INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CASE NO. ARB/23/5

RUBY RIVER CAPITAL LLC

Claimant

VS.

CANADA

Respondent

REPLY ON MERITS AND COUNTER-MEMORIAL ON JURISDICTION

18 April 2025

Before:

Ms Carole Malinvaud (President)
Mr Barton Legum
Prof Zachary Douglas KC

LALIVE

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DEFINED TERMS AND ABBREVIATIONS

Agency	Canadian Environmental Assessment Agency (until August 2019); Impact Assessment Agency of Canada (from August 2019 onwards)
Agency Report	Environmental Assessment Report prepared by the Agency, dated November 2021
[redacted]	[redacted]
Application	Gazoduq's consolidated regulatory application to be filed with the Agency and the MELCC
BAPE	*Bureau d'audiences publiques sur l'environnement*
BAPE Report	Report of the BAPE No. 358, published on 24 March 2021
BC	British Columbia
BC EAO	Environmental Assessment Office of British Columbia
[redacted]	[redacted]
Bill C-69	Denomination of the Impact Assessment Act 2019 prior to its enactment
Québec Cabinet	Council of Ministers of Québec (also known as the *Conseil exécutif* or *Conseil des ministres*)
CAD	Canadian dollars
Canada-Québec Agreement	Canada-Québec Agreement on Environmental Assessment Cooperation dated 2004 and renewed on 25 October 2010
CEAA 2012	Canadian Environmental Assessment Act, 2012
CER	Canada Energy Regulator

CETA	Canada-European Union Comprehensive Economic and Trade Agreement
CGL	Coastal GasLink Pipeline project, British Columbia
CIRAIG	International Reference Centre for Life Cycle Assessment and Sustainable Transition
Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, dated 15 July 2024
CQDE	*Centre québécois de droit de l'environnement*
DCF	Discounted cash flow
DEC	*Direction de l'expertise climatique*
Decision Statement	Decision Statement of the federal Minister of Environment and Climate Change Canada, dated 7 February 2022
Decree	Decree 1071-2021 of the Cabinet of Québec dated 21 July 2021 and published on 11 August 2021 regarding the refusal to approve the GNLQ Project
DFO	Department for Fisheries and Oceans of Canada, a federal department responsible for safeguarding Canada's ocean resources and under the direction of the Minister of Fisheries, Oceans, and the Canadian Coast Guard
DGRCDE	*Direction générale de la réglementation carbone et des données d'émission*
DPD	Detailed Project Description
DPCA	*Direction de la prospective climatique et de l'adaptation*
EA	Environmental assessment

ECCC	Environment and Climate Change Canada, the federal ministry responsible for environmental issues and under the direction of the Minister of Environment and Climate Change
EDC	Export Development Canada
EIS	Environmental Impact Statement for the GNLQ Project submitted to the MELCC and the Agency in February 2019
EIS Guidelines	Guidelines for the Preparation of an Environmental Impact Statement issued by the Agency on 14 March 2019
EQA	Québec Environment Quality Act, 1972
EY	Ernst & Young
federal Cabinet	The Governor in Council
FET	Fair and equitable treatment
Freestone	Freestone International LLC
FID	Final investment decision
FIPA	Canada's Model Foreign Investment Promotion and Protection Agreement
FTC	Free Trade Commission
Gazoduq	Gazoduq Inc.
Gazoduq Directive	*Ministère de l'Environnement et de la Lutte contre les changements climatiques, Directive pour la réalisation d'une étude d'impact sur l'environnement : Projet Gazoduq par Gazoduq inc.*, dated 6 December 2018
Gazoduq Project	780-km natural gas pipeline from eastern Ontario to the GNLQ facility to be operated by Gazoduq Inc.
GSA	Gas Sales Agreement
GCNN	Groupe Conseil Nutshimit-Nippour

GREMM	*Groupe de recherche et d'éducation sur les mammifères marins*
GNLQ	GNL Québec, Inc.
GNLQ Project	Liquefied natural gas facility in the region of Saguenay, Québec to be operated by GNLQ
HQ	Hydro-Québec
IA	Impact assessment
IAA	Impact Assessment Act, 2019
ICJ	International Court of Justice
ICJ Statute	1945 Statute of the International Court of Justice
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force on 14 October 1966
ILC Articles	ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001
IPD	Initial Project Description
IQ	*Investissement Québec*
IR	Information request
LNG	Liquefied natural gas
LNG SPA	LNG Sale Purchase Agreement
[redacted]	[redacted]
MEI	Québec *Ministère de l'Économie et de l'Innovation* (so named from October 2018 to 20 October 2022; previously named *Ministre de l'Économie, de l'Innovation et des Exportations* from April 2014 to January 2016 and *Ministère de l'Économie, de la Science et de l'Innovation* from January 2016 to October

	2018. Now named the *Ministère de l'Économie, Innovation et Énergie*)
Memorial	Claimant's Memorial on Jurisdiction and Merits, dated 21 November 2023
MELCC	Québec *Ministère de l'Environnement et de la Lutte contre les changements climatiques* (so named from 18 October 2018 to 20 October 2022, previously named *Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques* from April 2014 to October 2018. Now the *Ministère de l'Environnement et de la Lutte contre les changements climatiques, de la Faune et des Parcs*)
MELCC Directive	*Directive pour le projet Energie Saguenay de construction d'un complexe de liquéfaction de gaz naturel sur le territoire de la ville de Saguenay par GNL Québec inc.,* dated 10 December 2015
MELCC Report	MELCC Environmental Assessment Report, 30 June 2021
MERN	*Ministère de l'Énergie et des Ressources Naturelles*
MFFP	Québec *Ministère de la Faune, des Forêts et des Parcs*
MFN	Most favoured nation
MST	Minimum standard of treatment
MTQ	Québec *Ministère des Transports et de la Mobilité durable*
NAFTA	North American Free Trade Agreement, 1994
NEB	National Energy Board
NEB Act	National Energy Board Act, 2018

Norton Rose	Norton Rose Fulbright
NRCan	Natural Resources Canada
NT	National treatment
PAPD	Pre-Application Project Description
PGQ	*Procureur Général du Québec*
PORP	Pre-operational risk premium
PPA	Preferred Planning Area
Protocol	USMCA Protocol, dated 30 November 2018
QC-CAN Gazoduq Cooperation Agreement	Cooperation Plan for the Impact Assessment of the Gazoduq Project, dated 30 June 2020
RCGT	Raymond Chabot Grant Thornton
Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, 18 April 2025
Ruby River	Ruby River Capital LLC, the Claimant
SPA	Saguenay Port Authority
SPEDE	*Système de plafonnement et d'échange de droits d'émission*
Symbio	Symbio Infrastructure Partnership Limited
Symbio Project	The GNLQ Project and the Gazoduq Project taken together
TISG (or TIS Guidelines)	Agency's Tailored Impact Statement Guidelines
TTF	Title Transfer Facility
UPI	UniversalPegasus International
UQO	*Université du Québec en Outaouais*
USD	U.S. dollars

USMCA	Agreement between the United States of America, the United Mexican States, and Canada, 2020
Vard	Vard Marine Inc.
VCLT	Vienna Convention on the Law of Treaties, 1969
WACC	Weighted average cost of capital

1 INTRODUCTION

1 This Reply on the Merits and Counter-Memorial on Jurisdiction (the "**Reply**") is filed in response to the Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 15 July 2024 (the "**Counter-Memorial**"), pursuant to Rule 31(1)(c) of the ICSID Rules, paragraph 14.1 of Procedural Order No. 1 and the Tribunal's direction dated 21 March 2025.

2 The Claimant's project entailed a competitive, innovative, carbon-neutral LNG facility on the bank of the Saguenay River in Québec to be operated by GNL Québec, Inc. ("**GNLQ**") (the "**GNLQ Project**") and a carbon-neutral, 780-km natural gas pipeline from eastern Ontario to the GNLQ facility to be operated by Gazoduq Inc. ("**Gazoduq**") (the "**Gazoduq Project**", with the GNLQ Project, the "**Symbio Project**").

3 Had the Symbio Project not been brought to a halt by the Respondent's wrongful actions, it would have confirmed Canada's leading role as a reliable source of sustainable energy, brought substantial economic benefits to Québec and to Canada, and represented a significant pan-Canadian industrial collaboration. It would have bolstered the country's export capacity, allowing it to support its European allies seeking to move away from Russian gas and diversify its energy exports.

4 Understandably, the Symbio Project generated significant enthusiasm from Government officials at the local (Saguenay), provincial (Québec) and federal level, even before the environmental assessment ("**EA**") process began. These were not mere expressions of interest; they were strong words of encouragement that translated into concrete actions taken by various Québec and federal ministries and agencies to advance the Project. This support not only encouraged Symbio to pursue its investment, but also reinforced the Claimant's legitimate expectation that the Symbio Project would be assessed in a fair, predictable and unbiased manner throughout. This expectation was not met.

5 The decisions by the Québec and federal authorities not to allow the GNLQ Project to proceed were inherently unlawful. They were also the result of a series of wrongful acts and omissions, including direct political

interference, that compromised the integrity of the EA process for the GNLQ Project, at the outset in 2015 and throughout.

6 In its Counter-Memorial, the Respondent hardly disputes **the facts** as presented by the Claimant, but contends that its conduct was permissible under federal and Québec law to (allegedly) protect the environment, and, more specifically, to comply with Canada's objectives to reduce GHG emissions and protect endangered species.

7 This case, however, is not about a State's right to regulate to protect the environment and lawfully exercising its discretion to do so. Nor does it concern a disgruntled investor seeking to overturn a lawful but adverse regulatory decision. This case is about a State abusing its powers in terminating a project for reasons that were neither lawful nor valid.

8 As the evidence shows, the GNLQ Project was in line with both federal and Québec environmental policies. However, along with the Gazoduq Project, it became the victim of a process tainted by unlawful, improper and arbitrary actions and considerations on the part of both Québec and federal authorities. This abusive conduct was the direct result of breaches of federal and Québec environmental law, as well as Canadian constitutional law.

9 Environmental law inherently requires balancing different interests. This is particularly evident in the EA of large industrial projects, which requires careful consideration of both economic development and environmental objectives. As such, the process can become polarising, leaving decision-makers exposed to accusations of bias and arbitrariness by both proponents of and opponents to a project. This is why modern environmental laws provide for comprehensive, predictable and transparent frameworks within which EAs are carried out.

10 Canadian law is no exception in this regard. It provides two key safeguards to ensure that the EA of a project is conducted properly and fairly: first, the mandatory allocation or coordination of the EA process, to reflect the respective environmental responsibilities of the federal State and the provinces (here, Québec); and second, a mandatory early delineation of the scope of the EA, which sets the limits within which State authorities may make recommendations and decisions regarding the project. In this case,

the Respondent violated both of those safeguards, resulting in decisions by both the Québec and Federal Governments that were not only unlawful, but also arbitrary and improper.

11 At the outset, the EA process of the GNLQ Project took a wrong turn. Between November 2015 and January 2016, the Québec *Ministère de l'Environnement et de la Lutte contre le Changement Climatique* (the "**MELCC**") and the federal Canadian Environmental Assessment Agency (the "**Agency**") failed to ensure that there would be, either (i) a single federal assessment led by the Agency, since the GNLQ Project largely fell within federal jurisdiction, or (ii) a single joint assessment, carried out by the Agency and the MELCC, pursuant to the Canada-Québec Agreement on Environmental Assessment Cooperation, as renewed on 25 October 2010 (the "**Canada-Québec Agreement**").

12 Instead, the MELCC and the Agency unlawfully opted for two separate EAs. By doing so, they removed the first safeguard in the EA legal framework. Indeed, the lack of coordination and collaboration between the Québec and federal authorities not only resulted in two uncoordinated EA processes, and two (wrongful) decisions, it also paved the way for further irregularities.

13 In December 2015, the MELCC issued its *Directive pour le projet Energie Saguenay de construction d'un complexe de liquefaction de gaz naturel sur le territoire de la ville de Saguenay par GNL Québec Inc.*, under the Québec Environment Quality Act ("**EQA**") (the "**MELCC Directive**"). In March 2016, the Agency issued its own Guidelines for the Preparation of an Environmental Impact Statement under the Canadian Environmental Assessment Act 2012 ("**CEAA 2012**") (the "**EIS Guidelines**"). These comprehensive, legally binding documents defined the scope of the provincial Québec EA and the federal EA, establishing clear boundaries within which recommendations and decisions could be made. However, the Québec and federal authorities also ignored this second safeguard.

14 The MELCC and the Agency indeed exceeded their powers, not only by requesting that GNLQ provide information and assurances on matters that were outside their respective jurisdictions, but also by drawing conclusions and making recommendations to the Québec and Federal Governments on

matters that went beyond the scope of the MELCC Directive and the EIS Guidelines.

15 The unlawful dual track in the GNLQ Project EA process further enabled unlawful governmental interference in the provincial EA, which then tainted the federal EA. This could not have occurred had the EA process been run as a single federal assessment or as a joint assessment.

16 The Québec Government's interference with the provincial EA process was fatal to the GNLQ Project, as it included:

i) imposing at the eleventh hour, in March 2021, three new and purposely unrealistic "core criteria" for the approval of the GNLQ Project, including an astonishing requirement to prove that the project would lead to a reduction in global GHG emissions;

ii) effectively deciding already then to reject the GNLQ Project, thus by-passing the provincial EA process that was not yet complete, and instead forcing the MELCC team in charge into a different course, to secure an unjustified recommendation not to approve the project; and eventually

iii) deciding formally, on 21 July 2021, not to approve the GNLQ Project, on those same new "core" grounds, as well as others, which were either outside Québec's jurisdiction or outside the scope of the MELCC Directive, or both.

17 That decision by the Québec Government, in turn led the Federal Government to follow suit and act improperly by:

i) announcing already in September 2021 that the GNLQ Project would not go forward, while the federal EA, led by the Agency, was still ongoing, thereby prejudging its outcome;

ii) then relying on grounds that were outside the scope of the EIS Guidelines, in order to:

- have the Agency change its course and invoke grounds similar to the three "core criteria" imposed by the Québec Government in March 2021 and reflected in its decision of 21 July 2021;

- have the federal Minister of Environment refer the GNLQ Project to the Governor in Council (the "**federal Cabinet**") on 9 December 2021 for a decision, on the (wrong) basis that the project would allegedly cause significant adverse environmental effects that could not be mitigated; and
- decide, in turn, on 7 February 2022, that those allegedly adverse environmental effects were not justified in the circumstances, effectively rejecting the GNLQ Project.

18 The Québec and federal authorities' misconduct is fully borne out by the contemporaneous evidence on record, including documents that the Respondent produced in document production at the Claimant's request, that the Claimant suspected existed but had never seen prior to this arbitration. It is also supported by inferences that can be drawn from documents that the Respondent has identified as existing, and described, but refused to produce, in violation of the Tribunal's orders. The Claimant has identified throughout this Reply where such adverse inferences should be drawn.

19 In its Counter-Memorial, the Respondent struggles to find legitimate justifications for these events, and instead seeks to downplay their significance, offering excuses that find no support on the facts and under Canadian law.

20 As a matter of Canadian constitutional law, including the Canadian doctrine of paramountcy, the Respondent's proposition that Québec authorities were entitled to impose their own EA of the GNLQ Project is wrong. This is demonstrated by the Claimant's experts, Me Christine Duchaine and Mr Rodney Northey, both of whom have over 30 years of experience in advising and representing clients on EA-related matters at the Québec and federal levels, respectively.

21 Given the location of the GNLQ Project on federal land and the overwhelming number of matters that fell within exclusive federal jurisdiction, the GNLQ Project should have been subject only to a single federal assessment. Québec authorities had no reason to participate in the EA, let alone initiate their own provincial EA.

22 To the extent that Québec considered the project also to fall, in part, within its EA responsibility, the MELCC and the Agency were required by law to collaborate and conduct a joint assessment under the Canada-Québec Agreement. Documents produced by the Respondent in document production confirm that, indeed, this was the MELCC's and the Agency's understanding at the time, before they inexplicably changed tack and went their separate, uncoordinated ways.

23 While they proceeded separately, the scope of each EA was in any event squarely limited by the MELCC Directive and the Agency's EIS Guidelines. Both Me Duchaine and Mr Northey confirm that these documents were legally binding, contrary to the assertions of the Respondent and its experts – neither of whom has the requisite experience to opine on the matter. Again, as a matter of law and due process, any recommendation by the MELCC and the Agency, and any ground for any decision by the Québec or Federal Governments as part of the EA processes, that fell outside the scope of the MELCC Directive and the EIS Guidelines, was illegal.

24 On the facts, this is precisely what happened. In the face of political interference, the MELCC and the Agency each made recommendations that fell outside the scope of their respective EAs, which in turn led the Québec and Federal Governments to invoke grounds for their decisions that were also illegal.

25 At the Québec level, the MELCC's deviation from the lawful EA process was directly dictated by the Québec Government. This also explains why the Respondent now seeks to read into the MELCC Directive the three new "core criteria" imposed by the Québec Minister of Environment on GNLQ in the last months of an EA process that took several years. The Respondent is effectively trying to fit a square peg into a round hole – and trying to do so retroactively. Again, the above is clear from the documents produced by the Respondent in document production, and also from those it has listed but refused to produce.

26 At the federal level, the authorities fared no better. The Federal Government arbitrarily followed suit in deciding to refuse the GNLQ Project, in the context of the 2021 Canadian federal elections. It announced it already in September 2021, well before the Agency's own EA was

complete, thereby prejudging its outcome. That left the Agency to finalise a report with recommendations that would support the Federal Government's desired outcome. To do so, the Agency had to rely on grounds that not only fell outside, but had been explicitly excluded for consideration by, the EIS Guidelines. By relying on these grounds, the Federal Government's decision to reject the GNLQ Project was illegal.

27 It is therefore no surprise that, substantively, none of the grounds invoked by the Québec and federal authorities to reject the GNLQ Project were in any way justified, including scientifically. This too is borne out by the evidence.

28 In light of these damning facts, the Respondent's approach **on the merits** of the Claimant's claims is equally unsurprising

29 The Respondent first attempts to set an artificially high threshold for a breach of the customary international law minimum standard of treatment under Article 1105 NAFTA, that is unsupported by Article 1105 or by case law. On the facts of this case, Canada's conduct was discriminatory and arbitrary and violated due process as well as the Claimant's legitimate expectations, in breach of Article 1105 NAFTA.

30 Canada's conduct also failed to accord the GNLQ Project the same standards of treatment as that accorded to comparable projects before, simultaneously to, and after the facts in dispute in the present case, in breach of Articles 1102 and 1103 NAFTA. While the Respondent seeks to downplay them, those differences of treatment are glaring, including (i) in the choice of two separate, uncoordinated EAs for the GNLQ Project, as opposed to either a single federal assessment or a joint assessment; and (ii) in the much stricter standards imposed on the GNLQ Project regarding GHG emissions and the protection of beluga whales.

31 As for the Respondent's defences to the Claimant's expropriation claim under Article 1110 NAFTA they fail as matter of law. The Claimant had an investment to be expropriated within the meaning of the NAFTA and the doctrine of police powers invoked by the Respondent does not apply.

32 Finally, and contrary to the contentions of the *Centre québecois de droit de l'environnement* ("**CQDE**") in its *amicus curiae* submission, the

Respondent's conduct cannot be justified on the grounds that the Québec and federal authorities legitimately applied the precautionary principle in reaching their decisions. That principle was, rightly, not invoked by the Respondent either at the time or in its submissions in this arbitration.

33 **On quantum**, there can be no doubt that the Respondent's breaches of the NAFTA have caused the Claimant and Symbio to lose the fair market value of the Symbio Project as at 21 July 2021. In this regard, the Respondent's argument that the Symbio Project was not viable and in any event could not have been completed is disingenuous and untenable in light of the evidence on record:

- First, had the Symbio Project been doomed to fail even without the Respondent's NAFTA breaches, the Québec Government and other institutional investors would not have offered to invest in Symbio to support the Project, following extensive due diligence, let alone on the basis of a pre-money valuation of [redacted] in 2019-2020.
- Second, although the Gazoduq Project was still part-way through its own approval process at the federal and Québec levels, there is no reason why, but for the Québec and Federal Governments' decisions to put an end to the GNLQ Project, the Gazoduq Project would not have been completed in accordance with Gazoduq's schedule.

34 Applying the criteria used by other investment tribunals, the Claimant adopts the DCF methodology as the most sound and appropriate method to determine the market value of the Symbio Project and thus quantify the Claimant's loss.

35 In adjusting the fair market value of the Symbio Project submitted with this Reply, the Claimant's quantum expert, Secretariat, now takes 21 July 2021 as the valuation date, *i.e.*, the date on which the Québec Government refused to authorise the GNLQ Project. Secretariat calculates the fair market value of the Symbio Project as of that date at USD 588 million, a value that factors in contemporaneous transactions in the Symbio Project, as well as its stage of development at the time.

36 Lastly, in this Reply, the Claimant addresses the Respondent's belated and opportunistic new objection to the Tribunal's **jurisdiction** on the grounds that the Respondent's wrongful measures occurred after the termination of

the NAFTA on 30 June 2020, such that they are not covered by Annex 14-C of the USMCA. That objection too must fail.

37 First, the Claimant's claims arise out of a series of acts and omissions starting in December 2015, when the MELCC decided to proceed with its own EA in breach of Canadian law, and continuing through to the Québec and Federal Governments' decisions of July 2021 and February 2022. In aggregate, these acts and omissions constitute a composite act that amounts to a NAFTA breach extending from 2015 until 2022. The claims thus squarely fall within the Tribunal's jurisdiction.

38 Second and in any event, the Respondent's objection is unsupported by the ordinary meaning of the terms of Annex 14-C. Indeed, had the Respondent genuinely believed in this defence, it would have raised it at the outset in this arbitration to seek to bifurcate the proceedings, and also at the outset in other NAFTA legacy cases. It never did.

39 This Reply is structured as follows:

- **Section 2** sets out the relevant facts and addresses the Respondent's allegations in its Counter-Memorial, setting the record straight on a number of points including in the light of the documents produced, and not produced, in document production.
- **Section 3** responds to the Respondent's unfounded jurisdictional objections.
- **Sections 4** and **5** address the Respondent's defences on the merits of the Claimant's claims for breach of the NAFTA and on the compensation to which the Claimant is entitled.
- **Section 6** sets out the Claimant's request for relief.

40 This Reply is accompanied by:

- the second witness statement of Mr Jim Illich ("**CWS-1 (Second)**") submitted with new exhibits **JI-0122** to **JI-0197**;
- the second witness statement of Mr Vivek Bidwai ("**CWS-2 (Second)**") submitted with new exhibits **VB-0122** to **VB-0271**;
- the second witness statement of Mr Tony Le Verger ("**CWS-3 (Second)**") submitted with new exhibits **TLV-0099** to **TLV-0181**;

- the second witness statement of Mr Keith Bainbridge ("**CWS-4 (Second)**") submitted with new exhibits **KB-0022** to **KB-0025**;
- the second witness statement of Mr Ron Brintnell ("**CWS-5 (Second)**") submitted with new exhibits **RB-0021** to **RB-0040**;
- the second witness statement of Mr Denis Roux ("**CWS-6 (Second)**") submitted with new exhibits **DR-0062** to **DR-0104**;
- the first witness statement of Ms Adrienne Menzies ("**CWS-7**") submitted with exhibits **AM-0001** to **AM-0012**;
- the first witness statement of Mr Alex Krolick ("**CWS-8**") submitted with exhibits **AK-0001** to **AK-0034**;
- the second expert report of Me Christine Duchaine ("**CER-1 (Second)**") submitted with new exhibits **CD-0214** to **CD-0339**;
- the second expert report of Mr Rodney Northey ("**CER-2 (Second)**) submitted with new exhibits **RN-0147** to **RN-0204**;
- the second expert report of Secretariat ("**CER-3 (Second)**) submitted with new exhibits **SEC-0348** to **SEC-0498**;
- factual exhibits **C-0438** to **C-0628**; and,
- legal authorities **CL-280** to **CL-355**.

2 FACTUAL BACKGROUND

41 In its Memorial on Jurisdiction and Merits, dated 21 November 2023 (the "**Memorial**"), the Claimant set out the background to its investment in Canada. Specifically, the Claimant showed that the Symbio Project was part of a new generation of large private infrastructure energy projects, aiming to contribute to the energy transition.[1] Furthermore, the Claimant explained that the Symbio Project was, by design, in line with both the Québec and Canadian Government's policies to use Canada's considerable natural gas resources as a transition energy while developing a low-emission facility,[2] and to offer the Saguenay region an economic development opportunity, thanks to a unique use of the Saguenay River to access maritime commercial routes.[3]

42 During their development, the GNLQ and Gazoduq Projects consistently demonstrated their technical, economic, and environmental feasibility through extensive due diligence and engagement with key consultants.[4] Initially, GNLQ secured an export license from the National Energy Board ("**NEB**"), while Gazoduq pursued the development of a natural gas transmission line from Ontario to Québec.[5] Sustained negotiations with natural gas producers ensured a reliable supply of low-cost Western Canadian gas.[6] Meanwhile, the Claimant's team developed the Gazoduq Project and began to lay the foundations for its future activity by securing supply of natural gas and clients.[7]

43 The GNLQ Project received strong support from local and political stakeholders, including the Québec Government, who even proposed to

[1] Memorial, p. 11 *et seq*. (s. II(A)-(B)).

[2] Memorial, p. 13 *et seq.* (paras. 28-29, 162-163).

[3] Memorial, p. 22 (paras. 50-51).

[4] Memorial, p. 25 *et seq*. (s. II(C)-(F).

[5] Memorial, p. 29 *et seq*. (s. II(G)-(H)).

[6] Memorial, p. 17 *et seq*. (s. II(C)-(G)).

[7] Memorial, p. 30 *et seq*. (s. II(I)-(J)).

invest in the GNLQ Project.[8]. The project team was also attentive to the concerns of First Nations and local communities.[9]

44 Between 2014 and 2021, Symbio raised approximately USD 125 million for the Project from external investors, over four rounds of financing. During those financing rounds, the Respondent itself validated the viability of the Project. Specifically, the Québec Government, acting through its public investment corporation, Investissement Québec ("**IQ**"), offered to invest [redacted] in the third and fourth rounds respectively. After months of due diligence, these offers [redacted] only for the Québec Government to decide at the eleventh hour in both 2017 and 2020 not to approve the investment.[10]

45 In the Memorial, the Claimant also described the EA process of the GNLQ Project, including the submission by GNLQ of its comprehensive Environmental Impact Statement ("**EIS**").[11] The EIS was designed to comply with the requirements of the MELCC Directive and the EIS Guidelines, issued by the MELCC and the Agency respectively, at the beginning of the EA. With the support of Mr Northey's and Me Duchaine's expert opinion, the Claimant established that these documents were crucial to safeguard the integrity of the process as, (i) they defined the four corners within which the MELCC, the Agency and the Federal and Québec Governments could exercise their discretion and (ii) they were legally binding upon federal and Québec authorities.[12]

46 Despite the Claimant's efforts, this process was however riddled with irregularities, including:

- the MELCC's and the Agency's failure to cooperate at the outset to hold a single federal EA led by the Agency, or a joint assessment pursuant to the Canada-Québec Agreement on Environmental

[8] Memorial, p. 41 *et seq*. (ss. II(K)-(O), II(S)).

[9] Memorial, p. 41 *et seq*. (s. II(L)-(M)).

[10] Memorial, p. 51 *et seq.* (paras. 121-139), p. 69 *et seq.* (paras. 195-199).

[11] Memorial, p. 54 *et seq*. (s. II(P)-(R)). See also GNLQ EIS (January 2019), at **Exhibit C-0043-FRA**.

[12] Memorial, p. 55 *et seq*. (paras. 143-148).

Assessment Cooperation dated 2004 and renewed on 25 October 2010 Canada-Québec Agreement, subjecting GNLQ to two uncoordinated processes;[13]

- the conduct by the Commission of the *Bureau d'audiences publiques* ("**BAPE**") of biased hearings following the interference of the Québec Government who sent researchers hostile to the GNLQ Project to represent the *Ministère de la Faune, des Forêts et des Parcs* ("**MFFP**"), resulting in a biased report of the *Bureau d'audiences publiques sur l'environnement* on 24 March 2021 (the "**BAPE Report**");
- the late and unexpected imposition by Minister Charette of three new "core criteria" that the GNLQ Project would have to meet to be approved.[14]
- the MELCC's increasingly stringent and arbitrary concerns over GHG emissions and beluga whales from March 2021.[15]

47 These irregularities and political interferences led to the Québec Government's decision not to approve the GNLQ Project, based on unprecedented and discriminatory grounds by Decree 1071-2021 dated 21 July 2021 (the "**Decree**").[16]

48 Following the Decree, the Federal Government decided to follow suit, despite the federal EA process still ongoing.[17] Based on similarly unlawful and unjustified criteria presented in the Agency's Environmental Assessment Report dated November 2021 (the "**Agency Report**"), the federal Minister of Environment found that the GNLQ Project would have unmitigable adverse environmental effects and referred the matter to the federal Cabinet for a decision on whether these effects were justified in the circumstances. Unsurprisingly, the Cabinet considered that this was not the case. The Minister of Environment thus issued a Decision Statement

[13] Memorial, p. 56 *et seq*. (paras. 147-151).

[14] Memorial, p. 83 *et seq*. (s. II(W)).

[15] Memorial, p. 83 *et seq*. (s. II(W)).

[16] Memorial, p. 97 *et seq*. (s. II(X)-(Y)).

[17] Memorial, p. 102 *et seq*. (s. II(Z)).

pursuant to Article 54 of the CEAA 2012 officially rejecting the GNLQ Project (the "**Decision Statement**").

49 However, subsequent discussions revealed that both the Québec and the Federal Governments' decisions were politically motivated and unrelated to environmental concerns.[18]

50 In its Counter-Memorial, the Respondent leaves a large part of the Claimant's factual presentation unchallenged, but makes a number of ill-founded contentions. Contrary to the Respondent's allegations:

- the Symbio Project accorded with Canada's and Québec's commitments to reduce GHG emissions and efforts to preserve the beluga whales population (**Section 2.1**);
- as shown by IQ's own investment offers, the Symbio Project was commercially viable, already before Canada's breaches of the NAFTA (**Section 2.2**);
- the federal and Québec authorities were bound to cooperate to conduct a single federal EA led by the Agency, or a joint assessment, and failed to do so (**Section 2.3**);
- as the Québec and federal authorities proceeded with two separate assessments of the Project, in violation of Canadian constitutional law and practice, both the MELCC and the Agency were bound to carry out their respective assessments within the scope defined by the MELCC Directive and the EIS Guidelines (**Section 2.4**);
- had the federal and Québec authorities complied with their obligations under Canadian law, the Québec Government would not have been in a position to interfere with the provincial EA process and issue the Decree rejecting the GNLQ Project; the EA process and the Decree would not have been marred with irregularities as they were, including the introduction at the eleventh hour of new requirements for GNLQ to meet, as well as the failure to assess the GNLQ Project in accordance with the criteria set out in the MELCC Directive and the encroachments on federal jurisdiction (**Section 2.5**);

[18] Memorial, p. 102 *et seq*. (s. II(AA)-(BB)).

- in the same vein, the Federal Government would not have prejudged the outcome of the federal EA prior to its completion, leading to a decision affected by fatal deficiencies, relying on grounds falling squarely outside the EIS Guidelines (**Section 2.6**); and
- by the time the GNLQ Project came to a halt as a result of the Québec and Federal Governments' wrongful decisions not to approve it, the Gazoduq Project had made significant progress and was already substantially de-risked from a commercial, technical, social acceptability and Indigenous relations perspectives (**Section 2.7**).

2.1 The Project accorded with Canada's and Québec's policy objectives

51 The Respondent does not deny that, as described in the Memorial, the Symbio Project was in line with both the Québec and Canadian Government's policies on the use of Canada's considerable natural gas resources as a transition energy,[19] and in offering the Saguenay region an economic development opportunity.[20]

52 Instead, the Respondent wrongly argues that the Symbio Project was not compatible with Canada's and Québec's commitments to reduce GHG emissions (**Section 2.1.1**) and efforts to preserve the beluga whale population (**Section 2.1.2**).

2.1.1 The Project accorded with Canada's policy objectives and commitments to fight climate change

53 In the Memorial, the Claimant established that the Symbio Project was consistent with Canada's and Québec's policy and international commitments on energy transition,[21] including through a self-imposed commitment to making the Project carbon neutral.[22] The Claimant also recalled the numerous statements by which Canadian and Québec officials had specifically and consistently endorsed, and actively promoted, LNG as

[19] Memorial, p. 13 *et seq.* (paras. 28-29) and p. 60 (paras. 162-163).

[20] Memorial, p. 22 (paras. 50-51).

[21] Memorial, p. 13 (para. 28).

[22] Memorial, p. 60 (paras. 162-163).

a transition energy, both prior to and after the rejection of the GNLQ Project.[23]

54 In its Counter-Memorial, the Respondent contends that:

- the Project would have been one of the largest GHG emitters in Québec;[24]
- this would have been contradictory with Canada's and Québec's commitment to reduce their GHG emissions;[25] and
- the statements of Québec's and Canada's officials supporting the use of LNG as a transition energy were nothing more than "*des declarations générales désuètes au sujet du GNL*".[26]

55 The Respondent also highlights in the abstract the importance of fighting climate change,[27] and describes at length Canada's and Québec's international commitments towards reducing GHG emissions since 1992 and the measures taken in this respect.[28]

56 However, the Respondent's position that Québec and Canada had no other choice but to reject the GNLQ Project to comply with their commitments to fight climate change is a pure fabrication.

57 **First**, Québec's own experts engaged in the EA of the GNLQ Project consistently concluded that it was in line with Québec's environmental commitments and targets.[29]

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[23] Memorial, p. 13 *et seq.* (para. 29). See also Illich I, at **Exhibit CWS-1**, p. 10 *et seq.* (s. IV).

[24] Counter-Memorial, p. 3 (para. 3).

[25] Counter-Memorial, p. 3 (para. 3).

[26] Counter-Memorial, p. 259 (para. 652, second bullet point).

[27] Counter-Memorial, p. 15 *et seq.* (paras. 38-40).

[28] Counter-Memorial, p. 16 *et seq.* (paras. 41-55).

[29] Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**, p. 48 of the PDF (Direction de l'expertise climatique), p. 54 of the PDF (Direction générale de la réglementation carbone et des données d'émission) p. 59 of the PDF (Direction de la prospective climatique et de l'adaptation); Email correspondence between G. Bélanger (Agency) and M. Duquette (MELCC) from 13 September to 11 October 2019, at **Exhibit C-0440-FRA**.

58 As explained by Mr Le Verger in his Second Witness Statement, the Respondent's approach in the arbitration is biased in that it focuses only on the desired outcome, namely net-zero GHG emissions, rather than consider the means to reach that outcome, namely the energy transition.[30] As LNG emits much less GHG than fuel oil or coal, substituting fuel oil and coal with LNG is very much part of the transition towards net-zero, and recognized as such.[31]

59 As Mr Le Verger further explains, this was particularly true for the LNG to be produced by the Project, which benefited from (i) the lowest possible GHG emission levels at the extraction stage in light of Canada's regulations and investment in relevant technologies, (ii) the use of green hydroelectricity to power both the Gazoduq pipeline and the LNG plant, and (iii) a cold climate rendering the liquefaction process more efficient.[32] Furthermore, the Project would have promoted the energy transition locally by offering to supply Canadian LNG to communities and industries in remote areas in Québec in replacement of more polluting fuels in Québec.[33]

60 The Respondent's document production in this arbitration revealed that this was the position of Natural Resources Canada ("**NRCan**"), the federal department of the Government of Canada responsible for the use and development of natural resources. During an April 2021 meeting with the Ministry of Energy and Natural Resources ("**MERN**"), as part of the EA of the GNLQ Project, NRCan expressed its opinion as follows:

> "*Energie Saguenay est un projet qui peut contribuer à la décarbonisation des marchés mondiaux tout en générant des retombées économiques positives pour plusieurs communautés du pays.*
>
> *La capacité du Canada de réduire les émissions de méthane provenant de la production de gaz naturel (et d'utiliser*

[30] First Witness Statement of Tony Le Verger dated 21 November 2023, at **Exhibit CWS-3**, p. 5 (para. 6).

[31] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 6 (paras. 8-9).

[32] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 7 (para. 12).

[33] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 8 (para. 15).

> *l'hydroélectricité pour alimenter ses pipelines et ses opérations de GNL) nous permettrait d'offrir aux marchés internationaux l'option du GNL le plus propre au monde pour remplacer le charbon*."[34]

61 The Respondent's document production similarly revealed that the Québec Government's rejection of the Project in July 2021 on the ground that it failed to promote the energy transition was also contradicted by its own, earlier position, as expressed by the Québec Deputy Minister of Energy in a 4 July 2019 note on the GNLQ Project, which stated as follows:

> "[I]l *est* ***généralement reconnu que le gaz naturel représente une énergie de transition*** *entre les produits pétroliers (qui représentaient 40% du bilan énergétique du Québec en 2016 [HEC Montréal, 2018]) et les énergies propres en développement*.
>
> ***C'est d'ailleurs la position du Gouvernement du Québec, de même que celle de plusieurs autres pays***."[35]

62 Furthermore, as clearly transpires from internal NRCan communications dated January 2022, which the Respondent produced in document production, NRCan disagreed with the Québec Government's conclusion in July 2021 that the GNLQ Project allegedly did not contribute to the worldwide energy transition or the reduction of global GHG emissions.[36]

63 **Second**, while the Respondent argues in its Counter-Memorial that official statements supporting the use of LNG as a transition energy are "*désuets*[]",[37] it does not explain why or otherwise seek to support this bold statement, because there is no basis for it.

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[34] NRCan, Meeting notes with Deputy Minister M.-J. Lizotte dated 14 April 2021, at **Exhibit C-0441-FRA**, p. 6 *et seq.*

[35] MERN, Information note on technical and economic opinion on the liquefied natural gas project Quebec (20190531-12) dated 4 July 2019, at **Exhibit C-0442-FRA**, p. 8 (emphasis added).

[36] Internal NRCan email correspondence between C. Evans and N. Vrany *et al*. from 22 January to 27 January 2022, at **Exhibit C-0443-ENG**, p. 3 *et seq*. See also NRCan, Memorandum to the Minister dated 30 July 2021, at **Exhibit C-0444-ENG**, p. 1 (recently produced by the Respondent).

[37] Counter-Memorial, p. 259 (para. 652, second bullet point).

64 As the Claimant explained in the Memorial, these statements reflected the official and consistent position of the Governments of Canada and Québec that Canadian LNG is a transitional source of energy that can contribute to the reduction of GHG emissions.[38]

65 Furthermore, these statements can hardly be considered as "*désuet*[s]" to the extent that Canada's highest public officials continued to make similar representations after the rejection of the Project, and to this day.[39]

66 In other words, the Project was perfectly positioned to contribute to the energy transition in Canada, Québec and worldwide.[40]

[38] See Memorial, p. 214 *et seq*. (paras. 714-720).

[39] See MERN, "*Prolongement du réseau de distribution de gaz naturel - Québec investit plus de 1 M$ pour le développement économique en Montérégie*", 20 July 2021, at **Exhibit C-0396-ENG-FRA**, p. 1 ("*Le gaz naturel est une énergie de transition profitable pour le Québec*"); "*Caisse de dépôt: toujours foi en l'avenir d'Energir*", *Le Journal de Montréal*, 25 February 2022, at **Exhibit C-0445-FRA**, p. 1 ("*Le gaz naturel, c'est une énergie de transition qui est là pour rester*"); "*La guerre en Ukraine ravive la flamme de GNL Québec*", *Le Devoir,* 10 March 2022, at **Exhibit C-0446-FRA**, p. 3 ("*Même si nous travaillons très fort en faveur de la transition, nous savons qu'il y a un besoin de pétrole et de gaz*"); "Wilkinson thinks Canada can help Europe drop Russian natural gas; Government will explore options. minister says", *Edmonton Journal*, 10 March 2022, at **Exhibit C-0447-ENG**; "Energy chief says Canada could send gas to Europe within 3 years", *Bloomberg*, 26 May 2022, at **Exhibit C-0448-ENG**, p. 1 ("*The government is talking to Repsol and other firms interested in building LNG infrastructure about whether the regulatory process can be expedited*"); "Canada would back 'economically viable' new LNG terminals -finmin", *Reuters*, 14 October 2022, at **Exhibit C-0449-ENG**, "Canada Will Support 'Economically Feasible' LNG, Freeland Says", *The Energy Mix*, 16 October 2022, at **Exhibit C-0450-ENG** ("*LNG is an important transition fuel, and we will always be looking at economically viable LNG projects*"); A. Shields (journalist at Le Devoir), Tweet, at **Exhibit C-0451-FRA** ("*Plus tôt cette semaine, le ministre Jonathan Wilkinson a affirmé que la transition énergétique 'peut être accomplie sans un abandon du secteur pétrolier et gazier du Canada*'"); J. Wilkinson, "Question No.832 - Questions on the Order Paper Routine Proceedings", Twitter, 14 November 2022, at **Exhibit C-0452-ENG**; Transcript of "Rt. Hon. Justin Trudeau, Prime Minister of Canada, congratulates Cedar LNG on Positive Final Investment Decision", Vimeo, 21 June 2024, at **Exhibit C-0453-ENG** ; Government of Canada, "Government of Canada announces support for Cedar LNG", 21 March 2025, at **Exhibit C-0454-ENG** ; "Feds to contribute up to $200M for Haisla-led project to ship liquefied natural gas to Asia", *CBC News,* 21 March 2025, at **Exhibit C-0455-ENG**.

[40] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 8 (para. 13).

2.1.2 The Project accorded with Canada's and Québec's policies of both protecting beluga whales and promoting maritime traffic

67 As explained in the Memorial, the GNLQ Project was also in line with Canada's and Québec's policies for promoting the development of the Saguenay area as an industrial port, including the development of shipping on the Saguenay River, which started in the early 2010s and was updated through various development strategies over the years.[41]

68 The MELCC recognised as much in its Report:

> "[L]*e projet cadre a priori avec « Avantage Saint-Laurent », la nouvelle Stratégie maritime 2020-2025 du gouvernement du Québec, laquelle priorise le lancement des projets structurants d'infrastructures dans certains ports sur le Saint-Laurent et le Saguenay afin de stimuler l'économie québécoise et le développement socio-économique des différentes régions du Québec. Selon le MTQ* ["***Ministère des Transports du Québec***"]*, le projet Énergie Saguenay cadre avec les objectifs de la Politique de mobilité durable 2030 du gouvernement du Québec, puisqu'il contribue à la mise en place de services de transport performants pour les entreprises et des infrastructures de transport favorisant la mobilité durable.*"[42]

69 These policies remain in place to this day and the Saguenay Port Authority ("**SPA**"), with the support of federal and provincial authorities, is currently expecting more than CAD 250 million in investment for the modernisation of its infrastructure, which will result in an increase in maritime navigation

[41] Memorial, p. 22 (paras. 50-51); First Expert Report of Christine Duchaine dated 21 November 2023, at **Exhibit CER-1**, p. 113 *et seq.*

[42] MELCC, Environmental Assessment Report dated 30 June 2021, at **Exhibit C-0269-FRA**, p. 12. See also an earlier version at MELCC-DGEES, Draft Environmental Analysis Report for the GNLQ Project, at **Exhibit C-0456-FRA**, p. 43 *et seq.* of the PDF.

in the Saguenay River.[43] Some of these funds were committed merely weeks after the Québec Government rejected the Project on 21 July 2021.[44]

70 In its Counter-Memorial, the Respondent does not dispute the existence of these development policies,[45] but instead focuses in some detail on Canada's and Québec's policies for the protection of the beluga whale population in the St. Lawrence Estuary.[46] The Respondent, however, ignores the interaction of these policies with the Canadian authorities' goal of developing the Saguenay port area, as if the protection of beluga whales in the Saguenay-St. Lawrence was a peremptory policy goal, which is not the case.

71 In reality, as explained by the MELCC itself, the federal and provincial authorities' objective to protect beluga whales existed "*dans un contexte*

[43] "Port de Saguenay : investissements en infrastructures de 250 M$ d'ici 2027", Portail Constructo, 20 June 2024, at **Exhibit C-0457-FRA**. On prior investments, see, *e.g.*, Ministère des Transports et de la Mobilité durable, "*Programme d'investissement en infrastructures maritimes (PIIM) – Québec investit 20 M$ pour améliorer les infrastructures maritimes au Saguenay*", 10 November 2023, at **Exhibit CD-0056-FRA** ("*Québec investit 20 MS pour améliorer les infrastructures maritimes au Saguenay*"), "*Québec et Ottawa investissent 66 millions de dollars au Port de Saguenay*", *Radio-Canada*, 12 August 2021, at **Exhibit C-0275-FRA** ("*Le gouvernement du Québec et le gouvernement d'Ottawa ont versé jeudi matin une aide de 66 millions de dollars pour financer un important projet de convoyeur électrique afin de transporter les marchandises du Port de Saguenay aux entrepôts.*"); Cabinet du Premier Ministre, Press Release, "*Jusqu'à 33 M$ pour le développement du port de Saguenay*", 12 August 2021, at **Exhibit C-0276-FRA**, p. 1 ("[L]*e gouvernement du Québec offrira une contribution qui pourrait atteindre 33 M$ à Développements Port Saguenay inc. pour la construction d'un système mécanisé de transport de vrac multiusager (convoyeur) alimenté à l'électricité*"); Transport Canada, Press Release, "Government of Canada makes major investment at Saguenay Port", 12 August 2021, at **Exhibit C-0277-ENG** ("Today, the Minister of Transport […] and the Leader of the Government in the House of Commons and Quebec Lieutenant […] announced a major investment of over $33 million for the Saguenay Port, through the National Trade Corridors Fund. Project funding will enhance the performance and functions of facilities at the port, helping to increase handling capacity and reduce bottlenecks in daily operations."). See also Duchaine I, at **Exhibit CER-1**, p. 113 *et seq.*

[44] See Cabinet du Premier Ministre, Press Release, "*Jusqu'à 33 M$ pour le développement du port de Saguenay*", 12 August 2021, at **Exhibit C-0276-FRA**; Transport Canada, Press Release, "Government of Canada makes major investment at Saguenay Port", 12 August 2021, at **Exhibit C-0277-ENG**.

[45] See Counter-Memorial, p. 236 *et seq.* (paras. 591-592).

[46] Counter-Memorial, p. 21 *et seq.* (paras. 56-61).

d'accroissement du trafic maritime"[47] in the habitat considered essential for beluga whales, including a portion of the Saguenay River and of the southern waters of the St. Lawrence River estuary.[48]

72 The Project accorded with Canada's and Québec's efforts to protect beluga whales in that context as it indeed took into account all of the measures already taken by the authorities, as described by the Respondent in its Counter-Memorial, *i.e.*, the designation of beluga whales as an "endangered species",[49] the creation of the Saguenay-St. Lawrence Marine Park in 1998,[50] and the research initiatives and action plans aimed at understanding and managing the impact of underwater noise on beluga whales.[51]

73 Hence, **first**, GNLQ recognised in its EIS that beluga whales were an "endangered species".[52] In its first set of answers to the MELCC, GNLQ specified its engagements in relation to the potential risks to the beluga population, including a collaboration with the MFFP (by sharing information relevant for the *Université du Québec en Ouataouais* ("**UQO**") study the MFFP was financing) and with Transport Canada, in connection with its research on underwater noise.[53]

74 Furthermore, GNLQ adopted a charter of environmental commitments for the protection of marine mammals based on Canada's 2019 plan of action

[47] MELCC Report, at **Exhibit C-0269-FRA**, p. 35.

[48] MELCC Report, at **Exhibit C-0269-FRA**, p. 30 and 36. See also DFO, "Recovery Strategy for the beluga whale (Delphinapterus leucas) St. Lawrence Estuary population in Canada" (2012), at **Exhibit C-0370-ENG**, p. 42 *et seq.* (s. 2.4) and Counter-Memorial, p. 138 (Figure 1).

[49] Counter-Memorial, p. 21 *et seq.* (paras. 57 and 59).

[50] Counter-Memorial, p. 21 (para. 57).

[51] Counter-Memorial, p. 22 *et seq.* (paras. 59-61).

[52] See EIS, at **Exhibit C-0043-FRA**, p. 510 (s. 8.6.4.1).

[53] GNLQ, Answers to Questions and Comments (Volume 1) (August 2019), at **Exhibit C-0205-FRA**, p. 125.

to reduce noise in the beluga whale habitat,[54] reaffirming its commitment to reduce the underwater noise caused by users of the Saguenay River.[55]

75 **Second**, while the Saguenay-St. Lawrence Marine Park was created in 1998, and nothing in the Park's regulations restricted commercial navigation, GNLQ took into account the one specific zone that was the exception.

76 The park was indeed created to "increase […] the level of protection of the ecosystems of a representative portion of the Saguenay River and the St. Lawrence estuary for conservation purposes, while encouraging its use for educational, recreational and scientific purposes".[56] The park comprises different zones, including some of "general use".[57] As noted in the MELCC Environmental Assessment Report dated 30 June 2021 ("**MELCC Report**"), commercial navigation was permitted in all areas, except "Zone I", defined as "*preservation intégrale*".[58] This limitation was appropriately taken into account by GNLQ for the GNLQ Project.

77 Contrary to the Respondent's allegation, the Saguenay River, and in particular the mouth of the Saguenay, is not "*une zone relativement silencieuse de l'habitat essentiel du beluga*".[59] Recreational navigation is widespread in that area and, when developing an action plan for its 2015-2020 maritime strategy,[60] Québec referred to the promotion of recreational

[54] See Witness Statement of Simon Trépanier, at **Exhibit RWS-11 (corrected)**, p. 11 *et seq.* (paras. 26-27).

[55] GNLQ, "*Charte d'engagements environnementaux pour la protection des mammifères marins*" dated 24 September 2020, at **Exhibit C-0264-FRA**, p. 3 *et seq.* ("*La Charte s'inspire des 4 axes stratégiques contenus dans le Plan d'action 2019 du gouvernement du Canada pour réduire le bruit autour du béluga, ce qui assure la cohérence de la démarche.*"). See also BAPE hearing transcript (volume 4) dated 23 September 2020, at **Exhibit C-0259-FRA**, p. 14 of the PDF; First Witness Statement of Tony Le Verger dated 21 November 2023, at **Exhibit CWS-3**, p. 36 *et seq.* (paras. 143-152).

[56] Saguenay-St. Lawrence Marine Park Act, at **Exhibit C-0458-ENG-FRA**, p. 2 *et seq.* (s. 4).

[57] Saguenay-St. Lawrence Marine Park Act, at **Exhibit C-0458-ENG-FRA**, p. 2 (s. 2).

[58] EIS, at **Exhibit C-0043-FRA**, p. 807.

[59] Counter-Memorial, p. 136 *et seq.* (para. 378).

[60] See Memorial, p. 22 (para. 51).

and scientific navigation in the park.[61] The area is also used by other types of motorised boats, including bulk carriers, merchant ships, ferries, icebreakers, excursion and cruise ships, patrol boats belonging to the Canadian Coast Guard or Parks Canada, national defence vessels, and research ships.[62] In 2007, a Parks Canada study estimated at 91,000 the number of yearly passages of vessels in the Saguenay-St. Lawrence Marine Park.[63] A 2017 study estimated the number of passages to be around 65,000.[64]

78 The MELCC Report acknowledged that "*il existe déjà un certain transit commercial dans le* [*Parc marin du Saguenay–Saint-Laurent*]", and that therefore any measures aiming at protecting beluga whales should apply to all the users of the area.[65] Thus, the existence of the Saguenay-St-Lawrence Marine Park never hindered GNLQ's plan to have its ships use the Saguenay-St. Lawrence riverway. GNLQ had even proposed to go beyond the legal requirements, by committing to ask the federal pilots in charge of steering the ships in the Saguenay River to reduce the ships' speed to 10 knots around the relevant protected areas.[66]

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[61] Québec Secretariat for Maritime Affairs, "*Stratégie maritime à l'horizon 2030 - Plan d'action 2015-2020*", 29 June 2015, at **Exhibit C-0082-FRA**, p. 32 ("[the Government] *soutiendra des initiatives permettant notamment le développement des croisiéres-excursions, de l'observation de la faune marine ainsi que des sites naturels et patrimoniaux* […] *Ceci sera bénéfique pour toutes les régions côtières du Québec, et en particulier pour le parc marin du Saguenay-Saint-Laurent.*").

[62] See EIS, at **Exhibit C-0043-FRA**, p. 724. See also Parcs Canada, "*Portrait de la navigation dans le parc marin du Saguenay-Saint-Laurent*" (2017), at **Exhibit C-0459-FRA**, p. 51.

[63] See EIS, at **Exhibit C-0043-FRA**, p. 724.

[64] Parcs Canada, "*Portrait de la navigation dans le parc marin du Saguenay-Saint-Laurent*" (2017), at **Exhibit C-0459-FRA**, p. ii *et seq.*

[65] MELCC Report, at **Exhibit C-0269-FRA**, p. 36.

[66] GNLQ, Answers to Questions and Comments (Volume 1) (August 2019), at **Exhibit C-0205-FRA**, p. 108 (No. R-101) ("*La Corporation des pilotes du Bas-Saint-Laurent (la Corporation) a pris entente avec le Pare Marin du Saguenay-Saint-Laurent afin de volontairement réduire la vitesse des navires à 10 nœuds à proximité des zones de haute résidence* [of marine mammals], *dont la baie Sainte-Marguerite et l'embouchure du Saguenay, si cela peut être fait de manière sécuritaire. Ce sont donc les pilotes qui fixent la vitesse de transit sans égard à l'armateur ou au client. GNLQ s'engage à étendre la réduction volontaire de vitesse à l'ensemble du parc marin et les pilotes sont au fait de cet engagement puisqu'ils travaillent sur des simulations de la navigation sur le Saguenay. Cette limitation de vitesse est également incluse dans la planification logistique.*").

79 Furthermore, GNLQ undertook to have a representative of the Saguenay-St-Lawrence Marine Park participate in its consultation committee on the liquefaction complex, as requested by the MELCC.[67]

80 **Third**, Québec's research initiatives relating to the beluga whales cited by the Respondent in its Counter-Memorial were intended to ensure the sustainability of an increase in maritime transportation – not hinder its development.

81 Hence, the stated purpose of the UQO's 5-year programme, cited by the Respondent,[68] was to identify such solutions, again, "*dans un contexte d'accroissement du trafic maritime*".[69] As noted in the BAPE Report, "[the UQO study] *souhaite que soient évalués des scénarios de développement conciliant à la fois le développement économique et la protection des mammifères marins*".[70] Likewise, in the opinion statement it presented to the BAPE,[71] the UQO clearly stated that its goal was not to obstruct infrastructure projects, but to collect all the information needed for the government to make informed and fair decisions about them.[72] In line with

[67] GNLQ, Answers to questions and commitments requested by the MELCC dated 3 June 2021, at **Exhibit C-0068-FRA**, p. 64 of the PDF.

[68] Counter-Memorial, p. 23 (para. 61).

[69] MELCC Report, at **Exhibit C-0269-FRA**, p. 35.

[70] BAPE Report for the GNLQ Project dated 24 March 2021, at **Exhibit C-0250-ENG-FRA**, p. 67. See also Agency, Current Initiatives on Underwater Noise dated 14 May 2021, at **Exhibit C-0460-FRA**, p. 5 ("*Ce programme est piloté par l'Université du Québec en Outaouais et vise à tenir compte des effets cumulatifs de différents projets de développements, tels que ceux identifiés dans la Stratégie maritime du Québec, ainsi que de la croissance projetée du transport marchand.*"); Internal MFFP email correspondence (with attachment) from 23 to 28 September 2020, at **Exhibit C-0461-FRA**, p. 17 (where the MFFP notes "*nous avons, en 2018, investi près de 2,1 M$, en collaboration avec le Secrétariat à la stratégie maritime, et confié à l'UQO le mandat de réaliser un programme scientifique de 5 ans visant à identifier des solutions en vue de réduire l'exposition des bélugas aux bruits sous-marins de la navigation, dans le contexte du déploiement de la Stratégie maritime du Québec.*").

[71] See BAPE Report, at **Exhibit C-0250-ENG-FRA**, p. 434.

[72] See BAPE Report, at **Exhibit C-0250-ENG-FRA**, p. 67 ("*L'objectif n'est pas ici d'empêcher la concrétisation de grands projets industriels, mais bien de s'assurer, d'un point de vue sociétal, d'avoir en main toutes les informations pertinentes et nécessaires à une prise de décision éclairée et juste. Grâce à son travail, l'équipe de recherche sera en mesure de proposer des solutions concrètes de réduction du bruit, comme l'optimisation de routes maritimes, des réductions ciblées de la vitesse des bateaux ou l'ajout de technologie pour*

the UQO's goals, the Project would have bolstered economic growth in the region, while abiding by protective measures for beluga whales.

82 Finally, as the Claimant stated in the Memorial, Premier Legault expressed strong support for further industrial projects in the region, all of which would have caused substantial increases of maritime traffic and thus noise in the Saguenay River.[73]

2.2 The Respondent found the GNLQ Project not only economically viable but also valuable

83 In its Memorial, the Claimant described how, between 2014 and 2021, Symbio raised approximately USD 125 million for the Project from external investors over four rounds of financing, during which the Québec Government, acting through IQ, offered to invest [redacted] in the Project, [redacted] These offers [redacted] after extensive due diligence carried out by IQ and its advisors.[74]

84 In its Counter-Memorial, the Respondent seeks to distance itself from its own investment offers in an attempt to support a narrative that the Symbio Project was doomed to fail or be "worthless" even without Canada's

réduire le bruit des navires."). See also Counter-Memorial, p. 44 (para. 119) (quoting from the MELCC's request for information of 22 May 2019: "*D'ici l'avancement de ces connaissances, le MFFP va appuyer l'identification des mesures de prévention applicables avec les organisations concernées et les autorités fédérales. Plusieurs organisations, telles que le Groupe de travail sur le transport maritime et la protection des mammifères marins dans l'estuaire du Saint-Laurent, l'Alliance verte et Pêches et Océans Canada (MPO) travaillent à documenter cet enjeu et àtrouver des solutions pour concilier les usages. En complémentarité avec ces efforts, le MFFP a conclu une entente avec l'Université du Québec en Outaouais en 2018 pour un programme scientifique de cinq ans, lequel a pour objectif de développer des outils d'aide à la décision pour favoriser la conciliation du déploiement de la Stratégie maritime du Québec avec la protection de l'habitat du béluga. Pour le moment, on ne peut présumer des résultats de ce programme de recherche. L'initiateur doit s'engager à mettre en œuvre des mesures d'atténuation des impacts sur les mammifères marins qui seront validées par les partenaires du programme.*").

[73] Radio interview to Premier Legault, "*Le show du matin*" on Radio Station CKYK-FM 95.7, 19 May 2022, at **Exhibit C-0033-FRA**. See Memorial, p. 250 *et seq*. (para. 802).

[74] Memorial, p. 51 *et seq.* (paras. 121-139), p. 69 *et seq.* (paras. 195-199).

breaches of the NAFTA.[75] This is untrue and based on a misrepresentation of the facts.

85 As further explained below, IQ made a first offer, on behalf of the Québec Government, to invest in the Symbio Project in 2017, confirming the viability and substantial value of the Project (**Section 2.2.1**). IQ repeated that offer in 2019 and 2020, further confirming the substantial value of the Project (**Section 2.2.2**). Despite the Québec Government's failure to follow through on that offer and the efforts to undermine the Claimant by leaking to the press the withdrawal of a major potential investor, [redacted] the Project remained attractive to investors (**Section 2.2.3**).

2.2.1 The Québec Government, through IQ, offered to invest in the GNLQ Project in 2017, and confirmed its substantial value

86 As explained in the Memorial, the Québec Government first raised the possibility of a public investment in the Project in 2014. This developed into formal discussions with IQ as part of Symbio's third round of financing in 2016-2017. Following a substantial due diligence by IQ and its professional advisors, [redacted][76] After the Council of Ministers of Québec (the "**Québec Cabinet**") failed to vote on that investment in August 2017 for reasons that the Respondent has still not explained, [redacted][78] However, on 15 September 2017, the Deputy Minister of the MEI informed the Claimant that the letter would not be submitted to the Québec

[75] Counter-Memorial, p. 38 (para. 105).

[76] Memorial, p. 51 *et seq.* (para. 125-130); [redacted] at **Exhibit C-0193-ENG-FRA**; [redacted] at **Exhibit C-0195-ENG-FRA**.

[77] Although the MEI was called *Ministère de l'Économie, de la Science et de l'Innovation* (MESI) and only became the *Ministère de l'Économie et de l'Innovation* (MEI) in October 2018, the Claimant will use the acronym MEI throughout this submission for consistency.

[78] Memorial, p. 53 *et seq.* (paras. 130-134); [redacted] at **Exhibit C-0196-ENG-FRA**.

Cabinet for approval as planned. He did not provide any explanation for the turnaround, and, as a result, the Claimant closed its third round of financing without IQ's investment.[79]

87 In the Counter-Memorial, the Respondent tries to downplay the significance of the Québec Government's offers to invest (made through IQ), even asserting that it was the Claimant who first approached Québec "with insistence" for financing and suggesting that, despite the due diligence carried out and the letters issued, Québec never intended to invest.[80] Both contentions are belied by the evidence on record.

88 **First**, as confirmed by the Claimant's witnesses and contemporaneous documents, it is the MEI which first suggested a potential investment by the Québec Government in the GNLQ Project, as early as 2014. In fact, when Symbio held initial discussions with IQ in July 2014, Symbio's stakeholders were not convinced that Québec would be the right investor for the Project. Symbio had already received offers for its second round of financing and, as recorded in an internal Symbio email dated 3 September 2014, Symbio did not think at that point that it was worth committing resources to discussions with "an investor [*i.e.*, IQ] that we may never accept funds from."[81]

89 Nevertheless, the Claimant was open to a possible investment as part of its next round of financing. Following further discussions between Symbio and IQ, [redacted]

[redacted]

[redacted]

[79] Le Verger I, at **Exhibit CWS-3**, p. 21 *et seq.* (paras. 81-82).

[80] Counter-Memorial, p. 37 (para. 103); Witness Statement of Simon Sanschagrin dated 12 July 2024, at **Exhibit RWS-10**, p. 12 *et seq.* (paras. 40-49).

[81] Internal GNLQ email correspondence from 11 July 2014 to 4 September 2014, at **Exhibit TLV-0127-ENG**, p. 1. See also Le Verger I, at **Exhibit CWS-3**, p. 18 (para. 61); Second Witness Statement of Jim Illich, at **Exhibit CWS-1 (Second)**, p. 12 (para. 27); See also MEIE, GNLQ interministerial committee monitoring table dated 5 February 2015, at **Exhibit C-0462-FRA**, p. 3; MEIE, GNLQ interministerial committee monitoring table dated 26 November 2015, at **Exhibit C-0463-FRA**, p. 4; Le Verger II, at **Exhibit CWS-3 (Second)**, p. 22 (para. 60).

[redacted]

90 [redacted]

91 The Respondent's assertion that the Claimant first approached the Respondent "with insistence" sits uncomfortably with the above documentary evidence. It is based solely on the testimony of Mr Sanschagrin, an employee of IQ who was only involved in discussions on the Symbio Project from early 2017, and thus would not have known first-hand who initiated discussions on financing in 2014-2015.[84]

92 Furthermore, as Mr Illich and Mr Le Verger explain, the Symbio Project was not dependent on public funding, and did not initially envisage – let alone seek out – funding from the Québec Government.[85] The Respondent's assertion that Québec could not possibly be the only or the main source of funding for the Project is therefore a red herring;[86] the Claimant never suggested that that would be the case. Rather, as explained in the Memorial, the significance of IQ's offer was primarily symbolic as it reaffirmed the Québec Government's support for the Project. However, this also meant that, when Québec's investment abruptly failed to materialise, that *volte-face* temporarily undermined Symbio's fundraising efforts.[87]

[82] [redacted] at **Exhibit C-0153-ENG-FRA**, p. 2.

[83] [redacted] at **Exhibit C-0153-ENG-FRA**, p. 2; Le Verger I, at **Exhibit CWS-3**, p. 19 (para. 65).

[84] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 23 (para. 62); Sanschagrin, at **Exhibit RWS-10**, p. 12 (para. 40).

[85] Illich II, at **Exhibit CWS-1 (Second)**, p. 10 *et seq.* (paras. 26-27); Le Verger II, at **Exhibit CWS-3 (Second)**, p. 22 (paras. 59-60).

[86] Counter-Memorial, p. 37 *et seq.* (para. 103).

[87] Memorial, p 53 *et seq*. (paras. 131-135).

93 **Second**, the Respondent's contention that [redacted] is an afterthought, equally belied by the contemporaneous documentary evidence.[88]

94 [redacted][89] Similarly, [redacted][90] Following the completion of its due diligence, IQ [redacted]

95 [redacted][92] Symbio was informed that the investment would be tabled for Cabinet approval on 30 August 2017.

[88] Sanschagrin, at **Exhibit RWS-10**, p. 12 *et seq*. (paras. 41, 44).

[89] [redacted] at **Exhibit JI-0083-ENG-FRA**, p. 33.

[90] [redacted] at **Exhibit SS-0014-FRA**, p. 5 *et seq.*

[91] [redacted] at **Exhibit C-0193-ENG-FRA**; [redacted] at **Exhibit C-0195-ENG-FRA**; [redacted] at **Exhibit SS-0017-FRA**; [redacted] at **Exhibit C-0196-ENG-FRA**.

[92] See, *e.g.*, [redacted] at **Exhibit C-0195-ENG-FRA**, p. 1; [redacted] at **Exhibit C-0196-ENG-FRA**, p. 1.

However, as the Cabinet did not then approve the investment, [redacted] [93]

96 While the decree approving the investment was apparently withdrawn from the Québec Cabinet's agenda following discussions within Cabinet, the Respondent has provided no evidence that this was due to any concerns with the risks or economic viability of the Project.[94] On the contrary, the evidence shows that the MEI's assistant Deputy Minister told Symbio at the time that the Québec Cabinet was simply concerned about the "optics" of investing in the Project shortly before an election.[95] Moreover, if the feasibility or viability of the Project were really the stumbling block, [redacted] as described below.

97 As explained in the Memorial, the Québec Government's sudden change of heart disrupted the closing of the third round of financing. The sum of [redacted] had been allocated to Québec and, at Québec's invitation, Symbio had communicated that offer to investors who had made their own investments conditional on IQ's.[96] Despite this hurdle, Symbio managed to close the third round of financing and the economic fundamentals of the Project remained strong – as demonstrated when, in the fourth round, Québec again offered to invest.

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[93] Illich I, at **Exhibit CWS-1**, p. 61 *et seq.* (paras. 173-176); Le Verger I, at **Exhibit CWS-3**, p. 20 *et seq.* (paras. 76-77); [redacted] at **Exhibit C-0196-ENG-FRA**.

[94] Indeed, the Respondent has asserted Cabinet privilege over the Québec Cabinet's agendas and minutes, and communications with IQ and MEI, that would shed light on the reasons for this *volte-face*. See, Claimant's Document Production Requests dated 19 August 2024, p. 70 (Request No. 32).

[95] Illich I, at **Exhibit CWS-1**, p. 61 (para. 173); GNLQ Project – Third Round Financing – Status Update and Scenario Overview dated 26 September 2017, at **Exhibit C-0381-ENG**, p. 4 *et seq*.

[96] Memorial, p. 52 *et seq*. (para. 129).

2.2.2 The Québec Government and IQ renewed their interest in investing in the Project in 2019-2020, and re-confirmed its substantial value

98 As explained in the Memorial, the Québec Government, through IQ, [redacted] in the Project in the fourth round of financing.[97] In its Counter-Memorial, Canada again tries to distance itself from its previous interest in the Project, now arguing that [redacted] [98] This is not credible.

99 **First**, [redacted] [99] However, even a cursory review of [redacted] [100]

100 The Québec Government itself seems not to have agreed with [redacted] since IQ (with the approval of the MEI)[101] went on

[97] Memorial, p. 71 (para. 198).

[98] Counter-Memorial, p. 38 *et seq.* (paras. 105-107).

[99] Counter-Memorial, p. 38 (para. 105); [redacted] at **Exhibit SS-0004-FRA**, p. 34 (p. 39 of the PDF).

[100] [redacted] at **Exhibit SS-0004-FRA**, p. 2 (p. 7 of the PDF), 34 (p. 39 of the PDF); Second Expert Report of Secretariat dated 18 April 2025, at **Exhibit CER-3 (Second)**, p. 31 *et seq.* (paras. 3.39-3.40).

[101] Email correspondence between S. Sanschagrin (IQ) and R. Jeudi (MEI) from 29 January 2020 to 31 January 2020, at **Exhibit C-0464-FRA**; Email correspondence between S. Sanschagrin (IQ) and A. Cloutier (MEI) dated 24 October 2019, at **Exhibit C-0465-FRA**;

to [redacted][102] [redacted][103] In fact, [redacted] which IQ would only have done because it expected the Québec Cabinet to approve that investment.[104]

101 Thus, although the Respondent asserts that the Québec Government ultimately decided not to invest due to "*des risques associés aux projets*", it fails to provide **any** documentary evidence in support of this statement.[105] Notably, when requested, in document production, to produce the Cabinet agenda, minutes and communications with IQ and the MEI to confirm why the Québec Cabinet had backed out of its offer to invest in the Project, the Respondent chose to assert Cabinet privilege over all of those documents on the grounds that they were politically sensitive.[106] The Respondent's assertion therefore stands unsupported.

102 **Second**, the Respondent now also insists that IQ's investment offer was made in its capacity as agent ("*mandataire*") of the MEI, rather than on its own account and from its own funds.[107] This assertion is of no moment and, in any case, unsupported by the evidence.

Email correspondence between S. Sanschagrin (IQ) and A. Cloutier (MEI) dated 10 February 2020, at **Exhibit C-0466-FRA**.

[102] [redacted] at **Exhibit C-0226-ENG-FRA**; [redacted] at **Exhibit C-0227-ENG-FRA**; [redacted] at **Exhibit C-0228-ENG-FRA**.

[103] [redacted] at **Exhibit C-0228-ENG-FRA**, p. 4.

[104] [redacted] at **Exhibit C-0236-ENG**, p. 2.

[105] Counter-Memorial, p. 39 (para. 107).

[106] See Procedural Order No. 4, Annex A dated 30 November 2024, p. 128 (Request 35).

[107] Counter-Memorial, p. 280 (para. 699, n. 1145).

103 That IQ was acting only as agent for the MEI is entirely irrelevant. Indeed, whether the funds belonged to IQ or the MEI, Québec's investment was to be made using public funds. It is inconceivable that, if IQ had concluded that the Project was too risky, as the Respondent now contends, it would have made an offer to invest [redacted] in it. Equally, save for being grossly negligent, IQ could not have possibly recommended that Québec effectively waste public funds by investing in a Project for which it could never expect a return. Regardless of whether IQ was acting as an agent of the MEI, or on its own accord, the Québec Government was relying on IQ's due diligence and recommendation.[108]

104 In any case, there is no evidence showing that IQ, when acting as agent for the MEI, applied a different or lower standard of scrutiny to investment than when using its "own funds". In document production, the Respondent agreed in response to the Claimant's Request 31 to produce IQ's mandates in connection with Symbio's third and fourth rounds of financing, which would have shown the criteria used by IQ to evaluate this proposed investment. However, the Respondent eventually failed to produce anything, asserting that these documents were not in its possession, custody or control, which is simply not credible.[109] The Respondent's allegations regarding IQ's mandate and the standards it applied therefore stands unsupported and should be rejected.[110]

105 **Third**, [redacted][111] In making this extraordinary allegation, the Respondent

[108] See, *e.g.*, [redacted] at **Exhibit C-0226-ENG-FRA**, p. 1 [redacted].

[109] Respondent's letter to the Tribunal dated 28 March 2025, p. 1 ("*Nous avons effectué des recherches raisonnables afin d'identifier des documents répondant aux demandes no. 23 et 31 et le défendeur n'a pas en sa possession ou sous son contrôle de document répondant à ces demandes*.").

[110] Cf. *Nachingwea and others v. Tanzania*, ICSID Case No. ARB/20/38, Award, 14 July 2023, at **Exhibit CL-280-ENG**, p. 76 (paras. 263-268), finding the respondent's argument that it had "tried to search for the requested documents without success" unconvincing, noting that the documents would fall within the Respondent's possession, custody or control, and accordingly drawing adverse inferences against the Respondent as a result.

[111] Counter-Memorial, p. 38 *et seq.* (para. 106).

relies solely on the testimony of Mr Sanschagrin and is, again, unable to point to a single supporting document. That is because its *post hoc* story is patently false. As the documentary record show, IQ and the Québec Government offered to invest in the Project [redacted] To sum up:

- [redacted][112]
- The Québec Government issued a [redacted][113] Detailed due diligence and negotiations with IQ ensued over the following months.[114]
- [redacted]
- [redacted]
- [redacted][117]

[112] [redacted] at **Exhibit C-0193-ENG-FRA**; [redacted] at **Exhibit C-0195-ENG-FRA**; [redacted] at **Exhibit SS-0017-FRA**; [redacted] at **Exhibit C-0196-ENG-FRA**.

[113] [redacted] at **Exhibit C-0183-ENG-FRA**, p. 2.

[114] Illich I, at **Exhibit CWS-1**, p. 65 *et seq*. (paras. 187-188); Le Verger I, at **Exhibit CWS-3**, p. 23 (paras. 90-92).

[115] [redacted]

[116] [redacted]

[117] [redacted] at **Exhibit C-0226-ENG-FRA**.

- [redacted]120
- [redacted]
- [redacted]
- [redacted]
- [redacted]

106 In other words, there is simply no basis for the Respondent's claim in this arbitration that [redacted]

107 [redacted] Québec's Minister of Economy, Mr Fitzgibbon, continued to suggest that Québec would still be willing to participate in the financing of the Project, provided that the Federal Government and/or the

118 [redacted]
119 [redacted]
120 [redacted] at **Exhibit C-0227-ENG-FRA**.
121 [redacted]
122 [redacted]
123 [redacted]
124 [redacted]

Government of Alberta would co-invest alongside Québec, which ultimately came to naught.[125]

2.2.3 While the Québec Government reneged on its planned investment and sought to undermine the GNLQ Project in the media, Symbio continued to attract financing

108 In its Counter-Memorial, [redacted][126] This, too, is pure fantasy.

109 [redacted] but it was neither caused by, nor a reflection of a lack of viability of the Project. As explained below, what proved far more damaging was the Québec Government's decision in March 2020 to leak this development to the press, in a manner that negatively targeted the Project at a crucial moment.

110 **First**, as explained by Mr Illich in his second witness statement, and confirmed by Mr Krolick, a project financier with more than 20 years' experience, [redacted]

111 On launching the fourth round of financing, Symbio only intended to raise development finance to fund its operations until the next round. [redacted]

[125] Illich II, at **Exhibit CWS-1 (Second)**, p. 13 *et seq.* (paras. 31-34).

[126] Counter-Memorial. p. 280 (para. 698).

[127] Illich II, at **Exhibit CWS-1 (Second)**, p. 17 *et seq.* (paras. 38-39); First Witness Statement of Alexander Krolick, at **Exhibit CWS-8**, p. 8 *et seq*. (paras. 18-19).

[redacted] As such, it attested to Symbio's strong business model, encouraging economic viability and environmental credentials.

112 **Second**, Canada's assertion that [redacted] in that "*seulement quelques jours séparent le message* [redacted]", is demonstrably false.[129]

113 [redacted]

114 As explained in the Memorial, [redacted] railway blockades spread across Canada in mid-February 2020, and the Federal Government proved unable or unwilling to enforce court orders to remove the protestors.[132] [redacted]

[128] [redacted]

[129] Counter-Memorial, p. 280 (para. 698).

[130] [redacted]

[131] [redacted]

[132] Memorial, p. 74 (para. 209).

[133] [redacted]

[redacted]

115 **Third**, and in any case, despite [redacted] the Project still benefited from the financial support of significant investors such as [redacted][135] as well as strong interest from new potential investors, such as [redacted] Symbio was still in discussions with those investors in July 2021. The Québec Government's Decree refusing the GNLQ Project meant their investments ultimately did not come to fruition.[136]

116 **Fourth**, [redacted] would have had limited consequences on GNLQ's fourth round of financing had it not been for the Québec Government leaking this news to the press.[137]

117 Indeed, as explained in the Memorial, on [redacted]

[134] [redacted]

[135] Illich II, at **Exhibit CWS-1 (Second)**, p. 19 *et seq*. (para. 42).

[136] [redacted]

[137] Illich II, at **Exhibit CWS-1 (Second)**, p. 21 *et seq.* (paras. 45-46).

[redacted] significantly undermined the Project with other potential investors and customers. It made no reference to the Québec Government's own offer to invest in the Project in the same round of financing, and appears to have been part of an effort by the Québec Government to distance itself from the Project altogether.[138]

118 In its Counter-Memorial, the Respondent is careful not to deny expressly that it was the source of this leak. Rather, it limits itself to asserting, in merely one paragraph and later in a footnote, that [redacted] That is wrong.

119 Mr Illich explained in his first witness statement [redacted]

120 Importantly, [redacted]

[138] [redacted] Memorial, p. 75 *et seq.* (paras. 212-219).

[139] Counter-Memorial, p. 220 (para. 562), p. 272 (para. 680, fn 1113).

[140] Illich I, at **Exhibit CWS-1**, p. 73 (para. 213); Memorial, p. 76 *et seq.* (para. 216-217).

[141] Illich I, at **Exhibit CWS-1**, p. 73 (para. 213); Memorial, p. 76 (para. 216).

[142] [redacted]

[143] [redacted]

121 During document production in this arbitration, the Respondent insinuated that the Claimant might have been responsible for the leak.[144] This is flatly contradicted by the sources cited in the article itself, and strongly denied. The Respondent is unable to explain why – as indeed it would have made no sense - Symbio would have leaked negative news about its project to the press, particularly when it was seeking to close its fourth round of financing and the BAPE hearings were about to commence.[145] The Respondent's eagerness to point the finger at the Claimant, while still opting neither to confirm nor deny its responsibility for the leak, speaks for itself.[146]

122 This leak was only one of several irregularities and political interferences in the Respondent's treatment of the Claimant that marred the arbitrary and procedurally unfair EA process of the Symbio Project, leading to its rejection.

2.3 The federal and provincial authorities failed to conduct either an Agency-led federal assessment or a joint assessment of the GNLQ Project

123 In the Memorial, the Claimant explained that the GNLQ Project should never have been the subject of two distinct and uncoordinated provincial and federal EAs resulting in two separate decisions.[147] Instead, the assessment should have been carried out through a single federal review by the Agency, or a joint assessment with the MELCC pursuant to the Canada-Québec Agreement, in line with established practice in similar projects. The lack of federal leadership caused the desynchronisation of the two processes and enabled the Québec Government effectively to lead

[144] Claimant's Reply to Canada's Objections to Document Production Requests dated 25 October 2024, p. 80.

[145] Letter from MELCC to the President of the BAPE dated 20 February 2020, at **Exhibit C-0222-FRA**.

[146] Even after the Tribunal overruled the Respondent's objections and ordered it to produce documents responsive to the Claimant's Request 23 that would confirm the source of the leak, Canada conspicuously failed to produce any document. See PO4, Annex A, p. 90 (Request No. 23); Email correspondence between Respondent to Claimant from 20 February 2025 to 22 February 2025, at **Exhibit C-0434-ENG-FRA**.

[147] Memorial, p. 182 *et seq*. (paras. 608-609).

the process and issue the Decree based on criteria outside its jurisdiction, before the Federal Government essentially followed suit.

124 In response, the Respondent argues in its Counter-Memorial that:

- there was no legal requirement that there be a joint assessment of the Project;[148]
- the Canada-Québec Agreement is not binding, has seldom been applied, and its application would not affect the federal and provincial authorities' respective powers;[149]
- the Agency and the MELCC cooperated throughout the entire EA process and thereby applied the spirit of the Canada-Québec Agreement, even if not to the letter;[150] and
- GNLQ never complained about, or challenged, the conduct of two separate assessments at the time.[151]

125 These arguments are all ill-founded: the Respondent's assertion that a joint assessment, based on the Canada-Québec Agreement or other rules, was not required is wrong as a matter of Canadian law and practice (**Section 2.3.1**), and the evidence shows that the Agency and the MELCC did not cooperate meaningfully (**Section 2.3.2**). As for GNLQ, it was not in a position to challenge or dispute Canada's and Québec's wrongful decisions at the time (**Section 2.3.3**).

2.3.1 Canadian law mandated a single federal assessment or a joint assessment

126 In the Memorial, the Claimant relied on the reports of its Canadian law experts, Me Duchaine and Mr Northey, to show that the GNLQ Project

[148] Counter-Memorial, p. 178 (para. 481).

[149] Counter-Memorial, p. 36 *et seq.* (paras. 100-102) and p. 77 *et seq.* (para. 479).

[150] Counter-Memorial, p. 63 *et seq.* (paras. 172) and p. 178 *et seq.* (paras. 480 and 482).

[151] Counter-Memorial, p. 165 (para. 452).

should have been subject to a single federal assessment or to a joint assessment.[152]

127 In its Counter-Memorial, the Respondent seeks to challenge the Claimant's expert evidence, relying on its own experts, Ms Sarah Powell and Me Michel Yergeau, to contend, wrongly, that there was nothing unlawful in conducting two separate EAs, for the following reasons:

- this was in line with the constitutional allocation of powers between federal and provincial authorities, under which both levels of government are entitled to conduct EAs that relate to one of their constitutional powers;[153]
- there was no legal obligation on the part of either Canada or Québec to abstain from conducting its own, separate assessment;[154]
- there was no legal duty imposed on the Agency and the MELCC to collaborate, as the Canada-Québec Agreement is not mandatory;[155]
- a joint assessment is not the usual practice;[156]
- a joint assessment would not necessarily have been in GNLQ's interest.[157]

128 None of these points are correct, as explained by Mr Northey and Me Duchaine in their second reports and as set out below.

129 By way of preliminary remarks, it should be stressed that these questions do not concern "grey areas" of law, on which equally knowledgeable legal experts could reasonably disagree.

130 Nor, with respect, is this an instance of disagreement between legal experts of comparable experience on both sides: Mr Northey and Me Duchaine

[152] Memorial, p. 176 *et seq.* (paras. 587-594, 608-609, 669); Duchaine I, at **Exhibit CER-1**, p. 4, (paras. 64-69, 72, 75, 98 and 128); First Expert Report of Rodney Northey dated 20 November 2023, at **Exhibit CER-2**, p. 18 *et seq.* (paras. 51 and 72-76).

[153] Counter-Memorial, p. 177 (para. 479).

[154] Counter-Memorial, p. 178 (para. 481).

[155] Counter-Memorial, p. 178 (para. 481).

[156] Counter-Memorial, p. 179 (para. 482).

[157] Counter-Memorial, p. 179 *et seq.* (para. 483).

have far more, and more recent, experience in environmental assessments and related litigation under the current Canadian and Québec legal regimes than Ms Powell and Me Yergeau respectively.[158] Mr Northey has over 34 years of experience in federal environmental law. He is the author of the leading Guide to Canada's Impact Assessment Act; he advises and represents proponents in the context of environmental assessments and in related litigation proceedings at both provincial and federal levels, including before the Canadian Supreme Court.[159] Likewise, Me Duchaine has been practicing Québec environmental law for more than 35 years,[160] representing clients before Québec courts on environmental law matters, or advising clients in relation to the environmental assessment of their projects.[161]

131 In contrast, Ms Powell's experience mainly concerns the environmental law aspects of financial transactions in relation to project acquisition or financing.[162] As for Me Yergeau, his appointment as a judge of the Québec *Cour supérieure* some 13 years ago (in 2012) required him to move away from his exclusive focus on environmental law to embrace a broader practice until very recently.[163] As Me Duchaine highlights in her second report, Me Yergeau is now defending outdated, if not clearly obsolete,

[158] See Northey I, at **Exhibit CER-2**, p. 79 *et seq*. (Appendix A – Curriculum vitae); Second Expert Report of Christine Duchaine dated 7 April 2025, at **Exhibit CER-1 (Second)**, p. 209 *et seq.* (Annex IV – Curriculum vitae); Expert Report of Sarah Powell dated 12 July 2024, at **Exhibit RER-3**, p. 85 *et seq*. (Appendix A – Curriculum vitae); Expert Report of Michel Yergeau dated 12 July 2024, at **Exhibit RER-2**, p. 12 *et seq*. (paras. 25-39).

[159] Northey I, at **Exhibit CER-2**, p. 82.

[160] Duchaine II, at **Exhibit CER-1 (Second)**, p. 209 (Annex IV – Curriculum vitae).

[161] Duchaine II, at **Exhibit CER-1 (Second)**, p. 209 *et seq.* (Annex IV – Curriculum vitae).

[162] Powell, at **Exhibit RER-3**, p. 85 *et seq*. (Appendix A) (Showing that, out of 45 projects selected as Ms Powell's "representative work", only seven (or more likely six, as two of these projects are strictly identical) related to actual environmental assessments. The 38 other projects consisted of transactional work, or providing expertise in an arbitration matter. None of Ms Powell's representative work relates to environmental law litigation).

[163] Yergeau, at **Exhibit RER-2**, p. 12 *et seq*. (paras. 25-36).

conceptions of Québec's environmental law,[164] and failed to provide any supporting authority for many of his controversial opinions.[165]

2.3.1.1 Exclusive federal jurisdiction of the Agency

132 As Mr Northey and Me Duchaine both independently opine, the nature of the GNLQ Project meant that the Agency had exclusive jurisdiction to conduct a federal EA, without deferring to Québec, because it involved primarily the assessment of matters that are exclusively within the federal powers, and because of its location on federal land owned by the SPA.[166]

133 Pursuant to the Canadian constitutional law principle of federal paramountcy, where there is overlapping authority between the Federal and provincial Governments, federal law will prevail in case of conflict. This is a principle confirmed by Mr Northey and Me Duchaine,[167] and on which the Respondent's own experts chose not to engage. On the facts of this case, it clearly required that the Agency exercise exclusive federal jurisdiction to conduct the EA of the GNLQ Project.[168]

134 Addressing the **federal perspective**, Mr Northey explains that Canadian "[l]aw and practice support the application of federal EA to **all** projects on port authority lands."[169] He then proceeds to demonstrate that the same should have applied in the present case, *i.e.*, that the GNLQ Project should have been subject to a federal-only EA.[170]

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[164] See, *e.g.*, Duchaine II, at **Exhibit CER-1 (Second)**, p. 9 *et seq.* (paras. 37-47) and p. 32 (paras. 113-114).

[165] See, *e.g.*, Duchaine II, at **Exhibit CER-1 (Second)**, p. 2 (para. 8), p. 45 *et seq.* (paras. 150-151), p. 96 (para. 261), p. 99 (para. 275), p. 105 (para. 290), p. 114 (para. 314), p. 147 *et seq.* (paras. 382-388).

[166] Second Expert Report of Rodney Northey dated 14 April 2025, at **Exhibit CER-2 (Second)**, p. 18 *et seq*. (paras. 40-59); Duchaine II, at **Exhibit CER-1 (Second)**, p. 13 *et seq.* (paras. 48-80).

[167] Northey I, at **Exhibit CER-2**, p. 50 *et seq*. (para. 149); Northey II, at **Exhibit CER-2 (Second)**, p. 34 *et seq*. (para. 80); Duchaine II, at **Exhibit CER-1 (Second)**, p. 9 *et seq*. (paras. 37-47) and p. 22 *et seq.* (paras. 84-88).

[168] Northey II, at **Exhibit CER-2 (Second)**, p. 34 *et seq*. (para. 80); Duchaine II, at **Exhibit CER-1 (Second)**, p. 9 *et seq*. (paras. 37-47) and p. 22 *et seq.* (paras. 84-88).

[169] Northey II, at **Exhibit CER-2 (Second)**, p. 20 (para. 49) (emphasis in original).

[170] Northey II, at **Exhibit CER-2 (Second)**, p. 21 *et seq*. (paras. 50-54).

135 According to Mr Northey, Ms Powell's analysis on this point is wrong. Contrary to her analysis, the location of the GNLQ Project on land registered as "Schedule C" land had no impact on its qualification as federal property.[171] The "key question" is whether the SPA's regulatory authorisation was required to use the land.[172] That was indeed the case for the GNLQ Project land because the SPA was required to exercise its powers to issue a lease for use of its land for the GNLQ Project.[173]

136 Mr Northey also points out the following:

- The case law relied on by Ms Powell is inapposite, as it does not address the notion of federal land in an environmental law context.[174]
- Ms Powell herself acknowledges and refers to recent examples of the federal authorities' practice of carrying out the EA of projects located on federal land, such as the North Shore Terminal project which, like the GNLQ Project, is also entirely located on land owned by the SPA. The North Shore Terminal project was only subject to a federal assessment without any objection from Québec.[175]
- Ms Powell fails to address the "strongest illustration" of the federal practice with regard to EAs, namely the 1998 Sub-Agreement on Environmental Assessment, which confirms that the "federal government will be the lead Party for proposed projects on federal lands".[176]

137 Considering the matter from the **Québec perspective**, Me Duchaine takes the same view as Mr Northey, namely that the location of the GNLQ Project on federal land was a source of exclusive federal jurisdiction, and

[171] Northey II, at **Exhibit CER-2 (Second)**, p. 23 *et seq*. (paras. 55-57).

[172] Northey II, at **Exhibit CER-2 (Second)**, p. 24 (paras. 56-57).

[173] Northey II, at **Exhibit CER-2 (Second)**, p. 24 (paras. 56-57). See also Email correspondence between the Agency and the SPA dated 8-9 December 2015, at **Exhibit RN-0186-FRA**; Agency, Information sheet for the GNLQ Project, at **Exhibit RN-0187-FRA**.

[174] Northey II, at **Exhibit CER-2 (Second)**, p. 24 *et seq*. (para. 58-59).

[175] Northey II, at **Exhibit CER-2 (Second)**, p. 22 *et seq*. (paras. 53-54).

[176] Northey II, at **Exhibit CER-2 (Second)**, p. 27 (para. 63).

refutes Me Yergeau's similar objections to those of Ms Powell in this respect.[177]

138 Me Duchaine adds that the exclusive federal jurisdiction over the EA of the GNLQ Project also derived from the need to address matters pertaining to maritime navigation and infrastructure, both of which are within federal jurisdiction.[178] She opines that the specific assessments of (i) the impact of maritime transportation on marine mammals and (ii) nation-wide GHG emissions, both fall within exclusive federal jurisdiction.[179] In this respect, as she demonstrates, Me Yergeau's position that Québec could simply usurp federal powers when conducting its own EA is wrong from a constitutional law perspective.[180]

139 Me Duchaine concludes that, in the circumstances, Québec should have declined jurisdiction and deferred to the federal authorities to conduct the EA, as indeed it did for the North Shore Terminal project.[181]

140 Contrary to the Respondent's position in this arbitration, it appears that the Agency contemporaneously shared Mr Northey's and Me Duchaine's opinion that the federal authorities had exclusive jurisdiction to conduct the EA of the GNLQ Project. This is what transpires from an internal email from the Department of Fisheries and Oceans (the "**DFO**") regarding a meeting with the Agency following the Québec Government's Decree rejecting the GNLQ Project. In that email, obtained in document production, the DFO reported that the Agency considered that GNLQ could challenge Québec's decision by invoking the doctrine of federal paramountcy:

> "*Le promoteur pourrait contester la décision du Québec et* ***invoquer la préséance du fédéral*** *selon l'Agence*."[182]

[177] Duchaine II, at **Exhibit CER-1 (Second)**, p. 20 (paras. 75-77).

[178] Duchaine II, at **Exhibit CER-1 (Second)**, p. 21 *et seq.* (paras. 82-83).

[179] Duchaine II, at **Exhibit CER-1 (Second)**, p. 27 *et seq.* (paras. 96-105).

[180] Duchaine II, at **Exhibit CER-1 (Second)**, p. 30 *et seq*. (paras. 106-114).

[181] Duchaine II, at **Exhibit CER-1 (Second)**, p. 30 (para. 105).

[182] Internal DFO email dated 3 August 2021, at **Exhibit C-0470-FRA** (emphasis added).

141 It results from the above that there should only have been one EA process and one decision issued by the Federal Government, with no decision required from the Québec Government, or, at worse, as explained below, a joint, coordinated EA process in accordance with the Canada-Québec Agreement.

2.3.1.2 Application of the Canada-Québec Agreement

142 As explained by both Mr Northey and Me Duchaine, even assuming that both federal and provincial authorities should have been involved – despite the overwhelming part of the GNLQ Project falling within federal jurisdiction – the Canada-Québec Agreement should have been applied and resulted in a joint assessment.[183]

143 As explained in the Memorial, the Canada-Québec Agreement establishes the default framework for the two level of State authorities to conduct a coordinated joint assessment, whenever they have an overlapping responsibility for a project pursuant to their respective environmental laws.[184]

144 The federal and Québec authorities both failed to comply with all the steps required by the Canada-Québec Agreement.

145 **First**, the MELCC and the Agency should have consulted each other and collaborated with GNLQ "as early as possible" to ensure the provision of the information needed to establish their EA responsibilities and "advise[d]" GNLQ "at the earliest opportunity, about the potential for a cooperative environmental assessment".[185] However, neither the Agency nor the MELCC did so.

146 **Second**, the MELCC and the Agency should have notified each other "in a timely manner about projects that are potentially subject to a cooperative environmental assessment" and provided each other "mutual access to the

[183] Northey II, at **Exhibit CER-2 (Second)**, p. 25 *et seq*. (paras. 59-72); Duchaine II, at **Exhibit CER-1 (Second)**, p. 53 *et seq.* (paras. 157-160).

[184] Memorial, p. 177 (para. 588).

[185] Canada-Québec Agreement on Environmental Assessment Cooperation (2010), at **Exhibit RN-0010-ENG**, p. 6 (clause 5).

relevant information on the projects".[186] Instead, while the Agency wrote to the MELCC on 20 November 2015 to enquire about the application of the Canada-Québec Agreement,[187] (i) the MELCC failed to respond until after it had decided to initiate its own EA,[188] and (ii) the Agency failed to follow up with the MELCC.

147 **Third**, once Québec had established that it had an EA responsibility under the EQA that governs EAs in Québec, as the MELCC (erroneously) did in December 2015,[189] and where the Agency believed that it also had such responsibility under the CEAA 2012, the MELCC and the Agency were required to "cooperate until a decision has been made in this regard".[190] Instead, the MELCC ignored the Agency's potential EA responsibility and rushed to issue the MELCC Directive on 10 December 2015.[191]

148 **Fourth**, when the MELCC and the Agency "establish[ed] that they ha[d] an environmental assessment responsibility for" the GNLQ Project, they were supposed "to undertake a cooperative environmental assessment […] administered in a manner that allows both Parties to meet the requirements of their respective legislation."[192] Specifically:

i) The MELCC and the Agency should then have appointed "coordinators" to ensure the smooth implementation of the joint assessment, [193] and a "cooperative environmental assessment committee" in charge of managing the EA and ensuring that GNLQ provided the information required to that effect.[194]

[186] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 6 *et seq*. (clause 6(1)).

[187] Letter from the Agency to the MELCC dated 20 November 2015, at **Exhibit GB-0016-FRA**.

[188] Letter from the MELCC to the Agency dated 10 December 2015, at **Exhibit GB-0017-FRA**.

[189] Letter from the MELCC to the Agency dated 10 December 2015, at **Exhibit GB-0017-FRA**.

[190] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 8 (clause 7(3)).

[191] MELCC, Directive for the GNLQ Project, at **Exhibit C-0198-FRA**.

[192] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 8 (clause 8).

[193] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 8 *et seq*. (clause 9).

[194] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 9 *et seq*. (clause 10).

ii) The committee should have been in charge of establishing the schedule of the joint assessment and developing consolidated guidelines for assessing the GNLQ Project (as opposed to the Agency and the MELCC issuing separate guidelines, as they did) and analysing the overall acceptability of the GNLQ Project.[195]

iii) The MELCC and the Agency should have notified each other immediately of any requirement to hold public hearings (either BAPE at provincial level, or review panel at federal level), following which the MELCC and the Agency would be required to "consult on the possible establishment of a joint review panel."[196]

149 None of these steps were taken in the present case. In particular, as explained in Section 2.3.2 below, while the Québec Minister of Environment decided to hold BAPE hearings, there were never any consultations between the MELCC and the Agency regarding the organisation of a joint review panel. On the contrary, the Agency was not even invited to participate in the BAPE hearings.

150 **Finally**, the Québec and federal authorities should have ensured that the decisions – and announcements – of the Québec and Federal Governments were coordinated to the extent possible, by notifying each other in advance of their decisions.[197] The Canada-Québec Agreement specifies in this respect that "**neither Party will communicate its decisions directly to the proponent or the public without prior notification of the other Party**."[198] Again, there was no prior notification in this case, as explained in Section 2.3.2 below.

151 The Respondent alleges in the Counter-Memorial that "*ni l'Agence, ni le MELCC n'ont exprimé d'intérêt à procéder par commission d'examen conjoint pour mener leurs évaluations environnementales respectives du projet Énergie Saguenay au lancement des processus d'évaluation*

[195] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 9 *et seq*. (clauses 10, 12 and 13).

[196] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 12 (clause 14).

[197] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 13 (clause 15).

[198] Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 13 (clause 15(3)) (emphasis added).

environnementale en décembre 2015 et janvier 2016".[199] However, that assertion is belied by the evidence.

152 The documents produced by the Respondent with its Counter-Memorial, and in document production, reveal that both the MELCC and the Agency initially acted as if the Canada-Québec Agreement was to apply:

- In its letter dated 20 November 2015, the Agency indicated that it would inform the MELCC "si une évaluation environnementale en vertu de la LCÉE 2012 est requise ou non et de **voir aux modalités d'application de l'Entente de collaboration Canada-Québec en matière d'évaluation environnementale pour ce projet, le cas échéant**."[200]
- During a meeting of the interministerial committee set up to assist GNLQ, on 26 November 2015, the MELCC indicated that "***l'évaluation environnementale fera l'objet d'une entente de collaboration entre le provincial et le fédéral***."[201]
- On 18 December 2015, the Agency informed other federal authorities that "[l]*'Entente Canada-Québec en matière d'évaluation environnementale s'applique*" in relation to the assessment of the GNLQ Project.[202]

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[199] Counter-Memorial, p. 159 (para. 435).

[200] Letter from the Agency to the MELCC dated 20 November 2015, at **Exhibit GB-0016-FRA**.

[201] MEIE, GNLQ interministerial committee monitoring table dated 26 November 2015, at **Exhibit C-0463-FRA**, p. 4 *et seq*. (emphasis added). GNLQ initially relied on this representation, indicating to the public that the Canada-Québec Agreement was being applied, although it was not. See GNLQ and Transfert, meeting notes, "*Comité Consultatif Sur Le Complexe De Liquéfaction De Gaz Naturel, Compte rendu de la réunion tenue à l'Hôtel le Montagnais*" dated 10 March 2016, at **Exhibit C-0171-FRA**, p. 6 ("*L'ACEE et le MDDELCC ont des processus distincts d'évaluation environnementale. Il existe une entente de coordination entre les deux agences qui tentent de suivre un calendrier semblable afin d'éviter des délais supplémentaires pour le promoteur. Ils peuvent également participer aux mêmes rencontres et se partager l'information*.").

[202] Northey II, at **Exhibit CER-2 (Second)**, p. 28 (para. 65) (citing Agency, Information session on the GNLQ Project, 18 December 2016, at **Exhibit RN-0190-FRA**, p. 17 (of the PDF)).

- The MELCC and the Agency had even prepared a joint letter to inform GNLQ that there would be only one joint assessment:

  "*Nous vous informons qu'il a été déterminé que le projet susmentionné est assujetti à la fois à la procédure québécoise d'évaluation et d'examen des impacts sur l'environnement (section IV.1 de la Loi sur la qualité de l'environnement) et à la Loi canadienne sur l'évaluation environnementale.*

  Par conséquent, nous ***vous informons que ce projet fera l'objet d'une évaluation environnementale coopérative conformément à l'Entente de collaboration Canada-Québec en matière d'évaluation environnementale****.*

  […]

  [Le comité d'évaluation environnementale coopérative] *veillera à* ***coordonner, dans la mesure du possible, les étapes d'évaluation environnementale des processus québécois et fédéral****.* […]

  Advenant que la tenue d'une audience publique relative à ce projet est requise, le Québec et les autorités fédérales peuvent convenir ***d'établir une commission d'examen conjoint****.*"[203]

153 In the Counter-Memorial, the Respondent does not refer to that draft letter, produced by the Respondent in document production, nor, therefore, explain why it was never sent.

154 In sum:

- both the MELCC and the Agency knew at the end of 2015 that the Canada-Québec Agreement applied to the EA of the GNLQ Project;
- both the MELCC and the Agency accordingly took steps towards implementing the Canada-Québec Agreement;
- however, for reasons unknown to the Claimant, the MELCC changed tack in December 2015, deciding instead to initiate its own EA and the

[203] Draft letter from the Agency and the MELCC to GNLQ, at **Exhibit C-0471-FRA** (emphasis added).

Agency followed suit in January 2016, without holding the MELCC to its prior commitments.[204]

155 Addressing the Canada-Québec Agreement from a **federal perspective**, Mr Northey refutes Ms Powell's attempt to downplay the importance of that agreement. He explains that the establishment by both authorities of their EA responsibilities, in December 2015 for the MELCC and in January 2016 for the Agency, automatically triggered the mandatory application of the Canada-Québec Agreement, in accordance with its clause 8(1).[205] On the evidence, the federal and provincial authorities failed to comply with their respective obligations under that Agreement.[206]

156 Mr Northey further confirms that, regardless of the application of the Canada-Québec Agreement, the Agency should have complied with its own statutory duty under section 18 of the CEAA 2012 to offer to consult and cooperate with Québec.[207] It failed to do so at the outset and throughout the EA process.

157 As Mr Northey explained already in his first report, the Agency's failure enabled Québec to take unilateral initiatives against federal interests, namely, to conduct public hearings, to publish the BAPE Report without involving the Agency, and, ultimately, to reject the GNLQ Project, which led to a prejudgment of the outcome of the federal EA.[208]

158 From the **Québec perspective**, Me Duchaine similarly confirms that the Canada-Québec Agreement was applicable in the circumstances.[209] As she

[204] Letter from the MELCC to the Agency dated 10 December 2015, at **Exhibit GB-0017-FRA**; Lettre d'Anne-Marie Gaudet (Agence) à Yves Rochon (MELCC) sur la coordination fédérale-provinciale du projet Énergie Saguenay dated 15 January 2016, at **Exhibit GB-0018-FRA**.

[205] Clause 8 provides that "[w]here both Parties establish that they have an environmental assessment responsibility for a project, they **agree to undertake a cooperative environmental assessment**." See Northey II, at **Exhibit CER-2 (Second)**, p. 27 *et seq*. (para. 64).

[206] Northey II, at **Exhibit CER-2 (Second)**, p. 28 *et seq*. (paras. 65-67).

[207] Northey II, at **Exhibit CER-2 (Second)**, p. 26 (paras. 60-62).

[208] Northey I, at **Exhibit CER-2**, p. 27 (para. 75).

[209] Duchaine II, at **Exhibit CER-1 (Second)**, p. 33 *et seq*. (paras. 117-120).

explains, Me Yergeau's argument that the agreement was non-binding is directly contradicted by:

- the purpose of the Canada-Québec Agreement and the legal requirement to conduct cooperative assessments, *i.e.*, an assessment conducted jointly between the federal and provincial authorities;[210] and
- clause 8(1) of the Canada-Québec Agreement mentioned above, which provides for the mandatory application of the agreement upon establishment by the federal and provincial authorities of their respective EA responsibilities.[211] This condition was met in relation to the GNLQ Project in December 2015 for the MELCC and in January 2016 for the Agency. However, both authorities failed to initiate the application of the Canada-Québec Agreement and went their separate ways, in breach of the agreement.[212]

159 Me Duchaine further demonstrates that, contrary to Mr Yergeau's assertions, (i) the federal and provincial EA regimes are not irreconcilable since the Canada-Québec Agreement was established precisely to harmonise these procedures in a joint assessment;[213] and (ii) in practice, the use of a joint assessment was the norm rather than the exception in the context of comparator projects.[214]

160 Accordingly, even if Québec's authorities considered that it had reasons to be involved in conducting the EA, *quod non*, the assessment should have been conducted as a joint assessment under the terms of the Canada-Québec Agreement, in which the Agency would have played a prominent role, given the predominantly federal matters involved, and should have resulted in coordinated decisions. This (correct) process would have left no room for a separate Québec Government decree based on grounds outside its jurisdiction.[215]

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[210] Duchaine II, at **Exhibit CER-1 (Second)**, p. 34 *et seq.* (paras. 121-124).

[211] Duchaine II, at **Exhibit CER-1 (Second)**, p. 36 *et seq.* (paras. 125-126).

[212] Duchaine II, at **Exhibit CER-1 (Second)**, p. 37 *et seq*. (paras. 127-138).

[213] Duchaine II, at **Exhibit CER-1 (Second)**, p. 42 *et seq.* (paras. 140-153).

[214] Duchaine II, at **Exhibit CER-1 (Second)**, p. 47 *et seq*. (paras. 154-156).

[215] Duchaine II, at **Exhibit CER-1 (Second)**, p. 53 *et seq.* (paras. 160).

2.3.1.3 The impact of the failure to conduct a joint assessment

161 The Respondent's argument that the Claimant would not necessarily have been better off with a joint assessment is disingenuous.[216] The Respondent relies on *Bilcon v. Canada* in which the claimants complained that the referral of their project to a joint review panel had wrongly increased the length and costs of the process.[217] However, that comparison is inapposite.

162 In *Bilcon v. Canada*, the claimants contended that their project should have been evaluated under a comprehensive study conducted by the Agency, as opposed to a joint review panel process.[218] This is indeed the Claimant's primary case: here, there should have been only a single federal EA led by the Agency, with at most limited involvement from the Québec authorities.

163 Furthermore, the two cases are not comparable. The issue for the claimants in *Bilcon* was the additional delays and costs resulting from the joint review. For GNLQ, it was the impact of two separate, uncoordinated and desynchronised EAs, namely (i) two separate sets of questions from both authorities and, for the provincial assessment, lengthy BAPE hearings, and (ii) two desynchronised decisions whereby the first led to a prejudgment of the second, both on unjustified grounds, as further explained below (Sections 2.5 and 2.6). In that context, GNLQ evidently would have been better off with a joint assessment involving a fully coordinated approach by the Agency and the MELCC, even if it had required a joint review process.

164 Finally, in *Bilcon*, the joint review panel exceeded its mandate, as established in the applicable EIS guidelines for the project. The tribunal found that the panel had arbitrarily "created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out its mandate defined by the applicable law".[219] That can hardly be

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[216] Counter-Memorial, p. 179 *et seq.* (para. 483).

[217] *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**.

[218] See *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 39 *et seq*. (para. 168).

[219] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 176 *et seq*. (para. 591).

considered as a proper model of the type of joint assessment that the Claimant could have expected in this case.

2.3.1.4 Conclusion

165 In conclusion, as Mr Northey and Me Duchaine confirm, both from a federal law and a Québec law perspective, the GNLQ Project should have been assessed by the Agency alone because (i) it was located on federal land, and (ii) it required examination of elements that were exclusively within federal jurisdiction. Québec should never have conducted its own EA, let alone issued the Decree rejecting the GNLQ Project.

166 To the extent that Québec's involvement in the EA was justified and Québec had established that it had an EA responsibility, *quod non*, the process should have been conducted as a joint assessment under the Canada-Québec Agreement, in which the Agency would have played a prominent role given the predominantly federal matters involved. This process should have resulted in coordinated decisions, and would not have permitted Québec to deny the environmental authorisation on grounds outside its jurisdiction.

167 In any event, the provincial and federal authorities' failure to agree on a single federal EA or a joint assessment resulted in the improper imposition on GNLQ of two separate and desynchronised EA processes. This initial flaw tainted the entire process, creating at the outset significant risks of overlapping jurisdiction, irregularities, prejudgment and political interference. As explained below, these risks materialised at every step of each of the provincial and federal EA process.

2.3.2 The Agency and the MELCC did not cooperate meaningfully over the course of their respective assessments

168 The Respondent attempts to excuse Canada's shortcomings in not having solely a federal EA, or a joint assessment, of the GNLQ Project, by arguing that the Agency and the MELCC collaborated throughout the process.[220] This is to no avail as there was no meaningful "collaboration".

[220] Counter-Memorial, p. 63 *et seq.* (para. 172) and p. 178 *et seq.* (paras. 480 and 482).

169 The cooperation between the MELCC and the Agency throughout their respective EAs was, at best, superficial. The documents produced by the Respondent in document production indeed show that the "collaboration" was limited to the following:

- exchanging vague and random updates on where their respective processes stood;[221] and
- sharing information on discrete issues not within their respective jurisdiction.[222]

170 Tellingly, there was no cooperation between the MELCC and the Agency in relation to key milestones in their respective assessments, as illustrated by the following:

[221] See Email correspondence between G. Bélanger (Agency) and M. Duquette (MELCC) dated 6 May 2019, at **Exhibit C-0472-FRA**; Email correspondence between G. Bélanger (Agency) and M. Duquette (MELCC) from 13 September to 16 October 2019, at **Exhibit C-0473-FRA**; Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 31 August to 15 December 2020, at **Exhibit C-0474-FRA**; Email correspondence between G. Bélanger and M. Duquette from 28 March 2019 to 29 March 2019, at **Exhibit C-0475-FRA**; Email correspondence between G. Bélanger (Agency) and M. Duquette (MELCC) from 13 September to 11 October 2019, at **Exhibit C-0440-FRA**; Email correspondence between G. Bélanger (Agency) and M. Duquette (MELCC) dated 8 November 2019, at **Exhibit C-0476-FRA**; Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 21 January to 6 February 2020, at **Exhibit C-0477-FRA**; Email from J. Martin (Agency) to M. Duquette (MELCC) dated 19 June 2020, at **Exhibit C-0478-FRA**; Email from J. Martin (Agency) to M. Duquette (MELCC) dated 31 August 2020, at **Exhibit C-0479-FRA**; Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) dated 27 April 2021, at **Exhibit C-0480-FRA**; Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) dated 15 June 2021, at **Exhibit C-0481-FRA**.

[222] See, *e.g.*, Email correspondence between M. Vergara (Agency) and Y. Turgeon (MELCC) from 17 October to 6 December 2019, at **Exhibit C-0482-FRA** (pêche blanche); Email correspondence from M. Vergara (Agency) to Y. Turgeon (MELCC) *et al.* dated 6 February 2020, at **Exhibit C-0483-FRA**, Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 3 February to 4 February 2021, at **Exhibit C-0484-FRA** (first nations). Oddly enough, M. Duquette (MELCC) shared with Ms Bélanger (Agency) an online petition against the GNLQ Project – hardly an element of "cooperation" in and of itself. Email correspondence between G. Bélanger (Agency) and M. Duquette (MELCC) dated 17 April 2019, at **Exhibit C-0485-FRA**.

- The MELCC did not respond to the Agency's proposal that they work together to avoid work duplication in relation to the discussions with the First Nations.[223]
- Whereas the Agency invited the MELCC to participate in the public consultations it organised, the MELCC declined to do so.[224]
- The Agency was not invited to contribute to or participate in the BAPE hearings.[225] The DFO, which was invited and which was advising in parallel for the Agency in the federal process, complained on that occasion that the "Québec government did not agree in harmonizing its process with the [Agency's]".[226]

171 The only area where the federal and provincial authorities cooperated to some degree was in relation to the beluga whales. However, that cooperation was limited to two meetings in September 2020 and February 2021.[227]

172 Both Mr Northey and Me Duchaine confirm that the materials exchanged between the Agency and the MELCC, which were produced by the Respondent in document production and which they have reviewed, do not reflect the level of cooperation required of a cooperative EA.[228]

173 Furthermore, the Respondent's document production confirms that communication between the MELCC and the Agency almost stopped from March 2021 onwards, after Minister Charette's press conference during

[223] See Email from M. Vergara (Agency) to Essipit and Mashteuiatsh representatives dated 25 February 2019, at **Exhibit C-0486-FRA**.

[224] Email correspondence from G. Bélanger to M. Duquette from 21 May 2019 to 23 May 2019, at **Exhibit C-0487-FRA**.

[225] Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 31 August to 15 December 2020, at **Exhibit C-0474-FRA**, Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 13 February 2020 to 24 February 2020, at **Exhibit C-0488-FRA**.

[226] Email correspondence between the DFO and the Agency dated 22-23 September 2020, at **Exhibit C-0489-ENG**.

[227] See Agency, Report of meeting between Agency, PC, TC, DFO and MELCC dated 4 September 2020, at **Exhibit C-0490-FRA** and Agency, Report of meeting between Agency, TC, PC, DFO, MELCC and MFFP dated 3 February 2021, at **Exhibit C-0491-FRA**.

[228] Northey II, at **Exhibit CER-2 (Second)**, p. 31 (paras. 71-72); Duchaine II, at **Exhibit CER-1 (Second)**, p. 40 *et seq*. (paras. 136).

which he announced three "core criteria" to be met for the Project to go forward. Notably, the MELCC declined to organise a meeting between its own experts and those of the Agency on GHG emissions, despite the Agency's requests.[229]

174 Québec's decision to refuse to authorise the GNLQ Project came without prior warning, including to the Agency and its experts whom it left in disarray. This is confirmed by an internal email from the DFO reporting on a discussion with the Agency, during which the Agency indicated that "*c'est la **1ère fois** que la décision du Québec et de l'Agence sont désynchronisées de la sorte*".[230] The Agency was so perplexed by the situation that it decided to suspend the publication of its Report to "*analyser les implications de la décision du gouvernement du Québec*".[231]

175 In other words, the collaboration between the Agency and the MELCC was far from what was required for a cooperative assessment under the Canada-Québec Agreement, and certainly did not achieve its main purpose. This failure of coordination, in turn, led the Federal Government to upend its own assessment and to prejudge its outcome so as to reach the same conclusion as the Québec Government, as further explained in Section 2.6.1 below.

2.3.3 GNLQ was not in a position to challenge Canada's and Québec's decision to conduct parallel EA processes

176 The Respondent's argument that GNLQ never complained about or challenged the conduct of two separate EAs at the time is disingenuous.[232]

177 As explained by Mr Le Verger, GNLQ was not even aware of the decision by the Québec and federal authorities not to conduct a joint assessment and

[229] Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 27 April to 25 May 2021, at **Exhibit C-0492-FRA**; Email correspondence between J. Martin and M. Duquette dated 27 April 2021, at **Exhibit C-0493-FRA**.

[230] Internal DFO email dated 3 August 2021, at **Exhibit C-0470-FRA** (emphasis added).

[231] Email correspondence between the Agency, the DFO *et al.* from 22 July 2021 to 3 August 2021, at **Exhibit TLV-0155-FRA**.

[232] Counter-Memorial, p. 165 *et seq.* (paras. 452, 482).

thus could not have challenged it.[233] The Respondent only provided some indication of what really happened for the first time with its Counter-Memorial. Furthermore, it would have made no sense for GNLQ to antagonise the authorities in charge of conducting the EA of the GNLQ Project at the outset by questioning their jurisdiction and choice of EA process. In any event, there was no reason to challenge the manner in which the assessment was organised or conducted because, at least initially, it did not appear to prejudice GNLQ. On the contrary, the authorities' support for the Project suggested that they would conduct the process efficiently and in accordance with the law.

178 Neither the Respondent nor its expert on federal law, Ms Powell, refer to any case where the proponent of a project has successfully challenged the authorities' choice of process for the EA.

2.4 The MELCC Directive and the Agency's EIS Guidelines were binding and defined the scope of the environmental assessment and decision-making

179 Notwithstanding the decisions to proceed with two separate EAs of the GNLQ Project, in violation of Canadian constitutional law and against established practice (as explained in Section 2.3 above), both the MELCC and the Agency were bound to carry out their respective assessments within the scope defined by the MELCC Directive and the EIS Guidelines, respectively.

180 As explained in the Memorial and in the first reports of Mr Northey and Me Duchaine, the Agency's EIS Guidelines and the MELCC Directive, both issued in March 2016, were critical documents. They established the four corners within which the MELCC and the Agency were required to conduct their EAs of the GNLQ Project and subject to which the Federal and Québec Governments could exercise their discretion to approve or reject the GNLQ Project.[234]

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[233] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 29 (para. 84).

[234] Memorial, p. 187 *et seq.* (para. 624); Northey I, at **Exhibit CER-2**, p. 28 *et seq.* (paras. 78-85); Memorial, p. 227 (para. 739); Duchaine I, at **Exhibit CER-1**, p. 5 and p. 80.

181 The Respondent in the Counter-Memorial, and its experts in their reports, argue the opposite. Specifically, they contend that:

- the MELCC Directive and the EIS Guidelines were not binding and their content could be updated over time;[235] and
- the MELCC Directive and the EIS Guidelines had no impact on the Canadian and Québec Government's discretion in reaching a decision.[236]

182 Mr Northey and Me Duchaine demonstrate in their second reports that these arguments are incorrect as a matter of federal and Québec law. Contrary to the Respondent's assertions, the MELCC Directive and EIS Guidelines were binding on the authorities (**Section 2.4.1**) and should have limited the parameters of the assessment process as described below, and the bases upon which the final decisions could be made, at both the provincial (**Section 2.4.2**) and federal levels (**Section 2.4.3**).

2.4.1 The MELCC Directive and the EIS Guidelines were binding on State authorities

183 At the **provincial level**, in support of the Respondent's position, Me Yergeau argues that the MELCC Directive was a standardised instruction applicable to categories of projects creating a broad framework for the proponent that could evolve over time. As Me Duchaine explains, this contention is legally unfounded.[237]

184 The only case cited by Me Yergeau in support of his position confirms that directives issued by the MELCC are, in the words of the Québec Court of Appeal, meant to determine "**the parameters within which [the Minister of Environment] intended to exercise his discretion**".[238]

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[235] Counter-Memorial, p. 29 *et seq.* (paras. 78, 92, 117) and p. 183 (para. 492).

[236] Counter-Memorial, p. 31 *et seq.* (paras. 85, 97).

[237] Duchaine II, at **Exhibit CER-1 (Second)**, p. 99 *et seq.* (paras. 272-284).

[238] Québec (Procureur général) c. Gestion environnementale Nord-Sud inc., 2012 QCCA 357 dated 31 December 2012, at **Exhibit MY-0026-FRA**, 25 of the PDF (para. 104) (emphasis added) cited in Duchaine II, at **Exhibit CER-1 (Second)**, p. 101 *et seq*. (para. 280),

185 As for Me Duchaine's position that the MELCC Directive was binding on the MELCC and the Québec Government, it is well supported by case law, including from the Supreme Court of Canada.[239] She observes that Me Yergeau himself, in one of his decisions as a judge, emphasised that directives issued by a Minister, like the MELCC Directive, should not be construed as mere guidelines or instructions.[240]

186 As Me Duchaine also observes, Me Yergeau's argument that the MELCC Directive was in this case a standard directive is contradicted by the evidence.[241] Comparing the standard template for directives produced by the Respondent in document production, with the MELCC Directive, she notes that there were substantial deviations, and that the MELCC Directive was clearly adapted to the GNLQ Project.[242] She concludes that the MELCC made deliberate choices as to what it wanted to include in, or exclude from, the MELCC Directive.[243]

187 At the **federal level**, Mr Northey shows that, contrary to Ms Powell's contention, the binding nature of the EIS Guidelines results from the CEAA 2012. More specifically section 19(2) of the CEAA 2012 defines the "scope of the factors to be taken into account" in the determination of the environmental effects of a designated project, the significance of those effects and the measures that are technically and economically feasible to mitigate those effects.[244] He notes that the EIS Guidelines themselves indicate that their purpose is to "specif[y] the nature, scope and extent of the information required" for the EIS and the EA as a whole.[245]

188 Mr Northey refers to case law supporting his opinion, including a recent case relating to the Bay du Nord project, in which the Federal Government defended its prerogative under the CEAA 2012 to define the scope of an

[239] Duchaine II, at **Exhibit CER-1 (Second)**, p. 100 *et seq.* (paras. 278-284).

[240] Duchaine II, at **Exhibit CER-1 (Second)**, p. 100 (para. 277).

[241] Duchaine II, at **Exhibit CER-1 (Second)**, p. 104 (para. 285).

[242] Duchaine II, at **Exhibit CER-1 (Second)**, p. 104 (para. 285).

[243] Duchaine II, at **Exhibit CER-1 (Second)**, p. 104 (para. 287).

[244] Northey II, at **Exhibit CER-2 (Second)**, p. 36 *et seq*. (paras. 84-89).

[245] Northey II, at **Exhibit CER-2 (Second)**, p. 13 *et seq*. (paras. 28) and p. 36 *et seq*. (para. 85); Agency, Guidelines for the Preparation of an Environmental Impact Statement for the GNLQ Project dated 14 March 2016, at **Exhibit C-0199-ENG**, p. 1.

EA through the preparation of the guidelines.[246] More specifically, the Federal Government defended the Agency's decision to exclude maritime navigation from the guidelines, and thus from the scope of the EA.[247] The Federal Court upheld these views as reflecting federal law.[248]

189 Mr Northey also clarifies that, contrary to Ms Powell's statement, he never opined that the EIS Guidelines could not be amended.[249] He agrees that they could have been amended under certain conditions, but notes that the necessary process was not followed in the present case.[250] He notes in particular that, in the six cases he identified in which EIS guidelines have been amended, "the amending document was expressly called an amendment to the EIS guidelines", and was in all but one case sent before the proponent's submission of its EIS,[251] and not after as for GNLQ. Accordingly, Mr Northey concludes that the EIS Guidelines were never amended.[252]

190 The binding nature of the EIS Guidelines and the MELCC Directive affected how the federal and provincial authorities were entitled to conduct their EAs, as discussed below.

2.4.2 The provincial (Québec) EA process and Decree

191 The provincial (Québec) EA process under the EQA can be summarised as follows.

192 ***Avis de projet***: The Parties agree that the EA process begins with the notification by the proponent of an *Avis de projet*.[253] This notice, which effectively comprises the proponent's application for an environmental authorisation, contains a detailed description of the project's characteristics to enable the MELCC to prepare a directive. As Me Duchaine notes in her

[246] Northey II, at **Exhibit CER-2 (Second)**, p. 37 (para. 86).
[247] Northey II, at **Exhibit CER-2 (Second)**, p. 37 (para. 86).
[248] Northey II, at **Exhibit CER-2 (Second)**, p. 37 (para. 86).
[249] Northey II, at **Exhibit CER-2 (Second)**, p. 38 (paras. 88-89).
[250] Northey II, at **Exhibit CER-2 (Second)**, p. 38 (para. 89).
[251] Northey II, at **Exhibit CER-2 (Second)**, p. 38 (para. 89).
[252] Northey II, at **Exhibit CER-2 (Second)**, p. 38 (para. 89).
[253] Counter-Memorial, p. 29 (para. 77); GNLQ, *Avis de projet*, at **Exhibit C-0197-FRA**.

second report,[254] GNLQ's *avis de projet*, contained references to (i) the impact of the GNLQ Project on GHG emissions, (ii) GNLQ's aspiration that the GNLQ Project would help foster the energy transition, and (iii) the potential impact of the GNLQ Project on beluga whales.[255]

193 **Directive**: Following the *avis de projet*, the Minister of Environment prepares and communicates to the proponent a directive indicating "the nature, scope and extent of the environmental impact statement".[256] As explained above, this directive, here the MELCC Directive, is a binding document, which determines not only the boundaries of the EA, but also those of the Québec Government's ultimate decision.[257] Hence, the Minister of Environment could – and should – have included in the MELCC Directive all of the issues on which the Québec Government eventually – in the event, wrongly – based its Decree (provided that these were part of its jurisdiction). The Minister was aware of these issues because they were all mentioned in GNLQ's *Avis de projet*.[258] However, the Minister **chose not** to include them in the directive, thereby limiting the scope of the EA, and of the Québec Government's decision, to those issues that were mentioned in the MELCC Directive.[259]

194 **EIS**: Following the issuance of the ministerial directive, the proponent prepares and submits its EIS. As explained in the Memorial, the EIS is a lengthy and detailed submission which requires significant time, cost and expertise to prepare.[260] GNLQ had a team of experts working on this submission over three years.[261] The MELCC will first review the EIS to ensure that it is admissible, *i.e.* that the proponent has provided the information requested under the directive.[262] In doing so, the MELCC is

[254] Duchaine II, at **Exhibit CER-1 (Second)**, p. 25 (para. 92).

[255] GNLQ, *Avis de projet*, at **Exhibit C-0197-FRA**, p. 23-25 (GHG emissions), p. 9 (energy transition), p. 46 (beluga whales).

[256] Counter-Memorial, p. 29 *et seq.* (para. 78).

[257] MELCC Directive, at **Exhibit C-0198-FRA**.

[258] Duchaine II, at **Exhibit CER-1 (Second)**, p. 25 (para. 92).

[259] Duchaine II, at **Exhibit CER-1 (Second)**, p. 25 (paras. 92-93).

[260] Memorial, p. 57 *et seq.* (paras. 152-154).

[261] EIS, at **Exhibit C-0043-FRA**.

[262] Counter-Memorial, p. 29 (para. 79).

entitled to request the opinion of other ministries and agencies, ask questions to, and request additional information from, the proponent.[263] As Mr Le Verger explains in his second witness statement, GNLQ had decided to provide as much information as possible in its EIS, including information not requested in the MELCC Directive (or the EIS Guidelines for that matter), for several reasons: (i) for the sake of transparency, (ii) to pre-empt possible questions from the MELCC and the Agency and accelerate the assessment, and (iii) to provide the MELCC and the Agency information they needed for internal/policy-making purposes.[264]

195 **Declaration of admissibility of the EIS**: If the MELCC considers the EIS to contain the information requested, it declares the EIS admissible. As Me Duchaine notes, the declaration of admissibility of the GNLQ Project EIS was conditional upon the Minister of Environment's confirmation that the EIS properly addressed the issues raised in the MELCC Directive. Had the Minister not been satisfied, he could and should have pointed it out then, by judging the EIS inadmissible, which he did not.[265]

196 **Parallel BAPE hearings and EA**: Following the declaration of admissibility and depending on the size of the project, the MELCC may request that the BAPE hold public hearings. Given the size of the GNLQ Project and its importance for Québec, GNLQ knew BAPE hearings would be necessary and asked that the MELCC make that request, to save time.[266] In the context of the BAPE hearings, the MELCC and the BAPE can ask questions and request information beyond the scope of the ministerial directive.[267] The same goes for the Minister of Environment.[268] However, neither the Minister of Environment nor the Québec Government can base their recommendation and decision, respectively, on information that is

[263] Counter-Memorial, p. 29 (para. 79).

[264] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 27 *et seq*. (para. 79).

[265] Duchaine II, at **Exhibit CER-1 (Second)**, p. 104 (paras. 287) and p. 107 (para. 298).

[266] Counter-Memorial, p. 29 *et seq.* (paras. 79-84).

[267] Duchaine II, at **Exhibit CER-1 (Second)**, p. 142 (para. 379) ("*Il existe* […] *une distinction importante à faire entre, d'une part, le pouvoir d'un organe de colliger toute information pertinente dans le cadre d'une évaluation environnementale et, d'autre part, celui de rendre une décision en tenant compte uniquement des impacts relevant de sa compétence*").

[268] Duchaine II, at **Exhibit CER-1 (Second)**, p. 142 (para. 379).

outside the scope of the directive, which continues to set the permissible basis for the Québec Government's decision.[269]

197 **BAPE's report**: The BAPE's report is issued after the BAPE public hearings. The BAPE's report is meant to inform the Minister of Environment's recommendation to the Government and thus the Québec Government's decision. Therefore, only those recommendations and conclusions that fall within the scope of the ministerial directive can be taken into account by the MELCC, and in turn the Minister and the Québec Government. Documents produced by the Respondent in document production show that, in the case of the GNLQ Project EA, the BAPE made a number of recommendations on points, including global GHG emissions and the energy transition, that were outside the scope of the EA as defined by the MELCC Directive. This was specifically identified by the MELCC at the time.[270]

198 **MELCC's report**: The MELCC's report concludes the EA and is submitted to the Minister of Environment for his/her review. In the same vein as the BAPE's report, however, the MELCC's report must remain within the scope of the directive. As explained in Section 2.5.4.3 below, in the case of the GNLQ Project, four of the five issues raised in the MELCC Report on which the Québec Government relied to reject the GNLQ Project were outside the scope of the MELCC Directive, and it admitted that it had not even relied on the fifth ground, social acceptability, for its decision.

199 **Recommendation of the Minister of Environment to the Government**: On the basis of the BAPE's report and the MELCC's report, the Minister of Environment makes a recommendation to the Québec Government. The Parties agree that the Minister is not bound by either the MELCC's report or the BAPE's report.[271] However, it is his/her responsibility to ignore

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[269] Duchaine II, at **Exhibit CER-1 (Second)**, p. 142 (para. 379).

[270] [redacted] at **Exhibit TLV-0111-FRA**, p. 7 *et seq.* (Nos. 13, 14, 16, 17, 18, 22, 24). [redacted] at **Exhibit C-0494-FRA**. See also [redacted] at **Exhibit TLV-0111-FRA**, p. 3 *et seq.* (Nos. 7, 8, 36, 48, 49).

[271] Counter-Memorial, p. 31 *et seq.* (para. 85).

elements in these reports that are outside the scope of the directive and ensure that his/her recommendation does not exceed that scope.[272] As explained in Section 2.5.3.4 below, in document production, the Respondent has refused to produce the Minister of Environment's recommendation.[273] However, the fact that the Québec Government made a decision based on criteria outside the scope of the MELCC Directive itself strongly suggests that the Minister's recommendation was not in line with the MELCC Directive.

200 **Decision of the Government**: The Parties agree that there is a degree of discretion in the decision of the Government to authorise or reject an application for an environmental authorisation.[274] However, again this discretion can only be exercised within, and is limited by, the ministerial directive, and thus here could only be exercised subject to the MELCC Directive issued for the GNLQ Project.[275] As demonstrated in Section 2.5.4.1 below, the Québec Government exceeded its discretion in denying GNLQ's application on grounds outside this margin of discretion.

2.4.3 The federal EA process and decision

201 The federal EA process under the CEAA 2012, which was the legislative regime applicable to the GNLQ Project, can be summarised as follows.

202 **Project Description**: the Parties agree that at the federal level, the EA process commences with the proponent submitting an application for an environmental authorisation comprising a "Project Description", which is similar to the *Avis de projet*. GNLQ submitted the same document to both the MELCC and the Agency.[276]

203 **Determination**: The Project Description is followed by the Agency's decision of whether an EA is required and, if so, the Agency's preparation

[272] Duchaine II, at **Exhibit CER-1 (Second)**, p. 149 (paras. 390-393).

[273] See PO4, Annex A, p. 40 (Request 8).

[274] Counter-Memorial, p. 31 *et seq.* (para. 85).

[275] Duchaine II, at **Exhibit CER-1 (Second)**, p. 98 *et seq.* (paras. 272-288).

[276] Counter-Memorial, p. 99 *et seq.* (paras. 272-288).

of guidelines.[277] To that end, the Agency invites the public to provide comments on the potential impact of the project on the environment.[278]

204 **EIS Guidelines**: The preparation of the EIS guidelines is a complex process, which requires public consultations.[279] The Agency has the power to exclude from the EA certain aspects of the project within its jurisdiction. This is what the Agency did in the case of the GNLQ Project: in the EIS Guidelines, it expressly stated that it was excluding maritime shipping and the production of upstream GHG emissions from the scope of the EA, meaning that GNLQ did not need to consider those aspects in its EIS and the authorities could not consider them when assessing the GNLQ Project and deciding whether to authorise it.[280]

205 **EIS**: The proponent of the project must then submit an EIS. GNLQ submitted its EIS in January 2019.[281] Like the MELCC, the Agency must determine, following an initial review, whether the EIS is in line with the EIS guidelines, which it did in the case of the GNLQ Project in May 2019.[282]

206 **Public consultations**: When the EIS is deemed complete, the Agency again organises public consultations regarding the potential environmental

[277] Counter-Memorial, p. 33 *et seq*. (para. 91).

[278] Agency, Public Notice for the GNLQ Project dated 3 December 2015, at **Exhibit GB-0021-FRA**.

[279] Counter-Memorial, p. 33 *et seq*. (para. 91).

[280] Northey II, at **Exhibit CER-2 (Second)**, p. 39 *et seq*. (paras. 92-94). See also EIS Guidelines, at **Exhibit C-0199-ENG**, p. 4 ("Marine shipping associated with the Project that is beyond the care and control of GNL Québec and production of upstream GHGs are not considered to be part of the Project for the purposes of the environmental assessment. As a result, the Minister will not make a decision under CEAA 2012 about whether that [sic] marine shipping associated with the Project or the production of upstream GHGs that are likely to cause significant adverse environmental effects, and it will not be subject to conditions issued to the proponent in any decision statement allowing the Project to proceed. However, those activities are within the jurisdiction of the federal government. The environmental assessment will act as a means for the federal government to collect information on the effects of those activities associated with the Project for use by programs or activities within federal jurisdiction.").

[281] EIS, at **Exhibit C-0043-FRA**.

[282] Counter-Memorial, p. 34 (para. 94).

effects of the project.[283] In the case of GNLQ, these consultations were completed by the Agency in June 2019.

207 **EA**: The EA is conducted by the Agency, which consults other federal agencies or ministers. In the present case, this assessment lasted for over two years. As Mr Northey explains, although the EIS guidelines prepared by the Agency guide the assessment, there is a distinction between information gathering and decision making as part of the EA process.[284] The Agency can gather information on points not included in the guidelines, as "additional matters" under section19(1)(j) of the CEAA 2012.[285] However, the Agency cannot **use** the information gathered for the purpose of advising the Minister of Environment in relation to its decision, as this would contradict the EIS Guidelines.[286] Thus, even though the Agency excluded maritime shipping and upstream GHG emissions from the scope of the EA for the purpose of decision-making, Section 3.2.1 of the Guidelines clarifies that the Agency can ask GNLQ to provide information on those subjects.[287]

208 **Agency's report**: As a final step in its process, and similar to the MELCC's report, the Agency's report summarises the EA process and makes recommendations to the federal Minister of Environment in light of the environmental effects of the project and the mitigation measures identified by the Agency and the proponent. The Agency must ensure that its report remains within the scope of the EIS guidelines. It cannot make recommendations based on potential environmental effects not identified in, or excluded from, the EIS guidelines.[288] In this respect, the Respondent's characterisation in its Counter-Memorial of the Agency's report as solely determining whether the project will cause significant environmental effects is misleading.[289] Under the CEAA 2012, the Agency must also determine whether there are measures that are technically and

[283] Counter-Memorial, p. 34 *et seq.* (para. 95).

[284] Northey II, at **Exhibit CER-2 (Second)**, p. 38 *et seq*. (paras. 91-95, 100, 124).

[285] Northey II, at **Exhibit CER-2 (Second)**, p. 40 (para. 95).

[286] Northey II, at **Exhibit CER-2 (Second)**, p. 40 *et seq*. (paras. 95, 100).

[287] Northey II, at **Exhibit CER-2 (Second)**, p. 40 *et seq*. (paras. 95, 100).

[288] Northey II, at **Exhibit CER-2 (Second)**, p. 41 (paras. 100-101).

[289] Counter-Memorial, p. 35 para. 96.

economically feasible, which could mitigate such significant adverse effects.[290] In the case of the GNLQ Project, the Agency issued a draft of its report dated August 2021 and, following a period of public consultation, a final version dated 30 November 2021.[291]

209 **Referral by the federal Minister of Environment to the federal Cabinet for decision**: The Respondent's contention that the Minister of Environment **must** refer the decision whether to authorise a project to the federal Cabinet if he/she considers that it may cause significant environmental effects that cannot be mitigated, is incomplete and thus misleading.[292] The Minister of Environment must indeed first ensure (i) that these significant effects are within the scope set by the EIS guidelines, and (ii) that these significant effects cannot be mitigated. Only in that case, must he/she refer the decision to the federal Cabinet. However, where he/she considers that there are no significant effects or that those effects may be mitigated, the Minister of Environment has no other choice but to **approve** the project.[293]

210 **Decision by the federal Cabinet**: Like the Québec Government, the federal Cabinet enjoys a degree of discretion in its decision.[294] However, the Respondent's contention that this margin of discretion is wide and immune from judicial review is incorrect.[295] Mr Northey disagrees with Ms Powell in this regard and confirms that the federal Cabinet's discretion can only be exercised **within the boundaries** of the EIS Guidelines.[296] He also shows that decisions from the federal Cabinet are often subject to judicial review, notably in circumstances where the Agency's report is deficient.[297] In the present case, the federal Cabinet made its decision on 3

[290] CEAA 2012, at **Exhibit RN-0012-ENG**, p. 7 (of the PDF) (Article 19(1)(d)).

[291] Agency, Environmental Assessment Report (November 2021), at **Exhibit C-0037-ENG**.

[292] Counter-Memorial, p. 35 (para. 96).

[293] Northey II, at **Exhibit CER-2 (Second)**, p. 9 *et seq.* (para. 18).

[294] Counter-Memorial, p. 35 (para. 97).

[295] Counter-Memorial, p. 35 (para. 97).

[296] Northey II, at **Exhibit CER-2 (Second)**, p. 53 *et seq*. (paras. 137-148).

[297] Northey II, at **Exhibit CER-2 (Second)**, p. 14 *et seq*. (paras. 29-32).

February 2022,[298] and the Minister of Environment issued the Decision Statement.[299] As demonstrated in Section 2.6.2 below, the federal Cabinet exceeded its discretion in denying GNLQ's application for an environmental authorisation.

211 As explained below, many of the irregularities with the provincial and federal EAs derived from the Québec and Canadian authorities' disregard for the above processes, and specifically the scope imposed on their respective EA by the MELCC Directive and the EIS Guidelines, which were key safeguards against arbitrariness in the EA process. This, in turn, caused the Québec and the Federal Governments to make decisions based on unlawful grounds.

2.5 The multiple irregularities in the provincial EA process of the GNLQ Project culminated in an illegal decision by the Québec Government

212 As explained in Section 2.3 above, the main irregularity affecting Québec's EA of the GNLQ Project is that it should not have existed as a self-standing process in the first place. There should have been only one EA, either conducted by the Agency alone or as a joint assessment by the federal and provincial authorities in accordance with the Canada-Québec Agreement.

213 In addition, the Québec EA process was marred with irregularities, notably caused by the Québec authorities' failure to assess the GNLQ Project in accordance with the criteria set out in the MELCC Directive, which, as explained in Section 2.4.1 above, were binding on the MELCC, the Minister of Environment and the Québec Government.

214 In particular, the MELCC required GNLQ to conduct a type of cost-benefit analysis (*Analyse avantage-coûts* or AAC), which, according to

[298] Government of Canada, "Énergie Saguenay, Orders in Council" dated 3 February 2022, at **Exhibit RN-0030-ENG**; Agency, Press Release "Government of Canada Releases the Final Decision on the Energie Saguenay Project", 7 February 2022, at **Exhibit C-0295-ENG**.

[299] Minister of the Environment, "Decision Statement Issued under Section 54 of the CEAA, 2012 for the Énergie Saguenay Project" dated 7 February 2022, at **Exhibit RN-0004-ENG**.

Me Duchaine, had never been used in an EA of this nature before and was outside the scope of the MELCC Directive (**Section 2.5.1**).

215 As demonstrated in the Memorial, the BAPE conducted biased hearings further to the Québec Government's presentation of opponents to the GNLQ Project as representatives of the MFFP.[300] Documents produced by Canada in document production belie the Respondent's assertion that there was nothing untoward with this approach, but also evidence that the BAPE Report was largely outside the scope of the MELCC Directive (**Section 2.5.2**).[301]

216 After the BAPE hearings and the publication of a biased BAPE Report, the assessment was again disrupted, this time by the political interference of the Québec Minister of Environment, Minister Charette, who purported to impose on GNLQ three new "core criteria", which he announced during a press conference; these had already been rejected by the MELCC as already implemented or falling outside of the scope of the MELCC Directive (**Section 2.5.3**).

217 The Québec Government then doubled down on those irregularities by rejecting the GNLQ Project in a decision based on the new, and otherwise flawed, core criteria issued by Minister Charette, the cost-benefit analysis improperly imposed by the MELCC and the alleged impact of the GNLQ Project on beluga whales, an issue falling manifestly outside its jurisdiction (**Section 2.5.4**).

2.5.1 The MELCC's unlawful and unprecedented request for a cost-benefit analysis in May 2019

218 In his witness statement filed in support of the Counter-Memorial, Mr Michel Duquette, the analyst who was in charge of the MELCC's EA, addresses the basis for the MELCC's decision to reject the GNLQ Project. In particular, he provides more details on the MELCC's conclusion based on a cost-benefit analysis initially requested from GNLQ on

[300] Memorial, p. 78 *et seq.* (paras. 221-243).

[301] Counter-Memorial, p. 48 (paras. 127).

22 May 2019,[302] namely that it could not formulate a recommendation concerning the GNLQ Project from a cost-benefit perspective.[303] He explains that the analysis took the form of a table summarising the costs and advantages of the GNLQ Project for the populations of the Saguenay region, Québec and Canada.[304]

219 However, as Me Duchaine explains in her second report, both the MELCC's request for, and its reliance on, this (flawed) cost-benefit analysis were unlawful.

220 **First**, as confirmed by Me Duchaine, who reviewed the methodology used by the MELCC, the type of cost-benefit analysis requested here, is usually carried out at the beginning of public works projects; it is inadequate for the assessment of private projects, and was thus improper in this case.[305] GNLQ's consultant, WSP, had pointed this out to the MELCC from the beginning (in August 2019), refusing to conduct this analysis, but the MELCC had maintained the request for the analysis.[306]

221 Me Duchaine notes in this regard that, although the MELCC Directive included the consideration of the costs and the benefits of the GNLQ Project, it did not refer to the type of cost-benefit analysis ultimately

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[302] MELCC, Questions and Comments (1st series) (22 May 2019), at **Exhibit C-0204-FRA**, p. 25 *et seq*. (QC-85).

[303] Witness Statement of Michel Duquette dated 12 July 2024, at **Exhibit RWS-5**, p. 33 (para. 70).

[304] Duquette, at **Exhibit RWS-5**, p. 32 (paras. 68, Figure 2).

[305] Duchaine II, at **Exhibit CER-1 (Second)**, p. 128 *et seq.* (paras. 339-341).

[306] MELCC, Compilation of opinions from the consultation of ministries and organisations concerning the GNLQ Project (October 2019), at **Exhibit CD-0106-FRA**, p. 72 of the PDF ("*Dans ses réponses à nos commentaires, l'initiateur mentionne que :* '*En ce qui a trait à l'analyse avantages-coûts, les paramètres du guide du MTQ ainsi que la méthodologie associée sont prescrits pour de grands projets de dépenses publiques. Conséquemment, ils ne s'appliquent pas pour un projet d'investissement privé qui constitue un transfert de richesse entre agents économiques et non une sortie de fonds (dépense) provenant du gouvernement. Conséquemment, le ratio coûts-bénéfices n'a donc pas été calculé*.'").

imposed on GNLQ,[307] as the MELCC admitted in the document compiling the experts' opinions on the admissibility of GNLQ's EIS.[308]

222 In Me Duchaine's opinion, it was improper for the MELCC to impose on GNLQ a cost-benefit analysis of this nature, at such a late stage in the assessment, with so many variables to be addressed, some of which contradictory.[309]

223 Based on her review of similar projects from 2001 to 2017, she points out that a cost-benefit analysis had never been imposed on a proponent, regardless of whether the project was public or private, before GNLQ.[310] The MELCC started requesting such analyses in 2018, for the Gazoduq Project, but only as an option and not as a requirement.[311] She also notes that, since then, it has only been put forward once by a proponent (the Québec tramway project); however, (i) this was a public project with a significant public interest component and (ii) the request was put forward timely, at the very beginning of the assessment.[312]

224 **Second**, as Mr Le Verger explains, the MELCC did not indicate that the cost-benefit analysis requested from GNLQ would form part of the MELCC Report, let alone the Decree.[313] In fact, GNLQ and its consultant, WSP, were surprised by the MELCC's request because indeed this was a

[307] Duchaine II, at **Exhibit CER-1 (Second)**, p. 129 (para. 343).

[308] MELCC, Compilation of opinions from the consultation of ministries and organisations concerning the GNLQ Project (October 2019), at **Exhibit CD-0106-FRA**, p. 72 ("*Comme cette exigence n'a pas été expressément demandée dans la directive, l'initiateur pourra exceptionnellement déposer son analyse avantages-coûts (AAC) au plus tard à l'étape de l'analyse environnementale du projet*."). See also Duchaine II, at **Exhibit CER-1 (Second)**, p. 130 (para. 344).

[309] Duchaine II, at **Exhibit CER-1 (Second)**, p. 130 (paras. 345).

[310] Duchaine II, at **Exhibit CER-1 (Second)**, p. 140 *et seq.* (paras. 369-371 and 375-376).

[311] Duchaine II, at **Exhibit CER-1 (Second)**, p. 141 (paras. 372-374).

[312] Duchaine II, at **Exhibit CER-1 (Second)**, p. 141 (para. 375).

[313] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 50 (para. 156).

private project.[314] WSP had emphasised the same in its response to the MELCC.[315]

225 **Third**, when submitting GNLQ's cost-benefit analysis in August 2019, with the above reservation, WSP had indicated that one positive aspect of the GNLQ Project, relating to the increased competitiveness of Québec companies, could not be quantified because it would require a specific study.[316] The MELCC did not request that additional information, or any further studies on this topic.

226 **Fourth**, GNLQ's analysis showed that the Project would entail overwhelming economic benefits for Québec of more than CAD 75 billion. The MELCC itself was forced to admit that "*il est probable que le projet dégage plus d'avantages économiques que de coûts pour la société québécoise.*"[317] Despite this, the MELCC concluded that it could not make a clear recommendation, including (as one of the reasons) because the cost-benefit analysis did not include unspecified "*impacts difficilements quantifiables et non-négligeables*" such as the unquantified – and unsupported by data or scientific research – impact of the Project on biodiversity, as well as unquantified and unspecified "*impacts hors-Québec*".[318]

227 To conclude, the MELCC:

- required that GNLQ carry out an ill-defined and unprecedented cost-benefit analysis, very late in the assessment process, in May 2019;
- ended up with an incomplete and flawed analysis, which nonetheless indicated that the GNLQ Project had an overwhelmingly positive impact on Québec; but

[314] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 50 (para. 157).

[315] WSP, Answers to the MELCC's Request for additional information (cost-benefit analysis), at **Exhibit CD-0127-FRA**, p. 1 *et seq*.; Le Verger II, at **Exhibit CWS-3 (Second)**, p. 50 (para. 157).

[316] WSP, Answers to the MELCC's Request for additional information (cost-benefit analysis), at **Exhibit CD-0127-FRA**, p. 4; Le Verger II, at **Exhibit CWS-3 (Second)**, p. 50 (para. 157).

[317] MELCC Report, at **Exhibit C-0269-FRA**, p. 70 (s. 3.5.9.9).

[318] MELCC Report, at **Exhibit C-0269-FRA**, p. 11.

- decided to ignore this positive impact and declined to make a positive recommendation in this regard.

228 The MELCC's flawed approach to the evaluation of the costs and benefits of the GNLQ Project, in turn, led the Québec Government to wrongly include, as part of the grounds on which it decided to reject the GNLQ Project, the fact that "*une grand part d'incertitude subsiste concernant* […] *le bilan des avantages et coûts du projet*".[319]

2.5.2 The irregular and one-sided nature of the BAPE hearings and BAPE Report between September 2020 and March 2021

229 As explained in the Memorial, the BAPE hearings concerning the GNLQ Project that took place in September 2020, became a forum for the biased and unproven opinions of Mr Clément Chion, a UQO researcher, and Mr Robert Michaud, President of the *Groupe de recherche et d'éducation sur les mammifères marins* ("**GREMM**"), who were then advocating a complete moratorium on navigation on the Saguenay River. [320] Furthermore, the BAPE Report consisted of a series of unsubstantiated and speculative allegations, and failed to include an overall conclusion either in favour of or against the GNLQ Project.[321]

230 As explained below, contrary to the Respondent's arguments in the Counter-Memorial, [322] the BAPE hearings and BAPE Report were procedurally and substantively irregular.

231 **First**, the Respondent attempts to hide these irregularities, by arguing that Mr Chion and Mr Michaud's participation in the BAPE hearing as "*personnes-ressources*" (*i.e.*, a person competent on the topic addressed at

[319] Decree 1071-2021 concerning the refusal to issue an authorisation for the GNLQ project to build a natural gas liquefaction complex on the territory of the city of Saguenay dated 21 July 2021, at **Exhibit C-0274-FRA**.

[320] Memorial, p. 78 *et seq.* (paras. 225-234).

[321] Memorial, p. 81 *et seq.* (paras. 235-243).

[322] Counter-Memorial, p. 48 *et seq.* (paras. 127-131).

the relevant hearing) of the MFFP was normal practice.[323] This contention is misleading.

232 The circumstances of Mr Michaud's and Mr Chion's participation were ostensibly irregular. The MFFP had pushed for their participation despite the BAPE refusing on two occasions that they should appear.[324] It had managed to ensure that Mr Chion would be invited as an expert of the MFFP,[325] which he was not,[326] and to have Mr Michaud present in the room. [327] The BAPE then erroneously presented and referred to Mr Michaud as a representative of the MFFP, not an external "*personne-ressource*".[328]

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[323] Counter-Memorial, p. 48 (para. 127). See also Witness Statement of René Beaudet dated 12 July 2024, at **Exhibit RWS-2**, p. 16 *et seq.* (para. 39).

[324] Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 15 September 2020, at **Exhibit C-0495-FRA**, p. 1 ("*Comme discuté au cours des dernières semaines, nous avons proposé au BAPE de vous inviter aux audiences publiques qui auront lieu à Saguenay à partir du 21 septembre 2020. Malheureusement, nous avons reçu une réponse négative, et, à l'heure actuelle, le BAPE ne prévoit pas votre présence, que ce soit en personne ou en ligne.*"). Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 16 September 2020, at **Exhibit C-0496-FRA**, p. 1 ("*Le BAPE maintient sa décision de ne pas vous convoquer en tant que personnes-ressources lors des audiences publiques.*").

[325] Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 16 September 2020, at **Exhibit C-0496-FRA**, p. 1 ("[I]*l me sera possible d'inviter Clément à titre d'expert pour le MFFP. Clément, tu pourras donc, à la demande du commissaire, répondre aux questions qui nous seront posées concernant le programme de recherche*").

[326] He was self-admittedly participating for the purpose of presenting the results and actions of its research programme. See Email correspondence between I. Gauthier (MFFP) and C. Chion dated 15 September 2020, at **Exhibit C-0497-FRA** ("*Merci de poursuivre les efforts pour que nos résultats et notre démarche puissent être présentés lors des audiences publiques.*").

[327] Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 16 September 2020, at **Exhibit C-0496-FRA**, p. 1 ("*Robert, comme nous n'avons pas de lien contractuel avec le GREMM et que les places seront limitées, je ne pourrai pas t'inviter officiellement à titre de personne-ressource/expert pour le MFFP. Cependant, il te sera toujours possible d'être présent dans la salle, au même titre que tous les autres intervenants et groupes ou citoyens*"). See also Email correspondence between R. Michaud and I. Gauthier (MFFP) from 16 September 2020 to 21 September 2020, at **Exhibit C-0498-FRA**, p. 1; Email correspondence between G. Grenier (BAPE) and I. Gauthier (MFFP) from 21 September 2020 to 22 September 2020, at **Exhibit C-0499-FRA**, p. 1.

[328] See, *e.g.*, Email from V. de la Cheneliére (MFFP) to A. Lévesque (BSMA - Faune) dated 24 September 2020, at **Exhibit C-0500-FRA**, p. 1 ("*Alors que Clément Chion était correctement identifié comme étant associé à l'UQO au cours de ses interventions, la vignette d'identification*

233 These irregularities, compounded by the airtime granted to Mr Chion and Mr Michaud during the hearings, which the BAPE itself acknowledged was excessive,[329] created the impression that the Québec Government shared their biased views regarding the Project. As Mr Le Verger, who was present at the BAPE hearing, explains:

> "*En dépêchant des militants contre le Projet et en les présentant comme des experts de son ministère, le MFFP a donc assumé de prendre position contre le Projet, alors que son rôle était d'apporter une information scientifique et objective à la population.*
>
> *Au-delà de semer le doute concernant le projet dans l'esprit de la population, le MFFP lui a transmis le sentiment que le gouvernement du Québec partageait l'opinion de MM. Chion et Michaud.*"[330]

234 **Second**, there are reasons to doubt the BAPE's impartiality in the case of the GNLQ Project.

235 The BAPE Report indeed included considerations that went beyond the proper scope of the EA. In relation to GHG emissions, for instance, the BAPE Report speculated as to how the LNG exported by GNLQ would be used. [331] The documents produced by the Respondent in document production show that the MELCC itself noted that the resulting

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à l'écran indiquait 'Ministère des Forêts, de la Faune et des Parcs' lorsque Robert Michaud s'est exprimé. il s'agit d'une erreur de l'équipe de logistique du BAPE.); BAPE, Hearing Transcript (volume 8) dated 25 September 2020, at **Exhibit C-0260-FRA**, p. 10 ("*Peut-être laisser la parole maintenant à monsieur Michaud pour le ministère de la Forêt, Faune et Parcs?*") and p. 26 ("*Merci de ces précisions. Peut-être, pour Faune et Parcs, monsieur Michaud aurait-il un complément d'information à fournir?*").

[329] See Email correspondence between I. Gauthier (MFFP) and G. Grenier (BAPE) *et al.* from 21 September 2020 to 24 September 2020, at **Exhibit C-0501-FRA**, p. 3 (Where, after the third day of hearings, the BAPE writes to the MFFP: "*Pourriez juste simplement aviser M. Michaud d'être plus bref dans ses interventions étant donné la durée limitée de cette séance.*"). See also Memorial, p. 78 *et seq.* (paras. 225 and 230).

[330] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 30 (para. 89).

[331] BAPE Report, at **Exhibit C-0250-ENG-FRA**, p. 312-313.

recommendations from the BAPE on this point, and a number of others, were outside the scope of the EA.[332]

236 The BAPE's approach in its analysis of the GNLQ Project stands in stark contrast with the conclusions of another BAPE commission, presided by the same Mr Denis Bergeron who presided over the GNLQ BAPE hearings, in the context of the airport fuel supply terminal project in East Montreal, about two years before the GNLQ BAPE hearings.[333] In that case, the BAPE commission squarely dismissed the issue of GHG emissions as being outside the BAPE's mandate in the following terms:

> "*La commission d'enquête s'est également attardée à la question des gaz à effet de serre (GES) qui a été soulevée par certains participants à l'audience publique.* […] ***La commission considère toutefois que l'analyse de cet enjeu dépasse largement la portée de son mandat.***"[334]

237 There was no reason for the BAPE to take a different approach with the GNLQ Project.

2.5.3 The Québec Government's irregular interference in the EA process with the promulgation of new and unprecedented requirements in March 2021

238 The Claimant explained in the Memorial that, on 24 March 2021, after the completion of the BAPE Report, the Québec Minister of Environment, Mr Benoit Charette, held a press conference during which he unexpectedly

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[332] [redacted] at **Exhibit TLV-0111-FRA**, p. 7 *et seq.* (Nos. 13, 14, 16, 17, 18, 22, 24); [redacted] at **Exhibit C-0494-FRA**. See also [redacted] at **Exhibit TLV-0111-FRA**, p. 3 *et seq.* (Nos. 7, 8, 13, 14, 16, 17, 18, 22, 24, 36, 48, 49).

[333] See BAPE Commission Report 343 for the airport fuel supply terminal project in East Montreal dated May 2018, at **Exhibit CD-0076-FRA**, p. vii.

[334] BAPE Commission Report 343 for the airport fuel supply terminal project in East Montreal dated May 2018, at **Exhibit CD-0076-FRA**, p. xi.

set three "core criteria" that GNLQ was required to meet for the Project to be approved.[335] GNLQ was now required to demonstrate that the Project:

- would make a positive net contribution to reducing global, *i.e.*, worldwide, GHG emissions;
- would promote ("*favoriser*") the energy transition; and
- had achieved "social acceptability".[336]

239 As demonstrated in the Memorial, and in Me Duchaine's first report:

- the first two requirements had never been mentioned by the MELCC, let alone presented as "core criteria", whether in the MELCC Directive or during the several years of the EA process conducted by the MELCC,[337] had never been applied by the MELCC in any other project assessed under Québec law and have never been applied since;[338]
- the third criterion had, and has, never been construed under Québec law as a goal to be achieved, but rather as a process that proponents must go through to ensure the proper consultation of local communities, such that requiring a demonstration of the social acceptability of a project was and remains unprecedented.[339]

240 In its Counter-Memorial, the Respondent attempts to downplay Minister Charette's interference with the EA process and the novelty of the three "core criteria" by arguing (i) that these requirements existed at the outset of the process,[340] (ii) they had been emphasised in the MELCC's questions throughout the process,[341] and (iii) that, during his March 2021

[335] Memorial, p. 83 *et seq*. (para. 244); *Point de presse de M. Benoit Charette, ministre de l'Environnement et de la Lutte contre les changements climatiques*, 24 March 2021, at **Exhibit C-0031-ENG-FRA**.

[336] *Point de presse de M. Benoit Charette, ministre de l'Environnement et de la Lutte contre les changements climatiques*, 24 March 2021, at **Exhibit C-0031-ENG-FRA**; Memorial, p. 83 *et seq*. (para. 244).

[337] Memorial, p. 84 (paras. 245-247); Duchaine I, at **Exhibit CER-1**, p. 24.

[338] Memorial, p. 84 (para. 246); Duchaine I, at **Exhibit CER-1**, p. 90, 92.

[339] Memorial, p. 84 *et seq*. (para. 248); Duchaine I, at **Exhibit CER-1**, p. 122.

[340] Counter-Memorial, p. 180 *et seq.* (paras. 486-489).

[341] Counter-Memorial, p. 51 *et seq.* (para. 136).

press conference, Mr Charette merely reiterated their importance,[342] which was normal practice.[343] The Respondent further argues that, even if these criteria were new, GNLQ was granted sufficient time to address them after March 2021.[344]

241 The Respondent's arguments ignore the abnormality of Mr Charette's political intervention in the EA process (**Section 2.5.3.1**). They are in any event wrong: as imposed, all three core criteria were new (**Section 2.5.3.2**) and had been earlier disregarded by the MELCC (**Section 2.5.3.3**). Furthermore, GNLQ was provided insufficient time and guidance to address them in a meaningful way (**Section 2.5.3.4**).

2.5.3.1 The Québec Government's interference with the EA process was irregular and extraordinary

242 In its Counter-Memorial, the Respondent fails to explain why the Minister of Environment of Québec suddenly held a press conference to proclaim three new criteria that GNLQ was required to meet for the GNLQ Project to be approved when the MELCC's EA was still ongoing and had been ongoing for several years.

243 The Respondent's only explanation is that "*il est tout à fait normal et fréquent dans le cadre de l'analyse environnementale qu'un initiateur se voit* [sic] *poser des questions additionnelles pour évaluer si son projet est acceptable ou non*".[345]

244 That position, however, is contradicted by the very witness on whose testimony the Respondent relies, Mr Duquette, who admits in his witness statement that "*il n'est* ***pas nécessairement usuel*** *que le ministre de l'Environnement énonce des critères lors du dévoilement d'un rapport du BAPE.*"[346] Me Duchaine puts it more bluntly: in her expert opinion, Minister Charette's declaration and the imposition of new criteria so late

[342] Counter-Memorial, p. 50 *et seq.* (paras. 133-135), p. 182 (para. 490).

[343] Counter-Memorial, p. 184 (para. 493).

[344] Counter-Memorial, p. 184 (para. 494).

[345] Counter-Memorial, p. 184 (para. 493).

[346] Duquette, at **Exhibit RWS-5**, p. 24 (para. 52) (emphasis added).

in the assessment process was "*hautement inhabituelle et n'est aucunement conforme à la procédure de l'ÉEIE de la LQE*".[347] Me Duchaine confirmed this opinion in her second report in the light of her review of a number of documents produced by the Respondent in document production.[348]

245 Tellingly, the Respondent's own expert on Québec environmental law, Me Yergeau, does not comment on the propriety of Minister Charette's declaration. He merely indicates that the Minister of Environment can ask the proponent further questions or request information as he/she sees fit.[349]

246 Me Duchaine explains in her second report that Me Yergeau's position in this respect is misconceived.[350] With respect to the criteria pertaining to the energy transition and the reduction of worldwide GHG emissions, she confirms that additional questions could not amend the scope of the MELCC Directive and thus of the EA, including the basis for the decision of the Québec Government.[351] Furthermore, as she points out, if the Minister could amend the MELCC Directive whenever he/she wishes, it would render the MELCC Directive meaningless; the assessment would not be subject to any defined scope or framework, only the Minister's discretion.[352] She adds that Me Yergeau's position is also inconsistent with the fact that the EQA provided for a specific procedure to amend the MELCC Directive.[353]

247 What is more, the documents produced by the Respondent in document production confirm that Minister Charette's press conference, and the core criteria he proclaimed, were the result of a political initiative by the Québec Government to derail what would otherwise have been a positive

[347] Duchaine I, at **Exhibit CER-1**, p. 82.

[348] Duchaine II, at **Exhibit CER-1 (Second)**, p. 109 *et seq*. (para. 308).

[349] Yergeau, at **Exhibit RER-2**, p. 32 *et seq.* (paras. 95-96).

[350] Duchaine II, at **Exhibit CER-1 (Second)**, p. 105 *et seq.* (paras. 289-299).

[351] Duchaine II, at **Exhibit CER-1 (Second)**, p. 105 (para. 292) and p. 108 *et seq.* (paras. 304-309).

[352] Duchaine II, at **Exhibit CER-1 (Second)**, p. 75 *et seq.* (para. 224) and p. 105 (paras. 291-292).

[353] Duchaine II, at **Exhibit CER-1 (Second)**, p. 106 (para. 295).

recommendation by the MELCC, which should have led to an approval of the GNLQ Project.

248 Indeed, approximately 10 days before Minister Charette announced the three "core criteria", his staff were of the view that, based on the procedure to date and subject to further questions following the BAPE Report, the GNLQ Project would be authorised. In an internal MELCC email between Minister Charette's chief of staff, Mr Delaney, and his deputy, Ms Géhin, dated 10 March 2021, Ms Géhin stated:

[redacted][354]

249 On the same day, in another MELCC internal email of 10 March 2021 discussing the BAPE Report, [redacted][355]

[354] Internal MELCC email correspondence between E. Géhin and H. Delaney from 10 March 2021 to 19 March 2021, at **Exhibit C-0502-FRA**. In a subsequent email, [redacted] (Internal MELCC email correspondence between E. Géhin and H. Delaney *et al*. dated 23 March 2021, at **Exhibit C-0503-FRA** [redacted] (emphasis added)).

[355] Internal MELCC email correspondence between S. Berthiaume, B. Charette and E. Géhin dated 10 March 2021, at **Exhibit C-0504-FRA**, p. 1 [redacted].

250 It is not clear when this meeting occurred. However, the list of documents that the Respondent has refused to produce in this regard,[356] in violation of the Tribunal's order, is telling:

- Every day between 10 and 17 March 2021, Minister Charette sent the Québec Cabinet a [redacted][357]
- This draft note prompted numerous exchanges both within the MELCC itself and among Ministries of the Québec Government, including between the MELCC on the one hand and the MEI and the MERN on the other hand.[358]
- [redacted][359]

[356] Canada has refused to produce a substantial number of documents, despite the Tribunal's order to do so, in response to the Claimant's requests for (i) documents produced by the MELCC regarding the GNLQ Project from mid-February 2021 to the end of April 2021 (Request 4); and (ii) communications regarding the GNLQ Project between Minister Charette and the Prime Minister and/or members of the Québec Government from 1 March to 26 April 2021 (Request 5). PO4, Annex A, p. 21 *et seq.* (Requests 4 and 5); List of documents responsive to Request No. 4 that the Respondent has refused to produce, at **Exhibit C-0505-ENG-FRA**; List of documents responsive to Request No. 5 that the Respondent has refused to produce, at **Exhibit C-0506-ENG-FRA**. See also, more broadly List of Documents that the Respondent has refused to produce in response to the Claimant's requests in breach of Procedural Orders Nos. 4, 9, and 10, at **Exhibit C-0507-ENG**.

[357] See List of documents responsive to Request No. 4 that the Respondent has refused to produce, at **Exhibit C-0505-ENG-FRA** (PRIV00393, PRIV00010, PRIV00004, PRIV001164, PRIV001114, PRIV00376, PRIV000788, PRIV000371); see also List of documents responsive to Request No. 5 that the Respondent has refused to produce, at **Exhibit C-0506-ENG-FRA** (emphasis added).

[358] See, *e.g.*, List of documents responsive to Request No. 4 that the Respondent has refused to produce, at **Exhibit C-0505-ENG-FRA** (PRIV001286, PRIV001325, PRIV000376); List of documents responsive to Request No. 5 that the Respondent has refused to produce, at **Exhibit C-0506-ENG-FRA**.

[359] List of documents responsive to Request No. 4 that the Respondent has refused to produce, at **Exhibit C-0505-ENG-FRA**; List of documents responsive to Request No. 5 that the Respondent has refused to produce, at **Exhibit C-0506-ENG-FRA** (PRIV000587).

251 The documents at issue above are part of a substantial number of documents that the Respondent has refused to produce, despite the Tribunal's order to do so, in response to the Claimant's requests for:

- documents produced by the MELCC regarding the GNLQ Project from mid-February 2021 to the end of April 2021;[360] and
- communications regarding the GNLQ Project between Minister Charette and the Prime Minister and/or members of the Québec Government from 1 March to 26 April 2021.[361]

252 On the other hand, the documents that the Respondent did produce reveal that [redacted][362]

253 Furthermore, during a meeting held with the MELCC in November 2021, after the rejection of the GNLQ Project, the MEI asked where Minister Charette's three "core criteria" had come from. The MELCC representative confirmed that they had been added by the Québec Government for political reasons, as a result of its change of position regarding the GNLQ Project, and not therefore by the MELCC as part of the EA process:

> "*Le MEI se demandait d'où venaient les 3 critères énoncés par notre ministre pour GNL. Jean-François* [Gibeault, Deputy Minister of the Ministry of Environment] *a mentionné qu'il pouvait y avoir une* ***distinction entre le ministère et le politique, et que cela***

[360] See PO4, Annex A, p. 21 *et seq.* (Request 4); see also List of documents responsive to Request No. 4 that the Respondent has refused to produce, at **Exhibit C-0505-ENG-FRA**.

[361] See PO4, Annex A, p. 25 *et seq.* (Request 5); List of documents responsive to Request No. 5 that the Respondent has refused to produce, at **Exhibit C-0506-ENG-FRA**.

[362] Email correspondence between J. Martin (Agency) and M. Duquette (MELCC) from 27 April to 25 May 2021, at **Exhibit C-0492-FRA** [redacted] (emphasis added). See also Email correspondence from G. Richard (MELCC) to C. Benoit dated 23 March 2021, at **Exhibit C-0508-FRA**, [redacted] at **Exhibit C-0509-FRA**).

> ***a été un peu le cas pour GNL**. Nous avons notamment parlé du **changement de position par rapport au projet**, même si l'initiateur a bien fait ses devoirs*."[363]

254 In this context, were the documents listed above supportive of the Respondent's narrative, it would have produced them voluntarily, and certainly upon the Tribunal's order, regardless of any considerations of privilege as such considerations were specifically dismissed by the Tribunal.

255 **The Tribunal should therefore draw the following adverse inferences** [364] **from the Respondent's refusal to produce those documents**:

i) The Minister of Environment, Mr Charette, made, or was asked to make, a recommendation to the Québec Cabinet, albeit in the form of draft informative notes, regarding the EA of the GNLQ Project, whereas it was improper for him to do so prior to (i) the analysis of the BAPE Report (which the MELCC received only on 10 March 2021),[365] and (ii) a review of the MELCC Report (which was only issued on 30 June 2021).

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[363] Internal MELCC email correspondence between M. Gagnon, N. Gleeton and J. Bissonnette from 28 November 2021 to 1 December 2021, at **Exhibit C-0510-FRA** (emphasis added).

[364] The Tribunal's power to draw adverse inferences is clearly set out in paragraph 15.12 of Procedural Order No. 1 dated 23 August 2023 ("Should a party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate in relation to the documents not produced, taking into account all relevant circumstances, after seeking and taking into consideration explanations provided by the parties."). It is also in line with the approach adopted by investment arbitration tribunals, including in NAFTA cases: See *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, at **Exhibit CL-027-ENG**, p. 73 *et seq.* (para. 178) (in which the majority of the tribunal observed that the respondent had failed to produce evidence directly relevant to the issue of discrimination and had failed to explain why the evidence was never introduced. The majority asked: "Why would any rational party have taken this approach […] if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant." It concluded that "it is entirely reasonable for the majority of this Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue."). See also *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013, at **Exhibit CL-281-ENG**, p. 32 (para. 124), p. 40 (paras. 144-145).

[365] Beaudet, at **Exhibit RWS-2**, p. 18 (para. 42).

ii) The informative notes sent by Minister Charette between 10 and 17 March 2021 to the Québec Cabinet contain statements that demonstrate the unlawful motivations of the Minister for recommending that the GNLQ Project be rejected, namely matters outside Québec's jurisdiction or the MELCC Directive.

iii) Between 10 and 17 March 2021, the Québec Government, including Premier Legault through Mr Koskinen, was already discussing the GNLQ Project and whether to approve it, based on Minister Charette's draft informative notes, even though the EA was still ongoing (and would continue for another three months) and the MELCC had not issued its report.

iv) These discussions led to the conclusions that Minister Charette should raise the new "core criteria" that he raised during his press conference of 24 March 2021 regarding the publication of the BAPE Report.

v) By 24 March 2021, Minister Charette and the Québec Government had bypassed the EA process and pre-empted its outcome and were agreed on how to pave the way to refusing the environmental authorisation for the GNLQ Project, as the Government eventually did.

256 To conclude, the contemporaneous evidence, direct or inferred, shows that the addition of the three "core criteria" to the ongoing EA of the Project was the result of irregular political interference on the part of the Québec Government, designed to alter the course of the EA and set the ground for a rejection of the GNLQ Project.

2.5.3.2 The "core criteria", as imposed by the Minister of Environment on 24 March 2021, were new

257 The Respondent's contention in the Counter-Memorial that all three of the "core criteria" featured in the MELCC Directive, or were emphasised by the MELCC during the EA process, is unsubstantiated and wrong.[366]

258 That there were passing references to certain issues somewhat related to those "core criteria", as pointed out by the Respondent,[367] cannot and does

[366] Counter-Memorial, p. 180 *et seq.* (para. 486).

[367] Counter-Memorial, p. 180 *et seq.* (para. 486).

not mean that GNLQ was on notice that these issues would become mandatory requirements in the last few months of the EA process. In this respect, it is important to recall the exact words used by Mr Charette during his press conference to describe the three "core criteria":

> "*En fait,* ***on a posé trois conditions très claires*** *qui sont maintenues encore à ce jour,* ***acceptabilité sociale****,* ***favoriser la transition énergétique*** *et, ultimement,* ***contribuer aux diminutions mondiales des gaz à effet de serre***."[368]

259 The following thorough analysis of the MELCC Directive and GNLQ's exchanges with the MELCC shows that these "core criteria" were not clearly stated, at the outset or later in the process, but were uttered for the first time as such by Minister Charette on 24 March 2021.

(i) "acceptabilité sociale"

260 It is common ground between the Parties that the term "*acceptabilité sociale*" was mentioned in the MELCC Directive.[369] However, the MELCC Directive does not present social acceptability as an **outcome** to be achieved for the Project to be approved. On the contrary, GNLQ was **encouraged** to ensure that local communities would be adequately consulted and provided with a forum to express their point of view.

261 Indeed, under the heading "***[i]ncitation*** *à consulter le public et les communautés autochtones*", the MELCC Directive stated:

> "*Le Ministère* ***encourage*** *l'initiateur de projet à mettre à profit la capacité des citoyens et des communautés à* ***faire valoir leurs points de vue*** […]. *À cet effet, le Ministère* ***recommande*** *à l'initiateur de projet de mettre en place un processus de consultation publique. Dans la mesure où des communautés autochtones pourraient être affectées par un projet, le Ministère* ***recommande*** *la mise en place d'un processus distinct permettant à*

[368] *Point de presse de M. Benoit Charette, ministre de l'Environnement et de la Lutte contre les changements climatiques*, 24 March 2021, at **Exhibit C-0031-ENG-FRA**, p. 2 (emphasis added).

[369] Counter-Memorial, p. 181 (para. 487).

> *ces dernières de faire valoir les préoccupations particulières qu'elles pourraient avoir en lien avec le projet.*"[370]

262 The approach envisaged in the MELCC Directive is confirmed by Me Duchaine's analysis of the MELCC Directive in her first report.[371]

263 The Respondent is thus wrong to suggest that **achieving** social acceptability was an objective set by the MELCC Directive.

264 Furthermore, until the new "core criteria" were raised, social acceptability did not arise as an issue from the MELCC's questions to GNLQ during the EA process. As Me Duchaine noted in her first report, the MELCC did not ask GNLQ a single written question about social acceptability during the six-year period of the assessment.[372] It only did so once, on 26 April 2021, after and because of Minister Charette's press conference.[373]

(ii) "favoriser la transition énergétique"

265 According to the Respondent, the reference in the MELCC Directive to the goal of complying with the "*objectifs du développement durable*" was sufficient to indicate that the Project would have to "promote energy transition" ("*favoriser la transition energétique*").[374] However, that tenuous reading of the MELCC Directive cannot be sustained.

266 First, the concept of sustainable development is extremely broad; it spans across the environment, politics and the economy.[375] Although sustainable

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[370] MELCC Directive, at **Exhibit C-0198-FRA**, p. 3 (emphasis added).

[371] Duchaine I, at **Exhibit CER-1**, p. 121.

[372] Duchaine I, at **Exhibit CER-1**, p. 122.

[373] MELCC, Addendum to the request for undertakings and additional information of 3 March 2021 (26 April 2021), at **Exhibit C-0268-FRA**, p. 2.

[374] Counter-Memorial, p. 181 (para. 488).

[375] For instance Québec's *Loi sur le développement durable* defines "*développement durable*" as "*un développement qui répond aux besoins du présent sans compromettre la capacité des générations futures à répondre aux leurs. Le développement durable s'appuie sur une vision à long terme qui prend en compte le caractère indissociable des dimensions environnementale, sociale et économique des activités de développement*." See Loi sur le Développement Durable, chapitre D-8.1.1, at **Exhibit MY-0041-FRA**, p. 2 (Art. 2).

development may be said to encompass the energy transition as part of its goals or as a means to an end, the two concepts are not synonymous.

267 Conversely, the promotion of the energy transition, in the context of a natural gas transportation and liquefaction project has a very concrete meaning. It means contributing to the transition in energy use, from the consumption of fuels generating high GHG emissions to energy sources resulting in lower or net zero GHG emissions.[376] This goal does not appear in the MELCC Directive, let alone as a condition for the approval of the GNLQ Project.

268 The Respondent's reliance on questions raised in 2019 by the MELCC relating to GHG emissions and climate change at a global level is disingenuous.[377] None of these questions in any way suggested that the Project would be assessed according to its contribution to the global energy transition through the reduction of GHG emissions. The fact that the MELCC only asked two series of questions about this topic in the middle of a process that spanned over several years underscores how marginal the issue was for its analysis.

269 Ironically, the Respondent's main argument on this point is that GNLQ itself, in its EIS, presented the energy transition as a justification for the Project.[378] In other words, the Respondent suggests that Minister Charette set the promotion of the energy transition as a requirement for the acceptability of the Project, not on the basis of the EQA, the MELCC Directive, or the MELCC's questions to GNLQ, but on GNLQ's own aspirations. This too is disingenuous.

270 As Me Duchaine confirms in her second report:

> "[L]*e Québec ne peut prendre prétexte du fait que GNL Québec fait état de certains enjeux dans son Étude d'impact pour s'arroger une compétence qu'il n'a pas ou pour tenir compte d'enjeux que le*

[376] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 5 *et seq.* (paras. 6-7).

[377] Counter-Memorial, p. 44 *et seq.* (para. 119).

[378] Counter-Memorial, p. 181 (para. 488).

> *Ministre n'a pas jugé opportun de lister dans sa Directive dans sa prise de décision*."[379]

(iii) "contribuer aux diminutions mondiales des gaz à effet de serre"

271 The Respondent argues that the requirement for GNLQ to contribute to the global (worldwide) reduction of GHG emissions was subsumed in the MELCC's indication in the Directive that GNLQ should "***porter attention*** [*aux*] *effets du projet sur les grands enjeux de nature atmosphérique* [*soit les*] *gaz à effet de serre* [*et les*] *changements climatiques*".[380]

272 However, that sentence was extracted from a list of potential impacts of the GNLQ Project set out in the MELCC Directive.[381] The Respondent cannot seriously argue that it sufficed to warn GNLQ that it would be required, not only to mitigate the potential impact of the GNLQ Project itself on GHG emissions, but to meet the extraordinary requirement of **reducing** such GHG emissions **on a worldwide basis** - and not only at Québec's level.

273 The Respondent's argument is also inconsistent with its own submission. Indeed, in another part of its Counter-Memorial, the Respondent argues, that (i) the MELCC never requested that GNLQ establish that the GNLQ Project would result in a decrease of global GHG emissions downstream of the Project, notably because (ii) the MELCC Directive did not include such a requirement:

> "*Elle* [the Claimant] *s'appuie sur la prétention selon laquelle le MELCC n'aurait pas considéré les émissions en aval des ventes des produits de Métaux Blackrock, alors qu'il aurait exigé de GNL Québec qu'elle démontre que la consommation de gaz naturel liquéfié issu de son projet résultera en une diminution nette des émissions de GES.* ***Le MELCC n'a pas exigé une telle démonstration de la part de GNL Québec quant aux émissions en***

[379] Duchaine II, at **Exhibit CER-1 (Second)**, p. 105. (para. 288).

[380] Counter-Memorial, p. 182 (para. 489) (emphasis added).

[381] MELCC Directive, at **Exhibit C-0198-FRA**, p. 19 *et seq*.

> ***aval**, pas plus qu'il ne l'a exigé de la part de Métaux Blackrock. **Nulle part dans la Directive de décembre 2015 pour le projet Énergie Saguenay le MELCC ne mentionne une exigence de fournir cette démonstration**.*"[382]

274 To conclude, the "core criteria", as they were presented by Minister Charette on 24 March 2021 were entirely new to GNLQ, as they were not set out in the MELCC Directive and were never presented as requirements by the MELCC during the EA.

2.5.3.3 The MELCC had disregarded the "core criteria" but was compelled to take them into account after Minister Charette's press conference

275 In the Counter-Memorial, the Respondent relies on the MELCC's 26 April 2021 request for additional information to GNLQ, which included questions corresponding to Minister Charette's "core criteria", to contend that these criteria originated from the MELCC all along.[383] This is untrue.

276 The documents produced by the Respondent in document production revealed that the MELCC team in charge of the assessment had in fact already considered but disregarded Minister Charette's "core criteria" before and even immediately after his press conference, until they were compelled to take them into account by their hierarchy.

277 Before Minister Charette's press conference, the MELCC had rejected the contribution of the GNLQ Project to the energy transition and the reduction of global GHG emissions as requirements that GNLQ had to meet. This transpires from the MELCC's work product prepared before Minister Charette's press conference. Specifically, the MELCC had been required to opine on the BAPE's statement that there was no guarantee or any means to ensure that the LNG produced by GNLQ would effectively replace, and thus displace, more polluting fuels in the planned export markets.[384] The

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[382] Counter-Memorial, p. 122 *et seq.* (para. 334) (emphasis added).

[383] Counter-Memorial, p. 51 *et seq.* (paras. 135-136).

[384] [redacted] at **Exhibit TLV-0111-FRA**, p. 20 (of the PDF) (emphasis added).

MELCC team not only found this statement to be outside the scope of the EA, but also challenged the validity of the BAPE's conclusion as follows:

[redacted][385]

278 [redacted]

the MELCC reiterated that most of these "*avis*" fell outside the scope of the EA:

[redacted][386]

279 In that analysis, the MELCC made two further relevant observations.

280 [redacted][387] The SPEDE is a GHG emissions cap-and-trade system (*i.e.*, a carbon market) established by the Québec Government and

[385] [redacted] at **Exhibit TLV-0111-FRA**, p. 20 (of the PDF) (emphasis added).
[386] [redacted] at **Exhibit C-0494-FRA**, p. 6.
[387] [redacted] at **Exhibit C-0494-FRA**, p. 6 [redacted]

the State of California, by which high GHG emitters can acquire emissions rights from less intensive emitters to cover their emissions beyond a certain regulatory threshold.[388] The MELCC considered that this mechanism would be sufficient to ensure that the GHG emissions generated by the GNLQ Project would not hinder Québec's reduction objective.[389]

281 **Second**, [redacted][390] In other words, the MELCC was satisfied that the impact of the Project on Québec's GHG emissions reduction was limited and would in any event be mitigated.

282 Other documents produced by the Respondent in document production reveal that, ultimately, the MELCC team in charge of the GNLQ Project EA was instructed to change course by Minister Charette's staff who mandated them to include the "core criteria" in their questions to GNLQ and in their subsequent analysis. More specifically, the documents produced by the Respondent show that:

- the MELCC team conducting the assessment had no intention of asking any questions relating to the issues raised by Minister Charette during his press conference;[391]
- the MELCC acknowledged that these issues did not arise from the assessment team ("*Je sais que ce point ne vient pas de nous*");[392]

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[388] UQAC, Final Report "*Identification de moyens crédibles pour un grand émetteur final canadien de s'affirmer carboneutre au Québec*" dated 4 September 2019, at **Exhibit C-0213-FRA**, p. 65.

[389] [redacted] at **Exhibit C-0494-FRA**, p. 6.

[390] [redacted] at **Exhibit C-0494-FRA**, p. 6 *et seq*. [redacted]

[391] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 2 *et seq*., summarising the topics that would be raised as part of the MELCC's subsequent set of questions and explicitly confirming that these would not include Minister Charette's "core criteria" ("*Rien en ce qui concerne les GES*").

[392] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 2.

- the MELCC nonetheless required the assessment team to include questions regarding these issues;[393] and
- the assessment team initially pushed back, arguing that these issues were either closed (social acceptability) or outside the scope of a provincial environmental analysis (energy transition and global GHG emissions).[394]

283 On the issue of global GHG emissions, the MELCC stated the following:

> "*Pour le point 1* [le projet permettra de diminuer de façon significative les émissions mondiales de GES], ***le MELCC est limité dans sa validation par la portée de l'évaluation environnementale, c'est-à-dire que l'autorisation ne vise que les émissions québécoises***."[395]

284 This opinion was shared by the federal Agency. Indeed, after the rejection of the Project by the Québec Government, the Agency summarised Minister Charette's press conference internally and noted that his "core criteria" "***vont au-delà de la Loi sur la qualité de l'environnement***".[396]

285 The MELCC's reluctance to step outside the scope of the EA was short-lived. Ultimately, apparently in the face of political pressure, the MELCC issued additional questions on 26 April 2021, two of which included queries regarding the new "core criteria",[397] to the satisfaction of Minister Charette's Chief of Staff, Hugo Delaney, who forwarded them to his minister stating the following:

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[393] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 2.

[394] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 1 *et seq*.

[395] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 1 (emphasis added).

[396] Internal IAAC email correspondence between E. Landry and B. Dubreuil dated 21 July 2021, at **Exhibit C-0512-FRA**, p. 1.

[397] MELCC, Addendum to the request for undertakings and additional information of 3 March 2021 (26 April 2021), at **Exhibit C-0268-FRA**, p. 2 (Questions 52 and 53).

[redacted][398]

286 In sum, the Minister had successfully managed to force his own team to include criteria that they had rejected as outside the scope of their EA of the GNLQ Project.

287 As a result of this political interference, the contribution of the Project to the reduction of global GHG emissions formed a prominent part of the MELCC's reasons for concluding in its Report dated 30 June 2021 that the Project was not acceptable:

> "*L'analyse effectuée par le MELCC* […] *ne permet pas de conclure à l'acceptabilité environnementale du projet, et ce, malgré le fait que GNL Québec inc. se soit engagé à remplir la plupart des engagements demandés par le MELCC et les autres ministères et que la PÉEIE ait permis d'obtenir certains gains environnementaux. En effet,* ***le bilan des GES au niveau mondial, la transition énergétique****, le bilan des avantages et coûts du projet et l'impact appréhendé sur la population de bélugas de l'ESL* ***demeurent des enjeux pour lesquels une grande part d'incertitudes subsiste****. De plus, l'équipe d'analyse arrive à la même conclusion que celle de la commission du BAPE sur le projet, à savoir qu'elle n'est pas en mesure de se prononcer sur l'acceptabilité sociale à l'égard de celui-ci.*"[399]

288 The contrast between this conclusion and the MELCC's position immediately prior to Minister Charette's press conference reflects the Québec Government's tampering with the EA process in its final stage.

2.5.3.4 GNLQ was not afforded sufficient time to address Minister Charette's new "core criteria"

289 In the Counter-Memorial, the Respondent argues that, even assuming that the "core criteria" were new, GNLQ was provided with adequate notice

[398] Internal MELCC correspondence between H. Delaney and M. Croteau *et al*. dated 26 April 2021, at **Exhibit C-0513-FRA** (emphasis added.)

[399] MELCC Report, at **Exhibit C-0269-FRA**, p. 75 (emphasis added).

and sufficient time to address them.[400] The Respondent contends that GNLQ had four months to present its observations, between 24 March 2021, when Minister Charette articulated the three "core criteria", and 21 July 2021 when the Québec Government issued the Decree rejecting the Project.[401] Whilst the time period between these two events is not disputed, the simplistic conclusion that the Respondent seeks to draw from it is misguided.

290 **First**, it is not correct that GNLQ had four months to address the "core criteria". As explained in the Memorial, following Mr Charette's declaration, he and his staff were unable to provide any guidance as to how GNLQ's further submission on these three "core criteria" would be evaluated.[402] Mr Le Verger explains in his second witness statement that Mr Duquette confessed that he had no instructions or protocol to address the "core criteria".[403] GNLQ had to wait until 26 April 2021 to receive questions from the MELCC;[404] this is not disputed.[405]

291 Despite this uncertainty, Minister Charette put significant pressure on GNLQ to provide its response as quickly as possible, falsely implying that this would ensure the prompt organisation of BAPE hearings for the Gazoduq Project.[406]

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[400] Counter-Memorial, p. 184 (para. 494).

[401] Counter-Memorial, p. 184 (para. 494).

[402] Although GNLQ sought guidance on how to respond to the "core criteria" shortly after Minister Charette's press conference, it took until 22 April 2021 to meet him only for him to state that he did not know how GNLQ was supposed to respond. J. Pronovost (TACT), Note – Summary of the meeting with the Minister of the Environment and Climate Change dated 22 April 2021, at **Exhibit C-0267-FRA**; Le Verger I, at **Exhibit CWS-3**, p. 48 *et seq*. (paras. 196-198)). See also Memorial, p. 85 *et seq.* (paras. 250-252).

[403] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 40 (para. 124).

[404] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 40 *et seq.* (para. 125). See also Memorial, p. 86 (para. 253-254).

[405] Counter-Memorial, p. 184 (para. 494).

[406] J. Pronovost (TACT), Note – Summary of the meeting with the Minister of the Environment and Climate Change dated 22 April 2021, at **Exhibit C-0267-FRA** ("Minister Charette pointed out that the BAPE's schedule for 2022 1s filling up quickly. In that regard, the Minister told GNL Qc to speed up its analysis so the BAPE can quickly move on to Gazoduq's, which could happen as soon as 2022.").

292 GNLQ thus submitted its response to the MELCC's questions of 26 April 2021 five weeks later, on 3 June 2021.[407] The MELCC then issued its EA report – the MELCC Report on which the Government Decree is based – less than four weeks later, on 30 June 2021.[408]

293 Moreover, these five weeks have to be considered in the context of several years of EA process during which these questions could and should have been asked, if they reflected genuine concerns.

294 **Second**, the MELCC's questions of 26 April 2021 were **purposely** drafted to remain vague and open-ended, making it harder, if not plainly impossible, for GNLQ to address them in a meaningful way. This transpires from the documents produced by the Respondent in document production:

- A first version of the questions was ready on 16 April 2021, which provided GNLQ with objective guidance on how to meet Minister Charette's new requirements in relation to the two first criteria (GHG emissions and energy transition).[409]
- These questions were not put to GNLQ, as drafted. The MELCC team in charge of preparing them first shared them with Minister Charette on 16 April 2021 and met with him on 20 April 2021 to present them.[410]
- On 22 April 2021, Minister Charette met with GNLQ and, rather curiously, indicated that the MELCC could not provide GNLQ with

[407] GNLQ, Answers to questions and commitments requested by the MELCC dated 3 June 2021, at **Exhibit C-0068-FRA**.

[408] Counter-Memorial, p. 184 (para. 494).

[409] Email from C. Dufour (MELCC) to M. Gagnon (DGÉES) *et al.* (with attachment) dated 16 April 2021, at **Exhibit C-0514-FRA**. See also MELCC, Table of main issues for the GNLQ Project dated 16 April 2021, at **Exhibit C-0515-FRA**.

[410] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* (with attachment), at **Exhibit C-0516-FRA**; Email correspondence between N. Gleeton (MELCC), S. Chouinard, E. Géhin (MELCC) and J. Pronovost (TACT) from 31 March 2021 to 19 April 2021 dated 19 April 2021, at **Exhibit C-0517-FRA**.

guidance on how to address his "core criteria" because the MELCC allegedly lacked the required "knowledge to impose the framework".[411]

- On 26 April 2021, a new, final version of the questions was put to GNLQ.[412] These were vague as compared to the draft prepared by the MELCC on 16 April 2021, making it much more difficult for GNLQ to address them.

295 Specifically, the draft question relating to the reduction of global GHG emissions initially read as follows:

> "*Quelles preuves additionnelles l'initiateur est en mesure d'apporter pour confirmer son scénario de réduction de l'émission de GES au niveau mondial ?*
>
> *Pour y arriver, l'initiateur devrait notamment présenter en détail les marchés visés, les clients potentiels, le volume de GNL potentiellement vendu pour chacun des clients et le type des sources d'énergie que le GNL substituerait*."[413]

296 As for the draft question concerning the improvement of the energy transition, it read as follows:

> "*Est-ce que l'initiateur est en mesure de présenter des arguments afin de démontrer que les infrastructures du projet mise en place ne constitueraient pas un frein à la transition énergétique (ne verrouillera pas les choix énergétiques à court et à moyen termes)*

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[411] J. Pronovost (TACT), Note – Summary of the meeting with the Minister of the Environment and Climate Change dated 22 April 2021, at **Exhibit C-0267-FRA** ("The minister gives GNLQ a *carte blanche* as the cabinet does not have the knowledge to impose the framework. He basically said that forcing us to follow a path would put the Govt in an uncomfortable situation, so he does not want to tell us what to do. Stephan asked if this could be under the form of politicians or experts around the world talking to them, so that we help them help us, particularly for the day when they issue the decree. He said that it has to be more than just verbal. There needs to be something on record with which the MELCC is comfortable to be put in the file. He said, whether it is a scientific study, a demonstration, a contract etc... he has no views on this, but there needs to be a written proof.").

[412] MELCC, Addendum to the request for undertakings and additional information of 3 March 2021 (26 April 2021), at **Exhibit C-0268-FRA**, p. 2 (Questions 52 and 53).

[413] MELCC, Table of main issues for the GNLQ Project dated 16 April 2021, at **Exhibit C-0515-FRA**, p. 1.

> *vers des sources d'énergie beaucoup moins émettrices de GES, et ce, dans les différents marchés internationaux visés* ?"[414]

297 In the final version of the questions sent to GNLQ on 26 April 2021, these two questions, which contained at least some guidance on the type of evidence required from GNLQ, were merged into a single vague question, which speaks for itself:

> "*L'initiateur doit indiquer s'il a de nouveaux éléments à ajouter, par rapport à ce qu'il a déjà présenté dans l'ensemble des documents constituant son dossier de demande d'autorisation gouvernementale, concernant le scénario à l'effet que son projet permettrait une réduction des émissions de GES au niveau mondial ou concernant son effet sur la transition énergétique*."[415]

298 **Third**, it transpires that the MELCC set aside only **four** working days (4, 7, 8 and 9 June) for its experts to review GNLQ's answers submitted on 3 June 2021. This was insufficient by any standard.[416] Indeed despite the time constraints, GNLQ had managed to put together no less than 394 pages of highly technical information aiming to address to the best it could all three subjects.[417] It is inconceivable that the MELCC's experts, and the MELCC itself, could have properly taken these answers into account in just four days.

299 **Finally**, on this topic as well, the Respondent has refused to produce a substantial number of documents, despite the Tribunal's order to do so, and specifically documents in response to the Claimant's requests for:

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[414] MELCC, Table of main issues for the GNLQ Project dated 16 April 2021, at **Exhibit C-0515-FRA**, p. 2.

[415] MELCC, Addendum to the request for undertakings and additional information of 3 March 2021 (26 April 2021), at **Exhibit C-0268-FRA**, p. 2 (Question 52).

[416] Internal MELCC email correspondence between M. Gagnon and M. Duquette between 25 May 2021 and 26 May 2021, at **Exhibit C-0518-FRA**, p. 1.

[417] GNLQ, Answers to questions and commitments requested by the MELCC dated 3 June 2021, at **Exhibit C-0068-FRA**.

- comments on drafts of the MELCC Report, dated between January and June 2021 (Request No. 7); [418]
- Minister Charette's recommendation to the Québec Government regarding the GNLQ Project issued pursuant to Article 31.5 EQA and any drafts thereof, as well as related documents dated between 3 June and 21 July 2021 (Request No. 8);[419]
- drafts of Decree dated between 10 March and 21 July 2021 (Request No. 9);[420] and
- documents, including meeting agendas, minutes of meetings and transcripts, recording the Québec Cabinet's deliberations leading to Decree and dated 30 June to 21 July 2021 (Request No. 10).[421]

300 As part of the latter category (Request No. 10), the Respondent has refused to produce a [redacted] *i.e.*, well before the finalisation of the MELCC Report (on 30 June 2021), and thus well before its review, when the MELCC Report was to include an analysis of GNLQ's responses to the new questions posed on 26 April 2021 on the Minister's "core criteria".[423]

[418] See PO4, Annex A, p. 36 *et seq*. (Request 7); List of documents responsive to Request No. 7 that the Respondent has refused to produce, at **Exhibit C-0519-ENG-FRA**.

[419] See PO4, Annex A, p. 40 *et seq.* (Request 8); List of documents responsive to Request No. 8 that the Respondent has refused to produce, at **Exhibit C-0520-ENG-FRA**.

[420] See PO4, Annex A, p. 43 *et seq*. (Request 9); List of documents responsive to Request No. 9 that the Respondent has refused to produce, at **Exhibit C-0521-ENG-FRA**.

[421] See PO4, Annex A, p. 45 *et seq.* (Request 10); List of documents responsive to Request No. 10 that the Respondent has refused to produce, at **Exhibit C-0522-ENG-FRA**.

[422] See List of documents responsive to Request No. 10 that the Respondent has refused to produce, at **Exhibit C-0522-ENG-FRA**, p. 1 (PRIV290) (emphasis added).

[423] According to the MELCC's own schedule, the draft decree was logically supposed to be prepared after the MELCC Report, not before. See Email correspondence between J.

301 [redacted][424]

302 Again, had these documents, including the [redacted] been supportive of the Respondent's narrative, the Respondent would have produced them voluntarily, and certainly upon the Tribunal's order.

303 **The Tribunal should therefore draw the following adverse inferences from the Respondent's refusal to produce those documents**:

i) The Minister of Environment prepared a draft decree refusing the GNLQ Project on 17 June 2021, whereas it was improper for him to make any kind of recommendation, let alone a recommendation to refuse the GNLQ Project, before having received the MELCC Report on 30 June 2021.

ii) The Minister of Environment prepared a draft decree refusing the GNLQ Project before having received the MELCC Report because (i) the decision of the Québec Government to refuse the GNLQ Project had already been made in March 2021, when the Government decided that Minister Charette should raise three new core criteria to pave the way for the refusal of the GNLQ Project,[425] and (ii) the real grounds for the refusal of the GNLQ Project had nothing to do with the outcome of the EA presented in the MELCC Report.

2.5.4 The Quebec Government's decision not to authorise the GNLQ Project was based on illegal, predetermined and spurious grounds

304 In the Memorial, the Claimant showed that the Québec Government's decision to reject the GNLQ Project was unlawful under Québec law,

Bissonnette (MELCC) and N. Gleeton (MELCC) between 28 and 29 May 2021, at **Exhibit C-0523**, p. 4 *et seq*.

[424] See List of documents responsive to Request No. 10 that the Respondent has refused to produce, at **Exhibit C-0522-ENG-FRA**, p. 1 *et seq.*

[425] See paragraph 252 above.

because it was based on erroneous grounds outside the MELCC's jurisdiction.[426]

305 In the Counter-Memorial, the Respondent disputes the allocation of powers between Québec and the federal authorities and argues that Québec could reach a decision on any ground it wanted, regardless of whether it fell within the scope of federal power.[427] In addition, while the Respondent does not dispute that the grounds invoked were unprecedented, it maintains that they were legitimate.

306 As explained below, the Respondent's position is wrong in that, the Québec Government's decision was unlawful as based on grounds outside the Québec jurisdiction (**Section 2.5.4.1**). Furthermore, the decision was based on unprecedented grounds, which specifically targeted the Project (**Section 2.5.4.2**) and were both speculative and erroneous (**Section 2.5.4.3**).

2.5.4.1 The Québec Government's Decree was unlawful as it was based on grounds outside its jurisdiction and the MELCC Directive

307 In the Memorial, the Claimant, supported by the expert opinion of Me Duchaine, demonstrated that the Québec Government's decision to reject the Project was unlawful under Québec law, because it was based on aspects that fall squarely within the federal jurisdiction of the Government of Canada, namely public property, navigation, the protection of beluga whales and international trade.[428]

308 In its Counter-Memorial, the Respondent does not deny that these aspects were federal prerogatives. Instead, it erroneously reasserts that the Québec Government was entitled to conduct an EA and make a decision in relation to matters that fell under federal jurisdiction.[429]

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[426] Memorial, p. 101 *et seq.* (para. 311); Duchaine I, at **Exhibit CER-1**, p. 50.

[427] Counter-Memorial, p. 27 (para. 71).

[428] Memorial, p. 101 *et seq.* (para. 311); Duchaine I, at **Exhibit CER-1**, p. 50.

[429] Counter-Memorial, p. 27 (para. 71).

309 As explained in Section 2.3.1 above, Me Duchaine confirmed in her second report that:

- there is no support for Me Yergeau's position that the Québec Government could usurp federal prerogatives simply because it had decided to initiate a provincial EA;[430]
- on the contrary, all of the constitutional doctrines governing the allocation of powers between the federal and the provincial levels of government point to the same conclusion: the Québec Government should have declined jurisdiction over the EA of the GNLQ Project and either let the federal authorities take precedence or requested a joint assessment pursuant to the Canada-Québec Agreement;[431]
- the allocation of powers between the federal and provincial levels of government was in any event reflected in the MELCC Directive, which did not include references to maritime traffic, the protection of beluga whales or upstream or downstream GHG emissions – this ought to have prevented the MELCC from addressing these issues in the MELCC Report, the Minister of Environment from taking these matters into account in his recommendation to the Cabinet and the Cabinet from making a decision on the basis of these issues.[432]

310 The Québec Government should therefore not have rendered a decision on the GNLQ Project in the first place on the grounds it did.

2.5.4.2 The Québec Government's decision was based on unprecedented grounds that specifically targeted the GNLQ Project

311 In the Memorial, the Claimant explained that the Québec Government rejected the Project on the basis of five grounds, including the reduction of

[430] Duchaine II, at **Exhibit CER-1 (Second)**, p. 30 *et seq.* (paras. 106-114). See also paragraphs 137-139 above.

[431] Duchaine II, at **Exhibit CER-1 (Second)**, p. 33 (para. 115); see also p. 13 *et seq.* (paras. 48-114); Sections 2.3.1.1 and 2.3.1.2 above.

[432] Duchaine II, at **Exhibit CER-1 (Second)**, p. 108 *et seq.* (paras. 301-309). See also paragraphs 183-186 above.

global GHG emissions and the energy transition, that had never been applied before, and have not been applied since.[433]

312 [redacted][434]

313 In its response, the MELCC confirmed that these criteria had been devised to target the GNLQ Project and would not be used as a matter of course in future assessments:

[redacted][435]

314 In its Counter-Memorial, the Respondent does not deny that the Québec Government relied on unprecedented criteria to reject the GNLQ Project.

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[433] Memorial, p. 55 (para. 143) and p. 98 (para. 297).

[434] [redacted] at **Exhibit C-0280-FRA**. See Memorial, p. 98 (para. 298).

[435] [redacted] at **Exhibit C-0281-FRA**. See Memorial, p. 98 (para. 298).

Mr Duquette also confirms that the energy transition and reduction of global GHG emissions criteria have never been used in any other projects.[436]

315 Instead, the Respondent seeks to downplay [redacted][437]

316 However, this statement does not sit well with the Respondent's subsequent attempt to strike the exchange from the record on alleged grounds of political sensitivity – an attempt that was rejected by the Tribunal.[438] Nor does it sit well with the Respondent's refusal to produce – despite the Tribunal's order – the final version of Exhibit C-281.[439]

317 The Respondent's efforts to downplay [redacted] is further belied by the minutes of a meeting held in November 2021 between the MELCC and the MEI, referred to above, during which the MELCC confirmed that Minister Charette's three

[436] See Duquette, at **Exhibit RWS-5**, p. 27 (para. 58).

[437] Counter-Memorial, p. 260 *et seq.* (para. 656).

[438] Respondent's Request to exclude Exhibits C-280 and C-281 from the record dated 4 November 2024; PO4, Annex A, p. 7 *et seq*.

[439] [redacted] The Tribunal had ordered the production of these documents if they corresponded to the final version of Exhibit C-281. See Respondent's letter to the Tribunal dated 28 March 2025, p. 1; see Procedural Order No. 11 Decision on production of privileged documents dated 11 April 2025, p. 20 (para. 103); [redacted] that the Respondent has refused to produce, at **Exhibit C-0524-ENG-FRA**.

"core criteria" had been added by the Québec Government for political reasons, as a result of its change of position regarding the GNLQ Project.[440]

2.5.4.3 The Québec Government's decision was based on grounds that were speculative and erroneous

318 It is not disputed that, on 21 July 2021, the Québec Government refused to authorise the GNLQ Project.[441]

319 The Respondent also admits that the MELCC Report did not find that the GNLQ Project had any genuinely problematic environmental impact, but merely that GNLQ "*n'avait pas réussi à suffisamment dissiper les nombreuses incertitudes entourant les effets du projet sur les émissions de GES et la transition énergétique ainsi que sur la population de bélugas de l'ESL* ".[442] In other words, the Project was denied on the basis of alleged uncertainties as to how it might impact the environment, not on the basis of any objective, science-based analysis of its actual impact.

320 This is indeed what transpires from a review of each of the grounds in relation to which the MELCC identified such uncertainties, and which were mentioned by the Québec Government in the Decree as a basis for its decision.

321 The Québec Government invoked five alleged "uncertainties" as grounds for its decision:

i) uncertainty regarding the impact of the GNLQ Project on Québec's efforts to reach its target to reduce GHG emissions in Québec, and the reduction of worldwide GHG emissions;

ii) uncertainty regarding the impact of the GNLQ Project on the energy transition;

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[440] See paragraph 253 above. Internal MELCC email correspondence between M. Gagnon, N. Gleeton and J. Bissonnette from 28 November 2021 to 1 December 2021, at **Exhibit C-0510-FRA**, p. 3 *et seq*. (emphasis added).

[441] Counter-Memorial, p. 54 (para. 143); Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274-FRA**.

[442] Counter-Memorial, p. 53 (para. 140).

iii) uncertainty regarding the costs and benefits of the GNLQ Project;

iv) uncertainty regarding the social acceptability of the GNLQ Project; and

v) uncertainty concerning the impact of navigation on the beluga whale population of the St. Lawrence River.

322 The Claimant has already addressed and demonstrated in Section 2.5.1 above that the Government's reliance on the MELCC's flawed cost-benefit analysis (third ground) was unjustified. The same goes for the other grounds invoked by the Québec Government, which are addressed in turn (the first and second grounds being addressed together).

(i) The requirements to contribute to the reduction of global GHG emissions and to the energy transition were politically driven and highly speculative

323 The Respondent acknowledges in its Counter-Memorial that, during the press conference at which he announced the Decree, Minister Charette emphasised that GNLQ had failed to establish that the GNLQ Project would promote the energy transition, or contribute to a decrease of worldwide GES emissions, *i.e.*, two of the three "core criteria" introduced four months earlier.[443] These requirements were politically driven, highly speculative and intentionally framed without objective standards that could be met.

324 **First**, these criteria were added at the eleventh hour through the Québec Government's undue political interference with the EA process, as demonstrated above (Section 2.5.3).

325 **Second**, the MELCC's conclusion that there were uncertainties as to whether the Project met these criteria of reduction of worldwide GHG emissions and promotion of the energy transition, was highly subjective and speculative and ignored robust expert opinions.

[443] Counter-Memorial, p. 54 (para. 144); TACT, Transcript of press conference dated 22 July 2021, at **Exhibit C-0284-ENG-FRA**.

326 Indeed, the MELCC's conclusion on these issues[444] was contradicted by the conclusions of its own experts: the *Direction de l'expertise climatique* ("**DEC**"), the *Direction générale de la réglementation carbone et des données d'émission* ("**DGRCDE**") and the *Direction de la prospective climatique et de l'adaptation* ("**DPCA**") were all consulted by the MELCC for their expertise in relation to GHG emissions and the energy transition, and all concluded that the GNLQ Project was acceptable from that perspective.[445] More specifically, the DEC concluded:

> "*Le projet n'est pas incompatible avec les objectifs de réduction de GES du Québec ni avec les exigences de réduction de GES établies dans l'Accord de Paris*."[446]

327 The Respondent contends in the Counter-Memorial that these statements of acceptability were qualified or included additional conditions that affected their reliability.[447] This is incorrect.

328 None of the qualifications affected the conclusions reached by these entities that the GNLQ Project was acceptable from an environmental perspective.[448] As for the DPCA's conditions regarding the acceptability of the Project, namely the preparation of a plan to achieve carbon neutrality and the reduction of the duration of the GNLQ Project to 25 years, they would have posed no difficulties to GNLQ: they had been anticipated and were already in the course of being fulfilled, as GNLQ had communicated to the MELCC.[449] Furthermore, as mentioned above in Section 2.5.3.3, the

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[444] MELCC Report, at **Exhibit C-0269-FRA**, p. vii.

[445] Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**, p. 48 (Direction de l'expertise climatique), p. 54 (Direction générale de la réglementation carbone et des données d'émission), p. 59 (Direction de la prospective climatique et de l'adaptation).

[446] Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**, p. 48 (last paragraph).

[447] Counter-Memorial, p. 52 (para. 139).

[448] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 43 *et seq.* (paras. 136-138).

[449] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 45 (para. 139). See Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**, p. 42; Email from Will Solutions to GNLQ (with attachment) dated 27 January 2020, at **Exhibit TLV-0142-FRA**. The Respondent acknowledges that GNLQ had

MELCC itself had previously agreed with the DEC that the SPEDE mechanism, which would have enabled GNLQ to offset its GHG emissions, was an appropriate mitigation measure in relation to GHG emissions.[450]

329 In other words, the MELCC elected to ignore both the opinion of its own experts and its own legally enshrined mitigation measures, and instead speculated that GNLQ could not guarantee that it would promote the energy transition and reduce GHG emissions.

330 As explained by Me Duchaine in her second report, the *Guide d'élaboration et de rédaction du rapport d'analyse environnementale à l'intention des chargés de projet*, applicable to the preparation of the MELCC Report, provide that the normal practice for the MELCC is to follow the opinion of the experts consulted.[451] Any deviation from the experts' opinion therefore should have been explained and justified.[452] The MELCC Report does not contain any such justification or explanation for ignoring the opinion of its own experts. This is all the more surprising given that, except for the MFFP which did not provide any opinion, **all** the experts consulted during the EA of the GNLQ Project, not only those in charge of analysing the GHG emissions aspect, opined that the GNLQ Project was acceptable.[453]

331 Furthermore, as explained by Mr Le Verger in his second witness statement, the MELCC also deliberately ignored GNLQ's commitment to supply LNG to isolated regions in Québec to replace more polluting fuels, like fuel oil and gasoil.[454] Mr Le Verger demonstrates that, assuming the LNG supplied locally could replace more polluting fuel, it would be

committed to make the GNLQ Project carbon neutral: Counter-Memorial, p. 45 (paras. 120-121).

[450] See [redacted] at **Exhibit C-0494-FRA**, p. 6 [redacted]

[451] Duchaine I, at **Exhibit CER-1**, p. 110 (para. 308).

[452] Duchaine I, at **Exhibit CER-1**, p. 110 (para. 308).

[453] See Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**.

[454] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 8 (para. 15).

sufficient to make the GNLQ Project carbon neutral at Québec's level, thereby suppressing its impact on Québec's ability to reach its GHG-reduction targets.[455]

332 In this respect, on 20 July 2021, the day before the Québec Government's Decree rejecting the GNLQ Project on the ground of uncertainty as to its ability to promote the energy transition, the Québec Minister of Energy and Natural Resources, Jonatan Julien, declared in relation to an investment in the development of the natural gas distribution network that "[l]*e gaz naturel est une* ***énergie de transition*** *profitable pour le Québec*".[456] This confirms that the Québec Government's decision to reject the GNLQ Project cannot not have been based on genuinely held, science-based opinions.

333 **Third**, as articulated by the MELCC in its questions of 26 April 2021 under the guidance of Minister Charette, the requirements of improving the energy transition and reducing GHG emissions at a global level were, by design, impossible to meet in the absence of objective criteria. Tellingly, neither the MELCC in its Report, nor the Respondent in this arbitration, provided any indication as to what GNLQ would have had to establish to meet these two new "core criteria". The few elements the Respondent and its witnesses indicate as missing show that the threshold imposed by Minister Charette was, in fact, unattainable.

334 In the Counter-Memorial, the Respondent indeed reiterates the MELCC's argument that it would have been necessary for GNLQ to identify all of its future customers and to provide both their geographical position and contracts with GNLQ, to determine whether the LNG sold to them by GNLQ would have likely replaced other more polluting fuels consumed by these clients in their respective countries.[457] This was totally unrealistic.

335 To start with, providing contracts with future customers would have been an impossible hurdle to overcome. As acknowledged by NRCan in an

[455] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 11 (para. 20).

[456] MERN, "*Prolongement du réseau de distribution de gaz naturel - Québec investit plus de 1 M$ pour le développement économique en Montérégie*", 20 July 2021, at **Exhibit C-0396-ENG-FRA** (emphasis added).

[457] See, *e.g.*, Counter-Memorial, p. 116 *et seq.* (para. 318, 326 and 328).

internal exchange criticising the Québec Government's refusal of the GNLQ Project:

> "Commercial agreements commonly are signed **after a project secures regulatory approval to proceed**, and would **not include clauses committing to replace another fuel**, since that is typically beyond the scope of the buyer's influence."[458]

336 Even if GNLQ had been able to provide all contracts with all its future customers, to satisfy the MELCC, it would have been required to prove:

- that these customers were otherwise consuming more polluting fuels, or would in turn sell GNLQ's LNG to customers or markets as an alternative to high coal or fuel oil consumption;
- that the price at which the LNG would be sold to these future customers would be sufficiently competitive to displace other more polluting fuels in the destination markets, or other markets if the LNG would be sold in another country after regasification; and
- that these assumptions would have remained valid over the whole duration of the Project, *i.e.*, from 25 to 50 years, without any knowledge as to how the regulatory or geopolitical framework would evolve.

337 No LNG project could have ever met these requirements. In other words, regardless of the detailed information and assurances that GNLQ provided on 3 June 2021, GNLQ could not meet the burden imposed by the Québec Government and certainly not at that stage of the GNLQ Project.

(ii) GNLQ had demonstrated the social acceptability of the GNLQ Project within the meaning of Québec environmental law

338 In the Memorial, the Claimant established that, despite some opposition, the Project benefitted from strong local and regional support,[459] including

[458] Internal NRCan email correspondence between C. Evans and N. Vrany *et al*. from 22 January to 27 January 2022, at **Exhibit C-0443-ENG**, p. 4 (emphasis added).
[459] Memorial, p. 96 *et seq.* (paras. 291, 293-294).

after Minister Charette issued the three new "core criteria".[460] It also demonstrated, with the support of Me Duchaine's expert opinion, that both Québec law and the MELCC Directive define social acceptability as a **process** rather than an objective outcome required to be reached.[461] The Claimant showed that, in such a context, the MELCC's decision to defer to the Government in relation to social acceptability, and the Government's reference to an alleged lack of social acceptability in its Decree, were incomprehensible.[462]

339 In its Counter-Memorial, the Respondent concedes that the notion of social acceptability remains controversial.[463] However, it argues, based on Me Yergeau's report, that social acceptability corresponds to the "*perception d'une menace qu'un projet peut laisser planer sur la vie ou la qualité de vie d'un milieu*",[464] and concludes that the Québec Government reached its decision within this definition.[465] For the following reasons, the Respondent's argument is unfounded.

340 **First**, the Respondent's allegation that the Québec Government even reached a decision on social acceptability is contradicted by the evidence. Minister Charette admitted during the press conference of 21 July 2021 that the Cabinet had not evaluated the social acceptability of the GNLQ Project, despite acknowledging that the GNLQ Project benefitted from considerable popular support, on the ground that the two other "core criteria" (*i.e.*, the promotion of the energy transition and the global reduction of GHG emissions) had not been met:

> "*Nous avions trois conditions au départ. Souvenez-vous, au moment du dépôt du rapport du BAPE, j'avais exprimé les trois conditions : l'acceptabilité sociale, la transition énergétique et la baisse au niveau mondial.* ***Nous n'avons pas eu à évaluer***

[460] Memorial, p. 96 (para. 290).

[461] Memorial, p. 84 *et seq.* (para. 248); see Section 2.5.3.2(i) above.

[462] Memorial, p. 95 *et seq.* (paras. 286-295).

[463] Counter-Memorial, p. 207 (para. 536).

[464] Counter-Memorial, p. 207 (para. 536), citing Yergeau, at **Exhibit RER-2**, p. 63 *et seq.* (paras. 173, 175-171, 247).

[465] Counter-Memorial, p. 207 (para. 536).

> ***l'acceptabilité sociale compte tenu que les deux premières conditions n'étaient pas respectées***. *Nous sommes conscients qu'il y a des gens qui appuyaient très fortement ce projet et que d'autres exprimaient des réserves importantes, mais nous n'avons pas eu à évaluer et à pondérer les gens en faveur versus ceux en défaveur*."[466]

341 In other words, although the Québec Government mentioned the alleged "uncertainties" regarding the social acceptability of the GNLQ Project as part of the grounds for rejecting it in the Decree,[467] Mr Charette's statement confirms that the Québec Government did not even assess the Project on that basis.

342 **Second**, as the MELCC acknowledged in its report, "*pour certains, indépendamment des mesures et des mécanismes qui pourraient être mis en place, ce type de projet de développement ne trouvera jamais un accueil favorable*".[468] Stated differently, a project of this nature will never have 100% support.

343 As explained by Mr Le Verger, the MELCC failed to consider the level of support enjoyed by the GNLQ Project, regardless of the inevitable polarisation it generated as a large industrial project.[469] Mr Le Verger notes in particular that the MELCC and the Québec Government failed to consider the letters of support received from elected officials of local cities and towns, as well as local investors and associations.[470] Contrary to

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[466] TACT, Transcript of press conference dated 22 July 2021, at **Exhibit C-0284-ENG-FRA**, p. 4 (emphasis added).

[467] Decree 1071-2021 concerning the refusal to issue an authorisation for the GNLQ project to build a natural gas liquefaction complex on the territory of the city of Saguenay dated 21 July 2021, at **Exhibit C-0274-FRA**, p. 3.

[468] MELCC Report, at **Exhibit C-0269-FRA**, p. 65.

[469] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 38 *et seq.* (paras. 118-122).

[470] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 49 *et seq.* (para. 155), Letter from R. Martel (House of Commons of Canada) to Minister Charette dated 15 May 2020, at **Exhibit TLV-0143-FRA**; Letter from the *Fédération des chambres de commerce du Québec* to P. Bourke (BAPE) dated 20 May 2020, at **Exhibit TLV-0144-FRA**; La Tuque Agglomeration Council, Excerpt from the minutes of the regular meeting dated 15 September 2020, at **Exhibit TLV-0145-FRA**; Letter from the City of La Tuque to Minister Fitzgibbon dated 14 May 2020, at **Exhibit TLV-0146-FRA**; Letter from the City of Saguenay to GNLQ dated 3 May 2016, at **Exhibit TLV-0147-FRA**.

various pressure groups, who are capable of creating a semblance of opposition far beyond their representation, elected officials actually represent the population who elected them, a difference that should have carried more weight.[471]

344 More importantly, neither the MELCC nor the Québec Government ever argued, let alone provided evidence, that the GNLQ Project was not socially acceptable.

345 **Third**, Me Duchaine explains in her Second Report that the Respondent's presentation of the EQA on this issue is partial in the sense that it ignores the purpose of this law, which is to **authorise** projects.[472] Accordingly, the EQA does not set a threshold beyond which projects cannot be authorised, but rather requires Québec authorities to identify the conditions under which a specific project may be authorised.[473] In the words of the MELCC itself, the EQA is a "*loi d'autorisation*".[474]

346 This aspect of the EQA informs the concept of social acceptability and its boundaries. A project with significant local support cannot be excluded simply because it is met with some opposition. For instance, before Minister Charette decided to dictate three new "core criteria", [redacted][475] In other

[471] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 49 *et seq*. (para. 155), Municipality of Saint-François-de-Sales, Excerpt from the minutes or copy of the resolution dated 7 June 2021, at **Exhibit TLV-0148-FRA**; Municipality of Lac-Bouchette, Excerpt from the minutes of the regular meeting of "Support for the Énergie Saguenay (GNL) project" dated 3 May 2021, at **Exhibit TLV-0149-FRA**; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, "Local 711 Supports the Énergie Saguenay Project", at **Exhibit TLV-0150-FRA**; Municipality of Saint-David-de-Falardeau, Excerpt from the minutes of the regular meeting dated 5 April 2021, at **Exhibit TLV-0151-FRA**; Annex R53, Resolutions from various municipal councils, at **Exhibit TLV-0152-FRA**; Saguenay City Council, Excerpt from the minutes of the regular meeting of the, "Support for the GNL Québec Project" dated 6 April 2021, at **Exhibit TLV-0153-FRA**.

[472] Duchaine II, at **Exhibit CER-1 (Second)**, p. 80 *et seq*. (para. 239-245).

[473] Duchaine II, at **Exhibit CER-1 (Second)**, p. 84 (para. 245).

[474] Duchaine II, at **Exhibit CER-1 (Second)**, p. 82 (para. 243) and p. 149 *et seq*. (para. 379).

[475] [redacted] at **Exhibit C-0494-FRA**, p. 5 *et seq*.

words, the MELCC was working under the assumption that the GNLQ Project would be authorised and that the process of gaining social acceptability would follow its course. Unfortunately, following the issuance of the "core criteria" by Minister Charette, the MELCC abandoned this course of action, electing instead in the MELCC Report to defer to the Government regarding the decision on social acceptability.[476]

347 **Fourth**, Québec's decision-making in relation to the approval of other industrial projects does not depend on whether the relevant local population "*per*[çoit] *une menace qu'un projet peut laisser planer sur la vie ou la qualité de vie d'un milieu*".[477] The following two examples provide a good illustration of this point:

- The Québec Government recently proposed a law that would allow the expansion of a landfill site, notwithstanding the BAPE's recommendation not to proceed with it given the impact of such a project on the environment and its lack of social acceptability.[478] The local population's view, as expressed through the BAPE, was not determinative.
- For the Northvolt project, which envisages the construction of an electric vehicle battery plant, the Québec Government eased EA process requirements to circumvent altogether public consultations before the BAPE.[479] The local population's views, as would have been considered through the BAPE, were therefore not considered. While

[476] MELCC Report, at **Exhibit C-0269-FRA**, p. 64 *et seq*.

[477] Counter-Memorial, p. 207 (para. 536), citing Yergeau, at **Exhibit RER-2**, p. 63 *et seq.* (paras. 173, 175, 175-171, 247).

[478] "*Des avocats spécialisés en environnement dénoncent le projet de loi en faveur d'un stockage de déchets dangereux par Stablex à Blainville*", *Le Devoir,* 28 February 2025, at **Exhibit C-0525-FRA**.

[479] See "*Québec admet avoir voulu éviter l'examen du BAPE à Northvolt*", *Radio-Canada,* 6 March 2024, at **Exhibit C-0526-FRA** ("*Pour la toute première fois, le ministre de l'Environnement Benoit Charette avoue avoir délibérément aidé Northvolt à éviter l'examen du Bureau d'audiences publiques sur l'environnement (BAPE) par crainte de perdre le projet.* […] *'Si on n'avait pas pu donner de réponse à l'entreprise, que ce soit Northvolt ou une autre, avant 18 ou 24 mois, c'est certain que ces entreprises auraient retenu un autre lieu pour s'implanter.' Benoit Charette, ministre de l'Environnement du Québec, en entrevue avec Radio-Canada.*"). See also "*Une majorité de Québécois rejettent l'approche caquiste dans le dossier Northvolt*", *Le Devoir*, 28 February 2024, at **Exhibit C-0527-FRA**.

the population had previously raised biodiversity concerns over the project site, which had justified the refusal of a prior project, the project was authorised in 2024.[480]

348 **Finally**, Me Duchaine shows in her second report that, in five instances, the Québec Government approved projects, notwithstanding a finding by the BAPE that the project was not socially acceptable (*i.e.*, where the BAPE did not just refuse to issue a recommendation, as in the case of the GNLQ Project, but issued a recommendation **not** to authorise the project in question).[481] Likewise, Me Duchaine shows that, even when projects, other than these five projects, were subjected to a new evaluation following the BAPE's adverse findings regarding social acceptability, they were eventually approved.[482]

(iii) The MELCC's conclusions related to the protection of beluga whales disregarded GNLQ's commitments and were unsupported by scientific evidence

349 As explained in the Memorial, in March 2021, the MELCC adopted a zero-tolerance policy on underwater noise by concluding that GNLQ should consider suspending all maritime traffic over the summer period.[483] That policy stood in stark contrast to the MELCC's previous approach of focusing on mitigation measures GNLQ could implement.[484] The MELCC adopted this new approach in its report by relying on a preliminary and unpublished study, on which GNLQ was not given an opportunity to comment.[485]

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[480] See "*Québec a retiré des arguments scientifiques de son analyse*", *Radio-Canada*, 21 February 2024, at **Exhibit C-0528-FRA**. See also "*Northvolt: gestion de crise interne au ministère de l'Environnement*", *Radio-Canada*, 28 February 2024, at **Exhibit C-0529-FRA**.

[481] Duchaine II, at **Exhibit CER-1 (Second)**, p. 114 *et seq.* (para. 317, fourth bullet point).

[482] Duchaine II, at **Exhibit CER-1 (Second)**, p. 114 *et seq.* (para. 317, fourth bullet point).

[483] Memorial, p. 88 *et seq.* (paras. 263-269 and 277). See also MELCC Report, at **Exhibit C-0269-FRA**, p. 34 ("*L'équipe d'analyse est d'avis que la mesure la plus efficace pour contrer les effets du bruit demeure l'évitement*").

[484] Memorial, p. 61 *et seq.* (paras. 167-186).

[485] Memorial, p. 93 (para. 278).

350 In the Counter-Memorial, the Respondent argues that: (i) GNLQ was aware that the protection of beluga whales was a major issue in the EA of the GNLQ Project;[486] (ii) the MELCC could validly reach its conclusions on the basis of an unpublished study;[487] and (iii) the mitigation measures proposed by GNLQ were not proven to be effective.[488] Each of these contentions is baseless.

351 **First**, it is uncontested that GNLQ, at the outset and since its early studies on the project, was aware of the presence of beluga whales in the Saguenay area.[489] However, the Respondent's allegation that the Prime Minister of Québec and the Minister of Energy and Resources had warned GNLQ during a meeting on 20 May 2015 that the protection of beluga whales would be an issue in the provincial EA of the GNLQ Project is a gross misrepresentation.[490] In reality, the "key point[]" of the meeting was that "[b]elugas will be an issue brought by **national environment[al] groups**", something the Minister of Energy and Resources was "not afraid of".[491]

352 Likewise, the Respondent's contention that TransCanada's Energy East project, which initially included a marine terminal at Cacouna that was eventually abandoned, should have served as a cautionary tale for GNLQ in relation to how the protection of beluga whales could affect a project, is disingenuous.[492] GNLQ had clarified, during its 20 May 2015 meeting with the Prime Minister, "the key characteristics which make [the GNLQ Project] different from TransCanada Energie-Est project".[493] As Mr Le

[486] Counter-Memorial, p. 39 *et seq.* (paras. 108-110, 114, 119-120 and 122-123).

[487] Counter-Memorial, p. 193 *et seq.* (paras. 511-513).

[488] Counter-Memorial, p. 53 (para. 142).

[489] See Bidwai I, at **Exhibit CWS-2**, p. 15 *et seq.* (paras. 48-57).

[490] Counter-Memorial, p. 39 (para. 108).

[491] Internal email correspondence between J. Illich and M.-C. Lavigne from 20 May 2015 to 21 May 2015, at **Exhibit C-0379-ENG**, p. 1 (emphasis added).

[492] Counter-Memorial, p. 40 (para. 109). See also Mémoire du Centre Québecois du Droit de l'Environnement à titre d'*amicus curiae* dated 25 September 2024, p. 8 (paras. 29-30) (wrongly arguing that "[i]*l y a d'ailleurs plusieurs similitudes entre le projet Énergie Est et le projet faisant l'objet du présent litige*").

[493] Internal email correspondence between J. Illich and M.-C. Lavigne from 20 May 2015 to 21 May 2015, at **Exhibit C-0379-ENG**, p. 1.

Verger summarises in his second witness statement, the Energy East project was fundamentally different from the GNLQ Project, in that:

- Energy East consisted of an oil pipeline and marine terminals, with a much higher risk of pollution than an LNG liquefaction facility;
- the Cacouna marine terminal would have been located in the protected area of Gros Cacouna, known as "the beluga whales' nursery", an area that GNLQ had specifically avoided for this very reason;[494] and
- contrary to the GNLQ Project, the development of the Cacouna marine terminal would have involved continuous underwater works, including dredging, which would have damaged the surrounding environment.[495]

353 Furthermore, contrary to what the Respondent appears to imply, the abandonment of the Energy East project is not an example of the Québec and Federal Governments' favour for beluga whale protection over economic development. Even though TransCanada cancelled the Cacouna marine terminal element of the Energy East project in April 2015, it did so not as a result of some policy measure enacted by the Québec or Federal Government, but at its own election, in part because a judge had injuncted it from conducting certain works in the area.[496] Furthermore, the Québec Government had previously authorised an LNG terminal project at Cacouna in 2007 (*i.e.*, the Cacouna LNG project – see Section 4.2.2.3(iii) below) and the Gros Cacouna area is currently being used as a port terminal by the Québec Ministry of Transports and is undergoing important development works, also involving dredging in a protected area.[497]

354 **Second**, it is undisputed that the MELCC Report relied on an unpublished, draft study on the alleged impact of subaquatic noise on beluga whales, on

[494] See Bidwai I, at **Exhibit CWS-2**, p. 15 (para. 48).

[495] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 12 *et seq.* (para. 25). See also MELCC, Environmental Assessment Report for the Cacouna LNG project dated 22 June 2007, at **Exhibit C-0350-FRA**, p. 53 *et seq*. See also Bidwai I, at **Exhibit CWS-2**, p. 9 *et seq*. (para. 38).

[496] See O'Gorman, at **Exhibit RER-4**, p. 35 *et seq.* (para. 82). See also First Witness Statement of Adrienne Menzies dated 15 April 2025, at **Exhibit CWS-7**, p. 28 *et seq.* (paras. 81, 82d)).

[497] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 13 *et seq.* (paras. 29-30).

which GNLQ was not able to comment.[498] Mr Duquette argues that GNLQ was aware of the study, since it was presented during the BAPE hearings.[499] This is misleading. As Mr Le Verger explains, "*la présentation sommaire de cette étude lors des audiences du BAPE ne nous aurait pas permis d'en faire une analyse poussée.*"[500]

355 Mr Duquette further argues that, in certain circumstances, the MELCC must refer to unpublished studies in its work, and that such circumstances existed in the EA of the GNLQ Project.[501] However, he does not identify those circumstances with precision.

356 In any case, the MELCC's approach was inconsistent. On the one hand, the MELCC based its conclusions on inconclusive science,[502] namely (i) a UQO study funded by the MFFP which only produced a preliminary report in December 2019,[503] and no final study;[504] and (ii) a problematic 2021

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[498] See Counter-Memorial, p. 193 *et seq.* (paras. 511-513). See also Memorial, p. 93 (para. 278).

[499] Duquette, at **Exhibit RWS-5**, p. 34 (para. 71).

[500] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 48 (para. 150).

[501] Duquette, at **Exhibit RWS-5**, p. 34 (para. 71) ("[I]*l peut arriver dans certaines circonstances qu'il soit nécessaire de recourir à une étude à paraître dans le cadre de l'analyse environnementale. Ces circonstances existaient dans le cadre du dossier sous étude*"). Counter-Memorial, p. 194 (para. 512).

[502] As noted by GNLQ and acknowledged by the MELCC. See MELCC Report, at **Exhibit C-0269-FRA**, p. 33 ("*l'initiateur indique qu'il ne peut fournir avec certitude l'efficacité de ses mesures sur la population de bélugas* ***puisque les données scientifiques disponibles ne permettent pas d'établir la contribution relative du bruit sous-marin au déclin du béluga ni de seuils au-dessous desquels le bruit des navires devrait se situer pour ne pas constituer une menace pour le béluga***.") (emphasis added). See also Trépanier, at **Exhibit RWS-11 (corrected)**, p. 16 (para. 39) ("*Les données disponibles lors de l'analyse ne permettaient pas d'établir quel niveau de bruit additionnel pourrait être ajouté dans l'habitat du béluga sans le dégrader davantage jusqu'au point de compromettre la réalisation des fonctions vitales de l'espèce et son rétablissement.*").

[503] See MELCC Report, at **Exhibit C-0269-FRA**, p. 35 and Le Verger II, at **Exhibit CWS-3 (Second)**, p. 48 (para. 151) ("[J]*'observe que cette étude préliminaire, dont les conclusions finales devaient être publiées en 2023 à la clôture du programme, est demeurée préliminaire. Aucune étude finale venant confirmer ces conclusions n'a jamais été publiée à ce jour*"). See also Section 2.1.2 above.

[504] As of 2024, the UQO was still developing a simulator of the interactions between ships and beluga whales, and attempting to "[p]*réciser les impacts des différents segments de la navigation sur ces animaux*". See "*Protection du béluga - 2,5 M$ attribués à l'Université du*

draft study relied on by the MELCC, which warned that their estimates of the frequencies used by beluga whales of different ages are the only ones available, and "**should be treated with caution**".[505]

357 On the other hand, the MELCC understood that prohibiting one promoter from navigating on the Saguenay River would not advance the protection of beluga whales. For instance, in a meeting with various Québec and federal agencies on 3 February 2021, the MELCC noted:

> "*La problématique du MELCC, considérant l'incertitude et l'état du béluga, réside dans une question d'équité avec les promoteurs existants qui génèrent de la navigation dans le Saguenay et qui pourraient augmenter cette navigation, sans devoir appliquer de mesures particulières. Le MELCC s'interroge s'il est possible de refuser un projet sur l'unique base des effets de l'augmentation du transport maritime.* ***Considérant les autres projets, la problématique du transport et du béluga restera présente***."[506]

358 In an internal, undated document discussing potential questions for GNLQ, the MELCC admitted that "[l]*es effets de la navigation et du bruit subaquatique sont méconnus, tout comme les mesures d'atténuation à favoriser*".[507] A comment on this point notes: "*il me semble que l'un des enjeux est qu'on ne sait pas trop comment réduire l'impact, ne sachant pas trop comment il se fait sentir?*".[508] The MELCC's conclusion that the GNLQ Project could cause harm to the beluga whales population was thus based on pure speculation and ill-founded.

Québec en Outaouais pour la poursuite de son Programme scientifique béluga-bruit", *Cision*, 9 April 2024, at **Exhibit C-0530-FRA**.

[505] V. Vergara *et al.*, "Can you hear me? Impacts of underwater noise on communication space of adult, sub-adult and calf contact calls of endangered St. Lawrence belugas (*Delphinapterus leucas*)", (2021) 40 5521 *Polar Research*, at **Exhibit C-0375-ENG**, p. 14 (emphasis added).

[506] Agency, Report of meeting between Agency, TC, PC, DFO, MELCC and MFFP dated 3 February 2021, at **Exhibit C-0491-FRA**, p. 5 (emphasis added). See also Agency, Report of meeting between Agency, PC, TC, DFO and MELCC dated 4 September 2020, at **Exhibit C-0490-FRA**, p. 3 (Where a representative of Transport Canada notes that: "*Il est difficile d'exiger à un promoteur en particulier d'adopter des mesures pour contrecarrer des effets négatifs si les autres projets déjà existants ne sont pas soumis aux mêmes exigences.*").

[507] MELCC, Table of main issues for the GNLQ Project, at **Exhibit C-0531-FRA**, p. 2.

[508] MELCC, Table of main issues for the GNLQ Project, at **Exhibit C-0531-FRA**, p. 2.

359 **Third**, the Respondent reiterates the MELCC's contention that the mitigation measures proposed by GNLQ were not effective.[509] This too is disingenuous. In response to the MELCC's last-minute questions of 26 April 2021,[510] GNLQ had provided a list of confirmed noise-mitigation measures, the efficacy of which had been confirmed by Vard Marine Inc. ("**Vard**"), a leading consulting naval architecture and marine engineering company, in a study financed by Transport Canada in 2019.[511]

360 In a meeting among government agencies on 4 September 2020, the representative from Transport Canada had noted that the Vard study provided valuable information on noise-mitigation measures,[512] especially given the lack of information on the subject.[513] In other words, the Vard study to which GNLQ referred in June 2021 was the best available reference for state-of-the-art noise-mitigation measures at the time.[514] Mr Keith Bainbridge, who advised GNLQ on matters related to shipping and noise mitigation measures, explains in his second witness statement that GNLQ was also in advanced discussions with shipbuilders, and would have been able to set a new standard for noise-mitigation measures on its ships.[515]

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[509] Counter-Memorial, p. 53 (para. 142).

[510] See Memorial, p. 90 (para. 269); MELCC, Addendum to the request for undertakings and additional information of 3 March 2021 (26 April 2021), at **Exhibit C-0268-FRA**, question 48.

[511] GNLQ, Answers to questions and commitments requested by the MELCC dated 3 June 2021, at **Exhibit C-0068-FRA**, p. 75 of the PDF. The Government of Canada also invested around CAD 30 million to support the development of a pioneer low-noise and low-emissions tanker by Teekay Shipping (Canada) Ltd. ("**Teekay**") (one of the world's leading energy marine transportation companies headquartered in Vancouver, British Columbia). See "Powered by cleaner Canadian LNG, new tankers to be up to 90 per cent quieter than traditional tankers" dated 30 August 2019, at **Exhibit KB-0021-ENG**. As Mr Bainbridge explains, Teekay was working on implementing measures similar to those that GNLQ was proposing (see Second Witness Statement of Keith Bainbridge dated 17 April 2025, at **Exhibit CWS-4 (Second)**, p. 7 (fn. 16)). In other words, Canada was actively financing the implementation of measures similar to those the MELCC considered ineffective in its assessment of the GNLQ Project.

[512] Agency, Report of meeting between Agency, PC, TC, DFO and MELCC dated 4 September 2020, at **Exhibit C-0490-FRA**, p. 3.

[513] Agency, Report of meeting between Agency, PC, TC, DFO and MELCC dated 4 September 2020, at **Exhibit C-0490-FRA**, p. 2.

[514] Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 6 (para. 16).

[515] Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 7 *et seq.* (para. 21).

361 In addition, the MELCC did not analyse GNLQ's proposed mitigation measures properly; it only commented on three of the nine measures put forward,[516] yet drew sweeping and unsubstantiated conclusions as to their effectiveness.[517] This approach contradicted the opinion of its own experts. Indeed, [redacted][518]

362 **Finally**, the Respondent relies on the MELCC's conclusion that the GNLQ Project would have doubled the number of vessels crossing the Saguenay.[519] The Respondent omits to add that "doubling", in this case, meant adding one passage per day. The proposed increase of 140-165 round-trip voyages each year for the GNLQ Project stands in stark contrast with the 65,000 to 91,000 total annual passages of ships of all sizes and purposes in the beluga habitat across the St. Lawrence and Saguenay Rivers (as explained in Section 2.1.2 above).

363 The documents produced by the Respondent in document production reveal the MELCC's true concern behind its desire to limit GNLQ's marine traffic. In an exchange of comments on a draft of the MELCC Report, Ms Mélissa Gagnon, deputy director of the MELCC's Direction of Environmental Assessments (*Direction de l'évaluation environnementale et stratégique*), wrote:

> "*l'autorisation du projet, en plus d'amener des effets dont les conséquences pourraient être importantes, viendrait doubler le transit actuel dans le Saguenay, ce qui signifie qu'à lui seul le projet de GNL Québec occuperait le même espace que l'ensemble des utilisateurs actuels.* ***Cela me semble beaucoup pour un seul projet,***

[516] See MELCC Report, at **Exhibit C-0269-FRA**, p. 33.

[517] MELCC Report, at **Exhibit C-0269-FRA**, p. 34.

[518] MFFP, Ministerial opinion to MELCC (20201023-28-17) dated 26 November 2020, at **Exhibit C-0532-FRA**, p. 1. See also Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**, p. 12 *et seq.*

[519] Counter-Memorial, p. 53 (para. 142).

> ***qui ne vise pas à répondre à un besoin du Québec, en approvisionnement en ressources, ni en exportation de nos ressources ou produits d'ici***."[520]

364 This statement eerily resonates with Premier Legault's statement in a 19 May 2022 radio interview that, contrary to the reasons stated in the Québec Government's Decree, the real reason for the rejection of the Project was not so much the protection of beluga whales, but rather the fact that it concerned natural gas coming from outside Québec to be exported outside Québec, (allegedly) without benefitting Québec.[521]

365 As noted above, following the refusal of the GNLQ Project, [redacted][522]

366 The Respondent has refused to produce certain documents relating to this exchange, despite the Tribunal's order to do so,[523] specifically documents relating to [redacted]

[520] Internal MELCC email correspondence between M. Duquette and C.-O. Laporte dated 21 June 2021, at **Exhibit C-0533-FRA**, p. 3 (emphasis added). See also Ms Gagnon's comments on an earlier draft, at MELCC, Draft of the Environmental Analysis Report (3211-10-021), at **Exhibit C-0534-FRA**, p. 32 ("*l'autorisation du projet, en plus d'amener des effets dont les conséquences pourraient être importantes, viendrait doubler le transit actuel dans le Saguenay. ce qui signifie qu'à lui seul le projet de GNL Québec occuperait le même espace que l'ensemble des utilisateurs actuels. Cela me semble beaucoup pour un seul projet, qui ne vise pas à répondre à un besoin du Québec, n'y en approvisionnement en ressources ni en exportation de nos ressources ou produits d'ici. Ajouter aussi au besoin pour nuancer l'espace occupé par les utilisateurs actuels versus les potentiels autorisés comme le port de Saguenay et blackrock.*").

[521] Radio interview to Premier Legault, "*Le show du matin*" on Radio Station CKYK-FM 95.7, 19 May 2022, at **Exhibit C-0033-FRA**. See also Memorial, p. 95 (para. 283).

[522] See Section 2.5.4.2 above.

[523] See PO4, Annex A, p. 45 (Request 10); List of documents responsive to Request No. 12 that the Respondent has refused to produce, at **Exhibit C-0535**; See [redacted] at **Exhibit C-0281**, p. 1-2.

[redacted][524]

367 Had these documents been supportive to the Respondent's narrative, it would have produced them voluntarily or upon the Tribunal's order.

368 **The Tribunal should therefore draw the following adverse inferences from the Respondent's refusal to produce these documents:**

i) The view of the MERN [redacted] and shared with other ministries was that the rejection of the GNLQ Project set a problematic precedent with regard to future projects.

ii) The view of the MERN and other ministries was that the GNLQ Project had been treated differently from other projects in like circumstances.

369 To conclude, the contemporaneous evidence, direct or inferred, shows that that the decision made by the Québec Government in the Decree was unfounded. It relied on wrongful, speculative grounds which were, and remain, unprecedented grounds for rejection and targeted only the GNLQ Project.

2.6 The multiple irregularities in the federal EA process of the GNLQ Project culminated in an illegal decision by the Canadian Government

370 In the Memorial, the Claimant explained that Canada illegally prejudged the outcome of the federal EA process by announcing, before the Agency had completed its assessment, that it would not authorise the GNLQ Project.[525] As also explained in the Memorial, in rejecting the GNLQ Project, the Federal Government relied on grounds set out in the Agency Report that were outside the Agency's jurisdiction and therefore could not serve as lawful bases for that decision.[526]

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[524] List of documents responsive to Request No. 12 that the Respondent has refused to produce, at **Exhibit C-0535**.

[525] Memorial, p. 105 (para. 321); Northey I, at **Exhibit CER-2**, p. 15 *et seq.* (paras. 43, 47).

[526] Memorial, p. 102 *et seq.* (paras. 312-340).

371 The Claimant addresses the Respondent's arguments as to these two issues below in **Sections 2.6.1** and **2.6.2** respectively, none of which rebut the Claimant's position.

2.6.1 Following the Québec Government's decision, Canada illegally prejudged the outcome of the federal EA

372 Less than two months after the Québec Government's Decree, and while the federal EA process was ongoing, the Federal Government revealed that it had already decided to reject the GNLQ Project. Specifically, a journalist, quoting *verbatim* a spokesperson for the Liberal Party of Canada, announced the following on (then) Twitter: "'*Le Parti libéral du Canada est d'accord avec le gouvernement du Québec et n'appuie pas ce projet. Il est clair pour nous qu'il ne verra pas le jour', confirme un porte-parole*."[527]

373 This statement was relayed the next day in the Québec press.[528] As Mr Northey explained in his first report, such a statement on the outcome of an EA prior to the completion of the statutory process constitutes an illegal prejudgment under Canadian law.[529]

374 In its Counter-Memorial, Canada argues that the statement did not reflect a prejudgment of the outcome of the EA, but rather the fact that, irrespective of the outcome of the federal assessment, Québec's decision to reject the GNLQ Project effectively prevented it from "seeing the light of day" because approval at both provincial and federal levels was required.[530] This argument is factually inaccurate and legally ill-founded.

375 **First**, the Respondent's position is contradicted by the facts and, to start with, the content of the "tweet" in question, which stated that "[l]*e Parti*

[527] Memorial, p. 103 *et seq*. (paras. 316-320); A. Shields (journalist at *Le Devoir*), Tweet dated 14 September 2021, at **Exhibit C-0036-ENG-FRA**.

[528] Memorial, p. 104 (para. 317); "*Mises à pied massives chez GNL Québec et Gazoduq*", *Le Devoir*, 15 September 2021, at **Exhibit C-0293-FRA**; "*O'Toole réitère son appui à GNL Québec et s'attaque aux bloquistes*", *La Presse*, 15 September 2021 (accessed on 19 October 2023), at **Exhibit C-0294-ENG-FRA**.

[529] Memorial, p. 105 (para. 321); Northey I, at **Exhibit CER-2**, p. 15 *et seq.* (paras. 43, 47).

[530] Counter-Memorial, p. 209 (para. 542).

libéral du Canada ***est d'accord avec le Gouvernement du Québec*** […]." [531] The spokesperson's statement therefore manifested a clear opinion against the GNLQ Project on the part of the Liberal Party itself (*i.e.*, the incumbent party in Federal Government). Not only that but the same spokesperson specified that this reflected the views of the Prime Minister's team.[532] As such and because such a position had no possible legal basis at the time, it was a prejudgment of the outcome of the EA process.

376 Mr Hubbard, who was the President of the Agency at the time and filed a witness statement in support of the Counter-Memorial, admits that:

> "It is **unusual** for a political party to **express an opinion on the fate of a project that is undergoing an environmental assessment**, especially when that political party is **the one that forms the government**."[533]

377 Indeed, based on the relevant documents produced in document production, Mr Northey concludes in his second report that the federal Cabinet decided to refuse the GNLQ Project several months **before** the completion of the federal EA process, and notably before the publication of the Agency Report, which was necessary to determine whether or not the GNLQ Project was likely to cause unmitigable adverse environmental effects.[534]

378 As Mr Northey explains, there were still four prerequisite steps to be completed under the CEAA 2012 before the Federal Government could lawfully take the decision to refuse the GNLQ Project:

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[531] A. Shields (journalist at *Le Devoir*), Tweet dated 14 September 2021, at **Exhibit C-0036-ENG-FRA**.

[532] "*O'Toole réitère son appui à GNL Québec et s'attaque aux bloquistes*", *La Presse*, 15 September 2021 (accessed on 19 October 2023), at **Exhibit C-0294**, p. 2 ("[L]***'équipe de Justin Trudeau*** *'est d'accord avec le gouvernement du Québec et n'appuie pas ce projet'*") (emphasis added).

[533] Witness Statement of Terrence Hubbard dated 11 July 2024, at **Exhibit RWS-7**, p. 5 (para. 17).

[534] Northey II, at **Exhibit CER-2 (Second)**, p. 31 *et seq*. (paras. 73-78).

- a report by the Agency identifying significant adverse environmental effects, which must be provided to the Minister under section 25(2);
- a ministerial decision that these significant effects were not mitigable under section 52(1);
- the Minister referring these significant effects to Cabinet under section 52(2); and
- The Cabinet deciding under section 52(4) that there was no justification for the immitigable significant adverse effects referred to it by the Minister.[535]

379 In short, without the Agency Report, there was no basis for a negative decision.[536]

380 That the Federal Government prejudged the outcome of the federal EA process, if not planned to ignore it altogether, also transpires from a DFO email dated 24 September 2021, *i.e.*, a few days after the Liberal Party spokesperson's statement was reported on Twitter and, importantly, after the Liberal Party won the federal elections on 20 September 2021, therefore remaining in power. In that email, the DFO's Ms Corriveau summarised for her colleagues a meeting she had had with the Agency's Johannie Martin.[537] She described the next steps in the GNLQ Project EA and notably the preparation of potential conditions to be added in case the GNLQ Project were to be accepted by the Canadian Government.[538] Importantly, she added that, according to Ms Martin, "***Trudeau*** [Canada's then Prime Minister] ***aurait indiqué en élection de vouloir refuser le présent projet, alors il est probable que nous ne nous rendions jamais aux conditions provisoires.***"[539]

381 In other words, not only had the Federal Government, and specifically the Prime Minister, already decided to reject the GNLQ Project, and thus

[535] Northey II, at **Exhibit CER-2 (Second)**, p. 32 *et seq*. (paras. 75-77).

[536] Northey II, at **Exhibit CER-2 (Second)**, p. 33 *et seq.* (para. 78).

[537] Internal DFO email dated 24 September 2021, at **Exhibit TLV-0156-FRA**.

[538] Internal DFO email dated 24 September 2021, at **Exhibit TLV-0156-FRA**, p. 1.

[539] Internal DFO email dated 24 September 2021, at **Exhibit TLV-0156-FRA**, p. 1 (emphasis added).

prejudged the outcome of the EA, but the Agency, in charge of conducting that assessment, already knew that the GNLQ Project would be rejected and was influenced by that in finalising its report.[540]

382 Mr Le Verger explains, based on his contemporaneous meeting notes, how the Agency's tone changed after Québec's Decree. He provides an account of two meetings he had with the then President of the Agency, Mr Hubbard, on 14 July (before the Decree) and on 26 August 2021 (after the Decree). During the 14 July 2021 meeting, Mr Hubbard appeared reassuring, indicating that the Agency's draft report would be issued shortly and that the only issue was the DFO's concern with the beluga whales, but noting that this was not something that GNLQ needed to worry about.[541] However, during the 26 August 2021 meeting, Mr Hubbard appeared concerned about the impact of Canada's general elections on the Federal Government's decision.[542]

383 Mr Le Verger's account of these meetings corroborates the Claimant's case that the Federal Government's prejudgment of the outcome of the federal EA was motivated by a desire to defer to the Québec Government's decision, likely for electoral motives. This also transpires from the Agency's recommendation to the federal Minister of Environment, which emphasises the Québec Government's Decree as part of the "[a]*utres considerations*" that should be taken into account by the Minister of Environment in its decision on whether to refer the matter to the federal Cabinet, and adds the Québec Government decree as an annex to its recommendations.[543]

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[540] Northey II, at **Exhibit CER-2 (Second)**, p. 32 (para. 74).

[541] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 54 (para. 169). See also Notes of meetings with the Agency from 14 July 2021 to 23 September 2022, at **Exhibit TLV-0154-ENG**, p. 1.

[542] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 54 (para. 169). See also Notes of meetings with the Agency from 14 July 2021 to 23 September 2022, at **Exhibit TLV-0154-ENG**, p. 2.

[543] *L'évaluation environnementale au Québec méridional*, at **Exhibit RBE-0003-FRA**, p. 5 ("*Le projet a été soumis à la procédure d'évaluation et d'examen des impacts sur l'environnement par le gouvernement du Québec en vertu de la Loi sur la qualité de l'environnement. Le 21 juillet 2021, le Québec a annoncé qu'il refusait le projet, une décision officialisée par un décret publié le 11 août 2021 (Annexe IV). Malgré la décision du gouvernement du Québec, le promoteur a indiqué son intention de poursuivre l'ÉE fédérale. Le*

384 **Second**, the Respondent's argument that the Québec Government's rejection of the GNLQ Project effectively prevented it from being approved by the Federal Government is wrong as a matter of law.

385 As Mr Northey explains, under the constitutional doctrine of paramountcy under Canadian law, "the existence of a prior no by Quebec was not sufficient to settle the outcome of the Port Terminal."[544] Thus, he adds, "a federal yes could have overcome this provincial no."[545]

386 **Finally**, the Respondent has identified, but refused to produce, despite the Tribunal's order to do so, four documents in response to the Claimant's request for documents regarding the referral by the federal Minister of Environment and Climate Change to the Federal Government, dated between November 2021 and February 2022.[546] Those four documents, listed in the Respondent's second privilege log, represent exchanges between the Minister of Environment and "*fonctionnaires, bureau du conseil privé*" and/or members of the federal Cabinet and have an "estimated" date of "December 2021". Instead of providing the description of those documents, in the privilege log, the Respondent marked in each case "*section intentionnellement laissée en blanc*".[547]

387 In the same vein, the Respondent has not produced any documents responsive to the Claimant's request for documents recording the federal Cabinet's deliberations leading to the Decision Statement and dated between November 2021 and February 2022. It has identified but refused to produce two documents responsive to this request, despite the Tribunal's order that it should do so.[548] These are documents exchanged with the federal cabinet and the *Conseil du Trésor* but where, once again, in its

promoteur est toujours tenu d'obtenir toutes les approbations et tous les permis fédéraux et provinciaux nécessaires à la réalisation du projet avant d'aller de l'avant.").

[544] Northey II, at **Exhibit CER-2 (Second)**, p. 34 *et seq*. (para. 80).

[545] Northey II, at **Exhibit CER-2 (Second)**, p. 34 *et seq*. (para. 80).

[546] See PO4, Annex A, p. 69 (Request 17); List of documents responsive to Request No. 17 that the Respondent has refused to produce, at **Exhibit C-0536-ENG-FRA**.

[547] See List of documents responsive to Request No. 17 that the Respondent has refused to produce, at **Exhibit C-0536-ENG-FRA**. See also PO11, Annex A.

[548] See PO4, Annex A, p. 72 *et seq.* (Request 18); List of documents responsive to Request No. 18 that the Respondent has refused to produce, at **Exhibit C-0537-ENG-FRA**.

privilege log, the Respondent has deliberately left the subject matter blank.[549]

388 If these documents were reflective of a lawful decision-making process, based on science and data and free from improper political interference, the Respondent would have produced them, whether voluntarily or on the Tribunal's order.

389 **The Tribunal should therefore draw the following adverse inference from the Respondent's refusal to produce these documents**: Prior to its 7 February 2022 Decision Statement, the Federal Government had already decided to reject the GNLQ Project and follow the Québec Government's own decision, regardless of the outcome of the federal EA process for the GNLQ Project.

2.6.2 The Federal Government rejected the GNLQ Project on predetermined and unsubstantiated grounds outside the scope of the EIS Guidelines

390 On 9 December 2021, the federal Minister of Environment decided that, having considered the proposed mitigation measures, the project was likely to cause significant adverse environmental effects.[550] On 7 February 2022, the Federal Government decided to reject the GNLQ Project.

391 The Respondent has refused to produce a number of documents relating to the decision of the federal Minister of Environment, despite being ordered by the Tribunal to do so.[551] However, the actual decision of the Federal Government to reject the GNLQ Project relied on three grounds, namely the significant adverse environmental effects of the project on:

- the "increase in the pollutant greenhouse gas emissions";
- "the St. Lawrence beluga whale"

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[549] PO11, Annex A.

[550] *Note de service au ministre: Projet Énergie Saguenay – Décision sur l'importance des effets et renvoi possible au gouverneur en conseil* dated 9 December 2021, at **Exhibit TH-0003-FRA**.

[551] List of documents responsive to Request No. 17 that the Respondent has refused to produce, at **Exhibit C-0536-ENG-FRA**.

- "the cultural heritage of the Innu First Nations".[552]

This is not disputed.[553] Nor can it be disputed that these grounds resemble those invoked by the Québec Government to reject the Project on 21 July 2021.

392 In the Memorial, the Claimant demonstrated that all three grounds were outside the Agency's jurisdiction as defined by the EIS Guidelines,[554] and were in any event unsubstantiated.[555] Nothing in the Counter-Memorial changes this position, as explained below in **Sections 2.6.2.1** and **2.6.2.2**.

2.6.2.1 All the grounds on which the Federal Government relied to reject the GNLQ Project were outside the scope of the EIS Guidelines

(i) Upstream GHG emissions of the Project

393 In the Memorial, the Claimant, supported by Mr Northey's expert testimony, has shown that the Agency's consideration of upstream GHG emissions was inconsistent with the CEAA 2012, given that the EIS Guidelines specifically **excluded** upstream GHG emissions from the EA of the GNLQ Project.[556]

394 The Agency was fully aware of this because its draft Report of September 2021 included statements recalling this exclusion and the fact that GHG emissions would not be considered as part of the federal Minister of Environment's decision.[557] Not only did these statements disappear from the final version of the Report, but the Agency actively engaged in an analysis of upstream GHG emissions in the final Agency Report, on which

[552] Impact Assessment Agency of Canada, Environmental Assessment Decision Statement dated 7 February 2022, at **Exhibit JM-0053-ENG**; Agency, Press Release "Government of Canada Releases the Final Decision on the Energie Saguenay Project", 7 February 2022, at **Exhibit C-0295-ENG**.

[553] Counter-Memorial, p. 63 (para. 171).

[554] Memorial, p. 105 *et seq.* (para. 324), p. 107 (para. 329), p. 109 (para. 335).

[555] Memorial, p. 105 *et seq.* (para. 323), p. 107 *et seq.* (paras. 330-332, 333-335).

[556] Memorial, p. 105 *et seq.* (para. 324); Northey I, at **Exhibit CER-2**, p. 42 (para. 120).

[557] Agency, Draft Environmental Assessment Report (September 2021), at **Exhibit C-0296-ENG**, p. 37; see also Memorial, p. 106 (para. 325).

the Federal Government relied to find that the GNLQ Project had adverse effects on GHG emissions and to reject it.[558]

395 In its Counter-Memorial, the Respondent contends that the Agency was entitled to request information about upstream GHG emissions, and that it did not draw any conclusions from anticipated upstream GHG emissions taken in isolation, but only as part of the cumulative effects of the GNLQ Project on GHG emissions.[559]

396 As explained above, this contention does not sit well with the clear exclusion of upstream GHG emissions from the scope of the EIS Guidelines. The EIS Guidelines do not provide for any exception to that exclusion that would permit upstream GHG emissions to be considered for the assessment of cumulative effects. The EIS Guidelines unambiguously state that the "production of upstream GHG emissions are **not considered to be part of the Project for the purposes of the environmental assessment**."[560] Likewise the EIS Guidelines specify that:

> "[T]he Minister will **not make a decision under CEAA 2012 about whether […] the production of upstream GHGs […] are likely to cause significant adverse environmental effects**."[561]

397 In other words, GHG emissions were squarely outside the limits of the federal EA. The Agency could ask about them but only for information purposes, which the EIS Guidelines define as follows: "for use by programs or activities within federal jurisdiction."[562]

(ii) Impact on beluga whales

398 In its Memorial, the Claimant demonstrated that the exclusion, in the EIS Guidelines, of maritime shipping from the scope of the EA prevented the

[558] Memorial, p. 106 (paras. 326-327); Agency Report, at **Exhibit C-0037-ENG**, p. 48 *et seq*.

[559] Counter-Memorial, p. 60 *et seq.* (paras. 163, 521).

[560] EIS Guidelines, at **Exhibit C-0199-ENG**, p. 4 (emphasis added).

[561] EIS Guidelines, at **Exhibit C-0199-ENG**, p. 4 (emphasis added).

[562] EIS Guidelines, at **Exhibit C-0199-ENG**, p. 4.

Agency, and ultimately the Federal Government, from lawfully considering the effect of the GNLQ Project on beluga whales.[563]

399 In its Counter-Memorial, the Respondent acknowledges that maritime shipping was excluded from the scope of the assessment by the EIS Guidelines.[564] However, it contends that that exclusion was "reversed" in August 2019 when the Agency decided to amend the geographical scope of the GNLQ Project to include the impact of LNG tankers on the Saguenay River, on the ground that GNLQ allegedly had a "certain level of influence" over the ships.[565] This argument is wrong on three levels.

400 **First**, given that the exclusion of maritime navigation from the scope of the EA at the outset resulted from a deliberate choice by the Agency (after the DFO had specifically asked that it be included),[566] a reversal of the Agency's approach would have been clear and open – and certainly not done obliquely. However, the letter from the Agency to GNLQ dated 20 August 2019 did not mention any amendment of the EIS Guidelines, let alone contain any language revoking the exclusion of maritime shipping from the scope of the EA as set out in the EIS Guidelines.[567]

401 The letter mentioned: "*l'Agence a procédé à une révision de la portée géographique de la navigation à considérer dans le cadre de l'évaluation*

[563] Memorial, p. 107 (para. 329).

[564] Counter-Memorial, p. 56 *et seq.* (para. 152).

[565] Counter-Memorial, p. 57 (para. 153).

[566] See ECCC Comments on draft EIS Guidelines, at **Exhibit CC-0008-FRA**, p. 47 of the PDF (showing ECCC's comments on the draft EIS Guidelines, suggesting, in particular, to extend the geographical scope of the assessment to the Saguenay-St. Lawrence Maritime Park); and Email from the DFO to the Agency, at **Exhibit ST-0009-FRA**, p. 12 and 46 of the PDF (where the DFO comments on the scope of assessment of navigation, stating that it will assess effects on the beluga whale habitat as a whole). See also Email from the DFO to the Agency, at **Exhibit ST-0009-FRA**, p. 1 of the PDF (in which the DFO notes that it had sought to extend the scope of assessment for the North Shore Terminal project, and that the Agency had replied that it was not possible to impose conditions for activities outside of a promoter's control. Despite agreeing to produce documents responsive to DPR 13 in the document production process in this arbitration, the Respondent has failed to produce the Agency's answer to the DFO's email). The Agency **rejected** both the ECCC's and the DFO's suggestions in the EIS Guidelines. EIS Guidelines, at **Exhibit C-0199-ENG**, p. 41 of the PDF.

[567] Letter from the Agency to GNLQ, at **Exhibit GB-0025-FRA**.

environnementale en cours du Projet."[568] However, it also indicated that the purpose of this extension was to "*définir la façon appropriée de determiner quelles activités liées à un projet, comme la navigation maritime, doivent être incluses dans la portée de l'évaluation environnementale en vertu de la* [CEAA 2012]."[569]

402 In other words, according to the Agency, the extension of the EA geographical scope was merely an experiment to better define the scope of future projects under the CEAA 2012.

403 Mr Northey, in his second report, confirms that he finds "no basis in this letter to conclude that this letter amended and overturned the express exclusion in the EIS Guidelines regarding the **Environmental Assessment Decision**".[570] All Mr Northey gleans from the letter is an indication that the Agency intends to gather information regarding maritime shipping in the Saguenay River, which is explicitly authorised by section 3.2.1 of the EIS Guidelines.[571] However, nothing in the letter suggests that the EIS Guidelines would be modified to include maritime shipping as part of the matters on which the Minister would decide on the significance of environmental effects.[572]

404 **Second**, even assuming that the intended purpose of the letter had been to amend the scope of the EA (which it clearly was not), the basis on which the Agency should have purported to do so, namely GNLQ's alleged "*pouvoir d'influence*" over LNG tankers, would have been misconceived.

405 As Mr Bainbridge explains in his second witness statement, "the control over the vessels would have remained at all times with their shipmaster, who would only have answered to the shipping company, not GNLQ."[573] Furthermore, Mr Bainbridge explains that the shipmaster would have had

[568] Letter from the Agency to GNLQ, at **Exhibit GB-0025-FRA**, p. 1.

[569] Letter from the Agency to GNLQ, at **Exhibit GB-0025-FRA**, p. 1.

[570] Northey II, at **Exhibit CER-2 (Second)**, p. 57 *et seq*. (para. 149) (emphasis in original).

[571] Northey II, at **Exhibit CER-2 (Second)**, p. 58 (para. 151).

[572] Northey II, at **Exhibit CER-2 (Second)**, p. 58 *et seq*. (paras. 152-153).

[573] Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 4 (para. 10).

to relinquish control of the vessel to pilots of the Corporation of Lower St-Lawrence Pilots when entering the Saguenay River.[574]

406 The Agency itself acknowledged, in a document prepared in the context of the assessment of the North Shore Terminal project, that the recourse to pilots means surrendering control over a ship in a given area, with the consequences that the area concerned could not be subject to conditions for the project proponent to apply under the CEAA 2012 (but information obtained during the EA could be transmitted to federal authorities for them to take specific measures):

> "*Les stations de pilotage représentent donc une limite géographique à partir de laquelle il y a un certain niveau de contrôle et où des mesures peuvent être exigées par une autorité fédérale. La navigation dans cette zone ne fait donc pas l'objet de conditions LCÉE pouvant être mises en œuvre par le promoteur, mais l'information recueillie durant l'évaluation environnementale peut être transférée aux autorités fédérales ayant un contrôle sur la navigation afin que des mesures soient prises par ces autorités*."[575]

407 The Respondent's document production revealed that Ms Bélanger, who participated in the Agency's assessment of the GNLQ Project and testifies for the Respondent in this arbitration, confirmed the same point in an email dated 12 June 2015, in the context of the North Shore Terminal project:

> "*Nous ne pouvons inclure dans la portée de l'ÉE la navigation à l'extérieur de la zone où le promoteur a une certaine influence puisque les navires ne seront pas sous son contrôle, il nous est donc*

[574] Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 4 (paras. 10-11). ("Furthermore, foreign ships of more than 35 meters sailing in the Saguenay River (starting from the station of Les Escoumins, on the St Lawrence River and near the confluence with the Saguenay River) must be sailed by pilots of the Corporation of Lower St-Lawrence Pilots […]. Thus, between Les Escoumins and Grande Anse where the GNLQ loading facility would have been (a roughly 150-kilometre distance), the ships chartered by GNLQ would have been under the control of the shipmaster, with the mandatory assistance of the CLSLP pilots"). On the mandatory piloting on the Saguenay River, see also EIS (Annexes, Volume 4), at **Exhibit C-0202-FRA**, p. 540 of the PDF.

[575] Scope of the EA for the North Shore Terminal project dated 15 May 2015, at **Exhibit C-0538-FRA**, p. 5.

> *impossible de lui imposer des conditions en lien avec la navigation à l'extérieur de sa zone de juridiction. […] La navigation est une activité accessoire au projet, mais qui n'est pas réalisée par le promoteur et qui est 'mobile'* […]"[576]

408 Like the proponent of the North Shore Terminal project, GNLQ would have had no control over the LNG tankers that would have transited through the Saguenay River. The Agency's reference in its 20 August 2019 letter to GNLQ having "*pouvoir d'influence*" over LNG tankers was thus unfounded and could not have provided a proper basis to modify the scope of the EA.

409 In addition, as Mr Northey notes in his second report, the reference in that same letter to an alleged "*augmentation importante*" in navigation on the Saguenay River that "*est susceptible de causer des effets potentiels importants*"[577] contradicts the Agency's own opinion, as set out in its 2018 report on the North Shore Terminal project, that the cumulative increase in ship traffic in the Saguenay (which included shipping generated by the GNLQ Project) would not have significant effects.[578]

410 **Finally**, as Mr Northey notes, the documents produced by the Respondent in document production show that, six months **before** its 20 August 2019 letter, the Agency had in fact decided (improperly and unbeknownst to GNLQ) to include maritime shipping in its assessment, in complete contradiction with the EIS Guidelines.[579] Therefore, contrary to the Respondent's position in its Counter-Memorial, on no interpretation could the 20 August 2019 letter constitute a decision to expand the scope of the EA: that decision had already been taken but not communicated to GNLQ. At most, the Agency's August 2019 letter was thus a mere indication (albeit certainly not a clear one) that the Agency had already made this irregular decision.

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[576] Email correspondence between G. Belanger (Agency) and P. Beaufils (Parks Canada) from 11 to 12 June 2015, at **Exhibit C-0539-FRA**, p. 1.

[577] Letter from the Agency to GNLQ, at **Exhibit GB-0025-FRA**, p. 2.

[578] Northey II, at **Exhibit CER-2 (Second)**, p. 60 *et seq*. (para. 157). See also Section 4.2.2.3(iii) below.

[579] Northey II, at **Exhibit CER-2 (Second)**, p. 59 *et seq*. (paras. 154-156).

411 This confirms that the Respondent's contention that the Agency amended the EIS Guidelines in relation to maritime navigation is absurd. In the six instances identified by Mr Northey where the Agency amended its guidelines, the amending document was communicated to the proponent, made available on the Agency's public record and "expressly called an amendment to the EIS Guidelines." [580] An internal email, never communicated to the proponent, or made public, cannot constitute a lawful amendment of the EIS Guidelines.

(iii) Impact on Innu First Nations' cultural heritage

412 In the Memorial, the Claimant showed that the Agency's conclusion on the alleged lack of social acceptability of the GNLQ Project derived from indirect effects of increased maritime shipping on beluga whales and, in turn, on the cultural heritage of the Innu First Nations.[581] In other words, the Agency's conclusion on the Innu First Nations turned on its findings on the impact of the GNLQ Project on beluga whales, which, as explained above, was outside the scope of its EA, as defined by the EIS Guidelines, and thus unlawful.[582]

413 In the Counter-Memorial, the Respondent admits that the Agency's conclusions regarding the First Nations' cultural heritage derived from its finding relating to the impact of the Project on beluga whales.[583] It does not dispute either that, to the extent that it derived from a finding that was impermissible under the CEAA 2012 and the EIS Guidelines, the Agency's finding regarding the First Nations' cultural heritage was also impermissible.

414 In conclusion, all the grounds set out in the Agency's Report and relied on by the Federal Government were outside the scope of the EA.

415 These grounds also contradicted the EIS Guidelines. Indeed, neither the Agency in its Report nor the Federal Government in its decision relied on

[580] Northey II, at **Exhibit CER-2 (Second)**, p. 38 (para. 89).

[581] Memorial, p. 108 (para. 333).

[582] Memorial, p. 109 (para. 335).

[583] Counter-Memorial, p. 62 (para. 168).

any potential environmental effects that did fall within the proper scope of the Agency's EA as per the EIS Guidelines. In the absence of any such effects that could not be mitigated, under Canadian law, the Minister of Environment had no choice but to approve the Project, instead of making a finding of significant adverse environmental effects and referring the GNLQ Project to the Cabinet. As explained by Mr Northey:

> "[I]f the Minister had followed and **not** contradicted the 2016 EIS Guidelines, the Minister would have concluded that there were **no** significant adverse environmental effects. By the terms of CEAA, he would have then decided to approve the Port Terminal, and cabinet would have had no role in decision making"[584]

416 Furthermore, as explained below, the specific grounds on which the Federal Government did purport to rely were either unfounded or were environmental effects that could be mitigated, making the Minister of Environment's decision to refer the matter to the federal Cabinet even more incomprehensible.

2.6.2.2 All the grounds on which the Federal Government relied to reject the Project were unsubstantiated and/or concerned environmental effects that could be mitigated

417 As noted above, the Federal Government's decision to reject the GNLQ Project was based upon its alleged impact on (i) GHG emissions, (ii) beluga whales and (iii) the Innu First Nations' cultural heritage, and on the Agency's conclusion, in respect of each of these grounds, that the GNLQ Project had significant effects that could allegedly not be mitigated.

418 As explained by Mr Northey in his second report, under the CEAA 2012, the federal Minister of Environment can only refer a project to the federal Cabinet for a decision on whether "significant effects" on the environment are "justified in the circumstances" if the Agency has identified unmitigable significant effects in the first place.[585] In the absence of such

[584] Northey II, at **Exhibit CER-2 (Second)**, p. 12 (para. 26) (emphasis in original).

[585] Northey II, at **Exhibit CER-2 (Second)**, p. 9 *et seq*. (para. 18).

a finding by the Agency, the Minister of Environment cannot refer a project to the federal Cabinet, and instead must approve it.[586]

419 For instance, the federal Minister of Environment approved the controversial Bay du Nord project without referring it to the federal Cabinet, after the Agency's EA report concluded that the project was not likely to cause significant adverse environmental effects.[587] This was so even if, in that case, the Minister's decision contained a series of GHG-related conditions and mitigation measures, including that the proponent of the project, Equinor, include GHG emissions reduction measures in the design of the project and become carbon neutral by 2050.[588]

420 As explained below, in the case of the GNLQ Project, none of the Agency's findings of "unmitigable significant effect" were justified, such that the project should have been approved without being submitted to the federal Cabinet.

(i) The Agency's evaluation of GHG emissions was flawed

421 In the Memorial, the Claimant explained that the Agency's conclusion in its Report that the GNLQ Project would result in significant adverse transboundary environmental effects that would contradict Canada's and Québec's climate change objectives was erroneous, and indeed contradictory to the views of the MELCC's own experts that the GNLQ Project was compatible with Québec's GHG reduction objectives.[589]

422 In the Counter-Memorial, the Respondent alleges that the Agency relied on the views of federal experts,[590] and seeks to explain (unconvincingly)

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[586] Northey II, at **Exhibit CER-2 (Second)**, p. 9 *et seq*. (para. 18).

[587] Agency, Environmental Assessment Report for Bay du Nord (December 2021), at **Exhibit C-0365-ENG**, p. iv; Minister of Environment and Climate Change Canada, Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012 for the Bay du Nord Development Project dated 6 April 2022, at **Exhibit C-0364-ENG**.

[588] Minister of Environment and Climate Change Canada, Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012 for the Bay du Nord Development Project dated 6 April 2022, at **Exhibit C-0364-ENG**, p. 17 *et seq*. (paras. 6.1-6.5).

[589] Memorial, p. 105 (para. 323).

[590] Counter-Memorial, p. 59 *et seq.* (para. 161).

why it disregarded GNLQ's plan to achieve carbon neutrality and ignored the potential of the LNG produced by the GNLQ Project to replace more polluting fuels such as coal and fuel oil.[591] In doing so, the Respondent glosses over material deficiencies in the Agency's analysis.

423 **First**, the Respondent's attempt to absolve the Agency for dismissing GNLQ's carbon neutrality commitment is disingenuous.

424 GNLQ's commitment had a huge significance in the context of the Agency's analysis, as it should have effectively put to rest any concern Canada or Québec may have had in relation to direct GHG emissions in Canada: if GNLQ committed to suppress or offset the GHG emissions arising from the operation of the plant, the ones under GNLQ's responsibility and control, and became carbon neutral, the GNLQ Project would have had a much more limited impact on Canada's and Québec's GHG emissions, which were under GNLQ's responsibility and control.

425 In its Report, the Agency

- acknowledged that GNLQ had made such a commitment, which would have been effective as of the first year of operations (although GNLQ had also committed to ensuring that the construction phase would also be carbon neutral);[592]
- accepted that experts of Environment and Climate Change Canada ("**ECCC**") considered this plan credible, subject to implementing four recommendations;[593] and

[591] Counter-Memorial, p. 60 (para. 162).

[592] Agency Report, at **Exhibit C-0037-ENG**, p. 45 ("The Proponent has also committed to implementing a carbon neutrality program at the time of the plant's operation […]. The Proponent indicates that this plan would apply to emissions accounted for and reported under the Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere, effective from the first year of operation, and thus only to the emissions linked to the liquefaction process, which is equivalent to approximately 88% of the Project's emissions.").

[593] Agency Report, at **Exhibit C-0037-ENG**, p. 45 *et seq*. These recommendations were (i) extending it to upstream emissions (as opposed to only production, which still corresponded to 88% of the Project's total GHG emissions); (ii) taking into account a possible rise in the price of carbon offset credit proposals; (iii) ensuring compliance with the internationally transferred

- acknowledged that, although a new regulation of July 2020 required proponents to "provide a credible plan to describe how projects with a life beyond 2050 will achieve net zero emissions **by that time**", the assessment of the GNLQ Project was under the CEAA 2012 regime, which did not impose such a requirement.[594]

426 Yet, in the same section of its Report, the Agency decided to ignore GNLQ's – much stronger – commitment to achieve carbon neutrality from the construction stage, because its plan to do so was allegedly not credible, despite the recommendations identified by ECCC.[595] The Agency did not explain why GNLQ would have been unable to implement these recommendations, and why it could not have instead imposed those as conditions.

427 In the arbitration, the Claimant requested that the Respondent produce the documents reflecting the ECCC's or the Agency's analysis leading to this conclusion.[596] The Respondent agreed to do so, but did not have any responsive document to produce. This confirms that no such documents exist, and that the Agency's decision with respect to GNLQ's carbon neutrality plan was not based on anything tangible, let alone a proper analysis.

428 By dismissing the impact of GNLQ's voluntary carbon neutrality plan on the GHG emissions of its project for lack of credibility, the Agency effectively held the GNLQ Project to a higher standard than the projects evaluated post-July 2020, which only had to commit to reach carbon neutrality by 2050.

429 Had the Agency not improperly dismissed GNLQ's carbon neutrality commitment, it would not have been in a position to make a finding of "significant effects" on the environment in relation to GHG emissions, or at least not a finding of unmitigable "significant effects".

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mitigation outcome rules set by Article 6 of the Paris Agreement; and (iv) implementing an audit process to validate the achievement of its carbon neutrality target.

[594] Agency Report, at **Exhibit C-0037-ENG**, p. 48 (emphasis added).

[595] Agency Report, at **Exhibit C-0037-ENG**, p. 48.

[596] See PO4, Annex A, p. 66 *et seq*. (Request No. 16).

430 **Second**, in relation to the capacity of the GNLQ Project to sell LNG that would displace more polluting fuels, the Agency Report suffers from the same deficiencies as the MELCC Report. This is hardly surprising: in the chapter dedicated to GHG emissions alone, the Agency Report contains no less than five quotes from the MELCC Report.[597]

431 As explained above in Section 2.5.4.3(i), the MELCC took a purely speculative approach to assume that GNLQ would not contribute to worldwide GHG emissions reductions and brushed aside the fact that it would have been impossible for GNLQ to have proved the contrary with certainty.

432 **Third**, besides being unlawful under Canadian law from a procedural perspective, the Agency's inclusion of upstream GHG emissions in its analysis was substantively flawed. Indeed, the Agency's conclusion that "the [GNLQ] Project would result in significant adverse direct and cumulative transboundary environmental effects" was based on its assessment that the GNLQ Project would generate upstream GHG emissions amounting to "about 7,155 kilotonnes of CO_2 equivalent per year". [598] However, in addition to being expressly barred from consideration to determine significant adverse effects under the EIS Guidelines, this figure is grossly inflated and does not reflect reality.

433 In its Report, the Agency admits at the outset that this figure is not reflective of the actual GHG emissions that would be generated by the GNLQ Project, because it includes "preliminary work, exploration, extraction, treatment and closure of the natural gas extraction site", *i.e.*, work done years before the GNLQ Project itself, or to be done years after the completion of the GNLQ Project, and wholly outside GNLQ's control.[599] For this reason alone, the Agency's statement that the Project "would be responsible for about 7,155 kilotonnes of CO_2 equivalent per year" constituted a gross misrepresentation.[600]

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[597] Agency Report, at **Exhibit C-0037-ENG**, p. 41 and 47.

[598] Agency Report, at **Exhibit C-0037-ENG**, p. 41.

[599] Agency Report, at **Exhibit C-0037-ENG**, p. 41.

[600] Agency Report, at **Exhibit C-0037-ENG**, p. 41.

434 In addition, as explained by Mr Le Verger in his second witness statement, this figure was taken by ECCC from the life cycle study commissioned by GNLQ from the International Reference Centre for Life Cycle Assessment and Sustainable Transition ("**CIRAIG**"), without any proper analysis of whether it was relevant for the purpose of the assessment of the GNLQ Project.[601] ECCC and the Agency were wrong to rely on this figure because it included "scope 2 and 3 emissions" (*i.e.*, GHG emissions not directly caused by the GNLQ Project).[602] Mr Le Verger shows that, had ECCC applied its own methodology based on the underlying data provided by GNLQ, the overall emissions would have been around 5,300 kilotonnes of CO_2 equivalent per year instead of 7,155, *i.e.*, a difference of more than 25%.[603]

435 Mr Le Verger further explains that, even relying on this 5,300 kilotonnes of CO_2 equivalent per year would have been inadequate, because it would assume that the needs of the GNLQ Project (and the corresponding GHG emissions) would have resulted in a commensurate increase in production of natural gas in Canada (around 1.6 billion cubic feed per day).[604] However, as a Wood Mackenzie study provided by GNLQ to the Agency and ECCC showed, upon commencement of operations of the Project, the incremental increase of Canada's natural gas production would have only been 0.08 billion cubic feet per day on average, indicating that even the lower, 5,300 kilotonnes figure is a significant overestimate of the actual upstream GHG emissions of the GNLQ Project.[605] As Mr Le Verger explains, GNLQ estimated that the actual incremental increase in GHG emissions deriving from the GNLQ Project would have been 544 kT/year at the beginning of operations, and could have decreased down to 346 kT/year from 2046 – figures that ECCC concluded were plausible – as a result of regulatory and technological changes, notably aimed at reducing flaring and fugitive GHG emissions.[606]

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[601] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 56 (para. 176).

[602] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 55 (para. 174).

[603] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 56 (para. 177).

[604] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 56 *et seq.* (para. 178).

[605] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 57 (para. 180).

[606] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 58 (para. 181).

436 While, on 22 October 2021, GNLQ alerted the Agency to these glaring methodological issues in its analysis, the Agency failed to take them into account in its final Report.[607]

437 The use by the Agency of the grossly inflated figure of 7,155 kilotonnes of CO_2 equivalent per year in its Report was both incomprehensible and obviously highly prejudicial to GNLQ. In circumstances where both the ECCC and the Agency acknowledged this was an overestimate of GNLQ's actual GHG emissions, it was unjustified and improper.

(ii) The Agency's assessment of the effects of the GNLQ Project on beluga whales was speculative and unfounded

438 In the Memorial, the Claimant explained that the conclusions in the Agency Report on the impact of the GNLQ Project on beluga whales relied on the same inconclusive scientific studies as the MELCC Report. They went as far as questioning the choice of the GNLQ Project site location, almost a decade after it was made by GNLQ and six years after it was communicated to the Agency in the *Avis de projet* (the Project Description under the federal process). [608]

439 In the Counter-Memorial, the Respondent reiterates the Agency's conclusions, based on the DFO's opinion that the GNLQ Project would have had significant negative effects on beluga whales.[609] In particular, the Respondent refers to:

i) the Agency/DFO's argument that the GNLQ Project would have increased maritime traffic in an otherwise relatively silent area, which, when viewed cumulatively with existing and potential future maritime traffic, would have threatened the beluga population;[610] and

[607] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 57 *et seq.* (para. 182), GNLQ, Comments to the Agency dated 22 October 2021, at **Exhibit C-0376-FRA**, p. 9 *et seq*.

[608] Memorial, p. 107 *et seq.* (paras. 330-332). See also GNLQ, *Avis de projet*, at **Exhibit C-0197-FRA**, p. 1.

[609] Counter-Memorial, p. 60 *et seq.* (paras. 164 and 167).

[610] Counter-Memorial, p. 61 (para. 164).

ii) the effectiveness of the mitigation measures proposed by GNLQ which was allegedly not sufficiently proven.[611]

These conclusions could not serve as a basis for a valid refusal, for several reasons.

440 **First**, the Agency's finding in its Report, issued in November 2021, that the navigation associated with the GNLQ Project would cause significant environmental effects if combined with other "past, present **or projected** activities"[612] is discriminatory, as it contradicts the Agency's and the DFO's prior conclusions when assessing that same issue in relation to other projects. The Agency's finding in 2021 was indeed at odds with its position in 2018, when assessing the North Shore Terminal project, that the increase of navigation on the Saguenay River that the GNLQ Project would have generated was acceptable.[613] The DFO had expressed the same view in September 2020,[614] and in February 2021.[615]

441 The Agency had also recognised in September 2020 that there was no regional study assessing the impact of maritime traffic on marine mammals in the Saguenay-St. Laurent area.[616] At the time of its 2021 Report, the Agency did not provide any reason to justify its change of position and its decision to go against the DFO's conclusions. The Respondent's argument in the Counter-Memorial that the Agency relied on concerns expressed

[611] Counter-Memorial, p. 60 (para. 162).

[612] Agency Report, at **Exhibit C-0037-ENG**, p. 70 (emphasis added).

[613] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 58 (para. 184); Le Verger I, at **Exhibit CWS-3**, p. 57 (paras. 231-234). See also Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 288 of the PDF and Northey I, at **Exhibit CER-2**, p. 29 *et seq.* (paras. 83-86).

[614] See *Document Preparatoire BAPE - Énergie Saguenay*, at **Exhibit C-0540-FRA**, p. 679-681. See also Le Verger II, at **Exhibit CWS-3 (Second)**, p. 58 (para. 184) and Information sheet from the federal authorities dated 10 December 2015, at **Exhibit C-0541-FRA** (DFO's initial opinion on the GNLQ Project, which only concerns the construction and operation phases within the Project's perimeter and does not refer to navigation.).

[615] Agency, Report of meeting between Agency, TC, PC, DFO, MELCC and MFFP dated 3 February 2021, at **Exhibit C-0542-FRA**, p. 6 ("*Les scientifiques du MPO ont indiqué que leur avis de 2018 sur les effets cumulatifs des projets de Terminal en rive nord du Saguenay et Énergie Saguenay est toujours valide.*").

[616] Email from J. Martin (IAAC) to S. Boudreau *et al.* dated 14 September 2020, at **Exhibit C-0543-FRA**.

during the public consultations is opportunistic and not supported by documentary evidence, let alone scientific evidence.[617]

442 Furthermore, and similarly to the MELCC in its final report, the Agency based its reasoning on inconclusive scientific evidence. In this respect, the Respondent's argument that GNLQ was aware of the scientific studies relied on by the DFO, and allegedly showing that the decline in the beluga population had to do with the increase of subaquatic noise, is equally misleading.[618]

443 As GNLQ explained to the Agency in January 2021, these studies did not establish a link between the decline in the beluga population and subaquatic noise, and no studies had confirmed that noise elimination would support the recovery of the population.[619] In November 2021, the DFO itself had to admit that "current knowledge is insufficient to determine what levels of noise and vessel traffic may elicit a behavioural response in beluga whales and what effects such a response has on their ability to carry out their life functions".[620] As Mr Northey opines, the Agency had no scientific basis to consider that the impact of the GNLQ Project on beluga whales would have been "significant".[621]

444 Ms Bélanger seeks to downplay the lack of scientific evidence supporting the Agency's decision on this point by contending that the Agency applied the precautionary principle.[622] The Agency Report, however, does not mention anywhere that it based its conclusions on the precautionary principle,[623] because that would have been unlawful. Indeed, federal law

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[617] Counter-Memorial, p. 58 (para. 156); Bélanger, at **Exhibit RWS-1**, p. 27 (para. 73).

[618] Memorial, p. 198 (para. 520).

[619] Réponses aux questions et commentaires de l'AÉIC – GNLQ, volume 1 rapport principal dated 21 January 2021, at **Exhibit R-0085-FRA**, p. 238.

[620] Agency Report, at **Exhibit C-0037-ENG**, p. 57. See also Trépanier, at **Exhibit RWS-11 (corrected)**, p. 16 *et seq.* (para. 39) ("*Les données disponibles lors de l'analyse ne permettaient pas d'établir quel niveau de bruit additionnel pourrait être ajouté dans l'habitat du béluga sans le dégrader davantage jusqu'au point de compromettre la réalisation des fonctions vitales de l'espèce et son rétablissement.*").

[621] Northey II, at **Exhibit CER-2 (Second)**, p. 43 *et seq*. (paras. 105-120).

[622] Bélanger, at **Exhibit RWS-1**, p. 48 (para. 129).

[623] See Agency Report, at **Exhibit C-0037-ENG**, p. 64 (Parks Canada), p. 65 and 250 (Pessamiulnutsh), p. 110 (Huron-Wendat).

set strict boundaries for the application of this principle, including the requirement that it be applied based on "sufficiently solid" scientific knowledge.[624] As explained in the Federal Government's guidelines on the application of the precautionary principle:

> "*La notion de fondement scientifique '**suffisamment solide**' ou crédible devrait signifier posséder un ensemble d'informations scientifiques – empiriques ou théoriques – **permettant d'établir la validité d'une théorie**, incertitudes comprises, et révélant un potentiel de risque.*"[625]

445 Neither the Agency in its Report, nor Ms Bélanger in her witness statement, refer to robust or credible scientific evidence regarding the anticipated impact of the GNLQ Project on beluga whales that could have justified invoking the precautionary principle as a basis to reject it.[626] The non-application of this principle as a matter of law is addressed further below in Section 4.4.

446 **Second**, contrary to the Respondent's assertion,[627] the Agency did not properly take into consideration the mitigation measures proposed by GNLQ in relation to navigation. The Agency recognised the noise reduction potential of the technologies that GNLQ planned to implement on the tankers to be chartered, but went on to find that "their actual effect on tanker noise levels remains unproven".[628] However, that finding was incorrect.

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[624] *Gouvernement du Canada, Cadre d'Application de la Précaution Dans un Processus Décisionnel Scientifique en Gestion du Risque*, at **Exhibit ST-0020-FRA**, p. 7.

[625] *Gouvernement du Canada, Cadre d'Application de la Précaution Dans un Processus Décisionnel Scientifique en Gestion du Risque*, at **Exhibit ST-0020-FRA**, p. 8.

[626] See CQDE Memorial, p. 15 (para. 61) (Where the CQDE recognises that "*une **incertitude scientifique** importante entourait les impacts du projet sur les bélugas et sur leur habitat essentiel*") (emphasis in original).

[627] Counter-Memorial, p. 60 (para. 162).

[628] Agency Report, at **Exhibit C-0037-ENG**, p. 60. As explained at footnote 511 above, Transport Canada was financing a CAD 30 million project for the implementation of measures similar to those whose effectiveness the Agency put in doubt in the assessment of the GNLQ Project.

447 As GNLQ explained to the MELCC in June 2021, the measures that GNLQ was proposing would have reduced subaquatic noise by between 3 and 6 decibels.[629] Furthermore, as Mr Bainbridge explains, "[redacted] had confirmed around May 2021 that it could implement these measures and achieve a comparable noise reduction on GNLQ's LNG tankers".[630] There was no doubt that GNLQ would have been able to implement these measures on their tankers.[631] As such, the Agency's conclusion did not reflect the technological reality presented to it.

448 GNLQ explained as much to the Agency when commenting on the draft Agency Report in October 2021.[632] GNLQ also noted that, through its "Charter for the Protection of Marine Mammals", GNLQ had committed to use all the technological innovations available, and set up a CAD 5 million fund for other users of the Saguenay River to adopt best practices.[633] GNLQ also reiterated its commitment to reduce the number of passages of vessels.[634] However, the Agency simply disregarded these

[629] GNLQ, Answers to questions and commitments requested by the MELCC dated 3 June 2021, at **Exhibit C-0068-FRA**, p. 75. See also Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 7 (para. 19) ("GNLQ's proposed noise-mitigation measures required only standard equipment and had been successfully used on survey vessels, passenger ships and navy ships. While applying these measures to LNG tankers would have constituted an innovative evolution in the industry, I have no reason to believe that they would not have been effective."). The Claimant notes that MPO's opinion, dated 11 June 2021, on which the Agency Report is based, refers to GNLQ's proposed measures as of 2019. Avis final de Pêches et Océans Canada - Projet Énergie Saguenay dated 11 June 2021, at **Exhibit R-0084-FRA**, p. 11. See also Trépanier, at **Exhibit RWS-11 (corrected)**, p. 18 *et seq.* (paras. 13-14).

[630] Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 7 (para. 21).

[631] See Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 7 *et seq.* (para. 21).

[632] GNLQ, Comments to the Agency dated 22 October 2021, at **Exhibit C-0376-FRA**, p. 13.

[633] GNLQ, Comments to the Agency dated 22 October 2021, at **Exhibit C-0376-FRA**, p. 13. See also GNLQ, "*Charte d'engagements environnementaux pour la protection des mammifères marins*" dated 24 September 2020, at **Exhibit C-0264-FRA** ("*Soutenir concrètement le déploiement de mesures, d'actions et de solutions techniques concrètes développées dans le cadre des travaux de la Charte ou ailleurs dans le monde permettant de réduire le bruit sous-marin dans le fjord du Saguenay et dans le St-Laurent*").

[634] GNLQ, Comments to the Agency dated 22 October 2021, at **Exhibit C-0376-FRA**, p. 12.

commitments.[635] Once again, the Agency assumed without proper scientific foundation that the GNLQ Project would have adverse environmental effects, but when it came to assessing GNLQ's submissions of evidence of counterbalancing effects or (in this instance) proposed mitigation measures, the Agency disregarded those submissions as unproven.

449 This approach stands in stark contrast to the Agency's assessment of the North Shore Terminal project, which was due to generate an increase in maritime traffic comparable to that of the GNLQ Project.[636] Yet, for the North Shore Terminal project, in 2018, the Agency did not require the proponent to reach a zero-noise threshold, but instead accepted certain conditions and mitigation measures in relation to subaquatic noise. Furthermore, as the Agency admitted in a comment within an initial draft of its Report for the GNLQ Project, the conditions relating to the North Shore Terminal project were not binding and did not guarantee any reduction of subaquatic noise.[637]

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[635] See Agency Report, at **Exhibit C-0037-ENG**, p. 68 ("*the Charter for the Protection of Marine Mammals, developed by the Proponent, demonstrates its willingness to find solutions to reduce underwater noise. However, their actual effect on tanker noise levels remains unproven, as does their effect on the duration and intensity of beluga exposure to these noise levels.*") and Agency Report, at **Exhibit C-0037-ENG**, p. 161 (acknowledging that "[t]*he Project would add between 140 and 165 tankers (between 280 and 330 passages) annually to the commercial traffic on the Saguenay River*").

[636] See Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 209 of the PDF ("According to the proponent's estimates, the Saguenay River would remain free from the noise of large vessels 95.7% of the time the beluga whale is present, between May and October, considering the completion of all the potential projects currently known, i.e. an increase of 410 vessels on the Saguenay River by 2030. This scenario would bring to 635 the total number of vessels that could use the Saguenay River annually in 2030. The contribution of marine traffic related to the project would be 140 vessels by 2030 according to the maximum operating scenario, which represents **2 to 3 vessel movements per week** directly related to the project. The Agency relies on the advice of Fisheries and Oceans Canada, which considers that **the risk of an adverse effect on the beluga population of the St. Lawrence Estuary caused by the increase in marine traffic related to the project would be low**") (emphasis added).

[637] Agency, Draft report on the effects of underwater noise, at **Exhibit C-0544-FRA**, p. 9 ("*Il y a bien eu quelques conditions dans la déclaration de décision pour le Terminal en rive nord du Saguenay, mais celles-ci sont peut contraignantes et ne garantissent pas une réduction du bruit*").

(iii) The Agency's assessment of the impact of the GNLQ Project on the Innu First Nations' cultural heritage was purely speculative

450 In the Memorial, the Claimant established that the Agency's analysis of the impact of the GNLQ Project on Innu First Nations' cultural heritage was unsubstantiated and solely based on the assumption that beluga whales were important for the Innu First Nations and, consequently, parasitic on its speculative and unfounded assessment as to the effects of the project on beluga whales.[638]

451 Neither the Respondent in the Counter-Memorial, nor its witnesses, provide any response to the Claimant's position on this point, which therefore stands.

452 In conclusion, the decision of the federal Minister of Environment of 9 December 2021 that, having taken into account the proposed mitigation measures, the GNLQ Project was likely to cause significant adverse environmental effects in relation to global GHG emissions, marine mammals and Innu First Nations, was unfounded and unlawful. This is because it relied on the Agency's wrongful and speculative analysis of grounds outside of the scope of the EIS Guidelines.[639] The federal Cabinet's decision of 3 February 2022 and the subsequent Decision Statement of 7 February 2022, that such alleged effects were not justified in the circumstances were thus equally ill-premised and unlawful.[640]

2.7 The Respondent misrepresents the history of the Gazoduq Project and its prospects of success

453 In the Memorial, the Claimant explained how, in parallel to developing the GNLQ Project, Symbio – via its subsidiary, Gazoduq – made significant progress towards developing the related Gazoduq Project, a natural gas

[638] Memorial, p. 108 *et seq.* (paras. 333-335); Northey I, at **Exhibit CER-2**, p. 69 *et seq.* (p. 72 of the PDF) (paras. 195, 200).

[639] See *Note de service au ministre: Projet Énergie Saguenay – Décision sur l'importance des effets et renvoi possible au gouverneur en conseil* dated 9 December 2021, at **Exhibit TH-0003-FRA**. See also Government of Canada, "Énergie Saguenay, Orders in Council" dated 3 February 2022, at **Exhibit RN-0030-ENG**, p. 1 *et seq.*

[640] Government of Canada, "Énergie Saguenay, Orders in Council" dated 3 February 2022, at **Exhibit RN-0030-ENG**, p. 4 *et seq.* See also Decision Statement, at **Exhibit RN-0004-ENG**.

pipeline to transport gas from eastern Ontario to the LNG terminal at Saguenay.[641]

454 In its Counter-Memorial, the Respondent seeks to portray Gazoduq as a nascent project that had barely started by the time Québec denied the GNLQ Project in July 2021.

455 As explained below, the Respondent's misrepresentation of the Gazoduq Project, and in particular, its progress in obtaining regulatory approvals, not correspond to its true history, as established by the evidence.

456 In respect of the Gazoduq Project, as the Claimant explains further below in Section 2.7.1, the history of the applicable legal framework is complicated by the fact that Canada overhauled the federal legal regime for the review and approval of interprovincial pipeline projects mid-way through Gazoduq's application process. The Claimant herein refers to the "regulatory process" as an all-encompassing term to describe the changing processes, including EA process, of obtaining federal and provincial approvals, towards which Gazoduq worked from 2018 up until Québec refused the GNLQ Project in July 2021.

457 Notwithstanding that Canada's changes to its regulatory regime in mid-2019 forced Gazoduq to restart its federal regulatory process one year after commencing it, by July 2021, Gazoduq had made significant progress towards receiving the relevant approvals from Canada and Québec, which had agreed to conduct their EA of the Gazoduq Project as part of a cooperative process (**Section 2.7.1**).

458 Furthermore, by then, the Gazoduq Project was already substantially de-risked from a commercial and technical perspective, and there were no concerns as to the social or Indigenous acceptability of the (**Section 2.7.2**).

459 As for the Respondent's suggestion that Symbio ought to have continued the Gazoduq Project even after Québec refused the GNLQ Project on 21 July 2021, it is disingenuous. In light of Minister Charette's statement at

[641] Memorial, p. 30 *et seq.* (s. H).

the time that the refusal of the GNLQ Project also spelled the death of the Gazoduq Project, that was no longer a realistic option (**Section 2.7.3**).

460 As for the Respondent's argument that, regardless of the refusal of the GNLQ Project, the remainder of Gazoduq's regulatory review process would have been drawn out and uncertain, it is contradicted by the evidence. On the contrary, Gazoduq's expectation of receiving provincial and federal regulatory approvals by November 2023 was reasonable (**Section 2.7.4**).

2.7.1 Gazoduq made significant progress towards receiving its regulatory approvals at the provincial and federal levels

461 In its Counter-Memorial, the Respondent asserts that the provincial EA of the Gazoduq Project was "*peu avancée*" and that the federal regulatory process "*était à peine amorcée*".[642] Those assertions are misleading. The Gazoduq Project had made significant progress towards submitting its application for both the federal and Québec processes and was well on track to receive its federal and provincial approvals in late 2023.

462 Gazoduq applied to initiate both the Québec and federal regulatory processes in November 2018 (**Section 2.7.1.1**). However, as a result of Canada's transition to a new federal regulatory regime under the Impact Assessment Act ("**IAA**"), which entered into force in August 2019, Gazoduq was forced to re-start the federal impact assessment ("**IA**") process, which it did by submitting a new Initial Project Description in October 2019 (**Sections 2.7.1.2** and **2.6.1.3**). However, the inefficiency of Canada's legislative transition did not prevent Gazoduq from progressing the design, environmental studies and community consultations necessary to progress Gazoduq's consolidated regulatory application, and thereafter it continued those preparations under the auspices of the new IAA regime (**Section 2.7.1.4**).

[642] Counter-Memorial, p. 286 *et seq.* (paras. 710-711).

2.7.1.1 Gazoduq initiated the federal and Québec approval processes in November 2018 under the then applicable regulatory regime

463 In the Counter-Memorial, the Respondent acknowledges that Gazoduq submitted its project notice to the MELCC, thereby initiating the Québec EA process, in November 2018.[643] However, with regard to the federal regulatory process, the Respondent simply states that Gazoduq submitted a project notice to the Agency in October 2019.[644] The Respondent ignores that Gazoduq had already applied to initiate the federal regulatory process eleven months earlier, in November 2018, by filing a Pre-Application Project Description ("**PAPD**") to the NEB.[645]

464 As at November 2018, the federal environmental regulatory regime applicable to the Gazoduq Project was indeed the CEAA 2012. The NEB, as the regulator responsible for authorising the construction and operation of gas pipelines, would have carried out Gazoduq's EA in accordance with its own procedures under the National Energy Board Act ("**NEB Act**").[646] However, the Federal Government's intention to replace the CEAA 2012 with what would become the Impact Assessment Act 2019 (known prior to its enactment as "**Bill C-69**") had complicated the regulatory landscape. In late 2018, Bill C-69 had not yet passed the Senate in Parliament,[647] and it

[643] Counter-Memorial, p. 64 (para. 173). See also PR1.1 – GAZODUQ INC., Avis de projet, (novembre 2018), at **Exhibit TLV-0051-FRA**.

[644] Counter-Memorial, p. 64 (para. 173).

[645] See First Witness Statement of Ron Brintnell dated 20 November 2023, at **Exhibit CWS-5**, p. 9 (para. 35); Menzies, at **Exhibit CWS-7**, p. 8 *et seq.* (para. 22); Letter from Gazoduq to the NEB (Pre-Application Project Description) dated 20 November 2018, at **Exhibit RB-0009-ENG**; Gazoduq Project, Pre-Application Project Description (November 2018), at **Exhibit RB-0010-ENG**; Projet Gazoduq, Description du projet préalable à la demande, (novembre 2018), déposé à La secrétaire de l'Office national de l'énergie, Doc. No. 2018-11-20 A95939-2, at **Exhibit TLV-0050-FRA**.

[646] National Energy Board Act, at **Exhibit C-0545-ENG-FRA**, p. 61 (s. 52(3)). See also Menzies, at **Exhibit CWS-7**, p. 7 (para. 17).

[647] See Bill C-69 following Third Reading in the House of Commons dated 20 June 2018, at **Exhibit C-0546-ENG-FRA**.

was unclear whether or in what form Bill C-69 would receive Parliamentary approval.[648]

465 Therefore, when Gazoduq sought to initiate the federal regulatory approval process by filing the PAPD with the NEB in November 2018, as required under the NEB's regulatory framework in place at the time. It did so not knowing whether or when Bill C-69 would be passed, and hoping that, if so, it would be "grandfathered" under the CEAA 2012 and the NEB Act.[649] This was a reasonable expectation on Gazoduq's part, as the Federal Government had confirmed when announcing the transition to the new regime that "[n]o project proponent [would] be asked to return to the starting line".[650]

466 As Ms Adrienne Menzies, who has extensive experience working on federal regulatory processes for pipeline projects and worked for Gazoduq, explains in her witness statement, the process was to be as follows:

- After Gazoduq filed its PAPD with the NEB, the next step would have been to prepare and file its "certificate application" requesting the NEB's approval to construct and operate the Gazoduq pipeline.[651]
- The certificate application would include, among other components, Gazoduq's environmental impact statement for the purposes of the CEAA 2012 environmental approval process.
- As was typical for natural gas pipelines with multi-jurisdictional review processes, Gazoduq planned to address both the federal and Québec regulatory requirements via a single, consolidated application (referred to below as Gazoduq's regulatory "**Application**").[652]

467 When it filed the PAPD in November 2018, based on the Gazoduq team's experience of the NEB's regulatory process and other pipeline regulatory

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[648] Menzies, at **Exhibit CWS-7**, p. 7 (para. 18). See also Illich II, at **Exhibit CWS-1 (Second)**, p. 23 (para. 51).

[649] Menzies, at **Exhibit CWS-7**, p. 7 (para. 19). See also Letter from Gazoduq to the NEB (Pre-Application Project Description) dated 20 November 2018, at **Exhibit RB-0009-ENG**, p. 3.

[650] Government of Canada Statement: "Government of Canada Moves to Restore Trust in Environmental Assessment" dated 27 January 2016, at **Exhibit AM-0001-ENG**, p. 2.

[651] Menzies, at **Exhibit CWS-7**, p. 7 *et seq.* (para. 20).

[652] Menzies, at **Exhibit CWS-7**, p. 8 (para. 21).

approval processes, Gazoduq expected to file its Application with the NEB and MELCC by the end of 2019.[653] Accordingly, Gazoduq started the initial work towards preparing its Application in late 2018, building on the technical, stakeholder (including First Nations) engagement and regulatory work that it had already carried out throughout 2018.[654]

468 The Respondent is thus wrong to imply in its Counter-Memorial, as it does, that by July 2021, Gazoduq had not made progress through the federal or provincial EA processes. As Mr Illich points out in his second witness statement, by July 2021 when Québec declared both Projects "dead", from his perspective, Gazoduq had already spent three and a half years developing the pipeline, including two and a half years on its EA processes.[655] Gazoduq had also invested considerably in those processes: Secretariat's analysis shows that between 2018 and 2021 incurred costs of USD 29,883,772 in development of the Gazoduq Project.[656]

2.7.1.2 Gazoduq re-initiated the federal regulatory process under the IAA

469 Following Gazoduq's submission of its PAPD, the NEB proceeded with the pre-application activities forming part of its typical regulatory process.[657] In parallel, the MELCC undertook the initial steps in the Québec regulatory process; in particular, it issued a directive setting out

[653] Illich II, at **Exhibit CWS-1 (Second)**, p. 23 (para. 50).

[654] Menzies, at **Exhibit CWS-7**, p. 8 (para. 21). See also Brintnell I, at **Exhibit CWS-5**, p. 4 *et seq.* (s. III); First Witness Statement of Denis Roux dated 21 November 2023, at **Exhibit CWS-6**, p. 9 *et seq.* (paras. 36-49).

[655] Illich II, at **Exhibit CWS-1 (Second)**, p. 22 *et seq.* (para. 49).

[656] See Amounts Invested in Projects (2014-2022), at **Exhibit CER-3-Appendix C**, "C.1_Summary Amts", sum Cells G14-J14.

[657] Such activities included contacting potentially affected Indigenous communities to notify them of Gazoduq's PAPD and the upcoming public hearing process to be conducted by the NEB: see, *e.g.*, Letter from the NEB to Flying Post First Nation dated 29 May 2019, at **Exhibit C-0547-ENG**.

the detailed guidelines for Gazoduq's Application on 6 December 2018 (the "**Gazoduq Directive**").[658]

470 For its part, over the course of late 2018 and during 2019, Gazoduq continued to develop the Gazoduq Project, including work that would form part of its Application.[659] Such work included:

- a series of public consultations with communities along the pipeline route; [660]
- continuing the engagement with Indigenous communities that Gazoduq had already commenced in spring 2018, including (for example) to consider Indigenous input on the development of the pipeline route;[661]
- a comprehensive environmental field survey programme;[662]
- announcing the "preferred planning area" ("**PPA**") for the eventual pipeline route in April 2019;[663]

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[658] Ministère de l'Environnement et de la Lutte contre les changements climatiques, Guideline for conducting an environmental impact assessment: Gazoduq Project by Gazoduq Inc., at **Exhibit CD-0161-FRA**. On 7 February 2019 the MELCC also issued a document setting out the results of its public consultation on the issues that Gazoduq's Application should address: Ministère de l'Environnement et de la Lutte contre les changements climatiques, Comments on the issues that the impact study should address: Gazoduq project, at **Exhibit CD-0162-FRA**.

[659] See Gazoduq, Quarterly Report (Q1 2019) dated 1 April 2019, at **Exhibit RB-0038-ENG**; Gazoduq, Quarterly Report (Q2 2019), at **Exhibit C-0548-ENG**; Gazoduq, Quarterly Report (Q3 2019) dated 1 October 2019, at **Exhibit C-0549-ENG**; Gazoduq, Quarterly Report (Q4 2019) dated 1 January 2020, at **Exhibit C-0550-ENG**.

[660] Gazoduq, Quarterly Report (Q1 2019) dated 1 April 2019, at **Exhibit RB-0038-ENG**, p. 1; Brintnell I, at **Exhibit CWS-5**, p. 9 (para. 33).

[661] Roux I, at **Exhibit CWS-6**, p. 10 *et seq.* (paras. 38-69). See also Second Witness Statement of Denis Roux, at **Exhibit CWS-6 (Second)**, p. 16 *et seq.* (paras. 40-43).

[662] See Gazoduq, Quarterly Report (Q1 2019) dated 1 April 2019, at **Exhibit RB-0038-ENG**, p. 3; Gazoduq, Quarterly Report (Q2 2019), at **Exhibit C-0548-ENG**, p. 4 *et seq.*; Gazoduq, Quarterly Report (Q3 2019) dated 1 October 2019, at **Exhibit C-0549-ENG**, p. 3 *et seq*.

[663] The PPA consisted of a 400m-wide corridor along the length of the route within the original, much wider "Study Corridor". Gazoduq updated its project description submissions to the NEB and MELCC to notify them of the PPA route: Letter from Gazoduq to the NEB dated 23 April 2019, at **Exhibit C-0126-ENG**; Ministère du Développement durable, de l'Environnement, de la Faune et des Parcs, Registre des évaluations environnementales, Avis de projet, Projet Gazoduq, mise à jour avril 2019, at **Exhibit CD-0095-FRA**. Gazoduq further narrowed down the PPA in the Ontario part of the route in June 2019 (and updated the NEB accordingly) after

- engaging consultants to undertake key sector studies;[664] and
- completing a comprehensive FEED study for the natural gas pipeline, prepared by UniversalPegasus International ("**UPI**"), a leading expert consultancy in pipeline engineering and design.[665]

471 However, during the same period, over the course of several meetings that Gazoduq attended with the NEB and other Federal Government representatives, the Agency revealed that the Federal Government would not in fact "grandfather" Gazoduq's Application under the CEAA 2012 regulatory regime, and that Gazoduq was required to restart the process under the IAA.[666] Therefore, shortly after the IAA came into force in August 2019, Gazoduq prepared and, on 10 October 2019, filed its Initial Project Description ("**IPD**") with the Agency, thereby formally reinitiating the federal regulatory process under the (new) IAA.[667]

472 Being forced to restart the federal regulatory process in that way delayed Gazoduq's project schedule, because it pushed back the earliest date by which Gazoduq could have filed its Application.[668] Instead of filing it with the NEB at the end of 2019 as originally planned,[669] Gazoduq would have to wait until the Agency would publish "Tailored Impact Statement Guidelines" ("**TIS Guidelines**" or "**TISG**") containing the information requirements to which Gazoduq would need to respond in the Application.[670]

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agreeing a preferred tie-in location with TC Energy where the Gazoduq Project pipeline would connect to TC Energy's existing system: Letter from Gazoduq to the NEB (PAPD Update) dated 27 June 2019, at **Exhibit AM-0003-ENG**.

664 Gazoduq, Quarterly Report (Q3 2019) dated 1 October 2019, at **Exhibit C-0549-ENG**, p. 4.

665 See paragraph 497 below.

666 See Menzies, at **Exhibit CWS-7**, p. 9 *et seq.* (paras. 23-29).

667 Gazoduq, Initial Project Description of a Designated Project dated 10 October 2019, at **Exhibit C-0129-ENG-FRA**. See also Brintnell I, at **Exhibit CWS-5**, p. 9 (para. 36); Menzies, at **Exhibit CWS-7**, p. 13 (para. 32).

668 Menzies, at **Exhibit CWS-7**, p. 13 *et seq.* (paras. 34-36). See also Illich II, at **Exhibit CWS-1 (Second)**, p. 25 (para. 57).

669 See paragraphs 466-467 above.

670 Menzies, at **Exhibit CWS-7**, p. 13 (para. 35).

473 Nevertheless, as explained below (see Sections 2.7.1.3 and 2.7.4), despite the inefficiency caused by the transition between regimes, the IAA process itself ought to have been efficient, once underway.

2.7.1.3 The IAA regulatory approval process for CER-regulated natural gas pipelines

474 The IAA regulatory approval process replaced the previous NEB-led pipeline approval process. Under the IAA, the Agency would conduct the IA in collaboration with the Canada Energy Regulator ("**CER**"), which had replaced the NEB as the national regulator for gas pipelines. The IAA process for CER-regulated gas pipelines (such as Gazoduq) consisted of four key "Phases" preceding the Government's authorisation decision, each of which had maximum associated timeframes under the IAA.[671]

475 **Phase 1 ("Planning Phase")**: The Planning Phase began with the proponent submitting its Initial Project Description (IPD). During this phase, the Agency would conduct early consultation and engagement activities and the proponent would be required to submit a Detailed Project Description ("**DPD**"), resulting in its publication of TIS Guidelines for the project. The TISG would contain the information requirements for the proponent to include in its impact statement. The Planning Phase could last up to 180 days (extendable by 90 days at the request of another jurisdiction to enable the Agency to cooperate with that jurisdiction).[672]

476 **Phase 2 ("Impact Statement Phase")**: During the Impact Statement Phase, the project proponent would prepare and submit its impact statement responding to the TIS Guidelines. The proponent could submit its impact statement as soon as it was ready after issuance of the TIS Guidelines. The maximum timeframe for Phase 2 was three years, subject to extension upon request by the project proponent.[673] Phase 2 would end once the Agency was satisfied that the proponent had provided the

[671] Whilst the high-level description Mr O'Gorman provides (O'Gorman, at **Exhibit RER-4**, p. 8 *et seq.* (para. 16)) is broadly accurate, the Claimant does not accept Mr O'Gorman's description of the IAA process more generally, as explained in this Section 2.7.1.3 and below in Section 2.7.4.

[672] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 16 *et seq.* (ss. 18(1) and 18(3)).

[673] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 18 (ss. 19(1) and 19(2)).

information or studies requested in the TISG, at which point the Agency was required to post a notice on its website accepting the proponent's impact statement for detailed review.[674]

477 **Phase 3 ("IA Phase")**: During the IA Phase, an independent review panel would assess the proponent's impact statement (including by collecting views from the public and Indigenous communities and holding public hearings) and develop an IA report. The Agency would then submit a recommendation to the Government to assist in establishing conditions for its decision statement. The Agency was required to set a time limit for Phase 3 of up to 600 days.[675]

478 **Phase 4 ("Decision-making Phase")**: Finally, in the Decision-making Phase, the Governor in Council (*i.e.*, the Cabinet) would issue a decision statement approving or denying the project. The decision statement would include any conditions with which the proponent would have to comply. The maximum timeframe for the decision statement would be 90 days from the day the Agency posts recommendations for the Government's decision statement at the end of Phase 3.[676] Following Phase 4, there was also a "Post-Decision Phase" (Phase 5) consisting of condition compliance and monitoring.

479 Throughout the IAA process, project proponents and the Government would continuously engage with Indigenous communities to seek their input and ensure consideration of Indigenous knowledge. As explained further below and by Mr Roux in his witness statements, Gazoduq took its engagement efforts with Indigenous communities seriously from the outset and indeed engaged with the potentially affected Indigenous communities continuously, starting from spring 2018, long before the IAA process started.[677]

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[674] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 18 (s. 19(4)).

[675] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 28 (ss. 37(1) and 37(2)).

[676] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 45 (s. 65(4)(b)).

[677] Roux I, at **Exhibit CWS-6**, p. 10 *et seq.* (s. III.D.1).

2.7.1.4 Gazoduq continued its efforts to complete its regulatory application under the new IAA regime

480 After Gazoduq submitted its IPD in October 2019, the Agency commenced the Planning Phase of the IAA process (Phase 1).[678]

481 During the Planning Phase, the Agency held consultations with the public and Indigenous communities to inform its preparation of the TIS Guidelines.[679] In accordance with the IAA, Gazoduq submitted a Detailed Project Description (DPD) on 10 January 2020 which included Gazoduq's responses to the summary of issues raised in the Agency's public consultations.[680] Also as part of the Planning Phase, the Agency issued a notice formally deciding that the Gazoduq Project required an IA.[681]

482 Although the Planning Phase would normally have been completed by April 2020, the Agency extended it at Québec's request by 90 days (as was permissible under the IAA) to enable cooperation between the Agency and Québec, in light of the Covid-19 pandemic.[682] In June 2020, the Governments of Canada and Québec signed a Cooperation Agreement (the "**QC-CAN Gazoduq Cooperation Agreement**") in which they agreed to coordinate their parallel regulatory processes for the Gazoduq Project,[683]

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[678] Bélanger, at **Exhibit RWS-1**, p. 58 (paras. 159-161).

[679] Bélanger, at **Exhibit RWS-1**, p. 58 *et seq.* (paras. 160, 163).

[680] Brintnell I, at **Exhibit CWS-5**, p.10 *et seq.* (paras. 39-40).

[681] The Agency's decision was a mere formality under the IAA (see Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 15 (s. 16(1))) – it was never seriously in question that a 780 km inter-provincial gas pipeline would require an impact assessment. However, in its Counter-Memorial, the Respondent mischaracterises this decision, incorrectly stating that the Agency had "*déterminé que le projet, tel que soumis, était susceptible d'entraîner des effets négatifs relevant de compétence fédérale*." (Counter-Memorial, p. 65 (para. 175)). In fact, the Agency had made no such "determination". Rather, its decision merely stated that it had "**taken into account** […] **the possibility** that carrying out the Project **may** cause adverse effects within federal jurisdiction": Agency, Canadian Impact Assessment Registry, Gazoduq Project, Notice of Impact Assessment Decision with Reasons dated 22 January 2020, at **Exhibit DO-0110-ENG**, p. 1 (emphasis added). See also Projet Gazoduq - Avis de décision d'évaluation d'impact assortie de motifs dated 22 January 2020, at **Exhibit GB-0058-FRA**.

[682] Agency, Canadian Assessment Impact Registry, Gazoduq Project, Notice of Time Limit Extension with Reasons dated 14 April 2020, at **Exhibit DO-0113-ENG**.

[683] Impact Assessment Agency of Canada, Cooperation Plan for the Impact Assessment of the Gazoduq Project dated 30 June 2020, at **Exhibit DO-0115-ENG**; Entente de collaboration entre

including by holding joint public hearings.[684] On 17 July 2020, the Agency published the final TIS Guidelines,[685] bringing an end to the Planning Phase and commencing the IA Phase (Phase 2) of the IAA process.[686]

483 The next step in both the provincial and federal regulatory processes was for Gazoduq to finalise and submit its consolidated Application, constituting its EIS for the purposes of the Québec EQA and its impact statement for the purposes of the federal IAA.[687] The Application would comprise several volumes and numerous appendices prepared by Gazoduq's multi-disciplinary team, its consultants and its advisors, and would run to thousands of pages.[688]

484 In his report, Mr O'Gorman speculates that Gazoduq may have "significantly underestimated" the effort required to prepare its Application.[689] His speculation is groundless. Ms Menzies is a former Senior Advisor in Gazoduq's Regulatory Affairs team and has significant career experience preparing regulatory filings for federally regulated pipeline projects.[690] As she explains in her witness statement, by early

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le gouvernement du Canada et le gouvernement du Québec concernant la coordination des procédures d'évaluation environnementale et d'impact relatives au projet Gazoduq, juin 2020, at **Exhibit CD-0144-FRA**.

[684] Impact Assessment Agency of Canada, Cooperation Plan for the Impact Assessment of the Gazoduq Project dated 30 June 2020, at **Exhibit DO-0115-ENG**, p. 7 (clause 7.6).

[685] As Ms Menzies explains in her witness statement, the Agency also issued two prior iterative draft versions of the TISG, first in June 2019 and again in January 2020: Menzies, at **Exhibit CWS-7**, p. 12 *et seq.* (paras. 30, 38). Before the Agency issued the final TISG, Gazoduq used the draft TISG to prepare its Application, in addition to the pre-existing filing guidelines under the NEB regime, as well as the Gazoduq Directive for the purposes of the Québec environmental assessment process: Menzies, at **Exhibit CWS-7**, p. 14 *et seq.* (para. 39).

[686] Agency, TISG for Gazoduq Project dated 17 July 2020, at **Exhibit DO-0116-ENG**.

[687] See Menzies, at **Exhibit CWS-7**, p. 8 (para. 21).

[688] Menzies, at **Exhibit CWS-7**, p. 16 (para. 45). The subjects of the Application volumes would include: Gazoduq's environmental impact statement (EIS, including sectorial studies, technical data reports and its Preliminary Environmental Protection Plan); Stakeholder Consultation; Indigenous Peoples; Land; Engineering; Construction and Operations; Commercial; Maps and a standalone Tolls and Tariff Application. As Ms Menzies explains, the Tolls and Tariff Application was not strictly an IAA requirement, but rather a separate application to be submitted pursuant to Part III of the Canada Energy Regulator Act: Menzies, at **Exhibit CWS-7**, p. 17 (para. 48).

[689] O'Gorman, at **Exhibit RER-4**, p. 50 (para. 113).

[690] Menzies, at **Exhibit CWS-7**, p. 4 *et seq.* (s. 2).

2020, Gazoduq had made significant progress toward preparing its Application.[691] She estimates that the drafts as they stood in March-April 2020 (which amounted to 9,388 pages in total) only required two to three more months of work to be considered "fit for purpose" based on the then-available Application guidelines.[692]

485 However, with the onset of the Covid-19 pandemic in March 2020, the associated lockdown restrictions in Canada prohibited Gazoduq from conducting field studies and Indigenous community engagement efforts that would feed into the Application.[693] In the remainder of 2020, Gazoduq was therefore limited to reviewing the Agency's TIS Guidelines to assess what further work was required to respond to new requirements set out in those guidelines, and to reevaluating the Symbio Project schedule accordingly.[694] It also carried out further, *ad hoc* desktop engineering work such as studying the electrification of the compressor stations (based on which it received a CAD 1.9 million grant from Emissions Reductions Alberta).[695]

486 In January 2021, Symbio released a new Project schedule in which Gazoduq targeted 15 July 2022 to file its Application.[696] Based on its July

[691] Menzies, at **Exhibit CWS-7**, p. 14 *et seq.* (para. 39) and p. 20 (para. 58).

[692] With the exception of the "Commercial" volume, which Ms Menzies estimates would require four months of work. See Menzies, at **Exhibit CWS-7**, p. 20 (para. 58); Menzies, Annex A, at **Exhibit CWS-7 (Annex A)**, row 130. As Ms Menzies explains, the draft volumes and appendices would have been prepared by the relevant discipline leads and consultants to adhere to the applicable TIS Guidelines requirements up to the first draft TIS Guidelines issued in June 2019, but she assumes they would not yet account for additional requirements contained in the January or July 2020 iterations of the TIS Guidelines. Therefore, some additional time would be needed to conform the Application to the final TIS Guidelines: see **CWS-7**, p. 21 (paras. 60-61).

[693] Illich II, at **Exhibit CWS-1 (Second)**, p. 31 *et seq.* (para. 66); Menzies, at **Exhibit CWS-7**, p. 25 (para. 71); Second Witness Statement of Ron Brintnell dated 15 April 2025, at **Exhibit CWS-5 (Second)**, p. 6 (para. 14).

[694] Illich II, at **Exhibit CWS-1 (Second)**, p. 31 *et seq.* (para. 66).

[695] Brintnell I, at **Exhibit CWS-5**, p. 12 *et seq.* (paras. 44, 49); Gazoduq, "ERA Full Project Proposal" dated 31 July 2020, at **Exhibit RB-0013-ENG**; Email from Steve MacDonald to Jim Illich, "ERA Funding for Gazoduq" dated 5 February 2021, at **Exhibit RB-0014-ENG**.

[696] Illich II, at **Exhibit CWS-1 (Second)**, p. 32 *et seq.* (s. 4.3); GNLQ, Private Placement Memorandum (Addendum) dated 8 January 2021, at **Exhibit SEC-0101-ENG**, p. 7; LNG

2022 filing date, Symbio estimated that Gazoduq would receive regulatory approvals from the Québec and Federal Governments by Q4 2023, enabling the entire Symbio Project to proceed to a positive FID shortly thereafter.[697]

487 With its new Project schedule in mind, in early 2021, Gazoduq worked towards what it described as a "re-launch" of the Gazoduq Project.[698] Those re-launch activities included preparing to conduct an environmental field survey programme during the summer and fall of 2021. Mr O'Gorman infers from the term "re-launch" that Gazoduq had stopped working actively towards preparing its Application prior to April 2021.[699] He is incorrect to do so. As Mr Brintnell explains in his second witness statement, the term "re-launch" simply reflected the team transitioning from the period during mid- to late-2020 where Covid-19 had restricted the team's activity, to early 2021 where the Gazoduq team and its consultants once again ramped up their activities towards finalising the Application.[700]

488 In May 2021, Gazoduq engaged WSP, a leading consulting firm, to act as "primary consultant", taking lead responsibility for supporting completion of Gazoduq's Application.[701] WSP has extensive experience supporting regulatory processes for large, linear projects (such as pipelines, railways, roads and power lines) and was already familiar with the Gazoduq Project from its work on the GNLQ Project.[702]

Quebec LP Schedule (January 2021), at **Exhibit JI-0157-ENG**. Incidentally, July 2022 is similar to Mr O'Gorman's opinion in his report that Gazoduq would have been in position to submit its Application by "fall 2022": O'Gorman, at **Exhibit RER-4**, p. 58 (para. 134, second bullet).

[697] LNG Quebec LP Schedule (January 2021), at **Exhibit JI-0157-ENG**. Mr Illich explains in his second witness statement the timing estimates underlying Gazoduq's schedule: Illich II, at **Exhibit CWS-1 (Second)**, p. 32 *et seq.* (paras. 67-71). See also Section 2.7.4.2 below.

[698] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 6 *et seq*. (para. 15).

[699] O'Gorman, at **Exhibit RER-4**, p. 50 (para. 114).

[700] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 6 *et seq*. (para. 15).

[701] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 7 (para. 18).

[702] See Brintnell II, at **Exhibit CWS-5 (Second)**, p. 7 (para. 17). See also Le Verger II, at **Exhibit CWS-3 (Second)**, p. 28 (para. 80).

489 In preparation for Gazoduq's 2021 field programme, Ms Cathy Baptista (Gazoduq's Director of Environment) engaged closely with the Québec MFFP to obtain the necessary permits to conduct the surveys.[703] In this regard, the assertion of Mr Jean-François Bergeron – who worked as a coordinator within the MFFP at the relevant time –in his witness statement that he did not have any contact with Ms Baptista from 10 March 2020 onwards, is wrong,[704] as is the Respondent's reliance on his evidence to assert that Gazoduq "*n'a donné aucune suite aux exigences relatives à l'étude d'impact qu'il devait réaliser.*"[705] Mr Bergeron's testimony is indeed flatly contradicted by the documentary record, which reveals numerous emails between him and Ms Baptista between January and July 2021, including in which Ms Baptista specifically requested his assistance to obtain permits for Gazoduq's 2021 field surveys.[706] Those emails also undermine the Respondent's assertion that Gazoduq did not progress its Application.

490 Furthermore, Gazoduq also re-initiated its engagement efforts with the Indigenous communities in the vicinity of the Gazoduq Project during early 2021, in particular Mamo Aki, the group of eight Indigenous

[703] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 7 (para. 16). Based on the work Gazoduq intended to conduct during the 2021 field programme, it would need "*de permis d'intervention*" and "*de permis SEG*" for the areas in which it planned fieldwork along the gas pipeline route. Gazoduq requested these permits, which had a short lead time, in July 2021, planning to commence the field programme in August 2021. See Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 16 July 2021, at **Exhibit C-0551-FRA**. See also Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 30 July 2019, at **Exhibit C-0552-FRA** and Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 11 February 2020, at **Exhibit C-0553**, demonstrating that obtaining such permits was a quick and straightforward process.

[704] Witness Statement of Jean-Francois Bergeron dated 12 July 2024, at **Exhibit RWS-3**, p. 18 *et seq.* (paras. 49, 51).

[705] Counter-Memorial, p. 66 (para. 179).

[706] Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 16 January 2021, at **Exhibit C-0554**; Email from C. Baptista (Gazoduq) to J.F. Bergeron (MFFP) (with attachments) dated 5 February 2021, at **Exhibit C-0555**; Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 11 February 2020, at **Exhibit C-0553**; Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 23 February 2021, at **Exhibit C-0556-FRA**; Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 16 July 2021, at **Exhibit C-0551-FRA**; Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 20 July 2021, at **Exhibit C-0557**; Email from C. Baptista (Gazoduq) to C. Le Page (WSP) and J.F. Poirier (UDA) dated 20 July 2021, at **Exhibit C-0558**.

communities that would potentially be the most directly affected.[707] Such engagement efforts included involving Mamo Aki representatives directly in Gazoduq's 2021 field surveys[708] and positive discussions regarding Gazoduq's proposals for the Mamo Aki communities' equity participation in (and other financial benefits from) the Gazoduq Project.[709]

491 By July 2021, Gazoduq was in the final stages of its preparations to commence the 2021 field survey programme. WSP had organised a pre-survey training programme for individuals involved in carrying out the field surveys, to be held on 28 and 29 July 2021.[710] However, as explained in the Memorial and further below,[711] on 21 July 2021 when the Québec Government announced its refusal to authorise the GNLQ Project, it simultaneously put an end to the Gazoduq Project by declaring that it had "died" with GNLQ.[712]

2.7.2 The Gazoduq project was already substantially de-risked from a commercial, technical, social acceptability and Indigenous relations perspective

492 In addition to challenging the progress Symbio had made towards receiving regulatory approvals for the Gazoduq Project, the Respondent attempts, in the Counter-Memorial, to cast doubt on the viability of the Gazoduq Project from other perspectives. In each case, the Respondent's arguments are contradicted by the evidence. As explained below, Gazoduq

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[707] Roux I, at **Exhibit CWS-6**, p. 23 *et seq.* (paras. 90-96); Roux II, at **Exhibit CWS-6 (Second)**, p. 20 *et seq.* (paras. 53, 64).

[708] Roux I, at **Exhibit CWS-6**, p. 24 *et seq.* (paras. 94-95); Roux II, at **Exhibit CWS-6 (Second)**, p. 20 *et seq.* (paras. 53, 66).

[709] Roux I, at **Exhibit CWS-6**, p. 23 *et seq.* (s. III.H); Terms of reference and Proposal for an Equity Participation Proposal (March 2021), at **Exhibit DR-0025-ENG**; Email from D. Roux to Mamo Aki members dated 29 April 2021, at **Exhibit DR-0030-FRA**; Gazoduq, Presentation for Mamo Aki on the Gazoduq Project dated 29 April 2021, at **Exhibit DR-0031-ENG**; Email from D. Roux to Mamo Aki members dated 3 June 2021, at **Exhibit DR-0033-ENG-FRA**, with attachments at **DR-0034-ENG/DR-0035-FRA**.

[710] Email correspondence between Gazoduq, WSP and Tact Conseil from 7 July 2021 to 14 July 2021, at **Exhibit DR-0099-ENG**; Internal Gazoduq email from C. Rinfret to C. Baptista et *al.* dated 19 July 2021, at **Exhibit C-0559-FRA**.

[711] See Section 2.7.3 below.

[712] Memorial, p. 100 (para. 304).

had demonstrated the viability of the Gazoduq Project from a commercial and technical perspective (**Sections 2.7.2.1 and 2.7.1.2**), and there were no concerns as to its social or Indigenous acceptability (**Sections 2.7.1.3 and 2.7.1.4**).

2.7.2.1 The Gazoduq Project was commercially viable

493 First, contrary to the Respondent's assertions, the Gazoduq Project was commercially viable. In his first witness statement, Mr Brintnell explained that Gazoduq had conducted a successful "Open Season" in December 2019, following which GNLQ had formally signed up for pipeline capacity as Gazoduq's major anchor customer.[713] In addition, Gazoduq commissioned EY to produce a study, which it issued in March 2020, confirming that the Gazoduq Project would be suited to meet estimated demand growth in the natural gas market east of Ontario.[714] Mr Brintnell also explained in his first witness statement that Gazoduq had developed robust financial models for the Project,[715] which had been prepared with the support of Symbio's financial advisors at the time, Société Générale.[716]

494 In the Counter-Memorial, the Respondent does not dispute any of the above evidence of the commercial viability of the Gazoduq Project. Instead, it merely speculates that Gazoduq had not received expressions of interest in its pipeline capacity other than from GNLQ, and that, based on that (incorrect) assumption, Gazoduq "*n'a pas réussi à trouver d'acheteur*" for its residual pipeline capacity.[717] The Respondent's speculation is unfounded.

495 As Mr Brintnell explains in his second witness statement, it was not unusual that GNLQ was the only customer to formally sign up for capacity following the "Open Season", and it would have been surprising if other

[713] Brintnell I, at **Exhibit CWS-5**, p. 13 *et seq.* (para. 52).

[714] Brintnell I, at **Exhibit CWS-5**, p. 15 *et seq.* (paras. 57-59), as corrected in Brintnell II, at **Exhibit CWS-5 (Second)**, p. 23 *et seq.* (Annex); EY, "Natural Gas Local Market Study" dated March 2020, at **Exhibit RB-0019-ENG**.

[715] Brintnell I, at **Exhibit CWS-5**, p. 14 *et seq.* (paras. 56, 60).

[716] Le Verger I, at **Exhibit CWS-3**, p. 8 (para. 25); Secretariat I, at **Exhibit CER-3**, p. 57 (para. 4.57); Gazoduq Model, at **Exhibit SEC-0261-ENG**.

[717] Counter-Memorial, p. 285 *et seq.* (para. 709).

customers had wanted formally to sign up for pipeline capacity at that stage of the development of the Project.[718] In any event, Gazoduq did privately receive informal expressions of interest from communities along the pipeline route who would in the future be interested in receiving natural gas from the pipeline [redacted] which had also expressed interest.[719]

2.7.2.2 Gazoduq had confirmed the technical viability of the Gazoduq Project

496 Gazoduq also demonstrated the technical viability of the proposed natural gas pipeline, as Mr Brintnell explained in his first witness statement.[720]

497 In the Counter-Memorial, the Respondent acknowledges that the Claimant completed a FEED study for the Gazoduq Project prepared by UPI.[721] Gazoduq also planned to construct and operate the natural gas pipeline in a manner that minimised its environmental impact. As Mr Brintnell has explained in his witness statements, Gazoduq was already ahead of the curve in terms of utilising the NEB's "Best Available Technologies in Federally Regulated Pipelines" to develop the technical aspects of the Project in a manner that mitigated adverse environmental effects and

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[718] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 14 *et seq.* (paras. 36-37).

[719] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 15 (para. 38); Internal Gazoduq email from R. Brintnell to M. Demers dated 3 January 2019, at **Exhibit RB-0035-ENG**; Internal Gazoduq email from R Whitwham to M Demers (Gazoduq) *et al.* dated 4 February 2020, at **Exhibit RB-0033-ENG**; Email from [redacted] to R. Brintnell (Gazoduq) dated 22 January 2020, at **Exhibit RB-0036-ENG**; Presentation "Le projet Gazoduq" dated 10 February 2020, at **Exhibit C-0560-FRA**, p. 8; Email from R. Whitwham to L. Bergeron *et al.* dated 12 February 2020, at **Exhibit C-0561-ENG**. See also Gazoduq interministerial committee monitoring table dated 9 May 2019, at **Exhibit C-0562-FRA**, p. 4, demonstrating that the Québec Government (via the *Comité interministériel*) was aware of two communities (Senneterre and Lebel-sur-Quévillon) were interested in receiving gas from the pipeline even before Gazoduq's "Open Season".

[720] Brintnell I, at **Exhibit CWS-5**, p. 7 (paras. 26-27).

[721] Counter-Memorial, p. 283 *et seq.* (para. 705). The Respondent nevertheless requested the Claimant to produce UPI's FEED study in the document production process in this arbitration, and the Claimant has provided it accordingly (see the Claimant's response to the Respondent's document request No. 34 at Procedural Order No. 5. Annex A dated 20 December 2024, p. 101 *et seq.*).

promoted safety.[722] In a misguided attempt to downplay Gazoduq's technical development of the Project in its Counter-Memorial, the Respondent concedes that Gazoduq's technical efforts were work that "all project proponents undertake", thereby recognising that the Project was well on track from a technical perspective.[723]

498 Gazoduq had also committed in February 2021 to net-zero GHG emissions in the operation of its natural gas pipeline,[724] which it would achieve by, among other innovations, the use of electric compressor stations that would "set a new industry benchmark in Canada".[725]

2.7.2.3 The Gazoduq Project faced no concerns with social acceptability

499 As for social acceptability, the Project benefitted from strong support from the community, Indigenous peoples and the Government.[726] As Mr Brintnell explains in his second witness statement, Gazoduq had specifically selected a natural gas pipeline route through uninhabited areas, avoiding major population centres, to avoid issues of social acceptability experienced by a recently proposed oil pipeline, Energy East.[727] In the words of one of Canada's own Government officials within NRCan, Gazoduq's approach to community engagement had been "exemplary".[728]

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[722] Brintnell I, at **Exhibit CWS-5**, p. 10 (para. 38); Brintnell II, at **Exhibit CWS-5 (Second)**, p. 5 *et seq.* (para. 13).

[723] Counter-Memorial, p. 290 *et seq.* (para. 719).

[724] Brintnell I, at **Exhibit CWS-5**, p. 11 *et seq.* (para. 42); Gazoduq, Press release, "Gazoduq confirms its intention to aim for net zero emissions", 21 February 2021, at **Exhibit C-0046**. See also Email from C. Baptista (Gazoduq) to J.F. Bergeron (MFFP) (with attachments) dated 5 February 2021, at **Exhibit C-0555**.

[725] See Gazoduq, Press release, "Gazoduq confirms its intention to aim for net zero emissions", 21 February 2021, at **Exhibit C-0046-ENG**; Brintnell I, at **Exhibit CWS-5**, p. 11 *et seq.* (para. 42).

[726] Brintnell I, at **Exhibit CWS-5**, p. 16 (para. 61), as amended in Brintnell II, at **Exhibit CWS-5 (Second)**, p. 23 *et seq.* (Annex).

[727] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 9 *et seq.* (para. 25) and p. 19 *et seq.* (para. 50).

[728] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 12 *et seq.* (para. 31); Notes of Meeting between Gazoduq and NRCan, at **Exhibit RB-0020-ENG**, p. 2.

500 In its Counter-Memorial, the Respondent seeks to cast doubt on the social acceptability of the natural gas pipeline, and relies for that purpose on Ms Bélanger's testimony. [729] Ms Bélanger asserts that, during public consultation meetings held by the Agency to collect feedback on its draft TIS Guidelines for the Gazoduq federal regulatory process, "[l]*a plupart des paticipants locaux à ces rencontres ont exprimé une opinion de méfiance ou d'objection au projet, révélant une opinion publique divisée sur le projet.*"[730]

501 However, it is not clear how Ms Bélanger is able to testify to the opinions expressed during the Agency's consultation meetings, as she acknowledges having not been "*impliquée personnellement*" in Gazoduq's federal impact assessment process at all, and that she only has "*une connaissance institutionnelle*" of the Gazoduq file.[731]

502 Furthermore, Ms Bélanger's evidence is inconsistent with the feedback Gazoduq had itself received in its own community engagement meetings, where the overall message was one of support for the Project.[732] During Gazoduq's public consultations in Québec (where the majority of the pipeline route was situated), in which it visited three regions and ten cities and held over 60 hours of interaction with nearly 500 participants, the overall satisfaction rate from participants responding to on-site polls was 89%.[733]

503 In any event, as Mr Brintnell explains in his second witness statement, it is normal for members of the public to have some concerns at the early stages of development of a natural gas pipeline project, but that is not equivalent to an inherently negative public view of a project.[734] Once the proponent engages with the public over their concerns (either by way of community consultations or through public participation in the regulatory

[729] Counter-Memorial, p. 65 (para. 175).

[730] Bélanger, at **Exhibit RWS-1**, p. 59 (para. 163).

[731] Bélanger, at **Exhibit RWS-1**, p. 57 *et seq.* (para. 158).

[732] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 16 (para. 42); Gazoduq, Quarterly Report (Q1 2019) dated 1 April 2019, at **Exhibit RB-0038-ENG**, p. 4.

[733] Gazoduq, Quarterly Report (Q1 2019) dated 1 April 2019, at **Exhibit RB-0038-ENG**, p. 4.

[734] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 17 (para. 43).

approval process, or both), the proponent can explain how it plans to address the public's concerns. However, in its early consultation meetings, the Agency itself would not have been in a position to provide explanations to mitigate the public's concerns.[735]

504 In addition, Mr Brintnell points out that the cross-section of the population who elected to attend the Agency's consultation meetings does not necessarily reflect broader public opinion: it is typically people with concerns who elect to attend such meetings, rather than people who support a project or are ambivalent.[736] Mr Roux also confirms in his second witness statement that the public comments on Gazoduq to which the Respondent and Mr O'Gorman refer are not unusual for a project undergoing federal review, and were not of a particular concern to him or his Gazoduq colleagues at the time.[737]

2.7.2.4 The Gazoduq Project faced no concerns as to potential opposition from Indigenous communities

505 From the perspective of Indigenous community engagement, Mr Roux explained in his first witness statement the extensive Indigenous community consultations Gazoduq had conducted up until July 2021.[738]

506 In the Counter-Memorial, however, the Respondent attempts to portray the Gazoduq Project as one that would have faced problems due to Indigenous community opposition.[739]

507 As a preliminary observation, the Respondent states that the natural gas pipeline "*aurait traversé le territoire traditionnel de 28 communautés autochtones*".[740] Whilst that is correct, the "traditional territories" of

[735] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 17 (para. 44).

[736] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 17 (paras. 44-45). See also Le Verger II, at **Exhibit CWS-3 (Second)**, p. 39 (para. 120) (noting, in relation to the participation to BAPE hearings, that: "*un sondage réalisé peu avant le BAPE montrait que les opposants au Projet étaient bien plus mobilisés à venir porter leur voix lors des audiences*").

[737] Roux II, at **Exhibit CWS-6 (Second)**, p. 5 *et seq.* (s. 1.2).

[738] See generally Roux I, at **Exhibit CWS-6**.

[739] Counter-Memorial, p. 289 *et seq.* (paras. 715, 720-721).

[740] Counter-Memorial, p. 291 *et seq.* (para. 721).

Indigenous communities (or groups of communities) are distinct from the reserves or communities themselves that these groups occupy. The traditional territories comprise land claims or territories established by treaties, and cover vast areas of territory, many of which overlap. Therefore, whilst the PPA did technically cross the traditional territories of 28 potentially affected Indigenous communities, Gazoduq's DPD explained that the reserves or communities inhabited by those groups varied between 10 km and 190 km in distance from the PPA route.[741]

508 That clarification aside, the Respondent's suggestion that the support of Indigenous communities was one of the "*principaux défis suscités par le projet Gazoduq*" is, once again, unsupported by any concrete evidence.[742]

509 **First**, the Respondent relies on Mr O'Gorman's (selective)[743] summary of comments in the Agency's registry for the Gazoduq Project to argue that Indigenous communities "*avaient en effet exprimé soit un manque d'information ou d'engagement de la part de la demanderesse, soit des préoccupations ou même de l'opposition ou projet*".[744] Mr Roux explains in his second witness statement that Gazoduq was in contact with every one of the Indigenous communities on whose comments the Respondent relies. He further explains that only three comments to which Mr O'Gorman refers actually express opposition to the Gazoduq Project itself, as opposed to complaints about the IAA process (the latter being understandable given the delays caused by Canada forcing Gazoduq to restart the federal regulatory process under the IAA).[745] As for those comments expressing opposition, Mr Roux addresses each of them and

[741] Gazoduq, Detailed Project Description submitted to the Agency (January 2020), at **Exhibit C-0067**, p. 42 (s. 13.5). At the time of Gazoduq's DPD, only 27 potentially impacted Indigenous communities had been identified by the Crown. This was later increased to 28.

[742] Counter-Memorial, p. 291 *et seq.* (para. 721).

[743] As Mr Roux points out in his second witness statement, Mr O'Gorman only partially reflects a small subset of the total number of registry entries: Roux II, at **Exhibit CWS-6 (Second)**, p. 5 *et seq.* (para. 10).

[744] Counter-Memorial, p. 291 (para. 721).

[745] Roux II, at **Exhibit CWS-6 (Second)**, p. 7 *et seq.* (para. 19).

explains why they were not unusual, and that Gazoduq would address those concerns later on in the IAA process, via its Application.[746]

510 **Second**, Mr Roux explains that it is standard practice for Indigenous communities to express opposition to, or concerns about, a major project at the outset, as a negotiating strategy to secure better commercial and other terms for themselves. For this reason, he explains, it is rare to see early expressions of public support for major projects by Indigenous groups.[747] Nevertheless, Mr Roux explains that, unusually for a project at its stage of development, Gazoduq had in fact received support from Indigenous communities, including a particularly supportive message from one First Nation member, after the Gazoduq Project was suspended in July 2021, who had "truly believe[d] that the global impact of the project would have made this a positive, innovative approach to climate change".[748]

511 **Third**, in the Counter-Memorial, the Respondent refers to a resolution voted on by certain members of the Band Council of the Innu of Mashteuiatsh, one of the eight Mamo Aki members, that expressed opposition to the Symbio Project (including Gazoduq).[749] However, as Mr Roux explains in his second witness statement, the resolution appeared to arise from an isolated political issue amongst certain Mashteuiatsh representatives, rather than being indicative of continued and virulent opposition to the Gazoduq Project.[750] Indeed, Mr Roux notes that the resolution was a surprising and dramatic change of position on the Mashteuiatsh's part, and contradicted their ongoing participation in Gazoduq's Joint Cooperation Agreement with Mamo Aki and the preparation of Gazoduq's upcoming field studies in summer 2021, in collaboration with Groupe Conseil Nutshimit-Nippour ("**GCNN**").[751]

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[746] Roux II, at **Exhibit CWS-6 (Second)**, p. 5 *et seq.* (s. 1.2).

[747] Roux II, at **Exhibit CWS-6 (Second)**, p. 8 (para. 17).

[748] Email correspondence between A. Lefebvre (Métis Nation) and D. Roux (Gazoduq) from 29 to 30 July 2021, at **Exhibit DR-0096-ENG**; Roux II, at **Exhibit CWS-6 (Second)**, p. 17 *et seq.* (para. 44).

[749] Counter-Memorial, p. 287 *et seq.* (para. 712).

[750] Roux II, at **Exhibit CWS-6 (Second)**, p. 18 *et seq.* (s. 2).

[751] Roux II, at **Exhibit CWS-6 (Second)**, p. 18 *et seq.* (paras. 48-53). See also Illich II, at **Exhibit CWS-1 (Second)**, p. 5 *et seq.* (s. 2.2).

GCNN is an environmental consultancy firm owned by two Mashteuiatsh members and was identified by Mamo Aki to lead the Indigenous participation in specific studies.

512 **Finally**, in the Counter-Memorial, the Respondent makes a half-hearted argument that Gazoduq (or GNLQ) could have faced legal challenges by Indigenous groups opposed to the Project after receiving regulatory approval.[752] This must be seen for what it is: pure speculation. There had been no legal challenges to the Gazoduq Project before Canada signalled its demise in July 2021 nor, as Mr Roux explains, was there any basis to suspect there would have been any such challenges in the future.[753]

513 Mr O'Gorman, for the Respondent, seeks to draw a comparison between Gazoduq and TC Energy's Coastal GasLink pipeline project, which did face legal challenges by an Indigenous community (although he later acknowledges that it was nevertheless constructed and completed in 2023).[754] However, as Mr Roux explains, that comparison is not apt; compared with Gazoduq, Coastal GasLink had started their Indigenous community consultations later and taken a more inflexible approach to seeking agreements with the communities in question.[755] Mr Roux also explains that a comparison Mr O'Gorman seeks to draw with Indigenous opposition to the Ksi Lisims LNG project is similarly inapposite because, in that case, the opposition stemmed from a territorial dispute between two First Nations that pre-dated the Ksi Lisims LNG project.[756] Mr O'Gorman also seeks to lump the Gazoduq Project together with several oil pipeline projects but, as Mr Brintnell and Mr Northey explain, oil and gas pipelines

[752] Counter-Memorial, p. 292 (para. 722).

[753] Roux II, at **Exhibit CWS-6 (Second)**, p. 28 (paras. 77-78).

[754] O'Gorman, at **Exhibit RER-4**, p. 32 (para. 68). See also p. 77 *et seq.* (para. 177).

[755] Roux II, at **Exhibit CWS-6 (Second)**, p. 28 *et seq.* (paras. 80-82). In addition, the new IAA process was designed to place a greater emphasis on Indigenous engagement, with a view to securing consent and therefore minimising the kinds of disputes arising post-approval faced by Coastal GasLink: see Government of Canada, Handbook "Better Rules for Major Project Reviews" dated 5 September 2018, at **Exhibit RB-0025-ENG**, p. 5.

[756] Roux II, at **Exhibit CWS-6 (Second)**, p. 29 (para. 83). See also O'Gorman, at **Exhibit RER-4**, p. 71 (para. 157).

are not comparable from the safety and environmental perspectives or in terms of their implications for Indigenous groups.[757]

514 In sum, as Mr Roux notes, "there were no red flags" with respect to Indigenous opposition to the Gazoduq Project.[758] Similarly, as Mr Brintnell also explained in his first witness statement, in his experience, the Gazoduq Project was unique in "having received no "no's" from Indigenous communities at such an advanced stage of development."[759]

2.7.3 Canada's actions in July 2021 "killed" the Gazoduq Project, in addition to the GNLQ Project

515 In the Memorial, the Claimant explained that, on 21 July 2021, after announcing the Québec Government's refusal to authorise the GNLQ Project, Minister Charette also declared that there would be no separate BAPE process for the Gazoduq Project which, in the Minister's words, "dies" with the GNLQ Project.[760] Minister Charette's announcement effectively put an end to the Gazoduq Project.

516 In the Counter-Memorial, the Respondent seeks to avoid responsibility for the demise of the Gazoduq Project, instead blaming the Claimant. Rather cynically, the Respondent goes as far as to suggest that Gazoduq ought to have continued its Québec and federal regulatory processes **despite** Québec's refusal of the GNLQ Project and Minister Charette's announcement.[761]

517 The Respondent's argument is divorced from the reality facing Gazoduq as a result of Québec's actions. Aside from the obvious and undisputed fact

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[757] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 18 *et seq.* (paras. 46-49); Northey II, at **Exhibit CER-2 (Second)**, p. 70 *et seq*. (s. 6.0).

[758] Roux II, at **Exhibit CWS-6 (Second)**, p. 27 *et seq.* (para. 75).

[759] Brintnell I, at **Exhibit CWS-5**, p. 16 (para. 61), as amended in Brintnell II, at **Exhibit CWS-5 (Second)**, p. 23 *et seq.* (Annex).

[760] Memorial, p. 100 (para. 304); TACT, Transcript of press conference dated 22 July 2021, at **Exhibit C-0284-ENG-FRA**, p. 5 ("*Sans usine de liquéfaction, il n'y aura pas de gazoduc. Nous pouvons conclure qu'il n'y aura pas ce second BAPE pour évaluer le projet de gazoduc qui meurt avec le projet d'usine de liquéfaction.*"). See also "*Rejet de GNL Québec: il n'y aura pas de BAPE sur le projet de Gazoduq*", *Radio-Canada*, 21 July 2021, at **Exhibit C-0035-FRA**.

[761] Counter-Memorial, p. 66 (para. 179).

that Minister Charette **publicly confirmed** there would be no BAPE process for Gazoduq on 21 July 2021 – thereby making it impossible for Gazoduq to receive Québec's environmental approval – the effect of Québec's refusal of the GNLQ Project was to remove the entire commercial rationale for the Gazoduq Project. Without Gazoduq's principal customer to receive the gas transported by the pipeline, it would have been irrational to continue incurring expenditure pursuing regulatory approvals for the Gazoduq Project. It is doubtful that either regulator (the MELCC or the Agency) would even have accepted Gazoduq's Application without a commercial rationale, as it would also have been a waste of their time and resources.[762] As Mr Brintnell puts it in his second witness statement: "It would have been nonsensical to attempt to continue."[763]

518 Mr Northey also confirmed in his first report that, from a federal legal perspective, "the federal refusal of the Port Terminal also sealed the fate of the Pipeline. Practically speaking, without the Port Terminal, the purpose of the Pipeline […] ceased to be achievable."[764]

519 Therefore, notwithstanding the procedural impropriety of publicly declaring the Project "dead" midway through its provincial and federal regulatory processes, from a practical perspective, Minister Charette was correct. The Québec Government's decision to refuse the GNLQ Project had also killed the Gazoduq Project. There is no basis at all for the Respondent to suggest otherwise in its Counter-Memorial.

2.7.4 Before Québec's refusal of the GNLQ Project, Gazoduq had been on track to receive its regulatory approvals by late 2023

520 Immediately after Québec's Decree rejecting the GNLQ Project, Gazoduq instructed its staff and consultants to stop all work on the Gazoduq Project.[765] However, prior to that Decree, Gazoduq anticipated completing

[762] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 22 (para. 53).

[763] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 22 (para. 53).

[764] Northey I, at **Exhibit CER-2**, p. 76 (para. 215).

[765] See, *e.g.*, Email from C. Baptista (Gazoduq) to C. Le Page (WSP) and J.F. Poirier (UDA) dated 21 July 2021, at **Exhibit C-0563-FRA**; Internal Gazoduq email from L. Bergeron to D. Roux dated 21 July 2021, at **Exhibit C-0564-FRA**. See also Menzies, at **Exhibit CWS-7**, p. 16 (para. 44).

the provincial and federal regulatory review processes and receiving approvals from both levels of Government by November 2023.

521 In the Counter-Memorial, the Respondent asserts that "*le processus d'évaluation d'impact par les deux ordres de gouvernement aurait été long et aurait engendré des délais importants*", and that "*le projet Gazoduq aurait probablement toujours été en cours d'obtenir une autorisation environnementale au niveau fédéral.*"[766] However, those assertions are speculative and unsupported by the evidence.

522 As explained below, Canada's own contemporaneous public statements and assurances to Gazoduq confirmed that the federal IAA process, which the Respondent now asserts would have caused delay, was introduced to improve the efficiency of the federal project review process (**Section 2.7.4.1**). In light of those statements and assurances, as well as further evidence explained below, Gazoduq's schedule for receiving its regulatory approvals by November 2023 was reasonable (**Section 2.7.4.2**).

2.7.4.1 The IAA was intended to improve the efficiency and predictability of the federal project review process

523 In its Counter-Memorial, the Respondent seeks to portray its new IAA regulatory regime as "challenging and lengthy".[767] Based on the opinions of Mr O'Gorman – who appears to have no legal qualifications or practical experience of the IAA regulatory process beyond the Planning Phase[768] – the Respondent argues that the federal regulatory process under the IAA would have been "*beaucoup plus complexe et ardu qu'il ne l'était auparavant*."[769]

524 **First**, the Respondent's position is at odds with Canada's own public statements regarding the IAA regime outside this arbitration. Both before and after Parliament enacted the IAA in June 2019, Canada repeatedly stated in public policy announcements that one of the key aims of the IAA

[766] Counter-Memorial, p. 292 (para. 723).

[767] Counter-Memorial, p. 65 (para. 177).

[768] O'Gorman, at **Exhibit RER-4**, p. 2 *et seq.* (para. 3). See also Sapo'nuk Sustainability website (accessed 3 February 2025), at **Exhibit C-0565-ENG**.

[769] Counter-Memorial, p. 288 (para. 713).

was to make the federal regulatory approval process more efficient, timely, transparent and predictable for project proponents.[770] The IAA itself states that the following are "purposes" of the Act:

> "to establish a **fair, predictable and efficient** process for conducting impact assessments that enhances Canada's competitiveness, encourages innovation in the carrying out of designated projects and creates opportunities for sustainable economic development;"[771]
>
> "to **ensure** that an impact assessment is completed in a **timely manner**".[772]

525 In his report, Mr O'Gorman suggests that the "proposed timelines" in the IAA are merely "aspirational".[773] He is incorrect. An important feature of the IAA was to establish time **limits**, fixed in the legislation itself, for each step in the regulatory process, that were only extendable in certain circumstances or with the approval of the highest levels of Government.[774] As the Federal Government explained at the time it enacted the IAA, the

[770] Government of Canada, "A Modern, New and World-Class Federal Energy Regulator for the 21st Century" (February 2018), at **Exhibit JI-0151-ENG**; Government of Canada, "Key Amendments to Bill C-69", 31 July 2018, at **Exhibit JI-0152-ENG**; Government of Canada, Handbook "Better Rules for Major Project Reviews" dated 5 September 2018, at **Exhibit RB-0025-ENG**, p. 5; Government of Canada, Discussion Paper on Information Requirements and Time Management Regulatory proposal (May 2019), at **Exhibit C-0566-ENG**, p. 3 and 4; IAAC, "Better rules for major projects become law in Canada: Canada's new approach to impact assessments is designed to protect the environment and grow the economy" dated 21 June 2019, at **Exhibit DO-0142-ENG**; CEAA, "Better rules for impact assessments come into effect this month" dated 8 August 2019, at **Exhibit RB-0026-ENG**; Agency Presentation, "Overview of the Impact Assessment Act" dated 2 December 2019, at **Exhibit C-0567-ENG**; Government of Canada, A proposed new impact assessment system dated 26 September 2019, at **Exhibit DO-0007-ENG**. See also Illich II, at **Exhibit CWS-1 (Second)**, p. 22 *et seq.* (s. 4.1); Brintnell II, at **Exhibit CWS-5 (Second)**, p. 9 (para. 23).

[771] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 8 (s. 6(b.1)) (emphasis added).

[772] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 9 (s. 6(i)) (emphasis added).

[773] O'Gorman, at **Exhibit RER-4**, p. 9 (para. 17).

[774] The circumstances in which time limits could be extended or suspended were set out in the provisions of the IAA itself and in the Information and Management of Time Limits Regulations, SOR/2019-283 dated 28 August 2019, at **Exhibit C-0568-ENG**, p. 1 *et seq.* (Regulation 2).

purpose of establishing legislated timelines was to keep the process predictable.[775]

526 Canada's position in this arbitration is also at odds with what its own officials personally told Gazoduq representatives about the IAA regime, both before and after Canada passed the IAA in June 2019. Federal Government representatives, including senior ministers, repeatedly assured Gazoduq's representatives that the new IAA regime would be more efficient and that the Government would help Gazoduq by streamlining the process.[776]

527 As confirmed by a document produced by the Respondent in document production, the Agency, for its part, was "very committed to ensuring a smooth implementation of this [Gazoduq] project through the new impact assessment system",[777] and saw the Gazoduq Project as "an indicator of the success or failure of the new IA regime".[778] This evidence corroborates Mr Brintnell's testimony, who recalls that the Agency wanted Gazoduq to be the "poster child" of the new IAA regime.[779]

528 In light of the foregoing, it is unbecoming of the Respondent to argue in this arbitration that its own IAA process was, *per se*, much more complex, arduous, challenging and lengthy than the previous regulatory regime.

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[775] Government of Canada, Discussion Paper on Information Requirements and Time Management Regulatory proposal (May 2019), at **Exhibit C-0566-ENG**, p. 4: "The Government is establishing shorter timelines, enshrined in the legislation and managed in the context of clear criteria for suspending timelines, to help keep the new process on track and predictable."

[776] See Illich II, at **Exhibit CWS-1 (Second)**, p. 24 *et seq.* (paras. 52-53, 60); Brintnell II, at **Exhibit CWS-5 (Second)**, p. 12 *et seq.* (paras. 29-31).

[777] Meeting of the DM Impact Assessment Committee (Docket 185163) dated 30 January 2020, at **Exhibit C-0569-ENG**, p. 4.

[778] Meeting of the DM Impact Assessment Committee (Docket 185163) dated 30 January 2020, at **Exhibit C-0569-ENG**, p. 4.

[779] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 10 (para. 26).

2.7.4.2 Gazoduq's schedule for obtaining regulatory approvals by late 2023 was reasonable

529 Continuing its cynical characterisation of its own regulatory regime, the Respondent argues that Gazoduq's expectations for when it would complete the IAA process were "*tout à fait irréalistes*".[780] It relies on Mr O'Gorman, whose independence and expertise are both dubious,[781] in arguing that Gazoduq could not have received federal regulatory approval until December 2024.[782] However, the Respondent's position, and Mr O'Gorman's opinions on which it relies, are unsupported by the evidence which, to the contrary, confirms that Gazoduq's estimate of receiving regulatory approvals by November 2023 was entirely reasonable.

530 In Section 2.7.1.3 above, the Claimant describes the IAA process for CER-regulated gas pipelines (such as Gazoduq) and the four key "Phases" preceding the Government's authorisation decision. As at July 2021, the Gazoduq Project had passed through Phase 1 of the process and was preparing its Application pursuant to Phase 2. Therefore, the rest of Phase 2 and Phases 3 and 4 remained to be completed.

(i) Phase 2: Submission and sufficiency review of Gazoduq's Application

531 As at July 2021, the next step in the IAA regulatory process would have been for Gazoduq to submit its Application to the Agency.[783] Mr O'Gorman opines in his report that Gazoduq would not have been able to submit its Application until "fall 2022", an estimate which he describes

[780] Counter-Memorial, p. 289 *et seq.* (para. 716).

[781] Contrary to paragraph 17.3 of Procedural Order No. 1 and Article 5.2 of the MTQ, Mr O'Gorman's expert report does not include (i) a statement of any qualifications relevant to his purported expertise (cf. O'Gorman, at **Exhibit RER-4**, p. 2 *et seq.* (para. 3)); or (ii) a statement of his present and past relationship with the Respondent or of his independence from the Respondent. The website of his consultancy (Sapo'nuk Sustainability) suggests that the Government of Canada accounted for two of his five mandates at the time of his report: Sapo'nuk Sustainability website (accessed 3 February 2025), at **Exhibit C-0565-ENG**. See also D. O'Gorman Linkedin Profile (accessed 10 March 2025), at **Exhibit C-0570-ENG**.

[782] Counter-Memorial, p. 289 *et seq.* (para. 716).

[783] This Application would also address the requirements of the Québec regulatory regime: see paragraph 483 above.

as "very optimistic".[784] Mr O'Gorman's opinion is pure speculation: he had no involvement in the preparation of Gazoduq's Application, which (as explained in paragraph 467 above) had been ongoing since 2018, and no knowledge of its status of development as at July 2021.

532 In contrast, Ms Menzies was heavily involved in the preparation of Gazoduq's Application and has genuine expertise in preparing federal regulatory applications for both natural gas pipeline and oil pipeline projects.[785] In preparing her witness statement, Ms Menzies compiled and reviewed the thousands of pages of draft Application volumes and appendices Gazoduq had already prepared.[786] She assesses that, based on the status of Gazoduq's draft Application as it stood in July 2021, Gazoduq could have been in a position to submit the Application as early as between December 2021 and February 2022.[787] Nevertheless, as Mr Illich explains in his second witness statement, Gazoduq would have waited to gather input and feedback from Indigenous communities before finalising and submitting the application, hence its target submission date of July 2022.[788] As for Mr Roux, he explains in his second witness statement, that, from his perspective as Gazoduq's lead on Indigenous consultations, the July 2022 target date gave sufficient time to gather Indigenous input on Gazoduq's Application.[789]

533 After Gazoduq submitted its Application in July 2022, before the IA Phase (Phase 3) of the IAA process would commence, the Agency would conduct an initial "sufficiency review" of the Application.[790] As Ms Menzies

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[784] O'Gorman, at **Exhibit RER-4**, p. 58 (para. 134, second bullet) (emphasis omitted).

[785] See Menzies, at **Exhibit CWS-7**, p. 4 *et seq.* (s. 2).

[786] These are submitted as multi-volume **Exhibit C-571** (see, *e.g.*, Gazoduq Draft Application: V1 Application and Project Overview, at **Exhibit C-0571-V1-ENG**; Gazoduq Draft Application: V2 Environmental Impact Statement, at **Exhibit C-0571-V2-FRA**).

[787] Menzies, at **Exhibit CWS-7**, p. 20 *et seq.* (para. 59).

[788] Illich II, at **Exhibit CWS-1 (Second)**, p. 32 (para. 67); LNG Quebec LP Schedule (January 2021), at **Exhibit JI-0157-ENG**; GNLQ, Private Placement Memorandum (Addendum) dated 8 January 2021, at **Exhibit SEC-0101-ENG**, p. 7.

[789] Roux II, at **Exhibit CWS-6 (Second)**, p. 26 (para. 70).

[790] The Draft Terms of Reference for the Review Panel, prepared by the Agency, suggested that the Review Panel would also conduct its own, separate sufficiency review prior to the Agency

explains in her witness statement, this stage of the regulatory process does not involve a substantive review of the merits of the Application, but rather the Agency determining whether the Application includes the information requested in the TIS Guidelines (or provides sufficient explanations as to why certain information could not be provided).[791] Based on the precedents of other gas pipeline regulatory review processes in Canada, some of which members of the Gazoduq team had been involved with, Gazoduq estimated a 60-day timeframe for the sufficiency review.[792]

534 Mr O'Gorman, in contrast, estimates that the sufficiency review stage would have taken around **ten months**.[793] Mr O'Gorman's estimate is misconceived for several reasons.

535 **First**, as Ms Menzies explains in her witness statement, during a meeting between Gazoduq and the Agency in May 2019, Gazoduq specifically asked how long the sufficiency review process was likely to take under the IAA regime. Mr Terence Hubbard, then Vice-President of Operations for the Agency,[794] explained that the Agency had a service standard of 30 days to conduct the sufficiency review process, plus time to collect comments

commencing the IA Phase: Agency, Gazoduq Project Integrated Review Panel Terms of Reference, Draft for Consultation dated 15 May 2020, at **Exhibit DO-0131-ENG**, p. 9 (Art. 5.17). This appears to have been an error, because the IAA requires that the Agency appoint the Review Panel **only after** it has already initiated the IA Phase (*i.e.*, once it has already completed the sufficiency review): Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 34 (s. 47(1)). Therefore, as Mr O'Gorman acknowledges in his report, the Review Panel's sufficiency review would have been moved to Phase 3 in the final terms of reference: O'Gorman, at **Exhibit RER-4**, p. 48 *et seq.* (Table 6). This is confirmed by the Agency's website, which includes review panel sufficiency reviews as part of Phase 3 of the process: **DO-0125-ENG**, p. 4. The Agency appears to have corrected this error for another project subject to a review panel impact assessment under the IAA (the GCT Deltaport Expansion project), where the draft Review Panel Terms of Reference make clear that the review panel's sufficiency review takes place in Phase 3 and does not affect the time limit for that phase: Draft Review Panel Terms of Reference, GCT Deltaport Expansion dated 28 February 2023, at **Exhibit C-0572-ENG**, p. 12 (Art. 4.8).

[791] See Menzies, at **Exhibit CWS-7**, p. 25 *et seq.* (para. 72).

[792] Illich II, at **Exhibit CWS-1 (Second)**, p. 34 *et seq.* (para. 73).

[793] O'Gorman, at **Exhibit RER-4**, p. 58 (para. 134, third and fourth bullets) (emphasis omitted).

[794] Mr Hubbard is now President of the Agency and one of the Respondent's witnesses, but does not mention this or any other meeting with Gazoduq in his witness statement: Hubbard, at **Exhibit RWS-7**.

from the public on the proponent's application.[795] Therefore, the Agency's **own expectation** at the time the IAA was enacted was that sufficiency reviews would be in the same ballpark that Gazoduq estimated in its January 2021 schedule: nowhere near the ten months Mr O'Gorman envisages.

536 **Second**, Mr O'Gorman's opinion rests his assumption that, after Gazoduq submitted its Application, the Agency would issue "multiple rounds of information requests […] to Gazoduq, each of which can take months to address."[796] However, the IAA **did not permit** the Agency to request additional information or studies, beyond what was already listed in the TIS Guidelines, at the sufficiency review stage.[797] Indeed, one of the key features of the new IAA regime, in contrast to the prior, NEB review regime, was to front-load the process of identifying issues the proponent should address in its impact statement during the Planning Phase (*i.e.*, by preparing detailed, *Tailored* Impact Statement Guidelines), precisely to avoid new information requests ("**IRs**") coming up later on.[798]

537 Therefore, the only IRs that could arise were if the Agency considered Gazoduq had failed to provide information or studies requested in the TIS Guidelines. However, this would have been unlikely in circumstances

[795] Menzies, at **Exhibit CWS-7**, p. 26 (para. 74). See also Internal Gazoduq email from R. Basdeo to A. Menzies *et al.* (with attachment) dated 22 May 2019, at **Exhibit AM-0006-ENG**, p. 9.

[796] O'Gorman, at **Exhibit RER-4**, p. 52 (para. 119).

[797] See Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 16 *et seq.* Section 18(1)(a) requires the Agency to provide the proponent with the "information or studies" required to conduct the impact assessment at the end of the Planning Phase in its "notice of commencement". Section 19(1) requires the proponent to provide only the "information or studies" set out in the notice of commencement (*i.e.*, the TIS Guidelines). Once the proponent has provided such information or studies, section 19(4) mandates the Agency to post a "notice of determination" (*i.e.*, that its sufficiency review is complete) on its website, thereby commencing the legislated time limits for Phase 3 (see section 37.1). There is no scope under the IAA for the Agency to request additional information or studies, unless the proponent requests an extension to its deadline to submit its impact statement (see section 19(3)).

[798] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 8 *et seq.* (paras. 21-22). See also Government of Canada, Discussion Paper on Information Requirements and Time Management Regulatory proposal (May 2019), at **Exhibit C-0566**, p. 4: "The new impact assessment process is designed to enhance predictability and avoid delays – for example, caused by incomplete documentation and late requests for more information – by clearly setting out information needs during early planning."

where Gazoduq had given itself until July 2022 (*i.e.*, a whole year from July 2021) to finalise its Application in accordance with the TIS Guidelines, which it had already been assessing since their issuance in July 2020.[799] During that time, it would also have continued its coordination with the Agency to form a mutual understanding of the Agency's expectations with respect to the TIS Guidelines, reducing the risk of IRs.[800]

538 As Mr Brintnell explains in his second witness statement, and the Respondent's document production has confirmed,[801] the Agency wished to help Gazoduq through the IAA regulatory process to help demonstrate the efficacy of the new regime, and had demonstrated its willingness to "work closely" with Gazoduq to help it understand the new requirements.[802] In addition to the Agency itself, other senior Federal Government officials had also offered to help streamline the IAA process for Gazoduq, as Mr Illich and Mr Brintnell explain.[803] In summer 2022 – precisely the point in time when Gazoduq's Application would have come under sufficiency review – the Federal Government stated publicly that it would be willing to streamline regulatory processes for LNG projects to help expedite Canadian exports of LNG to Europe, following Russia's full-scale invasion of Ukraine in early 2022.[804]

539 Even if the Agency had issued IRs at the sufficiency review stage, it is unlikely that they would have caused any substantial delay. As Mr Brintnell explains, responding to IRs does not necessarily take "months" as Mr O'Gorman suggests; the process often involves merely providing

[799] Illich II, at **Exhibit CWS-1 (Second)**, p. 31 *et seq.* (paras. 66, 67).

[800] See Brintnell II, at **Exhibit CWS-5 (Second)**, p. 10 *et seq.* (paras. 26-28). See also Menzies, at **Exhibit CWS-7**, p. 22 *et seq.* (para. 65).

[801] See Meeting of the DM Impact Assessment Committee (Docket 185163) dated 30 January 2020, at **Exhibit C-0569-ENG**, p. 4.

[802] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 10 *et seq.* (paras. 26-28). See also CEAA, Draft Minutes of Meeting between Gazoduq and the Agency dated 5 July 2019, at **Exhibit RB-0021-ENG**; Email from C. Rinfret (Gazoduq) to R. Brintnell (Gazoduq) *et al.* dated 17 July 2019, at **Exhibit RB-0029-ENG**; Meeting invitation from Terence Hubbard (IAAC) to Ron Brintnell (Gazoduq) *et al.* dated 13 September 2019, at **Exhibit RB-0030-ENG**, p. 4 of the PDF.

[803] Illich II, at **Exhibit CWS-1 (Second)**, p. 24 *et seq.* (paras. 52-53, 60); Brintnell II, at **Exhibit CWS-5 (Second)**, p. 12 *et seq.* (paras. 29-31).

[804] See Illich II, at **Exhibit CWS-1 (Second)**, p. 35 *et seq.* (paras. 76-77).

information the proponent already has to hand, or the rewording of existing information in the proponent's application.[805]

540 **Third**, Mr O'Gorman ignores the evidence of how long other recent, federally regulated gas pipeline projects took to pass through the equivalent stage of their regulatory processes.[806] Gazoduq's estimate of 60 days for the sufficiency review was aligned with (and indeed, more conservative than) the time it took other recent, comparable gas pipeline projects regulated by the British Columbia Environmental Assessment Office ("**BC EAO**") to complete the equivalent stage of their regulatory processes.[807] Although there is currently no direct precedent for how long the Agency would take to complete a sufficiency review of a gas pipeline project under the IAA regime, the Cedar LNG Project, for which the Agency delegated its detailed review to the BC EAO, passed its sufficiency review in just 51 days, confirming again that Gazoduq's 60-day estimate was reasonable.[808]

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[805] Brintnell II, at **Exhibit CWS-5 (Second)**, p. 13 (para. 32).

[806] Mr O'Gorman refers only to the Energy East project (O'Gorman, at **Exhibit RER-4**, p. 52 (n. 165)) which, as Ms Menzies explains in her witness statement, was a far more complex project than Gazoduq: see Menzies, at **Exhibit CWS-7**, p. 32 *et seq.* (para. 86). See also Brintnell II, at **Exhibit CWS-5 (Second)**, p. 9 (para. 24).

[807] The Coastal Gaslink Pipeline Project ("**CGL**") took **41 days** from submission of its application (29 January 2014) to initiation the detailed review stage (11 March 2014): Assessment Report for the CGL Project (October 2014), at **Exhibit C-0573-ENG**, p. 33 *et seq.* (s. 3.2). The Westcoast Connector Gas Transmission Project ("**WCGT**") took **46 days** from submission of its application (21 March 2014) to the initiation of the detailed review stage (6 May 2014): Assessment Report for the WCGT Project dated 3 November 2014, at **Exhibit C-0574-ENG**, p. 36 *et seq.* (s. 3.2). The Prince Rupert Gas Transmission Project ("**PRGT**") took **43 days** from submission of its application (3 April 2014) to initiation of the detailed review stage (16 May 2014): Assessment Report for the PRGT Project dated 12 November 2014, at **Exhibit C-0575-ENG**, p. 54 (s. 3.2). The British Columbia Government approved CGL on 23 October 2014 (Coastal Gaslink, Environmental Assessment Certificate dated 23 October 2014, at **Exhibit C-0576-ENG**) and both WCGT and PGRT on 25 November 2014 (Westcoast Connector, Environmental Assessment Certificate dated 25 November 2014, at **Exhibit C-0577-ENG**; Prince Rupert Gas Transmission, Environmental Assessment Certificate dated 25 November 2014, at **Exhibit C-0578-ENG**). See also Menzies, at **Exhibit CWS-7**, p. 34 *et seq.* (para. 73). See also Illich II, at **Exhibit CWS-1 (Second)**, p. 27 (para. 76) and Menzies, Annex B, at **Exhibit CWS-7 (Annex B)**.

[808] Cedar LNG submitted its application on 15 December 2021 (Letter from BC EAO to Cedar LNG Accepting Application for Review dated 14 January 2022, at **Exhibit AM-0012-ENG**)

541 **Finally**, and notwithstanding the foregoing, in the QC-CAN Gazoduq Cooperation Agreement, Canada and Québec had already agreed that their respective sufficiency reviews for the Gazoduq Project would not exceed 180 days (*i.e.*, six months).[809] Mr O'Gorman's estimate exceeds this limit by four months. Although the 180-day time limit in the QC-CAN Gazoduq Cooperation Agreement excluded any time taken by Gazoduq to respond to IRs, for the reasons explained above, this ought not to have added much time, if any.

(ii) Phases 3 and 4: Impact Assessment and Decision-making Phases

542 Following the sufficiency review, the remaining steps in the IAA process prior to regulatory approval were the IA Phase (Phase 3) and the Decision-Making Phase (Phase 4). As explained in Section 2.7.1.3 above, the IAA imposed fixed legislated time limits for these Phases, subject to extensions in only specified circumstances and with the approval of the federal Minister of the Environment or, thereafter, the Cabinet.[810]

543 In July 2020, the Agency had established a maximum time limit for the IA Phase of 420 days.[811] Mr O'Gorman speculates that, since the default time limit under the IAA for Phase 3 was up to 300 days, the Agency's 420-day time limit indicated "the anticipated complexities the review panel would face" with the Gazoduq Project.[812] His speculation has no merit. Had it

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and the BC EAO accepted the application for detailed review on 4 February 2022 upon Cedar LNG providing an updated version of its application: British Columbia Environmental Assessment Office, Environmental Assessment Report of the Cedar LNG Project, at **Exhibit C-0368-ENG**, p. 68; EPIC Registry, Cedar LNG Application documents (accessed 27 March 2025), at **Exhibit C-0579-ENG**. The BC EAO's sufficiency review of the Cedar LNG project would have involved input from the Agency as to issues of federal jurisdiction, and the Agency confirmed in a meeting to Gazoduq that Cedar's application had addressed all of the new IAA substantive requirements: Notes of meetings with the Agency from 14 July 2021 to 23 September 2022, at **Exhibit TLV-0154-ENG**, p. 6.

[809] Impact Assessment Agency of Canada, Cooperation Plan for the Impact Assessment of the Gazoduq Project dated 30 June 2020, at **Exhibit DO-0115-ENG**, p. 7 (clause 7.3).

[810] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 28 *et seq.* (ss. 37(3)-(4), 37.1(4)) and p. 45 (ss. 65(5)-(6)).

[811] IAAC Registry, Notice of the establishment of time limits for the impact assessment of the Gazoduq Project dated 16 July 2020, at **Exhibit DO-0118-ENG**.

[812] O'Gorman, at **Exhibit RER-4**, p. 47 *et seq.* (para. 110).

wished, the Agency could have set a time limit of up to 600 days, but it elected not to.[813]

544 Mr O'Gorman also appears unaware that the Agency had already indicated to Gazoduq that its review could take less than the maximum 420 days: in a phone call in early 2020, the Mr Hubbard indicated to Gazoduq his view that the IA Phase would last around 350 days.[814] On that basis, Gazoduq's January 2021 schedule estimated that the IA Phase would last 350 days.[815] In light of the repeated assurances that the Government had made to Gazoduq prior to July 2021 that the IAA process would be streamlined and efficient, Gazoduq's estimate was reasonable.

545 For the Decision-Making Phase, the IAA established a time limit of 90 days. [816] However, again, Gazoduq reasonably estimated that the Government would not take all 90 days available to it to approve Gazoduq's application. As Mr Illich explains, Gazoduq reasoned that by that point in time the GNLQ Project would have been approved and awaiting FID, and therefore approving Gazoduq would have been high on the Government's list of priorities.[817] Gazoduq therefore estimated that Phase 4 would last 30 days.[818]

(iii) Gazoduq would have received regulatory approvals from both levels of Government by 30 November 2023

546 As the foregoing demonstrates, contrary to the grim picture Mr O'Gorman seeks to paint in his report, Gazoduq's schedule for receiving regulatory approvals contained reasonable estimates for each remaining stage of the federal impact assessment process. Mr Illich explains that Gazoduq also included an additional 60 days as a contingency for potential delays in the

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[813] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 29 *et seq.* (s. 37.1(2)). Indeed, for another recent IAA-governed project (GCT Deltaport Expansion), the Agency set a time limit of 600 days for Phase 3: IAAC, Notice of the Establishment of Time Limits with Reasons, GCT Deltaport Expansion dated 20 September 2024, at **Exhibit C-0580-ENG**.

[814] Email from C. Rinfret to J. Illich dated 3 April 2020, at **Exhibit JI-0154**.

[815] Illich II, at **Exhibit CWS-1 (Second)**, p. 35 (para. 74).

[816] Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 45 (s. 65(4)).

[817] Illich II, at **Exhibit CWS-1 (Second)**, p. 35 (para. 75).

[818] Illich II, at **Exhibit CWS-1 (Second)**, p. 35 (para. 75).

regulatory process.[819] Adding up Gazoduq's time estimates, plus this contingency, provided its overall estimate of 30 November 2023 for receiving Federal Government approval for the Gazoduq Project.[820]

547 Under the QC-CAN Gazoduq Cooperation Agreement, the Federal and Québec Governments had agreed to conduct joint hearings and coordinate the issuance of their decisions on Gazoduq's Application.[821] Therefore, it is reasonable to assume – as Gazoduq did[822] – that the MELCC regulatory approval process would have concluded at the same time as the IAA process.

548 Accordingly, contrary to the Respondent's position in the Counter-Memorial, the evidence shows that Gazoduq would have completed both the Québec and Federal Government regulatory processes, despite the delays to the latter caused by the implementation of the IAA, by November 2023.

[819] Illich II, at **Exhibit CWS-1 (Second)**, p. 33 (para. 71).

[820] Illich II, at **Exhibit CWS-1 (Second)**, p. 33 (para. 71).

[821] Impact Assessment Agency of Canada, Cooperation Plan for the Impact Assessment of the Gazoduq Project dated 30 June 2020, at **Exhibit DO-0115-ENG**, p. 7 *et seq.* (clauses 7.6, 7.13).

[822] LNG Quebec LP Schedule (January 2021), at **Exhibit JI-0157-ENG**.

3 JURISDICTION

550 In its request for bifurcation dated 5 January 2024, the Respondent made the following three objections to jurisdiction:

i) The Tribunal does not have jurisdiction over any of the Claimant's claims because the dispute purportedly does not arise out of an investment as required under Article 25 of the ICSID Convention;

ii) the Tribunal does not have jurisdiction over the claim arising out of the decision to subject the Project to two EAs (federal and provincial); and

iii) the Tribunal does not have jurisdiction over the claim arising out of the leak to the press about the withdrawal of an investor from the Project.[823]

551 In its Counter-Memorial, the Respondent maintains these objections but addresses them in only two paragraphs, out of the 30 pages dedicated to its jurisdictional objections. The Respondent instead focuses on a fourth and new jurisdictional objection, namely that the Claimant's claims purportedly arise out of State measures taken after the termination of the NAFTA and that Annex 14-C of the USMCA would allegedly not permit such claims.[824]

552 The timing of this new objection speaks for itself. Had the Respondent genuinely believed that the Tribunal lacked jurisdiction under Annex 14-C of the USMCA over some or part of the claims, it would have raised it at the outset.

553 Indeed, as a party to the USMCA, the Respondent has been aware of the content and purpose of Annex 14-C since its negotiation (in 2017-2018). Were it so clear – as the Respondent now argues – that it does not permit certain claims to be raised in this arbitration, there would have been no reason for the Respondent not to raise that argument when requesting bifurcation in January 2024.[825] No event occurred between January 2024

[823] *Demande de bifurcation*, p. 36 of the PDF (p. 39 (para. 82)).

[824] Counter-Memorial, p. 67 (para. 182).

[825] All the Respondent did in December 2023 was to apply, unsuccessfully, to stay the proceedings until the award in *TC Energy v. U.S.* would be rendered. In rejecting this request, the Tribunal stated "[i]f the Annex 14-C temporal application issue was, as the Respondent

(when the Respondent filed its request for bifurcation) and July 2024 (when the Respondent filed its Counter-Memorial) that provided a basis for that new objection, and certainly not the majority decision and dissenting opinion in the *TC Energy v. U.S.* case. As at January 2024, the other two USMCA parties, the U.S. and Mexico, had objected to the jurisdiction of other USMCA tribunals on similar grounds.[826] Canada was well aware of those objections[827] and yet did not take position in those proceedings.[828] As discussed in Section 3.3.4 below, it had even filed an Article 1128 NAFTA submission in *Legacy Vulcan v. Mexico*, but not on the issue of Annex 14-C.

554 In any event, as explained below (**Section 3.2**), it is not correct that the Claimant's claims post-date the termination of the NAFTA. Those claims arise out of a series of acts and omissions starting in 2015, some of which, on their own, amount to a NAFTA breach. As such, they also constitute a composite act which, in aggregate, is including the acts and omissions which on their own would not necessarily amount to a NAFTA breach, were wrongful and extended from the period 2015 until 2022. Because the breaches of the NAFTA relied upon by the Claimant (whether stand-alone or as a composite act) pre-date the termination of the NAFTA, the

contends, of such paramount importance and relevance to the present proceeding, the Respondent ought to have raised it, and the pending NAFTA cases dealing with it, in a timely manner." Procedural Order No. 3 dated 9 May 2024, p. 8 (para. 32).

[826] The U.S. had raised the objection months before in at least two cases: *TC Energy v. U.S.* and *Legacy Vulcan v. Mexico* (as Respondent and Non-Disputing Party). See *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 7 (para. 28); *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Second Submission of the United States of America, 21 July 2023, at **Exhibit R-0103-ENG**, p. 5 (para. 9). Mexico had raised the objection in *Legacy Vulcan v. Mexico* on 19 December 2022, *i.e.*, more than a year before January 2024. See *Legacy Vulcan, LLC v. United Mexican States,* ICSID Case No. ARB/19/1, Respondent's Counter-Memorial on the Ancillary Claim, 19 December 2022, at **Exhibit C-0581-ENG-SPA**, p. 307 of the PDF (para. 407).

[827] The cases were public and Canada, as a fellow USMCA party, was aware of them. For instance, the Respondent's representatives attended the hearing in *TC Energy v. U.S.* in April 2024. *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 11 *et seq.* (para. 64); see also PO3, p. 8 (para. 31).

[828] It is only recently that the Respondent made Article 1128 NAFTA comments regarding Annex 14-C in a similar case, *APMC v. U.S.* (where Canada, through APMC, a Canadian State-owned entity, is also opposing a jurisdictional objection relating to Annex 14-C). See Section 3.3.4 below.

Claimant's claims are permitted under Annex 14-C and the Tribunal has jurisdiction over them.

555 Furthermore, even if some of the acts out of which the claims arise took place after the termination of the NAFTA, the claims nevertheless fall within the scope of Annex 14-C. Indeed, as demonstrated below (**Section 3.3**), Annex 14-C does cover claims that arise out of measures that post-date the termination of the NAFTA but that are taken within the three-year period following termination. In this case, it is undisputed that the wrongful measures that post-date the termination of the NAFTA all occurred within that three-year window of time. The Claimant's claims are therefore permitted under Annex 14-C and the Tribunal has jurisdiction over them.

556 Before turning to the Respondent's objection based on Annex 14-C of the USMCA, the Claimant first addresses briefly its initial three jurisdictional objections (**Section 3.1**).

3.1 The Respondent's three initial jurisdictional objections remain without merit

557 None of the Respondent's three initial jurisdictional objections, as raised when making its request for bifurcation,[829] have any merits.

558 **First**, the Respondent continues to contend that the dispute does not arise directly out of an investment under Article 25 of the ICSID Convention. As the Claimant has explained in its earlier submissions, there is simply no basis for this contention.[830]

559 In brief, the Claimant has demonstrated that it acquired, held or controlled several assets which qualify as "investments" under Article 1139 NAFTA (as referred to in paragraph 6(b) of Annex 14-C of the USMCA) and Article 25(1) of the ICSID Convention, including several enterprises in

[829] Counter-Memorial, p. 97 (para. 271); *Demande de bifurcation*, p. 36 of the PDF (p. 39 (para. 82)).

[830] See Memorial, p. 126 *et seq.* (paras. 400-430); Claimant's Response to Respondent's Request for Bifurcation, p. 10 *et seq.* (s. II.A); Claimant's Rejoinder on Respondent's Request for Bifurcation, p. 16 *et seq.* (s. II.C.).

Québec: Symbio Infrastructure Limited Partnership, Symbio Infrastructure GP Inc., GNL Québec Inc. and Gazoduq Inc.[831] Both GNL Québec and Gazoduq had extensive commercial activities related to the development of the Symbio Project.[832] As various NAFTA tribunals have held, an enterprise may qualify as an "investment" already at the project development phase.[833] It is also well-established that direct and indirect equity participation in locally-incorporated companies qualifies as an "investment" under Article 25(1) of the ICSID Convention.[834]

560 Significantly, in its Counter-Memorial, the Respondent does not dispute – let alone address – the Claimant's submissions on this point. The Respondent's sole, new argument is that the Claimant purportedly failed to give notice under the Investment Canada Act about its investment.[835] While it is undisputed that the Claimant did not file such a notice, contrary to the Respondent's argument, this fact has no bearing on the Tribunal's jurisdiction under the USMCA, the NAFTA or the ICSID Convention. Indeed, nothing in the Investment Canada Act affects the definition of an investment under paragraph 6(b) of Annex 14-C of the USMCA, Article 1139 NAFTA or Article 25 of the ICSID Convention.

561 **Second**, the Respondent maintains – without any further submission – that "*le Tribunal n'a pas compétence pour entendre la demande relative à la tenue de deux évaluations environnementales sur le projet Énergie Saguenay car une telle demande est prescrite selon les termes de l'article 1117(2) de l'ALÉNA*."[836]

[831] Memorial, p. 126 *et seq.* (paras. 402-417); p. 132 *et seq.* (paras. 420-429); Claimant's Response to Respondent's Request for Bifurcation, p. 11 (para. 25).

[832] Claimant's Response to Respondent's Request for Bifurcation, p. 11 (para. 25).

[833] Claimant's Response to Respondent's Request for Bifurcation, p. 12 (para. 27) and the references cited therein,

[834] Claimant's Response to Respondent's Request for Bifurcation, p. 13 *et seq.* (para. 28-29) and the references cited therein.

[835] Counter-Memorial, p. 98 (para. 272); Investment Canada Act (ICA), R.S.C. 1985, c. 28 (1st Supp.), at **Exhibit R-0047-FRA**, p. 9 (Art. 12).

[836] Counter-Memorial, p. 97 (para 271); see also p. 69 *et seq.* (para. 188).

562 Again, as demonstrated in the Claimant's prior submissions, which are not addressed by the Respondent in its Counter-Memorial, this objection is without merit.[837] The Claimant's position is summarised as follows.

563 Article 1117(2) NAFTA provides:

> "An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, **knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage**."[838]

564 In this case, the Claimant was not aware of the Respondent's decisions that led to two separate EA processes (federal and provincial) when those decisions were made in 2015 and 2016.[839] In any case, those decisions did not affect the Claimant's rights at the time; it was not until much later that the Claimant learned that those decisions – as well as related, subsequent acts and omissions – amounted to a breach of the NAFTA that caused it to suffer a loss.

565 Indeed, the Claimant did not learn of the breach until the Québec Government and the Federal Government each refused to authorise the GNLQ Project in July 2021 and February 2022, respectively. As the Claimant has previously explained:

> "These decisions [the 2015-2016 Québec and Federal Government decisions to hold separate environmental assessments for the GNLQ Project] are **equally inseparable from the facts that follow these decisions and which include the conduct of these distinct environmental assessments beginning in December 2015 and**

[837] Memorial, p. 123 (para. 382); Claimant's Response to Respondent's Request for Bifurcation, p. 61 *et seq.* (para. 175 *et seq*.).

[838] North American Free Trade Agreement (1994), Chapter Eleven, at **Exhibit CL-001-ENG**, p. 10 (Art. 1117(2)) (emphasis added).

[839] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 29 (para. 84).

> **culminating in the 21 July 2021 provincial refusal** and the 7 February 2022 federal refusal to authorise the GNLQ Project."[840]

566 It was at that point in time (July 2021 and February 2022) that the Claimant learned, not only of the refusal to authorise the GNLQ Project, but also of the improper and unlawful grounds leading to those refusals, which were the result of an EA process that had itself been tainted by the initial 2015-2016 decisions and involved a series of unlawful acts, as recalled below.[841]

567 Furthermore, it is only at that point in time (July 2021 and February 2022) that the Claimant learned that it had suffered a loss as a result of the Respondent's wrongful actions and omissions.[842]

568 Hence, less than three years elapsed between the time when the Claimant learned of the Respondent's breach of the NAFTA and of its loss (on 21 July 2021 and 7 February 2022)[843] and the filing of the Claimant's Notice

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[840] Claimant's Response to Respondent's Request for Bifurcation, p. 59 (para.168) (emphasis added); see also para. 179 ("the NAFTA breaches of the Respondent that had begun in 2015-2016 continued into 2020 and through to 2021 and 2022"); p. 63 (para. 181) ("These continuing NAFTA breaches of the Respondent began in 2015-2016, with the launch of the separate provincial and federal environmental assessments, and continued well into 2020 and up to 2022, with the conclusion of the separate provincial and federal environmental assessments.").

[841] See also *United Parcel Service of America Inc. v. Government of Canada,* ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, at **Exhibit CL-023-ENG**, p. 13 (para. 28), ("continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here."); *Energía y Renovación Holding, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Award 31 March 2025, at **Exhibit CL-282-ENG-SPA**, p. 69 *et seq.* (para. 240) ("the limitation period only starts to run when the damage is known") and p. 71 (para. 244) ("above that the continuing illegality extends over time for the entire period during which the state persists in violating its obligations") (loose translations); *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 72 *et seq.* (para. 261).

[842] See Memorial, p. 123 (para. 382) (noting that the breaches continued until 2022); Claimant's Response to Respondent's Request for Bifurcation, p. 71 *et seq.* (paras. 216-227).

[843] On 3 February 2022 the Federal Government issued its decision (that the Project was likely to cause significant adverse environmental effects that were not justified in the circumstances). See Government of Canada, "Énergie Saguenay, Orders in Council" dated 3 February 2022, at **Exhibit RN-0030-ENG**. On 7 February 2022, the Minister of Environment issued the "Decision Statement" which confirmed the Federal Government's decision. Decision Statement, at **Exhibit RN-0004-ENG**.

of Arbitration (on 17 February 2023). Accordingly, the Claimant's claims were timely under Article 1117(2) NAFTA.[844]

569 **Third**, the Respondent maintains that the Tribunal does not have jurisdiction over the Claimant's claim arising out of the press leak regarding the withdrawal of an investor from the Project, on the grounds that this claim was not notified in accordance with Article 1119 NAFTA[845] and thus is not covered by Canada's consent to arbitration.[846] In the Counter-Memorial, the Respondent refers to its prior submissions, but does not dispute or address the Claimant's own submissions on this objection, as set out in the Memorial.[847]

570 As shown by the Claimant, the Respondent's argument is misplaced both because the claim was covered by the Notice of Intent and the Request for Arbitration and because it is manifestly not a new claim.[848] The Claimant need not address these points further.

3.2 The claims arise out of breaches of the NAFTA that pre-date the termination of the NAFTA

571 The Respondent's main jurisdictional argument is that Annex 14-C of the USMCA does not permit an investor to raise claims arising out of State measures that post-date the termination of the NAFTA on 30 June 2020. The Respondent, however, recognises that measures that took place before 30 June 2020 can amount to a NAFTA breach and thus implicitly recognises that claims arising out of such breaches are covered pursuant to Annex 14-C.[849]

572 In this case, as explained below, the claims before the Tribunal arise out of actions and omissions that started in 2015, some of which, on their own,

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[844] NAFTA, at **Exhibit CL-001-ENG**, p. 10 (Art. 1117(2)).

[845] Counter-Memorial, p. 97 *et seq.* (para. 271).

[846] Counter-Memorial, p. 70 (para. 189).

[847] Claimant's Response to Respondent's Request for Bifurcation, p. 71 *et seq.* (paras. 216-227); see also Memorial, p. 122 (para. 380).

[848] See Claimant's Response to Respondent's Request for Bifurcation, p. 72 *et seq.* (para. 218 *et seq.*).

[849] Counter-Memorial, p. 76 (para. 206).

amount to a breach of the NAFTA. As such, they also constitute a composite act which, in aggregate, that is, including the actions and omissions which on their own may not necessarily amount to a NAFTA breach, were wrongful and extended from the period 2015 until 2022.

573 Indeed, Article 15 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001) (the "**ILC Articles**"), entitled "breach consisting of a composite act", provides as follows:

> "1. The breach of an international obligation by a State through a **series of actions or omissions defined in aggregate as wrongful** occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> 2. In such a case, **the breach extends over the entire period** starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation."[850]

574 Here, the series of actions and omissions by the Québec and federal authorities which, when taken individually and "in aggregate", were wrongful comprise the following:

- the MELCC's failure to either (i) decline jurisdiction over the EA on 10 December 2015 (instead of issuing the MELCC Directive for the GNLQ Project) and to defer to the Agency, which had and should have exercised exclusive jurisdiction to conduct a federal EA alone; or (ii) invoke the application of the Canada-Québec Agreement and to conduct a joint EA, in cooperation with the Agency, on 15 January 2016, when both parties established that they had an EA responsibility for the GNLQ Project in accordance with Article 8(1) of the Canada-Québec Agreement; [851]

[850] ILC Articles on Responsibility of States for Internationally Wrongful Acts (2001), at **Exhibit CL-283-ENG**, p. 5 (Art. 15) (emphasis added).

[851] See Section 2.3.1 above; see also Memorial, p. 145 *et seq*. (paras. 465-474) and p. 195 *et seq.* (paras. 652-656); see also Letter from Claimant to Tribunal dated 6 November 2024, p. 2

- equally, the Agency's failure to either (i) advise the MELCC on or by 10 December 2015 (when the MELCC sent the Directive to GNLQ and the Agency) that the Agency should take the lead in conducting a federal assessment of the GNLQ Project in light of the exclusive federal jurisdiction over the matters at issue as part of the assessment, or (ii) on 15 January 2016, when it commenced its EA, invoke the application of the Canada-Québec Agreement and to conduct a joint EA, together with the MELCC;[852]
- the MELCC's request on 22 May 2019 that GNLQ provide a cost-benefit analysis of the Project (and *a fortiori* one based on guidelines for the assessment of public works for financing purposes);[853]
- the Agency's decision on 20 August 2019 – several months after receipt of GNLQ's EIS – to extend the geographic scope of the federal EA;[854]
- the Québec Government's [redacted][855]
- the Québec Government's direct support to two researchers hostile to the Project, by having them attend and speak at the BAPE hearings on behalf of the MFFP and the BAPE's irregular conduct of those hearings in September 2020;[856]
- the Québec Government's interference with the provincial EA process through (i) its decision in March 2021 to bypass the EA process and

et seq. (para. 8); see also Claimant's Response to Respondent's Request for Bifurcation, p. 62 (para. 179).

[852] See Section 2.3.1 above; see also Memorial, p. 145 *et seq*. (paras. 465-474) and p. 195 *et seq.* (652-656); see also Letter from Claimant to Tribunal dated 6 November 2024, p. 2 *et seq.* (para. 8); see also Claimant's Response to Respondent's Request for Bifurcation, p. 62 (para. 179).

[853] See Section 2.5.1 above.

[854] As explained above in Section 2.6.2.1(ii), the Agency did not indicate that it was amending the EIS Guidelines (and thus the scope of the EA) and the 20 August 2019 letter cannot be interpreted as an amendment of those guidelines. Furthermore, the letter suggested that the request for additional information was for purposes of assessing other projects.

[855] Memorial, p. 195 (para. 651); see also Letter from Claimant to Tribunal dated 6 November 2024, p. 3 (para. 9).

[856] See Section 2.5.2 above.

pre-empt its outcome, leading to (ii) the announcement by Minister Charette of three new "core criteria" to be met by GNLQ during a press conference on 24 March 2021, and (ii) the subsequent instruction to the MELCC team in charge of the EA to assess the GNLQ Project based on these new criteria, and to pose deliberately vague questions lacking concrete reachable objectives to GNLQ;[857]

- the Québec Government's formal decision on 21 July 2021 (the Decree) not to approve the GNLQ Project on grounds that were unjustified or outside of its jurisdiction and/or of the scope of the MELCC Directive; [858]
- the Federal Government's prejudgment of the outcome of the pending federal EA process in September 2021; [859]
- the Federal Minister of Environment's conclusion on 9 December 2021, based on elements that were outside the scope of the EIS Guidelines and therefore of the federal EA process, that the GNLQ Project had significant adverse effects, and his decision to refer the Project to the Cabinet for a decision on whether those effects were justified; [860]
- the Federal Government's decision that the allegedly adverse environmental effects of the GNLQ Project were not justified in the circumstances, effectively rejecting the project, on 7 February 2022.[861]

575 Under Article 15(2) of the ILC Articles, the composite act thus extended from 10 December 2015 to 7 February 2022.

576 The commentary to Article 15 of the ILC Articles states that "[**o]nly after a series of actions or omissions takes place will the composite act be revealed**, not merely as a succession of isolated acts, but as a composite

[857] See Section 2.5.3 above.

[858] See Section 2.5.4 above; Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274-FRA**.

[859] See Section 2.6.1 above.

[860] See Section 2.6.2.1 above.

[861] See Section 2.6.2.2 above; Government of Canada, "Énergie Saguenay, Orders in Council" dated 3 February 2022, at **Exhibit RN-0030-ENG**.

act, *i.e.*, an act defined in aggregate as wrongful."[862] Here, the composite act was "revealed" in July 2021, when the Québec Government refused to authorise the GNLQ Project.[863] It was only at that point in time that the Claimant became aware not only of the refusal, but also of the unlawful grounds for the refusal. The damage to the Claimant was confirmed by the Federal Government's decision on 7 February 2022.

577 The commentary to Article 15 of the ILC Articles further provides that the breach must be backdated to the first act in the series:

> "Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, **the breach is dated to the first of the acts in the series**. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point **the act should be regarded as having occurred over the whole period from the commission of the first action or omission**."[864]

578 Thus, in this case, the breach dates back to 10 December 2015.[865] In addition to being the first in a series of acts that amount in aggregate to a breach of the NAFTA, the December 2015 omissions of both the MELCC and the Agency constitute standalone breaches of not only the minimum standard of treatment clause (Article 1105), but also the MFN and national treatment clauses (Articles 1102 and 1103 NAFTA).[866]

579 **But for** the Agency's and the MELCC's failure to initiate a joint EA of the Project, there would **not** have been a separate, uncoordinated EA process

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[862] ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" in Yearbook of the ILC, Vol. II dated 31 December 2001, at **Exhibit CL-111-ENG**, p. 63 (para. 7) (emphasis added).

[863] See Section 2.5.4 above.

[864] ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 63 (para. 10) (emphasis added).

[865] See Claimant's Response to Respondent's Request for Bifurcation, p. 62 (para. 179); Memorial, p. 123 (para. 382).

[866] Conversely, even if the breach is dated to the first in a series of acts, which took place in 2015, the breach extends over the entire period from 2015 to 2022, such that there is no issue with the three-year statute of limitations.

in which the Québec Government would have interfered as it did, nor a formal decision by the Québec Government in July 2021, based on issues beyond its jurisdiction and/or outside the scope of the MELCC Directive. In other words, the very existence of the 2021 Decree was a consequence of the MELCC's and the Agency's failures in 2015 and 2016 and of the irregular and unlawful process that ensued. Equally, but for those failures, there would have been no decision of the Federal Government simply following suit, also based on matters outside the scope the EIS Guidelines.

580 Each decision is addressed in turn.

(i) Québec Government decision of July 2021

581 The grounds that the Québec Government invoked to refuse to authorise the GNLQ Project in July 2021 were themselves the result of an irregular EA process, part of which pre-dated the termination of the NAFTA.

582 **The first ground** was the possible effect of the GNLQ Project on Québec's efforts to achieve its 2030 targets for the reduction of GHG emissions and to achieve carbon neutrality in 2050. Had Québec declined to initiate a provincial EA process in line with the constitutional principle of federal paramountcy, as it did for, *e.g.*, the North Shore and Contrecoeur projects,[867] it would not have issued the Decree on 21 July 2021, and therefore not refused to authorise the GNLQ Project on this ground.

583 Notably, in doing so, the Québec Government acted against:

- the prior conclusions of the MELCC, following the issuance of the BAPE Report, that the impact of the GNLQ Project on Québec's GHG emissions was limited or could be mitigated;
- the MELCC's conclusions that GNLQ had made sufficient showings with regard to Québec's goals for GHG emissions and carbon neutrality;

[867] See Section 2.3.1.1 above and Section 4.2.2.1(i) below.

- the conclusions of other experts whom the MELCC consulted and who found that the Project was compatible with Québec's GHG targets.[868]

584 Rejecting the Project on this ground was thus a by-product of an irregular assessment process.

585 **The second ground** was the possible effect of the GNLQ Project on the global (worldwide) balance of GHG emissions and on the energy transition. This issue, however, was outside of the jurisdiction of the MELCC and the Québec Government.[869]

586 Had the Agency conducted the assessment alone, or had there been a joint EA, the Québec Government could not have rejected the Project on this ground. The Québec Government's refusal to authorise the Project on this basis thus resulted from the MELCC's and the Agency's failures in 2015 and 2016, which led to two uncoordinated EA processes taking place in parallel.

587 **The third ground** related to the balance of the benefits and costs of the GNLQ Project. The Québec Government's rejection of the Project on this basis also resulted from the irregular assessment process, and specifically, the MELCC's belated request (on 22 May 2019) that GNLQ provide a cost-benefit analysis that was:

- used for the early assessment of public projects to decide on their financing,
- outside the scope of the MELCC Directive, and
- had never been used in an EA of a project of this nature before.[870]

588 Accordingly, it was unlawful (i) for the MELCC both to request and to rely on that cost-benefit analysis in the MELCC Report; and (ii) for the Québec Government to refuse to authorise the GNLQ Project in part on (vague) grounds relating to that analysis (which, in any event, was flawed, as explained above in Section 2.5.1).

[868] See Section 2.5.4.3(i) above.

[869] See Sections 2.5.3.2(ii) and 2.5.4.3(i) above.

[870] See Section 2.5.1 above.

589 **The fourth ground** concerned the social acceptability of the GNLQ Project. However, neither the MELCC, nor the Québec Government explained their purported concerns surrounding the social acceptability of the GNLQ Project and the Respondent has not provided any evidence of those concerns in the arbitration.[871] Furthermore, Minister Charette admitted, during a press conference following the Government's decision refusing to authorise the GNLQ Project, that the Government had not actually assessed the social acceptability of the Project.[872] The refusal to authorise the Project on this basis is thus yet another by-product of an irregular assessment process.

590 **The fifth ground** related to the effect of navigation on the St. Lawrence Estuary beluga whale population. This issue fell squarely within the jurisdiction of federal authorities and therefore outside that of the MELCC and the Québec Government.[873] Again, had Québec deferred to the Agency to conduct a federal EA alone, or had there been a joint assessment in accordance with the Canada-Québec Agreement, the Québec Government could not have rejected the GNLQ Project on this ground.

(ii) Federal Government decisions of December 2021 and February 2022

591 By September 2021, the Federal Government had improperly and unlawfully decided to follow the Québec Government's decision in refusing to authorise the GNLQ Project, instead of letting an independent federal assessment come to its conclusion in accordance with federal law.[874] The Federal Government prejudged the outcome of the federal assessment process, making its decision public through a spokesperson for the Liberal Party in power, who indicated on behalf of the party and the Prime Minister's team that the GNLQ Project "would not see the light of

[871] See Section 2.5.4.3(ii) above.

[872] See Section 2.5.4.3(ii) above, paragraphs 340-341.

[873] See Section 2.5.4.1 above.

[874] See Section 2.6.1 above.

day" and that the Federal Government, or at least the Prime Minister, agreed with the Québec Government's decision.[875]

592 Had it not done so, the federal Minister of Environment would not have referred the GNLQ Project to the Cabinet in December 2021, and the Federal Government would not have rendered the decision on the (unlawful) grounds that they invoked in February 2022, which were similar to those invoked by the Québec Government.[876]

593 Furthermore, the reference by the federal Minister of Environment and the Federal Government to the impact of the GNLQ Project on beluga whales was the result of an irregular process, including the Agency's unlawful attempt, in August 2019, to extend the geographical scope of the Project and thus of the EA to include the impact of LNG tankers on beluga whales, when this was specifically excluded from the matters to be considered by the Minister of Environment for its decision in the EIS Guidelines issued by the Agency.[877]

594 In turn, the Agency's consideration of the possible impact of the GNLQ Project on beluga whales led it to consider that impact on the Innu First Nations' cultural heritage, a matter that was not included in the EIS Guidelines either and was thus outside the scope of the federal EA.[878]

595 In other words, the Agency's wrongful attempt to extend the geographical scope of the EA in 2019 resulted in the Agency, the Minister of Environment and the Federal Government relying on two grounds that they could not and should not have relied upon in their February 2022 decision.

596 To conclude, the claims before the Tribunal arise out of breaches of the NAFTA that pre-date the termination of the NAFTA. They arise out of a series of actions and omissions starting in 2015 and extending until 2022, which, when taken individually or with the other actions or omissions, constitute a wrongful act in breach of the NAFTA.

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[875] See Section 2.6.1; see also Memorial, p. 103 *et seq.* (paras. 316-319).

[876] See Section 2.6.2 above.

[877] See Section 2.6.2.1(ii) above.

[878] See Section 2.6.2.1(iii) above.

3.3 Even if some of the measures out of which the claims arise took place after the termination of the NAFTA, they nevertheless fall within the scope of Annex 14-C of the USMCA

597 In its Counter-Memorial, the Respondent alleges that the Respondent's consent to arbitration in Annex 14-C of the USMCA does not cover claims that arise out of measures that post-date the termination of the NAFTA.[879] As explained below, the Respondent's interpretation of Annex 14-C is incorrect.

598 In setting forth its argument, the Respondent relies on the majority decision in *TC Energy v. U.S.* dated 12 July 2024. However, that decision is of limited relevance mainly because, in the present case, all of the Respondent's wrongful acts, including those that took place after the termination of the NAFTA, are part of a composite act and are thus dated to the first act (in 2015) (**Section 3.3.1**).

599 In addition and in any event, the application of the principles set out in the Vienna Convention on the Law of Treaties (the "**VCLT**"), first, as to the ordinary meaning of the terms of Annex 14-C, second as to their broader context, confirm the Claimant's interpretation of Annex 14-C, namely that it does cover claims that arise out of measures that post-date the termination of the NAFTA and, more specifically, that occur during the three-year transition period between 1 July 2020 to 1 July 2023) (**Sections 3.3.2** and **3.3.3**).

600 Furthermore, contrary to the Respondent's assertion, the USMCA Parties have not expressed an agreement as to the interpretation of Annex 14-C, nor is there any established practice in that regard (**Section 3.3.4**).

601 Finally, neither the documents that the Respondent characterises as supplementary means of interpretation under the VCLT nor other documents available regarding the negotiations of the USMCA support the Respondent's interpretation of Annex 14-C; they rather endorse the Claimant's own interpretation (**Section 3.3.5**).

[879] Counter-Memorial, p. 73 (para. 197).

3.3.1 The decision of the majority of the Tribunal in *TC Energy v. U.S.* is of limited relevance

602 In its Counter-Memorial, the Respondent relies on the majority decision in *TC Energy v. U.S.* and argues that the U.S. successfully raised the same Annex 14-C jurisdictional objection in that case and that the same arguments that led to that decision should lead to a dismissal of the Claimant's claims in the present case.[880]

603 However, aside from the fact that the findings of the majority of the tribunal in *TC Energy v. U.S.* are not binding on the Tribunal,[881] those findings cannot simply be transposed to this case because the underlying facts and the evidence produced materially differ.

604 On the facts, the Claimant's claims in this arbitration arise out of measures that pre-date the termination of the NAFTA, unlike in the *TC Energy* case. As explained above, those measures, when taken individually or with other acts and omissions, constitute a composite act in breach of the NAFTA that dates to 2015.

605 As to the evidence, the documents relating to Annex 14-C produced by the U.S. in *TC Energy v. U.S.* in support of its case are not the same as those produced by the Respondent, and neither the Claimant nor the Tribunal has had access to those materials.[882]

606 Accordingly, the decision of the majority of the Tribunal in *TC Energy v. U.S.* can only be of limited relevance to the present case.

607 In any event, as explained below, contrary to the Respondent's contention, Annex 14-C of the USMCA should be understood to extend not only the consent of the USMCA Parties, but also the NAFTA substantive obligations under Chapter 11, over the transition period of three years.

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[880] Counter-Memorial, p. 69 (para. 186).

[881] PO3, p. 9 (paras. 37-38).

[882] The *TC Energy* majority decision and dissenting opinion are largely redacted, which prevents the reader from seeing the underlying evidence and following the reasoning. Furthermore, the U.S. State Department has refused to produce unredacted versions of the pleadings in that case.

3.3.2 Article 31(1) VCLT: The ordinary meaning of Annex 14-C of the USMCA

608 Article 31 VCLT set outs the general rule of treaty interpretation. According to Article 31(1) VCLT, the starting point is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[883]

609 Before turning to the ordinary meaning of the terms of Annex 14-C, the Claimant addresses the Respondent's first argument in its Counter-Memorial that the Claimant bears the burden of proving that the Respondent consented to the present claims being submitted to arbitration.[884] This argument is misplaced for the following two reasons.

610 **First**, the Respondent's consent to arbitrate is set out in paragraph 1 of Annex 14-C. The Respondent does not deny that there is consent in Annex 14-C; the point at issue is the scope of that consent. This, however, is a legal issue of treaty interpretation, not a matter of fact governed by burden of proof. Burden of proof is only relevant for purposes of establishing the facts underlying a party's jurisdictional case and there are no such factual issues here.

611 **Second**, investment arbitration tribunals have held that the notion of burden of proof does not apply when determining a tribunal's jurisdiction to hear a dispute arising under an investment treaty. For instance, in *WNC v. Czech Republic*, the tribunal held as follows:

> "[W]here, as here, the objections arise from the construction of specific provisions of the BIT, the Tribunal must apply the principles of interpretation reflected in the Vienna Convention on the Law of Treaties ('VCLT'). Issues of onus do not come into play

[883] Vienna Convention on the Law of Treaties, at **Exhibit CL-284-ENG**, p. 12.

[884] Counter-Memorial, p. 71 (para. 193).

> and the process of interpretation engaged in by the Tribunal determines the result."[885]

612 It is thus incumbent on the Tribunal, applying the VCLT, to satisfy itself of the correct meaning of Annex 14-C of the USMCA, and that correct meaning cannot shift based on traditional notions of burden of proof.

3.3.2.1 Overview of the main relevant terms of Annex 14-C

613 Annex 14-C, entitled "Legacy Investment Claims and Pending Claims," provides as follows, in its first paragraph:

> "1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
>
> (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
>
> (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner

[885] *WNC Factoring Ltd (WNC) v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, at **Exhibit CL-285-ENG**, p. 97 (para 293); see also *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, at **Exhibit CL-286-ENG**, p. 13 *et seq.* (para 63); *Grand River Enterprises Six Nations, Ltd., et al v. United States of America,* UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, at **Exhibit RL-030-ENG**, p. 17 (para. 37); *Addiko Bank AG et al v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU *Acquis*, 12 June 2020, at **Exhibit CL-287-ENG**, p. 61 (para 200) ("In applying these VCLT principles to interpret a treaty text, no burden of proof applies as between the parties to a particular dispute. The Tribunal must satisfy itself of the correct meaning of the treaty, and this correct reading will not shift based on traditional notions of burden of proof, which exist primarily to define the duty placed on a party to demonstrate or refute a disputed fact"); *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 98 *et seq.* (paras. 341-344) (rejecting the concept of a burden of proof on jurisdiction in favour of the tribunal's duty to decide on its jurisdiction sua sponte); *Itisaluna Iraq LLC and others v. Republic of Iraq,* ICSID Case No. ARB/17/10, Award, 3 April 2020 , at **Exhibit CL-288-ENG**, p. 72 (para 151); *Raiffeisen Bank International AG et al v. Republic of Croatia (I)*, ICSID Case No. ARB/17/34, Decision on the Respondent's Jurisdictional Objections, 30 September 2020, at **Exhibit CL-289-ENG**, p. 22 *et seq.* (paras. 93-94) and p. 34 (para. 127).

> inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994. [references to footnotes 20 and 21]"[886]

614 A "legacy investment" is defined at paragraph 6(a) as "an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement."[887]

615 Paragraphs 2 and 3 of Annex 14-C in turn provide:

> "2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:
>
> **(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre)** and the ICSID Additional Facility Rules for written consent of the parties to the dispute;
>
> (b) Article II of the New York Convention for an 'agreement in writing'; and
>
> (c) Article I of the Inter-American Convention for an "agreement".
>
> 3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."[888]

616 It appears undisputed that the ordinary meaning of these provisions is that the USMCA Parties consent to arbitrate claims arising from legacy investments, subject to four conditions:

i) the claim must concern a legacy investment,

ii) the claim must allege a breach of an obligation under the NAFTA, Chapter 11, Section A;

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[886] United States-Mexico-Canada Agreement (2020), Annex 14-C, at **Exhibit CL-003-ENG** (emphasis added). Footnotes 20 and 21 to paragraph 1 of Annex 14-C are discussed below.

[887] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 2 (Art. 6(a)).

[888] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (emphasis added).

iii) the claim must be made under the procedure set out in the NAFTA, Chapter 11, Section B; and

iv) the claim must be brought within three years of the termination of the NAFTA, *i.e.*, before 30 June 2023.[889]

617 Conversely, once the three years have lapsed, no investor-State claims may be brought by Canadian investors or against Canada under the NAFTA or the USMCA.[890]

618 As shown in the Memorial, in this case, all the conditions are met.[891] The claim:

i) concerns a legacy investment;[892]

ii) alleges breaches of obligations under the NAFTA, Chapter 11, Section A (specifically Articles 1102, 1103, 1105 and 1110);

iii) was made in accordance with the procedures set out in Section B;[893] and,

iv) was brought within three years of the termination of the NAFTA.[894]

619 The Respondent has therefore consented to arbitrate the Claimant's claims.

620 Significantly, while Annex 14-C defines a "legacy investment", it does not define a "legacy investment claim", which is a term only used in the heading of Annex 14-C, but not in the body of the annex. If Annex 14-C were concerned with legacy investment "claims" rather than legacy investments, such claims would have been defined (*e.g.*, as "claims that

[889] Counter-Memorial, p. 75 (para. 203); Memorial, p. 121 (paras. 376 and 388); see also *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 2 (para. 3).

[890] The only recourse available is through State-to-State dispute settlement. See United States-Mexico-Canada Agreement (USMCA), Chapter 31, at **Exhibit CL-291-ENG**.

[891] See Memorial, p. 121 *et seq.* (para. 376).

[892] The Claimant invested substantial amounts of capital, resources and efforts during the period of 2014-2021, and held these investments on the date of termination of the NAFTA.

[893] See Memorial, p. 118 *et seq.* (para. 371).

[894] The Request for Arbitration was submitted on 17 February 2023, *i.e.*, before 30 June 2023.

arose prior to the date of entry into force of the USMCA").[895] They were not. The heading of Annex 14-C must therefore be read simply as referring to claims concerning or arising out of "legacy investments" as defined in the annex.

621 Paragraph 6(a) of Annex 14-C provides that a "legacy investment means an investment […] in existence on the date of the entry into force of [the USMCA]." Accordingly, provided that a "legacy investment" existed on 30 June 2020, prior to the termination of the NAFTA, if it were expropriated only after that date, a claim arising out of that legacy investment would clearly fall within the scope of Annex 14-C. As discussed further below in Section 3.3.2.2(i), if the Respondent's reading were adopted, Annex 14-C could only apply to claims arising out of an expropriation that took place **before** 30 June 2020, the date of termination of the NAFTA. However, at that point in time, there could not be any investment "in existence on the date of entry into force" of the USMCA (*i.e.*, 1 July 2020).

3.3.2.2 On its ordinary meaning, Annex 14-C extends the NAFTA substantive obligations to measures post-dating the expiration of the NAFTA

622 As to the ordinary meaning of the terms of Annex 14-C, the Respondent recognises that Annex 14-C "*établit le consentement des Parties à l'ACEUM à l'arbitrage de plaintes relatives à des manquements survenus avant l'extinction de l'ALÉNA*", but wrongly denies that Annex 14-C extends the NAFTA substantive obligations under Chapter 11, Section B, to measures post-dating the expiration of the NAFTA.[896] This interpretation does not bear scrutiny, as demonstrated below.

623 **First**, the Respondent makes the general argument that Annex 14-C did not expressly extend those substantive obligations for three years.[897] Equally, however, Annex 14-C does not expressly state that those

[895] See also *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 2 *et seq.* (paras. 5-6).

[896] Counter-Memorial, p. 74 (para. 200).

[897] Counter-Memorial, p. 5 *et seq.* (para. 9).

substantive obligations should not be extended. The issue is therefore one of treaty interpretation and must be resolved by applying Article 31 VCLT.

624 **Second**, the Respondent argues that the USMCA Parties consented to arbitration under the NAFTA, Chapter 11, Section B only where there is a breach of the NAFTA and that, in the present case, there was no breach of the NAFTA because the measures at issue occurred after 30 June 2020,[898] at a time when the NAFTA had been terminated and the Respondent had been released of its obligation to implement and comply with the treaty.[899]

625 In support of this argument, the Respondent points out that, under the ILC Articles, a State cannot breach an international obligation unless it has that obligation at the time of the act or omission in question.[900] The Respondent relies on Articles 12[901] and 13[902] of the ILC Articles and Article 70 VCLT. It concludes that the Claimant has failed to demonstrate, as required under Annex 14-C, a "breach of an obligation under the NAFTA, Chapter 11, Section A" and thus failed to show that the claims at issue are covered by the Respondent's consent.[903]

626 However, to start with, as explained in Section 3.2 above, the Claimant's claims arise out of a series of acts and omissions starting in 2015, some of which, on their own, amount to a NAFTA breach. As such, they also constitute a composite act which, in aggregate, that is, including the acts and omissions which on their own would not amount to a NAFTA breach,

[898] The Respondent alleges that in this case, the claimed treaty breaches occurred on 21 July 2021 and 7 February 2022, with the rejection of the GNL Project by the Québec and Federal Governments, respectively. According to the Respondent, because these acts occurred after the expiry of the NAFTA on 30 June 2020, there can be no breach of the NAFTA. Counter-Memorial, p. 68 (para. 184).

[899] Counter-Memorial, p. 67 *et seq.* (paras. 182-183); Counter-Memorial, p. 76 (para. 206).

[900] Counter-Memorial, p. 67 *et seq.* (para. 183).

[901] ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 4 (Art. 12) ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.").

[902] ILC Articles on State Responsibility, at **Exhibit CL-283-ENG**, p. 4 (Art. 13) ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

[903] Counter-Memorial, p. 69 (para 185); USMCA, Annex 14-C, at **Exhibit CL-003-ENG**.

were wrongful and extended from 2015, prior to the termination of the NAFTA, until 2022.

627 Furthermore, Article 70(1) VCLT confirms that it is possible to provide for the continued application of a treaty after its termination:

> "70. Consequences of the termination of a treaty
>
> 1. **Unless** the treaty otherwise provides **or the parties otherwise agree**, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) releases the parties from any obligation further to perform the treaty;
>
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> 2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."[904]

628 In other words, a treaty will continue to apply in two scenarios: (i) when the treaty being terminated so provides (*i.e.*, through a so-called sunset clause); or (ii) when the parties so provide in a separate agreement ("or the parties otherwise agree"). The latter scenario is the one that materialised here. In the USMCA, the Parties agreed that certain provisions of the NAFTA would continue to apply.

629 Indeed, even if the NAFTA expired on 30 June 2020, certain provisions remained in effect for a transition period of three years, thereby allowing claims in connection with acts and omissions that occurred after 30 June 2020.[905]

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[904] VCLT, at **Exhibit CL-284-ENG**, p. 24 (emphasis added); see also Counter-Memorial, p. 75 *et seq.* (para. 204).

[905] Memorial, p. 116 *et seq.* (para. 365).

630 **Third**, the Respondent argues that the transition period of three years (under Annex 14-C, paragraph 3) corresponds to the three-year limitation period under Articles 1116 and 1117 NAFTA and therefore would reflect the fact that Annex 14-C only envisaged claims based on events that pre-date the termination of the NAFTA.[906]

631 However, the Respondent has submitted no evidence in support of that argument, and specifically no evidence of an intention to ensure that the length of the Annex 14-C transition period would coincide with that of the NAFTA limitation period.

632 On the contrary, had the USMCA Parties intended to only allow claims based on measures that pre-date the termination of the NAFTA, they would not have included paragraph 3 of Annex 14-C ("A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994"). Indeed, an investor with a legacy investment harmed before the termination of the NAFTA, would in any case have been able to file a claim for three years by virtue of, and in accordance with, paragraphs 1 and 2 of Annex 14-C, as combined with Articles 1116 and 1117 NAFTA.[907] By including the third paragraph in Article 1, the USMCA Parties thus allowed for new claims that might arise out of legacy investments in the three years following the termination of the NAFTA.

633 That the USMCA Parties intended to extend the substantive obligations of the NAFTA, Chapter 11, Section A for three years, is the proper meaning of paragraph 1 of Annex 14-C of the USMCA, is also confirmed by paragraph 6(a), footnote 20 and footnote 21. Conversely, there is no room

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[906] Counter-Memorial, p. 6 (para. 10) ("*L'effet combiné de l'extinction de l'ALÉNA le 1er juillet 2020 et du délai de prescription de trois ans prévu à l'article 1117 de l'ALÉNA fait en sorte que les seuls faits générateurs de responsabilité qui pourraient ressortir à la compétence du Tribunal sont ceux qui auraient pu survenir entre le 17 février 2020 et le 30 juin 2020* […]").

[907] See also *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (para. 29) (citing correspondence saying "If we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year consent period – we would have just defaulted to the statute of limitations in the NAFTA Secon [sic] B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument – the purpose of paragraph 3 was intended to alter the SOL for claims with respect to pre-existing measures, that's it, doesn't make a lot of sense.").

for an interpretation of Annex 14-C that seeks to add a temporal requirement that cannot be found in the terms of Annex 14-C with respect to the measures alleged to be in breach of the substantive standards of the NAFTA.

(i) Paragraph 6(a) envisages claims arising out of the NAFTA breaches that occur during the three-year transition period

634 The ordinary meaning of paragraph 1(a) of Annex 14-C, which provides for the USMCA Parties' consent to the submission of a claim arising out of a legacy investment alleging a breach of a substantive NAFTA obligation, combined with that of paragraph 6(a), which defines a "legacy investment", show that the Respondent's reading of Annex 14-C would result in absurd consequences by excluding expropriation claims even if they arose prior to 30 June 2020.

635 Paragraph 1(a) indeed provides an explicit consent of the USMCA Parties to the submission of a claim arising out of a legacy investment and alleging breach of a NAFTA substantive obligation (a breach of the NAFTA, Chapter 11, Section A).[908] One of the key substantive obligations under the NAFTA is the one governing expropriation (Article 1110(1)).[909] The central element of an expropriation is the taking of property; after an investment is expropriated, it is no longer held by the investor.[910] Furthermore, a claim alleging an unlawful expropriation can only be brought after the expropriatory act has occurred and the investment in question has been expropriated. In other words, expropriation claims can only be raised when the investment is no longer "in existence".

636 Paragraph 6(a) defines "legacy investment" as "an investment of an investor of another Party in the territory of the Party established or

[908] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (Art. 1(a)).

[909] NAFTA, at **Exhibit CL-001-ENG**, p. 7 (Art. 1110(1)).

[910] See, *e.g.*, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at **Exhibit CL-059-ENG**, p. 28 (para. 103); *Bernhard von Pezold and others v. The Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, at **Exhibit CL-097-ENG**, p. 179 (para. 494); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, at **Exhibit CL-007-ENG**, p. 69 (para. 280).

acquired between January 1, 1994, and the date of termination of NAFTA 1994, **and in existence on the date of entry into force of this Agreement**".[911]

637 Accordingly, on the Respondent's interpretation of Annex 14-C, an investor who made an investment under and in accordance with the NAFTA, but whose investment was expropriated **after** 30 June 2020 and during the three-year transition period would not be able to file a claim under Annex 14-C. In the same way, an investor who made an investment under and in accordance with the NAFTA, but whose investment was expropriated **before** 30 June 2020 would not be able to file a claim under Annex 14-C since the investment would no longer be in existence on the date of entry into force of the USMCA.

638 However, on an ordinary, logical reading, Annex 14-C cannot both (i) envisage expropriation claims arising out of legacy investments where the breach pre-dates the termination of the NAFTA (the Respondent's interpretation), and (ii) require investors in such cases to show that the investment was still "in existence" on the date of entry into force of the USMCA (*i.e.*, after the termination of the NAFTA). This is a manifestly absurd and unreasonable reading of the Treaty.

639 By contrast, on the Claimant's interpretation of Annex 14-C, where (i) an investor made an investment under and in accordance with the NAFTA, (ii) such investment existed on the date the USMCA entered into force (as required by paragraph 6(a), and (iii) was expropriated after 30 June 2020 and during the three-year transition period, that investor could bring an expropriation claim.

640 The only logical conclusion and interpretation of Annex 14-C that gives paragraph 6(a) an *effet utile* is therefore that the USMCA Parties agreed and intended to allow for expropriation claims, as well as other claims arising out of legacy investments and alleging violations of the NAFTA, to

[911] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 2 (Art. 6(a)) (emphasis added).

proceed in relation to measures that were taken during the three-year transition period after the USMCA entered into force.[912]

(ii) Footnote 20 supports the Claimant's interpretation of Annex 14-C

641 The Respondent mischaracterises footnote 20 to paragraph 1 of Annex 14-C, which provides:

> "**For greater certainty**, the relevant provisions in Chapter 2 (General Definitions), **Chapter 11 (Section A) (Investment)**, Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 **apply with respect to such a claim**."[913]

642 The ordinary meaning of these terms is that the provisions of Chapter 11, Section A, which comprise the NAFTA substantive obligations vis-à-vis foreign investors, "apply with respect to" the claims described in paragraph 1 of Annex 14-C. Stated differently, the claims described in paragraph 1 may arise out of, and thus allege violations of the obligations contained in, Chapter 11, Section A.

643 In the Counter-Memorial, the Respondent wrongly contends that the purpose of footnote 20 is to specify that a claim brought under paragraph 1 concerning a breach pre-dating the expiration of the NAFTA should be

[912] Ensuring that treaty terms have *effet utile* is an aspect of interpreting a treaty in good faith in accordance with Art 31(1) VCLT. See *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, 6 April 2018, at **Exhibit CL-292-ENG**, p. 46 (para. 182); *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award dated 9 April 2015, at **Exhibit CL-293-ENG**, p. 91 (para 293), *Draft Articles on the Law of Treaties with commentaries*, 1966, Yearbook of the ILC, vol II, at **Exhibit CL-294-ENG**, p. 219 (para. 6).

[913] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (n. 20) (emphasis added).

considered in the light of the provisions applicable at the time of the breach.[914]

644 That is, however, evidently not what footnote 20 states. It does not refer to a breach pre-dating the termination of the NAFTA. It does not contain any temporal limitation or requirement. The Respondent reads into footnote 20 a requirement that is simply not there.

645 What footnote 20 confirms is that, under paragraph 1, there is an extension of the NAFTA, Chapter 11, Section A substantive obligations, by clarifying that those provisions "apply with respect to such a claim". Given that paragraph 1 already expressly refers to the possibility of claiming "a breach of an obligation under Section A of Chapter 11 (Investment) of NAFTA 1994", the additional reference – "for greater certainty" - in footnote 20 to the application of Section A, only has an *effet utile* if to confirm that Section A **continues to apply**, *i.e.*, it is extended for the three-year transition period. Otherwise, the reference to Section A offers no greater certainty as compared to paragraph 1 on this point, and would be meaningless.

646 Footnote 20 must therefore mean, based on paragraph 3 of Annex 14-C, that a "claim" may include a claim arising out of measures taken during the three-year period following the termination of the NAFTA. Thus, the relevant provisions of the NAFTA Chapter 11 continue to apply to claims brought during the three-year transition period.[915]

(iii) Footnote 21 supports the Claimant's interpretation of Annex 14-C

647 The Respondent also mischaracterises footnote 21 to paragraph 1 of Annex 14-C, which provides:

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[914] Counter-Memorial, p. 78 *et seq.* (para. 214).

[915] See Memorial, p. 124 (para. 390); see also *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 4 (para. 10) ("Annex 14-C 1 plainly refers to both sections of Chapter 11 and provides for the application of each in the case of a claim with respect to a legacy investment. The application of Section A is confirmed by footnote 20.").

> "Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)."[916]

648 Footnote 21 carves out an exception to paragraph 1, for claims arising out of covered government contracts and arising between Mexican and U.S. parties, which should be submitted to arbitration in accordance with Annex 14-E. Footnote 21 is thus aimed at avoiding a possible overlap between Annex 14-C arbitrations and Annex 14-E arbitrations and requires Mexican and U.S. investors who meet the requirements of both Annex 14-C and 14-E to follow the arbitration procedures set out in Annex 14-E.[917]

649 Significantly, Annex 14-E allows claims only with respect to alleged "breache[s] [of] any obligation[s] under [Chapter 14 of USMCA]."[918] Stated differently, Annex 14-E applies to measures that post-date the termination of the NAFTA. Accordingly, Annex 14-C and Annex 14-E can overlap **only if** they **both** apply to measures that **post-date** the termination of the NAFTA. This is the only interpretation of footnote 21 that gives it *effet utile.*[919]

650 In the *TC Energy* dissenting opinion, Mr Henri Alvarez cited an internal USTR email that directly supports this (logical) interpretation. It is an email from Mr Lauren Mandell, the then USTR Investment Chapter Lead in the negotiation of the investment chapter of the USMCA, to Mr Khalil Gharbieh, the then Director for Investment in the Office of the USTR,

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[916] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**, p. 1 (fn. 21).

[917] See *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 4 *et seq.* (para. 12) ("in footnote 21 the Parties addressed the potential overlap between Annex 14-C 1 and Annex 14- E 2 and Mexico and the United States expressly excluded their consent to arbitrate in such a case."); see also United States-Mexico-Canada Agreement (USMCA), Chapter 14 dated 31 December 2020, at **Exhibit CL-262-ENG**, p. 3 (Art. 14.2(4)) ("For greater certainty, an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)).

[918] USMCA Chapter 14, at **Exhibit CL-262-ENG**, Annex 14-E, p. 38 (paras. 2(a)(i), (b)(i)).

[919] See also Memorial, p. 125 (para. 392).

which apparently post-dated the conclusion of the USMCA (although the date of the exchange is not clear from the dissenting opinion),[920] in which Mr Mandell stated the following with regard to footnote 21:

> "Finally, I think footnote 21 probably helps as well. The whole point of the footnote was to require keyhole investors to arbitrate under the 'new and improved' USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). **If 14-C only applied to preexisting measures, there'd be no reason to say that.** We'd just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework."[921]

651 In other words, Mr Mandell's view was that footnote 21 would not have been necessary if Annex 14-C only envisaged claims based on measures pre-dating the termination of the NAFTA.

652 In the Counter-Memorial, the Respondent raises several, equally wrong arguments in relation to footnote 21.

653 **First**, the Respondent argues that footnote 21 "*ne contient pas d'accord des Parties à l'ACEUM à prolonger les obligations de la section A du chapitre 11 de l'ALÉNA pour une période de trois ans suivant l'extinction du traité*."[922] However, footnote 21 does not contain or reflect either an agreement **not** to extend the NAFTA, Chapter 11, Section A obligations; the **only** interpretation of footnote 21 that gives it an *effet utile* assumes that the Chapter 11 Section A obligations **are extended** for the transition period of three years.

654 **Second**, the Respondent contends that footnote 21 "*vise les situations où un investisseur américain ou mexicain désirant se prévaloir du recours de l'annexe 14-C en déposant une plainte* ***à l'égard d'un manquement à l'ALÉNA survenu avant le 1er juillet 2020*** *remplit également les*

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[920] *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (paras. 29 and 31).

[921] *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (para. 29) (emphasis added).

[922] Counter-Memorial, p. 79 (para. 216).

conditions pour pouvoir déposer une plainte conformément à l'annexe 14-E."[923] However, footnote 21 is silent on the timing of the NAFTA breach; it does not require the NAFTA breach to have occurred before 1 July 2020. The Respondent reads into footnote 21 a requirement that is not there.

655 **Third**, the Respondent evokes the hypothetical scenario of a notice filed by an investor under Annex 14-C which would allege both a breach of the USMCA and a breach of Chapter 11 of the NAFTA. While not entirely clear, the Respondent seems to refer to a situation involving a continuing measure adopted before 1 July 2020[924] that would represent a breach of the NAFTA and then, after 1 July 2020, a breach of the USMCA. According to the Respondent, an investor could in that case allege a breach of the minimum standard of treatment under Article 1105 NAFTA and under Article 14.6 USMCA, such that footnote 21 "*n'implique aucunement qu'il y ait un chevauchement temporel entre l'application de la section A du chapitre 11 de l'ALÉNA et celle du chapitre 14 de l'ACEUM pendant les trois ans suivant l'extinction de l'ALÉNA.*"[925]

656 However, footnote 21 does not refer to continuing breaches or suggest that its purpose is to address any such scenario. The plain reading of footnote 21 is that an investor may meet the conditions of **both** Annex 14-C and Annex 14-E and, in that regard, that there may be an overlap between the two regimes. Footnote 21 says no more, no less.

657 In any event, as the tribunal found in *Finley v. Mexico*, even in a scenario of temporal overlap, a claim may be brought under Annex 14-C in connection with measures that both pre-date and post-date the termination of the NAFTA. In reaching its decision, the *Finley* tribunal specifically referred to footnote 21 of Annex 14-C.

658 In that case, U.S. investors brought claims under the USMCA, pursuant to both Annexes 14-C and 14-E. The claimants argued that one of the claims, relating to one of three contracts ("contract 821"), arose out of State

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[923] Counter-Memorial, p. 79 *et seq.* (para. 217) (emphasis added).

[924] The Respondent refers to an act "*qui constituerait consécutivement un manquement à l'ALENA* ***(à partir du 1er juillet 2020) puis*** *un manquement à l'ACEUM* ***(après le 1er juillet 2020)****.*" (emphasis added).

[925] Counter-Memorial, p. 80 (para. 219).

measures that both pre-dated and post-dated the termination of the NAFTA. More specifically, they argued that the respondent, through Pemex, engaged in a series of acts that materialised into a breach in October 2018,[926] which was compounded by later adverse actions, including a unilateral termination of the contract and a call for a performance bond, in November and December 2021, *i.e.*, after the termination of the NAFTA.[927] The respondent countered that the claimants could not bring claims arising out of both Annex 14-C and Annex 14-E of the USMCA in the same arbitration.

659 In its January 2025 decision, the tribunal upheld jurisdiction over the claim and relied on footnote 21 in Annex 14-C when doing so:

> "The Tribunal is cognizant of the temporal peculiarities of the claims in this arbitration, **to the extent that the facts underlying the claims straddle separate periods in which the NAFTA and the USMCA were in force,** respectively. Consequently, this has forced the Claimants to interpret the temporal procedural rules contained in the USMCA (**including footnote 21**) and, in the Tribunal's view, they have interpreted those rules in a consistent and reasonable manner.
>
> As the Claimants have argued, the facts related to the 821 Contract pose a particular legal conundrum, **to the extent that some of them took place before the entry into force of the USMCA** (e.g., the ruling of the TFJA in 2018), **which led them to present that claim under Annex 14-C ("legacy investments"), while other facts took place after that date, some even after this arbitration had already commenced** (e.g., the unilateral signature of the *finiquito* on November 10, 2021 and the subsequent calling upon of the Dorama Bond). **In the Tribunal's view, the Claimants were right**

[926] They argued that at that point in time a Mexican court "endorsed Pemex's fabrication of a work order so Pemex could administratively rescind the 821 Contract", *Finley Resources and others v. The United Mexican States*, ICSID Case No. ARB/21/25, Claimant's Reply, 14 April 2023, at **Exhibit C-0582-ENG**, p. 84 (para. 351).

[927] *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 84 (para. 351).

> **in presenting their claim(s) related to the 821 Contract under Annex 14-C of the USMCA and, hence, under the legacy provisions of the NAFTA**."[928]

660 In other words, the *Finley* tribunal found that a claim could be raised under Annex 14-C even if the measures invoked in part post-dated the termination of the NAFTA.

661 In the present case, as in *Finley*, the wrongful measures occurred before and after the entry of force of the USMCA. The Tribunal therefore has jurisdiction over the Claimant's claims, as they arise out of legacy investments and are properly brought under Annex 14-C. The Respondent's acts and omissions that post-date the termination of the NAFTA amount to NAFTA breaches, either on their own or as part of a composite act, as described above in Section 3.2, because Annex 14-C extended the substantive obligations of Chapter 11, Section A, by three years.

(iv) There is no additional temporal requirement in the terms of Annex 14-C regarding the allegedly wrongful measures

662 As explained above, on the ordinary meaning of Annex 14-C, paragraphs 1, 2 and 3, there are four conditions to the bringing of claims arising from legacy investments. [929] In its Counter-Memorial, the Respondent improperly seeks to introduce a fifth condition, namely, that the measures alleged to be in breach of the NAFTA's substantive standards must have occurred before the NAFTA's termination.[930] There is no such additional requirement in Annex 14-C, let alone one that would apply to all wrongful measures invoked by the investor.

663 Indeed, as explained in Section 3.2 above, the claims in the present case arise out of a series of acts and omissions starting in 2015, some of which, on their own, amount to a breach of the NAFTA. As such, they also constitute a composite act which, in aggregate, that is, including the acts

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[928] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 62 (paras. 213-214) (emphasis added).

[929] See Section 3.3.2.1 above.

[930] Counter-Memorial, p. 76 (para. 206).

and omissions which on their own would not amount to a breach of the NAFTA, were wrongful and extended from the period 2015 until 2022.

664 Furthermore, and in any event, the Respondent's approach is contrary to Article 31(1) VCLT which requires an interpretation of the "terms of the treaty", not of the terms as supplemented by a party. It is indeed impermissible to add requirements to a treaty, as several investment tribunals have held, including in the following cases:

- In *Saluka v. Czech Republic*: "it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add."[931]
- In *Tokios Tokeles v. Ukraine*:

  "[I]t is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed."[932]

- In *Yukos v. Russian Federation*:

  "The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements—which the drafters did not include—into a treaty, no matter how auspicious or appropriate they may appear."[933]

- In *Mera v. Serbia*:

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[931] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, at **Exhibit CL-296-ENG**, p. 49 (para. 241).

[932] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, at **Exhibit RL-048-ENG**, p. 15 *et seq.* (para. 36).

[933] *Yukos Universal Limited (Isle of Man) v. Russian Federation,* PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at **Exhibit CL-297-ENG**, p. 152 (para. 415).

> "It is not for the Arbitral Tribunal to insert additional requirements into the BIT which could have easily been inserted by the negotiators at the time of drafting, but were not."[934]

665 Most recently, the tribunal in *Gran Colombia Gold v. Colombia* recalled that it was relevant to consider not only what treaty provisions provide, but also what they do not provide, and added:

> "In these circumstances, the Tribunal would have great difficulty concluding that the FTA implicitly contains an additional (temporal) limitation on the Contracting Parties' exercise of the right they expressly agreed to retain in Article 814, but without stating any such limitation. States are free to grant reciprocal protections to investors through the mechanism of investment treaties, but they are also free to condition such grants on particular qualifying principles. [...] In general, it is not for arbitral tribunals, in interpreting the text of investment treaties, to read into such texts additional requirements (either on States or on investors) that the State Parties have not chosen to impose."[935]

666 In the present case, it would therefore be contrary to the VCLT principles of treaty interpretation to read into Annex 14-C of the USMCA a requirement that is not there, namely, a temporal requirement relating to the measures that are alleged to violate the NAFTA standards. Annex 14-C does not provide that the consent to arbitration is limited to measures that pre-date the termination of the NAFTA, nor does it provide that measures taken during the three-year transition period are excluded from a tribunal's jurisdiction.

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[934] *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018, at **Exhibit RL-039-ENG**, p. 22 (para. 88).

[935] *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, 23 November 2020 dated 23 November 2020, at **Exhibit CL-298-ENG**, p. 33 *et seq.* (para. 127).

3.3.3 Article 31(1) and (2) VCLT: The context of Annex 14-C and the relevant object and purpose of the USMCA

667 Article 31(1) VCLT provides that a treaty should be interpreted by reading its terms in their "context" which Article 31(2) defines as comprising the treaty preamble and annexes.

668 As explained below, the USMCA Protocol dated 30 November 2018 (the "**Protocol**") (**Section 3.3.3.2**), the USMC Preamble (**Section 3.3.3.3**) and Article 34.1 USMCA (**Section 3.3.3.4**) provide useful context when interpreting Annex 14-C in accordance with Article 31 VCLT which fully supports the Claimant's interpretation. On the other hand, the Respondent places an unwarranted reliance on a similarity between the NAFTA, Chapter 11, Section B dispute resolution mechanism and that of Annex 14-C. This point is addressed first (**Section 3.3.3.1**).

3.3.3.1 The similarity between Annex 14-C and the NAFTA, Chapter 11, Section B does not alter the ordinary meaning of Annex 14-C

669 In the Counter-Memorial, the Respondent notes that paragraphs 1 and 2 of Annex 14-C refer to the NAFTA, Chapter 11 and argues that that chapter may provide context when interpreting Annex 14-C. The Respondent relies on the fact that Annex 14-C contains provisions similar to the NAFTA, Chapter 11, Section B on dispute resolution and more specifically, Articles 1116, 1117 and 1122. This similarity, according to the Respondent, demonstrates that paragraphs 1 and 2 of Annex 14-C aim to provide dispute resolution mechanisms, not to extend the substantive obligations of the NAFTA, Chapter 11.[936] This approach is flawed.

670 Paragraph 1 of Annex 14-C does not only refer to the NAFTA, Chapter 11, Section B, but also to Section A, which sets out the States' substantive obligations. As noted above, on the plain reading of paragraph 1, the USMCA Parties provided their consent to arbitrate claims for breach of the NAFTA, Chapter 11, Section A, arising out of a legacy investment and that

[936] Counter-Memorial, p. 82 *et seq.* (paras. 223-224).

such claims must be submitted in accordance with the NAFTA, Chapter 11, Section B and Annex 14-C.

671 The similarity between the dispute resolution mechanisms of the NAFTA, Chapter 11, Section B and Annex 14-C does not alter this plain reading. It shows just that, a similarity. It does not address in any way the Parties' substantive obligations.

672 The Respondent relies on investment treaty cases and commentary concluding that Articles 1116 and 1117 NAFTA are limited to claims arising out of acts and omissions by the State at a time when it was bound by and had obligations under the treaty.[937] According to the Respondent, this context would confirm that the USMCA Parties' consent under Annex 14-C is limited to claims arising out of a breach of an obligation at a time when the NAFTA was still in effect.[938] This is not correct.

673 Annex 14-C indeed only refers to claims arising out of legacy investments, without requiring that those claims be based on alleged breaches that pre-date the termination of the NAFTA. No such requirement can be read into Annex 14-C by reference to the NAFTA, Chapter 11, Section B.

674 Furthermore, and in any event, here, the Claimant's claims arise out of a series of acts and omissions starting in 2015 and extending until 2022, which when taken individually or with the other actions or omissions, constituted a wrongful act in breach of the NAFTA, dated back to the first act in the series (2015) and extending over the entire period until 2022.

3.3.3.2 The USMCA Protocol supports the Claimant's interpretation of Annex 14-C

675 As the Respondent notes, under Article 31(2) VCLT, the "context" for purposes of interpreting a treaty includes "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."[939] The Protocol is such an agreement and it may

[937] Counter-Memorial, p. 85 *et seq.* (paras. 228-235).

[938] Counter-Memorial, p. 87 (para. 237).

[939] VCLT, at **Exhibit CL-284-ENG**, p. 12 (Art. 31(2)).

therefore provide context with regard to the USMCA, including Annex 14-C.[940]

676 Article 1 of the Protocol provides:

> "Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, **without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA**."[941]

677 On its ordinary meaning, Article 1 of the Protocol thus provides that the USMCA supersedes the NAFTA without, however, affecting the USMCA provisions that refer to the NAFTA provisions.[942] Stated differently, the USMCA did not supersede the NAFTA in its entirety and without exception; the superseding of the NAFTA by the USMCA was to be without prejudice to those USMCA provisions that aim to maintain specific NAFTA provisions.

678 Accordingly, Article 1 of the Protocol confirms that the USMCA Parties sought to extend certain provisions of the NAFTA (for three years).

679 Annex 14-C refers to the NAFTA in several instances including, as explained above, at paragraph 1 where it refers to Chapter 11, Section A (which comprises the States' substantive obligations under the NAFTA).[943] As the Protocol confirms, in that instance (reference to Section A) – like

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[940] Article 34.5 USMCA provides that the treaty "enters into force in accordance with paragraph 2 of the Protocol Replacing the [NAFTA] with the [USMCA]." United States-Mexico-Canada Agreement (USMCA), Chapter 34, at **Exhibit CL-299-ENG**, p. 2. The USMCA and its Protocol are both in force between the United States and Canada. See Government of Canada, Treaties (excerpt), at **Exhibit C-0019-ENG**; see also Counter-Memorial, p. 87 (para. 239); Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada (2018) dated 30 November 2018, at **Exhibit CL-002-ENG**.

[941] Protocol dated 30 November 2018, at **Exhibit CL-002-ENG**, p. 1 (Art. 1) (emphasis added).

[942] Counter-Memorial, p. 88 (para. 244); see also *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Claimant's Counter-Memorial on Preliminary Objections, 16 December 2024, at **Exhibit CL-300-ENG**, p. 21 (para. 50) ("the whole purpose of the Protocol […] states that [the USMCA] would in certain respects maintain the NAFTA provisions for certain purposes").

[943] USMCA, Annex 14-C, at **Exhibit CL-003-ENG**.

in other instances where the USMCA refers to the NAFTA – the USMCA did not supersede the NAFTA. The ordinary reading of Article 1 of the Protocol thus accords with the Claimant's position that the USMCA Parties sought to extend the NAFTA Chapter 11, Section A, obligations for three years.

680 Referring to the Protocol, the Respondent argues that, if the USMCA Parties had wished to maintain in effect the NAFTA, Chapter 11, Section A for three years following the termination of the treaty, they would have expressly stated so. In support of its argument, the Respondent refers to the sunset clauses contained in the 2004 and 2012 U.S. model BITs, the 2014 and 2021 model Canada BITs, and the 2008 Mexican model BIT.[944] This, however, is a red herring.

681 The USMCA Parties did expressly state at Annex 14-C that they wished to maintain in effect the NAFTA, Chapter 11, Section A for three years following the termination of the treaty. They made clear, first, that they consented, with respect to a legacy investment, to the submission of a claim for breach of an obligation under the NAFTA, Chapter 11, Section A. In doing so, they posed no limitation or condition on the timing of that breach. They made clear, second, that this consent would expire in 2023 (three years after the termination of the NAFTA). The USMCA Parties therefore did not need to include, in addition, a sunset clause similar to those invoked by the Respondent.

682 Furthermore, the provisions from the model BITs invoked by the Respondent are not relevant in that they relate to the entry into force, duration, and termination of a treaty. The issue here is that of the replacement of a treaty, the NAFTA, by another, the USMCA. The Protocol, together with Annex 14-C, address the manner in which the USMCA was to replace and effectively co-exist with the NAFTA for three years.

683 Had the USMCA Parties wished to condition their consent on the timing of the breach of an obligation *vis-à-vis* a legacy investment, they could have easily done so. Annex 14-C, however, contains no such limitations or

[944] Counter-Memorial, p. 89 *et seq.* (paras. 247-249).

condition. It refers only to claims arising out of legacy investments, without limitation. Furthermore and in any event, as explained above, the claims in this case arise out of a series of acts and omissions starting in 2015, prior to the termination of the NAFTA.

3.3.3.3 The USMCA Preamble supports the Claimant's interpretation of Annex 14-C

684 In the Counter-Memorial, the Respondent also wrongly argues that the USMCA Preamble supports its interpretation of Annex 14-C.[945]

685 The USMCA Preamble provides in part:

> "The Government of the United States of America, the Government of the United Mexican States, and the Government of Canada (collectively "the Parties"), resolving to:
>
> STRENGTHEN ANEW the longstanding friendship between them and their peoples, and **the strong economic cooperation that has developed through trade and investment**;
>
> […]
>
> REPLACE the 1994 North American Free Trade Agreement with a 21st Century, **high standard new agreement to support mutually beneficial trade** leading to freer, fairer markets, and to robust economic growth in the region;
>
> […]
>
> ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment;
>
> […]

[945] Counter-Memorial, p. 91 (paras. 250-251).

> **PROMOTE transparency, good governance and the rule of law**, and eliminate bribery and corruption in trade and investment;"[946]

686 The Respondent's interpretation of Annex 14-C could hardly be said to accord with the USMCA Preamble since it would not make the USMCA a "high standard new agreement" in the eyes of U.S. or Mexican investors in Canada. Indeed, it would abruptly leave certain U.S. and Mexican investors who invested in Canada in accordance with and in reliance on the NAFTA, including its substantive protections and dispute settlement provisions (allowing for recourse to an international arbitral tribunal), without the benefit of those protections and provisions after 30 June 2020. As at that point in time, they would not be able to file claims for breach of the NAFTA in connection with State measures post-dating the termination. (The only recourse available would be through State-to-State dispute settlement.)

687 The Respondent contends that its interpretation of Annex 14-C would accord with the goal set out in the USMCA Preamble of establishing a clear and predictable legal framework since it entails a "*une démarcation claire entre la période d'application des obligations de l'ALÉNA, d'une part, et celles de l'ACEUM, d'autre part*."[947] It further argues that the Preamble does not support the Claimant's interpretation of Annex 14-C because "*l'interprétation de la demanderesse implique que l'ACEUM ne remplace pas l'ALÉNA, mais s'y superpose pour une période de trois ans* […]".[948] This contention has no merit.

688 **First**, while it is undisputed that the USMCA replaced the NAFTA, Annex 14-C clearly provides for a transition period of three years during which claims arising out of legacy investments may be brought. There is thus undisputably a form of overlap.

689 **Second**, as noted above, the USMCA Preamble supports the Claimants' interpretation of Annex 14-C since that interpretation would not leave a category of legacy U.S. and Mexican investors who invested in Canada in

[946] United States-Mexico-Canada Agreement (USMCA), Preamble, at **Exhibit CL-301-ENG** (emphasis added).

[947] Counter-Memorial, p. 92 *et seq.* (para. 255).

[948] Counter-Memorial, p. 92 (para. 254).

accordance with and in reliance on the NAFTA without recourse before an international arbitral tribunal. That interpretation would better accord – than the Respondent's interpretation of Annex 14-C – with the goal of the USMCA of establishing "a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment". It also would better accord with the goal of the USMCA of encouraging foreign investment in Canada and promoting the rule of law.

3.3.3.4 Article 34.1 USMCA supports the Claimant's interpretation of Annex 14-C

690 Article 34.1(1) USMCA provides that "[t]he Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement."[949]

691 In the Counter-Memorial, the Respondent first asserts that "*[e]n offrant aux investisseurs une période de trois ans pour faire valoir les protections qui leur étaient accordées en vertu du chapitre 11 de l'ALÉNA, l'annexe 14-C met en œuvre l'objectif d'établir une transition harmonieuse de l'ALÉNA à l'ACEUM*."[950]

692 However, on the Respondent's interpretation of Annex 14-C, only certain legacy NAFTA investors harmed before 30 June 2020 (i) would be able to bring claims before an international arbitral tribunal in accordance with the NAFTA procedures, and (ii) would benefit from a three-year transition period.

693 In particular, as explained above, on the Respondent's interpretation of Annex 14-C, legacy investors whose investments were expropriated – whether before or after 30 June 2020 – would not be able to bring claims.[951]

694 More generally, the legacy NAFTA investors harmed after 30 June 2020 would have no transition – let alone a smooth transition – from the NAFTA to the USMCA. They would be left out of the equation, with no ability to

[949] Counter-Memorial, p. 93 (para. 257); USMCA, Chapter 34, at **Exhibit CL-299-ENG**.

[950] Counter-Memorial, p. 93 (para. 258).

[951] See Section 3.3.2.2(i) above.

seek recourse before an international arbitral tribunal (and left only with indirect recourse through State-to-State dispute settlement and without the possibility of securing damages). This would run counter to the USMCA Parties' recognition at Article 34.1(1) USMCA.

695 The Respondent then argues that, following the Claimant's interpretation of Annex 14-C, "*les investisseurs bénéficieraient des protections de fond relatives à l'investissement de l'ALÉNA jusqu'au 30 juin 2023, mais seraient incapables d'intenter un recours en vertu du mécanisme de RDIE pour des évènements survenus dans les six mois précédant le 30 juin 2023, […], en raison de la règle de l'article 1120 de l'ALÉNA*."[952] This, according to the Respondent, would neither amount to a smooth transition as envisaged by Article 34.1 USMCA, nor accord with the goals set out in the USMCA Preamble.[953]

696 Aside from the fact that this scenario does not apply to the present case, the Respondent's bold conclusion as to the fate of legacy investors facing wrongful measures in the six months prior to the end of the transition period, is baseless.

697 Article 1120 entitled "submission of a claim to arbitration" in part requires that "six months have elapsed since the events giving rise to a claim," before a disputing investor may submit the claim to arbitration (the so-called "cooling off period").[954] Annex 14-C does not specifically address the case of legacy investors that might have claims arising out of measures that occurred between 1 January 2023 and 30 June 2023. However, such claims are not excluded either; had the USMCA Parties wished to exclude them in Annex 14-C, they could have done so.

698 Absent any language addressing this specific category of potential claims, the reasonable interpretation of Annex 14-C remains that they would be covered under Annex 14-C. Indeed, not allowing an investor who otherwise met the requirements of Annex 14-C to bring a claim arising out of measures that occurred in the last six months of the transition period, on

[952] Counter-Memorial, p. 94 *et seq.* (para. 261).

[953] Counter-Memorial, p. 94 *et seq.* (para. 261).

[954] NAFTA, at **Exhibit CL-001-ENG**, p. 11 (Artic1e 1120).

the basis that the claim would be inadmissible under Article 1120 NAFTA would clearly constitute an abuse of rights.[955]

699 Accordingly, the Claimant's interpretation of Annex 14-C allows for a more predictable, and thus smoother, transition out of the NAFTA and a more predictable legal framework for legacy investors sustaining a loss out of wrongful measures taken during the three-year transition period – as compared to the outcome for such investors if the Respondent's interpretation were applied.

3.3.4 Article 31(3) VCLT: The USMCA Parties have not expressed an agreement as to the meaning of Annex 14-C, nor is there a common practice as to its application

700 Contrary to the Respondent's allegation, the USMCA Parties have not expressed an agreement that "Annex 14C does not extend the substantive NAFTA obligations relating to investments."[956]

701 In the Counter-Memorial, the Respondent refers to Article 31(3)(b) VCLT which provides that, when considering the meaning to be given to the terms of a treaty, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account.[957]

702 Relying on this provision, the Respondent contends that the U.S. and Mexico "*ont défendu la même interprétation [de l'annexe 14-C] dans leurs représentations dans les affaires TC Energy et Legacy Vulcan*" as Canada and refers to those States' pleadings against TC Energy and Legacy Vulcan.[958] The Respondent boldly concludes that a practice has been established with respect to the application of Annex 14-C. In this regard, it refers to the award in *Canadian Cattlemen for Fair Trade v. U.S.*, where the tribunal found that certain positions taken by the NAFTA parties in

[955] This would be a question of admissibility and not jurisdiction: see, *e.g.*, *Cengiz Insaat Sanayi ve Ticaret A.S. v. State of Libya*, ICC Case No. 21537/ZF/AYZ, Judgment of Paris Court of Appeal, 25 May 2021, at **Exhibit CL-302-FRA**, p. 11 (para. 55).

[956] Counter-Memorial, p. 95 (para. 262).

[957] VCLT, at **Exhibit CL-284-ENG**, p. 13.

[958] Counter-Memorial, p. 95 (para. 263).

Article 1128 submissions constituted a practice under Article 31(3) VCLT.[959]

703 The Respondent's contentions are misplaced for two main reasons.

704 **First**, the Respondent has not and cannot establish a "practice" based on disparate and selective quotes taken from pleadings in unrelated arbitration proceedings. The arguments raised by those Parties relate to their (self-interested) positions taken in the context of, and for the purposes of, defending themselves against specific claims in litigious proceedings.

705 In that regard, the position of the *Canadian Cattlemen* tribunal is at odds with other investment treaty cases and commentary. For instance, the tribunal in *Gas Natural SDG v. Argentina* rejected the possibility of using legal arguments advanced by a party in the context of arbitration proceedings to establish a subsequent practice in accordance with Article 31.3(b) VCLT.[960] Similarly, legal commentators have expressed caution when it comes to looking to submissions made in judicial or arbitral proceedings as evidence of a practice of treaty interpretation, precisely because such submissions may have "a specific, short-term goal in mind, namely, to put forward any arguments deemed effective in defending the State's position in the proceedings, such as jurisdictional objections, rather than as a reflection of the State's long-term position on a legal issue."[961]

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[959] Counter-Memorial, p. 95 (para. 263) (referring to *The Canadian Cattlemen for Fair Trade v. United States of America,* UNCITRAL, Award on Jurisdiction, 28 January 2008, at **Exhibit RL-085-ENG**).

[960] *Gas Natural SDG, S.A v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, at **Exhibit CL-303-ENG**, p. 28 (para. 47, fn. 12).

[961] I. Buga, "Subsequent Practice as a Means of Treaty Interpretation", in Irina Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press, 2018) 17, at **Exhibit CL-304-ENG**, p. 9 of the PDF (p. 30); see also *Eskosol S.p.A. in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, at **Exhibit CL-305-ENG**, p. 102 (para. 226) ("it would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed.").

706 **Second**, the USMCA Parties have not consistently argued that Annex 14-C should be interpreted to cover only claims of breach that pre-date 30 June 2020.

707 Hence, the Canadian State-owned entity Alberta Petroleum Marketing Commission ("**APMC**")[962] has claims pending against the U.S., arising out of the cancellation of the Keystone XL Pipeline[963] and, in that case, Canada, through APMC, is **opposing** a jurisdictional objection relating to Annex 14-C. Specifically, APMC is arguing that the offer to arbitrate under Annex 14-C extends to events that occurred during the three-year transition period after the termination of the NAFTA, and that the documents and context of the USMCA negotiations (which ran in parallel to APMC's investment) confirm this interpretation.[964]

708 Remarkably, recently, in January 2025, the Canadian Trade Law Bureau filed an Article 1128 submission in *APMC vs the U.S.*, expressing disagreement with the position of APMC and thus resulting in two (Canadian) State emanations expressing contradictory views.

709 At the same time, as shown by a document that the Respondent produced at the Claimant's request in this arbitration, [redacted][965]

[962] APMC describes itself as "a Provincial Corporation in Alberta and a commercial arm of the Government of Alberta". See *Alberta Petroleum Marketing Commission v. The Government of the United States of America,* ICSID Case No. UNCT/23/4, Notice of Intent to Submit a Claim to Arbitration, 9 February 2022, at **Exhibit C-0583-ENG**, p. 10 (para. 20).

[963] See *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Claimant's Memorial, 16 April 2024, at **Exhibit C-0418-ENG**, p. 2 (para. 2).

[964] APMC continues to oppose the U.S.'s jurisdictional objection relating to Annex 14-C. See *e.g.*, *APMC v. U.S.*, Claimant's Memorial, 16 April 2024, at **Exhibit C-0418-ENG**, p. 98 *et seq.* (ss. IV.A–IV.C); *APMC v. U.S.*, Claimant's Counter-Memorial on Preliminary Objections, 16 December 2024, at **Exhibit CL-300-ENG**, p. 7 *et seq.* (s. II).

[965] [redacted]

710 Conversely, based on publicly available information, the Respondent could have but did not file an Article 1128 NAFTA submission[966] on this issue in at least three other pending legacy NAFTA cases, namely, *TC Energy (Canada)*[967] *v. U.S.*,[968] *Coeur Mining (U.S.) v. Mexico*,[969] and *Legacy Vulcan (U.S) v. Mexico*.[970] Notably, the Respondent did not file an Article 1128 submission in *Legacy Vulcan v. Mexico* even after Mexico objected to the tribunal's jurisdiction on grounds relating to Annex 14-C and even though the Respondent had previously filed an Article 1128 submission in that case on other issues.[971] Had the Respondent genuinely believed, or adopted an official and considered position, that the Tribunal lacked jurisdiction over the claims in those cases on the grounds that Annex 14-C does not permit claims arising out of measures that post-date the termination of the NAFTA, it could and would have raised the objection through Article 1128 submissions. To argue as it does now that there is an agreement within the meaning of Article 31.3(b) VCLT as to the interpretation of Annex 14-C, it should have raised such an objection.

[966] NAFTA, at **Exhibit CL-001-ENG**, p. 16 (Art. 1128), entitled "Participation by a Party" provides that "[o]n written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement." See also PO3, p. 8 *et seq.* (para. 33) ("the Tribunal notes that the Respondent has not made any submission on the Annex 14-C temporal application issue in the TC Energy and Legacy proceedings pursuant to NAFTA Article 1128 […]").

[967] Nothing prevents a NAFTA Party from making an Article 1128 submission in a case brought by one of its own nationals. Thus, Canada could have made such a submission in the *TC Energy v. U.S.* case, which was brought by a Canadian company.

[968] See *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 7 (para. 30) and p. 11 (para. 63).

[969] See *Coeur Mining, Inc. v. United Mexican States*, ICSID Case No. UNCT/22/1, Procedural order No. 4, 28 May 2024, at **Exhibit CL-306-ENG**, p. 3 (para. 7).

[970] See *Legacy Vulcan v. Mexico*, public record at https://www.italaw.com/cases/6866, at **Exhibit C-0585-ENG**.

[971] The Respondent could have but did not file an Article 1128 submission following Legacy Vulcan's submission of an ancillary claim under Annex 14-C, even though it had previously filed an Article 1128 submission on other issues. See *Legacy Vulcan LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 7 June 2021, at **Exhibit CL-307-ENG**; *Legacy Vulcan v. Mexico*, public record at https://www.italaw.com/cases/6866, at **Exhibit C-0585-ENG**.

711 Similarly, Mexico only raised an Annex 14-C objection belatedly in the case brought by Legacy Vulcan.[972]

712 To sum up, so far, the USMCA Parties have decided when and how to argue Annex 14-C depending on the circumstances and their interests, on a case-by-case basis. This lack of consistency confirms that there has been no "subsequent practice" with regard to the application of Annex 14-C and thus no "agreed" interpretation.

3.3.5 Article 32 VCLT: Supplementary means of interpretation

713 The Respondent, in its Counter-Memorial, relies on Article 32 VCLT and argues that available supplementary means of interpretation confirm its own interpretation of Annex 14-C.[973]

714 Article 32 VCLT provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable."[974]

715 The Claimant's interpretation of Annex 14-C of the USMCA does not render the meaning of Annex 14-C ambiguous or obscure, nor does it lead

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[972] Based on publicly available information concerning the *Legacy Vulcan* arbitration, it appears that Mexico did not complain about the scope of Annex 14-C nor object to the continued application of Section A of the NAFTA Chapter 11 in May 2022, when the parties were exchanging submissions on Legacy Vulcan's request for leave to raise its ancillary claims (*Legacy Vulcan v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, at **Exhibit CL-308-ENG**). Mexico appeared to have only raised its objection on this aspect of USMCA Annex 14-C in its counter memorial on 19 December 2022, shortly before the United States filed its request for bifurcation in TC Energy (on 11 January 2023). See *Legacy Vulcan v. Mexico*, Respondent's Counter-Memorial on the Ancillary Claim, 19 December 2022, at **Exhibit C-0581-ENG-SPA**, p. 307 *et seq.* of the PDF (para. 408, 409).

[973] Counter-Memorial, p. 96 (paras. 265-266).

[974] VCLT, at **Exhibit CL-284-ENG**, p. 13.

to a result that is manifestly absurd or unreasonable. Indeed, for the reasons set out in Sections 3.3.2. to 3.3.3 above, Annex 14-C of the USMCA is sufficiently clear, such that the Tribunal need not look beyond the four corners of the USMCA and its context for guidance as to its interpretation.

716 In any event, the supplementary means of interpretation that the Respondent has proffered do not assist the Respondent's cause. While the Respondent has chosen not to submit into evidence any *travaux préparatoires* or negotiation history documents relating to Annex 14-C, its position is not supported by the documents it has referred to, nor indeed by other documents available regarding the USMCA negotiations, be it isolated and irrelevant political statements (**Section 3.3.5.1**), documents exchanged during the negotiations (**Section 3.3.5.2**) or internal U.S. and Canadian documents (**Section 3.3.5.3**). If anything, those documents endorse the Claimant's interpretation of Annex 14-C. The same goes for documents reflecting the views of USMCA negotiators (**Section 3.3.5.4**).

3.3.5.1 Isolated political statements are not relevant to the interpretation of Annex 14-C

717 By reference to Article 32 VCLT and allegedly in support of its interpretation of Annex 14-C, the Respondent refers to fragments of political statements by Canadian and Mexican officials,[975] namely:

- a statement made in October 2018 by Chrystia Freeland, the then Canadian Minister in charge of international trade and the USMCA negotiations, that "one of the achievements [she is] most proud of is that the investor-state dispute resolution system, which in the past allowed foreign companies to sue Canada, will be gone;" [976]
- a similar statement by Ms Freeland made in June 2020;[977]

[975] Counter-Memorial, p. 69 *et seq.* (paras. 267-269).

[976] Counter-Memorial, p. 96 (paras. 267-268); "Chrystia Freeland says the new trade deal prevented possible widespread economic disruption", *National Observer*, 19 October 2018, at **Exhibit R-0043-ENG**, p. 7; "Chrystia Freeland: The USMCA is a good deal for Canadians", *Vancouver Sun*, 26 October 2018, at **Exhibit R-0044-ENG**, p. 4.

[977] Declaration of the Vice Prime Minister dated 30 June 2020, at **Exhibit R-0045-FRA**, p. 2.

- a statement made in 2020 by a sub-secretary of the Mexican Foreign Ministry that "[i]t was agreed that the Investor-State Dispute Settlement mechanism [under the USMCA] will not apply to Canada."[978]

718 These statements are entirely irrelevant.

719 **First**, they do not reflect "preparatory work of the treaty and the circumstances of its conclusion" or otherwise shed light on the common understanding of the USMCA Parties at the time of the conclusion of the treaty in November 2018 (not least because two of the three statements post-date the conclusion of the USMCA by some two years).

720 **Second**, these statements simply recall the (undisputed) fact that, with the USMCA, Canada sought to eliminate investor-State dispute settlement; they do not, however, address or shed any light on Annex 14-C which – and this too is undisputed - permits investor-State dispute settlement against Canada for a transition period of three years. These statements do not comment on the types of claims that may or may not be brought during those three years.

721 **Third**, other Canadian State representatives have made statements emphasising that claims can be brought in connection with legacy investments for three years after the termination of the NAFTA, without mentioning any limitations as to when the cause of action arose.[979]

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[978] Counter-Memorial, p. 97 (para. 269); *Secretaría de Relaciones Exteriores*, Undersecretary for North America, "United States-Mexico-Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism", at **Exhibit R-0046-ENG**.

[979] See, *e.g.*, Minister of International Trade - Briefing book dated 1 November 2019, at **Exhibit C-0586-ENG**, p. 62 ("NAFTA's existing ISDS mechanism will continue to apply for three years after termination of the Agreement for investments made prior to the entry into force of CUSMA."); see also Van Bael and Bellis, Investors' Right to Bring Investment Claims Under the NAFTA Investment Chapter Expires Soon dated 13 March 2023, at **Exhibit C-0587-ENG**, p. 2 ("[CUSMA], which replaced [NAFTA] on July 1, 2020, kept alive NAFTA's Investment Chapter (Chapter 11) for a 3-year period allowing investors to subject legacy investment claims to arbitration under NAFTA within that survival period.") (written by Mr Romero Martinez, who was part of the Mexican negotiating team for the USMCA and has since moved to private practice).

3.3.5.2 The preparatory work of the treaty supports the Claimant's interpretation of Annex 14-C

722 The VCLT does not define what constitutes "the preparatory work" of a treaty (*travaux préparatoires*) or what type of evidence may reflect "the circumstances of its conclusion" under Article 32.[980]

723 As noted above, the Respondent has not submitted into evidence any *travaux préparatoires* or documents evidencing the circumstances of the conclusion of Annex 14-C.

724 Further to the Claimant's requests, the Tribunal ordered Canada to produce documents exchanged with Mexico and the U.S. relating to the negotiation of Chapter 14 of the USMCA.[981] Significantly, none of the documents that the Respondent produced in response to this request support its interpretation of Annex 14-C. It is thus of no surprise that the Respondent has not submitted any of them into evidence with its Counter-Memorial.

725 Conversely, none of the documents produced by the Respondent contradicts the Claimant's interpretation of Annex 14-C. If anything, they support the Claimant's interpretation of Annex 14-C as they are silent regarding claims arising out of legacy investments and breaches post-dating the termination of the NAFTA, just as they are silent regarding claims arising out of legacy investments and involving a wrongful composite act based on measures that commenced before the termination of the NAFTA.

726 In parallel, the Claimant filed requests for documents regarding the USMCA negotiation history through the Canadian Access to Information Act. In response, the Respondent produced documents that were almost entirely redacted.[982]

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[980] The International Law Commission "did not think that anything would be gained by trying to define *travaux préparatoires*." *Draft Articles on the Law of Treaties with commentaries*, 1966, Yearbook of the ILC, vol II, at **Exhibit CL-294-ENG**.

[981] See PO4, Annex A, p. 130 *et seq.* (Request 36).

[982] Letter from Fasken to Global Affairs Canada dated 25 May 2023, at **Exhibit C-0588-ENG**; Letter from Global Affairs Canada to Fasken dated 29 November 2024, at **Exhibit C-0589-**

727 Based on publicly available information, Canada also does not appear to have provided or commented on the *travaux préparatoires* in other pending NAFTA cases.[983] More generally, the USMCA Parties have not been forthcoming with the *travaux préparatoires*.

728 This is the case for the U.S.:

- In *APMC v. U.S.*, although the claimant requested the *travaux préparatoires* through Freedom of Information Act requests, as well as in the arbitration, the U.S. only disclosed limited documents.[984] The claimant concluded in that case that "there is a record, both pre- and post-signature of CUSMA, which undermines Respondent's position and which it has consistently resisted being open about".[985]
- In *Legacy Vulcan v. Mexico* and *Access Business Group v. Mexico*, the U.S. has neither provided nor discussed the *travaux préparatoires*; yet

ENG and its two enclosures, *i.e.*, Legacy Investment Claims and Pending Claims negotiation documents and records dated between May 18, 2017 and August 27, 2018 (provided by Global affairs Canada), at **Exhibit C-0590-ENG** and Legacy Investment Claims and Pending Claims negotiation documents and records dated between May 18, 2017 and August 27, 2018 (provided by Global affairs Canada), at **Exhibit C-0591-ENG**.

983 In *APMC v. U.S.* and *Access Business Group v. Mexico*, Canada did not provide or comment on the *travaux preparatoires* in its Article 1128 submissions. *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Non-Disputing Party submission of the Government of Canada pursuant to NAFTA Article 1128, 15 January 2025, at **Exhibit CL-309-ENG**; *Access Business Group v. Mexico*, ICSID Case No. ARB/23/15, Non-Disputing Party submission of the Government of Canada pursuant to NAFTA Article 1128, 28 March 2025, at **Exhibit CL-310-ENG**. As far as publicly known, Canada did not make Article 1128 submissions on this issue in other cases, including *TC Energy v. U.S., Legacy Vulcan v. Mexico, First Majestic Silver v. Mexico (II), Amerra Capital Management v. Mexico* and *Coeur Mining v. Mexico*.

984 See *APMC v. U.S.*, Claimant's Counter-Memorial on Preliminary Objections, 16 December 2024, at **Exhibit CL-300-ENG**, p. 42 (para. 104) ("Respondent has repeatedly refused to volunteer the CUSMA *travaux préparatoires* record throughout these proceedings"). See also *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Respondent's Memorial on its Preliminary Objections, 15 October 2024, at **Exhibit CL-311-ENG**, p. 47 *et seq*. (paras. 89-96) (arguing that documents relied upon by the claimant do not constitute *travaux préparatoires* as they do not reflect the common understanding of the negotiating parties but failing to refer to any *travaux* that would contradict the claimant's position). See also *APMC v. U.S.*, Claimant's Memorial, 16 April 2024, at **Exhibit C-0418-ENG**, p. 111 (paras. 237-238).

985 *APMC v. U.S.*, Claimant's Counter-Memorial on Preliminary Objections, 16 December 2024, at **Exhibit CL-300-ENG**, p. 48 (para. 113).

these are the only cases in which the U.S has filed publicly available Article 1128 NAFTA submissions addressing Annex 14-C.

729 Mexico has fared no better:

- In *Coeur Mining v. Mexico*, Mexico has provided limited documents concerning the negotiation history. Following the claimant's complaints that Mexico's production was incomplete, the tribunal ordered Mexico to provide the search methodology employed to identify the *travaux préparatoires* responsive to the production order.[986]
- In *Legacy Vulcan v. Mexico*, Mexico has not exhibited the *travaux préparatoires* with its pleadings.[987]
- In the three cases in which it has made an Article 1128 NAFTA submission regarding Annex 14-C, namely *APMC v. U.S.*, *TC Energy v. U.S* and *Westmoreland v. Canada (III)*, again, Mexico has neither provided nor commented on the *travaux préparatoires*.[988]

3.3.5.3 Internal Canadian documents regarding Annex 14-C of the USMCA support the Claimant's interpretation of Annex 14-C

730 As noted above, Article 32 VCLT does not define the type of evidence that might shed light on the circumstances surrounding the conclusion of a treaty. While the goal remains to ascertain a common understanding of the

[986] *Coeur Mining Inc v. Mexico*, ICSID Case No. UNCT/22/1, Procedural Order No. 8, 29 October 2024, at **Exhibit CL-312-ENG**, p. 20 (para. 59).

[987] See *Legacy Vulcan v. Mexico*, Respondent's Counter-Memorial on the Ancillary Claim, 19 December 2022, at **Exhibit C-0581-ENG-SPA**, p. 307 *et seq.* of the PDF (paras. 407-414) and *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Respondent's Rejoinder on the Ancillary Claim, 21 April 2023, at **Exhibit C-0592-SPA**, p. 79 *et seq.* (paras. 273-276).

[988] See, *e.g.*, *Alberta Petroleum Marketing Commission v. The Government of the United States of America*, ICSID Case No. UNCT/23/4, Submission of Mexico pursuant to NAFTA Article 1128, 15 January 2020, at **Exhibit C-0593-ENG**.

parties to a treaty, evidence from individual States or negotiators can potentially shed light on those circumstances.[989]

731 As with the *travaux préparatoires*, the Respondent has not submitted into evidence internal documents reflecting the understanding of Annex 14-C of its own representatives.

732 During the document production phase, the Claimant thus requested those documents.[990] Again, none of the documents that the Respondent produced in response to this request support its interpretation of Annex 14-C and none contradict the Claimant's interpretation of Annex 14-C. If anything, the documents produced support the Claimant's interpretation.

733 Hence, a 4 July 2018 mark-up of a draft note entitled "NAFTA-investment", prepared by Ms Evelyne Bolduc and Mr Vernon Mackay, respectively a senior advisor and director at Global Affairs Canada, the department of the Government of Canada responsible for international trade and investment matters, states the following:

> "The original NAFTA included an ISDS mechanism whereby an investor of a Party could launch a dispute against another NAFTA party government in situations where they were not treated fairly. The modernized NAFTA will not include a trilateral ISDS mechanism. Investment obligations will remain subject to the agreement's state-to-state dispute settlement mechanism. **The original NAFTA ISDS mechanism will remain available to investors with respect to their existing investments for a period of three years after entry-into-force of the new NAFTA,** after

[989] See *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014, at **Exhibit CL-313-ENG**, p. 54 *et seq.* (para. 181) ("Article 32 VCLT allows recourse to the preparatory work of the treaty and the circumstances surrounding the treaty's conclusion. It does not give an exhaustive list of admissible materials and the Tribunal thus has latitude to include any element capable of shedding light on the interpretation of 'shall assent'."); see also para. 212; *Sempra Energy International v. The Argentine Republic*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, at **Exhibit CL-314-ENG**, p. 41 (para. 145) ("[T]he opinion of those who were responsible for the drafting and negotiation of a State's bilateral treaties [is not] irrelevant, in that it serves, precisely, to establish the original intention.").

[990] PO4, Annex A, p. 135 *et seq.* (Request 37).

> which investors will no longer be able to initiate NAFTA ISDS challenges against Canada. Following the entry into force of the Comprehensive Partnership for the Trans-Pacific Partnership (CPTPP), Canadian and Mexican companies will have recourse to ISDS mechanism under that agreement. Separately, the United States and Mexico have agreed to maintain a limited bilateral ISDS mechanism under a modernized NAFTA."[991]

734 This summary does not say that claims arising out of legacy investments and breaches that post-date the termination of the NAFTA will not be covered by the USMCA. It suggests that investors will be able to file any claims in relation to legacy investments for a period of three years.

735 Similarly, an internal draft note entitled "Investment chapter summary" dated 4 October 2018 states the following:

> "The parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of the USMCA. Apart from this transition period for existing investments, U.S. investors will not be able to launch an ISDS claim against Canada. The only recourse will be State-to-State dispute settlement if the U.S. government were to bring a claim against Canada on a U.S. investor's behalf. However, if successful, such claims would not result in the award of any damages. This is important because, since 1994, U.S. investors have received 205 million in damages and settlement from cases brought against Canada under NAFTA."[992]

736 This note again makes no distinction between legacy investments harmed before and after the termination of the NAFTA. It refers to ISDS being available for any claims arising out of legacy investments for a period of three years.

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[991] Mark-up of draft note entitled "NAFTA-Investment" dated 4 July 2018, at **Exhibit C-0594-ENG**, p. 2.

[992] USMCA Investment Chapter Summary prepared by Canada dated 4 October 2018, at **Exhibit C-0595-ENG**, p. 1.

3.3.5.4 Documents reflecting the views of USMCA negotiators

737 Lastly a number of documents that reflect the views of certain negotiators of the USMCA, including documents described in the *TC Energy v. U.S.* majority decision and dissenting opinion, also support the Claimant's interpretation of Annex 14-C.

(i) Documents relied on in the TC Energy v. U.S. majority decision and dissenting opinion

738 In *TC Energy v. U.S.*, the majority of the tribunal and the dissenting arbitrator considered certain internal U.S. documents that both pre-date and post-date the conclusion of the USMCA, when addressing the meaning of Annex 14-C. However, references to that evidence are largely redacted in both the majority decision and the dissenting opinion, making them unusable.[993]

739 In his dissenting opinion, Mr Alvarez deemed admissible pursuant to Article 32 VCLT a U.S.-Canada Closing Term Sheet dated 28 September 2018 recording that "Canada agrees to 3-years grandfathering of ISDS."[994] (The Respondent has not submitted or produced a document matching that description in this arbitration.)

740 As noted above, Mr Alvarez also cites an internal U.S. email from Mr Mandell to Mr Gharbieh,[995] which states as follows:

> "Regarding your question, **we intended the annex to cover measures in existence before AND after USMCA entry into force**. That could probably be clearer. I'd have to think about the best textual argument, but the one that immediately comes to mind rests on paragraph 3. If we were just intending to allow claims for pre-existing measures, we likely wouldn't have framed a three-year

[993] *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 44 *et seq.* (paras. 184 and 187-197); *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 5 *et seq.* (paras. 14-21, 25-32).

[994] *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 8 (para. 21); see also p. 5 (para. 13).

[995] *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (paras. 29 and 31); see Section 3.3.2.2(iii) above.

> consent period -- we would have just defaulted to the statute of limitations in NAFTA Secon [sic] B that would apply to claims for those measures. In other words, we would have omitted paragraph 3 altogether. The contrary argument -- the purpose of paragraph 3 was intended to alter the SOL for claims with respect to pre-existing measures, that's it, doesn't make a lot of sense. I think it's also significant that the title of the annex -- and the key concept in the annex -- references legacy investments, not legacy measures. If we were focused only on legacy measures, it would have been easy to expressly limit paragraph 1 accordingly, but we didn't. Finally, I think footnote 21 probably helps as well. The whole point of the footnote was to require keyhole investors to arbitrate under the 'new and improved' USMCA rules and procedures (there was no reason to give them the option of arbitrating under NAFTA rules and procedures under 14-C instead). If 14-C only applied to preexisting measures, there'd be no reason to say that. We'd just be punishing keyhole investors, which is contrary to the clear intentions of the whole keyhole framework."[996]

741 While this email apparently post-dates the conclusion of the USMCA, the phrase "we intended" suggests a common understanding with other USMCA negotiators and supports the Claimant's interpretation of Annex 14-C.[997]

(ii) Other documents reflecting the views of USMCA negotiators

742 Documents obtained through Freedom of Information Act requests in the U.S. reflect the views of Mr Mandell and other USMCA negotiators and thus support the Claimant's interpretation of Annex 14-C.

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[996] *TC Energy v. U.S.*, Dissenting opinion of Henri C. Alvarez, K.C., 12 July 2024, at **Exhibit CL-290-ENG**, p. 9 *et seq.* (para. 29) (emphasis added).

[997] To the extent the *TC Energy v. U.S.* majority was dismissive of documents authored by Mr Mandell (see *TC Energy v. U.S.*, Award and Dissenting Opinion, 12 July 2024, at **Exhibit CL-270-ENG**, p. 46 *et seq.* (para. 190) ("[I]t cannot be excluded that Mr. Mandell misunderstood the legal implications of the language of Paragraph 1 of Annex 14-C limiting the offer to arbitrate to a breach of NAFTA")), it must be recalled that Mr Mandell was the U.S. chief negotiator of Annex 14-C.

743 **First**, in a talking points note circulated by Mr Mandell internally at the USTR on 9 October 2018 (*i.e.*, shortly before the signature of the USMCA), he states that "[he and his team] prepared" the following note:

> "Narrow Coverage of the **three−year ISDS grandfather clause**: Description: Under the ISDS grandfather clause, investors can bring ISDS claims under NAFTA 1994 for **three additional years with respect to investments established or acquired between January 1, 1994 and the date of the termination of NAFTA 1994** (*i.e.*, the lifetime of NAFTA 1994). Under the revised approach, investments established or acquired after signature of the USMCA, but before the termination of NAFTA 1994, would be excluded from the grandfather clause."[998]

744 Similarly, in another USTR talking points note circulated by Mr Mandell, on 19 October 2018, for an OECD Investment Committee Meeting, it is stated:

> "First, investors that have established or acquired investments during the lifetime of the NAFTA can continue to bring ISDS claims under the NAFTA rules and procedures with respect to those **'legacy investments' for three years after the termination of the NAFTA**.
>
> Second, apart from these legacy investment claims and claims that are currently pending under the NAFTA, there will be no ISDS between the United States and Canada.
>
> Third, as between the United States and Mexico, investors in all sectors will have limited access to ISDS as a last resort to provide protection in the case of certain egregious government actions, namely, post−establishment discrimination or direct expropriation. In certain critical sectors, such as oil and gas and telecommunications, investors with government contracts will have broader access to ISDS to protect the long−term, capital-intensive

[998] Email from L. Mandell to D. Bahar dated 9 October 2018, at **Exhibit C-0596-ENG**, p. 2 (emphasis added.)

> investments in these sectors, which are subject to heightened political risks."[999]

745 These talking points confirm that investors with legacy investments were clearly intended to have three years to file claims after the termination of the NAFTA, without distinction between claims based on measures that would pre-date the termination of the NAFTA and claims based on measures that would post-date the termination of the NAFTA.[1000]

746 **Second**, on 27 September 2018, the Industry Trade Advisory Committee on Services, which was created by the USTR, issued a report on the USMCA negotiations in which it opined as follows:

> "[T]he [proposed] transition period for bringing ISDS claims under the original NAFTA is limited to 3 years from the date of NAFTA termination. The 3-year window is short compared to the 10-year period typically provided under terminated BITs."[1001]

747 In other words, Annex 14-C was understood as serving the same purpose as a sunset clause.[1002]

748 **Third**, Mexico's Chief Negotiator of the USMCA, Mr Kenneth Smith Ramos, like Mr Mandell, has endorsed an interpretation of Annex 14-C which accords with the Claimant's interpretation, and offered witness testimony to that effect in another NAFTA / USMCA case, *Cyrus Financial*

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[999] Email from L. Mandell to M. Tracton dated 19 October 2018, at **Exhibit C-0597-ENG**, p. 1 *et seq.* (enclosing talking points for OECD meeting) (emphasis added).

[1000] See also WilmerHale Client Alert, "Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims", 18 March 2021, at **Exhibit C-0598-ENG**, p. 1 *et seq.* (in which Mr Mandell and his co-authors write "US, Canadian and Mexican investors with 'legacy investments' in the territory of another Party – investments established during the lifetime of the NAFTA (January 1, 1994–July 1, 2020) – have full access to ISDS under NAFTA rules for claims brought within three years after the date of the USMCA's entry into force, meaning until July 1, 2023").

[1001] Report of the Industry Trade Advisory Committee on Services dated 27 September 2018, at **Exhibit C-0599-ENG**, p. 20.

[1002] This Committee has "direct access to policymakers at Commerce Department and the Office of USTR. In such capacity advisors assist in developing industry positions on U.S. trade policy and negotiating objectives." See U.S. Department of Commerce, International Trade Administration, Industry Trade Advisory Center: Become an Advisor (accessed 12 February 2025), at **Exhibit C-0600-ENG**, p. 1.

v. Mexico. The claimant's submissions in that case, which are publicly available, state the following:

> "Mexico's Chief Negotiator of the USMCA, Mr. Kenneth Smith Ramos, provides further context on the goal and function of Annex 14-C, as informed by his experience negotiating the provision. As described in his witness statement, Mr. Smith confirms that:
>
> 'the Mexican position regarding the legacy provisions, and the intention of the negotiators of Mexico, Canada, and the United States, was to ensure that **all of the substantive provisions of NAFTA Chapter 11, as well as the ISDS mechanism, would be extended for three years after the NAFTA had been replaced by the new agreement**.'
>
> Mr. Smith further confirms that no argument arose - at any point during the course of the negotiations concerning the legacy provisions - that the substantive provisions of NAFTA Chapter 11 would not apply during the Transition Period. Mr. Smith cites to three meetings with Mexican Ministry of Economy officials and other Mexican stakeholders concerning the legacy investment provisions, each of which involved explicit discussions on the intent of the parties to extend NAFTA Chapter 11's substantive investment protections for three years after NAFTA terminated."[1003]

3.3.6 Conclusion

749 In conclusion, for the reasons set out above, the Tribunal has jurisdiction over all of the Claimant's claims, as they were validly brought under Annex 14-C of the USMCA:

750 First, the claims pre-date the termination of the NAFTA, as explained in Section 3.2: they arise out of a series of acts and omissions starting in 2015,

[1003] *Cyrus Capital Partners, L.P. Contrarian Capital Management, LLC v. United Mexican States*, ICSID Case No. ARB/23/33, Claimants' Counter-Memorial on Jurisdiction, 29 August 2024, at **Exhibit CL-315-ENG**, p. 63 *et seq.* (paras. 232-233) (citing the witness statement of Kenneth Smith Ramos).

some of which amount to a stand-alone NAFTA breach. That series of wrongful acts and omissions also amounts to a composite act which extended from 2015 until 2022 and violated the NAFTA. Because the NAFTA breach out of which the claims arise pre-dates the termination of the NAFTA, these claims are evidently permitted under Annex 14-C.

751 Furthermore, even if some of the wrongful acts out of which the claims arise post-date the termination of the NAFTA, the Tribunal nonetheless has jurisdiction over the claims, because the wrongful acts arose during the three-year transition period following the termination of the NAFTA. On the ordinary meaning of the terms of Annex 14-C, the USMCA Parties extended, for a period of three years, not only their consent to investor-State arbitration, but also the substantive obligations of the NAFTA, Chapter 11, Section A. Annex 14-C thus encompasses claims arising out of measures that breached the NAFTA during the three-year transition period. The Respondent's contrary interpretation of Annex 14-C not only is unsupported, but also would lead to manifestly absurd and unreasonable results, including barring expropriation claims arising out of legacy investments that arose prior to the termination of the NAFTA.

752 The Tribunal should therefore dismiss the Respondent's objections to jurisdiction.

4 THE CLAIMANT'S CLAIMS

753 As explained in the Memorial, the Respondent's conduct in relation to the Claimant's investment breached the NAFTA. In particular, the Respondent failed to accord the Claimant's investment the customary international law MST standard, in breach of Article 1105 NAFTA,[1004] as well as national or most favourable nation treatment, in breach of Articles 1102 and 1103 NAFTA.[1005] Furthermore, the Respondent unlawfully expropriated the Claimant's investment in breach of Article 1110 NAFTA.[1006]

754 In the Counter-Memorial, the Respondent wrongly denies that its treatment of the Claimant's investment breached the NAFTA.

755 In the following sections, the Claimant addresses the Respondent's erroneous contentions and demonstrates that the Respondent's treatment of the Claimant's investment fell short of the customary international law MST standard (**Section 4.1**) as well as the national treatment and most favoured nation treatment standards under the NAFTA (**Section 4.2**). Furthermore, the Respondent's conduct amounted to an unlawful expropriation of the Claimant's investment (**Section 4.3**). Finally, the precautionary principle cannot be invoked to justify the Respondent's breaches of the NAFTA (**Section 4.4**).

4.1 The Respondent breached Article 1105 NAFTA

756 The Claimant showed in the Memorial that, under Article 1105 NAFTA, Canada was required to accord the Claimant's investment treatment in accordance with the MST under international law.[1007] It further explained how Canada's treatment of the Claimant's investment breached Article 1105.[1008]

757 The Respondent's purported defences in respect of this breach are without merit. First, the Respondent misrepresents the standard set out in

[1004] Memorial, p. 179 *et seq.* (s. IV(B)).
[1005] Memorial, p. 135 *et seq.* (s. IV(A)).
[1006] Memorial, p. 230 *et seq.* (s. IV(C)).
[1007] Memorial, p. 179 *et seq.* (paras. 595-601).
[1008] Memorial, p. 181 *et seq.* (s. IV(B)(2)).

Article 1105 (**Section 4.1.1**). The Respondent also mischaracterises the Claimant's legitimate expectations (**Section 4.1.2**). Lastly, the Respondent fails to rebut the Claimant's demonstration that Canada violated the Claimant's legitimate expectations and due process and that its treatment of GNLQ was arbitrary and discriminatory, in breach of Article 1105 (**Section 4.1.3**).

4.1.1 The Respondent misrepresents the applicable legal standard

758 As the Claimant explained in the Memorial, a breach of Article 1105 NAFTA is established whenever a State:

- acts in breach of due process *vis-à-vis* an investor and/or an investment;[1009]
- takes arbitrary measures towards an investor and/or an investment;[1010]
- unfairly targets an investor and/or an investment;[1011]
- breaches an investor's legitimate expectations.[1012]

759 In the Counter Memorial, the Respondent misrepresents the standard of protection at Article 1105 in several respects.

760 As explained below, the Respondent's position that Article 1105 should be construed based on the customary international law MST as it was defined in the 1920s is anachronistic (**Section 4.1.1.1**). Furthermore, whereas the Parties agree on what constitutes a violation of due process or arbitrary conduct, the Respondent improperly attempts to heighten the Claimant's burden of proof and to apply undue limitations to what constitutes discrimination under Article 1105 (**Section 4.1.1.2**). Finally, the Respondent exaggerates the deference to be given to the State's right to regulate in this context (**Section 4.1.1.3**).

[1009] Memorial, p. 181 *et seq.* (paras. 603-606).

[1010] Memorial, p. 188 (para. 626).

[1011] Memorial, p. 193 *et seq.* (paras. 647-649).

[1012] Memorial, p. 201 *et seq.* (paras. 674-685).

4.1.1.1 The MST standard under Article 1105 NAFTA refers to current customary international law

761 Under Article 1105(1) NAFTA, as interpreted by the NAFTA Free Trade Commission ("**FTC**") in 2001, Canada must afford investors "the customary international law minimum standard of treatment of aliens".[1013] As explained in the Memorial, this obligation was aptly summarised by the tribunal in *Waste Management v. Mexico* in 2004:

> "Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant **if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory** and exposes the claimant to sectional or racial prejudice, **or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with** a manifest failure of natural justice in judicial proceedings or **a complete lack of transparency and candour in an administrative process**. In applying this standard **it is relevant that the treatment is in breach of representations made by the host State** which were reasonably relied on by the claimant. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[1014]

762 In the Counter-Memorial, the Respondent does not explicitly refute this description, but seeks to heighten the MST standard, by requiring the investor to show that the conduct at issue was "sufficiently egregious and

[1013] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions dated 31 July 2001, at **Exhibit CL-316-ENG**, p. 1 *et seq.* (item B). The Parties agree that the NAFTA Free Trade Commission interpretation of Article 1105 NAFTA is binding. See Memorial, p. 179 (paras. 596-597) and Counter-Memorial, p. 169 (para. 463). See also NAFTA, at **Exhibit CL-001-ENG**, p. 17 (Art. 1131(2)) (Pursuant to which an interpretation by the NAFTA Free Trade Commission "shall be binding on a Tribunal established under [NAFTA Chapter 11]").

[1014] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, at **Exhibit CL-040-ENG**, p. 35 *et seq.* (paras. 98-99) (emphasis added). See Memorial, p. 179 *et seq.* (paras. 597-598).

shocking".[1015] The Respondent relies in this regard on (i) the 1926 decision by the Mexico/US Claims Commission in the *Neer* case;[1016] and (ii) the 2024 Draft Interpretation of the CETA Joint Committee of the content of the fair and equitable treatment ("**FET**") standard included in the Canada-European Union Comprehensive Economic and Trade Agreement ("**CETA**").[1017] Its position is outdated and wrong.

763 **First**, the reference to the MST in Article 1105(1) cannot be interpreted as referring to the conception of customary international law of the 1920s. As explained in the Memorial, NAFTA tribunals have recognised the need to adapt the MST standard as defined in the *Neer* case, to present-day circumstances.[1018] The MST standard as recognised by the FTC note cited by the Respondent[1019] cannot be frozen in time, decades before the entry into force of Article 1105. As the *Mondev* tribunal put it in 2002:

> "[I]t is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. […] [T]here can be no doubt that [Article 1105(1)] **refers to customary international law as it stood no earlier than the time at which NAFTA came into force**. It is not limited to the international law of the 19th century or even of the first half of the

[1015] Counter-Memorial, p. 169 *et seq.* (paras. 464-465), citing *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, at **Exhibit CL-035-ENG**, p. 268 (para. 627).

[1016] Counter-Memorial, p. 171 *et seq.* (para. 468).

[1017] Counter-Memorial, p. 171 (para. 467).

[1018] *Glamis Gold v. U.S.*, Award, 8 June 2009, at **Exhibit CL-035-ENG**, p. 264 (para. 616) (Finding that the *Neer* standard applies, but its application necessarily evolves over time: "The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously"); and *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, at **Exhibit CL-021-ENG**, p. 80 (para. 286) (Finding that "the current customary international law standard of 'fair and equitable treatment' at least reflects the **adaptation of the agreed *Neer* standard to current conditions**") (emphasis added). See also Memorial, p. 179 *et seq.* (para. 597, fn 863).

[1019] NAFTA FTA Notes of Interpretation, at **Exhibit CL-316-ENG**, p. 1 et *seq*.

> 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, **the FTC interpretations incorporate current international law**, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce".[1020]

764 As the tribunal in *Bilcon v. Canada* observed, "the international minimum standard has evolved over the years towards greater protection for investors".[1021] The same tribunal added:

> "[T]here is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but **[t]here is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour**. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on

[1020] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at **Exhibit CL-037-ENG**, p. 40 (para. 116) and p. 43 *et seq.* (para. 125) (emphasis added). See also, *e.g.*, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 63 *et seq.* (para. 194) ("The content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law"). Some tribunals also noted that the *Neer* standard was not formulated in the context of investment protection. See, *e.g.*, *Mondev v. U.S.*, Award, 11 October 2002, at **Exhibit CL-037-ENG**, p. 40 (para. 115) ("The Tribunal would observe, however, that the *Neer* case […] concerned not the treatment of foreign investment as such but the physical security of the alien."); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, at **Exhibit CL-038-ENG**, p. 278 *et seq.* (para. 181) ("[T]he Claims Commission in the *Neer* case did not purport to pronounce a general standard applicable not only with respect to protection against acts of private parties directed against the physical safety of foreigners while in the territory of a host State, but also in any and all conceivable contexts. here appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State"). See also Memorial, p. 179 *et seq.* (para. 597, fn 863).

[1021] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 126 *et seq.* (para. 435).

> representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.".[1022]

765 Finally, as the *Lone Pine v. Canada* tribunal noted more recently:

> "[T]he *Waste Management* tribunal's articulation of the customary international law minimum standard of treatment for FET has been considered by almost every arbitral tribunal coming thereafter and has also been followed by many arbitral tribunals as describing the current customary international law minimum standard of treatment for FET".[1023]

766 There is thus no reason to depart from the *Waste Management* formulation of the MST standard in the present case.

[1022] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 129 (paras. 442-444) (emphasis added). See also, *e.g.*, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, at **Exhibit CL-030-ENG**, p. 55 *et seq.* (para. 118) ("[T]he Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be 'egregious,' 'outrageous' or 'shocking,' or otherwise extraordinary"); *Waste Management v. Mexico*, Award, 30 April 2004, at **Exhibit CL-040-ENG**, p. 32 *et seq.* (para. 93) ("Both the *Mondev* and *ADF* tribunals rejected any suggestion that the standard of treatment of a foreign investment set by the NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case, *i.e.*, to treatment amounting to an 'outrage, to bad faith, to wilful neglect of duty, or to an in insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'").

[1023] *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022, at **Exhibit CL-254-ENG**, p. 199 (para. 608). See also, *e.g.*, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, Award, 24 March 2016, at **Exhibit CL-041-ENG**, p. 117 *et seq.* (para. 501) ("The Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary International law minimum standard of treatment found in Article 1105."); *Joshua Dean Nelson and Jorge Blanco v. United Mexican States*, ICSID Case No. UNCT/17/1, Award, 5 June 2020, at **Exhibit CL-055-ENG**, p. 93 *et seq.* (para. 322); *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, at **Exhibit CL-253-ENG**, p. 86 (para. 283); *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 129 (para. 442).

767 **Second**, the Respondent's attempt to rely on the 2024 Draft Interpretation of the CETA Joint Committee of the FET standard at Article 8.10 of the CETA to interpret Article 1105(1) NAFTA[1024] is inapposite.

768 As the Respondent admits,[1025] the 2024 Draft Interpretation of the CETA Joint Committee has not yet been adopted; it therefore does not reflect the position of Canada (or the EU for that matter).

769 In any case, an interpretation of the FET standard at Article 8.10 of the CETA[1026] cannot guide the interpretation of the MST standard at Article 1105 NAFTA. The wording of Article 8.10 CETA is substantially different from that of Article 1105. Article 8.10 CETA does not refer to customary international law on MST as Article 1105 does, but to a specific enumeration of violations of the FET standard.[1027] There are no grounds for transposing the (unadopted) interpretation of the former to the interpretation of the latter. Furthermore, the NAFTA provides for its own, binding interpretation mechanism, [1028] and Article 1105 has been interpreted accordingly.[1029] It is thus inappropriate to invoke the (draft) interpretation of a similar provision by analogy.

4.1.1.2 Article 1105 NAFTA protects investors from conduct that is arbitrary or discriminatory, or violates due process

770 As explained in the Memorial, the obligation to provide a minimum standard of treatment is breached by State conduct that is arbitrary or

[1024] Counter-Memorial, p. 171 (para. 467); see also Counter-Memorial, p. 174 (paras. 472-474).

[1025] Counter-Memorial, p. 171 (n. 642) referring to *Déclaration conjointe: Croissance économique durable dans l'Union européenne et au Canada grâce à l'Accord économique et commercial global* dated 9 February 2024, at **Exhibit R-0075-FRA**, p. 3 ("*Les coprésidents ont confirmé que le texte de l'Interprétation a été approuvé sur le fond et se sont engagés à ce qu'il soit adopté de manière définitive en temps voulu* […]").

[1026] See Canada-European Union Comprehensive Economic and Trade Agreement (2016) dated 31 December 2016, at **Exhibit CL-044-ENG**, p. 4 (Art. 8.10).

[1027] CETA, at **Exhibit CL-044-ENG**, p. 4.

[1028] NAFTA, at **Exhibit CL-001-ENG**, p. 17 (Art. 1131).

[1029] See paragraph 461 above.

discriminatory, or that violates due process, including through a lack of transparency and candour in an administrative process.[1030]

771 In the Counter-Memorial, the Respondent admits that:

- A lack of transparency and candour in the administrative process violates due process in breach of Article 1105;[1031]
- State conduct that is not rationally connected to a legitimate policy objective and reflects an excess of discretionary power, a pre-judgment or a personal preference is arbitrary in breach of Article 1105;[1032]
- the wilful targeting of an investor that is not based on any legitimate justification is discriminatory in breach of Article 1105, but [1033] discrimination based on nationality is not a requirement under Article 1105;[1034] and
- an investor's legitimate expectations is a relevant factor to be assessed in determining a breach of Article 1105,[1035] and States are tied by the objective expectations they create to encourage investments.[1036]

772 However, the Respondent attempts to add improper evidentiary requirements to establish a breach of its obligations under Article 1105.

[1030] *Waste Management v. Mexico*, Award, 30 April 2004, at **Exhibit CL-040-ENG**, p. 35 *et seq.* (paras. 98-99). See also Memorial, p. 179 *et seq.* (paras. 597-598).

[1031] See Counter-Memorial, p. 177 (para. 477); Memorial, p. 181 *et seq.* (paras. 603-606). The Parties also agree that "a lack of due process leading to an outcome which offends judicial propriety" breaches Article 1105 NAFTA.

[1032] Counter-Memorial, p. 202 (para. 524) and p. 210 (para. 544). See also Memorial, p. 188 (para. 626).

[1033] Counter-Memorial, p. 213 *et seq.* (paras. 549 and 552). See also Memorial, p. 193 *et seq.* (paras. 647-649).

[1034] Counter-Memorial, p. 213 (para. 549).

[1035] Memorial, p. 201 *et seq.* (paras. 675-685); Counter-Memorial, p. 221 *et seq.* (paras. 564-565).

[1036] Memorial, p. 202 (para. 678); Counter-Memorial, p. 223 (para. 570).

(i) Due process has been interpreted broadly when assessing administrative decisions

773 In the Memorial, the Claimant relied on the tribunal's finding in *Bilcon v. Canada* that a State's failure to give appropriate notice of the criteria to be met for an environmental authorisation to be granted denies the investor "a fair opportunity to know the case it had to meet and to address it"[1037] in breach of due process.[1038]

774 The Respondent, for its part, relies on the Draft Interpretation of the CETA Joint Committee to argue that a breach of due process requires:

i) "*une conduite procédurale incorrecte et choquante* […] *dans les procédures judiciaires ou administratives*";[1039] and

ii) "*un manque complet ou injustifiable de transparence dans la procédure, tel qu'un défaut de notification de la procédure ou des motifs de la décision*".[1040]

775 This argument has no merit.

776 **First**, as explained at paragraphs 767-769 above, the Draft Interpretation of the CETA Joint Committee cannot be relied upon to interpret the NAFTA.

777 In addition, as also explained in Section 4.1.1.1 above, NAFTA tribunals have established that a finding of breach of Article 1105 does not require conduct that is "shocking". The Respondent cannot purport to add this requirement to Article 1105 by reference to a different treaty.

778 **Second**, NAFTA tribunals have confirmed that breaches of due process in administrative proceedings, including in the context of denials of permits,

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[1037] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 161 (para. 543).

[1038] Memorial, p. 181 *et seq.* (paras. 604-606).

[1039] Draft Interpretation of the CETA Joint Committee, at **Exhibit R-0076-FRA**, p. 2 *et seq.*; Counter-Memorial, p. 171 (para. 467).

[1040] Draft Interpretation of the CETA Joint Committee, at **Exhibit R-0076-FRA**, p. 3; Counter-Memorial, p. 171 (para. 467).

are not limited to the narrow ground of lack of transparency put forward by the Respondent.

779 For instance, the tribunal in *Odyssey v. Mexico* considered that the denial of a permit "based on reasons that are unrelated to specific existing requirements for issuing that permit" constitutes a breach of due process.[1041]

780 Furthermore, in *Finley Resources v. Mexico*, the tribunal analysed the concept of misuse of power,[1042] finding that "the use by public authorities of legal instruments for purposes other than those for which they were created–*i.e.*, cases of misapplication of power–particularly when carried out in bad faith and causing serious damage to investors" could be considered as breaches of the MST under Article 1105.[1043]

(ii) Arbitrariness does not equate to egregious conduct

781 The Claimant explained in the Memorial that, in accordance with Canada's own definition of the MST standard in its 2021 Model Foreign Investment

[1041] *Odyssey Marine Exploration, Inc. v. The United Mexican States*, ICSID Case No. UNCT/20/1, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 77 (para. 310), referring to P. Dumberry, "The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105" (Kluwer, 2013) (excerpt), at **Exhibit CL-318-ENG**, p. 235 (Commenting, specifically, on the finding of the *Metalclad v. Mexico* tribunal that a permit was denied "without any consideration of, or specific reference to, construction aspects or flaw of the physical facility'". See *Metalclad v. Mexico*, Award, 30 August 2000, at **Exhibit CL-059-ENG**, p. 26 (para. 93)).

[1042] *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 146 *et seq.* (paras. 531-535).

[1043] *Finley Resources and others v. Mexico*, Claimant's Reply, 14 April 2023, at **Exhibit C-0582-ENG**, p. 147 (para. 535). The *Finley Resources v. Mexico* tribunal went on to find that, by ignoring the investors' pleadings on misuse of power by Mexican authorities, Mexican courts denied the investor justice in breach of Article 1105 NAFTA. See *Finley Resources and others v. Mexico*, Revised Decision on Jurisdiction and Liability, 8 January 2025, at **Exhibit CL-295-ENG**, p. 220 *et seq.* (paras. 755-759).

Promotion and Protection agreement (which contains the same standard as in Article 1105 as interpreted by the FTC[1044]), a measure is arbitrary:[1045]

> "when it is evident that the measure is not rationally connected to a legitimate policy objective, such as when a measure is based on prejudice or bias rather than on reason or fact".[1046]

782 In the Counter-Memorial, the Respondent argues that: (i) a finding of arbitrariness requires proof of egregious conduct, in the terms of the *Neer* standard and subsequent cases citing to it;[1047] and (ii) a political decision is not *per se* arbitrary.[1048] The Respondent's arguments are misleading.

783 **First**, as explained in Section 4.1.1.1 above, the MST standard of Article 1105 does not require that "the challenged conduct reach[] the level of shocking or outrageous behaviour".[1049] Even the Respondent's own

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[1044] See Canada's Model Foreign Investment Promotion and Protection Agreement (2021) ("FIPA"), at **Exhibit CL-319-ENG**, p. 15 *et seq.* (Art. 8(1)) ("Each Party shall accord in its territory to a covered investment of the other Party and to an investor with respect to their covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens.").

[1045] For the avoidance of doubt, a finding of breach of Article 1105 NAFTA only requires a finding of "arbitrary", not "manifestly arbitrary" conduct. See, *e.g.*, *Waste Management v. Mexico*, Award, 30 April 2004, at **Exhibit CL-040-ENG**, p. 35 *et seq.* (paras. 98-99); *Mobil and Murphy v. Canada*, Decision on Liability and on Principles of Quantum, 22 May 2012, at **Exhibit CL-036-ENG**, p. 76 (para. 152); *Merril and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 26 May 2010, at **Exhibit CL-320-ENG**, p. 80 *et seq.* (para. 208).

[1046] FIPA, at **Exhibit CL-319-ENG**, p. 82 (n. 1). The Claimant resubmits the legal authority to provide a clearer and more easily readable version of the same document. See also Memorial, p. 188 (para. 626); Counter-Memorial, p. 173 *et seq.* (para. 470).

[1047] Counter-Memorial, p. 171 *et seq.* (para. 468) and p. 210 (para. 544).

[1048] Counter-Memorial, p. 211 et seq. (paras. 546-547).

[1049] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 129 (para. 444) (emphasis added). See also, *e.g.*, *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, at **Exhibit CL-030-ENG**, p. 55 *et seq.* (para. 118) ("[T]he Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be 'egregious,' 'outrageous' or 'shocking,' or otherwise extraordinary"); *Waste Management v. Mexico*, Award, 30 April 2004, at **Exhibit CL-040-ENG**, p. 32 *et seq.* (para. 93) ("Both the *Mondev* and *ADF* tribunals rejected any suggestion that the standard of treatment of a foreign investment set by the NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case, i.e. to

interpretation of arbitrariness in its 2021 Model Foreign Investment Promotion and Protection Agreement, as quoted above, does not require the showing of a shocking or outrageous conduct.[1050] The Respondent does not explain why the Claimant should be held to a standard higher than Canada's own interpretation of the same standard, albeit in a different (model) treaty.

784 As established by the tribunal in *Gramercy v. Peru*, cited by the Respondent, arbitrariness refers to conduct in which "prejudice, preference, bias and lack of reason is substituted for the rule of law and proper procedure". [1051] For instance, in assessing the denial of an environmental authorisation, the *Bilcon v. Canada* tribunal considered that Canada's conduct was arbitrary because the joint review panel that was carrying out the EA of the claimant's project imposed "**a new standard of assessment rather than fully carrying out the mandate defined by the applicable law**".[1052]

785 **Second**, the Respondent's argument that an administrative decision made for political reasons is not necessarily arbitrary is misleading. [1053] In *Electrabel v. Hungary*, the case on which the Respondent relies, the reason why the tribunal considered that the Hungarian government's decision to regulate the price of electricity was not arbitrary, is that the decision was required by the European Commission's finding that the previous

treatment amounting to an 'outrage, to bad faith, to wilful neglect of duty, or to an in insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'.").

[1050] See FIPA, at **Exhibit CL-319-ENG**.

[1051] *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Award, 6 December 2022, at **Exhibit RL-032-ENG**, p. 185 (para. 832).

[1052] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 176 *et seq*. (para. 591) (emphasis added). See also *Odyssey Marine Exploration v. Mexico*, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 76 (para. 307) ("to determine a violation, it is necessary to analyze the conduct and the reasons the State had to reach a specific decision. Accordingly, in the present case, if the administrative decision that Respondent was entitled to make regarding the MIAs 'was not founded on reason or fact, nor on the law' or was 'clearly improper and discreditable,' then the State's conduct will be considered arbitrary under the applicable FET standard.").

[1053] Counter-Memorial, p. 211 *et seq*. (para. 546).

regulatory regime constituted unlawful state aid and had to be amended.[1054] The government's decision, far from being irrational or unreasonable, therefore sought to comply with European law. The situation is different in the present case where, as explained in Section 2.4.1 above, the level of discretion held by the Québec and the Federal Governments in assessing and deciding GNLQ's application for an environmental authorisation was limited by the MELCC Directive and the EIS Guidelines.

786 Furthermore, the Respondent cannot shield itself from international responsibility by invoking its right to make political decisions. The point was considered by the *Odyssey v. Mexico* tribunal who found that, while Mexico was entitled to make political decisions, this did "not […] mean that the exercise of policy choices is without limits" and "[o]ne of these limits is not to engage in arbitrary conduct." The tribunal went on to determine that, if a decision "'was not founded on reason or fact, nor on the law' or was 'clearly improper and discreditable,' then the State's conduct will be considered arbitrary under the applicable FET standard."[1055] In that case, the majority of the tribunal went on to find a breach of the MST standard under Article 1105, based on the fact that the rejection of an authorisation "lacked technical, scientific and objective reasons" and was instead taken based on undue interference by the secretary of the competent EA agency.[1056]

[1054] *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, at **Exhibit CL-065-ENG**, p. 245 (para. 8.25).

[1055] *Odyssey Marine Exploration v. Mexico*, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 76 (paras. 306-307). While the paragraph refers to "the applicable FET standard", the *Odyssey v. Mexico* tribunal decided under the MST standard at Article 1105 NAFTA. See *Odyssey Marine Exploration v. Mexico*, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 72 *et seq.* (paras. 292-296) ("Based on the interpretation given by the Free Trade Commission, the Parties agree, and the Tribunal endorses, that the legal standard contemplated in NAFTA Article 1105(1), and particularly, the FET standard under analysis, must be understood as referring to the standard under customary international law. Consequently, in order to reach a decision in the present case, it is necessary to determine what customary international law requires to meet that standard.").

[1056] *Odyssey Marine Exploration v. Mexico*, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 122 *et seq.* (paras. 433-447) and p. 41 (para. 189) and p. 50 (para. 216).

(iii) Discriminatory conduct does not require proof of a motive

787 The Claimant explained in the Memorial that discrimination in breach of Article 1105 NAFTA is established where a State wilfully targets an investor through measures that "evidently single[] out [the investor] (*de jure* or *de facto*)"[1057] without any legitimate justification.[1058]

788 In the Counter-Memorial, the Respondent does not dispute this interpretation, [1059] but argues that the Claimant must establish that discrimination was based on sex, race or religion,[1060] or that it constitutes a manifest injustice.[1061] It thus implies that it is not sufficient to prove differential treatment, and necessary to prove "*un motif de discrimination*".[1062]

789 These contentions are baseless.

790 The MST standard protects against conduct "that is […] discriminatory".[1063] As held by the tribunal in *Nelson v. Mexico*, on which the Respondent relies,[1064] "discrimination exists if the State wilfully targets the investor".[1065] The same tribunal held that "[t]o identify whether the State wilfully targeted the investor, Tribunals have looked into whether there is a legitimate justification for such targeting".[1066] The Parties agree here that this is the enquiry that the Tribunal is required to perform.[1067]

[1057] UNCTAD, Fair and Equitable Treatment, 7 (UNCTAD Series on Issues in *International Investment Agreements II*, United Nations, 2012) dated 31 December 2012, at **Exhibit CL-054-ENG**, p. 82.

[1058] Memorial, p. 193 *et seq.* (paras. 647-649).

[1059] Counter-Memorial, p. 213 (para. 549).

[1060] Counter-Memorial, p. 213 (para. 549).

[1061] Counter-Memorial, p. 214 (para. 550).

[1062] See Counter-Memorial, p. 216 (para. 556) and p. 220 (para. 562).

[1063] *Waste Management v. Mexico*, Award, 30 April 2004, at **Exhibit CL-040-ENG**, p. 35 *et seq.* (paras. 98 and 99) (emphasis added). See Memorial, p. 179 *et seq.* (paras. 597-598).

[1064] See Counter-Memorial, p. 214 (para. 551).

[1065] *Joshua Dean Nelson v. Mexico*, Award, 5 June 2020, at **Exhibit CL-055-ENG**, p. 103 *et seq.* (para. 351).

[1066] *Joshua Dean Nelson v. Mexico*, Award, 5 June 2020, at **Exhibit CL-055-ENG**, p. 104 (para. 352).

[1067] See Counter-Memorial, p. 214 (paras. 551 and 552).

However, the Respondent's attempt to add the additional requirement that discrimination be based on manifestly unlawful motives such as sex, race or religion is unsupported.[1068]

791 Equally unsupported is the Respondent's position that, to be considered a breach of MST, unlawful targeting must constitute a manifest injustice.[1069] This proposition is based on a misrepresentation of the reasoning of the tribunal in *Cargill v. Mexico*. The *Cargill* tribunal found that a permit requirement imposed on certain foreign investors to persuade the U.S. to change its policy goals was "manifestly unjust".[1070] In this context, it added that "this wilful targeting, by its nature, [was] a manifest injustice".[1071] This fact-specific reasoning does not mean that wilful targeting must constitute a manifest injustice to constitute a breach of MST. This is indeed not the case.

(iv) Legitimate expectations may be based on the domestic regulatory framework and/or "clear and explicit" representations

792 As explained in the Memorial, to prove a violation of its legitimate expectations, the Claimant must prove that it relied on "clear and explicit" representations made to the investor.[1072]

793 The Respondent argues that only "specific assurances" from the State towards the investor can give rise to legitimate expectations.[1073] This argument misrepresents the applicable law. Article 1105(1) NAFTA does not require that specific assurances be given.

[1068] Counter-Memorial, p. 213 (para. 549).

[1069] Counter-Memorial, p. 214 (para. 550).

[1070] *Cargill v. Mexico*, Award, 18 September 2009, at **Exhibit CL-021-ENG**, p. 84 (para. 299).

[1071] *Cargill v. Mexico*, Award, 18 September 2009, at **Exhibit CL-021-ENG**, p. 84 *et seq.* (para. 300).

[1072] Memorial, p. 202 (para. 679).

[1073] Counter-Memorial, p. 173 *et seq.* (paras. 470-472) and p. 221 *et seq.* (566-569). The Respondent's reliance on the unadopted interpretation of the CETA (Counter-Memorial, p. 174 (para. 472)) is inapposite for the reasons explained at paragraph 768 above, and should therefore be disregarded.

794 First, NAFTA tribunals have found that the applicable legal framework is relevant to assess an investor's legitimate expectations. Hence, in finding that the rejection of an environmental permit breached Article 1105, the tribunal in *Odyssey v. Mexico* found that:

> "[T]he signing by a State of treaties providing for the protection of foreign investments and **the existence of a domestic regulatory framework governing a technical and objective assessment of the environmental effects** of any relevant project, even when they are **not promises specifically addressed to a particular investor**, **constitute elements that can reasonably be expected to give rise to the emergence of objective and legitimate expectations** on the part of the investor."[1074]

795 NAFTA tribunals have also considered general statements as apt to give rise to legitimate expectations. In his separate opinion in *Thunderbird v. Mexico*, Prof Thomas Wälde observed that "conduct, informal, oral or general assurances can give rise to or support the existence of a legitimate expectation".[1075] Contrary to what the Respondent argues,[1076] the majority in that case did not find that a notice of conformity was not specific enough to create legitimate expectations; [1077] the tribunal found that State's

[1074] *Odyssey Marine Exploration v. Mexico*, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 79 (para. 318) (emphasis added). See also *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 137 (para. 474) ("The 'reasonable expectations' analysis must take into account the regulatory framework for environmental assessments of the time and the direction provided by the JRP pursuant to its statutory mandate."); *Merril and Ring Forestry v. Canada*, Award, 26 May 2010, at **Exhibit CL-320-ENG**, p. 89 *et seq.* (para. 233) ("While it is clear that no representations have been made by Canada to induce the Investor to make a particular decision or to engage in conduct that is later frustrated, any investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives.").

[1075] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, 1 December 2005, at **Exhibit CL-321-ENG**, p. 27 (para. 32).

[1076] Counter-Memorial, p. 222 (para. 568).

[1077] See *Thunderbird v. Mexico*, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 49 (paras. 147-148) ("Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates

representations based on incomplete information provided by the investor itself did not give rise to legitimate expectations.[1078]

796 As for the Respondent's contention that legitimate expectations must stem from an "objective norm rather than a subjective one",[1079] it is similarly unsupported.

797 The Respondent further argues that the *Lone Pine v. Canada* award illustrates the "threshold" of specificity allegedly required for representations to give rise to legitimate expectations.[1080] It does not. The *Lone Pine v. Canada* tribunal merely found that the claimant had invested in reliance to certain initial permits, but not the permit that was eventually revoked; it thus concluded that discussions with Québec authorities at the time of the investment did not create legitimate expectations on the fate of the later permit.[1081] It is only as a secondary consideration that the tribunal considered that Canada's representations were not specific enough to give rise to legitimate expectations.[1082]

798 A more apposite case than *Lone Pine* is *Bilcon v. Canada*, in which the State's representations relied on by the claimant were more comparable to those in the present case. In analysing Canada's conduct in relation to an EA, the *Bilcon* tribunal considered a series of policy statements, either directed to the general public or to the investor, and concluded as follows:

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reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages. The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA and the circumstances of the case.").

[1078] See *Thunderbird v. Mexico*, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 49 *et seq.* (paras. 148-166).

[1079] Counter-Memorial, p. 223 (para. 570).

[1080] Counter-Memorial, p. 231 (para. 583).

[1081] *Lone Pine Resources Inc. v. Canada*, Final Award, 21 November 2022, at **Exhibit CL-254-ENG**, p. 208 (para. 632) ("[T]he Enterprise's investment in Québec had commenced with the acquisition of the Original Permits, at which time, there was no mention of the River Permit").

[1082] *Lone Pine Resources Inc. v. Canada*, Final Award, 21 November 2022, at **Exhibit CL-254-ENG**, p. 208 (para. 632).

> "**A series of encouragements by Nova Scotia in policy pronouncements and directly by elected officials and civil servants**, some highlights of which the Tribunal has quoted, **created the expectation in the Investors**, on which they could reasonably rely, **that an environmental impact assessment** of a coastal quarry and marine terminal project in the Whites Point area **would be carried out fairly and impartially within the legislative framework provided by federal Canada and Nova Scotia**. The specific encouragements were critical for the Investors' decision to continue with the project, including the commitment of significant resources to the environmental assessment process."[1083]

799 More specifically, the *Bilcon* tribunal considered the following factors:

- Nova Scotia's official public policy to welcome domestic and foreign investment in mining[1084] while respecting local communities and the environment;[1085]
- Nova Scotia's policy of a "one-window" (*i.e.*, simplified) approach at regulatory requirements, consultation and assistance for investors;[1086]
- Nova Scotia's representations on its competitive advantages for mining exploitation, specifically in relation to quarries (*i.e.*, the investors' project);[1087]

[1083] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 136 (para. 470) (emphasis added).

[1084] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 131 *et seq.* (paras. 456-458).

[1085] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 132 (para. 458).

[1086] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 132 (para. 458).

[1087] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 132 *et seq.* (paras. 459-462).

- Nova Scotia technical officials'[1088] and politicians'[1089] support of the proposed project site;
- Nova Scotia's public advertisement and representations to investors that it was "open for business".[1090]

800 None of these were "specific representations" as the Respondent argues would be necessary to establish legitimate expectations. Yet, the *Bilcon* tribunal found that:

> "**Viewing the actions of Canada as a whole**, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a 'no go' zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits."[1091]

801 The same occurred in this case as explained further in Section 4.1.3 below.

4.1.1.3 Deference to a State's decision-making is not unlimited

802 The Respondent argues in its Counter-Memorial that international tribunals must show great deference to the decision-making of national authorities in light of their policy objectives, in particular in cases involving decisions relating to the fight against climate change.[1092]

803 The Claimant does not dispute that States have a right to regulate and make decisions in the public interest. However, States cannot invoke public

[1088] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 134 (paras. 463-464).

[1089] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 134 *et seq.* (paras. 465-466).

[1090] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 135 *et seq.* (paras. 468-469).

[1091] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 177 (para. 592).

[1092] Counter-Memorial, p. 167 *et seq.* (para. 459), p. 175 *et seq.* (473-474) and p. 211 *et seq.* (546-548).

policy or the public interest to justify or excuse decisions made in breach of the MST standard under Article 1105 NAFTA.

804 In the words of the *Crystallex v. Venezuela* tribunal, the Tribunal's deference to Canada's decisions "cannot be unlimited, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory." [1093] Regardless of the existence of an allegedly "important public purpose", in assessing Canada's conduct, the Tribunal, like the *Crystallex* tribunal, must determine:

> "whether there have been serious procedural flaws which have resulted in the Permit being arbitrarily denied, or in the investor being treated non-transparently or inconsistently throughout the process and thereafter."[1094]

4.1.2 The Claimant legitimately expected that the EA of the GNLQ Project would be conducted fairly and in accordance with Canadian law and practice

805 In the Memorial, the Claimant established that:

- the Québec and Federal Governments' conduct towards the Claimant and its affiliates created legitimate expectations on the part of the Claimant, and in particular the legitimate expectation that the EA of the GNLQ Project would be conducted fairly and in accordance with Canadian law and practice;[1095]
- the Respondent violated the Claimant's legitimate expectations over the course of the EA process and, eventually, through the rejection of the GNLQ Project.[1096]

[1093] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 154 *et seq.* (paras. 584-585) (emphasis added).

[1094] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 154 *et seq.* (paras. 584-585) (emphasis added).

[1095] Memorial, p. 204 *et seq*. (paras. 686-735).

[1096] Memorial, p. 226 (paras. 736-748).

806 In its Counter-Memorial, the Respondent acknowledges that the protection of an investor's legitimate expectations is relevant to assessing a claim of breach of Article 1105(1) NAFTA.[1097] However, the Respondent argues that the Claimant failed to draw a link between its legitimate expectations and the breach of "*une autre obligation de la norme minimale de traitement*",[1098] but misread the Memorial, which states:

> "It follows that **in determining a violation of NAFTA Article 1105**, the Tribunal should **take into account, as relevant factors**: (i) the extent to which the Respondent made explicit and consistent representations to the Claimant and Symbio in order to induce the investment; (ii) the extent to which the Respondent's conduct created reasonable and justifiable expectations on the part of the investor to act in reliance on said conduct; and (iii) the extent to which the Respondent repudiated or acted against those objective representations."[1099]

807 Thus, contrary to the Respondent's allegation, the Claimant made clear that the Tribunal should consider its claims under Article 1105(1) NAFTA against the backdrop of the Respondent's violation of its legitimate expectations, not on a standalone basis.

808 As the Claimant demonstrated in the Memorial, the Respondent's support and representations contributed to forming the Claimant's legitimate expectation that the GNLQ Project would be assessed in a fair and unbiased manner, based on the criteria set out in the MELCC Directive and the EIS Guidelines.[1100] This expectation was based on the ordinary reading of the EQA and the CEAA 2012, which outline a fair and unbiased process, but also on the Respondent's representations, whether general or specific:

- the Symbio Project enjoyed support from local, provincial and federal authorities,[1101]

[1097] Memorial, p. 201 *et seq*. (paras. 674-685); Counter-Memorial, p. 220 (para. 564).

[1098] Counter-Memorial, p. 221 (para. 565).

[1099] Memorial, p. 203 (para. 685) (emphasis added).

[1100] Memorial, p. 226 *et seq.* (para. 736).

[1101] Memorial, p. 206 (para. 695).

- the Symbio Project was aligned with the Québec and Canadian Governments' environmental and economic policies of (i) developing exports of Canadian LNG as a transitional source of energy prone to contributing to the reduction of GHG emissions,[1102] and (ii) promoting the economic development of the Saguenay region,[1103] so that the impact of the GNLQ Project on beluga whales identified by GNLQ early in the EA process could be mitigated through reasonable and appropriate mitigation measures;[1104] and
- Québec Government officials had confirmed to Symbio representatives that 19 out of 20 major EAs in Québec had been approved.[1105]

809 As explained below, the Respondent wrongly argues that the representations invoked by the Claimant are not sufficiently specific to create legitimate expectations.

(i) Federal and provincial State representatives supported the GNLQ Project

810 As explained in the Memorial, Québec and Federal Government representatives, as well as local officials, expressed their support for the GNLQ Project.[1106] In particular, during meetings held at the outset in 2013, local, provincial and federal officials showed their enthusiasm for the GNLQ Project.[1107] This support materialised through the speedy execution, with the assistance of federal, provincial and municipal levels of government, [redacted]

[1102] Memorial, p. 211 *et seq*. (paras. 706, 714, 719).

[1103] Memorial, p. 225 (para. 733).

[1104] Memorial, p. 221 (para. 721).

[1105] Memorial, p. 208 *et seq.* (para. 700-702); Duchaine I, at **Exhibit CER-1**, p. 47.

[1106] Memorial, p. 204 (paras. 689-713).

[1107] Illich I, at **Exhibit CWS-1**, p. 18 *et seq.* (paras. 37-42, 47-48), and p. 46 (para. 129); Memorial, p. 204 *et seq.* (paras. 690-692).

[redacted]

811 Between 2014 and 2018, this support intensified at **provincial level** with the then Premier Philippe Couillard calling GNLQ's consultation efforts in connection with the GNLQ Project between 2013 and 2015 "exemplary",[1110] and subsequently assuring, in May 2015, the Claimant's representatives that the Québec Government would "do its best to make sure everything goes smoothly" and that the EA process would not be "politically driven".[1111] This support materialised with:

- the creation by the MEIE of an Inter-Ministerial Steering Committee to assist GNLQ with the administrative permitting process;[1112]
- the confirmation by the MERN that it would supply a block of 550MW of energy for 20 years at a competitive rate, leading to the signature of a pre-project agreement with HQ in November 2018;[1113]
- the confirmation by the Ministry of Finance that GNLQ would qualify for a tax-break, as a "major investment project";[1114]
- [redacted]

[1108] See Memorial, p. 11 (para. 24).

[1109] [redacted]

[1110] *"Philippe Couillard fait son bilan de 2015 pour le Saguenay- Lac-Saint-Jean*", *Radio-Canada*, 21 December 2015, at **Exhibit C-0023-ENG-FRA**, p. 3; Illich I, at **Exhibit CWS-1**, p. 46 (para. 129), GNLQ, "LNG Project Overview of Environmental Permitting and other Key Quebec Government Approvals" dated 26 September 2017, at **Exhibit C-0378-ENG**, p. 2.

[1111] Internal email from J. Illich to Breyer Capital dated 19 September 2016, at **Exhibit C-0385-ENG**. See also Memorial, p. 204 *et seq.* (paras. 690-692, 697, 703, 710-711).

[1112] Letter from MEIE to GNLQ dated 24 October 2014, at **Exhibit C-0151-ENG**; Memorial, p. 207 (para. 698).

[1113] Letter from MERN to GNLQ dated 23 July 2015, at **Exhibit C-0182-ENG-FRA**; [redacted] at **Exhibit C-0154-FRA**, p. 1. See also Memorial, p. 207 *et seq*. (paras. 698 and 700).

[1114] GNLQ, "Énergie Saguenay LNG Project - Third Round Financing – Status Update and Scenario Overview" dated 6 June 2016, at **Exhibit C-0380-ENG**. See also Memorial, p. 207 (para. 698).

[redacted][1115]

812 This support continued in 2018 through 2020, notably through Premier Legault's renewed commitment to invest in the GNLQ Project in January 2019 and subsequent encouraging statements.[1116]

813 At **federal level**, the Federal Government showed the same level of enthusiasm for the GNLQ Project.[1117] In particular:

- the NEB approved GNLQ's export licence application;[1118]
- The Minister of International Trade offered the services of his administration to secure offtake agreements and financing;[1119]

814 In addition, the Government of Alberta proposed to invest in the Symbio Project and [redacted][1120]

815 In this context, it was legitimate for the Claimant to expect that the EA of the GNLQ Project would be conducted fairly and in accordance with Canadian law and not arbitrarily or in a discriminatory fashion; it was also legitimate for the Claimant to expect that it would not be subjected at the

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[1115] [redacted] at **Exhibit C-0153-ENG-FRA**; Illich I, at **Exhibit CWS-1**, p. 59 (para. 167); [redacted] at **Exhibit C-0195-ENG-FRA**. See also Memorial, p. 208 *et seq.* (paras. 700-701).

[1116] Illich I, at **Exhibit CWS-1**, p. 47 *et seq.* (paras. 132-135); [redacted] at **Exhibit C-0183-ENG-FRA**; [redacted] at **Exhibit C-0226-ENG-FRA**; [redacted] at **Exhibit C-0227-ENG-FRA**; [redacted] at **Exhibit C-0228-ENG-FRA**. See also Memorial, p. 210 *et seq.* (paras. 703-705).

[1117] Memorial, p. 211 *et seq.* (paras. 708-710).

[1118] NEB, Letter Decision concerning GNLQ's application for a Licence to Export Gas as LNG dated 27 August 2015, at **Exhibit C-0109-ENG**; NEB, Licence GL-317 dated 26 May 2016, at **Exhibit C-0110-FRA**; Bidwai I, at **Exhibit CWS-2**, p. 28 *et seq.* (para. 74). See also Memorial, p. 211 *et seq.* (para. 709).

[1119] See also Illich I, at **Exhibit CWS-1**, p. 52 (paras. 141-152) (discussing statements of support from the Federal Government); Bidwai I, at **Exhibit CWS-2**, p. 56 (para. 145); GNLQ, Internal notes of meeting with the Minister of International Commerce, F.-P. Champagne, 20 September 2017, at **Exhibit C-0383-ENG**. See also Memorial, p. 212 (para. 710).

[1120] Bidwai I, at **Exhibit CWS-2**, p. 74 *et seq.* (paras. 201-209); "Investment in New Technologies Aims To Reduce Pipeline Emissions", *Emissions Reduction Alberta*, 4 February 2021 dated 4 February 2021, at **Exhibit C-0384-ENG**. See also Memorial, p. 213 (para. 711).

eleventh hour to vague and unattainable requirements. As Mr Illich explained in his first witness statement, this support reasonably induced the Claimant to continue investing in the GNLQ and Gazoduq Projects.[1121]

816 The Respondent contends that: (i) the declarations of support made to GNLQ were generic[1122] and the public declarations of support were anecdotal and not sufficiently clear or specific;[1123] and (ii) [redacted][1124] Accordingly, it argues, they could not give rise to legitimate expectations.

817 The Respondent's arguments miss the mark. While declarations of support and commitments taken in isolation may not create legitimate expectations, as explained in Section 4.1.1.2(iv) above, such statements should be considered as a whole. Like in *Bilcon v. Canada*, in which the tribunal found that the Respondent's "officials […] encouraged coastal mining projects in general and specifically encourage[d] the pursuit of the project at the Whites Point site",[1125] here, the Respondent generally encouraged investments in the Saguenay area and in transition energies and specifically encouraged the pursuit of the GNLQ Project. It was thus reasonable for the Claimant to expect that the EA would be conducted fairly and in accordance with Canadian law and that such support would continue throughout; the Claimant would have otherwise stopped investing in the Project.

818 The Respondent further argues that the commitments by Québec and federal authorities to the GNLQ Project in the form of *e.g.* licences, commitments to invest in the Project or supply a block of 550MW of hydro-electricity, or tax breaks and cuts, were not binding on the authorities and [redacted]

[1121] Illich I, at **Exhibit CWS-1**, p. 56 (para. 152). See also Memorial, p. 213 (para. 712).

[1122] Counter-Memorial, p. 223 *et seq*. (paras. 572 and 574).

[1123] Counter-Memorial, p. 224 *et seq*. (para. 574).

[1124] Counter-Memorial, p. 225 *et seq*. (paras. 575-581).

[1125] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 177 (para. 592).

[redacted][1126] According to the Respondent, in the face of such caveats, the Claimant should have understood that none of these engagements implied "*que le projet Energie Saguenay serait autorisé*."[1127] The Respondent's argument is based on an incorrect understanding of the Claimant's position.

819 **First**, the Respondent's suggestion that, in its Memorial, the Claimant presented these commitments by the Respondent, or HQ, as binding and/or unconditional is incorrect. Had these commitments been binding, the Claimant would have presented them as acquired rights, not as the source of legitimate expectations. Regardless of whether certain commitments were conditional, they evidence a willingness on the part of federal and provincial officials for the State to support the Project, including financially, prior to and upon its completion.

820 **Second**, in the Memorial, the Claimant did not argue that the Respondent's representations and commitments created a legitimate expectation that the GNLQ Project would be approved. The Claimant argued, rather, that the Respondent's strong and consistent declarations of support created the legitimate expectation that the GNLQ Project would be assessed in a fair and unbiased manner, taking into account its potential benefits for Québec and Canada; the Claimant was accordingly encouraged to continue to invest in the Project.[1128]

(ii) The GNLQ Project was aligned with federal and provincial environmental and economic policies

821 In the Memorial, the Claimant showed that the Federal and Québec Governments made clear and consistent representations, to GNLQ directly and to the general public, that they considered Canadian natural gas instrumental to the energy transition and the reduction of GHG emissions, as well as to Europe's energy diversification, away from Russian gas.[1129]

[1126] Counter-Memorial, p. 225 *et seq.* (paras. 576-581).

[1127] Counter-Memorial, p. 224 *et seq*. (para. 574; see also para. 581).

[1128] Memorial, p. 226 *et seq.* (para. 736). See also Memorial, p. 206 (para. 695).

[1129] Memorial, p. 214 *et seq.* (paras. 714-718).

This support for Canadian LNG as a transition energy was prominent in federal and Québec policy statements.[1130]

822 These policy statements also translated into manifestations of support by government officials for the GNLQ Project. At the **provincial level**, Premier Legault and other Québec Government officials, notably Minister Charette, endorsed the GNLQ Project for these reasons on multiple occasions, including before the National Assembly of Québec. [1131] Ministers at the **federal level** made similar statements, similarly praising

[1130] MELCC, "Québec and Climate Change, A Challenge for the Future", June 2008, at **Exhibit C-0391-ENG**, p. 23;"B.C. welcomes Federal Government's action to support LNG", British Columbia News, 19 February 2015 (accessed on 15 November 2023), at **Exhibit C-0392-ENG**; MERN, "*Le ministre Pierre Arcand se réjouit de la volonté du gouvernement fédéral de soutenir l'industrie du gaz naturel liquéfié*", 20 February 2015 dated 20 February 2015, at **Exhibit C-0393-ENG-FRA**; Government of Québec, "2030 Energy Policy- Energy in Québec: A Source of Growth", 2016, at **Exhibit C-0394-ENG**, p. 54; Energir, Press release, "Liquefied natural gas deliveries start to the Stornoway Renard diamond mine in Northern Quebec, 1,040 kilometers from Montreal", 13 June 2016, at **Exhibit C-0063-ENG**; Government of Canada, "LNG Canada announces 40 billion dollar investment that will lead to 10,000 middle class jobs", 2 October 2018 (accessed 10 December 2023), at **Exhibit C-0395-ENG**; Office of the Prime Minister, "Prime Minister Trudeau delivers remarks about LNG Canada's $40 billion investment", 2 October 2018 (accessed on 10 December 2023), at **Exhibit C-0053-ENG**; Government of Canada, News release, "Government of Canada confirms support for largest private investment in Canadian history", 24 June 2019 dated 24 June 2019, at **Exhibit C-0066-ENG**; MERN, "*Prolongement du réseau de distribution de gaz naturel - Québec investit plus de 1 M$ pour le développement économique en Montérégie*", 20 July 2021, at **Exhibit C-0396-ENG-FRA**; Bidwai I, at **Exhibit CWS-2**, p. 25 *et seq.* (s. III); Illich I, at **Exhibit CWS-1**, p. 14 (para. 26). See also Memorial, p. 218 *et seq.* (para. 718).

[1131] See, *e.g.*, Internal GNLQ email correspondence (attaching statements by Premier F. Legault before the National Assembly of Québec) dated 3 June 2019, at **Exhibit C-0058-ENG-FRA**; Internal GNLQ email correspondence (attaching statements made by Premier F. Legault before the National Assembly of Québec) dated 12 June 2019, at **Exhibit C-0059-ENG-FRA**; "*Échange musclé entre François Legault et Pascal Bérubé sur fond de projets gaziers*", *Radio-Canada*, 13 June 2019, at **Exhibit C-0025-ENG-FRA**; Internal GNLQ email from P. Fiore to S. Fortin dated 13 June 2019, at **Exhibit C-0386-ENG-FRA**; Internal GNLQ email correspondence (attaching statements made by Premier F. Legault before the National Assembly of Québec), at **Exhibit C-0060-ENG-FRA**; Internal GNLQ emails correspondence (attaching statements made by Premier F. Legault before the National Assembly of Québec), at **Exhibit C-0061-ENG-FRA**; "*François Legault rencontre GNL Québec et vante le projet Énergie Saguenay*", *Radio-Canada*, 16 January 2020, at **Exhibit C-0026-ENG-FRA**. See also Illich I, at **Exhibit CWS-1**, p. 51 (paras. 138-139) and Memorial, p. 214 *et seq.* (paras. 715-716).

the potential of the GNLQ Project to replace more polluting fuels with Canadian LNG, including in letters addressed directly to GNLQ.[1132]

823 The Claimant also established that the Québec and Federal Governments consistently promoted the economic development of the Saguenay region and thus envisaged an increase in maritime shipping.[1133]

824 In particular, Québec's first ever maritime strategy in 2015 planned investment in maritime infrastructure to foster shipping on the St. Lawrence River, including significant capital investments in the development of the Saguenay industrial port.[1134] The interplay of this development strategy with the protection of beluga whales transpired from the environmental impact assessment of the North Shore Terminal project, located on the Saguenay River 8 km from the GNLQ Project site and initiated by the SPA in April 2015.[1135] That assessment concluded that the impact of the project on beluga whales would not be significant, despite a material increase in maritime traffic.[1136] Significantly, in making that

[1132] Illich I, at **Exhibit CWS-1**, p. 10 *et seq.* (para. 24) and p. 53 (para 143); Internal GNLQ email from J. Illich to M. Gagnon dated 8 March 2017, at **Exhibit C-0388-ENG**; Letter from J. Illich to Minister J.-F. Champagne dated 17 May 2018, at **Exhibit C-0389-ENG**; Letter from the Minister of Natural Resources to GNLQ dated 22 May 2020, at **Exhibit C-0064-ENG**.

[1133] Memorial, p. 221 *et seq.* (paras. 721-734).

[1134] Bidwai I, at **Exhibit CWS-2**, p. 23 *et seq.* (para. 62); Québec Ministry of Finance, Press release, "*Budget 2014-2015 - Déploiement de la stratégie maritime du Québec*", 4 June 2014, at **Exhibit C-0077-FRA**; Government of Canada, News release, "PM Announces Job-Creating Investments in the Port of Saguenay", 17 January 2012, at **Exhibit C-0076-ENG**; Québec Ministry of Transportation and Sustainable Mobility, Press Release "*Lancement de la Stratégie maritime du Québec*" (accessed on 20 December 2021) dated 29 June 2015, at **Exhibit C-0078-ENG**; Québec Ministry of International Relations and Francophonie, Press Release "*La toute première stratégie maritime de l'histoire du Québec est lancée*", 29 June 2015, at **Exhibit C-0079-FRA**; Parti Libéral du Québec, "*Une Strategie Maritime pour le Québec*" (2014), at **Exhibit C-0080-FRA**, p. 4 and 18; "*Stratégie Maritime Du Québec | Port-Saguenay Bien Positionné Pour Se Développer*" Informe Affaires, 30 October 2015, at **Exhibit C-0081-FRA**; "*Québec veut développer l'activité portuaire*", *Le Devoir,* 7 June 2016, at **Exhibit C-0083-FRA**. See also Memorial, p. 221 *et seq.* (paras. 722-725).

[1135] See EIS Guidelines for North Shore Terminal project (August 2015), at **Exhibit RN-0046-ENG**, p. 2 (s. 3.1).

[1136] Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 249. See also SPA, "Maritime Terminal Project on The North Shore of the Saguenay – Environmental Impact Statement Summary" (August 2016), at **Exhibit C-0399-ENG**; "*Le béluga ne serait pas affecté*", *Le Quotidien*, 2017 (accessed on 9 October 2023), at **Exhibit C-0400-FRA**; Memorial, p. 223 *et seq.* (para. 728).

assessment, the Agency had considered the cumulative effects of the traffic resulting from **all** of the projects contemplated in the area, including both the GNLQ Project and the North Shore Terminal project.[1137]

825 As explained in Section 2.1 above, the GNLQ Project was thus perfectly aligned with federal and provincial policy objectives related to, on the one hand, the fight against climate change and balancing the protection of beluga whales of the St. Lawrence River and, on the other hand, the economic development of the region.

826 It was therefore reasonable for GNLQ to expect that the Project would be assessed without bias arising from contradictory policy objectives.[1138]

827 In the Counter Memorial, the Respondent argues that:

- the statements relating specifically to the GNLQ Project merely reiterated the conditions set for its acceptability, namely the energy transition, the global reduction of GHG emissions and social acceptability;[1139]
- Québec's energy policies are general statements that cannot form the basis of legitimate expectations, notably because these statements evolved over time;[1140]
- federal financial support to other LNG projects could not create legitimate expectations for GNLQ;[1141] and
- in relation to navigation on the Saguenay and St. Lawrence Rivers, the St. Lawrence Maritime Strategy is not specific enough to create legitimate expectations that the effects of increased maritime traffic can be mitigated.[1142]

[1137] Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 186, 201, 212-214 and 249. See also Memorial, p. 224 *et seq.* (para.730).

[1138] See Memorial, p. 225 (paras. 731-733).

[1139] Counter-Memorial, p. 232 (para. 585).

[1140] Counter-Memorial, p. 233 *et seq.* (para. 587).

[1141] Counter-Memorial, p. 234 *et seq.* (para. 588).

[1142] Counter-Memorial, p. 236 (para. 591).

828 The Respondent's arguments are unfounded or in fact support the Claimant's position.

829 Indeed, the Respondent admits that:

> "[Declarations by Québec public officials] *ne font que confirmer la cohérence de la position du gouvernement du Québec, à l'effet que l'intérêt environnemental du GNL était principalement associé à la théorie selon laquelle le gaz naturel remplacerait des sources d'énergies à plus fortes émissions carbone comme le mazout*."[1143]

830 The Respondent makes the same admission in relation to representations by federal officials.[1144] It thus admits that the Federal and Québec Government policy at the time of the GNLQ EA was that Canadian LNG was a transition energy and was likely to replace more polluting fuels.

831 The Claimant expected that the GNLQ Project would be assessed in accordance with these policy objectives. It also reasonably and legitimately expected that GNLQ would not, at the eleventh hour, be required by the Québec Minister of Environment to **prove** the accuracy of this position (namely, that LNG would promote the energy transition), which was (and remains as established in Section 2.1.1 above) Québec's official position.

832 In the same vein, the Respondent admits that the Québec Government's policy since the early 2010s[1145] included "*favoriser l'implantation d'une zone industrialo-portuaire à Saguenay*."[1146]

833 Furthermore, the Claimant legitimately expected that the measures proposed to protect beluga whales would be assessed fairly and on the basis of scientific evidence. The balance in Canada's policy objectives between, on the one hand, protecting beluga whales and, on the other hand, developing industrial port infrastructures in the Saguenay River, reinforced the legitimacy of the Claimant's expectation. The MELCC's extreme

[1143] Counter-Memorial, p. 231 *et seq.* (para. 584).

[1144] Counter-Memorial, p. 233 *et seq.* (para. 586).

[1145] See Memorial, p. 22 (para. 50).

[1146] Counter-Memorial, p. 236 *et seq.* (para. 592).

proposal, at the eleventh hour, envisaging no shipping at all during the summer season was contrary to those legitimate expectations.

834 These expectations were all the more reasonable given that, as mentioned above, the Agency had concluded in October 2018 that the increased maritime traffic that would result from both the North Shore Terminal project and the GNLQ Project, would not create any significant adverse effects for beluga whales. Indeed, the Agency calculated the cumulative impact of the North Shore Terminal project by adding, among others, the projected maritime traffic of the GNLQ Project, and concluded that "[the North Shore Terminal project] is not likely to cause significant adverse cumulative effects on the St. Lawrence beluga, as it would not be detrimental to the recovery of the species".[1147] In its Counter-Memorial, the Respondent conveniently omitted to mention this critical conclusion on the part of the Agency.

(iii) The Québec Government approved 99% of the large industrial projects over the previous 30 years

835 As the Claimant explained in the Memorial, Québec Government officials indicated to Symbio representatives on different occasions that 19 out of the last 20 major EAs in Québec had concluded with approvals.[1148] This representation was consistent with Me Duchaine's finding that 99% of the large-scale industrial projects that have been subject to an EA in southern Québec over the last 30 years have been approved.[1149]

836 In its Counter-Memorial, the Respondent argues that the statistics advanced by the Claimant are incorrect, and that, in any event, statistics concerning prior projects cannot create legitimate expectations that a project will be approved, as explained by the tribunal in *Global Telecom v. Canada*.[1150] These arguments are misleading.

[1147] See Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 186, 196, 201, 212-214 and 249.

[1148] Memorial, p. 208 *et seq.* (paras. 700-702); Duchaine I, at **Exhibit CER-1**, p. 47.

[1149] Memorial, p. 209 *et seq.* (para. 702); Duchaine I, at **Exhibit CER-1**, p. 47.

[1150] Counter-Memorial, p. 224 (para. 573).

837 **First**, the Respondent's allegation that the Claimant's statistics are incorrect is unsupported. The Respondent relies on Ms Powell's conclusion that some of the 13 (unrelated) comparator projects used by Mr Northey in his report resulted in a finding of adverse effects.[1151] Ms Powell's finding is irrelevant as it considers federal projects, not projects assessed by Québec authorities. Besides, the Respondent confuses the rejection of projects with findings that projects are likely to cause significant adverse environmental effects. A finding of significant adverse environmental effects does not mean that a project will be refused.[1152]

838 The Respondent also relies on Me Yergeau's allegation that "*environ 20% des projets assujetis au processus d'évaluation d'impact ayant suscité une forte participation publique ont fait l'objet d'un refus*".[1153] However, Me Duchaine notes in her second report that Me Yergeau's assertion is not only unsupported, but also wrong, as only two projects corresponding to Me Yergeau's characterisation have been rejected, both over 15 years ago.[1154] Me Yergeau does not otherwise address Me Duchaine's finding that "*outre le Projet GNL Québec, il n'y a eu que 7 refus, tous émis avant 2010. Des 7 refus, 6 concernent des lieux d'élimination de matières résiduelles qui ont été émis entre 1995 et 2009, soit pendant le moratoire imposé par le gouvernement*." Me Duchaine's evidence thus remains unrebutted.[1155]

839 Furthermore, Me Duchaine explains in her second report that this high approval rate confirms the prevailing view (including that of the Québec authorities) that the EQA is "*une loi d'autorisation*", *i.e.*, a regime under which the presumption is that a given project will be approved, albeit subject to possible conditions.[1156] Me Duchaine explains that this position is the one adopted by the MELCC itself; for instance during her cross-

[1151] Counter-Memorial, p. 224 (para. 573); Powell, at **Exhibit RER-3**, p. 56 *et seq.* (paras. 113 and 139).

[1152] See, *e.g.*, Section 4.2.2.2(v) below (explaining that the Pacific NorthWest project was approved despite the Agency's finding).

[1153] Yergeau, at **Exhibit RER-2**, p. 70 (para. 197).

[1154] Duchaine II, at **Exhibit CER-1 (Second)**, p. 113 *et seq*. (paras. 313-320).

[1155] Duchaine I, at **Exhibit CER-1**, p. 47 *et seq.*

[1156] Duchaine II, at **Exhibit CER-1 (Second)**, p. 80 (paras. 239-258).

examination by the PGQ in the *Ville de Mascouche* case, the representative of the MELCC testified:

> "*Comme on dit, des refus, dans la vraie vie,* ***on n'en fait à peu près pas***. ***Nous, ça ne nous est pas arrivé, moi comme directrice adjointe***. […]
>
> *Puis* ***notre objectif, ce n'est pas d'empêcher … ce n'est pas un régime d'interdiction***. *On n'interdit pas les travaux. On dit juste que ça prend une autorisation. On ne part pas dans l'idée qu'on va refuser.* […]"[1157]

840 Me Duchaine also highlights that the position of the *Procureur Général du Québec* ("**PGQ**") in the *Ville de Mascouche case* was similarly that the purpose of the EQA was to authorise projects and that rejections were "*rarissimes*":

> "*Lorqu'il reçoit une demande de certificat d'autorisation, le* [MELCC] *n'a pas à dire simplement 'oui' ou 'non' au projet, mais il va plutôt analyser la demande pour s'assurer qu'elle contient des mesures d'atténuation de l'impact sur l'environnement qui soient appropriés dans les circonstances ; ce travail d'analyse nécessite la collaboration, lorsque requise, du demandeur de certificat* ***dans la recherche de solutions appropriées pour atteindre la réalisation du projet***.
>
> *Ce n'est que dans des cas rarissimes que le* [MELCC] *refuse une demande de certificat d'autorisation ;* ***à titre d'exemple, dans la période de 2015 à 2016, le*** **[MELCC]** ***a délivré 1 876 certificats d'autorisation et en a refusé 6*** […]."[1158]

841 Finally, Me Duchaine confirms that Québec officials' statement to the Claimant that 19 of the last 20 large projects have been approved by the Québec Government was, in any event, accurate.[1159]

[1157] Duchaine II, at **Exhibit CER-1 (Second)**, p. 85 (para. 252) (emphasis added).

[1158] Duchaine II, at **Exhibit CER-1 (Second)**, p. 85 *et seq*. (para. 252) (emphasis added).

[1159] Duchaine II, at **Exhibit CER-1 (Second)**, p. 92 *et seq*. (paras. 260-261).

842 **Second**, the Respondent's reliance on *Global Telecom v. Canada* to argue that the approval of prior projects cannot create legitimate expectations is inapposite. [1160] The Claimant never stated that it had a legitimate expectation that the Project would be **approved**. Its expectation was, rather, that its project would be assessed fairly, in accordance with applicable law, in light of its alignment with Québec's and Canada's policies. Accordingly, given the Respondent's clear and explicit expressions of support, it was legitimate for the Claimant to expect that the GNLQ Project would **not** have been the exception in the long history of EAs of large industrial projects in Québec.

843 In conclusion, the representations relied on by the Claimant were more specific than the representations that the tribunal in *Bilcon v. Canada* concluded gave rise to legitimate expectations.[1161] As explained below, the Claimant's legitimate expectations were violated every step of the way through Canada's violations of its obligations under Article 1105.

4.1.3 Federal and Québec authorities committed a series of wrongful acts and omissions that breached Article 1105 NAFTA

844 As explained in the Memorial, federal and provincial authorities committed a series of wrongful acts and omissions extending from the decision (in 2015) not to conduct a single federal EA, or at least a joint EA, to the Québec and Federal Government decisions (in 2021 and 2022) to refuse to authorise the GNLQ Project on wrongful grounds. In committing these acts and omissions, the Respondent violated **due process**,[1162] acted **arbitrarily**, [1163] **unfairly targeted** the Claimant, [1164] and **violated its legitimate expectations**,[1165] and thereby violated Article 1105 NAFTA.

[1160] *Global Telecom Holding v. Canada*, Award, 27 March 2020, at **Exhibit RL-106-ENG**, p. 178 *et seq.* (paras. 552-554).

[1161] See Section 4.1.2 above.

[1162] Memorial, p. 182 *et seq.* (paras. 608-625).

[1163] Memorial, p. 189 *et seq*. (paras. 628-646).

[1164] Memorial, p. 195 *et seq*. (paras. 651-673).

[1165] Memorial, p. 226 *et seq.* (paras. 736-746).

845 In its Counter-Memorial, the Respondent argues that the Claimant's claims are not founded because the EAs of the GNLQ Project were conducted fairly and resulted in rational and well-founded decisions.[1166] According to the Respondent, the contested acts or omissions do not violate due process,[1167] were not arbitrary[1168] or discriminatory,[1169] and the Claimant did not have any legitimate expectations that could be breached.[1170] This is not correct.

846 As explained below:

- The MELCC's decision in 2015 not to defer to federal authorities to complete a single federal EA and the Agency's and MELCC's failure in 2016 to initiate a joint assessment each constitute standalone breaches of Canada's obligations under Article 1105 (**Section 4.1.3.1**).
- These initial breaches were followed by the Québec Government's leak of confidential information regarding the decision of an investor to withdraw its support for the GNLQ Project (**Section 4.1.3.2**) and numerous irregularities affecting the Québec EA (**Section 4.1.3.3**) and the federal EA (**Section 4.1.3.4**) of the GNLQ Project.
- These irregularities culminated in the decisions, at Québec and federal level, refusing to authorise the GNLQ Project, which also constitute standalone breaches of Article 1105.

847 As explained in Section 3.2 above, the Respondent's wrongful acts and omissions which, on their own, amount to a NAFTA breach also form part of a composite act (comprising wrongful acts and omissions which on their own would not necessarily amount to a NAFTA breach). That composite act, which extended from 2015 until 2022, also amounts to a violation of Article 1105 NAFTA.[1171]

[1166] See the Respondent's summary of its position at Counter-Memorial, p. 166 *et seq.* (paras. 457-460) and p. 237 (para. 593).

[1167] Counter-Memorial, p. 176 *et seq.* (paras. 475-523).

[1168] Counter-Memorial, p. 202 *et seq.* (paras. 524-548).

[1169] Counter-Memorial, p. 213 *et seq.* (paras. 549-563).

[1170] Counter-Memorial, p. 223 *et seq.* (paras. 571-592).

[1171] See paragraphs 574-575 above.

848 The tribunal in *Global Telecom Holding v. Canada*, relying on the *Tecmed v. Mexico* award,[1172] considered that "a composite/cumulative breach" of the FET standard requires determining whether the State's acts taken together amount to a "converging action towards the same result, *i.e.*, depriving the investor of its investment".[1173] In its analysis of whether Canada's actions constituted a composite breach, the *Global Telecom* tribunal considered whether different agencies of the Canadian Government acted within their respective authority and whether their actions were duplicative or repetitive.[1174] While the *Global Telecom Holding* did not find a breach of the FET standard, in the present case, the Respondent's acts clearly converged towards depriving the Claimant of its investment, starting from Québec's *ultra vires* and duplicative EA process (as explained below).

849 In the same vein, and in a factual context similar to that of the present case, the *Bilcon v. Canada* tribunal considered Canada's "numerous continuous breaches with ongoing and direct effect", as identified by the claimant,[1175] and found that Canada's conduct of encouraging the development of a project, and then adopting an unprecedented approach as the basis for rejecting it, "as a whole"[1176] constituted a breach of Article 1105.[1177] The same reasoning applies to the facts at hand.

[1172] See *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, at **Exhibit CL-064-ENG**, p. 19 (para. 62).

[1173] *Global Telecom Holding v. Canada*, Award, 27 March 2020, at **Exhibit RL-106-ENG**, p. 216 *et seq.* (paras. 641-642).

[1174] *Global Telecom Holding v. Canada*, Award, 27 March 2020, at **Exhibit RL-106-ENG**, p. 217 (para. 644).

[1175] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 69 (para. 251).

[1176] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 177 (para. 592).

[1177] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 176 *et seq*. (paras. 588-592).

4.1.3.1 The federal and provincial authorities' failure to conduct either a single federal assessment or a joint assessment of the GNLQ Project breached Article 1105 NAFTA

850 As established in the Memorial, and above (see Section 2.3 above), the Respondent breached Article 1105 NAFTA by subjecting the GNLQ Project to two separate, uncoordinated EAs,[1178] as follows:

i) The MELCC failed to either (i) decline jurisdiction over the EA on 10 December 2015 (rather than issue the MELCC Directive for the GNLQ Project) and defer to the Agency, which had, and should have exercised, exclusive jurisdiction to conduct a federal EA alone; or (ii) in the application of the Canada-Québec Agreement to conduct a joint assessment, in cooperation with the Agency, once both parties established that they had an EA responsibility for the GNLQ Project in accordance with clause 8(1) of the Canada-Québec Agreement.[1179]

ii) The Agency failed to either (i) advise the MELCC on or by 10 December 2015 (when the MELCC sent the Directive to GNLQ and the Agency) that the Agency should take the lead in conducting a federal EA of the GNLQ Project in light of the exclusive federal jurisdiction over the matters at issue, or (ii) on 15 January 2016, when it established that it had an EA responsibility, invoke the application of the Canada-Québec Agreement to conduct a joint assessment, together with the MELCC.[1180]

851 By proceeding in this way, the Québec and federal authorities removed an essential Canadian environmental law safeguard, designed to protect proponents against arbitrary and unpredictable decisions. This allowed the Québec Government to unduly interfere with the EA process and take an unlawful decision on the GNLQ Project in July 2021. As for the Federal Government, by September 2021 it had improperly and unlawfully decided

[1178] Memorial, p. 182 *et seq.* (paras. 608-609 and 652-657).

[1179] See Sections 2.3.1.1 and 2.3.1.2 above. See also Memorial, p. 147 *et seq*. (para. 474) and p. 195 *et seq.* (paras. 652-656).

[1180] See Sections 2.3.1.1 and 2.3.1.2 above. See also Memorial, p. 145 *et seq*. (paras. 465-474) and p. 195 *et seq.* (paras. 652-656).

to follow suit, prejudging the outcome of the ongoing federal EA process and rendering an unlawful decision on the Project in February 2022.

852 In the Counter-Memorial, the Respondent argues that: (i) in accordance with Canadian constitutional law, each level of government, federal and provincial, was independently responsible for carrying out the EA of the GNLQ Project;[1181] and (ii) the 2010 Canada-Québec Agreement was not binding, but that, in any event, federal and provincial authorities collaborated throughout their respective EAs.[1182] Each of those contentions is unfounded, as a matter of both fact and law.

853 As explained below, the Respondent breached Article 1105 NAFTA by failing to carry out a single federal EA, or, to the extent that the MELCC established that it had an EA responsibility under the EQA, a joint assessment. These failures also represent the first in a series of wrongful acts forming a composite act that breached Article 1105.

(i) The MELCC's failure to defer to the Agency and the Agency's failure to take the lead on a single federal EA of the GNLQ Project breached Article 1105 NAFTA

854 As explained in the Memorial, the federal authorities' failures to conduct a single federal EA of the GNLQ Project violated Canadian law and due process.[1183] The same goes for the MELCC's failure to decline jurisdiction over the GNLQ Project in light of the exclusive federal jurisdiction over most of the matters involved. By contrast, the North Shore Terminal project, which was located on lands belonging to the same federal entity, the SPA, was subject to a federal EA alone (by the Agency).[1184]

855 In the Counter-Memorial, the Respondent argues (i) that subjecting the GNLQ Project to two separate EAs was in accordance with the Canadian constitution;[1185] and (ii) that, by allegedly failing to prove a motive on the

[1181] Counter-Memorial, p. 177 *et seq.* (para. 479).

[1182] Counter-Memorial, p. 178 *et seq.* (paras. 480-483).

[1183] Memorial, p. 183 *et seq.* (para. 609).

[1184] Memorial, p. 196 *et seq.* (paras. 656-657); see also Section 4.2.2.1(i) below.

[1185] Counter-Memorial, p. 177 *et seq.* (para. 479).

part of the Respondent, the Claimant has failed to prove discrimination.[1186] These arguments do not withstand scrutiny.

856 **First**, as explained in Section 2.3.1.1 above, based on the Canadian constitutional law principle of federal paramountcy, where there is overlapping or conflicting authority between the Federal and provincial Governments, federal law prevails.[1187] The GNLQ Project fell squarely within federal jurisdiction, because (i) it was located on land owned and administered by a federal authority, namely the SPA,[1188] and because (ii) its assessment involved matters pertaining to maritime navigation and infrastructure, as well as international commerce, all of which fall within federal jurisdiction.[1189] Accordingly, there should have been one single federal EA of the GNLQ Project, led by the Agency. The choice of two procedures, as a result of the MELCC's failure to decline jurisdiction and the Agency's failure to advise the MELCC that there should be a single federal assessment, therefore violated Canadian constitutional law.[1190]

857 The documents produced by the Respondent in document production confirmed that federal authorities were fully aware of the principle of federal paramountcy and even expressed the concern that GNLQ would invoke it following the Québec Government's decision not to approve the GNLQ Project.[1191]

858 Yet, neither the Agency nor the MELCC communicated candidly with GNLQ about the Federal Government's jurisdiction over the GNLQ Project. Instead, Québec proceeded with its assessment, misapplying its powers to carry out an EA, which fell squarely outside of its jurisdiction.

[1186] Counter-Memorial, p. 216 (para. 556).

[1187] Northey I, at **Exhibit CER-2**, p. 50 *et seq*. (para. 149, n 176); Northey II, at **Exhibit CER-2 (Second)**, p. 34 *et seq*. (para. 80); Duchaine II, at **Exhibit CER-1 (Second)**, p. 10 *et seq*. (paras. 38-47) and p. 22 *et seq*. (paras. 84-88).

[1188] Northey II, at **Exhibit CER-2 (Second)**, p. 20 *et seq*. (paras. 49-52).

[1189] Duchaine II, at **Exhibit CER-1 (Second)**, p. 21 *et seq*. (paras. 81-83).

[1190] Duchaine II, at **Exhibit CER-1 (Second)**, p. 143 *et seq*. (para. 380).

[1191] See Internal DFO email dated 3 August 2021, at **Exhibit C-0470-FRA**. See also paragraph 140 above.

This lack of transparency on the part of both levels of government, constitutes further breaches of due process.

859 **Second**, as explained in Section 4.1.1.2(iii) above, a finding of discriminatory conduct does not require a showing as to the reason for that conduct; an investor need only show that its investment has been treated differently for no legitimate reason. In this regard, the Claimant has already demonstrated – and the Respondent has not denied – that the North Shore Terminal project, which was also located on federal land and raised issues within federal jurisdiction, was subject to a single federal assessment.[1192] The Contrecoeur project, which is also located on federal land, was similarly subject to a single federal assessment by the Agency (as also explained in Section 4.2.2.1 below).[1193]

860 The Respondent has failed to provide any legitimate justification for the differential treatment of the GNLQ Project,[1194] which therefore amounts to discriminatory conduct in breach of Article 1105.

861 The failure of the Agency to carry out a federal EA of the GNLQ Project violated the Claimant's legitimate expectation that its project would be assessed in accordance with Canadian law and in a non-discriminatory fashion, as compared to other projects.

(ii) The federal and Québec authorities' failure to carry out a joint assessment of the GNLQ Project breached Article 1105 NAFTA

862 As explained in Section 2.3.1.2 above, absent a single federal EA, the Agency and the MELCC were legally required to apply the Canada-Québec Agreement and proceed with a joint assessment of the GNLQ Project. As established in the Memorial, their failure to do so amounts to a violation of Canadian law and due process in breach of Article 1105

[1192] See Memorial, p. 196 (para. 656).

[1193] See Agency, Report on the Contrecoeur project (March 2021), at **Exhibit R-0073-FRA**, p. 4. In the same vein, the Laurentia project, which was also located on federal land, was only subject to a federal assessment (see Agency, Report on the Laurentia project (June 2021), at **Exhibit C-0601-ENG**, p. 19 of the PDF).

[1194] See also Section 4.2.2 below.

NAFTA.[1195] Furthermore, it amounts to discriminatory conduct, as comparator projects, namely Cacouna LNG and Rabaska LNG, were assessed by joint review panels in accordance with the Canada-Québec Agreement.[1196]

863 In the Counter-Memorial, the Respondent argues the following:

- There was no breach of due process because (i) the Canada-Québec Agreement is not binding and has not been applied under the CEAA 2012;[1197] (ii) GNLQ never requested a joint assessment;[1198] (iii) the MELCC and the Agency collaborated, in accordance with the spirit of the Canada-Québec Agreement.[1199]
- The Claimant failed to establish that the lack of joint assessment was discriminatory towards GNLQ (i) because the Claimant has not demonstrated a motive for that discriminatory conduct;[1200] (ii) because a joint assessment is not necessarily more favourable treatment;[1201] and (iii) less than 10% of eligible projects were subject to joint public hearings and a joint report.[1202]

864 The Respondent's arguments, which are addressed in turn below, do not withstand scrutiny.

865 **First**, the Canada-Québec Agreement is binding upon federal and provincial authorities. By establishing their respective responsibilities for the EA of the GNLQ Project, in 2015 and 2016 respectively, the Québec and Federal Governments triggered the mandatory application of the

[1195] Memorial, p. 182 *et seq.* (para. 608).
[1196] Memorial, p. 195 *et seq.* (para. 655).
[1197] Counter-Memorial, p. 178 (para. 481).
[1198] Counter-Memorial, p. 180 (para. 484).
[1199] Counter-Memorial, p. 178 *et seq.* (paras. 480 and 482).
[1200] Counter-Memorial, p. 216 (para. 556).
[1201] Counter-Memorial, p. 179 *et seq.* (para. 483).
[1202] Counter-Memorial, p. 216 (para. 556).

Canada-Québec Agreement (pursuant to its Article 8(1)).[1203] This is explained in more detail in Section 2.3.1.2 above.

866 Me Yergeau's contention that the federal and Québec EAs could not be harmonised given their intrinsic differences[1204] is misplaced: the Canada-Québec Agreement was established **precisely** to harmonise and streamline these procedures in a joint assessment.[1205]

867 **Second**, the Respondent cannot shift the blame for its own shortcomings onto GNLQ by arguing that GNLQ should have requested a joint assessment. It was Canada's and Québec's duty to ensure the proper application of their respective laws, not GNLQ's.

868 **Third**, federal and provincial authorities did not meaningfully collaborate on the EA of the GNLQ Project. As explained in Section 2.3.2 above, the "collaboration" between the Agency and the MELCC was very limited. There was no cooperation between them in relation to key milestones, including public hearings and consultations, expert consultations, or the preparation of their respective reports. Both Me Duchaine and Mr Northey agree that the exchanges between the Agency and the MELCC – produced by the Respondent on document production – do not come close to the level of cooperation that would have been expected and required under the Canada-Québec Agreement.[1206]

869 **Fourth**, as explained in Section 4.1.1.2(iii) above, the Claimant is not required to prove a motive behind the authorities' failure to conduct a joint assessment of the GNLQ Project, including as compared to other projects.

870 Conversely, the Respondent fails to provide any justification for its discriminatory treatment of the GNLQ Project, let alone a legitimate one.

[1203] Northey II, at **Exhibit CER-2 (Second)**, p. 27 *et seq*. (paras. 64-65); Duchaine II, at **Exhibit CER-1 (Second)**, p. 36 *et seq*. (paras. 126-127); Canada-Québec Agreement, at **Exhibit RN-0010-ENG**, p. 8 (s. 8(1)).

[1204] Yergeau, at **Exhibit RER-2**, p. 126 (para. 378). See also Counter-Memorial, p. 179 (para. 482).

[1205] Duchaine II, at **Exhibit CER-1 (Second)**, p. 42 *et seq*. (paras. 140-153).

[1206] Northey II, at **Exhibit CER-2 (Second)**, p. 28 *et seq*. (paras. 65-66, 71-72); Duchaine II, at **Exhibit CER-1 (Second)**, p. 40 *et seq*. (paras. 135-138).

871 **Fifth**, there is no merit in the Respondent's argument that a joint assessment is not necessarily a more favourable treatment. The Respondent's reliance on *Bilcon v. Canada* in this regard is misleading.[1207] In *Bilcon*, the claimant argued that the (joint) review panel process had "important negative aspects […] **compared to a screening or even a comprehensive study EA** for a project proponent".[1208] In the present case, the "comparison" is between one joint assessment and **two**, parallel and uncoordinated assessments.[1209] As explained in Section 2.3.1.3 above, a joint assessment, involving effective cooperation and collaboration between federal and provincial authorities, would have been more favourable to GNLQ than the two uncoordinated assessments that resulted in equally uncoordinated as well as unfounded and unlawful decisions.

872 **Finally**, the Respondent's contention, based on Me Yergeau's opinion that less than 10% of eligible projects were subject to joint assessments, is incorrect.[1210] As Me Duchaine explains in her second report, out of the 36 projects to which Me Yergeau referred,[1211] **all** of those that fell within both the federal and provincial jurisdiction and whose assessment was either ongoing or yet to start upon the signature of the Canada-Québec Agreement, were either jointly assessed, or assessed through *ad hoc* procedures which only consisted in one assessment.[1212]

873 In sum, the analysis of comparator projects confirms that the Respondent singled out GNLQ for unfavourable treatment and failed to provide any legitimate justification when doing so. The Respondent's conduct is

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[1207] Counter-Memorial, p. 179 *et seq.* (para. 483).

[1208] See *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 78 (para. 279) (emphasis added).

[1209] See also paragraphs 162-163 above.

[1210] Counter-Memorial, p. 216 (para. 556).

[1211] See Yergeau, at **Exhibit RER-2**, p. 125 (para. 372).

[1212] Duchaine II, at **Exhibit CER-1 (Second)**, p. 47 *et seq*. (paras. 154-156). In relation to the *ad hoc* assessments, Me Duchaine explains, namely, that they were either assessed under specific agreements between Canada, Québec and First Nations (hydroelectric development project at Thompson Falls on the Franquelin River), or under accelerated procedures (construction project for the new Île-d'Orléans bridge), or in the context of the renewal of an existing permit, which did not require a full environmental assessment (ten-year maintenance dredging program at the Rivière-du-Loup ferry dock).

therefore discriminatory. Furthermore, the Agency and the MELCC's decision to disregard the 2010 Canada-Québec Agreement did not serve any legitimate policy objective and is therefore arbitrary. The Respondent's conduct therefore breached Article 1105 NAFTA, including in the light of the Claimant's legitimate expectation that the EA of the GNLQ Project would be conducted in accordance with Canadian law and practice.

4.1.3.2 The Québec Government's leak of information about an investor's decision not to invest in the GNLQ Project breached Article 1105 NAFTA

874 As explained in the Memorial, and in Section 2.2.3 above, on 5 March 2020, an article published in the Québec newspaper *La Presse* indicated that, based on information received by the journalist, a major investor had pulled out of the GNLQ Project. The article revealed information to which only senior Québec Government officials were privy.[1213] The Claimant demonstrated that this leak to the press harmed and unfairly targeted GNLQ.[1214]

875 In its Counter-Memorial, the Respondent argues that: (i) the Claimant has failed to prove discriminatory intent; (ii) the claim is speculative since the press article in question did not mention a source.[1215] These arguments are meritless.

876 **First**, as explained in Section 4.1.1.2(iii) above, there is no requirement for the Claimant to prove discriminatory intent. A discriminatory measure is one that "evidently singles out (*de jure* or *de facto*) the claimant" on "manifestly wrongful grounds" or through "conduct that amount[s] to 'deliberate conspiracy […] to destroy or frustrate the investment'".[1216] The

[1213] Memorial, p. 76 (paras. 215-216).

[1214] Memorial, p. 195 (para. 651).

[1215] Memorial, p. 220 (para. 562).

[1216] UNCTAD, FET, at **Exhibit CL-054-ENG**, p. 82. See also Memorial, p. 194 *et seq.* (paras. 648-649).

[redacted] in breach of the [redacted] signed by IQ,[1217] meets that standard.

877 **Second**, as explained above, in Section 2.2.3, contrary to the Respondent's assertion, the article does indicate the source of the leak.[1218] Furthermore, the journalist who authored the article was notorious for his contacts within the Québec Government.[1219] It is therefore clear that the leak originated from someone in the Québec Government. The Respondent does not dispute the Claimant's position in that regard, neither in the Counter-Memorial, nor in response to the Claimant's document production requests.[1220] The Claimant's position on this breach of Article 1105 NAFTA therefore stands.

4.1.3.3 The MELCC's EA of the GNLQ Project leading to the Québec Government's decision not to authorise the GNLQ Project breached Article 1105 NAFTA

878 In the Memorial, the Claimant established the following:

- The decision of the Québec Government not to authorise the GNLQ Project based on factors outside of the MELCC Directive was contrary to Canadian constitutional law and Québec law.[1221]

[1217] [redacted] at **Exhibit C-0602-FRA**.

[1218] [redacted]

[1219] [redacted]

[1220] [redacted]

[1221] Memorial, p. 197 (para. 658).

- The Québec Government's abrupt imposition of new three new "core criteria" for the EA of GNLQ several years into the process violated due process,[1222] and constitutes arbitrary conduct.[1223]
- In its Report, which led to the Québec Government's decision not to authorise the GNLQ Project, the MELCC (i) disregarded the evidence submitted by GNLQ in relation to the impact of the GNLQ Project on global GHG emissions and the energy transition in breach of due process,[1224] and (ii) arbitrarily disregarded the conclusions of the MELCC's own experts on these issues.[1225]
- In its Report, the MELCC also (i) relied on an unpublished study regarding the impact of subaquatic noise on beluga whales, which had not even been peer reviewed and which was never made available to GNLQ,[1226] (ii) made findings on the impact of the GNLQ Project on beluga whales that were arbitrary and not science-based,[1227] and (iii) took a discriminatory approach towards the GNLQ Project, as compared to other projects.[1228]
- The decision of the Québec Government relied on grounds that have never been used in any EA in Québec, neither before or after the assessment of the GNLQ Project, *i.e.*, alleged uncertainties as to the impact of the GNLQ Project on global GHG emissions and the promotion of the energy transition.[1229]
- The decision of the Québec Government not to authorise the GNLQ Project based on alleged uncertainties over the social acceptability of the Project was arbitrary.[1230]

[1222] Memorial, p. 184 *et seq.* (paras. 610-618).
[1223] Memorial, p. 189 (para. 628).
[1224] Memorial, p. 186 (paras. 619-620).
[1225] Memorial, p. 191 *et seq.* (paras. 639-640).
[1226] Memorial, p. 186 *et seq.* (para. 621).
[1227] Memorial, p. 189 *et seq.* (paras. 630-632).
[1228] Memorial, p. 198 *et seq.* (paras. 665-669).
[1229] Memorial, p. 197 *et seq.* (paras. 659 and 664).
[1230] Memorial, p. 192 *et seq.* (para. 643).

- The Québec Government's decision also violated GNLQ's legitimate expectations based on the Québec and Federal Government's policies and statements advocating for (i) LNG as a means to foster the energy transition and to reduce GHG emissions worldwide,[1231] and (ii) the economic development of the Saguenay area, including through the increase in maritime traffic.[1232]

879 In the Counter-Memorial, the Respondent wrongly argues that Québec's EA of the GNLQ Project was in line with Canada's obligations under Article 1105.[1233]

880 As explained below, the Québec Government's wrongful rejection of the GNLQ Project was indeed the by-product of an EA process tainted by irregularities including:

- the MELCC's unlawful request in May 2019 that GNLQ prepare a cost-benefit analysis (*analyse avantage-coûts*) and the Québec Government's subsequent reliance on that analysis not to authorise the GNLQ Project;
- the irregular and biased hearings before the BAPE, which led to an inconclusive but biased BAPE Report;
- the Minister of Environment's sudden decision to impose three new, unattainable, unsubstantiated and illegitimate conditions for the approval of the Project; and
- the MELCC's recommendation that the Québec Government reallocate the hydroelectricity promised to GNLQ.

(i) The MELCC's unlawful request for, and the Québec Government's reliance on, an unprecedented type of cost-benefit analysis were unlawful, discriminatory and violated due process

881 In its Counter-Memorial, the Respondent mentions that, in May 2019, the MELCC requested that GNLQ provide a cost-benefit analysis in

[1231] Memorial, p. 189 *et seq.* (paras. 630-632).

[1232] Memorial, p. 190 *et seq.* (paras. 633-642).

[1233] See Counter-Memorial, p. 180 *et seq.* (paras. 485-514), p. 202 *et seq.* (paras. 525-536) and p. 558 *et seq.* (paras. 558-561).

connection with the Project.[1234] Mr Duquette testifies that, in its Report, the MELCC could not recommend the GNLQ Project from a cost-benefit perspective on the basis of the analysis submitted by GNLQ.[1235] The Québec Government took this absence of recommendation into account in its decision.[1236] However this approach was unfounded and contrary to Québec law, as well as discriminatory.

882 Indeed, as explained in Section 2.5.1 above, the MELCC's request for a cost-benefit analysis of this nature was not only improper as a matter of law and practice, it was also made very late in the process, and unprecedented. Furthermore, even though GNLQ's cost-benefit analysis showed that the GNLQ Project would have benefitted the Québec population, the MELCC concluded in its Report, without further explanation, that the cost-benefit analysis did not account for unspecified "*impacts difficilement quantifiables et non-négligeables*".[1237] The Québec Government went on to wrongly base its rejection of the GNLQ Project on these alleged uncertainties surrounding the cost-benefit analysis.[1238]

883 Accordingly, the MELCC acted arbitrarily and discriminatorily by asking GNLQ to prepare a cost-benefit analysis based on criteria that had never been applied to private projects before and that have not been applied since.[1239]

884 Furthermore, the MELCC violated due process by failing to inform GNLQ of its exact requirements for the cost-benefit analysis, and that that analysis would form the basis of the MELCC Report and of the Government's ensuing decision.[1240] The MELCC further lacked transparency and acted in violation of due process, by failing to follow up on GNLQ's cost-benefit

[1234] Counter-Memorial, p. 189 (para. 502).

[1235] Duquette, at **Exhibit RWS-5**, p. 32 *et seq.* (paras. 68-70).

[1236] Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274**, p. 3.

[1237] See MELCC Report, at **Exhibit C-0269-FRA**, p. 71.

[1238] Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274**, p. 3. See also Section 2.5.1 paragraph 322 above.

[1239] Duchaine II, at **Exhibit CER-1 (Second)**, p. 126 *et seq*. (paras. 331-368).

[1240] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 50 (para. 156). See paragraphs 221-224 and 228 above.

analysis, only to bring it up in the MELCC Report as a basis to decline making a positive recommendation regarding the Project.[1241]

(ii) The Québec Government's irregular interference with the BAPE hearings led to an inconclusive but biased BAPE Report in violation of due process

885 As shown in the Memorial, the Québec Government unlawfully interfered with the BAPE hearings in September 2020, by having the MFFP present two opponents to the GNLQ Project, Mr Michaud and Mr Chion, as government representatives, who were thus given an undue opportunity to express their criticisms and to do so on behalf of the Québec Government.[1242]

886 In the Counter-Memorial, the Respondent argues that (i) the BAPE hearings were fair and afforded GNLQ the possibility to present its position and that (ii) the credentials of the two individuals presented by the MFFP as "*personnes-ressources*" (*i.e.*, competent representatives) were correctly presented in the BAPE Report.[1243] As explained in Section 2.5.2 above, this is wrong.

887 The participation of two researchers wrongly put forward at the hearing as representatives of the MFFP, gave the public the misguided impression that the MFFP, and possibly the Québec Government more broadly, were hostile to the Project.

888 Documents produced in document production have revealed that the misrepresentation of Mr Michaud's and Mr Chion's credentials was all but an accident. The MFFP had insisted on their participation, despite the BAPE's refusal on two occasions,[1244] including to have Mr Chion invited

[1241] See paragraph 225 above.

[1242] See Memorial, p. 78 *et seq.* (paras. 224-230).

[1243] Counter-Memorial, p. 185 *et seq.* (paras. 496-498). See also Counter-Memorial, p. 205 *et seq.* (para. 532). See paragraph 231 above.

[1244] Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 15 September 2020, at **Exhibit C-0495-FRA**, p. 1. See also Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 15 September 2020, at **Exhibit C-0495-FRA**, p. 1; Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 16 September 2020, at **Exhibit C-0496-FRA**.

as an expert of the MFFP,[1245] which he was not, and Mr Michaud present in the room.[1246] The BAPE's misstatement of their credentials[1247] compounded the impression of bias the MFFP was able to create at the BAPE hearings.

889 The misrepresentation of these two individuals' roles and the excessive airtime provided to them reflect a fundamental lack of transparency in the organisation and conduct of the BAPE hearings – a key milestone in the EA process – and amount to a violation of due process on the part of Canadian authorities.

890 Furthermore, as noted in Section 2.5.2 above, the BAPE improperly included in its Report several considerations and recommendations which fell outside the scope of the EA as determined by the MELCC Directive.[1248]

(iii) The Québec Government's interference with the assessment of the GNLQ Project by imposing three new criteria was arbitrary and violated both due process and the Claimant's legitimate expectations

891 As explained in the Memorial, and above in Section 2.5.3, on 24 March 2021, during a press conference announcing the publication of the BAPE Report, Minister Charette for the first time referred to three new "core criteria" that GNLQ was required to meet for the Project to be

[1245] Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 16 September 2020, at **Exhibit C-0496-FRA**, p. 1.

[1246] Email from I. Gauthier (MFFP) to C. Chion and R. Michaud dated 16 September 2020, at **Exhibit C-0496-FRA**, p. 1. See also Email correspondence between R. Michaud and I. Gauthier (MFFP) from 16 September 2020 to 21 September 2020, at **Exhibit C-0498-FRA**, p. 1; Email correspondence between G. Grenier (BAPE) and I. Gauthier (MFFP) from 21 September 2020 to 22 September 2020, at **Exhibit C-0499-FRA**, p. 1.

[1247] See, *e.g.*, Email from V. de la Cheneliére (MFFP) to A. Lévesque (BSMA - Faune) dated 24 September 2020, at **Exhibit C-0500-FRA**, p. 1; BAPE, Hearing Transcript (volume 8) dated 25 September 2020, at **Exhibit C-0260-FRA**, p. 10 and 26.

[1248] See [redacted] at **Exhibit TLV-0111-FRA**, p. 7 *et seq.* (nos. 13, 14, 16, 17, 18, 22, 24). [redacted] at **Exhibit C-0494-FRA**. See also paragraphs 277-278 above.

approved. [1249] The Claimant explained in the Memorial that this announcement:

- **violated due process**, as the new criteria went beyond the mandatory scope of the EA set in the MELCC Directive,[1250] and the Québec Government acted with a total lack of candour by refusing to provide GNLQ guidance on how to address these criteria and the MELCC's related questions;[1251]
- **was arbitrary**, since these criteria were introduced for the first time several years after the beginning of the assessment, and had never been used before and have not been used since, in other EAs in Québec;[1252] and
- **breached the Claimant's legitimate expectation** that the GNLQ Project would be assessed according to the criteria in the MELCC Directive, which GNLQ had relied upon when preparing its EIS.[1253]

892 In its Counter-Memorial, the Respondent does not dispute that it breached the Claimant's legitimate expectations in this regard. However, the Respondent argues:

- in relation to **due process**, that: (i) these three criteria were not new and had already been included in the MELCC Directive;[1254] (ii) the MELCC granted GNLQ sufficient time to submit its observations on these criteria,[1255] including throughout the Québec EA;[1256] and
- in relation to **arbitrariness**, that the Claimant failed to show that the conduct of Québec's authorities was arbitrary, *i.e.*, that it was not linked

[1249] See Memorial, p. 83 *et seq*. (para. 244).
[1250] Memorial, p. 184 *et seq*. (paras. 610-615 and 617).
[1251] Memorial, p. 185 *et seq.* (para. 618).
[1252] Memorial, p. 189 (para. 628).
[1253] Memorial, p. 226 *et seq.* (paras. 736-746).
[1254] Counter-Memorial, p. 180 *et seq.* (paras. 485-489).
[1255] Counter-Memorial, p. 182 (paras. 490-495).
[1256] Counter-Memorial, p. 187 *et seq*. (paras. 499-504).

to a legitimate policy objective, or that it reflected an abuse of discretionary power, prejudgment or personal preference.[1257]

893 These arguments are without merit.

894 **First**, as demonstrated in Section 2.5.3.2 above, the references in the MELCC Directive to issues that only vaguely related to the "core criteria" did not make those criteria any less new. Specifically:

- The "*acceptabilité sociale*" of the GNLQ Project was referenced in the MELCC Directive, but not as an **outcome** that GNLQ was required to achieve for the Project to be approved. Rather, GNLQ was **encouraged** to ensure that local communities would be adequately consulted and provided with a forum to express their point of view.[1258] The concept as expressed in the MELCC Directive does not present social acceptability as a "**condition**".[1259]
- Contrary to the Respondent's contention,[1260] the reference in the MELCC Directive to "*objectifs du développement durable*"[1261] was not an indication that the Project was required to "promote energy transition" ("*favoriser la transition energétique*") as Minister Charette announced in March 2021.[1262] While those two goals may overlap, they are not synonymous. Furthermore, GNLQ's position that the Project promoted the energy transition did not allow the MELCC to invoke a new requirement for the Project and the EA, several years after the issuance of the MELCC Directive.[1263]

[1257] Counter-Memorial, p. 211 (para. 545).

[1258] MELCC, Directive for the GNLQ Project, at **Exhibit C-0198-FRA**, p. 3.

[1259] *Point de presse de M. Benoit Charette, ministre de l'Environnement et de la Lutte contre les changements climatiques*, 24 March 2021, at **Exhibit C-0031-ENG-FRA**, p. 2. See also Section 2.5.3.2(i) above.

[1260] Counter-Memorial, p. 181 (para. 488).

[1261] MELCC, Directive for the GNLQ Project, at **Exhibit C-0198-FRA**, p. 1, p. 2, p. 7, p. 13 and p. 22.

[1262] *Point de presse de M. Benoit Charette, ministre de l'Environnement et de la Lutte contre les changements climatiques*, 24 March 2021, at **Exhibit C-0031-ENG-FRA**, p. 2. See also Section 2.5.3.2(ii) above.

[1263] Duchaine II, at **Exhibit CER-1 (Second)**, p. 105 (para. 288). See also paragraphs 269-270 above.

- Contrary to the Respondent's argument,[1264] the indication in the MELCC Directive that GNLQ should "***porter attention*** [aux] *effets du projet sur les grands enjeux de nature atmosphérique* [*soit les*] *gaz à effet de serre* [*et les*] *changements climatiques*"[1265] does not equate to the extraordinary requirement, as announced by Minister Charette, that the Project "*contribue[] aux diminutions mondiales des gaz à effet de serre*."[1266] The Respondent in fact admits elsewhere in its Counter-Memorial that this criterion was indeed not included in the MELCC Directive.[1267]

895 **Second**, the Respondent's contention that the MELCC granted GNLQ sufficient time to submit its observations on the new criteria is patently false.[1268] As explained in Section 2.5.3.4 above, despite its requests, GNLQ received no guidance regarding the new criteria and the MELCC's related questions which were inherently vague.

896 The vagueness of these questions combined with the pressure put on GNLQ to submit its answers as quickly as possible underscores the fundamental lack of transparency, fairness and due process on the part of the MELCC, in its relations with GNLQ, not least when the vagueness of the questions was the result of conscious re-drafting by the MELCC under the guidance of Minister Charette,[1269] compounded by an intentional lack of proper directions on how to address them.[1270]

[1264] Counter-Memorial, p. 182 (para. 489).

[1265] MELCC Directive, at **Exhibit C-0198**, p. 18 *et seq.* (emphasis added).

[1266] *Point de presse de M. Benoit Charette, ministre de l'Environnement et de la Lutte contre les changements climatiques*, 24 March 2021, at **Exhibit C-0031-ENG-FRA**, p. 2. See also Section 2.5.3.2(iii) above.

[1267] Counter-Memorial, p. 122 *et seq.* (para. 334). See also paragraph 273 above.

[1268] Counter-Memorial, p. 182 *et seq.* (paras. 490-495). See also Counter-Memorial, p. 189 *et seq.* (para. 503).

[1269] See paragraphs 294-297 above.

[1269] Counter-Memorial, p. 187 *et seq.* (paras. 499-504).

[1270] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 40 *et seq*. (paras. 124-128).

897 Furthermore, the MELCC set aside only four working days for its experts to review GNLQ's answers,[1271] which confirms that it had no intention of genuinely or meaningfully assessing GNLQ's responses and suggests that the outcome of the EA process had already been decided.

898 As for the Respondent's argument that GNLQ had opportunities during the EA process to provide answers to the MELCC's (new) questions, notably on the impact of the Project on beluga whales, GHG emissions and social acceptability, it is disingenuous.[1272]

899 GNLQ addressed all requests for information during the EA process.[1273] The MELCC never pointed to any failure on GNLQ's part to address its questions, nor does the Respondent do so in the Counter-Memorial. However, the MELCC's requests for additional information during the EA process did not change the scope of the assessment, as defined in the MELCC Directive.[1274] When the MELCC suddenly sought to impose new conditions, it did not afford GNLQ any meaningful possibility to respond or present its point of view – a conduct which, again, lacked candour and violated due process.

900 **Third**, as set out in Section 2.5.3.1 above, documents produced by the Respondent in document production confirm that the Québec Government improperly interfered with the EA process. They confirm, in particular, that:

[1271] Internal MELCC email correspondence between M. Gagnon and M. Duquette between 25 May 2021 and 26 May 2021, at **Exhibit C-0518-FRA**. Furthermore, it appears that only 8 days after the end of the MELCC's alleged review of GNLQ's answers on 9 June (see paragraph 298 above), Minister Charette was already circulating to the Cabinet a [redacted] (Procedural Order No. 9, Annex A dated 24 January 2025, p. 100 (doc PRIV000290)). The Respondent, however, has refused to produce this [redacted] in breach of the Tribunal's Procedural Order No. 9.

[1272] Counter-Memorial, p. 187 *et seq.* (paras. 499-504).

[1273] See Memorial, p. 59 (para. 156-157).

[1274] See Duchaine I, at **Exhibit CER-1**, p. 80 ("[L]*'émission de la directive est une étape cruciale de la procédure d'ÉEIE en ce qu'elle identifie les enjeux qui doivent être évalués pour déterminer l'acceptabilité environnementale du projet soumis. Cet exercice doit impérativement se faire dès le début de l'ÉEIE et les possibilités de modifier la directive sont limitées et spécifiquement prévues à la LQE*"). See also Duchaine II, at **Exhibit CER-1 (Second)**, p. 99 (para. 274).

- as of around 10 March 2021, the MELCC was working under the assumption that the GNLQ Project would be approved;[1275]
- on 23 March 2021, *i.e.*, the day before his press conference and likely after a meeting with Premier Legault, Minister Charette suddenly added the three "core criteria" to the narrative for his press conference;[1276]
- as of late March 2021, the MELCC team conducting the assessment of the GNLQ Project did not intend to seek clarifications from GNLQ on the "core criteria";[1277]
- the MELCC acknowledged that the new criteria did not come from the assessment team, [1278] but nonetheless required that they include questions on those criteria;[1279]
- the assessment team initially pushed back, arguing that these issues were either closed (social acceptability) or outside the scope of a

[1275] Internal MELCC email correspondence between E. Géhin and H. Delaney from 10 March 2021 to 19 March 2021, at **Exhibit C-0502-FRA** [redacted]; Internal MELCC email correspondence between E. Géhin and H. Delaney *et al*. dated 23 March 2021, at **Exhibit C-0503-FRA**; Internal MELCC email correspondence between E. Géhin and H. Delaney from 10 March 2021 to 19 March 2021, at **Exhibit C-0502-FRA**. See also paragraphs 248-249 above and Section 2.5.3.3 above.

[1276] Internal MELCC email correspondence between I. Lewis and H. Delaney dated 23 March 2021, at **Exhibit C-0603-FRA** [redacted] (emphasis added). See also Email correspondence from G. Richard (MELCC) to C. Benoit dated 23 March 2021, at **Exhibit C-0508-FRA**, in which the "core criteria" were all mentioned for the first time in the media line prepared for the Minister, whereas they did not appear in a previous draft from 21 March 2021 (Draft press briefing lines prepared for Minister B. Charette dated 21 March 2021, at **Exhibit C-0509-FRA**). See also paragraph 252 above.

[1277] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 2 *et seq*. (Summarising the topics that would be raised as part of the MELCC's subsequent set of questions and explicitly confirming that these would not include Minister Charette's "core criteria" ("*Rien en ce qui concerne les GES*")).

[1278] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 2.

[1279] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 2.

provincial environmental analysis (energy transition and global GHG emissions);[1280]

- the MELCC assessment team eventually prepared a set of additional questions to GNLQ on the new "core criteria", which were specific and contained objective criteria to assess GNLQ's responses, but were later replaced with much vaguer and sweeping questions, which are the ones that were ultimately sent to GNLQ;[1281] Minister Charette's Chief of Staff, Hugo Delaney, forwarded the MELCC's questions to his Minister, stating the following: [redacted];[1282] and
- in November 2021, after the rejection of the Project, a MELCC representative confirmed to the MEI that the new criteria had been added by the Québec Government for political reasons.[1283]

901 The above, combined with the lengthy list of highly relevant documents that the Respondent has **refused** to produce, and from which the Tribunal should draw inference,[1284] confirm that the imposition of the three new "core criteria" was the result of irregular political interference on the part of the Québec Government.[1285] By March 2021, the Minister of Environment and/or the Government of Québec had already decided not to

[1280] Email correspondence between M. Duquette (MELCC) and M. Gagnon (DGÉES) *et al.* from 31 March 2021 to 15 April 2021, at **Exhibit C-0511-FRA**, p. 1 *et seq*.

[1281] MELCC, Addendum to the request for undertakings and additional information of 3 March 2021 (26 April 2021), at **Exhibit C-0268-FRA**, p. 1 *et seq*. (Questions 52 and 53).

[1282] Internal MELCC correspondence between H. Delaney and M. Croteau *et al*. dated 26 April 2021, at **Exhibit C-0513-FRA** (emphasis added).

[1283] Internal MELCC email correspondence between M. Gagnon, N. Gleeton and J. Bissonnette from 28 November 2021 to 1 December 2021, at **Exhibit C-0510-FRA**.

[1284] See paragraphs 250-251 and paragraphs 299-300.

[1285] These documents include: (i) draft notes comprising already a [redacted] before the MELCC's review of the BAPE Report or its finalisation of its own report on the GNLQ Project; and (ii) [redacted] which thus also pre-dated the finalisation of the MELCC Report.

authorise the GNLQ Project and had thus bypassed the EA process, pre-empting its outcome.

902 Finally, by imposing new and overly broad conditions on GNLQ at the eleventh hour in the EA process, and by failing to provide GNLQ with a meaningful opportunity to address those conditions, the MELCC violated GNLQ's legitimate expectations that it would be treated fairly and in accordance with due process and Canadian law.[1286]

(iv) The MELCC's recommendation that the Québec Government reallocate the hydroelectricity promised to GNLQ was improper

903 As explained in the Memorial, the MELCC unfairly targeted GNLQ by opining in its Report, without any apparent basis, that hydroelectricity resources promised to GNLQ should be reallocated to "more promising" projects, although this had never been a criterion in GNLQ's, or in fact in any, environmental evaluation.[1287]

904 The Respondent barely addresses this claim and merely repeats the MELCC's view that, as Québec no longer had a surplus of hydroelectricity, the available resources should be used for more strategic projects, and that Canada "*ne voit pas dans ce type de conclusion un ciblage intentionnel pouvant constituer une injustice manifeste à l'endroit de GNL Québec*".[1288]

905 The Respondent, however, does not dispute that the question of the allocation of Québec's hydroelectricity resources was outside the scope of the EA of the GNLQ Project.[1289]

906 The Respondent thus cannot deny that the MELCC's conclusion in this regard was improper.

[1286] See Memorial, p. 226 *et seq.* (paras. 736-746).

[1287] Memorial, p. 197 *et seq.* (paras. 660-663); MELCC Report, at **Exhibit C-0269-FRA**, p. 45, 47, 75-76.

[1288] Counter-Memorial, p. 218 (para. 560).

[1289] See Memorial, p. 198 (para. 662); Counter-Memorial, p. 218 (para. 560).

(v) The Québec Government's decision not to authorise the GNLQ Project based on grounds outside of its jurisdiction violated Canadian law and due process

907 As explained in the Memorial, the Québec Government's decision not to authorise the GNLQ Project based on factors falling outside of its constitutional powers violated Canadian law and due process and amounted to unfair targeting of GNLQ since Québec had respected the boundaries of its jurisdiction in prior EAs.[1290]

908 In the Counter-Memorial, the Respondent argues that (i) Canadian constitutional law did not prevent the Québec Government from assessing the impact of the GNLQ Project on beluga whales or on the reduction of global GHG emissions, and that (ii) GNLQ acknowledged Québec's and Canada's shared constitutional powers in its summary Project description.[1291] These arguments are unavailing.

909 **First**, as explained in Section 2.5.4.1 above, all of the constitutional doctrines governing the allocation of powers between the federal and the provincial levels point to the conclusion that Québec had no jurisdiction to assess the GNLQ Project. As Me Duchaine explains in her second report, as a matter of Canadian constitutional law:

> "*bien qu'un ordre de gouvernement puisse théoriquement colliger toutes les informations relatives au projet qu'il évalue,* ***rendu à l'étape de la prise de décision, il ne pourra se baser que sur les aspects de l'activité, incluant les impacts qui en découlent, qui relèvent de son champ de compétence exclusive***."[1292]

910 In other words, Québec could **not** base its decision on aspects of the GNLQ Project falling under exclusive federal jurisdiction, including its impact on global GHG emissions and the impact of the maritime navigation it would

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[1290] Memorial, p. 197 (para. 658). See also Duchaine I, at **Exhibit CER-1**, p. 128.

[1291] Counter-Memorial, p. 216 *et seq.* (para. 557).

[1292] Duchaine II, at **Exhibit CER-1 (Second)**, p. 31 (para. 110) (emphasis added). See also, generally, Duchaine II, at **Exhibit CER-1 (Second)**, p. 30 *et seq.* (s. 3.1.4) and Section 2.5.4.1 above, explaining that the allocation of powers between the federal and provincial levels was reflected in the MELCC Directive, which should have prevented an *ultra vires* decision by the Québec Government.

engender on marine mammals and international trade.[1293] In relation to the impact of maritime navigation on marine mammals, as Me Duchaine explains in her second report, the fact that both provincial and federal law protect beluga whales does **not** alter the federal exclusive jurisdiction.[1294] Indeed, the MELCC itself noted that the protection of beluga whales "*relève principalement de la juridiction de Pêches et Océans Canada (MPO)*" and that "*l'autorité légale d'imposer des mesures de protection, applicables au transport maritime, relève exclusivement de la responsabilité du gouvernement fédéral*".[1295]

911 The Québec Government's reliance on issues outside its jurisdiction singled out GNLQ without any legitimate justification.[1296] Neither the Respondent, nor its experts can point to another project assessed by Québec authorities on grounds falling within federal jurisdiction or to any legitimate justification for the differential treatment of the GNLQ Project.

912 **Second**, the Respondent's argument that GNLQ acknowledged the division of constitutional powers between Canada and Québec in its summary Project description is untenable.[1297] The Respondent refers to the passages in which GNLQ lists the federal and provincial laws, regulations and policies with which the GNLQ Project should comply.[1298] While these lists include federal and Québec legislation relating to the protection of marine mammals and GHG emissions, their purpose was manifestly to inform the authorities that the consultants who helped prepare the summary were aware of and had reviewed the legislation that would potentially be relevant for the preparation of the EIS. Nothing in those lists,

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[1293] Duchaine II, at **Exhibit CER-1 (Second)**, p. 27 *et seq*. (paras. 96-98) and p. 146 (para. 380(e)).

[1294] Duchaine II, at **Exhibit CER-1 (Second)**, p. 28 (para. 100).

[1295] MELCC Report, at **Exhibit C-0269-FRA**, p. 30 *et seq*.

[1296] See Duchaine II, at **Exhibit CER-1 (Second)**, p. 4 (paras. 14-15) ("*L'analyse de projets comportant* [des éléments de compétence exclusive fédérales] *permet de constater que le gouvernement provincial s'abstient normalement d'aborder des éléments ne relevant pas de ses compétences constitutionnelles, de sorte que le Projet a visiblement fait l'objet d'un traitement différencié*").

[1297] Counter-Memorial, p. 216 *et seq*. (para. 557).

[1298] GNLQ, Summary of Project Description, at **Exhibit CC-0018-FRA**, p. 3 *et seq.* See also GNLQ, *Avis de projet*, at **Exhibit C-0197-FRA**, p. 3 *et seq.*

in their proper context, can be taken as an acknowledgment of shared powers in relation to the EA process.

913 In any case, it was not for GNLQ to parse Canada's and Québec's respective jurisdiction in relation to the upcoming EA process. Canadian and Québec EA authorities were the best placed, and under an obligation, to determine their respective jurisdiction themselves.

(vi) The Québec Government's decision not to authorise the GNLQ Project based on alleged uncertainties surrounding its impact on global GHG emissions was arbitrary, discriminatory and violated due process, in breach of GNLQ's legitimate expectations

914 The Québec Government also based its decision of July 2021 not to authorise the GNLQ Project on alleged uncertainties regarding the ability of the GNLQ Project to reduce global GHG emissions.[1299] As explained in the Memorial, the MELCC's conclusion on which this decision was based, *i.e.*, that there was an uncertainty as to whether the GNLQ Project could contribute to reducing global GHG emissions:

- **violated due process**, as the MELCC failed to consider the evidence submitted by GNLQ and the positive recommendation of the MELCC's own climate change experts;[1300]
- was **arbitrary** for the same reasons[1301] and because the MELCC ignored Québec's policies denoting Canadian LNG as a means to foster the energy transition and reduce global GHG emissions;[1302] and
- **unfairly discriminated against the Claimant**, as the GNLQ Project was the only project which was rejected as a result of its alleged cumulative impact on Québec's ability to reach its GHG emissions

[1299] Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274**, p. 3.

[1300] Memorial, p. 186 (paras. 619-620).

[1301] Memorial, p. 189 (para. 629).

[1302] Memorial, p. 189 *et seq.* (paras. 630-632).

targets[1303] or on its ability to reduce global GHG emissions and to favour the worldwide energy transition.[1304]

915 In the Counter-Memorial, the Respondent argues:

- in relation to **due process**, that the MELCC duly considered the opinion of its own experts and the information provided by GNLQ;[1305]
- in relation to **arbitrariness**, that the MELCC's conclusions were rational and explicitly linked to the EA of GNLQ and the fight against climate change;[1306] and
- in relation to **discriminatory conduct**, that the Claimant has failed to prove discriminatory intent.[1307]

916 Again, the Respondent's arguments are without merit.

917 **First**, as explained in Section 2.5.4.3(i) above, Me Duchaine opines that the *Guide d'élaboration et de rédaction du rapport d'analyse environnementale à l'intention des chargés de projet* applicable to the MELCC Report requires that the MELCC follow the opinion of the experts consulted,[1308] and that any deviation from the experts' opinion be duly justified.[1309] The MELCC Report does not contain any such justification or explanation.

918 Furthermore, the Respondent's contention that the MELCC duly considered its experts' conclusions and GNLQ's commitments[1310] is false. As shown in Section 2.5.4.3 above, none of the experts consulted by the MELCC issued an opinion against the approval of the GNLQ Project. Furthermore, GNLQ was ready to meet the DPCA's conditions to the acceptability of the Project, *i.e.*, the preparation of a plan to achieve carbon

[1303] Memorial, p. 197 (para. 659). See also Memorial, p. 190 (para. 632).

[1304] Memorial, p. 198 (para. 664). See also Memorial, p. 190 (para. 632).

[1305] Counter-Memorial, p. 190 *et seq.* (paras. 505-510).

[1306] Counter-Memorial, p. 202 *et seq.* (paras. 525-527).

[1307] Counter-Memorial, p. 217 *et seq.* (paras. 558-559).

[1308] Duchaine II, at **Exhibit CER-1 (Second)**, p. 109 *et seq*. (para. 308, fourth bullet point).

[1309] Duchaine II, at **Exhibit CER-1 (Second)**, p. 109 *et seq*. (para. 308, fourth bullet point).

[1310] Counter-Memorial, p. 193 (para. 510).

neutrality and the reduction of the duration of the Project to 25 years.[1311] It was also ready to use the SPEDE mechanism to offset its GHG emissions as required by the DEC.[1312] The MELCC ignored both of these commitments, as well as that of supplying LNG to isolated regions in Québec to replace more polluting fuels, like fuel oil and gasoil.[1313]

919 Such lack of candour in the conduct of the administrative proceedings violates due process.

920 **Second**, the Respondent argues that the Québec Government's decision was based on the EA of the GNLQ Project on the one hand, and the protection of the environment and the fight against climate change, on the other hand.[1314] This is misleading. As explained above, the EA of the GNLQ Project was tainted by violations of due process and based on arbitrary criteria as a result of the Québec Government's interference with the process. As a result, the BAPE Report and the MELCC Report, on which the Québec Government relied for its decision, were irregular. The fact that the Cabinet Decision is based on an irregular EA cannot justify the Respondent's arbitrary conduct – it rather confirms it.

921 The Respondent purports to link the Cabinet Decision to "*la protection de l'environnement et la lutte aux changements climatiques*".[1315] However, regardless of the legitimacy of the objective pursued, a decision must be based on a fair and equitable process, in accordance with domestic and international law. It is otherwise tainted by irregularity. A legitimate policy objective cannot redeem a decision based on unlawful grounds.

922 Besides, the Cabinet Decision should have been linked to Québec's legitimate policies favouring LNG as means to foster the energy transition and reduce GHG emissions worldwide. The Respondent does not

[1311] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 44 *et seq*. (para. 138). See also paragraph 328 above.

[1312] See Le Verger I, at **Exhibit CWS-3**, p. 35 (para. 136(5)). See also paragraph 280 above.

[1313] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 8 *et seq*. (paras. 16-21).

[1314] Counter-Memorial, p. 202 *et seq*. (para. 526).

[1315] Counter-Memorial, p. 202 (para. 526).

challenge the Claimant's argument that ignoring such policies was arbitrary.[1316]

923 Furthermore, as explained in Section 2.5.4.3 above, Minister Charette's newly imposed requirements, as part of his "core criteria", that the GNLQ Project improve the energy transition and reduce GHG emissions at a global level were intentionally framed without objective standards that could be met. It was impossible for GNLQ to provide at that stage all contracts with all of its future customers and, at any stage, to prove that they would have abandoned more polluting fuels. The decision of the Québec Government to rely on these criteria for its decision on an EA reflects an excess of discretionary power and a pre-judgment, *i.e.*, arbitrary conduct in breach of Article 1105 NAFTA.

924 **Third**, the Respondent does not (and indeed cannot) deny that the GNLQ Project is the only project to date to have been rejected by the Québec Government because of purported uncertainties surrounding its cumulative effects on GHG emissions[1317] or its inability to reduce global GHG emissions and to favour the worldwide energy transition.[1318] As explained above in Section 2.5.4.2, [redacted][1319]

925 Furthermore, as explained in Section 4.1.1.2 above, the Respondent's contention that, to show discrimination in the context of a claim under Article 1105, the Claimant must prove discriminatory **intent** is wrong.

926 **Finally**, given Québec's environmental and economic policies promoting Canadian LNG as a transitional source of energy and vehicle to reduce GHG emissions, GNLQ legitimately expected that, to the extent the MELCC had concerns about the impact of the GNLQ Project on GHG

[1316] See Memorial, p. 189 *et seq.* (paras. 630-632).

[1317] Memorial, p. 197 (para. 659). See also Memorial, p. 190 (para. 632).

[1318] Memorial, p. 198 (para. 664).

[1319] [redacted] at **Exhibit C-0280-FRA**. See Memorial, p. 98 (para. 298).

emissions, it would work with GNLQ to formulate measures to mitigate that impact.[1320] The MELCC's findings that there were "*incertitudes*" surrounding the impact of the GNLQ Project on GHG emissions, its refusal to articulate those uncertainties or concerns or to consider mitigation measures with GNLQ violated GNLQ's legitimate expectations in this regard.

927 The Québec Government's rejection of the GNLQ Project in part because of uncertainties relating to its impact on GHG emissions also breached GNLQ's legitimate expectations that the Project would be assessed fairly and in accordance with Canadian law, also by the Québec Government.

(vii) The Québec Government's decision not to authorise the GNLQ Project based on alleged uncertainties as to its impact on beluga whales violated due process, was arbitrary and discriminatory, in breach of GNLQ's legitimate expectations

928 The Québec Government also based its decision not to authorise the GNLQ Project on alleged uncertainties concerning the effects of navigation on the beluga whale population.[1321] As explained in the Memorial, the MELCC's conclusion on which this decision was based, *i.e.*, that the only way in which the GNLQ Project would have no significant impact on beluga whales was if GNLQ suspended all maritime traffic over the summer period, constitutes a breach of Article 1105.[1322] This is because that conclusion:

- **violated due process**, as it fell outside the scope of the MELCC Directive[1323] and relied on an unpublished study on underwater noise, on which GNLQ was not provided the opportunity to comment;[1324]

[1320] See paragraphs 821-826 above.

[1321] Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274**, p. 3.

[1322] Memorial, p. 88 *et seq.* (paras. 263-269) and p. 93 (para. 277). See also MELCC Report, at **Exhibit C-0269-FRA**, p. 34 ("*L'équipe d'analyse est d'avis que la mesure la plus efficace pour contrer les effets du bruit demeure l'évitement*").

[1323] Memorial, p. 185 (para. 616). See also Section 2.5.4.1 above.

[1324] Memorial, p. 186 *et seq.* (para. 621). See also Section 2.5.4.3(iii) above.

- was **arbitrary**, since it adopted a zero-tolerance policy in relation to navigation on the Saguenay River, despite the lack of scientific knowledge backing it, and contrary to the policies favouring the increase of shipping traffic on the Saguenay River;[1325]
- **unfairly discriminated against the Claimant**, since the MELCC's approach differed drastically from the approach adopted in the assessment of comparator projects.[1326]

929 In the Counter-Memorial, the Respondent argues:

- in relation to **due process**, that: (i) GNLQ was not entitled, under Québec or international law, to comment on every study relied upon by the MELCC; (ii) the MELCC acted within the limits of its discretionary power; and (iii) the Claimant has not demonstrated that the MELCC's conclusions would have been different had GNLQ been in a position to comment on the study;[1327]
- in relation to **arbitrariness**, that: (i) the Claimant was aware from the outset that the protection of beluga whales would be an issue requiring measures to mitigate the adverse impacts of the GNLQ Project; and (ii) the BAPE Report included the UQO's conclusions that any approval of shipping on the Saguenay River should await the end of its study;[1328]
- in relation to **discriminatory conduct**, in general, that the evaluation of the GNLQ Project was not carried out in circumstances similar to those in other projects.[1329]

930 These arguments are meritless.

931 **First**, the MELCC's conclusions regarding the impact of the Project on beluga whales fell outside the scope of the Québec EA process.[1330] Furthermore, as explained above in Section 2.5.4.1, and contrary to the

[1325] Memorial, p. 190 *et seq.* (paras. 633-642). See also Section 2.1.2 above.

[1326] Memorial, p. 198 *et seq.* (paras. 665-669). See also Section 4.2.2 below.

[1327] Memorial, p. 193 *et seq.* (paras. 511-514).

[1328] Counter-Memorial, p. 203 *et seq.* (paras. 529-531).

[1329] Counter-Memorial, p. 219 (para. 561).

[1330] See Memorial, p. 185 (para. 616). See also Section 2.5.4.1 above.

Respondent's arguments,[1331] the MELCC Directive did not identify the impact of underwater noise on beluga whales as part of the assessment of the GNLQ Project.[1332]

932 Furthermore, as also explained in Section 2.5.4.3(iii) above, the MELCC relied on an unpublished and inconclusive study to reach its untenable conclusion regarding the impact of the GNLQ Project on shipping and beluga whales. The MELCC abruptly shifted its focus from elaborating mitigation measures to a zero-tolerance approach, thereby displaying a total lack of transparency and due process with regard to GNLQ. The Respondent's attempt to justify this change of position as a use of its discretionary power[1333] must fail, since the assessment of the effects of shipping was outside of the scope of the MELCC Directive and, in any event, outside provincial jurisdiction.[1334]

933 **Second**, the Respondent wrongly attempts to justify its arbitrary conduct by arguing that GNLQ knew that beluga whales could pose a problem to the Project. [1335] As explained in Section 2.5.4.3(iii) above, it is a misrepresentation to assert that GNLQ was "warned" by the Québec Government that beluga whale protection would hinder GNLQ's ability to receive an environmental authorisation.[1336] There was no such warning; rather, Premier Couillard reassured GNLQ that any opposition to the GNLQ Project based on concerns relating to beluga whales could be overcome.[1337] Furthermore, contrary to the Respondent's suggestion,[1338] the reference in the BAPE Report to the unfinished UQO study did not in any way put GNLQ on notice of the MELCC's upcoming zero-tolerance policy. (In any event, even if the BAPE Report had somehow flagged that

[1331] Counter-Memorial, p. 203 *et seq.* (para. 529).

[1332] See MELCC Directive, at **Exhibit C-0198**, p. 19 *et seq.*

[1333] Counter-Memorial, p. 194 (para. 513).

[1334] See Section 2.5.4.1 above.

[1335] Counter-Memorial, p. 203 *et seq.* (paras. 529-531).

[1336] Counter-Memorial, p. 203 (para. 529).

[1337] As explained at paragraph 351 above, the "key point[]" of the meeting was that "[b]elugas will be an issue brought by national environment[al] groups", something the Minister of Energy and Resources was "not afraid of". Internal email correspondence between J. Illich and M.-C. Lavigne from 20 May 2015 to 21 May 2015, at **Exhibit C-0379-ENG**, p. 1.

[1338] Counter-Memorial, p. 204 *et seq.* (para. 531).

risk, that notification would still have come several years into the EA and thus would have been unfair and contrary to due process.)

934 During the EA process of the GNLQ Project, the MELCC focused on mitigation measures with regard to the protection of beluga whales. As the Respondent acknowledges,[1339] the MELCC's questions of 22 May 2019, mention that "[d]*'ici l'avancement de ces connaissances, le MFFP va appuyer* ***l'identification des mesures de prévention applicables*** *avec les organisations concernées et les autorités fédérales"*[1340] requesting that GNLQ "***s'engage*****[]** ***à mettre en œuvre des mesures d'atténuation*** *des impacts sur les mammifères marins qui seront validées par les partenaires du programme*".[1341] The MELCC's sudden adoption, as of March 2021 and subsequently in its Report in June 2021, of a zero-tolerance policy for underwater noise arbitrarily departed from this approach.

935 The Respondent's attempt to justify the MELCC's change in position by arguing that the noise-mitigation measures proposed by GNLQ in its responses to the MELCC's questions were ineffective, does not withstand scrutiny.[1342] As explained in Section 2.5.4.3(iii) above, GNLQ had provided a list of confirmed noise-mitigation measures, whose efficacy had been confirmed by a study conducted by Vard Marine, a leading shipbuilding company, in a study financed by Transport Canada in 2019;[1343] the study had also been recognised by Québec and federal agencies as the most advanced on the issue.[1344] Initially, and as at

[1339] Counter-Memorial, p. 203 (para. 529).

[1340] MELCC, Questions and Comments (1st series) (22 May 2019), at **Exhibit C-0204-FRA**, p. 31 (emphasis added).

[1341] MELCC, Questions and Comments (1st series) (22 May 2019), at **Exhibit C-0204-FRA**, p. 32 (emphasis added).

[1342] Counter-Memorial, p. 204 (para. 530).

[1343] GNLQ, Answers to questions and commitments requested by the MELCC dated 3 June 2021, at **Exhibit C-0068-FRA**, p. 75 of the PDF.

[1344] Agency, Report of meeting between Agency, PC, TC, DFO and MELCC dated 4 September 2020, at **Exhibit C-0490-FRA**.

November 2020, the MFFP considered these mitigation measures satisfactory,[1345] and GNLQ had committed to implementing them.[1346]

936 However, the MELCC failed to meaningfully consider these measures in its Report, rushing to the draconian and unsupported conclusion that "*la mesure la plus efficace pour contrer les effets du bruit demeure l'évitement*".[1347]

937 **Third**, the MELCC's assessment of the impact of shipping was discriminatory, as it singled out the GNLQ Project without any legitimate justification. As explained in Section 4.2.2. below, and contrary to the Respondent's contention,[1348] the Arianne Phosphate and Blackrock Metals projects entailed similar circumstances to that of the Project, as both would have generated an increase in shipping in the Saguenay River. The MELCC acknowledged the impact that these projects would have on maritime traffic, but the Québec Government authorised them nevertheless.[1349]

938 **Finally**, the MELCC's findings violated GNLQ's legitimate expectation that the MELCC would work with GNLQ to consider how the possible impacts of the Project on beluga whales could be reasonably mitigated – not through draconian measures like suspending all shipping during the summer season, a condition that would have effectively rendered the Project non-viable. The MELCC's findings also violated GNLQ's legitimate expectations that the Project would be assessed objectively, in accordance with the prevailing view that there is no concrete evidence that subaquatic noise from large ships impacts beluga whales – not based on an isolated and incomplete draft study co-authored by Mr Robert Michaud, a known opponent to the GNLQ Project.[1350]

[1345] MFFP, Ministerial opinion to MELCC (20201023-28-17) dated 26 November 2020, at **Exhibit C-0532-FRA**, p. 1. See also Compilation of opinions from consultations with ministries and organisations concerning the GNLQ Project (June 2021), at **Exhibit C-0032-FRA**, p. 12 *et seq.*

[1346] See Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 6 *et seq.* (paras. 18-23).

[1347] MELCC Report, at **Exhibit C-0269-FRA**, p. 34.

[1348] Counter-Memorial, p. 219 (para. 561).

[1349] See Section 4.2.2.3(ii) below.

[1350] See paragraph 229 above. See also Memorial, p. 79 (para. 229).

(viii) The Québec Government's decision not to authorise the GNLQ Project based on alleged uncertainties as to its social acceptability was unjustified and arbitrary

939 The Québec Government also based its decision not to authorise the GNLQ Project on the alleged uncertainties surrounding its social acceptability.[1351] As explained in the Memorial, this was arbitrary because the MELCC and the Québec Government relied on a standard for social acceptability manifestly different from the one set out in the MELCC Directive and previously applied by the MELCC, which only required that GNLQ **engage** with the local communities and communicate about the GNLQ Project with a view to improving its acceptability.[1352] Furthermore, social acceptability was mentioned as a concern for the first time during Minister Charette's March 2021 press conference, several years into the EA.[1353]

940 In the Counter-Memorial, the Respondent argues that: (i) the need for social acceptability was included in the MELCC Directive and amply discussed during the BAPE hearings, and therefore GNLQ was aware of it; and (ii) the notion of social acceptability is sufficiently precise and defined under Québec law.[1354]

941 The Respondent's arguments however miss the point.

942 **First**, it is undisputed that GNLQ was "aware" of the criterion of social acceptability. However, as explained at Section 2.5.3.2(i) above, the MELCC Directive encouraged GNLQ to consult local communities, including after the approval of the GNLQ Project; it did not require that GNLQ demonstrate that the Project was socially acceptable for it to be approved.

943 In any case, GNLQ had demonstrated that the GNLQ Project benefitted from strong local support, which had been confirmed by local

[1351] Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274**, p. 3.

[1352] Memorial, p. 192 *et seq.* (para. 643).

[1353] Memorial, p. 228 (para. 742).

[1354] Counter-Memorial, p. 206 *et seq.* (paras. 535-536).

authorities.[1355] Neither the MELCC nor Minister Charette at the time explained the purported uncertainties or concerns regarding the social acceptability of the Project. Nor has the Respondent in this arbitration provided any explanations concerning those purported uncertainties or concerns, let alone any evidence thereof.

944 **Second**, the Respondent admits that the notion of social acceptability remains controversial.[1356] In its attempt to define it as the "***perception d'une menace qu'un projet peut laisser planer sur la vie ou la qualité de vie d'un milieu***",[1357] the Respondent confirms its inherently arbitrary nature if used as a criterion for a decision in the context of an EA, as explained in Section 2.5.4.3(ii) above.

4.1.3.4 The Federal Government's decision not to authorise the GNLQ Project breached Article 1105 NAFTA

945 In relation to the Federal Government's decision not to authorise the GNLQ Project, the Claimant explained the following in the Memorial:

- The Federal Government's prejudgment of the outcome of the federal EA process breached Canadian law and due process,[1358] and was arbitrary.[1359]
- The Agency's findings and recommendations based on the upstream GHG emissions of the GNLQ Project were made in violation of due process[1360] and were discriminatory.[1361]

[1355] See "With environmental review still pending, Québec minister touts benefits of natural gas project", *CBC,* 25 September 2020, at **Exhibit C-0030** ("Quebec's junior minister responsible for regional development, Marie-Ève Proulx, said the construction of a natural gas liquefaction plant on the shores of the Saguenay river was 'a promising project for the future of Quebec.' Proulx also said the project has the overall support of 'social, economic and municipal stakeholders.'").

[1356] Counter-Memorial, p. 207 (para. 536).

[1357] Counter-Memorial, p. 207 (para. 536) (emphasis added), citing Yergeau, at **Exhibit RER-2**, p. 63 *et seq.* (paras. 173, 175-181) and p. 84 (para. 247).

[1358] Memorial, p. 187 (para. 623). See also Section 2.6.1 above.

[1359] Memorial, p. 193 (paras. 645-646).

[1360] Memorial, p. 188 (para. 625). See also Sections 2.6.2.1(i) and 2.6.2.2(i) above.

[1361] Memorial, p. 200 *et seq.* (paras. 670-673).

- The Agency's findings on the impact of the GNLQ Project on beluga whales and in turn on the Innu First Nations violated due process.[1362]
- The Federal Government's decision not to authorise the GNLQ Project did not comply with the binding EIS Guidelines, in violation of Canadian law and due process.[1363]

946 In the Counter-Memorial, the Respondent contends that the federal EA process of the GNLQ Project was in line with Canada's obligations under Article 1105.[1364] As explained below, that is not the case.

(i) The Federal Government's pre-judgment of the outcome of the federal EA of the GNLQ Project breached Article 1105 NAFTA

947 On 14 September 2021, a Tweet quoting a spokesperson for the Liberal Party of Canada announced that: "*Le Parti libéral du Canada est d'accord avec le gouvernement du Québec et n'appuie pas* [the GNLQ Project]. *Il est clair pour nous qu'il ne verra pas le jour*".[1365] This announcement was never denied, revoked or otherwise disavowed.[1366] As explained in the Memorial, it reflected a pre-judgment of the outcome of the federal assessment of the GNLQ Project, which **violated due process**[1367] and amounted to **arbitrary conduct**.[1368]

948 In the Counter-Memorial, the Respondent argues that this declaration: (i) cannot be attributed to Canada under public international law;[1369] and, in any event, (ii) is not arbitrary in that it constitutes a simple factual proposition – since GNLQ required authorisations from both governments,

[1362] Memorial, p. 188 (para. 625). See also Sections 2.6.2.1(ii)-(iii) and 2.6.2.2(ii)-(iii) above.

[1363] Memorial, p. 187 *et seq.* (para. 624). See also Section 2.6.2.1 above.

[1364] See Counter-Memorial, p. 195 *et seq.* (paras. 515-523), p. 209 (paras.540-542) and p. 219 (para. 561).

[1365] A. Shields (journalist at *Le Devoir*), Tweet dated 14 September 2021, at **Exhibit C-0036-ENG-FRA**.

[1366] See Counter-Memorial, p. 193 (para. 646).

[1367] Memorial, p. 187 (para. 623).

[1368] Memorial, p. 193 (paras. 645-646).

[1369] Counter-Memorial, p. 209 (para. 541).

Québec's refusal was sufficient for it not to go ahead.[1370] These arguments are wrong.

949 **First**, while the Liberal Party is not an organ of the State, it was in power at the time of the Tweet. Furthermore, the spokesperson of the Liberal Party was primarily conveying the views of the Prime Minister's team.[1371] Therefore, the statement relayed in the Tweet effectively came from governmental representatives,[1372] who in turn did not correct or disavow it.

950 This question is, in any event, moot. As explained at paragraph 380 above, documents produced by the Respondent at the Claimant's request, show that the then Prime Minister of Canada, Mr Trudeau, indicated in September 2021 "*vouloir **refuser** le présent projet*", prompting the Agency to consider that the GNLQ Project would not be approved.[1373]

951 The Federal Government thus pre-judged the fate of the GNLQ Project and upended the federal EA process, in breach of Canadian law and fundamental principles of due process and transparency.

952 **Second**, as explained at paragraphs 384-385 above, Canada's argument that the Québec Government's rejection of the Project effectively prevented it from being approved by the Federal Government is wrong as a matter of law.[1374] Under the constitutional doctrine of paramountcy, the federal authorities retained full decision-making authority over GNLQ's application, including the power to disagree with Québec's decision.[1375]

[1370] Counter-Memorial, p. 209 (para. 542).

[1371] "*O'Toole réitère son appui à GNL Québec et s'attaque aux bloquistes*", *La Presse*, 15 September 2021 (accessed on 19 October 2023), at **Exhibit C-0294**, p. 2 ("[L]***'équipe de Justin Trudeau*** *'est d'accord avec le gouvernement du Québec et n'appuie pas ce projet'*") (emphasis added).

[1372] "*O'Toole réitère son appui à GNL Québec et s'attaque aux bloquistes*", *La Presse*, 15 September 2021 (accessed on 19 October 2023), at **Exhibit C-0294-ENG-FRA** (Indicating that the opinion relayed by the Tweet came from "*l'équipe de Justin Trudeau*").

[1373] Internal DFO email dated 24 September 2021, at **Exhibit TLV-0156-FRA**, p. 1 ("*Trudeau aurai*[t] *indiqué en élection de vouloir refuser le présent projet, alors il est probable que nous ne nous rendions jamais aux conditions provisoires.*") (emphasis added).

[1374] Counter-Memorial, p. 207 *et seq.* (para. 537).

[1375] Northey II, at **Exhibit CER-2 (Second)**, p. 34 *et seq.* (para. 80).

The Respondent's pre-judgment of the fate of the Project thus cannot be justified as a matter of Canadian law.

(ii) The Agency's failure to comply with the EIS Guidelines violated due process, in breach of GNLQ's legitimate expectations

953 As explained in the Memorial, the Agency failed to abide by its own binding EIS Guidelines in its assessment of the GNLQ Project, thereby **violating due process**.[1376] In particular, as the Claimant demonstrated in the Memorial, the EIS Guidelines excluded from consideration in the EA effects deriving from:

- maritime shipping associated with the Project;[1377] and
- the production of upstream GHG emissions.[1378]

954 In its Counter-Memorial, the Respondent acknowledges that maritime shipping was excluded from the original EIS Guidelines,[1379] but argues that this issue was reinstated by a letter from the Agency to GNLQ dated 20 August 2019.[1380] The Respondent also alleges that upstream GHG emissions were part of the scope of the assessment in relation to their cumulative effects, because the EIS Guidelines in fact required GNLQ to estimate the upstream GHG emissions of the Project.[1381] These arguments do not hold water.

955 **First**, as explained in Section 2.6.2.1(ii) above, the letter from the Agency to GNLQ dated 20 August 2019 did not mention **any** amendment of the EIS Guidelines, let alone comprise any language revoking the exclusion of maritime shipping from the scope of the EA as set out in the EIS Guidelines.[1382] At best, this letter could have affected the information that

[1376] Memorial, p. 187 *et seq.* (para. 624).

[1377] Memorial, p. 107 (para. 329).

[1378] Memorial, p. 105 *et seq.* (para. 324); Northey I, at **Exhibit CER-2**, p. 42 (para. 120).

[1379] Counter-Memorial, p. 56 *et seq.* (para. 152).

[1380] Counter-Memorial, p. 57 (para. 153).

[1381] Counter-Memorial, p. 196 *et seq.* (para. 518).

[1382] See Letter from the Agency to GNLQ dated 20 August 2019, at **Exhibit C-0285-FRA**.

the Agency could request from GNLQ, not the scope of the EIS Guidelines and of the EA.[1383]

956 In any event, the premise of the Agency's letter was factually wrong. The Agency purported to amend the geographic scope of navigation to be considered as part of the EA of the GNLQ Project on the ground that GNLQ allegedly had a "certain level of influence" over the ships that it would have chartered for the Project.[1384] GNLQ, however, would not have controlled those ships. As explained in Section 2.6.2.1(ii) above, ship control would have remained at all times with the shipmaster, answering to the shipping company, not GNLQ.[1385] Furthermore, the shipmaster would have had to relinquish control to federal pilots for the navigation on the Saguenay River. As the Agency acknowledged in the context of the assessment of the North Shore Terminal project, "[l]*es stations de pilotage représentent donc une limite géographique à partir de laquelle il y a un certain niveau de contrôle et où des mesures peuvent être exigées par une autorité fédérale.*"[1386]

957 The exclusion of maritime shipping from the EIS Guidelines and thus the scope of the federal EA also meant that the Agency could not consider the alleged impact of the GNLQ Project on the Innu First Nations as a result of its impact on beluga whales. As the Respondent admits, the Agency's conclusions regarding the First Nations' cultural heritage derived from its finding relating to the impact of the Project on beluga whales.[1387] Those conclusions were therefore also outside the scope of the EIS Guidelines and of the EA.

[1383] See paragraphs 400-403 above.

[1384] Counter-Memorial, p. 57 (para. 153).

[1385] Bainbridge II, at **Exhibit CWS-4 (Second)**, p. 4 (para. 11). On the mandatory piloting on the Saguenay River, see also EIS (Annexes, Volume 4), at **Exhibit C-0202-FRA**, p. 540 *et seq.* of the PDF.

[1386] Scope of the EA for the North Shore Terminal project dated 15 May 2015, at **Exhibit C-0538-FRA**, p. 5. See also Email correspondence between G. Belanger (Agency) and P. Beaufils (Parks Canada) from 11 to 12 June 2015, at **Exhibit C-0539-FRA**, p. 1.

[1387] Counter-Memorial, p. 62 (para. 168).

958 **Second**, the requirement in the EIS Guidelines that the proponent estimate its upstream GHG emissions[1388] does not alter the fact that upstream GHG emissions were specifically excluded from the assessment. [1389] As explained in Section 2.6.2.1(i) above, the Agency itself noted in its draft Report of September 2021 that GHG emissions would not be considered as part of the federal Minister of Environment's decision.[1390]

959 As also explained in Section 2.6.2.1 above, in assessing upstream GHG emissions and the impact of shipping on beluga whales and the Innu First Nations, the Agency violated the binding and mandatory scope of the EIS Guidelines, in breach of Canadian law and due process. That conduct was also contrary to GNLQ's legitimate expectations that the GNLQ Project would be assessed in a fair and unbiased manner, within the confines of the EIS Guidelines.[1391]

(iii) The Agency's findings on GHG emissions violated due process and were discriminatory, in breach of GNLQ's legitimate expectations

960 The Claimant explained in the Memorial that, in relation to GHG emissions, the Agency:

- **violated due process** by relying on the MELCC's findings regarding impact of the Project on GHG emissions without carrying out an independent assessment, [1392] and by assessing the upstream GHG emissions of the Project, despite the facts that (i) they were excluded from the EIS Guidelines and (ii) outside of GNLQ's control for the purpose of mitigation measures, without giving GNLQ an opportunity to comment;[1393]

[1388] See Counter-Memorial, p. 196 *et seq.* (paras. 518).

[1389] Memorial, p. 105 *et seq.* (para. 324); Northey I, at **Exhibit CER-2**, p. 42 (para. 120).

[1390] Agency, Draft Environmental Assessment Report (September 2021), at **Exhibit C-0296-ENG**, p. 37. See also Memorial, p. 106 (para. 325).

[1391] See paragraphs 953-959 above.

[1392] Memorial, p. 188 (para. 625).

[1393] Memorial, p. 188 (para. 625).

- **unfairly targeted** the GNLQ Project, as it had otherwise never recommended the rejection of the GNLQ Project on this ground, including for other LNG facilities,[1394] and, to date, has never made such a recommendation on this ground, the GNLQ Project representing the only instance.[1395]

961 The Respondent in its Counter-Memorial argues that: (i) the Agency proceeded independently from the MELCC;[1396] (ii) the Agency evaluated upstream GHG emissions in the context of its assessment of cumulative GHG emissions in accordance with the CEAA 2012;[1397] and (iii) GNLQ has failed to prove a motive of discrimination, and the Respondent's differential treatment was justified by the different circumstances of the other projects assessed.[1398] These arguments have no merit.

962 **First**, as explained in Section 2.6.2.2(i) above, the Respondent's assertion that the Agency proceeded independently sit uncomfortably with the evidence: beyond the context known to the Agency prior to issuing its report – namely that the Federal Government (or at least the Prime Minister) had decided not to allow the GNLQ Project – the chapter of the Agency Report dedicated to GHG emissions contains no less than five quotes from the MELCC Report.[1399] Furthermore, to reach the same conclusion as the MELCC, the Agency discarded GNLQ's carbon neutrality commitment, which the experts of ECCC had considered credible subject to implementing four recommendations.[1400] The Agency,

[1394] Memorial, p. 200 (paras. 671-672).

[1395] Northey I, at **Exhibit CER-2**, p. 46 (paras. 132-133).

[1396] Counter-Memorial, p. 197 *et seq*. (para. 519).

[1397] Counter-Memorial, p. 199 *et seq*. (para. 521).

[1398] Counter-Memorial, p. 219 (para. 561).

[1399] Agency Report, at **Exhibit C-0037-ENG**, p. 41 and 47. See also paragraphs 430-431 above.

[1400] Agency Report, at **Exhibit C-0037-ENG**, p. 45 *et seq*. These recommendations were (i) extending it to include certain indirect scope 2 emissions (as opposed to only scope 1 emissions related to the direct emissions by GNLQ coming from the liquefaction process, which still corresponded to about 94% of what they call Project emissions); (ii) taking into account a possible rise in the price of carbon offset credit proposals; (iii) ensuring compliance with the internationally transferred mitigation outcome rules set by Article 6 of the Paris Agreement; and (iv) implementing an audit process to validate the achievement of its carbon neutrality target.

however, referred to the ECCC's recommendations as reasons for which GNLQ's carbon-neutrality plan was not credible, without any explanation as to why in its view GNLQ would not be able to implement these commitments.[1401]

963 **Second**, as explained above in Section 2.6.2.1(i), upstream GHG emissions were explicitly excluded from the EIS Guidelines,[1402] and should not have been assessed, either directly or as part of the cumulative effects to the GNLQ Project. Furthermore, the Agency's conclusions on upstream GHG emissions were based on grossly inflated figures that included scope 2 and 3 emissions (*i.e.*, GHG emissions not directly caused by the GNLQ Project).[1403]

964 The Agency disregarded a Wood Mackenzie study that GNLQ had provided to the Agency and ECCC, showing that the incremental increase of Canada's natural gas production due to the Project was minimal, meaning that the vast majority of the Agency's estimated upstream GHG emissions were expected to be emitted in Western Canada regardless of whether or not the Project proceeded – making GNLQ's indirect upstream GHG emissions significantly smaller.[1404] The Agency also disregarded a study provided by GNLQ, which showed that regulatory and technological changes, notably aimed at reducing flaring and fugitive GHG emissions, would have further decreased upstream emissions associated with the Project (which ECCC had accepted).[1405] By failing to properly consider GNLQ's input, the Agency acted arbitrarily and in breach of due process.

965 **Third**, the Respondent's attempts to justify its differing treatment of the GNLQ Project are unavailing. As explained in Section 4.2.2.2 below, the Federal and Québec Governments treated the GNLQ Project less favourably than Canadian or other foreign investors with respect to the impact of the GHG emissions generated by the GNLQ Project. The

[1401] Agency Report, at **Exhibit C-0037-ENG**, p. 48. See paragraph 426 above.

[1402] See Section 2.6.2.1 above.

[1403] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 55 *et seq*. (paras. 174-177). See paragraph 434 above.

[1404] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 57 (paras. 179-180). See paragraphs 435-436 above.

[1405] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 57 (para. 181). See paragraph 435 above.

Respondent has failed to provide any legitimate justification for its conduct in this regard.

966 **Finally**, given the Federal Government's policies promoting Canadian LNG as a means to reduce GHG emissions, GNLQ legitimately expected was that, to the extent the Agency had concerns about the impact of the GNLQ Project on GHG emissions, it would express those concerns and work with GNLQ to formulate measures to mitigate that impact.[1406] GNLQ also legitimately expected that the Agency would conduct a meaningful, independent EA process of the Project that was science-based. By making unsupported findings that seemed to blindly rely on the MELCC's own flawed findings in this regard, the Agency violated GNLQ's legitimate expectations.[1407]

(iv) The Agency's assessment of the potential impacts of the GNLQ Project on beluga whales and on the Innu First Nations violated due process and was discriminatory, in breach of GNLQ's legitimate expectations

967 As established in the Memorial, the Agency Report on the impact of the Project on beluga whales relied on the same inconclusive studies as the MELCC Report.[1408] The Agency,

- **violated due process** by substantially relying on the MELCC's findings without carrying out an independent assessment,[1409] and failing to properly consider GNLQ's proposed measure to mitigate the impact of its maritime shipping;[1410]
- **unfairly targeted** GNLQ by finding that the GNLQ Project was likely to cause significant adverse environmental effects, in part on grounds relating to its projected impact on maritime shipping, even though it

[1406] See paragraphs 812-822 above.

[1407] See paragraphs 427, 436 above.

[1408] Memorial, p. 107 *et seq.* (paras. 330-332).

[1409] Memorial, p. 188 (para. 625).

[1410] Memorial, p. 188 (para. 625).

had not taken issue with the North Shore Terminal project, which envisaged the same volume of shipping.[1411]

968 In the Counter-Memorial, the Respondent repeats the Agency's conclusions, based on the DFO's opinion, that the Project would have had significant negative effects on beluga whales.[1412] According to the Respondent, (i) the Agency conducted its own independent assessment of the effects of the GNLQ Project on beluga whales[1413] and provided GNLQ opportunities to provide its comments;[1414] and (ii) GNLQ has failed to prove a motive of discrimination, and the Respondent's differential treatment was justified.[1415] Again, none of these argument has any merit.

969 **First**, as explained in Section 2.6.2.2(ii) above, the Agency failed to follow the reasoning it applied when assessing the North Shore Terminal project.[1416] Like the MELCC, the Agency disregarded, without any explanation, GNLQ's numerous commitments to reduce subaquatic noise. As such, while GNLQ was given opportunities to comment, its position, based on scientific evidence, was ignored. In doing so, the Agency treated GNLQ in an arbitrary manner and in violation of due process.

970 **Second**, the Respondent's attempts to justify its discrimination of the GNLQ Project by alleged differences in circumstances with other projects must fail. As explained in Section 4.2.2.2 below, the federal and provincial authorities treated the GNLQ Project less favourably than Canadian or third-State investors in relation to the impact of maritime shipping on beluga whales. The Respondent has failed to provide any legitimate justification for such conduct.

[1411] Memorial, p. 200 *et seq.* (para. 673).

[1412] Counter-Memorial, p. 60 *et seq.* (paras. 164 and 167).

[1413] Counter-Memorial, p. 195 *et seq.* (paras. 515-523).

[1414] Counter-Memorial, p. 200 *et seq.* (paras. 522-523).

[1415] Counter-Memorial, p. 219 (para. 561).

[1416] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 58 (para. 184); Le Verger I, at **Exhibit CWS-3**, p. 57 (paras. 231-234). See also Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 275 and Northey I, at **Exhibit CER-2**, p. 29 *et seq.* (paras. 83-86).

971 The different treatment of the GNLQ Project is striking given that, during its assessment of the North Shore Terminal project, the Agency also considered the increased traffic generated by the GNLQ Project,[1417] and concluded in October 2018 that the North Shore Terminal project was "not likely to cause significant adverse environmental effects, as defined in CEAA 2012".[1418] The Agency's conclusion that the same cumulative increase in shipping was acceptable for the North Shore Terminal project, but not for the GNLQ Project, is not only arbitrary, it is also inherently discriminatory.

972 In her witness statement, Ms Bélanger attempts to justify this differential treatment by stating that, in assessing cumulative effects, the Agency gives different weight to the impact of potential projects depending on the probability that they will be completed.[1419] The Respondent has, however, provided no documentary support of this practice. In any event, even if true, this approach could not be considered rational or to justify the different treatment of the GNLQ Project. In fact, Ms Belanger's testimony, if true, would suggest that, when the Agency completed the assessment of the North Shore Terminal project in October 2018, it considered that the GNLQ Project would likely not be approved. There is not a shred of evidence that this was the case, nor could there be any, so early in the process.

973 **Third**, the Agency's assessment of the impact of the GNLQ Project on the Innu First Nations' cultural heritage was solely based on the unsubstantiated assumption that beluga whales were important for the Innu

[1417] See Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 186 and 201. See also Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 212 *et seq.* ("According to the information provided by the proponent, and taking into account all of the existing and potential projects, marine traffic on the Saguenay River could increase to 635 vessels per year by 2030, which is equivalent to a maximum of 4 to 6 vessels per day […]").

[1418] Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 249.

[1419] Bélanger, at **Exhibit RWS-1**, p. 57 (para. 156).

First Nations.[1420] The Claimant's argument in this respect stands unrebutted.

974 Finally, by ignoring GNLQ's scientific evidence regarding the possible impacts of the Project on beluga whales, and relying instead on inconclusive and unreliable information, the Agency violated GNLQ's legitimate expectations that the Agency would assess the GNLQ Project against science-based position,[1421] and in accordance with the EIS Guidelines and Canadian law, and not on arbitrary basis. The Agency's actions also violated GNLQ's legitimate expectation that the Agency would work with GNLQ to consider how the possible impacts of the Project on beluga whales could be reasonably mitigated.

(v) The Federal Government's decision not to authorise the GNLQ Project was unjustified and arbitrary

975 As explained in Section 2.4.3 above, the Federal Minister of Environment could only refer the GNLQ Project to the Cabinet for a decision of whether the "significant effects" of the GNLQ Project on the environment were "justified in the circumstances" if the Agency has properly identified unmitigable significant effects in the first place.[1422] As the significant effects identified by Agency in this case related to matters (upstream GHG emissions and maritime traffic) that were barred from consideration to determine adverse effects under the EIS Guidelines, the Minister of Environment's decision to refer the GNLQ Project to the Cabinet was unjustified and arbitrary.

976 The Cabinet's decision that the alleged significant effects of the Project on the environment were not justified in the circumstances was equally arbitrary and unjustified, for the same reasons.

977 These decisions both violated the Claimant's legitimate expectation that the GNLQ Project would be assessed under a fair process, in compliance

[1420] Memorial, p. 108 *et seq.* (paras. 333-335); Northey I, at **Exhibit CER-2**, p. 69 *et seq.* (para. 195) and p. 81 (para. 200).

[1421] See paragraphs 442-445 above.

[1422] Northey II, at **Exhibit CER-2 (Second)**, p. 32 *et seq.* (paras. 76-78).

with federal law, and notably the requirement that the EIS Guidelines define the scope of any decision pertaining to the GNLQ Project.

4.2 The Respondent breached Articles 1102 and 1103 NAFTA

978 The Claimant explained in the Memorial that, under Articles 1102 and 1103 NAFTA, Canada was required to accord to the Claimant and its investment National Treatment ("**NT**") or Most Favoured Nation treatment ("**MFN**"), *i.e.*, treatment no less favourable than it accorded, in like circumstances, to Canadian or third-State investors.[1423] It further explained how, in breach of those provisions, Canada failed to accord GNLQ the same standards of treatment that it had accorded to several comparator projects before, simultaneously to, and after the facts in dispute in the present case.[1424]

979 As explained below, the Respondent's defences rely on an incorrect statement of the applicable legal standards under Articles 1102 and 1103 (**Section 4.2.1**).

980 Furthermore – and contrary to the Respondent's attempts in the Counter-Memorial to distinguish the GNLQ Project from every possible comparator project – there are "like circumstances" sufficient to establish valid comparisons between Canada's treatment of GNLQ and its treatment of those comparator projects, for the purpose of Articles 1102 and 1103. Those comparisons demonstrate that Canada accorded GNLQ less favourable treatment than it accorded the comparator projects. The Respondent has failed to prove that this disparity of treatment is – or can be – explained by any rational policy (**Section 4.2.2**).

4.2.1 The Respondent misrepresents the applicable legal standard

981 The Claimant explained in the Memorial the elements required to demonstrate a breach of Articles 1102 or 1103 NAFTA, namely that:

[1423] Memorial, p. 135 *et seq.* (s. IV(A)(1)(a)).

[1424] Memorial, p. 145 *et seq.* (s. IV(A)(2)(b)).

- Canada accorded "treatment" to the investor and/or the investment;[1425]
- the Claimant and its investment were in "like circumstances" as compared to national or other foreign investors or investments;[1426] and
- the Claimant or its investments were treated less favourably than the latter.[1427]

982 The Parties agree that these three requirements are necessary to establish a breach of Articles 1102 or 1103.[1428] However, they disagree with respect to three points relating to the legal standard.

983 First, the Respondent attempts to add a fourth requirement: that the disparity of treatment was discriminatory because of the Claimant's nationality. As explained below, that position is unsupported (**Section 4.2.1.1**).

984 Second, the Respondent denies that the evidentiary burden of proof shifts to the Respondent once the Claimant has established a *prima facie* disparity of treatment in like circumstances. The Respondent's position is contradicted by overwhelming authority on this point (**Section 4.2.1.2**).

985 Third, presumably to support its defence that none of the comparator projects that the Claimant identified were in "like circumstances" to GNLQ, the Respondent posits an overly narrow interpretation of that phrase under Articles 1102 and 1103 since the phrase "like circumstances" does not require "identical" circumstances – as the words themselves indeed suggest (**Section 4.2.1.3**).

4.2.1.1 The Claimant is not required to prove discrimination based on nationality

986 In its Counter-Memorial, the Respondent attempts to limit the application of Articles 1102 and 1103 NAFTA exclusively to discrimination based on

[1425] Memorial, p. 138 *et seq.* (paras. 438-443).

[1426] Memorial, p. 140 *et seq.* (paras. 444-459).

[1427] Memorial, p. 144 *et seq.* (paras. 460-464). See also NAFTA, at **Exhibit CL-001-ENG**, p. 2 *et seq.* (Arts. 1102 and 1103).

[1428] Counter-Memorial, p. 100 (para. 276).

nationality.[1429] This strawman argument is supported neither by the terms of Articles 1102 and 1103, nor by the decisions of NAFTA tribunals.

987 It is undisputed that, as stated by NAFTA tribunals, Articles 1102 and 1103 may have been "designed to prevent discrimination on the basis of nationality".[1430] This does not, however, mean that a party invoking these provisions must show that the discrimination from which it has suffered was based on nationality. As the *Feldman v. Mexico* tribunal explained in relation to Article 1102, such an interpretation is contrary to the text, and would frustrate the very purpose, of the national treatment standard under Article 1102:

> "[I]t is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances. […]
>
> More generally, requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason. […] If Article 1102 violations are limited to those where there is explicit (presumably *de jure*) discrimination against foreigners, *e.g.*, through a law that treats foreign investors and domestic investors differently, it would

[1429] Counter-Memorial, p. 101 *et seq.* (para. 278-279).

[1430] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, at **Exhibit RL-028-ENG**, p. 75 *et seq.* (para. 181). See also cases cited by the Respondent at Counter-Memorial, p. 101 *et seq.* (paras. 278-279).

> greatly limit the effectiveness of the national treatment concept in protecting foreign investors."[1431]

988 This was confirmed by the *Thunderbird v. Mexico* tribunal, which held the following:

> "It is not expected from Thunderbird that it show **separately** that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favourably than a national investor. That case is to be proven by a foreign investor, and, additionally, the reason why there was a less favourable treatment."[1432]

989 While the above reasoning refers specifically to Article 1102, it also applies to Article 1103. As the *Mercer v. Canada* Tribunal explained:

> "[T]he requirements for establishing a violation of NAFTA Article 1103 are the same as establishing a violation of NAFTA Article 1102, except that the applicable comparator, in like circumstances, is a foreign (non-Canadian) investor or investment".[1433]

990 The Claimant therefore does not have to show anything other than the three requirements of Articles 1102 and 1103 set out above. Furthermore, it is sufficient for the Claimant to establish that these requirements are met *prima facie*.[1434]

[1431] *Feldman v. Mexico*, Award, 16 December 2002, at **Exhibit RL-028-ENG**, p. 75 *et seq.* (paras. 181-183). See also *Thunderbird v. Mexico*, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 59 (para. 177).

[1432] *Thunderbird v. Mexico*, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 59 (para. 177) (emphasis in the original).

[1433] *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, at **Exhibit CL-026-ENG**, p. 97 (para. 7.10).

[1434] Memorial, p. 138 (para. 437). See also *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 214 (para. 723).

4.2.1.2 Once the Claimant has established its *prima facie* case, the evidentiary burden shifts to the Respondent

991 As explained in the Memorial, once the Claimant has established *prima facie* the three elements of a breach of Articles 1102 or 1103 NAFTA, the Respondent has the burden to prove its defences under these provisions.[1435]

992 In its Counter-Memorial, the Respondent erroneously argues that the burden of proof never shifts by relying on

- an erroneous reading of prior decisions by NAFTA tribunals; and
- the purported agreement of the NAFTA Parties on this point.[1436]

993 **First**, the Respondent confuses the **legal** burden of proving discrimination under Articles 1102 and 1103, which rests on the Claimant, and the **evidentiary** burden, which shifts to the Respondent if the Claimant has made a *prima facie* case of differential treatment. As explained by the *Mercer v. Canada* tribunal (on which the Respondent relies, albeit based on a truncated quote):[1437]

> "[T]he Tribunal must also take account of the distinction between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence). Moreover, **every party bears the burden of proving its positive allegations, whether claimant or respondent**. […] [W]hilst the legal burden of proof rests always on the Claimant to prove its claims under NAFTA Articles 1102 and 1103, **the question whether the evidential burden shifts to the Respondent remains relevant, including the question whether any positive defence put forward by the Respondent is established**."[1438]

[1435] Memorial, p. 138 (para. 437). See also *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 214 (para. 723).

[1436] Counter-Memorial, p. 100 *et seq.* (para. 277).

[1437] Counter-Memorial, p. 101 (para. 100, fn 335).

[1438] *Mercer v. Canada,* Award, 6 March 2018, at **Exhibit CL-026-ENG**, p. 97 *et seq.* (paras. 7.14-7.16) (emphasis added). The Respondent also relies on the *Apotex* and *Resolute Forest*

994 NAFTA tribunals have consistently held that the evidentiary burden of proof shifts to the respondent State once a claimant has established a *prima facie* case of breach of Articles 1102 and 1103. Indeed, the tribunal in *Feldman v. Mexico* found that the claimant had "established a presumption and a prima facie case that the Claimant has been treated in a different and less favorable manner" and that Mexico had "failed to introduce any credible evidence into the record to rebut that presumption".[1439]

995 The tribunal in *Bilcon v. Canada* similarly found that once a claimant makes a *prima facie* case, the onus to prove whether "a measure is still sustainable within the terms of Article 1102" shifts to the Respondent.[1440] Likewise, the tribunal in *Resolute Forest v. Canada* considered it necessary to establish whether the claimant "discharged its burden of establishing *prima facie* differential treatment in like circumstances".[1441]

996 The Respondent cannot impose a higher burden on the Claimant in the present case.

997 **Second**, there is no merit in the Respondent's argument that the NAFTA Parties' alleged agreement that the burden of proof never shifts must be considered as State practice for the purpose of Article 31.3(b) VCLT.[1442]

998 As explained in paragraphs 704-705 above, a subsequent practice under Article 31(3)(b) VCLT requires more than disparate positions taken by the

awards, which however support the Claimant's case. See *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, at **Exhibit RL-086-ENG**, p. 194 *et seq.* of the PDF (paras. 8.8-8.10) (holding that in relation to two specific comparators "the evidential burden of proof does shift to the Respondent."); *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-1, Final Award, 25 July 2022, at **Exhibit RL-087-ENG**, p. 167 *et seq.* (para. 570) ("the Tribunal finds it is useful to draw the difference between 'legal burden of proof' and 'evidential burden'").

[1439] *Feldman v. Mexico*, Award, 16 December 2002, at **Exhibit RL-028-ENG**, p. 73 *et seq.* (paras. 177-178). See also *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, at **Exhibit CL-030-ENG**, p. 35 *et seq.* (para. 78).

[1440] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 214 (para. 723). See also Memorial, p. 138 (para. 437).

[1441] *Resolute Forest Products Inc. v. Government of Canada*, Final Award, 25 July 2022, at **Exhibit RL-087-ENG**, p. 167 *et seq.* (paras. 569-574).

[1442] Counter-Memorial, p. 100 *et seq.* (para. 277).

NAFTA Parties in an opportunistic manner to defend their own position in litigious proceedings.

999 In any case, there can be no subsequent practice with respect to the issue at hand. Indeed, in the *Resolute Forest v. Canada* case, the Respondent acknowledged that the legal and the evidentiary burden of proof are two distinct concepts, and that it is for a respondent State to argue that there are rational government policies justifying a difference in treatment.[1443]

4.2.1.3 The analysis of "like circumstances" does not require identical conditions

1000 The Parties agree that the concept of "like circumstances" is context-dependent.[1444] As explained in the Memorial, the concept of "like circumstances" is broad.[1445] In analysing allegations of breach of Articles 1102 and 1103 NAFTA, prior tribunals have considered comparators subject to similar legal regimes, including "all enterprises affected by the environmental assessment regulatory process",[1446] comparators in the same business sector[1447] and comparators providing the same or competing products or services.[1448]

1001 In its Counter-Memorial, the Respondent argues that:

i) the "treatment", rather than the investment or investor, must be "in like circumstances";[1449]

[1443] See *Resolute Forest Products Inc. v. Government of Canada*, Final Award, 25 July 2022, at **Exhibit RL-087-ENG**, p. 168 (para. 571). See also *Resolute Forest Products Inc. v. Government of Canada*, Final Award, 25 July 2022, at **Exhibit RL-087-ENG**, p. 167 (para. 569).

[1444] Memorial, p. 140 (para. 445); Counter-Memorial, p. 106 (para. 291).

[1445] Memorial, p. 140 (para. 445).

[1446] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 206 (paras. 694-695). See Memorial, p. 141 *et seq.* (paras. 448-452).

[1447] Memorial, p. 142 *et seq.* (paras. 453-456).

[1448] Memorial, p. 143 *et seq.* (paras. 457-459).

[1449] Counter-Memorial, p. 105 *et seq*. (paras. 289-290).

ii) the relevant comparators must be subject to the same regulatory regime;[1450] and

iii) an analysis of "like circumstances" must take into account public policy considerations that would warrant a differential treatment.[1451]

1002 The Respondent's position is not accurate.

1003 **First**, the Claimant agrees that it is the "treatment" that must be "in like circumstances" and not the investment or the investor.[1452] However, where the investments or investors under comparison **are** similar, this can be a relevant factor for finding that there are "like circumstances". As the Claimant explained in the Memorial, tribunals have adopted a flexible approach that "varies according to the circumstances of the investment or investor and according to the treatment at issue."[1453]

1004 **Second**, the Respondent's contention that being subject to an identical legal regime is a condition for a comparison under Articles 1102 and 1103 is wrong. As the tribunal in *Pope & Talbot v. Canada* put it:

> "By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of 'like' can have a range of meanings, from 'similar' all the way to 'identical.'"[1454]

1005 The tribunal in *Bilcon v. Canada* (in the relevant context of a comparison of the regime under which EAs were carried out) put it another way:

> "[**T**]**he operative word in Article 1102 is 'similar', not 'identical'**. In addition to **giving the reasonably broad language of Article 1102 its due**, a Tribunal must also take into account the objects of NAFTA […]

[1450] Counter-Memorial, p. 107 *et seq.* (para. 292).

[1451] Counter-Memorial, p. 106 *et seq.* (para. 291).

[1452] See Memorial, p. 142 (para. 451).

[1453] Memorial, p. 140 (para. 445).

[1454] *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, at **Exhibit CL-030-ENG**, p. 33 *et seq.* (para. 75).

> The Tribunal finds, that on examination of their particular facts, many of the comparison cases brought forward by the Investors qualify as **'sufficiently' similar** to sustain an Article 1102 comparison for the purposes of this case."[1455]

1006 On that basis, the *Bilcon* tribunal rightly rejected Canada's argument that comparators could only be projects that had been assessed by federal joint review panels, like the claimant's project.[1456] It concluded that sufficiently similar comparators included mining projects and oil and gas exploration projects accompanied by exports that involved sea routes, and that, as long as the EA considered "likely significant adverse effects after mitigation", the comparators were appropriate.[1457]

1007 **Third**, contrary to the Respondent's argument, a "*politique publique*" that may be invoked as a justification for differential treatment does not alter the fact that different projects may be in "like circumstances".[1458] Indeed, if that were the case, a State could avoid its NT or MFN obligations under investment treaties merely by invoking purportedly different public policy considerations. At best, the existence of different public policies may be relevant to the question of whether the treatment of two comparator projects was distinct. However, as explained in Section 4.2.2 below, in this case the Respondent, for the most part, does not dispute that its treatment of GNLQ was less favourable than that afforded to comparator projects.

[1455] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 205 *et seq.* (paras. 692-695) (emphasis added).

[1456] *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 205 (paras. 690-691).

[1457] See *Bilcon v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, at **Exhibit CL-024-ENG**, p. 206 *et seq.* (paras. 696-701).

[1458] Counter-Memorial, p. 106 *et seq*. (para. 291).

4.2.2 The treatment granted to the GNLQ Project was less favourable than the treatment granted to projects in like circumstances

1008 The Parties agree that GNLQ received "treatment" within the meaning of Articles 1102 and 1103 NAFTA. Specifically, the Respondent accepts in the Counter-Memorial that the following constituted "treatment":

i) the EA process conducted by the MELCC;

ii) the EA process conducted by the Agency;

iii) the Government of Québec's decision to refuse to authorise the GNLQ Project on 21 July 2021; and

iv) the Federal Government's decision on 7 February 2022 that the allegedly negative environmental effects of the GNLQ Project were not justified in the circumstances.[1459]

1009 The "treatment" at issue thus extended from the start of the EA processes to the Governmental decisions not to authorise the GNLQ Project. In that regard, by its very nature, an EA process entails a series of State measures that amount to a composite act. Here, the treatment of the GNLQ Project, when examined with comparator projects, also amounts to a wrongful composite act in breach of Articles 1102 and 1103 NAFTA.

1010 The treatment accorded to GNLQ was indeed less favourable than the treatment federal and provincial authorities accorded projects of Canadian and third-State investors in like circumstances. In particular, federal and provincial authorities treated the GNLQ Project less favourably than other projects,

- by carrying out two separate EAs, instead of a single federal EA led by the Agency, or at least a joint assessment under the Canada-Québec Agreement (**Section 4.2.2.1**);

[1459] Counter-Memorial, p. 105 (para. 286). The Claimant does not agree with the Respondent's argument that this "treatment" was solely in the context of "*l'établissement projeté d'un investissement au Canada*". The treatment also concerned the "expansion, management, conduct [and] operation" of the Claimant's investment (see NAFTA, at **Exhibit CL-001-ENG**, p. 2 *et seq*. (Arts. 1102, 1103)). Nevertheless, this disagreement is immaterial in that both Parties agree that the "treatment" requirement is met.

- in relation to the issue of GHG emissions (**Section 4.2.2.2**); and
- in relation to the issue of the beluga whales (**Section 4.2.2.3**).

1011 Had Québec and Canada accorded the GNLQ Project the same treatment as they accorded other Canadian and third-State investors' projects:

- federal and provincial authorities would not have conducted two separate, parallel assessments; they would have instead conducted a single federal assessment led by the Agency, or, at least, a joint assessment, which would have avoided the Québec Government's interference in the EA process and decision not to approve the GNLQ Project, as well as the pre-judgment of the GNLQ Project at the federal level; and
- the federal authorities would in turn not have refused to approve the GNLQ Project, be it on the basis of its alleged GHG emissions, or its alleged impact on beluga whales.

1012 In addition to the treatment described above, as explained in Section 2.5.1 above, in its EA of the GNLQ Project, the MELCC unlawfully applied a cost-benefit analysis of the type typically carried out for public works projects. In no other project from 2001 to 2017 (whether those under comparison or any other) did Québec impose on a proponent a cost-benefit analysis of this nature. Québec's decision in this regard, therefore, also constitutes a breach of Articles 1102 and 1103.

4.2.2.1 Federal and provincial authorities treated the GNLQ Project less favourably by carrying out two separate EAs

1013 As the Claimant explained in the Memorial, the Respondent accorded several other comparator projects more favourable treatment than the GNLQ Project by subjecting them to a single EA process, as opposed to two separate EAs at Québec and federal levels.[1460]

[1460] Memorial, p. 176 *et seq.* (paras. 587-594).

1014 In the Counter-Memorial, the Respondent denies that being subjected to a single federal or joint assessment, rather than two EAs, constitutes more favourable treatment.[1461] As demonstrated below, this is not correct.

1015 Canada should have (under both its own law and Article 1102 NAFTA) subjected GNLQ to a single, federal assessment conducted by the Agency under the CEAA 2012 (as ought to have been the case under Canadian law), as opposed to both a federal and a provincial EA in parallel. As a general proposition, the Respondent cannot sensibly deny (nor does it appear to) that being subject to two EA processes constituted less favourable treatment than being subject only to one.

1016 Had Québec's involvement in the EA process been necessary, which is denied, the MELCC and the Agency should have initiated a joint assessment pursuant to the Canada-Québec Agreement, as soon as both established that they had an EA responsibility, on 16 January 2016.

1017 In the Counter-Memorial, the Respondent contends that a joint assessment constitutes less favourable treatment than a single assessment carried out by the Agency.[1462] This is, however, beside the point. In the present case, the relevant comparison is between **two** separate (and uncoordinated) assessments, as they occurred, and either a single federal assessment or a joint assessment.

1018 Contrary to the Respondent's arguments, GNLQ would have received more favourable treatment, including in all likelihood, authorisation for the Project, had Canada only subjected it even to a joint assessment. Indeed, as explained in Sections 2.4 and 2.5 above, it was the repeated irregularities in the MELCC's conduct of the provincial EA process that led to the Québec Government's interference and unlawful decision to refuse the Project, and in turn to the rejection at the federal level, when the Federal Government simply followed suit. Had the Agency led a single federal assessment from the outset, the irregularities tainting the entire process could (and should) have been avoided.

[1461] Counter-Memorial, p. 163 *et seq*. (paras. 447-452).

[1462] Counter-Memorial, p. 163 *et seq*. (paras. 449-451).

(i) Canada should have assessed the GNLQ Project under a single, federal assessment, as it did for the North Shore Terminal and Contrecoeur projects

1019 At least two recent projects located in Québec, but on land belonging to federal port authorities, like the GNLQ Project, were assessed under a single, federal assessment.

1020 As explained in the Memorial, the most directly relevant comparator is the **North Shore Terminal** project, a multi-user marine terminal promoted by the SPA and located on the Saguenay River, opposite the site where the GNLQ Project should have been built.[1463] Both projects were located on federal lands.[1464] The North Shore Terminal was approved in 2018.[1465] It is uncontested that Canada reviewed the North Shore Terminal project under a single, federal EA governed by the CEAA 2012.[1466]

1021 Another relevant comparator is the **Contrecoeur Port Terminal** project, proposed by and located on the lands of the Montreal Port Authority (an independent federal agency) and approved in 2021.[1467] This project is also directly comparable to the GNLQ Project, and a further example of a single, federal EA process under the CEAA 2012.

1022 In the Counter-Memorial, relying on Ms Powell's expert report, the Respondent seeks to distinguish between the GNLQ and North Shore Terminal projects by asserting that the GNLQ Project was subject to two separate processes because its proponent was not a port authority and because it included an LNG liquefaction plant.[1468] However, the Respondent fails to demonstrate the relevance of those two elements. As explained in Section 2.3.1.1 above, under its own laws and agreements, Canada was required to conduct a single, federal-led assessment of the

[1463] See Memorial, p. 23 (paras. 53-54). See also Illich I, at **Exhibit CWS-1**, p. 21 (n. 66).

[1464] Memorial, p. 178 (para. 593); Northey I, at **Exhibit CER-2**, p. 26 *et seq.* (paras. 73-74).

[1465] See Memorial, p. 161 (para. 526).

[1466] See Memorial, p. 172 *et seq.* (paras. 570 and 592); Counter-Memorial, p. 128 (para. 350) and p. 160 (para. 439).

[1467] See Memorial, p. 175 (para. 580); Counter-Memorial, p. 154 *et seq.* (para. 420).

[1468] Counter-Memorial, p. 160 (para. 439).

GNLQ Project, **regardless** of the fact that GNLQ was not a port authority and the project entailed an LNG plant.

1023 Hence, Canada ought to have conducted a single federal assessment for the GNLQ Project, as it did for North Shore Terminal and Contrecoeur Port Terminal projects. These two projects were in "like circumstances" for the purpose of Article 1102,[1469] and Canada's failure to do so therefore was in breach of Article 1102.

(ii) Canada, alternatively, should have assessed the GNLQ Project under a joint assessment, as it did for Cacouna LNG and Rabaska LNG

1024 The Claimant also explained in the Memorial how Canada subjected the **Cacouna LNG** and **Rabaska LNG** projects, two LNG import terminals,[1470] to joint assessments, in conformity with the Canada-Québec Agreement.[1471]

1025 In the Counter-Memorial, the Respondent argues that these projects were not in "like circumstances" to the GNLQ Project because they were assessed under the CEAA 1992 regime, rather than the CEAA 2012 regime.[1472] However, as explained in Section 4.2.1.3 above, Article 1102 does not require identical circumstances but rather similar or like circumstances. Accordingly, the applicable legal regime does not need to be identical to establish a valid comparator under Article 1102.

1026 The Respondent's argument that the CEAA 2012 made it more difficult to conduct joint assessments under the Canada-Québec Agreement is irrelevant: that was a problem of Canada's own creation, which does not affect the obligations of the federal and Québec authorities under that agreement. In any event, as the Respondent admits, it was by choice, and not in light of the requirements of the CEAA 2012, that federal and

[1469] Evidently, Canada cannot rely on the mere fact that it subjected GNLQ to two separate processes, when it should have only subjected it to one, as a relevant distinguishing factor – that being the very "less favourable treatment" that the Claimant claims breached Article 1102.

[1470] Memorial, p. 148 *et seq.* (paras. 477 and 485).

[1471] Memorial, p. 178 (para. 591).

[1472] Counter-Memorial, p. 158 *et seq.* (para. 434).

provincial authorities decided not to assess the GNLQ Project jointly. Relying on the evidence of Ms Bélanger and Mr Duquette, the Respondent indeed acknowledges that,

> "*ni l'Agence, ni le MELCC n'ont exprimé d'intérêt à procéder par commission d'examen conjoint pour mener leurs évaluations environnementales respectives du projet Énergie Saguenay au lancement des processus d'évaluation environnementale en décembre 2015 et janvier 2016*."[1473]

1027 As explained in Section 2.3.1.2 above, both levels of Government determining their responsibility in the EA of the GNLQ Project triggered the mandatory application of the Canada-Québec Agreement.[1474] Contrary to Ms Powell's contention,[1475] the Agency had advised other federal authorities in December 2015 that the Canada-Québec Agreement would apply to the EA of the GNLQ Project,[1476] without any reference to a purported difference in regime between the CEAA 1992 and the CEAA 2012. The MELCC and the Agency had even prepared a letter informing GNLQ that a joint assessment would be carried out. [1477]

1028 Accordingly, in the alternative to applying a single, federal EA of the GNLQ Project, federal and provincial authorities should have conducted a joint assessment of the GNLQ Project under the Canada-Québec Agreement. Their failure to do so amounts to a breach of Article 1102.

4.2.2.2 Federal and provincial authorities treated the GNLQ Project less favourably in relation to GHG emissions

1029 In the Memorial, the Claimant explained how the Québec and federal EA processes, along with the subsequent rejections of the GNLQ Project, demonstrated inconsistent treatment as compared to other, similar

[1473] Counter-Memorial, p. 159 (para. 435).

[1474] Northey II, at **Exhibit CER-2 (Second)**, p. 27 *et seq*. (paras. 64-65).

[1475] Powell, at **Exhibit RER-3**, p. 13 (para. 24).

[1476] See Section 2.3.1.2 above. Northey II, at **Exhibit CER-2 (Second)**, p. 28 (para. 65).

[1477] Draft letter from the Agency and the MELCC to GNLQ, at **Exhibit C-0471-FRA** (emphasis added).

projects.[1478] The disparity of treatment is particularly pronounced with regard to GHG emissions, both at the provincial level[1479] and the federal level.[1480]

1030 [redacted][1481]

1031 The Respondent's attempts to differentiate comparable projects due to changes in Québec's and Canada's GHG emissions targets, differences in GHG emission levels between the comparable projects and the GNLQ Project, and the application of different EA regimes, are all unavailing.[1482]

1032 As explained below, each of the projects identified by the Claimant is comparable to the GNLQ Project. However, both the Québec and Federal Government treated the GNLQ Project differently compared to those projects. Both levels of Government found these comparable projects to be environmentally acceptable or considered that the significant adverse impacts of the GHG emissions were justified. However, only the GNLQ Project was subject to unprecedented and unattainable requirements as to its GHG emissions. This included requiring GNLQ to prove the substitutive impact of its LNG on global GHG emissions and that the GNLQ Project would reduce global GHG emissions. As a result, both levels of Government refused to authorise the GNLQ Project.

[1478] Memorial, p. 146 (paras. 468-469) and p. 148 *et seq.* (paras. 475-545).

[1479] Memorial, p. 148 *et seq*. (paras. 475-506).

[1480] Memorial, p. 156 *et seq.* (paras. 507-545).

[1481] [redacted] at **Exhibit C-0280-FRA**. See Memorial, p. 98 (para. 298). See also Section 2.5.4.2 above.

[1482] Counter-Memorial, p. 109 *et seq*. (paras. 298-301).

(i) The Québec Government accorded the GNLQ Project less favourable treatment than it accorded the Blackrock Metals project in its assessment of GHG emissions

1033 As explained in the Memorial, the Blackrock Metals project (approved in in April 2019)[1483] concerned the construction and operation of an iron concentrate processing facility at the Port of Saguenay.[1484] In February 2019, the MELCC concluded that the Blackrock Metals project was acceptable from an environmental point of view and recommended that it be approved,[1485] which the Québec Government did in April 2019.[1486]

1034 It is not in dispute that the project proponent, Blackrock Metals (a.k.a. Métaux BlackRock inc.), is a Canadian enterprise.[1487] Therefore, Article 1102 applies.

1035 In several respects, Québec's treatment of the Blackrock Metals project was more favourable than its treatment of the GNLQ Project:

- In calculating that the Blackrock Metals project would emit 395,000 tonnes of GHG emissions annually during operations,[1488] the MELCC counted only emissions from the processing facility itself and from the transportation of the concentrate and other input products to the facility.[1489] The MELCC did not consider **at all** the potential GHG emissions arising from the **downstream** transportation and use of the products or by-products generated by the processing facility.[1490]

[1483] Memorial, p. 154 (paras. 499).

[1484] Memorial, p. 154 *et seq.* (para. 499).

[1485] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. v.

[1486] Government of Québec, Decree 372-2019 concerning the issuance of an authorisation to Métaux BlackRock inc. for a project to convert iron concentrate into pig iron and ferrovanadium in the City of Saguenay dated 3 April 2019, at **Exhibit C-0356-FRA**.

[1487] Memorial, p. 154 *et seq.* (para. 499).

[1488] Memorial, p. 154 *et seq.* (para. 499).

[1489] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 13.

[1490] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 13-14.

- The MELCC acknowledged that Blackrock's processing facility would contribute to global GHG emissions. However, it did not seek to quantify the net impact of the process or even consider it as a drawback to the proposed project. Instead, the MELCC merely stated: "*le fait que celle-ci puisse être construite au Québec assure une prise en compte et un encadrement de cet enjeu.*"[1491]

- Unlike GNLQ,[1492] Blackrock did not commit to offset its GHG emissions, nor did it conduct a lifecycle assessment of the impact of its products on GHG emissions.[1493] It merely proposed certain mitigation measures and "*rester à l'affût de nouvelles mesures de reduction*".[1494] This was sufficient to convince the MELCC that the project was compliant with Québec's target of reducing GHG emissions by 37.5% by 2030 from 1990 levels (the same GHG emissions target in place when Québec assessed the GNLQ Project).[1495]

1036 In sum, the MELCC found the Blackrock Metals project to be environmentally acceptable, and Québec approved the project, without having subjected it to any scrutiny as to the GHG emissions resulting from the downstream use of its products and despite acknowledging that it would be a source of global GHG emissions. The Québec Government also invested CAD 248 million in the Blackrock Metals project and later became a 50% shareholder in that project.[1496]

[1491] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 14.

[1492] See paragraph 53 above; Memorial, p. 60 (paras. 162-163).

[1493] Memorial, p. 155 (para. 501); MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 13-14.

[1494] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 14.

[1495] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 14.

[1496] Illich I, at **Exhibit CWS-1**, p. 20 *et seq.* (para. 45); La Presse, "*Secteur minier Feu vert de Québec au rachat de Métaux BlackRock*" dated 25 May 2022, at **Exhibit JI-0024-ENG-FRA**; Investissement Québec, "*Québec investit 248 M$ dans la réalisation du projet de Métaux BlackRock et le développement du secteur Grande Anse*" dated 21 August 2018, at **Exhibit JI-0025-ENG-FRA**.

1037 In breach of Article 1102, Québec treated the GNLQ Project far less favourably:

- When it came to the GNLQ Project, the MELCC scrutinised in detail, albeit in a speculative and flawed manner, the net impact of the project on global GHG emissions.[1497]
- It concluded that the GNLQ Project was not environmentally acceptable, in part on the basis of GNLQ's alleged failure to prove that the downstream consumption of its LNG production would result in a net reduction of global GHG emissions.[1498]
- The Québec Government refused to authorise the GNLQ Project on that same basis.[1499]

1038 The Respondent's attempts in its Counter-Memorial to deny this clear disparity in treatment is baseless.

1039 **First**, the Respondent denies that the MELCC required GNLQ to demonstrate that consumption of its LNG would lead to a net reduction in GHG emissions downstream. It asserts that the MELCC only addressed this issue in its assessment because GNLQ had raised it, and accuses GNLQ of "*une tentative de verdir son projet*".[1500]

1040 That is a self-serving attempt to rewrite history. As explained above in Section 2.5.3, Minister Charette declared publicly on 24 March 2021 that GNLQ was required to demonstrate that it would reduce net global GHG emissions as one of the three "core criteria" the Project had to meet. It is correct that the MELCC Directive itself had never requested GNLQ to address that criterion. However,

- the purpose of the MELCC Directive was precisely to set out the outer limits of the EA and thus of the Québec Government's decision; that the MELCC Directive did not mention downstream GHG emissions

[1497] Memorial, p. 155 *et seq.* (paras. 504-505). See Section 2.5.4.3(i) above.

[1498] Memorial, p. 155 *et seq.* (paras. 504-505). See Section 2.5.4.3(i) above.

[1499] Memorial, p. 100 *et seq.* (para. 308). See paragraph 321 above.

[1500] Counter-Memorial, p. 122 *et seq.* (para. 334).

meant that the Québec Government could not make a decision on whether to accept or reject the GNLQ Project on that basis;

- as explained by Mr Le Verger, the fact that GNLQ's EIS contained information not expressly requested in the MELCC Directive was not intended to broaden the scope of the EA, but to be as exhaustive as possible and anticipate questions by the MELCC;[1501] and
- the fact that Québec imposed this requirement at the last minute only serves to demonstrate how unfavourable the treatment of the GNLQ Project by Quebec was relative to that of the Blackrock Metals project.

1041 **Second**, the Respondent seeks to justify the MELCC's conclusions on the GNLQ Project by reference to the studies mentioned in the MELCC Report.[1502] This confirms the Claimant's point. Regardless of its analysis (which was, in any event, flawed), the MELCC did not subject the Blackrock Metals project to any such scrutiny, despite it having potentially significant downstream GHG emissions.

1042 **Third**, the Respondent seeks to distinguish the circumstances of the GNLQ Project from those of the Blackrock Metals project, on the basis that the GNLQ Project would have produced LNG whereas the Blackrock Metals project produces high-purity pig iron and ferrovanadium (among other by-products).[1503] According to the Respondent, this is relevant because the raw material produced by the Blackrock Metals project "*n'émet pas des GES lors sa consommation*".[1504]

1043 However, that is incorrect. As the MELCC would have discovered had it scrutinised this issue when assessing the Blackrock Metals project, one of the primary uses of pig iron is the manufacturing of steel **by burning off its carbon content**.[1505] Ferrovanadium is also predominantly used to make

[1501] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 27 *et seq*. (paras. 77-81).

[1502] Counter-Memorial, p. 123 (para. 335).

[1503] Counter-Memorial, p. 123 *et seq*. (paras. 336-337).

[1504] Counter-Memorial, p. 123 *et seq*. (para. 336).

[1505] "Steel industry emissions are a big contributor to climate change. Can it go green?", *Science AAAS*, 1 May 2024, at **Exhibit C-0604-ENG**, p. 1. See also Le Verger II, at **Exhibit CWS-3 (Second)**, p. 35 (para. 110).

high strength steel.[1506] It is well known that, as a result, steel production is a significant source of GHG emissions, accounting for **7% of all human GHG emissions globally**.[1507] Moreover, unlike natural gas molecules, which can only be burned for energy once, industrial metals such as pig iron, ferrovanadium and titanium are often re-used or reprocessed over decades in ways that generate further GHG emissions,[1508] including in the aerospace, automotive and construction sectors that the Blackrock Metals project was intended to supply.[1509]

1044 Therefore, contrary to the Respondent's argument,[1510] the distinction in the raw materials produced by the respective processing plants in this context is immaterial. Both the GNLQ Project and the Blackrock Metals project involved the processing of natural resources for distribution to national and international markets which, upon their downstream use, would generate GHG emissions. Those are sufficiently "like circumstances" for the purpose of Article 1102. The Respondent's ignorance as to the downstream impact of the Blackrock Metals project in its Counter-Memorial only serves to underscore the much more stringent standard to which it held the GNLQ Project.

(ii) The Québec Government accorded the GNLQ Project less favourable treatment than it accorded the Stolt LNGaz project in its assessment of the substitutive effect of LNG on GHG emissions

1045 As explained in the Memorial, the purpose of the Stolt LNGaz project (approved in August 2015),[1511] was to construct and operate a natural gas

[1506] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 35 (para. 110). A 2022 information memorandum concerning the Blackrock Metals project confirmed that the steel-making industry is the primary market for its pig iron, vanadium and titanium products: Deloitte, BlackRock Metals Reorganization Opportunity dated 10 January 2022, at **Exhibit C-0605-ENG**, p. 2 (Market Dynamics).

[1507] "Steel industry emissions are a big contributor to climate change. Can it go green?", *Science AAAS*, 1 May 2024, at **Exhibit C-0604-ENG**.

[1508] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 35 *et seq*. (paras. 111-112).

[1509] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 10 (s. 3.1).

[1510] Counter-Memorial, p. 123 *et seq*. (paras. 336-337).

[1511] See Memorial, p. 153 (para. 493).

liquefaction plant in Québec – similar to the GNLQ Project.[1512] It was expected to produce 1 million tonnes of LNG and emit 31,000 tonnes of GHG emissions per year during its operational phase.[1513]

1046 In the Counter-Memorial, the Respondent notes that the Stolt LNGaz project is owned by third-State joint venture partners, and the Claimant agrees.[1514] It argues that, accordingly, the Claimant cannot rely on Article 1102 NAFTA in respect of Québec's treatment of the Stolt LNGaz project. That is incorrect. The joint venture company and project proponent itself was Stolt LNGaz Inc.,[1515] a company incorporated in Québec.[1516] Therefore, Article 1102 applies (in addition to Article 1103).

1047 As explained below, Québec's treatment of the Stolt LNGaz project was more favourable than that accorded to the GNLQ Project:

- As explained in the Memorial, the MELCC identified GHG emissions as one of the six "key issues" for the Stolt LNGaz project, but dedicated less than one page to the issue,[1517] limiting its analysis to GHG emissions generated directly by the project (and not considering downstream emissions).[1518]
- The MELCC accepted at face value Stolt LNGaz Inc.'s statement that its LNG could have, by substitution, reduced GHG emissions in

[1512] Memorial, p. 153 (paras. 493-494).

[1513] Memorial, p. 153 (para. 493).

[1514] Counter-Memorial, p. 104 (para. 283).

[1515] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. I.

[1516] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. 3; Québec Registre des Enterprises, Stolt LNGaz Inc., accessed 13 March 2025, at **Exhibit C-0606-FRA**.

[1517] Memorial, p. 153 *et seq*. (para. 495); see also MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. iii and p. 20 *et seq.* (s. 3.4.3).

[1518] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. 20 (s. 3.4.3).

Québec by 600,000 tonnes per year (assuming Stolt LNGaz Inc. distributed 50% of its maximum production within the province).[1519]

- The MELCC found the Stolt LNGaz project to be environmentally acceptable and Québec authorised the project in August 2015.[1520]

1048 The Respondent does not appear to dispute that this treatment was more favourable than that which it accorded the GNLQ Project.[1521] Instead, the Respondent argues that its treatment of the Stolt LNGaz project was not in like circumstances within the meaning of Articles 1102 and 1103 NAFTA.[1522] However, its arguments do not withstand scrutiny.

1049 **First**, the Respondent argues that the MELCC accepted the substitutive impact of LNG supplied by the Stolt LNGaz project but not the GNLQ Project because of the different markets they were intended to supply. According to the Respondent, the Stolt LNGaz project was intended to supply customers in Québec that were not already connected to the natural gas distribution network, whereas the GNLQ Project was intended to supply international customers.[1523]

1050 Even if the assumptions underpinning that argument were correct, *quod non*, the argument would not assist the Respondent. The point is not whether the MELCC's divergent conclusions were justified on the basis of distinct facts; rather, that the MELCC's **approach** to scrutinising the evidence of the two projects' impacts differed. The MELCC did not meaningfully test Stolt LNGaz Inc.'s views as to the substitutive impact of its LNG; it simply accepted them, based on the fact that Stolt LNGaz Inc. had an export licence for only 500,000 tonnes of LNG per year (*i.e.*, half

[1519] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. 20 (s. 3.4.3).

[1520] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. v; Government of Québec, Decree 719-2015, concerning the issuance of an authorisation to Stolt LNGaz Inc. for the construction of a natural gas liquefaction facility within the territory of the City of Bécancour dated 19 August 2015, at **Exhibit C-0354-FRA**.

[1521] Counter-Memorial, p. 118 *et seq.* (paras. 322-331).

[1522] Counter-Memorial, p. 118 *et seq.* (para. 323).

[1523] Counter-Memorial, p. 119 (paras. 324-325).

of its maximum production).[1524] Had the MELCC treated the GNLQ Project in the same way, it would have found its GHG emissions acceptable.[1525]

1051 **Second**, and in any event, the Respondent's assertion that the Stolt LNGaz project and the GNLQ Project would supply different markets is incorrect. The MELCC acknowledged in its assessment report that Stolt LNGaz Inc. intended to supply markets outside Québec, including international markets. Indeed, unless Stolt LNGaz Inc. built a second liquefaction unit, which it would only do "*si le marché le permet*", Stolt LNGaz Inc. could export up to 100% of the LNG it produced.[1526] The MELCC did not require Stolt LNGaz Inc., unlike GNLQ,[1527] to identify specific customers to whom it would sell its LNG, to determine the acceptability of its GHG emissions.[1528]

1052 Conversely, the Respondent's suggestion that the GNLQ Project only intended to supply international markets is also false.[1529] As Mr Le Verger explains, GNLQ envisaged supplying customers in Québec, as it explained in its EIS.[1530] Had the GNLQ Project supplied just 5% of its LNG production to customers in Québec, it would have generated a net reduction in GHG emissions of 600,000 tonnes per year in Québec – more than enough to offset the entirety of the GHG emissions in Québec.[1531] In contrast to its assessment of the Stolt LNGaz project, the MELCC purposely elected not to consider the substitutive effect of GNLQ's LNG

[1524] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. 20 *et seq.* (s. 3.4.3).

[1525] For the same reason, the Respondent's contention that the MELCC's 20-page assessment of GNLQ's GHG emissions was merely in response to the volume of material GNLQ submitted in support of its application does nothing to assist its defence: see Counter-Memorial, p. 121 (para. 330).

[1526] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. 2 *et seq.* (ss. 1 and 1.1).

[1527] MELCC Report, at **Exhibit C-0269-FRA**, p. 52. See Memorial, p. 154 (para. 497).

[1528] MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. 20 *et seq.* (s. 3.4.3).

[1529] Counter-Memorial, p. 119 *et seq.* (para. 326).

[1530] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 8 *et seq.* (paras. 16-21); EIS, at **Exhibit C-0043-FRA**, p. 7, p. 15, p. 57, p. 628.

[1531] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 11 (para. 20).

in Québec in its assessment, despite it being, in essence, an **identical** factor in favour of both projects.[1532]

1053 **Third**, the Respondent argues that the MELCC did not assess the two projects in "like circumstances" because Québec's GHG emissions target had changed between 2015 when it assessed the Stolt LNGaz project and 2021 when it assessed the GNLQ Project.[1533] This argument does not withstand scrutiny, for the following reasons:

- The emissions targets were, contrary to Canada's assertions, almost equivalent on a per-year basis. As at 2015, Québec's target was to reach 20% below its 1990 emissions levels by 2020, *i.e.*, a reduction of around **2.3 Mt per year**.[1534] As at 2021, its target was to reach 37.5% below its 1990 levels by 2030, *i.e.*, a reduction of around **2.9 Mt per year**.[1535]
- Regardless of the precise targets, in both cases the MELCC was faced with the question of whether LNG to be produced by a liquefaction plant would reduce emissions (by substitution), in circumstances where Québec was seeking to reduce its overall emissions.

1054 **Fourth**, the Respondent seeks to justify its divergent treatment of the projects on the basis that the GNLQ Project would have produced a higher gross volume of GHG emissions than the Stolt LNGaz project.[1536] This is another misleading statistical comparison given that the GNLQ Project

[1532] See [redacted] at **Exhibit CD-0250-FRA**, p. 1 (Avis 2).

[1533] Counter-Memorial, p. 120 *et seq.* (paras. 327-328, 330).

[1534] This is calculated by dividing by five the difference between Québec's actual emissions in 2014 (78,635,940.27 tonnes: see Inventory of GHGs in Québec, 1990 to 2022, downloaded from https://open.canada.ca/data/en/dataset/08fbecd2-2532-408a-b153-ab00bad3ff31 (downloaded on 16 March 2021), at **Exhibit C-0607-FRA**, sum cells E1162-1210) and its emissions target by 2020 (67,100,000 tonnes: see **R-0071-FRA**, p. 47).

[1535] This is calculated by dividing by ten the difference between Québec's actual emissions in 2019 (82,610,247.6 tonnes: see **Exhibit C-0607-FRA**, sum cells E1407-1455) and its emissions target by 2030 (54,000,000 tonnes: see Counter-Memorial, p. 111 (para. 300); MELCC Report, at **Exhibit C-0269-FRA**, p. 42. The emissions in 2020 (74,220,599.9 tonnes) are not used as they are assumed to be anomalous due to Covid-19, but if used would produce a per-year reduction target of 2.2 Mt.

[1536] Counter-Memorial, p. 120 (para. 328).

would have produced 10.5 times the volume of LNG than the Stolt LNGaz project.[1537] On a per-tonne LNG basis, the amounts of GHG emissions were similar.[1538]

1055 **Finally**, the Respondent argues that the EAs of the two projects were not conducted in "like circumstances" because of legislative amendments (after the Stolt LNGaz project assessment), which required the Minister of Environment to consider GHG emissions in his/her analysis of the impacts of a project on the environment.[1539] This distinction is not relevant given that, regardless of whether the Minister was mandated to consider GHG emissions of the Stolt LNGaz project, the MELCC did in fact consider those emissions a "key issue".[1540]

1056 In sum, contrary to the Respondent's attempts to distinguish the two projects, Québec assessed and refused the GNLQ Project in like circumstances to those in which it assessed and authorised the Stolt LNGaz project. The MELCC's refusal to accept GNLQ's evidence that the GNLQ Project would reduce global GHG emissions or to acknowledge that its plan to supply of LNG locally would reduce GHG emissions in Québec, and the Québec Government's resulting refusal of the GNLQ Project, breached Articles 1102 and 1103.

[1537] MELCC Report, at **Exhibit C-0269-FRA**, p. 3 (s. 1.2.2); MELCC Report for Stolt LNGaz project, at **Exhibit C-0355-FRA**, p. 2.

[1538] The MELCC accepted that the Stolt LNGaz project would produce 31,000 tonnes of GHG emissions for 1,000,000 tonnes LNG per year (*i.e.*, 0.031 tGHG/tLNG): MELCC Report for Stolt LNGaz project, at **Exhibit C-0355-FRA**, p. 20 *et seq.* (s. 3.4.3). It assessed that 453,130 tonnes of GHG emissions would be attributable to the GNLQ Project, which would produce for 10,500,000 tonnes LNG per year (*i.e.*, 0.043 tGHG/tLNG): MELCC Report, at **Exhibit C-0269-FRA**, p. 38 and p. 75.

[1539] Counter-Memorial, p. 120 *et seq*. (para. 329).

[1540] Memorial, p. 153 *et seq.* (para. 495); MELCC, Environmental Assessment Report for Stolt LNGaz project dated 6 August 2015, at **Exhibit C-0355-FRA**, p. iii.

(iii) The Québec Government accorded the GNLQ Project less favourable treatment than it accorded the Cacouna LNG and Rabaska LNG projects in its assessment of the substitutive effect of LNG on GHG emissions

1057 The Claimant explained in the Memorial that the Québec Government authorised the Cacouna LNG project (in June 2007)[1541] and the Rabaska LNG project (in October 2007),[1542] two proposed LNG import terminals and related shipping and port facilities on the St. Lawrence River, in June and October 2007, respectively. [1543] In the Counter-Memorial, the Respondent argues that its treatment of the Cacouna and Rabaska LNG projects was not in "like circumstances" to its treatment of the GNLQ Project, because Québec's policies regarding GHG emissions had changed between 2007 and 2021.[1544] Accordingly, it argues, Québec's treatment of these projects cannot form the basis of the Claimant's claims under Articles 1102 and 1103.[1545]

1058 The Claimant accepts that Québec's EAs of the Cacouna and Rabaska LNG projects were carried out under different legislation regarding GHG emissions. [1546] However, as explained in Section 4.2.1.3 above, the Claimant does not have to prove identical circumstances to establish that a project is a valid comparator. The Cacouna and Rabaska LNG projects were sufficiently similar to the GNLQ Project as they involved LNG processing facility and ports on the St. Lawrence River,[1547] regardless of the differences in legislation.

1059 Québec's treatment of the Cacouna and Rabaska LNG projects demonstrates its long-standing view that LNG reduces emissions by replacing more polluting fossil fuels. As explained in the Memorial, with both projects, Québec accepted that the increased use of natural gas

[1541] Memorial, p. 148 (para. 477).

[1542] Memorial, p. 150 (para. 485).

[1543] Memorial, p. 148 *et seq.* (paras. 477, 485-486).

[1544] Counter-Memorial, p. 113 *et seq.* (paras. 308-314).

[1545] Counter-Memorial, p. 118 (para. 320).

[1546] See Counter-Memorial, p. 114 *et seq.* (para. 313).

[1547] See Memorial, p. 149 *et seq.* (paras. 477-478, 486).

resulting from the import of LNG (through the envisaged import terminals) would lead to a reduction of GHG emissions both in Québec and internationally (in the U.S.).[1548] The same principle should apply to the use of natural gas resulting from liquefaction terminals such as that of the GNLQ Project; furthermore, as explained above, GNLQ intended to supply both Québec and international markets.[1549]

1060 For these reasons, the Respondent's different treatment of the GNLQ Project as compared to the Rabaska and Cacouna LNG projects amounts to a breach of Articles 1102 and 1103 NAFTA.

(iv) The Federal Government accorded the GNLQ Project less favourable treatment than it accorded the LNG Canada project, which it approved despite similar conclusions on GHG emissions

1061 In the Memorial, the Claimant explained that Canada approved the LNG Canada project in June 2015.[1550] That project entailed the construction and operation of a natural gas liquefaction plant and marine terminal in northwest British Columbia ("**BC**") – in other words, a western Canada equivalent to the GNLQ Project.[1551] The LNG Canada project's forecasted GHG emissions were **3.96 million** tonnes per year of operations: **eight times** those of the GNLQ Project (489,000 tonnes) and four times the GNLQ Project's GHG emissions per unit of LNG produced.[1552]

1062 Despite the conclusion of the BC Environmental Assessment Office ("**EAO**"), in its EA of the LNG Canada project,[1553] that the GHG emissions

[1548] Memorial, p. 149 *et seq.* (paras. 480, 489); see also MELCC, Environmental Assessment Report for Rabaska Project dated 19 October 2007, at **Exhibit C-0351-FRA**, p. 34.

[1549] See paragraph 1052 above; Le Verger II, at **Exhibit CWS-3 (Second)**, p. 8 *et seq.* (s. 2.2).

[1550] Memorial, p. 157 (para. 509).

[1551] Memorial, p. 157 (para. 509); Counter-Memorial, p. 144 (para. 340).

[1552] BC EAO, Environmental Assessment Report for LNG Canada Export Terminal project dated 6 May 2015, at **Exhibit C-0358-ENG**, p. 60; Northey I, at **Exhibit CER-2**, p. 57 *et seq.* (paras. 167, 173); Memorial, p. 157 *et seq.* (paras. 509, 514).

[1553] As Mr Northey explains in his second report, the substitution mechanism permits the Federal Government to allow a province to conduct an EA, which the Federal Government deems to be a federal EA for the purposes of making an ultimate federal decision on whether to approve a project: Northey II, at **Exhibit CER-2 (Second)**, p. 30 *et seq*. (para. 70). See also

of the LNG Canada project would have a "significant residual adverse effect", the Federal Government approved it, deciding that "the significant adverse environmental effects (…) are justified in the circumstances."[1554] In contrast, the Federal Government refused to authorise the GNLQ Project, finding that its purportedly significant adverse effects, also in part relating to GHG emissions, were not justified.[1555]

1063 The Respondent does not advance any arguments to explain this disparity in treatment. Instead, it seeks to escape responsibility under Articles 1102 and 1103 NAFTA by invoking legal technicalities, but to no avail.

1064 **First**, the Respondent incorrectly asserts that the LNG Canada project is not owned by a Canadian company.[1556] The project proponent, LNG Canada Development Inc., is a Canadian company registered in Calgary, Alberta.[1557] The Respondent is, however, correct that LNG Canada Development Inc. was, in turn, owned by a consortium of four third-State investors from the United Kingdom,[1558] Japan, Korea and China.[1559] Therefore, contrary to the Respondent's arguments, the Claimant can rely on both Articles 1102 and 1103 in respect of the treatment Canada accorded to the LNG Canada project.[1560]

1065 **Second**, the Respondent argues that the BC EAO did not treat the LNG Canada project more favourably than the Agency treated the GNLQ Project because in both instances the regulator made a finding of significant adverse effects. That is beside the point: the Federal Government approved the LNG Canada project **despite** that finding, in

CEAA 2012, at **Exhibit RN-0012-ENG**, p. 11 *et seq.* (ss. 32-36); Impact Assessment Act, at **Exhibit DO-0010-ENG-FRA**, p. 24 *et seq.* (ss. 31-35).

[1554] Decision Statement authorising LNG Canada Export Terminal project dated 17 June 2015, at **Exhibit C-0357-ENG**, p. 2.

[1555] See Section 2.6.2 above.

[1556] Counter-Memorial, p. 104 (para. 282).

[1557] Government of Canada, Federal Corporation Information on LNG Canada Development Inc., at **Exhibit C-0608-ENG**.

[1558] Shell Canada Energy is a subsidiary of Shell plc, the latter being a company incorporated in the United Kingdom: Shell plc, Annual Report and Accounts, 2024, at **Exhibit C-0609-ENG**, p. 456.

[1559] See Counter-Memorial, p. 104 (para. 282).

[1560] See Counter-Memorial, p. 104 (para. 284).

direct contrast to the GNLQ Project where it did not. It is the latter treatment, not the BC EAO's actions, that gives rise to a breach of Articles 1102 and 1103.[1561]

1066 **Third**, the Respondent argues that "*aucune comparaison entre les deux projets n'est admissible*" under Article 1102, because the BC EAO conducted LNG Canada's EA under the federal substitution mechanism.[1562] It relies on Article 1102(3) NAFTA, under which provincial treatment must only be at least as favourable as the treatment that province grants to host-State investors. However, this point is moot because, as the Respondent recognises, regardless of Article 1102(3), Article 1103 also applies to Canada's treatment of the LNG Canada project by virtue of the latter's ownership by third-State investors.[1563]

1067 The restriction in Article 1102(3) does not apply, in any event. Under the substitution mechanism, the Federal Government permits a provincial regulator to conduct the EA process in the stead of the Agency but does not delegate the decision whether to authorise the project.[1564] The treatment under comparison in this instance is not the BC EAO's EA,[1565] but rather the Federal Government's decision to approve the LNG Canada project (**despite** the conclusions of that assessment), in contrast to its decision to refuse the GNLQ Project in similar circumstances. That disparity of treatment amounts to a breach of both Articles 1102 and 1103 NAFTA.

[1561] The Claimant acknowledges that paragraph 517 of the Memorial is inaccurate in this regard in saying that the EAO (as opposed to Canada) accorded more favourable treatment to LNG Canada.

[1562] Counter-Memorial, p. 125 *et seq.* (para. 342).

[1563] See paragraph 1064 above.

[1564] Northey II, at **Exhibit CER-2 (Second)**, p. 30 *et seq*. (para. 70).

[1565] In any event, as Mr Northey explains, the EA conducted by a province under the substitution mechanism is deemed to be a federal EA: Northey II, at **Exhibit CER-2 (Second)**, p. 30 *et seq*. (para. 70). Therefore, the distinction the Respondent seeks to draw between provincial and federal treatment under Article 1102(3) NAFTA is also moot because the BC EAO's assessment was federal in nature.

(v) The Federal Government accorded the GNLQ Project less favourable treatment than it accorded the Pacific NorthWest project, which it approved despite the Agency's conclusions on GHG emissions

1068 In the Memorial, the Claimant explained that the Federal Government approved the Pacific NorthWest project in September 2016.[1566] That project envisaged the construction of a natural gas liquefaction plant and marine terminal, as well as a storage facility, in Port Edward, BC.[1567] The Pacific NorthWest project's forecasted GHG emissions were even higher than those of the LNG Canada project; as explained in the Memorial, it was estimated to produce **4.5 million** tonnes of GHG emissions per year (without including upstream emissions, which would have been at least as significant as those of the GNLQ Project).[1568] This amounted to almost five times the GNLQ Project's GHG emissions per tonne of LNG produced (*i.e.*, 0.22 tonnes of GHG emissions per tonne of LNG for the Pacific NorthWest project, versus 0.047 tonnes of GHG emissions per tonne of LNG for the GNLQ Project).[1569]

1069 The Respondent does not dispute that the Pacific NorthWest project was owned by third-State investors.[1570] Therefore, Article 1103 applies.

1070 Canada's treatment of the Pacific NorthWest project was similar to its treatment of the LNG Canada project:

- the Agency conducted the EA of the Pacific NorthWest project and concluded that it was likely to cause significant adverse environmental effects;[1571]

[1566] Memorial, p. 159 (para. 518).

[1567] Memorial, p. 159 (para. 518); Counter-Memorial, p. 126 (para. 344).

[1568] Memorial, p. 159 *et seq.* (paras. 520-521).

[1569] BC EAO, Environmental Assessment Report the Pacific NorthWest project, at **Exhibit C-0361-ENG**, p. 37. See paragraph [344] below.

[1570] Memorial, p. 159 (para. 518).

[1571] Memorial, p. 160 (para. 522); BC EAO, Environmental Assessment Report the Pacific NorthWest project, at **Exhibit C-0361-ENG**, p. 179 (s. 10).

- the Federal Government nevertheless authorised the Pacific NorthWest project, finding that the adverse environmental effects were justified in the circumstances;[1572]
- instead of refusing the project, the Government addressed the Agency's concerns regarding GHG emissions by including conditions and mitigation measures designed to ensure Pacific NorthWest did not exceed the GHG emissions (and emissions per unit of LNG) that it had forecasted.[1573]

1071 As with the Pacific NorthWest project, the Federal Government could have included measures to mitigate the possible impacts of the GNLQ Project on GHG emissions but instead refused the project altogether, in breach of Article 1103.

1072 The Respondent denies that the Agency assessed the two projects in "like circumstances", because Canada's GHG emissions targets changed between September 2016 and November 2021.[1574] However, as the Respondent acknowledges, the Agency "*a tout de même utilisé la même approche pour évaluer les émissions de GES des deux projets et est parvenue à la même conclusion*".[1575]

1073 The relevant treatment at issue is that of the Federal Government, not the Agency. As with LNG Canada, the Federal Government's rejection of the GNLQ Project on GHG-related grounds – even though it had approved the Pacific NorthWest project **despite** the Agency's similar conclusions regarding GHG emissions – constitutes less favourable treatment in breach of Article 1103.[1576]

[1572] Decision Statement authorising Pacific NorthWest dated 27 September 2016, at **Exhibit C-0610-ENG**, p. 2.

[1573] Decision Statement authorising Pacific NorthWest dated 27 September 2016, at **Exhibit C-0610-ENG**, p. 9 *et seq.* (s. 3).

[1574] Counter-Memorial, p. 127 *et seq*. (paras. 346-349).

[1575] Counter-Memorial, p. 128 (para. 349).

[1576] The Claimant acknowledges that paragraph 525 of the Memorial inaccurately states that the CEAA (as opposed to Canada) accorded more favourable treatment to Pacific NorthWest.

(vi) The Federal Government accorded the GNLQ Project treatment less favourable than it accorded the North Shore Terminal project in its assessment of global GHG emissions

1074 As explained in the Memorial, the North Shore Terminal project (authorised in October 2018)[1577] concerned the construction of a marine terminal on the north shore of the Saguenay River by a Canadian federal public enterprise.[1578] Therefore, it is undisputed that Article 1102 applies.

1075 As explained in the Memorial, the federal authorities found the North Shore Terminal project to be environmentally acceptable and approved it, despite the Agency's finding that it would result in 108,700 tonnes of GHG emissions per year of operation:[1579]

- The Agency concluded that the direct and indirect GHG emissions would be "low", and that the project was not likely to cause significant adverse effects.[1580]
- The Agency did not assess the net effect of the project on global GHG emissions, other than to note that "the GHG emissions are global in nature, long-term and irreversible because of the persistence of CO_2 in the atmosphere."[1581]
- The Federal Government authorised the project in October 2018.[1582]

1076 The Respondent does not dispute that its treatment of the North Shore Terminal project was more favourable than its treatment of the GNLQ Project. However, it argues that the projects were not in "like circumstances" because the GHG emissions to be generated by the GNLQ Project were higher than for the North Shore Terminal project.[1583]

[1577] See Memorial, p. 161 (para. 526).

[1578] Memorial, p. 161 (paras. 526-527).

[1579] Memorial, p. 161 (para. 526).

[1580] Memorial, p. 161 (paras. 528-529); Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 67 (s. 7.1.4).

[1581] Minister of Environment and Climate Change Canada, Decision Statement for the North Shore Terminal project, at **Exhibit C-0363-ENG**, p. 67 (s. 7.1.4).

[1582] Memorial, p. 161 (para. 526).

[1583] Counter-Memorial, p. 129 (para. 355).

1077 However, as explained above, the "like circumstances" requirement does not demand that the comparator project be identical to the GNLQ Project.[1584] The two projects involved sufficiently comparable volumes of GHG emissions and, in both cases, the Agency acknowledged that the projects would have an impact on global GHG emissions. The relevant differences are that:

- the Agency did not assess the impact of the North Shore Terminal project on global GHG emissions; and
- it found the North Shore Terminal project to be environmentally acceptable **despite** its GHG emissions, whereas it found that the GNLQ Project was likely to cause significant adverse environmental effects because of its purported impact on global GHG emissions.

1078 In other words, the difference between the two projects is how the Agency treated them, and that difference in treatment amounts to a breach of Article 1102.

(vii) The Federal Government accorded the GNLQ Project treatment less favourable than the Bay du Nord project in its assessment of GHG emissions

1079 The Bay du Nord project (authorised in April 2022)[1585] is a further example of the Agency finding a high-emitting project to be environmentally acceptable in like circumstances to the GNLQ Project. As the Claimant explained in the Memorial, the Bay du Nord project is an offshore oil project in the waters off Newfoundland and Labrador.[1586] Since the Bay du Nord project is owned by third-State investors, Canada should have accorded the GNLQ Project equivalent treatment to the Bay du Nord project under Article 1103.[1587]

[1584] See Section 4.2.1.3 above.

[1585] Memorial, p. 162 (para. 531).

[1586] Memorial, p. 162 (para. 531).

[1587] See Memorial, p. 162 (para. 531).

1080 As also explained in the Memorial, the difference in the Agency's assessment of the GHG emissions of the two projects was stark:[1588]

- The Agency issued its EA report for the Bay du Nord project in December 2021, concluding that the project was not likely to cause significant adverse environmental effects, if certain mitigation measures were implemented.[1589]
- The Agency did not assess the Bay du Nord project's contribution to global GHG emissions; nor did it consider the downstream emissions from the use of Bay du Nord's oil (which, as is trite, would have been more emitting and have no substitutive effect compared with LNG).[1590]
- In fact, the Agency did not consider GHG emissions as a standalone "valued component" of its assessment of the Bay du Nord project, as it did with the GNLQ Project; rather, GHG emissions only formed a part of the analysis concerning "Air Quality".[1591]
- The Federal Government in turn approved the Bay du Nord project in April 2022.[1592]

1081 The much stricter standards the Agency applied to the GNLQ Project constituted less favourable treatment than that which it accorded to the Bay du Nord project in breach of Article 1103.

1082 The Respondent's attempts in the Counter-Memorial to deny its breach of Article 1103 are without merit.

1083 **First**, the Respondent denies that it treated the Bay du Nord project more favourably than the GNLQ Project because, it asserts, it did not take downstream emissions into account in its EA of the GNLQ Project.[1593]

[1588] Memorial, p. 162 *et seq*. (paras. 533-537).

[1589] Agency, Environmental Assessment Report for Bay du Nord (December 2021), at **Exhibit C-0365-ENG**, p. iv.

[1590] Memorial, p. 162 *et seq*. (paras. 533-536).

[1591] Agency, Environmental Assessment Report for Bay du Nord (December 2021), at **Exhibit C-0365-ENG**, p. 94-99.

[1592] Minister of Environment and Climate Change Canada, Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012 for the Bay du Nord Development Project dated 6 April 2022, at **Exhibit C-0364-ENG**.

[1593] Counter-Memorial, p. 131 *et seq*. (para. 363).

That assertion is undermined by the Agency's report for the GNLQ Project, which included a full subsection addressing the "End use of Liquified Natural Gas".[1594] Therein, the Agency largely parroted the (flawed) conclusions of the MELCC's EA report on the alleged lack of certainty regarding the substitutive effect of GNLQ's LNG and its ability to reduce global GHG emissions.[1595]

1084 Therefore, although the Agency did not expressly state the extent to which its downstream emissions analysis had affected its conclusions, the Respondent cannot deny that the Agency took into account the downstream GHG emissions of the GNLQ Project in its overall assessment – in contrast to Bay du Nord. This fact has been confirmed by Canada's production of internal Agency emails showing that downstream emissions were "factors to be considered for the decision" even though they "were not included in the [subsection on the] significance of the effect".[1596]

1085 **Second**, the Respondent argues that the Agency's assessment of the Bay du Nord project was not in like circumstances to that of the GNLQ Project.[1597] It asserts that the anticipated annual GHG emissions of the GNLQ Project were higher than those of the Bay du Nord project and would have formed a higher percentage of Canada's GHG emissions.[1598]

1086 However, that assertion is based on the incorrect figures lifted from the Agency's report on the Bay du Nord project. Contrary to the Respondent's allegations in the Counter-Memorial, the Agency found that the Bay du Nord project would emit up to **309,407 tonnes** of GHG emissions (not 178,000 to 258,000 tonnes), which would constitute **0.04%** of Canada's total GHG emissions (not 0.03%).[1599] Those figures are sufficiently comparable to the GNLQ Project's figures (489,000 tonnes of GHG

[1594] Agency Report, at **Exhibit C-0037-ENG**, p. 42-43.

[1595] Agency Report, at **Exhibit C-0037-ENG**, p. 42-43.

[1596] Internal Agency email from B. Dubreuil to E. Landry, at **Exhibit C-0611-ENG-FRA**.

[1597] Counter-Memorial, p. 130 *et seq.* (paras. 361-362).

[1598] Counter-Memorial, p. 130 *et seq.* (para. 362).

[1599] Agency, Environmental Assessment Report for Bay du Nord (December 2021), at **Exhibit C-0365-ENG**, p. 97.

emissions, representing 0.07% of Canada's total emissions) [1600] to constitute like circumstances within the meaning of Article 1103. Furthermore, the Agency admitted after the approval of the Bay du Nord project that its assessment of the project's GHG emissions was only based on the project location and activity, but did not even include the amount of oil to be produced, which had increased from just 300,000 barrels to more than one billion barrels of oil during the course of the assessment.[1601]

1087 The emails mentioned above also confirm that the Agency considered the two projects similar. In an internal email dated 21 November 2021, the Agency's Director General of the Regional Operations Directorate, Mr Eric Landry, saw fit to request from his colleagues "key messages/talking points about why we conclude no significant GHG impacts on Bay du Nord and significant impact for Energie Saguenay."[1602] Mr Landry thus recognised that Agency had treated the GNLQ Project one way in November 2021 and was intending to treat the Bay du Nord project differently (which it did the following month, in December 2021).[1603]

(viii) The Federal Government accorded the GNLQ Project treatment less favourable than it accorded the Cedar LNG project in its assessment of GHG emissions and by rejecting the former but authorising the latter

1088 Like the LNG Canada and Pacific NorthWest projects, the Cedar LNG project (authorised in March 2023)[1604] is similar in nature to the GNLQ Project. In the Memorial, the Claimant explained that the Cedar LNG project concerns the construction and operation of an LNG processing

[1600] Agency Report, at **Exhibit C-0037-ENG**, p. 47.

[1601] "*Bay du Nord produirait plus de pétrole que prévu: des groupes dénoncent l'évaluation*", *La Presse Canadienne*, 4 June 2022, at **Exhibit C-0612-FRA**.

[1602] Internal Agency email from B. Dubreuil to E. Landry, at **Exhibit C-0611-ENG-FRA**, p. 2.

[1603] See Agency, Environmental Assessment Report for Bay du Nord (December 2021), at **Exhibit C-0365-ENG**.

[1604] Memorial, p. 164 (para. 538).

facility and marine export terminal in BC.[1605] The Cedar LNG project is owned by Canadian investors, meaning Article 1102 applies.

1089 Canada accorded more favourable treatment to the Cedar LNG project than the GNLQ Project given the following circumstances:

- The Agency found Cedar LNG's GHG emissions to be environmentally acceptable, leading the federal Minister of Environment to approve the project in March 2023 without even referring it to the Cabinet.[1606]
- Prime Minister Trudeau has since hailed Cedar LNG as a national success story. Indeed, after Cedar LNG achieved its positive FID in June 2024, Prime Minister Trudeau offered his personal congratulations to Cedar LNG for what he described as "the world's lowest carbon footprint LNG facility".[1607]
- In March 2025, the Federal Government announced that it would invest CAD 200 million into Cedar LNG.[1608]

1090 By contrast, the Agency concluded that the very similar levels of GHG emissions of the GNLQ Project were likely to cause significant adverse environmental effects and the Federal Government refused to authorise the GNLQ Project.

1091 The Respondent raises three arguments in its defence in the Counter-Memorial, none of which withstands scrutiny.

1092 **First**, the Respondent argues that Article 1102(3) NAFTA precludes a comparison between the BC EAO's EA of the Cedar LNG project and the Agency's EA of the GNLQ Project.[1609] However, that argument is flawed. Even though the BC EAO conducted Cedar LNG's EA, it did so in the

[1605] Memorial, p. 164 (para. 538).

[1606] See Memorial, p. 164 *et seq.* (paras. 538-545).

[1607] Cedar LNG, Press Release "Cedar LNG Announces Positive Final Investment Decision", 25 June 2024, at **Exhibit AK-0029-ENG**; Transcript of "Rt. Hon. Justin Trudeau, Prime Minister of Canada, congratulates Cedar LNG on Positive Final Investment Decision", Vimeo, 21 June 2024, at **Exhibit C-0453-ENG**.

[1608] Government of Canada, "Government of Canada announces support for Cedar LNG", 21 March 2025, at **Exhibit C-0454-ENG**; "Feds to contribute up to $200M for Haisla-led project to ship liquefied natural gas to Asia", *CBC News,* 21 March 2025, at **Exhibit C-0455-ENG**.

[1609] Counter-Memorial, p. 133 (para. 368).

exercise of federal, not only provincial, authority and as part of the federal decision-making process.[1610]

1093 As explained above and as Mr Northey explains in his second report, this EA was deemed to be a federal EA for the purposes of the Federal Government's authorisation decision.[1611] Furthermore, the BC EAO's EA took into account the input of federal agencies including the Agency and the ECCC.[1612] Accordingly, its conclusions do not constitute treatment by a province (*i.e.*, BC) within the meaning of Article 1102(3).[1613]

1094 In any event, the Federal Government did not delegate the decision whether to approve or reject the Cedar LNG project to the BC Government.[1614]

1095 **Second**, the Respondent disputes the application of Article 1102 on the basis of its reservation in Annex II of the NAFTA.[1615] That provision states that "Canada reserves the right to adopt or maintain any measure denying

[1610] See BC EAO, EA Report for the Cedar LNG Project, at **Exhibit C-0368-ENG**, p. 23 ("Cedar LNG is subject to an EA under B.C.'s Environmental Assessment Act (2002) […] **and the Impact Assessment Act (IAA).** On January 24, 2020, the federal Minister of Environment and Climate Change approved the substitution of the federal EA process to the Province of B.C. **The substituted process administered by the [BC EAO] must meet the requirements of the IAA.**") and p. 24 ("The EAO assessed all information required by the Act (2002), **effects within federal jurisdiction as required under the IAA**, and certain assessment matters of the Act (2018), as described above.") (emphasis added).

[1611] Northey II, at **Exhibit CER-2 (Second)**, p. 30 *et seq*. (para. 70); see paragraph 1067 above.

[1612] See BC EAO, EA Report for the Cedar LNG Project, at **Exhibit C-0368-ENG**, p. 24 ("The Agency also provided advice to the EAO in relation to fulfilling the requirements related to the IAA") and p. 69 ("In granting substitution of the EA, the federal Minister was satisfied the EAO would involve the Federal Authorities in the EA. The following federal departments participated in the review of Cedar's documents […] and EAO's draft report and proposed conditions: […] Environment and Climate Change Canada (ECCC) provided comments and information related to its regulatory and statutory responsibilities […])". See also Northey I, at **Exhibit CER-2**, p. 19 (paras. 53-59).

[1613] See Northey II, at **Exhibit CER-2 (Second)**, p. 30 *et seq*. (para. 70).

[1614] Minister of Environment and Climate Change Canada, Decision Statement Issued under Section 54 of the Canadian Environmental Assessment Act, 2012 for the Cedar LNG Project dated 15 March 2023, at **Exhibit C-0366-ENG**.

[1615] Counter-Memorial, p. 136 (n. 501).

investors of another Party and their investments […] any rights or preferences provided to aboriginal peoples."[1616]

1096 The Respondent's reliance on that reservation is misconceived. The preferential treatment in this case was accorded to Cedar LNG, which is not an Indigenous people, but rather a limited partnership comprised of Pembina Pipeline Corporation and the Haisla Nation.[1617]

1097 On the Respondent's reading of that reservation, it could disregard its obligations to NAFTA investors under Article 1102 whenever an Indigenous person is among the owners of a comparator Canadian-owned investment. That is not the ordinary meaning of the terms of the reservation and would not be a reasonable interpretation of it. Rather, it is intended to allow Canada to adopt measures **of general application** that deny NAFTA State investors rights or preferences that it has granted Indigenous people. That is not the case here. Canada's less favourable treatment of the GNLQ Project was specific to the GNLQ Project and therefore not the type of measure contemplated by Canada's reservation at Annex II.

1098 **Third**, the Respondent argues that its more favourable treatment of the Cedar LNG project was justified by the lower anticipated GHG emissions of that project.[1618] The Cedar LNG project, however, produces more GHG emissions per tonne of LNG than the GNLQ Project would have, as the Claimant explained in the Memorial.[1619] In connection with the 3 million tonnes of LNG that Cedar LNG expected to produce per year, it expected to produce 251,300 tonnes of GHG emissions (*i.e.*, 0.084 tonnes of GHG emissions per tonne of LNG);[1620] whereas the GNLQ Project was expected to produce 10.5 million tonnes of LNG and 489,000 tonnes of GHG

[1616] NAFTA, Annex II: Reservations for Future Measures (Chapters 11, 12, and 14), Schedule of Canada, at **Exhibit CL-322-ENG**, p. 1.

[1617] Cedar LNG, Press Release "Cedar LNG Announces Positive Final Investment Decision", 25 June 2024, at **Exhibit AK-0029-ENG**.

[1618] Counter-Memorial, p. 134 *et seq.* (para. 372).

[1619] See Memorial, p. 164 *et seq.* (paras. 538, 541).

[1620] British Columbia Environmental Assessment Office, Environmental Assessment Report of the Cedar LNG Project, at **Exhibit C-0368-ENG**, p. 33 (s. 2.2.1) and p. 403 (Table 39).

emissions per year (*i.e.*, 0.047 tonnes of GHG emissions per tonne of LNG).[1621]

1099 **Finally**, the Respondent seeks to distinguish the Cedar LNG project from the GNLQ Project on the basis that the former fell under the IAA regime, whereas the latter was under the prior, CEAA 2012 regime.[1622] The Respondent argues that the projects were, therefore, not in like circumstances. However, regardless of the applicable legal regimes, the Agency applied the same scope and type of assessment to the Cedar LNG project as it did to the GNLQ Project. Indeed, documents produced by the Respondent confirm that the ECCC, which led the GHG emissions analysis for the Cedar LNG project, used the GNLQ Project EA as a starting point.[1623]

1100 Contrary to the Respondent's argument, the only relevant difference was the Agency's conclusions as to the acceptability of the GHG emissions of the two projects (*i.e.*, the "treatment" itself), not the legal framework. That treatment – at the hands of the Agency, the Minister of Environment and the Federal Government – was less favourable than that which it accorded to the Cedar LNG project, in breach of Article 1102.

4.2.2.3 Federal and provincial authorities treated the GNLQ Project less favourably than comparator Canadian or third-State projects in relation to the impact on beluga whales

1101 In the Memorial, the Claimant established that both the Québec and the Federal Governments treated the GNLQ Project less favourably than other projects in like circumstances when assessing the impact of shipping activities on beluga whales.[1624] The beluga whales are present in part of the Saguenay River and the southern portion of the St. Lawrence Estuary.[1625]

[1621] Agency Report, at **Exhibit C-0037-ENG**, p. 47.

[1622] Counter-Memorial, p. 133 *et seq.* (para. 369).

[1623] Internal ECCC email from C. Coutu to M. Zeppetelli, at **Exhibit C-0613-ENG**.

[1624] Memorial, p. 166 *et seq.* (paras. 546-586).

[1625] DFO, "Recovery Strategy for the beluga whale (Delphinapterus leucas) St. Lawrence Estuary population in Canada" (2012), at **Exhibit C-0370-ENG**, p. 45 (s. 2.4.2). See also p. 44 (Figure 9), reproduced in Counter-Memorial, p. 138 (para. 378).

1102 As explained below, the **Cacouna LNG**, **Rabaska LNG**, **Stolt LNGaz** and **Contrecoeur** projects, all of which would have generated maritime traffic within the areas frequented by beluga whales, were approved by federal and provincial authorities without even assessing the impact of those projects on beluga whales.[1626] In the cases of the **Arianne Phosphate** (approved in December 2015[1627]) and **Blackrock Metals** (approved in May 2019[1628]) projects, the Québec Government authorised the projects even though it acknowledged their impact on beluga whales.[1629] In the case of the **North Shore Terminal** project, the Agency concluded that the risk for beluga whales would be low, even though it was to be located directly opposite from the GNLQ Project site on the Saguenay River and would generate similar levels of maritime traffic;[1630] the Agency even took into account the increased maritime traffic generated by both projects in its analysis.[1631]

1103 The Respondent appears to acknowledge that its treatment of other projects was more favourable in this regard than the treatment afforded to the GNLQ Project.[1632] The Respondent, however, argues that the comparator projects were not in like circumstances.[1633]

[1626] See paragraphs 1113, 1132 below.

[1627] See Memorial, p. 169 (para. 558).

[1628] Memorial, p. 170 *et seq.* (para. 564).

[1629] See paragraphs 1118, 1121, 1123-1124 below.

[1630] See paragraphs 1126-1127 below.

[1631] See Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 186 and 201. See also Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 212 *et seq.* (s. 8.4.7) ("According to the information provided by the proponent, and taking into account all of the existing and potential projects, marine traffic on the Saguenay River could increase to 635 vessels per year by 2030, which is equivalent to a maximum of 4 to 6 vessels per day […]").

[1632] See Counter-Memorial, p. 161 *et seq.* (s. V(F)) (where the Respondent argues that the treatment afforded to comparable project was not less favourable than the treatment accorded to GNLQ, in relation to the assessment of GHG emissions and to the use of a joint environmental assessment, but not in relation to the assessment of the effects of maritime shipping).

[1633] Counter-Memorial, p. 149 *et seq.* (paras. 405-430).

1104 In relation to the **Québec EA**, the Respondent argues that the existence of like circumstances in this context depends on (i) the application of identical standards and objectives in the protection of beluga whales,[1634] and (ii) the comparator projects being also located on the Saguenay River.[1635]

1105 As explained in Section 4.2.1.3 above, identical circumstances are not required for a finding of breach of Articles 1102 or 1103 NAFTA. As explained below, the Respondent's arguments in this regard are inapposite.

1106 **First**, Mr Duquette asserts that beluga whale protection became more relevant for the MELCC after the publication of the DFO's 2020 Action Plan to Reduce the Impact of Noise on the Beluga Whale (*Delphinapterus leucas*) and Other Marine Mammals at Risk in the St. Lawrence Estuary.[1636] This proposition is baseless. In Québec, beluga whales were designated as an endangered species in 2000, and that designation has not changed over time.[1637] Whether the MELCC's perception of the issue changed over time is irrelevant to determine the "like circumstances" related to the legal regime. The Action Plan reflected political objectives, not a change in legal requirements,[1638] and did not recommend that projects that might generate maritime traffic be refused.[1639]

[1634] Counter-Memorial, p. 136 (para. 377) and p. 143 *et seq.* (para. 389).

[1635] Counter-Memorial, p. 136 *et seq.* (paras. 377-378) and p. 139 (para. 382).

[1636] Duquette, at **Exhibit RWS-5**, p. 25 (para. 54). See also Counter-Memorial, p. 144 (para. 389) and DFO, 2020 Action Plan to Plan to Reduce the Impact of Noise on the Beluga Whale, at **Exhibit ST-0004-FRA**.

[1637] See MELCC Report, at **Exhibit C-0269-FRA**, p. 30 ("*Au Québec, cette population isolée des autres bélugas nordiques a été désignée 'menacée' en mars 2000 en vertu de la Loi sur les espèces menacées ou vulnérables du Québec* […]").

[1638] See, *e.g.*, DFO, 2020 Action Plan to Plan to Reduce the Impact of Noise on the Beluga Whale, at **Exhibit ST-0004-FRA**, p. 12 ("*La réduction de l'impact du bruit sur les mammifères marins en péril de l'estuaire du Saint-Laurent dépend de l'engagement et de la coopération de ceux qui voudront prendre part à la mise en œuvre des mesures établies dans le plan d'action. La mise en œuvre du plan d'action dépendra de cette approche collective dans laquelle Pêches et Océans Canada est un partenaire des efforts de rétablissement.* […] *La mise en œuvre du présent plan d'action est assujettie aux crédits, aux priorités et aux restrictions budgétaires des instances et des organismes participants.*").

[1639] See DFO, 2020 Action Plan to Plan to Reduce the Impact of Noise on the Beluga Whale, at **Exhibit ST-0004-FRA**, p. 14 *et seq.* (Describing the measures to be taken by the DFO and other entities engaged in the programme, none of which implies a ban on generating further

1107 **Second**, the Respondent's argument that only projects entailing maritime traffic in the Saguenay River (and not those generating maritime traffic in the St. Lawrence River) are apt comparators[1640] is without merit. As the Respondent admits, the critical habitat of belugas encompasses not only parts of the Saguenay River downstream of the location of the GNLQ Project, but also a portion of the St. Lawrence River.[1641] And, indeed, the Decree justifies the refusal to authorise the GNLQ Project by reference to the "uncertainty" of "*l'effet de la navigation sur la population du* ***beluga de l'estuaire du Saint-Laurent***". [1642] As such, projects generating navigation in the St. Lawrence River (not just the Saguenay River) are also in like circumstances to the GNLQ Project for the purposes of Articles 1102 and 1103.

1108 In relation to the **federal EA**, the Respondent argues that the presence of like circumstances depends on the envisaged effects of a project on the beluga whale population, the status of that population and the measures and objectives provided for in the applicable action plans. [1643] The Respondent argues that these factors have evolved over time. [1644] Nevertheless, as explained below, the relevant circumstances surrounding the projects at issue remain similar.

1109 **First**, the extent to which the Agency foresees that a project may impact beluga whales and considers how that impact may be mitigated goes to the treatment accorded to those projects, not to whether those projects are in like circumstances, as it is the Agency itself that determines whether such effects are significant and can be mitigated.[1645]

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navigation. In fact, the measures include actions on which GNLQ was actively engaging. See, in particular, p. 17 (No. 26): "*Promouvoir la modernisation et l'implantation des technologies connues qui contribuent à diminuer le bruit lors de la conception, de la réparation, de la remise en état ou de la construction de navires des différentes flottes.*").

[1640] Counter-Memorial, p. 136 *et seq.* (para. 378).

[1641] See map at Counter-Memorial, p. 138 (para. 378).

[1642] Decree 1071-2021 dated 21 July 2021, at **Exhibit C-0274**, p. 3 (emphasis added).

[1643] Counter-Memorial, p. 149 *et seq.* (paras. 405-410).

[1644] Counter-Memorial, p. 149 *et seq.* (paras. 405-410).

[1645] See paragraph 974 above.

1110 **Second**, the estimates of the beluga whale population are in constant evolution. As Mr Le Verger mentions in his second witness statement, a 2023 DFO study shows that the beluga population is more than twice that of the 2012 estimates on which the Agency relied in its report.[1646] Given the uncertainty of the data, the beluga whale count should not be considered as a factor in the analysis of the "like circumstances".

1111 **Third**, the Respondent refers to the designation of beluga whales as an endangered species in 2017, to the ministerial decree prohibiting the destruction of its essential habitat, and to the 2020 DFO Action Plan to argue that "like circumstances" must refer to the measures and objectives in force at any given time.[1647] These facts are, however, not relevant. In particular:

- both comparator projects, the North Shore Terminal and Contrecoeur projects, were assessed under the 2017 legislation designating beluga whales as an endangered species and protecting its essential habitat;[1648] this is therefore not a distinguishing factor;
- as explained at paragraph 1106 above, the 2020 DFO Action Plan essentially reflects political objectives,[1649] and does not include any recommendation to refuse new projects that might generate maritime

[1646] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 59 *et seq*. (para. 189). See also DFO, "Abondance et trajectoire de la population de béluga de l'estuaire du Saint-Laurent", (2023) Secrétariat canadien des avis scientifiques, at **Exhibit TLV-0159-FRA**, p. 3 (referring to an estimate of 1,850 individuals) and Agency Report, at **Exhibit C-0037-ENG**, p. 53 (referring to an estimate of 900 individuals for roughly the same period).

[1647] Counter-Memorial, p. 149 *et seq*. (paras. 405-410).

[1648] See Trépanier, at **Exhibit RWS-11 (corrected)**, p. 9 (paras. 24-25).

[1649] See DFO, 2020 Action Plan to Plan to Reduce the Impact of Noise on the Beluga Whale, at **Exhibit ST-0004-FRA**, p. 12 ("*La réduction de l'impact du bruit sur les mammifères marins en péril de l'estuaire du Saint-Laurent dépend de l'engagement et de la coopération de ceux qui voudront prendre part à la mise en œuvre des mesures établies dans le plan d'action. La mise en œuvre du plan d'action dépendra de cette approche collective dans laquelle Pêches et Océans Canada est un partenaire des efforts de rétablissement.* […] *La mise en œuvre du présent plan d'action est assujettie aux crédits, aux priorités et aux restrictions budgétaires des instances et des organismes participants.*").

traffic.[1650] As such, its publication did not alter the circumstances of the assessments of the GNLQ Project and comparator projects.

(i) Federal and provincial authorities accorded the GNLQ Project treatment less favourable than they accorded the Cacouna LNG, Rabaska LNG and Stolt LNGaz projects in their assessments of impacts on beluga whales

1112 As explained in the Memorial, in the years prior to the rejection of the GNLQ Project, the Québec and Federal Governments approved three marine terminals on the St. Lawrence River:

- the Cacouna LNG project, which included an LNG marine import terminal (and whose projected increase in maritime traffic was not considered);[1651]
- the Rabaska LNG project, which included a marine terminal and was projected to add 60 LNG tankers per year;[1652] and
- the Stolt LNGaz project, whose operations were estimated to add 52 to 156 LNG tankers per year on the St. Lawrence River.[1653]

1113 The Respondent concedes that the treatment of the Cacouna LNG, Rabaska LNG and Stolt LNGaz projects was more favourable than that accorded to the GNLQ Project, as the MELCC did not assess the impact of maritime traffic that would be generated by these projects, while it considered that issue determinative in its assessment of the GNLQ Project. [1654]

[1650] See DFO, 2020 Action Plan to Plan to Reduce the Impact of Noise on the Beluga Whale, at **Exhibit ST-0004-FRA**, p. 14 *et seq.*

[1651] Memorial, p. 166 (para. 546). The Claimant hereby corrects a typo in this paragraph. The Cacouna LNG project was approved in June 2007.

[1652] Memorial, p. 167 (para. 551). The Claimant hereby corrects a typo in this paragraph. The Rabaska LNG project was approved in October 2007.

[1653] Memorial, p. 168 *et seq.* (para. 556).

[1654] See Counter-Memorial, p. 138 *et seq.* (paras. 379-390) (in which the Respondent does not contest that the treatment afforded to the comparable projects was more favourable than that accorded to GNLQ). See also Counter-Memorial, p. 161 *et seq.* (s. V(F)); Memorial, p. 166 *et seq.* (paras. 548-549), p. 168 (paras. 553-554 and 557).

1114 However, the Respondent argues that these projects were not "in like circumstances" as compared to the GNLQ Project as they were located on the St. Lawrence River rather than on the Saguenay River.[1655] In relation to the Cacouna and Rabaska LNG projects, the Respondent also argues that they were assessed in 2007, when the beluga whale population of the St. Lawrence Estuary was estimated at 1,000 to 1,400, whereas the population was estimated at 900 at the time of the EA of the GNLQ Project.[1656] These arguments are meritless.

1115 As explained above,

- projects generating maritime traffic in the beluga whales' habitat are "in like circumstances" for the purpose of assessing the MELCC's treatment of the GNLQ Project; all three projects above would have generated such traffic. Furthermore, as the Respondent admits,[1657] the Cacouna LNG project was located within the essential habitat of beluga whales (namely, an area known as the "beluga whales' nursery");
- the Québec legal framework for the protection of beluga whales remained essentially unchanged since the 2000s, as the Respondent admits,[1658] and beluga whale counts have been subject to corrections over time;[1659] the Respondent's attempted differentiation of the GNLQ Project from the three projects mentioned above based on "*la dégradation de l'état de la population du beluga du Saint-Laurent*" and on "*la hausse des mesures de protection à son endroit*"[1660] is baseless.

1116 The circumstances surrounding the assessment of these projects are therefore sufficiently similar to that of the GNLQ Project for the purposes of Article 1102 and, in the case of the Stolt LNGaz project, Article 1103.

[1655] Counter-Memorial, p. 140 *et seq.* (para. 385) and p. 142 *et seq.* (paras. 387-388).

[1656] Counter-Memorial, p. 143 *et seq.* (para. 389).

[1657] See Counter-Memorial, p. 140 (para. 385); see also Counter-Memorial, p. 136 *et seq.* (para. 378).

[1658] See Counter-Memorial, p. 143 *et seq.* (para. 389).

[1659] See, in particular, Le Verger II, at **Exhibit CWS-3 (Second)**, p. 59 *et seq.* (para. 189) ("*en 2023, une étude a été publiée par des représentants de MPO montrant que la population de béluga était en réalité de plus du double des estimations utilisées jusqu'alors*").

[1660] Counter-Memorial, p. 144 (para. 389).

(ii) The Québec Government accorded the GNLQ Project treatment less favourable than it accorded the Blackrock Metals and Arianne Phosphate projects in its assessments of impacts on beluga whales

1117 As explained in the Memorial, the Québec Government authorised two industrial projects, both proposed by Canadian companies,[1661] that would have used the Saguenay and St. Lawrence Rivers for the shipping of their products, namely:

- the Arianne Phosphate project, consisting in an apatite mine;[1662] and
- the Blackrock Metals project, a pig iron and ferrovanadium processing facility.[1663]

1118 The MELCC recognised, in both cases, that the increase in maritime traffic they would cause could be problematic but nevertheless concluded that those were environmentally acceptable.[1664] It thereby accorded both projects more favourable treatment than it did the GNLQ Project, in breach of Article 1102.

1119 The Respondent's attempts in its Counter-Memorial to evade liability for that disparity of treatment[1665] are to no avail.

1120 In relation to the **Arianne Phosphate project**, the Respondent argues that that project was not in like circumstances as compared to the GNLQ Project, since it did not include a marine terminal and therefore the MELCC did not have to evaluate its effects on marine mammals.[1666] This argument is disingenuous.

1121 In its report on the Arianne Phosphate project, the MELCC noted that the project operations could not be dissociated from the transportation of its

[1661] See Memorial, p. 169 *et seq.* (paras. 558 and 564).
[1662] Memorial, p. 169 (para. 558).
[1663] Memorial, p. 154 *et seq.* (para. 499).
[1664] Memorial, p. 170 *et seq.* (paras. 561 and 566).
[1665] Counter-Memorial, p. 145 *et seq.* (paras. 391-404).
[1666] Counter-Memorial, p. 146 (para. 395).

product.[1667] Indeed, the project relied on maritime transportation in the Saguenay River,[1668] just as the GNLQ Project did. The MELCC's decision not to evaluate the impact of that project on maritime traffic, despite preoccupations voiced during the BAPE hearings, [1669] evidences the disparity of treatment of the two projects.

1122 In relation to the **Blackrock Metals project**, the Respondent argues that it was not in like circumstances as compared to the GNLQ Project, because:

- it was evaluated before the UQO published the interim results of its research, and before the DFO published its 2020 Action Plan;[1670]
- it would have generated less traffic than the GNLQ Project;[1671] and
- whereas the Blackrock Metals project had been evaluated without taking into account the additional traffic generate by the GNLQ Project, the evaluation of the cumulative effects of the GNLQ Project took into account the maritime traffic generated by the Blackrock Metals project, because it had already been approved at the time.[1672]

[1667] MELCC, Environmental Assessment Report for Arianne Phosphate (9 February 2016) dated 9 February 2016, at **Exhibit C-0372-FRA**, p. 60 ("*Arianne Phosphate Inc. a présenté l'infrastructure du terminal portuaire dans son document de réponses à la première série de questions et commentaires (mai 2014) en indiquant que le concentré serait transféré dans des silos d'entreposage et serait ensuite transbordé par convoyeur fermé vers un terminal portuaire. L'initiateur indiquait qu'il ne serait pas l'opérateur de ces installations à Saint-Fulgence, qui pourraient potentiellement être multiusagers. Toutefois, le projet de déchargement et de transport du concentré, alors localisé à Saint-Fulgence, ne pouvait être complètement dissocié du présent projet de mine d'apatite.*").

[1668] See MELCC, Environmental Assessment Report for Arianne Phosphate (9 February 2016) dated 9 February 2016, at **Exhibit C-0372-FRA**, p. iii ("*Le concentré sera transporté par camion hors norme dans des remorques fermées, puis transféré dans des silos d'entreposage. Il sera ensuite transbordé par convoyeur fermé vers un terminal portuaire projeté à Sainte-Rose-du-Nord.*").

[1669] See MELCC, Environmental Assessment Report for Arianne Phosphate (9 February 2016) dated 9 February 2016, at **Exhibit C-0372-FRA**, p. 61 ("[…] *les impacts sociaux et environnementaux du terminal maritime soulevaient énormément d'inquiétudes. De plus, le fait que cette infrastructure ne soit pas incluse dans l'analyse environnementale du projet minier a été critiqué par les participants et par la Commission du BAPE.*").

[1670] Counter-Memorial, p. 146 *et seq.* (paras. 400-401).

[1671] Counter-Memorial, p. 148 (para. 402).

[1672] Counter-Memorial, p. 148 *et seq.* (para. 403).

1123 These alleged differences are not relevant. The UQO's interim report in 2019 and the 2020 DFO Action Plan were aimed at achieving a better understanding of the effect of underwater noise on the beluga population.[1673] Contrary to the Respondent's argument, neither publication established that underwater noise had a tangible impact on the beluga whale population.[1674] Furthermore, the fact that the Blackrock Metals project would have added 4 or 6 ship passages per month, while the GNLQ Project would have added one per day, does not create a significant difference in their assessments. The MELCC itself considered that the marine traffic caused by the Blackrock Metals project should be considered in light of its cumulative effects on navigation in the Saguenay River, rather than taken in isolation.[1675]

1124 Thus, the MELCC's evaluation of these two projects was in like circumstances. The MELCC's assessment of the effects of the maritime traffic that would be generated by the GNLQ Project and the Québec Government's rejection of the GNLQ Project on that basis constitutes differential treatment in breach of Article 1102.

(iii) The Federal Government accorded the GNLQ Project treatment less favourable than it accorded the North Shore Terminal project in its assessment of impacts on beluga whales

1125 As explained in the Memorial, Canada approved the North Shore Terminal project, a marine terminal proposed by the SPA located on the Saguenay

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[1673] C. Chion *et al., "Modelisation du trafic maritime et des déplacement des baleines dans l'estuaire du Saint-Laurent et le Saguenay"*, at **Exhibit R-0025-FRA**, p. v ("*Le présent programme de recherche (2018-2023) ainsi que l'initiative de recherche conduite dans le cadre du Plan de protection des océans (2017-2022) mené par Pêches et Océans Canada visent notamment à évaluer l'exposition cumulative des BESL au BSM de la navigation ainsi que leurs impacts et effets cumulatifs sur cette population*"). In relation to the DFO Action Plan, see paragraph 1111 above.

[1674] Counter-Memorial, p. 147 *et seq*. (para. 401).

[1675] MELCC, Environnement Assessment Report for the BlackRock project (27 February 2019) dated 27 February 2019, at **Exhibit C-0218-FRA**, p. 41 ("*Bien que le trafic maritime associé au projet de MBR représente une faible proportion du trafic actuel et projeté sur la rivière Saguenay, les effets négatifs reliés à l'augmentation du bruit associé à la navigation s'ajoutent aux pressions subies par la population de bélugas du Saint-Laurent*"); MELCC Report, at **Exhibit C-0269-FRA**, p. 35.

River, opposite GNLQ's terminal,[1676] which envisaged around 140 additional ships per year on the Saguenay River.[1677] As explained above, the North Shore Terminal project was proposed by a Canadian Federal public enterprise, meaning Article 1102 NAFTA is engaged.[1678]

1126 The Respondent accorded the GNLQ Project treatment less favourable than that accorded the North Shore Terminal project. When assessing the cumulative impact of the North Shore Terminal project, the Agency considered the increased traffic generated by the GNLQ Project,[1679] and concluded that the North Shore Terminal project was "not likely to cause significant adverse environmental effects, as defined in CEAA 2012".[1680] The fact that the Agency considered that the **very same** cumulative increase in navigation was acceptable for the North Shore Terminal project, but not for the GNLQ Project, is patently discriminatory.

1127 Similarly, the DFO's conclusion that the navigation generated by the North Shore Terminal project would have posed a low ("*faible*") risk for beluga

[1676] Memorial, p. 172 (para. 570).

[1677] Memorial, p. 173 (para. 572).

[1678] See paragraph 1074 above.

[1679] See Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 186 and 201. See also Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 212 (s. 8.4.7) ("According to the information provided by the proponent, and taking into account all of the existing and potential projects, marine traffic on the Saguenay River could increase to 635 vessels per year by 2030, which is equivalent to a maximum of 4 to 6 vessels per day […]"). As the Respondent's document production has shown, in the context of the environmental assessment of the North Shore Terminal project, the DFO had requested input from the Canadian Science Advisory Secretariat on the cumulative impact of the North Shore Terminal project and the GNLQ Project on beluga whales; the Canadian Science Advisory Secretariat concluded that the impact of increased maritime traffic could be mitigated effectively. See, in particular, Canadian Science Advisory Secretariat, Potential effects of the Construction of Marine Terminals in the Saguenay Fjord on the St. Lawrence Beluga Whale and its habitat, *Science Response 2018/025*, at **Exhibit C-0614-ENG**, p. 16 ("For unavoidable transits through the Saguenay, various vessel design measures (vessel renovation or construction engineering), noise reduction at source initiatives or an increase in the number of silent windows for the Beluga Whale should be examined."). The DFO's final opinion on the GNLQ Project referred to this study as still valid. DFO Final Opinion dated 11 June 2021, at **Exhibit R-0084-FRA**, p. 5.

[1680] Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 249.

whales[1681] is in striking contrast with its finding that navigation generated by the GNLQ Project would have posed a high ("*accru*") risk in that regard.[1682]

1128 The Respondent argues that these differences in treatment are "justified" by the allegedly different circumstances in which the two projects were evaluated,[1683] namely:

i) the GNLQ Project would have generated a higher increase in maritime traffic than the North Shore Terminal project;[1684]

ii) GNLQ did not propose adequate mitigation measures, while North Shore Terminal proposed to reduce the number of projected vessels;[1685]

iii) between October 2018, when the Agency concluded its assessment of the North Shore Terminal project, and November 2021, when the Agency concluded its assessment of the GNLQ Project, the status of beluga whales as an endangered species had worsened;[1686]

iv) during the same timeframe, the authorities had increased the measures for the re-establishment of beluga whales, including the new 2020 DFO Action Plan;[1687] and

v) the North Shore Terminal project had already been approved when the GNLQ Project was assessed, so it was counted in the calculation of cumulative effects of the GNLQ Project on underwater noise.[1688]

1129 The Respondent's arguments are misplaced. In particular:

[1681] DFO Final Opinion on the North Shore Terminal project dated 16 March 2018, at **Exhibit C-0615-FRA**, p. 2 ("*Le risque d'effet négatif sur la population de béluga de l'estuaire du Saint-Laurent occasionné par cette augmentation du trafic maritime est considéré comme faible*").

[1682] DFO Final Opinion dated 11 June 2021, at **Exhibit R-0084-FRA**, p. 7 of the PDF ("*Le MPO évalue ainsi que l'augmentation du transport maritime associée au projet pose un risque accru pour les individus de béluga du Saint-Laurent.*").

[1683] Counter-Memorial, p. 152 (para. 413).

[1684] Counter-Memorial, p. 152 (para. 414).

[1685] Counter-Memorial, p. 152 (para. 415).

[1686] Counter-Memorial, p. 153 (para. 416).

[1687] Counter-Memorial, p. 153 (para. 417).

[1688] Counter-Memorial, p. 154 (para. 418).

i) at its maximum capacity, the North Shore Terminal project would have generated traffic comparable to the GNLQ Project (140 ships for North Shore, 140-165 for GNLQ);[1689]

ii) just like North Shore Terminal,[1690] GNLQ proposed to reduce the number of passages of tankers from 200 to 140-165.[1691] However, the Agency ignored GNLQ's binding commitment to eliminate at least 35 passages a year, whereas it accepted non-binding commitment of the North Shore Terminal project's anchor customers to make their best efforts to reduce passages;[1692]

iii) beluga whale counts have increased in recent years; those counts did not decrease between the approval of the North Shore Terminal project and the rejection of the GNLQ Project;[1693]

iv) as explained at paragraph 1123 above, the 2020 DFO Action Plan did not affect the legal status of the beluga whale, nor did it require the Agency to reject projects that might affect the beluga whale population; and

v) the approval of the North Shore Terminal project also took into account the navigation that would be generated by the GNLQ Project, as explained at paragraph 440 above; therefore, the Respondent's suggestion that its approval changed the circumstances of the assessment of the GNLQ Project is disingenuous.

[1689] Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 92 ("According to the scenarios assessed by the proponent, the project would result in one or two ships a week docking at the wharf to meet the needs of the Arianne Phosphate mining company, and **two or three ships a week under the maximum operation scenario** involving several clients.") (emphasis added). See also Agency Report, at **Exhibit C-0037-ENG** ("**Three to four tankers per week, or 140 to 165 tankers per year (maximum operating scenario)**") (emphasis added).

[1690] See Agency, Environmental Assessment Report for the North Shore Terminal project (October 2018), at **Exhibit C-0215-ENG**, p. 192.

[1691] GNLQ, Comments to the Agency dated 22 October 2021, at **Exhibit C-0376-FRA**, p. 12.

[1692] See paragraph 449 above.

[1693] See Le Verger II, at **Exhibit CWS-3 (Second)**, p. 59 *et seq.* (para. 189). See DFO, "Abondance et trajectoire de la population de béluga de l'estuaire du Saint-Laurent", (2023) Secrétariat canadien des avis scientifiques, at **Exhibit TLV-0159-FRA**, p. 3.

1130 As such, the North Shore Terminal and GNLQ projects were in like circumstances. The less favourable treatment granted to the GNLQ Project breached Article 1102.[1694]

(iv) The Federal Government accorded the GNLQ Project treatment less favourable than it accorded the Contrecoeur Port Terminal project in its assessment of impacts on beluga whales

1131 As explained in the Memorial, in March 2021 Canada approved the expansion of the Contrecoeur Port Terminal by the Montreal Port Authority, a federal entity.[1695] The project was expected to increase maritime traffic on the St. Lawrence River by 156 ships per year.[1696]

1132 The Respondent accorded the GNLQ Project treatment less favourable than that accorded to the Contrecoeur Port Terminal project, since the Agency did not assess the impact of the Contrecoeur project on beluga whales, but did assess that of the GNLQ Project, although the ships transiting to/from the Contrecoeur terminal would inevitably cross a significant portion of the critical habitat of the beluga whales.[1697]

1133 In the Counter-Memorial, the Respondent argues that the different treatment of the two projects was justified by alleged differences in their assessments.[1698] In particular, the Respondent argues that that (i) the Contrecoeur project is not comparable as the Saguenay River is not the same as the St. Lawrence River in terms of beluga whale habitat,[1699] and (ii) the Contrecoeur project is not within a zone frequented by beluga whales.[1700] Both of those arguments are wrong.

1134 Like the GNLQ Project,[1701] the Contrecoeur project was located outside the critical habitat of beluga whales, but would have generated maritime

[1694] See Memorial, p. 173 *et seq.* (paras. 574-578).

[1695] Memorial, p. 175 (para. 580).

[1696] Memorial, p. 175 (para. 580).

[1697] Memorial, p. 175 *et seq.* (paras. 582-585).

[1698] Counter-Memorial, p. 156 *et seq.* (paras. 427 and 430).

[1699] Counter-Memorial, p. 155 (para. 423).

[1700] Counter-Memorial, p. 155 *et seq.* (paras. 422-429).

[1701] See Bidwai I, at **Exhibit CWS-2**, p. 18 *et seq.* (paras. 50-51).

traffic in the St. Lawrence areas frequented by beluga whales.[1702] The DFO identified the critical habitat of the beluga of the St. Lawrence Estuary as including "the [St. Lawrence's] Upper Estuary, from the Battures aux Loups Marins to the Saguenay River and the southern portion of the [St. Lawrence's] Lower Estuary".[1703] No area has been identified as more critical than another. Therefore, the potential of the Contrecoeur project to increase maritime traffic in the St. Lawrence River places it in like circumstances as compared to the GNLQ Project, for the purpose of Article 1102. Indeed, the Agency noted that the noise of ships carrying the containers to and from the Contrecoeur Port Terminal project would affect marine mammals.[1704]

1135 In the case of the GNLQ Project, the Agency purported to extend the geographical scope of the project and thus of the EA to encompass areas frequented by beluga whales (although it did not validly do so).[1705] In the case of the Contrecoeur project, the Agency limited the scope of the assessment to the area under the Montreal Port Authority's jurisdiction, not extending it to include other areas frequented by beluga whales.[1706] Thus, the Agency's lack of assessment of the impact of increased traffic on

[1702] As recognised by the Agency in an internal analysis shared by Canada during document production. See Preliminary analysis of the ancillary nature of navigation and the spatial scope of this activity Environmental assessment of the Contrecœur Port Terminal Expansion Project, at **Exhibit C-0616-FRA**, p. 15 ("[L]***a navigation reliée aux porte-conteneurs se rendant au terminal projeté de Contrecœur s'effectuera dans l'habitat essentiel du béluga*** *et pourrait avoir des effets sur le beluga de même que sur les autres mammifères marins présents dans l'estuaire du Saint-Laurent. Cependant, comme ces navires sont d'un gros gabarit, ils effectuent des manœuvres qui sont prévisibles pour le béluga et les autres mammifères marins, réduisant ainsi les risques d'effets importants sur le béluga et les autres mammifères marins. D'autre part, les navires évitent la zone de confluence entre le Saint-Laurent et le Saguenay, un lieu très fréquenté par les bateaux et également très fréquenté par le béluga et d'autres espèces animales*") (emphasis added).

[1703] DFO, "Recovery Strategy for the beluga whale (Delphinapterus leucas) St. Lawrence Estuary population in Canada" (2012), at **Exhibit C-0370-ENG**, p. 45 (s. 2.4.2). See also p. 44 (Figure 9).

[1704] Agency, Environmental Assessment Report of Contrecoeur Port Terminal Expansion project, at **Exhibit C-0374-ENG**, p. 66. See also Memorial, p. 175 *et seq.* (paras. 583-584).

[1705] See Section 2.6.2.1(ii) above.

[1706] Agency, EIS Guidelines for Contrecoeur project (March 2016), at **Exhibit RN-0047-ENG**, p. 8 (Including in the scope of assessment the "maritime traffic associated with the project and within the area of jurisdiction of the Montreal Port Authority, including approach and docking operations and use of tugboats"). See also Northey I, at **Exhibit CER-2**, p. 68 (para. 183).

maritime mammals when conducting its EA of the Contrecoeur Port Terminal project is treatment more favourable than that accorded to the GNLQ Project.[1707] Canada's failure to accord the same level of treatment to the GNLQ Project was in breach of Article 1102.

4.3 The Respondent expropriated the Claimant's investment in breach of Article 1110 NAFTA

1136 In addition to constituting breaches of Articles 1102, 1103 and 1105 NAFTA, Canada's treatment of the Claimant's investment amounted to an unlawful expropriation in breach of Article 1110 NAFTA.

1137 The Respondent does not dispute the Claimant's description of the legal standard in its Memorial.[1708] The Claimant explained that Article 1110(1) NAFTA prohibits not only (i) direct expropriation, but also (ii) indirect expropriation and (iii) measures tantamount to expropriation, as is clear from the provision itself:

> "No Party may **directly or indirectly nationalize or expropriate** an investment of an investor of another Party in its territory or **take a measure tantamount to nationalization or expropriation** of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6."[1709]

[1707] Memorial, p. 175 *et seq.* (paras. 582-584).

[1708] See Memorial, p. 231 *et seq.* (paras. 752-760); Counter-Memorial, p. 237 *et seq.* (paras. 594-596).

[1709] NAFTA, at **Exhibit CL-001-ENG**, p. 7 (Art. 1110) (emphasis added).

1138 The Respondent argues that the Tribunal should apply a three-step analysis to determine whether a party's measures have violated Article 1110 NAFTA:

- First, identify the investment alleged to have been expropriated.
- Second, assess whether it has been expropriated directly, indirectly or by measures tantamount to expropriation.
- Third, assess whether the expropriation was lawful under Article 1110.[1710]

1139 The Parties disagree over the first two of these steps.

1140 First, the Respondent argues that the Claimant did not have an investment capable of expropriation. On the contrary, the Claimant did have an "investment" within the meaning of the NAFTA – which does not appear to be in dispute – and there is no reason why such investment should not be capable of expropriation (**Section 4.3.1**).

1141 Second, the Respondent argues that it did not expropriate the Claimant's investment, and that instead its actions were a permissible exercise of regulatory authority under the "police powers" doctrine. Those arguments also fail. The Respondent's measures amounted to an expropriation, or were tantamount to expropriation, and fall within the prohibition under Article 1110 (**Section 4.3.2**) and the police powers doctrine does not apply in this case (**Section 4.3.3**).

1142 As for the third step of the analysis, the Respondent offers no defence to the effect that its actions amounted to a lawful expropriation – nor could it, in circumstances where the requirements for a lawful expropriation under Article 1110(1) are not satisfied on any view. It follows that, if the Tribunal finds that there was an expropriation, it was unlawful and breached Article 1110 (**Section 4.3.4**).

[1710] Counter-Memorial, p. 238 *et seq*. (para. 596).

4.3.1 The Claimant's investment was protected under Article 1110 NAFTA

1143 In the Counter-Memorial, the Respondent seeks to restrict the scope of its obligations under Article 1110 NAFTA by importing limitations on the types of investments that can be expropriated.[1711] It argues that only "*droits fondamentaux de propriété*" may be expropriated;[1712] that expropriation "cannot affect potential interests";[1713] that only proprietary contractual rights, or rights that can be transferred to a third party, may be expropriated;[1714] and that there can be no expropriation of a "*possibilité d'affaires*" unless the investor demonstrates a vested right to the benefit of that opportunity.[1715]

1144 However, there are no such limitations in the wording of Article 1110. The provision, which must be interpreted in accordance with its ordinary meaning,[1716] states that Canada may not expropriate any "investment".[1717] There is no indication in Article 1110 that "investment" should not bear its usual meaning as defined under Article 1139 NAFTA.[1718] If the NAFTA

[1711] Counter-Memorial, p. 240 *et seq.* (paras. 599-603, 605).

[1712] Counter-Memorial, p. 237 *et seq.* (para. 595).

[1713] Counter-Memorial, p. 240 *et seq.* (paras. 600-601).

[1714] Counter-Memorial, p. 241 (para. 602).

[1715] Counter-Memorial, 241 *et seq.* (para. 605).

[1716] See paragraphs 599 and 608 above.

[1717] NAFTA, at **Exhibit CL-001-ENG**, p. 7 (Art. 1110(1)).

[1718] Under Article 1139 NAFTA, "investment" is defined as "(a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise; (d) a loan to an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise; (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d); (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise". See NAFTA, at **Exhibit CL-001-ENG**, p. 21 (Art. 1139).

Parties had intended to restrict the application of Article 1110 to some subcategory of "investments", they would have included language to that effect in the treaty.[1719]

1145 The Respondent raises several arguments, all are ill-founded.

1146 **First**, the Respondent relies on a passage of the award in *Lone Pine v. Canada* to argue that, notwithstanding the existence of a protected investment within the meaning of the NAFTA, the Tribunal must determine whether the particular investment protected was capable of being expropriated, before it may examine whether the investment was expropriated.[1720]

1147 Notwithstanding the *Lone Pine* tribunal's *dictum*, it is neither necessary nor useful to distinguish between whether an investment is capable of expropriation in the abstract and whether it was **in fact** expropriated or subject to measures tantamount to expropriation. The Tribunal's task in applying Article 1110 NAFTA is to assess whether the investment was indirectly expropriated or subject to measures tantamount to expropriation. As the Claimant explained in the Memorial, and as NAFTA tribunals have consistently found, this is "in the first place a matter of evidence, that is, a factual determination of whether an effective or *de facto* taking of property that is attributable to the State has taken place".[1721]

1148 That determination will inevitably depend on not only the nature of the investment in question, but also the nature and impact of the measures alleged to have expropriated that investment. Indeed, as the tribunal in *S.D. Myers v. Canada* acknowledged:

> "The Tribunal accepts that, in legal theory, rights other than property rights may be 'expropriated' and that international law

[1719] Indeed, they did so under Article 1110(7) by carving out certain measured in relation to intellectual property rights from the protections under Article 1110. However, there is no general limitation on the meaning of "investment" within the context of Article 1110.

[1720] Counter-Memorial, p. 240 (para. 599); *Lone Pine Resources Inc. v. Canada*, Final Award, 21 November 2022, at **Exhibit RL-102-FRA**, p. 182 *et seq.* (paras. 502-503).

[1721] *Windstream Energy LLC v. Government of Canada,* UNCITRAL, Award, 27 September 2016 dated 27 September 2016, at **Exhibit CL-046-ENG**, p. 76 (para. 284). See also Memorial, p. 231 (para. 753).

> makes it appropriate for tribunals to examine the purpose and effect of governmental measures."[1722]

1149 Therefore, beyond confirming that the Claimant had an investment under the NAFTA, it serves no purpose to examine whether such investment was capable of expropriation in the abstract. Indeed, despite its suggestion that this was a necessary exercise, the *Lone Pine* tribunal did not conduct it and instead went on directly to consider both the nature of the investment **and** the effect of the impugned measures on it when deciding whether it had been expropriated.[1723]

1150 In this case, there is no question that the Claimant had an "investment" protected by the NAFTA.[1724] As explained in the Memorial, the Claimant's investment in the Symbio Project comprised several forms of assets protected under the NAFTA, in particular:

- "enterprises" organised under the laws of Canada and qualifying as investments under Article 1139(a) NAFTA, including Symbio and Symbio GP and, through Symbio, GNL Québec Inc. and Gazoduq Inc., the entities through which the Claimant pursued the GNLQ and Gazoduq Projects respectively;[1725]
- through Symbio, interests entitling the Claimant to the income or profits of these enterprises under Article 1139(e);[1726]
- interests arising from the commitment of capital and other resources to all aspects of developing the GNLQ and Gazoduq Projects under Article 1139(h), including for example the significant capital expenses on [redacted] and the

[1722] *S.D. Myers v. Canada,* Partial Award, 13 November 2000, at **Exhibit CL-007-ENG**, p. 69 (para. 281).

[1723] *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022, at **Exhibit RL-102-FRA**, p. 182 *et seq.* (paras. 503-528).

[1724] See Memorial, p. 235 *et seq.* (paras. 763-767). See also Memorial, p. 126 *et seq.* (paras. 402-418).

[1725] Memorial, p. 127 *et seq.* (paras. 404, 406).

[1726] Memorial, p. 127 (para. 405).

expenditures and commitment of resources towards obtaining the required permits and regulatory approvals for the two Projects;[1727]

- the Claimant's investments in tangible and intangible property resulting from those capital expenditures, which were "acquired in the expectation or used for the purpose of economic benefit or other business purposes" under Article 1139(g), including for example the numerous and comprehensive studies and reports commissioned to develop the Projects and for their regulatory approval processes.[1728]

1151 The Respondent does not dispute that the Claimant made an "investment" within the meaning of Article 1139 NAFTA.[1729] Therefore, there is no reason why the protections under Article 1110 NAFTA should not apply.

1152 **Second**, instead of acknowledging the common ground over the existence of the Claimant's investment under the NAFTA, the Respondent argues that the Claimant "*n'a pas méticuleusement précisé les droits détenus au moment de l'expropriation.*"[1730] It then seeks to pick apart the assets and interests forming the Claimant's investment in Canada and argues that each of them individually could not be expropriated. This approach is misguided. NAFTA awards, including awards on which the Respondent relies, have confirmed that one must consider the "investment" **as a whole** to determine whether it was *de facto* expropriated.[1731] In the present case, viewed as a whole, the assets and interests listed above constituted the Symbio Project that is the "investment" the subject of the present dispute. The Tribunal must, therefore, determine whether the Symbio Project as a whole – not the individual constituent elements of it – was expropriated

[1727] Memorial, p. 128 (para. 407). Contrary to the Respondent's assertion, the Claimant's interests under [redacted] are protected under Article 1139(h) NAFTA and are part of its investment. See Counter-Memorial, p. 245 (para. 615).

[1728] Memorial, p. 131 *et seq.* (paras. 415-417).

[1729] Rather, the Respondent only argues that the Claimant had no "investment" within the meaning of Article 25 of the ICSID Convention: Counter-Memorial, p. 239 *et seq.* (para. 598). See also Counter-Memorial, p. 97 *et seq.* (paras. 271-272); *Demande de bifurcation* dated 5 January 2024, p. 5 *et seq.* (s. III).

[1730] Counter-Memorial, p. 241 (para. 604).

[1731] *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, at **Exhibit CL-028**, p. 56 (para. 144); *Lone Pine Resources Inc. v. Canada*, Final Award, 21 November 2022, at **Exhibit RL-102-FRA**, p. 186 of PDF (p. 185, para. 508). The Respondent relies on both of these awards in its Counter-Memorial, p. 240 (paras. 599-600).

directly or indirectly, or whether they were subject to measures tantamount to expropriation.

1153 **Third**, in any event, the Respondent's argument that certain forms of assets or interests held by the Claimant cannot be expropriated is wrong.

1154 Relying on the award in *Merrill & Ring Forestry v. Canada*, the Respondent argues that expropriation "cannot affect potential interests".[1732] However, that award does not purport to lay down a general rule to that effect. Rather, the *Merrill & Ring* tribunal was discussing whether the claimant's investment in that case was a protected investment **at all** under Article 1139.[1733] It decided that an "interest in realizing fair market value for its logs on the international market" did not constitute a protected contractual interest under Article 1139(h). It nevertheless went on to suggest that interference with intangible interests such as a "right to access the international market" could form the basis of an expropriation claim under the NAFTA "because it is the very objective of the investment made", but that the investment must be looked at as a whole.[1734]

1155 In other words, so long as a "potential interest" forms part of an overall investment that is protected under the NAFTA, there is no reason why it cannot be affected by expropriatory measures.[1735] Indeed, if the investment derives a significant part of its value from the realisation of potential interests, the interference with those interests may well form the basis of an expropriation claim.[1736]

[1732] Counter-Memorial, p. 240 (para. 600).

[1733] *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, at **Exhibit CL-028**, p. 54 *et seq.* (paras. 139-142).

[1734] *Merrill and Ring Forestry L.P. v. Canada,* ICSID Case No. UNCT/07/1, Award, 31 March 2010, at **Exhibit CL-028**, p. 55 *et seq.* (paras. 143-144).

[1735] For the same reasons, the Respondent's objection that the contracts the Claimant was negotiating or had entered into were not enforceable (Counter-Memorial, p. 243 *et seq.* (paras. 609-613)) is besides the point; those contracts form part of the overall investment in the Project.

[1736] See *Methanex Corporation v. United States of America*, UNCITRAL, Award, 3 August 2005, at **Exhibit CL-031-ENG**, p. 281 *et seq.* of PDF (Part IV - Chapter D - pp. 7-8, para. 17): "Certainly, the restrictive notion of property as a material 'thing' is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of the Tribunal, items such as goodwill and market

1156 Indeed, other recent tribunals have found investments to be expropriated based on the denial of a future or potential interest. In *Rockhopper v. Italy*, the tribunal held that Italy had expropriated the claimant's investment by denying its application for an offshore production concession.[1737] In so doing, it expressly rejected Italy's argument that the investment could not be expropriated because "the extractive business of the Claimants never started and had never been authorised."[1738] Similarly, in *Eco Oro v. Colombia*, the tribunal found that the claimant's right to exploit a mining concession was capable of expropriation even though it was contingent on approval of its construction plan and receipt of an environmental licence.[1739]

1157 For the same reasons, the Respondent's argument that a business opportunity cannot be expropriated unless there is a vested right to the benefit of that opportunity misses the mark.[1740] If a business opportunity forms part of a lawful "investment" under Article 1139, when viewed as a whole, there is no reason why sufficient interference with that opportunity could not amount to measures equivalent to expropriation under Article 1110. In this regard, the Respondent's reliance on *International Thunderbird v. Mexico* in support of its position is inapposite; in that case the tribunal had found that the claimant's business activity did not form part of a lawful investment because it contravened Mexican gambling laws.[1741]

1158 **Fourth**, the Respondent deploys arguments to the effect that the Claimant had no right to the Symbio Project going ahead, or that it had no right to

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share may, as Professor White wrote, 'constitute [] an element of the value of an enterprise and as such may have been covered by some of the compensation payments'. Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal."

[1737] *Rockhopper Exploration plc, Rockhopper Italia s.p.a and Rockhopper Mediterranean Ltd v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award dated 23 August 2022, at **Exhibit CL-323-ENG**, p. 59 *et seq.* (paras. 190-203).

[1738] *Rockhopper v. Italy*, at **Exhibit CL-323-ENG**, p. 60 *et seq.* (paras. 195-196).

[1739] *Eco Oro Minerals Corp. v. The Republic of Columbia,* ICSID Case No. ARB/16/41, Award, 9 September 2021, at **Exhibit CL-039-ENG**, p. 260 (para. 623).

[1740] Counter-Memorial, p. 241 *et seq.* (para. 605).

[1741] Counter-Memorial, p. 241 *et seq.* (para. 605); *Thunderbird v. Mexico*, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 54 *et seq.* (paras. 164-166), p. 68 (para. 208).

the anticipated future profits of the Project.[1742] Those arguments conflate the identification of the Claimant's investment (an issue of liability) with the value of that investment (a question of the quantification of loss).

1159 The Claimant does not claim that Canada expropriated "*bénéfices futurs hypothétiques*".[1743] Rather, the Claimant claims that Canada expropriated (or imposed measures tantamount to expropriation) its investment as a whole, *i.e.*, the Symbio Project, the **fair market value of which** should be quantified by reference to the net present value of the future cashflows that the investment would generate (see Section 5.2 below). However, the mere fact that the value of the Project derived from the expectation of future returns does not mean that it was not capable of expropriation.

1160 **Finally**, the Respondent's argument that the Claimant's capital expenditures did not give it a right that the Project should go ahead is similarly misguided.[1744] The expenditures were still incurred in relation to the investment and added to its value.[1745] The Respondent argues that the Claimant made expenditures on lobbying, legal fees and expert reports because it knew the investment was uncertain;[1746] to the contrary, the Claimant incurred those and all other capital expenditures on the Project because it reasonably believed it would achieve a return on those investments.[1747] It was the Respondent's actions that illegitimately denied the Claimant the potential to realise those returns.

1161 In conclusion, therefore, there is no reason for the Tribunal to assess in the abstract whether the Claimant's "investment" was capable of being expropriated; however, even if it did, the Symbio Project clearly was (as were its constituent elements, to the extent that is relevant).

[1742] Counter-Memorial, p. 241 *et seq.* (paras. 605, 607, 608, 617-619).

[1743] Counter-Memorial, p. 242 (para. 607).

[1744] Counter-Memorial, p. 246 (paras. 617-619).

[1745] Incidentally, the Respondent's argument that "*la grande majorité de ces dépenses n'étaient pas liées à des droits pouvant être expropriés*" acknowledges that the Claimant did have some rights capable of being expropriated: see Counter-Memorial, p. 242 *et seq.* (para. 608).

[1746] Counter-Memorial, p. 246 (para. 618).

[1747] See Memorial, p. 238 *et seq.* (paras. 772-773).

4.3.2 The Respondent's measures were an indirect expropriation or tantamount to expropriation of the Claimant's investment

1162 In the Memorial, the Claimant explained that the actions of the Québec and Federal Governments amounted to an indirect expropriation of its investment.[1748] Canada's refusal to authorise the Project had the effect of depriving the Claimant of its reasonably-to-be-expected economic benefit of its investment which, as the Claimant explained, has consistently been stated by NAFTA tribunals to be indicative of an indirect expropriation.[1749]

1163 In its Counter-Memorial, the Respondent denies that it expropriated the Claimant's investment. For the reasons explained below, the Respondent's arguments fail.

1164 **First**, the Respondent argues that an impact on the economic value of an investment alone does not amount to an expropriation.[1750] Of course, it is trite that a detrimental economic impact on an investment alone would not **always** mean the impugned government measures amounted to an expropriation. The question of whether there has been an expropriation (or indeed measures tantamount to expropriation) is a fact-based enquiry to be assessed on a case-by-case basis.[1751]

1165 As explained in the Memorial, previous NAFTA tribunals have considered the severity of the economic impact of the measures in question to be the decisive criterion.[1752] In this regard, the Respondent's attempt to rely on Article 3(a)(i) of Annex 14-B USMCA to downplay the relevance of economic impact under Article 1110(1) NAFTA is misconceived: the latter treaty does not purport to clarify the meaning of the former – to the

[1748] Memorial, p. 234 *et seq.* (paras. 761-774). For the avoidance of doubt, where the Claimant referred to "indirect expropriation" in the Memorial, it intended also to refer to the concept of "measures tantamount to expropriation" under Article 1110 NAFTA.

[1749] Memorial, p. 231 *et seq.* (paras. 754-755).

[1750] Counter-Memorial, p. 247 *et seq.* (paras. 621-624).

[1751] Memorial, p. 233 (para. 758). See also *Feldman v. Mexico*, Award, 16 December 2002, at **Exhibit RL-028-ENG**, p. 37 (para. 102) ("Ultimately, decisions as to when regulatory action becomes compensable under article 1110 and similar provisions in other agreements appear to be made based on the facts of specific cases. This Tribunal must necessarily take the same approach.").

[1752] Memorial, p. 232 (para. 755).

contrary, it promulgates a new and different standard of expropriation with different wording to Article 1110 NAFTA.[1753]

1166 As explained in the Memorial, and further below, the Respondent's refusals to authorise the GNLQ Project resulted in the total destruction of the economic value of the Claimant's investment in the Symbio Project.[1754] The Respondent does not appear to contest that this was the effect of its measures. [1755] Furthermore and in any event, the Respondent's characterisation of the Claimant's position as relying "*uniquement sur l'incidence économique du rejet de son projet*" is incorrect. [1756] As explained in the Memorial, the intensity and duration of the Respondent's measures were such that they amounted to an indirect taking of the Claimant's investment; and they interfered with the Claimant's distinct, reasonable, investment-backed expectations.[1757] The Claimant maintains those submissions, upon which it elaborates below.

1167 **Second**, the Respondent argues that there cannot have been an expropriation because the Claimant still formally retains control over GNL Québec Inc. and Gazoduq Inc, the corporations through which it invested in the Project.[1758] Aside from amounting to a belated admission that the Claimant **did, after all**, have an investment capable of being expropriated (*i.e.*, the companies themselves), the Respondent's argument lacks merit. It is well established that a finding of indirect expropriation (as opposed to direct expropriation) does not depend on the investor no longer controlling the investment.[1759]

1168 The Respondent's argument, in reliance on *Feldman v. Mexico*, to the effect that shares in a company can only be expropriated where the investor

[1753] See Counter-Memorial, p. 248 (para. 624); USMCA Annex 14-B, at **Exhibit CL-324-ENG**. See also Memorial, p. 233 *et seq.* (paras. 759-760).

[1754] Memorial, p. 234 *et seq.* (paras. 762-770). See Section 5.1.3 below.

[1755] Counter-Memorial. p. 247 (para. 621). See also Section 5.1.3 below.

[1756] Counter-Memorial. p. 247 (para. 621).

[1757] Memorial, p. 238 *et seq.* (paras. 771-774).

[1758] Counter-Memorial, p. 248 *et seq.* (paras. 625-626).

[1759] Memorial, p. 232 (para. 756).

is deprived of control over the company, is flawed.[1760] On no reading of the *Feldman* award could it be interpreted as laying down a general principle to that effect. Rather, that tribunal determined that the claimant's continued control over aspects of its business that were unrelated to the impugned measures was just one of several factors that led it to conclude that there had been no indirect expropriation, on the facts before it.[1761] If anything, *Feldman* undermines the Respondent's point, because the tribunal stated that it did not consider the control issue to be decisive.[1762] Moreover, in contrast to the claimant in *Feldman*, neither the Claimant nor its subsidiaries had any further business activities in Canada beyond the Symbio Project.

1169 **Third**, although the Respondent acknowledges that the Claimant's reasonable expectations are relevant to determining whether there has been an indirect expropriation (or measures tantamount to expropriation),[1763] it argues that, in this case, the Claimant's expectations do not support the finding of an expropriation.

1170 That argument rests, in large part, on the inaccurate assertion that, in light of the award in *Methanex v. U.S.*, "[*des*] *engagements spécifiques envers le demandeur quant à un résultat particulier d'un processus réglementaire*" are required to make a measure expropriatory (assuming it is also non-discriminatory, enacted for a public purpose and with due process).[1764] But that is not what the tribunal in *Methanex* said. Rather, it explained:

> "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with

[1760] Counter-Memorial, p. 248 *et seq*. (para. 625).

[1761] *Feldman v. Mexico*, Award, 16 December 2002, at **Exhibit RL-028-ENG**, p. 40 *et seq.* (para. 111), p. 58 *et seq.* (para. 142).

[1762] *Feldman v. Mexico*, Award, 16 December 2002, at **Exhibit RL-028-ENG**, p. 58 *et seq.* (para. 142).

[1763] Counter-Memorial, p. 250 *et seq*. (para. 629).

[1764] Counter-Memorial, p. 251 (para. 630) (original emphasis). The Respondent also relies, again, on Annex 14-B USMCA to suggest that "binding written assurances" could be necessary before an investor's expectations would contribute to the expropriatory character of a State measure (Counter-Memorial, p. 251 (para. 631)). For the same reasons explained above (see paragraph 1165), that reliance is misplaced.

> due process **and, which affects, inter alios**, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[1765]

1171 In other words, the *Methanex* tribunal was only suggesting that specific commitments would be needed in respect of regulatory measures of **general application**, not targeted regulatory actions affecting only one investor, such as in the present case. Indeed, the foregoing extract is, in substance, merely an espousal of the police powers doctrine under international law which (for the reasons explained in Section 4.3.3 below), does not apply here.

1172 In any event, as explained in the Memorial and contrary to the Respondent's effectively bare denial in the Counter-Memorial,[1766] the Claimant did receive specific and repeated assurances and expressions of support from the Québec and Federal Governments, which played a key role in its decision to invest (and continue investing) in the Symbio Project.[1767]

1173 The Respondent also argues that the Claimant's expectations as to its regulatory treatment by Canada were not reasonable because "*[i]l serait déraisonnable pour la demanderesse de s'attendre à ce que le Québec et le Canada présument de l'issue de l'évaluation environnementale de son projet et en arrivent à un résultat particulier*".[1768] However, this misunderstands the Claimant's claim. The Claimant does not suggest that it was entitled to a particular outcome. As explained in Section 4.1 above, what it could – and did – expect was that Canada would accord GNLQ a fair, non-discriminatory and non-arbitrary EA in accordance with Canadian law. As explained above, that was not the case: Canada breached

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[1765] *Methanex Corporation v. USA*, Award, 3 August 2005, at **Exhibit CL-031-ENG**, p. 278 of the PDF (Part IV - Chapter D - p. 4, para. 7) (emphasis added).

[1766] Counter-Memorial, p. 253 (para. 636).

[1767] Memorial, p. 238 *et seq.* (paras. 772-773); Illich I, at **Exhibit CWS-1**, p. 45 *et seq.* (s. X); Illich II, at **Exhibit CWS-1 (Second)**, p. 22 *et seq.* (s. 4.1). See also Section 4.1.2(i) above.

[1768] Counter-Memorial, p. 253 (para. 636).

its own law by failing to conduct a federal assessment by the Agency alone or a joint assessment of the GNLQ Project (see Section 2.3 above); the MELCC and Agency's separate processes both disregarded the proper scope of their reviews as set out in the MELCC Directive and EIS Guidelines (see Section 2.4 above); and these (and other) irregularities culminated in decisions to refuse the GNLQ Project that were unlawful under Canadian law (see Sections 2.5 and 2.6 above).

1174 As explained in the Memorial, the Claimant also expected that – in implementing their EAs – both levels of government would act consistently with the policies they had clearly established and explained to GNLQ (and the broader public).[1769] Specifically:

- As explained in Sections 2.1.1 and 4.2.2.2 above, the Québec and Federal Governments had both consistently endorsed and actively promoted LNG as a transition energy and had acted accordingly in their assessment of the environmental impact of projects with GHG emissions comparable to GNLQ's, or by approving such projects notwithstanding a finding that there would be an adverse environmental impact.[1770]
- As explained in Sections 2.1.2 and 4.2.2.3 above, the Québec and Federal Governments had a policy of promoting the development of shipping on the Saguenay River and, as such, to protect beluga whales in the Saguenay and St. Lawrence region not as a peremptory policy goal, but in the context of increased maritime traffic. It had followed that policy rationale in its EA and approval of similar projects involving increased maritime traffic in the Saguenay and St. Lawrence region.

1175 The Claimant reasonably expected that federal and Québec authorities would act consistently with the foregoing policies and prior practice with regard to the EA and decision whether to approve the GNLQ Project. Instead, Québec authorities arbitrarily imposed eleventh-hour "core

[1769] Memorial, p. 238 *et seq.* (paras. 772.b.-772.c.).

[1770] The Federal Government announced as recently as March 2025 its intention to invest CAD 200 million in the Cedar LNG project: Government of Canada, "Government of Canada announces support for Cedar LNG", 21 March 2025, at **Exhibit C-0454-ENG**, "Feds to contribute up to $200M for Haisla-led project to ship liquefied natural gas to Asia", *CBC News,* 21 March 2025, at **Exhibit C-0455-ENG**.

criteria" that turned those policies on their heads and ultimately led to the unlawful denial of the GNLQ Project both at the provincial and federal levels (see Sections 2.5.3 and 2.6.1 above).

4.3.3 The police powers doctrine does not apply

1176 The Respondent argues in the Counter-Memorial that, even if its measures vis-à-vis the Symbio Project would otherwise amount to an indirect expropriation (or be tantamount to expropriation), they should be deemed a valid exercise of the State's regulatory authority under the police powers doctrine.[1771] The Claimant does not dispute that, where measures are properly characterised as a valid exercise of police powers, they should not be deemed an expropriation under Article 1110 NAFTA.[1772] The Parties also do not appear to disagree significantly on the substance, in principle, of the police powers doctrine under international law (although to the extent there are minor differences, the Claimant maintains its submissions as set out at in the Memorial).[1773]

1177 However, where the Parties do disagree substantially is as to whether the police powers doctrine exculpates the Respondent on the facts of this case. The Claimant maintains that it does not, for the following reasons:

i) Québec and Canada's refusals to authorise the GNLQ Project cannot amount to a valid exercise of police powers because they **did not follow due process**.[1774] Putting aside the fact that under Canadian law there ought have been a single, rather than two EA processes (see Sections 2.3 and 4.1.3.1 above), both refusals were the culmination of regulatory processes that were marred by procedural irregularities. As explained in Sections 2.5 and 4.1.3.3 above, the Québec Government's

[1771] Counter-Memorial, p. 254 *et seq.* (s. VII.C.3).

[1772] See Memorial, p. 240 (para. 775).

[1773] See Memorial, p. 240 *et seq.* (paras. 775-783). In addition, the Respondent seeks to broaden the scope of the police powers doctrine by reference to Annex 14-B of the USMCA (Counter-Memorial, p. 255 (para. 641)). However, Annex 14-B USMCA is not a statement of the police powers as it exists customary international law (nor does it purport to be) and, for the reasons explained in paragraph 1165 above, it is irrelevant to the interpretation and application of Article 1110 NAFTA.

[1774] See Memorial, p. 246 (para. 784.f.).

EA process was procedurally unfair and unlawful in several respects, most obviously by the late addition of three "core criteria" which, document production has revealed, the MELCC itself had not considered problematic before the Québec Government interfered in the process at the eleventh hour (see Section 2.5.3.3 above), and which GNLQ was not afforded sufficient time to address (see Section 2.5.3.4 above). As for the EA process at the federal level, it was tainted when federal authorities illegally pre-judged its outcome, as explained in Section 2.6.1 above. The Québec Government also denied Gazoduq due process when it pre-emptively and publicly declared on 21 July 2021 that the Gazoduq Project had "died" and that there would be no BAPE process for it (see Section 2.7.3 above).[1775]

ii) The refusals to authorise the GNLQ Project were also **arbitrary**.[1776] In addition to the procedural irregularities that led to those decisions, the extent and impact of which rendered them both arbitrary, the refusal decisions themselves were based on arbitrary reasons. As explained in Section 4.1.3.3(vi)-(viii) above, the Québec Government's refusal of the GNLQ Project due to alleged uncertainties surrounding its impacts on GHG emissions in Québec, the alleged impact of marine traffic on beluga whales and its social acceptability was arbitrary and unfounded and contradicted Québec's long-standing policies on those issues.

iii) The refusals of the Québec and Federal Governments to authorise the GNLQ Project were also **discriminatory**.[1777] The Respondent denies this, arguing that those refusals were evidence-based.[1778] However, for the reasons explained in the context of its Article 1102 and Article 1103 NAFTA claims, that position does not withstand scrutiny: both the Québec and federal authorities applied double-standards in their EAs and subsequent rejections of the GNLQ Project, as compared to other projects in like circumstances (see Section 4.2.2 above). The Claimant also demonstrates how those processes were discriminatory in the context of its Article 1105 NAFTA claim (see Section 4.1.3 above).

[1775] See also Memorial, p. 243 (para. 784.a.)

[1776] See also Memorial, p. 244 *et seq.* (paras. 784.b.-784.c.).

[1777] See also Memorial, p. 244 *et seq.* (paras. 784.b.-784.c.)

[1778] Counter-Memorial, p. 260 (para. 655).

iv) The Québec and Federal Governments' refusals to authorise the GNLQ Project were not *bona fide* exercises of regulatory authority in the **public interest**. The Respondent argues incorrectly that the Claimant must demonstrate bad faith.[1779] That would amount to a reversal of the evidentiary standard; rather, the **absence of good faith** is one of several factors that precludes the application of the police powers doctrine.[1780] As explained in Section 2.5.3.1 above, the documents that the Respondent has produced in document production confirm that the Minister of Environment's last-minute introduction of "core criteria" went against the MELCC's initial plan, based on its ongoing EA, to recommend approving the GNLQ Project. As for the documents regarding the genesis of the core criteria that the Respondent has refused to produce as noted above in Section 2.5.3.1, they allow the Tribunal to infer that those documents would have revealed motives that were not *bona fide* public interest concerns.

v) Finally, even if the Respondent's measures had been solely motivated by public interest concerns, the Québec and Federal Government's refusals to authorise the GNLQ Project were **excessive**, not proportionate. As explained in the Memorial, the Québec and federal authorities could have addressed their purported concerns, such as the level of sub-aquatic noise in the Saguenay River, by less draconian means and by imposing reasonable mitigation measures on GNLQ.[1781] The Respondent asserts that there is no evidence that the impacts of the GNLQ Project could have been mitigated by suitable conditions,[1782] but that assertion is undermined by the documents produced at the Claimant's request in this arbitration, which include draft lists of conditions and mitigation measures that the MELCC had been

[1779] Counter-Memorial, p. 258 (para. 650).

[1780] See Memorial, p. 241 (para. 778); *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, 30 March 2023 dated 30 March 2023, at **Exhibit CL-075-ENG**, p. 54 (para. 185).

[1781] The Respondent asserts, incorrectly, that the Claimant does not argue that the Federal Government's refusal was excessive: Counter-Memorial, p. 263 (para. 663). For the avoidance of doubt, the Claimant also submits that the federal rejection was excessive.

[1782] Counter-Memorial, p. 263 (para. 662).

intending to propose.[1783] Instead, both the Québec and Federal Governments unlawfully refused to authorise the GNLQ and Gazoduq Projects altogether, thereby destroying the entire value of the Symbio Project.

1178 Lastly, the Respondent complains that GNLQ did not initiate judicial review proceedings to challenge the Québec and federal EA processes at the time and that accordingly those processes must not have been discriminatory or involved violations of due process.[1784] That is evidently a legal fallacy. The fact that GNLQ did not initiate judicial review proceedings does not have any bearing on their expropriatory nature under Article 1110 NAFTA.

1179 The Respondent's related argument that the Claimant cannot claim to have been denied procedural fairness because Canada's legal framework offered GNLQ the option to pursue remedies in domestic courts is equally unmeritorious.[1785] Canada had offered the Claimant and Symbio the option of commencing arbitration under the NAFTA and they chose to exercise that right. There is no "exhaustion of local remedies" provision under the NAFTA.[1786]

1180 For all the foregoing reasons, the Tribunal should conclude that the police powers doctrine does not exculpate the Respondent from what would otherwise be an expropriation within the meaning of Article 1110.

4.3.4 The Respondent's expropriation was unlawful

1181 In the Memorial, the Claimant demonstrated that Canada's expropriation of its investment did not comply with the conditions for an expropriation to be lawful under Article 1110 NAFTA, namely: (i) that it be for a public purpose, (ii) conducted on a non-discriminatory basis, (iii) in accordance

[1783] See paragraph 346 above; [redacted] at **Exhibit C-0494-FRA**, p. 5 *et seq*.

[1784] Counter-Memorial, p. 257 *et seq*. (paras. 648 and 659).

[1785] Counter-Memorial, p. 262 *et seq*. (paras. 660-661).

[1786] Quite the opposite, under Article 1121 NAFTA, the Claimant and Symbio were required to waive their rights to pursue local remedies in order to bring the present claim: NAFTA, at **Exhibit CL-001-ENG**, p. 12.

with due process of law and Article 1105(1) NAFTA, and (iv) upon payment of compensation in accordance with Articles 1110(2) to (6) NAFTA.[1787]

1182 In the Counter-Memorial, the Respondent offers no rebuttal, only that it is not necessary to examine whether the expropriation was lawful because, on its case, there has not been one.[1788]

1183 That is, of course, simply a veiled acknowledgement that Canada cannot satisfy the cumulative conditions for lawful expropriation under Article 1110. It is common ground that Canada has offered no compensation to the Claimant. For that reason alone, the expropriation was unlawful.

4.4 The precautionary principle does not apply and, in any event, would not justify a breach of the NAFTA

1184 In the Counter-Memorial, the Respondent argued in passing that the Agency applied the precautionary principle when assessing the possible impacts of the GNLQ Project on beluga whales.[1789] However, as explained at Section 2.6.2.2(ii) above, the Agency Report nowhere mentions the precautionary principle,[1790] nor indeed does the MELCC Report.

1185 The precautionary principle has instead been invoked by a Québec NGO, the CQDE, in its *amicus curiae* submission filed on 25 September 2024 in this arbitration.[1791] At the time of CQDE's application, the Claimant noted that a submission from CQDE would not assist the Tribunal by bringing a "perspective, particular knowledge or insight" different from that of the disputing parties on any factual or legal issue.[1792] Indeed, as far as the precautionary principle is concerned, the Respondent is the only party able

[1787] Memorial, p. 246 *et seq.* (paras. 787-826).

[1788] Counter-Memorial, p. 263 (para. 664).

[1789] Counter-Memorial, p. 62 (para. 167). See also Bélanger, at **Exhibit RWS-1**, p. 39 *et seq.* (paras. 107-108 and 129-130).

[1790] See Agency Report, at **Exhibit C-0037-ENG**, p. 64 (Parks Canada), p. 65 (Pessamiulnutsh), p. 110 (Huron-Wendat), p. 250 (Pekuakamiulnuatsh).

[1791] Mémoire du Centre Québecois du Droit de l'Environnement à titre d'*amicus curiae* dated 25 September 2024.

[1792] Claimant's letter to the Tribunal dated 25 October 2024, p. 1 *et seq.* (paras. 2-5).

to explain if and how that principle was, in its view, relevant to the decision-making process surrounding the GNLQ Project and other projects.

1186 Tellingly, the Respondent recognised at the time of the CQDE application that it had not addressed this issue in its submissions:

> "*Il [Le CQDE] se prononce ensuite sur les raisons pour lesquelles les autorités canadiennes et québécoises ont tenu compte, conformément au droit applicable, du principe de précaution dans leur évaluation des impacts engendrés par le projet Énergie Saguenay sur la transition énergétique, les émissions globales de GES et la population de béluga.* ***Aucune des parties contestantes n'a fourni une telle perspective sur le principe de précaution dans ses plaidoiries***."[1793]

1187 Had the Respondent genuinely believed that the Québec and federal authorities' actions reflected a legitimate exercise of precaution, it would have presented evidence to that effect in its Counter-Memorial. It is not for the CQDE to explain whether or how, as a legal matter or as a factual matter, the Québec and federal authorities exercised prudence when analysing the GNLQ Project.

1188 Nevertheless, the CQDE defends the Federal and Québec Government's decisions not to authorise the GNLQ Project, by arguing that:

i) international law does not prevent States from applying their own laws for the protection of the environment;[1794]

ii) the precautionary principle grants States the power to make decisions aimed at protecting the environment in case of scientific uncertainty;[1795] and

[1793] Observations du Canada quant à la demande d'autorisation du CQDE dated 25 October 2024, p. 2 (emphasis added).

[1794] CQDE Memorial, p. 18 (para. 76).

[1795] CQDE Memorial, p. 10 *et seq.* (para. 37), p. 18 (para. 78).

iii) the Québec and Federal Governments validly applied the precautionary principle in refusing to authorise the GNLQ Project.[1796]

1189 The CQDE's arguments are without merit.

1190 It is undisputed that, under the NAFTA, Canada has the power to adopt the measures and make the decisions it considers necessary to protect the environment.[1797] However, Article 1114 NAFTA provides that this power must be exercised in a manner "**otherwise consistent with [Chapter 11 NAFTA]**".[1798] In other words, contrary to the CQDE's suggestion, Canada's measures must not be contrary to Articles 1102, 1103, 1105 and 1110 NAFTA, which provide for the protection of investments. This principle suffers no exception.

1191 The CQDE argues that the precautionary principle is "*particulièrement pertinent*"[1799] in the context of environment protection and should be applied when the following criteria are met:

> "1*) l'absence de certitude scientifique complète;*
> *2) le caractère grave ou irréversible du dommage potentiel, lequel s'évalue en fonction du niveau de protection recherché; et*
> *3) la présence de motifs raisonnables de craindre des effets dangereux sur l'environnement (la probabilité du risque ne doit pas être simplement hypothétique ou de la nature de conjectures)*".[1800]

1192 The CQDE does not offer any source for this three-prong test, except the "*enseignements*" of unspecified "*auteurs*" and two Québec domestic cases.[1801] This absence of legal support does not prevent the CQDE from arguing that these criteria were met and that Québec and federal authorities validly applied the precautionary principle vis à vis the GNLQ Project and

[1796] CQDE Memorial, p. 19 (paras. 79-81).
[1797] CQDE Memorial, p. 1 (s. I(b)).
[1798] NAFTA, at **Exhibit CL-001-ENG**, p. 9 (Art. 1114). CQDE Memorial, p. 1 *et seq.* (paras. 5-6).
[1799] CQDE Memorial, p. 3 (para.12).
[1800] CQDE Memorial, p. 10 (para. 37).
[1801] CQDE Memorial, p. 10 (para. 37).

must therefore be exonerated from any liability under the NAFTA.[1802] This conclusion is patently wrong.

1193 **First**, the CQDE fails to explain how the precautionary principle could apply in the present dispute. Article 1131(1) NAFTA indeed provides that the Tribunal "shall decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law."[1803] Prior tribunals have held that "applicable rule[] of international law" refers to the sources of public international law listed in Article 38 of the ICJ Statute, *i.e.*, treaties, custom, general principles of law and, as subsidiary means of interpretation, judicial decisions and teachings of highly qualified publicists.[1804] The CQDE fails to demonstrate that the precautionary principle constitutes an "applicable rule[] of international law" under Article 1131(1) NAFTA.

1194 **Second**, as noted above, the MELCC, the Agency and the Federal and Québec Governments never invoked the precautionary principle – or any of its purported components as set out by the CQDE – in their respective recommendations and decisions. Furthermore, the Respondent has not invoked the precautionary principle as a defence to the claims against it in this arbitration.

1195 **Third**, under federal Canadian law and Québec law, the precautionary principle can only be invoked in limited circumstances as set out in the "framework for the application of precaution in science-based decision making about risk" issued by the Federal Government.[1805] In accordance with this framework, precautionary measures must be:

i) applied provisionally and subject to reconsideration based on the evolution of science, technology and society's chosen level of protection;

[1802] CQDE Memorial, p. 10 (paras. 37-38).

[1803] NAFTA, at **Exhibit CL-001-ENG**, p. 17 (Art. 1131(1)).

[1804] See *Thunderbird v. Mexico*, Arbitral Award, 26 January 2006, at **Exhibit CL-057-ENG**, p. 31 (para. 90); *Methanex Corporation v. USA*, Award, 3 August 2005, at **Exhibit CL-031-ENG**, p. 17 of the PDF (para. 3).

[1805] *Gouvernement du Canada, Cadre d'Application de la Précaution Dans un Processus Décisionnel Scientifique en Gestion du Risque*, at **Exhibit ST-0020-FRA** (in French).

ii) proportional to the potential severity of the risk being addressed and to society's chosen level of protection;

iii) non-discriminatory and consistent with measures taken in similar circumstances;

iv) 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

v) where more than one option meets the above characteristics for a valid precautionary measure, then the least trade-restrictive measure should be applied.[1806]

1196 In other words, precautionary measures must be adequately justified and meet a number of criteria properly and transparently set out as part of the decision. None of the recommendations or decisions by the federal and Québec authorities meet these requirements.

1197 In conclusion, the precautionary principle cannot be invoked as a *post hoc* excuse for the Respondent's conduct. Putting aside the Respondent's failure to demonstrate that the principle qualifies as a rule of international law under Article 1131(1) NAFTA, the Respondent never invoked the principle at the time of the refusals to authorise the GNLQ Project. In any case, there is no indication that, by refusing to authorise the GNLQ Project, the authorities legitimately sought to exercise caution in the public interest; on the contrary, the evidence overwhelmingly shows that those decisions were not science-driven and were the result of improper political interference, as well as of the arbitrary and discriminatory conduct of both Québec and Federal authorities.

[1806] *Gouvernement du Canada, Cadre d'Application de la Précaution Dans un Processus Décisionnel Scientifique en Gestion du Risque*, at **Exhibit ST-0020-FRA**, p. 11 *et seq.* (No. 4.6 - 4.10).

5 QUANTUM OF COMPENSATION

1198 Notwithstanding its attempts to do so in the Counter-Memorial, the Respondent cannot avoid its obligation to make reparation for its breaches of Chapter 11 of the NAFTA. The Claimant and Symbio have suffered losses by reason of, or arising out of those breaches, in that the Respondent's actions deprived them of the fair market value of the Symbio Project as at July 2021 (**Section 5.1**). This fair market value is most appropriately assessed using a DCF methodology (**Section 5.2**). Using such a DCF methodology, weighted together with past transactions in Symbio, Secretariat has produced an *ex ante* valuation of the Symbio Project of USD 588 million as at July 2021 (**Section 5.3**). The Claimant and Symbio are entitled to interest on this amount at a commercial rate (**Section 5.4**).

5.1 The Respondent's breaches of the NAFTA caused the Claimant and Symbio to lose the fair market value of the Symbio Project as at 21 July 2021

1199 As the Claimant has established,[1807] the arbitrary and procedurally unfair treatment of the Claimant, through the provincial and federal EAs, ultimately resulted in Québec's rejection of the GNLQ Project in July 2021 and prevented it from moving forward through its development, construction and operation. The Federal Government indicated even before it had concluded its own EA that it would follow suit, which it did in February 2022, cementing the decision to block the GNLQ Project. For its part, the Gazoduq Project, in the words of Minister Charette, "died" together with the GNLQ Project.[1808] Canada's treatment of the Symbio Project, which, as set out in Section 4 above, breached its obligations under Chapter 11 of the NAFTA, thus deprived the Claimant and Symbio of their reasonably to-be-expected economic returns and the benefit of their investment in the Project.

[1807] Memorial, p. 263 *et seq.* (paras. 859-863).

[1808] "*Rejet de GNL Québec: il n'y aura pas de BAPE sur le projet de Gazoduq*", *Radio-Canada*, 21 July 2021, at **Exhibit C-0035-FRA**.

1200 In its Counter-Memorial, the Respondent accepts that authorisations by the Québec and Federal Governments were indispensable to the GNLQ Project and, by extension, the Gazoduq Project.[1809] It also does not appear to dispute that, following the decision that the GNLQ Project would "never see the light of day",[1810] the Symbio Project was essentially worthless. Yet, Canada also claims that, even if its breaches of the NAFTA were established, the Claimant has failed to prove a causal link with sufficient certainty between those breaches and its losses.[1811]

1201 Specifically, the Respondent argues that the success of the Symbio Project was dependent on various factors and that, even in the absence of Canada's NAFTA breaches leading to the refusal of environmental authorisation, the Project might have failed for other reasons – for example, an unrelated permitting issue, or because the Claimant might have decided to abandon the Symbio Project in light of "economic circumstances".[1812] Thus, the Respondents says, any losses by the Claimant are too "uncertain" to be compensated.[1813] This argument does not withstand scrutiny.

1202 *In limine*, to align with the *ex ante* approach used by the Respondent's experts, the Claimant in this Reply has brought forward the date of valuation to 21 July 2021. The Tribunal must therefore assess the Claimant's and Symbio's losses, and the relevant counterfactual scenario, as at July 2021 (**Section 5.1.1**).

1203 Furthermore, the Claimant and Symbio have suffered losses by reason of, and arising out of, the Respondent's NAFTA breaches. The Respondent's arguments to the contrary misstate the applicable legal standards of proof for the existence and for the quantification of loss, imposing a threshold which no pre-production project – or, arguably, even an operational one – could meet (**Section 5.1.2**).

[1809] Counter-Memorial, p. 296 (n. 1223).

[1810] TACT, Transcript of press conference dated 22 July 2021, at **Exhibit C-0284-ENG-FRA**, p. 1 and p. 6.

[1811] Counter-Memorial, p. 266 *et seq.* (s. VIII.A.).

[1812] Counter-Memorial, p. 265 (para. 667).

[1813] Counter-Memorial, p. 270 *et seq.* (para. 677).

1204 The standard of compensation for these losses is the fair market value of the Symbio Project. This standard applies not only to expropriation but to all the NAFTA breaches as long as they lead (individually or together) to a total loss of the investment, as is the case here (**Section 5.1.3**).

5.1.1 The Claimant's and Symbio's losses are assessed as of 21 July 2021

1205 In its Memorial, the Claimant noted that, under customary international law, a party is entitled to elect its **valuation date** and may decide to adopt an *ex post* approach (*i.e.*, at the date of the award) or *ex ante* approach (*i.e.*, at the date when the loss was incurred).[1814] On this basis, the Claimant's previous counsel instructed Secretariat to adopt an *ex post* approach, using a valuation date of 30 September 2023 (*i.e.*, shortly before its Memorial), to be updated until the final award. The *ex post* approach allows the Tribunal to take into account any developments in the Symbio Project that would have occurred post-July 2021 as well as current market data and geopolitical developments following the Russian invasion of Ukraine.[1815]

1206 The Respondent, for its part, argues for an *ex ante* approach using a valuation date of 21 July 2021, *i.e.*, the date on which the Québec Government refused to authorise the GNLQ Project. It maintains that this date is more appropriate on the ground that Québec's authorisation was indispensable for the realisation of the GNLQ Project (and, thus, also the Gazoduq Project), and that this decision therefore "*a mis fin au projet Énergie Saguenay et au projet Gazoduq*."[1816]

1207 As the *Karkey Karadeniz v. Pakistan* tribunal observed, it is not necessary to "enter into a theoretical debate as to the appropriateness of an ex-ante

[1814] Memorial, p. 269 (para. 880); F. Lavaud and G Recena Costa, *Valuation Date in Investment Arbitration: A fundamental examination of Chorzów's principles", Journal of Damages in International Arbitration*, at **Exhibit CL-325-ENG**, p. 34; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, IUSCT Case No. 39, Award, 29 June 1989, at **Exhibit CL-326-ENG**, p. 29 (para. 110); *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No ARB/15/36, Award, 6 September 2019, at **Exhibit CL-327-ENG**, p. 246 (para 683).

[1815] Memorial, p. 272 *et seq.* (para. 887).

[1816] Counter-Memorial, p. 296 (n. 1223).

or ex-post valuation" and "[e]ach approach may be acceptable provided it leads to full compensation of the damaged party".[1817] In order to narrow the issues between the Parties and taking into account the conceptual and practical issues of an *ex post* valuation, the Claimant in its Reply has instructed Secretariat to use an *ex ante* valuation date of 21 July 2021, namely the same date as used by Canada.[1818]

1208 The use of an *ex ante* approach has two main consequences on the valuation of the Symbio Project.

1209 **First**, it means that Secretariat assesses the Claimant's loss (which, as set out in Section 5.1.3, is the fair market value of the Symbio Project) using information known or knowable as at 21 July 2021.[1819] Specifically, this excludes the effect on gas prices of the invasion of Ukraine in February 2022 (although not the longer-term trend towards European energy security, diversification of supply and reducing reliance on Russian gas, already existing in 2021). In addition, Secretariat relies on the pricing terms in GNLQ's 2021 term sheets, rather than the revised terms negotiated in 2022 with gas suppliers and offtakers.[1820]

1210 **Second**, the counterfactual scenarios differ as follows:

i) In an *ex post* scenario, the Tribunal would have to determine the fair market value of the Symbio Project as it would be today, but for the Respondent's breaches. This entails a factual enquiry into, *inter alia*, how the Project would have likely progressed between July 2021 and the present day.

ii) In an *ex ante* scenario, by contrast, the Tribunal must determine the fair market value of the Symbio Project in July 2021, immediately before the Québec Government refused to authorise the GNLQ Project,

[1817] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, at **Exhibit CL-328-ENG**, p. 185 (para. 670).

[1818] Counter-Memorial, p. 296 (n. 1223).

[1819] Secretariat II, at **Exhibit CER-3 (Second)**, p. 19 *et seq*. (para. 3.7).

[1820] See, *e.g.*, Secretariat II, at **Exhibit CER-3 (Second)**, p. 79 *et seq.* (para. 4.24, third bullet point).

preventing the Claimant from developing the Symbio Project and resulting in its total loss of value.

1211 It follows that, even with the benefit of hindsight and current market data, the *ex post* approach requires the Tribunal to make additional assumptions, or factual findings, about the probable counterfactual scenario. This is in fact the Respondent's primary criticism of the *ex post* approach: Canada and Accuracy assert that it would require the Tribunal to assume that the Symbio Project would have "necessarily" proceeded and reached FID, been constructed and entered profitable operations in a "quasi-certain" manner.[1821] As explained below in Section 5.1.2, that assertion is overstated even in the context of an *ex post* approach, but, importantly, it is **irrelevant** in the context of an *ex ante* approach as of July 2021.

1212 Taking the facts of this case, in an *ex ante* approach, the Tribunal has the benefit of a reasonably contemporaneous valuation model, as well as arm's length transactions in the form of prior investments in Symbio over multiple financing rounds (each of which included new investors). As Secretariat explains, while the Symbio Project would have appreciated further in value by July 2021 due to market conditions and the further development and de-risking of the Project, these pre-July 2021 transactions provide real-world indicators of the fair market value of the Symbio Project, reasonably close to the valuation date.[1822]

1213 As detailed further in Section 5.3 below, the consequence of the revised valuation date is to reduce the fair market value of the Symbio Project from USD 1.0 billion (as assessed as at September 2023 in Secretariat's first report) to USD 588 million (as at July 2021). This reduction is driven primarily by, first, the lower gas hub prices prevailing in 2021 compared to 2023 and, second, the significantly higher pre-operational risk premium ("**PORP**") applied in the *ex ante* scenario to reflect the earlier stage of development of the Project as at July 2021 compared to September 2023

[1821] Counter-Memorial, p. 265 (para. 667), p. 267 (para. 671).

[1822] Secretariat II, at **Exhibit CER-3 (Second)**, p. 67 *et seq.* (paras. 4.6-4.8); see paragraphs 1353-1355 below.

(when it would have been approaching FID) and the accompanying development risks.[1823]

5.1.2 The Claimant and Symbio have suffered losses by reason of, or arising out of, the Respondent's breaches of the NAFTA

1214 In its Counter-Memorial, the Respondent starts from the principle that, under Article 1117 NAFTA and customary international law, the Claimant bears the burden of proving that it and Symbio suffered loss by reason of, or arising out of, Canada's breaches.[1824] That much is uncontroversial. However, the Respondent then jumps to the conclusion that the Claimant must therefore show with "reasonable certainty" that, if it had been granted the authorisations by the Québec and Federal Governments, it would have fulfilled all conditions and completed all steps necessary to bring the Symbio Project into operation.[1825] Since the Project was dependent on various factors which could have affected its commercial success (or whether it realised profitability at all), the Respondent says, the Claimant fails to meet this threshold.[1826]

1215 The Respondent misstates, however, the standard for causation under the NAFTA and customary international law more broadly and, as a result, the standard to be met by the Claimant to prove the existence of a loss and the quantification of that loss (**Section 5.1.2.1**). Applying those standards, the Claimant has proven with reasonable certainty that it and Symbio have suffered a loss (**Section 5.1.2.2**), and the cases relied upon by the Respondent to deny that its breaches caused any loss are inapposite (**Section 5.1.2.3**). It follows that the Respondent's breaches of the NAFTA caused the Claimant's and Symbio's losses (**Section 5.1.2.4**).

[1823] Secretariat II, at **Exhibit CER-3 (Second)**, p. 78 (para. 4.23) and p. 94 *et seq*. (paras. 4.55-4.59).

[1824] Counter-Memorial, p. 265 (para. 667).

[1825] Counter-Memorial, p. 270 *et seq*. (para. 677).

[1826] Counter-Memorial, p. 275 *et seq*. (paras. 687-694).

5.1.2.1 The Respondent misstates the standards of proof for the existence and the quantification of a loss

1216 The Respondent confuses the standard of proof for the **existence** of a loss (which appears to be the basis for its "reasonable certainty" threshold) with the standard for the **quantification** of that loss.[1827] The tribunal in *Lemire v. Ukraine*, in the context of assessing damages where the authorities had wrongfully denied a radio operator's applications for frequency licences, noted the following:

> "The Tribunal agrees that it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; **the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages**. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss. […]
>
> While the existence of damage is certain, calculating the precise amount of the compensation is fraught with much more difficulty, inherent in the very nature of the 'but for' hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; **the best any tribunal can do is to make an informed and conscientious evaluation,** taking into account all the relevant circumstances of the case, **not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings**."[1828]

[1827] Counter-Memorial, p. 265. (para. 667).

[1828] *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award, 28 March 2011, at **Exhibit CL-121-ENG**, p. 70 (para. 246-248) (emphasis added).

1217 Other investment treaty tribunals have similarly held that, once the fact of a loss is established, the standard of proof for quantifying the loss is lower.[1829] This is notably true in the case of the loss of future revenue, which will by its very nature entail a degree of uncertainty:

> "[O]nce the fact of damage has been established, a claimant should not be required to prove its exact quantification with the same degree of certainty. **This is because any future damage is inherently difficult to prove**."[1830]

1218 Thus, once it is established that the Claimant and Symbio have suffered a loss with reasonable certainty – which, in both arbitral jurisprudence and literature, means that the loss is more probable than not (rather than, for example, proven beyond reasonable doubt)[1831] – a lower threshold applies to proving the amount of that loss. In particular, it is sufficient that the Tribunal has a basis on which it can reasonably estimate the amount of that loss.[1832]

[1829] *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020, at **Exhibit CL-329-ENG**, p. 42 (para. 125); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Case No. ARB/84/3, Award on the Merits, 20 May 1992, at **Exhibit CL-330-ENG**, p. 31 of the PDF (para. 215).

[1830] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 238 (paras. 867-868) (emphasis added). See also *Tecmed v. Mexico*, Award, 29 May 2003, at **Exhibit CL-064-ENG**, p. 76 (para. 190); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at **Exhibit CL-063-ENG**, p. 252 (para. 8.3.16) ("[…] approximations are inevitable; the settling of damages is not an exact science").

[1831] *Vivendi v. Argentina*, Award, 20 August 2007, at **Exhibit CL-063-ENG**, p. 250 (para. 8.3.10); S. Ripinsky and K. Williams, *Damages in International Investment Law* (BIICL 2008) (excerpts), at **Exhibit CL-331-ENG**, p. 12 of the PDF.

[1832] S. Ripinsky and K. Williams, *Damages in International Investment Law*, at **Exhibit CL-331-ENG**, p. 12 *et seq.* of the PDF.

5.1.2.2 The Claimant and Symbio have established with "reasonable certainty" their losses as a result of the Respondent's breaches

1219 On the facts, the Claimant has more than met the requirement to prove the existence of a loss by reason of, or arising out of, the Respondent's breaches.

1220 **First**, the fact that the Symbio Project was pre-operational and, to some degree, contingent upon the Claimant successfully completing other steps does not undermine that the Claimant has, with "reasonable certainty", suffered a loss.

1221 Notably, the Respondent has argued to take 21 July 2021 as the relevant date to assess the fair market value of the Claimant's investment in the Symbio Project, and the Claimant has now instructed Secretariat to prepare an *ex ante* valuation as of the same valuation date. From an economic point of view, the fair market value of the Symbio Project as at July 2021 reflects what a hypothetical buyer would have paid for the opportunity to develop the Project, in the absence of Canada's breaches. While a hypothetical buyer would discount the valuation to reflect uncertainties in the future development of the Project (such as permitting, financing or construction risk), in the same way as those uncertainties were reflected in contemporaneous valuations of the Project, they do not mean that the value was nil, as the Respondents suggests.

1222 That much is acknowledged in the line of cases and commentary recognising the availability of compensation for loss of opportunity. Put simply, it is recognised that the chance of making profit is an asset with a value of its own.

1223 Indeed, investment treaty tribunals have confirmed that compensation for loss of opportunity is not incompatible with the requirement to establish the existence of a loss with a "reasonable degree of certainty".[1833] Such a loss of opportunity is compensable as its own head of damages or as a

[1833] *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 324 of the PDF (paras. 13-88).

"sub-species of lost profits".[1834] The difference between lost profits and lost opportunity is indeed more a difference of degree than of kind, since compensation for future profits is in any case discounted at a rate reflecting, *inter alia*, the uncertainty inherent in future cash flows.

1224 Tribunals have confirmed that a loss of opportunity is a compensable loss, particularly in the case of pre-operational projects. Indeed, this is far from a recent development in the law. One of the earliest investment arbitration awards, *Sapphire v. NIOC*, awarded compensation for the repudiation of an oil concession agreement granted by Iran's national oil company to a Canadian developer. The area had not yet been prospected, such that it was uncertain whether it even contained oil in commercially viable quantities or whether an oilfield could be brought into operation. Nevertheless, it was clear that the developer "had an opportunity to discover oil, an opportunity which both parties regarded as very favourable" and that the deprivation of this opportunity entitled it to compensation.[1835] In assessing the value of the lost opportunity, the arbitrator observed – in terms later echoed by other tribunals, as noted above – that "[i]t is not necessary to prove the exact damage", provided that it is possible to show "with sufficient probability the existence and extent of the damage".[1836]

1225 That principle was confirmed in *Gemplus v. Mexico*, in which the investor had held shares in a local company, the concessionaire, whose concession to operate a vehicle registry was arbitrarily revoked. While the business had not progressed beyond a start-up and the tribunal considered its

[1834] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Ad hoc Arbitration, Award, 15 March 1963, at **Exhibit CL-332-ENG**, p. 44 *et seq.* (para. 15); *Lemire v. Ukraine (II)*, Award, 28 March 2011, at **Exhibit CL-121-ENG**, p. 70 *et seq.* (para. 251) (while awarding damages for lost profits instead, the *Lemire* tribunal noted that "compensation for a lost chance is admissible, and is normally calculated as the hypothetical maximum loss, multiplied by the probability of the chance coming to fruition."); *Bilcon of Delaware et al v. The Government of Canada*, NAFTA, PCA Case No. 2009-04, Award on Damages, 10 January 2019, at **Exhibit CL-140-ENG**, p. 81 (para. 286); *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 324 *et seq.* of the PDF (paras. 13-83-13-92).

[1835] *Sapphire v. NIOC*, Award, 15 March 1963, at **Exhibit CL-332-ENG**, p. 44 *et seq.* (para. 15).

[1836] *Sapphire v. NIOC*, Award, 15 March 1963, at **Exhibit CL-332-ENG**, p. 44 *et seq.* (para. 15).

prospects of commercial success as "significantly less than 50%",[1837] the tribunal was nevertheless satisfied that the investor had suffered a loss. Having surveyed prior arbitral decisions on the subject, the tribunal affirmed that compensation for loss of opportunity satisfies the requirement to prove damages with a degree of certainty, including certainty on a balance of probabilities.[1838]

1226 The *Gemplus* tribunal further noted that, while the quantification of lost future profits may be difficult or uncertain, that was not a factor that should lead to the denial of compensation, adding the following:

> "The Tribunal emphasises that it is here addressing **contingent future events and not actual past events**; it is seeking to determine not what did or did not happen as past facts but what could have happened in the future. This exercise necessarily involves the Tribunal in assessing whether such future events would have occurred and in quantifying that assessment in money terms, as compensation. It is not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal can only evaluate the chances of such a future event happening. That is not therefore an exercise in certainty, as such; but **it is, in the circumstances, an exercise in 'sufficient certainty'**, as indicated by the ILC's Commentary [on State Responsibility] […]".[1839]

1227 On that basis, the *Gemplus* tribunal held that the loss was equal to the market value of the investor's shares in the concessionaire immediately

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[1837] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 319 of the PDF (para. 13-76). See also p. 109 of the PDF (para. 4-189), assessing a "a reasonable hope" or "'possibility' and not a 'probability'" that the project would be restored.

[1838] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 321 *et seq.* of the PDF (paras. 13-82–13-88).

[1839] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 325 *et seq.* of the PDF (para. 13-91). See also p. 328 of the PDF (paras. 13-97–13-98) (emphasis added) ("This lost chance was clearly not 100%; nor was it manifestly 0% […] In the Tribunal's view, there was […] no certainty or realistic expectation of this project's profitability as originally envisaged, but there was nonetheless a reasonable opportunity. That opportunity […] has a monetary value for the purpose of Article 36 of the ILA Articles and the indemnities for compensation provided by the two BITs.").

prior to the critical breach.[1840] That value had to be valued by reference to the "reasonably anticipated loss of future profits", using a "modified form of the income-based approach".[1841]

1228 More recently, the NAFTA tribunal in *Bilcon v. Canada* awarded compensation for loss of opportunity to investors whose quarry and marine terminal project in Nova Scotia was refused following a fundamentally unfair EA process. On the facts of that case, the tribunal found the investors had not established that their project would have been approved "in all probability" or "with a sufficient degree of certainty".[1842] Nevertheless, the tribunal found that the investors were entitled to compensation for "the value of the opportunity to have the environmental impact of [the project] assessed in a fair and non-arbitrary manner."[1843] In this respect, the tribunal noted the following:

> "From an economic perspective, the value of the opportunity to have the environmental impact of the [project] assessed in a fair and non-arbitrary manner is broadly equivalent to the value of the opportunity to develop the quarry site subject to the EA, as the EA was a significant milestone on the path toward building the quarry, and there was no other reason to undertake the EA than the intended quarry development."[1844]

1229 In determining the value of that opportunity, the tribunal took into account, *inter alia*, past transactions and offers from which it could establish an implied value of the "investment opportunity" presented by the project.[1845]

[1840] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 327 of the PDF (paras. 13-93–13-94).

[1841] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 318 *et seq.* of the PDF (paras. 13-74 – 13-75), p. 327 *et seq.* of the PDF (paras. 13-95–13-100).

[1842] *Bilcon v. Canada*, Award on Damages, 10 January 2019, at **Exhibit CL-140-ENG**, p. 46 (para. 175).

[1843] *Bilcon v. Canada*, Award on Damages, 10 January 2019, at **Exhibit CL-140-ENG**, p. 46 (para. 176).

[1844] *Bilcon v. Canada*, Award on Damages, 10 January 2019, at **Exhibit CL-140-ENG**, p. 80 (para. 281).

[1845] *Bilcon v. Canada*, Award on Damages, 10 January 2019, at **Exhibit CL-140-ENG**, p. 82 *et seq.* (paras. 288-299).

1230 Other tribunals have also awarded damages for the lost opportunity to develop projects for, *inter alia*, public housing,[1846] a tourist complex,[1847] and a residential estate.[1848]

1231 Relative to the case at hand, the above projects were at a far earlier stage and/or faced significant impediments to their feasibility that are not present here. None of the investors concerned had committed the same time and resources or confirmed the commercial viability of their investments in the same manner as the Claimant and Symbio. On any measure, the probability in July 2021 that the Symbio Project would become profitable was far higher than the investments for which the above tribunals awarded compensation:

i) Whereas the investor in *Sapphire* had a concession that had not been prospected, with no guarantee that it even contained viable oil reserves, Symbio had a robust commercial model for liquefying gas from **existing** western Canadian producers with which GNLQ was already in commercial negotiations. Such was the level of interest from those producers that they remained engaged in 2022, even after the Québec and Federal Governments had refused to authorise the GNLQ Project.[1849]

ii) Whereas the enterprise in *Gemplus* was a start-up that had been ordered to suspend activities and that had lost its key management,[1850] Symbio

[1846] *Société Ouest-Africaine des Bétons Industriels (SOABI) v. The Republic of Senegal*, ICSID Case No. ARB/82/1, Award, at **Exhibit CL-333-FRA**, p. 36 *et seq.* of the PDF (paras. 7.13-7.19) (valuing the opportunity by reference to the expected gain, subject to "corrections" for the economic and financial risks of the project).

[1847] *SPP v. Egypt*, Award on the Merits, 20 May 1992, at **Exhibit CL-330-ENG**, p. 31 *et seq.* of the PDF (paras. 214-217) (finding the imputed future revenues minus expenditure equalled the "minimum measure of the value to be ascribed to the opportunity to make a commercial success of the project").

[1848] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, at **Exhibit CL-334-ENG**, p. 114 *et seq.* (para. 12.3.2) ("the Tribunal considers that the appropriate compensation for the loss of opportunity would be and should be the expected return as foreshadowed in the Appraisal Report").

[1849] Bidwai I, at **Exhibit CWS-2**, p. 43 *et seq.* (paras. 104-105).

[1850] One, the general director, to arrest and extradition; the second, the under-secretary running the project, to a sudden death: *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 71 *et seq.* of the PDF (paras. 4-94–4-107, 4-125–4-130).

had painstakingly invested time and resources for over eight years in studies confirming the technical, commercial and environment viability of the Project, with sophisticated investors and a well-qualified team headed by a former Bechtel executive experienced in the construction of LNG plants. The prospects of the Symbio Project were far more than a "reasonable hope", as was the case in *Gemplus*, as confirmed by the renewed offers of offtake and financing in 2021 and 2022, including hundreds of millions of dollars from major players such as [redacted] and the German Government.[1851]

iii) Whereas the investors in *Bilcon* had not shown the probability that its EA ought to have been approved, in this case, as explained in Section 2.3 above, had the GNLQ Project been subject to a single federal EA of the from the start, the Agency would in all probability have had little or no hesitation in approving the GNLQ Project – as it has done in the case of other LNG projects. The same would have occurred through a joint assessment under the Canada-Québec Agreement. Even at the level of Québec, had the Québec Government followed its proper rules under the EQA, which Québec has consistently confirmed as being an "authorising regime",[1852] GNLQ would have then received the authorisation.

1232 Indeed, as further explained below in Section 5.2.3, and contrary to the Respondent's assertions, the record shows that the Symbio Project was well on track to reach FID in December 2023 and thereafter become operational and profitable, but for Canada's breaches of the NAFTA. Furthermore, and in any event, the above cases illustrate that – even taking the Respondent's arguments at their highest – the alleged "uncertainty" over the success of the Symbio Project does not mean that the Claimant has failed to prove a loss or that its loss is too speculative to warrant compensation.

1233 **Second**, in a context where Canada deprived Symbio of the opportunity to develop the Project, there is no merit in the Respondent's assertion that the Claimant must prove that the Project would "necessarily" have reached a

[1851] Bidwai I, at **Exhibit CWS-2**, p. 56 *et seq.* (paras. 140-149); Illich I, at **Exhibit CWS-1**, p. 86 (paras. 257-265); Illich II, at **Exhibit CWS-1 (Second)**, p. 20 *et seq.* (para. 44).
[1852] Duchaine II, at **Exhibit CER-1 (Second)**, p. 82 *et seq.* (paras. 243-246).

positive FID and that, with "reasonable certainty", the Claimant would have fulfilled all conditions to make the Project a success.[1853] That assertion already overstates the standard in the case of an *ex post* scenario, where the Tribunal is required only to assume what would have probably happened between the date on which the investment was lost and the date of the award. It is doubly inapposite in an *ex ante* scenario, as in the present case, in their second report, the Claimant's experts value the Claimant's investment immediately before the harm to it materialised.

1234 The valuation in an *ex ante* scenario indeed requires a determination of what a hypothetical buyer would have paid for the Symbio Project at that date, and thus already "prices in" any future uncertainties affecting the expected economic return of the Project.

1235 It is no defence therefore for the Respondent to argue that other future events might have prevented the Symbio Project from reaching profitability. If claimants were required to prove with certainty or near-certainty how their investments would have fared following a breach, tribunals could never or rarely award compensation, especially as the fair market value of an investment is driven by the economic returns that a hypothetical buyer expects to realise.

1236 That much is true not only of pre-production projects, but even of going concerns with a track record of profits: as any financial advisor would warn, past performance is not a guarantee of future results. The Respondent's professed standard would therefore mean that investors suffering a loss of their investment could only rarely, if ever, recover compensatory damages even when liability is established. Again, nothing in international law or valuation practice supports such a result.

1237 Indeed, it is cynical to argue that the damage is too "uncertain" because the Symbio Project never became operational,[1854] given that the very reason **why** the Project never became operational is the Respondent's own treaty breaches. As noted by investment treaty tribunals, the obligation to provide full reparation would be meaningless if a State could take advantage of its

[1853] Counter-Memorial, p. 265 (para. 667), p. 267 (para. 671).

[1854] Counter-Memorial, p. 265 (para. 667).

own wrongful acts to avoid compensation in this manner.[1855] The Respondent's argument that the Claimant's and Symbio's losses are too speculative or uncertain should, therefore, be rejected.

5.1.2.3 The cases relied upon by the Respondent are inapposite

1238 The Respondent further relies on the decisions in *Biwater Gauff v. Tanzania* and *ELSI v. Italy*, in which an arbitral tribunal and the International Court of Justice ("**ICJ**"), respectively, exceptionally declined to award compensation for the expropriation of the claimants' businesses. However, these decisions are inapposite. The Respondent itself concedes that, in both cases, the investments were found to have already lost their entire value prior to the breach,[1856] which is evidently not the case here:

- In *Biwater Gauff*, the tribunal found that at the time immediately prior to the first contested measure, the value of the investment (a business with the concession for urban water and sewerage services) was already nil.[1857] The tribunal noted in particular that the lease contract on which the investment was based was about to terminate[1858] and the poor management of the company prevented the investor from generating the income it had foreseen.[1859] The investor itself "had repeatedly said that the investment was not financially viable under the *status quo*".[1860] Unsurprisingly therefore, the tribunal concluded that, at the time when the investor claimed that its investment had been expropriated, the investment had no economic value.[1861]
- Similarly, in *ELSI v. Italy*, the ICJ concluded that immediately before the Italian authorities had requisitioned a utilities company, the

[1855] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 326 of the PDF (para. 13-92); *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010, at **Exhibit RL-155-ENG**, p. 11 (para. 39).

[1856] Counter-Memorial, p. 271 (para. 679).

[1857] *Biwate*r *Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 236 (para. 797).

[1858] *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 235 (para. 791).

[1859] *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 234 (para.789).

[1860] *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 234 (para. 790).

[1861] *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 235 (para. 792).

company's value was null.[1862] The company board had itself decided on the cessation of the company's operation, the immediate discontinuance of production and the dismissal of its workforce.[1863] On that basis, the ICJ unsurprisingly found that the "warning loudly proclaimed about its precarious situation; the socially damaging decision to terminate the business; close the bank and dismiss the workforce; the position of the banks as major creditors"[1864] were all indicative of the nil value of the company prior to the requisition.

1239 Those facts are very far removed from Symbio's position in July 2021. Adopting the Respondent's approach would require a finding that the Claimant's investment had **no value** at all even before Québec's Decree. Such a finding would be plainly incompatible with the contemporaneous record, including historical transactions prior to July 2021, as detailed in Section 5.3.1 below:

- **First**, Symbio underwent multiple rounds of financing from 2014 onwards, and the Project value rose as it was progressively derisked. In its fourth round of financing starting from 2019, existing and new investors agreed on a pre-money valuation of [redacted] (or a post-money valuation of [redacted] taking into account contributions received in that round). As Secretariat explains, the Symbio Project accumulated further value between late 2019 and July 2021 as it raised additional capital and completed additional milestones on the path to FID forecasted to be in late 2023.[1865]
- **Second**, Québec itself, through IQ, sought to invest in the Symbio Project multiple times throughout the course of its development, [redacted]

[1862] *Elettronica Sicula S.p.A.* (ELSI), Judgment, I.C.J. Reports, 20 July 1989, at **Exhibit RL-145-ENG**, p. 41 of the PDF (para. 80).

[1863] *Elettronica Sicula S.p.A.,* Judgment, 20 July 1989, at **Exhibit RL-145-ENG**, p. 41 of the PDF (para. 80).

[1864] *Elettronica Sicula S.p.A.,* Judgment, 20 July 1989, at **Exhibit RL-145-ENG**, p. 50 of the PDF (para. 101).

[1865] Secretariat II, at **Exhibit CER-3 (Second)**, p. 30 (para. 3.36) and p. 69 *et seq*. (para. 4.8).

[redacted] It is not credible for the Respondent, having conducted extensive due diligence on the Project over many months and been willing to invest [redacted] of public funds in it, now to assert in the arbitration that the Project was worthless.

5.1.2.4 The Respondent's breaches therefore caused the Claimant's and Symbio's losses

1240 As recalled above, the Claimant's case on causation is straightforward: it is the irregularities in Canada's treatment of the Claimant and Symbio in the EA process of the GNLQ Project (as detailed in Sections 2.5 and 2.6 above), leading to the Decree, that resulted in the destruction of the value of the GNLQ Project in its entirety. This, in turn, caused the failure of the Gazoduq Project given the interrelated nature of the GNLQ Project and the Gazoduq Project, as ultimately acknowledged by the Respondent.[1867]

1241 It follows from the principles above that it is not enough for the Respondent to assert, as it does, that, regardless of its own breaches that brought the Project to a halt, there were "serious doubts" about the success of the Symbio Project.[1868] That is not the required standard in a context where the Respondent has deprived the Claimant of its opportunity to continue developing the Project and, ultimately, to bring it into operation.

1242 Rather, the Respondent's defence that its alleged breaches caused no loss to the Claimant could only succeed if the Project was effectively doomed in any event, such that it had no value even in the "but for" scenario. That is not the Respondent's case, and for good reason. Indeed, that defence would be untenable in light of Symbio's substantial progress towards

[1866] See, *e.g.*, [redacted] at **Exhibit C-0193-ENG-FRA**; [redacted] at **Exhibit C-0195-ENG-FRA**; [redacted] at **Exhibit C-0196-ENG-FRA**; [redacted] at **Exhibit C-0227-ENG-FRA**; [redacted] at **Exhibit C-0228-ENG-FRA**, p. 4.

[1867] Counter-Memorial, p. 273 (para. 682).

[1868] Counter-Memorial, p. 268 (para. 673).

securing the permits, financing and commercial agreements for a positive FID, as well as the contemporaneous valuations of Symbio, as further detailed below.[1869]

1243 Therefore, the Claimant has more than met the standard necessary to substantiate that it and Symbio have suffered losses as a result of Canada's treaty breaches. In quantifying those losses, it is sufficient for the Claimant to provide a reasonable basis upon which the Tribunal can estimate the loss. That basis may derive from contemporaneous valuations, business plans or expert evidence – or, as here, a combination of all of them. As explained in the following Section 5.1.3, that loss is equal to the fair market value of the Symbio Project as at July 2021.

5.1.3 The measure of the Claimant's loss is the fair market value

1244 As also established in the Memorial, the lost fair market value is the applicable standard of compensation not only in cases of expropriation, but also in cases of other treaty breaches which have led to the destruction of the entire value of an investment.[1870]

1245 Thus, the NAFTA tribunal in *Metalclad v. Mexico* reasoned that, where the investor had been denied a permit to operate its landfill business and that denial amounted to both a breach of the minimum standard of treatment (Article 1105) and an indirect expropriation (Article 1110), damages should be assessed on the same basis:

> "In this instance, the damages arising under NAFTA, Article 1105 and the compensation due under NAFTA, Article 1110 would be the same since both situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment."[1871]

1246 Similarly, it has been held that the fair market value of the investment is the appropriate standard of compensation where the treaty breach in

[1869] See Sections 5.2.3 and 5.3.1 below.

[1870] Memorial, p. 265 *et seq*. (paras. 866-871).

[1871] *Metalclad v. Mexico*, Award, 30 August 2000, at **Exhibit CL-059-ENG**, p. 30 (para. 113).

question, even if not classified as an expropriation, gives rise to "important long-term losses".[1872]

1247 The same is true in the present case. As in *Metalclad*, the Québec Government's decision resulted in the "complete frustration of the operation" of the Symbio Project and "negate[d] the possibility of any meaningful return" on the Claimant's investment. Without the authorisation from Québec, there was no prospect of bringing the GNLQ Project into operation, which destroyed in turn the *raison d'être* for the Gazoduq Project, leaving the Symbio Project as a whole valueless. Compensation should therefore equal the lost fair market value of the Symbio Project.[1873]

1248 That approach is also consistent with the *Chorzów Factory* standard of full reparation, in that it would restore the Claimant to the position that it would have been in on 21 July 2021 but for the Respondent's breaches of the NAFTA.

1249 These principles appear to be common ground. The Respondent acknowledges that the fair market value standard is applicable not only to expropriation claims, but also to other breaches resulting in the "total loss of the investment".[1874] The Respondent further appears to acknowledge that such a total loss is present in this case, as Québec's authorisation was "indispensable" to both the GNLQ and the Gazoduq Project and its Decree "put an end" to the Symbio Project.[1875]

[1872] *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, 12 May 2005, at **Exhibit CL-068-ENG**, p. 118 (para. 410) ("[T]he Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in **important long-term losses**."). See also *Cargill v. Mexico*, Award, 18 September 2009, at **Exhibit CL-021-ENG**, p. 126 *et seq*. (paras. 432-433, 444) in which the tribunal agreed with the claimant to quantify losses for the NAFTA breaches other than expropriation using a DCF valuation of lost future revenue.

[1873] Memorial, p. 264 *et seq.* (paras. 864-872).

[1874] Counter-Memorial, p. 296 (para. 732).

[1875] Counter-Memorial, p. 296 (n. 1223).

1250 Nevertheless, the Respondent comments in passing that the Claimant does not distinguish between the damages it claims and the different NAFTA breaches that it alleges.[1876] If the Respondent is suggesting that the Claimant is required to allocate different proportions of its loss to the different provisions of the NAFTA that have been breached, that suggestion is misguided.

1251 Tribunals have recognised that where different treaty breaches have caused "more or less equivalent harm", the compensation will be the same.[1877] That is undoubtedly the case here, where the Claimant's claims for breaches of Articles 1102, 1103, 1105 and 1110 NAFTA relate to the same underlying measures, or treatment, by Canada and have resulted in the same loss (*i.e.*, the total loss of value of the Symbio Project). This principle is, indeed, familiar to Canada from the case of *SD Myers v. Canada*, in which the tribunal held that:

> "When both Article 1102 and 1105 have been breached, as the Tribunal has found in this case, the usual principle to be applied is that rights and remedies under trade agreements are cumulative unless there is actual conflict between different provisions. The fact that a host Party has breached both Articles 1102 and 1105 cannot be taken to mean that the investor is entitled to less compensation than if only Article 1102 were breached. A host Party does not reduce the extent of its liability by breaching more than one provision of the NAFTA."[1878]

1252 The tribunal in that case went on to award the investor a single sum for Canada's breaches of its obligations under Chapter 11 of the NAFTA,

[1876] Counter-Memorial, p. 296 (para. 732).

[1877] *Vivendi v. Argentina*, Award, 20 August 2007, at **Exhibit CL-063-ENG**, p. 245 (para. 8.2.8); *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. The Republic of Kazakhstan (I)*, SCC Case No. V 116/2010, Award, 19 December 2013, at **Exhibit CL-335-ENG**, p. 258 (paras. 1204-1205).

[1878] *S.D. Myers v. Canada,* Partial Award, 13 November 2000, at **Exhibit CL-007-ENG**, p. 79 (para. 318).

without parcelling out that compensation among the specific treaty provisions breached.[1879]

1253 It follows from the above that, in Symbio's case, the Tribunal should award compensation for the Respondent's breaches of the NAFTA, Chapter 11 equal to the lost fair market value of the Symbio Project.

5.2 The DCF method is appropriate to determine the fair market value of the Symbio Project

1254 In the Memorial, the Claimant explained that it had applied the forward-looking DCF method to determine the fair market value of the Project.[1880] As explained by Secretariat, the DCF method is the economically most sound method to value pre-operational projects which have been subjected to due diligence, and is the methodology most commonly used by investors and valuation practitioners.[1881]

1255 In the Counter-Memorial, the Respondent takes issue with this approach and contends that the DCF approach is not an appropriate method to value pre-operational projects.[1882] Based on that (flawed) argument, the Respondent argues that the Tribunal should not apply the DCF method to calculate the value of the Symbio Project.[1883]

1256 As explained below, both contentions are wrong. There is no dogmatic, universally recognized principle that pre-operational projects cannot be valued by reference to the DCF method; tribunals should simply apply the most appropriate valuation methodology as suits the case before it (**Section 5.2.1**). In the present case, a DCF method is, indeed, the most appropriate means to calculate the Symbio Project's fair market value (**Section 5.2.2**). As for the alleged uncertainties remaining in the Symbio Project, they are accounted for within the DCF valuation and are in any case overstated by the Respondent; hence, they do not prevent the use of

[1879] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, at **Exhibit CL-137-ENG**, p. 77 (para. 311).

[1880] Memorial, p. 277 (para. 895).

[1881] Secretariat I, at **Exhibit CER-3**, p. 75 *et seq*. (para. 5.25).

[1882] Counter-Memorial, p. 297 (para. 733).

[1883] Counter-Memorial, p. 297 *et seq*. (paras. 733-745).

DCF but rather confirm that the DCF methodology is appropriate in this case. (**Section 5.2.3**).

5.2.1 The Tribunal should apply the valuation method most appropriate to the present case

1257 It is well established in the practice of investment treaty tribunals that, in assessing the fair market value of an investment, the appropriate valuation methodology will depend on the specific facts of the case. As put by the *Crystallex* tribunal:

> "[T]here is no one methodology best suited for determining the fair market value of the investment lost in every situation. Tribunals may consider any techniques or methods of valuation that are generally acceptable in the financial community, and whether a particular method is appropriate to utilize is based on the circumstances of each individual case. A tribunal will thus select the appropriate method basing its decision on the circumstances of each individual case, mainly because a value is less an actual fact than the expression of an opinion based on the set of facts before the expert, the appraiser or the tribunal."[1884]

1258 In determining the market value of an investment, tribunals have relied on various valuation methodologies, which fall into three general categories:

- First, tribunals have taken the forward-looking income approach, which models the value of an asset as the present value of its expected future cash flows (DCF method).[1885]
- Second, tribunals have taken the so-called market approach which uses previous transactions in the same or a comparable asset and multiples derived from these transactions to estimate the market value.[1886]

[1884] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 243 (para. 886).

[1885] I. Marboe, "International Standard, Base of Value and Valuation Approaches" in I. Marboe (eds) C*alculation of Compensation and Damages in International Investment Law* (Oxford University Press, 2017), at **Exhibit CL-336-ENG**, p. 13 of the PDF (para. 4.89).

[1886] I. Marboe, "International Standard, Base of Value and Valuation Approaches", at **Exhibit CL-336-ENG**, p. 11 *et seq.* of the PDF (paras. 4.75, 4.86).

- Third, tribunals have occasionally also taken a "backward-looking" or cost-based approach, considering the sunk costs expended by the investor to date. The cost-based approach differs in that it is not intended to measure the market value of the investment. Awarding sunk costs as damages aims to put the investor in the position as if it had never made the investment, rather than "wiping out" the consequences of the respondent's breach.[1887]

1259 When it comes to the most appropriate valuation method, tribunals have held that income-based approaches, such as the DCF method, are preferable provided that (i) the investment has a track record of profitability, or (ii) in the absence of a history of profitability, there is an evidentiary basis on which the tribunal can estimate future profits with a sufficient degree of certainty.[1888] On that basis, the DCF method is the most appropriate approach to assess the value of a development project like the Symbio Project.[1889]

1260 The DCF method is compatible with the concept of fair market value and can easily be applied to assess the value of an advanced development project. Indeed, the fair market value of an asset relates to its **future** performance, not its past performance or its historical costs. While in some cases tribunals have taken a different approach, relying on past performance as an indicator for future performance is inappropriate, as past performance fails to account for dynamic economic variables, market fluctuations, and external shocks that can significantly change future outcomes. Therefore, the absence of historical profits should not preclude the use of the DCF method when the estimated future profits can be based on reasonable assumptions and the uncertainties of future cash flows are factored in by applying an appropriate discount rate.

1261 Put simply, the key requirement for the application of the DCF method is not a "track record" as such, but whether there is sufficient evidence to

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[1887] I. Marboe, "International Standard, Base of Value and Valuation Approaches", at **Exhibit CL-336-ENG**, p. 19 *et seq*. of the PDF (paras. 4.134-4.135).

[1888] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 241 (para. 877): *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, at **Exhibit CL-337-ENG**, p. 213 (para. 830).

[1889] Memorial, p. 235 *et seq.* (para. 765).

estimate future profits with a sufficient degree of certainty.[1890] In that respect, Professor Irmgard Marboe rightly states the following:

> "It has to be pointed out that, according to international valuation standards, the existence of a 'going concern' is not a condition for the application of an income-based valuation method. It is only important that, in the opinion of the valuer, **the asset is likely to yield economic benefits to the owner in the future**"[1891]

1262 Nor is this in any way an unorthodox or novel proposition. To the contrary, one of the earliest international authorities on compensation for internationally wrongful acts – *Chorzów Factory* – concerned a chemical factory that was yet to be built, but the Permanent Court of International Justice held that damages for future profits were recoverable despite its pre-construction status.[1892]

1263 Since then, tribunals have further endorsed the DCF method to calculate the value of pre-operational projects. For instance, the *Gold Reserve* tribunal held that:

> "Claimant's experts have modelled an alternative value based on a weighted average of a DCF valuation, comparable publicly traded company and comparable transactions. **Although the Brisas Project was never a functioning mine and therefore did not have a history of cashflow which would lend itself to the DCF model, the Tribunal accepts the explanation of both Dr Burrows (CRA) and Mr Kaczmarek (Navigant) that a DCF method can be reliably used in the instant case** because of the commodity nature of the product and detailed mining cashflow analysis

[1890] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 241 (para. 877).

[1891] I. Marboe, "Methods of Valuation in International Practice*"* in I. Marboe (eds) Calculation of Compensation and Damages in *International Investment Law* (Oxford University Press 2017), at **Exhibit CL-338-ENG**, p. 13 (para. 5.93) (emphasis added).

[1892] Factory at Chorzów (Germany v. Poland) (Merits) PCIJ Rep Series A No. 17, 13 September 1928 (**"Chorzów Factory Case"**), at **Exhibit CL-109-ENG-FRA**, p. 103 of the PDF ("The fact that the chemical factory was not only not working, but not even completed, at the time of transfer of the territory to Poland, can be of no importance […] [T]he entry into working of the factory was only the normal and duly foreseen development of the industrial activity which the Oberschlesische had the right to exercise in Polish Upper Silesia.").

previously performed. The Tribunal also notes that the experts agreed on the DCF model used, and it is only the inputs that are contested. Many of these have already been discussed above, with the remaining variables discussed below."[1893]

1264 As explained by a valuation expert whom Canada has itself instructed on more than one occasion, the income approach is well suited to the valuation of natural resource projects, including at pre-production stage:

"**The income approach is well suited to the valuation of natural resource projects.** The discounted cash flow (DCF) method was proposed in the majority of investment arbitrations with publicly available awards on damages, and was rejected by the tribunals in favour of alternative valuation methods in approximately a third of those cases.

Two principal factors contribute to the suitability of the income approach to resource extraction projects. First, the outputs produced by most oil and gas and mining projects are commodities. They sell in well-developed and liquid markets, often global in scope, with relatively little uncertainty about the producer's ability to find buyers. Although commodity prices can be volatile, **the existence of derivative markets – in which futures, forwards and options are traded – provides information that may allow the valuer to quantify price risk and develop objective, market-based price projections well into the future.** Futures and forward prices are the prices at which market participants today agree to exchange a unit of the commodity (e.g., a barrel of oil or an ounce of gold) at a known date in the future. They incorporate, therefore, the market participants' expectations about the average price level in the future

[1893] *Gold Reserve v. Venezuela*, Award, 22 September 2014, at **Exhibit CL-337-ENG**, p. 213 (para. 830) (emphasis added); see also *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, at **Exhibit CL-339-ENG**, p. 101 *et seq.* (para 330) ("In the Tribunal's view, a review of recent case law, including but not limited to the cases set out in more detail above, confirms that the question **whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project which has not yet become operational** depends strongly on the circumstances of the individual case") (emphasis added).

> and the risk premium necessary to eliminate that risk […] **Second, large projects are only undertaken after the owners have conducted technical and economic assessments, such as feasibility and pre-feasibility studies and environmental impact assessments, which require detailed analyses of project viability** […] **These technical documents typically provide an objective basis to build projections of production and costs that incorporate the specific features of the asset being valued**. […]
>
> [C]onsidering the nature of the assets involved and the information typically available, our experience and review of arbitral awards suggests that the **income approach is frequently relied on by experts and tribunals because it can often best capture the unique aspects of the investment at issue in many of these cases**. "[1894]

1265 Notably, the two "principal factors" identified above – the availability of "market-based price projections well into the future" and the existing technical and economic assessments – are met in relation to the Symbio Project. The Tribunal can therefore estimate with a sufficient degree of certainty[1895] the future profits that the Project would have generated had the Respondent not breached its NAFTA obligations.[1896]

1266 The Respondent argues that the DCF approach is inappropriate because – unlike businesspeople who can and should accept calculated risks inherent in any decision-making which is based on forecasts of an uncertain future – judicial organs have a mandate to reduce to the minimum possible the element of uncertainty or risk when deciding on legal issues.[1897] In support of this contention, the Respondent refers to a 1991 article on the use of the DCF method by the Iran-United States Claims Tribunal, written by Iran's

[1894] D. Chodorow, F. Dorobantu, "Damages in Oil and Gas Mining Arbitrations", in J. A. Trenor (ed.) *The Guide to Damages in International Arbitration* (Law Business Research, 2021), at **Exhibit CL-340-ENG**, p. 5 *et seq.* and p. 9 (emphasis added). The Respondent engaged Mr Chodorow in *Bilcon v. Canada* (PCA Case No. 2009-04) and (currently) in *Einarsson. v. Canada* (ICSID Case No. UNCT/20/6).

[1895] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 241 (para. 877).

[1896] See Section 5.3 below.

[1897] Counter-Memorial, p. 297 (para. 733).

appointee, Mr Seyed Khalil Khalilian, to seek to justify his own decision not to sign awards in which the majority tribunals applied the DCF method. With respect, Mr Khalilian's view is neither a convincing authority nor correct.

1267 **First**, his view that "judicial bodies […] have been disinclined to use the DCF method for valuation"[1898] because of the element of speculation inherent to the method was already questionable in 1991 and is certainly unsupported today. Tribunals (as noted above) and scholars have long accepted that the value of an asset is represented by its ability to yield financial benefits to its owner which is what is commonly determined by a DCF analysis.[1899] Moreover, there is no legal authority to support Mr Khalilian's and the Respondent's claim that tribunals must "reduce to the minimum possible the element of uncertainty" – which claim appears to mean that any "uncertainty" must be resolved in favour of the treaty-breaching State, and to the detriment of the investor. In essence, this contrived rule would oblige tribunals to reduce successful claimants' compensation to the minimum, which is inconsistent with both the fair market value standard and with the principle of full reparation under customary international law.

1268 **Second**, Mr Khalilian and the Respondent ignore that, in assessing fair market value, tribunals must consider how businesspeople would value an investment in the real world. This indeed stems from the definition of "fair market value", namely the price at which an investment "would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted

[1898] SK Khalilian, "The Place of Discounted Cash Flows in International Commercial Arbitrations: Awards by Iran-United States Claims Tribunal", (1991) 8 Journal of International Arbitration 31, at **Exhibit RL-151-ENG**, p. 47.

[1899] I. Marboe, "International Standard, Base of Value and Valuation Approaches", at **Exhibit CL-336-ENG**, p. 13 *et seq.* (paras. 4.89-4.90); *Biwater v. Tanzania*, Award, 24 July 2008, at **Exhibit RL-144-ENG**, p. 235 (para. 793) ("In assessing value for the purposes of a damages claim, the Arbitral Tribunal considers that the appropriate method in the present case is the Discounted Cash Flow method (which is the method used in most BIT cases")").

market."[1900] Tribunals cannot therefore disregard real-world valuation practices.

1269 Beyond the context of legal proceedings, it is common practice for real world market participants to value LNG projects at development stage by relying on a DCF method, *i.e.*, relying on an income approach to assess the future financial performance. As explained by Secretariat and Mr Alexander Krolick, a project financier of more than 20 years' experience who advised Symbio at the time, investors (and potential investors) in the Symbio Project historically relied on the DCF approach when making their investment decisions.[1901] This is because this method allows investors to calculate their anticipated return on investment.[1902] It also reassures lenders on the Project's capability to service debt repayments.[1903]

1270 [redacted]

[redacted][1904]

- [redacted] which it deemed to be the most appropriate valuation method given that [redacted]

[1900] AICPA, *Valuation of a Business, Business Ownership Interest, Security, or Intangible Asset*, (2007) Appendix B: International Glossary of Business Valuation Terms, at **Exhibit CL-341-ENG**, p. 44; IVSC, International Valuation Standards 2020, at **Exhibit CL-342-ENG**, p. 18 (para. 30.1).

[1901] Secretariat II, at **Exhibit CER-3 (Second)**, p. 33 (para. 3.46).

[1902] Secretariat II, at **Exhibit CER-3 (Second)**, p. 33 (para. 3.46); Krolick, at **Exhibit CWS-8**, p. 12 *et seq.* (para. 26).

[1903] Krolick, at **Exhibit CWS-8**, p. 13 (para. 26).

[1904] [redacted] at **Exhibit SEC-0205-ENG-FRA**, p. 23

[redacted][1905]

1271 In sum, the Respondent's bold assertion that the lack of past-performance data renders the quantification of future profits speculative is untenable.[1906]

5.2.2 On the Respondent's own case, the present case supports the use of the DCF methodology

1272 In the Counter-Memorial, the Respondent in fact admits that the DCF method may be used for valuing pre-operational projects in some cases, but maintains that DCF may only be used "exceptionally".[1907] As explained immediately above (Section 5.2.1), international investment law does not support such a dogmatic position; rather, tribunals must adopt the appropriate valuation methodology in the circumstances of the case. Furthermore, as explained below, the Respondent's refusal to accept the DCF methodology does not withstand scrutiny when considering the factual circumstances of this case.

1273 In support of its position that the DCF method should not be applied in this case, the Respondent misleadingly refers to *Rusoro Mining v. Bolivarian Republic of Venezuela* as imposing a strict tick-box exercise.[1908] In that case, the tribunal, referred to several relevant elements to determine whether a DCF analysis was appropriate, including, but not solely, past performance:

> "DCF, however, cannot be applied to all types of circumstances, and while in certain enterprises it returns meaningful valuations, in other cases it is inappropriate. DCF works properly if all, or **at least a significant part**, of the following criteria are met:

[1905] [redacted] at **Exhibit ACC-0002-FRA**, p. 19 [redacted].

[1906] Counter-Memorial, p. 297 *et seq*. (paras. 733-745).

[1907] Counter-Memorial, p. 298 (para. 735).

[1908] Counter-Memorial, p. 300 *et seq*. (para. 742).

- The enterprise has an established historical record of financial performance;

- There are **reliable projections** of its future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company's officers and verified by an impartial expert;

- The **price at which the enterprise will be able to sell** its products or services can be determined with reasonable certainty;

- The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the **availability of financing**;

- It is possible to calculate a **meaningful WACC**, including a reasonable **country risk premium**, which fairly represents the political risk in the host country;

- The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish **the impact of regulation** on future cash flows with a minimum of certainty."[1909]

1274 Even assuming that past performance should be **one of many** criteria when deciding whether to apply the DCF method, the Claimant meets a "significant part" (if not all) of the remaining criteria considered by the *Rusoro Mining* tribunal, as further detailed in Sections 5.2.3 and 5.3 below. In brief:

1275 **First**, the Claimant has produced two contemporaneous and detailed business models setting out reliable projections, prepared by Symbio and verified by independent experts. The Respondent does not contest their existence, but contends that they do not reflect Symbio's business models

[1909] *Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, at **Exhibit CL-104-ENG**, p. 165 (para. 759) (emphasis added).

at the time of breaches.[1910] This is not correct. Symbio developed two business models for GNLQ[1911] and Gazoduq[1912] both prepared by Société Générale based on "base case" discounted cash flows.[1913] These models were then adapted over the years[1914] and were relied upon by Symbio's existing and prospective investors when they agreed to finance the development of the Project. The models were also vetted both by IQ[1915] and Export Development Canada ("**EDC**").[1916] They further served as a basis for Secretariat, which conducted an independent review of the calculations and concluded in its first report that the models were appropriate and could be used as a "starting point for the purpose of valuation".[1917]

1276 **Second**, the prices at which Symbio could have purchased natural gas and sold LNG can be determined with reasonable certainty. Symbio's business model consisted in purchasing natural gas from suppliers in Western Canada, liquefying the gas to obtain LNG and selling the LNG to offtakers in Europe or Asia. Symbio's net revenue was, therefore, dependent on the unit price of natural gas and the unit price of LNG. Both are part of a liquid market and, as explained by Mr Bidwai, [redacted][1918] Given that natural gas and LNG are widely traded commodities, reliable long-term forecasts exist for these price indices to calculate expected cash flows, which increases the certainty and reliability of the cash flow forecast, as also addressed below in Section 5.2.3.5.

[1910] Counter-Memorial, p. 301 *et seq*. (para. 744).

[1911] GNLQ, Base Case Model (January 2022), at **Exhibit SEC-0118-ENG**.

[1912] Gazoduq Model, at **Exhibit SEC-0261-ENG**.

[1913] Krolick, at **Exhibit CWS-8**, p. 12 *et seq*. (paras. 26-27).

[1914] Krolick, at **Exhibit CWS-8**, p. 13 (para. 27).

[1915] [redacted] at **Exhibit SEC-0205-ENG-FRA**, p. 18 and 33.

[1916] Le Verger I, at **Exhibit CWS-3**, p. 8 (para. 24).

[1917] Secretariat I, at **Exhibit CER-3**, p. 89 *et seq.* (para. 6.34) and p. 77 (para. 6.3).

[1918] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 3 *et seq.* (paras. 6-9).

1277 **Third**, but for Canada's breach, Symbio could have raised the required funding for the Project. This is addressed below in Section 5.2.3.3, in the context of the Respondent's alleged uncertainties with the Project.

1278 **Fourth**, as explained in more detail in Section 5.3.1, it is possible to calculate a meaningful WACC, as Secretariat has done for both GNLQ Project and Gazoduq Project.[1919] While no country risk premium is included in the WACC in this case, as Secretariat explained, that is irrelevant since "Canada's country risk is considered aligned with U.S. country-risk".[1920] That approach is consistent with publicly available data that suggests a country risk premium of 0% (*i.e.*, subject to no more political risk than the United States).[1921]

1279 **Fifth**, while the energy sector in which Symbio operated is a highly regulated sector in terms of permit requirements, the regulatory regime is designed to be predictable, in particular by frontloading the cardinal requirement for a federal authorisation following a proper EA process, from which flow all other permits and ad-hoc authorisations for construction and operation.[1922] It is Canada's breach of its obligations in the application of that regulatory process that caused Symbio to lose the value of its investment.

1280 In short, even adopting for the sake of argument the criteria highlighted by the Respondent, in the circumstances of this case, the DCF method is the suitable method to determine the fair market value of the Symbio Project. To seek to avoid this conclusion, the Respondent overstates the alleged "uncertainties" that could have impacted the Project, to no avail.

[1919] Secretariat II, at **Exhibit CER-3 (Second)**, p. 99 (table 8) and p. 111 (table 11).

[1920] Secretariat I, at **Exhibit CER-3**, p. 110 (para. 6.90, fn 520).

[1921] Damodaran, Country Risk Premium Data dated 1 July 2023, at **Exhibit SEC-0310-ENG**: Prof Damodaran calculates the country risk premium for Canada at 0%.

[1922] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 19 (para. 48).

5.2.3 The alleged uncertainties over the Symbio Project are overstated and do not preclude, but rather support, the use of the DCF method

1281 In its Counter-Memorial, the Respondent claims that various scenarios could have led to the failure of the Symbio Project.[1923] Specifically, the Respondent speculates about matters such as cost overruns, delays and negative permitting decisions, which it contends might have prevented the Project from reaching FID, or otherwise reduced or destroyed its value.

1282 However, the existence of some uncertainty with the Project *per se* does not preclude the application of the DCF method. As explained in Section 5.3.2.1 below, Secretariat's DCF model includes a significant 4% PORP within the discount rate to account for uncertainties inherent in an *ex ante* valuation of the Symbio Project. This increase to the discount rate has the effect of significantly reducing the net present value of the GNLQ Project as at July 2021 – by 70%, or USD 1.4 billion – to account for the fact that the receipt of future cashflows is not certain. In other words, Secretariat's DCF model already "prices in" these uncertainties, as any arm's length buyer would do in a hypothetical transaction, consistent with the definition of fair market value.

1283 In any event, the Respondent's account of the alleged uncertainty surrounding the Symbio Project is, at best, misleading. As explained below, the Symbio Project was well on track to achieve FID in December 2023, be constructed and thereafter generate returns as forecasted in the contemporaneous business plans.

1284 Specifically, contrary to the Respondent's contentions in the Counter-Memorial:

- both the GNLQ and Gazoduq Projects were on track to receive their main regulatory approvals, namely the governmental decisions granting GNLQ's applications for environmental permits, following the relevant EAs – and therefore all related secondary approvals and permits (**Sections 5.2.3.1** and **5.2.3.2**);

[1923] Counter-Memorial, p. 267 *et seq*. (paras. 671-674).

- Symbio had the means to procure the necessary funding to continue developing the Symbio Project (**Section 5.2.3.3**);
- there were no doubts as to the technical viability of the Symbio Project (**Section 5.2.3.4**);
- there is ample evidence to show that the Symbio Project would have been profitable (**Section 5.2.3.5**).

1285 Before addressing those alleged uncertainties in detail, the Claimant needs to address the Respondent's misleading reliance on a particular statistic: a purported "failure rate" for LNG export terminal projects of 89% in Canada, and 100% on its East Coast.[1924] As ever with statistics, their value in providing insights depends on the underlying data and how applicable it is to the specific context. In this case, the Respondent's "failure rates" are meaningless as indicators of the success prospects of the Symbio Project, for two reasons.

1286 **First**, the Respondent omits to specify that the rates cover projects that were at development stages which were either far less advanced than Symbio, as well as LNG projects that were repurposed for another project.[1925]

1287 **Second**, the Respondent's alleged failure rates are not only misleading, they are also irrelevant. This is because, as Secretariat explains, the Respondent and Accuracy fail to account for the differences between the failed projects located in the U.S. or on the western coast of Canada and the GNLQ Project in Québec, such as lower capital costs, cheaper operating costs, closer proximity to Europe, a favourable pipeline terrain and better availability of skilled labour.[1926]

[1924] Counter-Memorial, p. 267 (para. 672); Expert Report of Accuracy dated 14 July 2024, at **Exhibit RER-1**, p. 99 (para. 304).

[1925] See, *e.g.*, the Bear Head LNG project located in Nova Scotia with a nameplate capacity of 12mtpa is converting into an ammonia and hydrogen facility (NGI, Bear Head's Canadian East Coast LNG Project Now Looks to Export Hydrogen (accessed 17 March 2025) dated 24 March 2023, at **Exhibit C-0617-ENG** and Chemanalyst, Bear Head Energy (BHE) to Launch Innovative Project, Building an Ammonia Hydrogen Plant (accessed 17 March 2025) dated 18 April 2023, at **Exhibit C-0618-ENG**).

[1926] Secretariat II, at **Exhibit CER-3 (Second)**, p. 21 *et seq*. (paras. 3.13-3.20).

1288 Furthermore, with regard to the four cancelled Atlantic Canada LNG projects, Accuracy neglects to mention that these projects had been halted prior to the Russian invasion of Ukraine and that two of them were subsequently revisited in light of the increased demand for European LNG.[1927] While plans for new LNG export terminals were ultimately abandoned, this was largely due to existing pipeline constraints and geographical limitations that prevented cost-competitive access to natural gas supply, an issue that the GNLQ Project would not have faced thanks to the Gazoduq Project pipeline, including its strategic tie-in location to the Canadian Mainline. Moreover, one of the four "cancelled" projects (Saint John LNG) continues to be an operational LNG *import* terminal and another two projects (Bear Head and Goldboro) were converted into planned hydrogen, ammonia and aviation fuel export facilities.[1928]

1289 Ultimately, the Respondent seeks to rely on the alleged "failure rate" of LNG Projects, and on alleged uncertainties surrounding the success of the Symbio Project, to imply that the Project had no value, even "but for" Canada's breaches of the NAFTA. That proposition, bold as it is, is simply impossible to reconcile with contemporaneous evidence of the Project's actual and substantial market value, including Québec's offers to invest (as explained in Section 5.3.1.1).

5.2.3.1 The GNLQ Project would have been approved by Québec and federal authorities and was on track to receive all other permits and authorisations required

1290 According to the Respondent, the Claimant must establish, first, that each ground relied on by the Québec and Federal Government for refusing to approve the GNLQ Project are violations of the Respondent's NAFTA obligations and, second, that the GNLQ Project would have obtained all other permits necessary to enter commercial operations.[1929]

[1927] Secretariat II, at **Exhibit CER-3 (Second)**, p. 22 *et seq.* (para. 3.16).

[1928] Secretariat II, at **Exhibit CER-3 (Second)**, p. 22 *et seq.* (paras. 3.16-3.18); Krolick, at **Exhibit CWS-8**, p. 19 (para. 47).

[1929] Counter-Memorial, p. 274 *et seq*. (paras. 685-686).

1291 The first proposition is not correct. The Claimant's case, as demonstrated above in Sections 2.5 and 2.6, is indeed that (i) the EA process for the GNLQ Project that led to the decisions of the Québec and Federal Government was in breach of Canadian law and improper; and (ii) the ground relied upon by both governments were unlawful as either outside their respective jurisdiction or beyond the boundaries of the binding MELCC Directive and the EIS Guidelines. Thus, the Claimant is not required to demonstrate that each ground (wrongly) invoked by the Québec and Federal Governments was a breach of the NAFTA.

1292 Indeed, as explained above (Section 4.1.3.1 and Section 4.2.2.1), the Québec and federal authorities' decisions in December 2015 and March 2016 not to conduct either a single federal EA or a joint assessment, and instead proceed with two separate, uncoordinated EAs, one by Québec and one by Canada, constitute a breach of Articles 1102, 1103 and 1105 NAFTA. Those decisions, taken together with federal and Québec authorities' other wrongful acts and omissions during the EA processes, and the Québec and Federal Governments' subsequent unlawful refusals to approve the GNLQ Project (the latter also constituting NAFTA breaches), form part of a composite act which itself amounts to a violation of Articles 1102, 1103 and 1105 NAFTA.[1930] The refusals also amounted to an illegal expropriation under Article 1110 NAFTA.[1931]

1293 Had the Respondent properly complied with its obligations under the NAFTA, Québec would not have issued its Decree, and the Federal Government would not simply have followed suit and would have likely issued a favourable decision.[1932] Not only was the Decree the result of a wrongful government interference with the Québec EA process, as explained above,[1933] it was also based on matters outside Québec's jurisdiction and outside the legally binding scope of the MELCC Directive (such as the effect of the GNLQ Project on global GHG emissions, the energy transition and beluga whales).

[1930] See Section 3.2 and paragraphs 853, 1009 above.

[1931] See Section 4.3 above.

[1932] See Section 4.2.2.1 above.

[1933] See Section 2.5.3 above.

1294 This is explained by Me Duchaine in the following terms:

> "*Si le Projet avait été traité de la même façon que l'ont été les projets qui lui sont comparables, la soussignée est d'avis qu'il aurait connu un sort positif, à l'instar de la quasi-totalité des projets assujettis à la PÉEIE*.
>
> […] *De toute évidence, si le Québec avait laissé le fédéral se prononcer sur la question des GES mondiaux, la conclusion aurait été favorable.*
>
> *À la lumière de ce qui précède, la soussignée soumet que n'eut été du non-respect des compétences attribuées au provincial et nombreuses violations de la procédure de la PÉEIE et à l'équité procédurale, le Projet aurait selon toute vraisemblance fait l'objet d'un décret d'approbation*."[1934]

1295 As for the Respondent's second argument that the Claimant falls short of proving that it would have obtained "*tous les autres permis et autorisations requis*" – namely ancillary permits such as construction permits, water permits, and permits in relation to hazardous materials[1935] – this is a complete red herring.

1296 To start with, and as explained in Section 5.1.2 above, an investor is not required to prove as a matter of causation that it would have "necessarily" obtained all permits or obtained them within a specific timeframe. Taken to its logical conclusion, the Respondent's position would otherwise mean that, unless a project were fully permitted, or certain to be fully permitted, investors would never be entitled to compensation. That would preclude investors from ever recovering compensation for a development-stage project as a State could always argue that, regardless of its own breaches (*e.g.*, in relation to a specific permitting process), in a hypothetical but-for scenario, it could always have denied some other permit.

[1934] Duchaine II, at **Exhibit CER-1 (Second)**, p. 159 *et seq.* (paras. 437-441).

[1935] Counter-Memorial, p. 275 *et seq.* (para. 687) and p. 292 *et seq.* (paras. 724-729); Sanschagrin, at **Exhibit RWS-10**, p. 7 *et seq*. (paras. 23-30).

1297 Nor is an investor required to prove that all permits were in place (or effectively guaranteed) as a condition for use of the DCF method. Development-stage projects are frequently transacted at significant values, and often appraised using the DCF method, even though they will, by definition, still require certain permits. Rather, in determining whether the DCF approach is appropriate, the more relevant question is whether the claimant had a "**reasonable plan**" for obtaining the remaining required permits considering the stage of the Project.[1936] In this case, the answer is yes, as explained below.

1298 As explained by Mr Le Verger in his second witness statement, once the GNLQ and Gazoduq Projects completed the EAs, there would have been no genuine risk of any "*autres permis et autorisations*" not being granted. [1937] Symbio was fully aware of those other permits and authorizations that would be required to bring the Symbio Project to operation; those had been identified by Symbio's legal counsel and environmental expert, WSP. [1938] Contrary to the environmental authorisations, which were specific to the GNLQ Project, these additional permits were routine administrative authorisations inherent to the construction and operation of any large industrial facility.[1939] Any time required to obtain those was evidently factored in the completion of Project, as part of the overall development and construction schedule.[1940] Again, the key milestone was the environmental approval by the Québec and Federal Governments on the recommendation of the MELCC and the Agency, with specific conditions to be followed on which the ancillary permits and authorisations depended.[1941]

[1936] See, in relation to a pre-production mining project, *Tethyan v. Pakistan*, Award, 12 July 2019, at **Exhibit CL-339-ENG**, p. 399 (paras. 1207-1209) ("Claimant rather has to establish that it was prepared for what a buyer would have expected when purchasing a project at the development stage of Reko Diq, *i.e.*, that relevant permits and approvals had either already been obtained or that Claimant had a **reasonable plan and schedule to obtain them** in time for the project to start construction and, subsequently, mining operations.") (emphasis added).

[1937] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 21 (para. 57).

[1938] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 19 *et seq*. (paras. 50-52, 54-56).

[1939] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 20 (paras. 51-52).

[1940] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 21 (para. 56).

[1941] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 21 (para. 54).

1299 Equally baseless are the Respondent's contradictory arguments on GNLQ's export licence. On the one hand, the Respondent and its legal expert, Ms Powell, contend that the Project would not have reached operation because the export licence would have expired before GNLQ could secure its renewal.[1942] On the other, they explain that obtaining the export licence is only a formality and does not constitute a "major milestone".[1943]

1300 In reality, when GNLQ obtained the export licence in 2014, that was a breakthrough in the Project as it was a prerequisite for the sale of LNG to Asia and Europe.[1944] As Mr Le Verger explains, even if GNLQ would not have carried out its first LNG export by 20 May 2026, when the export licence would otherwise expire, GNLQ would, in all likelihood, have been able to either adjust the licence date for first export or renew the licence.[1945] This is precisely because extension or renewal would have been no more than a formality, as showed by contemporaneous evidence for other LNG projects in Canada.[1946]

1301 In other words, there was no legitimate reason to doubt, in July 2021, that GNLQ would have received the required ancillary permits and authorisations following the completion of the EA.

5.2.3.2 The Gazoduq Project was on track to receive regulatory approvals and all other permits and authorisations required

1302 The Respondent also contends that the Claimant fails to demonstrate "*en toute probabilité*" that the Gazoduq Project would have obtained regulatory approvals to proceed with its development and construction.[1947]

[1942] Accuracy, at **Exhibit RER-1**, p. 33 (para. 102); Counter-Memorial, p. 293 (para. 724).

[1943] Counter-Memorial, p. 292 *et seq.* (para. 724); Powell, at **Exhibit RER-3**, p. 76 (para. 158).

[1944] NEB, Decision Letter dated 27 August 2015, at **Exhibit TLV-0016-FRA**; Le Verger I, at **Exhibit CWS-3**, p. 15 (para. 49).

[1945] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 15 *et seq*. (paras. 37-38).

[1946] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 15 *et seq*. (paras. 37-38); Letter from CER to Saint John LNG Development Company Ltd. dated 24 January 2023, at **Exhibit TLV-0118-ENG**; Letter from CER to Cedar 1 LNG Export Ltd. (Cedar 1) dated 30 August 2022, at **Exhibit TLV-0119-ENG**.

[1947] Counter-Memorial, p. 286 *et seq.* (paras. 710-723).

While "in all probability" is not the relevant standard, that contention is, in any event, unsupported by the evidence. On the contrary, based on the facts as they stood in July 2021, the Gazoduq Project was on track to receive regulatory approval from both the Federal and Québec Governments following their joint environmental assessment process – and conversely, there was **no indication** that either level of Government would refuse to authorise the Gazoduq Project.

1303 **First**, from a high-level perspective, the evidence is clear that the Federal Government wanted the Gazoduq Project to succeed. As explained above (see Section 2.7.4.1), the Agency and senior Federal Government Ministers repeatedly assured Gazoduq that they wanted to help Gazoduq through the regulatory process. The documents produced by the Respondent in this arbitration confirm that the Agency saw Gazoduq's success as vital to demonstrate the efficacy of its new IAA regime. The President of the Agency's briefing notes from a meeting in January 2020 confirm:

> "the success or failure of Gazoduq will be considered as an indicator of the success or failure of the new [impact assessment] regime. It is important that we continue to work together to support the process for this project."[1948]

1304 **Second**, the regulatory approval decisions by the Federal and Québec Governments with respect to Gazoduq would both have been made later in time than their (coordinated) decisions on the GNLQ Project. Assuming that GNLQ had already received its approvals, it would be highly unlikely that either level of Government would go on to refuse the Gazoduq Project (it being the sole source of natural gas feeding GNLQ and therefore a necessary element for its success), absent extraordinary, compelling circumstances specific to the Gazoduq Project. There were **no such circumstances** as at July 2021.

1305 As explained in Section 2.7.2 above, Gazoduq had already demonstrated the technical viability of the Project and had made good progress towards

[1948] Meeting of the DM Impact Assessment Committee (Docket 185163) dated 30 January 2020, at **Exhibit C-0569**, p. 4.

its further technical development. It also enjoyed support from local communities, Indigenous people and the Government, indicating its strong social acceptability. There were also no "red flags" from the perspective of potential Indigenous opposition to the Project, unlike some other gas pipelines in Canada, such as the Coastal GasLink Project, which was nonetheless ultimately constructed and put into operation.[1949]

1306 Therefore, the evidence regarding Gazoduq's position as of July 2021 indicates that, in all likelihood, Gazoduq would have received provincial and federal approvals at the end of the respective regulatory processes. Or, put another way, there was no evidence in July 2021 to suggest that it would **not** have.

1307 Finally, the Respondent alleges that the Claimant has failed to demonstrate that Gazoduq would have received "*un nombre important de permis et d'autorisations des gouvernements fédéral et du Québec.*" [1950] It is impossible for the Claimant to respond to such a vague, unspecific allegation concretely.[1951] In any case, assuming that the Respondent refers to ancillary permits and authorisations of the same kind it alleges GNLQ may have failed to obtain, the Claimant's answer is the same as explained in Section 5.2.3.1 above: in July 2021, there was no reason to suspect that Gazoduq would not receive such permits and licences, which were issued as a matter of course once the main regulatory approval was obtained from the Québec and Federal Governments. Indeed, historically Gazoduq had not encountered any challenges in obtaining the ancillary permits and

[1949] In particular, there is no evidence to suggest that Gazoduq would have faced any lawsuits by potential Indigenous opponents of the Gazoduq Project (see Section 2.7.2.4 above). In any event, for a hypothetical judicial review against Canada or Québec's approval of the Project to have any merit, one would have to assume Canada had acted contrary to its own laws – something which the but-for hypothesis does not permit.

[1950] Counter-Memorial, p. 294 *et seq.* (para. 728).

[1951] Gazoduq included a list of potential permits and authorisations it would require with its DPD (Gazoduq, Detailed Project Description – Appendices, January 2020, at **Exhibit DO-0003-ENG**, p. 163 *et seq.* (Table 1-1).

authorisations needed to conduct field studies and geotechnical work in development of the Gazoduq Project.[1952]

5.2.3.3 The Symbio Project had the means to procure the necessary funding

1308 In the Counter-Memorial, the Respondent argues that the Claimant would not have raised sufficient financing for the Project to be operative.[1953] In particular, Canada claims that the Claimant fell short of the financing required to reach a positive FID and would have had to raise USD 15 billion in construction finance for the Project.[1954] Accuracy in fact overstates the construction finance required, which appears to be due to it misreading sums in Canadian dollars as US dollars, but its argument is in any case based on a misconception of project finance.[1955]

1309 **First**, the Respondent misunderstands how project finance works. As Mr Krolick explains from his own two-decade experience as a financial advisor on LNG and other projects, project finance is a form of non-recourse finance in which the project owner raises funds to finance the project based on its expected future cash flows. In other words, the owner can raise the capital to build the project without having the necessary funds at the outset.[1956] It is common, and indeed prudent, to raise the capital needed for each specific stage of a project rather than seeking to raise the entire capital upfront.[1957]

1310 Since the Symbio Project was at the development phase, the Claimant was solely raising the development capital dedicated to the completion of the

[1952] See footnote 703 above; Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 30 July 2019, at **Exhibit C-0552-FRA** and Email from J.F. Bergeron (MFFP) to C. Baptista (Gazoduq) dated 11 February 2020, at **Exhibit C-0553-FRA**.

[1953] Counter-Memorial, p. 279 (para. 696) and p. 282 *et seq.* (paras. 702-703).

[1954] Counter-Memorial, p. 279 (para. 695) and p. 282 *et seq.* (para. 702); Accuracy, at **Exhibit RER-1**, p. 45 (para. 138).

[1955] Secretariat II, at **Exhibit CER-3 (Second)**, p. 46 *et seq.* (paras. 3.70-3.73), explaining that Secretariat in fact calculated construction costs in its first report as [redacted]

[1956] Krolick, at **Exhibit CWS-8**, p. 6 (para. 11); Illich II, at **Exhibit CWS-1 (Second)**, p. 8 *et seq.* (para. 20).

[1957] Krolick, at **Exhibit CWS-8**, p. 6 *et seq.* (paras. 12, 14).

development phase up to the FID and was not expected to raise construction capital until it reached FID.[1958] Development capital itself is not raised upfront, but through multiple rounds of fundraising aiming at funding the different stages of the development and ultimately de-risking the project by conducting studies such as technical or environmental studies, to determine its feasibility.[1959]

1311 In this case, Symbio was well-advanced in securing the necessary funding for the development phase and laying the groundwork to raise construction finance. Symbio had been professionally advised on its previous financing rounds by Société Générale and, in 2021, it sought to retain [redacted] as advisor on debt and equity finance to prepare for the final rounds of funding before FID.[1960] [redacted]

1312 In fact, out of the total USD 331 million (including contingencies) that Symbio estimated were needed to take the Project to FID, it had raised more than USD 120 million, or about 36%[1962] (and not 0.8% as suggested by Canada, which misleadingly confuses development and construction finance).[1963] Had Canada rightfully granted the provincial and federal approvals for GNLQ, Symbio would have raised the remaining development capital in the final round(s) of financing. Symbio and its financial advisor would also have been approach by interested lenders and equity investors willing to finance construction closer to the FID.

1313 **Second**, the Respondent's contention that the lack of a "strategic investor" was an element of risk deterring IQ from investing in the Project,[1964] was not reflected in IQ's contemporaneous conduct toward Symbio. [redacted]

[1958] Krolick, at **Exhibit CWS-8**, p. 6 *et seq.* (paras. 12-14).

[1959] Krolick, at **Exhibit CWS-8**, p. 7 (para. 14).

[1960] Krolick, at **Exhibit CWS-8**, p. 17 *et seq.* (paras. 42-43).

[1961] [redacted] at **Exhibit AK-0020-ENG**.

[1962] Illich II, at **Exhibit CWS-1 (Second)**, p. 9 *et seq.* (para. 23).

[1963] Counter-Memorial, p. 275 *et seq.* (para. 687).

[1964] Counter-Memorial, p. 281 (para. 700); Witness Statement of Simon Sanschagrin dated 12 July 2024, at **Exhibit RWS-10**, p. 9 (paras. 31-32).

[redacted] after the Claimant had informed Québec of [redacted] [1965] Indeed, as explained by Mr Krolick, a strategic investor, if any, only materialises closer to FID.[1966] In July 2021, at the time when Canada's breaches of its obligations under the NAFTA prevented the Project from proceeding any further, the Project was still at the development phase. It was therefore normal and expected not to have a strategic investor at that stage[1967] and by no means did such an absence preclude the Project's ability to reach FID in the future.

1314 As for the Respondent's claim that [redacted] evidenced the "risky" nature of the Claimant's investment at the time, [1968] this is wrong, as explained in the Memorial and above in Section 2.2.3. On the contrary, [redacted] [969] in the Project was testament to the modest pre-FID risk.[1970] This is all the more significant considering that Symbio only intended to raise an

[1965] [redacted] at **Exhibit C-0193-ENG-FRA**; [redacted] at **Exhibit C-0195-ENG-FRA**; [redacted] at **Exhibit C-0196-ENG-FRA**; [redacted] at **Exhibit C-0226-ENG-FRA** [redacted] at **Exhibit C-0227-ENG-FRA**; [redacted] at **Exhibit C-0228-ENG-FRA**, p. 2.

[1966] Krolick, at **Exhibit CWS-8**, p. 8 *et seq.* (paras. 18-20).

[1967] Krolick, at **Exhibit CWS-8**, p. 8 *et seq.* (paras. 18-20). See, *e.g.*, Cheniere Energy, Press Release "Blackstone Enters into an Arrangement for $2B Equity Investment for the Sabine Pass Liquefaction Project" dated 27 February 2012, at **Exhibit AK-0006-ENG**; Cheniere Energy, Press Release "Board of Directors Made Positive FID for Two Liquefaction Trains" dated 30 July 2012, at **Exhibit AK-0007-ENG**; Venture Global, Press Release "Venture Global Announces FID and Financial Close for Calcasieu Pass LNG", 19 August 2019 (accessed 9 April 2025), at **Exhibit AK-0008-ENG**; Venture Global, Press Release "Venture Global LNG and Stonepeak Infrastucture Partners Announce $1.3BN Equity Investment in Calcasieu Pass LNG Export Facility", 28 May 2019 (accessed 9 April 2025), at **Exhibit AK-0009-ENG**.

[1968] Counter-Memorial, p. 280 (para. 698).

[1969] [redacted] at **Exhibit JI-0113-ENG**, p. 1-2; Illich II, at **Exhibit CWS-1 (Second)**, p. 18 (para. 40).

[1970] GNLQ, Status Update, "LNG Quebec Limited Partnership (LP) – GNLQ Project & Gazoduq Development Update" dated 17 July 2020, at **Exhibit C-0229-ENG**, p. 2.

additional USD 56 million of development capital (alongside the [redacted] expected from the Québec Government) to close the fourth round of financing.[1971]

1315 [redacted]

1316 Notwithstanding [redacted] and the COVID-19 pandemic, Symbio continued to raise funds in 2020-2021 while it awaited the outcome of the EA of the GNLQ Project.

1317 Among its investors was [redacted]

[1971] GNLQ, Private Placement Memorandum dated 26 January 2019, at **Exhibit JI-0045-ENG**, p. 132; Symbio, "Fully Diluted Cap Table by Round", at **Exhibit C-0095-ENG**.

[1972] [redacted]

[1973] [redacted] at **Exhibit C-0229-ENG**, p. 2; Illich II, at **Exhibit CWS-1 (Second)**, p. 18 (para. 41).

[1974] Illich II, at **Exhibit CWS-1 (Second)**, p. 18 *et seq.* (para. 41).

[1975] Illich II, at **Exhibit CWS-1 (Second)**, p. 18 *et seq.* (para. 41). See also Section 2.2.3 above.

[1976] [redacted] at **Exhibit VB-0086-ENG**; Bidwai II, at **Exhibit CWS-2 (Second)**, p. 29 *et seq.* (para. 54).

[1977] [redacted] at **Exhibit VB-0087-ENG**; Bidwai II, at **Exhibit CWS-2 (Second)**, p. 29 *et seq*. (para. 54).

[redacted] Unfortunately, Québec's refusal to authorise the Project in July 2021 put a halt to the financing round and [redacted]

1318 In addition, in early 2021, Emissions Reduction Alberta announced that it would award Gazoduq a CAD 2 million grant to support the engineering studies.[1981] In parallel, and by way of example, Symbio was also engaged in discussions with [redacted] senior management, even meeting the global CEO, regarding a potential equity investment in the Project.[1982] Symbio was also in discussions with [redacted][1983] Indeed, Mr Bidwai has described in his first witness statement how in 2020-2021, he held discussions with 40 interested potential investors.[1984]

1319 These negotiations speak to the continued investor appetite in 2021 for the Project, as a low-GHG emissions LNG project. Had Canada not breached its obligations under the NAFTA and brough the Project to a halt, Symbio could and would have continued raising capital to reach FID.

[1978] [redacted] at **Exhibit C-0011-ENG**, p. 8; Bidwai II, at **Exhibit CWS-2 (Second)**, p. 29 *et seq.* (para. 54).

[1979] [redacted] at **Exhibit VB-0088-ENG**; [redacted] at **Exhibit VB-0089-ENG**.

[1980] [redacted] at **Exhibit C-0095-ENG**.

[1981] GNLQ, Private Placement Memorandum (Addendum) dated 8 January 2021, at **Exhibit SEC-0101-ENG**, p. 5.

[1982] [redacted] at **Exhibit SEC-0184-ENG**, p. 2; Illich II, at **Exhibit CWS-1 (Second)**, p. 20 *et seq.* (para. 44); Bidwai I, at **Exhibit CWS-2**, p. 75 *et seq*. (para. 205); Le Verger I, at **Exhibit CWS-3**, p. 16 (paras. 57-58).

[1983] Bidwai I, at **Exhibit CWS-2**, p. 70 (para. 187).

[1984] Bidwai I, at **Exhibit CWS-2**, p. 70 *et seq.* (para. 188).

1320 **Third**, the Project presented a strong project finance case such that, at FID, it would have been well-positioned to raise the required equity and debt to finance construction.[1985] As Mr Krolick explains, by the time a project reaches FID, it has already been substantially de-risked and undergone significant due diligence.[1986] At this point, debt would be provided through a syndicate of commercial banks.[1987] It is common to raise equity from institutional investors, as well as the project's contracted offtakers. For example, [redacted] – with whom Symbio was in negotiations in 2021, as mentioned above – [redacted] Moreover, in June 2021, Symbio and [redacted] which planned to supply the Symbio Project with engineering support and equipment, [redacted] for the development and/or construction of the Project.[1989]

1321 In sum, on the basis of information available in July 2021, Symbio had the means available to procure the remaining funding necessary to develop the Symbio Project, and the evidence on record shows that it would have done so. In fact, Mr Krolick points to **four** other U.S. and Canadian LNG projects which, since 2021, have reached positive FIDs and collectively raised over USD 50 billion in project finance to build new LNG facilities.[1990] As Mr Krolick explains, the Symbio Project would have been an even more attractive financing case in several respects, owing to its favourable economics, low-emissions credentials and the depth of its management's and contractors' experience.[1991]

1322 As it turned out, taking into account the events after the valuation date of July 2021, Symbio's contemporaneous assumptions and plans proved to be

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[1985] Krolick, at **Exhibit CWS-8**, p. 19 *et seq.* (paras. 46, 51).

[1986] Krolick, at **Exhibit CWS-8**, p. 8 (para. 17).

[1987] Krolick, at **Exhibit CWS-8**, p. 8 *et seq.* (para. 18).

[1988] Krolick, at **Exhibit CWS-8**, p. 8 *et seq*. (para. 18, third bullet point).

[1989] [redacted] at **Exhibit C-0320-ENG**, p. 2 (cl 1.5(a)). [redacted] at **Exhibit AK-0024-ENG**.

[1990] Krolick, at **Exhibit CWS-8**, p. 20 *et seq.* (para. 49).

[1991] Krolick, at **Exhibit CWS-8**, p. 22 *et seq.* (para. 51).

conservative, in particular in light of Russia's invasion of Ukraine and the subsequent quest for LNG in Europe.[1992] It is public knowledge that, in response to the Russian invasion, the European Union indeed accelerated its efforts to reduce dependence on Russian fossil fuels, while maintaining its commitment to become carbon neutral by 2050.[1993] The Symbio Project would have been in an enviable position to answer Europe's need for cleaner and responsibly-sourced natural gas and to present itself as a favourable alternative to Russian gas.[1994]

1323 Indeed, as Mr Illich explains, as a consequence of Russia's invasion, European government representatives expressed their hope for a relaunch and acceleration of the Project.[1995] As of May 2022, Mr Illich had met with numerous high-ranking German politicians[1996] who told him that the German Government would provide financial support in the range of USD 200 to 500 million, if Québec reversed its decision refusing the Project and if Canada followed suit.[1997] This support from the EU was followed by concrete commitments from energy majors.[1998] For instance, at that point in time as well, Symbio continued discussing the Project with [redacted] which remain supportive despite Québec's decision.[1999]

[1992] Illich I, at **Exhibit CWS-1**, p. 85 (para. 252).

[1993] Illich I, at **Exhibit CWS-1**, p. 84 (para. 252); Eurostat, "EU energy mix and import dependency", at **Exhibit C-0305-ENG**; Eurostat, "EU imports of energy products - latest developments", at **Exhibit C-0304-ENG**.

[1994] Illich I, at **Exhibit CWS-1**, p. 85 *et seq.* (paras. 254-265).

[1995] Illich I, at **Exhibit CWS-1**, p. 85 (para. 255).

[1996] Mr Illich met Ms Sparwasser, the German Ambassador in Canada, Steffen Meyer, the Director General for Economic, Fiscal and Climate Policy at the German Chancellery, Mr Robert Habeck, the German Vice Chancellor and Mr Jörg Kukies, the German State Secretary.

[1997] Illich I, at **Exhibit CWS-1**, p. 87 (para. 262).

[1998] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 19 (paras. 27-28). See, also, [redacted] at **Exhibit SEC-0188-ENG** [redacted] at **Exhibit SEC-0187-ENG** [redacted] at **Exhibit C-0144-ENG**; [redacted] at **Exhibit C-0145-ENG**.

[1999] Bidwai I, at **Exhibit CWS-2**, p. 72 *et seq.* (paras. 194-195).

5.2.3.4 The Symbio Project was technically viable

1324 In its Counter-Memorial, the Respondent acknowledges that the Claimant conducted pre-feasibility and feasibility studies for the GNLQ Project,[2000] but argues that the Claimant failed nonetheless to show that the Project was technically viable, as it had no EPC contracts in place.[2001] This is misleading.

1325 As explained below, executed EPC contracts would follow at the conclusion of FEED (front-end engineering design) studies; what matters, however, is that Symbio conducted numerous studies evidencing the technical viability of both the GNLQ Project and the Gazoduq Project.

1326 From March 2014 to the end of 2019, Symbio undertook significant technical feasibility work for the GNLQ Project, which included:

i) six studies from Poten & Partners including a pre-FEED contractor screening[2002], a project layout report[2003], an LNG market analysis[2004] and a marine and shipping review;[2005]

ii) the first detailed 9-month pre-FEED study from Amec Foster Wheeler which contained the "technical definition such as the basis of design, preliminary design, sized equipment list, process flow schemes, site plan, civil works quantities, design and execution philosophies, capital and operating cost estimates and an EPC schedule";[2006]

[2000] Counter-Memorial, p. 283 *et seq*. (paras. 704-705).

[2001] Counter-Memorial, p. 283 *et seq*. (para. 705).

[2002] Illich I, at **Exhibit CWS-1**, p. 31 (para. 81); Poten & Partners, "Pre-FEED Contractor Screening Report", at **Exhibit C-0097-ENG**.

[2003] Illich I, at **Exhibit CWS-1**, p. 31 (para. 81); Poten & Partners, "Site Layout and Project Technical Definition Report" (March 2014), at **Exhibit C-0098-ENG**.

[2004] Illich I, at **Exhibit CWS-1**, p. 31 (para. 81); Poten & Partners, "LNG Market Analysis" (March 2014), at **Exhibit C-0099-ENG**.

[2005] Illich I, at **Exhibit CWS-1**, p. 31 (para. 81); Poten & Partners, "Freestone Marine and Shipping Review" (March 2014), at **Exhibit C-0100-ENG**.

[2006] GNLQ, Private Placement Memorandum dated 1 July 2020, at **Exhibit SEC-0070-ENG**, p. 36; Foster Wheeler Energy, LNG Plant Operating Costs, January 2015, at **Exhibit SEC-0131-ENG**; Foster Wheeler Energy, Energie Saguenay Project Cost Estimate, December 2014, at **Exhibit SEC-0132-ENG**.

iii) further studies in 2016 and 2017 by KBR, JGC and Technip to validate the proposed technical and engineering design of the Plant;[2007]

iv) the second pre-FEED study prepared in 2018 by the Bechtel-Chiyoda consortium to expand the first pre-FEED study and supplement it with [redacted] and necessary studies used to inform the GNLQ's environmental permitting work;[2008] and

v) a Front-End Engineering Design Services Agreement with Bechtel as EPC contractor for the GNLQ Project, which included a term sheet for the EPC contract.[2009] As part of its FEED services, Bechtel had already produced six FEED studies[2010] for the LNG plant and 21 technical reports between January to March 2020,[2011] confirming the technical viability of the Project.

1327 Similarly, for the Gazoduq Project, Symbio had commissioned UPI to prepare extensive feasibility and FEED studies for the Project, as explained in paragraphs 496-498 above.

1328 The Respondent's reliance on the absence of an executed EPC contract shows no more than, again, a lack of industry knowledge. GNLQ and Bechtel had already [redacted][2012] Indeed, as

[2007] GNLQ, Private Placement Memorandum dated 1 July 2020, at **Exhibit SEC-0070-ENG**, p. 36.

[2008] GNLQ, Private Placement Memorandum dated 1 July 2020, at **Exhibit SEC-0070-ENG**, p. 36; GNLQ, GNLQ LNG Plant Capex Estimate, January 2019, at **Exhibit SEC-0157-ENG**.

[2009] GNL Québec Inc. and Bechtel Canada Co., Front End Engineering Design Services Agreement for the Development of a Liquefied Natural Gas Export Facility dated 24 July 2019, at **Exhibit JI-0040-ENG**.

[2010] See, *e.g.*, GNLQ, Study of the Impact of Feed Gas Inerts on the LNG Product, at **Exhibit C-0619-ENG**; GNLQ, Ethane vs Ethylene Study, at **Exhibit C-0620-ENG** .

[2011] See, *e.g.*, GNLQ, APCI Design Basis for FEED, at **Exhibit C-0621-ENG**; GNLQ, AGRU Design Basis, at **Exhibit C-0622-ENG**; GNLQ, Start-up and Operating Philosophy, at **Exhibit C-0623-ENG**; GNLQ, Labor Assessment Survey and Strategy Report, at **Exhibit C-0624-ENG**; GNLQ, Digital Transformation Study, at **Exhibit C-0625-ENG**; GNLQ, Piping Design and Layout Philosophy , at **Exhibit C-0626-ENG**; GNLQ, Isolation Philosophy, at **Exhibit C-0627-ENG**.

[2012] Illich I, at **Exhibit CWS-1**, p. 35 *et seq.* (para. 94); Illich II, at **Exhibit CWS-1 (Second)**, p. 45 (para. 93); FEED Agreement between GNLQ and Bechtel dated 24 July 2019, at **Exhibit JI-0184-ENG**, p. 108 of the PDF [redacted]

Mr Illich, who ran Bechtel's global LNG business before founding Symbio, explains in his second witness statement, the EPC contract would be executed at the completion of the FEED studies. At the end of the FEED process, Bechtel would have provided a final cost estimate for the construction of the plant, after which GNLQ and Bechtel would have agreed on a final price and signed the EPC contract.[2013] It is, however, unheard of in the LNG industry for a developer to sign a detailed, binding EPC Contract prior to completing a FEED study for the project, which was cut short in this case by Québec's unlawful Decree.

1329 In light of the foregoing, there is no reason to doubt that Symbio would have been able, from a technical perspective, to construct and operate the Symbio Project, had Canada not breached its obligations under the NAFTA.

5.2.3.5 The Claimant would have operated the Symbio Project profitably

1330 In its Counter-Memorial, the Respondent contends that the Claimant failed to demonstrate that the Project was economically viable as it did not bring evidence showing that it would have concluded firm agreements with gas suppliers and offtakers.[2014] The Respondents' arguments are unfounded.

1331 **First**, the Respondent misrepresents the Claimant's economic model, contending that Symbio would have borne market risks associated with the purchase, sale and transportation of natural gas and LNG. In particular, the Respondent claims that GNLQ switched from a "tolling model" to a "merchant model" that would have been exposed it to price and volume risk.[2015]

1332 However, as explained in the Memorial and by Messrs Bidwai and Krolick, GNLQ's business model was not a classic "merchant" model as described by Canada and Accuracy, but rather based on the model developed by

[2013] Illich II, at **Exhibit CWS-1 (Second)**, p. 48 (para. 102).

[2014] Counter-Memorial, p. 284 *et seq*. (paras. 707-709).

[2015] Counter-Memorial, p. 284 *et seq*. (para. 707).

Cheniere, the largest current exporter of North American LNG.[2016] This meant that, rather than selling on the spot market, GNLQ would enter into long-term contracts both upstream (*i.e.*, GSAs with gas suppliers) and downstream (*i.e.*, LNG SPAs with offtakers) covering the vast majority of its production. In simple terms, the margin is equal to the price difference between the GSAs and LNG SPAs, minus its Gazoduq tolls and shipping costs.[2017] Mr Krolick explains that the GNLQ model (based on the Cheniere model) had a risk profile similar to the tolling model, in that – contrary to Canada and Accuracy's allegations[2018]– the Project does not assume the risk of fluctuations in feed gas and LNG prices.[2019]

1333 Furthermore, as noted above,[2020] GNLQ mitigated the risks related to the volatility of the LNG and natural gas prices by incorporating in both the GSAs and LNG SPAs [redacted][2022] In 2022, in discussions with counterparties following the invasion of Ukraine while Symbio was

[2016] Memorial, p. 39 (para. 94); Bidwai I, at **Exhibit CWS-2**, p. 44 *et seq.* (paras. 112-116). See also, Krolick, at **Exhibit CWS-8**, p. 13 *et seq*. (para. 29).

[2017] Secretariat II, at **Exhibit CER-3 (Second)**, p. 42 *et seq*. (para. 3.66); Krolick, at **Exhibit CWS-8**, p. 14 (para. 30).

[2018] Counter-Memorial, p. 284 (para. 707); Accuracy, at **Exhibit RER-1**, p. 29 (paras. 87-88).

[2019] Krolick, at **Exhibit CWS-8**, p. 13 *et seq*. (paras. 29-31).

[2020] See paragraph 1276 above.

[2021] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 3 (para. 6). See, *e.g.*, GNLQ [redacted] draft LNG SPA Term Sheet dated [redacted] 2021, at **Exhibit VB-0145-ENG**; GNLQ GSA Term Sheet - [redacted] dated [redacted] 2020, at **Exhibit SEC-0114-ENG**; GNLQ- [redacted] – draft GSA Term Sheet (with Annex) dated [redacted] 2019, at **Exhibit VB-0247-ENG**.

[2022] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 3 (para. 6). See, *e.g.*, GNLQ [redacted] draft GSA Term Sheet dated [redacted] 2020, at **Exhibit VB-0066-ENG**; GNLQ [redacted] GSA Term Sheet dated [redacted] 2019, at **Exhibit SEC-0113-ENG**; GNLQ GSA Term Sheet - [redacted] dated [redacted] 2020, at **Exhibit SEC-0114-ENG**; GNLQ- [redacted] – draft GSA Term Sheet (with Annex) dated [redacted] 2019, at **Exhibit VB-0247-ENG**.

seeking to revive the Symbio Project, [redacted][2023]

1334 As Mr Bidwai explains in his second witness statement, in its base case, [redacted] This confirmed that, even adopting conservative assumptions on margin, the project would be highly profitable.[2024] The Respondent is wrong, however, to claim that GNLQ's financial model developed by Société Générale did not reflect the "merchant" model (or, more precisely, GSA/SPA model) used after 2019.[2025] In fact, the contemporaneous model allowed investors to switch between the tolling and "GSA/SPA" models and to input individual contracts and pricing assumptions into the latter.[2026]

1335 **Second**, the Respondent's unwarranted criticism of the timing of entering into agreements with offtakers and gas suppliers further demonstrates its lack of industry knowledge.

1336 Offtakers tend to start concluding binding LNG SPAs no earlier than 18 months before FID, and to have these agreements in place within less than 12 months of FID.[2027] With an FID in December 2023, GNLQ would therefore have moved from non-binding terms to binding agreements around Q2 2022 to Q1 2023, had Québec not refused the Project.[2028] Similarly, projects typically conclude binding GSAs less than 15 months from the FID.[2029]

1337 As Mr Bidwai explains, the mere fact that gas suppliers and offtakers were willing to negotiate term sheets at such an early stage was therefore an

[2023] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 5 (para. 10).

[2024] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 3 *et seq*. (paras. 6-10).

[2025] Counter-Memorial, p. 301 *et seq*. (para. 744).

[2026] Secretariat II, at **Exhibit CER-3 (Second)**, p. 40 (Figure 2).

[2027] Krolick, at **Exhibit CWS-8**, p. 7 *et seq.* (para. 16); Bidwai II, at **Exhibit CWS-2 (Second)**, p. 8 (para. 16).

[2028] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 8 (para. 17).

[2029] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 22 *et seq*. (para. 38). See also, Bidwai I, at **Exhibit CWS-2**, p. 38 (para. 98).

encouraging sign as no supplier or offtaker would have devoted the time and costs (including opportunity costs) discussing a Project that was commercially unattractive or unlikely to succeed.[2030]

1338 While the Respondent in its Counter-Memorial[2031] seeks to downplay the extent of Symbio's progress by challenging its business model and its ability to enter into LNG SPAs and GSAs, it also fails to account for the favourable economic climate in the energy industry to the Claimant's benefit, even from an *ex ante* perspective.[2032] In its first report, Secretariat noted that already in 2021, European countries were investing heavily in new LNG import facilities to satisfy their increased demand,[2033] including Germany with whom Symbio went on to hold promising commercial discussions in 2022.[2034]

1339 By March 2021, the Claimant was negotiating terms of LNG SPAs with no fewer than eleven offtakers, who together amounted to 116-140% of the annual projected production volume of the GNLQ Project.[2035] In other words, there was already in early 2021 demand for Symbio's LNG far exceeding the Project's capacity. Had the Québec Government not refused to authorise the GNLQ Project, it is highly likely that Symbio would have been able to conclude binding offtake agreements for at least 75-85% of its nameplate capacity (which would have allowed it to proceed to FID based on the targeted debt/equity ratio).[2036]

1340 In fact, interest from offtakers was so strong that, even despite Québec's unlawful decision, GNLQ held further offtake discussions in 2022, including signing a [redacted][2037] proceeding to

[2030] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 17 *et seq*. (para. 24).

[2031] Counter-Memorial, p. 284 *et seq*. (paras. 707-708).

[2032] GNLQ, Private Placement Memorandum (Addendum) dated 8 January 2021, at **Exhibit SEC-0101-ENG**, p. 9.

[2033] Secretariat I, at **Exhibit CER-3**, p. 18 *et seq*. (para. 3.9-3.15); GNLQ, Private Placement Memorandum dated 1 July 2020, at **Exhibit VB-0001-ENG**, p. 131-132.

[2034] Illich I, at **Exhibit CWS-1**, p. 85 *et seq.* (paras. 255-265).

[2035] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 15 (para. 20).

[2036] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 16 (para. 21).

[2037] [redacted] at **Exhibit C-0144-ENG**. See also Bidwai II, at **Exhibit CWS-2 (Second)**, p. 9 (para. 18, b))

negotiations on binding LNG SPAs [redacted][2038] and signing a binding LNG SPA [redacted][2039]

1341 Symbio's position in terms of obtaining supply of natural gas (to be transported via the Gazoduq Project pipeline) also benefited from favourable Canadian market conditions. The price for natural gas was declining in Canada and by 2018, Canada had lost significant export market share[2040] and was unable to market all of its sizable gas production locally. As a result, gas producers primarily based in Alberta had to supply their natural gas at a lower price than US prices to remain competitive.[2041]

1342 In addition, western Canadian gas producers were seeking additional revenue opportunities to increase their long-term production, as they had abundant low-cost gas reserves but were constrained by limited market opportunities.[2042] This together with the available infrastructure left a long-term surplus of low-cost natural gas in the market.[2043] In this favourable market context, Symbio had commenced discussions with nine gas suppliers to receive gas to be transported via the Gazoduq Project pipeline, and had already concluded term sheets with [redacted][2044] had also expressed its

[2038] GNLQ [redacted] draft LNG SPA dated [redacted] 2022, at **Exhibit SEC-0188-ENG**; GNLQ-[redacted] draft LNG SPA, at **Exhibit C-0145**. See also Bidwai II, at **Exhibit CWS-2 (Second)**, p. 9 (para.18, a)).

[2039] GNLQ [redacted] LNG SPA Term Sheet dated [redacted] 2019, at **Exhibit C-0147-ENG**. See also, Bidwai II, at **Exhibit CWS-2 (Second)**, p. 10 *et seq*. (para. 18 e)).

[2040] Secretariat I, at **Exhibit CER-3**, p. 23 (para. 3.18, Figure 5).

[2041] Bidwai I, at **Exhibit CWS-2**, p. 27 *et seq*. (paras. 72) and p. 38 *et seq*. (para. 99); Secretariat I, at **Exhibit CER-3**, p. 24 (para. 3.21).

[2042] Bidwai I, at **Exhibit CWS-2**, p. 38 *et seq.* (paras. 99, 135).

[2043] Secretariat I, at **Exhibit CER-3**, p. 26 *et seq*. (para. 3.24); Navigant, "GNL QUÉBEC INC. Natural Gas Supply and Demand Market Assessment" dated 27 October 2014, at **Exhibit C-0108-ENG**, p. 47.

[2044] GNLQ [redacted] GSA Term Sheet dated [redacted] 2019, at **Exhibit C-0133** [redacted] GNLQ GSA Term Sheet - [redacted] dated [redacted] 2020, at **Exhibit SEC-0114-ENG**.

interest in supplying long-term volumes from [redacted] [2045]

1343 **Finally**, the Respondent argues that the Claimant has failed to demonstrate that there was sufficient third-party demand for Gazoduq's residual gas pipeline capacity – that is, for part of the remaining 11% of Gazoduq's capacity beyond the 89% already allocated to GNLQ[2046] – to support the Symbio Project's commercial viability.[2047] That argument is equally misplaced.

1344 The Respondent's criticism is based on a misunderstanding of the purpose of Gazoduq's "open season" in December 2019 and its claim that Gazoduq had received no expressions of interest for its pipeline capacity other than from GNLQ.[2048] As explained above in Section 2.7.2.1, it would have been unusual for Gazoduq to receive other formal requests for pipeline capacity in December 2019, so far in advance of the pipeline construction; but in any event Gazoduq did receive several informal expressions of interest.[2049]

1345 As Secretariat also explains, EY forecasted in a March 2020 study that by 2030 there would be additional natural gas demand of 162 to 274 MMcf/d in Québec and neighbouring regions – more than the 150 MMcf/d of capacity that it assumes Gazoduq would have marketed to third parties.[2050] EY and Canada's own agency, NRCan, further noted that the Gazoduq Project could "optimize" how gas was delivered to Québec from western Canada, in that it offered a more efficient route than the existing, over-utilised pipeline system.[2051] In other words, NRCan understood that, even putting aside the predicted increase in gas demand, any available capacity

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[2045] Bidwai II, at **Exhibit CWS-2 (Second)**, p. 24 *et seq.* (paras. 41-43); GNLQ-[redacted] GSA Term Sheet dated [redacted] 2020, at **Exhibit SEC-0115-ENG**.

[2046] Secretariat conservatively assumed in its first report, referring a contemporaneous gas demand study by EY, that Gazoduq could market just under three-quarters of the residual capacity to chieve utilisation of 97%: Secretariat I, at **Exhibit CER-3**, p. 82 (para. 6.13).

[2047] Counter-Memorial, p. 285 *et seq.* (para. 709) and p. 304 *et seq.* (paras. 752-753).

[2048] Counter-Memorial, p. 285 *et seq.* (para. 709).

[2049] See Section 2.7.2.1 above. See also, Brintnell II, at **Exhibit CWS-5 (Second)**, p. 15 (para. 38).

[2050] Secretariat II, at **Exhibit CER-3 (Second)**, p. 106 (para. 4.84).

[2051] Secretariat II, at **Exhibit CER-3 (Second)**, p. 106 *et seq.* (para. 4.85-4.87).

on Gazoduq would have allowed distributors in northern Ontario and Québec to reroute existing gas supply through a less costly route.

1346 To conclude, the evidence on record shows that as at July 2021 there were no issues with the commercial viability of the Symbio Project, and events following July 2021 only confirm that to be the case. Had Canada not breached its obligations under the NAFTA, all indications suggest that Symbio would have operated the Project profitably.

5.3 The fair market value of the Symbio Project as at 21 July 2021 is USD 588 million

1347 As explained above in Section 5.1, the Respondent's breaches of each of Articles 1102, 1103, 1105 and 1110 NAFTA caused the Claimant to lose the fair market value of the Symbio Project as at 21 July 2021. In Section 5.2, the Claimant has explained why the DCF methodology is, in this case, an appropriate methodology to quantify that fair market value.

1348 Secretariat's valuations of both the GNLQ Project and the Gazoduq Project on an *ex ante* basis are appropriate. Starting with prior transactions and a DCF analysis taking into account the further de-risking that took place between the prior transactions and the valuation date, Secretariat arrives at a robust fair market value of **USD 557 million** for the GNLQ Project and of **USD 31 million** for the Gazoduq Project as at 21 July 2021, *i.e.* a total **fair market value for the Symbio Project of USD 588 million** (**Section 5.3.1**).

1349 In doing so, Secretariat has properly and conservatively factored in the uncertainties and risks associated with the Symbio Project as of July 2021 (**Section 5.3.2**).

1350 Finally, Secretariat confirms the amounts that Symbio invested in the Projects, should this be helpful to the Tribunal, but explains that on a proper application of valuation theory, sunk costs ought to be irrelevant to the fair market value of the Symbio Project (**Section 5.4.3**).

5.3.1 Secretariat's valuation based on prior transactions and DCF analyses is robust

1351 As explained in Section 5.1.1 above, the Claimant has instructed Secretariat in its second report to prepare an *ex ante* valuation as of 21 July 2021. From an economic point of view, the fair market value of the Symbio Project in July 2021 reflects what a hypothetical buyer would have paid for the opportunity to develop the Project, but for Canada's breaches.

5.3.1.1 The valuation of the GNLQ Project

1352 Prices paid in arm's-lengths transactions sufficiently close to the valuation date can serve as reliable anchors when determining the fair market value of an asset.[2052]

1353 The starting point for Secretariat's second report was therefore the actual investment transactions in the Symbio Project before the valuation date in July 2021. As explained in Section 5.2.3.3, the Claimant raised considerable equity between 2013 and 2021 following four rounds of financing during which more than fifteen investors, not including the founding investors (Freestone and Breyer Capital), invested.[2053] In its fourth round of financing starting from 2019, existing and new investors agreed on a pre-money valuation of [redacted][2054]

1354 Other sophisticated prospective investors – [redacted] – also agreed to the [redacted][2055] From February 2021, Symbio and [redacted] on the basis of a pre-money valuation of [redacted]

[2052] I. Marboe, "Methods of Valuation in International Practice", at **Exhibit CL-338-ENG**, p. 4 (para. 5.21).

[2053] GNLQ, Private Placement Memorandum dated 1 July 2020, at **Exhibit SEC-0070-ENG**, p. 19.

[2054] Secretariat II, at **Exhibit CER-3 (Second)**, p. 68 (para. 4.7).

[2055] Secretariat I, at **Exhibit CER-3**, p. 120 *et seq.* (para. 6.121); [redacted] at **Exhibit C-0228-ENG-FRA**, p. 4; Equity investment Agreement among [redacted] LNG Quebec Limited Partnership and LNG Quebec GP Inc. dated [redacted] 2020, at **Exhibit C-0232-ENG**, p. 2.

[redacted][2056] Although these investments ultimately did not materialise – in the latter case, due to Québec's refusal to authorise the GNLQ Project – Ripinsky and Williams acknowledge in their leading text that such "contemplated" transactions nevertheless represent "strong evidence" of fair market value.[2057]

1355 In addition, between 2019 and 2021, GNLQ had further increased the value of the Symbio Project by successfully securing USD 23 million of equity[2058] and USD 31 million of convertibles notes[2059] totalling additional funding of USD 54 million at the end of the fourth round.

1356 Secretariat concludes that, based solely on the four financing rounds, the implied post-money value of the Symbio Project amounted to [redacted][2060]

[redacted]

1357 Deducting the implied value of the Gazoduq Project of USD 31 million (as detailed below in Section 5.3.1.2) from the implied value of Symbio,

[2056] Secretariat I, at **Exhibit CER-3**, p. 61 *et seq.* (para. 4.67); Symbio Infrastructure and [redacted] at **Exhibit SEC-0184-ENG**, p. 1.

[2057] S. Ripinsky and K. Williams, *Damages in International Investment Law*, at **Exhibit CL-331-ENG**, p. 19 of the PDF ("Valuation can be performed on the basis of past transactions with the evaluated asset itself. Such transactions, whether actually executed or only contemplated by the parties at arm's length, represent strong evidence of the asset's [fair market value] […]").

[2058] Secretariat I, at **Exhibit CER-3**, p. 120 *et seq*. (para. 6.121).

[2059] Secretariat I, at **Exhibit CER-3**, p. 120 *et seq.* (para. 6.121).

[2060] Secretariat II, at **Exhibit CER-3 (Second)**, p. 30 (figure 1).

Secretariat estimates the implied value of the GNLQ Project based on previous transactions to [redacted][2061]

[redacted]

1358 The use of prior transactions requires that the passage of time between the prior transaction and the valuation date be factored in, as in that period, the value may evolve.[2062] In this case, the fourth round of financing began in 2019, during which Symbio agreed with its investors on the [redacted] pre-money valuation. Thus, Secretariat updates the DCF model – the same as developed by Société Générale and used for Secretariat's *ex post* valuation in its first report – to reflect pricing and cost assumptions as of 21 July 2021. Secretariat also takes into account the fact that, in parallel to raising financing, Symbio incrementally "de-risked" the Symbio Project throughout the development phase by conducting technical, environmental and economic studies, engaging in negotiations with offtakers, gas suppliers, contractors and concluding agreements with potential investors. These steps incrementally increased the value of the Project.[2063]

1359 As explained in Section 5.1.1, the main differences between Secretariat's *ex post* and *ex ante* DCF valuations are the stage of the Project as at July 2021 (compared to September 2023 in the *ex post* "but for" scenario) and the prevailing market conditions, which have an impact on the expected

[2061] Secretariat II, at **Exhibit CER-3 (Second)**, p. 68 *et seq.* (para. 4.7, table 5).

[2062] S. Ripinsky and K. Williams, *Damages in International Investment Law*, at **Exhibit CL-331-ENG**, p. 15 of the PDF (p. 216).

[2063] Illich II, at **Exhibit CWS-1 (Second)**, p. 8 *et seq.* (paras. 20-21); Secretariat II, at **Exhibit CER-3 (Second)**, p. 69 *et seq*. (para. 4.8); Bidwai II, at **Exhibit CWS-2 (Second)**, p. 22 *et seq.* (s. 3) and p. 29 *et seq.* (s. 4).

revenues and the costs. In summary, Secretariat has made four main adjustments:

i) Secretariat adjusts the remaining development costs to bring the Project to FID and the capital expenditure (or capex) for construction costs. With respect to the remaining development costs, Secretariat quantifies them at [redacted] considering that GNLQ had already incurred approximately [redacted] between 2014 and 2022 and includes a 21% contingency for any unexpected expenses.[2064] With respect to the construction costs, Secretariat bases its assumptions on the pre-FEED estimate prepared by Bechtel and a study from Wood Mackenzie that escalates the pre-FEED estimate for inflation, plus conservatively adding a further contingency, and actualises the costs of construction to approximately [redacted][2065]

ii) Secretariat adjusts the net revenues using long-term natural gas and LNG price forecasts (in particular, [redacted]) taking into account the information available as at 21 July 2021.[2066] Secretariat forecasts GNLQ's net revenues, after subtracting shipping costs, to be in the range of [redacted] in 2027 and [redacted] in 2048.[2067] Nevertheless, Secretariat conservatively uses a net revenue of [redacted] (as of 2023) which, escalated for inflation, [redacted] Secretariat explains that, by leaving an additional "buffer", it makes allowance for any uncertainties over the level of the net revenue – equivalent to adding another 5% to the PORP.[2068]

iii) Secretariat updates the operating expenditure based on S&P Global's Upstream Operating Cost Index and IMF's World Economic Outlook forecasts adjusted for the new valuation date and inflation.[2069] It also

[2064] Secretariat II, at **Exhibit CER-3 (Second)**, p. 75 (para. 4.14).

[2065] Secretariat II, at **Exhibit CER-3 (Second)**, p. 75 *et seq.* (para. 4.15).

[2066] Secretariat II, at **Exhibit CER-3 (Second)**, p. 78 *et seq*. (para. 4.23).

[2067] Secretariat II, at **Exhibit CER-3 (Second)**, p. 78 *et seq.* (para. 4.23).

[2068] Secretariat II, at **Exhibit CER-3 (Second)**, p. 85 *et seq.* (paras. 4.33-4.34).

[2069] Secretariat II, at **Exhibit CER-3 (Second)**, p. 90 (para. 4.41).

updates the hydroelectricity tariffs that GNLQ would have expected to pay Hydro-Québec ("**HQ**").[2070]

iv) Secretariat updates the discount rate on the basis of the weighted average cost of capital ("**WACC**") to reflect the contemporaneous macroeconomic environment. In calculating the cost of equity, Secretariat adds a PORP of 4% to reflect the Symbio Project's earlier stage of development as at July 2021, and therefore greater development risks, relative to the *ex post* scenario as at September 2023.[2071] Weighting the cost of equity with the cost of debt, Secretariat calculates a WACC of 7.2%, which it concludes to be reasonable by comparison with other North American LNG projects in 2021.[2072]

1360 After making the above adjustments, Secretariat arrives at a DCF valuation of the GNLQ Project of USD 602 million as of 21 July 2021.[2073]

1361 To estimate the fair market value for the GNLQ Project taking into account also the prior transactions, Secretariat then takes a weighted average between the value based on prior transactions of [redacted] and the DCF-based net present value of USD 602 million [redacted] to arrive at a **fair market value of USD 557 million for the GNLQ Project as at 21 July 2021**. Secretariat explains that the greater weighting for the DCF valuation reflects the abundant contemporaneous evidence supporting the inputs of the DCF analysis.[2074]

5.3.1.2 The valuation of the Gazoduq Project

1362 As Secretariat explained in its first report, the business model of Gazoduq involved Gazoduq charging tolling fees that would be set under a regulated cost-of-service approach.[2075] Secretariat in its valuation assumed that there

[2070] Secretariat II, at **Exhibit CER-3 (Second)**, p. 89 (para. 4.39). Those estimates are slightly higher than the already conservative estimation in its *ex post* valuation: Secretariat I, at **Exhibit CER-3**, p. 104 (para. 6.72).

[2071] Secretariat II, at **Exhibit CER-3 (Second)**, p. 94 *et seq.* (paras. 4.55-4.61).

[2072] Secretariat II, at **Exhibit CER-3 (Second)**, p. 98 *et seq.* (para. 4.64, table 8).

[2073] Secretariat II, at **Exhibit CER-3 (Second)**, p. 99 (para. 4.65, table 9).

[2074] Secretariat II, at **Exhibit CER-3 (Second)**, p. 100 (paras. 4.68-4.69, table 10).

[2075] Secretariat I, at **Exhibit CER-3**, p. 77 *et seq*. (para. 6.3).

would be **no additional value generated** in the future **over and above its cost of capital**, as Gazoduq would only be able to cover its costs (including debt service) and earn a return equivalent to its cost of capital. As a result, the value of Gazoduq is equivalent to the amounts that have historically been invested, brought forward to the valuation date at the WACC.[2076]

1363 To estimate the DCF value of the Gazoduq Project, Secretariat in its second report maintains the assumptions explained in their first report, including on WACC and tolling fees, but adjusted them to the new valuation date.[2077]

1364 Symbio's investments in the development of the Gazoduq Project pipeline since the establishment of Gazoduq in 2018 amount to approximately USD 27.6 million.[2078] Those amounts would form a part of the future tolling fees of the Gazoduq Project pipeline whereby Gazoduq (and Symbio as the 100% owner) would recoup those investments and a reasonable return. A reasonable return would be based on Gazoduq's WACC, incorporating its cost of equity, which for gas pipelines in Canada is federally regulated.[2079] Accordingly, the value of Gazoduq as of 21 July 2021, can be calculated based on the amounts invested in the project by Symbio from 2018 through 2021, brought forward at the rate of the WACC. Applying the WACC to Claimant's historical investments in Gazoduq, Secretariat calculates a value of USD 31 million as of 21 July 2021.[2080]

5.3.2 Secretariat's valuation appropriately considers uncertainties

1365 As explained above in Section 5.2, the Respondent's argument that the DCF method is not appropriate to value a pre-operational project because of the uncertainty inherent in such projects is misguided. Indeed, the DCF methodology was used to value the Symbio Project in this case by both existing and potential investors, [redacted] and its investment advisors. The risks raised by the Respondent and Accuracy – which are common to most pre-operational projects and, in any event,

[2076] Secretariat I, at **Exhibit CER-3**, p. 71 *et seq*. (para. 5.12).

[2077] Secretariat II, at **Exhibit CER-3 (Second)**, p. 112 (para. 4.102).

[2078] Secretariat II, at **Exhibit CER-3 (Second)**, p. 109 (paras. 4.94-4.99).

[2079] Secretariat II, at **Exhibit CER-3 (Second)**, p. 108 *et seq.* (paras. 4.94-4.96).

[2080] Secretariat II, at **Exhibit CER-3 (Second)**, p. 112 (para. 4.102).

overstated – are appropriately taken into account in the DCF valuation by Secretariat.

1366 Indeed, in its valuation, Secretariat appropriately reflects risks in the cash flow projections and through the discount rate applied in the DCF model, in particular a higher PORP at 4% (**Section 5.3.2.1**). Furthermore, as explained above in Section 5.2.3, in July 2021 the Symbio Project was on track to achieve FID in December 2023, be constructed and thereafter generate returns as forecasted in the contemporaneous business plans. The Respondent overstates the risk of delay in receiving Gazoduq's main regulatory approvals; that risk was low, and even if it had materialised, Symbio had strategies available to maintain the Project on the critical path to its first LNG cargo (**Section 5.3.2.2**). Similarly, the Respondent overstates the risk that, once the Project would have reached FID, it would have faced cost overruns or delays during construction (**Section 5.3.2.3**).

5.3.2.1 Secretariat's valuation properly takes into account uncertainties through a 4% PORP

1367 As Secretariat explains in its second report, it is common to take risks into account within the discount rate in the DCF model and/or within the cash flow projections.[2081] When such risks are accounted for in the discount rate, this is commonly accomplished by including a PORP in the calculation of the discount rate. The PORP specifically captures the additional risks to which a project might be exposed because of its pre-operational status.[2082]

1368 In its first report, Secretariat included a PORP of 1% in its discount rate. A PORP of 1% was adequate for an *ex post* valuation since, by the date of Secretariat's first report, the Symbio Project would have been permitted, fully designed, and approaching FID; by the time of the award, it would have been under construction and approaching first production. The pre-operational risks would therefore have been minimal in an *ex post* analysis.

[2081] Secretariat II, at **Exhibit CER-3 (Second)**, p. 36 (para. 3.54).

[2082] Secretariat II, at **Exhibit CER-3 (Second)**, p. 37 (para. 3.55).

1369 However, in its *ex ante* analysis as at 21 July 2021, Secretariat accounts for development risks. Although, as explained in Section 5.2.3 above, the Respondent overstates these uncertainties (and therefore downplays the Symbio Project's prospects of success), as of July 2021, the Symbio Project had not yet reached FID or been constructed. Therefore, as Secretariat acknowledges, there was naturally a higher level of pre-operational risk at that stage. Secretariat accounts for this risk by increasing the PORP from 1% to **4%.**[2083]

1370 A PORP of 4% is significant and, consequently, has a significant impact on the valuation of the Symbio Project. By increasing the discount rate, the PORP increases the amounts by which future cashflows are discounted to present value. In other words, the effect of the relatively high PORP is to place exponentially lower values on the future cash flows, reflecting the increased level of uncertainty as at July 2021 compared with an *ex post* approach.[2084]

1371 Overall, the effect of increasing the PORP from 1% to 4% is to reduce the DCF value of the Symbio Project by USD 1.4 billion, from over USD 2 billion to USD 602 million.[2085] This adjustment has an equivalent effect to incorporating a 27-month delay to first production, or increasing up-front construction costs of approximately USD 1.8 billion, into the cash flows in the DCF model.[2086] The higher discount rate resulting from the PORP is combined with conservative net revenue assumptions which reflect potential uncertainty in the cash flows; together, these assumptions mean that the DCF value of the GNLQ Project is only a fraction of its *potential* value once operational:[2087]

[2083] Secretariat II, at **Exhibit CER-3 (Second)**, p. 95 *et seq*. (para. 4.57, 4.59).

[2084] Secretariat II, at **Exhibit CER-3 (Second)**, p. 37 (para. 3.5).

[2085] Secretariat II, at **Exhibit CER-3 (Second)**, p. 37 (para. 55).

[2086] Secretariat II, at **Exhibit CER-3 (Second)**, p. 12 (para. 2.8, fourth bullet point).

[2087] Secretariat II, at **Exhibit CER-3 (Second)**, p. 100 (Figure 13).

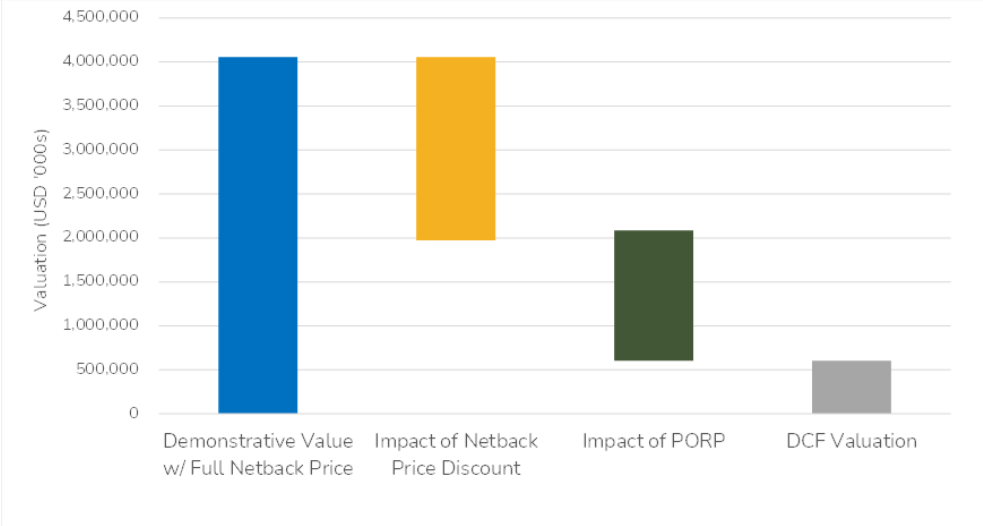

Figure 3: Effect on NPV of discount to discounted netback prices and PORP

1372 The PORP results in an assumed cost of equity of 12.2%, which, as noted by Secretariat, is significantly higher than for other North American LNG projects in the same period. For example, another development-stage LNG project, NextDecade's Rio Grande project, had a publicly reported cost of equity of 8.8% in mid-2021; NextDecade went on to achieve FID in July 2023, a few months before the Symbio Project was expected to reach FID.[2088] This confirms the reasonableness of Secretariat's selection of a 4% PORP.

1373 The 4% PORP is also at the upper end of the range of PORPs discussed in articles cited by Accuracy. Accuracy refers to two articles which suggest a PORP of 1.5% to 2.5%[2089] and 3% to 5%[2090], respectively, for greenfield projects, based on which Accuracy proposes a PORP of merely 3%, at the intersection of the ranges.

1374 In short, via the PORP, Secretariat's DCF model more than accounts for the pre-operational risks of the Symbio Project, as at July 2021, with regard to financing, permitting, construction and other risks. Put another way, to

[2088] Secretariat II, at **Exhibit CER-3 (Second)**, p. 98 (para. 4.64) and p. 123 (para. 6.2).

[2089] Vernimmen, La Lettre Vernimmen n°74 dated 1 March 2009, at **Exhibit ACC-0026-FRA**, p. 2.

[2090] Accuracy, at **Exhibit RER-1**, p. 150 (para. 458); SAGE, The Risks and Rewards of Private Equity in Infrastructure, at **Exhibit ACC-0027-ENG**.

the extent that the business plan of the Symbio Project as at July 2021 was subject to uncertainties (such as future decisions on permitting, financing and further engineering), those uncertainties are "priced in" to Secretariat's valuation.

1375 Accordingly, there is no need to further adjust the cashflow projections themselves in Secretariat's DCF model to account for project risks. To do so would amount to **double-counting** the impact of those potential risks.

1376 For example, as at July 2021, the exact date on which the Project would achieve its first LNG cargo was not entirely certain; in reality, it could have been before, on or after the estimate of Q3 2027 in Symbio's business model. However, this uncertainty is precisely what Secretariat's PORP incorporates into the DCF model. It would not be appropriate, therefore, to postpone the cashflows in the DCF model – as Accuracy seeks to do – on the basis that first cargo might have been later than the Claimant's estimate. Indeed, the inclusion of a PORP to account for downside risk is conservative, in that the "uncertainties" raised by Canada also entail upside; thus, if the GNLQ Project had reached first cargo three months ahead of schedule, similarly to other Bechtel-constructed LNG projects, that would increase the value of the GNLQ Project by USD 125 million.[2091]

1377 In any event, as explained below, the Respondent overstates the risk of delay on both the required regulatory approval required for Gazoduq and the construction of the Symbio Project, as well as construction cost overruns.

5.3.2.2 The Respondent overstates the risk of delay associated with Gazoduq's regulatory approval process

1378 As explained above (see Section 2.7.1.2), unlike the GNLQ Project which had proceeded under the CEAA 2012 federal regulatory regime, the Gazoduq Project was subject to the IAA, after Canada enacted the latter in June 2019. Despite delays caused by the transition from the prior regulatory regime to the IAA, Gazoduq had made substantial progress through both the new IAA process and the MELCC EA process, and

[2091] Secretariat II, at **Exhibit CER-3 (Second)**, p. 64 (para. 3.109).

expected to receive approvals from both the Quebec and Federal Government by November 2023 (see Section 2.7.1.4).

1379 As explained above (Section 2.7.4), in its Counter-Memorial, the Respondent seeks to overstate the risks inherent in its new IAA regulatory process. However, its characterisation of the regime as "*beaucoup plus complexe et ardu qu'il ne l'était auparavant*"[2092] is not only inaccurate, but also at odds with Canada's own public statements at the time the IAA was enacted, as well as the Federal Government's contemporaneous desire to provide Gazoduq with a streamlined, efficient regulatory process. Contrary to the Respondent's contention (based entirely on the speculative opinions of Mr O'Gorman), the evidence indicates that, in all likelihood, Gazoduq would have received both provincial and federal regulatory approvals on schedule, by November 2023.

1380 Moreover, even if there had been unforeseen delays in Gazoduq's regulatory processes, that would not necessarily have caused delay to the overall schedule of the Symbio Project. This is explained by Mr Illich in his second witness statement as follows.

1381 **First**, Gazoduq had built in 60 days of contingency into its schedule for Gazoduq's regulatory process (meaning that, if there had been no delays, it would receive its approvals 60 days before its estimate of 30 November 2023).[2093]

1382 **Second**, a delay in receiving Gazoduq's regulatory approvals beyond those 60 days could be managed within the overall Symbio Project schedule via the use of "early works" and by ordering long-lead equipment items ahead of FID.[2094] Mr Illich explains how early works are frequently used in large-scale LNG projects, and how Symbio could have utilised them to mitigate the impact of a delay to the Symbio Project FID by shortening the post-FID construction period, thereby maintaining its target date of Q3 2027 for the first cargo.[2095]

[2092] Counter-Memorial, p. 288 (para. 713).

[2093] Illich II, at **Exhibit CWS-1 (Second)**, p. 33 (para. 71).

[2094] Illich II, at **Exhibit CWS-1 (Second)**, p. 38 *et seq.* (s. 4.4).

[2095] Illich II, at **Exhibit CWS-1 (Second)**, p. 39 *et seq.* (paras. 82-86).

1383 **Third**, although Symbio's January 2021 Project schedule anticipated construction of the GNLQ plant to last 53 months, based on his experience, Mr Illich confirms that Bechtel could have delivered an accelerated schedule if needed to mitigate pre-FID delays.[2096]

1384 Mr Illich concludes that Symbio could have accelerated the post-FID construction phase of the Project by around six months.[2097] Indeed, Mr Illich identifies other LNG projects constructed by Bechtel – on a non-expedited basis – that reached first production up to six months ahead of schedule.[2098] In other words, even if Gazoduq's regulatory process was **eight months** slower than had been estimated in its January 2021 schedule (*i.e.*, counting the 60 days of contingency already built in, plus up to six months of additional delay), this would have **no impact** on the date of its first cargo delivery.

5.3.2.3 The Respondent overstates the risk of cost overruns or delays in the construction of the Symbio Project

1385 In the Counter-Memorial, the Respondent and Accuracy argue that the estimated construction costs for both the GNLQ Project and the Gazoduq Project do not factor in the risks associated with modifications in budget or delays.[2099] Accuracy alleges that the Claimant has failed to take into account cost overruns in its contingencies which could have reduced or wiped out the value of the Project.[2100] This is incorrect.

1386 **First**, the Respondent misconstrues Secretariat's treatment of construction costs in its valuation.[2101] Both the Respondent and its experts rely on an outdated EY study of oil and gas projects around the world from 2014 which does not address the specificities of the Project.[2102] Rather, Secretariat has relied on a bespoke analysis conducted by Wood Mackenzie

[2096] Illich II, at **Exhibit CWS-1 (Second)**, p. 43 *et seq.* (paras. 90-91).

[2097] Illich II, at **Exhibit CWS-1 (Second)**, p. 44 (para. 91).

[2098] Illich II, at **Exhibit CWS-1 (Second)**, p. 49 *et seq.* (para. 104).

[2099] Counter-Memorial, p. 303 *et seq.* (paras. 750).

[2100] Accuracy, at **Exhibit RER-1**, p. 123 *et seq.* (paras. 374-380).

[2101] Counter-Memorial, p. 303 *et seq*. (paras. 750-751).

[2102] Secretariat II, at **Exhibit CER-3 (Second)**, p. 58 *et seq*. (paras. 3.97- 3.101).

which already include a substantial contingency to account for potential budget overruns.[2103]

1387 **Second**, GNLQ retained Bechtel as an EPC contractor (which has a strong, proven track record of delivering LNG projects on time and within budget)[2104] and [redacted] which had three significant consequences:[2105]

- [redacted]

- Bechtel, a world leader in the construction and engineering industry, would have [redacted] Indeed, the quantities of materials were well known, the site was compact, there were no significant challenges in respect of its marine scope, no large personnel camps anticipated, and no expected significant logistical challenges.[2107]

- [redacted]

[2103] Secretariat II, at **Exhibit CER-3 (Second)**, p. 61 *et seq.* (para. 3. 102); Wood Mackenzie, Gas and LNG, 2023, at **Exhibit SEC-0255-ENG**.

[2104] Illich II, at **Exhibit CWS-1 (Second)**, p. 48 *et seq.* (paras. 103-104).

[2105] FEED Agreement between GNLQ and Bechtel dated 24 July 2019, at **Exhibit JI-0184-ENG**.

[2106] [redacted]

[2107] Illich II, at **Exhibit CWS-1 (Second)**, p. 47 *et seq.* (para. 100).

[2108] [redacted]

1388 **Third**, Accuracy assumes that the construction of the GNLQ Project would have been delayed by two years, which would have wiped out its value.[2109] This assumption is not credible.[2110]

1389 Secretariat relies on GNLQ's contemporaneous project schedules in early 2021, which estimated the date of FID in Q4 2023, and first production by Q3 2027.[2111] That estimate already accounted for the delays accumulated throughout the development phase, notably those caused by the COVID-19 pandemic and resulting from the postponement of the BAPE hearings.[2112]

1390 Furthermore, and in any event, as explained above, Secretariat includes within the discount rate a PORP of 4%, which corresponds to a 27-month delay in the commencement of commercial operations, as explained above (Section 5.3.2.1).[2113] The risk of delay – which in any case is overstated by Accuracy – is thus factored in the valuation of the Project.

5.3.3 Sunk costs are irrelevant to the fair market value of the Symbio Project

1391 The Respondent observes in its Counter-Memorial that investment treaty tribunals which have rejected a DCF approach have nevertheless awarded compensation for an investor's "sunk costs" (*i.e.*, the cost-based approach mentioned in Section 5.2.1 above).[2114]

1392 However, awarding sunk costs rather than the fair market value of the asset at the valuation date would run contrary to the *Chorzów Factory* principle of full reparation, under which compensation should put the Claimant in the position as if Canada's wrongful acts had not occurred.[2115]

[2109] Accuracy, at **Exhibit RER-1**, p. 125 *et seq*. (paras. 381-386).

[2110] See Illich II, at **Exhibit CWS-1 (Second)**, p. 48 *et seq.* (paras. 103-104).

[2111] GNLQ, Private Placement Memorandum (Addendum) dated 8 January 2021, at **Exhibit SEC-0101-ENG**, p. 7.

[2112] Secretariat II, at **Exhibit CER-3 (Second)**, p. 62 (para. 3.104).

[2113] Secretariat II, at **Exhibit CER-3 (Second)**, p. 62 *et seq.* (para. 3.105).

[2114] Counter-Memorial, p. 308 *et seq.* (para. 765).

[2115] *Chorzów Factory Case*, at **Exhibit CL-109-ENG-FRA**, p. 88 *et seq.* of the PDF.

1393 As a matter of economic principle, "sunk costs" have little or no correlation to the fair market value of an asset. The sunk costs approach aims at reimbursing the investor for its past expenditures on an asset. However, historical expenditures do not necessarily, or even usually, reflect the actual value of the investment.[2116] As Prof Ripinsky explains, this valuation method is "primarily a way to put the investor back in a position he would have been in if **the investment had never occurred rather than a valuation method**. It is similar to awarding *damnum emergens* in a contractual context."[2117]

1394 Understandably, therefore, investment treaty tribunals have been reluctant to admit sunk costs as a proxy for fair market value. For instance, the *Crystallex v. Venezuela* tribunal found that the cost approach "would not reflect the fair market value of the investment, as by definition it only assesses what has been expended into the project rather than what the market value of the investment is at the relevant time".[2118]

1395 Furthermore, "sunk costs" are likely to understate the fair market value, especially in a large-scale energy project. Energy companies such as the Claimant invest significant resources to conduct commercial, technical and environmental studies demonstrating the feasibility of the Project. By doing so, the investor incrementally "de-risks" the Project and elevates the value of the asset more than by just the amount incurred at the early development phase.[2119] That is evident in this case, where investors and prospective investors agreed in 2019 on a pre-money valuation of the

[2116] I. Marboe, "Methods of Valuation in International Practice", at **Exhibit CL-338-ENG**, p. 34 (para. 5.242); *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 250 (para. 911).

[2117] S. Ripinsky and K. Williams, *Damages in International Investment Law*, at **Exhibit CL-331-ENG**, p. 23 of the PDF (emphasis added)

[2118] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 242 (para. 882). See also *Hydro S.RL., Costruzioni S.R.L., Francesco Becchetti, Mauro de Renzis, Stefania Grigolon, Lilian Condomitti v. Republic of Albania (I)*, Award, ICSID Case No. ARB/15/28 dated 24 April 2019, at **Exhibit CL-343-ENG**, p. 182 (para. 847) ("The Tribunal considers that awarding the Claimants their wasted costs would merely return them to the position they would have been in if the investments in Albania had never been made, rather than returning them to the position they would have been in had Albania not committed its illegal acts, which is what is called for by the Chorzów standard of full reparation.").

[2119] See Krolick, at **Exhibit CWS-8**, p. 7 (para.14).

Symbio Project at [redacted] an amount several times the sunk costs expended to date that reflected the Project's accretion in value. An award of damages that only reimburses the direct costs incurred does not appropriately compensate the investor for the risks undertaken, or the lost opportunity to earn profits or returns on the amounts invested.

1396 Where tribunals have awarded sunk costs as damages, there was typically not sufficient evidence available to establish the fair market value using other valuation methods.[2120] Occasionally, tribunals have – despite the questionable economic foundation – looked at sunk costs to provide a "bottom line" under which compensation should not fall, particularly where there are no other reliable indicators of value.[2121] That is not the case here, where the Tribunal has the benefit of both prior transactions and a contemporaneous business model that had been reviewed and updated by experienced valuation experts at Secretariat.

1397 Nonetheless, in order to be fully transparent, Secretariat in its first report calculated the direct costs spent by Symbio. It based its quantification on the review of GNLQ and Gazoduq's financial statements and estimated that the Claimant's direct costs amounted to USD 125 million, which covered operating expenses, and expenses related to capitalized and intangible assets.[2122]

1398 The Respondent now claims that the Claimant has not sufficiently justified its sunk costs, which the Respondent says are unproven and unreasonable or excessive.[2123] These contentions are misguided.

[2120] See, *e.g., Odyssey Marine Exploration v. Mexico*, Award, 17 September 2024, at **Exhibit CL-317-ENG**, p. 203 (para. 734); *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Award, 07 March 2008, at **Exhibit CL-344-ENG**, p. 23 *et seq.* (paras. 177-180).

[2121] *Khan Resources Inc., Khan Resources B.V and Cauc Holding Company Ltd v. The Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015, at **Exhibit CL-345-ENG**, p. 106 (para. 409).

[2122] Secretariat I, at **Exhibit CER-3**, p. 63 *et seq.* (para. 4.72).

[2123] Counter-Memorial, p. 311 *et seq*. (paras. 771-773).

1399 **First**, Secretariat's method of calculating "sunk costs" is consistent with arbitral practice. Financial statements (both audited[2124] and unaudited[2125]) have been consistently used as evidence by tribunals to quantify costs. Secretariat explains that Deloitte audited the financial statements for the period from 2014 to 2019, which together constitute around 70% of the Claimant's total expenditure.[2126] Mr Le Verger explains in his second witness statement that, following the Québec Government's decision in July 2021, the Claimant waived the audits of the financial statements for 2020 onwards, [redacted][2127] Secretariat concludes that sufficient documentation to corroborate sunk costs exists also for 2020-2022, taking into account the invoices produced by the Claimant in document production. Notably, in response to the Tribunal's order to produce a sample of invoices with non-Canadian contractors, the Claimant has produced all invoices of over USD 25,000 with its top 14 contractors for those years.[2128]

1400 Secretariat arrives at an updated calculation of sunk costs of USD 124.5 million, within 0.05% of the amount quantified in its first report.[2129]

[2124] *Siemens A.G. v. The Argentine Republic*, ICSID No. ARB/02/8, Award, 6 February 2007, at **Exhibit CL-346-ENG**, p. 117 *et seq*. (para. 368) ("The Tribunal will use as a starting point SITS' audited financial statements. They have been audited by a highly qualified firm of independent auditors, which confirmed the reliability of the accounting records"); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, at **Exhibit CL-347-ENG**, p. 67 (para. 248) ("Hence, in the Tribunal's view, audited financial statements benefit from a *prima facie* presumption of reliability"); *Latam Hydro and CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Award, 20 December 2023, at **Exhibit CL-348-ENG**, p. 109 (para. 366, n. 410); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at **Exhibit CL-349-ENG**, p. 177 (para. 485, n. 436).

[2125] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, at **Exhibit CL-199-ENG**, p. 82 *et seq*. (para. 320) (noting that the claimant's expert had reviewed the costs and made corrections as appropriate).

[2126] Secretariat I, at **Exhibit CER-3,** p. 63 *et seq.* (para. 4.72); Secretariat II, at **Exhibit CER-3 (Second)**, p. 128 (para. 6.10, first bullet point).

[2127] Le Verger II, at **Exhibit CWS-3 (Second)**, p. 62 (para. 202).

[2128] Secretariat II, at **Exhibit CER-3 (Second)**, p. 126 *et seq*. (para. 6.5, fourth bullet point).

[2129] Secretariat II, at **Exhibit CER-3 (Second)**, p. 131 (para. 6.16).

1401 **Second**, contrary to the Respondent's allegations, these costs are neither unreasonable nor excessive.[2130] The Respondent has simply failed to adequately consider the specificities of the Symbio Project as an energy project.

1402 Indeed, by their nature, such projects require significant upfront expenditure, making high development costs the norm. The Claimant's sunk costs represent more than eight years' worth of studies and due diligence by engineers such as Bechtel and Poten, surveyors, environmental consultants, commercial and marketing consultants such as Wood Mackenzie, financial advisors such as Société Générale, permitting and legal advisors, shipping experts such as CS LNG and other consultants, together with the team to manage them. As Secretariat notes, the Claimant's sunk costs are in line with the development costs of other North American LNG projects.[2131]

1403 Notably, the Respondent does not explain why, if the Claimant's costs were "unreasonable" or failed to advance the Project, its sophisticated investors would have continued to fund those expenses as they did. Nor does it explain why the Québec Government, via IQ, did not identify this "unreasonable" expenditure during its due diligence or why it nevertheless [redacted] in the Symbio Project. In any event, it is nonsensical for the Respondent to claim that the Symbio Project has no value because the developer raised and spent too little funds relative to the development budget of the Project, while also claiming that the costs it did incur in developing the Project were excessive. The Respondent cannot have it both ways.

1404 As for the Respondent's contention that any award of compensation amounting to "sunk costs" should only consider expenses made before 21 July 2021 to reflect the fair market value of the investment,[2132] this is also misguided. Putting aside that, as explained above, "sunk costs" are not a proxy for the fair market value (and would put a claimant back in the

[2130] Counter-Memorial, p. 311 *et seq*. (paras. 771-773).

[2131] Secretariat II, at **Exhibit CER-3 (Second)**, p. 125 (paras. 6.1-6.2).

[2132] Counter-Memorial, p. 310 (para. 769).

position as if the investment had never occurred), there is no basis to disregard these expenses given the following:

- The Federal Government's EA process continued after July 2021, only reaching a decision on 7 February 2022.
- Even after that date, winding down the Symbio Project entailed time and cost. While the Claimant decreased its expenditure (to USD 2.3 million in 2022, down from USD 11.6 million in 2021 and USD 21.7 million in 2020), it could hardly stop paying employees and contractors from one day to the next.[2133]
- Even after the federal rejection of the GNLQ Project in February 2022, Symbio attempted to mitigate its losses by seeking to persuade the Québec and Federal Governments to reconsider their decisions in the light of strong interest from European governments and LNG buyers.[2134] This included engagement with gas suppliers and offtakers, whose interest in the Project heightened following the Russian invasion of Ukraine.

1405 To conclude, should the Tribunal come to the conclusion (*quod non*) that instead of awarding the fair market value of the Project, the Claimant ought to be awarded sunk costs, the Claimant has nevertheless established both the existence and reasonableness of its expenditure on the Symbio Project.

5.4 Interest

1406 As explained in the Memorial, the Claimant is entitled to obtain payment of interest on damages in accordance with Articles 1135 and 1110 NAFTA and customary international law.[2135]

1407 As a preliminary point, the Respondent contends in its Counter Memorial that it would be inappropriate to award interest on future lost profits.[2136] In support, the Respondent cites the ILC Articles, which note the following:

[2133] Secretariat II, at **Exhibit CER-3 (Second)**, p. 130 (para. 6.12).

[2134] Secretariat II, at **Exhibit CER-3 (Second)**, p. 130 (para. 6.12).

[2135] Memorial, p. 279 *et seq.* (paras. 903-911).

[2136] Counter-Memorial, p. 313 (para. 776).

> "*Si des indemnités pour manque à gagner sont allouées, il n'est pas indiqué d'octroyer des intérêts (en vertu de l'article 38) sur les capitaux productifs de profits pendant la même période, tout simplement parce que le capital ne peut produire simultanément des intérêts et des profits. L'objectif premier est d'éviter une double indemnisation tout en assurant une réparation intégrale*." [2137]

1408 As that extract makes clear, however, the ILC Articles are addressing the situation where an injured party claims both interest on capital and the profits that would have been generated from that capital. That is not the situation here. Rather, the Claimant is claiming for the lost value of its investment based on the expectations of future cash flow discounted to the valuation date.[2138]

1409 Since the Claimant relied on an *ex post* valuation in its Memorial (*i.e.*, with the valuation date set at the date of the award), it claimed only post-award interest. With the Parties now having agreed on a valuation date of 21 July 2021, the Claimant has updated its valuation, discounting cash flows back to 21 July 2021. It follows that pre-award interest should also be applied from the valuation date.

1410 The Parties further agree that interest should run at a "commercially reasonable rate" but disagree on that rate and on compounding. The Claimant explains below that the Tribunal should apply the US Prime rate +1% as a commercially reasonable rate for pre- and post-award interest (**Section 5.4.1**), and why the Tribunal should award compound as opposed to simple interest (**Section 5.4.2**).

5.4.1 The Tribunal should award interest at US Prime + 1% to reflect a commercially reasonable rate

1411 The Parties agree that the Tribunal should apply a "commercially reasonable rate" of interest in order to afford full reparation, as also

[2137] Counter-Memorial, p. 313 (para. 776); ILC Articles on State Responsibility with commentaries, at **Exhibit CL-111-ENG**, p. 109 (Art. 38, para. 11).

[2138] See paragraphs 1347-1348 above.

reflected in Article 1110 NAFTA.[2139] They disagree, however, on how that rate should be determined.

1412 In the Memorial, the Claimant claimed interest at a fixed rate of 6%, which it justified, *inter alia*, by reference to the then-recent decision of *Bridgestone v. Panama* awarding interest at US Prime + 2%.[2140] As the Claimant explained, the US Prime rate published by the Wall Street Journal is an average of the base rates charged by the largest US banks to their most creditworthy customers (and each other); as such, it is the most relevant reference rate for compensation denominated in USD, to a US claimant.[2141]

1413 Since the Memorial, the US Prime rate has continued to evolve and the Claimant now claims pre-award interest from the *ex ante* valuation date in July 2021 (a date since which the US Prime rate has also evolved). Accordingly, rather than apply a fixed rate, the Claimant now submits that the Tribunal should apply pre-and post-award interest at a rate of 1% over the US Prime rate.

1414 In its Counter-Memorial, the Respondent argues to apply instead the rate on Canadian Treasury bonds.[2142] For the reasons below, however, US Prime + 1% is a more appropriate benchmark of a commercially reasonable rate in this case.

1415 As a starting point, tribunals have applied different approaches to determine an appropriate rate of interest, among which the most frequently used are:

[2139] Counter-Memorial, p. 313 (para. 777); Memorial, p. 285 *et seq.* (para. 924).

[2140] Memorial, p. 283 *et seq.* (paras. 922-924).

[2141] Memorial, p. 285 (para. 924); *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020, at **Exhibit CL-141-ENG**, p. 176 (paras. 589-590).

[2142] Counter-Memorial, p. 313 (para. 777).

- A rate based on interbank or benchmark interest rates plus a spread, which serves as a proxy for an investor's notional borrowing costs;[2143]
- A rate to compensate the investor for the lost time value of money based on a notional alternative investment;[2144]
- A rate derived from national law for debts or pre-judgment interest.[2145]

1416 A rate of US Prime + 1% is consistent with the first, commonly used approach. Current market conditions demonstrate the importance of a rate protecting the real value of the Claimant's compensation which is typically achieved by adding a margin to an interbank or other reference rate.[2146] As the tribunal in *Murphy Exploration v. Ecuador* recognised, it is necessary to add a margin to the US Prime rate to reflect the actual cost of money in the market for most borrowers:

> "In accordance with the practice in past cases, the Tribunal further decides that the prime rate has to be increased by a few percentage points considering that only the most solvent and creditworthy borrowers are able to borrow money from banks at the prime rate. To account for this fact, Tribunals in recent cases have added up to four percentage points to the prime rate."[2147]

1417 Indeed, the Wall Street Journal defines the US Prime rate as "the **base rate** on corporate loans posted by at least 70% of the 10 largest U.S. banks".[2148] For most businesses, therefore, the cost of borrowing will be a few

[2143] I. Marboe, "Interest" in I. Marboe (eds) Calculation of Compensation and Damages in *International Investment Law* (Oxford University Press 2017), at **Exhibit CL-350-ENG**, p. 18 (paras. 6.137-6.159); *Cargill v. Mexico*, Award, 18 September 2009, at **Exhibit CL-021-ENG**, p. 157 *et seq.* (para. 544).

[2144] I. Marboe, "Interest", at **Exhibit CL-350-ENG**, p. 14 *et seq.* (paras. 6.115-6.127).

[2145] *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017, at **Exhibit CL-078-ENG**, p. 264 (para. 648).

[2146] I. Marboe, "Interest", at **Exhibit CL-350-ENG**, p. 19 *et seq.* (para. 6.144).

[2147] *Murphy Exploration & Production Company - International v. The Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Award, 6 May 2016, at **Exhibit CL-351-ENG**, p. 162 (para. 517).

[2148] The Wall Street Journal, "Money Rates", at **Exhibit C-0628-ENG** (emphasis added). See also Investopedia, "Wall Street Journal Prime Rate: Definition, Methodology, Uses" dated 10 August 2021, at **Exhibit C-0306-ENG**: "a bank's prime rate is the **lowest rate** it charges on lending to its highest credit quality customers (and also to other banks)" (emphasis added).

percentage points above US Prime. Accordingly, in recent decisions, investment treaty tribunals have added a margin between 1% and 2% to the US Prime rate to achieve a commercially reasonable rate.[2149] For similar reasons, tribunals have routinely applied margins to other reference rates, such as LIBOR, as a proxy for commercial interest rates.[2150]

1418 On that basis, Secretariat calculates interest at a rate of US Prime + 1%.[2151] This rate errs on the conservative side, being slightly below the estimated cost of borrowing for the Symbio Project calculated by Secretariat.[2152]

1419 Conversely, the Respondent's proposal to use the rate based on the Canadian Treasury bonds "at the moment when the award is rendered"[2153] is inappropriate, for several reasons.

1420 **First**, Article 1110 NAFTA provides that "[i]f payment is made in a **G7 currency**, compensation shall include interest at a commercially reasonable rate for **that currency** from the date of expropriation until the date of actual payment."[2154] Since the Claimant's losses and compensation claim are denominated in USD, a "commercially reasonable" interest rate

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[2149] See, *e.g.*, *Tethyan v. Pakistan*, Award, 12 July 2019, at **Exhibit CL-339-ENG**, p. 602 (para. 1799) (awarding interest based on US Prime + 1%); *Nachingwea U.K. Limited (UK), Ntaka Nickel Holdings Limited (UK) and Nachingwea Nickel Limited (Tanzania) v. Tanzania*, ICSID Case No. ARB/20/38, Award, 14 July 2023, at **Exhibit CL-352-ENG**, p. 109 (para. 384) (awarding interest based on US Prime + 2%); *Bridgestone v. Panama*, Award, 14 August 2020, at **Exhibit CL-141-ENG**, p. 176 (para. 589).

[2150] As explained in *Lemire v. Ukraine (II)*, Award, 28 March 2011, at **Exhibit CL-121-ENG**, p. 97 *et seq.* (paras. 355-356), when stating the reasons for applying LIBOR + 2%, "LIBOR reflects the interest at which banks lend to each other money. **Loans to customers invariably include a surcharge, and this surcharge must be inserted in the calculation of interest to reflect the financial loss caused to Claimant by the temporary withholding of money. A claimant to whom money is awarded would not be fully compensated, if the interest rate applied did not include an appropriate margin** […] 2% is a reasonable margin, which reflects the surcharge which an average borrower would have to pay for obtaining financing based on LIBOR." (emphasis added). See also I. Marboe, "Interest", at **Exhibit CL-350-ENG**, p. 11 (para. 6.90).

[2151] Secretariat II, at **Exhibit CER-3 (Second)**, p. 133 (para. 7.3).

[2152] Secretariat calculates a cost of debt of 4.5% based on the cost of debt for other LNG projects in 2021: Secretariat II, at **Exhibit CER-3 (Second)**, p. 97 *et seq*. (paras. 4.61-4.62). This equates to a premium of 1.25% over the US Prime rate as at July 2021.

[2153] Counter-Memorial, p. 313 (para. 777).

[2154] NAFTA, at **Exhibit CL-001-ENG**, p. 7 (Art. 1110.4) (emphasis added).

must also be determined by reference to USD – and not Canadian Treasury bonds denominated in Canadian dollars. While Article 110 NAFTA refers to compensation for expropriation, as explained in Section 5.1.3, the same standard applies to all the Claimant's claims for compensation, and the Respondent agrees that the reference to a "commercially reasonable rate" in Article 1110 NAFTA is the appropriate benchmark.[2155]

1421 **Second**, it is also essential to apply an interest rate in the currency of the claim from an economic perspective. This is explained by the interest rate parity theory, according to which, the applicable interest rate for each currency is related to its exchange rate, inflation and monetary policy.

1422 This is further acknowledged in commentaries and by arbitral tribunals.[2156] For instance, the *Niko Resources* tribunal explained:

> "The distinction of interest rates according to currencies […] reflects economic reality: interest rates for a debt in a certain currency are related to the corresponding economy and thus may vary from one currency to another, reflecting for instance differences in the rate of inflation. Irmgard Marboe, in the study on which the Claimant relies, mentions as an example, the differences in LIBOR rates for US Dollars and Euros and concludes that 'the choice of currency also plays an important role for the determination of the interest rate'."[2157]

[2155] Counter-Memorial, p. 312 *et seq.* (paras. 775, 777).

[2156] See, *e.g.*, *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5), Award, 21 November 2007, at **Exhibit CL-033-ENG**, p. 91 (para. 300); *Mr. Franz Sedelmayer v. The Russian Federation through the Procurement Department of the President of the Russian Federation*, SCC, Award, 7 July 1998, at **Exhibit CL-353-ENG**, p. 116.

[2157] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex),* ICSID Case No. ARB/10/18, Decision on the Payment, 11 September 2024, at **Exhibit CL-354-ENG**, p. 77 (para. 247).

1423 In *S.D. Meyers v. Canada*, the tribunal confirmed that interest rate must be applied to the currency that is the most "closely connected to the currency of the account in which the award of compensation is made".[2158]

1424 It is therefore legally and economically unsound to apply an interest rate related to one currency (CAD) to compensation denominated in a different currency (USD), as the Respondent seeks to do.

1425 **Third**, as the rate on government bonds such as Canadian Treasury bonds is regarded as essentially a "risk-free" rate, it does not reflect the time cost of money for most investors and would undercompensate the Claimant, contrary to the principle of full reparation. The Respondent's argument to take the Canadian Treasury bond rate as at a single moment in time – the date of the award – would also disregard changes in interest rates between the valuation date and the award, and between the award and the final date of payment. This arbitrary approach would mean that the interest rate applied in the award would not match interest rates applicable for most of the period in which the Claimant was deprived of payment.

1426 To conclude, the Tribunal should therefore award interest at US Prime + 1% to reflect a commercially reasonable rate and ensure full reparation.

5.4.2 The Tribunal should award compound interest

1427 The Claimant further submits that interest should be calculated on a compound basis. As explained in the Memorial, compound interest has been frequently awarded by investment treaty tribunals, including under the NAFTA, on the basis that "[t]he time value of money in free market economies is measured in compound interest".[2159]

1428 In its Counter-Memorial, the Respondent argues that tribunals award compound interest only in "very particular" circumstances which are not

[2158] *S.D. Myers v. Canada*, Second Partial Award, 21 October 2002, at **Exhibit CL-137-ENG**, 21 October 2002, p. 74 (para. 304).

[2159] Memorial, p. 281 *et seq.* (paras. 912-917); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, at **Exhibit CL-130-ENG**, p. 135 (para. 309).

present in this case.[2160] However, the Respondent's contention is based on an outdated presentation of the law that reflects neither the last two decades of investment treaty jurisprudence, nor commercial realities.

1429 **First**, the Respondent relies on a statement in the Commentary to the 2001 ILC Articles to the effect that an injured State could only claim compound interest in special circumstances.[2161] Whether or not that statement correctly reflected the law when it was written (and whether it ever held true outside the inter-State context), the Claimant has demonstrated in its Memorial, that, since the 2000 decision in *Santa Elena*, the majority of investment treaty tribunals have recognised that compound interest is necessary to ensure full reparation to the injured party.[2162]

1430 Thus, the tribunal in *Gemplus v. Mexico* observed – in an award nearly 10 years ago – that a form of *jurisprudence constante* had already emerged, establishing a presumption in favour of awarding compound interest:

> "[T]he reference to 'commercial' and 'market' in Article 5 of these BITS both point to the permissible application of reasonable compound rates, given that **it is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest and not simple interest.** In addition, it is clear from the legal materials cited by the Claimants (summarised above, to which several more could be added) that the **current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of 'jurisprudence constante' where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order**

[2160] Counter-Memorial, p. 313 (para. 778).

[2161] Counter-Memorial, p. 313 (para. 778).

[2162] *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, at **Exhibit CL-355-ENG**, p. 32 *et seq.* (paras. 98, 106-107); Memorial, p. 281 *et seq.* (paras. 912-913).

> **compound interest, unless shown to be inappropriate in favour of simple interest**, rather than vice-versa."[2163]

1431 Moreover, the sole decision cited by the Respondent – the 2003 award in *CME v. Czech Republic* – does not support its position.[2164] To the contrary, the *CME* tribunal acknowledged that, whereas tribunals had awarded compound interest infrequently "in the past", the same was not necessarily true of contemporary practice, even as early as 2003:

> "In respect of international law, arbitral tribunals **in the past** awarded compound interest infrequently. […]
>
> However, in recent years international arbitral tribunals, particularly those acting under bilateral investment treaties, have increasingly have [sic] awarded compound interest essentially in recognition of the prevalent contemporary commercial reality that companies that borrow pay compound interest".[2165]

1432 **Third**, the requirement for a "commercially reasonable rate" favours an award of compound interest. Simple interest is typically unavailable in commercial transactions and thus does not reflect the commercial reality for investors. The *Crystallex* tribunal thus discerned "a clear trend in recent decisions in favour of the award of compound interest", to reflect the commercial realities of borrowing and reinvestment.[2166] It explained:

> "[…] it has become increasingly recognized that simple interest may not adequately ensure full reparation for the loss suffered and the award of interest on a compound basis is therefore not excluded. This is because modern financial activity normally involves compound interest. Thus, a judgment creditor promptly placed in the possession of the funds due would be able to lend them out or invest them at compound interest rates or, if forced to borrow as a

[2163] *Gemplus v. Mexico*, Award, 16 June 2010, at **Exhibit CL-120-ENG**, p. 356 of the PDF (para. 16-26) (emphasis added).
[2164] Counter-Memorial, p. 313 (n. 1301).
[2165] *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, at **Exhibit RL-163-ENG**, p. 159 (paras. 644-645) (emphasis added).
[2166] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 257 (para. 935).

> result of the respondent's wrongful act, will do so at compound rates."[2167]

1433 Accordingly, the Claimant requests that interest should be compounded yearly.

[2167] *Crystallex v. Venezuela*, Award, 4 April 2016, at **Exhibit CL-119-ENG**, p. 257 (para. 935).

6 PRAYERS FOR RELIEF

1434 The Claimant respectfully requests, on behalf of Symbio, that the Tribunal:

a) declare that the Respondent has breached Articles 1102, 1103, 1105 and 1110 NAFTA;

b) order the Respondent to pay to the Claimant the amount of USD 588,140,000 for the losses suffered as a result of the Respondent's breaches, plus interest from 21 July 2021 until the date of payment, at 1% over the US Prime rate published by the Wall Street Journal, compounded annually;

c) order the Respondent to pay to the Claimant compensation for all costs, fees and expenses incurred in the proceeding, plus interest from the date of the award until the date of payment, at 1% over the US Prime rate published by the Wall Street Journal, compounded annually; and

d) grant such other relief as the Tribunal may deem appropriate.

Respectfully submitted,

18 April 2025

For and on behalf of the Claimant,

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