

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

KOCH INDUSTRIES INC. & KOCH SUPPLY & TRADING, LP

Claimants

v.

CANADA

Respondent

REQUEST FOR ARBITRATION

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7 December 2020

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1. Pursuant to Article 36 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the **Convention**), Rules 1 and 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the **Institution Rules**) and Articles 1116(1), 1117(1) and 1120(1)(a) of the North American Free Trade Agreement (**NAFTA**), Koch Industries, Inc. (**Koch**) and Koch Supply & Trading, LP (**KS&T**) (collectively, the **Claimants**) hereby respectfully request that the Secretary-General of the International Centre for the Settlement of Investment Disputes (**ICSID**) register this arbitration against the Respondent, the Government of Canada (**Canada**) concerning the claims stated herein.

I. INTRODUCTION

2. This claim arises out of the summary and arbitrary suspension and purported cancellation without compensation by the Province of Ontario (**Ontario**) of millions of carbon allowances¹ which KS&T had acquired in the course of its business operations in the Province at the cost of \$30,158,240.95 (the **Purchase Price**), an amount which it had paid to Ontario for these same allowances only days before the measures at issue.²
3. In 2016, Ontario adopted the *Climate Change Mitigation and Low-Carbon Economy Act* (the **Act**) and the related Cap and Trade Program Regulation (the **Regulation**) (collectively also referred to as the **Cap and Trade Program**). The Act and Regulation sought to lower greenhouse gas (**GHG**) emissions by imposing mandatory limits, or “caps,” on GHG emissions produced by designated classes of industrial emitters and enforcing monetary penalties where the caps were exceeded. The Act and Regulation created carbon allowances that gave participants the right to emit GHGs and provided that the pool of allowances would be reduced over time. The Act and Regulation mandated public auctions to sell allowances and specifically envisioned a secondary market for allowances that was essential to harnessing market mechanisms to achieve the Cap and Trade Program’s objectives at the lowest overall cost. Ontario’s system therefore specifically created a category of participants —defined as “market participants”— mandated under the Program to engage in the business of buying and selling allowances, thereby creating a secondary market. This in turn provided market liquidity to all participants and established transparent prices for all participants through the forces of supply and demand.
4. Ontario structured the Cap and Trade Program in this way in anticipation of an agreement that came into effect on 1 January 2018, linking its Program to equivalent programs in Québec and California. The goal was to trade allowances through the three jurisdictions, enhancing the Ontario market for allowances and, through this, the viability of Ontario’s Program.
5. KS&T is a Koch entity specializing in trading in commodity markets, including emissions markets. To assist Koch affiliates with emissions cap obligations and provide specialized access to the market, KS&T registered in the Ontario Cap and Trade

¹ References to “**carbon allowances**” in this Request for Arbitration refer to a right under the Regulation (or other applicable program, as the context requires) to emit one tonne of carbon dioxide (or the carbon dioxide equivalent of other GHGs).

² All monetary references in this document are to United States dollars unless otherwise indicated.

Program as a market participant, thereby establishing itself in the business of trading emissions allowances in Ontario.

6. On 15 May 2018, KS&T took part in the joint (Ontario, Québec and California) cap and trade auction as an Ontario registered market participant. KS&T purchased [REDACTED] allowances (the **Purchased Allowances**) for the Purchase Price. KS&T paid these funds in full as directed by Ontario. The Purchased Allowances were deposited into KS&T's Ontario cap and trade registry account on 11 June 2018.
7. On 15 June 2018, Premier-designate Doug Ford abruptly announced that the Province would “cancel” the cap and trade program and immediately withdraw from future allowance auctions. This declaration (which violated the terms of Ontario's agreement with Québec and California) prompted immediate suspension of emission allowance transfers between Ontario and both Québec and California, effectively stranding allowances in current accounts and precluding any trading of Ontario held allowances either within or outside Ontario.
8. On 3 July 2018, Ontario promulgated Ontario Regulation 386/18 (**Regulation 386/18**), repealing the Regulation. Regulation 386/18 expressly prohibited Ontario-registered cap and trade emission allowance participants in any category from any kind of purchasing, selling, trading or otherwise dealing in emission allowances.
9. On 25 July 2018, Ontario introduced Bill 4 (the **Bill**), *the Cap and Trade Cancellation Act* (the **Cancellation Act**), which went on to receive Royal Assent on 31 October 2018. The Cancellation Act repeals the Act and thereby formally ends Ontario's Cap and Trade Program.³ Further, the Cancellation Act denies compensation to all market participants. The Cancellation Act bars related domestic legal proceedings, with retroactive effect, and summarily declares that any action taken pursuant to the Cancellation Act does not constitute an expropriation.
10. In response to public comments questioning market participants' exclusion from compensation under the Cancellation Act, Ontario responded that “...market participants without a compliance obligation chose to take risks as market traders and speculators,” and therefore merited no compensation for the allowances they held that were summarily cancelled by the Province.
11. In November 2018, Ontario implemented a compensation procedure for eligible participants.
12. In February 2019, KS&T filed for compensation in accordance with the Ontario procedure.
13. Through a letter dated 14 March 2019, Ontario denied KS&T's claim for compensation on the basis that KS&T was not entitled to compensation because it was a market participant.

³ *An Act respecting the preparation of a climate change plan, providing for the wind down of the cap and trade program and repealing the Climate Change Mitigation and Low-carbon Economy Act, 2016 (“Cap and Trade Cancellation Act, 2018”), 1st Sess, 42nd Leg, Ontario, 2018 (first reading July 25, 2018), Exhibit CL-1.*

14. On 14 May 2020, the Claimants held formal consultations with the Respondent under Article 1118 of NAFTA regarding the damages they have suffered as a result of Ontario's measures in breach of NAFTA Chapter Eleven. Since these consultations failed to result in a mutually agreeable resolution of the claim, this Request is filed to ensure that the Respondent compensates the Claimants in full of all damages, costs and other related losses both entities have incurred as a result of Ontario's measures. Canada is responsible for such breaches pursuant to NAFTA Article 105 and international law.

II. THE PARTIES

A. The Claimants

15. Koch and KS&T submit this Request on their own behalf as qualifying investors under Article 1116 of the NAFTA.
16. Koch is a U.S. (Kansas) privately held company, with its principal registered place of business at 4111 East 37th Street North, Wichita, KS 67220. Koch was founded in 1940. Through its subsidiaries, Koch is involved in the manufacturing, refining and distribution of petroleum, chemicals, energy, fibers, intermediates and polymers, minerals, fertilizers, pulp and paper and chemical technology equipment, as well as in ranching, finance and commodities trading and investing.
17. KS&T is organized under the laws of Delaware and is a wholly-owned subsidiary of Koch. KS&T's business initially focused on the purchase and sale of energy products before expanding into trading in a broad variety of commodity markets, including cap and trade emissions allowances. KS&T's role within the Koch enterprise is to engage on a for-profit basis in the specialist business of energy and related market trading, and also contracts with other Koch companies with corresponding emissions and other compliance obligations. KS&T seeks to ensure that relevant Koch companies meet compliance obligations in the most efficient manner possible, while acting as an independent profit center within the Koch group of companies. KS&T's principal place of business is also 4111 East 37th Street North, Wichita, KS 67220.
18. KS&T invested in Canada by acquiring the Purchased Allowances under the Cap and Trade Program in May 2018, along with other allowances it bought and sold in the course of doing business as a registered market participant under the Program. Koch indirectly holds this same investment through KS&T. Koch further holds other substantial investments in Canada, including considerable Ontario-based enterprises owned and operated by its 100% subsidiaries. These include, but are not limited to, an INVISTA nylon plant and a global research and development center for industrial nylon fibers in Kingston, Ontario, as well as an INVISTA plant in Maitland, Ontario that produces engineered polymers, an intermediate product for the automotive industry. Overall, Koch investments employ approximately [REDACTED] people in Ontario.

B. The Respondent

19. Canada is a sovereign State which is a Party to the NAFTA and a Contracting State to the Convention.

20. Under Article 1137(2) of the NAFTA, delivery of notices and documents to the Government of Canada shall be made to the following address:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
Canada

21. The following has been the principal point of contact within the Government of Canada concerning this matter:

E. Alexandra Dosman
Trade Law Bureau | Direction générale du droit commercial
international - JLTB
Lester B. Pearson Building
125 Sussex Drive
Ottawa, ON K1A 0G2
Canada

Email: alexandra.dosman@international.gc.ca
Tel+1-343-549-8977

III. CONSENT TO THE JURISDICTION OF THE CENTRE

A. The Claimants' Consent

22. The Claimants have consented to the submission of this dispute to the jurisdiction of ICSID by the filing of this Request for Arbitration.

B. The Respondent's Consent

23. The Respondent's consent arises through the text of the NAFTA, and the operation of the United States-Mexico-Canada Agreement (**USMCA**).
24. In NAFTA Article 1122(1), Canada consented to submit to arbitration claims for breaches of a substantive obligation of Chapter Eleven of that treaty. Further, NAFTA Article 1122(2) states that "[t]he consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of ... Chapter II of the ICSID Convention (Jurisdiction of the Centre) ... for written consent of the parties."
25. The NAFTA entered into force in 1994, and was terminated on 1 July 2020.⁴ However, pursuant to Annex 14-C of the USMCA, Canada consented to submit to arbitration

⁴ See North American Free Trade Agreement (1994), Chapter Eleven, **Exhibit CL-2**; Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (30 November 2018), **Exhibit CL-3**.

(continued)

claims under Chapter Eleven of the NAFTA with regard to “legacy investments” until 1 July 2023.⁵

26. Annex 14-C defines “legacy investment” as “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement.”⁶
27. Article 1(a) of Annex 14-C specifically provides that “Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994...”.
28. Article 2(a) of Annex 14-C further confirms that “[t]he consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of: (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre)...”.
29. Article 3 of Annex 14-C finally establishes that “A Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.”
30. The Claimants hold a “legacy investment” for the purposes of the USMCA, in that the investment predates the termination of NAFTA and was made during the period that Agreement remained in force. This Request has been filed within three years of the termination of NAFTA 1994. The USMCA remains in force between the United States and Canada.⁷
31. Accordingly, the conditions for consent to arbitration under the ICSID Convention have been fulfilled.

C. The Claimants have Fulfilled the NAFTA’s Procedural Requirements

32. The temporal requirements set out in Article 1119 and 1120(1) of the NAFTA have been met. First, the Claimants have complied with Article 1119 by submitting the notice of intention to submit a claim to arbitration to Canada “at least 90 days before” filing this Request for Arbitration.⁸ Second, the Claimants have satisfied Article

⁵ United States-Mexico-Canada Agreement, Annex 14-C, **Exhibit CL-4**. The USMCA allows claims to continue to be brought under NAFTA Chapter Eleven with regard to “legacy investments” for a period of three years after the coming into force of the USMCA, which occurred on 1 July 2020.

⁶ Annex 14-C, section 6(a), definition of “legacy investment”. See *id.*

⁷ Government of Canada, Treaties (Excerpt), **Exhibit C-1**.

⁸ Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of the North American Free Trade Agreement, 20 February 2020, **Exhibit C-2**. See also Letter from Shendra Melia (Global Affairs Canada) to Claimants’ counsel, 23 March 2020, **Exhibit C-3** (“This letter confirms receipt by the Government of Canada, on February 20, 2020, of a Notice of Intent to Submit a Claim to Arbitration ... under Section B of Chapter Eleven of the North American Free Trade Agreement ... served on behalf of Koch Industries Inc. and Koch Supply & Trading, LP.”).

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1120(1), which states that a disputing investor may submit a claim to arbitration “provided that six months have elapsed since the events giving rise to a claim.” More than six months have elapsed since the cancellation of the Cap and Trade Act on 31 October 2018, when the Claimants began to incur damages.

33. The conditions precedent to submission of a claim to arbitration, as provided for in Article 1121 of the NAFTA, have also been satisfied. The Claimants have provided the requisite consent to arbitration and waiver in the form contemplated by Article 1121 at **Annex A** to this Request.
34. In addition, Article 1120(1) provides that if both the disputing Party and the Party of the investor are parties to the Convention, the dispute may be submitted to the Centre at the request of the investor. The Claimants are enterprises organized under the laws of the United States, and are therefore investors of the United States under the definitions set out in Article 1139 of the NAFTA.⁹ The United States ratified the Convention on 1 November 2013, and the Convention entered into force with respect to Canada on 1 December 2013.¹⁰ Therefore, each of the United States and Canada is a member of the Convention, and the Claimants may submit their arbitration claim to the Centre.
35. Canada’s consent to arbitration, and the Claimants’ filing of this Request for Arbitration thus form the agreement to arbitrate between the Parties to the dispute.

IV. THE ISSUES IN DISPUTE

36. This claim concerns Ontario’s illegal expropriation of KS&T’s Purchased Allowances through its arbitrary denial of compensation for cancelled emission allowances, and related denial of justice. When Premier-designate Ford’s incoming government summarily cancelled Ontario’s mandatory Cap and Trade Program, it eliminated Koch’s and KS&T’s substantial property right in the Purchased Allowances acquired just weeks before at the Ontario-sponsored emissions allowance auction, without providing any compensation. This measure individually, and the subsequent regulatory and legislative measures restricting and formally cancelling the Cap and Trade Program, individually and severally, breached Article 1110 of the NAFTA. Moreover, Ontario denied access to courts to claim compensation for its expropriation and treated the Claimants in an arbitrary manner. Ontario in so doing repudiated the Claimants’ reasonable and justifiable expectations objectively based upon Ontario’s conduct, including the Cap and Trade Program’s specific provisions for market participants and Ontario’s international commitment to an orderly wind-down of the Program. These measures individually and severally constitute a breach of Article 1105(1) of the NAFTA. Canada is responsible under international law for all of these measures pursuant to NAFTA Article 105.

⁹ Koch Supply & Trading, LP, Certificate of Good Standing, 1 December 2020, **Exhibit C-4**; Koch Industries Inc., Certificate of Good Standing, 1 December 2020, **Exhibit C-5**.

¹⁰ List of Contracting States and Other Signatories of the Convention (as of 9 June 2020), ICSID, **Exhibit C-6**.

A. Factual History

1. Ontario Introduced its Cap and Trade Program in 2016 with the Purpose of Reducing Carbon Emissions
37. In 2016, Ontario adopted the Act and its related Regulation. The Act and Regulation capped the amount of GHGs that covered companies could release and provided for penalties if companies exceeded these mandatory limits. Participation was mandatory for certain businesses that exceeded an emissions threshold, including most enterprises in the energy sector.
38. One of the central features of a cap and trade program is “trade”; that is, the creation of a market for emission allowance trading. Ontario’s Cap and Trade Program accordingly was designed as a market-based trading system for emissions that allowed for the sale and purchase of tradeable emission allowance certificates on the secondary market. Creating a secondary market allowed entities to sell their surplus and unused certificates and permitted other emitters requiring additional certificates to purchase them, but at increasingly higher prices.
39. The Act and Regulation provided that the Province would regularly sell allowances through public auction.¹¹ Each allowance entitled the holder to emit one tonne of GHGs.¹² Consistent with the market approach at the heart of the program, allowances were tradeable and were designed to be capable of being sold and purchased on the secondary market. Accordingly, if an emitter’s actual emissions were less than the allowances it held, it was entitled to sell its unused carbon allowances on the market. By design, the number of allowances in circulation would be reduced over time. The Province envisioned that gradually constraining allowance supplies, combined with the effect of forces in the secondary market, would steadily increase the cost of the allowances.
40. Allowance auctions generated revenue for Ontario. Under the Act, money raised from Ontario’s Cap and Trade Program was to be deposited into a new Greenhouse Gas Reduction Account (the **Account**). Funds paid into the Account were designated for investment into Ontario carbon reduction projects and other carbon reduction initiatives.

¹¹ Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 32, **Exhibit CL-5**; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, **Exhibit CL-6**. Regulation 144/16, Section 58(1) mandated that such an auction would be held in Ontario four times per year, starting in 2017. Results of the auction would be posted no later than 45 days following the auction’s conclusion (Section 64(2)). Summary results were to be followed by a proceeds report showing the total dollar amounts of auction proceeds received by each of Ontario, Québec and California (Section 64(1)). See Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Sections 58 and 64, **Exhibit CL-6**.

¹² Under the Regulation, “[a]n Ontario emission allowance or Ontario credit is equivalent to one tonne of CO₂e,” or carbon dioxide equivalent. Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Section 10, **Exhibit CL-6**.

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41. The Act defined a broad set of emitters as “**mandatory participants**.”¹³ These included a range of industrial actors subject to mandatory emissions reporting requirements and whose annual emissions exceeded 25,000 tonnes of CO₂ per annum.¹⁴ Industrial actors falling within the scope of emissions reporting requirements but whose annual emissions were between 10,000 and 25,000 tonnes of CO₂ could also take part in the Cap and Trade Program as “**voluntary participants**.”¹⁵
42. Importantly, the Act also provided for “**market participants**” who could purchase allowances at auction for resale.¹⁶ As the Act recognized, the efficiency of the carbon market depended largely on the ability to freely trade carbon allowances in the secondary market. The role of market participants was crucial to the functioning of the secondary market in a number of ways. By building inventory, market participants created an emission allowance spot market and provided essential liquidity. The existence of a secondary market also enabled mandatory and other participants to engage in price discovery, providing a transparent indicator of market value. These price signals would in turn inform investment and market decisions by mandatory participants. Market participants also served as ready buyers for mandatory participants who wanted to finance carbon reduction investments, in part, by selling unused allowances.
43. Through such trades, mandatory and voluntary participants would be able to realize the value of their carbon emissions reductions and seek additional carbon allowances as necessary. The Cap and Trade Programs of California and Québec, which predated the Ontario Program, both provided for the category of market participants, as they were necessary to the functioning of each system. Since Ontario envisaged linking its emissions trading market with those of California and Québec, it sought to emulate the structure of these existing Programs, including by providing for market participants.
44. On 22 September 2017, Ontario, Québec and California signed an Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (the **OQC Agreement**). The OQC Agreement, which came into effect on 1 January 2018, linked the three carbon markets to harmonize regulations and

¹³ Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 15, **Exhibit CL-5**; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Sections 21-27, **Exhibit CL-6**.

¹⁴ Pursuant to Ontario Regulation 452/09: Greenhouse Gas Emissions Reporting, Table 2, industrial actors required to report annual emissions included persons engaged in ammonia production, cement production, electricity generation, ferroalloy production, glass production, hydrogen production, petrochemical production, petroleum refining, pulp and paper and soda ash production, among other activities. Reporting was also required for electricity importers, natural gas distributors and petroleum suppliers subject to prescribed conditions. *See* Environmental Protection Act, Ontario Regulation 452/09, Table 2, **Exhibit CL-7**.

¹⁵ Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 16, **Exhibit CL-5**; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Sections 28-35, **Exhibit CL-6**.

¹⁶ Climate Change Mitigation and Low-carbon Economy Act, 2016, Section 17, **Exhibit CL-5**; Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Sections 36-38, **Exhibit CL-6**.

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allowed for the mutual recognition and trading of allowances among the three jurisdictions.¹⁷ The OQC Agreement provided that if any of its parties sought to withdraw from the arrangement, they would provide at least a year's notice.¹⁸ By linking the Ontario market to those of California and Québec, the Province significantly expanded the scale of the carbon allowances trading market to which its participants had access. This step deepened the pool of allowances in the market, encouraging greater supply, liquidity and price transparency.

2. KS&T Participated in Ontario's Auction as a Market Participant

45. Koch participated in the May 2018 Western Climate Initiative (WCI) joint auction through KS&T, which had been registered as a market participant under the Regulation since 2017, when it established a Compliance Instrument Tracking System Service (CITSS) account and a designated representative in the Province. Koch and KS&T did so to secure carbon allowances for Koch affiliates with emission compliance obligations under the mandatory legislation and regulations in the linked Québec-Ontario-California carbon allowances market. KS&T sought to fulfil this role given the latter company's specialized market trading role within the Koch group of companies. For KS&T, participation was consistent with its Ontario business model of buying and selling carbon allowances acquired through the Ontario auction process and on the secondary Ontario market, for resale either internally to Koch companies or to third parties. KS&T already had participated in Ontario-only auctions of 2017, and in the initial WCI joint auction of February 2018. In addition, KS&T had regularly been engaged in multiple trades in the secondary market from 2017 onward. In connection with this investment, KS&T since 2017 had actively sought to develop its contacts in the Ontario carbon allowances market with a view to third party sales.
46. For the May 2018 auction, [REDACTED] by Flint Hills Resources (FHR), a wholly owned Koch affiliate with emissions compliance obligations, including a firm delivery obligation of approximately [REDACTED] of carbon allowances due by [REDACTED]. Pursuant to that arm's-length contract, KS&T stood to benefit by investing in the Ontario carbon allowances through the auction and reselling them to [REDACTED]. KS&T understood that any additional allowances it purchased at auction also could be resold to Koch businesses with future emissions compliance obligations, including those of Koch mandatory participants in Ontario, and otherwise could be sold to third parties on the secondary allowances market (indeed, KS&T had firm third party obligations to Ontario purchasers in the spring of 2018). KS&T's auction participation as an Ontario

¹⁷ Linking is the process through which the allowances can be used interchangeably from one linked program to the other. For example, emission allowances acquired through the Ontario auction could be used in California and Québec and vice-versa. *See, e.g.*, Climate Change Mitigation and Low-carbon Economy Act, Ontario Regulation 144/16, Sections 10.1, **Exhibit CL-6**.

¹⁸ Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions between California, Ontario and Québec, 22 September 2017, Article 17 (Withdrawal Procedure), **Exhibit CL-8**. ("A Party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to give 12 months notice of intent to withdraw to the other Parties. A Party that intends to withdraw from this Agreement shall endeavor to match the effective date of withdrawal with the end of a compliance period.")

registered market participant in turn would contribute to the success of Ontario's Cap and Trade Program, bringing millions of dollars into the Account, funds designated under the Act to support green energy initiatives in the Province.

47. At the 15 May 2018 auction, KS&T therefore acquired the Purchased Allowances in Ontario's publicly mandated emission allowances auction, paying the Purchase Price as directed by Ontario as consideration.
48. On 11 June 2018, the Purchased Allowances were deposited into KS&T's Ontario Cap and Trade Registry Account.

3. The Ontario Premier's Opposition to and Declaration of the Province's Withdrawal from the Cap and Trade Program

49. On 7 June 2018, Ontario's Progressive Conservative (PC) party won a majority in the Ontario general election. Under the Province's parliamentary system, this meant that the leader of the PC Party, Doug Ford, would be designated Premier of Ontario.
50. One week later, on 15 June 2018, Premier-designate Ford announced without notice that Ontario "will ... cancel Ontario's current cap-and-trade scheme" and withdraw from the agreement linking Ontario with the Québec and California cap-and-trade markets.¹⁹ He also announced he had directed the government "to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits."²⁰ Premier-designate Ford also affirmatively announced that "[t]he government will provide clear rules for the orderly wind down of the cap-and-trade program."²¹ These definitive declarations by the Premier-designate with no prior notice to any or all entities in the market precipitated the immediate suspension of the transfer system between Ontario and both Québec and California, as those jurisdictions moved to protect their allowance markets and cap and trade systems. The outcome was entirely predictable, as otherwise Ford's announcement would have precipitated a flight of allowances from the Ontario system into the California and Québec systems, flooding them with excess allowances and undercutting their impact on emissions control behaviour. The declarations also were expressly in violation of the terms of the OQC Agreement, which provided for 12 months' notice of an intention to withdraw. The declarations effectively destroyed the value of the Purchased Allowances which no longer could be traded either internally within the Province or to any external entities.
51. On 3 July 2018, Ontario confirmed in law what it had already accomplished in practice, by introducing Regulation 386/18, and repealing the Regulation.²² Regulation 386/18

¹⁹ Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax," 15 June 2018, **Exhibit C-7**.

²⁰ *Id.*

²¹ *Id.*

²² The archived Ontario cap and trade program web site notes that the government on 3 July 2018 "we cancelled the cap and trade regulation and prohibited all trading of emission allowances". See Ontario, Archived – Cap and Trade, Overview, **Exhibit C-8**.

(continued)

prohibited all Ontario registered cap and trade emission allowance participants from purchasing, selling, trading or otherwise dealing in carbon allowances.²³

52. On 25 July 2018, Ontario introduced the Bill. A second Ontario press release of this date confirmed that pursuant to the provisions of the Bill, participants would only be eligible for compensation if they:
- a. Were required to participate in the program;
 - b. Had accumulated costs beyond their assessed emissions; and
 - c. Did not pass additional costs accrued because of the program down to consumers.

In other words, the Bill foresaw withholding compensation from market participants for any unused allowances they held, despite that the Act and Regulation expressly had mandated market participants to trade in allowances as an integral and essential building-block of the Cap and Trade Program.

53. In the formal public consultation leading to adoption of the Bill, members of the public questioned the unfairness of barring market participants from compensation for allowances they had purchased from Ontario under the Cap and Trade Program. Ontario's official response was that its compensation approach "recognizes that regulated participants may have purchased allowances to comply with the regulation whereas *market participants without a compliance obligation chose to take risks as market traders and speculators*."²⁴ This response confirmed that Ontario's measure lacked any rational policy basis: market participants could not be assumed to have undertaken the risk of an uncompensated and illegal expropriation contrary to international law when taking part in the Cap and Trade Program. Moreover, the response ignored that Ontario expressly induced market participants in light of the value they contributed to meeting the government's stated objectives of reducing GHG emissions at a lower overall price to the Ontario economy. Ontario's response also arbitrarily ignored the role that market participants played in assisting mandatory participants to meet their compliance obligations.
54. On 24 October 2018, Koch wrote to Premier Ford noting that the Bill "arbitrarily disadvantages multi-national corporate compliance groups, like Koch, for complying with the rules and regulations of the cap and trade program of the former Liberal government." Koch suggested a series of amendments to compensate companies such as Koch whose allowances had been rendered worthless by Ontario's measure.
55. Ontario rejected Koch's proposals and proceeded to adopt the Cancellation Act without material amendments.

²³ Climate Change Mitigation and Low-Carbon economy Act, 2016, Ontario Regulation 386/18, **Exhibit CL-9**.

²⁴ See Bill 4, Cap and Trade Cancellation Act, 2018, Comments received, 15 November 2018, p. 6 (pdf), **Exhibit C-9**.

4. Ontario Cancelled the Cap and Trade Act, Arbitrarily Denying Market Participants Compensation
56. The Cancellation Act, which provided for the termination of Ontario's Cap and Trade Program and purported to cancel any remaining carbon allowances in Ontario accounts, received Royal Assent on 31 October 2018. With regard to market participants, Section 8(5)1 provided as follows:

Unless otherwise provided by a regulation made under paragraph 5 of subsection 15 (2), no compensation shall be paid to the following participants: 1. A participant that was registered as a market participant within the meaning of the Climate Change Mitigation and Low - carbon Economy Act, 2016.
 57. The Cancellation Act also purported to limit potential government liability and to bar proceedings against the government. Section 9 unlawfully excludes compensation for additional loss, including loss of revenues or profits related to the enactment of the Cancellation Act, the repeal of the Act or the making or revocation of any regulation under either the Cancellation Act or the Act. Section 10 unreasonably bars any proceedings in respect of the Cancellation Act, with retroactive effect. Subsection 10(6) of the Cancellation Act purports that none of the government's actions constitute an expropriation or injurious affectation under the Expropriations Act and/or at law.
 58. On 14 November 2018, Ontario launched a compensation procedure for eligible participants.
 5. KS&T Was Unjustly Denied Compensation for the Taking of its Emission Allowances
 59. On 14 February 2019, in the hope that Ontario would recognize the injustice and illegality of excluding it from any relief, KS&T filed an application for compensation flowing from the purported cancellation of its Purchased Allowances.
 60. On 14 March 2019, Ontario rejected KS&T's request for compensation. In its official Notice, Ontario stated as follows: "Koch Supply & Trading, LP was registered under the Cap and Trade program as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* [...] subparagraph 1 of subsection 8(5) specifically states that entities that were registered as a market participant under the cap and trade program are not eligible to receive compensation."²⁵
 61. Ontario has since refused all requests by Koch and KS&T to provide compensation for the Purchase Price for its Purchased Allowances.

²⁵ Ontario Ministry of the Environment, Conservation and Parks, Final Determination Notice to Koch Supply & Trading, LP of the Decision in Respect of an Application for Cap and Trade Compensation, 14 March 2019, **Exhibit C-10**.

B. The Respondent has Violated NAFTA Chapter Eleven

1. Cap and Trade Rights are Protected Investments Under NAFTA Article 1139

62. At the time Ontario adopted its unlawful measures, KS&T held a right under Ontario law to over █████ cap and trade emission allowances, secured only a few days prior to Ontario's unlawful measures through a public auction conducted at Ontario's behest. KS&T paid the Purchase Price as consideration for these Purchased Allowances. The funds KS&T paid were destined by statute to be used to finance a range of prescribed investments in greenhouse gas reduction initiatives in Ontario relating to renewable and alternative energy sources, land use and buildings, transportation, industry, agriculture, forestry, waste systems and financial models and services.²⁶
63. NAFTA Article 1139(g) defines investment to include intangible property "acquired with the expectation or used for the purpose of economic benefit or other business purposes." The Purchased Allowances were issued by the Province as tradeable certificates and were sold by the Province to KS&T for the Purchase Price. By definition, each allowance represented a right to emit one tonne of CO₂ emissions. Moreover, these rights were, and were designed to be, saleable. Indeed, tradability of the allowances was one of the essential features of the Cap and Trade Program. The allowances were to be used either for trading with third parties on the Ontario market, or to fulfil intra-company contractual obligations, with the goal of generating a return while ultimately assisting the relevant Koch companies efficiently comply with emissions control obligations. These various rights are clear examples of expected economic benefits and other business purposes and qualify the Purchased Allowances as an investment.
64. NAFTA Article 1139(g) further defines investment to include the commitment of capital to the territory of Canada. The Purchase Price KS&T invested in Ontario to purchase the Purchased Allowances also constituted a protected investment under the NAFTA.

2. The Respondent Has Violated NAFTA Article 1110 (Expropriation and Compensation)

65. The measures described above, individually and severally, are violations of NAFTA Article 1110 (Expropriation and Compensation). That article provides that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law and Article 1105(1) and (d) on payment of compensation in accordance with paragraphs two through six of Article 1110.
66. Here, KS&T acquired title to the Purchased Allowances through Ontario's May 2018 auction, for which it paid the Purchase Price. Ontario's decision to cancel the Cap and Trade Program, destroying the value of the Purchased Allowances; its hurried steps

²⁶ Climate Change Mitigation and Low-carbon Economy Act, 2016, Schedule 1, **Exhibit CL-5**.

thereafter formally to freeze trading in allowances and subsequently to eliminate the Cap and Trade Program and purport to cancel the allowances; and its refusal to pay KS&T any compensation, expropriated, directly and/or indirectly, existing valuable property rights.

67. The Purchased Allowances are property rights constituting investments under NAFTA Article 1139 as “intangible” property “acquired in the expectation or used for the purposes of economic benefit or other business purposes.” Intangible property can of course as here be the subject of an expropriation.²⁷
68. Moreover, the expropriation here was “illegal” under international law because it was a taking without public purpose; it was discriminatory, as only a very limited number of mandatory participants were provided compensation; the Cancellation Act violated the Minimum Standard of Treatment by denying KS&T access to a court remedy (in which regard, see Article 1105(1) analysis below); and KS&T was not paid compensation. In any case, even if there were public interest motivations for the measures, they remain expropriatory and compensation is still owed.²⁸
69. Canada cannot rely on its “police powers” to excuse this indirect expropriation, given the disproportionate, arbitrary and discriminatory targeting of market participants with regard to non-compensation, which bears no rational connection to the purposes of the Cancellation Act.
70. Whether the measure is assessed as a direct or as an indirect expropriation, compensation owing would be the same: Article 1110 provides that compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”) and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

3. The Respondent Has Breached NAFTA Article 1105(1) (Minimum Standard of Treatment)

71. The Ontario Government’s measures amount to a violation of NAFTA Article 1105(1) (Minimum Standard of Treatment). Article 1105(1) provides that each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
72. The manner in which Ontario terminated its Cap and Trade Program violated NAFTA Article 1105(1). Article 10 of the Cancellation Act bars any court proceedings or claims in respect of the Act and of the Cap and Trade Program, with retroactive effect. The barring of any domestic proceedings in connection with a State action is a classic

²⁷ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2), Award, 16 April 2014, ¶¶ 159-164, **Exhibit CL-10**.

²⁸ *See Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226) Final Award, 18 July 2014, ¶¶ 1763, 1769, **Exhibit CL-11**.

(continued)

example of denial of justice, one of the core obligations of the Minimum Standard of Treatment of investors under international law (MST), which Article 1105(1) upholds.

73. Article 1105(1) also protects investors against manifestly arbitrary measures by a host State.²⁹ Ontario's responses to public questions confirmed that it had denied market participants compensation on the manufactured basis that they were "speculators," rather than "legitimate" users of allowance credits. The explanation on its face lacks any rational basis. It baldly ignores the fact that Ontario itself created a class of market participants and did so to support the critical market features of the Cap and Trade Program. This distinction is also based on the absurd premise that by playing a role in the allowances market, market participants knowingly and willingly undertook the risk of illegal expropriation of such allowances by Ontario.
74. In considering the breach of Article 1105(1), it is also relevant that Ontario's measures amount to a repudiation of KS&T's reasonable and justifiable expectations arising out of Ontario's objective inducement of its investment in the Province.³⁰ Ontario specifically engineered the creation of a category of market participants such as KS&T, knowing that their actions in acquiring allowances and trading them on the secondary market was an essential component of the success of its Cap and Trade Program, and was indeed a requirement to link its market to that of Québec and California. Moreover, through the OQC Agreement Ontario made an objective public commitment that it would only withdraw from the Agreement, if at all, in an orderly fashion over the course of a twelve-month period. Instead, the Province repudiated its commitments under the OQC Agreement with immediate effect and summarily cancelled Cap and Trade, adding punitive provisions that specifically targeted KS&T and other market participants and arbitrarily refused them all compensation.

²⁹ *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB (AF)/00/3) Award, 30 April 2004, ¶ 98, **Exhibit CL-12**; see also *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 [Spanish], ¶¶ 650-651, **Exhibit CL-13**; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2) Award, 7 March 2017 [Spanish], ¶ 527, **Exhibit CL-14**; *TECO Guatemala Holdings, LLC v. The Republic of Guatemala* (ICSID Case No. ARB/10/17) Award, 19 December 2013, ¶ 587, **Exhibit CL-15**.

³⁰ *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000, ¶ 87, **Exhibit CL-16**; *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Award, 26 January 2006, ¶ 147, **Exhibit CL-17**; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Final Award, 8 June 2009, ¶¶ 621-622, **Exhibit CL-18**; *Merrill & Ring Forestry L. P. v. Government of Canada* (ICSID Case No. UNCT/07/1, ICSID Administrated), Award, 31 March 2010, ¶¶ 150, 233, **Exhibit CL-19**; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶¶ 140-141, **Exhibit CL-20**.

C. The Claimants Have Suffered Loss As a Result of the Respondent's Violations of NAFTA Chapter Eleven

1. The Claimants Have Suffered Damages in Connection with Their Investment as a Result of Acts in Breach of the Treaty Standards Attributable to Canada Under International Law
75. The following pronouncements and legislative and regulatory acts of the Province breach Canada's obligations under Chapter Eleven of the NAFTA and have caused Koch and KS&T loss and damage:
- a. The Ontario Premier-designate's declaration of 15 June 2018, made without prior notice, "cancelling" the Ontario Cap and Trade Program and withdrawing Ontario's participation from the next scheduled allowance auction, which resulted in the immediate suspension of any allowance transfers within Ontario and between the Province of Ontario and the allowance markets in both the Province of Québec and the State of California, destroying the value of carbon allowances issued by and held in Ontario, including KS&T's Purchased Allowances.
 - b. Regulation 386/18, promulgated on 5 July 2018, prohibiting Ontario registered cap and trade emission allowance participants of any kind, including KS&T, from purchasing, selling, trading or otherwise dealing in emission allowances.
 - c. The Cancellation Act, introduced on 25 July 2018 and effective 31 October 2018, purporting to cancel outright all Ontario emission allowances, including KS&T's Purchased Allowances, denying compensation to market participants holding emission allowances, including KS&T, and formally prohibiting any rights of action before the Ontario Courts.
 - d. Ontario's decision on 14 March 2019, made on the basis of the provisions of the Cancellation Act, formally denying Koch and KS&T any compensation for the measures purporting to eliminate KS&T's emission allowances.
76. These measures purported to eliminate KS&T's property rights in, and KS&T's ability to enjoy and dispose of, the Purchased Allowances, for no legitimate public purpose, in a discriminatory manner, in violation of due process and of the standard upheld under NAFTA Article 1105(1) and with express refusal of any compensation. They therefore amounted to an illegal expropriation, in violation of NAFTA Article 1110. Moreover, they constitute violations of the obligation of fair and equitable treatment in accordance with customary international law, in violation of NAFTA Article 1105(1).
77. Pursuant to NAFTA Article 105, the Government of Canada is responsible for measures of provincial governments that fail to respect the provisions of NAFTA, including obligations Canada has agreed to observe *vis-à-vis* investors of another Party.³¹

³¹ NAFTA Article 105 (Extent of Obligations) provides as follows: *The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments. See North American Free Trade Agreement (1994), Chapter One, Exhibit CL-21.*

2. Approximate Damages Suffered

78. As a result of measures taken by Ontario, Koch and KS&T have suffered losses in an amount to be fully quantified, but not less than \$30,158,240.95, and including, but not limited to:
- a. The value of the [REDACTED] emission allowances KS&T purchased at auction from Ontario weeks before the measures for \$30,158,240.95;
 - b. The cost of obtaining allowance “cover” in connection with KS&T’s legal obligations to its counterparty;
 - c. The costs of in-house and outside counsel, including, but not limited to, the costs of preparing the Notice of Intent, the costs of the unsuccessful consultations, the costs of preparing this Request and any subsequent arbitration, enforcement or other proceedings related to the injuries caused to Koch and KS&T by the measures;
 - d. The management, administrative and overhead costs Koch and KS&T incurred in taking remedial steps and to obtain relief in response to the measures and the injuries the measures caused Koch and KS&T; and
 - e. Compound interest, at a rate to be determined, running from the date of the losses caused by the measures through full payment.
79. Moreover, in the case of an “illegal” expropriation (as here), a claimant may instead claim the higher calculation that results from applying the Article 1110 standards and the general standard of “full reparation” for illegal acts at international law. Koch and KS&T reserve the right to elect to do so at the appropriate time.

D. Requested Relief

80. The Claimants request that the Arbitral Tribunal constituted in accordance with NAFTA Chapter Eleven:
- a. Award monetary damages to Koch and to KS&T pursuant to Article 1116 in an amount to be fully quantified, but not less than \$30,158,240.95, for all injuries and losses by reason of, or arising out of, Canada’s breaches of Articles 1105(1) and 1110 of NAFTA;
 - b. Grant pre- and post-Award compound interest on the amount of damages awarded;
 - c. Compensate Koch and KS&T for all costs of the arbitration, as well as for their costs of legal representation and other related costs; and
 - d. Grant such other relief as the Arbitral Tribunal may deem just.

V. OTHER INFORMATION

A. Authorization of the Request

81. The Claimants have taken all necessary internal actions to authorize this Request for Arbitration. The Claimants' respective General Counsel have considered the matter and authorized consent to arbitration and execution of the instruments necessary to make this request.³² In addition, the Claimants have appointed the undersigned as attorneys in this matter, provided the appropriate notification to the Secretariat pursuant to Arbitration Rule 18(1), and specifically authorized the undersigned to file this Request. This Request has been fully authorized in accordance with the law and applicable corporate instruments.

B. Appointment of Counsel

82. Legal counsel for the Claimants is Christophe Bondy, Steptoe & Johnson UK LLP.
83. All correspondence in this matter should be directed to:

Christophe Bondy
Steptoe & Johnson UK LLP
5 Aldermanbury Square
London, EC2V 7HR
UK

cbondy@steptoe.com
Tel: +44 (20) 207 367 8028
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C. Fee for Lodging the Request

84. The Claimants have provided the fee for lodging this Request, a confirmation of which is attached.
85. The Claimants accordingly request that the Centre acknowledge and register this Request, and notify the Parties of its registration as soon as possible.

D. Constitution of the Tribunal

86. Having regard to Article 1123 of the NAFTA, Article 37 of the Convention, Rule 3 of the Institution Rules and Rule 2 of the Arbitration Rules, the Claimants request the constitution of a tribunal consisting of three arbitrators, one appointed by each party, and the President of the tribunal appointed by agreement of the parties or, failing such agreement, by the Secretary-General of the Centre.
87. In accordance with Rule 5(1) of the Arbitration Rules, the Claimants hereby notify the Secretary-General of their designation of Mr. Henri C. Alvarez, QC as their party-appointed arbitrator, and ask that the Secretary-General proceed to formally confirm

³² Authorization and Power of Attorney, signed by the General Counsel of Koch Industries, Inc. and the General Counsel of Koch Supply & Trading, LP, 1 December 2020, **Exhibit C-11**.

his acceptance in accordance with Rule 5(2) of the Arbitration Rules. Mr. Alvarez's contact details are as follows:

Henri C. Alvarez
Vancouver Arbitration Chambers
122 Eagle Pass
Port Moody, B.C. V3H 5E8
Canada

Tel. +1 604 506-7700

Email: halvarez@alvarezarbitration.com

E. Supporting Documentation

88. This Request is accompanied by **Exhibits C-1 to C-11**, and by **Exhibits CL-1 to CL-21**, listed in the attached Index of Exhibits

VI. SUBMISSION

89. On the basis of the above, the Claimants respectfully request that the Secretary-General: (a) acknowledge receipt of the Request; and (b) proceed to register the Request as soon as possible and notify the Parties of the registration, in accordance with Institution Rule 6(1).

Dated: 7 December 2020
London, UK

Respectfully submitted,



Christophe Bondy
Step toe & Johnson UK LLP

ANNEX A: WAIVER AND CONSENT

Pursuant to Articles 1121(1) and 1121(2) of the North American Free Trade Agreement (the NAFTA), Koch Industries, Inc. (Koch) and Koch Supply & Trading, LP (KS&T) each consent to arbitration in accordance with the procedures set out in the NAFTA and waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to measures of Canada alleged in the Request for Arbitration to be a breach referred to in Articles 1116 or 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the laws of Canada.

By:  _____
Koch Industries, Inc.

By:  _____
Koch Supply & Trading, LP

Name: Raymond F. Geoffroy III
Title: Vice President & General Counsel
Date: December 1, 2020

Name: Morten Vigilius
Title: Deputy General Counsel - Trading
Date: December 1, 2020