PUBLIC VERSION

IN THE MATTER OF AN ARBITRATION UNDER 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", and together with the Claimants the "Disputing Parties")

(ICSID Case No. UNCT/20/6)

GOVERNMENT OF CANADA

REJOINDER MEMORIAL ON JURISDICTION, MERITS AND DAMAGES

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I. INTRODUCTION

1. The Claimants' Reply Memorial ("Reply") contains three key statements which demonstrate why this NAFTA claim is fundamentally flawed in all respects and should be rejected by the Tribunal, with costs awarded to Canada.

2. The first key statement is a concession that "the Claimants do not allege that the submission and public disclosure of the Seismic Works under the Regulatory Regime breached NAFTA."[1] This confirms that the Tribunal cannot consider any acts by the Boards pursuant to the Regulatory Regime as a basis for a NAFTA breach or damages. Given that the reality of the Claimants' case is a challenge to these very acts, what remains is essentially an empty shell.

3. The Claimants' acknowledgment was unavoidable given the time limitation in NAFTA Articles 1116(1) and 1117(1), which deprives the Tribunal of jurisdiction over any measures prior to April 18, 2016 (*i.e.*, three years prior to the Claimants' NAFTA Notice of Arbitration). The Claimants' acknowledgment also renders Claimant Paul Einarsson's lengthy witness statements almost entirely irrelevant. His rehashing of the same grievances that GSI has made for decades serves only to demonstrate why the Claimants' NAFTA claim is futile: they knew for decades before the Alberta Court Decisions were rendered that the Boards were exercising their authority under the Regulatory Regime to make publicly available, including for copying, Disclosed Seismic Materials notwithstanding GSI's position that those materials were confidential, trade secrets and subject to copyright.

4. The second key statement in the Claimants' Reply demonstrating the defects of their claim is that they are only challenging the Alberta Court Decisions. In the context of NAFTA Article 1110, they describe it as "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."[2] In the context of NAFTA Article 1106, they make the same argument, claiming that the Courts "made effective, the Regulatory Regime's provisions" and "forced

[1] *GSI v. Canada* (ICSID Case No. UNCT/20/6), Rebuttal Memorial of the Claimants on Jurisdiction, Merits, and Damages, 31 May 2024 ("Claimants' Reply"), ¶ 48.

[2] Claimants' Reply, ¶ 49 (emphasis omitted).

GSI to grant some form of compulsory license to permit the Seismic Works to be released and used by the public."[3] There are multiple flaws with the Claimants' assertions.

5. First, the Claimants' argument that the measure at issue is the Alberta Court Decisions is clearly a pretense to get around the Tribunal's lack of jurisdiction over the Regulatory Regime and the Boards' ongoing disclosure of seismic materials since the 1990s. Regardless of how the Claimants now purport to characterize the measure, up until three weeks before filing of their NAFTA Notice of Intent on October 2018, GSI was still arguing before the Federal Court of Canada that it was the Regulatory Regime and past disclosures by the Boards which expropriated its copyright, trade secrets and business. After the Alberta Court Decisions were rendered, GSI sued the Governments of Canada, Newfoundland and Labrador, Nova Scotia and Québec for damages claiming that "the Legislation has resulted in the *de facto* expropriation, regulatory or constructive taking of GSI's copyright and confidentiality in the Seismic Data" and that "[a]s a result of the Legislation and the conduct of the [Canadian public] Servants, all reasonable uses of GSI's licensing business for the Seismic Data and [GSI's] [g]oodwill have been taken or regulated away, without provision for compensation to GSI for same."[4] This was the same so-called "confiscatory conduct" argument against the Regulatory Regime and Boards that GSI had been making against Canada and the CNLOPB in domestic courts since 2011.[5] The Claimants' attempt at reframing the basis of their claim to get around the NAFTA jurisdictional time limitation is exposed by their own prior arguments.

6. Second, the Claimants' arguments rely on a mischaracterization of the Alberta Court Decisions. The Alberta Court Decisions did not take away existing rights, they simply interpreted and applied long-standing existing domestic law to determine whether copyright could subsist in seismic data and clarified the effect of the Regulatory Regime on such copyright after the confidentiality period expired.

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[3] Claimants' Reply, ¶ 292(a).

[4] **R-585**, *GSI v. HMTQ* (FCC File No. T-1023-17), Amended Amended Statement of Claim, 28 September 2018 ("*GSI v. HMTQ*, Amended Amended Statement of Claim 2018"), ¶ 52 (emphasis added); **R-365**, *GSI v. HMTQ* (FCC File No. T-1023-14), Statement of Claim, 12 July 2017 ("*GSI v. HMTQ* – Statement of Claim"), ¶ 1(b)(i), ¶¶ 37-38.

[5] **R-004**, *GSI v. CNLOPB* (SCNL Trial Division (General) File No. 2011 01G 5430), Statement of Claim, 10 August 2011 ("*GSI v. CNLOPB* - Statement of Claim"); **R-005**, *GSI v. CNLOPB* (SCNL Trial Division (General) File No. 2011 01G 5430), Amended Statement of Claim, 7 January 2013 ("*GSI v. CNLOPB* - Amended Statement of Claim"); **R-010**, *GSI v. HMTQ and NEB* (ABQB File No. 1401-05316), Statement of Claim, 14 May 2014.

7. Third, it is spurious to assert that Canada's conduct "crystallized into an illegal expropriation"[6] once the Alberta Court Decisions became final in November 2017. The dispute between GSI and the Boards regarding the Regulatory Regime and copyright had crystallized decades earlier. GSI and its legal counsel had asserted their position on the disclosure of seismic data, copyright, confidentiality and trade secrets to the Boards in 1993 and 1998, and in response, the Boards disagreed with GSI's position and continued to exercise their legal authority under the Regulatory Regime to provide copies of seismic materials to the public after the end of the confidentiality period. Despite having full knowledge of the Boards' position and practices, the Claimants chose to continue investing in GSI's business throughout the 1990s and 2000s by gathering seismic data from offshore areas which Canada - not GSI - owns and over which it sets the regulatory terms and conditions required to access that sovereign territory.

8. The fact that GSI only sought to test its copyright assertions in Canadian courts in 2007 does not change the fact that the dispute about the disclosure and copying of GSI's seismic materials long predates the Common Issues Trial.[7] The outcome of the Common Issues Trial was not a "crystallized […] illegal expropriation" under international law, it was simply a legal interpretation by the domestic courts of the relationship between the *Copyright Act* and the Regulatory Regime. Thus, nothing in the Alberta Court Decisions constitutes an independent actionable breach: the Claimants are simply trying to relitigate the same legal dispute that has existed with the Boards for decades.

9. On the merits, the Claimants' expropriation case fails because it rests on a fundamental misunderstanding of NAFTA Article 1110 and the rules of international law regarding expropriation of foreign investment. The awards of NAFTA and international tribunals, academic writings and the positions of all three NAFTA Parties have consistently affirmed that a domestic judicial decision cannot be considered an expropriation except in egregious circumstances such as where there is a denial of justice. A finding of judicial expropriation is extremely rare in international law and nothing in the Alberta Court Decisions comes close to reaching the threshold of fundamental unfairness that might result in a breach of Article 1110. The Claimants do not allege a denial of justice. GSI and dozens of defendants, including Canada, had a full and fair hearing on questions of first instance. The

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[6] Claimants' Reply, ¶ 49.

[7] **R-586**, *GSI v. Encana Corporation* (ABQB File No. 0701 04061) ("*GSI v. Encana*"), Statement of Claim, 19 April 2007 ("*GSI v. Encana* – Statement of Claim"), ¶¶ 12-14.

decision of the Alberta Court of Queen's Bench was affirmed unanimously by three judges of the Alberta Court of Appeal and leave to appeal to the Supreme Court of Canada was sought and denied. Labelling a court judgment as "novel" or "surprising," as the Claimants assert, or alleging errors in the reasoning of the Courts, is wholly insufficient to constitute a judicial expropriation in international law; otherwise NAFTA Chapter Eleven tribunals would be transformed into supra-national courts of appeal.

10. The Claimants' NAFTA Article 1106 arguments also rest on a misunderstanding of what those provisions are meant to address and on the false premise that the Alberta Court Decisions created or enforced a requirement for GSI to transfer proprietary information to the Boards and to third parties.

11. The third key statement in the Claimants' Reply is an unfounded leap of logic that reveals the lack of a causal link between the alleged breach and damages claimed: "[h]ad the Alberta Decisions had the opposite outcome […] GSI would have won immense damages awards against all of the parties copying the Seismic Works."[8] This is speculation that not even the Claimants' own damages expert is willing to support.

12. First, if GSI had prevailed on the second question in the Common Issues Trial (*i.e.*, whether the Regulatory Regime allowed copying of GSI's seismic materials after the confidentiality period expired), the next steps in the litigations would have been (1) to address whether GSI in fact had copyright over the specific seismic materials at issue in each of the domestic litigations, and (2) to address the many other legal defenses raised by Canada and the other defendants as to why there was no violation of the *Copyright Act* (*e.g.*, the section 29 defense of fair dealing). Only if all the legal defenses failed would damages have then been litigated, and whether GSI would have been able to recover even a fraction of what was claimed is highly speculative. The Claimants' Reply ignores this entirely and does not even attempt to demonstrate that a different decision on the second question in the Common Issues Trial would have actually resulted in a finding of copyright violation and damages to GSI. This fundamental flaw in factual causation is just one of the several reasons why, even if a NAFTA breach was found, the Tribunal can award no compensation to the Claimants.

[8] Claimants' Reply, ¶ 108.

13. Second, the Claimants' basis for claiming alleged damages resulting from the Alberta Court Decisions demonstrates the contradictions in their case. On the one hand, the Claimants say that "[t]he Regulatory Regime itself did not cause damages to the Claimants,"[9] but on the other hand, their damages model is built up on "Unpaid Invoices" issued by GSI to third-parties between 2011 and 2016 and which include charges for seismic materials disclosed by the Boards under the Regulatory Regime in the 1990s and 2000s – that is, exactly the damages which the Claimants have conceded cannot be part of this NAFTA claim.

14. The Claimants' entire damages analysis presents a counterfactual that fails to isolate the alleged breach starting in November 2017 and assumes alternative facts that predate and are unrelated to the alleged breach. Indeed, the Claimants simply ignore the fact that, immediately before the date of the alleged expropriation in November 2017, GSI was no longer a going concern and had not been for many years prior because of extrinsic market factors and GSI's own scorched-earth litigation strategy against its customers. The Claimants' defective approach to causation means that even if the Tribunal were to find a NAFTA violation, it cannot award any damages to the Claimants because of their failure to reasonably establish any damage flowing from the alleged breach.

15. If the multiple flaws in causation were not problematic enough, the model presented by their damages expert, Mr. Paul Sharp of PricewaterhouseCoopers ("PwC"), is so speculative and replete with errors that it cannot be relied upon as a reasonable quantification of damages. While there is no NAFTA violation, there is in any event no credible basis upon which the Tribunal could award any damages.

16. In support of this Rejoinder Memorial, Canada submits second witness statements from Trevor Bennett, Bharat Dixit and Carl Makrides, which respond to certain points raised by Paul Einarsson in his second witness statement. Canada also submits a second expert report from Barry Sookman of McCarthy Tétrault, LLP in response to Professor Cameron Hutchison's expert report on legal issues of intellectual property under Canadian law. This Rejoinder is also supported by second expert reports from Robert Hobbs and Doug Uffen, as well as from Darrell Chodorow and Alexis Maniatis of The

[9] Claimants' Reply, ¶ 118.

Brattle Group ("Brattle"), all of whom respond to allegations made by the Claimants and their experts Victor Ancira, Chip Gill and Paul Sharp.

17. Unless defined otherwise, this Rejoinder adopts all acronyms and terminology as set out in Canada's Counter-Memorial.

II. THE CLAIMANTS' REPLY CONTINUES TO MISCHARACTERIZE THE NATURE OF THE ALBERTA COURT DECISIONS

18. Conceding that they cannot challenge the submission and public disclosure of GSI's seismic materials under the Regulatory Regime,[10] the Claimants assert that the "Alberta Decisions are an independent actionable breach in their own right" because the Alberta Court "created a new legal norm, namely a novel compulsory license scheme with confiscatory effects"[11] and because they effectively enforced the Regulatory Regime.

19. This characterization suffers from three fundamental flaws. First, it is inconsistent with the fact that it was GSI who initiated the legal proceedings to assert rights that had not been established. Second, it is inconsistent with any reasonable reading of the Decisions and with the Claimants' own statements (both before and after the Alberta Court Decisions) alleging that it was the Regulatory Regime which expropriated its copyright and business. Third, the Alberta Court Decisions did not create a "novel compulsory license scheme" – they simply interpreted existing Canadian law as it relates to the protection and disclosure of seismic materials. The fact that it was the first time the Courts had to consider the specific legal issue does not mean that they created a new legal norm, nor does NAFTA permit yet another re-hearing of the same arguments the Claimants already made during the Common Issues Trial and in GSI's appeals.

A. The Alberta Court Decisions Interpreted the Existing Domestic Legal Regime as it Relates to Copyright Protection and the Disclosure of Seismic Materials

20. The Claimants' mischaracterization of the Alberta Court Decisions ignores the context in which these decisions arose. The Common Issues Trial arose from 25 actions initiated by GSI "against the

[10] Claimants' Reply, ¶ 48.

[11] Claimants' Reply, ¶ 71(b).

Boards, numerous oil and gas exploration companies, seismic companies and copying companies"[12] starting with GSI's claim against Encana in 2007 that broached the same legal issues, including allegations of copyright infringement resulting from the disclosure of seismic materials pursuant to the Regulatory Regime.[13] Essentially, GSI was seeking compensation for access by third parties to its seismic materials that had been disclosed by the Boards in the 1990s and 2000s pursuant to the Regulatory Regime based on GSI's alleged copyright over the seismic data. While GSI had been threatening legal action against the Boards since 1993 and 1998 for violation of copyright, as well as confidentiality and trade secret assertions (see Part III(C)(1) and (2) below), GSI's copyright over seismic data had never been established. GSI also had claimed, but never established, that it had a right to prevent third parties from accessing the Disclosed Seismic Materials from the Boards under the Regulatory Regime.

21. On June 2, 2015, Chief Justice Wittman of the ABQB, who had been case managing these actions, ordered the trial of two common issues as an initial step to facilitate the efficient resolution of the multiple litigations: (1) "What is the effect of the Regulatory Regime on GSI's claims?" and (2) "Can copyright subsist in seismic material of the kind that are the subject matter of GSI's claims?"[14] Other issues were not included in the Common Issues Trial, including defenses raised by the defendants, such as fair dealing under the *Copyright Act*, limitation periods and damages. GSI's contractual claims for exploration group and transfer fees, as well as contractual penalty clauses for accessing GSI materials from the Boards, were also excluded from the Common Issues Trial.

22. The matter was decided on April 21, 2016 by Justice Eidsvik of the ABQB. The Court of Appeal, to which GSI appealed, summarized the ABQB's answers to the two common issues questions above as follows:

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[12] **R-001**, *GSI v. Encana et al.*, 2016 ABQB 230, Reasons for Judgment on the Copyright and Regulatory Common Issues of the Honourable Madam Justice K.M. Eidsvik, 21 April 2016 ("Common Issues Decision – Alberta Court of Queen's Bench"), ¶ 5; **RER-01**, Expert Report of Barry Sookman, 16 January 2023 ("Sookman Counter-Memorial Expert Report"), ¶¶ 18, 118.

[13] The full list of companies against whom GSI filed suit is at **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, p. 65, Schedule A.

[14] **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, ¶ 7; **RER-01**, Sookman Counter-Memorial Expert Report, ¶¶ 18, 118.

> In answer to the first question, the Trial Court decided that specific statutory provisions lawfully operate to preclude GSI's claims of unlawful disclosure and breach of copyright, from which answer GSI appeals.
>
> In answer to the second question, the Trial Court decided that copyright can subsist in seismic data of the kinds that are the subject-matter of GSI's claims, namely the data listed in question (b)(i)-(vii) above. The Trial Court's answer to this question has not been appealed.[15]

23. The ABCA went on to dismiss GSI's appeal on the first finding since the Court found, on a standard of correctness, that the Trial Judge did not commit any errors of law.[16] GSI's leave to appeal to the Supreme Court of Canada was denied.[17]

24. The Alberta Court Decisions were the culmination of the multiple legal proceedings initiated by GSI which required the interpretation of pre-existing Canadian law as it relates to copyright protection and the disclosure of seismic materials. The fact that the Courts addressed an issue that had not previously been decided, or that the Courts did not adopt the interpretation advocated by GSI, does not change the fact that the Courts interpreted the existing legal regime and did not create "new legal norms."

B. The Claimants' Theory that the Alberta Court Decisions Expropriated Their Business Contradicts GSI's Earlier Claims that It Was the Regulatory Regime that Expropriated Their Business and Copyright Over Seismic Data

25. The Claimants' position in this NAFTA arbitration plainly contradicts GSI's previous claims before the Canadian courts that it was the Regulatory Regime and disclosures by the Boards, not the Alberta Court Decisions, which expropriated their copyright in seismic data and drove GSI out of business.

26. In 2013, GSI claimed that the CNLOPB's disclosure of GSI's seismic materials to third parties "has deprived and continues to deprive and has caused and continues to cause [l]osses and deprive GSI of all reasonable uses and benefits of the Non-Exclusive Data […] [T]his conduct constitutes an

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[15] **R-002**, *GSI v. Encana et al.*, 2017 ABCA 125, 28 April 2017 ("Common Issues Decision – Alberta Court of Appeal"), ¶¶ 11-12.

[16] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 108.

[17] **R-003**, *GSI v. Encana et al.*, 2017 SCC 37634, 30 November 2017.

expropriation of GSI's assets and valuable interests with respect to the Non-Exclusive Data by each of the C-NLOPB and the Province" for which GSI was owed damages.[18]

27. In 2014, GSI argued that the Regulatory Regime and disclosure of seismic materials by the NEB constituted an expropriation of its business and intellectual property rights: "As a result of the Legislation and/or the [NEB's] Wrongful Acts, the Defendants have acquired GSI's intellectual and other property rights in respect of the Seismic Materials and in respect of the [GSI] Business, and have deprived GSI of all reasonable uses of its private property rights."[19]

28. It was the Claimants' position that the Regulatory Regime and disclosures by the Boards expropriated GSI's copyright and business even after the Alberta Court Decisions were rendered.

29. For example, on July 28, 2017, three months after the ABCA upheld the ABQB judgment and one month after GSI filed its appeal to the SCC, GSI filed a new claim in the Federal Court of Canada ("FCC") against the Governments of Canada, Newfoundland and Labrador, Nova Scotia and Québec seeking "[a] declaration that the Legislation has resulted in the *de facto* expropriation, regulatory or constructive taking of GSI's copyright and confidentiality" in GSI's seismic data, licences and company goodwill.[20] GSI sought an order to mandate the Copyright Board of Canada "to administer the compulsory licensing scheme created by the Legislation."[21] GSI argued that "[t]he Legislation has been deemed by the Courts to be 'confiscatory'" and "[t]he Courts have deemed that, as a result of the Legislation, the exclusivity of GSI's private property rights, including copyright and confidentiality in the Seismic Data, has ended."[22] The essence of GSI's argument to the FCC was that:

> As a result of the Legislation, through the conduct of the Defendants pursuant to the Legislation and their actions beyond the scope of the Legislation and sometimes prior to the expiry of the privilege period under the Disclosure Legislation, contrary to the proprietary rights of GSI, the Defendants have, from time to time, taken or

[18] **R-005**, *GSI v. CNLOPB* - Amended Statement of Claim, ¶ 26.

[19] **R-010**, *GSI v. HMTQ and the NEB* (ABQB File No. 1401-05316), Statement of Claim, 14 May 2014, ¶ 23 (emphasis added).

[20] **R-365**, *GSI v. HMTQ* – Statement of Claim, ¶ 1(b)(i) (emphasis added).

[21] **R-365**, *GSI v. HMTQ* – Statement of Claim, ¶ 1(f) (emphasis added).

[22] **R-365**, *GSI v. HMTQ* – Statement of Claim, ¶ 1(b)(i), ¶¶ 37-38 (emphasis added).

> regulated away most or all reasonable uses of the Seismic Data, without providing GSI compensation for same.[23]

30. Even a few weeks before the Claimants' filed their NAFTA NOI in October 2018, GSI was still arguing to the FCC that "[a]s a result of the Legislation and the conduct of the [Canadian public] Servants, including the Representations, GSI has lost all reasonable uses of the Seismic Data,"[24] citing to the same decades-old grievances against the Regulatory Regime and actions of the Boards that the Claimants are making again in this NAFTA arbitration.[25]

31. The position the Claimants took in the FCC after the issuance of the Alberta Court Decisions and the position they are taking now in this arbitration are in complete contradiction. The Claimants have plainly characterized their NAFTA claim with the goal of circumventing the limitations period and manufacturing alleged NAFTA violations where none exist.

C. The Alberta Courts Applied Long-Standing Principles of Interpretation to Find that the Effect of the Regulatory Regime Precluded Copyright Infringement Claims with Respect to Disclosed Seismic Materials

32. In their Reply, the Claimants recognize that prior to the Alberta Court Decisions, it was not clear whether copyright could subsist in seismic data and how any protection under the *Copyright Act* related to the Regulatory Regime.[26] This is what the Alberta Courts were asked by GSI to decide. In the Common Issues Trial, the Court did not decide whether GSI held copyright in each specific instance where GSI's alleged seismic data is or was the subject of infringement claims. While the Claimants have purported to put forward evidence to establish such copyright in their Reply,[27] Canada maintains that the Claimants have failed to particularize their claims of copyright over the

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[23] **R-365**, *GSI v. HMTQ* – Statement of Claim, ¶ 36 (emphasis added).

[24] **R-585**, *GSI v. HMTQ*, Amended Amended Statement of Claim 2018, ¶ 49 (emphasis added). *See also*, ¶ 52 ("As a result of the Legislation and the conduct of the Servants, all reasonable uses of GSI's licensing business for the Seismic Data and the Goodwill have been taken or regulated away, without provision for compensation to GSI for same").

[25] **R-585**, *GSI v. HMTQ*, Amended Amended Statement of Claim 2018, ¶ 35 (labelling a list of actions of the Boards and other Canadian government officials as "representations").

[26] Claimants' Reply, ¶¶ 258-261.

[27] Claimants' Reply, ¶¶ 11-42.

seismic materials. The witness statements of Messrs. Lau and Feir are insufficient to establish copyright.[28]

33. The ABQB found that copyright could subsist in seismic data, but concluded that the Regulatory Regime allowed disclosure after the expiry of the confidentiality period and therefore, there could be no breach of GSI's copyright:

> The CPRA, properly interpreted, allows for disclosure without restriction after a defined period of time. It is a complete and specific code that applies to all oil and gas property in the offshore and frontier lands, including seismic data. Its provisions supplant any more general pieces of legislation, such as the Copyright Act or the AIA to the extent that they conflict. Therefore, the Boards and recipients of seismic data have not breached GSI's copyright rights. Under the existing Regulatory Regime, it is not unlawful for the Boards to disclose data after the expiry of the privilege period in the manner that they have been doing. There is no need to resort to the procedures set out in the AIA to respond to requests for data.[29]

34. While the *CPRA* does not use the express words permitting the Boards to "copy" Disclosed Seismic Materials, the Court found that the only reasonable interpretation of the provisions that permit disclosure of geophysical work performed on Canada's frontier lands was to give "the statutory authority to the regulatory boards to disclose material without restriction and without the consent of the owner of such material, once the confidentiality period has expired."[30]

35. GSI appealed to the ABCA on the ground that the ABQB erred in finding that the Regulatory Regime answers GSI's copyright infringement grievance, but the appeal was dismissed:

> Having reviewed the extensive record, and the history of the legislation giving rise to the current Regulatory Regime under which GSI operates, we are of the view that the findings of fact and statutory interpretation reached by the Trial Court are rational and correct, and otherwise reveal no error warranting appellate intervention.[31]

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[28] **CWS-09**, Witness Statement of George Lau, 20 August 2023; **CWS-10**, Witness Statement of Allan Feir, 9 October 2023. *See*, Canada's Counter-Memorial, ¶¶ 291-293.

[29] **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, ¶ 132 (emphasis omitted).

[30] **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, ¶ 254.

[31] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 98.

36. With respect to GSI's argument that section 101 of the *CPRA* does not refer to copying, only disclosure, the ABCA held that "the Regulatory Regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate, in their sole discretion as they see fit, all materials acquired from GSI and collected under the Regulatory Regime. The correct interpretation of 'disclose' also confers on these Boards the legal right to grant to others both access and opportunity to copy and re-copy all materials acquired from GSI and collected under the Regulatory Regime."[32]

37. GSI sought leave to appeal from the Supreme Court of Canada on the basis of an error of interpretation by the lower Alberta Courts regarding the Regulatory Regime and the relationship between the Regulatory Regime and the *Copyright Act*. It further suggested that the error stemmed from uncertainty regarding longstanding rules of statutory interpretation in the specific context of the novel right in seismic data and the effect of the Regulatory Regime on such rights. Specifically, GSI posed the following questions:

> What is the appropriate interpretation and balancing of the *Copyright Act* and the regulatory regime governing seismic surveys in Canada? If the two apparently conflict, should the Court adopt an interpretation that allows for breaching copyright without compensation? Should the court *endorse* the transformation of a regulatory regime into a proprietary acquisition regime?[33]

38. The response of the Attorney General of Canada to this request for leave to appeal noted that:

> The proper application of settled law in this case does not raise a question of legal significance or public importance warranting this Court's intervention. The courts below properly applied the specific legislation over the general, and there is no need to investigate the *Copyright Act,* RSC, c C-42, further in the circumstances.[34]

39. The Supreme Court denied GSI's request for leave to appeal.[35]

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[32] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 102.

[33] **R-587**, *GSI v. Encana et al.* (SCC File No. 37634), Application for Leave to Appeal, 22 June 2017 ("Common Issues Decision – GSI Leave to Appeal to SCC"), ¶ 29 (emphasis added).

[34] **R-588**, *GSI v. Encana et al.* (SCC File No. 37634), Respondent's Memorandum of Argument, 25 August 2017, ¶ 1.

[35] **R-003**, *GSI v. Encana et al.*, 2017 SCC 37634.

40. In sum, the outcome of the Alberta Court Decisions resolved an interpretative issue regarding the interaction between the Regulatory Regime and the *Copyright Act*. All of GSI's legal arguments were considered thoroughly and the Courts came to a conclusion that was different from what the Claimants believed was the proper interpretation.

41. What the Claimants are doing in this NAFTA claim is putting exactly the same legal arguments before this Tribunal and asking it to conclude differently on how Canadian legal principles of statutory interpretation should be applied. The Claimants' arguments on statutory interpretation are tantamount to an *ex post* appeal of the Alberta Court Decisions.

42. In their Reply, the Claimants assert that the ABQB's decision was surprising because it resolved the conflict between the *Copyright Act* and the Regulatory Regime by finding that the more specific legislative regime must prevail over the more general one.[36] The Claimants take issue with Justice Eidsvik's words:

> There is a conflict between the *Copyright Act* protections and the provisions of the Regulatory Regime that allow disclosure without the owner's consent. […] The solution is found in the rule of statutory interpretation that the more specific legislative regime must apply over the more general one. […] Accordingly, with respect to the disclosure provisions, 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*. The *CPRA* creates a separate oil and gas regulatory regime wherein the creation and disclosure of exploration data on Canadian territory is strictly regulated and, in my view, not subject to the provisions of the *Copyright Act* to the extent that they conflict.[37]

43. GSI contested exactly this aspect of the ABQB decision before the ABCA. But the ABCA emphatically upheld the findings of the Trial Court and its interpretative approach:

> The Trial Court properly took "into account the purpose of the legislative provisions and all relevant context" (Sullivan on the Construction of Statutes, at 2.2), the approach to statutory interpretation mandated by the Supreme Court of Canada in ***Rizzo*** at para 21. Namely, the Trial Court understood the complex and multi-dimensional character of statutory interpretation, and undertook the task required by pursuing the ultimate objective of understanding the will of the

[36] Claimants' Reply, ¶¶ 265-272.

[37] **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, ¶¶ 295, 299-304.

> legislator, while also reading the text in its grammatical and ordinary sense harmoniously with the overarching purpose and scheme of the entire legislation.[38]

44. In its leave to appeal to the Supreme Court of Canada, GSI again took issue with the Alberta Courts' application of the rules of statutory interpretation and restated roughly the same legal argument on implied exceptions that the Claimants are bringing up again in this NAFTA arbitration: "[t]he application of the rules of interpretation with respect to conflicting legislation dealing with disparate areas [was] lacking in thoroughness in the courts below as well as in jurisprudence and academic commentary generally […] a more careful look is warranted."[39]

45. This argument did not sway the Supreme Court to grant leave to GSI and there is no basis for this NAFTA tribunal to revisit the issue. The Canadian courts identified and applied the applicable and settled principles of statutory interpretation. The Trial Judge applied the Supreme Court's jurisprudence in *Rizzo, Bell ExpressVu* and *Re Broadcasting* and was guided by *Sullivan on the Construction of Statutes* in interpreting the *Copyright Act* and the Regulatory Regime. The Trial Judge noted that this approach was agreed to by all parties.[40] The Court of Appeal reviewed the ABQB's decision and after reviewing and applying the same principles, endorsed the Trial Judge's approach and concluded there was no legal error.

46. In the Claimants' Memorial and in their Reply, the Claimants once again make similar arguments challenging the Alberta Court's reasoning. The Claimants purport to rely on reports by Professors Bankes and Hutchison to question the interpretative approach and conclusion reached by the Alberta Court, in fact, both of their reports highlight the difficult interpretive question that faced the Alberta Court. While Canada explains once again in Part IV(B) why the Court's reasoning was in line with previous jurisprudence, an academic debate on the application of interpretative principles by Canadian courts is unnecessary; the ABCA has already considered the Claimants' arguments and

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[38] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 98 (emphasis in original). GSI's factum included lengthy references to the same blog posts by Professor Bankes that were attached to his report in this NAFTA arbitration. *See*, **R-656**, *GSI v. Encana et. al* (ABCA File No. 1601-0103AC), Factum of the Appellant, 21 April 2016, ¶¶ 55-56, 143; **CER-01**, Expert Report of Nigel Bankes, 30 August 2022 ("Bankes Expert Report"), Annexes B and C.

[39] **R-587**, Common Issues Decision – GSI Leave to Appeal to SCC, ¶ 52.

[40] **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, ¶¶ 133-137.

concluded that the ABQB did not err in its interpretative approach.[41] The Claimants' efforts at re-arguing this same issue yet again before a NAFTA tribunal should be rejected.

D. The Claimants Are Seeking a Rehearing of the Alberta Court Decisions

47. The interaction between GSI's alleged copyright over seismic data and the Regulatory Regime is now a matter of settled law in Canada. The Claimants had the opportunity to fully present their arguments to the Courts regarding their preferred interpretation of the law. They seek to recycle the same arguments before this Tribunal that were already heard, considered and rejected by the Courts. The fact that the Alberta Court concluded that the Regulatory Regime was a "complete answer" to GSI's claims of copyright infringement cannot be appealed to this Tribunal to obtain compensation from the effects of the Regulatory Regime.

48. As discussed in the next section, the Tribunal has no jurisdiction over this NAFTA claim because the Claimants' challenge to the Alberta Court Decisions does not concern an independently actionable breach. Furthermore, the Regulatory Regime, all disclosures by the Boards of GSI's seismic materials and any impacts on GSI's business prior to April 18, 2016 are outside the Tribunal's jurisdiction.

III. THE TRIBUNAL LACKS JURISDICTION OVER THE CLAIM AND ALL MEASURES PRIOR TO APRIL 18, 2016, WHICH INCLUDE THE REGULATORY REGIME, ALL INSTANCES OF DISCLOSURE AND COPYING OF GSI'S SEISMIC MATERIALS AND ANY LOSS OR DAMAGE ARISING THEREFROM

A. In Assessing Its Jurisdiction, the Tribunal Must Discern the "Reality of the Case" by Reference to the Claimants' Submissions, as Opposed to Relying Solely on the Measures Identified by the Claimants to Be in Breach of NAFTA

49. In their Reply, the Claimants argue that the Tribunal ought to reject Canada's jurisdictional objections under NAFTA Articles 1116(2) and 1117(2) because "Canada's breach of NAFTA was crystallized on November 30, 2017, when the Alberta Decisions created a compulsory licence scheme with a confiscatory character, which led to the destruction of GSI."[42] In doing so, the Claimants say that "the focal point of the jurisdictional determination to be made under Article 1116(2) and 1117(2)

[41] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 98.

[42] Claimants' Reply, ¶ 81.

of NAFTA is the breach identified as actionable in the Claimants' proceedings."[43] However, this analysis does not rest solely on the measure identified by the Claimants to be in breach of the NAFTA. Instead, the Tribunal must consider the Claimants' submissions as a whole to discern the "reality of the case" and determine whether the Claimants' characterization of the measure at issue in this case is supported by their submission on the merits.

50. In determining whether the jurisdictional requirements have been established, past international investment tribunals, including those referred to by the Claimants, have looked beyond the identified measures in claimants' submissions to understand the essence of the case on the merits. For example, in its analysis of jurisdiction under NAFTA Articles 1116(2) and 1117(2), the *Eli Lilly* tribunal "carefully examined Claimant's written and oral submissions to evaluate whether Claimant's characterization of its claim for the purpose of jurisdiction is supported by its position on the merits."[44] Ultimately, the tribunal's determination that it had jurisdiction in that case was based on an overall reading of the claimant's submission.[45] Similarly, in concluding that "[t]he basis of the claim is to be determined with reference to the submissions of [the] Claimant," the *Glamis* tribunal went on to review the submissions of the claimant, including the notice of arbitration and subsequent filings, to examine whether a claim had been brought on the basis of earlier events listed by the respondent.[46]

51. Highlighting the importance of understanding "the essence of the Claimants' case," the *Spence* tribunal explained:

> In determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case and the respondent formulated its reply. In an adversarial system, such as operates in investor-State arbitration proceedings, it is the litigation imperative of counsel for each side to formulate their case in the strongest, most

[43] Claimants' Reply, ¶ 84 (emphasis omitted).

[44] **RLA-025**, *Eli Lilly and Company v. Government of* Canada (ICSID Case No. UNCT/14/2), Final Award, 16 March 2017 ("*Eli Lilly* – Award"), ¶ 164.

[45] **RLA-025**, *Eli Lilly* – Award, ¶ 164.

[46] **CLA-069**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL), Award, 8 June 2009 ("*Glamis* – Award"), ¶¶ 349-350.

> uncompromising terms. Their task is not to shine a light on truth. It is to shine a light on the issues, leaving the tribunal to discern the reality of the case.[47]

52. The *Spence v. Costa Rica* tribunal then proceeded to provide a detailed assessment of both the claimants' and respondent's oral and written submissions to determine whether each of the claimants' allegations were sufficient to bring their claims within the limitation period.[48]

53. Based on the foregoing, it is not sufficient for the Tribunal to rely solely on the Claimants' identification of a particular measure as a basis for determining that it has jurisdiction under Articles 1116(2) and 1117(2) and proceeding to the assessment of the case on the merits. Rather, the Tribunal must discern the "reality of the case" by taking into account all of the disputing parties' submissions, to evaluate whether Claimants' characterization of their claim for the purpose of jurisdiction is supported by their position on the merits.

B. The Claimants' Submissions Make Clear that the Reality of this Case Concerns the Effects of the Regulatory Regime

54. Notwithstanding the Claimants' repeated assertions that the measure at issue is the Alberta Court Decisions, their submissions (including witness statements) make clear that this arbitration is just another attempt at challenging the Regulatory Regime and actions of the Boards, including the submission and disclosure requirements and any damages arising therefrom, which both disputing parties agree are outside the Tribunal's jurisdiction.

55. In their Reply, the Claimants attempt to reposition their claim by stating that they are challenging "the judicial determination that ultimately created a change in law by positing that [the] Regulatory Regime's disclosure obligations are tantamount to a compulsory licence permitting the disclosure, access and copying of seismic data."[49] However, a review of the Claimants' submissions in their totality demonstrates that, in reality, the Claimants are continuing to challenge aspects of the Alberta Court Decisions that address the interpretation of existing Canadian law and the

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[47] **RLA-010**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* (UNCITRAL), Interim Award, 25 October 2016 ("*Spence* - Interim Award"), ¶ 226 (emphasis added).

[48] **RLA-010**, *Spence* - Interim Award, ¶¶ 249-303.

[49] Claimants' Reply, ¶ 104 (emphasis omitted).

determination of GSI's rights thereunder, and that these aspects of the Alberta Court Decisions are inextricably linked to GSI's grievances concerning the Regulatory Regime.

56. First, as described above in Part II, the challenge of the Alberta Courts' interpretation of the Regulatory Regime in this NAFTA arbitration repeats the same arguments put forward by the Claimants before Canadian courts challenging access by third parties to copies of GSI's Disclosed Seismic Materials pursuant to the Regulatory Regime. This by itself demonstrates that the NAFTA claim is not about the Alberta Court Decisions. The arguments that the Claimants make here regarding the interpretation by the ABQB of the Regulatory Regime and its relationship with the *Copyright Act* are the same arguments that were presented to the ABCA and to the Supreme Court of Canada.[50] This duplication highlights that the Claimants' case is simply a continuation of the domestic litigation challenging the Regulatory Regime. Indeed, as described in Part II(B), immediately prior to filing their NAFTA NOI in 2018, the Claimants were still claiming before the FCC that the Regulatory Regime and actions of the Boards over several decades were expropriatory and caused the total loss of GSI's copyrights, licences and business.[51]

57. Second, consistent with the principle that the time limitation for administrative and regulatory measures cannot be tolled by litigation, past investment tribunals have declined to exercise their jurisdiction *ratione temporis* in cases involving claims against judicial decisions relating solely to the judicial determination of the lawfulness of pre-limitations measures.

58. For example, the central issue in *Carrisoza v. Colombia* concerned "whether the annulment proceedings leading to the issuance of the 2014 Order were in the nature of an extraordinary recourse (*recurso extraordinario*) under Colombian law."[52] When asked to articulate the complaint specifically directed at the 2014 Order in *Carrisoza*, the claimant answered that "[t]he 2014 Constitutional Court's opinion had the effect of finally removing, without compensation, Claimant's entitlement to the value of her investment in Granahorrar that had been embodied in the 2007 Judgment that the Council of State had rendered."[53] The tribunal rejected the claimant's argument

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[50] *See*, Parts II(C) and IV(G).

[51] **R-585**, *GSI v. HMTQ*, Amended Amended Statement of Claim 2018.

[52] **RLA-024**, *Astrida Benita Carrizosa v. Republic of Colombia* (ICSID Case No. ARB/18/5), Award of the Tribunal, 19 April 2021 ("*Carrizosa* – Award"), ¶ 156.

[53] **RLA-024**, *Carrizosa* – Award, ¶ 160.

that this was an independent allegation against the 2014 Order, as it "corroborate[d] that the proceedings ending with the 2014 Order necessarily called for a finding about the lawfulness of the 2011 Decision that had quashed a prior administrative judgment that had awarded the claimant damages for its investment."[54] Given that the *Carrizosa* tribunal did not have jurisdiction to determine the lawfulness of the 2011 Decision, the tribunal determined that it was not competent to resolve the claimant's claim.[55] Furthermore, the tribunal pointed to the claimant's categorization of damages claimed as evidence that she did not claim redress for losses suffered from the 2014 Order in and of itself, meaning that the tribunal would not have been able to decide damages without reviewing the lawfulness of the pre-limitation period measures that were beyond its jurisdiction.[56] For these reasons, the tribunal concluded that the 2014 Order did not constitute an actionable breach in its own right.[57]

59. While the Claimants now argue that it was the Alberta Courts' interpretation, not the Regulatory Regime, that created an uncompensated compulsory licence by allowing disclosure of GSI seismic materials by the Boards and access by third parties, this is plainly contradicted by the fact that the Board disclosures and access by third parties had already taken place pursuant to the Regulatory Regime many years prior to the Alberta Court Decisions. Simply put, the Claimants are continuing to challenge measures that were authorized by the Regulatory Regime, not a new measure by the Courts.

60. Third, the Claimants' assertion that "[h]ad 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"[58] speaks precisely to the fact that, in reality, they are continuing to challenge the effects of the Regulatory Regime. In resolving the interpretative issue regarding the interaction between the Regulatory Regime and the *Copyright Act*, the Alberta Courts determined that "the Regulatory

[54] **RLA-024**, *Carrizosa* – Award, ¶ 161.

[55] **RLA-024**, *Carrizosa* – Award, ¶ 161.

[56] **RLA-024**, *Carrizosa* – Award, ¶¶ 162-164. *See also*, **RLA-169**, *Sergei Paushok et al. v. The Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011, ¶ 430 ("In no case, however, does this mean that investors could claim damages retrospectively on the basis of breaches that would have arisen prior to that date, unless some other provisions of the Treaty would indicate that this was the clear intention of the Contracting Parties.").

[57] **RLA-024**, *Carrizosa* – Award, ¶ 156.

[58] Claimants' Reply, ¶ 108.

Regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate, in their sole discretion as they see fit, all materials acquired from GSI and collected under the Regulatory Regime."[59] This judicial interpretation confirmed that the Boards' previous practices of disclosure and allowing for the copying of GSI's seismic materials under the Regulatory Regime were lawful and as such, GSI had no basis to continue its domestic litigation for copyright infringement. This "outcome" did not give rise to any changes to the Regulatory Regime or result in the further "confiscation" of GSI's property. The outcome of the Alberta Court Decisions did not alter the *status quo*: the Boards continued to make GSI's seismic materials available for accessing and copying by third parties after the expiry of the confidentiality period, just as the Claimants had known the Boards were doing since 1993.

61. As explained further in Part VI, the Claimants' damages claim also confirms that the essence of the Claimants' case is about the effects of the Regulatory Regime. Now that the Claimants' have produced the invoices listed in Exhibit C-112 and relied upon by PwC for their [redacted] it is obvious that the damages model used as a proxy for alleged losses that stem directly from the Regulatory Regime and the Board disclosures of GSI's seismic materials in the 1990s and 2000s, predating the Alberta Court Decisions.[60] The Claimants pretend that their damages model is "forward-looking" and an "enterprise valuation,"[61] but the reality is they are seeking damages that were incurred as a result of the Regulatory Regime and access to GSI seismic material by third-parties decades ago. None of this is within the jurisdiction of the Tribunal.

C. The Pre-Limitations Period Facts Demonstrate that the Claimants Were Aware of the Effects of the Regulatory Regime Decades before the Alberta Court Decisions

62. Given that the Claimants have conceded that the submission and public release of GSI's seismic materials and damages arising therefrom are not within the scope of the Tribunal's jurisdiction, and in light of their statement that they are only challenging the Alberta Court Decisions, the exact date

[59] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 102.

[60] Claimants' Reply, ¶ 192; **CER-06**, Reply Expert Report of Paul Sharp, 30 May 2024 ("Sharp Reply Expert Report"), ¶ 50. *See also*, Part VI below.

[61] Claimants' Reply, ¶¶ 193, 333.

of the time limit for challenging the Regulatory Regime is irrelevant.[62] Nonetheless, it is clear that the NAFTA limitation period for any acts of the Boards and any damages arising out of those acts has long since passed given the overwhelming evidence (much of which comes from the Claimants' own document production in this arbitration) that the dispute over GSI's copyright and the Regulatory Regime crystallized more than three years before the submission of the claim, and long before the Alberta Court Decisions.

63. As explained in Canada's Counter-Memorial, the time limitation under NAFTA Articles 1116(2) and 1117(2) is triggered by actual or constructive knowledge.[63] Past tribunals have also concluded that later challenges in domestic courts to the measure causing the breach and loss do not toll the limitation period.[64] For example, when applying a similarly worded limitations period under the *Central America-Dominican Republic-United States Free Trade Agreement*, the tribunal in *Spence* concluded that the relevant date for initiating arbitration for expropriation was the date in which "the practical and economic use of the properties was irretrievably lost," regardless of subsequent court proceedings.[65]

64. The Claimants' repeated reference to their own subjective statements regarding their alleged lack of knowledge of the disclosure and copying of GSI's seismic materials under the Regulatory Regime and its impact on intellectual property rights is not only insufficient, but it is flatly

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[62] Claimants' Reply, ¶¶ 63, 69-70. It is the burden of the Claimants to establish the jurisdiction of the Tribunal, including that the measures and damages sought as a breach of NAFTA fall within the three-year time bar of Articles 1116(2) and 1117(2). *See e.g.*, **RLA-004**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB/AF)/12/1) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex* – Award on Jurisdiction and Admissibility"), ¶ 150; **RLA-123**, *Bayview Irrigation District et al. v. Mexico* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007, ¶¶ 63, 122 (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim").

[63] Canada's Counter-Memorial, ¶¶ 203-207.

[64] *See e.g.*, **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶ 328, citing to **CLA-054**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, ¶ 87; **CLA-068**, *Grand River Enterprises Six Nations, Ltd. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006, ¶ 78. The Claimants' attempt to distinguish *Apotex* at ¶¶ 98-100 of their Reply is baseless. As demonstrated in the previous section, the actionable alleged breach in this case concerns the effects of the Regulatory Regime, including the Boards' disclosure of GSI's seismic materials, not the Alberta Court Decisions. Furthermore, the Alberta Court Decisions did not "crystallize" the alleged NAFTA breach. Accordingly, it is not accurate to state that the Claimants are challenging the judicial decisions. Moreover, as explained below, the Claimants' argument that their issues concerning the Board disclosures were "premature" is misleading.

[65] **RLA-010**, *Spence* - Interim Award, ¶¶ 257-265; citing to **CLA-085**, *Compania Del Desarrollo de Santa Elena, SA v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Award, 17 February 2000, ¶¶ 76, 80-81.

contradicted by the evidence. Contrary to the Claimants' assertions that they did not know that Canada would breach NAFTA before the Alberta Court Decisions were rendered, the facts predating the Alberta Court Decisions, and even those predating the entry into force of NAFTA, demonstrate that the Claimants did know that GSI's materials were being disclosed under the Regulatory Regime at the end of the confidentiality period and that third parties would be able to copy these materials from the Boards.

65. The Claimants' assertion that their issues concerning Board disclosures were not "ripe for decision"[66] also misrepresents their knowledge of the Regulatory Regime and does not account for the fact that GSI had been threatening legal action against the Boards for their practices allowing for the public disclosure and copying of seismic materials since 1993.

66. In their Reply, the Claimants point to the Canadian Federal Court of Appeal's determination in 2011 that GSI's judicial review of the NEB's disclosure of certain seismic data was "premature" to argue that they could not have known in advance that its copyright would be confiscated.[67] This is a red herring: the Claimants fail to mention that the decision only concerned a limited set of seismic materials collected in the North Labrador Sea in 2008 that would not be publicly available until 2023, hence the finding that the question of public access would not arise for another decade.[68] GSI's misguided legal challenge in that specific instance does not change the fact that the Claimants already had years of prior knowledge about the effects of the Regulatory Regime on seismic materials that were already publicly available from the Boards, which is the relevant departure point for bringing a NAFTA challenge against the Regulatory Regime.

67. The following section demonstrates that the Claimants had actual and constructive knowledge of the Boards' disclosure and copying practices under the Regulatory Regime decades prior to the NAFTA limitation period critical date of April 18, 2016.

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[66] Claimants' Reply, ¶ 100.

[67] Claimants' Reply, ¶ 100.

[68] **C-205**, *GSI v. NEB*, 2011 FCA 360, 15 December 2022, ¶¶ 1, 6, 12.

1. The Claimants' Challenges to the Regulatory Regime and Assertion of Copyright Started in 1993

68. As explained in Canada's Counter-Memorial, the laws and regulations regarding the disclosure of seismic materials after the expiration of the applicable confidentiality period and availability for copying by the public have been in place since the 1970s.[69] Since that time, by consulting public documents issued by government authorities,[70] companies and individuals have been able to access from the Boards Disclosed Seismic Materials for which confidentiality periods had expired.[71]

69. Going back to 1971, government approvals for Delaware GSI's seismic projects (later purchased by Claimant GSI) stated explicitly that the Submitted Seismic Materials would be disclosed after a period of confidentiality.[72] In accordance with those approvals, the 1986 *CPRA* and

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[69] Canada's Counter-Memorial, ¶¶ 30-53 and exhibits cited therein. *See e.g.*, **R-589**, Energy, Mines and Resources Canada, "Offshore Geophysical Surveys: Procedures and Guidelines," May 1980, p. 2 ("Department of Energy Guidelines, May 1980"); **R-239**, COGLA, *Geophysical and Geological Programs on Frontier Lands: Guidelines for Approvals and Reports*, January 1987; **R-514**, CNLOPB, "Released Geophysical and Geological Reports: Newfoundland Offshore Area," 1 June 1988 ("CNLOPB Guidelines, 1988"); **R-199**, CNSOPB, "Geophysical and Geological Programs in the Nova Scotia Offshore Area Guidelines for Work Programs, Authorizations & Reports", 1992; **R-241**, CNLOPB, *Geophysical, Geological, Environmental and Geotechnical Program Guidelines*, January 1999. The Claimants argue at ¶ 112 of their Reply that COGLA catalogues and old permits which contain reference to the privilege period are not relevant because they are not "legal documents" with the force of law. The point is meritless. The Boards derive their practices from the Regulatory Regime and these publications explain how they carry out their authority under applicable laws and regulations.

[70] *See e.g.*, **R-226**, COGLA, "Released Geophysical and Geological Reports Canada Lands", January 1984; **R-514**, CNLOPB, "Released Geophysical and Geological Reports: Newfoundland Offshore Area," 1 June 1988; **R-247**, NEB, Frontier Lands: Released Information, December 1992; **R-515**, CNLOPB, "Released Geophysical and Geological Reports", August 1992; **R-290**, NEB, "Information Bulletin: The Frontier Information Office", June 1995; **R-240**, CNLOPB, "Geophysical, Geological, Environmental and Geotechnical Program Guidelines", January 1996; **R-532**, CNSOPB, "Information on Well Data, Geological Data, Geophysical Data and Land Rights", March 1998; **R-291**, NEB, "Information Series: Frontier Information Office", 2002; **R-289**, NEB, "Frontier Lands: Released Information Geophysical/Geological, ESRF, Well Histories Information for the Public", June 2005.

[71] *See e.g.*, **R-591**, Information Request to CNLOPB by Hunt Oil, 10 February 1989; **R-592**, Letter from BP to CNLOPB, 13 March 1989; **R-519**, Letter from BP to CNLOPB, 25 May 1989; **R-520**, Information Request to CNLOPB by BP, 26 June 1990; **R-521**, Letter from Marathon to CNLOPB, 16 December 1991; **R-522**, Information Request to CNLOPB by KP Seismic, 22 October 1994; **R-593**, Information Request to CNLOPB by KP Seismic, 31 July 1997; **R-523**, Information Request to CNLOPB by KP Seismic, 7 October 1997; **R-524**, Information Request to CNLOPB by GSI, 23 March 1998; **R-525**, Information Request to CNLOPB by GSI, 13 June 2001.

[72] **R-594**, Letter from Indian Affairs and Northern Development Canada ("Indian Affairs Canada") to GSI, 28 October 1971, p. 1 ("information from participation programs is released 10 years after completion of the field work, therefore the technical reports submitted for Project Nos. 838-9-8-71-1 and 838-9-9-71-2 will be released on October 1, 1981."). *See also*, **R-595**, Letter from GSI to Indian Affairs Canada, 22 August 1973, p. 8; **R-596**, Indian Affairs Canada, Notice of Commencement of Exploratory Work ("Notice of Commencement") held by GSI, 8 July 1976, p. 2; **R-597**, Notice of Commencement held by GSI, 18 April 1977, p. 2; **R-598**, Notice of Commencement held by GSI, 7 June 1977, p. 2; **R-599**, Letter from COGLA to GSI, 11 June 1977; **R-600**, Letter from Indian Affairs Canada to GSI, 8 March 1978;

Accord Acts, almost all of the Disclosed Seismic Materials that GSI purchased in 1993 was already publicly available for copying.[73]

70. Shortly after obtaining the seismic data library, GSI's legal counsel wrote to the CNLOPB on November 3, 1993 to demand that it "desist from releasing any more of GSI's seismic data" and that it would take "legal action against the [CNLOPB] for damages" and seek an injunction from the Federal Court of Canada if the demand was not complied with.[74] GSI argued that the Board did not have legal authority under section 119(2) of the C-NL Accord Acts to release copies of GSI's seismic materials and that the *Access to Information Act* ("*ATIA*") precluded the release of GSI's seismic materials because it was "confidential commercial information."[75] But the CNLOPB continued to disclose seismic materials to the public notwithstanding GSI's legal threats.[76]

71. Importantly, by 1993, the Claimants were already asserting that GSI "maintain[ed] trade secret and copyright interest" in its seismic materials.[77] In other words, the conflict between GSI's position on copyright, trade secrets and confidentiality and the Boards' ongoing disclosure of Disclosed Seismic Materials to requestors pursuant to the Regulatory Regime had already "crystallized" thirty years ago. Despite this knowledge, the Claimants continued investing in GSI's seismic data business throughout the 1990s.

R-601, Letter from Energy, Mines and Resources Canada ("Energy Canada") to GSI, 14 March 1978; **R-602**, Notice of Commencement held by GSI, 1 June 1978, p. 2; **R-603**, Notice of Commencement held by GSI, 4 June 1979, p. 2.

[73] Canada's Counter-Memorial, ¶¶ 79-80 and exhibits cited therein. *See e.g.*, **R-248**, Letter from CNLOPB to Halliburton GSI, 31 August 1992.

[74] **R-249**, Letter from Parlee McLaws to CNLOPB, 3 November 1993, pp. 2, 13. The letter also confirms that GSI had been consulting the CNLOPB publications listing publicly available seismic materials: p. 5 (referring to CNLOPB July 1991 and August 1993 "Released Geophysical and Geological Reports: Newfoundland Offshore Area" publications).

[75] **R-249**, Letter from Parlee McLaws to CNLOPB, 3 November 1993, pp. 5-7, 10.

[76] The CNLOPB also informed GSI that certain lines of data from its East Coast 3D survey had been previously released to Lamata Consultants. *See*, **R-604**, Letter between CNLOPB and GSI, 21 December 1993.

[77] *See*, **R-605**, [redacted], ¶ 1.2; **R-606**, [redacted], ¶ 1.2; **R-607**, [redacted], ¶ 1.2; **R-608**, [redacted], ¶ 1.2; **R-609**, [redacted], ¶ 1.2.

2. GSI Renewed its Threat of Lawsuits in 1998, Asserting that the Boards Were Violating the *Copyright Act* By Allowing Third Parties to Copy Seismic Materials

72. GSI wrote to the CNLOPB on November 17, 1997 to complain that "the '[CNLOPB] is allowing parasitic companies […] to acquire a copy of released seismic data from the [CNLOPB]."[78] In response, GSI was told that, pursuant to its authority under the C-NL Accord Act, the CNLOPB would continue its practice of releasing "copies of paper sections and the accompanying reports" to the public upon the expiration of the applicable confidentiality period.[79]

73. GSI wrote again to the CNLOPB on July 27, 1998 asserting that the seismic material it submitted to the Boards "enjoys copyright protection" and "is not to be released."[80] Accompanying GSI's letter was a legal analysis from GSI's counsel arguing, among other things, that Submitted Seismic Materials constituted GSI's trade secrets and was protected under the *Copyright Act* and continued disclosure would result in the liability of the Boards for copyright infringement:

> A Canadian court would likely conclude that the maps, tapes, and other geophysical material generated created by GSI constitute material in which a copyright may subsist. If it can be established that GSI is the rightful author of the compilation, GSI may be able to prove that the boards infringed on its copyright. […] [T]here are several remedies available to [GSI] under the *Copyright Act*. These remedies include civil remedies encompassing injunctions, damages, accounts and other remedies which are or may be conferred by law for the infringement of a right. In addition to paying damages suffered by the owner due to the infringement, the infringer may be found liable to pay the owner such part of the profits that the infringer has made from the infringement. The infringer, in the case of data released by the respective boards, would be the board.[81]

74. The CNLOPB responded to GSI on June 18, 1999: "the Board does not agree with the legal analysis offered on your behalf" and that "the Board intends to continue the practice of making such information available to the public following the expiry of the specified periods."[82]

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[78] **R-269**, Letter from GSI to CNLOPB, 17 November 1997.

[79] **R-270**, Letter from CNLOPB to GSI, 27 November 1997.

[80] **R-531**, Letter from GSI to CNLOPB, 27 July 1998, attaching letter from Code Hunter Wittman to GSI, 30 July 1998.

[81] **R-531**, Letter from GSI to CNLOPB, 27 July 1998, attaching letter from Code Hunter Wittman to GSI, 30 July 1998, pp. 12-13 (PDF pp. 15-16).

[82] **R-274**, Letter from CNLOPB to GSI, 18 June 1999 (emphasis added).

75. Despite GSI's explicit assertion of its legal position on copyright in 1998 and the disagreement by the CNLOPB in 1999, GSI again chose not to seek a judicial interpretation of the *Copyright Act* and the Regulatory Regime even though their interpretation was at odds with the Boards regarding the ongoing disclosure and copying of GSI's seismic materials. Instead, the Claimants chose to continue investing in GSI's business throughout the 2000s, including by applying for new authorizations for projects in the Newfoundland and Labrador offshore area.[83]

3. Documents Produced by the Claimants Confirm their Decades-old Knowledge that Seismic Materials Were Available for Copying from the Boards After the Confidentiality Period Expired

76. Documents produced by the Claimants in this arbitration demonstrate decades of actual and constructive knowledge of ongoing disclosure and copying of GSI's seismic materials notwithstanding GSI's assertions of copyright.

77. [redacted]"[84] When marketing its seismic data to customers, GSI emphasized that what it could offer was more valuable than what was obtainable from the Boards, writing to Husky in 1994 that "[GSI's] understanding is, the data available from Government agencies are limited to copies/prints of seismic sections and regional maps" and that GSI had additional data to license which could be used for reprocessing.[85]

78. [redacted]"

[83] **RWS-02**, Witness Statement of Trevor Bennett, 16 January 2023 ("Bennett Witness Statement"), ¶ 35 and exhibits cited therein.

[84] **C-558.1**, [redacted] (emphasis added); **C-558.3**, [redacted] (emphasis added).

[85] **R-610**, [redacted]

[86] **C-558.6**, [redacted].

[redacted][87] The assertions of copyright and confidentiality in GSI's price lists coincided with its renewed threat of legal action against the CNLOPB in 1998.[88]

79. GSI licences with third parties also demonstrate its knowledge that, notwithstanding its assertions of copyright, copies of GSI's Disclosed Seismic Materials were available from the Boards decades before the Alberta Court Decisions.

80. In the 1980s, Delaware GSI licences acknowledged that copies of licensed seismic materials would eventually be publicly available from the Boards. For example, a 1987 agreement with [redacted][89] Similarly, Delaware GSI's 1988 licence with [redacted][90]

81. Starting in 2000, GSI became more assertive in trying to prevent licensees from accessing materials from the Boards. GSI started to write directly to companies stating its disagreement with the Boards' interpretation of the Regulatory Regime and warning that copies of their seismic materials should not be accessed from the Boards because they were GSI's trade secrets and subject to copyright.[91] GSI also started to include contractual prohibitions in its licence agreements. For example, the 2000 licence between GSI and [redacted] stated:

[redacted]

[87] **C-558.7**, [redacted] **C-558.8 – C-558.62**, [redacted]

[88] **R-531**, Letter from GSI to CNLOPB, 27 July 1998, attaching letter from Code Hunter Wittman to GSI, 30 July 1998.

[89] **R-611**, [redacted] **R-289**, NEB's June 2005 Publication "Frontier Lands: Released Information: Geophysical/Geological, ESRF, Well Histories Information for the Public," PDF p. 107.

[90] **R-612**, [redacted] (emphasis added).

[91] **R-613**, Letter from GSI to Anadarko, 13 March 2000; **R-614**, Letter from GSI to Mobil, 14 March 2000.

[redacted][92]

82. Similar contractual prohibitions against accessing GSI seismic materials from the Boards were introduced into licences with companies such as [redacted][93] [redacted][94] [redacted][95] [redacted][96] and [redacted][97] Some licensees negotiated exceptions to the commitment not to obtain GSI's seismic materials from the Boards. For example, in its 2001 licence with GSI, [redacted][98] [redacted][00]

83. [redacted]

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[92] **BR-45**, [redacted] (emphasis added). [redacted]
See, **R-011**, *GSI v. Total*, 2020 ABQB 730, Judgment, 25 November 2020.

[93] **R-615**, [redacted]

[94] **R-616**, [redacted]

[95] **R-618**, [redacted]

[96] **R-687**, [redacted]

[97] **R-620**, [redacted]

[98] **R-621**, [redacted]

[99] **R-622**, [redacted]

[100] **R-623**, [redacted]

[101] **R-615**, [redacted] *See e.g.*, **R-618**, [redacted] **R-625**, [redacted]

[redacted][103]

84. In sum, the Claimants' own documents demonstrate their awareness since 1993 that copies of GSI's seismic materials were available from the Boards and that the dispute regarding the effects of the Regulatory Regime on GSI's alleged copyright and trade secrets had been a live issue with the Boards, and even with GSI's own licensees, decades before the Alberta Court Decisions.

85. Finally, while the Claimants' complaints regarding the so-called "Secondary Submissions" are irrelevant because the issue falls outside of the Tribunal's jurisdiction, documents produced by the Claimants confirm that they have known for decades the process by which companies submit reports of reprocessed seismic data to the Boards to claim portions of their work commitment deposits (referred to as "allowable expenditures" or "work credits").

86. For example, [redacted]

[102] *See e.g.*, **R-687**, [redacted] *See also*, **BR-48**, **R-628**, **R-629**, **R-630**, [redacted]

[103] **R-631**, [redacted] *See*, **R-632**, [redacted]

See, **R-633**, Letters from GSI to Conoco et al., 8 May 2012.

[redacted]"[104] Delaware GSI's Offshore Program Notices from the 1970s and 1980s acknowledge that licensees would be applying for allowable expenditures: "application for expenditure to permits to be made by individual permit holders who purchase data."[105] Decades-old correspondence[106] and Board publications[107] explained how purchasers of seismic data could apply for allowable expenditures.

87. GSI's licence agreements also demonstrate that the Claimants have understood for decades that its licensees apply for allowable expenditures and submit copies of seismic materials to the Boards. For example, GSI's 2000 licence with [redacted] allowed seismic data, "[redacted][108] GSI's 2002 licence with [redacted] also dealt with the issue: [redacted]

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[104] **R-634**, [redacted] *See*, **R-635**, **R-636**, **R-637**, **R-638**, [redacted]

[105] **R-594**, Letter from Indian Affairs Canada to GSI, 28 October 1971, p. 1. *See also*, **R-595**, Letter from GSI to Indian Affairs Canada, 22 August 1973, p. 4; **R-603**, Notice of Commencement held by GSI, 4 June 1979; **R-639**, Offshore Program Notice held by GSI, 4 January 1982; **R-640**, Letter from COGLA to GSI, 12 May 1982, attaching Offshore Program Notice, 8 April 1982.

[106] **R-641**, Letter from Indian Affairs Canada to Delaware GSI, 28 October 1971 ("expenditures incurred in the purchase of information by your clients may be applied to their permits on Canada lands administered by this Department south of latitude 67° and east of Baffin Island […] Information from participation programs is released 10 years after completion of the field work"); **R-600**, Letter from Indian Affairs Canada to GSI, 8 March 1978 ("Your clients must submit a Notice of Commencement of Exploratory Work before purchasing any data which will be used for work credits. The data pertaining to this report will be released under the proposed new regulations."); **R-640**, Letter from COGLA to GSI, 12 May 1982, attaching Offshore Program Notice, 8 April 1982.

[107] *See e.g.*, **R-642**, COGLA, Geophysical and Geological Programs on Frontier Lands Guidelines, January 1987, pp. 13-14; **R-643**, NEB, Geophysical/Geological Operations on Frontier Lands, February 1995, ss. 5-7; **R-240**, CNLOPB, Geophysical, Geological, Environmental and Geotechnical Program Guidelines, January 1996, p. 9, s. 3.2 ("Programs without Field Work. If an operator wishes to claim allowable expenditures against deposit or rental commitments for an exploration license for a program that does not involve field work, the program must be approved by the Board prior to its commencement. Examples of programs which may be eligible for such credits include the purchase and/or reprocessing of seismic data."); **R-590**, NEB, Information for the Public – Geophysical/Geological Operations on Frontier Lands Regulated by the National Energy Board, July 2002, ss. 5-6, pp. 9-10; **R-200**, CNSOPB, Geophysical, Geological, Geotechnical and Environmental Program Guidelines, 26 January 2015, p. 9, s. 4.0.

[108] **R-622**, [redacted] *See also*, **R-608**, [redacted] **R-644**, CNLOPB, "Notice NF95-1 Call for Bids", 28 September 1995, PDF p. 6, explaining how Allowable Expenditures are calculated. The GSI-Murphy licence also contains an excerpt from **R-642**, COGLA, Geophysical and Geological Programs on Frontier Lands Guidelines, January 1987, pp. 4 and 14, which explain the approval process for work expenditures.

[redacted][109]

88. The Claimants have always had the ability to identify publicly available secondary submissions. For example, the CNLOPB's March 1996 publication "Released Geophysical and Geological Reports" contained descriptions such as "interpretation of data purchased from GSI," "interpretation of purchased GSI data from 8620-G005-0001P – GSI 1971" and "[r]eprocessing of Shell and GSI lines in Orphan Basin."[110] Paul Einarsson received a list of all secondary submissions in the FIO database from NEB staff simply by asking for it.[111]

89. Again, while irrelevant to this NAFTA claim, the issue of secondary submissions is also a decades-old practice of the Boards under the Regulatory Regime known and understood by the Claimants and which had crystallized years before the Alberta Court Decisions and is thus outside this Tribunal's jurisdiction under NAFTA Articles 1116(2) and 1117(2).

4. GSI Started Threats of Legal Action Against Specific Companies in 2003 and Commenced Copyright Infringement Proceedings Against Encana in 2007

90. In 1999, stating that it was aware that "confidential information provided by [GSI] to the [NEB] has recently been released to a number of third parties," GSI made a request under the *ATIA* for the specific names and addresses of those third parties.[112] The NEB told GSI that the *CPRA* empowered

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[109] **R-628**, [redacted]

[110] **R-516**, CNLOPB, Released Geophysical and Geological Reports, March 1996. pp. 12, 35. *See also*, **RWS-05**, Rejoinder Witness Statement of Trevor Bennett, 11 October 2024 ("Bennett Rejoinder Witness Statement"), ¶¶ 10, 16-17; **R-517**, CNLOPB "Released Geophysical and Geological Reports, Newfoundland and Labrador Offshore Area", March 2006; **R-518**, CNLOPB, Released Geophysical Reports, December 2010. *See also*, **RWS-06**, Rejoinder Witness Statement of Carl Makrides, 24 October 2024 ("Makrides Rejoinder Witness Statement"), ¶ 9.

[111] **CWS-07**, Witness Statement of Harold Paul Einarsson, 31 January 2024, ¶ 19 ("[NEB Staff Member] Lori Ann Sharp is the person that handed me a list which linked secondary submissions IDs to GSI survey IDs as her name is scribbled on the top of the list from about a decade ago when she provided that list to me."). GSI made *ATIA* requests to the Boards in 2012 and 2013 to obtain itemized lists of secondary submissions from the Boards. *See* **R-509**, Letter from CNLOPB to GSI, 13 March 2012; **R-504**, Letter from NEB to GSI, 16 July 2013.

[112] **C-194**, Letter from GSI to NEB, 20 September 1999. *See*, **R-645**, *GSI v. NEB* (FCC File No. T-2101-00), Affidavit of Paul Einarsson, 11 December 2000, ¶¶ 3, 8; **R-646**, *GSI v. CNSOPB* (FCC File No. T-2102-00), Affidavit of Paul Einarsson, 11 December 2000, ¶¶ 3, 8; **R-647**, *GSI v. CNLOPB* (FCC File No. T-2100-00), Affidavit of Paul Einarsson, 11 December 2000, ¶¶ 3, 8.

it to disclose copies of seismic materials to requestors,[113] but did release FIO borrowing agreements with personal information redacted pursuant to *ATIA* s. 19(1).[114]

91. In 2003, once the question of whether the *ATIA* required disclosure of names and addresses of companies accessing materials from the Boards was resolved by the court in GSI's favour,[115] the Boards provided those details.[116] In turn, GSI started to threaten legal action and/or demand payment from third parties because they had accessed GSI materials from the Boards.[117] However, throughout the 2000s, notwithstanding GSI's long-standing position on copyright, the Claimants knew that the Boards never ceased to exercise their legal authority under the Regulatory Regime to provide public access to copies of non-confidential seismic materials.

92. While GSI made another threat of legal action against the CNSOPB in 2007 regarding copyright, trade secrets and the Regulatory Regime,[118] GSI's first lawsuit directly asserting a copyright infringement claim was filed against Encana in 2007 for Beaufort Sea data obtained from

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[113] **R-302**, Letter from NEB to GSI, 8 October 1999 ("[t]he information you provide to the Board for the purposes of the *Canada Oil and Gad Operations Act (COGOA)* or the *Canada Petroleum Resources Act (CPRA)* is kept in our Frontier Information Office (FIO), after it has been released from privileged status pursuant to Section 101 of CPRA. A person who wishes to consult any information in the FIO makes an appointment to do so and attends at the FIO. Once in the FIO, the person may consult and photocopy any released information respecting oil and gas exploration and production operations on frontier lands."); **R-303**, Letter from NEB to GSI, 21 March 2000. The Claimants themselves were accessing materials from the NEB in 2000 and 2001. *See*, **R-292**, NEB, "Frontier Information Office Log: GSI Logs," 2000-2002; **R-293**, Liability Agreements of Borrowed Materials at NEB by GSI, 2000-2001; **R-648**, Liability Agreement of Borrowed Materials at NEB by Ardal Petroleum, 8 November 2000; **R-649**, Liability Agreement of Borrowed Materials (unredacted) at NEB by Ardal Petroleum, 8 November 2000.

[114] *See e.g.*, **R-650**, Letter from NEB to GSI, 21 March 2000 attaching *Access to Information Act* Disclosure from NEB, Request No. 232-A000-4-00-01, 21 March 2000.

[115] **C-197**, *GSI v. CNLOPB, NEB and CNSOPB*, 2003 FCT 507, Reasons for Order, 25 April 2003.

[116] *See*, **R-651**, Letter from NEB to Gowlings LLP, 9 June 2003; **R-652**, Letter from CNSOPB to GSI, 28 November 2003, ¶¶ 89-90; **R-526**, Letter from CNLOPB to GSI, 4 June 2003. *See also*, **R-527**, Letter from CNLOPB to GSI, 22 January 2004; **R-653**,*Access to Information Act* Disclosure from NEB, Request No. 232-A000-4-2003/08, 31 October 2003; **R-654**, *Access to Information Act* Disclosure from NEB, Request No. 232-A000-4-2004/07, 15 December 2004; **R-655**, *Access to Information Act* Disclosure from CNLOPB, Request No. 12710 2004-04, 31 December 2004; **C-408**, Letter from NEB to GSI, 16 December 2005; **R-528**, Letter from CNLOPB to GSI, 12 January 2006; **R-653**, *Access to Information Act* Disclosure from NEB, Request No. 232-A000-4-2003/08, 31 October 2003.

[117] **R-659**, Letter from GSI to Lynx, 2 November 2003; **R-660**, Letter from GSI to GLR Resources, 17 January 2005 (referring to access at NEB by GLR – *see*, **R-654**, *Access to Information Act* Disclosure from NEB, Request No. 232-A000-4-2004/07, 15 December 2004); **R-661**, Letter from GSI to Encana, 30 May 2006; **R-662**, Letter from GSI to Encana, 11 August 2006; **R-663**, Letter from GSI to Encana, 21 September 2006.

[118] **R-218**, Letter from Gowlings to CNSOPB, 30 March 2007 (attaching draft Statement of Claim).

the NEB.[119] Encana "denie[d] that the Beaufort Material is protected by copyright," and argued that, even if it was copyright protected, there was no infringement thereof because copies were legally obtained in 1999 from the NEB pursuant to the *CPRA* and applicable regulations.[120]

93. GSI put the issue of copyright and the Regulatory Regime before the Canadian courts again in 2009 when it claimed copyright infringement against Lynx Canada for having accessed GSI's Arctic and Beaufort Sea seismic materials from the Boards.[121] GSI initiated further copyright violation cases against oil companies and others, including Suncor in 2009,[122] Husky in 2010,[123] CalWest in 2011[124] and more than two dozen other claims that would eventually form part of the Common Issues Trial.[125]

94. GSI waited until 2011 to commence legal action directly against the CNLOPB,[126] almost twenty years after first threatening to do so and more than a decade after the CNLOPB stated it "disagreed with [GSI's] legal analysis" with respect to alleged copyright, confidentiality and lack of authority under the Regulatory Regime to release copies of seismic materials to the public.[127] GSI subsequently commenced further lawsuits against the CNLOPB, NEB, CNSOPB and other Canadian government departments between 2012-2014.

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[119] **R-586**, *GSI v. Encana* – Statement of Claim, ¶¶ 12-14.

[120] **R-664**, *GSI v. Encana,* Statement of Defence, 22 June 2007, ¶¶ 7, 12-13.

[121] **R-666**, *GSI v. Lynx Canada et al.* (ABQB File No. 0901-08210) ("*GSI v. Lynx*"), Statement of Claim, 2 June 2009. Lynx denied violating the *Copyright Act* and asserted publicly available copies were disclosed under the authority of the NEB. *See*, **R-667**, *GSI v. Lynx*, Statement of Defence, 22 January 2010. Canada and the NEB were joined as third-party defendants in 2011 and 2013. *See*, **R-668**, *GSI v. Lynx,* Third Party Claim, 27 May 2011; **R-669**, *GSI v. Lynx*, NEB Third Party Statement of Defence, 20 July 2011; **R-670**, *GSI v. Lynx*, Canada Third Party Statement of Defence, 4 August 2011; **R-671**, *GSI v. Lynx*, Canada Statement of Defence to Amended Amended Statement of Claim, 11 July 2013; **R-672**, *GSI v. Lynx*, NEB Statement of Defence, 18 July 2013.

[122] **R-567**, *GSI v. Suncor* (ABQB File No. 0901-08209), Statement of Claim, 2 June 2009.

[123] **R-673**, *GSI v. Husky* (ABQB File No. 1001-05568), Statement of Claim, 13 April 2010.

[124] **R-674**, *GSI v. CalWest* (ABQB File No. 1101-15306), Statement of Claim, 9 November 2011.

[125] *See e.g.*, **R-675**, Letter from GSI to Conoco, 2 October 2012; **R-676**, Letter from GSI to JEBCO, 2 October 2012; **R-677**, Letter from GSI to Marathon, 2 October 2012; **R-678**, Letter from GSI to Murphy, 2 October 2012; **R-679**, Letter from GSI to BP, 2 October 2012.

[126] **R-004**, *GSI v. CNLOPB* - Statement of Claim, 10 August 2011. *See also*, **R-005**, *GSI v. CNLOPB* - Amended Statement of Claim; **R-682**, *GSI v. CNLOPB and HMTQ* (SC NL Trial Division General File No. 2011 01G 5430), Amended Defence on behalf of the First Defendant, 1 February 2013.

[127] **R-249**, Letter from Parlee McLaws to CNLOPB, 3 November 1993; **R-531**, Letter from GSI to CNLOPB, 27 July 1998, attaching letter from Code Hunter Wittman to GSI, 30 July 1998.

95. In sum, the evidence confirms that the Claimants had actual and constructive knowledge of the Boards' disclosure and copying practices under the Regulatory Regime, as well as knowledge of companies accessing their seismic materials from the Boards, decades before the Alberta Court Decisions. Pursuant to NAFTA Articles 1116(2) and 1117(2), none of the actions of the Boards and effects of the Regulatory Regime on GSI's copyrights and business are in the jurisdiction of the Tribunal, nor can they form any basis of the Claimants' NAFTA claim.

D. The Claimants Fail to Demonstrate that their Challenge of the Alberta Court Decisions Concerns an Independent Judicial Action that is Separate and Distinct from the Regulatory Regime and as a Result, their Claim is Time Barred

96. The factual evidence described above demonstrates that this claim has been formulated to avoid the consequences of the NAFTA limitation period. As explained in Canada's Counter-Memorial, to be justiciable, an alleged breach must relate to an independently actionable conduct within the limitation period.[128] While past tribunals have considered pre-limitations period events to inform their understanding of the relevant facts, events predating the limitations period are not susceptible to founding of a treaty breach.[129]

97. In the case of challenges involving judicial measures, the principle that the time limitation for administrative or regulatory measures cannot be tolled by litigation underscores the importance of identifying an independent judicial action capable of constituting a breach in its own right.[130] For example, past international investment tribunals have found judicial measures to form the basis of their jurisdiction *ratione temporis* where the challenged measures involved identifiable independent

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[128] Canada's Counter-Memorial, ¶ 192, citing **RLA-010**, *Spence* – Interim Award, ¶ 221 ("As noted in the discussion above, the Tribunal considers that, to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period.").

[129] *See e.g.*, **RLA-170**, *Bayindir Insaat Turizm Ticaret Ve Sanay A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, ¶ 283 ("However, these events occurred prior to the entry into force of the Treaty on 3 September 1997 and the disputes arising from them have been settled. These events are thus not susceptible of founding a treaty breach in these proceedings. They can merely be taken into account for a better understanding of the relevant facts"); **RLA-171**, *ECE Projektmanagement International GMBH et al. v. The Czech Republic* (PCA Case No. 2010-5), Award, 19 September 2013, ¶ 3.176 ("[The conduct of the Respondent prior to their acquisition of the claimants' investments] retains its life only to the extent that the Tribunal will, in its treatment of the merits, pay particular attention to assuring itself that the claims for adjudication do relate exclusively to conduct falling properly with the scope of the BIT *ratione temporis*.").

[130] Canada's Counter-Memorial, ¶¶ 194-197.

judicial acts, such as the seizure or transfer of assets,[131] or the denial of a request for emergency relief and rehearing.[132] The Claimants have not identified any similar independent judicial actions in this case.

98. Instead, the Claimants' challenge of the Alberta Court Decisions relates solely to the Courts' interpretation of the Regulatory Regime. In interpreting the law, the Courts did not confer or take away any rights from GSI. The interpretation of the Regulatory Regime as allowing disclosure by the Boards and copying of GSI's seismic materials at the end of the confidentiality period was a confirmation of existing practices based on long-standing laws and regulations. It did not result in further "confiscation" of GSI's copyright. Therefore, it cannot be said that the Alberta Court Decisions constitutes an independently actionable breach in its own right.

99. In the absence of any identifiable judicial action that is separate and distinct from the Regulatory Regime, the Claimants have failed to meet their burden of proof that the Alberta Court Decisions constitute an independently actionable breach under NAFTA Articles 1116(2) and 1117(2). Accordingly, their claim must be dismissed in its entirety for lack of jurisdiction *ratione temporis*.

100. Nevertheless, even if the Tribunal finds that it can proceed to the merits, it should bear in mind that that measures relating to the effects of the Regulatory Regime and actions of the Boards are still beyond the Tribunal's jurisdiction and therefore that its ability to consider the Alberta Court Decisions is limited. In Part IV below, Canada explains why the Alberta Court Decisions are not themselves a breach of NAFTA Articles 1110 and 1106(1).

E. The Claimants' Characterization of the Waiver Requirement in NAFTA Article 1121 is Inconsistent with its Object and Purpose

101. Another jurisdictional issue that arises from this claim is the implication of GSI having continued domestic claims involving the payment of damages after filing its NAFTA NOA on April

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[131] **RLA-172**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award, 12 April 2002; **RLA-173**, *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), Award, 19 December 2016 ("*Garanti Koza* – Award"); **RLA-174**, *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12), Award, 2 November 2012.

[132] **CLA-036**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB/AF)/12/1), Award, 25 August 2014.

18, 2019. The Claimants contend they are not in violation of the waiver requirements set out in Article 1121(1)(b) and (2)(b), distinguishing between claims against the CNLOPB and contractual claims against third-party oil companies.[133] For the former category, the Claimants suggest that it there is no consequence for having failed to terminate the claim by the date of their NOA. For the latter, they submit these litigations are not "with respect to the measure" and that there is no risk of double recovery. As explained in Canada's Counter-Memorial,[134] the Claimants' approach to both categories is problematic.

102. The issue of GSI's ongoing domestic contractual claims against third parties which overlap with the damages as claimed in this NAFTA arbitration is addressed in Part VI(B)(4) below. With respect to GSI's claim against the CNLOPB which it failed to terminate before filing the NOA, the Claimants simply respond that the case had not been active for nearly two and a half years and that GSI did not intend to pursue it.[135] Subjective and *post-facto* justifications for failing to terminate domestic damages claims prior to a NAFTA NOA simply do not matter for the purposes of Article 1121(1). As Canada noted in its Counter-Memorial, NAFTA and other tribunals dealing with similar waiver requirements have determined it is a strict condition precedent to filing a claim to arbitration that all domestic claims for damages "with respect to the measure" alleged to breach the NAFTA be terminated by the time the NOA is filed.[136] A claimant is not permitted to simply leave open, after filing its NOA, a domestic litigation involving payment of damages with respect to an alleged NAFTA breach.[137] Previous NAFTA and other investment tribunals consider the formal termination of such proceedings to be essential for demonstrating compliance with Article 1121. Failure to comply with this condition vitiates the consent to arbitrate and, without the consent of the Respondent

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[133] Claimants' Reply, ¶¶ 121-198.

[134] Canada's Counter-Memorial, ¶¶ 155-185.

[135] Claimants' Reply, ¶¶ 132-134. *See*, Canada's Counter-Memorial, ¶ 177 and exhibits cited therein.

[136] Canada's Counter-Memorial, ¶¶ 159-161 and authorities cited therein.

[137] In this respect, the authorities cited by the Claimants at ¶¶ 139-147 – *Ethyl*, *Pope & Talbot* and *Thunderbird* – are irrelevant because those cases involved the claimant's tardiness in filing the actual written waiver, not failing to discontinue ongoing domestic litigations by the date of filing the NAFTA NOA. *See*, **CLA-070**, *Ethyl Corporation v. Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998; **CLA 072**, *Pope &Talbot v. Canada* (UNCITRAL), Award in Relation to Preliminary Motion by the Government of Canada, 24 February 2000; **CLA-057**, *International Thunderbird Gaming Corporate v. Mexico* (UNCITRAL), Award, 26 January 2006. Furthermore, the approach by those early NAFTA tribunals has overtaken by subsequent interpretations from more recent NAFTA and other investment tribunals, which have been informed by the consistent approach by all three NAFTA Parties, confirming that full compliance with Article 1121 is a jurisdictional issue and a strict condition precedent to filing a claim.

Party, the Tribunal has no authority to cure the Claimants' non-compliance with such an essential element of its jurisdiction.[138]

IV. THE ALBERTA COURT DECISIONS ARE NOT AN EXPROPRIATION UNDER NAFTA ARTICLE 1110

A. The Overwhelming Majority of Investment Treaty Awards Have Confirmed that Denial of Justice or Some Egregious Judicial Misconduct is Required for a Finding of Judicial Expropriation

103. It is not sufficient that the effect of a judicial ruling was to substantially deprive an investor of the value of its investment. A finding of judicial expropriation is extremely rare: as a general rule, it would not occur in the absence of a judicial decision amounting to a denial of justice.

104. In their Reply, the Claimants continue to assert that denial of justice is not required to demonstrate an indirect expropriation through a domestic court decision.[139] The Claimants provide virtually no support for their position and fail to address the numerous sources to the contrary cited by Canada in its Counter-Memorial. Esteemed publicists such as Paulsson, Paparinskis, Greenwood and other leading authors on the subject have explained that denial of justice or egregious judicial misconduct attaching to the judicial process itself is required to find an action by the judiciary as expropriatory under international law.[140]

105. The overwhelming majority of international investment awards also support this position. In its Counter-Memorial, Canada cited numerous cases such as *Loewen v. United States of America*,[141]

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[138] Canada's Counter-Memorial, ¶ 168 and authorities cited therein.

[139] Claimants' Reply, ¶ 213.

[140] Canada's Counter-Memorial, ¶¶ 246-258. *See e.g.*, **RLA-046**, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, 208 (2013) (excerpt), p. 208 ("while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice"); **RLA-048**, Jan Paulsson, *Denial of Justice in International Law*, 44 (2005), p. 81; **RLA-055**, Edwin M. Borchard, *The Diplomatic Protection of Citizens Aboard or the Law of International Claims* 330 (1925), p. 196; **RLA-050**, Christopher Greenwood, "State Responsibility for the Decisions of National Courts," in *Issues of State Responsibility Before International Judicial Institutions* 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004).

[141] **RLA-023**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003, ¶ 141 ("Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen established a denial of justice under 1105").

Azinian v. Mexico,[142] *Mondev v. United States of America*[143] and *Lion Mexico Consolidated LP v. Mexico*,[144] all of which have confirmed this long-standing rule of international law.[145]

106. In a recent case, the tribunal in *Manolium Processing v. Belarus* considered the issue of judicial expropriation in the context of a decision from the Supreme Court of Belarus confirming an earlier decision by the courts terminating a contract. Because it had found no denial of justice, the tribunal stated there could be no judicial expropriation:

> The question now before the Tribunal is whether the Cassation Decision, a judgement rendered by the Supreme Court of Belarus, constituted an indirect expropriation. Taking of property through a judicial process can indeed give rise to an expropriation, but the Tribunal considers that the standard must be equivalent to that applied to judicial decisions which violate the FET standard: judicial expropriation must result from denial of justice. This conclusion is confirmed by case law and by scholarly opinion:
>
> > "[w]hile taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice."

[142] The *Azinian* tribunal found that the fact that the Claimants did not allege a denial of justice was fatal to the claim. *See*, **CLA-042**, *Robert Azinian, Keneth Davitian, & Ellen Baca v. Mexico* (Case No. ARB(AF)/97/2), Award (English), 1 November 1999 ("*Azinian* - Award"), ¶¶ 99-100.

[143] **CLA-054**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002, ¶ 75 (holding that "the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover, it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA.")

[144] At issue in *Lion Mexico* was an alleged fraudulent scheme of judicial and administrative proceedings initiated by a debtor. The tribunal reaffirmed the general rule that "liability for expropriation under [NAFTA] Art. 1110 arising from the decisions of domestic courts requires a finding of a denial of justice." **CLA-108**, *Lion Mexico Consolidated L.P. v. Mexico* (ICSID Case No. ARB(AF)/15/2), Award of the Tribunal, 20 September 2021 ("*Lion Mexico* – Award"), ¶ 188.

[145] In its Reply at ¶ 214, the Claimants cite a sentence of the *Eli Lilly* award which suggests that a judicial expropriation *could* occur if it "crystallizes a taking" but omits the fact that in the following paragraphs the tribunal goes to great lengths to emphasize that a NAFTA Chapter Eleven tribunal is "not an appellate tier in respect of the decisions of national judiciaries" and in particular that this means that the findings of the courts would be accorded "considerable deference" except "in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct". **RLA-025**, *Eli Lilly* – Award, ¶¶ 221, 224. The *Eli Lilly* tribunal did not find that the patent invalidation was a judicial expropriation despite the claimant's argument that the application of a "judge-made rule" (the "promise of the patent") was, just as the Claimants argue in this arbitration, novel and surprising, ¶¶ 421, 442.

> The Tribunal has already decided that the Cassation Decision did not constitute a denial of justice, and this finding precludes the possibility that the Cassation Decision gives rise to a judicial expropriation.[146]

107. The decision in *Manolium* is apposite because the tribunal in that case also was faced with arguments based on earlier judicial conduct. Having concluded that the original termination of the contract was outside its jurisdiction *ratione temporis*, the tribunal proceeded to consider whether the Cassation Decision itself could constitute an expropriation and concluded it did not.

108. The Claimants rely on a single award from 2009 in *Sistem v. Kyrgz Republic* as the only example where a tribunal apparently found a judicial expropriation without denial of justice.[147] The *Sistem* award contains virtually no discussion of international law, stating only briefly that the expropriation of the claimant's hotel (which had been seized by force by the claimant's joint venture partner) had been effected by the courts and the state was responsible for these actions.[148] However, the tribunal's conclusion was evidently based on the inconsistent and procedurally deficient domestic court proceedings reversing the 1998 bankruptcy of the claimant's joint venture partner (a bankruptcy which the Kyrgyz court had previously declared and the government recognized as valid) only one day after the question of hotel ownership was submitted to the court, which led to the cancellation of the claimant's acquisition of its partner's rights in the hotel.[149] The tribunal found that the Kyrgyz courts' actions abrogated property rights which had previously been specifically recognized by the

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[146] **RLA-175**, *OOO Manolium Processing v. Republic of Belarus* (PCA Case No. 2018-06), Final Award, 22 June 2021, ¶¶ 591-592, citing **RLA-023**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003, ¶ 141; **RLA-046**, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, 208 (2013) (emphasis added, footnotes omitted).

[147] **CLA-082**, *Sistem Mühendislik In aat Sanayi ve Ticaret A. v. Kyrgz Republic* (ICSID Case No. ARB/05/16), Award, 9 September 2009 ("*Sistem* – Award"), ¶ 118. While the Claimants at ¶¶ 214-219 of their Reply refer to a few other cases like **CLA-079**, *Saipem S.p.A. v. Bangladesh* (ICSID Case No. ARB/05/07), Award, 30 June 2009, where the tribunal left the door open to a finding of judicial expropriation in the absence of denial of justice if other exceptional circumstances were present, the facts in these cases did not require a finding on what factual circumstances would warrant such a finding.

[148] The tribunal only made the uncontroversial observation in a footnote that under Article 4 of the ILC Articles on State Responsibility, States are responsible for the actions of its organs, including the judiciary. **CLA-082**, *Sistem* – Award, ¶ 118, fn. 103.

[149] **CLA-082**, *Sistem* – Award, ¶¶ 104-108, 112, 122. Indeed, the capacity of the Kyrgyz courts to administer justice in an even-handed manner was questioned in subsequent enforcement proceedings of the *Sistem* award. *See*, **RLA-176**, *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic,* 2012 ONSC 4351, 25 July 2012, ¶ 71 ("[T]he evidence concerning the past corruption of the Republic's courts and the present uncertainties of its judicial system certainly do not operate to point to the Republic as the clearly more appropriate forum in which to litigate the ownership of the Disputed Shares.").

government and the courts.[150] The *Sistem* case is not useful precedent and, in any event, rests on very different factual circumstances that bear no resemblance to the judicial measure before this Tribunal.

109. Decisions by domestic courts, when they are acting lawfully as neutral and independent arbiters of legal rights, do not give rise to a claim for expropriation.[151] As Canada noted in its Counter-Memorial, this well-established principle is reflected in the repeated and consistent submissions of the three NAFTA Parties.[152] In the context of domestic court decisions on the determination of legal rights, the awards in *Azinian*, *Arif* and *Liman Caspian* amongst others make clear that domestic court decisions cannot amount to an expropriation absent denial of justice.[153] Moreover, the fact that a court interprets or applies legislation which may itself be in breach of a treaty obligation is not relevant if the challenged measure is the court decision.

B. The Claimants Do Not Allege Denial of Justice and Instead Advance an Unsubstantiated Argument that the Alberta Court Decisions Reached a "Novel" or "Surprising" Interpretation of Canadian Law

110. The Claimants do not allege a denial of justice. They have sought to avoid meeting the burden of establishing that international legal standard by alleging instead an expropriation by the Alberta Courts arising from their interpretation of Canadian law.

111. Accepting the Claimants' argument that judicial decisions can amount to an expropriation simply by pronouncing on the existence and scope of property rights – in this case, the existence and scope of the GSI's copyright in seismic materials – would essentially turn investment tribunals into

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[150] **CLA-082**, *Sistem* – Award, ¶ 69 ("[T]he July 1999 Agreements were an explicit and unequivocal recognition by the Kyrgyz Government that Sistem was thenceforth the sole and undisputed owner of the hotel."), ¶ 74.

[151] **CLA-108**, *Lion Mexico* – Award, ¶¶ 188-189.

[152] Canada's Counter-Memorial, ¶ 247, fns. 443, 444. *See*, for example, **CLA-108**, *Lion Mexico* – Award, ¶¶ 189, 281-286 referring to Mexico's submissions and the non-disputing Party submissions made by Canada and the United States.

[153] *See also*, **RLA-053**, *Krederi Ltd. v. Ukraine* (ICSID Case No. ARB/14/17) Award, 2 July 2018, ¶ 709. In that case, the tribunal observed, in the context of private law disputes over ownership of movable or immovable property, that "judicial determinations [of which party prevails in a private law dispute over ownership of movable or immovable property] do not constitute expropriation." It added that where a court finds that a property transfer was invalid, "the resulting transfers of ownership do not amount to expropriation." The tribunal then stated at ¶ 713 that it is necessary to ascertain, in order to determine whether an indirect expropriation or a measure tantamount to expropriation had occurred in those circumstances, "whether an additional element of procedural illegality or denial of justice was present." The tribunal in *Krederi* dismissed the expropriation claim on the basis that the domestic judicial proceedings had not involved a breach of due process. In *Garanti Koza v. Turkmenistan*, the tribunal found that a seizure of property does not amount to an expropriation unless there existed "an element of serious and fundamental impropriety about the legal process." **RLA-173**, *Garanti Koza* - Award, ¶ 365.

appeal courts of domestic decisions. International law does not determine the existence and scope of property rights, and domestic court decisions on the existence and scope of rights under domestic law are binding on investment tribunals.[154] Here, the Alberta Courts considered the existence and scope of GSI's copyright and found that the Regulatory Regime allowed the Boards to disclose copies of GSI's seismic materials notwithstanding GSI's copyright. They did so after a lengthy trial with voluminous legal argument, evidence, witness and expert testimony by GSI and the large group of defendants. The Claimants' characterization of the Alberta Court Decisions as "novel" or "surprising" is nothing more than another effort to appeal the Decisions. The Supreme Court of Canada considered the very same arguments that the Claimants are now making regarding the Alberta Court Decisions and refused leave to appeal.

112. Even if the Claimants could establish that the Alberta Courts' interpretation of domestic law is "novel" or "surprising," this still would not be sufficient to breach international law. Tribunals have consistently confirmed that domestic judicial determinations on domestic law are not subject to review by international investment tribunals except when the judiciary is in violation of the treaty because of a denial of justice.[155] On this basis alone, this NAFTA claim must fail.

113. In any event, contrary to how the Claimants try to portray the Alberta Court Decisions, the Courts did not create a "new legal norm" or "change the law". The Alberta Courts interpreted existing laws in accordance with accepted norms of statutory interpretation. Moreover, the interpretation was not a radical change of well-settled law but rather a reasoned analysis of novel legal issues. While denying that this is the applicable test to find a judicial expropriation under international law, Canada notes the following in response to the Claimants' arguments.

114. First, the Alberta Court Decisions did not reverse previous well-settled law. The Claimants themselves acknowledge that Canadian courts had not previously recognized that copyright could

[154] Canada's Counter-Memorial, ¶¶ 259-267.

[155] **CLA-042**, *Azinian* - Award, ¶ 99 ("the possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction."). *See also*, **RLA-097**, Andrew Newcombe, *Law and Practice of Investment Treaties*, "Standards of Treatment", February 2009 (excerpt), ¶ 7.19; Canada's Counter-Memorial, ¶ 263; **RLA-048**, J. Paulson, Denial of Justice in International Law, 2005, pp. 36-37.

subsist over seismic data and had not previously analyzed the relationship between the Regulatory Regime and the *Copyright Act*.[156]

115. Second, as Canada explained in its Counter-Memorial, the Alberta Courts applied accepted modern statutory interpretation principles to come to a conclusion on the relationship between the *Copyright Act* and the Regulatory Regime. In his first expert report, Mr. Sookman's analysis of the Alberta Court Decisions sets out their reasoning, and explains that the Courts' reasoning is based on, and in line with, earlier decisions.[157] In response, the Claimants filed a new expert opinion by Professor Hutchison, but his report does very little to support the Claimants' contentions or address the relevant issue before this Tribunal.

116. There is little daylight between Professor Hutchison and Mr. Sookman's articulation of the modern principle of statutory interpretation.[158] However, while Professor Hutchison describes principles that can be used to avoid a conflict, his report is silent on how an analysis ought to proceed where a conflict is found to exist.[159] Mr. Sookman explains that in such situations, courts may use interpretive rules to resolve the conflict, including – as the ABQB has done – *lex specialis*.[160] The

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[156] Claimants' Reply, ¶ 258.

[157] Canada's Counter-Memorial, ¶¶ 126-146; **RER-01**, Sookman Counter-Memorial Expert Report, ¶¶ 153-166.

[158] **CER-04**, Expert Report of Cameron Hutchison, 18 January 2024 ("Hutchison Expert Report"), ¶¶ 6-9; **RER-01**, Sookman Counter-Memorial Expert Report, ¶¶ 95-97; **RER-05**, Rejoinder Expert Report of Barry Sookman, 25 October 2024 ("Sookman Rejoinder Expert Report"), ¶ 4. *See also*, **CER-01**, Bankes Expert Report, ¶¶ 42-43.

[159] Notably, however, Professor Hutchison has previously acknowledged that, in principle, priority rules such as *lex specialis* can be used to resolve such conflicts. *See*, **R-547**, C. Hutchison, "The Modern Principle of Statutory Interpretation", (LexisNexis, 2nd ed, 2022) (extract), p. 74, fn. 25 ("Where in theory such conflicts arise, there are rules of paramountcy that direct which statutory directive takes priority. Federal legislation takes priority over provincial legislation; human rights legislation takes priority over ordinary statutes; the specific provision takes priority over the general provision").

[160] The concept of *lex specialis* or "implied exception" is associated with the Latin maxims *generalia specialibus non derogant* and *lex specialis derogate legi generali*, meaning that in the case of a true conflict between a provision that deals with a specific matter and a provision of more general application, the more specific provision prevails over the general. *See*, **R-112**, Ruth Sullivan, "The Construction of Statutes", 7th ed (LexisNexis Canada, 2022) (excerpts), ¶ 11.05[6]. *See also*, **RER-01**, Sookman Counter-Memorial Expert Report, ¶¶ 99-104; **CER-01**, Bankes Expert Report, ¶¶ 58-59; **CER-04**, Hutchison Expert Report, ¶ 21; **RER-05**, Sookman Rejoinder Expert Report, ¶¶ 6-10; **R-538**, *City of Ottawa v. Town of Eastview* [1941] S.C.R. 448, pp. 461–462; **R-539**, *R. v. Greater Sudbury (City)*, 2023 SCC 28, ¶ 99; **R-536**, *Massicotte v. Boutin*, [1969] SCR 818, p. 821.

Claimants' other expert, Professor Bankes, also recognizes *lex specialis* as a "principle for resolving conflicts between different statutory provisions."[161] As Mr. Sookman concludes:

> The ABQB Decision consists solely of application of established principles of statutory interpretation and copyright law. It does not reverse or modify any previous jurisprudence or establish any novel principles of law.[162]

117. Contrary to what the Claimants state in their Reply, the reports of Professors Bankes and Hutchison do not confirm that "[the Court's] interpretation was unexpected by the legal community."[163] Professor Hutchison recognizes that "judges may apply the modern principle and still arrive at different interpretations of legislative intent."[164] He concludes that "legal certainty of approach and application by courts to the problem of overlapping statutes makes legal certainty prior to a judicial ruling virtually impossible."[165] While Professor Hutchison may not agree with the Alberta Courts' conclusion,[166] he does not state that the interpretation adopted by the ABQB regarding the relationship between the Regulatory Regime and the *Copyright Act* is unreasonable. Instead, he remarks generally that "judges may differ on the relationship between overlapping statutory provisions."[167] This insight contradicts the Claimants' contention that they had a legitimate expectation that the *Copyright Act* would prevail over the Regulatory Regime.

118. Third, the Claimants' argument ignores that other courts in the United States and in the Falkland Islands reached the same ultimate conclusion as the Alberta Courts when faced with similar issues. In *GSI v. TGS*, the U.S. courts concluded there was an implied licence that arose by virtue of the

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[161] **CER-01**, Bankes Expert Report, ¶ 46. While Professor Bankes appears to disagree that there was an unavoidable conflict in this case and cautions that a Court cannot "fasten on the *lex specialis* principle in isolation from the broader consideration of context," it is clear from the ABCA's review of the ABQB decision that the ABQB did not disregard the broader context. *See*, **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 98 ("The Trial Court properly took 'into account the purpose of the legislative provisions and all relevant context'").

[162] **RER-01**, Sookman Counter-Memorial Expert Report, ¶ 143.

[163] Claimants' Reply, ¶ 263. Professors Hutchison and Bankes' reports contain no such statement and the citation on which the Claimants rely to say that it was "an unnecessarily broad interpretation of the section [of the *CPRA*])" is from a blog post by Professor Bankes himself which was attached to this report. *See*, **CER-01**, Bankes Expert Report, Appendix C.

[164] **CER-04**, Hutchison Expert Report, ¶ 11.

[165] **CER-04**, Hutchison Expert Report, ¶ 24.

[166] Professor Hutchison appears to disagree with Justice Eidsvik's terminology and characterization of the Regulatory Regime as an implied licence or a compulsory licence scheme. *See*, **CER-04**, Hutchison Expert Report, ¶¶ 47, 57.

[167] **CER-04**, Hutchison Expert Report, ¶ 23.

Canadian Regulatory Regime.[168] In *GSI v. Falkland Islands*, the courts found an express licence through GSI's participation in its preexisting domestic regulatory regime, which also allowed copying of seismic materials after 5-years of confidentiality.[169] In both cases, GSI's argument that even after the confidentiality period GSI's seismic materials could not be disclosed and copied because of copyright was rejected.[170] The fact that courts in other jurisdictions reached the same ultimate conclusion is a confirmation that there was nothing unreasonable – let alone egregious or shocking as would be necessary to violate international law – in the Alberta Courts' finding that GSI's copyright could not prevent the disclosure and copying of its seismic materials after the confidentiality period as set out in the Regulatory Regime (and on the basis of which it obtained its seismic permit authorizations in the first place).

119. The Claimants may have preferred a different outcome and Professors Bankes and Hutchison may be of the view that the Courts should have adopted different reasoning, but that is not the test to find a breach of NAFTA Article 1110. Nothing in the Alberta Court Decisions rises to the level of egregiousness where international law would recognize a judicial expropriation.

C. The Alberta Court Decisions Did Not Issue a Compulsory Licence and Did Not Cause a Substantial Deprivation of the Value of the Claimants' Investment

120. The Claimants have alleged that the Alberta Court Decisions indirectly expropriated their seismic data business. The Claimants recognize that for there to be an expropriation, showing loss of economic value of their investment is insufficient and that they must establish that the Alberta Court Decisions essentially took the property rights associated with their business and rendered them worthless.[171] Even if the Alberta Court Decisions could amount to an expropriation, absent denial of justice, the Claimants fail to meet this test.

121. The Claimants posit that "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

[168] **R-483**, *GSI v. TGS* (US Court of Appeals 5th Circuit No-18-20493), 13 September 2019, p. 5.

[169] **R-029**, *GSI v. FOGL* (Claim No. SC/CIV/05/14), Approved Judgment, 9 December 2016, ¶¶ 176-177; **R-108**, *GSI v. FOGL* (Civil Appeal No. 2), Approved Judgment, 10 April 2018, ¶ 76.

[170] Canada's Counter-Memorial, ¶¶ 336-337.

[171] Claimants' Reply, ¶ 235.

infringements in the domestic claims and would have been able to continue to sustain its business."[172] They also state that the Alberta Court Decisions "determined that there was no more exclusive copyright in seismic data" and that it "confiscated" "the Claimants' [intellectual property rights] in the Seismic Works."[173] The evidence simply does not support these assertions.

122. On a plain reading, the Alberta Court Decisions were not a taking of the Claimants' rights associated with their investment but merely an interpretation of the relationship between the Regulatory Regime and the *Copyright Act*. The Alberta Court Decisions only interpreted the law as it existed and did not take away GSI's copyright in seismic data or any other property rights in its seismic data business. The Claimants concede they cannot challenge the Regulatory Regime, but their arguments on substantial deprivation solely attribute the effect of the Regulatory Regime to the Alberta Court Decisions. In their Reply, the Claimants continue to argue that the Alberta Court Decisions issued a compulsory licence, but a proper reading of the Decisions indicates that Justice Eidsvik did not use the terms "compulsory licence" in the technical sense but as a description of one possible way of conceptualizing the effect of the Regulatory Regime on copyright in seismic data after the expiry of the confidentiality period.[174]

123. Further, the Claimants' Reply does not address their failure to prove a causal relation between the Alberta Court Decisions and the substantial deprivation of value of GSI's business: (1) the Claimants do not address the fact that by the time of the Alberta Court Decisions in 2017, GSI had not been a going concern for many years; (2) the Claimants provide no evidence that the Disclosed Seismic Materials represented a significant proportion of the overall value of its seismic data business; and (3) the Claimants do not explain how the Alberta Court Decisions affected GSI's ownership of its seismic data or existing licences over this data. In fact, they did not. Therefore, the Courts cannot be said to have substantially interfered with the Claimants' business.

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[172] Claimants' Reply, ¶ 230.

[173] Claimants' Reply, ¶¶ 223, 235.

[174] Claimants' Reply, ¶ 7; Canada's Counter-Memorial, ¶¶ 268-281; **RER-01**, Sookman Counter-Memorial Expert Report, ¶¶ 11-16, 59-62, 132-139,150; **RER-05**, Sookman Rejoinder Expert Report, ¶¶ 19-22.

1. The Claimants Do Not Explain How the Alberta Court Decisions Rendered Their Investment Worthless Given That the Loss of Value of The Investment Long Predates The Decisions and Was Caused by Extrinsic Market Factors and GSI's Own Business Decisions

124. NAFTA Article 1110(2) requires that the valuation date for an expropriation is "immediately before the expropriation took place." It is uncontested by the Claimants' damages expert PwC and Canada's damages experts, Brattle, that by the alleged expropriation date (*i.e.*, November 30, 2017), GSI had no value.[175] But in their Reply, the Claimants do not directly address the fact that temporally and logically, GSI's loss of value cannot have been caused by the Alberta Court Decisions.

125. In fact, documents produced by the Claimants confirm what Canada argued in its Counter-Memorial: GSI's financial demise was unrelated to the Boards' disclosures. Rather, it was caused by market forces and GSI's own business decisions.

126. First, it is not credible to argue that disclosure by the Boards of GSI's seismic materials were responsible for the loss of GSI's business. The vast majority of disclosures took place in the 1990s and early 2000s and consisted of seismic materials which GSI had purchased in 1993 for less than US$500,000 and had been publicly available to copy for years.[176] Furthermore, GSI's newly acquired seismic materials had remained confidential by the time GSI found itself in financial dire straits starting in 2008. There is simply no established financial connection between the Board's disclosure

[175] **RER-04**, Expert Report of The Brattle Group, 16 January 2023 ("Brattle Counter-Memorial Expert Report"), ¶¶ 32-35; **RER-08**, Rejoinder Expert Report of The Brattle Group, 25 October 2024 ("Brattle Rejoinder Expert Report"), ¶ 44; **CER-02**, Expert Report of Paul Sharp, PricewaterhouseCoopers LLP, 26 September 2022, ¶ 71 and Schedule D2; **CER-06**, Sharp Reply Expert Report, ¶¶ 24, 143, 159. In this respect, the cases cited by the Claimants at ¶¶ 341-344 of their Reply – *Quiborax*, *Yukos* and *Casinos Austria* – are not relevant in this arbitration because in those cases, the investment at issue was a going concern immediately prior to the alleged expropriation. *See*, **CLA-120**, *Quiborax v. Bolivia* (ICSID Case No. ARB/06/2), 16 September 2015; **CLA-121**, *Veteran Petroleum v. Russian Federation* (PCA Case No. 2005-05/AA228), Final Award, 18 July 2014; **CLA-122**, *Casinos Austria v. Argentina* (ICSID Case No. ARB/14/32), Award, 5 November 2021.

[176] GSI had been able to license data even though copies of certain materials were available from the Boards. *See e.g.*, **R-610**, [redacted] **R-683**, [redacted] **R-684**, [redacted] **R-685**, [redacted] **BR-48**, [redacted] **R-686**, [redacted] **R-619**, [redacted] **R-688**, [redacted] **R-689**, [redacted] **R-690**, [redacted] **R-691**, [redacted] **R-692**, [redacted] **R-693**, [redacted]

of seismic materials for copying by third parties and GSI having ceased to be a going concern by 2011.

127. Second, the 2008 global financial crisis led to significant financial losses [redacted][177] The impact of the financial crisis on GSI's business is illustrated by the collapse of a March 2008 licence deal in which [redacted][178] [redacted][179] [redacted][180]

128. GSI also suffered from the unfortunate timing of having spent "over" US$20 million "for inspections, dis-assembly and re-fit" of its ships in late 2007 and 2008.[181] But by December 2008, GSI had put its ships up for sale[182] and they were sold for less than a quarter of what GSI had just spent on upgrades.[183] The sale of the ships in 2011 and 2012 meant GSI was no longer able to acquire

[177] **R-694**, GSI's Consolidated Financial Statements, 31 December 2008, PDF p. 6 ("[redacted] *See also*, **R-579**, [redacted] **RER-08**, Brattle Rejoinder Expert Report, p. 19, fns. 59 and 60.

[178] **R-627**, [redacted] **R-695**, [redacted] **R-696**, [redacted]

[179] **R-697**, Letters from GSI to NWest, 4 December 2008.

[180] **R-698**, Letter from NWest to GSI, 16 January 2012. *See*, **R-699**, Email from NWest to GSI, 16 January 2012.

[181] NAFTA NOI, ¶ 99. *See also*, Procedural Order No. 2 Annex B, 29 July 2023, p. 47 ("There is no material dispute between the parties that GSI spent 'over USD$20,000,000 in upgrades and additions to its ships and equipment' in or around 2007 and 2008."). *See also*, **CWS-12**, Witness Statement of Harold Paul Einarsson, 31 May 2024 ("Paul Einarsson Reply Witness Statement"), ¶ 122.

[182] **R-701**, Emails between GSI and Natural Resources Canada, 1 December 2008; **R-355**, Canada Transportation Agency, Decision No. 253-W-2009, 22 June 2009, ¶ 9.

[183] The Admiral was sold in August 2011 for only C$3.5 million. *See*, **R-702**, Letter from Gowlings to GSI, 9 August 2011, attaching Counter-Offer Memorandum of Agreement, 8 August 2011. While the Claimants produced a March 2012 sale agreement of the Pacific for USD$1.5 million, it appears it was sold in October 2012 for only USD$180,000. *See*, **R-569**, Memo of Agreement between GSI and Maintenance Gear Rebuilders, 26 March 2012; **R-570**, Agreement of Purchase and Sale between GSI and Ocean Marine Contractors LLC, 17 October 2012.

new seismic data, which is the lifeblood of any seismic company,[184] and in any event would have been competing with stronger companies, including PGS and TGS.[185]

129. Other market developments pre-dating and unrelated to the Alberta Court Decisions negatively impacted GSI's ability to license its seismic data and the ultimate value of its seismic data library. For example, GSI had previously been able to license old Beaufort Sea, Mackenzie Delta and Arctic seismic data even though much of it had been publicly available from the NEB since the 1980s and 1990s.[186] But according to Mr. Uffen, the significant drop-off in licensing of this data after 2011 was connected to the demise of the Mackenzie Valley pipeline project[187] and the 2016 ban on oil exploration in the Arctic offshore (which continues today).[188] Once the prospect of building a pipeline from this area became impossible, oil companies no longer had any reason to continue exploration or to license GSI data in the region.[189]

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[184] **RER-06**, Rejoinder Expert Report of Robert Hobbs, 22 October 2024 ("Hobbs Rejoinder Expert Report"), ¶¶ 25, 32. While the Claimants say GSI could have bought its ships back and continued its seismic acquisition business, there is no support for this speculative assertion. *See*, **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 120.

[185] **RER-06**, Hobbs Rejoinder Expert Report, ¶¶ 22-23, 36; **R-571**, Transport Canada, "Coasting Trade Act and Seismic Activities", 2012.

[186] *See e.g.*, **R-684**, [redacted] **R-685**, **R-703**, **R-704**, **BR-48**, **BR-61**, **R-705**, **R-706**, **R-707**, **R-708**, **R-709**, **R-690**, **R-710**, **R-692**,

[187] **RER-07**, Rejoinder Expert Report of Doug Uffen, 29 October 2024 ("Uffen Rejoinder Expert Report"), ¶ 48; **R-711**, CBC News, "Chevron puts Arctic Drilling plans on hold indefinitely," 18 December 2014; **R-712**, CBC News, "Imperial Oil, BP delay Beaufort Sea drilling plans indefinitely," 26 June 2015; **R-564**, CBC News, "Mackenzie Valley Pipeline Project Officially One for the History Books," 28 December 2017; **R-565**, CBC News, "Feds Return $430M to oil and gas companies ahead of Arctic offshore exploration ban," 18 December 2019.

[188] **RER-07**, Uffen Rejoinder Expert Report, ¶ 48. *See also*, **RWS-01**, Witness Statement of Bharat Dixit, ¶ 40; **R-563**, Canada-U.S. Joint Arctic Leaders Statement re Arctic Drilling Moratorium, 20 December 2016; **R-713**, Government of Canada, "Order Amending the Order Prohibiting Certain Activities in Arctic Offshore Waters, 2022: SOR/2023-268," 8 December 2023.

[189] Similarly, hydrocarbon exploration declined substantially in the Nova Scotia offshore in the 2010s, culminating with the abandonment of its only gas-producing project in 2018. *See*, **RER-07**, Uffen Rejoinder Expert Report, ¶ 49; **R-566**, CBC News, "Call for Nova Scotia offshore exploration licenses gets no bids," 12 November 2021.

130. In other words, the Alberta Court Decisions did not substantially deprive GSI of the value of its investment: GSI's licensing business and the overall value of its seismic data library was hurt by extrinsic market factors that pre-dated and were unrelated to the Alberta Court Decisions.

131. The Claimants appear to argue that their investment would have had value but for the ongoing litigation because GSI would have been successful in their copyright infringement claims.[190] Not only is this assumption unsupported by evidence, but the Claimants' argument is circular: the Claimants acknowledge their litigation against their customers destroyed their business but also argue that they were "forced" to enforce their copyright claims and that the Alberta Court Decisions deprived them of the ability to continue to pursue litigation against their customers. The Claimants also accuse Canada of "victim blam[ing]."[191] These arguments are meritless.

132. As a general point, GSI's decision to initiate litigation long pre-dates and cannot have been caused by the Alberta Court Decisions.[192]

133. Furthermore, it was the Claimants' own decision to target GSI's customer base rather than focusing its legal challenge on the statutory authority of the Boards under the Regulatory Regime to disclose copies of allegedly copyrighted and trade secret seismic materials. GSI had been threatening to take legal action against the Boards since 1993 on precisely this issue and could have done so at any time in the 1990s and 2000s. The result of GSI's litigation strategy generally was that companies stopped accessing GSI data from the Boards, but at the cost of destroying customers' willingness to do business with GSI at all.

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[190] Claimants' Reply, ¶ 230.

[191] Claimants' Reply, ¶ 114; **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 118.

[192] *See*, **RER-08**, Brattle Rejoinder Expert Report, ¶ 28 ("We note that as a logical matter, damages cannot precede the expectation or realization of the alleged breaches. Therefore, Canada's actions *before* the alleged breaches in 2017 cannot create damages in the counterfactual scenario. And similarly, harm to GSI's value caused by GSI's actions *prior* to the alleged breaches are not part of damages. This includes purported ancillary harm caused by GSI's copyright litigation filed before the alleged breaches and its pursuit of breach-of-contract claims against its own customers.") (emphasis in original).

134. For example, [redacted] had licensed [redacted] of newly acquired seismic data from GSI between 2002 and 2005,[193] but never did again after GSI sued in 2007.[194] [redacted],[195] [redacted][196] But in 2011 when GSI demanded payment for data obtained from the Boards in the 1990s, plus payments of equalization fees that [redacted] said were unjustified, the company never licensed data from GSI again:

> The nature and tone of the emails received from GSI is causing significant damage to the relationship between ConocoPhillips and GSI. While ConocoPhillips has indicated that it may be interested in purchasing additional seismic data from GSI, we are reluctant to do so while these issues are outstanding.[197]

135. Contractual disputes with Husky, Suncor and other companies involving GSI's demand of payment of tens of millions of dollars for equalization and transfer fees also resulted in GSI losing business.[198] The Claimants' litigation strategy is not attributable to Canada and had the consequence of destroying the value of GSI's business long before the alleged date of expropriation on November 30, 2017.

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[193] *See*, **R-572**, [redacted]; **R-753**, [redacted] **R-714**, Letter from GSI to Encana, 14 August 2002; **R-629**, [redacted]; **R-715**, [redacted] **R-716**, [redacted]; **R-717**, [redacted] **R-718**, Letter from Encana to GSI, 5 October 2005.

[194] **R-586**, *GSI v. Encana* – Statement of Claim.

[195] **R-706**, [redacted] **R-632**, [redacted]; **R-709**, [redacted] **R-719**, [redacted] **R-632**, [redacted]; **R-720**, [redacted]; **R-721**, [redacted]; **R-722**, [redacted] **R-723**, [redacted] **R-724**, [redacted] **R-725**, [redacted]

[196] **R-631**, [redacted] **R-632**, [redacted]

[197] **R-726**, Letter from Conoco to GSI, 7 October 2011; **R-727**, Letter from GSI to Conoco, 21 August 2012 (referring to "destroyed the trust and good working relationship" between GSI and ConocoPhillips).

[198] *See e.g.*, **R-584**, Letter from GSI to Husky, 22 March 2010 ("Husky's response [to GSI] was to stop all business, close the door and unplug the phone."); **R-728**, Letter from GSI to Suncor *et al*., 4 May 2012; **R-729**, Letter from GSI to Devon, 20 November 2012; **R-730**, Letter from GSI to BP, 20 November 2012; **R-731**, Letter from GSI to Statoil, 20 December 2012.

2. The Claimants Do Not Explain How the Alberta Court Decisions, Which Only Related to Access and Copying of Disclosed Seismic Materials after the Confidentiality Period, Could Have Resulted in a Substantial Deprivation of GSI's Seismic Data Business

136. Given that the Claimants' argument is based on the expropriation of its seismic data business, it is common ground between the disputing parties that the Claimants must establish that the measure caused the substantial deprivation of the value of the Claimants' business, not only a negative effect on the value of GSI's copyright.

137. In their Reply, the Claimants assert that "the Alberta Decisions annihilated GSI's ability to enforce its copyright and to generate licensing revenues" and that "GSI can no longer license the Seismic Works for a fee because Canada made it available without a fee."[199] Yet, the Alberta Court Decisions (and the Regulatory Regime which it interpreted) had no effect on GSI's copyright over Submitted Seismic Materials during the confidentiality period. The Claimants may not have liked the length of the confidentiality period (and indeed lobbied for decades that it should be longer) but it is well-established that it was designed to ensure that companies, such as GSI, would have a sufficiently long period of confidentiality to market seismic data and recoup the value of their investment. The Alberta Court Decisions did not change the confidentiality period in the Regulatory Regime.

138. The Claimants' argument on expropriation of its seismic data business also ignores the evidence of Canada's experts that establishes that most of the value of the seismic data (and therefore of copyright in that data) lies in the early years after which it is acquired, which coincides with the Regulatory Regime's ten-to-fifteen-year confidentiality period.[200]

139. The Claimants also ignore the fact that the Disclosed Seismic Materials represent only a portion of GSI's seismic data. The Alberta Court Decisions (and the Regulatory Regime which they interpreted) did not require the submission and disclosure of all of GSI's seismic data.[201]

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[199] Claimants' Reply, ¶ 228.

[200] Canada's Counter-Memorial, ¶ 297; **RER-02**, Expert Report of Robert Hobbs, 14 January 2023 ("Hobbs Counter-Memorial Expert Report"), ¶¶ 76(4)(c), 77(4); **RER-04**, Brattle Counter-Memorial Expert Report, ¶ 25.

[201] The Claimants seem to admit that "processed and reprocessed seismic data that are part of the Seismic Works […] were either not submitted by GSI (or its predecessors) or submitted separately by third parties as Secondary Submissions" but they nevertheless unexplainably argue that this data was "confiscated" by Canada. Claimants' Reply, ¶ 51 (emphasis in original). GSI does not explain how seismic materials not submitted by GSI to the Boards or secondary submissions

140. In their Reply, the Claimants gloss over the evidence that demonstrates that the type and quality of data being licensed by GSI was different from that disclosed by the Boards. [redacted][202] In addition, as Canada previously explained, GSI's digital (SEG-Y) seismic data has not been disclosed by the Boards.[203]

141. Mr. Paul Einarsson has acknowledged that the seismic materials submitted to the Boards and disclosed at the end of the confidentiality period were inferior to the quality of the data actually licensed by GSI.[204] The logical implication is that there continued to be value that could be derived from licencing the field or processed data from GSI.

142. In sum, the Alberta Court Decisions did not substantially deprive GSI of the value of its seismic data given that they only had an impact on the value of the data after the confidentiality period, and the Claimants have not demonstrated that this impact was significant in relation to the overall value of the seismic data.

3. The Claimants Ignore the Fact that the Alberta Court Decisions Did Not Affect the Ownership of GSI's Seismic Data, its Licences or Contractual Claims Against Its Licensees

143. In their Reply, the Claimants argue that the Alberta Court Decisions resulted in the loss of value of all of GSI's seismic data, their inability to license their seismic data and non-compliance by licensee of existing contracts.[205] These statements are inaccurate.

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are affected by the measure alleged to be in breach of NAFTA, as the Alberta Court Decisions only dealt with data submitted to and disclosed by the Boards under the Regulatory Regime and the Courts left untouched GSI's ability to enforce its licence agreements including any provisions that prevented licensees from submitting GSI's seismic materials to the Boards.

[202] *See e.g.*, **C-357.10**, [redacted]

[203] Canada's Counter-Memorial, ¶¶ 56, 64-65; **RWS-01**, Witness Statement of Bharat Dixit, ¶ 23, 26; **RWS-02**, Bennett Witness Statement, ¶¶ 26, 55; **RWS-03**, Witness Statement of Carl Makrides, 14 January 2023, ¶¶ 20, 29, 51, 54. The Claimants' Reply at ¶ 260 references to the Boards "hav[ing] demonstrated their intent to demand submission of SEG-Y processed digital data" mischaracterizes events that occurred in the 2000s and which are irrelevant to this NAFTA claim. *See*, **RWS-06**, Makrides Rejoinder Witness Statement ¶¶ 4-5, 7.

[204] *See*, **R-011**, *GSI v Total SA*, 2020 ABQB 730, ¶ 100. *See also*, **CWS-06**, Witness Statement of Harold Paul Einarsson, 27 September 2022, ¶ 105; and **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 139. *See also*, **RER-02**, Hobbs Counter-Memorial Expert Report, ¶ 76(4)(c); **RER-03**, Expert Report of Doug Uffen, 13 January 2023 ("Uffen Counter-Memorial Expert Report"), ¶¶ 39-41.

[205] Claimants' Reply, ¶¶ 220-229.

144. First, GSI's ownership of its seismic data was not affected by the Alberta Court Decisions. GSI retained its entire seismic library (which included Canadian and foreign data), and was free to dispose of it or otherwise market its seismic data, which includes materials which had never been submitted to the Boards and still remain in GSI's possession.

145. Second, GSI retained its ability to derive value from this data by licensing it. The fact that few companies were interested in licensing that data from GSI was not a result of the Alberta Court Decisions. Rather, the reason was that GSI already had licence agreements with most of the players in the market and companies were no longer interested in entering contractual relationships with GSI given its litigious reputation.

146. Third, the Alberta Court Decisions left GSI's contractual claims untouched. Therefore, the Alberta Court Decisions cannot be said to have caused non-compliance by licensees with their contracts and there is no such evidence on the record. In addition, many of GSI's licences included contractual provisions preventing its licensees from accessing any of GSI's Disclosed Seismic Materials from the Boards even after the end of the confidentiality period.[206] The Alberta Court Decisions only addressed the issue of whether accessing GSI's seismic materials from the Boards without GSI's permission was a copyright infringement. It did not decide contractual claims.[207] GSI's success, or lack thereof, in pursuing contractual breach claims is irrelevant.

D. CUSMA Annex 14-B Provides Relevant Clarification Regarding the Test for Indirect Expropriation

147. Canada's Counter-Memorial explained that NAFTA Article 1110 reflects customary international law rules on expropriation of foreign investments and that Annex 14-B of the *Canada-United States-Mexico Agreement* ("CUSMA") describes the considerations for indirect expropriation that the three NAFTA and CUSMA Parties agree reflect international law.[208] In their Reply, the

[206] *See*, Part II(B) above. *See e.g.*, **BR-45**, [redacted] This clause was the subject of the litigation in **R-011**, *GSI v. Total*, 2020 ABQB 730.

[207] **R-001**, Common Issues Decision – Alberta Court of Queen's Bench, ¶¶ 4, 323. For example, in some cases the Courts found that GSI failed to prove breach of contract for allegedly accessing materials from the Boards or breach of contract for disclosing licensed materials with members of an exploratory group. *See e.g.*, **R-378**, *GSI v. Murphy*, 2017 ABQB 464, 26 July 2017, ¶¶ 12-23, 25-32, 76; **R-379**, *GSI v. Murphy*, 2018 ABCA 380, 21 November 2018, ¶¶ 39-48, 93; **R-380**, *GSI v Murphy* (SCC File No. 38486), 23 May 2019; **R-444**, *GSI v. Encana*, 2017 ABQB 466, 26 July 2017 ¶ 96; **R-381**, *GSI v. Encana*, 2018 ABCA 384, 11 November 2018, ¶ 65.

[208] Canada's Counter-Memorial, ¶¶ 226-242.

Claimants argue that CUSMA Annex 14-B cannot be used to interpret the expropriation provision at NAFTA Article 1110(1) and (2), citing *Koch v. Canada* and *RosInvestCo v. Russia* as precedent.[209] The Claimants' submission is incorrect.

148. Neither precedent supports the Claimants' position. The tribunal in *Koch* said nothing about CUSMA Annex 14-B as it was irrelevant for its decision dismissing the claim on jurisdictional grounds.[210] In *RosInvestCo*, the tribunal concluded that neither earlier nor later bilateral investment treaties ("BIT") were relevant for interpreting Article 8 of the BIT in question, as they did not have a direct connection or relation to the treaty being interpreted.[211] In contrast, NAFTA and CUSMA are consecutive free trade agreements between the same Parties, both containing investment protections and substantially similar provisions on expropriation.[212] Relying on Article 31(3)(c) of the *Vienna Convention of the Law of Treaties* ("*Vienna Convention*"),[213] as a subsequent agreement between NAFTA Parties, CUSMA elucidates the intent of NAFTA Parties and confirms their agreement and practice as to the interpretation of certain NAFTA provisions, such as indirect expropriation.[214]

149. In any event, Canada's reference to CUSMA Annex 14-B is not an attempt to retroactively apply new legal norms or modify the rights and obligations in NAFTA. As explained in Canada's Counter-Memorial, CUSMA Annex 14-B provides guidance on whether an action constitutes an indirect expropriation and reflects the customary international law on expropriation as understood by the NAFTA Parties.[215] Contrary to what the Claimants' say, the criteria for indirect expropriation outlined in CUSMA Annex 14-B are not novel introductions that post-date NAFTA. Annex 14-B of CUSMA provides a more detailed articulation of the criteria for determining whether an indirect

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[209] Claimants' Reply, ¶¶ 250-252.

[210] **CLA-117**, *Koch Industries, Inc. and Koch Supply & Trading LP v. Canada* (ICSID Case No. ARB/20/52), Award, 13 March 2024.

[211] **CLA-118**, *RosInvestCo UK Ltd. v. The Russian Federation* (SCC Case No. V079/2005), Award on Jurisdiction, October 2007, ¶ 119.

[212] *See*, NAFTA Article 1110(1) and **RLA-080**, *Canada-United States – Mexico Free Trade Agreement*, entered into force 1 July 2020 ("CUSMA"), Article 14.8.

[213] **CLA-034**, *Vienna Convention on the Law of Treaties,* 1155 U.N.T.S. 331, 23 May 1969 ("*Vienna Convention*"), Article 31(3)(c).

[214] **RLA-080**, CUSMA.

[215] Canada's Counter-Memorial, ¶ 240.

expropriation has occurred, including the consideration of "the extent to which the measure interferes with distinct, reasonable investment-backed expectations."[216] These criteria are long-standing components of the understanding between the Parties regarding what constitutes indirect expropriation within NAFTA.[217] They also reflect how NAFTA tribunals have approached indirect expropriation under NAFTA Article 1110.[218]

E. The Claimants' Arguments about Their Reasonable Investment-backed Expectations are Contradicted by the Evidence, the Claimants' Own Statements and Those of Their Experts

150. The indirect expropriation claim also falls short because the Claimants understood the Regulatory Regime and nevertheless chose to continue to invest in seismic data in Canada. In their Reply, the Claimants have tried to minimize the requirements in the Regulatory Regime. They reiterate that they never consented to the Regulatory Regime and that they had certain expectations regarding how the *Copyright Act* would apply to its seismic data, and how the relationship between the Regulatory Regime and the *Copyright Act* would be interpreted by courts.

151. There is no question that GSI understood that if it wanted to conduct seismic operations on Canada's offshore, it would be subject to the Regulatory Regime.[219] Whether it liked it or not, GSI knew that it would have to submit seismic materials to the Boards and that these materials could be disclosed and made accessible to the public at the end of the confidentiality period.[220] That was the condition for Delaware GSI when it shot the seismic data the Claimants purchased in 1993 and that was the condition for GSI's new seismic data projects.[221] The intended purpose of the Regulatory Regime was abundantly clear. As Justice Eidsvik noted in her decision, the statute and the

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[216] **RLA-080**, CUSMA, Annex 14-B 3(a)(ii).

[217] Canada's Counter-Memorial, ¶ 240. *See also*, **R-733**, *Lone Pine Resources Inc. v. Canada* (ICSID Case No. UNCT/15/2), Submission of the United States of America (pursuant to Article 1128 of the NAFTA), 16 August 2017, ¶ 12, where the United States provided interpretation of indirect expropriation under NAFTA Article 1110 consistent with Canada's submission.

[218] *See e.g.*, **CLA-069**, *Glamis* – Award, ¶ 356.

[219] *See*, Part III(C) and exhibits cited therein.

[220] *See*, Canada's Counter-Memorial, ¶¶ 79, 109 and exhibits cited therein.

[221] *See e.g.*, **R-603**, Notice of Commencement held by GSI, 4 June 1979, p. 2 ("The data will be released from confidential status 5 years after completion of field work."); **R-250**, Letter from CNLOPB to GSI, 10 July 1997; **R-204**, Letter from CNSOPB to GSI, 4 October 2000; **R-288**, Letter from NEB to GSI, 8 August 2008.

parliamentary debates leading up to its adoption were clear in the intent to disseminate and make accessible seismic materials after the statutory confidentiality period to stimulate oil and gas exploration, and Parliament's intent "was well-known to GSI."[222] GSI was not forced to make its investment in seismic data if it did not want to abide by the terms set out in the Regulatory Regime. However, in order to legally have access to the offshore areas that are owned by Canada – not GSI or anyone else – it had to adhere to the laws, regulations and government approvals that Canada had the authority to set in exchange for the opportunity to profit from seismic data collected from Crown Land.

152. The Claimants do not establish that they had a legitimate expectation of copyright over seismic data that would prevent access to and copying of GSI materials after the confidentiality period and that this right was "at the heart" of their investment decision. The Claimants' assertions regarding their expectations at the time of their investment that Canadian copyright law would apply to seismic data acquired under the Regulatory Regime are baseless. In fact, their own statements and those of their witnesses and experts contradict these assertions. The law was unclear on whether copyright could subsist in seismic data and there was no guarantee that the Courts would find that it did. Prior to the Alberta Court Decisions, the question had been briefly considered and the courts did not appear to be inclined to find that it did.[223]

153. GSI started specifically asserting copyright over its seismic data against the Boards in 1998 and lobbying for longer confidentiality periods under the Regulatory Regime.[224] However, the evidence only shows that this was the position put forward by GSI for the purpose of delaying or limiting the disclosure of its seismic materials under the Regulatory Regime. None of the evidence establishes that GSI's position was grounded in well-settled law and it did not seek a court ruling on the issue until 2007 against Encana and until 2011 against the Boards.

154. GSI itself recognized that prior to the Alberta Court Decisions the law was unsettled regarding whether seismic data could be protected by copyright. In its leave to appeal to the Supreme Court of

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[222] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 106, summarizing Justice Eidsvik's findings.

[223] **R-734**, *GSI v. CNSOPB* (FCC File No. T-467-14), 2014 FC 450, 9 May 2014, ¶ 24. *See also*, **R-354**, GSI v. CNLOPB, 2003 FCT 507, ¶ 75.

[224] *See*, **R-531**, Letter from GSI to CNLOPB, 27 July 1998, attaching letter from Code Hunter Wittman to GSI, 30 July 1998. *See also*, **R-249**, Letter from Parlee McLaws to CNLOPB, 3 November 1993.

Canada, GSI stated that "prior to the decision below no Canadian court had recognized copyright in seismic data. Accordingly, when the Courts below were considering conflicting legislation and rights they were doing so in a nascent legal setting"[225] and "from the decisions below it is now the law in Canada that copyright can subsist in seismic data and is therefore protected by the Copyright Act."[226] GSI also refers to the fact that copyright subsists in seismic data as a "significant legal development" and a "recently recognized right."[227]

155. Even if there was copyright in the seismic data, the Claimants acknowledge the relationship between the *Copyright Act* and the Regulatory Regime had never been considered by Canadian courts. The fact that the Claimants' experts do not agree with, or did not expect, the interpretation adopted by the Alberta Court Decisions does not change this. Indeed, Professor Hutchison acknowledges that legal certainty prior to a judicial ruling is virtually impossible.[228]

156. GSI had no reasonable legitimate expectation that it had unencumbered copyright that was not limited by the Regulatory Regime. Canada never provided the Claimants a written representation confirming GSI's position. While the Boards were cognizant of GSI's assertions, they did not accept that GSI had copyright and asserted that the Regulatory Regime allowed disclosure and copying.[229]

157. In *CalWest*, Justice Eidsvik acknowledged that the industry did not know at the time whether GSI could establish copyright over seismic data and whether copying of the seismic data could be a violation of GSI's copyright, which was one of the reasons why she would not have ordered anything more than nominal damages against the defendant in that case: "In assessing nominal damages, I would have looked at the culpability of Calwest […] this is not a case where it copied knowing that copyright was being infringed."[230]

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[225] **R-587**, Common Issues Decision – GSI Leave to Appeal to SCC, ¶ 8.

[226] **R-587**, Common Issues Decision – GSI Leave to Appeal to SCC, ¶ 30.

[227] **R-587**, Common Issues Decision – GSI Leave to Appeal to SCC, ¶ 66.

[228] **CER-04**, Hutchison Expert Report, ¶ 24.

[229] Claimants' Reply, ¶ 273. *See*, R-274, Letter from CNLOPB to GSI, 18 June 1999. *See also*, **RWS-05**, Bennett Rejoinder Witness Statement, ¶ 7 and exhibits cited therein; **RWS-04**, Rejoinder Witness Statement of Bharat Dixit, 1 November 2024, ¶ 10 and exhibits cited therein.

[230] **R-150**, *GSI v. CalWest*, 2016 ABQB 365, 28 June 2016 ("*GSI v. CalWest*"), ¶ 58.

158. The decision in the *Total* case also discusses the legal uncertainty that existed at the time of the negotiations of GSI's master licence agreements in 2000 and the introduction of provisions preventing licensees from accessing GSI's seismic materials from the Boards:

> In 2000, when the MDLA was signed, the Plaintiff knew: (1) that the Board considered that ten-year privileged period to deny public access to the acquired data was over, and (2) that the Board was taking the position that the public could request data from it and reproduce that data. The Plaintiff took the position that its copyright would protect the data but was nervous and clearly feared some oil and gas companies would gain access to this copyrighted data directly from regulatory boards. […] The contracting parties were both sophisticated corporations, one supplying seismic data which the other wished to access and license so it could use it for oil and gas exploration. I find from the evidence that in 2000, it would be known to the parties that it may be possible to access seismic data directly from the Board, otherwise there would be no reason for clause 2(f)(iii). Regardless of the position the Board was taking, the legal status of the data was not clear. That issue was not decided until the Common Issues Trial in 2017.[231]

159. The court in *Total* noted that the contractual provision made sense because "at the time of contracting, the public right to obtain information from the Board without licensing […] was legally uncertain."[232] It further observed:

> The Plaintiff clearly knew at the time of entering into the MDLA in 2000 that the Board was taking the position that the acquired data could be requested from it and copied by members of the public. The Plaintiff did not agree with that conduct of the Board, due to the copyright it owned, and its position was that this was proprietary data.[233] […]
>
> Aware of the issues around getting the data from the Board, and the legal uncertainty of positions, the Plaintiff negotiated terms to protect its business product and contracted to prevent the licensees going directly to the Board to obtain data, albeit inferior, that the parties would otherwise come to the Plaintiff to license.[234]

[231] **R-484**, *GSI v. Total*, 2020 ABQB 730, Decision, 25 November 2020 ("*GSI v. Total*"), ¶¶ 3.19, 4.3.14.

[232] **R-484**, *GSI v. Total*, ¶ 6.32.

[233] **R-484**, *GSI v. Total*, ¶ 7.3.2.40.

[234] **R-484**, *GSI v. Total*, ¶ 9.4.95.

160. The legal uncertainty surrounding the existence and scope of GSI's copyright in seismic data at the time of the investment decisions contradicts the Claimants' assertions of supposed "legitimate expectations." The Claimants' Article 1110 claim is wholly deficient and should be dismissed.

F. The Claimants' Alleged Expropriation of GSI's Trademark is Inadmissible and Without Merit

161. In their Reply, the Claimants claim for the first time in this arbitration that Canada "has also violated created [sic] a compulsory license of GSI's Trademark, which is an expropriation."[235] This claim is inadmissible, outside the Tribunal's jurisdiction and baseless in any event.

162. First, the claim that GSI's trademark was expropriated is inadmissible and outside the Tribunal's jurisdiction because the Claimants never raised the trademark issues in their NOA or Memorial. They cannot suddenly raise it in their Reply. Canada never consented to arbitrating this claim and it is outside the scope of the submission to arbitration. Moreover, Article 20 of the UNCITRAL Arbitration Rules prohibits amendments that fall outside the scope of the arbitration agreement.[236] While Article 20 allows disputing parties to amend their claims, such an amendment must be explicitly requested and allowed by the tribunal.[237] The Claimants have not requested an amendment (or provided any justification in support) and the Tribunal has not authorized the addition of this claim. It would be improper to do so at this stage. The Tribunal cannot allow a brand-new claim to proceed when Canada cannot properly respond.[238] Finally, the trademark claim suffers from the same jurisdictional default as the rest of the claims: any alleged expropriation of GSI's trademark is outside the NAFTA three-year limitation period.

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[235] Claimants' Reply, ¶ 312.

[236] UNCITRAL Rules (1976) Article 20 ("During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.").

[237] **RLA-178**, *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile* (PCA Case No. 2017-30), Award, 28 November 2019, ¶ 178.

[238] UNCITRAL Rules Article 15(1) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.").

163. Second, the measure at issue in this dispute – the Alberta Court Decisions – did not address GSI's trademark claim. The trademark claim was not within the scope of the Common Issues Trial. Since the Claimants maintain that the only measure at issue in this arbitration are the Alberta Court Decisions, there is simply no nexus between their trademark claim and the measure alleged to breach the NAFTA.

164. Third, the substance of the Claimants' allegation is, in any event, meritless. On the one hand, the Claimants appear to suggest that the Alberta Courts have created a compulsory licence of GSI's trademark.[239] This is patently untrue because the Decisions do not deal with trademark at all. On the other hand, the Claimants base their argument on NAFTA Chapter 17, which Canada has already argued is an improper construal of those provisions.[240] Finally, the Claimants' arguments are difficult to discern. The Claimants do not establish how the appearance of GSI's trademark on Disclosed Seismic Materials was "confusing" to potential licensees or the orchestration of "some sort of passing off scheme."[241] The Disclosed Seismic Materials were simply GSI's own trademark appearing on materials submitted in accordance with the Regulatory Regime.

V. THE CLAIMANTS FAIL TO DEMONSTRATE HOW THE ALBERTA COURT DECISIONS CAN BE CONSTRUED TO CONSTITUTE A VIOLATION OF NAFTA ARTICLE 1106

A. The Claimants Do Not Address Canada's Arguments that the Alberta Court Decisions Did Not "Enforce" Any Requirement Within the Meaning of Article 1106(1)(f)

165. The Claimants concede they cannot allege that the "submission and public disclosure of the Seismic Works under the Regulatory Regime breached NAFTA."[242] This statement is enough to dispose of the claim that there has been a violation of NAFTA's prohibition in Article 1106(1)(f) against a requirement to "transfer […] proprietary knowledge to a person in its territory." As Canada explained in its Counter-Memorial, it is obvious that the only "requirement" on GSI to "transfer" alleged "proprietary knowledge" to "a person in its territory" came at the time Delaware GSI and

[239] Claimants' Reply, ¶ 312.

[240] Canada's Counter-Memorial, ¶¶ 350-353.

[241] Claimants' Reply, ¶ 318.

[242] Claimants' Reply, ¶ 48.

Claimant GSI were required by law (*i.e.*, the Regulatory Regime) to submit the requisite seismic materials from its non-exclusive surveys to the Boards. All of this occurred many years before the NAFTA limitation period, meaning that the requirement for GSI to submit seismic materials to the Boards and the public disclosure of "proprietary knowledge" are outside the Tribunal's jurisdiction.

166. In their Reply, the Claimants try to avoid this fundamental problem by arguing that the Alberta Court Decisions "'enforced', *i.e.* made effective, the Regulatory Regime's provisions, and expanded 'disclosure' to 'copy' and 'publish' […]."[243] This is a mischaracterization of the nature of the Alberta Court Decisions. The Alberta Court Decisions did not create or give rise to any requirement on GSI to transfer proprietary knowledge to the Boards or third parties. There was no judicial action to enforce the Regulatory Regime. The Courts simply interpreted the meaning of existing Canadian law in response to requests from the Claimants in the cases they brought against the Boards and third parties.[244]

167. In its Counter-Memorial, Canada explained that interpreting the ordinary meaning of Article 1106(1) in accordance with the *Vienna Convention* means that the phrase "'enforce' a 'requirement' is to compel performance or compliance with a demand" and that to "'impose' a requirement is to lay or inflict something demanded."[245] The Claimants appear to equate the term "enforce" with the term "made effective."[246] This interpretation is not consistent with *Vienna Convention* Article 31(1) because it is not supported by the ordinary meaning of the term "enforce" read in context and in light of the object and purpose of the provision.

168. The definition of "enforce" in the context of Article 1106(1) is to "compel."[247] This is different from the term "made effective," the present tense of which ("give effect to") is defined as "the state of being operative or in force."[248]

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[243] Claimants' Reply, ¶ 292(a).

[244] *See*, Canada's Counter-Memorial, ¶ 375.

[245] Canada's Counter-Memorial, ¶¶ 367-370.

[246] Claimants' Reply, ¶ 292(a); Claimants' Memorial, ¶ 449.

[247] Canada's Counter-Memorial, ¶ 368.

[248] **R-735**, Oxford English Dictionary Online, "Give effect to", accessed 24 October 2024, available online at: Oxford English Dictionary (oed.com).

169. The Claimants have drawn a false equivalency between the terms "enforce" and the term "made effective" to substantiate the argument that the Alberta Court Decisions "enforced" the Regulatory Regime. However, the Claimants do not explain how the Courts compelled GSI to do anything they had not already done decades ago. The Regulatory Regime had been "in force" long before the Alberta Court Decisions and it was GSI who went to court to seek damages from the Boards and third party companies. It was not Canada nor the Boards that sought to enforce GSI's obligations under the Regulatory Regime. It is clear from the *dispositif* of the Decisions that the Court is nor ordering or compelling GSI to transfer proprietary information.

170. This interpretation of what constitutes the enforcement of a requirement is consistent with the objective of the provision. The purpose of Article 1106 has been described as follows:

> The prohibition on performance requirements serves two goals. First, it eliminates trade distortions that arise from the imposition of performance requirements. Hence, a Party is prohibited from imposing such requirement even on its own investors. Second, it ensures a degree of entrepreneurial autonomy: sourcing and sales decisions are based on the investor's judgment, not by the dictates of the host government. Finally, with respect to performance requirements, there is a prohibition on certain requirements linked to incentives. The essence of this provision is that certain performance requirements are so unacceptably trade-distorting or intrusive that host government should not be able to induce an investor to accept them by conditioning the receipt of any advantage on their fulfillment by the investor.[249]

171. The tribunal in *Joseph Charles Lemire v. Ukraine (II)* found that prohibitions against performance requirements exist for a narrow purpose, that is: "to avoid that States impose local content requirements as protection of local industries against competing imports."[250] In other words, Article 1106 seeks to prohibit measures that insulate – or incentivize the insulation of – domestic producers against foreign competition. This purpose is further constrained by the wording of Article

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[249] **CLA-095**, Meg Kinnear, Andrea Kay Bjorklund and John F.G. Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006) – Annotations on Article 1106, p. 1106-11 citing Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 Int'l Law. 727, 729 (1993). *See also*, Canada's Counter-Memorial, ¶¶ 362-365.

[250] **RLA-138**, *Joseph Charles Lemire v. Ukraine (II)* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, ¶ 510.

1106(5) which makes clear that the prohibitions explicitly enumerated at paragraphs 1 and 3 are exhaustive.[251]

172. Since the interpretation of existing law by the Alberta Courts has no discernable nexus with the object and purpose of Article 1106, as explained above, the Claimants in effect seek to expand the notion of a performance requirement to a situation that is clearly beyond what is contemplated by NAFTA.

B. In the Alternative, Canada Submits that Article 1106(1) Does Not Apply to the Regulatory Regime and that There Is No Breach of Article 1106(3).

173. The Claimants attempt to conflate Canada's main argument as to why there is no breach of Article 1106 with arguments that were made "in the alternative." In its Counter-Memorial, Canada explained why even if the Alberta Court Decisions "enforced" the Regulatory Regime – which Canada does not concede – the Regulatory Regime never imposed a "requirement" on GSI to transfer proprietary knowledge to a person under Article 1106(1). Rather, the Regulatory Regime's provisions on submitting seismic material for disclosure were conditions on the receipt of an advantage: in return for an authorization to conduct seismic surveys in Canada's offshore, GSI accepted that it had to submit certain seismic materials to the Boards for disclosure after the confidentiality period expired. As such, the measures should be considered under Article 1106(3), not Article 1106(1).[252]

174. The Claimants' response glosses over the fact that arguments pertaining to the nature of the Regulatory Regime were made in the alternative and contingent on a finding that the Alberta Court Decisions enforced the Regulatory Regime.

175. First, although the Claimants assert that a requirement was imposed on GSI since they never consented to the Regulatory Regime, the Claimants have nonetheless knowingly and willingly participated in it since they first submitted and received authorizations to conduct operations in Canada's offshore. The Claimants now attempt to play down this participation by asserting that that they "never consented to the Regulatory Regime or the disclosure of Seismic Works."[253] Despite the Claimants' objections, there was no "requirement" for them to participate in the Regulatory Regime.

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[251] Canada's Counter-Memorial, ¶ 365.

[252] Canada's Counter-Memorial, ¶ 382. *See also*, ¶¶ 383-418 for a complete explanation.

[253] Claimants' Reply, ¶ 292(b).

Evidence on the record demonstrates not only that they willingly participated, but also that they tailored their data to benefit from this participation. The Claimants also ignore the fact that more than 50% of their seismic data was purchased from a company which had already consented to the Regulatory Regime and had submitted the seismic data to the Boards before 1993 and almost all of which was already publicly available.

176. Second, because there is no requirement, but a condition on the receipt of an advantage, the measure should only properly be considered under Article 1106(3).[254] The Claimants incorrectly assert that GSI derives no advantage from its participation in the Regulatory Regime.[255] Mr. Paul Einarsson contends that "GSI did not receive any advantages or benefits from obtaining geophysical program authorizations."[256] This is a fundamental misunderstanding of the situation.[257] GSI does not own any of the offshore areas on which it collected seismic marine data. Those areas, the seabed on Canada's continental shelf, belong to Canada,[258] not GSI or any other private entity. GSI would have been subject to penalties if it trespassed and acquired seismic data from Canadian Crown land for it to exploit for profit.[259] Canada only allows GSI and other seismic companies the right to collect data on its land and make a profit on conditions that Canada designs, including the ability to disclose certain seismic materials to the public after a certain period of time, as set out in the Regulatory Regime. In exchange, the advantage received by GSI was substantial opportunity to make as much profit as it can in 10 or fifteen years from data acquired from property that it did not own. This type of time restriction is not unique in the Canadian intellectual property context. For example, the *Copyright Act* does not grant copyright in perpetuity – copyright is subject to statutory limits and after a certain period of time, under the laws of Canada, the exclusive rights conferred by copyright

[254] Canada's Counter-Memorial, ¶ 382.

[255] Claimants' Reply, ¶¶ 292(c) and 294.

[256] **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 162.

[257] **R-002**, Common Issues Decision – Alberta Court of Appeal, ¶ 97.

[258] **RLA-179**, Sprankling, John G, "Rights in Waters and Oceans", *The International Law of Property* (Oxford, 2014) (extract), p. 154. *See also*, **RLA-180**, United Nations Convention on the Law of the Sea, 10 December 1982, Articles 1, 136, 173.

[259] *See*, for example, **C-167**, *Canada Petroleum Resources Act*, RSC 1985, c 36 (2nd Supp), s. 56.

are extinguished.[260] The Claimants still erroneously insist that deriving profits cannot constitute an advantage as "the making of an investment is always conditioned on the prospect and benefit of deriving profit therefrom."[261] Their argument ignores the fact that GSI has no legal right to access Canada's offshore to conduct seismic surveys.

177. While the Claimants refer to various examples of "advantages" in academic literature to support their contention that they received no advantage under Article 1106(3), these are, by the Claimants' own admission, only examples of common forms of advantages.[262] Canada has already submitted, through *Vienna Convention* analysis, that the term "advantage" is broad enough to encompass much more than just tax benefits and subsidies.[263] In this case, it is only because Canada granted Delaware GSI and Claimant GSI permission to access its sovereign land that they could develop seismic surveys of the offshore for marketing to third parties – the access to Canada's land is therefore an advantage. The Claimants also contend that Article 1106(3) requires some form of specific or particularized benefit to an investor.[264] While the Claimants do not provide any basis for this statement, on its face the permit to access the offshore and conduct seismic surveys was particular to GSI.[265]

178. As a result, because there was no requirement, but rather a condition on the receipt of an advantage, any consideration of whether there was a prohibited performance requirement should be under Article 1106(3) not Article 1106(1)(f).

179. Finally, even if Article 1106(1)(f) were relevant, the Claimants' argument that there was a requirement under the Regulatory Regime to transfer proprietary knowledge to the public must fail

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[260] *See e.g.*, **C-329**, *Copyright Act*, RSC 1985, c. 42. Section 6 of the *Copyright Act*, which states: "[e]xcept as otherwise expressly provided by this Act, the term for which copyright subsists is the life of the author, the remainder of the calendar year in which the author dies, and a period of 70 years following the end of that calendar year."

[261] Claimants' Reply, ¶ 296.

[262] Claimants' Reply, ¶ 301.

[263] Canada's Counter-Memorial, ¶¶ 394-395. For example, in *Pope & Talbot,* the disputing parties and the tribunal agreed that quotas were advantages. **CLA-077**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL), Interim Award, 26 June 2000, ¶ 73.

[264] Claimants' Reply, ¶ 303.

[265] At ¶ 304 of their Reply Memorial, the Claimants also contend that Canada's arguments do not address secondary submissions. However, the Claimants do not explain how the complaint related to the secondary submissions is related to the Alberta Court Decisions or attributable to Canada.

because the Claimants conflate the notion of "disclosure to the public" with that of "a transfer of proprietary knowledge." As Canada explained in its Counter-Memorial, disclosure of information to the public does not transfer proprietary knowledge to a person – it renders the information no longer confidential.[266]

VI. THE CLAIMANTS CANNOT BE AWARDED COMPENSATION BECAUSE THE DAMAGES CLAIMED HAVE NO CAUSAL LINK TO THE ALBERTA COURT DECISIONS AND ARE SPECULATIVE AND UNREASONABLE

A. Investment Tribunals Have Declined to Award Compensation to Claimants Who Fail to Establish a Causal Link between the Measure Breaching the Treaty and the Damages Claimed

180. While Canada maintains that the Alberta Court Decisions cannot be construed as a breach of NAFTA Articles 1106 or 1110, if one is found, the Claimants' assertions that it is entitled to hundreds of millions of dollars in damages are baseless and should be rejected.

181. Canada explained in its Counter-Memorial the legal standards applicable under NAFTA and international law for compensation to be awarded for a treaty breach, which require a claimant to establish direct causal link between the loss and the State's specific breach.[267] When a claimant fails to establish a direct causal link between the specific breach of the treaty and the damages claimed, it is appropriate for an investment tribunal to decline to award compensation.

182. For example, in *Biwater Gauff*, although a series of Tanzania's actions were determined to violate the treaty's fair and equitable treatment and expropriation obligations, the tribunal declined to award any damages.[268] The tribunal explained that the claimant not only had to prove the eliminated value of its investment, but that the specific actions that breached the treaty "were the actual and proximate cause of such diminution in, or elimination of, value."[269] The tribunal concluded:

> [I]n all the circumstances that the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had

[266] Canada's Counter-Memorial, ¶ 410.

[267] Canada's Counter-Memorial, ¶¶ 425-430 and authorities cited therein.

[268] **CLA-084**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 ("*Biwater Gauff*-Award").

[269] **CLA-084**, *Biwater Gauff*-Award, ¶ 787.

> already occurred by 12 May 2005. In other words, none of the Republic's violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question or broke the chain of causation that was already in place. […] [T]he actual loss and damage for which BGT has claimed – however it is quantified – is attributable to other factors.[270]

183. Similarly, the claimant in *Infinito Gold* successfully argued a breach by Costa Rica of the fair and equitable treatment provision in the Canada-Costa Rica *FIPA* due to a 2011 legislative mining ban and the ancillary 2012 resolution implementing that ban.[271] However, the tribunal refused to award compensation because of the claimant's failure to identify the damage that was specifically caused by the breach found by the tribunal:

> [E]ven if the Tribunal were to accept that the fact of harm was established, this would not assist the Claimant's case. There is no basis in the record, and Infinito has articulated none, allowing the Tribunal to quantify the damage caused by this standalone breach. […] Assuming arguendo that the 2010 Executive Moratoria did not already prevent Industrias Infinito from restarting the process, the Claimant's harm would essentially consist in the loss of an opportunity or chance to apply for an exploitation concession. Yet, the Claimant has not put forward a quantification for such a loss of opportunity, nor has it provided the Tribunal with any elements to calculate it. If one adds the inherent uncertainty and the regulatory risk involved in any application process, the monetary consequences of this loss of chance appear too speculative to give rise to an award of damages.[272]

184. The tribunal in the *Eco Oro* dispute came to the same conclusion. In that case, the tribunal found that Colombia was in breach of Article 805 of the *Canada-Colombia Free Trade Agreement* [Minimum Standard of Treatment] in connection with a mining project and environmental protection measures.[273] However, the tribunal also refused to award damages because the claimants failed to prove, with a sufficient degree of certainty, that the measures which violated the treaty caused the specific loss claimed and the quantum of that loss.[274] The tribunal stated:

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[270] **CLA-084**, *Biwater Gauff*-Award, ¶¶ 798, 805.

[271] **CLA-083**, *Infinito Gold Ltd. v. Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021 ("*Infinito Gold* - Award"), ¶¶ 581, 799(c).

[272] **CLA-083**, *Infinito Gold* - Award, ¶ 585.

[273] **RLA-181**, *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 743-821.

[274] **RLA-182**, *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Award on Damages, 15 July 2024 ("*Eco Oro* – Award on Damages"), ¶¶ 290-317.

> [I]t is unarguable that inherent in the reparation standard is the principle that a claimant can only recover for losses which it has established to have been caused by an internationally wrongful act. A loss caused by other factors, including any act which has been found to be lawful, is not recoverable. To this end, in identifying the losses which are caused by the acts found by the majority of the Tribunal to amount to a breach of Article 805, it is necessary to exclude those losses which would have been suffered in any event as a result of measures found by the majority of the Tribunal to be lawful. […] Eco Oro bears the burden of establishing its actual loss caused by Colombia's breach of Article 805, namely the loss of opportunity to apply for an environmental license. It has not done so. This failure means that Eco Oro has offered the Tribunal no basis on which to value the loss it has suffered, and as a consequence the majority of the Tribunal has concluded that it has no basis on which to justify awarding damages to the Claimant.[275]

185. The *Biwater Gauff*, *Infinito Gold* and *Eco Oro* awards confirm that the burden is on the Claimants to specifically link the damages being claimed to the alleged breach.[276] Failure to carry that burden leaves a tribunal with no choice but to award zero damages. That is the case here.

B. The Claimants' Theory of Damages Does Not Assess the Specific Consequence of the Alberta Court Decisions

186. In their Reply, the Claimants have for the first time sought to articulate a "but-for" scenario for the purposes of claiming damages. According to the Claimants, absent the alleged NAFTA breach "GSI's copyright in its Seismic Works would be enforceable to protect its intellectual property rights."[277] The Claimants then make another leap of logic to argue that "GSI would have won immense damages awards against all of the parties copying the Seismic Works."[278] Both assumptions are highly flawed and do not properly assess the direct causal link between the alleged NAFTA breaches resulting from the Alberta Court Decisions and, strikingly, neither assumption forms the basis of the PwC damages model.

187. The Claimants' assumptions are flawed because they ignore all of the other defenses that were never considered during the Common Issues Trial that could have exonerated Canada or the other defendants for copyright infringement. GSI would never have been successful in obtaining damages

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[275] **RLA-182**, *Eco Oro* – Award on Damages, ¶¶ 299, 304.

[276] *See also*, **RLA-146**, *Nordzucker AG v. The Republic of Poland* (UNCITRAL), Third Partial and Final Award, 23 November 2009, ¶¶ 60-65.

[277] Claimants' Reply, ¶ 108.

[278] Claimants' Reply, ¶ 108.

unless it first prevailed against these defenses. Even if it did, it is doubtful they would have obtained "immense" damages. In other words, "but-for" the Alberta Court Decisions, GSI may have been able to continue its domestic litigations, but contrary to what the Claimants assume, whether it would have prevailed on copyright infringement or recouped any damages at all is highly uncertain.

188. In their Reply, the Claimants and Mr. Sharp admit that the valuation of GSI's litigation claims as of the date of expropriation is "highly speculative."[279] In order to side-step this issue, as well as to double-down on their existing damages model, the Claimants assert that, as a consequence of no longer being able to enforce its copyrights, the Alberta Court Decisions "effectively destroy[ed] GSI's business."[280] Based on this theory, the Claimants submit that "an enterprise valuation is the most appropriate damages valuation method in the present case"[281] and proceed to imagine an alternative universe where GSI's business, years before the Alberta Court Decisions, would have been revived and generated significant revenues as a multiclient seismic company. In other words, the Claimants' damages analysis reimagines the entire GSI enterprise before the Alberta Court Decisions, including by inventing new investments, the retention of ships that were sold, the acceptance by customers of legal claims that were rejected, and assumes perpetual success thereafter and attributes the shortfalls in the actual world to the Alberta Court Decisions that did not yet exist.

189. Again, the Claimants' approach is logically problematic, relies on highly speculative and unsupported assumptions that are implausible. Furthermore, the Claimants ignore the many other factors which were the actual cause of the demise of GSI's business long before the Alberta Court Decisions. The Claimants also incorporate damages for alleged contractual breaches by third parties which have no causal link to the Alberta Court Decisions (in particular, exploration group and transfer fees).

190. Finally, in addition to failing to demonstrate a causal link between the allege NAFTA breach and the damages claimed, neither their theory that GSI would have recovered "immense" damages

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[279] Claimants' Reply, ¶ 355; **CER-06**, Sharp Reply Expert Report, ¶ 24. *See*, **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 4, 27 and Figure 1 which illustrates the correct counterfactual "but-for" the Alberta Court Decisions.

[280] Claimants' Reply, ¶ 324.

[281] Claimants' Reply, ¶ 333.

or their purported "enterprise valuation" demonstrates any interference with any shareholder rights such that the Claimants have standing to bring a claim under Article 1116.

191. In short, the Claimants' damages claim must be dismissed in its entirety and the Tribunal need not consider further the issue of quantification because the Claimants have failed to prove that the alleged breaches factually and legally caused the alleged loss of their fictious enterprise.

1. The Outcome of the "But-For" Scenario where GSI Retained the Right to Pursue Copyright Violation Claims Remains Highly Speculative

192. In the absence of the Alberta Court Decisions, the Claimants say that GSI would have maintained the right to continue domestic litigation against third parties for the enforcement of copyright violations beyond November 30, 2017 and recovered "immense" damages for copyright violations.[282] But this is an incorrect "but-for" counterfactual for the Alberta Court Decisions.

193. The proper counterfactual should establish what would have happened if the Courts had ruled in GSI's favor on the question of the interpretation of the Regulatory Regime's relation with the *Copyright Act*.[283] The Common Issues Trial was limited to only answering two questions: (1) whether copyright could subsist in seismic data, and (2) what was the effect of the Regulatory Regime on GSI's claims. There was no consideration of the many other defenses that the defendants, including Canada, had raised in reply to GSI's claims and which were never litigated because the Courts' findings on the Regulatory Regime rendered those defenses moot. Therefore, if the Alberta Courts were wrong in concluding that the Regulatory Regime prevails over the *Copyright Act*, the correct counter-factual is one in which GSI and Canada and other defendants would have had further rounds of litigation to argue the many other defenses that could have succeeded in rejecting GSI's claims, exonerating completely the defendants or significantly limiting liability for copyright infringement.

194. In particular, Canada and the NEB raised multiple defenses under the *Copyright Act*, the *Limitations Act* and common law as alternative arguments in the event the court did not find that the

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[282] Claimants' Reply, ¶ 108: ("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.")

[283] *See*, **RER-08**, Brattle Rejoinder Expert Report, Part IV.

Regulatory Regime allowed copying of seismic data upon the expiration of the confidentiality period.[284] The defenses raised against copyright infringement under various sections of the *Copyright Act* included Crown copyright (section 12), fair dealing (section 29), Crown use undertaken without motive of gain (section 29.3), limitation of liability for library, archives and museums (sections 29 and 30.2(1)) and statutory time limitations (section 41).[285] Canada also raised the equitable doctrines of laches and acquiescence that could have barred GSI's claim.[286] The CNLOPB also raised the defense of fair dealing under section 29 of the *Copyright Act*, as well as time limitations, laches and acquiescence, against GSI's copyright infringement claims.[287] Many of the third parties sued by GSI also raised the defense of fair dealing under the *Copyright Act*, in addition to arguing that GSI's claims were time-barred.[288]

195. For instance, there is strong evidence to show that the fair dealing defense under the *Copyright Act* could have succeeded had it been litigated.[289] In *GSI v. CalWest*, the defendant brought an application to amend its defense against GSI to include fair dealing.[290] Justice Eidsvik, the same judge who rendered the ABQB decision (which was, at the time, under appeal at the ABCA), denied CalWest's amendment as being late, but referred to her previous findings on the Regulatory Regime and the potential for an alternative fair dealing defense under the *Copyright Act*:

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[284] **R-671**, *GSI v. Lynx,* Government of Canada Statement of Defence to Amended Amended Statement of Claim, 11 July 2013, ¶¶ 68-70; **R-672**, *GSI v. Lynx,* NEB Statement of Defence to Amended Amended Statement of Claim, 18 July 2013, ¶ 18; **R-736**, *GSI v. AG and NEB* (ABQB File No. 1401-05316), Statement of Defence, 25 June 2014, ¶¶ 25-27; **R-737**, *GSI v. AG and NEB* (ABQB File No. 1401-5316), Statement of Defence, 30 June 2014, ¶¶ 35-37.

[285] **C-329**, *Copyright Act*, RSC 1985, c. 42. Canada and the NEB also plead that section 39(1) of the *Copyright Act* limits liability in the absence of reasonable grounds for suspecting copyright subsisted in the seismic materials. *See*, **R-736**, *GSI v. AG and NEB* (ABQB File No. 1401-05316), Statement of Defence, 25 June 2014, ¶ 25(j).

[286] **R-736**, *GSI v. AG and NEB* (ABQB File No. 1401-05316), Statement of Defence, 25 June 2014, ¶ 27.

[287] **R-738**, *GSI v. Arcis et al.* (ABQB File No. 1301-02933), CNLOPB Statement of Defence, 24 July 2015, ¶ 20(I).

[288] *See*, **R-739**, *GSI v. CalWest,* (ABQB File No. 1101-15306) ("*GSI v. CalWest*") CalWest Pre-trial Brief, 25 November 2015, ¶¶ 38-46 (asserting defense of fair dealing). *See also*, **R-150**, *GSI v. CalWest*, ¶¶ 42-43, wherein the Trial Judge states that such a defense would likely have succeeded; **RER-05**, Sookman Rejoinder Expert Report, ¶ 30; **R-740**, *GSI v. Anadarko* (ABQB File No. 1201-15228), Statement of Defence of Canadian Natural Resources, 26 March 2013, ¶ 24; **R-741**, *GSI v. ExxonMobil* (ABQB File No. 1301-14139), Statement of Defence, 4 April 2014, ¶ 37; **BR-59**, *GSI v. Murphy* (ABQB File No. 1301-15085), Statement of Defence, 28 March 2014.

[289] **C-329**, *Copyright Act*, RSC 1985, c. 42, s. 29 ("Fair dealing for the purpose of research, private study, education, parody, or satire does not infringe copyright.").

[290] **R-150**, *GSI v. CalWest*, ¶¶ 40-41. *See also*, **R-739**, *GSI v. CalWest,* Pre-trial Brief of the Defendant Calwest, 25 November 2015, ¶¶ 38-45.

> In my view, the application, and need to resort to this defense of fair dealing is not necessary considering my findings on the applicability of the Regulatory Regime to CalWest's liability. Accordingly, I will forego making any decisions on these points. In the alternative, if I am wrong on the Regulatory Regime finding, this [fair dealing] defense becomes more important. In this regard, on the evidence, it is likely in my view that this defense could have succeeded.[291]

196. It is not disputed that "but-for" the Alberta Court Decisions on the Regulatory Regime, GSI would have been thrust back into new rounds of litigation where the Courts would have had to decide on the fair dealing defense, as well as all of the other defenses to copyright infringement that had not been considered during the Common Issues Trial. As Mr. Sookman notes,[292] *CalWest* suggests that GSI would have had an uphill battle to defeat the fair dealing defense. In the absence of those defenses having been properly litigated before Canadian courts, it is too speculative to assume that GSI would have ultimately prevailed on any copyright infringement claim even if the Alberta Court Decisions had reached a different conclusion on the Regulatory Regime and the *Copyright Act*.[293]

197. As for the Claimants' assumptions that GSI would have won "massive" damages awards, even if the *Copyright Act* and other defenses had failed, the quantum of damages would have been vigorously litigated and it cannot be assumed that GSI would have been awarded even a fraction of what it claimed, as happened in the *Total* case.[294] In addition, as the Courts found, many of GSI's claims relating to access to materials from the Boards were statutorily barred due to limitation periods because the alleged copyright and contractual violations occurred in the 1990s and early 2000s.[295] An alternative outcome in the Common Issues Trial would not have changed this fact.

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[291] **R-150**, *GSI v. CalWest*, ¶¶ 42-43. *See also*, **RER-05**, Sookman Rejoinder Expert Report, ¶ 30.

[292] **RER-05**, Sookman Rejoinder Expert Report, ¶¶ 27-30. Professor Hutchison also briefly discusses the availability of fair dealing defenses to copyright infringement claims in his report. **CER-04**, Hutchison Expert Report, ¶¶ 28, 30, 51, 70-71.

[293] *See*, **CER-06**, Sharp Reply Expert Report, ¶ 163 ("[A] quantification of GSI's lawsuits would be speculative.").

[294] GSI claimed more than US$12 million but was awarded less than US$1 million. **R-011**, *GSI v. Total*, 2020 ABQB 730, Judgment, 25 November 2020, ¶ 126.

[295] **R-011**, *GSI v. Total*, 2020 ABQB 730, Judgment, 25 November 2020, ¶¶ 45-49. *See also*, **R-378**, *GSI v. Murphy*, 2017 ABQB 464, Reasons for Judgment, 26 July 2017, ¶ 62.

198. The Claimants also do not consider their own admission that the materials accessed from the Boards were not the same materials available directly from GSI.[296] Hence, any damages could only be based on what was actually disclosed by the Boards, not what GSI actually charged for the more valuable seismic data in its sole possession. GSI had previously agreed that materials from the Boards were only worth [redacted][297] which is a fraction of the revenue that Mr. Sharp assumed that GSI would have been able to collect through the "revenue normalization" that is the centerpiece of PwC's damages assessment.

199. Nominal damages would also have been a possible outcome. For example, in *GSI v. CalWest*, GSI adopted a similar approach to damages that it does in this NAFTA arbitration, arguing that it was owed what it would have cost to license the data properly (C$236,000), future income from the data (C$1.5 million) and the replacement cost (C$8.5 million). The court considered all of these heads of damage to be speculative and stated that even if there had been copyright infringement, GSI would have only been entitled to nominal damages of $25,000.[298]

200. The Claimants ignore all of this, making the simplistic causal assertion that a different ruling on the Regulatory Regime question would have *ipso facto* resulted in unquantified immense damages. Nothing in the evidence nor in logic supports this conclusion.

201. To circumvent their failure to value the proper counter-factual, the Claimants submit that the Tribunal ought to apply an "enterprise valuation" approach based on the assertion that the Alberta Court Decisions "effectively destroy[ed] GSI's business."[299] But the pursuit of copyright litigation claims, which the Claimants' admit is highly speculative, is all that remained of GSI's ongoing business immediately prior to the alleged expropriation date. As explained in the following sections, this approach equally lacks any causal link to the Alberta Court Decisions, is highly speculative and impermissibly incorporates alleged losses that were accrued at a time outside the Tribunal's jurisdiction.

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[296] **CWS-06**, Witness Statement of Harold Paul Einarsson, 27 September 2022, ¶ 105; and **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 139.

[297] **R-631**, [redacted] and **R-632**, [redacted]

[298] **R-150**, *GSI v. CalWest*, ¶¶ 55-61.

[299] Claimants' Reply, ¶ 324.

2. The Claimants Ignore All the Other Extrinsic Factors Which Caused GSI's Loss Long Before the Alberta Court Decisions

202. The Claimants submit that "an enterprise valuation is the most appropriate damages valuation method in the present case."[300] However, as acknowledged by Mr. Sharp, "the actual value of the company at the Valuation Dates […] is likely to be nil"[301] given that "GSI was not a going concern immediately prior to the point in time at which the alleged expropriation was formally crystallized."[302] Under NAFTA Article 1110(2), the legal consequence of this admission is that there has been no expropriation of GSI's enterprise and thus no compensation for the alleged loss of that enterprise is owed.

203. Rather than attempting to ascertain GSI's actual enterprise value as it existed immediately prior to the alleged NAFTA breach in 2017, the Claimants and Mr. Sharp construct a completely new counter-factual scenario under which GSI's business would have been revived from the defunct state it had already been for several years and generated significant new revenues as a multiclient seismic company from customers it had alienated as a result of its legal actions and who disputed GSI's contractual claims to that revenue.

204. This approach completely ignores the fact GSI was no longer a going concern in 2017, and had not been for many years prior, due to extrinsic market factors and GSI's decision to pursue a sweeping litigation campaign against its customers, all of which took place long before and were unrelated to the Alberta Court Decisions.

205. These market factors are explained in detail in Canada's Counter-Memorial, in Part IV(C)(1) above and in the expert reports of Doug Uffen and Robert Hobbs.[303] The Boards' disclosure of GSI's seismic materials to third parties under the Regulatory Regime did not cause GSI's demise – it had been profitable until 2008 even though companies had been accessing copies of seismic materials from the Boards during the 1990s and the first half of the 2000s. Rather, the combined impact of the 2008 financial crisis, the sale of GSI's ships and the declining market for seismic data in the Beaufort

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[300] Claimants' Reply, ¶ 333.

[301] **CER-06**, Sharp Reply Expert Report, ¶ 24.

[302] **CER-06**, Sharp Reply Expert Report, ¶ 144.

[303] Canada's Counter-Memorial, ¶¶ 304-321; **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 47-51; **RER-06**, Hobbs Rejoinder Expert Report, ¶¶ 22-32, 36, 44.

Sea, Arctic, Nova Scotia and other low exploration areas were key reasons why GSI was not a going concern by 2011 and had a nil value by November 2017.

206. As Brattle explains, even if GSI had survived as a going concern in the 2010s, it would have faced the reality of increased competition in Canada's offshore and new seismic data overlapping that of GSI, another factor for which the Claimants' enterprise valuation fails to account.[304] PwC's (unsupported) explanation is that the market entrance of TGS and PGS to fill the void after GSI sold its ships would not have occurred because "in the but-for scenario…without the alleged expropriation of GSI's business, this void would have not existed."[305] This illustrates the Claimants' illogical approach to causation: the Claimants decided to sell their ships in 2008,[306] almost a decade before the Alberta Court Decisions, and GSI was already financially compromised by the time the opening of competition to non-Canadian flagged ships occurred in 2011.[307] There is no world in which the Claimants' "but-for" scenario would have precluded competition from new entrants into the seismic data market.

207. Of course, the other critical factor which caused GSI's demise long before the Alberta Court Decisions, which is described in Part IV above, was its decision to sue its own licensees starting with Encana in 2007. These third-party lawsuits not only involved access to Disclosed Seismic Materials from the Boards going back to the 1990s and early 2000s, but also contractual exploration group and transfer fees which GSI's licensees vigorously opposed. As the Claimants admit, "once GSI commenced litigation against a party, that party never entered into any further licensing arrangements with GSI except Shell Canada (on one occasion) and GSI has not had any business with Shell since."[308] Again, the Claimants' enterprise valuation exercise fails to account for the consequences of the total loss of GSI's customer base due to its own actions many years before the Alberta Court Decisions.

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[304] **RER-08**, Brattle Rejoinder Expert Report, ¶ 74. *See also*, **RER-06**, Hobbs Rejoinder Expert Report, ¶ 36; **C-384**, *Coasting Trade Act*, S.C. 1992, c. 31, s. 3(2)(c.1); and **R-571**, Transport Canada, "Coasting Trade Act and Seismic Activities," 2012.

[305] **CER-06**, Sharp Reply Expert Report, ¶¶ 54-55.

[306] **R-701**, Email from GSI to Natural Resources Canada, 1 December 2008; **R-355**, Canada Transportation Agency, Decision No. 253-W-2009, 22 June 2009, ¶ 9.

[307] *See*, **R-571**, Transport Canada, "Coasting Trade Act and Seismic Activities," 2012.

[308] Claimants' Reply, ¶ 361.

208. Based on the foregoing, the Claimants' purported "enterprise valuation" must be rejected as it ignores all the factors which caused GSI's demise prior to 2017 and instead, values a fictitious company that never existed and which re-established all of the customer relationships that GSI had destroyed, with no causal – or even temporal – connection to the Alberta Court Decisions.

3. The Alberta Court Decisions Did Not Interfere with GSI's Ability to Pursue Contractual Claims, Including Penalty Clauses for Accessing Seismic Materials from the Boards

209. The Claimants "enterprise valuation" also ignores the fact that GSI retained the ability to pursue claims against all of the companies that were contractually prohibited from accessing GSI's seismic materials from the Boards. As discussed in Part III(C)(3) above, starting in 2000, most of GSI's licensees were subject to penalties if they copied GSI's seismic materials from the Boards.[309] The contractual right to pursue claims against those licensees were never abrogated by the Alberta Court Decisions, as demonstrated by *GSI v. Total*. The Claimants do not explain what damages, if any, could have been separately awarded for copyright violations if the alleged third-party copiers of GSI's seismic materials were already financially liable for acquiring such copies under contractual clauses.

210. Furthermore, the Alberta Court Decisions did not abrogate any of GSI's other contractual rights. This is evidenced by the fact that GSI continued (and, as discussed below, is still continuing) contractual claims for exploration group and transfer fees which were, according to the Claimants' list of "Unpaid Invoices" listed in Exhibit C-112, allegedly worth [redacted]

211. Most notably, the Claimants' continued inclusion of alleged damages arising from GSI's projects in the Falkland Islands in PwC's "revenue normalization" demonstrates the absence of causal link between their damages claim and the Alberta Court Decisions. [redacted]

[redacted]

[redacted]

[309] *See e.g.*, **BR-45**, [redacted] **R-615**, [redacted] **R-618**, [redacted] **R-687**, [redacted]

[redacted][310] None of these customers ever accessed GSI's materials from the Boards.

212. Yet, Mr. Sharp defends inclusion of these "lost" revenues based on Mr. Paul Einarsson's assertion that Falkland Islands companies refused to pay GSI's invoices because its reputation was ruined by Canada.[311] The Claimants provide no evidence of this alleged causal link between the Alberta Court Decisions and these alleged lost contractual revenues. Mr. Sharp tries to justify their inclusion by arguing that the licences are governed by Alberta law and are litigated in the Alberta courts.[312]

213. This is frivolous. Nothing in those purely contractual disputes turns on the Alberta Court Decisions, Canada's Regulatory Regime or any disclosure of seismic materials by the Boards. These amounts should never have been included in PwC's model, let alone triple counted.[313] Moreover, the fact that Mr. Sharp's inclusion of these amounts fails to account for the fact that GSI's claims against FOGL and Rockhopper were summarily dismissed[314] [redacted][315] makes their inclusion all the more inappropriate.

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[310] **C-356.6**, [redacted] **C-356.36**, [redacted] **C-356.37**, [redacted] **C-356.27**, [redacted] **C-356.45**, [redacted] **R-752**, *GSI v. Edison* (ABQB File No. 1301- 09664), Amended Statement of Claim, 19 January 2018, ¶¶ 32-43; **R-657**, *GSI v. FOGL* (ABQB File No. 1601-00797), Amended Statement of Claim, 19 January 2018, ¶¶ 28-33.

[311] **CER-06**, Sharp Reply Expert Report, ¶ 67.

[312] **CER-06**, Sharp Reply Expert Report, ¶ 67.

[313] **RER-08**, Brattle Rejoinder Expert Report, ¶ 108.

[314] **BR-19**, *GSI v. FOGL*, 2019 ABQB 162, Reasons for Judgment, 7 March 2019; **R-446**, *GSI v. FOGL*, 2020 ABCA 21, 20 January 2020. *See also*, **R-700**, *GSI v. FOGL* (ABQB File No. 1601-00797), Affidavit of Timothy Paul Bushell, 8 March 2018 (excerpt).

[315] *See*, **C-356.6**, [redacted]; **C-356.36**, [redacted] **R-754**, *GSI v. Edison* (ABQB File No. 1301-09664), Statement of Claim, 13 August 2013, pp. 8 and 14; **R-752**, *GSI v. Edison* (ABQB File No. 1301- 09664), Amended Statement of Claim, 19 January 2018, ¶¶ 32-43; **R-755**, *GSI v. Edison* (ABQB File No. 1301-09664), Affidavit of Jennifer Carr, 2 December 2014; **R-756**, *GSI v. Edison*, 2024 ABKB 27 (Court's decision and reasons with respect to each Undertaking and Question asked by GSI to Edison). *See*, **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 173.

4. GSI Has Continued to Litigate Domestic Contract Claims Against Third Parties Involving the Same Damages Underlying the Claimants "Revenue Normalization" Model

214. [redacted] [316] As Brattle points out, if the Claimants admit that the outcome of GSI's contractual litigations is speculative, "it is clearly unreasonable to assume that GSI would collect 100% of these disputed revenues with certainty."[317] Moreover, the actual outcome of these litigations was GSI collecting only pennies on the dollar, which impugns the credibility of GSI's claims in the first place.[318]

215. The Claimants' incorporation of GSI's third-party contract claims into PwC's "revenue normalization" model and treatment of such amounts – essentially as guaranteed income – is not only an unreasonable valuation approach, but it also raises jurisdictional issues concerning the Claimants' compliance with the waiver requirement in NAFTA Article 1121. As Canada explained in its Counter-Memorial, NAFTA Article 1121(1) and (2) prohibits the Claimants from including any damages in their model that overlap with claims pursued against third parties after the NOA.[319] This is the logical interpretation of Articles 1116(1), 1117(1), 1121(1)(b) and 1121(2)(b) when read together. If GSI's ongoing domestic damages claims are not "with respect to" the alleged NAFTA breach, then there should be no overlap with the NAFTA damages claim, which can only include "loss or damage by reason of, or arising out of, that [NAFTA] breach" as set out in NAFTA Article 1116(1) and 1117(1).[320] However, if the Claimants are trying to recover damages against Canada which are also being sought in ongoing domestic claims against third parties, then they would necessarily be in violation of Articles 1121(1) and (2) and the Tribunal would be deprived of jurisdiction over the entire claim. In other words, either the Claimants damages claim is fatally defective for being premised on damages sought in post-NOA domestic proceedings, or they are necessarily in violation of the waiver requirement.

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[316] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 88-97.

[317] **RER-08**, Brattle Rejoinder Expert Report, ¶ 97.

[318] **RER-08**, Brattle Rejoinder Expert Report, ¶ 96.

[319] Canada's Counter-Memorial, Section VI.B, ¶ 10.

[320] NAFTA, Articles 1116(1) and 1117(1).

216. The Claimants' Reply demonstrates a misunderstanding of how Articles 1121(1) and (2) operate, arguing that the NAFTA waiver requirements only apply to proceedings involving (1) the same parties, (2) the same subject matter, and (3) the same remedy.[321] The Claimants submit that those requirements are not met given that ongoing domestic proceedings involve (1) private parties, not Canada, (2) contractual claims which "do not concern the implications of the Alberta Decisions under international law," and (3) pose no risk of "double recovery."[322]

217. The Claimants' interpretation of the NAFTA is incorrect because, as previous tribunals have confirmed, the phrase "with respect to" in Article 1121 necessarily leads to a broad interpretation.[323] There is no support in the plain language of Article 1121 for adding in the requirements regarding the strict identity of parties, subject matter and remedy. As the *KBR v. Mexico* tribunal noted, it "look[ed] at the outcome" that the proceedings at issue "seek to achieve [and] while the relief sought in the different proceedings may formally not be identical, the practical outcome that both the Enforcement Proceedings and these NAFTA proceedings seek to achieve is for all practical purposes analogous."[324] It is the same situation here: the Claimants are seeking, under the guise of a "forward looking" enterprise valuation of GSI, to recover allegedly lost revenues that GSI is also seeking to recover through contractual claims against third parties in ongoing domestic proceedings.

218. In their Reply, the Claimants insist that GSI "only continued domestic proceedings against private third parties which are <u>not</u> 'with respect to the measure of the disputing Party that is alleged to be a breach'" and that there is no risk of double recovery.[325] The Claimants defend PwC's use of

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[321] Claimants' Reply, ¶ 153.

[322] Claimants' Reply, ¶¶ 153 and 190.

[323] Canada's Counter-Memorial, ¶¶ 162-164; **RLA-018**, *KBR Inc. v. Mexico* (UNCITRAL) Final Award, 30 April 2015 ("KBR – *Award*"), ¶¶ 112-113; **CLA-071**, *Waste Management I* – Award, ¶ 27; **CLA-032**, *Canfor – Decision*, ¶ 201.

[324] **RLA-018**, *KBR – Award*, ¶ 139. The Claimants' attempt to distinguish *KBR* by saying that it involved a State-owned enterprise is without merit as it had no bearing on the tribunal's interpretation of Article 1121 and the waiver requirement. Other distinctions the Claimants attempt to draw with the decisions on waiver in *Detroit International Bridge* and *Waste Management I* are also inapposite. *See* Claimants' Reply, ¶¶ 159-175. The interpretation of NAFTA Article 1121 in the dissenting opinion of Arbitrator Highet in *Waste Management* (**CLA-071,** *Waste Management I* - Award) is not shared by subsequent NAFTA tribunals, all of which confirm the same broad interpretation of "with respect to" in Article 1121 and that the provision is a jurisdictional requirement that goes to the consent of the Party to arbitrate. As for *DIBC*, the tribunal looked carefully at the various goals each of the domestic litigations and the NAFTA arbitration sought to achieve and concluded that, even though there was not a strict overlap in the claims, because they were grounded in the same issues, the concurrent litigations placed the claimants in violation of Article 1121. **RLA-012**, *Detroit International Bridge Company v. Canada*, UNCITRAL, Award on Jurisdiction, 2 April 2015, Section VII.B(2).

[325] Claimants' Reply, ¶ 123(c) (emphasis in original), ¶¶ 190-199.

the "Unpaid Invoices" listed in Exhibit C-112 [redacted] because they are merely being used as a "revenue normalization analysis towards the enterprise value of GSI."[326] The Claimants say that PwC's model is "far more complex" than claiming the same amounts as those listed on the invoices in Exhibit C-112.[327] The Claimants characterize their damages model as "the value of GSI, but for the Alberta Decisions, using normalized historical revenues. This analysis is forward-looking, which is why it requires the normalization of historical revenues and earnings."[328]

219. The Claimants' explanation can only be described as a shell game. Simply because PwC has devised a "complex" damages model that uses GSI's "Unpaid Invoices" as a proxy for unrealized revenues does not change the fact that those "normalized historical revenues" are calculated using amounts which GSI is still trying to recover against third parties. It is disingenuous to argue there is no risk of double recovery when substantial portions of PwC's analysis are still in litigation or were already rejected on contractual grounds by domestic courts.

220. The inherent contradiction in the Claimants' approach is demonstrated by the *GSI v. Total* litigation, which continued until early 2021 (*i.e.*, past the NAFTA NOA).[329] [redacted][330] The Claimants argue that the claims in the *GSI v. Total* litigation are "purely private and contractual" and are "unrelated to" the alleged NAFTA breach.[331] On this point, Canada agrees with the Claimants that the *Total* claim was not "with respect to" the Alberta Court Decisions because GSI

[326] Claimants' Reply, ¶ 192.

[327] Claimants' Reply, ¶ 191.

[328] Claimants' Reply, ¶ 193.

[329] Canada's Counter-Memorial, ¶ 178; **R-011**, *GSI v. Total*, 2020 ABQB 730; **R-404**, *GSI v. Total* (ABQB File No. 1401 03449), Procedure Card, consulted on 19 December 2022.

[330] **C-356.8**, [redacted] **R-011**, *GSI v. Total*, 2020 ABQB 730, ¶ 107.

[331] Claimants' Reply, ¶ 188.

never lost the contractual right to enforce a penalty clause in its licence with Total, which involved a 150% penalty for accessing data from the Boards.[332]

221. But what the Claimants do not explain is, if the amount claimed against Total is not "with respect to" Canada's NAFTA-breaching measure, then what is the justification for using exactly that [redacted] damages model. The Claimants cannot in one breath say that the breach of contract claim against Total has nothing to do with Canada's measures and in the next breath say that the same amount can be used to inflate GSI's enterprise value via "normalized revenue." To make matters worse, Mr. Sharp used the entire amount of the [redacted] as a proxy for historical revenues even though the court awarded GSI less than $1 million in damages. In other words, the Claimants are not just trying to indirectly recover from Canada the full amount of the invoice, they also include money already paid by Total. This shows not only that PwC's normalization adjustments are flawed, but the entire approach is a double recovery scheme.

222. The problem is compounded by the sheer number of post-NOA and ongoing domestic litigations overlapping with the "Unpaid Invoices" in Exhibit C-112 which form the basis of the Claimants' damages model. For example, as noted in Canada's Counter-Memorial,[333] [redacted][334] Again, the Claimants do not explain why, if the contractual claim against Plains Midstream is not "with respect to" the Alberta Court Decisions, [redacted] is included in their damages model. Furthermore, the Claimants fail to explain why the dismissal of this claim for purely contractual reasons did not cause PwC to remove that entire amount from the "revenue normalization" analysis. Mr. Sharp says that merely because the courts dismissed the claim does not mean the amount GSI

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[332] **BR-45**, [redacted] **R-011**, *GSI v. Total.*, 2020 ABQB 730, 25 November 2020, ¶ 3(9).

[333] Canada's Counter-Memorial, ¶ 178.

[334] **C-356.16**, [redacted] **R-349**, *GSI v. Plains Midstream* (ABQB File No. 1401 00646), Statement of Claim, 16 July 2014, ¶ 57(i)(i); **R-742**, *GSI v. Plains Midstream* (ABQB File No. 1401-00646), Amended Amended Amended Statement of Claim, 21 June 2018, ¶ 53(i)(i); **R-743**, *GSI v. Plains Midstream* (ABQB File No. 1401-00646), Affidavit of Paul Einarsson, 8 April 2019 (excerpt); **BR-17**, *GSI v. Plains Midstream*, 2022 ABKB 722, Reasons for Judgment, 1 November 2022; **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 90-91, 97; and **R-744**, *GSI v. Plains Midstream* (ABQB File No. 1401-00646), 2023 ABCA 277, 29 September 2023.

claimed is invalid,[335] a surprising statement which further demonstrates the lack of credibility in the Claimants' approach.

223. Other invoices which underlie PwC's "revenue normalization" are still being litigated today. For example, [redacted][340]

224. Double dipping into damages that are simultaneously being sought in ongoing domestic proceedings either means the Claimants are in violation of the Article 1121 condition precedent to filing a NAFTA claim, which deprives the Tribunal of jurisdiction over the entire claim, or that their damages claim is not, as required by Articles 1116(1) and 1117(1), "by reason of, or arising out of" the NAFTA breach. Under either scenario, the entire claim must be dismissed.

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[335] **CER-06**, Sharp Reply Expert Report, ¶ 66.

[336] **C-356.18**, [redacted] *See also*, **C-356.32**, [redacted]; **BR-56**, *GSI v. Conoco* (ABQB 1301-07573), Amended Statement of Claim, 27 June 2013; **R-745**, *GSI v. Conoco* (ABQB File No. 1301-07573), Affidavit of Paul Einarsson, 20 June 2019 (excerpt), PDF p. 26; **R-746**, *GSI v. Conoco* (ABQB File No. 1301-0757, Procedure Card, consulted on 10 October 2024; **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 93-95.

[337] **C-356.22**, [redacted] **R-405**, *GSI v. Nalcor* (ABQB File No. 1301 09665), Statement of Claim, 13 August 2013, ¶¶ 24-26; **R-747**, *GSI v. Nalcor* (ABQB File No. 1301-09665), Procedure Card, consulted on 10 October 2024.

[338] **C-356.24**, [redacted] **C-356.44**, [redacted] **R-748**, *GSI v. Exxon* (ABQB File No. 1301-14139), Statement of Claim, 29 November 2013; **R-749**, *GSI v. Exxon* (ABQB File No. 1301-14139), Procedure Card, consulted on 10 October 2024.

[339] **C-356.26**, [redacted] **C-356.29**, [redacted] **R-750**, *GSI v. Repsol* (ABQB File No. 1601-03432), Statement of Claim, 9 March 2016, ¶¶ 22, 27, 28; **R-617**, *GSI v. Repsol* (ABQB File No. 1601-03432), Procedure Card, consulted on 31 October 2024.

[340] **C-356.13**, [redacted] **C-356.28**, [redacted] **C-356.11**, [redacted] **C-356.3**, [redacted] **C-356.7**, [redacted] **R-753**, *GSI v. NWest* (ABQB File No. 1201-11934), Amended Statement of Claim, 21 May 2014, ¶ 53; **R-751**, *GSI v. NWest* (ABQB 1201-11934), Procedure Card, consulted on 10 October 2024. *See*, **RER-08**, Brattle Rejoinder Expert Report, ¶ 107.

5. The Alberta Court Decisions Did Not Interfere with Shareholder Rights

225. The Claimants' arguments on reflective loss also miss the point. As explained in Canada's Counter-Memorial, the Einarsson Claimants lack standing to make a claim under NAFTA Article 1116(1) to claim damages for indirect or reflective loss stemming from their investment in GSI. In response, the Claimants argue that they do not claim that the loss of their shareholder loans was caused by the Regulatory Regime.[341] The Claimants also argue that they are "not claiming reflective losses as they put GSI's claim forward under Article 1117(1) and, in the alternative, their own personal claims [...] under Article 1116(1)."[342]

226. However, the issue is not simply an issue of whether the Claimants claim direct losses but also whether those damages are demonstrated to have any direct link to the alleged breaches. As Canada has explained in its Counter-Memorial, NAFTA Article 1116(1) only allows an investor to recover direct damages for alleged losses that are incurred from the challenged measure such as interference with shareholder, creditor or employee rights to dividends, loan repayment or remuneration.[343] However, the Claimants neither cite nor demonstrate any changes that are a direct result of the Alberta Court Decisions to the Einarssons' rights as shareholders to receive dividends, vote or sell shares; as creditors to seek repayment; or to their contractual right to remuneration. Even if the Tribunal were to accept the Claimants' arguments on merits, the Einarssons' alleged losses are at most only an indirect result of the Alberta Court Decisions interference with GSI's rights and assets. Hence, the Einarsson Claimants have no standing to claim damages personally for their alleged losses under Article 1116(1).

C. The Claimants' Damages Model is Implausible and Cannot be Relied Upon as a Reasonable Quantification of Damages

227. Canada's Counter-Memorial and Brattle's first report explained that the damages model submitted by PwC was implausible, speculative and contained substantial errors.[344] But instead of

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[341] Claimants' Reply, ¶¶ 365-367. *See also*, Canada's Counter-Memorial, ¶¶ 470-473; **CER-06**, Sharp Reply Expert Report, ¶¶ 165-175.

[342] Claimants' Reply, ¶¶ 368-369.

[343] Canada's Counter-Memorial, ¶ 466.

[344] Canada's Counter-Memorial, ¶¶ 419-424; **RER-04**, Brattle Counter-Memorial Expert Report, Part V.

submitting a rational quantification of damages or correcting the identified errors in their existing damages model, the Claimants double-down on their flawed approach in their Reply. Brattle's Rejoinder expert report explains in detail why the explanations provided in Mr. Sharp's second report fail to justify these errors and PwC's damages model remains unreasonable.

228. In this section, Canada highlights some of the numerous flaws in the Claimants' damages claim which render PwC's damages model unreliable. In particular, the "enterprise valuation" lacks independence and relies on information and assumptions by the Claimants that are unsupported by verifiable evidence. In fact, as Brattle explains, the verifiable evidence refutes the key inputs into PwC's model.[345] Moreover, PwC's valuation contains numerous errors and, despite acknowledging some of them in his second report, Mr. Sharp does not correct them. PwC's valuation is also unrealistic and bears no relationship to actual performance in the Canadian oil and gas markets or the global offshore seismic industry. Therefore, even if the Tribunal were to accept the Claimants' unreasonable assertion that an "enterprise valuation" is appropriate in this case, it would still have no choice but to reject the Claimants' damages claim on the basis that they have failed to put forward a quantification of those damages which meets the reasonable certainty standard required under the NAFTA and international law.[346]

1. PwC's Valuation Lacks Independence and Relies on Information and Assumptions by the Claimants that are Not Supported by Independent Evidence

229. As Brattle explains, the PwC analysis lacks independence.[347] In addition to the dearth of evidence supporting the foundation of Mr. Sharp's damages analysis (he admits that PwC did not seek to audit or review the financial information that Mr. Einarsson provided for the damages claim),[348] PwC accepts unreasonable assumptions to support the purported "enterprise value" in the Claimants' "but-for" world.

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[345] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 79, 84 and 85.

[346] *See*, Canada's Counter-Memorial ¶¶ 433-435 and authorities cited therein. *See also*, **CLA-097**, *Mobil v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 439 (applying the standard of "reasonable certainty" for proof of damages).

[347] **RER-08**, Brattle Rejoinder Expert Report, Section VIII.A.

[348] **CER-06**, Sharp Reply Expert Report, ¶ 9.

230. For example, in response to two "normalization" errors identified in Brattle's first report, Mr. Sharp takes note of the errors but dismisses them as being "immaterial" or not impacting his "judgmental selection" of maintainable revenues.[349] In other words, as explained by Brattle: "Mr. Sharp recognizes an error, does not correct it (and does not show the impact on his calculations of correcting it) and instead uses discretionary "selection" to maintain his previous results."[350]

231. PwC's model also continues to fail to account for evidence concerning the availability of overlapping and more modern seismic data that is available for license by GSI's competitors. Rather than revising PwC's model to incorporate considerations of such factor, Mr. Sharp speculates that such data would not have existed in a "but-for" world.[351] This ignores market evidence that several of GSI's competitors had acquired seismic data in Canada prior to the Alberta Court Decisions and GSI's lawsuits against its customers. It also ignores that, after 2011, competitors using foreign-flagged ships were allowed to collect seismic data in Canada's offshore.[352]The extensive availability of new competitor data in areas that overlap with GSI's existing data suggests that GSI's older data is less valuable.[353]

232. Similarly, Mr. Sharp's revenue normalization adjustment assumes that each Board access concerning GSI materials would have resulted in a licence agreement. This assumption lacks any independent support and contradicts Mr. Sharp's own acknowledgment of the basic economic principle that "parties are likely to 'consume more of something when it is free than when it is costly'".[354] It is pure speculation to assume that companies willing to access materials for free would pay the often substantial licensing fees (often more than $1 million) if they could not access information for free through the Boards.[355]

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[349] **CER-06**, Sharp Reply Expert Report, ¶¶ 53, 63 (emphasis added).

[350] **RER-08**, Brattle Rejoinder Expert Report, ¶ 72.

[351] **CER-06**, Sharp Reply Expert Report, ¶¶ 54-55.

[352] **RER-06**, Hobbs Rejoinder Expert Report, ¶ 66.

[353] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 39, 73-75; **RER-02**, Hobbs Counter-Memorial Expert Report, ¶ 59; **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 47, 50.

[354] **CER-06** Sharp Reply Expert Report, ¶ 56.

[355] **RER-08**, Brattle Rejoinder Expert Report, ¶ 57. For example, Brattle notes at ¶ 144 that Mr. Sharp assumes Chevron would have paid a licence fee of US$5.7 million for each access.

233. The error is compounded because Mr. Sharp further assumes that all of these supposed licences would have led to yet more licensing revenues by applying his "multipliers" to the but-for licensing revenue.[356] In PwC's model, each private company is assumed to license the data a second, or in some cases, a third time.[357] However, as Brattle explains, there is no evidence supporting the multipliers assumed by Mr. Sharp, and which adds more than C$530 million of Mr. Sharp's normalized revenues from 2000 to 2012.[358]

2. PwC's Valuation Contains Numerous Errors, Including Those Which are Acknowledged but Not Corrected

234. As noted in Brattle's first expert report, PwC's valuation adopts without testing the enormous but-for revenue normalization adjustments and in which it was clear there are errors.[359] In response, Mr. Sharp acknowledges certain errors but does not correct them. He purports to have conducted "verification" procedures to test for further errors and reports he found none.[360]

235. As Brattle notes, PwC does not present the verification procedures used to test the inputs relied upon to "normalize" GSI revenues and admits that a substantial portion of the revenue adjustments were not checked because Claimants did not provide the necessary information. But where Claimants did provide documentation to support Mr. Sharp's revenue normalization assumptions, PwC's "verification procedures" missed clear errors, many of which are substantial. As Brattle explains, this often led to double or triple counting of assumed lost revenues,[361] the calculation of lost revenues using the wrong prices,[362] and the assumed collection of contractual revenues for "Unpaid Invoices" that domestic courts have found GSI had no legal right to collect.[363] These frequent and often

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[356] **RER-08**, Brattle Rejoinder Expert Report, ¶ 57.

[357] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 101-104, 142, 144, and Figure 10.

[358] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 147-150.

[359] **RER-04**, Brattle Counter-Memorial Expert Report, Part V.

[360] **RER-08**, Brattle Rejoinder Expert Report, ¶ 68-75, 86-97; 123-124. (As noted at ¶ 86: "Some of the [normalization adjustment] errors appear to have been identified in [Mr. Sharp's] 'verification procedures'. We cannot assess the reasonableness of the steps taken by Mr. Sharp to conduct his purported verification procedures because Mr. Sharp did not provide them in his report. But we do know that they were ineffective, because his revenue normalization adjustments continue to contain clear errors.")

[361] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 101-104, and 142-146.

[362] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 132-133.

[363] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 12.d, 79, 89 and 149.

substantial errors cause PwC to overstate GSI's lost revenues, but due to the Claimants' lack of support for these essential inputs, it is not possible to determine the correct figures.[364]

236. For example, as explained above, the Claimants' damages model improperly incorporates GSI's contractual claims against third parties that lack any causal connection to the alleged NAFTA breach.[365] As Brattle explains, Mr. Sharp's quantification exacerbates this error by incorrectly assuming that GSI had a legal right to the full amount stated on those unpaid invoices even though customers have vigorously disputed them and domestic courts have rejected many as without merit for purely contractual reasons.[366] Even in cases where GSI was awarded damages for third party access to GSI's seismic materials from the Boards in violation of a contractual prohibition not to do so, GSI was awarded a fraction of what was claimed for reasons that have nothing to do with the Alberta Court Decisions.[367]

237. Furthermore, PwC's "revenue normalization" damages model fails to account for the fact that GSI settled some of its claims[368] in which GSI sought immense damages, [redacted][369] [redacted][370] [redacted][371] [redacted][372] [redacted][373] [redacted][374] and [redacted]

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[364] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 87 and 122.

[365] **RER-08**, Brattle Rejoinder Expert Report, Subsection VIIIB.2.a.

[366] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 89-97.

[367] **R-011**, *GSI v. Total*, 2020 ABQB 730, Judgment, 25 November 2020, ¶¶ 72-73, 126.

[368] **R-757**, [redacted]

[369] **C-356.4**, [redacted] **C-356.5**, [redacted] **C-356.14**, [redacted] **C-356.15**, [redacted] *See*, **R-758**, *GSI v. Anadarko* (ABQB File No. 1201 15228), Affidavit of Paul Einarsson, 4 September 2019 (excerpt), PDF pp. 20, 32; **BR-16**, GSI Letter to Occidental, 14 August 2019, p. 2. The Canadian and U.S. claims were dismissed in 2021 pursuant to a confidential settlement reached between the parties. *See*, **R-759**, *GSI v. Anadarko* (ABQB File No. 1201 15228), Consent Dismissal Order, 15 April 2021; and **R-408**, *GSI v. Anadarko* (S.D. Tex, File No. 4:2015cv02765), Order of Dismissal, 29 March 2021.

[370] **C-356.17**, [redacted] and **R-760**, *GSI v. Devon* (ABQB File No. 1401-12230), Amended x4 Statement of Claim, 24 June 2015, ¶ 33.

[371] **C-356.12**, [redacted] and **R-761**, *GSI v. Hunt Oil* (SCNS File No. 420361), Amended Notice of Action, 16 January 2014, p. 13.

[372] **C-356.1**, [redacted] **C-356.9**, [redacted]

[373] **C-356.23**, [redacted]

[374] **C-356.10**, [redacted] **C-356.25**, [redacted] **C-356.31**, [redacted] **C-356.33**, [redacted] and **R-762**, *GSI v. Suncor* (ABQB 0901-08209), Amended Amended Amended Statement of Claim, 19 April 2018, ¶ 63(e).

[redacted][375] the bulk of which related to transfer fees and exploration group licensing fees. While the Claimants have withheld details of those settlements, based on GSI's financial statements, Brattle estimates that those settlements were made for [redacted][376] PwC made no effort to eliminate double counting of settled amounts and furthermore provides no explanation as to why GSI's supposed "historical revenues" should be exponentially higher than what GSI was able to collect for these "Unpaid Invoices."

238. Brattle explains other errors demonstrating an incautious approach to quantification by the Claimants. [redacted][380] These and other errors evaded PwC's "verification" exercise and further undermine the credibility of the PwC damages analysis. Given that the Claimants did not provide the underlying documentation, it is not possible to even identify all such errors, much less to correct them.[381]

[375] **C-356.38**, [redacted] **C-356.39**, [redacted] **C-356.40**, [redacted] **C-356.41**, [redacted] **C-356.42**, [redacted] and **C-356.43**, [redacted]

[376] **RER-08**, Brattle Rejoinder Expert Report, ¶ 96, fn. 138.

[377] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 103-104.

[378] **RER-04**, Brattle Counter-Memorial Expert Report, ¶ 105.

[379] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 101-102.

[380] **RER-08**, Brattle Rejoinder Expert Report, ¶ 107.

[381] **CER-06**, Sharp Reply Expert Report, ¶ 38; **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 10 and 64.

3. PwC's Valuation is Unrealistic and Bears No Relationship to Actual Performance in the Canadian Oil and Gas Markets or the Global Offshore Seismic Industry

239. PwC's analysis suffers from the underlying problem of having no connection to market reality. For example, as Brattle explains, PwC's methodology of establishing a statistical relationship with global rig counts in its revenue normalization analysis is seriously flawed[382] and lacks meaningful statistical relationship to crude prices.[383] Furthermore, PwC's approach to bringing forward GSI's 2012 "but-for" revenues to the valuation dates generates estimated revenues that significantly outperform the global offshore seismic industry as a whole.[384] Indeed, it is unreasonable to assume that GSI could maintain a long-term profit margin that is approximately three times that of PGS and TGS, the comparable companies relied on by PwC. Mr. Sharp's analysis does not have a realistic explanation for that assessment.[385]

240. Mr. Sharp's updating of the 2012 revenue to the valuation dates also ignores GSI's reality: the company stopped investing in new seismic data acquisition after 2008. But as Mr. Hobbs explains, collecting new data is critical to generating revenue for a multiclient seismic data company.[386] The lack of new data after 2008 would have seriously limited GSI's ability to generate revenue as of the valuation dates, but PwC assumes that GSI's revenue generation capability is unchanged by this lack of investment. In other words, Mr. Sharp's valuation assumes GSI can generate profits on past investments that the company never made.[387]

241. In sum, even putting aside the fundamental causation problems underlying the Claimants' counterfactual, the quantification by PwC is not supported by verifiable evidence and contains substantial errors that PwC could have and should have identified. Given the lack of support for key

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[382] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 151-152. *See also*, **RER-06**, Hobbs Rejoinder Expert Report, ¶¶ 71-72.

[383] **RER-08**, Brattle Rejoinder Expert Report, ¶ 163.

[384] **RER-08**, Brattle Rejoinder Expert Report, ¶ 162 and Figure 13.

[385] **RER-08**, Brattle Rejoinder Expert Report, ¶ 176. Mr. Sharp calculates a *maintainable* EBIDTA margin for GSI of 75% while over the long term, Pulse has only had a 21% margin and TGS only a 27% margin. *See*, **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 181-184.

[386] **RER-02**, Hobbs Counter-Memorial Expert Report, ¶ 76; **RER-06**, Hobbs Rejoinder Expert Report, ¶ 18.

[387] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 81-83.

inputs to the damages analysis and the errors revealed in the limited documentation that was provided, the Claimants have failed to provide a reliable enterprise valuation of GSI.[388]

D. The Claimants Do Not Present any Credible Valuation of GSI's Seismic Data Library, GSI's Only Remaining Asset as of the Date of Alleged Expropriation

242. As explained in Canada's Counter-Memorial and Brattle's first expert report, because GSI was no longer a going concern before the alleged NAFTA breach, the appropriate "but-for" counterfactual should reflect the company's liquidation value of its only remaining asset – GSI's seismic data library – as of the alleged expropriation date of November 30, 2017.[389] Accompanying Canada's Counter-Memorial was an expert report submitted by Mr. Doug Uffen, an accredited geophysicist with more than 40 years of experience in the seismic industry, including inspecting and valuing seismic data libraries, which explained the methodology necessary to determine a reasonable valuation of GSI's library.[390]

243. In their Reply, the Claimants did not respond to Mr. Uffen or present an actual valuation of GSI's seismic data library. Instead, the Claimants submitted a report by Mr. Victor Ancira of Troika USA ("Troika") which put forward a "replacement cost" valuation method, suggesting that damages should be substantially higher than those estimated by PwC.[391]

244. As explained by Messrs. Uffen and Hobbs and by Brattle, Mr. Ancira's "replacement cost" valuation is an unrealistic and unreliable approach to assessing the fair market value of GSI's seismic data library.[392] In particular, as acknowledged by Mr. Ancira, the "replacement cost" valuation is flawed.[393] Among other things, the Troika analysis makes no mention of adjustments for depreciation, which is contrary to standard valuation guidelines,[394] and contrary to what Messrs. Uffen and Hobbs

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[388] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 63-64.

[389] Canada's Counter-Memorial, Part VIII.E.

[390] **RER-03**, Uffen Counter-Memorial Expert Report, ¶¶ 50-83.

[391] Claimants' Reply, ¶¶ 355-358; **CER-07**, Expert Report of Victor Ancira of Troika USA, 3 May 2024 ("Troika Expert Report").

[392] **RER-06**, Hobbs Rejoinder Expert Report, ¶¶ 56-60; **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 12-17; **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 205-212.

[393] **CER-07**, Troika Expert Report, ¶ 19.

[394] **RER-08**, Brattle Rejoinder Expert Report, ¶¶ 207-210.

say is essential to seismic data valuation.[395] It is also inconsistent with GSI's own documentation which explicitly recognized that the value of seismic data depreciates over time.[396] Troika also neglects to account for competitive considerations,[397] and does not assess GSI's actual seismic data, apart from viewing a small sample of processed data selected by the Claimants.[398] In view of these errors, Troika's "replacement cost" methodology must be rejected as unrealistic, unverifiable and unreliable.

245. Furthermore, the Claimants ignore GSI's own internal valuations contemporaneous to the time the company was at its most active. In [redacted] GSI obtained valuations of its seismic data library from [redacted][399] The Claimants barely refer to [redacted] valuations, stating only that they were done for "a specific purpose to support GSI financings."[400] However, this presumably means that GSI used them to represent the value of its seismic data library to financial lending institutions and other investors.[401]

246. For the purpose of providing the Tribunal with additional guidance as to how unrealistic the PwC and Troika valuations are, Canada instructed Mr. Uffen to apply the [redacted]

[395] **RER-07**, Uffen Rejoinder Expert Report, ¶ 26; **RER-06**, Hobbs Rejoinder Expert Report, ¶¶ 25, 43-44, 68-69.

[396] **C-560**, Bundle of Seismic Data Valuations Reports for GSI by [redacted], p. 12; **RER-08**, Brattle Rejoinder Expert Report, ¶ 213.

[397] **CER-07**, Troika Expert Report, ¶ 19.

[398] **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 13-15; **RER-06**, Hobbs Rejoinder Expert Report, ¶¶ 46-57.

[399] **C-560**, Bundle of Seismic Data Valuations Reports for GSI by [redacted]

[400] **CWS-12**, Paul Einarsson Reply Witness Statement, ¶ 146. Mr. Einarsson also says they were done from a "geophysical perspective" but does not explain what that means.

[401] **RER-07**, Uffen Rejoinder Expert Report, ¶ 3.

[402] **RER-07**, Uffen Rejoinder Expert Report, Part III.B

[403] **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 42-51. Mr. Uffen explained the methodology for a seismic data library inspection in his first report. **RER-03**, Uffen Counter-Memorial Expert Report, ¶¶ 50-83.

[redacted]

[redacted]"[404] For example, no or low exploration in the areas where GSI has most of its Canadian seismic data (*e.g.*, Beaufort, Arctic, Labrador) impacts GSI's ability to generate revenues from its existing library.[405] Such market developments have no connection to the alleged breach in this NAFTA arbitration but depress the value of GSI's seismic data library.

247. Applying the [redacted] methodology suggests an absolute ceiling of value for GSI's seismic data library in 2017 of around [redacted][406] But as Mr. Uffen explains, this is likely an inflated number that does not actually reflect the fair market value that a third-party buyer would pay for GSI's library. According to Mr. Uffen, if a thorough quality assessment was undertaken and market factors were applied, the fair market value of GSI's seismic data library in 2017 would have likely been closer to the [redacted] future sales valuation that [redacted] methodology estimates. But even then, Mr. Uffen advises that "on a risked commercial basis, a purchaser wanting to further license the data would likely demand to pay less than this valuation to secure a greater profit and/or adequate rate of return."[407]

248. In sum, the Claimants' own independent and contemporaneous valuations suggest that GSI's only asset as of the alleged expropriation date was worth a fraction of what they are claiming as damages in this arbitration. PwC and Troika both ignore GSI's own valuations in their damages analyses. In any event, in failing to meet their burden of proving a credible valuation of GSI's seismic data library, the Claimants' damages claim must be dismissed.

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[404] **C-560**, Bundle of Seismic Data Valuations Reports for GSI by [redacted] **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 47-51. Mr. Sharp does not directly address the competition point other than by acknowledging that there is competitor data which may have overtaken GSI's (*see*, **CER-06**, Sharp Reply Expert Report, ¶¶ 54-55), but the ability of competitors like PGS and TGS to carry-out seismic projects after 2012 without GSI having the ability to block their use of foreign flagged vessels (*see*, **R-571**, Transport Canada, "Coasting Trade Act and Seismic Activities," 2012) led to an increase in data which overlapped with GSI's and decreased its value.

[405] **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 48-50.

[406] **RER-07**, Uffen Rejoinder Expert Report, ¶ 38.

[407] **RER-07**, Uffen Rejoinder Expert Report, ¶¶ 39-40.

E. Claimant Paul Einarsson Does Not Have Standing to Claim Damages on His Own Behalf Because His Dominant and Effective Nationality was Canadian at the Time When the Alleged Losses Were Incurred

249. As Canada argued in its Counter-Memorial, Mr. Paul Einarsson cannot bring a claim on his own behalf under NAFTA Article 1116 because, at the time the alleged losses were incurred, his dominant and effective nationality was Canadian.[408] In their Reply, the Claimants do not dispute that to bring an Article 1116 claim, an investor must meet a diversity of nationality requirement, that is, an investor cannot bring a claim against their State of dominant and effective nationality.[409] Indeed, this was the recent conclusion of the tribunal in *Alicia Grace v. Mexico*.[410] While there is some disagreement as to the weight to be given to certain factors,[411] Canada and the Claimants largely agree that the test requires a fact-based inquiry of factors such as habitual residence, personal attachments and center of economic, social and family life.[412]

250. The Claimants acknowledge they have the burden of proving that the dominant and effective nationality of Mr. Paul Einarsson was American at the time of the alleged losses.[413] Canada has never disputed Paul Einarsson has American citizenship, which makes the Claimants' reliance on *Kim v. Uzbekistan* misplaced.[414] Canada's point is that, because the evidence shows that from 1997 to 2017, Paul Einarsson's dominant and effective nationality was Canadian, he cannot bring a claim for any

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[408] Canada's Counter-Memorial, ¶¶ 480-487.

[409] Claimants' Reply, ¶ 205; *See also*, Claimants' Memorial, ¶¶ 172-173; Canada's Counter-Memorial, ¶ 476.

[410] **RLA-183**, *Alicia Grace v. Mexico* (ICSID Case No. UNCT/18/4), Final Award, 19 August 2024, ¶ 475.

[411] For example, the Claimant accords weight to subjective factors when it argues that Mr. Einarsson "self-identifies" as an American and has "deep attachment with the United States." *See*, Claimants' Memorial, ¶ 207. However, this assertion is inconsistent with his public statements (*see*, Canada's Counter-Memorial, ¶¶ 481-483 and exhibits cited therein) and is, in any event, less important than objective factors. *See*, **RLA-177**, *Alberto Carrizosa Gelzis et al., v. Republic of Colombia* (PCA Case No. 2018-56), Award, 7 May 2021, ¶ 196 (objective factors that can be ascertained should be given more weight than professed subjective feelings).

[412] The Claimants acknowledge that habitual residence is one of the most important factors to consider. *See* Claimants' Memorial, ¶¶ 176-177; Claimants' Reply, ¶ 206. *See*, **RLA-184**, *Raimundo J. Santamarta Devis v. Bolivarian Republic of Venezuela* (PCA Case No. 2020-56), Award on Jurisdiction *Ratione Personae*, 26 July 2023 [Unofficial English translation] ¶ 516 (noting precedents regarding the dominant nationality emphasizing residence as a key factor).

[413] Claimants' Reply, ¶ 208. International investment tribunals acknowledge that the burden of establishing jurisdiction lies primarily upon the claimant. *See e.g.*, **RLA-185**, *Marko Mhialjevic v. Republic of Croatia* (ICSID Case No. ARB/19/35), Award, 19 May 2023, ¶¶ 64-65.

[414] **CLA-116**, *Kim v. Uzbekistan* (ICSID Case No. ARB/13/6), Decision on Jurisdiction, 8 March, 2017. That case only dealt with a dispute over whether the claimants lost their Kazakh citizenship when they acquired citizenship of another state.

of the alleged losses he claims as an investor under NAFTA Article 1116. Canada already put forward substantial evidence demonstrating that Mr. Einarsson worked and resided in Calgary with his family for over two decades starting in 1997.[415] New documents produced by the Claimants further prove Canada's point, [redacted] [416] Although Mr. Einarsson held assets in the United States and travelled there, the Claimants have not demonstrated that the United States was as central to his economic, social and family life as Canada up until 2018. Accordingly, Claimant Paul Einarsson cannot make a claim under NAFTA Article 1116.

VII. CONCLUSION AND ORDER REQUESTED

251. The Claimants started their investment in GSI in 1993 by acquiring a seismic data library which included materials that were already publicly accessible for copying from the Boards pursuant to laws, regulations and government approvals that extended back to the 1970s. The dispute between the Claimants and the Boards regarding the authority to release copies of seismic materials under the Regulatory Regime notwithstanding GSI's assertions of copyright, trade secrets and confidentiality started practically on day one of the establishment of GSI as a company and continued throughout the 1990s and 2000s. But throughout that entire period, GSI knew that the Boards were continuing to exercise their legal authority to allow public access to existing seismic materials and knew that their applications to acquire seismic data from Canada's offshore were approved on the condition that the Submitted Seismic Materials would become public after a 10 or fifteen year period. The Claimants may not have liked it, but they could not have had any expectations otherwise.

252. This NAFTA claim is a meritless last effort by the Claimants to again challenge the Regulatory Regime that they had voluntarily participated in, and profited from, between 1993 and 2008. GSI's business was lost by 2011, not because of the Boards' disclosures of GSI's seismic materials, but

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[415] Canada's Counter-Memorial, ¶¶ 480-487 and exhibits cited therein. The Claimants concede that Mr. Paul Einarsson generally resided in Calgary between 1997-2011. *See*, Claimants' Memorial, ¶ 195. The fact that he purchased a house in 2011 in California where he spent his winters or that he travelled on vacation abroad does not alter the fact that Calgary was his place of habitual residence, and he continued to spend significant time of the year in Calgary. *See e.g.*, Claimants' Reply, ¶ 204; **CWS-06**, Witness Statement of Paul Einarsson, 27 September 2022, ¶ 43 (acknowledging Mr. Einarsson spent over 40% of time in Canada from 2011 to 2016).

[416] **C-561.11**-**C-561.19**, [redacted] **C-577**, [redacted] The Claimants suggest that Mr. Einarsson's tax returns evidence "stronger ties with the United States," but offer no explanation as to how, other than he disposed of most of his Canadian assets by 2017. *See*, Claimants' Reply, ¶ 207.

because of other factors such as the global financial crisis and because of its decision starting in 2007 to sue its customers for copyright infringement. No matter how the Claimants try to paint their claim, the Alberta Court Decisions are not an expropriation or performance requirement which "crystallized" in 2017. Rather, this NAFTA claim is simply an effort to turn this Tribunal into a supra-national court of appeal so that the Claimants can re-challenge a reasoned and reasonable interpretation by the Canadian courts on a question of first instance regarding the protection of copyright and the Regulatory Regime. That is not the role of a NAFTA Chapter Eleven tribunal. Nothing in the Alberta Court Decisions comes close to constituting an expropriation under international law and NAFTA Article 1110. Nor is there any rational way to construe the Alberta Court Decisions as a prohibited performance requirement under NAFTA Article 1106.

253. Accordingly, for the reasons described in Canada's Counter-Memorial and this Rejoinder, Canada respectfully requests that the Tribunal render an award dismissing the Claimants' NAFTA claim in its entirety and with prejudice. Canada also respectfully requests that the Tribunal order the Claimants, jointly and severally, to be liable for the costs of the arbitration in full and to indemnify Canada for its costs for legal representation and assistance and costs borne in this arbitration, as well as any other further relief the Tribunal deems just and appropriate under the circumstances.

November 1, 2024

Respectfully submitted on behalf of Canada,

[Signed]

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