

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

BETWEEN:

**LONE PINE RESOURCES INC.**

**Claimant**

AND

**GOVERNMENT OF CANADA**

**Respondent**

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**RESPONSE TO AMICUS CURAE SUBMISSION  
OF CENTRE QUEBECOIS DU DROIT DE L'ENVIRONNEMENT**

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**ICSID CASE NO. UNCT/15/2**  
22 September 2017

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## I. INTRODUCTION

1. The *amicus curiae* submission by Centre Québécois du droit de l'environnement ("CQDE") makes four primary arguments:
  1. The precautionary principle is a recognized doctrine in international law;
  2. The precautionary principle forms part of the corpus of Canadian environmental law;
  3. Bill 18 "is a perfect example of the implementation of the precautionary principle;"<sup>1</sup> and
  4. Bill 18 should have been foreseeable.
2. The Claimant respectfully submits that the CQDE's submissions relating to the existence of the precautionary principle under Canadian domestic law are not relevant. The principle does not apply under the NAFTA or under international law.
3. In these submissions, the Claimant will demonstrate that:
  1. The precautionary principle is not applicable in the context of a NAFTA Chapter 11 dispute;
  2. CQDE's arguments on the facts repeat arguments already relied upon by Canada;

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<sup>1</sup> *Amicus curiae* memorial, 16 August 2017, para 48, Claimant's translation.

3. The evidence in this dispute that has not been reviewed by the CQDE demonstrates that, in any event, Quebec's actions do not meet the test for the application of the precautionary principle; and
4. The precautionary principle is not addressed in Bill 18; and
5. The foreseeability of Bill 18 is not a relevant issue.

## **II. TERMS OF THE NAFTA**

### **A. The precautionary principle is not applicable in the context of a NAFTA Chapter 11 dispute**

4. Tribunals established pursuant to Chapter 11 of the NAFTA are constrained by Article 1131, entitled "Governing Law," which states:
  1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
  2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.
5. Therefore, for the precautionary principle to apply as a doctrine of law applicable to the resolution of this dispute, it must:
  1. be set out in the text of the NAFTA,
  2. constitute an applicable rule of international law, or

3. be the subject of an interpretation by the NAFTA Commission directing tribunals to do so.
  
6. The CQDE has not discharged its burden of demonstrating that the precautionary principle meets any of these requirements. The CQDE has not demonstrated that the precautionary principle is set out in the text of the NAFTA or that it constitutes a rule of applicable law. Furthermore, as the NAFTA Commission has not issued an interpretation on the precautionary principle, it cannot be considered under that possibility.

***The NAFTA text does not provide for the application of the precautionary principle***

7. The drafters of the NAFTA had an opportunity to incorporate the precautionary principle into the treaty's affirmation of environmental protection set out in Article 1114. They did not do so. The NAFTA was signed and entered into force after the United Nations Conference on Environment and Design drafted the *Rio Declaration*. The NAFTA entered into force on 1 January 1994; the *Rio Declaration* was signed on 14 June 1992. There is no reason the drafters of the NAFTA would not have known of the precautionary principle.
  
8. Moreover, the NAFTA Parties addressed environmental issues in a parallel side agreement, the *North American Agreement on Environmental Cooperation* (the "NAAEC"),<sup>2</sup> which was negotiated in late 1993 and came into force simultaneously with the NAFTA. The NAAEC, like the NAFTA itself, makes no reference to the precautionary principle.

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<sup>2</sup> (1993), 32 ILM 1482 (CLA-112).

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9. As noted by the CQDE, Principle 15 of the 1992 *Rio Declaration* set out the precautionary principle,<sup>3</sup> nearly two years before the NAFTA came into force. Supplemental international treaties relied upon by the CQDE, such as the *United Nations Framework Convention on Climate Change*<sup>4</sup> and the *Convention on Biological Diversity*,<sup>5</sup> the *Vienna Convention for the Protection of the Ozone Layer*,<sup>6</sup> and *Montreal Protocol on Substances that Deplete the Ozone Layer*<sup>7</sup> also pre-date the NAFTA and its drafting.
10. The provision in Chapter 11 on environmental protection, which post-dates these international instruments, does not reference the precautionary principle.
11. NAFTA Article 1114, "Environmental Measures" provides:
1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
  2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise

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<sup>3</sup> *Amicus curiae* memorial, 16 August 2017, para 6; *The Rio Declaration on the Environment and Development*, August 12, 1992, A/CONF.151/26, on line: <[www.un.org/documents/ga/conf151/aconf15126-1annex1.htm](http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm)> ["*Rio Declaration*"].

<sup>4</sup> (1992), May 9, 1992, Can TS 1994 No. 7, Art. 3(3) (entered into force: March 21, 1994).

<sup>5</sup> (1992), June 5, 1992, 1760 UNTS 79, (entered into force: December 29, 1993).

<sup>6</sup> (1985), March 22, 1985, 1513 UNTS 293, (entered into force: September 22, 1988).

<sup>7</sup> (1987), September 16, 1987, 1522 UNTS 3, in the preamble (entered into force: January 1, 1989).

derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

[Emphasis added.]

12. As the wording of article 1114 clearly indicates, it must comply with articles 1110 and 1105 of the NAFTA, and cannot be construed as a stand-alone provision. This is supported by the fact that Canada has not raised Article 1114 to support the argument that the NAFTA contemplates environmental measures founded upon the precautionary principle. Such a position would go against a coherent, exegetical analysis of the NAFTA and make it say what it does not.
13. The other NAFTA Party intervenors have not argued that the precautionary principle is applicable to NAFTA and, therefore, to this dispute.

***The precautionary principle does not constitute an applicable rule of international law***

14. Second, the precautionary principle is not "an applicable rule of international law" under Article 1131 and therefore may not be considered by a dispute resolution panel established under Chapter 11. The CQDE has not made any submission on the status of the precautionary principle in international law, beyond noting its mention in certain treaties.
15. Because the terms of the NAFTA did not include the precautionary principle from its provisions, the precautionary principle must meet a condition set out in Article 38(1)(b-d)

of the *Statute of the International Court of Justice* ("ICJ Statute")<sup>8</sup> if it is to be applicable under NAFTA Article 1131(1). The Claimant submits that it does not, as demonstrated by the positions adopted by the Government of Canada.

16. Article 38(1) of the ICJ Statute sets out the four sources of international law:
- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations; and
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
17. First, the Government of Canada's official position is that the precautionary principle or approach is not a rule of customary international law in accordance with Article 38(1)(b). In its *Framework for the Application of Precaution in Science-based Decision Making about Risk*,<sup>9</sup> the Canadian government was unambiguous about the status of the precautionary principle at international law:

The Government does not yet consider the precautionary principle/approach to be a rule of customary international law.<sup>10</sup>

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<sup>8</sup> *Statute of the International Court of Justice*, [1945] Can TS 7, article 38(1)(b-d) (CLA-111).

<sup>9</sup> Privy Council Office "A Framework for the Application of Precaution in Science-based Decision Making about Risk", online: Government of Canada <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=precaution/precaution-eng.htm>> (C-162).

<sup>10</sup> Privy Council Office "A Framework for the Application of Precaution in Science-based Decision Making about Risk", online: Government of Canada <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=precaution/precaution-eng.htm>> (C-162).

18. A previous government document confirms that this conclusion is "[d]ue to an absence of clear evidence of uniform State practice and *opinio juris*."<sup>11</sup>
19. The Government of Canada's official position remains unchanged.<sup>12</sup>
20. Second, the Government of Canada has also confirmed its position that the precautionary principle does not constitute a general principle of law pursuant to Article 38(1)(c) of the ICJ statute. In the WTO Appellate Body ("AB") decision in *EC-Hormones*, the AB confirmed Canada's position:

The "precautionary principle" should be characterized as the "precautionary approach" because it has not yet become part of public international law. Canada considers the precautionary approach or concept as an emerging principle of international law, which may in the future crystallize into one of the "general principles of law recognized by civilized nations", within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.<sup>13</sup>

21. The AB's conclusion was also consistent with Canada's position. It concluded that it could not affirm that the precautionary principle reached the status of a general principle of customary international law:

The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having

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<sup>11</sup> Government of Canada, A Canadian Perspective on the Precautionary Approach/Principle-- Discussion Document (Ottawa: Government of Canada, 2001), at 16 (C-163).

<sup>12</sup> See the Government of Canada's response to a petition: *Applying the precautionary principle in relation to a number of Canada's international environmental commitments*: "The Government of Canada's policy on precaution is described in the *Framework for the Application of Precaution in Science-based Decision Making about Risk*," see for example the response by the Minister of Health, 7 August 2013, online: <[http://www.oag-bvg.gc.ca/internet/English/pet\\_349\\_e\\_38460.html](http://www.oag-bvg.gc.ca/internet/English/pet_349_e_38460.html)> (C-164).

<sup>13</sup> *EC-- Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-1, WT/DS26/AB/R, 16 January 1998, para 60 (CLA-110) [*EC-Hormones*].

crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears less than clear.<sup>14</sup>

22. Third, the Claimant submits that the precautionary principle cannot be considered a source of law pursuant to Article 38(1)(d) of the ICJ statute due to inconsistent application of the precautionary principle by different international courts and tribunals, and the lack of a uniform definition of what the principle actually requires of a state. The lack of a uniform approach means the precautionary principle has not reached a state where it can be consistently applied to international disputes. As noted by Daniel Kazhdan, "[t]he lack of a clear, consistent definition complicates efforts to compare the holdings of international tribunals on precaution."<sup>15</sup>
23. The sources of law outlined in Article 38 of the ICJ statute provide certainty for what may and may not be relied upon for the resolution of international disputes. Among other things, a principle may not be relied upon where "the threshold degree of uncertainty, the magnitude of harm threatened, and the type of response necessary are all much debated."<sup>16</sup>
24. For these reasons, the Claimant submits that the precautionary principle has no application to this matter.

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<sup>14</sup> *EC – Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-1, WT/DS26/AB/R, 16 January 1998, para 123 (CLA-110).

<sup>15</sup> Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, 38 *Ecology L.Q.* 527, 552 (2011) para 530 (C-166).

<sup>16</sup> Daniel Kazhdan, *Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle*, 38 *Ecology L.Q.* 527, 552 (2011) para 529 (C-166).

### III. SIMILARITY IN ARGUMENTS BETWEEN CQDE AND CANADA

#### A. The CQDE's Submissions Add Nothing New to the Debate

25. As underlined in the Claimant's comments on the CQDE's application to file *amicus curiae* submissions, these submissions address matters that are exhaustively treated by Canada in its submissions. Much of the CQDE's submissions, for instance, deal with the findings of SEA-1 and the BAPE 273 Report and repeat the substance of Canada's submissions on "police powers".

#### B. The CQDE and Canada Propose a Similar Analysis of the Evidence

26. The parties to the dispute do not address the precautionary principle. However, the essence of both Canada's arguments and the CQDE's submissions are the same, namely: a) the absence of complete scientific knowledge; b) the potential for serious and irreparable harm; and c) the existence of legitimate concerns. The Counter-Memorial and Rejoinder are largely dedicated to establishing precisely what the CQDE asserts, in parallel, using different legal terminology.
27. As demonstrated by the table below – a version of which was included in the Claimant's response to the CQDE's initial application – the CQDE covers ground that has already been amply briefed by Canada:

CQDE's Submissions	Canada's Submissions
There was scientific uncertainty given the lack of knowledge (para 23)	Canada's Counter Memorial, paras 10, 129, 143-152  Canada's Rejoinder, paras 101, 241, 365
The uncertainty raised by SEA-1 (paras 26 and 27)	Canada's Counter-Memorial, paras 122-130  Canada's Rejoinder, paras 102, 231, 241
The uncertainty raised by the BAPE 273 Report (paras 28-30)	Canada's Counter-Memorial, paras 143-152; 212  Canada's Rejoinder, paras 101, 122
The importance of the St. Lawrence River (para 32)	Witness Statement of Jacques Dupont, 15 July 2015, paras 38-51  Canada's Rejoinder, paras 98, 99, 159-161, 232, 233
Reasonable basis to believe that the risks could materialize (paras 34-36)	Same as for the uncertainties raised by the SEA-1 and the BAPE 273 Report
Other circumstances to be taken into account (paras 37-42)	Canada's Counter-Memorial, paras 34, 41, 162, 168-170  Canada's Rejoinder, paras 75-88

28. Without examining each of these passages exhaustively, the two following examples demonstrate the obvious similarities between the submissions of the CQDE and those of Canada:

<b>CQDE's Submissions</b>	<b>Canada's Submissions</b>
<p>[<i>Claimant's translation</i>]</p> <p>28. In February 2011, the BAPE submitted Rapport 273 concerning the sustainable development of shale gas in Quebec. The investigators "paid particular attention to the insertion of development of the shale gas industry into the natural and human environments, having regard to the sixteen principles set out in section 6 of the Sustainable Development Act", including the precautionary principle. The concerns identified in Rapport 273 are clearly set out in the counter-memorial of Canada. We will refer here only to those that are essential and illustrate our comments:</p> <ul style="list-style-type: none"> <li>- a lack of information within the municipalities concerning their capacity to treat wastewater from the shale gas industry;</li> </ul>	<p>146. On 28 February 2011, after holding public hearings in several municipalities in the St. Lawrence Lowlands and receiving 199 memorandums, 123 of which were presented during the public hearings, the BAPE inquiry commission submitted its very detailed Report 273 on the sustainable development of the shale gas industry in land environments. Minister Normandeau called this [TRANSLATION] "a watershed moment in [the understanding by the Ministère des Ressources naturelles] of this industry". The report was the first to paint a big-picture portrait of the shale gas industry, the activities required to develop the resource, the receiving environment, from both biophysical and human perspectives, and the anticipated environmental effects of the development of this new energy source. More particularly, this BAPE report focused on issues relating to water usage and protection, air quality, natural and technological risks, the human environment</p>

<p style="text-align: center;"><b>CQDE's Submissions</b></p>	<p style="text-align: center;"><b>Canada's Submissions</b></p>
<ul style="list-style-type: none"> <li>- incomplete hydrogeological mapping of the St. Lawrence lowlands;</li>   <li>- the lack of studies determining the risks of water contamination associated with hydraulic fracturing;</li>   <li>- the lack of essential information concerning the chemical additives used;</li>   <li>- mapping of the features in the region in question would be necessary in order to assess the risks of contamination relating to hydraulic fracturing work; and</li>   <li>- under the precautionary principle, it would be necessary to assess the long-term risk of contaminated fracturing water in the rock formations.</li> </ul>	<p>and the Quebec economy and provided a large number of opinions and observations, many identifying risks of environmental contamination or gaps in scientific knowledge.</p>
<p>32. As noted earlier, the seriousness of the damage must be assessed having regard to the level of protection sought. Rapports 193</p>	<p>39. The Saint Lawrence, with its river section and its estuary, opens into the Gulf of Saint Lawrence, a veritable inland sea</p>

<b>CQDE's Submissions</b>	<b>Canada's Submissions</b>
<p>and 273 and SEA1 highlight the great biological and human value of the St. Lawrence. We would note that 60% of the population of Quebec lives on its shores and that it provides 45% of drinking water consumed in the province. This information is all accessible to the public and the Quebec government had to consider the essential points of this situation at the time the Act was enacted, particularly to assess the seriousness of the risks.</p>	<p>feeding into the Atlantic Ocean. It is one of the largest waterways in Canada. From the Great Lakes to the Atlantic Ocean, it extends over nearly 1,600 km and its hydrographic system drains nearly 25% of the world's freshwater reserves. More than 60% of the population of Québec lives on its banks. [...]</p> <p>51. In this respect, the June 2011 Act to Limit Oil and Gas Activities, by establishing the Saint Lawrence River as a separate resource and giving it special protection, was part of the sequence of a set of measures taken by the Québec government for more than a decade seeking to protect and conserve this exceptional waterway.</p>

29. In addition, Canada's Counter-Memorial dedicates two entire sections in its Statement of Facts (C and D) to the issues of scientific knowledge, risk assessment, and governmental concern and action.

**C. The Precautionary Principle is Comparable to the Police Powers Doctrine**

30. Canada pleads a police powers doctrine that in many ways resembles the precautionary principle advanced by the CQDE.

31. Canada argues that "NAFTA Chapter 11 does not limit the State's police powers, quite the contrary. The Parties expressly mention them several times in order to preserve their sovereign right to legislate for, among other things, environmental protection."<sup>17</sup>
32. Like the CQDE, Canada elaborates a legal doctrine which would allegedly justify a state in taking measures – including the expropriation of property without compensation – in order to protect the environment, even in the absence of scientific certainty.
33. Whether or not this argument is advanced under the heading of "police powers" or "the precautionary principle," it fundamentally raises the same point concerning Quebec's Bill 18. Having already responded to Canada's position, the Claimant will not repeat its submissions in response to the submissions made by CQDE, but relies on these arguments already before the Tribunal.

#### **IV. PRECAUTIONARY PRINCIPLE**

##### **A. The Government did not base its decision on the precautionary principle**

34. The memorial submitted by the CQDE outlines Principle 15 of the *Rio Declaration* as the "cornerstone of the precautionary principle".<sup>18</sup> Principle 15 states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty

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<sup>17</sup> Counter-Memorial, 24 July 2015, para 501.

<sup>18</sup> *Amicus curiae* memorial, 16 August 2017, para 7.

shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

35. Inherent in Principle 15 is the requirement that there be a threat of "serious or irreversible damage" before a decision is made. Canada's evidence does not demonstrate that Quebec officials believed horizontal drilling under the St. Lawrence River, from onshore, presented threats of serious or irreversible harm. The reason for this is simple: the Government of Quebec did not conduct the scientific or other studies that would have enabled it to acquire the knowledge required to make a decision about this risk.

**B. The Government's decision does not meet Canada's own standard for the precautionary principle**

36. The Government of Canada sets out its guideline for the use of the precautionary principle in areas of regulatory activity through the *Framework for the Application of Precaution in Science-based Decision Making about Risk*.<sup>19</sup> There are five principles for Precautionary Measures, which are as follows:

1. Precautionary measures should be subject to reconsideration, on the basis of the evolution of science, technology and society's chosen level of protection;
2. Precautionary measures should be proportional to the potential severity of the risk being addressed and to society's chosen level of protection;
3. Precautionary measures should be non-discriminatory and consistent with measures taken in similar circumstances;
4. Precautionary measures should be cost-effective, with the goal of generating (i) an overall net benefit for society at least cost, and (ii) efficiency in the choice of measures; and

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<sup>19</sup> Privy Council Office "A Framework for the Application of Precaution in Science-based Decision Making about Risk", online: Government of Canada <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=precaution/precaution-eng.htm>> (C-162).

- 5. Where more than one option reasonably meets the above characteristics, then the least trade-restrictive measure should be applied
- 37. The Quebec Government violated all five of these principles.

***1. The Government's decision was not provisional***

38. First, the Quebec Government did not use the precautionary principle because it did not implement the measures in Bill 18 on a provisional basis. The backbone of the precautionary principle is science-based risk management.<sup>20</sup> Without planning for follow-up activities such as research and scientific monitoring, there is no way to take into account any scientific and technological advances.

39. Indeed, the memorandum presented by Minister Normandeau to the Council of Ministers on 4 May 2011 [REDACTED]

[REDACTED]

[REDACTED]<sup>21</sup>

40. If the Government had been using the precautionary principle, the decision would have been provisional, pending scientific or technological advances. Perceived or potential scientific uncertainty was not the basis for Bill 18 because it left no room for additional, later scientific information.

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<sup>20</sup> Privy Council Office "A Framework for the Application of Precaution in Science-based Decision Making about Risk", online: Government of Canada <<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=precaution/precaution-eng.htm>> (C-162).

<sup>21</sup> Memoire au Conseil des Ministres De: Madame Nathalie Normandeau, Ministre des Ressources naturelles et de la Faune - "Projet de loi limitant les activites petrolieres et gazieres et modifiant la Loi sur les mines" (4 May 2011), p. 4 (C-132).

41. Instead, the revocation of permits was permanent, completely extinguishing the affected rights.

**2. *The Government's decision was not proportional***

42. Second, the content of Bill 18 was not proportional to any perceived or potential danger. It simply cannot be proportional to permanently extinguish rights based on a principle of precaution, due to the purported uncertainty of something not studied.

43. An arbitrary,<sup>22</sup> idiosyncratic,<sup>23</sup> and unjust<sup>24</sup> decision that results in the revocation of rights is not a proportional decision.

44. In addition, the decision of the Government to deny compensation to permit holders has no connection to a rational environmental objective and caused significant economic harm to the Claimant. Through Section 4 of Bill 18, the Government purposefully and explicitly denied permit holders any compensation for the revocation of their permit rights. As the Claimant has argued in its memorials, this action lacked public purpose and proportionality.

45. According to the federal Government, measures are considered proportional "in relation to the magnitude and nature of the potential harm in a particular circumstance". One form of harm, which is not addressed by the CQDE, is the economic harm suffered by the Claimant when the permits were revoked. This harm is not related to environmental protection but rather to the Government's political objective.<sup>25</sup> The Government was well aware that

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<sup>22</sup> Reply, 25 July 2017, para 495.

<sup>23</sup> Reply, 25 July 2017, para 568.

<sup>24</sup> Reply, 25 July 2017, para 549.

<sup>25</sup> Reply, 25 July 2017, para 134 (I).

private actors were holding valid property rights in their permits and had invested significantly with the support of the Government and in compliance with the regulations already in place.<sup>26</sup>

46. The exercise of the precautionary principle requires proportionality to "maintain credibility in the application of precaution". Denying compensation for expropriation is not credible; it is not connected to any rational environmental objective.

***3. The Government's decision is not consistent with similar circumstances***

47. Third, the Government's course of action set out in Bill 18 is not consistent with similar circumstances because in "all other instances of studying and regulating hydrocarbon development the Government maintained a commitment to area and sector specific studies."<sup>27</sup> The Quebec government mandated three SEAs and a BAPE in order to gather data and make a policy decision. This is why the government did not include the area subject to the SEA-2 study in Bill 18. It is also why the government followed the BAPE report's recommendation to conduct a specialized SEA on shale gas.
48. Bill 18, by contrast, is the outlier in Quebec's approach to balancing its commitment to hydrocarbon development and environmental protection; it is the only instance that put in place a permanent measure in the complete absence of targeted study. In order to pass Bill 18, Minister Normandeau believed that [REDACTED]

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<sup>26</sup> Secteur de l'énergie, Direction générale des hydrocarbures et des biocarburants - Activité d'exploration et d'exploitation d'hydrocarbures dans le fleuve Saint-Laurent (partie fluviale) pour les permis de recherche localisés entre la pointe Est de l'île d'Orléans et la frontière provinciale Québec/Ontario (19 November 2010) C-116

<sup>27</sup> Reply, 25 July 2017, para 568.

██████████ to an entirely different geographic region without any basis in a scientific or environmental study.<sup>28</sup> This is despite the fact that the SEA-1 did not examine the St. Lawrence Lowlands, the river upstream from the Estuary, or the effect of drilling at depths beneath waterbeds from an onshore location, all of which were impacted by Bill-18. The Government contradicted its own objectives and misused the commission of inquiry process in order to achieve political ends that were not based in science.

#### ***4. The Government's decision is not cost-effective***

49. The Government already possessed a method of evaluating the safety of proposed projects and refusing to authorize any projects it deemed to be risky through s. 22 of the *Loi sur la qualite de l'environnement* (EQA).<sup>29</sup> In his witness statement, Mr. Dupont refers to the process of obtaining certification under s. 22 of the EQA.<sup>30</sup> He notes that "s. 22 obligates [a party] to obtain an authorization certificate from the Minister of the Environment before (i) making or altering a construction; (iii) undertaking to operate any industry, the carrying on of an activity or the use of an industrial process; or (iv) increasing the production of a good or service."<sup>31</sup>
50. The EQA is described in the CQDE's memorial as "the generally applicable scheme" that was present in Quebec at the time.<sup>32</sup>

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<sup>28</sup> Reply, 25 July 2017, para 402.

<sup>29</sup> CQLR, c. Q-2.

<sup>30</sup> Dupont Witness Statement, paras 17-27 (RWS-002).

<sup>31</sup> Dupont Witness Statement, para 19 (RWS-002).

<sup>32</sup> *Amicus curiae* memorial, 16 August 2017, para 39.

51. Using the existing regulatory framework would have been less burdensome and more cost-effective than the wholesale expropriation of river permits without compensation. Indeed, rather than create a new statutory framework in order to protect the St. Lawrence River, the Estuary, and the northwest of the Gulf of St. Lawrence, the Government could have relied upon an existing mechanism in order to evaluate projects on a case-by-case basis.
52. To the extent that Bill 18 was intended to safeguard the marine environment, it was disproportionate in its scope by preventing horizontal drilling that has no relationship with that environment.

**5. *The Government did not choose the least trade-restrictive measure***

53. Because the measure chosen by the Government had the effect of preventing any drilling whatsoever from taking place in or under the St. Lawrence River, it was necessarily *not* the least trade-restrictive measure. On the contrary, it was the most trade restrictive measure that could have been adopted under the circumstances since it completely and permanently prevented any exploration or exploitation activities from taking place.

**V. **The Precautionary Principle is not addressed in Bill 18****

54. At no time during the adoption of Bill 18 did the Government address the precautionary principle. The Government did not say that it intended to embody or apply the precautionary principle. [REDACTED]  
[REDACTED], and it did not employ the term in the statute itself.

**VI. The Foreseeability of Bill 18 is not a Relevant Issue**

53. As for the CQDE's submission that Bill 18 should have been foreseeable, it relies on precisely the same arguments that Canada has already made in its Counter-Memorial and Rejoinder.<sup>33</sup> The Claimant has consistently stated that it was prepared and able to adapt to regulatory changes implemented by the Quebec government.<sup>34</sup> The foreseeability of Bill 18 is not a relevant consideration in determining Canada's compliance with the NAFTA.

**ALL OF WHICH** is respectively submitted.

Date: 22 September 2017



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<sup>33</sup> Counter Memorial, 24 July 2015, para 41; Rejoinder, 4 August 2017, para 113.

<sup>34</sup> D. Axani Reply Witness statement, para 66 (CWS-006); D. Axani Witness Statement, paras 48 (CWS-001).