

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

BETWEEN:

LONE PINE RESOURCES INC.

Claimant

AND

THE GOVERNMENT OF CANADA

Respondent

FINAL AWARD

ARBITRAL TRIBUNAL:

Professor Dr. Albert Jan van den Berg (President)
Mr. David R. Haigh K.C.
Professor Brigitte Stern

SECRETARY OF THE TRIBUNAL

Mr. Benjamin Garel

Date of dispatch to the Parties: 21 November 2022

REPRESENTATION OF THE PARTIES

Representing Lone Pine Resources Inc.:

Sabrina A. Bandali
Vasilis Pappas
Valerie Hughes
Quentin Vander Schueren
Ethan Gordon

Bennett Jones LLP

3400 One First Canadian Place, P.O. Box 130
Toronto, ON M5X 1A4
Canada

André Ryan
Shaun E. Finn

BCF Business Law

25th Floor
1100 René-Lévesque Blvd West
Montréal, Québec H3B 5C9
Canada

Representing the Government of Canada:

Sylvie Tabet
Jean-François Hébert
Annie Ouellet
Éric Bédard
Johannie Dallaire
Marc-André Léveillé

Trade Law Bureau (JLT)

Global Affairs Canada
125 Sussex Drive
Ottawa, ON K1A 0G2
Canada

Nathalie Latulippe
Marc-Antoine Couet
Louis-Philippe Coulombe

Department of Justice

8, rue Cook
Québec QC G1R 0A4
Canada

TABLE OF CONTENTS

TABLE OF DEFINED TERMS	6
I. INTRODUCTION.....	15
II. PARTIES	16
III. PROCEDURAL HISTORY	18
IV. FACTUAL BACKGROUND.....	47
A. Shale Gas Exploration and Development.....	47
(1) St. Lawrence Lowlands and the St. Lawrence River.....	47
(2) Utica Shale	48
(3) Shale Gas	48
(4) Hydraulic Fracturing and Horizontal Drilling	48
(5) Conventional and Non-Conventional Resources	49
(6) Relevant Laws and Regulations.....	49
(7) Relevant Regulatory Bodies	51
(8) SEA	52
(9) BAPE	52
(10) Exploration License or Permit	53
(11) Other Permits	55
(12) Mining Register	55
(13) QOGA.....	55
(14) Farmout and Farmin Agreements	56
B. Québec’s Energy Policies.....	56
(1) Québec Energy Strategy 2006-2015	56
(2) QMNR Budget 2009-2010.....	57
C. Factual Background to Claimant’s Claims.....	58
(1) Claimant’s entry into Québec’s oil and gas market.....	58
a. Farmout Agreement and Original Permits	58
b. River Permit Agreement and River Permit	61
c. Assignment Agreements.....	66
(2) Events Leading up to the Introduction and Passage of Bill 18	70
a. SEA-1 and SEA-2	70
b. BAPE Report 273.....	73

c. SEA-SG Committee	73
d. Bill 18.....	74
e. The Act.....	78
f. Studies and Reports on Shale Gas Development Post-Enactment of the Act	79
V. PARTIES' CLAIMS AND REQUESTS FOR RELIEF.....	80
A. Claimant	80
B. Respondent	82
VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS	82
VII. OUTSTANDING PROCEDURAL ISSUES.....	83
A. Claimant's Request to Draw Adverse Inferences from Respondent's Allegedly Deficient Document Production.....	83
(1) Parties' Positions.....	83
(2) The Tribunal's Analysis.....	86
a. Non-Production of Documents by Respondent.....	87
b. Non-production of appropriate witnesses by Respondent at the Hearing	93
B. Respondent's Request to Strike Out from the Arbitration Record Certain Slides From Claimant's Closing Presentation at the November 2017 Merits Hearing	95
(1) Parties' Positions.....	95
(2) The Tribunal's Analysis.....	97
VIII. APPLICABLE LAW	97
IX. JURISDICTION	101
A. Introduction	101
B. Objection to the Tribunal's Jurisdiction Ratione Materiae	102
(1) Relevant Treaty Provisions	102
(2) Parties' Positions.....	103
a. Respondent's Position	103
b. Claimant's Position	109
(3) Non-Disputing Parties' Submissions	113
a. USA NDP Submission	113
b. Mexico NDP Submission	113
(4) The Tribunal's Analysis.....	114
a. Scope of Claimant's Alleged "Investment" in Canada	114
b. Whether the River Permit Rights are a protected investment under NAFTA Article 1139	117

C.	Objection to the Tribunal’s Jurisdiction due to the Alleged Lack of a “Legally Significant Connection” Between the Impugned Act and the Enterprise or its Investments	126
(1)	Relevant Treaty Provisions	126
(2)	The Parties’ Positions	127
a.	Respondent’s Position	127
b.	Claimant’s Position	129
(3)	Non-Disputing Parties’ Submissions	132
a.	USA NDP Submission	132
b.	Mexico NDP Submission	132
(4)	The Tribunal’s Analysis.....	132
a.	Legal Standard.....	133
b.	NAFTA Article 1101(1) in this Case	134
X.	LIABILITY	140
A.	Expropriation.....	140
(1)	Relevant Treaty Provisions	140
(2)	Parties’ Positions.....	141
a.	Claimant’s Position	141
b.	Respondent’s Position	148
(3)	Non-Disputing Parties’ Submissions	154
a.	USA NDP Submission	154
b.	Mexico NDP Submission	156
(4)	Amicus Curiae Submissions	156
a.	CQDE’s Submission.....	156
b.	Claimant’s Reply to CQDE’s Amicus Curiae Submission	160
(5)	The Tribunal’s Analysis.....	162
a.	Legal Standard.....	163
b.	Alleged Expropriation in this Case	167
B.	Minimum Standard of Treatment	173
(1)	Relevant Treaty Provisions	173
(2)	The Parties’ Positions	174
a.	Claimant’s Position	174
b.	Respondent’s Position	182
(3)	Non-Disputing Parties’ Submissions	190

a. USA NDP Submission	190
b. Mexico NDP Submission	191
(4) The Tribunal's Analysis.....	192
a. The Legal Standard	192
b. FET Breach in this Case.....	202
XI. DAMAGES	209
XII. COSTS	209
XIII. AWARD	212

TABLE OF DEFINED TERMS

Term	Description
2001 FTC Note	FTC's Notes of Interpretation of Certain Chapter 11 Provisions dated 31 July 2001
Act	<i>Act to limit oil and gas activities</i> , passed in the Québec National Assembly on 10 June 2011, which entered into force on 13 June 2011
Adam First Statement	Witness Statement of Mr. Marc-Antoine Adam dated 3 August 2017
Arbitration Costs	Costs excluding costs of legal representation and assistance, referred to in Article 40(a)-(c) of the UNCITRAL Rules
Asselin First Statement	Witness Statement of Ms. Luce Asselin dated 16 July 2015
Asselin Second Statement	Witness Statement of Ms. Luce Asselin dated 28 July 2017
Assignment Agreements	Forest Oil – Enterprise Assignment Agreement, Original Permits Assignment Agreement and the River Permit Assignment Agreement, collectively
Axani First Statement	Witness Statement of Mr. Douglas W. Axani dated 10 April 2015
Axani Second Statement	Witness Statement of Mr. Douglas W. Axani dated 19 May 2017
BAPE	Bureau d'audiences publiques sur l'environnement
BAPE Report 193	BAPE Report dated 31 August 2004
BAPE Report 273	BAPE Report dated 28 February 2011
BAPE Report 307	BAPE Report issued in November 2014
Bill 18	A bill presented to the Québec National Assembly on 12 May 2011, entitled <i>An Act to limit oil and gas activities</i>
Budget Plan 2009-2010	The Québec Government's Budget Plan of 2009-2010 dated 19 March 2009
Canada	Government of Canada
Centre	International Centre for Settlement of Investment Disputes
CFOL	Canadian Forest Oil Ltd, now known as Lone Pine Resources Canada Ltd.
Claimant	Lone Pine Resources Inc.

Claimant's Document Production Request	Claimant's request for production of documents dated 4 April 2016
Confidentiality Order	Procedural Order dated 11 March 2015
Constitution	Canadian Constitution Act, 1867
Contract Area	The geographical area stipulated in the Farmout Agreement as covered by the Original Permits
Counter-Memorial	Respondent's Counter-Memorial dated 24 July 2015 and filed on 25 January 2016
C-PHB	Claimant's Post-Hearing Brief dated 22 January 2021
CQDE	Centre québécois du droit de l'environnement
CQDE <i>Amicus</i> Submission	Written Submissions by CQDE dated 16 August 2017
CQDE's Application for Leave	Application for leave to file written submissions as <i>Amicus Curiae</i> by CQDE dated 16 August 2017
C-Response to <i>Amicus</i>	Claimant's observations dated 22 September 2017 to CQDE <i>Amicus</i> Submission
C-Response to NDP Submissions	Claimant's observations on the Mexico NDP Submission and the USA NDP Submission pursuant to Article 1128 of NAFTA dated 22 September 2017
Daigle First Statement	Witness Statement of Ms. Danie Daigle dated 28 July 2017
Deloitte	Deloitte LLP
Deloitte Damages First Report	Expert Report of Deloitte on Damages dated 23 July 2015
Deloitte Damages Second Report	Expert Report of Deloitte on Damages dated 3 August 2017
Deloitte Resources First Report	Expert Report of Deloitte on resource potential of Permit 2009PG490 dated 23 July 2015
Deloitte Resources Second Report	Expert Report of Deloitte on resource potential of Permit 2009PG490 dated 3 August 2017
Dorrins First Statement	Witness Statement of Mr. Peter Dorrins dated 7 April 2015

Dorrins Second Statement	Witness Statement of Mr. Peter Dorrins dated 19 May 2017
Draft Memorandum of 3 February 2011	A draft Memorandum prepared by the QMNR dated 3 February 2011
Draft Memorandum of 29 April 2011	A draft Memorandum prepared by the QMNR dated 29 April 2011
Draft Memorandum of 4 May 2011	A draft Memorandum dated 4 May 2011 presented alongside the draft Bill 18 by Minister Normandeau to the Cabinet
Dupont First Statement	Witness Statement of Mr. Jacques Dupont dated 15 July 2015
Enterprise	Lone Pine Resources Canada Ltd.
EQA	Environment Quality Act
Farmout Agreement	A Letter Agreement dated 5 June 2006 entered into between Forest Oil and Junex
FET	Fair and Equitable Treatment
Forest Oil	Forest Oil Corporation, the parent company of Claimant
Forest Oil – Enterprise Assignment Agreement	Assignment agreement dated 8 April 2009 between Forest Oil and the Enterprise, pertaining to the Farmout Agreement
Frappier First Statement	Witness Statement of Mr. Gerry Frappier dated 4 August 2017
FTI	FTI Consultancy Inc.
FTI First Report	Expert Report of FTI dated 8 April 2015
FTI Second Report	Expert Report of FTI dated 19 May 2017
FTC	NAFTA Free Trade Commission
Gagné First Report	Expert Report of Mr. Jean M. Gagné dated 24 July 2015
Gagné Reply Report	Expert Report of Mr. Jean M. Gagné dated 4 August 2017
GENIVAR	A consulting engineering firm which conducted the SEA-2 Report
GLJ	GLJ Petroleum Consultants Limited
GLJ First Report	Expert Report of GLJ dated 7 April 2015
GLJ Second Report	Expert Report of GLJ dated 18 May 2017
Gosselin First Statement	Witness Statement of Mr. Mario Gosselin dated 12 July 2015

Gosselin Second Statement	Witness Statement of Mr. Mario Gosselin dated 26 July 2017
IBA Rules	International Bar Association's Rules on the Taking of Evidence in International Arbitration 2010
ICJ Statute	Statute of the International Court of Justice, 1945
ICSID	International Centre for Settlement of Investment Disputes
Land Licenses	Four exploration permits, held by Junex on four blocks of lands in the Utica Shale basin: 1996PG950 (renumbered to 2006RS184), 2002PG597 (renumbered to 2009RS285), 2002PG596 (renumbered to 2009RS284) and 2004PG769 (renumbered to 2009RS286)
Lavoie First Statement	Witness Statement of Mr. Jean-Yves Lavoie dated 8 April 2015
Lavoie Second Statement	Witness Statement of Mr. Jean-Yves Lavoie dated 19 May 2017
Legal Costs	Costs of legal representation and assistance referred to in Article 40(e) of the UNCITRAL Rules
Lone Pine	Lone Pine Resources Inc.
LPRC	Lone Pine Resources Canada Ltd.
Memorial	Claimant's Memorial dated 10 April 2015
Mexico	United Mexican States, a non-disputing party in ICSID Case No. UNCT/15/2
Mexico NDP Submission	Mexico's non-disputing party submission dated 16 August 2017
Mining Act	Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011)
Mining Register	A public register of real and immoveable mining rights, established under Section 11 of the Mining Act
Minister of Sustainable Development	Minister of Sustainable Development, Environment and Fight against Climate Change, formerly known as the Minister of Environment until February 2005
Mr. Islam's Application for Leave	Application for leave to file written submissions as <i>Amicus Curiae</i> by Mr. Muhammad Muzahidul Islam, Lawyer, Supreme Court of Bangladesh, dated 4 August 2017
NAAEC	North American Agreement on Environmental Cooperation

NAFTA	North American Free Trade Agreement
Normandeau First Statement	Witness Statement of Ms. Nathalie Normandeau dated 16 July 2015
Notice of Arbitration	Notice of Arbitration dated 6 September 2013
Notice of Intent	Claimant's Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of NAFTA to Canada dated 8 November 2012
November 2017 Merits Hearing	Hearing on the merits held on 24 November 2017
November 2017 Merits Hearing, Tr., Day [x], [pp:ll]	Transcription (bilingual version) of the Hearing on the merits held on 24 November 2017, with indication of the day, pages and lines
October 2017 Merits Hearing	Hearing on the merits held between 2 and 13 October 2017
October 2017 Merits Hearing, Tr., Day [x], [pp:ll]	Transcription (bilingual version) of the Hearing on the merits held between 2 and 13 October 2017, with indication of the day, pages and lines
Order on <i>Amici</i> Applications	Procedural Order dated 10 September 2017 on the <i>Amici</i> Applications for Leave to file non-disputing party submissions
Order on Document Production	Procedural Order dated 27 May 2016 on the Parties' Disputed Document Production Requests
Order on Withheld and Redacted Documentation	Procedural Order dated 24 February 2017 on Withheld and Redacted Documentation
Original Permits	Four exploration permits, held by Junex on four blocks of lands in the Utica Shale basin: 1996PG950 (renumbered to 2006RS184), 2002PG597 (renumbered to 2009RS285), 2002PG596 (renumbered to 2009RS284) and 2004PG769 (renumbered to 2009RS286)
Original Permits Assignment Agreement	Assignment agreement dated 28 January 2010 between Junex and the Enterprise pertaining to the Original Permits
Parties	Claimant and Respondent, collectively

Parties' Document Production Requests	Claimant's Document Production Request and Respondent's Document Production Request, collectively
Party	Claimant and Respondent, individually
Permit PG490	Exploration permit bearing Permit #2009PG490 over a surface area of 13,541 hectares in the St. Lawrence River
PO 1	Procedural Order No. 1 dated 11 March 2015
PO 2	Procedural Order No. 2 dated 19 October 2016
PO 3	Procedural Order No. 3 dated 14 June 2017
PO 4	Procedural Order No. 4 dated 27 July 2017
PO 5	Procedural Order No. 5 dated 10 August 2017
PO 6	Procedural Order No. 6 dated 13 September 2017
PO 7	Procedural Order No. 7 dated 14 September 2017
Procedural Order on Claimant's Applications of 31 March and 27 April 2017	Procedural Order dated 4 May 2017 on Claimant's Applications dated 31 March 2017 and 27 April 2017
Procedural Order on Two Disputed Issues	Procedural Order on the Two Disputed Issues dated 6 February 2015
Protocol	Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States and Canada
QMNR	Québec Ministry of Natural Resources and Wildlife
QOGA	Québec Oil and Gas Association
Québec Charter	Québec Charter of Human Rights and Freedoms
Québec Civil Code	Civil Code of Québec, CQLR c. C-1991
Québec Energy Strategy 2006-2015	The energy strategy of the Québec Government entitled "Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy 2006-2015" dated 4 May 2006
Refresher Hearing	Refresher Hearing held on 25 and 26 February 2021

Refresher Hearing, Tr. Day [x]	Transcription (English version) of the Refresher Hearing held on 25 and 26 February 2021, with indication of the day, pages and lines
Regulation	Regulation Respecting Petroleum, Natural Gas and Underground Reservoirs, CQLR, Chapter M-13.1, r.1 (version in force on 12 June 2011)
Rejoinder	Respondent's Rejoinder dated 4 August 2017
Reply	Claimant's Reply dated 22 May 2017
Respondent	Government of Canada
Respondent's Document Production Request	Respondent's request for production of documents dated 4 April 2016
Response	Respondent's Response to the Notice of Arbitration dated 27 February 2015
Rio Declaration	Rio Declaration on Environment and Development
River Permit	Exploration permit bearing Permit #2009PG490 over a surface area of 13,541 hectares in the St. Lawrence River
River Permit Agreement	29 November 2006 Letter Agreement, 5 December 2006 Email and 14 December 2006 Letter Agreement, collectively
River Permit Assignment Agreement	Assignment agreement dated 28 January 2010 between Junex and the Enterprise pertaining to the River Permit
River Permit Rights	Enterprise's 100% working interest in the River Permit Area
Roney First Statement	Witness Statement of Mr. Dana Roney dated 10 April 2015
R-PHB	Respondent's Post-Hearing Brief dated 22 January 2021
R-Response to NDP Submissions	Respondent's observations on the Mexico NDP Submission and the USA NDP Submission pursuant to Article 1128 of NAFTA dated 22 September 2017
Sauvé First Statement	Witness Statement of Mr. Robert Sauvé dated 10 July 2015
Sauvé Second Statement	Witness Statement of Robert Sauvé dated 21 July 2017
SDA	Sustainable Development Act of 2006
SEA	Strategic Environmental Assessment

SEA-1	A SEA on the maritime Estuary and northwestern part of the Gulf of St. Lawrence, which commenced in June 2009
SEA-1 Preliminary Report	SEA-1 Preliminary Report published in July 2010
SEA-2	A SEA on the three eastern zones of the Gulf of St. Lawrence, including the Anticosti, Magdalen and Chaleur Bay basins, which commenced in February 2010
SEA-2 Report	Report of the SEA-2 dated 13 September 2013
SEA-SG	A SEA of Québec's shale gas industry, which commenced in May 2011
SEA-SG Committee	A SEA Committee established on 12 May 2011 by the Minister of Sustainable Development, tasked with implementing and overseeing a SEA of Québec's shale gas industry
SEA-SG Report	Report of SEA-SG dated 15 January 2014
Tremblay Report	Expert Report of Professor Hugo Tremblay dated 19 May 2017
Tribunal	The Arbitral Tribunal constituted for ICSID Case No. UNCT/15/2
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules as revised in 2010 and adopted in 2013
USA	United States of America
USA NDP Submission	USA's non-disputing party submission dated 16 August 2017
USMCA	Agreement between the United States of America, the United Mexican States and Canada, which entered into force on 1 July 2020
VCLT	Vienna Convention on the Law of Treaties
Water Act	Water Act of 2009
Wiggin First Statement	Witness Statement of Mr. Roger Wiggin dated 8 April 2015
Wiggin Second Statement	Witness Statement of Mr. Roger Wiggin dated 19 May 2017
Wiser Companies	Wiser Oil Delaware LLC and Wiser Delaware LLC

I. INTRODUCTION

1. Claimant, Lone Pine Resources Inc. (“**Lone Pine**” or “**Claimant**”), has submitted the present dispute to international arbitration pursuant to Chapter Eleven of the North American Free Trade Agreement, which entered into force on 1 January 1994 (“**NAFTA**”) and the United Nations Commission on International Trade Law (“**UNCITRAL**”) Arbitration Rules, as revised in 2010 and adopted in 2013 (“**UNCITRAL Rules**”).¹ By agreement of the Parties, the International Centre for Settlement of Investment Disputes (“**ICSID**” or “**Centre**”) serves as the administrative authority for this arbitration.²
2. Claimant has initiated this arbitration on behalf of its enterprise, Lone Pine Resources Canada Ltd. (the “**Enterprise**” or “**LPRC**”), pursuant to NAFTA Article 1117, seeking relief against the Government of Québec’s allegedly arbitrary, capricious and illegal revocation of the Enterprise’s rights to mine for oil and gas under the St. Lawrence River through the passage of Bill 18, *An Act to limit oil and gas activities* (“**Bill 18**”) in the Québec National Assembly as an *Act to limit oil and gas activities* (the “**Act**”). Claimant contends that the actions of the Government of Québec violate the substantive protections offered under NAFTA Articles 1105 and 1110.
3. Respondent, the Government of Canada (“**Canada**” or “**Respondent**”), objects to the jurisdiction of the Tribunal and also denies Claimant’s assertions regarding the alleged violations of NAFTA Articles 1105 and 1110.
4. This Final Award is divided into the following Sections. Section II sets out the particulars of the Parties. Section III sets out the procedural history of the case. Section IV sets out the factual background to the dispute between the Parties. Section V contains a summary of the Parties’ claims and reliefs sought. Section VI contains an introduction into the Tribunal’s analysis. Section VII addresses the Parties’ disputes on procedural matters.

¹ In the Notice of Arbitration dated 6 September 2013 (“**Notice of Arbitration**”) at ¶ 1, Claimant states that it has initiated this arbitration in accordance with Article 3 of the UNCITRAL Arbitration Rules, 1976. Thereafter, the Parties agreed that the UNCITRAL Rules as revised in 2010 and adopted in 2013 will be applicable to these proceedings. Procedural Order No. 1 dated 11 March 2015 (“**PO 1**”) at ¶ 22 records the Parties’ agreement that the applicable arbitration rules to these proceedings are the UNCITRAL Arbitration Rules, as revised in 2010 and as adopted in 2013, except to the extent that they conflict with or are modified by Section B of Chapter 11 as per NAFTA Article 1120(2) or PO 1.

² PO 1, ¶ 11.

Section VIII addresses the applicable law governing the merits of the dispute. Section IX addresses the jurisdictional objections raised by Respondent and Section X addresses the merits of Claimant's claims regarding Respondent's violations under NAFTA. Sections XI pertains to Claimant's claim for damages and Section XII pertains to costs. The Tribunal's decisions are contained in Section XIII.

II. PARTIES

Claimant

5. Claimant, Lone Pine Resources Inc., is an oil and gas exploration, development and production company organized under the laws of Delaware in the United States of America ("USA").³ Claimant's registered address, as stated in the Notice of Arbitration dated 6 September 2013 ("**Notice of Arbitration**"), is:

2711 Centerville Road,
Suite 400
Wilmington, Delaware 19808
United States of America⁴

6. Claimant's relevant company history is set out below:
- (i) Claimant was incorporated on 30 September 2010 under the name of Forest Oil Operating Company, as a wholly owned subsidiary of Forest Oil Corporation ("**Forest Oil**"), a corporation organized under the laws of the State of New York in USA.⁵ Claimant's parent company, Forest Oil, is an intermediate oil and gas exploration, development and production company, founded in 1916, incorporated in 1924, and publicly owned since 1969.⁶
 - (ii) On 7 December 2010, Claimant changed its name from "Forest Oil Operating Company" to Lone Pine Resources Inc.⁷

³ Memorial dated 10 April 2015 ("**Memorial**"), ¶ 13.

⁴ Notice of Arbitration, ¶ 6.

⁵ Memorial, ¶¶ 13-14, 24, *citing* **Exh. C-087**, Forest Oil Operating Company, Certificate of Incorporation, filed on 30 September 2010; **Exh. C-089**, Lone Pine Resources Inc., Certificate of Amendment filed on 7 December 2010.

⁶ Memorial, ¶ 24.

⁷ Memorial, ¶ 13, *citing* **Exh. C-089**, Lone Pine Resources Inc., Certificate of Amendment filed on 7 December 2010.

- (iii) On 1 June 2011, Claimant concluded an initial public offer for 17.7% of its shareholding and was listed on the New York Stock Exchange and the Toronto Stock Exchange. Forest Oil retained the remaining 82.3% shareholding until 30 September 2011, when it distributed it to its own public shareholders. Following this, Claimant became a standalone public company listed on the New York Stock Exchange and the Toronto Stock Exchange.
 - (iv) On 16 September 2013, Claimant was delisted from the New York Stock Exchange and on 1 November 2013, it was delisted from the Toronto Stock Exchange.⁸
 - (v) In late 2013, after the filing of Claimant's Notice of Arbitration, Claimant and its subsidiaries commenced restructuring proceedings under Chapter 15 of the United States Bankruptcy Code and the Canadian Companies Creditors Arrangement Act. The Parties agree that Claimant's claim of insolvency and the restructuring proceedings are not related to the disputes raised by Claimant in this arbitration. As such it is not necessary for the Tribunal to expand further on this matter for the purposes of this Award.⁹
7. As mentioned in ¶ 2 above, Claimant has initiated this arbitration on behalf of the Enterprise, Lone Pine Resources Canada Ltd., formerly known as Canadian Forest Oil Ltd. until 30 June 2011.¹⁰ The Enterprise is incorporated in the province of Alberta and has the following registered address:
- 640 5th Avenue SW, Suite 1100
 Calgary, Alberta T2P 3G4
 Canada¹¹
8. The Enterprise, originally acquired by Forest Oil in 1996, was transferred to Claimant on 26 May 2011,¹² whereby it became a wholly owned subsidiary of Claimant.¹³

⁸ Memorial, ¶¶ 14-16, 27-28.

⁹ Memorial, ¶¶ 11, 21-22; Counter-Memorial dated 24 July 2015 and filed on 25 January 2016 ("**Counter-Memorial**"), ¶¶ 258-266.

¹⁰ Notice of Arbitration, ¶¶ 3-4.

¹¹ Notice of Arbitration, ¶ 7.

¹² Memorial, ¶ 17.

¹³ Claimant holds approximately 86.6% shareholding of the Enterprise directly and the remainder indirectly through Wiser Oil Delaware, LLC and Wiser Delaware LLC (together, "**Wiser Companies**"). See Memorial, ¶ 26.

9. Through the Enterprise, Claimant carried out its business activities in Alberta, British Columbia, Québec, and the Northwest Territories. The Enterprise is active in the Deep Basin and Peace River Arch areas (northwestern Alberta and northeastern British Columbia), the Utica Shale (Québec) and the Liard Basin (Northwest Territories), pursuing both conventional and unconventional plays, including developing light oil and natural gas resources through hydraulic fracturing and other methods.¹⁴

Respondent

10. Respondent is the Government of Canada.
11. Claimant and Respondent are each individually referred to as a “**Party**” and together they are referred to as the “**Parties**”. The Parties’ representatives and their addresses are listed above on page 2.

III. PROCEDURAL HISTORY

12. On 8 November 2012, Claimant delivered a Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of NAFTA to Canada (“**Notice of Intent**”) in accordance with NAFTA Articles 1118 and 1119.
13. On 6 September 2013, Claimant delivered the Notice of Arbitration to Canada pursuant to Article 3 of the UNCITRAL Rules 1976 and NAFTA Articles 1117 and 1120.
14. In accordance with NAFTA Article 1123, the Parties agreed that the number of arbitrators shall be three, with one arbitrator being appointed by each of the Parties and the third presiding arbitrator to be appointed by agreement of the Parties.
15. On 13 September 2014, the arbitral tribunal comprising of Mr. V.V. Veeder Q.C., Mr. David R. Haigh K.C. and Professor Brigitte Stern (the “**Tribunal**”) was constituted in accordance with the UNCITRAL Arbitration Rules, 1976 and Chapter Eleven of NAFTA. Mr. David R. Haigh K.C., a national of Canada, was appointed by Claimant, Professor Brigitte Stern, a national of France, was appointed by Respondent and Mr. V.V.

¹⁴ Memorial, ¶ 19.

Veeder Q.C., a national of the United Kingdom, was appointed jointly by the Parties as President of the Tribunal. The addresses of the Tribunal Members are set out below:

Mr. David R. Haigh K.C.
Burnet, Duckworth & Palmer LLP
2400, 525 – 8th Avenue S.W.
Calgary, AB T2P 1G1
Canada
T: +1 403 260 0135
E: drh@bdplaw.com

Professor Brigitte Stern
7, rue Pierre Nicole
Code A1672
75005, Paris
France
T: +33 (0)1 40 46 93 79
E: brigitte.stern@jstern.org

Mr. V.V. Veeder Q.C.
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom
T: +44 (0)20 7813 8000
E: vvveeder@londonarbitrators.net

16. As noted in ¶ 109 below, on 21 September 2020, the Tribunal was reconstituted with Professor Dr. Albert Jan van den Berg replacing Mr. V.V. Veeder Q.C. as President of the Tribunal.
17. On 9 January 2015, the Tribunal held the first procedural meeting by telephone conference. The Parties confirmed during the procedural meeting, *inter alia*, that (i) the Tribunal has been duly constituted in accordance with NAFTA Article 1123; (ii) the place of arbitration is Ottawa, although hearings in the arbitration could be held at other locations if so ordered by the Tribunal after consultation with the Parties; (iii) NAFTA Article 1131 sets out the governing law for the dispute; and (iv) the applicable arbitration rules are the UNCITRAL Arbitration Rules, as revised in 2010 and as adopted in 2013, except to the extent that they conflict with or are modified by Section B of Chapter 11 as per NAFTA Article 1120(2) or

the forthcoming Procedural Order No. 1. The agreement of the Parties was embodied in the Minutes of the First Session signed by the President of the Tribunal and subsequently issued to the Parties.

18. By emails of 16 January 2015, the Parties jointly requested that ICSID administers the proceedings.
19. By letter of 19 January 2015, ICSID informed the Parties that it accepted their request to administer the proceedings. The case was assigned ICSID Case No. UNCT/15/2. Ms. Aurélia Antonietti, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
20. On the same date, *i.e.*, 19 January 2015, the Parties submitted a joint written submission on two matters on which they had disagreed during the first procedural meeting, referred to in ¶ 17 above: (i) the language(s) of the arbitration; and (ii) the procedural schedule regarding document production.
21. On 23 January 2015, Claimant filed a written submission on the two disputed issues, referred to in ¶ 20 above. Claimant submitted that English should be the language of the arbitration. On the document production issue, Claimant submitted that the Parties should simultaneously exchange requests for document production after the first exchange of substantive written pleadings (*i.e.*, Claimant's Memorial and Respondent's Counter-Memorial, but before Claimant's Reply and Respondent's Rejoinder).
22. On the same date, *i.e.*, 23 January 2015, Respondent filed a written submission on the two disputed issues, referred to in ¶ 20 above. It submitted, *inter alia*, that the languages of the arbitration should be both English and French (as each Party may choose), with no requirement for any translation imposed on either Party. It also submitted that document production should take place before the first exchange of substantive written pleadings, *i.e.*, after Respondent's Response to Claimant's Notice of Arbitration but before Claimant's Memorial.
23. On 6 February 2015, the Tribunal issued a Procedural Order on the Two Disputed Issues ("**Procedural Order on Two Disputed Issues**"), which provided in relevant part that:

18. The Tribunal has decided that English and French shall both be the languages of this arbitration. [...]

24. The Tribunal decides that, whilst requests for document production can be made in advance of the Parties' Memorial and Counter-Memorial (even now, as is the case), the stage of document production and the Tribunal's involvement over disputed requests shall take place after the Respondent's Counter-Memorial and before the Claimant's Reply Memorial, with the Parties' simultaneous requests for the production of documents.

25. Given the high level of co-operation between the Parties in this arbitration, the Tribunal is content to leave the Parties to work out the time-tabling consequences of the Tribunal's decision and to complete accordingly their joint draft of the first procedural order, as soon as practicable.

24. On 10 February 2015, the Centre requested an advance payment of USD 100,000 from each Party.
25. On 27 February 2015, Respondent submitted its Response to the Notice of Arbitration ("**Response**").
26. On 11 March 2015, the Tribunal issued Procedural Order No. 1 establishing the procedural rules governing the arbitration ("**PO 1**"). PO 1 records, amongst others, that:
- (i) the Parties agree and confirm that the Tribunal has been duly constituted in accordance with NAFTA Article 1123;
 - (ii) the place of arbitration is Ottawa;
 - (iii) the law governing the disputes in the arbitration is NAFTA Article 1131;
 - (iv) the applicable arbitration rules are the UNCITRAL Arbitration Rules, as revised in 2010 and as adopted in 2013, except to the extent that they conflict or are modified by Section B of Chapter 11 as per NAFTA Article 1120(2) or PO 1. Should the UNCITRAL Rules and PO 1 not address a specific procedural issue, the Tribunal shall, after consultation with the disputing parties, determine the applicable procedure;
 - (v) the Tribunal shall consult Articles 3, 4, 5, 7, 8 and 9 of the International Bar Association's Rules on the Taking of Evidence in International Arbitration 2010 ("**IBA Rules**") as guidance for deciding evidentiary matters; and
 - (vi) English and French are the languages of the arbitration.

27. Also on 11 March 2015, the Tribunal issued another Procedural Order addressing matters concerning the confidentiality of the arbitration (“**Confidentiality Order**”).
28. On 19 March 2015, the Centre acknowledged receipt of the Parties’ payments of the requested advances on costs, referred to in ¶ 24 above.
29. On 10 April 2015, Claimant filed a Memorial (“**Memorial**”), accompanied by Exhibits C-1 to C-102, Legal Authorities CLA-1 to CLA-64, Witness Statement of Mr. Douglas W. Axani dated 10 April 2015 (“**Axani First Statement**”), Witness Statement of Mr. Roger Wiggin dated 8 April 2015 (“**Wiggin First Statement**”), Witness Statement of Mr. Peter Dorrins dated 7 April 2015 (“**Dorrins First Statement**”), Witness Statement of Mr. Jean-Yves Lavoie dated 8 April 2015 (“**Lavoie First Statement**”), Witness Statement of Mr. Dana Roney dated 10 April 2015 (“**Roney First Statement**”), Expert Report of GLJ Petroleum Consultants Limited (“**GLJ**”) dated 7 April 2015 (“**GLJ First Report**”) and Expert Report of FTI Consultancy Inc. (“**FTI**”) dated 8 April 2015 with exhibits CER-002A to CER-002BD (“**FTI First Report**”).
30. On 14 April 2015, pursuant to ¶ 3 of PO 1, Respondent requested the Tribunal members to provide the Parties with their declarations of independence and impartiality and disclosure statements.
31. On 15 April 2015, Mr. Haigh and Mr. Veeder provided the Parties with their respective declarations of independence and impartiality and disclosure statements. On 16 April 2015, Professor Stern provided the Parties with her declaration of independence and impartiality and disclosure statement.
32. On 24 July 2015, the Parties jointly requested that “the Tribunal suspend the procedural schedule to permit the parties time to engage in discussions regarding the dispute.” On the same day, the President of the Tribunal confirmed the suspension of the procedural timetable. Respondent’s Counter-Memorial (“**Counter-Memorial**”), which, as per PO 1, was due to be filed on 24 July 2015, was placed into escrow with Mr. Matthew Kronby, an attorney in the law firm representing Claimant, Bennett Jones.
33. On 13 September 2015, the Secretary of the Tribunal inquired with the Parties as to the status of the case.

34. On 9 October 2015, the Parties jointly requested the Tribunal to “continue to stay the arbitral proceedings to allow the parties to pursue discussions regarding the dispute.”
35. On 13 October 2015, the Secretary of the Tribunal informed the Parties that their request, referred to in ¶ 34 above, has been granted by the Tribunal.
36. On 4 January 2016, the Secretary of the Tribunal inquired with the Parties as to the status of the case. On the same day, Respondent informed the Tribunal that the Parties would be able to provide the requested update by the end of that week.
37. On 8 January 2016, Claimant inquired on behalf of both Parties as to whether the Tribunal would be available to schedule a call to discuss the resumption of the arbitration proceedings and proposed to circulate a draft revised schedule ahead of the call.
38. On 9 January 2016, the Secretary of the Tribunal informed the Parties that the Tribunal was not available for a call and invited them to provide their written proposal(s) for a revised schedule.
39. On 13 January 2016, the Parties jointly submitted a proposed revised procedural schedule to the Tribunal.
40. On 19 January 2016, the Tribunal informed the Parties that the proceedings were no longer suspended, and that the Parties’ proposed revised procedural schedule was largely adopted.
41. On 25 January 2016, Respondent filed its Counter-Memorial in French along with an English translation. The Counter-Memorial was accompanied by Exhibits R-002A, R-004A, R-005A, R-034A, R-042 to R-164, Legal Authorities RLA-1 to RLA-87, Witness Statement of Ms. Luce Asselin dated 16 July 2015 (“**Asselin First Statement**”), Witness Statement of Mr. Jacques Dupont dated 15 July 2015 (“**Dupont First Statement**”), Witness Statement of Mr. Mario Gosselin dated 12 July 2015 (“**Gosselin First Statement**”), Witness Statement of Ms. Nathalie Normandeau dated 16 July 2015 (“**Normandeau First Statement**”), Witness Statement of Mr. Robert Sauvé dated 10 July 2015 (“**Sauvé First Statement**”), Expert Report of Mr. Jean M. Gagné dated 24 July 2015 (“**Gagné First Report**”), Expert Report of Deloitte LLP (“**Deloitte**”) on resource potential of Permit 2009PG490 dated 23 July 2015 with exhibits RER-001A-001 to RER-001A-014

(“**Deloitte Resources First Report**”) and Expert Report of Deloitte on Damages dated 23 July 2015 with exhibits RER-001B-001 to RER-001A-081 (“**Deloitte Damages First Report**”).

42. On 4 April 2016, the Parties exchanged between themselves, with the Centre in copy, their respective requests for production of documents by the other Party. Claimant’s request is referred to as the “**Claimant’s Document Production Request**”, Respondent’s request is referred to as the “**Respondent’s Document Production Request**”, and together they are referred to as the “**Parties’ Document Production Requests**”.
43. On 18 April 2016, each Party filed its observations on the other Party’s Document Production Request of 4 April 2016.
44. On 6 May 2016, each Party filed a response to the other Party’s observations of 18 April 2016, referred to in ¶ 43 above.
45. On 27 May 2016, the Tribunal issued a Procedural Order on the Parties’ Disputed Document Production Requests (“**Order on Document Production**”).
46. On 2 June 2016, the Centre requested a further advance payment of USD 220,000 from each Party.
47. On 7 July 2016, the Centre acknowledged receipt of Respondent’s payment of its share of the requested advance. On 8 July 2016, the Centre acknowledged receipt of Claimant’s payment of its share of the requested advance.
48. On 19 October 2016, the Tribunal issued Procedural Order No. 2 containing a revised procedural timetable as agreed between the Parties (“**PO 2**”).
49. On 29 November 2016, in accordance with PO 2, the Parties exchanged documents pursuant to the Order on Document Production and filed their respective privilege logs.
50. On 19 January 2017, the Parties filed their objections to each other’s privilege logs.
51. On 2 February 2017, the Parties filed their respective responses to the other side’s objections on their privilege logs. Each Party contested certain documents that had been redacted or withheld by the other Party.

52. On 24 February 2017, further to the Parties' respective written submissions of 2 February 2017, the Tribunal issued a Procedural Order on Withheld and Redacted Documentation (**"Order on Withheld and Redacted Documentation"**).
53. On 27 February 2017, Respondent requested a number of clarifications from the Tribunal with respect to its Order on Withheld and Redacted Documentation. Respondent requested the Tribunal to stay the document production deadline fixed in said Order by 15 days until the requested clarifications were provided by the Tribunal.
54. On 28 February 2017, Claimant submitted that one of the clarifications requested by Respondent was in fact an attempt by Respondent to re-argue its position and opposed such attempt. Claimant also opposed Respondent's request for stay and reserved its right to request an amendment of the procedural timetable such that its Reply was only due eight weeks after receipt of Respondent's documents.
55. On 1 March 2017, the Tribunal provided the clarifications requested by Respondent. The Tribunal rejected Respondent's request for a stay of its Order on Withheld and Redacted Documentation but extended the deadline for production of documents by a maximum of seven days.
56. On 17 March 2017, Respondent provided Claimant with 14 out of the 23 documents, which the Tribunal had ordered Respondent to produce in its Order on Withheld and Redacted Documentation.
57. On 31 March 2017, Claimant filed an application alleging that Respondent has failed to comply with the Tribunal's Order on Withheld and Redacted Documentation and requested the Tribunal to:
- (i) issue a declaration that Respondent is in a deliberate violation of an Order from the Tribunal and of its obligations under NAFTA and international law;
 - (ii) draw adverse inferences from Respondent's refusal to produce documents;
 - (iii) strike out portions of Respondent's pleadings and evidence;
 - (iv) declare that Respondent is precluded from making a number of specific submissions to the Tribunal in relation to Bill 18;

- (v) direct Respondent to pay an interim award to Claimant in the amount of USD 50,000;
 - (vi) direct Respondent to transmit certain documents referred in its privilege log to the Tribunal for determination whether they in fact meet the requirements of solicitor-client privilege;
 - (vii) confirm that the procedural timetable fixed in the arbitration did not require Claimant to file its Reply earlier than 12 May 2017; and
 - (viii) modify the procedural timetable such that the filing date of Claimant's Reply would be postponed to 26 May 2017 (with a corresponding curtailment of time for the filing of Respondent's Rejoinder).
58. On 10 April 2017, Respondent requested the Tribunal to reject in entirety Claimant's requests, referred to in ¶ 57 above, and proposed that the deadline for the filing of Claimant's Reply may be postponed to 4 May 2017.
59. On the same day, Respondent also informed Claimant about 26 additional responsive documents that were unaccounted for in its production index or privilege logs. Respondent explained that 10 of these documents could be produced by it entirely or in a lightly redacted form and had been uploaded to the case's folder on ICSID's file sharing platform. Respondent added that the remaining 16 documents were withheld entirely, pursuant to solicitor-client privilege and/or special political or institutional sensitivity. Respondent also stated that in its view, this additional production of documents had no significant impact on the timetable of the proceedings.
60. On 13 April 2017, Claimant indicated to Respondent that it had no objection to the non-production of the additional documents over which Respondent asserted solicitor-client privilege. However, Claimant objected to the non-production of additional documents over which a claim of political or institutional sensitivity was asserted and requested the production of further additional documents. Claimant further added that it disagreed with Respondent's assertion that the production of additional documents had no significant impact of the procedural timetable.

61. On 21 April 2017, Respondent addressed Claimant's position and arguments and reiterated that in its view, its limited additional production of 10 documents did not warrant any further modifications to the procedural timetable than those proposed in Claimant's letter to the Tribunal of 10 April 2017.
62. On 27 April 2017, Claimant filed an application seeking a further postponement of the deadline for filing its Reply, until at least 5 June 2017.
63. On 2 May 2017, Respondent opposed Claimant's application, referred to in ¶ 62 above, submitting that the deadline for Claimant's Reply may be extended at the latest until 9 May 2017.
64. On 4 May 2017, the Tribunal issued a Procedural Order on Claimant's Applications dated 31 March 2017 and 27 April 2017 regarding production of documents and the procedural timetable ("**Procedural Order on Claimant's Applications of 31 March and 27 April 2017**").
65. On 22 May 2017, Claimant filed its Reply ("**Reply**"), accompanied by Exhibits C-103 to C-160, Legal Authorities CLA-65 to CLA-108, Witness Statement of Mr. Douglas W. Axani dated 19 May 2017 ("**Axani Second Statement**"), Witness Statement of Mr. Roger Wiggin dated 19 May 2017 ("**Wiggin Second Statement**"), Witness Statement of Mr. Peter Dorrins dated 19 May 2017 ("**Dorrins Second Statement**"), Witness Statement of Mr. Jean-Yves Lavoie dated 19 May 2017 ("**Lavoie Second Statement**"), Expert Report of Professor Hugo Tremblay dated 19 May 2017 with Exhibits CER-003a to CER-003az ("**Tremblay Report**"), Expert Report of GLJ dated 18 May 2017 with Exhibits CER-004A to CER-004B ("**GLJ Second Report**"), and Expert Report of FTI dated 19 May 2017 with Exhibits CER-005A to CER-005BU ("**FTI Second Report**").
66. On 23 May 2017, the Tribunal provided the Parties with a draft of Procedural Order No. 3, intended to establish the remainder of the procedural timetable for their comments.
67. On 14 June 2017, following the Parties' respective comments of 5 June 2017, the Tribunal issued Procedural Order No. 3, establishing a revised timetable ("**PO 3**").

68. On 24 July 2017, Respondent requested an extension of three working days for the submission of its Rejoinder and accompanying documents, until 4 August 2017.
69. On 25 July 2017, Claimant opposed Respondent’s request for an extension, referred to in ¶ 68 above. As a compromise solution, Claimant submitted that Respondent must file its Rejoinder on 1 August 2017 and could file the accompanying documentary evidence by 4 August 2017. On the same day, Respondent rejected Claimant’s proposed compromise solution.
70. On 27 July 2017, the Tribunal issued Procedural Order No. 4 extending the deadline for the submission of Respondent’s Rejoinder by three business days (“**PO 4**”).
71. On 4 August 2017, Respondent filed its Rejoinder (“**Rejoinder**”), accompanied by Exhibits R-165 to R-295, Legal Authorities RLA-88 to RLA-117, Witness Statement of Ms. Luce Asselin dated 28 July 2017 (“**Asselin Second Statement**”), Witness Statement of Mr. Mario Gosselin dated 26 July 2017 (“**Gosselin Second Statement**”), Witness Statement of Mr. Robert Sauvé dated 21 July 2017 (“**Sauvé Second Statement**”), Witness Statement of Mr. Marc-Antoine Adam dated 3 August 2017 (“**Adam First Statement**”), Witness Statement of Ms. Danie Daigle dated 28 July 2017 (“**Daigle First Statement**”) and Witness Statement of Mr. Gerry Frappier dated 4 August 2017 (“**Frappier First Statement**”), Expert Report of Mr. Jean M. Gagné dated 4 August 2017 (“**Gagné Reply Report**”), Expert Report of Deloitte resource potential of Permit 2009PG490 dated 3 August 2017 with Exhibits RER-003A-001 to RER-003A-006 (“**Deloitte Resources Second Report**”) and Expert Report of Deloitte on Damages dated 3 August 2017 with Exhibits RER-003B-001 to RER-003B-043 (“**Deloitte Damages Second Report**”).
72. Also on 4 August 2017, Mr. Muhammad Muzahidul Islam, Lawyer, Supreme Court of Bangladesh, filed an application for leave to file written submissions as *Amicus Curiae* (“**Mr. Islam’s Application for Leave**”), accompanied with the written submissions, for which leave was sought.
73. On 10 August 2017, the Tribunal issued Procedural Order No. 5 containing a revised timetable (“**PO 5**”).

74. On 11 August 2017, the *Centre québécois du droit de l'environnement* (“**CQDE**”) filed an application for leave to file written submissions as *Amicus Curiae*. On 16 August 2017, CQDE filed a renewed application for leave to file written submissions as *Amicus Curiae* (“**CQDE’s Application for Leave**”) accompanied with the written submissions, for which leave was sought (“**CQDE Amicus Submission**”).
75. Also on 16 August 2017, the United Mexican States (“**Mexico**”) filed a non-disputing party submission pursuant to NAFTA Article 1128 with respect to certain questions of interpretation of NAFTA (“**Mexico NDP Submission**”).
76. On the same date, *i.e.*, 16 August 2017, USA filed a non-disputing party submission pursuant to NAFTA Article 1128 with respect to certain questions of interpretation of NAFTA (“**USA NDP Submission**”, together with the Mexico NDP Submission, “**NDP Submissions**”).
77. On 18 August 2017, ICSID informed USA and Mexico that the hearing in this arbitration would be held from Monday, 2 October to Friday, 13 October 2017 at Arbitration Place in Toronto, Canada.
78. On 30 August 2017, Claimant submitted its comments on CQDE’s Application for Leave.
79. Also on 30 August 2017, Respondent submitted its comments on Mr. Islam’s Application for Leave and CQDE’s Application for Leave.
80. On 7 September 2017, Mexico informed ICSID that it would not attend the hearing scheduled to take place from Monday, 2 October to Friday, 13 October 2017, at Arbitration Place in Toronto, Canada.
81. On 8 September 2017, USA informed ICSID that it would attend part of the hearing scheduled to take place from Monday, 2 October to Friday, 13 October 2017, at Arbitration Place in Toronto, Canada.
82. On 10 September 2017, the Tribunal issued a Procedural Order on the *Amici* Applications for Leave to file non-disputing party submissions (“**Order on Amici Applications**”), deciding that: “(1) Mr Islam’s Application for leave is rejected and, (2) CQDE’s Application for leave is granted.”

83. On 11 September 2017, Respondent sought the Tribunal's approval to request the assistance of the competent judicial court of Canada to compel the attendance of Ms. Normandeau at the hearing.
84. On 12 September 2017, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference. In addition to the Tribunal and its Secretary,¹⁵ the following persons participated in this telephone conference:

For Claimant:

- Mr. Milos Barutciski, Bennett Jones LLP;
- Mr. Andrew D. Little, Bennett Jones LLP;
- Mrs. Sabrina A. Bandali, Bennett Jones LLP;
- Mr. Josh Scheinert, Bennett Jones LLP;
- Mr. Mario Welsh, BCF Law;
- Mr. Andre Ryan, BCF Law; and
- Mr. Shaun Finn, BCF Law;

For Respondent:

- Ms. Sylvie Tabet, Government of Canada;
- Mr. Jean-François Hébert, Government of Canada;
- Ms. Annie Ouellet, Government of Canada;
- Mr. Éric Bédard, Government of Canada;
- Ms. Johannie Dallaire, Government of Canada;
- Ms. Nathalie Latulippe, Government of Québec; and
- Mr. Marc-Antoine Couet, Government of Québec.

85. On 13 September 2017, the Tribunal issued Procedural Order No. 6 (“**PO 6**”), granting Respondent's request of 11 September 2017, referred to in ¶ 83 above:

5. The Tribunal hereby grants the Respondent its approval to request the assistance of the competent judicial court of Canada to compel the attendance of Ms. Normandeau at the hearing to be held in Toronto to be cross-examined on the content

¹⁵ Mrs. Aurélia Antonietti, Secretary of the Tribunal, at that time.

of her witness statement or to any other fact that is within her personal knowledge, and is relevant and material to the issues in the case.

86. On 14 September 2017, the Tribunal issued Procedural Order No. 7 in relation to certain procedural matters that had arisen during the pre-hearing organizational meeting held on 12 September 2017 (“**PO 7**”).
87. On 22 September 2017, Claimant submitted its observations on the *Amicus Curiae* submission of the CQDE (“**C-Response to Amicus**”).
88. Also on 22 September 2017, the Parties filed their observations on the NDP Submissions of USA and Mexico pursuant to Article 1128 of NAFTA (“**C-Response to NDP Submissions**” and “**R-Response to NDP Submissions**”).
89. On 28 September 2017, the Centre informed the Parties that Mr. Benjamin Garel had been assigned to serve as Secretary of the Tribunal.
90. From 2 to 13 October 2017, the Tribunal held a hearing on the merits (the “**October 2017 Merits Hearing**”) at Arbitration Place, 333 Bay St. #900, Toronto M5H 2R2, Canada. In addition to the Tribunal and the Tribunal Secretary, the following persons were present at this Hearing:

For Claimant:

- Mr. Milos Barutciski, Bennett Jones LLP;
- Mr. Andrew D. Little, Bennett Jones LLP;
- Ms. Sabrina A. Bandali, Bennett Jones LLP;
- Mr. Josh Scheinert, Bennett Jones LLP;
- Mr. Jacob Mantle, Bennett Jones LLP;
- Ms. Katherine Rusk, Bennett Jones LLP;
- Mr. Mario Welsh, BCF Law;
- Mr. Andre Ryan, BCF Law;
- Mr. Shaun Finn, BCF Law;
- Ms. Louise McLean, paralegal, Bennett Jones LLP;
- Ms. Jacquie White, paralegal, Bennett Jones LLP;
- Ms. Elizabeth Fimeo, paralegal, Bennett Jones LLP;

- Mr. Tim Granger, Claimant's representative;
- Mr. Doug Axani, Claimant's representative.

For Respondent:

- Ms. Sylvie Tabet, Government of Canada;
- Mr. Jean-François Hébert, Government of Canada;
- Ms. Annie Ouellet, Government of Canada;
- Mr. Éric Bédard, Government of Canada;
- Ms. Johannie Dallaire, Government of Canada;
- Mr. Marc-André Léveillé, paralegal, Government of Canada;
- Ms. Shawna Lesaux, paralegal, Government of Canada;
- Mr. François Guimont, Respondent's representative, Government of Canada;
- Ms. Julie Boisvert, Respondent's representative, Government of Canada;
- Ms. Martine Bélanger, Respondent's representative, Government of Canada;
- Mr. Tristan Lambert, Respondent's representative, Government of Québec;
- Mr. Jean-François Lord, Respondent's representative, Government of Québec;
- Ms. Nathalie Latulippe, Respondent's representative, Government of Québec;
- Mr. Marc-Antoine Couet, Respondent's representative, Government of Québec;
- Mr. Pascal Perron, Respondent's representative, Government of Québec; and
- Mr. Jean-Félix Robitaille, Respondent's representative, Government of Québec.

For USA (non-disputing NAFTA Party):

- Mr. John Blanck.

91. During the October 2017 Merits Hearing, the following persons were examined:

On behalf of Claimant:

- Mr. Doug Axani (witness);
- Mr. Dana Roney (witness);
- Mr. Roger Wiggin (witness);
- Mr. Peter Dorrins (witness);
- Mr. Jean-Yves Lavoie (witness);

- Professor Hugo Tremblay (expert);
- Mr. Howard Rosen (expert);
- Mr. Chris Milburn (expert);
- Mr. Chad Lemke (expert); and
- Mr. Warren Bindon (expert).

On behalf of Respondent:

- Mr. Robert Sauvé (witness);
- Mr. Mario Gosselin (witness);
- Ms. Luce Asselin (witness);
- Mr. Jacques Dupont (witness);
- Mr. Marc-Antoine Adam (witness);
- Ms. Danie Daigle (witness);
- Mr. Gerry Frappier (witness)
- Ms. Nathalie Normendeau;
- Mr. Jean M. Gagné (expert);
- Mr. Cary Mamer (expert);
- Mr. Robin G. Bertram (expert); and
- Mr. Larry D. Boyd (expert).

92. On 5 November 2017, the Tribunal invited the Parties to address the following questions and topics (“**Tribunal’s Questions to the Parties**”) in the forthcoming one-day hearing, which was scheduled for 24 November 2017 for the Parties to make oral closing submissions (“**November 2017 Merits Hearing**”):

(A) Jurisdiction/Admissibility – NAFTA Articles 1139(g) and 1139(h)

1. Generally, what is the Claimant’s “investment”, as an objective fact: (i) the River Permit 490 only or (ii) the River and Land Permits as a whole? As regards the factual evidence, it will be recalled that the Claimant’s witnesses (particularly Mr Axani) testified that the permits were seen as a whole, not individually.
2. For this purpose, is the test under NAFTA Article 1139 an objective or a subjective test? In other words, as to the latter, can a claimant for the purpose of establishing jurisdiction subjectively carve out a particular “investment”, as a stand-alone “investment”, from a larger

“investment” assessed objectively as regards both jurisdiction and the merits?

3. The Claimant’s “investment” under NAFTA Article 1139(g), as “intangible property rights”: If the Claimant’s investment under Article 1139 were to comprise the River and Land Permits as a whole (and not merely the River Permit), does the Respondent accept that such investment would satisfy the requirements of NAFTA Article 1139(g) – subject to Quebec law as to real and personal rights?
4. The Claimant’s “investment” under NAFTA Article 1139(h), as “interests arising from the commitment of capital”: If the Claimant’s investment under Article 1139 were to comprise the River and Land Permits as a whole (and not merely the River Permit), does the Respondent accept that such investment would satisfy the requirements of NAFTA Article 1139(h) – subject to Quebec law as to real and personal rights?
5. As to NAFTA Article 1101(1) and Bill 18 as the relevant measure, the Tribunal understands the Parties to be agreed as to the test formulated in *Methanex v USA* (i.e., a “legally significant connection”): does the Claimant accept that there was no targeted malice committed by the Respondent towards the Claimant or its “investment”?
6. If not, the Claimant should identify from its existing pleadings the specific allegations upon which it relies, together with all evidential references said to support such allegations.
7. In regard to the Agreements of 29 November and 14 December 2006, does Quebec law (as the applicable law) recognise any doctrine of rectification or reformation, as distinct, if different, from contractual interpretation to determine the common intentions of the contracting parties (*Junex* and *Forest Oil*)? If so, is that doctrine relevant in the present case?
8. For the purpose of applying international law under NAFTA in determining the Tribunal’s jurisdiction, is there a distinction between a bare legal title and a beneficial interest; and, if so, would such a distinction be relevant to the Respondent’s jurisdictional objections in the present case?

(B) NAFTA Article 1105 – Customary Standard

9. The Tribunal understands the Parties to be agreed to the application under NAFTA Article 1105 of the customary international law standard confirmed or established by the NAFTA Free Trade Commission of 2001. The Parties are invited to elaborate further upon the specific content of that customary standard, particularly if and to the extent that it may have evolved since the *Neer Case* and/or 2001.

10. The Parties' pleadings and certain of the witnesses referred to a general consideration of "précaution" (principally: the Respondent's Counter-Memorial, paragraphs 110 and 363; the Respondent's Rejoinder, paragraphs 46 and 236; the oral testimony of Mr. Gosselin; and the statement of Mr. Arcand in C-054): is there such a legal principle of "precaution" under international law; and, if so, is it relevant to the content of the customary standard in the present case as part of any margin of appreciation to be afforded to the Respondent?
11. Have the Claimant and/or its quantum expert witnesses advanced any separate methodology for compensation under NAFTA Article 1105 (as distinct from expropriation under NAFTA Article 1110)?
12. If so, the Claimant should identify from its existing pleadings the specific methodology upon which it relies in regard to NAFTA Article 1105, together with all evidential expert references said to support such methodology.
13. If and to the extent relevant to this case, the Tribunal here draws the Parties' attention to the Institute of International Law's Resolution: "Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties" of 13 September 2013, Article 13, paragraph 3 ("Compensation due to an investor for violation of the FET standard shall be assessed without regard to compensation that could be allocated in case of an expropriation, in accordance with the damage suffered by the investor").

(C) NAFTA Article 1110 – (Uncompensated) Expropriation

14. On the assumption (here assumed for the sake of argument only) that the Claimant's "investment" comprised the River and Land Permits as a whole (and not merely the River Permit), the Claimant should clarify its pleaded case on the alleged expropriation of such investment as a whole under NAFTA Article 1110, given that (as the Tribunal understands), in contrast to the River Permit, the Land Permits are not alleged to have been similarly expropriated by the Respondent.

(D) Compensation

15. The Parties, but particularly the Respondent, should explain, by reference to the evidence adduced in this arbitration, the factual basis for the Respondent's decision not to pay any compensation to the Claimant and, specifically, whether there was any specific assessment by the Respondent of the wasted expenditure to be sustained by the Claimant under Bill 18. In both cases, the Tribunal requests a list of the relevant evidential references. (The Tribunal does not thereby require the Respondent to waive any privilege as to

legal advice).

16. Mirroring the topics listed above (see Nos 11 and 12), the Claimant is requested to confirm that its methodology as to quantum is based on expropriation under NAFTA Article 1010 and not separately under NAFTA Article 1105.

(E) “Adverse Inferences” Etc.

17. The Tribunal refers to the Claimant’s submissions regarding the Respondent’s non-compliance with the Tribunal’s procedural orders regarding document production and redaction by the Respondent.
18. First, the Tribunal wishes to be taken through the specific documentation said by the Claimant to constitute the Respondent’s non-compliance and its materiality to the issues before the Tribunal, particularly the contemporary documentation and related testimony for the period from January 2010 to June 2011.
19. Second, the Parties are requested to address the scope of the Tribunal’s powers in the event of such material non-compliance, both as to any adverse inferences as well as any costs order, other sanction or compensation for breach of any duty to arbitrate in good faith.

(F) The Claimant’s Prayer for Relief

20. The Claimant is requested to confirm or complete its final claim for relief, as currently pleaded in its Reply Memorial:

“714. As a result of Canada's breaches of Chapter Eleven of NAFTA described above, the Enterprise has suffered significant loss and damage for which the Claimant requests the following relief pursuant to NAFTA Article 1117:

- (a) A declaration that Canada has breached its obligations under Article 1110(1) and Article 1105(1) of NAFTA and is liable to the Claimant therefore;*
- (b) An award of compensatory damages in an amount to be proven at the hearing but which the Claimant currently estimates to be US\$103,600,000 inclusive of pre-award interest;*
- (c) An award of the full costs associated with this arbitration, including professional and legal fees and disbursements, as well as the fees and disbursements of the Tribunal and the Administrative Authority;*
- (d) An award of pre-award (as included in compensatory damages) and post-award interest at a rate to be fixed by the Tribunal;*
- (e) An award of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and*

(f) An award of any such further relief that the Tribunal may deem just and appropriate.”

(G) The Respondent’s Prayer for Relief

21. The Respondent is requested to confirm or complete its final claim for relief, as currently pleaded in its Answer dated 27 February 2015:

“114. Pour ces motifs, le Canada demande respectueusement au Tribunal de:

a) Rejeter la totalité de la demande de LPRC [Lone Pine Resources Inc.]; et

b) Ordonner à la demanderesse de supporter la totalité des frais d’arbitrage, incluant les frais juridiques du Canada en vertu de l’article 1135(1) de l’ALÉNA et de l’article 42 des règles d’arbitrage de la CNUDCI; et

c) Ordonner toute autre indemnité qu’il estime appropriée.”

(H) Costs

22. The Tribunal understands that the Parties jointly seek from the Tribunal a first partial award deciding issues of jurisdiction/admissibility and merits (including pre-award and post-award interest), excepting only issues as to the allocation and quantification of arbitration and legal costs to be addressed later, after hearing the Parties in writing, by a separate final award. For the avoidance of doubt, the Parties are invited to confirm such request.

93. On 6 November 2017, the Parties informed the Tribunal and ICSID of their agreement to hold the November 2017 Merits Hearing at the Palais des Congrès in Montreal. On 7 November 2017, the Tribunal took note of the Parties’ agreement and confirmed that the November 2017 Merits Hearing would take place in Montreal.
94. On 17 November 2017, the President of the Tribunal informed the Parties that, for medical reasons, he would likely be unable to travel to Montreal to attend the November 2017 Merits Hearing in person, but would be able to attend by video conference from London.
95. On 17 November 2017, ICSID informed USA and Mexico that the November 2017 Merits Hearing would be held at the Palais des Congrès de Montréal, 1001 Jean-Paul-Riopelle Pl, Montreal QC H2Z 1H5, Canada on 24 November 2017.
96. On 20 November 2017, USA informed ICSID that its representatives would not be attending the November 2017 Merits Hearing.

97. On 21 November 2017, Mexico informed ICSID that its representatives would not be attending the November 2017 Merits Hearing.
98. On 22 November 2017, ICSID confirmed to the Parties that the President of the Tribunal would participate in the November 2017 Merits Hearing by video conference. ICSID confirmed that the participants in the Hearing room in Montreal would be able to see and hear the President, and that the President would hear and see the Hearing room, including documents and presentations shown by the Parties. The Parties were invited to provide the President with an electronic copy of their presentations and any demonstrative exhibits that they intended to display at the Hearing, at least 30 minutes in advance of their presentations.
99. On 24 November 2017, the Tribunal held the November 2017 Merits Hearing. The President of the Tribunal participated remotely, while Professor Stern, Mr. Haigh K.C., and the Tribunal Secretary, together with the following, were present in-person at this Hearing:

For Claimant:

- Mr. Milos Barutciski, Bennett Jones LLP;
- Mr. Andrew D. Little, Bennett Jones LLP;
- Ms. Sabrina A. Bandali, Bennett Jones LLP;
- Mr. Josh Scheinert, Bennett Jones LLP;
- Mr. Jacob Mantle, Bennett Jones LLP;
- Ms. Katherine Rusk, Bennett Jones LLP;
- Mr. Mario Welsh, BCF Law,
- Mr. Andre Ryan, BCF Law; Mr. Shaun Finn, BCF Law;
- Ms. Louise McLean, paralegal, Bennett Jones LLP;
- Ms. Jacquie White/Elizabeth Fimeo, paralegal, Bennett Jones LLP;
- Mr. Tim Granger, Claimant's representative; and
- Mr. Doug Axani, Claimant representative.

For Respondent:

- Ms. Sylvie Tabet, Government of Canada;
- Mr. Jean-François Hébert, Government of Canada;

- Ms. Annie Ouellet, Government of Canada;
 - Mr. Éric Bédard, Government of Canada;
 - Ms. Johannie Dallaire, Government of Canada,
 - Mr. Marc-André Léveillé, paralegal, Government of Canada;
 - Ms. Shawna Lesaux, paralegal, Government of Canada;
 - Ms. Julie Boisvert, Respondent's representative, Government of Canada;
 - Ms. Martine Bélanger, Respondent's representative, Government of Canada;
 - Mr. Tristan Lambert, Respondent's representative, Government of Québec;
 - Mr. Jean-François Lord, Respondent's representative, Government of Québec;
 - Ms. Nathalie Latulippe, Respondent's representative, Government of Québec;
 - Mr. Marc-Antoine Couet, Respondent's representative, Government of Québec;
 - and
 - Mr. Renaud Patry, Respondent's representative, Government of Québec.
100. On 21 December 2017, Respondent requested the Tribunal to order Claimant to submit an updated version of the PowerPoint presentation used by it during the November 2017 Merits Hearing, excluding, in whole or in part, a number of slides. On 23 December 2017, Claimant indicated that it would respond in substance to Respondent's requests in the new year.
101. On 9 January 2018, the Tribunal invited Claimant to respond to Respondent's requests of 21 December 2017 at the latest by 12 January 2018.
102. On 12 January 2018, Claimant responded to Respondent's request, objecting to all but one of Respondent's requests.
103. On 9 March 2020, ICSID informed the Parties that the President of the Tribunal had passed away, and that, pursuant to Articles 1 and 14 of the UNCITRAL Rules and NAFTA Article 1123, a substitute arbitrator shall be appointed by agreement of the disputing parties.
104. On 17 April 2020, the Parties requested the remaining members of the Tribunal to provide additional information about the status of their deliberations with respect to the issues in dispute and drafting of the Award, before the passing of the President of the Tribunal.

105. On 27 April 2020, the remaining members of the Tribunal conveyed the following message to the Parties:

The Tribunal has indeed had some deliberations which reflected a different approach by the two remaining arbitrators as well as the position of the President, but nothing was recorded in writing at that point.

They think however that once a new President is appointed, it should be her or his decision to ask the two co-arbitrators to inform her or him of the status of their discussions, and/or to indicate whether she or he prefers to start from a “tabula rasa” and hold a new hearing.

106. On 28 August 2020, the Parties transmitted to ICSID a statement of availability from the candidate they were considering appointing as president of the Tribunal. The Parties requested the remaining members of the Tribunal to provide feedback, if any, regarding the candidate’s availability in light of their own schedules.
107. On 9 September 2020, ICSID transmitted to the Parties the statements of availability of the remaining members of the Tribunal.
108. On 18 September 2020, the Parties appointed Professor Dr. Albert Jan van den Berg as President of the Tribunal.
109. On 21 September 2020, Professor Dr. van den Berg accepted his appointment as President of the Tribunal, thereby reconstituting the Tribunal. Professor Dr. van den Berg’s address is:

Professor Dr. Albert Jan van den Berg
Hanotiau & van den Berg
IT Tower, 9th Floor
Avenue Louise 480 bte 9
1050 Brussels
Belgium
T: +32 2-290-3913
E: ajvandenbergh@hvdb.com

110. On 30 September 2020, the Tribunal proposed to organize a case management conference with the Parties to discuss the resumption of the arbitration and the next steps in the proceedings. The Tribunal shared a draft agenda for the proposed case management conference with the Parties, inviting them to provide their comments on the agenda and to confirm their availability for the conference.

111. On 5 October 2020, following Respondent’s email of 2 October 2020, wherein Respondent advised the Tribunal that it was not available for the proposed case management conference on the date indicated by the Tribunal, the Tribunal invited the Parties to provide their comments on the draft agenda in writing, following which a case management conference could be organized with the Parties to resolve any outstanding issues, as required. The Tribunal further advised the Parties of its intention to conduct a short, two-day “refresher” hearing through video conference as a result of the reconstitution of the Tribunal, with the view that each Party would present its case, without re-hearing witness and expert evidence. The Tribunal invited the Parties to submit, prior to this “refresher” hearing, simultaneous post-hearing briefs, which recapitulate the evidence submitted during the October 2017 Merits Hearing and the November 2017 Merits Hearing (together, the “**2017 Hearings**”), with appropriate references to the transcripts of the 2017 Hearings.
112. On 9 October 2020, Claimant posed certain queries to the President of the Tribunal with respect to a disclosure made by Respondent. Claimant also requested an extension of time, until 19 October 2020, to submit the Parties’ comments on the draft agenda of the case management conference.
113. On 10 October 2020, Respondent provided the Tribunal with the entire disclosure, which it had transmitted to Claimant, referred to in ¶ 112 above.
114. On 12 October 2020, the Tribunal granted Claimant’s request for an extension of time to submit the Parties’ comments on the agenda of the case management conference and their proposals on the next steps in this arbitration, referred to in ¶ 112 above.
115. On 12 October 2020, the President of the Tribunal responded to Claimant’s queries, concerning Respondent’s disclosure, referred to in ¶¶ 112 and 113 above.
116. On 13 October 2020, Claimant confirmed that it was satisfied with the President’s responses, referred to in ¶ 115 above, and had no further queries in that regard.
117. On 19 October 2020, the Parties provided their comments on the draft agenda of the case management conference and their proposals on the next steps in this arbitration. The Parties confirmed that they agreed to the application of Articles 15 and 17 of the UNICTRAL Rules for the resumption and conduct of this arbitration. The Parties jointly proposed the deadline

for filing the simultaneous filing of their post-hearing briefs and provided their availabilities for a two-day virtual “refresher” hearing, as requested by the Tribunal. The Parties requested the Tribunal to direct that the post-hearing briefs and “refresher” hearing are not opportunities for either party to file new evidence or present new theories of the case. The Parties advised the Tribunal that they had been unable to reach an agreement on whether they could refer to any evolution in governing law or new arbitral awards that have been rendered since November 2017. In this connection, the Parties proposed to make separate submissions to the Tribunal on this point by a deadline, subject to any parameters set by the Tribunal.

118. On 26 October 2020, the Tribunal (i) confirmed that the date for the filing of the Parties’ simultaneous post-hearing briefs shall be 22 January 2021, (ii) proposed to hold the two-day “refresher” hearing on 25 and 26 February 2021 by video conference, (iii) indicated that it may pose questions to the Parties before the “refresher” hearing, and would do so no later than one week before the “refresher” hearing, (iv) confirmed that it did not envision the post-hearing briefs and refresher hearing as an opportunity for the Parties to file new evidence and/or present new legal arguments and (v) invited the Parties to simultaneously submit, within two weeks, i.e., by 9 November 2020, their observations on the issue of the filing of new legal authorities or arbitral awards rendered since November 2017.
119. On 9 November 2020, each Party submitted its observations on the issue of the filing of new legal authorities or arbitral awards rendered since November 2017.
120. On 16 November 2020, the Tribunal directed the Parties to submit (i) within two weeks, a list of the new legal authorities they wish to introduce into the record; (ii) within two weeks of the submission of the aforementioned lists, a list of rebuttal authorities as well as objections to the proposed list of authorities, if any. The Tribunal further indicated that (i) should there be no objection to the admission of these new authorities, the Parties may proceed to submit them into the record; and (ii) should objections be raised by a Party, the Tribunal shall decide on the objections after giving the other Party an opportunity to respond.
121. On 30 November 2020, the Parties submitted their respective lists of new legal authorities.

122. On 14 December 2020, the Parties submitted their objections and observations on the other Party's list of new legal authorities. Respondent indicated that it did not have objections to Claimant's new legal authorities.
123. On 17 December 2020, the Tribunal invited the Parties to submit, by 23 December 2020, their responses, if any, to each other's objections of 14 December 2020.
124. On 23 December 2020, the Parties submitted their respective observations to each other's objections to their list of new legal authorities. Considering the absence of any objections by Respondent to Claimant's proposed new legal authorities, Claimant submitted said legal authorities, numbered Exhibits CLA-113 to CLA-116.
125. On 30 December 2020, the Tribunal permitted Respondent to introduce certain of its proposed new legal authorities into the record, which were submitted by Respondent as Exhibits RLA-119 to RLA-128.¹⁶
126. On 22 January 2021, the Parties filed their respective post-hearing briefs summarizing the dispute and evidence heard at the October 2017 Merits Hearing. Claimant's post-hearing brief is referred to as the "**C-PHB**" and Respondent's post-hearing brief is referred to as the "**R-PHB**".
127. On 9 February 2021, the Tribunal circulated to the Parties the English version of draft Procedural Order No. 8. The French version of draft Procedural Order No. 8 was circulated on 10 February 2021.
128. On 11 February 2021, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference. In addition to the Tribunal and the Tribunal Secretary, the following persons participated in this video conference:

For Claimant:

- Ms. Sabrina A. Bandali, Bennett Jones LLP;
- Mr. Vassilis Pappas, Bennett Jones LLP;
- Ms. Valerie Hughes, Bennett Jones LLP;

¹⁶ All new legal authorities submitted by the Parties have been uploaded to the case's folder on Box.

- Ms. Gita Keshava, Bennett Jones LLP;
- Mr. Quentin Vander Schueren, Bennett Jones LLP; and
- Mr. Ethan Gordon, Bennett Jones LLP.

For Respondent:

- Ms. Sylvie Tabet, Government of Canada;
- Mr. Jean-François Hébert, Government of Canada;
- Ms. Annie Ouellet, Government of Canada;
- Mr. Marc-André Léveillé, Government of Canada;
- Ms. Nathalie Latulippe, Respondent’s representative, Government of Québec;
- Mr. Louis-Philippe Coulombe, Respondent’s representative, Government of Québec;
- Mr. Marc-Antoine Couet, Respondent’s representative, Government of Québec;
- Mr. Julien Hamel-Guilbert, Respondent’s representative, Government of Québec; and
- Ms. Julie Boisvert, Respondent’s representative, Government of Canada.

129. On 19 February 2021, the Tribunal issued Procedural Order No. 8 setting out the virtual hearing protocol, establishing the rules regarding the organization and conduct of the refresher hearing scheduled on 25 and 26 February 2021 (“**PO 8**”).
130. On 22 February 2021, Mr. Haigh made certain disclosures to the Parties, in connection with Claimant’s counsel in this arbitration.
131. On 25 and 26 February 2021, the Tribunal held a refresher hearing by video conference (“**Refresher Hearing**”). In addition to the Tribunal and the Tribunal Secretary, the following persons were present at this Hearing:

For Claimant:

- Ms. Sabrina A. Bandali, Bennett Jones LLP;
- Mr. Vassilis Pappas, Bennett Jones LLP;
- Ms. Valerie Hughes, Bennett Jones LLP;

- Ms. Gita Keshava, Bennett Jones LLP;
- Mr. Quentin Vander Schueren, Bennett Jones LLP;
- Mr. Ethan Gordon, Bennett Jones LLP;
- Ms. Mehak Kawatra, Bennett Jones LLP;
- Mr. Marshall Torgov, Bennett Jones LLP;
- Mr. Erik Coates, Bennett Jones LLP;
- Mr. Andre Ryan, BCF Law;
- Ms. Carle Jane Evans, BCF Law;
- Ms. Gjöa Taylor, Claimant's representative; and
- Mr. Doug Axani, Claimant's representative.

For Respondent:

- Ms. Sylvie Tabet, Government of Canada;
- Mr. Jean-François Hébert, Government of Canada;
- Ms. Annie Ouellet, Government of Canada;
- Mr. Marc-André Léveillé, Government of Canada;
- Mr. Patrick McSweeney, Respondent's representative, Government of Québec;
- Ms. Nathalie Latulippe, Respondent's representative, Government of Québec;
- Mr. Louis-Philippe Coulombe, Respondent's representative, Government of Québec;
- Mr. Marc-Antoine Couet, Respondent's representative, Government of Québec;
- Mr. Julien Hamel-Guilbert, Respondent's representative, Government of Québec;
- Ms. Julie Boisvert, Respondent's representative, Government of Canada; and
- Ms. Frédérique Délaprée, Respondent's representative, Government of Canada;

For USA (non-disputing NAFTA Party)

- Ms. Lisa Grosh, U.S. Department of State;
- Ms. Nicole Thornton, U.S. Department of State;
- Mr. John Blanck, U.S. Department of State;
- Ms. Amanda Blunt, Office of the U.S. Trade Representative;

- Mr. Edward Rivera, U.S. Department of Commerce; and
 - Mr. William Stroupe, U.S. Department of Commerce.
132. During the Refresher Hearing on 25 February 2021, pursuant to Respondent’s request, Mr. Haigh provided certain clarifications to the Parties regarding the disclosures made on 22 February 2021, referred to in ¶ 130 above.
 133. On 26 February 2021, the Tribunal Secretary confirmed to the Parties that the PowerPoint presentations used at the 2017 Hearings and at the Refresher Hearing had been assigned Exhibit numbers C-174 to C-176, for Claimant’s presentations, and R-304 to R-308 for Respondent’s presentations.
 134. On 11 January 2022, Mr. Haigh conveyed additional disclosures to the Parties and updates on the disclosures made on 22 February 2021, referred to in ¶ 130 above. On the same day, ICSID informed the Parties that the Tribunal had made good progress with the Award and anticipated issuing it in the forthcoming months.
 135. On 14 January 2022, Respondent requested Mr. Haigh to provide certain clarifications regarding the additional disclosures made on 11 January 2022, which were provided by Mr. Haigh on 19 January 2022.
 136. On 27 January 2022, Respondent submitted its observations on Mr. Haigh’ disclosures and clarifications.
 137. On 27 October 2022, the Parties requested an update from ICSID or the Tribunal regarding the timing of the issuance of the Award.
 138. On 10 November 2022, ICSID informed the Parties that the Award was being finalized and would be issued in the course of the week starting 14 November 2022, or early in the subsequent week. ICSID also asked the Parties to indicate whether they wished to receive an advance notice prior to the issuance of the Award and, if so, the length of the interval between the advance notice and the issuance of the Award. Further, ICSID invited the Parties to confirm or amend the list of their respective representatives to appear in the Award.

139. On 15 November 2022, Respondent, on behalf of both Parties, requested that a 72-hour advance notice be provided to the Parties and that the Award be issued no sooner than on 21 November 2022. Respondent also provided ICSID with an updated list of its representatives to appear in the Award.
140. On 18 November 2022, Claimant provided ICSID with an updated list of its representatives to appear in the Award.
141. On 18 November 2022, ICSID informed the Parties that the Award would be issued on 21 November 2022.

IV. FACTUAL BACKGROUND

A. SHALE GAS EXPLORATION AND DEVELOPMENT

142. Set out below is a brief description of concepts and terms that are relevant to the law and practice of shale gas exploration and development in Québec.

(1) St. Lawrence Lowlands and the St. Lawrence River

143. The St. Lawrence Lowlands is a region of Québec which begins at Québec's southern border and extends northwards. The St. Lawrence Lowlands include a 400-kilometer section of the freshwater St. Lawrence River.¹⁷ The St. Lawrence Lowlands and a part of the St. Lawrence River contains Utica Shale.¹⁸
144. The Parties' disputes in this arbitration relate to the Government of Québec's revocation of nine exploration permits held under the St. Lawrence River.¹⁹

¹⁷ Memorial, Glossary.

¹⁸ Counter-Memorial, ¶ 137.

¹⁹ The St. Lawrence River begins at the outflow of the Great Lakes, near the Québec-USA border. Around 550 kilometers downstream from the border, the St. Lawrence River widens and becomes the maritime St. Lawrence Estuary, which opens into the northwestern part of the Gulf of St. Lawrence (*see* Memorial, Glossary). Respondent describes the St. Lawrence River as an exceptional environment known for its history, biodiversity, and seaway to the Great Lakes. It states that the St. Lawrence River serves as drinking water supply for more than half of Québec's population and supports a range of key socio-economic sectors for Québec and Canada (*see* Counter-Memorial, ¶ 4).

(2) Utica Shale

145. Utica Shale is a carbonate rich shale²⁰ sequence that is located in southeastern Québec and northeastern USA.²¹ The Utica Shale geological formation is made up of a low porosity and low permeability sedimentary clay rock containing natural gas in varying proportions.²²

(3) Shale Gas

146. Shale gas is natural gas that is trapped in the pores of shale rock.

(4) Hydraulic Fracturing and Horizontal Drilling

147. Hydraulic fracturing is a stimulation technique for extracting natural gas from shale formations, primarily from shallow vertical wells that rely on natural fracturing to produce low rates over a long time. The process involves a combination of water, sand, and chemicals being pumped into a wellbore with sufficient pressure to widen naturally occurring fissures in the rock, enabling the backflow of gas, oil, salt water and the fracking fluid into the well for extraction.²³
148. According to Claimant, since the mid-2000s, the process of hydraulic fracturing has been used in combination with horizontal drilling as a standard way to extract natural gas from so-called “unconventional” resources.²⁴ The combined process of hydraulic fracturing and horizontal drilling entails the drilling of a vertical well to a predetermined depth above a shale gas or oil reservoir, which is then drilled at an increasing angle until it meets the reservoir depth. Once it reaches that depth, a wellbore is drilled horizontally, sometimes up to 2,500 meters. Thereafter, the shale rock surrounding the wellbore is fractured, either to intersect and open existing natural fractures in the shale, or to create new fractures,

²⁰ Shale is a sedimentary deposit that generally combines clay, silica (*e.g.*, quartz), carbonate (*e.g.*, calcite or dolomite) and organic material. Shale contains tiny pores in which natural gas or oil is trapped. *See* Memorial, ¶ 30, **Exh. C-074**, National Energy Board, “A Primer for Understanding Canadian Shale Gas”, November 2009, p. 2.

²¹ Memorial, Glossary. *See also* FTI First Report, ¶ 5.8.

²² Counter-Memorial, ¶ 38.

²³ Memorial, ¶¶ 31-32; *citing* **Exh. C-074**, National Energy Board, “A Primer for Understanding Canadian Shale Gas”, November 2009, p. 3.

²⁴ Memorial, ¶¶ 32-33; *citing* **Exh. C-081**, “Use of Horizontal Drilling and Hydraulic Fracturing, Western Canada, 2006 to 2013.” This document was created by the Enterprise, based on public Government data from geoScout, a software for oil and gas industry professionals.

thereby creating pathways by which the natural gas and oil can flow into the wellbore for extraction.²⁵ Horizontal drilling ensures that the surface footprint of the drilling operation can be small, and the productivity of the well can be increased by enabling a greater contact area within the shale deposit.²⁶

149. Respondent submits that the combined technique of horizontal drilling and hydraulic fracturing to extract shale gas is a relatively new one and its effects on the environment and human health are not entirely clear and are being examined in several jurisdictions, including in Québec. Respondent submits that France has banned the use of this technique.²⁷

(5) Conventional and Non-Conventional Resources

150. Conventional and non-conventional resources for gas extraction are distinguished on the basis of their resource base. Shale gas and oil are classified as unconventional resources because the shale layer does not permit gas and oil to flow through it easily. Juxtaposed with this, conventional oil and gas are produced from pools in which they gather.²⁸

(6) Relevant Laws and Regulations

151. Legislative jurisdiction in Canada is divided among the federal and provincial governments, including the Québec National Assembly.²⁹ Section 109 of the Canadian Constitution Act, 1867 (the “**Constitution**”) provides that the provinces own the natural resources within their boundaries. Section 92 of the Constitution vests the provinces with exclusive legislative authority over, *inter alia*, property and civil rights. Section 92A of the Constitution further grants the provinces the exclusive jurisdiction to legislate with respect to exploration, development and conservation of non-renewable natural resources.³⁰

²⁵ Memorial, ¶ 34.

²⁶ Memorial, ¶¶ 32-33; *citing* **Exh. C-081**, “Use of Horizontal Drilling and Hydraulic Fracturing, Western Canada, 2006 to 2013.” This document was created by the Enterprise, based on public Government data from geoScout, a software for oil and gas industry professionals.

²⁷ Counter-Memorial, ¶ 17.

²⁸ Memorial, ¶ 33.

²⁹ Counter-Memorial, ¶ 42; *citing* **Exh. R-094**, Henri Brun & Guy Tremblay, *Droit Constitutionnel*, 5e éd., Cowansville, Les Éditions Yvon Blais, 2008, 1548, p. 141.

³⁰ Counter-Memorial, ¶ 43; *citing* **Exh. R-133**, *Loi constitutionnelle de 1867 (R-U)*, 30 & 31 Vict, c 3. *See also* Memorial, ¶ 61.

152. The oil and gas industry in Canada is subject to the general mining regime.³¹ In Québec, shale gas exploration and development is regulated by the provincial Mining Act, RSQ c. M-13.1 (the “**Mining Act**”).³² The Québec mining regime operates on a first come, first served basis, also known as free mining or universal access to the resource.³³
153. Also relevant to oil and gas exploration and development activities in Québec, is the Regulation Respecting Petroleum, Natural Gas and Underground Reservoirs (the “**Regulation**”).³⁴ According to Respondent, the licenses or permits required for undertaking most oil and gas exploration and development activities are issued by the Ministry of Natural Resources and Wildlife (“**QMNR**”) under the Mining Act and the Regulation. The objective of such licenses or permits is to ensure oversight of exploration and development activities to promote the orderly and safe development of Québec’s oil and gas resources.³⁵
154. Several other general legislative provisions govern oil and gas exploration and development activities from an environmental protection and sustainable development perspective in Québec. These include (i) the Environmental Quality Act, CQLR³⁶ and associated regulations; (ii) an Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resources Protection;³⁷ (iii) an Act Respecting the Preservation of Agricultural Land and Agricultural Activities;³⁸ and (iv) an Act Respecting the Conservation and Development of Wildlife and the Regulation Respecting Wildlife Habitats.³⁹

³¹ Counter-Memorial, ¶ 41, 62-63.

³² Memorial, ¶ 58; citing **Exh. C-004 / Exh. R-002**, Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011).

³³ Counter-Memorial, ¶ 62; citing Gagné First Report, ¶ 23. See also Memorial, ¶ 65.

³⁴ **Exh. R-003**, *Règlement sur le pétrole, le gaz naturel et les réservoirs souterrains*, RLRQ, chapitre M-13.1, r.1 (version in force on 11 June 2011).

³⁵ Counter-Memorial, ¶ 63.

³⁶ **Exh. R-004**, *Loi sur la qualité de l’environnement*, RLRQ, chapitre Q-2 (version in force on 10 June 2011).

³⁷ **Exh. R-017**, *Loi affirmant le caractère collectif des ressources en eau et visant à renforcer leur protection*, LQ 2009, chapitre 21 (Projet de loi n°27, 1ère session, 39ème législature, sanctionné, 12 June 2009).

³⁸ **Exh. R-105**, *Loi sur la protection du territoire et des activités agricoles*, RLRQ, chapitre P-41.1 (version in force on 12 June 2011).

³⁹ Counter-Memorial, ¶ 59.

155. The Civil Code of Québec (the “**Québec Civil Code**”)⁴⁰ along with the Mining Act is relevant for the Parties’ disputes relating to the nature of the property rights received under an exploration permit.⁴¹

(7) Relevant Regulatory Bodies

156. The oversight of oil and gas exploration and development in Québec falls mainly to the QMNR and the Ministry of Environment.⁴² The QMNR grants mining rights, including oil and natural gas exploration licenses and production leases. It is responsible for regulating oil and gas exploration and development activities, and for governing this sector. Between 23 June 2009 and 6 September 2011, the position of Minister of Natural Resources was held by Ms. Nathalie Normandeau.⁴³
157. The Ministry of Environment is tasked to ensure the protection of environment in Québec and to promote sustainable development within the public administration.⁴⁴ Between 11 August 2010 and 19 September 2012, the position of Minister of Environment was held by Mr. Pierre Arcand.⁴⁵
158. For the purposes of developing policy initiatives and legislation, these Ministries routinely order the conduct of a Strategic Environmental Assessment (“**SEA**”), which is elaborated upon below.

⁴⁰ **Exh. C-002**, Civil Code of Québec, CQLR c. C-1991.

⁴¹ See Memorial, ¶¶ 61-66.

⁴² Counter-Memorial, ¶ 45.

⁴³ Counter-Memorial, ¶ 48; *citing* Normandeau First Statement, ¶ 5.

⁴⁴ See Counter-Memorial, ¶¶ 46-47, 52-53.

⁴⁵ Counter-Memorial, ¶ 54.

(8) SEA

159. The term SEA refers to a Strategic Environmental Assessment ordered to be conducted by the Government of Québec. The Parties have referred to the following SEAs in their submissions:

- (i) SEA-1: A SEA on the maritime Estuary and northwestern part of the Gulf of St. Lawrence (“**SEA-1**”). SEA-1 began in June 2009 and its preliminary report was published in July 2010.⁴⁶
- (ii) SEA-2: A SEA on the three eastern zones of the Gulf of St. Lawrence, including the Anticosti, Magdalen and Chaleur Bay basins (“**SEA-2**”). SEA-2 began in February 2010 and its final report was published in September 2013.⁴⁷
- (iii) SEA-SG: A SEA on shale gas in Québec (“**SEA-SG**”). The SEA-SG began in May 2011 and its final report was published in February 2014.⁴⁸

(9) BAPE

160. The *Bureau d’audiences publiques sur l’environnement*, (“**BAPE**”) is an independent provincial agency reporting to the Minister of Sustainable Development, Environment and Fight against Climate Change (“**Minister of Sustainable Development**”)⁴⁹ on matters relating to the quality of the environment. BAPE was created by a statute of the Québec National Assembly in 1978 to support informed decision making by the Québec Government from a sustainable development perspective.⁵⁰ BAPE conducts inquiries and informs and consults the public about projects or issues submitted to it by the Minister of Sustainable Development relating to environmental quality.⁵¹

⁴⁶ Memorial, Glossary.

⁴⁷ Memorial, Glossary.

⁴⁸ Memorial, Glossary.

⁴⁹ Formerly known as the Minister of Environment until February 2005.

⁵⁰ Counter-Memorial, ¶¶ 45, 57; citing **Exh. R-101**, *Loi modifiant la Loi sur la qualité de l’environnement*, RLRQ, 1978 (version in force on 12 June 2011); Memorial, ¶ 129. Respondent states that the BAPE plays an important role in the governmental decision-making process. Claimant states that the BAPE’s role is purely advisory and it has no decision-making power.

⁵¹ Counter-Memorial, ¶ 57.

161. The Parties refer to the following BAPE Reports issued in the period between 2004 and 2014:

- (i) BAPE Report 193: BAPE Report 193, issued on 31 August 2004 (“**BAPE Report 193**”), reports on environmental issues associated with seismic surveys in the Estuary and Gulf of St. Lawrence.⁵²
- (ii) BAPE Report 273: BAPE Report 273, issued on 28 February 2011, reports on the sustainable development of the shale gas industry in land environments. The BAPE’s mandate for this report was to propose (i) a framework for the exploration and development of shale gas that would promote the harmonious co-existence of these activities with local populations, the environment and other activity sectors in the area; and (ii) guidelines for a legislative and regulatory framework so that the industry could be developed safely and in compliance with the requirements of sustainable development.⁵³ BAPE Report 273 is one of the studies on the basis of which the Government of Québec justifies the introduction and passage of Bill 18, which is the impugned measure in this arbitration (see ¶ 2 above).
- (iii) BAPE Report 307: BAPE Report 307, issued in November 2014 (“**BAPE Report 307**”), reports on issues associated with the exploration and development of shale gas in the St. Lawrence Lowlands.⁵⁴

(10) Exploration License or Permit

162. Section 165 of the Mining Act provides that “[n]o person may explore for petroleum, natural gas or underground reservoirs without holding a license to explore for petroleum, natural gas and underground reservoirs issued by the Minister”.⁵⁵ Thus, any person seeking to explore for oil or natural gas in Québec must obtain an exploration license from the

⁵² Counter-Memorial, ¶¶ 114-115; citing **Exh. R-019**, BAPE, Rapport 193, Rapport d’enquête et d’audience publique, *Les enjeux liés aux levés sismiques dans l’estuaire et le golfe du Saint-Laurent*, August 2004.

⁵³ Counter-Memorial, ¶¶ 143, 146; citing **Exh. R-024**, BAPE, Rapport 273, Rapport d’enquête et d’audience publique, *Développement durable de l’industrie des gaz de schiste au Québec*, February 2011.

⁵⁴ Counter-Memorial, ¶ 166; citing **Exh. R-027**, BAPE, Rapport 307, Rapport d’enquête et d’audience publique, *Les enjeux liés à l’exploration et à l’exploitation du gaz de schiste dans le shale d’Utica des basses-terres du Saint-Laurent*, November 2014.

⁵⁵ Memorial, ¶¶ 58-59; quoting **Exh. C-004 / Exh. R-002**, Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011), Chapter 3, Division XI, ¶ 165.

Minister of Natural Resources pursuant to Section 165 of the Mining Act. The holder of an exploration license or permit obtains the exclusive right to explore for mineral substances on the parcel of land subject to the license. An exploration license or permit is initially valid for a term of five years, after which it is eligible for a renewal of five years, thus permitting a total of ten years of exploration activity.⁵⁶

163. Section 8 of the Mining Act further stipulates that the rights conferred through “licenses to explore for petroleum, natural gas and underground reservoirs” are immovable real rights and Section 9 of the Act provides that “[e]very real and immovable mining right constitutes a separate property”.⁵⁷
164. Upon receipt of an exploration license or permit, the permit holder assumes certain ongoing obligations, which includes the obligations to (i) expend certain minimum costs on exploration activities in the licensed territory; (ii) submit a year-end report to the QMNR describing the exploration work completed and outlining the money expended to complete the work; (iii) submit annually a program of operations outlining exploration activities scheduled for the upcoming year.⁵⁸
165. The discovery of a resource deposit triggers a new set of obligations for the licensee. The licensee must notify the Minister of Natural Resources in writing upon discovering a deposit of petroleum or natural gas, including the nature and location of the deposit. The Minister may request an economic assessment of the potential of the deposit. If the assessment confirms that an economically workable deposit exists, within six months of the date of the assessment, the licensee must apply for a lease to produce petroleum and natural gas.⁵⁹

⁵⁶ See **Exh. C-004 / Exh. R-002**, Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011), ¶¶ 165, 168, 208; **Exh. R-003**, *Règlement sur le pétrole, le gaz naturel et les réservoirs souterrains*, RLRQ, chapitre M-13.1, r.1, (version in force on 11 June 2011), ¶¶ 64, 70.

⁵⁷ Memorial, ¶¶ 63-64; citing **Exh. C-004 / Exh. R-002**, Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011).

⁵⁸ **Exh. C-004 / Exh. R-002**, Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011), ¶ 177; **Exh. R-003**, *Règlement sur le pétrole, le gaz naturel et les réservoirs souterrains*, RLRQ, chapitre M-13.1, r.1, (version in force on 11 June 2011), ¶¶ 66, 67, 68.

⁵⁹ Memorial, ¶ 70, citing **Exh. C-004 / Exh. R-002**, Mining Act, RSQ c. M-13.1 (version in force on 13 June 2011), ¶ 176; Counter-Memorial, ¶ 75.

(11) Other Permits

166. Respondent states that each different activity associated with the exploration and exploitation of natural gas in Québec requires different permits or licenses. For instance, geophysical surveying and drilling, conversion, completion and closing of wells may be carried out subject to obtaining the requisite licenses and authorizations for each of these activities.⁶⁰ Claimant, too, acknowledges that different licenses are required for different activities.⁶¹

(12) Mining Register

167. Section 11 of the Mining Act provides for the establishment of a public register of real and immovable mining rights, which is referred to as a mining register (“**Mining Register**”). The Mining Register is used by the QMNR for the management and administration of the Mining Act, in particular to record and track the real and immovable mining rights issued. The transfer of a license or any other instrument relevant to certain types of licenses is also recorded in the Mining Register.⁶²
168. The Parties disagree regarding the effect of the registration of entries in the Mining Register. According to Claimant, the registration of licenses or permits in the Mining Register has the effect of conferring opposability against the State. Conversely, Respondent contends that any opposability conferred by the registration of entries in the Mining Register is only with respect to the Minister of Natural Resources to the extent of imposing an obligation on the Minister to inform the concerned persons regarding the measures taken in relation to the mining titles.⁶³

(13) QOGA

169. QOGA refers to the Québec Oil and Gas Association, which is an association of oil and gas companies with interests in Québec. The Enterprise is a member of the QOGA.⁶⁴

⁶⁰ Counter-Memorial, ¶¶ 69-79.

⁶¹ Memorial, ¶ 64.

⁶² Counter-Memorial, ¶ 85; *citing* Gagné First Report, ¶¶ 57-61. *See also* Memorial, ¶ 66.

⁶³ Memorial, ¶¶ 66-67; Counter-Memorial, ¶¶ 85-87.

⁶⁴ Counter-Memorial, ¶¶ 40, 145.

(14) Farmout and Farmin Agreements

170. According to Claimant, in the context of the oil and gas industry, the terms “farmout” and “farmin” are functionally equivalent, differing only to reflect the position of the author of the contract.⁶⁵
171. A farmout agreement is drafted by the company that holds the permit rights to record the terms on the basis of which the permit holder is “farming out” its rights to another. Conversely, a farmin agreement is drafted by the person seeking to invest in the permit area to record the terms on the basis of which the investing company is “farming-in” to the permit rights by investing capital pursuant to the agreement.⁶⁶

B. QUÉBEC’S ENERGY POLICIES

(1) Québec Energy Strategy 2006-2015

172. On 4 May 2006, the Québec Government released its energy strategy entitled “*Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy 2006-2015*” (the “**Québec Energy Strategy 2006-2015**”), with the following six objectives: (i) Québec must strengthen its energy supply security; (ii) Québec must make better use of energy as a lever for economic development. Priority is given to hydroelectricity, wind energy potential, hydrocarbon reserves and the diversification of natural gas supplies; (iii) local and regional communities and First Nations must be given more say; (iv) Québec must use energy more efficiently; (v) Québec must become a leader in the sustainable development field; and (vi) electricity rates must be set at a level that promotes the interests of Québec and ensures proper management of resources, thus improving price signals while protecting consumers and Québec’s industrial structure.⁶⁷
173. The Québec Energy Strategy 2006-2015 further specified the following priority actions that were to be undertaken to achieve the above-mentioned objectives: (i) resume and accelerate the pace of development of Québec’s hydroelectric potential; (ii) develop wind

⁶⁵ Memorial, fn. 1.

⁶⁶ Memorial, fn. 1.

⁶⁷ Memorial, ¶ 38; citing **Exh. C-045 / R-022**, QMNR, “Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy 2006-2015”, 2006, p. IX. See also Counter-Memorial, ¶¶ 116-118.

power, an energy source for the future; (iii) use energy more efficiently; (iv) innovate in the energy field; (v) consolidate and diversify sources of oil and gas supply; and (vi) modernize the legislative and regulatory framework.⁶⁸

(2) QMNR Budget 2009-2010

174. On 19 March 2009, the Québec Government announced Québec’s Budget Plan for 2009-2010 (“**Budget Plan 2009-2010**”). With respect to measures instituted to “[s]timulat[e] gas exploration in Québec”, the Budget Plan 2009-2010 stated:

. . . [T]he government is acting to pursue exploration activity and increase the possibilities for production to come on-stream in the near future. To do so, the government is announcing:

- the implementation of a five-year royalty holiday of up to \$800,000 per well for wells put into production by the end of 2010;
- the participation of the *Société générale de financement du Québec* (SGF) to apply the tools at its disposal to support the development of this industry in Québec;
- implementation of a program for the acquisition of geoscientific knowledge;
- implementation of a strategic environmental assessment program.

To stimulate natural gas exploration in Québec, the government will provide industry with support of \$10.8 million over the next two years.⁶⁹

175. On 25 March 2009, the QMNR issued a press release in relation to the Budget Plan 2009-2010. The press release recorded the statements of the then Minister of Natural Resources and Wildlife responsible for the Bas-Saint-Laurent region, Mr. Claude Béchar, regarding the development of gas exploration in Québec:

“La géologie du Québec est favorable à la découverte de gisements gaziers et les travaux d’exploration déjà amorcés l’ont démontré. Imaginez, si la totalité du potentiel gazier était exploité, la production pourrait répondre aux besoins du Québec pendant près de 190 ans. Le développement du Québec doit mettre à profit cette nouvelle filière énergétique”, a souligné le ministre Béchar.

En ce sens, le Québec entend mettre en valeur les hydrocarbures présents sur son territoire de façon responsable et respectueuse de l’environnement. “Le gouvernement souhaite présenter des modifications législatives et réglementaires visant à mettre en valeur, de façon responsable, les ressources pétrolières et gazières

⁶⁸ Memorial, ¶¶ 38-39; citing **Exh. C-045 / R-022**, QMNR, “Using Energy to Build the Québec of Tomorrow: Québec Energy Strategy 2006-2015”, 2006, p. IX. See also Counter-Memorial, ¶¶ 116-118.

⁶⁹ Memorial, ¶ 53; citing **Exh. C-048**, Finances Québec, *2009-2010 Budget – Budget Plan* (Québec: Government of Québec, 2009), pp. F73-F74.

du Québec dans une perspective de développement durable”, a indiqué le ministre Béchard.

Ces modifications moderniseront le système de redevances applicables aux hydrocarbures. “Il importe, pour notre gouvernement, que le régime de redevances sur cette nouvelle ressource demeure concurrentiel, tout en assurant aux Québécois un juste retour sur la ressource dont ils sont collectivement propriétaires”, a conclu M. Béchard.

Crédit d’impôt remboursable pour la formation

Soulignons également que le budget 2009-2010 a prévu que les entreprises des secteurs de la foresterie, de l’exploitation forestière, de l’extraction minière, de l’exploitation en carrière et de l’extraction de pétrole et de gaz pourront désormais se prévaloir du crédit d’impôt remboursable pour la formation. Auparavant, ce crédit d’impôt s’appliquait seulement aux entreprises manufacturières.⁷⁰

176. On 19 October 2009, the new Minister of Natural Resources and Wildlife, Ms. Nathalie Normandeau, spoke at a conference organized by the QOGA about encouraging exploration companies to pursue their investments in activities to develop oil and gas potential in a manner that is responsible and respectful to the environment, noting further that if a quarter of the estimated natural gas reserves in the St. Lawrence Lowlands could be extracted, it would meet Québec’s needs for the next 200 years.⁷¹

C. FACTUAL BACKGROUND TO CLAIMANT’S CLAIMS

(1) Claimant’s entry into Québec’s oil and gas market

a. Farmout Agreement and Original Permits

177. On 5 June 2006, Forest Oil (Claimant’s and the Enterprise’s parent company at the time), entered the Québec oil and gas market by entering into a Letter Agreement (the “**Farmout Agreement**”) with Junex, a Québec-incorporated oil and gas company. The Farmout Agreement related to four exploration permits held by Junex on four blocks of lands in the Utica Shale basin covering a total of 57,772 hectares, bearing permit numbers: 1996PG950

⁷⁰ Memorial, ¶ 53; *quoting* **Exh. C-047**, QMNR, « Budget 2009-2010 – Le gouvernement du Québec annonce une série de mesures pour stimuler l’exploration gazière au Québec », 25 March 2009: <<http://www.mern.gouv.qc.ca/presse/communiqués.jsp?idSecteur=0>>.

⁷¹ Memorial, ¶ 55; *citing* **Exh. C-049**, QMNR, « Secteur pétrolier et gazier – Une modernisation du cadre législatif et réglementaire s’impose » 19 October 2009: <<http://www.mern.gouv.qc.ca/presse/communiqués.jsp?idSecteur=0>>.

(renumbered to 2006RS184), 2002PG597 (renumbered to 2009RS285), 2002PG596 (renumbered to 2009RS284) and 2004PG769 (renumbered to 2009RS286) (together “**Original Permits**” or “**Land Licenses**”). The Original Permits related to the Bécancour/Champlain Block, which was adjacent to the St. Lawrence River.⁷²

178. The Farmout Agreement was entered with a view to undertake “(i) the coring and evaluation of certain shale stratum in the Junex/Becancour #8 Well; (ii) the optional coring and evaluation of similar horizons in a subsequent well to be agreed upon between Forest and Junex; and (iii) subject to the conditions set forth herein [*i.e.*, in the Farmout Agreement], the option by Forest to earn one hundred percent (100%) of the working interest in said Exploration Permits [Original Permits] in stratum starting from the surface (excluding the overburden and 10m within the hard rock) to the stratigraphic equivalent of the top of the Trenton – Black River Formations at 743m as seen in the SOQUIP - Becancour #2 Well on the Dual Laterolog survey which was conducted by Schlumberger on 22 August 1981” (“**Contract Area**”).⁷³
179. The salient features of the agreement between Forest Oil and Junex under the Farmout Agreement are set out below:
 2. Junex agrees to drill the Junex/Becancour #8 Well on, or about July 15, 2006 and shall agree to core said well using the specifications set out in the proposal attached hereto as Exhibit “B”. Forest shall reimburse Junex for 100% of the costs incurred in coring and analysis by an accredited laboratory selected by Forest and Junex shall pay for 100% of the rig expense during the period of time in which all cores are acquired. Additionally, upon written request Forest shall be given representative samples of all cutting taken through intervals of their choice in the Junex/Becancour # 8 Well and a copy of all logs acquired by Junex in said well. Both Forest and Junex shall have access to, and copies of, all the information taken and provided in this operation.
 3. Upon receipt of the information in Paragraph 2 from Junex, Forest shall have a period of six (6) months from the day Forest receives the final core analysis to elect to exercise their option to drill and earn interest in the Contract Area. Forest shall notify Junex in writing of their intentions to either relinquish their rights to earn an interest in the Contract Area or exercise the option to earn the interest under the terms stated herein.

⁷² Memorial, ¶¶ 72, 75, Counter-Memorial, ¶ 230. *See also*, **Exh. C-016**, Overview of Original and River Permits.

⁷³ **Exh. C-017**, Letter Agreement between Forest Oil and Junex, 5 June 2006 (the “**Farmout Agreement**”), p. 1. *See also* Memorial, ¶ 85; Counter-Memorial, ¶ 231.

4. In the event that Forest elects to exercise said option they shall have a period of 18 months (Commitment Period) to spend, cause to be spent or commit to spend a total sum of [REDACTED] in drilling, completions, re-completions, construction of facilities, pipelines, and gathering lines or on geological and geophysical expenses in order to earn 100% of the Contract Area.

...

7. Upon the satisfaction of Forest's obligations during the Commitment Period in Paragraph 4 Junex shall assign to Forest 100% interest in the Contract Area and retain [REDACTED]

...

9. In the event that Forest spends less than the committed amounts of [REDACTED] during the Commitment Period then at their election they shall pay Junex either (1.) the difference between the amount of capital spent and [REDACTED] or (2.) they shall be entitled to an assignment of a portion of the Contract Area in the Exploration Permits equal to the proportionate amount of capital spent. (By example, if Forest spends, or causes to be spent, a total of [REDACTED] during the Commitment Period, then they shall be entitled to receive an assignment from Junex of 50% of the Contract Area.) If less than all the interest is earned then Forest would advise Junex of the geographical areas it desires to surrender prior to the conveyance of interest by Junex. The provisions of this paragraph 9 shall be the sole and exclusive remedy for the failure of Forest to comply with any of the terms of this letter agreement.

...

13. It is understood that this Agreement is not intended to create a partnership or joint venture between Forest and Junex, nor shall the provisions of this Agreement be construed as creating such relationship.⁷⁴

180. On 10 May 2007, Forest Oil exercised its option to earn interest in the Contract Area covered by the Original Permits, in accordance with paragraph 3 of the Farmout Agreement, referred to in ¶¶ 178 and 179 above.⁷⁵

181. Following the exercise of the option, referred to in ¶ 180 above, Forest Oil undertook exploration work on three out of the four Original Permits, being Permit No. 2009RS285 situated on the north shore of the St. Lawrence River and Permits No. 2006RS184 and 2009RS286 situated on the south shore of the St. Lawrence River. Claimant spent USD 11,607,000 towards (i) drilling an exploration well in the area covered by Permit No. 2010RS285; (ii) completing an existing well of Junex in the area covered by Permit No.

⁷⁴ **Exh. C-017**, Letter Agreement between Forest Oil and Junex, 5 June 2006, pp. 2-3.

⁷⁵ **Exh. C-024**, Letter from the Enterprise to Junex re: exercise of Utica Shale Farmout Agreement, 10 May 2007. Memorial, ¶ 104; Counter-Memorial, ¶ 240.

2006RS184 and conducting core analysis and surveying for this well; and (iii) conducting seismic surveys in the areas of the Permits No. 2006RS184 and 2009RS286, thereby expending more than the [REDACTED] amount that was required under paragraph 4 of the Farmout Agreement (see ¶ 179 above). The Parties disagree whether the aforementioned work undertaken by Claimant related to the development of the Bécancour/Champlain Block as a whole, *i.e.*, including the River Permit Area (defined in ¶ 193 below) or if it only related to the area covered by the Original Permits.⁷⁶

182. On 19 August 2009, the Enterprise met the capital commitment requirements under the Farmout Agreement.⁷⁷

b. River Permit Agreement and River Permit

183. In July 2006, Mr. Wiggin from Forest Oil contacted Mr. Jean-Yves Laliberté, the coordinator of oil and gas exploration for the QMNR, to discuss the possibility of acquiring land under the St. Lawrence River, which was adjacent to the Bécancour/Champlain Block.⁷⁸ Mr. Wiggin states in the Wiggin First Statement that after he had explained to Mr. Laliberté that it was Forest Oil’s plan to employ horizontal drilling techniques from onshore locations covered by the Original Permits (see ¶ 177 above) to access the area under the St. Lawrence River, Mr. Laliberté indicated that the QMNR would be willing to grant a permit for the resources under the St. Lawrence River adjacent to the Bécancour/Champlain Block.⁷⁹
184. On 28 July 2006, the Enterprise applied for an exploration permit for the area under the St. Lawrence River adjacent to the Bécancour/Champlain Block.⁸⁰ The Enterprise stated in its application that it “plans to test the shale gas potential of the Utica Formation through horizontal drilling and completion techniques” and submitted a three-year work program to that end. Amongst others, the work program specified the following tasks: (i) “[i]dentify drill sites on both the north and south shore (and not inside the banks) of the St. Lawrence

⁷⁶ Counter-Memorial, ¶ 241, *referring to* Memorial, ¶ 400; *See also* Memorial, ¶ 105; *citing* Lavoie First Statement, ¶ 22.

⁷⁷ Memorial, ¶ 108; *citing* **Exh. C-035**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, 28 January 2010, ¶ 1.

⁷⁸ Memorial, ¶ 88; *citing* Wiggin First Statement, ¶ 12.

⁷⁹ Memorial, ¶¶ 88–92; *citing* Wiggin First Statement, ¶¶ 12–16.

⁸⁰ Memorial, ¶ 93; *citing* **Exh. C-018**, Letter Application from the Enterprise to QMNR, 28 July 2006.

River such that all drilling will initiate from dry land locations”; (ii) “[c]oordinate with existing oil and gas permit holders on the north and south sides of the St. Laurent River such that Forest would access the oil and gas resources under the St. Lawrence River by providing certain well log and direction survey data obtained from Forest’s horizontal drilling activities”. The Enterprise stated further that it would apply for an operating license and commence development of the project, subject to the results of the data collected pursuant to the horizontal drilling program.⁸¹

185. On 25 September 2006, the QMNR Registrar wrote to Mr. Wiggin in relation to the Enterprise’s application, referred in ¶ 184 above. The Registrar confirmed that the license number would be 2006PG906 (“**Permit PG906**”) and that the area covered by the license would be 11,434 hectares. She further stated that she would send the Enterprise the official documents concerning the license once she received the cheque towards the rental for the first year of the license.⁸²
186. On 26 September 2006, the QMNR Registrar wrote to Mr. Wiggin stating that a modification of another oil and gas exploration license had led to a change in the license area covered under Permit PG906, which was now 11,570 hectares.⁸³
187. Also on 26 September 2006, Mr. Wiggin responded to the QMNR Registrar expressing concern whether the Enterprise “w[ould] be able to readily access certain areas under the license while drilling horizontally from onshore positions – particularly the north shore where it appear[ed] that Junex’s position d[id] not follow the banks of the Fleuve St-Laurent but rather extend[ed] significantly into the river”. Mr. Wiggin queried if there was a mismatch of lands as shown on the digital plans or if Junex owned the lands under the river.⁸⁴

⁸¹ Memorial, ¶ 93; **Exh. C-018**, Letter Application from the Enterprise to QMNR, 28 July 2006.

⁸² Memorial, ¶ 94; *citing* **Exh. C-019**, Email from L. Levesque of QMNR to R. Wiggin of Forest Oil re: application for exploration permit, 25 September 2006.

⁸³ Memorial, ¶¶ 94-95; *citing* **Exh. C-020**, Email from R. Wiggin of Forest Oil to L. Levesque of QMNR re: application for exploration permit, 26 September 2006.

⁸⁴ **Exh. C-020**, Email from R. Wiggin of Forest Oil to L. Levesque of QMNR re: application for exploration permit, 26 September 2006.

188. On 26 September 2006, the QMNR Registrar confirmed that the Junex’s licenses extended into the river.⁸⁵
189. On 13 October 2006, the Enterprise made the requisite payments to the QMNR towards the first-year rental for Permit PG906.⁸⁶
190. Following subsequent discussions between Junex and Forest Oil in November-December 2006, the two entities reached an agreement that Forest Oil would withdraw its application for Permit PG906, with the view that Junex would file a request to add the acreage under Permit PG906 to one of its existing permits, which when granted would be subject to the same primary terms as set forth under the Farmout Agreement (see ¶¶ 178 and 179 above).⁸⁷ Junex and Forest Oil recorded the terms of their agreement on this matter in (i) a Letter Agreement between Forest Oil and Junex regarding the River Permit Agreement, dated 29 November 2006 (“**29 November 2006 Letter Agreement**”);⁸⁸ (ii) an undated email from Victor Luszczyk of Forest Oil to Junex regarding the terms of the River Permit Agreement, believed to be from on or around 5 December 2006 (“**5 December 2006 Email**”);⁸⁹ and (iii) a Letter Agreement between Forest Oil and Junex regarding amendments to the River Permit Agreement, dated 14 December 2006⁹⁰ (“**14 December 2006 Letter Agreement**”, together with the 29 November 2006 Letter Agreement and the 5 December 2006 Email, the “**River Permit Agreement**”).

⁸⁵ **Exh. C-020**, Email from R. Wiggin of Forest Oil to L. Levesque of QMNR re: application for exploration permit, 26 September 2006.

⁸⁶ Memorial, ¶ 95; *citing* **Exh. C-021**, Covering Letter from the Enterprise to QMNR re: payment of first year rental, 13 October 2006.

⁸⁷ Memorial, ¶ 98. *See also* ¶¶ 96-97.

⁸⁸ **Exh. C-022A**, Letter Agreement between Forest Oil and Junex re: River Permit Agreement, 29 November 2006.

⁸⁹ **Exh. C-022B**, Email from Victor Luszczyk of Forest Oil to Junex re: terms of the River Permit Agreement, undated, believed to be from on or around 5 December 2006.

⁹⁰ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex re: amendments to the River Permit Agreement, 14 December 2006.

191. The River Permit Agreement recorded Forest Oil's and Junex's agreement, *inter alia*, that:

- (i) "Forest Oil shall withdraw its request for the Oil and Natural Gas Prospecting License(s) beneath the St. Lawrence River in the vicinity of Bécancour and Champlain to permit the enlargement of licence number 2006RS184";⁹¹
- (ii) "In exchange, JUNEX inc. agrees that the new enlarged portion of license number 2006RS184 shall be subject to the same terms and conditions as specified in the **Letter Agreement, Utica Shale Option Farmout, St. Lawrence Lowlands Area, province of Québec**, that was signed by JUNEX inc. on July 11, 2006";⁹²
- (iii) "Junex would grant Forest [Oil] the right to re-enter the Junex Bécancour #4 Well or the Intermont Bécancour #2 Well in an attempt to test and establish production in the Utica Shale and/or Lorraine Sections. As compensation for an assignment from Junex of said wellbores Forest [Oil] would immediately assume all surface lease rental costs and, upon completion of its operations, assume plugging costs, abandonment costs, and site restoration costs for each wellbore utilized";⁹³
- (iv) "Junex will consider the possibility of granting Forest [Oil] the right to re-enter the Junex Bécancour # 8 Well under the same terms as Condition 1 [referred in point (iii)] above";⁹⁴
- (v) "By its contribution of Permit #2006PG906 containing 11,570 hectares to the enlargement of Junex Permit #2006RS184 Forest [Oil] would be deemed to have earned all rights in, and to the Utica Shale and Lorraine Sections in this 11,570 hectares extension of Permit #2006PG906 (the "Extension"). The terms and conditions of the Letter Agreement dated June 5, 2006 would apply to the Extension

⁹¹ **Exh. C-022A**, Letter Agreement between Forest Oil and Junex re: River Permit Agreement, 29 November 2006.

⁹² **Exh. C-022A**, Letter Agreement between Forest Oil and Junex re: River Permit Agreement, 29 November 2006 (bold in original).

⁹³ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex re: amendments to the River Permit Agreement, 14 December 2006. *See also* **Exh. C-022B**, Email from Victor Luszczyk of Forest Oil to Junex re: terms of the River Permit Agreement, undated, believed to be from on or around 5 December 2006.

⁹⁴ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex re: amendments to the River Permit Agreement, 14 December 2006.

except that Forest [Oil] would be deemed to have earned such rights within the Extension”;⁹⁵

(vi) “Junex would grant Forest [Oil] a ‘first right of refusal’ on Permit #2002RS056 for any farmout granted during the term of [the] Letter Agreement dated June 5, 2006 to any third party for the Utica and Lorraine Sections”;⁹⁶

(vii) With respect to point (iv) above, Junex stated that “[w]e’ve added a new condition #2 [point (iv)] for the Bécancour # 8 well as we are still considering our options for this well (i.e. the well had deviated significantly during drilling and we are considering a possible re-entry to whipstock to our original target)”;⁹⁷

(viii) With respect to point (v) above, Junex stated that, “pursuant to our meeting we understand that, in exchange for Forest [Oil]’s contribution of Permit #2006PG906, the Junex Permit #2006RS184 would be enlarged and Forest [Oil] would earn all rights in the Utica and Lorraine only in the enlarged portion of the Permit #2006RS184, subject to Junex’s [REDACTED] convertible after payout to [REDACTED] [REDACTED] per the Letter Agreement dated June 5, 2006”.⁹⁸

192. On 10 January 2007, the QMNR returned the documents relating to the Enterprise’s application for Permit PG906 in view of the River Permit Agreement executed between Forest Oil and Junex.⁹⁹

193. Subsequently, Junex applied for rights to explore the area under the St. Lawrence River, originally covered by Permit PG906 (see ¶ 186 above), which was the subject matter of the River Permit Agreement (see ¶ 191 above). On 17 March 2009, Junex was granted an exploration permit bearing Permit #2009PG490 over a surface area of 13,541 hectares in

⁹⁵ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex re: amendments to the River Permit Agreement, 14 December 2006.

⁹⁶ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex re: amendments to the River Permit Agreement, 14 December 2006.

⁹⁷ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex regarding amendments to the River Permit Agreement, 14 December 2006.

⁹⁸ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex regarding amendments to the River Permit Agreement, 14 December 2006.

⁹⁹ Memorial, ¶ 99; *citing* **Exh. C-023**, Letter from QMNR to the Enterprise re: return of exploration permit application, 10 January 2007.

the St. Lawrence River (“**River Permit**” or “**Permit PG490**”).¹⁰⁰ The area covered by the River Permit is referred to as the “**River Permit Area**”. The Parties disagree about the reasons for which Junex applied for a fresh exploration permit in relation to the area under the St. Lawrence River instead of seeking an expansion of Permit #2006RS184, as was envisaged under the River Permit Agreement (see ¶ 191(ii) above). According to Claimant, the issuance of a new permit was necessary as Permit #2006RS184 already covered the maximum surface area permissible under the Mining Act. Respondent disputes that an expansion of Permit #2006RS184 would cross the permissible limit under the Mining Act.¹⁰¹

194. Also on 17 March 2009, Junex received two other exploration permits, being Permits #2009PG491 and #2009PG492.¹⁰²

c. Assignment Agreements

195. On 8 April 2009, Forest Oil and the Enterprise executed an assignment agreement pursuant to which Forest Oil assigned all its rights, duties, benefits, and obligations in the Farmout Agreement to the Enterprise, with effect from 1 October 2007 (“**Forest Oil – Enterprise Assignment Agreement**”).¹⁰³ On 23 April 2009, Forest Oil notified Junex of this assignment.¹⁰⁴
196. On 28 January 2010, Junex and the Enterprise entered into two assignment agreements.

¹⁰⁰ **Exh. C-031**, Letter from QMNR to Junex re: approval of exploration permits 2009PG490 to 2009PG492, 26 March 2009. *See also* Lavoie First Statement, ¶¶ 15-16; Dorris First Statement, ¶ 11; Memorial, ¶ 106.

¹⁰¹ Counter-Memorial, ¶ 239.

¹⁰² **Exh. C-031**, Letter from QMNR to Junex re: approval of exploration permits 2009PG490 to 2009PG492, 26 March 2009. *See also* Memorial, ¶ 106.

¹⁰³ **Exh. C-032**, Assignment Agreement between Forest Oil and the Enterprise, April 2009 re: Farmout Agreement between Forest Oil and Junex. *See also* Memorial, ¶ 107; Counter-Memorial, ¶ 247.

¹⁰⁴ **Exh. C-033**, Letter from Forest Oil to Junex re: assignment to the Enterprise of the Farmout Agreement, 23 April 2009. *See also* Memorial, ¶ 107. *See also* Counter-Memorial, ¶ 248.

197. Under the first assignment agreement of 28 January 2010, Junex assigned a working interest in the River Permit to the Enterprise, with effect from 17 March 2009 (“**River Permit Assignment Agreement**”), which comprised of:¹⁰⁵

[o]ne hundred percent (100%) of the working interest in (i) the strata starting from the surface (excluding the overburden and 10 metres within the hard rock) to the stratigraphic equivalent of the top of the Trenton - Black River Formations at 743 metres as seen in SOQUIP - Bécancour #2 Well on the Dual Laterolog survey which was conducted by Schlumberger on 22 August 1981 subject to (ii) Junex retaining

Junex shall have the right, at its election, to convert its

Payout. Project Payout is defined as the point in time when the gross proceeds from the sale of production that is attributable to the Contract Area, after the payment of all taxes, governmental royalties, and overriding royalties, including the overriding royalties retained by Junex, shall equal the total cost of drilling, testing, completing and equipping all wells in the Contract Area plus the costs of operating and maintaining said wells during the payout period.¹⁰⁶

198. The River Permit Assignment Agreement recorded the agreement between Junex and the Enterprise that:

1. Junex hereby assigns, transfers and conveys unto Forest [Enterprise], effective as of March 17, 2009 when the Title Documents were issued to Junex by the Quebec Ministry of Natural Resources and Wildlife (the “Effective Date”), the Assigned Interest in the Lands and Title Documents, to hold the same unto Forest [Enterprise] for its sole use and benefit.
2. Forest [Enterprise] hereby acknowledges that in all matters relating to the Assigned Interest, which matters include but are not limited to matters of accounting, operations and disposition of production, on and from the Effective Date until the delivery of a fully executed copy of this agreement to Forest and Junex, Junex has been acting as the trustee and authorized agent of Forest [Enterprise]. Forest [Enterprise] hereby expressly ratifies, adopts and confirms all acts and omissions of Junex in its capacity as trustee and agent to the end that all such acts and omissions shall be construed as having been made or done by Forest [Enterprise].
3. Junex covenants and agrees with Forest [Enterprise] that it shall and will, from time to time and at all times hereafter, at the request of Forest [Enterprise] execute such further assurances and do all such further acts as may be

¹⁰⁵ **Exh. C-034**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, 28 January 2010. *See also* Memorial, ¶ 108; Counter-Memorial, ¶ 248.

¹⁰⁶ **Exh. C-034**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, 28 January 2010, Schedule A.

reasonably required for the purpose of vesting the within assignment in Forest [Enterprise].¹⁰⁷

199. Under the second assignment agreement of 28 January 2010, Junex assigned a working interest to the Enterprise in the Original Permits (see ¶ 177 above), with effect from 19 August 2009 (“**Original Permits Assignment Agreement**”, and together with the Forest Oil – Enterprise Assignment Agreement and the River Permit Assignment Agreement, “**Assignment Agreements**”), which comprised of:¹⁰⁸

[o]ne hundred percent (100%) of the working interest in (i) the strata starting from the surface (excluding the overburden and 10 metres within the hard rock) to the stratigraphic equivalent of the top of the Trenton - Black River Formations at 743 metres as seen in SOQUIP - Bécancour #2 Well on the Dual Laterolog survey which was conducted by Schlumberger on 22 August 1981 subject to (ii) Junex retaining

Junex shall have the right, at its election, to convert its

Payout. Project Payout is defined as the point in time when the gross proceeds from the sale of production that is attributable to the Contract Area, after the payment of all taxes, governmental royalties, and overriding royalties, including the overriding royalties retained by Junex, shall equal the total cost of drilling, testing, completing and equipping all wells in the Contract Area plus the costs of operating and maintaining said wells during the payout period.¹⁰⁹

200. The Original Permits Assignment Agreement recorded the agreement between Junex and the Enterprise that:

1. Junex hereby assigns, transfers and conveys unto Forest [Enterprise], effective as of the date the Capital Commitment was met under the terms of the Letter Agreement dated June 5, 2006 between Junex, Inc. and Forest Oil Corporation [Farmout Agreement], being August 19, 2009, (the “Effective Date”), the Assigned Interest in the Lands and Title Documents, to hold the same unto Forest for its sole use and benefit.
2. Forest hereby acknowledges that in all matters relating to the Assigned Interest, which matters include but are not limited to matters of accounting, operation and disposition of production, on and from the Effective Date until the delivery of a fully executed copy of this agreement to Forest and Junex, Junex has been acting as the trustee and authorized agent of Forest. Forest hereby expressly ratifies, adopts and confirms all acts and omissions of Junex in its capacity as

¹⁰⁷ **Exh. C-034**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the River Permit, 28 January 2010.

¹⁰⁸ Memorial, ¶ 108; *citing* **Exh. C-035**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, 28 January 2010.

¹⁰⁹ **Exh. C-035**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, 28 January 2010, Schedule A.

trustee and agent to the end that all such acts and omissions shall be construed as having been made or done by Forest.

3. Junex covenants and agrees with Forest that it shall and will, from time to time and at all times hereafter, at the request of Forest execute such further assurances and do all such further acts as may be reasonably required for the purpose of vesting the within assignment in Forest.
4. Forest is and shall be liable for, and in addition shall indemnify and save harmless Junex and its Affiliates, together with their respective directors, officers, successors and permitted assigns from and against all liabilities, obligations, damages; losses, costs, expenses and fees which any of them may suffer, sustain, pay or incur and all claims, demands, lawsuits, actions, proceedings that may be commenced against any of them, in either case, arising as a consequence of any operations, by Forest with respect to the Assigned Interest.¹¹⁰

201. On 19 April 2010, Junex applied to the QMNR to request it to record in the Mining Register the transfer of interests in the Farmout Agreement and the River Permit Agreement to the Enterprise.¹¹¹
202. On 21 April 2010, the QMNR acknowledged Junex's transfer request, referred to in ¶ 201 above.¹¹²
203. On 27 May 2010, the QMNR transferred the interests, referred to in ¶ 201 above, to the Enterprise and recorded the transfer in the Mining Register:

La présente fait suite de votre demande de transfert de 100% d'intérêts de la surface jusqu'à l'équivalent stratigraphique du toit de la formation du Trenton/Black-River à 743 mètres à Canadien Forest Oil limitée sur les permis cités en objet. Nous vous transmettons le détail des dits permis ainsi qu'une copie des états financiers rattachés à ces permis.

En terminant, nous désirons vous rappeler que les présents permis de recherche vous dispense [sic] en aucune façon d'obtenir les autorisations requises en vertu des autres lois et réglementations en vigueur relativement à toutes activités sur le territoire couvert par les permis.¹¹³

¹¹⁰ **Exh. C-035**, Assignment Agreement between the Enterprise and Junex re: assignment of working interest in the Original Permits, 28 January 2010.

¹¹¹ **Exh. C-036**, Letter from QMNR to Junex re: confirming receipt of application for assignment of rights to the Enterprise, 21 April 2010; **Exh. R-006**, *Formulaire de transferts de droits relatif au permis d'exploration de Junex Inc. 2009PG490*, 19 April 2010. See also Memorial, ¶ 109; Counter-Memorial, ¶ 249.

¹¹² **Exh. C-036**, Letter from QMNR to Junex re: confirming receipt of application for assignment of rights to the Enterprise, 21 April 2010. See also Memorial, ¶ 110.

¹¹³ **Exh. C-038**, Letter from QMNR to Junex re: confirming assignment of rights to the Enterprise, 27 May 2010. See also Memorial, ¶ 110.

204. The effect and scope of the QMNR's 27 May 2010 transfer of interests to the Enterprise and its registration in the Mining Register are disputed issues between the Parties.¹¹⁴

(2) Events Leading up to the Introduction and Passage of Bill 18

a. SEA-1 and SEA-2

205. On 27 July 2009, the QMNR announced the implementation of a SEA on oil and gas development in marine environments. The SEA was split into two parts: the first part of the SEA was conducted in the maritime Estuary basin and northwestern part of the Gulf of St. Lawrence (SEA-1) and the second part of the SEA was conducted in the rest of the Gulf including the Anticosti, Magdalen and Chaleur Bay basins (SEA-2).¹¹⁵ The SEA-1 was conducted by AECOM, an internationally recognized engineering firm,¹¹⁶ and SEA-2 was conducted by the consulting engineering firm, GENIVAR.¹¹⁷
206. In July 2010, AECOM submitted its preliminary finding under SEA-1 that the maritime Estuary and the northwestern part of the Gulf of St. Lawrence was ill-suited to oil and gas development, whether in the exploration phase or the resource development phase, to the Minister of Natural Resources ("**SEA-1 Preliminary Report**").¹¹⁸ Amongst others, the SEA-1 Preliminary Report recommended to the Government to commission the BAPE to study the issue of shale gas development.¹¹⁹ The Parties disagree about the relevance of the findings in the SEA-1 Preliminary Report behind the Québec Government's decision to adopt Bill 18.
207. Claimant states that while the SEA process was underway in mid-2010, a number of interest groups had begun to put pressure on the Québec Government to limit shale gas exploration and development activities in the province.¹²⁰

¹¹⁴ Counter-Memorial, ¶¶ 249-250; Reply, ¶¶ 214-219.

¹¹⁵ Counter-Memorial, ¶ 122.

¹¹⁶ Counter-Memorial, ¶ 123.

¹¹⁷ Counter-Memorial, ¶ 129.

¹¹⁸ Counter-Memorial, ¶ 124; *citing* **Exh. R-021**, AECOM Tecsult Inc., Rapport préliminaire en appui aux consultations, Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent, July 2010.

¹¹⁹ Reply, ¶ 40; *citing* **Exh. R-021**, AECOM Tecsult Inc., Rapport préliminaire en appui aux consultations, Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent, July 2010.

¹²⁰ Memorial, ¶ 125.

208. In August 2010, the Québec Government prepared a “Shale Gas Q&A” outlining the Government’s policy direction concerning shale gas developments in Québec. The Shale Gas Q&A maintained the overall strategy set out in the Québec Energy Strategy 2006-2015 regarding the development of Québec’s shale gas resources.¹²¹
209. On 31 August 2010, the Québec Government, following the recommendations in the SEA-1 Preliminary Report, tasked BAPE with establishing a commission of inquiry and holding public hearings regarding the sustainable development of the shale gas industry in Québec.¹²² Respondent states that the mandate of the commission of inquiry was to propose a framework for the exploration and development of shale gas that would promote the harmonious co-existence of these activities with local populations, the environment and other activity sectors in the area.¹²³ BAPE established the commission of inquiry in September 2010.¹²⁴
210. On 15 September 2010, the QMNR published a technical document on the development of shale gas in Québec.¹²⁵
211. In September 2010, the QOGA organized three public assemblies in the St. Lawrence Lowlands to inform the population of the impacts of shale gas development. Respondent states that it became clear during these assemblies that shale gas development suffered from a major deficit in social acceptability and that the QOGA faced fierce opposition from local communities.¹²⁶
212. On 27 September 2010, Minister Normandeau announced that considering the findings in the SEA-1 Preliminary Report of July 2010 (see ¶ 206 above), the Québec Government

¹²¹ **Exh. C-107**, Gaz de Schiste Questions – Réponses August 2010. *See also* Reply, ¶¶ 42-43.

¹²² Memorial, ¶ 128; *citing* **Exh. R-024**, BAPE, Rapport 273, Rapport d’enquête et d’audience publique, Développement durable de l’industrie des gaz de schiste, February 2011, p. 1. *See also* Counter-Memorial, ¶ 143.

¹²³ Counter-Memorial, ¶ 143; *citing* Dupont First Statement, ¶ 74.

¹²⁴ Memorial, ¶ 131; *citing* **Exh. R-024**, BAPE, Rapport 273, Rapport d’enquête et d’audience publique, Développement durable de l’industrie des gaz de schiste, February 2011.

¹²⁵ **Exh. C-052**, QMNR, “Le développement du gaz de schiste au Québec – Document technique”, 15 September 2010.

¹²⁶ Counter-Memorial, ¶ 145; *citing*, Sauvé First Statement, ¶ 29; Dupont First Statement, ¶¶ 75-77.

had decided to prohibit all oil and gas exploration and exploitation activities in the maritime Estuary and northwestern Gulf of St. Lawrence.¹²⁷

213. On 27 October 2010, two bills were introduced in the Québec National Assembly:

- (i) Bill 396, *An Act to put a temporary stop to shale gas exploration and development activities*,¹²⁸ and
- (ii) Bill 397, *An Act to impose a moratorium on shale gas exploration and development projects*.¹²⁹

214. In response to the abovementioned two Bills, Minister Normandeau stated in the Québec National Assembly that “[a moratorium is not an option, not an option]”.¹³⁰

215. On 9 November 2010, Minister Normandeau announced that the proposed prohibition on oil and gas activity in the Estuary and the Gulf, referred to in ¶ 212 above, would also apply to the St. Lawrence River.¹³¹

216. On 12 January 2011, representatives of the Enterprise and Junex met with Mr. Robert Sauvé, the Deputy Minister of the QMNR, and Mr. Laliberté to seek clarification if the moratorium extension announced by Minister Normandeau would prevent the exploration and development of the Bécancour/Champlain Block, considering the Enterprise’s intention to drill from onshore locations.¹³² Claimant’s witness, Mr. Dorrins, states in the Dorrins First Statement that Mr. Sauvé and Mr. Laliberté gave the impression during the

¹²⁷ **Exh. R-029**, Ministre des Ressources naturelles, Communiqué de presse, Première évaluation environnementale stratégique : secteur de l’estuaire – Le Gouvernement du Québec est à l’écoute et interdit les activités d’exploration et d’exploitation dans l’estuaire du Saint-Laurent, Rivière-du-Loup, 27 September 2010. *See also Exh. R-021*, AECOM Tecsult Inc., Rapport préliminaire en appui aux consultations, Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l’estuaire maritime et du nord-ouest du golfe du Saint-Laurent, July 2010; Memorial, ¶ 139.

¹²⁸ **Exh. C-055**, Québec, Bill 396, *An Act to put a temporary stop to shale gas exploration and development activities*, 1st Session, 39th Leg (2010) (introduced on 27 October 2010).

¹²⁹ **Exh. C-056**, Québec, Bill 397, *An Act to impose a moratorium on shale gas exploration and development projects*, 1st Session, 39th Leg (2010) (introduced on 27 October 2010).

¹³⁰ Memorial, ¶ 125; *citing Exh. C-054*, Québec, National Assembly, “Point de presse de M. Pierre Arcand, ministre du Développement durable, de l’Environnement et des Parcs et de Mme Nathalie Normandeau, ministre des Ressources naturelles et de la Faune”, 27 October 2010.

¹³¹ Memorial, ¶ 141; *citing Exh. C-057*, Monique Beaudin, “Oil, gas development in St. Lawrence is frozen to Ontario border”, *The Gazette*, 10 November 2010.

¹³² Memorial, ¶¶ 143-144; *citing Dorrins First Statement*, ¶¶ 20-21.

meeting that the resources contained in the River Permit would continue to be accessible to the Enterprise and Junex.¹³³

b. BAPE Report 273

217. On 28 February 2011, the BAPE commission of inquiry, referred to in ¶ 209 above, submitted its final report to the Minister of Sustainable Development (“**BAPE Report 273**”).¹³⁴ The BAPE made several recommendations to the Québec Government in the BAPE Report 273, including the creation of a SEA committee that would be tasked with implementing and overseeing a SEA of Québec’s shale gas industry (“**SEA-SG Committee**”).¹³⁵

218. On 8 March 2011, the BAPE Report 273 was publicly released.¹³⁶

c. SEA-SG Committee

219. Also on 8 March 2011, the Minister of Sustainable Development announced that he was adopting the BAPE’s recommendation to create the SEA-SG Committee (see ¶ 217 above).¹³⁷

220. On 12 May 2011, the SEA-SG Committee was constituted with the mandate of establishing parameters and timelines for conducting a SEA of Québec’s shale gas industry (SEA-SG) and overseeing the SEA-SG. The SEA-SG Committee was given an 18 to 30-month mandate and was tasked with producing two reports: one report on the SEA-SG and the second report containing recommendations on how to improve the legislative and regulatory framework governing the oil and gas industry in Québec.¹³⁸

¹³³ Memorial, ¶ 145; *citing* Dorrins First Statement, ¶ 22.

¹³⁴ **Exh. R-024**, BAPE, Rapport 273, *Développement durable de l’industrie des gaz de schiste au Québec*, Rapport d’enquête et d’audience publique, February 2011.

¹³⁵ Memorial, ¶¶ 132-33; *citing* **Exh. R-024** BAPE, Rapport 273, *Développement durable de l’industrie des gaz de schiste au Québec*, Rapport d’enquête et d’audience publique, February 2011., pp. 224-225, 245.

¹³⁶ Memorial, ¶ 134; *citing* **Exh. C-060**, Québec Ministry of Sustainable Development, “Gaz de schiste – les activités de l’industrie seront assujetties au développement de connaissances scientifiques”, 8 March 2011.

¹³⁷ Memorial, ¶ 134; *citing* **Exh. C-060**, Québec Ministry of Sustainable Development, “Gaz de schiste – les activités de l’industrie seront assujetties au développement de connaissances scientifiques”, 8 March 2011.

¹³⁸ Memorial, ¶¶ 134-135; *citing* **Exh. C-062**, Québec Ministry of Sustainable Development, “Composition du comité de l’Évaluation environnementale stratégique”, 12 May 2011.

d. Bill 18

221. Between November 2010 and May 2011, the QMNR explored various proposals to implement the moratorium on oil and gas activities in the St. Lawrence River announced by Minister Normandeau in November 2010, referred to in ¶ 215 above. The various options considered by the QMNR to implement the moratorium, including through (i) enactment of a special law; (ii) using the authorization certificate scheme under Section 22 of the Environment Quality Act (“EQA”); (iii) tightening the conditions for drilling in the St. Lawrence by subjecting the activity to an environmental impact assessment under Section 31 of the EQA; [REDACTED]

[REDACTED] At the same time, the possibility of not implementing the moratorium was also explored.¹³⁹

222. A draft Memorandum prepared by the QMNR, dated 3 February 2011 (“**Draft Memorandum of 3 February 2011**”), [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴⁰

223. Another draft Memorandum prepared by the QMNR following the BAPE 273 Report, dated 29 April 2011 (“**Draft Memorandum of 29 April 2011**”), [REDACTED]

[REDACTED]
[REDACTED]

¹³⁹ Reply, ¶¶ 57-65.

¹⁴⁰ Reply, ¶¶ 66-69; *citing* **Exh. C-122**, Memoire au conseil des ministres - De: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune - Objet: Projet de loi qui interdit les activités d'exploration et d'exploitation pétrolière et gazière dans le fleuve, l'estuaire et la partie nord-ouest du - golfe du Saint-Laurent, 3 February 2011.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴¹

224. On 4 May 2011, Minister Normandeau presented the draft Bill 18 to the Cabinet along with a draft Memorandum dated 4 May 2011 (“**Draft Memorandum of 4 May 2011**”)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁴³

225. On 12 May 2011, *i.e.*, on the same day that the SEA-SG Committee was constituted (see ¶ 220 above), the Québec Government introduced Bill 18 in the Québec National Assembly, which provided in relevant part:

1. No mining right provided for under Divisions IX to XIII of Chapter III of the Mining Act (R.S.Q., chapter M-13.1) may be issued for the part of the St. Lawrence River west of longitude 64°51'22" in the NAD83 geodetic reference system or for the islands situated in that part of the river.

¹⁴¹ Reply, ¶¶ 86-92; *citing* **Exh. C-127**, Mémoire au Conseil des Ministres de: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune - Objet: Projet de loi limitant les activités pétrolières et gazières et modifiant la Loi sur les mines, 29 April 2011; **Exh. C-128**, Mémoire au Conseil des Ministres de: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune - Objet: Projet de loi limitant les activités pétrolières et gazières et modifiant la Loi sur les mines, 29 April 2011.

¹⁴² Reply, ¶¶ 95-103; *citing* **Exh. C-131**, Mémoire au Conseil des Ministres Gouvernement du Québec - De: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune - Objet: Projet de loi limitant les activités pétrolières et gazières et modifiant la Loi sur les mines, 4 May 2011; **Exh. C-132**, Mémoire au Conseil des Ministres de: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune - “Projet de loi limitant les activités pétrolières et gazières et modifiant la Loi sur les mines”, 4 May 2011.

¹⁴³ Reply, ¶¶ 105-108; *citing* **Exh. C-134**, Mémoire au Conseil des Ministres Gouvernement du Québec - de: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune//Monsieur Serge Simard, Ministre délégué aux Ressources naturelles et à la Faune - Objet: Projet de loi limitant les activités pétrolières et gazières et modifiant la Loi sur les mines, 5 May 2011; **Exh. C-136**, Mémoire Au Conseil Des Ministres Gouvernement Du Québec de: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune/Monsieur Serge Simard, Ministre délégué aux Ressources naturelles et la Faune - Objet: Projet de loi limitant les activités pétrolières et gazières et modifiant la Loi sur les mines, 6 May 2011.

2. Any mining right referred to in section 1 and issued for the zone described in that section is revoked.

...

3. The holder of license to explore for petroleum, natural gas and underground reservoirs is exempted from performing the work required under the Mining Act until the beginning of third year of the term of the license following (*insert the date of coming into force of this Act*). In that case, the term of the license is deemed to be suspended in accordance with section 169.2 of that Act.

4. The application of this Act entails no compensation from the State.¹⁴⁴

226. On 19 May 2011, Bill 18 was debated in the Québec National Assembly. During these legislative debates, Minister Normandeau introduced the Bill explaining that:

[t]his Bill, Mr. President, now fulfills a commitment we announced last September 27th. It is what I did in Rimouski. So, this commitment will be followed through with the fact that we are going to completely forbid all oil and gas exploration and exploitation in the St. Lawrence River and its estuary. This decision follows from the analysis of the results of the first strategic environmental evaluation that we ordered in July, 2011 [sic], with the result obtained, Mr. President, in 2010. And it is precisely after the conclusions made by the environmental evaluation that we made this decision therefore to forbid all exploration and exploitation of oil and gas in the St. Lawrence River and its estuary. Why a bill, Mr. President? To give a legal basis for this will to forbid this type of business in our river and its estuary.

... our government has always maintained that the business of exploration and exploitation of hydrocarbons under the sea should be carried out with a view to sustainable development and that this development should not be done while ignoring the cost ... a sacred principle that guides all action taken by our government in the sector of exploration, exploitation of oil and gas, but also in all the entire sector of activities concerning natural resources.

... In the framework of this strategic environmental evaluation, the experts were mandated to evaluate, first, number one, in an overall and integrated manner, the environmental and socio-economic effects that exploration and exploitation work would cause. Secondly, the experts were told that their goal was that of formulating recommendations for conditions under which exploration and exploitation work should be carried out. And thirdly, it was a matter of reconciling exploration and exploitation work with, among others, already existing activities, especially in the commercial fishing sector, maritime transport, tourist observation activity and the protection of marine mammals.

... the report that was submitted to us was prepared by independent ... experts ... [who] have given proof that the basin of the maritime estuary and the north-west of the Gulf of St. Lawrence is a complex and very fragile environment. And, for this

¹⁴⁴ **Exh. C-063**, Québec, Bill 18, *An Act to limit oil and gas activities*, 2nd Session, 39th Leg (2011) (introduced on 12 May 2011). See also Memorial, ¶ 147.

reason, our government has come to the conclusion that this environment would not be favorable for exploration and exploitation work.¹⁴⁵

227.

228. On 31 May 2011, committee hearings on Bill 18 were conducted by the Committee on Agriculture, Fisheries, Energy and Natural Resources of the Québec National Assembly, which were also attended by the QOGA representatives. In response to questions regarding the no-compensation provision in the Bill (see ¶ 225 above), Minister Normandeau stated, *inter alia*, that:

. . . to the aspect related to compensation in the bill. There are two schools. . . Well, I will not say two schools of thought, but Mr. Bouchard, the arguments that you are making from a legal perspective are quite justified. From our side, we are making more political, rather than legal arguments. And the bill in its current form, I think, shows a nice balance that one must have in recognizing the contribution of the oil and gas industry to Québec's economic activities. On the one hand, there is a provision in Article 3 which provides an exemption. Moreover there is a precedent that was created in 1998 by the Quebecois Party in the Gulf, when the moratorium was decreed. So we passed a provision to suspend . . . [ellipsis in the original] to avoid, in fact, the suspension of permits. So we are relying precisely on this precedent to justify the presence of Article 3 in the bill.

In terms of compensation, Mr. Bouchard, in the current context, let's say it frankly. I do not think that the citizens would have appreciated us compensating gas companies in the extremely highly emotional context that has occupied us in recent months, in recent weeks. That said, Mr. Chairman, I recognize the validity of your arguments from a legal perspective. But from a political perspective, the government has communicated a very different message.

In this case, we will seek to share with what are the impacts, but to our knowledge, there is no work that has been done in the marine environment by the companies. And perhaps if there is a case that [sic] could be documented further, it is perhaps the [sic] case of Junex. If Mr. Dorris from Junex wishes to speak on the subject to know the impact of this decision on his business, we would be delighted to hear him.

¹⁴⁵ **Exh. C-064**, Québec, National Assembly, *Journal des débats*, 2nd Session, 39th Leg, Vol. 42 No. 29, 19 May 2011; **Exh. C-064A**, Translation of Québec, National Assembly, *Journal des débats*, 2nd Session, 39th Leg, Vol. 42 No. 29, 19 May 2011, p. 2032.

¹⁴⁶ Reply, ¶ 112, citing **Exh. C-142**, Email from J. Drolet (BSMA-Energile) to A. Lefebvre re: "Commission PL18 - Presence de M. Bouchard demain", 31 May 2011.

But what I would like to bring to your attention, Mr. Bouchard, is that we do indeed hear the appeal that you are making to us this morning. On the other hand, as Minister of Natural Resources, I have to say this. We cannot compare, for example, the industry or the provisions contained in the bill for the river and the estuary, which are exceptions, with the mining dynamic, for example, prevailing in the territory of Quebec.

You are basically saying: What message are we sending to foreign investors? The message, for example, communicated by the Northern Plan is an extremely positive message, and I think that investors are able to make sense of things. And the things they are trying to do is to recognize that indeed in the marine environment there is a specificity as regards ecosystems, biodiversity, which is unique to this type of activity, which has nothing to do with what we do on land, in the mining sector.

So, the message, the message that we are communicating, basically, is to say to investors: In Quebec, we want to develop our natural resources, and you are right to insist on our ability to develop all this potential, but to do it according to the principles of sustainable development. So that's the message we want to communicate. But I think the industry can make sense of things and recognize that indeed there is a very exceptional fragile environment. And in this sense, Mr. Chairman, I would like to conclude my remarks by saying to Mr. Bouchard that we have noted his request, we will look at it very, very closely, but politically, this message and this decision that was made, Mr. Chairman, is one that also allows us to take into account the state of mind our citizens are in at the point of emergence of the oil and gas sector.¹⁴⁷

229. Between 2 – 7 June 2011, the Committee on Natural Resources conducted further meetings to review Bill 18 and also proposed some minor amendments to the Bill. The report of the Committee on Natural Resources was adopted on 9 June 2011.¹⁴⁸

e. The Act

230. On 10 June 2011, Bill 18 was passed unanimously in the National Assembly and became law as an *Act to limit oil and gas activities*. The Act entered into force on 13 June 2011.¹⁴⁹
231. The Act caused the full revocation of nine exploration permits, which were completely situated under the St. Lawrence River, including the River Permit, and a decrease in the

¹⁴⁷ **Exh. C-066**, Translation of pages 11-12 and 16-17 of Québec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Session, 39th Leg, Vol. 42 No. 12, 31 May 2011. *See also* Memorial, ¶¶ 148-149; **Exh. C-067**, Québec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Session, 39th Leg, Vol. 42 No. 12, 7 June 2011.

¹⁴⁸ Counter-Memorial, ¶ 225.

¹⁴⁹ **Exh. C-063**, Québec, Bill 18, *An Act to limit oil and gas activities*, 2nd Session, 39th Leg (2011) (introduced on 12 May 2011). *See also* Memorial, ¶ 150.

permit area of 20 permits that were partially situated in the St. Lawrence River. Respondent states that all 29 permits belonged to nine companies headquartered in Canada.¹⁵⁰

232. On 11 July 2011, Minister Normandeau contacted all exploration permit holders which were affected by the Act, [REDACTED]

[REDACTED]
[REDACTED]¹⁵¹

233. On 2 September 2011, the Director of the QMNR wrote to Junex to inform it of the revocation or decrease of its exploration permits that were wholly or partially situated in the St. Lawrence River, including the River Permit, and to reimburse Junex with the portion of annual fees for the revoked licenses that had already been paid by it. The Director also advised Junex of the option available to apply exploration work carried out in the areas covered by the revoked permits to other, still valid permits.¹⁵²

f. Studies and Reports on Shale Gas Development Post-Enactment of the Act

234. On 13 September 2013, the SEA-2, which commenced in February 2010 (see ¶ 159(ii) above), published its report (“**SEA-2 Report**”).¹⁵³
235. On 15 January 2014, the SEA-SG, which was commissioned in May 2011, published its report (“**SEA-SG Report**”).¹⁵⁴
236. Following the publication of the SEA-2 and the SEA-SG Reports, the Government of Québec initiated another BAPE study on shale gas exploration in the Utica Shale and St.

¹⁵⁰ Counter-Memorial, ¶ 220.

¹⁵¹ **Exh. R-132**, Lettre du ministère des Ressources naturelles à Junex Inc., Québec, 11 July 2011. *See also* Counter-Memorial, ¶ 227.

¹⁵² **Exh. R-038**, Lettre du ministère des Ressources naturelles à Junex Inc., Québec, 2 September 2011. *See also* Counter-Memorial, ¶ 228.

¹⁵³ **Exh. R-023**, GENIVAR, Rapport d’étude, *Évaluation environnementale stratégique sur la mise en valeur des hydrocarbures dans les bassins d’Anticosti, de Madeleine et de la baie des Chaleurs*, September 2013. *See also* Counter-Memorial, ¶¶ 129-130.

¹⁵⁴ **Exh. R-025**, Comité de l’évaluation environnementale stratégique sur le gaz de schiste, Rapport de synthèse : *Évaluation environnementale stratégique sur le gaz de schiste*, January 2014. *See also* Counter-Memorial, ¶ 154.

Lawrence Lowlands (“**BAPE 307**”). BAPE 307 was largely based on SEA-SG and published the BAPE Report 307 in November 2014.¹⁵⁵

237. In May 2014, two further SEA studies were commissioned by the Québec Government: (i) a general SEA covering Québec’s hydrocarbon channel; and (ii) a SEA to specifically examine Anticosti Island.¹⁵⁶ These two SEA reports were published in April 2015.¹⁵⁷
238. On 8 April 2016, the Québec Government unveiled its 2030 Energy Policy,¹⁵⁸ following which, on 7 June 2016, Bill 106, *An Act to implement the 2030 energy policy*, was introduced in the Québec National Assembly. Bill 106 received Royal Assent on 10 December 2016. Chapter IV of Bill 106 enacted the Petroleum Resources Act, pursuant to which hydraulic fracturing was permitted, provided the permit holder obtained special authorization by the Minister.¹⁵⁹

V. PARTIES’ CLAIMS AND REQUESTS FOR RELIEF

A. CLAIMANT

239. In its Memorial, Claimant requests the following relief:

408. As a result of Canada’s breaches of Chapter Eleven of NAFTA described above, the Enterprise has suffered significant loss and damage for which the Claimant requests the following relief pursuant to NAFTA Article 1117:

- (a) A declaration that Canada has breached its obligations under Article 1110(1) and Article 1105(1) of NAFTA and is liable to the Claimant therefore;
- (b) An award of compensatory damages in an amount to be proven at the hearing but which the Claimant currently estimates to be US\$118,900,000 inclusive of pre-award interest;

¹⁵⁵ **Exh. R-027**, BAPE, Rapport 307, Rapport d’enquête et d’audience publique, Les enjeux liés à l’exploration et à l’exploitation du gaz de schiste dans le shale d’Utica des basses-terres du Saint-Laurent, November 2014. *See* Reply, ¶¶ 117-119.

¹⁵⁶ Reply, ¶ 117.

¹⁵⁷ Reply, ¶ 120.

¹⁵⁸ **Exh. C-156**, “The 2030 Energy Policy: Energy in Québec A Source of Growth,” Government of Québec, 2016.

¹⁵⁹ Reply, ¶ 121; *citing Exh. C-152*, Québec, Bill 106, *An Act to implement the 2030 Energy Policy and to amend various legislative provisions*, 1st Session, 41st Leg (2014-) (entered into force on 10 December 2016).

- (c) An award of the full costs associated with this arbitration, including professional and legal fees and disbursements, as well as the fees and disbursements of the Tribunal and the Administrative Authority;
- (d) An award of pre-award (as included in compensatory damages) and post-award interest at a rate to be fixed by the Tribunal;
- (e) An award of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
- (f) An award of any such further relief that the Tribunal may deem just and appropriate.¹⁶⁰

240. In its Reply, Claimant requests the following relief:

714. As a result of Canada's breaches of Chapter Eleven of NAFTA described above, the Enterprise has suffered significant loss and damage for which the Claimant requests the following relief pursuant to NAFTA Article 1117:

- (a) A declaration that Canada has breached its obligation under Article 1110(1) and Article 1105(1) of NAFTA and is liable to the Claimant therefore;
- (b) An award of compensatory damages in an amount to be proven at the hearing but which the Claimant currently estimates to be US\$103,600,000 inclusive of pre-award interest;
- (c) An award of the full costs associated with this arbitration, including professional and legal fees and disbursements, as well as the fees and disbursements of the Tribunal and the Administrative Authority;
- (d) An award of pre-award (as included in compensatory damages) and post-award interest at a rate to be fixed by the Tribunal;
- (e) An award of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
- (f) An award of such further relief that the Tribunal may deem just and appropriate.¹⁶¹

241. During the November 2017 Merits Hearing, in response to the Tribunal's Question No. 20 to the Parties (see ¶ 92 above), Claimant submitted as follows regarding its final request for relief in this arbitration:

PRESIDENT: . . . confirm the question in paragraph 20 as to what the claimant's prayer for relief is. Is it as there stated?

. . .

MR. LITTLE: . . . In response to the Tribunal's question number 20 . . . The answer to the question is no, does that paragraph fully reflect what we are asking for.

¹⁶⁰ Memorial, ¶ 408.

¹⁶¹ Reply, ¶ 714.

I would make two points, perhaps three. The first one is that to the extent that the Tribunal is asking us whether we would be supporting a number other than the expressly mentioned number on the quantum of compensation; we certainly are not wedded to that number, although we think it is fully supportable.

...

The second point relates to the conduct of this arbitration and perhaps this is something that given the other question asked by the Tribunal is more responsive to the spirit.

In one of the Tribunal's questions, there is a question about a possible breach of the duty to arbitrate in good faith. To the extent that the Tribunal does conclude that has been breached by Canada in this arbitration . . . we would ask for an order of compensation.

That relates to, I think, three classes of breaches, perhaps four. No. 1 is the breach of your order of February 24, 2011, the expressed refusal to produce documents that were ordered by you to be produced to us. . . .

The second area is the failure to produce documents for the period of February to April 2011 which Mr. Ryan described this morning.

The third is the failure to produce documents mentioned by witnesses at the hearing . . .

Then lastly the fourth category would be the failure to call appropriate witnesses that might have illuminated the Tribunal on issues . . .

That would be in addition to the adverse inferences that we ask you to draw and they are set out in our reply. . . ¹⁶²

B. RESPONDENT

242. In its Counter-Memorial and the Rejoinder, Respondent requests the Tribunal as follows:

655. Pour ces motifs, le Canada demande respectueusement au Tribunal de rejeter la totalité de la réclamation de LPRI.

656. Le Canada se réserve à une date ultérieure le droit de faire des représentations quant aux dépens. ¹⁶³

VI. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS

243. In its analysis below, the Tribunal has considered not only the positions of the Parties as summarized in this Award, but also the numerous detailed arguments made in the Parties' written and oral submissions. To the extent that these arguments are not referred to expressly, they have been considered and subsumed into the Tribunal's analysis.

¹⁶² November 2017 Merits Hearing Tr., 94:11-98:15.

¹⁶³ Counter-Memorial, ¶¶ 655-656. *See also* Rejoinder, ¶¶ 492-493.

VII. OUTSTANDING PROCEDURAL ISSUES

A. CLAIMANT'S REQUEST TO DRAW ADVERSE INFERENCES FROM RESPONDENT'S ALLEGEDLY DEFICIENT DOCUMENT PRODUCTION

(1) Parties' Positions

244. Claimant requests the Tribunal to draw adverse inferences against Respondent on account of Respondent's failure to:

- (i) produce, either wholly or in part, certain "critical" documents, which Claimant alleges is in contravention of the Tribunal's Order on Withheld and Redacted Documents and the Tribunal's Order on Claimant's Applications of 31 March and 27 April 2017.¹⁶⁴ Claimant contends that Respondent only produced 14 out of the 23 documents ordered to be produced by the Tribunal in the Order on Withheld and Redacted Documentation and partially redacted three of the produced documents in contravention of the said Order.¹⁶⁵
- (ii) produce documents referred to by Respondent's witnesses during the October 2017 Merits Hearing, which Claimant alleges ought to have been produced by Respondent in response to Claimant's Document Production Requests;¹⁶⁶
- (iii) produce any documents pertaining to the period of 28 February to 29 April 2011, which Claimant alleges "would explain or substantiate the public policy basis for the QMNR's shift in position regarding horizontal drilling";¹⁶⁷ and
- (iv) call representatives of the *Bureau des hydrocarbures* as witnesses to the Hearing, who "might have illuminated the Tribunal" and "provided relevant information to remedy the non-production of documents" by Respondent".¹⁶⁸

¹⁶⁴ Reply, ¶¶ 123-126. *See generally* ¶¶ 123-136. *See also* Refresher Hearing Tr. Day 2, 106:2-13; November 2017 Merits Hearing Tr., 97:15-22.

¹⁶⁵ Claimant's Reply Slides, 26 February 2021, slide 29.

¹⁶⁶ Refresher Hearing, Tr. Day 2, 108:15-109:5; November 2017 Merits Hearing Tr., 98:1-7.

¹⁶⁷ Claimant's Reply Slides, 26 February 2021, slide 32; Refresher Hearing, Tr. Day 2, 110:17-20; November 2017 Merits Hearing Tr., 97:23-25.

¹⁶⁸ Refresher Hearing, Tr. Day 2, 109:6-110:6; Claimant's Reply Slides, 26 February 2021, slide 33; November 2017 Merits Hearing Tr., 98:8-11.

245. Claimant contends that the absence of the aforementioned documents has “deprived the Tribunal of [the] complete record of evidence . . . [and] ha[s] also deprived the Claimant of its right to fully argue its case and respond to claims for justification made by Canada on the basis of police powers”.¹⁶⁹
246. Relying on Article 30(3) of the UNCITRAL Rules and Article 9(5) of the IBA Rules, Claimant requests the Tribunal to draw adverse inferences against Respondent that the production of the wholly or partially withheld documents, would be adverse to the interests of Respondent because they would “(i) support the Claimant’s position that Bill 18 was in fact motivated by political or partisan-political considerations; and (ii) undermine Canada’s claim that the revocation of permits and the decision not to pay compensation in Bill 18 was implemented for *bona fide* reasons of environmental protection”.¹⁷⁰
247. Claimant contends that Respondent’s failure to produce the aforementioned documents and call appropriate witnesses to the Hearing also constitutes a breach of Respondent’s duty to arbitrate in good faith and of the procedural rules governing this arbitration, specifically ¶ 64 of PO 1, Article 27(3) of the UNCITRAL Rules and Article 3(7) of the IBA Rules, for which Claimant is entitled to receive compensation.¹⁷¹
248. During the November 2017 Merits Hearing, Claimant requested the Tribunal to award it compensation in the form of costs for Respondent’s alleged breach of its duty to arbitrate in good faith.¹⁷² However, during the Refresher Hearing, Claimant submitted that, following an agreement between the Parties, “Claimant will withdraw its motion for costs associated with the document-production issues”, although it continues to maintain its “outstanding motion for adverse inferences related to the non-production of documents”.¹⁷³

¹⁶⁹ Reply, ¶ 134(p).

¹⁷⁰ Reply, ¶ 134(o). *See also* Closing Submissions of Claimant, 24 November 2017, slide 343: “If the documents that Canada failed to produce had supported its story for the development of Bill 18, it would have produced them. It did not, thereby depriving the Claimant and the Tribunal the opportunity to have a full picture of how Bill 18 came to revoke permits and extinguish rights. As a result, the Tribunal should draw an adverse inference that these documents do not in fact support the theory that Canada has proposed”.

¹⁷¹ Claimant’s Reply Slides, 26 February 2021, slide 35.

¹⁷² November 2017 Merits Hearing Tr., 97:6-99:5; Closing Submissions of Claimant, 24 November 2017, slides 346-348.

¹⁷³ Refresher Hearing, Tr. Day 1, 3:14-22.

249. Respondent objects to Claimant’s request to draw adverse inferences from Respondent’s incomplete document production, contending that it had a “serious reason” to withhold certain documents.¹⁷⁴ Respondent disputes Claimant’s assertion that the documents referred by Respondent’s witnesses during the October 2017 Merits Hearing were responsive to any of Claimant’s document production requests granted by the Tribunal.¹⁷⁵ Respondent submits that the absence of documentary evidence during the two-month period between 28 February – 29 April 2011 does not justify any adverse inference being drawn as “[i]t is quite possible that the limited number of civil servants was doing something else with its time, and there was a problem with the consensus with the elected members of the government”.¹⁷⁶ As to Claimant’s contention regarding its failure to call all relevant persons to testify at the Hearing, Respondent contends that “all the main actors who took part in the adoption of the bill [18] . . . the deputy minister . . . the highest civil servants in the Ministry of Natural Resources” had been presented before the Tribunal.¹⁷⁷
250. Respondent further contests Claimant’s request for adverse inferences on the grounds that: (i) this is not an appropriate case for adverse inferences as the inference is not determinative to the Tribunal’s decisions;¹⁷⁸ (ii) Claimant has failed to identify the specific adverse inferences that it requests the Tribunal to draw and, therefore, the request is not sufficiently specific;¹⁷⁹ (iii) Claimant has failed to establish that it has a *prima facie* case in support of the inferences sought;¹⁸⁰ (iv) Claimant’s request for adverse inferences requires the Tribunal to disregard the evidence on record, which demonstrates that the main purpose of the impugned Act was to protect the St. Lawrence River;¹⁸¹ and (v) there is no connection between the likely nature of the non-disclosed documents and the adverse inferences sought.¹⁸² Respondent emphasizes in this regard that the Tribunal’s power to draw adverse

¹⁷⁴ Rejoinder, ¶¶ 137, 145-146.

¹⁷⁵ R-PHB, ¶¶ 132-148.

¹⁷⁶ Refresher Hearing, Tr. Day 2 (English version), 125:7-12.

¹⁷⁷ Refresher Hearing, Tr. Day 2 (English version), 122:22-123:7.

¹⁷⁸ Rejoinder, ¶¶ 137, 145-146.

¹⁷⁹ Rejoinder, ¶¶ 153-154.

¹⁸⁰ Rejoinder, ¶¶ 155-157.

¹⁸¹ Rejoinder, ¶¶ 158-161.

¹⁸² Rejoinder, ¶¶ 162-163.

inferences is discretionary in nature and the circumstances referred hereinabove militate against the exercise of this discretion.¹⁸³

(2) The Tribunal's Analysis

251. PO 1 provides that the applicable procedural framework governing this arbitration shall be the UNCITRAL Rules, except to the extent that they conflict with or are modified by Section B of NAFTA Chapter 11 as per NAFTA Article 1120(2) or PO 1.¹⁸⁴ With respect to evidentiary matters, PO 1 provides that the IBA Rules shall be consulted as follows:

68. The disputing parties agree that, except as otherwise specified by the terms of this Procedural Order and the Confidentiality Order, provisions of the *International Bar Association's Rules on the Taking of Evidence* ("*IBA Rules*") shall be consulted as guidelines on:

- (a) The exchange of documents (Article 3 of the *IBA Rules*);
- (b) The presentation of evidence by fact and expert witnesses (Articles 4 and 5 of the *IBA Rules*);
- (c) On-site inspection (Article 7 of the *IBA Rules*);
- (d) The conduct of the evidentiary hearing (Article 8 of the *IBA Rules*); and
- (e) The admissibility and assessment of evidence (Article 9 of the *IBA Rules*).¹⁸⁵

252. The relevant provisions of the UNCITRAL Rules on evidentiary matters are extracted below:

Article 27 – Evidence

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

...

3. At any time during the arbitral proceedings, the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such period of time as the arbitral tribunal shall determine.
4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Article 30 - Default

...

¹⁸³ Refresher Hearing, Tr. Day 2, 118:8-119-14.

¹⁸⁴ PO 1, ¶¶ 22-23.

¹⁸⁵ PO 1, ¶ 68.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

253. The relevant provisions of the IBA Rules are extracted below:

Article 3 Documents

...

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

Article 9 Admissibility and Assessment of Evidence

...

5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

...

7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal, may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

254. The Tribunal will first consider Claimant's request for adverse inference on account of Respondent's non-production of documents, referred to in ¶¶ 244(i) – 244(iii) above (*a*), followed by a consideration of Claimant's request on account of non-production of appropriate witnesses by Respondent, referred to in ¶ 244(iv) above (*b*).

a. Non-Production of Documents by Respondent

255. Claimant's assertions that adverse inferences must be drawn against Respondent's case for non-production of documents are grouped into three categories:

- (i) Documents that Respondent refused to produce contrary to the Tribunal's Orders on Withheld and Redacted Documents and on Claimant's Applications of 31 March and 27 April 2017: Claimant submits that Respondent withheld in entirety the first seven documents and partially redacted the last three documents enumerated below:
- a) [REDACTED] allegedly responsive to request number 19 of Claimant's Document Production Requests;¹⁸⁶
 - b) [REDACTED]
[REDACTED] allegedly responsive to request number 12 of Claimant's Document Production Requests;¹⁸⁷
 - c) [REDACTED]
[REDACTED] allegedly responsive to request number 12 of Claimant's Document Production Requests;¹⁸⁸
 - d) [REDACTED]
[REDACTED] allegedly responsive to request number 19 of Claimant's Document Production Requests;¹⁸⁹
 - e) [REDACTED]
[REDACTED] allegedly responsive to request number 6 of Claimant's Document Production Requests;¹⁹⁰
 - f) [REDACTED]
[REDACTED] allegedly responsive to request number 2 of Claimant's Document Production Requests;¹⁹¹

¹⁸⁶ Claimant's Reply Slides, 26 February 2021, slide 37.

¹⁸⁷ Claimant's Reply Slides, 26 February 2021, slide 37.

¹⁸⁸ Claimant's Reply Slides, 26 February 2021, slide 37.

¹⁸⁹ Claimant's Reply Slides, 26 February 2021, slide 38.

¹⁹⁰ Claimant's Reply Slides, 26 February 2021, slide 38.

¹⁹¹ Claimant's Reply Slides, 26 February 2021, slide 38.

g) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

allegedly responsive to request number 2 of Claimant's Document Production Requests;¹⁹²

h) [REDACTED]
[REDACTED]¹⁹³ allegedly

responsive to request number 2 of Claimant's Document Production Requests;

i) [REDACTED]
[REDACTED] allegedly responsive

to request number 2 of Claimant's Document Production Requests;¹⁹⁴

j) [REDACTED]
[REDACTED] allegedly

responsive to request number 2 of Claimant's Document Production Requests.¹⁹⁵

(ii) Documents that were discussed during the October 2017 Merits Hearing but were not produced by Respondent: Claimant contends that the following documents, which were mentioned by Respondent's witnesses during cross-examination, ought to have been produced by Respondent in response to Claimant's Document Production Requests:

a) Notes prepared in the fall of 2010 and winter of 2011, referred to by Respondent's witness Jacques Dupont, allegedly responsive to request number 6 of Claimant's Document Production Requests;¹⁹⁶

¹⁹² Claimant's Reply Slides, 26 February 2021, slide 38.

¹⁹³ Claimant's Reply Slides, 26 February 2021, slide 39.

¹⁹⁴ Claimant's Reply Slides, 26 February 2021, slide 39.

¹⁹⁵ Claimant's Reply Slides, 26 February 2021, slide 39.

¹⁹⁶ Claimant's Reply Slides, 26 February 2021, slide 40.

- b) Analysis of the BAPE 273 Report by the Ministry of Environment, referred to by Respondent's witness Jacques Dupont, allegedly responsive to request number 16 of Claimant's Document Production Requests;¹⁹⁷
 - c) Analysis of the BAPE 273 Report by the Ministry of Environment, in particular its analysis of hydraulic fracturing, referred to by Respondent's witness Jacques Dupont, allegedly responsive to request number 16 of Claimant's Document Production Requests;¹⁹⁸
 - d) Notes to Minister Normandeau on the development of Bill 18, referred to by Respondent's witness Minister Normandeau, allegedly responsive to request number 18 of Claimant's Document Production Requests.¹⁹⁹
- (iii) Non-production of any documents between the period of 28 February to 29 April 2011: Claimant contends that there is an "evidentiary gap" as Respondent failed to produce any documents during this two-month period that might explain or substantiate the public policy basis for QMNR's shift in position regarding horizontal drilling.²⁰⁰
256. With respect to the first category of documents identified by Claimant (see ¶ 255(i) above), Respondent justifies the non or partial production of these documents, citing reasons of political and institutional sensitivity. Respondent further contends that Claimant has available considerable information and documentation on the development of the Act and the reasons behind it and, therefore, there is no reason to draw adverse inferences on account of the non-production of these documents. Respondent argues that the seven withheld documents and the redactions in the other documents, contain no analysis of the reasons for the Act or other information essential to the dispute.²⁰¹

¹⁹⁷ Claimant's Reply Slides, 26 February 2021, slide 40.

¹⁹⁸ Claimant's Reply Slides, 26 February 2021, slide 41.

¹⁹⁹ Claimant's Reply Slides, 26 February 2021, slide 40.

²⁰⁰ Claimant's Reply Slides, 26 February 2021, slide 32.

²⁰¹ Rejoinder, ¶ 148.

257. With respect to the second category of documents identified by Claimant (see ¶ 255(ii) above), Respondent argues that the documents identified by Claimant were not covered by Claimant's Document Production Requests.²⁰²
258. With respect to the third category of documents (see ¶ 255(iii) above), Respondent appears to suggest that no relevant documents pertain to the said period.²⁰³
259. Pursuant to Article 9(5) of the IBA Rules (see ¶ 253 above), the Tribunal has the discretion to draw adverse inferences vis-à-vis Respondent's case, on account of any non-production of documents by Respondent in contravention of the Tribunal's directions to produce the documents. The Tribunal's discretionary power in this regard is not in dispute between the Parties.
260. The Tribunal considers that the remedy of drawing adverse inferences for non-production of documents by a party, contrary to an arbitral tribunal's order, is not one to be resorted to lightly. Neither is it the appropriate remedy in each and every case of non-production of documents. Further, drawing an adverse inference against another party's case, in and of itself, will not completely absolve a party from satisfying its evidentiary burden on the basis of primary evidence.
261. The connection of the undisclosed documents identified by Claimant in the first category (see ¶ 255(i) above) to the issues raised in this arbitration, is not in dispute between the Parties. Indeed, the documents largely relate to memoranda and information notes presented to the Québec Executive Council in connection with the adoption of Bill 18 or drafts thereof, communication plans discussing strategy for unveiling the impugned Act to the public, game plans relating to the BAPE 273 Report and the SEA-SG, excerpts of the Québec's Executive Council Deliberations, which all relate to the basis and process for adoption of Bill 18.

²⁰² R-PHB, ¶¶ 132-148.

²⁰³ Refresher Hearing, Tr. Day 2, 124: 15-125:13.

262. Respondent had objected to the production of these documents, suggesting political and institutional sensitivity as the documents pertained to the drafting and passing of the Act in Canada. This objection was previously rejected by the Tribunal.
263. Claimant requests the Tribunal to infer that the undisclosed and redacted documents contain evidence in support of Claimant's position that Bill 18 was adopted by the Québec Government for political reasons and contrary to Respondent's position that it was adopted for a valid public policy objective of environmental protection (see ¶ 246 above). The larger issue before the Tribunal is whether the adoption of Bill 18 by the Québec Government constitutes a treaty breach of expropriation and violation of the minimum standard of treatment for fair and equitable treatment under NAFTA Articles 1110 and 1105 respectively.
264. The Tribunal notes that the documents could have been of potential relevance when considering whether the adoption of Bill 18 by the Québec Government was a valid exercise of the police powers doctrine and consistent with the precautionary principle. However, it is not the case that Claimant was unable to present or prepare a case for the alleged treaty violations by Respondent due to the missing documents. The Tribunal considers it appropriate to examine the issue of whether adverse inferences need to be drawn from the missing and redacted documents, as necessary, when considering Parties' other evidence on record in support of their respective positions regarding Claimant's allegations of breaches of NAFTA Article 1110 and 1105 below.
265. With respect to the second category of undisclosed documents (see ¶ 255(ii) above), Respondent's position is that these documents are not responsive to Claimant's Document Production Request.²⁰⁴ On a review of Mr. Dupont's and Ms. Normandeau's witness testimony relied on by Claimant and the concerned Document Production Requests, which Claimant alleges have been violated by Respondent, it is not entirely clear to the Tribunal that the said documents are responsive to Claimant's Document Production Requests and have been deliberately withheld by Respondent. As such, the Tribunal is not persuaded that

²⁰⁴ R-PHB, ¶¶ 132-148.

drawing adverse inferences is the appropriate remedy in connection with this second category of undisclosed documents.

266. With respect to the third category of undisclosed documents (see ¶ 255(iii) above), Respondent appears to suggest that no relevant documents were existing in this period:

My colleague says that that gap with respect to the process of that bill is inexplicable. I will rise to the challenge and try to provide an explanation. I think that that so-called gap can be easily explained.

In March, there was a BAPE 273. We said it was an important moment; that coincidence is not fortuitous. And that report contains over hundreds of statements on the implementation of a strategic study on shale gas. It is a study in March that is wide ranging. It cost several million dollars. It is quite possible that the limited number of civil servants was doing something else with its time, and there was a problem with the consensus with the elected members of the government and all that. Nobody questions that. I would like to ask the Court not to draw any conclusion based on the so-called gaping hole.²⁰⁵

267. The Tribunal notes with concern this two-month evidentiary gap from 28 February to 29 April 2011, in a crucial period immediately preceding the adoption of Bill 18. The Tribunal is not fully persuaded by Respondent's suggestion that no documents exist during this two-month period. Moreover, the Tribunal finds troubling that Respondent's suggestion appears to be only a hypothesis by Respondent's counsel and not an affirmation that no relevant documents exist during this period. The Tribunal considers it appropriate to examine the issue of whether adverse inferences need to be drawn from this two-month "evidentiary gap", as necessary, when considering Parties' other evidence on record in support of their respective positions regarding Claimant's allegations of breaches of NAFTA Article 1110 and 1105 below.

b. Non-production of appropriate witnesses by Respondent at the Hearing

268. Claimant alleges that Respondent ought to have called to the Hearing the following representatives from the *Bureau des hydrocarbures*, who in Claimant's view may have provided relevant information to remedy the non-production of documents by Respondent: (i) Alain Lefebvre, General Manager and author of Exhibits C-126 and R-042; (ii) Louise Lévesque, Registrar; (iii) Jean-Yves Laliberté, Coordinator of oil and gas exploration; (iv)

²⁰⁵

Refresher Hearing, Tr. Day 2, 124:21-125:13.

Carol Cantin, Research Agent, author of information notes in Exhibits R-043 and R-044; and (v) Pascal Perron and Brigitte Houle, representatives in indeterminate roles, as appears from Exhibit C-123.²⁰⁶ On this basis, Claimant requests the Tribunal to draw adverse inferences against Respondent's case.

269. Respondent contends that it produced "all witnesses who were able to throw some light on the process that came to that [Bill 18]".²⁰⁷ It submits that if it would be impractical for it to produce as a witness, each person who had participated in the process of adoption of Bill 18.²⁰⁸
270. The Tribunal does not consider it appropriate to draw adverse inferences in this case. As a matter of principle, unless ordered by the Tribunal, there is no duty on a party to bring forward witnesses, either at its own motion or on the request of the opposing party. Claimant did not make any such request to the Tribunal and no such order was passed by the Tribunal.
271. Lastly, the Tribunal recalls that during the November 2017 Merits Hearing, Claimant had advised the Tribunal that it was adding to its final request for relief, a request for a declaration that Respondent's non-production of documents and failure to call appropriate witnesses at the Hearing constitutes a breach of its duty to arbitrate in good faith. Claimant also requested compensation from Respondent for breach of its duty to arbitrate in good faith (see ¶ 241 above). During the Refresher Hearing, the Parties advised the Tribunal of their agreement that Claimant only maintains its request for adverse inferences on account of the document production and witnesses-related issues:

MS. BANDALI: . . .

And so the parties have agreed that if the – to propose to the Tribunal that each side bears its own costs of legal representation, and that Tribunal costs will be split evenly between the parties, and that the Claimant will withdraw its motion for costs associated with the document-production issues, although our outstanding motion for adverse inferences related to the non-production of documents still stands.

. . .

²⁰⁶ Claimant's Reply Slides, 26 February 2021, slide 33.

²⁰⁷ Refresher Hearing, Tr. Day 2, 123:6-7.

²⁰⁸ Refresher Hearing, Tr. Day 2, 122:16-123:7.

MR. HÉBERT: Yes, what Ms. Bandali said is correct. It reflects the agreement between the parties on the question of costs.²⁰⁹

272. The Tribunal understands that the Parties have agreed that in connection with the document-production and witnesses-related issues raised by Claimant, which are summarised in this Section, Claimant only retains its request for adverse inferences and that it withdraws its request for a declaration that Respondent has breached its duty to arbitrate in good faith and its corresponding claim for compensation from Respondent. Accordingly, no decision is required from the Tribunal on this issue.

B. RESPONDENT’S REQUEST TO STRIKE OUT FROM THE ARBITRATION RECORD CERTAIN SLIDES FROM CLAIMANT’S CLOSING PRESENTATION AT THE NOVEMBER 2017 MERITS HEARING

(1) Parties’ Positions

273. As noted in ¶ 100 above, Respondent requests the Tribunal to strike out from the arbitration record, slides 246-250, 277-280 and 285-290, which formed part of Claimant’s closing presentation at the November 2017 Merits Hearing.²¹⁰

274. Respondent contends that slides 246-250 contain new methods for quantifying damages, based on the use of multiples, which methods were presented by Claimant for the first time during the November 2017 Merits Hearing. Respondent contends that it did not have the opportunity to rebut Claimant’s evidence on the new methods for quantification of damages set forth in these slides, and, therefore, requests that these slides are struck off from the arbitration record.²¹¹

275. With respect to slides 277-280 and 285-290, Respondent contends that these slides contain calculations that appear to have been prepared after the October 2017 Merits Hearing. According to Respondent, these calculations are not based on the expert testimony of GLJ and FTI and are in the nature of new evidence, which is in contravention of the Tribunal’s

²⁰⁹ Refresher Hearing, Tr. Day 1, 3:3-4:2.

²¹⁰ Respondent’s email dated 26 February 2021. *See also* Respondent’s letter dated 21 December 2017; R-PHB, ¶¶ 195-196.

²¹¹ R-PHB, ¶¶ 195-196.

directions at the end of the October 2017 Merits Hearing. For these reasons, Respondent requests that these slides must be struck off from the arbitration record.²¹²

276. With respect to slides 246-250, Claimant maintains that the slides do not contain new arguments on quantification of damages. Claimant argues that the slides contain submissions reflecting the structure and content of the evidence given by its expert, Mr. Rosen, at the October 2017 Merits Hearing, with a view to demonstrate how the existing factual and expert evidence “could be approached to quantify damages in the way proposed by Mr. Veeder’s question [to Mr. Rosen at the October 2017 Merits Hearing], that is, on the basis that Claimant proved up the resource and should receive its investment to do so, plus a return on investment”. Claimant further submits that Respondent had the opportunity to cross-examine Mr. Rosen on these issues, but chose not to do so, including after Mr. Veeder’s question. Claimant adds that Respondent also chose not to address these issues during the November 2017 Merits Hearing, despite having plenty of time between the two Hearings to consider its position and prepare submissions. Lastly, Claimant contends that Respondent could have responded to Claimant’s oral submissions in its reply after the lunch break during the November 2017 Merits Hearing, but it chose not to do so. For Claimant, “it is especially unfortunate that Canada has decided now to complain about submissions which they either did not anticipate or to which did not respond, despite opportunity to do so”.²¹³
277. With respect to slides 277-279 and 286-290, Claimant contends that the tables in these slides, which Respondent seeks to exclude from the arbitration record, are “just math” and that “anyone with a calculator can arrive at the numbers in these tables” which “were presented for the assistance of the Tribunal in the event that its assessment of the expert reports and the evidence lead to findings that affect the damages calculations.”²¹⁴
278. With respect to slide 280, Claimant submits that the numbers contained in that slide “are the result of the FTI model using Deloitte’s approach to the premium, at different

²¹² Refresher Hearing, Tr. Day 2, 125:14-127:4.

²¹³ Claimant’s letter dated 12 January 2018. *See also* Refresher Hearing, Tr Day 2, 43:2-43:15 ; 121:16-122:7.

²¹⁴ Claimant’s letter dated 12 January 2018. *See also* Refresher Hearing, Tr. Day 2, 121:16-122:7.

percentages” which, it believes “may be of assistance to the Tribunal in considering the two parties' positions”.²¹⁵

(2) The Tribunal's Analysis

279. The Tribunal has reviewed Claimant's slides under challenge and finds that slides 246-250 of Claimant's closing presentation during the November 2017 Merits Hearing contain arguments and evidence regarding a new valuation methodology that had not been presented, addressed or discussed by Claimant's counsel or its experts during the October 2017 Merits Hearing. The Tribunal does not consider that the question posed by Mr. Veeder on October 12, 2017, to Claimant's expert, Mr. Rosen, authorized Claimant to include such new evidence in its closing presentation at the November 2017 Merits Hearing. As Respondent did not have the opportunity to refute the new methodology through the submission of rebuttal expert evidence and cross-examination of Claimant's experts, the Tribunal considers it appropriate to strike out slides 246-250 from the arbitration record.
280. As for slides 277 to 280 and 285 to 290 of Claimant's closing presentation, the Tribunal finds that, contrary to Respondent's assertions, these slides do not offer “new methods of quantifying damages”. The Tribunal agrees with Claimant that these slides, and in particular the tables they contain, reflect figures and percentages that have been calculated from existing figures and percentages already on the record (in particular in the experts' reports). Accordingly, the Tribunal rejects Respondent's request to strike these slides from the record of the arbitration.

VIII. APPLICABLE LAW

281. Article 35(1) of the UNCITRAL Rules provides as follows in connection with applicable law:

Article 35

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which is determined to be appropriate.

²¹⁵ Claimant's letter dated 12 January 2018.

282. NAFTA Article 1131 sets out the governing law for disputes raised in this arbitration and provides as follows:

Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

283. Thus, pursuant to NAFTA Article 1131(1) read with Article 35(1) of the UNCITRAL Rules, the applicable law governing the merits of the disputes raised in this arbitration is NAFTA and the applicable rules of international law.

284. With respect to the Tribunal's obligation under NAFTA Article 1131(1) to decide disputes in accordance with NAFTA, NAFTA Articles 102, 103(2) and 1112(1) are relevant. NAFTA Article 102(2) provides that "[t]he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law".²¹⁶ NAFTA Article 103(2) sets forth the rule in the event of an inconsistency between NAFTA and other agreements entered into by NAFTA Parties,²¹⁷ and NAFTA Article 1112(1) sets forth the rule in the event of an inconsistency between NAFTA Chapter Eleven and other chapters of NAFTA.²¹⁸

285. With respect to the Tribunal's obligation under NAFTA Article 1131(1) to decide disputes in accordance with the applicable rules of international law, it is for each tribunal to determine, in the circumstances of the dispute before it, which are the relevant rules of international law that would be applicable in that case.

²¹⁶ Paragraph 1 of NAFTA Article 102 lists the objectives of NAFTA as follows: "1. The objective of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to: a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; b) promote conditions of fair competition in the free trade area; c) increase substantially investment opportunities in the territories of the Parties; d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement."

²¹⁷ NAFTA Article 103(2) states: *In the event of any inconsistency between this Agreement and such other agreements [i.e., General Agreement on Tariffs and Trade and other agreements to which NAFTA Parties are a party], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.*

²¹⁸ NAFTA Article 1112(1) states: *In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*

286. For interpretation of NAFTA provisions, the Tribunal shall rely on Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT”), which codify customary international law. Articles 31 and 32 of the VCLT state as follows:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
 - (b) leads to a result which is manifestly absurd or unreasonable.
287. Further, pursuant to NAFTA Article 1131(2), the Tribunal is bound by any interpretation provided by NAFTA Free Trade Commission (“FTC”) of NAFTA provisions. Specifically relevant to the disputes in this arbitration is the FTC’s Notes of Interpretation of Certain Chapter 11 Provisions dated 31 July 2001 (“**2001 FTC Note**”).

288. The Parties further disagree on whether the Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States and Canada (“**Protocol**”) and the Agreement between the United States of America, the United Mexican States and Canada, which entered into force on 1 July 2020 (“**USMCA**”), constitutes an “applicable rule of international law” under NAFTA 1131(1).
289. Relying on Article 31(3)(c) of the VCLT, Respondent argues in the affirmative. Respondent contends that the USMCA, being an agreement between NAFTA Parties, which contains substantially the same obligations as under NAFTA elucidates the intent of NAFTA Parties and confirms their practice and agreement as to the interpretation of NAFTA provisions. Thus, for Respondent, the USMCA constitutes a relevant rule of international law for interpreting NAFTA.²¹⁹
290. Claimant disputes that the USMCA constitutes a relevant rule of international law for interpreting NAFTA. It points out that, notwithstanding the promulgation of the USMCA (i) the law governing the Parties’ disputes in this arbitration continues to be Chapter Eleven of NAFTA; (ii) NAFTA Parties agreed to a transition period of three years during which NAFTA investor-state dispute settlement rules will continue to apply for investments made prior to 1 July 2020; (iii) neither does the USMCA interpret NAFTA, nor is it an agreement concerning the application of NAFTA; rather it supersedes NAFTA. Thus, Claimant argues that the USMCA cannot have a bearing on the disputes in this arbitration. Claimant argues that, in any event, questions of applicability and relevance of the USMCA for the interpretation of NAFTA are beyond the remit of this arbitration as this was a new issue that arose following the conclusion of the final Hearing in the matter.²²⁰
291. For the purposes of this arbitration, it is neither necessary nor appropriate for the Tribunal to decide this matter. As noted in ¶ 120 above, the Tribunal had granted the Parties permission to submit new legal authorities into the arbitration record, which arose after the conclusion of the November 2017 Merits Hearing, subject to no new arguments or submissions being raised by the Parties in connection with their new authorities. The Tribunal’s directions were issued with the concurrence of the Parties, taking into account

²¹⁹ Respondent’s Letter to the Tribunal dated 23 December 2020.

²²⁰ Claimant’s Letter to the Tribunal dated 9 November 2020, ¶ 45.

that the final Merits Hearing had already been concluded in the arbitration in November 2017 and that the Refresher Hearing was fixed only with a view for the Parties to recapitulate their arguments and evidence for the benefit of the newly constituted Tribunal. The PHBs were also requested by the Tribunal with this same objective (see ¶¶ 111 and 120 above). Respondent seeks to rely on the USMCA to interpret certain provisions of NAFTA, the relevance of which is disputed by Claimant. As the Refresher Hearing and the PHBs were intended to only enable the Parties to recapitulate their evidence and submissions raised during the 2017 Hearing, no new arguments or submissions were made by the Parties in connection with their new legal authorities. Thus, the Parties have not had the opportunity to address in detail questions of relevance of the USMCA for the interpretation of NAFTA. Accordingly, the Tribunal does not consider it appropriate or necessary for this Award to decide the Parties' disputes on this matter.

IX. JURISDICTION

A. INTRODUCTION

292. Claimant seeks relief in this arbitration in relation to Respondent's revocation of the Enterprise's 100% working interest in a specific geographical interval of the River Permit Area (the "**River Permit Rights**") through the passage of Bill 18, on the grounds that the revocation constitutes a violation of NAFTA Articles 1105 and 1110. Claimant submits that the River Permit Rights are an intangible property right, as well as an interest that arose from the investment of capital, and, therefore, meet the definition of "investment" under NAFTA Article 1139(g) and (h) respectively.²²¹ Respondent objects to the Tribunal's jurisdiction *ratione materiae* over Claimant's claims, contending that the claims do not satisfy the "gateway" provisions of NAFTA Articles 1101 and 1139. Specifically, Respondent (i) disputes that Claimant had an "investment" in Canada within the meaning of NAFTA Article 1139(g) and (h); and (ii) submits that there is no "legally significant connection" between the impugned Act and Claimant's alleged investment, as is required

²²¹ Memorial, ¶¶ 191-212; Reply, ¶¶ 255-283; C-PHB, ¶¶ 14-39.

under NAFTA Article 1101.²²² The Tribunal will address each of Respondent's objections in turn in Sub-Sections (B) and (C) below.

B. OBJECTION TO THE TRIBUNAL'S JURISDICTION *RATIONE MATERIAE*

(1) Relevant Treaty Provisions

293. A claim by an "Investor" on behalf of an "Enterprise" is governed by NAFTA Article 1117, which provides as follows:

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
 - (a) Section A or Article 1503(2) (State Enterprises), or
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
4. An investment may not make a claim under this Section.

294. NAFTA Article 1139 defines "investment" in relevant part as follows:

investment means:

- (a) an enterprise;
- ...
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

²²² Counter-Memorial, ¶¶ 269-273.

- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
 - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
 - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

- (i) claims to money that arise solely from
 - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or
 - (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or
- (j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

295. NAFTA Article 201.1 defines the terms “enterprise”, “enterprise of a Party” and “measure” as follows:

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

enterprise of a Party means an enterprise constituted or organized under the law of a Party;

....

measure includes any law, regulation, procedure, requirement or practice;

(2) Parties' Positions

a. Respondent's Position

296. Respondent objects to the Tribunal's jurisdiction over Claimant's claims, contending that Claimant's allegations do not concern an “investment” within the meaning of NAFTA Article 1139.²²³ Respondent submits that, contrary to Claimant's assertion, the River Permit Rights do not constitute an “investment” under NAFTA Article 1139(g) or (h).

²²³ Rejoinder, ¶ 164; Counter-Memorial, ¶¶ 271-275.

297. Respondent further contends that whilst Claimant’s ownership and control over the Enterprise satisfies the requirements for the Tribunal’s jurisdiction *ratione personae* under NAFTA Articles 1101 and 1117, Claimant has raised no claims with respect to the treatment of the Enterprise. Thus, for Respondent, “it matters little whether LPRC [Enterprise] may be characterized as an investment”.²²⁴

(i) Claimant’s alleged “investment” is not covered within the definition of NAFTA Article 1139(g)

298. Respondent contends that the River Permit Rights do not constitute “real estate or other property, tangible or intangible . . . used for the purpose of economic benefit or other business purposes”, as required under NAFTA Article 1139(g).²²⁵

299. Respondent’s main objection in this regard is that the Enterprise did not own the mining rights under the River Permit. More specifically, Respondent contends that (i) “the Farmout Agreement between Forest Oil and Junex and the Assignment Agreements between LPRC and Junex d[id] not give LPRC a mining right or other immovable real right. Nor d[id] they confer a right in the potential resources in the River License area”; and (ii) “the claimant . . . made no expenditures to obtain interests in the River License, other than those made to acquire interests in the four Land Licenses in the Champlain/Bécancour Block, [and therefore] the interests that it owns in this license do not arise from the commitment of capital or other such resources in the territory within the meaning of Article 1139(h)”.²²⁶

300. Respondent contends that for Claimant to establish that it holds a real right in the resources of Junex’s River Permit, it must demonstrate its entitlement to such right under Québec law, which applies as a question of fact. Respondent contends that Claimant has failed to discharge this burden.²²⁷ For the following reasons, Respondent contends that Claimant does not hold property rights or even real rights in the River Permit but only has personal rights with respect to Junex.

301. *First*, Respondent contends that Claimant incorrectly asserts that the Farmout Agreement and the River Permit Agreement between Forest Oil and Junex granted it a dismemberment

²²⁴ Counter-Memorial, ¶ 274.

²²⁵ Counter-Memorial, ¶ 271.

²²⁶ Counter-Memorial, ¶¶ 277-278.

²²⁷ Counter-Memorial, ¶¶ 281-282.

of Junex’s exploration permits and, therefore, a real right in the natural gas resources situated within the perimeter of those permits.²²⁸

302. Respondent relies on the opinion of its expert, Mr. Gagné, to contend that Junex did not assign to the Enterprise its real rights under the River Permit, but had only assigned an “economic interest in receiving proceeds from the development of a well-defined stratigraphic area”.²²⁹
303. Respondent rejects Claimant’s position that a “working interest” is perceived in the mining industry as a property right. Respondent relies on Mr. Gagné’s opinion that “[t]he only way that Junex could assign to CFOL [Enterprise] ‘the full enjoyment of a real right and of the prerogatives it confers’ was to assign to it an undivided interest in the River License, which is usual procedure in Québec”.²³⁰
304. Respondent further submits that Claimant’s expert, Professor Tremblay, has “made several errors in his description of the applicable legal framework and in his analysis of the Agreements” and has relied on concepts and agreements that are not common to the mining industry or compatible with Québec law.²³¹
305. *Second*, Respondent contends that Claimant has failed to demonstrate that it was the intention of the parties to the River Permit Agreement and the River Permit Assignment Agreement for Junex to transfer real rights in the River Permit to the Enterprise. Respondent finds the testimony of Claimant’s witnesses, Mr. Lavoie and Mr. Dorrins, regarding Junex’s intention to transfer real rights to Enterprise, unpersuasive.²³² Respondent submits further that these witness statements were produced for the purposes of this arbitration and do not constitute contemporary evidence of Junex’s intention at the time when the said Agreements were concluded.²³³ Notwithstanding this, Respondent submits that the alleged intention of Junex, Forest Oil and the Enterprise cannot change the nature of the rights conferred by the clear terms of the River Permit Agreement and the

²²⁸ Counter-Memorial, ¶¶ 279-280.

²²⁹ Counter-Memorial, ¶¶ 284-285; *citing* Gagné First Report, ¶¶ 86-108, 114, 136.

²³⁰ Rejoinder, ¶ 174; *citing* Gagné First Report, ¶ 52. *See also* Rejoinder, ¶ 175.

²³¹ Rejoinder, ¶¶ 170-172; *citing* Gagné First Report, ¶¶ 21m 48-49m 60 and 71.

²³² Rejoinder, ¶¶ 176-177; *citing* Lavoie Second Statement, ¶ 10; Dorrins Second Statement, ¶ 24(a).

²³³ Rejoinder, ¶¶ 177-178.

River Permit Assignment Agreement. The said Agreements only record the transfer of a future working interest, which does not meet the requirements set out by NAFTA Article 1139(g), being in the nature of a personal right.²³⁴

306. Respondent further contends that the factual context described below further does not support the statements of Mr. Lavoie and Mr. Dorrins:

- (i) In an email dated 9 May 2012, an employee of Claimant stated in relation to the contractual arrangement between Junex and the Enterprise that “Junex/Gastem are on title and we are at our 100% or 60% WI underneath the title because Québec does not have a land titles systems that allows for the transfer of permit ownership”.²³⁵ Respondent submits that this indicates that the parties were aware that Québec law did not allow the transfer of ownership of a license for a specific geological interval (see ¶ 303 above), which was the reason behind Junex deciding to grant the Enterprise mere working interests in the River Permit;²³⁶
- (ii) The limits imposed by Québec law on the possibility of transferring rights in exploration licenses had been highlighted by the QOGA, including in meetings where a representative of Claimant was present;²³⁷
- (iii) In an internal Forest Oil email exchange between 14-15 December 2010, the Enterprise is referred to as a “contract operator” and as a “100% WI owner”, and not as a holder of real rights;²³⁸
- (iv) The forms concerning the River Permit are unequivocal that Junex was the holder of 100% of the real rights in the River Permit;²³⁹
- (v) Junex had remained as a necessary intermediary between the Enterprise and the River Permit as it was (i) the entity responsible for paying fees and performing statutory

²³⁴ Rejoinder, ¶¶ 177-178; *citing* Gagné Reply Report, ¶ 68.

²³⁵ **Exh. R-271**, Courriel de Doug Axani à Alayna Hoenig, « Subject: FW: Lone Pine licenses », 9 May 2012.

²³⁶ Rejoinder, ¶ 178.

²³⁷ Rejoinder, ¶ 178; *citing* Gagné Reply Report, ¶¶ 72-73.

²³⁸ Rejoinder, ¶ 178; *citing* Gagné Reply Report, ¶ 65. *See also* **Exh. R-174**, Courriels entre Mel Stahl et Robert Welch, « Subject: Québec Wells », 15 December 2010.

²³⁹ Rejoinder, ¶ 178; *citing* **Exh. C-038**, Letter from QMNR to Junex re: confirming assignment of rights to the Enterprise, 27 May 2010.

work on the Permit; and (ii) the entity which could obtain drilling permits on the territory of the River Permit and could eventually obtain an operating permit. Respondent contends that had Junex abandoned the River Permit, for instance, by not paying the annual fees payable to the Minister of Natural Resources, the Enterprise would have lost its working interest in the River Permit.²⁴⁰

307. *Third*, Respondent contends that the Agreements between the Enterprise and Junex were never recorded in the appropriate register for the transfer of real rights. For Respondent, the registration of the Enterprise's contractual interests in the Mining Register is not sufficient to effectuate a transfer to the Enterprise of a real right in the River Permit.²⁴¹ Respondent contends that to transfer real rights in Québec, mining businesses use indivision agreements, which are recorded in the resource register.²⁴² Relying on the opinion of Mr. Gagné, Respondent contends that "the mining register is constituted purely for administrative purposes and recording the River Permit Assignment Agreement in it was unnecessary. Rather, a record in the resource register (a different register that Junex and LPRC have never used) is the way to ensure opposability of rights against third parties".²⁴³

(ii) Claimant's alleged "investment" is not covered within the meaning of NAFTA Article 1139(h)

308. Respondent contends that the alleged interests acquired by Claimant under the River Permit Agreement do not constitute an "investment" within the meaning of NAFTA Article 1139(h) as Claimant did not commit any capital to Junex's River Permit.²⁴⁴

309. Respondent contends that, contrary to Claimant's assertion, the River Permit Agreement imposed no requirement on Claimant to perform any work or incur any expenditure in the River Permit Area to obtain the alleged interests in the River Permit.²⁴⁵ Respondent submits that any work that was undertaken by Claimant was performed on land and the vast

²⁴⁰ Rejoinder, ¶ 179.

²⁴¹ Counter-Memorial, ¶ 285. *See also* Rejoinder, ¶¶ 180-184.

²⁴² Rejoinder, ¶ 183.

²⁴³ Rejoinder, ¶ 181; *citing* Gagné Reply Report, ¶¶ 57, 111.

²⁴⁴ Counter-Memorial, ¶ 272. *See also* ¶¶ 286-292.

²⁴⁵ Counter-Memorial, ¶ 288.

majority of such work was even performed before the River Permit Agreement had been executed.²⁴⁶

310. For Respondent, the present case is distinguishable from the *Mondev* case,²⁴⁷ relied on by Claimant, as Claimant's capital commitment was only towards the Original Permits and not towards the River Permit, which was the subject of Respondent's impugned measure. Respondent submits that, as opposed to this, in the *Mondev* case, the claimant's invested capital naturally led to the investment in that case as it related to two phases of the same project and the claimant in that case drew its rights from a single assignment agreement entered into directly with the City of Boston and one of its agencies.²⁴⁸
311. In response to Claimant's argument that expenditures under the Farmout Agreement (which included expenditures for the Original Permits) applied to the River Permit, Respondent argues that the parties could have included a term to make Claimant's acquisition of the River Permit Rights conditional on the commitment of capital under the Farmout Agreement had they intended to do so.²⁴⁹ That such provision was not included evidences the absence of such intention, in Respondent's view. Respondent contends further that Claimant has not provided any evidence demonstrating that the work done under the Farmout Agreement applied to the River Permit.²⁵⁰
312. Respondent contends that any general expenses incurred by Claimant in relation to the River Permit will not satisfy the requirements of NAFTA Article 1139(h).²⁵¹ In this regard, Respondent emphasizes that, in any event, it was Junex who was required to pay annual fees and uphold various statutory obligations to maintain its interests in the River Permit, and not Claimant.²⁵²

²⁴⁶ Counter-Memorial, ¶ 289; citing **Exh. CER-0020**, Summary of Bécancour and Champlain Projects Costs by Month, undated.

²⁴⁷ **Exh. CLA-049**, *Mondev International Ltd. v. United States of America*, (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002.

²⁴⁸ Counter-Memorial, ¶¶ 290-292; citing **Exh. CLA-049**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002.

²⁴⁹ Rejoinder, ¶¶ 192-193.

²⁵⁰ Rejoinder, ¶¶ 192-193.

²⁵¹ Rejoinder, ¶ 186.

²⁵² Rejoinder, ¶¶ 195-196.

313. Albeit in the context of its defense to Claimant's claim of expropriation, Respondent submits that, objectively considered, Claimant's investment in Québec comprises its interests both in the Original Permits and the River Permit.²⁵³ Respondent argues that only if Claimant's investment is regarded as comprising the Enterprise's interests in both the River Permit and in the Original Permits, can the River Permit Rights be regarded as constituting an investment under NAFTA Article 1139(h). Respondent submits that, in such case, it concedes that Claimant has an investment under NAFTA Article 1139(h).²⁵⁴

b. Claimant's Position

(i) Claimant's investment is covered within the meaning of NAFTA Article 1139(g)

314. Claimant submits that the River Permit Rights satisfy the legal definition of an "investment" as intangible property under Article 1139(g). In this connection, Claimant contends that Junex had dismembered real rights related to a specific geological interval which it transferred entirely to the Enterprise by virtue of the Assignment Agreements.²⁵⁵ In Claimant's view, Respondent (i) agrees that the rights conferred by an exploration permit are intangible property; and (ii) disputes that the River Permit Agreement and River Permit Assignment Agreement had the effect of transferring such intangible property to Claimant.²⁵⁶

315. Claimant rejects Respondent's contention that the Farmout and River Permit Agreements granted Claimant only a contractual right to uncertain future economic benefits, and not real property rights within the River Permit Area.²⁵⁷

316. Claimant submits that the Parties agree that the ownership of the River Permit Rights is to be determined in accordance with Québec law. Claimant contends that, under Québec law, an "exploration license gives its holder an immovable real right", which can also "be the object of an innominate dismemberment".²⁵⁸ In Claimant's view, Respondent wrongly

²⁵³ R-PHB, ¶ 79.

²⁵⁴ November 2017 Merits Hearing Tr., 118:11-23.

²⁵⁵ C-PHB, ¶¶ 24-25.

²⁵⁶ C-PHB, ¶ 24.

²⁵⁷ C-PHB, ¶ 24.

²⁵⁸ Reply, ¶ 262; C-PHB, ¶ 23.

concludes that the Farmout and River Permit Agreements did not meet the necessary conditions to dismember Junex's rights and grant said rights to the Enterprise.²⁵⁹

317. Claimant submits that "Junex granted the Enterprise an option to earn a '100% working interest' in certain resources situated in the River Permit and the Land Permits [Original Permits], subject to certain [REDACTED] reserved to Junex".²⁶⁰ Claimant contends that, as explained by its expert, Professor Tremblay, the concept of "working interest" is crucial to understanding the legal effect of the transfer. Claimant argues that "working interest" is "a term of art in the oil and gas industry that is understood as a basic unit of ownership, with the result that the 100% 'working interest' contemplated under the Agreements transferred the fullest extent of the rights (*i.e.*, the same bundle of prerogatives and the same innominate real rights) that Junex had in the geological intervals that were the objects of the Agreements".²⁶¹ Accordingly for Claimant, ownership over a specific geological interval is permitted under the Québec Civil Code, which allows for "superficies ownership".²⁶²
318. Claimant submits further that, as reflected in the Agreements, it was the common intention of Junex and Forest Oil that all ownership rights in a specific geological interval, including the beneficial ownership rights, would be transferred from Junex to the Enterprise upon fulfilment of the spending requirements stipulated under the Agreements.²⁶³
319. Claimant finds Mr. Gagné's conclusion, that there was no transfer of River Permit's real rights from Junex to the Enterprise, to be erroneous.²⁶⁴ Claimant contends that Mr. Gagné mistakenly minimized the ability of a permit holder to transfer its rights to a third party.²⁶⁵ Conversely, Claimant argues that Professor Tremblay's report supports its contention that Junex intended to (i) transfer its rights to Forest Oil; and (ii) make known that the Enterprise held the River Permit Rights through recording the assignment in the Mining Registry.²⁶⁶

²⁵⁹ Reply, ¶ 263; C-PHB, ¶ 24.

²⁶⁰ C-PHB, ¶ 26.

²⁶¹ C-PHB, ¶ 26-28, 33, 42; *citing* October 2017 Merits Hearing, Tr. Day 7, p. 1807:13-25.

²⁶² C-PHB, ¶ 32.

²⁶³ C-PHB, ¶ 29; *citing* October 2017 Merits Hearing, Tr. Day 3, 583:13-22; 584:8-10; 592:7-11; 613:11-15; 679:11-22.

²⁶⁴ Reply, ¶¶ 264-270.

²⁶⁵ Reply, ¶ 266; C-PHB, ¶¶ 32-33.

²⁶⁶ Reply, ¶ 271; C-PHB, ¶ 29.

Claimant relies on Professor Tremblay's testimony to contend that publication in the Mining Register of a real mining right is effective against the State.²⁶⁷

320. Claimant disputes Respondent's contention that Junex remained an intermediary between the Enterprise and the River Permit Rights. In Claimant's view, "Junex remained the titular permit holder and did not change the name on the permit because it continued to hold rights in other geological intervals that fell outside the deal with Forest Oil. Once the Enterprise earned its working interest, however, Junex had no ability to direct or veto their activities and had no input or control of any kind over what the Enterprise chose to do . . . As the titular permit holder, Junex retained the administrative responsibilities, such as filing annual reports and applying for certain permits, but the Enterprise was the beneficial owner of the real rights in the permit".²⁶⁸

(ii) Claimant's alleged investment is covered within the meaning of NAFTA Article 1139(h)

321. Claimant submits that the River Permit Rights also meet the definition of "investment" under NAFTA Article 1139(h), as they constitute Claimant's ownership interests arising from the commitment of capital.²⁶⁹ Claimant contends that the Enterprise's ownership interests in the River Permit was contingent upon it spending a certain amount of money, and that the Enterprise has "committed capital and other resources through its expenditures on" the development of the River Permit.²⁷⁰
322. Claimant submits that Respondent's position, that Claimant was not required to commit capital and did not perform any work in the River Permit Area, is not borne out from the facts of the case.²⁷¹ Claimant argues that the context in which the River Permit Agreement was negotiated in relation to the Farmout Agreement, demonstrates that the expenditures demanded under the Farmout Agreement were also applicable to the River Permit.²⁷² According to Claimant, the onshore expenditures should be treated as expenditures toward

²⁶⁷ C-PHB, ¶ 33; October 2017 Merits Hearing, Tr. Day 7, 1959:19-21; 1809:8-1810:6.

²⁶⁸ C-PHB, ¶ 30.

²⁶⁹ Reply, ¶¶ 273-274; C-PHB, ¶ 36.

²⁷⁰ Reply, ¶ 274.

²⁷¹ Reply, ¶ 276; C-PHB, ¶ 38.

²⁷² Reply, ¶ 276.

the River Permit, because the nature of the Enterprise’s development plan for the River Permit did not relate to offshore activities.²⁷³

323. Claimant submits further that the acquisition of the River Permit was part of a broader effort to acquire permit areas in the Utica Shale throughout Québec.²⁷⁴ This required the Enterprise to expend resources in acquiring core samples of other areas to acquire other related permits necessary for its project; this directly relates to the Enterprise acquiring the River Permit.²⁷⁵ These related expenses should be considered for the purposes of capital commitment under NAFTA Article 1139(h).
324. Claimant further argues that the Enterprise was required to pay annual fees to Québec to maintain its River Permit.²⁷⁶
325. Claimant disagrees with Respondent’s application of the *Mondev* case (see ¶ 310 above), to the present case. According to Claimant, Respondent is mistaken in its position that Claimant was not the valid holder of a “real right” in the River Permit. Claimant further rejects Respondent’s contention that the expenditures were not sufficiently related to the River Permit as the expenditures lay directly under the Original Permits.²⁷⁷
326. Claimant contends that it was the holder of real rights under Québec law and that the commitment of capital toward the Original Permits was (i) necessary to Claimant’s plan for developing the River Permit; and (ii) made with the intention of realizing the River Permit Rights.²⁷⁸ Claimant, thus, concludes that the River Permit Rights fall within the definition of investment under NAFTA Article 1139(h).²⁷⁹
327. Claimant submits that the River Permit Rights are a distinct investment from the Enterprise’s interests in the Original Permits. As such, Claimant objects to said interests

²⁷³ Reply, ¶ 277.

²⁷⁴ Reply, ¶ 278.

²⁷⁵ Reply, ¶ 278.

²⁷⁶ Reply, ¶¶ 278-279.

²⁷⁷ Reply, ¶ 282.

²⁷⁸ Reply, ¶ 283; C-PHB, ¶ 39.

²⁷⁹ Reply, ¶ 283.

being considered cumulatively for the purposes of establishing the Tribunal’s jurisdiction under NAFTA Article 1139(h).²⁸⁰

(3) Non-Disputing Parties’ Submissions

a. USA NDP Submission

328. USA submits that the definition of “investment” under NAFTA Article 1139 sets forth an exhaustive list of what constitutes a NAFTA-protected investment.²⁸¹
329. With respect to the meaning of the term “property” in NAFTA Article 1139(g), USA submits that (i) NAFTA tribunals have consistently declined to recognize “mere contingent interests” as falling within the scope of “property” under NAFTA Article 1139(g);²⁸² and (ii) it is appropriate to look at the laws of the host State to determine the definition and scope of the “property right” at issue.²⁸³
330. Regarding the meaning of “interests arising from the commitment of capital” in Article 1139(h), USA submits that an investor must have more than the mere commitment of funds;²⁸⁴ a “cognizable interest” arising from the commitment of those resources is required.²⁸⁵ Accordingly for USA, not every economic interest arising from a contract will constitute an “interest” for the purposes of NAFTA Article 1139(h).²⁸⁶

b. Mexico NDP Submission

331. Mexico has made no submissions with respect to the Tribunal’s jurisdiction *ratione materiae*.

²⁸⁰ C-PHB, ¶ 15; November 2017 Merits Hearing Tr., 58:17-23.

²⁸¹ USA NDP Submission, ¶ 2; citing *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award, 12 January 2011, ¶ 82.

²⁸² USA NDP Submission, ¶ 3; citing *Merrill & Ring Forestry L.P. v. Canada*, ICSID Administered Case, Award, 31 March 2010, ¶¶ 142, 257-58.

²⁸³ USA NDP Submission, ¶ 3; citing Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, (1982) 176 *Collected Courses of the Hague Academy of International Law* 263, p. 270.

²⁸⁴ USA NDP Submission, ¶ 5.

²⁸⁵ USA NDP Submission, ¶ 5.

²⁸⁶ USA NDP Submission, ¶ 5.

(4) The Tribunal's Analysis

332. To satisfy the Tribunal's jurisdiction *ratione materiae* under NAFTA, Claimant must demonstrate that its alleged investment is covered within the definition of "investment" under NAFTA Article 1139.
333. Claimant asserts, but Respondent disputes, that its alleged investment falls within the definition of "investment" under NAFTA Article 1139(g) and (h). The Parties also disagree on the precise scope of Claimant's investment in Canada.
334. The Tribunal will first address in (a) below, the Parties' disputes regarding the scope of Claimant's investment in Canada. Thereafter in (b) below, the Tribunal will assess whether Claimant has a protected investment under NAFTA Article 1139.

a. Scope of Claimant's Alleged "Investment" in Canada

335. Claimant identifies the alleged investment in Canada as comprising the River Permit Rights held by the Enterprise. The River Permit Rights refer to the Enterprise's 100% working interest over a specific geologic interval extending from slightly below the surface until a depth of 743 meters within the River Permit Area.²⁸⁷ Although the Parties disagree on what the term "working interest" entails, the Tribunal understands that there is no disagreement regarding the definition of the River Permit Rights as put forth by Claimant.²⁸⁸
336. The issue regarding the scope of Claimant's alleged "investment" in Canada was initially raised by Respondent in the context of its defense to Claimant's contention that Respondent has expropriated Claimant's investment in Québec.²⁸⁹ Respondent contends that Claimant is artificially limiting the scope of its full investment in Québec in order to satisfy the "substantial deprivation" test necessary for establishing its expropriation claim under NAFTA Article 1110. According to Respondent, Claimant's investment in Québec is not limited to the River Permit Rights as derived from the River Permit, but also includes

²⁸⁷ See Refresher Hearing, Tr. Day 2, 129:16-130:12; Tremblay Expert Report, ¶ 63 read with ¶¶ 59.3 and 60.

²⁸⁸ See Refresher Hearing, Tr. Day 2, 129:16-130:19.

²⁸⁹ Counter-Memorial, ¶ 448; Rejoinder, ¶¶ 286-287.

Claimant's interests in the Bécancour/Champlain Block as derived from the Original Permits.²⁹⁰

337. Subsequently, this issue was also discussed in the context of ascertaining the Tribunal's jurisdiction under NAFTA Article 1139.

338. In its Questions to the Parties, referred to in ¶ 92 above, the Tribunal invited the Parties' comments on, *inter alia*, the following two questions relating to the scope of Claimant's investment in Québec in the context of ascertaining its jurisdiction:

1. Generally, what is the Claimant's "investment", as an objective fact: (i) the River Permit 490 only or (ii) the River and Land Permits as a whole? As regards the factual evidence, it will be recalled that the Claimant's witnesses (particularly Mr. Axani) testified that the permits were seen as a whole, not individually.
2. For this purpose, is the test under NAFTA Article 1139 an objective or a subjective test? In other words, as to the latter, can a claimant for the purpose of establishing jurisdiction subjectively carve out a particular "investment", as a stand-alone "investment", from a larger "investment" assessed objectively as regards both jurisdiction and the merits?

339. In response to the Tribunal's aforementioned questions, Claimant emphasized that the "first principle is that the claimant identifies the investment".²⁹¹ Claimant further affirmed that "the investment is the River Permit rights",²⁹² which are a distinct investment from Claimant's interests in the Bécancour/Champlain Block derived through the Original Permits.²⁹³ With respect to the test under NAFTA Article 1139, Claimant submitted that:

What the Tribunal must do for this issue is to evaluate the subjective definition of the investment for the purposes of the dispute in light of the objective criteria that are set out in NAFTA article 1139.²⁹⁴

340. Whilst Respondent does not dispute that Claimant must define its investment for the purposes of ascertaining the Tribunal's jurisdiction, Respondent contends that Claimant may not artificially slice its investment for establishing a treaty breach. Albeit in the context of its defense to Claimant's claim of expropriation, Respondent submits that, objectively considered, Claimant's investment in Québec comprises its interests both in the Original

²⁹⁰ Counter-Memorial, ¶¶ 451-456.

²⁹¹ November 2017 Merits Hearing Tr., 56:7-9.

²⁹² November 2017 Merits Hearing Tr., 58:14-15.

²⁹³ November 2017 Merits Hearing Tr., 58:17-24; 59:10-11; 60: 8-21.

²⁹⁴ November 2017 Merits Hearing Tr., 57:17-21.

Permits and the River Permit.²⁹⁵ During the Refresher Hearing, Respondent submitted as follows:

Before going any further, I would like to answer the second question that the Tribunal asked in 2017. The Tribunal asked us whether the definition of investment should be seen objectively or subjectively. The Claimant is, of course, free to define its investment as it sees it, because after all, it is they who are writing the claim in this arbitration. If the investment such has satisfied the definition of investment according to article [1139], well, then the Tribunal would have jurisdiction. However, this does not mean that an investor can be -- can decide what is a violation or not of this article. As I will explain a little bit later in my pleading, the definition of investing must be appreciated in an objective fashion.²⁹⁶

341. It is common ground between the Parties, and the Tribunal also concurs, that it is up to a party how it wishes to formulate its claims or counterclaims in an arbitration. In an investment arbitration, it is up to the claimant to identify its alleged investment and the impugned measure by the State, which it alleges has adversely impacted its investment. The Tribunal also accepts that an investment may comprise of different parts, each of which may separately qualify as distinct investments for jurisdictional purposes.
342. Thus, the Tribunal accepts Claimant's contention that, for the purposes of ascertaining its jurisdiction over Claimant's claims in this arbitration, the Tribunal must assess whether the alleged investment, as identified by Claimant, satisfies the objective criteria under NAFTA Article 1139.
343. In this case, as Claimant seeks to premise its claims on the River Permit Rights, the jurisdictional issue to be considered by the Tribunal is whether the River Permit Rights fall within the definition of "investment" under NAFTA Article 1139.
344. Having said that, the aforesaid position, referred to in ¶¶ 342 and 343, does not mean that the scope of Claimant's whole investment in Québec has no relevance to the Parties' disputes in the arbitration. Respondent rightly notes that the scope of Claimant's whole investment in Québec has a bearing on the Tribunal's analysis of the alleged treaty breaches by Respondent. This issue will be addressed by the Tribunal further in Section X below when analyzing Claimant's allegations of treaty breaches by Respondent.

²⁹⁵ R-PHB, ¶ 79.

²⁹⁶ Refresher Hearing, Tr. Day 1, 133:1-16.

b. Whether the River Permit Rights are a protected investment under NAFTA Article 1139

345. Claimant asserts that the River Permit Rights are in the nature of (i) intangible property rights, which are covered within the definition of investment under NAFTA Article 1139(g); and (ii) interests arising from the commitment of capital, that are covered within the definition of investment under NAFTA Article 1139(h). The Tribunal will first address the Parties' submissions in connection with NAFTA Article 1139(h) in (i) below and, thereafter, it will address their submissions in connection with NAFTA Article 1139(g) in (ii) below.

(i) NAFTA Article 1139(h)

346. The Tribunal recalls the definition of investment under NAFTA Article 1139(h) (see ¶ 294 above):

investment means:

...

- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
 - (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
 - (ii) contracts where remuneration depends substantially on the production, revenue or profits of an enterprise.

347. To qualify as a protected investment under NAFTA Article 1139(h), the alleged investment must be (i) an interest; (ii) arising out of the commitment of capital or other resources in the territory of a NAFTA party; (iii) which capital, must have been committed towards economic activity in the territory of a NAFTA party; and (iv) must be pursuant to a contractual arrangement. Sub-clauses (i) and (ii) of NAFTA Article 1139(h) provide illustrative examples of types of contracts relevant for NAFTA Article 1139(h).

348. Respondent submits that the River Permit Rights do not qualify as a protected investment under NAFTA Article 1139(h) as, pursuant to the River Permit Agreement, Claimant was "deemed" to have acquired rights in the River Permit Area, without any requirement to

commit any capital or to perform work in the River Permit Area.²⁹⁷ Respondent alleges that:

- (i) no capital had been specifically committed by Claimant for acquiring the River Permit Rights;
- (ii) no work was performed by Claimant in the River Permit Area for the purposes of acquiring the River Permit Rights.²⁹⁸

349. For these reasons, Respondent submits that the River Permit Rights do not constitute “interests arising from the commitment of capital” for the purposes of NAFTA Article 1139(h).

350. Respondent contends that the River Permit Rights may constitute an investment under NAFTA Article 1139(h), only if they are regarded as forming part of Claimant’s larger investment in the Bécancour/Champlain Block. Thus, for Respondent, if the River Permit Rights are considered as an independent investment by Claimant, distinct from its other investments in the Bécancour/Champlain Block derived through the Original Permits, they fail to satisfy the definition of investment under NAFTA Article 1139(h).²⁹⁹

351. Claimant maintains that the River Permit Rights are interests arising from the commitment of capital. As proof of commitment of capital, Claimant relies on (i) the expenditure undertaken by the Enterprise pursuant to the Farmout Agreement, which it submits was expended for procuring a 100 % working interest in the Contract Area under the Original Permits as well as in the River Permit Area;³⁰⁰ and (ii) the annual fees that the Enterprise was allegedly obliged to pay to maintain the River Permit.³⁰¹

352. Claimant further disputes that the Enterprise did not perform any work in the River Permit Area. Claimant submits that the Enterprise’s activities and the capital expenditure incurred

²⁹⁷ Counter-Memorial, ¶ 288; *citing* **Exh. C-022C**, Letter Agreement between Forest Oil and Junex re: amendments to River Permit Agreement, 14 December 2006, ¶ 3; Gagné First Report, ¶ 92. *See also* R-PHB, ¶ 42.

²⁹⁸ Counter-Memorial, ¶¶ 288-289; Rejoinder, ¶ 22.

²⁹⁹ R-PHB, ¶ 43.

³⁰⁰ Memorial, ¶¶ 209-210.

³⁰¹ Reply, ¶ 279.

in the area covered by the Original Permits was towards the development of the River Permits.³⁰²

353. As noted in ¶ 335 above, the River Permit Rights refer to the Enterprise’s 100% working interest in a specific geographical interval of the River Permit Area. Claimant submits, but Respondent disputes, that “working interest” is a basic unit of ownership in the oil and gas industry and is equivalent to a property.³⁰³ According to Claimant, the Enterprise’s interests comprise the “real” mining rights acquired by the Enterprise in a specific geographical interval of the River Permit Area, following Junex’s dismemberment of the River Permit. Claimant submits that these dismembered “real” mining rights qualify as intangible property rights under Québec law.³⁰⁴ This is disputed by Respondent, contending that the Enterprise’s interests are in the nature of “personal” rights vis-à-vis Junex and are not property rights or real rights under Québec law.³⁰⁵
354. The Tribunal notes that, whilst Respondent disagrees about the nature and extent of the rights conferred on the Enterprise through the assignment of the “100% working interest” in the specific geographical interval of the River Permit Area, Respondent does not appear to dispute that the River Permit Rights constitute “interests” for the purposes of NAFTA Article 1139(h).
355. The term “interests” is not defined under NAFTA Article 1139(h). Therefore, the term “interests” under NAFTA Article 1139(h) must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty” (*see* Article 31(1) VCLT extracted in ¶ 286 above). The Tribunal considers that the term must be interpreted broadly as covering a broad range of interests, provided that (i) the interests arise out of the commitment of capital in the territory of a NAFTA party towards economic activity in that territory, pursuant to a contract; and (ii) are not covered by the exclusionary language under NAFTA Article 1139(i) and (j) (*see* ¶ 294 above).

³⁰² Reply, ¶ 277.

³⁰³ November 2017 Merits Hearing Tr., 61:7-9; 112:2-17; Refresher Hearing, Tr. Day 1, 94:13-95-1; Tr. Day 2, 83:20-84:1; 113:17-114:3. *See also* October 2017 Merits Hearing, Tr. Day 3, 583:13-22; 679:11-22; 477:21-278:4.

³⁰⁴ Memorial, ¶ 200.

³⁰⁵ Rejoinder, ¶¶ 167-168.

356. The Tribunal does not need to decide for the purposes of NAFTA Article 1139(h) whether Claimant's interests are in the nature of real property rights or personal rights under Québec law. In the Tribunal's view, the term "interests" under NAFTA Article 1139(h) is broad enough to cover both types of interests, provided the other conditions, referred to in the preceding paragraph, are satisfied.
357. Moreover, Claimant rightly notes that Respondent concedes that the River Permit Rights will qualify as a protected investment under NAFTA Article 1139(h), if Claimant's interests in the River Permit Area are taken together with its interests in the overall Bécancour/Champlain Block.³⁰⁶ Indeed, Respondent's jurisdictional objection in connection with NAFTA Article 1139(h) is only that no capital can be regarded as having been committed by the Enterprise towards the procurement of the River Permit Rights, if the River Permit Rights are regarded as an individual investment. Respondent accepts that if the River Permit Rights are taken together with the Enterprise's interests in the Original Permits, they satisfy the definition of investment under NAFTA Article 1139(h). Thus, Respondent does not dispute that the River Permit Rights qualify as "interests" for the purposes of NAFTA Article 1139(h).
358. The Tribunal will now consider whether Claimant's River Permit Rights arose from the commitment of capital, which is Respondent's main objection in connection with NAFTA Article 1139(h).
359. In view of its determinations in ¶¶ 342 and 343 above, the question before the Tribunal is whether the River Permit Rights, considered as a standalone investment, satisfy the requirement of "interests arising from the commitment of capital" under NAFTA Article 1139(h). For the following reasons, the Tribunal decides this in the affirmative.
360. It is a matter of record, which is also undisputed between the Parties, that Forest Oil acquired the River Permit Rights from Junex pursuant to the terms of the River Permit Agreement and the Farmout Agreement.
361. The Farmout Agreement was the first Agreement entered into between Junex and Forest Oil on 5 June 2006, which related only to Forest Oil's acquisition of interests in the Original

³⁰⁶ Refresher Hearing, Tr. Day 1, 95:21-96-9.

Permits. Paragraphs 3, 4 and 7 of the Farmout Agreement concern Forest Oil's exercise of its rights to earn an interest in the Contract Area of the Original Permits and its commitment of capital obligations:

3. Upon receipt of the information in Paragraph 2 from Junex, Forest shall have a period of six (6) months from the day Forest received the final core analysis to elect to exercise their option to drill and earn interest in the Contract Area. Forest shall notify Junex in writing of their intentions to either relinquish their rights to earn an interest in the Contract Area or exercise the option to earn interest under the terms stated herein.
4. In the event that Forest elects to exercise said option they shall have a period of 18 months (Commitment Period) to spend, cause to be spent or commit to spend a total sum of [REDACTED] in drilling, completions, re-completions, construction of facilities, pipelines, and gathering lines or on geological and geophysical expenses in order to earn 100% of the Contract Area.
- ...
7. Upon the satisfaction of Forest's obligations during the Commitment Period in Paragraph 4 Junex shall assign to Forest 100% interest in the Contract Area and retain [REDACTED] ...³⁰⁷

362. Through the 29 November 2006 Letter Agreement, which forms part of the River Permit Agreement (see ¶ 190 above), Junex and Forest Oil agreed that (i) Forest Oil would withdraw its pending application for an exploration license under the St. Lawrence River (in the area now specified as the River Permit Area); and (ii) Junex would seek an extension of one of its Original Permits, #2006RS184, to cover the River Permit Area.

363. Thereafter, through the 14 December 2006 Letter Agreement, which also forms part of the River Permit Agreement (see ¶ 185 above), Junex and Forest Oil agreed to extend the terms of the Farmout Agreement to the potentially enlarged area of Original Permit #2006RS184, for which Junex was yet to procure the exploration license. Paragraph 3 of the 14 December 2006 Letter Agreement, provides that:

3. By its contribution of Permit #2006PG906 containing 11,570 hectares to the enlargement of Junex Permit #2006RS184 Forest [Oil] would be deemed to have earned all rights in, and to the Utica Shale and Lorraine Section in this 11,570 hectares extension of Permit #2006PG906 (the "Extension"). The terms and conditions of the Letter Agreement dated June 5 2006 would apply to the

³⁰⁷ **Exh. C-017** Letter Agreement between Forest Oil and Junex, 5 June 2006, p. 2.

Extension except that Forest [Oil] would be deemed to have earned such rights within the Extension.³⁰⁸

364. The 14 December 2006 Letter Agreement records further in connection with the Parties' agreement under paragraph 3 thereof, that:

... in exchange for Forest's contribution of Permit #2006PG906, the Junex Permit #2006RS184 would be enlarged and Forest would earn all rights in the Utica and Lorraine only in the enlarged portion of the Permit #2006RS184, subject to Junex's [REDACTED] convertible after payout to [REDACTED] as per the Letter Agreement dated June 5, 2006".³⁰⁹

365. In the Tribunal's view, it is clear from the above that following the execution of the River Permit Agreement, the amount of [REDACTED] which was initially to be expended by Forest Oil under the Farmout Agreement, was regarded by Junex and Forest Oil as covering Forest Oil's acquisition of interests both in the Original Permits and in the River Permit.
366. Respondent argues that the fact that the QMNR had issued the River Permit as a separate exploration license to Junex, *i.e.*, instead of granting Junex's request for enlargement of its existing Original Permit #2006RS184, makes it clear that the Enterprise's contribution under the Farmout Agreement cannot be regarded as covering the River Permit as well. Respondent also attributes heavy significance to the term "deemed" in the 14 December 2006 Letter Agreement, in support of its position that Forest Oil did not commit any capital towards the acquisition of its interests in the River Permit Area. The Tribunal does not find these arguments persuasive.
367. In the Tribunal's view, the fact that the QMNR issued the River Permit as a separate exploration license to Junex does not detract from Forest Oil's and Junex's agreement under the River Permit Agreement to extend the terms of the Farmout Agreement to the River Permit. A combined reading of the Farmout Agreement and the River Permit Agreement makes it clear that, whilst initially Junex and Forest Oil had agreed that Forest Oil's capital commitment of [REDACTED] would be towards the acquisition of its interests in the Original Permits, thereafter, they agreed that this capital expenditure would also cover the acquisition of interests in the River Permit Area. That the River Permit

³⁰⁸ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex regarding amendments to the River Permit Agreement, 14 December 2006.

³⁰⁹ **Exh. C-022C**, Letter Agreement between Forest Oil and Junex regarding amendments to the River Permit Agreement, 14 December 2006.

Agreement was executed subsequently to the Farmout Agreement does not undermine Forest Oil's and Junex's agreement in this regard.

368. In the Tribunal's view, the relevant question is whether Junex and Forest Oil have agreed that Forest Oil's commitment of [REDACTED] was only towards acquisition of interests in the Original Permit or if it was towards acquisition of interests in both the Original Permits and the River Permit. The terms of the Farmout Agreement read together with the River Permit Agreement make clear that [REDACTED] expenditure was towards acquisition of interests in both the Original Permits and the River Permit. This position does not change depending on whether River Permit Rights are regarded as a standalone investment or are taken together with the Enterprise's investment in the Original Permits or by the fact that the River Permit was issued as a separate permit.
369. Moreover, the Tribunal notes that the amount of [REDACTED] referred to in paragraph 4 of the Farmout Agreement (see ¶ 361 above) was expended by Forest Oil after May 2007, *i.e.*, after the execution of the River Permit Agreement. The River Permit Agreement was executed by Junex and Forest Oil in November-December 2006. On 10 May 2007, Forest Oil elected to exercise its option to earn the interests referred under the Farmout Agreement, triggering the beginning of the "Commitment Period" under the Farmout Agreement. Claimant submits, which is not disputed by Respondent, that within the 18-month period thereafter, Forest Oil expended more than the [REDACTED] amount required by the Farmout Agreement.³¹⁰ Considering that at the time that Forest Oil had elected to exercise its option to earn the interests referred under the Farmout Agreement, the River Permit Agreement had already been executed between Junex and Forest Oil, the Tribunal finds it reasonable to consider that the option was exercised by Forest Oil towards earning interests in both the Original Permits and the River Permit.

³¹⁰ **Exh. C-024**, Letter from the Enterprise to Junex re: exercise of Utica Shale Farmout Agreement, 10 May 2007; Lavoie First Statement, ¶ 22. Reply, pp. 7-10, Claimant's timeline of key events; Refresher Hearing, Tr. Day 1, 100:25-106:4.

370. Moreover, Claimant rightly notes, there is “consistent evidence from both sides of the deal (Forest Oil and Junex) that the [REDACTED] spend was required for Forest Oil to earn its interests in both the Land Permits and the River Permit”.³¹¹
371. The Tribunal is also persuaded that the drilling and exploration work undertaken by Forest Oil on the Contract Area under the Original Permits must be taken as being expended by Forest Oil towards its acquisition of interests in both the River Permit and Original Permits. This is consistent with the testimony of Claimant’s witnesses in the arbitration that Forest Oil’s plan for oil and gas exploration within the Bécancour/ Champlain Block, including the River Permit Area, contemplated onshore drilling rather than off-shore drilling.³¹²
372. Respondent contends that the work undertaken and expenses incurred in connection with Original Permits cannot be regarded as applying to the acquisition of interests in the River Permit as the majority of the work and expenses incurred on the Contract Area under the Original Permits took place prior to the issuance of the River Permit and at a time “when the processing of the licence application [for the River Permit] had been suspended, with no indication as to when the ministry would consider it”.³¹³ The Tribunal is not persuaded by this argument.
373. In the Tribunal’s view, the fact that majority of the work on the Contract Area under the Original Permits had been performed by Forest Oil prior to Junex’s acquisition of the River Permit does not undermine Junex’s and Forest Oil’s agreement under the River Permit Agreement that the terms of the Farmout Agreement must be regarded as applying equally to the River Permit Agreement.
374. The determinative question in the Tribunal’s view is whether Forest Oil would be eligible to acquire the interests in the River Permit Area had it not spent [REDACTED] and undertaken the work contemplated under the Farmout Agreement. The Tribunal concurs with Claimant that it is clear from the evidence on record that, had Forest Oil spent no

³¹¹ C-PHB, ¶ 38; *citing* October 2017 Merits Hearing, Tr. Day 3, 613:9-15; Tr. Day 2, 335:21-337:7.

³¹² Wigin First Statement, ¶¶ 13-15; Lavoie First Statement, ¶ 17; Lavoie Second Statement, ¶¶ 13-14.

³¹³ Rejoinder, ¶ 133.

money and undertaken no work in the Contract Area of the Original Permits, the Enterprise would not have obtained the River Permit Rights.³¹⁴

375. Contrary to Respondent's assertion, the Tribunal considers that the present case bears similarity to the situation in the *Mondev* case. Respondent distinguishes the *Mondev* case from the present one on the basis that, in that case, the contractual arrangement was such that the claimant had invested in a two-phase project through a singular agreement. The agreement contemplated that the claimant would have to invest capital to obtain the assignment and complete the first phase of the project, following which, the claimant had the option to elect whether it wished to undertake work on the second phase of the project. Respondent emphasizes that the claimant in the *Mondev* case derived its interests in both phases of the project from a singular agreement, which was entered into with the city of Boston. The Tribunal is not persuaded by the distinction sought to be drawn by Respondent between the *Mondev* case and the present case. As noted in the preceding paragraphs, it is apparent from a combined reading of the Farmout Agreement and the River Permit Agreement that Claimant could acquire interests in the River Permit Area only once it expended capital and undertook the work contemplated under the Farmout Agreement. There is no requirement under NAFTA Article 1139(h) that the contractual arrangement pursuant to which interests are acquired by the investor must have been entered into by the investor with host State.
376. Lastly, it is apparent that the [REDACTED] amount expended by Forest Oil towards the acquisition of the River Permit Rights was pursuant to the Farmout Agreement read together with the River Permit Agreement. The stipulation under NAFTA Article 1139(h) regarding contractual arrangements, therefore, stands satisfied.
377. Thus, the Tribunal determines that Claimant's River Permit Rights constitute an "investment" within the meaning of NAFTA Article 1139(h). As such, the Tribunal has jurisdiction *ratione materiae* over Claimant's claims in this arbitration.

³¹⁴ C-PHB, ¶ 39.

(ii) NAFTA Article 1139(g)

378. The Parties have made extensive submissions and have filed expert reports in support of their respective positions on whether the River Permit Rights qualify as an investment under NAFTA Article 1139(g). The Parties disagree on whether the River Permit Rights are in the nature of real property rights under Québec law, or if they are personal contractual rights.
379. The Tribunal has determined in ¶ 377 above that the River Permit Rights qualify as a protected investment under NAFTA Article 1139(h), thereby establishing the Tribunal’s jurisdiction *ratione materiae* over Claimant’s claims in this arbitration.
380. In view of this finding, it is not necessary for the Tribunal to further examine whether the River Permit Rights also qualify as a protected investment under NAFTA Article 1139(g) for the purposes of establishing its jurisdiction *ratione materiae* over Claimant’s claims in this arbitration. Should it be necessary for the Tribunal to consider the nature of the River Permit Rights for addressing the Parties’ other disputes in this arbitration, it will address this question as required in the appropriate place in the Award.

C. OBJECTION TO THE TRIBUNAL’S JURISDICTION DUE TO THE ALLEGED LACK OF A “LEGALLY SIGNIFICANT CONNECTION” BETWEEN THE IMPUGNED ACT AND THE ENTERPRISE OR ITS INVESTMENTS

(1) Relevant Treaty Provisions

381. NAFTA Article 1101 sets out the scope of the substantive protections under NAFTA Chapter Eleven and states in relevant part as follows:

Article 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of another Party;
 - (b) investments of investors of another Party in the territory of the Party; and
 - (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

...

382. NAFTA Article 1139 defines the terms “investment of an investor of a Party” and “investor of a Party” as follows:

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;

383. NAFTA Article 201(1) defines the terms “enterprise”, “enterprise of a Party” and “measure” as follows:

enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

enterprise of a Party means an enterprise constituted or organized under the law of a Party;

. . . .

measure includes any law, regulation, procedure, requirement or practice;

(2) The Parties’ Positions

a. Respondent’s Position

384. Relying on the treaty interpretation rules under the VCLT and decisions of prior arbitral tribunals, Respondent submits that the phrase “relating to” under NAFTA Article 1101(1) requires establishing the existence of a “legally significant connection” between the impugned measure and the investor or the investment. Respondent submits that such connection must entail more than a demonstration that the impugned measure may have “affected” the investor or the investment.³¹⁵

385. Respondent contends that Claimant has failed to demonstrate the existence of a “legally significant connection” between the impugned Act and the Enterprise or its alleged investment, as the Act does not revoke any license or mining right held by the Enterprise.³¹⁶

³¹⁵ Counter-Memorial, ¶ 294-307. *See also* R-PHB, ¶ 52; citing **Exh. CLA-116**, *Resolute Forest Products Inc.*, (UNCT/15/2) Decision on Jurisdiction and Admissibility, 30 January 2018.

³¹⁶ Counter-Memorial, ¶¶ 273, 293.

386. Respondent submits that the assessment of whether there exists a “legally significant connection” between the impugned measure and the investor or investment is a factual enquiry, which must be guided by the following principles:
- (i) whether there exists a legal relationship between the impugned measure and the investor or investment;
 - (ii) whether the investor belongs to an indeterminate class of investors; and
 - (iii) whether there exists an intention by the host State to penalize the investor.³¹⁷
387. Respondent contends that the “legally significant connection” requirement of NAFTA Article 1101 is not satisfied in this case as:
- (i) there was no contractual or legal relationship between the Enterprise and Respondent;³¹⁸
 - (ii) the only direct effect of the impugned Act was to revoke the mining rights located in St. Lawrence River, which were not held by Claimant.³¹⁹ Respondent contends that the Enterprise’s remedy for any losses lies against its co-contracting party, *i.e.*, Junex, and not Respondent;³²⁰
 - (iii) Claimant belongs to an indeterminate class of investors affected indirectly by the impugned Act because of contractual agreements;³²¹ and
 - (iv) Respondent, in adopting the Act, had no intention of penalizing Claimant or its alleged investment. Respondent relies on the *Methanex* case to contend that the

³¹⁷ Counter-Memorial, ¶ 308; citing **Exh. CLA-046**, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 139.

³¹⁸ Counter-Memorial, ¶¶ 310-312.

³¹⁹ Rejoinder, ¶¶ 199-205; citing **Exh. RLA-045**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶ 6.23; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 173, 175; **Exh. CLA-026**, *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶ 101. See also R-PHB, ¶ 53.

³²⁰ Counter-Memorial, ¶ 313.

³²¹ Rejoinder, ¶¶ 207-210. See also R-PHB, ¶¶ 55-57.

investor is required to demonstrate malicious intent of the State in penalizing foreign investors.³²²

b. Claimant's Position

388. Claimant maintains that its claims raised in this arbitration satisfy the jurisdictional requirements under NAFTA Article 1101(1), as (i) the impugned Act was a legislative Act of the National Assembly of Québec and is, therefore, attributable to Respondent; (ii) the River Permit Rights are an “investment” within the meaning of NAFTA Article 1139(g) and (h); and (iii) Bill 18, by revoking “[a]ny mining right” that had been issued “for the part of the St. Lawrence River west of longitude 64°51'22" in the NAD83 geodetic reference system or for the islands situated in that part of the river”, caused the revocation of the River Permit and consequently a termination of Claimant’s River Permit Rights. Claimant contends that, as Bill 18 directly nullified its River Permit Rights, there is a “legally significant connection” between the “measure”, *i.e.*, Bill 18, and the Enterprise’s “investment”.³²³
389. Claimant concurs with Respondent that, to meet the jurisdictional requirements of NAFTA Article 1101(1), it must establish that there was a “legally significant connection” between the impugned measure and the Enterprise or its investments in the territory of Respondent.³²⁴ Claimant also concurs with Respondent that a “legally significant connection” requires more than a demonstration that the measure was “affecting” Claimant or its investment in the territory of Respondent.³²⁵
390. Claimant submits that there is no dispute between the Parties that Bill 18 revoked the River Permit.³²⁶ Claimant contends that Respondent incorrectly asserts that there is no “legally significant connection” between Bill 18 and the River Permit as: (i) Junex was the titular holder of the River Permit at the time Bill 18 received Royal Assent and, therefore, Junex

³²² R-PHB, ¶ 54; Counter-Memorial, ¶¶ 308, 329-330; *citing Exh. CLA-046, Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 154.

³²³ Memorial, ¶¶ 183-191, 213; Reply, ¶¶ 231-232.

³²⁴ Memorial, ¶ 177.

³²⁵ Memorial, ¶¶ 177, 189-191; *citing Exh. CLA-046, Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 147. *See also* C-PHB, ¶ 40; *citing Exh. CLA-116, Resolute Forest Products Inc.*, UNCT/15/2 Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 242.

³²⁶ C-PHB, ¶ 41; *citing* October 2017 Merits Hearing, Tr. Day 1, p. 104:1-104:4.

was acting as an intermediary between the Enterprise and the “measure”; and (ii) the Enterprise belonged to an “indeterminate class of investors” and, therefore, has no right of action under NAFTA Chapter Eleven.³²⁷

391. Claimant refutes Respondent’s abovementioned contentions, asserting that: (i) it was the holder of the River Permit Rights, through the Enterprise; (ii) there was no intermediary between the Enterprise and its ability to conduct exploration activities in realization of the River Permit Rights; (iii) no third party had a right to restrict the Enterprise’s activities pursuant to its River Permit Rights; (iv) the Enterprise held a 100% working interest in those rights pursuant to its completion of the terms set by the River Permit Agreement; and (v) when Bill 18 came into force, the Enterprise was the sole party engaged in natural gas exploration in the River Permit Area.³²⁸
392. Claimant objects to Respondent characterizing the Enterprise as belonging to an “indeterminate class of investors”, contending that the Enterprise was part of a select group of companies which held rights to engage in a specific activity within a defined territory, that were targeted by Bill 18.³²⁹ Claimant argues that for the Enterprise to be regarded as belonging to an “indeterminate class” it would have to be one of the many suppliers and service providers which provided equipment to entities developing the resource and would not be holding any property rights itself.³³⁰
393. Claimant submits that the *Methanex* case is factually distinguishable from the present one and, in any event, Claimant meets the “legally significant connection” test advanced by the *Methanex* tribunal.³³¹ Claimant agrees with the findings of the arbitral tribunals in the cases of *Apotex* and *Cargill*, that the “legally significant connection” requirement under NAFTA Article 1101(1) would be met when there is (i) a determinate number of investors; and (ii) a direct link between the measure and the investor or investment. Claimant asserts that the present situation is similar to that in the *Apotex* and *Cargill* cases.³³² Claimant argues that

³²⁷ C-PHB, ¶ 41; *citing* Tr. Day 1, p. 146:11-147:3; Counter-Memorial, ¶ 309.

³²⁸ Reply, ¶ 232; *citing*, Axani Second Statement, ¶¶ 3, 5, 7, 18; Lavoie Second Statement, ¶¶ 11, 23. *See also* C-PHB, ¶ 42; *citing* Tr. Day 3, p. 689:3-14; 691:5-9; Tr. Day 7, p. 1883:6-14; ¶ 43.

³²⁹ Reply, ¶ 237; C-PHB, ¶ 43.

³³⁰ Reply, ¶ 238.

³³¹ Reply, ¶ 233-235; *citing* **Exh. CLA-046**, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 137.

³³² Reply, ¶ 239.

the findings of the *Bilcon* tribunal³³³ further support its position that there was a legally significant connection between Bill 18 and the River Permit.³³⁴

394. Claimant argues that “the immediate effect” of Bill 18 prevented Claimant from exercising its rights, which further evidences a “legally significant connection”.³³⁵ In this regard, Claimant refers to the arbitral awards in *Cargill* and *Apotex*, to show that a Government act which had an “immediate and direct effect” on the investment satisfied the legally significant connection requirement for jurisdiction.³³⁶ On the facts, Claimant alleges that, as the Enterprise’s River Permit Rights were directly and deliberately revoked by Bill 18, this would satisfy the jurisdictional requirement in NAFTA Article 1101 that the measure “relates to” the investment.³³⁷ Claimant contends that an analysis of the extent to which Claimant, through the Enterprise, was prohibited from realizing its rights and the nature of the prohibition should be reserved for enquiries under Articles 1105 or 1110.³³⁸
395. Claimant contends that, contrary to Respondent’s assertions,³³⁹ there is no requirement to demonstrate a State’s intention to penalize the investor in order to meet the “legally significant connection” requirement under NAFTA Article 1101.³⁴⁰ Claimant relies on the *Methanex* award, where the tribunal explicitly rejected an interpretation that requires a finding of “malign intent” to find a “legally significant connection”.³⁴¹ Claimant submits that Respondent, too, acknowledges that “evidence of intent was not always necessary to meet the threshold of Article 1101”.³⁴²

³³³ **Exh. CLA-031**, *Clayton/Bilcon v. Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015.

³³⁴ Reply, ¶ 240.

³³⁵ Reply, ¶¶ 245-251; C-PHB, ¶ 14.

³³⁶ Reply, ¶¶ 248, 251.

³³⁷ Reply, ¶¶ 248, 251.

³³⁸ Reply, ¶ 249.

³³⁹ Counter-Memorial, ¶¶ 327-330.

³⁴⁰ Reply, ¶ 252.

³⁴¹ **Exh. CLA-045**, *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 8.

³⁴² Counter-Memorial, fn 428.

(3) Non-Disputing Parties' Submissions

a. USA NDP Submission

396. USA concurs with the Parties that the phrase “relating to” in NAFTA Article 1101(1) cannot be satisfied by the incidental effect that a challenged measure has on an investor, and that a “legally significant connection” between the measure and the investor or its investment must be established.³⁴³ According to USA, the “legally significant connection” test is not satisfied by the “[n]egative impact of a challenged measure on a claimant, without more . . . Rather a ‘legally significant connection’ requires a more direct connection between the challenged measure and the foreign investor or investment”.³⁴⁴ USA submits that otherwise “untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 1101(1) threshold”.³⁴⁵

b. Mexico NDP Submission

397. Mexico emphasizes the relevance of NAFTA Article 1101(1) in determining the jurisdiction of arbitral tribunals to adjudicate on investment disputes under NAFTA.³⁴⁶

398. Mexico submits that the phrase “relating to” in NAFTA Article 1101(1) requires the demonstration of a “legally significant connection” between the impugned measure and the investor or its investment and concurs with Respondent’s submissions in this regard at ¶¶ 298-306 of the Counter-Memorial. Mexico contends that such an interpretation of NAFTA Article 1101(1) has been supported by Canada, Mexico and USA in previous cases and has been applied by NAFTA Chapter Eleven arbitral tribunals.³⁴⁷

(4) The Tribunal’s Analysis

399. The Tribunal will first address, in Section (a) below, the legal standard under NAFTA Article 1101(1) and, thereafter, in Section (b) below, it will address the Parties’ disputes

³⁴³ USA NDP Submission, ¶ 6.

³⁴⁴ USA NDP Submission, ¶ 7.

³⁴⁵ USA NDP Submission, ¶ 6; *citing Methanex Corporation v. United States of America*, Partial Award, 7 August 2002.

³⁴⁶ Mexico NDP Submission, ¶¶ 3-4; *citing Methanex Corporation v. United States of America*, Partial Award, 7 August 2002; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Award, 25 August 2014.

³⁴⁷ Mexico NDP Submission, ¶ 5.

on whether Claimant has satisfied NAFTA Article 1101(1) requirements for purposes of establishing the Tribunal’s jurisdiction.

a. Legal Standard

400. As noted in ¶ 381 above, NAFTA Article 1101(1) provides in relevant part that NAFTA Chapter Eleven “applies to measures adopted or maintained by a Party relating to (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; . . .”. Thus, to fulfil the threshold jurisdictional requirements under NAFTA Article 1101(1), there must be: (i) an investor of a NAFTA Party; (ii) an investment of such an investor in the territory of another NAFTA Party; and (iii) a measure by the other NAFTA Party relating to the investor or the investment.
401. Whilst the Parties have made detailed submissions as to the meaning of “relating to” under NAFTA Article 1101(1), the Tribunal notes that the legal standard under NAFTA Article 1101(1) is not in dispute between the Parties, and that there is also consensus amongst the non-disputing NAFTA Parties on this matter.
402. Specifically, it is well-settled in NAFTA arbitral jurisprudence that to satisfy the jurisdictional requirement of NAFTA Article 1101(1), it must be demonstrated that a “legally significant connection” exists between the impugned measure by the host State and the investor or the investment. Such “legally significant connection” requires “something more than the mere effect of a measure on an investor or an investment”.³⁴⁸
403. When analyzing whether the threshold of a “legally significant connection” under NAFTA 1101(1) is met, previous arbitral tribunals have considered, *inter alia*, (i) whether the impugned measure has had an “immediate and direct effect” on the investor or the investment,³⁴⁹ (ii) whether the impugned measure constituted a legal impediment on the

³⁴⁸ **Exh. CLA-046**, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 147; **Exh. RLA-045**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, Award, ICSID Case No. ARB(AF)/12/1, 25 August 2014, ¶ 6.13; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 174-175; **Exh. CLA-031** *Clayton/Bilcon v. Canada*, Award on Jurisdiction and Liability, PCA No. 2009-04, 17 March 2015, ¶ 240.

³⁴⁹ **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 175.

investor's activities,³⁵⁰ and (iii) whether the investor belonged to a determinate class of investors.³⁵¹ The Tribunal will be guided by these factors, which are also not disputed by the Parties.

404. Consistent with the decisions of arbitral tribunals before it, the Tribunal does not regard the establishment of an intention to penalize the investor or investment to be a necessary criterion for establishing the “legally significant connection” test under NAFTA Article 1101(1).³⁵²

b. NAFTA Article 1101(1) in this Case

405. Claimant is a USA company. Claimant has initiated this arbitration pursuant to NAFTA Article 1117, on behalf of the Enterprise, a Canadian entity, which is a wholly owned subsidiary of Claimant (see ¶¶ 2, 5, 7 and 8 above). The Enterprise qualifies as an “enterprise” under NAFTA Article 201(1) and as an “investor of a Party” under NAFTA Article 1139.
406. Respondent accepts that “[t]he fact of owning or controlling LPRC [the Enterprise] would therefore enable it [Claimant] to satisfy the criteria of Articles 1101 and 1117 for *in personam* jurisdiction”.³⁵³ However, it contends that “it matters little whether LPRC [Enterprise] may be characterized as an investment”, as Claimant “is not alleging that the Act has had the effect of expropriating LPRC or treating it in a manner contrary to the minimum standard of treatment prescribed by NAFTA Article 1105”.³⁵⁴
407. As noted in ¶ 343 above, Claimant’s investment, which is the subject-matter of its claims in this arbitration, is the Enterprise’s River Permit Rights. Claimant clarifies that it “refers to the Enterprise [] in the jurisdictional analysis to assert that Lone Pine has standing as a

³⁵⁰ **Exh. RLA-045**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, ¶¶ 6.23-6.24

³⁵¹ **Exh. CLA-046**, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶¶ 138-139.

³⁵² **Exh. CLA-045**, *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, ¶ 8.

³⁵³ Counter-Memorial, ¶ 274.

³⁵⁴ Counter-Memorial, ¶ 274.

NAFTA-qualified investor. The investment that is the object of Canada's NAFTA breaches is the River Permit Rights . . .".³⁵⁵

408. The Tribunal has determined in ¶ 377 above that the River Permit Rights constitute an "investment" under NAFTA Article 1139(h). The River Permit Rights are the Enterprise's investments in Canada and, therefore, also satisfy the requirement of "investments of investors of another Party in the territory of the Party" under NAFTA Article 1101(1).
409. The impugned measure challenged by Claimant in this arbitration is the *Act to limit oil and gas activities* passed by the Québec National Assembly. The impugned Act, being a law passed by Québec, meets the definition of "measure" under NAFTA Article 201.1 and, therefore, constitutes a "measure adopted or maintained by a Party [Canada]", as is required under NAFTA Article 1101(1).
410. Thus, to satisfy the jurisdictional requirements under NAFTA Article 1101(1), the issue to be considered by the Tribunal is whether the impugned Act bears a "legally significant connection" with the Enterprise or the River Permit Rights.
411. Respondent argues that there is no "legally significant connection" between the impugned Act and the Enterprise or the River Permit Rights as:
- (i) the Enterprise did not own the mining rights that were revoked through the impugned Act; and
 - (ii) that "[a]t best, it [the Enterprise] holds future economic interests in the development of mineral substances, and those interests constitute a personal right vis-à-vis one of the holders of those mining rights, namely, Junex".³⁵⁶ On this basis, Respondent contends that the economic impact of the Act on the Enterprise and its investment, if any, is, therefore, indirect and solely derived from the damage that Junex may have suffered. That the impugned Act might have had an immediate effect on the Enterprise is insufficient to establish a "legally significant connection", in

³⁵⁵ Memorial, ¶ 181, fn 268.

³⁵⁶ Rejoinder, ¶ 202. *See also* Rejoinder, ¶¶ 201, 203-205; R-PHB, ¶ 53.

Respondent's view.³⁵⁷ According to Respondent, the Enterprise's remedy for any losses lies against its co-contracting party, *i.e.*, Junex, and not Respondent,³⁵⁸

- (iii) there was no direct legal relationship between the Enterprise and the impugned Act, as Junex was the only holder of the River Permit until the entry into force of the impugned Act and the Enterprise has never been the holder or co-holder of the River Permit;³⁵⁹
- (iv) the Enterprise belonged to an indeterminate class of investors as it was not one of the listed companies directly holding the revoked exploration permits. According to Respondent, only the nine companies that held the 29 exploration permits, which had been partially or fully revoked through the impugned Act, constitute the specific group of investors to which the impugned Act relates to. Respondent contends that, as the Enterprise only had a contractual relationship with Junex for a specific geological interval in the River Permit Area, it does not fall within the class of affected investors.³⁶⁰ Respondent further contends that (i) Junex could have potentially granted contractual interests in the River Permit's other geological intervals to other entities; and (ii) that it would not be practically possible for Respondent to know the identities of all entities who held a contractual interest in exploration permits because there was no requirement to register such an interest in the Mining Register;³⁶¹ and
- (v) there is no evidence to show that the Québec Government intended to harm the Enterprise or its alleged investment and that Claimant, too, accepts that there was no targeted malice against it by the Québec Government through the adoption of the impugned Act.³⁶²

³⁵⁷ Rejoinder, ¶¶ 199-204; citing **Exh. RLA-045**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009; **Exh. CLA-026** *Bayview Irrigation District et al v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007.

³⁵⁸ Counter-Memorial, ¶ 313.

³⁵⁹ Counter-Memorial, ¶¶ 310-312.

³⁶⁰ Rejoinder, ¶¶ 207-208. *See also* R-PHB, ¶¶ 55-57.

³⁶¹ Rejoinder, ¶¶ 207-210.

³⁶² Counter-Memorial, ¶ 330; R-PHB, ¶ 54.

412. Claimant refutes Respondent's assertions, contending that:

- (i) pursuant to the River Permit Rights, the Enterprise had acquired a 100% working interest in the specific geographical interval of the River Permit Area, which meant that there was no intermediary between the Enterprise and its ability to conduct exploration activities in that area;
- (ii) the Enterprise belonged to a select group of companies, which held the rights to conduct exploration activities in the St. Lawrence River. Claimant contends that an "indeterminate class" of investors would have to be one of the many suppliers and service providers which provided equipment to entities developing the resource and would not be holding any property rights itself, which the Enterprise was not;³⁶³
- (iii) Claimant contends that in the *Methanex* case, unlike the case before this Tribunal, the impact of the impugned measure was ancillary to the claimant's investment, *i.e.*, the investment was not the target of the impugned measure. For this reason, the *Methanex* tribunal determined that there was no "legally significant connection" between the impugned measure and the claimant's investment in that case, as the claimant belonged to an indeterminate class of investors.³⁶⁴ Whereas in the present case, Claimant contends that the Enterprise was the entity exercising the River Permit Rights until it was directly revoked by Bill 18.³⁶⁵ Claimant asserts that the present situation is similar to that in the *Apotex* and *Cargill* cases because Claimant was part of a determinate group of investors whose investment had been targeted by the act of the Government Act;³⁶⁶
- (iv) Claimant argues that the findings of the *Bilcon* tribunal support its position that there was a legally significant connection between Bill 18 and the River Permit.³⁶⁷ The tribunal in *Bilcon* rejected the respondent's position in that case and stated that questions about the existence and ownership of rights under municipal law could not

³⁶³ Reply, ¶ 238.

³⁶⁴ Reply, ¶¶ 234-235; citing **Exh. CLA-046**, *Methanex Corporation v. United States of America*, Partial Award 7 August 2002, ¶ 137.

³⁶⁵ Reply, ¶ 233.

³⁶⁶ Reply, ¶ 239.

³⁶⁷ Reply, ¶¶ 240-241; citing **Exh. CLA-031**, *Clayton/Bilcon v. Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 219-220.

obviate an otherwise clear existence of a legally significant connection.³⁶⁸ Claimant contends that the present situation, in which Claimant has acquired a 100% working interest in the River Permit Rights, demonstrates an even greater legally significant connection than in the *Bilcon* case, where Bilcon shared rights with Nova Stone.³⁶⁹ To further support its position, Claimant argues that the later assignment of rights evidences that Junex and Forest Oil intended to provide the Enterprise with full and exclusive rights and control over the River Permit area.³⁷⁰

(v) Claimant argues that “the immediate effect” of Bill 18 prevented Claimant from exercising its rights, which further evidences a “legally significant connection”;³⁷¹

(vi) Claimant contends that, contrary to Respondent’s assertions,³⁷² there is no requirement to demonstrate a State’s intention to penalize the investor in order to meet the “legally significant connection” requirement under NAFTA Article 1101.³⁷³

413. For the following reasons, the Tribunal determines that the impugned Act bears a significant legal connection with the Enterprise’s River Permit Rights.

414. The Tribunal considers that the Enterprise belongs to a determinate class of investors holding exploration rights in the River Permit Area. Specifically, the Enterprise holds a 100% working interest in a specific geographical interval of the River Permit Area. Although Respondent disputes whether the 100% working interest vests an intangible property right in the Enterprise, it is clear from the evidence on record that pursuant to the acquisition of the River Permit Rights, the Enterprise had exploration rights in a specific geographical interval of the River Permit Area.

415. The passage of the impugned Act revoked all mining rights under the St. Lawrence River, which included the Enterprise’s exploration rights in the River Permit Area. Thus, the

³⁶⁸ Reply, ¶ 241.

³⁶⁹ Reply, ¶ 243.

³⁷⁰ Reply, ¶ 244; C-PHB, ¶ 42.

³⁷¹ Reply, ¶¶ 245-251; C-PHB, ¶ 14.

³⁷² Counter-Memorial, ¶¶ 327-331.

³⁷³ Reply, ¶¶ 252-254.

Enterprise's exploration rights in the River Permit Area were directly affected by the impugned Act.

416. Contrary to Respondent's assertion, the connection between the Enterprise's investment and the impugned Act is not comparable to the situation in the *Methanex* case. Unlike the *Methanex* case, where Methanex was not the target of the impugned measure (being the producer of methanol and not methyl tertiary-butyl ether, which was the product banned by the host State), the Tribunal finds that the River Permit Rights were the target of the impugned Act. The Tribunal does not consider it crucial for the Enterprise to be a permit holder, or have property rights under the St. Lawrence River, for it to fall within the determinate class of investors, whose rights in the St. Lawrence River were affected by the passage of Bill 18 or to be directly impacted by the impugned Act.
417. Respondent contends that the significant legal connection test is not satisfied in this case, as there is no direct legal relationship between the Enterprise and the host State, since the Enterprise was not the actual permit holder of the River Permit. The Tribunal is not persuaded by this argument. The Tribunal does not consider that, only where there is a direct legal relationship between the investor and the host State, will a "legally significant connection" be established between the impugned measure of the State and the investor or the investment. Instead, in the Tribunal's view, what needs to be considered is whether the impugned measure has a direct impact on the investor and the investment. In this case, the Tribunal finds that the impugned Act had an immediate and direct impact on the Enterprise's River Permit Rights as the said rights were extinguished following the impugned Act. Thus, the Tribunal is satisfied that there is a "legally significant connection" between the impugned Act and the River Permit Rights.
418. Accordingly, the Tribunal rejects Respondent's objections under this head and determines that Claimant has met the threshold jurisdictional requirements under NAFTA Article 1101.

419. To conclude the jurisdictional analysis, the Tribunal further notes that it is not disputed between the Parties, and the Tribunal is also satisfied, that Claimant has satisfied the other temporal and formal requirements under NAFTA Articles 1117 to 1121.³⁷⁴

420. Thus, the Tribunal concludes that it has jurisdiction over Claimant's claims in this arbitration.

X. LIABILITY

A. EXPROPRIATION

(1) Relevant Treaty Provisions

421. NAFTA Article 1110 provides as follows regarding expropriation:

Article 1110: Expropriation and Compensation

1. 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 ("expropriation"), except:
 - (a) for a public purpose;
 - (b) on a non-discriminatory basis;
 - (c) in accordance with due process of law and Article 1105(1); and
 - (d) on payment of compensation in accordance with paragraphs 2 through 6.
2. 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. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
3. Compensation shall be paid without delay and be fully realizable.
4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest

³⁷⁴

Memorial, ¶¶ 214-215; Counter-Memorial, ¶ 274.

had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.
7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).
8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

(2) Parties' Positions

a. Claimant's Position

422. Claimant argues that Respondent has breached its obligations under NAFTA Article 1110 through Québec's passage of Bill 18, which expropriated Claimant's investment in Canada, without providing any compensation to Claimant.³⁷⁵ Claimant contends that, contrary to Respondent's assertions, Bill 18 was not passed for a public purpose, and neither was it a valid exercise of Respondent's police powers.³⁷⁶

(i) Legal Standard

423. Claimant submits that NAFTA Article 1110 covers explicit nationalizations or expropriations as well as measures tantamount thereto. According to Claimant, the phrase "tantamount to expropriation" in NAFTA Article 1110(1) must be interpreted as "equivalent" to expropriation and the test is the same for both "expropriation" and "measure tantamount to" expropriation.³⁷⁷
424. Claimant submits that to determine whether an expropriation has occurred "the essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control".³⁷⁸ The test is based on the

³⁷⁵ Memorial, ¶¶ 217-219; Reply, ¶¶ 20-23; C-PHB, ¶¶ 44-45.

³⁷⁶ Reply, ¶¶ 284-285; C-PHB, ¶¶ 44-45.

³⁷⁷ Memorial, ¶¶ 222-225.

³⁷⁸ Memorial, ¶ 223; citing **CLA-011**, Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), pp. 508-509.

“effects of the impugned measure”,³⁷⁹ which in turn requires a consideration of whether (i) “[t]he object of the alleged expropriation falls within the scope of treaty-protected property rights (i.e. is capable of being the object of a taking)”;³⁸⁰ and (ii) “[t]he measure—either directly or indirectly—resulted in a taking or substantial deprivation of the protected property rights.”³⁸¹

425. As regards item (i), referred to in the preceding paragraph, Claimant further submits that the scope of property rights protected by NAFTA Article 1110(1) is broad.³⁸² The legal determination of whether the protections offered by NAFTA Article 1110 apply, is a question of treaty interpretation and application of international law, including customary international law and that the decisions of other international tribunals may also be used as a “subsidiary means for the determination of rules of law”.³⁸³ With respect to item (ii), Claimant submits that the difference between direct and indirect expropriation is a question of the “taking’s efficient cause”.³⁸⁴

(ii) Covered investments

426. Claimant submits that NAFTA Article 1110(1) applies to any “investments” of an investor.³⁸⁵ Claimant contends that the term “investment” has the same meaning under NAFTA Articles 1139 and 1110. Therefore, once an investment qualifies as a NAFTA-protected investment under NAFTA Article 1139, such investment is capable of being expropriated under NAFTA Article 1110.³⁸⁶

427. On a combined reading of NAFTA Article 1110(1) with NAFTA Article 1139, Claimant contends that, to establish that it has suffered expropriation, it need not demonstrate that its

³⁷⁹ Memorial, ¶ 226.

³⁸⁰ Memorial, ¶ 226.

³⁸¹ Memorial, ¶ 226(a)-(b). *See also* ¶ 225; *citing Exh. CLA-053, Pope & Talbot Inc. v. Canada*, Interim Award, 26 June 2000, ¶¶ 102, 104; *Exh. CLA-058, S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, ¶ 286; *Exh. CLA-038, Fireman’s Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, ¶ 176(c); *Exh. CLA-039, Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 357.

³⁸² Memorial, ¶ 229.

³⁸³ Memorial, ¶¶ 228-229; *citing Exh. CLA-004, Statute of the International Court of Justice (1945) (“ICJ Statute”)*, Article 38.

³⁸⁴ Memorial, ¶ 239.

³⁸⁵ Memorial, ¶ 230.

³⁸⁶ Memorial, ¶ 232; Reply, ¶¶ 304-309.

entire “enterprise” was taken or that it had no other business activities left.³⁸⁷ Rather, Claimant is only required to show that the object of the alleged expropriation satisfies one of the definitions of “investment” in NAFTA Article 1139.³⁸⁸

428. Claimant disagrees with Respondent’s characterization of Claimant’s investment as comprising all five related permits that make up the Bécancour/Champlain Block, *i.e.*, the Original Permits and the River Permit together. It also rejects Respondent’s assertion that the Original Permits are relevant for the expropriation analysis.³⁸⁹ Claimant contends that, notwithstanding that it had other ongoing operations, the River Permit was the “sweet spot” of its investment in Respondent’s territory, and constitutes an investment in its own right, independent of the Original Permits.³⁹⁰ In this regard, Claimant relies on the arbitral tribunals’ findings in cases of *Ampal-American Israel Corp*³⁹¹ and *GAMI*.³⁹² Claimant submits that, in these cases, the arbitral tribunals had found that taking of part of a property or revocation of a license in the context of a larger project, which was not destroyed because of taking of the license, can be tantamount to expropriation.³⁹³ Claimant contends that the cases of *Burlington Resources*, *Electrabel*, *Vanessa Ventures*, *Merril & Ring*, *Marvin Feldman*, and *Telenor*, which are relied on by Respondent, are factually distinguishable from the dispute before this Tribunal and are, therefore, not relevant.³⁹⁴

³⁸⁷ Memorial, ¶ 230.

³⁸⁸ Memorial, ¶ 230.

³⁸⁹ Reply, ¶¶ 336-339; referring to Counter-Memorial, ¶¶ 451-452.

³⁹⁰ Reply, ¶ 341.

³⁹¹ Reply, ¶¶ 344-345; citing **Exh. CLA-076**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶¶ 179, 180.

³⁹² Reply, ¶¶ 344-345; citing **Exh. CLA-086**, *GAMI Investments Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 126.

³⁹³ Reply, ¶¶ 342-346; citing **Exh. CLA-076**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶¶ 179-180; **Exh. CLA-086**, *GAMI Investments Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 126.

³⁹⁴ Reply, ¶¶ 347-372; citing **Exh. CLA-081**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶¶ 260, 404, 456; **Exh. RLA-050**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Part VI, ¶¶ 6.53, 6.57, 6.58; **Exh. RLA-086**, *Vanessa Ventures Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶¶ 61, 188, 190; **Exh. CLA-043**, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Administered Case, Award, 31 March 2010, ¶¶ 144, 148; **Exh. CLA-042**, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 111; **Exh. RLA-084**, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶¶ 61, 67, 72.

(iii) Bill 18 Expropriated Claimant's River Permit Rights

429. Claimant submits that the revocation of the River Permit Rights through Bill 18 is an expropriation of Claimant's River Permit Rights in two alternative ways:
- (i) *First*, Claimant's investment under NAFTA Article 1139(g) was directly expropriated or was subject to measures tantamount thereto; and
 - (ii) *Second*, Claimant's investment under NAFTA Article 1139(h) was indirectly expropriated or subject to measures tantamount thereto.³⁹⁵
430. In relation to item (i) in the preceding paragraph, Claimant contends that as Bill 18 revoked the River Permit, which included the Enterprise's intangible and immovable real rights in the River Permit, it constitutes a direct expropriation under international law and is therefore a breach of NAFTA Article 1110.³⁹⁶ Claimant disputes Respondent's characterization of the effect of Bill 18 as tantamount to an indirect expropriation for which Claimant is required to establish "substantial deprivation" of its investment. It argues that "Bill 18 patently constituted a direct taking. [Therefore,] [t]here is no need to prove substantial deprivation as the Enterprise's investment was taken, full stop".³⁹⁷
431. Notwithstanding its position in the preceding paragraph, Claimant submits that the effect of Bill 18 on the River Permit did result in a substantial deprivation of Claimant's use and benefit of its River Permit Rights.³⁹⁸ In this regard, Claimant contends that an assessment of whether Bill 18 substantially deprived Claimant of its investment must be made against Claimant's investment in the River Permit, *i.e.*, the River Permit Rights and not in the Original Permits.³⁹⁹

³⁹⁵ Memorial, ¶ 221. *See also* Reply, ¶¶ 286-288.

³⁹⁶ Memorial, ¶ 221; Reply, ¶¶ 286-289; C-PHB, ¶¶ 47, 52-53, 66.

³⁹⁷ Reply, ¶ 289.

³⁹⁸ Reply, ¶¶ 290-295; *citing* **Exh. CLA-035**, *El Paso Energy International Company v. Argentine Republic*, ICSID No. ARB/03/15, Award, 31 October 2011, ¶¶ 254, 256; **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, p. 283; **CLA-097**, *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016. *See also* Memorial, ¶ 221; C-PHB, ¶ 44.

³⁹⁹ Reply, ¶ 291.

432. Claimant submits further that for expropriation to have occurred, the deprivation need not necessarily result in a benefit to the State. It is the effect of the host State’s measure that is dispositive and not the State’s underlying intent, according to Claimant.⁴⁰⁰
433. In relation to ¶ 429(ii) above, Claimant rejects Respondent’s position that this interest could not be expropriated because it was allegedly an interest that had yet to vest. Relying on the Tremblay Expert Report, Claimant contends that it had a vested right in the River Permit.⁴⁰¹
434. In opposition to Respondent’s claim that the rights in the River Permit could never have been realized, Claimant explains that Respondent’s argument that “horizontal drilling across permit boundaries was not permitted” is anomalous.⁴⁰² Claimant argues that the prohibitions in Section 22 of the Mining Act apply exclusively to the surface of the land, and do not prohibit nor preclude drilling underneath the surface of the land,⁴⁰³ when the same party owns both contiguous permits.
435. Claimant contends that international law supports the position that rights under the River Permit are capable of being expropriated.⁴⁰⁴ Claimant cites various cases to show that (i) property rights, enjoyment of rights under a license, and contractual rights are generally capable of being expropriated; and (ii) the transfer of rights from one entity to another also grants the recipient a right capable of expropriation.⁴⁰⁵ On the present facts, Claimant argues that the River Permit Rights are a discrete asset, capable of being the object of independent commercial transactions. Claimant supports this claim by pointing to the conduct of Forest Oil, Junex, the Enterprise, and Lone Pine, all of which were engaged in negotiations and agreements which recognized these rights as a separate and distinct asset.⁴⁰⁶

⁴⁰⁰ Memorial, ¶¶ 238-239.

⁴⁰¹ Reply, ¶¶ 317-319; *citing* Gagné First Report, ¶ 72.

⁴⁰² Reply, ¶¶ 320-326; *citing* Counter-Memorial, ¶ 440.

⁴⁰³ Reply, ¶¶ 321-322.

⁴⁰⁴ Memorial, ¶ 235.

⁴⁰⁵ Memorial, ¶ 235(a)-(c); *citing* **Exh. CLA-028**, *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ (Series A) No. 7, Judgment, 25 May 1926, ¶ 44; **Exh. CLA-060**, *Starrett Housing Corp v. Islamic Republic of Iran*, 4 Iran-US CTR 122, 1983, ¶ 24; **Exh. CLA-022**, *Amoco International Finance Corporation v. Islamic Republic of Iran*, IUSCT Case No. 56, Partial Award, 14 July 1987, ¶ 108; **Exh. CLA-063**, *Tre Traktörer Aktiebolag v. Sweden*, Judgment, ECTHR (Series A) No. 159, 7 July 1989, ¶ 53.

⁴⁰⁶ Memorial, ¶ 236.

436. Claimant distinguishes the cases of *Thunderbird*,⁴⁰⁷ *Merril & Ring*,⁴⁰⁸ and *Marvin Feldman*,⁴⁰⁹ which Respondent has relied on, from the situation in the present case.⁴¹⁰

(iv) The Unlawful Nature of the Expropriation

437. Claimant submits that Respondent's expropriation of its investments was unlawful under NAFTA, as Respondent did not satisfy the conditions under sub-clauses (a) to (d) of NAFTA Article 1110.⁴¹¹

438. Claimant mainly emphasizes the fact that Respondent should have, but failed to, provide compensation to Claimant for the expropriation of its investment pursuant to NAFTA Article 1110(1)(d).⁴¹² In this regard, Claimant draws the Tribunal's attention to Section 4 of Bill 18, which explicitly provides that there will be "no compensation from the State".⁴¹³

439. Claimant further submits that Bill 18 was not justified by a public purpose and, therefore, did not meet the requirements under NAFTA Article 1110(a).⁴¹⁴ Claimant contends that, although Respondent's objective to enable hydrocarbon exploration through environmentally and scientifically sound projects might be a legitimate public policy objective, the passage of Bill 18 to revoke the exploration licenses in the St. Lawrence Lowlands was arbitrary and "without a legitimate purpose or rational explanation".⁴¹⁵ In Claimant's view, the Québec Government provided disingenuous justifications for the passage of Bill 18, which were not grounded in the results of previous studies undertaken

⁴⁰⁷ **Exh. RLA-060**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006.

⁴⁰⁸ **Exh. CLA-043**, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Administered Case, Award, 31 March 2010.

⁴⁰⁹ **Exh. CLA-042**, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

⁴¹⁰ Reply, ¶¶ 331-333; citing **Exh. RLA-060**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 208; **Exh. CLA-043**, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Administered Case, Award, 31 March 2010; **Exh. CLA-042**, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 152.

⁴¹¹ Reply, ¶¶ 296-297.

⁴¹² Reply, ¶ 297; quoting **Exh. C-063**, Québec, Bill 18, *An Act to limit oil and gas activities*, 2nd Sess, 39th Leg (2011) (introduced on 12 May 2011), ¶ 4; C-PHB, ¶ 44.

⁴¹³ Memorial, ¶¶ 274-278; C-PHB, ¶¶ 52, 66. See also **Exh. C-063**, Québec, Bill 18, *An Act to limit oil and gas activities*, 2nd Session, 39th Leg (2011) (introduced on 12 May 2011), ¶ 4.

⁴¹⁴ Memorial, ¶ 254; C-PHB, ¶¶ 52, 65.

⁴¹⁵ Reply, ¶ 373.

by the Government. Furthermore, Bill 18 was passed by the Government before the SEA-SG and SEA-2 assessments had concluded.⁴¹⁶

440. With regard to the scope of police powers, Claimant submits that Respondent's arguments have greatly elevated the scope of police powers without any supporting authority.⁴¹⁷ According to Claimant, Respondent's position that a measure can only be excluded from the scope of a State's police powers if it is "manifestly incoherent or constitutes a disguised form of protectionism", is without basis and does not find any support in the legal authorities relied on by Respondent.⁴¹⁸ Claimant submits that the proper test to determine whether a State's reliance on police powers is justified entails the following two questions: (i) whether the State's interest is *bona fide* or genuine; and (ii) whether the action is non-discriminatory.⁴¹⁹
441. In this connection, Claimant argues that Respondent's interest in expropriating the permits through Bill 18 was not a *bona fide* exercise of regulatory power, since Minister Normandeau disregarded scientific facts and evidence in passing Bill 18.⁴²⁰ In Claimant's view, a finding that Bill 18 was not a *bona fide* exercise of police powers would not undermine the State's right to regulate to protect the environment, as Bill 18 was not enacted for the purpose of environmental protection.⁴²¹
442. Claimant contends that the Minister's decision to pass Bill 18 contradicted the Government's position that horizontal drilling and hydraulic fracturing was safe,⁴²² the position of the Minister's own officials at the QMNR, and that advanced by environmental advocates, who supported a temporary measure affecting permits in the St. Lawrence River until scientific certainty was available to properly inform policymaking.⁴²³ Claimant argues

⁴¹⁶ Memorial, ¶ 256; C-PHB, ¶¶ 54-57.

⁴¹⁷ Reply, ¶ 374.

⁴¹⁸ Reply, ¶¶ 374-377.

⁴¹⁹ Reply, ¶¶ 376-377; **Exh. CLA-038**, *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006, ¶ 176(j); **Exh. CLA-020**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 432; **Exh. CLA-045**, *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.

⁴²⁰ Reply, ¶¶ 380-383; C-PHB, ¶¶ 58-65.

⁴²¹ Reply, ¶¶ 439-441.

⁴²² Reply, ¶¶ 384-389.

⁴²³ Reply, ¶¶ 383(a), 384-396.

the QMNR failed to provide scientific or environmental justification for revoking permits through the extension of the moratorium to areas not studied by SEA-1.⁴²⁴ According to Claimant, Respondent also misapplied and disregarded the findings in the SEA-1 Report and BAPE Report 273 to suit the Government's political objective, to justify the revocation of permits.⁴²⁵

443. Claimant contends further that Bill 18 did not conform to the standard that Québec set for itself for developing a regulatory framework for hydrocarbon activities.⁴²⁶ Claimant argues that the Minister's decision to prohibit oil and gas activities in the St. Lawrence River portion, despite a lack of scientific evidence supporting this decision, contradicted the scientific and evidence-based decision-making framework established by Respondent with respect to hydraulic fracturing.⁴²⁷
444. Claimant maintains that Bill 18 was motivated by political considerations.⁴²⁸ According to Claimant, this is evident from Minister Normandeau's various statements characterizing Bill 18 as a political decision,⁴²⁹ and Respondent's and Québec's refusal to comply with this Tribunal's earlier orders to produce documents that are clearly of a political nature.⁴³⁰

b. Respondent's Position

(i) The Legal Standard

445. Respondent concurs with Claimant that NAFTA Article 1110 covers both direct and indirect expropriations. Respondent further agrees with Claimant that the concept of expropriation under NAFTA Article 1110 corresponds to the definition given to the term under customary international law.⁴³¹

⁴²⁴ Reply, ¶¶ 383(b), 397-410.

⁴²⁵ Reply, ¶¶ 383(c), 411-426.

⁴²⁶ Reply, ¶ 427.

⁴²⁷ Reply, ¶¶ 427-433.

⁴²⁸ Reply, ¶¶ 434-435; C-PHB, ¶¶ 65, 83.

⁴²⁹ Reply, ¶¶ 435-436.

⁴³⁰ Reply, ¶¶ 437-438.

⁴³¹ Counter-Memorial, ¶¶ 397-399; citing **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009; **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000; **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

446. Respondent contends that the phrase “measures tantamount to nationalization or expropriation” in NAFTA Article 1110(1) does not have the effect of broadening the scope of the said provision to include something that goes beyond the ordinary concept of expropriation under international law.⁴³²

(ii) Covered Investments

447. Respondent characterizes Claimant’s alleged investment as “consisting of all of LPRC’s [Enterprise’s] interests in the five exploration licenses in the Champlain/Bécancour Block”.⁴³³

448. Respondent rejects Claimant’s characterization of its investment as being limited to the Enterprise’s rights in the River Permit, contending that “the fact that the Land Licenses [Original Permits] and the River License [River Permit] were closely connected to the claimant’s plan to explore and develop share gas, that the River License Agreement specifically stipulates that the River License is subject to the same terms and conditions as those contained in the Farmout Agreement and that Junex produced a consolidated report on all of the work performed on the five exploration licenses for the *Ministère des Ressources naturelles* . . . show once more that the claimant’s investment was not limited to LPRC’s rights in the River License given that the four Land Licenses and the River License were inextricably linked”.⁴³⁴

449. According to Respondent, the Axani First Statement reinforces Respondent’s position that the Original Permits and the River Permit must be considered as a whole. Respondent asserts that Claimant’s contention regarding the “sweet spot” of its investment was a concept developed in its Reply submission because, in its Memorial, Claimant had referred to “the Champlain/Bécancour Block – 37 times – as an indivisible whole all of which it wished to explore and which included the River License”.⁴³⁵

⁴³² Counter-Memorial, ¶ 399; citing **Exh. CLA-053**, *Pope & Talbot Inc. v. Canada*, Interim Award, 26 June 2000; **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000; **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009.

⁴³³ Rejoinder, ¶ 288.

⁴³⁴ Rejoinder, ¶ 298. See also ¶ 303; citing **Exh.C-022**, River Permit Agreement; **Exh.R-120** Junex Inc., *Rapport de travaux statutaires* 2010; **Exh.R-146** Junex Inc., *Soumission des dépenses d’exploration pour les travaux statutaires sur les permis d’exploration de Junex dans les basses-terres du Saint-Laurent*, 22 November 2010.

⁴³⁵ Rejoinder, ¶ 301. See also ¶¶ 299-300.

450. Respondent contends that Claimant is employing a variable definition of investment, as “for jurisdictional purposes and the calculation of damages, it does not hesitate to include the work performed on the Land Licenses, while for the expropriation analysis, it now alleges – with the sole purpose of restricting the definition of investment as much as possible – that only LPRC’s rights in the River License are relevant”.⁴³⁶

(iii) The Alleged Expropriation

451. Respondent contends that it has not violated NAFTA Article 1110 because even if Claimant had an investment within the meaning of NAFTA Article 1139, which Respondent disputes, Claimant had no rights that were capable of being expropriated.⁴³⁷

452. Respondent contends that the concept of expropriation under customary international law and NAFTA Article 1110 is limited to property that is capable of being expropriated.⁴³⁸ In Respondent’s view, the issue of whether there exists an “investment capable of being expropriated” is distinct from whether there exists an investment that is covered within the scope of the treaty under consideration. For Respondent, the latter is a question of whether the investment satisfies the jurisdictional conditions under a treaty, which would not necessarily make it capable of being expropriated.⁴³⁹

453. With respect to NAFTA, Respondent does not dispute that the definition of investment under NAFTA Article 1139 also applies to NAFTA Article 1110. Its position, however, is that it is not sufficient for an asset to qualify as an investment under NAFTA Article 1139 in order to be afforded protection against expropriation pursuant to NAFTA Article 1110. In this regard, Respondent relies on the findings of the *Cargill* tribunal that “the scope of what may be the subject of a claim is delimited in part by the definition of investment in Article 1139, but also by the confines of the legal basis of the particular claim”.⁴⁴⁰

⁴³⁶ Rejoinder, ¶ 302.

⁴³⁷ Rejoinder, ¶ 261.

⁴³⁸ Counter-Memorial, ¶¶ 400-403; Rejoinder, ¶¶ 265-266.

⁴³⁹ Rejoinder, ¶¶ 265-266; citing **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009; **Exh. RLA-055**, *European Media Ventures SA v. Czech Republic* UNCITRAL, Partial Award on Liability, 8 July 2009; Counter-Memorial, ¶¶ 403-404.

⁴⁴⁰ Rejoinder, ¶¶ 265-266; citing **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009.

454. Respondent contends that, contrary to Claimant's assertion, its position in this arbitration does not contradict its position in the *Windstream* case. Respondent submits that in both cases, its position has been that an investment must give rise to a vested right before it can be expropriated under NAFTA Article 1110.⁴⁴¹ Respondent submits that both USA and Mexico had supported its interpretation regarding NAFTA Article 1110 in the *Windstream* case. Respondent contends further that the awards rendered in *Chemtura*, *Merril & Ring* and *European Media Ventures* do not support Claimant's position that only the definition of investment in NAFTA Article 1139 must be considered when determining whether the said investment is capable of being expropriated. According to Respondent, these cases simply suggest that an interest must, at minimum, constitute an investment under NAFTA Article 1139 to be protected by NAFTA Article 1110.⁴⁴²
455. Accordingly, Respondent contends that Claimant must (i) establish that it has an investment falling within the meaning of NAFTA Article 1139(g) and (h) for jurisdictional purposes; then (ii) demonstrate that such investment is protected by NAFTA Article 1110, *i.e.*, it constitutes an investment that is capable of being expropriated in accordance with the applicable principles of international law. Respondent submits that Claimant agrees with its position that the investment must be capable of being expropriated.⁴⁴³
456. It is Respondent's case that Claimant's alleged investments under NAFTA Article 1139(g) and (h) were not capable of being expropriated, directly or indirectly, as:
- (i) *First*, "the agreements between Junex and Forest Oil on one hand, and Junex and LPRC [Enterprise] on the other hand, did not have the effect of transferring Junex's exploration licences to LPRC or of conferring on LPRC intangible property rights in the licences in the Champlain/Bécancour Block or their underlying resources."

⁴⁴¹ Rejoinder, ¶ 270; citing **Exh. RLA-100**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Canada's Rejoinder, 6 November 2015, ¶ 83.

⁴⁴² Rejoinder ¶¶ 271-272; citing **Exh. RLA-101**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Submission of the United States of America, 12 January 2016, ¶ 3; **Exh. RLA-102**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Submission of Mexico pursuant to NAFTA article 1128, 12 January 2016, ¶ 11; Reply, ¶¶ 307-308.

⁴⁴³ Counter-Memorial, ¶¶ 405-408.

Therefore, according to Respondent, there could not have been any direct expropriation of the Enterprise's rights, as Claimant alleges;⁴⁴⁴

- (ii) *Second*, pursuant to the River Permit Agreement, the Enterprise had only received a future, uncertain, and conditional economic interest in the potential exploitation of gas resources contained in a specific geological interval under the River Permit Area. According to Respondent, the Enterprise ought to have acquired the right of development prior to the date of expropriation for it to be capable of being expropriated;⁴⁴⁵
- (iii) *Third*, Bill 18 did not have the effect of substantially depriving the Enterprise of its investment since only the River Permit was revoked and the Enterprise's interests in the Original Permits remained intact.⁴⁴⁶ According to Respondent, the substantial deprivation test must be established for both direct and indirect expropriation;⁴⁴⁷
- (iv) *Fourth*, LPRC's contractual rights were not expropriated because the State did not interfere with the contractual relationship between the Enterprise and Junex, which remained intact.⁴⁴⁸

(iv) The Impugned Act Constitutes a Valid Exercise of the State's Police Powers

- 457. Respondent submits further that there is no expropriation because the passage of Bill 18 by the National Assembly was a valid exercise of Québec's police powers.⁴⁴⁹
- 458. Respondent submits that international tribunals must show deference to the measures proposed by States to legislate for the public's welfare. Respondent relies on the deference standard applied by the *Glamis Gold* tribunal, wherein the tribunal observed that a tribunal's only task is to decide whether a claimant has proven that the State's actions "exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack

⁴⁴⁴ Counter-Memorial, ¶ 415.

⁴⁴⁵ Rejoinder, ¶¶ 267-269, 273-276.

⁴⁴⁶ Rejoinder, ¶¶ 296-304.

⁴⁴⁷ Rejoinder, ¶¶ 262, 278-287; *quoting* **Exh.CLA-038**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 355. *See also* ¶¶ 289-304.

⁴⁴⁸ Rejoinder, ¶¶ 262, 280, 305-308.

⁴⁴⁹ Rejoinder, ¶ 263.

of due process, evident discrimination, or a manifest lack of reasons”.⁴⁵⁰ Respondent contends that a claimant should not be allowed to bind the review of State actions in a manner that is not compatible with the regulatory power of States.⁴⁵¹

459. Respondent submits that the burden of proving that the State did not act in good faith for the legitimate protection of the environment lies on Claimant. Respondent contends that Claimant has a high burden in proving that the State did not act in good faith for the legitimate protection of the environment, a burden which is not met in this case.⁴⁵²
460. Respondent contends that while Claimant has raised “political reasons” as the allegedly true motive behind the enactment of the impugned Act, it has not elaborated on what those political reasons were.⁴⁵³ According to Respondent, Claimant erroneously interprets various documents in an attempt to establish that Minister Normandeau acted against the advice of her officials for allegedly purely political reasons.⁴⁵⁴ Respondent contends that Claimant has misunderstood the Québec Government system in asserting that Minister Normandeau took the decision to adopt the Act alone. Respondent explains that the Act was adopted unanimously by Québec’s National Assembly and had the approval of various officials that Minister Normandeau had consulted.⁴⁵⁵ Respondent accordingly concludes that Claimant has not discharged its burden of proof that there was an absence of good faith in the passage of the Act.
461. Respondent submits that the theory of police powers does not provide that scientific evidence is necessary when a State wants to legislate for the public’s welfare (as evidenced in the cases of *Chemtura*, *Glamis Gold*, and *Methanex*).⁴⁵⁶ Respondent maintains that Québec had a legitimate objective of environmental protection, which had a reasonable and

⁴⁵⁰ Rejoinder, ¶ 312; quoting **Exh. CLA-038**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 779; citing **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, ¶ 261.

⁴⁵¹ Rejoinder, ¶ 314.

⁴⁵² Rejoinder, ¶¶ 316-317; citing **Exh. CLA-030**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada*, Award, 2 August 2010, ¶ 137; **Exh. CLA-046**, *Methanex Corporation v. United States of America*, Partial Award, 7 August 2002, ¶ 45.

⁴⁵³ Rejoinder, ¶¶ 318-319.

⁴⁵⁴ Rejoinder, ¶¶ 319-320.

⁴⁵⁵ Rejoinder, ¶¶ 321-322.

⁴⁵⁶ Rejoinder, ¶¶ 328-331; quoting **Exh. CLA-030**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada*, Award, 2 August 2010, ¶ 266; **Exh. CLA-038**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 818; **Exh. CLA-045**, *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, Part III – Chapter A – 51.

rational basis in the form of the SEA-1 Preliminary Report and the BAPE Report 273.⁴⁵⁷ In reaching the decision to adopt Bill 18, the Québec Government had duly considered the society's risk tolerance or the social acceptability of the project and the lack of work undertaken till that date in the area of the exploration licenses granted in the St. Lawrence River, which was within its remit to do.⁴⁵⁸ Respondent argues that the valid exercise of police powers is not subject to a State obligation to use the least trade restrictive approach.⁴⁵⁹

462. Respondent contends that the Act is a non-discriminatory measure adopted in good faith for the legitimate protection of the public's welfare. According to Respondent, Claimant also does not allege that the Act is a discriminatory measure.⁴⁶⁰
463. Respondent contends that the legitimacy of a measure must be assessed on its true objectives and not on its merits; the measure need not be necessary, it simply needs to be supported by legitimate objectives.⁴⁶¹ Respondent argues that this is because the criterion of legitimacy is primarily used to distinguish between an illegitimate measure (because it is discriminatory or adopted for a disguised form of protectionism) and a legitimate measure.⁴⁶²
464. Accordingly for Respondent, the criterion of legitimacy was met. Respondent, thus, concludes that the adoption of Bill 18 was pursuant to Québec's police powers and therefore that it does not violate NAFTA Article 1110.⁴⁶³

(3) Non-Disputing Parties' Submissions

a. USA NDP Submission

465. Regarding the interpretation of NAFTA Article 1110, USA opines that, for there to have been an expropriation under customary international law, a property right or property

⁴⁵⁷ Rejoinder, ¶¶ 325-326, 332.

⁴⁵⁸ Rejoinder, ¶¶ 333-338.

⁴⁵⁹ Rejoinder, ¶¶ 339-340.

⁴⁶⁰ Rejoinder, ¶¶ 341-342.

⁴⁶¹ Rejoinder, ¶ 346.

⁴⁶² Rejoinder, ¶¶ 346-347.

⁴⁶³ Rejoinder, ¶ 348.

interest must have been taken.⁴⁶⁴ USA submits that favorable business conditions, market share and goodwill are not vested property rights.⁴⁶⁵

466. USA submits that the first element to be satisfied in any analysis of NAFTA Article 1110, is whether there is an investment capable of being expropriated.⁴⁶⁶
467. USA further submits that NAFTA Article 1110 provides protection from both direct and indirect expropriation.⁴⁶⁷ USA contends that direct expropriation takes place where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.⁴⁶⁸ For indirect expropriation, USA opines that a claimant must, *firstly*, demonstrate that the Government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as “to support a conclusion that the property has been ‘taken’ from the owner”.⁴⁶⁹ *Secondly*, an objective inquiry into the reasonableness of the claimant’s expectations relating to the host State regulation is required, which in turn depends partly on the nature and extent of the governmental regulation in the relevant sector.⁴⁷⁰ *Thirdly*, the character of the Government action must be considered, including whether “it arises from some public program adjusting the benefits and burdens of economic life to promote the common good”.⁴⁷¹
468. USA relies on the awards in *Glamis Gold*, *Chemtura*, and *Methanex* to submit that a Government action will not ordinarily be deemed expropriatory where it is a *bona fide*, non-discriminatory regulation.⁴⁷² Further, USA submits that courts and tribunals rarely

⁴⁶⁴ USA NDP Submission, ¶ 9; citing Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, (1982) 176 Collected Courses of the Hague Academy of International Law 259, p. 272.

⁴⁶⁵ USA NDP Submission, ¶ 9; citing *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, ¶ 17.

⁴⁶⁶ USA NDP Submission, ¶ 10.

⁴⁶⁷ USA NDP Submission, ¶ 11.

⁴⁶⁸ USA NDP Submission, ¶ 11.

⁴⁶⁹ USA NDP Submission, ¶ 13; citing *Pope & Talbot Inc. v. Canada*, Interim Award, 26 June 2000, ¶ 102.

⁴⁷⁰ USA NDP Submission, ¶ 14; citing *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, ¶ 9; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶¶ 144-145.

⁴⁷¹ USA NDP Submission, ¶ 15; citing *Glamis Gold Ltd. v. United States of America*, Rejoinder of Respondent United States of America, 15 March 2007, ¶ 109.

⁴⁷² USA NDP Submission, ¶ 16; citing *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 354; *Chemtura Corporation (formerly Crompton Corporation) v. Canada*, Award, 2 August 2010, ¶ 266; *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, 3 August 2005, ¶ 7.

question a host State's characterization of a Government measure as non-discriminatory or for a *bona fide* public purpose.⁴⁷³

b. Mexico NDP Submission

469. Mexico agrees with the submissions of USA at ¶ 468 above, adding that the doctrine of police powers under customary international law is directly applicable to an assessment under NAFTA Article 1110.⁴⁷⁴
470. Mexico agrees with Respondent's position that NAFTA Parties have expressly recognized their sovereign right to legislate in the public interest, including environmental protection, which has also been recognized by NAFTA Chapter Eleven arbitral tribunals as a settled point of international law.⁴⁷⁵

(4) Amicus Curiae Submissions

a. CQDE's Submission

471. In its *Amicus Curiae* submissions, CQDE submits that: (i) NAFTA allows a State Party to regulate in the public interest to fulfil its duty to protect the environment, including compliance with the precautionary principle; (ii) the precautionary principle is incorporated into the domestic law of Respondent; and (iii) Bill 18 satisfies the elements of the precautionary principle as interpreted by the domestic law of Respondent. CQDE's submissions in respect of these three positions are elaborated below.

(i) NAFTA allows a State Party to regulate in the public interest to fulfil its duty to protect the environment

472. Relying on NAFTA preamble and NAFTA Article 1114, CQDE asserts that Respondent is permitted to adopt measures it considers necessary to fulfil its duty to protect the

⁴⁷³ USA NDP Submission, ¶ 17; citing Louis B. Sohn and R.R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens," 55 Am. J. Int'l L. 545, 555-56 (1961).

⁴⁷⁴ Mexico NDP Submission, ¶¶ 7-8; citing NAFTA, Article 1131(1); *Vienna Convention on the Law of Treaties* (27 January 1980) 1155 UNTS 331, 8 ILM 679, Article 31(3)(c); *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 290.

⁴⁷⁵ Mexico NDP Submission, ¶ 9.

environment.⁴⁷⁶ CQDE submits that the duty to protect the environment is further articulated in (i) the North American Agreement on Environmental Cooperation (“NAAEC”),⁴⁷⁷ which may be referred to when interpreting the provisions in NAFTA;⁴⁷⁸ (ii) the Rio Declaration on Environment and Development (“**Rio Declaration**”);⁴⁷⁹ and (iii) the *Bilcon* case.⁴⁸⁰ CQDE submits that the content of the precautionary principle is also found in the several international law sources to which Respondent is a State Party.⁴⁸¹

473. CQDE submits that, despite the uneven application of the precautionary principle in practice, the essential element is “*d’éviter de causer des dommages dans un contexte d’incertitude scientifique*”.⁴⁸² In this regard, CQDE submits that the precautionary principle cannot be invoked in the absence of at least preliminary information suggesting the presence of risks.⁴⁸³

⁴⁷⁶ CQDE Amicus Submission, ¶ 1; citing NAFTA, Preamble (“ . . . UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation; . . . PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental laws and regulations . . . ”); NAFTA, Article 1114 (“Nothing in this Chapter [11] shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”).

⁴⁷⁷ CQDE Amicus Submission, ¶ 2; citing North American Agreement on Environmental Cooperation (1 January 1994) (“NAAEC”), Preamble; quoting NAAEC, Article 3.

⁴⁷⁸ CQDE Amicus Submission, ¶ 2; citing Vienna Convention on the Law of Treaties (27 January 1980) 1155 UNTS 331, 8 ILM 679, Article 31(2).

⁴⁷⁹ CQDE Amicus Submission, ¶ 3; quoting Rio Declaration on Environment and Development (1992) (“**Rio Declaration**”), Principle 2.

⁴⁸⁰ CQDE Amicus Submission, ¶ 5; citing *Clayton/Bilcon v. Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 738.

⁴⁸¹ CQDE Amicus Submission, ¶ 7, citing Rio Declaration, Principle 15; United Nations Framework Convention on Climate Change (1992), ¶ 3(3); Convention on Biological Diversity (1992), Preamble, ¶ 9; Vienna Convention on the Protection of the Ozone Layer (1985), Preamble; Montreal Protocol on Substances that Deplete the Ozone Layer (1987), Preamble; 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), Preamble, Article 3; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), Article 3(d); Stockholm Convention on Persistent Organic Pollutants (2001), Preamble, Article 1.

⁴⁸² CQDE Amicus Submission, ¶ 8; quoting Research Service of the European Parliament, “The Precautionary Principle: Definitions, Applications and Governance”, 2015, p. 7: < www.europarl.europa.eu/RegData/etudes/IDAN/2015/573876/EPRS_IDA%282015%29573876_FR.pdf>.

⁴⁸³ CQDE Amicus Submission, ¶ 9; citing Nicolas de Sadeleer, *Les principes du pollueur-payeur, de prévention et de précaution : essai sur la genèse et la portée juridique de quelques principes du droit de l’environnement*, Brussels, Bruylant 1999, pp. 173-179.

(ii) The precautionary principle is incorporated into the domestic law of Respondent

474. CQDE asserts that the precautionary principle was first established as forming part of the domestic law of Respondent in the 2001 decision in *Spraytech*.⁴⁸⁴ CQDE contends that this decision is significant as it recognizes the legitimate use by a municipality of the precautionary principle for the purposes of environmental protection.⁴⁸⁵
475. CQDE submits that, following *Spraytech*, the precautionary principle has been incorporated by Québec into its domestic legal framework through the following legislation: (i) Sustainable Development Act (2006) (“**SDA**”); (ii) EQA; (iii) Water Act (2009) (“**Water Act**”); and (iv) Québec Charter of Human Rights and Freedoms⁴⁸⁶ (“**Québec Charter**”), which has also been upheld in court decisions.⁴⁸⁷

(iii) Bill 18 satisfies the elements of the precautionary principle as interpreted by the domestic law of Respondent

476. CQDE submits that Bill 18 satisfies the elements of the precautionary principle as the following three legal elements are satisfied: (i) “*l’absence de certitude scientifique complète*”, i.e., a lack of full scientific certainty; (ii) “*dommage grave ou irréversible*”, i.e., serious or irreversible damage; and (iii) “*des motifs raisonnables de s’inquiéter*”, i.e., reasonable grounds for concern.⁴⁸⁸
477. CQDE submits that the BAPE Report 193, SEA-1 Report, and BAPE Report 273 all demonstrate that there was scientific uncertainty regarding the potential harm caused by the hydraulic fracturing method of injecting water mixed with chemicals under high

⁴⁸⁴ CQDE *Amicus* Submission, ¶ 10; citing 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (City)*, [2001] 2 SCR 241, ¶ 30 *et seq.*

⁴⁸⁵ CQDE *Amicus* Submission, ¶ 10, citing 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (City)*, [2001] 2 SCR 241, ¶ 31; Hélène Trudeau, “From International Law to Domestic Law: The Emergence of the Precautionary Principle in Environmental Law”, (2003) 28 *Queen’s LJ* 455, 507.

⁴⁸⁶ CQDE *Amicus* Submission, ¶¶ 18-20; citing Québec Charter of Human Rights and Freedoms, RLRQ, Chapter C-12, Section 46.1.

⁴⁸⁷ CQDE *Amicus* Submission, ¶¶ 11-20.

⁴⁸⁸ CQDE *Amicus* Submission, ¶ 21; citing *Centre québécois du droit de l’environnement v. Oléoduc Énergie Est ltée* (2014) QCCS 4398, ¶ 27, fn 25.

pressure into geological strata.⁴⁸⁹ According to CQDE, these reports reveal that this lack of scientific certainty was due to a lack of knowledge.⁴⁹⁰

478. CQDE submits that the BAPE Report 193, SEA-1 Report, and BAPE Report 273 all reveal the importance of the St. Lawrence River to Québec's population.⁴⁹¹ CQDE submits that the SEA-1 Report in particular highlights the potential risks of serious or irreversible damage in the St. Lawrence River.⁴⁹² With reference to the Lower Estuary and the north-western Gulf of St. Lawrence, CQDE notes that the SEA-1 Report found that "*la survenue d'un accident ou d'un déversement dans l'estuaire maritime pourrait avoir des impacts importants, voire catastrophiques selon son ampleur, tant au point de vue biologique qu'humain*", i.e., the occurrence of an accident or spill in the Lower Estuary could have significant, even catastrophic impacts, depending on its magnitude, from both a biological and human standpoint.⁴⁹³
479. CQDE submits that BAPE Report 273 revealed that "*proportion très élevée de puits récemment forés au Québec par l'industrie du gaz de shale présentent des problèmes d'étanchéité*", i.e., a very high proportion of wells recently drilled in Québec by the shale gas industry have sealing problems.⁴⁹⁴ More generally, CQDE submits that the authors of the BAPE Report 193, the SEA-1 Report, and the BAPE Report 273, all recommend that considerable resources be devoted to acquiring the missing knowledge before authorizing several activities in the St. Lawrence River.⁴⁹⁵

(iv) Other relevant circumstances in the context of the adoption of Bill

18

480. CQDE submits that at the time of Bill 18's adoption, Québec did not have any legislative provisions that would have provided an environmental framework for the oil and gas

⁴⁸⁹ CQDE *Amicus* Submission, ¶¶ 23-31.

⁴⁹⁰ CQDE *Amicus* Submission, ¶¶ 23-31.

⁴⁹¹ CQDE *Amicus* Submission, ¶ 32.

⁴⁹² CQDE *Amicus* Submission, ¶ 33.

⁴⁹³ CQDE *Amicus* Submission, ¶ 33; citing AECOM Tecsult Inc., Rapport préliminaire en appui aux consultations, *Évaluation environnementale stratégique de la mise en valeur des hydrocarbures dans le bassin de l'estuaire maritime et du nord-ouest du golfe du Saint-Laurent*, July 2010.

⁴⁹⁴ CQDE *Amicus* Submission, ¶ 34; quoting BAPE, Rapport 273, Rapport d'enquête et d'audience publique, *Développement durable de l'industrie des gaz de schiste au Québec*, February 2011, p. 120.

⁴⁹⁵ CQDE *Amicus* Submission, ¶ 35.

industry beyond the general application of the EQA.⁴⁹⁶ CQDE asserts that the adoption of Bill 18 was foreseeable by Claimant, as several jurisdictions around the world, including New York and France had, prior to the measures instituted by Québec, instituted moratoriums on hydraulic fracturing pursuant to the precautionary principle.⁴⁹⁷

b. Claimant's Reply to CQDE's Amicus Curiae Submission

481. Claimant contends that (i) the precautionary principle is not applicable in the context of a NAFTA Chapter 11 dispute; (ii) Québec's actions do not meet the test for the application of the precautionary principle; (iii) the precautionary principle is not addressed in Bill 18; and (iv) the foreseeability of Bill 18 is not a relevant issue.⁴⁹⁸
482. Claimant further asserts that CQDE's submissions do not offer new information and instead address matters already contended by Respondent in its own submissions, including the findings of the SEA-1 Report and the BAPE 273 Report, and Respondent's submissions on "police powers".⁴⁹⁹ Claimant further contends that Respondent's pleading in respect of the police powers doctrine resembles the substance of the precautionary principle advanced by the CQDE.⁵⁰⁰

(i) The precautionary principle is not applicable in the context of a NAFTA Chapter Eleven dispute

483. Claimant relies on NAFTA Article 1131 to contend that the precautionary principle will only be applicable to this dispute if: (i) it is provided for in the text of NAFTA; (ii) it constitutes an applicable rule of international law; or (iii) it is the subject of an interpretation by the NAFTA Commission directing tribunals to apply the principle.⁵⁰¹ In Claimant's view, the CQDE has not discharged its burden of demonstrating that the precautionary principle meets any of the above stated prerequisites.⁵⁰²

⁴⁹⁶ CQDE *Amicus* Submission, ¶ 39; quoting BAPE, Rapport 273, Rapport d'enquête et d'audience publique, *Développement durable de l'industrie des gaz de schiste au Québec*, February 2011, p. 1.

⁴⁹⁷ CQDE *Amicus* Submission, ¶¶ 40-42.

⁴⁹⁸ C-Response to *Amicus*, ¶ 3.

⁴⁹⁹ C-Response to *Amicus*, ¶¶ 25- 26. See generally the tabulated examples of overlapping submissions at C-Response to *Amicus*, ¶¶ 27-28.

⁵⁰⁰ C-Response to *Amicus*, ¶ 30-33.

⁵⁰¹ C-Response to *Amicus*, ¶¶ 4-5; quoting NAFTA, Article 1131.

⁵⁰² C-Response to *Amicus*, ¶ 6.

484. Claimant contends that the drafters of NAFTA Chapter Eleven had the opportunity to, and yet did not, make express reference to the precautionary principle within the text of NAFTA.⁵⁰³ In this connection, Claimant submits that NAFTA Article 1114, the relevant provision on environmental matters, cannot be construed as a standalone provision, but must be read together with NAFTA Articles 1110 and 1105.⁵⁰⁴
485. Claimant contends that if the precautionary principle is to be regarded as being applicable under NAFTA Article 1131(1), it must meet one of the conditions set out in Article 38(1)(b)-(d) of the *Statute of the International Court of Justice* (1945) (“**ICJ Statute**”). Claimant contends that none of the conditions are met in this case.⁵⁰⁵

(ii) Québec’s actions do not meet the test for the application of the precautionary principle

486. Claimant contends that, inherent within Principle 15 of the Rio Declaration, is the requirement that there must be “threat of serious or irreversible damage” before a decision to implement an environmental protection measure can be made.⁵⁰⁶ In Claimant’s view, the Government of Québec did not conduct the scientific studies that would have enabled it to determine whether horizontal drilling under the St. Lawrence River, from onshore, presented threats of serious or irreversible harm.⁵⁰⁷
487. Claimant submits that the Government of Québec violated all five principles for precautionary measures set out within Respondent’s own guidelines, entitled Framework for the Application of Precaution in Science-based Decision Making about Risk, as the decision: (i) is not provisional;⁵⁰⁸ (ii) is not proportional;⁵⁰⁹ (iii) is not consistent with

⁵⁰³ C-Response to *Amicus*, ¶¶ 7-10.

⁵⁰⁴ C-Response to *Amicus*, ¶¶ 11-12; *quoting* NAFTA, Article 1114.

⁵⁰⁵ C-Response to *Amicus*, ¶¶ 15-22; *citing* **Exh. CLA-004**, ICJ Statute.

⁵⁰⁶ C-Response to *Amicus*, ¶¶ 34-35; *quoting* Rio Declaration, Principle 15.

⁵⁰⁷ C-Response to *Amicus*, ¶ 35.

⁵⁰⁸ C-Response to *Amicus*, ¶¶ 38-41; *quoting* **Exh. C-162**, Privy Council Office “A Framework for the Application of Precaution in Science-based Decision Making about Risk”: <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=precaution-eng.htm>.

⁵⁰⁹ C-Response to *Amicus*, ¶¶ 42-46; *citing* Reply, ¶¶ 495, 549, 568.

decisions taken in similar circumstances;⁵¹⁰ (iv) is not cost-effective;⁵¹¹ and (v) is not the least trade-restrictive option available.⁵¹²

(iii) The precautionary principle is not addressed in Bill 18

488. Claimant asserts that the Government of Québec never expressed its intention to embody or apply the precautionary principle through the adoption of Bill 18, nor was there any reference made to the precautionary principle in the Memorandum presented to the Council of Ministers or the statute itself.⁵¹³

(iv) The foreseeability of Bill 18 is not a relevant issue

489. Claimant opposes the relevance of the CQDE's submission that Bill 18 should have been foreseeable. In Claimant's view, its own ability to have foreseen the measures within Bill 18 is not a relevant consideration in determining Canada's own compliance with NAFTA.⁵¹⁴

(5) The Tribunal's Analysis

490. The issue before the Tribunal is whether Québec's revocation of the River Permit pursuant to the impugned Act, which in turn allegedly extinguished the Enterprise's River Permit Rights, was expropriatory in nature. If so, whether such expropriation was wrongful on account of Québec's failure to comply with the conditions stipulated under NAFTA Article 1110(1).
491. Claimant contends, but Respondent disputes, that Québec's conduct violates NAFTA Article 1110 as (i) the impugned Act was not passed for a public purpose; and (ii) no compensation was paid to the Enterprise upon revocation of its River Permit Rights.
492. Respondent further disputes that it is a case of expropriation, amongst others, on the grounds that the River Permit Rights were not capable of being expropriated and that, even

⁵¹⁰ C-Response to *Amicus*, ¶¶ 47-48; *citing* Reply, ¶ 568.

⁵¹¹ C-Response to *Amicus*, ¶¶ 49-52; *quoting* Dupont First Statement, ¶¶ 17-27.

⁵¹² C-Response to *Amicus*, ¶ 53.

⁵¹³ C-Response to *Amicus*, ¶ 54.

⁵¹⁴ C-Response to *Amicus*, ¶ 55 (incorrectly numbered as paragraph 53 in the C-Response to *Amicus*).

if they were, it is not a case of expropriation as the impugned Act affected only a part of Claimant's investment in Québec.

a. Legal Standard

493. NAFTA Article 1110(1) covers both direct and indirect expropriation, including measures tantamount thereto (see NAFTA Article 1110(1) extracted at ¶ 421 above).
494. The term “expropriation” is not defined under NAFTA. The Parties to this case and the NAFTA non-disputing parties, comprising USA and Mexico, agree that “expropriation” under NAFTA Article 1110 is to be interpreted in accordance with the customary international law meaning of the term,⁵¹⁵ which is also the consistent position that has been taken by other NAFTA tribunals.⁵¹⁶
495. The concept of expropriation is well settled under customary international law as requiring either a direct taking or an outright transfer or seizure of the investor's property (direct expropriation) or a substantial deprivation, *i.e.*, total or near-total deprivation, of the investor's property, without a formal transfer of title or outright seizure (indirect expropriation).
496. The *Metalclad* tribunal describes direct expropriation as an “open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State . . .”.⁵¹⁷ The formal transfer of title from the investor to the host State or to a third party at the behest of the host State is an identifying criterion of direct expropriation.⁵¹⁸

⁵¹⁵ Memorial, ¶¶ 228-229; Counter-Memorial, ¶¶ 397-399; USA NDP Submission, ¶ 9; Mexico NDP Submission, ¶¶ 7-8.

⁵¹⁶ See **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 354; **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000; **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

⁵¹⁷ **Exh. CLA-044**, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103; **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 355. See also **Exh. CLA-061**, *Tecnicas Medicambientales Tecmed S.A v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 113 (“a forcible taking by the Government of tangible or intangible property owned by private persons”).

⁵¹⁸ **Exh. CLA-035**, *El Paso Energy International Company v. Argentine Republic*, ICSID No. ARB/03/15, Award, 31 October 2011, ¶ 265; **Exh. RLA-050**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Part VI, ¶ 6.62.

497. As for indirect expropriation, the *Glamis Gold* tribunal describes it as occurring when “some entitlements inherent in the property right are taken by the government or the public so as to render almost without value the rights remaining with the investor”.⁵¹⁹ Some other arbitral tribunals have held that, for indirect expropriation to occur, the effect of the measure in question should be “irreversible and permanent”,⁵²⁰ “as if the rights related thereto . . . had ceased to exist”;⁵²¹ or the measure amounted to “a lasting removal of the ability of an owner to make use of its economic rights”⁵²². Thus, the threshold for indirect expropriation is also a very high one. There should be a substantially complete deprivation of the economic use and enjoyment of the rights to the investment, such that the investment is seen to have been taken, albeit without a formal transfer of title or outright seizure.
498. In the present case, Claimant alleges that Québec has engaged in both direct and indirect expropriation or measures tantamount thereto. Claimant contends that where the River Permit Rights are regarded as intangible property rights, constituting a protected investment under NAFTA Article 1139(g), Québec’s conduct amounts to a direct expropriation or measures tantamount thereto. Where the River Permit Rights are regarded as interests arising from commitment of capital, constituting a protected investment under NAFTA Article 1139(h), Québec’s conduct amounts to an indirect expropriation or measures tantamount thereto.⁵²³
499. Claimant further contends that to the extent that it is alleging direct expropriation by Québec of its intangible property rights, “[t]here is no need to prove substantial deprivation as the Enterprise’s investment was taken, full stop”.⁵²⁴ The Tribunal has difficulty in accepting Claimant’s position as a matter of general application. The Tribunal can see, particularly in cases where the investment, allegedly expropriated, forms part of a larger investment, that questions of substantial deprivation of the whole investment vis-à-vis the

⁵¹⁹ **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 355.

⁵²⁰ **Exh. CLA-061**, *Tecnicas Medicambientales Tecmed S.A v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 116-117.

⁵²¹ **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 357, citing **Exh. CLA-061**, *Tecnicas Medicambientales Tecmed S.A v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 115.

⁵²² **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, ¶ 283.

⁵²³ Memorial, ¶ 221; Reply, ¶¶ 286-295.

⁵²⁴ Reply, ¶ 289.

taking in full of a part of the investment may have to be considered for the expropriation analysis. As noted in ¶ 492 above, this is also one of the disputed issues in this case. Whilst the Tribunal will address this issue further in the following Sub-Section, at this juncture, the Tribunal considers it sufficient to note that it concurs with the *Electrabel* tribunal's observations that, for both claims of direct and indirect expropriation, the investor must establish the "substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralization or factual destruction of its investment, its value or enjoyment".⁵²⁵

500. As for the phrase "measures tantamount to ... expropriation" in NAFTA Article 1110(1), the Tribunal agrees with the view taken by several arbitral tribunals before it, that this phrase does not broaden the ordinary concept of expropriation under international law.⁵²⁶
501. The Tribunal notes further, that the Parties agree that to establish the treaty breach of expropriation under NAFTA Article 1110, Claimant must establish that it has an investment capable of being expropriated.⁵²⁷ They, however, disagree on the appropriate test for determining if there exists an investment capable of being expropriated.
502. It is Claimant's position that an investment which qualifies as a protected investment under NAFTA Article 1139 is capable of being expropriated for the purposes of NAFTA Article 1110(1). Claimant contends that "[i]t is plain that the text of Article 1110(1) that prohibits expropriation of 'an investment' must be interpreted to prohibit the expropriation of an investment as defined by the treaty itself, meaning in accordance with the definitions set out in Article 1139."⁵²⁸ Respondent disagrees with Claimant that an investment as defined under NAFTA Article 1139 is *ipso facto* capable of being expropriated, contending that "[t]he concept of 'expropriation', which is limited in customary international law to

⁵²⁵ **Exh. RLA-050**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Part VI, ¶ 6.62. *See also Exh. CLA-011*, Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), pp. 508-509: "The essence of the matter is the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control."

⁵²⁶ **Exh. CLA-053**, *Pope & Talbot Inc. v. Canada*, Interim Award, 26 June 2000, ¶ 96; **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 355.

⁵²⁷ Memorial, ¶ 226; Counter-Memorial, ¶ 400, *citing Exh. CLA-030*, *Chemtura Corporation (formerly Crompton Corporation) v. Canada*, Award, 2 August 2010, ¶¶ 242, 257.

⁵²⁸ Reply, ¶ 309. *See also* ¶¶ 304-308.

property capable of being expropriated, is not broadened by the definition of the term ‘investment’ included in NAFTA Article 1139.”⁵²⁹

503. In the Tribunal’s view, Respondent is correct. An inquiry into an alleged treaty breach of expropriation commences with an examination of whether there exists a protected investment under the treaty, which must be followed by an examination of whether the said protected investment is capable of being expropriated. As noted by the *Cargill* tribunal, “the scope of what may be the subject of a claim [for expropriation under NAFTA] is delimited in part by the definition of investment in Article 1139, but also by the confines of the legal basis of the particular claim”.⁵³⁰ The Tribunal notes that this approach was also followed by the arbitral tribunal in *European Media Ventures v. The Czech Republic*, which decision has been relied on by Claimant.⁵³¹ In *European Media Ventures*, the tribunal, whilst noting that the treaty under consideration in that case “is permeated by a single concept of investment”, clarified that it “consider[ed] the questions (a) whether the contractual rights on which Claimant relies constitute an investment within Article 1 of the Treaty; (b) whether those rights are capable of expropriation under Article 3; and (c) whether they were in fact expropriated, to be three entirely separate questions”.⁵³² Contrary to Claimant’s contention, the Tribunal does not consider that this is tantamount to different meanings being attributed to the term “investment” under NAFTA Article 1139 and under NAFTA Article 1110. The Tribunal further concurs with Respondent that neither the decisions in *Chemtura v. Canada* and *Merrill & Ring v. Canada*, nor Canada’s submissions in *Windstream Energy LLC v. Canada*, which are all relied on by Claimant in support of its position, contradict this approach.⁵³³

⁵²⁹ Counter-Memorial, ¶ 403.

⁵³⁰ **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 354. See also ¶ 351.

⁵³¹ Reply, ¶ 308, citing **Exh. RLA-055**, *European Media Ventures SA v. Czech Republic* UNCITRAL, Partial Award on Liability, 8 July 2009.

⁵³² **Exh. RLA-055**, *European Media Ventures SA v. Czech Republic* UNCITRAL, Partial Award on Liability, 8 July 2009, ¶ 41, fn 4. See also ¶ 63.

⁵³³ Rejoinder, ¶¶ 270-272, citing **Exh. RLA-100**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Canada’s Rejoinder, 6 November 2015, ¶ 83; **Exh. CLA-030**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada*, Award, 2 August 2010, ¶ 243; **Exh. CLA-043**, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Administered Case, Award, 31 March 2010, ¶ 139.

b. Alleged Expropriation in this Case

504. Claimant contends that where the River Permit Rights are regarded as intangible property rights, constituting a protected investment under NAFTA Article 1139(g), the revocation of the River Permit Rights through the impugned Act amounts to a direct expropriation or measures tantamount thereto. According to Claimant, where the River Permit Rights are regarded as interests arising from commitment of capital, constituting a protected investment under NAFTA Article 1139(h), the revocation of the River Permit Rights, through the impugned Act, amounts to an indirect expropriation or measures tantamount thereto.⁵³⁴
505. Respondent contests Claimant's allegations of expropriation, *inter alia*, on the grounds that: (i) the River Permit Rights do not constitute a protected investment under NAFTA Article 1139(g) and (h); (ii) Claimant's alleged investment under NAFTA Article 1139 was not capable of being expropriated as Claimant's interests in the River Permit Area had not yet vested; (iii) it is not a case of direct expropriation as the River Permit Rights were not acquired or appropriated from the investor to the host State; (iv) the impugned Act did not have the effect of substantially depriving Claimant of its investment in Québec.
506. As a first step, an analysis of the scope of Claimant's investment in Québec is in order. As noted in the Parties' respective positions under this Section (see ¶¶ 426-428 and 447-450 above), and also in the context of Tribunal's jurisdictional analysis in ¶¶ 335-340 above, the Parties have debated extensively regarding the scope of Claimant's investment in Québec and its relevance for addressing Claimant's allegations of treaty breaches by Respondent.
507. The Tribunal determined in ¶ 342 above, that for the purposes of ascertaining its jurisdiction over Claimant's claims, the Tribunal must assess whether the alleged investment, as identified by Claimant, satisfies the objective criteria under NAFTA Article 1139. However, the fact that Claimant chose to limit its claims of alleged treaty breaches to the treatment of its River Permit Rights, does not preclude the Tribunal from considering Claimant's investment as a whole, where such assessment is necessary for the purposes of

⁵³⁴ Memorial, ¶ 221.

addressing its claims of alleged treaty breaches (see ¶ 344 above). This is particularly the case where the alleged treaty breach is expropriation.

508. The Tribunal considers that even if different parts of an investment may qualify as separate investments for jurisdictional purposes, the test for expropriation must be applied to the relevant investment as a whole. A contrary approach, as the *Electrabel* tribunal noted, would “mean, absurdly, that an investor could always meet the test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test”.⁵³⁵
509. In the facts of this case, the Tribunal finds that Claimant’s whole investment in Québec necessarily comprises its interests in the Original Permits and the River Permit taken together. For the reasons elaborated below, the Tribunal finds that the Enterprise’s River Permit Rights, which Claimant alleges were expropriated by Respondent, were acquired as part of Forest Oil’s investment activity in the Original Permits and in furtherance of its plan to explore shale gas in the Utica Shale basin in the St. Lawrence Lowlands. As such, the River Permit Rights are intrinsically linked to the Enterprise’s interests in the Original Permits. Thus, whilst the River Permit Rights constitute a separate investment for jurisdictional purposes, the Tribunal considers that they cannot be separated from the Enterprise’s interests in the Original Permits for the purposes of the expropriation analysis.
510. *First*, the documents on record make clear that the Original Permits and the River Permit were closely connected in Claimant’s plan to explore and develop shale gas in the Bécancour/Champlain Block. Specifically, Claimant’s interests in all five Permits originate either from the Farmout Agreement individually considered or from the Farmout Agreement and the River Permit Agreement taken together. Specifically, the Tribunal notes that Claimant’s interests in the Original Permits were acquired pursuant to the Farmout Agreement and its interests in the River Permit, *i.e.*, the River Permit Rights, were acquired pursuant to the River Permit Agreement read together with the Farmout Agreement ¶¶ 177 and 191 above, respectively.

⁵³⁵ **Exh. RLA-050**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Part VI, ¶ 6.57.

511. *Second*, it is apparent from the terms of the River Permit Agreement that although the River Permit Agreement was executed later in point of time by Junex and Forest Oil, it is closely tied to the Farmout Agreement. Paragraph 3 of the 14 December 2006 Letter Agreement, which forms part of the River Permit Agreement (see ¶ 190 above), specifically provides that “[t]he terms and conditions of the Letter Agreement dated June 5 2006 [*i.e.*, Farmout Agreement] would apply to the Extension [*i.e.*, River Permit Area] . . .” (see ¶ 191(v) above).
512. *Third*, the Original Permits and the River Permit form part of the same investment activity by Forest Oil in Québec. The Tribunal notes that Forest Oil, Claimant’s former parent company, had entered into the Farmout Agreement with Junex in June 2006, with a view to explore the shale gas potential of the St. Lawrence Lowlands.⁵³⁶ As noted in ¶ 143 above, (i) the St. Lawrence Lowlands include a section of the freshwater St. Lawrence River; and (ii) both the St. Lawrence Lowlands and a part of the St. Lawrence River contain Utica Shale.
513. At the time of Forest Oil’s entry into the Farmout Agreement, Junex was the holder of four exploration permits, *i.e.*, the Original Permits, in the northern and southern boundaries of the St. Lawrence River, referred to as the Bécancour/Champlain Block. Accordingly, the Farmout Agreement pertained only to the Original Permits. Thereafter, in July 2006, Forest Oil applied for an exploration permit under the St. Lawrence River, which it subsequently withdrew following its agreement with Junex, that Junex would apply for an exploration permit under the St. Lawrence River and would allow Forest Oil to partner with it to develop the shale gas resources under the St. Lawrence River. The exploration permit acquired by Junex under the St. Lawrence River refers to the River Permit. A map depicting the Original Permits and the River Permit held by Junex, and in which Forest Oil acquired the 100% working interest for a specific geographical interval, is extracted below. The four Original or Land Permits are depicted in orange colour and the River Permit is depicted in green colour:⁵³⁷

⁵³⁶ Wiggins First Statement, ¶ 8; Memorial, ¶ 3; Reply, ¶¶ 141, 145; Claimant’s Presentation, 25 February 2021, slide 8.

⁵³⁷ Claimant’s Presentation, 25 February 2021, slide 5.

- 170

separate investment from the Enterprise's interests in the Original Permits.⁵³⁸ The Tribunal is not persuaded by this argument. The question is whether the Enterprise's interests on the Original Permits and the River Permit formed part of one integrated investment activity by Claimant. Further, Claimant's witness, Mr. Lavoie, testified during cross-examination, that it was the common intention of Junex and Forest Oil to extend the territorial scope of the Farmout Agreement to also cover the River Permit Area, which indicates that the River Permit and the Original Permits were regarded as one integrated investment activity:

Q. So essentially, you enlarged the territorial scope of the contract [Farmout Agreement]?

A. That was the spirit of that [River Permit] agreement, just to enlarge that, so we came [to] exactly the same term, so they have to spend the [REDACTED] and that includes that potential enlargement on one of the permits.⁵³⁹

517. All these factors lead the Tribunal to conclude that the Enterprise's interests in the River Permit and the Original Permits form part of one integrated investment. As such, Claimant's claim for expropriation needs to be assessed keeping in mind its whole investment in Québec.
518. The Tribunal now turns to the question of whether the extinguishment of the Enterprise's River Permit Rights constitutes an expropriation, or a measure tantamount to expropriation, of Claimant's whole investment comprising the River Permit Rights and the Enterprise's interests in the Original Permits together.
519. The Tribunal notes that Claimant initially maintained that the River Permit Rights were the "sweet spot" or the "engine" of Claimant's investment in Bécancour/Champlain Block and, therefore, their extinguishment pursuant to the impugned Act was tantamount to an expropriation of Claimant's investment in Québec. However, during the November 2017 Merits Hearing, Claimant conceded that if the Tribunal were to determine that its investment comprises the River Permit Rights and the interests in the Original Permits together, Claimant does not meet the test for expropriation.

⁵³⁸ C-PHB, ¶ 15; November 2017 Merits Hearing Tr., 58:17-23.

⁵³⁹ October 2017 Merits Hearing, Tr. Day 3, 592:5-11.

520. The Tribunal recalls that in its Questions to the Parties, referred to in ¶ 92 above, the Tribunal invited Claimant's comments on the following question relating to its claim for the treaty breach of expropriation:

14. On the assumption (here assumed for the sake of argument only) that the Claimant's "investment" comprised the River and Land Permits as a whole (and not merely the River Permit), the Claimant should clarify its pleaded case on the alleged expropriation of such investment as a whole under NAFTA Article 1110, given that (as the Tribunal understands), in contrast to the River Permit, the Land Permits are not alleged to have been similarly expropriated by the Respondent.

521. During the November 2017 Merits Hearing, Claimant confirmed that, should the Tribunal consider its investment to comprise the Enterprise's interests in the Bécancour/Champlain Block as a whole, it concedes its expropriation claim in this arbitration:

If you decide to consider the Bécancour-Champlain block to be the investment, Canada told us this morning they concede it would qualify as an investment under article 1139(H). In that light, we would also like to respond and ensure you have a clear response to the question No. 14 that you posed prior to the closing of arguments which was to ask what the effect on our pleadings with respect to article 1110 would be if you were to find that the Bécancour-Champlain block was the investment.

If you so find, the claimant maintains its 1105 claim but has a concession to make in turn that we would not argue that there would be an expropriation under 1110 if you find that the Bécancour-Champlain block as a whole is the investment.⁵⁴⁰

522. As the Tribunal has determined above that Claimant's investment comprises the River Permit Rights and the interests in the Original Permits taken together, Claimant's claim for expropriation can be directly rejected on the basis of its aforementioned concession.

523. In any event, the Tribunal is also not persuaded from the documents on record that the River Permit Rights were the "sweet spot" of Claimant's investment in the Bécancour/Champlain Block, such that the extinguishment of the River Permit led to a substantially complete deprivation of Claimant's investment in the Bécancour/Champlain Block.

524. *First*, the Tribunal notes that the Farmout Agreement does not contain any provisions for exploring shale gas under the St. Lawrence River. If the area under the St. Lawrence River

⁵⁴⁰ November 2017 Merits Hearing Tr., 229:12-230:3.

was the “sweet spot” as Claimant alleges, the Tribunal considers that it would have been reflected in the Farmout Agreement. Rather, the documentary record makes clear that at the time that Forest Oil commenced its investment in Québec, the possibility of obtaining the River Permit was not clearcut. Notwithstanding this, Forest Oil invested in the Original Permits. Thus, the Tribunal is not persuaded that at the time of Forest Oil’s entry into the Québec market, it had determined that the area under the St. Lawrence River was the “sweet spot” of its investment in Québec.

525. *Second*, the testimonies by Claimant’s witnesses and experts do not support the position that the River Permit Rights were considered by Claimant to be the primary focus of its investment to the exclusion of the Enterprise’s interests in the Original Permits.⁵⁴¹
526. *Third*, it is undisputed by Claimant that it can continue to undertake exploration activities on the Contract Area of the Original Permits and, therefore, its entire investment in Québec has not been extinguished through the impugned Act.
527. Thus, the Tribunal concludes that Claimant’s investment in Québec has not been expropriated through the impugned Act. In view of this determination, the Tribunal does not need to address the Parties’ arguments on the satisfaction of the conditions of legal expropriation under NAFTA Article 1110 or on Claimant’s request for adverse inferences for non-production of documents.
528. The Tribunal, accordingly, rejects Claimant’s claim for breach of NAFTA Article 1110.

B. MINIMUM STANDARD OF TREATMENT

(1) Relevant Treaty Provisions

529. NAFTA Article 1105 provides as follows regarding the minimum standard of treatment:

Article 1105: Minimum Standard of Treatment

1. 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.

⁵⁴¹ Axani First Statement, ¶ 26; October 2017 Merits Hearing, Tr. Day 2, 279:20-281:10; Tr. Day 8, 2093:13-22.

2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

530. The 2001 FTC Note provides the following clarification regarding the interpretation of the minimum standard of treatment under NAFTA Article 1105:

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

(2) The Parties’ Positions

a. Claimant’s Position

(i) The Legal Standard

531. Claimant submits that the Parties agree that NAFTA Article 1105 must be interpreted consistently with the 2001 FTC Note, referred to in ¶ 530 above, which provides that the minimum standard of treatment under NAFTA Article 1105 is akin to the customary international law minimum standard of treatment of aliens.⁵⁴²
532. Claimant relies on the *Waste Management* tribunal’s articulation of the customary international law rule on the minimum standard of treatment of FET, to contend that customary international law has evolved over time and includes conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, or involving a lack of due

⁵⁴² Reply, ¶¶ 448-449; C-PHB, ¶ 68.

process”.⁵⁴³ Claimant submits that subsequent arbitral tribunals under NAFTA, and other treaties, have acknowledged the *Waste Management* award as articulating the standard of customary international law.⁵⁴⁴

533. According to Claimant, there is a growing convergence between customary and autonomous standards of FET, which has been recognized by several arbitral tribunals. Accordingly, in Claimant’s view, Respondent’s argument that the customary and autonomous standards are distinct, is misguided.⁵⁴⁵
534. Claimant submits that arbitral awards should not be discounted when ascertaining the content of NAFTA Article 1105, as they provide important descriptions of the content of the minimum standard of FET, even if they do not prove the existence of custom.⁵⁴⁶

⁵⁴³ Reply, ¶ 453; citing **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

⁵⁴⁴ Reply, ¶¶ 456-459, citing **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 98; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶¶ 283, 285; **Exh. CLA-086**, *GAMI Investments Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 100; **Exh. CLA-097**, *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶¶ 323-324; **Exh. CLA-082**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 167.

⁵⁴⁵ Reply, ¶¶ 471-478, citing **Exh. CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 500; **Exh. RLA-080**, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 291; **Exh. CLA-095**, *Murphy Exploration & Exploration Company International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 206; **Exh. CLA-083**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 284; **Exh. CLA-025**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 361; **Exh. CLA-085**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 337; **Exh. CLA-080**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB-05-22, Award, 24 July 2008, ¶ 592; **Exh. CLA-096**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 190; **Exh. RLA-050**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Part VII, ¶ 7.158; **Exh. CLA-105**, *Windstream Energy LCC v. Government of Canada*, Government of Canada Counter-Memorial, 20 January 2015; **Exh. CLA-104**, *Windstream Energy LCC v. Government of Canada*, Expert Report of Professor Dr. Rudolf Dolzer, 19 August 2014, ¶ 25.

⁵⁴⁶ Reply, ¶¶ 460-470, citing, *inter alia*, **Exh. CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 222; **Exh. CLA-021**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 184; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 274.

Claimant submits that Respondent too, in other cases, has accepted as correct the *Waste Management* tribunal's description of the minimum standard of treatment of FET.⁵⁴⁷

535. Claimant submits that proving State practice of FET is challenging as it “would require Claimant to prove a negative, by demonstrating ways that states do not behave as a means of proving they agree to an obligation or standard of conduct under customary international law”.⁵⁴⁸ Claimant submits further that ascertaining custom requires a flexible approach, enabling the decision-maker to deduce the existence of a rule of customary international law when State practice is conflicting or is too disparate, or there is discrepancy between State practice and *opinio juris*.⁵⁴⁹
536. Claimant rejects Respondent's proposition that a measure would be violative of NAFTA Article 1105 if it is “devoid of any basis or rational connection with the intended goal” and submits that Respondent has failed to cite any authority in support of this proposition.⁵⁵⁰ Claimant further rejects Respondent's contention that the onus lies solely on Claimant to demonstrate the existence of a rule of customary international law, contending that each Party bears the onus to support its respective position regarding the appropriate standard under NAFTA Article 1105.⁵⁵¹

(ii) FET Breach in this Case

a) The Tribunal's power to examine the challenged measure pursuant to NAFTA Article 1105

537. Claimant submits that the investor protections in NAFTA Chapter 11 establish a framework for governmental action in Respondent's dealings with investors and that no State has an unlimited ability to act as it sees fit, whether in its administrative or legislative capacity.⁵⁵²

⁵⁴⁷ Reply, ¶ 455, quoting **Exh. CLA-105**, *Windstream Energy LCC v. Government of Canada*, Government of Canada Counter-Memorial, 20 January 2015, ¶ 385.

⁵⁴⁸ Reply, ¶¶ 464-465 (emphasis in original), citing **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 277; **Exh. CLA-105**, *Windstream Energy LCC v. Government of Canada*, Government of Canada Counter-Memorial, 20 January 2015, ¶ 351.

⁵⁴⁹ Reply, ¶¶ 479-481, citing **Exh. CLA-071**, Stefan Talmon, “Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion” (2015) *European Journal of International Law* 26:2 417, p. 433.

⁵⁵⁰ Reply, ¶ 454, quoting Counter-Memorial, ¶ 350.

⁵⁵¹ Reply, ¶ 482, quoting **Exh. CLA-105**, *Windstream Energy LCC v. Government of Canada*, Government of Canada Counter-Memorial, 20 January 2015, ¶ 350.

⁵⁵² Reply, ¶ 485.

Claimant contends that Respondent's reliance on "sufficient deference to a measure enacted by an elected legislature" cannot prevent this Tribunal from performing the task required by NAFTA.⁵⁵³ That a Government may be afforded a certain level of deference where the case warrants it, does not automatically mean that NAFTA Article 1105 is of no force and effect or that it has not been violated, in Claimant's view.⁵⁵⁴

538. Claimant clarifies that, whilst it is not challenging Québec's democratic process, it is challenging Québec's decision to revoke valid exploration permits without a valid basis, on the ground that this violates Respondent's obligations under NAFTA.⁵⁵⁵ Claimant explains that its NAFTA Article 1105 claim is not premised on the argument that Bill 18 adversely affected the River Permit, but rather, on the content of the measure and how the Government of Québec went about its regulatory actions.⁵⁵⁶ In arguing that Bill 18 violates NAFTA Article 1105, Claimant submits that it is not suggesting that Québec was precluded from taking steps to protect the environment.⁵⁵⁷
539. Claimant contends that Bill 18's immediate and permanent revocation of permits was not justified by any definitive scientific conclusions that presented dire consequences if action was not taken. Claimant argues that Bill 18 was enacted in the absence of any evidence supporting the Act.⁵⁵⁸ Claimant clarifies that it is not challenging a demanding domestic regulatory framework, rather it is challenging Québec's attempt to justify Bill 18 with environmental and scientific bases that did not exist.⁵⁵⁹
540. Claimant concludes that Bill 18 departed from both NAFTA Article 1105 standard, and the decision-making standard which Québec had set for itself. By deviating from these

⁵⁵³ Reply, ¶¶ 451-452.

⁵⁵⁴ Reply, ¶¶ 451-452, 486.

⁵⁵⁵ Reply, ¶ 487.

⁵⁵⁶ Reply, ¶ 488.

⁵⁵⁷ Reply, ¶ 489.

⁵⁵⁸ Reply, ¶ 490.

⁵⁵⁹ Reply, ¶ 491.

standards, Claimant asserts that Québec acted in a manner that was arbitrary, grossly unfair and unjust, and idiosyncratic, which in Claimant's view, violated NAFTA Article 1105.⁵⁶⁰

b) Bill 18 was arbitrary

541. Claimant argues that Québec's immediate and permanent revocation of exploration permits was arbitrary because it lacked any factual, scientific or logical basis, and even contradicted the Government's own internal position that horizontal drilling under the river could be done safely.⁵⁶¹
542. According to Claimant, the St. Lawrence River was never part of Québec's ongoing environmental study process, which formed the basis for reforms to the hydrocarbon exploration framework.⁵⁶² Thus, there was "no rational connection between the stated purpose of Bill 18 and its effect".⁵⁶³
543. Claimant relies on the following to contend that Bill 18 was arbitrary in revoking the exploration permits in the St. Lawrence River, including the River Permit:⁵⁶⁴
- (i) Québec did not take any steps to study the St. Lawrence River area affected before enacting Bill 18, despite its commitment to study areas before taking regulatory action.⁵⁶⁵
 - (ii) Respondent's evidence and the internal Québec Government's documents in 2010-2011 allegedly included no scientific or factual support for a revocation of permits. According to Claimant, the documentary record demonstrates that environmental groups had only asked Minister Normandeau to suspend St. Lawrence River activities for a study of the river in November 2010 and had not asked for permits to be revoked.⁵⁶⁶ Furthermore, the proposed moratorium was only intended to affect marine surface activities and not sub-surface exploration or exploitation.⁵⁶⁷

⁵⁶⁰ Reply, ¶ 493.

⁵⁶¹ Reply, ¶¶ 495, 499-500; Memorial, ¶ 294.

⁵⁶² Reply, ¶ 496; C-PHB, ¶ 69.

⁵⁶³ Reply, ¶ 497.

⁵⁶⁴ Reply, ¶¶ 502-503.

⁵⁶⁵ Reply, ¶¶ 507-509.

⁵⁶⁶ Reply, ¶¶ 510-519.

⁵⁶⁷ Reply, ¶ 516.

- (iii) Contrary to Respondent's arguments that Bill 18 was enacted based on the findings of the SEA-1 Report and the BAPE 273 report, Claimant alleges that the studies and conclusions in these Reports pertained to areas that were not the subject matter of Bill 18. Accordingly, for Claimant, neither the SEA-1 Report nor the BAPE-273 Report supports the implementation of Bill 18.⁵⁶⁸
 - (iv) Respondent's justification for Bill 18, namely, that it is "logical" to extend the moratorium from the areas covered by the SEA-1 Report to the St. Lawrence River, is illogical,⁵⁶⁹ and contravenes the Québec Government's commitment to basing its decisions on scientific facts.⁵⁷⁰
 - (v) Québec summarily reversed its earlier position that horizontal drilling was safe, without any evidence.⁵⁷¹
544. Claimant further argues that it had a legitimate expectation that it would be afforded the opportunity to explore for shale gas and to pursue its commercial development plans, as before Forest Oil had applied for the original River Permit, it had specific discussions with the QMNR officials about its plans and it was encouraged to proceed with its investment.⁵⁷² Claimant contends that the permit revocation effected by Bill 18 was neither within the normal regulation of the industry, nor was it provided for by the Mining Act.⁵⁷³
545. According to Claimant, the real reason for revoking the permits was political, which it alleges has also been admitted by Minister Normandeau.⁵⁷⁴
- c) Bill 18's revocation of permits was grossly unfair and unjust
546. Claimant argues that Québec's decision to immediately and permanently revoke the permits without paying any compensation through Bill 18 was grossly unfair and unjust as:
- (i) Bill 18 was not devised and implemented in a context of thorough study aimed at regulatory reform founded upon scientific fact. Claimant contends that the permanent

⁵⁶⁸ Reply, ¶¶ 520-535; C-PHB, ¶¶ 70-73.

⁵⁶⁹ Reply, ¶ 501(d).

⁵⁷⁰ Reply, ¶ 538.

⁵⁷¹ Reply, ¶¶ 542-548.

⁵⁷² Memorial, ¶ 295.

⁵⁷³ Memorial, ¶ 320.

⁵⁷⁴ Reply, ¶ 504; C-PHB, ¶ 65.

revocation of permits through Bill 18, before the completion of scientific studies on either the area affected by the Act or the industry generating concern, was grossly unjust and unreasonable. For Claimant, the fact that the measure was implemented in an industry that was “still in a very early stage of its development”, where the Government was conducting an evidence-based approach to studying its development, further heightened the unjustness of the measure;⁵⁷⁵

- (ii) the immediate and permanent revocation of permits took place while Québec continued to rely on existing provisions in the EQA to ensure that hydrocarbon exploration activities conformed to the province’s environmental safety standards.⁵⁷⁶ Claimant argues that the existence of environmental protection and supervisory mechanisms at the disposal of Québec’s regulators evidence that the revocation of permits through Bill 18 was a political objective lacking scientific or evidentiary basis.⁵⁷⁷
- (iii) Minister Normandeau held horizontal drilling to an impossible standard that no regulated activity could be expected to meet;⁵⁷⁸
- (iv) Québec took the decision to not pay monetary compensation to the permit holders on the basis that it would be politically unpopular to compensate.⁵⁷⁹

547. Claimant rejects Respondent’s reliance on the precautionary principle, contending that a permanent destruction of rights, like the revocation of the River Permit, cannot be justified using the precautionary principle.⁵⁸⁰

d) The boundaries of the permit revocations are idiosyncratic

548. Claimant argues that the geographic boundaries of Bill 18 cannot be supported (i) in light of the Government’s alleged admissions that the decision was not based on environmental considerations; and (ii) considering that for other instances of studying and regulating

⁵⁷⁵ Reply, ¶¶ 549-559.

⁵⁷⁶ Reply, ¶¶ 560-566.

⁵⁷⁷ Reply, ¶ 567.

⁵⁷⁸ C-PHB, ¶ 87.

⁵⁷⁹ Memorial, ¶¶ 323, 326-328.

⁵⁸⁰ C-PHB, ¶ 91.

hydrocarbon development, the Government had maintained a commitment to area-specific studies.⁵⁸¹ Claimant contends that the Government's admissions concerning the importance of obtaining geography-specific evidence undermines any argument that the territorial scope of Bill 18 can be justified, as studies have not been conducted in the St. Lawrence river area.⁵⁸²

549. Claimant argues that the eastern boundaries of the permit revocation lack coherence and are idiosyncratic,⁵⁸³ which is demonstrated by Minister Normandeau's declaration "that we cut it where we cut it".⁵⁸⁴ Claimant contends that a measure that is intended to protect the environment requires an ecological and environmental basis for application on a specific area and not a longitudinal one as was the case with Bill 18.⁵⁸⁵ According to Claimant, Bill 18's eastern boundary was adjusted to comply with an inter-governmental agreement between Québec and Respondent, and not on account of environmental facts and needs.⁵⁸⁶

e) The revocation of the River Permit violated Claimant's legitimate expectations

550. Claimant argues that treatment from the host State made in breach of representations from the host State on which Claimant had reasonably relied on is a relevant consideration for assessing whether the international minimum standard of treatment was met.⁵⁸⁷
551. Claimant argues that it had a reasonable and objective expectation that its development plans would not be summarily extinguished by an extraordinary measure such as Bill 18, as:
- (i) Forest Oil had specifically described its plan to access the resources under the St. Lawrence River with the QMNR, making sure that its project was understood and supported by the relevant Québec authorities before entering the Québec market;⁵⁸⁸

⁵⁸¹ Reply, ¶ 568; C-PHB, ¶¶ 92-93.

⁵⁸² Reply, ¶ 572.

⁵⁸³ Reply, ¶ 569; C-PHB, ¶¶ 92-93.

⁵⁸⁴ Reply, ¶¶ 569-570; *quoting Exh. C-065*, Québec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Session, 39th Leg, Vol. 42 No. 11, 26 May 2011.

⁵⁸⁵ Reply, ¶ 570.

⁵⁸⁶ Reply, ¶ 571.

⁵⁸⁷ Memorial, ¶ 316.

⁵⁸⁸ Memorial, ¶¶ 318-319.

- (ii) QMNR had allegedly provided assurances to the Enterprise that it would be able to undertake permitted activities so long as applicable laws were complied with;⁵⁸⁹ and
- (iii) a revocation of the nature effected by Bill 18 is not provided for in the Mining Act and is not within the QMNR's normal regulatory activity.⁵⁹⁰

b. Respondent's Position

(i) Legal Standard

552. Relying on the 2001 FTC Note (extracted in ¶ 530 above), Respondent contends that the minimum standard of treatment under NAFTA Article 1105 “requires no more and no less than the minimum standard of treatment of aliens under customary international law”.⁵⁹¹ Thus, according to Respondent, to establish a violation of NAFTA Article 1105, an investor is required to prove that Canada has violated an obligation prescribed by a rule of customary international law regarding the protection of aliens.
553. Respondent submits that to establish the existence of such customary rule, the following two conditions must be met: (i) the existence of the general practice of States; and (ii) the *opinio juris*, *i.e.*, the subjective element indicating that the said practice was adopted by States because of a belief that it constitutes a rule of law. Further, according to Respondent, the minimum standard of treatment under NAFTA Article 1105 is an objective standard based on the existence of specific rules regarding the protection of aliens and is not a subjective standard allowing a tribunal to assess the impugned measure against its own idea of what constitutes FET.⁵⁹²
554. For Respondent, the burden to establish the existence of a customary rule lies entirely on Claimant and cannot be shifted to Respondent or the Tribunal.⁵⁹³
555. Respondent contends that to violate the minimum standard of treatment of FET, the acts or omissions attributable to the State must reach a high threshold of seriousness, *i.e.*, they

⁵⁸⁹ Memorial, ¶ 321.

⁵⁹⁰ Memorial, ¶ 320.

⁵⁹¹ Counter-Memorial, ¶ 340.

⁵⁹² Counter-Memorial, ¶ 343; citing **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, ¶ 261; **Exh. CLA-049**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 120.

⁵⁹³ Counter-Memorial, ¶¶ 341-342; Rejoinder, ¶ 219.

must be “sufficiently egregious and shocking [entailing either] a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons”,⁵⁹⁴ or “gross misconduct, manifest injustice or, . . . bad faith or the willful neglect of duty . . . in regard to the investment”.⁵⁹⁵

556. Respondent contends that Claimant’s allegations of “arbitrary, unfair and idiosyncratic measures” by Respondent do not meet the threshold of the minimum standard of treatment of aliens under customary international law and consequently of NAFTA Article 1105.⁵⁹⁶ Respondent contends that the arbitral tribunal’s findings in the *Waste Management* case, on which Claimant relies (see ¶ 527 above), do not have the effect of elevating the interdiction of unfair or arbitrary measures to the status of a rule of customary international law as part of the minimum standard of treatment of aliens.⁵⁹⁷
557. As to Claimant’s contentions regarding the relevance of arbitral awards (see ¶ 534 above), Respondent relies on the observations of the *Glamis Gold* tribunal that, while arbitral awards can serve as illustrations of customary international law if they involve an examination of customary international law, they do not constitute State practice and thus cannot create or prove the existence of customary international law.⁵⁹⁸
558. Respondent denies Claimant’s assertion that arbitral tribunals have moved away from the high threshold requirement to establish a breach of NAFTA Article 1105.⁵⁹⁹
559. Respondent contends further that NAFTA Article 1105 does not protect an investor’s expectations. It submits that several NAFTA tribunals have recognized that “legitimate expectations” is not part of customary international law on the minimum standard of treatment, and such tribunals have refused to apply it in the context of an analysis of a

⁵⁹⁴ Counter-Memorial, ¶ 345; *citing, inter alia*, **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 627; Rejoinder, ¶ 218.

⁵⁹⁵ Counter-Memorial, ¶ 345; *citing, inter alia*, **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 286.

⁵⁹⁶ Counter-Memorial, ¶ 346.

⁵⁹⁷ Counter-Memorial, ¶ 346.

⁵⁹⁸ Counter-Memorial, ¶¶ 346-347; Rejoinder, ¶¶ 221-222.

⁵⁹⁹ Counter-Memorial, ¶¶ 348-349; *citing Exh. RLA-068*, *Mesa Power Group, LLC v. Canada*, UNCITRAL, Observations on the Award on Jurisdiction and Merits in *Clayton/Bilcon v. Canada*, 14 May 2015; **Exh. RLA-069** *Mesa Power Group, LLC v. Canada*, UNCITRAL, Second Submission of the United States of America Pursuant to NAFTA Article 1128, 12 June 2015; **Exh. RLA-070**, *Mesa Power Group, LLC v. Canada*, UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128, 12 June 2015.

breach of NAFTA Article 1105.⁶⁰⁰ Respondent contends that Claimant, too, is no longer pursuing its contention that its expectations are protected by the minimum standard of treatment under NAFTA Article 1105.⁶⁰¹

(ii) FET Breach in this Case

a) The Tribunal's power to examine the challenged measure pursuant to NAFTA Article 1105

560. Respondent submits that when examining whether there is a breach of the minimum standard of treatment under NAFTA Article 1105, arbitral tribunals must be deferential to the regulatory power of States and must not substitute themselves for the States and rule on whether it was appropriate to adopt one measure as opposed to another. According to Respondent, arbitral tribunals may not question the public policy choices of the responsible authorities of a State.

561. Respondent submits that, the aforementioned approach equally applies to measures adopted by a State's legislative bodies.⁶⁰²

b) The passage of the impugned Act is not a violation of NAFTA Article 1105

562. According to Respondent, irrespective of whether the Tribunal adopts Canada's or Claimant's position on the legal standard of the protections offered under NAFTA Article 1105, the impugned Act, when considered in its context, is not violative of either standard put forth by the Parties.⁶⁰³

563. Respondent submits that the impugned Act was passed in light of the unfavorable findings and concerns towards shale gas exploration and exploitation activities identified in the SEA-1 Preliminary Report and BAPE Report 273, and the serious lack of social acceptability of shale gas development in Québec. Thus, Respondent submits that the revocation of exploration permits in the St. Lawrence River through the impugned Act was

⁶⁰⁰ Counter-Memorial, ¶¶ 351-354.

⁶⁰¹ Rejoinder, ¶ 229.

⁶⁰² Counter-Memorial, ¶¶ 344, 350; Rejoinder, ¶¶ 223-228.

⁶⁰³ Rejoinder, ¶ 222.

based on a legitimate policy objective, which was to ensure the protection of the St. Lawrence River.⁶⁰⁴

564. Respondent objects to Claimant's contention that the adoption of the impugned Act by the Québec National Assembly was not supported by scientific basis and was thus arbitrary, unjust, and inequitable. Respondent argues that this is a misinterpretation of the SEA-1 Report, BAPE Report 273, and Minister Normandeau's statements.⁶⁰⁵
565. Respondent submits that the findings in the SEA-1 Preliminary Report mentioned the vulnerability of St. Lawrence and noted that the area studied was not suitable for oil and gas development. The BAPE Report 273 sheds further light on major gaps in relation to scientific knowledge relating to shale gas exploration and development activities as well as their risks. Based on the findings of these two reports, as a cautious measure, the Québec Government considered it appropriate to prohibit oil and gas exploration in the St. Lawrence River.⁶⁰⁶
566. Respondent denies that the findings in the SEA-1 Preliminary Report and BAPE Report 273 contradict the grounds relied upon by the Québec Government while passing the impugned Act.⁶⁰⁷ BAPE Report 273 noted that parts of the Québec territory may not be compatible with shale gas development activities, which as the Assistant Deputy Minister, Water Expertise, Analysis and Environmental Assessment indicated "it was obvious that one of those territories was the St. Lawrence".⁶⁰⁸ This observation was made in a context where SEA-1 had concluded that the relevant sectors of the St. Lawrence were not an appropriate environment for such activities even though more scientific knowledge was required and relevant to discover the exact extent of the risk.⁶⁰⁹
567. Respondent disputes Claimant's contention, that the Québec Government's decision to apply certain findings of the SEA-1 Preliminary Report and BAPE 273 Report to the fluvial

⁶⁰⁴ Rejoinder, ¶¶ 231-232; Counter-Memorial, ¶ 365.

⁶⁰⁵ Rejoinder, ¶¶ 231-236.

⁶⁰⁶ Counter-Memorial, ¶¶ 361-365.

⁶⁰⁷ Rejoinder, ¶ 241.

⁶⁰⁸ Rejoinder, ¶ 241; *citing* Dupont First Statement, ¶ 83; **Exh. R-024**, BAPE Report 273, Inquiry and Public Hearing Report, *Sustainable Development of the Shale Gas Industry in Québec*, February 2011, p. 174.

⁶⁰⁹ Rejoinder, ¶ 241; *citing* **Exh. R-021**, SEA-1 Preliminary Report, pp. 22 and 23 of the summary and pp. 13-2, 13-30 to 13-32 of the preliminary report.

portion of the St. Lawrence River was illogical. In Respondent's view, the Government had identified the characteristics of this territory that justified the transposition of the findings.⁶¹⁰

568. Thus, Respondent maintains that the Québec Government's decision to revoke mining rights in the St. Lawrence River was based on available information and studies and was not arbitrary. Respondent submits that the decision was also consistent with the principles set out in Section 6 of the SDA.⁶¹¹
569. Respondent emphasizes that the St. Lawrence River is distinguishable from other water bodies in Québec as it is an exceptional environment known for its history, biodiversity, and seaway to the Great Lakes. It also serves as a drinking water supply for more than half of Québec's population and supports a range of key socio-economic sectors for Québec and Canada.⁶¹² Thus, the Québec Government's decision not to extend the application of the Act to all of Québec's watercourses cannot be regarded as arbitrary. Likewise, for the Gulf of Lawrence beyond Anticosti Island. In case of the latter, Respondent submits that the area was subject to an SEA that had yet to be completed.⁶¹³
570. Respondent submits that the impugned Act cannot be regarded as arbitrary simply because the two studies did not deal specifically with the territory forming subject matter of the Act.⁶¹⁴ Respondent submits that the Tribunal should not substitute its own assessment of

⁶¹⁰ Rejoinder, ¶ 243; *citing* Dupont First Statement, ¶¶ 63-69; Gosselin First Statement, ¶¶ 51-52; Sauv  First Statement, ¶¶ 22-23; **Exh. C-114**, Moratoire sur les activit s d'exploration et d'exploitation d'hydrocarbures dans le fleuve du Saint-Laurent (partie fluviale) pour les permis de recherche localis s entre la pointe Est de l' le d'Orl ans et la fronti re provinciale Qu bec/Ontario, 9 November 2010, p. 1: [TRANSLATION, as provided in Rejoinder, fn 346] "the physical narrowness of the river, its shallower depth, the significant density of human occupation and uses as well as a substantial number of threatened or fragile areas and species, stating that the river also provides drinking water to 45% of the Qu bec population". The applicability of the findings in the SEA-1 report to the fluvial section of the St. Lawrence River was noted by a number of environmental groups in a press release.

⁶¹¹ Rejoinder ¶ 242; *citing* **R-005A**, *Sustainable Development Act*, CQLR, chapter D-8.1.1, s.6.

⁶¹² Counter-Memorial, ¶¶ 365-366.

⁶¹³ Counter-Memorial, ¶¶ 367-370.

⁶¹⁴ Rejoinder, ¶ 243; *citing* Counter-Memorial, ¶ 501. *See also* Rejoinder, fn 347: [REDACTED]

[REDACTED] [Counter-Memorial, ¶¶ 88, 90, 555 and 571. [REDACTED]

[REDACTED] (C-146, . . . C-147, . . . C-150, . . . R-069, . . .) [REDACTED]

[REDACTED] (emphasis in original).

the facts and issues for that of senior officials of the Government, the Cabinet, and the National Assembly.⁶¹⁵

571. Respondent submits that the results of studies conducted after the passage of the Act, specifically the SEA-SG Report and BAPE Report 307, did not alleviate the environmental and social concerns that had led to the adoption of the Act.⁶¹⁶ The SEA-SG Report describes concerns relating to the physical and human environment with regard to hydraulic fracturing and gas migration, and also the lack of social acceptability.⁶¹⁷ BAPE Report 307 concludes that the advantages for Québec in the St. Lawrence Lowlands using hydraulic fracturing had not been demonstrated because of the potential impact in a populated area, including on the water, and because it is difficult for the industry to maintain the long-term integrity of wells.⁶¹⁸
572. The Québec Government wanted to protect the St. Lawrence River environment where the exploitation of shale gas was facing a lack of social acceptability and raising environmental concerns.⁶¹⁹
573. Respondent submits that Government documents and Minister Normandeau's opening statement in this arbitration evidence that the objective behind Bill 18 was environmental protection.⁶²⁰ Respondent contends that there is no factual basis for Claimant's allegations that the Québec Government's real motivation was political.⁶²¹ Respondent explains that Minister Normandeau's use of the term "political" whilst referring to the decision to not compensate permit holders impacted by Bill 18 was not a reference to a political decision aimed at advancing a party's interests, but rather a decision involving a political process, requiring the Government to legislate for the public interest.⁶²² Respondent submits that the decision to not compensate the affected permit holders was made because, firstly, the importance of the environment suggested the need for great care, and secondly, the lack of

⁶¹⁵ Rejoinder, ¶ 244.

⁶¹⁶ Rejoinder, ¶¶ 246-247.

⁶¹⁷ Rejoinder, ¶ 247.

⁶¹⁸ Rejoinder, ¶ 247.

⁶¹⁹ Rejoinder, ¶ 232.

⁶²⁰ Rejoinder, ¶¶ 233-234.

⁶²¹ Rejoinder, ¶ 235.

⁶²² Rejoinder, ¶ 236.

exploratory work by permit holders did not warrant any compensation.⁶²³ In Respondent's view, there is nothing improper about making decisions involving a political process as that is the role of the Government. Respondent also submits that it is within a legislator's function to consider, *inter alia*, the social acceptability of an economic activity, even in a limited fashion as in the present situation.⁶²⁴

574. Respondent contends that the regulation of a new industry such as the exploitation of hydrocarbons is different from regulating an existing well-established industry such as marine transportations; it cannot be inferred that the St. Lawrence River is conducive to any new type of activity simply because it has already been used for regulated commercial and industrial uses.⁶²⁵ It is also because this environment was in high demand that extreme caution had to be taken before new activities would be authorized.⁶²⁶ This argument was made in response to Claimant's allegations that the Québec Government cannot credibly claim that it was seeking to protect the St. Lawrence River environment when the environment was already being used for commercial and industrial purposes.⁶²⁷
575. Respondent submits that Minister Normandeau's decision to propose that the Act be adopted was consistent with the opinions of other QMNR officials. Respondent argues that Claimant is attempting to mislead the Tribunal by alleging that QMNR officials believed that Minister Normandeau only wanted to prohibit the development of shale gas on a temporary basis.⁶²⁸
576. Respondent contends that Claimant is further attempting to mislead the Tribunal through a biased and truncated reading of documents.⁶²⁹ Respondent submits that Exhibit C-107, which Claimant presents as a QMNR document, is in fact not a QMNR document. Further, according to Respondent, the document simply states that the Government believes that it is not necessary to consider a complete moratorium on all Québec territory.⁶³⁰ According to Respondent, Claimant has misunderstood the scope of an information note from an

⁶²³ Rejoinder, ¶ 236.

⁶²⁴ Rejoinder, ¶ 237.

⁶²⁵ Rejoinder, ¶ 239.

⁶²⁶ Rejoinder, ¶ 239.

⁶²⁷ Rejoinder, ¶ 239.

⁶²⁸ Rejoinder, ¶¶ 248-249.

⁶²⁹ Rejoinder, ¶¶ 251-256.

⁶³⁰ Rejoinder, ¶ 250.

official at the QMNR dated 27 January 2011, which deals with the consequences of a moratorium on shale gas development on all of Québec's territory and does not relate to a moratorium specifically on the territory covered by Bill 18.⁶³¹ According to Respondent, Claimant was also wrong in interpreting the said document as opposition by officials toward Minister Normandeau's stance. Moreover, the Deputy Minister at the QMNR has confirmed that "the officials with whom he interacted at the *Ministère des Ressources naturelles* [i.e., the QMNR] unanimously believed that Bill 18 was a reasonable, justified public interest measure . . .".⁶³²

577. Respondent contends further that Claimant had misinterpreted various documents as demonstrating that the Québec Government considered that it was sufficient to apply Section 22 of the EQA to regulate gas drilling.⁶³³ Respondent concedes that the application of the EQA to gas drilling was meant to tighten the regulations for the industry; however, it argues that there was no suggestion that the Québec Government had planned to limit itself to that measure.⁶³⁴
578. Further, neither Minister Normandeau, nor the Québec Government, indicated that the prohibition announced in the fall of 2010 was aimed only at surface activities and that exploration and development beneath the St. Lawrence River would be permitted.⁶³⁵ No announcement was made to this effect, and Claimant is relying on an internal document of its Enterprise to support its position. Respondent argues that even if the document were to be given weight by the Tribunal, the contents of the document do not support Claimant's position.⁶³⁶
579. Contrary to Claimant's arguments, Canada also contends that the Québec Government has never taken the position that horizontal drilling could be performed safely beneath the St.

⁶³¹ Rejoinder, ¶ 251; *citing* Reply, ¶¶ 61-63.

⁶³² Rejoinder, ¶ 251; *quoting* Suavé First Statement, ¶ 48; Sauvé Second Statement, ¶ 3.

⁶³³ Rejoinder, ¶¶ 252-254.

⁶³⁴ Rejoinder, ¶ 252.

⁶³⁵ Rejoinder, ¶ 255.

⁶³⁶ Rejoinder, ¶ 255; *citing* **Exh. C-119**, Québec – Public relations Issues, 23 December 2010.

Lawrence River. Respondent submits that this issue was considered, however no position was taken.⁶³⁷

580. In view of the above, Respondent invites the Tribunal to exercise extreme caution before accepting Claimant's version of the facts as true, without first referring to the relevant documents themselves.⁶³⁸

581. Thus, Respondent maintains that the Act does not violate NAFTA Article 1105 because it was adopted (i) following the SEA-1 Preliminary Report and BAPE Report 273, which expressed environmental concerns regarding shale gas exploration activities; and (ii) in a context where shale gas development faced a lack of social acceptability. Further, the affected companies had not conducted any exploration work and suffered no injustice or unfairness, because the Act has no discriminatory provisions, and applies to all holders of the affected area equally, and because the adoption of Bill 18 followed a proper decision-making and statutory development process. Respondent submits that several other jurisdictions have also questioned the environmental and social impacts of shale gas development or prohibiting it.⁶³⁹

(3) Non-Disputing Parties' Submissions

a. USA NDP Submission

582. USA concurs with the Parties that, under the 2001 FTC Note, NAFTA Parties expressly intended NAFTA Article 1105(1) to afford the minimum standard of treatment to covered investments, as crystallized under customary international law through general and consistent State practice and *opinio juris*.⁶⁴⁰

583. USA agrees with Respondent's position that: (i) customary international law is evidenced by widespread and consistent State practice and *opinio juris*, not by determinations of arbitral tribunals;⁶⁴¹ (ii) a claimant must demonstrate that any alleged standards, which are

⁶³⁷ Rejoinder, ¶ 256.

⁶³⁸ Rejoinder, ¶ 257.

⁶³⁹ Rejoinder, ¶ 258.

⁶⁴⁰ USA NDP Submission, ¶¶ 19, 29; citing 2001 FTC Note, ¶¶ B.1, B.2.

⁶⁴¹ USA NDP Submission, ¶ 28; citing **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶¶ 605, 608.

not specified in the treaty, have crystallized into an obligation under customary international law;⁶⁴² (iii) the burden of proof is on a claimant alone to establish the existence and applicability of a relevant obligation under customary international law;⁶⁴³ and (iv) a claimant must then show that the State has engaged in conduct that violates that rule.⁶⁴⁴

584. USA opines that customary international law has crystallized to establish a minimum standard of treatment in the areas of FET and full protection and security.⁶⁴⁵ With respect to FET, USA submits that it is not aware of any general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations.⁶⁴⁶ USA opines that host States may modify or amend their regulations to achieve a legitimate public objective and will not incur liability under customary international law merely because such changes interfere with an investor's regulatory expectations.⁶⁴⁷

b. Mexico NDP Submission

585. Mexico conveys its agreement to Respondent's positions regarding (i) the relevance of the 2001 FTC Note for interpreting NAFTA Article 1105; (ii) the requirements for demonstrating the existence of a customary international law rule on minimum standard of treatment; and (iii) the burden of proof in relation to establishing a claim for breach of the minimum standard of treatment.⁶⁴⁸

⁶⁴² USA NDP Submission, ¶ 29.

⁶⁴³ USA NDP Submission, ¶ 30; citing *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, ICJ, 176, 27 August 1952, ¶ 200; *S.S. "Lotus" (France v. Turkey)*, PCIJ, (ser. A) No. 10, 27 September 1927, ¶¶ 25-26.

⁶⁴⁴ USA NDP Submission, ¶ 31; citing *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 177.

⁶⁴⁵ USA NDP Submission, ¶¶ 21-22.

⁶⁴⁶ USA NDP Submission, ¶ 26; citing *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, U.S. Counter-Memorial, ¶¶ 96-97; *Robert Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, ¶ 87.

⁶⁴⁷ USA NDP Submission, ¶¶ 27-28; citing *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 153.

⁶⁴⁸ Mexico NDP Submission, ¶ 6.

(4) The Tribunal's Analysis

a. The Legal Standard

586. It is Claimant's case, which Respondent disputes, that the revocation of Bill 18 by Québec constitutes a breach of the FET standard of treatment guaranteed under NAFTA Article 1105(1). Before examining the merits of Claimant's allegations of breach of NAFTA Article 1105(1), the Tribunal must address the legal standard of FET under NAFTA Article 1105(1), which is also in dispute between the Parties.

587. At the outset, the Tribunal affirms the Parties' positions that NAFTA Article 1105(1) is to be interpreted in accordance with the 2001 FTC Note. As noted in ¶ 287 above, the interpretation of NAFTA Article 1105(1) under the 2001 FTC Note is binding on the Tribunal, pursuant to NAFTA Article 1131(2).

588. Thus, in accordance with the 2001 FTC Note, the standard of treatment afforded to foreign investors under NAFTA Article 1105(1) is "that which is required by the customary international law minimum standard of treatment of aliens" (see ¶ 530 above).

589. The divergence between the Parties relates to (i) the content of the customary international law minimum standard of treatment for FET; (ii) whether, and to which extent, it has evolved since the seminal *Neer* case; and (iii) the appropriate means for ascertaining the content of such custom. The Parties further disagree about which Party bears the burden for establishing the content of custom.

590. The Tribunal will first address the Parties' dispute regarding burden of proof, which will be followed by the appropriate means for ascertaining content of custom, including with respect to evidence of evolution of custom, and thereafter the content of the customary international law minimum standard of treatment for FET under NAFTA Article 1105.

(i) Sources to ascertain the content of the customary international law minimum standard of treatment for FET

591. The existence of a customary international law rule on the minimum standard of treatment for FET is not in dispute. Indeed, this is also clear from NAFTA Article 1105(1) read with the 2001 FTC Note. The Parties also agree that the burden to establish the content of

customary international law, lies first and foremost on Claimant.⁶⁴⁹ However, as noted in ¶ 589 above, the Parties mainly disagree on the content of the customary international law rule on the minimum standard of treatment for FET and the means for ascertaining such content. In this Sub-Section, the Tribunal will address the Parties' disagreement on the means for ascertaining the content of custom.

592. Respondent submits that to establish the content of the customary international law rule on the minimum standard of treatment for FET, Claimant must demonstrate the existence of a general practice of States and *opinio juris* indicating that this practice was adopted because it constitutes a rule of law.⁶⁵⁰ Respondent argues that awards rendered by international arbitral tribunals do not constitute State practice and, thus, cannot create or prove the existence of customary international law.⁶⁵¹
593. Claimant does not dispute that proof of existence of State practice and *opinio juris* are necessary pre-requisites for establishing the content of the customary international law rule on the minimum standard of treatment for FET. Claimant also agrees with Respondent that arbitral decisions do not create a rule of customary international law. However, it contends that arbitral decisions constitute “important indicators of the existence of a rule under customary international law”,⁶⁵² and are “an appropriate source for descriptions of customary international law”.⁶⁵³ Thus, Claimant submits that arbitral decisions should not be discounted when ascertaining the content of a customary international law rule.⁶⁵⁴ Claimant further contends that proving State practice in the manner contended by Respondent is a “challenge” as it “would require the Claimant to prove a negative, by demonstrating ways that states do not behave as a means of proving they agree to an obligation or standard of conduct under customary international law”.⁶⁵⁵

⁶⁴⁹ Counter-Memorial, ¶¶ 341-342; Reply, ¶¶ 448-450; Rejoinder, ¶ 219.

⁶⁵⁰ Counter-Memorial, ¶ 342; Rejoinder, ¶ 219.

⁶⁵¹ Counter-Memorial, ¶ 346.

⁶⁵² Reply, ¶¶ 461-462.

⁶⁵³ Reply, ¶ 447(a).

⁶⁵⁴ Reply, ¶¶ 461-465, citing **Exh. CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 222; **Exh. CLA-021**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, ¶ 184.

⁶⁵⁵ Reply, ¶ 464, citing **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 274 (emphasis in original). See also ¶¶ 479-482.

594. Article 38(1)(b) of the ICJ statute, pertaining to sources of international law, states as follows in connection with custom:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

...

b. international custom, as evidence of a general practice accepted as law;

....

595. Respondent, thus, rightly posits that the content of custom is best evidenced by proof of consistent and widespread State practice that is adopted out of a sense of legal obligation. This position is not disputed by Claimant and is also accepted by the non-disputing NAFTA parties.
596. Claimant contends that it is difficult to precisely ascertain the content of custom, amongst others, because “(a) State practice is non-existent because the question under examination is too new; (b) State practice is conflicting or too disparate and thus inconclusive; (c) The *opinio juris* of states cannot be established; or (d) There is a discrepancy between state practice and *opinio juris*”.⁶⁵⁶
597. A review of the arbitral decisions relied on by both Parties shows that the difficulty in ascertaining the content of custom has been acknowledged by several arbitral tribunals.⁶⁵⁷ The Tribunal also accepts Claimant’s position that there are difficulties in precisely ascertaining the content of custom. In this regard, the Tribunal notes that the practice of international arbitral tribunals as well as of the International Court of Justice (“ICJ”) has been to apply a flexible approach in ascertaining custom. International arbitral tribunals routinely refer to prior arbitral decisions as illustrations of custom.⁶⁵⁸

⁶⁵⁶ Reply, ¶¶ 479-480, citing **Exh. CLA-071**, Stefan Talmon, “Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion” (2015) *European Journal of International Law* 26:2 417, ¶ 422.

⁶⁵⁷ **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 274.

⁶⁵⁸ **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009; **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009; **Exh.**

598. The *Cargill* tribunal, noting the difficulties in procuring evidence of consistent State practice to establish the content of custom, stated as follows regarding other evidence of custom:

274. . . . The Tribunal acknowledges, however, that surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as “fair and equitable treatment” where developed examples of State practice may not be many or readily accessible. Claimant has not provided the Tribunal with such a survey of recent State practice nor is the Tribunal aware of such a survey.

275. In such instances, recourse may be made to other evidence of custom. The statements of States can—with care—serve as evidence of the content of custom. In the case of the NAFTA State Parties, they have made statements in the context of their position as respondents or as non-disputing State Parties in Chapter 11 arbitrations. Thus, Mexico has not only presented its view on the content of customary international law standard in this proceeding, but also as a non-disputing State Party in an Article 1128 Submission. . . . The Tribunal acknowledges that the weight of these statements needs to be assessed in light of their position as respondents at the time of the statement . . .

276. It also is widely accepted that extensive adoption of identical treaty language by many States may in and of itself serve—again with care—as evidence of customary international law. . .

277. Finally, the writings of scholars and the decisions of tribunals may serve as evidence of custom. It is important to emphasize, however, as Mexico does in this instance, that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.

599. The *Glamis Gold* tribunal noted in this regard that:

602. The Tribunal acknowledges that it is difficult to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (1) “a concordant practice of a number of States acquiesced in by others,” and (2) “a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).”

603. The evidence of such “concordant practice” undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings. Although one can readily identify the practice of States, it is usually very difficult to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, a

CLA-031, *Clayton/Bilcon v. Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; **Exh. CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016; **Exh. RLA-060**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006.

complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom.

604. The Tribunal notes that, although an examination of custom is indeed necessary to determine the scope and bounds of current customary international law, this requirement—repeatedly argued by various State Parties—because of the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision at the 1926 conception of egregiousness.

600. The Tribunal finds the aforementioned observations of the *Cargill* and *Glamis Gold* tribunals instructive. For avoidance of any doubt, the Tribunal clarifies that arbitral awards rendered by international arbitral tribunals do not constitute State practice or *opinio juris* and, as such, do not create customary international law. Having said that, arbitral awards may serve as illustrations of custom, particularly those awards containing an examination of customary international law. Furthermore, whether an arbitral tribunal's articulation of the standard of customary international law has been consistently followed by later arbitral tribunals and is also relied on by States in other proceedings is a relevant guiding consideration in the analysis of the current standard of customary international law.
601. On the relevance of prior arbitral awards, the Parties also disagree on whether awards based on BITs containing autonomous treaty language for FET are relevant for ascertaining the content of the customary international law rule on the minimum standard of treatment for FET under NAFTA Article 1105. Claimant contends, which is disputed by Respondent, that BIT awards may be relied on by the Tribunal as there is a growing convergence between the customary and autonomous standards of BIT. In the Tribunal's view, Claimant has failed to establish that the customary international law rule on minimum standard of treatment for FET has evolved to such an extent that the protection offered thereunder is akin to the protection offered under autonomous treaty standards of FET. Furthermore, awards addressing the autonomous treaty standard of FET do not typically undertake an analysis of the existence of custom. Therefore, the Tribunal is not persuaded that awards which examine an autonomous standard of FET are relevant for the purposes of examining the content of custom.⁶⁵⁹

⁶⁵⁹ **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶¶ 606-607. See also Reply, ¶¶ 473-475, citing **CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 500; **Exh. RLA-080**, *Saluka Investments B.V. v. Czech Republic*, UNCTRAL, Partial

(ii) Content of the customary international law minimum standard of treatment for FET

602. The customary international law minimum standard of treatment is not a static standard but is an evolutionary one. The Tribunal understands there to be no serious dispute between the Parties regarding this position.⁶⁶⁰ The Parties also appear to agree that the customary international law minimum standard of treatment has evolved since the *Neer* case, although it remains a high standard. At its end, Claimant places heavy reliance on the *Waste Management* tribunal's articulation of the current customary international law minimum standard of treatment and the subsequent arbitral awards that have upheld this articulation.⁶⁶¹ Respondent relies on the customary international law minimum standard of treatment articulated by the *Glamis Gold*, *Cargill* and *Thunderbird* arbitral tribunals.⁶⁶²
603. The Tribunal notes that the arbitral decisions relied on by both Claimant and Respondent propound a common view – which the Tribunal also agrees with – that (i) the customary international law minimum standard of treatment is an evolving standard; and (ii) the current standard, while remaining a high one, offers more substantive protection than what was envisaged in the *Neer* case. Specifically, the *Waste Management* tribunal, referring to previous arbitral decisions, noted that “[b]oth the *Mondev* and *ADF* tribunals rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case”.⁶⁶³ The *Cargill* tribunal held that “the current customary international law standard of ‘fair and equitable treatment’ at least reflects the adaptation of the agreed *Neer* standard to current conditions . . .”.⁶⁶⁴ The *Glamis Gold* tribunal noted that whilst “[t]he fundamentals of the *Neer* standard . . .

Award, 17 March 2006, ¶ 291, **Exh. CLA-095**, *Murphy Exploration & Exploration Company International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 206a.

⁶⁶⁰ R-PHB, ¶ 62.

⁶⁶¹ Memorial, ¶ 297, quoting **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

⁶⁶² Counter-Memorial, ¶¶ 344-345, citing **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 286; **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 627; **RLA-060**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 194.

⁶⁶³ **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 93.

⁶⁶⁴ **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 286.

still apply today . . . it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously”.⁶⁶⁵ The *Thunderbird* tribunal held that “[n]otwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence”.⁶⁶⁶

604. The Tribunal now turns to the content of the customary international law rule on the minimum standard of treatment for FET.
605. The *Waste Management* award, on which Claimant relies, identifies the content of the minimum standard of treatment for FET as follows:

. . . the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.⁶⁶⁷

606. Respondent contends that the *Waste Management* award cannot be relied on by Claimant to satisfy its evidentiary burden to establish the content of custom, as the passage of the *Waste Management* award cited by the claimant relies not on State practice but rather on other arbitral awards.⁶⁶⁸ As to the content of the customary international law rule on the minimum standard of treatment for FET, Respondent emphasizes the use of adverbs to describe conduct that may fall afoul of the minimum standard of treatment for FET. It contends that the NAFTA Article 1105 sets a very high threshold, which is reflected in the use of terms such as “gross denial of justice . . . manifest arbitrariness falling below acceptable international standards”.⁶⁶⁹ Respondent submits that adverbs such as “gross”

⁶⁶⁵ **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 616.

⁶⁶⁶ **RLA-060**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 194.

⁶⁶⁷ **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98.

⁶⁶⁸ Counter-Memorial, ¶¶ 346-347.

⁶⁶⁹ Counter-Memorial, ¶ 348, citing **RLA-060**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 194; **Exh. CLA-058**, *S.D. Myers, Inc. v. Canada*, Partial Award, 13 November 2000, ¶ 263; quoting **Exh. CLA-039**, *Glamis Gold, Ltd. v. United States of America*, Final Award, 8 June 2009, ¶ 627.

and “manifest” are important because they reflect the high threshold of severity required by customary international law.⁶⁷⁰ During the Refresher Hearing, Respondent further explained its position as follows:

For its part, Canada recognizes that the content of the minimal standard of treatment protects foreign investment, especially if the conduct is egregious that it would shock.

It would be really unfair or a treatment that is manifestly arbitrary. In other words, it states that is so far below the international norms that any reasonable person would be shocked. Also, no step that contravenes—it is not that can only be arbitrary and also be qualified as manifestly arbitrary. Here, the adverb is important because it enhances the threshold of gravity that is required by customary international law. This threshold was recognized by arbitr[al] Tribunals that buttress the large measure or the large latitude that was given to governments to arbitrate.⁶⁷¹

607. However, the Tribunal notes that Respondent does not appear to be disputing the *Waste Management* tribunal’s description of the customary international law minimum standard of treatment for FET. During the Refresher Hearing, in response to a question from the President of the Tribunal, Respondent confirmed that it agrees with the *Waste Management* tribunal’s articulation of the content of the customary international law minimum standard of treatment for FET.⁶⁷²
608. The Tribunal notes that the *Waste Management* tribunal’s articulation of the customary international law minimum standard of treatment for FET has been considered by almost every arbitral tribunal coming thereafter and has also been followed by many arbitral tribunals as describing the current customary international law minimum standard of treatment for FET.⁶⁷³
609. As noted in ¶ 607 above, Respondent, too, accepts the *Waste Management* tribunal’s articulation of the customary international law minimum standard of treatment for FET. Further, Claimant rightly notes that in another previous NAFTA arbitration, *Windstream Energy LLC v. Government of Canada*, Respondent has cited with approval the *Waste Management* tribunal’s articulation of the customary international law minimum standard

⁶⁷⁰ R-PHB, ¶ 63.

⁶⁷¹ Refresher Hearing, Tr. Day 1, 165:19-166:11.

⁶⁷² Refresher Hearing, Tr. Day 1, 166:20-25.

⁶⁷³ **Exh. CLA-031**, *Clayton/Bilcon v. Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015; **Exh. CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016.

of treatment for FET.⁶⁷⁴ The *Cargill* award, which is an authority relied on by Respondent in support of a high threshold for a breach of NAFTA Article 1105, also cites with approval several elements of the content of the minimum standard of treatment for FET described by the *Waste Management* tribunal:

296. In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. . . . To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.⁶⁷⁵

610. With respect to the standard of arbitrariness that meets the minimum standard of treatment for FET, *i.e.*, whether it is arbitrary conduct or “manifestly” or “demonstrably” arbitrary conduct, both Parties cite with approval the standard of arbitrariness propounded by the ICJ in the *ELSI* case, namely that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law”.⁶⁷⁶ On arbitrariness, Claimant also adds that “[t]he key is this idea of the rational connection; there has to be some rational relationship between the alleged harm and the proposed remedy . . .”.⁶⁷⁷
611. Based on the above, the Tribunal concludes that, notwithstanding an evolution from the *Neer* standard, the customary international law minimum standard of treatment for FET continues to bear a high threshold. This position has been consistently recognized by international arbitral tribunals. The Tribunal does not consider the *Waste Management* award as departing from this high threshold.
612. For the purposes of this case, the Tribunal considers that acts or omissions that are manifestly or demonstrably arbitrary, grossly unfair, inherently unjust, or idiosyncratic, fall

⁶⁷⁴ Reply, ¶ 455, quoting **Exh. CLA-105**, *Windstream Energy LCC v. Government of Canada*, Government of Canada Counter-Memorial, 20 January 2015, ¶ 385.

⁶⁷⁵ **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 296.

⁶⁷⁶ Memorial, ¶ 300, citing **Exh. CLA-036**, *Elettronica S.p.A (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ¶ 128; R-PHB, ¶ 63.

⁶⁷⁷ Refresher Hearing, Tr. Day 1, 119:16-19.

below the acceptable minimum standard of treatment for FET. Although Claimant has not put forth any direct evidence of State practice or *opinio juris*, considering the position taken by Respondent in previous arbitrations and NAFTA authorities relied on by both Parties, the Tribunal considers that conduct which is manifestly or demonstrably arbitrary, grossly unfair, inherently unjust, or idiosyncratic, will fall afoul the acceptable minimum standard of treatment for FET protected under NAFTA Article 1105.

613. As noted in the preceding Sub-Section, Claimant has not cited any persuasive evidence to demonstrate that the customary international law standard for FET is akin to the autonomous treaty standard of FET.
614. With respect to the relevance of the legitimate expectations of the investor for purposes of analyzing a potential breach of the minimum standard of treatment for FET under NAFTA Article 1105, several investment law tribunals have considered that a failure to respect an investor's legitimate expectation is an element to take into account when assessing whether other components of the standard are breached.⁶⁷⁸ Respondent disputes that NAFTA Article 1105 protects an investor's expectation. It submits that to the limited extent that prior NAFTA Chapter 11 arbitral tribunals have considered an investor's expectation, they have only done so where specific assurances were made to the investor by the host State to the effect that the proposed investment could move forward.⁶⁷⁹ It is not necessary for the Tribunal to resolve the debate as to whether legitimate expectations are protected under NAFTA Article 1105 as, for the reasons elaborated in ¶ 632 below, the Tribunal does not find that any representations made by Respondent's officials to Forest Oil at the time of its investment in Québec or the prevalent legal regime under the Mining Act, generated a legitimate expectation in Forest Oil leading to its investment in the River Permit, as alleged by Claimant. Hence, Québec's revocation of the Enterprise's River Permit Rights cannot be regarded as a breach of the Enterprise's legitimate expectation.

⁶⁷⁸ **Exh. CLA-091**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016; **Exh. CLA-064**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004; **Exh. CLA-027**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009.

⁶⁷⁹ Counter-Memorial, ¶¶ 351-354.

b. FET Breach in this Case

615. Claimant contends that Québec’s “immediate and permanent” revocation of the exploration permits in the St. Lawrence River without payment of any compensation under the impugned Act, violates the minimum standard of treatment for FET afforded under NAFTA Article 1105 as:⁶⁸⁰

- (i) the revocation of the exploration permits and the decision to deny compensation to the affected permit holders was neither rationally connected nor necessary to serve the stated purposes of environmental protection and preservation of the St. Lawrence River. For this reason, Claimant contends that the revocation of the exploration permits was “arbitrary, grossly unfair and unjust and idiosyncratic”;⁶⁸¹
- (ii) Québec’s justification for Bill 18 was premised on preliminary studies which were inapplicable in the present case. Claimant contends that the studies relied on by Québec were done in a marine environment and concerned offshore drilling technology, whereas the River Permit that was revoked belonged to the fluvial St. Lawrence Lowlands, and Claimant would only access the resource below the river from onshore locations and at significant depth.⁶⁸² Claimant disputes that the SEA-1 Report and the BAPE Report 273 had any relevance to the issue of whether the drilling of horizontal wells under the St. Lawrence River should be authorized to produce shale gas that might be found there;⁶⁸³
- (iii) the permanent revocation of the River Permit and other permits in the St. Lawrence River was “an unnecessary deprivation of rights” as there were other effective mechanisms prescribed under the Mining Act to protect rivers and watercourses in Québec;⁶⁸⁴

⁶⁸⁰ Memorial, ¶¶ 281-284, 292-296.

⁶⁸¹ Reply, ¶ 494.

⁶⁸² Memorial, ¶ 303.

⁶⁸³ Reply, ¶¶ 520-535.

⁶⁸⁴ Memorial, ¶¶ 304-306.

- (iv) the territorial boundaries of the permit revocation through Bill 18 were idiosyncratic and irrational from an environmental point of view;⁶⁸⁵
 - (v) the permit revocation was unfair as it did not await the results of the SEA-SG Report, which was “directly relevant to the development of the River Permit Area, the specific technologies that would be used to extract resources located underneath the River, and the possible environmental effects and risks involved”;⁶⁸⁶
 - (vi) the revocation of the exploration permits violated Claimant’s legitimate expectations that it would be subject to regulation in the normal course in accordance with the framework for investment in the oil and gas sector in Québec. Claimant contends that a revocation of the exploration permits as undertaken through Bill 18 is not provided for in the Mining Act and is not within the QMNR’s normal regulatory activity. Claimant further contends that its “investment in Québec was specifically induced by the Québec Government: In addition to an official policy of encouraging oil and gas activity communicated in statements about the Government’s commitment to respect market and free enterprise rules (in addition to environmental rules), the QMNR had extensive and specific discussions with Forest Oil in 2006 concerning Forest Oil’s proposed project and project site”;⁶⁸⁷ and
 - (vii) the decision to deny compensation for revoking the exploration permits was a politically motivated one and was “[s]hocking and [g]rossly [u]nfair”.⁶⁸⁸
616. Claimant refutes Respondent’s contention that the Tribunal is precluded from examining Claimant’s allegations of FET breach as arbitral tribunals must be deferential to the regulatory power of States and may not substitute themselves for the States to assess whether the adoption of one measure is more appropriate than another. Claimant clarifies that it is not contesting Québec’s power to adopt Bill 18 or to take measures in pursuance of environmental concerns, and that it is only contesting the method by which the Québec

⁶⁸⁵ Memorial, ¶¶ 307-311.

⁶⁸⁶ Memorial, ¶ 313. *See also* ¶¶ 312, 314-315.

⁶⁸⁷ Memorial, ¶ 292(b).

⁶⁸⁸ Memorial, ¶¶ 323-332.

Government reached the decision to revoke the exploration permits under the St. Lawrence River.

617. Respondent denies that it has breached the FET protection offered under NAFTA Article 1105, contending that Bill 18 was based on a legitimate policy objective, which was to ensure the protection of the St. Lawrence River. Respondent contends that Bill 18 was passed in light of the unfavorable findings and concerns identified in the SEA-1 Report and the BAPE Report 273, and the serious lack of social acceptability of shale gas development in Québec, especially in the St. Lawrence Lowlands.⁶⁸⁹
618. Respondent submits that the adoption of the Act resulted from the normal and legitimate exercise of Québec's legislative power, taking into account competing public interests in a sensitive social context and that the Tribunal may not substitute itself for the Québec Government through Article 1105 to determine whether it was the right decision.⁶⁹⁰
619. For the following reasons, the Tribunal finds that Claimant has failed to establish a breach of the minimum standard of treatment for FET under NAFTA Article 1105, in accordance with the standard set forth in ¶ 612 above.
620. *First*, there is nothing in the record that might suggest that the impugned Act was adopted by the Québec Government without following proper democratic procedures. As noted in ¶¶ 224 - 230 above, on 4 May 2011, Minister Normandeau had presented a draft of Bill 18 to the Cabinet, which was followed by several other drafts thereafter. On 19 May 2011, Bill 18 was duly debated in the Québec National Assembly and thereafter, until 7 June 2011, several committee meetings and public consultations were conducted to review Bill 18. Bill 18 was ultimately passed unanimously by the Québec National Assembly on 10 June 2011.
621. Claimant's allegations regarding Minister Normandeau's political motivations behind the adoption of Bill 18, even if established to be correct, cannot detract from the aforementioned factual position.

⁶⁸⁹ Rejoinder, ¶ 231.
⁶⁹⁰ Counter-Memorial, ¶ 334.

622. *Second*, Bill 18 was passed with the stated public policy objective of preservation of the fluvial environment under the St. Lawrence River. The Parties debate on the level of deference that must be afforded to legislative measures of the host State and whether this Tribunal is empowered to assess if the adoption of Bill 18 by the Québec Government comports with the protection afforded under NAFTA Article 1105. Although initially the Parties appeared to be at opposing ends on this matter, the Tribunal finds that during the course of the arbitration, their positions on this issue were not very far apart.
623. Specifically, the Parties do not dispute that, to establish a breach of the customary international law rule on the minimum standard of treatment under NAFTA Article 1105, a high threshold must be met. In general, arbitral tribunals must grant significant deference to the host State's democratic process and public policy choices and may not substitute their own judgment for that of the host State whilst assessing whether NAFTA Article 1105 has been breached in a particular case. In other words, arbitral tribunals may not substitute their own judgment for that of State legislators.
624. Several investment tribunals have confirmed – and this Tribunal, too, subscribes to this position – that a high measure of deference must be given to the right of the host State to make regulatory changes in light of the public interest. The Tribunal does not consider that a different standard of deference applies to legislative bodies within the host State as opposed to administrative bodies.
625. *Third*, although Claimant clarifies that it is not challenging Québec's democratic process, but is challenging "Québec's decision to revoke valid exploration permits without a valid basis"⁶⁹¹ (*i.e.*, "in the absence of any scientific or other evidence supporting that action"⁶⁹²), the Tribunal considers that an examination of whether the passage of Bill 18 was justified in light of the evidence before the QMNR and the Québec National Assembly, necessarily requires an in-depth inquiry into the basis of the Québec Government's decision. Specifically, the analysis requested of the Tribunal by Claimant, involves examining the various reports and studies before the QMNR, which led the QMNR to propose Bill 18. The purpose of this exercise would be to assess whether the QMNR was correct and

⁶⁹¹ Reply, ¶ 487.

⁶⁹² Reply, ¶ 490.

justified in reaching its conclusion that a revocation of the permits under the St. Lawrence River was necessary for reasons of environmental preservation on the basis of the evidence before it. The Tribunal does not consider it within its remit to undertake an in-depth analysis of the SEA-1 Report and BAPE Report 273 to assess whether the conclusions referred therein support the adoption of Bill 18 and the revocation of the environmental permits. This would be tantamount to substituting its decision for that of the legislature.

626. *Fourth*, based on the evidence on record, the Tribunal is not persuaded that the Québec Government’s decision to revoke the permits under the St. Lawrence River was manifestly or demonstrably arbitrary, grossly unfair, inherently unjust, or idiosyncratic, which may establish a breach of NAFTA Article 1105. The Tribunal recalls that the standard to be met for a breach of NAFTA Article 1105 is a very high one. In the facts of this case, it would require Claimant to demonstrate that there was a complete disconnect between the impugned Act and the objective of protecting the fluvial environment under the St. Lawrence River.
627. The documentary record of this case shows that, since July 2009, the Government of Québec had been undertaking several strategic environmental assessments to study the impact of shale gas exploration in various parts of Québec (see ¶ 159 above). Claimant rightly notes that neither the SEA-1 Report, nor the BAPE Report 273, specifically dealt with or analyzed the fluvial section of the St. Lawrence River, which was ultimately the subject of the revocation measures under the impugned Act. However, the Tribunal does not find it arbitrary or illogical that studies on the impact of shale gas exploration in other areas in Québec were transposed by the Québec Government to the fluvial section of St. Lawrence River.
628. Claimant argues that the permanent revocation of the River Permit and other permits in the St. Lawrence River was “an unnecessary deprivation of rights” as there were other effective mechanisms prescribed under the Mining Act to protect rivers and watercourses in Québec. That the Québec Government chose one option over another option in pursuance of its objective to preserve fluvial environment under the St. Lawrence River cannot be regarded as manifestly arbitrary conduct, in the Tribunal’s view.

629. Claimant also contends that the timing of the impugned Act makes it clear that it was passed purely for political reasons. Claimant points out that, at the time that Bill 18 was introduced in the Québec National Assembly and the impugned Act was passed, there was a specific SEA (SEA-SG) ongoing, which was directly relevant to the River Permit Area. That the Québec Government did not wait for the findings of the SEA-SG before passing the impugned Act, is unfair in Claimant’s view. Claimant also challenges the territorial boundaries of the permits’ revocation through the impugned Act as idiosyncratic. The Tribunal does not consider that these matters, even if correct, meet the high threshold of the minimum standard of treatment for FET. In any event, it is not for this Tribunal to assess what territorial boundaries were justifiable for the permits’ revocation based on the evidence before the QMNR and the Québec National Assembly.
630. *Fifth*, it is not clear to the Tribunal to what extent Claimant maintains its position that the non-payment of compensation to permit holders affected by the impugned Act constitutes a breach of NAFTA Article 1105. The Tribunal notes that Claimant had initially challenged the non-payment of compensation under the impugned Act as being violative of NAFTA Article 1105(1) on the grounds that it was grossly unjust. However, it does not appear to be seriously pursuing this argument in its subsequent submissions in the arbitration.⁶⁹³
631. Notwithstanding the above, taking into account the status of exploration activities under the St. Lawrence River, coupled with the public policy objective of the revocation, the majority of the Tribunal does not consider the non-payment of compensation to be “grossly unfair” or “inherently unjust”, which is required to meet the high threshold for breach of NAFTA Article 1105. The majority of the Tribunal takes note that public perception against compensation was an important consideration in Minister Normandeau’s proposal not to provide compensation to the permit holders affected by the passage of the impugned Act. However, other considerations such as, the absence of work undertaken in the permits

⁶⁹³ The Tribunal notes that in its Memorial, Claimant challenged both the revocation and no-compensation decision under the Act as constituting a breach of the minimum standard of treatment under NAFTA Article 1105 (*see* Memorial, ¶¶ 280-281, 283-284, 294 and 323-332). In its Reply and C-PHB, Claimant no longer emphasized the no-compensation aspect as constituting a breach of the minimum standard of treatment, arguing mainly that the permanent and immediate revocation of the River Permit is a breach of the minimum standard of treatment under Article 1105 (*see* Reply, ¶¶ 483-572; C-PHB, ¶¶ 69-93). During the Refresher Hearing, Claimant again mentioned that the denial of compensation was grossly unfair (*see* Claimant’s Presentation, 25 February 2021, slide 103).

affected by the passage of the impugned Act, the Québec Government's intention to encourage the sustainable development of natural resources with a view to protect the environment of the St. Lawrence River, the refund by the Government of a portion of the annual fees paid by the affected permit holders, and the possibility to attribute the research expenditure incurred on the affected permits to other research permits of the affected permit holders, contributed to the Government's decision not to award compensation to the permit holders affected by the impugned Act.⁶⁹⁴ Furthermore, as noted in ¶ 620 above, it cannot be ignored that the impugned Act was passed unanimously by the Québec National Assembly following all democratic processes. In the view of the majority of the Tribunal, any political motivations of Minister Normandeau in her proposal to not provide compensation to the affected permit holders under the impugned Act cannot diminish this factual position.

632. Lastly, based on the evidence on record, the Tribunal is also not persuaded that the discussions between the QMNR officials and Forest Oil in July 2006, regarding the possibility to procure an exploration permit under the St. Lawrence River and/or the legal regime under the Mining Act, can be regarded as creating reasonable and justifiable expectations on part of Forest Oil leading to its investment in the River Permit, a breach of which may be regarded as violating the Enterprise's legitimate expectations. As noted above, the Enterprise's investment in Québec had commenced with the acquisition of the Original Permits, at which time, there was no mention of the River Permit. Moreover, the Tribunal does not consider Québec's alleged conduct specific enough, which may lead to any legitimate expectations on part of the Enterprise.
633. Thus, the majority of the Tribunal finds that the revocation of the River Permit Rights through the impugned Act without payment of any compensation does not meet the high threshold of the minimum standard of treatment for FET under NAFTA. In view of this finding, the Tribunal does not need to consider any further the Parties' submissions on the

⁶⁹⁴ See **Exh. C-66**, Translation of pages 11-12 and 16-17 of Québec, National Assembly, Committee on Agriculture, Fisheries, Energy and Natural Resources, *Journal des débats*, 2nd Session, 39th Leg, Vol. 42 No. 13, 31 May 2011; **Exh. R-38**, Lettre du Ministère des Ressources naturelles à Junex Inc., Québec, 2 September 2011; R-PHB, ¶ 72.

precautionary principle, nor Claimant's request for adverse inferences for non-production of documents.

XI. DAMAGES

634. The Tribunal notes that Claimant claims compensatory damages in the amount of USD 103,600,000 on account of Respondent's alleged breaches of NAFTA Articles 1105 and 1110. Respondent disputes Claimant's entitlement to compensation. Both Parties have made extensive submissions and have filed quantum and resources expert reports in support of their respective positions regarding the alleged financial impact of the challenged measures.
635. Considering that the Tribunal has rejected all of Claimant's claims relating to Respondent's alleged breaches under NAFTA, the Tribunal finds that Respondent is not liable to pay any compensation to Claimant. Accordingly, the Tribunal does not consider it necessary to detail here the Parties' respective submissions regarding the financial impact of the various measures at issue and the quantification of Claimant's alleged damages and resulting compensation.
636. The Tribunal notes that Claimant also requests the Tribunal to order any further relief that it may consider appropriate (see ¶ 240 above). The Tribunal does not consider any such further relief to be necessary or appropriate in the circumstances of this case and, accordingly, rejects this request.

XII. COSTS

637. NAFTA Article 1135 provides in relevant part regarding the costs of the arbitration that:

A tribunal may also award costs in accordance with the applicable arbitration rules.

638. Articles 40 to 43 of the UNCITRAL Rules, which are applicable in these proceedings (see ¶ 2 above), relate to costs of the arbitration.

639. Article 40 defines costs of the arbitration and is extracted in relevant part below:

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term “costs” includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) The reasonable travel and other expenses incurred by the arbitrators;
 - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

...

640. Article 40(e) of the UNCITRAL Rules pertains to costs of legal representation and assistance, which are hereafter referred to as “**Legal Costs**”. Article 40(a)-(c), (d) and (f) pertains to the other costs of the arbitration. For the purposes of these proceedings, the costs referred in Article 40(a)-(c) are relevant and are hereafter referred to as “**Arbitration Costs**”.
641. Article 42 sets forth the principle governing the allocation of costs of the arbitration and provides as follows:

Allocation of costs

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
 2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.
642. During the course of the Refresher Hearing, the Parties advised the Tribunal that they have reached an agreement that each Party shall bear its own Legal Costs and that the Arbitration Costs shall be borne equally by the Parties:

MS. BANDALI: We do have an update to provide to the Tribunal on the issue of costs, . . .

...

So I am glad to report that the parties were able to consult on the matter, as the Tribunal requested. And rather than coming to an agreement on procedure, we have actually come to an agreement on the disposition of costs.

And so the parties have agreed that if the – to propose to the Tribunal that each side bears its own costs of legal representation, and that Tribunal costs will be split evenly between the parties, and that the Claimant will withdraw its motion for costs associated with the document-production issues, although our outstanding motion for adverse inferences related to the non-production of documents still stands.

...

MR. HÉBERT: Yes, what Ms. Bandali said is correct. It reflects the agreement between the parties on the question of costs.⁶⁹⁵

643. In view of the Parties' agreement referred to in the preceding paragraph, the Tribunal determines that each Party will bear its own Legal Costs and the Arbitration Costs shall be borne by the Parties in equal shares.
644. The Parties deposited with the Centre a total of USD 1,390,000 (USD 695,000 by Claimant and USD 695,000 by Respondent) to cover the costs of arbitration. This amount yielded, as at the date of issuance of this Award, USD 17,394.10 in investment income throughout the duration of the case.
645. The fees and expenses in this arbitration of Mr. David R. Haigh K.C., arbitrator appointed by Claimant, amount to USD 152,650 and USD 15,446.06 respectively.
646. The fees and expenses in this arbitration of Professor Brigitte Stern, arbitrator appointed by Respondent, amount to USD 191,125 and USD 20,904.93 respectively.
647. The fees and expenses in this arbitration of Mr. V.V. Veeder Q.C., former President of the Tribunal of the Tribunal, amount to USD 119,925 and USD 15,966.99 respectively.
648. The fees and expenses on this arbitration of Professor Dr. Albert Jan van den Berg, President of the Tribunal, amount to USD 257,249.98 and USD 16,024.50 respectively.
649. Pursuant to the agreement of the Parties, ICSID was appointed to administer these arbitration proceedings. The ICSID's fees for administrative services in this arbitration amount to USD 306,000.

⁶⁹⁵ Refresher Hearing, Tr. Day 1, 3:3-4:2.

650. Other arbitration costs in these proceedings, including costs for court reporters, interpreters, translators, hearing room equipment, hearing venue charges, bank charges, catering, printing, and other associated expenses relating to the arbitration proceedings amount to USD 311,731.07.
651. Based on the above figures, the Arbitration Costs, comprising the items covered by Article 40 (a) to (c) of the UNCITRAL Rules, amounts to USD 1,407,023.53.
652. In view of its determination in ¶ 643 above, the Tribunal determines that each Party is liable for an amount of USD 703,511.76 towards the Arbitration Costs, which have been paid from the Parties' deposits. The unexpended balance shall be refunded to the Parties in equal shares.

XIII. AWARD

653. FOR THE FOREGOING REASONS, the Tribunal decides as follows:
- (1) DECLARES that it has jurisdiction over Claimant's claims in this arbitration;
 - (2) DISMISSES Claimant's claim of breach by Respondent of its obligations under NAFTA Article 1110(1);
 - (3) DISMISSES, by majority, Claimant's claim for of breach by Respondent of its obligations under NAFTA Article 1105(1);
 - (4) DISMISSES Claimant's claim for compensatory damages;
 - (5) DETERMINES that, following an agreement between the Parties, the Arbitration Costs amounting to USD 1,407,023.53 shall be borne in equal shares by each Party and that Claimant is liable for an amount of USD 703,511.76 towards the Arbitration Costs and Respondent is liable for an amount of USD 703,511.76 towards the Arbitration Costs; and
 - (6) REJECTS all other relief sought by the Parties.

Place of arbitration: Ottawa

Date: 21 November 2022

THE ARBITRAL TRIBUNAL

[SIGNATURE]

Mr. David R. Haigh Q.C.
Arbitrator

[SIGNATURE]

Professor Brigitte Stern
Arbitrator

[SIGNATURE]

Professor Albert Jan van den Berg
President of the Tribunal