IN THE MATTER OF AN ARBITRATION UNDER THE CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 1976 UNCITRAL ARBITRATION RULES

-BETWEEN-

THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN EINARSSON, and GEOPHYSICAL SERVICE INCORPORATED

(the "Claimants")

-and-

GOVERNMENT OF CANADA

(the "Respondent")

(ICSID Case No. UNCT/20/6)

REBUTTAL MEMORIAL OF THE CLAIMANTS ON JURISDICTION, MERITS, AND DAMAGES

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CLAIMANTS' MEMORIAL INDEX

TABLE OF CONTENTS

DEFINED TERMS

Term	Definition	Paragraph
"**Acapulco**"	City Council of Acapulco	162
"**Counter-Memorial**"	Canada's Counter-Memorial on Jurisdiction, Merits and Damages dated January 17, 2023	1
"**Canada's Statement of Defence"**	Canada's Statement of Defence, dated June 9, 2022	5
"**Claimants' Memorial"**	Claimants' Memorial on Jurisdiction, Merits and Damages dated September 27, 2022	2
"Copyright Act"	Copyright Act, RSC 1985, c C-42	15
"CUSMA"	*Canada-United States-Mexico Agreement*	250
"DIBC"	*Detroit International Bridge Corporation*	170
"FDA"	United States' Food and Drugs Administration	95
"**Harmac**"	Harmac Pacific Inc.	143
"**SLA**"	Softwood Lumber Agreement	240
"**Troika**"	Troika International Limited	357

I. INTRODUCTION

1. In accordance with Procedural Order No. 1 and the Tribunal's direction on May 7, 2024, the Claimants hereby file their Reply Memorial on Jurisdiction, Merits and Damages in response to Canada's Counter-Memorial on Jurisdiction, Merits and Damages dated January 17, 2023 ("**Counter-Memorial**").

2. All capitalized terms otherwise not defined herein shall take the meaning ascribed to them in the Claimants' Memorial on Jurisdiction, Merits and Damages dated September 27, 2022 (the "**Claimants' Memorial**").

3. In sum, the Claimants refute Canada's challenges to jurisdiction and defences on the merits.

4. Canada attempts to argue against jurisdiction because it has weak defences on the merits. Nevertheless, its challenges to jurisdiction are equally weak. Canada has misstated facts, embellished issues such as the waiver issues discussed under Article 1121 of NAFTA, and incorrectly applies international legal principles regarding limitation periods and nationality.

5. In Canada's Statement of Defence, dated June 9, 2022 ("**Canada's Statement of Defence**"), Canada ignores that Canada itself did not know that there was any confiscation of seismic data's copyright until the Alberta Decisions, and then further mischaracterizes its conduct to its advantage when it clearly was not transparent during the relevant period of time. It is plain and obvious, as Canada knows, that Canada has now expropriated and transferred proprietary knowledge from the Claimants to third parties as it saw (and continues to see) fit.

6. Canada is so bold as to allege that enterprise value is the improper valuation approach for the damages incurred by the Claimants. However, an expropriator does not get to cherry pick and isolate the damages it sows. Enterprise value is the appropriate measure of damages applicable for a wholesale expropriation of the nature suffered by the Claimants, as the proprietary rights expropriated were the crux of its business. Canada's critique of the Claimants' damages is hollow, especially that Canada itself has previously accepted

values for the Seismic Works in the hundreds of millions of dollars when related to work credits (also known as allowable expenditures) in exchange for the Secondary Submissions. Canada continues to shield those facts by asserting an unjustified "privilege" over those documents in this Arbitration.[1]

7. Fundamentally, the very fact that Canada believes that the disclosure of seismic data without compensation will encourage offshore oil and gas development means that seismic companies are subsidizing oil and gas exploration, losing out on fees for their seismic data, and undercutting those business revenues. How can Canada then state that there is little value to the Seismic Works when it affirms, on the other hand, that releasing them at no costs achieves an important policy objective? There is no doubt that the Seismic Works are of significant value, and that Canada has breached its NAFTA obligations through the Alberta Decisions, which have created a compulsory license scheme with confiscatory effects on the Seismic Works.

8. The Claimants submit that Canada's challenges to jurisdiction, defences to the merits and critique of damages should be dismissed and the Claimants' claim should be allowed, for the reasons detailed below.

II. RESTATEMENT OF THE FACTS MISCONSTRUED BY CANADA

9. In its Counter-Memorial[2], Canada contends, among other things, that the Claimants (i) "*failed to particularize the specific seismic materials at issue in this Arbitration*"[3], (ii) "*have not established copyright over any specific Disclosed Seismic Materials*"[4] and that the Claimants must submit evidence of authorship, skill and judgment, and chain of title to "*prove their copyright with respect to the Disclosed Seismic Materials*".[5]

10. Canada's above contentions are without merit for the following reasons.

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[1] **C-525**, Annex A – Canada's Reply to Motion to Compel Documents – Privilege Log, dated February 16, 2024.
[2] Counter-Memorial at ¶¶ 132, 291-293.
[3] Counter-Memorial at ¶ 291.
[4] Counter-Memorial at ¶ 292.
[5] Counter-Memorial at ¶ 293.

A. The Specific Seismic Materials at Issue in this Arbitration are Clearly Particularized

11. First, in its Memorial and evidence provided in support thereof[6], the Claimants have clearly particularized the specific seismic materials at issue in this Arbitration, contrary to Canada's contentions.

12. The specific seismic materials at issue in this Arbitration are the Seismic Works[7], which are comprised of the seismic survey assets described in Davey Einarsson's Witness Statement[8] and detailed in a list filed as Exhibit C-047 in this Arbitration's record. This list details and particularizes the Seismic Works that were either originally created by Delaware GSI and ultimately owned by the Claimant, GSI[9], or otherwise created by GSI.[10] Canada itself has a copy of the Seismic Works, which is at the heart of this Arbitration.

13. Canada's contention that the Claimants failed to particularize the specific seismic materials at issue in this Arbitration is thus without merit.

B. GSI Already Clearly Established that the Seismic Works are Afforded Protection Under The *Copyright Act*

14. Second, Canada's contention that the Claimants have not established copyright over any specific Seismic Works is also without any merit.

15. At the outset, it is worth noting that the Common Issues Decision already established that, under Canadian law: (i) the raw or field seismic data is an original literary compilation work; and (ii) that the processed seismic data is both an original literary compilation work and an artistic compilation work in the scientific domain; and

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[6] See notably Section III(B) of Claimants' Memorial.

[7] As defined in the Claimants' Memorial at ¶ 29.

[8] **CWS-03**, Davey Einarsson Witness Statement dated December 2, 2019 [**CWS-03**] at ¶ 25.

[9] See for the list of the survey assets originally acquired by GSI Delaware and Halliburton which ultimately became owned by GSI, namely Exhibit A to **C-564**, Affidavit of T. David Einarsson in Court of Queen's Bench Action No. 1101-15306.

[10] **CWS-03** at ¶ 25.

therefore, they are protected under section 3 of the *Copyright Act,* RSC 1985, c C-42 ("***Copyright Act***"):

> *[115] In conclusion, the raw or field seismic data is an original literary compilation work and the processed data is both an original literary compilation work and an artistic compilation work in the scientific domain. As such, they are protected under s 3 of the Copyright Act. For the reasons I have outlined, there is no need to resort to or rely on any presumption of copyright afforded in the Copyright Act.*[11]

16. Nonetheless, in the context of this Arbitration, the Claimants also provided evidence that seismic data meets all the requirements in order to be afforded protection under the *Copyright Act*, namely that GSI's seismic material – the Seismic Works – can be considered an original literary compilation work and an artistic compilation work in the scientific domain under Canadian law.[12]

17. As it did in the trial that led to the Common Issues Decision, GSI adduced evidence in this Arbitration establishing how seismic data is created and processed and how human skill and judgment is required in order to do so.[13]

18. The fact that the raw or field seismic data can be an original literary compilation work, and that the processed data can be an original literary compilation work and an artistic compilation work in the scientific domain and that, as such, can be protected under the *Copyright Act*, has therefore clearly been established both in the context of the Common Issues Decision Trial and this Arbitration.

C. Copyright Subsists in the Seismic Works

19. Since it is established in Canadian law that copyright can subsist in seismic data, the analysis then turns to whether copyright subsists in the seismic data at issue in this Arbitration – the Seismic Works. The Claimants submit that copyright subsists in the Seismic Works, as already established, and will review the principles again as detailed below.

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[11] **R-001**, ABQB Common Issues Decision at ¶ 115.
[12] **R-001**, ABQB Common Issues Decision at ¶ 36.
[13] See Claimants' Memorial at ¶ 11-39.

(1) The Pre-1993 portions of the Seismic Works acquired from GSI Delaware

20. Mr. George Lau was employed by GSI Delaware in 1981 until around 1988 or 1989, and he provided a Witness Statement in support of this Reply Memorial to further establish how GSI Delaware created the pre-1993 Seismic Works that were conveyed to GSI.[14] Mr. Lau also testified to a similar extent in the Calwest Trial.[15]

21. Mr. Lau worked in Calgary, Alberta, for GSI Delaware as a party chief in the marine department and, later, land department. As a party chief, he supervised a group of individuals who were involved in processing offshore seismic data as that work is a collective group effort.[16]

22. Mr. Lau describes how, while performing seismic data processing for GSI, on a daily basis, his team would collect all the field data and relevant information, process seismic sections usually using proprietary GSI Delaware processes, algorithms, software and hardware, and conduct quality control on the work performed by the group.[17]

23. Mr. Lau further explains how quality control was important in the process because it would ensure that reasonable skill and judgment was used in selecting the numerous parameters to choose from in processing a seismic section and that they were applied appropriately. Mr. Lau and his team were hired for their skills in doing so and expected to perform these tasks based on their skills and judgment from their experience in processing seismic data.[18]

24. Mr. Lau testified during the Calwest Trial, which is the Court of Queen's Bench of Alberta (now King's Bench since the succession of King Charles III) proceeding in which that Court confirmed that GSI owned the copyright in the Seismic Works created

[14] **CWS-09** at ¶4. Davey WS ¶27 and 30.
[15] **C-405**, Trial Transcripts of the Common Issues Trial from November 23, 24, 25, 27, and 30 2015, and December 1, 2, 3, 4, 8, 9, and 10, 2015 [**Common Issues Trial Transcripts**].
[16] **CWS-09** at ¶ 6.
[17] **CWS-09** at ¶ 7-8.
[18] **CWS-09** at ¶ 8.

by GSI Delaware.[19] During the Calwest Trial, he spoke about specific seismic sections that were exhibited during that proceeding relating to the Sable Island and Gulf of St. Lawrence areas in offshore Canada, and how he affixed his signature to those seismic sections as part of the side label for that data, as he did for many other seismic sections while working for GSI Delaware. [20] He signed sections when he was the party chief for those seismic sections, to indicate that he conducted quality control and supervision on the processing of those seismic sections.[21]

(2) The Portions of the Seismic Works Created by GSI

25. Mr. Allan Feir was employed by GSI and he provided a Witness Statement in support of this Reply Memorial to further establish how the Seismic Works created directly by GSI were created.[22]

26. Mr. Feir was in charge of the team of people performing the processing at GSI and explains how processing seismic data requires a team of people and large amount of specialized skills and judgment.[23]

27. Mr. Allan Feir emphasized that significant experience, knowledge and skill was involved based on the specific geology of an area, understanding that geology and the challenges it may involve regarding the interaction with the sound waves used to image the subsurface.[24] GSI personnel had to skillfully select the tools and methods that would best

[19] **C-132**, *Geophysical Service Incorporated v 612469 Alberta Limited* (Calwest Printing & Reproductions), 2016 ABQB 356, Reasons for Judgment, June 28, 2016 at ¶ 18 ("[F]or the reasons I discuss in my common issues decision, the creation of the 1982 Data meets the Canadian skill and judgment test laid out by the Supreme Court of Canada… and should be considered original artistic or literary compilation productions in the scientific domain, and therefore copyright works.").

[20] **C-132**, Geophysical Service Incorporated v 612469 Alberta Limited (Calwest Printing & Reproductions), 2016 ABQB 356, Reasons for Judgment, June 28, 2016 at ¶ 9, 16 and 18.

[21] **CWS-09** at ¶ 10.

[22] **CWS-09** at ¶ 4. **CWS-03** at ¶ 27 and 30.

[23] **CWS-10** at ¶ 8.

[24] **CWS-10** at ¶ 9.

address the imaging in the area, and create input parameters into the various software to implement the processing flow and steps to obtain an approximation of the subsurface.[25]

28. To create a final seismic section, the processing team had to review numerous items, including information about the ship, the observer reports, tapes containing the field data, attributes of the data itself, the navigation data, and the geologic conditions related to the specific area in which the field data was created, among other items, to reflect the geology of the area as accurately as possible.[26] As Mr. Feir explains, "*there is no single correct way to process seismic data, and it requires experience and know how to do it well*."[27]

29. The sale and licensing of GSI's seismic data to its customers depended on the exercise of that skill and judgment in the processing of the acquired seismic data. The field data and the processed data were all created by GSI employees in the course of their employment.[28]

(3) Copyright Subsists in the Seismic Works

30. Messrs. Lau's and Feir's testimonies have further established, although not required from the Claimants at this stage, that copyright subsists in the Seismic Works.

31. Pursuant to the findings of the Common Issues Decision, under Canadian law, the protection of copyright is afforded by the *Copyright Act*, in which the term "copyright" is defined as, in the case of a "work", the rights to reproduce the work for a limited time:

> *[23] The protection of many intellectual property rights are created by statute. This includes copyright where, in Canada, the definition and protection of those rights are found in the* Copyright Act*. Indeed, even the term "copyright" is defined in s 2. It states that "copyright" means, in the case of a "work", the rights described in s 3. Section 3 protects the* ***sole*** *right to reproduce the work; the protection is time limited.* [emphasis added]

[25] **CWS-10** at ¶ 9.
[26] **CWS-09** at ¶ 9.
[27] **CWS-10** at ¶ 9.
[28] **CWS-10** at ¶ 13.

32. Therefore, to determine whether the *Copyright Act* bestowed copyright protection on the seismic material, the first question the Court of Queen's Bench of Alberta had to ask itself was whether the seismic material meets the conditions to qualify as a "work".[29]

33. In the context of the Common Issues Trial, GSI argued that the seismic material qualified as a "work", in that it is created by the involvement of human skill and judgment with the aid of computers, and provided extensive evidence to that effect. Pursuant to such evidence and in light of GSI's arguments, the Court of Queen's Bench of Alberta concluded that both the raw or field data and the processed data could be considered protected "works" under the *Copyright Act*.[30]

34. In the context of the Calwest Trial, GSI further argued that the Seismic Works that were the subject of that litigation and were created by GSI Delaware were copyright works, and the Court of Queen's Bench of Alberta agreed.[31]

35. Messrs. Lau's and Feir's testimonies further establish how the creation of the raw or field data and the processed data that comprise the Seismic Works requires the involvement of human skill and judgment, and that, as such, the Seismic Works clearly qualify as "works" under the *Copyright Act* and are consequently afforded the protections provided thereunder.

(4) GSI Owns Copyright in the Seismic Works

36. The Claimants have also clearly demonstrated that they own the intellectual property rights in the Seismic Works.[32]

37. First, GSI registered with the Canadian Intellectual Property Office its copyright in each of the 135 seismic surveys that comprise the Seismic Works.[33] Those copyright

[29] **R-001**, ABQB Common Issues Decision at ¶ 25.
[30] **R-001**, ABQB Common Issues Decision at ¶ 29, 43 and ff., and 78.
[31] **C-132**, Geophysical Service Incorporated v 612469 Alberta Limited (Calwest Printing & Reproductions), 2016 ABQB 356, Reasons for Judgment, June 28, 2016 at ¶ 18.
[32] See section II(B) of the Claimants' Memorial.
[33] **C-136**, Bundle of GSI Canadian Copyright Registrations for Seismic Works**.**

registrations give rise to a presumption under Canadian copyright legislation that GSI owns the copyright in the Seismic Works, and Canada has not, nor can it, rebut such presumption.[34] On this basis alone, Canada's contention that GSI has not proven that it owns the copyrights in the Seismic Works must fail.

38. Nevertheless, and second, Messrs. Lau's and Feir's testimonies, as former employees of GSI Delaware and GSI, further establish GSI's ownership of the intellectual property rights in the Seismic Works. Under Canadian copyright legislation, GSI owns the intellectual property rights in the Seismic Works by virtue of those Seismic Works being created by its employees in the ordinary course of GSI's business.[35]

39. GSI created approximately 40%[36] of the original seismic data that is the subject of this Arbitration and has further reprocessed all or almost all (more than 80% to PSTM version)[37] of the seismic data acquired from GSI Delaware into further updated versions.[38]

40. Second, GSI duly acquired the intellectual property rights in the Seismic Works that were originally created by GSI Delaware as a result of the Geophysical Speculative Acquisition and the GSI Acquisitions.[39] It is noteworthy that the Court of Queen's Bench of Alberta already determined, based on the same evidence submitted in this

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[34] **C-133**, Canadian *Copyright Act* at Section 53(2) ("*A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright*").

[35] **C-133**, Canadian *Copyright Act* at Section 13(3) ("*Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright…*"); **CWS-06**, Paul Einarsson Witness Statement dated September 27, 2022 [**CWS-06**] at ¶ 98.

[36] **C-563**, GSI Database Percentages Old New.

[37] **C-562**, Percent GSI Data through PSTM.

[38] **CWS-03** at ¶ 23; **C-562**, Percent GSI Data through PSTM; **C-563**, GSI Database Percentages Old New.

[39] **CWS-03** at ¶¶ 26 and 30; **C-050**, Seismic Data Purchase Agreement, dated May 8, 1995; **C-051**, Seismic Data Purchase Agreement, dated September 30, 1995; **C-052**, Certificate of Amalgamation, dated January 1, 1999; As requested by Canada, the Claimants further provided a list of the seismic assets created by GSI Delaware and ultimately purchased by GSI, along with Mr. Davey Einarsson's testimony given in the Trial confirming that such list of seismic assets is in fact all the data purchased from Halliburton Geophysical. See **C-566**, Transcript of Questioning of Davey Einarsson, dated August 13, 2025. **C-405**, Common Issues Trial Transcripts.

Arbitration[40], that the intellectual property rights in the subset of the Seismic Works that were created by GSI Delaware, was conveyed in the Geophysical Speculative Acquisition and the GSI Acquisitions.[41]

41. Notwithstanding the fact that the Alberta Decisions and the evidence already in the record in this Arbitration are sufficient to establish that the Seismic Works are afforded protection under the *Copyright Act* and that the Claimants own such Seismic Works at issue in this Arbitration, the Claimants have further established their copyright and ownership in the Seismic Works by detailing how GSI's predecessor, GSI Delaware, GSI and its employees used skill and judgment in creating the Seismic Works at issue in this Arbitration.

42. In light of the foregoing, Canada's contentions that GSI has not established copyright nor ownership over any specific Seismic Works is without any merit.

III. JURISDICTION, STANDING AND ADMISSIBILITY

A. Summary of Claimants' Position

43. In Canada's Statement of Defence and Counter-Memorial, Canada argues that:

(a) NAFTA does not apply retroactively to GSI's seismic materials made publicly available prior to the entry into force of NAFTA on January 1, 1994;

(b) The Claimants failed to comply with the three-year limitation period enshrined in Articles 1116(2) and 1117(2) of NAFTA;

(c) The Claimants failed to comply with the waiver requirement enshrined in Articles 1121(1) and 1121(2) of NAFTA by continuing domestic claims with respect to the same measures as alleged in this Arbitration;

[40] **C-564**, Affidavit of T. David Einarsson in Court of Queen's Bench Action No. 1101-15306 at ¶20 and Exhibit A.

[41] **C-132**, *Geophysical Service Incorporated v 612469 Alberta Limited (Calwest Printing & Reproductions),* 2016 ABQB 356, Reasons for Judgment, June 28, 2016 at ¶¶ 31-32. It should be noted that, contrary to the Counter-Memorial's footnote 616, fair use was not a defence pleaded in this matter, which is only mentioned in *obiter dicta*.

(d) Paul Einarsson does not have personal jurisdiction or standing under Articles 1101(1), 1116(1), 1117(1) and 1139 of NAFTA because he was not an "*investor of another Party*" (i.e. an American investor); and

(e) The Claimants do not have standing to claim for reflective damages under Articles 1116(1) of NAFTA.

44. The Claimants rebut Canada's assertions in detail below. However, Canada's argument with respect to the Claimants' standing under Article 1116(1) of NAFTA is addressed in section VI on damages.

B. The Tribunal Has Jurisdiction *Rationae Temporis* Over the Claimants' Claim with respect to Data Made Publically Available Prior to the Entry into Force of NAFTA

45. In its Statement of Defence[42] and Counter-Memorial[43], Canada argues that the Tribunal does not have jurisdiction *rationae temporis* to adjudicate NAFTA breaches relating to the submission and public disclosure of GSI's seismic material prior to January 1, 1994 (when NAFTA entered into force). Canada's argument is flawed and unsubstantiated, and should be dismissed.

(1) Establishing *Rationae Temporis* Jurisdiction under NAFTA: The Reference Point is the Actionable Breach Alleged by the Claimant

46. For the purposes of determining the Tribunal's *rationae tempori*s jurisdiction under NAFTA, the reference point is the actionable breach alleged by the claimant, which must have occurred or continued after January 1, 1994. This principle was clearly confirmed in the *Feldman*[44] decision:

> *62. The reliance of the Tribunal on alleged violations of NAFTA Chapter Eleven Section A also implies that the Tribunal's jurisdiction ratione materiae becomes jurisdiction ratione temporis as well. Since NAFTA, and a particular part of NAFTA at that, delivers the only normative*

[42] Canada's Statement of Defence at ¶ 15.

[43] Counter-Memorial at fn 272.

[44] **CLA-50**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues at ¶ 62.

> *framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal ratione temporis. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. However, this also means that if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, "became breaches" of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction, as the Government of Canada points out (paras. 18, 19) and also the Respondent concedes (Counter-Memorial, para. 232). Any activity prior to that date, even if otherwise identical to its post-NAFTA continuation, is not subject to the Tribunal's jurisdiction in terms of time. [Our Emphasis]*

47. Fundamentally, Canada's argument that the NAFTA breach at issue relates to the submission and public disclosure of GSI's seismic material prior to January 1, 1994 is incorrect. Once more, Canada mischaracterizes the actual NAFTA breach at issue.

48. As clearly explained in the Claimants' NOA and Memorial, the Claimants do not allege that the submission and public disclosure of the Seismic Works under the Regulatory Regime breached NAFTA.

49. In this Arbitration, the Claimants attack Canada's confiscatory conduct, which occurred when the Canadian Courts rendered GSI's intellectual property rights unenforceable, and which crystallized into an illegal expropriation on November 30, 2017.

50. This confiscation had not occurred prior to January 1, 1994, even if, as Canada alleges, some of GSI's seismic material had already been submitted to the Boards and made available to third parties.[45]

51. As discussed in the Claimants' Memorial, as well as in the Witness Statements of Davey[46] and Paul[47] Einarsson, it is conceded that Canada required GSI to submit

[45] Under Canada's submissions, third parties would also need to access the Seismic Works, but Canada has not proven that any third parties have copied the Seismic Works prior to January 1, 1994.
[46] **CWS-03** at ¶¶55 to 67.

information to the Boards as a condition for GSI to operate under the permits granted by said government agencies. However, these submission requirements and disclosures have nothing to do with the copyright confiscation that occurred later. Even more clearly, these submission requirements have no relation to the processed and reprocessed seismic data that are part of the Seismic Works, which were either not submitted by GSI (or its predecessors) or submitted separately by third parties as Secondary Submissions, but which were nevertheless ultimately confiscated. Further, the submission requirements have no relation to the SEG-Y data that the CNSOPB demanded from GSI after the fact, but which the CNSOPB also threatens to disclose. It is thus immaterial to the present proceedings that those submission requirements existed prior to 1994 (in addition to such submission requirements not being at issue in this Arbitration).

52. Another element to consider is that Canada, at the time of adopting NAFTA, did not even consider that the Submission Legislation and Disclosure Legislation constituted potential NAFTA breaches. Canada's domestic reservations to the application of NAFTA demonstrate that Canada assessed whether to exclude the CPRA from NAFTA's purview. As set forth in *Annex I – Reservations for Existing Measures and Liberalization Commitments,* Canada included other reservations related to the CPRA, including to the application of Article 1102 of NAFTA, whereby oil and gas production licenses may be issued to a Canadian "interest-owner" (as defined in the CPRA).[48] However, Canada did not include a reservation pertaining to the CPRA's privilege period provisions applicable to geophysical (seismic) data so, clearly, it did not consider the Submission Legislation and Disclosure Legislation to be of any concern for NAFTA's application.

53. That is because the actionable breach at issue is not in the Submission Legislation or Disclosure Legislation. It is in the Alberta Decisions.

(2) Canada's Conduct Prior to January 1, 1994 is Nevertheless Relevant to Contextualize Canada's Actionable Breach

[47] **CWS-06**; **CWS-03.**

[48] **CLA-1**, NAFTA, Annex I – Reservations for Existing Measures and Liberalization Commitments, Schedule of Canada, Sector: Energy, Sub-sector: Oil and Gas [NAFTA].

54. The conduct of Canada prior to January 1, 1994 is nevertheless relevant to contextualize and characterize the actionable breach committed by Canada after that date and to respond to Canada's Counter-Memorial.

55. This distinction between a breach and the context of a breach was discussed in the *Mondev* decision:

> *70. Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.*[49] [Our Emphasis]

56. This context is explained in detail in the Claimants' NOA and Memorial, but it bears repeating given Canada's assertions that the Claimants should have been aware, prior to NAFTA's adoption and for many more years after that, that the Seismic Works were not protected by intellectual property laws.

57. To the contrary, the Claimants were not and could not have been aware of this, first and foremost because Canada's confiscatory conduct only crystallized in 2017. Paul Einarsson confirmed this repeatedly, as discussed in his Reply Witness Statement.[50]

58. At the time of making its investment, GSI only knew that it had to submit data to the Canadian government (including the Boards). GSI did not know then that such data would be made public and would be copied.

59. It is only through the AIA requests that GSI made in 2000 and onwards that GSI was able to uncover Canada's disclosure practice. Through these requests, GSI understood that, over time, Canada's disclosure practice evolved from, in a nutshell, no disclosure at all, to viewing without taking notes in government-controlled offices, to loaning out protected seismic material, to making copies and sending seismic material to copy firms. To this day, GSI continues to pursue AIA requests to understand how Canada's

[49] **CLA-54**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at ¶ 70.

[50] **CWS-07**, Witness Statement of Paul Einarsson, dated January 31, 2024 **[CWS-07]** at Sections VI. A and VI. B.

disclosure practice evolved and unfolded to understand the sheer volume of copying. Canada's policies were not static[51] and it is the Alberta Decisions, rendered final in 2017, that crystallized Canada's evolving and nebulous conduct as confiscatory.

60. In sum, Canada's actual confiscatory conduct occurred after the entry into force of NAFTA. The *rationae temporis* jurisdiction of this Tribunal is thus incontestable.

(3) In Any Event, Canada's Argument is Unsubstantiated

61. Notwithstanding the foregoing, another issue with Canada's position is that it is unsubstantiated.

62. At paragraph 15 of Canada's Statement of Defence, Canada states that the seismic data that GSI acquired from "*another company*", namely Halliburton, in 1993 was already available to the public through the Boards pursuant to pre-existing laws and regulations. Canada adds that the confidentiality periods for "*much of that seismic data*", which had been collected in the 1970s and 1980s, had lapsed, so that the NAFTA "actionable breach" (as Canada characterizes it) had already occurred.

63. However, Canada does not specify: (i) which seismic material would have been made available to the public nor when prior to January 1, 1994; nor (ii) whether such seismic material was effectively accessed and copied.

C. The Claimants' NAFTA Claims Are Not Time-Barred Under Articles 1116(2) and 1117(2) of NAFTA Because the Alberta Decisions Crystallized Canada's Actionable Breach and the Claimants' Knowledge of Their Damages

64. Article 1116(2) of NAFTA sets forth that an investor may make a NAFTA claim within three years "*from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage*"[52].

[51] **CWS-12**, at Section VI. B.
[52] **CLA-1**, NAFTA, Article 1116(2).

65. The occurrence of a breach, the incurrence of damages and the knowledge (actual or constructive) of such breach and ensuing damages are cumulative conditions.[53] Also, the three-year limitation period runs from the occurrence of the later of these events when they do not occur simultaneously.

66. Article 1117(2) of NAFTA, which is concerned with claims being made on behalf of an enterprise, is to the same effect.

67. In Canada's Statement of Defence and again in its Counter-Memorial, Canada asserts that the critical date for assessing the Claimants' compliance with this time limitation period is April 18, 2016, namely three years prior to the institution of this Arbitration.

68. Canada contends that, prior to April 18, 2016, the Claimants actually and constructively knew of Canada's alleged breach of NAFTA and of their damages because the Regulatory Regime already existed and was being litigated domestically. On this basis, Canada argues that the Claimants' NAFTA claim is time-barred.

69. Canada assumes the burden of proving its jurisdictional defence, namely that the Claimants' claim falls outside this limitation period.[54]

70. Before addressing how Canada's argument lacks merits, it is noteworthy that, in its Counter-Memorial, Canada does not specify when the Claimants' limitation period should have begun to run. Canada itself is unable to identify when GSI became, or should have become, aware of NAFTA's breach and its ensuing damages. It is telling and, in fact, it supports the argument that GSI itself could not know before the Alberta Decisions became final.

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[53] **CLA-046**, *Resolute Forest Products Inc v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ("*Resolute*") at ¶ 153; **CLA-043**, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, ("*Eli Lilly*") at ¶ 167; **CLA-40**, Kinnear, Bjorklund & Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* at 1116-36b (July 2009) ("*The investor must, however, acquire knowledge of both the breach and the ensuing damage. The three-year limitation period presumably runs from the later of these events to occur in the event that the knowledge of both events is not simultaneous*")

[54] **CLA-60**, *Pope & Talbot Inc. v. Canada*, NAFTA/UNCITRAL, Award in Relation to Preliminary Motion (24 Feb. 2000), at ¶ 11 ("*Canada's contention that the . . . claim is time barred is in the nature of an affirmative defence, and, as such, Canada has the burden of proof of showing factual predicate to that defence.").*

71. On the merits, Canada's jurisdictional defence should be rejected because:

(a) As the clear language of Articles 1116(2) and 1117(2) indicates, and as discussed above in section II.A., the focal point of a time-limitation determination under NAFTA is the alleged actionable breach, not the breach as recharacterized by the Defendant. In the present case, the focal point of Canada's time-limitation argument is incorrect as it is grounded in Canada's recharacterization of the Claimants' claim, which is that the Regulatory Regime is what would constitute an actionable breach under NAFTA. The Claimants' actual claim is that the Alberta Decisions, which became final as of the date of the Supreme Court of Canada's judgment rendered on November 30, 2017, is the actionable breach.

(b) The Alberta Decisions are an independent actionable breach in their own right as they crystallized a confiscation by the Alberta Courts which created a new legal norm, namely a novel compulsory license scheme with confiscatory effects (as explained in Dr. Cameron Hutchison and Dr. Nigel Bankes' Expert Reports)[55]. This is the measure that crystallized the expropriation of GSI.

(c) Considering that the Alberta Decisions are the relevant actionable breach, the cumulative conditions set forth at Articles 1116(2) and 1117(2) are met as the Claimants could not have actual nor constructive knowledge of said judgments and their effects before they were rendered. The same argument goes for the Claimants' knowledge of their damages.

72. Since the Claimants commenced the present proceedings on April 18, 2019, namely approximately a year and a half after the Alberta Decisions became final, they were well within NAFTA's applicable three-year time limitation period.

(1) The Relevant Actionable Breach According to the Claimants

73. As mentioned, Canada argues that since the Claimants' knowledge of the Regulatory Regime itself dates from the 1980s or 1990s, the Claimants' claim is time-barred.

[55] **CER-01,** Expert Report of Nigel Bankes dated August 30, 2022 **[CER-01]**; **CER-04**.

74. Canada's position is incorrect. In fact, Canada's depiction of the events that unfold between the 1980s and 2017 is flawed. Incorrectly, Sections II and III in Canada's Counter-Memorial portray Canada's Regulatory Regime as "static" and thus as the only possible "actionable breach" in this Arbitration.

75. However, the Claimants' knowledge of the Regulatory Regime's obligatory content evolved as the Boards deployed their own agendas, policies, guidelines and rules, which differed.[56]

76. This is ignored in Canada's Counter-Memorial, which is also silent on what occurred after the CPRA was implemented, including all of the correspondence between Canada and GSI concerning GSI's objections and attempts to obtain clarity when the Boards changed their agendas, policies, guidelines and rules.[57]

77. On this last point, it is noteworthy that at paragraph 64 of its Counter-Memorial, Canada admits that CNLOPB changed its policy from only disclosing seismic data in paper format to PDF format in 2015 (i.e. a copyable format), around the time of the Common Issues Decision.

78. A similar admission is also found at paragraph 102 of Canada's Counter-Memorial, where Canada concedes that there have been significant technology changes after the CPRA was implemented.

79. Further examples of this non-static regulatory landscape are provided in Paul Einarsson's Reply Witness Statement. In essence, he explains that GSI (and its predecessors) consistently asked Canada to maintain the confidentiality and proprietary character of the Seismic Works. That is why there exist no permits or authorizations in which GSI agreed to the copying or the removing of its intellectual property rights.

80. GSI, on its end, could not have anticipated, nor consented to, such changes.

[56] **CWS-12** at ¶ 39
[57] **CWS-12**, sections VI. A and VI. B.

81. The foregoing explains that the Claimants allege that Canada's breach of NAFTA was crystallized on November 30, 2017, when the Alberta Decisions created a compulsory license scheme with a confiscatory character, which led to the destruction of GSI.

82. The Alberta Decisions are thus the relevant actionable NAFTA breach.

83. It is important to reiterate that, contrary to Canada's assertions[58], the Claimants are not "appealing" the Alberta Decisions. In fact, Canada is the one that criticizes and attempts to recast the Alberta Decisions by stating that they: (i) decided, under Canadian law, that GSI "*never held the right it alleges the Alberta Courts confiscated*"[59], and (ii) did not issue a compulsory licence or "confiscate" GSI's copyright, both of which assertions are clearly inaccurate. The Claimants have accepted the findings of the Alberta Decisions as unappealable[60], but claim the Alberta Decisions constitute Canada's actionable breach under NAFTA, for the reasons discussed extensively in the Claimants' Memorial and this Reply Memorial. The Alberta Decisions were novel and a departure in the legitimate expectations of the Claimants.

84. In the *Eli Lilly* decision, the Tribunal confirmed that the focal point of the jurisdictional determination to be made under Article 1116(2) and 1117(2) of NAFTA is the breach identified as actionable in the Claimants' proceedings:

> *163. However, as Claimant is the Party asserting the Tribunal's jurisdiction to decide its substantive claim, the "alleged breach" must, in the first instance, be identified by reference to Claimant's submissions. Claimant has repeatedly asserted that the measure at issue is the Canadian courts' invalidation of the Zyprexa and Strattera Patents by application of the promise utility doctrine; Claimant denies that it is challenging the promise doctrine in the abstract or the doctrine's application to the Raloxifene Patent.*
>
> *164. […]. An overall reading of the Reply confirms that Claimant's challenge is aimed solely at the invalidation of the Zyprexa and Strattera Patents. Indeed, this is clear even if one focuses specifically on the paragraphs of the Reply cited by Respondent for its portrayal of the claim.*

[58] See for instance Canada's Counter-Memorial, ¶¶ 12 and 227.
[59] Canada's Counter-Memorial, ¶ 227.
[60] Claimants' Memorial, ¶ 104 and ff.

> *Claimant does not allege that the promise utility doctrine itself in the abstract is a violation of NAFTA Chapter Eleven.*
>
> *165. Therefore, Respondent's attempt to re-characterize Claimant's case cannot be accepted. The Tribunal finds that the "alleged breach" for purposes of NAFTA Articles 1116(2) and 1117(2) is the invalidation by the Canadian judiciary of the Zyprexa and Strattera Patents through application of the promise utility doctrine.*
>
> *[…]*
>
> *167. With respect to jurisdiction, the critical question is obviously: when did Claimant first acquire knowledge, or constructive knowledge, of the alleged breach and the ensuing loss? Given the Tribunal's finding on the identity of the alleged breach, the Tribunal sees no way in which Claimant could have acquired the requisite knowledge before the court invalidated the Zyprexa and Strattera Patents. An investor cannot be obliged or deemed to know of a breach before it occurs. [Our Emphasis]*

85. In *Glamis*, the Tribunal also concluded that the legal basis of a claim is to be determined with reference to the position of the Claimant:

> *348. The Tribunal in this instance, however, is presented with a preliminary question. In particular, does Claimant bring its claim on the basis of the events referred to by Respondent? Both Claimant and Respondent state that a claim brought on the basis of an event properly within the time limit of Article 1117(2) may cite to earlier events as "background facts" or "factual predicates." The Tribunal agrees. It is necessary that any action be preceded by other steps, but such factual predicates are not per se the legal basis for the claim.*
>
> *349. The basis of the claim is to be determined with reference to the submissions of Claimant. [Our Emphasis]*

86. In *Resolute*, the Tribunal adopted the same reasoning, beginning its analysis and determination of Mexico's jurisdictional challenge by identifying the governmental conduct complained of by the claimant and noting that one cannot know of a breach before it occurs:

> *154. As to the requirement of breach, one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur: paragraph (2) deals with allegations, no doubt, but not with contingencies. There may thus be a difference between the date of different breaches arising from a given course of governmental conduct. The Claimant alleges breaches of*

> *Articles 1102(3) (national treatment), 1105(1) (unfair and inequitable treatment), and 1110(1) (expropriation). Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs. By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct or indirect). Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation under Article 1110(1).*[61] *[Our Emphasis]*

87. Whether the actionable breach, as characterized by the Claimants, constitutes a breach of a substantive obligation under NAFTA is a matter to be determined on the merits, not at the jurisdictional stage.

88. It is clear that the Claimants allege an actionable breach that meets the *ratione temporis* requirement for jurisdiction.

(2) The Alberta Decisions are an Independent Actionable Breach in their Own Right

89. At paragraph 194 of its Counter-Memorial, Canada argues that the Alberta Decisions are of administrative or regulatory nature given that they decide upon the Regulatory Regime.

90. Canada further argues[62] that, when faced with a claim that is "rooted" in "*pre-entry into force and critical limitation date*" conduct, the Tribunal ought to assess whether the actionable breach as identified by a claimant is sufficiently detached from said conduct so as to be independently justiciable under NAFTA.

91. Relying mostly on *Apotex*[63], Canada further asserts that claims based on judicial and regulatory conduct are to be distinguished for time limitation purposes.

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[61] **CLA-046**, *Resolute*, at ¶ 154.

[62] Counter-Memorial, ¶¶ 194-202.

[63] **RLA-004**, *Apotex Inc. v. the Government of the United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex* – Award on Jurisdiction and Admissibility").

92. Canada contends that, based on the "principle of finality"', judicial conduct becomes actionable as of the "final decision".[64] Canada goes on to argue that, in contrast, when regulatory conduct is at issue, prescription begins to run as of the commission or occurrence of the regulatory conduct and it cannot be tolled by subsequent litigation or court decisions, the subject-matter of which is the said regulatory conduct.[65]

93. Once more, Canada's argument and, more specifically the aforementioned distinction between judicial and regulatory conduct, is rooted in Canada's mischaracterization of the Claimants' claim in this Arbitration.

94. Before delving into how the Alberta Decisions are an independent actionable judicial action because they created an unexpected confiscatory change in law (as discussed below), a review of *Apotex*'s facts and conclusions will be undertaken given Canada's central reliance on that case.

95. In *Apotex*, two actionable breaches were at issue, namely a judicial decision and an administrative decision. The jurisdictional debate between the parties only pertained to the latter, namely a decision rendered by the United States' Food and Drugs Administration ("**FDA**")[66].

96. In the end, the Tribunal concluded that judicial proceedings could not toll the original administrative decision's time-limitation. With respect to the judicial decision, the Court concluded that there was not any time-bar difficulty:

> *333. Claims Based on the 6 June & 17 August 2006 D.C. Decisions: Having so ruled, it must be made clear that there is no time-bar difficulty with respect to Apotex's claims based upon the 6 June 2006 and 17 August 2006 decisions of the D.C. Circuit. And clearly, any claim that these judicial decisions constituted a breach of the NAFTA would require at least some consideration of the prior administrative and judicial decisions.*[200]

[64] Counter-Memorial, ¶ 194; Loewen.

[65] Canada's Counter-Memorial, ¶ 194-202.

[66] Including the National Energy Board, the Canada-Newfoundland and Labrador Offshore Petroleum Board (Newfoundland Board), and the Canada-Nova Scotia Offshore Petroleum Board (Nova Scotia Board), collectively "Boards".

> *334. But the two types of claim are clearly analytically distinct. One is a claim that a breach occurred, and loss was incurred, as at 11 April 2006, by reason of the FDA's (administrative) ruling that the dismissal of Apotex's declaratory judgment action against the patent owner did not constitute a "court decision trigger". The other is a claim that a breach occurred, and loss was incurred, as at 6 June 2006, or alternatively 17 August 2006, by reason of the (judicial) decisions of the Court of Appeals for the D.C. Circuit.*[67] *[Our Emphasis]*

97. *Apotex* is not a useful precedent in this case. This Arbitration is distinguishable.

98. First, contrary to *Apotex*, where the claimant pleaded that the FDA decision constituted a breach of NAFTA in and of itself, administrative or regulatory decisions (or conduct more generally speaking) are not identified as actionable breaches by the Claimants. That seems to again be part of Canada's mischaracterization of the Claimants' claim being about the Regulatory Regime and its policy decisions.

99. As further discussed below, the Alberta Decisions are judicial decisions about the application of copyright law to seismic data. They are not regulatory decisions. The fact that the interpretation of the Regulatory Regime was part of the subject-matter addressed in the Common Issues Decision. It is inconsequential as the Alberta Decisions, namely the NAFTA breach, truly determined copyright law.

100. Second, in the context of the Alberta Decisions, the Claimants did not litigate administrative or regulatory decisions rendered by the Boards. In fact, GSI had attempted to challenge a decision of the NEB (now the CER) through judicial review in 2010, and was told that such challenge to the NEB's disclosure of certain seismic data was premature. Further, the Federal Court of Appeal of Canada determined that, since the seismic data at issue would only be disclosed in 2023, the issues raised by GSI were not "*ripe for decision*".[68] Those attempts to seek regulatory decisions failed, and only confirmed that GSI could not know in advance that its copyright would be confiscated. It only knew when the Alberta Decisions became final and determined that GSI's seismic data could be disclosed and copied, and thus confiscated.

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[67] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility at ¶¶ 333-334.

[68] Claimants' Memorial ¶ 81-82; **C-205**, *Geophysical Service Incorporated v National Energy Board,* 2011 FCA 360, Reasons for Judgment of the Court ("*FCA NEB Appeal")* at ¶¶ 6 and 12.

101. Rather, before the Alberta Courts, the Claimants litigated the interplay between the Regulatory Regime and the *Copyright Act*. Such was the subject-matter of the Alberta Decisions, which became an unexpected change in law (as discussed below). [69]

102. The Alberta Decisions are thus independently justiciable under NAFTA because they brought a change in Canada's legal landscape concerning copyright protections.

103. According to Canada, the Alberta Decisions did not create a compulsory license confiscating GSI's copyrights nor can it be detached from the Regulatory Regime because adjudication of the Alberta Decisions requires a finding going to the lawfulness of the Regulatory Regime itself. Again, that is a misunderstanding of what actually occurred.

104. The Claimants are not challenging the Regulatory Regime as it is. They are challenging the judicial determination that ultimately created a change in law by positing that said Regulatory Regime's disclosure obligations are tantamount to a compulsory licence permitting the disclosure, access and copying of seismic data (which is effectively confiscatory, as noted in the Alberta Decisions, and which is a departure from the *Copyright Act* scheme). Canada asks the Tribunal to ignore the plain words used in the Alberta Decisions to find otherwise.

105. Finally, as further argued below in section 4.A., contrary to Canada's contention, the Alberta Decisions do not have to constitute a denial of justice to be independently actionable.

(3) The Events that Unfolded Prior to the Alberta Decisions are Nevertheless Relevant Because They Confirm That the Claimants Could Not Know of the Alberta Decisions' Outcome in Advance and its Confiscatory Nature

106. Canada argues, in a simplistic way, that since the Claimants knew of the Regulatory Regime, and more generally speaking of the Boards' conduct, prior to April 18, 2016

[69] **R-002**, *Geophysical Service Incorporated v. Encana Corporation, et al*., 2017 ABCA 125 at ¶8 ("ABCA Common Issues Appeal").

(i.e., three years prior to the commencement of this Arbitration), they knew or they ought to have known of Canada's breach of NAFTA.

107. With respect, knowing of a regulatory scheme under Canadian law and knowing of an actual NAFTA breach are very different. Only the latter is determinative for time limitation purposes and it occurred on November 30, 2017, when the Alberta Decisions became final.

108. One only has to think of what would have happened if the Alberta Decisions had been different to see how obvious it is that a breach occurred. Had the Alberta Decisions had the opposite outcome, this Arbitration would have been unnecessary as there would not have been any breach of NAFTA and GSI's copyright in its Seismic Works would be enforceable to protect its intellectual property rights. GSI would have won immense damages awards against all of the parties copying the Seismic Works. Of course, as we all know, the Alberta Decisions determined otherwise. In that sense, the Claimants' knowledge of the Regulatory Regime and the Boards' conduct prior to April 18, 2016, are not determinative but only relevant for context.

109. This approach was followed in *Eli Lilly*, where that Tribunal considered events falling outside of the three-year time limitation as they provided factual background for the measure allegedly actionable under NAFTA:

> *171. A remaining issue concerns the Tribunal's treatment of those events that did occur more than three years before this arbitration was initiated. Although the alleged promise utility doctrine is not the substantive basis of Claimant's claim, it plays a prominent role in Claimant's submissions. Indeed, one critical element of Claimant's case is establishing that judicial decisions issued from 2002 to 2008 effected a dramatic change in the Canadian utility requirement.*
>
> *172. In this context, many previous NAFTA tribunals that have found it appropriate to consider earlier events that provide the factual background to a timely claim. As stated by the tribunal in Glamis Gold v. United States, a claimant is permitted to cite "factual predicates" occurring outside the limitation period, even though they are not necessarily the legal basis for its claim. The tribunal in Grand River v. United States reached the same conclusion, drawing on past decisions:*

> *The Mondev and Feldman tribunals both considered the merits of claims regarding events occurring during the three-year limitations period, even though they were linked to, and required consideration of, events prior to the limitations period or to NAFTA's entry into force. In Mondev, the Tribunal considered (and rejected) the Claimant's claim that it had suffered a denial of justice in connection with state court proceedings occurring after NAFTA entered into force, although the dispute underlying the litigation arose years before. In Feldman, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitations period, but its analysis of this and other claims again required consideration of earlier events.*
>
> *173. The Tribunal also adopts this well accepted approach. The following analysis of the merits of Claimant's claim will be informed where appropriate by reference to earlier relevant events, including the Canadian judiciary's interpretation of the utility requirement over time. NAFTA Articles 1116(2) and 1117(2) in no way limit or preclude such consideration.*[70] *[Our Emphasis]*

110. Citing *Mondev*, the same reasoning was applied by the Tribunal in *Bilcon*, where prior facts were deemed relevant to determine whether the alleged breach occurred:

> *282. […] While Article 1116(2) bars breaches in respect of events that took place more than three years before the claim was made, events prior to the three-year bar, however, are by no means irrelevant. They can provide necessary background or context for determining whether breaches occurred during the time-eligible period. Whether a party is an investor, or has made an investment, can depend in a case on activities that took place before the three-year clock began to run. The legitimate expectations of an investor — a factor that may be part of an overall analysis of whether treatment has breached the minimum standard of fairness — may depend crucially on contracts, assurances or the legal landscape, including existing statutes and judicial and administrative precedents, that existed before an alleged breach took place. The Tribunal is supported in this respect by the following passage from the Mondev award:*
>
> *On the other hand, it does not follow that events prior to the entry into force of NAFTA may not be relevant to the question whether a NAFTA Party is in breach of its Chapter 11 obligations by conduct of that Party after NAFTA's entry into force. To the extent that the last sentence of the passage from the Feldman decision, quoted, appears to say the contrary, it seems to the present Tribunal to be too categorical, as indeed the United States conceded in argument.*

[70] **CLA-043**, *Eli Lilly* at ¶ 172-173.

> *Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.*[71] *[Our Emphasis]*

111. Facts dated to April 18, 2016 or prior are relevant insofar as they demonstrate that the Claimants did not actually nor constructively know that Canada would breach NAFTA before the Alberta Decisions were rendered.

112. To argue that GSI knew the law, and more specifically that any diligent investor should have known the law, Canada tries to reference catalogs of available seismic data that were created by COGLA in 1984, guidelines dated after 1983 that speak to submitting seismic data and a privilege period, and also to letters from the CNLOPB that enclosed the permits for conducting seismic surveys that state that the privilege period would expire.[72] These are not legal documents with the force of law, so their existence is not relevant nor determinative.

113. Moreover, as discussed in Paul Einarsson's Witness Statement based on Canada's document production in this Arbitration, in 1999, the NEB believed that seismic companies needed to enforce their ownership over their data and that the end of privilege periods set forth in the CPRA did not equate to the data being in the public domain.[73] This is evidence that the Boards themselves did not know so GSI, before the Alberta Decision, also could not know that it had no ownership rights or enforceable copyright over the Seismic Works once said privilege periods were over.[74]

114. It is also ironic that Canada criticizes and victim blames against GSI's decision to sue its customers in the Domestic Litigations in order to protect and enforce its intellectual property rights in the Seismic Works, when the NEB's position at the time was that seismic companies needed to enforce their ownership over their data and that the end of

[71] **RLA-022**, *William Ralph Clayton et. al v. Government of Canada* (UNCITRAL), Award on Jurisdiction and Liability, 17 March 2015 at ¶ 282.
[72] Canada's Counter-Memorial, at ¶ 58, 326.
[73] **CWS-12** at ¶ 84(t) **C-481**, CAN.NAFTA00020908.
[74] **CWS-12** at ¶108.

privilege periods set forth in the CPRA did not equate to the data being in the public domain. Considering the foregoing, Canada's criticism that GSI filed numerous claims against customers for accessing its own data also rings hollow and, instead, indicates that the Seismic Works attract a large amount of interest in the marketplace given the number of third parties accessing and copying the Seismic Works from the Boards.

115. Finally, as explained in Paul Einarsson's Witness Statement, GSI had obtained legal opinions advising it that the Seismic Works could not be disclosed and copied as Canadian copyright law and confidentiality protected them.[75]

116. Simply put, these facts uncontestably demonstrate that the Claimants, as well as the legal community, could not know that the Canadian Courts would create an unprecedented, novel type of compulsory license with a confiscatory character rendering the Claimants' copyrights unenforceable against copiers.

(4) The Claimants Could Not Know of Their Damages Before the Alberta Decisions Became Final

117. As mentioned, knowledge of a breach and damages are cumulative conditions under Articles 1116(2) and 1117(2) of NAFTA.

118. It goes without saying that, if the Claimants did not know and could not know of the Alberta Decisions' outcome and their confiscatory effects before they became final, they could not know that GSI would be expropriated. The Regulatory Regime itself did not cause damages to the Claimants. The Alberta Decisions, and the effects of the Domestic Litigations that culminated in the Alberta Decisions, did, as further discussed in this Reply's Section 5 on damages. As mentioned in *Resolute*, "*a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before*".[76]

[75] **C-450**, Opinion of Code Hunter on GSI data to CNLOPB and CNSOPB dated July 30, 1998.
[76] **CLA-046**, *Resolute*, at ¶ 154.

119. Further, Canada's references to GSI's litigation in the Falkland Islands[77] and in the United States[78] for the purposes of suggesting that the law was settled are irrelevant for the present purposes as they involve different set of laws and facts. They prove nothing in this Arbitration whatsoever.

120. For that reason, the Claimants also comply with the second criteria of Articles 1116(2) and 1117(2), namely no damages prior to November 2017 when the Alberta Decisions became final.

D. Claimants Fulfilled the Waiver Requirement Enshrined In Article 1121 Of NAFTA

121. Article 1121 of NAFTA provides for conditions precedent to the submission of a claim to arbitration.[79] Such conditions include waiving any right to initiate or continue domestic litigation with respect to the same measure that is alleged to be a breach of NAFTA, except for injunctive, declaratory or other extraordinary relief, not involving the payment of damages.

122. In summary, in Canada's Statement of Defence[80] and Counter-Memorial[81], Canada asserts that:

(a) the Claimants' claim is barred because they were required to discontinue all of their claims for damages against: (i) Canada, (ii) the Provinces of Newfoundland and Labrador and Nova Scotia, and (iii) the NEB, CNLOPB and CNSOPB "*with respect to*" the measures at issue in this Arbitration; and

(b) the Claimants also had to discontinue all Canadian and American domestic litigations against private third parties[82] (namely GSI's licensees, whose

[77] See Canada's Counter-Memorial at ¶¶ 336-337.

[78] See Canada's Counter-Memorial at ¶¶ 182-184.

[79] Article 1118 to 1120 also provide conditions and formalities precedent to submitting a claim to arbitration, but are not at issue in the present proceedings. Please refer to paragraphs 337 to 339 of the Claimants' Memorial regarding compliance with Article 1118 of NAFTA. Please refer to paragraphs 340 to 343 of the Claimants' Memorial regarding compliance with Article 1119 of NAFTA. Please refer to paragraphs 344 to 348 of the Claimants' Memorial regarding compliance with Article 1120 of NAFTA.

[80] ¶¶22 to 25.

[81] ¶¶155 to 156.

non-payment of their use and copying of GSI's seismic data caused damages to GSI).

123. The Claimants will rebut Canada's arguments on four bases (which are also discussed in paragraphs 354 to 371 of its Memorial):

(a) Except as explained hereunder at sub-paragraph (b), the Claimants did not continue domestic proceedings against: (i) Canada, (ii) the Provinces of Newfoundland and Labrador and Nova Scotia, nor (iii) the Boards (NEB, CNLOPB and CNSOPB) after April 18, 2019 with respect to the measures at issue in this Arbitration;

(b) The two domestic proceedings that the Claimants terminated on June 9, 2020, do not bar the Tribunal's jurisdiction because the Claimants' untimeliness in complying with its waiver was a matter that could be, and that has been, remedied; and

(c) The Claimants only continued domestic proceedings against private third parties which are not "*with respect to the measure of the disputing Party that is alleged to be a breach*"[83]. On this basis, these domestic proceedings do not overlap with the present NAFTA proceedings and the Claimants do not contravene Article 1121.

(1) The Object and Purpose of Article 1121 of NAFTA: Avoiding Conflicting Outcomes and Double Recovery for the Same Measures

124. Prior to delving into the Claimants' substantive arguments concerning compliance with Article 1121, it is important to recall the object and purpose of Article 1121.

125. As already discussed in the Claimants' Memorial[84], Article 1121 ought to be read and interpreted in accordance with the VCLT. Article 31(1) of the VCLT codifies the well-

[82] Including Plains Midstream, Total, Nalcor, TGS, Anadarko, Murphy and others.
[83] **CLA-1**, NAFTA, Article 1121.
[84] Claimants' Memorial, at ¶ 350.

known and accepted general rule of treaty interpretation whereby "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*"[85].

126. It has been recognized on several occasions in NAFTA cases that the object and purpose of Article 1121 is to avoid conflicting outcomes and double recovery for the same measures. At paragraph 164 of its *Counter-Memorial*, Canada expressly agrees with this premise.

127. Conversely, to the extent that domestic and NAFTA proceedings continue to co-exist but may not give rise to conflicting outcomes and double recovery because they are not predicated on the same illegal measures[86], Article 1121 will be complied with.[87]

(2) The Claimants did not Continue Domestic Proceedings against Canada, the Provinces of Québec, Newfoundland and Labrador and Nova Scotia, or the Boards after April 18, 2019

128. As discussed at paragraphs 356 to 358 of the Claimants' Memorial, and as evidenced in the Claimants' Exhibits[88], the Claimants discontinued the following proceedings before April 18, 2019:

(a) the *De Facto* Expropriation Claim commenced before the Federal Court of Canada against Canada[89] and the Provinces of Newfoundland and Labrador[90], Nova Scotia[91] and Québec[92]; and

[85] **CLA-034**, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969 at Article 31(1).
[86] **CLA-071**, *Waste Management, Inc. v. United Mexican States ICSID Case No. ARB (AF)/98/2*, Arbitral Award, June 2, 2000 [*Waste Management* Award] at ¶ 27.3
[87] **CLA-071**, *Waste Management* Award at ¶ 27.3
[88] **C-299** to **C-314**.
[89] **C-300**.
[90] **C-299**.
[91] **C-299**.
[92] **C-300**.

(b) the Government Domestic Claims commenced in Alberta against Canada, the NEB, the CNLOPB, Public Works and the NRC.[93]

129. This point does not require any further submissions, nor evidence. Canada has access to any public documents contained in court records should it believe otherwise.

(3) The Claimants' Inactive Continuance of Two Domestic Proceedings in Newfoundland and Labrador after April 18, 2019 Does Not Entail Non-Compliance with Article 1121 of NAFTA

130. By April 18, 2019, the Claimants had not formally discontinued two government domestic claims commenced in Newfoundland and Labrador. Such claims were terminated in June 2020[94].

131. Canada alleges that these claims "*were not discontinued until June 2020, more than a year after filing its NOA, but only with respect to the CNLOPB*"[95]. In Canada's view, this amounts to non-compliance with the formal requirement enshrined in Article 1121.

132. However, Exhibits C-311 and C-313 clearly evidence that these Newfoundland and Labrador-based litigations were left inactive for nearly two and a half years until being "procedurally revived" when summary dismissal proceedings were commenced by the Defendants, not GSI.

133. Importantly, as further discussed in paragraphs 359 to 363 of the Claimants' *Memorial*, these claims had been inactive prior to and after the NOA was served.[96]

134. In his Reply Witness Statement, Paul Einarsson confirmed that these two files remained inactive given that GSI did not intend to pursue them.[97]

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[93] **C-301**, **C-303**, **C-304**, **C-305**, **C-306**, **C-308** and **C-310**.
[94] **C-311**; **C-390** Court Docket in File No. 2011 01G 5430; **C-391** Court Docket in File No. 2013 01G 1671.
[95] Counter-Memorial at ¶ 177.
[96] **CWS-06**, at ¶ 166
[97] **CWS-12**, at ¶¶ 16-17.

135. In that sense, the Claimants complied with the substantive waiver requirement enshrined in Article 1121, which ought to be interpreted liberally.

136. As discussed above, Article 1121 is first and foremost concerned with avoiding conflicting outcomes and double recovery. Dormant proceedings that were left open for a year after the filing of their NOA did not create any such risks. Frankly, this Arbitration was stalled by the conflict of interest on Canada's team, and thus was not progressing with any speed.

137. The Claimants also did not act contrary to the "spirit" of Article 1121 NAFTA. As correctly pointed out by Canada in its Counter-Memorial, citing *Waste Management I*, "*the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued*"[98]. The Claimants' conduct, by inactively continuing these two domestic litigations, was in line with its NOA.

138. Furthermore, Canada's argument whereby the Claimants could not retroactively cure such untimeliness is meritless. Questions concerning the timeliness of waivers under Article 1121 have arisen in prior NAFTA cases and tribunals have concluded that the filing of a waiver after the filing of the NOA but before the hearing did not necessarily constitute a jurisdictional default.

139. In *Ethyl*, a similar question arose when the claimant, Ethyl Corporation, delivered a waiver under Article 1121 along with its Statement of Claim, and thus after the filing of its NOA. Canada, relying on Article 1121's formulation "*Conditions Precedent to Submission of a Claim to Arbitration*", argued that Ethyl Corporation's waiver was not timely and barred the tribunal's jurisdiction.[99] In response, Ethyl Corporation argued that Article 1121 was concerned with the admissibility of claims as opposed to the jurisdiction of the tribunal.[100]

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[98] **CLA-071**, *Waste Management* Award at ¶ 24.

[99] **CLA-070** *Ethyl Corporation v The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 [*Ethyl Corporation* Award] at ¶ 89.

[100] **CLA-070** *Ethyl Corporation* Award at ¶ 74-75.

140. First, that tribunal noted that the VCLT applied and that it ought to reject a too restrictive interpretation of Article 1121. Second, that tribunal asked the following question: "*To what extent, if any, is Canada's consent to arbitration in Chapter 11 conditioned absolutely on the fulfillment of specified procedural requirements at a given time?*"[101]

141. That tribunal concluded that the untimeliness of the waiver was not fatal for jurisdictional purposes as a waiver was necessarily implied in the act of initiating arbitral proceedings:

> *90. The Tribunal has not gained any insight into the reasons for the formalities prescribed by Article 1121, which on their fact seem designed to memorialize expressis verbis what is normally the case in any event, namely, that the initiation of arbitration constitutes consent to arbitration by the initiator, whereby access to any court or other disputes settlement mechanism is precluded (except as allowed ancillary to or in support of the arbitration).* [102] *[Our Emphasis]*

142. That Tribunal also concluded that the requirement that a waiver be included "*in the submission of a claim to arbitration*" did not necessarily mean "*in the NOA*".[103] The ultimate interpretation of Article 1121 was broad enough that it could mean at a later time than the NOA.

143. A liberal approach to Article 1121 was also adopted in the *Pope and Talbot* case under NAFTA.[104] In that case, in its statement of claim, the investor (Pope & Talbot) claimed damages arising out of one of its investments in Canada called Harmac Pacific Inc. ("**Harmac**"), a separate company. However, at the time of filing its NOA, Pope & Talbot had not filed a waiver for Harmac itself. In response, Canada asked that tribunal to dismiss Harmac's claim on jurisdictional grounds.

144. That tribunal ultimately rejected Canada's argument that the waiver perfected the claim to arbitration. To the contrary, that tribunal, relying on *Ethyl*, concluded that the claim to arbitration constituted a waiver of the right to initiate other proceedings. In other words,

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[101] **CLA-070** *Ethyl Corporation* Award at ¶ 60.

[102] **CLA-070** *Ethyl Corporation* Award at ¶ 90.

[103] **CLA-070** *Ethyl Corporation* Award at ¶ 83-84.

[104] **CLA-072**, *Pope & Talbot Inc v The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (the "Harmac Motion"), 24 February 2000.

that tribunal viewed the commencement of the NAFTA proceedings as a constructive waiver to initiate domestic proceedings.[105]

145. That tribunal also concluded that the requirement in Article 1121 that a waiver be included in the submission of a claim to arbitration did not entail that the waiver was a prerequisite to submitting a claim, but that the waiver be provided before that tribunal entertained the claim.[106] In that tribunal's view, complying with Article 1121 is a condition for the admissibility of a claim.

146. In *International Thunderbird*, Mexico sought the dismissal of International Thunderbird's claim because it had filed waivers under Article 1121 along with its statement of claim, approximately a year after having filed its NOA.

147. That tribunal recognized that the untimeliness of the filing of the waivers was an issue, but not one that could invalidate the submission of a claim to arbitration if the so-called failure was remedied at a later stage of the proceedings. That tribunal refused to construe Article 1121 in an excessively technical manner and deemed Thunderbird's claim admissible.[107]

148. In sum, NAFTA tribunals apply Article 1121 with flexibility, especially when the untimeliness of a waiver does not entail any risks of conflicting outcomes and double recovery. That is the case in the current circumstances, as there are no ongoing nor new domestic claims in respect of the measures that are the subject of this Arbitration.

149. The few domestic litigations that the Claimants did not discontinue were not actively pursued. That complied with the spirit of Article 1121, which requires a claimant not to continue overlapping domestic claims.

(4) The Claimants' Continuance of Private Law Domestic Proceedings Against Private Third Parties Does Not Breach Article 1121 Of NAFTA because

[105] **CLA-072**, Harmac Motion at ¶ 16.
[106] **CLA-072**, Harmac Motion at ¶ 18.
[107] **CLA-057**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006 at ¶ 116 to 118.

there is no Risk of Overlap nor Contradicting Outcomes Between These Proceedings and the Present NAFTA Proceedings

150. As discussed at paragraphs 362 to 371 of their Memorial, the Claimants continued a certain number of domestic proceedings in Canada and the United States against private third parties for breaches of private law.

151. Canada argues that these ongoing domestic claims for damages overlap with the present NAFTA proceedings because they are "*with respect to*" the NAFTA measure at issue (i.e. the Regulatory Regime according to Canada).[108] In Canada's view, this amounts to non-compliance with the material requirement enshrined in Article 1121.

152. With respect, Canada's claim is factually and legally incorrect. Fundamentally, the domestic proceedings are not "*with respect to the measures*" at issue in the NAFTA proceedings, namely the Alberta Decisions. This is another instance of Canada mischaracterizing the Claimants' claim to suit its desires.

153. Moreover, there is no risk of overlap between these domestic proceedings and the present NAFTA proceedings because:

(a) The parties involved in the domestic and the present NAFTA proceedings are different. The defendant parties in the domestic proceedings are purely private third parties and not Canada. Canada raises no evidence, nor can it, that it has been responding to the Claimants' pursuit of domestic litigation about expropriation or the transfer of proprietary knowledge since this Arbitration commenced;

(b) The subject-matter of the domestic and the present NAFTA proceedings (i.e. the actionable measures) are different. In the domestic proceedings, GSI's claims do not concern the implications of the Alberta Decisions under international law. The Claimants' domestic claims concern breaches of contractual licenses or

[108] Counter-Memorial at ¶¶ 162-168.

transmission of licensed data to non-licensees for tort, copyright infringement, breach of confidence, or other legal or equitable claims; and

(c) The remedies sought in the domestic and the present NAFTA proceedings are different. This last point is addressed in the next subsection concerning the absence of any risk of double recovery.

154. With respect to point (a) above, it is incontestable that the parties in the domestic and NAFTA proceedings are different. At paragraph 164 of its Memorial, Canada states that one of the aims of Articles 1121 is to "*avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple fora*". That aim is absolutely met in the present case. Canada cannot point to a single domestic proceeding that it is responding to at this time because there is none.

155. Furthermore, third parties are not government entities that are capable of having obligations under NAFTA.

156. With respect to point (b) above, Canada misconstrues the correct application of Article 1121. There cannot be overlap between the domestic and NAFTA proceedings because the actionable measures at issue are different.

157. In its Counter-Memorial, at paragraph 128, Canada argues that certain domestic claims are predicated on the allegation that the defendant third parties accessed data from the Boards. This is a complete misunderstanding of the status of GSI's ongoing domestic claims. The Alberta Decisions have already decided the issue of accessing seismic data from the Boards, leaving aside contractual issues as between the parties. For that reason, GSI's domestic claims are purely contractual or in tort.

158. Moreover, at paragraph 178 of its Counter-Memorial, Canada notes the TGS US litigation, which was the "test case" in the United States (one of five similar claims GSI brought in the US), as overlapping with this Arbitration. However, that litigation did not continue after the NOA was served, but for GSI seeking leave to appeal before the United States Supreme Court in 2020, which was denied. The issue in that litigation was whether the Seismic Works could be imported into the United States and TGS (as one of the

private defendants) defended this argument by saying that GSI's seismic data could be disclosed without restrictions as per the Alberta Decisions. So, the claim was an importation claim, contrary to what Canada alleges.

159. More importantly, in support of its position that the domestic proceedings overlap with this Arbitration, Canada argues that the phrase "*with respect to the measure*" in Article 1121 should be interpreted broadly to not mean that the measures challenged in the domestic and the NAFTA proceedings ought to be identical or predicated on the same legal instruments.[109] Canada pleads that this expression rather ought to be understood as "with reference or regard to something", "concerning the measure in question" or "relating to the disputed measure".[110] Canada argues that such were the conclusions reached in the NAFTA awards issued in *KBR*[111], *Detroit International Bridge*[112] and *Waste Management I*[113].

160. From the outset, it is important to note that those cases concerned NAFTA proceedings and domestic proceedings commenced against State-owned enterprises (i.e. sub-branches of NAFTA parties), not private parties.

161. Canada's reliance on the *Waste Management I*, *KBR*, *Detroit International Bridge* awards is evidence that Article 1121 of NAFTA is not applied to cases where the measures of public parties (under national or international law) and private parties (under contracts) are equated or overlapped.

162. In the *Waste Management I* case, Waste Management commenced NAFTA proceedings against Mexico for indirect expropriation based on the failure of different State-owned

[109] Counter-Memorial at ¶¶ 162-163.
[110] Counter-Memorial at ¶¶ 162-163.
[111] **RLA-018**, *KBR Inc. v. United Mexican States* (UNCITRAL) ("*KBR*") Final Award, 30 April 2015 ("*KBR* – Award").
[112] **RLA-012**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 2 April 2015 ("*DIBC* – Award").
[113] **CLA-071**, *Waste Management* Award.

entities (including the City Council of Acapulco ("**Acapulco**") and Banobras, a state-owned bank) to pay invoices under a concession agreement.[114]

163. Mexico invoked, among others, non-compliance with Article 1121 of NAFTA because there existed ongoing domestic litigation commenced by Waste Management against Acapulco and Banobras (for breach of contract and non-payment of invoices).[115] Waste Management replied that there could not be overlap between the NAFTA and the domestic proceedings because it did not invoke any breach of NAFTA (or international law more generally speaking) before the Mexican courts.

164. It is noteworthy that, in the *Waste Management I* case, the parties and contested measures were identical before both forums, namely: Acapulco's and Banobras' breach of concession agreement, which allegedly breached Mexican law and NAFTA.

165. That tribunal ultimately disagreed with Waste Management's proposition and held that, even if the measures invoked in the NAFTA proceedings related to obligations of international law, the same measures could very well constitute breaches of contract law under Mexican law such that it would be included within the framework of conduct that the waiver should cover:

> *27. […] According to the interpretation of the waiver maintained by the Claimant, said waiver would refer exclusively to proceedings that expressly invoke failure to comply with obligations of international law set forth in Chapter XI of NAFTA. Following this line of reasoning, the Claimant would have acted in accordance with the terms of its waiver since, in fact, ACAVERDE did not expressly invoke those provisions of NAFTA that it considered breached before other courts or tribunals, but instead, making use of the domestic instruments available to it under Mexican legislation, instituted several claims for monetary compensation in respect of unpaid invoices and non-compliance with various obligations under a line of credit agreement and a Concession Agreement, considering such conduct "permissible" in light of its own interpretation of said waiver. This justification of its conduct is unsustainable for the following reasons:*

[114] In short, Acapulco was alleged to have failed to pay invoices under the concession agreement and Banobras was alleged to have failed to make payments for the defaulting Acapulco.

[115] **CLA-071**, *Waste Management* Award at ¶ 14 and ff.

> *a) it is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA. In any case, it is not the mission of the Tribunal, at this stage of the proceedings, to make an in-depth analysis of alleged breaches of the NAFTA invoked by the Claimant, since that task, should it become necessary, belongs to an analysis of the merits of the question.*
>
> *[…]*
>
> *The fact, expressly admitted by the Claimant, that the object of the proceedings initiated against BANOBRAS and ACAPULCO referred to one of the measures allegedly breaching NAFTA provisions is sufficient proof, in the spirit of NAFTA Article 1121, to include it within the framework of conduct that the waiver should cover, as referred to in said Article and as proscribed for obtaining access to an arbitration proceeding as contemplated under NAFTA.*
>
> *§28 (…) It is clear that the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings.*
>
> *[…]*
>
> *§29 Also, we are facing proceedings with identical subjects for purposes of NAFTA Article 1121 since, pursuant to such treaty, the Mexican Government would have to be liable for those actions attributable to BANOBRAS and ACAPULCO. This point has been given sufficient credit through the Respondent's written pleadings concerning the issue of jurisdiction.* [116] *[Our Emphasis]*

166. That case is very different from this Arbitration. The *Waste Management I* case stands for the proposition that claims arising from the same measures may overlap. In this Arbitration, the actionable measures in the domestic and NAFTA proceedings are clearly not the same.

[116] **CLA-071**, *Waste Management* Award at ¶¶ 27-29.

167. On this last point, the dissent opinion of Arbitrator Keith Highet should be noted from the *Waste Management I* case, who posed the following question to answer this issue: *"[W]hether individual actions of, e.g. Banobras, or the Municipality of Acapulco, or Guerrera, would be considered as being the right kind of measure: i.e. a "measure ... that is alleged to be a breach" of NAFTA obligations within the meaning of Article 1121*".[117]

168. In his dissent, arbitrator Highet concluded that the language "*with respect to*" in Article 1121 of NAFTA should not be interpreted as broadly as meaning "*relating to*" or "*concerning*". He rather concluded that the important element in an Article 1121 analysis is to determine whether the causes of action in the domestic and NAFTA proceedings are different.[118]

169. This reasoning is sound. Conduct relating to a given legal activity (in this case, a domestic legal activity predicated on contractual rights) may not vitiate a waiver pertaining to another legal activity (in this case, an international legal activity predicated on international law). The same reasoning applies to GSI's domestic proceedings and the present NAFTA proceedings.

170. In *Detroit International Bridge Corporation*, Detroit International Bridge Corporation ("**DIBC**") sued Canada based on Canada's breaches of NAFTA through the adoption of various laws, policies and regulations that ultimately diverted traffic from the Ambassador Bridge (connecting the cities of Windsor and Detroit), thereby preventing the DIBC to collect toll revenues.

171. At the same time, the DIBC (along with the Canadian Transit Company, DIBC's Canadian subsidiary) pursued domestic proceedings in Washington D.C. against Canada, the United States and various United States government agencies based on, among others, the same measures raised against Canada in the NAFTA proceedings:

[117] **CLA-071**, *Waste Management* Award at ¶ 12.
[118] **CLA-071**, *Waste Management* Award at ¶¶ 13, 14 and 28.

> *298. On April 29, 2011, when the First NOA and the First Waiver were submitted, Claimant had a court proceeding ongoing against Canada (i.e., the Washington Litigation), which according to Canada involved the same measures as those at stake in this arbitration and included a request for damages. However, the Washington Litigation was expressly carved out from the First Waiver, which according to Canada prevents the Tribunal from acquiring jurisdiction in this arbitration.*[119] *[Our Emphasis]*

172. Canada argued that the "*gravamen of the [the DIBC's NOA] and DIBC's [complaint in the Washington Litigation] was the same: Canada's decision to locate the DRIC Bridge [a new bridge], corresponding Parkway, and customs plaza in proximity to the Ambassador Bridge*"[120].

173. Based on the facts of that case, and more specifically the NAFTA and Washington complaints at hand, that NAFTA tribunal concluded that the measures attacked in both the NAFTA and Washington proceedings were the same:

> *301.In order to analyze whether Canada's measures at stake in the Washington Litigation are the same as those at stake in this arbitration, it is necessary to first define the term "measure".*
>
> *[…]*
>
> *310. The Tribunal finds that DIBC's claims in the Washington Complaint covers the same grounds that the "measures" put in issue in the First NAFTA NOA.*
>
> *[…]*
>
> *312. In view of the foregoing, the Washington Complaint shows that the Washington Litigation was a proceeding with respect to the measures that are alleged to breach NAFTA in this arbitration.*[121] *[Our Emphasis]*

174. This case is also easily distinguishable from this Arbitration on two grounds. First, in both proceedings, there were identical parties: DIBC was claimant and Canada was defendant. Second, that tribunal concluded that the measures at issue in both proceedings covered the same grounds.

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[119] **RLA-012**, *DIBC* – Award at ¶ 298.
[120] **RLA-012**, *DIBC* – Award at ¶ 169.
[121] **RLA-012**, *DIBC* – Award at ¶ 301-312.

175. On the other hand, in this Arbitration, the measures at issue in the domestic and the present NAFTA proceedings (i.e. the actionable measures) are different. In the domestic proceedings, GSI's claims do not concern the implications of the Alberta Decisions under international law. The Claimants' domestic claims concern breaches of contractual licenses or transmission of licensed data to non-licensees for tort, copyright infringement, breach of confidence, or other legal or equitable claims.

176. In *KBR*[122], a company called COMMISA won an ICC arbitration against PEP, a Mexican public energy which had annulled COMMISA's permit to construct natural gas platforms. COMMISA commenced enforcement proceedings in the United States and also sought to attach PEP's assets in Luxembourg.

177. PEP successfully sought the annulment of the ICC Award before the Mexican Courts (which entailed the liquidation of the performance bonds that PEP provided to COMMISA). KBR, the parent company of COMMISA, then commenced NAFTA proceedings against Mexico, alleging that the Mexican Courts breached Articles 1105 and 1110 of NAFTA by annulling the ICC award and liquidating PEP's performance bonds.

178. Before that NAFTA tribunal, Mexico argued that COMMISA's continuation of the enforcement proceedings against PEP in the United States and Luxembourg breached Article 1121 of NAFTA.

179. Ultimately, that NAFTA tribunal found that the United States proceedings (between COMMISA and PEP for the enforcement of the ICC award) and the NAFTA proceedings (between KBR and Mexico, for the decision of the Mexican Courts) were inextricably linked[123], even if the subject-matter of the two proceedings was not identical. In that NAFTA tribunal's view, what mattered was the risk of conflicting outcomes and double recovery:

[122] **RLA-018**, *KBR* – Award.
[123] **RLA-018**, *KBR* – Award at ¶ 130.

> *130. The Tribunal considers that both the Annulment Decision and the calling of the performance bonds [NAFTA claims] fall within the subject matter of the Enforcement Proceedings. With regard to the Annulment Decision, the Tribunal is of the view that it is inextricably linked to the Enforcement Proceedings. Indeed, the Panama Convention provides that the annulment of an award may constitute a ground for non-enforcement (as does New York Convention which is applicable in the Luxembourg proceedings).146 In this respect, in the eyes of the Tribunal, it is irrelevant which party referred to the Annulment Decision in the Enforcement Proceedings. Nor can the Tribunal consider the Annulment Decision as merely incidental or tangential to the New York proceedings. Rather, it is clear that the Annulment Decision belongs to the core issues being decided in the Enforcement Proceedings.* [124] *[Our Emphasis]*

180. The main principle enunciated in *KBR* is that Article 1121 of NAFTA is, above all, concerned with avoiding conflicting outcomes and double recovery. In that case, the United States enforcement proceedings and the NAFTA proceedings were directly linked because both ultimately dealt with whether KBR was entitled to the "*benefits*" of the ICC Award (through domestic enforcement mechanisms in the United States and Luxemburg or through a NAFTA pecuniary condemnation).

181. That case is distinguishable from this Arbitration, as there definitely was a risk of inconsistent outcomes in *KBR*. In the end, both proceedings would lead to a determination of whether the ICC award ought to be enforced or not.

182. A precedent more relevant to our case is *Azinian*[125], where M. Azinian commenced NAFTA proceedings against Mexico further to Mexico's annulment (through administrative and subsequent court decisions) of DESONA's (the Mexican entity owned by M. Azinian) concession contract for waste collection and disposal in the city of Naucalpan de Juarez.

183. That tribunal performed an analysis of the "principles" underlying NAFTA's Chapter 11 and concluded that mere contractual breaches are not covered by NAFTA:

[124] **RLA-018**, *KBR* – Award at ¶ 116 and 130.

[125] **CLA-042**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999 ("*Azinian*").

> *83. […] a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and still not be in a position to state a claim under NAFTA. […]*
>
> *87. The problem is that the Claimants' fundamental complaint is that they are the victims of a breach of the Concession Contract. NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.*[126] *[Our Emphasis]*

184. Such reasoning squarely applies to the case at hand: the Claimants' domestic claims concern breaches of contractual licenses or transmission of licensed data to non-licensees for tort, copyright infringement, breach of confidence, or other legal or equitable claims unrelated to Canada's breaches under international law.

185. Turning to the present case, it is clear that there is a fundamental difference between the contractual licenses that GSI entered into with third parties and the confiscation by the Alberta Decisions.

186. As addressed below in Section 4.A., through the Alberta Decisions, Canada created a type of confiscation that did not exist before in Canadian law. The Tribunal could very well adjudicate the legality of no compensation for the Alberta Decisions under NAFTA without having to opine on the application of the contractual license claims by GSI against private third parties.

187. As already discussed at paragraph 371 of the Claimants' Memorial, evidence of how the Claimants' domestic private claims and NAFTA claims are unrelated can be found in the *Total* case.[127] In that litigation, GSI had sued *Total* for having breached its contractual obligation not to obtain and copy the Seismic Works from Boards.

188. Ultimately, GSI won this litigation and the source of *Total*'s wrongful conduct was determined to be the license agreement it had entered into with GSI, not any regulatory

[126] **CLA-042**, *Azinian* at ¶ 83 and 87.
[127] **C-286**, *Geophysical Service Incorporated v Total SA*, 2020 ABQB 730.

obligation. This is evidence that the litigation between GSI and Total was purely private and contractual, and most importantly unrelated to the rights and obligations enshrined in the Regulatory Regime.

189. In sum, the Claimants may continue to pursue the domestic actions because those proceedings are not "*[w]ith respect to the measure[s]*" at issue in this Arbitration and cannot result in contradicting outcomes.

(5) The Claimants' Continuance of Private Law Domestic Proceedings Does Not Breach Article 1121 Of NAFTA because there is no Risk of Double Recovery Between Those Domestic Proceedings and This NAFTA Proceeding

190. In the present case, there is no risk of double recovery.

191. Contrary to what Canada alleges, in the present NAFTA proceedings, the Claimants are not seeking the payment of the invoices at issue in the domestic proceedings. Canada attempts to portray PwC's valuation as a mere "addition exercise" (i.e. adding the outstanding amounts owed to GSI under 42 unpaid invoices to come to a "total"), but PwC's calculations are far more complex.

192. "Unpaid Invoices", as defined in paragraph 39 of PwC's Reply Report[128] and as listed in C-112, are considered as part of PwC's revenue normalization analysis towards an enterprise value of GSI.

193. In simple terms, PwC calculated the value of GSI, but for the Alberta Decisions, using normalized historical revenues.[129] This analysis is forward-looking, which is why it requires the normalization of historical revenues and earnings.

194. PwC calculated what GSI's revenues would have been had those Unpaid Invoices been paid as part of regular accounts receivables. The Unpaid Invoices claimed in the domestic proceedings are just considered as an element of a revenue normalization analysis. If the invoices are paid or unpaid, they are treated in the exact same manner.

[128] **CER-06** at ¶ 39.
[129] **CER-06** at ¶ 50.

195. In sum, contrary to what Canada alleges, PwC does not consider "Unpaid Invoices" as losses resulting from a NAFTA breach.[130] PwC is focused on arriving at an enterprise value for GSI based upon its historical revenues.

196. In any event, had GSI collected the unpaid invoices that it claims in the domestic proceedings against third parties, which is not the case, it would still be uncontestable that GSI would be entitled to use these invoices' amounts in its historical revenues to assess GSI's value.

197. Concerning the consideration of the revenues that GSI should have derived from the disclosure of the data rendered public from the Boards, a similar reasoning applies. PwC did not account for this revenue as a debt.

198. Instead, PwC considered this revenue as an indication of GSI's income-producing capability for revenue normalization purposes. This revenue is a good indication of the market demand for GSI's seismic data.[131]

199. Canada's arguments regarding double-recovery are therefore without merit.

E. The Estate of Theodore Davey Einarsson's Standing

200. Following the death of Davey Einarsson and subsequent exchanges between the Parties, the Tribunal directed the Claimants, pursuant to Procedural Orders Nos. 4 and 6, to submit materials concerning Paul Einarsson's authority and standing to pursue the claims initiated by Davey on behalf of Davey's Estate and on behalf of GSI. The Tribunal had previously communicated that it wished to confirm its jurisdiction over Davey's NAFTA claims following his death.

201. On March 14, 2024, the Claimants provided to the Tribunal and Canada detailed written submissions with supporting materials with respect to their position that Davey's Estate, which is duly represented by Paul Einarsson in these proceedings[132], is Davey's legal

[130] **CER-06** at ¶ 50.
[131] **CER-06** at ¶ 39.
[132] **CWS-08**, Witness Statement of Jessica Watts.

successor of his claims under Articles 1116 and 1117 NAFTA. All said materials are hereby incorporated by reference and form part of this Arbitration record.

202. On April 12, 2024, Paul Einarsson executed, on his own behalf, as the personal representative of the Estate of Davey, and on behalf of GSI, a Power of Attorney confirming that Stikeman Elliott LLP has full authorization to act in a full counsel of record role in this Arbitration.[133]

203. On May 22, 2024, Paul Einarsson signed a letter confirming that the waiver signed by Davey is binding on the Estate of Davey.[134] Canada confirmed that the letter signed by Paul Einarsson[135] addressed Canada's concerns with respect to the application of the April 3, 2019 waivers to the Estate of Davey Einarsson.[136]

F. The Claimants Comply with Articles 1101, 1116 And 1117 Of NAFTA: Paul Einarsson's Dominant And Effective Nationality Has Always Been And Remains American

204. For the purposes of the present subsection, the Claimants refer the Tribunal to paragraphs 169 to 241 of their Memorial, and more particularly paragraphs 191 to 235 concerning Paul Einarsson's dominant and effective American nationality. The Claimants also refer the Tribunal to Paul Einarsson's Witness Statement[137]. In that Witness Statement, Paul Einarsson clarifies that, as of 2011, his ties with Canada became minimal as the main purpose of his travelling to Canada was overseeing GSI's litigation:

> *I resided spent [sic] approximately 45% of each year from 2011 through 2016 in the United States, during which time I spent another 10-20% of the year travelling to see relatives in other countries such as Australia, Italy, or Iceland, or on vacations. I also travelled to and from Canada*

[133] **C-388**, Power of Attorney executed on April 12, 2024.
[134] **C-389**, Letter signed on May 22, 2024, acknowledging and affirming that the Estate of Davey Einarsson remains bound by the Article 1121 NAFTA Waiver executed on April 3, 2019.
[135] **CWS-12** at ¶ 13; **C-389**, Letter signed on May 22, 2024, acknowledging and affirming that the Estate of Davey Einarsson remains bound by the Article 1121 NAFTA Waiver executed on April 3, 2019.
[136] **C-445**, Letter from Canada to the Tribunal, dated May 28, 2024.
[137] **CWS-12** at ¶¶ 50 to 68.

> *after 2011 with the main purpose of overseeing GSI's litigation in Canada.*[138]

205. On this topic, Canada recognizes that, with respect to an investor's dominant and effective nationality, what matters is where was the focal point of that investor's economic and family life during the relevant times (include the date of the alleged loss and the date of the submission of the claim).[139]

206. Curiously, in its Counter-Memorial, Canada puts a lot of emphasis on Paul Einarsson's public statements from 2014 onwards.[140] However, statements of this kind are not determinative of the objective elements to be reviewed in a dominant and effective nationality analysis (including the place of habitual residence, the investor's personal attachment for a particular country, the circumstances in which the second nationality was acquired, etc.).[141]

207. Moreover, Paul Einarsson's T4s between 2011 and 2016 (filed in support of his Witness Statement dated May 31, 2024)[142] evidence that he maintained stronger ties with the United States than Canada. Tax returns are not material in and of themselves, but in the present case, they confirm that Paul Einarsson disposed of most of his Canada assets by 2017 and continued to sell afterwards.[143]

208. Finally, the burden of proving the American nationality of Paul Einarsson rests with, and was met by, the Claimants.

209. Now that Canada objects to it, the burden shifts to Canada to demonstrate the contrary, which it has failed to do.[144]

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[138] **CWS-12** at ¶ 43.
[139] Counter-Memorial at ¶ 484.
[140] Counter-Memorial at ¶ 481 and 484.
[141] **CLA-52**, *Michael Ballantine and Lisa Ballantine v The Dominican Republic,* PCA Case No. 2016-17, Final Award, 3 September 2019.
[142] **C-561**, Bundle of T4s of Paul Einarsson.
[143] **C-577**, Income and Tax Return of Paul Einarsson.
[144] **CLA-116**, *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, at ¶ 209-211.

IV. MERITS

210. In this Part, the Claimants' will address Canada's contentions in relation to its violation of Article 1110 of NAFTA (Section A), as well as its breach of Article 1106 of NAFTA (Section B).

A. Canada Breached Article 1110 of NAFTA by Expropriating the Claimants' Proprietary Rights

211. In support of its contentions that it did not breach Article 1110 of the NAFTA by expropriating the Claimants' rights in the Seismic Works, Canada argues the following:

(a) The Alberta Court Decisions cannot constitute an expropriation in violation of Article 1110 absent a denial of justice. This argument is without merit, as a denial of justice is not the only was in which expropriation can occur through a court decision;

(b) The Alberta Court Decisions did not lead to a substantial deprivation of the Claimants' investments in Canada. This argument is also without merit, as the Alberta Court Decisions caused a substantial deprivation of the value of the Claimants' investment to nil, and the Claimants have had no license sales or new business since 2017 and no compliance with its licence agreements by clients;

(c) The Alberta Decisions did not interfere with any distinct, reasonable investment-backed expectations of the Claimants. Assuming that demonstrating interference with a distinct, reasonable investment-backed expectation is required to satisfy the conditions of Article 1110 of the NAFTA – which is not admitted and expressly denied by the Claimants – the outcome of the Alberta Decisions was clearly contrary to the Government Conduct and Representations as well as Canada's established copyright law, including its obligations under NAFTA Chapter 17, which created an expectation on the part of the Claimants that Canada would abide by GSI's intellectual property rights in the Seismic Works; and

(d) The Tribunal has no jurisdiction to decide an alleged breach of NAFTA Chapter Seventeen (Intellectual Property) or the *Berne Convention.* This argument is

without merit, as Chapter 17 of NAFTA necessarily informs the analysis of Article 1110 of NAFTA.

212. The Claimants will refute the points raised by Canada in the same order as in the Counter-Memorial.

(1) Denial of Justice is not Required to Demonstrate an Indirect Expropriation Through a Domestic Court Decision

213. Contrary to what Canada argues, a denial of justice is not required to demonstrate an indirect expropriation through a court decision.[145] Canada is attempting to impose an additional burden on the Claimants that is not in Article 1110 of NAFTA.

214. As stated by the Tribunal in *Eli Lilly,* it is possible for a judicial act to engage questions of expropriation under NAFTA Article 1110, such as in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110, as contended by the Claimants in the present case:

> *[a]s a matter of broad proposition, […] it is possible to contemplate circumstances in which a judicial act (or omission) may engage questions of expropriation under NAFTA Article 1110, such as, perhaps, in circumstances in which a judicial decision crystallizes a taking alleged to be contrary to NAFTA Article 1110.*[146] *[Our Emphasis]*

215. *Sistem*[147], a case decided under the Turkey-Kyrgyz BIT, offers an example where a judicial act crystallizes a taking alleged to be contrary to the expropriation provisions of a BIT, without any findings of denial of justice. In that case, the tribunal concluded that the impugned domestic court decisions, which annulled a Share Purchase Agreement, had deprived the claimant of its property rights in its investment (a hotel) just as if the State had expropriated it by decree, and that no compensation had been paid to the claimant. The tribunal came to these determinations without any findings of denial of justice, rather noting that the abrogation of the claimant's property rights amounted to a breach of the

[145] See Counter-Memorial at ¶ 246.

[146] **RLA-025**, *Eli Lilly* – Award at ¶ 221.

[147] **CLA-082**, *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 [*Sistem Mühendislik* Award].

Turkey-Kyrgyz BIT, which forbids the expropriation of property unless it is done for a public purpose, in a non-discriminatory manner, and upon payment of prompt, adequate and effective compensation.

216. The following excerpts aptly summarize the tribunal's analysis to this effect:

> *117. The Tribunal has found that in 1999 the Claimant became the sole owner of the hotel, and that the Claimant's ownership rights in the hotel were abrogated by the decision of the Leninskiy District Court of the City of Bishkek dated June 27, 2005, which was upheld by the decision of the Bishkek City Court dated August 30, 2005 and the decision of the Kyrgyz Supreme Court dated November 2, 2005, invalidating the July 1999 Share Purchase Agreement. The effect of those decisions was supported by the decision of the Bishkek Interdistrict Court dated June 17, 2005, annulling the bankruptcy of Ak-Keme.*
>
> *118. That abrogation was effected by an organ of the Kyrgyz State, for which the Kyrgyz Republic is responsible. It is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree. If the Claimant has been deprived of its property rights by an act of the State, it is irrelevant whether the State itself took possession of those rights or otherwise benefited from the taking.*
>
> *119. That abrogation of the Claimant's property rights amounts to a breach of the Article III of the Turkey-Kyrgyz BIT, which forbids the expropriation of property unless it is done for a public purpose, in a non-discriminatory manner, and upon payment of prompt, adequate and effective compensation. Those conditions are not satisfied in this case: in particular, no compensation has been paid. The Respondent is accordingly obliged to make reparation for that breach of the BIT.*[148] *[Our Emphasis]*

217. In the case at hand and as argued extensively by the Claimants in their Memorial, the domestic court decisions, i.e., the Alberta Decisions, breached Article 1110 of NAFTA by confiscating GSI's copyright in the Seismic Works through a compulsory license in a manner tantamount to expropriation.[149] The present case is therefore similar to that in *Sistem*, in that the Alberta Decisions deprived the Claimants of their intellectual property

[148] **CLA-082**, *Sistem Mühendislik* Award at ¶ 117-119.
[149] Claimants' Memorial at Section IV.A.

rights in the Seismic Works, without providing adequate compensation under Article 1110 NAFTA. This is Canada's actionable breach under 1110 NAFTA pursuant to which the Claimants are seeking compensation.

218. Moreover, prior tribunals in other investor-state disputes have also found that it is not necessary for a claimant to show that a domestic court decision constituted a denial of justice to pursue an expropriation claim.[150]

219. Therefore, on such basis, Canada's contention that a finding of denial of justice is required to demonstrate an indirect expropriation through a court decision is without merit. As in *Sistem*, this Tribunal is rather required to make a determination that the Alberta Decisions deprived the Claimants of their intellectual property rights in the Seismic Works in breach of Article 1110 NAFTA, which forbids the expropriation of property unless it is done for a public purpose, on a non-discriminatory basis, in accordance with due process of law and Article 1105(1), and upon payment of compensation. Those conditions are not satisfied in this case, as no compensation has been paid to the Claimants pursuant to the confiscation of their intellectual property rights in the Seismic Works. Canada is accordingly obliged to make reparation for that breach under NAFTA.

(2) The Challenged Measures Caused a Substantial Deprivation of the Value of the Claimants' Investment

220. Both parties agree that the Claimants' investments will only have been expropriated if the measure at issue amounts to a "substantial deprivation" of their investment.[151] The parties, however, disagree on whether that standard is met in this case.

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[150] **CLA-079**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009; **CLA-081**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008; **CLA-083**, *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 at ¶¶ 359 and 701; see also, **CLA-084**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 at ¶¶ 457-458; **CLA-080**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010.

221. Contrary to what Canada alleges, the compulsory license and corresponding confiscation of the intellectual property rights in the Seismic Works that the Alberta Decisions imposed upon GSI caused a substantial deprivation of the Claimants' investment, which became worthless as a result.

222. Also contrary to what Canada alleges, the Alberta Courts had not "*stated (in the alternative and in obiter) that the Regulatory Regime issued a compulsory licence and was "confiscatory" in character*".[152] The Alberta Courts reasoning regarding the creation of a compulsory license system and corresponding confiscation of GSI's Seismic Works is at the heart of the Common Issues Decision and is intrinsically linked to its *ratio decidendi*, which was upheld on appeal.[153] To allege that these findings were made in *obiter* is simply inaccurate.

223. Moreover, at paragraph 17 of its Counter-Memorial, Canada suggests that there is no proximate causation between the Alberta Decisions and GSI's losses because the Alberta Courts could have dismissed GSI's claims for copyright infringement for other reasons. That is not the test for proximate causation, i.e., that there could have been other outcomes. The test is in relation to what was in fact decided. The Alberta Decisions determined that there was no more exclusive copyright in seismic data. The result of that decision was that GSI's business was expropriated.

224. The denial of exclusivity of GSI's copyright in its seismic data was interference so significant as to amount to a taking of GSI's business because GSI no longer had the valuable exclusive rights to control its seismic data – the very thing that GSI's business was premised on in order to be able to collect license fees on its data and restrict access to that data, and to support and carry on all other aspects of its business.

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[151] **CLA-076**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada* (UNCITRAL), Award, 2 August 2010 at ¶ 242; see also **CLA-077**, *Pope & Talbot Inc v Government of Canada,* UNCITRAL, Interim Award, June 26, 2000 [*Pope & Talbot* Interim Award] at ¶ 102.

[152] Counter-Memorial at ¶ 217.

[153] **R-001**, ABQB Common Issues Decision at ¶¶ 317-318; **R-002**, ABCA Common Issues Appeal at ¶ 104 and 106.

225. Canada further argues[154] that there was no substantial deprivation of the Claimants' investment because GSI can still license the Seismic Works. Canada ignores the fact that copyright is valuable because of its exclusive rights afforded to the owner of the copyright. When exclusivity is removed, it is devalued and meaningless because anyone is allowed to exercise all of those exclusive rights.

226. The Seismic Works and GSI's intellectual property rights therein were the lifeblood of GSI's business, which was predicated on its ability to keep the Seismic Works confidential and copyright by maintaining control of them and limiting their publication and copying.[155]

227. Before the Common Issues Decision became *res judicata*, GSI was not barred from seeking to enforce its copyright in the Seismic Works and none of the Domestic Actions were struck on the basis that GSI's claims were manifestly ill-founded. Instead, GSI was permitted to advance its infringement claims based in the Domestic Actions.

228. The Alberta Decisions annihilated GSI's ability to enforce its copyright and to generate licensing revenues. GSI can no longer license the Seismic Works for a fee because Canada made it available without a fee. In fact, no one has been licensing the Seismic Works after the Alberta Decisions. Third parties, all of whom were either GSI's former customers, former prospective customers, or former competitors, now have open source access to the Seismic Works from the Boards.[156]

229. This unrestricted access and copying, coupled with GSI's inability to enforce its copyright in domestic courts, effectively put GSI out of business.[157] At paragraph 377 of its Counter-Memorial, Canada concedes that the Alberta Decisions meant that GSI could no longer enforce its copyright claims. GSI has been substantially deprived of the value of its investment and is now unable to exclusively use, enjoy or dispose of its property. GSI is not even allowed to dispose of the seismic data under the Regulatory Regime,

[154] At ¶¶ 300-301 of its Counter-Memorial.
[155] **CWS-06** at ¶ 99.
[156] **CWS-06** at ¶ 156.
[157] **CWS-06** at ¶ 157.

which requires that it maintain a copy of the Seismic Works within Canada.[158] Clearly, GSI has lost its valuable proprietary rights in the Seismic Works.

230. In response, Canada relies on *Generation Ukraine* to argue that "[t]he fact that an investment has become worthless obviously does not mean that there was an act of expropriation".[159] Canada's assertion on this point is misleading. GSI would have had very valuable proprietary rights in the Seismic Works, but for the Alberta Decisions, as it would have been entitled to damages for the various infringements in the domestic claims and would have been able to continue to sustain its business.

231. In *Generation Ukraine,* that claimant was seeking damages in excess of USD$9.4 billion against Ukraine for the spoliation of its alleged investment in commercial property in Kyiv. That claimant contended that it was strongly encouraged by the Government of Ukraine to invest in Ukraine; that it established a local investment as a result; and that, after it duly identified and achieved approval of its investment in the commercial property in Kyiv, local authorities obstructed and interfered with the realization of that project over the course of the ensuing years in a manner that was tantamount to expropriation.

232. To establish expropriation, that tribunal in *Generation Ukraine* determined that the claimant was required to perform a coherent analysis of: (i) the timing and the nature of its investments in Ukraine; and (ii) how the acts and omissions of Ukraine had affected the claimant's investment in the form it existed at the time of those acts and omissions. In other words, the claimant not only had the burden of demonstrating the nature and quantum of its investment, but also had to establish causation between the alleged prejudicial acts with the erosion of the claimant's rights to its investment, all of which was to an extent that violated the relevant international standard of protection against expropriation.[160]

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[158] **C-142**, *Canada Oil and Gas Geophysical Operations Regulations*, SOR/96-117 at Section 39.
[159] Counter-Memorial at ¶ 283.
[160] See **RLA-084**, *Generation Ukraine* - Award, ¶ 20.26.

233. That tribunal in *Generation Ukraine* required that the claimant establish causation between the state's impugned measure and the loss of its investment. That Tribunal's reasoning provides the relevant context to the quote cited by Canada, although it omitted to cite the entire statement of such quote, which states that:

> *The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. [This emphasized part of the sentence was omitted by Canada in its citation]*[161]

234. In other words, not only is an investor required to demonstrate that its investment was destroyed (or became worthless), but it is further required to demonstrate how the acts and omissions of the State directly affected its investment, given that investments, by nature, entail risks of becoming worthless.[162] That is common knowledge.

235. Here, the Claimants argue that they were expropriated in breach of NAFTA because the total deprivation of the value of their investment was caused by the measures taken by Canada through its judicial branch (i.e., the Alberta Decisions, which confiscated the Claimants' copyright in the Seismic Works). The Claimants' reasoning is therefore aligned with that of the tribunal in *Generation Ukraine*. Contrary to what Canada seems to suggest, the Claimants do not argue that the loss of economic value of their investment, alone, is sufficient to establish an indirect expropriation.

236. Canada also contends that "*NAFTA tribunals have declined to find an indirect expropriation where the complaint merely alleged lost profits, while the claimant remained in possession of the investment and able to conduct other lines of business*".[163] Canada relies on the cases of *Feldman*, *Pope & Talbot*, and *Phillip Morris*.[164] Respectfully, these decisions are distinguishable from this Arbitration.

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[161] See **RLA-084**, *Generation Ukraine* - Award, ¶ 20.30.

[162] See **RLA-084**, *Generation Ukraine* - Award, ¶ 20.26.

[163] Counter-Memorial at ¶ 286.

[164] **RLA-021**, *Feldman* – Award, ¶ 52; **CLA-077**, *Pope & Talbot* – Interim Award, ¶ 101; **RLA-075**, *Philip Morris* – Award, ¶¶ 279-283.

237. First, the *Feldman* case concerns a dispute regarding the application of certain tax laws by Mexico to the export of tobacco products by the claimant. That claimant alleged that, through the conduct of its Ministry of Finance and Public Credit, Mexico's refusal to rebate excise taxes applied to cigarettes exported by that claimant and Mexico's continuing refusal to recognize the claimant's right to a rebate of such taxes regarding prospective cigarette exports constituted a breach of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Level of Treatment) and 1110 (Expropriation and Compensation). Regarding its expropriation claim, that claimant's contention was that the various actions of Mexican authorities in denying the tax rebates on cigarette exports to the claimant resulted in an indirect or "creeping" expropriation of the claimant's investment and were tantamount to expropriation under Article 1110.

238. That Tribunal declined to find expropriation due to, among other elements, the fact that the exportation of cigarettes formed one of the components of the claimant's business and that such other components were unaffected by the regulatory actions of Mexico.

239. The *Feldman* case is obviously distinguishable from this Arbitration insofar as the Claimants do not conduct other lines of business.[165] Moreover, although it is true that the tribunal declined to find indirect expropriation, the fact that the claimant alleged lost profits as part of its damages was not part of the determining factors in order to conclude that there was no expropriation.

240. In *Pope & Talbot*, the claimant was a United States company with a Canadian subsidiary which operated three sawmills in Canada and exported to the United States most of the softwood lumber it produced. The dispute arose out of Canada's actions in the implementation of the five-year Softwood Lumber Agreement ("**SLA**") concluded by Canada and the United States in 1996. The SLA established a limit on the free export of softwood lumber into the United States and required Canada to collect a fee for export of softwood lumber in excess of certain established quantities. Each year, Canada allocated export quotas among its softwood lumber producers. The claimant alleged that certain aspects of Canada's implementation of the SLA constituted a breach by Canada of the

[165] **RLA-021**, *Feldman* – Award, ¶ 142.

following provisions under NAFTA Chapter 11: Article 1102 (National Treatment), Article 1105 (Minimum Standard of Treatment), Article 1106 (Performance Requirements) and Article 1110 (Expropriation). In relation to its expropriation claim, that claimant alleged that Canada's implementation of the SLA had deprived the investment of its ordinary ability to alienate its product to its traditional and natural market. The claimant alleged that each time Canada reduced the investment's allocation of fee free quota, a further expropriation occurred.

241. Although that tribunal concluded that the investment's access to the United States market was a property interest subject to protection under Article 1110 NAFTA and that the scope of that Article did cover non-discriminatory regulation that might be said to fall within an exercise of a state's so-called police powers, that tribunal did not believe that those regulatory measures constituted an interference with the investment's business activities substantial enough to be characterized as an expropriation under international law.[166] In its analysis, that tribunal noted that the claimant remained in full control of its investment[167], further noting that the claimant continued to derive profits from its investment despite Canada's measures.[168]

242. Moreover, that tribunal further noted that the degree of interference with the investment's operations did not rise to the level of an expropriation, as an interference must be sufficiently restrictive to support a conclusion that the property has been "taken" from the owner.[169]

243. Therefore, the *Pope & Talbot* case cited by Canada does not directly support its contention that "NAFTA tribunals have declined to find an indirect expropriation where the complaint merely alleged lost profits, while the claimant remained in possession of the investment and able to conduct other lines of business"[170].

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[166] **CLA-077**, *Pope & Talbot* – Interim Award, ¶ 96.
[167] **CLA-077**, *Pope & Talbot* – Interim Award, ¶ 100.
[168] **CLA-077**, *Pope & Talbot* – Interim Award, ¶ 101.
[169] **CLA-077**, *Pope & Talbot* – Interim Award, ¶ 102.
[170] Counter-Memorial at ¶ 296.

244. Turning to this Arbitration's facts, in this case, the Claimants no longer derive any profits out of their investment as a result of the Alberta Decisions, which have significantly deprived the investment of its value by allowing its open-source access by third parties without adequate compensation.

245. Second, the *Pope & Talbot* case is obviously distinguishable from this Arbitration insofar as the interference in the Claimants' investment is very significant. The Claimants' intellectual property rights in the Seismic Works constituted the heart of their business, and this is what was confiscated by the Alberta Decisions. Therefore, contrary to the findings in *Pope & Talbot*, Canada's interference in the case at hand is sufficiently restrictive to support a conclusion that the property has been effectively 'taken' from its owner.

246. Turning to the next case that Canada relies upon in its arguments, *Philip Morris* is also distinguishable from this Arbitration. That dispute concerned allegations by claimants that, through several tobacco-control measures regulating the tobacco industry, Uruguay violated the Switzerland–Uruguay Bilateral Investment Treaty in its treatment of the trademarks associated with cigarettes brands in which the claimants had invested. In consideration of those claimants continuing to derive substantial profits from their business and that they only alleged partial loss of profits, that tribunal dismissed all the claims made by the claimants and upheld the legality of the tobacco control measures enacted by Uruguay for the purpose of protecting public health, as the impugned measures did not substantially deprive the claimants of their investment.[171]

247. By contrast, the Claimants in the instant case have not suffered a partial, but a ***total*** deprivation of not only profits, but all revenues and any compliance with existing contracts. The Claimants no longer derive any benefits from their investment as a result of the Alberta Decisions. Further, there is no public health measure at stake in this Arbitration, as there was in the *Philip Morris* case.

[171] **RLA-075**, *Philip Morris* – Award, ¶¶ 285-296.

248. Thus, contrary to the cases cited, Canada's interference is sufficiently restrictive to support a conclusion that the Claimants' investment has been "taken" from them.

(3) CUSMA Annex 14-B is not Relevant in this NAFTA Case

249. At the outset of its Counter-Memorial, Canada purports to outline the principles governing the interpretation of Article 1110 of NAFTA. Canada makes the argument that Annex 14-B of the *Canada-United States-Mexico Agreement* ("**CUSMA**") is relevant in interpreting NAFTA.[172] Canada then relies on CUSMA Annex 14-B for guidance on the issue of whether a measure constituted an indirect expropriation under NAFTA in order to notably add the requirement that for an indirect expropriation to occur, a tribunal must consider "*the extent to which that measure interferes with distinct, reasonable investment-backed expectations*"[173].

250. Canada's reliance on the CUSMA to retroactively interpret provisions of the NAFTA is clearly unwarranted.

251. In *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, that claimant rightly pointed out that Canada's reliance on CUSMA to interpret NAFTA is a boilerplate submission used in many different arbitrations.[174] Canada cannot use its own negotiated agreement, which came into force more than twenty years after NAFTA and after this Arbitration commenced, to argue a retroactive application of CUSMA. The Claimants had no part in that renegotiation and their expectations would have relied on NAFTA, not CUSMA.

252. CUSMA has no bearing on the intent of the parties at the time of NAFTA's conclusion. In *RosInvestCo UK Ltd.*, the tribunal correctly held that "*earlier or later BITs or other*

[172] Counter-Memorial at ¶¶ 240-243.

[173] See e.g., Counter-Memorial at ¶ 282.

[174] **CLA-117,** Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada, ICSID Case No. ARB/20/52, Claimant Reply Memorial, at ¶¶ 518-519.

agreements or other practice of the contracting parties" do not bear a relationship or connection with the treaty to be interpreted and thus should be ignored.[175]

253. NAFTA must be interpreted on its own terms and with tools that are relevant to the interpretation of the intent of the parties at the time of its enactment. Canada's recourse to CUSMA is self-serving and this later treaty is simply too remote to be of any relevance.

254. Notwithstanding the above, the Claimants in any event would meet Canada's alleged test under the CUSMA, as the Claimants had a reasonable, investment-backed expectation that they held copyright in the Seismic Works for the normal term guaranteed under Canadian copyright laws. Furthermore, the Claimants never consented to the confiscation of their copyright in the Seismic Works.

(4) In Any Event, the Alberta Court Decisions Interfered with the Claimants' Reasonable Investment-Backed Expectations

255. The Claimants had a reasonable, investment backed expectation that they held copyright for the normal term guaranteed under Canadian copyright laws, United States copyright laws and NAFTA Chapter 17.

256. In its Counter-Memorial, Canada argues that, because the Claimants knew about the Regulatory Regime, "*they cannot establish that they held a distinct reasonable investment-backed expectation that they could prevent the disclosure and copying of GSI's Submitted Seismic Materials after the confidentiality period expired*".[176]

257. Canada's contention obfuscates the crucial distinction between accessibility and copying.

258. Until the Common Issues Decision was rendered, the Claimants held the reasonable belief that both the Regulatory Regime and the *Copyright Act* could coexist and that they maintained their copyright protections after the expiry of the privilege period (note it is

[175] **CLA-118,** *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on jurisdiction, October 2007 at ¶ 119.
[176] Counter-Memorial at ¶ 323.

not called a "confidentiality period" in the CPRA). Prior to that date, no Canadian court had yet adjudicated the lawfulness of the disclosure and copying of the Submissions in relation to GSI's intellectual property rights in the Seismic Works.[177]

259. Moreover, at the time of the Claimants' investment, the format of the disclosed seismic data (paper and mylar copies) could not be easily copied to a SEG-Y format. That is, until the development of computers and the vectorizing process became available in Canada during the 1990s.[178] The Claimants did not foresee those technological advancements at the time of their investment, such that the disclosure of their Seismic Works could make them accessible for copying.[179]

260. The Claimants note that Canada is eager to assert that it is not disclosing digital or SEG-Y seismic data.[180] However, the Boards have demonstrated their intent to demand submission of SEG-Y processed digital data[181], which first started with the CNSOPB changing its policy in order to do so, and was followed by the CNLOPB. In fact, the CNSOPB demanded that GSI submit SEG-Y digital data **retroactively** for all of the Seismic Works in its jurisdiction and GSI complied due to potential for regulatory repercussions or retribution. Given the Alberta Decisions, all seismic data, regardless of format, can be disclosed and copied, including SEG-Y digital data. The Secondary Submissions also include different versions of GSI processed and reprocessed SEG-Y digital data, which is then available for disclosure and copying under the Alberta Decisions.[182]

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[177] See, **C-205**, *FCA NEB Appeal* at ¶ 12 (refusing to consider whether the Regulatory Regime overrides GSI's intellectual property rights in the Seismic Works); **C-211**, *Geophysical Service Incorporated v Antrim Energy Inc*, 2015 ABQB 482, Memorandum of Decision at ¶ 41 (refusing to decide whether Canadian law precluded GSI's claim for copyright infringement against a party who obtained Seismic Works from the CNLOPB).

[178] Claimants' Memorial at ¶¶ 435-436; **CWS-04**, Ralph Maitland Witness Statement dated August 24, 2022 at ¶¶ 3 and 9.

[179] **CWS-03** at ¶¶ 56 and 59 ("*At the time that the Seismic Works were created, predecessors to GSI that I worked with did not anticipate the technological advances that have occurred in the seismic industry*").

[180] Counter-Memorial at ¶¶ 64-65, 296, 298.

[181] **CWS-12**, ¶¶ 29 and 30; **C-407,** Letter from Sandy MacMullin to Murray Coolican dated October 20, 2010.

[182] **C-578,** Letter from D. Henley to James Isnor dated September 29, 2010. **C-579**, Letter from GSI TO CNSOPB dated July 7, 2009.

261. In any event, and regardless of the evolution of technology, section 101(7) of the *CPRA* does not explicitly state that the information deposited with the Boards may be "copied". The Claimants thus reasonably believed that copyright subsisted in their Seismic Works and that their copyright protection survived the confidentiality period, and that protection would be enforced by Canadian courts.

262. The Alberta Court of Queen's Bench recognized the nuance between disclosure and copying. Nevertheless, that Court concluded that section 101 of the CPRA allowed copying by implication.[183] The Court of Appeal of Alberta upheld that reasoning to the effect that disclosure entails the right to copy, noting that "[w]hile section 101 of the *Canada Petroleum Resources Act* does not explicitly provide that seismic data may be "copied", the extensive provisions thereunder as to "disclosure" do not provide any restrictions beyond the privilege period".[184]

263. The Claimants' experts, Dr. Nigel Bankes and Dr. Cameron Hutchison confirmed that such interpretation was unexpected by the legal community.

264. Dr. Nigel Bankes and Dr. Cameron Hutchison both explain that the Alberta Courts' interpretation was "*an unnecessarily broad interpretation of the section [of the CPRA] which confounds the different qualities of the rights (and liberties) associated with the data*", namely that copyright is a form of property that affords exclusivity, but not confidentiality, the latter stemming from common law (including contracts).[185]

265. Dr. Cameron Hutchison explains in his report that fundamentally, copyright law in Canada aims to provide creators with rewards and protections, including exclusivity (to produce, reproduce, exhibit, perform, communicate, publish or sell the works), which can be dealt with through contractual licensing or exceptions enshrined in the law, whereas

[183] **R-001**, ABQB Common Issues Decision at ¶¶ 252-253.

[184] **R-002**, ABCA Common Issues Appeal at ¶ 99.

[185] **CER-01** at Appendix "B" (Case comment on *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230: "Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute")

confidentiality is concerned with access to certain information (as provided in the CPRA).[186]

266. The Common Issues Decision thus obscures the distinction between confidentiality (which prohibits access) and exclusivity (which protects ownership and prohibits copying, among other things), which came as a surprise to the Claimants and the legal community.[187] It also would have been a surprise to Canada, given that it had believed that seismic data owners could enforce their ownership rights.[188]

267. Based on this novel finding, the Court of Queen's Bench of Alberta concluded that there was an apparent "conflict" between the Regulatory Regime and the *Copyright Act*. Again, the existence of this "conflict" was not foreseeable nor automatic, especially given that "the governing principle" is the presumption of coherence between different legal instruments.[189]

268. The Court of Queen's Bench of Alberta then proceeded to resolve this apparent "conflict" by applying the doctrine of *lex specialis*, holding that "the specific legislated authority in the Regulatory Regime that allows disclosure and copying, as described above, prevails over the general rights afforded to GSI in the *Copyright Act*".[190]

269. The Court of Queen's Bench of Alberta's recourse to the doctrine of *lex specialis* and the Court's *lex specialis* analysis was unknown to the parties.

270. The Claimants' expert, Dr. Hutchison, explains that the problem of overlapping statutes should be resolved through a modern principle construction. The modern principle of statutory interpretation most frequently cited by the Supreme Court of Canada is as follows:

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[186] ¶¶ 25-28 and 38.

[187] **CWS-06** at ¶ 153; **CER-01** at Appendix "B" (Case comment on **C-340**, *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230: "*Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute*").

[188] **CWS-06** at ¶ 84(v); **C-483**, CAN.NAFTA00020950.

[189] **CER-01** at ¶ 51.

[190] **R-0001**, ABQB Common Issues Decision at ¶ 304.

> *[…] the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*[191]

271. Dr. Hutchison notes that confusion arises from the use of priority rules, adopted at a time when courts construed legislation textually rather than according to the modern principle.[192] Among those older interpretive principles is the doctrine of *lex specialis* to the effect that the more specific statutory provision takes precedence over the more general one.[193] This priority rule is unpredictable since "*[i]t is not always clear which statutory provision is the more specific such that the lex specialis is applicable*."[194]

272. Thus, the Court of Queen's Bench of Alberta's novel findings that "*the liberty to disclose includes the liberty to copy and to facilitate copying by others*"[195], the disclosure requirements in the Regulatory Regime created a compulsory licensing scheme for seismic data despite the fact that the *Copyright Act* does not provide for any compulsory licensing scheme,[196] as well as its recourse to the rule of *lex specialis* to resolve the apparent "conflict" that it had just created between the *Copyright Act* and the *CPRA* and despite none of their provisions indicating express overlap between them, were far from self-evident and do not make the Claimants' belief unreasonable. In fact, it is quite the contrary.

(5) The Claimants Never Consented to the Confiscation of their Copyright

273. Canada contends that *"[b]y choosing to participate in the Regulatory Regime and capitalize on the potential benefits of acquiring seismic data, the Claimants necessarily assented to all of the terms and conditions of entry – including the Boards' right to*

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[191] **CER-04** at ¶¶ 3 and 5.
[192] **CER-04** at ¶ 8.
[193] **CER-04** at ¶ 8.
[194] **CER-04** at ¶ 9.
[195] **CER-01** at ¶ 25 and at Appendix "B" (Case comment on *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230: "Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute").
[196] **CER-04** at ¶ 41.

disclose and copy the Disclosed Seismic Materials" [Our Emphasis].[197] This submission is misleading and should be dismissed.

274. In the Common Issues Decision, the Court of Queen's Bench of Alberta acknowledged that the Claimants never consented to disclosure of the Seismic Works:

> *[317] It is also clear that GSI fought against this disclosure policy for years (and obviously is still fighting). To suggest that it has "consented" to the disclosure of its very valuable seismic data, impliedly or not, does not sit well with me. In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public. The Regulatory Regime provides for this, as discussed above. GSI may not have liked to do so, it certainly never "consented" and it may be unfair, but it is the Regulatory Regime approved by Parliament.*[198]

275. This finding is *res judicata* as between GSI and Canada, who both participated in the Alberta Decisions.

276. Further, the findings of Court of Queen's Bench found a conflict between the Regulatory Regime and the *Copyright Act* for the first time and then ruled upon it. Therefore, the Common Issues Decision was accordingly the first instance in which the Claimants' copyright was confiscated. A party cannot consent to something if it was unknown previously. That is illogical and begs clairvoyance.

277. Even further, the Common Issues Decision found as a fact that the permits and program authorizations did not say anything about GSI assigning or licensing the Seismic Works to Canada or Canadian regulatory bodies.[199]

278. In other words, GSI never consented to the disclosure of the Seismic Works, never assigned or licensed the Seismic Works to Canada and did not consent to the confiscation of their copyright. It is not open to this Tribunal to find otherwise and thereby contradict

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[197] Counter-Memorial at ¶ 329.

[198] **R-001**, ABQB Common Issues Decision at ¶ 317.

[199] **R-001**, ABQB Common Issues Decision at ¶ 130 ("I will mention the permit requirements only briefly later in these reasons. They are not contentious and it is conceded that they contain nothing to suggest that seismic data is assigned or licensed to the regulatory bodies...").

the findings of the Common Issue Decision. Canada was a party to the domestic proceedings and had its chance to argue that GSI consented; it cannot do it again as it is *res judicata*.

279. As mentioned, Canada is unable to point to any permits or authorizations that contradict this finding. Canada merely refers to cover letters, some of which reference the end of the confidentiality period.[200] These cover letters are not permits and cannot alter the terms of the law and regulatory permits that were issued to GSI. They do not reference the Claimants' intellectual property rights, including copyright; therefore, there is nothing to suggest that the intellectual property rights in the Submissions did not or would not remain intact and survive the expiry of the confidentiality period. Canada's allegation that the Claimants somehow consented to the taking of their copyright in the Seismic Works is belied by the record.

280. Canada relies[201] on the *Wholesale Travel*[202] case from the Supreme Court of Canada to argue that GSI consented by participating in the regulated activity of conducting seismic surveys. However, the Common Issues Decision reviewed the *Wholesale Travel* case and rejected the assertion that GSI consented to the disclosure of its Seismic Works,[203] so Canada's argument is without merit.

(6) A Public Program without Compensation is Illegal Expropriation

281. Canada's submission that the character of the Alberta Decisions was not expropriatory is also without merit.[204] The Alberta Decisions crystallized the expropriation of the Claimants' copyright in the Seismic Works by taking their intellectual property rights without compensation.

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[200] Counter-Memorial, ¶325, citing *See e.g.*, **RWS-03**, Makrides Witness Statement at ¶ 25; **RWS-01**, Dixit Witness Statement at ¶ 28; **RWS-02**, Bennett Witness Statement at ¶ 35.
[201] Counter-Memorial at ¶¶ 328-332.
[202] **R-100**, *R. v. Wholesale Travel Group Inc.* [1991] 3 SCR 154.
[203] **R-001**, ABQB Common Issues Decision at ¶¶314-318.
[204] Counter-Memorial, ¶¶ 345-346.

282. Article 1110 of NAFTA makes clear that a State cannot expropriate an investment except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6 thereof.

283. Canada refers to an OECD article entitled *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law,* which states that arbitral tribunals have identified three factors to distinguish legitimate non-compensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, namely: (i) the degree of interference with the property right; (ii) the character of governmental measures, i.e. the purpose and the context of the governmental measure; and (iii) the interference of the measure with reasonable and investment-backed expectations.[205]

284. Canada alleges that the assessment of the character of the measure "requires considering whether the challenged measure involves physical invasion by the government, or whether it is more regulatory in nature – such as if the challenged measure concerns a public program adjusting the benefits and burdens of economic life to promote the public interest".[206] Canada suggests that the mere regulatory nature of a measure, without more, is sufficient to militate against a finding of indirect expropriation.

285. Canada's submission is inaccurate. The sources cited by Canada instead establish that the test to assess the character of the measure is not whether the "*challenged measure involves physical invasion by the government, or whether it is more regulatory in nature*", but rather "*whether the measure refers to the State's right to promote a recognized "social purpose" or the "general welfare" by regulation*"[207].

[205] Counter-Memorial, ¶ 345 at footnote 626, citing **RLA-078**, OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, (OECD Working Papers on International Investment) 10 (2004/4).
[206] Counter-Memorial at ¶ 345.
[207] **RLA-078**, OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, (OECD Working Papers on International Investment) 10 (2004/4), at p. 16. See also **RLA-121**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006 at ¶ 262.

286. The focus is therefore on whether the regulation was made for the "general welfare" or a recognized "social purpose", such as the environment, human health and safety, market integrity and social policies.[208] A determination that a challenged measure is regulatory in nature is not sufficient to trigger the public interest exception to indirect expropriation.

287. Moreover, none of the sources cited by Canada discuss a so-called public program that seeks to "adjust the benefits and burdens of economic life to promote the public interest", and for which compensation would not be required. This is not a case of taxation. This overly broad notion of non-compensable regulation "adjusting the benefits and burdens of economic life" would effectively render the expropriation clause of NAFTA meaningless, as it could legitimize any form of economic taking by the State.

288. In this case, Canada's confiscation of the Claimants' copyright in the Seismic Works does not aim to protect a recognized social purpose such as the environment, human health and safety, market integrity or social policies. The expropriation rather seeks to promote oil and gas exploration and development of the Canadian offshore and frontier lands by interested parties – i.e., to allow the very customers of GSI to access the Seismic Works without a fee. While the government has the prerogative to enact legislation aimed at facilitating oil and gas exploration, it cannot take away, through its judiciary, GSI's copyright in the Seismic Works without adequate compensation. This is especially true when the purpose of the Submission Legislation related to safety and environmental regulation. The Submission Legislation never had a purpose statement that related to the promotion of Canadian offshore oil and gas development. The purpose of the Submission Legislation indicated to Davey, Paul and GSI that the Submissions were only required for that purpose – safety and environmental regulation.[209]

289. The *Copyright Act* already balances the competing interests of authors, who must be rewarded for their creative investment, and the general public, who becomes entitled to use the copyright work upon the expiry of a reasonable period of time. The Alberta

[208] **RLA-078**, OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, (OECD Working Papers on International Investment) 10 (2004/4), at p. 22.
[209] **CWS-03** at ¶ 61(a); **CWS-06** at ¶ 115(b).

Decisions trampled the balance struck by the *Copyright Act* by confiscating the Claimants' intellectual property rights in the Seismic Works well ahead of the protection afforded under the *Copyright Act*, without any compensation whatsoever:

> *In Geophysical Service Incorporated v Encana Corporation, Justice Eidsvik considered whether GSI's submission of seismic data as required under the Canadian Petroleum Resources Act (CPRA) constituted an "implied license" or a "compulsory license." The justice states:*
>
> *As noted above, the Defendants argue that by participating in the Regulatory Regime, GSI impliedly licenced its data for public use pursuant to the "rules of the regime". This is another way of viewing the allegedly competing legislation, that is, to take the view that s 101 of the CPRA creates a mandatory or compulsory licensing system for seismic data, once the confidentiality period has expired. The music and broadcast business also has compulsory licencing requirements and, in a way, the situation here is similar.*
>
> *This passage presents a novel understanding of copyright terminology that sometimes happens when a generalist judge encounters an unfamiliar, and complex, legal area. Implied licenses and compulsory licenses are not, as canvassed above, the same thing. Moreover, compulsory licensing, which does not exist under the Copyright Act, is distinct from the collective administration of copyright.*[210] *[Our Emphasis]*

290. At paragraph 200 of its Counter-Memorial, Canada relies on the case *Carrizosa v. Republic of Colombia*, which states "*[i]ndeed, a judicial decision dealing with the amount of compensation for expropriation can be independently challenged, e.g. for violating the treaty's standard of adequate and effective compensation*"[211], as quoted by Canada in its Counter-Memorial. That is exactly what the Claimants seek right now – adequate and effective compensation for Canada's breach of NAFTA. Canada tries to argue that the Common Issues Decision stated that the CPRA provides for no compensation. Contrary to Canada's argument, the Court of Appeal of Alberta stated

[210] **CER-04** at ¶ 18.

[211] Counter-Memorial at ¶ 200; **RLA-024**, *Carrisoza – Award* at ¶¶ 165-166.

that it would not decide the compensation issue because that was not a central point of the Common Issues Decision, thereby leaving the compensation issue an open question.[212]

291. In light of the foregoing, the Alberta Decisions breached Article 1110 of NAFTA and Canada's defences to the Claimants' claim for expropriation are without merit.

B. Canada Breached Article 1106 of NAFTA by Imposing Performance Requirements on GSI

292. In its Counter-Memorial, Canada contends that the Claimants' Article 1106 claim should fail for notably the following reasons:

(a) The Alberta Decisions did not 'enforce' any requirement on GSI to transfer proprietary knowledge to the Boards or third parties.[213] However, the Claimants have already clearly established that the Alberta Decisions have in fact "enforced", i.e., made effective, the Regulatory Regime's provisions, and even expanded "disclosure" to "copy" and "publish", which have for all purposes and effect, forced GSI to grant some form of compulsory license to permit the Seismic Works to be released and used by the public.[214] Therefore, the Claimants reiterate their arguments made in their Memorial on this issue and submit that Canada's counter-arguments are without any merit;

(b) the Regulatory Regime did not impose any "requirement" on GSI to transfer proprietary knowledge to third parties, since GSI chose to participate in the Regulatory Regime, applied to the Boards to obtain an authorization to undertake seismic operations on Canada's offshore and, in doing so, it necessarily assented to the terms and conditions applicable to such authorizations as set out in the Regulatory Regime. However, the Claimants have already clearly established that GSI never consented to the Regulatory Regime or the disclosure of the Seismic

[212] Claimants' Memorial at ¶ 98-103. 313 **R-002**, *Geophysical Service Incorporated v. Encana Corporation, et al*., 2017 ABCA 125 at ¶¶ 106-107.
[213] Counter-Memorial at ¶ 358.
[214] Claimants' Memorial, at Part IV, Section B.

Works[215]. Therefore, the Claimants reiterate their arguments made in their Memorial and herein on this issue and submit that Canada's counter-arguments are without any merit;

(c) the submission of seismic materials to the Boards for eventual disclosure under the Regulatory Regime is not a "requirement" within the meaning of Article 1106(1), but rather, it is a condition for the receipt of an advantage that is not prohibited under the NAFTA. Canada's contentions on this issue are without any merit as there was no advantage to the Claimants here and are discussed further below; and

(d) even if the submission of seismic materials for disclosure under the Regulatory Regime was a requirement, the Claimants do not establish that it was a requirement to "transfer" to a third-party certain "proprietary knowledge". This is simply not true because the Submission Legislation did not require copying, the Disclosure Legislation did not indicate that copying was permitted but the Alberta Decisions determined that copying by third parties from the Boards was permissible.

(1) Article 1106(3) of NAFTA is Inapplicable in the Case at Hand, as the Alberta Decisions Do Not Enforce a Requirement Conditioned on the Receipt of an Advantage

293. In its Counter Memorial, Canada contends that the Alberta decisions did not enforce a prohibited performance requirement under Article 1106(1) of NAFTA and that the Regulatory Regime is in fact concerned with Article 1106(3), which Canada further argues is not contravened. Canada asserts that the Regulatory Regime's provisions on submitting seismic material for disclosure were conditions on the receipt of an advantage, whereby in return for the benefit of accessing Canada's offshore to conduct seismic surveys and derive profits by licensing seismic materials, GSI purportedly agreed to

[215] Claimants' Memorial at ¶ 425 and ff.

submit to the Boards for disclosure certain seismic materials in relation to its programs.[216]

294. Canada's contentions on this issue are without any merit and are fundamentally flawed on the simple fact that the domestic courts found that GSI never consented to the disclosure of the Seismic Works, contrary to what Canada asserts.[217]

295. Moreover, the prospect of accessing Canada's offshore to conduct seismic surveys and derive profits therefrom does not fall within the meaning of "advantage" as established by prior NAFTA tribunals, the doctrine itself and the NAFTA interpretive statements of the United States and Canada.

296. First, the prospect of deriving profits from an investment is not and cannot constitute an "advantage" under NAFTA, as the making of an investment is *always* conditioned on the prospect and benefit of deriving profits therefrom. Accepting Canada's argument would devoid Article 1106(1)(f) of any meaning, as a NAFTA Party could almost always argue that any purported transfer of proprietary knowledge was conditioned on the prospect and benefit of making profits, therefore escaping liability under Article 1106(3) NAFTA. Rather, as discussed below, NAFTA tribunals, authors and the NAFTA interpretive statements of the United States and Canada have interpreted the term "advantage" much more narrowly, such as to include for instance tax benefits or export quotas, or even infrastructure development or subsidies. Never has it been defined as the prospect of deriving profits or accessing a Party's market.

297. For instance, in *Pope & Talbot, Inc. v. Government of Canada*[218], it was common ground between the parties that the granting and maintaining of quotas was an advantage within the meaning of Article 1106(3) NAFTA.

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[216] Counter-Memorial at ¶ 359.

[217] Common Issues Decision at ¶ 317.

[218] **CLA-60,** *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002.

298. In *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*[219], another NAFTA case, the claimant, an American fructose company, sued Mexico alleging that a 20% excise tax on the use of foreign sugar contravened Article 1106(3) because it conferred an "advantage"; specifically, an exemption from the tax on Mexican bottlers who use domestic cane sugar, and therefore punished bottlers for using any other sweetener including the claimants' high fructose corn syrup. Those claimants argued that this tax had a direct impact on the claimants' investment in high fructose corn syrup production and distribution facilities causing it substantial loss or damage in violation of Article 1106.[220]

299. Mexico responded that the excise tax at issue did not trigger Article 1106(3) NAFTA as, among others, the tax exemption (i.e., the advantage) for cane sugar was not even available to those claimants and was not provided in connection with an investment.

300. That tribunal agreed with those claimants and determined that Mexico's 20% tax on soft drinks and syrups that use any sweetener other than cane sugar conferred an "advantage" to domestic bottlers "conditioned" upon the use of domestic cane sugar, therefore placing the claimants at a competitive disadvantage vis-à-vis sugar producers in Mexico.[221]

301. Considering that few NAFTA tribunals have discussed the notion of "advantage" under Article 1106(3), the doctrine discussing Articles 1106(1) and (3) are of assistance in this case. The authors Newcombe and Paradell, in discussing the performance requirements found in Article 1106(3) NAFTA, list examples of what could constitute an advantage, namely tax concessions, infrastructure development or subsidies:

> *V. Advantage-conditioning in relation to Performance Requirements*
>
> *Certain IIAs authorize Performance Requirements (e.g., Article 1106(3) and 1106(4) of the North American Free Trade Agreement [NAFTA]) in exchange for certain advantages (e.g., tax concessions, infrastructure development or subsidies).*

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[219] **CLA-74,** *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5.
[220] **CLA-74,** *Ibid* at ¶ 108, 217 and 218.
[221] **CLA-74,** *Ibid* at ¶ 223.

> *[…]*
>
> *b. The notion of "advantage" under NAFTA Article 1106(3)*
>
> *16. Tribunals have interpreted this notion to include quotas and tax exemptions.* [222]

302. Moreover, in their commentary on Article 1106 NAFTA, authors Kinnear and Bjorklund state[223] that, although the term "advantage" is not defined in the NAFTA, the NAFTA interpretive statements of the United States and Canada suggest that an advantage would include a tax holiday[224], tax incentives, or a subsidy[225].

303. As appears from the above, the notion of "advantage" under Article 1106(3) requires that some form of specific or particularized benefit be granted by a NAFTA party to an investor. None of the authorities that discuss the notion of advantage under Article 1106(3) support Canada's contention that an advantage could constitute something as broad as conducting seismic surveys in the Canadian offshore and deriving profits therefrom.

304. Further, Canada's 1106(3) arguments do nothing to contend with Secondary Submissions; there was no advantage to GSI as the Seismic Works were submitted by others in exchange for an advantage to them – but nothing was provided to the owner of the Seismic Works. That cannot be ignored.

305. Lastly, Canada argues[226] that the submission and disclosure regime promotes trade and investment in this argument. However, it actually distorts trade and investment in seismic data and oil and gas development, so that is simply incorrect and does not support Canada's assertions here.

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[222] **CLA-96**, Newcombe, A. and Paradell, L., *Law and Practice of Investment Treaties: Standard of Treatment*, 2009, at 429.

[223] **CLA-95**, Article 1106 - Performance Requirements', in Meg Kinnear, Andrea Kay Bjorklund, et al., Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1 (© Kluwer Law International; Kluwer Law International 2006) pp. 1106-16.

[224] **C-580**, United States Statement of Administrative Action, at p. 142.

[225] **C-581**, Canadian Gazette, Part 1, Volume 154, Number 34: Global Affairs, Canadian Statement on Implementation.

[226] Counter-Memorial at ¶ 403.

306. For these reasons, Article 1106(3) NAFTA is inapplicable to the case at hand and Canada has rather clearly breached Article 1106(1)(f) by enforcing a performance requirement for GSI to transfer its proprietary knowledge in the Seismic Works to third parties in Canada to develop Canada's offshore oil and gas industry, as established by the Claimants in their Memorial.[227]

(2) Canada Required a 'Transfer' of 'Proprietary Knowledge' to the Public

307. Canada contends that the Claimants do not have standing to allege a breach of Chapter 17 of NAFTA and that the "transfer" of proprietary knowledge has not been explained.

308. Simply put, the Seismic Works also contained trade secrets, as defined in Article 1711, which when expropriated, required the transfer of the trade secrets to the public.

309. The Calwest Decision already determined that the Seismic Works at issue in that litigation were confidential but for the Regulatory Regime,[228] which meet the definition of a trade secret under Article 1711 of NAFTA.

310. Further, the Seismic Works are not simply "data", as alleged by Canada at paragraph 408 of its Counter-Memorial, as the Alberta Decisions determined that they were copyrightable works. The Alberta Decisions then went further and determined that the intellectual property rights in the Seismic Works were confiscated by eliminating the exclusivity in copyright, including the right to reproduce and publish the Seismic Works. The publication of a copyright work entails rendering the copyright work no longer confidential, meaning it cannot be a trade secret.

311. On this point, Canada is incorrect, as the Alberta Decisions enforced the transfer of proprietary knowledge to the public.

[227] Claimants' Memorial at ¶ 441 and ff.
[228] Calwest Decision at ¶ 27-30.

C. Canada has also Expropriated GSI's Trademark

312. For the reasons detailed below, and in addition to its violation of Article 1106 NAFTA, Canada has also violated created a compulsory license of GSI's Trademark, which is an expropriation.

313. GSI holds the trademark that appears on all of the Seismic Works (the "**GSI Trademark**"):[229]

314. All of the Seismic Works were branded with the GSI Trademark.[230] There is a lot of value in the GSI Trademark, as it is synonymous with high quality, offshore seismic data.[231]

315. The GSI Trademark therefore meets the definition of "trademark" under Article 1708(1) NAFTA:

> *1. For purposes of this Agreement, a trademark consists of any sign, or any combination of signs, capable of distinguishing the goods or services of one person from those of another, including personal names, designs, letters, numerals, colors, figurative elements, or the shape of goods or of their packaging. Trademarks shall include service marks and collective marks, and may include certification marks. A Party may require, as a condition for registration, that a sign be visually perceptible.*

316. As mentioned, the Common Issues Decision found that GSI had full copyright and other proprietary rights in the Seismic Materials, but that the Regulatory Regime created a compulsory license over them in perpetuity that overrode the protections afforded to GSI's copyright in the Seismic Materials under Canadian copyright law:

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[229] **CWS-12** at ¶138.
[230] **CWS-12** at ¶139.
[231] **CWS-12** at ¶139.

> *[317] It is also clear that GSI fought against this disclosure policy for years (and obviously is still fighting). To suggest that it has "consented" to the disclosure of its very valuable seismic data, impliedly or not, does not sit well with me. In my view, GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public. The Regulatory Regime provides for this, as discussed above. GSI may not have liked to do so, it certainly never "consented" and it may be unfair, but it is the Regulatory Regime approved by Parliament.*
>
> *[318] In conclusion on this question, I find the Boards have not breached GSI's rights under the Copyright Act by copying, or allowing others to copy, the seismic data GSI deposited with them. The specific legislative authority in the CPRA and Federal Accord Act overrides the general rights contained in the Copyright Act. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have the authority to copy, and as a result they are not infringing the Copyright Act when they do so.*[232] *[Emphasis added]*

317. By doing do, Canada, which is responsible in international law for the conduct of its organs, including the judiciary[233], is in violation of Article 1708(11) NAFTA, which prohibits a Party from requiring compulsory licensing, as compulsory licensing severely undermines a trademark holder's ability to exert control over the quality of the goods or services offered under the trademark:[234]

> *11. A Party may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign its trademark with or without the transfer of the business to which the trademark belongs.*

318. When Canada disclosed and made copying of the Seismic Works possible, it was directly competing with GSI for potential licensees and, worse, it was using the GSI Trademark to do so, confusing potential licensees as to what GSI's wares and services were.[235] That contributed to the negative attitude towards GSI because some of the Seismic Works

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[232] **R-001**, ABQB Common Issues Decision at ¶¶ 317-318.

[233] **CLA-043**, *Eli Lilly* at ¶ 221; **CLA-044**, *UN Responsibility for Internationally Wrongful Acts* at Article 4(1).

[234] NAFTA, Article 1708(11); **CLA-119,** Sharon Leslie Goolsby, Protection of Intellectual Protection of Intellectual Property Rights under NAFTA, Law and Business Review of the Americas, Volume 4, Number 4, Article 2, 1998, at pp. 35-36.

[235] **CWS-12** at ¶139.

were not processed in the same way when submitted to the Boards versus what was available for license to customers.[236] This practice not only competed with GSI as some sort of passing off scheme, but additionally contributed to negatively impacting GSI's reputation, which culminated in its condonation by the Alberta Decisions. [237]

Canada is therefore liable to compensate the Claimants for the loss of value in the GSI Trademark as has expropriated GSI's Trademark by virtue of the Alberta Decisions' creation of a compulsory licensing system that allows for the copying and use of the GSI Trademark.

V. DAMAGES

A. The Seismic Works were the Lifeblood of GSI And Canada Destroyed GSI by Expropriating Said Seismic Works

319. As agreed between the Claimants and Canada, Articles 1116(1) and 1117(1) require the Claimants to establish that they have incurred loss or damage as a result of a breach of NAFTA by Canada.[238]

320. In other words, the Claimants must establish factual and proximate causation between Canada's breach of NAFTA and the damages claimed. Contrary to what Canada alleges in its Counter-Memorial,[239] the Claimants have clearly done so.

321. Put simply, and as further discussed in the Claimants' Memorial, the Alberta Decisions, which have confiscated the Claimants' copyrights in the Seismic Materials through a compulsory licensing scheme[240], the whole in contravention of NAFTA and international law, constitute Canada's wrongful act.

322. This is the direct and proximate cause of GSI's expropriation, regardless of how Canada wishes to recharacterize it.

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[236] **CWS-12** at ¶139.
[237] **CWS-12** at ¶139.
[238] Counter-Memorial at ¶425.
[239] Counter-Memorial at ¶425.
[240] **R-001**, ABQB Common Issues Decision at ¶¶ 317-318.

323. The direct consequences of such wrongful act were to allow third parties, many of whom would have otherwise been GSI's customers or prospective customers, to access and copy the Seismic Works from the Boards without a fee, to forbade GSI from interfering or objecting to that practice, and to force GSI to discontinue many of the Domestic Actions and pay substantial costs to the defendants.

324. In essence, GSI could no longer enforce its copyrights in the Seismic Materials, effectively destroying GSI's business, as it was entirely contingent on GSI's ability to license the Seismic Materials to third parties in exchange for money (and profits). These are the consequences that Canada is required to address under international law in order to restore the *status quo* and make full reparation for the injury caused.[241]

325. To remedy the consequences of the Alberta Decisions and award full reparation to the Claimants, it is necessary to factor in the damages caused by the Domestic Actions (the first of which was initiated by GSI in 2007[242]) and related litigation on GSI's enterprise value, as such Domestic Actions and related litigation culminated in, and are intrinsically linked to, the Alberta Decisions.

326. As detailed in Claimant's Memorial[243], between 2007 and 2015, as it was receiving the AIA responses from the Boards and other Canadian government entities, GSI began commencing lawsuits against various parties who it discovered were either in breach of their licence agreements with GSI or infringed its intellectual property rights in the Seismic Works.

327. GSI was <u>forced</u> to commence those claims to enforce the intellectual property rights that were the foundation of its business or would have been seen to abandon them. By 2015, GSI had commenced approximately 30 lawsuits against oil and gas companies, Boards and Canadian government agencies, and copy companies (i.e., the Domestic Actions).

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[241] **CLA-074**, *Archer Daniels* at ¶ 275; **CLA-107**, *Case Concerning the Factory at Chorzów (Germany v. Poland),* 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928) at p. 47; **CLA-106**, *SD Myers Inc v Government of Canada*, UNCITRAL, First Partial Award, 13 November 2000 [*SD Meyers* First Partial Award]at ¶ 315.

[242] **CWS-12** at ¶ 139.

[243] Claimants' Memorial at ¶ 78 to 112.

328. In 2015, the Chief Justice of the Court of Queen's Bench of Alberta ordered the trial of the Common Issues, which were common to the Domestic Actions. This trial led to the Common Issues Decision, which rendered GSI unable to pursue any of its claims for the disclosure and copying of the Seismic Works by Canada (outside of contractual rights) in the Domestic Actions. The Common Issues Decision was affirmed in the Common Issues Appeal,[244] which in turn led to Supreme Court of Canada denying leave to appeal pursuant to the Supreme Court of Canada Decision, all of which collectively constitute the Alberta Decisions that have destroyed GSI's business and substantially deprived the Claimants of their investments.

329. As appears from the above, the Domestic Actions and related litigation form the basis of, and are intrinsically linked to, the Alberta Decisions, which is why it is necessary to factor in the damages that they have caused on GSI's enterprise value in order to wipe out the consequences of Canada's breach under NAFTA and international law.

330. Moreover, since the Alberta Decisions, GSI has not had a single customer. This is evidence that the Alberta Decisions rendered GSI incapable of further marketing the Seismic Works.[245] This is further evidence that the Alberta Decisions destroyed GSI's business by confiscating its intellectual property, rendering GSI's customers able to access and copy the Seismic Works without a fee and even not to respect their existing licence agreements with GSI.

331. The Claimants have established the direct and immediate causation between the Alberta Decisions and GSI's expropriation.

332. The Claimants' expert, PwC, which performed a valuation of the Claimants' losses, considered such context. Canada's unsubstantiated critiques of PwC's valuation are addressed in detail below.

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[244] **CLA-123**, Under Rule. 14.6 of the Alberta *Rules of Court*, Canada could have cross-appealed with respect to the Common Issues Decision on copyright and on whether GSI consented, but it did not. A party is entitled to cross-appeal in Alberta to have the Court of Appeal change the reasoning to come to the same conclusion.

[245] **CWS-12** at ¶137.

B. GSI'S Enterprise Value is the Appropriate Measure Of Damages

333. The Claimants submit that an enterprise valuation is the most appropriate damages valuation method in the present case.

334. As further discussed in the Claimants' Memorial at paragraphs 481 and following, this Tribunal has discretion in accepting the valuation method chosen by the Claimants given the absence of guidance to that effect in Articles 1135 and 1102 of NAFTA. NAFTA only specifies that the compensation to be granted to the investor shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.

335. Canada, on the other hand, criticizes the Claimants' enterprise valuation method, without proposing any valid or convincing alternative.

(1) The Principle of Full Reparation Guides Enterprise Valuations

336. First, the Claimants disagree with Canada's assertion that their compensable damages are limited to the value of the Seismic Works, especially after Canada's devaluation of them through the breaches of NAFTA. What Canada suggests is tantamount to an asset valuation that ultimately would not truly compensate GSI for its actual losses.

337. The Alberta Decisions expropriated GSI's copyright in the Seismic Works, which were its primary assets and formed the heart of its business. The confiscation of GSI's copyright thus rendered GSI's business virtually worthless.

338. But for the Alberta Court Decisions, GSI would have been able to run its business by generating licensing revenues and enforcing its copyright in the Seismic Works. GSI is therefore entitled to seek full reparation in accordance with the customary principle of international law, which dictates that the aggrieved investor must receive compensation

for the unlawful expropriation in order to "*wipe out all the consequences of the illegal act*" and in an effort to restore the *status quo* as much as possible.[246]

339. In this case, the principle of full reparation thus entitles the Claimants to damages equivalent to the enterprise value of GSI.

340. This approach is not novel. Investors who were unlawfully expropriated of an asset have been awarded damages equivalent to the value of the enterprise in many ISDS cases.

341. For instance, in *Quiborax SA v. Bolivia* (2006), the Claimant (Quiborax) held shares in a local subsidiary (NMM) that possessed mining concessions. The Tribunal found that the State's revocation of the mining concessions belonging to NMM substantially deprived it of the value of its investment in Bolivia, namely the concessions, and similarly deprived Quiborax of its investment in Bolivia, i.e., its shares in NMM. On the indirect expropriation of Quiborax's investment, the Tribunal held that Quiborax's investment was rendered "virtually worthless" without the concessions, "which were the *raison d'être* of NMM". NMM had no other business than to exploit the concessions[247]. Applying the *Chorzów* standard of full reparation, the tribunal awarded damages corresponding to the fair market value of the concessions held by NMM – a going concern with a proven record of profitability – based on the DCF analysis, since the concessions were NMM's primary asset.[248] In that case, the damages were calculated according to the value of the enterprise.

342. Similarly, in *Veteran Petroleum Limited v. The Russian Federation* (2005), the claimant held shareholdings in the Russian-incorporated Yukos Oil Company OJSC. The Claimant's expropriation claim was based on a series of actions undertaken by the respondent State against Yukos Oil Company, including arrests, large tax assessments and liens, and the auction of the main Yukos facilities, among others, which allegedly led to the bankruptcy of the company and eliminated all value of Claimant's shares in Yukos.

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[246] **CLA-107**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928) at p. 47; **CLA-106**, *SD Meyers* First Partial Award at ¶ 315.
[247] **CLA-120**, *Quiborax v. Bolivia Award* (ICSID Case No. ARB/06/2) at ¶ 239.
[248] **CLA-120**, *Ibid* at ¶ 346.

The tribunal held that the "substantial deprivation" occurred when Yukos' main production asset was sold at auction. At that time, Yukos became "incapable of operating a business".[249] The claimants were entitled to the following heads of damages: (1) the value of the claimants' shares in Yukos valued as of the valuation date; (2) the value of the dividends that the tribunal determines would have been paid to the claimants by Yukos up to the valuation date but for the expropriation of Yukos; and (3) pre-award simple interest on these amounts.[250] Thus, while the expropriation occurred as a result of the sale of an asset, the tribunal determined that the expropriated investment was the enterprise as a whole, and awarded damages corresponding to the value of the Claimant's shares in the business of Yukos.

343. In the instant case, like in *Yukos*, the confiscation of the copyright in the Seismic Works led to GSI being incapable of running its business, since the Seismic Works could not be controlled by GSI, could not be kept confidential, and could not be licensed for a fee, as it became available without a fee from the government.

344. In *Casinos Austria v. Argentina* (2021), the claimant submitted that it had been indirectly expropriated due to the State's revocation of the gambling licence of its local subsidiary (ENJASA). The tribunal agreed with the claimant for the following reasons: "ENJASA's exclusive license, which granted a monopoly for operating games of chance in the Province of Salta, was the heart of its entire business operation, the irreplaceable organ that ensured the functioning and survival of the entire body. Without it, ENJASA's operations in the gaming sector became impossible. What remained was an empty shell of assets, employees, and goodwill, a body that was left to decompose economically".[251]

345. For GSI, the copyright in its seismic data was also the "heart" and "irreplaceable organ" of its business, without which it could not survive. The expropriation of GSI's copyright in the Seismic Works through the Alberta Decisions constituted a substantial deprivation of the Claimants' investment because it took away the value of its primary asset.

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[249] **CLA-121**, *Veteran Petroleum v. Russia Final Award* (PCA Case No. 2005-05/AA228) at ¶ 1762.
[250] **CLA-121**, *Ibid* at ¶ 1778.
[251] **CLA-122**, *Casinos Austria v. Argentina Award* (ICSID Case No. ARB/14/32) at ¶ 353.

346. By contrast, in *Chemtura*, the NAFTA Tribunal dismissed the claim of indirect expropriation brought by an agricultural pesticide manufacturing company on the grounds that the ban of an agrochemical only affected a relatively small part of the overall sales of the allegedly expropriated investment i.e., the enterprise Chemtura Canada, such that the interference with the Claimant's investment was not "substantial".[252]

347. Here, the confiscation of GSI's copyright is a substantial deprivation of the Claimant's investment, as it affected GSI's primary asset and annihilated its ability to generate licensing revenues. GSI has no other lines of business to compensate for this loss.

(2) PwC's Enterprise Valuation is Sound, Contrary to Canada's Proposed Asset-Based Valuation

348. As discussed in paragraphs 485 to 498 of the Claimants' Memorial, PwC was engaged by the Claimants to evaluate GSI's fair market value in a but-for scenario as at November 30, 2017 and June 30, 2022.

349. More specifically, PwC utilized a capitalized cash flow method to determine GSI's value, using GSI's reported historical earnings (including license revenues) during a representative period of time to forecast the cash flow that GSI would have generated had it not been implicated in the litigation culminating in the Alberta Decisions.

350. As mentioned, PwC opted for one of the several valuation methods available under NAFTA. PwC deemed this method the most appropriate as it assesses the "full reparation" owed to GSI by Canada.

351. On this point, Canada, without any valid grounds, alleges that PwC is not independent. PwC is a major accounting firm known the world over for the quality and calibre of its work. Canada seems to rely on the test proposed in *Rompetrol*[253], where the appropriate compensation for an injury is "*what does the compensation method set out to measure,*

[252] **CLA-076**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada* (UNCITRAL), Award, 2 August 2010.
[253] **RLA-166**, *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013 at ¶ 287

and does it do so with sufficient accuracy and reliability?". As evidenced through PwC's report, PwC performed a valuation analysis in accordance with Article 1110(2) of NAFTA, and this valuation method is sound, accurate and reliable, and contrary to Brattle's valuation, does not rest on speculative claims.

352. Based on PwC's valuation, as presented in PwC's Initial Report[254], GSI's enterprise value reached between CAD$363,160,000 and $448,926,000 as at November 30, 2017, or between CAD$271,052,000 and $338,559,000 as at June 30, 2022.

353. For the purposes of the present Reply, PwC has prepared a Reply Report. In this report, PwC addresses the criticisms proffered by Canada's expert (the Brattle Group) and clarifies that the results of its further assessments do not warrant updates or modifications to the conclusions reached in its initial report.

354. Canada's damages expert criticizes PwC for having chosen an enterprise valuation method. The Brattle Group is of the view that a more appropriate quantification of damages approach would be a liquidation approach, whereby it would perform the valuation of GSI's two most valuable assets: the Seismic Works and GSI's remaining outstanding domestic litigation claims. The Brattle Group takes this view as it considers that GSI ceased to be a going-concern before November 30, 2017.

355. In its Reply Report, PwC explains that this proposed approach is flawed as, in a nutshell: litigation claims are highly speculative and valuing GSI's seismic data on an as-is basis would not form the basis of a "full reparation" given that the value of GSI's assets had already been negatively impacted by the litigation that culminated in the Alberta Decisions. In other words, PwC explains that a liquidation approach would not quantify GSI's "but-for" value.

356. Furthermore, it bears to underline that the Brattle Group did not articulate or assert any particular value of GSI's so-called two most important assets. Instead, the Brattle Group, suggested an asset-based valuation approach without actually implementing it to the facts

[254] **CER-02**, Expert Report of Paul Sharp, PricewaterhouseCoopers LLP dated September 26, 2022 at p. 8.

and evidence at hand in this case. The Brattle Group merely criticizes without offering a valuation.

357. This exercise was attempted by Troika International Limited ("**Troika"**), an expert retained by the Claimants in the context of preparing the present Reply. As explained in Troika's report, the Claimants engaged Troika to perform an asset-based valuation. Troika used the "replacement cost" method to assess GSI's library as if this data had not been made public by Canada.

358. Ultimately, Troika concluded that there was insufficient market information to perform such a market valuation. The seismic industry is very secretive. Troika then advances a replacement valuation for the Seismic Works, indicating that the Seismic Works would be worth between USD$761.6 to $870.4 million (excluding processing costs).

359. This exercise demonstrates that the Brattle Group's proposition that an asset-based approach is appropriate leads to values that are significantly higher than those assessed by PwC. This exercise also demonstrates that the Brattle Group's proposition is impractical, in addition to being unsubstantiated by the Brattle Group itself.

360. Moreover, contrary to what Canada asserts, GSI's demise was not caused by "its poor financial management, risky business decisions and inability to adapt to tough economic conditions and technological change"[255]. GSI's downfall was caused by GSI's inability to enforce its intellectual property rights in the Seismic Works and revenue stream flowing from same because of the Alberta Decisions.[256] Although GSI was impacted by the 2008 downturn, the cause of GSI's financial difficulties was the loss of license fees due to rapidly expanding government publishing, scanning and copying of the Seismic

[255] Counter-Memorial at ¶ 233. The reliance on Robert Hobbs for some of these comments is countered by the Expert Report of Chip Gill (**CER-06)**.

[256] **CWS-12**, "*GSI's downfall was not caused by the purchase of its vessels and related equipment in 2007 to 2008, nor by the 2008 financial crisis, but rather by GSI's inability to enforce its intellectual property rights in its Seismic Data and revenue stream flowing from same because of the Alberta Decisions*."

Works, as well as the destruction of GSI's customer relationships due to Canada's interference in those contractual relationships, and the confiscation of GSI's copyright.[257]

361. The litigation leading to the Alberta Decisions was unavoidable because GSI had to enforce its copyright in the Seismic Works to protect its copyright and confidentiality, and not be seen as abandoning its copyright and confidentiality in the Seismic Works. That litigation had a negative impact on GSI's reputation with its customers, despite GSI's efforts to be conciliatory with those customers regarding the breaches of copyright and confidentiality in the Seismic Works. GSI made every effort to mitigate any damage to its reputation, but those efforts were ultimately unsuccessful. Once GSI commenced litigation against a party, that party never entered into any further licensing arrangements with GSI but for Shell Canada (on one occasion) and GSI has not had any business with Shell since.[258] GSI is not in the business of litigation. It was in the business of licensing its proprietary data, which involves protecting it.

362. Even if the 2008 financial crisis did not occur, the result would have been the same – GSI's intellectual property rights in the Seismic Works would have been confiscated through Canada's actions and would have consequently destroyed GSI's business.[259]

363. At paragraphs 121-125 of its Counter-Memorial, Canada relies on a security for costs motion by many of the defendants that occurred in the lead up to the trial that led to the Common Issues Decision to argue that GSI is impecunious. That motion did not involve any expert report on the value of GSI and cannot constitute, as it would be wholly inappropriate, any form of measure of GSI's value. Canada's argument on this point should therefore be dismissed.

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[257] **CWS-12,** "*Although GSI was impacted by the 2008 downturn, the cause of GSI's financial difficulties was the loss of license fees due to rapidly expanding government publishing, scanning and copying of GSI's Seismic Works, as well as the destruction of GSI's customer relationships due to Canada's interference in those contractual relationships, and the confiscation of GSI's copyright*."

[258] **CWS-12**.

[259] **CWS-12**.

364. In sum, GSI did not make risky business decisions. Canada is grasping at straws and attempts to distract from the biggest risky business decision that GSI made which was to do business in Canada given that the Alberta Decisions expropriated GSI's business.[260]

B. The Claimants Valuation of The Losses Suffered by Davey, Paul And Russell Einarssons is Sound

365. PwC has also valued Davey, Paul and Russell's claims for unpaid loans and loss of employment earnings in its Initial report.

366. In its Reply report, PwC addressed the Brattle Group's criticisms[261] and does not modify its initial valuation.

367. The Claimants thus refer the Tribunal to PwC's reports on this point.

C. The Claimants are Not Claiming Reflective Losses

368. Canada contends that the Claimants are claiming reflective losses by presenting a claim under both Articles 1116(1) and 1117(1) of NAFTA.[262] Canada adds that, based on the Claimants' NOA, they appear solely to claim under 1117(1) for the losses suffered by GSI.

369. On this specific point, the Claimants refer to paragraph 498 (a) and (b) of their Memorial, where it is specified that the Claimants are not claiming reflective losses as they put GSI's claim forward under Article 1117(1) and, in the alternative, their own personal claims (in their capacity of shareholders of GSI in the case of Davey and Paul) under Article 1116(1).

VI. CONCLUSION

370. The Claimants submit that Canada's challenges to jurisdiction, defences to the merits and critique of damages should be dismissed and the Claimants' claim should be allowed.

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[260] **CWS-12**, at Section VIII. A. and B.
[261] ¶¶ 165-175.
[262] Canada's Statement of Defence at ¶¶ 28-30.

VII. RELIEF SOUGHT BY CLAIMANTS

371. The Claimants seek the relief detailed at paragraph 498 of their Memorial.

All of which is respectfully submitted on behalf of the Claimants this 31st day of May, 2024.

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