

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Ruby River Capital LLC**

**v.**

**Canada**

**(ICSID Case No. ARB/23/5)**

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**PROCEDURAL ORDER NO. 10**

**Decision on Requests for Production of Documents Identified as Privileged**

***Members of the Tribunal***

Ms. Carole Malinvaud, President of the Tribunal

Mr. Barton Legum, Arbitrator

Prof. Zachary Douglas KC, Arbitrator

***Secretary of the Tribunal***

Mr. Benjamin Garel

***Assistant of the Tribunal***

Mr. Pierre Collet

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21 March 2025

**I. PROCEDURAL BACKGROUND**

1. On 30 November 2024, the Tribunal issued Procedural Order No. 4, addressing the Claimant’s document production requests and ordering the Respondent, *inter alia*, (i) to produce, by 10 December 2024 at the latest, a privilege log and redacted versions of documents.
2. On 5 December 2024, the Respondent indicated that it would only be able to produce, on 10 December 2024, a partial log of around 350 withheld documents for which it invokes privilege, and that some of the documents would not be produced within the prescribed deadline. The Respondent also explained that it was impossible to produce on that same date, even in a limited number, documents redacted on the basis of privilege.
3. On 9 December 2024, the Claimant objected to the Respondent’s production of its privilege log without the corresponding partially redacted documents, and to the production of redacted documents without providing the basis for such redactions.
4. On 11 December 2024, the Tribunal informed the Parties that it would hear them during a procedural session held by videoconference on 18 December 2024. The Tribunal also invited the Parties to confer and agree on proposed adjustments to the procedural calendar, or, should they be unable to agree, to submit their respective proposals by 17 December 2024.
5. On 17 December 2024, the Parties transmitted their respective proposed amendments to the procedural calendar.
6. On 18 December 2024, the Tribunal held a procedural session with the Parties by videoconference. After the videoconference, at the request of the Tribunal, the Claimant transmitted to the Tribunal (i) the partial privilege log it had received from the Respondent on 10 December 2024 and (ii) “*a list of the 44 documents containing redactions for which the Respondent provided no justification, nor identified as redacted in the index provided with the documents.*”

7. On the same day, the Tribunal informed the Parties that it had reviewed the privilege log transmitted by the Claimant and wished to receive and review the Claimant's request for production of documents withheld on the basis of privilege, scheduled to be filed on 19 December 2024 (per paragraph 39 of Procedural Order No. 4 and step 14 of the Procedural Calendar), before providing further directions to the Parties.
8. On 19 December 2024, the Claimant filed its "Request for the Production of Documents withheld by the Respondent, listed in the Respondent's Privilege Log dated 10 December 2024, and its annexes."
9. On 20 December 2024, the Tribunal issued Procedural Order No. 5 addressing the Respondent's document production requests to the Claimant.
10. On 21 December 2024, following the Respondent's request for clarification of 20 December 2024, the Tribunal informed the Parties that the deadline prescribed in Procedural Order No. 4 for the filing by the Respondent of any opposition to the Claimant's request filed on 19 December 2024 was maintained.
11. On 26 December 2024, the Respondent filed its opposition to the Claimant's requests for production of the documents not produced, together with the witness statements of Ms. Josée De Bellefeuille and Mr Donald Booth.
12. On 30 December 2024, the Claimant informed the Tribunal that it maintained its request for an Order per paragraph 39 of Procedural Order No. 4 but that it withdrew certain prior requests which had become moot, thus narrowing down the issues for the Tribunal.
13. On 3 January 2025, the Tribunal issued Procedural Order No. 8, which contained in its Annex A, a revised procedural calendar, and provided to the Parties explanations and guidelines applicable to the privilege logs to be submitted by the Parties on 14 February 2025. The Tribunal explained that these explanations and guidelines might be supplemented by said procedural order addressing the Respondent's privilege log dated 10 December 2024 (as updated on 20 December 2024). The Tribunal also invited the Respondent to incorporate in its final privilege log an updated version of the privilege log submitted on 10 December 2024.

14. On 6 January 2025, the Claimant requested clarifications from the Tribunal regarding the revised procedural calendar transmitted on 3 January 2025.
15. On 7 January 2025, the Tribunal provided the requested clarifications to the Parties.
16. On 9 January 2025, in light of the clarifications provided by the Tribunal, the Parties jointly submitted to the Tribunal a number of proposed corrections to the revised procedural calendar transmitted on 3 January 2025 as Annex A to Procedural Order No. 8. The Tribunal approved the proposed corrections on 10 January 2025, and a revised procedural calendar was transmitted to the Parties on 16 January 2025.
17. On 24 January 2025, the Tribunal issued Procedural Order No. 9, which contained in its Annex A, its decisions on the Claimant’s requests for the production of documents identified as privileged in the Respondent’s privilege log transmitted on 10 December 2024 and updated on 20 December 2024.
18. On 4 February 2025, the Claimant sought “*leave to address the Tribunal on the Respondent’s document production - or rather lack thereof altogether - in response to Procedural Order No. 9 and to request appropriate directions and relief from the Tribunal.*”
19. On 7 February 2025, the Tribunal authorized the Claimant to file its proposed observations on the Respondent’s document production, and invited the Parties to try, to the extent possible, to resolve their disagreements before referring them to the Tribunal.
20. On 25 February 2025, the Claimant filed a Request for an order that Respondent produce documents listed in its privilege log dated 14 February 2025, together with exhibits C-432 to C-437.
21. On 25 February 2025, the Respondent filed a Request for the production of a redacted document listed by the Claimant in its privilege log dated 14 February 2025.
22. On 4 March 2025, the Claimant wrote to the Tribunal regarding (i) clarifications provided by the Respondent on 28 February 2025 regarding the Respondent’s privilege log, and (ii) four exhibits (R-128 to R-131) uploaded by the Respondent onto the case

folder on Box the Claimant on 27 February 2025 (i.e. after the Claimant filed its Request on 25 February 2025). The Claimant indicated that it was prepared to provide comments on these exhibits should it be of assistance to the Tribunal.

23. On 4 March 2025, the Claimant sought “*leave to raise an issue with the Tribunal concerning the Respondent's privilege logs and, more specifically, the Respondent's assertion of legal privilege in connection with documents responsive to the Claimant's request No. 36 for the travaux préparatoires underlying Annex 14-C to the USMCA.*”
24. On 6 March 2025, the Tribunal granted the leave sought by the Claimant on 4 March 2025.
25. On 7 March 2025, the Claimant wrote to the Tribunal as authorized by the Tribunal on 6 March 2025.
26. On 11 March 2025, the Tribunal wrote to the Parties regarding pending issues with the Respondent's production of documents, and:
  - a) invited the Respondent to indicate, by 13 March 2025, whether it intends to produce the documents from its final privilege log of 14 February 2025 for which the Respondent invokes political or institutional grounds, should the Tribunal order it to do so.
  - b) took note of the Respondent's indication that documents for which it is specified in the Respondent's final privilege log that they are identical or similar to those which were the subject of a decision by the Tribunal in Procedural Order No. 9, will not be disclosed (email from counsel for the Respondent dated 12 February 2025, Exhibit C-0436)
  - c) questioned the Respondent on its position in the event that, in addition to identical or similar documents, the Tribunal were to order the disclosure of documents that it considered to be preparatory documents and not documents reflecting the deliberations of the Council of Ministers.

d) asked the Respondent to confirm the nature of the withheld documents PRIV000336, PRIV000361, PRIV000362 and PRIV000364 as being internal documents of the Respondent's government and therefore responsive to Claimant's request no. 37. Absent such confirmation, the Tribunal asked the Respondent to comment on the Claimant's position that the confidentiality privilege attached to documents containing legal advice from government lawyers is waived when such documents are shared with third parties.

27. On 13 March 2025, the Respondent wrote to the Tribunal to address the Tribunal's questions dated 11 March 2025.

## **II. SCOPE OF THE ORDER**

28. In this Order, the Tribunal rules on pending issues regarding document production further to Procedural Order No. 9, and on the Parties' respective requests for the production of documents identified as privileged in the Parties' privilege logs dated 14 February 2025.

## **III. PARTIES' POSITIONS**

29. The Tribunal provides here a succinct overview of the Parties' arguments, and refers to the Parties submissions filed on 25 February, 4 and 7 March 2025 (Claimant) and 25 February and 13 March 2025 (Respondent). The Tribunal will expand on the relevant arguments raised by the Parties, as necessary, in its analysis.

### **Claimant**

30. The Claimant submits that the Respondent has failed to comply with the Tribunal's Orders on document production, namely PO9 (first privilege log)<sup>1</sup>, PO4 (first order for document production)<sup>2</sup>, PO8 (information to be provided in the privilege log)<sup>3</sup>, and also

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<sup>1</sup> Claimant's Request dated 25 February 2025, paras. 14-21.

<sup>2</sup> Claimant's Request dated 25 February 2025, paras. 22-31.

<sup>3</sup> Claimant's Request dated 25 February 2025, paras. 32-37.

failed to provide relevant confirmation regarding the Respondent's invocation of legal privilege.<sup>4</sup>

31. The Claimant also contends that the Respondent has failed to meet its burden of proving that the documents withheld are privileged or otherwise confidential. The Claimant claims that some of the documents identified by the Respondent in its second privilege log appear similar to those in the first privilege log, over which the Tribunal has ruled in PO9.<sup>5</sup> The Claimant requests the production of the majority of the documents that the Respondent seeks to withhold on grounds of political sensitivity (Article 9.2(f) of the IBA Rules)<sup>6</sup>, legal privilege (Article 9.2(b) of the IBA Rules)<sup>7</sup>, lack of relevance and materiality (Article 9.2(a) of the IBA Rules)<sup>8</sup>, and commercial or technical confidentiality (Article 9.2(e) of the IBA Rules)<sup>9</sup>
32. The Claimant further submits that the Respondent has failed to prove that certain documents should not be produced unredacted. In particular, the Claimant contends that half of the documents produced in a redacted fashion by the Respondent should be produced unredacted, disputing the Respondent's invocation of political sensitivity,<sup>10</sup> legal privilege,<sup>11</sup> and commercial or technical confidentiality.<sup>12</sup>
33. Lastly, the Claimant requests the production of four documents relating to the negotiations of Annex 14-C of the USMCA, withheld by the Respondent, on the ground that the invocation of legal privilege should not justify withholding them, to the extent these documents were shared with the U. S. and/or with Mexico.<sup>13</sup>

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<sup>4</sup> Claimant's Request dated 25 February 2025, paras. 38-39.

<sup>5</sup> Claimant's Request dated 25 February 2025, paras. 43-50.

<sup>6</sup> Claimant's Request dated 25 February 2025, paras. 51-62.

<sup>7</sup> Claimant's Request dated 25 February 2025, paras. 63-67.

<sup>8</sup> Claimant's Request dated 25 February 2025, paras. 68-71.

<sup>9</sup> Claimant's Request dated 25 February 2025, paras. 72-73.

<sup>10</sup> Claimant's Request dated 25 February 2025, paras. 76-80.

<sup>11</sup> Claimant's Request dated 25 February 2025, paras. 81-83.

<sup>12</sup> Claimant's Request dated 25 February 2025, para. 84.

<sup>13</sup> Claimant's letter dated 7 March 2025.

**Respondent**

34. The Respondent requested the production of information redacted in exhibit SEC-0122, on the grounds that even if such information may contain confidential commercial information, the Claimant has not explained why the transparency/confidentiality regime set up by PO2 in this proceeding would not be sufficient to protect said confidential commercial information.<sup>14</sup>
35. In its letter dated 13 March 2025, the Respondent indicated that even if the Tribunal were to order the production of documents for which the Respondent has invoked a privilege based on political sensitivity (Article 9.2(f) of the IBA Rules), the Respondent would not produce such documents because of the very high institutional and political sensitivity of these documents, as explained in its letter dated 26 December 2024.<sup>15</sup>
36. Lastly, the Respondent confirmed that the four documents relating to the negotiations of Annex 14-C of the USMCA requested by the Claimant are internal documents which were not communicated to the U.S. or to Mexico.<sup>16</sup>

**IV. TRIBUNAL'S DETERMINATIONS AND APPROACH**

37. The Tribunal will first address the Claimant's requests regarding the Respondent's withheld and redacted documents as well as the Respondent's final privilege log (**B**), followed by the Respondent's requests regarding the Claimant's withheld and redacted documents as well as the Claimant's privilege log (**B**).

**A. CLAIMANT'S REQUESTS AND RESPONDENT'S FINAL PRIVILEGE LOG (ANNEX A)**

**Claimant's Requests**

38. The Tribunal notes as a preliminary matter that in its letters of 25 February and 7 March 2025, the Claimant made several general requests in connection with documents

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<sup>14</sup> Respondent's comment (line 7) in Claimant's privilege log dated 14 February 2025.

<sup>15</sup> Respondent's letter dated 13 March 2025.

<sup>16</sup> Respondent's letter dated 13 March 2025.



withheld or redacted by the Respondent, and which do not necessarily appear in the Respondent's final privilege log of 14 February.

39. Most of these requests have been resolved following exchanges of correspondence since then.<sup>17</sup>
40. However, two of the Claimant's general requests remain to be decided in addition to the requests made in the Respondent's final privilege log of 14 February.
41. The first one is the Respondent's request for confirmation that it has conducted reasonable searches to identify documents responsive to requests no. 2, 18, 23 and 31, and that it does not have in its possession documents responsive to requests no. 23 and 31.
42. The Claimant considers indeed that the Respondent's reply of 21 February 2025 to its letter of 20 February 2025 is ambiguous.
43. In view of these exchanges and the volume of documents identified by the Respondent, the Tribunal is of the opinion that the Respondent has, generally speaking, carried out reasonable searches to identify any documents responding to the disclosure requests made by the Claimant, and does not consider it appropriate to request further general confirmation from Canada on this point.
44. However, taking note of the fact that Canada has not communicated any document relating to requests no. 23 and 31, the Tribunal considers that Canada's reply in its email of 22 February 2025 that "*aucun document répondant aux demandes 23 et 31 n'a été produit ou inclus dans notre registre*" does not constitute the legitimately requested confirmation that there are no documents responding to these requests.<sup>18</sup>

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<sup>17</sup> Email from the Claimant's counsel to Mr. Garel dated 4 March 2025 at 11:52 a.m. (regarding the Claimant requests in the Claimant's letter to the Tribunal dated February 25, 2025 in paragraphs 33-34 and 38-39); letter from the Respondent to the Tribunal dated March 13, 2025 (regarding the request in the Claimant's letter to the Tribunal dated March 7, 2025).

<sup>18</sup> Respondent's email to Claimant dated 22 February 2025 (Exhibit C-0434).

45. In these circumstances, the Tribunal invites Canada to confirm that, having made reasonable searches, it does not have in its possession or under its control any document responding to requests no. 23 or 31.
46. The second general request<sup>19</sup> concerns the (51) occurrences in the final log that the Respondent describes as “*similar*” or “*substantially identical*” to a document in the first log, for which the Tribunal has maintained confidentiality on condition that the documents in question do not correspond to Exhibit C-280 or the final version of Exhibit C-281.
47. Indeed, in Procedural Order no. 9, the Tribunal maintained the privilege and refused disclosure of certain documents on condition that the document in question was neither the final version of exhibit C-281 nor exhibit C-280, which had otherwise been admitted into the proceedings.
48. Consequently, the Tribunal invites the Respondent to confirm that none of the 51 documents is the final version of Exhibit C-281 or Exhibit C-280.
49. Lastly, the Tribunal takes note of the Respondent’s indication<sup>20</sup> that even if the Tribunal were to order the production of documents for which it has invoked a privilege based on political sensitivity (Article 9.2(f) of the IBA Rules), the Respondent would not produce such documents due to the very high institutional and political sensitivity of these documents.
50. Notwithstanding this indication, it is up to the Tribunal to decide whether or not to order the production of the documents whose disclosure has been requested and which have been withheld or redacted for reasons of political sensitivity.
51. In this respect, the Tribunal notes that the Claimant has indicated its intention to ask the Tribunal to draw negative inferences from Canada's failure to disclose the documents

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<sup>19</sup> Claimant’s letter dated 25 February 2025, paras. 48-49.

<sup>20</sup> Respondent’s email dated 13 March 2025

withheld for reasons of political sensitivity, the production of which had been ordered by the Tribunal in Procedural Order no. 9.<sup>21</sup>

52. Besides these preliminary points, the Tribunal's decisions for each of the documents in the Respondent's final privilege log are set out in the spreadsheet in Annex A to this Order.
53. To this end, the Tribunal has analyzed all of the Parties' submissions and arguments, and has defined the following guidelines.

**The Respondent's final privilege log of 14 February 2025**

54. As a preliminary matter, the Tribunal notes that no decision is required on several documents which the Claimant does not request to be produced. For the rest, the Tribunal has carried out an analysis of each document in the light of the four reasons given by the Respondent for withholding or redacting the documents listed in its final privilege log of 14 February 2025 (hereinafter, "**the Respondent's Final Log**").

**Political and institutional sensitivity (Article 9(2)(f) of the IBA Rules)**

55. Political and institutional sensitivity is the ground invoked by the Respondent in the vast majority of cases to justify the withholding or redaction of a document, in isolation or in conjunction with another ground.
56. With regard to the ground of political and institutional sensitivity, the Tribunal has followed the same approach as for the Respondent's first log of 10 December 2024 (hereinafter, the "**First Log**"), described in Procedural Order No. 9, while taking into account the specificities of the Respondent's Final Log.<sup>22</sup>
57. In this regard, the Tribunal recalls that it recognizes the Respondent's legitimate and compelling public interest in refusing disclosure of documents relating to cabinet/council of ministers decisions at the federal and provincial levels, but also that it recognizes the

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<sup>21</sup> Claimant's letter dated 25 February 2025, paras. 14-16.

<sup>22</sup> Procedural Order No. 9, paras. 37-64.

Claimant's legitimate and compelling interest in having access to the documents to prove its allegations.

58. The Tribunal also recalls that it considers that the interests of each Party must be balanced.

59. To carry out this balancing exercise, the Tribunal relies on the same criteria as those mentioned in Procedural Order no. 9:<sup>23</sup>

- The Tribunal assesses the political or institutional sensitivity of the documents by distinguishing between the authors and recipients of the documents, as well as between documents prepared to inform the deliberations of the Cabinet/Council of ministers and documents reflecting the content of these deliberations.
- The Tribunal balances the Claimant's interest in obtaining the documents to support its claims or allegations against the Respondent's interest in not disclosing these documents.
- The Tribunal assesses whether the requested documents are the only evidence supporting the Claimant's claims or allegations, or whether the Claimant could support or establish these claims or allegations by other available means of evidence.

60. However, the Tribunal provides new answers to the specificities of the Respondent's Final Log.

61. First, the Tribunal notes that some of the withheld documents are described by the Respondent as "*similar*" or "*substantially identical*" to a document in the First Log, and that this qualification is not systematically contested by the Claimant.

62. With regard to these documents, the Tribunal notes the Parties' agreement on the qualification of "*similar*" or "*substantially identical*" and therefore considers that the same decision as that relating to the First Log should be applied to these documents.

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<sup>23</sup> Procedural Order No. 9, paras. 56-61.

63. Second, the Tribunal notes that certain withheld documents are qualified by the Respondent as “*similar*” or “*substantially identical*” to a document in the First Log, and that this qualification is sometimes contested by the Claimant.
64. With regard to these documents, the Tribunal accepts the Respondent’s qualification where the date of the documents described as “*similar*” or “*substantially identical*” changes by only a few days and therefore considers that the same decision as that relating to the First Log should be applied to these documents.
65. Third, the Tribunal notes that several documents withheld and redacted by Canada on the ground of political or institutional sensitivity respond to the Claimant’s requests no. 31 to 35.
66. The Tribunal notes that these requests relate to the “quantum of compensation”, in particular to evidence of the Project’s financial viability or lack thereof, and ultimately to the method of calculating compensation for the damage alleged by the Claimant.
67. The Tribunal considers that these requests raise a *prima facie* question that seems important. However, the Tribunal considers that the Claimant has other means of proving its allegations concerning the financial viability of the Project.
68. Therefore, the Tribunal considers that, for these documents, the balancing of the interests of each Party is in favor of maintaining the privilege and therefore orders that the privilege be maintained.
69. Fourth, the Tribunal notes that several of the documents withheld on the grounds of political or institutional sensitivity respond to Claimant’s requests no. 17 and 18.
70. The Tribunal notes that these documents are federal documents relating to the Federal Government’s Council of Ministers.
71. The Tribunal considers that these documents appear *prima facie* to be at the heart of the Claimant’s argument, namely that the real motives underlying the Respondent’s decision are different from the apparent or declared motives.

72. Moreover, the fact, as indicated by the Respondent in its letter of 26 December 2024, that these documents relate to a decision that the Claimant has not expressly contested, does not diminish their relevance to the Claimant’s case.
73. The Tribunal recognizes that these documents from the Federal Government's Council of Ministers have a similar sensitivity to those of the Conseil des ministres of Québec.
74. Consequently, the Tribunal considers that the documents of the Federal Government's Council of Ministers are subject to the same regime as the documents of Quebec's Council of Ministers, and will therefore apply the same criteria.
75. Fifth, the Tribunal notes that the Respondent has used the same sentence describing the invocation of privilege for the vast majority of the documents withheld or redacted for reasons of political or institutional sensitivity.
76. The description reads as follows: “[c]e document comporte des informations qui dévoilent le contenu d’un dossier destiné au Conseil des ministres et est protégé en droit canadien par l’article 283 du Code de procédure civile du Québec [...]”.
77. The Tribunal notes that this description differs from the two previously most frequently used descriptions in the First Log, namely:
- “Le document contient des renseignements dont le but est d’informer le Conseil des ministres en lien avec la décision de refuser le projet Énergie Saguenay.”*
- “Le document reflète le contenu des délibérations du Conseil des ministres ayant mené à la décision de refuser le projet Énergie Saguenay.”*
78. The Tribunal considers that this “new” wording seems *prima facie* to correspond to a document prepared to allow for an informed deliberation by the Cabinet/Council of Ministers, and not to a document reflecting the content of these deliberations.
79. As it decided in Procedural Order no. 9, the Tribunal therefore considers, in principle, that the balancing of the interests of both Parties favors disclosure of these documents, notwithstanding the privilege invoked by the Respondent for these documents.

80. The Tribunal therefore orders the disclosure of these documents, subject to the application of several exceptions, for which the balancing of the interests of both Parties is in favor of maintaining the privilege.
81. First, as indicated above, for the documents responding to requests nos. 31 to 35, the Tribunal considers that the balancing of the interests of the two Parties is in favor of maintaining the privilege.
82. Second, for the documents withheld or redacted on the ground of political or institutional sensitivity which, despite the use of the new generic wording, the more precise description of the privilege invocation or of the Title/Subject bring said document closer to a document reflecting the content of the deliberations, the Tribunal considers that the balancing of the interests of both Parties is in favor of maintaining the privilege.<sup>24</sup>
83. These decisions are made on a case-by-case basis in the Respondent’s Final Log, and maintaining the privilege include notably the recommendations and proposals hypotheses.

**Legal privilege and professional secrecy (Article 9(2)(b) of the IBA Rules)**

84. Concerning legal privilege and professional secrecy, the Tribunal recalls that it noted in paragraph 14(c)(v) of Procedural Order No. 8 that:

*“In case of a withholding or redaction based on the “legal advice” nature of a document, the ground on which that document can be qualified as “legal advice”, including with respect to the title or function of the drafter and/or sender of the document.”*

85. On this basis, the Tribunal invites the Respondent to confirm that certain documents withheld or redacted on grounds of legal privilege may qualify as “*legal advice*” in

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<sup>24</sup> In the First Log, the Tribunal considered as closer to documents reflecting the content of the deliberations, documents related to the following documents: the agendas of the Council of Ministers, the minutes of the deliberations, the press releases accompanying the decision to refuse the Energie Saguenay project; the draft note on Q&A to the Minister concerning the decision to refuse the project, the documents related to the *Comité ministériel de l’économie et de l’environnement* (CMEE).

accordance with Procedural Order no. 8 (see “Tribunal decision” column of the Respondent’s Final Log).

86. In this respect, the Tribunal notes that the Respondent has relied on the professional secrecy of accountants on several occasions to withhold documents from its log. With regard to these documents, the Tribunal orders the Respondent to confirm the nature of, and reasons, for protecting the professional secrecy of accountants.

**Relevance of the document (Article 9(2)(a) of the IBA Rules)**

87. With regard to the six documents withheld on the grounds of lack of relevance, the Tribunal agrees with the Claimant that the Respondent’s decision to include these documents in its Final Log makes them *de facto* relevant.
88. Therefore, for the document withheld on the sole ground of lack of relevance (PRIV1334), the Tribunal orders its disclosure with the passwords redacted.
89. For the other five documents, the Tribunal invites the Parties to refer to the spreadsheet in Annex A to this Procedural Order.
90. With regard to the 23 redacted documents for which the claim that they lack relevance is contested by the Claimant, the Tribunal orders that five of the 23 non-redacted documents be disclosed to it so that the Tribunal may assess the relevance, or lack thereof, of the redacted information.
91. For the remaining 17 documents, the Tribunal has provided answers on a case-by-case basis, in particular with regard to the other grounds for redaction invoked by the Respondent.

**Technical or commercial confidentiality (article 9(2)(e) of the IBA Rules)**

92. With regard to the three documents withheld on grounds of technical or commercial confidentiality, the Tribunal notes that other grounds are generally invoked to withhold these documents. The Tribunal will analyze on a case-by-case basis whether the invocation of other grounds is justified and will then rule, if necessary, on this ground in the spreadsheet in Annex A to this Procedural Order.



93. In addition, the Tribunal notes that Procedural Order No. 2 provides for an enhanced confidentiality regime capable of ensuring effective protection and safeguards against the disclosure of commercially sensitive information to persons not participating in the present arbitration.
94. With regard to the document redacted (CAN586408) on grounds of technical or commercial confidentiality and lack of relevance, the Tribunal orders that the unredacted document be provided to it so that the Tribunal can assess the relevance, or lack thereof, of the information in the document, as well as the commercial or technical confidentiality.

**B. RESPONDENT’S REQUESTS AND CLAIMANT’S PRIVILEGE LOG OF 14 FEBRUARY 2025 (ANNEX B)**

95. The Tribunal notes that the Respondent requests the production of certain redacted information in a document identified in the Claimant’s privilege log entitled “*Front End Engineering Design Services Agreement*”.
96. The Claimant justifies the redaction of these parts of the document on the grounds of the commercial confidentiality of the information in the document.
97. The Tribunal notes from the Respondent’s comments in the Claimant’s privilege log that the redacted version of the document communicated to the Respondent is a more complete version than Exhibit SEC-0122, since it includes information relating to the confidentiality regime, which was not the case with Exhibit SEC-0122, in which the confidentiality clause was redacted (article 13).
98. The Tribunal considers that the redacted information in the document<sup>25</sup>, the production of which is requested by the Respondent, appears *prima facie* to be useful for the Respondent to rebut the Claimant’s allegation regarding the financial viability of the Project, which may have an impact on the valuation method for the alleged prejudice.

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<sup>25</sup> This information is as follows: (i) paragraph 2.2 of Annex J of this document and (ii) redacted information in Annex K of this document (on pages 143 to 176 of the pdf document), including Exhibit 1 entitled “*Open-Book Process Development Plan List*”, Exhibit 2 entitled “*Data Room Procedure*” and Exhibit 3 entitled “*EPC Cost Estimate Sample Pages*”.

99. The Tribunal considers that the confidentiality and transparency regime established by Procedural Order No. 2 constitutes an effective protection and guarantee against the disclosure of commercially sensitive information to persons not participating in the present arbitration.
100. Finally, the Tribunal notes that the Respondent is not a competitor of Bechtel.
101. The Tribunal wishes to order disclosure of the document without the redactions of the information requested by the Respondent.
102. However, in order to make any necessary adjustments to the confidentiality regime, the Tribunal would like to see the version of the contract communicated to the Respondent, in which the confidentiality clause appears.
103. The Tribunal orders that it be provided with document no. 7 entitled “*Front End Engineering Design Services Agreement*” as communicated to the Respondent.
104. Before ordering the disclosure of the unredacted document to the Respondent, the Tribunal will assess whether it is appropriate to amend the applicable confidentiality regime.

## **V. ORDER**

105. Applying the reasoning articulated above, the Tribunal issues for each document listed in the Respondent’s Final Privilege Log and in the Claimant’s Privilege Log, the decision indicated, respectively, in the Excel spreadsheet in Annex A and in the table in Annex B.
106. The Tribunal orders:
- The Respondent to provide (i) to the Claimant on 28 March 2025 at the latest, the documents identified in Annex A and (ii) to the Tribunal on 28 March 2025 at the latest, the unredacted documents identified in Annex A so that the Tribunal may assess the relevance of the redactions.

- The Claimant to provide to the Tribunal on 28 March 2025 at the latest, the document identified in Annex B.
- To each Party to provide to the other Party on 18 April 2025 at the latest any additional documents which the Tribunal may order to be produced in the decision to be issued on 11 April 2025 at the latest (regarding documents communicated to the Tribunal only on 28 March 2025).

107. In addition, the Tribunal invites the Respondent to confirm no later than 28 March 2025:

- That, after having made reasonable searches, it does not have in its possession or under its control any document responding to requests no. 23 or 31;
- That none of the 51 documents mentioned in §§46-48 above is the final version of Exhibit C-281 or Exhibit C-280;
- That the documents withheld or redacted on grounds of legal privilege mentioned in §§84-85 *supra* can be qualified as “*legal advice*” in accordance with Procedural Order No. 8 (see “Tribunal decision” column of the Respondent’s Final Log);
- The nature of, and reasons, for protecting the professional secrecy of accountants (§86 above).

108. Further, with respect to documents which would be produced to the Claimant on 18 April 2025, i.e. simultaneously with the filing of the Claimant's Reply on the merits and Counter-Memorial on jurisdiction, the Tribunal authorizes the Claimant to complete/amend this Memorial on 2 May 2025 at the latest, exclusively in light of the content of the newly produced documents.

109. In order to take these decisions into account, the Procedural calendar is amended and appended hereto (Annex C).

On behalf of the Tribunal,

[SIGNATURE]

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Ms. Carole Malinvaud  
President of the Tribunal  
Date: 21 March 2025

**Annexes:**

Annex A – Respondent’s Final Privilege Log

Annex B – Claimant’s Privilege Log

Annex C – Procedural calendar amended as of 21 March 2025

**Annex C**

**Procedural Calendar (version updated on 21 March 2025)**

	Step	Parties / Tribunal	Days	Date
1.	Procedural Order No. 1	Tribunal		23 August 2023
2.	Memorial	Claimant	90	21 November 2023
	<i>Decision on bifurcation</i>	<i>Tribunal</i>		<i>26 April 2024</i>
3.	Counter-Memorial on the Merits and Memorial on Jurisdiction	Respondent	80	15 July 2024
4.	Parties' respective Requests to Produce Documents	Parties	35	19 August 2024
5.	Objections to Requests to Produce Documents	Parties	30	18 September 2024
6.	Deadline for applications for leave to submit <i>amicus curiae</i> submissions, if any, attaching the proposed submission	Third-parties	102 (from step 3)	25 September 2024
7.	Replies to objections to Requests to Produce Documents	Parties	30 (from step 5)	25 October 2024
8.	Observations on applications for leave to submit <i>amicus curiae</i> submissions	Parties	30 (from step 6)	25 October 2024
9.	Decision on applications for leave to submit <i>amicus curiae</i> submissions	Tribunal		20 December 2024
10.	Decision by the Tribunal on Requests to Produce Documents	Tribunal		30 November 2024
11.	Privilege log with redacted versions of documents identifying the grounds for redacting	Respondent		10 December 2024
12.	Production of Documents (both non-contested and as ordered by the Tribunal) responding to requests 5,9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 30, 36, 37, 38, 39.	Parties		13 to 20 December 2024

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	<b>Step</b>	<b>Parties / Tribunal</b>	<b>Days</b>	<b>Date</b>
13.	Request for production of documents identified in Respondent's privilege log ("documents identified as privileged")	Claimant		19 December 2024
14.	Opposition to requests for production of documents identified as privileged.	Respondent		26 December 2024
15.	Reply to Respondent's opposition	Claimant		30 December 2024
16.	Production of documents as ordered by the Tribunal on 20 December 2024	Claimant		20 January 2025 (at the latest)
17.	Decision on requests for production of documents identified as privileged	Tribunal		23 January 2025 (at the latest) <sup>1</sup>
18.	Production of documents as ordered by the Tribunal in Step 17	Respondent	7 days from Step 17	30 January 2025 (at the latest)
19.	Production of documents (both non-contested and as ordered by the Tribunal) responding to requests 1, 2, 3, 4, 6, 7, 8, 12, 23, 25, 26, 28, 29, 31, 32, 33, 34, 35 and production of a privilege log	Respondent		21 December 2024 – 14 February 2025
20.	Production of documents and of a final privilege log	Parties		14 February 2025
21.	Requests for production of documents identified as privileged or of the redacted documents	Parties		25 February 2025
22.	Decision on the requests for production of documents identified as privileged	Tribunal		21 March 2025
23.	Production of documents as ordered by the Tribunal in Step 22	Respondent		28 March 2025
24.	Communication to the Tribunal of the unredacted documents as ordered by the Tribunal in order to assess the relevance of the redactions (Respondent).	Parties		28 March 2025

<sup>1</sup> 23 January 2025 is a deadline and the Tribunal will make its best efforts to issue its decision before that date.

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	<b>Step</b>	<b>Parties / Tribunal</b>	<b>Days</b>	<b>Date</b>
	Communication to the Tribunal of the Bechtel contract as communicated to the Defendant (Claimant).  Confirmations by the Respondent per §107.			
25	Decision of the Tribunal on the documents redacted by the Respondent and the redaction of the Bechtel contract.	Tribunal		11 April 2025
26	Communication to the Parties of the additional documents as ordered by the Tribunal.	Parties		18 April 2025
27	Reply on the Merits and Counter-Memorial on Jurisdiction	Claimant		18 April 2025
28	Possible addendum to the Reply on the Merits and the Counter-Memorial on jurisdiction in light of the new documents communicated on 18 April 2025.	Claimant		2 May 2025
29	Rejoinder on the Merits and Reply on Jurisdiction	Respondent	70	28 June 2025
30	Rejoinder on Jurisdiction	Claimant	61	28 August 2025
31	NAFTA Article 1128 Submissions by non-disputing NAFTA Parties, if any	Non-disputing NAFTA Parties	20	17 September 2025
32	List of witnesses and experts to be cross-examined during the hearing	Parties	At least 4 weeks before the dates for Hearing	7 October 2025
33	Request for leave to present witnesses/experts not called by the other Party.	Parties	Within 48 hours of step 28	9 October 2025
34	Disputing Parties' Submissions, if any, on NAFTA Article 1128 Submissions	Parties	30	17 October 2025
35	Indication of witnesses/experts called by the Tribunal and Tribunal's ruling on Parties' requests for leave to present	Tribunal	Within 2 weeks of step 29	23 October 2025

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	<b>Step</b>	<b>Parties / Tribunal</b>	<b>Days</b>	<b>Date</b>
	witnesses/experts not called by the other Party.			
36.	Pre-hearing organizational teleconference/videoconference	All	At least 4 weeks before the dates for Hearing	4 November 2025
37.	Hearing	All		2 to 12 December 2025 [with 1 or 2 days in reserve]
38.	Post-Hearing Briefs	Parties	TBC	TBC
39.	Cost submissions	Parties	TBC	TBC