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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

CANADA

Respondent

(ICSID Case No. ARB/20/52)

CLAIMANTS' POST-HEARING BRIEF

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

I. INTRODUCTION

2. This claim arises out of summary and arbitrary measures by the Province of Ontario (**Ontario**) that had the effect of wiping out KS&T's carbon allowances trading business in the Province and arbitrarily and illegally stripped KS&T of millions of dollars in inventory without any compensation. These measures, for which the Respondent is responsible under the NAFTA and international law, violated Koch and KS&T's rights under NAFTA Chapter Eleven, giving rise to this claim and to a right to damages.

3. In this Brief, the Claimants limit their comments to issues arising out of the Hearing held 5-8 December 2022, and incorporate by reference their prior written submissions on the wrongful measures taken by the Province of Ontario, for which the Respondent is liable.

4. As the Tribunal considers the largely uncontroverted facts, and weighs the evidence presented during the Hearing, it should carefully consider what was left unanswered by the Respondent. The Respondent's approach in this arbitration has been to simply ignore evidence or legal authority adverse to its position, or to mischaracterize the facts and the Claimants' claims to suit its own narrative. These tactics were evident in the Hearing.[1]

5. The Respondent predictably fell back on a series attempts to deny this Tribunal jurisdiction, notably by mischaracterising the scope of the Claimants' business in Ontario; and by proffering a blatantly results-driven and obscure analysis seeking to deny the status of allowances as "property" in Ontario, that consistently ignored the express language of the Cap and Trade Act. The Respondent sought to divert the Tribunal's attention from how an Ontario Court would actually determine allowances to be property, and how jurisdictions around the world – including the influential English courts – *in fact* have found allowances to be property under equivalent regimes.

[1] Where the Respondent – *inter alia* – declined to offer any rebuttal to the Claimants' Opening Statement; declined to hear from Mr. Paul Brown or Mr. Michael Berends; declined to cross-examine Prof. Stavins; and sought to prevent the Tribunal from considering the most recent and directly applicable jurisprudence on relevant issues in these proceedings. *See* Tr., Day 2, p. 311, lines 7-19 (Claimants).

6. The Respondent also had no real response to the Claimants' case on the merits during the Hearing, presenting a one-sided description of the Ontario Cap and Trade Program (the **Program**) that ignored its central market and cost efficiency imperatives. Its attempts to mischaracterise the actual functioning of the Ontario Program were overturned by the evidence of Koch witnesses and by its own witnesses' admissions. The Respondent largely sought to ignore the actions of the Premier-elect on 15 June 2018, including his direct orders to Ontario officials, implausibly claiming that this action did not amount to a "measure". But the Hearing confirmed the immediate and foreseeable consequences of his reckless direction and of the officials acting pursuant to his illegal orders, who acted in full knowledge of the ensuing destruction they would cause and proceeded regardless.

7. Likewise, the Hearing demonstrated the absurdity of the Respondent's attempt to blame the Claimants (for failing to predict Ontario's future illegal behaviour, despite its solemn public commitments to its partners and multiple assurances to its stakeholders), and its own carbon trading partners (for their entirely predictable response to Ontario's reckless measures). Yet there is one common denominator in the events which directly and indisputably caused the Claimants significant loss: Ontario's illegal measures in violation of NAFTA. As a matter of causation, this loss was proximate and entirely foreseeable.

8. This being the case, the Respondent's attempt at the Hearing to raise for the first time arguments to deny the Claimants' damages should be rejected. The Claimants suffered clear damage from the Respondent's breach, and should be compensated accordingly.

II. THE FACTS AS PRESENTED BY THE CLAIMANTS WERE CONFIRMED DURING THE HEARING

A. Cap and Trade Programs, and the Importance of Market Participants

9. The Claimants in their written pleadings and during the Hearing have explained at length how Ontario's Program was designed to reduce greenhouse gas (**GHG**) emissions by: (1) imposing a progressively reducing limit or cap on those emissions; and (2) establishing a "market mechanism" to facilitate trade in allowances to achieve GHG emissions reductions efficiently.[2] In other words, establishing an active "market" was core to Ontario's policy objective of reducing GHG emissions at the lowest possible cost to Ontarians.

[2] Tr., Day 3, p. 660, lines 5-11, p. 744, lines 4-7 (de Beer), **CD-2**, Slide 7.

10. Given this, it was deeply unfair and inequitable for Ontario to refuse to compensate market participants – as key players in that market – when it summarily cancelled the Program in June 2018. The Respondent therefore took every opportunity at the Hearing to misstate the nature of the Program, arguing that it was merely a "regulatory scheme to reduce [GHG]", and ignoring its stated purpose to create a market mechanism to achieve that objective in the most cost-efficient manner.[3] The Respondent (and its expert) sought to divert the Tribunal's attention from the express provisions in the Cap and Trade Act, which plainly states that the "cap and trade program is a market mechanism" established to influence economic decisions to achieve the reduction of GHGs, as well as the Act's preamble, which makes clear that a "key purpose" of the Act was to "establish a carbon price" and allow Ontario to link to other regional cap and trade markets.[4] Mr. Litz flatly contradicted the Respondent's false narrative, agreeing that a cap and trade program "is an environmental policy that guarantees a specific emissions outcome across a set of covered pollution sources *at the lowest possible cost*."[5] Prof. Stavins' testimony to the same effect is thus uncontested.[6]

11. Ontario intentionally created a specific class of participants, "market participants", whose recognised role was to ensure that the allowances market functioned efficiently and effectively.[7] The Respondent's witness, Mr. Wood, acknowledged "in fact, market participants were part of the system that we [the Ontario government] designed."[8] As Prof. Stavins recalled, this is because market participants can provide market liquidity, optimize price discoverability, and avoid the need for compliance entities to develop specialised expertise necessary to operate in this distinct market: all of which was acknowledged by the Respondent's experts and witnesses during the Hearing.[9] Indeed, when questioned, Mr. Litz conceded that virtually all existing cap and trade programs include market participants.[10]

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[3] Tr., Day 1, p. 160, lines 14-15 (Claimants).

[4] **CL-5**, Section 1 and preamble, 8th clause and Tr., Day 4, p. 1024, lines 7-12 (Question from Arbitrator Alvarez), p. 1024, line 13 to p. 1025, line 10 and p. 1026, line 16 to p. 1030, line 6 (Katz).

[5] Tr., Day 4, p. 1130, lines 2-9 (Litz) (emphasis added). See also, Tr., Day 4, p. 1151, lines 3-6 (Litz).

[6] **CD-4**, Slide 3.

[7] *See*, *e.g.*, Tr., Day 4, p. 1072, lines 7-22 (Stavins).

[8] Tr., Day 2, p. 484, lines 8-9 (Wood).

[9] Tr., Day 2, p. 484, line 10 to p. 486, line 179 (Wood) (where Mr. Wood agreed that the design of Ontario's Cap and Trade Program was to "ensur[e] business the broadest possible market for emission reductions opportunities. In doing so, it will help businesses both achieve reductions at the lowest possible price, and help them sell their emission allowances to a greater pool of willing buyers."). *See also* Tr., Day 4, p. 1164, lines 18 to p. 1166, line 4 (Litz); Tr., Day 4, p. 1115, lines 15-21 (Litz); **RD-3**, Slide 13 ("More participants is generally better than fewer participants").

[10] Tr., Day 4, p. 1162, lines 2-9 (Litz). The one exception is Nova Scotia's regional program.

The notion that market participants like KS&T were peripheral or *a fortiori* undeserving of fair compensation when the Program was wound down was therefore confirmed to be false.

12. The Hearing also confirmed that KS&T was [redacted] helping attain precisely the goals Ontario sought to achieve.[11] Prof. Stavins noted that over the life of the Program, [redacted] of allowance transfers involved a market participant,[12] even though they only constituted 7% of all registered entities in the jurisdiction.[13] Mr. Litz could not deny that Ontario's secondary market would have continued developing and expanding, given that secondary market activity generally increases very significantly as the end of a compliance period nears and as a program matures.[14] As Prof. Stavins observed, the secondary market of Ontario's Program "was active, despite its relatively nascent state" and [redacted], despite "operat[ing] for only one-and-a-half years".[15] As such, but for its abrupt and arbitrary cancellation by Ontario, that secondary market would have similarly grown as the Program matured and, with it, the Claimants' role as an active market participant.

B. The Claimants' Investments in Ontario

13. The centrepiece of the Respondent's case has been to deny that the Claimants were investors in Canada on the basis of its false narrative that they were merely "cross-border traders". As the Claimants have demonstrated (and none of which was disputed at the Hearing), all key elements of their investment depended to the contrary on its base in Ontario, where the Claimants were registered; where they took part in public auctions; made payment through Ontario's agent as part of the substantial cash benefit Ontario directly derived from the Program; and where the inventory they acquired was deposited.[16] The point is that, but for their clear and essential Ontario investment base, the Claimants would have been barred from pursuing their investment strategy. Given these uncontroverted facts, the Respondent's focus on the physical location of KS&T's personnel is nothing more than a red herring.

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[11] *See, e.g.*, Tr., Day 2, p. 385, lines 5-8; p. 386, line 19 to p. 387, line 6; p. 400, lines 13-16; p. 429, lines 2-9; p. 430, line 14 to p. 431, line 2; p. 457, lines 5-22; and p. 458, line 21 to p. 459, line 1 (King). *See also* **CWS-4**, para. 11.

[12] Tr., Day 4, p. 1078, line 20 to p 1079, line 4 (Stavins). *See also* **RWS-4**, para. 45; and Tr., Day 3, p. 630, line 10 to p. 633, line 9 (where Ms. Ramlal agreed that [redacted]

[13] **CD-3**, Slide 12.

[14] Tr., Day 4, p. 1140, lines 2-14 (Litz: [redacted]); p. 1152, line 3 to p. 1153, line 2 (Litz). *See also*. **CD-4**, Slide 9 ("For example, in the European Union Emissions Trading System (EU-ETS), secondary market volume *grew* by 83% from 201 to the end of the compliance period in 2020 (while auction volume *decreased* by 54%").

[15] Tr., Day 4, p. 1077, lines 8-18 (Stavins).

[16] *See*, *e.g.*, **CWS-4**, paras. 8-30; **CWS-3**, paras. 15-26.

14. One of KS&T's key objectives in investing in Ontario's Program was to build upon its position as a leading player in North American environmental credit markets. As Mr. Martin explained, "[w]e were already active in the linked program",[17] and "we thought longer term Ontario would link with California and Québec, [redacted][18] While KS&T had traded in allowances up to 2016, the ability to directly take part in allowances auctions as an Ontario registrant allowed the Claimants to transform their business model. KS&T thus spent a significant amount of time and resources to register in Ontario and participated in all Ontario-sponsored auctions as an Ontario market participant.[19]

15. Registering in Ontario and taking part in the Ontario Program as a market participant was essential to KS&T's overall investment strategy, notably by enabling it "to more easily participate in auctions".[20] Purchasing allowances in public auctions [redacted]

16. The allowances KS&T purchased in multiple Ontario sponsored public auctions in 2017 and 2018 were therefore purchased through an Ontario-specific internet address,[28] deposited directly into KS&T's Ontario-registered CITSS account, paid for through Ontario's

[17] Tr., Day 2, p. 320, lines 12-13 (Martin).
[18] Tr., Day 2, p. 321, lines 2-7 (Martin).
[19] *See* **CD-1**, Slides 30-36.
[20] *See, e.g.,* Tr., Day 2, p. 321, lines 8-12 (Martin).
[21] *See, e.g.,* Tr., Day 2, p. 321, line 13 to p. 322, line 5; p. 376, lines 5-13; and p.377, lines 6-10 (Martin).
[22] Day 2, p. 318, line 19 to p. 320, line 3 (Martin).
[23] Tr., Day 2, p. 375, lines 6-7 (Martin).
[24] Tr., Day 2, p. 376, lines 5-8 (Martin).
[25] Tr., Day 2, p. 375, line 1 to p. 376, line 4 (Martin).
[26] Tr., Day 2., p. 367, line 16 to p. 368, line 15 (Martin); and p. 388, lines 13-21 (King).
[27] Tr. Day 2, p. 367, line 16 to p. 368, line 15 (Martin); p. 388, lines 13-21 (King).
[28] Tr., Day 2, p. 553, line 14 to p. 555, line 22 (Wood).

agent as part of the substantial cash benefit Ontario directly derived from the Program, and physically held in Ontario for up to a year as part of KS&T's ongoing business across Ontario and other participating WCI jurisdictions. This was not "cross border trade": all essential elements of registration, primary market purchases and related primary deliveries took place within the four corners of Ontario.

17. KS&T also deliberately tweaked its strategy to maximize its ability to further invest in the Ontario Program. KS&T [redacted]

18. The essential Ontario focus of its investment was reflected in the massive amounts of capital KS&T directly poured into Ontario as an investor in the Program, substantially contributing to the multi-billion dollar cash benefit Ontario drew from the Program over its brief lifetime. KS&T contributed a cumulative total of USD [redacted] to the Program by purchasing millions of Ontario emissions allowances directly from Ontario in 2017 and then fungible WCI allowances in 2018 (which included significant amounts of Ontario allowances).[31] The fact that, from an Ontario base, KS&T proceeded to trade with counterparts across the three linked WCI markets is another of the Respondent's red herrings: an investor who from Ontario trades across North America is no less of an investor in Ontario. Moreover, Ontario itself designed its system for linkage from the start and actively encouraged participants to treat the system as a single market.

19. KS&T's Ontario base was not only essential in terms of its basic business model, but from that base it [redacted]

[29] Tr., Day 2, p. 377, lines 18-21 (Martin).
[30] Tr., Day 2, p. 383, lines 1-20 (King). *See also* Tr., Day 2, p. 432, line 11 to p. 433, line 17; p. 436, lines 7-17 (King).
[31] **CD-1**, Slide 37.
[32] **CD-1**, Slides 47-50.
[33] Tr., Day 2, p. 387, lines 18-21; p. 458, line 21 (King).

[redacted][35] Ms Ramlal's testimony failed to address the full scale and extent of KS&T's secondary market activity.[36] She conceded that her evidence was specifically limited to "settled transfers that were recorded in CITSS", neglecting secondary market activity data such as derivative trading [redacted] and "other sorts of contracts" preceding any physical delivery of compliance instruments.[37] Only 'counting' Ontario CITSS records necessarily left out other important aspects of KS&T's activity in Canada, [redacted]

20. KS&T's plan was to be a long-term investor in Ontario through the market platform that was essential to its business model, and it would have continued in its profitable business activities in Ontario for the full life of the Program.[39] The Respondent argued incorrectly that not all allowances acquired by KS&T were truly "Ontario" investments, as California and Québec also supplied emissions allowances for the 2018 joint auctions.[40] Such allowances were directly delivered into KS&T's Ontario CITSS account based upon bids made through the Ontario website and were immediately part of its Ontario-regulated holdings.[41] Due to linkage between the three WCI jurisdictions, irrespective of 'origin' all such allowances were "to be treated as the [equivalent Ontario] instrument".[42] Ontario amply demonstrated this when as of 3 July 2018 it expressly froze and thereafter cancelled *all* KS&T's allowances held in its Ontario CITTS account.[43]

C. The Claimants' Expectations were Reasonable and Legitimate

21. The Claimants held legitimate and reasonable investment-backed expectations informed by representations by Ontario, including based upon the Program's market-driven design; through express written commitments entered into by Ontario, Québec and California

[34] *See, e.g.* Tr., Day 2, p. 382, lines 7-17; p. 394, lines 6-20; p. 430, line 17 to p. 431, line 2; p. 442, line 15 to p. 445, line 17 (King).
[35] Tr., Day 2, p. 386, line 21 to p. 387, line 1 (King).
[36] *See, e.g.,* Counter-Memorial, para. 51 and n. 83; and para. 66 and n. 110.
[37] *See, e.g.,* Tr., Day 3, p. 610, line 15 to p. 618, line 20; p. 633, line 19 to p. 634, line 12 (Ramlal).
[38] Tr. Day 2, p. 457, line 1 to p. 458, line 1 (King).
[39] **CD-1**, Slide 33.
[40] Tr., Day 1, p. 197, lines 9-13 (Respondent).
[41] *See, e.g.,* Tr., Day 1, p. 192, lines 8-12; and p. 197, lines 5-8) (Respondent).
[42] *See* **CL-6**, s. 10.1.
[43] *See* **CL-9**, s. 1; and **CL-1**, s.7.

(the **OQC Agreement**);[44] through the practice of regular, scheduled auctions; and through the repeated promise by Ontario that any cancellation of its Program would be "orderly".[45]

22. The Respondent implausibly dismissed the OQC Agreement's significance *vis-à-vis* the Claimants' reasonable expectations, treating it as a mere "mutual expression of intent to collaborate" (contrary to its express provisions), asserting that the Article 17 withdrawal procedure was "not intended to *prevent* any party to the agreement from withdrawing unilaterally or without providing 12 months' notice."[46] The point is not whether Ontario was prevented from withdrawing, but rather, whether Ontario's commitments created reasonable expectations on the part of the Claimants that any withdrawal would be gradual and orderly (they did). The Respondent had no answer when faced with the express contemporaneous representations made by Ontario officials (including ministers) that it would be "very hard to undo cap and tra[de]" in the event of a "divorce" between the three jurisdictions.[47]

23. The Respondent spent a disproportionate amount of Hearing time denying, on the basis of a footnote, that Program participants expected regular Ontario auction participation, as publicly announced by Ontario and its partners at the beginning of the year.[48] The Respondent's apparent point was that Ontario Program participants could have no expectation that an auction would be held on a particular date or at all, thereby justifying Ontario's precipitous pull-out on 15 June 2018 from the next scheduled auction.[49]

24. The Respondent's argument was contradicted both by the evidence on record and by witness testimony during the Hearing. The referenced footnote likely reflected Californian regulations allowing auction dates to be adjusted by a "maximum of four days".[50] There had never been a last-minute "resiling" by a participating jurisdiction from the preannounced auction schedule. Mr. Martin did not recall "ever seeing a difference" between the schedule

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[44] **CD-1**, Slides 26, 30-33, 41, 166 to 168.

[45] Tr., Day 1, p. 48, lines 3-13; p. 56, line 13 to p. 57, line 2 (Claimants); **CD-1**, Slides 39-41; **CWS-1**, paras. 81-83 and 94.

[46] Tr., Day 1, p. 171, lines 5-7 (Claimants) (emphasis added).

[47] *See*, *e.g.*, **CD-1**, Slide 41; **CWS-5**, para. 22. *See also* **CD-4**, Slide 15 (where Prof. Stavins confirmed that "Ontario's actions were contrary to expectations set about the way jurisdictions would withdraw in its linkage agreement with California and Québec") (emphasis in original).

[48] Tr., Day 2, p. 353, line 4 to p.356, line 9 (Martin), citing **C-30**, pp. 3-4. *See also* **C-30**, p. 3. While undated, it appears from the text of the website that it was published between 22 September 2017 and 1 January 2018. ("We signed a cap and trade linking agreement … with Quebec and California on September 22, 2017. It comes into effect on January 1, 2018.").

[49] According to the Respondent, the footnote – which stated that "dates shown are subject to change and will be confirmed through the official Auction Notice" – meant that the Claimants could not have had any legitimate expectation that Ontario would issue an auction notice on 15 June 2018, 60 days before the scheduled auction of 14 August 2018, despite nearly two years of quarterly auctions having taken place on their pre-scheduled date. **C-30**, p.4; Tr., Day 1, p. 165, lines 15-22 (Respondent); Day 2. p. 353 to p. 356 line 9 (Martin).

[50] Tr., Day 2, p. 544, line 6 to p. 545, line 11 (Wood).

published and the dates "the auctions are actually held".[51] "[E]verybody that participates in these markets generally knows that … the auctions are going to be mid-February, mid-May, mid-August, and mid-November".[52] Nothing in the schedule suggested that, post-linkage, Ontario would hold its own auctions on entirely separate days.[53] [redacted]

25. In light of the Respondent's extensive efforts to link with the California and Québec markets over several years,[55] its position that Ontario – in only their third linked auction – was likely to hold its own independent auctions on a different date than the joint schedule (or not at all) is not credible. The Claimants' expectations that an auction notice would be released on 15 June 2018 was reasonable, in line with past practice, and mirrored the expectations of the broader market.[56] This, as well as express statements from Ontario, contributed to the Claimants' reasonable expectation that any cancellation of its Program would take place in an orderly, phased manner, affording all participants due process and allowing them to exit without incurring dramatic losses. Instead, the opposite occurred.

D. The Respondent's Cancellation of the Cap and Trade Program was Abrupt, Arbitrary and Chaotic

26. The Claimants have explained at length in written pleadings, and during the Hearing, Premier-elect Ford's *ultra vires* announcement on 15 June 2018 proclaiming Ontario's abrupt cancellation of its Program (the **Announcement**), in which he also "directed" incumbent government officials not to issue the requisite notice of participation for the August 2018 auction.[57] The effect was "catastrophic" and all the steady growth and business development in Ontario, including contractual negotiations, "came to an abrupt halt".[58]

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[51] Tr., Day 2, p. 355, lines 10-15 (Martin).

[52] Tr., Day 2, p. 355, lines 18-21 (Martin). *See also* Tr., Day 2, p. 355, lines 1-4 (Martin) ("the expectation, is that those auctions are going to occur on those dates").

[53] Tr., Day 2, p. 541, line 2 to p. 546, line 6 (Wood).

[54] [redacted]

[55] Tr., Day 4, p. 1034, line 17 to p. 1035, line10 (Katz); p. 1082, lines 3 to 15 (Stavins).

[56] *See*, *e.g.*, **CWS-1**. Notably, the Respondent declined to cross-examine Mr. Berends, who established from the perspective of a central player in the Ontario market that the Program was understood to last at least 10 years, and no one was expecting the devastating way in which Ontario withdraw from the Program in June 2018. *See id*., paras. 49, 75-80, 94.

[57] **CWS 1**, paras. 74-75; 78-80, 86-88, 95; **CWS 7**, paras. 23 24. *See also* [redacted], **C-7**, **C-43**; **C-101**; **C-102**. *See also* [redacted].

[58] Tr., Day 2, p. 322, line 15 to p. 324, line 2 (Martin).

27. During the Hearing, the Respondent continually sidestepped and ignored the Premier-elect's unauthorized actions on 15 June 2018, refusing to even acknowledge the Announcement in the timelines in its opening presentation.[59] It implausibly maintained that the Announcement was "prospective" and "simply [had] no effect",[60] a deliberate mischaracterization, manifestly contradicted by the plain words of the Announcement itself as well as by evidence presented both prior to and during the Hearing.[61] The Respondent had no response to the evidence that the sudden Announcement took California and Québec regulators, and the entire carbon trading industry, by surprise.[62] Ontario officials acted pursuant to the Announcement that afternoon, in full knowledge of its anticipated devastating effect on the Ontario market and participants.[63]

28. Faced with these facts, the Respondent's weak defence was that the Claimants should never have participated in the May 2018 auction, or that they should have transferred the allowances out of their Ontario CITSS account in the *four-day period* between 11 June 2018 (when the allowances were first deposited by Ontario) and 15 June 2018 (when the Premier-elect made his *ultra vires* Announcement). The Claimants have addressed these untenable arguments at length.[64] In short, both on the auction date of 15 May 2018, and the Announcement date of 15 June 2018, Premier-elect Ford was not yet in power.[65] During the election campaign, he had failed to provide any details of the timing and manner of the Program's cancellation should he gain power. In any event, there is a wide gap between a general statement of intent during an election and an actual measure once elected.[66] The Claimants could not have reasonably anticipated that the Premier-elect would act without authority and in flagrant disregard of the law, and direct immediate withdrawal from auctions on 15 June 2018, at a time when the incumbent government was still in power.[67] All evidence confirms that while the Claimants understood that Ontario might ultimately

[59] *See*, *e.g.*, **RD-1**, Slides 42, 43, 157, 159, 161, 162.
[60] *See*, *e.g.*, Tr., Day 1, p. 243, line 22 to p. 244, line 5 (Respondent).
[61] *See,* **C-7**, [redacted]; Tr., Day 2, p. 571 line 15 to p. 572, line 9 (Wood).
[62] *See also* **CWS 1**, para. 86, **C-200**, **C-104**; [redacted].
[63] *See* Tr., Day 2, p. 522 lines 2 to 17 and p. 525, line 6 to p. 528, line 3 (Wood).
[64] **C-101**; **C-102**.
[65] Premier-elect Ford was not scheduled to be sworn into office in Ontario until 29 June 2018: *see*, *e.g.*, **CD-1**, Slide 54.
[66] *See*, *e.g.*, Tr. Day 2, p.322, line 12 to p. 323, line 12 (Martin); p. 507, line 22 to p. 509, line 7 (Wood); **CD-1**, Slides 52-53.
[67] *See*, *e.g.*, Tr., Day 2, p. 370, lines 4-12 (Martin); *see also* Tr., Day 2, p. 355, lines 1-4, lines 10-15, lines 18-21 (Martin).

terminate the Program, they reasonably expected any winddown would occur (if at all) only once a new government was in power, and in a lawful and orderly manner.[68]

29. The Respondent also maintained that the Ontario public service was bound by the caretaker convention, and that it therefore had no choice but to "act with caution" and "not frustrate the policy goals of the incoming government".[69] This position is directly contradicted by evidence which shows that, as part of its "normal activity", Ontario officials had begun preparing for Ontario's participation in the August 2018 auction.[70] It was only *after* the Premier-elect's *ultra vires* "direction" to Ontario officials decreeing that Ontario would not be participating in the forthcoming auction that these officials confirmed they deviated from their normal activity and "reverse[d] the process".[71] In the face of this contemporaneous, written evidence, Mr. Wood's testimony that the government was simply maintaining "maximum optionality" for any potential policy option rings hollow.[72] In any event, the Respondent's *ex post facto* heavy dependence on the (ambiguous and seemingly shifting) requirements of the caretaker convention cannot exculpate Ontario. Mr. Wood admitted at the Hearing that [redacted][73] In other words, [redacted] Regardless of whether or not the Ontario officials' actions followed the caretaker convention, it still amounted to a "measure" giving rise to a NAFTA breach – in particular given that, [redacted][74]

[68] *See*, *e.g.*, Tr., Day 2, p. 370, lines 4-12 (Martin); *see also* **CWS-2**, paras. 49, 56-57, 73; **CWS-5**, paras. 24, 27; **CWS-1**, para. 75, 77, 79; **CWS-7**, paras. 24-25; [redacted], **RS-110**.

[69] Tr., Day 1, p. 173, lines 9-14 (Respondent).

[70] **C-200**.

[71] **C-200**.

[72] Tr., Day 2, p. 513, lines 19-20 (Wood). Mr. Wood was unable to explain the nature of the transition briefings he asserts occurred with the incoming government during the caretaker period, nor has he provided any written document evidencing this "optionality" policy approach or even an assessment of factors that the caretaker convention requires *see* Tr., Day 2, p. 512, line 1 to p. 515, line 11; p. 534, line 5 to p. 535, line 2 (Wood).

[73] Tr., Day 2, p. 533, lines 14-15 and p. 534, line 19 to p. 535, line 2 (Wood).

[74] *See* Tr., Day 2, p. 522 lines 2 to 17; p. 523, line 6 to p. 524, line 18; p. 525, line 6 to p. 528, line 3 (Wood); **C-200** (which confirms that Mr. Wood's team knew that a participant had made transfers from its Ontario CITSS account to its California account, and which indicates that Mr. Wood knew that other participants would hope to do the same).

30. Finally, the Respondent and its expert, Mr. Litz, spent a significant amount of time during the Hearing shifting blame to California (but curiously, not Québec, another Canadian province) for the Claimants' loss.[75] In particular, the Respondent asserted that "California could have remedied the Claimants' inability to transfer". Among other things, [redacted] [redacted][76] As Mr. Martin explained during the Hearing, [redacted] [redacted][77] This does nothing to diminish Ontario's liability for the direct, immediate and foreseen consequences of its own reckless and unlawful actions of 15 June 2018.

31. Moreover, while Mr. Litz, repeatedly asserted during the Hearing that Ontario's trading partners "had a number of options beyond the course of action that they chose",[78] he steadfastly refused to opine on the relative merits of these options, and whether they were in any way workable or advisable.[79] Given this, his evidence can be given very little weight. By contrast, Prof. Stavins, recalling that Ontario's quantity of surplus allowances "in the middle of a compliance period [i.e., mid-2018] … was very large[, being] 53 percent of California's and Québec's 2018 remaining annual compliance requirements", highlighted the real risks of California's and Québec's emissions decrease progress being "eliminated", and their 2030 environmental goals being "jeopardized to an alarming degree".[80] He thus robustly confirmed that in light of the "immediate threat of tremendous magnitude to the … environmental integrity of [the California and Québec] programs that were posed by the flood of allowances from Ontario accounts that would otherwise have occurred", their "response of suspending trading with Ontario CITSS accounts on the day that Ontario abruptly announced its withdrawal from linkage and cancellation of its program was … a direct, reasonable, and predictable consequence of the nature of Ontario's withdrawal and cancellation."[81] Indeed, as Prof. Stavins further testified, "it's virtually inconceivable that California and Québec …

[75] Tr. Day 4, p 1220 line 19 to p. 1221, line 11 and p. 1229 lines 10 to 20 (Litz).
[76] Tr., Day 1, p. 277, lines 6-13 (Respondent).
[77] *See* Tr., Day 2, p. 357, line 21 to p. 359, line 9 (Martin).
[78] Tr., Day 4, p. 1106, lines 14-16 (Litz).
[79] Tr., Day 4, p. 1199, line 3 to p.1200, line 22 (Litz). *See also* Tr., Day 4, p. 1190, lines 19 to 21 (Litz).
[80] Tr. Day 4, p.1084, line 18 to p. 1085, line 9 (Stavins).
[81] Tr., Day 4, p. 1085, lines 9-15 (Stavins). *See also* Tr., Day 4, p. 1085, lines 16-20 (Stavins); **CD-3**, Slide 25: "[The] response of freezing trading with Ontario accounts was a direct, prompt, reasonable, and predictable consequence".

could do anything other than that same day suspending allowance trading."[82] This is especially clear when contrasted with Mr. Litz's alleged "option" of a *post-hoc* adjustment to the cap and his misleading reference to the alleged RGGI precedent, and the withdrawal of New Jersey.[83] The RGGI adjustments in question were made over several years to address surplus allowances (the vast majority of which were not auctioned by New Jersey)[84]and set legislatively.[85] Moreover, as Prof. Stavins highlighted, any direct comparison with withdrawal from the RGGI "d[id] not make sense", as New Jersey's surplus allowances represented a tiny fraction (6%) of the remaining RGGI jurisdictions' annual emissions budget,[86] which was also – in contrast to the WCI's "economy-wide" programs – an industry-specific initiative.[87] California and Québec program administrators were faced with an immediate threat on 15 June 2018 and had no way of guaranteeing when or if legislators would make adjustments sufficient to restore the environmental integrity of their programs.[88]

32. Indeed, regardless of Mr. Litz's speculation, [redacted][91] As Prof. Stavins explained in response to President Zuleta's question,[92] unlike Ontario, California and Québec were not withdrawing from the Cap and Trade linked program, but were preserving their markets from the real threat of a flood of allowances caused by Ontario's actions.[93] That California and Québec might suspend trading with Ontario was thus a direct and foreseeable

[82] Tr., Day 4, p. 1096, lines 5-11 (Stavins).
[83] **RD-3**, Slide 18; Tr. Day 4, p. 1187, line 1 to p. 1188, line 22.
[84] **RS-21**, pp. 12-13; **CER-2**, para. 91.
[85] **RS-40**, pp. 209, 211.
[86] Tr., Day 4, p. 1086, line 15 to p. 1087, line 5 (Stavins).
[87] Tr., Day 4, p. 1221, lines 9-20 (Litz).
[88] **CER-2**, para. 93.
[89] **CD-1**, Slide 58; [redacted]
[90] Tr., Day 2, p. 521, line 16 to p. 527, line 22 (Wood).
[91] Tr., Day 2, p. 523, line 8 to p. 524, line 7 (Wood).
[92] Tr., Day 4, p. 1101, lines 5-16 (President Zuleta)
[93] Tr., Day 4, p. 1102, lines 1-12 (Stavins).

consequence of the Premier-elect's Announcement on 15 June 2018. Accordingly, the Respondent's attempt to avoid responsibility for these consequences is entirely to be rejected.

E. The Hasty Introduction of Regulation 386/18 and the Cancellation Act Served No Legitimate Public Purpose

33. The Hearing also confirmed that the Respondent's attempt to cloak the measures in the guise of a "legitimate public purpose" was equally vain and unprincipled.

34. The Claimants have explained in detail how Ontario hastily introduced Regulation 386/18 on 3 July 2018, just *four days* after the Ford Government came into power.[94] During the Hearing, [redacted]"[96] This hastily adopted Regulation ensured that the *de facto* freeze on all emissions allowances held in Ontario CITSS accounts from the Premier-elect's Announcement on 15 June 2018 became *de jure*, cementing the destruction of any value of the Claimant's investment in Cap and Trade.[97]

35. The Respondent's attempts to portray the Cancellation Act as the result of "good democratic practice", and for a legitimate public purpose, is also unsupported.[98]

36. First, testimony from Mr. Wood confirms the arbitrary, reckless and procedurally unprincipled manner in which Bill 4 (ultimately, the Cancellation Act) was introduced into law. For example, he confirmed that more than half of the public comments received on Bill 4 were disregarded on the sole basis that they opposed the legislation, and that this was done to ensure Ontario's Program would be terminated as quickly as possible.[99] In effect, Ontario ignored thousands of legitimate concerns about Bill 4, simply because they were opposed to a reckless new policy. Of course, these comments were only solicited *after* Greenpeace Canada instituted a legal challenge against the Ontario Government for failing to conduct public consultations in respect of the legislation (as required by Ontario law). This fact was again one conveniently and obviously omitted from the Respondent's whitewashed version of

[94] **CD-1**, Slide 68.
[95] *See* Tr., Day 2, p. 546, line 7 to p. 547, line 20 (Wood).
[96] Tr., Day 2, p. 531, lines 14 to 19 (Wood).
[97] Tr. Day 1, p 29, lines 16 to 20; p. 64, lines 16 to 19 (Claimants).
[98] Tr. Day 1, p 76, lines 1 to 11; p. 77, lines 1 to 7 and p. 127, lines 16 to 22 (Claimants).
[99] Tr., Day 2, p. 574, line 19 to p. 576, line 6 (Wood).

events in its opening statement at the Hearing.[100] Clearly, Ontario had no desire to comply with its own legislative requirements and did so only under threat of judicial sanction.

37. Second, the Respondent's repeated insistence that the Ontario Program was cancelled for a "legitimate public purpose" is further contradicted by its own witness's testimony. During his cross-examination, Mr. Wood could not dispute that more than three and a half years elapsed between the Premier-elect's Announcement on 15 June 2018 and the entry into force of Ontario's current, and substantially similar, emissions performance standard program in January 2022, admitting that it "was a long time".[101] He also acknowledged the Ford Government's objective in cancelling the Program was to bring down gas prices,[102] and [redacted][103] The Respondent's position that the Program's cancellation was part of the Ontario government's "environmental policy" should not detain the Tribunal for long: bringing down the cost of gas at the pump by 10 cents a litre cannot amount to the exercise of a "police power" to protect the environment.

F. The Compensation Framework under the Cancellation Act was Arbitrary and Discriminatory

38. The Respondent's position that Ontario adopted a "principled" compensation approach under the Cancellation Act, and offered allegedly "fair" treatment of the Claimants, remains unsupported following the Hearing. As Prof. Stavins explained: (i) Ontario instead picked "winners and losers" in cancelling its Program;[104] (ii), unfairly and arbitrarily targeted market participants, which it had purposefully included in the regime, to exclude from compensation; and (iii) the Respondent's changing explanations for Ontario's approach to cancellation was "circular" and "absent any true rationale".[105] The Respondent, of course, chose not to question Prof. Stavins during the Hearing.

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[100] Tr., Day 1, p.66, lines 1-21 (Claimants).
[101] Tr., Day 2, p. 569, line 14 to p. 571 line 12 (Wood).
[102] Tr., Day 2, p. 572, lines 4-9 (Wood).
[103] Tr., Day 2, p. 573, line 10 to p. 574, line 19 (Wood).
[104] *See also* **CD-1**, Slide 74 (where the Environmental Commissioner of Ontario found that Ontario's compensation framework "reward[ed] laggards and punish[ed] the rest", including market participants).
[105] **CD-3**, Slides 23-24.

39. Mr. Wood also confirmed that there was no way for market participants to recoup their costs under the Cancellation Act,[106] and by contrast acknowledged that fuel suppliers and natural gas distributors "were able to recover the cost of compliance they faced".[107] Furthermore, while he suggested in his written testimony that market participants were excluded from receiving any compensation because they were not compelled to participate in the Program,[108] he subsequently confirmed during his examination that voluntary participants – likewise not compelled to participate – were *not* excluded from receiving compensation.[109] In this respect, and as Prof. Stavins explained during the Hearing, Mr. Wood failed to identify any supporting rationale as to "*why* differential treatment was appropriate for compensation, when in many other cases … they were treated comparably to compliance entities."[110]

40. As the Claimants explained during the Hearing (and affirmed by the Respondent's own documents), the true reason for Ontario's arbitrary framework was to minimize compensation payable and preserve the Ford Government's public image.[111] In fact, Ontario officials estimated that they could limit compensation to only $5 million, instead of the nearly $250 million it admitted would be required, by eliminating compensation for market participants, and others.[112] And, as Mr. Wood confirmed, [redacted] with the total compensation paid out being, coincidentally, "in the neighbourhood of $5 million."[113] In this regard, it is all the more cynical for the Respondent to invoke "government's policy" to reduce costs associated with the Program's cancellation[114] as a justification for its illegal and unjust decision to exclude an entire class of participants from compensation.

41. The Claimants understandably made every good faith effort to mitigate their losses and be compensated for Ontario's wrongful actions at the time of the measures.[115] Yet these efforts also were derided by the Respondent, who criticised the Claimants for even attempting apply for compensation in February 2019.[116] The Respondent had nothing of

[106] Tr., Day 2, p. 569, lines 7-14 (Wood).
[107] Tr., Day 2, p. 560, lines 12-20 (Wood).
[108] **RWS-3**, para. 22.
[109] Tr., Day 2, p. 496, line 8 to p. 499, line 13 (Wood).
[110] **CD-3**, Slide 24.
[111] Tr., Day 1, p. 106, lines 4-21 (Claimants).
[112] Tr., Day 1, p. 106, lines 8-21 (Claimants).
[113] Tr., Day 2, p. 501, line 19 to p. 502, line 3 (Wood).
[114] Tr., Day 1, p. 268, lines 15-18 (Respondent).
[115] **CD-1,** Slide 76; **CWS 1**, para. 108. *See also* **C-115**, **C-119**.
[116] Tr., Day 1, p. 247, lines 12-18 (Respondent).

value to say about [redacted]

III. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

A. The Tribunal's Jurisdiction *Ratione Voluntatis*, *Temporis* and *Personae* Stands Uncontested

42. There is no dispute between the Parties as to the Tribunal's jurisdiction *ratione voluntatis*, *temporis* or *personae* in relation to KS&T.[119] At the Hearing, the Respondent did not challenge these arguments, which now stand uncontested. Moreover, although the Claimants at the Hearing reiterated the reasons why Koch Industries, Inc. has standing to bring a NAFTA claim,[120] the Respondent made no comment on these issues. For this reason, the Claimants do not elaborate on this, instead focussing their comments on the Respondent's arguments on jurisdiction *ratione materiae*.

43. At the outset, the Claimants confirm that it is ultimately for the Tribunal to determine its jurisdiction based on the evidence before it.[121] The Respondent however, continues incorrectly assert that "[i]f there remains doubt as to whether the Claimants have established they held protected investments, the answer is, they haven't".[122] This wrongly converts the standard for the confirmation of a relevant fact from the "balance of probabilities" (the

[117] **CD-1**, Slide 149; **C-175**.
[118] Tr., Day 1, p. 272, lines 2-6 (Respondent).
[119] *See* **CD-1**, Slide 93. *See also* Reply, paras. 234-236.
[120] *See* Tr., Day 1, p. 99, lines 2 to 20 (Claimants); **CD-1**, Slides 128-129; Reply, paras. 390-398; Memorial, paras. 313-317.
[121] Reply, paras. 239; Claimants' Response to US1128, para. 25.
[122] Tr., Day 1, p. 176, lines 14 to 17 (Respondent) (emphasis added).

correct standard) to a quasi-criminal standard of "beyond any reasonable doubt"; an attempt which should be roundly rejected. Moreover, and as evidenced at the Hearing and recalled below, the Claimants *have* met their factual burden to demonstrate the Tribunal's jurisdiction.

B. The Tribunal has Jurisdiction *Ratione Materiae*

44. During the Hearing, the Claimants confirmed that the Tribunal holds jurisdiction *ratione materiae* under both the NAFTA and the ICSID Convention. With respect to the latter, the Respondent chose not to put forward its jurisdictional arguments at the Hearing, and did not dispute the foundational facts upon which these arguments are premised.[123] Accordingly, the Claimants will not address these arguments further, but note that these undisputed facts clearly support the finding of jurisdiction under the ICSID Convention.

1. The Claimants Hold Investments Under NAFTA Article 1139(g)

(a) Allowances are "Property" Under NAFTA Article 1139(g)

45. The emission allowances that KS&T acquired are "intangible property" under NAFTA Article 1139(g).[124] 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.[125] The Parties agree that: (i) it is appropriate to look to Ontario law for a determination of "property"; and (ii) Ontario courts have yet to consider whether emission allowances are "property" under Ontario law.[126] However, the inquiry does not stop there: it is instead appropriate to consider what conclusion an Ontario court was likely to draw as to the proprietary status of allowances as created under the Cap and Trade Act, and Regulations. In this regard, the Claimants put forward extensive expert evidence, which confirmed that an Ontario Court was most likely to find that emissions allowances constituted "property".

46. The Respondent 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 to assist the Tribunal in making its finding of fact.[127] Yet, in its opening statement, the Respondent argued that the Tribunal need not go any further than noting the absence of express legislative declaration or judicial decision on the status of allowances as property.[128]

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[123] *See*, *e.g.*, **CD-1**, Slides 119-126.
[124] *See* **CD-1**, Slides 95-108; *see also* Reply, paras. 246-296; Memorial, para. 323(c).
[125] **CD-1**, Slide 97; *see also* Reply, para. 248; Claimants' Response to US1128, para. 42.
[126] **CD-1**, Slide 98; Reply, para. 248; **RD-1**, Slides 95-97.
[127] Tr., Day 1, p. 202, lines 11-20 (Respondent).
[128] Tr., Day 1, p. 207, lines 8-13 (Respondent).

The Respondent further – incorrectly – asserted that the Claimants are asking the Tribunal to "base its jurisdiction on speculation".[129] The Respondent is wrong: the Claimants are instead asking the Tribunal to make a finding of fact based on the expert evidence.

47. In this regard, Hearing evidence confirmed as follows: (1) the Ontario courts provide the appropriate analytical framework, the application of which confirms that emission allowances are indeed property; (2) the Respondent's position is not supported by principles of statutory interpretation or the application of the Ontario court framework; and (3) is likewise inconsistent with international practice.

48. The Respondent has no real response to overturn the above conclusions. It instead sought to portray Ontario property law as "too complex" to determine whether allowances are "property" under Ontario law and the typical practice of Ontario courts – as though none of the Tribunal members were capable of assessing the Respondent expert's results-driven, theory-heavy analysis, and weighing it against the common-sense, textually grounded analysis of Prof. de Beer.[130] The Respondent also suggested that since the respective experts reach different conclusions on what an Ontario court would likely hold, they effectively cancel each other out, which would somehow mean that the Claimants have failed to meet their burden of proof.[131] This approach is manifestly incorrect: the Tribunal is called to consider, on the basis of its assessment of the expert evidence, what implications an Ontario court would be more likely to draw from the provisions of the Cap and Trade Act and Regulation and to determine, on the balance of probabilities, whether emission allowances amount to "property" for the limited jurisdictional purposes of NAFTA Article 1139(g). As made clear in the Hearing, and set out as follows, they do.

(1) The Ontario Courts Provide the Appropriate Analytical Framework

49. Prof. de Beer derives the legal test that Ontario courts would apply to a determination of property under Ontario law from the most recent authoritative Canadian cases,[132] being from: (i) the Supreme Court of Canada in *Saulnier v Royal Bank of Canada*;[133]and (ii) the

[129] Tr., Day 1, p. 202, lines 6-10 (Respondent); see also *ibid.*, lines 2-5 (Respondent).
[130] Tr., Day 1, p. 200, line 11 to p. 201, line 1 (Respondent). *See also* Tr., Day 4, p. 880, lines 12-14 (Katz).
[131] Tr., Day 1, p. 223, line 11 to p. 224, line 4 (Respondent).
[132] *See* Tr., Day 3, p. 637, lines 9-14; p. 640, line 10 to p. 641, line 13; p. 642, lines 4-19 (de Beer); **CER-3**, paras. 88-98.
[133] **LK-19,** para. 43 (where the Supreme Court of Canada found a fishing license to be property for the purposes of the Bankruptcy and Insolvency Act).

Ontario Court of Appeal in *Tucows.com v Lojas*.[134] As Prof. de Beer confirmed, and Prof. Katz conceded, what is at issue is whether an allowance is "property" in the sense of an object to which is attached the bundle of rights that display the common law characteristics of property, as opposed to an abstract inquiry into the nature of the "interest".[135]

50. The "preferred approach" of the Supreme Court in *Saulnier* asks: were the exclusive rights that an emission allowance holder had "a good deal more than merely permission to do what would otherwise be illegal" in the relevant statutory context?[136] The Court's legal focus was on what the right-holder *had*, rather than what it *lacked,* or what it could have possessed in theory, or what the Government possessed.[137] Thus, the Supreme Court identified the rights that the license holder held under the statute, which it then determined were "sufficient to qualify the 'bundle of rights' the appellant *Saulnier did* possess as property".[138]

51. The Ontario Court of Appeal decision in *Tucows* complements *Saulnier* by expressly elaborating on the contents of the bundle of rights that make an object (tangible or intangible) "property". The Court examined whether the bundle of rights that Tucows had over a domain name satisfied the "attributes of property" under Ontario law,[139] and confirmed exclusivity is a necessary incident of property.[140]

52. At the Hearing, the Respondent and its expert Prof. Katz incorrectly rejected the existence of any legal test,[141] and concluded that the emission allowances created under the Ontario Program are not abstract "property rights" because Ontario courts "take a cautious approach to admitting new interests to the category of property" and Ontario courts have not yet "admitted" or "added" emission allowances to the category of property.[142] However, as Prof. de Beer explained,[143] the Respondent's position ignores the practice of Ontario and Canadian courts, which have instead adopted a balanced and neutral approach when considering the implications of a statute. Statutorily-created objects such as allowances are

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[134] **LK-7**, para. 64 (where the Ontario Court of Appeal found a domain name to be property for jurisdictional purposes under the Ontario Rules of Civil Procedure).

[135] *C.f.* Tr., Day 4, p. 913, line 19 to p. 914, line 4; p. 917, lines 16-22 (Katz); **CER-3**, para. 35.

[136] *See* **CER-3**, paras. 88-90. *See also* Tr., Day 3, p. 642, line 20 to p. 643, line 3 (de Beer).

[137] *See* Tr., Day 3, p. 653, lines 12-18 (de Beer), **CER-3**, paras. 88-90.

[138] **LK-19**, para. 43 (emphasis in original).

[139] **LK-7**, paras. 55-63.

[140] **LK-7**, paras. 62-64. *See also* **CER-3**, paras. 95-96.

[141] Tr., Day 4, p. 880, lines 19-22 to p. 881, lines 1-3 (Katz) ("The meaning of property is not reducible to a single test in a single case, or even two cases…").

[142] *See* Tr., Day 1, p. 200, line 21 to p. 201, line 1 (Respondent); Tr., Day 4, p. 883, lines 2-5, 16-19 (Katz); *see also* **RER-1**, para. 51; **RER-3**, paras. 6, 34; Counter-Memorial, para. 143; Rejoinder, para. 127.

[143] *See* **CER-3**, paras. 40-45.

not "admitted to the category of property" *via* judicial decision; their proprietary status is determined by the legislature. The court subsequently confirms what the legislature has already established – it does not "create" property by fiat.[144]

53. Moreover, as explained by Prof. de Beer at the Hearing in response to a question from Arbitrator Bjorklund, a legislative declaration expressly stating the proprietary status of allowances was unnecessary. Governments typically take a minimalist approach in that regard: the legislature did what is necessary to create the rights that will make the market mechanism function, leaving it to the courts to recognize the implications of the regime it has created, should the need arise.[145] At the Hearing, Prof. de Beer confirmed, in response to a question from Arbitrator Alvarez, that even though multiple statutory creations have been recognized by Ontario courts as property, legislative declarations on the property status of statutory rights are rare; indeed, both legal experts have only been able to point to a single example of an express declaration, under Ontario's *Securities Transfer Act*.[146] This is further confirmed by the evidence from Prof. Mehling, explaining that even though only one country has made an express declaration recognizing the proprietary status of allowances, there is consistent administrative or judicial practice in many jurisdictions recognizing property rights in allowances *without* explicit recognition in law, even in jurisdictions that deny property rights in allowances.[147] Prof. Katz agrees that, "[i]n the absence of legislative declaration, it falls to courts to determine whether emission allowances are property for the purposes of the law generally or for particular statutory purposes."[148] But that "determination" is a conclusion based upon analysis of an existing legislative state of affairs.

54. Thus, the status of emission allowances as "property" does not require an Ontario judicial decision affirming this fact;[149] it is inherent in the Cap and Trade Act and is revealed by analysing the statute in the same way as an Ontario court would.[150] With this in mind, Prof. de Beer undertook a practical analysis of the Program and examined the Cap and Trade Act as a whole, including its text, context and purpose, in line with the modern principle of

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[144] Tr., Day 3, p. 639, lines 1-12; p. 650, lines 20-22 to p. 651, lines 1-2 (de Beer); **CER-3**, para. 32.

[145] Tr., Day 3, p. 749, lines 6-13 (Arbitrator Bjorklund) and p. 750, line 14 to p. 751, line 4 (de Beer).

[146] Tr., Day 3, p. 754, lines 17-22 (Arbitrator Alvarez), p. 755, lines 1-11 (de Beer); **RER-003**, para. 31; **LK-76,** s. 1, 97.

[147] Tr., Day 3, p.7 69, line 3 to p. 773, line 16 (Mehling).

[148] **RER-001**, para. 50.

[149] Tr., Day 3, p. 638, line 14 to p. 639, line 18 (de Beer).

[150] **CD-2**, Slide 4; Tr., Day 3, p. 638, line 20 to p. 639, line 6 (de Beer) ("When a court applies the modern principle of statutory interpretation, in my view, it's very important to understand that a court is not conferring a legal status upon an intangible object like an emission allowance. A court is confirming the status that the statute already establishes, whether expressly or by operation"). *See also* **CD-1**, Slide 102, Reply, paras. 255-256 and **CER-3**, para. 32.

statutory interpretation, as an Ontario court would do, and applying the precedents binding on that court.[151] In contrast with Prof. Katz, who began her analysis with an adverse presumption against the proprietary status of allowances,[152] Prof. de Beer objectively analysed the bundle of rights that participants exercised over allowances pursuant to the Cap and Trade Act and Regulation.[153] This bundle includes, for example: the right to engage in an exclusive Cap and Trade Program under certain conditions;[154] the ability to "hold" allowances and bank them in an account indefinitely, which is "as close as anyone can come to possessing an intangible object";[155] the ability for mandatory and voluntary participants to use allowances by submitting them to the Minister for compliance purposes;[156] the ability for market participants to use allowances by trading them with others and control their position *vis-à-vis* those allowances;[157] the right to "own" allowances, a term which connotes control and is a core characteristic of property;[158] an open-ended ability to "otherwise deal" with allowances in an unlimited and non-specific way;[159] the right to the earnings from the sale, both of allowances and derivatives and earnings from participating in the program, *i.e.*, earnings from the sale of goods and services that emit GHGs;[160] and the right to direct the director as to how the allowances are supposed to be used.[161] These rights are fundamental indicia of property, including the core characteristic of exclusivity[162] (a necessary attribute as set out in *Tucows*,[163] and agreed by the Respondent and Prof. Katz[164]).

55. After analysing the relevant statute and regulations, Prof. de Beer found ample evidence of "exclusive control and use" in Sections 22(1) and 28(2) of the Cap and Trade Act

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[151] Tr., Day 3, p. 654, lines 2-9 (de Beer); *see also* **CER-3**, paras. 38, 54-62 and section IV.D.

[152] **CD-1**, Slide 101; *see also* Reply, para. 268.

[153] **CD-2**, Slides 7-9 and 13-14; *see also* Tr., Day 3, p. 657, line 12 to p. 658, line 13 (de Beer).

[154] Tr., Day 3, p. 643, lines 4-12 (de Beer). *See also* p. 686, lines 10-17 (de Beer).

[155] Tr., Day 3, p. 643, lines 13-17 (de Beer).

[156] Tr., Day 3, p. 643, lines 19-22 and p. 644, lines 1-2 (de Beer).

[157] Tr., Day 3, p. 644, lines 3-9 (de Beer).

[158] Tr., Day 3, p. 643, lines 18-19 (de Beer); *see also* p. 659, lines 1-18 (de Beer). Prof. de Beer explained that Prof. Katz's suggestion that the term "owned" does not describe a property right but "relates to a relationship of belonging of a holder of a right" is impossible to understand. Notably, in *Anglehart* the federal court of appeal rejected the argument that individual fishing quotas were "property" as they were not "owned" by the appellants: **LK-12**, para. 35.

[159] Tr., Day 3, p. 644, lines 10-14 (de Beer).

[160] Tr., Day 3, p. 644, line 20 to p. 645, line 3 (de Beer); c.f. *Tucows*, **LK-7**, para. 63, where the Court of Appeal noted that, as in *Saulnier*, the holder "derives income from being the holder of the rights in the domain name".

[161] Tr., Day 3, p. 646, line 21 to p. 647, line 3 (de Beer).

[162] Tr., Day 3, p. 654, lines 17-20 (de Beer).

[163] **CD-1**, Slide 101; Tr., Day 3, p. 647, line 17 to p. 648, line 8 (de Beer); **CER-3**, para. 135.

[164] Tr., Day 1, p. 217, lines 4-18 (Respondent). Tr., Day 4, p. 881, line 8 to p. 882, line 2 (Katz).

and Section 15 of the Cap and Trade Regulation.[165] These provisions clearly substantiate the quality of "exclusive control and use" as discussed in *Tucows*, by confirming the many different things a participant could do to control and use allowances to the exclusion of others.[166] On that basis, Prof. de Beer 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.[167] Applying the tests that an Ontario court itself would apply, he thus concluded that emission allowances, created under the Cap and Trade Act, are indeed property as a matter of Ontario law.[168]

(2) The Respondent's Position Remains Unsupported under the Cap and Trade Act, and the Ontario Court Framework

56. By contrast, while the Respondent accepted that modern principles of statutory interpretation must be applied,[169] neither the Respondent nor Prof. Katz applied this principle.

57. First, Prof. Katz did not analyse objectively the statutory features of allowances in either of her two Reports or in her testimony at the Hearing, maintaining a results-driven approach that focussed on one aspect of the Program – the use of allowances for compliance purposes.[170] To this end, Prof. Katz imported into the analysis the theoretical "Hohfeldian" framework, which attempts to identify a predominant element of a legal interest to the exclusion of all other aspects.[171] This is the polar opposite of an Ontario court's application of the modern principle of statutory interpretation. Predictably, her approach reached the results-driven outcome that emission allowances created under the Program are not "property rights", ignoring the full range of attributes granted under the statute.

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[165] **CD-2**, Slides 16-17; Tr. Day 3, p. 643, lines 4-8, p. 654, lines 14-20 (de Beer); **CER-3**, paras. 139-157. *See also* Tr., Day 3, p. 785, line 18 to p. 786, line 2 (Mehling).

[166] These included holding, purchasing, selling, trading, or otherwise dealing with the allowances: *see* Tr., Day 3, p. 647, lines 4-11 and p. 653, lines 4-8 (de Beer); **CD-2**, Slide 7; *see also* **CER-3**, para. 83.

[167] *See* Tr., Day 3, p. 653, line 22 to p. 654, line 18 (de Beer); **CER-3**, paras. 170 and 204-213.

[168] *See* **CD-1**, Slide 99, citing **CER-3**, para. 210.

[169] Tr., Day 1, p. 208, lines 1-8 (Respondent).

[170] Tr., Day 4, p. 889, line 5 to p. 890, line 12 (Katz), stating that: "The core nature of emission allowances as immunities from penalties gives emission allowances their entire purpose within the regulatory framework." For example, Prof. Katz refused to acknowledge the "plain language" of Section 22(1) of the Act, arguing that it does not "create the power to purchase, sell, trade and otherwise deal" with emission allowances. In her view, "Section 22 is a directive, directed at the director" and the "Act as a whole (…) sets out extensive discretion to regulate that". *See* Tr., Day 4, p. 923, lines 2-18 (Katz); p. 927, line 16 to p. 928, line 12 (Katz). *C.f.* **RER-1**, para. 62, where Prof. Katz expressly refers to incidental "powers to purchase, sell or otherwise deal with" allowances.

[171] It is remarkable that Prof. Katz never once acknowledged she has been pushing for a "Hohfeldian" analysis through her career in academia. Not a single court in the world has ever cited her scholarship: Tr., Day 4, p. 905, lines 4-11 (Katz).

58. Without any legal analysis or support from relevant case-law, Prof. Katz baldly asserted through circular reasoning that the "core character" or "core legal nature" of emission allowances is not "rights" in the Hohfeldian sense but "immunities" from penalties, which are "non-compensable regulatory interests" and therefore not property.[172] All the while, Prof. Katz ignored what allowance holders could do with allowances as "incidental as a matter of legal analysis",[173] and sought to dismiss half of the Cap and Trade Act simply because it does not fit within her pet framework.[174] As explained at the Hearing, framing allowances as "immunities" is not based on any principle of statutory interpretation that an Ontario court would likely apply, nor has an Ontario court ever relied on Hohfeldian theory in a property law case.[175] Nor is the characterization of allowances as "immunities from penalty" based on the text of the Act, as Prof. Katz herself admitted at the Hearing.[176]

59. Second, the Respondent and Prof. Katz sought to deny the significance of Ontario's express choice of a "market mechanism" as part of the Program objectives and the commercial context inherent to the Cap and Trade Act and Regulation.[177] Confronted with the clear terms of Section 2(2), Prof. Katz refused to acknowledge that the establishment of a "market mechanism" was a co-equal objective of the Cap and Trade Act.[178] However, in response to a question from Arbitrator Alvarez, Prof. Katz confirmed that her narrow reading of the purpose of the Act had entirely ignored the preamble, which makes clear that "a key purpose" of the Act was to establish a "broad carbon price through a cap and trade program" that would allow Ontario to link to other regional trade markets.[179]

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[172] Tr., Day 4, p. 889, line 19 to p. 890, line 21 and p. 1043, lines 11-22 (Katz); **RER-1**, paras. 9, 25 and footnotes 34, 86, 88; **RER-3**, nn. 56 and 68.

[173] Tr., Day 3, p. 655, line 16 to p. 656, line 12 (de Beer). *See also* **RER-1**, p. 30, n. 85 and para. 62 ("These are powers incidental to and *in respect of* emission allowances and as such do not form the substantive legal core of the emission allowances. Powers to trade an immunity do not imbue the immunity with the character of a 'right'.").

[174] *See* Tr., Day 4, p. 1043, lines 12 to 15 and p. 1052, lines 8 to 17 (Katz); *see also* **RD-1**, Slides 111, 113; **RER-1**, para. 50; **RER-3**, para. 37, 47, 51; Counter-Memorial, para. 244; Rejoinder, paras. 133, 233.

[175] **CD-1**, Slide 102; **CER-3**, para. 39; Reply, paras. 255-256.

[176] Tr., Day 4, p. 1043, lines 11-17 (Katz) ("the language that I'm using to describe emission allowances and immunity from penalty doesn't exist in the Act").

[177] Tr., Day 4, p. 1017, lines 20-22 ("objective is not to create a market"), p. 1026, lines 7-17 (Katz); **RD-1**, Slides 106-7. *See also* **CL-5**, preamble, 8th clause and Tr., Day 4, p. 1024, lines 7-12 (Question from Arbitrator Alvarez), p. 1024, line 13 to p. 1025, line 10 and p. 1026, line 16 to p. 1030, line 6 (Katz). Prof. Katz stated that the preamble is "not part of the actual Act" and ignored its contents.

[178] Tr., Day 4, p. 1022, lines 15-18 ("Q. So the market mechanism bound up in the purpose of the Act, you'd agree with that? (…) A. Is the means to the regulatory end."); p. 1023, lines 9-11 ("A. So to achieve the purpose, you would have to create a market mechanism, but the purpose is to reduce greenhouse gas emissions") and p. 1030, lines 4-6 ("Just again, to put it concisely, I believe it was the means that the Government of Ontario chose to achieve its regulatory objectives.") (Katz).

[179] **CL-5**, preamble, 8th clause; Tr., Day 4, p. 1024, lines 7-12 (Question from Arbitrator Alvarez), p. 1024, line 13 to p. 1025, line 10 and p. 1026, line 16 to p. 1030, line 6 (Katz).

60. Prof. de Beer, by contrast, paid due attention to the practical commercial context of emission allowances that existed under a statute that had hybrid environmental and economic purposes through the synergy of both cap and trade.[180] In choosing a market mechanism (as opposed to some other mechanism), Ontario sought to reduce GHG emissions at the lowest possible cost. This choice meant that it needed a well-functioning market.[181] Creating a proprietary interest in allowances is understood as critical to achieving that objective, as Prof. Mehling testified.[182] Prof. de Beer concluded that 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, in line with the Supreme Court's interpretative instruction in *Saulnier*.[183]

61. Third, the Respondent and Prof. Katz refused to engage in any meaningful analysis of the relevant context in which the question of allowances as property arises, namely, a jurisdictional dispute under the NAFTA, or to accept its obvious similarity with the context in which the Ontario Court of Appeal had to address the status of domain names as "property" in *Tucows*.[184] Instead, aware of how damaging the actual relevant context in this case is to their position,[185] the Respondent sought to analogize the present dispute with *Anglehart*.[186] However, as Prof. de Beer explained, *Anglehart* is entirely distinguishable from the present case.[187] That dispute arose within a starkly different constitutional and policy context and notably involved individual fishing quotas associated with fishing licenses. The language of the *Fisheries Ac*t at issue in that case established the Minister's "absolute discretion" to issue fishing licenses under "any condition".[188] The court also pointed out that the appellants did

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[180] **CER-3**, paras. 75-79.

[181] Tr., Day 3, p. 645, line 17 to p. 646, line 1 and p. 656, line 15 to p. 657, line 6 (de Beer); Tr. Day 3, p. 768, lines 1-19 (Mehling). *See also* **CER-3**, para. 76, citing, **CER-1**, paras. 42-44, 49-50.

[182] Tr., Day 3, p. 768, lines 13-15 (Mehling); **CER-4**, para. 47. At the Hearing, Prof. Katz misrepresented Prof. de Beer's statement on this issue suggesting that he "conceded" that "we don't need property rights in order to have an effective market mechanism" (Tr., Day 4, p. 1021, lines 9-12). However, Prof. de Beer has made clear that "[p]roperty rights *are not the only way to support a market mechanism*, but they are *an effective way to do so*." **CER-3**, paras. 184-186 (emphases added). Indeed, "[e]fficiency is enhanced when transaction costs are minimized, and transaction costs are minimized by clear and enforceable property rights. That is why the context of a market mechanism, and emission allowances' tradability, support the conclusion that allowances are property." (**CER-3**, para. 185).

[183] **CER-3**, paras. 77-79; citing **LK-19**, para. 42 ("commercial realities provide an appropriate context (…) commercial statutes should be interpreted in a way best suited to enable them to accomplish their respective commercial purposes.").

[184] *See* **RER-3**, paras. 81-83.

[185] *See, e.g.*, Tr., Day 4, p. 1037, lines 16-21 (Question from Arbitrator Alvarez) and p. 1038, lines 1-16 (Katz).

[186] Tr., Day 1, p. 216, lines 3-12, citing **LK-12**.

[187] Tr., Day 3, p. 652, lines 4-11 (de Beer); **CER-3**, paras. 70, 161-164.

[188] **LK-12**, paras. 25-30 (setting out relevant provisions), 44 ("I cannot accept this argument, particularly considering the discretion granted to the Minister under the Fisheries Act (…) The crabbers had no legal right to any particular amount of quota. This flows from the nature of fishing licences, in respect of whose issuance the Minister has the broadest discretion") and 47 (referring to the Minister's "colossal task of managing, developing and conserving the fisheries.").

not "own" their individual quotas.[189] By contrast, no such absolute discretion exists under the Cap and Trade Act and the Act expressly confirms that allowances are "owned" by the participant on whose account they are held pursuant to Section 22(2). Contrary to Prof. Katz' suggestion,[190] the approach in *Anglehart* in interpreting the *Fisheries Act* to determine whether quotas are property is consistent with the Claimants' position. Importantly, agreeing with Prof. de Beer's analysis does not require the Tribunal to find that an Ontario court would likely conclude that emission allowances were property in *all* contexts, only in at least *some* contexts, including a jurisdictional context, as has arisen here under the NAFTA. By contrast, accepting Prof. Katz's analysis would require the Tribunal to reach the sweeping and unproven conclusion that allowances were not property under Ontario law in *any* context.

62. Fourth, ignoring the multiple ways in which allowances could be exclusively controlled and used summarized above, the Respondent and Prof. Katz argued that emission allowances lack exclusivity on the alleged basis that: (i) they were subject to the "extensive discretion" of the Government;[191] (ii) Section 70 of the Cap and Trade Act evidences an intention "to create not a property right, but a non-compensable regulatory interest";[192] and (iii) Section 28(2) of the Act prohibited allowance holders from including others.[193] These arguments contradict principles of statutory interpretation and common sense.

63. With respect to (i), the Respondent took the position that "[t]he reservation of government discretion, whether or not exercised, denies the holder of an emission allowance the ability to exclude government from interference". However, as Prof. de Beer has explained, 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 control/use by *allowance holders*.[194] Indeed, any authority over allowances conferred by the Act had to be specifically provided for in the Act itself or "prescribed" in the Regulation adopted under the Act.[195] Consequently, the Government did not have absolute discretion under the statute, and had to exercise its regulatory powers in line with the Act itself and the Regulation, as

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[189] **LK-12**, para. 35.

[190] *C.f.* **CER-3**, paras. 70 and 164; **RER-1**, paras. 46-48.

[191] Tr., Day 1, p. 218, line 10 to p. 219, line 18 (Respondent).

[192] Tr., Day 4, p. 892, lines 8-13 (Katz).

[193] Tr., Day 1, p. 222, line 4 to p. 223, line 4 (Respondent); *see also* **RER-3**, para. 55.

[194] Tr., Day 3, p. 669, line 21 to p. 672, line 10 (de Beer). *See also* **CER-3**, paras. 160-169.

[195] Sections 27(1)-(2) and 33(2) of the Act refer to the authority of the Minister or Director to "cancel" or "remove" emission allowances from a registered participant's cap and trade account either "in the circumstances specified in this Act" or "in such circumstances as may be prescribed" (under Section 1, "prescribed" means by a regulation made under this Act").

acknowledged by Prof. Katz.[196] But when brought to the specific provisions of the Act and Regulation that governed Ontario's power to intervene in the system, Prof. Katz simply refused to accept, on a repeated basis, their plain language, and instead argued that these were merely "examples" of the reservation of a more "extensive discretion" reserved to the Government to make regulations.[197]

64. In addition, none of the examples pointed to by the Respondent show "extensive discretion" with respect to the treatment of allowances.[198] As demonstrated at the Hearing, the instances where the Government had reserved its authority to interfere with emission allowances were limited to a narrow set of cases that were intended to preserve the integrity of the market mechanism— notably: to cover a shortfall in the submission of allowances; rectify discrepancies in accounts' reporting; address a violation of the holding limits; and sanction fraud, market manipulation, or unauthorized transactions. In those few, limited circumstances, the Government could either remove[199] or cancel[200] allowances, or suspend the authority of participants to deal with them.[201] The Government's authority was thus limited to specific contexts, and was narrowly-construed. The term "discretion" is not even mentioned in the Cap and Trade Act or Regulation, in contrast to the clearly distinguishable Canadian cases where the government necessarily retained comprehensive authority over the operation of the statutory scheme. As Prof. de Beer explained at the Hearing[202] and in response to a question from President Zuleta, the Program and its market mechanism are the

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[196] Tr., Day 4, p. 893, lines 6-10, p. 990, lines 2-7, p. 1003, lines 18-22 (Katz) (no absolute discretion in Ontario law) and p. 1002, lines 15-16 (Katz) ("[t]he minister has set out these regulations and has committed itself to following these steps").

[197] *See, e.g.* Tr., Day 4, p. 1010, lines 1-11 and p. 1012, line 22 to p. 1013, lines 1-16 (Katz). When asked about the practical exercise of the Minister's powers under the Act, Prof. Katz stated that she was interpreting provisions in the abstract, as "a property law scholar" and "not discussing the practicalities". Day 4, p. 1002, lines 21-22 to p. 1003, lines 1-3 (Katz).

[198] Tr., Day 1, p. 218, line 15 to p. 219, line 22 (Respondent). *See also* **RER-3**, pp. 22-24.

[199] The removal of allowances contemplated in Section 27(1) and (2) of the Act was possible under five circumstances specified in the Cap and Trade Act and prescribed in the Regulations: (1) a shortfall in the required submission of allowances (s. 14(7) of the Act), in which case ss. 16(1) and 18 of the Regulations set out a specific process, limits and conditions; (2) where the account is closed (s. 26(6) of the Act); (3) where a foreign jurisdiction linked to Ontario's Program cancelled or extinguished an instrument (s. 38(2) of the Act); (4) a discrepancy arising under the Reporting Regulation (s. 20(1) of the Regulations); and (5) a contravention of the holding limits in the Act (s. 43(2) of the Regulations).

[200] Section 33(2) provided that "[t]he Minister may cancel Ontario emission allowances in accordance with the regulations in such circumstances as may be prescribed." Whilst the Regulations regulated the cancellation of *registration* in the program (ss. 27, 35, 38), they do not "prescribe" any circumstances under which emission allowances could be cancelled.

[201] Section 25 provided that the Director could "suspend the authority of a registered participant or designated account agent to deal with emission allowances and credits in the participant's accounts" in "such circumstances as may be prescribed". Section 49(1) of the Regulations "prescribed" such circumstances where the Director "has reason to believe that the participant or account representative has contravened this Regulation or section 21 [transactions by unregistered persons], 28 [Unauthorized transfers] or 29 [Fraud and market manipulation] of the Act."

[202] *See* Tr., Day 3, p. 651 line 5 to p. 652 line 19 (de Beer).

antithesis of supply management programs considered by Canadian courts with regard to the existence or not of a "property" interest.[203]

65. With respect to (ii), the Respondent and Prof. Katz further mischaracterized Section 70 of the Cap and Trade Act, arguing that this provision suggests that a participant "could not exclude the government from adopting measures that interfered with or cancelled the emission allowances by requiring compensation".[204] Not only is this interpretation deeply flawed,[205] but it is also inconsistent with the prior position taken by Prof. Katz that "Section 70 is not determinative of the legal nature of emission allowance as it explicitly addresses only the quality of government actions."[206]

66. In fact, as explained during the Hearing, the Supreme Court of Canada in *Annapolis v. Halifax* confirmed that provisions like Section 70 do nothing more than disclaim financial liability (and not other legal remedies) in the domestic law context.[207] Section 70 says nothing about the nature of the "interest" and whether it is property; nor does it say anything about how allowances could or could not be used. To the contrary, Section 70 as drafted actually supports the inference that allowances are property, rather than the opposite; if they were not property, an express declaration of "no compensation" would be unnecessary to protect against domestic law expropriation claims.

67. Finally, with respect to (iii), Prof. Katz further alleged that emission allowances lack the necessary exclusivity ostensibly because Section 28(2) of the Act precludes their "fragmentation".[208] In the first instance, this is a purely academic concept,[209] and Prof. Katz has not provided any authority for the proposition that the ability to fragment is part of the concept of exclusivity under Ontario law.[210] In any event, with regard to Section 28(2) of the Cap and Trade Act, Prof. de Beer explained that this provision only prevented one type of

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[203] *Bouckhuyt* on tobacco (**R-67**, paras. 22-24 (holding that the "unfettered" and "complete discretion" of the Board over tobacco quotas that prevented a conclusion that it amounted to intangible personal property); *Taylor* on dairy (**LK-27**, para. 70 (holding that producers exercised "very little control" over dairy quotas that were subject to "comprehensive" regulatory control over the producer's ability to obtain, retain and transfer the quota)); and *Anglehart* on fisheries (**LK-12**, paras. 25 and 47-49, (accepting the lower court's finding that the "absolute discretion" granted to the Minister under the Fisheries Act prevented a conclusion that a fishing license amounted to property)).

[204] Tr., Day 1, p. 220, lines 1-21 (Respondent).

[205] Tr., Day 4, p. 892, lines 8-13 (Katz).

[206] **RER-1**, para. 59.

[207] Tr., Day 3, p. 660, line 12 to p. 662, line 12 and p. 728, lines 5 to p. 730, line 22 (de Beer).

[208] *See* Tr., Day 4, p. 892, lines 14 to 21 (Katz); *see also* **RER-1**, para. 69.

[209] Tr., Day 3, p. 648, lines 3-8 (de Beer).

[210] Tr., Day 3, p. 659, line 19 to p. 660, line 11 and p. 702, line 18 to p. 703, line 5 (de Beer).

fragmentation of the right – the creation of a trust.[211] Section 28(2) did not prevent holders from creating security interests in their allowances, as Profs. de Beer and Mehling confirmed.[212] Prof. de Beer also pointed out that Prof. Katz lists the ability to create a security interest as an example of the ways that one can fragment intangible rights.[213] Consequently, even if the ability to fragment were an accepted aspect of exclusivity for purposes of finding something to be "property" (*quod non*), Prof. de Beer amply demonstrated it would have been met in the case of emissions allowances under the Act.

68. Thus, the approach of the Respondent and Prof. Katz to exclusivity is inconsistent with the approaches applied by the Supreme Court of Canada in *Saulnier* and the Ontario Court of Appeal in *Tucows*, which both focussed on what the right holder could *do* and the rights actually held, rather than on what ostensibly was lacking.[214] By contrast, and as discussed above, the overwhelming conclusion to be drawn based on practical, legal precedent, is that an Ontario court would find allowances to be "property".

(3) The Respondent's Position Remains Unsupported by International Case Law and Practice

69. The conclusions of Prof. de Beer are also supported by international cases and practice,[215] which – as explained in detail by Prof. Mehling – confirm the recognition of carbon emission allowances as property.[216] In particular, in the *Armstrong* case, the English High Court found that emission allowances under the EU ETS (**EUAs**) are "property" under common law,[217] because they satisfy the criteria set out in *Ainsworth*: they are definable; identifiable; capable of assumption by third parties; and have permanence and stability.[218] Emission allowances under Ontario's Cap and Trade Act also display those attributes.[219]

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[211] Tr., Day 3, p. 698, lines 5 to 22 to p. 699, lines 1 to 7 (de Beer); *see also* **CD-2**, Slide 17.

[212] *See* Tr., Day 3, p. 698, line 19 to p. 699, line 7 (de Beer). *See* Tr., Day 3, p. 867, lines 1-7 (Mehling) and p. 744, lines 1-7 (de Beer) ("What you had to do to have a functioning market mechanism was the ability to (…) create derivatives and collateralize the allowances. That's (…) exactly what happened.").

[213] *See* Tr., Day 3, p. 698, lines 4-12; (de Beer); **RER-1**, para. 29.

[214] Tr., Day 3, p. 637, lines 17-19 and p. 642, line 20 to p. 643, line 8 (de Beer).

[215] Tr., Day 1, p. 85 lines 5 to 7 (Claimants); *see also* **CD-1**, Slide 105.

[216] According to Prof. Mehling, international practice supports the notion that emission allowances have the characteristics necessary for recognition of property at common law (Tr., Day 3, p. 785, lines 9-17 (Mehling)); that "many emissions trading systems recognize property rights in allowances" (Tr., Day 3, p. 769, lines 1-2 (Mehling)); and "[e]ven without explicit recognition (…) a number of jurisdictions have seen judicial practice or administrative practice recognize property rights in allowances" (Tr., Day 3, p. 769, line 14 to p. 771, line 7)). Moreover, even in the few jurisdictions that "have a legislative or regulatory declaration that emission allowances are not property, the practice has nonetheless seen that there is recognition of ownership interest." (Tr., Day 3., p. 773, line 18 to p. 774, line 21). *See also* **CER-4**, section 3.

[217] Tr., Day 3, p. 771, line 8 to p. 772, line 17 (Mehling). *See also* **CER-4,** paras. 19-24; **CER-3**, paras. 100-111.

[218] **LK-40**, para. 50.

[219] Tr., Day 3, p. 648, line 11 to p. 650, line 22 (de Beer). *See also* **CER-3**, para. 211.

Moreover, Prof. de Beer explained that it would be significant to an Ontario court that the *Ainsworth* test, which the Ontario Court of Appeal applied in *Tucows*, formed the basis for the High Court's finding in *Armstrong* that EU allowances amounted to property.[220]

70. Confronted with such overwhelming evidence of international practice, the Respondent first tried to dismiss Prof. Mehling's conclusions as "speculative",[221] including by selectively quoting from his report.[222] This was not based on rational analysis, but simply because Prof. Mehling's findings on international practice plainly contradict their position.[223]

71. Second, the Respondent asserted, again without foundation, that the approaches of other jurisdictions "have limited relevance to an Ontario Court's assessment of an Ontario statute under Ontario law".[224] However, the judgment in *Tucows* demonstrated that international practice will likely be considered by an Ontario court in a property case.[225] As Prof. de Beer explained, the *Armstrong* judgment "would be highly persuasive to an Ontario court" and would be "analyzed closely".[226] In any event, regardless of the precise weight that an Ontario court would place on international practice in the legal treatment of emission allowances in other emissions trading systems, the Respondent has offered no explanation why *the Tribunal* cannot consider such evidence in its legal analysis.

72. Third, while Prof. Katz ultimately accepted that emission allowances under the Program partially satisfied the *Ainsworth* test (which they in fact do, fully) by being definable and capable of assumption by third parties,[227] she nevertheless avoided answering the question whether allowances were identifiable on the basis of their unique reference number and other characteristics (as the High Court held in respect of EUAs in *Armstrong*).[228]

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[220] *See* Tr., Day 1, p. 85, lines 5 to 20 (Claimants); **Exh. CD-1**, Slide 103; **CER-3**, paras. 93, 102-105, 109, 125; **LK-7**, para. 64; **LK-40**, para. 50. The Respondent incorrectly asserted at the Hearing that: "the Claimants did not submit any evidence on the status of emission allowances under Ontario law until their Reply", and that the Claimants' "evidence [was] late in arriving" (Tr., Day 1, p. 199, lines 2-4 (Respondent). The Claimants cited to the High Court's critical conclusion in *Armstrong* in their Memorial (para. 30, n 12 and n 416), and elaborated on these issues in their Reply. The Claimants were not obliged in their Memorial to anticipate and pre-empt the Respondent's argument that allowances are not property.

[221] *See* **RER-3**, para. 90, n 37; Rejoinder, para. 123.

[222] *See* Tr., Day 1, p. 199, line 21 to p. 200, line 3 (Respondent); **RD-1**, slide 97; citing **CER-4**, para. 62.

[223] **CER-4**, para. 59 (*see also* paras. 15, 59).

[224] Tr., Day 1, p. 200, lines 5 to 9 (Respondent).

[225] **LK-7**, paras. 50-55.

[226] Tr., Day 3, p. 703, line 13 to p. 704, line 3 (de Beer).

[227] Tr., Day 4, p. 935, lines 5-9 (Katz) ("I think they're definable, yes."); Tr. Day 4, p. 953, lines 14-18 (Katz) ("So here in *Armstrong*, the Court treats the fact that allowances are transferrable; i.e., tradeable, as demonstrating that they're capable of assumption by third parties; right? A. So, yes, the Court does do that."), p. 954, line 22 to p. 955, line 4 ("Q. So just to clarify (…) you agree that allowance doesn't depend on its connection to a particular person, that the allowance doesn't shift in nature when it goes from one person to the next? A. So I actually agree with that.").

[228] **LK-40**, paras. 17 and 50-51; Tr., Day 4, p. 940, line 14 to p. 950, line 7 (Katz).

Moreover, she merely rehashed that emission allowances lacked stability because "the government has reserved the power to remove, to suspend, to cancel, even" allowances.[229]

73. In this connection, it is crucial to note that the High Court in *Armstrong* used Hohfeldian terminology to state that an EUA "is not a 'right' (in the Hohfeldian sense)" but "represents at most a permission (or liberty in the Hohfeldian sense) or an exemption from a prohibition or fine" — and yet, the High Court immediately went on to find that "the sum total of rights and entitlements conferred on the holder pursuant to the ETS" amounted to "property" at common law, as it satisfied the *Ainsworth* test.[230] Confronted with this conclusion, Prof. Katz was simply unable to articulate any credible response, and instead tried to mischaracterize the basis of the High Court's decision.[231] However, this tactic is unsupported by the plain text of the judgment itself, as explained by both Profs. Mehling and de Beer.[232] Moreover, and remarkably, when faced with the question whether the analysis in *Armstrong* undermined her theoretical framework predicated on a "Hohfeldian" terminology, Prof. Katz simply stated that she disagreed with the reasoning of the High Court in "stage two" and "stage three" of her proposed framework, because the High Court "wasn't being precise at that point" on the "core legal nature" of emission allowances.[233] This is despite the fact that Prof. Katz ultimately acknowledged that she had not examined whether the enacting regulations underlying the ETS are comparable to the Cap and Trade Act and Regulation.[234]

74. There is no question that the statutory framework under the EU ETS strongly resembled the framework set out in Ontario's Program,[235] nor has the Respondent been able to point to any statutory difference that would warrant a conclusion different to that reached in *Armstrong*. Thus, the Tribunal is facing a situation where an instrument for all purposes the same as an Ontario Cap and Trade allowance was expressly considered by a leading common law jurisdiction and found to be "property" in common law, applying the exact same test as would be applied by an Ontario court. To accept the Respondent's position on

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[229] Tr., Day 4, p. 970, line 3 to p. 972, line 9 (Katz).

[230] **LK-40**, paras. 48 and 50.

[231] Tr., Day 4, p. 1047, line 14 to p. 1049, line 9 (Katz) and p. 1053, lines 4-22 (Katz); **RER-1**, paras. 61, 78-79.

[232] Tr., Day 3, p. 860, lines 9-22 (Mehling); **CER-3**, paras. 104-109; **CER-4**, para. 24 ("Importantly, this test [*Celtic Extraction*] was not used to determine whether allowances constituted property (a finding that had already been established applying the *Ainsworth* test, as set out above); instead, the *Re Celtic* test was applied to confirm that allowances are *intangible* property…"). *See also* **LK-40**, paras. 50, 52 and 58.

[233] Tr., Day 4, p. 1049, lines 11-15 (Katz). *See also* Tr., Day 4, pp. 1053-1056 (Katz).

[234] Tr., Day 4, p. 971, lines 12-13 (Katz) ("don't know if that's the case. I haven't reviewed the enacting legislation") and p. 1049, line 17 to p. 1050, line 3 (Katz) ("I haven't studied the EUAs, but broadly speaking, the analytical claim I'm making is--you know, more or less, I think it's fair to say supported by Paragraph 50…").

[235] Tr., Day 3, p. 469, lines 8-16 (de Beer). *See also* **CER-3**, para. 100**.**

jurisdiction would require the Tribunal to endorse the view that an Ontario court would likely decline to follow *Armstrong*, which is simply not credible. The Respondent has failed to provide any reason why the Tribunal should ignore this highly-persuasive authority.[236]

75. In sum, the Hearing confirmed that an Ontario court would most likely conclude that emission allowances under the Cap and Trade Act are "property" and thus constituted an "investment" under NAFTA Article 1139(g), establishing the Tribunal's jurisdiction.

(b) KS&T Acquired the Allowances for Economic Benefit

76. At the Hearing, the Claimants recalled that KS&T acquired the allowances for economic benefit or other business purposes under NAFTA Article 1139(g), including by: engaging in the Program as a natural development of its environmental credit trading business; registering as an Ontario market participant, retaining the services of an Ontario-based PAR, and opening an Ontario CITSS account; participating as a regular primary market participant, submitting bids in all 6 emissions allowance auctions that took place in 2017-2018; frequently engaging in significant and sustained secondary market activity with Canadian counterparties in 2017-2018; doing so all with a view to making a profit.[237] The Respondent does not dispute *any* of these facts, save for its incorrect attempt at downplaying KS&T's secondary market activity.[238] Viewed together with the broader operational context of KS&T, it is indisputable that the acquisition of emissions allowances by KS&T was for "economic benefit or other business purposes".

77. Contrary to the Respondent's suggestion,[239] there is no lack of clarity in the Claimants' position as to which emission allowances amount to covered investments under NAFTA Article 1139(g), as the Claimants have described in their written pleadings, at the Hearing, and in Part II.B above.[240] Furthermore, the Respondent admits that Ontario issued [redacted] of the [redacted] emission allowances that KS&T purchased at the May 2018 auction;[241] and that KS&T paid [redacted] into bank settlement accounts that were formally handled by Ontario's agent, and received [redacted] allowances into its Ontario

[236] Tr., Day 4, p. 900, line 7 to p. 901, line 5; p. 905, lines 10-11 (Katz).
[237] *See* **CD-1**, Slide 107.
[238] *See* Reply, paras. 50-59.
[239] *See* **RD-1**, Slides 92-93.
[240] *See* Tr., Day 1, p. 29, lines 11 to 14; p. 46, lines 14 to 21 (Claimants); **CD-1**, Slide 3; *see also* Reply, para. 127; Tr., Day 2, p. 553, line 16 to p. 556, line 3 (Wood).
[241] *See* **RD-1**, Slide 92; *see also* Counter-Memorial, paras. 64, 76, n 243.

CITSS account for this payment.[242] There is also no dispute that Ontario retained authority over all allowances held in Ontario CITSS accounts, including the Claimants', and Ontario indeed proceeded to annul these allowances without compensation, and without any distinction as to whether Québec or California or Ontario had created these allowances.[243]

78. Accordingly, the emissions allowances that KS&T acquired in Ontario, including those that KS&T acquired at the May 2018 auction, are property acquired for economic benefit or other business purposes under NAFTA Article 1139(g).

2. The Claimants Hold Investments Under NAFTA Article 1139(h)

(a) The Respondent's Legal Standard Remains Unsupported

79. In any event, the emissions 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).[244] In this respect, the term "interests" carries a broad ordinary meaning,[245] as recognised by NAFTA tribunals.[246]

80. At the Hearing, the Respondent misrepresented the Claimants' position on the scope of Article 1139(h), and failed to support its narrow reading of the provision.

81. First, the Respondent asserted that the Claimants argued that the chapeau uses the term "such as" to denote that the items mentioned in subparagraphs (h)(i) and (h)(ii) are merely examples of an economic activity.[247] This is a red herring, and an incorrect framing of the Claimants' case.[248] Instead, as the Claimants have explained, the clear intention of the NAFTA Parties in the chapeau of Article 1139 is to infuse the term "interests" with a broad meaning by using the open-ended expression "such as". The effect of the expression "such as" on the term "interests" does not change whether one considers that the illustrative examples amount to qualifying interests in and of themselves or to examples of economic activity under which qualifying interests may arise. In this respect, and contrary to the

[242] *See* Reply, para. 125, 128-129.
[243] *See* Tr., Day 1, p. 19, lines 7 to 12 (Claimants); *see also* Reply, para. 126.
[244] *See* **CD-1**, Slides 109-115.
[245] *See* **CD-1**, Slide 111, citing the definition of "Interest", in **CL-171** ("[a] legal share in something" and "any aggregation of rights, privileges, powers, and immunities").
[246] *See* **CD-1**, Slide 110-112, citing **CL-19**, paras. 140 and 142 (emphasis added); *see also* Reply, para. 313.
[247] *See* Tr., Day 1, p. 229, lines 7 to 13 (Respondent).
[248] *See* Reply, para. 345; Claimants' Response to US1128, para. 55.

Respondent's suggestion,[249] there is no disagreement between the Claimants' interpretation of NAFTA Article 1139(h)[250] and the interpretation that the United States put forward.[251] Rather, the divergence arises between the Respondent's overly restrictive reconstruction of the chapeau of Article 1139(h) and the interpretation of the United States, which had nothing to say about unwritten restrictions or exclusions to the chapeau. In fact, the United States clearly pointed to the separate provisions under NAFTA Articles 1139(i) and 1139(j) as the proper bases for exclusions from the definition of investment.[252] In no way did the United States suggest that interests not possessing the characteristics of the illustrative examples in sub-subsections (i) and (ii) should be excluded under NAFTA Article 1139(h).

82. Second, the Respondent then attempted to derive from the illustrative in NAFTA Article 1139(h)(i) and (ii) additional requirements to inappropriately superimpose onto the plain, ordinary and clear meaning of the chapeau of NAFTA Article 1139(h). For example, at the Hearing, the Respondent stated that the illustrative examples led to the conclusion that: "the types of contractual interests illustrated confirm that any cognizable interest (…) must be longer term and include an important commitment of capital in the territory of the host State".[253] This is neither proper treaty interpretation nor a proper use of context; this is a textbook case of reading unwritten requirements into an otherwise clear treaty provision.

83. Moreover, the Respondent failed to clarify or quantify either this supposed "longer term" requirement ("longer" than what duration?) or this "important commitment of capital" (when does a contribution become "important"?). The Claimants disagree with the Respondent's overstated importance of the illustrative examples.[254] What should guide the Tribunal is the ordinary meaning of the term "interests", which the Claimants conveyed in clear and simple terms at the Hearing and which has previously been applied by other NAFTA tribunals.[255] By contrast, the Respondent failed to engage with this meaning, and instead improperly used illustrative examples that go beyond their consideration as "context".

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[249] *See* Tr., Day 1, p. 229, lines 10 to 19 (Respondent).

[250] *See* Claimants' Response to US1128, paras. 51-52; *see also* Reply, paras. 345-348.

[251] The U.S. opined that "such interests might arise from, for example" from the illustrative examples set out in subsections (i) and (ii) of Article 1139(h), but did not assert that these examples are interests in and of themselves. **US1128**, para. 8.

[252] *See* **US1128**, para. 9.

[253] *See* Tr., Day 1, p. 230, lines 2 to 7 (Respondent).

[254] *See* Tr., Day 1, p. 230, lines 8 to 11 (Respondent).

[255] *See* Tr., Day 1, p. 90, line 10 to p. 91, line 3 (Claimants); *see also* **CD-1**, Slides 111-112.

The Respondent's approach reflects a desperate attempt to bury the intended meaning of "interests" as used in Article 1139(h) under a thick layer of unwritten requirements.[256]

(b) The Facts Demonstrate Satisfaction of the Criteria Under NAFTA Article 1139(h)

84. At the Hearing, the Claimants further explained that the emissions allowances they acquired and their carbon trading business satisfy the other criteria set out in Article 1139(h) since: (i) the Claimants' emission allowances qualify as interests that "ar[ose] from the commitment of capital or other resources"; (ii) KS&T's commitment of capital and other resources was made "in the territory of [Ontario]"; and (iii) KS&T's commitment of capital and other resources was "to economic activity in [Ontario's] territory".[257] Once again, the Respondent does not dispute any of these facts, save for its incorrect attempt at downplaying KS&T's secondary market activity.[258]

85. Instead, in framing the Claimants' activities as cross-border trading, the Respondent adopts a reductionist analysis and a cookie-cutter approach that disregards the broader operational context of the Claimants' engagement with Ontario's Program. This strategy is irreconcilable with numerous undisputed facts, including the purchases of Ontario-administered allowances from Ontario-administered auctions, which were deposited into KS&T's Ontario-registered CITSS account.[259] As described in Part II.B, these undisputed facts show clearly that the purchase by KS&T of emission allowances at the May 2018 auction was far from a mere "one-off cross-border trade", or indeed that there was any "cross-border trade" at all. The essential Ontario focus of KS&T's investment was reflected in the massive amounts of capital KS&T directly poured into Ontario as an investor in the Ontario Program through its purchase of allowances.

86. In any event, the Respondent is estopped under international law from raising any jurisdictional objection *ratione materiae* on the basis of territorial requirements.[260] The Respondent suggested at the Hearing that "the Claimants argue the Tribunal can find jurisdiction even if the facts do not support that finding".[261] The Respondent is wrong: the Claimants have demonstrated in evidence that KS&T's emission allowances arose from its

[256] *See* **RD-1**, Slides 136-137.
[257] *See* **CD-1**, Slide 113.
[258] *See* Reply, paras. 50-59.
[259] *See*, *e.g.*, Part II.B above; **CD-1**, Slide 114.
[260] *See* **CD-1**, Slides 117-118.; *see also* Reply, paras. 330-341.
[261] *See* Tr., Day 1, p. 233, lines 8 to 15 (Respondent); **RD-1**, Slide 142.

commitment of capital and other resources to economic activity in the territory of Ontario. The Respondent is estopped from challenging the sufficiency of that demonstration (notably, seeking to point to any cross-jurisdictional aspects of KS&T's overall running of its business) 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.

3. Neither the NAFTA nor the ICSID Convention Require Physical or Corporate Presence in a Territory

87. As the Claimants explained in their written submissions, there is no requirement under either NAFTA Article 1139(g) or 1139(h) or the ICSID Convention for a physical presence or fixed place of business in Canada, nor is there a need for the Claimants to establish any kind of activity that goes beyond the making of the investment. What is relevant is that KS&T committed capital and resources in Ontario through holdings in intangible property and its related emissions allowances business, which as noted were fundamentally situated "in Ontario" through registration, engagement in auctions, and its allowances account, all essential to its investment model.[262]

88. At the Hearing, the Respondent nevertheless spent a considerable amount of time focused on the fact that the Claimants are U.S. enterprises that operated mainly in the United States, and that decisions regarding KS&T's participation in Ontario auctions were made in the United States.[263] The Respondent's efforts are in vain. There is no requirement for a physical or corporate presence in Canada in order to make an investment covered under either NAFTA Article 1139(g) or 1139(h) or the ICSID Convention.

89. Moreover, the fact that the Claimants operated mainly from the United States does not detract from their investment-making activities in the territory of Canada. Indeed, the Respondent readily admitted the following undisputed facts at the Hearing, which clearly establish that the Claimants' investments were made in the territory of Ontario, including that KS&T: (i) registered as a market participant in Ontario, with an Ontario-based Koch employee as PAR;[264] (ii) participated in Ontario-only auctions in 2017 and in joint Ontario-Quebec-California auctions in 2018,[265] using an Ontario-specific website;[266] (iii) purchased

[262] Reply, paras. 355, 371, citing **CL-156**, para. 429.
[263] *See* **RD-1**, Slides 48-90.
[264] *See* **RD-1**, Slides 56-57, 58, 87.
[265] *See* **RD-1**, Slides 60-64, 72, 81.
[266] *See* Tr., Day 2, p. 553, line 16 to p. 556, line 3 (Wood).

allowances in Ontario in 2017 and 2018 which were deposited directly into its Ontario-registered CITSS account;[267] and (iv) held allowances in its Ontario CITSS account in 2017 and 2018, and used this account for secondary market transactions in the same period including for compliance obligations in Ontario.[268] KS&T's allowances were subject to Ontario regulatory control,[269] and Ontario asserted this control in cancelling the allowances without compensation.[270] These undisputed facts all highlight the essential nexus between the Claimants' investment-making activities and the territory of Canada.

IV. THE RESPONDENT IS LIABLE FOR BREACHES UNDER NAFTA CHAPTER ELEVEN

A. The Premier-Elect's Announcement of 15 June 2018 is a "Measure"

90. At the Hearing, the Respondent acknowledged that the following are all "measures" under NAFTA Article 1101(1): Ontario's decision not to issue an auction notice of 15 June 2018; Ontario Regulation 386/18 of 3 July 2018; Bill 4 submitted on 25 July 2018, and adopted as the Cancellation Act on 31 October 2018; and Ontario's formal denial of compensation on 14 March 2019.[271] However, it continues to assert that the Premier-elect's Announcement does not amount to a measure,[272] trying to avoid the Tribunal's consideration of those *ultra vires* actions in assessing the Respondent's breach of the NAFTA.

91. As was evident during the Hearing, the Respondent's position is unsupported by legal authority, and rests solely on its self-serving interpretation of the NAFTA text. It asserts that to be a measure, "an impugned act" must "impose requirements or govern conduct"[273] and is only "adopted when it is taken, approved or formally accepted, and maintained when it is continued".[274] The Respondent failed to provide any support for its narrow interpretation.

92. The Claimants for their part have clearly and consistently articulated the applicable legal standards under Articles 201 and 1101, supported by jurisprudence and the facts in these proceedings.[275] The sudden Announcement on 15 June 2018 was a requirement or practice and therefore a measure under NAFTA Article 201, wherein Premier-elect Ford

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[267] *See* **RD-1**, Slide 66.
[268] *See* **RD-1**, Slides 68-69, 80. *See* Tr., Day 1, p. 29, lines 11 to 14; p. 46, lines 14 to 21 (Claimants); **CD-1**, Slide 3.
[269] *See* **RD-1**, Slide 26.
[270] *See* Tr., Day 1, p. 19, lines 7 to 12 (Claimants).
[271] *See* Tr., Day 1, p. 246, lines 15-19 (Respondent); **RD-1**, Slides 150, 157-162. *See also* Reply, paras. 402-410.
[272] Tr., Day 1, p. 241, lines 15-20 (Respondent). *See also* Reply, paras. 402-410, **CD-1**, Slide 132.
[273] Tr., Day 1, p. 242, lines 20-22 to p. 243, lines 1-3 (Respondent).
[274] Tr., Day 1, p. 243: 6-9 (Respondent).
[275] *See*, *e.g.*, Memorial, paras. 185-206; Reply, paras. 402-410; **CD-1**, Slides 132-135.

confirmed that he had "directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits."[276] [redacted][279] In any event, the Respondent does not deny the fact that the implementation of the Premier-elect's direction, *i.e.*, the decision by Ontario officials not to issue the auction notice and not to participate in the August 2018 auction with the aim of implementing the Announcement, is in and of itself a measure. The Respondent's attempt to argue that Ontario did not "do anything" on 15 June 2018 is therefore a red herring.

B. The Measures Amount to a Breach of NAFTA Article 1105(1)

93. The Claimants have demonstrated at length how the Respondent has violated the fair and equitable treatment (**FET**) standard as set out under NAFTA Article 1105(1) with respect to its treatment of the Claimants and their investment.[280] Ontario's actions were manifestly arbitrary and discriminatory,[281] and included an express denial of justice.[282] Ontario's violation of the Claimants' legitimate expectations in taking these actions further confirm that a NAFTA breach has occurred.[283] Each of the Claimants' claims are supported by wide-ranging and consistent legal authority (including NAFTA-specific jurisprudence and commentary).[284]

94. In the Hearing, the Respondent continued to largely ignore the weight of legal authority supporting the Claimants. Instead of addressing the Claimants' specific arguments within the framework of Article 1105(1), it simply repeated that "Article 1105 establishes a

[276] *See* Tr., Day 1, p. 102, lines 6-17 (Claimants); Tr., Day 1, p. 103, lines 1-11 (Claimants). *See also* Reply, paras. 402-410; **CD-1**, Slides 133-135; **C-7**; Memorial, paras. 185-206; Reply, paras. 405-410.

[277] Tr., Day 1, p. 245, lines 7-11; *id*., p. 245, lines 21-22 to p. 246, lines 1-5 (Respondent).

[278] *See* Tr., Day 2, p. 533, lines 9-19 and p. 534, lines 20-22 (Wood) ([redacted]). *See also* Reply, paras. 134-138.

[279] Tr., Day 2, p. 533, lines 14-15; p. 534, line 19 to p. 535, line 2 (Wood).

[280] *See* Memorial, paras. 344-399; Reply, paras. 411-511; **CD-1**, Slides 137-149.

[281] Memorial, paras. 352-374; Reply, paras. 428-455; **CD-1**, Slides 139-149.

[282] Memorial, paras. 375-387; Reply, paras. 456-485; **CD-1**, Slides 150-157.

[283] Memorial, paras. 388-399; Reply, paras. 486-510; **CD-1**, Slides 158-159.

[284] Memorial, Part IV.B; Reply, paras. 414-510.

floor for treatment to be accorded to investments of investors of another party. That floor is set as the customary international law minimum standard of treatment."[285] But there is no dispute between the Parties on this point,[286] and the Respondent's repeated, hollow statement has no bearing on the Tribunal's consideration of the arguments in dispute.

95. What is in issue, and what the Respondent has continuously failed to adequately address, is the standard of Article 1105(1) and the minimum standard of treatment. The Claimants have demonstrated that NAFTA tribunals have consistently acknowledged that the fundamental protections contained in the minimum standard include protection against denial of justice, a fundamental breach of due process, manifest arbitrariness, targeted discrimination, or the abusive treatment of investors.[287] These standards are consistent with the Respondent's own model investment agreement from 2021 as well as with the language negotiated and agreed upon in its more recent free trade agreements.[288]

96. Yet, the Respondent in the Hearing (and throughout this dispute) adopted a tactic of ignore and pivot: largely ignoring the actual arguments on legal standards advanced by the Claimants, and instead unilaterally reframing the Claimants' claims for its own ends. This evasion should be rejected.

97. With respect to the Claimants' claims of arbitrary and discriminatory treatment, the Respondent noted at the outset of the Hearing that "[n]otably, the minimum standard of treatment does not include a protection against regulatory change."[289] As the Claimants have repeatedly explained, these arguments fail to reflect what is actually in dispute between the Parties, and are incorrect as articulated.[290] The Claimants have never argued that Article 1105(1) incorporates an obligation of regulatory stability. As affirmed at the Hearing, States have the right to impose regulatory change: the issue instead is whether the manner in which the State effects such change is arbitrary or discriminatory in light of the international legal standards in question. It is this fundamental question that the Respondent continues to steadfastly ignore, presumably because it knows engaging with the actual legal standards and facts in issue in this case lead directly to a finding of breach.

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[285] Tr., Day 1, p. 264, lines 21-22 to p. 265, lines 1-2 (Respondent). *See also* **RD-1**, Slides 198-201.

[286] *See*, *e.g.*, Memorial, paras. 344-345; Reply, paras. 414-415.

[287] *See*, *e.g.*, Memorial, paras. 346-348, including nn. 437-438; Reply, paras. 414-421.

[288] *See*, *e.g.*, Tr., Day 1, p. 103, lines 12-22 to p. 104, lines 1-21 (Claimants); Memorial, paras. 344-348; Reply, paras. 414-419; **CD-1**, Slides 137-139.

[289] Tr., Day 1, p. 265, lines 19-21 (Respondent).

[290] *See*, *e.g.*, Tr., Day 1, p. 105, lines 8-15 (Claimants); Reply, paras. 430-438.

98. The same is true of the Claimants' claims of denial of justice under Article 1105(1). The Claimants argued that Section 10 of the Cancellation Act amounts to an express denial of justice under the Article because the legislation fundamentally denies access to the courts.[291] Instead of engaging with the extensive legal standards addressed by the Claimants, the Respondent in the Hearing continued to sidestep any discussion of the complete denial of justice effected by Section 10 of the Cancellation Act, including consideration of the most recent NAFTA decision of *Lion v. Mexico*.[292] Instead, the Respondent adopted the position that the Claimants had failed to put forward "evidence" of the operation of Section 10, and sought to reframe the Claimants' case as purely a question of a "statutory immunity clause".[293] The language of Section 10 is, however, clear, and demonstrates an express and sweeping denial of justice to the courts. No further evidence is required.

99. On the other hand, having advanced a positive defence to the Claimants' claims based on statutory immunity, it is the *Respondent* who bears the burden of proving its arguments.[294] The Respondent utterly failed to support its position, even conceding that it is "not saying that all Crown immunity provisions are automatically acceptable under Article 1105".[295] In fact, as expressly recognized "[i]n a [NAFTA] Chapter 11 arbitration, *no local statutory immunity would apply*."[296]

100. Finally, the Respondent has consistently sought to downplay the relevance of legitimate expectations to determining a breach of Article 1105(1), simply reiterating at every opportunity that "legitimate expectations are not a stand-alone rule or obligation under customary international law."[297] That much is undisputed by the Parties. The Claimants have been clear throughout these proceedings that legitimate expectations are instead "a relevant factor" for the Tribunal to take into account when considering other evidence of breach of Article 1105(1).[298] As discussed at length in the Claimants' written pleadings, and as described in Part II.C, Ontario made a series of express, long-term and specific representations in designing its Program, and with respect to the procedure for withdrawal

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[291] *See*, *e.g.*, Tr., Day 1, pp. 111 to 113 (Claimants); Memorial, paras. 375-387; Reply, paras. 456-458.

[292] Tr., Day 1, p. 111, lines 6-20 (Claimants); **CD-1**, Slides 150-151.

[293] Tr., Day 1, p. 274, lines 15-17 (Respondent). The Claimants note that the Respondent did not provide any further support for its assertion that the Claimants were required to exhaust local remedies during the Hearing.

[294] Reply, para 475. *See also*, **CL-87**, **RL-61**.

[295] Tr., Day 1, p. 276, lines 5-7 (Respondent).

[296] **CL-56**, para. 154 (emphasis added). *See also* Reply, paras. 460-469; Tr., p. 113, line 20 to p. 114, line 5 (Claimants).

[297] Tr., Day 1, p. 273, lines 18-21 (Respondent).

[298] *See*, *e.g.*, Memorial, paras. 388-399; Reply, paras. 488-490.

from the linked market.[299] The Respondent's repudiation of these representations violated the Claimants' legitimate expectations, and supports a finding of breach of Article 1105(1).

C. The Measures Amount to a Breach of NAFTA Article 1105(1)

1. The Claimants Hold Investments Capable of Being Expropriated

101. During the Hearing, the Respondent repeated its unsustainable position that the Claimants did not have property rights capable of being expropriated,[300] taking the position that whether an investment is capable of being expropriated under NAFTA Article 1110 is independent of whether there is an investment under Article 1139. But it has been unable to point to *any* NAFTA case in support of its position, seeking instead to import the terms of the Canada-United States-Mexico Agreement.[301] However, in line with Article 31(1) of the Vienna Convention on the Law of Treaties (**VCLT**), this separate treaty's wording cannot usurp the ordinary meaning to be given to NAFTA terms, which operate as *lex specialis*.[302] As *Media Ventures* made clear – a case expressly referred to by the Respondent during the Hearing[303] – nothing in the text "suggests, let alone compels, the conclusion that some investments are simply incapable of expropriation".[304]

102. In any event, and as the Claimants demonstrated during the Hearing, and in their written submissions and expert briefs, as well as in Part III.B above, they held intangible property capable of being expropriated.

2. The Respondent Indirectly Expropriated the Claimants' Investment

103. The Parties agree that, for an indirect expropriation to have occurred, the question will turn on whether the governmental measures have deprived the owner of substantially all the benefits of its investment.[305] Such an assessment includes whether the measures objectively impacted that investment's economic benefit, as well as the relative impact of the measure on the owner's reasonably-held expectations.[306] However, as to the scope of these latter

[299] *See*, *e.g.*, Memorial, paras. 388-399; Reply, paras. 486-510; **CD-1**, Slides 158-159.
[300] Tr., Day 1, pp. 250-253 (Respondent).
[301] Tr., Day 1, p. 252, lines 20-22 to p. 253, lines 1-3 (Respondent).
[302] Tr., Day 1, p. 118, lines 2-5 (Claimants); Reply, paras. 517-528.
[303] Tr., Day 1, p. 251, lines 18-22 to p. 252, line 1 (Respondent).
[304] Tr., Day 1, p. 118, lines 6-9 (Claimants); *see also* Reply, para. 520.
[305] *See*, *e.g.*, Memorial, para. 408; Reply, paras. 541, 544; Counter-Memorial, para. 259.
[306] *See*, *e.g.*, Memorial, paras. 407-411; Reply, paras. 543-562.

assessments, and the question of whether the measures are an exercise of police powers,[307] the Respondent continues to submit unsupported legal and factual allegations.

104. First, with respect to the objective impact on the economic benefit of the Claimants' investment, the Respondent continues to assert (incorrectly) that it was California's decision to delink its CITSS registry from Ontario that caused the Claimants' loss on 15 June 2018, and not the Premier-elect's reckless Announcement and Ontario officials' consequent pull-out from future auctions that same day.[308] As described in Part II.D above, this position cannot be sustained. Ontario (and therefore the Respondent, under the NAFTA) clearly is responsible for the Claimants' losses.

105. Second, the Respondent continues to reframe the Claimants' case and misrepresent the facts, arguing that "NAFTA Article 1110 does not require a NAFTA party to compensate investors of the failure of a business plan",[309] asserting further that the Claimants had no reasonable expectations that "Ontario wouldn't change, replace, or cancel its Cap and Trade Program."[310] The Respondent's sleight of hand is unavailing. What Article 1110 certainly does offer is compensation for the direct destruction of an investment by a measure adopted by the host Party. Ontario could pull out of Cap and Trade: it simply could not do so lawfully while destroying the Claimants' investment without compensation. As evident during the Hearing, the Claimants' business was profitable, and thriving.[311] Moreover, as the Claimants have repeated multiple times, it does not challenge the Respondent's right to impose regulatory change.[312] However, the latter's actions in imposing such change clearly interfered with the Claimants' reasonable expectations that their investments be treated in a lawful manner by Ontario. The wrongful actions taken by Ontario directly interfered with these investment-backed expectations, demonstrating a breach of NAFTA Article 1110. The Respondent's argument that the Claimants "accepted the risk" of seizure of their investment without compensation is another of its unprincipled and shocking arguments: no investor accepts that risk, as distinct from ordinary commercial risk.

106. Third, during the Hearing the Respondent continued to advocate for an unfettered application of the police powers doctrine, asserting that the Tribunal should not "second-

[307] *See*, *e.g.*, Memorial, paras. 412-418; Reply, paras. 563-596.
[308] Tr., Day 1, p. 260, lines 10-13 (Respondent).
[309] Tr., Day 1, p. 256, lines 12-15 (Respondent).
[310] Tr., Day 1, p. 259, lines 17-18 (Respondent).
[311] *See* Part II.B above. *See also* Reply, paras. 251-252, 558.
[312] *See*, *e.g.*, Reply, paras. 436, 559.

guess[]" the Respondent's policy decisions.[313] But this broad position has been "considered and rejected in the past, with tribunals considering that Canada's formulation "goes too far'" in this respect.[314] It is extraordinary to suggest that expropriation without compensation should be condoned, where this reflects State "policy" to minimize the costs associated with their illegal measures.

107. The Respondent also urges the Tribunal to reject any sort of proportionality analysis in its assessment of the measures in issue.[315] This position is inconsistent with the case law,[316] and with factors previously identified by the Respondent as being relevant to an assessment of police powers (namely, whether the measures were "excessive").[317] During the Hearing, the Respondent had no answer to its inconsistent approach.

3. The Respondent Directly Expropriated the Claimants' Investment

108. The Respondent also maintained its position that because the emission allowances were "cancelled" under the Cancellation Act, there is no expropriation because the allowances were not *transferred* to Ontario.[318] However, the Respondent's own authorities make clear that a direct expropriation required the coercive or forcible *appropriation* by the State.[319] The Respondent's attempts to parse the terminology reflects its bad faith position, and an attempt to avoid the fact that the Cancellation Act expressly acknowledges that compensation would be paid "out of money *appropriated under section 11*" therein (the Greenhouse Gas Reduction Account, the repository of funds from the sale of allowances).[320]

109. During the Hearing, the Respondent wholly omitted reference to its previous position that Ontario had received "no benefit" from the Program's cancellation. Its omission was unsurprising, since the position is logically flawed and untenable: Ontario expropriated the Claimants' property, and did not pay compensation, and thus benefited at least USD [redacted] (if not USD [redacted]) from its wrongful actions.[321] Indeed, it had no answer to evidence the Claimants recalled at the Hearing, to the effect that Ontario profited to the tune of over CAD 2.9 billion overall from its Program, and specifically received over USD 300

[313] Tr., Day 1, p. 262, lines 7-8 (Respondent).
[314] Tr., Day 1, p. 122, lines 15-21 (Claimants); **CD-1**, Slide 169. *See also* Reply, paras. 565-575.
[315] Tr., Day 1, p. 262, lines 8-11 (Respondent).
[316] *See*, *e.g.*, Reply, paras. 565-575, 584-589.
[317] Tr., Day 1, p. 124, lines 11-21 (Claimants); **CD-1**, Slides 172-173.
[318] Tr., Day 1, p. 254, lines 11-22 to p. 255, lines 1-7 (Respondent).
[319] Tr., Day 1, p. 126, lines 6-8 (Claimants); **CD-1**, Slide 175; Reply, paras. 597-601.
[320] Tr., Day 1, p. 126, lines 9-17 (Claimants); **CD-1**, Slide 175.
[321] Tr., Day 1, p. 126, lines 18-22 to p. 127, lines 1-15 (Claimants); **CD-1**, Slide 176; Reply, paras. 602-604.

million from the May 2018 auction alone.[322] Mr. Wood, unable to recall where all of that money was spent, did confirm that $5M of it compensated certain Program participants, but not market participants such as the Claimants, who were arbitrarily targeted.[323]

110. In sum, the Respondent unlawfully expropriated the Claimants' investments, in a manner which violated the requirements as set out in Article 1110 of the NAFTA.

V. THE CLAIMANTS HAVE ESTABLISHED THAT THEY ARE ENTITLED TO COMPENSATION FOR THE LOSSES CAUSED BY THE RESPONDENT

A. The Losses

111. During the Hearing, the Respondent made very little attempt to advance its position as to the quantification of the Claimants' losses. In part, its arguments merely repeated prior positions that have already been rebutted, so will not be re-addressed here.[324] The remainder of its arguments were new. Once again, that is not how arbitration works. The fact that the Respondent's previous arguments have been disproved is no basis to permit it to keep raising new, non-responsive defences. In any event, the Respondent's new arguments are wrong.

112. ***The Carbon Emission Allowances:*** To recall, the Claimants' primary position is that the expropriated allowances should be valued by reference to their published market value on the eve of the expropriation (USD [redacted]), or alternatively per the auction price actually paid by the Claimants shortly before then (USD 14.65 per unit).[325] At the Hearing, the Respondent asserted (for the first time) that the latter is more reliable because the former "is drawn from the price of an ICE futures contract for California carbon allowances on June 14th", but made no attempt to explain the alleged problem with this.[326] On that date, allowances were fungible between California and Ontario, so the value of California allowances on the secondary market is an entirely proper basis to establish the FMV of Ontario allowances. In addition, the Respondent's further suggestion to use the Compensation Regulation's unit rate of CAD 18.32 (USD 14.08)[327] is likewise misplaced: that cannot be said to establish *market* value.

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[322] *See, e.g.,* Tr., Day 1, p. 69, lines 8-12 (Claimants).
[323] Tr., Day 2, p. 500, line 19 to p. 502, line 12 (Wood).
[324] *See* the matrix of arguments and responses at Claimants' Opening, **CD-1**, Slides 185 and 187.
[325] Memorial, paras. 493-495; **CD-1**, Slide 183.
[326] Tr., Day 1, p. 281, lines 8-14 (Respondent).
[327] **RD-1**, Slide 233.

113. ***Losses Arising from the FHR Sale:*** In the Counter-Memorial, the Respondent sought to impugn this head of loss by reference to the "Delivery Disruption" clause in the underlying contract, [redacted] [329] The Respondent failed to articulate its argument, but its concern appears to concern mitigation of damages. Regardless, its position is misconceived. [redacted]

114. In its Counter-Memorial, the Respondent argued that the Claimants' spreadsheets proving the transactions underlying the FHR losses were "seemingly generated for the purposes of creating an exhibit in this arbitration", which the Claimants rebutted and the Respondent seems to have abandoned.[332] It is right to have done so, particularly given that Ms. Ramlal confirmed at the Hearing that she had undertaken essentially the same process of downloading data from CITSS in creating the annexes to her own statements.[333]

115. ***Losses Arising from Remedial Actions:*** At the Hearing, the Respondent argued that the cost of the Claimants' initial NAFTA counsel should be considered at the costs phase of the arbitration (not in the damages phase), and that the scope of Canadian counsel work being claimed for is unclear.[334] The Claimants maintain that both heads of cost represent a loss

[328] Reply, para. 660, citing **CWS-6**, para. 39.
[329] Tr., Day 1, p. 282, lines 7-10 (Respondent).
[330] Memorial, para. 165.
[331] The FHR contract is at **C-73**. [redacted]
[332] *See* citations at **CD-1**, Slide 185, item 1.
[333] Tr., Day 3, p. 624, line 18 to p. 627, line 12 (Ramlal).
[334] Tr., Day 1, p. 282, lines 11-16 (Respondent).

requiring compensation, regardless of what phase of the arbitration they are addressed at. As to Canadian counsel costs, the Respondent's principal objection is that the cost of domestic access-to-information requests are not recoverable since that process is "wholly irrelevant to this arbitration".[335] Even if true (which is denied), the Respondent overlooks the test for recovery. In the ILC's words, "[i]t is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach".[336] That is the basis on which the access-to-information process was undertaken: in the course of, and to support, the Claimants' efforts to repair the damage done by the Respondent's unlawful actions.

B. Causation

116. As to causation, the Claimants refer the Tribunal to their opening statement.[337] Ultimately, the Respondent's main complaint is that California and Québec's decision to de-link their markets from Ontario is an intervening act that breaks the causal chain. In particular, the Respondent argued in opening: "California's actions on June 15th were not the inevitable result of Ontario's decision not to participate in the August 2018 auction. As you will hear from Mr. Litz, California and Québec had several other options if they wished to take action as a result of Ontario's non-participation in the auction."[338] However, whereas Mr. Litz refused to offer an opinion as to the actual merits of these options,[339] Prof. Stavins testified *inter alia* that "it's virtually inconceivable that California and Quebec, that the dedicated public servants there … that cared about the environmental integrity of their program[,] could do anything other than that same day suspending allowance trading." In any event, the Respondent's argument is legally irrelevant: per *Lemire*, "a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage."[340] Thus, the question is not whether California and Quebec took the only option open to them, but rather, whether the action they actually took was objectively foreseeable. It was.[341]

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[335] Tr., Day 1, p. 282, line 17 to p. 283, line 1 (Respondent).

[336] **CL-51**, para. 34. *See also* Memorial, paras. 506-509.

[337] Tr., Day 1, p. 138, line 12 *et seq* (Claimants); and **CD-1**, Slide 189 *et seq*. Further, as to the Respondent's complaint regarding causation under the Article 1105 claim, the Claimants refer the Tribunal to paras. 640 -648 of their Reply.

[338] Tr., Day 1, p. 277, line 18 to p. 278, line 3 (Respondent).

[339] *See* Part II.D above.

[340] **CL-200**, para. 170. *See also* the analysis and further citations in the Reply, paras. 618 to 626.

[341] [redacted]

C. Interest

117. As to interest, the Claimants refer the Tribunal to the comprehensive analysis set out in their pleadings and summarised during their opening statement, which the Respondent has largely failed to engage with. In particular, prior to the Hearing, it had never sought to rebut the Claimants' evidence that it could have obtained a 23% return had compensation been paid promptly, nor its conservative decision to accept a 5% interest rate.[342] Yet, at the Hearing, the Respondent complained in half a sentence that "the Claimants' suggested rate of interest [is] too high, especially given prevailing rates at the time of the measures".[343] Once again, it is much too late for the Respondent to be making new arguments. In any event, the 5% rate is amply supported by the evidence and is consistent with the Respondent's own position in prior cases.[344] Moreover, the Respondent has failed to put the "prevailing rates at the time of the measures" in evidence, so it cannot rely on them. That said, unlike the Respondent, the Claimant has put such rates in evidence: at the date of expropriation (15 June 2018), the WSJ Prime Rate was 5%.[345]

VI. OBSERVATIONS ON THE ORAL, NON-DISPUTING PARTY SUBMISSION OF THE UNITED STATES

118. In the course of the Hearing, the United States made an oral submission with respect to the role of NAFTA Party submissions in the interpretation of the NAFTA, according to the customary law principles of treaty interpretation reflected in Articles 31(3)(a) and 31(3)(b) of the VCLT. In particular, the United States took issue with the Claimants' reliance on a passage from the WTO Appellate Body's (**AB**) report in *Japan — Alcoholic Beverages II*, which stated that "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation", and that "[a]n isolated act is generally not sufficient to establish subsequent practice", for "it is a sequence of acts establishing the agreement of the parties that is relevant."[346] This passage was quoted by the International Law Commission (**ILC**) in

[342] Memorial, para. 531; **CD-1**, Slide 213.

[343] Tr., Day 1, p. 283, lines 19-21 (Respondent).

[344] Memorial, paras. 531-535.

[345] *See* Memorial, para. 534. As explained there, the WSJ Prime Rate is an aggregate average of the various prime rates that ten of the largest banks in the United States charge to their highest credit quality customers for loans with relatively short-term maturities, and has been adopted by at least one tribunal in recent years.

[346] **CL-208**, pp. 12-13.

its commentary to draft conclusion 9 on subsequent agreements and subsequent practice in relation to the interpretation of treaties.[347]

119. Without calling into question these authorities, the United States criticised the Claimants for "fail[ing] to acknowledge" that, in the very next paragraph of its commentary, the ILC stated that the International Court of Justice (**ICJ**) has applied Article 31(3)(b) VCLT "more flexibly" than the WTO AB and "without adding further conditions".[348] Moreover, the United States argues that the ILC has "reject[ed]" the WTO AB's "concordant, common and consistent" formula as a minimum threshold for the applicability of Article 31(3)(b).[349] On that basis, the United States posited that "subsequent practice is not required to be concordant, common and consistent" but rather that "the weight of such practice, even a one-time practice, is determined by the extent to which it demonstrates the parties' common understanding of the meaning of the terms of the treaty."[350]

120. In the Claimants' view, this interpretation is untenable as a matter of law and wholly unsupported. It would lead to the absurd conclusion that a discordant, divergent or inconsistent practice of the parties could evidence an interpretative agreement even where such practice presents material inconsistencies, and is entirely fortuitous or circumstantial.

121. Moreover, the argument of the United States proceeds from an incomplete reading of the ILC's Conclusions. The ILC's draft conclusion 9, para. 2, makes clear that "the weight of subsequent practice under article 31, paragraph 3 (b), depends, *inter alia*, *on whether and how it is repeated*."[351] Thus, the interpretative weight of State practice must be determined by reference to its frequency across time and "the character of the repetition".[352] It stands to reason that, for a subsequent practice to establish the parties' interpretative agreement, it must present a minimum degree of consistency and frequency so as to evidence the "grounding" of a particular position of the parties regarding the interpretation of a treaty.[353]

122. Furthermore, the Claimants note that the ILC's commentary refers to two judgments of the ICJ to support the proposition that the Court has applied Article 31(3)(b) VCLT "more flexibly" than the WTO AB. However, a closer look at these judgments leads to the exact

[347] **CL-206**, vol. II, Part Two, p. 72, commentary (7) to draft Conclusion 9; Claimants' Response to US 1128, paras. 17-19.
[348] Tr., Day 1, p. 13, lines 14-22 (Thornton).
[349] Tr., Day 1, p. 14, lines 1-20 (Thornton).
[350] Tr., Day 1, p. 15, lines 7-12 (Thornton).
[351] **CL-206**, p. 70, draft Conclusion 9, paragraph 2 (emphasis added).
[352] **CL-206**, p. 72, commentary (6) to draft Conclusion 9, paragraph 2.
[353] **CL-206**, p. 72, commentary (6) to draft Conclusion 9, paragraph 2.

opposite conclusion: in *Kasikili/Sedudu Island*, the ICJ expressly *rejected* the claim that the events between 1907 and 1951 amounted to "subsequent agreement" or "subsequent practice" precisely because they fell short of the requirements of Article 31(3)(a)-(b) VCLT.[354] In the *Territorial Dispute (Libya/Chad)* the Court examined numerous instances of diplomatic exchanges and treaties concluded between the parties relating to their frontier, which "indicate[d] the *consistency* of Chad's conduct in relation to the location of its boundary."[355] For the Court, it was the *consistent* conduct of Chad, coupled with the position of Libya, that satisfied the requirements of Article 31(3)(a) and (b) of the VCLT.

123. In the same vein, the ILC commentary refers to Case No. B1 in *Iran v. United States* as an example of an international court that did not apply the WTO AB's formula. In that case, however, the Iran-US Claims Tribunal used *identical* language to the WTO AB, holding that "[t]he value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent" whereas "[a] practice is a sequence of facts or acts and cannot be established by one isolated fact or even by several individual applications."[356] Thus, the cases referenced in the ILC's commentary to draft Conclusion 9 confirm the proposition that subsequent State practice must present some qualitative characteristics of specificity, frequency and uniformity to satisfy the threshold of Article 31(3)(b) of the VCLT.

124. Similarly, the United States failed to acknowledge that, in *Immunities and Criminal Proceedings*, the ICJ rejected France's argument that the limited instances of practice by some parties to the Vienna Convention on Diplomatic Relations amounted to "subsequent practice" under Article 31(3)(b) VCLT.[357] In his separate opinion, the President of the Court articulated the standard enunciated by the ILC in 1964, whereby "the practice of an individual party or of only some parties as an element of interpretation is on a quite different

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[354] **CL-206**, p. 73, footnote 385**,** citing *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1087, para. 63. *See also* p. 1094, paras. 73-74, where the Court stated that the "*long-standing*, unopposed, presence of Masubia tribespeople on Kasikili/Sedudu Island" and "over a period of many years" would constitute subsequent practice in the application of the 1890 treaty only if the Bechuanaland authorities were Sully aware of and accepted this as a confirmation of the Treaty boundary, which was found not to be the case (emphasis added).

[355] **CL-206**, p. 73, footnote 385, citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 34–37, paras. 66-71, where the Court examined various agreements concluded between Libya and Chad from March 1966 to January 1981, as well as numerous reports, documents and publications before the United Nations and the African Union, which demonstrated that Chad had "*consistently adopted the position* that it does have a boundary with Libya, and that the territory of Chad includes the 'Aouzou strip'" (emphasis added).

[356] **CL-206**, p. 73, footnote 386, citing Iran-United States Claims Tribunal, Interlocutory Award No. ITL 83-B1-FT (Counterclaim), paras. 113-114 and 116 ("the Parties have engaged in a concordant, common and consistent practice in filing counterclaims to official claims, and this practice reflects an agreement as to the interpretation of Article II, paragraph 2, of the Claims Settlement Declaration").

[357] **CL-207**, p. 352, para. 29, referring to para. 69 of the Judgment.

plane from a *concordant practice embracing all the parties and showing their common understanding of the meaning of the treaty*."[358]

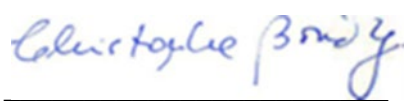
125. In light of the foregoing, the arguments of the United States must be rejected.

VII. REQUEST FOR RELIEF

126. For the above reasons, the Claimants respectfully maintain the request for relief as set out in their Memorial and Reply.

Dated: 19 January 2023
London, UK

Respectfully submitted,



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[358] **CL-207**, p. 352, para. 30 (emphasis added).