

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

BETWEEN:

LONE PINE RESOURCES INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

**CLAIMANT'S REPLY TO THE SUBMISSIONS OF THE UNITED STATES OF
AMERICA AND MEXICO PURSUANT TO ARTICLE 1128 OF THE NAFTA**

ICSID CASE NO. UNCT/15/2
22 September 2017

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I. INTRODUCTION

1. Pursuant to Article 1128 of the *North American Free Trade Agreement (NAFTA)*, both the United States of America (**United States**) and the United Mexican States (**Mexico**) made submissions on the interpretation of the NAFTA. The Claimant thanks both parties for their thoughtful submissions and responds in the paragraphs below.

II. JURISDICTION OF THE TRIBUNAL

A. **Bill 18 relates to the River Permit and therefore the Tribunal has jurisdiction**

2. The Claimant agrees with both the United States and Mexico that Article 1101(1) of the NAFTA requires that a challenged measure, in this case Bill 18's revocation of the Enterprise's River Permit, "relate to" an investor of another NAFTA Party, or that investor's investments.¹ The Claimant further agrees that the appropriate legal test is found in the *Methanex v. USA* tribunal award. It requires the existence of a "legally significant connection between the measure and the investor or the investment."²

3. As the United States correctly notes, this creates a jurisdictional "threshold" ensuring NAFTA protections do not lead to situations of indeterminate liability owed to an indeterminate class of investors. The determination of whether a measure meets this threshold depends, as the

¹ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 4; *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of Mexico Pursuant to Article 1128 (16 August 2017), para. 2.

² *Methanex v. United States of America*, UNCITRAL, First Partial Award (7 August 2002), para. 147 (CLA-046).

United States notes, “on the facts of a given case.”³ The tribunal in *Bilcon* confirmed the fact specific, case-by-case nature of this analysis.⁴

4. In this situation, by the passage of Bill 18, Quebec targeted a specific set of exploration permits that gave a small number of companies the right to engage in specified activities, in a defined territory.⁵ The Enterprise directly held property rights in the River Permit.⁶ These rights entitled the Enterprise to undertake the very exploration activity that was the purpose of an exploration permit, at its own direction, without further approval or input from the titular permit holder, Junex.⁷

5. Quebec was aware of the Enterprise’s exclusive right to conduct exploration activity within the River Permit Area since they were registered and specified in the public registry of mining rights set up by Quebec to enable the publication of rights that are intended to be opposable to the state. QMNR officials had express knowledge of these rights as a result of email communication from Junex. QMNR officials provided the transfer form and information about the Mining Registry in order to permit Junex to effect the transfer and registration of the River Permit Rights to the Enterprise,⁸ and ultimately entered the information in the public registry of mining rights. As the

³ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 7.

⁴ *Clayton/Bilcon v. Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), para. 235 (CLA-031).

⁵ Secteur de l'énergie, Direction générale des hydrocarbures et des biocarburants - Activité d'exploration et d'exploitation d'hydrocarbures dans le fleuve Saint-Laurent (partie fluviale) pour les permis de recherche localisés entre la pointe Est de l'île d'Orléans et la frontière provinciale Québec/Ontario (19 November 2010) (C-116).

⁶ Expert Report of Professor Hugo Tremblay, para. 13.2 (CER-003).

⁷ P. Dorrins Reply Witness Statement, paras. 23-25 (CWS-008); J-Y. Lavoie Reply Witness Statement, paras. 10-11 (CWS-009); See also, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, dated 28 January 2010 (C-034): “Junex covenants are agrees with Forest that is shall and will, from time to time and at all times hereafter, at the request of Forest execute such further assurances and do all such further acts as may be reasonably required for the purpose of vesting the within assignment in Forest.”

⁸ P. Dorrins Reply Witness Statement, paras. 26-27 (CWS-008); Letter from QMNR to Junex re: confirming receipt of application for assignment of rights to the Enterprise (21 April 2010) (C-036).

owner of property rights that were specifically and deliberately registered with the government, the Enterprise does not belong to an indeterminate class of investors.

6. The Enterprise is not like the entities that concerned the tribunal in *Methanex*. The tribunal in *Methanex* was concerned about entities further down the business supply chain, and wanted to avoid an interpretation of the “relating to” requirement that could be met not only by Methanex’s suppliers but also the “suppliers to those suppliers and so on, towards infinity.”⁹ The Enterprise is not an unnamed supplier with a downstream or upstream connection to the revoked rights. It was the Enterprise’s rights that were revoked and nullified by the passage of Bill 18.

B. The River Permit Rights are an investment pursuant to Article 1139 of the NAFTA

7. In its submission on Article 1139, the United States argues it is appropriate to look to the law of the host state to determine the property rights, if any, at issue.¹⁰ The Claimant agrees. However, the domestic jurisprudence provided by the United States is not appropriate for determining the issue that must be decided by this Tribunal: the nature of the rights under Canadian, and specifically *Quebec*, law. The Tribunal should be cautious when considering the cases cited by the United States as they have no bearing for a determination of the matters at issue in this arbitration.

8. The situation under Quebec law is different from that under United States law. Under Quebec law, the Claimant and Canada agree that an exploration licence granted by the Quebec

⁹ *Methanex v. United States of America*, UNCITRAL, First Partial Award (7 August 2002), para. 137 (CLA-046); In *Bayview Irrigations*, cited by the United States, the tribunal was presented with a question of whether an investor in one NAFTA state, affected by measures in another NAFTA state, benefits from the protections of the NAFTA. This is a wholly different question than that before the Tribunal.

¹⁰ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 3.

government gives its holder an immovable real right, which further can be the object of an innominate dismemberment.¹¹ Both the Claimant and Canada's experts confirmed this.¹² Specifically, the Claimant agrees with Canada's expert, Professor Gagné that, "the prospecting permit gives its holder a real right of the nature of an innominate severance of the State's ownership".¹³ These rights formed under Quebec law and owned by the Enterprise are the focus of this arbitration.

III. ARTICLE 1110: EXPROPRIATION

A. Customary international law cannot override clear treaty language

9. In their submissions, the United States and Mexico propose an interpretation of the police powers doctrine that relies on customary international law in a manner that effectively circumvents the text of the NAFTA.

10. Broadly stated the police powers doctrine holds that a state party will not be liable or be required to pay compensation for injury caused by the exercise of regulatory powers where such action is *bona fide*, non-discriminatory and in the public interest.¹⁴

11. Insofar as United States and Mexico advocate adopting the customary international law standard of police powers without due attention to the specific text of Article 1110 of the NAFTA, they miss the mark. Article 31(1) of the *Vienna Convention on the Law of Treaties* requires

¹¹ Counter-Memorial, 24 July 2015, para. 283; Reply Memorial, 22 May 2017, para. 262.

¹² Expert Report of Professor Hugo Tremblay Report, para. 13.2 (CER-003); Expert Report of Mr. Gagne, paras. 30-35, 83-84 (RER-002).

¹³ Expert Report of Mr. Gagne, para. 84. (RER-002).

¹⁴ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 16; *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of Mexico Pursuant to Article 1128 (16 August 2017), para. 8.

“ordinary meaning to be given to the terms of the treaty.” This requires any interpretation of the NAFTA’s protection against expropriation to begin with the text of the NAFTA. Customary international law cannot be relied upon to disregard what is plainly set out in the treaty text.¹⁵ In the same way that statute takes precedence over the common law, so too do specific treaty obligations take precedence over customary international law.

12. In context of expropriation under the NAFTA, this is an important distinction. Under the police powers doctrine, a non-discriminatory action for a public purpose does not require compensation. The requirements of the NAFTA are clearly different given the specific text of Article 1110, which sets out four conditions that must be satisfied in order for an expropriation to be compatible with the protections of the NAFTA. As under customary international law, NAFTA Article 1110(1)(a) requires an expropriation to have a public purpose. Where the NAFTA departs from customary international law and adopts an approach specific to the treaty is with respect to the mandatory requirement for compensation. The text of Article 1110(1)(d) stipulates that even if the measure is in furtherance of a public purpose, compensation must also be paid.

13. The definition of police powers advanced by the NAFTA parties in this arbitration would render the text of Article 1110(1)(d) meaningless. If an expropriatory measure was implemented for a public purpose but no compensation was paid, it violates Article 1110. If the customary international law police powers doctrine is used in lieu of the requirements of Article 1110, it makes the stipulation in Article 1110(1)(d) meaningless.

¹⁵

Vienna Convention on the Law of Treaties (27 January 1980) 1155 UNTS 331, 8 ILM 679, art 26 and 31 (CLA-003).

14. In keeping with the *Vienna Convention*, the ordinary meaning of “payment of compensation” cannot be interpreted by reference to customary international law to mean “no payment of compensation.” Yet, this is the interpretation offered by the United States and Mexico. They ask the Tribunal to overlook the exact wording of the NAFTA in an attempt to restrict the investor protections they themselves have provided for in the NAFTA, and limit them to the lower standard of protection provided for by the doctrine of police powers.

15. As the *Methanex* tribunal noted, “the NAFTA Parties intended that the provisions of Chapter 11, particularly 1101(1) NAFTA, should be interpreted [...] without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief”.¹⁶

B. Liability for Expropriation under the NAFTA

16. In its submissions, the United States comments on the types of expropriation an investor has protection from pursuant to the NAFTA.¹⁷ While the Claimant agrees that the NAFTA provides protection from both direct and indirect expropriation, a proper review by a tribunal must include an analysis of both cause (whether the cause is direct or indirect) and effect (whether the measure results in an expropriation or has effects tantamount to expropriation). As the Claimant has argued from the beginning, as articulated in the text of the NAFTA, cause and effect are conceptually distinct questions, both of which are provided for in Article 1110.¹⁸

¹⁶ *Methanex v. United States of America*, UNCITRAL, First Partial Award (7 August 2002), para. 105 (CLA-046).

¹⁷ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), paras. 11-12.

¹⁸ Memorial, 10 April 2015, paras. 221-225, 238-239.

17. The Claimant's real rights under Quebec law are rights that have been dismembered from the bundle of rights that is an exploration permit. These real rights satisfy the definition of an investment under Article 1139(g) and were directly expropriated: upon Bill 18's entering into force the government nullified them directly in revoking the permit. Quebec law is clear that real rights may be dismembered through the force of a contract. Forest Oil's, and then the Enterprise's, contractual arrangements with Junex required capital to be spent for Forest Oil to earn in and cause these rights to be dismembered. Accordingly, the Claimant's interests that arose from the commitment of capital, an investment as defined under Article 1139(h), were indirectly expropriated.

IV. ARTICLE 1105: THE MINIMUM STANDARD OF TREATMENT

A. The Claimant has discharged its burden to prove the content of Fair and Equitable Treatment, Canada has not

18. The Claimant acknowledges, as both the United States and Mexico assert,¹⁹ that it bears a burden of establishing the content of fair and equitable treatment under the minimum standard of treatment requirement of the NAFTA.

19. The Claimant has discharged its burden.²⁰

¹⁹ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 30; *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of Mexico Pursuant to Article 1128 (16 August 2017), para. 6.

²⁰ Memorial, 10 April 2015, paras. 280–335; Reply Memorial, 22 May 2017, paras. 448–442.

20. To the extent that the United States argues that a party proffering a position on the content of the minimum standard of treatment bears the burden of proving it, the Claimant agrees. However, the Claimant disagrees that the burden is “on the claimant and the claimant alone.”²¹

21. The most recent NAFTA arbitral tribunal in *Windstream v. Canada* found that each party must support its own position with appropriate legal and academic sources on the content of the minimum standard of treatment.²² Although Canada has continued to reject the Claimant’s position on the content of the minimum standard of treatment, it has yet to articulate its own. It merely asserts that the actions of Quebec through Bill 18 did not violate the minimum standard of treatment because such actions were passed by a legislative body.²³ Actions of a legislative body are quintessential “measures” subject to NAFTA obligations. The fact of passage by a legislative body is not an incantation that deflects or supersedes the treaty obligation to comply with the minimum standard of treatment required by the NAFTA.

22. The Claimant is aware of the process through which Bill 18 entered into force and has advanced arguments how and why Article 1105 is engaged by the actions of the Quebec government in relation to the development and adoption of Bill 18.

23. The content of the customary international law standard of the minimum standard of treatment of aliens is settled. The Claimant’s argument under Article 1105 is and has always been that the actions of Quebec officials violate *that* standard. This is not an attempt to expand the scope of Article 1105; it is an application of facts to law consistent with the practice of past NAFTA

²¹ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 30.

²² *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (27 September 2016), para. 350 (CLA-106).

²³ Rejoinder, 4 August 2017, para. 228.

tribunals. The misplaced fixation on adjectives²⁴ amounts to nothing more than a distraction from the principle task: an inquiry of whether or not the actions of Quebec violated Article 1105.

B. The Claimant does not argue that its “legitimate expectations” form the basis for a violation of the minimum standard of treatment

24. In its submissions, the United States asserts that the Claimant is attempting to expand the legal standard of fair and equitable treatment under the minimum standard of treatment to include an independent obligation on states to respect an investor’s legitimate expectations.²⁵ Canada has also made this allegation.²⁶ Neither is correct.

25. Both the United States and Canada mischaracterize the Claimants argument. In doing so they erect a straw man.²⁷

26. The Claimant does not dispute Quebec’s right to regulate or that the regulation of an industry may change over time. Indeed, as experienced participants in the oil and gas industry, the Claimant and its Enterprise are familiar with the need to comply with extensive regulation, and undertake operations to do so. Bill 18 was no mere regulatory act. The Claimant’s rights to the River Permit were not regulated; they were arbitrarily eradicated.

²⁴ Rejoinder, 4 August 2017, para. 221.

²⁵ *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Submission of the United States Pursuant to Article 1128 (16 August 2017), para. 26.

²⁶ Counter-Memorial, 24 July 2015, paras. 346-356.

²⁷ Counter-Memorial, 24 July 2015, paras. 375-380.

27. In the Claimant's view, Quebec violated Article 1105 of the NAFTA because of its arbitrary, idiosyncratic, unfair and inequitable revocation of the Enterprise's River Permit.²⁸

ALL OF WHICH is respectively submitted.

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