PUBLIC VERSION

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

between

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

(the "Claimants")

-and-

GOVERNMENT OF CANADA

(the "Respondent", and together with the Claimants, the "Disputing Parties")

(ICSID Case No. UNCT/20/6)

GOVERNMENT OF CANADA

COUNTER-MEMORIAL ON JURISDICTION, MERITS AND DAMAGES

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I. INTRODUCTION

A. Summary of Canada's Defense Against the Claims

1. This claim under the North American Free Trade Agreement ("NAFTA") constitutes a last-ditch attempt by the Claimants to challenge Canada's offshore seismic data regulatory regime (the "Regulatory Regime"), having failed in their attempts to do so in domestic courts. While the Claimants have presented the case as a challenge to the Alberta Courts' decisions on copyright in seismic materials, it is abundantly clear that what they are really seeking to revisit are the very terms of the Regulatory Regime under which authorizations were granted to conduct seismic surveys on Crown land in Canada's offshore.[1]

2. In 1993, one of the Claimants in this arbitration, Mr. Theodore David ("Davey") Einarsson, a former employee of Geophysical Service Inc. ("Delaware GSI"), purchased a Canadian offshore seismic data library that had been created by Delaware GSI from Halliburton Geophysical ("Halliburton") for USD$450,000. Eventually this library became owned by another Canadian company that he founded with a virtually identical name: Geophysical Service Incorporated ("GSI"). Most of that data had been acquired throughout the 1970s and 1980s and the seismic reports were already publicly available for copying at the time Mr. Davey Einarsson bought the data library from Halliburton. Over the course of the following 15 years, the Claimants attempted to develop a business based on reprocessing the old data created by Delaware GSI, which represents almost 60% of GSI's current seismic data library, and by acquiring additional seismic data on Canada's offshore between 1997 and 2008, primarily from offshore Newfoundland and Labrador and Nova Scotia, and in foreign jurisdictions, and licencing it to oil and gas companies.

3. In order to conduct seismic surveys to acquire seismic data in offshore Newfoundland and Labrador, Nova Scotia and in the North, including Canadian Arctic waters and Beaufort Sea, GSI and Delaware GSI applied for and received various authorizations from Canadian federal and provincial government regulators. The Regulatory Regime under which authorizations to conduct

[1] As a constitutional monarchy, Canada maintains the reigning monarch of the United Kingdom as its formal Head of State. By constitutional and historical convention in Canada, the "Crown" is used to refer to the sovereignty of the Canadian State. For example, "Crown land" is used to refer to publicly-owned lands as opposed to private land. Throughout this and subsequent submissions, Canada will use the phrase "Crown land" to refer to all publicly-owned land, whether federal or provincial.

seismic surveys were issued has essentially remained unchanged over the last 40 years. It seeks to facilitate both acquisition and disclosure of seismic materials through a transparent and predictable set of laws, regulations and policies. In applying for authorizations under the Regulatory Regime, the Claimants, like Delaware GSI, understood the rules of the game: in exchange for government authorization to conduct seismic surveys on Canada's offshore, operators are required to submit certain seismic materials (reports, maps and other information relating to the authorized seismic survey) to government regulators. A further condition of approval was that the submitted seismic materials would be subject to public disclosure after the applicable confidentiality period expired. Seismic data companies can sell or licence their offshore seismic data to companies seeking to explore oil and gas resources. After the expiration of the confidentiality period, the Regulatory Regime provided that seismic materials can be disclosed so as to encourage dissemination of information and stimulate further interest in oil and gas development in Canada's offshore. In this respect, Canada's longstanding Regulatory Regime is similar to many other jurisdictions in the world.

4. The Claimants, like Delaware GSI, knew that the confidentiality period for the materials submitted to government regulators was time-limited. Since 1982 to the present day, the statutory confidentiality period has been five years, after which government regulators are free to disclose the information to the public for viewing and copying. At various points between 1987 and 1999, the relevant government regulators – the Canada Oil and Gas Lands Administration ("COGLA"), Canada-Newfoundland and Labrador Offshore Petroleum Board ("CNLOPB"), Canada-Nova Scotia Offshore Petroleum Board ("CNSOPB") and National Energy Board ("NEB")[2] (collectively, the "Boards") – exercised their administrative discretion to extend the confidentiality period beyond the statutory five-year minimum (10 years in the Newfoundland and Labrador and Nova Scotia offshore areas, 15 years in the offshore areas north of 60° latitude). The Boards' objective in extending the confidentiality period was to allow more time for operators to licence their seismic data to customers on a non-exclusive basis.

5. Between 1997 and 2008, GSI accepted the benefits of access to Canada's offshore having been informed ahead of time that the materials it was required to submit would be made public in 10 or 15

[2] In 2019, the NEB became the Canada Energy Regulator ("CER"). Since most of the relevant events in this arbitration occurred prior to this change, the acronym "NEB" is generally used throughout this Counter-Memorial.

years. GSI nevertheless subsequently decided to challenge the terms of its participation in the Regulatory Regime in domestic courts in order to stop or delay the disclosure of the seismic materials it submitted to the Boards and to seek compensation for the disclosures of such materials to make up for GSI's own business failures.

6. By 2008, GSI was in a dire financial situation because of the Claimants' own risky and ill-judged business decisions. When the global financial crisis hit that year, GSI's auditors warned that the company's status as a going-concern was in danger. Highly leveraged, GSI was unable to generate enough revenue from its newer Canadian seismic surveys, even though virtually all of the seismic materials it had acquired were still confidential and had not been released by the Boards. GSI also suffered significant losses from its single largest project in the Falkland Islands. As a result, it sold its two ships and adopted a scorched-earth litigation strategy. By 2012, GSI was no longer a going-concern. By 2014, GSI had launched dozens of lawsuits in Canada and the United States. The claims were not only against Canada, various provinces and the Boards for alleged violations of GSI's copyright and trade secrets and expropriation of its business (i.e., the same types of claims it is recycling again in this arbitration), but also against its own customers ("licencees") in the oil and gas industry who were the lifeblood of its business.

7. The Court of Queen's Bench of Alberta ("ABQB") decided to address two common issues arising from many of these lawsuits in one trial (the "Common Issues Trial"): (1) whether seismic materials could be subject to copyright under Canadian law, and (2) what was the effect of the Regulatory Regime on GSI's claims.

8. On April 21, 2016, the ABQB ruled that seismic materials could be subject to copyright, but that the Regulatory Regime supplanted Canada's *Copyright Act* to the extent of conflict.[3] The ABQB concluded that the Boards did not infringe GSI's rights under the *Copyright Act* by copying, or allowing others to copy, the seismic materials GSI deposited with them.[4] GSI appealed this decision to the Alberta Court of Appeal ("ABCA"), which upheld the ABQB Decision. GSI then sought to

[3] **R-001**, *Geophysical Service Incorporated v. Encana Corporation, et al.*, 2016 ABQB 230 ("*GSI v. Encana*, 2016 ABQB 230"), ¶ 319.

[4] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 318.

appeal the ABCA Decision to the Supreme Court of Canada, which declined leave to appeal on November 30, 2017. Together, these decisions are referred to as the "Alberta Court Decisions" or "Decisions".[5]

9. Having failed in their challenge to the Regulatory Regime in domestic courts, the Claimants chose to bring an international claim under NAFTA Chapter Eleven. Yet the Claimants recognized a serious problem: the Regulatory Regime, which had allegedly caused GSI damage, had been in place for decades. Thus, it fell outside the three-year limitation period set out in NAFTA Articles 1116(2) and 1117(2). To get around the time limitation, the Claimants concocted a NAFTA claim based upon mischaracterizations of the Alberta Court Decisions to allege that those Decisions expropriated their investment and enforced a requirement to transfer GSI's proprietary knowledge. The reality is that the Claimants' claims arise out of the Regulatory Regime, not the Alberta Court Decisions. Their attempt to show otherwise is empty sophistry. In this Counter-Memorial, Canada demonstrates why the Tribunal should reject the Claimants' claim entirely.

10. The Tribunal has no jurisdiction over this NAFTA claim, for at least two reasons. First, the Claimants failed to comply with the waiver requirements in Article 1121, which is a fundamental condition precedent to Canada's consent to arbitration. Article 1121 requires the individual Claimants and their enterprise GSI to discontinue all claims for damages "with respect to" measures alleged to breach NAFTA. After filing their Notice of Arbitration on April 18, 2019 ("NOA"), the Claimants continued numerous lawsuits for damages in Canadian and United States courts that overlap with this NAFTA claim. In particular, the Claimants' damages model against Canada in the NAFTA arbitration is premised almost entirely on allegedly unpaid invoices listed in Exhibit C-112, which are in several cases identical to those still being litigated against third parties in domestic courts. This is an unconscionable effort at double recovery and prohibited by Article 1121(1). Past NAFTA tribunals have affirmed the serious consequences of a claimant failing to discontinue overlapping domestic litigation claims for damages after commencing a NAFTA claim. This Tribunal should do the same and reject the claim entirely for lack of jurisdiction.

[5] **R-001**, *GSI v. Encana*, 2016 ABQB 230; **R-002**, *Geophysical Service Incorporated v. Encana Corporation, et al.*, 2017 ABCA 125, ("*GSI v. Encana*, 2017 ABCA 125"); and **R-003**, *Geophysical Service Incorporated v. Encana Corporation et al.*, 2017 SCC 37634 ("*GSI v. Encana*, 2017 SCC 37634").

11. Second, the claim falls outside the strict three-year limitation period in Articles 1116(2) and 1117(2). This limitation period applies once a claimant first knew or should have known of the alleged breach and that it allegedly suffered loss or damage. It is uncontested that the Regulatory Regime and the Boards' disclosure of GSI's seismic materials for public viewing and copying pursuant to the Regulatory Regime cannot be challenged in this arbitration. These measures have been in place for decades. The Claimants have known that third parties were accessing GSI's seismic materials from the Boards since the 1990s. The fact that the Alberta Court Decisions upheld the Regulatory Regime does not offer an avenue to renew the NAFTA limitation period. For court decisions to fall within the limitation period, they must constitute an independently actionable breach. Yet all of the harms alleged by the Claimants arise from the Regulatory Regime, not the Alberta Court Decisions. Thus, the Tribunal should reject the claim on jurisdiction *rationae temporis* since it necessarily falls outside the limitation period.

12. The Claimants' NAFTA claim is also untenable on the merits. The Claimants' Article 1110 (Expropriation) claim based on the Alberta Court Decisions is fundamentally misguided and premised on a mischaracterization of what the Courts did. The only basis in international law by which the Claimants could challenge domestic judicial decisions under Article 1110 is by claiming denial of justice, which they have not alleged. Instead, the Claimants plainly attempt to appeal the substance of the Alberta Court Decisions and their interpretation of Canadian law. The Claimants cannot base a NAFTA claim by picking and choosing the elements of domestic judicial decisions they like (copyright protection of seismic data) and dislike (the Boards' authority to disclose seismic materials notwithstanding GSI's copyright). The Alberta Courts properly exercised their judicial function by reasonably interpreting the applicable statutes and regulations (which, again, cannot be challenged here) and discerning the disputing parties' rights thereunder. GSI received full due process and appellate review. The Claimants have offered no grounds — nor does the Tribunal have a mandate — to second-guess the determinations of Canadian law by Canada's judiciary. The Article 1110 claim must fail on this basis alone.

13. The Article 1110 claim suffers from many more flaws. To prove an expropriation under NAFTA and international law, a claimant must establish that the challenged measure substantially deprived the claimant of its property rights and interfered with its distinct, reasonable investment-backed expectations. The Claimants cannot establish any of this. Under domestic law, GSI did not

hold a right to exclusivity over the seismic materials disclosed by the Boards after the applicable confidentiality period expired. The Regulatory Regime permitted the disclosure of seismic materials after that time. This renders the expropriation claim non-viable: the Claimants cannot establish the deprivation of a right they did not hold under domestic law. Moreover, the Claimants incorrectly allege that the Alberta Court Decisions issued a compulsory licence, "confiscated" GSI's copyright and forbade GSI from challenging the infringement of its intellectual property rights. The Claimants' arguments are based on a misreading of the Decisions. The ABQB used the terms "compulsory licence" and "confiscatory" to describe the Regulatory Regime, not the effects of the trial decision. In any event, the ABQB used these phrases in the alternative and in *obiter* – they were not definitive legal pronouncements.

14. The fact that the Claimants' investment was rendered valueless is not attributable to the Alberta Court Decisions. The Claimants repeatedly attributed the loss of value of their investment to the Regulatory Regime — not the Alberta Court Decisions — even after filing the NAFTA claim. Yet the Regulatory Regime offered GSI opportunities to licence its seismic data during and after the confidentiality period. GSI still retained the field data, processed data, including in SEG-Y format, as well as reprocessed data, which it did not submit to the Boards and could still licence to third parties. GSI also retained any copyright that it might have had in its seismic data. In reality, GSI's business failed more than a decade before the Decisions because of its own risky business choices, its poor financial management, the 2008 financial recession and its inability to adapt to technological change. There was no expropriation of the Claimants' investment under Article 1110.

15. Given the Claimants' failure to establish an expropriation, Canada does not need to prove that, pursuant to Article 1110(7), Canada's measures are consistent with NAFTA Chapter Seventeen and the *Berne Convention for the Protection of Literary and Artistic Works*.[6] In fact, neither falls within the jurisdiction of this Tribunal.

16. The Claimants' performance requirements claim under Article 1106(1)(f) is also meritless. The Alberta Court Decisions did not "enforce" any "requirement" to "transfer" any "proprietary knowledge". The Alberta Courts simply interpreted the existing laws and regulations to discern the

[6] **CLA-089**, *Berne Convention for the Protection of Literary and Artistic Works*, 1161 U.N.T.S. 3, 9 September 1886 (revised 24 July 1971).

parties' rights thereunder. The Alberta Courts decided on claims brought by GSI – they were not asked to order GSI to transfer data to the Boards. Moreover, even if the Courts were enforcing the Regulatory Regime, there would still be no violation of Article 1106. The offshore is Canada's sovereign territory, and GSI has no right to conduct seismic surveys on Crown land without authorization by the Boards. GSI voluntarily received the advantage of conducting seismic surveys in return for assenting to the conditions of public disclosure set out in the Regulatory Regime. Accordingly, the transfer of proprietary information, to the extent there was any (which has not been established by the Claimants), was a condition on the receipt of an advantage under Article 1106(3) and therefore not a prohibited performance requirement.

17. Finally, even if the Claimants could overcome the fatal jurisdictional and merits flaws in their NAFTA claim, they would still not be entitled to any damages. The Claimants ignore the NAFTA standard of compensation for expropriation in Article 1110, rendering compensation nil since GSI was worth nil "immediately before the [alleged] expropriation took place" in November 2017 and had not been a going concern since at least 2012, if not earlier. The Claimants fail to prove factual and proximate causation between the Alberta Court Decisions and the alleged damages claimed. The Claimants have not proven that, absent the Alberta Courts Decision, GSI would have succeeded in its copyright infringement claims. The Courts could have rejected GSI's claims on different bases. Furthermore, the Claimants cannot established that Canada should be responsible to pay damages for alleged breaches of GSI's licence agreements with third parties. Such alleged losses are not attributable to Canada under international law and were not caused by the Alberta Court Decisions, which left untouched GSI's contractual claims and which they have continued today.

18. Instead, the Claimants assume, and ask the Tribunal to blindly accept, that they would be entitled to hundreds of millions of damages arising from "unpaid invoices" by third parties. The Claimants ignore the many other factors that caused GSI's losses and have nothing to do with Canada, including their many poor business decisions. Inexplicably, the Claimants include in their damages claim against Canada losses relating to GSI's seismic data in the Falkland Islands. The Claimants' damages expert, Mr. Paul Sharp of PricewaterhouseCoopers, made no effort to test the reasonableness of the assumptions he was instructed by the Claimants to accept, rendering his report so riddled with flaws that it must be rejected.

19. Canada, its provinces and the Boards have faced the Claimants' regular complaints and legal threats for decades. This NAFTA claim is the end of the road because Canada has not violated any of its international treaty obligations. Canada respectfully requests the Tribunal to reject this claim in its entirety and order the Claimants, jointly and severally, to pay all of the arbitration costs and Canada's costs and expenses.

B. Materials Submitted by Canada in this Counter-Memorial

20. Canada has filed reports by the following experts in support of its Counter-Memorial:

- **BARRY SOOKMAN** is a senior counsel with McCarthy Tétrault LLP, a prominent Canadian law firm. Mr. Sookman has practiced in the area of intellectual property including copyright and technology law for over 30 years. In his Expert Report, Mr. Sookman opines that the ABQB Decision consists solely of the application of established principles of statutory interpretation and copyright law. In his opinion, the ABQB Decision explains the consequences of the Regulatory Regime and does not take away any rights from GSI, including its copyright in seismic materials. Mr. Sookman ascribes no legal significance to the ABQB's characterization of the Regulatory Regime as "confiscatory", as the phrase appeared to trace from political usage and nothing in the ABQB Decision turned on this issue.

- **ROBERT HOBBS** has more than 33 years of experience in the seismic industry and oil and gas exploration fields, including as the former Chief Executive Officer of TGS-Nopec ("TGS"), the largest global publicly-traded multi-client seismic data company and the independent Director and Chairman of the Board for Shearwater Geoservices, the world's largest offshore marine geophysical contractor. In his Expert Report, Mr. Hobbs addresses matters related to the global offshore seismic industry, including industry trends since the 2000s, factors influencing decisions to invest in MC seismic surveys and industry models for financial decisions for investment in MC seismic surveys. Mr. Hobbs opines that in valuing GSI, Mr. Sharp fails to account for relevant market trends and the need to make continued investment in GSI's seismic data library. Mr. Hobbs further describes how the impacts of competition, permit expiration and seismic data location could impact the value of GSI's seismic data.

- **DOUG UFFEN** is President and Director of Reflection Peak Enterprises Limited, a consultancy that offers services to the oil and gas industry. Mr. Uffen is a professional geophysicist and geoscientist. He has over 40 years of industry experience in the oil and gas industry, working with and interpreting seismic data. In his Expert Report, Mr. Uffen explains various technical aspects of different types of seismic data and why the seismic materials released by the Boards are not the same as what remains in the exclusive possession of seismic companies. In the absence of any valuation of GSI's seismic data library in the Claimants' Memorial, Mr. Uffen also presents the appropriate methodology

that an objective third party would adopt to establish a fair market value of GSI's seismic data library.

- **DARRELL B. CHODOROW AND ALEXIS MANIATIS, THE BRATTLE GROUP** are Principals of the Brattle Group, an international economics consultancy. Mr. Chodorow and Mr. Maniatis have over 25 and over 30 years of experience, respectively, in analyzing and advising on the quantification of economic damages and valuation in diverse litigation and advisory matters. In their Expert Report, Messrs. Chodorow and Maniatis explain that Mr. Sharp's valuations are not meaningful and do not quantify the fair market value of GSI absent the alleged breaches. Messrs. Chodorow and Maniatis further explain that the going-concern value of GSI immediately before the alleged breaches was nil and that GSI had not been a going-concern since at least 2012. The but-for value of GSI is therefore a function of the proceeds that could be received from a liquidation of GSI's business on 30 November 2017, when its primary asset was GSI's seismic data library. Additionally, Messrs. Chodorow and Maniatis opine that Mr. Sharp's analysis of losses related to the Claimants' shareholder loans and lost employment earnings are conceptually flawed and speculative.

21. Canada has filed statements by the following witnesses in support of its Counter-Memorial:

- **BHARAT DIXIT** joined the NEB in 1992. From 2010 to 2022, he was a technical leader for the NEB's Arctic Offshore Drilling Review. Until 2009, he was the designated Chief Conservation Officer under the *Canada Oil and Gas Operations Act*. He has a Ph.D. in Physics & Physical Oceanography.

- **TREVOR BENNETT** is the Information Resources Manager/Access of the CNLOPB. He has held this position since 2010 and joined the CNLOPB in 1988.

- **CARL MAKRIDES** is the Director, Resources and Rights and Chief Conservation Officer of the CNSOPB. He has held this position since 2013 and has worked at the CNSOPB since 1992. He is a Registered Professional Geoscientist (P.Geo.).

22. Each of these Witness Statements describes the legislation, regulations and guidelines governing the submission and disclosure of seismic materials by their respective Board. Furthermore, the Witness Statements describe GSI's seismic programs under the jurisdiction of each Board. Each witness also addresses certain correspondence between GSI and their respective Board, and responds to specific allegations made by the Claimants in the Memorial.

C. Terminology Used in this Counter-Memorial

23. The Claimants' NAFTA claim relates to various types of seismic information, the treatment of which may vary depending on applicable legislation, regulations and guidelines. For the purpose of this Counter-Memorial, the terminology below is understood as follows:

(a) **Disclosed Seismic Materials:** seismic materials made publicly available and disclosed by the Boards after the expiry of the applicable confidentiality period. To date, the Boards have only disclosed paper and mylar copies of GSI's seismic materials and none of the Boards have made GSI's digital SEG-Y data available to the public;

(b) **exclusive seismic data:** seismic surveys conducted on behalf of a specific customer, who retains ownership of the acquired seismic materials;

(c) **field data:** the original recorded geophysical data, sometimes referred to as basic or raw data, together with the description of the complete recording parameters. For seismic data in particular, this means geophysical shot record, survey information and observers' reports;

(d) **multi-client/non-exclusive/speculative seismic data:** seismic surveys conducted for the purpose of licencing to multiple customers;

(e) **processed data:** field data that has been interpreted by geophysicists to remove extraneous "noise" collected during the acquisition process and put into other formats such as SEG-Y;

(f) **Regulatory Regime:** the Canadian federal and provincial regulatory framework governing the ability to conduct seismic surveys on Canada's offshore and their use thereafter, including the deposit of the material, the term of confidentiality and public disclosure. This includes all of the legislation listed in Schedule B "Regulatory Regime in Chief's Order" in the ABQB Decision;

(g) **reprocessed data:** field data that is reprocessed using newer technology to improve the quality of the data beyond the original processing. Operators are not required to submit reprocessed data to the Boards as a condition of obtaining an authorization to acquire seismic data in Canada's offshore and may licence reprocessed data to third parties;

(h) **seismic materials:** seismic information, including (i) raw seismic field data, or raw seismic, magnetic, and gravity data; (ii) seismic related navigation data; (iii) processed and reprocessed seismic data; (iii) selections, arrangements and compilations of raw, processed and reprocessed seismic data; (iv) productions and reproductions of seismic data in various forms and media including physical, electronic, magnetic and digital works; (v) interpretations, derivations and translations of the seismic data; and (vi) related seismic data materials; and

(i) **Submitted Seismic Materials:** seismic materials that operators are required to submit to the Boards pursuant to the Regulatory Regime within a set period of time after work completion (generally one year) and are subject to an applicable confidentiality period. To date, these materials have never included field data. Generally, regulations applicable to GSI's seismic programs required only submission of paper and mylar copies of processed data reports.

II. CANADA'S FRONTIER ENERGY POLICY AND THE REGULATORY REGIME GOVERNING OFFSHORE RESOURCES

A. Constitutional Authority Over Natural Resources in Canada

24. In Canada, constitutional authority over natural resources is divided between the federal and provincial governments ("the Crown").[7] Exploration, development, management and conservation of non-renewable resources within the territory of a province fall under its legal jurisdiction.[8] The federal government also plays a significant role in developing natural resources given its constitutional jurisdiction over trade and commerce, taxation and other powers.[9] Additionally, the federal government has exclusive jurisdiction over natural resources in Canada's northern territories and in all offshore areas that are not subject to a joint federal-provincial management regime.[10] Based on their shared authority in relation to natural resources and the discovery of oil and gas in offshore Newfoundland and Labrador and Nova Scotia in the late 1960s, the federal and provincial governments decided to jointly manage offshore petroleum resources.

25. This arbitration concerns three management regimes over Canada's offshore (also referred to as the "Frontier Lands")[11] under the Regulatory Regime:

(a) the federal regime, managed by the NEB since 1994, over the offshore and frontier lands north of 60° latitude (the Beaufort Sea, Arctic Islands, Eastern Arctic Offshore and

[7] **R-307**, *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 ("*Constitution Act, 1982*"); **R-308**, *Constitution Act, 1867*, 30 & 31 Vict., c. 3 ("*Constitution Act, 1867*") (The *Constitution Act, 1982*, which came into force on April 17, 1982, renamed the *British North America Act, 1867* as *Constitution Act, 1867*). Canada also includes three northern territories – Yukon, Northwest Territories and Nunavut.

[8] **R-308**, *Constitution Act, 1867*, s. 92A (1). Provincial jurisdiction includes the exploration, development, management and conservation of non-renewable natural resources.

[9] *See* **R-308**, *Constitution Act, 1867*, s. 91.

[10] In 1984, the Supreme Court of Canada ruled that the federal government has (1) the right to explore and exploit the mineral and other natural resources of the seabed and subsoil of the continental shelf in the area offshore Newfoundland, and (2) [by virtue of the peace, order, and good government power in its residual capacity] legislative jurisdiction to make laws in relation to the exploration and exploitation of the said mineral and other natural resources. **R-309**, *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86, pp. 89, 128-129.

[11] "Frontier Lands" refers to the C-NL Offshore Area, C-NS Offshore Area and the Federal Offshore Area, as defined in the following subparagraphs.

Hudson Bay), Gulf of St. Lawrence and the west coast offshore area (the "Federal Offshore Area");[12]

(b) the federal-provincial regime in Newfoundland and Labrador, managed by the CNLOPB since 1986, over the Canada-Newfoundland and Labrador Offshore Area ("C-NL Offshore Area");[13] and

(c) the federal-provincial regime in Nova Scotia, managed by the CNSOPB since 1987, over the Canada-Nova Scotia Offshore Area ("C-NS Offshore Area").[14]

B. Canada's Policy to Promote Exploration and Development of Petroleum Resources in the Frontier Lands

26. Canada has had a consistent governmental policy for the development of petroleum resources in the Frontier Lands since at least the 1960s, principally driven by certain foreign and domestic forces:

[12] Although the NEB was created in 1959, it has regulated oil and gas operational activities, including geophysical (seismic) operations, on frontier lands in northern Canada and in offshore areas not subject to federal-provincial joint management legislation only since 1991. *See* **RWS-01**, Witness Statement of Bharat Dixit, 16 January 2023 ("Dixit Witness Statement"), ¶¶ 8-9 and Annex I for a map of the NEB's jurisdiction over the Federal Offshore Area.

[13] **R-231**, Government of Canada and Government of Newfoundland and Labrador, "The Atlantic Accord: A Memorandum of Agreement between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing," 11 February 1985. On February 11, 1985, the Government of Canada and the Government of Newfoundland and Labrador entered into the Memorandum of Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing (the "C-NL Atlantic Accord") which was implemented in 1986 through mirror federal and provincial legislation (collectively, the "C-NL Accord Acts"). The C-NL Accord Acts contain corresponding provisions, however, the section numbers may not always identical. For ease of reference, citations will be made to the "C-NL Federal Accord Act". **RWS-02**, Witness Statement of Trevor Bennett, 16 January 2023 ("Bennett Witness Statement"), ¶¶ 9-10 and Annex I, for a map of the CNLOPB's jurisdiction over the of offshore area; and **C-151**, *Canada-Newfoundland and Labrador Atlantic Accord Implementation Act,* SC 1987, c. 3 ("*C-NL Accord Act*"), s. 9.

[14] **R-198**, Government of Canada and Government of Nova Scotia, "Canada-Nova Scotia Offshore Petroleum Resources Accord", 26 August 1986. On August 26, 1986, the Government of Canada and the Government of Nova Scotia entered into the *Canada-Nova Scotia Offshore Petroleum Resources Accord* (the "C-NS Accord") that recorded the federal-provincial agreement on offshore petroleum resource management and revenue sharing. The C-NS Accord was implemented in 1987-1988 through mirror federal and provincial legislation (collectively, the "C-NS Accord Acts"). The C-NS Accord Acts contain corresponding provisions, however, the section numbers may not always identical. For ease of reference, citations will be made to "C-NS Federal Accord Act". **RWS-03**, Witness Statement of Carl Makrides, 16 January 2023 ("Makrides Witness Statement"), ¶¶ 6-8 and Annex I, for a map of the Canada-Nova Scotia Oil and Petroleum Board ("CNSOPB")'s jurisdiction over the offshore area; and **C-152**, *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act,* SC 1988, c. 28 ("*C-NS Federal Accord Act*"), s. 9(1).

(a) The Crown, as the owner of the resources, controls the ability of companies and individuals interested in exploration and development to engage in those activities in the Frontier Lands.[15]

(b) Natural resources development in the Frontier Lands is relatively recent – exploration for hydrocarbons in the Frontier Lands did not begin before the 1960s, and not in earnest until the 1970s.[16]

(c) In the 1970s, due to the "oil crisis" resulting from the formation of the Organization of the Petroleum Exporting Countries ("OPEC"), the Canadian government introduced major policies and proposed legislation to make Canada self-sufficient in its energy consumption. The proposals included the exploration and development of domestic oil and gas supply in Frontier Lands.[17]

(d) Exploration and development of hydrocarbons in the Frontier Lands has its own unique set of challenges not experienced in onshore oil and gas development.[18] As a result, exploration and development in the Frontier Lands carries greater financial risks than onshore oil and gas activities and in other jurisdictions with mature hydrocarbon industries. There is also far less technical and geophysical data available to incentivize the industry to pursue operations there.[19]

27. Based on these considerations, Canada's policy on geophysical (or "seismic") information acquired on Frontier Lands balances two important but competing objectives: (1) the protection of the confidentiality of seismic materials for a reasonable period of time to allow for the commercialization of the information collected, thus incentivizing investment by companies in the acquisition of geophysical information in the Frontier Lands; and (2) the dissemination of that

[15] **R-001**, *GSI v. Encana***,** 2016 ABQB 230, ¶ 171.

[16] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 146.

[17] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 150; **R-310**, Energy, Mines and Resources Canada & Indian and Northern Affairs Canada, "Statement of Policy: *Proposed Petroleum and Natural Gas Act* and new *Canada Oil and Gas Land Regulations*", 19 May 1976 ("1976 Statement of Policy"), p. 1; **R-311**, Ministry of Energy, Mines and Resources Canada & Indian and Northern Affairs Canada, "An Energy Strategy for Canada: Policies for Self-Reliance", 1976, ("1976 Energy Strategy").

[18] **R-312**, Affidavit of Samuel Millar, sworn September 1, 2015, filed in *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 230 ("Millar Affidavit"), ¶ 5. Some of those challenges include the size and remoteness of the geographical areas, the number of exploration and development companies with the technical resources to operate in them, the physical challenges inherent in doing so, and the limited pre-existing knowledge of the subsurface geology.

[19] **R-312**, Millar Affidavit, ¶¶ 5 and 21; **R-310**, 1976 Statement of Policy, p. 1.

information in order to stimulate additional exploration interest, and improve efficiencies and safety for the benefit of the public as a whole.[20]

28. Government regulators have balanced these two competing objectives by allowing companies to acquire seismic materials on Crown land subject to the following conditions:

(a) the operator seeking to conduct seismic exploration must obtain authorization under the relevant statutory provisions;

(b) the operator may sell or licence any acquired seismic materials for profit;

(c) the operator has the legal obligation to submit seismic materials to the regulator in a specific format; and

(d) the regulator has the legal authority to publicly disclose seismic materials after the expiry of a confidentiality period, as set out in the Regulatory Regime.[21]

29. Although some variations exist between jurisdictions with respect to the confidentiality period of certain seismic materials, the Regulatory Regime has developed based on these objectives and conditions and has consistently applied for decades with respect to seismic surveys undertaken by domestic and foreign companies in the Frontier Lands.

C. Overview of the Regulatory Regime in Canada

30. While some aspects of the Regulatory Regime have evolved since the 1960s, the requirement to obtain an authorization to conduct seismic surveys, the requirement to submit seismic materials to government regulators and the concomitant legal right of the government regulators to disclose Submitted Seismic Materials to the public after the expiry of an applicable confidentiality period have existed in Canadian legislation since at least 1961.[22]

[20] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 171; **R-312**, Millar Affidavit, ¶¶ 7-8.

[21] **R-312**, Millar Affidavit, ¶¶ 9, 13.

[22] For the obligation to obtain an authorization: *see* **C-138**, *Canada Oil and Gas Land Regulations*, SOR 61/253, ("*1961 COGL Regulations*"), ss. 2(1)(k), (o), (v), 23, 24, 30, 32, 34. For the reporting requirement, *see* **C-138**, *1961 COGL Regulations*, s. 54(1), (2), (4). The *1961 COGL Regulations* were enacted pursuant to **R-344**, the *Territorial Lands Act*, R.S.C. 1952, c. 363 and **R-345**, the *Public Lands Grants Act*, R.S.C. 1952, c. 224. For the release of the information, s*ee* **C-138**, *1961 COGL Regulations*, s. 107(5); *see also* s. 28(a) and (b), ss. 36, 37, 40 and 62-64.

31. As discussed in greater detail in the following subsections, while the confidentiality period for exclusive seismic surveys has been subject to a five-year confidentiality period in the relevant jurisdictions in this dispute since 1982, non-exclusive seismic surveys have benefitted from a longer confidentiality period as summarized in the following chart:

Type of Seismic Data	Federal Offshore Area (NEB) Confidentiality Period	C-NL Offshore Area (CNLOPB) Confidentiality Period	C-NS Offshore Area (CNSOPB) Confidentiality Period
Exclusive	5 years (since 1982)	5 years (since 1982)	5 years (since 1982)
Non-Exclusive	15 years (since 1988)	10 years (since 1999)	10 years (since 1992)

1. Regulatory Framework from 1982 to 1986: *Canada Oil and Gas Act*

32. In the mid-1970s, policy discussions on how to incentivize exploration in Frontier Lands influenced the legislation adopted in the early 1980s concerning the applicable confidentiality period for seismic surveys. Up until that point, the *Canada Oil and Gas Land Regulations* ("*1961 COGL Regulations*") allowed for the disclosure of information submitted by a permittee or lessee two years after the cancellation, surrender or expiry of the permit or the oil and gas lease.[23]

33. In 1976, following the spike in international crude oil prices caused by OPEC, the Minister of Energy, Mines and Resources ("EMR") introduced a report in the House of Commons outlining an energy strategy including with respect to the stimulation of exploration and development activity in the Frontier Lands. The report noted that a reduction of the period of confidentiality for "geological information" would result in exploration companies having greater access to knowledge about the potential resources.[24] Around the same time, the *Statement of Policy: Proposed Petroleum and Natural Gas Act and New Canada Oil and Gas Land Regulations* ("1976 Statement of Policy"), recommended "shorter confidential periods for proprietary information i.e. geophysical, geological,

[23] **C-138**, *1961 COGL Regulations*, s. 107(5), see also s. 28(a) and (b), ss. 36, 37, 40 and 62-64.

[24] **R-311**, 1976 Energy Strategy, p. 134.

feasibility, environmental".[25] In explaining the goals of Canada's new energy policy, the Minister of EMR stated that "the early release of information, especially seismic data, that has been collected by the oil companies and filed with the federal resource management agencies" will act as an "incentive to exploration."[26]

34. These proposals were reflected in the *Canada Oil and Gas Act* ("*COGA*"), which was introduced to Parliament in 1980.[27] The "clause-by-clause" summary of the *COGA* presented to the Parliament of Canada made it clear that the intention was to require geophysical operators to report certain information acquired through a seismic program to the regulator and to require the public disclosure of reported seismic materials after the expiry of a statutory confidentiality period, as a condition for being granted authorization to acquire seismic data from the Frontier Lands.[28]

35. The *COGA* came into force on March 5, 1982 and applied to all of Canada's Frontier Lands. The COGLA was created in 1981 to administer the new regulatory regime.[29] *COGA* required that in order to "carry on any work or activity related to the exploration for or the production of oil or gas", the person had to obtain an operating licence and an authorization for each proposed work or activity.[30]

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[25] **R-310**, 1976 Statement of Policy, p. 2, Item 9. The proposed legislative change was for "[r]elease dates to be tied into completion dates of work programs"; for geophysical data, the proposed release date was "5 years from completion of program or upon termination of rights, whichever [was] earlier; 10 years in respect of work carried out prior to the date of this announcement and for which a specific governmental commitment ha[d] been given in writing." *See also* **R-310**, 1976 Statement of Policy, Schedule A: Proposed Legislative Elements as Related to Existing Permits and Leases, p. 9.

[26] **R-492**, House of Commons Debates, 19 May 1976, p. 13688. The proposed legislation being discussed (*Bill C-20*) was not enacted because of the prorogation of Parliament in 1977.

[27] **C-160**, *COGA*; **R-492**, House of Commons Debates, 19 May 1976, p. 13688 (on the Minister of EMR explaining that the intention of the *COGA* was for earlier release of proprietary information); **R-313**, House of Commons of Canada, Common Debates, "*Canada Oil and Gas Act*, Measure Respecting Oil and Gas Interests", 11 December 1980, p. 5668. *See also* **R-314**, House of Commons Debates, 11 December 1980, p. 5833 (discussion of the Honourable Maurice Foster describing that the purpose of making public geophysical and geological information was to promote exploration by interested parties).

[28] **R-315**, "'Clause-by-Clause' Review of relevant sections of COGA presented to Parliament during COGA's Introduction," p. 72. *See also* **R-312**, Millar Affidavit, ¶ 25.

[29] The COGLA administered the regulatory regime until 1991 when its regulatory authority was transferred to the NEB for the Federal Offshore Area. *See* **R-312**, Millar Affidavit, ¶ 26; **R-316**, NEB/COGLA, "Integration Discussion Paper", August 1991 ("NEB/COGLA – Discussion Paper"), p. 2

[30] **C-160**, *COGA*, s. 76 (3.1). *See also* **RWS-01**, Dixit Witness Statement, ¶ 13.

36. Section 50 of the *COGA* clearly set out the rules for public disclosure of seismic materials after the end of a five-year confidentiality period for information submitted in respect of a seismic program on the Frontier Lands, without any distinction between exclusive and non-exclusive seismic programs.[31] Guidelines issued by the COGLA in the 1980s informed geophysical program operators about the approval and reporting requirements for seismic operations on the Frontier Lands.[32]

37. Furthermore, the statutory confidentiality period for Submitted Seismic Materials for exclusive or non-exclusive seismic programs has remained unchanged since 1982. Nevertheless, as discussed below, the confidentiality period was administratively extended in the late 1980s and 1990s for non-exclusive seismic programs beyond the five-year statutory rule which had been in place since 1982.

2. *Canada Petroleum Resources Act* of 1986

38. The *Canada Petroleum Resources Act* ("*CPRA*") replaced the *COGA* in 1986.[33] The *CPRA*, along with the 1985 *Canada Oil and Gas Operations Act* ("COGOA"),[34] continue to govern the issuance of geophysical licences in the Federal Offshore Area.[35] Like its predecessor legislation, *CPRA* sought to strike a balance between incentivizing data collection and encouraging exploration in the Frontier Lands.[36] In particular, Section 101 of the *CPRA*, which replaced Section 50 of the *COGA*, maintains a five-year confidentiality period for Submitted Seismic Materials.

39. In drafting the *CPRA*, the Government of Canada engaged in extensive consultations with industry stakeholders,[37] including with one of the Claimants, Mr. Davey Einarsson, who was Vice President Worldwide Marine Marketing Operations for Delaware GSI during this time, and his

[31] **C-160**, *COGA*, ss. 50 and 50(3)(d).

[32] **R-317**, COGLA, "Geophysical Surveys on Canada Lands: Guidelines for Approvals and Reports", November 1982 ("*1982 COGLA Guidelines*"); **R-318**, COGLA, "Geophysical Surveys on Canada Lands: Guidelines for Approvals and Reports", January 1983 ("*1983 COGLA Guidelines*"); **R-238**, COGLA, "Geophysical and Geological Programs on Canada Lands: Guidelines for Approvals and Reports", March 1984 ("*1984 COGLA Guidelines*").

[33] **C-167**, *Canada Petroleum Resources Act*, R.S.C. 1985 c. 36 (2nd Supp.) ("*CPRA*").

[34] **C-150**, *COGOA*.

[35] *See also* **RWS-01**, Dixit Witness Statement, ¶ 16.

[36] **R-319**, *Canada Petroleum Resources Act*, Clause-by-Clause Review, 1986, p. 84 (emphasis added).

[37] **R-320**, House of Commons of Canada, "Commons Debates", 33rd Parliament, 2nd session, 14 October 1986, pp. 354-355, Hon. Marcel Masse. *See* Statement of Minister Masse October 14, 1986 explaining that the Canadian Government had proceeded with broad consultations with the industry. **R-493**, Affidavit of Rowland Harrison, sworn on 28 August 2015, filed in *GSI v. Encana*, 2016 ABQB 230, ¶¶ 8-11; **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 175.

colleague Mr. John Clink, then President and Manager of Arctic Marine Exploration of Delaware GSI. Messrs. Einarsson and Clink actively lobbied the Government of Canada to extend the confidentiality period for Submitted Seismic Materials beyond five years.

40. For example, in an October 7, 1986 letter to the Minister of EMR concerning a non-exclusive seismic program that Delaware GSI had conducted off North Labrador and in Davis Strait in late 1982, Mr. Clink stated that "[p]resent legislation would make that data openly available, for free, in 1988" and proposed the legislation to be changed as follows to:

> 1. Hold "Speculative" or "Non-exclusive" data confidential in perpetuity, or, failing that,
>
> 2. Hold it confidential for a greatly extended time, such as fifteen years (our normal restriction with the licensee in other areas of the world), when presumably it would have little or no commercial value […][38]

41. On November 18, 1986, Mr. Clink testified on behalf of Delaware GSI before the Standing Senate Committee on Energy and Natural Resources and made a similar proposal for the disclosure of information relating to non-exclusive seismic programs:

> Finally, I have a range of suggestions. Perhaps the first one is not in line with what has generally been done in Canada. The second suggestion is in line and is a reasonable suggestion given the present state of the business. The suggestion is that non-exclusive data be held confidential by the government for a period of 15 years.[39]

42. Ultimately, however, the Government decided that continuing the statutory five-year confidentiality period for seismic data that had existed since 1982 was still appropriate. The Minister of EMR, Marcel Masse, informed GSI Delaware of the decision by letter on December 3, 1986:

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[38] **C-165**, Letter from John W. Clink, Arctic Marine Exploration Manager, Geophysical Service Inc. ("GSI") to Marcel Masse, Minister of Energy, Mines and Resources ("EMR"), 7 October 1986, p.3; **R-321**, Transcript of the Proceedings of Standing Senate Committee on Energy and Natural Resources, 18 November 1986 ("Senate Transcript (22 November 1986)"), p. 4:29.

[39] **R-321**, Senate Transcript, 22 October 1986. At p. 4:31 of the transcript, Mr. Clink also stated the following: "As to the five-year limit, this becomes an emotional issue when upper management is approached and asked to spend so many millions of dollars on a survey and there is an element of chance in terms of making their money back. They know full well that the government will release the information in five years and that, after three or four years, people will realize that in another year or two they will have free access to that information."

> I have given the matter careful consideration and, for the reasons enumerated below, I feel that the Bill properly balances the public's need to have access to information against the right of absolute exclusivity of information.
>
> The overall objective in releasing technical data arising from geophysical work and drilling operations to the public is to facilitate the dissemination of this information throughout the industry in a timely manner so that the common, collective knowledge of the petroleum geology of our frontier basins increases, both within the industry and the scientific community. […]
>
> In summary, we have concluded that the five-year confidentiality period for geophysical data should remain in the proposed legislation now being reviewed by the Senate (Bills C-5 and C-6). I am confident that this practice will lead to efficient exploration and discovery of our hydrocarbon resources, without unduly prejudicing the interest of the geophysical service industry in the use of its non-exclusive data.[40]

3. Management by the COGLA, and later the NEB, Over the Federal Offshore Area

43. The *COGOA* is the enabling statute for the COGLA's – and later the NEB's– authority to grant licences and authorizations for geophysical operations.[41] As a condition for receiving any authorization to conduct seismic surveys, subsequent regulations also set out reporting requirements for seismic operators.[42]

44. Despite the five-year confidentiality period under Section 101(3)(d) of the *CPRA*, in 1988 the COGLA exercised its administrative authority to extend the applicable confidentiality period for non-exclusive seismic surveys by 10 years, making such information confidential for a total of 15 years

[40] **R-286**, Letter from Marcel Masse, Minister of EMR, to John W. Clink, Arctic Marine Exploration Manager, GSI, 3 December 1986, pp. 1, 2-3. Mr. Davey Einarsson expressed his personal disagreement with the decision to maintain the five-year confidentiality period. **R-285**, Letter from Davey Einarsson, GSI to Marcel Masse, EMR, 17 February 1987.

[41] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 185-188. **C-150**, *COGOA*, s. 5(3). *See also* **C-142**, *Canada Oil and Gas Operations Regulations*, SOR/83-149, s.5, which sets out that all geophysical operations on frontier lands must be authorized by the NEB before they begin.

[42] *See e.g.*, **R-322**, *Canada Oil and Gas Geophysical Operations Regulations*, SOR/96-117 ("*COGGOR*"), s. 38. Since the 1980s, COGLA also set out procedures for obtaining an operating licence and a program approval for geophysical work, and detailed reporting requirements after completion of the program. **R-317**, *1982 COGLA Guidelines*, s. 7; **R-318**, *1983 COGLA Guidelines*, s. 7; **R-238**, *1984 COGLA Guidelines*, s. 7; **R-239**, COGLA, "Geophysical and Geological Programs on Frontier Lands: Guidelines for Approvals and Reports", January 1987 ("*1987 COGLA Guidelines*"), ss. 8.1(b) and 8.2.

after completion of the work.[43] The 15-year confidentiality period for non-exclusive seismic programs continues to be the policy to this day for the Federal Offshore Area.[44]

45. COGLA's administrative decision to extend the confidentiality period resulted in part from industry consultations, which included the correspondence with Mr. Davey Einarsson and his colleague at Delaware GSI, Mr. John Clink.[45] Ultimately, Mr. Clink, on behalf of Delaware GSI, publicly expressed his agreement with the 15-year confidentiality period to government officials and other industry stakeholders.[46]

4. Management by the CNLOPB Over the C-NL Offshore Area

46. In 1985, the C-NL Accord Acts established the current legislative requirements to obtain authorization for seismic programs ("Geophysical Program Authorizations" or "GPAs") and the rules for the submission and disclosure of seismic materials in the C-NL Offshore Area.[47]

47. Under the C-NL Accord Acts, in order to "carry on any work or activity related to the exploration or drilling for or the production, conservation, processing or transportation of petroleum in the [C-NL] offshore area", an operator is required to obtain an operating licence and an authorization from the CNLOPB.[48] An authorization is subject to such approvals and requirements as the CNLOPB determines.[49]

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[43] **C-169**, Memorandum, G.R. Campbell, Director General, Resource Evaluation Branch to M.E. Taschereau, Administrator, RE: "Disclosure of Geophysical Data", 31 July 1987; **C-170**, Canada Oil and Gas Lands Administration, Resource Evaluation Branch, "Disclosure of Geophysical Data: Discussion Paper on Modification to the Five Year Confidential Period", 8 January 1988; **RWS-01**, Dixit Witness Statement, ¶ 18.

[44] **RWS-01**, Dixit Witness Statement, ¶ 24.

[45] *See e.g.*, **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 193. **R-323**, Letter from Graham R. Campbell, Director General, Resource Evaluation, COGLA to John Clink, GSI, 16 February 1988.

[46] **R-324**, Minutes of the CPA Negotiating Subcommittee Meeting with Graham Campbell, 22 January 1988, p. 11 ("John [Clink] agreed with [COGLA Director General, Graham Campbell's] summary provided that the confidentiality period is long enough.").

[47] **C-151**, *C-NL Federal Accord Act*, ss. 137, 138.

[48] **C-151**, *C-NL Federal Accord Act*, ss. 137, 138(1).

[49] **C-151**, *C-NL Federal Accord Act*, s. 138(4). A GPA may also contain conditions in relation to the specific work or activities, as established by the CNLOPB. An operator cannot conduct a seismic program or any other type of geological or geophysical program in relation to the C-NL Offshore Area without a GPA issued by the CNLOPB.

48. In 1995, the *Newfoundland Offshore Area Oil and Gas Operations Regulations* were promulgated, followed by the *Newfoundland Offshore Area Petroleum Geophysical Operations Regulations* in 1996 ("*1996 Geophysical Regulations*").[50] The former address requirements for obtaining an operating licence,[51] whereas the latter regulations address geophysical reporting requirements and retention of geophysical records in Canada. The *1996 Geophysical Regulations* also set out requirements for operators to submit (1) a report on the progress of the operation, and (2) a final report that includes the information related to the seismic data acquired.[52]

49. Furthermore, Section 119 of the C-NL Federal Accord Act sets out a statutory five-year confidentiality period for Submitted Seismic Materials for both exclusive and non-exclusive seismic programs.[53]

50. Nevertheless, in February 1999, the CNLOPB decided to exercise its administrative discretion to extend the applicable confidentiality period for non-exclusive seismic programs to 10 years.[54] This decision was reflected in the November 2001 Geophysical, Geological, Environmental and Geotechnical Program Guidelines ("CNLOPB Guidelines").[55] In addition to this publication, the

[50] **R-232**, *Newfoundland Offshore Area Oil and Gas Operations Regulations*, SOR/88-347 ("*NOAOGOR*"); **R-233**, *Newfoundland Offshore Area Petroleum Geophysical Operations Regulations*, SOR/95-334 ("*1996 C-NL Geophysical Regulations*")**.**

[51] **R-232**, *NOAOGOR*, s. 3.

[52] **R-233**, *1996 C-NL Geophysical Regulations*, Part IV.

[53] **C-151**, *C-NL Federal Accord Act*, s. 119(2), (3), (5) (emphasis added). These provisions have not been amended since the Act entered into force.

[54] **RWS-02**, Bennett Witness Statement, ¶ 17.

[55] **R-242**, CNLOPB, *Geophysical, Geological, Environmental and Geotechnical Program Guidelines*, November 2001 ("2001 CNLOPB Guidelines"), s. 8 ("Release of Data"). The same was repeated in the April 2004 and May 2008 CNLOPB Guidelines, after which GSI stopped applying for seismic survey authorizations. *See* **R-243**, CNLOPB, *Geophysical, Geological, Environmental and Geotechnical Program Guidelines*, April 2004 ("2004 CNLOPB Guidelines"), s. 8 ("Release of Data") ("Under the [Accord] Acts, reports and data resulting from most technical programs in the Newfoundland offshore area cease to be privileged five years following completion of the program. The Board has, however, extended the confidentiality period for non-exclusive programs to ten years following program completion. The completion date for geophysical, geological and geotechnical programs involving field work is established as six months following termination of the field work […] A full listing of the geophysical and geological reports and data released by the Board may be found in the publication *Released Geophysical and Geological Reports – Newfoundland Offshore Area*, copies of which may be obtained from the Board office or from our website under 'Publications'"); **R-244**, CNLOPB, *Geophysical, Geological, Environmental and Geotechnical Program Guidelines*, May 2008 ("2008 CNLOPB Guidelines"), s. 8 ("Release of Data").

CNLOPB indicated in its GPAs the applicable Guidelines and confidentiality period, after which the Submitted Seismic Materials would be subject to public disclosure.[56] Furthermore, GSI and the industry were given notice of the CNLOPB's decision.[57]

5. Management by the CNSOPB Over the C-NS Offshore Area

51. In 1986, the C-NS Accord Acts established the current legislative requirements to obtain an authorization for seismic programs ("Geophysical/Geological Work Authorizations" or "GWAs") and the rules for the submission and disclosure of Submitted Seismic Materials in the C-NS Offshore Area. The C-NS Accord Acts provide that "[n]o person shall carry on any work or activity related to the exploration or drilling for or the production, conservation, processing or transportation of petroleum in the [C-NS] offshore area" unless that person (i) holds an operating licence issued by the CNSOPB, (ii) has obtained an authorization from the CNSOPB for each such work or activity, and (iii) where required, is authorized or entitled to carry on business in the place where the proposed work or activity would be carried on.[58]

52. In 1995, the *Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations* ("*1995 C-NS Regulations*") further established requirements to submit seismic materials to the CNSOPB Chief Conservation Officer within 12 months after the date of termination of a geophysical operation.[59]

53. Section 122 of the C-NS Federal Accord Act sets out a statutory five-year confidentiality period for Submitted Seismic Materials for both exclusive and non-exclusive seismic programs.[60]

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[56] Each GPA issued to GSI was accompanied by a cover lever confirming the applicable Guidelines and the time period after which the submitted seismic materials would cease to be privileged and released to the public. *See* **RWS-02**, Bennett Witness Statement, ¶ 35, citing to GSI's seismic programs approved by the CNLOPB.

[57] **R-236**, Letter from Hal Stanley, CNLOPB to Davey Einarsson, GSI, 24 February 1999; **R-237**, Letter from H.H. Stanley, CNLOPB to Mr. W. Kammermeyer, Canadian Association of Geophysical Contractors, 24 February 1999. **RWS-02**, Bennett Witness Statement, ¶¶ 17-18, 20-23.

[58] **C-152**, *C-NS Federal Accord Act*, ss. 140 and 142(1). *See also* **RWS-03**, Makrides Witness Statement, ¶ 11.

[59] **C-141**, *Nova Scotia Offshore Area Petroleum Geophysical Operations Regulations*, SOR/95-144, ss. 25(1) and (9). As explained above, because the federal and provincial regulations contain corresponding provisions, for ease of reference, in this submission citations will be made to the federal *1995 C-NS Regulations*.

[60] **C-152**, *C-NS Federal Accord Act*, s. 122. *See also* **RWS-03**, Makrides Witness Statement, ¶ 11.

Nevertheless, in 1992 the CNSOPB decided to exercise its administrative discretion to extend the applicable confidentiality period for non-exclusive seismic programs to 10 years:

> Exclusive geophysical and geological reports, maps, data and other materials are kept confidential for 5 1/2 years after termination of the field work.
>
> Non-Exclusive or Speculative geophysical data, reports and maps will be kept confidential for at least ten years from the completion of the field work. […]
>
> Reports and data are made available to the public at the termination of relevant confidentiality periods.[61]

D. Logistics of Public Disclosure of Seismic Materials by the Boards After the Expiry of the Applicable Confidentiality Period

54. As discussed above, for decades, government regulators have established reporting requirements as a condition for obtaining an authorization to conduct seismic surveys in the Frontier Lands. Upon expiry of the applicable confidentiality period, this information is subject to public disclosure. While there have been some variations over time as to how the disclosure was done as between the Boards, the disclosure of certain Submitted Seismic Materials after the confidentiality period has remained constant.

1. Submission of Seismic Materials to and Public Disclosure by the COGLA and the NEB

55. COGLA's guidelines and regulations required operators to submit paper and mylar (film) copies of processed seismic sections and seismic shotpoint maps.[62] Importantly, both the 1984 and 1987 COGLA Guidelines expressly provided that the COGLA could request "copies of other versions

[61] **R-325**, CNSOPB, Geophysical and Geological Programs in the Nova Scotia Offshore Area Guidelines for Work Programs, Authorizations & Report, 1992 ("1992 CNSOPB Guidelines"), s. 9 ("Confidentiality") (emphasis added). The 1992 CNSOPB Guidelines were updated in 2015 to provide for the same confidentiality period but did not apply to GSI's seismic programs in the C-NS Offshore Area, the last of which was completed in 2003. GSI's seismic operations in the C-NS Offshore Area between 1998 and 2003 were authorized under the conditions set out in the 1992 CNSOPB Guidelines and the *1995 C-NS Geophysical Regulations*. *See also* **RWS-03**, Makrides Witness Statement, ¶¶ 22, 24 and 35; and **R-326**, CNSOPB, Geophysical and Geological Programs in the Nova Scotia Offshore Area Guidelines for Work Programs, Authorizations & Report, 2015.

[62] *See e.g.*, **R-317**, *1982 COGLA Guidelines*, s. 7; **R-318**, *1983 COGLA Guidelines*, s. 7; **R-238**, *1984 COGLA Guidelines*, s.7; **R-239**, *1987 COGLA Guidelines*, s. 8.2; and **RWS-01**, Dixit Witness Statement, ¶ 26.

of the processed seismic.[63] Further, the 1987 Geophysical Surveys on Canada Lands: Guidelines for Approvals and Reports ("COGLA Guidelines") stated that the COGLA and the CNLOPB were developing a computerized shotpoint location system and that operators would be required to submit digital shotpoint location tapes with their final reports.[64]

56. Since the NEB took over the COGLA's responsibilities in 1994, it has required operators to submit the requisite seismic materials in both paper and a reproducible mylar format. Starting in 2008, the NEB has required a paper copy and a copy in electronic format (i.e., a CD with an electronic file in .tif, .pdf or .jpg format).[65] Importantly, the NEB has never collected field data, which has remained in the exclusive possession of operators. Nor has the NEB collected processed data, including in SEG-Y format. Accordingly, the NEB has never made field or processed data publicly available.[66]

57. Pursuant to the *Canada Oil and Gas Geophysical Operations Regulations* ("*COGGOR*"), exploration licence holders that reprocess seismic data can voluntarily submit the reprocessed seismic materials to the NEB to obtain a credit against allowable expenditures credits.[67]

58. Since at least 1984, COGLA and then the NEB, through the Frontier Information Office ("FIO"), have made seismic materials available to the public for viewing and for reproduction following the expiration of the confidentiality period.[68] For example, a 1984 COGLA Catalogue stated that "[a]ll geophysical/geological reports have been microfilmed for the purposes of archival storage and data reproduction"[69] and were available to the public at COGLA's offices in Halifax,

[63] **R-238**, *1984 COGLA Guidelines*, s.7, note on p. 28; **R-239**, *1987 COGLA Guidelines*, s. 8.2 on p. 21.

[64] **R-239**, *1987 COGLA Guidelines*, s.8.2(h), note 1.

[65] **RWS-01**, Dixit Witness Statement, ¶ 26 (this requirement only ever applied to GSI program 2008 2D Marine Seismic Survey North Labrador Sea NEB#5554116).

[66] **RWS-01**, Dixit Witness Statement, ¶ 26.

[67] **C-142**, COGGOR, s. 38(6) and **RWS-01**, Dixit Witness Statement, ¶ 51.

[68] **RWS-01**, Dixit Witness Statement, ¶¶ 27-28.

[69] **R-226**, COGLA, "Released Geophysical and Geological Reports – Canada Lands", January 1984, ("1984 COGLA Catalogue"), p. 2 ("Report Management – Microfilm Copy").

Calgary and St. John's.[70] The 1984 COGLA Catalogue also explained how "[d]uplication of microfilm materials can be arranged" and noted specifically that "[m]icrofilm reproduction will generally be done by a commercial firm."[71]

59. Similar to the COGLA, the NEB published in 1995 a document describing the FIO and its services to the public, including how copies of seismic data for which confidentiality period had expired could be obtained.[72] Previously, the NEB disclosed seismic materials through the FIO only in microfiche format, which substantially limited the readability of the materials. However, in the mid-2000s, the NEB started to move to electronic formats (usually in .jpg, .tif and .pdf) as part of a more general move in data storage from microfiche, though the existing content of the FIO remains in microfiche format.[73] The NEB has not converted, and is not pursuing a conversion of, the contents of the FIO as a whole from microfiche into electronic formats.

2. Submission of Seismic Materials to and Public Disclosure by the CNLOPB

60. Part IV of the *Newfoundland Offshore Area Petroleum Geophysical Operations Regulations* ("*1996 C-NL Geophysical Regulations*") sets out the requirements for operators to submit to the CNLOPB information, material and documentation in relation to work and activity conducted in the C-NL Offshore Area, throughout the geophysical operation and within 12 months after the date of termination of a geophysical operation.[74] Section 25 of the *1996 C-NL Geophysical Regulations* establishes the information that is required to be submitted to the CNLOPB's Chief Conservation Officer in a final report.[75] Since 1996, the CNLOPB has issued guidelines for geophysical, geological, environmental and geotechnical programs in the C-NL Offshore Area, which provide additional

[70] **R-226**, 1984 COGLA Catalogue, pp. 3-4 ("Report Management – Distribution of Hard Copy and Microfilm").

[71] **R-226**, 1984 COGLA Catalogue, p. 5 ("Reproduction of Microfilm Data").

[72] **R-290**, NEB, "The Frontier Information Office: Information Bulletin", June 1995, p. 1; **RWS-01**, Dixit Witness Statement, ¶¶ 31-32.

[73] **R-327**, Affidavit of Bharat Dixit, sworn August 28, 2015, filed in *Geophysical Service Incorporated v Encana Corporation*, 2016 ABQB 230, ¶ 20.

[74] **R-233**, *1996 C-NL Geophysical Regulations*, Part IV.

[75] **R-233**, *1996 C-NL Geophysical Regulations*, s. 25(1).

guidance as to the content of the final report that an operator must submit, including the format of the information.[76]

61. Each CNLOPB Guideline between 1999 and 2008 has required operators to submit paper and mylar (film) copies of "each migrated seismic section" and "digital seismic traces" in SEG-Y format.[77] Importantly, these guidelines also expressly provided that the CNLOPB could request "[c]opies of other versions of the processed seismic data."[78] For non-exclusive geophysical surveys, the operator is required to submit a final report, as described above, "plus any additional digital data required."[79]

62. Similar to the federal regime, exploration and significant discovery licence representatives that reprocessed the seismic data can voluntarily submit the reprocessed data to the CNLOPB to obtain a credit against their security deposit for work expenditure commitments.[80]

63. In accordance with the C-NL Accord Acts, the CNLOPB operates a Library/Information Resources Centre ("IRC") in St. John's.[81] Requestors are allowed to view or obtain copies of

[76] **R-241**, CNLOPB, "Geophysical, Geological, Environmental and Geotechnical Program Guidelines, January 1999 ("1999 CNLOPB Guidelines"), s. 5.0; **R-242**, 2001 CNLOPB Guidelines, s. 5.0; **R-243**, 2004 CNLOPB Guidelines, s. 5.0; **R-244**, 2008 CNLOPB Guidelines, s. 5.0.

[77] *See e.g.*, **R-241**, 1999 CNLOPB Guidelines, s. 5.2(d) ("Copies of each migrated seismic section. Where no migrated sections were prepared, copies of the last processing of non-migrated sections should be submitted. One paper copy on pre-folded paper and one mylar (film) copy are required. For 3-D surveys copies of lines and traces are required. … Two copies of the digital seismic traces are also required, either migrated or non-migrated as described previously. The digital data should be in SEG -Y format with header information as shown in Appendix 2. Data should be submitted on 8mm tapes, maximum size 5 GB. Copies of other versions of the processed seismic data may be requested."); **R-242**, 2001 CNLOPB Guidelines, s. 5.2(d), **R-243**, 2004 CNLOPB Guidelines, 5.2(d); and **R-244**, 2008 CNLOPB Guidelines, s. 5.2(d).

[78] **R-241**, 1999 CNLOPB Guidelines, s. 5.2(d); **R-242**, 2001 CNLOPB Guidelines, s. 5.2(d); **R-243**, 2004 CNLOPB Guidelines, s. 5.2(d); **R-244**, 2008 CNLOPB Guidelines, s. 5.2(d).

[79] **R-241**, 1999 CNLOPB Guidelines, s. 5.3; **R-242**, 2001 CNLOPB Guidelines, s. 5.3; **R-243**, 2004 CNLOPB Guidelines, s. 5.3; **R-244**, 2008 CNLOPB Guidelines, s. 5.3;

[80] **R-233**, *1996 Geophysical Regulations*, s. 25(6) ("Allowable Expenditures"); **RWS-02**, Bennett Witness Statement, ¶ 53.

[81] **C-151**, C-NL Federal Accord Act, s. 22; **RWS-02**, Bennett Witness Statement, ¶ 27.

Disclosed Seismic Materials at the IRC, including (a) operations reports; (b) processing reports; (c) interpretation reports; (d) program location information; and (e) seismic sections.[82]

64. Prior to 2015, the CNLOPB had never disclosed "anything but copies of the paper reports, or of the paper or mylar seismic sections that accompanied those reports, to a requestor."[83] After 2015, PDF or mylar copies have been sent to members of the public requesting such material. While the CNLOPB has collected SEG-Y data in accordance with the C-NL Accord Acts, the regulations and the CNLOPB Guidelines, the CNLOPB has never provided GSI's digital seismic data to requestors.[84] In other words, GSI's reports, navigation charts and seismic section images were provided to requestors in paper format until 2015, then in PDF format, but not in SEG-Y format.

3. Submission of Seismic Materials to and Public Disclosure by the CNSOPB

65. The Geophysical and Geological Programs in the Nova Scotia Offshore Area Guidelines for Work Programs, Authorizations & Reports ("CNSOPB Guidelines") of 1992 and then the *1995 C-NS Geophysical Regulations* set out the reporting requirement in hardcopy format (paper and mylar), with the exception of digital seismic navigation data.[85] While the CNSOPB's Chief Conservation Officer has the authority to require an operator to submit other information, such as digital seismic data in SEG-Y format, the CNSOPB does not publicly disclose SEG-Y data received from operators. Furthermore, the CNSOPB does not collect or release raw or field data.[86]

[82] **RWS-02**, Bennett Witness Statement, ¶¶ 26-27. As described by Mr. Bennett, the CNLOPB does not have any GSI interpretation reports in its records.

[83] **R-227**, Affidavit of John Andrews, sworn August 27, 2015, filed in GSI v. Encana, 2016 ABQB 230, ¶ 42.

[84] **RWS-02**, Bennett Witness Statement, ¶ 26.

[85] **RWS-03**, Makrides Witness Statement ¶ 20.

[86] **RWS-03**, Makrides Witness Statement, ¶¶ 19-20. Both the 1992 CNSOPB Guidelines and then the *1995 C-NS Geophysical Regulations* were in effect at the time GSI conducted non-exclusive surveys in the C-NS Offshore Area between 1998 and 2003.

66. In addition, pursuant to the *1995 C-NS Geophysical Regulations*, oil and gas companies can voluntarily submit reprocessed seismic data to the CNSOPB to obtain a credit against work expenditure commitments.[87]

67. Once the applicable confidentiality period expires, Disclosed Seismic Materials for non-exclusive seismic programs are made available to the public at the Nova Scotia Geoscience Research Centre ("NS GRC"), which has been in operation since 1992, for viewing in paper and mylar format.[88]

68. Since December 2007, the CNSOPB has made PDF copies of seismic materials for exclusive seismic programs available to the public online via its digital Data Management Centre ("DMC").[89] While there had been discussions with industry in the mid-2000s to make non-exclusive survey materials available online and in digital format, that proposal did not proceed.[90] Accordingly, materials from non-exclusive surveys are not available to download on the DMC and can only be obtained in paper or mylar format from the NS GRC.[91]

E. Canada's Regulatory Regime for the Submission and Public Disclosure of Seismic Materials is Similar to That of Foreign Jurisdictions

69. Canada is not unique in its approach regarding the authorization, collection and public release of seismic materials in its offshore. Many countries adopt a regulatory regime similar to that of Canada. For example, Norway, Australia, Brazil, Falkland Islands, the United Kingdom and the United States all require operators to submit seismic materials to regulators, which is held in confidence for a prescribed statutory period before the information is made publicly available, as a condition for obtaining a permit to conduct seismic surveys in their offshore.[92] The global seismic

[87] **C-141**, 1995 *C-NS Federal Geophysical* Regulations, s. 25(5) -(6); and **RWS-03**, Makrides Witness Statement, ¶ 53.

[88] **RWS-03**, Makrides Witness Statement, ¶¶ 28-29.

[89] **RWS-03**, Makrides Witness Statement, ¶ 31.

[90] **RWS-03**, Makrides Witness Statement, ¶ 31.

[91] **RWS-03**, Makrides Witness Statement, ¶ 31.

[92] **RER-02**, Expert Report of Robert Hobbs, 16 January 2023, ("Hobbs Report"), ¶ 76; **R-029**, *Geophysical Service Incorporated v. Her Majesty in right of her Government of the Falkland Islands*, Claim No. SC/CI/05/14, Judgment, 9 December 2016 ("*GSI v. Falkland Islands*, 9 December 2016 "), ¶ 294.

industry and their oil and gas company customers are well-aware of those rules and always take them into account when making their decisions to invest in a seismic survey.[93]

III. THE CLAIMANTS' SEISMIC DATA BUSINESS AND THEIR VOLUNTARY PARTICIPATION IN CANADA'S REGULATORY REGIME

A. Establishment of GSI

1. GSI is a Separate and Distinct Entity from Delaware GSI and Halliburton

70. From 1956 to 1989, prior to founding GSI, Mr. Davey Einarsson was an employee of Delaware GSI, a division of Texas Instruments, and subsequently, in 1989, an employee of Halliburton, after it acquired Delaware GSI.[94] Over the course of his employment with both Delaware GSI and Halliburton, Mr. Davey Einarsson occupied various positions both in Canada and abroad,[95] including as Vice-President, assigned to offshore operations in Alaska, United States and northern Canada, during which time offshore seismic surveys were conducted in the Arctic and eastern Canada.[96] Around 1985, Mr. Davey Einarsson began to manage worldwide marine operations and data processing for Delaware GSI, which included the operations in Canada's offshore.[97]

71. Following the termination of his employment with Halliburton,[98] Mr. Davey Einarsson founded Geophysical Speculative Investment Corp. ("Geophysical Speculative"), a Houston-based company

[93] **RER-02**, Hobbs Report, ¶ 76(4)(c) ("In my experience, most governments require data disclosure after a reasonable period. This is known and understood throughout the industry. Understanding the regulatory framework and applicable confidentiality period upfront is crucial to informing a MC seismic company's investment decision and assessment of whether it can achieve an adequate [rate of return] on its investment.").

[94] **CWS-03**, Witness Statement of Theodore David Einarsson, 2 December 2019 ("Davey Einarsson Witness Statement"), ¶¶ 7-13.

[95] **CWS-03**, Davey Einarsson Witness Statement, ¶¶ 7-13.

[96] **C-126**, Davey Einarsson, *A Life of Adventure* (Calgary: Theophania Publishing, 2015) ("Davey, A Life of Adventure"); and **CWS-03**, Davey Einarsson Witness Statement, ¶¶ 9 - 10.

[97] **R-328**, Transcript of "Questioning of T. David Einarsson by Mr. Marko Vesely in *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 230, 13 August 2015, p. 22.

[98] **C-125**, Canadian Society of Exploration Geophysicists, "'Something no one ever did before!' An Interview with Davey Einarsson", Recorder: Official publication of the Canadian Society of Exploration Geophysicists, May 2008 Edition, Vol. 33, Issue No. 05 ("CSEG Recorder").

incorporated in Texas, United States, in 1992.[99] The Claimants' enterprise, GSI, was subsequently incorporated in Alberta in 1993.[100] According to Mr. Davey Einarsson, "Geophysical Speculative entered into corporate transactions with other entities, ultimately concluding with GSI."[101]

72. Despite the similarities in corporate names, Geophysical Speculative and GSI are separate entities, bearing no relation to Delaware GSI, which had been in operation for over 25 years prior to Mr. Davey Einarsson's employment and had since been purchased in 1989 by Halliburton.[102] However, Mr. Davey Einarsson started using Delaware GSI's trademarks and services marks, including its logo, (the "GSI Marks"). Shortly after the formation of Geophysical Speculative, Halliburton brought a claim against GSI, alleging that GSI had begun offering products and services to the oil and gas industry using the GSI Marks.[103] In response, GSI admitted to using the GSI Marks, but argued that these marks had been abandoned by GSI.[104]

[99] **CWS-03**, Davey Einarsson Witness Statement, ¶ 16.

[100] **CWS-03**, Davey Einarsson Witness Statement, ¶ 3. **C-045**, Certificate of Incorporation of 559720 Alberta Ltd. and related amendments, 18 March 1993.

[101] On May 8, 1994, Geophysical Speculative sold its "Canadian library of speculative geophysical data, including all license agreements associated therewith" to Geophysical Service Incorporated ("GSI"). Later, on September 30, 1995, GSI sold its "Canadian library of speculative geophysical data" to Ardal Resources Inc. On January 1, 1999, Ardal Resources Inc. merged with GSI, and the latter name was kept. **CWS-03**, Davey Einarsson Witness Statement, ¶¶ 16, and 30. *See* **C-050**, Seismic Data Purchase Agreement between Geophysical Speculative Investment Corp. and Geophysical Service Incorporated, 5 August 1994; **C-051**, Seismic Data Purchase Agreement between Geophysical Speculative Investment Corp. and Geophysical Service Incorporated, 30 September 1995; and **C-052**, Industry Canada, "Certificate of Amalgamation Canada Business Corporations Act, Geophysical Service Incorporated", 1 January 1999.

[102] **C-046**, *Halliburton v. GSI*, United States District Court, Southern District of Texas, Houston Division, C.A. No. H-92-4079, 31 December 1992, Complaint ("*Halliburton v. GSI*, (31 December 1992)"), ¶ 6.

[103] **C-046,** *Halliburton v. GSI*, (31 December 1992), ¶¶ 16-18; 19-21. According to Halliburton's Complaint at ¶¶ 19-21 ("[19] Defendant's use of one or more of the GSI Marks in this connection with the sale of its goods and services will allow Defendant to unjustly receive the benefit of the goodwill and recognition built up at the great labor and expense of Plaintiff and its predecessors-in-interest, and to gain acceptance of its goods and services based no solely on their own merits, but also on the reputation and goodwill of Plaintiff and its predecessors-in-interest. [20] Defendant's use of one or more of the GSI Marks constitutes an invasion of valuable property rights of the Plaintiff in the GSI Marks and in the attendant goodwill associated therewith in a manner that unjustly enriches Defendant. [21] Defendant's use of one or more of the GSI Marks places the valuable reputation and goodwill of Plaintiff in the hands of Defendant, over whom Plaintiff has absolutely no control.").

[104] **C-046**, *Halliburton v. GSI*, (31 December 1992), ¶ 6.

73. Ultimately, the litigation surrounding GSI's use of Delaware GSI Marks ended up being dismissed in settlement on September 28, 1993.[105] Around the same time, Geophysical Speculative purchased Halliburton's Canadian seismic data library in August 1993.[106]

2. GSI's Acquisition of Halliburton's Canadian Seismic Data Library in 1993

74. The purchase of Halliburton's Canadian seismic data library by Geophysical Speculative was carried out through a Seismic Data Purchase Agreement (the "Purchase Agreement"), dated August 20, 1993. Mr. Davey Einarsson's move to purchase Halliburton's Canadian seismic data library occurred in the context of Halliburton's closure of its processing center in Calgary, which resulted in the company's Canadian seismic data being put up for sale.[107]

75. According to the Purchase Agreement, Geophysical Speculative acquired Halliburton's Canadian seismic data library, in addition to the other assets related to the seismic data library, including storage and production equipment used solely for its Canadian seismic data library business, agreements regarding the acquisition, ownership or licensing of seismic data, and operational records (together, with the seismic data library, referred to as the "Assets"), for a total purchase price of USD$450,000 in 1993.[108]

76. Specifically, Section 1.1(a) of the Purchase Agreement provides for the sale and purchase of Halliburton's Assets as follows:

> Sale and Purchase of Assets. On the terms and subject to the conditions of this Agreement, on the Closing date (as defined in Section 6), the Seller shall sell, convey, transfer, assign and deliver to the. Buyer, and the Buyer shall purchase from the Seller the following:

[105] **C-046**, *Halliburton v. GSI*, (31 December 1992), PDF, p. 56.

[106] **CWS-03**, Davey Einarsson Witness Statement, ¶¶ 14, 26.

[107] **C-126**, Davey, A Life of Adventure, p. 302 ("Halliburton was selling off a bunch of assets from GSI, and the data was one of those things. I found out that Halliburton was closing down the processing center in Calgary and that the data was up for bid. I did little snooping around to see what others were offering, and I put in a bid.").

[108] **C-049**, Seismic Data Purchase Agreement between Geophysical Speculative Investment Corp. and Halliburton Energy Services, 20 February 1993 ("Halliburton Seismic Data Purchase Agreement").

> a. all of the Seller's right, title and interest in and to all of the Seller's speculative seismic data which pertains only to any lands within Canada, which data is located in the Seller's Location and at the Seller's offices in Calgary, Alberta, Canada, (collectively, the "Assets Location"), or wherever else located, including, without limitation, the seismic data listed on Schedule 1.1 hereto, and all other processed tapes, field tapes: all other tapes and support data, files; films, microfilms, mylar, black-lines, sections (stack and migration), shot point base maps, x-y coordinates and derivatives related to the speculative seismic data (collectively, the "Data")[…].[109]

77. Whereas Section 1.1 (a) makes general reference to Geophysical Speculative's purchase of Halliburton's "right, title and interest in and to all of Halliburtin's speculative seismic data which pertains only to any lands within Canada," the Purchase Agreement as a whole, makes no specific mention of any transfer or assignment of "intellectual property rights" or "copyright".[110]

78. Furthermore, the copy of the Purchase Agreement filed by the Claimants in this Arbitration does not include the list of seismic data purchased from Halliburton in Schedule 1.1 of the Purchase Agreement.[111] Instead, the Claimants' have filed a separate document that appears to have been created in the context of GSI's domestic litigation purporting to list seismic programs that were acquired from Halliburton or otherwise created by GSI.[112]

79. Of critical importance is the fact that most of the seismic data that Mr. Davey Einarsson purchased from Halliburton through his companies and which ultimately ended up in GSI's possession was already in the public domain by 1993. The seismic data had been acquired by Delaware GSI between 1971 and 1990 and the seismic materials were submitted to COGLA or its predecessors before GSI was formed.[113] In addition to the records of the CNLOPB, CNSOPB and NEB which confirm the various seismic programs were, for the most part, no longer confidential by

[109] **C-049**, Halliburton Seismic Data Purchase Agreement, s. 1.1.

[110] **CWS-03**, Davey Einarsson Witness Statement, ¶ 26.

[111] **C-049**, Halliburton Seismic Data Purchase Agreement.

[112] **C-047**, Seismic Survey Assets, undated.

[113] The Claimants appear to be in agreement on this fact. *See* Claimants' Memorial, 27 September 2022 ("Memorial"), ¶¶ 18-20. GSI purports to show the relevant dates of its projects in its list of "Acquired Data" on its website. *See* **R-159**, Geophysical Service Incorporated, Acquired Data website.

1993,[114] various publications from the 1980s and 1990s indicate that seismic materials submitted by Delaware GSI to government regulators were already public and were available for copying.[115] Those same publications include instructions to the public as to how they can obtain copies from the government regulators.[116] In his Witness Statement, Mr. Dixit refers to the other documents that were publicly available in 1993, at the time of Mr. Davey Einarsson and Geophysical Speculative's purchase of Halliburton's Canadian seismic data library.[117]

80. Indeed, contemporaneous correspondence with the CNLOPB shows that GSI was aware of these publications in 1993 and knew that most of the data it purchased from Halliburton was already in the public domain.[118]

81. In other words, the Claimants' first investment in Canada was the purchase for US $450,000 in 1993 of a seismic data library for which most of the confidentiality periods had expired and was already publicly available for copying by any member of the public who requested it. That initial purchase continues to represent a significant portion of GSI's total seismic survey assets (152,850.30 km or approximately 57.84%).[119] While GSI spent the next few years between 1993 and 1997 reprocessing, enhancing, and marketing the raw data it purchased for the purpose of licencing it to

[114] **RWS-02**, Bennett Witness Statement, ¶¶ 31-34; **RWS-03**, Makrides Witness Statement, ¶¶ 32-33; **RWS-01**, Dixit Witness Statement, ¶ 35.

[115] **R-226**, COGLA, "Released Geophysical and Geological Reports – Canada Lands", January 1984, pp. 16-17, 19, 26, 29, 34, 98, 123, 127 (excerpts); **R-247**, NEB, "Frontier Lands: Released Information", December 1992, pp. 17, 19, 95, 122, 127.

[116] *See e.g.*, **R-247**, NEB, Released Reports, December 1992, pp. 5-6 ("E. Reproduction of Data […] Reproduction will generally be done by a commercial firm who will bill the purchaser direct […] Format of reproduction: microfilm, enlargement – scale of maps, seismic sections; medium (film or paper).").

[117] **RWS-01**, Dixit Witness Statement, ¶¶ 27-32.

[118] **R-249**, Letter from William R. Pieshel, Parlee McLaws to Jim Strain, CNLOPB, 3 November 1993. *See also* **R-248**, Letter from James Strain, CNLOPB, to Keith Mathews, Halliburton Geophysical Services, 31 August 1992. **RWS-02**, Bennett Witness Statement ¶¶ 33-34.

[119] **C-047**, Seismic Survey Assets, undated; and **C-048**, Speculative Data Bought from Halliburton. Exhibit **C-047** is GSI's Canadian Schedule of Lines and Kilometres = 264,276.329 km (Total Canada 2D kms: 259,469.714; Total Canada 3D sq. km: 4,806.615). Exhibit **C-048** is Speculative Data Bought from Halliburton (Total All Surveys = 152,850.30 km). Dividing GSI's Halliburton Purchased Seismic (152,850.30 km) by GSI's Canadian Schedule of Lines of Kilometres (264,276.329 km) = 0.5784, or 57.84%.

other companies,[120] the Claimants have no basis to complain about the continued disclosure of seismic materials which had already been public and available for copying long before NAFTA even came into force. Mr. Davey Einarsson knew – or should have known – what he was buying in 1993 and cannot pretend that the seismic materials submitted by Halliburton and its predecessor to government regulators were proprietary, a trade secret or otherwise protected from disclosure when they were already in the public domain.

82. Importantly, given that these reprocessing efforts were in respect of seismic programs conducted decades earlier, GSI was not required to submit any additional seismic materials to the Boards resulting from its reprocessing of Halliburton's Canadian seismic data library.

B. GSI's Offshore Seismic Operations in Canada and Abroad (1997-2008)

1. GSI's Investments in its Offshore Seismic Operations in Late 1990s and Early 2000s

83. GSI did not commence its own offshore seismic data acquisitions until 1997, when GSI formed a joint venture with a Norwegian company Rieber Shipping to conduct seismic surveys.[121] According to the records of the NEB and CNLOPB, as discussed below, GSI's first non-exclusive seismic surveys were commenced in 1997 with a small land-based seismic project in the Northwest Territories approved by the NEB and one project in the C-NL Offshore Area approved by the CNLOPB.[122] It was also in 1997 when Paul Einarsson moved his family from Houston, Texas, United States to Calgary, Alberta, Canada to join his father running GSI's operations.[123]

[120] **C-126**, Davey, *A Life of Adventure*, p. 304 ("We spent the next few years going through the data, reprocessing, enhancing it, and marketing it to companies."); **C-125**, CSEG Recorder, p. 9: ("From 1992 on we were enhancing the data, reprocessing it and marketing it [the seismic data]").

[121] **C-125**, CSEG Recorder, p. 9.

[122] **RWS-01**, Dixit Witness Statement, ¶ 36; **R-330**, Program 9229-G-005-001P/NEB 5553693 (Fort Laird Seismic Survey), Application Date December 11, 1996; **RWS-02**, Bennett Witness Statement ¶ 35.

[123] **CWS-06**, Witness Statement of Harold Paul Einarsson, 26 March 2021 ("Paul Einarsson Witness Statement"), ¶¶ 33-34. Russell stayed in Texas as he was the Vice President of GSI's affiliate, Ocean Geophysical Service Incorporated, which was based in Houston, Texas. **CWS-05**, Witness Statement of Russell John Einarsson, 4 August 2022, ¶ 6.

84. After the joint-venture with Rieber Shipping ended in 2000 after only three years, apparently "during a down-turn,"[124] GSI "did nothing new for a while" until it utilized ships from other contractors and eventually purchased its own vessel.[125] During this time, GSI also made a number of sizable investments in its attempt to create new non-exclusive seismic data in the Canadian offshore and abroad.

85. In 1999, GSI acquired Precision Seismic Processing & Consultants Ltd. ("Precision Processing"), a land seismic data processing centre in Calgary.[126] In 2001, GSI invested to convert Precision Processing from being able to conduct onshore-only data processing to also being able to process offshore seismic data.[127]

86. In 2001, GSI acquired its own vessel, the "GSI Admiral", and began acquiring offshore seismic data off of the east coast of Canada as a Canadian-flagged vessel. [128] Thereafter, "business dried up a little," and GSI had to upgrade the GSI Admiral, which was originally built in 1976 as a fishing trawler,[129] to include 3D capabilities, four streamers and two sources.[130]

87. The early days of GSI were financially difficult because of its significant expenditures and, as it turns out, substantial overbillings for the GSI Admiral by its own partner, Sable Mary Seismic ("SMS"), which, as of 2013, were never recouped. A 2009 decision by the Nova Scotia Supreme Court described GSI's financial status in 2001 as follows:

> In the fall of 2001, GSI's controller Wayne Lam was expressing concerns about GSI's serious cashflow problems (he called it a "crisis") that stemmed from the

[124] **C-125**, CSEG Recorder, p. 10.

[125] **C-125**, CSEG Recorder, p. 10: ("We did nothing new for a while and then we hired a few boats from other contractors and then in 2002 we bought our own vessel, the GSI Admiral and started the marine operation.").

[126] Memorial, ¶ 25; **CWS-06**, Paul Einarsson Witness Statement, ¶ 86.

[127] Memorial, ¶ 25. Davey Einarsson has stated that "about 60 percent of the data processing we do at that [Precision Seismic Processing] center is data we are paid to process as a contractor for others. This is just another way for us to diversify our revenue and expand our services."). *See* **C-126**, Davey, A Life of Adventure, p. 306.

[128] **BR-2**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.,* 2009 NSSC 404, Judgment, 31 December 2009 ("*GSI v. Sable Mary Seismic*, 2009 NSSC 404"), ¶ 61.

[129] **R-331**, Mac Mackay, Ship fax: a blog about ships and shipping from Halifax, Nova Scotia and beyond, "GSI-Admiral – sold (old news)", 26 March 2012.

[130] **C-125**, CSEG Recorder, p. 17.

> large capital expenditures on the East Coast marine operation, and operating expenses (that he believed were higher than necessary), coupled with the uncertain revenue stream from speculative data collection. Conservation of cash had led to a shutdown of marine operations in August 2001. Paul Einarsson too asked questions about operating expenses, relying on Wayne Lam's inquires and analyses of what SMS was costing; he was considering changes to the marine seismic operation.[131]

88. To support GSI's investments and given GSI's limited revenues, GSI had to rely on substantial personal loans in 2001 from the Einarssons, allegedly for approximately CAD$3 million,[132] and on unspecified "outside financing."[133] GSI then made another major capital investment by purchasing a second ship in 2004 or 2005, the "GSI Pacific," with limited 2D capacities and which sailed under a Panamanian flag.[134]

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[131] **BR-2**, *GSI v. Sable Mary Seismic*, 2009 NSSC 404, ¶ 65. GSI initiated a lawsuit against Sable Mary Seismic Inc. ("SMS") and its owner (Mathew Kimball) in November 2002 but it was not until December 31, 2009 that GSI was awarded more than CAD$2 million in damages against SMS and Mr. Kimball. **BR-2**, *GSI v. Sable Mary Seismic*, 2009 NSSC 404, ¶¶ 202-205; **R-332**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2010 NSSC 357, Judgment, 29 September 2010, ¶¶ 6, 41 (GSI sought CAD$794,058.36 in costs against SMS and Kimball, but was awarded only CAD$407,882.94). As of 2013, GSI had not been able to collect its damages award from SMS and Mr. Kimball. **R-333**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2013 NSSC 424, Decision on Costs, 20 December 2013, ¶ 1. ("The Plaintiff, Geophysical Service Incorporated (GSI), have been involved in protracted litigation with the corporate Defendants and Mr. Kimball since 2003. There was a lengthy trial after which the Plaintiffs were the successful party. Large damages were awarded as were costs of the action. The Plaintiff has not realized on its judgment as of the date of this application.") (emphasis added).

[132] Memorial, ¶ 152 ("(a) loan from Davey to GSI dated June 15, 2001, in the amount of C$900,000, plus interest; (b) loan from Russell to GSI dated June 15, 2001, in the amount of C$900,000, plus interest; (c) loan from Paul to GSI dated June 15, 2001, in the amount of CAD$564,901.30, plus interest, which loan was subsequently increased by a promissory note to C$820,946.67; (d) loan from Paul to Precision Processing (at the time a wholly-owned subsidiary of GSI) dated June 15, 2001, in the amount of C$74,132,391 which loan was subsequently increased by a promissory note to C$79,605 (the "Precision Loan"); (e) loan from Alexandra Holdings Ltd. (a holding company wholly owned by Paul) to GSI dated February 19, 2004, in the amount of C$113,578.53; and (f) loan from Paul to GSI dated May 5, 2005, in the amount of US$350,000; (collectively, the "Loans")" (footnotes omitted)).

[133] **C-125**, CSEG Recorder, p. 17: ("We have expanded. In 1992, the first year, we billed $8,000 and we have completely self financed everything since, until we bought the Admiral. We had to get some outside financing for the ship because it was such a big expenditure, but pretty much self-funded, family owned").

[134] Memorial, ¶ 27; **CWS-03**, Davey Einarsson Witness Statement, ¶ 19; and **C-125**, CSEG Recorder, p. 18: ("the GSI Pacific is a 2D vessel"). **C-126**, Davey, A Life of Adventure, p. 307 ("In 2004, we bought the GSI Pacific to bring our fleet to two ships. We did some work for Chile, an did some work in West Africa, as well as doing work off the coast of Canada. […] The GSI Pacific was in an interesting situation, since it actually sailed under a Panama flag."). *See also* **RER-04**, Expert Report of the Brattle Group, 16 January 2023 ("Brattle Report"), ¶ 164.

89. Between 2001 and 2008, GSI was highly leveraged but nevertheless paid out extraordinary bonuses to its shareholders and above-market rate compensation to its officers and directors.[135] During this time, GSI sought to expand its operations outside of Canada, but some of its foreign projects did not turn out the way GSI had hoped. For example:

(a) GSI was contracted to carryout a seismic survey in Grenada using the GSI Admiral in February 2004, which turned out to be an illegal survey "in criminal violation of" Grenadian law and which resulted in serious damage to Grenadian fisherman and GSI's ship.[136] GSI launched a lawsuit in March 2004 against the company which had retained it to carry out the Grenada survey seeking than CAD$2 million in damages, but it is not clear whether GSI ever recouped its alleged significant losses from this project.[137]

(b) In 2004, GSI carried out a non-exclusive survey in the Falkland Islands where the confidentiality period for non-exclusive surveys was five-years before it would be released to the public.[138] Mr. Einarsson testified that "he did not follow what was going on in the Falklands from a regulatory perspective, that he did no due diligence prior to entering into the MDLA and that he did not look at the Falkland Islands' regulatory regime."[139] By 2010, "GSI [had] not even recovered costs on the data to date…to date only a small portion of the entire dataset has been licenced" and asked that the Falkland Island Government grant an extension of the confidentiality period to attempt to recoup its investment.[140] Despite having been granted an extraordinary extended confidentiality period by the Falkland Islands government,[141] GSI was apparently never able to recover its investment after losing its legal challenges against the Falklands Islands. In 2019, Mr. Paul Einarsson stated that GSI had invested $50 million in its Falkland Islands project but had only "obtained about $35 million in licence fees."[142]

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[135] **CER-02**, Sharp Report, Schedule D1, showing Officer and Director bonuses totaled CAD$13,400,000 over 2005–2007; *see also*, **RER-04**, Brattle Report, Figure 24 ("GSI Book Value of Debt and Equity (CAD$ Millions)").

[136] **RLA-002**, *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14) Final Award, 13 March 2009, ¶¶ 171-172.

[137] **R-334**, Letter from Matti Lemmens, BLG, to Chief Justice Wittmann, Alberta Court of Queen's Bench, 10 September 2015 (attaching **R-335**, *Geophysical Service Incorporated v. Grynberg Petroleum Company*, Action No. 0401-04329, Statement of Claim, 17 March 2004 ("The [Grynberg Action] matter concluded in approximately 2008.")).

[138] **R-029**, *GSI v. Falkland Islands*, 9 December 2016, ¶¶ 39-40. *See also* **R-108**, *Geophysical Service Incorporated v. Her Majesty in right of her Government of the Falkland Islands*, Civil Appeal No. 2 of 2016, Judgment 10 April 2018; **R-336**, *Geophysical Service Incorporated v. Her Majesty in right of her Government of the Falkland Islands*, Approved Costs Judgment, 21 May 2018.

[139] **BR-19**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited*, 2019 ABQB 162, 7 March 2019, ¶ 14.

[140] **R-029**, *GSI v. Falkland Islands*, 9 December 2016, ¶ 49.

[141] **R-029**, *GSI v. Falkland Islands*, 9 December 2016, ¶¶ 50-57.

[142] **R-337**, Email from Paul Einarsson, GSI, to Loris Mirella, Global Affairs Canada, 22 February 2019.

90. GSI's ill-fated investment in its non-exclusive Falkland Islands seismic survey, which according to GSI's website was the largest single survey it had ever undertaken,[143] likely had a significant impact on its already precarious financial status. It is unclear whether GSI's other foreign projects it undertook in the 2000s – Morocco in 2007[144] and Guinea in 2008 (which included a revenue sharing agreement that was apparently terminated soon thereafter in 2010)[145]– made up for the significant expense of investing, retrofitting and maintaining two ships.

2. GSI's Authorizations to Acquire Offshore Seismic Data in Canada and its Knowledge of the Regulatory Regime Requirements

91. Between 1997 and 2008, GSI's Canadian seismic surveys focused on the East Coast of Canada.[146] During this time, GSI was issued 19 authorizations from the CNLOPB to carryout non-exclusive surveys in the C-NL Offshore Area between 1997 and 2008,[147] while only six authorizations were issued by the CNSOPB for non-exclusive surveys between 1998 and 2003.[148]

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[143] **R-159**, Geophysical Service Incorporated, Acquired Data website (indicating that GSI's non-exclusive Falkland/Malvinas 2D 2005/2006 survey consisted of 25,572.1km, which is almost double the next largest surveys – Scotian Salt 1998/1999 (13,753.1km) and Labrador 2005 (13,044.1km)).

[144] GSI's website indicates that it obtained 1,241.5 km of 2D data offshore Morocco in 2007. *See* **R-159**, Geophysical Service Incorporated, Acquired Data website, chart and map "Morocco 2D Acquisition, Approx. 1,241 km".

[145] GSI undertook a seismic survey project in Guinea in 2008 with the expectation of sharing in revenue data under its agreement with Hyperdynamics Corporation, but that agreement was apparently terminated on May 20, 2010. **R-338**, Petroleum Africa, "Hyperdynamics and GSI Enter Seismic Deal", 27 February 2008; **R-339**, Petroleum Africa, "HyperD Finalizes Preparation for Offshore Guinea Seismic Shoot", 8 April 2008; **R-340**, Hyperdynamics Corporation, "Form 10K", 30 September 2008, p. F-36 ("Contract Commitments" describing agreement with GSI "for the acquisition of up to 6,000 kilometers of 2-D seismic data in our Guinea concession area"); **R-341**, Sale and Purchase Agreement between Hyperdynamics Corporation (SCS Corporation) and Dana Petroleum (E&P) Limited, 4 December 2009, p. 7 (mentioning February 13, 2008 agreement between GSI and SCS Corporation); **R-342**, Purchase and Sale Agreement between SCS Corporation Ltd. And Tullow Guinea Ltd., 20 November 2012, PDF, p. 160 ("Exhibit D") (mentioning Material Documents GSI-SCS agreement dated February 13, 2008 "subject to the Release and Settlement Agreement and Amendment to PSC dated May 20, 2010" (emphasis added). The same document indicates that SCS entered into an agreement with GSI's competitor PGS for the Supply of Marine Seismic Data Acquisition Services immediately after GSI's agreement with SCS was ended.)

[146] GSI only carried out two non-exclusive surveys in the Federal Offshore Area, which required NEB approval. **RWS-01**, Dixit Witness Statement ¶ 37.

[147] **RWS-02**, Bennett Witness Statement, ¶ 35.

[148] **RWS-03**, Makrides Witness Statement, ¶ 34.

GSI also received two authorizations from the NEB (in 1997 and 2008) to conduct non-exclusive surveys.[149]

92. As described in the Witness Statements of Messrs. Bennett, Makrides and Dixit, since the founding of GSI in 1993, there had been no major changes to the Regulatory Regime and the Claimants were at all times fully aware of the conditions upon which its non-exclusive surveys were approved.[150]

93. In relation to GSI's 19 seismic surveys authorized by the CNLOPB in the C-NL Offshore Area between 1997 and 2008, the company was consistently reminded that the seismic materials submitted to the Board would become public after the expiration of the applicable confidentiality period set out in Section 119 of the C-NL Federal Accord Act.[151] For example, a letter accompanying the first GPA issued to GSI by CNLOPB on July 10, 1997 stated that the seismic material submitted upon completion of the program would be made publicly available:

> We would like to remind you that the final report should include digital copies of the shotpoint location data and the seismic traces. Details are described in the Board's "Geophysical, Geological, Environmental and Geotechnical Program Guidelines", Section 5.0. The data from this survey will be made publicly available five years following completion of field work.[152]

[149] GSI conducted one small survey in the Northwest Territories in 1997 and one in 2008 in the North Labrador Sea (August 8, 2008 2D Marine Seismic Survey North Labrador Sea Project ID 5554116). **RWS-01**, Dixit Witness Statement ¶¶ 36-37. With respect to GSI's 2008 Labrador survey approved by the NEB, this program is not listed in Dixit Exhibit J since it is subject to a 15-year confidentiality period that does not expire until late 2023. **R-288,** Letter from Bharat Dixit, NEB to Darlene Davis, GSI, 8 August 2008.

[150] For example, as described in **RWS-01**, Dixit Witness Statement, ¶ 38, GSI received approval from the NEB on August 8, 2008 to carryout its 2D Marine Seismic Survey North Labrador Sea (Project ID 5554116) with the caveat that "the [submitted] information will be disclosed pursuant to section 101 of the *Canada Petroleum Resources Act*."

[151] **RWS-02**, Bennett Witness Statement, ¶¶ 18, 35-37.

[152] **R-250**, CNLOPB, "Geophysical / Geological / Geotechnical /Environmental Program Authorization Application" (and accompanying cover letter) ("CNLOPB Program Authorization"), 8924-G005-001P, 10 July 1997. The same statement was in the cover letter for program number **R-251**, CNLOPB, Program Authorization, 8924-G005-002P, 14 June 1998. This language was further updated when the privilege period was extended to 10 years. This is reflected in the cover letter for CNLOPB Program Authorization numbers: **R-252**, CNLOPB, Program Authorization 8924-G005-003P, 4 June 1999; **R-253**, CNLOPB, Program Authorization 8924-G005-004P, 22 June 2000; **R-254**, CNLOPB, Program Authorization 8924-G005-005P, 3 May 2001; **R-255**, CNLOPB, Program Authorization 8924-G005-006P, 17 August 2001; **R-256**, CNLOPB, Program Authorization 8924-G005-007P, 6 July 2001; **R-257**, CNLOPB, Program Authorization 8924-G005-008P, 5 August 2002; **R-258**, CNLOPB, Program Authorization 8924-G005-009P, 21 November 2022; **R-343**, CNLOPB, Program Authorization 8924-G005-010P and 8924-G005-011P, 22 July 2003; **R-261**, CNLOPB, Program

94. On November 17, 1997, GSI wrote to the CNLOPB alleging that its seismic data was being copied by third parties once it was disclosed and requested that the Board disclose only copies of paper sections and only to oil and gas companies.[153] In response, on November 27, 1997, the CNLOPB reminded GSI of the rules governing the disclosure of seismic materials:

> The Board's release of seismic data is governed by the confidentiality period set out in the [C-NL Accord Acts]. In your [November 17, 1997] letter, you have requested that the released data be limited to copies of paper sections and that their release be limited to oil companies only. Please note that the Board's current practice is to limit release of this data to copies of paper sections and the accompanying reports. The Board does not have the power to limit the release of such data to oil companies only. Once the period of confidentiality has expired, the Board has no choice but to allow the data to fall within the entire public domain.[154]

95. As described in the Witness Statement of Trevor Bennett, the CNLOPB announced on February 24, 1999 that it would extend the confidentiality period for non-exclusive seismic surveys for an extra five years (for 10 years in total).[155] While GSI continued thereafter to demand that GSI's seismic materials not be disclosed to the public,[156] the CNLOPB consistently confirmed that GSI's non-exclusive seismic surveys would be subject to a 10-year confidentiality period as provided by the law, as stated in a letter to GSI dated June 18, 1999:

> While the Board understands your position, the Board does not agree with the legal analysis offered on your behalf respecting the release of the subject data provided by GSI. We have, for policy reasons, nonetheless agreed to withhold such data for a period of 10 years, as stated in my February 24, 1999 letter to you. […] The Board believes that the disclosure of information obtained as a result of carrying on a work or activity is authorized under our Accord Acts. I refer in particular to s. 119 and s. 115 of the Federal and Provincial Accord Acts, respectively. <u>The Board intends to continue the practice of making such information available to the public following</u>

Authorization 8924-G005-012P, 26 September 2003; **R-263**, CNLOPB, Program Authorization 8924-G005-014P, 17 June 2005; **R-267**, CNLOPB, Program Authorization 8924-G005-018P, 30 June 2008; and **R-268**, CNLOPB, Program Authorization 8924-G005-019P, 17 October 2008.

[153] **R-269**, Letter from Sam Nader, GSI to John G. Fitzgerald, C-NLOPB, 17 November 1997.

[154] **R-270**, Letter from John G. Fitzgerald, CNLOPB, to Sam Nader, GSI, 27 November 1997.

[155] **RWS-02**, Bennett Witness Statement, ¶¶ 17-19.

[156] **R-271**, Letter from T.D. "Davey" Einarsson, GSI, to Neil DeSilva, CNLOPB, 1 June 1999. *See also* **R-272**, Letter from Doug Dowdell, GSI, to Neil DeSilva, CNLOPB, 5 May 1999; **R-273**, Letter from Neil DeSilva, CNLOPB to Doug Dowdell, GSI, 13 May 1999.

> the expiry of the specified periods, except for non-exclusive seismic, which period has been extended. To my knowledge, the Board has never previously agreed to do otherwise.[157]

96. All of GSI's subsequent GPAs between 2000 and 2008 made clear that: materials submitted as part of the authorization to access the C-NL Offshore Area to carry out GSI's proposed non-exclusive surveys would be released to the public after 10 years.[158] GSI decided to proceed with these projects knowing in advance what the rules of disclosure were.

97. Similarly, in relation to GSI's six seismic programs authorized by the CNSOPB, each GWA issued to GSI by the CNSOPB stated that it was subject to the reporting requirements of the 1992 CNSOPB Guidelines that stipulated that seismic materials would be made available to the public after the termination of the applicable confidentiality period, which in the case of these GSI six surveys (non-exclusive) was ten years.[159]

98. As described in the Makrides Witness Statement, the CNSOPB reminded GSI that one of the "conditions […] attached to" the approval to conduct the proposed seismic survey was that final reports, maps and data for non-exclusive programs would be publicly disclosed after the expiration of the applicable confidentiality period. For example, in its approval letter dated October 4, 2000 for Program No. NS24-G005-003P, the CNSOPB reminded GSI that:

> Final reports, maps and data for non-exclusive geophysical programs will be disclosed to the public after 10 years from the termination date of the geophysical operation. In accordance with the geophysical regulations a non-exclusive survey is conducted for the sale, in whole or in part, to the public. If the data is not available for sale to the public then it will be considered exclusive data and will be disclosed five and one half years after the termination date of the geophysical operation.[160]

[157] **R-274**, Letter from H.H. Stanley, CNLOPB to T.D. "Davey" Einarsson, GSI, 18 June 1999.

[158] **RWS-02**, Bennett Witness Statement, ¶ 35 and exhibits cited therein.

[159] *See* **R-202**, CNSOPB, Geophysical/Geological Work Authorization, Program NS24-G005-001P, 13 July 1998; **R-346**, Program NS24-G005-002P, 9 April 1999; **R-203**, Program NS24-G005-003P, 4 October 2000; **R-204**, Program NS24-G005-004P, 15 May 2001; **R-205**, Program NS24-G005-007P, 19 July 2002; and **R-210**, Program NS24-G005-008P, 25 April 2003.

[160] **R-207**, Letter from J.E. Dickey, CNSOPB to Matthew Kimball, GSI, 4 October 2000 (emphasis added).

99. The CNSOPB reminded GSI of the same in letters dated May 15, 2001, July 18, 2002 and April 25, 2003 for Programs NS24-G005-004P, NS24-G005-007P and NS24-G005-008P, respectively that:

> Exclusive geophysical and geological reports; maps and data and other materials will be kept confidential for five and one half years after termination of the fieldwork. Non-exclusive or speculative geophysical and geological data, reports and maps will be kept confidential for at least ten years from the completion of the fieldwork. Hard copy of data, reports and maps will be made available for public disclosure at the termination of the relevant confidentiality periods.[161]

100. GSI knew the rules that were applicable to its Nova Scotia seismic surveys that it undertook between 1999 and 2003. Nevertheless, GSI decided to proceed with its non-exclusive surveys knowing in advance that the seismic materials would be made public in ten years.

3. GSI's "Concerns" Regarding Technological Advancements and the Implications for its Seismic Business

101. The rules regarding disclosure of seismic materials had been stable since the early 1980s and GSI was fully aware of the Regulatory Regime since its founding in 1993. The only significant change came in 1999 when the CNLOPB extended the confidentiality period for non-exclusive surveys in the C-NL Offshore Area to 10-years (the same as in the C-NS Offshore Area), which was to GSI's benefit.

102. While Canada's Regulatory Regime remained consistent and predictable for decades, the technology used for interpreting seismic data began to change significantly. In the late 1990s, GSI saw the emergence of "vectorization" technology and the actions of third parties (particularly, GSI's oil and gas company customers and "data copy companies"[162]) as an emerging threat to its nascent business, because it made the paper and mylar copies of Disclosed Seismic Materials easier to use on computers than what had been the case previously.[163] Mr. Davey Einarsson states that he had not

[161] **R-208**, Letter from J.E. Dickey, CNSOPB to Matthew Kimball, GSI, 15 May 2001; **R-209**, Letter from J.E. Dickey, CNSOPB to Matthew Kimball, GSI, 19 July 2002; **R-210**, Letter from J.E. Dickey, CNSOPB to Matthew Kimball, GSI, 25 April 2003.

[162] **CWS-03**, Davey Einarsson Witness Statement, ¶ 58. *See* Memorial, ¶ 61.

[163] The Claimants argue that "in GSI's discussions with the Boards, and specifically the CNSOPB, there was talk of a 'shared data repository' being created, which suggested that traditional confidentiality and intellectual property protection

foreseen the advances in technology which would impact the ability of third parties to better utilize the already-public seismic materials he had purchased from Halliburton in 1993.[164]

103. Nevertheless, GSI decided to continue to invest in new non-exclusive seismic surveys between 1997 and 2008 despite its awareness that, once the applicable confidentiality period expired, advancements in technology might impact the value of its seismic data more so than it had in the past. GSI lobbied the government to change the Regulatory Regime to account for these advances in technology. For example, GSI wrote to the Prime Minister of Canada and the Premiers of Nova Scotia and Newfoundland and Labrador on October 1, 2002 complaining that "[m]odern technology has enabled other enterprises (mostly offshore companies) to copy, process and distribute seismic information filed with the government boards without payment of licence fees."[165] However, the Boards continued to fulfil their statutory obligation that had existed since the 1980s for seismic surveys carried out on Frontier Lands: to make submitted seismic materials available to the public once the applicable confidentiality period expired.

104. GSI knew that the bulk of its seismic data library was already in the public domain and available for copying by 1993. It knew that its non-exclusive surveys starting in 1997 were approved with a 10-year confidentiality period, after which its seismic materials would be released to the public. By this time, it also knew that technological advances made it possible that third parties would utilize the paper and mylar versions of seismic materials available from the Boards in ways that it would prefer they not. In the early 2000s, GSI tried to mitigate these technological changes by changing some of its licence agreements to prohibit its licencees from accessing copies from the Boards or be

for seismic data could be compromised going forward." (Memorial, ¶ 61) However, the "shared data repository" never materialized and the regional data centre was never created. Additionally, the Claimants argue that "GSI was becoming concerned that oil and gas companies were not treating the seismic data of others with the same degree of proprietary care that had been historically customary or that they practiced with their own proprietary information, including seismic data." (Memorial, ¶ 61) This concern relates to actions of oil and gas companies who later became the subject of GSI's numerous claims against licensees, oil and gas companies and other seismic data companies, not Canada.

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

[165] **R-471**, Letter from Paul Einarsson, GSI to Right Honourable Jean Chretien, the Prime Minister of Canada, Honourable John Hamm, the Premier of Nova Scotia, and Honourable Roger Grimes, the Premier of Newfoundland, 1 October 2002.

subject to a penalty clause.[166] But while GSI's competitors adapted to these technological changes and continued to invest in Canada's offshore,[167] GSI would adopt a more litigious strategy that would contribute to its ultimate demise as a seismic acquisition company.

4. GSI's Awareness that Third Parties Were Accessing from the Boards GSI's Seismic Materials for Which the Confidentiality Period Had Expired

105. It is evident that the Claimants have known for decades the process by which the Boards publicly disclosed seismic materials for which the confidentiality period had expired. As explained in the Dixit Witness Statement, representatives of GSI visited the FIO on at least three occasions during the years 2000, 2001 and 2002.[168] Representatives of GSI had also been borrowing materials from the FIO more than two decades ago as evidenced by signed FIO Liability Agreements from 2000 and 2001.[169]

106. Nevertheless, around 1999, GSI started making access to information requests to each of the Boards to discover the names and addresses of all parties who accessed the Disclosed Seismic Materials from each Board, together with details of what information each Board had provided.[170] At that time, the only seismic materials which were publicly available from the Boards were those which GSI had purchased from Halliburton in 1993 and had already been in the public domain for years – the confidentiality periods for GSI's new seismic surveys would not start to expire until 2008.[171]

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[166] GSI claimed breach of contract against multiple licences for accessing seismic materials from the Boards. *See e.g.* **R-011**, *GSI v. Total*, 2020 ABQB 730, Decision, 25 November 2020, ¶¶ 1, 8-14; **R-347**, *GSI v. Devon*, ABQB File No 1401 12230, Amended (4X) Statement of Claim, 24 June 2015, ¶¶ 39(p), 43; **R-348**, *GSI v Murphy*, ABQB File No. 1301 15085, Statement of Claim, 20 December 2013, ¶¶ 31(k)-(n) and 37; **R-349**, *GSI v. Plains Midstream, BP et al.*, Amended (2x) Statement of Claim, 16 July 2014, ¶¶ 40(m)-(p), 52; **R-350**, *GSI v. Corridor Resources Inc.*, ABQB File No. 1301 10045, Statement of Claim, 22 August 2013, ¶¶ 20(d)-(e), 21(b)-(d).

[167] **RER-02**, Hobbs Report, ¶ 76; **RER**-04, Brattle Report, ¶ 36; **RWS-03**, Makrides Witness Statement, ¶¶ 37-38; **RWS-02**, Bennett Witness Statement, ¶¶ 38-43.

[168] **RWS-01**, Dixit Witness Statement, ¶ 33.

[169] **RWS-01**, Dixit Witness Statement, ¶ 33.

[170] **R-354**, *GSI v. C-N Offshore Petroleum*, 2003 FCT 507, ¶ 9.

[171] **RWS-02**, Bennett Witness Statement, ¶¶ 31-37; **RWS-03**, Makrides Witness Statement, ¶¶ 32-36; **RWS-01**, Dixit Witness Statement, ¶¶ 35-38.

107. Initially, the Boards declined to provide GSI with this information given the uncertainty as to whether the federal *Access to Information Act* ("*AIA*") permitted the disclosure of the information GSI was demanding. To compel the Boards to release the names of those who had obtained copies of GSI's Disclosed Seismic Materials, GSI commenced litigation against the Boards at the Federal Court of Canada in 2001.[172]

108. Over the course of this litigation, the practice of the Boards regarding the disclosure of seismic materials after the expiration of the applicable confidentiality periods were clearly described.[173] For example, CNSOPB General Counsel and Access to Information Coordinator Michael S. McPhee explained in his January 29, 2001 affidavit that while digital data is not made available to the public for inspection or copying, the paper or mylar copies of reports for which the confidentiality period had expired were loaned to borrowers provided that the liability form was signed.[174] Similarly, the NEB Business Unit Leader, Operations John McCarthy explained in his March 7, 2001 affidavit the NEB position as well regarding Disclosed Seismic Materials.[175]

109. Additionally, on October 8, 1999, the NEB replied to an Access to Information Request from GSI, reminding it that Canadian laws and regulations permitted the disclosure and photocopying of its seismic materials once the applicable confidentiality period expired:

> As you may be aware, the information you provide to the Board for the purposes of the *Canada Oil and Gas Operations Act* (*COGOA*) or the *Canada Petroleum Resources Act* (CPRA) is kept in our Frontier Information Office (FIO), after it has been released from privileged status pursuant to Section 101 of the CPRA. A person who wishes to consult any information in the FIO makes an appointment to do so and attends at the FIO. Once in the FIO, the person may consult and photocopy any released information respecting oil and gas exploration and production operations

[172] *See* **R-354**, *GSI v. C-N Offshore Petroleum*, 2003 FCT 507.

[173] **R-216**, *Geophysical Service Incorporated v. The Chairman, Canada-Nova Scotia Offshore Petroleum Board and Information Commissioner of Canada*, Federal Court- Trial Division T-2102-00, Affidavit of Michael S. McPhee, 26 January 2001 ("*GSI v. CNSOPB*, Affidavit of Michael McPhee, 26 January 2001").

[174] **R-216**, *GSI v. CNSOPB*, Affidavit of Michael McPhee, 26 January 2001, ¶ 14(c).

[175] **R-304**, *Geophysical Service Incorporated v. The Chairman, National Energy Board*, Federal Court File No. T-2101-00, Affidavit of John McCarthy, 7 March 2001.

> on frontier lands…if a person borrows information from the FIO, the Board records the specifics of the information borrowed to ensure its return.[176]

110. While the Federal Court of Canada ruled on April 25, 2003 that the Boards were required to release the names of those requesting GSI's seismic materials, Justice Gibson also confirmed that after the expiry of the confidentiality period in the legislation it was "entirely open" for the Boards to make submitted seismic materials available to a third party requesting such information:

> I am satisfied that it is beyond doubt that the seismic data provided by the Applicant to the Canada-Newfoundland Board was information or documentation provided for the purposes of Part II or Part III and thus fell within the ambit of the privilege provided by subsection 119(2) of the *Act*. I am equally satisfied that, by virtue of paragraph 119(5)(d), and in particular subparagraph (ii) of paragraph (d), that privilege expired five (5) years following the date of completion of the seismic work to which the information or documentation related. Thus, on the expiration of that five (5) year period, it was entirely open to the Canada-Newfoundland Board to make such information or documentation available to a requester.[177]

111. In other words, by 2003, not only was GSI aware of the rules of the Regulatory Regime which had been in place since its creation, and not only was it aware that third parties were accessing its publicly-available materials from the Boards, but the Federal Court of Canada had confirmed the authority of the Boards to disclose GSI's Submitted Seismic Materials to the public once the confidentiality period expired. Despite all of this knowledge, GSI decided to continue with new non-exclusive seismic surveys in the Frontier Lands and making significant investments in its business.

C. GSI's Business Failure and Shift from a Seismic Data Company to Litigation Beginning 2008

112. By the beginning of 2008, only two of GSI's new non-exclusive seismic surveys had entered the public domain.[178] All of the other non-exclusive surveys GSI undertook between 1998 and 2008

[176] **R-302**, Letter from Michel L. Mantha, NEB, to Doug Dowdell, GSI, 8 October 1999 (emphasis added). The NEB made the same statement to GSI in its letter dated March 21, 2000. *See* **R-303**, Letter from Michel L. Mantha, NEB, to Paul Einarsson, GSI, 21 March 2000.

[177] **R-354**, *GSI v. C-N Offshore Petroleum*, 2003 FCT 507, ¶ 75. While paragraph 75 refers only to the CNLOPB, Justice Gibson held in paragraph 69 that his analysis applies equally to the CNSOPB. The claim against the NEB is treated in a different section.

[178] **RWS-02**, Bennett Witness Statement, ¶ 30 (citing to **R-246**, CNLOPB, Chart of GSI-related seismic programs). The confidentiality period for GSI's first project in the C-NL Offshore Area (Program #8924-G005-001P 2D Speculative

would only gradually enter the public domain starting in 2009, by which time GSI was already in serious financial trouble as a result of other factors including the 2008 global financial crisis, poor management and unrecovered losses from its 2004 Falkland Islands project.

113. As described in the Brattle Report, GSI was [redacted] since its inception, making it vulnerable to economic downturns in the oil and gas industry, which the seismic industry depended upon for its customer base.[179] By 2008, GSI's auditors [redacted] which was unsurprising because the 2008 global financial crisis severely impacted the global oil and gas industry, which in turn caused oil exploration and production (E&P) companies to substantially cut their spending on offshore seismic exploration, particularly in North America.[181] While GSI did not produce its financial statements after 2008 with its Memorial, GSI has previously acknowledged the impact of the economic downturn, as well as the impact of the April 2010 Deepwater Horizon oil spill in the Gulf of Mexico, on its business.[182]

114. GSI's seismic competitors were also seriously impacted by the sharp cuts in spending on seismic surveys in North America.[183] But whereas GSI's competitor companies like PGS and TGS were able to weather the storm, GSI could not afford to maintain the two seismic vessels it purchased a few years before, likely because, in addition to losses suffered in the Falkland Islands and [redacted]

Survey Jeanne D'Arc Basin) expired on January 15, 2008. GSI Program #8924-G005-009P 2002 Non-Exclusive Gulf of St. Lawrence was changed from non-exclusive to exclusive and released on June 14, 2008. As explained above and in the Witness Statements of **RWS-01**, Bharat Dixit (¶ 35), **RWS-02**, Trevor Bennett (¶¶ 31-34) and **RWS-03**, Carl Makrides (¶¶ 32-33).

[179] **RER-04**, Brattle Report, ¶ 32.

[180] **C-109**, Financial statements of GSI, year ended 31 December 2008, Note 1.

[181] **RER-02**, Hobbs Report, ¶¶ 33, 86; **RER-04**, Brattle Report, ¶ 100.

[182] *See e.g.*, **R-299**, Email from Paul Einarsson, GSI, to Bharat Dixit, NEB, 4 February 2010 (Paul Einarsson stated that "GSI has been forced to reduce staff by more than 90% and there are no qualified staff to prepare this report, due to the economy and combined with the fact that GSI is expending all our resources on lawyers to address the two copyright violations the NEB has facilitated in providing GSI's seismic data to third parties although we believe the NEB owes GSI a duty of confidence." (emphasis added)); **R-029**, *GSI v. Falkland Islands*, 9 December 2016, ¶ 49 (quoting Paul Einarsson email dated November 2, 2010: "[D]ue to the BP well blow out, the economic downturn, ever increasing government regulations around the world, and the practice of some governments to release our intellectual property have taken a big toll on our company and we are doing very poorly").

[183] **RER-02**, Hobbs Report, ¶ 33, citing to **R-170**, Schlumberger Limited, 2009 Annual Report, pp. 2, 23; **R-171**, Schlumberger Limited, 2010 Annual Report, "WesternGeco", p. 24; **R-172**, TGS, 2009 Annual Report, pp. 4, 8, 10.

[redacted] paid to its [redacted] GSI allegedly made the ill-timed investment in late 2007 to spend around $20 million on upgrades and additions to the GSI Admiral and GSI Pacific while they were in drydock.[185] GSI was apparently unable to manage these expenditures because it put both ships up for sale in 2008.[186] GSI was not able to sell the GSI Admiral until October 2011.[187] It is unclear when GSI Pacific was sold, but it appears that it had been out of service since at least 2011.[188]

115. GSI was also facing internal management problems that led to its inability to compete for contracts. For example, GSI missed the public tender announcement in 2008 for a major seismic United Nations Convention on the Law of the Sea project on behalf of the Government of Canada that was eventually awarded to a competitor, Fugro Canada Corp. ("Fugro").[189] Paul Einarsson did not realize until May 2009 that GSI "had somehow missed the public advertising of this project on the government website and, therefore, had not participated" in the bidding for this project.[190] GSI launched several legal challenges against the awarding of the contract to Fugro, making allegations similar to that which it has in this NAFTA arbitration (i.e., that Canada was "retaliating" against GSI

[184] *See e.g.*, **BR-19**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited*, 2019 ABQB 162, 7 March 2019, ¶ 1; **R-029**, *Geophysical Service Incorporated v The Falkland Islands*, Claim No SC/CIV/05/14, 9 December 2016 ("*Falklands S.C.*"); and **CER-02**, Sharp Report, Schedule D1, [redacted]

[185] *Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter Eleven*, 10 October 2018 ("NAFTA Notice of Intent"), ¶ 99.

[186] **R-355**, Canada Transportation Agency, Decision No. 253-W-2009, "Application by TGS-NOPEC Geophysical Company, pursuant to the *Coasting Trade Act*, S.C., 1992, c.31, for a license to use the 'BERGEN SURVEYOR' File No. W8125/P5/09-12", 22 June 2009, ¶ 7 ("[T]he entire GSI fleet is listed for sale with Gibson shipbrokers"); ¶ 9 ("[T]he "GSI ADMIRAL" was listed for sale with Gibson shipbrokers in December 2008").

[187] **R-356**, Mac Mackay, "GSI Admiral – sold (old news)", Shipfax, 26 March 2012.

[188] **R-357**, Screenshot of Vessel Finder, "GSI Pacific Research Vessell, IMO 7907908"; **R-358**, Screenshot of Marine Traffic, "GSI Pacific Special Vessel IMO: 7907908".

[189] *See* **R-359**, *Geophysical Services Incorporate v. Canada (Attorney General)*, 2021 NSSC 77, Decision - Summary Judgment on Evidence, 1 March 2021 ("*GSI v. Canada*, 2021 NSSC 77"), ¶ 3 ("In 2008/09, the government of Canada wished to have seismic 'mapping' research done off the coast of Labrador in order to delineate the limits of Canada's continental shelf, as part of a United Nations research project […]."); ¶ 4 ("Public Works and Government Services Canada ("PWGSC") issued a public Request for Proposals ('RFP') for this work."); ¶ 7 ("Two proposals were received as a result of this posting. It is important to note that the plaintiff [GSI] did not submit a proposal.").

[190] **R-359,** *GSI v. Canada*, 2021 NSSC 77, ¶ 20; **R-360**, *Canada (Attorney General) v. Geophysical Services Incorporated*, 2022 NSCA 41, Reasons for Judgment, 3 December 2021 ("*Canada v. GSI*, 2022 NSCA 41") ¶ 28.

by allowing foreign-companies to bid on seismic surveys in Canada[191]), but all of these allegations were dismissed as having no merit and GSI was required to pay Canada's litigation costs.[192]

116. The 2008 financial crisis appears to have also impacted GSI's ability to process the seismic data it had collected in its most recent non-exclusive seismic surveys, which presumably would have impacted its ability to licence the data to third parties while it was still confidential. GSI had already failed to submit certain seismic materials to the CNSOPB for projects carried out between 1998 and 2003,[193] but also failed to submit the requisite seismic materials to the CNLOPB for certain projects undertaken in 2007 and 2008.[194] Paul Einarsson explained in a February 4, 2010 email to the NEB that "GSI has been forced to reduce staff by more than 90% and there are no qualified staff to prepare this report, due to the economy and combined with the fact that GSI is expending all our resources on lawyers to address the two copyright violations…"[195]

117. By October 2009, the vast majority of non-exclusive seismic surveys that GSI had undertaken were still confidential: only three of GSI's 22 new surveys from the C-NL and C-NS Offshore Areas had been released.[196] It was around this time that GSI essentially stopped its business as a seismic company and adopted a scorched-earth litigation strategy of suing the Boards, the federal and provincial governments and third parties, including its own customers on which its economic livelihood depended.[197]

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[191] NAFTA Notice of Intent, ¶¶ 97-100; *See also* Memorial, ¶ 72.

[192] **R-361**, *Geophysical Service Incorporated (Re), [2009] C.I.T.T., No. 32*, Canadian International Trade Tribunal Decisions (File No. PR-2009-08), Decision, 19 May 2009; **R-359**, *GSI v. Canada*, 2021 NSSC 77, ¶ 20; **R-360**, *Canada v. GSI*, 2022 NSCA 41, ¶ 28.

[193] **RWS-03**, Makrides Witness Statement, ¶ 36.

[194] **RWS-02**, Bennett Witness Statement, ¶ 37.

[195] **R-299**, Email from Paul Einarsson, GSI to Bharat Dixit, NEB, 4 February 2010.

[196] **RWS-02**, Bennett Witness Statement ¶¶ 30, 35-37 (Project No. 8924-G005-002P, 1997 2D Speculative Survey Jeanne D'Arc Basin, released 15-Jan-2008; Project No. 8924-G-0005-002P, 1998 2D Non-Exclusive Flemish Pass, released 4-Feb-2009); **RWS-03**, Makrides Witness Statement ¶ 36 (Project No. NS24-G005-001P, released October 10, 2009).

[197] **R-362**, CTV News, "Calgary seismic firm alleges its IP rights were violated over improper data release", 12 January 2014.

IV. GSI'S LITIGATION IN CANADA AND THE UNITED STATES

A. GSI's Domestic Court Claims Challenging the Regulatory Regime, the Disclosure of Seismic Materials by the Boards and Claims Against Third Parties

118. Starting in 2007, GSI began initiating domestic court actions against the federal and provincial governments of Nova Scotia, Newfoundland and Labrador, Québec, the Boards and at least 45 oil and gas companies, and other seismic data and copy companies. GSI filed dozens of claims in several jurisdictions in Canada, including before the Alberta Courts, and in the United States, all related to the Regulatory Regime and to the Boards' disclosure of GSI's seismic materials pursuant to the Regulatory Regime.[198]

119. These claims included *inter alia*:

(a) a claim in 2010 against the NEB challenging the Boards' authority to disclose seismic materials under the Regulatory Regime;[199]

(b) request for declaratory judgment in 2013 against the CNSOPB, the Government of Canada and the Government of Nova Scotia on the Boards' authority to regulate the collection and storage of seismic data;[200]

(c) copyright infringement claims between 2011 and 2014 against the federal and provincial governments and the Boards for disclosing GSI's seismic materials;[201]

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[198] These litigations were in addition to claims GSI had launched against former partners Sable Mary Seismic and Grynberg Petroleum Company. GSI also filed a similar claim challenging the Falkland Islands offshore seismic regulatory regime before the Falkland Island Courts. *See* **R-029**, *Geophysical Service Incorporated v. Her Majesty in Right of Her Government of the Falkland Islands*, 9 December 2016; **R-108**, *Geophysical Service Incorporated v. Her Majesty in Right of Her Government of the Falkland Islands*, Falkland Island Court of Appeal, Civil Appeal No 2. of 2016, Approved Judgment, 10 April 2018.

[199] **R-363**, *Geophysical Service Incorporated v. National Energy Board and others*, 2011 FCA 360, 15 December 2011, ¶ 6. GSI filed a judicial review request of the NEB's refusal to modify the 15-year privilege period. GSI argued that the 15-year period of confidentiality did not supersede the protection provided by the *Copyright Act* and the law respecting confidential information. The Federal Court of Appeal dismissed the appeal for being premature because the specific information at issue would not be disclosed until 2023.

[200] The Nova Scotia Supreme Court dismissed GSI's claims, reasoning that the CNSOPB had authority to regulate the collection and storage of seismic data. **R-364**, *Geophysical Service Incorporated v. Canada-Nova Scotia Offshore Petroleum Board and others,* Supreme Court of Nova Scotia, No. HFX No. 410874 ("*GSI v CNSOPB*, SC Nova Scotia 2013"), Statement of Claim, 8 January 2013. **R-152**, *Geophysical Service Inc. v. Canada-Nova Scotia Offshore Petroleum Board*, 2014 NSSC 172, Decision, 14 May 2014 ("*GSI v CNSOPB*, 2014 NSSC 172"), ¶ 6.

[201] While GSI filed claims against the federal and provincial governments and the Boards as primary defendants, it also named them second and third defendants in claims involving third parties. *See e.g.*, **R-005**, *Geophysical Service Incorporated v Canada-Newfoundland and Labrador Offshore Petroleum Board*, NLSC File No. 2011 01G 5430, Amended Statement of Claim, 7 January 2013 ("*GSI v. CNLOPB*, Amended SOC"), ¶¶ 22-23(c); **R-008**, *Geophysical Service Incorporated v. Lynx and others,* ABQB File No. 0901 08210, Amended x2 Statement of Claim, 4 June 2013

(d) several claims against the federal and provincial governments, alleging expropriation of its business and its seismic materials. For example, in 2014, GSI claimed against the Government of Canada (including Natural Resources Canada) and the NEB that: (1) the laws and regulations requiring GSI to submit seismic materials to the Boards, (2) the position of the federal government and the Boards to disclose seismic materials at the expiration of the privilege period, and (3) the actual disclosure of seismic materials without GSI's authorization, expropriated its business and all reasonable use of its intellectual property rights in the seismic materials.[202] As discussed below, after the Alberta Court Decisions, GSI also brought before the Federal Court a claim that the regulatory regime expropriated GSI's seismic business;

(e) claims before Canadian Courts between 2007 and 2017 against companies operating in the oil and gas industry for breach of contract, and in some instances copyright infringement, purportedly resulting from (1) access to GSI's Disclosed Seismic Materials from the Boards, (2) companies submitting seismic materials to the Boards for allowable expenditure credits ("secondary submissions"), (3) failure to pay additional licence fees ("transfer fees") when these companies came into possession of GSI's licenced material though mergers and acquisitions with GSI's licencees, or (4) involvement in exploratory groups with GSI's licencees;[203] and

(f) claims before U.S. courts between 2014 and 2021 against companies operating in the oil and gas industry for copyright infringement, and in some instances breach of contract, resulting from access to GSI's Disclosed Seismic Materials from the Boards. For example, GSI filed a claim in 2014 against TGS, one of GSI's competitors, for unauthorized access to GSI seismic materials from the CNLOPB.[204]

120. Throughout the various litigations, Canadian courts upheld the Regulatory Regime and the Boards' authority to disclose Submitted Seismic Saterials after the expiry of the confidentiality period.[205] In certain cases however, courts found that oil and gas companies accessing GSI seismic

("*GSI v. Lynx*, Amended x2 SOC"), ¶¶ 32, 36-37; **R-006**, *Geophysical Service Incorporated v. Olympic Seismic Ltd., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; and Companies A-Z* (Case No. 1201-16166), Statement of Claim, 19 December 2012, ¶¶ 41 and 43(a).

[202] *See e.g.*, **R-010**, *Geophysical Service Incorporated v. Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada itself, and on behalf of the Department of Natural Resources Canada; and the National Energy Board* (GSI Claim Case No. 1401-05316), Statement of Claim, 14 May 2014, ¶¶ 21-23. Subsection VII further addresses GSI's expropriation claims against the federal and provincial governments.

[203] *See e.g.* **R-366**, *GSI v Encana*, ABQB File No. 0701 04061, Amended SOC (23 May 2014), ¶¶ 9-10, 12-14, 22-25, 27-30; **R-367**, *Geophysical Service Incorporated v. Hunt Oil Company of Canada*, 2017 NSSC 344, Decision on Motion to Order Protection of Certain Confidential Information, 2017 NSSC 344, 4 May 2017, ¶¶ 11-12.

[204] *See e.g.* **R-368**, *Geophysical Service Incorporated v. TGS-Nopec Geophysical Company* ("*GSI v. TGS*"), United States District Court, Southern District of Texas File No. 4:2014cv01368, Complaint, 16 May 2014, ¶¶ 45-50; **R-369**, *GSI v. Occidental*, File no. 4:20-cv-01396, Original Complaint, ¶¶ 23-30.

[205] *See e.g.*, **R-363**, *Geophysical Service Incorporated v. National Energy Board and others*, 2011 FCA 360, 15 December 2011, ¶ 6.

materials (either from the Boards or from other licencees) breached their specific licence agreements with GSI.[206]

B. ABQB Court Order on Security for Costs Applications Confirming GSI Ceased its Seismic Exploration in Canada in 2009 and had Limited Assets and Revenues on the Eve of the Common Issues Trial

121. Due to GSI's numerous claims before the Alberta Courts and rumors that GSI no longer had income, several defendants in GSI's domestic litigations filed security for cost applications.[207]

122. On March 19, 2015, ABQB Master in Chambers, K.R. Laycock, awarded 26 applications for security for costs in 17 actions.[208] In his reasoning, Master Laycock considered that GSI had ceased its seismic exploration in Canada by 2009[209] and GSI's asset base was "tenuous" as of January 2015.[210]

123. In evaluating GSI's assets, Master Laycock did not include GSI's seismic data. While noting that the valuation of GSI's seismic data was "hotly contested" in the security for costs applications,[211] Master Laycock reasoned that previous 2003 and 2014 domestic court decisions had already determined that GSI's Disclosed Seismic Materials were properly disclosed to the public by the

[206] *See e.g.*, **R-011**, *GSI v. Total*, 2020 ABQB 730, ¶ 19; **R-370**, *GSI v. Devon,* ABQB File No 1401 12230, Decision, 2017 ABQB 463, (26 July 2017), ¶ 49-50.

[207] **R-371**, *Geophysical Service Incorporated v. Encana Corporation*, 2015 ABQB 196, Reasons for Judgment of K.R. Laycock, Master in Chambers, 19 March 2015 ("*GSI v. Encana*, 2015 ABQB 196"), ¶ 14.

[208] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶¶ 102, 118.

[209] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶ 8. ("The plaintiff and a predecessor company, have been large players in the acquisition of both Onshore and Marine seismic data in Canada for numerous years, but the plaintiff ceased its seismic exploration in Canada and sold its ships in 2009. Mr. [Paul] Einarsson swears in his affidavit that the company continues to work outside of Canada on seismic projects and licensing non-Canadian seismic materials. He alleges that the company is actively working on marine seismic projects in South America, the Caribbean and Morocco which involves licensing existing data and new acquisition projects") (emphasis added).

[210] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶ 95.

[211] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶ 13.

Boards and that the seismic data was "dated."[212] As a result, he concluded that the seismic data "would be difficult to sell through execution proceedings and is of little value."[213]

124. The Court was also concerned about GSI's "rapid reduction in [its] asset base [...] caused merely by its legal expenses."[214] In this regard, Master Laycock noted that the "plaintiff's legal costs in 2014 averaged $93,000 per month and $83,000.00 per month in 2013."[215]

125. GSI appealed the Master of Chambers' order. GSI's appeal was allowed, but only to reduce the total amount of the security to account for amounts related to the defendants' litigation costs.[216]

V. THE ALBERTA COURT DECISIONS

A. Order for a Common Issues Trial

126. In January 2015, GSI approached approximately 25 defendants[217] against whom it had commenced litigation at the ABQB for case management of the common issues. GSI initially identified issues common to many if not all of these actions as follows:

(1) Whether copyright subsists in seismic data, in various manifestations;

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[212] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶ 18. Master Laycock was referring to **R-354**, *GSI. v. CNLOPB*, 2003 FCT 507 and to **R-152**, *GSI v. CNSOPB*, 2014 NSSC 172.

[213] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶ 18.

[214] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶ 98.

[215] **R-371**, *GSI v. Encana*, 2015 ABQB 196, ¶¶ 15-16. As noted by the Court, subsequent undertaking responses showed that GSI's legal costs increased to $107,251 in October, $144,062 in November and $134,836 in December 2014.

[216] **BR-5**, *Geophysical Service Incorporated v Encana and others*, 2016 ABQB 49, Memorandum of Decision of the Honourable Madam Justice J. Streakaf, 22 January 2016 ("*GSI v. Encana*, 2016 ABQB 49"), ¶¶ 45, 57.

[217] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 12. Although GSI's claim against CalWest was part of the Common Issues Trial, the ABQB examined this claim separately because it was already set for trial before the Common Issues Trial was ordered by Chief Justice Wittmann. In a separate decision, the ABQB dismissed the action against CalWest. It reasoned that CalWest did not breach any copyrights or other tortious duties it may have owed GSI when it copied GSI's seismic materials from the Quebec Ministry in 2010. GSI appealed this decision to the ABCA, but subsequently withdrew the appeal on 12 January 2018, in light of the SCC Decision in the Common Issues Trial, dismissing leave to appeal. In the Common Issues Trial, the ABQB had reasoned that its decision would be binding on the *CalWest* trial. See **R-150**, *Geophysical Service Incorporated v. CalWest*, 2016 ABQB 356 ("*GSI v. CalWest*, 2016 ABQB 356"), ¶ 62; **R-372**, *GSI v CalWest*, ABCA No. 1601-0179AC, Letter from Matti Lemmens, BLG to Registrar, Court of Appeal of Alberta, 12 January 2018.

(2) Whether GSI is the owner of intellectual property to the seismic data including copyright;

(3) Whether, by virtue of the legislative scheme, various parties were entitled to "copy", "publish", "sell" and/or "use" the seismic date free of any proprietary rights of GSI in the seismic data; and

(4) Whether certain conduct by licencees of GSI constituted a breach in the various terms of GSI's form or forms of licence agreement in addition to being a breach of GSI's copyright.[218]

127. In the case management proceedings, GSI and the defendant group[219] disagreed on the formulation of the copyright issue.[220] In particular, GSI preferred the word "does" instead of "can" in resolving the question of whether copyright subsisted in seismic data. GSI did not want a hypothetical answer, which would leave the issue of whether GSI actually held copyright in specific seismic data open.[221] In contrast, the defendant group argued that the copyright issue should be resolved at a higher level to avoid fact-intensive discovery.[222]

128. On June 2, 2015, Chief Justice Wittmann of the ABQB ordered the trial of the following two common issues:

(1) What is the effect of the Regulatory Regime on GSI's claims?

(2) Can copyright subsist in seismic material of the kind that are the subject matter of GSI's claims? [223]

129. Chief Justice Wittmann also broadly outlined the kind of seismic materials at issue:

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[218] **R-373**, Letter from Timothy C. Platnich, Caron & Partners LLP, 13 January 2015, p. 1. In a letter to defendants, counsel to GSI proposed a trial of common issues on the basis that "it is not an efficient use of court resources to have the common issues litigated and re-litigated over multiple actions."

[219] A complete list of the Defendants is attached as Schedule A to **R-001**, *GSI v. Encana*, 2016 ABQB 230.

[220] *See* **R-374**, *GSI v. Encana*, 2016 ABQB 230, Case Management, 8 April 2015; **R-375**, *GSI v. Encana*, 2016 ABQB 230, Case Management, 2 June 2015.

[221] **R-375**, *GSI v. Encana*, 2016 ABQB 230, Case Management, 2 June 2015, p.12, lines 15-29.

[222] *See e.g.*, **R-375**, *GSI v. Encana*, 2016 ABQB 230, Case Management, 2 June 2015, p.25 lines 5-9 (Mr. Donaldson for Suncor and Devon).

[223] **R-376**, *GSI v. Encana*, 2016 ABQB 230, Order, 2 June 2015.

(a) raw seismic field data, or raw seismic, magnetic, and gravity data;

(b) seismic related navigation data;

(c) processed and reprocessed seismic data;

(d) selections, arrangement and compilations of raw, processed and reprocessed seismic data;

(e) productions and reproductions of seismic data in various forms and media including physical, electronic, magnetic and digital works;

(f) interpretations, derivations and translations of the seismic data; and

(g) related seismic data materials.[224]

130. The Common Issues Trial did not include GSI's other claims for losses from conversion of its seismic material, breach of confidence, unjust enrichment, breach of contractual licence agreement, negligent misrepresentation, expropriation and contractual interference.[225] Chief Justice Wittmann also did not include in the Common Issues Trial GSI's similar claims before the federal and the provincial courts of Nova Scotia and Newfoundland.[226]

131. In 2015, Justice K.M. Eidsvik of the ABQB heard the Common Issues Trial. On April 21, 2016, Justice Eidsvik dismissed GSI's claim for the reasons summarized below.[227] GSI appealed the ABQB Decision to the ABCA.[228] On April 28, 2017, the ABCA dismissed GSI's appeal.[229] GSI then filed an application for leave to appeal the ABCA Decision to the Supreme Court of Canada. On November 30, 2017, the Supreme Court of Canada dismissed GSI's leave to appeal.[230] This constituted the final judgment rendered on the common issues under Canadian law.

[224] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 26. *See also* **R-376**, *GSI v. Encana*, 2016 ABQB 230, Order, 2 June 2015.

[225] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 4.

[226] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 5.

[227] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 318, 323.

[228] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 27.

[229] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 108.

[230] **R-003**, *GSI v. Encana*, 2017 SCC 37634 (leave to appeal denied). There is no right of appeal to the Supreme Court of Canada from a decision of a provincial Court of Appeal in a civil matter. Instead, a party must first seek leave to appeal from the Supreme Court of Canada.

B. Summary of the Alberta Court Decisions

132. The ABQB addressed the two issues in the Common Issues Trial in reverse order. On the first issue – whether copyright can subsist in seismic material – the ABQB divided seismic material into two categories: (1) raw or field seismic data, and (2) processed data.[231] The ABQB found that both categories of data could be protected under the *Copyright Act*.[232] Both categories met the "skill and judgment" test laid out by the Supreme Court of Canada.[233] The ABQB found that field data qualified as original artistic or literary products in the scientific domain.[234] Processed data qualified as an original literary compilation work and an artistic compilation work in the scientific domain.[235] While the ABQB found that copyright could subsist in GSI's seismic material, the Court did not determine that copyright existed in any specific seismic data held by GSI, including raw or field seismic data or processed data.[236]

133. The ABQB framed the second issue of the Common Issues Trial as "whether the Defendants have breached the copyright in GSI's seismic data by copying, or allowing others to copy, data that was submitted to various government entities pursuant to the Regulatory Regime."[237]

134. To resolve this issue, the ABQB investigated the purpose of the Regulatory Regime through consideration of its legislative history and an extensive volume of extrinsic evidence tendered before the Court.[238] Under Canadian law, the proper approach to statutory interpretation is to take "into

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[231] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 43. Specifically, the ABQB considered "raw or field seismic data" to include: "(i) raw seismic field data, or raw seismic, magnetic, and gravity data, and (ii) seismic related navigation data;" and "processed data" to include "(iii) processed and reprocessed seismic data; (iv) selections, arrangement and compilations of raw, processed and reprocessed seismic data, (v) productions and reproductions of seismic data in various forms and media including physical, electronic, magnetic and digital work, (vi) interpretations, derivations and translations of the seismic data."

[232] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶115.

[233] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 78, 82, 85 (citing **R-015**, *CCH Canadian Ltd. v. Law Society of Upper Canada*).

[234] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 78, 82, 85 (citing **R-015**, *CCH Canadian Ltd. v. Law Society of Upper Canada*).

[235] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 78, 83, 85.

[236] **RER-01**, Expert Report of Mr. Barry Sookman, 16 January 2023 ("Sookman Report"), ¶¶ 10, 120-124.

[237] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶116.

[238] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 143-212; *see also* **R-002**, *GSI v. Encana*, 2017 ABQB 125, ¶¶ 82-97.

account the purpose of the legislative provisions and all relevant context".[239] The ABQB found Parliament formulated the Regulatory Regime with the aim to balance:

> [T]he twin objectives of promoting confidentiality in seismic data and promoting resource exploration and development [that] would be best met by imposing a period of privilege over geophysical works and then allowing such materials to be disclosed without further restrictions.[240]

135. In assessing the ABQB's analysis, the ABCA found:

> [T]he Trial Court understood the complex and multi-dimensional character of statutory interpretation, and undertook the task required by pursuing the ultimate objective of understanding the will of the legislator, while also reading the text in its grammatical and ordinary sense harmoniously with the overarching purpose and scheme of the entire legislation.[241]

136. The ABCA agreed that the "plain and obvious intention of the legislators" was:

> [T]o identify, weigh and balance a variety of disparate interests, so as to achieve two policy objectives. First, to attract investment by companies with the capacity to acquire geophysical data regarding petroleum resources in the challenging frontier and offshore. Second, to regulate dissemination of geophysical data at a pace that would broadly encourage further interest and study by the resource and investments industries, and academia, in frontier and offshore resource exploration and development, for the benefit of all Canadians.[242]

137. The Alberta Courts determined that the only statutory interpretation that could fulfill Parliament's intention was to read the Regulatory Regime as allowing the disclosure of seismic materials after the confidentiality period, including the right to access and copy such materials. The ABQB stated:

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[239] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 133-137; *see also* **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 98. Statutory interpretation in Canada includes seeking to infer the intended meaning of a legislative text based on its words, its purpose, and all relevant context including legislative history and factual matrix and established legal norms. *See also* **RER-01**, Sookman Report, Section H ("Statutory Construction Principles").

[240] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 241 (emphasis added). *See also* ¶¶ 150, 170-171, 177, 179-182, 241-242, 297-298.

[241] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 81 (emphasis added).

[242] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 81.

> GSI's submissions ignore the reality that Parliament's purpose and intention when it enacted the [CPRA] was to allow for public disclosure of seismic data after a period of time to allow for necessary oil and gas exploration of the Canadian offshore and frontier lands.[243]
>
> [*CPRA*] s. 101 read in its entirety does not make sense unless it is interpreted to mean that permission to disclose without consent after the expiry of the 5 year period, or under the conditions found in s. 101(6) must include the ability to copy the information. In effect, permission to access and copy the information is part of the right to disclose.[244]

138. With this issue on appeal, the ABCA confirmed:

> [T]he ability to copy data thereafter [is] not only a rational interpretation of the Boards' right to disclose, but the only one in keeping with the dual objectives of the legislation.[245]
>
> In our view, the statutory interpretation most consistent with the rational inferences drawn by the Trial Court, and most compatible with common sense, is that there is to be free and unfettered dissemination of acquired and retained data following the requisite privilege period to encourage national and international academic and entrepreneurial engagement. […] [T]he legislators intended that the data be disseminated to facilitate its use; "disclosure" must then be interpreted in a manner which readily allows the data to be used. Permitting the data to be copied, squarely meets with that intention.[246]
>
> The position taken by GSI as to the limited meaning of "disclosure", namely "expose to view", is not tenable and is wholly inconsistent and incompatible with the intention of the Regulatory Regime.[247]
>
> The Trial Court's statutory interpretation of the Regulatory Regime and its conclusion that the legislated right *to disclose* was the legislated right *to copy*, was correct.[248]

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[243] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 319 (emphasis added).

[244] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 253 (emphasis added).

[245] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 99 (emphasis added).

[246] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 100 (emphasis added).

[247] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 101 (emphasis added).

[248] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 105 (underlining added; italics in original).

139. The Alberta Courts saw a conflict between the Regulatory Regime and the *Copyright Act*. The ABQB stated:

> [T]he rights afforded to owners of copyrightable material created in the Canadian offshore conflict head on with the rights and obligations under the Regulatory Regime. In simple terms, it is the difference of a few decades of protection (approximately 50 years) under the *Copyright Act* versus 5 to 15 years under the Regulatory Regime (as it is presently applied).[249]
>
> Parliament made the logical decision to deal with disclosure of material filed under the Regulatory Regime exhaustively through provisions contained within the Regime itself.[250]

140. The ABCA also observed an "apparent conflict" between the statutory regimes.[251]

141. The ABQB then resolved this conflict by applying the "modern principle"[252] for statutory interpretation. It used the conflict resolution technique of implied exception (*generalia specialibus non derogant* or *lex specialis*)[253] to find that the specific legislated authority in the Regulatory Regime was a complete code on the issue of the disclosure of seismic materials.[254] The ABQB summarized its "decision in brief" as follows:

> The *CPRA*, properly interpreted, allows for disclosure without restriction after a defined period of time. It is a complete and specific code that applies to all oil and gas property in the offshore and frontier lands, including seismic data. Its provisions supplant any more general pieces of legislation, such as the *Copyright Act* or the *AIA* to the extent that they conflict. Therefore, the Boards and recipients of seismic data have not breached GSI's copyright rights. Under the existing Regulatory

[249] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 296 (emphasis added).

[250] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 298 (emphasis added).

[251] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 103.

[252] **RER-01**, Sookman Report, ¶¶ 95-103.

[253] The two are logically equivalent: both mean that in the case of a true conflict between a provision that deals specifically with the matter at hand and a provision of more general application, the more specific or "special" provision prevails over the general one on the basis that it creates an implied exception from the latter. **RER-01**, Sookman Report, ¶¶ 95-103.

[254] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 304.

> Regime, it is not unlawful for the Boards to disclose data after the expiry of the privilege period in the manner that they have been doing.[255]

142. The ABCA found no reviewable error in the ABQB's analysis and held:

> [T]here is no breach of copyright in this matter by the Boards' disclosure of seismic data after the privilege period, including allowing data to be copied. […] GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period. Thereafter, GSI has no legal basis or lawful entitlement to interfere or object to any decisions made by the Boards relating to its collected data.[256]

143. Subsequently, the ABQB considered that "in the alternative" the Regulatory Regime created a compulsory licencing system through which the Boards have the authority to copy seismic materials after the confidentiality period expired; thus, they are not infringing the *Copyright Act* when they do so.[257]

144. The Alberta Court Decisions did not resolve GSI's contractual claims against third parties, and instead left "open other contractual issues in each case."[258] Nor did the Alberta Court Decisions make a finding that the Regulatory Regime constituted an expropriation. Such a claim was not before the Alberta Courts in the Common Issues Trial.

145. The judgment roll of the ABQB Decision stated:

> IT IS ORDERED AND ADJUDGED THAT:
>
> 1. Copyright can subsist in both raw or field seismic data and in processed seismic data.
> 2. The Regulatory Regime, as defined in the Reasons for Judgment:
>
> a. is a complete answer to the Plaintiff's claims that the Boards acted unlawfully in disclosing the information and documentation to the public;

[255] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 132 (emphasis added); *see also* ¶¶ 295, 299-304, 319, 323.

[256] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶¶ 104, 108. The ABCA also reasoned that the "Regulatory Regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate, in their sole discretion as they see fit, all materials acquired from GSI and collected under the Regulatory Regime," ¶ 102.

[257] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 318.

[258] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 323.

b. is a complete answer to whether the copying companies and other organizations were entitled to receive and copy the information and documentation for customers; and

c. for oil companies, establishes that there is nothing unlawful about accessing or copying the information from the Boards, leaving open other contractual issues in each case.

3. Costs are reserved to be spoken to at a later date, if the parties are unable to agree.[259]

146. Thus, the Alberta Courts interpreted a complete statutory scheme and explained its application to GSI, the Boards and third parties. The rights of the Boards to disclose the seismic materials, including for copying, arose from the Regulatory Regime and "have always been there".[260]

C. GSI's Continued Domestic Litigations After the Alberta Court Decisions

147. As described above, the Common Issues Trial did not resolve all of GSI's claims, for breach of contract. GSI pursued these claims after the Alberta Court Decisions. In some instances, GSI obtained damages against third parties for breach of contract[261] while in other instances, the courts dismissed GSI's claims on the basis that GSI failed to prove them[262] or they were time-barred by domestic limitations periods.[263] As of the date of this submission, litigation for some GSI claims continue.[264]

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[259] **R-377**, *GSI v. Encana*, Judgment Roll dated 21 April 2016, filed at the Judicial Centre of Calgary, 5 July 2015.

[260] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 322; *see also* **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 104.

[261] **R-011**, *GSI v. Total*, 2020 ABQB 730, ¶ 19. *See also*, **R-370**, *GSI v Devon*, Decision, 26 July 2017 ("*GSI v. Devon*, 2017 ABQB 463"), ¶¶ 49-50 and 55.

[262] For instance, in some cases the Courts found that GSI failed to prove breach of contract for allegedly accessing data from the Boards or breach of contract for disclosing licenced materials with members of an exploratory group. *See e.g.*, **R-378**, *GSI v. Murphy*, 2017 ABQB 464, ¶¶ 12-23, 25-32, 76; **R-379**, *GSI v. Murphy*, 2018 ABCA 380, Memorandum of Judgment and Dissent, 21 November 2018 ("*GSI v. Murphy*, 2018 ABCA 380"), ¶ 39-48 and 93; **R-380**, *GSI v Murphy*, Supreme Court of Canada File No. 38486, 23 May 2019 (leave to SCC denied); **R-444**, *Geophysical Service Incorporated v. Encana Corporation*, 2017 ABQB 466, Judgment, July 26, 2017 ¶ 96; **R-381**, *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, Judgment, 11 November 2018 ¶ 65.

[263] *See e.g.*, **R-011**, *GSI v Total*, 2020 ABQB 730, ¶ 57. (dismissing claim in part for limitations period); **R-381**, *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, ¶ 35 (the ABCA held that section 3(1)(a) of the *Limitations Act* was a complete defence to GSI's "Accessed Data" claim.)

[264] *See e.g.*, **BR-17**, *Geophysical Service Incorporated v. Plains Midstream Canada ULC*, 2022 ABKB 722, Reasons for Judgment, 1 November 2022; **R-403**, *Geophysical Service Incorporated v. Plains Midstream Canada*, File No. 1401 00646, Procedural Card, Consulted on December 19, 2022.

148. In addition, on July 12, 2017, GSI also filed a new claim against the federal and provincial governments of Newfoundland, Nova Scotia and Québec seeking:

> A declaration that the Legislation has resulted in the *de facto* expropriation, regulatory or constructive taking of GSI's copyright and confidentiality of the Seismic Data, the Licensing Agreements, the Licensing Obligations and the Goodwill.[265] […]

149. In support of its claim, GSI relied in particular on the Alberta Court Decisions:

> The Legislation has been deemed by the Courts to be "confiscatory." […]
>
> The Courts have deemed that, as a result of the Legislation, the exclusivity of GSI's private property rights, including copyright and confidentiality in Seismic Data, has ended.[266]

150. The expropriation claim was not resolved by Canadian courts.[267] Instead, GSI served Canada with a Notice of Intent to Submit a Claim under NAFTA on October 10, 2018 and launched this arbitration on April 18, 2019.

VI. THE TRIBUNAL LACKS JURISDICTION OVER THE CLAIMANTS' CLAIMS

A. Summary of Canada's Position on the Tribunal's Jurisdiction

151. An investor who brings a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions precedent to submit a claim to arbitration and that the tribunal has

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[265] Although GSI filed the claim against Québec, it did not particularize its claims. The Statement of Claim concerned the federal and provincial offshore seismic regulations. **R-365**, *Geophysical Service Inc. v. Her Majesty the Queen in Right of Canada,* Federal Court File No. T-1023-14, Statement of Claim, July 12 2017 ("*GSI v. HMTQ*, T-1023-14, SOC"), ¶ 1(b)(i) (emphasis added).

[266] **R-365**, *Geophysical Service Inc. v. Her Majesty the Queen in Right of Canada,* Federal Court File No. T-1023-14, Statement of Claim, July 12 2017, ¶¶ 35-39.

[267] On June 28, 2018, Prothonotary Tabib of the Federal Court struck down GSI's Statement of Claim, with leave to amend, on the basis that GSI's cause of action of *de facto* expropriation was based on a right it never had. **R-383**, *Geophysical Service Inc. v. Her Majesty the Queen in Right of Canada*, Federal Court File No. T-1023-14, 2018 FC 670, ¶ 6. GSI appealed the order claiming that the Prothonotary erred in striking GSI's Statement of Claim. In March 2019, Justice Boswell of the Federal Court granted GSI's motion and restored the Statement of Claim. Justice Boswell reasoned that the standard to strike a statement of claim was a strict one and "the Prothonotary misapprehended the cause of action for confiscation or *de facto* expropriation." As a result, Justice Boswell restored GSI's initial Statement of Claim. However, Justice Boswell did not rule on GSI's claim. The Government of Canada appealed Justice Boswell's decision to the Federal Court of Appeal, and then, later discontinued the appeal in light of GSI discontinuing the underlying claim. **R-494**, *Geophysical Service Inc. v. Her Majesty the Queen in Right of Canada*, Federal Court File No. T-1023-14, 2019 FC 337, ¶¶ 40-42.

jurisdiction over the dispute. This fundamental principle has consistently been reaffirmed by NAFTA tribunals, including in recent cases such as *Tennant v. Canada*, *Westmoreland v. Canada*, and *Apotex v. United States*.[268] As the tribunal in *Mesa v. Canada* stated "[i]t is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."[269] Moreover, where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[270] Therefore, regardless of whether a disputing party raises an issue or not, a claimant must first establish that its claims fall within the tribunal's jurisdiction in order to be able to proceed beyond the jurisdictional stage.[271]

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[268] *See e.g.*, **RLA-003**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 120 ("In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e., that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established."); **RLA-020**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Final Award, 25 October 2022 ("*Tennant* – Final Award"), ¶¶ 349-355; **CLA-038**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022 ("*Westmoreland* – Final Award"), ¶ 193; and **RLA-004**, *Apotex Inc. v. the Government of the United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex* – Award on Jurisdiction and Admissibility"), ¶¶ 149-150.

[269] **CLA-035**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 236.

[270] **RLA-005**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶ 61; **RLA-006**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶ 277 ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional phase[.]") (citation omitted); **RLA-007**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on Jurisdiction, 1 June 2012, ¶ 2.8 ("it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that 'prima facie' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case."); **RLA-008**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama* (ICSID Case No. ARB/16/34) Decision on Expedited Objections, 13 December 2017, ¶ 118 ("[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction."); **RLA-009**, *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29) Award, 22 October 2018, ¶ 250 ("[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.")

[271] **RLA-010**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica* (UNCITRAL) Interim Award, 25 October 2016 ("*Spence* – Interim Award on Jurisdiction"), ¶ 225.

152. In this case, the Claimants have not – and cannot – establish the jurisdiction of this Tribunal to hear its claims. There are two primary jurisdictional flaws that flow through the entirety of the Claimants' claim.[272]

153. First, the Claimants failed to comply with the waiver requirements in Article 1121. To comply with an effective waiver after filing the NOA, the Claimants could not continue litigating claims for damages "with respect to the measure" alleged to breach NAFTA. The Claimants have taken the position that licence fees allegedly owed by third parties are being found not to be payable because of the Alberta Court Decisions. By this (flawed) logic, GSI and the individual Claimants were bound under Article 1121 to discontinue all claims for damages involving its allegedly unpaid licence fees as of the date it filed its NAFTA NOA (April 19, 2019). But they did not do so and are now engaged in a flagrant attempt at double recovery by continuing to seek the same damages against third parties that they are simultaneously claiming against Canada. This is a direct contravention of the preconditions to establish Canada's consent to arbitration. The Claimants' waiver is therefore defective, and they cannot belatedly remedy it. The Tribunal has no jurisdiction and should dismiss the claim pursuant to Article 1121 without entering the merits.

154. Second, the Claimants' assertion that the Alberta Court Decisions are the alleged NAFTA breach is a transparent and futile attempt to circumvent the limitation period set out in Articles 1116(2) and 1117(2). There is no dispute that the Regulatory Regime and the resulting disclosure by the Boards of Disclosed Seismic Materials to the public after the expiry of the confidentiality period are time-barred and cannot form the basis of NAFTA liability. The Claimants have not impugned any element of the Alberta Court Decisions that could constitute an independently actionable breach of NAFTA. Everything the Claimants have alleged as having caused them harm arises from the Regulatory Regime, not the Alberta Court Decisions. The Alberta Court Decisions did not take any rights away from GSI, they simply interpreted existing domestic law and the rights of GSI thereunder. This is further evidenced by the fact that the Claimants' damages claim is almost entirely premised

[272] As noted in Canada's Statement of Defence (¶ 15), the Tribunal has also no jurisdiction *rationae temporis* to consider measures relating to the submission of and public disclosure of GSI's seismic materials prior to January 1, 1994 because of the non-retroactivity rule in international law. *See* **RLA-011**, *Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdiction Issues, December 6, 2000 ¶ 62; **CLA-054**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev* – Award"), ¶¶ 57-68.

on alleged lost revenues dating as far back as the year 2000, well prior to the April 18, 2016 critical date for the limitation period in this case (and the Alberta Court Decisions). In failing to identify any claim that falls within the three-year limitation period applicable under NAFTA Articles 1116(2) and 1117(2), the Tribunal should reject the Claimants' claim entirely for lack of jurisdiction *ratione temporis*.

B. The Tribunal Has No Jurisdiction over this Claim Because the Claimants Have Failed to Fulfil the Condition Precedent to Arbitration in NAFTA Article 1121

155. The Claimants must comply with an effective waiver under Article 1121 to establish the Tribunal's jurisdiction. Article 1121 does not allow the Claimants to continue litigating claims in domestic courts for damages "with respect to the measures" alleged to breach NAFTA. Upon filing the NOA, the Claimants were required to discontinue all of their claims for damages against the Governments of Canada, Newfoundland and Labrador and Nova Scotia, the NEB, CNLOPB, CNSOPB and third parties whose access of seismic data from the Boards allegedly caused GSI losses that the Claimants seek to recover in this NAFTA arbitration.

156. The Claimants filed a waiver with their April 19, 2019 NOA. Yet they did not comply with the concomitant requirement to immediately discontinue all claims for damages "with respect to the measures" alleged to breach NAFTA. In addition to a belated discontinuance of a lawsuit against CNLOPB in February 2020, GSI continued multiple lawsuits after filing their NOA against companies including Plains Midstream, Total, Nalcor, TGS, Anadarko, Murphy and others in Canadian and U.S. courts for damages arising from their alleged access of GSI's seismic data from the Boards and violations of their licence agreements. In many cases, GSI has claimed the same damages simultaneously against Canada in this NAFTA arbitration, as evidenced by Exhibit C-112 (the so-called "Unpaid Invoice Listing"), which is at the core of the Sharp Report's calculation of the Claimants' damages claim.[273] This is an egregious case of seeking double recovery, and a direct failure to meet the preconditions in Article 1121 to establish Canada's consent to arbitration.

[273] **C-112**, GSI, "Unpaid GSI Invoice Listing", various dates (the alleged "Unpaid Invoices"); **CER-02**, Expert Report of Paul Sharp of PricewaterhouseCoopers LLP, 26 September 2022 ("Sharp Report"), Background, p. 16, ¶ 70 ("Based on Mr. Paul Einarsson's Witness Statement, we understand that invoices dated between 2011 and 2016 (for contractual obligations arising between 2007 and 2016) totalling [redacted] were not paid."); Scope of Our Work, p. 35 ¶ 2.6; Income Approach – Capitalized Cash Flow, Unpaid Revenues, p. 21 ¶¶ 92-96, p. 24, ¶ 112.

1. The Claimants Must Comply with the Waiver Requirement in Article 1121 to Establish Canada's Consent to Arbitration

157. NAFTA Articles 1116 to 1121 set the procedures claimants must follow to submit a claim to arbitration.[274] Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," states:

> A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[275]

158. Under Article 1121, NAFTA claimants must waive the right to initiate or continue proceedings before any administrative tribunal or court under the law of any Party (i.e. Canada, the United States or Mexico) with respect to the respondent's measures that allegedly breach Chapter Eleven. The only exceptions allowed are those expressly set out in Article 1121 – proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of Canada.[276]

159. A NAFTA Party's consent to arbitration under Article 1122(1) is conditioned on full compliance with the procedures set out in Chapter Eleven, including each condition precedent in Articles 1116 through 1121.[277] Compliance with an effective waiver under Article 1121 is among

[274] **CLA-031**, *Methanex Corporation v. United States of America* (UNCITRAL), Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002 ("*Methanex* – First Partial Award"), ¶¶ 120, 121.

[275] Article 1121(1) contains the same condition precedent for a disputing investor filing a claim under Article 1116.

[276] **RLA-012**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) ("*DIBC*") Award on Jurisdiction, 2 April 2015 ("*DIBC* – Award"), ¶ 293.

[277] **CLA-031**, *Methanex* – First Partial Award, ¶¶ 120-121.

those pre-requisites to establish the consent of a NAFTA Party to arbitrate. A claimant's failure to comply with the waiver requirement means the tribunal would lack jurisdiction *ab initio*, or upon its composition.[278]

160. Compliance with Article 1121 entails both formal and material requirements.[279] On the formal requirements, the waiver "must be clear, explicit and categorical".[280] Under Article 1121(3), the waiver must be in writing, delivered to the disputing Party and included in the submission of a claim to arbitration. For cases submitted under the UNCITRAL Rules, a claim is "submitted to arbitration" when the notice of arbitration is received by the disputing Party.[281] Hence, compliance with Article 1121 is mandatory immediately when a claimant files the notice of arbitration.[282]

161. On the material requirements, a claimant must act consistently and concurrently with the waiver by not continuing domestic proceedings for the payment of damages "with respect to the measure" alleged to breach NAFTA.[283] If a claimant or its enterprise[284] continues litigation with respect to the

[278] **CLA-071**, *Waste Management, Inc. v. United Mexican* States (ICSID Case No. ARB (AF)/98/2) ("*Waste Management I*"), Arbitral Award, 2 June 2000 ("*W*aste *Management I* – Award"), p. 239; **RLA-012**, *DIBC* – Award, ¶¶ 320, 336-337; **RLA-013**, *The Renco Group, Inc. v. The Republic of Peru* (UNCITRAL) Partial Award on Jurisdiction, 15 July 2016 ("*Renco* - Partial Award") ¶ 73; **RLA-012**, *DIBC* – Award, ¶¶ 291, 336-337; **RLA-014**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (CAFTA-DR/ICSID Case No. ARB/09/17) Award, 14 March 2011 ("*Commerce Group* – Award") ¶¶ 79-80; **RLA-015**, *Railroad Development Corp. v. Republic of Guatemala* (CAFTADR/ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction under CAFTA Article 10.20.5, 17 November 2008 ("*Railroad Development* - Decision on Jurisdiction"), ¶ 56.

[279] **RLA-013**, *Renco* - Partial Award, ¶ 73; *see also* **CLA-071**, *Waste Management I* – Award, ¶ 20; **RLA-014**, *Commerce Group* – Award, ¶¶ 79-80.

[280] **CLA-071**, *Waste Management I* – Award, ¶ 18.

[281] NAFTA, Article 1137(1)(c) ("A claim is submitted to arbitration under this Section when: […] (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.").

[282] **RLA-012**, *DIBC* – Award, ¶ 295; **CLA-071**, *Waste Management I* – Award, ¶¶ 19, 24.

[283] **CLA-071,** *Waste Management I* – Award, ¶¶ 14, 20, 24. **RLA-014,** *Commerce Group* – Award, ¶¶ 79-80, 84, 102, 107.

[284] For a waiver to be and remain effective, any juridical persons that a claimant directly or indirectly owns or controls must abstain from initiating or continuing proceedings in another forum as of the date of filing the waiver (and thereafter) with respect to the measures alleged to violate NAFTA Chapter Eleven. To allow otherwise would permit a claimant to circumvent the formal and material requirements under Article 1121 through its enterprise, rendering the waiver provision ineffective. This would frustrate the purpose of Article 1121, as described herein.

measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement.[285] The *Waste Management I* tribunal stated:

> [T]he act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. […] [I]t is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver [...][286]

162. The phrase "with respect to the measure" in Article 1121 does not mean the "measures" challenged in the NAFTA case and other fora must be identical or that the legal basis for the challenge must be the same. The ordinary meaning of the phrase "with respect to" is "with reference or regard to something".[287] In describing Article 1121, Canada's NAFTA Statement of Implementation states that the investor and its enterprise must "waive their right to initiate or continue legal proceedings […] concerning the measure in question."[288] The United States' NAFTA Statement of Administrative Action states, "Article 1121 requires the investor […] to waive the right to initiate or continue any actions in local courts or other *fora* relating to the disputed measure".[289]

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[285] **RLA-014**, *Commerce Group* – Award, ¶ 115 (noting that the waiver was invalid and lacked "effectiveness" because claimants failed to discontinue domestic proceedings in El Salvador, so there was no consent of the respondent and the tribunal lacked jurisdiction); *see also* **RLA-012**, *DIBC* – Award, ¶ 336.

[286] **CLA-071**, *Waste Management I* – Award, ¶ 24 (emphasis added).

[287] **R-388**, *Shorter Oxford English Dictionary*, *sub nom* "respect", Merriam-Webster, *sub nom* "respect" ("with respect to : with reference to : in relation to"). The equally authoritative French and Spanish texts of the NAFTA use similarly broad language. In French, "des procédures *se rapportant* à la mesure [...]" is used and means proceedings "relating to" or "in logical relation with." Loi de mise en œuvre de l'Accord de libre-échange nordaméricain, L.C. 1993, ch. 44. The Spanish text uses "respecto a la medida [...]" which means proceedings "respecting" the measure. El Tratado de Libre Comercio en America del Norte, Executive Decree of December 14, 1993, Diario Oficial, December 20, 1993. *See* **CLA-032**, *Canfor Corporation v. United States of America and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) ("*Canfor*"), Decision on Preliminary Question, 6 June 2006 ("*Canfor* – Decision"), footnote 214 to ¶ 201 (citing use of "with respect to" in the French and Spanish versions of NAFTA).

[288] **RLA-016**, *North American Free Trade Agreement*, Statement of Implementation, Canada Gazette Part I, 1 January 1994), p. 154.

[289] **RLA-017**, *The North American Free Trade Agreement Implementation Act*, United States Statement of Administrative Action ("U.S. Statement of Administrative Action"), p. 147.

163. The three NAFTA Parties agree that the phrase "with respect to" in Article 1121 should be interpreted broadly.[290] NAFTA tribunals concur. The *Waste Management I* tribunal stated:

> For purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA.[291]

164. A broad construction of "with respect to" is consistent with the purpose of Article 1121.[292] NAFTA and other tribunals confirm that Article 1121 aims to avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple fora, to minimize the risk of double recovery and to reduce the risk of conflicting outcomes (and thus legal uncertainty).[293]

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[290] **RLA-018**, *KBR Inc. v. United Mexican States* (UNCITRAL) ("*KBR*") Final Award, 30 April 2015 ("*KBR* – Award"), ¶ 113 ("The Tribunal further observes that Respondent and the non-disputing NAFTA Parties concur in that the expression '*with respect to the measure*' should be broadly interpreted. Claimant has not disputed this view of the three NAFTA Parties. The Tribunal accepts that the formula 'with respect to' is wide. Its plain meaning is equivalent to 'relating to' or 'concerning,' terms used respectively in the United States' Statement of Administrative Action and Canada's Statement of Implementation."); **CLA-032**, *Canfor* – Decision, ¶ 201. *See also* **R-389**, *DIBC*, Submission of the United States of America, 14 February 2014 ("*DIBC* – USA Article 1128 Submission"), ¶ 6 ("As the United States has previously argued, the phrase 'with respect to' in Article 1121(b) should be interpreted broadly."); **R-390**, *DIBC*, Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014 ("*DIBC – Mexico's Article 1128 Submission*"), ¶ 8 ("Mexico agrees that all three Parties 'used the phrase 'with respect to' interchangeably with 'concerning'', which suggests a 'broad and general relationship.' Mexico also agrees with Canada's views expressed in this proceeding, that '[t]he ordinary meaning of the words 'with respect to' is 'as regards; with reference to,' not 'identical' or 'same as.'").

[291] **CLA-071**, *Waste Management I* – Award, ¶ 27 (emphasis added). *See also* **RLA-018**, *KBR – Award*, ¶ 112 ("The *Waste Management I* tribunal points to the requirement that the *object* or better the subject matter of the parallel proceedings "*consist[] of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA.*" In other words, the measure that is alleged to be a breach in the NAFTA arbitration must fall within the subject matter of the parallel domestic or international proceedings. This interpretation comports with the natural and plain meaning of Article 1121 of NAFTA.").

[292] **CLA-071**, *Waste Management I* – Award, ¶ 27 (emphasis added).

[293] **CLA-075**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) ("*Waste Management II*"), Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 27; **CLA-057**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNICTRAL) Arbitral Award, 26 January 2006 ("*Thunderbird* – Award"), ¶ 118; **RLA-018**, *KBR – Award*, ¶¶ 116, 124. The tribunal in *Commerce Group* observed that the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart." **RLA-014**, *Commerce Group – Award*, ¶ 111-112.

165. The *KBR v. Mexico* NAFTA case considered these questions in detail.[294] In that case, the claimant's ("KBR") Mexican subsidiary ("COMMISA") prevailed in an International Chamber of Commerce ("ICC") arbitration against a Mexican energy company ("PEP"). The contractual dispute concerned the construction of natural gas platforms. COMMISA applied to U.S. courts to enforce the ICC award, and to Luxembourg courts to attach PEP's assets. Concurrently, PEP applied to annul the ICC award in Mexican courts. The Mexican courts annulled the ICC award and liquidated COMMISA's performance bonds provided to PEP. KBR launched a NAFTA Chapter Eleven claim against Mexico alleging that the Mexican courts' annulment of the ICC award and resulting liquidation of COMMISA's performance bonds violated Articles 1105 and 1110. However, COMMISA continued seeking enforcement of the ICC award against PEP in New York and Luxembourg while KBR brought the NAFTA claim against Mexico. KBR argued the enforcement actions against third party PEP were not "with respect to the measure" alleged to breach NAFTA, which was focused solely on the actions of the Mexican courts.

166. The tribunal rejected the claimant's interpretation, finding that the NAFTA claim and the enforcement proceedings were inextricably linked, and dismissed the claim for lack of jurisdiction. The tribunal stated that Article 1121 should not be interpreted in an overly formalistic way.[295] To prevent any risk of double recovery and conflicting outcomes, tribunals should interpret Article 1121 broadly by considering whether the domestic litigation "fall(s) within the subject-matter of the NAFTA proceedings."[296] The tribunal found that the subject matter of the two proceedings did not need to be identical.[297] It did not matter that the enforcement proceedings were against a PEP while

[294] **RLA-018**, *KBR – Award.*

[295] **RLA-018**, *KBR – Award*, ¶ 124.

[296] **RLA-018**, *KBR – Award*, ¶ 116 ("Like other mechanisms aimed at avoiding concurrent proceedings, the waiver provision of Article 1121 seeks to avoid the risks of double recovery, wasted resources due to duplicative proceedings, and conflicting outcomes. In light of this purpose, the Tribunal considers that it should not adopt an excessively formalistic approach to the interpretation of Article 1121. The terms of Article 1121 do not suggest that a waiver be given only with respect to proceedings whose subject matter is 'identical' to the measures at issue in the NAFTA context. Rather, the measure(s) at issue in the parallel proceedings must fall within the subject-matter of the NAFTA proceedings. A narrow approach based on a formal identity of the measures would not comport with the object and purpose of this specific provision.") (emphasis added).

[297] **RLA-018**, *KBR – Award*, ¶ 124 ("While the subject matters of the two proceedings […] are thus not identical, the Tribunal considers, as it has already clarified, that it should not adopt an excessively formalistic approach to the interpretation of Article 1121. Indeed, it should be guided by the purpose of that provision, which is to avoid conflicting outcomes, a waste of resources, and double recovery.")

the NAFTA claim was against Mexico for the actions of its domestic courts. What mattered was the outcome sought by the claimant's in the cases and the risk of double recovery. The tribunal stated:

> The Tribunal is reinforced in its view that it should find the waivers non-compliant with Article 1121 if it looks at the outcome that the various proceedings seek to achieve. While the relief sought in the different proceedings may formally not be identical, the practical outcome that both the Enforcement Proceedings and these NAFTA proceedings seek to achieve is for all practical purposes analogous. In all settings, Claimant seeks to obtain the payment of the amount of the ICC Award plus the amount of the performance bonds. While the Tribunal has no reason to doubt Claimant's representation that it will not seek double recovery and *'that it will deduct any such collection [in the Enforcement Proceedings] from any amount sought in this NAFTA arbitration,'* the concrete risk that such double (or triple) recovery may occur appears rather obvious to the Tribunal and reinforces its conclusion that the measures which are the subject matter of these proceedings fall within the subject matter of the Enforcement Proceedings.[298]

167. The *Detroit International Bridge Corporation v. Canada* ("*DIBC*") case is also relevant. In *DIBC*, the claimant (DIBC) alleged the "practice" of discriminatory and inequitable diminution of DIBC's toll revenues expected to result from certain measures violated NAFTA. Simultaneously, DIBC continued domestic litigation proceedings seeking damages against Canada in the U.S. and Canadian courts ostensibly for different measures. The tribunal considered whether those proceedings involved "the same measures as those at stake in this arbitration"[299] or covered the "same grounds",[300] and whether the prayer for relief in the domestic litigations "relates to the same 'measures' as the 'measures' put in issue" in the NAFTA arbitration.[301] The tribunal found that the measures at stake in the domestic and NAFTA proceedings included alleged traffic diversion and non-improvement of roads. The tribunal also found the domestic proceedings sought damages, and

[298] **RLA-018**, *KBR* – Award, ¶ 139 (underline emphasis added; italicized emphasis in original).

[299] **RLA-012**, *DIBC* – Award, ¶ 320 ("In light of the above, considering that (i) the Washington Litigation involves the same measures as those at stake in this arbitration; (ii) the Washington Complaint contains a request for damages against Canada; […] the First Waiver does not comply with Article 1121.") and ¶¶ 300, 336.

[300] **RLA-012**, *DIBC* – Award, ¶¶ 310-312 ("The Tribunal finds that DIBC's claims in the Washington Complaint covers the same grounds that the "measures" put in issue in the First NAFTA NOA. The Tribunal also notes that paragraphs 5, 8 and 157 of the Washington Complaint indicate that the Washington Litigation is *also based upon, inter alia*, alleged traffic diversion and non-improvement of roads. In view of the foregoing, the Washington Complaint shows that the Washington Litigation was a proceeding with respect to the measures that are alleged to breach NAFTA in this arbitration.") (emphasis added).

[301] **RLA-012**, *DIBC* – Award, ¶¶ 332-333.

did not fall within the Article 1121 exception for purely injunctive or declaratory proceedings. Thus, the *DIBC* tribunal held it had no jurisdiction and dismissed the entire claim due to the lack of an adequate waiver.

168. Where a claimant fails to meet the formal and material requirements under Article 1121, the claimant cannot retroactively cure its non-compliance.[302] Nor can the tribunal remedy a defective waiver: as NAFTA and other tribunals have found, the tribunal would have been constituted before the proper submission of the claim to arbitration and without the consent of the respondent State as contemplated in Article 1121. Instead, the discretion whether to permit a claimant to either proceed under or remedy an ineffective waiver lies with the respondent State, as a function of its general discretion to consent to arbitration.[303] This has been the longstanding position of the NAFTA Parties,[304] and affirmed by many tribunals.[305] Without a respondent's consent, a claimant cannot cure a defective waiver by discontinuing the impugned domestic proceedings. Instead, the tribunal must dismiss the claim for lack of jurisdiction.

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[302] **RLA-018**, *KBR* – Award, ¶ 148: "the practice of previous NAFTA tribunals adduced by the Parties in this case shows that the waiver may not be corrected in the course of the arbitration concerned unless the NAFTA Party consents to such correction." **RLA-019**, *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11, Partial Award on Jurisdiction, 05 August 2022, ¶ 237: "The Claimant argues that, because the Tribunal has the power to allow him to amend or supplement the Notice of Arbitration and/or Memorial under the UNCITRAL Rules, this also includes the power to grant him leave to amend a defective waiver. The Tribunal is not persuaded. A tribunal's power to grant leave to amend or modify a notice of arbitration and/or statement of claim is part of the general power of a tribunal over arbitral proceedings. It is a matter of case management and sound administration of justice. In contrast, granting leave to cure a defective waiver, over the objection of the Respondent, would be tantamount to the Tribunal creating consent to arbitration where no such consent existed when the Tribunal was constituted. The Tribunal simply fails to see how, despite having been constituted on the basis of an invalid arbitration agreement, and hence not having jurisdiction over the Parties from the beginning of these proceedings, it could purport to exercise a power to cure the Claimant's defective waiver over the objection of the Respondent, and thereby endow itself with jurisdiction." (emphasis added), ¶ 265. **RLA-012**, *DIBC* – Award, ¶ 335.

[303] **RLA-013**, *Renco* - Partial Award, ¶ 173; **RLA-015**, *Railroad Development - Decision on Jurisdiction*, ¶ 61; **CLA-071**, *W*aste *Management I* – Award, ¶ 31.

[304] *See e.g.*, **R-384**, *Waste Management I*, Mexico's Counter-Memorial Regarding the Competence of the Tribunal 5 November 1999, ¶¶ 25-30, 93-98; **R-385**, *Waste Management I*, Submission of the Government of Canada, 17 December 1999, ¶¶ 8 and 11; **R-386**, *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Statement of Defense on Jurisdiction of Respondent United States of America, 15 December 2004, ¶¶ 8-10; **R-387**, *KBR*, Submission of the United States of America, 30 July 2014, ¶¶ 2-4.

[305] **RLA-012**, *DIBC – Award*, ¶ 321. *See* **RLA-015**, *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008, ¶ 61. *See* **RLA-018**, *KBR – Award*, ¶ 148; **RLA-019**, *Bacilio Amorrortu v. Peru* (PCA Case No. 2020-11), Partial Award on Jurisdiction, 5 August 2022, ¶¶ 237, 265.

2. GSI Has Continued Domestic Litigations Seeking Damages Against Third Parties Which Overlap with its Claims Against Canada in this NAFTA Arbitration

169. The Claimants state the challenged "measure" in this NAFTA arbitration is the Alberta Court Decisions.[306] The Claimants maintain the Alberta Court Decisions breached Articles 1110 and 1106 by issuing a compulsory licence, "confiscating" GSI's copyright, "enforcing" a requirement on GSI to transfer proprietary knowledge to the Boards and effectively ending GSI's ability to enforce its intellectual property rights in the Disclosed Seismic Materials against third parties.[307] The Claimants allege CAD$507 million of damages resulted from these alleged NAFTA breaches, including that licence fees allegedly owed by third parties in relation to the Disclosed Seismic Materials.[308]

170. The Claimants have been explicit about their intention to seek unpaid licence fees as damages against Canada in this arbitration, as evidenced by a letter sent by the Claimants on July 15, 2019 with respect to the dismissal by the ABQB of its licencing claims of GSI against Murphy Oil and Encana Corporation:

> This decision impacts the [NAFTA] claims asserted by the Investors of GSI. The Investors of GSI take the position that the license fees owed by various third party licensees were found not to be payable due to the conduct of Canada […] this correspondence confirms that those licensing fees form part of the [NAFTA] claims by the Investors."[309]

171. The Claimants have done exactly that, including more than [redacted] of allegedly unpaid invoices by Murphy and Encana in its damages claim against Canada.[310] But while the Murphy and Encana litigations ended on May 23, 2019 when the Supreme Court of Canada denied GSI's leave to

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[306] Memorial, ¶¶ 296, 367, 371.

[307] Memorial, ¶¶ 73, 107, 109, 111, 166, 308, 313, 328, 329, 375, 377, 381-387, 392, 401, 411, 440, 444, 452, 482.

[308] Memorial, ¶¶ 388, 390, 483.

[309] **R-014**, Letter from GSI to Canada, July 15, 2019 (emphasis added); **R-378**, *Geophysical Service Incorporated v Murphy Oil Company Ltd*, 2017 ABQB 464; **R-379**, *GSI v. Murphy*, 2018 ABCA 380. *See also* **R-348**, *GSI v Murphy*, ABQB File No. 1301 15085, 2017 ABQB 464, SOC (20 December 2013); **R-444**, *Geophysical Service Incorporated v. Encana Corporation*, 2017 ABQB 466, Judgment, July 26, 2017 ¶ 96; **R-381**, *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, Judgment, 11 November 2018 ¶ 65; **R-380**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd. and Encana Corporation*, Judgment No. 38486, May 23, 2019.

[310] **C-112**, Unpaid Invoice Listing [redacted] Invoice No. [redacted] totalling [redacted] and [redacted] Invoice Nos. [redacted] and [redacted] totalling [redacted]

appeal,[311] they had clearly continued after the filing of the NOA. Moreover, GSI did not end many of its other ongoing lawsuits in Canadian and U.S. domestic courts seeking damages against third parties which GSI is now simultaneously claiming against Canada in this NAFTA arbitration.

172. Before addressing GSI's specific cases of ongoing domestic litigation with respect to the measure alleged to breach NAFTA, Canada addresses three overarching issues.

173. First, the fact that GSI discontinued certain domestic cases, or that they were dismissed, after filing the NOA does not mean the Claimants complied with the waiver. As explained above, a defective waiver on the date of filing the NOA means the Tribunal never had jurisdiction. The Claimants could satisfy the preconditions in Article 1121 only if, before the date of filing the NOA, they discontinued all domestic litigations with respect to the challenged measure here.

174. Second, the fact that some of the domestic cases pursued by GSI are against third parties, not directly against Canada, the Provinces or the Boards, does not mean the Claimants complied with the waiver. Identical parties are not necessary to find a defective waiver under Article 1121.

175. Third, the fact that some of the domestic cases pursued by GSI are based on alleged contract violations does not mean the Claimants complied with the waiver.[312] The practical outcomes that the Claimants seek in their domestic litigations overlap with this NAFTA claim because GSI has been seeking the same damages against third parties that the Claimants simultaneously seek against Canada here. For example, Exhibit C-112 lists [redacted] as one of the bases of the damages claim against Canada in the NAFTA arbitration.[313] While the Claimants have produced none of the underlying evidence, it is already apparent that many of the same claims, the same invoices and the same damage figures in Exhibit C-112 are the bases of GSI litigations against third parties which continued after the NOA or are still continuing today. This

[311] **R-401**, *GSI v. Murphy Oil Company Ltd.*, *GSI v. Encana Corporation*, File No. 38486, Application for leave to appeal dismissed, 23 May 2019.

[312] As discussed below, any alleged breaches of GSI's licence agreements are not attributable to Canada, which cannot be held liable for such damages. Nonetheless, as the Claimants asserted that Canada's measures have caused the Claimants' third-party contractual claims not to be payable, the Claimants were obliged under Article 1121 to not continue such domestic contractual claims upon filing this NAFTA claim.

[313] **CER-02**, Sharp Report, ¶¶ 92-96

is a blatant attempt at double recovery and it exemplifies the type of situation that Article 1121 is intended to prevent.

176. The Claimants cannot have it both ways. They have included hundreds of millions of dollars of third-party invoices in the damages claim against Canada which are also the subject of domestic litigations ongoing after the NOA. Either these litigations are "with respect to" the measures alleged to breach the NAFTA, which means the Claimants are in violation of Article 1121, or the damages that the Claimants are seeking have no connection to the alleged NAFTA breach.

(a) Claims for Damages in Canadian Courts

177. While GSI discontinued its expropriation claim against the Government of Canada in domestic courts two days before filing the NOA,[314] GSI's 2011 and 2013 claims for alleged expropriation of GSI's business and infringement of copyright against the Province of Newfoundland and Labrador and the CNLOPB were not discontinued until June 2020, more than a year after filing its NOA,[315] but only with respect to the CNLOPB.[316] The Claimants' supposed "intentions" as a justification for belated and ongoing non-compliance with Article 1121 are unavailing: failure to comply with the conditions precedent to consent to arbitration deprives the Tribunal of jurisdiction over the claim.

178. Even more striking are the continuing domestic litigations against third parties which overlap with the damages claimed. The Claimants failed to provide any supporting or clarify what domestic litigations they continued after the NOA despite Canada's request that they do so in the Statement of Defence,[317] so it is not possible at this stage of the arbitration to fully confirm all of the ongoing GSI domestic litigations which overlap with the amounts simultaneously included in the Claimants'

[314] **R-469**, *Geophysical Service Inc. v. HMTQ in Right of Canada et al*, Federal Court of Canada, Docket: T-1023-17, Notice of Discontinuance, April 17, 2019.

[315] **R-005**, *GSI v. CNLOPB*, Amended SOC, ¶¶ 22-23(C)(E), 24; **R-402**, *GSI v. Wade Atlantic*, Decision, ¶¶ 1, 6-8 (CNLOPB and the Government of Newfoundland and Labrador named as second and third defendants); **C-313**, Order of Justice Faour, Court File No. 2013 01G-1671; **C-312**, CNLOPB Satisfaction Piece (Case No. 2011 01G 5340), 8 June 2002; **C-314**, CNLOPB Satisfaction Piece (Case No. 2013 01G 1671), 8 June 2002.

[316] Memorial ¶ 306; CWS-06, ¶ 166.

[317] Canada's Statement of Defence, 9 June 2022, ¶ 25.

damages claim. However, from information currently available, below are some examples of evident overlap:

- *GSI v. Plains Midstream/BP*: In this NAFTA claim, GSI includes an allegedly unpaid invoice by Plains Midstream of [redacted] for transfer fees, exploration group licensing fees, submitted data to the Boards and accessing GSI seismic materials from the Boards.[318] GSI has made the same claims against Plains Midstream and BP Canada (amalgamated co-defendants) for similar amounts in a litigation that GSI has been continuing to the present date with the most recent judgment released on November 1, 2022 dismissing all of GSI's claims.[319] GSI appealed the decision on November 15, 2022.[320]

- *GSI v. Total*: GSI initiated a domestic litigation claim against Total SA in 2014 seeking damages for an unpaid November 2014 invoice of USD$11,074,873.01 for breach of their licence agreement for accessing GSI's data from the CNLOPB.[321] This allegedly unpaid invoice is exactly the same the Claimants have included in their NAFTA claim against Canada.[322] GSI continued to pursue its claim until judgment was rendered on November 25, 2020. GSI was only awarded USD$970,174.68 in damages,[323] which appears to have been paid by Total on January 25, 2021.[324]

- *GSI v. Nalcor*: In this NAFTA claim, GSI has included an allegedly unpaid invoice by [redacted] for [redacted] relating to exploration group equalizations to other partners and access to GSI's seismic materials from the Boards.[325] This is a similar amount for the same claim as what GSI has been claiming against Nalcor since 2013 and continues today.[326] Furthermore, a note to the Claimants' Exhibit C-112 states "[redacted]" which appears to be a reference to GSI's claim for damages against TGS in

[318] **C-112**, Unpaid Invoice Listing [redacted] Invoice No. [redacted]

[319] **R-349**, *GSI v Plains Midstream*, ABQB File No. 1401 00646, SOC. July 16, 2014, ¶ 57(i)(i) (seeking CAD$116,660,872.28, CAD$27,292,181 and CAD$22,938,800 for contractual breaches and wrongful acts relating to accessing GSI's data and secondary submissions and transfer fees); **BR-17**, *Geophysical Service Incorporated v. Plains Midstream Canada ULC*, 2022 ABKB 722, Reasons for Judgment, 1 November 2022, ¶¶ 87, 89.

[320] **R-403**, *GSI v Plains Midstream*, ABQB File No. 1401 00646, Procedural Card, (Consulted on December 19, 2022)

[321] **R-011**, *GSI v. Total*, 2020 ABQB 730, ¶ 3(21) ("The Plaintiff sent an invoice in November 2014 to Total France for US$11,074,873.01, which included a stated interest rate of 1.5 percent a month. This invoice was a calculation of the cost of the data which the Plaintiff believed both defendants had accessed from the Board.") (emphasis added).

[322] **C-112** lists [redacted] Invoice No. [redacted] dated [redacted] as [redacted] for alleged "GSI unlicensed data obtained from the Boards."

[323] **R-011**, *GSI v. Total*, 2020 ABQB 730, ¶ 104.

[324] **R-404**, *GSI v. Total*, 1401 03449, Procedural Card (Consulted on December 19, 2022).

[325] **C-112**, Unpaid Invoice Listing ([redacted] and [redacted] respectively).

[326] **R-405**, *GSI v. Nalcor*, ABQB File No. 1301 09665, SOC (13 August 2013), ¶¶ 24-26; *See* **R-406**, *GSI v. Nalcor*, ABQB File No. 1301 09665, Procedural Card, (Consulted December 7, 2022).

the United States, which also overlaps with this NAFTA arbitration and was also continued after the NOA (discussed in the next section below).

- *GSI v Devon*: In this NAFTA claim, GSI includes an allegedly unpaid invoice by Devon of [redacted] for exploration group equalizations, secondary submissions and unlicenced seismic materials accessed from the Boards.[327] At least one of the alleged damages figures in the NAFTA claim (Accessed Data USD$539,769) is exactly the same amount and bears the same invoice date as GSI claimed against Devon in its litigation.[328] Moreover, GSI's ongoing domestic claim seeks more than CAD$15 million and CAD$2 million for exploration group licensing fees and submitted data claims against Devon, which appear to be the same damages for the same claims being sought against Canada in Exhibit C-112.[329]

(b) Claims for Damages in U.S. Courts

179. In U.S. courts, GSI continued third-party claims for damages which overlap with those claimed in this NAFTA arbitration, including:

- *GSI v. Anadarko/Occidental*: On April 20, 2020, GSI sued Occidental Petroleum Corp. and Occidental Oil & Gas Corp., which had recently purchased Anadarko Petroleum Corp, for copyright infringement and misappropriation of trade secrets.[330] GSI demanded that Occidental assume responsibility for Anadarko's unauthorized access of seismic materials from the Boards in violation of its copyright and trade secrets.[331] GSI's Statement of Claim appended a letter demanding that Occidental pay invoice #7514 dated July 31, 2014 for USD$88,756,876.02.[332] [redacted]

[327] **C-112** ([redacted] and [redacted] for Exploration Group Licensing Partner Equalizations and Access data from the Boards, respectively).

[328] **R-370**, *Geophysical Service Incorporated v Devon ARL Corporation*, 2017 ABQB 463, 26 July 2017, ¶ 52 ("GSI presented an invoice for USD$539,769.15 that it issued to Devon on August 29, 2014, not long after Devon confirmed its possession of the Accessed Data."). The ABQB summarily dismissed GSI's claim (¶ 112), but GSI has nevertheless included it again in its damages claim against Canada.

[329] **R-370**, *Geophysical Service Incorporated v Devon ARL Corporation,* 2017 ABQB 463, 26 July 2017, ¶ 112 ("GSI is seeking CAD$2 million in damages for the breach of this [Submitted Data] claim.") and ¶ 114 ("GSI seeks indemnity of more than CAD$15 million for the instances in which these alleged Beaufort Exploration Group members did not enter into use-license agreements with GSI"); **C-112**, [redacted] (Exploration Group Licensing Partners equalizations) and [redacted] (Submitted Data to the Boards).

[330] **R-369**, *GSI v. Occidental*, File no. 4:20-cv-01396, Original Complaint, ¶¶ 23-30. **R-369** *GSI v. Occidental*, Combined GSI Data Licensed by: Anadarko Petroleum, Anadarko Canada, Kerr McGee. (Exhibit 1-2 to GSI's Complaint).

[331] GSI's original claim against Anadarko was for damages arising from its access of seismic materials from the CNSOPB and the CNLOPB without GSI's authorization in violation of its copyrights and the *Berne Convention*. **R-422**, *GSI v. Anadarko*, S.D. Tex, File No. 4:2015cv02765, Amended Complaint, (3 May 2017), ¶¶ 62-72.

[332] **R-369**, *GSI v. Occidental*, File no. 4:20-cv-01396, GSI Letter to Occidental, (Exhibit C to Original Complaint) August 14, 2019, ("GSI v. Occidental, Letter to Occidental), p. 2.

[redacted] The litigation terminated on March 29, 2021 through a confidential settlement agreement.[336] It appears that GSI's settlement with Anadarko in the U.S. led to an order to dismiss GSI's 2012 claim against Anadarko in Alberta on April 15, 2021.[337]

180. GSI continued other litigations in Texas and Arkansas claiming damages for copyright infringement and misappropriation of trade secrets against third parties including Hunt Oil Company (settlement on September 16, 2020),[338] ConocoPhilips (dismissed March 1, 2020)[339] and Murphy Oil Company (terminated March 26, 2021).[340] These companies are each listed in Exhibit C-112 as having allegedly unpaid invoices.

181. Furthermore, GSI's lawsuit against TGS in the U.S. District Court for the Southern District of Texas dealt with the substantive issues decided in the Alberta Court Decisions and continued until 2020 when leave to appeal was refused by the U.S. Supreme Court.

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[333] Exhibit C-112 [redacted]

[334] **R-369**, *GSI v. Occidental*, GSI Letter to Occidental, 31 July 2014, p. 2.

[335] Exhibit **C-112**, [redacted]

[336] **R-407**, *GSI v. Anadarko*, S.D. Tex, File No. 4:2015cv02765, Agreed motion to lift stay and Joint stipulation of dismissal with prejudice, (18 March 2021); **R-408**, *GSI v. Anadarko*, S.D. Tex, File No. 4:2015cv02765, Order of Dismissal, (29 March 2021).

[337] **R-409**, *GSI v. Anadarko et al., ABQB File No 1201 15228*, Procedural Card, (Consulted on December 19, 2022), p. 15.

[338] **R-410**, N.D. Tex, *GSI v. HuntOil*, GSI Complaint, (18 September 2015) ¶ 42-54. N.D. Tex, *GSI v. HuntOil*, GSI correspondence with the CNSOPB (Exhibit A to GSI's Complaint). **R-411**, N.D. Tex, *GSI v. HuntOil*, GSI Amended Complaint, (8 August 2016) ¶ 46-51; **R-412**, *GSI v. HuntOil*, N.D. Tex File No. 3:2015cv03045, Joint Stipulation of Dismissal with Prejudice, (16 September 2020). Exhibit C-112 [redacted] for unauthorized access of data from the Boards.

[339] **R-413**, *GSI v. ConocoPhilips*, Complaint, 22 September 2015, ¶¶ 26-48; **R-414**, S.D. Tex, *GSI v. ConocoPhilips*, Amended Complaint, 3 August 2016, ¶¶ 44-52. The claim was not dismissed until March 1, 2020. *GSI v. ConocoPhilips*, S.D. Tex, File No. 4:2015cv02766, Docket (Claim terminated on March 1, 2020 by order dismissing the claim).

[340] **R-415**, W.D. Ark., *GSI v. Murphy Oil*, GSI, First Amended Complaint, 26 June 2017, ¶¶ 64-83. **R-416**, W.D. Ark. File No. 1:2017cv01023, Joint Motion to Lift and Joint Motion to Dismiss with Prejudice, (26 March 2021); **R-417**, *GSI v. Murphy Oil*, W.D. Ark. File No. 1:2017cv01023, Order granting motion to lift stay and dismiss case (26 March 2021); Exhibit C-112 ([redacted] for [redacted]

182. GSI sued TGS for accessing GSI seismic materials from the CNLOPB.[341] GSI's claim placed Canada's Regulatory Regime and the breach of GSI's copyright as protected by the *Berne Convention* at the core of its claim. Through a series of motions to dismiss, reconsiderations and appeals, the question before the U.S. Courts was narrowed to the question of whether GSI granted the CNLOPB an express or implied licence which would allow TGS and others to legally access GSI's seismic data.[342] On June 19, 2018, the U.S. District Court ruled that there was an implied licence in Canada which absolved TGS of liability for copying GSI's seismic materials from the CNLOPB.[343]

183. The way in which GSI presented its case in U.S. courts leaves no doubt that the litigation was with respect to the same measure that is really in dispute in this NAFTA arbitration. GSI framed its appeal to the U.S. Court of Appeals for the Fifth Circuit as whether the lower court correctly concluded that "by obtaining a licence and depositing seismic materials with the government as required by Canadian law – [GSI]'s predecessor demonstrated the requisite intent to grant an implied copyright licence broad enough in scope to authorize the infringing conduct in question?"[344] GSI argued that the Alberta Court Decisions did not find an implied licence that would allow the Boards to disclose GSI's data for copying.[345] GSI framed its appeal as follows:

> [T]his appeal is not about the confidentiality of the works. It is about whether [GSI]'s predecessor granted a copyright license to an agency of the Canadian government to not merely allow inspection of the works but to **make additional**

[341] **R-368**, *GSI v. TGS-Nopec*, S.D. Tex. File No. 4:2014cv01368, Complaint, (May 16, 2014).

[342] **R-419**, *GSI v. TGS-Nopec*, S.D. Tex. File No. 4:2014cv01368, Memorandum and Opinion, (30 March 2015), pp. 12-21; **R-420**, *GSI v. TGS-Nopec*, S.D. Tex. File No. 4:2014cv01368, Memorandum and Opinion, (9 November 2015), pp. 9-11; **R-418**, *GSI v. TGS*, Memorandum and Opinion, 19 June 2018, p. 19. The Federal Court of Appeal affirmed the decision on appeal and granted TGS's motion to dismiss the claim on the basis that GSI granted CNLOPB an implied licence. **R-495**, *Geophysical Service Incorporated v. TGS-Nopec Geophysical Company*, Federal Court Appeal, File No. No. 0:2018pcf20493, Unpublished Opinion, 13 September 2019, p .7. **R-421**, *Geophysical Service Incorporated v. TGS-Nopec Geophysical Company*, Supreme Court File No. 19-873, Petition denied, 26 May 2020 ("*GSI v. TGS*, Supreme Court Petition Denied").

[343] **R-105**, *Geophysical Services Incorporated v TGS-Nopec Geophysical Services*, Civil Action No-14-1368, Memorandum and Opinion, 2018 WL 3032575 (S.D. Texas, June 19, 2018), ¶ 19.

[344] **R-423**, *GSI v. TGS-Nopec*, FCA (5th Cir.) File No. 0:2018pcf20493, Appellant's Brief, (13 December 2018), pp. xii-xiii.

[345] **R-423**, *GSI v. TGS-Nopec*, FCA (5th Cir.) File No. 0:2018pcf20493, Appellant's Brief, (13 December 2018), pp 40-43.

> **copies** and **distribute copies**, including by sending copies of them to TGS (a competing seismic company) here in the United States.[346]

184. The U.S. Court of Appeals upheld the lower court decision.[347] GSI then sought *certiorari* to the U.S. Supreme Court. In its January 10, 2020 brief, GSI sought a ruling on the nature and scope of an implied licence to copyright infringement and whether making copies of copyrighted works legal under U.S. law when the Boards (allegedly) compelled their submission. GSI argued that the Alberta Court Decisions found that the Regulatory Regime created a compulsory licence, not an implied licence that would absolve TGS for its copying.[348] It is only on May 20, 2020, that the litigation ended when the U.S. Supreme Court denied GSI's appeal of the U.S. Court of Appeal (Fifth Circuit).[349]

185. The Claimants are plainly continuing litigation by seeking the same damages in multiple fora. This is precisely what Article 1121 is intended to prevent. While Canada denies that any of the damages allegedly suffered by the Claimants were caused by the Alberta Court Decisions, by including hundreds of millions of dollars of lost licensing revenues in the NAFTA claim that the Claimants have been also seeing to recover through courts in Canada and the United States, the Claimants have themselves put their compliance with the waiver requirement in Article 1121 and the jurisdiction of this Tribunal at issue, with fatal consequences. It is too late for the Claimants to try to rectify their defective waiver by discontinuing all domestic litigation proceedings or by revising their damages claim in the Reply Memorial. As in *Waste Management*, *DIBC* and *KBR*, this Tribunal should dismiss the entire claim on the basis that it has no jurisdiction because of the Claimants failure to comply with Article 1121.

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[346] **R-423**, *GSI v. TGS-Nopec*, FCA (5th Cir.) File No. 0:2018pcf20493, Appellant's Brief, 13 December 2018 (emphasis in original). GSI has specifically relied on findings by the Alberta courts in support of its arguments before the United States District Court and appeals. *See e.g.* Brief of the Appellant GSI, December 13, 2018, pp. 40-43; **R-424**, GSI Reply in Opposition to Motion to Dismiss, May 18, 2018.

[347] **R-105**, *Geophysical Services Incorporated v TGS-Nopec Geophysical Services*, Civil Action No-14-1368, Memorandum and Opinion, 2018 WL 3032575 (S.D. Texas, June 19, 2018), ¶ 19.

[348] **R-425**, *Geophysical Service, Incorporated v. TGS-NOPEC Geophysical Company*, No. 19-873, Petition for Writ of Certiorari, January 10, 2020, pp. 16-17.

[349] **R-421**, *GSI v. TGS*, Supreme Court Petition Denied.

C. The Tribunal Lacks Jurisdiction Under Article 1116(2) and 1117(2) Because the Claimants and their Enterprise First Acquired Knowledge of the Alleged Breaches and Alleged Damages More than Three Years Prior to the Submission of the Claim to Arbitration

186. The Claimants have failed to comply with the strict three-year time limitation imposed by NAFTA Articles 1116(2) and 1117(2). Accordingly, Canada does not consent to the arbitration of the claims under NAFTA Chapter Eleven and the Tribunal lacks jurisdiction *ratione temporis*.

187. In order for their claims to fall within the limitation period under NAFTA, the Claimants bear the burden of proving that the judicial measure constitutes an independent actionable breach. There is no dispute that the Claimants' alleged facts concerning the Regulatory Regime all occurred outside of the critical date of April 18, 2016. While the Claimants have attempted to characterize the Alberta Court Decisions as the challenged measure, they have not identified any element of those decisions that could constitute an independently actionable breach of NAFTA. All of the alleged harms identified by the Claimants arise from the Regulatory Regime, not the Alberta Court Decisions. The Claimants' improper attempt to evade the three-year time limitation is also clear from their damages claim, which is almost entirely based on alleged lost revenues due to actions predating the time limitation period and the Alberta Court Decisions. In the absence of any claim that falls within the three-year limitation period under NAFTA Articles 1116(2) and 1117(2), the Tribunal need not proceed to consider the merits or damages and should reject the Claimants' claim entirely for lack of jurisdiction *ratione temporis*.

1. Consent to Arbitration under NAFTA is Conditional on the Claimants' Satisfaction of the Strict Three-Year Limitation Period in Articles 1116(2) and 1117(2)

188. NAFTA Articles 1116(2) and 1117(2) impose a strict three-year limitation period for a claimant to submit a claim to arbitration. In *Feldman v. Mexico*, the tribunal interpreted this provision as "a clear and rigid limitation defense, which as such, is not subject to any suspension[…], prolongation or other qualification".[350] Accordingly, the NAFTA Parties do not consent to arbitrate claims

[350] **RLA-021**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman* – Award"), ¶ 63.

submitted to arbitration after the expiry of the three-year limitation period, and a NAFTA Chapter Eleven tribunal has no jurisdiction *ratione temporis* over such untimely claims.[351]

189. The time limitation period applies to the making of a claim, meaning the point at which the claim is submitted to arbitration as determined by NAFTA Article 1137(1).[352] In a dispute governed by the UNCITRAL Arbitration Rules such as this one, the claim is submitted to arbitration when the respondent Party receives the NOA.[353]

190. The time limitation or "time bar" in Articles 1116(2) and 1117(2) begins running from the date on which the claimant or its enterprise "first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or the enterprise] has incurred loss or damage."[354] The use of the term "first" means "earliest in occurrence, existence."[355] The inclusion of "first" to modify the phrase "acquired knowledge" was a deliberate drafting choice, intended to mark the beginning of the time when knowledge of breach and loss existed and not the middle or end of a continuous event or period.[356]

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[351] *See e.g.,* **CLA-068**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNICTRAL) ("*Grand River*"), Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River* – Decision on Objections to Jurisdiction"), ¶¶ 103-104. In this case, the tribunal dismissed all claims outside the three-year limitations period; the only claim it reserved for consideration on the merits was based on separate and distinct legislation adopted within the applicable three-year limitation period; **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶ 335.

[352] **CLA-050**, *Marvin Roy Feldman Karpa v. United Mexican State* (ICSID Case No. ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 ("*Feldman – Decision on Jurisdiction*"), ¶ 44 ("'Making a claim' is used to denote the definitive activation of an arbitration procedure rather than to localize the commencement of arbitration in terms of time […]. The relevant provision is to be found in Article 1137(1)").

[353] *NAFTA*, Article 1137(1)(c). **RLA-004**, *Apotex – A*ward on Jurisdiction and Admissibility, ¶ 301.

[354] *NAFTA*, Article 116(2) (emphasis added); *see also NAFTA*, Article 1117(2).

[355] **R-388**, *Shorter Oxford English Dictionary*, (Oxford University Press, 2002, 5th ed.), Vols. 1 and 2 [Excerpts].

[356] All three NAFTA Parties agree on this interpretation of Articles 1116(2) and 1117(2). *See e.g.*, **R-426**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL), U.S. 1128 Submission on Jurisdiction, 14 June 2017, ¶ 7 ("An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized, a continuing course of conduct by the host State does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the NAFTA Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2)."); **R-427**, *Merrill and Ring Forestry L.P. v. Government of Canada* (UNCITRAL) ("*Merrill and Ring*"), Submission of the United States of America, 14 July 2008, ¶ 5 ("An investor *first* acquires knowledge of an alleged

191. In cases involving a series of related events tribunals have separated related events into distinct components to identify independent causes of action potentially within the tribunal's jurisdiction.[357]

192. In order to be justiciable, an alleged breach must relate to independently actionable conduct within the limitation period.[358] While tribunals are not precluded from having regard to pre-limitation period conduct for the purpose of determining a justiciable breach, such conduct cannot, in and of itself, form the basis of a finding of NAFTA liability. Accordingly, when faced with a number of claims that were deeply rooted in pre-treaty entry into force and critical limitation date conduct, the tribunal in *Spence v. Costa Rica* (interpreting a similarly worded time limitation provision) considered it necessary to assess whether the claims could be "sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable."[359] In applying this analysis, the *Spence* tribunal reasoned that:

> An alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time. The Tribunal may have regard to pre-entry into force acts and facts for evidential and similar purposes, as discussed above. Such acts and facts cannot, however, form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach. To be justiciable, a breach that is alleged to have taken place within the permissible period, from a limitation perspective, must, if it has deep roots in pre-entry into force or pre-critical limitation date conduct, be *independently* actionable.[360]

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breach and loss at a particular moment in time: under 1116(2), that knowledge is acquired on a particular "date". Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis."); and **R-428**, *Merrill and Ring*, Submission by the Government of Mexico made pursuant to Article 1128 of the NAFTA, 2 April 2009 (which agreed with the U.S. submission "in its entirety").

[357] For example, in *Bilcon*, the tribunal found it "possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits." **RLA-022**, *William Ralph Clayton et. al v. Government of Canada* (UNCITRAL) ("*Bilcon*"), Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon – Award on J&L*"), ¶ 266.

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

[359] **RLA-010**, *Spence– Interim Award on Jurisdiction*, ¶ 222.

[360] **RLA-010**, *Spence– Interim Award on Jurisdiction*, ¶ 218.

193. Furthermore, while acknowledging that a tribunal may have regard to pre-limitation period acts and facts for the purposes of assessing whether damages are due and in what form, the *Spence* tribunal considered its jurisdiction to award damages was "necessarily linked to and constrained" by the breach over which it is seised and had jurisdiction.[361]

2. The Three-Year Limitation Period for Claims Based on Administrative or Regulatory Measures Cannot be Tolled by Litigation, or Court Decisions Regarding those Measures

194. In applying the limitation period under Articles 1116(2) and 1117(2), NAFTA tribunals have distinguished between claims based on judicial and administrative measures. For claims based on judicial measures, the rule of finality applies "to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision."[362] The time limitation period therefore only counts from the final decision. In contrast, when administrative or regulatory measures are at issue, the limitation period for claims cannot be tolled by subsequent litigation or court decisions.

195. The difference in analytical approach was made clear by the tribunal in *Apotex*.[363] In that case, the tribunal was faced with series of claims based on (1) an administrative decision of the United States Food and Drug Administration ("FDA"), and (2) subsequent court decisions of the D.C. District Court, which may have entailed reference to the earlier FDA and court decisions.[364] In applying the limitation period under NAFTA Article 1116(2), the tribunal drew a distinction between the two types of measures.

196. Specifically, based on the facts of that case, the *Apotex* tribunal determined that claims based on the FDA decision were time-barred as the claimant had knowledge of the measure and any resulting loss or damage allegedly arising from it prior to applicable three-year limitation period in

[361] **RLA-010**, *Spence– Interim Award on Jurisdiction*, ¶ 218.

[362] **RLA-023**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 ("*Loewen – Award*"), ¶ 156.

[363] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility.

[364] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶ 317.

that case.[365] In doing so, the tribunal held that "Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a '*continuing breach*' by the United States or '*part of the same single, continuous action*,' in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure."[366] Moreover, in distinguishing the claims based on the FDA measure from other claims relating to court decisions, the tribunal reasoned:

> But [the rule of finality] is of no application here, for the simple reason – as Apotex asserts elsewhere – that the FDA measure in question is an "*administrative decision*", not a "*judicial action*"; that the FDA measure could have been the subject of a separate complaint under the NAFTA; and that the NAFTA does not require claimants to exhaust all available remedies before challenging non-judicial decisions.
>
> The position, therefore, is that any challenge to the FDA decision itself had to be brought within three years, and could not be delayed by resort to court action. Any conclusion otherwise would provide a very easy means to evade the clear rule in NAFTA Article 1116(2) in most cases (*i.e.*, by filing any court action, however hopeless).[367]

197. The *Apotex* tribunal also found support in the decisions of other NAFTA Chapter Eleven tribunals for the proposition that the limitation period applicable to discrete a government or administrative measure is not tolled by litigation, or court decisions.[368]

198. For example, in *Mondev*, the tribunal rejected the claimant's attempt to toll the limitation period for measures concerning the development of a commercial real estate project that occurred prior to the entry into force of the NAFTA through subsequent court action.[369] As explained by the *Mondev.* tribunal, "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[370] Furthermore,

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[365] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶¶ 320-324.

[366] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶ 325 (original emphasis).

[367] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶ 331 (original emphasis).

[368] **RLA-004**, *Apotex* – Award on Jurisdiction and Admissibility, ¶ 328.

[369] **CLA-054**, *Mondev* – Award, ¶ 87.

[370] **CLA-054**, *Mondev* – Award, ¶ 87.

> The mere fact that earlier conduct has gone remedied or unredressed when a treaty enters into force does not justify the tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.[371]

199. Similarly, in *Grand River*, the tribunal rejected the claimants' attempt to argue that the limitation period applied differently depending on the timing of subsequent litigation that quantified the extent of its losses, finding that the claimants had prior knowledge of the loss or damage, even if the extent of quantification of the loss or damage was still unclear.[372]

200. Other international investment tribunals in more recent cases have arrived at similar conclusions. In particular, the tribunal's jurisdictional analysis in *Carrizosa v. Republic of Colombia* is instructive. At issue in that dispute was a 2014 Constitutional Court order concerning the lawfulness of a previous 2011 court decision that pre-dated the entry into force of the *United States Colombia Trade Promotion Agreement*. The 2011 court decision had quashed a 2007 administrative judgment that had awarded the claimant damages for its investment.[373] Regarding the temporal scope of the treaty, the tribunal first noted, in accordance with *Mondev*, that "[t]he mere fact that in 2014 the Constitutional Court did not annul or otherwise redress the outcome of the pre-treaty measures does not place those measures within the scope of the Tribunal's jurisdiction."[374] Furthermore, in determining that the 2014 Constitutional Court order did not constitute an independent actionable breach in its own right, the tribunal explained:

> [T]here is a significant difference between a judgment that sets the compensation for an expropriation and thus may breach the treaty if the compensation is not

[371] **CLA-054**, *Mondev* – Award, ¶ 70; *see also*, **RLA-022** *Bilcon* – Award on J&L, ¶ 268, ("The Tribunal's position that an act can be complete even if it has continuing ongoing effects, is in line with the view of the tribunal in *Mondev*, and further consistent with Article 14(1) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, according to which: The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.")

[372] **CLA-068**, *Grand River* – Decision on Objections to Jurisdiction, ¶¶ 77-83.

[373] **RLA-024**, *Astrida Benita Carrizosa v. Republic of Colombia* (ICSID Case No. ARB/18/5), Award of the Tribunal, 19 April 2021 ("*Carrisoza – Award*"), ¶¶ 95-98.

[374] **RLA-024**, *Carrisoza – Award*, ¶ 157.

> adequate or effective, and a court decision that resolved a challenge over an alleged prior administrative expropriation.
>
> Indeed, a judicial decision dealing with the amount of compensation for expropriation can be independently challenged, e.g. for violating the treaty's standard of adequate and effective compensation. The same cannot be said of the 2014 Order, which merely rejected the bid to annul the 2011 Decision and is not alleged to amount to a treaty violation separate and distinct from the prior challenged measures. Hence, the Claimant's statement that the "2014 Order constituted a new State measure on which Claimant's claims are based" is unpersuasive.[375]

201. Additionally, in concluding that claims concerning the 2014 Constitutional Court order were time-barred, the *Carrisoza* tribunal held that the 2014 Constitutional Court order "did not alter the 'subject matter' or 'the real cause' of the dispute," which had always been Colombia's treatment of the claimant's interest in its investment underlying the legal disputes.[376]

202. Based on the foregoing, the analytical approach with respect the limitation period under NAFTA differs depending on the type of measure being challenged. Unlike claims based on judicial actions, the three-year limitation period for claims based on administrative or regulatory measures cannot be tolled by litigation, or court decisions. In order for a claim based on a judicial measure to fall within a NAFTA tribunal's jurisdiction *ratione temporis*, the challenged judicial measure must constitute an independent actionable breach in its own right.

3. The Claimants Have Failed to Establish that the Tribunal has Jurisdiction *Ratione Temporis* over Their Claims

(a) It is Uncontested that the Regulatory Regime Falls Outside of the Three-Year Limitation Period and Cannot Form the Basis of a Finding of NAFTA Liability

203. The Claimants filed their NOA on April 18, 2019. Accordingly, the critical limitation date in this case is April 18, 2016.[377] The Claimants must be able to demonstrate that they first acquired actual or constructive knowledge of the alleged breaches and alleged loss on or after this date. In this

[375] **RLA-024**, *Carrisoza – Award*, ¶¶ 165-166.

[376] **RLA-024**, *Carrisoza – Award*, ¶¶ 220-222.

[377] The Disputing Parties are in agreement on these dates. *See* Memorial, ¶ 294.

regard, there is no dispute that the Claimants had knowledge of the Regulatory Regime, including actions taken by the Boards concerning the Disclosed Seismic Materials after the expiry of the confidentiality period, and resulting loss or damage arising from it, well before the three-year limitation period under NAFTA Articles 1116(2) and 1117(2). Consequently, neither the Regulatory Regime, nor alleged losses or damages resulting from such measures can form the basis of a finding of NAFTA liability.

204. The fact that the Regulatory Regime is time-barred and outside the jurisdiction of the Tribunal is not in dispute. Even if the Tribunal were to accept the facts alleged by the Claimants *pro tem*, the Claimants, themselves, acknowledge that "Disclosure Legislation has been in place since 1950s."[378] Moreover, "as a condition of operating under [] permits [to conduct seismic surveys in Canada's offshore], Canadian regulations required GSI and GSI Delaware to submit routine information to Canadian regulatory bodies about seismic surveying, acquisition and processing undertaken by GSI and GSI Delaware,"[379] and "[s]tarting in the mid-2000s, Canadian regulatory agencies began requiring GSI to submit one paper copy of the Submissions and one copy in electronic format in the form of a CD with an electronic file in TIF, PDF or JPG format."[380]

205. Notably, according to the Claimants themselves all of the "key events" that relate to the treatment of their Seismic Works, and any intellectual property rights therein, took place in the context of the application of the Regulatory Regime between 1974 and 2010.[381]According to the Claimants, it was in the fall of 1999 that they became concerned that the Boards were allowing third-party access to Disclosed Seismic Materials and began taking steps to determine what the Boards were doing with the information that Delaware GSI and GSI had submitted as a condition of their seismic program authorizations.[382] The Claimants concede that by 2011 they had knowledge of the scope of disclosure as the Boards' responses to their AIA requests "provid[ed] GSI with some clarity

[378] Memorial, ¶ 50.

[379] Memorial, ¶ 40.

[380] Memorial, ¶ 45.

[381] Memorial, ¶¶ 57-59 and ¶ 321.

[382] Memorial, ¶¶ 60-62.

as to the Boards' actual use and disclosure of the Seismic Works".[383] In addition, "[b]y 2010, GSI learned of the general practice where the Boards paid GSI's licensees (through allowable expenditure credit applications and otherwise) to submit Seismic Works to the Boards that licensees only licensed from GSI".[384]

206. The Claimants' knowledge of the alleged Regulatory Regime, the alleged impacts of the Regulatory Regime and their alleged losses and damages resulting from it, is also evidenced by their domestic court actions many of which pre-date the time limitation period. As part of these claims, GSI claimed various damages relating to its seismic business and seismic data, stemming from alleged breaches of contract, copyright infringement and expropriation, which in many cases GSI argued were directly or indirectly a result of the Regulatory Regime.[385]

207. Given that the Claimants first acquired knowledge of the Regulatory Regime and any resulting loss or damage more than three years prior to the submission of their claim to arbitration, there is no dispute that these measures are outside the Tribunal's jurisdiction and cannot form the basis of any determination of NAFTA liability in this dispute. As a result, the Claimants bear the burden of proving that the Tribunal has jurisdiction over independently actionable breaches that are separate and distinct from these measures.

(b) The Claimants' Identification of the Alberta Court Decisions as the Challenged Measure is a Plainly Improper Attempt to Evade the Three-Year Limitation Period under Articles 1116(2) and 1117(2)

208. In order to circumvent the three-year limitation period under NAFTA Articles 1116(2) and 1117(2), the Claimants attempt to characterize the Alberta Court Decisions as the measures at issue in this Arbitration.[386] However, based on their submissions, it is clear that the only aspects of the Alberta Court Decisions the Claimants take issue with in their claim is the Courts' statutory interpretation and application of the Regulatory Regime under existing Canadian law and GSI's rights

[383] Memorial, ¶ 72.

[384] Memorial, ¶ 70.

[385] *See* Section IV(A).

[386] *See e.g.,* Memorial, ¶ 296 (citing Notice of Arbitration, ¶¶ 20-23).

thereunder,[387] which do not constitute independently actionable conduct that is within the Tribunal's jurisdiction *ratione temporis*.

209. In response to Canada's time bar objection, the Claimants point to their own submissions identifying the Alberta Court Decisions as the measures at issue in the Arbitration,[388] arguing that "[t]he measure at issue in this Arbitration must be identified, at least at first instance, by reference to the Claimants' submissions."[389] While Canada agrees that, at the jurisdictional stage, the identification of the measures at issue must be based on the Claimants' submissions, this does not obviate the Claimants' burden of having to demonstrate at the jurisdictional stage that their identification of the challenged measure conforms with their legal claims.

210. Notably, NAFTA tribunals, including those cited by the Claimants, have examined the link between claimants' identification of the measures at issue and their position on the merits. For example, to assess the respondent's argument that Eli Lilly had "recast" its claim in its reply submission, the *Eli Lilly* tribunal went on to carefully examine the claimant's written and oral submissions "to evaluate whether the Claimant's characterization of its claim for the purpose of jurisdiction is supported by its position on the merits."[390] Similarly, the tribunal in *Glamis*, reviewed the claimant's submissions to confirm that the claimants did not bring a claim on the basis of earlier events that were time-barred.[391]

211. In this case, the Claimants' submissions belie their assertion that the Regulatory Regime "is not itself the legal basis for the claims"[392] and that their legal claims only relate to aspects of the Alberta Courts' interpretation and application of Canadian law and determination of GSI's rights thereunder.

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[387] **RER-01**, Sookman Report, ¶¶ 143-147, 160 and 166.

[388] Memorial, ¶¶ 296, 311 (citing Notice of Arbitration, ¶¶ 20-23, 28).

[389] Memorial, ¶ 311.

[390] **RLA-025**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) ("*Eli Lilly*"), Final Award, 16 March 2017 ("*Eli Lilly – Award*"), ¶ 164.

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

[392] Memorial, ¶ 311.

212. As the basis for their NAFTA Article 1110 claim, the Claimants allege that the "Alberta Decisions imposed a compulsory license over the submissions 'confiscating' GSI's copyright therein" and that the Alberta Court Decisions "expressly prohibited GSI from enforcing its intellectual property rights in the Submissions by finding that it had '[n]o legal basis or lawful entitlement to interfere or object to any decision made by the Boards about its collected data' after the expiration of the privilege period set out in the Disclosure Legislation".[393]

213. In respect of their NAFTA Article 1106(1)(f) claim, the Claimants argue that the alleged breach could not have occurred until the Alberta Court Decisions "declared lawful" the ability of Boards and third parties to copy GSI's Disclosed Seismic Materials after the expiration of the applicable privilege period under the Regulatory Regime. [394]

214. In support of these allegations, the Claimants rely primarily on ¶¶ 318, 321-322 of the ABQB Decision and ¶¶ 102 and 104 of the ABCA Decision, which provide:

ABQB Decision:

> [318] In conclusion on this question, I find the Boards have not breached GSI's rights under the *Copyright Act* by copying, or allowing others to copy, the seismic data GSI deposited with them. The specific legislative authority in the *CPRA* and *Federal Accord Act* overrides the general rights contained in the *Copyright Act*. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have the authority to copy, and as a result they are not infringing the *Copyright Act* when they do so. […]
>
> [321] Having said this, I disagree with the Defendants' position that the Regulatory Regime did not provide for proprietary rights in the seismic material. Instead, in my view, GSI has full copyright and other proprietary rights over its seismic data, but the Regulatory Regime applies to the extent that it conflicts with the *Copyright Act*; the Regulatory Regime, in effect, creates a compulsory licence over the data in perpetuity after the expiry of the confidentiality or privileged period.
>
> [322] As pointed out by Senator Hays some 30 years ago, the Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the *CPRA* is not apologetic for it – indeed, it makes clear that there is no compensation for any confiscation under the Act (s 111 (2)). GSI was fully aware that some of its data would

[393] Memorial, ¶ 313.

[394] Memorial, ¶ 315.

> have to be submitted and that it would be made public when it undertook its work on these offshore and frontier lands. It is perhaps true that the provisions for submission have become more onerous over time and that the quality of the materials submitted have become better, further encroaching on GSI's ability to licence its data to others, but the provisions have always been there. Unfair as this may seem, it is not for this Court to re-write the legislation comprising the Regulatory Regime.[395]

ABCA Decision:

> [102] In the result here, the Regulatory Regime confers on the Boards the unfettered and unconditional legal right after expiry of the privilege period to disseminate, in their sole discretion as they see fit, all materials acquired from GSI and collected under the Regulatory Regime. The correct interpretation of "disclose" also confers on these Boards the legal right to grant to others both access and opportunity to copy and re-copy all materials acquired from GSI and collected under the Regulatory Regime. That the Boards have administratively decided to extend the time during which the statutory privilege period subsists, and have made other administrative decisions about dissemination of some types of seismic data (SEG-Y), is strictly within their regulatory and administrative prerogatives. […]
>
> [104] As found by the Trial Judge, there is no breach of copyright in this matter by the Boards' disclosure of seismic data after the privilege period, including allowing data to be copied. "The specific legislative authority of the [*Canada Petroleum Resources Act*] and the *Federal Accord Act* overrides the general rights contained in the *Copyright Act*. Further, or in the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have authority to copy": Decision, para 318. Here, that means GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period. Thereafter, GSI has no legal basis or lawful entitlement to interfere or object to any decisions made by the Boards relating to its collected data.[396]

215. The Alberta Courts' statements above make clear that the Courts were interpreting Canadian law and GSI's rights thereunder.[397] Contrary to the Claimants' assertions,[398] the Alberta Courts interpreted and applied domestic law to explain the consequences of the Regulatory Regime as it existed when the relevant statutes came into effect, and neither conferred any rights on the Boards,

[395] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 318, 321-322 (emphasis added).

[396] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶¶ 102 and 104 (emphasis added).

[397] Memorial, ¶¶ 308, 313-315 (citing to **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 318, 321-322; and **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶¶ 102, 104).

[398] *See, e.g.*, Memorial, ¶ 313-315.

nor took away any rights from GSI.[399] Similar to the court decisions at issue in *Carrisoza*, the Alberta Courts' interpretation of the Regulatory Regime "did not alter the 'subject matter' or 'the real cause' of the dispute."[400]

216. Applying the analysis in *Spence*, the Courts' statements are "deeply rooted" in the Regulatory Regime and cannot be "sufficiently detached" from that earlier measure so as to be independently justiciable.[401]

217. The Claimants' allegations in their NAFTA Article 1110 and 1106 claims do not actually arise from actions of the Alberta Courts. As shown in Section VII(A)(3)(b) below, the Alberta Court Decisions did not issue a compulsory licence or "confiscate" GSI's copyright. Instead, the Alberta Courts stated (in the alternative and in *obiter*) that the Regulatory Regime issued a compulsory licence and was "confiscatory" in character.[402] These statements concern the Regulatory Regime, itself, which is the real measure at issue in this dispute. Adjudication of the Claimants' alleged Articles 1110 and 1106 breaches, therefore, "necessarily" and "unavoidably" requires a finding going to the lawfulness of the Regulatory Regime, which, in effect, would allow the Claimants to circumvent the three-year time limitation under NAFTA Articles 1116(2) and 1117(2) simply by virtue of the filing of their domestic court actions. Similarly, the Claimants' improper attempt to evade the three-year limitation period permeates their flawed damages claim, which is almost entirely premised on the assumption of alleged lost revenues from the Boards' disclosure of GSI's seismic materials and "unpaid invoices" dating as far back as the year 2000, well prior to the Alberta Court Decisions and critical date of April 18, 2016.[403]

218. The Claimants argue that the Courts' statements were not in place prior to the Alberta Court Decisions, therefore, making it impossible for the Claimants to have been aware of the alleged breaches of Articles 1110 and 1106(1)(f) in this Arbitration, or any damages arising therefrom, prior

[399] **RER-01**, Sookman Report, ¶¶ 143-147, 160 and 166.

[400] **RLA-024**, *Carrisoza – Award*, ¶ 220.

[401] **RLA-010**, *Spence– Interim Award on Jurisdiction*, ¶¶ 222, 246, 252 and 269.

[402] *See also*, **RER-01**, Sookman Report, ¶¶ 148-152, 162-164.

[403] *See* Section VIII(C) and (D) and **RER-04**, Brattle Report, Part V (A).

to the Alberta Court Decisions.[404] However, the Courts' ruling on the two common issues in the Alberta Court Decisions did nothing to change the *status quo* regarding GSI's rights under the Regulatory Regime that prevailed before the Alberta Court Decisions.[405] The submission and disclosure requirements under the Regulatory Regime were in effect long before the Alberta Court Decisions and implemented by prior administrative measures and acts by the Boards.[406]

219. The Claimants' domestic lawsuits both predating and postdating April 18, 2016 and containing the same allegations of copyright infringement and expropriation highlight the fact that the real dispute is about the Regulatory Regime, not the Alberta Court Decisions.[407] The Claimants' argument that these claims were merely "hypothetical,"[408] that "GSI did not even know who or what was responsible for the alleged expropriation"[409] and "until the Alberta Decisions were rendered, no party knew whether GSI had intellectual property rights in the Seismic Works or how those rights were affected"[410] are of no avail. The fact of the matter is that GSI was claiming compensation for the same alleged impact on its copyrights and on its business well before the Alberta Court Decisions. The loss of their business cannot therefore arise from the Alberta Court Decisions.[411]

220. There is no reason why the Claimants could not have submitted a NAFTA Chapter Eleven claim directly challenging the Regulatory Regime in a timely manner. GSI's numerous domestic actions alleging copyright infringement and expropriation, and claiming resulting damages prior to the Alberta Court Decisions demonstrate that they were well aware of the potential impact of the

[404] Memorial, ¶¶ 309, 313.

[405] *See* Section VII(A)(3)(b); and **RER-01**, Sookman Report, ¶¶ 143-147, 160 and 166.

[406] *See* **CLA-083**, *Infinito Gold Ltd. v. Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021 ("*Infinito* – Award"), ¶ 240 ("That is not to say that an investor is required to exhaust local remedies before resorting to arbitration as a requirement for the admissibility of a claim…The situation is generally different for administrative decisions, with the result that 'an expropriation occurs at the moment of the decision of an administrative authority and is not complete with the final refusal to remedy the administrative act.")

[407] *See* Section IV.

[408] Memorial, ¶ 326.

[409] Memorial, ¶ 329.

[410] Memorial, ¶ 335.

[411] *See* Sections VII(A)(3)(e)(iii), VII(B)(B) and VIII(C) which explain why the Claimants' alleged losses are not attributable or caused by the Alberta Court Decisions.

Regulatory Regime on their intellectual property rights more than three years prior to the submission of their NAFTA claim.

221. Based on the manner in which the Claimants have formulated their legal and damages claims, the Alberta Court Decisions do not constitute an independently actionable breach, that is separate from the Regulatory Regime. Given that NAFTA Articles 1116(2) and 1117(2) do not permit the Claimants to rely on later court proceedings to toll the limitation period for administrative or regulatory measures, the Tribunal lacks jurisdiction over these claims.

(c) The Claimants Have Not Identified Any Conduct of the Alberta Courts within the Limitation Period that Could Constitute an Independently Actionable Breach

222. Apart from the Courts' interpretation of domestic law assessment of the rights of GSI thereunder, the Claimants have not identified any separate judicial conduct or acts in the context of the Alberta Court Decisions, which constitute an alleged violation of NAFTA. As explained in Sections VII(A)(3)(c) and VII(B)(3), their legal claims are plainly a challenge of the Regulatory Regime, rather than the Alberta Court Decisions. Nor have the Claimants identified any other loss or damage directly resulting from the Alberta Court Decisions in and of themselves. To borrow the words of the *Carrisoza* tribunal, the Claimants "alleged no independent violation perpetrated through the proceedings"[412] leading to the Alberta Court Decisions, such as a denial of justice, through the Alberta Court Decisions.[413] Accordingly, the Claimants have failed to meet their burden in identifying any identifiable independently actionable breach within the applicable limitation period in this case.

223. In sum, the Claimants have failed to establish that the Tribunal has jurisdiction *ratione temporis* over their NAFTA claims. It is uncontroverted that the Regulatory Regime and the Claimants' alleged losses occurred prior to April 18, 2016 and therefore that the Claimants therefore cannot bring a challenge in this respect. The Courts' interpretation of domestic law in the Alberta Court Decisions – which is the *only* measure at issue identified by the Claimants in this Arbitration - did not in any

[412] **RLA-024,** *Carrisoza* – Award, ¶ 161;

[413] *See e.g.,* Memorial, ¶¶ 371-373 ("[I]t is not necessary for the Claimants to show a 'denial of justice'."); Section VII(A)(3)(2).

way revoke or change GSI or the Boards' rights and do not constitute an separate actionable breach that is capable of renewing the limitation period under NAFTA Articles 1116(2) or 1117(2). Therefore, the Claimants' entire NAFTA claim must be dismissed for lack of jurisdiction pursuant to NAFTA Articles 1116(2) and 1117(2).

VII. THE CLAIMANTS' CHALLENGE OF THE ALBERTA COURT DECISIONS HAS NO MERIT

224. The Claimants' case is that the "Alberta Decisions are the measures at issue in this Arbitration."[414] To meet their case, the Claimants must therefore prove that the Alberta Court Decisions – not the Regulatory Regime – constitute a breach of NAFTA. They fail to do so. The Claimants' attempt to frame their case around the Alberta Court Decisions in order to circumvent the time limitation is entirely based on a mischaracterization of the Alberta Court Decisions. Contrary to the Claimants' assertions, the Alberta Court Decisions did not: (i) "issue" a compulsory licence; (ii) "confiscate" GSI or its copyright; (iii) "enforce" any requirement on GSI to transfer seismic material to the Boards; or (iv) "prohibit" GSI from enforcing its intellectual property rights. Properly understood, the Alberta Court Decisions are incapable of establishing a breach of NAFTA Articles 1110 and 1106.

225. The Alberta Courts interpreted and applied Canadian law and found that in disclosing GSI's seismic materials pursuant to the Regulatory Regime and allowing copying, the Boards did not breach GSI's copyrights, and neither did the oil and gas companies when accessing this material. The Tribunal has no basis to second-guess this interpretation of GSI's rights by Canada's judiciary. Canada further demonstrates below that the Claimants failed to establish any of the main elements necessary to prove a violation of Articles 1110 and 1106.

A. The Alberta Court Decisions Do Not Constitute a Breach of Article 1110 (Expropriation)

1. Summary of Canada's Position on Article 1110

226. The Claimants allege that the Alberta Court Decisions violated Article 1110 by imposing a compulsory licence and prohibiting GSI from enforcing its intellectual property rights in domestic

[414] Memorial, ¶ 296 (emphasis added).

courts, which the Claimants allege effectively confiscated GSI's copyright and rendered GSI valueless as an enterprise.[415] This claim is fundamentally flawed and incapable of establishing a violation of Article 1110 for multiple reasons.

227. First, the Alberta Court Decisions cannot constitute an expropriation in violation of Article 1110 absent a denial of justice. International tribunals pay high deference to domestic court decisions interpreting rights and obligations under domestic law, absent denial of justice. The Claimants have not alleged a denial of justice. Nor could they, as they received full due process and appellate review of their claims. The Claimants may dislike the outcome of the domestic court process but they cannot invoke Article 1110 to appeal domestic judicial findings or re-litigate issues decided by domestic courts.

228. Second, under Canadian law GSI never held the right it alleges the Alberta Courts confiscated – exclusivity over the Disclosed Seismic Materials after the confidentiality period expired. The Alberta Courts reviewed the evidentiary record, interpreted the statutory scheme and found that GSI's right to exclusivity in the Disclosed Seismic Materials ended once the confidentiality period expired. After that point, pursuant to the Regulatory Regime and the conditions that applied to GSI's seismic surveys, the Boards could disclose seismic materials to the public for copying. The Tribunal should defer to this determination by the Canadian judiciary of GSI's rights under Canadian law. Given that GSI did not have the alleged right to prevent disclosure and copying of the Disclosed Seismic Materials after the confidentiality period, there can be no expropriation of such right.

229. Indeed, the Claimants' Article 1110 claim rests on an erroneous factual premise. The Alberta Court Decisions did not issue a compulsory licence. The Alberta Court Decisions described "in the alternative" the Regulatory Regime as creating a compulsory licencing system.[416] The Alberta Courts did not "confiscate" GSI's copyright. The ABQB used the term "confiscate" in *obiter* to describe the Regulatory Regime (echoing the term that a Senator had used to describe the Regulatory Regime in

[415] Memorial, ¶¶ 313 ("The Alberta Decisions imposed a compulsory license over the submissions, "confiscating" GSI's copyright therein. The Alberta Decisions also expressly prohibited GSI from enforcing its intellectual property rights in the Submissions"). *See also* Memorial, ¶¶ 401, 411, 412, 414, 415, 416, 418, 419, 420, 421, 422, 423.

[416] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 318.

a political debate held decades previously).[417] The Alberta Court Decisions did not "prohibit" GSI from enforcing its copyright. The ABCA explained that since GSI no longer held exclusivity in the Disclosed Seismic Materials after the confidentiality period expired, GSI had "no legal basis" under Canadian law to bring claims against the Boards.[418] In short, the Alberta Court Decisions did not "take" GSI or any of its rights. The Decisions described GSI's rights under the Regulatory Regime – as they have always existed from the moment GSI obtained authorizations to conduct seismic surveys in Canada's offshore. Even if the Regulatory Regime could be characterized as imposing a "compulsory licence" (which is doubtful)[419] or as being "confiscatory" (which was not a legal determination made by the Courts)[420], the Regulatory Regime is plainly outside the scope of this Tribunal's jurisdiction *rationae temporis*.

230. The claim must fail on these bases alone.

231. In any event, none of the elements necessary to establish an indirect expropriation under NAFTA Article 1110 are otherwise present. The Alberta Court Decisions did not lead to a substantial deprivation of the Claimants' investments in Canada. The Claimants have not specified the seismic material in which they claim GSI held copyright, provided evidence to establish copyright in that material or specified the alleged lost value of the Disclosed Seismic Material. Most of the commercial value of GSI's copyrights over Disclosed Seismic Materials, if established, would exist during the confidentiality period, as the value of the materials diminished over time. The Alberta Court Decisions did not interfere with the confidentiality period set out in the Regulatory Regime or GSI's ability to licence its seismic data during that time (10 or 15 years for those surveys that GSI conducted between 1997 and 2008).

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[417] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 322. *See* **R-283**, Proceedings of the Standing Senate Committee on Energy and Natural Resources, no 1 (22 October 1986) (Bill C-5) at 1:46.

[418] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 104.

[419] *See e.g.* **RER-01**, Sookman Report, ¶ 138 ("I therefore interpret the references to being "in effect" a "compulsory" or "mandatory" licence to mean an Implied Licence that arose as a mandatory consequence of GSI's voluntary participation in the Regulatory Regime).

[420] *See e.g.* **RER-01**, Sookman Report, ¶ 151 (explaining in regard to the ABQB's use of the term "confiscatory" that "I would ascribe no legal significance to this characterization. It is non-binding *obiter dicta*.").

232. The value of the Disclosed Seismic Materials would in any case only represent a portion of the value of GSI's seismic data library. GSI still retained the field data and reprocessed data, which it did not submit to the Boards and that it licenced to third parties.

233. Moreover, the Claimants' allegation that the loss of value of GSI's business is attributable to the Alberta Court Decisions runs directly contrary to the Claimants' own allegations in domestic proceedings, where GSI previously claimed that the business was expropriated by the Regulatory Regime. In reality, GSI's business failure long predates the Alberta Court Decisions. Due to its poor financial management, risky business decisions and inability to adapt to tough economic conditions and technological change, by 2012 and possibly before GSI was no longer a going-concern, even though much of the Submitted Seismic Materials related to GSI's seismic surveys remained confidential. GSI's scorched-earth litigation strategy destroyed its reputation in the oil and gas industry. Suing virtually all its customers undermined the commercially realizable value of its seismic data.

234. Furthermore, the Alberta did not interfere with any distinct, reasonable investment-backed expectation of the Claimants. The Claimants never held an objectively reasonable expectation of exclusivity over the Disclosed Seismic Materials after the confidentiality period expired. They knew or should have known of the requirements for the submission and disclosure of seismic materials under the Regulatory Regime when they invested in Canada. GSI knew in 1993 when it bought Halliburton's seismic data library that most of the seismic materials submitted to regulators were already public. The Claimants knew when GSI sought authorization under the Regulatory Regime for its own seismic surveys between 1997 and 2008 that GSI would be subject to the rules permitting the Boards to disclose the seismic materials after the confidentiality period expired. Nor was the character of the Alberta Court Decisions expropriatory. The Alberta Courts independently and impartially interpreted the statutory scheme and described GSI's rights under Canadian law. This is the proper function of a judiciary. For all these reasons, the Article 1110 claim must fail.

235. Finally, the Tribunal has no jurisdiction to decide an alleged breach of NAFTA Chapter Seventeen (Intellectual Property) or the *Berne Convention*. The Claimants cannot invoke Article 1110(7) to turn investment protection obligations under NAFTA into a mechanism for arbitrating alleged violations of intellectual property rights or consistency with international intellectual property

obligations. Moreover, it is simply unnecessary to consider the consistency of the challenged measures under Chapter Seventeen, because the Alberta Court Decisions clearly did not expropriate the Claimants' investment.

2. Article 1110 Incorporates Customary International Law Rules on Expropriation

236. NAFTA Article 1110(1) states:

> 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.

237. NAFTA does not define the term "expropriation". NAFTA Tribunals have interpreted Article 1110(1) as incorporating customary international law rules.[421] The three NAFTA Parties have confirmed that this is the proper interpretation of Article 1110.[422]

238. NAFTA tribunals follow three steps to assess whether a Party's measures violate customary international law as reflected in Article 1110(1):

(i) Does the investor have an investment capable of being expropriated?

(ii) If so, has the investment been expropriated?

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[421] **CLA-069**, *Glamis* – Award, ¶ 354; **CLA-074**, *Archer Daniels Midland Company v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, ("*Archer Daniels* – Award"), ¶ 237.

[422] **CLA-069**, *Glamis* – Award, ¶ 354; **CLA-074**, *Archer Daniels* – Award, ¶ 237; **CLA-071**, *Waste Management I* – Award, ¶ 177. **R-429**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Submission of the Government of the United States of America, 9 November 1999, ¶ 10; **R-430**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Second Submission of Canada pursuant to NAFTA Article 1128, 7 July 2001, ¶¶ 64-65; **R-431**, *Methanex Corporation v. The United States of America* (UNCITRAL) Mexico Fourth Submission pursuant to NAFTA Article 1128, 30 January 2004, ¶ 13.

(iii) If so, did this expropriation satisfy the conditions set out in Article 1110(1)(a) to (d)?[423]

239. The burden of establishing an expropriation under Article 1110 rests on the party alleging the expropriation of its investment – in this case, the Claimants.[424]

240. The three NAFTA Parties recently entered into a new trade agreement, the *Canada-United States-Mexico Agreement* ("CUSMA"),[425] which terminated and replaced NAFTA. CUSMA Annex 14-B (Expropriation) reflects the three NAFTA Parties' understanding of what constitutes an expropriation under NAFTA.[426] Annex 14-B does not change the applicable test to find an expropriation under Article 1110; it simply elucidates the three NAFTA Parties' intent and provides

[423] **RLA-026**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/01), Award, 17 July 2006 ("*Fireman's Fund* – Award"), ¶ 174 ("Paragraphs (a) through (d) do not bear on the question as whether an expropriation has occurred. Rather, the conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110."); **RLA-027**, *Corn Products International Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01), Decision on Responsibility, 15 January 2008, ¶ 89 ("[I]t is important not to confuse the question whether there has been an expropriation with that of whether the four criteria in paragraphs (a) to (d) of Article 1110 have been satisfied. Those paragraphs come into play only if it has been decided that there has been an expropriation, or a measure tantamount to an expropriation, but the absence of one or more of them is not in itself indicative of expropriation."); **CLA-076**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada* (UNCITRAL), Award, 2 August 2010, ¶ 240.

[424] **RLA-028**, *Emmis et al. v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 ("*Emmis – Award*"), ¶ 173 ("[T]he Claimants bear the burden of proving that they owned an investment capable of expropriation."); UNCITRAL Arbitration Rules, Article 27(1). Once the State has brought *prima facie* evidence of a legitimate exercise of police powers, the burden falls to the claimant to establish that the exercise was not legitimate. **RLA-029**, *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland* (UNCITRAL) Final Award, 14 February 2012, at ¶¶ 582-584.

[425] *Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can. T.S. 2020 No.5 (entered into force 1 July 2020) ("CUSMA").

[426] This understanding of the test to find an indirect expropriation reflects the NAFTA Parties' understanding of NAFTA Article 1110 as set out in their non-disputing party submissions in various investment arbitrations. *See e.g.*, **R-432**, *Alicia Grace and others v. United Mexican States* (UNCITRAL), Submission of the United States of America, 24 August 2021, ¶ 59; **R-433**, *Lupaka Gold Corp. v. Republic of Peru* (ICSID Case No. ARB/20/46), Non-Disputing Party Submission of the Government of Canada, 26 May 2022, ¶ 30. The recent treaty practice of the three NAFTA Parties also reflects this understanding. **RLA-030**, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ("CPTPP"), Annex 9-B: Expropriation (both Canada and Mexico are party to the CPTPP); **RLA-031**, *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment*, (2008), in force 1 January 2012, Annex B: Expropriation; **RLA-032**, *United States – Panama Trade Promotion Agreement*, (2007), in force 31 October 2012, Chapter Ten, Annex 10-B Expropriation; **RLA-033**, *United States – Colombia Trade Promotion Agreement*, (2006), in force 15 May 2012, Chapter Ten, Annex 10-B Expropriation. *See also* **RLA-034**, *The Agreement Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, (2012), Annex B: Expropriation; **RLA-035**, *Canada's 2021 Foreign Investment Promotion and Protection Agreement* (FIPA) Model, (2021), Art. 9(2), (3) and (4).

additional guidance to tribunals.[427] The Tribunal may therefore rely on CUSMA Annex 14-B for guidance in interpreting NAFTA Article 1110.[428] CUSMA Annex 14-B states:

> The Parties confirm their shared understanding that:
>
> 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right [Footnote18] or property interest in an investment.
>
> 2. Article 14.8.1 (Expropriation and Compensation) addresses two situations. The first is direct expropriation, in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
>
> 3. The second situation addressed by Article 14.8.1 (Expropriation and Compensation) is indirect expropriation, in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred,
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, [Footnote 19] and
>
> (iii) the character of the government action, including its object, context, and intent.
>
> (b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances. [Emphasis added.]

[427] **RLA-036**, Andrea J. Menaker, "Benefiting from Experience: Developments in the United States' Most Recent Investment Agreements", (2006) 12:1 U.C. Davis J. Int'l L. Pol'y 121, p. 122; **RLA-037**, Andrew Newcombe, "Canada's New Model Foreign Investment Protection Agreement", August 2004, pp. 5-6.

[428] *See* **CLA-034**, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969 ("*Vienna Convention*"), Article 31(3)(c) ("There shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties.").

241. Footnote 19 states:

> For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector. [Emphasis added.]

242. As shown below, CUSMA Annex 14-B reflects how NAFTA tribunals have interpreted Article 1110, and how they have distinguished an indirect expropriation from a measure which does not violate Article 1110 and thus does not require compensation.

3. The Alberta Court Decisions Cannot and Did Not Constitute an Expropriation under Article 1110

243. The Claimants have not alleged a direct expropriation under Article 1110, nor could they establish such a claim. The Alberta Courts did not nationalize GSI or transfer the business to Canada. The Claimants continue to own their GSI shares and debt interests. They have not alleged that the Alberta Courts interfered with these interests.[429] Nor did the Alberta Courts transfer GSI's business or GSI's copyrights to Canada. The Courts noted that GSI continues to own any copyrights it had over seismic materials it acquired, including the Disclosed Seismic Materials.[430] Instead, the Claimants allege the Alberta Court Decisions breached Article 1110 "in a manner tantamount to expropriation".[431] The phrase "measure tantamount to nationalization or expropriation" does not broaden the scope of Article 1110.[432] The Claimants must still establish that the Alberta Court Decisions expropriated their investments.

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[429] Memorial, ¶ 386: "GSI technically retains formal title to the Seismic Works, in the sense that the title has not been formally transferred or assigned to Canada."

[430] **R-434**, *Geophysical Service Incorporated v. Her Majesty the Queen in Right of Canada as represented by Attorney General of Canada and in Right of Quebec as represented by Attorney General of Quebec*, 2019 FC 337, Order and Reasons, 19 March 2019 ("*GSI v. HMTQ*, 2019 FC 337"), ¶ 40 ("GSI still retains copyright in its seismic data and will do so for the time permitted by section 91 of the *Copyright Act*.").

[431] Memorial, ¶ 377.

[432] **CLA-077**, *Pope & Talbot Inc. v. Canada* (UNCITRAL) Interim Award, 26 June 2000 ("*Pope & Talbot – Interim Award*"), ¶ 96; **CLA-106**, *S.D. Myers v. Canada* (UNCITRAL) Partial Award, 13 November 2000 ("*S.D. Myers* – Partial Award"), ¶ 286; **CLA-069**, *Glamis* – Award, ¶ 355.

244. The Claimants' allegation rests on the theory that the Alberta Court Decisions issued a compulsory licence and prohibited GSI from enforcing its intellectual property rights in domestic courts, which effectively confiscated GSI's copyright and deprived GSI of value. They allege:

> The Alberta Decisions breached Article 1110 of NAFTA by confiscating GSI's copyright in the Seismic Works through a compulsory licence in a manner tantamount to expropriation.[433]
>
> The findings in the Alberta Decisions admitted that GSI's copyright in the Seismic Works were confiscated through the imposition of a compulsory licence.[434]
>
> The effect of the Alberta Decisions was to reduce the temporal scope of GSI's copyright in the Seismic Works from the standard under Canadian copyright law (life of the author plus 50 years), to the length of the privilege period under the applicable Disclosure Legislation and Board policies, which was five years.[435]
>
> [T]he Alberta Decisions rendered GSI's formal title useless by stripping GSI of its intellectual property rights after the expiration of the applicable privilege period. That substantially impaired GSI's ability to recoup its investment in the Seismic Works by curtailing its term of exclusivity, but it also confiscated GSI's right to enforce that exclusivity in Canadian courts, contrary to its rights under Canadian copyright legislation.[436]
>
> [T]he Alberta Decisions resulted in no dividends being paid to Davey or Paul because GSI is effectively out of business now that it is unable to recover its investment into the Seismic Works, has lost the ability to control the dissemination of the Seismic Works and is unable to enforce those intellectual property rights against third parties.[437]
>
> [T]he Alberta Decisions confiscated GSI's most valuable asset – its copyright in its Seismic Works.[438]

[433] Memorial, ¶ 377 (emphasis added).

[434] Memorial, ¶ 381 (emphasis added).

[435] Memorial, ¶ 382 (citing: **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 321; **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 104).

[436] Memorial, ¶ 386 (emphasis added).

[437] Memorial, ¶ 389 (emphasis added).

[438] Memorial, ¶ 390 (emphasis added).

> The Alberta Decisions confiscated GSI's copyright in the Seismic Works without compensation by imposing a compulsory licence that diminishes the term of GSI's copyright protection significantly.[439]

245. The Claimants' Article 1110(1) claim is fundamentally flawed. The Tribunal should reject it for multiple reasons.

(a) The Alberta Court Decisions Cannot Constitute an Expropriation under Article 1110 Absent a Denial of Justice

246. The first flaw in the Article 1110 claim is that the Alberta Court Decisions cannot constitute an expropriation under international law absent a denial of justice. The Claimants argue that judicial decisions may violate Article 1110 without a denial of justice because Canada has State responsibility for its judiciary under international law and because the plain construction of Article 1110 allegedly does not require denial of justice for a judicial decision to breach Article 1110.[440] These arguments are groundless.

247. The Claimants' analysis ignores the extensive international law jurisprudence and commentary on bringing international legal claims against domestic judiciaries. The question is not whether NAFTA Parties are responsible for the actions of their judiciary (courts are an organ of the State under international law[441]), but whether and under what circumstances such actions can constitute an expropriation. The customary international law of expropriation has, for centuries, concerned only executive, legislative, military and police actions.[442] Decisions of domestic courts acting in the role

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[439] Memorial, ¶ 440 (emphasis added).

[440] Memorial, ¶¶ 371-376.

[441] **RLA-040**, ILC Article 4 (Conduct of organs of a State) ("1. The conduct of any State organ shall be considered the act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of a State.").

[442] **RLA-038**, G.C. Christie, "What Constitutes a Taking of Property under International Law?", 38 British Yearbook of International Law 307 (1962); **RLA-039**, Restatement of the Law Third: The Foreign Relations of the United States, Vol. 2 (St. Paul, MN: American Law Institute, 1987). *See, e.g.*, these seminal cases of the customary international law of expropriation: **RLA-041**, *Oscar Chinn Case* (*UK v. Belgium*) (PCIJ Ser A/B, No. 63), Judgment, 12 December 1934; **RLA-042**, *Norwegian Ship Owners' Claims (Norway v. USA*) (1 RIAA 307), Permanent Court of Arbitration, Award of 13 October 1922; **RLA-043**, *German Interests in Polish Upper Silesia* (*Germany v. Poland*) (PCIJ Ser A, No. 7), Judgment, 25 May 1926; **RLA-044**, *Chorzow Factory* Case (Jurisdiction) (1927), Ser. A, No. 9; **RLA-045**, *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, 1970 ICJ 3.

of neutral and independent arbiters of the legal rights of litigants do not give rise to State responsibility for expropriation under international law and Article 1110.[443] Where a court of competent jurisdiction acts in accordance with due process and makes a determination on the scope and effect of a property right under domestic law, this judgment cannot amount to a "taking" in international law even if it significantly affects the rights of the parties to the court proceedings. This is simply a juridical determination of the existence and scope of the property right under the law that creates the right.[444] Absent a denial of justice, even judicial error in domestic courts' decisions does not give rise to international responsibility on the part of the State.[445]

248. Many tribunals under NAFTA and other investment treaties, and prominent international legal scholars, have confirmed that domestic judicial determinations on domestic law are not subject to

[443] *See e.g.*, **RLA-046**, Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment, 208 (2013) (expressing the view that "while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice"); **RLA-023**, *Loewen – Award*, ¶ 141 (noting that claimants' expropriation claim based on judicial acts "adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if *Loewen* establishes a denial of justice under Article 1105."); **R-435**, *B-Mex, LLC and others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Respondent Counter-Memorial on the Merits, 4 December 2020, [English Translation], ¶¶ 23, 742-749; **RLA-436**, *Angel Samuel Seda and others v. Republic of Colombia* (ICSID Case No. ARB/19/6), Submission of the United States of America, 26 February 2021, ¶ 29; **RLA-437**, *Lion Mexico Consolidated L.P. v. Mexico* (CIADI Case No. ARB (AF)/15/2) ("*Lion Mexico*"), Submission of the United States of America, 21 June 2019 ("*Lion Mexico* – US 1128"), ¶ 20; **RLA-438**, G*ramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (UNCITRAL), Submission of the United States of America, 21 June 2019, ¶ 28.

[444] **R-439**, United States' Article 1128 submission in *Eli Lilly*, ¶ 29 ("decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not give rise to a claim for expropriation under Article 1110(1)"); **R-440**, Mexico's Article 1128 submission in *Eli Lilly*, ¶ 19 ("When legal rights are declared a nullity, or void ab initio, by a court of competent jurisdiction, there cannot be a claim of expropriation. Mexico agrees with Canada that in such case, as a matter of domestic law, the alleged investment never existed for the purposes of Article 1110."); **R-441**, Canada's Response to Article 1128 submissions of the United States and Mexico, ¶ 30.

[445] **RLA-161**, Harvard Research Draft, The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, art. 9, 23 AM. J. INT'L L. SP. SUPP. 134 (1929); **RLA-048**, Jan Paulsson, Denial of Justice in International Law, 44 (2005) at 81; **RLA-055**, Edwin M. Borchard, The Diplomatic Protection of Citizens Aboard or the Law of International Claims 330 (1925), at 196; **RLA-050**, Christopher Greenwood, State Responsibility for the Decisions of National Courts, in Issues of State Responsibility Before International Judicial Institutions 61 (Malgosia Fitzmaurice & Dan Sarooshi eds., 2004); **RLA-051**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014 [Spanish], ¶ 640; **RLA-052**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 453; **RLA-053**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, 2 July 2018, ¶ 506; **RLA-054**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020, ¶ 528.

review by international investment tribunals except in the extraordinary circumstances of gross procedural misconduct amounting to a denial of justice.[446] Jan Paulsson explains:

> To the extent that national courts disregard or misapply national law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner which scholars have often referred to as technical or procedural denial of justice.[447]

249. Then-Professor Christopher Greenwood (now Member of the U.S.-Iran Claims Tribunal and former Judge of the International Court of Justice) stated:

> Although the *Loewen* claim also alleges an expropriation in violation of Article 1110, an award of damages, including an award of punitive damages, can amount to an expropriation only if the court proceedings are so flawed as to amount to a denial of justice.[448]

250. The tribunal in *Loewen* agreed with Professor Greenwood, holding that the judicial measure in question could not amount to an expropriation absent a denial of justice:

> Claimant's reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.[449]

[446] The *Azinian* tribunal identified four types of denial of justice: (i) refusal to entertain suit, (ii) subjecting a suit to undue delay, (iii) administering justice in a seriously inadequate way, or (iv) clearly and maliciously misapply the law such that there is a pretence of form to mask an internationally unlawful end. **CLA-042**, *Robert Azinian, Keneth Davitian, & Ellen Baca v. United Mexican States* (Case No. ARB(AF)/97/2), Award (English), 1 November 1999 ("*Azinian* - Award"), ¶ 103.

[447] **RLA-048**, Jan Paulsson, Denial of Justice in International Law (2010), p. 5 (emphasis added).

[448] **RLA-056**, *Loewen*, Opinion of Christopher Greenwood Q.C, 26 March 2001, ¶ 10; *see also* **CLA-054**, *Mondev* – Award, ¶ 75 (holding that "the only arguable basis of claim under NAFTA concerns the conduct of the United States courts in dismissing LPA's claims. Moreover, it is clear that Article 1105(1) provides the only basis for a challenge to that conduct under NAFTA.") (emphasis added). *See also* **RLA-050**, Christopher Greenwood KC, "State Responsibility for the Decisions of National Courts" in M Fitzmaurice and D Sarooshi (eds), Issues of State Responsibility before International Judicial Institutions (Hart Publishing 2004), pp. 59-60.

[449] **RLA-023**, *Loewen* Award, ¶ 141 (emphasis added).

251. The Claimants cite *Azinian* as establishing the responsibility of States for acts of the judiciary.[450] That is not contested, as it is axiomatic in international law.[451] Yet, the Claimants miss the point because they ignore that the *Azinian* tribunal also affirmed that unless the claimant could prove impropriety in the judicial process, the tribunal had to defer to the Mexican court determination.[452] The tribunal explained:

> The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.
>
> But the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice. Without exception, they have directed their many complaints against the Ayuntamiento of Naucalpan. The Arbitral Tribunal finds that this circumstance is fatal to the claim, and makes it unnecessary to consider issues relating to performance of the Concession Contract.[453]

252. The NAFTA tribunal in *Lion Mexico Consolidated L.P. v. United Mexican States* recently restated the general rule that there is "no judicial expropriation without denial of justice."[454] To determine if the challenged court decision amounted to an expropriation (and after referring to the

[450] Memorial, ¶¶ 372-373.

[451] **RLA-040**, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, 4 (Conduct of organs of a State).

[452] **CLA-042**, *Azinian* - Award, ¶¶ 102-103. *See also* **CLA-096**, Andrew Newcombe, Law and Practise of Investment Treaties, "Standards of Treatment", February 2009 ("Newcombe, Standards of Treatment (February 2009)"), ¶ 7.19.

[453] **CLA-042**, *Azinian* - Award, ¶¶ 99-100 (emphasis added).

[454] **CLA-108**, *Lion Mexico*, Award, 20 September 2021 ("*Lion Mexico* – Award"), ¶¶ 187-188. The *Lion* tribunal further adopted the "very high standard" of the *Mondev* and *Loewen* tribunals at ¶¶ 287-288, 297-298, 217. The *Lion* tribunal acknowledged just one exception to this rule: "whenever it can be proved that the courts were not neutral and independent, especially from the other branches of power of the host State."; ¶¶ 190-191.

non-disputing party submissions of the United States and Canada[455]), the *Loewen* award and other authorities, the *Lion* tribunal went on to consider first whether there was a denial of justice.[456]

253. Investment tribunals under other bilateral investment treaties have followed the same approach. In *Arif v. Moldova*, the tribunal held that the Moldovan courts' declaration that the claimant's asserted contractual rights were invalid under Moldovan law could not amount to an expropriation,[457] as the claimant had not established that the courts committed a denial of justice:

> [T]hese agreements have been declared invalid under Moldovan law by the whole of the Moldovan judicial system, including the Supreme Court. The Tribunal is not persuaded that there has been collusion between the courts and the investor's competitors in the proceedings before the Moldovan courts over these agreements or that the Moldovan courts have acted in denial of justice in any way (see Section VI.B.2). Moreover, there is no evidence in the record that persuades the Tribunal to conclude that the Moldovan judiciary has not applied Moldovan law legitimately and in good faith in the proceedings commenced by Claimant's competitors.
>
> Le Bridge has had a fair opportunity to defend its position under Moldovan law before the Moldovan courts. This Tribunal is not a court of appeal of last resort. There is no compelling reason that would justify a new legal analysis by this Tribunal regarding the invalidity of these agreements which has already been repeatedly, consistently and irrevocably decided by the whole of the Moldovan judicial system.[458]

254. In *Liman Caspian v. Kazakhstan*, the tribunal first noted its finding that the Kazakh court decisions were not "arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process", before holding that "even if incorrect as a matter of Kazakh law" the impugned judicial

[455] **CLA-108**, *Lion Mexico* – Award, ¶¶ 189, 282-286; **R-437**, *Lion Mexico* - U.S. 1128, ¶ 8. In that case, all three NAFTA Parties made submissions reflecting their clear, consistent and repeated position on this point. The United States explained: "Indeed, as a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice." **R-496**, *Lion Mexico*, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 June 2019, ¶ 12.

[456] **CLA-108**, *Lion Mexico* – Award, ¶¶ 369, 397-509.

[457] **RLA-052**, *Arif* – Award, ¶ 420 (holding that "The Tribunal has already accepted the invalidity of these rights as declared by the Moldovan judicial system as a result of the legitimate application of Moldovan law and has found that this invalidity cannot be interpreted as an expropriation of the investor's rights, i.e., the Tribunal has found that there is no possible expropriation of invalid rights.").

[458] **RLA-052**, *Arif* – Award, ¶¶ 415-416 (emphasis added).

determinations "have to be accepted from the perspective of international law."[459] Consequently, in the absence of a fundamental defect in the domestic court proceedings, it concluded that the invalidation of a licence by the Kazakh courts was not expropriatory.

255. In their Memorial, the Claimants cite a minority of decisions suggesting that denial of justice is not required for a judicial decision to constitute an expropriation. This does not reflect the longstanding rules under international law, but is in any event a misleading characterization of those decisions: in each of the cases cited by the Claimants, tribunals still demanded "exceptional circumstances" to review judicial actions, such as judicial conduct that is "egregious or shocking", "fundamentally arbitrary or unfair" or involves gross impropriety.[460] For example, while the *Eli Lilly* tribunal did not conclude whether denial of justice is necessary to establish a violation of Chapter Eleven, it emphasized that exceptional circumstances were required to review judicial decisions:

> [T]he Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts. It will accordingly only be in very exceptional circumstances, in which there is clear evidence of egregious and shocking conduct, that it will be appropriate for a NAFTA Chapter Eleven tribunal to assess such conduct.[461]

256. The Claimants fail to identify a single investment case where a tribunal found a judicial expropriation by an independent and impartial court that discharged its judicial function of interpreting and applying domestic law to determine the existence and scope of a claimant's rights under domestic law. As in *Loewen*, *Lion*, *Azinian*, *Arif*, and *Liman Caspian*, and many other cases, the Alberta Court Decisions' interpretation of Canadian law and application to the facts cannot constitute an expropriation absent a denial of justice.

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[459] **RLA-057**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14), Excerpts of the Award, 22 June 2010, ¶ 431.

[460] **CLA-083**, *Infinito* – Award, ¶ 718. Likewise, in *Biwater Gauff*, the tribunal held that a denial of justice need not be established to find an expropriation in the specific context of a breach of contract by a State party. **CLA-084**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008 ("*Biwater Gauff* – Award"), ¶ 458.

[461] **RLA-025**, *Eli Lilly* – Award, ¶¶ 189, 218-226.

257. The Claimants have not alleged the Alberta Court Decisions constituted a denial of justice. The Claimants may dislike certain parts of the Alberta Court Decisions that did not find in GSI's favour. Yet, NAFTA offers no basis for the Tribunal to review the correctness of the Alberta Court Decisions' interpretation and application of Canadian law. As numerous tribunals have stated, NAFTA Chapter Eleven is not an appellate mechanism to review domestic judicial decisions.[462]

258. The Claimants had their "day in court". They exercised their lawful entitlement to present their claims to Canada's judiciary on the existence and scope of GSI's alleged rights. They received full due process and appellate review from an independent and impartial judiciary – this is uncontested. As described below, the Alberta Courts reviewed the extensive evidentiary record, including the legislative history and Parliament's intent, applied the proper statutory interpretation principle, and described the existence and scope of GSI's asserted rights under Canadian law. One cannot conclude (nor do the Claimants allege) that the Alberta Court Decisions amounted to a denial of justice or entailed "flagrant procedural deficiencies"; something "egregious", "shocking" or "arbitrary"; "gross defects in the substance of the judgment itself". Thus, the Tribunal cannot review the interpretation of GSI's rights by the Alberta Court Decisions to determine if it is correct, or if it constitutes a breach of Article 1110. The Claimants' expropriation claim over the actions of Canada's judiciary is untenable under international law and should be rejected on this basis alone.

[462] **RLA-004**, *Apotex* - Award, ¶ 278, **CLA-042**, *Azinian* – Award, ¶ 99; **CLA-075**, *Waste Management Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, ¶ 129; **RLA-058**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Award, 20 February 2015, ¶ 167. Tribunals under other investment treaties have made similar comments. *See e.g.* **RLA-059**, *América Móvil S.A.B. de C.V. v. Republic of Colombia* (ICSID Case No. ARB(AF)/16/5) Award, 07 May 2021, ¶¶ 337, 413, 419; **RLA-060**, *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Award, 3 July 2008, ¶¶ 105-106; **RLA-061**, *Binder v. Czech Republic* (UNCITRAL) Award on Jurisdiction, 6 June 2007, ¶ 390; **RLA-062**, *World Values v. Venezuela* (ICSID Case No. ARB/13/11) Award, 25 July 2017, ¶ 553; **RLA-052**, *Arif – Award*, ¶ 441; **RLA-063**, *Hassan Awdi v. Romania* (ICSID Case No. ARB/10/13) Award, 2 March 2015, ¶ 106; **RLA-064**, *Limited Liability Company Amto v. Ukraine* (SCC Case No. 080/2005) Final Award, 26 March 2008, ¶ 80; **RLA-065**, *Renee Rose Levi v. Peru* (ICSID Case No. ARB/10/17) Award, 26 February 2014, ¶ 433.

(b) GSI Never Held the Right that the Claimants Allege the Alberta Court Decisions Took

259. To prove a violation of Article 1110, the Claimants must demonstrate GSI held a right capable of expropriation under domestic law.[463] They cannot do so. Under Canadian law, GSI did not hold a right to exclusivity in the Disclosed Seismic Materials after the confidentiality period expired.

260. International law does not determine the existence and scope of property rights.[464] NAFTA tribunals[465] must rely on domestic law for the determination of claimants' property rights, including intellectual property rights.[466] International law scholars consistently affirm this *renvoi* to domestic law to determine the existence and scope of such rights.[467]

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[463] **CLA-076**, *Chemtura Corporation (formerly Crompton Corporation) v. Canada* (UNCITRAL), Award, 2 August 2010, ¶ 258 ("The first issue is whether the Claimant had an investment [. . .] capable of being expropriated."). *See* Memorial, ¶¶ 226, 237. In this sense, the analysis adopted under NAFTA Article 1110(1) does not differ from the evaluations made under other treaties; *see* **RLA-028**, *Emmis et al. v. Hungary* (ICSID Case No. ARB/12/2), Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 43 ("the Tribunal [needs] to determine the nature and incidents of the rights held by Claimants that may be considered as investments capable of enjoying the protection of international law against expropriation before deciding whether Respondent's conduct had in fact caused any such expropriation") (emphasis added); **RLA-047**, *Accession Mezzanine et al. v. Hungary* (ICSID Case No. ARB/12/3), Award, 17 April 2015 ("*Accession Mezzanine* – Award"), ¶ 75.

[464] **RLA-086**, UNCTAD Series on International Investment Agreements II, "Expropriation: A Sequel" (2012), p. 22; **RLA-087**, Zachary Douglas, "Property, "Investment and the Scope of Investment Protection Obligations", ¶ 1.150; **RLA-088**, John G. Sprankling, "The International Law of Property", (Oxford University Press, 2014), p. 3.

[465] *See* **RLA-021**, *Feldman* – Award, ¶¶ 118 and 152; **RLA-089**, *Eureko B.V. v. Poland* (UNCITRAL), Partial Award, 19 August 2005, ¶ 151; **CLA-057**, *Thunderbird* – Award, ¶ 208; **RLA-090**, *Merrill and Ring*, Award, 31 March 2010 ("*Merrill and Ring* – Award") ¶ 142; **RLA-028**, *Emmis* – Award, ¶ 168; **RLA-091**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50), Award, 4 September 2020, ¶¶ 470 and 472. **CLA-108**, *Lion* – Decision on Jurisdiction, ¶ 231; **CLA-056**, *Joshua Dean Nelson v. United States of Mexico* (UNCITRAL) Final Award, 5 June 2020, ¶¶ 228, 280.

[466] **RLA-028**, *Emmis* – Award, ¶ 162; **RLA-049**, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006 ("*Encana* – Award"), ¶ 184; **RLA-092**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina* (ICSID Case No. ARB/03/19) Decision on Liability, 30 July 2010, ¶ 151; **RLA-047**, *Accession Mezzanine* – Award, ¶ 75; **RLA-093**, *Vestey Group Ltd v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4) Award, 15 April 2016, ¶ 257.

[467] **RLA-094**, Campbell Mclachlan, Laurence Shore & Matthew Weiniger, "International Investment Arbitration: Substantive Principles", (Oxford University Press 2007) ("McLachlan: Substantive Principles (2007)"), ¶ 8.65; **RLA-095**, M. Sonarajah, The International Law on Foreign Investment, Third Edition, p. 383, fn. 67. **RLA-096**, Monique Sasson, Substantive Law in Investment Treaty Arbitration the Unsettled Relationship Between International and Municipal Law, (Wolter Kluwers 2010), pp. 81-82; **CLA-096**, Newcombe, Standards of Treatment (February 2009), ¶ 7.19. **RLA-097**, Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties, Standards of Treatment (2009, Kluwer Law International BV), pp. 351-352; **RLA-063**, Zachary Douglas, "The International Law of Investment Claims" (Cambridge: CUP, 2009), p. 187; **RLA-098**, Zachary Douglas, "The Foundations of International Investment Law", Oxford University Press, 2014, p. 402.

261. A right that does not exist is not capable of being expropriated. Where a claimant cannot prove the existence of an alleged property right under domestic law, this failing is issue-dispositive for the expropriation claim: it simply cannot get off the ground if the claimant held no property right that could be "taken".[468] The NAFTA tribunal in *Thunderbird v. Mexico* held there can be no expropriation of an investment "where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."[469] The *Emmis v. Hungary* tribunal stated that it "follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress."[470]

262. Where domestic courts have determined a claimant's property rights under domestic law, international tribunals defer to this determination.[471]

263. Investment tribunals have affirmed that an international tribunal cannot deviate from the application of the domestic law carried out by the domestic courts nor impose its own evaluation of

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[468] **RLA-084**, *Generation Ukraine v. Ukraine* (ICSID Case No. ARB/00/9), Award, 16 September 2003 ("*Generation Ukraine* – Award"), ¶ 22.1; **RLA-049**, *Encana* – Award, ¶ 184; **RLA-093**, *Vestey Group Ltd. v. Bolivarian Republic of Venezuelan* (ICSID Case No. ARB/06/4), Award, 15 April 2016, ¶ 252; **RLA-083**, *Fouad Alghanim & Sons for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdon of Jordan* (ICSID Case No. ARB/13/38), Award of the Tribunal, 14 December 2014, ("*Fouad Alghanim – Award*") ¶ 350; and **RLA-021**, *Feldman* – Award, ¶ 152; **CLA-042**, *Azinian* – Award, ¶ 100.

[469] **CLA-057**, *Thunderbird* – Award, ¶ 208.

[470] **RLA-028**, *Emmis* – Award, ¶ 168.

[471] **RLA-099**, *Affaires Du Chemin De Fer Panevezys-Saldutiskis Railway Cases*, PCIJ series A/B. No. 76 (1939), p. 18; **RLA-052**, *Arif* – Award, ¶ 417; **RLA-049**, *Encana* – Award, ¶ 200, fn.138. **CLA-096**, Newcombe, Standards of Treatment (February 2009), ¶ 7.19; *see also* **RLA-065**, Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment, (Oxford University Press, 2013), p. 208; **RLA-066**, Zachary Douglas, "Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex", (2006) 22 Arbitration International, Issue 1, p. 45. 1. The classic expression of this principle is found in the *Serbian Loans and Brazilian Loans* judgments of the Permanent Court of International Justice: "[T]he Court must pay the utmost regard to the decisions of the municipal courts of a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case. If the Court were obliged to disregard the decisions of municipal courts, the result would be that it might in certain circumstances apply rules other than those actually applied; this would seem to be contrary to the whole theory on which the application of municipal law is based. Of course, the Court will endeavor to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law. But to compel the Court to disregard that jurisprudence would not be in conformity with its function when applying municipal law." **RLA-067**, *Payment of Various Serbian Loans*, Case PCIJ (Ser. A) No. 20, Sentence No. 14, 12 July 1929, p. 46.

how a particular issue should be resolved under domestic law. These cases include *Fouad Alghanim v. Jordan,*[472] *Helnan v. Egypt,*[473] *Binder v. Czech Republic*[474] and *Arif v. Moldova*.[475] The *America Movil* tribunal recently stated:

> The rule that international tribunals are not competent to review, as if they were an appellate court, matters of domestic law applies to any matter of domestic law that an international tribunal must define as part of an international claim. Said rule is also applied to establish the existence of an acquired right in the framework of an expropriation claim. Indeed, it is widely recognized, including by the jurisprudence of the Permanent Court of International Justice, that domestic courts, and not international tribunals, are the authorized interpreters of domestic law. As a consequence of this principle, domestic decisions on the existence or non-existence of investors' rights under domestic law are binding for international tribunals. The only situation in which this rule does not apply is if there was a denial of justice, which never existed or was alleged by América Móvil.[476]

264. Commentators on international law concur. Jan Paulsson explains, "[t]he general rule is that the final word as to the meaning of national law should be left with the national judiciary."[477] Borzu Sabahi, Kabir Duggal, and Nicholas Birch state:

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[472] **RLA-083**, *Fouad Alghanim – Award*, ¶ 357 ("It may not simply disregard the doctrine of the municipal courts and arrive at its own interpretation.").

[473] "When [...] a domestic tribunal has ruled on an issue of domestic law which subsequently has to be considered by an ICSID Tribunal, the ICSID Tribunal will have to take into account that the task of applying and interpreting domestic law lies primarily with the courts of the host country. An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice." **RLA-060**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, July 3, 2008, ¶¶ 105-106.

[474] **RLA-069**, *Rupert Joseph Binder v. Czech Republic*, (UNCITRAL) Final Award, 15 July 2011, ¶ 390 "The Arbitral Tribunal derives its competence exclusively from the BIT and is not competent to decide how Czech law is to be interpreted, this being a matter exclusively for the Czech courts. Consequently, the Tribunal cannot review the interpretation of domestic law in Czech court decisions. Nor can the Tribunal express an opinion on the interpretation of Czech law on matters which have not been decided by Czech courts."

[475] **RLA-052**, *Arif* – Award, ¶ 274 ("[...] [I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. [...] The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact [...] arbitral tribunals cannot 'put themselves in the shoes of international appellate courts.'")

[476] **RLA-059**, *America Movil*, ¶ 137.

[477] **RLA-048**, J. Paulsson, Denial of Justice in International Law, 2005 p. 37.

> If the host State law […] set limits on the scope of rights granted under the licence […] e.g., limitations on duration of a licence […] those limitations constitute an integral part of the property rights and cannot be dispensed with by reference to international law. In other words, the source of law that creates a right determines the scope of that right. Therefore, while international law may provide protections for the rights created pursuant to domestic law, it cannot change their scope or configuration; it only protects them with all their limitations.[478]

265. Thus, the Tribunal should defer to the Alberta Court Decisions insofar as they concern the existence and scope of GSI's rights under Canadian law.

266. The Claimants alleged that GSI held a right to exclusive control over reproduction of the Disclosed Seismic Materials after the confidentiality period expired. Yet in resolving the two overarching questions in the Common Issues Trial, the ABQB made the following determinations regarding GSI's rights under Canadian law. First, GSI could have copyright over seismic data under the *Copyright Act*.[479] Second, the ABQB determined that despite the first finding, the Regulatory Regime was a complete answer to GSI's claims against multiple parties for unlawful disclosure and copyright infringement.[480] The Courts found that under Canadian law, GSI was required to submit certain seismic materials to the Boards and had no right to prevent the disclosure by the Boards and copying of its seismic materials. In other words, GSI did not hold the alleged right to exclusive control over reproduction of the Disclosed Seismic Materials after the confidentiality period expired.

267. The Tribunal should defer to this determination by the Canadian judiciary on the existence and scope of GSI's rights under Canadian law. As noted above, absent a denial of justice this determination cannot amount to an expropriation.

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[478] **RLA-070**, Borzu Sabahi, Kabir Duggal, and Nicholas Birch, *Principles Limiting the Amount of Compensation*, in Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration, Edited by Christina l. Beharry, 2018 Koninklijke Brill NV.

[479] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 115 ("In conclusion, the raw or field seismic data is an original literary compilation work and the processed data is both an original literary compilation work and an artistic compilation work in the scientific domain. As such, they are protected under s 3 of the *Copyright Act*.").

[480] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 230.

(c) The Claimants Mischaracterized the Factual Premises of the Article 1110 Claim

268. The Claimants' Article 1110 is also fundamentally flawed because it is based on a mischaracterization of the Alberta Court Decisions. According to the Claimants, the Courts issued a compulsory licence, "confiscated" GSI's copyright and prohibited GSI from enforcing its intellectual property rights in domestic courts. These assertions are factually incorrect. The Claimants mischaracterize the nature of the Alberta Court Decisions by quoting certain comments from the trial Judge out of context.

269. The Alberta Court Decisions did not issue a compulsory licence. As explained above, the ABQB considered that in the alternative the Regulatory Regime created a compulsory licencing system. The ABQB stated:

> GSI has been forced to grant, in effect, a compulsory licence to permit its offshore seismic data to be released and used by the public. The Regulatory Regime provides for this.[481]
>
> In the alternative, the Regulatory Regime created a compulsory licencing system through which the Boards have the authority to copy.[482]
>
> [T]he Regulatory Regime, in effect, creates a compulsory licence over the data in perpetuity after the expiry of the confidentiality or privileged period.[483]

270. The ABQB described the alternative compulsory licence theory as "another way of viewing the allegedly competing legislation".[484]

271. This alternative finding by the Alberta Court Decisions was a reference to the effect of the Regulatory Regime. GSI understood it this way, contrary to the position it takes now. In GSI's leave to appeal to the Supreme Court of Canada, GSI submitted:

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[481] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 317 (emphasis added).

[482] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 318 (emphasis added).

[483] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 321 (emphasis added).

[484] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 309.

The trial judge below found that the regulatory regime creates

a. "a compulsory licencing system through which the Boards have the authority to copy, and as a result they are not infringing the Copyright Act when they do so"; and

b. "a compulsory licence over the data in perpetuity after the expiry of the confidentiality or privileged period."[485]

272. The Alberta Court Decisions never issued a compulsory licence, extinguished GSI's rights in its seismic materials, took GSI's copyrights, transferred GSI's property rights to the State or another party nor revoked GSI's rights to pursue litigation against third parties.[486] The Regulatory Regime, not the Courts, provided which seismic materials had to be submitted to the Boards or in what form, set the confidentiality period and allowed the Boards to disclose materials for copying after the confidentiality period expired. In short, the Alberta Courts did not give the Boards any rights, nor take any rights away from GSI. GSI's rights arose as a result of seismic surveys conducted pursuant to the Regulatory Regime and subject to the terms and conditions set out therein.

273. Mr. Sookman explains:

> Canadian courts have consistently followed the principle that, where courts engage in statutory interpretation, their role is to give effect to the statute, which statute applies as of the moment when it became effective, not when the judgment interpreting it was issued.[487]
>
> [T]he [ABQB] decision should not be considered a change of law. Rather, it is an interpretation and application of the law, as it is deemed to have existed since the relevant statutes came into effect.[488]
>
> Accordingly, in my opinion, the judgment neither confers any rights on the Boards nor takes away any rights from GSI. Rather it explains that, to the extent either of

[485] **R-003**, *Geophysical Service Incorporated v. Encana and others*, Supreme Court of Canada File No. 37634, Notice of Application for Leave to Appeal (Geophysical Service Incorporated, Applicant), 22 June 2017 ("*GSI v. Encana*, SCC File No. 37634 – Application") ¶ 72 (emphasis added).

[486] **RER-01**, Sookman Report, ¶¶ 137-145, 157-158.

[487] **RER-01**, Sookman Report, ¶ 114 (citing: **R-140**, *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada*, ¶ 57 (following decision in National Westminster); **R-141**, *Beairsto v Cook*, 2018 NSCA 90, ¶¶ 64-66 (following decision in National Westminster); **R-142**, *Morrow v. Zhang*, 2008 ABQB 98, ¶¶ 351-352, rev'd on other grounds; **R-143**, *Morrow v. Zhang*, 2009 ABCA 215, leave to appeal to SCC denied, 2009 CanLII 71477 (SCC).

[488] **RER-01**, Sookman Report, ¶ 143.

> these occurred, they are consequences of the Regulatory Regime, as it has always existed.[489]

274. On the ABQB's use of the term "confiscatory" in discussing the Regulatory Regime,[490] it is unclear how such a reference could assist the Claimants in establishing that the Alberta Court Decisions amounted to an expropriation. First, the ABQB's remark to the "confiscatory" nature of the Regulatory Regime was a reference to a Canadian Senator's comment about the relevant disclosure provision of the *CPRA* 30 years prior, in a Parliamentary debate.[491] In this context, the use of this term "seems likely to be political, rather than legal."[492] The ABQB did not define what it meant by the term "confiscatory" and referred to no case law on what does and does not qualify as "confiscatory" in a legal sense.[493] As Mr. Sookman observes:

> Given that Justice Eidsvik has not referred to any of the relevant case law in the judgment and, in any case, nothing in the ABQB Decision, the ABQB Judgment Roll, or in the common issues before her turns on whether the Regulatory Regime is or is not "confiscatory" in nature, I would ascribe no legal significance to this characterization. It is non-binding *obiter dicta*.[494]

275. The Alberta Court Decisions did not make a determination on any *de facto* expropriation claim (i.e., that there was no "confiscation" in a legal sense) because such a claim was not before the Alberta Courts. The ABCA did not adopt the ABQB's characterization of the legislation as having a "confiscatory nature".[495] The ABCA referred to that characterization only in dismissing any consideration of Section 111(2) of the *CPRA* as irrelevant to the case, and used quotation marks when

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[489] **RER-01**, Sookman Report, ¶ 146.

[490] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 237 ("Indeed, both *COGA* (1982) and later the *CPRA* incorporated 'no compensation' clauses in its legislation (s 61(2) and s 111(2) respectively). In my view, this acknowledges Parliament's intent to confiscate private property in return for a policy it believed to be in the public interest to promote early exploration of its resources in the offshore and frontier lands. Section 101(7) must be interpreted with this intent in mind, unfair as it may be to GSI.").

[491] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 236, 243, 322.

[492] **RER-01**, Sookman Report, ¶ 148.

[493] **RER-01**, Sookman Report, ¶ 149.

[494] **RER-01**, Sookman Report, ¶ 151.

[495] **RER-01**, Sookman Report, ¶ 162 ("The Court of Appeal does not appear to have ascribed any explicit legal significance to this characterization and it did not make a legal determination that there was a confiscation.").

referring to the trial judge's characterization of the Regulatory Regime as "confiscatory".[496] As Mr. Sookman states, this characterization was *obiter*. The binding disposition (or *ratio decidendi*)[497] of the Alberta Court Decisions was that the Boards did not breach GSI's copyright rights by copying, or allowing others to copy, the Disclosed Seismic Materials because the Regulatory Regime supplanted the *Copyright Act*, as stated in the judgment roll.[498]

276. Second, the Alberta Courts did not "confiscate" anything. The ABQB's reference to confiscation was a passing way of depicting the Regulatory Regime.[499] The fact that the Courts were referring to the Regulatory Regime as being in a sense "confiscatory" is consistent with how GSI explained the reference in its application for leave to appeal to the Supreme Court of Canada:

> The Court of Appeal nonetheless stated it agreed with the trial judge's determination it was Parliament's intent to create a regulatory regime which was confiscatory in nature.[500]
>
> The trial judge made it clear that the regulatory regime is confiscatory legislation: "the Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the CPRA is not apologetic for it". This Honourable Court has held repeatedly, over many decades, that potentially confiscatory legislation should be strictly construed in favour of the party whose rights are affected.[501]

[496] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶¶ 106-107.

[497] **RER-01**, Sookman Report, ¶¶ 117, 120, 154. The Ontario Court of Appeal described the distinction between *ratio decedendi* and *obiter dicta* as follows.: "A legal pronouncement that is integral to the result or the analysis that underlies the determination of the matter in any particular case will be binding. Obiter that is incidental or collateral to that analysis should not be regarded as binding, although it will obviously remain persuasive." *See* **R-148**, *R. v. Prokofiew*, 2010 ONCA 423, ¶ 20.

[498] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 132, 318

[499] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 319 ("the Regulatory Regime has confiscated the seismic data created over the offshore and frontier lands and the CPRA is not apologetic for it – indeed, it makes clear that there is no compensation for any confiscation under the Act (s 111 (2))."; ¶ 243 ("Parliament's intent to confiscate private property in return for a policy it believed to be in the public interest to promote early exploration of its resources in the offshore and frontier lands.").

[500] **R-443**, *GSI v. Encana*, SCC File No. 37634 – Application, ¶ 28 (emphasis added).

[501] **R-443**, *GSI v. Encana*, SCC File No. 37634 – Application, ¶ 67 (emphasis added).

> The reality is that a regulatory regime which forces a licence on creators allowing for the confiscation of their property entirely disrupts the balance intended by the *Copyright Act*.[502]

277. The Alberta Courts performed their judicial function and interpreted domestic law. The Claimants' suggestion that the Decisions created a compulsory licence or "confiscated" GSI or its copyright is baseless.

278. While the Bankes Report on the Alberta Court Decisions takes issue with the Courts' analysis on statutory interpretation, Professor Bankes offers no support for the Claimants' position that the Alberta Court Decisions themselves imposed a compulsory licence or constituted an expropriation of GSI.[503]

279. Finally, the Claimants' allegation that the Alberta Court Decisions expressly prohibited GSI from enforcing its intellectual property rights is a gross misreading of how domestic judicial decisions operate. The ABCA stated:

> GSI's exclusivity to its seismic data ends, for all purposes including the *Copyright Act*, at the expiry of the mandated privilege period. Thereafter, GSI has no legal basis or lawful entitlement to interfere or object to any decisions made by the Boards relating to its collected data.[504]

280. The ABCA's finding that GSI had no "legal basis or lawful entitlement" to object to the Boards' disclosure policies was an interpretation of GSI's rights under domestic law. The Courts did not prohibit GSI from enforcing a right it previously held, but interpreted the scope of GSI's rights

[502] **R-443**, *GSI v. Encana*, SCC File No. 37634 – Application, ¶ 79 (emphasis added).

[503] **CER-01**, Expert Report of Nigel Bankes, 30 August 2022 ("Bankes Report"). Professor Bankes observes that the ABQB's discussion of a compulsory licencing scheme was in the alternative: "As for a compulsory licensing scheme, Justice Eidsvik offers very little in the way of reasoning to support her conclusion other than to draw an analogy (at para 310) to the compulsory licensing regime for the music and broadcast business and then simply to assert, at the end of her judgment (at para 318), that '… in the alternative [to inapplicability based on a theory of conflict] the Regulatory Regime created a compulsory licensing scheme'". In Professor Bankes' view, "The claim that the *CPRA* establishes a compulsory licensing scheme is nothing more than an unsupported assertion". **CER-01**, Bankes Report, Appendix B, *Expiration of Confidentiality also gives Boards the Liberty to Copy and Distribute*, Page 6. As noted above, an error by a domestic court in the interpretation and application of domestic law, even if established, is not grounds for review by an international investment tribunal.

[504] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 104 (emphasis added).

with respect to the seismic data acquired under the terms of the Regulatory Regime. As the Federal Court of Canada noted, "the Regulatory Regime [not the Alberta Court Decisions] diminishes GSI's ability to act to prevent unauthorized use of its seismic data after the privilege period expires."[505] GSI received full due process upon invoking its lawful entitlement to present its claims to the Canadian judiciary over the scope of its rights. The Claimants have no basis to insinuate that the Alberta Court Decisions revoked their access to the Canadian judicial system.

281. The Claimants' mischaracterization of the Alberta Court Decisions to make their expropriation claim rests on wholly inaccurate premises. The challenged measures are incapable of violating Article 1110. Thus, the Tribunal does not need to go further and consider the elements necessary to establish an indirect expropriation of the Claimants' investment. Nonetheless, in the next section, Canada demonstrates that the Claimants meet none of these requirements.

(d) The Claimants Failed to Establish an Indirect Expropriation of their Investment

282. An indirect expropriation arises where an action or series of actions by a NAFTA Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure. As noted above, CUSMA Annex 14-B provides guidance on whether an action constitutes an indirect expropriation. Determining if an indirect expropriation has occurred requires a case-by-case, fact-based inquiry that considers, among other factors:

i. the economic impact of the measure;
ii. the extent to which that measure interferes with distinct, reasonable investment-backed expectations; and
iii. the character of the measure.

283. None of these factors is determinative, alone or in combination. The Claimants appear to argue that proving a substantial deprivation of the economic value of their investment is sufficient to establish an indirect expropriation, without considering if the measure interfered with a claimant's reasonable, investment-backed expectations and the character of the measure.[506] However, the fact

[505] **R-434**, *GSI v. HMTQ*, 2019 FC 337, ¶ 40 (emphasis added).

[506] Memorial, ¶¶ 384, 385.

that a challenged measure has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.[507] As the *Generation Ukraine* tribunal stated, "[t]he fact that an investment has become worthless obviously does not mean that there was an act of expropriation".[508] Determining whether a challenged measure constitutes an indirect expropriation requires a contextual inquiry that goes beyond the measure's effects.[509]

(e) There was No Substantial Deprivation of the Investment

284. To find an indirect expropriation, a tribunal must first consider whether the State has "taken"[510] a property right, directly or indirectly, in a manner causing a "substantial deprivation" of economic value of the investment.[511] The substantial deprivation analysis has two elements: first, identification of the investment allegedly expropriated; and second, assessing the severity of the challenged measure's economic impact on the investment.

285. The test for expropriation under international law applies to the relevant investment as a whole.[512] A claimant cannot narrow the substantial deprivation analysis to the parts of its investment that the challenged measure affected. After analyzing many arbitral awards, the *Burlington Resources*

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[507] **RLA-080**, *CUSMA*, Annex 14-B, ¶ 3(a)(i).

[508] **RLA-084**, *Generation Ukraine* – Award, ¶ 20.30.

[509] **CLA-106**, *S.D. Myers – Partial Award*, ¶¶ 281, 285; **RLA-062**, Newcombe, Standards of Treatment (February 2009), ¶ 7.7; **CLA-040**, M. Kinnear, A. Bjorklund and J. Hannaford, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kluwer: 2006), p. 1110, ¶¶ 15-17.

[510] *See, e.g.*, **RLA-094**, McLachlan: Substantive Principles (2007), ¶ 8.68; **CLA-077**, *Pope & Talbot* – Partial Award, ¶ 102; **CLA-069**, *Glamis* – Award, ¶ 356; **CLA-074**, *Archer Daniels* – Award, ¶ 240.

[511] **CLA-077**, *Pope & Talbot* – Partial Award, ¶ 102; **CLA-110**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 ("*Tecmed* – Award"), ¶ 115 ("[I]t must be first determined if the Claimant […] was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto […] had ceased to exist."); **CLA-069**, *Glamis* – Award, ¶ 357 (the tribunal began its analysis "by determining whether the federal and California measures 'substantially impair[ed] the investor's economic rights […] by rendering them useless. Mere restrictions on the property rights do not constitute takings.'"); **RLA-090**, *Merrill & Ring* – Award, ¶ 145; **CLA-045**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 ("*Grand River* – Award"), ¶ 148 ("Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment […]"). *See also* **CLA-096**, Newcombe, Standards of Treatment (February 2009), p. 341, s. 7.12 ("[T]he claimant must establish that the measure in question results in a substantial deprivation."); and p. 344, s. 7.16 ("The deprivation of property must be severe, fundamental or substantial and not ephemeral.").

[512] **RLA-072**, *Electrabel S.A. v. Republic of Hungary*, (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("*Electrabel* – Decision"), ¶ 6.58. *See also* **CLA-045**, *Grand River* – Award, ¶ 148; **RLA-090**, *Merrill & Ring* – Award, ¶ 144.

tribunal[513] confirmed, "the focus of the expropriation analysis must be on the investment as a whole, and not on discrete parts of the investment."[514] Investment tribunals have resisted claimants' attempts to parse their investment into sub-investments in order to prove a substantial deprivation, as this would render the substantial deprivation test useless. The *Electrabel* tribunal stated:

> If it were possible so easily to parse an investment into several constituent parts each forming a separate investment (as Electrabel here contends), it would render meaningless that tribunal's approach to indirect expropriation based on "radical deprivation" and "deprivation of any real substance" as being similar in effect to a direct expropriation or nationalisation. It would also 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.[515]

286. NAFTA tribunals have declined to find an indirect expropriation where the complaint merely alleged lost profits, while the claimant remained in possession of the investment and able to conduct other lines of business.[516]

287. The threshold to prove the second element of a substantial deprivation is high.[517] It is a fundamental principle of international law that for an expropriation claim to succeed, the claimant must demonstrate that the challenged measure 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

[513] **RLA-073**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012 ("*Burlington – Liability Decision*"), ¶ 257 (citing **RLA-074**, *Telenor Mobile Communications A.S. v. The Republic of Hungary* (ICSID Case No. ARB/04/15), Award, 13 September 2006, ¶ 67); **RLA-090**, *Merrill & Ring* – Award, ¶ 144; **RLA-021**, *Feldman* – Award, ¶ 152.

[514] **RLA-073**, *Burlington* – Liability Decision, ¶ 257, regarding an allegation of expropriation under a bilateral investment treaty between Ecuador and the United States, in which the article on expropriation is drafted very similarly to NAFTA Article 1110; **CLA-096**, Newcombe, Standards of Treatment (February 2009), p. 350 (emphasis added).

[515] **RLA-072**, *Electrabel* – Decision, ¶ 6.57 (emphasis added). The tribunal was analyzing a passage from *Metalclad* in light of its interpretation of *Tecmed* (**CLA-110**).

[516] **RLA-021**, *Feldman* – Award, ¶ 152; **CLA-077**, *Pope & Talbot* – Partial Award, ¶ 101; **RLA-075**, *Philip Morris Brand Sàrl* (*Switzerland*), *Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016 ("*Philip Morris* – Award"), ¶¶ 279-283.

[517] **CLA-071**, *Waste Management I* – Award, ¶ 160; **RLA-026**, *Fireman's Fund* – Award, ¶ 176(c); **RLA-076**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶ 262.

conclusion that the property has been 'taken' from the owner."[518] The State must virtually completely deny the claimant use of its investment. Deprivation that is merely partial, temporary or "ephemeral" does not meet this threshold.[519] Mere interference with a claimant's use or enjoyment of the property is insufficient to constitute an expropriation under Article 1110.[520]

288. In *Philip Morris v. Uruguay*, the tribunal rejected the claim of expropriation of the investment, which included intellectual property rights, because "as long as sufficient value remains [in the business] after the Challenged Measures are implemented, there is no expropriation."[521] The tribunal also reasoned that it had to consider the claimant's investment as a whole, including the entirety of the claimant's activities in the host State market.[522]

289. Furthermore, Article 1110 does not eliminate the normal commercial risks of a foreign investor, or place a burden on the NAFTA Party to compensate for the failure of a business plan that was not prudent in the circumstances.[523]

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[518] **CLA-077**, *Pope & Talbot* – Partial Award, ¶ 102; *see also* **CLA-069**, *Glamis* – Award, ¶ 357; **CLA-045**, *Grand River* – Award ¶¶ 149-150 (citing the *Glamis* Award); **CLA-039**, *Cargill Inc. v. United Mexican States* (ICSID Case No. ARB/(AF)/05/2), Award, 18 September 2009, ¶ 360.

[519] **RLA-077**, *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 22 June 1984 in 6 IRAN U.S. CL. TRIB. REP. 219, 225; *see* **CLA-106**, *S.D. Myers* – Partial Award, ¶¶ 284, 287-88.

[520] **CLA-069**, *Glamis* – Award, ¶ 357; **RLA-078**, OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, OECD Working Papers on International Investment, No. 2004/4, p. 11.

[521] These activities corresponded to the sale of cigarettes using different trademarks. **RLA-075**, *Philip Morris* – Award, ¶¶ 284-286.

[522] **RLA-075**, *Philip Morris* – Award, ¶¶ 281-283.

[523] **CLA-071**, *Waste Management I* – Award, ¶¶ 160 ("It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise"), and ¶ 177 ("[I]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance."); **RLA-026**, *Fireman's Fund* – Award, ¶¶ 184, 218 ("The NAFTA, like other free trade agreements and bilateral investment treaties, does not provide insurance against the kinds of risks that FFIC assumed […]").

i. The Claimants Provide No Particulars on the Value of the Disclosed Seismic Materials and Its Importance to their Investment

290. The Claimants cannot establish that the Alberta Court Decisions destroyed all, or virtually all, of their investment. While the Claimants state that their investment is GSI the enterprise, shares in GSI and loans to GSI, their expropriation arguments focus on the alleged taking of GSI's copyrights as a result of the Alberta Court Decisions. However, the Claimants never substantiate the particulars of their claims over the Disclosed Seismic Materials.

291. First, they failed to particularize the specific seismic materials at issue in this arbitration. In the Memorial, the Claimants referred to GSI's "Seismic Works", which they define as "the largest collection of Canadian marine seismic data in the world".[524] This (unproven) factoid framed as a definition offers no basis for the Tribunal to assess the effect of the Alberta Court Decisions on the Claimants' investment, as discussed below.

292. Second, the Claimants have not established copyright over any specific Disclosed Seismic Materials in this arbitration. The ABQB was not asked to consider whether copyright does subsist in any specific work, but whether it could subsist in a class or category of works.[525] The ABQB found that "copyright can subsist in GSI's seismic material".[526] It also noted, "the seismic material at issue in these common actions is all purportedly presently owned by the Plaintiff […]."[527] Mr. Sookman explains:

> [T]he [ABQB's] holding with respect to subsistence of copyright must be understood to be provisional: copyright in the works can exist and there is no legal bar to GSI claiming ownership of such copyright, but whether it actually holds

[524] Memorial, ¶ 29 ("Through its efforts between 1993 and 2009, GSI amassed the largest collection of Canadian marine seismic data in the world (the "Seismic Works")."). While the Claimants cited Exhibit C-047 regarding the so-called "Seismic Works", Exhibit C-047 merely provided a schedule of lines and kilometers without specifying which materials, if any, constitute the Disclosed Seismic Materials specifically at issue in this arbitration.

[525] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 92: "The Defendants also argue that GSI's claims should fail because they have not proven the identity of the specific person who created the seismic data. Such proof is unnecessary given the nature of the common issues question: "can" copyright exist in the seismic data not "does" it exist." **RER-01**, Sookman Report, ¶ 120.

[526] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 116 (emphasis added).

[527] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 16 (emphasis added).

> copyright in each specific work is a factual question that remains open to challenge.[528]

293. To prove their copyright with respect to the Disclosed Seismic Materials, the Claimants must submit evidence[529] of authorship, skill and judgment, and chain of title.[530] The Claimants have not done so.[531] They base their NAFTA claim on GSI's alleged copyrights without evidence to prove such copyright.

294. Third, the Claimants failed to particularize the alleged value of the Disclosed Seismic Materials, and the alleged loss resulting for GSI. As Mr. Sharp concedes, the Claimants do not value GSI's seismic data library, although he admits considering doing so.[532] Without an estimated valuation of the Disclosed Seismic Materials in relation to GSI's entire seismic data library (which can be done applying the methodology that Mr. Uffen describes in his Report[533]), the Tribunal cannot determine whether the Alberta Court Decisions destroyed the value of the investment, nor assess the extent that other factors may have affected its value. Thus, the Claimants failed to meet their burden of proof by providing insufficient particulars for their Article 1110 claim.

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[528] **RER-01**, Sookman Report, ¶ 123 (emphasis added).

[529] **RLA-079**, *Carlos Sastre and others v. United Mexican States* (UNCITRAL), Award on Jurisdiction, 21 November 2022, ¶ 302 ("The Tribunal recognizes that the majority of the licenses were issued for purposes of operating La Tente Rose, but there is no evidence to support Mr. Jacquet's possible property interest in Behla Tulum or in La Tente Rose.325 Licenses and land use certificates serve to demonstrate that the municipal authority authorized the performance of the activities to which they refer, but they do not grant property or related rights" (emphasis added)).

[530] **RER-01**, Sookman Report, ¶¶ 120-124.

[531] The Claimants would be required to put evidence forward to establish GSI's copyright over each of the alleged seismic lines, as GSI did in *CalWest*. In *CalWest*, after the Common Issues Decision, the ABQB specifically considered whether there was copyright over certain Old GSI seismic data i.e. copyright over 1982 data in Gulf St-Lawrence and Sable Island submitted and accessed from the NEB. It consisted of the original processed seismic sections of two surveys. The 1982 Data consisted only of the original processed data created in Calgary from the raw data collected in the Gulf and Sable Island areas (not the logs, raw data, or re-processed data). The Court (Eidsvik) heard evidence about the design, collection, processing and confidential measures taken surrounding the 1982 Data. The Court found that this data (which consisted of original reprocessed data created from raw data – but not raw data, logs or re-processed data) was copyrighted works. **R-150**, *GSI v. CalWest*, 2016 ABQB 356, ¶¶ 8, 9, 18.

[532] **CER-02**, Sharp Report, ¶ 77.

[533] **RER-03**, Expert Report of Mr. Douglas Uffen, 13 January 2023 ("Uffen Report"), ¶¶ 50-83.

ii. The Value of GSI's Disclosed Seismic Materials Represents Only a Portion of the Value of GSI's Business

295. As noted above, the Claimants cannot parse their investment into sub-investments to prove a substantial deprivation under Article 1110. Yet another flaw in the expropriation claim is that the value of the Disclosed Seismic Materials at issue in the Alberta Court Decisions represents only a portion of the value of GSI's business and seismic data library.

296. For example, the Alberta Court Decisions had no impact on a large part of GSI's seismic data library, almost 60% of which consisted of 1970s and 1980s vintage data that it purchased from Halliburton in 1993 for a mere USD$450,000.[534] The confidentiality period for most of these seismic surveys had already expired; the materials were public and available for copying from the Boards when GSI bought Halliburton's Canadian seismic data library (the remainder entered the public domain by the end of the 1990s).[535] Regarding these seismic surveys, GSI held digital field data and SEG-Y data, neither of which was publicly disclosed by the Boards.[536] GSI reprocessed the seismic data for these surveys for licence to third parties for many years after 1993, and did not have to submit these materials to the Boards.

297. Further, GSI's own seismic surveys conducted between 1997 and 2008 received a lengthy confidentiality period: 10 years for GSI's Newfoundland and Labrador and Nova Scotia seismic programs, and 15 years for GSI's seismic programs approved by the NEB. The greatest potential commercial value of seismic data derives from the first 4 to 8 years of collection.[537] Mr. Sharp admits

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[534] **C-047**, Seismic Survey Assets, undated; and **C-048**, Speculative Data Bought from Halliburton. Exhibit **C-047** is apparently GSI's Canadian Schedule of Lines of Kilometres = 264,276.329km (Total Canada 2D kms: 259,469.714; Total Canada 3D sq kms: 4806.615). Exhibit **C-048** is apparently Speculative Data Bought from Halliburton (Total All Surveys = 152,850.30). Dividing GSI's Halliburton Purchased Seismic (152,850.30) by GSI's Total Canadian Seismic Lines (264,276.329) equals 0.5784, or 57.84%.

[535] **RWS-02**, Bennett Witness Statement, ¶¶ 32, 35; **RWS-03**, Makrides Witness Statement, ¶¶ 33-36; **RWS-01**, Dixit Witness Statement, ¶¶ 36-37.

[536] **RWS-02**, Bennett Witness Statement, ¶ 26; **RWS-03**, Makrides Witness Statement ¶¶ 20, 54; **RWS-01**, Dixit Witness Statement ¶¶ 23, 23.

[537] **RER-02**, Hobbs Report, ¶ 77(4) ("Typically, the standard in the industry is to amortize the projected investment over 4 years for a marine project (discussed further below). This is the time period during which the investor expects to reach their expected rate of return for the project. After that time period, the seismic data might still have some value and it would still be possible to derive revenue from licensing the data, but the revenue stream would be less certain as the years go by because the limited pool of customers will have already licensed the data as soon as it comes on to the market."). In its petition to the United States Supreme Court in *TGS-NOPEC*, GSI recognised the "long period of confidentiality" –

that GSI's surveys generated most of its revenues within the first year.[538] The lengthy confidentiality period under the Regulatory Regime gave GSI extensive time to recoup its investment and make a profit. After the confidentiality period expired, the value of the Disclosed Seismic Materials was only a small portion of a project's total commercial value, which would have already been largely realized.

298. Even after the confidentiality periods expired, the disclosure from the Boards was limited, in content and format, compared to the seismic material that GSI could licence to customers.[539] GSI retained digital copies of field data and SEG-Y data, which the Boards did not disclose to the public.[540] Mr. Makrides explains that the CNSOPB does not require operators to submit field data and that non-exclusive digital SEG-Y data continues to be unavailable for public viewing, borrowing or copying from the CNSOPB.[541] The Claimants try to minimize this by pointing to the fact that new technology allows "vectorizing" of paper copies of Disclosed Seismic Materials. However, the CNSOPB has never provided "vectorized" paper copies to borrowers, and Canada is not responsible for third parties vectorising paper copies.[542] Mr. Bennett states that to his knowledge the CNLOPB has never disclosed anything to the public except copies of the paper reports, or of the paper or mylar seismic sections that accompanied GSI's reports; and CNLOPB does not vectorize materials for the public.[543] Mr. Dixit notes that the NEB has never collected field data, which remains in the exclusive possession of the operators; nor does it collect data in SEG-Y format.[544]

during which it could license the Submitted Seismic Data – as follows: "the long period of confidentiality against disclosure provided under Canadian energy law". **R-425**, Geophysical Service Incorporated GSI Petition to U.S. Supreme Court, page 23. **RER-04**, Brattle Report, ¶¶ 73, 75, 193.

[538] **RER-04**, Brattle Report, ¶¶ 25, 105, 106, 122, 193, citing **CER-02,** Sharp Report, ¶ 59.

[539] **RER-03**, Uffen Report, ¶ 40 ("Hence, it is important to understand that the material released by the Boards **is not** the same as what remains in the exclusive possession of the company. While the copies released by the Boards may be of utility, even with the highest calibre of vectorization, it is not possible to reverse engineer the hardcopies available from the Board to be a direct substitute for the data materials available by license from the company." (emphasis in original)).

[540] **RWS-02**, Bennett Witness Statement, ¶ 26; **RWS-03**, Makrides Witness Statement, ¶¶ 20, 54; **RWS-01**, Dixit Witness Statement, ¶¶ 23, 53. The Boards have never released GSI's SEG-Y data.

[541] **RWS-03**, Makrides Witness Statement, ¶¶ 20, 54.

[542] **RWS-03**, Makrides Witness Statement, ¶ 54.

[543] **RWS-02**, Bennett Witness Statement, ¶ 55.

[544] **RWS-01**, Dixit Witness Statement ¶¶ 27, 30.

299. Furthermore, GSI retained any copyright in the Disclosed Seismic Materials[545] and the underlying field data. This allowed GSI to, among other things, reprocess data and to licence the reprocessed data, thereby deriving further value from its seismic data.

300. The Claimants have not demonstrated that the Alberta Court Decisions destroyed GSI's ability to grant licences over its seismic data or to enforce the terms of these licences. Mr. Sookman notes in this respect:

> In any case, the judgment expressly does *not* find that copyright in the seismic works has been negated or removed. To the contrary, it finds that "GSI has full copyright and other proprietary rights over its seismic data", subject to the non-exclusive licence imposed "in effect" by the Regulatory Regime. As noted above, a non-exclusive copyright licence does not transfer or convey any copyright right or interest to the licensee. GSI retains the ability to grant licences to other parties and to enforce the terms of those licences. The judgment also states that the Regulatory Regime (and the judgment itself) has no direct effect on contractual claims between GSI and its licensees.[546]

301. After the Alberta Court Decisions and even to the present day, GSI continues to pursue litigation for violations of its licence agreements, further indicating that Canada did not expropriate its investment.[547] Neither the Alberta Court Decisions nor the Regulatory Regime have any impact on GSI's ability to seek to recoup money owed under any of its licence agreements for penalties or other fees.

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[545] **R-434**, *GSI v. HMTQ*, 2019 FC 337, ¶ 40. The Federal Court stated: "GSI still retains copyright in its seismic data and will do so for the time permitted by section 91 of the Copyright Act. The Regulatory Regime diminishes GSI's ability to act to prevent unauthorized use of its seismic data after the privilege period expires. There is still copyright in the seismic data, even after the privilege period expires; but by virtue of the Regime it is a modified or restricted copyright. Copyright is more than just the right to exclude others from unauthorized use. There are, for example, still moral rights in the seismic data and these rights survive."

[546] **RER-01**, Sookman Report, ¶ 145 (emphasis in original; footnotes omitted). **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶¶ 4, 323.

[547] *See e.g.*, **R-378**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd.*, 2017 ABQB 464, ¶¶ 25-28, 30-32, 76; **R-379**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd.*, 2018 ABCA 380, ¶¶ 45-48; **R-444**, *Geophysical Service Incorporated v. Encana Corporation*, 2017 ABQB 466, Judgment, July 26, 2017 ¶ 96; **R-381**, *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, Judgment, 11 November 2018 ¶ 65; **R-401**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd. and Encana Corporation*, Judgment No. 38486, May 23, 2019.

302. The Claimants make a number of vague allegations in the Memorial on the issue of "secondary submissions" (i.e., reprocessed seismic materials submitted by third parties in exchange for allowable expenditure credits under the Regulatory Regime[548]) without explaining how the Alberta Court Decisions resulted in the expropriation of any rights held by GSI. It appears that the Claimants are arguing that oil companies submitted to the Boards for disclosure seismic data licenced from GSI or reports based on seismic data licensed from GSI. Whether oil and gas companies had a right to submit to the Boards certain materials relating to GSI's seismic surveys depended on the licensing agreement between GSI and each oil and gas company. A breach of such agreement is not attributable to Canada.[549] Further, the Alberta Court Decisions did not decide this contract interpretation question. Moreover, the Claimants provided no evidence in this arbitration or before the Alberta Courts that GSI had copyright[550] over the reprocessed material that oil and gas companies submitted to the Boards for eventual disclosure, which the oil and gas companies may have prepared themselves.[551]

303. Accordingly, the Alberta Court Decisions had no effect on major portions of the investment, meaning they did not cause a substantial deprivation under international law.

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[548] **RWS-02**, Bennett Witness Statement, ¶ 53 ("Pursuant to the 1996 Regulations, exploration and significant discovery licence representatives that reprocessed the seismic data can submit the reprocessed data to the C-NLOPB to obtain a credit against their security deposit for work expenditure commitments under their exploration or significant discovery licences.") *See also* **RWS-01**, Dixit Witness Statement, ¶ 51; **RWS-03**, Makrides Witness Statement, ¶ 53.

[549] As Canada's witnesses explain, the Boards are not a party or privy to licence agreements between GSI and its licensees. **RWS-03**, Makrides Witness Statement, ¶ 53 ("It is in the discretion of the oil company involved to decide if it wants to claim the allowable expenditure credit. […] Accordingly, the Board has no knowledge as to whether oil companies that submit the requisite materials to claim allowance expenditure credits are doing so in violation of their license agreements with GSI."); **RWS-02**, Bennett Witness Statement, ¶ 53 ("The Board is not a party to and has no knowledge of the terms and conditions of seismic data licensing agreements which those who claim allowable expenditures may have with third parties, including GSI."); **RWS-01**, Dixit Witness Statement, ¶ 51.

[550] *See e.g.* **R-370**, *GSI v. Devon*, 2017 ABQB 463, ¶ 106 ("GSI has not submitted any evidence to prove that Devon actually did submit any Seismic Data. GSI's argument primarily alleges that the report was Work Product Derivative"). *See also*, **R-444**, *GSI v. Encana*, 2017 ABQB 466, ¶¶ 69-70 ("The data submissions in question are various applications for allowable expenditure credits and one seismic interpretation "report". There is a dispute in the evidence about whether the applications include any seismic data – Encana says that they do not and GSI suggests that they may, although the evidence it relies on is sketchy in this regard. […] In my view, the evidentiary dispute about whether the application contained seismic data need not be decided to address Encana's argument that there is no breach in any event.").

[551] **RWS-02**, Bennett Witness Statement, ¶ 53; **RWS-01**, Dixit Witness Statement, ¶ 51; **RWS-03**, Makrides Witness Statement, ¶ 53.

iii. The Claimants' Alleged Losses Are Not Attributable to the Alberta Court Decisions But Resulted from their Own Business Failings and Global Economic Factors

304. Another major flaw in the Article 1110 claim is that the complained effects on the Claimants' business that resulted in GSI becoming worthless are not attributable to the Alberta Court Decisions. The Claimants identify the alleged effects of the challenged measure as follows:

> [T]he Seismic Works are effectively rendered worthless because any party can access them for free from the Boards if it waits out the length of the privilege period in the Disclosure Legislation.[552]
>
> By handing out the Seismic Works for free, Canada is confiscating the Seismic Works for its own benefit and at the Claimants' expense.[553]
>
> [GSI] has lost the ability to control the dissemination of the Seismic Works, the most important aspect of its business."[554]
>
> [T]he Alberta Decisions resulted in no dividends being paid to Davey or Paul because GSI is effectively out of business now that it is unable to recover its investment into the Seismic Works, has lost the ability to control the dissemination of the Seismic Works and is unable to enforce those intellectual property rights against third parties.[555]

305. None of these alleged effects resulted from the Alberta Court Decisions. They stem from the Regulatory Regime, which is outside the scope of this Tribunal's jurisdiction. The fact that third parties can access the Disclosed Seismic Materials "for free" and that GSI does not "control the dissemination" of the Disclosed Seismic Materials are directly attributable to the Regulatory Regime, not the Alberta Court Decisions.

306. The Claimants have previously made similar complains and attributed their alleged losses to the Regulatory Regime. In Canadian and U.S. domestic courts, GSI repeatedly alleged that the

[552] Memorial, ¶ 386 (emphasis added).

[553] Memorial, ¶ 388.

[554] Memorial, ¶ 387.

[555] Memorial, ¶ 389.

Regulatory Regime, and the conduct of the Boards pursuant to it, expropriated GSI's investment and rendered its business worthless.[556] In GSI's May 14, 2014 Statement of Claim against the NEB, GSI alleged that the disclosure of seismic materials to the public by the Boards was an expropriation of GSI's intellectual property rights and its business, and that it was entitled to compensation.[557] GSI made the same allegations in that lawsuit that the Claimants recycle in their Article 1110 claim:

> As a result of the Legislation and/or the Wrongful Acts, the Defendants have acquired GSI's intellectual and other property rights in respect of the Seismic Materials and in respect of the Business, and have deprived GSI of all reasonable uses of its private property rights […] the foregoing conduct constitutes an expropriation of one or more of the Business or the Seismic Materials, by the Defendants and GSI is entitled to compensation or damages for the expropriation.[558]

307. Schedule 1 to GSI's May 14, 2014 Statement of Claim contained a list of all the seismic data allegedly expropriated by the actions of the Boards – it is the same list of seismic data that the Claimants have alleged the Alberta Courts expropriated in this arbitration in Exhibit C-047.

308. On June 4, 2013, GSI amended a statement of claim that it had originally filed against Lynx, a scanning company, on June 2, 2009 to include claims against Canada on behalf of the NEB, alleging that Canada's actions had violated GSI's copyright and constituted an expropriation.[559] GSI appended

[556] In GSI's petition to the United States Supreme Court in *TGS*, after describing GSI's characterization of TGS's argument, GSI stated: "But what this describes is a compulsory license. That is, indeed, how Canadian courts have described the effect of this regime" (emphasis added). In that instance, GSI did not mischaracterize the Alberta Court Decisions as issuing a compulsory licence themselves. Instead, GSI explained that the ABQB "described the effect" of the Regulatory Regime as a compulsory licence. Elsewhere in its petition to the United States' top court, GSI described the Regulatory Regime and selectively cited parts of the ABQB Decision without ever stating that the Claimants considered that the ABQB itself issued a compulsory licence, confiscated GSI's copyrights or expropriated GSI itself. **R-425**, GSI Petition to the United States Supreme Court, p. 5.

[557] **R-010**, *Geophysical Service Incorporated v. Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada itself, and on behalf of the Department of Natural Resources Canada; and the National Energy Board* (GSI Claim Case No. 1401-05316), Statement of Claim, 14 May 2014 ("GSI Claim Case No. 1401-05316"). **RWS-01**, Dixit Witness Statement, ¶ 47.

[558] **R-010**, GSI Claim Case No. 1401-05316, ¶¶ 23-26.

[559] **R-008**, *Geophysical Service Incorporate and Lynx Canada Information Systems Ltd*. (Case No. 0901-08210), Amended Amended Statement of Claim, 4 June 2013 ("GSI Case No. 0901-08210"); **R-009**, *Geophysical Service Incorporate and Lynx Canada Information Systems Ltd.* (Case No. 0901-08210), Statement of Claim, 2 June 2009.

a list of its seismic data it claimed had been expropriated,[560] which again appears to be the same seismic data that the Claimants alleged the Alberta Courts expropriated in this arbitration.

309. On March 6, 2013, GSI sued Canada on behalf of the NEB and CNLOPB and third parties for expropriation, among other things.[561] In that claim, GSI again appended a list of the seismic data it sought damages for,[562] which overlaps with the same seismic data that the Claimants alleged the Alberta Courts expropriated in this arbitration.

310. On January 7, 2013, in a proceeding against the CNLOPB, GSI alleged "expropriation of GSI's business assets, including its intellectual property rights," for which it sought damages.[563]

311. On December 19, 2012, GSI sued Canada (on behalf of the NEB) and third parties for expropriation, among other things, claiming damages.[564]

312. On August 10, 2011, GSI alleged that the CNLOPB's public disclosure of its seismic materials after the confidentiality period expired constituted a wrongful appropriation, conversion, breach of confidence, infringement of copyright and expropriation by the CNLOPB and the Province of Newfoundland and Labrador.[565]

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[560] **R-008**, GSI Case No. 1901-08210, Schedule 1.

[561] **R-007**, *Geophysical Service Incorporated v. Arcis Seismic Solutions Corp., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; Canada-Newfoundland and Labrador Offshore Petroleum Board and Companies A-Z* (Case No. 1301-02933), Statement of Claim, 6 March 2013 ("GSI Case No. 1301-02933").

[562] **R-007**, GSI Case No. 1301-02933, ¶ 14.

[563] **R-005**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General)), Amended Statement of Claim, 7 January 2013.

[564] **R-006**, *Geophysical Service Incorporated v. Olympic Seismic Ltd., Her Majesty the Queen in Right of Canada as represented by the Attorney General of Canada on behalf of the National Energy Board; and Companies A-Z* (Case No. 1201-16166), Statement of Claim, 19 December 2012.

[565] **R-004**, *Geophysical Service Incorporated v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Her Majesty in Right of Newfoundland and Labrador* (Case No. 2011 01G 5430), Supreme Court of Newfoundland and Labrador Trial Division (General)), Statement of Claim, 10 August 2011.

313. The fact that the Claimants alleged expropriation because of the Regulatory Regime in domestic litigation years before the Alberta Court Decisions further confirms that the alleged expropriation is not attributable to those Decisions.

314. Even after the Alberta Court Decisions, the Claimants continued to attribute the alleged expropriation of GSI's business to the Regulatory Regime itself.[566] Following the Alberta Court Decisions, GSI alleged before the Federal Court of Canada:

> [T]he Legislation has now been deemed by the Courts to be "confiscatory". The Courts have deemed that, as a result of the Legislation, the exclusivity of GSI's private property rights, including copyright and confidentiality in the Seismic Data, has ended.[567]
>
> As a result of the Legislation […] all reasonable uses of GSI's licensing business for the Seismic Data and the Goodwill have been taken or regulated away".[568]

[566] On July 12, 2017, GSI filed a claim against the federal and provincial governments of Newfoundland, Nova Scotia and Québec for, "a declaration that the Legislation has resulted in the *de facto* expropriation, regulatory or constructive taking of GSI's copyright and confidentiality of the Seismic Data, the Licensing Agreements, the Licensing Obligations and the Licensing Obligations and the Goodwill." **R-365**, *GSI v. HMTQ*, SOC, 1(b)(i). GSI further alleged: "[t]he Legislation has been deemed by the Courts to be 'confiscatory.'"; "[t]he Courts have deemed that, as a result of the Legislation, the exclusivity of GSI's private property rights, including copyright and confidentiality in Seismic Data, has ended."; "[a]s a result of the Legislation, through the conduct of the Defendants pursuant to the Legislation and their actions beyond the scope of the Legislation and sometimes prior to the expiry of the privilege period under the Disclosure Legislation, contrary to the proprietary rights of GSI, the Defendants have, from time to time, or regulated away most or all reasonable uses of the Seismic Data; without providing GSI compensation."; "GSI is unable to sell, assign, transfer or in any way exercise its exclusive proprietary rights the Seismic Data since it is available to the public for free pursuant to the Legislation. The Courts have determined that the exclusivity of GSI's rights the *Copyright Act* and the *Berne Convention* expire at the end of the privilege period under the Disclosure Legislation and that GSI has no ability to interfere with the Crown decisions regarding the Data. As a result, GSI has lost all reasonable uses of the Seismic Data"; **R-365**, *GSI v. HMTQ*, SOC, ¶¶ 35-39.

[567] **R-470**, *GSI v. HMTQ*, Federal Court File No. T-1023-17, Amended Amended Statement of Claim, 28 September 2018 ("*GSI v. HMTQ*, Amended x2 SOC") ¶ 47 (emphasis added); ¶ 36 (GSI further alleged: "As a result of the conduct of the Servants of the Defendants and pursuant to the exercise of their discretion under the Legislation […] contrary to the proprietary rights of GSI, the Defendants have, from time to time, taken or regulated away most or all reasonable uses of the Seismic Data, without providing GSI compensation for same."); ¶ 38 ("GSI states, and the fact is, that the Servants, through the Representations, acted beyond the scope of their authority or contrary to the provisions of the *Copyright Act* and the *Access to Information Act*, and thereby committed the confiscation, and unauthorized, regulatory or compulsory taking of the Seismic Data, and caused damages stemming from the loss of the Goodwill, the Licensing Obligations and the Licensing Agreements, as described above in this Claim.").

[568] **R-470**, *GSI v. HMTQ*, Amended x2 SOC, ¶ 52 (emphasis added); ¶¶ 49-50 ("As a result of the Legislation and the conduct of the Servants […] GSI has lost all reasonable uses of the Seismic Data. […] As a result, GSI claims against the Defendants the loss of value of the Seismic Data.").

315. To avoid the logical and temporal flaws in their expropriation claim, the Claimants invoke their own confusion and inability to consistently articulate what had been expropriated. They say they did not know that a compulsory licence had been issued.[569] This is beside the point. An expropriation cannot occur multiple times. GSI's investment cannot have been rendered worthless both by the effect of the Regulatory Regime and again, years later, by the Alberta Court Decisions.

316. The Claimants' reformulation of their alleged losses as attributable to the Alberta Court Decisions is a thinly veiled attempt to circumvent the limitation period in Articles 1116(2) and 1117(2). GSI's allegations before domestic courts that its business had been expropriated unequivocally show that the Claimants attributed the alleged expropriation of their business and related losses to the Regulatory Regime and the Boards.

317. Moreover, as described above, GSI was already in serious financial difficulty well before the Alberta Court Decisions. As Brattle explains, GSI was no longer a going-concern by 2012 (and possibly earlier) due to the Claimants' own risky business decisions and external economic factors that went back more than a decade before the Alberta Courts rendered the Decisions.[570]

318. After a 2001 cash flow "crisis",[571] GSI remained highly leveraged throughout the 2000s to support the purchase of two ships.[572] Nonetheless, GSI continued to award its executives above-market salaries and extraordinary bonuses.[573] GSI's 2004 Falkland Islands survey, the largest single

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[569] Memorial, ¶ 332.

[570] **RER-04**, Brattle Report, ¶¶ 160-178.

[571] **BR-2**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2009 NSSC 404, ¶ 65. By 2013, GSI still had not recovered a CAD$2 million damages award it had received against Sable Mary Seismic for overbilling. **BR-2**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2009 NSSC 404; **R-332**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2010 NSSC 357, Judgment, 29 September 2010; **R-333**, *Geophysical Services Inc. v. Sable Mary Seismic Inc.*, 2013 NSSC 424, Decision on Costs, 20 December 2013.

[572] **RER-04**, Brattle Report, ¶ 162 ("GSI was very highly leveraged at virtually all times during this period and ended with negative book equity. While GSI had positive book equity (CAD$8.2 million) at the end of 2005, this was quickly depleted through the payment of extraordinary bonuses to the company's officers and directors. In most other years, GSI had little or even negative book equity."); ¶ 33 ("GSI's distressed condition in 2008 followed years of large bonuses and continued compensation to its officers and directors above market rates – amounts that could have been reinvested in the business.").

[573] **RER-04**, Brattle Report, ¶¶ 33, 162. GSI paid out bonuses of CAD$6.9 million in 2005, CAD$4.5 million in 2006, and CAD$2.0 million in 2007. See **CER-02**: Sharp Report, Schedule D1.

survey GSI had ever undertaken,[574] was a financial failure (apparently losing CAD$15 million[575]). GSI's lawsuits against the Government of the Falklands Islands[576] and its licensees[577] were all rejected. GSI's other foreign forays were also underwhelming: a 2004 project in Grenada that GSI undertook for a partner was illegal under Grenadian law and resulted in damage to GSI's ships.[578] GSI's revenue-sharing project in Guinea in 2008 appears to have terminated less than two years later.[579]

319. Such financial issues did not put GSI in a strong position to survive the 2008 global financial crisis, even though virtually all of GSI's new Canadian seismic surveys were still in their 10 or 15-year confidentiality periods.[580] GSI allegedly spent USD$20 million repairing and upgrading its ships

[574] GSI's Falklands Islands data consists of 25,572.1 km, almost double the next largest surveys – Scotian Salt 1998/1999 (13,753.1km) and Labrador 2005 (13,044.1km). **R-159**, Geophysical Service Incorporated, Acquired Data website.

[575] **R-337**, Email from Paul Einarsson (GSI) to Loris Mirella (Global Affairs Canada), 22 February 2019. GSI had not recovered its allegedly costs by 2010. *See* **R-029**, *GSI v. Falkland Islands*, 9 December 2016, ¶ 49.

[576] **R-029**, *Geophysical Service Incorporated v. Her Majesty in right of her Government of the Falkland Islands*, Claim No. SC/CI/05/14, Judgment, 9 December 2016; **R-108**, *Geophysical Service Incorporated v. Her Majesty in right of her Government of the Falkland Islands*, Civil Appeal No. 2 of 2016, Judgment 10 April 2018; **R-336**, *Geophysical Service Incorporated v. Her Majesty in right of her Government of the Falkland Islands*, Approved Costs Judgment, 21 May 2018.

[577] **BR-19**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited*, 2019 ABQB 162, Reasons for Judgment, 7 March 2019; **R-479**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited*, 2020 ABCA 21, Judgment, 16 January 2020; **R-480**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited*, S.C.C. No. 39093, Judgment, 24 September 2020.

[578] **RLA-002**, *RSM Production Corporation v. Grenada* (ICSID Case No. ARB/05/14), Final Award, 13 March 2009, ¶¶ 171-172 (discussing the GSI Admiral project in Grenada), ¶ 467 ("The Tribunal assumes, for present purposes, that RSM undertook unauthorized research in February 2004, with the operations of the "GSI Admiral" in Grenadian waters in criminal violation of Section 4 of the 1989 Act […]"); **R-334**, Letter from Matti Lemmens, BLG, to Chief Justice Wittmann, Alberta Court of Queen's Bench, 10 September 2015 (attaching Statement of Claim from *Geophysical Service Incorporated v. Grynberg Petroleum Company*, Action No. 0401-04329, March 17, 2004).

[579] *See* **R-338**, "Hyperdynamics and GSI Enter Seismic Deal", 27 February 2008; **R-339**, Petroleum Africa, "HyperD Finalizes Preparation for Offshore Guinea Seismic Shoot," Petroleum Africa, 8 April 2008; **R-340**, Hyperdynamics Corporation, "Form 10K", 30 September 2008, pp. 4-8; **R-341**, Sale and Purchase Agreement between Hyperdynamics Corporation (SCS Corporation) and Dana Petroleum (E&P) Limited, 4 December 2009, p. 13; **R-342**, Purchase and Sale Agreement between SCS Corporation Ltd. And Tullow Guinea Ltd., November 20, 2012, p. 160 (mentioning as Exhibit D Material Documents GSI-SCS agreement dated February 13, 2008 "subject to the Release and Settlement Agreement and Amendment to PSC dated May 20, 2010." (emphasis added).

[580] **RWS-02**, Bennett Witness Statement ¶¶ 30, 35-37, referring to **R-248**, Letter from James Strain, C-NLOPB to Keith Mathews, Haliburton Geophysical Service Inc., 31 August 1992; **RWS-03**, Makrides Witness Statement, ¶ 36.

in late 2007 and 2008,[581] just as the financial crisis hit and when demand for seismic data plummeted. The oil and gas industry slashed spending.[582] GSI's own accountants were [redacted]

[redacted]

320. The Claimants did not produce financial statements for years after 2008 in the Memorial. Yet GSI previously acknowledged the negative impact the economy had on its business, and that GSI had to lay off almost all of its staff.[584] These problems undoubtedly contributed to internal management issues, such as missing the public tender in 2008 for a major seismic contract with the Government of Canada.[585]

[581] NAFTA Notice of Intent, ¶ 99. GSI put the two vessels up for sale in late 2008. **R-355**, Canada Transportation Agency, Decision No. 253-W-2009, "Application by TGS-NOPEC Geophysical Company, pursuant to the *Coasting Trade Act*, S.C., 1992, c.31, for a license to use the 'BERGEN SURVEYOR' File No. W8125/P5/09-12", 22 June 2009, ¶¶ 7, 9.

[582] **RER-02**, Hobbs Report, ¶ 86; **RER-04**, Brattle Report, ¶¶ 164, 168.

[583] **C-109**, Financial statements of GSI, various dates, p. 205 (emphasis added).

[584] *See* **R-299**, Email from Paul Einarsson, GSI to Bharat Dixit, NEB, 4 February 2010 ("GSI has been forced to reduce staff by more than 90% and there are no qualified staff to prepare this report, due to the economy and combined with the fact that GSI is expending all our resources on lawyers to address the two copyright violations […]") (emphasis added); **R-029**, *GSI v. Falkland Islands*, 9 December 2016, ¶ 49 (quoting Paul Einarsson email dated November 2, 2010: "[D]ue to the BP well blow out, the economic downturn, ever increasing government regulations around the world, and the practice of some governments to release our intellectual property have taken a big toll on our company and we are doing very poorly").

[585] GSI's multiple legal challenges to the tender process were dismissed as without merit. *See* **R-361**, *Geophysical Service Incorporated (Re), [2009] C.I.T.T., No. 32*, Canadian International Trade Tribunal Decisions (File No. PR-2009-08),

321. GSI's decision to adopt a scorched-earth litigation strategy of suing not only the Boards and governments but virtually all of its customers was a business decision that destroyed GSI's reputation in the industry. Meanwhile GSI's competitors – all of whom were subject to the same Regulatory Regime as GSI – chose a different approach: they continued to invest in the Canadian offshore after the 2008 financial crisis,[586] including with newer 3D surveys overlapping with GSI's older surveys.[587] GSI simply could not compete amidst these market forces. Ultimately, its economic failure was not due to the Regulatory Regime, let alone the Alberta Court Decisions. GSI's downfall resulted from its own risky business decisions and inability to endure tough economic conditions.

(f) The Alberta Court Decisions Did Not Interfere with Any Distinct, Reasonable Investment-Backed Expectations of the Claimants

322. The second factor to assess a claim of indirect expropriation is the extent the challenged measure interferes with distinct, reasonable investment-backed expectations.[588] This may depend on whether the government provided the investor with binding written assurances, and the nature and

Decision, 19 May 2009; **R-359**, *GSI v. Canada*, 2021 NSSC 77, ¶ 20; **R-360**, *Canada v. GSI*, 2022 NSCA 41, ¶ 28; Claimants' NAFTA Notice of Intent, ¶¶ 97-100.

[586] **RER-02**, Hobbs Report, ¶ 47 ("I understand that all of the companies which operate in Canada are subject to the same regulatory rules, including disclosure of data after the expiration of the applicable confidentiality period, as GSI.") ("From my experience, Canada is also a traditionally successful market, as evidenced by the ongoing investment by global companies like TGS and PGS continuing to acquire seismic data in offshore Newfoundland and Labrador.").

[587] **RWS-02**, Bennett Witness Statement, ¶ 38 and Annexes II-A to II-E ("GSI has some 3D data from its 1986 and 2003 programs (8624-G005-011P and 8924-G005-011P, respectively), but there have been more recent overlapping 3D programs, including several whose confidentiality periods have expired and are available from the Board. The large number of 3D programs available also overlap with existing 2D data, including GSI's."); **RWS-03**, Makrides Witness Statement, ¶¶ 38-39 and Annexes II-VI ("These maps illustrate that there is a significant amount of 2D and 3D seismic data in the C-NS Offshore Area collected by other seismic operators in addition to GSI's surveys."); **RER-02**, Hobbs Report, ¶¶ 59, 76(5); **RER-03,** Uffen Report, ¶ 62.

[588] **CLA-069**, *Glamis* – Award, ¶ 356 and fn. 704. **RLA-080**, *CUSMA*, Annex 14-B, ¶ 3(a)(i).

extent of governmental regulation or the potential for government regulation in the sector.[589] Where a sector is "already highly regulated, reasonable extensions of those regulations are foreseeable."[590]

323. The Claimants knew the rules of the Regulatory Regime from the outset of their investment in Canada. They cannot establish that they held a distinct, reasonable investment-backed expectation that they could prevent the disclosure and copying of GSI's Submitted Seismic Materials after the confidentiality period expired.

324. It was not objectively reasonable for the Claimants to hold such an alleged expectation. Seismic data acquisition in Canada's offshore was always strictly regulated.[591] GSI never owned the offshore areas where it shot seismic data. It never held a common law right to do so. This has always been Canada's sovereign territory. The Regulatory Regime was the source of GSI's permission to acquire seismic data, and it set the terms for GSI to do so. Those terms allowed the Boards to disclose seismic materials to the public after the confidentiality period expired.[592] Since at least 1961 when the *COGL Regulations* were enacted, the rules were in place for (a) operators to obtain an authorization to conduct geophysical activities in Canada's offshore; (b) operators to submit seismic reports to the Boards; and (c) the Boards to publicly disclose certain seismic materials.[593] The five-year statutory period before seismic programs can be released to the public has been in place since 1982.[594] While certain terms in the Regulatory Regime and GSI's authorizations evolved over the decades, the

[589] **RLA-080**, *CUSMA* Annex 14-B, fn. 19. **RLA-100**, *Methanex v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005*Methanex* – Final Award, Part IV, Ch. D, ¶ 9. **RLA-081**, Jack Coe, Jr., and Noah Rubins, "Regulatory Expropriation and the Tecmed Case: Context and Contributions", in Todd Weiler, Ed., "International Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties And Customary International Law", (2005) p. 624.

[590] **CLA-069**, *Glamis* – Award; **R-450**, *Glamis*, Rejoinder Memorial of the United States, 15 March 2007, ¶ 91.

[591] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 304 ("The *CPRA* creates a separate oil and gas regulatory regime wherein the creation and disclosure of exploration data on Canadian territory is strictly regulated and, in my view, not subject to the provisions of the *Copyright Act* to the extent that they conflict.").

[592] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 211. **RWS-01**, Dixit Witness Statement, ¶ 11. **RWS-03**, Makrides Witness Statement, ¶ 11; **RWS-02**, Bennett Witness Statement, ¶ 8.

[593] **C-138**, *1961 COGL Regulations*. **RWS-01**, Dixit Witness Statement, ¶ 12.

[594] **C-160**, *COGA*, s. 50 and 50(3)(d). Section 50 was renumbered as s. 51 in R.S.C. 1985, c. O-6; **C-167**, *Canada Petroleum Resources Act*, R.S.C. 1985 c. 36 (2nd Supp.), s. 101(7)(d)(ii). **C-151**, *C-NL Federal Accord Act*, s. 119(5)(d)(ii). **C-152**, *C-NS Accord Act*, s. 122(5)(d)(ii).

Alberta Court Decisions conclusively established that the relevant features of the Regulatory Regime have been in place long before GSI acquired the seismic materials at issue in this arbitration.[595]

325. GSI's authorizations to conduct seismic surveys always carried the obligation to submit seismic materials to the Boards with the explicit disclosure provisions upon the expiry of the applicable confidentiality period. As explained above and in the Witness Statements, GSI received authorizations from the Boards to conduct seismic surveys.[596] These authorizations and other related documentation attached thereto from the CNSOPB, CNLOPB and NEB referenced the Boards' authority to release GSI's seismic materials.[597] For example, Mr. Bennett states:

> The CNLOPB issued 19 GPAs to GSI between 1997 and 2008. In each case, the approval of GSI's non-exclusive seismic survey was communicated to GSI by a letter attaching the authorization documents. In each letter, the CNLOPB confirmed the applicable Guidelines and the time period after which the submitted seismic data materials would cease to be privileged and released to the public.[598]

326. As described in the Dixit, Bennett and Makrides Witness Statements, the Boards have for decades published guidelines, interpretive notes and catalogues on the disclosure rules and how members of the public could access related seismic materials.[599] No diligent investor in the seismic and oil and gas industry could possibly have been unaware of these publications. Given the longstanding rules on disclosure of seismic materials under the Regulatory Regime, available

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[595] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 211 ("The historical review of the Regulatory Regime makes it clear that ever since marine seismic data has been created by seismic companies on Canadian offshore and frontier lands, there has been a regulated process for obtaining permits coupled with a requirement to submit data to various regulatory bodies, and that this data has been made available for disclosure to the public after a certain period of time without compensation to the seismic data owners.") ABCA, ¶ 97. ("The lawful participation of data collectors in these geographical areas has always had conditions attached; in particular, permission must be obtained to enter onto Crown interests to acquire sought-after data, the data collector must report data acquired under the Regulatory Regime, and the Boards thereunder have legislated authority to release the reported data publicly after a period of time, for use by the broader community.").

[596] **RWS-01**, Dixit Witness Statement, ¶ 37. **RWS-03**, Makrides Witness Statement, ¶ 24. **RWS-02**, Bennett Witness Statement, ¶ 35.

[597] *See e.g.*, **RWS-03**, Makrides Witness Statement, ¶ 25; **RWS-01**, Dixit Witness Statement, ¶ 28; **RWS-02**, Bennett Witness Statement, ¶ 35.

[598] **RWS-02**, Bennett Witness Statement, ¶ 35 (emphasis added; footnote omitted).

[599] **R-325**, *1992 CNSOPB Guidelines*. The *1992 CNSOPB Guidelines* stated: "Reports and data are made available to the public at the termination of relevant confidentiality periods." S. 8.0 of the 2001, 2004, and 2008 CNLOPB Guidelines stated: "Under the Acts, reports and data resulting from most technical programs in the Newfoundland offshore area, cease to be privileged five years following completion of the program."

publications and guidelines, and pursuant to GSI's own authorizations, it was never objectively reasonable for the Claimants to expect that GSI could prevent the Boards from disclosing GSI's seismic materials for copying after the confidentiality period expired.[600]

327. The Claimants argue they did not consent to the disclosure terms of the Regulatory Regime. This is irrelevant and inaccurate. The Regulatory Regime applied irrespective of whether GSI expressly consented to specific terms.[601] The ABQB explained:

> The plain meaning of s 101(7) is that the consent required in s 101(2) is not required after 5 years.[602]
>
> In conclusion, in my view, the *CPRA* is not silent as to the Boards' ability to copy seismic data. The only reasonable interpretation of s 101 of the *CPRA* and s 119 of the *Federal Accord Act* is that it gives the statutory authority to the regulatory boards to disclose material without restriction and without the consent of the owner of such material, once the confidentiality period has expired.[603]
>
> In my view, there is a conflict between the *Copyright Act* protections and the provisions of the Regulatory Regime that allow disclosure without the owner's consent.[604]

328. GSI decided to conduct seismic surveys in Canada's offshore and to apply for an authorization. In doing so, the Claimants understood they would be subject to the Regulatory Regime and that the Boards had authority to disclose the seismic materials pursuant to the Regulatory Regime. The

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[600] As the Texas District Court ruled in *TGS*: "[A] reasonably prudent company engaged in offshore geophysical surveying should have seen the publication and been familiar with its terms." **R-105**, *GSI v. TGS*, Civil Action No-14-1368, ¶ 22. The Federal Court of Canada confirmed in 2003 that the Board had the legal authority under C-NL Accord Acts to release GSI's seismic data after the expiry of the five-year privilege period. **R-354**, *GSI v. C-N Offshore Petroleum*, 2003 FCT 507, ¶ 75. While paragraph 75 refers only to the CNLOPB, Justice Gibson held in paragraph 69 that his analysis applies equally to the CNSOPB. The claim against the NEB is in a different section.

[601] **R-152**, *GSI v CNSOPB*, 2014 NSSC 172, ¶ 35 ("[T]he impugned Regulations are vires and are part of the overall legislative and regulatory scheme of the Acts. The fact that the information supplied by the Applicant [GSI] to the Board for many years, pursuant to authorizations and upon agreed terms and conditions, is no longer confidential are the rules of the industry in Nova Scotia. They are the "governing authority's rules" and they are enabled by the governing statutes. They are the same rules by which the Applicant undertook to participate in this exploration more than a decade ago." (emphasis added)).

[602] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 222 (emphasis added).

[603] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 254 (emphasis added).

[604] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 295 (emphasis added).

Claimants could not apply for an authorization and then, having obtained one, decide that they did not want to comply with the applicable rules. Mr. Makrides observes:

> Having received approval by the CNSOPB based on these explicit conditions in its six GWAs, and having been apprised of those conditions prior to commencement of these projects, GSI decided to proceed with its seismic surveys.[605]

329. By choosing to participate in the Regulatory Regime and capitalize on the potential benefits of acquiring seismic data, the Claimants necessarily assented to all of the terms and conditions of entry – including the Boards' right to disclose and copy the Disclosed Seismic Materials.

330. It is a well-accepted principle in Canadian law that a person engaging in a regulated activity necessarily accepts the applicable terms and conditions. As the Supreme Court of Canada stated in *Wholesale Travel*:

> [T]hose who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere […].[606]

331. The Supreme Court of Canada stated in *R. v. Fitzpatrick*:

> Surely it defies common sense to argue that the state, in seeking to regulate the commercial fishery by attaching certain conditions to a fishing licence, is coercing an individual to furnish information against himself. Quite the opposite in fact is true; the individual is furnishing information that is meant to benefit him or her, through proper and fair distribution of scarce fishing resources. […] The state required certain information to be provided, and the individual voluntarily assumed the obligation to do so in deciding to become a fisher in the first place. It ill lies in the mouth of someone who knowingly assumes an obligation for a beneficial purpose to argue later that this obligation has the effect of denying him his rights.[607]

332. Mr. Sookman explains:

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[605] **RWS-03**, Makrides Witness Statement, ¶ 27. *See also* **RWS-02**, Bennett Witness Statement, ¶ 32 ("In each case, having received authorization from the CNLOPB on the basis of the condition that submitted seismic materials would be disclosed to the public after ten years, GSI continued to proceed with its seismic survey.").

[606] **R-100**, *R. v. Wholesale Travel Group Inc.* [1991] 3 SCR 154, ¶¶ 228, 232, 229.

[607] **R-101**, *R. v. Fitzpatrick*, [1995] 4 SCR 154 (emphasis added).

> The *Fitzpatrick* decision and authorities that have followed it in other licensing contexts establish that where a permit or licence is required for a person to engage in a regulatory activity, the person who voluntarily applies for such a permit or licence has freely accepted the statutory and regulatory compulsions that exist in relation to that industry.
>
> If a condition of a permit or licence includes the grant of a licence to disclose copyright materials created by the regulatory licensee in connection with the regulated activity, under the *Wholesale Travel Group* and *Fitzpatrick* decisions and the authorities that have followed them in other licensing contexts, the regulated entity must be deemed to have voluntarily agreed to any such licence.[608]

333. The Alberta Courts relied on the clearly established rules in the Regulatory Regime to find that the Defendants had not violated GSI's copyright. Moreover, courts in other jurisdictions considered that GSI issued an implied or express licence under the Regulatory Regime or similar rules.

334. In *Geophysical Services Incorporated v TGS-Nopec Geophysical Services*, the Texas District Court found that GSI issued an implied (and express) licence:

> The undisputed evidence shows that, as a matter of law, Geophysical granted the Board an implied license to copy and export Geophysical's submitted seismic data.[609]

335. The United States Court of Appeals for the Fifth Circuit affirmed this decision, stating:

> Even taking the evidence in the light most favorable to Geophysical, the totality of the parties' conduct proves that Geophysical granted the Board an implied license to copy and distribute the GSI Works, and no material fact issues exist.[610]

336. The Falkland Islands courts held that GSI had granted an express, or in the alternative an implied, statutory licence to publish and disclose GSI seismic data following the expiry of a five-year

[608] **RER-01**, Sookman Report, ¶¶ 69-70 (emphasis added).

[609] **R-105**, *GSI v. TGS*, 2018 WL 3032575. **RER-01**, Sookman Report, ¶ 76.

[610] **R-483**, *GSI v. TGS*, Civil Action No-18-20493.

confidentiality period.[611] Both the trial judge and the Falkland Islands Court of Appeal held that GSI had granted a statutory licence and that such licence had been voluntarily given:[612]

> Looking at the substance of these provisions, each of these provisions would make no sense if they did not amount to the granting of a licence in respect of GSI's copyright in the works. They each contemplate the Government using the Data for purposes which would amount to restricted acts that would not be permissible absent a licence. Applying the ordinary and natural meaning of the express language of these provisions set against the backdrop of the applicable principles as to copyright that I have identified, I find that the manifest and expressed legislative intention of each of these provisions is to provide a licence to use the copyrighted works in the respects so specified.[613]

337. The Falkland Islands Court of Appeal confirmed that the statutory licence granted by virtue of GSI obtaining the permit was a voluntary licence. This disposed of GSI's submission that the statutory licence operated as an appropriation (of copyright) without compensation.[614]

338. The Alberta Courts could have reached the same result[615] by expressly finding an implied or express licence, as other courts had done, or by accepting other defences raised in the Common Issues Trial such as fair dealing.[616] This further confirms that the Claimants cannot establish any interference with a distinct, reasonable expectation to exclusivity in the Disclosed Seismic Materials, as courts in other jurisdictions reached a similar result as the Alberta Courts even if through different reasons.

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[611] **R-108**, *Geophysical Service Incorporated v The Falkland Islands*, Approved Judgment, Civil Appeal No 2 of 2016, 10 April 2018, ¶ 52. **RER-01**, Sookman Report, ¶ 83.

[612] A copyright licence can, therefore, arise by statute, and there is no reason, in principle, why a licence cannot arise in the context of, for example, an exploration licence granted pursuant to a statutory regime for the licensing of oil exploration, and the provisions thereof, whether the exploration licence is to be characterised as a public law instrument or as a contract **R-029**, *Falklands S.C.*, ¶¶ 94, 95. The trial Judge also confirmed that a statutory licence did not need to use terms such as "copyright", or "licence" or indeed "publish" or "disclose". *See* **RER-01**, Sookman Report, ¶ 86.

[613] **R-029**, *Falklands S.C.*, ¶ 216 (emphasis added).

[614] **R-108**, *Falklands C.A*, ¶¶ 51, 59-60. **RER-01**, Sookman Report, ¶ 91.

[615] **RER-01**, Sookman Report, ¶ 134 ("Fundamentally, what Justice Eidsvik has done is to consider several alternative legal licence theories and conclude that they all lead to the same result: there is no infringement of copyright. Because of this, there was no need to determine precisely which licence theory is correct.").

[616] **R-150**, *GSI v. CalWest*, 2016 ABQB 356, ¶¶ 40-46 ("In the alternative, if I am wrong on the Regulatory Regime finding, this defence becomes more important. In this regard, on the evidence, it is likely in my view that this defence could have succeeded. […] I am cognisant that in the common issues case management hearings, fair dealing has been raised as one of the defences that may have been in common to all defendants.").

339. The Claimants argue that Canada is estopped from contending that they consented to the terms of the Regulatory Regime. This is inaccurate. Canada has never accepted otherwise. Moreover, the fact that Canada did not appeal the ABQB's commentary in *obiter*, where the Court used quotations in saying GSI never "consented" to the release of seismic materials, is a red herring: this was not a finding that could be appealed.[617]

340. The evidence of GSI's informed and voluntary participation in the Regulatory Regime, which clearly permitted the Boards to disclose seismic materials after the confidentiality period expired, contradicts the Claimants' argument that they had a distinct, reasonable expectation that they could prevent the Boards from doing so. In any event, whether they agreed to comply with the Regulatory Regime or not, they cannot establish that they were not fully aware of its terms when they invested in Canada. GSI knew of the Boards' disclosure policies, as described above. Mr. Dixit explains that representatives of GSI had been borrowing materials of other seismic data collection operators from the FIO more than two decades ago.[618]

341. The Claimants presented no evidence that Canada provided any binding written assurances that the Boards would not release GSI's Disclosed Seismic Materials, or that GSI could prevent third parties from accessing and copying the material. The Claimants mischaracterized their correspondence with the Boards, who never represented that the disclosure provisions of the Regulatory Regime would not apply to the Claimants or that the Claimants held exclusivity over the Disclosed Seismic Materials for life plus 50 years.

342. For example, in their Witness Statements, Mr. Dixit and Mr. Makrides refute the Claimants' specific allegations of representations to GSI.[619] Mr. Dixit states that it is not clear what "explicit representations or conduct" the Claimants are referring to in asserting that the NEB "led Davey, Paul and/or GSI to believe, either through explicit representations or conduct, that their intellectual

[617] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 317 ("GSI may not have liked to do so, it certainly never 'consented' and it may be unfair, but it is the Regulatory Regime approved by Parliament.").

[618] As evidenced by signed FIO Liability Agreements from 2000 and 2001. **RWS-01**, Dixit Witness Statement, ¶ 56. **R-293**, NEB, "Liability Agreement – Borrowed Materials", GSI Signed Agreements, 2000-2001.

[619] **RWS-01**, Dixit Witness Statement, ¶ 63; **RWS-03**, Makrides Witness Statement, ¶¶ 47-54.

property rights in the Seismic Works would be protected."[620] Mr. Makrides explains that the November 28, 1974 letter relied on by Mr. Einarsson[621] to support an alleged expectation of non-disclosure of non-exclusive seismic data "contains no representation or any connection to GSI's non-exclusive seismic surveys."[622] Mr. Makrides also notes the CNSOPB reminded GSI of the disclosure rules in approval letters to GSI.[623]

343. Further, the Claimants concede that they did not know if GSI held copyright under Canadian law in its seismic materials before the Alberta Court Decisions.[624] This contradicts the Claimants' alleged expectation that they could prevent the Boards from disclosing GSI's seismic materials for copying.

344. Consequently, the Alberta Court Decisions did not interfere with any distinct, reasonable investment-backed expectation of the Claimants.

(g) The Character of the Alberta Court Decisions was Not Expropriatory

345. The third factor in assessing an alleged indirect expropriation is the character of the measure, including its object, context and intent.[625] This requires considering whether the challenged measure involves physical invasion by the government, or whether it is more regulatory in nature – such as if the challenged measure concerns a public program adjusting the benefits and burdens of economic life to promote the public interest.[626]

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[620] **RWS-01**, Dixit Witness Statement, ¶ 63. Memorial, ¶ 57.

[621] **C-156**, Letter from Nova Scotia Department of Mines to Geophysical Service Incorporated enclosing Permit No. 5, 28 November 1974.

[622] **RWS-03**, Makrides Witness Statement, ¶ 48.

[623] **RWS-03**, Makrides Witness Statement, ¶¶ 25-26.

[624] Memorial, ¶ 335.

[625] *See* **CLA-110**, *Tecmed* – Award, ¶¶ 115, 122; **RLA-021**, *Feldman* – Award, ¶ 103; **CLA-106**, *S.D. Myers* - Partial Award, ¶ 281; **CLA-074**, *Archer Daniels* - Award, 21 November 2007, ¶ 250; **RLA-100**, *Methanex* - Final Award, ¶ 7. **RLA-080**, *CUSMA*, Annex 14-B.

[626] **CLA-069**, *Glamis* - Award, fn. 705. **RLA-078**, OECD, "Indirect Expropriation" and the "Right to Regulate" in International Investment Law, (OECD Working Papers On International Investment) 10 (2004/4) [Ex. 53]. *See also* **RLA-121**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶ 264.

346. The character of the Alberta Court Decisions was not expropriatory. As explained above, the Alberta Courts independently and impartially interpreted the statutory scheme and applied it to the facts to discern the existence and scope of GSI's rights under domestic law. The Alberta Courts did not target GSI, but issued a statutory interpretation that would have broader application in Canada. The Alberta Courts' object and intent was to faithfully execute their judicial function. The Tribunal has no basis to second-guess these decisions by Canada's judiciary under Canadian law. For all of the above reasons, the Claimants failed to demonstrate that the Alberta Court Decisions constituted an indirect expropriation in violation of Article 1110.

4. The Tribunal has No Jurisdiction to Consider Violations of NAFTA Chapter Seventeen

347. The Claimants allege that the Alberta Court Decisions violated Canada's obligations in NAFTA Article 1705. The Tribunal has no jurisdiction to hear this allegation, for two reasons. First, the Claimants cannot invoke Chapter Seventeen – only the NAFTA Parties can. Second, Canada does not need to invoke Article 1110(7), as the Alberta Court Decisions did not violate Article 1110(1). While Canada maintains that the challenged measures are consistent with Chapter Seventeen, there is no need for this Tribunal to consider the matter.

(a) The Claimants Cannot Invoke Chapter Seventeen

348. An investor cannot invoke Article 1110(7) to allege a violation of Chapter Seventeen. NAFTA Article 1110(7) states:

> This Article does not apply to the issuance of compulsory licences 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). (Emphasis added)

349. The Claimants allege:

> [I]f the compulsory licence does not satisfy that three-step test [set out in Article 1705(5)], Canada will be liable for a breach of Article 1110.[627]

[627] Memorial, ¶¶ 401, 423, 440.

350. The Claimants mischaracterize the relationship between Article 1110 and Chapter Seventeen. Article 1110(7) creates an exception to the obligations in Article 1110 ("[t]his Article does not apply) where the challenged measure is consistent with Chapter Seventeen. Article 1110(7) and hence Chapter Seventeen are relevant in an Article 1110 claim only if a claimant can first establish an expropriation in violation of Article 1110(1). The NAFTA Parties may invoke Article 1110(7) as a shield against an alleged expropriation under Article 1110(1); yet Article 1110(7) cannot serve as a sword for disappointed copyright litigants to wield.

351. The NAFTA Parties adopted Article 1110(7) to prevent abusive expropriation claims over intellectual property. Article 1110(7) provides a safeguard against such claims and their impact on domestic intellectual property regimes.[628] As Kinnear, Bjorklund and Hannaford explain:

> Absent a provision such as Article 1110(7) one can imagine an investor claiming that the issuance of a compulsory licence or the revocation, limitation or creation of intellectual property rights effectively expropriated its investment, resulting in an obligation on the host government to compensate for the loss caused by its measures or to provide restitution of the intellectual property rights. The mischief that such a claim would cause domestic intellectual property regimes is evident. Presumably, the drafters of NAFTA included Article 1110(7) to avoid any such argument.[629]

352. All three NAFTA Parties confirmed in *Eli Lilly v. Canada* that Article 1110(7) acts as a "shield" to an expropriation claim, not a "sword" to be wielded by a claimant.[630] This agreement among the

[628] The text of Article 1110(7) makes clear that this additional hurdle applies to measures taken by any branch of government. NAFTA Article 1110(7) makes reference to the "issuance of compulsory licenses" which would typically be an executive branch function. Similarly, the "revocation, limitation or creation" of intellectual property rights could be achieved through executive, legislative or judicial action.

[629] **CLA-040**, M. Kinnear, A. Bjorklund and J. Hannaford, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kluwer: 2006), p. 1110-57 (emphasis added).

[630] **R-439**, *Eli Lilly*, Submission of the United States of America, 18 March 2016, ¶¶ 31-37; **R-475**, *Eli Lilly*, Supplemental Submission of the United States of America, 8 June 2016, ¶¶ 6-12; **R-476**, *Eli Lilly*, Submission of the United Mexican States, 18 March 2016, ¶¶ 22-31; **R-441**, *Eli Lilly*, Government of Canada Observations on Issues Raised in NAFTA Article 1128 Submissions of the United States and Mexico, 22 April 2016, ¶¶ 34-37. **R-497** *Eli Lilly*, Submission of the United States of America, 18 March 2016, ¶¶ 9-10. **R-475**, *Eli Lilly*, Supplemental Submission of the United States, 8 June 2016, ¶ 12.

treaty Parties[631] forms subsequent agreement and subsequent practice[632] on the proper interpretation of NAFTA. The Tribunal must take it into account, and should accord it considerable weight.[633]

353. This Tribunal should decline the Claimants' invitation to drastically transform both the international investment and intellectual property legal regimes in this way. If the NAFTA Parties intended to allow claimants to litigate breaches of Chapter Seventeen, "some clear indication of this would have been expected."[634] In the absence of such a reference, the Tribunal cannot engage in a review of consistency with Chapter Seventeen.[635] In any event, an alleged breach of Chapter Seventeen, even if it were proven, would not establish a breach of Chapter Eleven.

[631] **CLA-034**, *Vienna Convention*, Article 31(3)(a) ("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;"). VCLT Article 31 is considered to reflect customary international law. The use of the word "shall" indicates that a tribunal must take into consideration the subsequent agreement of the NAFTA Parties regarding the interpretation of their obligations, including where their agreement is established by subsequent practice. The International Law Commission also emphasized that: "[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." *See* **RLA-122**, Reports of the ILC Commission, p. 221, ¶ 15 (emphasis added). *Vienna Convention* Article 31.3 does not limit the form that such an agreement or practice must take. In this regard, the International Law Commission includes "statements in the course of a legal dispute" as relevant subsequent practice of States for the purposes of treaty interpretation. **RLA-122**, Report of the International Law Commission, Seventieth session (30 April-1 June and 2 July-10 August 2018) (UN Doc. A/73/10) Chapter IV, p. 32, Conclusion 4, Commentary 18; *See also* **CLA-061**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Award on Damages, 10 January 2019 ("*Bilcon – Award on Damages*"), ¶ 378.

[632] In the NAFTA context, subsequent agreement and subsequent practice establishing agreement on interpretation may be evidenced by the NAFTA Parties' arbitration submissions, including non-disputing Party submissions under Article 1128. Where the NAFTA Parties express concordant views on how to interpret the NAFTA, they create subsequent agreement and subsequent practice within the meaning of VCLT Article 31(3). **CLA-037**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008 ("*Canadian Cattlemen* – Award on Jurisdiction"), ¶¶ 181-189. The *Bilcon* tribunal concurred. *See* **CLA-061**, *Bilcon* – Award on Damages, ¶ 377.

[633] Tribunals have accorded considerable weight to the concordant views of the NAFTA Parties. *See* **CLA-037**, *Canadian Cattlemen* – Award on Jurisdiction, ¶¶ 181-189; **RLA-123**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 100, 106-107; **CLA-031**, *Methanex* – First Partial Award, ¶ 147; **CLA-069**, *Glamis* – Award, ¶¶ 601 and 618; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶¶ 83-92; **CLA-050**, *Feldman – Decision on Jurisdiction*, ¶¶ 44-45; **CLA-097**, *Mobil Investments, Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶¶ 291-295, 302-303, 346-350, 374.

[634] **CLA-054**, *Mondev* – Award, ¶ 121.

[635] The United States has maintained the same position. **RLA-389**, *DIBC – USA Article 1128 Submission*, ¶ 2.

(b) Canada Does Not Need to Invoke Chapter Seventeen

354. Canada does not need to invoke the exception in Article 1110(7) because the Claimants cannot prove the Alberta Court Decisions violated Article 1110(1), as explained above. Thus, there is no need for this Tribunal to consider Canada's compliance with Chapter Seventeen.

355. Moreover, the Claimants base their allegations over Article 1705 on the same inaccurate factual premise underlying the Article 1110(1) claim – namely, that the Alberta Court Decisions issued a compulsory license. Since this is incorrect, the analyses of whether GSI's Disclosed Seismic Materials qualify as works covered by Article 2 of the *Berne Convention* and the flexibilities under the three-step test in Article 1705(5) are not even relevant here. Thus, the Tribunal has no jurisdiction to address whether the Regulatory Regime is consistent with Chapter Seventeen and the *Berne Convention*. In any event, Canada would maintain that the Regulatory Regime is consistent with Chapter Seventeen and the *Berne Convention*.

356. In sum, the Claimants' Article 1110 claim must fail. They cannot establish that the Alberta Courts violated Article 1110 absent a denial of justice. GSI never held the right that the Claimants allege the Alberta Courts took. The Claimants mischaracterize the nature of the Alberta Court Decisions to circumvent NAFTA's limitation period. The Claimants cannot establish that those Decisions substantially deprived them of their investment; denied any of their distinct, reasonable investment-backed expectations; or had an expropriatory character. Finally, the Tribunal has no jurisdiction over the Claimants' allegations under NAFTA Chapter Seventeen.

B. The Alberta Court Decisions Do Not Constitute a Breach of NAFTA Article 1106 (Performance Requirements)

1. Summary of Canada's Position on Article 1106(1)(f)

357. The Claimants' argument that the Alberta Court Decisions are a prohibited performance requirement must fail. On its face the argument is incompatible with the nature of the Decisions, which the Claimants mischaracterize. The Claimants evidently seek to challenge the Regulatory Regime as imposing a prohibited performance requirement in violation of Article 1106(1)(f). Yet

they cannot do so, as that claim would fall outside NAFTA's limitation period.[636] In an attempt to fit within the limitation period, the Claimants instead allege "the Alberta Decisions breached Article 1106(1)(f) of NAFTA by enforcing a requirement for GSI to transfer its proprietary knowledge in its Seismic Works to third parties."[637] The Claimants' Article 1106 claim is flawed for multiple reasons.

358. First, the Alberta Court Decisions did not "enforce" any requirement on GSI to transfer proprietary knowledge to the Boards or third parties. The Alberta Courts did not order GSI to transfer any proprietary knowledge to anyone or force compliance with the Regulatory Regime. Rather, the Alberta Courts answered GSI's claims by interpreting the Regulatory Regime and Canada's *Copyright Act* and discerning the parties' rights thereunder. The Courts found the Boards had the authority to disclose seismic materials at the end of the confidentiality period, as they had been doing for decades, and that GSI had "no legal basis" to prevent this disclosure.[638] Since the Alberta Court Decisions did not "enforce" a prohibited performance requirement, the Article 1106(1)(f) claim must fail on this basis alone.

359. Second, even if the Alberta Court Decisions did enforce the Regulatory Regime, the Article 1106(1)(f) claim must fail because the Regulatory Regime did not impose any "requirement" on GSI to transfer proprietary knowledge to third parties. GSI chose to participate in the Regulatory Regime. It applied to the Boards to obtain an authorization to undertake seismic operations on Canada's offshore. In doing so, it necessarily assented to the terms and conditions applicable to such authorizations as set out in the Regulatory Regime. In return for the substantial benefit of accessing Canada's offshore to conduct seismic surveys and derive profits by licensing seismic materials, GSI agreed to submit to the Boards for disclosure certain seismic materials in relation to its programs. Accordingly, the submission of seismic materials to the Boards for eventual disclosure under the Regulatory Regime is not a "requirement" within the meaning of Article 1106(1). Rather, it is a

[636] Indeed, more than half of GSI's seismic data library had been submitted to federal regulators by a different company and released to the public years before the NAFTA even existed, and before GSI bought it from Halliburton in 1993.

[637] Memorial, ¶ 473 (emphasis added); ¶ 456 ("The requirement enforced by the Alberta Decisions was for GSI to transfer its proprietary knowledge in the Seismic Works to persons in Canada to expand oil and gas operation in the Canadian offshore." (emphasis added); ¶ 461 ("By declaring the Regulatory Regime lawful and forbidding GSI from contesting third parties' ability to obtain copies of its copyrighted Seismic Works from the Boards, the Alberta Decisions enforced a requirement to transfer that proprietary knowledge within the meaning of Article 1106(1)(f)." (emphasis added).

[638] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 104.

condition for the receipt of an advantage. As such, it would only be a prohibited performance requirement if it fell within the more limited categories listed in Article 1106(3). It does not: NAFTA does not prohibit a condition requiring transfer of proprietary knowledge in exchange for an advantage. Thus, there is no prohibited performance requirement here.

360. Third, even if the submission of seismic materials for disclosure under the Regulatory Regime was a requirement, the Claimants do not establish that it was a requirement to "transfer" to a third-party certain "proprietary knowledge". The Claimants fail to prove (1) that the Boards' disclosure of information to the public constitutes a transfer of information to a person within the meaning of Article 1106(1)(f) and (2) that when the confidentiality period expired, the Disclosed Seismic Materials qualified as "proprietary knowledge" under Article 1106(1)(f). The Claimants provide no particulars over the seismic materials at issue, nor evidence proving it qualified as "proprietary". If it ever did, it was no longer proprietary once the confidentiality period expired.

2. Article 1106 Prohibits Specific Trade-Distorting Performance Requirements

361. Article 1106 prohibits certain types of listed performance requirements:

> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of goods or services;
>
> (b) to achieve a given level or percentage of domestic content;
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
>
> (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

> (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
>
> (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
>
> (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.
>
> […]
>
> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:
>
> (a) to achieve a given level or percentage of domestic content;
>
> (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
>
> (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
>
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings. […]

362. Performance requirements have been described as "stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country."[639] Kinnear, Bjorklund and Hannaford explain the policy rationale for these measures:

> Performance requirements are generally used by governments to achieve specific policy objectives. These objectives are usually economic, including trade-

[639] **RLA-125**, UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, UNCTAD/ITE/IIA/2003/7, p. 2 (hereinafter "Foreign Direct Investment and Performance Requirements").

> balancing, creation of employment opportunities, and regional development. Performance requirements can also have a political objective, and may serve as an assertion of sovereignty and political independence.[640]

363. The United Nations Conference on Trade and Development ("UNCTAD") notes that host States have used two types of performance requirements: first, when a host State adopts mandatory performance requirements in connection with the operation of the investment (mandatory); and second, where it is in exchange for granting an advantage to the investor (conditional).[641]

364. Trade and investment agreements typically prohibit certain performance requirements that distort international trade and investment flows.[642] Professor Giorgio Sacerdoti states:

> The real objection to these policies pertains rather to their distortive trade effects. By artificially promoting exports or restricting the demand for imports through local content requirements, such provisions may be considered equivalent to export subsidies or import restrictions, deemed incompatible with the spirit if not always with the letter of GATT.[643]

365. Consistent with the desire to eliminate trade distortions, NAFTA Article 1106 prohibits a closed list of performance requirements that would otherwise reduce the cross-border flow and importation of goods and services.[644] In commenting on the purpose of Article 1106, the tribunal in *Merrill &*

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[640] **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-5 - P. 1106-6, citing: **RLA-125**, UNCTAD, "Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries", UNCTAD/ITE/IIA/2003/7, at 6–9 (2003); **RLA-129** Nagesh Kumar, Use and Effectiveness of Performance Requirements: What Can Be Learnt from the Experiences of Developed and Developing Countries, in The Development Dimension of FDI: Policy and Rule-Making Perspectives, Part I, UNCTAD/ITE/IIA/2003/4, at 59 (2003).

[641] **RLA-130**, UNCTAD, *Host Country Operational Measures* (UNCTAD/ITE/IIT/26: 2001), p. 11 (hereinafter "Host Country Operational Measures"). **RLA-126**, Gloria L. Sandrino, The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective, 27 Vand. J. Transnat'l L. 259, 311, n. 243 (1994). **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-5.

[642] **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-7.

[643] **RLA-127**, CG. Sacerdoti; "Case T 8735-01-77, The Czech Republic v. CME Czech Republic B.V. - Expert Opinion of Professor Sacerdoti", TDM 5 (2005)Sacerdoti, at 367. *See also* **RLA-128**, Kevin C. Kennedy, A WTO Agreement on Investment: A Solution in Search of a Problem?, 24 U. Pa. J. Int'l Econ. L. 77, 164–167 (2003). **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-7.

[644] The *Merrill & Ring* tribunal said the performance requirements enumerated in NAFTA Article 1106 "are related to the export of goods and services and the conditions under which such exports are made" and are "designed to restrict or

Ring explained that it seeks "to prohibit performance requirements designed to oblige an investor to export more than it otherwise would have exported".[645]

3. The Alberta Court Decisions Did Not Enforce a Prohibited Performance Requirement within the Scope of Article 1106(1)

(a) The Alberta Court Decisions Did Not "Enforce" the Transfer of GSI's Seismic Materials to a Third Party

366. In accordance with Article 31 of the *VCLT*, Article 1106 must 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."[646]

367. To breach Article 1106(1), a Party must either "impose" or "enforce" a prohibited "requirement", or "enforce" a "commitment or undertaking" to do so. The ordinary meaning of the terms "impose" or "enforce" implies an act of compulsion. The *New Shorter Oxford English Dictionary* defines the term "impose" as follows:

> [L]ay or inflict (a tax, duty, charge, obligation, etc.) esp. forcibly; compel compliance with.[647]
>
> To put authoritatively (an end, conclusion, etc.) to.

368. The term "enforce" is defined as follows:

> To compel by physical or moral force (the performance of an action, conformity to a rule, etc.).

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enhance exports". **RLA-090** *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, March 31, 2010, ¶ 115.The purpose of Article 1106(1)(f) is not to prevent violations of international intellectual property laws. The authorities cited by the Claimants simply do not support this assertion.

[645] **RLA-090**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, March 31, 2010, ¶ 113.

[646] **CLA-034**, *Vienna Convention*, Article 31(1).

[647] **R-388**, Shorter Oxford English Dictionary, (Oxford University Press, 2002, 5th ed.), Vols. 1 and 2 [Excerpts].

> To compel the observance of (a law); to support by force (a claim, demand, obligation).[648]

369. The term "requirement" is defined as follows:

> [S]omething called for or demanded; a condition which must be complied.[649]

370. The ordinary meaning of the phrase to "enforce" a "requirement" is to compel performance or compliance with a demand. To "impose" a requirement is to lay or inflict something demanded.[650]

371. The Claimants allege the Alberta Court Decisions "enforced" a requirement on GSI to transfer proprietary knowledge in violation of Article 1106(1)(f). This mischaracterizes the Alberta Court Decisions.

372. The "enforcement" of a requirement by a court implies a separate, distinct order from the court to compel something from the investor.[651] Simply interpreting a law and discerning rights thereunder is not an act of "enforcement" by the court, as it does not require anything from the investor. Whether a court "enforces" a requirement largely depends on the relief sought by the plaintiff. For example, if a plaintiff asks a court to order or compel a defendant to comply with a requirement to transfer proprietary knowledge, and the court decides to grant that relief, then the court might be said to "enforce" that requirement (subject to the facts). By contrast, when a court is asked to interpret existing statutes and laws to discern the disputing parties' rights thereunder – absent a request to order

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[648] **R-388**, Shorter Oxford English Dictionary, (Oxford University Press, 2002, 5th ed.), Vols. 1 and 2 [Excerpts].

[649] **R-388**, Shorter Oxford English Dictionary, (Oxford University Press, 2002, 5th ed.), Vols. 1 and 2 [Excerpts].

[650] Even a measure which deters an action is not equivalent to a measure which requires an action. *See*, **CLA-077**, *Pope & Talbot*, ¶ 75 ("the Tribunal concludes that the Investor has not made out a valid claim under Article 1106(1)(a) because the Regime does not 'impose or enforce…requirements.' Rather, it is a tariff-rate export restraint regime fixing only the level up to which covered products may be exported fee-free (EB), then at a lower fee (LFB) up to a given higher level, and thereafter in unlimited quantities at a higher fee (UFB) […] While the Regime undoubtedly deters increased exports to the U.S., that deterrence is not a 'requirement' for establishing, acquiring, expanding, managing, conducting or operating a foreign owned business in Canada") (emphasis added).

[651] **RLA-131**, *Canada-United States Free Trade Agreement*, 4 October 1987 [Excerpt], Article 1603(3) (which preceded NAFTA Article 1108) confirms this understanding: "3. For purposes of paragraphs 1 and 2 and paragraph 2 of Article 1602, a Party "imposes" a requirement or commitment on an investor when it requires particular action of an investor or when, after the date of entry into force of this Agreement, it enforces any undertaking or commitment of the type described in paragraphs 1 and 2 or in paragraph 2 of Article 1602 given to that Party after that date.")

or compel the performance of a requirement to transfer proprietary knowledge – the court does not "enforce" such a requirement.

373. The exception in Article 1106(1)(f) illustrates the type of enforcement by courts that the provision may capture. The exception provides:

> [E]xcept when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; (emphasis added.)

374. For example, where the companies involved in a potential merger or acquisition might otherwise violate competition laws, a court may enforce an order from a NAFTA Party's competition or antitrust authority (such as Canada's Competition Tribunal) to transfer certain assets, including copyright, to third persons to remedy that situation.

375. The claims before the Alberta Courts that resulted in the Common Issues Trial and the Alberta Court Decisions were brought by GSI – not by the federal or provincial governments, the Boards or a third-party seeking to compel disclosure of GSI's seismic materials. GSI had argued that the Regulatory Regime involved an unlawful transfer of GSI's copyright-protected seismic materials to the Boards and third parties; and GSI claimed damages with respect to third parties' access to GSI's materials.[652] The Defendants did not ask the Alberta Courts to order GSI to transfer seismic materials to the Boards or to third parties. Instead, the Defendants defended against GSI's application by referring to the legislative scheme envisaged by the Regulatory Regime.

376. The Alberta Courts interpreted the Regulatory Regime's provisions on disclosure of seismic materials, including for copying, and reached the following conclusion as set out in the ABQB's "Decision in brief":

> The *CPRA*, properly interpreted, allows for disclosure without restriction after a defined period of time. It is a complete and specific code that applies to all oil and gas property in the offshore and frontier lands, including seismic data. Its provisions supplant any more general pieces of legislation, such as the *Copyright Act* or the AIA to the extent that they conflict. Therefore, the Boards and recipients of seismic

[652] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 3.

> data have not breached GSI's copyright rights. Under the existing Regulatory Regime, it is not unlawful for the Boards to disclose data after the expiry of the privilege period in the manner that they have been doing. There is no need to resort to the procedures set out in the AIA to respond to requests for data.[653]

377. The Alberta Courts came to this conclusion by interpreting the relationship between the Regulatory Regime and the *Copyright Act*, and by discerning the parties' rights thereunder. The Courts found that while copyright could subsist in seismic materials submitted to the Boards, this did not prevent the Boards from making certain data publicly available, including for copying, under the Regulatory Regime. The Alberta Courts made a declaration on the rights of the Boards, third parties accessing Disclosed Seismic Materials and GSI. The Decisions did not order a transfer of any information. This is clear from the judgment roll of the ABQB.[654] Nor did the Decisions result in any transfer of information. The outcome of the Decisions was that GSI did not pursue certain copyright infringement claims against the Boards for the disclosure of the seismic materials, or against oil and gas companies for accessing and copying the materials (except for contractual claims).

378. The Claimants argue that due to the Alberta Court Decisions, GSI was "legally obligated to comply with third parties copying the Seismic Works contained in the Submissions."[655] They allege:

> The requirement enforced by the Alberta Decisions also had a substantial detrimental effect on the profitability of GSI and imposed conditions with respect to its conduct and operations in Canada by forbidding it from contesting the disclosure of the Seismic Works under the Regulatory Regime.[656]

379. Again, this mischaracterizes the Alberta Court Decisions. The Alberta Court Decisions did not "impose conditions" on GSI or "legally obligate it" to comply with Canadian law – GSI was subject to the Regulatory Regime since the first day it received authorization to conduct a seismic survey in Canada's offshore. Beyond that, the Decisions imposed no new conditions on GSI with respect to its conduct and operations in Canada. Nor was GSI "forbidden from contesting the disclosure of the

[653] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 132.

[654] **R-377**, ABQB Judgment Roll.

[655] Memorial, ¶ 452 (emphasis added).

[656] Memorial, ¶ 455.

Seismic Works under the Regulatory Regime". GSI appealed the ABQB's Decision and received full due process and appellate review of its claims at the ABCA. The Alberta Court Decisions did not revoke GSI's access to justice by finding that GSI had "no legal basis or lawful entitlement" in Canadian law to object to the Boards' disclosure policies.[657] Rather, the Alberta Courts resolved GSI's claims by interpreting the law and discerning the parties' rights thereunder. The Decisions affirmed that the Boards could continue making certain seismic materials public – as they had done for decades.

380. To the extent that the Alberta Court Decisions affected GSI's ability to obtain damages for copyright infringement, such effects do not establish the elements of Article 1106(1). The incidental effects of a regulatory framework following an investor's participation in it do not establish a prohibited performance requirement.[658]

381. Thus, the Alberta Court Decisions fall outside the scope of Article 1106. The Claimants fail to show that the Decisions "enforced" any requirement on GSI to transfer proprietary knowledge to the Boards or to third parties. The Tribunal should reject the Article 1106 claim on this basis alone.

(b) Even if the Alberta Court Decisions Enforced the Regulatory Regime, that Regime Was Not a "Requirement" under Article 1106(1)

382. Even if the Alberta Court Decisions enforced the Regulatory Regime (which they did not do), the Regulatory Regime never imposed a "requirement" on GSI to transfer proprietary knowledge to a person under Article 1106(1). As explained below, the Regulatory Regime's provisions on submitting seismic material for disclosure were conditions on the receipt of an advantage: in return

[657] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 104.

[658] The Tribunal in *Merrill & Ring Forestry v. Canada* agreed with Canada in that even though the measure had "an incidentally adverse effect on the Investor's exports to the extent that it might wish to cut, sort and scale its logs as required by its customers in foreign markets", these requirements were not subject to NAFTA Article 1106 given that they were not "directly and specifically connected to exports" and they "merely ha[d] some indirect effect on exports". **RLA-090**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, ¶¶ 95, 109. The Claimant Merrill & Ring Forestry L.P. ("Merrill") claimed that the Log Export Control regime imposed the obligation to scale timber rafts metrically in violation of NAFTA Article 1106(1)(c) as Merrill needed to retain the services of qualified Canadian personnel to complete such task. Canada argued that scaling logs in conformity with the metric system simply amounted to the application of Canada's measurement system and did not compel Merrill to purchase services in Canada as Merrill was free to hire workers from outside Canada. Resorting to Canadian service providers in order to achieve these tasks constituted "purely a business decision". The tribunal agreed with Canada that "incidental consequences of the regulatory regime" could not convert a measure into a performance requirement.

for an authorization to conduct seismic surveys in Canada's offshore, GSI agreed to submit certain seismic materials to the Boards for disclosure after the confidentiality period expired. As such, the measures should be considered under Article 1106(3), not Article 1106(1).

i. Articles 1106(1) and 1106(3) Address Distinct Measures

383. The Claimants read Article 1106(1)(f) in isolation without applying a proper *VCLT* analysis, including consideration of the context and object and purpose of the treaty. The context includes Articles 1106(3) and 1106(5). Under Article 1106(5), the list of performance requirements set out in Articles 1106(1) and (3) are exhaustive.[659] A measure will not contravene Articles 1106(1) or 1106(3) unless explicitly prohibited by one of them.

384. NAFTA tribunals uphold this reading. In *S.D. Myers*, the tribunal stated:

> Although the Tribunal must review the substance of the measure, it cannot take into consideration any limitations or restrictions that do not fall squarely within the 'requirements' listed in Articles 1106(1) and (3).[660]

385. The tribunal in *Pope & Talbot* echoed the finding of *S.D. Myers*:

> The Tribunal endorses Canada's contention that Article 1106(5) is vital to the interpretation of Articles 1106(1) and (3). Consequently, the ambit of these two Articles may not be broadened beyond their express terms. The enumeration of seven requirements in Article 1106(1) and four in Article 1106(3) is limiting in each case.[661]

386. The United States endorsed the same principle in its NAFTA Article 1128 submission to the *Pope & Talbot* tribunal:

> Article 1106 identifies two categories of performance requirements and, separately for each category, sets forth an exhaustive list of the specific performance

[659] **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-17 - P. 1106-18; **CLA-077**, *Pope & Talbot*, ¶ 70.

[660] **CLA-106**, *S.D. Myers*, ¶ 275. The claimant in *S.D. Myers* had argued that Canada's restriction on the export of hazardous waste amounted to a violation of Articles 1106(1), (b) and (c).

[661] **CLA-077**, *Pope & Talbot*, ¶ 70, (emphasis added). *Pope & Talbot* dealt with a claim by the investor that Canada's implementation of the 1996 Softwood Lumber Agreement amounted to an impermissible export quota that violated NAFTA Articles 1106(1)(a) and (e) and 1106(3)(d). None of these provisions are at issue in this arbitration.

> requirements prohibited. The Article prescribes different prohibitions for each category. […]
>
> Article 1106(5) states explicitly and clearly that Article 1106(1) applies only to the seven performance requirements specifically listed in Article 1106(1) […][662]

387. Leading commentators agree that under Article 1106(5), a tribunal can consider only those measures that fall squarely within the relevant category of prohibited performance requirements listed in Articles 1106(1) and 1106(3).[663]

388. The *chapeaus* of Articles 1106(1) and 1106(3) specify the different categories of measures they each address. The *chapeau* of Article 1106(1) states:

> No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory: […] (emphasis added.)

389. By contrast, the *chapeau* of Article 1106(3) states:

> No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-

[662] **RLA-132**, *Pope & Talbot Inc. v. Government of Canada*, (UNCITRAL) Submission of the United States of America, April 7, 2000, ¶¶ 9, 12, (emphasis added).

[663] **RLA-133**, J. Johnson, *The North American Free Trade Agreement: A Comprehensive Guide* (Ontario: Canada Law Book Inc., 1994), pp. 287-88 ("NAFTA 1106(5) makes it clear that the prohibited performance requirements, whether as conditions of investment or receiving an advantage, are confined to those specifically identified") (emphasis added); **CLA-040**, M. Kinnear, A. Bjorklund and J. Hannaford, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kluwer: 2006), pp. 1106-16 ("NAFTA 1106(5) states what should be obvious from the wording of Article 1106(1) and 1106(3): only those performance requirements that are specifically listed in Article 1106 are prohibited under this article") (emphasis added); **RLA-134**,Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford: 2009), p. 404 ("Article 1106(5) of NAFTA provides that the prohibitions in Articles 1106(1) and 1106(3) do not apply to any requirement other than the requirements set out in those paragraphs. In other words, the list of prohibited performance requirements is exhaustive") (emphasis added); **RLA-135**, J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Progress of a Work in Progress*, in L. Dawson, ed., *Whose Rights: The NAFTA Chapter 11 Debate* (Ottawa: Centre for Trade Policy and Law, 2002), p. 75 ("Article 1106(5) states that the prohibitions in Article 1106(1) are not to be interpreted to extend beyond those requirements specifically listed and the *S.D. Myers* and *Pope & Talbot* tribunals have interpreted the provisions in a manner that is consistent with this admonition") (emphasis added). **RLA-136**, Barton Legum, *Understanding Performance Requirement Prohibitions in Investment Treaties*, in *Contemporary Issues in International Arbitration and Mediation*, p. 59 (Jun. 2007) ("The NAFTA provides a definitive list of prohibited performance requirements rather than a series of examples. In the first paragraph, NAFTA Article 1106 lists seven specific types of host State measures that the State cannot impose or enforce.") (emphasis added).

> Party, on compliance with any of the following requirements: […] (emphasis added.)

390. As UNCTAD notes this distinction between the two categories of prohibited performance requirements is a part of the treaty practice of certain countries including Canada and the United States:

> Most of the requirements […] are only prohibited when applied as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment. In most cases, such as under the United States BITs and the Singapore-Japan Agreement, the parties are allowed to impose conditions in these areas for the receipt or continued receipt of various benefits and incentives.[664]

391. Whereas Article 1106(1) applies to requirements that are "imposed" or "enforced", Article 1106(3) applies to requirements that are the conditions resulting from an investor's choice to avail itself of an "advantage".[665]

392. Thus, one must determine whether a measure is a mandatory requirement under Article 1106(1) or a condition on the receipt of an advantage under Article 1106(3) before considering if a measure falls within the list of prohibited performance requirements in the applicable paragraph.

393. The *Oxford English Dictionary* defines the term "condition" as follows:

> A convention, stipulation, proviso, etc.
>
> In a legal instrument, e.g. a will, or contract, a provision on which its legal force or effect is made to depend.
>
> Something that must exist or be present if something else is to be or take place; that on which anything else is contingent; a prerequisite.[666]

394. The *Oxford English Dictionary* defines the term "advantage" as follows:

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[664] **RLA-125**, UNCTAD, "Foreign Direct Investment and Performance Requirements, p. 5.

[665] **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-16. A condition for the receipt or continued receipt of an advantage referred to in Article 1106(3) does not constitute a "commitment or undertaking" for the purposes of Article 1106(1).

[666] **R-388**, *Shorter Oxford English Dictionary*, (Oxford University Press, 2002, 5th ed.), Vols. 1 and 2 [Excerpts].

> A condition, circumstance, or ability that puts one in a favourable or superior position.
>
> A favourable or desirable feature of a thing, activity, or course of action.
>
> A favourable occasion; a chance or opportunity.
>
> Profit, gain; interest on money lent.[667]

395. The term "advantage" in Article 1106(3) includes any benefit that is provided to the investor and has a broader meaning than "subsidies or grants". The NAFTA Parties used those terms in Article 1108(7)(b).[668] Had they wished to limit the conditional benefits captured under Article 1106(3) to subsidies or grants, they would have used those terms.

ii. A Condition to Transfer Proprietary Information in Exchange for the Receipt of an Advantage is Not a Prohibited Performance Requirement

396. Within their respective subparagraphs, Article 1106(1) prohibits seven categories of measures whereas Article 1106(3) prohibits only four categories of measures as follows:

Performance Requirements	Article 1106(1)	Article 1106(3)
to export a given level or percentage of goods or services	(a)	(a)
to achieve a given level or percentage of domestic content	(b)	**N/A**
to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;	(c)	(b) (limited to goods)
to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;	(d)	(c)
to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;	(e)	(d)

[667] **R-388**, *Shorter Oxford English Dictionary*, (Oxford University Press, 2002, 5th ed.), Vols. 1 and 2 [Excerpts].

[668] NAFTA Article 1108(7)(b): "Articles 1102, 1103 and 1107 do not apply to: […] subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance."

to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or	(f)	**N/A**
to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.	(g)	**N/A**

397. As the chart shows, Article 1106(3) does not prohibit conditioning receipt of an advantage on compliance with requirements to export at a given level; transfer technology, a production process or other proprietary knowledge; or act as an exclusive supplier of goods or services produced (the equivalents of Articles 1106(1)(a), (f) and (g), respectively).[669] Had the NAFTA Parties intended to prohibit conditional advantages for such requirements, they would have done so. On this point, the *Pope & Talbot* tribunal remarked:

> Those four requirements of Article 1106(3) are identical to four of the seven requirements found in Article 1106(1). Consequently, three of the seven requirements that may not be imposed or enforced under Article 1106(1) may nonetheless be stipulated as conditions for the receipt or continued receipt of an advantage. They are Articles 1106(1)(a), (f) and (g).[670]

398. The evolution from the Canada-United States Free Trade Agreement ("Canada-U.S. FTA") to the NAFTA confirms this reading. The Canada-U.S. FTA did not specifically prohibit performance requirements as conditions to receive advantages. The Canada-U.S. FTA prohibited certain requirements as follows:

> Neither Party shall impose on an investor of the other Party, as a term or condition of permitting an investment in its territory, or in connection with the regulation of

[669] **CLA-040**, Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11 (Kinnear, Bjorklund and Hannaford); Jan 2006, P. 1106-16. As one author notes: "Agreements that follow the NAFTA model prohibit the conditioning of receipt of advantages in certain cases but not others. For example, Article 1106(3) […] does not prohibit host states from conditioning receipt of advantages on three other requirements: to export a given level or percentage of goods and services; to transfer technology; or to act as an exclusive supplier". *See also*, **CLA-096**, Newcombe, Standards of Treatment (February 2009) p. 429.

[670] **CLA-077**, *Pope & Talbot*, Interim Award, ¶ 72 (emphasis added).

> the conduct or operation of a business enterprise located in its territory, a requirement to: a) export a given level or percentage of goods or services; b) substitute goods or services from the territory of such Party for imported goods or services; c) purchase goods or services used by the investor in the territory of such Party or from suppliers located in such territory or accord a preference to goods or services produced in such territory; or d) achieve a given level or percentage of domestic content.[671]

399. By contrast, the NAFTA Parties specifically included a separate paragraph prohibiting conditioning receipt of an advantage on certain performance requirements as Article 1106(3). They also broadened the list of prohibited performance requirements under Article 1106(1) to include Article 1106(1)(f) and (g). Yet as noted, the NAFTA Parties did not choose to prohibit such requirements when they take the form of conditions to receive advantages.

400. Thus, Article 1106 does not prohibit a measure that conditions receipt of an advantage on compliance with requirements to transfer proprietary knowledge. Such a measure does not fall within the *chapeau* of Article 1106(1): it is neither "imposed" nor "enforced", but instead falls within the *chapeau* of Article 1106(3) because the investor voluntarily accepts the conditions for receipt of the advantage. Yet such a measure does not fit within the four prohibited requirements in the subparagraphs of Article 1106(3).

iii. The Regulatory Regime's Condition on Submitting Seismic Materials for Disclosure after the Confidentiality Period Must be Considered Under Article 1106(3)

401. Here, the Regulatory Regime did not include a "requirement" on GSI to transfer proprietary knowledge to the Boards within the meaning of Article 1106(1).[672] It was GSI's choice to seek an

[671] **RLA-131**, Canada-U.S. FTA, Article 1603 (Performance Requirements).

[672] Many investment tribunals have refrained from finding that conditions relating to an investment constituted prohibited "requirements". In *Pope & Talbot*, the tribunal did not find that the quota regime "imposed or enforced" a "requirement" on the claimant even though it deterred exports to the U.S. **CLA-077**, *Pope & Talbot*, Interim Award, ¶ 72. Similarly, the *Cargill v. Poland* tribunal did not find a prohibited performance requirement because the claimant had failed to establish that the performance requirements were imposed as a condition of the expansion of its investment. In *Lemire v Ukraine*, the tribunal found that a cultural policy that required 50 per cent of each station's broadcasting time to be reserved for music produced in Ukraine did not constitute a prohibited performance requirement under Article II.6 of the Ukraine-United States BIT. Notwithstanding that the measure had the effect of requiring local content, the tribunal was not a prohibited performance requirement because the challenged measure was better characterized as a measure promoting

authorization to acquire seismic data on Crown land. GSI was never required to access Canada's offshore and to shoot seismic data there. The Claimants knew the conditions to obtaining this opportunity and freely chose to seek such authorizations. As the ABQB stated:

> GSI was fully aware that some of its data would have to be submitted and that it would be made public when it undertook its work on these offshore and frontier lands.[673]

402. GSI may have disliked the terms that applied to the authorizations to collect seismic data. Yet it still proceeded to seek an authorization. In these circumstances, Article 1106(1) does not apply to either the Alberta Court Decisions or the Regulatory Regime itself.

403. Moreover, the Regulatory Regime did not undermine the purpose of Article 1106 – preventing distortions of international trade or investment flows. The overall objective of the Regulatory Regime is to encourage greater exploration, greater competition and lower costs in the offshore, and to enhance operational safety for exploration, development and production activities.[674] Rather than distorting trade or investment, the submission and disclosure of certain seismic materials after a confidentiality period can facilitate trade and investment by encouraging exploration and development, among other things.

404. It is true that GSI's authorizations expressly referenced "conditions" on submitting certain seismic materials to the Boards for disclosure, as explained above and in the Witness Statements of Trevor Bennett, Carl Makrides and Bharat Dixit.[675] These conditions only applied in return for GSI receiving significant "advantages": permission to enter Crown land, the opportunity to acquire seismic data there and a lengthy confidentiality period to market that seismic data. This placed GSI in a highly favourable position. It acquired the ability to derive profit from Canada's sovereign territory by licensing seismic data acquired from the offshore. Without authorization, GSI could not

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"Ukraine's cultural inheritance". **RLA-138**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 505-510.

[673] **R-002**, *GSI v. Encana*, 2017 ABCA 125, ¶ 322.

[674] **RWS-02**, Trevor Bennett Witness Statement, ¶ 16. **RWS-03**, Makrides Witness Statement, ¶ 7. **R-152**, *GSI v CNSOPB*, 2014 NSSC 172.

[675] See authorizations set out in: **RWS-03**, Makrides Witness Statement, ¶ 25; **RWS-01**, Dixit Witness Statement, ¶ 28. **RWS-02**, Bennett Witness Statement, ¶ 35.

access that land or obtain any seismic information on Canada's offshore. To the extent that GSI obtained valuable proprietary knowledge about the offshore, it was solely due to the benefit it obtained from accepting the conditions in its authorizations. Moreover, the confidentiality period gave GSI a prolonged window to licence its seismic data exclusively and generate commercial gains for years. These were unequivocal advantages for GSI.

405. Thus, in exchange for the ability to disclose certain information after the confidentiality period expired – the "condition" – Canada allowed companies like GSI to obtain information on Canada's offshore – the "advantage". Pursuant to the *chapeau* of Article 1106(3), the Regulatory Regime conditioned the receipt of an advantage on GSI meeting the terms of its authorization to acquire seismic data, including on disclosure.

406. Under Article 1106(5), the Regulatory Regime could violate Article 1106 only if it constituted one of the four prohibited measures listed in Article 1106(3). Article 1106(3) does not prohibit requiring a transfer of proprietary knowledge as a condition on the receipt of an advantage, as shown above. Moreover, the Regulatory Regime did not contain conditions on (a) domestic content, (b) preferential treatment to domestic goods, (c) imports or exchange inflows, or (d) exports or foreign exchange earnings. Thus, the Regulatory Regime did not constitute a prohibited performance requirement under Article 1106. Nor did it impose a "requirement" for the Alberta Courts to have enforced. The Claimants' Article 1106(1)(f) claim must fail.

(c) The Claimants Did Not Establish that the Regulatory Regime Required the "Transfer" to a Person of "Proprietary Knowledge" in Canada

i. Seismic Data Disclosure Was Not a "Transfer" of Proprietary Knowledge to a Person in Canada

407. Without supporting analysis or evidence, the Claimants allege that the Alberta Court Decisions enforced a requirement to "transfer" proprietary knowledge to persons in Canada.[676] Yet in addition to mischaracterizing the Decisions, the Claimants blur the distinction between NAFTA disciplines

[676] Memorial, ¶¶ 460-461 ("Based on those definitions, the Alberta Decisions enforced a requirement for GSI to transfer its proprietary knowledge in the Seismic Works to persons in Canada. […] The purpose of the Alberta Decisions was to determine whether the Boards' transfer of the Seismic Works to third parties by disclosing the Seismic Works and making them available for copying was lawful.").

that apply to measures requiring the transfer of proprietary information to a person and NAFTA disciplines that apply to data submissions to a NAFTA Party or disclosure of information by a Party. Measures that relate to disclosure of data submitted to a Party as conditions to obtain certain authorizations are subject to different disciplines. For example, Article 1711 (Trade Secrets) states:

> 1. Each Party shall provide the legal means for any person to prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the person lawfully in control of the information in a manner contrary to honest commercial practices, in so far as:
>
> (a) the information is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally deal with the kind of information in question;
>
> (b) the information has actual or potential commercial value because it is secret; and
>
> (c) the person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret. […]
>
> 3. No Party may limit the duration of protection for trade secrets, so long as the conditions in paragraph 1 exist. […]
>
> 5. If a Party requires, as a condition for approving the marketing of pharmaceutical or agricultural chemical products that utilize new chemical entities, the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective, the Party shall protect against disclosure of the data of persons making such submissions, where the origination of such data involves considerable effort, except where the disclosure is necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.

408. Article 1711(5) contains disciplines on the treatment of data regarding pharmaceutical or agricultural chemical products and its disclosure. Chapter Eleven does not contain the same disciplines for the treatment of seismic materials (nor does Chapter Seventeen).

409. Article 1106(1)(f) addresses the forced transfer of technology, a production process or proprietary knowledge to persons in the host State – not the protection of trade secrets or

governmental obligations to protect confidential information submitted to regulators from public disclosure.

410. In the Memorial, the Claimants offered no explanation of how the Regulatory Regime required the "transfer" of proprietary knowledge to a person in Canada under Article 1106(1)(f).[677] Instead, the Claimants objected to the Alberta Court Decisions' finding that under Canadian law, the Boards could publicly disclose GSI's Submitted Seismic Data. Disclosure of information to the public does not transfer proprietary information to a person; it renders the information no longer confidential.[678] To the extent the Claimants are alleging that in disclosing certain GSI's seismic data, Canada failed to comply with its obligations to protect trade secrets in violation of Article 1711(3), the Claimants lack standing to invoke NAFTA Chapter Seventeen.[679]

411. Thus, the Claimants' accusations over the alleged mistreatment of GSI's seismic data offer no basis to find a violation of Article 1106(1)(f).

ii. The Claimants Fail to Prove the Seismic Materials at Issue Was "Proprietary Knowledge"

412. The Claimants bear the burden to establish that the alleged requirement allegedly enforced by the Alberta Court Decisions related to GSI's "proprietary knowledge" under Article 1106(1)(f). They failed to meet their burden for three reasons.

[677] Memorial, ¶¶ 460-461.

[678] By way of comparison to the patent context, Mr. Sookman notes that in *Catnic*, the plaintiff made a copyright infringement claim for the infringement of copyright in drawings that were included in a patent application. The court stated: "by applying for a patent and accepting the statutory obligation to describe and if necessary illustrate embodiments of his invention, a patentee necessarily makes an election accepting that, in return for a potential monopoly, upon publication, the material disclosed by him in the specification must be deemed to be open to be used by the public, subject only to such monopoly rights as he may acquire on his application for the patent and during the period for which his monopoly remains in force, whatever be the reason for the determination of the monopoly rights." **RER-01**, Sookman Report, ¶¶ 74, 92(f), citing **R-081**, *Catnic Components Limited v. Hill & Smith Limited*, [1978] F.S.R. 405 (Ch.) pp. 11-12.

[679] Memorial, ¶ 143.

413. First, the Claimants did not particularize the seismic materials allegedly transferred. They defined the "Seismic Works" without particulars, as noted above.[680] This renders it impossible for the Claimants to prove the Alberta Court Decisions required or enforced a requirement for GSI to transfer any "proprietary knowledge" to the Boards or to third parties.

414. Second, the Claimants provided no evidence that the material at issue qualified as "proprietary" within the meaning of Article 1106(1)(f). The Claimants offered just one line in their Memorial:

> GSI had "proprietary knowledge" in the Seismic Works by virtue of its intellectual property rights, which was confirmed by the Alberta Decisions.[681]

415. This conclusory statement lacks substantiation and misrepresents the Alberta Court Decisions. As noted above, the ABQB was not asked to consider whether copyright does subsist in any specific work, but whether it could subsist in a category of works.[682] The Alberta Court Decisions did not determine whether GSI held copyright in specific seismic data. Given that the Claimants have not particularized the seismic data at issue here, the Decisions alone do not enable the Claimants to establish that they held copyright over any specific seismic data. This renders it impossible for the Claimants to prove that the Alberta Court Decisions enforced any requirement to transfer "proprietary knowledge" under Article 1106(1)(f).

416. Third, after the confidentiality period expired, it was clear that certain technical reports relating to the Disclosed Seismic Materials would no longer be treated as confidential under Canadian law. As such, it would not qualify as "proprietary knowledge" under Article 1106(1)(f). The Alberta Court Decisions could not have resulted in the transfer of "proprietary knowledge" with respect to GSI's Disclosed Seismic Materials given that the materials were already in the public domain and therefore

[680] Memorial, ¶ 29: "Through its efforts between 1993 and 2009, GSI amassed the largest collection of Canadian marine seismic data in the world (the "Seismic Works")."

[681] Memorial, ¶ 461. *See also* ¶ 58: "NAFTA also does not define the term "proprietary knowledge". The ordinary meaning of the term "proprietary" includes "something that is used, produced, or marketed under exclusive legal right of the inventor or maker"."

[682] **RER-01**, Sookman, ¶ 10. **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 92: "The Defendants also argue that GSI's claims should fail because they have not proven the identity of the specific person who created the seismic data. Such proof is unnecessary given the nature of the common issues question: "can" copyright exist in the seismic data not "does" it exist."

no longer proprietary (as noted above, the Alberta Court Decisions did not order or result in any additional disclosure of seismic materials).

417. Thus, the Claimants cannot establish that the Alberta Court Decisions required GSI to transfer "proprietary knowledge" to a person of a Party in violation of Article 1106(1)(f).

418. For the foregoing reasons, the Claimants' Articles 1110 and 1106 claims must fail. Canada did not violate NAFTA Chapter Eleven. While the Tribunal has no jurisdiction to hear this claim, if it finds otherwise it should reject this claim on the merits.

VIII. THE CLAIMANTS HAVE FAILED TO PROVE ANY DAMAGES ARISING FROM THE ALBERTA COURT DECISIONS AND ARE ENTITLED TO NO COMPENSATION EVEN IF A NAFTA VIOLATION IS FOUND

A. Summary of Canada's Position on Damages

419. For the Claimants to be entitled to damages pursuant to NAFTA Articles 1116(1) and 1117(1), they must prove: (1) a measure attributable to Canada breached an obligation in Section A of NAFTA Chapter Eleven; (2) the breach was the proximate cause of the Claimants' alleged losses; and (3) the Claimants' quantification of those losses is reasonable, rational and not speculative. Proof of proximate cause requires persuasive evidence that the alleged breach – not other factors – factually caused the specific damage, and that the alleged damage is not too remote. A rational method of quantification follows reasonable and reliable steps to measure the specific damages amount. It cannot be speculative or based on unreasonable assumptions, among other flaws.

420. The Claimants' damages claim fails to meet these requirements in many respects.[683] First, the Claimants allege that "[t]he Alberta Decisions destroyed GSI's business by breaching Articles 1110 and 1106(1)(f)," specifically by (1) "allow[ing] third parties […] to access and copy the Seismic Works from the Boards for free"; and (2) "forb[iding] GSI from interfering or objecting to that

[683] In addition to the many flaws described in this Part VIII, in order for the Claimants to prove that they have complied with the waiver provision in NAFTA Article 1121, they must establish that the domestic litigations against third parties which GSI continued to pursue after its NAFTA NOA are not "with respect to the measure" alleged to breach the NAFTA. But in so doing, the Claimants would have to concede that its damages claim is largely premised on unpaid invoices against third parties not linked to the Alberta Court Decisions. The Claimants cannot have it both ways: if the Claimants pass the Article 1121 test, the necessarily fail the damages causation test.

practice, forcing GSI to discontinue many of the Domestic Actions and pay substantial costs to the defendants."[684] However, the Claimants' damages claim does not represent a measure of damages resulting from the Alberta Court Decisions. Indeed, it suffers from a fundamental flaw: it does not identify the "but-for" scenario upon which their damages claim is based. Instead, it assumes lost revenue from licensing and assumes that, in effect, more than [redacted] of third-party invoices alleged to have been sent to GSI's customers from 2012 to 2016 would have been paid absent the alleged breaches. The damages claim further assumes that the lost revenues would have formed the basis of a perpetual revenue stream thereafter. The Claimants provide no rationale for these assumptions. Even if the Alberta Courts had not rendered the Decisions, the Regulatory Regime would have provided for disclosure of seismic materials after the confidentiality period. The Claimants cannot establish that in this "but-for" scenario, GSI would have licenced the Disclosed Seismic Materials at the amount they claim (or at all), or that GSI would have recovered that sum through copyright infringement claims in domestic courts.

421. Second, the Claimants include alleged damages from contractual breaches by third parties (including some unrelated to Canada's offshore) for which Canada is not responsible under international law. The Alberta Court Decisions left untouched GSI's right to continue domestic litigation claims over alleged contractual breaches, including on transfer fees, exploration group licencing and equalization fees and penalty clauses. Canada cannot be liable under NAFTA for these alleged damages.

422. Third, the Claimants did not quantify the alleged damages reasonably. The Brattle Report explains systematically why Mr. Sharp's valuation of GSI's "but-for" value cannot be used to estimate damages reliably. Brattle explains that Mr. Sharp's analysis lacks independence, is built on unreasonable assumptions, is methodologically unsound and fails to comport with the expropriation compensation standard set under Article 1110(2). Mr. Sharp also failed to account for the factors unrelated to the Alberta Court Decisions that caused GSI to go out of business long before the Alberta Court Decisions, including [redacted] fruitless investments abroad, scorched-earth litigation strategy and decision to not adequately invest in its seismic data library. Mr. Sharp also failed to take into account relevant

[684] Memorial, ¶¶ 481-482 (citations omitted).

macroeconomic and industry trends, as outlined in the Hobbs Report. These factors raise credible doubts over whether GSI could sustain the alleged revenues while competition was increasing, the seismic industry saw a collapse in spending and the industry was consolidating. Together, these factors caused GSI to no longer be a going-concern by 2012 (and possibly earlier) – years before the Alberta Court Decisions.

423. GSI's worth at the valuation date can represent no more than the value of its offshore seismic data library. Yet conspicuously, the Claimants did not provide an estimate of its value as of the valuation date in order to measure the potential impact of the alleged breaches. Nonetheless, Brattle expects that the fair market value of the library at the valuation date was limited, including because GSI's data was relatively old and/or subject to competition from other companies' seismic materials that was newer, higher quality and (at least in part) available through Board disclosure.

424. Ultimately, the Claimants fail to prove their damages claim in accordance with international law. Even if the Tribunal found a NAFTA breach, it would have no basis to award compensation.

B. The Claimants Bear the Burden to Prove that the Alleged Breaches Factually and Proximately Caused the Alleged Losses

1. Compensation under Articles 1116(1) and 1117(1) Requires Proof of Proximate Causation

425. Articles 1116(1) and 1117(1) require the Claimants to establish that they have "incurred loss or damage, by reason of, or arising out of" a breach of NAFTA. Applying the general rule of treaty interpretation,[685] the ordinary meaning of these terms in their context requires a "sufficient causal link"[686] or an "adequate[] connect[ion]"[687] between the alleged breach of NAFTA and the loss

[685] **CLA-034**, *Vienna Convention*, Article 31(1).

[686] **RLA-139**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002 ("*S.D. Myers* – Second Partial Award"), ¶ 140. *See also*, **CLA-084**, *Biwater Gauff* – Award, ¶ 779: ("Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].").

[687] **RLA-021**, *Feldman* – Award, ¶ 194.

sustained by the investor. This requires proof of factual and proximate (or legal) causation.[688] The *Biwater Gauff* tribunal stated that causation in international law:

> [C]omprises a number of different elements, including (*inter alia*): (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote.[689]

426. On factual causation, ILC Article 31 provides that a State that has committed a wrongful act must make "full reparation," but only for "any damage […] caused by the internationally wrongful act."[690] Commentary to ILC Article 31 states:

> It is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made. […] [T]he subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.[691]

427. As the tribunal in *Pey Casado* explained, the operation of the rule "depends on injury, and that injury in turn depends on causation. […] The injury in question must be caused by that specific breach. Causation is of the essence."[692] This is not a step that a claimant can skip and assume that, if

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[688] **RLA-140**, S. Ripinsky, *Damages in International Investment Law* (London, British Institute of International and Comparative Law: 2008) ("Ripinsky") (emphasis in original), p. 135. *See also* **RLA-141**, T. Weiler & L.M. Diaz, *Causation and Damages in NAFTA Investor-State Arbitration in NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, (T. Weiler, ed.) (Transnational Publisher: 2004), pp. 194-195.

[689] **CLA-084**, *Biwater Gauff* – Award, ¶ 785; **RLA-142**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468; **RLA-139**, *S.D. Myers* – Second Partial Award, ¶ 140: ("the harm must not be too remote, or […] the breach of the specific NAFTA provision must be the *proximate* cause of the harm.")

[690] **RLA-143**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Text adopted by the International Law Commission at its fifty-third session, in 2001, (A/56/10), United Nations, New York 2001 ("Draft ILC Articles with Commentaries"), Article 31. *See* **RLA-144**, T.W. Walde & B. Sabahi, *Compensation, Damages, and Valuation* in *The Oxford Handbook of International Investment Law* (OUP 2008), p. 1057: (The commission of an internationally wrongful act entails the obligation to put the victim back into the position it would "have – in theory – [been in] had the unlawful act not occurred.")

[691] **RLA-143**, Draft ILC Articles with Commentaries, Article 31, Commentary (9) (emphasis added).

[692] **RLA-145**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No ARB/98/2) ("*Casado* – Award"), ¶¶ 204, 218; *See also* **RLA-139**, *S.D. Myers – Second Partial Award*, ¶ 173, which provided that with respect to the injury caused by the breach, what must be proven is both the existence of an injury to the claimant and that that particular injury is the sufficiently proximate consequence of the specific breach.

it established a breach of an international obligation, it is entitled to recover any alleged damages. As the *Biwater* tribunal stated:

> In this regard, some meaning must be given to the concept of '*injury*'. In particular, 'causing *injury'* must mean more than simply the wrongful act itself (e.g., an expropriation, or unfair or inequitable treatment), otherwise the element of causation would have to be taken as present in every case, rather than being a separate enquiry.[693] […]
>
> Whether or not each wrongful act by [the Respondent] 'caused injury' such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which [the claimant] has in fact claimed damages.[694]

428. On proximate causation, Commentary to ILC Article 31 states:

> [C]ausality in fact is a necessary but not a sufficient condition of reparation. […] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.[695]

429. This reflects the customary international law standard of proximate causation, which requires a close and direct causal link between the alleged breach and the alleged loss.[696] The *S.D. Myers* tribunal stated:

> [C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by [the investor] must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes.[697]

430. Thus, even where it can be established that an identified breach was a factual "but-for" cause in the chain of causation, recovery of the damages sought is not permitted unless the claimant

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[693] **CLA-084**, *Biwater Gauff* – Award, ¶ 803.

[694] **CLA-084**, *Biwater Gauff* – Award, ¶ 804; s*ee also*, **RLA-146**, *Nordzucker AG v. The Republic of Poland* (UNCITRAL) Third Partial and Final Award, 23 November 2009 ("*Nordzucker* – Final Award"), ¶ 47.

[695] **RLA-143**, Commentary on the ILC Articles, Article 31, Commentary (10) (emphasis added) (citations omitted).

[696] **RLA-143**, Draft Articles on State Responsibility, 2001, Article 31, Commentary 10. The terms of Articles 1116(1) and 1117(1) are similar to those used in other treaties that have been interpreted to require proximate causation.

[697] **CLA-106**, *S.D. Myers* – Partial Award, ¶ 316 (emphasis added). In *Pope & Talbot*, the tribunal held that an investor bringing a claim under Article 1116 bears the burden to "prove that loss or damage was caused to its interest, and that it was causally connected to the breach complained of." *See* **CLA-060**, *Pope & Talbot, Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002 ("*Pope & Talbot* – Award in Respect of Damages"), ¶ 80.

can prove that "the wrongful conduct was a sufficient, proximate, adequate, foreseeable, or direct cause of the injury."[698]

431. On the burden of proof, the Claimants must establish factual and proximate causation.[699] In *UPS*, the tribunal explained that a "claimant must show […] that it has persuasive evidence of damages from the actions alleged to constitute breaches of NAFTA obligations."[700]

432. Finally on State responsibility, under NAFTA and international law, the acts which allegedly caused the claimant's loss must be attributable to the respondent State.[701] Unless a State has "effective control" over the acts of private parties, they are not attributable to the State under principles of non-responsibility in international law.[702]

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[698] **RLA-140**, *Ripinsky*, p. 135 (emphasis in original). *See also* **RLA-141**, T. Weiler, pp. 194-195.

[699] UNCITRAL Arbitration Rules (2010), Article 27(1). *See also*, **RLA-162**, M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer Law International, 1996), p. 222: ("As a general principle, however, it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute."); **RLA-163**, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, 2008), pp. 105-106 ("The injured claimant, therefore, has the burden of demonstrating that the claimed quantum flowed from that conduct.")

[700] **CLA-053**, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, May 24, 2007 ("*UPS* – Award"), ¶ 38 (emphasis added).

[701] **RLA-040**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with Commentaries ("ILC Articles"), Article 2 ("There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of that State". **RLA-147**, *Gustav FW Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010 ("*Gustav* – Award"), ¶¶ 171-180. *See also*, NAFTA Article 1101(1) ("Scope and Coverage. 1. This Chapter applies to measures adopted or maintained by a Party […]") (emphasis added).

[702] **RLA-040**, ILC Articles, Article 8: ("Conduct directed or controlled by a State. The conduct of a person or group of persons shall be considered an act of a State in international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct."). *See* **RLA-164**, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Judgment, 27 June 1986, ¶ 115: (describing the test of effective control in international law); **RL-165**, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment, 26 February 2007, ¶ 400: (instructions from the State must have been given "in respect of each operation in which the alleged violations occurred"); **RLA-147**, *Gustav - Award*, ¶ 179: ("The jurisprudence of the ICJ sets a very demanding threshold in attributing the act of a private entity to a State, as it requires both general control of the State over the entity, and specific control of the State over the particular act in question. This is known as the 'effective control test'").

2. Quantification of the Alleged Damages Must be Reasonable, Not Speculative

433. Once a claimant has established a NAFTA breach that factually and proximately caused alleged losses for which the respondent bears responsibility, the claimant must prove the appropriate compensation for that injury.[703] The test according to the *Rompetrol* tribunal is: "what does the [compensation] method set out to measure, and does it do so with sufficient accuracy and reliability?"[704]

434. It is inappropriate to award compensation for inherently speculative claims.[705] As the tribunal in *S.D. Myers* noted, a claimant must establish that the sums in question are "neither speculative nor too remote", and a tribunal should approach the task "both realistically and rationally."[706] Commentaries to the ILC Articles make clear that future lost profits are to be compensated only where an anticipated income stream amounts to a "legally protected interest of sufficient certainty."[707]

435. When an enterprise is not a going-concern, claims for lost future profits are too remote or speculative. The tribunal in *Metalclad* held, "where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value."[708] In *Siemens,* the business was not a going-concern, so the tribunal awarded only sunk costs, despite the existence of a contract for

[703] **RLA-145**, *Casado – Award*, ¶ 217.

[704] **RLA-166**, *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013 ("*Rompetrol – Award*"), ¶ 287.

[705] **RLA-040**, Commentary on the ILC Articles, Art 36(27), pp. 259-260; **RLA-167**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007, ¶ 51.

[706] **RLA-139**, *S.D. Myers – Second Partial Award*, ¶ 173.

[707] **RLA-040** Commentary on the ILC Articles, Article 36, Commentary (27).

[708] **CLA-073**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB (AF)/97/1) Award, 30 August 2000 ("*Metalclad – Award*"), ¶ 120 (emphasis added). The investor in that case had purchased, permitted, financed and constructed a waste disposal facility before Mexico thwarted its operation through an ecological decree. Nevertheless, the tribunal ruled that since the landfill was never operational, the "fair market value is best arrived at […] by reference to Metalclad's actual investment in the project." *See* **CLA-073**, *Metalclad – Award*, ¶¶ 121-122.

services.[709] In *Vivendi*, the tribunal denied the claimants' lost profits claims and awarded costs based on investment value because the enterprise was not a going-concern and had never turned a profit.[710]

C. The Claimants Failed to Identify a Realistic "But-For" Scenario or Prove that the Alberta Court Decisions Factually or Proximately Caused the Alleged Damages

436. The only measure challenged in this arbitration is the Alberta Court Decisions. The Claimants allege that the Alberta Court Decisions destroyed GSI's business by confirming that the Regulatory Regime permitted the Boards to lawfully disclose for copying GSI's seismic materials after the confidentiality period expired. The Claimants argue that the fair market value of GSI's business that was destroyed by the Decisions was between [redacted] and [redacted]

437. However, the Claimants have failed to specify how the Alberta Court Decisions factually or proximately caused the alleged losses. The Alberta Court Decisions may have made GSI's copyright infringement claims related to the Disclosed Seismic Materials untenable. Yet that does not mean that absent the Decisions, GSI would have earned the alleged lost licensing revenue or recovered amounts billed in the [redacted] listed in Exhibit C-112.[711] The Claimants provide no litigation risk analysis and fail to establish that but-for the Alberta Court Decisions, GSI would have succeeded in all of its domestic litigation claims for copyright infringement; the Claimants also do not explain how the contractual claims were affected by the challenged measure and, as discussed in the next section, why Canada should be responsible for these losses.[712]

438. For example, as explained above, the Claimants filed no evidence of the specific seismic materials accessed from the Boards, the timing of such access or evidence that such material was

[709] **RLA-148**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Award, 6 February 2007, ¶¶ 362-389.

[710] **RLA-149**, *Compania de Aguas def Aconquija SA. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007 ("*Vivendi – Award*"), ¶¶ 8.3.5-8.3.11.

[711] **CER-02**, Sharp Report ¶¶ 92-96.

[712] As Brattle notes, Mr. Sharp fails to value GSI's intellectual property damages claims against defendants in the "Domestic Actions". **RER-04**, Brattle Report, ¶¶ 16, 47-50. The standard method for such valuations considers the path of litigation, the probability of winning damages, the amount of damages awarded contingent on success and the costs associated with the litigation.

copyright-protected. Just as this failure to particularize their claim rendered the Claimants' merits claims unviable, it also leaves their entire damages claim unproven.

439. Second, many of the seismic materials were accessed by the public well before the Alberta Court Decisions (and even before NAFTA came into force in 1994) and any copyright infringement claims related to access to GSI's seismic materials may fall outside the three-year limitation period under Section 43 of Canada's *Copyright Act*,[713] and other applicable limitation periods. The Claimants filed no evidence to establish that GSI could overcome these domestic time limitation periods. Indeed, GSI's claims against Encana, Total and others were found to be time-barred by domestic courts.[714]

440. Third, the Claimants cannot establish that GSI's domestic claims would have been successful given the availability of defences in the *Copyright Act*, such as fair dealing or other defences available under domestic law. Consequently, the Claimants' domestic litigation claims had merely speculative prospects of success.

441. Fourth, the Claimants do not establish that if GSI's domestic claims were successful (which they have not proven), GSI would have been awarded damages in the amount claimed. In particular, Disclosed Seismic Materials only contain a subset of the seismic materials that GSI offers to customers for licencing at the list prices. As explained by Mr. Uffen, "the material released by the Boards ***is not*** the same as what remains in the exclusive possession of the company"[715] and was being licenced by GSI to customers.

442. Instead of valuating the litigation claims in the absence of the Alberta Court Decisions, the Claimants' damages claim is based on counterfactual assumptions unrelated to the alleged breaches.[716] As Brattle explains, these include the assumptions that: (1) the Disclosed Seismic

[713] *See* **RER-01**, Sookman Report, ¶ 152.

[714] *See e.g.*, **R-484**, *GSI v. Total*, 2020 ABQB 730, Decision, 25 November 2020, ¶ 57 (dismissing claim in part for limitations period); **R-381**, *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, ¶ 35 (section 3(1)(a) of the *Limitations Act* was a complete defence to GSI's Accessed Data claim).

[715] **RER-03**, Uffen Report, ¶ 40 (original emphasis).

[716] **RER-04**, Brattle Report, ¶ 51.

Materials would have never been made publicly available; (2) GSI would have retained the customer goodwill it destroyed by suing customers; (3) GSI would have invested successfully in new seismic data acquisition to build its library; and (4) GSI's customers would have paid all invoices sent to them by GSI for a variety of alleged licence violations.[717] The damages claim also wrongly assumes that entities accessing material available for free through the Boards would instead have licenced these materials from GSI, generating licence fees in excess of the list price.[718] Yet none of these assumptions reflects the forward-looking impact from the Alberta Court Decisions.

443. The Claimants have not proven a factual or proximate causal link between the specific alleged breach and the specific alleged losses as required under international law. Their damages claim should be dismissed on causation alone.

D. The Claimants Seek Compensation for Alleged Contract Breaches on Which the Alberta Court Decisions Had No Bearing and for which Canada Bears No Responsibility

444. The Claimants also fail to establish that Canada bears State responsibility under international law for many of the alleged damages, which concern the conduct of third parties and did not result from the Alberta Court Decisions. The Claimants' damages claim include unpaid invoices covering transfer fees and exploration group licensing and equalization fees.[719] Yet the Claimants cannot establish how the Alberta Court Decisions caused these alleged losses and hence why Canada is responsible for them. The Alberta Court Decisions specifically did not make any findings on contractual claims.[720]

445. GSI continued both before and after the Claimants' NOA to pursue contractual claims against its licensees.[721] While some of its claims were unsuccessful, the Alberta Court Decisions did not cause GSI to lose them. GSI's contractual claims were determined on their own terms, not by the

[717] **RER-04**, Brattle Report, ¶ 17.

[718] **RER-04**, Brattle Report, ¶¶ 23, 72.

[719] **RER-04**, Brattle Report, ¶ 80.

[720] **R-001**, *GSI v. Encana*, 2016 ABQB 230, ¶ 4.

[721] *See e.g.*, **R-485,** *GSI v Plains Midstream*, Decision, 2021 ABQB 359; **BR-17** *Geophysical Service Incorporated v. Plains Midstream et al.*, Judgment, 2022 ABKB 72; **R-011**, *GSI v. Total*, Judgment, 2020 ABQB 730.

challenged measure. For example, GSI's claims against Murphy Oil Corporation and Encana – for exploration group licencing fees, which were not determined by the Alberta Court Decisions – were dismissed in 2019 on the basis of the licencing agreement.[722] Despite this dismissal on grounds unrelated to the alleged NAFTA breach, GSI calculates its damages under the assumption that it had the right to collect amounts from the allegedly unpaid invoices of [redacted] (Murphy), and [redacted] (Encana) for exploration group equalizations in this claim against Canada.[723]

446. Moreover, in a request of shocking audacity, the Claimants include in their NAFTA damages claim more than [redacted] of allegedly unpaid invoices that arise from contractual claims over GSI's seismic data in the Falkland Islands.[724] The Claimants do not even allege that any of the defendant companies accessed GSI's foreign seismic material from, or submitted such data to, the Boards.[725]

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[722] *See e.g.*, **R-378**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd.*, 2017 ABQB 464, ¶¶ 25-28, 30-32, 76; **R-379**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd.*, 2018 ABCA 380, ¶¶ 45-48; **R-444**, *Geophysical Service Incorporated v. Encana Corporation*, 2017 ABQB 466, Judgment, July 26, 2017 ¶ 96; **R-381**, *Geophysical Service Incorporated v. Encana Corporation*, 2018 ABCA 384, Judgment, 11 November 2018 ¶ 65; **R-401**, *Geophysical Service Incorporated v. Murphy Oil Company Ltd. and Encana Corporation*, Judgment No. 38486, May 23, 2019; **BR-17**, *Geophysical Service Incorporated v. Plains Midstream et al.*, 2022 ABKB 722, ¶¶ 43, 58, 74.

[723] **C-112**, entry for Murphy Oil Company, Encana Corporation and Plains Midstream. *See also* **R-014**, Letter from M. Lemmens to M. Luz, 15 July 2019.

[724] [redacted]

[725] **C-112**, [redacted] *See* **R-487**, *GSI v. Edison S.P.A. and Edison International S.P.A.*, ABQB File No. 1301 09664, Statement of Claim, 13 August 2013, ¶¶ 30 ("In respect to this wrongful conduct, Edison is liable to GSI for, and GSI therefore seeks from Edison, damages in the amount of $6,129,587.25, or more to be determined at trial, equal to 150% of the total of GSI's current license."), ¶ 35(d). [redacted] **BR-19**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited and Rockhopper Exploration PLC*, 2019 ABQB 162, Judgment, ¶ 105. GSI's claims were dismissed because the alleged transfer and exploration group licensing fees were not payable under GSI's licence agreement with FOGL, Rockhopper, Edison and Noble, as well as being barred by the statute of limitations. **BR-19**, *Geophysical Service Incorporated v. Falkland Oil and Gas Limited and Rockhopper Exploration PLC*, 2019 ABQB 162, Judgment, 7 March 2019, ¶¶ 55-56,74, 77, 90, 112-113, 115-116.

E. The Claimants Failed to Reasonably Quantify the Alleged Damages

447. The Claimants' damages claim also fails because it does not reasonably quantify the alleged damages. The Claimants rely on the Sharp Report for quantification. Brattle demonstrates the flaws in the Sharp Report showing Mr. Sharp's valuations are not meaningful and cannot be used to estimate damages. These flaws concern the Sharp Report's approach and substance.

448. On the approach, Mr. Sharp relies almost entirely on assumptions from Mr. Paul Einarsson and the Claimants' counsel.[726] Several of these assumptions are entirely implausible.[727] Mr. Sharp bypasses the responsibility to test the assumptions given to him with a caveat: "[f]or the purposes of this Report, we have assumed these assumptions to be reasonable." [728]

449. This does not offer a reliable basis for the Tribunal to assess the Claimants' alleged damages. While it is standard for valuation experts to rely on certain assumptions, accepting assumptions that are unreasonable on their face without further inquiry undermines Mr. Sharp's independence and credibility.

450. Based on the Claimants' unreasonable assumptions, Mr. Sharp's assumed revenues and expenses lead to demonstrably excessive profit margins.[729] Brattle observes that the implied GSI margins are far higher than those of all comparable companies for 2017 except for one, Pulse Seismic, Inc. ("Pulse").[730] Mr. Paul Einarsson instructed Mr. Sharp to treat Pulse as the best comparable. Yet Pulse is plainly not the best comparator: Pulse is not even an offshore seismic data company, which is GSI's primary business.[731] Brattle also shows how Mr. Sharp assumed GSI's long-term profit margin based on an anomalously profitable year of Pulse, leading him to significantly overstate GSI's value. These assumptions render the Sharp Report unreliable.[732]

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[726] *See e.g.*, **C-113**, Email, Matti Lemmens, BLG, to Mike Dutka, PWC, 23 September 2022.

[727] **RER-04**, Brattle Report, ¶ 14.

[728] **CER-02**, Sharp Report, ¶ 30 (emphasis added).

[729] **RER-04**, Brattle Report, ¶ 26.

[730] **RER-04**, Brattle Report, ¶ 26.

[731] **RER-03**, Uffen Report, ¶ 83; **RER-04**, Brattle Report, ¶ 26.

[732] **RER-04**, Brattle Report, ¶¶ 131-132.

451. Another flaw in the Sharp Report is that it is not fully transparent and cannot be audited.[733] The Claimants failed to submit sufficient evidence to establish that any of the alleged damages in fact occurred. Instead, the Sharp Report relies on alleged lost revenues and unpaid invoices that cannot be verified because no supporting documents are provided.[734]

452. On its substance, the Sharp Report is deeply flawed in many respects. Mr. Sharp does not identify the "but-for" scenario. He purports to value GSI but for "certain actions" by Canada.[735] Yet his report does not identify the "certain actions" to which he refers. As Brattle notes, this is a fundamental flaw.[736] Without specifying the actions from which liability allegedly arises under NAFTA, it is impossible to isolate the impacts of those alleged breaches on GSI. Instead, as noted above Mr. Sharp's analysis is based on an unreasonable counterfactual scenario.

453. A large portion of the damages claimed rests on the assumption that any third party who accessed GSI's Disclosed Seismic Materials through the Boards would have instead licenced GSI's data at the list price. The Sharp Report does not account for the economic reality that many of the customers that accessed GSI's Disclosed Seismic Materials through the Boards may not have been willing to licence the data from GSI at the price assumed by Mr. Sharp.[737] Additionally, some of the GSI Disclosed Seismic Materials may have had limited commercial value because they cover areas where hydrocarbon exploration and production prospects are limited or prohibited by law (e.g., Labrador and the Arctic).[738] Much of the GSI seismic material accessed through the Boards was beyond the age where it would be expected to generate material revenue, while some of its competitors' data was higher quality.[739] Furthermore, some companies may have accessed GSI's seismic materials through the Boards because it was free; they may have not done so if they had been

[733] **RER-04**, Brattle Report, ¶ 15.

[734] **RER-04**, Brattle Report, ¶ 13.

[735] **CER-02**, Sharp Report, p. 5.

[736] **RER-04**, Brattle Report, ¶ 13.

[737] **RER-04**, Brattle Report, ¶ 23.

[738] *See* paragraph 331 above; **RER-02**, Hobbs Expert Report, ¶ 108; **RER-03**, Uffen Report, ¶¶ 54-55; **RER-04**, Brattle Report, ¶¶ 23(a), 191.

[739] **RER-04**, Brattle Report, ¶¶ 23(e), 41, 193; **RER-02**, Hobbs Expert Report, ¶ 105.

required to purchase a licence from GSI.[740] Despite this, Mr. Sharp's analysis assumes that these companies would have licenced GSI's data at the list price. He then assumes that each access would have generated revenue that was a multiple of that list price because of assumed exploration group sharing or mergers and acquisitions in the oil and gas sector. These assumptions are unreasonable.

454. The Sharp Report is also flawed because it wrongly relies on allegedly unpaid invoices (totaling more than [redacted] Mr. Sharp was instructed to assume that the invoices exist and that they are reasonable. Yet the amounts of these invoices for a company the size of GSI is simply implausible.

455. Finally, and importantly, the Sharp Report also fails to take into account that, as a matter of factual and legal causation, the Alberta Court Decisions did not cause GSI to have nil value. As addressed above, GSI's business failed almost a decade before the Alberta Court Decisions because of GSI's own risky business decisions, poor financial management, inability to adapt to technological change and difficulties resulting from the global economic slowdown. By 2008, virtually all of the 27 non-exclusive surveys that GSI collected in the 1990s and 2000s were still covered by the 10- or 15-year confidentiality period under the Regulatory Regime.[741] This was GSI's best window of opportunity to licence its seismic data for a profit. Instead, it chose to destroy its reputation and relationships by suing its own customers for accessing Disclosed Seismic Materials. The Alberta Court Decisions had nothing to do with GSI's failure.

456. As described above, the Claimants are responsible for GSI's poor commercial performance. Highly leveraged and paying excessive bonuses and compensation,[742] GSI made ill-timed investments (e.g., USD$20 million on ship repairs and upgrades in late 2007 and 2008[743]) and suffered losses on its 2005 Falkland Islands survey. GSI's auditors also warned in 2008 that its status

[740] **RER-04**, Brattle Report, ¶ 72; **RER-02**, Hobbs Expert Report, ¶ 105.

[741] **RWS-02**, Bennett Witness Statement ¶ 30; **RWS-03**, Makrides Witness Statement ¶ 36; **RWS-01**, Dixit Witness Statement, ¶¶ 37-38.

[742] **RER-04**, Brattle Report, ¶ 33; **CER-02**, Sharp Report, Schedule D1. [redacted]

[743] GSI's NOI, ¶ 99.

as a going-concern was in danger because of "continuing weak demand for energy services" and "current poor market conditions."[744]

457. Likely as a result of its financial difficulties, by 2009 GSI had ceased its seismic data collection activities in Canada, well before the Alberta Court Decisions.[745] This failure to acquire new data had a direct effect on GSI's ability to generate future revenue.[746] As Brattle notes:

> In the seismic industry, investment in data acquisition generates revenue. As explained by Mr. Hobbs, the revenue captured from investments in seismic data accrue largely in a short period following the data collection. For example, public seismic data companies generally amortize their investments in multi-client seismic data acquisition over a period of 4 years, to match the typical revenue profile of multi-client studies.
>
> Indeed, Mr. Sharp found *that most GSI revenue was the result of data acquisition investments made within the year*. Thus, future revenue does not come primarily from seismic studies conducted more than 4 years prior, let alone from ones made 10 or 15 years previously that has become subject to disclosure. Rather, revenue comes from recent studies that are created by new investment.[747]

458. Mr. Sharp's damages quantification ignores this and inexplicably assumes in his counterfactual scenario that GSI would have invested in data acquisition that would generate continued revenues up to the valuation date. The Claimants offer no evidence to support this assumption. GSI's failure to invest in new data after 2009 cannot have been caused by the Alberta Court Decisions in 2017. In reality, GSI was no longer a going-concern by 2012 (and possibly earlier).[748] It had laid off over 90% of its staff and shifted its primary business to litigation.[749] The Claimants could have made different

[744] **C-109**, Financial statements of GSI, p. 205 (emphasis added).

[745] **BR-4**: *Geophysical Service Incorporated v. Encana Corporation*, 2015 ABQB 196, dated 19 March 2015, ¶ 8. *See also* **BR-5**: *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 49, dated 22 January 2016, ¶ 40, **RER-04**, Brattle Report, ¶ 25.

[746] **RER-04**, Brattle Report, ¶ 32.

[747] **RER-04**, Brattle Report, ¶¶ 104-105 (italics in original).

[748] **RER-04**, Brattle Report, ¶¶ 3, 32-35.

[749] **BR-4**: *Geophysical Service Incorporated v. Encana Corporation*, 2015 ABQB 196, dated 19 March 2015, ¶ 8. *See also* **BR-5**: *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 49, 22 January 2016, ¶ 40; **RER-04**, Brattle Report, ¶¶ 25, 32.

business decisions that might have led to a different outcome. They did not, and this has nothing to do with the Alberta Court Decisions.

459. In fact, GSI's competitors such as PGS and TGS were subject to the same Regulatory Regime in Canada and other jurisdictions with confidentiality periods of similar length, and yet were successful.[750] As Brattle notes, this suggests that it is incorrect to attribute GSI's failure entirely to the Alberta Court Decisions' interpretation of the Regulatory Regime.[751]

460. Due to diverse reasons unrelated to the challenged measures, the value of GSI as an ongoing enterprise (i.e., a going-concern) was nil starting many years prior to the alleged date of expropriation of November 30, 2017. Since a full accounting of the Claimants' alleged damages is impossible and their damages claim relies on implausible assumptions, it should be rejected.

F. If Any Compensation Is Owed to the Claimants, it Must be Less than the Residual Value of GSI's Seismic Data Library at the Valuation Date

461. Since GSI was no longer a going-concern years before the alleged breaches, it should not be valued as such.[752] As Brattle explains, when an entity has no realistic possibility of continuing to operate, as was the case for GSI well before 30 November 2017, accounting guidance shifts toward analyzing the business on a liquidation basis.[753] Thus, the "but-for" value of GSI is a function of the proceeds that could be received from a liquidation of GSI's business on 30 November 2017, which requires a determination of the value of GSI's seismic data library to a willing buyer.[754]

462. However, the Claimants have not provided an estimate of the value of its offshore seismic data library as of the valuation date. They provided no evidence that GSI has ever received an independent

[750] The confidentiality period in Canada is 10-15 years, similar to that of Australia, Brazil, Norway, and the U.K. *See* **RER-02**, Hobbs Expert Report, ¶ [76(4)]. TGS and PGS continue to operate in some of these countries. *See* **BR-35**: S&P Capital IQ, PGS ASA Company Tearsheet Report; and **BR-36**: S&P Capital IQ, TGS ASA Company Termsheet.

[751] **RER-04**, Brattle Report, ¶ 36.

[752] **RER-04**, Brattle Report ¶¶ 31, 37.

[753] **RER-04**, Brattle Report ¶ 37.

[754] As Brattle notes, GSI had a negative liquidation value before considering the value of its seismic data library. **RER-04**, Brattle Report, ¶ 187.

appraisal of its seismic data library.[755] Nor have the Claimants provided evidence that would allow an independent valuation to be conducted, including such factors as whether GSI's library has been properly maintained physically.[756] Thus, the information available is not sufficient to perform an independent valuation of GSI on a liquidation basis immediately before the alleged breaches on 30 November 2017.

463. The Uffen Report explains the methodology that would be undertaken to conduct a valuation of GSI's seismic library. It would first involve a physical inspection of GSI's storage facility to verify the integrity of the data. Given that a significant portion of the library is reaching half-a-century old, the physical usability of the data would have to be ascertained.[757] Thereafter, a number of factors would have to be taken into consideration, including the age (vintage) and type of data (2D or 3D), acquisition parameters (i.e., technology used to acquire the data), geographic location, the availability of competitor data either under licence or free from the Boards and past sales.[758] All of these factors would be relevant to reaching an assessment of what GSI's library could be sold to a willing buyer in an arms-length transaction. However, based on the information available concerning GSI's seismic data library, Brattle anticipates that its fair market value at the time of the valuation date was relatively limited, including due to its age.[759]

464. In conclusion, the Claimants failed to meet their burden to prove the alleged damages claimed. The Claimants did not establish a realistic "but-for" scenario proving that the Alberta Court Decisions were the factual or proximate cause of their alleged damages under international law. Additionally,

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[755] **CER-02**, Sharp Report, ¶ 5: ("We also considered an asset-based approach, which would consider, as part of it, a standalone value analysis for GSI's seismic data collection. Our research did not yield sufficient independent data points in order to facilitate a robust analysis and accordingly, this analysis has not been included in this Report.").

[756] **RER-04**, Brattle Report, ¶ 40.

[757] **RER-03**, Uffen Report, ¶¶ 51-52.

[758] **RER-03**, Uffen Report, ¶¶ 53-83. In the event that the Claimants put forward an independent valuation of GSI's seismic data library at a later stage of this arbitration, Canada reserves the right to request the appraisal of GSI's seismic data library (including a physical inspection of its seismic materials) in order to concretely ascertain that Claimants' remaining assets.

[759] **RER-04**, Brattle Report ¶¶ 40, 41. Canadian courts concluded in 2015 that "[g]iven these decisions [confirming that GSI's seismic materials were properly releasable into the public domain by the Boards] and the age of the seismic data, it would be difficult to sell through execution proceedings and is of little value." *See* **BR-4**: *Geophysical Service Incorporated v. Encana Corporation*, 2015 ABQB 196, 19 March 2015, ¶ 18.

the Claimants seek to recover damages against Canada for alleged losses arising from the conduct of third parties, which do not relate to the Alberta Court Decisions and for which Canada bears no responsibility. Moreover, the Claimants' attempt to quantify their alleged losses is riddled with flaws that render it unreliable. Thus, even if Canada were found liable for the alleged NAFTA breaches (which it is not), the Claimants are not entitled to any damages.

G. The Claimants Have No Standing Under NAFTA Article 1116(1) to Claim Damages For Indirect or Reflective Loss

465. In the final section of the Memorial for "relief sought", the Claimants seek damages for GSI under Article 1117 or "in the alternative" for the three Einarsson Claimants under Article 1116.[760] Articles 1116(1) and 1117(1) govern a claimant's standing to bring a claim and set limitations on damages for such claims. The Claimants allege the Einarssons have standing under Article 1116(1) because due to the alleged breaches: (a) the value of GSI shares diminished and GSI paid fewer dividends; (b) GSI did not repay certain loans; and (c) GSI did not make payments under certain remuneration contracts.[761] Canada explains in this section that (1) Article 1116(1) does not permit claims of indirect or reflective loss; and (2) the Einarssons' claims solely concern indirect losses deriving from alleged interference with GSI's rights. Thus, the Einarssons lack standing for their claims under Article 1116(1), and the Tribunal cannot award them damages personally.

1. Article 1116(1) Does Not Permit Claims of Indirect or Reflective Loss

466. Articles 1116(1) and 1117(1) are strictly separate standing provisions that address discrete, non-overlapping types of injury.[762] Article 1116(1) permits an investor to file a claim "on its own behalf" alleging "that the investor has incurred loss or damage". Article 1117(1) permits an investor to file a claim "on behalf of an enterprise" of another Party that the investor owns or controls alleging "that the enterprise has incurred loss or damage". Read together, the plain meaning of these provisions is that where the investor seeks to recover damages for alleged losses that it incurred directly from the challenged measure, it may bring a claim under Article 1116(1). Direct losses to a

[760] Memorial, ¶ 498(b), (c), and (d).

[761] Memorial, ¶ 251. *See also* ¶¶ 243, 245, 248, 249, 274, 277.

[762] *See* **RLA-017**, U.S. Statement of Administrative Action.

shareholder, creditor or employee may arise where the challenged measure interfered with their rights to dividends, loan repayment or remuneration. By contrast, where the investor seeks to recover damages for alleged losses that it incurred indirectly, it may bring a claim under Article 1117(1) only, with any damages paid to the enterprise under Article 1135(2)(b). Indirect losses may arise where the investor alleges that interference with the enterprises' rights led to economic effects such as a diminution in share value, unpaid debts or unmet remuneration.

467. Article 1116(1) contains no language granting a shareholder, creditor or employee standing to personally recover compensation for harm to the enterprise's rights or assets that led indirectly to economic effects for the investor. The context confirms that Article 1116(1) does not grant standing to claim such reflective losses. Permitting these claims would render Article 1117(1) ineffective by eliminating the strict distinction from Article 1116(1).[763] It would also undermine NAFTA's objectives to ensure a predictable commercial framework and investor protection.[764] Advanced domestic legal systems prohibit claims of reflective loss to maintain the corporation's separate legal personality.[765] Allowing shareholders to personally recover damages under NAFTA for the enterprise's losses would create a contradictory commercial framework, and undermine investor protection by reducing the assets available to creditors and non-claimant shareholders.

468. Customary international law upholds the general rule against reflective loss and the corporation's separate legal personality.[766] Nothing in the text of Article 1116(1) indicates that the NAFTA Parties intended to derogate from customary international law here.[767] Instead, the long-

[763] **RLA-150**, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, I.C.J. Reports 1994, ¶ 51.

[764] NAFTA Preamble. *See also* NAFTA Article 102: Objectives.

[765] *See e.g*. **R-488** *Meditrust HealthCare Inc. v. Shoppers Drug Mart*, 61 O.R. (3d) 786 (Ont. Ct. App. 2002), ¶¶ 12-14. **R-489**, *Hometown Financial, Inc. v. United States*, 56 Fed. Cl. 477, 486 (2003), p. 12. **RLA-151**, David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, OECD Working Papers on International Investment, No. 2013/03, OECD Investment Division ("Gaukrodger, 2013), pp. 8, 15-17.

[766] **RLA-045** *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970, ¶ 38. **RLA-152**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (I.C.J. Reports 2010) Judgment, 30 November 2010, ¶ 105. Zachary Douglas, The International Laws of Investment Claims (2009), ¶ 768.

[767] It is well recognized that "[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so." **RLA-023**, *Loewen Group Inc. v. United States* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 160.

standing and consistent understanding of the NAFTA Parties on Articles 1116(1) and 1117(1) establishes subsequent agreement and practice to properly interpret these standing provisions.[768] Under *VCLT* Article 31(3)(a) and (b), the Tribunal must take into account the NAFTA Parties' common understanding, and should give it considerable weight in interpreting Article 1116(1).[769]

469. The NAFTA cases cited by the Claimants do not support a rule that Article 1116(1) allows claims for reflective loss.[770] In *Mondev*, the tribunal urged tribunals to "be careful not to allow any recovery, in a claim that should have been brought under Article 1117(1), to be paid directly to the investor."[771] In *GAMI*, the tribunal in its merits analysis warned of many complications arising if shareholders are permitted to raise reflective loss claims under Article 1116(1) – warnings that were not confined to the case. The tribunal cautioned that allowing minority shareholders to make claims for reflective loss created insoluble challenges concerning quantification, double recovery, inconsistent decisions and judicial economy.[772] Recently in *Bilcon*, the tribunal accepted the

[768] *See, e.g.*, **RLA-153**, *S.D. Myers, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 6-10 (Sept. 18, 2001); **RLA-154**, *Pope & Talbot, Inc. v. Government of Canada*, NAFTA/UNCITRAL, Seventh Submission of the United States of America ¶¶ 2-10 (Nov. 6, 2001); **RLA-155**, *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 2-18 (June 30, 2003). *GAMI – Statement of Defence*, p. 59 n.158. **RLA-156**, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-9 (May 21, 2004).

[769] *See e.g.*, **CLA-061**, *Bilcon – Award on Damages*, ¶ 379.

[770] Neither the *Pope & Talbot* nor *UPS* tribunals adopt such a broad rule; they were early NAFTA decisions that express case-specific determinations. *See* **CLA-060**, *Pope & Talbot – Award in Respect of Damages*, ¶ 80; **CLA-053**, *UPS – Award*, ¶¶ 32-35. The *Pope & Talbot* tribunal awarded damages only for losses suffered directly by the investor, not by the enterprise. Cases under treaties that do not contain a separate standing provision comparable to Articles 1116(1) and 1117(1) do not offer useful guidance here. *See e.g.* **CLA-062**, *Camuzzi International S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/2) Decision on Objection to Jurisdiction, 11 May 2005, ¶ 64; **CLA-064**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 48; **CLA-065**, *Telefónica S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/20) Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, ¶ 77; **CLA-066**, *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9) Decision on Jurisdiction, 22 February 2006, ¶ 80. *See* **RLA-157**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Correction and Interpretation of the Award, 13 June 2003, ¶¶ 12-13 (revising the award to comply with the requirement of Article 1135(2) that damages under Article 1117 be paid to the enterprise).

[771] **CLA-054**, *Mondev* – Award, ¶ 86.

[772] **CLA-058**, *GAMI Investments Inc. v. Mexico* (UNCITRAL) Final Award, 15 November 2004 ("*GAMI – Final Award*"), ¶¶ 33, 37-42, 115-121, 137. The *GAMI* tribunal took a strict stance in defining the substantive rights that a minority shareholder, who did not own or control the company, could assert. The tribunal refused to consider acts taken towards GAM because, by definition, they were acts taken against the enterprise – not the claimant shareholder. The tribunal rejected GAMI's argument that treatment of GAM's mills rendered GAMI's shares worthless.

"consistent practice of the NAFTA Parties" and confirmed, "Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116".[773]

2. The Einarssons Have No Standing for Their Claims Under Article 1116(1)

470. The Claimants argue Article 1116(1) merely requires the Einarssons to "claim" they suffered loss from the alleged breaches.[774] This is incorrect: the Claimants bear the burden to substantiate all elements of their claim, including on jurisdiction (here, standing) and damages. Moreover, how the Claimants characterize their alleged loss or damage does not determine whether the alleged injury is direct or indirect. What is determinative is whether the allegedly infringed right belongs to the enterprise on the one hand, or the shareholder, creditor or employee on the other.

471. The Claimants say that the Einarssons are not making claims for reflective losses, and that they incurred loss "due to the diminution of specific rights under their shares, their Loans and their lost employment remuneration".[775] Yet the Claimants neither cite nor prove any changes to the Einarssons' rights. They do not allege that the Alberta Court Decisions directly interfered with the shareholders' right to receive dividends, vote or sell shares; the creditors' right to repayment; or the contractual right to remuneration. The Einarssons retained all of their respective shareholder, creditor and employment rights. The alleged inability of GSI to pay dividends, repay loans or satisfy remuneration contracts is an alleged economic effect that did not change the Einarssons' rights.

472. Each of the Einarssons' alleged losses are at most an indirect result of the Alberta Court Decisions' alleged interference with GSI's rights and assets. The Claimants allege the Alberta Court Decisions "confiscated GSI's assets, its intellectual property rights in the Seismic Works, and frustrated its ability to pay dividends to Paul and Davey by destroying its business."[776] GSI's assets, intellectual property rights and business are the rights of GSI the enterprise – not of its owners, creditors or employees. The Claimants effectively concede their alleged losses are indirect: "[t]he

[773] **CLA-061**, *Bilcon – Award on Damages*, ¶¶ 379, 389.

[774] Memorial, ¶¶ 250, 272.

[775] Memorial, ¶¶ 270, 286.

[776] Memorial, ¶ 279. *See also*, ¶¶ 377, 381, 382, 386, 389, 390, 440, 456, 473.

destruction of GSI's business in turn impacted the value of the Einarssons' investments in GSI."[777] Thus, the challenged measures interfered with GSI's rights alone (allegedly), and merely led indirectly to a reduction in share value, dividends, loan value, loan repayments or contract payments (allegedly).[778]

473. Article 1116(1) does not grant standing for the Einarssons to overturn the corporate form and recover damages personally for their alleged losses. Article 1117(1) is the only provision in Chapter Eleven that may grant standing to claim an alleged breach of an obligation owed to, and loss incurred by, GSI. The Tribunal has no jurisdiction to consider the Einarssons' claims under Article 1116(1), nor to award damages to the Einarssons personally, including "in the alternative".

H. Harold Paul Einarsson Has No Standing to Claim Damages Because He was Not an "Investor of a Party" at the Time of the Alleged Losses

1. NAFTA Articles 1116 and 1117 Do Not Permit an Investor of a Party to Bring a Claim Against its State of Dominant and Effective Nationality

474. NAFTA Articles 1116 and 1117 state that "an investor of a Party […] may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A […]" (emphasis added). Both standing provisions rely on the concepts of an "investor of a Party" bringing a claim against "another Party". The term "another" makes clear that a claim can only be made by an investor of one Party against a different Party.[779] Accordingly, a claimant under NAFTA Chapter Eleven must have diversity of nationality to bring a claim (i.e. it generally cannot claim against its state of nationality). This is consistent with the position of the NAFTA Parties,[780] decisions of

[777] Memorial, ¶ 286.

[778] **RER-04**, Brattle Report, ¶ 207: ("GSI could repay at least some of these loans despite the alleged breaches.").

[779] *See also*, NAFTA Article 1101(1) (Scope and Coverage): "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; (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party." (emphasis added.)

[780] The three NAFTA Parties have consistently argued that the international legal principle of non-responsibility applies to NAFTA Chapter 11 and that for dual nationals, a claimant cannot make a claim against his or her state of dominant and effective nationality. *See e.g.* **R-432**, *Alicia Grace and others v. United Mexican States* (ICSID Case No. UNCT/18/4) ("*Alicia Grace*") Submission of the United States, ¶¶ 3-8; **R-940**, *Alicia Grace*, Submission of Canada**,** ¶¶ 4-13; **RLA-160**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Counter-Memorial on Preliminary Questions, 8 September 2000, ¶¶ 13, 16-34, 57-83.

NAFTA tribunals[781] and the well-established principle of international law that an individual or entity generally cannot maintain an international claim against its own State (i.e. the rule of non-responsibility).[782]

475. NAFTA Chapter Eleven does not expressly address claims by dual nationals, where an investor simultaneously possesses the nationality of the home State and the host State. Yet, there is no presumption that NAFTA establishes a *lex specialis* for claims by dual nationals or that such claims are permitted.[783] In the absence of specific language addressing claims by dual nationals, NAFTA tribunals and other investment tribunals have considered whether claims by dual nationals are allowed by referring to the concept of predominant nationality under customary international law.[784] Under this rule, a claimant is prohibited from making a claim against its State of dominant and

[781] *See also* **RLA-023**, *Loewen* – Award, ¶ 223; *See also*: **CLA-058**, *GAMI – Final Award*, ¶¶ 38, 122. Most recently, the tribunal in *Carlos Sastre* referred to the common position of all three NAFTA Parties' submissions on the applicability of dominant and effective nationality under NAFTA. The tribunal reasoned that "in a situation where all State parties to the treaty are of the same opinion regarding the interpretation and scope of one of the terms used therein, if the tribunal were to deviate from such consensus, it would need to explain the reasons for doing so." **RLA-079**, *Carlos Sastre v. Mexico*, Award, ¶ 230.

[782] **R-491**, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, Article 4; *See* **R-473**, *The Carlyle Group L.P. and others v. Kingdom of Morocco* (ICSID Case No.ARB/18/29) Submission of the United States, 4 December 2020, ¶ 6 and fn.8, with respect to the analogous provision under the U.S.-Morocco BIT (referring to: Robert Jennings & Arthur Watts, "Oppenheim's International Law, Volume I: Peace", 9th edition, London: Longman, 1992, pp. 512-513); *See also*: **R-474**, Z.R. Rode, "Notes and Comments: Dual Nationals and the Doctrine of Dominant Nationality", The American Journal of International Law (1959) pp. 139, 141.

[783] *See* **RLA-101**, *Case Concerning Elettronica Sicula SpA* (*ELSI) (United States of America v. Italy*), I.C.J. Reports 1989, Judgment, 20 July 1989, p.42, ¶ 50; **RLA-023**, *Loewen – Final Award*, ¶¶ 160, 162.

[784] Article 1131 requires that the Tribunal decide issues in dispute "in accordance with the [NAFTA] and applicable rules of international law," which include principles of customary international law. *See* **RLA-100**, *Methanex* – Final Award, Part IV, Chapter B, ¶ 29; *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB (AF)/04/1) Decision on Responsibility, 15 January 2008, ¶ 76; *Archer Daniels Midland Company et at. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5) Award, 21 November 2007 ("*Archer Daniels – Award*"), ¶ 195. Legal commentators have noted that a 'general rule' has emerged in investor-state dispute settlement, whereby tribunals apply the dominant and effective nationality rule when the treaty is silent on the issue standing of dual national claimants. *See* **RLA-094**, Campbell McLachlan, Laurence Shore and Matthew Weiniger, "International Investment Arbitration: Substantive Principles (2nd ed.)" (Kluwer Law International, May 2017) ("*McLachlan, Shore & Weiniger*") §§ 5.92, 5.89-5.96. *See also* Noah D. Rubins et.al, "Investor-State Arbitration" (OUP: 2008), p. 304. *See also* **RLA-108**, Zachary Douglas, "The International Law of Investment Claims" (Cambridge University Press, January 2010), p. 321.

effective nationality.[785] The Claimants do not dispute that the dominant and effective nationality applies in this case.[786]

476. The relevant dates on which the claimant must have the requisite diversity of nationality (i.e. not have the dominant and effective nationality of the host State), include the date of the alleged loss and the date of the submission of the claim.[787] While both dates are relevant, the date of the alleged loss is a focal point of the inquiry, since a claimant can only bring a claim under NAFTA Chapter 11 for "a measure adopted or maintained by a NAFTA Party". If the claimant's dominant and effective nationality is that of the host State at either time, the claim may not proceed.

477. Additionally, the tribunal in *Sergei Viktorovich Pugachev v. The Russian Federation* reasoned that the investor's nationality goes to both issues of standing and the substantive standards guaranteed by a treaty:

> It is well settled under international law that the foreignness of the investment is determined by the investor's nationality. If the investor wishes to have the protection of a determined treaty, it must show that it has the nationality of one of the two State parties. In this regard, the investor's nationality is relevant for at least two purposes: (i) the substantive standards guaranteed in a treaty will only apply to the respective national; and (ii) the jurisdiction of a tribunal is determined, inter alia, by a claimant's nationality.[788]

478. Therefore, to the extent that the Claimants allegedly incurred losses in Canada, they can only avail themselves of NAFTA's substantive standards when their dominant and effective nationality was not Canadian.

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[785] **CLA-048**, *Nottebohm Case* (*second phase*), I.C.J. Reports 1955, Judgment of April 6th, 6 April 1955 ("*Nottebohm Case*"), pp 22-24. **RLA-102**, *Mergé Case – Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, pp. 243-246. **CLA-049**, *Iran-United States Claims Tribunal, Case No. A/18-FT*, 5 Iran-U.S. CL. Tribunal Rep. 251 (1984-1), ¶ 51. Canada's position is that the dominant and effective nationality rule is only with respect to determining an individual's citizenship and does not apply in respect of any other immigration status. *See* **CLA-050**, *Feldman – Decision on Jurisdiction*, ¶¶ 30, 31-32; **RLA-104**, *Manuel Garcia Armas et al. v. Republic of Venezuela* (UNCITRAL) Award, 13 December 2019, ¶ 741; **RLA-105**, *Enrique Heemsen and Jorge Heemsen v. Venezuela* (PCA Case No. 2017) Decision on Jurisdiction, 29 October 2019, ¶¶ 439-440.

[786] Memorial, ¶ 173.

[787] *See* **RLA-109**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic* (UNCITRAL) Submission of the United States of America, 6 July 2018 ¶ 4.

[788] **RLA-120**, *Sergei Viktorovich Pugachev v. Russia*, Award on Jurisdiction, 18 June 2020, ¶ 398.

479. The dominant and effective nationality test is a fact-based inquiry. It considers factors such the claimant's habitual residence, personal attachments, and centre of economic, social and family life.[789] Under investment treaties, tribunals have also reasoned that circumstances surrounding the investment are relevant in determining dominant and effective nationality.[790] The Tribunal must assess the degree and magnitude of such connections (dominant)[791] and whether the connections are substantive and not merely declaratory (effective).[792] In essence, the Tribunal must determine which nationality is stronger and takes precedence over the other.[793]

2. The Dominant and Effective Nationality of Paul Einarsson was Canadian at the Time of All Relevant Actions Which Allegedly Caused Him and GSI Loss or Damage

480. The Claimants fail to demonstrate that Mr. Paul Einarsson had the requisite diversity of nationality to claim the alleged damages under NAFTA. A proper examination of the relevant facts in this case – including Mr. Paul Einarsson's habitual residence, circumstances surrounding the investment, personal attachment to a particular country, and center of economic, social and family life – demonstrates that his dominant and effective nationality was Canadian starting in 1997 when he moved with his family to Calgary until past the time of the alleged breach on November 30, 2017,

[789] **CLA-052**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Final Award, 3 September 2019 ("*Ballantine* – Award"), ¶ 588-591. *See* **CLA-048**, *Nottebohm Case*, p. 24. Some elements of this customary international law test have been applied in recent ISDS decisions. *Ballantine – Award*, ¶ 547; *David R. Aven and Others v. Republic of Costa Rica* (ICSID Case No. UNCT/15/3) Award, 18 September 2018, ("*Aven – Award*") ¶ 205.

[790] *Aven – Award*, ¶¶ 209, 211. *Ballantine* – Award, ¶ 553-554, 590. *See also* **RLA-079**, *Carlos Sastre v. Mexico* ¶ 157, 196-198. Although the tribunal found that the relevant dates for jurisdiction under the Mexico – Argentina BIT were the date of the alleged breach and the date of the claim, the tribunal nonetheless considered elements relating to the date of the investment in finding that the Claimant was domiciled in Mexico at the time of the alleged breach.

[791] **CLA-052**, *Ballantine* – Award, ¶ 538. ("['dominant'] conveyed the notion of strength and precedence of one thing over another and that closeness between an individual and a State can indicate such attributes.")

[792] **CLA-052**, *Ballantine* – Award, ¶ 539. ("We understand this concept as requiring this nationality bond to go beyond a formality with no apparent further effect, to be of substance rather than merely declaratory. An individual can possess a second nationality but this would not necessarily mean that such nationality is effective if, for instance, it has never been exercised; if the individual has never presented himself or herself as a national of that country; if he or she never visited that country; if he or she holds no personal or professional connection to that country; or if he or she has never complied with obligations or exercised rights as national of that country.")

[793] **CLA-052**, *Ballantine* – Award, ¶¶ 530, 540.

by which time GSI had long ceased to be a going concern and he already suffered his alleged loss or damage.

481. Mr. Einarsson explains he first resided in Canada between 1971 and 1975, and then moved back in 1997 with his family to work full time for GSI.[794] While Mr. Einarsson seeks to emphasize his retained connections to his U.S. citizenship after he moved to Calgary, the evidence demonstrates that his professional and family life was in Calgary as a Canadian for the purposes of the dominant and effective nationality test. Mr. Paul Einarsson concedes that he used his Canadian nationality to maintain his investment and job in Canada.[795] He consistently represented himself as a "businessman from Calgary" or "Alberta" in legal proceedings in Canada and the United States, even as recently as 2019.[796] His investment in, and employment with, GSI in Canada have been a substantial part of his life and career over the past three decades.[797] He was a Canadian national, living in Canada, and managing a Canadian company with allegedly 250 employees.[798]

482. After moving to Calgary in 1997, Mr. Paul Einarsson was engaged in issues affecting Canadian society and his local community by making political contributions to Canadian political parties and candidates;[799] being part of, and making donations to, Canadian national organizations;[800]

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[794] *See* **CWS-06**, Paul Einarsson Witness Statement, ¶¶ 33-34.

[795] **CWS-06**, Paul Einarsson Witness Statement, ¶ 71.

[796] **R-451**, *Geophysical Service Incorporated v. Anadarko* (US), File no. 4:19-mc-02426, Exhibit 2, H. Paul Einarsson Affidavit, 19 December 2019 ("'I, H. Paul Einarsson, of Alberta, SWEAR AND SAY THAT'" and signed before the Alberta Commissioner of Oaths).

[797] *See* **CLA-052**, *Ballantine* – Award, ¶ 574-577 (which ruled on similar facts.)

[798] **CWS-06**, Paul Einarsson Witness Statement, ¶ 87.

[799] **R-452**, Elections Canada, Record of Contributions for "Paul Einarsson" and "Harold Einarsson", available at www.elections.ca (Accessed: January 13, 2023); **R-453** National Post, Follow the Money, "Einarsson", available at www.nationalpost.com (Accessed January 13, 2023); **R-454**, Alberta Elections, "Einarsson", available at efpublic.elections.ab.ca (Accessed January 13, 2023). Under Canadian and Alberta election rules, donations to political candidates above a certain threshold are publically disclosed and available for examination at the websites of Elections Canada and Elections Alberta. Such public data is also distributed through the National Post newspaper's "Follow the Money – Database".

[800] **R-455**, Canadian Constitution Foundation, 2010 Annual Report, p. 6; **R-456,** Canadian Constitution Foundation, 2009 Annual Report, p. 3; **R-457,** Canadian Constitution Foundation, "2006 Annual Report", p. 5; **R-458** *See also*, Ontario Health Coalition, *Backgrounder: Canadian Constitution Foundation Challenge against Single-Tier Medicare*, May 2007, p. 3.

participating in public inquiries affecting his local community; [801] and being a member of local professional and social clubs.[802] Mr. Einarsson's wife also made political contributions in Canada[803] and was involved in issues affecting her community,[804] as well as living and working in Calgary during the relevant times. This demonstrates the depth of their social attachment to Canada.

483. Paul Einarsson publicly declared his attachment to Alberta by stating in 2014 that, "I am from Alberta and proud of it."[805] This echoed other statements he made publically being "proud…[to] represent Alberta" on the Board of the Canadian Independent Federation of Business[806] and regarding the work of the non-profit Canadian Constitutional Foundation, of which he was a donor and Board member: "The work of the CCF is so critical to our democracy in Canada to ensure constitutional issues are monitored and protected by someone, and that justice is not denied on constitutional issues for lack of resources."[807] Even his father Davey Einarsson wrote in 2015 that "my Canadian son [Paul] runs the company and lives in Alberta."[808]

484. The fact that Paul Einarsson had some investments and assets in the United States is not dispositive.[809] The Claimants did not demonstrate that these investments and assets were central to Paul Einarsson's economic life. The Claimants did not show he served in equivalent roles with an American company as an officer or a director. The fact that he continued to pay taxes in the United

[801] **R-459**, Email from Paul Einarsson to CEAA, "RE: Sprinbank Dam needs a CEAA Review", 16 May 2016 (email included in public comments to environmental review of Springbank dam in Calgary).

[802] **CWS-06**, Paul Einarsson Witness Statement, ¶ 65: (member of the Calgary Golf and Country Club and the Calgary Petroleum Club).

[803] *See* **R-460**, Elections Canada, [redacted] (Accessed: January 13, 2023); **R-453,** National Post, Follow the Money, [redacted] (Accessed January 13, 2023).

[804] **R-462,** [redacted]

[805] **R-463,** Frontier Centre for Public Policy, Blog Post by Paul Einarsson, "Canada, what happened to We Stand on Guard for Thee?", 29 January 2014, (Accessed January 12, 2023).

[806] **R-464**, GSI Website, "CFIB Recognizes Service of GSI COO and Chairman Paul Einarsson", 6 June 2013 (Accessed January 12, 2023).

[807] **R-455**, Canadian Constitution Foundation, 2010 Annual Report, p. 10.

[808] **C-126**, Davey Einarsson, *A Life of Adventure*, p. 65.

[809] **CWS-06**, Paul Einarsson Witness Statement, ¶ 58.

States is not in dispute: U.S. citizens are required to file and pay taxes in the United States regardless of where in the world they live or how long they have been abroad.[810] What matters is where the focal point of his economic and family was during the relevant times, and that was in Canada.

485. The Claimants allege that Mr. Einarsson severed ties with Canada in 2011 when he purchased a home in San Diego, where he spent winters, and travelled to Canada "with the main purpose of overseeing GSI's litigation."[811] However, recent cases on similar facts have found this argument unpersuasive. In *Michael and Lisa Ballantine v. The Dominican Republic*, the tribunal found unpersuasive the argument that the United States was the claimants' residence because they maintained at least one residence after moving to the Dominican Republic. The tribunal reasoned that this only showed that the claimants maintained connections with the United States, while residing in the Dominican Republic.[812] Likewise, the tribunal in *Carlos Sastre & al. v. The United Mexican States* was unpersuaded by the claimant's argument that he only resided in Mexico for the purposes of the legal proceedings, when he had been living there for more than a decade.[813] Similarly, the fact Paul Einarsson purchased property in California where he spent winters, or that he maintained his home in Canada for the purposes of the legal proceedings, does not negate the fact that he had been residing in Canada for nearly two decades by 2011, and continued residing in Canada after that date.

[810] *See* **R-466**, U.S. Internal Revenue Service, General FAQ (Response to Question 1: "[I]f you are a U.S. citizen or resident alien living outside the United States, your worldwide income is subject to U.S. income tax, regardless of where you live".) See also, **R-467**, U.S. Internal Revenue Service, "Tax Guide for U.S. Citizens and Resident Aliens Abroad – Publication 54", p. 2.

[811] *See* **CWS-06**, Paul Einarsson Witness Statement, ¶ 43. (emphasis added). However, the evidence on the record shows that Mr. Einarsson only sold his family home in Alberta late 2016; **C-271**, Residential Purchase Contract.

[812] **CLA-052**, *Ballantine* – Award, ¶ 563-566. See also **RLA-079**, *Carlos Sastre v. Mexico*, Award, ¶ 198 where the tribunal found unpersuasive the claimants' argument they he resided in Mexico only for the purposes of the proceedings, when other aspects of his life, such as his investment, showed he had been residing in Mexico.

[813] **RLA-079**, *Carlos Sastre v. Mexico* ¶ 198 ("Mr. Sastre arrived in Mexico in 2005 after having sold his business in Argentina, extended his resident permits, applied for and obtained the Mexican nationality, renounced his Argentine nationality, presented himself several times before different Mexican authorities, conducted business in Mexico and lived in Mexico for approximately ten years. In light of the evidence before this Tribunal, his declaration that after the alleged breaches in 2011 and 2015 he "[s]tayed in Mexico mainly to receive updates on the proceedings and administer the new hotel business", and at the end of 2015 he "[d]ecided to go back with my family to Río Cuarto, Argentina" is not persuasive.") (emphasis added)

486. Second, Mr. Einarsson states that he filed a departing tax return with Revenue Canada in 2017, but the exhibit he relies on contains only his wife's departure filling, not his own.[814] Paul Einarsson continues to be listed a GSI director with a Canadian address.[815] Even if Mr. Einarsson proves he departed from Canada by 2019, it does not establish that he has standing to bring a claim under NAFTA Chapter Eleven given the preponderance of his connections to Canada throughout all of the relevant period at issue in this dispute.

487. Overall, the evidence shows that despite holding U.S. citizenship, Paul Einarsson's dominant and effective nationality was Canadian during the time he and GSI suffered their alleged losses. Consequently, Paul Einarsson does not qualify as an "investor of [another] Party" at the relevant times and has no standing under Articles 1116(1) and 1117(1) to claim or recover any damages through this NAFTA arbitration personally or on behalf of GSI.

I. In Any Event, the Einarssons' Alleged Losses are Not Proximately Caused by the Alberta Court Decisions and are Unsubstantiated

488. As described above, the Einarssons' damages claim for unpaid loans and salaries depends entirely on their claim that the Alberta Court Decisions resulted in the alleged losses to GSI. In addition to failing to establish the Claimants' damages claim with respect to GSI, Mr. Sharp's quantification of the Einarssons' alleged losses is afflicted by the same flawed analysis. As Brattle notes in their report, the claims related to lost employment earnings and repayment of shareholder loans are deeply flawed, unreliable and unsubstantiated.[816] The Einarssons' personal claim for damages should therefore also be rejected.

[814] *See* **CWS-06**, Paul Einarsson Witness Statement, ¶ 48; Exhibit **C-272**, Joint Departing Tax Return, [redacted]

[815] **R-468**, Government of Canada, Federal Corporation Information, "Geophysical Service Incorporated", Last annual filing January 1, 2022 (Accessed January 12, 2023).

[816] **RER-04**, Brattle Report, ¶¶ 42-44, 204-214.

IX. ORDER REQUESTED

489. For the foregoing reasons, Canada respectfully requests that this Tribunal render an award dismissing the Claimants' claims in their entirety and with prejudice, ordering the Claimants, jointly and severally, to bear the costs of the arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration and granting any further relief it deems just and appropriate under the circumstances.

January 17, 2023

Respectfully submitted on behalf of Canada,

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