

NAFTA Chapter Eleven

Koch Industries Inc. & Koch Supply & Trading, LP

Claimants

v.

Canada

Respondent

**Notice of Intent to Submit a Claim to Arbitration under
Chapter Eleven of the North American Free Trade
Agreement**

20 February 2020

I. INTRODUCTION

1. Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement (**NAFTA**), and with a view to settling this dispute amicably through consultations in accordance with Article 1118 of NAFTA, Koch Industries, Inc. (**Koch**) and Koch Supply & Trading, LP (**KS&T**) (collectively the **Claimants**) hereby submit this Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven (**NOI**) to Canada.
2. This claim arises out of the summary and arbitrary cancellation without compensation by the Province of Ontario (**Ontario**) of millions of carbon allowances for which KS&T had paid \$30,158,240.95 (the **Purchase Price**) to Ontario only weeks before.¹
3. In 2016, Ontario adopted the Climate Change Mitigation and Low-Carbon Economy Act (the **Act**) and the related Cap and Trade Program Regulation (the **Regulation**) (collectively also referred to as the “Cap and Trade Program”). The Act and Regulation sought to lower greenhouse gas (**GHG**) emissions by imposing mandatory limits, or “caps,” on GHG emissions produced by designated classes of industrial emitters and enforcing monetary penalties where the caps were exceeded. The Act and Regulation created carbon allowances² that gave participants the right to emit GHGs and provided that the pool of allowances would be reduced over time. The Act and Regulation mandated public auctions to sell allowances and specifically envisioned a secondary market for allowances that was essential to harnessing market mechanisms to achieve the Cap and Trade Program’s objectives at the lowest overall cost. Ontario’s system therefore allowed parties whose participation was not mandatory—defined as “market participants”—to purchase allowances in order to create a secondary market, provide market liquidity and establish prices through the forces of supply and demand.
4. Under the Act, money raised from Ontario’s Cap and Trade Program was to be deposited into a new Greenhouse Gas Reduction Account (the **Account**). Funds paid into the

¹ All monetary references in this document are to United States dollars unless otherwise indicated.

² References to “carbon allowances” in this NOI are intended to refer to a right under the Regulation (or other applicable program, as the context requires) to emit one tonne of carbon dioxide (or the carbon dioxide equivalent of other GHGs).

Account were designated for investment into Ontario green projects and other carbon reduction initiatives.

5. Through an agreement that came into effect on 1 January 2018, Ontario linked its Cap and Trade Program to equivalent programs in Quebec and California to permit trading of allowances through the three jurisdictions and enhancing the market for allowances and the viability of Ontario's program.
6. KS&T is a Koch entity specializing in commodity markets, including emissions markets. To assist Koch affiliates with emissions cap obligations and provide specialized access to the market, KS&T registered in the Ontario Cap and Trade Program as a market participant.
7. On 15 May 2018, KS&T took part in the joint (Ontario, Quebec and California) cap and trade auction as an Ontario registered market participant. KS&T purchased [REDACTED] allowances (the **Purchased Allowances**) for the Purchase Price. KS&T paid these funds in full as directed by Ontario. The Purchased Allowances were deposited into KS&T's Ontario cap and trade registry account on 11 June 2018.
8. On 15 June 2018, Premier-designate Doug Ford abruptly announced that the Province would "cancel" the cap and trade program and withdraw from future allowance auctions. This declaration prompted immediate suspension of emission allowance transfers between Ontario and both Quebec and California, stranding KS&T's credits in Ontario, and effectively ended allowance trading on the secondary market within Ontario.
9. On 3 July 2018, Ontario promulgated Ontario Regulation 386/18 (**Regulation 386/18**), repealing the Regulation. Regulation 386/18 expressly prohibited Ontario registered cap and trade emission allowance participants from any kind of purchasing, selling, trading or otherwise dealing in emission allowances.
10. On 25 July 2018, Ontario introduced Bill 4 (the **Bill**), the Cap and Trade Cancellation Act (the **Cancellation Act**), which went on to receive Royal Assent on 31 October 2018. The Cancellation Act repeals the Act and thereby formally ends Ontario's Cap and Trade

Program.³ Further, the Cancellation Act denies compensation to all market participants. The Cancellation Act bars related domestic legal proceedings, including with retroactive effect, and summarily declares that any action taken pursuant to the Cancellation Act does not constitute an expropriation.

11. In response to public comments questioning market participants' exclusion from compensation under the Cancellation Act, Ontario responded that "...market participants without a compliance obligation chose to take risks as market traders and speculators," and therefore merited no compensation for the allowances they held that were summarily cancelled by the Province.
12. In November 2018, Ontario implemented a compensation procedure for eligible participants.
13. In February 2019, KS&T filed for compensation in accordance with the Ontario procedure.
14. Through a letter dated 4 March 2019, Ontario denied KS&T's claim for compensation on the basis that KS&T was not entitled to compensation because it was a market participant.
15. By this Notice, Koch and KS&T seek formal consultations under Article 1118 of NAFTA regarding the damages they have suffered as a result of Ontario's measures in breach of NAFTA Chapter Eleven. Canada is responsible for such breaches pursuant to NAFTA Article 105 and international law. Should such consultations fail, Koch and KS&T will seek recovery in full of all damages, costs and other related losses both entities have incurred as a result of Ontario's measures through NAFTA Chapter Eleven arbitration.

II. NAME AND ADDRESSES OF THE DISPUTING INVESTORS

16. Koch and KS&T submit this NOI on their own behalf as qualifying investors under Article 1116 of NAFTA.
17. Koch is a U.S. (Kansas) privately held company, with its principal registered place of business at 4111 East 37th Street North, Wichita, KS 67220. Koch was founded in 1940. Through its subsidiaries, Koch is involved in the manufacturing, refining and distribution

³ *Cap and Trade Cancellation Act, 2018*, 1st Sess, 42nd Leg, Ontario, 2018 (first reading July 25, 2018).

of petroleum, chemicals, energy, fibers, intermediates and polymers, minerals, fertilizers, pulp and paper and chemical technology equipment, as well as in ranching, finance and commodities trading and investing.

18. KS&T is organized under the laws of Delaware and is a wholly-owned subsidiary of Koch. KS&T's business initially focused on the exchange of energy products before expanding into a broad variety of commodity markets. KS&T's principal place of business is also 4111 East 37th Street North, Wichita, KS 67220.
19. KS&T invested in Canada by acquiring the Purchased Allowances under the Cap and Trade Program in May 2018. Koch indirectly holds this same investment through KS&T. Koch further holds other substantial investments in Canada, including considerable Ontario-based enterprises owned and operated by its 100% subsidiaries. These include, but are not limited to, an INVISTA nylon plant and a global research and development center for industrial nylon fibers in Kingston, Ontario, as well as an INVISTA plant in Maitland, Ontario that produces fluoroproduct, a refrigerant used in cooling devices, and engineered polymers, an intermediate product for the automotive industry. Overall, Koch investments employ approximately [REDACTED] people in Ontario.

III. LEGAL REPRESENTATIVES AND SERVICE OF DOCUMENTS

20. Legal counsel for the Claimants are Christophe Bondy, Steptoe & Johnson UK LLP, and Mark Beckett, Cooley LLP.
21. All correspondence in this matter should be directed to:

Christophe Bondy
Steptoe & Johnson UK LLP
5 Aldermanbury Square
London, EC2V 7HR
UK
cbondy@steptoe.com
Tel: +44 (20) 207 367 8028
Fax: +44 (20) 207 367 8001

Mark Beckett
Cooley LLP
55 Hudson Yards
New York, New York 1001
USA
mbeckett@cooley.com
Tel: +1 (212) 479 6464
Fax: +1 (212) 479 6275

IV. ISSUES AND FACTUAL BASIS FOR CLAIM

22. This claim concerns Ontario's illegal expropriation of KS&T's Purchased Allowances through its arbitrary denial of compensation for cancelled emission allowances, and related denial of justice. When Premier-designate Ford's incoming government summarily cancelled Ontario's mandatory Cap and Trade Program, it eliminated Koch's and KS&T's substantial property right in the Purchased Allowances acquired just weeks before at the Ontario-sponsored emissions allowance auction, without providing any compensation. This measure individually, and the subsequent regulatory and legislative measures restricting and formally cancelling the Cap and Trade Program, individually and severally, breached Article 1110 of NAFTA. Moreover, Ontario denied access to courts to claim compensation for its expropriation and treated the Claimants in an arbitrary manner, in breach of Article 1105(1) of NAFTA. Canada is responsible under international law for both of these measures, pursuant to NAFTA Article 105.

A. Ontario Introduced its Cap and Trade Program in 2016 with the Purpose of Reducing Carbon Emissions

23. In 2016, Ontario adopted the Act and its related Regulation. The Act and Regulation sought to lower greenhouse gas emissions by capping the amount of GHGs that companies with significant emissions could release and providing for penalties if companies exceeded these mandatory limits. Participation was mandatory for certain businesses which exceeded an emissions threshold, including most enterprises in the energy sector.

24. One of the central features of a cap and trade program is “trade”; that is, the creation of a market for emission allowance trading. Ontario’s Cap and Trade Program accordingly was designed as a market-based trading system for emissions that allowed for the sale and purchase of tradeable emission allowance certificates on the secondary market. Creating a secondary market allowed entities to sell their surplus and unused certificates and permitted other emitters requiring additional certificates to purchase them, but at increasingly higher prices.
25. The Act and Regulation provided that the Province would regularly sell allowances through public auction.⁴ Each allowance entitled the holder to emit one tonne of GHGs.⁵ Consistent with the market approach at the heart of the program, allowances were tradeable and were designed to be capable of being sold and purchased on the secondary market. Accordingly, if an emitter’s actual emissions were fewer than the allowances it held, it was entitled to sell its unused carbon allowances on the market. By design, the number of allowances in circulation would be reduced over time. The Province envisioned that gradually constraining allowance supplies, combined with the effect of forces in the secondary market, would steadily increase the cost of the allowances.
26. Allowance auctions generated revenue for Ontario. Under the Act, money raised from Ontario’s Cap and Trade Program was to be deposited into the new Account. Monies in the Account were used to fund Ontario investments into environmental projects and other carbon reduction initiatives.
27. The Act defined a broad set of emitters as “mandatory participants.”⁶ These included a range of industrial actors subject to mandatory emissions reporting requirements and whose annual emissions exceeded 25,000 tonnes of CO₂ per annum.⁷ Industrial actors

⁴ Regulation 144/16, Article 58(1) mandated that such an auction would be held in Ontario four times per year, starting in 2017. Results of the auction would be posted no later than 45 days following the auction’s conclusion (Article 64(2)). Summary results were to be followed by a proceeds report showing the total dollar amounts of auction proceeds received by each of Ontario, Quebec and California (Article 64(1)).

⁵ Under the Regulation, “[a]n Ontario emission allowance or Ontario credit is equivalent to one tonne of CO₂e,” or carbon dioxide equivalent. *Id.* at Section 10.

⁶ Act Section 15 and Regulation Sections 21-27.

⁷ Pursuant to Ontario Regulation 452/09: Greenhouse Gas Emissions Reporting, Table 2, industrial actors required to report annual emissions included persons engaged in ammonia production, cement production,

falling within the scope of emissions reporting requirements but whose annual emissions were between 10,000 and 25,000 tonnes of CO₂ could also take part in the Cap and Trade Program as “voluntary participants.”⁸

28. Importantly, the Act also provided for “market participants” who could purchase allowances at auction for resale.⁹ As the Act recognized, the efficiency of the carbon market depended largely on the ability to freely trade carbon allowances in the secondary market. The role of market participants was crucial to the functioning of the secondary market in a number of ways. By building inventory, market participants created an emission allowance spot market and provided essential liquidity. The existence of a secondary market also enabled mandatory and other participants to engage in price discovery, providing an accurate indicator of market value. These price signals would in turn inform investment and market decisions by mandatory participants. Market participants also served as ready buyers for mandatory participants who wanted to finance carbon reduction investments, in part, by selling unused allowances.
29. Through such trades, mandatory and voluntary participants would be able to realize the value of their carbon emissions reductions and seek additional carbon allowances as necessary. The Cap and Trade Programs of California, Quebec and Ontario all provided for the category of market participants, as they were necessary to the functioning of each system.
30. Ontario linked its emissions trading market with the emissions trading markets in two other jurisdictions: Quebec and California. On 22 September 2017, Ontario, Quebec and California signed an Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions (the **OQC Agreement**). The OQC Agreement, which came into effect on 1 January 2018, linked the three carbon markets

electricity generation, ferroalloy production, glass production, hydrogen production, petrochemical production, petroleum refining, pulp and paper and soda ash production, among other activities. Reporting was also required for electricity importers, natural gas distributors and petroleum suppliers subject to prescribed conditions.

⁸ Act Section 16 and Regulation Sections 28-35

⁹ Act Section 17 and Regulation Sections 36-38

to harmonize regulations and allowed for the mutual recognition and trading of allowances among the three jurisdictions.¹⁰ By linking the Ontario market to those of California and Quebec, the Province significantly expanded the emission certificate trading market. This step deepened the pool of allowances in the market, providing for greater supply, liquidity and pricing accuracy, and therefore further enhanced the market efficiency of the Province's Cap and Trade Program

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

31. Koch participated in the May 2018 WCI joint auction through KS&T, which had been registered as a market participant under the Regulation. Koch and KS&T did so primarily to secure carbon emission allowances for Koch affiliates with emission compliance obligations under the mandatory legislation and regulations in the linked Quebec-Ontario-California emissions market. Koch mandated KS&T to fulfil this role given the latter company's specialized market trading role within the Koch group of companies.
32. KS&T notably had an ongoing obligation to deliver all allowances required by Flint Hills Resources (**FHR**), a wholly owned Koch affiliate with emissions compliance obligations, including a firm delivery obligation of approximately [REDACTED] of carbon allowances due by [REDACTED]. KS&T understood that any additional allowances received at auction could be applied against future emissions compliance obligations, including those of Koch mandatory participants in Ontario. .
33. At the 15 May 2018 auction, KS&T acquired the Purchased Allowances in Ontario's publicly mandated emission allowances auction, paying the Purchase Price as directed by Ontario as consideration.
34. On 11 June 2018, the Purchased Allowances were deposited into KS&T's Ontario Cap and Trade Registry Account.

¹⁰ Linking is the process through which the allowances can be used interchangeably from one linked program to the other. For example, emission allowances acquired through the Ontario auction could be used in California and Quebec and vice-versa. See, e.g., Regulation Section 10.1.

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

35. On 7 June 2018, Ontario's Progressive Conservative (PC) party won a majority in the Ontario general election. Under the Province's parliamentary system, this meant that the leader of the PC Party, Doug Ford, would be designated Premier of Ontario.
36. One week later, on 15 June 2018, Premier-designate Ford announced without notice that Ontario "will ... cancel Ontario's current cap-and-trade scheme" and would withdraw from the agreement linking Ontario with the Quebec and California cap-and-trade markets.¹¹ He also announced he had directed the government "to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits."¹² Premier-designate Ford also affirmatively announced that "[t]he government will provide clear rules for the orderly wind down of the cap-and-trade program."¹³ These definitive declarations by the Premier-designate with no prior notice to any or all entities in the market precipitated the immediate suspension of the transfer system between Ontario and both Quebec and California, as those jurisdictions moved to protect their allowance markets and cap and trade systems. The Premier-designate's declarations stranded KS&T's Purchased Allowances in Ontario. At the same time, the declarations effectively destroyed the value of the Purchased Allowances held in the Province.
37. On 3 July 2018, Ontario introduced Regulation 386/18, repealing the Regulation.¹⁴ Regulation 386/18 prohibited all Ontario registered cap and trade emission allowance participants from purchasing, selling, trading or otherwise dealing in carbon emission allowances.

¹¹ Office of the Premier-designate, News Release, "Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax," 15 June 2018, at: <https://news.ontario.ca/opd/en/2018/06/premier-designate-doug-ford-announces-an-end-to-ontarios-cap-and-trade-carbon-tax.html>

¹² *Id.*

¹³ *Id.*

¹⁴ The archived Ontario cap and trade program web site notes that the government on 3 July 2018 "we cancelled the cap and trade regulation and prohibited all trading of emission allowances." <https://www.ontario.ca/page/cap-and-trade-program-overview>

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

In other words, the Bill foresaw withholding compensation from market participants which the Act had defined and whose role the Act and Regulation had made an integral element of the Cap and Trade Program.

39. In the formal public consultation leading to adoption of the Bill, members of the public questioned the unfairness of barring market participants from compensation for allowances they had purchased from Ontario under the Cap and Trade Program. Ontario's official response was that its compensation approach "recognizes that regulated participants may have purchased allowances to comply with the regulation whereas *market participants without a compliance obligation chose to take risks as market traders and speculators.*"¹⁵ This response confirmed that Ontario's measure lacked any rational policy basis: Market participants could not be assumed to have undertaken the risk of an uncompensated and illegal expropriation when taking part in the Cap and Trade Program. Moreover, the response ignored that Ontario expressly induced market participants in light of the value they contributed to meeting the government's stated objectives of reducing GHG emissions at a lower overall price to the Ontario economy. Ontario's response also arbitrarily ignored the role that market participants played in assisting mandatory participants meet their compliance obligations.

¹⁵ See Bill 4, Cap and Trade Cancellation Act, 2018, Comments received, 15 November 2018. To be consulted at: <https://ero.ontario.ca/notice/013-3738#comments-received>.

40. On 24 October 2018, Koch wrote to Premier Ford noting that the Bill “arbitrarily disadvantages multi-national corporate compliance groups, like Koch, for complying with the rules and regulations of the cap and trade program of the former Liberal government.” Koch suggested a series of amendments to compensate companies such as Koch whose allowances had been rendered worthless by Ontario’s measure.

41. Ontario rejected Koch’s proposals and proceeded to adopt the Cancellation Act without material amendments.

D. Ontario Cancelled the Cap and Trade Act, Arbitrarily Denying Market Participants Compensation

42. The Cancellation Act, which provided for the termination of Ontario’s Cap and Trade Program and the cancellation of any remaining carbon emission allowances in Ontario accounts, received Royal Assent on 31 October 2018. With regard to market participants, Section 8(5)1 provided as follows:

Unless otherwise provided by a regulation made under paragraph 5 of subsection 15 (2), no compensation shall be paid to the following participants: 1. A participant that was registered as a market participant within the meaning of the Climate Change Mitigation and Low-carbon Economy Act, 2016.

43. The Cancellation Act also purported to limit potential government liability and to bar proceedings against the government. Section 9 unlawfully excludes compensation for additional loss, including loss of revenues or profits related to the enactment of the Cancellation Act, the repeal of the Act or the making or revocation of any regulation under either the Cancellation Act or the Act. Section 10 unreasonably bars any proceedings in respect of the Cancellation Act, including with retroactive effect. Subsection 10(6) of the Cancellation Act egregiously states that none of the government’s actions will constitute an expropriation or injurious affectation under the Expropriations Act and/or at law.

44. On 14 November 2018, Ontario launched a compensation procedure for eligible participants.

E. KS&T Was Unjustly Denied Compensation for the Taking of its Emission Allowances

45. On 14 February 2019, KS&T filed an application for compensation flowing from the cancellation of its Purchased Allowances.
46. On 4 March 2019, Ontario rejected KS&T's request for compensation. In its official Notice, Ontario stated as follows: "Koch Supply & Trading, LP was registered under the Cap and Trade program as a market participant within the meaning of the *Climate Change Mitigation and Low-carbon Economy Act, 2016* [...] subparagraph 1 of subsection 8(5) specifically states that entities that were registered as a market participant under the cap and trade program are not eligible to receive compensation."¹⁶
47. Ontario has since refused all requests by Koch and KS&T to provide compensation for the Purchase Price for the cancelled Purchased Allowances.

V. CANADA HAS BREACHED ITS OBLIGATIONS UNDER NAFTA CHAPTER ELEVEN

A. KS&T and Koch Have Standing to Bring a Claim Under NAFTA Chapter Eleven

48. Both KS&T and Koch, as U.S. enterprises, have standing to bring a claim against Canada for alleged violations of NAFTA Chapter Eleven affecting their investments in Canada.
49. Article 1116 provides that an investor of a Party may file a claim that another Party has breached an obligation under Chapter Eleven and that it has incurred loss or damage by reason of, or arising out of, that breach. Article 1139 defines an "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." The same Article defines "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of such Party."
50. The Purchased Allowances that Ontario cancelled were the legal property of KS&T. Thus, KS&T is the "investor of a Party" entitled to bring a claim under Chapter Eleven of NAFTA.

¹⁶ Final Determination Notice to Koch Supply & Trading, LP of the Decision in Respect of an Application for Cap and Trade Compensation, 14 March 2019.

Koch in turn owns KS&T, as well as substantial Canadian-based industrial enterprises, and thus holds investments in Canada both directly and indirectly.

B. Cap and Trade Rights are Protected Investments Under NAFTA

51. At the time Ontario adopted its unlawful measures, KS&T held a right under Ontario law to over █████ cap and trade emission allowances, secured only a few days prior to Ontario's unlawful measures through a public auction conducted at Ontario's behest. KS&T paid the Purchase Price as consideration for these Purchased Allowances. The funds KS&T paid would then be used to finance a range of prescribed investments in greenhouse gas reduction initiatives in Ontario relating to renewable and alternative energy sources, land use and buildings, transportation, industry, agriculture, forestry, waste systems and financial models and services.¹⁷
52. NAFTA Article 1139(g) defines investment to include intangible property "acquired with the expectation or used for the purpose of economic benefit or other business purposes." The Purchased Allowances were issued by the Province as tradeable certificates and were sold by the Province to KS&T for the Purchase Price. By definition, each allowance represented a right to emit one tonne of CO₂ emissions. Moreover, these rights were, and were designed to be, saleable. Indeed, tradability of the allowances was one of the central features of the Cap and Trade Program. These various rights are clear examples of expected economic benefits and qualify the Purchased Allowances as an investment.
53. NAFTA Article 1139(g) further defines investment to include the commitment of capital to the territory of Canada. The Purchase Price KS&T invested in Ontario to purchase the Purchased Allowances also constituted a protected investment under NAFTA.

C. Canada Has Violated NAFTA Article 1110 (Expropriation and Compensation)

54. The measures described above, individually and severally, are violations of NAFTA Article 1110 (Expropriation and Compensation). That article provides that no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in

¹⁷ Regulation 144/16, Schedule 1

its territory or take a measure tantamount to nationalization or expropriation of such an investment, except (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law and Article 1105(1) and (d) on payment of compensation in accordance with paragraphs two through six of Article 1110.

55. Here, KS&T acquired title to the Purchased Allowances through Ontario's May 2018 auction, for which it paid the Purchase Price. Ontario's decision to cancel the Cap and Trade Program, effectively trapping KS&T's Purchased Allowances in Ontario and destroying their value and the secondary market; its hurried steps thereafter to formally freeze trading in allowances and subsequently to eliminate the Cap and Trade Program and cancel the allowances; and its refusal to pay KS&T any compensation, expropriated, directly and/or indirectly, existing valuable property rights.
56. There can be no question but that the allowances are property rights constituting investments under NAFTA Article 1139 that are "intangible" property "acquired in the expectation or used for the purposes of economic benefit or other business purposes." It is not subject to question that intangible property can be the subject of an expropriation.¹⁸
57. Moreover, the expropriation here was "illegal" under international law because it was a taking without public purpose; it was discriminatory, as a limited number of mandatory participants were provided compensation; the Cancellation Act violated the Minimum Standard of Treatment by denying KS&T access to a court remedy (in which regard, see Article 1105(1) analysis below); and KS&T was not paid compensation. In any case, even if there were public interest motivations for the measures, they remain expropriatory, and compensation is still owed.¹⁹
58. Nor would it be available for Canada to rely on its "police powers" to excuse this indirect expropriation, given the disproportionate, arbitrary and discriminatory targeting of

¹⁸ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2, Award) 16 April 2014, ¶¶ 159- 164.

¹⁹ *See Hulley Enterprises v. Russia, Yukos v. Russia, Veteran Petroleum v. Russia* (PCA Case No. 2005-05/AA228) Final Award, 18 July 2014, ¶¶ 1763, 1769.

market participants with regard to non-compensation, which bears no rational connection to the purposes of the Cancellation Act.

59. Whether the measure is assessed as a direct or as an indirect expropriation, compensation owing would be the same: Article 1110 provides that compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”) and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

D. Canada Has Breached NAFTA Article 1105(1) (Minimum Standard of Treatment)

60. The Ontario Government’s measures amount to a violation of NAFTA Article 1105(1) (Minimum Standard of Treatment). Article 1105(1) provides that each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
61. The manner in which Ontario terminated its Cap and Trade Program violated NAFTA Article 1105(1). Article 10 of the Cancellation Act bars any court proceedings or claims in respect of the Act and of the Cap and Trade Program, with retroactive effect. The barring of any domestic proceedings in connection with a State action is a classic example of denial of justice, one of the core obligations of the Minimum Standard of Treatment of investors under international law (**MST**), which Article 1105(1) upholds.
62. Article 1105(1) also protects investors against manifestly arbitrary measures by a host State.²⁰ Ontario’s responses to public questions confirmed that it had denied market participants compensation on the manufactured basis that they were “speculators,” rather than “legitimate” users of allowance credits. The explanation on its face lacks any rational basis. It baldly ignores the fact that Ontario itself created a class of market participants and did so to support the critical market features of the Cap and Trade

²⁰ *Waste Management, Inc. v. Mexico* (ICISD Case No. ARB (AF)/00/3) Award, 30 April 2004, ¶ 98; see also *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013 [Spanish], ¶ 650; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICISD Case No. ARB/13/2) Award, 7 March 2017 [Spanish], ¶ 527; *TECO Guatemala Holdings, LLC v. Guatemala* (ICISD Case No. ARB/10/23) Award, 19 December 2013, ¶ 587.

Program. This distinction is also based on the absurd premise that by playing a role in the allowances market, market participants knowingly and willingly undertook the risk of illegal expropriation of such allowances by Ontario.

E. Claimants Have Suffered Damages in Connection with Their Investment as a Result of Acts in Breach of the Treaty Standards Attributable to Canada Under International Law

63. The following measures, described above, which are pronouncements and legislative and regulatory acts of the Province, breach Canada's obligations under Chapter Eleven and have caused Koch and KS&T loss and damage:
- a. The Ontario Premier-designate's declaration of 15 June 2018, made without prior notice, "cancelling" the Ontario Cap and Trade Program and withdrawing Ontario's participation from the next scheduled allowance auction, which resulted in the immediate suspension of any allowance transfers between the Province of Ontario and the allowance markets in both the Province of Quebec and the State of California, and which effectively destroyed the value of emission allowances issued by and held in Ontario, including KS&T's Purchased Allowances.
 - b. Regulation 386/18, promulgated on 5 July 2018, formally prohibiting Ontario registered cap and trade emission allowance participants of any kind, including KS&T, from purchasing, selling, trading or otherwise dealing in emission allowances.
 - c. The Cancellation Act, introduced on 25 July 2018 and effective 31 October 2018, cancelling outright all Ontario emission allowances, including KS&T's Purchased Allowances, and denying compensation to market participants holding emission allowances, including KS&T.
 - d. Ontario's decision on 14 March 2019, made on the basis of the provisions of the Cancellation Act, formally denying Koch and KS&T any compensation for the measures eliminating KS&T's emission allowances.
64. These measures eliminated KS&T's property rights in, and KS&T's ability to enjoy and dispose of, the Purchased Allowances.

65. Pursuant to NAFTA Article 105, the Government of Canada is responsible for measures of provincial governments that fail to respect the provisions of NAFTA, including obligations Canada has agreed to observe vis-à-vis investors of another Party.²¹

VI. APPROXIMATE DAMAGES SUFFERED

66. As a result of measures taken by Ontario, Koch and KS&T have suffered losses in an amount to be fully quantified, but not less than \$30,158,240.95, and including, but not limited to:

- a. The value of the [REDACTED] emission allowances KS&T purchased at auction from Ontario weeks before the measures for \$30,158,240.95;
- b. The cost of obtaining allowance “cover” in connection with KS&T’s legal obligations to its counterparty;
- c. The costs of in-house and outside counsel, including, but not limited to, the costs of preparing this Notice and the costs of any subsequent consultations and arbitration, enforcement or other proceedings related to the injuries caused to Koch and KS&T by the measures;
- d. The management, administrative and overhead costs Koch and KS&T incurred in taking remedial steps and to obtain relief in response to the measures and the injuries the measures caused Koch and KS&T; and
- e. Compound interest, at a rate to be determined, running from the date of the losses caused by the measures through full payment.

67. Moreover, in the case of an “illegal” expropriation (as here), a claimant may instead claim the higher calculation that results from applying the most convenient method of the Article 1110 standards and the general standard of “full reparation” for illegal acts at international law. Koch and KS&T reserve the right to elect to do so at the appropriate time.

²¹ NAFTA Article 105 (Extent of Obligations) provides as follows: *The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.*

VII. REQUEST FOR RELIEF

68. In the event that the parties to the dispute are unable to resolve this dispute through consultations under Article 1118, Koch and KS&T will request that the Arbitral Tribunal constituted in accordance with NAFTA Chapter Eleven:

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



Dated: 20 February 2020

Steptoe & Johnson UK LLP
For and on behalf of the Claimants