When framing the *Celtic* test, the British court in *Armstrong* recognized that *Celtic* had involved a specific statutory definition of property subject to "the purposes of the s.436 Insolvency Act 1986".[381] In fact, it quoted sections of *Celtic* that referred to definitions of property in *Nai Keung* and *In Re Rae*, which were also subject to specific statutes and contexts:

> "[In *Nai Keung*,] the Privy Council considered that textile export quotas were **property within the definition in the Theft Ordinance of Hong Kong** and therefore capable of being stolen. The definition was: 'property includes money and all other property, real and personal, including things in action and other intangible property.' […] 'In summary, to be registered as the holder of an appropriate quota is a prerequisite to obtaining an export licence; it confers an expectation that, in the ordinary course, a corresponding licence will be granted, though not an enforceable legal right ... It would be strange indeed if something which is freely bought and sold ...were not capable of being stolen.'
>
> A similar conclusion was reached by Warner J in *In re Rae* [1995] BCC 102. In that case a bankrupt had been licensed under the Sea Fish (Conservation) Act 1967 in respect of four fishing vessels. The licences terminated on his bankruptcy. But the Ministry of Agriculture, Fisheries and Food, the department which issued such licences, recognised an 'entitlement' in the holder or the person to whom he 'waived' his entitlement to be considered for the grant of new licences. Such an entitlement had value. The question was whether the benefit of the entitlement remained with the bankrupt or passed to his trustee for the benefit of his creditors. Warner J decided that the 'entitlement' was **within the definition of 'property' as a present interest in property,** namely the vessels. **He considered it to be immaterial that the entitlement was also incidental to other things, such as the exercise of the minister's discretion**".[382]

259. The Court then quoted *Celtic*'s conclusions on the foregoing cases in connection with the waste management licenses, which reflected the "property test":

> "It appears to me that these cases indicate the salient features which are likely to be found if there is to be conferred on an exemption from some wider statutory prohibition the status of property. First, there must be a statutory framework conferring an entitlement on one who satisfies certain conditions even though there is some element of discretion

---

[380] *Id.*, ¶¶ 56, 58.

[381] *Id.*, ¶ 53.

[382] *Id.*, ¶ 54 (emphasis added).

> exercisable within that framework […] Second, the exemption must be transferable […] Third, the exemption or license will have value. […]
>
> In my view a waste management licence comes within the definition of 'property' contained in section 436 of the Insolvency Act 1986. It is in my view 'property' properly so called. In the alternative, I consider that it is an 'interest ... incidental to, property' namely the land to which it relates".[383]

The Tribunal's conclusions on Armstrong

260. The Tribunal observes that, though not identical, the EU allowances created by Directive 2003/87/EC of the European Parliament and Council and the emission allowances under the Cap and Trade Act have several similarities. Like in the Cap and Trade Act, the EU allowances were a permission that had to be acquired by companies operating within the EU, in order to emit carbon dioxide above a certain minimum level. Without EU allowances "the holder would either be prohibited from emitting CO_2 beyond a certain level or at least would be required to pay a fine if he did so. In this way, the holding of the EUA exempts the holder from the payment of that fine".[384] EU allowances were allocated for a specified period and had to be submitted to meet compliance obligations of capped companies. They were tradable and any surplus could be retained by the company to meet future compliance obligations.[385] Moreover, EU allowances were not only traded by capped companies, but also by non-capped companies known as "traders".[386] Each trader and company had an account with a unique number, and each EU allowance has an individual number and is easily identifiable.[387]

261. The fact that *Armstrong* considered the same issue as is before this Tribunal, whether emission allowances constitute property, provides guidance for the decision before this Tribunal, but is not in itself sufficient for this Tribunal to apply the test followed by the English court and conclude that allowances are property under Ontario law.

262. *Armstrong* found that EU allowances were "property" at common law by applying the *Ainsworth* test, and that they were intangible property by applying the *Celtic* test. The Tribunal has already concluded that the Canadian cases submitted in this arbitration are not sufficient to support the conclusion that *Ainsworth* is a "test" adopted as such by Ontario courts, despite that such decision was taken into consideration in *Tucows*. There is also no evidence or allegation that the *Celtic* test has been adopted or applied as a "test" by Ontario courts.

263. Most importantly, neither *Ainsworth* nor *Celtic* includes what the Parties and their experts have recognized to be an essential element to find property under Ontario common law: exclusive control. The decisions do not refer to that element. This element is also missing in *Armstrong*'s

---

[383] *Id.*, ¶ 56.

[384] *Id.*, ¶ 48.

[385] *Id.*, ¶¶ 6-11.

[386] *Id.*, ¶ 12

[387] *Id.*, ¶¶ 15,17.

analysis and conclusion that EU allowances satisfy both the *Ainsworth* and *Celtic* property tests.[388] In fact, the first element in *Celtic*'s test indicates that "some element of discretion" does not affect the proprietary status of a statutory exemption. Further the decision barely deals with the State's discretion and its consequent interference with the holder's "exclusive control", which the Parties agree is a core issue under Ontario law.

264. Furthermore, there is an important difference between *Armstrong*'s interpretative approach and that of the Canadian decisions. The English courts have specifically recognized that the characteristics of property found in various statutory definitions reflect common law concepts, and vice versa. The *Armstrong* court explained that

> "[w]hilst the cited case law concerned the meaning of 'property' as specifically defined in various statutes, in my judgment, the reasoning of Morritt LJ applies equally to the characteristics of property at common law. Indeed, Morritt LJ himself relied upon *National Provincial Bank v Ainsworth*. Moreover, the terms used in statutory definitions are themselves derived from common law concepts". [389]

265. Canadian courts, on the contrary, have thus far declined to follow this approach. They have maintained a distinction between specific statutory definitions of property and the general common law conception of property. The *Anglehart* court, for example, distinguished *Saulnier* on the grounds that its reasoning could not be extrapolated to find that licenses granted under the Fisheries Act were property at general common law[390] because *Saulnier*'s analysis of property was performed in a different and specific statutory context, *i.e.* that of insolvency law.[391] *Anglehart*'s conclusion is consistent with the *Saulnier* decision itself, in which Justice Binnie restricted the Court's finding to the specific legislative context.

266. Thus, even though Canadian courts would likely consider decisions from other common law jurisdictions in determining whether allowances are property, and particularly decisions that deal with the same type of asset, the Canadian court in *Anglehart* did not interpret *Saulnier* in the same way that the English court in *Armstrong* interpreted *Celtic*. It adopted a different approach and rejected the extrapolation of the conclusions of *Saulnier* to establish a common law definition of what constitutes property.[392]

267. To conclude, *Armstrong* shares with the case before this Tribunal the fact that both refer to the determination of whether emission allowances under similar cap and trade regimes may be considered property. But the similarities end there. The issue put before this Tribunal is twofold: first, whether a Canadian court would consider decisions of common law jurisdictions in determining the novel issue of whether allowances are property, and second, assuming

---

[388] *Id.*, ¶ 50.

[389] *Id.*, ¶ 59.

[390] **LK-012,** *Anglehart v. Canada*, [2018] CAF 115, ¶ 19.

[391] *Id.*, ¶ 21.

[392] **LK-019,** *Saulnier v. Royal Bank of Canada*, [2008] 3 SCR 166, ¶¶ 36-37.

Armstrong is one of those decisions, whether a Canadian court would conclude that allowances are property.

268. The Tribunal is persuaded that Canadian courts have considered and would consider decisions of other common law jurisdictions to determine whether allowances are property. However, they are not bound by such decisions, and it is not clear whether a Canadian court would adopt the same approach as the English court in *Armstrong*. Rather, the decisions of the Canadian courts submitted in this arbitration suggest that they are reluctant to create general rules or tests based on cases that are fact and statute specific or to extrapolate from decisions based on specific statutory definitions of property to other cases in different contexts and where there is no definition, or a different definition, of property.

(c) Analysis of the Cap and Trade Act

269. Quoting the decision of the Supreme Court of Canada in *Canada* (*Minister of Citizenship and Immigration) v. Vavilov*, Claimants' expert submits that the interpretation of a statute under Ontario common law requires looking at its "text, context and purpose".[393] According to Claimants these "general interpretative principles" allow the conclusion that Claimants had property rights over the emission allowances.[394]

270. The Tribunal has already concluded that the Canadian court decisions referred to in the preceding paragraphs of this Award have a common element in which the experts of both Parties agree: a fundamental attribute of property is "exclusive control" and in the case of a statutory creation the "exclusive control" would depend on the extent of the discretionary power of the government over the rights of the holder of the corresponding asset. However, the said decisions do not establish a conclusive general rule in Ontario that determines the scope and extent of the rights that must be associated with a statutory creation to satisfy the "exclusive control" attribute.

271. Therefore, the Tribunal needs to determine whether under the Cap and Trade Act the holders of emission allowances, and particularly the market participants, had exclusive control over emission allowances – as opposed to third parties, including the Ontario government, – and thus, whether the Tribunal is persuaded that the emission allowances created by the Cap and Trade Act constitute property in Ontario for the purposes of establishing that an investment existed under NAFTA.[395] For purposes thereof, the Tribunal will analyze (i) the purpose, (ii) the context, and (iii) the text of the Cap and Trade Act, as the statute creating the emission allowances.

---

[393] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶¶ 37-38.

[394] *Id.*, ¶¶ 54, 205.

[395] *Id.*, ¶ 35.

(i) The Purpose of the Cap and Trade Act

272. Claimants and their experts submit that the statutory purpose of the Cap and Trade Act and the Regulation was to create a "market mechanism to achieve environmental policy goals"[396] and "to establish a broad carbon price through a cap and trade program that will change the behavior of everyone across the Province" and "link to other regional cap and trade markets as part of international, national and interprovincial responses to reduce greenhouse gas".[397] In their view, the establishment of a broad market through a cap and trade program is a "[a] key purpose" of the Act, that subsection (2) of the Purpose of the Act leaves no doubt on the point and is in equal footing with subsection (1), both being part of the purpose of the Cap and Trade Act.

273. The interpretation of the aforementioned provisions by Claimants is plausible and results from the structure of the Cap and Trade Act which in places both subsections (1) and (2) under "Purpose".

274. The Cap and Trade Act defines its "Purpose" in section (2) as follows:

> "**Purpose**:
>
> (1) Recognizing the critical environmental and economic challenge of climate change that is facing the global community, the purpose of this Act is to create a regulatory scheme,
>
> (a) to reduce greenhouse gas in order to respond to climate change, to protect the environment and to assist Ontarians to transition to a low-carbon economy; and
>
> (b) to enable Ontario to collaborate and coordinate its actions with similar actions in other jurisdictions in order to ensure the efficacy of its regulatory scheme in the context of a broader international effort to respond to climate change.
>
> **Same**
>
> (2) The cap and trade program is a market mechanism established under this Act that is intended to encourage Ontarians to change their behaviour by influencing their economic decisions that directly or indirectly contribute to the emission of greenhouse gas". [398]

275. Subsection (1) of the Purpose of the Cap and Trade Act leaves no doubt about the purpose to create a "regulatory scheme" to reduce gas emissions, protect the environment, transit to a carbon low economy and allow Ontario to coordinate its actions with other jurisdictions in order to ensure the efficacy of its regulatory scheme in the international context.

---

[396] *Id.*, ¶ 62.

[397] *Id.*, ¶ 21.

[398] **CL-005**, Climate Change Mitigation and Low-carbon Economy Act, 2016, Cap and Trade Act, Section (2).

276. As regards subsection (2), there are two possible readings of the reference to the market mechanism. One way is to view the market mechanism as one of the purposes (though not necessarily "the key" response as proposed by Claimants) of the Cap and Trade Act. In this regard, subsection (1) is preceded by the word "Purpose" and then Section (2) is preceded by the word "Same" which is an indication that subsection (2) is also a purpose of the Cap and Trade Act. In addition, the Preamble of the Cap and Trade Act refers to the establishment of a "broad carbon price" that is "a key purpose" of the statute:

> "The Government of Ontario cannot address this challenge alone. Collective action is required. As a leading sub-national jurisdiction, Ontario will participate in the international response to reduce greenhouse gas by establishing a carbon price. A **key purpose** of this Act is to establish a broad carbon price through a cap and trade program that will change the behaviour of everyone across the Province, including spurring low-carbon innovation. A cap and trade program in Ontario will allow Ontario to link to other regional cap and trade markets as part of the international, national and interprovincial responses to reduce greenhouse gas.
>
> In addition to the carbon price signal and to further support the reduction of greenhouse gas, the Government of Ontario will pursue complementary actions to support and promote the transition to a low-carbon economy".[399]

277. The other way to see the market mechanism is as a means to achieve the Purpose of creating a regulatory scheme to "reduce greenhouse gas in order to respond to climate change, to protect the environment and to assist Ontarians to transition to a low-carbon economy". The wording in Subsection (2) refers to the "intention" or purpose of the market mechanism, but not of the Cap and Trade Act or of the regulatory scheme. By contrast, Subsection (1) expressly refers to the regulatory scheme as "the" purpose of the Act. The Preamble refers to the carbon price as "a" key purpose, not "the" purpose, and only to the extent that it "will change the behaviour of everyone across the Province, including spurring low-carbon innovation". The ultimate Purpose remains the reduction of greenhouse gases under a regulatory scheme as indicated in subsection (1).

278. The Tribunal is not inclined to either reading of subsection (2). Both readings are admissible, and they cannot be isolated one from the other for purposes of the interpretation of the Cap and Trade Act. On balance, emission allowances, as the object that embodies, materializes or "facilitates"[400] the market mechanism, played the central role in the Act's purpose of achieving the reduction of greenhouse gases in collaboration with other jurisdictions to respond to climate change, and were an integral part of the Cap and Trade Act's purpose. But the Tribunal must also consider the language in subsection (1) of the "Purpose" section of the Cap and Trade Act, which unambiguously recognizes that "the purpose of this Act is to create a regulatory scheme".

---

[399] *Id.*, Preamble (emphasis added).

[400] **CER-003,** Expert Report of Professor Jeremy de Beer, ¶ 206.

The Tribunal recognizes the importance of both the regulatory scheme and the market mechanism, and will consider them both for the purposes of its analysis on property.

(ii) The context and the text of the Cap and Trade Act

279. Professor Robert Stavins – Claimants' expert – explains that carbon-pricing policies emerged as instruments to reduce greenhouse gas emissions, and that there are two types: carbon taxes and emission trading systems, "[c]arbon taxes fix the price of carbon and allow the resulting emissions to vary, while emission trading systems fix total emissions and allow the resulting emission price to vary".[401] The Tribunal finds Professor Stavins' description of cap and trade systems illustrative:

> "a cap-and trade system […] creates total allowances equal to the targeted (constrained) quantity of total emissions. After initial distribution of the allowances, which may occur through free allocation or sale, participants can trade allowances on the secondary market to achieve compliance, given their emission-generating activities. Emission sources (capped participants) can also take actions that lower emissions, and thus reduce their compliance burden. For example, electric utilities that generate power using non- or lower-emitting sources rather than high-emission sources (for example, renewables or natural gas rather than coal) would incur lower costs because the quantity of allowances required to comply with the emission trading system would be less. From the perspective of entities holding allowances, those allowances are valuable not only because they can be used to fulfill any compliance obligations the entities have, but also because they can be sold to other entities with compliance obligations or that otherwise place a greater value on the allowances".[402]

> "Participation in emission trading markets is not limited to capped entities, but typically includes other entities ("market participants") that play different roles that are important to emission market performance and include services to capped entities that help them achieve compliance and manage compliance risks. […] Market participants, in turn, benefit financially from participating in emission markets through positive expected returns earned in the course of trading or providing services for participants in the market".[403]

280. According to Professor Stavins, since the goal of these systems is to achieve emission reductions, the emissions cap, and therefore the number of allowances available, tend to decline from year to year until the target is met. With fewer allowances in the market, capped

[401] **CER-001,** Expert Report of Professor Robert Stavins, ¶¶ 23-24.

[402] *Id.*, ¶ 25.

[403] *Id.*, ¶ 43.

participants are forced to either change their behavior and business to reduce emissions or purchase the increasingly scarce and expensive allowances.[404]

281. With the issuance of the Cap and Trade Act, the Ontario province created a regulatory scheme to reduce greenhouse gases emissions through a carbon-pricing policy in the form of a cap and trade system instead of a carbon tax.

282. The Cap and Trade Act defines emission allowances as "an Ontario emission allowance or an instrument created by a jurisdiction other than Ontario that, under section 38, is to be treated as an emission allowance for the purposes of this Act; ('quota d'émission')". [405] An Ontario emission allowance is "an emission allowance created under section 30; ('quota d'émission de l'Ontario')".[406] Section 30, in turn, provides that "(1) The Minister shall create Ontario emission allowances in accordance with the regulations, and may create classes of allowances" and that "(2) The regulations shall prescribe the maximum number or amount of Ontario emission allowances that may be created for a period, and the maximum shall be determined with reference to the targets established under section 6 for the reduction of greenhouse gas emissions". [407]

283. The emission allowances created by the Cap and Trade Act represent the right to emit a certain amount of greenhouse gas for a prescribed activity,[408] and must be submitted to the Government by the capped participants in an amount equal to the amount of greenhouse gases emitted by them during a compliance period.[409]

284. The Cap and Trade Act and the Regulation refer to three types of participants in the carbon price market: mandatory participants, voluntary participants, and market participants.[410] Only mandatory and voluntary participants were "capped", *i.e.* subject to caps on emissions. If they exceeded the cap, mandatory or voluntary participants were exposed to penalty. The market participants had no underlying activity associated with the cap and trade program that generates emissions. Therefore, they did not submit allowances, had no cap obligations and were not subject to penalties or other sanctions for exceeding cap emissions.[411]

285. Mandatory or voluntary participants could comply with the cap by adjusting their production or investing in green technologies, or by acquiring emission allowances. Voluntary and mandatory participants could acquire emission allowances by (i) receiving them free of charge by distribution from the Government of Ontario in accordance with the regulations; (ii) purchasing

---

[404] *Id.*, ¶ 40.

[405] **CL-005**, Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 1(1).

[406] *Id.*, Section 1(1).

[407] *Id.*, Section 30.

[408] *Id.*, Sections 1(2) and 13(1).

[409] *Id.*, Section 14(1).

[410] *Id.*, Sections 15, 16 and 17.

[411] **CL-006**, Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Section 1: "'capped participant' means a mandatory participant or a voluntary participant"; **CER-1**, Expert Report of Dr. Robert Stavins, ¶¶ 70-71.

them in auctions conducted by the Government of Ontario; or (iii) purchasing them from other mandatory, voluntary or market participants.[412] Market participants were permitted to purchase allowances at auctions conducted by Ontario (and the other participating jurisdictions) and participate as traders to purchase or sell allowances.[413]

286. Therefore, the cap and trade system was composed of a primary market of free allowances granted by the Government of Ontario, and the emissions sold in auctions, also by the Government of Ontario.[414] In the secondary market, the overall allowances issued by the government were traded between participants, including not only market, but also mandatory and voluntary participants.[415]

287. The cap and trade program established an aggregate cap on emissions of greenhouse gas and created allowances that represented the right to emit individual units of greenhouse gas. An entity subject to the cap had to obtain emission allowances corresponding to its emissions. Given that the aggregate cap was fixed by the regulator and represented the total number of allowances, an entity that needed more allowances had to acquire them through transactions with other allowance holders. It could also bid on and purchase allowances at auction, hold them, and sell or trade excess allowances that other participants needed or wished to acquire.

288. Emission allowances under the cap and trade program were created for mandatory and voluntary participants as a tool to meet their compliance obligations under the regulatory scheme that sought to influence their decisions that may contribute to the reduction of emission of greenhouse gases. The regulatory scheme's goal of changing the behavior to reduce greenhouse gas emissions required, on the one hand, establishing an aggregate cap to control the emissions of the mandatory and voluntary participants, and on the other, creating a market for such emissions that permitted their trade.

289. Tradable emission allowances were, therefore, a creation of the regulator pursuant to a regulatory scheme designed to curb the emissions of greenhouse gases over time and to respond to changing conditions. This regulatory scheme imposed significant limitations on the participants' right to use and control the allowances and, in turn, attributed considerable powers to the government regarding their allocation, creation, and cancellation.

290. The government was the issuer or creator of emission allowances for each period, could classify them, and determine the amount of allowances that would be in circulation, in accordance with the applicable regulations.[416] The Minister had the power to regulate auctions or sales, establish who participated in them and limit the number of emission allowances per person in the

---

[412] **CL-005**, Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 31 and 32; **CL-006**, Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Sections 55, 56, 57, 58, 59, and 85.

[413] **CER-002**, Second Expert Report of Dr. Robert Stavins, ¶ 25; **CER-1**, Expert Report of Dr. Robert Stavins, ¶ 71**; CER-3**, Expert Report of Professor Jeremy de Beer, ¶¶ 76-77.

[414] **CL-005**, Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 30(5); **CER-1**, Expert Report of Dr. Robert Stavins, ¶ 73.

[415] **CER-001**, Expert Report of Dr. Robert Stavins, ¶ 70.

[416] **CL-005**, Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 30(2).

auctions.[417] The Director was able to take the allowances and submit them whenever there was a shortfall, and to impose adverse consequences when a capped participant's emissions surpassed its allowances.[418] In certain circumstances, the government could suspend the trade of the emission allowances,[419] "remove" emission allowances and credits, even without notice,[420] and without compensation.[421] Section 28(2) also forbade the possibility of holding allowances for a third party or to establish a trust without the government's authorization.

291. Overall, the purpose and context of the Cap and Trade Act indicate that emission allowances were subject to a strict regulatory scheme controlled by the government, which does not seem to weigh in favor of finding that there was "exclusive control" over the emission allowances. The following sections will review, in detail, the rights and limitations envisaged in the text of the Cap and Trade Act and the Regulations to determine whether the emission allowances created under this statute possess the attributes of property required under the laws of Ontario and particularly whether they satisfy the "exclusive control" element.

(iii) Whether emission allowances satisfy the "exclusive control" element

292. The Tribunal recalls that the Parties and their experts do not dispute that exclusive control is a salient and determinative element of property under Ontario law[422] and that exclusive control is related to the degree of government interference, including, of course, the discretionary powers of the government. The Tribunal will first review the provisions of the Cap and Trade Act invoked by Professor de Beer to assert exclusive control by the holders of emission allowances, and then will consider other relevant provisions of the Cap and Trade Act to determine whether there is exclusive control.

a. Provisions identified by Claimants' expert

293. Professor de Beer considers the following provisions of the Cap and Trade Act and the Regulation to be evidence that participants had exclusive control and use over the emission allowances:

293.1. Exclusive use: Under Subsection 22(1) of the Cap and Trade Act emission allowances were held in cap and trade accounts "under the control of participants",[423] and only registered participants could purchase, sell and trade, and deal with emission allowances, "generally" on their own terms.[424] According to Professor de Beer, apart from a few prescribed circumstances, only the holder of the allowances could determine

---

[417] *Id.*, Section 32.

[418] *Id.*, Sections 10, 14(7) and (8).

[419] *Id.*, Section 25(3).

[420] *Id.*, Section 27.

[421] *Id.*, Section 70.

[422] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 133; Respondent's PHB, ¶ 37.

[423] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 83, p. 23.

[424] *Id.*, ¶ 83, p. 24, ¶ 146.

whether and how to use them, whether by holding them, submitting them to the Minister, selling or trading them.[425] Also, Subsection 15(3) of the Regulation provided that capped participants could submit only the emission allowances held in their own account to the Minister.[426]

293.2. Exclusive control: Subsection 28(2) of the Cap and Trade Act provides that control of the allowances in participants' accounts was exclusive to the extent that participants may not hold in their accounts allowances "owned" by another person.[427] Therefore, Professor de Beer concludes that only the registered participant could control allowances in their account.[428]

294. The Tribunal accepts that that the aforementioned provisions invoked by Claimants' expert, when individually considered, may indicate that there is some degree of exclusivity or control over the emission allowances created by the Cap and Trade Act. However, those provisions cannot be analyzed in isolation, but rather must be considered in context and together with the other provisions of the Cap and Trade Act, including those that were not reviewed by Professor de Beer in his expert report.

295. The rule in Subsection 22(1) of the Cap and Trade Act has "the purpose of allowing" registered participants to trade, deal and submit the allowances to the Minister. However, the authorization or permit to negotiate a right with third parties, by itself, does not alter the nature of that right, and does not necessarily confer exclusive use or control over a thing, especially when it is subject to statutory limitations or conditions. Subsection 15(3) of the Regulation excludes the possibility of submitting the emission allowances to the Ministry in order to meet a participant's compliance obligations, if they are not held in that participant's account. Therefore, it appears that the purpose of Subsection 22(1), jointly considered with Subsection 15(3), rather than to vest an exclusive right to use and control the allowances account to the exclusion of others, is to require the participants to have their own account in order to limit the possibility to participate through another entity.

296. Consistent with the foregoing provisions, the rule in Subsection 28(2) of the Cap and Trade Act also forbids the indirect holding of allowances or beneficial interests of third parties. The prohibition for a registered participant to hold in its account allowances that are owned by another person does not resemble or embody a right to exclude the interference of third parties from using its allowances. On the contrary, this provision establishes a limitation of use of the allowance by a holder, who cannot choose to hold the allowances in another participant's account, or vice versa. Professor de Beer does not explain how the fact that each participant has an exclusive account in this sense is equivalent to the ability to exclude others from interfering with a defined domain of activity.

---

[425] *Id.*, ¶ 83, p. 24, ¶ 170.

[426] *Id.*, ¶ 83, p. 24, ¶ 148.

[427] *Id.*, ¶ 83, p. 23, ¶¶ 139 - 144.

[428] *Id.*, ¶ 83, p. 23, ¶ 140.

297. The Tribunal is also not convinced that the use of the word "owned" in Subsection 28(2) of the Cap and Trade Act, by itself, implies the existence of property, especially when the effect of the provision is to impose a limitation to the holder's rights. Recalling the analysis of Professor Katz in this regard, the word "owned" by itself does not constitute "a property right and has to be understood in context: in the context of s. 28(2), it refers to the relation of belonging between a holder of a right and the beneficial interest, which cannot be 'owned' by anyone other than the account holder, i.e. no trust can be created. In the common law tradition, it is recognized that owning does not in itself refer to holding a property right".[429]

298. Moreover, the presence or absence of the term "owned" has not been determinative to find property in any of the Canadian cases submitted by the parties. In fact, in *Bouckhuyt* the trial court referred to the holder of Tobacco Quotas as an owner who "does not possess full rights of ownership",[430] a conclusion that was upheld by the Ontario Court of Appeal. Thus, the use of the words "own" and "owner" in a statute is not determinative to prove the existence of ownership rights or property over an intangible object.

299. In sum, as Professor de Beer acknowledged, the limitations identified in the aforementioned provisions serve the purpose of controlling the regulatory scheme created under the Cap and Trade Act: "**You have an ability to prescribe regulations and limits**, and it's much differently worded, and it's anchored or rooted in the purpose of protecting the integrity of the markets. You can't have people hoarding allowances beyond the limit, **or you can't have people hiding their allowances in other people's accounts held in trust**, and so on and so forth".[431]

300. This control is ultimately exerted by, or in favor of, the Government, and it reduces the scope of the participant's control over the emission allowances. Therefore, the Tribunal is not persuaded that these provisions referred to by Professor de Beer are sufficient to support a finding of "exclusive control".

b. Other statutory provisions are indicative of the absence of the "exclusive control" element of property

301. The Tribunal finds that there are provisions in the Cap and Trade Act which relate to the government powers that were not convincingly addressed by Claimants' expert. These provisions are:

301.1. Section 33(2), which provides that "[t]he Minister may cancel Ontario emission allowances in accordance with the regulations in such circumstances as may be prescribed".[432]

---

[429] **RER-003**, Second Expert Report of Professor Larissa Katz, ¶ 32, footnote 50, *citing to* **LK-077**, J.W. Harris, "Property and Justice" (Oxford University Press, 2002), p. 68: ("'Ownership' is not a term of art in English law").

[430] **LK-0023**, *National Trust Co. v. Bouckhuyt*, [1987] CarswellOnt 141, ¶ 14.

[431] Hearing Tr. Day 3, 759: 15-22 – 760: 1-3 (emphasis added).

[432] **CL-005**, Climate Change Mitigation and Low-carbon Economy Act, 2016, Cap and Trade Act, Section 33(2), p. 16.

301.2. Subsection (3) of Section 22, which provides that "[t]he Director may impose requirements and restrictions with respect to a registered participant's accounts".[433]

301.3. Section 17(4), which provides that "[d]espite subsection (3), the Director may refuse to register the applicant if the Director is of the opinion that the applicant should not be registered, having regard to such circumstances as may be prescribed and such other matters as the Director considers appropriate".[434]

301.4. Subsection (3) of Section 28, which provides that "[s]ubsection (2) does not apply to such registered participants, or in such circumstances, as may be prescribed".[435]

301.5. Section 78(1) subsection (8), which provides that "(1) The Lieutenant Governor in Council may make regulations in respect of the following matters: […] (8) Governing the creation, distribution, retirement from circulation, and cancellation of Ontario emission allowances and the retirement of other emission allowances from circulation".[436]

302. Claimants' expert's opinion was that these provisions constituted insufficient discretion to negate the possession of property by Claimants.[437] However, in the Tribunal's view, the foregoing provisions, in the aggregate, represent significant limitations to the holders' control and use of emission allowances by allowing the Government to, *inter alia*, retire them from circulation and cancelling them,[438] refuse the registration of an application,[439] impose "requirements and restrictions with respect to registered participant's accounts",[440] and prescribe exceptions to the prohibition on dividing interest, for participants to create a trust.[441]

303. These powers were granted either with no restriction – where the Government "considered appropriate"[442] – or according to regulations issued by the regulator itself[443] – as a subset of the Government's discretion.[444] Therefore, the Government had broad powers that imposed

---

[433] *Id.*, Section 22(3), p. 11.

[434] *Id.*, Section 17(4), p. 9.

[435] *Id.*, Section 28(3), p. 13.

[436] Hearing Tr. Day 3, 673-675.

[437] However, Claimants' expert admitted he did not review these provisions in detail in his report. *See* Hearing Tr. Day 3, 677, 681, 685-686, 707–709.

[438] *Id.*, 673-675.

[439] *Id.*, 684-685.

[440] *Id.*, 682.

[441] *Id.*, 708-709.

[442] *Id.*, 684-685.

[443] *Id.*, 678-679.

[444] Claimants' expert conceded that such provisions envisaged powers for the Government related to emission allowances, which could be exercised without specific restrictions or as the Government considered appropriate. *See* Hearing Tr. Day 3, 674-676, 678-679, 682-683, 685-686, 707-709.

significant limitations raising doubts as to the "exclusivity" that both Parties claim to be at the core of property rights.[445]

304. In addition to these provisions, the Parties and their experts debated whether Section 70 evidences exclusive control over and suggests the intent of the regulator to create property rights in the emission allowances.[446]

305. Section 70 of the Cap and Trade Act provides as follows:

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

306. Professor de Beer is of the view that Section 70 leads to the conclusion that emission allowances were property.[447] According to him, Section 70 did not limit the holder's rights to control and use an allowance, but only provided for a limitation of one of the remedies available to the holder by denying "one path of legal recourse (Ontario expropriation law)".[448] However, as he acknowledged in his cross-examination, expropriation claims are not merely one of many paths to enforcement of property against the State; rather, they are a typical remedy.[449]

307. Professor de Beer also concludes that if emission allowances were not property, then Section 70 would not have been necessary, "there would be no need to deny compensation,

---

[445] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 210; Hearing Tr. Day 3, 672:17-22; 688: 1-4.

[446] **RER-003**, Second Expert Report of Professor Katz, ¶¶ 61-64; **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 192, Claimants' PHB, ¶¶ 65-66; Respondent's PHB, ¶ 45.

[447] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 192.

[448] *Id.*, ¶ 194.

[449] Hearing Tr. Day 3, 731.

expropriation, or payment if emission allowances were not property".[450] Respondent's expert disagrees and submits that the fact that the very statute creating the interest excluded compensation for interferences with such interest confirms "an intention not to confer a right that is exclusive vis-à-vis government […] free from interference by government and others", and therefore, that the government did not create a property right.[451]

308. The Tribunal considers that Section 70 addresses two separate concepts. Subsection (1) refers to compensation for any action by the Minister or the Director "under the Act", including compensation for the "removal" of allowances and credits from a participant's cap and trade accounts. Subsection (2) specifically refers to expropriation claims for anything "done or not done in accordance with this Act" "for the purposes of the Expropriation Acts or otherwise at law".

309. This evident distinction supports the conclusion that emission allowances are not property under the Cap and Trade Act. That subsection (2) addresses the possibility that any conduct done or not done in accordance with the Act could qualify as an expropriation does not mean that it recognizes allowances as property susceptible of being expropriated. Subsection (1) exists on a separate basis precisely to address the situation in which an allowance could be "removed", rather than expropriated.

310. Claimants' expert emphasized this distinction, arguing that subsection (2) was limited to the expropriation of land-based facilities and was not to address government actions regarding emission allowances or trading accounts and transactions (which are not interests in land and therefore whose taking or injurious affection would not be covered by the Expropriation Act in any event).[452] There is also a textual distinction between subsection (1), which uses the term "removal" when referring to allowances instead of the term "taking", and subsection (2), which refers to "taking" and expropriations.[453] "Taking" is the term that is used by the Expropriations Act: "'expropriate' means the **taking** of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers; ('exproprier')".[454] This difference in language, while not determinative, may assist in the interpretation of the Cap and Trade Act.

311. Overall, the Tribunal observes that the treatment assigned to emission allowances under Section 70 is relevant in light of the general parameters derived from the analysis of the Canadian decisions debated by the Parties in this arbitration. In the Tribunal's view, discretionary powers over statutory creations permitting the taking, removal or modification of rights by the Government without compensation may be indicative of the absence of the exclusive control

---

[450] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶198.

[451] **RER-003**, Second Expert Report of Professor Katz, ¶¶ 62-64.

[452] **CER-003**, Expert Report of Professor Jeremy de Beer, ¶ 195.

[453] *Id.*, ¶ 195, the Claimants' expert referring to "taking or injurious affection" in the context of the Expropriations Act; ¶ 123, "the context of 'takings' clause under the Fifth Amendment".

[454] **JDB-008**, *Expropriations Act*, 1990, Article I, Definitions (emphasis added).

element required to find property in Ontario.[455] The Cap and Trade act not only excludes claims for the "removal" of emission allowances but also does not recognize the possibility of expropriations of emission allowances, supporting the conclusion that these intangible objects were not conceived as property in Ontario.

312. In sum, the Tribunal is of the view that Section 70 is indicative of a degree of discretion, control and interference by the Government inconsistent with the concept of "exclusive control".

Tribunal's conclusions on Article 1139(g)

313. The Tribunal concludes that there is a significant number of provisions of the Cap and Trade Act that, in the aggregate, grant the regulator a broad degree of control over the rights conferred over the emission allowances. These broad powers affect the possibility of legally enforcing the holder's rights against the State. Contrary to the suggestion of Claimants' expert, the Cap and Trade Act does not provide for exclusive control by participants, but only control over certain rights in limited circumstances.

314. The powers granted to the regulator are certainly not unfettered or unlimited. However, as previously discussed, there is no standard identifying the scope of the powers or extent of the discretion of the Minister sufficient to limit the control of an emission holder such as to create an obstacle to a finding of property. The issue is not whether the powers of the government are unlimited, but rather whether such powers are broad enough to sufficiently limit exclusive control, which the Tribunal finds to be the case.

315. Finally, the Claimants argue that the Minister had broad discretion but subject to the law and therefore the discretion is a limited one. Discretion does not mean arbitrariness, and whatever the degree of discretion granted to a regulator, it does not authorize a government to act outside the framework of the law in the exercise of that discretion. What matters for purposes of this arbitration, however, is whether the Cap and Trade Act granted discretion to the regulator which was broad enough to exclude or seriously limit exclusive control by the holder of the allowance. How such discretion is exercised, is a different matter.

316. Based on its analysis of the context, purpose and text of the Cap and Trade Act, the Tribunal is not persuaded that the Claimants have demonstrated the existence of "exclusive control" over emission allowances under the Cap and Trade Act sufficient to constitute the core element required of property in Ontario. That said, this is a very close case. Claimants are correct in that emission allowances do have a number of attributes of property under common law. However, the decisions of the Ontario and Canadian courts that the Parties have submitted in this

---

[455] In *Anglehart,* the absence of a right to bring expropriation claims for the reduction of fishing quotas was linked to the absence of property. In *Bouckhuyt,* when defining the element of "exclusivity", the Court referred to a previous U.S. case that "reflected [its] same approach" by holding that property "does not arise from value, although exchangeable – a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference". *See* **LK-23,** *National Trust Co. v. Bouckhuyt,* [1987] CarswellOnt 141, ¶ 25. From the foregoing, it appears that the ability to "destroy" an exchangeable value without giving rise to a right to compensation, would indicate that the element of exclusivity may not be satisfied.

arbitration indicate that exclusivity is the key element to determine property, and that, to the extent that the holder does not have sufficient control over the asset, there can be no finding of property. Therefore, on the balance of probabilities, and considering the approach developed by Ontario and Canadian courts, the Tribunal concludes that the evidence presented by Claimants in this arbitration does not demonstrate that, as a holder of emission allowances under the Cap and Trade Act, KS&T had sufficient control over those allowances to satisfy the necessary attribute of exclusive control to find property under Ontario law.

317. In the absence of evidence that Claimants had property in Canada, the Tribunal must conclude that Claimants did not have an investment in Canada as required by Article 1139(g) of NAFTA.

C. JURISDICTION UNDER NAFTA ARTICLE 1139(H)

1. Respondent's Position

318. Respondent submits that Claimants have failed to articulate a cohesive theory of their investment under NAFTA Article 1139(h).[456] According to the Respondent, the Claimants initially claimed that their investment comprised KS&T's "broader carbon trading business", as well as the purchase price of emission allowances in Ontario,[457] but then seemed to abandon the first part of their claim to "focus exclusively on the 'emission allowances', not their purchase price, as the relevant 'interest'".[458] In any event, it is Respondent's case that neither of these alleged investments is an interest protected by Article 1139(h).[459]

319. Respondent submits that principles of proper treaty interpretation require that the *chapeau* of Article 1139(h) be read in conjunction with subparagraphs (h)(i) and (h)(ii).[460] Accordingly, to qualify as an investment under Article 1139(h), an "interest" must exhibit similar features to those of the illustrative examples in the subparagraphs.[461]

320. According to Respondent:

> "The common features of the illustrative examples include references to contracts; the presence of an investor's property or an enterprise in the territory of the host Party; and economic activities in the territory of the host Party (*e.g.* turnkey or construction contracts or concessions; or production, revenue or profits of an enterprise). The types of contractual interests illustrated in subparagraphs (h)(i) and (h)(ii) thus confirm that, for an interest to meet the requirements of Article 1139(h), it must be longer-term and include an important commitment

[456] Rejoinder, ¶ 145; Hearing Tr. Day 1, 225:4-226:13.

[457] Rejoinder, ¶ 142, *citing* Memorial, ¶ 323(a) and (b), and RFA, ¶ 64.

[458] Rejoinder, ¶ 143.

[459] Rejoinder, ¶ 145; Hearing Tr. Day 1, 226:15-18.

[460] Rejoinder, ¶¶ 146-148.

[461] *Id.*, ¶ 149.

> of capital contributing to the economic development of the host State".[462]

321. Respondent claims that KT&S's "interests" do not meet the specific requirements of Article 1139(h) as they bear no similarity to the illustrative examples of subparagraphs (h)(i) and (h)(ii).[463]

322. First, KS&T had no physical or corporate presence in Ontario consistent with Articles 1139(h)(i) or (ii), which is indicative of the kind of economic activity necessary to give rise to a qualifying interest.[464]

323. Second, the economic activities that KS&T undertook in Ontario were not in support of any "business in Ontario", but in the U.S.[465] The evidence shows that (i) KS&T's purchases of emission allowances through its Ontario CITSS account were orchestrated and executed in the U.S.;[466] (ii) it was the company's standard practice to move all emission allowances it purchased through its Ontario account to its California account immediately;[467] and (iii) very few of KS&T's secondary market transactions had any meaningful connection with Ontario.[468] Indeed, almost none of KS&T's bilateral trades in compliance instruments used its Ontario CITSS account, involved another Ontario CITSS account, or were governed by Ontario law.[469] Similarly, KS&T's trading in future contracts involved "[b]uying and selling anonymous promises to deliver in the future on a U.S. exchange", which "is not a business activity in Ontario, even if the derivative product could involve the future delivery of an Ontario emission allowance".[470]

324. Third, "the mere expenditure of funds, even in connection with an 'interest', does not suffice to qualify as an investment under Article 1139(h)".[471] This is confirmed by Articles 1139(i) and (j), which exclude from protection "claims to money" arising from (i) cross-border sales agreements for goods or services, (ii) the extension of credit in connection with a commercial transaction, or (iii) any other claims to money that do not otherwise fall within the specifically enumerated categories of investment in Article 1139.[472] As confirmed by the tribunals in *Apotex*

---

[462] *Id.*, ¶ 150. (footnotes omitted).

[463] *Id.*, ¶ 152.

[464] Rejoinder, ¶ 153; Respondent's PHB, ¶ 53.

[465] Rejoinder, ¶ 154; Respondent's PHB, ¶ 52.

[466] Rejoinder, ¶ 154; Respondent's PHB, ¶ 54.

[467] Rejoinder, ¶ 154.

[468] Respondent's PHB, ¶ 55.

[469] Rejoinder, ¶ 155; Respondent's PHB, ¶ 55.

[470] Respondent's PHB, ¶ 56.

[471] Rejoinder, ¶ 156; Respondent's PHB, ¶ 58.

[472] Rejoinder, ¶ 151.

and *Canadian Cattlemen*, cross-border trade interests are not protected under NAFTA Article 1139(h), as this provision requires "something more permanent".[473]

325. Finally, Respondent does not agree with Claimants' argument that it is estopped from challenging jurisdiction for lack of a territorial link under Article 1139 because its own legislation and regulations encourage treating the three jurisdictions participating in the Ontario Program as one market.[474] Respondent contends that estoppel cannot be invoked to create jurisdiction and, in any event, market harmonization did not do away with territoriality, either from a regulatory perspective or from the perspective of NAFTA Chapter Eleven.[475]

326. Based on the foregoing, Respondent concludes that regardless of how Claimants characterize their investments, none of them qualify for protection under NAFTA Article 1139(h):

326.1. Claimants' assertion that they held rights in a "broader carbon trading business" cannot serve as the basis for the Tribunal's jurisdiction because Article 1139(h) requires, among other things, a cognizable interest and Claimants have failed to identify what those rights are.[476]

326.2. The emission allowances KS&T purchased in the May 2018 auction do not qualify as an investment under Article 1139(h) for the reasons set forth in paragraphs 322 and 323 above. KS&T had no physical or corporate presence in Ontario and its activities in the primary and secondary markets were conducted from the U.S. or to support its U.S. business.[477]

326.3. The monies used to purchase the emission allowances do not qualify as an investment under Article 1139(h) either. According to Canada, "the mere expenditure of funds is not sufficient on its own to qualify as an investment in Ontario",[478] especially given that "KS&T expressly purchased the emission allowances in the May 2018 auction to sell in California for use against compliance obligations in the United Stated, and to settle anonymous futures contracts on a US exchange".[479] But even if the mere expenditure of funds were sufficient to qualify an interest as an investment, (i) "Claimants have not established the requisite connection between the emission allowances that are the subject of this claim, and monies used to purchase allowances that are not",[480] and (ii) "the maximum that KS&T can be said to have spent in Ontario in the May 2018

---

[473] C-Mem., ¶¶155-156, *citing* **RL-030**, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 233; **RL-31**, *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, ¶ 144.

[474] Claimants' PHB, ¶ 86. *See also*, Reply, ¶¶ 330-341.

[475] Respondent's PHB, ¶¶ 59-61. *See also*, Hearing Tr. Day 1, 234:22-236:15.

[476] Hearing Tr. Day 1, 231:20 – 232:8.

[477] *Id.*, 232:9 – 233:21.

[478] *Id.*, 238:10-13.

[479] *Id.*, 238:13-19.

[480] *Id.*, 237:14-19.

auction" is [redacted] which corresponds to the purchase price for the Ontario-created allowances.[481]

327. Accordingly, the Tribunal does not have jurisdiction *ratione materiae* with respect to KS&T under NAFTA Article 1139(h).

2. Claimants' Position

328. Claimants maintain that "the emission allowances that KS&T acquired, together with its carbon trading business in Ontario, are also 'interests arising from the commitment of capital and other resources' to economic activity in Ontario and independently qualify as protected 'interests' under NAFTA Article 1139(h)".[482]

329. Claimants contend that Respondent's interpretation of Article 1139(h) is incorrect. First, they claim that "[t]he term 'interest' carries a broad ordinary meaning that extends far beyond the realm of contracts".[483] According to Claimants, NAFTA tribunals have held that Article 1139(h) covers "anything amounting to 'an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument'".[484] Emission allowances, in and of themselves, fall within that definition and Respondent does not seem to deny it.[485]

330. Second, Claimants claim that Respondent's use of subparagraphs 1139(h)(i) and (ii) to derive unwritten, additional requirements onto the plain, ordinary, and clear meaning of the *chapeau* of NAFTA Article 1139(h) is improper treaty interpretation.[486] Moreover, Respondent has failed to specify what the alleged requirements of a "longer term" interest or "an important commitment of capital" mean.[487]

331. Claimants further contend that Respondent's characterization of their activities as cross-border trading is not only wrong but disregards the broader operational context of the Claimants' engagement with Ontario's cap and trade program.[488] Claimants' emission allowances and their carbon trading business satisfy the criteria under Article 1139(h).[489]

332. First, Claimants' emission allowances qualify as interests that "arose from the commitment of capital or other resources" including "(i) the monies used to purchase the emission allowances;

---

[481] *Id.*, 237:20 – 238:9.

[482] Claimants' PHB, ¶ 79.

[483] Reply, ¶ 313.

[484] *Id.*, ¶ 313, citing to **CL-019**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case UNCT/07/1, Award, 31 March 2010, ¶ 142.

[485] Reply, ¶ 314.

[486] Claimants' PHB, ¶ 82. *See also*, Reply, ¶¶ 342-348.

[487] Claimants' PHB, ¶ 83.

[488] *Id.*, ¶ 85.

[489] *Id.*, ¶ 84.

and (ii) KS&T's business development, marketing and trading activities in Ontario over the course of several years as part of a sustained, long-term business plan".[490]

333. Claimants contend that Respondent's reliance on *Apotex*, *Canadian Cattlemen*, and *Bayview* to assert that Article 1139(h) excludes cross-border trade interests is inapposite because the relevant facts in those cases were substantially different from those in this case.[491] Additionally, neither the NAFTA nor the ICSID Convention requires physical or corporate presence in Canada for there to be a covered investment, and KS&T's emission allowances and related business was situated in Ontario through registration, engagement in auctions, and CITSS account.[492]

334. According to Claimants, the emission allowances that KS&T purchased at Ontario from Ontario-held auctions:

> "[E]xtend far beyond either cross-border trade interests, a claim to money arising from a purchase and sale transaction or exports of goods. Rather, in the present dispute KS&T: (i) sought and obtained registered status as an Ontario market participant in accordance with Ontario law; (ii) possessed an Ontario CITSS account; (iii) retained the services of an Ontario-resident Koch company employee as its Ontario-based representative; (iv) bid for Ontario-created emissions allowances at six auctions held and regulated by Ontario; (v) paid monies destined for the public coffers of Ontario in exchange for emission allowances; (vi) held emission allowances in its Ontario CITSS account for varying amounts of time over a period of more than 18 months following their purchases; and (vii) entered into contracts for the supply of offsets and/or emission allowances from its Ontario CITSS account to Canadian purchasers".[493]

335. Second, Claimants' interests arose from the commitment of capital "in the territory of [Ontario]" "to economic activity in [Ontario's] territory".[494] Respondent's position that "KS&T's business strategy merely involved purchasing emission allowances from auctions 'almost exclusively for transfer to its California CITSS account…for resale in that jurisdiction'"[495] is unsupported considering KS&T's active presence as an Ontario registered market participant.[496]

336. In this regard, Claimants argue that:

---

[490] Reply, ¶ 315.

[491] *Id.*, ¶¶ 316-318.

[492] Claimants' PHB, ¶¶ 87-89.

[493] Reply, ¶ 318.

[494] Claimants' PHB, ¶ 84, citing to **CD-1**, Claimants' Opening Statement, Slide 113.

[495] Reply, ¶ 319.

[496] *Id.*, ¶ 320.

336.1. KS&T "built its emission allowance inventory in its Ontario CITSS account by committing capital that was intended to fund Ontario green projects".[497] KS&T's participation in secondary market OTC and futures transactions with counterparties in Ontario, Québec and California was "intrinsically linked to its ownership of an Ontario-based CITSS account into which it deposited and held and through which it traded in [Ontario Carbon Allowances (**OCAs**)] as an Ontario-registered market participant".[498] What matters is that the economic effect of the investment is felt in the host State's territory as was the case here.[499]

336.2. In trading as an Ontario-registered market participant, KS&T complied in good faith with the legal framework established by Ontario, including the holding limits of allowances in Ontario CITSS accounts.[500] KS&T "stored" it allowances in California to maximize its investment while ensuring compliance with these holding limits.[501] Also, storing these allowances in KS&T's California CITSS account did not affect their utility to satisfy compliance obligations in Ontario.[502]

336.3. Respondent's argument that KS&T acquired emission allowances in the May 2018 auction to sell them to a U.S. company with compliance obligations in California is a red herring, since this was just "the latest activity by a registered market participant which regularly traded and transacted in the Ontario Cap and Trade Program over the course of 2017 and 2018".[503]

336.4. Regardless, "there is no debate that throughout 2017 and 2018 Ontario received the proceeds of its emissions allowances purchased by KS&T, which constituted continuing and regular commitments of capital made directly to the Ontario Government and to economic activity in the territory of Ontario".[504] Tribunals considering financial investments have been satisfied that a sufficient territorial nexus exists as long as funds were made available to host States and served to finance their economy or needs.[505]

337. In any event, according to Claimants, Respondent is estopped from challenging jurisdiction based on an alleged insufficient territorial link "given its own prior legislative and regulatory

---

[497] **CD-1**, Claimants' Opening Statement, Slide 113.

[498] Reply, ¶ 323.

[499] *Id.*, ¶ 323.

[500] *Id.*, ¶ 324.

[501] *Id.*, ¶ 324.

[502] *Id.*, ¶ 325.

[503] *Id.*, ¶ 326, *citing to* **CWS-006**, Reply Witness Statement of Frank King, ¶¶ 16-31.

[504] Reply, ¶ 327.

[505] *Id.*, ¶ 327.

provisions and public statements encouraging investors in the Ontario Program to treat all three jurisdictions as a single borderless market".[506]

3. The Tribunal's Analysis

338. The Parties dispute whether Claimants had a protected investment under NAFTA Article 1139(h). According to Claimants, the emission allowances that KS&T acquired, along with its carbon trading business in Ontario, qualify as "'interests arising from the commitment of capital and other resources' to economic activity in Ontario", and thus meet the requirements for protection under Article 1139(h).[507] In contrast, Respondent maintains that Claimants have failed to establish that "KS&T held interests contemplated by Article 1139(h), properly understood".[508]

339. Article 1139(h) of the NAFTA reads as follows:

> "[I]nvestment means:
>
> […]
>
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
>
> > (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
> >
> > (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise".[509]

340. Article 1139(h) comprises a general description of interests which give rise to an investment, a *chapeau* and two sub-paragraphs which refer to certain examples. The Parties disagree as to the role of these sub-paragraphs in the interpretation of this provision and its scope. Respondent claims that (i) the two sub-paragraphs constitute highly relevant context that clarifies the type of interests covered by Article 1139(h);[510] (ii) to qualify for protection, an alleged interest must have features similar to the illustrative examples in the sub-paragraphs;[511] (iii) the common features of these examples include the reference to contracts, the presence of an investor's

[506] Claimants' PHB, ¶ 86. *See also*, Reply, ¶¶ 330-341.

[507] Claimants' PHB, ¶ 79.

[508] Respondent's PHB, ¶ 49.

[509] **CL-002**, North American Free Trade Agreement, 1994, Chapter Eleven.

[510] Rejoinder, ¶ 148.

[511] *Id.*, ¶ 149.

property or enterprise in the host State, and economic activities conducted within the host State's territory;[512] and (iv) KS&T's alleged interests do not bear any similarity to these examples.[513]

341. Claimants, on the other hand, maintain that (i) the term "interests" carries a broad ordinary meaning, which should guide the Tribunal's interpretation;[514] (ii) Article 1139(h) is not limited to contracts;[515] (iii) the two sub-paragraphs merely serve as examples of the "interests" that fall within the scope of this provision and do not restrict the meaning and extent of qualifying interests;[516] and (iv) emission allowances do not need to correspond to these examples to qualify for protection.[517]

342. The Tribunal will first consider the interpretation of NAFTA Article 1139(h) and then examine whether Claimants have a protected investment based on the facts.

(a) Interpretation of NAFTA Article 1139(h)

343. The Tribunal must interpret the NAFTA in accordance with the general rule of treaty interpretation contained in the Vienna Convention on the Law of Treaties (**VCLT**). Indeed, NAFTA Article 1131(1) mandates that the Tribunal decide the issues in dispute in accordance with the NAFTA and "applicable rules of international law".[518] Similarly, NAFTA Article 102(2) requires that the treaty provisions be interpreted and applied in light of the objectives stated in Article 102(1), and in accordance with "applicable rules of international law".[519]

344. The term "applicable rules of international law" is widely understood to encompass the customary rules of treaty interpretation, which are reflected in Articles 31 and 32 of the VCLT.[520] Furthermore, despite the United States not being a party to the VCLT, it recognizes that Article 31 of the Convention reflects customary international law regarding treaty interpretation.[521] In addition, both Canada and Mexico are parties to the VCLT. Therefore, the Tribunal will apply the VCLT's "general rule of interpretation" when interpreting Article 1139(h).

345. Article 31(1) of the VCLT requires that a treaty be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

---

[512] *Id.*, ¶ 150.

[513] *Id.*, ¶ 152.

[514] Reply, ¶ 313; Claimants' PHB, ¶ 83.

[515] Reply, ¶ 345.

[516] *Id.*, ¶¶ 345 and 348.

[517] *Id.*, ¶¶ 346 and 348.

[518] **CL-002**, North American Free Trade Agreement, 1994, Chapter Eleven, Article 1131(1).

[519] *Id.*, Chapter One.

[520] **RL-031**, *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, ¶ 46.

[521] Hearing Tr. Day 1, 10:4-7.

object and purpose".[522] In turn, Article 31(2) specifies that the relevant context includes the treaty's text, its preamble and annexes, and certain related agreements or instruments.[523] The elements of VCLT Article 31(1) "form a single rule of interpretation and may not be taken separately or in isolation".[524]

346. As noted earlier, NAFTA Article 1139(h) comprises a *chapeau* and two sub-paragraphs. Claimants challenge Respondent's use of the sub-paragraphs[525] and instead focus their argument on the *chapeau*. They contend that "[t]he emission allowances that KS&T acquired, together with its carbon trading business in Ontario, are […] interests arising from the commitment of capital and other resources as set out under NAFTA Article 1139(h)".[526] According to Claimants, it is sufficient to prove that (i) they hold an "interest" (understood in a broad sense), (ii) which arose from the commitment of capital, (iii) in the territory of Ontario.[527]

347. The Tribunal disagrees. First, the term "interests" cannot be construed in isolation from the other elements outlined in Article 1139(h). This provision only extends protection to "interests arising *from* the commitment of capital or other resources *in* the territory of a Party *to* economic activity in such territory".[528] Thus, there must be a cognizable interest that results from committing those resources within the territory of a Party towards economic activity within that territory. In this case, the territory in question is Ontario.

348. Second, in the Tribunal's view, proper treaty interpretation requires that meaning be given to the examples in the sub-paragraphs and their content as part of the context of the treaty.[529] Not considering them would suggest that the examples are redundant and lack purpose, despite the fact that states carefully negotiate and draft their treaties to clarify their scope.[530] The Tribunal notes that, unlike other treaties containing lists of broad examples, the sub-paragraphs contain limited and specific examples that clarify the scope of Article 1139(h). As the tribunal in *Grand River* found, "NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an

---

[522] **RL-029,** Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980) 1155 U.N.T.S. 331, Art. 31(1).

[523] *Id.*, Art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty").

[524] **RL-014**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶ 282.

[525] *See*, Claimants' PHB, ¶¶ 82-83.

[526] Hearing Tr. Day 1, 90:9-13.

[527] Reply, ¶ 310. *See also*, Hearing Tr. Day 1, 90:6-93:2.

[528] **CL-002**, North American Free Trade Agreement, 1994, Chapter Eleven, Article 1139(h) (emphasis added).

[529] **RL-014,** *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶ 293; **RL-024**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, ¶¶ 205-207.]

[530] **RL-014**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶ 294.

exclusive list of elements or activities that constitute an investment for purposes of NAFTA".[531] This does not mean that an alleged investment must fall squarely within one of the examples to be protected. The term "such as" indicates that they are illustrative, rather than exhaustive. However, it is more focused than the frequently used term "including" and implies similarity with the examples or their features. Therefore, the alleged investment must exhibit features similar to those in the examples in the sub-paragraphs 1139(h)(i) and/or (ii).[532]

349. In *Lion v. Mexico*, the tribunal reached a similar conclusion, which Respondent cited in its pleadings and which Claimants did not dispute as relevant to this case. In considering whether promissory notes (*pagarés no negociables*) issued in connection with short-term loans extended by a Canadian company to two Mexican enterprises qualified as protected investments under NAFTA Article 1139(h),[533] the tribunal in *Lion v. Mexico* stated that:

> "The *chapeau* cannot be read by itself. The NAFTA does not extend protection to any 'commitments of capital', but only to those which exhibit certain features so as to give rise to "interests". These features are defined through two illustrative examples in subparagraphs (h.i) and (h.ii)".[534]

350. The tribunal in *Lion v. Mexico* concluded that the promissory notes were not contracts and the contracts underlying those notes did not share any of the characteristics described in sub-paragraphs (h)(i) and (h)(ii).[535] The tribunal then provided the following reasoning to support the latter conclusion:

> "The contracts that underlie the *pagarés no negociables* – short-term, fixed-interest loans – do not share any traits with the contracts described in sub-paragraphs (h.i) and (h.ii), which serve as illustrative examples of protected 'commitments of capital'. Sub-paragraph (h.i) covers construction contracts and concessions, and sub-paragraph (h.ii) contracts with variable remuneration. The ordinary meaning of a term in a treaty must be read in its context, as Art. 31.1 VCLT mandates. And in this case the context provided by sub-paragraphs (h.i) and (h.ii) shows that 'commitments of capital' to be protected under paragraph (h) must show some additional, defining feature, which simple short-term fixed-interest loans lack. Loans are specifically governed by Art. 1139(d) NAFTA – and only protected provided that the requirements set forth in that provision are met".[536]

---

[531] **CL-20,** *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶ 82.

[532] **RL-024**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, 30 July 2018, ¶¶ 205-207.

[533] *Id.*, ¶¶ 101 and 163.

[534] *Id.*, ¶ 205.

[535] *Id.*, ¶¶ 205-207.

[536] *Id.*, ¶ 207.

351. The Tribunal concurs with the *Lion v. Mexico* tribunal that the examples in Article 1139(h) of NAFTA serve to illustrate the type of arrangements that might give rise to protected interests under Article 1139(h). Therefore, the arrangements in question must share some resemblance to those provided as examples.

352. It is also worth noting that the tribunal in *Lion v. Mexico* found that mortgages, as opposed to short term fixed loans, did constitute property under Article 1139(g), because under Mexican laws, mortgages were explicitly defined as *in rem* rights that encumber real estate.[537] As noted in section V(B)(3)(b), paragraph 165 above, the case of emission allowances is different in that there is no statutory provision or judicial decision recognizing them as property.

(b) Whether KS&T held a protected investment under NAFTA Article 1139(h)

353. Claimants have identified their protected interests under Article 1139(h) as the "emission allowances that KS&T acquired, together with its carbon trading business in Ontario".[538] Claimants contend that the ordinary meaning of the term "interest" should guide the Tribunal's interpretation and assert that emission allowances clearly fall within the broad ordinary meaning of the term, which includes a legal share in something and any right, privilege, power, or immunity, as per its dictionary definition.[539]

354. The Tribunal disagrees with the notion that emission allowances are covered under the term "interests" as outlined in Article 1139(h). First, as mentioned earlier, the term "interests" cannot be interpreted in isolation from the other elements specified in the article. Second, even if the focus were exclusively on this term, the Tribunal is still not convinced that emission allowances are included in the ordinary sense of "interests" as used in Article 1139(h).

355. Claimants cite the definition of "interest" from Black's Law Dictionary, which reads as follows:

> "**interest** n. (15c) **1.** […] **2.** A legal share in something; all or part of a legal or equitable claim to or right in property <right, title, and interest>. • Collectively, the word includes any aggregation of rights, privileges, powers, and immunities; distributively, it refers to any one right, privilege, power, or immunity".[540]

356. However, only the first part of this definition ("[a] legal share in something; all or part of a legal or equitable claim to or right in property") corresponds to the sense in which the term is used in

---

[537] *Id.*, ¶¶ 217-225.

[538] Claimants' PHB, ¶ 79.

[539] Reply, ¶¶ 313-314; Claimants' PHB, ¶ 83. Claimants further contend that "NAFTA tribunals have […] construed the provision broadly, such that it is understood to cover anything amounting to 'an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument'" (Reply, ¶ 313; emphasis in original) and cite paragraph 142 of the *Merrill & Ring Forestry v. Canada* award in support of this proposition. However, the Tribunal notes that, read in context, the quote to the *Merrill & Ring* award seems to refer to rights capable of being expropriated, rather than to qualifying investments under NAFTA Article 1139(h). (*See*, **CL-019,** *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Administered Case No. UNCT/07/1, Award, 31 March 2010, ¶ 142).

[540] **CL-171**, "Interest", in Bryan A. Garner (Editor in Chief), Black's Law Dictionary, 11th ed (2019).

Article 1139(h). This is further confirmed by examining the Spanish and French versions of the *chapeau* of Article 1139(h), which are equally authoritative:[541]

357. In Spanish, the *chapeau* of NAFTA Article 1139(h) reads as follows:

> "la **participación** que resulte del capital u otros recursos destinados para el desarrollo de una actividad económica en territorio de otra Parte, entre otros, conforme a: […]" (emphasis added)

358. The French version provides:

> "les intérêts découlant de l'engagement de capitaux ou d'autres ressources sur le territoire d'une Partie pour une activité économique exercée sur ce territoire, par exemple en raison: […]"

359. As explained earlier, under the Cap and Trade Act and the Regulation, an emission allowance is a permit or right granted to mandatory or voluntary participants, allowing them to emit greenhouse gases up to a specified limit.[542] As a market participant, KS&T had no cap obligations and was not subject to penalties for exceeding any such cap.[543] Since emission allowances did not grant KS&T a legal share in any asset or resource, they cannot be considered as "interests" under Article 1139(h).

360. In relation to the claim that KS&T's trading business in Ontario is a protected investment under Article 1139(h), the Tribunal acknowledges the inherent complexities of the trading business.

361. However, the Tribunal notes that the essence of KS&T's activities involved purchasing emission allowances in the primary market and reselling them in the secondary market. These purchase and sale transactions bear no resemblance to those described in the illustrative examples of sub-paragraphs (h)(i) and (h)(ii).

362. Article 1139(h) specifies that interests must arise from a commitment of capital in the host state's territory for the development of an economic activity in that territory. Sub-paragraph (h)(i) pertains to contracts that involve the presence of an investor's property in the territory of the host State, while subparagraph (h)(ii) relates to contracts "where remuneration depends substantially on the production, revenues or profits of an enterprise". The illustrative examples therefore suggest that the types of arrangements that can give rise to protected interests are related to economic activities in the host state's territory that involve the presence of an investor's property or of an enterprise in that territory. This is consistent with the types of investments covered under Article 1139, which basically comprise (i) interests related to

---

[541] North American Free Trade Agreement, 1994, Art. 2206 ("The English, French and Spanish texts of this Agreement are equally authentic"); **RL-029,** *Vienna Convention on the Law of Treaties*, 23 May 1969 (entered into force 27 January 1980) 1155 U.N.T.S. 331, Art. 33.

[542] Award, ¶¶ 283–284 above.

[543] Award, ¶ 285 above.

situations where the investor owns or finances "enterprises" located in the host State, and (ii) real estate or other property in the host State.[544]

363. For instance, in *Mondev v. USA*, the tribunal determined that the Canadian claimant's interests, which were based on its U.S. subsidiary's contractual rights to develop large property parcels in Boston, met the definition of an "investment" as outlined in NAFTA Article 1139(h).[545]

364. However, in the present case, KS&T did not have any physical or corporate presence, or economic activity, in Ontario, except for a Koch-company employee based in Ontario who was appointed as their local representative to fulfill a regulatory obligation. Additionally, the activities related to the trading business, including the planning and execution of purchases in primary and secondary markets, were carried out from the U.S. As further detailed below, there is no evidence that KS&T's trading business was linked to a specific underlying economic project, operation, or activity taking place in Ontario.[546]

365. Claimants have strongly emphasized that the proceeds from KS&T's purchase of emission allowances were received by Ontario to fund green projects in the province.[547] Their argument that the territorial nexus requirement is met based on the availability of funds for Ontario's economy or needs relies on decisions made by non-NAFTA tribunals considering treaty provisions different from the ones at stake in this arbitration, in the context of financial investments like sovereign bonds and hedging agreements.[548] However, this reasoning cannot be applied to NAFTA Article 1139(h), which sets specific requirements for an expenditure of funds to qualify for protection.

366. In conclusion, the Tribunal finds that the emission allowances acquired by KS&T and its carbon trading business, considered in the context of NAFTA Article 1139(h) as a whole, do not constitute protected investments. Even if the illustrative examples are disregarded, it is not in dispute that the *chapeau* of Article 1139(h) requires economic activity in the territory of the host State. In the Tribunal's view, KS&T's activity was based on cross-border trade, which several NAFTA tribunals have found not to be protected by Article 1139(h).

367. In *Apotex v. USA*, the tribunal found that the claimant's interests in submitting, maintaining, and using its applications for regulatory approval of two generic drug products, as well as gaining an economic benefit from selling the products in the U.S., did not qualify for protection

---

[544] *See*, **RL-024,** *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction, 30 July 2018, ¶¶ 182-186.

[545] **CL-056**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶¶ 80-83.

[546] Award, ¶¶ 377–400 below.

[547] *See*, Reply, ¶ 327; **CD-001**,Claimants' Opening Statement, Slide 113.

[548] Reply, ¶ 327, citing **CL-155,** *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 374; **CL-156,** *Ambiente Ufficio SPA and Others (Case formerly known as Giordano Alpi and Others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶¶ 498–499, 508–510; **CL-44,** *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶¶ 288, 292.

under NAFTA Article 1139(h).[549] The tribunal noted that Article 1139(h) does not cover "simple cross-border trade interests"[550] and that the interests identified by the claimant "amount to no more than the ordinary conduct of a business for the export and sale of goods".[551]

368. The *Apotex* tribunal further noted that Article 1139(h) must be read together with Articles 1139(i) and (j), which clarify what does not qualify as an investment, and concluded that "NAFTA Article 1139(h)'s focus on interests arising from the commitment of capital in the host State to economic activity in such territory excludes simple cross-border trade interests. Something more permanent is necessary".[552]

369. In *Merrill & Ring Forestry v. Canada*, the tribunal considered whether the claimant's allegedly expropriated right, defined as the "interest in realizing fair market value for its logs on the international market", was protected under NAFTA Article 1139(h).[553] The tribunal noted that Article 1139(h) covers "contractual interests and contractual rights", while Articles 1139(i) and (j) exclude "claims to money under commercial contracts and other commercial arrangements".[554] The tribunal determined that the claimant's right did "not appear to arise from a contract that might be considered directly related to the investment made".[555] Indeed, according to the tribunal, the purported interest was only a potential interest and not an actual right; however, even if it were an actual right, it would still fall within the exclusions of Articles 1139(i) and (j).[556]

370. In *Canadian Cattlemen v. USA*, the tribunal considered whether domestic investors were eligible for protection under NAFTA Chapter Eleven.[557] It concluded that they were not, based, among others, on its reading of Articles 1139(i) and (j) in conjunction with Article 1139(h). The tribunal noted that these provisions require something more permanent, such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory, for a contractual claim for money based on cross-border trade to be considered an investment under Chapter Eleven.[558]

371. Claimants claim that their interests arose from the commitment of capital in the territory of Ontario.[559] Specifically, Claimants assert that (i) "KS&T actively participated in Ontario in both

---

[549] **RL-030**, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 235.

[550] *Id.*, ¶ 233.

[551] *Id.*, ¶ 235, ¶¶ 226-241.

[552] *Id.*, ¶¶ 232-233.

[553] **CL-019**, *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Administered Case No. UNCT/07/1, Award, 31 March 2010, ¶¶ 139-140.

[554] *Id.*, ¶ 139.

[555] *Id.*, ¶ 140.

[556] *Id.*, ¶¶ 140-141.

[557] *See*, **RL-031**, *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL, Award on Jurisdiction, 28 January 2008, ¶¶ 31 and 111.

[558] *Id.*, ¶¶ 140-144.

[559] Reply, § III.B.2(a)(3).

the primary and secondary markets"[560] and (ii) "[i]n any event, the Respondent is estopped from denying jurisdiction on the basis of territorial objections".[561]

372. After carefully examining the evidence on the record, the Tribunal has concluded that KS&T did not conduct sufficient economic activity in the territory of Ontario to establish jurisdiction *ratione materiae* under NAFTA Article 1139(h).

373. KS&T's economic activities primarily involved purchasing allowances in Ontario and then transferring them to California for resale in the secondary market. Claimants do not dispute this, but rather affirm that they had traded for many years in Québec and California. The evidence suggests that KS&T registered as a market participant in the Ontario program with the expectation that it would be linked to California and Québec.[562] KS&T had been registered as market participant in California since 2013 and had a CITSS account there.[563] Additionally, the company was active in the Québec and Alberta markets.[564] By registering as a participant in the Ontario program, KS&T could purchase allowances in the primary market through the auctions hosted by Ontario, which would become fungible with those of other participating jurisdictions after the programs were linked.[565] KS&T had decided not to participate in auctions in California due to the stringent disclosure obligations in that jurisdiction.[566] KS&T identified the potential to effectively sell allowances and offsets to new counterparties once linkage occurred,[567] and to promote efficient compliance for two Koch Ontario-based subsidiaries.[568] Finally, KS&T's entry into the Ontario program prior to the linkage presented an arbitrage opportunity, as it could obtain the allowances at a lower price in Ontario and profit from the increase in their value once the linkage occurred.[569]

374. With this scenario in mind, the Tribunal will now examine each of the activities Claimants have identified as economic activities in Ontario.[570]

375. First, Claimants allege that KS&T participated in all four Ontario-based auctions in 2017, and the two joint auctions in 2018, using an Ontario-specific website,[571] and purchased a cumulative total of [redacted] in allowances through its Ontario CITSS account.[572] Claimants

---

[560] *Id.*, § III.B.2, p. 109.

[561] *Id.*, § III.B.2, p. 112.

[562] Hearing Tr. Day 2, 320:7-14.

[563] **CWS-002**, Witness Statement of Graeme Martin, ¶ 18; Hearing Tr. Day 2, 320:7-14.

[564] Hearing Tr. Day 2, 320:7-14.

[565] *Id.*, 321:2-7.

[566] *Id.*, 370:19 – 371:19; 373:20 – 374:5.

[567] *Id.*, 321:2-7.

[568] Reply, ¶¶ 56; 223.

[569] Hearing Tr. Day 2, 321:13 – 322:5

[570] Reply, § III.B.2, p. 109.

[571] Reply, ¶ 51; Claimants' PHB, ¶ 89.

[572] Reply, ¶ 51.

emphasize that KS&T's purchase of emission allowances provided Ontario with funds to finance its economy.[573]

376. In the Tribunal's view, the purchase of allowances in an auction, through an Ontario-specific website or CITSS account, does not in itself constitute an investment in Ontario in the terms of Article 1139(h).

377. Although KS&T paid significant amounts for the allowances in these auctions, and Ontario received a sizable share of these payments, this expenditure alone is insufficient to be considered a protected investment either under Article 1139(h) or under Article 1139(g). As outlined in section V(B)(3)(b)(i) above, Canadian decisions have consistently recognized that the fact that an object has value, while an indication of property, is not sufficient in itself to support a finding of property in Ontario, as required by Article 1139(g).[574]

378. After the programs were linked, the joint auctions included allowances from all three jurisdictions, and payments were divided up based on the number of allowances from each jurisdiction.[575] KS&T decided to bid in these auctions as an Ontario-registered market participant but effectively purchased allowances from all three jurisdictions, with the purchase price being distributed to each jurisdiction accordingly.[576]

379. Most importantly, the evidence shows that after the auctions KS&T consistently transferred allowances deposited into its Ontario CITSS account to its California CITSS account and thereafter traded from California, not Ontario. Indeed, KS&T moved the allowances purchased

---

[573] Reply, ¶¶ 323, 327; **CD-001**, Claimants' Opening Presentation, Slide 113.

[574] *See,* **LK-012,** *Anglehart v. Canada*, [2018] CAF 115, ¶ 18, referring to *Saulnier* "Therefore, the concepts of *profit à prendre* and of the market value of licences addressed by the Supreme Court in *Saulnier* depend on the definition of 'property' set out in the legislation at issue. Justice Binnie, writing the reasons for the Court in *Saulnier*, is careful to specify that '[i]t is extremely doubtful that a simple [fishing] licence could itself be considered property at common law' even though 'a fishing licence is unquestionably a major commercial asset' (*Saulnier*, at paragraph 23)". *See* also, **LK-23,** *National Trust Co. v. Bouckhuyt,* 1987 CarswellOnt 141, ¶¶ 25-26:

> "The United States Supreme Court reflected this same approach when it considered what constituted 'property' in *International News Service v. Associated Press*, supra. In the reasons of Justice Holmes, the following passage appears at p. 246:
>
> > ... Property, a creation of law, does not arise from value, although exchangeable — a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. ...
>
> The principle enunciated there is, I think, applicable to the facts of this case. Although the BPQ might be sold in a limited market, the mere fact that it could be exchanged, sold, pledged or leased does not in itself make it property".

[575] **C-036**, Detailed Auction Requirements and Instructions, updated 26 January 2018, p. 7; pp. 51-52.

[576] *See, Id.*, pp. 51-52; **R-162**, [redacted] **RWS-002,** Witness Statement of Nadia Ramlal, Attachment 1. In the first joint auction, held in February 2018, KS&T purchased a total of [redacted] allowances. Out of the total allowances purchased, [redacted] allowances [redacted] were allocated from California; [redacted] a llowances [redacted] from Ontario, and [redacted] allowances [redacted] from Québec. In the second joint auction, held in May 2018, KS&T purchased a total of [redacted] allowances. Out of the total allowances purchased, [redacted] allowances [redacted] were allocated from California; [redacted] allowances [redacted] from Ontario, and [redacted] allowances [redacted] from Québec. *See also*, **R-089**, [redacted]

in Ontario-only auctions to California [redacted][577] Similarly, it began transferring allowances purchased at the first joint-auction [redacted][578] and further planned to transfer the allowances purchased in the second and last joint-auction [redacted] into its Ontario CITSS account.[579]

380. Furthermore, at the Hearing, Frank King, who served as a proprietary trader for KS&T, including with respect to purchases at auctions under the Cap and Trade program, confirmed that [redacted][580] Claimants' witnesses, Graeme Martin and Frank King, also confirmed that it was standard practice for KS&T to transfer the allowances from Ontario to California and conduct the trading from there.[581]

381. Claimants' explanation that KS&T transferred allowances to California to comply with Ontario's holding limits does not affect the Tribunal's decision. The allowances did not remain in Ontario [redacted]. Additionally, Mr. King's clarification during the Hearing that [redacted] undermines Claimants' argument.

382. Similarly, Claimants' argument that KS&T not using the allowances purchased in the Ontario-only auctions to satisfy regulatory requirements in Ontario cannot be held against them due to the program's early cancellation[583] does not change the Tribunal's assessment. The Tribunal must consider the activities that KS&T actually carried out rather than what it could have potentially done if the program had continued until 2030. This is especially relevant since there is no contemporary business plan or other compelling evidence that supports Claimants' claims, and [redacted][584]

383. Second, Claimants assert that "[f]rom 1 January 2017 to 31 December 2017, in addition to its purchases in the primary auction market, KS&T engaged in at least [redacted] on the secondary market through the ICE".[585]

---

[577] **RWS-002,** Witness Statement of Nadia Ramlal, Attachment 1.

[578] *Id.*, Attachment 1. On March 20, 2018, KS&T received emission allowances from the first joint auction, which were deposited into its Ontario CITSS account. Subsequently, KS&T transferred these allowances to its California CITSS account [redacted].

[579] **R-162**, [redacted].

[580] Hearing Tr. Day 2, 432:6-435:16.

[581] *See*, Hearing Tr. Day 2, 376:15 – 378:5; 436:10-20. *See also*, **R-089**, [redacted]

[582] Hearing. Tr Day 2, 380:4-14.

[583] Reply, ¶¶ 56-57.

[584] *See*, **C-077**, [redacted]; **C-078**, [redacted]

[585] Reply, ¶ 305. *See also*, Reply, ¶ 53; **CWS-006**, Reply Witness Statement of Frank King, Annex A, ¶¶ 1-11, and **FK-005**, [redacted]

384. As established during the Hearing, [redacted][586] Apart from this, there is no evidence on the record of any [redacted] that resulted in the transfer [redacted], or between KS&T and other participants registered in the Ontario Program.

385. Third, Claimants argue that "[redacted] all of which were with Canadian counterparties".[587]

386. However, the evidence pertaining to these trades shows that:[588] (i) [redacted];[589] (ii) [redacted][590] (iii) [redacted];[591] and (iv) [redacted].[592]

387. [redacted][593] The Tribunal notes that [redacted] prior to the linkage of the Ontario, Québec, and California

---

[586] Hearing Tr. Day 2, 446 – 455.

[587] Reply, ¶ 305. *See also*, Reply, ¶ 53.

[588] *See*, [redacted]
See also, Hearing Tr. Day 2, 392 – 443.

[589] [redacted] Hearing Tr. Day 2, 427:19-429:10.

[590] [redacted] Hearing Tr. Day 2, 400:8-13; 401:12-19.

[591] [redacted]

[592] *See*, [redacted]

[593] *See, e.g.*, [redacted]

programs.[594] Additionally, [595]

388. While these [596] the Tribunal notes that [597] In fact, [598].

389. At the Hearing, Claimants' witness, Frank King, confirmed that [599] Consequently, it is not apparent that these trades were even linked to KS&T's participation in Ontario's Program.

390. Regarding the remaining [600] the Tribunal notes that, [601]

---

[594]

[595]

[596] *See*, **CWS-006**, Reply Witness Statement of Frank King, Annex A, ¶¶ 13-33.

[597] *See also*, Hearing Tr. Day 2, 403 – 425.

[598] .

[599] *See, e.g.*, Hearing Tr. Day 2, 412:5-16. *See also*, Hearing Tr. Day 2, 398:20 – 399:9.

[600] . *See also*, **CWS-006**, Reply Witness Statement of Frank King, Annex A, ¶¶ 34-45.

[601] Hearing Tr. Day 2, 436:7-17. *See generally*, Hearing Tr. Day 2, 427– 442.

The fact that [redacted].

391. Fourth, Claimants assert that "[f]rom 1 January 2018, after the respective cap and trade programs of Ontario, California and Québec were formally linked, KS&T entered [redacted] satisfy compliance obligations in Ontario".[602]

392. The evidence pertaining to [redacted] shows that: [redacted][605]

393. While it is true that [redacted] could be used to satisfy compliance obligations in any of the three participating jurisdictions after the linkage of the California, Québec, and Ontario programs, the evidence discussed above suggests that [redacted]

394. Fifth, Claimants assert that KS&T's trade activity as an Ontario market participant, especially [redacted] was broader than the specific examples given, as [redacted] but were folded into trades in generic WCI instruments, and the anonymity of futures trading in an electronic platform meant that KS&T likely engaged in many additional transactions with Canadian counterparties.[606]

---

[602] Reply, ¶ 305. *See also*, Reply, ¶ 53.

[603] Hearing Tr. Day 2, 444:13 – 446:2.

[604] *See* [redacted]

[605] *See*, **RWS-002,** Witness Statement of Nadia Ramlal, Attachment 1. This table displays [redacted] referred to by the Claimants in paragraphs 53 and 305 of their Reply (and documented in the contracts listed in the previous footnote) [redacted] Furthermore [redacted] (*See*, **FK-044**, **FK-046**, **FK-048**, **FK-049**, **FK-053**, **FK-055**, **FK-057**, **FK-059**, **FK-062**, **FK-063**, **FK-064**).

[606] Reply, ¶¶ 53, 305.

395. Claimants' argument is not persuasive. First, there is no evidence in the record of [redacted], let alone of [redacted]. Second, due to the anonymity of the process, the possibility of effectively transacting with these counterparties is only speculative. Finally, the Tribunal concurs with Respondent's argument that engaging in [redacted] on a U.S. exchange does not constitute a business activity in Ontario, even if it entails the possibility of [redacted] being delivered.[607]

396. Finally, Claimants' assert that Respondent is estopped from challenging jurisdiction based on an alleged insufficient territorial link "given its own prior legislative and regulatory provisions and public statements encouraging investors in the Ontario Program to treat all three jurisdictions as a single borderless market".[608]

397. The Tribunal finds this argument unpersuasive. First and foremost, the jurisdiction of the Tribunal is a matter of law. The Tribunal must be satisfied that the jurisdictional requirements of the NAFTA are met, and if not, must decline its jurisdiction. The Tribunal therefore concurs with the tribunal in *Oded Besserglik v. Mozambique* that "the jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel".[609]

398. But even if it were appropriate to consider the doctrine of estoppel in the manner proposed by Claimants, the Tribunal is not convinced that the statements made by Ontario about the linked carbon market being a single market could be reasonably understood as statements or representations regarding the existence of an investment under NAFTA Chapter 11. It is also worth recalling that KS&T held CITSS accounts in both California an Ontario but decided to participate in the auctions through its Ontario CITSS account due to California's stricter disclosure requirements.[610] KS&T's decision to purchase allowances in the joint auctions through its Ontario CITSS account appears to have been motivated to satisfy California-based obligations rather than to base a business in Ontario and access protection under the NAFTA.

399. For the aforementioned reasons, the Tribunal rejects the Claimants' argument that the doctrine of estoppel can be used to establish jurisdiction in this case.

400. In conclusion, KS&T did not hold a protected investment under NAFTA Article 1139(h), and the Tribunal has no jurisdiction *ratione materiae* with respect to KS&T.

---

[607] *See*, Respondent's PHB, ¶ 56.

[608] Claimants' PHB, ¶ 86. *See also*, Reply, ¶¶ 330-341.

[609] **CL-166**, *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019, ¶ 422.

[610] Hearing Tr. Day 2, 367:6 – 368:21.

D. JURISDICTION *RATIONE MATERIAE* WITH RESPECT TO KOCH INDUSTRIES

1. Respondent's Position

401. Respondent contends that Claimants have failed to articulate a cohesive theory of Koch Industries' alleged investments[611] and that, in any event, none of the alleged investments is sufficient to establish subject-matter jurisdiction in this dispute.[612]

402. First, Respondent argues that Koch Industries' shareholding in KS&T does not qualify as an investment under NAFTA Article 1139(a), because the "enterprise" referred to in such provision must necessarily be an enterprise of the host State (in this case, Canada) and KS&T is a partnership organized under the laws of Delaware.[613]

403. Second, in response to the Claimants' argument that Koch Industries indirectly owned the emission allowances purchased by KS&T and thus held investments under NAFTA Articles 1139(e), 1139(g), and 1139(h), the Respondent argues that: (i) emission allowances purchased by an enterprise do not constitute interests in that enterprise and therefore are not protected under Article 1139(e);[614] (ii) as a matter of fact, emission allowances cannot be indirectly "owned" under the Cap and Trade Act;[615] and (iii) even if it were possible for Koch Industries to have an indirect interest in the emission allowances themselves, the allowances do not qualify as investments under Article 1139(g) or Article 1139(h).[616]

404. Third, Respondent asserts that Koch Industries' shareholding in Canadian entities INVISTA and Georgia Pacific does not qualify as an investment under NAFTA Article 1139(a). According to Respondent, in order to ground subject-matter jurisdiction under Article 1101(1)(b) and Article 1139(a), the "enterprise" must also be the alleged "investment" in dispute, and Claimants have not made any claims of breach or damage with respect to INVISTA or Georgia Pacific under NAFTA Article 1116.[617]

405. Similarly, with respect to Claimants' argument that Koch Industries hold "a range of other bricks-and-mortar investments in Ontario, as well as intangible investments", which "include, but are not limited to, Koch subsidiaries INVISTA and Georgia Pacific", Respondent contends that "unidentified investments cannot found the Tribunal's jurisdiction"[618] Additionally, whether or not Koch Industries owns real estate in Canada indirectly through its ownership of

---

[611] Rejoinder, ¶¶ 160-162.

[612] C-Mem., ¶ 165.

[613] *Id.*, ¶¶ 166-167.

[614] Rejoinder, ¶ 164.

[615] *Id.*, ¶¶ 165-166.

[616] *Id.*, ¶ 167.

[617] C-Mem., ¶ 168; Rejoinder, ¶¶ 168-170.

[618] C-Mem., ¶ 170, *citing to* Memorial, footnote 412.

Canadian companies is not relevant unless the real estate itself is the subject of the investment dispute.[619]

2. Claimants' Position

406. In their Memorial, Claimants assert that Koch Industries holds the following investments in Canada: (i) "its 100 percent shareholding in KS&T and INVISTA", which qualify as an investment in under NAFTA Article 1139(a);[620] (ii) "interests in enterprises entitling Koch to income or profits of these enterprises", which qualify as an investment under NAFTA Article 1139(e);[621] and (iii) "real estate or other property, tangible or intangible, that was acquired in the expectation or used for the purpose of economic benefit or other business purposes", which qualify as an investment under Article 1139(g).[622] In relation to the latter, Claimants note that "Koch held a range of other bricks-and-mortar investments in Ontario, [which include, but are not limited to, Koch subsidiaries INVISTA and Georgia Pacific,] as well as intangible investments".[623]

407. In their Reply, Claimants clarified that "[t]hrough its 100 percent shareholding in KS&T, Koch indirectly acquired the emission allowances that KS&T held", which qualify as investment under NAFTA Articles 1139(g) and/or 1139(h).[624] Additionally, they submitted that Koch Industries' indirect ownership of the emission allowances from the May 2018 auction qualify as investments under NAFTA Article 1139(e).[625]

408. Finally, Claimants maintained that "Koch's 100 percent shareholdings in INVISTA and Georgia Pacific are interests in enterprises that entitled Koch to the income or profits of those enterprises".[626] According to Claimants, "Ontario's measures related in particular to INVISTA, as INVISTA was a mandatory participant under Ontario's Cap and Trade Program, and the cancellation and termination thereof impacted its compliance obligations".[627] Moreover, they claim that

> "KS&T became an investor in Ontario as part of a strategy to efficiently address the Cap and Trade compliance needs of all members of the Koch Group, including those based in Ontario, and in the process turn a profit. In this regard, too, the measures at issue were 'in relation to' these other Koch investments in Ontario, since these investments formed part of the rationale for KS&T's presence in Ontario and

---

[619] C-Mem., ¶ 170.

[620] Memorial, ¶ 322(a) and footnote 409.

[621] *Id.*, ¶ 322(b) and footnote 410.

[622] *Id.*, ¶ 322(c) and footnote 411.

[623] *Id.*, ¶ 322(c) and footnote 412.

[624] Reply, ¶ 352.

[625] *Id.*, ¶ 353.

[626] *Id.*, ¶ 354.

[627] *Id.*, ¶ 354.

> investment in the Ontario Cap and Trade system, leaving KS&T exposed to the measures at issue in this claim".[628]

3. Tribunal's Analysis

409. Claimants argue that the Tribunal has jurisdiction over Koch Industries on the basis of (i) Koch Industries' indirect ownership of the emission allowances purchased by KS&T by virtue of its 100% shareholding in KS&T; and (ii) Koch Industries' ownership of two Canadian companies "entitling KI to income or profits of these enterprises".

410. For the reasons set out below, the Tribunal has concluded that neither of these bases supports the Tribunal's jurisdiction over Koch Industries. The Tribunal will first examine the arguments related to KS&T and then turn to those related to Koch Industries' Canadian subsidiaries.

411. First, Claimants appear to have abandoned their argument that their 100% ownership of KS&T constitutes an investment under NAFTA Article 1139(a), as it was not raised in their Reply or subsequent submissions. In any event, the Tribunal considers that such ownership could not constitute an investment protected under Article 1139(a) because the "enterprises" referred to in that article are enterprises of the host State, and KS&T is a U.S. company.

412. Second, Claimants' main argument seems to be that, through its ownership of KS&T, Koch Industries "indirectly holds intangible property and/or an interest (the emission allowances) that was acquired in the expectation or used for the purpose of economic benefit or other business purposes and which arose from the commitment of capital and other resources to economic activity in the territory of Ontario".[629]

413. The Tribunal has already determined that the emission allowances do not meet the definition of property under NAFTA Article 1139(g) and that KS&T did not have a qualifying investment under NAFTA Article 1139(h). Therefore, the Tribunal does not need to further consider whether Koch Industries' claimed indirect ownership of the emission allowances gives it standing to bring claims regarding those alleged investments. As the emission allowances do not qualify as protected investments, Koch Industries cannot establish jurisdiction based on them.

414. Finally, Koch Industries' ownership of other Canadian entities, namely INVISTA and Georgia Pacific, does not establish jurisdiction over this dispute.

415. To properly define the scope of the Tribunal's jurisdiction, NAFTA Article 1139 must be read in conjunction with NAFTA Articles 1101(1) and 1116(1). Article 1101(1) provides in relevant part that NAFTA Chapter 11 "applies to measures adopted or maintained by a Party relating to: […] (b) investments of investors of another Party in the territory of the Party[…]".[630]

---

[628] *Id.*, ¶ 356.

[629] *Id.*, ¶ 352.

[630] **CL-002**, North American Free Trade Agreement, 1994, Chapter Eleven.

Accordingly, the "measure" at issue must relate to the "investments". In turn, Article 1116(1) provides in relevant part that "[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises)[…]".[631] The Parties agree that NAFTA Article 1116 requires that an investor demonstrate that it has suffered loss or damage as a result of an alleged violation of NAFTA.[632]

416. The claims made by Claimants do not pertain to INVISTA or Georgia Pacific. While Claimants maintain that the cancellation of the Cap and Trade Program was in violation of the NAFTA, they have not identified how the cancellation violated treaty rights of the aforesaid companies – not claimants in these proceedings – or how Claimants' rights in those companies were affected by the contested measures. Moreover, the fact that KS&T registered as a market participant in Ontario's Cap and Trade Program to help the Koch Group's Ontario subsidiaries with compliance is insufficient grounds for jurisdiction, particularly since the Tribunal has already established that it has no jurisdiction over KS&T.

417. For the foregoing reasons, the Tribunal does not have jurisdiction *ratione materiae* over Koch Industries.

418. Since the Tribunal has already determined that it lacks jurisdiction *ratione materiae* over KS&T and Koch Industries, there is no need to consider the other jurisdictional objections raised by Respondent. Based on the conclusions stated in the previous sections, the Tribunal does not have the authority to hear the dispute submitted by Claimants.

VI. COSTS

419. Article 28(2) of the ICSID Rules provides that "[p]romptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding". Pursuant to this provision, the Tribunal received the Parties' statements on costs on 14 April 2023.

420. In their Memorial and Reply, Claimants requested the Tribunal to award compensation "for all of their costs of the arbitration and costs of legal representation, plus compound interest thereon at the same rate and interval as on the damages".[633] In their statement of costs, Claimants estimated their "arbitration costs" in the amount of USD 350,000.00, their "legal fees" in the

---

[631] *Id.*

[632] C-Mem., ¶ 295 ("The requirement to establish causation is reflected in the text of the NAFTA itself. Article 1116(1) accords standing only to a claimant alleging that it 'has incurred loss or damage, by reason of, or arising out of' an alleged breach of the NAFTA."); Reply, ¶ 646 ("The NAFTA requires an investor to demonstrate it 'has incurred loss or damage, by reason of, or arising out of' a breach of the NAFTA").

[633] Memorial, ¶ 538; Reply, ¶¶ 683-684.

amount of USD 3,474,662.97, and their "disbursements" in the amount of USD 1,171,009.63, for a total amount of USD 4,995,672.60.[634]

421. In its Counter-Memorial and Rejoinder, Respondent requested the Tribunal to "require the Claimants to bear all costs of the arbitration, including Canada's costs of legal assistance and representation".[635] In its statement of costs, Respondent estimated its "costs of legal representation" in the amount of CAD 5,601,465.21, and its "disbursements" in the amount of CAD 1,085,196.75 (including ICSID advances in the amount of USD 325,000), for a total amount of CAD 6,686,661.96. [636]

422. Article 61(2) of the ICSID Convention provides that the "Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award".[637]

423. Pursuant to the aforementioned provision, absent a specific agreement between the Parties in this arbitration regarding the allocation of costs, the Tribunal has the authority to decide – with "considerable discretion" – which party shall bear the costs and how they shall be paid.[638]

424. Under the aegis of such authority and broad discretion, ICSID tribunals have now a wide and varied history of applying both the "costs lie where they fall" approach, ordering each party to cover their own costs, and the "costs follow the event" approach, ordering the unsuccessful party to cover all costs.[639] When applying either approach, rather than allocating costs strictly on the basis of the outcome, ICSID tribunals also tend to consider all the circumstances of each case, giving particular attention to the complexity of the legal issues, and the conduct of the parties during the arbitration.

425. In *Poštová banka v. Hellenic Republic*, the tribunal ordered both parties to "bear the costs of arbitration equally" despite having concluded that it lacked jurisdiction, and having ruled in favor of respondent, given that "the jurisdictional issue was not clear-cut and involved a complex factual and legal background. Each side presented valid arguments in support of its respective case and acted fairly and professionally".[640] Similarly, in *Bayview*, the tribunal ordered each party to bear their own costs considering that "[t]he claims were not frivolous, and

---

[634] Claimants' Statement of Costs, ¶ 5.

[635] C-Mem., ¶ 327; Rejoinder, ¶ 332.

[636] Respondent's Statement of Costs, p. 1. Each Party subsequently made a further advance of USD 25,000 to ICSID to cover the costs of the proceeding.

[637] ICSID Convention, Article 61(2).

[638] **CL-115**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, ¶ 955.

[639] **CL-130**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 621.

[640] **RL-014**, *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, ¶¶ 377, 378.

they were pursued in good faith and with all due expedition. The claims were, equally, defended in good faith and with due expedition. Both sides agreed to the separation of the jurisdictional issue, and this proved a sensible and economical step".[641] The tribunal in *Global Trading v. Ukraine* also followed this approach on the basis of the "reasonable nature of the arguments",[642] which had been "concisely presented" by the parties.

426. The Tribunal is of the view that the particular circumstances of this case weigh in favor of following the "costs fall where they lie" approach. Despite not finding jurisdiction over Claimants' claims in this arbitration, the Tribunal does not consider that Claimants' claims were frivolous or pursued in bad faith. Quite to the contrary, Claimants brought a well-structured case that posed intricate legal questions. As explained throughout the Award, this was a very close case, with a profoundly complex and novel legal issue at the core of the debate on jurisdiction, *i.e.*, the definition of "property" and its application to emission allowances created under a novel statute such as the Cap and Trade Act.

427. The Tribunal further notes that the conduct of both Parties throughout the arbitration was commensurate with the high level of complexity of the issues in dispute. The Parties dealt with multiple legal and procedural challenges in a professional and efficient manner, showcasing a sophisticated level of advocacy. Their submissions were concise, reasonable, and well-substantiated, which provided valuable support for the Tribunal's decision-making task, as reflected in this Award.

428. For the foregoing reasons, the Tribunal orders each Party in this arbitration to bear its own costs, and to share in equal parts the costs of the Tribunal and the ICSID Secretariat, as follows:

a) Fees and expenses of the Tribunal and the Tribunal's Assistant	
Arbitrator's Fees and Expenses	
• Mr. Eduardo Zuleta	232,916.48
• Professor Andrea K. Bjorklund	95,749.13
• Mr. Henri C. Alvarez, K.C.	128,154.20
Fees and Expenses of the Assistant to the President of the Tribunal	
• Ms. María Marulanda	3,104.05

[641] **CL-161**, *Bayview Irrigation District v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award on Jurisdiction, 19 June 2007, ¶ 125.

[642] **RL-021**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, ¶ 59.

b) ICSID's administrative fees and direct expenses	
ICSID's Administrative Fees	178,000.00
Direct Expenses	53,041.68
c) Total costs of the proceeding	
Total	**690,965.54**

429. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD 345,482.77.

430. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

VII. DECISION

431. For the reasons set out above, the Tribunal decides as follows:

(1) The Tribunal does not have jurisdiction over the claims filed by Claimants, Koch Industries, Inc. and Koch Supply & Trading, LP, against Respondent, Canada.

(2) Each Party shall bear its own costs, fees, and expenses.

(3) The costs of this arbitration, including the fees and expenses of the Tribunal and of the ICSID Secretariat as outlined in paragraph 428 of this Award, shall be shared in equal parts by the Parties.

(4) All other requests for relief are rejected.

[redacted]

Professor Andrea K. Bjorklund
Arbitrator

Date:

Mr. Henri C. Alvarez, K.C.
Arbitrator

Date: 6 March 2024

Mr. Eduardo Zuleta
President of the Tribunal

Date:

[redacted]

Professor Andrea K. Bjorklund
Arbitrator

Date: 5 March 2024

Mr. Henri C. Alvarez, K.C.
Arbitrator

Date:

Mr. Eduardo Zuleta
President of the Tribunal

Date:

Professor Andrea K. Bjorklund
Arbitrator

Date:

Mr. Henri C. Alvarez, K.C.
Arbitrator

Date:

Mr. Eduardo Zuleta
President of the Tribunal

Date: March 5, 2024