

**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

CASE NO. ARB/23/5

RUBY RIVER CAPITAL LLC

Claimant

VS.

CANADA

Respondent

CLAIMANT'S POST-HEARING BRIEF

24 March 2026

Before:

Ms Carole Malinvaud (President)

Mr Barton Legum

Prof Zachary Douglas KC

LALIVE

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1 INTRODUCTION

- 1 The Claimant submits this Post-Hearing Brief (“**PHB**”) in accordance with the Tribunal’s directions of 13 January 2026 and addresses herein the Tribunal’s questions of 31 December 2025 (the “**Tribunal’s Questions**”).¹ The Claimant’s earlier submissions, including its Opening Statement at the Hearing, all stand.
- 2 The Hearing confirmed the core issue in this dispute: Symbio, having invested [REDACTED] into a major, innovative LNG project, with the support of federal and provincial authorities, fell victim to a breakdown in Canada’s constitutional machinery – specifically, in the federal-provincial split of competences and coordination for EAs and approvals. That failure had severe adverse consequences on the EA process to which the GNLQ Project was subjected, and for Symbio.
- 3 Like all other proponents, GNLQ had been advised throughout the EA process that projects of this nature were, as a matter of course, typically approved, an understanding borne out by experience: no LNG export project had ever been rejected in Canada, and at the provincial level in Québec, over 99 percent of projects subject to an EA process in the last 30 years were approved.
- 4 It is against all odds that, after nearly seven years of EA process, in July 2021, the Québec Government took it upon itself to reject the GNLQ Project and announce that the Gazoduq Project died with it. Shortly thereafter, in February 2022, the Federal Government seemingly blindly followed suit – rejecting the GNLQ Project on virtually identical grounds. Those grounds could not validly be invoked and those decisions were unlawful.
- 5 That both levels of Government have discretion to reject or approve industrial projects is no answer in this case. As a matter of law, that discretion is limited to grounds both within their constitutional

¹ This PHB is accompanied by legal authorities **CL-404-ENG** and **CL-405-ENG**. The abbreviations in this PHB have the same meaning as that set out in the Parties’ joint list of abbreviations dated 5 November 2025, unless otherwise stated. Emphasis is added in quoted extracts.

prerogatives and properly set out in the Québec Minister of Environment's directive and the Agency's guidelines. In this case, the Québec and Federal Governments did not have the discretion to reject the GNLQ Project on the grounds invoked, which were either outside their constitutional powers, or outside the framework set out in the Directive and the Guidelines.

- 6 Nor can the precautionary principle explain – or now justify – those decisions. That principle was not relied upon as a factor by the MELCC or the Agency in their analyses or conclusions, but simply mentioned in passing in their reports. Nor was it referred to by the Federal and Québec Governments (or Ministers of Environment) in their respective decisions. The Respondent did not even mention the precautionary principle in its Counter-Memorial in these proceedings. It is at best an afterthought prompted by the erroneous non-disputing party submission filed by the CQDE.
- 7 In this arbitration, the Claimant is not asking the Tribunal to substitute its own judgment for that of the federal and Québec authorities. Nor is it asking the Tribunal to determine whether the GNLQ Project should have been approved as a matter of policy.
- 8 Indeed, this case is not about whether Canada is entitled to regulate environmental matters. Canada is entitled to do so, by assessing the environmental impacts of a project of this nature, including on GHG emissions and beluga whales, and possibly deciding that those impacts were not justified.
- 9 However, international law, including the NAFTA, draws a line between *bona fide* regulation and conduct that is unfair, arbitrary, discriminatory, lacking in transparency, and does not observe due process. Canada's conduct crossed that line.
- 10 This case is about the fundamental irregularities that occurred in two uncoordinated EA processes, at the Québec and federal level, to which the GNLQ Project was subjected. Those irregularities, in turn, gave rise to decisions, and reasons on which they were based, that were equally wrong, as outside of the respective authorities' discretionary and constitutional powers.

- 11 Accordingly, what the Tribunal is asked to conclude is that Canada failed to accord Symbio the MST owed to foreign investors under the NAFTA as well as national treatment, and MFN treatment, in breach of Articles 1105, 1102 and 1103 NAFTA, and that its actions amounted to an unlawful expropriation, or measures tantamount to expropriation, in breach of Article 1110 NAFTA.
- 12 As recalled at the Hearing, **the Tribunal has jurisdiction** over these claims. They have been properly brought under Annex 14-C of the USMCA and arise out of a legacy investment under the NAFTA and the ICSID Convention.
- 13 **First**, they arise out of a wrongful composite act – a series of acts and omissions, which, in aggregate, are wrongful and some of which also amount on their own to instantaneous or standalone NAFTA breaches – that commenced and is deemed to have occurred prior to the termination of the NAFTA. Specifically, the wrongful act extended from December 2015 until 7 February 2022, although it already crystallized and revealed itself in July 2021 when the Québec Government rejected the GNLQ Project. Under the ILC Articles, where there is a wrongful composite act, the breach is dated to the first of the acts in the series – in this case, to December 2015.
- 14 **Second**, and, in any event, claims arising out of measures that were taken during the three-year transition period following the termination of the NAFTA in July 2020 fall within the scope of Annex 14-C, which extended the substantive obligations of Section A, Chapter 11 NAFTA for legacy investments.
- 15 Even if the Tribunal were to rule against the Claimant on the above, it would still need to address **two stand-alone breaches** of Articles 1102, 1103 and 1105 NAFTA committed by Canada, namely:
- the MELCC's failure, on 10 December 2015, to defer to the Agency and its issuance of the Directive commencing its own EA; and
 - the Agency's failure, as of 15 January 2016, to initiate a single federal EA or a joint EA with the MELCC.

- 16 The Hearing confirmed the exceptional nature, as well as the dramatic impact of those two initial wrongful actions, namely the gravity of the irregularities in the two EA processes that ensued and led to two wrongful decisions.
- 17 The Respondent's witnesses, Mélissa Gagnon and Michel Duquette (for the MELCC) and Geneviève Bélanger (for the Agency) all conceded that the MELCC's and the Agency's decisions in 2015 and 2016, respectively, to proceed with two uncoordinated EA processes, rather than with one single federal assessment or a joint assessment, were unusual. As the Claimant's legal experts confirmed, they blatantly disregarded federal law, the Canada-Québec Agreement and normal practice. The same goes for the absence of consultation, cooperation and coordination throughout the EA processes. The evidence, contemporaneous and at the Hearing, shows that this was the first time that the two EA processes, and specifically the decisions of the Québec and Federal Governments, were desynchronised in this way.
- 18 GNLQ understood that the MELCC and the Agency would both be assessing the environmental impact of the GNLQ Project. However, in a total lack of transparency, it was misled to believe that they would conduct a joint assessment. Ms Bélanger confirmed at the Hearing that the Agency never informed GNLQ of the implications of the decisions to have separate EA processes. Ms Gagnon admitted that the Québec Government repeatedly represented to GNLQ that the two EA processes would be conducted jointly in accordance with the Canada-Québec Agreement.
- 19 This (concealed) lack of federal-provincial coordination paved the way for improper conduct on the part of the MELCC and the Agency, and for political interference.
- 20 At the Québec level, years into the process, and more than two years after GNLQ submitted its EIS, during a press conference in March 2021, the Minister of the Environment, announced three new conditions for the GNLQ Project to be approved: it needed to achieve social acceptability, promote the energy transition and decrease GHG emissions at a global, worldwide level. Mr Duquette and Ms Gagnon conceded that this way of proceeding was unusual. The Respondent's legal expert, Me Yergeau, admitted that in 50 years of practice he had never seen a Minister of

Environment interfere with an EA process in this way. The Claimant's legal expert, Me Duchaine, confirmed that it was not only "highly unusual" but also contrary to the LQE.

- 21 None of the Respondent's witnesses could credibly explain the unusual position they found themselves in as a result, having to include conditions that came from "*le politique*", and that were outside the scope of the EA, as well as unrealistic and unachievable, while setting a problematic precedent according to other Québec ministries.
- 22 The five grounds on which the Québec Government officially rejected the GNLQ Project in July 2021 related to the effects of the GNLQ Project on the reduction of worldwide GHG emissions, on the energy transition, its cost-benefit analysis, its social acceptability, and its impact on the beluga whales. They were themselves arbitrary and unlawful: they were either outside the scope of the Directive, or outside the Québec Government's jurisdiction, or had not been properly and timely raised with GNLQ, or never imposed on comparable projects, or any other project for that matter.
- 23 They were the result of an EA process lacking in transparency and due process, as GNLQ was never informed that the Québec Government would take them into consideration, let alone that it would rely on them to reject the GNLQ Project.
- 24 The federal EA process fared no better. Following the Québec Government's rejection of the GNLQ Project, politics improperly reared its head when, in the midst of an election campaign, the ruling party announced (mirroring the opposition party) that, following Québec's rejection, the GNLQ Project would not be approved, before the Agency even completed the EA Report and submitted it to the Minister of Environment. While Ms Bélanger confirmed that, by then, she was no longer involved and thus has no first-hand knowledge of the matter, the then President of the Agency, Terrence Hubbard, has conceded that this was "unusual". As the Claimant's legal expert, Mr Northey, pointed out, even more damning than the announcement itself was the fact that it was not retracted after it was attributed to the Prime Minister, Mr Trudeau. The fate of the GNLQ Project was sealed by September 2021.

- 25 The three grounds on which the Federal Government rejected the GNLQ Project in February 2022 – effects relating to upstream GHG emissions, the impact of shipping on the beluga whales and the resulting impact on the cultural heritage of First Nations – were again the result of an irregular EA process as they were out of scope. They were also discriminatory as compared to the way in which the Agency treated comparable projects.
- 26 Ultimately, neither the effects of marine shipping on beluga whales nor the effects of the GNLQ Project on upstream GHG emissions could lawfully provide grounds for rejecting it – for constitutional law reasons (in the case of the Québec Government) and for reasons relating to the Agency's specific actions in this case (for the Federal Government). None of these reasons are attributable to the Claimant, and none can allow the Respondent to evade liability in this arbitration.
- 27 **As to quantum**, against this background, there can be no doubt that the Respondent's breaches of the NAFTA destroyed the entire value of the Symbio Project as at 21 July 2021.
- 28 To be entitled to the damages it seeks, the Claimant need not prove with certainty that the Symbio Project would have succeeded entirely according to its plans. It is sufficient for the Claimant to show with reasonable certainty that, because of the Respondent's breaches, it and Symbio lost their opportunity to develop the Symbio Project – an opportunity comprised of investments protected under the NAFTA and that had real and calculable monetary value.
- 29 The Hearing confirmed that, but for the Respondent's breaches, the GNLQ Project would, like the vast majority of comparable projects in Canada and Québec, likely have been approved. As at July 2021, the Gazoduq Project was also on track to receive its regulatory approvals in time for FID targeted in Q4 2023. Symbio was well-positioned to secure project financing to achieve a positive FID and operate profitably, and LNG market conditions were ideal (and only improved thereafter).
- 30 Secretariat calculates that the fair market value of the Symbio Project was USD 588 million as at 21 July 2021. The Hearing confirmed the appropriateness of Secretariat's methodology and the soundness of its valuation, which is based on both real-world prices paid by investors in

Symbio in 2019-2021 and on a DCF valuation that appropriately accounts for the uncertainties associated with the Project at that valuation date.

- 31 Even if the Tribunal were to conclude that it only has jurisdiction to rule on the Respondent's 2015-2016 NAFTA breaches, the Claimant should be entitled, as a lesser sum, to the reimbursement of its wasted costs that it incurred in the expectation that the EA of the GNLQ Project would be conducted fairly and lawfully, unaware of those standalone breaches.
- 32 Finally, before turning to the Claimant's submission, **four observations** should be made **on the evidence** given and not given at the Hearing.
- 33 **First**, the Respondent's two key witnesses, Ms Gagnon and Ms Bélanger, could not defend their extensive written evidence regarding the meaning of the LQE and CEAA 2012, respectively. They and the Respondent's counsel insisted that they were not lawyers or legal experts. The Respondent, however, cannot have it both ways: either these witnesses are qualified to give an opinion on the meaning of these laws, based on their experience and practice, or they are not. Given the Respondent's objections to the Claimant's questions in this regard (and the palpable concern that these witnesses would stumble on cross-examination), the related evidence of these witnesses – both written and oral – should be disregarded.²
- 34 **Second**, while the Claimant's fact witnesses were forthcoming and candid on the stand, the **Respondent's fact witnesses** were on several crucial points painfully evasive, if not misleading, and overtly enthusiastic to toe the party line, making monologues – at times obviously pre-prepared – attempting to support the Respondent's position; meanwhile their written and oral evidence was inconsistent and undermined by the documentary record.
- 35 **Third**, the Respondent's **experts** did not have in several respects the appropriate qualifications and experience, and at times impartiality:

² For Ms Gagnon, compare **RWS-22**, (¶¶11, 22-24, 30-31, 46) with her oral testimony that she has no legal training and decided “[ne] pas [se] lancer” in the interpretation of the LQE (Day-5-FRA, p.8(8); also Day-4-FRA, p.95(31-35)). Canada's counsel tried to interrupt every time she was asked a question about the LQE (e.g., Day-5-FRA, p.12(10-14)).

- **Me Yergeau**, despite an undisputedly impressive legal career had little to no recent experience in Québec environmental law, EA processes, and related litigation, his practice having been mostly as a judge (in a wide array of fields) in recent years.³ By contrast, **Me Duchaine** has continuously specialised in Québec environmental law and EA processes and litigation for 30 years, including litigation involving the constitutional law divide between federal and Québec EA law.⁴ She was able to set out both the federal and Québec positions on the constitutional issues in dispute, underscoring that, in this case, the Respondent is advancing the Québec Government's position even though Canadian courts have consistently rejected it. Me Yergeau confined his analysis to advocating Québec's "*souverainiste*" rhetoric that EAs on Québec territory fall within Québec's own constitutional authority.
- **Ms Powell** was only able to recall one federal EA governed by CEAA 2012 on which she had advised and confirmed she had **no** experience with federal-provincial joint EAs, Québec EA processes, or judicial review proceedings arising out of a CEAA 2012 EA process.⁵ By contrast, **Mr Northey** has advised clients regarding 10 federal-provincial EAs, 22 provincial EAs and 15 federal EAs; represented clients in 17 court proceedings arising out of federal EAs; has written six books on federal EA law; and was appointed in 2016 by the Federal Government to serve on a four-person independent panel tasked with reforming federal EA law (which led to the IAA in 2019).⁶
- **Dean O'Gorman**, was shown to have no relevant qualifications and little relevant experience qualifying him to give expert opinions on federal environmental law and process under the IAA. Rather, he is a self-proclaimed "practitioner" of EA processes who advertises consultancy services to First Nations seeking to oppose major industrial projects.

³ Day-7-FRA, p.18(5)-20(35).

⁴ Day-6-FRA, p.38(29-32).

⁵ Day-8-ENG, p.2045(1)-2050(6).

⁶ Day-7-ENG, p.1855(16)-1856(15); Northey Presentation, p.2.

- The Respondent's supposed LNG industry and financing expert, **Paul Shultz**, knew embarrassingly little about the subject matter and had overstated his experience to a misleading degree. The contrast with **Alex Krolick**, who although appearing as a fact witness, is a project finance advisor who has advised on multiple major LNG transactions, was striking.
 - **Accuracy** demonstrated a one-sided analytical approach. Instead of assisting the Tribunal with their own independent valuation, they merely modelled alternative assumptions designed to reach the Respondent's desired conclusion: to reduce Secretariat's DCF valuation to zero. Those assumptions were shown to be inappropriate on cross-examination.
- 36 **Lastly**, the Tribunal should recall the evidence that the Respondent elected **not** to submit in this arbitration and draw the appropriate conclusions. A number of key officers were not proffered as witnesses, including, at the ministerial level, Premier Legault, Minister Charette and Minister Fitzgibbon; at the technical level, in particular Johannie Martin, the Agency's GNLQ Project manager when the Québec Government rejected the GNLQ Project, when the Agency issued the draft and final versions of the EA Report, and when the federal Minister of Environment and the Cabinet issued their decisions and even though she is still with the Agency.⁷
- 37 In the same vein, the Respondent refused to provide a significant number of key documents, notwithstanding the Tribunal's orders. The Claimant recalls and explains in this PHB the **adverse inferences** that it has asked and continues to ask the Tribunal to draw.

⁷ Day-4-ENG, p.932(7)-933(6), 982(13)-986(18)/Day-4-FRA, p.23(23-41), 42(1)-43(17).

2 THE TRIBUNAL HAS JURISDICTION

- 38 The Respondent has raised four objections to the Tribunal's jurisdiction, including that the Claimant allegedly lacks an "investment" within the meaning of Article 25 of the ICSID Convention, and that the claims allegedly arise out of measures taken by the Respondent after the termination of the NAFTA and are thus not permitted under Annex 14-C of the USMCA.⁸
- 39 The Claimant has explained why those two objections have no merit. Its written submissions stand and are not fully repeated.
- 40 In short, **first**, the Claimant held or controlled assets which qualify as investments under Article 1139 NAFTA (as referred to in Annex 14-C) and Article 25(1) of the ICSID Convention.⁹
- 41 **Second**, the Tribunal has jurisdiction, despite the termination of the NAFTA and the terms of Annex 14-C. Indeed, the Claimant's claims arise out of legacy investments and measures that pre-date the termination of the NAFTA.¹⁰ More specifically, they 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, including the acts and omissions which on their own would not necessarily amount to a breach of the NAFTA, was wrongful and extended from 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, they are permitted under Annex 14-C.
- 42 Even if some of the acts out of which the claims arise took place after the termination, on its proper interpretation, the claims nevertheless fall within the scope of Annex 14-C because Annex 14-C covers claims that arise out

⁸ The other two objections are not addressed in this PHB. They are addressed in the Claimant's Reply on Merits and Counter-Memorial on Jurisdiction dated 18 April 2025, p.192 (¶¶561-570) and Rejoinder on Jurisdiction, p.34 (ss.2.3.1, 2.3.2).

⁹ Reply, p.191 (¶¶558-560); Rejoinder on Jurisdiction, p.116 (s.4).

¹⁰ C-Presentation, p.166-176; Day-1-ENG, p.124-150; Reply, p.195 (s.3.2); Rejoinder on Jurisdiction, p.12 (s.2).

of measures taken within the three-year period following termination.¹¹ In this case, it is undisputed that the wrongful measures that post-date the termination of the NAFTA all occurred within that three-year timeframe.

- 43 In **Sections 2.1 to 2.6**, the Claimant addresses the points raised by the Tribunal during and after the Hearing, largely in the order and under the headings of the five topics, and the one additional question on jurisdiction set out in the Tribunal's Questions.¹²

2.1 Definition of an "investment"

- 44 The Tribunal asked about the significance of paragraph 27 of the Report of the Executive Directors of the World Bank (the "**Report**"), when considering the requirements for an "investment" under the NAFTA and the ICSID Convention:

"And then on the topic of Article 25 of the ICSID Convention, a topic that Me Tabet addressed, if I understand Canada's position, it is that there is daylight between the definition of 'investment' in Article 1139 of the NAFTA and Article 25 of the ICSID Convention.

So my question is, is there any significance to Paragraph 27 of the Report of the Executive Directors of the World Bank, which states that no attempt was made to define the term 'investment' given the essential requirement of consent by the Parties and the mechanism through which Contracting States can make known in advance if they so desire the classes of disputes which they would or would not consider submitting to the Centre? [Article 25(4)]"¹³

- 45 Paragraph 27 is significant because it confirms that the drafters of the Convention did not intend to define the term "investment" and makes clear

¹¹ Reply, p.204 (s.3.3); Rejoinder on Jurisdiction, p.51 (s.3); C-Presentation, p.171-188; Day-1-ENG, p.136-150.

¹² The third topic is addressed first (in **Section 2.1**) because, unlike the others, it does not relate to the Respondent's Annex 14-C objection.

¹³ Day-1-ENG, p.313(15)-314(7); Report, **CL-008-ENG**, p.36 (¶27).

that this approach was reflected in Article 25(4) of the Convention, which provides:

“Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary General shall forthwith transmit such notification to all Contracting Convention States. **Such notification shall not constitute the consent required by paragraph (1).**”¹⁴

46 Article 25(4) thus allows an ICSID Contracting State to unilaterally notify ICSID of the types of investment disputes it is willing – or unwilling – to submit to ICSID arbitration. However, as the final sentence provides, a notification under Article 25(4) does “not constitute the consent required by paragraph (1).” The consent must have another source, a separate instrument of consent, such as an investment treaty. Here, the instruments of consent are Annex 14-C of the USMCA and the NAFTA.

47 Furthermore, in this case:¹⁵

- **First**, it is undisputed that the Claimant's investment meets the requirements of Article 1139 NAFTA.
- **Second**, the Respondent's position that the Tribunal should ignore the definition of a protected investment under Article 1139 NAFTA and adopt only the subjective interpretation of “investment” in Article 25 has never been followed by any investment treaty tribunal; investment treaty tribunals have confirmed the opposite.
- **Third**, in any case, the Claimant did make an investment within the meaning of Article 25; in particular, the Claimant's investment satisfies the “contribution” requirement under the *Salini* test: in terms of capital

¹⁴ Article 25(1) provides: “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre**. When the parties have given their consent, no party may withdraw its consent unilaterally.”

¹⁵ Rejoinder on Jurisdiction, p.10 (¶¶19, 339, 345-346, 351; s.4 generally).

expenditures, from 2013 onwards, the Claimant made monetary contributions in the amount of [REDACTED]

- 48 The Claimant thus holds a protected investment and there cannot be any doubt that the Tribunal has jurisdiction *ratione materiae*.¹⁶

2.2 The interpretation of Annex 14-C

- 49 The Tribunal asked several questions regarding the interpretation of Annex 14-C.

2.2.1 The definition of a “legacy investment” is forward-looking

- 50 The Tribunal asked two questions on the interpretation of the definition of a “legacy investment” at paragraph 6(a) of Annex 14-C.¹⁷

- 51 **First**, the Tribunal asked about the hypothetical case of an expropriation claim arising out of acts pre-dating the termination of the NAFTA and, more specifically, whether the Claimant would “support [the] caveat” that the definition should be read to **allow** such claims (the implicit assumption being that **not allowing** such claims would not amount to a good faith interpretation of Annex 14-C and/or be inequitable):

“You made the point about the legacy investment definition [...] having to be [in] existence at the time NAFTA terminates. [...] And I think you made a perfectly valid point about the expropriation situation. [...] that point was raised in the *Westmoreland* case. And I think it was conceded that, if the Respondent State was responsible for the investment no longer being around, then that would not fall foul of that definition. Would you support that caveat?”¹⁸

- 52 To place the question in context, as explained at the Hearing:

- “[T]he definition of a legacy investment under paragraph 6(a) [of Annex 14-C] [...] is [...] ‘an investment of an investor of

¹⁶ Rejoinder on Jurisdiction, p.117 (s.4.1).

¹⁷ USMCA, Annex 14-C, **CL-003-ENG**, p.2.

¹⁸ Day-1-ENG, p.152(13)-153(3).

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.**”¹⁹

- “The Respondent’s reading of Annex 14-C would result in absurd consequences by excluding **expropriation** claims even if they arose prior to 1 July 2020. It would disregard the phrase ‘in existence’. It would mean that an investor that made an investment before the termination of NAFTA and whose investment was expropriated before the termination of NAFTA would not be able to file a claim under Annex 14-C (since the investment would no longer be ‘in existence’).”²⁰
- “By contrast, the Claimant’s interpretation gives *effet utile* to the phrase ‘in existence’, [by considering] that Annex 14-C covers claims based on measures **post-dating** the termination of NAFTA. [The Claimant’s] interpretation is, thus, consistent with this phrase.”²¹
- “In light of this provision, Annex 14-C can only be read to extend the substantive obligations of NAFTA for three years. **There would otherwise be no need – under any circumstance – to require an investment ‘in existence’ when the USMCA entered into force.** The Respondent has provided no response to this conundrum.”²²

53 To avoid these difficulties, the Respondent has argued that:

“[M]ême dans les rares cas d’expropriation directe, des principes d’équité procédurale pourraient être invoqués pour empêcher le

¹⁹ Day-1-ENG, p.143(20)-144(4); C-Presentation, p.181.

²⁰ Day-1-ENG, p.144(5-14); C-Presentation, p.181. The Respondent asserts that Annex 14-C “exclut toute plainte relative à un investissement qui aurait cessé d’exister avant l’extinction de l’ALÉNA.” (Reply on Jurisdiction, p.24 (¶67)).

²¹ Day-1-ENG, p.144(15-19).

²² Day-1-ENG, p.144(20)-145(3).

rejet d'une plainte au motif que l'expropriation d'un investissement aurait privé un investisseur d'un 'investissement antérieur'".²³

- 54 It is in support of that argument that the Respondent relies on the following finding in *Westmoreland III*:

“[G]iven the wording of Paragraph 1 of Annex 14-C, in which the USMCA Parties consented to arbitrate claims of breach of an obligation under Chapter 11, including expropriation under Article 1110, **a good faith interpretation of the “in existence” requirement would imply disregarding that requirement in cases where the “non-existence” is caused by the respondent State.**”²⁴

- 55 Stated differently, according to the *Westmoreland III* tribunal (and the Respondent here), a “good faith interpretation” of Annex 14-C could salvage an expropriation claim that pre-dated the termination of the NAFTA and ensure that that claim does not run afoul of the definition of a legacy investment. The Respondent notes that doing otherwise would be inequitable.
- 56 Returning to the Tribunal’s question, the Claimant supports the outcome as inevitable, rather than only as a “caveat” to an otherwise different interpretation of the “in existence” requirement. Else, an investor whose investment was expropriated prior to the termination of the NAFTA would have no recourse under the NAFTA and USMCA after 1 July 2020.
- 57 In the hypothetical situation where an investor made an investment and that investment was expropriated before the termination of the NAFTA (due to the wrongful actions of the State), objecting to the investor’s claim absent an investment at the time the claim is being made would not be a genuine jurisdictional objection by the respondent State as it would seek to deny jurisdiction by drawing on its own wrong, *i.e.*, that there was no investment – and thus no jurisdiction – because the investment had been expropriated prior to 1 July 2020. In such case, the issue would be one for

²³ Reply on Jurisdiction, p.9 (¶22).

²⁴ *Westmoreland v. Canada (III)*, **RL-184-ENG**, p.44 (¶169); Rejoinder on Jurisdiction, p.64 (¶¶175-184), p.85 (¶243) (addressing *Westmoreland III*); Day-1-ENG, p.152(17)-153(21).

the merits, not jurisdiction, because it would be a question of whether the treaty applied to the expropriation (which it would).

- 58 Here too, the Respondent's jurisdictional objection is not a genuine jurisdictional objection in the sense that it draws on the merits. Whether Canada's actions and omissions, including those occurring after the termination of the NAFTA, constitute a composite act is not a matter of jurisdiction. It involves a **substantive inquiry into the facts** and thus relates to the merits of the case.
- 59 A good faith interpretation of Annex 14-C and one in line with *Westmoreland* indeed allows the Tribunal to consider measures that were taken **after** the date of termination of the NAFTA when establishing whether they form part of a composite breach that started **before** the termination.
- 60 As previously explained, and as the Respondent recognises,²⁵ the Commentary to Article 15 of the ILC Articles addresses the situation where an obligation under the treaty did not exist "at the beginning of the course of conduct but came into existence thereafter".²⁶ In such cases, tribunals have considered facts and evidence **before** the entry into force of the treaty to determine the existence of a breach **thereafter**.²⁷
- 61 The Commentary does not, however, address the situation, where a treaty is terminated **during** a series of actions and omissions comprising a

²⁵ Reply on Jurisdiction, p.67 (¶187). Nearly all the cases cited by the Respondent acknowledge **that facts formally outside the tribunal's temporal jurisdiction may nonetheless be relied upon to establish a breach** of a treaty obligation. The cases differ in that they address the situation where an obligation did not exist at the beginning of the course of conduct but came into being **thereafter**. These situations thus differ the present case: *Société Générale v. The Dominican Republic*, **RL-207-ENG**, p.42 (¶92); *Chevron v. Ecuador*, **RL-208-ENG**, p.137 (¶301); *Hydro v. Albania*, **RL-070-ENG**, p.160 (¶558); *Walter Bau v. Thailand*, **RL-209-ENG**, p.116 (¶¶9.91, 12.22-12.23); *ABCI Investments v. Tunisia*, **RL-210-FRA**, p.63 (¶178); *Mondev v. U.S.*, at **Exhibit CL-037-ENG**, p.22 (¶¶69-70); *Pac Rim v. El Salvador*, **RL-199-ENG**, p.67 of PDF (¶2.105).

²⁶ Day-1-ENG, p.126(14)-127(12); Rejoinder on Jurisdiction, p.46 (¶¶118-121) (quoting ILC Articles Commentary that the word "remain" in Article 15 "need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order **to establish a factual basis** for the later breaches [...])").

²⁷ Rejoinder on Jurisdiction, p.48 (¶121, fn. 149).

composite act and where an obligation exists **at the beginning** of the course of conduct but no longer exists at the end of it.²⁸ In such cases, when the treaty terminates, the series of acts and omissions comprising the wrongful composite act has already commenced and is ongoing.

- 62 In the same way as a tribunal can consider facts and evidence that took place **before** the entry into force of a treaty, to determine whether a treaty breach took place **after** the entry into force of the treaty, a tribunal can consider facts and evidence that took place **after** the expiry of a treaty, to determine whether, as a matter of fact, there is a composite act that that was completed after the expiry of the treaty. As a matter of law, as explained, that breach would be backdated to the first act in the series (in this case, to 2015).²⁹
- 63 The Tribunal has jurisdiction to engage in such a factual inquiry. Indeed, even if it concludes that Annex 14-C did not extend the substantive obligations of Chapter 11, Section A, beyond the termination of the NAFTA, the Tribunal cannot and should not close its eyes to evidence that post-dates that termination.
- 64 Proceeding otherwise would also be inequitable. As stressed at the Hearing, “while the Tribunal need not rely on equity, equity does lead to the same result”:

“The ILC Articles Commentary also specifies that, where there is a wrongful composite act, the breach is dated to the first of the acts in the series. There is, thus, no issue of intertemporal law in this case because, under international law, the breach is deemed to have occurred in 2015 even if it extends over a period of time. As a matter of law, the entirety of the composite act, therefore, occurred prior to the termination of NAFTA. As a matter of fact, it straddled the termination of the treaty.

It would be wrong under international law, and as we will see shortly under Annex 14-C properly interpreted, and inequitable to

²⁸ It is, however, in any event, the Claimant's case that the substantive obligations at issue here also existed at the end of the course of conduct.

²⁹ Reply, p.195 (s.3.2).

find otherwise, to the extent equitable considerations should be applied, as the Respondent has suggested in its submissions.

It would, indeed, be wrong as a matter of international law to find that acts forming a composite breach that were taken after the termination of NAFTA cannot be taken into account when establishing whether they form part of a composite breach that started in 2015. It would also lead to absurd results: a respondent State could evade liability relating to a wrongful composite act by terminating a treaty, even though the breach had, as a matter law, already occurred. So, while the Tribunal need not rely on equity, equity does lead to the same result.³⁰

- 65 There would be no reason to interpret paragraph 6(a) of Annex 14-C (i) to salvage expropriation claims pre-dating the termination of the NAFTA, but (ii) to prevent claims (expropriation or other) arising out of composite acts that straddled the termination of the NAFTA.
- 66 **Second**, the Tribunal asked about the purpose of paragraph 6(a) on the Respondent's interpretation of Annex 14-C (that acts post-dating the termination of the NAFTA are not covered by Annex 14-C):

“[L]et's assume that Canada is right, for purposes of this question, and that the NAFTA terminated in July of 2020 and **it is not possible for any post July 2020 Act to breach Section A of the Chapter.**

What purpose does the definition of 'legacy investment' serve on that case? Wouldn't it be the case that any claim under Section A of the NAFTA could not proceed? Is there content to the definition of 'legacy investment' in that scenario?”³¹

- 67 On that interpretation of Annex 14-C (*quod non*), the avenue for bringing claims arising out of a legacy investment would be narrower (than on the Claimant's interpretation):

³⁰ Day-1-ENG, p.126(14)-127(18); C-Presentation, p.163; Rejoinder on Jurisdiction, p.62 (s.3.1.2).

³¹ Day-1-ENG, p.155(5-15).

- it would still be possible to bring claims arising out of legacy investments and **composite and/or continuing acts** that commenced prior to the termination of the NAFTA;
 - however, it would not be possible to bring claims arising out of (instantaneous) breaches **post-dating** July 2020 (the assumption on which the hypothesis is based).
- 68 As to whether it would be possible, in that scenario, to bring **claims** arising out of acts and omissions **pre-dating** the entry into force of the USMCA,³² the answer would depend on the hypothetical scenario:
- **If neither Section A, nor Section B, is extended (*quod non*)**, then the definition of a legacy investment – and Annex 14-C more broadly – would be entirely void of effect. A party would not be able, after July 2020, to bring a claim arising out of a legacy investment and acts pre-dating (or post-dating) the termination of the NAFTA.
 - **If Section B alone is extended (and not Section A)** (the Respondent's position in this arbitration) (*quod non*), a party would still be able (after July 2020) to bring a claim arising out of a legacy investment and acts and omissions pre-dating the termination of the NAFTA that violate Section A. And it would still be possible to bring claims arising out of composite and/or continuing acts that commenced prior to the termination of the NAFTA and that violate Section A.
- 69 There is, however, be no reason to conclude that only Section B of Chapter 11 NAFTA (and not Section A), is extended for three years.³³ If that had been the USMCA Parties' intention, they would have stated as much.

³² The respondent State might object to the tribunal's jurisdiction in cases where the legacy investment has been lost prior to the termination of the NAFTA and no longer exists at the time of bringing suit. However, such an objection would not be valid or genuine if the State is responsible for and committed the wrong (a question which would go to the merits of the case). *Supra*, ¶¶51-65.

³³ Rejoinder on Jurisdiction, p.52 (¶134).

- 70 Furthermore, if the USMCA Parties had intended to exclude **claims** that arose **after** the entry into force of the USMCA, they could have done so.³⁴

2.2.2 Annex 14-C: A question of jurisdiction or merits?

- 71 At the Hearing, the Tribunal asked how it should approach Annex 14-C and whether the question is more a question of jurisdiction or of merits:

“So my first question is [...] It is a bit philosophical, and that is, is it useful to think about the Annex 14-C issue as one of jurisdiction? Or is it really an objection that there was no violation of Section A of the NAFTA because the NAFTA was not in force, therefore, **it is really a question as to whether there were substantive obligations that were breached at the time** as opposed to whether there is jurisdiction because if you look at the first paragraph of Annex 14-C, the conditions for jurisdiction is somebody has to present a claim concerning a legacy investment that alleges a breach. **It doesn't require it to be a breach. It has to be a claim that alleges a breach.**

So my initial question is, is it useful, particularly given the stage we're at in this proceeding, to think about this as a violation of – well, a question of consent to arbitration as opposed to one as to whether there's been a substantive obligation that has been breached?”³⁵

- 72 Under paragraph 1 of Annex 14-C, the Respondent has “**consente[d]**, 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

³⁴ Day-1-ENG, p.143(7-19) (“[...] if the USMCA Parties had intended to exclude claims that arose after the entry into force of the USMCA, they could have done so. They could have limited the scope of Annex 14-C to pending 11 claims, as described at Paragraph 5 of Annex 14-C, and to preexisting claims. As we see on the slide, the USMCA Parties know how to draft treaties that limit jurisdiction to preexisting claims, as they did with the Claims Settlement Declaration establishing the Iran-U.S. Claims Tribunal, as well as CETA and the Canada-Perú Free Trade Agreement. They did not do that in this case.”); C-Presentation, p.180.

³⁵ Day-1-ENG, p.154(6)-155(3).

and this Annex alleging breach of an obligation under [...] (a) Section A of Chapter 11 (Investment) of NAFTA 1994.” Here, the claims:

- concern a legacy investment;
- allege breaches of NAFTA, Chapter 11, Section A (specifically Articles 1102, 1103, 1105 and 1110);
- were made in accordance with the procedures set out in Section B; and
- were brought within three years of the termination of the NAFTA.³⁶

73 The conditions are thus met and accordingly, the Tribunal has jurisdiction.

74 The Tribunal must then decide **whether the Respondent has breached** the Section A obligations at issue, which is a question of merits. As noted above, the Respondent cannot object to jurisdiction based on an argument drawn on the merits. It is an impermissible objection to jurisdiction (or to the admissibility of the claims).

75 Even if the Tribunal conclude that the NAFTA Chapter 11 Section A obligations were not extended for three years (*quod non*), it still has jurisdiction over the claims that arise out of a wrongful composite act that commenced and is deemed to have occurred as of the first act, prior to the termination of the NAFTA.³⁷

76 Furthermore, even if, still in that case, the Tribunal also conclude that it does not have jurisdiction over the claims arising out of a wrongful composite act (*quod non*), it still has jurisdiction to decide the (stand-alone) claims arising out of the Respondent's wrongful acts and omissions that took place prior to July 2020 and should take into account, for this purpose, facts and events that took place after the expiry of the NAFTA.³⁸

77 In both cases, the Tribunal may consider the measures that post-date the termination of the NAFTA, when considering the merits of the Claimant's claims, the loss they caused and the quantum of that loss, since these are factual determinations that are allowed under international law.

³⁶ Day-1-ENG, p.137(1-19); C-Presentation, p.174-176.

³⁷ Day-1-ENG, p.125(11)-133(20); C-Presentation, p.160-170, 176.

³⁸ C-Presentation, p.162; Reply, p.287 (s.4.1.3.1), p.342 (s.4.2.2.1).

2.2.3 Annex 14-C requires only an allegation of breach of the NAFTA

78 The Tribunal asked the following question (addressed to the Respondent):

“Then on Annex 14C, Ms. Beaudet, you had a very helpful slide. It is Slide 40 in your deck.

That compared Annex 14-C and the corresponding provisions of Section B of Chapter 11. In looking at the comparison, to me it is striking that in Article 1116 you see ‘**a claim where a party has breached an obligation under Section A.**’

And then in Annex 14-C, there is ‘in the case where it is **alleged** that there was breaching of an obligation provided for in Section A.’ **In one case, there is this reference to an allegation, whereas, in the original Article 1116, there is no reference to an allegation; is there any significance in that?**”³⁹

79 Paragraph 1 of Annex 14-C indeed mirrors Article 1116 NAFTA with that key difference:

- Annex 14-C provides each Party’s consent to the submission of “a claim [...] **alleging** breach of an obligation [under Section A of Chapter 11]”.
- Article 1116 NAFTA states that an investor may submit to arbitration “a claim that another Party has breached an obligation under Section A [...]” without referring to the notion of “allegation” of a breach.

80 This difference in formulation suggests that the drafters of Annex 14-C sought to lighten the burden of allegation for possible claimants under Annex 14-C (as compared to claimants who brought NAFTA claims prior to the entry into force of the USMCA). The claimant need only allege a breach.

³⁹ Day-1-ENG, p.313(1-14); R-Presentation, p.40.

- 81 The claims here meet the requirements of Annex 14-C, including because they concern a legacy investment and allege breaches of NAFTA, Chapter 11, Section A.⁴⁰

2.2.4 The hypothetical scenario of Annex 14-C claims arising between January and June 2023 does not undermine the Claimant's interpretation of Annex 14-C

- 82 The Tribunal asked how Annex 14-C should be interpreted in light of the hypothetical situation of claims arising between January and June 2023:

“Suppose Section A and Section B continue for the three years after the termination of NAFTA as is your case. Section B says that you can't bring a claim without giving 90 days' notice and you can't bring a claim until six months has elapsed from the breach. That is Articles [...] 1119 and 1120. So what would happen in relation to these Section A obligations, substantive obligations, being in force you say for the entire three-year period? And these procedural requirements of Section B, which also would apply, which wouldn't allow a claim at least six months in the last year of the three-year period, I mean, would those provisions of Section B be displaced, is there any redeemable conflict? How would it work?”⁴¹

- 83 As explained, Annex 14-C does not address this hypothetical situation (which in any event does not apply in this case) and it would be inequitable and an abuse of rights to exclude such claims.⁴²
- 84 In the hypothetical scenario where a claim arose between January and June 2023 and would have to be filed after 1 July 2023, and assuming both Sections A and B of Chapter 11 are deemed extended for three years (until

⁴⁰ C-Presentation, p.176.

⁴¹ Day-1-ENG, p.150(21)-151(13).

⁴² Day-1-ENG, p.151(14)-152(4) (“Annex 14 C does not address the specific situation of legacy investors that might have claims arising out of measures that occurred between January 1, 2023, and June 30, 2023. [...]. But those Claims are not excluded either. And our position is that had the USMCA Parties wished to exclude that, they could have done so. They don't address it. **So we would say that the reasonable interpretation is that those Claims are covered, and that it would be an abuse of rights effectively to deem such claims inadmissible.**”); Reply, p.232 (¶¶697-698).

1 July 2023), a tribunal would **have** jurisdiction. It would then apply and follow the procedures in Chapter 14 of the USMCA to hear the claim. Objecting to such a claim on the basis that it was submitted after 1 July 2023 would, again, not be a genuine jurisdictional objection.

2.2.5 There can be a difference between an act that violates international law and an act that causes damage

- 85 The Tribunal – relying on another hypothetical scenario, involving a court proceeding – asked about the difference between acts that violate international law and acts that cause damage:

“Third question is kind of a hypothetical that is intended to explore **whether there’s a difference between an act that violates an obligation of international law and an act that causes damage?** [...] So in this hypothetical, assume with me that under customary international law, only procedural violations can give rise to a denial of justice [...]

Assume that the highest court of the country excludes an investor from attending a Hearing in that case. And that takes place before a treaty terminates. The Judgment denying the investor’s case takes place afterwards. **Is there a violation that has occurred while the Treaty was in force?**”⁴³

- 86 In short:

- there can be a difference between acts that violate international law and acts that cause a damage (and there is such a difference in this case); and
- in the above hypothetical scenario, there would be a violation that occurred while the treaty was in force.

- 87 Depending on the facts of the hypothetical case, the exclusion of the investor from the court hearing and the ensuing court judgment might together form part of a wrongful composite act that, as a matter of fact, straddled the termination of the treaty and that, as a matter of law, predated

⁴³ Day-1-ENG, p.155(16)-156(9).

the termination of the treaty. The exclusion of the investor from the court hearing might also amount, on its own, to a treaty violation.

- 88 This is analogous to the present case: the Claimant's claims arise out of acts and omissions that pre-date the termination of the NAFTA. Those acts and omissions, as a matter of fact, straddled the termination of the treaty (extending from 2015 until 2022). As a matter of law, that wrongful composite act that breached Articles 1105, 1102, and 1103 NAFTA is deemed to exist as of the first of the acts in the series, on 10 December 2015.⁴⁴ The breach, however, only revealed itself on 21 July 2021, when the Québec Government rejected the Project. That was the date of the full damage and thus corresponds to the valuation date in this case.
- 89 The Tribunal can consider the measures that occurred after the expiry of the NAFTA both to determine the existence of a composite act and to determine the extent of the damage.⁴⁵

2.3 The interpretation of the USMCA Protocol

- 90 The Tribunal asked the Parties to address further the meaning of the USMCA Protocol:

“You haven’t talked much about the protocol terminating the NAFTA and replacing it with the USMCA. It would be useful [...] to have the Parties’ views [...]

What does the clause ‘without prejudice’ [do] to those provisions set forth in the USMCA that refer to provisions of the NAFTA [...] in Paragraph 1?

Is Annex 14-C a provision that refers to provisions of the NAFTA? It seems to me that it does refer to provisions of the NAFTA, and I guess the question for us is, **what significance do**

⁴⁴ There were in fact three wrongful composite acts: one that breached each of Articles 1105, 1102, 1103. The composite act is defined by the obligation breached.

⁴⁵ *Supra*, Section 2.2.1.

we draw from the fact that it does refer to provisions of the NAFTA?”⁴⁶

91 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.**”⁴⁷

92 The term “without prejudice” in Article 1 means that the USMCA supersedes the NAFTA without, however, affecting the USMCA provisions that refer to NAFTA provisions.⁴⁸ Annex 14-C, in each of its paragraphs, indeed “**refer[s] to provisions of NAFTA**” (namely Sections A and B of Chapter 11). That is not disputed.

93 Accordingly, the USMCA did not supersede the NAFTA in its entirety and without exception. Based on those USMCA provisions that refer to NAFTA provisions, some NAFTA provisions are not terminated; they remain in effect. Stated differently, Article 1 of the Protocol confirms that the USMCA Parties sought to extend the application of certain NAFTA provisions beyond the termination of the NAFTA including, through Annex 14-C, specifically Sections A and B of Chapter 11, for three years.⁴⁹

94 The phrase “without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA” is not an anodyne phrase and it must be given *effet utile*. “Without prejudice” means “without detriment to any existing **right**.”⁵⁰ In Article 1 of the Protocol, the USMCA Parties thus expressed their intention to maintain rights established by the NAFTA.

⁴⁶ Day-1-ENG, p.157(5-18).

⁴⁷ Protocol, **CL-002-ENG**, p.1 (Art. 1); Reply, p.226 (s.3.3.3.2); Rejoinder on Jurisdiction, p.79 (¶¶224-226).

⁴⁸ Reply, p.227 (¶677); *APMC v. U.S.*, **CL-300-ENG**, p.21 (¶50) (“the whole purpose of the Protocol [...] states that [the USMCA] would in certain respects maintain the NAFTA provisions for certain purposes”).

⁴⁹ Reply, p.227 (¶¶678-679).

⁵⁰ **C-0640-FRA**, p.1.

Had they intended the USMCA to replace the NAFTA entirely and without exception, they would not have included that phrase in the Protocol.

- 95 In other words, through Annex 14-C specifically, the USMCA Parties expressed their intention to maintain the rights established under those provisions of the NAFTA referred to in Annex 14-C, including **both** Section B and Section A (referred to in paragraph 1(a)), and this for three years. If the drafters of Annex 14-C had wished to extend rights only under Section B (and not Section A), they would have limited the reference to Section B in Annex 14-C.

2.4 Composite and continuing acts

- 96 The Tribunal asked several questions regarding the Claimant's composite act theory.

2.4.1 An act can constitute both a standalone treaty breach and part of a composite act that breaches the same or a different treaty obligation

- 97 The Tribunal asked whether an act can both constitute a standalone treaty breach and form part of a composite act that breaches the same treaty obligation:

“[O]n the composite act, I understand that [...] that there is a standalone breach which was the original [...] breach of 2015. And this breach is also part of the composite act; right? **And in theory, is it possible that the standalone breach is a breach of the same obligation as the composite act, or doesn't it have to be a different – a violation of a different obligation?**”⁵¹

- 98 The claims before the Tribunal are in part:
- **stand-alone claims** that certain acts and omissions in 2015, 2016, 2021 and 2022 breached Articles 1102, 1103, and 1105 NAFTA; and

⁵¹ Day-1-ENG, p.158(22)-159(7).

- claims that those same acts and omissions when taken together with other acts and omissions form part of **a composite act** that breached those **same** provisions.⁵²
- 99 It is undisputed that a wrongful act or omission can violate a norm which is **different** from the legal norm violated by the composite act of which it forms part. For example, an act forming part of a creeping expropriation may also constitute a stand-alone breach of the FET standard.⁵³
- 100 However, there is nothing in the ILC Articles that suggests that an action or omission cannot both constitute a stand-alone breach of an international obligation and at the same time form part of a wrongful composite act amounting to a breach of that **same obligation**.⁵⁴ Nor is there any principle that would prevent it. Indeed, it must be the case that an action or omission **can** constitute both.
- 101 If a State commits a breach of an international obligation, and then later in time takes further actions that, by themselves do not amount to a breach, but do so when considered in aggregate with the initial action, there is no reason why the initial breach should preclude the finding of a composite breach including the later actions.
- 102 This would be the case, for example, in a hypothetical scenario where a government decides to nationalise a group of foreign-owned companies and first cancels the license of one of the companies, amounting to an expropriation of its business, and, subsequently, takes a series of actions over the course of several years which, when taken together with the cancellation of the first company's licence, amount to an expropriation of the other companies in the group. In that scenario, the initial action amounts to a standalone breach of an obligation (obligation not to

⁵² Rejoinder on Jurisdiction, p.31 (¶65); C-Presentation, p.162.

⁵³ Rejoinder on Jurisdiction, p.31 (¶¶67-74).

⁵⁴ It is not surprising that the ILC Articles do not expressly refer to the "same obligation" scenario since the ILC are secondary rules of international law; they do not define the content of international obligations. Day-1-ENG, p.159(8-12) ("there's no impediment to the 2015 failure, the 2015, 2016 failures amounting to a breach effectively of FET on its own [...] And the composite act breach **also being a breach of FET** or of Articles 1102, 1103.").

expropriate) and can also be part of a composite act in breach of that same obligation in relation to the entire group belonging to the same claimant.

- 103 The reverse may also occur, *i.e.*, where a series of acts or omissions not in themselves wrongful are followed by an individual act that by itself constitutes a stand-alone breach of an international obligation; when aggregated with the prior actions, they may all be considered to violate that same international obligation.
- 104 Here, the Respondent committed a series of wrongful acts and omissions extending from 2015 to 2022 that, when taken in aggregate, constitute a wrongful composite act that violated Article 1105 as well as Articles 1102 and 1103 NAFTA. However, some of those acts also constitute stand-alone breaches of those same obligations.
- 105 Nevertheless, should the Tribunal find that a wrongful composite act extending from 2015 to 2022 breached Article 1105, it **need not** determine whether any of the acts and omissions constituting that composite act would also, on their own, constitute a stand-alone breach of Article 1105. (The same reasoning applies to Articles 1102 and 1103.)
- 106 Should the Tribunal, however, conclude that there was no wrongful composite act that breached Article 1105 (*quod non*), it must still consider the Claimant's alternative claims that some of the acts and omissions in the series, on their own constitute stand-alone breaches of Articles 1105: namely the acts and omissions of the Agency and MELCC in 2015 and 2016 and the Québec and Federal Government's decisions in 2021 and 2022.⁵⁵ (Again, the same applies to the claims brought under Articles 1102 and 1103.)
- 107 Moreover, where an individual act amounts to both a standalone breach of a treaty obligation and part of a composite act that breaches the same obligation, the scope of the damage caused by the composite act may be different from the damage caused by the individual act. In this case, the most extensive damage is that which resulted from the Québec Government's July 2021 rejection of the GNLQ Project. However, even if the Tribunal concludes that Annex 14-C did not extend the substantive

⁵⁵ *Supra*, ¶98.

obligations of Chapter 11, Section A, it still has jurisdiction **and** on the merits may consider the facts that followed July 2020 – both to determine the existence of a composite act and to consider the extent of the damage caused by the composite act.

2.4.2 It is well established that investment treaty obligations can give rise to composite breaches

108 The Tribunal asked the Parties to address (i) what makes investment obligations systematic obligations and (ii) the purpose of backdating a breach, in the case of a composite act, to the first wrongful act or omission in the series:

“[...] Article 15 [of the ILC Articles] doesn't apply to every obligation in international law. So you can have a composite act that breaches all the obligations in the Treaty. And that would occur when you have several steps, which in the aggregate rise to the level of a breach. But the breach would be at the date when those steps rise to the aggregate instead of the threshold.

Article 15 relates to obligations which, in the drafts leading up to Article 15, were called **systematic obligations**. And in the commentary at Article 15, they refer to genocide, apartheid, these sorts of crimes.

And the idea behind those sorts of crimes is that the sum of the Acts is greater than the individual Acts. So genocide having individual killings, and it only rises to the level of a genocide **once there's a pattern**.

And so what I'd like to hear from both Parties a little bit more is **what is it about the investment obligations which make them systematic obligations, such that it is appropriate to apply Article 15?** Because it's very clear that Article 15 does not apply to every obligation of international law. There has to be that systematic nature, such as genocide, such as apartheid, and so on.

Maybe something to come back to because **Article 15 has a very specific purpose, which is to backdate the breach to the first**

Act. And you can certainly see why in genocide that makes perfect sense. The first unlawful killing, not a genocide in and of itself, but if you characterize the entire series of unlawful killings as genocide, that it makes sense to backdate it to the first one.

But how do investment obligations fit into that sort of model?"⁵⁶

109 The Tribunal also asked the following related question:

"And then just to add on an additional question, the question that Zach has already asked about, Article 15 of the Articles on State Responsibility, his question focused on whether there's a systematic violation. It would also be useful for me if that question could be answered with respect to **whether there's been a series [...] of actions or omissions defined in the aggregate as wrongful.**

So [...] **do the obligations present here meet that definition?** That's the question that I would add to Zach's question. I think that's all."⁵⁷

110 **First, Article 15 of the ILC Articles does not require that the underlying obligation of international law at issue be "a systematic obligation."**⁵⁸ It simply requires, at its first paragraph, "an international obligation by a State":

"Breach consisting of a composite act

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."⁵⁹

⁵⁶ Day-1-ENG, p.134(2)-135(15).

⁵⁷ Day-1-ENG, p.156(10)-157(2).

⁵⁸ Rejoinder on Jurisdiction, p.18 (¶42).

⁵⁹ ILC Articles on State Responsibility, **CL-283-ENG**, p.5 (Art. 15); C-Presentation, p.163.

- 111 More generally, Article 15 does not provide that it only concerns certain types of international obligations (systematic obligations and/or otherwise). All that is required is that the obligation is of a type that may be breached by an act that would be wrongful in aggregate.
- 112 The underlying obligations at issue in this case – the obligation to provide the MST, the obligation not to expropriate and the obligations to provide national treatment and most-favoured nation treatment – all meet that basic definition of “an international obligation by a State.”
- 113 **Second**, to show a **breach** consisting of a composite act, Article 15 does not require (i) a State “policy” – let alone a “systematic policy” – “target[ing] the investor,” (ii) a “pattern or purpose” or (iii) a “common denominator”.⁶⁰
- 114 To show a breach, all that is required is “a series of actions or omissions defined in aggregate as wrongful [...] which, taken with the other actions or omissions is sufficient to constitute the wrongful act”. The Claimant has made that showing in this case.⁶¹
- 115 **Third**, the reference in the ILC Articles Commentary – not the articles themselves – to systematic obligations like the prohibition against genocide does not mean that Article 15 only concerns those obligations.
- 116 On the contrary, there is extensive case law and indeed *jurisprudence constante* (as set out in the Claimant's earlier submissions) that that investment treaty obligations like the obligation to provide FET or the obligation not to expropriate can be “creeping”, *i.e.*, they are breached by a wrongful composite act.⁶² By way of illustration:

⁶⁰ Day-1-ENG, p.129(19)-130(20); C-Presentation, p.168-169; Rejoinder on Jurisdiction, p.18 (¶¶42-43).

⁶¹ *Infra*, Sections 3.6, 4.2.4; Day-1-ENG, p.131(7-14); C-Presentation, p.170.

⁶² Rejoinder on Jurisdiction, p.20 (¶46); *Vivendi (II) v. Argentina*, **CL-356-ENG**, p.204 (¶¶7.4.12, 7.4.18-7.4.19, 7.4.46, 7.5.34) (finding composite breach of FET and creeping expropriation), ¶7.5.31 (“It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached.”); *Siemens v. Argentina*, **CL-357-ENG**, p.83 (¶¶271, 273) (finding creeping expropriation);

- The tribunal in *Siemens v. Argentina* addressing creeping expropriation in the context of Article 15 of the ILC Articles found:

“By definition, **creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation.** If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel’s back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break.”⁶³

- In *Walter Bau v. Thailand*, the tribunal found a breach of the FET standard in the Germany-Thailand BIT and held:

“The Respondent’s argument that “creeping expropriation” only, and not breaches of FET, can be defined by a series of acts is not correct. **The Tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions.** One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligations.”⁶⁴

Biloune and Marine Drive Complex Ltd. v. Ghana, **CL-358-ENG**, p.20 (¶85) (finding creeping (constructive) expropriation); *Tatneft v. Ukraine*, **CL-359-ENG**, p.122 (¶¶412-413) (finding composite breach of FET); *El Paso v. Argentina*, **CL-360-ENG**, p.188 (¶¶515-519) (finding composite breach of FET); *Walter Bau v. Thailand*, **RL-209-ENG**, p.140 (¶¶12.43-12.44) (finding composite breach of FET); *Chevron v. Ecuador*, **RL-208-ENG**, p.136 (¶298) (referring to Article 15 of the ILC Articles and finding that “the Tribunal finds that the Respondent’s continuing conduct in relation to the seven lawsuits could constitute a denial of justice within the Tribunal’s jurisdiction under the BIT.”) and ¶299-301 (referring to Article 15 and finding that the Respondent’s conduct “could constitute a composite act giving rise to a denial of justice within its jurisdiction”); *Crystallex v. Venezuela*, **CL-119-ENG**, p.184 (¶¶669-671, 708) (confirming that the notion of creeping expropriation is reflected in Article 15(1) of the ILC Articles and finding a creeping expropriation on the facts); *Resolute v. Canada*, **RL-087-ENG**, p.157 (¶545) (confirming that Articles 1102 and 1105 NAFTA could be breached by a “pattern” of discrimination or unfair and inequitable treatment).

⁶³ *Siemens v. Argentina*, **CL-357-ENG**, p.81 (¶263).

⁶⁴ *Walter Bau v. Thailand*, **RL-209-ENG**, p.140 (¶12.43).

- In *El Paso v. Argentina*, the tribunal found a breach of the FET standard in the U.S.-Argentina BIT and held:

“The Tribunal considers that, in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard. According to the case-law, **a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result.** A *creeping violation of the FET standard* could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.”⁶⁵

- 117 **Fourth**, as to whether backdating only applies to breaches of systematic obligations (versus other types of obligations under international law), again, the ILC Articles Commentary does not draw such a distinction. It states:

“(10) *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. **If this were not so, the effectiveness of the prohibition would thereby be undermined.**”⁶⁶

- 118 The ILC Articles Commentary does not state that backdating should only be done with certain types of wrongful composite acts. All that is required is that the obligation is of a type that may be breached by an act that would

⁶⁵ *El Paso v. Argentina*, **CL-083-ENG**, p.189 (¶518).

⁶⁶ ILC Articles with Commentary, **CL-111-ENG**, p.63 (¶10); C-Presentation, p.163-164.

be wrongful in aggregate (in this sense, but only in this sense, the obligations that are capable of being breached by a composite act may be considered “systematic”).

- 119 **Fifth**, as stated in the Commentary, the reason for backdating is that, otherwise, the “effectiveness of the prohibition would [...] be undermined.” In other words, **State responsibility** does not just arise at the end of the series. It extends throughout the period and is dated to the first act.
- 120 In applying this principle, there is no reason to distinguish between different types of composite acts, when neither the Articles themselves nor the Commentary make any distinction in this context (again, all that is required is an obligation that is of a type that may be breached by an act that would be wrongful in aggregate).
- 121 In other words, there would be no reason to hold that the wrongful composite act of genocide should be backdated but not the wrongful composite act of failing to provide FET, national or most-favoured-nation treatment. In each case, the State committed a wrong. In each case, that wrong is comprised of “a series of actions or omissions defined in aggregate as wrongful.” The effectiveness of the obligations to provide FET, national and most-favoured-nation treatment would be undermined if the breach were not backdated.

2.4.3 The last act or omission in the series can and should be considered to determine the wrongful composite act, even if that last act or omission occurred after the termination of the NAFTA

- 122 The Tribunal asked about the last act or omission that is required for the composite act to be effective, and specifically:

“For a composite act to be effective, the last act must take place where the obligation is still standing, doesn’t it?”

[...]

[W]hen I read through Article 15.2, as you well know, it ends up by: ‘Omissions of the series and last as long as this action or

omission are repeated and remain not in conformity with international obligations.'

So the very wording of the text suggests that the last act must occur when the underlying obligation still remains. So if we are – it is just a hypothesis, where Annex 14-C does not extend a substantive obligation beyond July 2020, then there is no such obligation.”⁶⁷

123 As recalled *supra*, Section 2.2.1, even on the Respondent's case that Annex 14-C did not extend the substantive obligations of Chapter 11, Section A (*quod non*), the Tribunal may consider events that took place after 1 July 2020 to determine both whether a composite act existed past that date as a matter of fact and the extent of the damage (occurring mainly on and after 21 July 2021).

124 If the Tribunal concludes, as a matter of fact, that a wrongful composite act straddled the termination of the NAFTA, that act is backdated to the first act in the series of acts and omissions.

125 As reiterated at the Hearing:

“The ILC Articles Commentary also specifies that, where there is a wrongful composite act, the breach is dated to the **first** of the acts in the series. There is, thus, no issue of intertemporal law in this case because, under international law, the breach is deemed to have occurred in 2015, even if it extends over a period of time. **As a matter of law, the entirety of the composite act therefore occurred prior to the termination of NAFTA. As a matter of fact, it straddled the termination of the treaty.**”⁶⁸

126 Stated differently, as a matter of law, the breach is deemed to have occurred on the date of the first act in the series – not the last act.

⁶⁷ Day-1-ENG, p.160(1-4)-161(1-11).

⁶⁸ Day-1-ENG, p.126(14)-127(1); C-Presentation, p.163-164.

2.4.4 Footnote 21 of Annex 14-C may be read to address situations of continuing breach

127 The Tribunal asked two questions regarding the concept of continuing⁶⁹ breach in the context of footnote 21 in Annex 14-C.⁷⁰

128 **First**, it asked for examples of such breaches in investment arbitration case law:

“With regards to your interpretation of the Footnote 21, you mentioned the concept of continuous breach to justify this interpretation.

And I would like to know the following: **Are there real examples in case law of this concept of continuous breach?** Because in investment arbitration, a claim can only be expressed as of the moment where damage happens. And this happens at a given moment in time.

Things are different in human rights because a deprivation of freedom, for instance, continues as long as the deprivation of freedom continues. And I don't see any good example in case law investment.”⁷¹

129 As noted above, many tribunals have found composite breaches of investment obligations, including creeping expropriation and creeping breaches of FET.⁷² Furthermore, as the ILC Articles Commentary makes clear, wrongful composite acts are a **type** of continuing breach:

“(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite

⁶⁹ The Claimant uses the terms “continuous” and “continuing” interchangeably and accords them the same meaning in this context.

⁷⁰ USMCA, Annex 14-C, **CL-003-ENG**; C-Presentation, p.177.

⁷¹ Day-1-ENG, p.210(11)-211(2).

⁷² *Supra*, ¶116 and authorities cited therein; *SGS v. Philippines*, **RL-002-ENG**, p.63 (¶167) (“At least it is clear that it [the BIT] applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach.”).

wrongful act. **Composite acts give rise to continuing breaches,** which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.”⁷³

130 While the Tribunal’s question perhaps refers to continuing breaches in the narrow sense of the term – *i.e.*, as envisaged under Article 14 of the ILC Articles alone – the Claimant’s case is that a wrongful composite act, as envisaged under **Article 15** of the ILC Articles, breached the NAFTA (not a continuing breach as envisaged under Article 14).

131 **Second**, the Tribunal asked the following question about continuing measures and footnote 21:

“Now, if the breach and the Claim can only be based on a moment when damage happens, if it happens before the termination of NAFTA this moment in time allows claim, and **I don’t see in the situation of a continuous measure where does the damage happen, where does the harm happen?** So why are you speaking about continuous measures? **Why is it important for the interpretation of the Footnote 21?**”⁷⁴

132 With a continuing breach in the broad sense (*i.e.*, as envisaged under both Articles 14 and 15 of the ILC Articles), the timing of the damage or harm will depend on the facts of the case.

133 In the case of a continuing breach as envisaged under Article 14 of the ILC Articles, the harm may occur during the entire time when the breach is occurring. For instance, in the case of a deprivation of liberty or an illegal occupation, the harm may be deemed to occur throughout the time of such deprivation of liberty or occupation (and may be increasing with the passage of time).

134 In the case of a composite act under Article 15 of the ILC Articles, the harm may occur only **once the composite act is revealed**, as the Commentary to the ILC Articles states:

⁷³ ILC Articles with Commentary, **CL-111-ENG**, p.62; Day-1-ENG, p.129(3-11); C-Presentation, p.167.

⁷⁴ Day-1-ENG, p.211(12-19).

“(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. **Only 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 act, i.e. an act defined in aggregate as wrongful.**”⁷⁵

135 Here, the wrongful composite act extended from December 2015 until February 2022, although it only revealed itself in July 2021, when the Québec Government rejected the GNLQ Project.⁷⁶ As explained in **Section 6** below, in the present case of composite act, the valuation date to measure the Claimant's damage should coincide with the “watershed” moment at which the Claimant suffered a total loss of its investment, *i.e.*, July 2021.

136 Turning to Annex 14-C (including footnote 21), it does not directly address continuous or composite breaches. It neither includes nor excludes claims that might arise out of such breaches and that might, more specifically, straddle the termination of the NAFTA.⁷⁷

137 The Respondent, however, acknowledges that footnote 21 may have been designed to address situations of continuing breach:

*“l’effet de la note de bas de page 21 pourrait se manifester dans une situation d’acte continu chevauchant la date à laquelle l’ACEUM a remplacé l’ALENA [...]”.*⁷⁸

138 In support of that interpretation, it relies on statements by the tribunal in *TC Energy v. U.S.*, which acknowledged that its conclusions might not apply to claims of composite breach:

⁷⁵ ILC Articles with Commentary, **CL-111-ENG**, p.63.

⁷⁶ C-Presentation, p.164.

⁷⁷ C-Presentation, p.177.

⁷⁸ Reply on Jurisdiction, p.12 (¶33).

“[i]n the case of a composite breach, there may also be uncertainty as to when the action or omission occurred which, taken with the other actions or omissions, constitutes the wrongful act.”⁷⁹

- 139 Only one tribunal has specifically addressed claims of breach that straddled the termination of the NAFTA and considered footnote 21 of Annex 14-C for that purpose: the *Finley v. Mexico* tribunal. As explained at the Hearing:

“In that case, which involved a U.S. claimant and México, the question was, in part, whether the Claims were properly brought under Annex 14-C and/or Annex 14-E.

The tribunal in its January 2025 decision concluded as follows: ‘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**

⁷⁹ *TC Energy v. U.S.*, **CL-270-ENG**, p.40 (¶167). As the Respondent notes, the *TC Energy* majority also stated, “**Footnote 21 does therefore not necessarily presuppose** that Chapter 11 remains in force after 30 June 2020: the parties **may have wanted** to avoid the uncertainties described above and the potential parallel arbitrations.” *Ibid.*; Reply on Jurisdiction, p.13 (¶34). The majority thus did not exclude the possibility that footnote 21 presupposed that Chapter 11 (i.e., Sections A and B) would remain in force after 30 June 2020. Reply, p.205 (¶604).

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.'

The *Finley* tribunal thus found that a claim could be made under Annex 14-C in circumstances where the measures invoked both pre-dated and post-dated the termination of NAFTA."⁸⁰

140 More generally, on a plain reading, 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 under Annex 14-E. Annex 14-C and Annex 14-E can overlap **only if they both** apply to measures that **post-date** the termination of the NAFTA.

141 The Claimant's interpretation of footnote 21 is supported by the views of the U.S. Chief Negotiator of the USMCA, Mr Lauren Mandell, who stated:

"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.)"⁸¹

2.5 The oral submissions of the U.S. and Mexico

142 Before addressing the oral submissions by the U.S. and Mexico at the Hearing, the Claimant recalls the following:

⁸⁰ Day-1-ENG, p.141(14)-142(21) (amended to align with extract read aloud); C-Presentation, p.179; *Finley v. Mexico*, **CL-295-ENG**, p.62 (¶¶213-214).

⁸¹ **C-0638-ENG**, p.3; Day-1-ENG, p.140(9-16); C-Presentation, p.178; *ABG v. Mexico*, **RL-0323-ENG**, p.94 of PDF (Dissenting Opinion, ¶¶81-97) (discussing in detail this email exchange).

- Under Article 31(3) VCLT, there was and is no agreement of the USMCA Parties on the interpretation of Annex 14-C, nor any established practice reflecting such an agreement.
- When it comes to the interpretation of Annex 14-C, neither the U.S., nor Mexico are disinterested Parties. They have been and currently are defendants against claims brought under Annex 14-C and, more specifically, claims arising out of legacy investments and State acts and omissions that occurred at least in part after the termination of the NAFTA. They therefore have a direct interest in taking a position in these proceedings to buttress their own position as defendants in the pending cases against them.
- None of the arguments raised by them sheds light on the USMCA Parties' intentions at the time of drafting and concluding Annex 14-C.
- They (together with Canada) have provided no supplementary means of interpretation within the meaning of Article 32 VCLT.
- Instead, they make circular arguments, including by relying on the conclusions of the majority of the tribunal in *TC Energy v. U.S.* – a decision which is in large part redacted and based on documents to which the Claimant (and this Tribunal) do not have access.⁸²

143 At the Hearing, the U.S. reiterated its written submissions, which the Claimant has already addressed.⁸³ Mexico raised several arguments that it should have previously raised but did not, which are addressed below.

144 **First**, however, the Claimant notes that both Mexico and the U.S. remained **silent** regarding the manner in which wrongful composite acts that straddle the termination of the NAFTA should be treated under Annex 14-C.

145 The U.S. repeated its written submission that it did not take a position on how its interpretation of the treaty applies to the facts of this case and that no inference should be drawn from the absence of comment on any issue. It did not refer to its prior, specific comment that it “**expresses no view on**

⁸² Claimant's Comments on NDP Submissions, p.4 (¶¶5-6); Day-1-ENG, p.145(14)-150(17); C-Presentation, p.183-188; Reply, p.233 (ss.3.3.4-3.3.5); Rejoinder on Jurisdiction, p.89 (ss.3.3-3.4).

⁸³ Claimant's Comments on NDP Submissions.

how the below interpretation applies to Claimant's allegations of a 'composite breach.'"⁸⁴

- 146 Nor did the U.S. react to the Claimant's written observation that "the U.S. does not dispute the Claimant's submissions that Annex 14-C encompasses claims that arise out of legacy investments and wrongful composite acts that commenced prior to the termination of the NAFTA."⁸⁵
- 147 Mexico also did not refer to its written submission that "[n]either composite nor continuing acts operate to extend NAFTA's substantive protections".⁸⁶ Mexico has provided no explanation or support for that statement.⁸⁷
- 148 The Tribunal cannot ignore the U.S. and Mexico's silence on this central issue.⁸⁸ Had the USMCA Parties intended to exclude claims arising out of legacy investments and composite acts that straddle the termination of the NAFTA, they would have said so in Annex 14-C and contemporaneous documents would confirm that understanding. They – including the U.S. and Mexico – would *a fortiori* have made that submission in this arbitration.
- 149 Turning to Mexico's submissions at the Hearing, the Claimant has two comments.
- 150 **First**, Mexico for the first time commented on the *Finley v. Mexico* decision, which the Claimant had addressed in detail in both its Reply and its Rejoinder.⁸⁹ Mexico sought to distinguish that case on the grounds that it involved claims under both Annex 14-C and Annex 14-E and that the tribunal purportedly allowed the claims to go forward, in one single

⁸⁴ U.S. NDP Submission, p.1 (¶1).

⁸⁵ Claimant's Comments on the NAFTA 1128 Submissions dated 22 October 2025, p.5 (¶8).

⁸⁶ Mexico NDP Submission, p.10 (s.I.D).

⁸⁷ Claimant's Comments on the NAFTA 1128 Submissions dated 22 October 2025, p.5 (¶9).

⁸⁸ Even if the Non-Disputing Parties indicated that no inferences should be drawn from their absence of comment on any particular issue: U.S. NDP Submission, p.1; Mexico NDP Submission, p.1 (¶2); Day-2-ENG, p.336(2-5), 354(7-11).

⁸⁹ Rejoinder on Jurisdiction, p.70 (¶¶196, 206-221, 295); Reply, p.220 (¶¶657-661); Mexico NDP Submission (not mentioning the *Finley* award).

proceeding, for reasons of procedural economy that would not apply in this case.⁹⁰

- 151 This misses the point. It is undisputed that the question in that case was, in part, whether the claims were properly brought under Annex 14-C and/or Annex 14-E. This led to a question as to whether there should be two arbitrations: one for measures pre-dating the termination of the NAFTA and one for measures post-dating the termination. It is in that context that the tribunal considered the question of procedural economy.
- 152 However, the *Finley* tribunal did conclude that it had jurisdiction under Annex 14-C of the USMCA over claims based on measures that straddled the NAFTA termination date. Procedural economy did not, and indeed cannot in and of itself, provide a basis for such jurisdiction.⁹¹
- 153 Mexico did not otherwise address the Claimant's detailed submissions regarding the relevance of *Finley v. Mexico* case.⁹²
- 154 **Second**, Mexico for the first time commented on the testimony of Mr Kenneth Smith Ramos – Mexico's former Chief Negotiator of the USMCA – in other Annex 14-C cases (including *Cyrus Capital v. Mexico* and *ABG v. Mexico*).⁹³ Although the Claimant had addressed that testimony in both its Reply and its Rejoinder,⁹⁴ Mexico for the first time alleged that in other cases it was "neither probative nor reliable," in part referring to the decision of the majority of the tribunal in *ABG v. Mexico*.⁹⁵
- 155 Mexico failed, however, to mention the strong, detailed dissent by Prof. Franco Ferrari in *ABG v. Mexico* concerning the relevance of Mr Smith Ramos's testimony, including the following:

⁹⁰ Day-2-ENG, p.360(22)-362(9).

⁹¹ Rejoinder on Jurisdiction, p.75 (¶¶209-211).

⁹² Rejoinder on Jurisdiction, p.70 (¶¶196, 206-221, 295); Reply, p.220 (¶¶657-661); Day-1-ENG, p.127(19)-128(4), 141(10)-142(21); C-Presentation, p.165.

⁹³ Day-2-ENG, p.365(19)-367(7).

⁹⁴ Reply, p.248 (¶748); Rejoinder on Jurisdiction, p.115 (¶332).

⁹⁵ Day-2-ENG, p.366(18)-367(7).

- “I find Mr. Smith Ramos’ witness statement convincing. His testimony is based on **direct personal knowledge** arising from his participation in the negotiations from their very commencement through their conclusion. Furthermore, Mr. Smith Ramos does not merely state a conclusion, but also explains the basis for his understanding, stating that “[t]here was no doubt on the scope of Annex 14-C discussion on this subject because it was understood, as proposed by the United States as early as Round 4 of the negotiations, that the goal was to extend the substantive protections to investors as established in Chapter 11 of the NAFTA for a duration of three years.” [...]”
- “[...] I find that Mr. Smith Ramos’s cross-examination confirmed not only his testimony’s accuracy, but also Mr. Smith Ramos’s **integrity** [...]”
- “Mr. Smith Ramos explained his motivation for his testimony as stemming from professional responsibility for the negotiation he had led, not pecuniary advantage, as Mexico seemed to suggest [...]”
- “The converging results of the Mandell email addressed in the previous section of this Dissenting Opinion and the Smith Ramos testimony addressed in the present one create an evidentiary foundation that exposes a litigation-driven volte-face, which contradicts the existence of the subsequent practice by the NAFTA/USMCA Parties claimed by Mexico.”⁹⁶

156 The Claimant maintains that evidence of Mr Smith Ramos’s testimony in related cases is relevant, even if it is incumbent on the Tribunal to assess the weight of that evidence, together with the other documents put forward by the Claimant as reflecting the views of USMCA negotiators and as constituting supplementary means of interpretation.⁹⁷

⁹⁶ *ABG v. Mexico*, **RL-0323-ENG**, p.102 of PDF (Dissenting Opinion, ¶¶99, 102, 103, 105); C-Presentation, p.178.

⁹⁷ Rejoinder on Jurisdiction, p.112 (s.3.4.4.2); Reply, p.245 (s.3.3.5.4).

2.6 Should the Tribunal conclude that the substantive obligations of the NAFTA expired on 30 June 2020, the Claimant would still be entitled to compensation

157 The Tribunal asked the Parties to address the following hypotheses:

“If the Tribunal was to conclude that the substantive obligations of the NAFTA expired on June 30, 2020, provide comments on what the Tribunal would have to rule on in the two following cases: (i) a composite act is found; (ii) no composite act is found.”⁹⁸

158 **Should the Tribunal conclude that the substantive obligations of the NAFTA expired on 30 June 2020 but that the Respondent committed a wrongful composite act** that commenced before the termination of the NAFTA, the Tribunal has jurisdiction over and must rule on the following claims:

- i) the claim that, on 10 December 2015, the MELCC failed to defer to the Agency and issued the Directive, commencing its own EA, in breach of Articles 1102, 1103 and 1105 NAFTA;⁹⁹
- ii) the claim that, as of 15 January 2016, the Agency failed to initiate a single federal EA or a joint EA with the MELCC, thereby breaching Articles 1102, 1103 and 1105 NAFTA;¹⁰⁰
- iii) the claim that a wrongful composite act, which commenced in 2015 and continued until February 2022, breached Articles 1102, 1103 and 1105 NAFTA.¹⁰¹

159 **Should the Tribunal conclude that the substantive obligations of the NAFTA expired on 30 June 2020 and that the Respondent did not commit a wrongful composite act** that commenced before the termination of the NAFTA, it still has jurisdiction over but must address only claims (i) and (ii) above, which are discussed further *infra*, Sections 3.2 and 4.2.1.

⁹⁸ The Tribunal asked a similar question at the Hearing: Day-1-ENG, p.162(7)-163(4).

⁹⁹ Reply, p.41 (ss.2.3, 4.1.3.1, 4.2.2.1); C-Presentation, p.170; *infra*, ss.3.2, 4.2.1.

¹⁰⁰ *Ibid.*

¹⁰¹ Reply, p.284 (ss.4.1, 4.2); C-Presentation, p.170; *infra*, ss.3.6, 4.2.4.

160 **In either case**, as explained in **Section 6** below, the Claimant is entitled to compensation.

3 THE RESPONDENT BREACHED ARTICLE 1105 NAFTA

- 161 The Claimant's case is that the Respondent's federal and provincial authorities committed a series of wrongful acts and omissions, extending from the failure to conduct a single federal EA, or at least a joint EA, in 2015 and 2016, and culminating in the decisions of the Québec and Federal Governments to reject the GNLQ Project in 2021 and 2022.¹⁰² These wrongful acts and omissions amount to a violation of Article 1105 NAFTA, as part of a composite act and, in some cases, also in and of themselves.¹⁰³
- 162 The unifying feature of the composite act is the Federal and Québec Government's failure to accord the Claimant due process throughout the EA process. As a matter of international law, the MST under Article 1105 NAFTA protects investors against due process violations by administrative bodies, including during EAs, as recognised by the *Bilcon* tribunal (**Section 3.1**).
- 163 The evidence at the Hearing confirmed the basis of the Claimant's claim of breach of Article 1105 NAFTA:
- imposing two parallel EA processes was wrongful under Canadian law and discriminatory (**Section 3.2**);
 - the Québec EA process was arbitrary and violated due process, resulting in a wrongful and discriminatory decision by the Québec Government (**Section 3.3**);
 - the Federal Government's decision to reject the GNLQ Project was tainted by the Québec EA process and was also wrongful and discriminatory (**Section 3.4**);
 - the broad but legally constrained discretion to approve or refuse a project conferred on the Québec and Federal Governments under the applicable statutes cannot excuse or justify the Respondent's NAFTA breaches (**Section 3.5**); and,

¹⁰² Reply, p.284 (s.4.1.3).

¹⁰³ Reply, p.196 (¶¶574, 578-590); Day-1-ENG, p.125(17)-126(3); C-Presentation, p.162.

- the Respondent's acts and omissions, when taken in aggregate, constitute a wrongful composite act in breach of Article 1105 NAFTA (Section 3.6).

3.1 The NAFTA protects investors against violations of due process by administrative bodies

164 The Tribunal has asked the Parties **three questions** regarding the MST under Article 1105:

- “[h]ow much process is due under NAFTA Article 1105(1) for administrative measures such as the environmental assessment decisions at issue [...]?”;¹⁰⁴
- whether “the Claimant contend[s] that the only way for Canada to comply with its international obligations was to approve the project”;¹⁰⁵
- whether is it possible to reconcile the finding in *Apotex*, paragraphs 9.15-9.65, with that in *Bilcon*, paragraphs 588-604.¹⁰⁶

165 The Claimant addresses these questions in turn.

3.1.1 Article 1105 NAFTA protects investors against a lack of candour, unfairness or disregard for applicable rules in connection with administrative processes and measures

166 The Respondent does not directly dispute that, under the MST of Article 1105 NAFTA, the State has a **broad obligation** to provide investors with due process in connection with administrative measures and

¹⁰⁴ Tribunal's Questions, p.2 (C.2).

¹⁰⁵ Tribunal's Questions, p.1 (B, second).

¹⁰⁶ Tribunal's Questions, p.2 (C.2).

proceedings.¹⁰⁷ Numerous tribunals have stressed this point,¹⁰⁸ including in connection with EA processes.¹⁰⁹ That due process obligation will be violated:

- through the “**willful disregard of the fundamental principles upon which the regulatory framework is based**”,¹¹⁰
- when a State **fails to ensure a transparent and predictable framework for the investor regarding the requirements** for an administrative permit;¹¹¹
- when the process resulted in an “**outcome which offends judicial propriety – as might be the case with [...] a complete lack of transparency and candour in an administrative process**”,¹¹²

¹⁰⁷ Reply, p.253 (¶¶761, 770, 773-780). The Respondent rather argues that (i) Article 1105 requires a high threshold of severity for the conduct of a State to give rise to a breach, and (ii) that the Tribunal must defer to the State's decision-making: Rejoinder, p.174 (¶¶418-441). On these points, the Claimant refers the Tribunal to its Reply, p.253 (¶¶761-769, 802-804).

¹⁰⁸ *Odyssey v. Mexico*, CL-317-ENG, p.77 (¶309) (“Being that **due process is a central element of the FET standard**, the Tribunal must first make clear that **it applies not only to acts of the judiciary but also to acts of other branches of the government, including administrative decisions.**”); *TECO v. Guatemala*, CL-042-ENG, p.96 (¶¶456-457) (applying the MST in CAFTA-DR and finding that “a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard”); *Waste Management v. Mexico*, CL-040-ENG, p.35 (¶¶98-99), as endorsed in, e.g., *Lone Pine v. Canada*, CL-254-ENG, p.199 (¶608); *Mesa Power v. Canada*, CL-041-ENG, p.117 (¶501); *Nelson v. Mexico*, CL-055-ENG, p.93 (¶322); *Vento v. Mexico*, CL-253-ENG, p.86 (¶283).

¹⁰⁹ *Bilcon v. Canada*, CL-024-ENG, p.129 (¶¶442-443), 176 (¶¶590-592); *Odyssey v. Mexico*, CL-317-ENG, p.77 (¶310).

¹¹⁰ *TECO v. Guatemala*, CL-042-ENG, p.96 (¶458).

¹¹¹ *Metalclad v. Mexico*, CL-059-ENG, p.27 (¶¶99-100) (“Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. [...] [T]he acts of Mexico [...] fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with international law”); *Nelson v. Mexico*, CL-055-ENG, p.106 (¶359); *Thunderbird v. Mexico*, CL-057-ENG, p.65 (¶200) (in which the tribunal confirmed that administrative proceedings should be tested against standards of due process and procedural fairness).

¹¹² *Waste Management v. Mexico*, CL-040-ENG, p.36 (¶98); *TECO v. Guatemala*, CL-042-ENG, p.96 (¶458).

- when a permit is denied for **reasons unrelated to the requirements** for issuing it (as the *Odyssey* tribunal found in connection with an EA process).¹¹³

167 In other words, the process due under Article 1105(1) for administrative measures requires:

- a transparent and predictable framework regarding the requirements to secure whichever measure or permit is at issue;
- transparent, candid and predictable conduct by administrative bodies;
- the correct application of legal rules and principles;
- conducting administrative proceedings fairly and in good faith; and
- a decision based on the applicable legal requirements.

3.1.2 Approving the Project was not the only way for Canada to comply with its international obligations

168 The Claimant's case is not that the only way for Canada to have complied with its international obligations, including Article 1105 NAFTA, was to approve the Project. This would be saying that the Claimant was automatically entitled to the approval of its project, which no investor can claim.

169 The Respondent could in theory have complied with its international obligations, including under Article 1105 NAFTA, if the federal and Québec authorities had rejected the GNLQ Project but had nevertheless:

- acted transparently, candidly and predictably towards GNLQ;
- correctly applied federal and Québec laws;
- acted fairly and in good faith towards GNLQ; and
- rendered decisions based on genuine and lawful reasons.

¹¹³ *Odyssey v. Mexico*, CL-317-ENG, p.77 (¶310).

170 This is not what happened. Here, the Respondent failed to accord the Claimant the due process it was owed in connection with both the federal and the Québec EA.¹¹⁴

171 Specifically, **each of the grounds** on which the decisions of the Québec and Federal Governments relied to reject the GNLQ Project was unlawful, arbitrary, and discriminatory and the result of an irregular EA process.¹¹⁵ In that sense, the Respondent should have authorised the GNLQ Project and breached its international obligations by not doing so.

3.1.3 The *Bilcon* award best describes the due process owed to investors in the context of administrative measures such as EA decisions

172 In *Apotex* and *Bilcon*, the tribunals reached opposite conclusions regarding allegations of breach of Article 1105 NAFTA:

- The *Apotex* tribunal, in an award dated 25 August 2014, found that the U.S. did not breach Article 1105 NAFTA by imposing an import alert against certain drugs manufactured by the claimant in Canada;¹¹⁶
- The *Bilcon* tribunal, in an award dated 17 March 2015, found that Canada breached Article 1105 NAFTA in the context of an EA by a joint review panel, which disregarded the applicable standards without providing reasonable notice to the proponent.¹¹⁷

173 Despite the different outcomes, the tribunals' findings as to the level of due process required in the context of administrative measures are not only compatible but also complementary. Nevertheless, the *Bilcon* tribunal's analysis is the most relevant to this case as it concerns an EA process.

174 **First**, the *Apotex* and *Bilcon* findings are compatible as to the definition of the MST.

¹¹⁴ Reply, p.284 (s.4.1.3); Day-1-ENG, p.35(14)-77(1); C-Presentation, p.24-103.

¹¹⁵ Reply, p.102 (s.2.5.4); p.131 (s.2.6.2); p.308 (¶¶907-944); p.323 (¶¶953-977); Day-1-ENG, p.70(16-18), 76(11-17); C-Presentation, p.103.

¹¹⁶ *Apotex v. U.S.*, **RL-086-ENG**, p.239 of PDF (¶¶9.65); p.83 of PDF (¶¶3.57-3.66).

¹¹⁷ *Bilcon v. Canada*, **CL-024-ENG**, p.177 (¶¶594).

175 The *Bilcon* tribunal agreed (as do the Parties in this case)¹¹⁸ with the *Waste Management* tribunal that the MST protects against conduct that is:

“[A]rbitrary, 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.”¹¹⁹

176 The *Waste Management* tribunal thus enumerated several prongs of the MST, which include “due process” in a judicial and an administrative context.

177 The *Apotex* tribunal also referred to the *Waste Management* award,¹²⁰ but did not apply the *Waste Management* formulation to define the MST as such. It noted, however, that tribunals accept the MST as comprising certain defined elements, rather than abstract notions of justice or rule of law,¹²¹ which is in line with the *Waste Management* standard relied on in *Bilcon*.

178 **Second**, the *Apotex* and *Bilcon* findings are complementary in terms of how they apply the due process requirement to administrative measures.

179 In *Apotex*, the claimant argued that the U.S. had not provided notice or the possibility for a hearing before imposing an import ban on certain drugs; according to the claimant, the MST required that such measures be put in

¹¹⁸ Reply, p.253 (¶¶761-762); Rejoinder, p.175 (¶424).

¹¹⁹ *Waste Management v. Mexico*, **CL-040-ENG**, p.35 (¶98) (also holding that “[i]n 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.”).

¹²⁰ *Apotex v. U.S.*, **RL-086-ENG**, p.230 of PDF (¶9.44).

¹²¹ *Ibid.*, p.229 of PDF (¶9.41) (“the Tribunal recalls that past NAFTA tribunals generally have interpreted the minimum standard in NAFTA Article 1105 as being comprised of a limited number of defined elements (denial of justice, failure to accord full protection and security, etc.). These international tribunals have rejected conceptions equating this minimum standard with broader and more abstract notions such as ‘justice’ or ‘the rule of law.’”).

place (even though they were not provided for under domestic law).¹²² The tribunal analysed that specific question (and not whether due process was part of the MST generally).¹²³ It concluded that the specific measures invoked by the claimant were not required under customary international law.¹²⁴ It noted that its reasoning related specifically to the regulation of cross-border trade in drug products, and added:

“[A]s prior international tribunals have decided, **whatever process may be due depends on the particular context or circumstances of the claim.**”¹²⁵

- 180 In *Bilcon*, the claimant argued that the application by a joint review panel of an unprecedented EA criterion, with no basis in the applicable framework, and no prior notice, breached the MST.¹²⁶ The tribunal analysed the facts before it against various prongs of the MST as outlined in *Waste Management*,¹²⁷ i.e., whether the States’ conduct was procedurally or substantively unfair,¹²⁸ arbitrary,¹²⁹ or in breach of legitimate expectations,¹³⁰ although not specifically in relation to administrative due process as such. It noted however that the MST “calls for a consideration of procedural as well as substantive fairness”.¹³¹
- 181 The tribunal then found that Canada had breached Article 1105, since *Bilcon* had no reason to expect that it would be assessed under an

¹²² *Apotex v. U.S.*, **RL-086-ENG**, p.216 of PDF (¶¶9.7-9.9, 9.16).

¹²³ The *Apotex* tribunal expressly avoided deciding whether the MST encompasses due process obligations: *Apotex v. U.S.*, **RL-086-ENG**, p.232 of PDF (¶¶9.49-9.65) (“[A]ssuming (**without here deciding**) that some element of due process figures in Article 1105’s customary minimum standard, the Tribunal finds, on the facts of this case, that the Respondent’s conduct impugned by the Claimants does not approach the ‘high threshold of severity and gravity’ required to establish a violation of Article 1105(1) [...]”).

¹²⁴ *Apotex v. U.S.*, **RL-086-ENG**, p.223 of PDF (¶¶9.25-9.36). The tribunal then went on to dismiss the claimants’ claims also on other fact-specific grounds (p.232 of PDF (¶¶9.49-9.65)).

¹²⁵ *Apotex v. U.S.*, **RL-086-ENG**, p.232 of PDF (¶9.48).

¹²⁶ *Bilcon v. Canada*, **CL-024-ENG**, p.103 (¶¶361-363).

¹²⁷ *Waste Management v. Mexico*, **CL-040-ENG**, p.35 (¶¶98).

¹²⁸ *Bilcon v. Canada*, **CL-024-ENG**, p.176 (¶590).

¹²⁹ *Ibid.*, p.176 (¶591).

¹³⁰ *Ibid.*, p.176 (¶589).

¹³¹ *Ibid.*, p.176 (¶590).

unprecedented standard without any notice,¹³² and characterised the conduct of the joint review panel as “arbitrary”.¹³³ It concluded:

“The basis of liability under Chapter Eleven is that, **after all the specific encouragement the Investors and their investment had received** from government to pursue the project, and **after all the resources placed** in preparing and presenting their environmental assessment case, the Investors and their investment were not afforded **a fair opportunity to have the specifics of that case considered, assessed and decided in accordance with applicable laws.**”¹³⁴

182 Hence, while the *Bilcon* tribunal did not refer to “due process” under the MST, it effectively applied the MST, as formulated in *Waste Management*, to an administrative measure.

183 **Third**, the *Bilcon* tribunal applied the MST to a comparable case (involving an EA).¹³⁵ The *Apotex* award concerns emergency administrative measures, made for the immediate protection of public safety against ill-manufactured drugs.¹³⁶ The level of due process granted to an investor in the context of such a measure can be limited and remain fair. The same cannot be said for due process in the context of an EA process that lasts for several years,¹³⁷ entail high costs for the investor, and aims to authorise projects.¹³⁸

¹³² *Ibid.*, p.176 (¶590).

¹³³ *Ibid.*, p.176 (¶591).

¹³⁴ *Ibid.*, p.179 (¶603); p.177 (¶592).

¹³⁵ *Ibid.*, p.1 (¶5).

¹³⁶ *Apotex v. U.S.*, **RL-086-ENG**, p.232 of PDF (¶9.48); p.48 of PDF (¶¶2.24-2.26, 3.8).

¹³⁷ The *Bilcon* award indeed considered the continuous nature of the breaches and their ongoing effect (*Bilcon v. Canada*, **CL-024-ENG**, p.69 (¶251)); Reply, p.286 (¶849).

¹³⁸ **CER-1 (Second)**, p.80 (¶¶239-261); Day-4-FRA, p.101(25-32) (“**Me Barrier.-** Pour revenir à la procédure, après la recevabilité, si je suis un peu la manière dont vous décrivez ça, c’est qu’il y a différents filtres dans lesquels le projet avance à travers l’étude d’impact, dont l’objectif est de faire en sorte qu’il soit considéré comme acceptable par le gouvernement. Je crois que c’est au paragraphe 24 que vous dites ça, d’ailleurs. **Mme Gagnon.-** Oui. [...] Comme l’initiateur à la base souhaite réaliser son projet, c’est sûr que l’objectif ultime, c’est d’arriver à un projet qui est acceptable pour qu’il puisse aller de l’avant. Donc, c’est l’effet du processus.”).

184 Here, both Parties have referred extensively to the *Bilcon* decision.¹³⁹ Only
the Respondent has referred to the *Apotex* award, and only to passages
regarding the deference that tribunals have given to State decision-
makers.¹⁴⁰

185 To conclude, the *Bilcon* award is therefore more relevant to this case than
the *Apotex* award.

3.2 Having two parallel EA processes for the GNLQ Project was wrongful under Canadian law and constitutes a breach of Article 1105 NAFTA

186 The GNLQ Project should not have been subjected to two uncoordinated
provincial and federal EAs resulting in separate decisions, but rather to
either a single federal EA or a joint EA.¹⁴¹

187 A single federal EA was mandated under Canadian law (**Section 3.2.1**). In
any event, even if conducting two EAs was permissible, the Agency and
the Federal Government should have collaborated with the MELCC and
failed to do so (**Section 3.2.2**). Even if having two EAs was lawful, the
Federal and Québec Governments failed to conduct a joint EA as required
by the Canada-Québec Agreement (**Section 3.2.3**). They also misled
GNLQ by representing that a joint EA was underway (**Section 3.2.4**).
These acts and their consequences constitute a stand-alone breach of the
NAFTA (**Section 3.2.5**).

3.2.1 Canadian law mandated a single federal EA

3.2.1.1 The GNLQ Project fell within exclusive federal jurisdiction according to the Canadian constitution

188 The principal reason why the GNLQ Project required a single federal EA
is that it was partly located on federal Crown lands administered by the

¹³⁹ *E.g.*, Reply, p.55 (s.2.3.1.3), p.255 (¶¶764, 773-780, 784, 798-800); Rejoinder, p.36-187 (¶¶75, 428, 448)); Counter-Memorial, p.179 (¶483).

¹⁴⁰ Rejoinder, p.180 (¶¶436-437).

¹⁴¹ Reply, p.41 (¶¶123-160).

SPA.¹⁴² The Respondent and its experts do not dispute the Federal Government's exclusive jurisdiction to conduct an EA for projects on Crown lands, but argue that in this case there was shared jurisdiction.

189 Mr Northey confirmed at the Hearing that the GNLQ Project was partly located on Crown lands, relying on a map appended to his First Report. That map shows land under option between the SPA and GNLQ, approximately half of which was owned by the "Canada Government under SPA management."¹⁴³ This was the map submitted to federal and Québec authorities with GNLQ's *Avis de projet* in November 2015, and the map available to the Federal Government when determining jurisdiction.¹⁴⁴

190 During Mr Northey's cross-examination, the Respondent attempted to rely on a different map from Ms Powell's First Report.¹⁴⁵ However:

- a) the map was dated "*Juillet 2020*", nearly five years **after** the *Avis de projet*, the initiation of two separate EAs and subsequent project changes; and
- b) it still showed that part of the GNLQ Project would be built on "*terres domaniales*" (i.e., Crown lands).¹⁴⁶

191 On this basis alone, the Federal Government had and should have asserted exclusive jurisdiction over the EA. Mr Northey's testimony on this point was un rebutted.

192 Equally unchallenged was Mr Northey's additional conclusion that the entire Project was effectively located on federal property because SPA authorisation was required. That evidence therefore stands.¹⁴⁷

193 Me Duchaine further explained that the Project was federal in nature because it involved interprovincial transportation of natural gas for

¹⁴² CER-2, p.19 (¶¶55, 58); CER-2 (Second), p.20 (¶¶48-59).

¹⁴³ CER-2, p.114 of PDF (Appendix D); Day-8-ENG, p.1997(1)-1998(2).

¹⁴⁴ C-0197-FRA, p.11.

¹⁴⁵ Day-8-ENG, p.1998(3)-2000(2).

¹⁴⁶ RER-3, p.101.

¹⁴⁷ Reply, p.46 (¶135); CER-2, p.19 (¶¶53-55); CER-2 (Second), p.23 (¶¶55-59).

liquefaction and international export, placing it squarely within federal constitutional powers.¹⁴⁸ Nothing in the Project justified Québec jurisdiction:

“Me Duchaine.- [...] *En ce qui me concerne, le Projet GNL Québec est un projet qui aurait dû être géré par le fédéral uniquement. Je m’explique. Vous avez un gazoduc qui amène du gaz naturel dans une usine de liquéfaction – ce n’est pas différent du dossier Lafarge, où c’était une cimenterie – qui est située sur le territoire du parc du Saguenay. Je ne rentrerai pas dans la discrétion entre les deux. Pour votre information, en ce qui me concerne, l’application des doctrines constitutionnelles, ça s’applique autant sur une terre privée que sur une terre fédérale. Donc, on a un gazoduc, on a une usine de liquéfaction qui va liquéfier le gaz pour le mettre dans un bateau qui va partir pour des fins d’exportation. Donc, à tous les éléments de cette chaîne, on parle de compétence fédérale. Je ne vois pas, personnellement, la compétence provinciale dans ce projet.*”¹⁴⁹

- 194 Me Duchaine also testified that Québec has frequently refrained from initiating EAs where projects fell under federal jurisdiction and should have done so here.¹⁵⁰

¹⁴⁸ **CER-1 (Second)**, p.27 (¶¶96-114); Reply, p.47 (¶¶138-139). Mr Northey agrees with Me Duchaine’s assessment of the defining features of the Project for the purpose of establishing jurisdiction under the Canadian constitution (**CER-2**, p.14 (¶¶37, 56)).

¹⁴⁹ Day-6-FRA, p.44(10-20); p.63(1-10), p.66(24-35). Me Duchaine’s reliance on the *Lafarge* case is accurate. This case concerned the construction of a ship offloading/concrete batching facility on land owned by the Vancouver Port Authority (“VPA”). A group of rate payers opposed the approval of the project by the VPA on the ground that the City of Vancouver should not have declined jurisdiction over the lands and instead should have insisted that Lafarge obtain a City development permit. The Supreme Court of Canada considered that, regardless of whether the Crown owned the land directly or if such land were part of Schedule C land owned by the VPA, the contemplated facility was sufficiently integrated into the ship/barge unloading facility to make it subject to exclusive federal jurisdiction over navigation and shipping (**CD-0041-FRA**, p.34 (¶¶31-91)).

¹⁵⁰ Duchaine Presentation, p.26 (naming, in particular, the port terminal in Sorel Tracy, the North Shore Terminal and the Contrecoeur projects.).

195 Mr Northey further confirmed that a single federal EA would have exhaustively assessed environmental effects, leaving no constitutional basis for a provincial EA:

“[Mr Hébert.-] I think what we’re interested in is to determine whether the Federal Government had exclusive authority to conduct the EA process. [...]

[Mr Northey.-]. [...] I believed it had broad authority to cover all of the effects, whether that authority is exclusive, I think that was an overstatement. What I say, though, at the end of the sentence is, which still stands, is that that broad authority, in my view, meant there was no constitutional basis to require that there be a Provincial EA because all effects could be assessed under Federal EA. In other words, there was no gap, Counsel.”¹⁵¹

196 The Respondent does not deny that the Project engaged federal jurisdiction. It argues instead that Québec also had jurisdiction based on local and private matters.¹⁵² The Respondent contends that this created shared jurisdiction because:

- a single federal EA would be inconsistent with collaborative federalism; and
- interjurisdictional immunity and federal paramountcy did not apply absent a conflict between the Québec and Federal legislation.¹⁵³

197 The Hearing confirmed that none of these objections have merit.

3.2.1.2 The doctrine of collaborative federalism is inapposite

198 As Me Duchaine testified, the Supreme Court of Canada has made clear that cooperative federalism cannot displace established constitutional doctrines, notably the doctrines of interjurisdictional immunity and federal paramountcy:

¹⁵¹ Day-7-ENG, p.1914(13)-1915(11).

¹⁵² Rejoinder, p.29 (¶62).

¹⁵³ Rejoinder, p.30 (¶¶64-85).

“Me Duchaine.- [...] *L’argument du fédéralisme coopératif est attrayant. Le procureur général du Québec s’en sert tout particulièrement et puis Me Yergeau le reprend dans son rapport pour justifier l’application de la loi provinciale ou le fait que l’évaluation provinciale peut couvrir des éléments de compétence fédérale.*

Sauf que, je veux dire, la Cour suprême nous a rappelé, notamment dans une décision récente, que cette doctrine, on va l’appeler, ce principe, le fédéralisme coopératif, n’est pas une nouvelle doctrine constitutionnelle et ça n’écarte pas les doctrines constitutionnelles qui sont applicables, c’est-à-dire la séparation des pouvoirs. Vous avez, dans le passage suivant, les éléments de la décision de la Cour suprême de 2023 qui le dit.”¹⁵⁴

- 199 She further explained that the Québec Court of Appeal and the Supreme Court conclusively held in *IMTT* that once federal jurisdiction is established, Québec **cannot** impose its own EA:

“Me Duchaine.- [...] *Mais ce sur quoi j’aimerais porter votre attention, c’est justement l’extrait de la décision de la Cour d’appel dans IMTT, dans lequel c’est très clair.*

La position du Québec est très clairement énoncée. Je vous fais grâce de la citation, des deux premières citations. Je vous amène tout de suite à la conclusion de la Cour.

Dans cette citation, la Cour se disait : [...] [q]u’est-ce qu’il se passe si on applique cette procédure dans les domaines de compétence fédérale ? On parlait ici de navigation, notamment. [...] Alors, vous avez, au paragraphe 221, à la fin, la Cour qui nous dit : ‘Le gouvernement du Québec ne peut exercer aucun pouvoir décisionnel à l’égard de tels projets.’ Parce que la Cour constate que c’est de compétence fédérale.”¹⁵⁵

¹⁵⁴ Day-6-FRA, p.43(3-12); Duchaine Presentation, p.23-24 referring to **MY-0004-FRA**; Rejoinder on Jurisdiction, p.27 (fn.56); **MY-0174-FRA**, p.31 (¶¶33-35).

¹⁵⁵ Day-6-FRA, p.43(13-25); Duchaine Presentation, p.25; **CD-0048-FRA**, p.66 (¶221).

- 200 *IMTT* reflects longstanding Supreme Court jurisprudence on federal paramountcy, including before the initiation of the EAs in this case:

“Me Duchaine.- *En fait, il y a plusieurs arrêts du même type. Il y a l’arrêt COPA, juste avant, qui était par rapport à la loi sur la protection du territoire agricole. On a plusieurs décisions et puis on a des décisions de la Cour suprême – donc, c’est une Cour qui est plus élevée que la Cour du Québec – sur le fait qu’un régime d’autorisation discrétionnaire ne peut pas s’appliquer dans un champ de compétence de l’autre palier de gouvernement. [...]*

Me Hébert.- *Je comprends que c’est l’affaire IMTT que vous citez le plus souvent dans vos rapports.*

Me Duchaine.- *Oui parce que [...] elle est postérieure à des décisions de la Cour suprême, donc les décisions de la Cour suprême sont plus importantes, mais elle répond spécifiquement à la question qui est posée ici, donc c’est pour ça que je la cite plus que les autres.”*¹⁵⁶

- 201 Me Yergeau himself confirmed on cross-examination that *IMTT* involved a Québec-based project over which Québec claimed jurisdiction, but which the courts found to fall exclusively within federal jurisdiction:

“Me Barrier.- *Ma question, je peux la redire, c’est : est-ce que nous sommes d’accord qu’il s’agissait d’un projet qui était situé au Québec, sur lequel le Québec revendiquait sa compétence en matière d’autorisation environnementale et que la Cour a considéré comme relevant exclusivement de la compétence fédérale ? [...]*

Me Yergeau.- *Oui, je suis d’accord avec vous. Je suis d’accord avec vous.”*¹⁵⁷

¹⁵⁶ Day-6-FRA, p.55(29)-56(4).

¹⁵⁷ Day-7-FRA, p.50(7-13).

- 202 The Respondent's argument that collaborative federalism should have applied in the context of the GNLQ Project is thus inconsistent with the position of Canadian courts.

3.2.1.3 The conditions for the application of the doctrines of interjurisdictional immunity and federal paramountcy are met

- 203 As Me Duchaine confirmed, in *IMTT*, the Court of Appeal held that Québec's EA process impaired the core of federal jurisdiction over Crown lands and navigation:

“Me Hébert.- [...] Alors, à la page 25 du PDF, selon la Cour : ‘L’application de la procédure d’évaluation du Québec entrave le contenu élémentaire et irréductible de la compétence du gouvernement fédéral en matière de propriété publique fédérale et de navigation’.

*Me Duchaine.- C’est effectivement... En fait, il y avait trois champs de compétences qui étaient proposés pour l’application de la doctrine de l’exclusivité des compétences par le PGC et l’association portuaire IMTT. Il y avait également le transport inter provincial. Mais le Tribunal, la Cour d’appel a retenu ces deux champs-là.”*¹⁵⁸

- 204 She also clarified that impairment of a single exclusive federal power can trigger exclusive federal jurisdiction:

“Me Duchaine.- [...] La Cour d’appel a tout de suite enlevé le transport inter provincial et a retenu les deux autres. Mais ce n’est pas parce qu’elle a retenu les deux autres que les deux doivent être liés. Au contraire, ça ne prend qu’un seul champ de compétences qui est entravé pour que la doctrine s’applique. [...] Parce que dans l’arrêt Mascouche, c’était 100 % sur des terres privées. Le débat était de savoir : est-ce que la procédure... le régime provincial a entravé la compétence du fédéral dans ce que si c’étaient les aéroports ? Et puis la réponse au niveau de la Cour

¹⁵⁸ Day-6-FRA, p.59(11-18).

supérieure, c'était : oui. Il n'y a absolument personne, ni du PGQ ni du PGC ni le juge qui a essayé de soulever que, parce qu'on était sur des terres privées, les doctrines constitutionnelles ne s'appliquaient pas."¹⁵⁹

- 205 Responding to the Tribunal, Me Duchaine explained that the question is whether Québec's EA hindered the application of CEAA 2012:

*“Me Duchaine.- [...] [P]our répondre à votre question très précisément, la doctrine constitutionnelle, on l'applique lorsqu'il y a une entrave à une compétence fédérale. On doit regarder le lien entre l'activité qui est faite et la compétence fédérale.”*¹⁶⁰

- 206 She explained that this occurred here because Québec's EA allowed it to pre-empt and frustrate the federal EA on matters of exclusive federal jurisdiction:

“Me Duchaine.- [...] en ayant cette opportunité de bloquer un projet, ça... C'est ça, le fameux conflit d'objet. C'est-à-dire que ça... Il faut que le fédéral ait le dernier mot, essentiellement, donc il faut que ce soit le fédéral qui décide s'il va de l'avant ou pas avec le projet qui est dans son champ de compétences. Alors, à partir du moment où il y a un régime discrétionnaire qui peut se terminer par non, malgré, comme je vous ai dit, malgré toutes les tentatives du procureur général de dire que, dans un fédéralisme coopératif, il n'appliquerait pas ce droit de dire non et qu'il permettrait toujours un projet, je veux dire, la Cour d'appel est arrivée à la conclusion que ça serait une inversion des doctrines et que ça permettrait finalement au provincial d'avoir le dernier mot sur un projet de compétence fédérale. Donc, ce qu'il faut déterminer, c'est : est-ce qu'il y a un projet de compétence fédérale ici ? Pas nécessairement que c'est une installation portuaire. Et, là, dans l'optique où on le regarde, dans un contexte où c'est un Projet qui veut exporter du GNL à l'extérieur du Québec, je veux dire, il faut qu'on soit capable d'acheminer le GNL dans les navires pour qu'il

¹⁵⁹ Day-6-FRA, p.60(22)-61(6); p.63(22-48) (answering a question from the Tribunal).

¹⁶⁰ Day-6-FRA, p.63(31-33).

*puisse partir. L'équipement de liquéfaction sur les terres contrôlées par le port, c'est ce qui permet de faire cette activité. **Donc, dans la théorie de la doctrine constitutionnelle de prépondérance fédérale, on ne peut pas appliquer un régime d'autorisation discrétionnaire qui pourrait permettre au provincial de dire non. C'est exactement ce qui s'est passé dans GNL Québec.***"¹⁶¹

- 207 She further explained that Québec's EA also encroached on federal jurisdiction over maritime navigation:

***“Me Hébert.-** Donc, le Projet Énergie Saguenay, je pense, est un très bon exemple où l'application de la procédure d'évaluation et d'examen des impacts sur l'environnement du Québec sur l'entreprise locale, l'usine de liquéfaction de gaz naturel, pourrait avoir un effet accessoire sur la navigation.*

***Me Duchaine.-** Alors si, par effet accessoire, on parle d'un effet qui est tel qu'on entrave le cœur de la compétence fédérale de la navigation, la réponse est : non, ça ne peut pas se faire. C'est exactement la doctrine constitutionnelle.*"¹⁶²

- 208 The Hearing showed that, in fact, the Québec Government **knew** that, by pursuing its own EA, it was unlawfully encroaching on the exclusive federal power regarding maritime navigation.
- 209 Mr Duquette, who has held various roles within the MELCC since 2007¹⁶³ and has participated in more than 60 EAs,¹⁶⁴ but who is not a lawyer,¹⁶⁵ sought to argue for the first time at the Hearing that the MELCC could circumvent any constitutional limitation in relation to navigation by basing its decision on the protection of beluga whales:

¹⁶¹ Day-6-FRA, p.68(41)-69(13).

¹⁶² Day-6-FRA, p.72(41-47).

¹⁶³ **RWS-5**, p.2 (¶3); Day-5-FRA, p.79(27-33).

¹⁶⁴ **RWS-5**, p.3 (¶6); Day-5-FRA, p.79(37-41).

¹⁶⁵ Day-5-FRA, p.79(25-26).

“Me Barrier.- *Donc, la navigation était sous juridiction fédérale, et vous ne pouviez imposer aucune condition à l’initiateur, de ce fait ?*

M. Duquette.- *En fait, ce n’est pas tout à fait exact. Oui, la navigation est de juridiction fédérale, mais, évidemment, le promoteur ne pouvait pas nécessairement être responsable puisqu’il mentionnait ne pas être l’armateur... j’oublie peut-être les termes, là... mais qui n’était pas le transporteur par navire. Mais, nous, à notre niveau, c’était au niveau de la protection du béluga qui est une espèce à statut menacé dans son environnement estival. Donc, c’est à ce niveau-là que la navigation entrainait en jeu.”*¹⁶⁶

210 Me Duchaine described this position as a shocking disregard for the Constitution:

“Me Duchaine.- [...] *J’ai entendu les explications que M. Duquette a données à la question de Me Douglas concernant la navigation et la compétence fédérale. J’ai été personnellement choquée d’entendre que le provincial dit : ‘Oui, je n’ai pas de compétence pour protéger... pour intervenir sur la navigation. Alors, je vais intervenir en imposant des conditions de bruit pour protéger l’habitat du béluga.’ [...] Ça va à l’encontre de toutes les doctrines constitutionnelles. Ça empêche le fédéral de gérer la navigation sur... qui est sa propre compétence.”*¹⁶⁷

¹⁶⁶ Day-5-FRA, p.103(45)-104(6); **C-0490-FRA**, p.4 (“Michel Duquette précise toutefois que dans une éventuelle autorisation du Québec, il n’y aura pas de conditions pour le promoteur sur les aspects de navigation, puisque la navigation est de compétence fédérale. Ces aspects seront tout de même pris en compte dans l’analyse de l’acceptabilité environnementale du projet et pris en compte dans la future décision du gouvernement du Québec sur le projet.”).

¹⁶⁷ Day-6-FRA, p.47(44)-48(2); p.78(15-22) (“**Me Duchaine.-** Mais sur l’élément, par exemple, des bélugas, où j’ai... on fait l’analyse, je vous donne les informations, à l’effet, que le fédéral, dans des cas similaires, dans la même région, même, autorisait des projets, en faisant une analyse scientifique complètement différente de celle qu’on retrouve dans l’analyse... l’analyse provinciale. Donc, le provincial, en prenant... en s’arrogeant cette compétence-là, et en refusant l’autorisation basée sur ce motif-là, qui est un motif qui est illégal selon moi, il empêchait le fédéral de prendre sa propre décision. Et les exemples qu’on a dans les autres cas similaires, c’est des cas où la décision est différente de celle du Québec.”).

- 211 While Me Yergeau attempted to argue that Québec has prerogatives to protect the beluga whales of the St. Lawrence Estuary,¹⁶⁸ he conceded that Québec could **not** impose navigation restrictions to protect belugas:

“Me Barrier.- Est-ce que vous êtes quand même d'accord sur le fait que le Québec ne peut pas imposer des conditions sur la navigation pour protéger le béluga ?

*Me Yergeau.- Le Québec ne peut pas imposer de conditions. Le Québec n'a pas à imposer de conditions dans le dossier que j'ai analysé.”*¹⁶⁹

- 212 As for Ms Powell, she conceded that her testimony on the constitutional doctrines amounted to a legal opinion on Québec law, even though she is not admitted to practice in Québec,¹⁷⁰ which she could not deny is illegal under Québec law.¹⁷¹ Her opinions on federal paramountcy and interjurisdictional immunity must therefore be disregarded.
- 213 In sum, the Hearing left no doubt that Québec's EA unlawfully encroached on exclusive federal powers.

3.2.1.4 The Québec Government decided to initiate its own EA based on political and sovereignty, not legal, grounds

- 214 The Hearing revealed the true motives behind the Québec Government's decision to impose its own EA, despite having no power to do so.
- 215 Ms Gagnon, who has worked within the MELCC in various roles since 2013,¹⁷² and is currently an assistant deputy director of one of the MELCC's divisions,¹⁷³ acknowledged Québec's longstanding practice of asserting jurisdiction over EAs for projects within its territory:

¹⁶⁸ Day-7-FRA, p.48(45)-49(17).

¹⁶⁹ Day-7-FRA, p.49(18-21).

¹⁷⁰ Day-8-ENG, p.2114(14-21).

¹⁷¹ Day-8-ENG, p.2114(22)-2115(8).

¹⁷² **RWS-22**, p.2 (¶5); Day-4-FRA, p.96(30)-97(7).

¹⁷³ **RWS-22**, p.1 (¶3); Day-4-FRA, p.97(8-12).

“Me Barrier.- *Et est-ce que vous étiez au courant de cette... on va dire velléité ou revendication du Québec de faire en sorte qu’il n’y ait qu’une seule évaluation fédérale... une seule évaluation environnementale – pardon ?*

Mme Gagnon.- *Oui. C’est bien connu, au Québec, le Québec considère avoir l’expertise en matière d’évaluation environnementale, avoir une procédure qui est reconnue et qui fait le travail. Donc, le Québec revendique depuis de nombreuses années son... sa capacité à faire les évaluations dans l’optique d’éviter le dédoublement des évaluations environnementales.*”¹⁷⁴

216 She confirmed that since 1995 Québec has viewed federal EAs as redundant:

“Me Barrier.- *Je voudrais qu’on prenne la page 1 du mémoire, et ça, ça va confirmer... Ça commence par ‘Depuis 1995’... voilà : ‘Depuis 1995, date d’entrée en vigueur de la première loi fédérale sur l’évaluation environnementale, l’expérience nous montre que le processus fédéral dédouble inutilement le régime québécois qui lui est antérieur. Ce dédoublement des procédures, notamment pour des projets de compétence québécoise comme des projets énergétiques et miniers, occasionne de nombreux problèmes, tels que la coordination des échéanciers, l’imposition aux initiateurs de projets de deux séries de conditions et le contrôle du gouvernement fédéral sur le développement de projets provinciaux en raison des possibles répercussions dans un domaine de compétence qui est accessoire à la réalisation du projet lui-même [...].’*

Est-ce que ça reflète ce que vous disiez sur le... cette revendication du Québec de pouvoir garder cette compétence sur les projets énergétiques et miniers, notamment, qui sont situés sur son territoire ?

Mme Gagnon.- *Effectivement, c’est un des éléments... oui.*”¹⁷⁵

¹⁷⁴ Day-5-FRA, p.38(22-29).

¹⁷⁵ Day-5-FRA, p.38(39)-39(7).

- 217 Although interrupted by the Respondent's counsel,¹⁷⁶ this testimony confirms that Québec's actions in the case of GNLQ aligned with its policy of asserting primacy over EAs.
- 218 Me Duchaine, who has over 35 years of practice in this field before the Canadian courts including on constitutional law matters,¹⁷⁷ explained that the Respondent's arguments in this arbitration to justify a Québec EA, including the reliance on cooperative federalism, mirrors the unsuccessful arguments repeatedly advanced by the Québec Attorney-General ("PGQ") to assert jurisdiction over projects falling within federal jurisdiction:

“Me Duchaine.- [...] Procureur général c. IMTT Québec. C’est une décision de la Cour d’appel qui fait suite à plusieurs décisions de la Cour suprême en matière de loi sur la protection du territoire agricole ou de réglementation de zonage. Et, cette fois-ci, le procureur général essayait d’écarter l’application des doctrines constitutionnelles en avançant justement le fédéralisme coopératif pour dire : étant donné que l’environnement n’est pas une compétence qui est nommément attribuée dans les articles 91 et 92, on pouvait l’étendre. Et, du fait que l’activité se passait au Québec, la loi québécoise et la procédure québécoise trouvaient application. Dans IMTT, je vous citais des passages, la Cour d’appel écarte cette façon de faire et cette façon de penser. Quand je vous dis que le droit canadien n’est pas à cet effet, je vous cite Ville de Mascouche c. Canada Association. C’est un dossier que j’ai personnellement mené jusqu’en Cour d’appel. Dans ce dossier, le procureur général du Québec essayait le même argument que dans IMTT, cette fois-ci pour la construction d’une piste d’aérodrome. Et la grosse différence entre IMTT et Canada Association, c’est qu’on était à 100 % sur des terres privées. Le même argument a été présenté. Ces deux dossiers ont progressé de la même façon : Cour supérieure, Cour d’appel. On a été entendu dans les deux dossiers par le même banc. Les deux décisions devaient être rendues en même temps. Il y a eu un règlement qui est intervenu dans le dossier

¹⁷⁶ Day-5-FRA, p.39(23-33).

¹⁷⁷ Day-6-FRA, p.39(22-28).

de Canada Association, donc vous n'avez pas l'éclairage de la Cour d'appel, parce que le règlement est intervenu, mais comprenez que, en ce qui me concerne, quand je vous parle de ce dossier, c'est un dossier que j'ai fait main dans la main avec les procureurs fédéraux. Et j'avais le procureur général de l'autre côté. On a entendu... Je suis très familière, finalement, avec la position de l'un et l'autre, et c'est ce qui me permet de vous dire que ce que vous voyez ici, ou ce qu'on vous présente ici, c'est la position que le procureur général du Québec tente de faire devant les tribunaux canadiens, et non pas la position du procureur général du Canada, qui est en opposition avec cette position.

*Ce qui me permet de vous dire que c'est très surprenant de lire ce qui vous est présenté ici, parce que, en ce qui me concerne, ça ne correspond pas à l'application du droit.*¹⁷⁸

- 219 Me Yergeau showed at the Hearing that he shares the Québec Government's "souverainiste" approach. He argued that certain projects located in Québec should have been assessed by the MELCC, although all of them were subject to a single federal EA:

Me Barrier.- *Est-ce que vous avez connaissance du projet de terminal en rive nord qui se situe sur la rive opposée à celle du Projet Énergie Saguenay ? [...] Et c'est bien un projet qui est situé au Québec, n'est-ce pas ?*

Me Yergeau.- *Oui, oui.*

Me Barrier.- *Et si je suis bien votre argument, du coup, le terminal en rive nord devait aussi entrer dans la compétence provinciale puisqu'il était situé sur le lit d'une rivière.*

Me Yergeau.- *Oui.*

Me Barrier.- *Et pourtant, ce projet a fait l'objet d'une évaluation uniquement fédérale, n'est-ce pas ?*

¹⁷⁸ Day-6-FRA, p.42(21)-43(2).

Me Yergeau.- *Oui, oui.*

Me Barrier.- *Et la même chose s'est produite pour le projet d'expansion du port de Montréal, à Contrecoeur; il a été aussi analysé uniquement par le fédéral ?*

Me Yergeau.- *Exactement.*

Me Barrier.- *Et de même pour le projet Laurentia, qui était encore un projet situé au Québec, qui a été examiné uniquement par le fédéral également ?*

Me Yergeau.- *Oui.*¹⁷⁹

- 220 Me Yergeau's position undermines his credibility as an expert.
- 221 In sum, the GNLQ Project became a casualty of Québec's political objective to control the EA process for projects within its territory, an objective the Respondent now seeks to defend before this Tribunal by relying on arguments advanced by the Québec Government – against the Federal Government – and that Canadian courts have consistently rejected.

3.2.2 The Agency and the MELCC failed to coordinate a joint EA, contrary to the Canada-Québec Agreement and the representations made to GNLQ

- 222 The Federal and Québec Governments failed to apply the Canada-Québec Agreement, which establishes a default framework for joint EAs where jurisdiction overlaps.¹⁸⁰

¹⁷⁹ Day-7-FRA, p.49(22-38).

¹⁸⁰ Reply, p.48 (¶143).

3.2.2.1 The MELCC and the Agency acknowledged that the Canada-Québec Agreement applied to the GNLQ Project

- 223 In November 2015, both the MELCC and the Agency understood that the Canada-Québec Agreement applied,¹⁸¹ as the Respondent's witnesses and Me Yergeau confirmed.¹⁸²
- 224 Ms Bélanger confirmed that a December 2015 internal Agency document stated that the Canada-Québec Agreement applied to the GNLQ Project.¹⁸³ Ms Powell in turn could not deny the relevance of this document and conceded that, although Mr Northey had relied on it (to opine that the Agency advised in December 2015 that the Agreement would apply), she had not even referred to it in her reports.¹⁸⁴
- 225 Ms Gagnon confirmed that, between 2004 and 2012, the Agreement was applied systematically:

“Me Barrier.- [...] Vous évoquez l’Entente entre le Canada et le Québec et vous identifiez ensuite au paragraphe 34 de l’attestation qu’entre 2004 et 2012, 88 projets ont été examinés par le biais d’une analyse environnementale coopérative, c’est bien ça ?

Mme Gagnon.- *Exact.*

Me Barrier.- *Est-ce que ce serait juste de dire qu’entre... enfin, dans cette période-là que vous mentionnez, entre 2004 et 2012, l’Entente était appliquée de manière quasiment systématique pour les projets qui faisaient l’objet d’un examen à la fois par le fédéral et le provincial ?*

¹⁸¹ Reply, p.51 (¶152); Day-1-ENG, p.39(11)-41(11); C-Presentation, p.34 (Summarising the position expressed at the time by the Agency and the MELCC that the GNLQ Project would be subject to a joint EA under the Canada-Québec Agreement).

¹⁸² Day-4-ENG, p.936(22)-937(3)/Day-4-FRA, p.25(18-20); Day-5-FRA, p.82(25-27); p.18(3)-19(6), p.23(15-33); Day-7-FRA, p.53(1-2) (“**Me Yergeau.-** [...] *C’était lorsque le projet... lorsque le projet... l’avis de projet a été donné, l’Entente, la nouvelle Entente de 2010 était théoriquement applicable.*”).

¹⁸³ Day-4-ENG, p.941(3-8)/Day-4-FRA, p.26(39-43); **RN-0190-FRA**, p.16.

¹⁸⁴ Day-8-ENG, p.2064(21)-2066(13); **CER-2 (Second)**, p.28 (¶65).

Mme Gagnon.- *Oui. En fait, c'était vraiment dans les bonnes pratiques d'avoir une communication bien établie avec l'Agence et avec le fédéral et systématiquement, aussitôt qu'il y avait un projet, il y avait dans nos façons de faire une communication à l'Agence pour... au fédéral pour l'informer qu'on avait un projet, et voir si ce projet-là était aussi assujetti au processus fédéral.*"¹⁸⁵

226 As she further confirmed, the MELCC and Agency applied the Agreement in 2016, *i.e.*, after the initiation of the federal and Québec EAs for the GNLQ Project, in the Akasaba project.¹⁸⁶

227 Her evidence was consistent with the testimony of Me Duchaine:

"Me Duchaine.- [...] *Donc, one project, one evaluation : c'est comme ça qu'on nous le présente. Et vous avez eu des témoignages qui confirmaient que, que ce soit en vertu du libellé exact de l'Entente de 2010 ou pas, on applique les principes de l'Entente systématiquement. Donc, il y a vraiment un effort qui est fait, et c'est un effort qui est souhaitable, qui est louable. Je veux dire, donc... si vous me demandez quelle est la force obligatoire, c'est écrit dans l'Entente qu'elle n'est pas obligatoire. Mais ce qu'on constate dans les faits, c'est que les parties l'appliquent, les deux paliers l'appliquent.*"¹⁸⁷

228 Crucially, the purpose of joint assessments is to preserve constitutional boundaries and avoid jurisdictional overreach. That is why the Agreement was applied systematically. In Me Duchaine's words:

"Me Duchaine.- [...] *Une analyse collaborative, c'est une analyse qui est à l'avantage de toutes les Parties. C'est-à-dire, au niveau fédéral comme au niveau provincial, on arrime le processus pour qu'il n'y en ait pas un qui arrive avant l'autre, pour qu'il n'y en ait pas un qui commence à empiéter sur les compétences de l'autre. Donc, on s'arrange pour que ce soit coordonné et synchronisé. Et puis, pour l'initiateur du projet, ça permet de faire*

¹⁸⁵ Day-5-FRA, p.14(6-18).

¹⁸⁶ Day-5-FRA, p.18(8)-19(6).

¹⁸⁷ Day-6-FRA, p.82(1-8).

une analyse environnementale conjointe, qui doit tenir compte des éléments soulevés par les deux paliers de gouvernement. Sachant que, une fois cette analyse faite, les décisions qui vont être prises par les différents paliers de gouvernement vont respecter leurs champs de compétences respectifs. Donc, c'est une façon logique de procéder.”¹⁸⁸

229 Despite this, in the case of GNLQ, the MELCC and the Agency failed to collaborate in accordance with the Agreement.

3.2.2.2 The MELCC and the Agency decided, or were instructed, not to conduct a joint EA

230 Documents obtained through document production established that Québec refused to harmonise the two EAs.¹⁸⁹ This evidence was not rebutted at the Hearing.

231 The evidence at the Hearing confirmed that, although there were communications between the Agency and the MELCC, they did not come close to what was required under the Canada-Québec Agreement, or even the “principles” of the Agreement. In particular:

- The MELCC and the Agency failed to consult each other “as early as possible” to ensure the provision of the information needed to establish their EA responsibilities.¹⁹⁰ Ms Gagnon alleged that such communications existed, but none were produced in the arbitration.¹⁹¹ Either they do not exist, which would be, on Ms Gagnon’s admission,

¹⁸⁸ Day-6-FRA, p.45(1-11); Duchaine Presentation, p.29.

¹⁸⁹ Reply, p.57 (¶170); C-Presentation, p.39; **C-0489-ENG**, p.1.

¹⁹⁰ Reply, p.48 (¶145); **RN-0010-ENG**, p.6 (cl.5(1)).

¹⁹¹ Day-5-FRA, p.19(11-19) (“**Me Barrier.-** Il n’y a pas au dossier de notification au moment de la réception par le ministère de l’Environnement de l’avis de projet du projet Énergie Saguenay de notification à l’Agence de la réception du... de cet avis de projet. **Mme Gagnon.-** En toute transparence, je croyais qu’il y en avait eu, mais là, je n’ai pas accès naturellement au dossier. Donc, je ne peux pas affirmer ou confirmer quoi que ce soit. **Me Barrier.-** Mais selon vous, il y a eu une telle notification ? **Mme Gagnon.-** De mémoire, j’avais l’impression qu’il y en avait eu une, comme ça se fait systématiquement.”).

contrary to normal practice,¹⁹² or they exist and they should have been produced in response to the Claimant's document production request no. 21.¹⁹³ Either way, the Tribunal should infer from the absence of documents on record that the MELCC and the Agency did not comply with the Agreement.

- The MELCC and the Agency failed to "advise" GNLQ "at the earliest opportunity, about the potential for a cooperative environmental assessment".¹⁹⁴ Ms Gagnon conceded that the MELCC and the Agency drafted a letter informing GNLQ that the Agreement would apply and could not explain why that letter was not sent.¹⁹⁵
- The MELCC ignored its obligation to cooperate with the Agency until the latter decided to initiate a federal EA.¹⁹⁶
- The MELCC and the Agency failed to appoint a "cooperative environmental assessment committee"¹⁹⁷ in charge of managing the joint EA and ensuring that GNLQ provided the information required to that effect.¹⁹⁸ The Respondent's witnesses contradicted each other on this point. Mr Duquette and Ms Gagnon attempted to suggest that such

¹⁹² Day-5-FRA, p.17(39)-18(2) ("**Mme Gagnon.**- *En fait, systématiquement, comme les principes de l'Entente étaient bien établis dans nos processus, donc, il faut comprendre que la procédure, c'est un cadre très défini, d'application étape par étape. On a même un cahier de procédure qui dicte les étapes à accomplir. Les bonnes pratiques de communication avec l'Agence qui étaient inscrites dans l'Entente à l'époque se sont poursuivies. Donc, systématiquement, quand on recevait un projet, on informait l'Agence. L'échange d'informations, la coordination dans la mesure du possible, tout... toutes ces bonnes pratiques ont été maintenues, mais, effectivement, comme je le mentionnais, l'Entente en tant que telle référerait à une autre loi qui n'était pas celle qu'on appliquait à ce moment-là, mais qui était applicable.*").

¹⁹³ Request No. 21: "To the extent not covered by Request 20 above, documents exchanged between the Agency and the MELCC (named MDDELCC between 11 November 2015 and 14 March 2016) evidencing their consultation or cooperation on the environmental assessment of the GNLQ Project." (PO4, Annex A, p.81).

¹⁹⁴ Reply, p.48 (¶145); **RN-0010-ENG**, p.6.

¹⁹⁵ Day-5-FRA, p.21(2-6) ("**Me Barrier.**- *Bon. Est-ce que vous avez eu connaissance de ce projet de lettre, à l'époque ?* **Mme Gagnon.**- *J'ai vu le projet de lettre dans le présent processus, mais je ne me rappelais pas avoir travaillé ou non sur ce projet de lettre à l'époque, et je ne me rappelle pas non plus pourquoi elle n'a pas été transmise. Donc voilà.*").

¹⁹⁶ Reply, p.49 (¶147); **RN-0010-ENG**, p.8 (cl.7(3)).

¹⁹⁷ A requirement under the Canada-Québec Agreement; **RN-0010-ENG**, p.9 (cl.10).

¹⁹⁸ Reply, p.49 (¶148); **RN-0010-ENG**, p.9 (cls.10-15).

a committee was constituted,¹⁹⁹ although Ms Gagnon could not even remember any exchange of correspondence between its members.²⁰⁰ Ms Bélanger, however, conceded that “*dans le cas du Projet Énergie Saguenay, il n’y a pas eu de réel comité conjoint de coopération d’établi, ni de directive conjointe, ni d’échéancier conjoint.*”²⁰¹

- The MELCC and the Agency failed to notify 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.”²⁰² Ms Bélanger conceded that the Agency did not go to the trouble of asking the MELCC whether it wanted a joint review panel.²⁰³ Mr Duquette acknowledged that the Agency was not even invited to participate in the BAPE hearings.²⁰⁴

232 On cross-examination, Me Duchaine confirmed that the correspondence between the MELCC and the Agency fell far short of the cooperation required under the Agreement:

“**Me Duchaine.**- Écoutez, je ne nie pas qu’il y ait eu des échanges d’informations. Mais quand je parle d’études conjointes et collaboratives, ce n’est pas ça. Donc, c’est plus... C’est plus que quand on s’envoie des courriels avec de l’information, ici et là. C’est un travail de coordination pour synchroniser les deux évaluations environnementales. Ce n’est pas du tout ce que vous me montrez.”²⁰⁵

¹⁹⁹ Day-5-FRA, p.82(34-41); p.20(5-26).

²⁰⁰ Day-5-FRA, p.20(38)-21(1).

²⁰¹ Day-4-FRA, p.41(8-10).

²⁰² **RN-0010-ENG**, p.12 (cl.14); Reply, p.50 (¶148(iii)).

²⁰³ Day-4-ENG, p.955(21)-956(10)/Day-4-FRA, p.32(20-30).

²⁰⁴ Day-5-FRA, p.86(4-6) (“**Me Barrier.**- Et est-ce que, à votre connaissance, l’Agence a été finalement invitée à participer aux audiences du BAPE ? **M. Duquette.**- Non, l’Agence n’a pas été invitée à participer à l’audience en personne.”).

²⁰⁵ Day-6-FRA, p.84(5-9).

233 Although Ms Powell had opined that the level of cooperation between the Quebec and federal authorities “d[id] not arise to any level of wrongdoing”, she conceded that her opinion rested on a single 2019 email:

“[**Ms de Germiny.-**] Okay. But, putting aside practice, and, in this case, your testimony today is that you don’t recall providing any other evidence [other than RN-205] to support your conclusion that there was collaboration, there was cooperation?”²⁰⁶

[**Ms Powell.-**]. Correct.”²⁰⁶

234 In any case, both Mr Duquette and Ms Bélanger acknowledged that all communications between the MELCC and the Agency ceased as of March 2021, after Minister Charette issued the three conditions and the MELCC issued its Report.²⁰⁷

235 Yet, as Me Duchaine explained, the most crucial step under the Agreement, was the obligation to coordinate the **decisions** of the Federal and the Québec Governments:

“**Me Duchaine.-** [...] *ce que l’Entente prévoit, c’est qu’au de la prise de décision, les deux paliers doivent s’informer du moment de la décision pour que les décisions soient rendues de façon synchronisée.*”²⁰⁸

236 No such coordination occurred, as Mr Duquette acknowledged:

“**M. Duquette.-** *Eh bien, à ma connaissance, je ne crois pas que le gouvernement du Québec ait coordonné sa décision avec le gouvernement fédéral. C’est une décision qui ne relève que du gouvernement du Québec. Il n’y avait pas lieu de coordonner les décisions, à ce que j’en sais.*”²⁰⁹

²⁰⁶ Day-8-ENG, p.2071(9-14); p.2069(1)-2071(8); **RN-0205-FRA**.

²⁰⁷ Day-5-FRA, p.86(12)-87(44); Day-4-ENG, p.978(9)-979(7)/Day-4-FRA, p.40(27-42).

²⁰⁸ Day-6-FRA, p.74(5-7).

²⁰⁹ Day-5-FRA, p.84(24-27).

237 Ms Bélanger not only admitted that there was no coordination on the timing and announcements of the final decisions of the two EAs,²¹⁰ but also that it was the first time that the decisions of the Québec and Federal Governments were so desynchronised.²¹¹

3.2.3 The Federal Government failed to comply with its obligation to collaborate with the Québec Government to conduct a single federal EA or a joint EA

3.2.3.1 The Agency did not discharge its mandatory duty to offer to consult and cooperate pursuant CEAA 2012

238 It is undisputed that Section 18 of CEAA 2012 required federal authorities to offer to consult and cooperate with Québec regarding the GNLQ Project.

239 The Agency failed to do so, enabling Québec to take unilateral action, including rejecting the Project without consulting the Federal Government, thereby prejudging the outcome of the federal EA.²¹²

240 Mr Northey confirmed at the Hearing that the Agency breached its Section 18 obligation, which directly resulted in the initiation of two separate EAs:

“[**Mr Northey.**-] Ms. Powell has provided no evidence that the Agency at the time considered the Section 18 duty or communicated any offer to cooperate to Québec after the Agency decided the Federal EA was required. The result of this failure was two separate EAs.”²¹³

241 By contrast, the North Shore Project (located across the site of the GNLQ Project) was subject to a single federal EA,²¹⁴ with which the MELCC

²¹⁰ Day-4-ENG, p.969(9-15)/Day-4-FRA, p.37(18-26).

²¹¹ Day-4-ENG, p.982(13-20)/Day-4-FRA, p.42(1-6).

²¹² Reply, p.53 (¶¶156-157); Day-4-ENG, p.942(22)-944(2)/Day-4-FRA, p.27(25-43); Day-7-ENG, p.1857(14-21); Northey Presentation, p.4.

²¹³ Day-7-ENG, p.1858(8-12); Northey Presentation, p.4-5.

²¹⁴ **C-0215-ENG**, p.3; Day-7-ENG, p.1858(14)-1859(9); Northey Presentation, p.6.

collaborated (without initiating its own EA).²¹⁵ This is how the EA of the GNLQ Project should have been conducted.²¹⁶

- 242 The Respondent has not addressed this breach. Ms Powell confirmed that she had not explained why she disagreed with Mr Northey's conclusion that Section 18 was breached:

“[Ms de Germiny.-] [...] And in your Second Report, you do not address Mr. Northey's conclusion that those two letters [letters from the Agency to the Québec authorities dated 20 November 2015, GB-0016-FRA, and 15 January 2016, GB-0018-FRA] did not satisfy the duty to offer to consult and cooperate under Section 18, right?”

[Ms Powell.-] I didn't address everything he raised. I narrowed it to certain issues, but I didn't – the fact that I didn't address it, I guess, I would say doesn't mean that it changes my view from the First Opinion. So I didn't.

[...]

[Ms de Germiny.-] And, to be clear, he is finding a violation of Section 18 of CEAA 2012, but you did not respond to him on that point?

[Ms Powell.-] I did respond in the First Report.

[Ms de Germiny.-] You did not respond, though, to his explanation as to why he reached his conclusion?

[Ms Powell.-] I don't believe that I did.”²¹⁷

²¹⁵ **C-0215-ENG**, p.3 (“The Project did not follow[] the Provincial environmental assessment process however a collaborative scenario has been established with the [MELCC] for the port expansion projects currently being assessed by the Agency, including that of the Saguenay Port Authority.”).

²¹⁶ Day-1-ENG, p.86(17)-87(9); Reply, p.42 (¶¶132-141).

²¹⁷ Day-8-ENG, p.2062(7)-2063(2).

243 Ms Powell's silence speaks for itself. There has been no credible rebuttal of Mr Northey's opinion:

- Ms Bélanger could not identify any correspondence invoking Section 18 or offering cooperation.²¹⁸
- She confirmed that no emails existed addressing the modalities of joint work arrangements.²¹⁹
- Ms Powell identified only three communications from 2015 to 2016, none of which mentioned Section 18 or offered cooperation.²²⁰

244 As Mr Northey explained, this breach had material consequences for the conduct of the EA:

“**[Mr Northey.-]** What are the repercussions of this? **Section 18 of CEAA was designed to avoid exactly what happened here:** Two Governments pursuing separate EAs. Had there been a Federal only EA or a Joint Federal Provincial Joint Panel, there would have been one set of Guidelines, one EA Report, and coordinated decision-making.

Coordinated decision-making means two Governments determining together the timing of decisions, who decides what, and who regulates each of the predicted effects and required mitigation. This coordination avoids regulatory gaps and duplication.”²²¹

245 Had the Agency complied with Section 18, it is more likely than not that the process and outcome would have been materially different. In particular, it is more likely than not that the process would not have resulted in a wrongful decision by the Québec Government, followed by an equally wrongful decision by the Federal Government. It would likely have been consistent with the approval of every LNG project in Canada over the past three decades.

²¹⁸ Day-4-ENG, p.943(18)-944(10)/Day-4-FRA, p.27(39)-28(7).

²¹⁹ Day-4-ENG, p.945(7)-942(19)/Day-4-FRA, p.28(22)-29(2).

²²⁰ Day-8-ENG, p.2061(13-19), 2064(21)-2066(13).

²²¹ Day-7-ENG, p.1860(6-17); Northey Presentation, p.8.

3.2.3.2 The Minister of Environment did not refer the GNLQ EA to a joint review panel under CEAA 2012

246 It is undisputed that, under Section 38 CEAA 2012, the Minister of Environment may refer an EA to a joint review panel where it is in the public interest, based on:

- the potential for the project to cause significant adverse environmental effects,
- public concerns about those effects, and
- the possibility of cooperating with another jurisdiction that has responsibilities in connection with the effects of the project.²²²

247 Ms Bélanger confirmed that a joint federal provincial EA could have been conducted by a joint review panel appointed by the MELCC and the Agency.²²³

248 Here, the Minister should have referred the GNLQ Project to a review panel. Ms Powell conceded that she did not dispute Mr Northey's conclusion in this regard:

“[Ms de Germiny.-] Mr. Northey goes on to say that he has not seen and this is still at Paragraph 66 [of Mr Northey's Second Report] that he has not seen any document where the Agency discussed with Québec the Federal Minister's duty to address whether there would be a Federal Review Panel. And in your Second Report, you did not dispute that statement, did you?

[Ms Powell.-] I didn't address it, no.

[Ms de Germiny.-]. Have you seen any documents between the Agency and Québec discussing Section 38?

[Ms Powell.-] I have not.

²²² Day-4-ENG, p.950(8)-951(16)/Day-4-FRA, p.30(25-36); Day-8-ENG, p.2066(4)-2061(2); CER-2 (Second), p.28 (¶66).

²²³ Day-4-ENG, p.947(2-12)/Day-4-FRA, p.29(6-15).

[**Ms de Germiny.-**]. And Mr. Northey concludes still at Paragraph 66, that: 'if it was clear to the Agency that Québec EA was proceeding and would include a public hearing, **the Federal Minister should have referred the Federal EA to a Review Panel under Section 38** and reached agreement with Québec on a Joint Federal Provincial review.'

And, again, **you do not dispute that conclusion**, do you, Ms. Powell?

[**Ms Powell.-**] That the Minister should have? **I didn't dispute it at the time, no.**"²²⁴

- 249 Mr Northey noted that there had been joint federal-provincial EAs for the Cacouna LNG Project (which was on federal port lands on the St. Lawrence River) and that, here:

"[**Mr Northey.-**] [...] [N]othing in CEAA [2012] inhibited the creation of a Joint Committee between Canada and Québec, yet, there was no such Committee [in relation to the GNLQ Project].

Given the numerous CEAA provisions governing early steps in the process, **I cannot explain why there is not much more information on how the Agency implemented each of these early steps without delivering a single EA.**

I have done CEAA cases on access to records, I cannot remember ever seeing such gaps in the record."²²⁵

- 250 Mr. Northey stressed that the limited cooperation on the GNLQ Project did not fulfil the Respondent's obligations under Canadian law:

"[**Mr Northey.-**] [...] Because there was pressure on the Minister under Section 38 [CEAA 2012] to decide whether there was to be a Federal panel review within 60 days of Jan 15, and there was that notice that I've taken you to of November, it seemed to me two points: Empirically and legally and – I guess three – logically,

²²⁴ Day-8-ENG, p.2067(15)-2068(14).

²²⁵ Day-7-ENG, p.1859(17)-1860(4); Northey Presentation, p.7.

something, **a lot of things needed to happen from the very first notice** where no EA was required in November, to this process of Québec decides something in December, Feds decide something in January, and then we have still obligations triggered in January of whether there's to be a Federal only EA or a joint EA, in terms of that. [...]

On the right side of the slide [Northey Slide 7] I've given you excerpts of what happens, but **what happens for a joint EA is the Minister Federally, and the Minister Provincially get together and agree on terms of reference, on how to appoint. They also agree on the substantive question of what the EA will look at. They look at who is going to be on the Panel.** Is it more of a Provincial two panel, so to speak.

So there is [...] a lot that I would have expected very early in this to explain what happened [...]."²²⁶

- 251 Furthermore, as Ms Bélanger confirmed, proponents have no role in deciding whether a joint review panel is established²²⁷ and accordingly, GNLQ was not consulted:

"[Ms de Germiny.-] So we established a moment ago that, that under [CEAA], this proponent does not have a say in deciding whether there will be a Joint Review Panel. But putting aside the law for a moment, the Agency did not ask GNLQ whether it wanted a review panel; right?

Mme Bélanger.- *Exact.*

[Ms de Germiny.-] There is no letter from the Agency to GNLQ saying there are various options, either we do a single federal EA or we do separate provincial and Federal EAs, or we do a Joint

²²⁶ Day-7-ENG, p.1924(18)-1925(21); p.1922 ("[Mr Northey.-] [...] I'm not saying there were no examples [of cooperation], but is that what a cooperative EA is? No, I don't think that is sufficient."); Northey Presentation, p.7.

²²⁷ Day-4-ENG, p.951(17-22)-952(1-7)/Day-4-FRA, p.30(41)-31(4).

Review Panel. There is no such letter; right? Because they don't have a say.

Mme Bélanger.- *Non, il n'y a pas de lettre comme ça. Ce n'est pas une question qu'on pose au promoteur dans nos procédures habituelles.*

[**Ms de Germiny.-**] And there is no letter then from the Agency explaining what, in practice, the repercussions of those options are?

Mme Bélanger.- *À ma connaissance, non.*"²²⁸

252 She also confirmed that GNLQ was never informed that the Minister had decided against a joint review panel, nor advised that separate EAs would proceed.²²⁹

253 The decision not to appoint a joint review panel was significant and materially affected the EA process for the GNLQ Project. Ms Bélanger conceded that point.²³⁰

254 As for Mr Northey, he opined that the outcome would likely have been different had a joint review panel been appointed:

"[**Mr Hébert.-**] And why is it that you think that having just one Environmental Assessment Report done by a JRP [joint review panel] would necessarily have led to a different result or a positive result?

[**Mr Northey.-**] **Well, I think the crucial point I'll emphasize with the JRP is that there's independence of the Panel.** I'm not persuaded that what we had here, Federally, was independent. It was done by the Agency. I don't regard the Agency's assessments as independent. **And I think a panel would have been more independent than the Agency.** I think, as you say, I've seen – provided some fairly significant criticisms of what occurred here. I

²²⁸ Day-4-ENG, p.955(1-20)/Day-4-FRA, p.32(5-19).

²²⁹ Day-4-ENG, p.961(6-9)/Day-4-FRA, p.34(19-21).

²³⁰ Day-4-ENG, p.948(4-14)/Day-4-FRA, p.29(27-33).

can't say a panel would not have done what occurred here, but I think it's less likely that would have occurred here.

And for particular, let me just say I don't, in my experience and I have read a lot of panel Reports and looked at EIS Guidelines, **I have not seen something where the EIS Guidelines are not followed the way that was going on here. That, I regard, is very different. So I don't think a panel I think a panel would have been more respectful of what those Guidelines said.**"²³¹

255 In conclusion:

- The federal Minister of Environment and the Agency breached Section 38 CEAA 2012.
- Compliance would have fundamentally altered the GNLQ EA process and likely its outcome.

3.2.4 The Québec and Federal Governments misrepresented to GNLQ the nature of the EAs being conducted

256 The Respondent has suggested that GNLQ was aware that two separate EAs were underway and that it should have requested a joint EA or challenged the process before Canadian courts.²³²

257 The Hearing revealed the opposite. The Québec and federal authorities concealed to GNLQ the nature of the EA being conducted. Freestone's expectations, prior to submitting its *Avis de projet* were that the GNLQ project would be subject to a single EA.²³³ Mr Illich confirmed the same on cross-examination.²³⁴ Mr Le Verger similarly confirmed that Freestone considered that the permitting process would be "integrated".²³⁵

²³¹ Day-7-ENG, p.1934(15)-1935(15).

²³² Day-2-FRA, p.85(4-7), 86(7-10).

²³³ C-Presentation, p.30; **C-0637-ENG**, p.1 ("[...] [A]n integrated permitting process involving federal and provincial organisations in one unique team").

²³⁴ Day-2-ENG, p.396(13-19).

²³⁵ Day-3-FRA, p.45(5-23).

- 258 These expectations were based on early meetings with the MELCC and the Agency, which Ms Gagnon confirmed took place.²³⁶
- 259 GNLQ maintained these expectations based on statements and conduct by the *ad hoc* Québec Interministerial Committee set up to assist GNLQ. Mr Le Verger confirmed that, in that context, between 25 November 2015 and 2 May 2019, the Ministry of Environment systematically informed GNLQ that the GNLQ Project would undergo a joint EA.²³⁷
- 260 Mr Le Verger also confirmed that the Agency regularly communicated that the Canada-Québec Agreement would apply to the GNLQ Project.²³⁸
- 261 As he testified, until Minister Charette issued the three conditions, GNLQ had no reason to suspect that the EA was not being conducted as a joint EA (but rather as two uncoordinated EAs):

*“M. Le Verger.- Ce que je veux dire dans ces deux déclarations, c’est qu’il n’y a pas eu d’éléments qui nous ont, disons, alertés que le processus collaboratif ou coopératif entre les deux organes réglementaires n’était pas vraiment en place. Et là, ce que je précise ici, c’est ce qui s’est passé en mars 2021 avec la sortie un peu... je dirais inhabituelle ou non usuelle du ministre de l’Environnement pour émettre des conditions spécifiques, trois nouvelles conditions spécifiques au projet, nous a alertés par rapport au fait qu’il pouvait manquer... ou que les deux processus n’avançaient pas comme on pensait qu’ils devaient avancer avec cette coopération.”*²³⁹

- 262 This is in line with Me Duchaine’s opinion that proponents cannot easily discern whether an EA is joint or separate.²⁴⁰

²³⁶ Day-5-FRA, p.14(43-47).

²³⁷ Day-3-FRA, p.45(5)-46(45); C-0637-ENG, p.1; C-0463-FRA, p.5; R-0214-FRA, p.5, TLV-0104-FRA, p.5; TLV-0105-FRA, p.5; TLV-0106-FRA, p.4; TLV-0107-FRA, p.4; SS-0028-FRA, p.5.

²³⁸ Day-3-FRA, p.46(39-45); C-0637-ENG, p.1.

²³⁹ Day-2-FRA, p.90(8-17).

²⁴⁰ Day-6-FRA, p.85(39)-86(47).

263 Canada misrepresented to GNLQ the nature and conduct of the EA process
being carried out. As a result, Canada induced GNLQ to continue investing
in the GNLQ Project despite the substantial risks arising from the lack of
coordination between the two EAs, and in particular from the absence of
any meaningful constraint on the Québec Government's ability to reject
the Project on improper political grounds.

3.2.5 Subjecting the GNLQ Project to two separate, uncoordinated EAs constitutes a standalone breach of Article 1105 NAFTA

264 Canada's failure to initiate a single federal or a joint EA constitutes the first
omission of a composite act which extended to February 2022.²⁴¹
However, it also constitutes a standalone breach of Article 1105
NAFTA,²⁴² which resulted in a separate loss (as addressed in Section 6.3).

265 **First**, the existence of two parallel and uncoordinated EA processes was
not an accident or administrative oversight, but rather the result of a choice
by Québec to assert jurisdiction over projects within its territory.

266 Canada was aware of this and of the risks of allowing two uncoordinated
EAs. Nevertheless, it failed to comply with the coordination mechanisms
required by Canadian law and practice, rendering the decision-making
process procedurally flawed and unfair for GNLQ.

267 **Second**, the consequences of this failure were dramatic. But for this
failure, the two decisions refusing the GNLQ Project would have never
been rendered. These decisions would likely have been consistent with the
systematic approval of LNG projects in Canada over 30 years. *A minima*,
they would not have existed in the form in which they were rendered.²⁴³
Specifically, but for this initial failure:

²⁴¹ Reply, p.195 (¶¶572-575).

²⁴² Contrary to the Respondent's claim, this standalone breach of the NAFTA is not time-barred
pursuant to Article 1117(2) NAFTA because the damage resulting from this breach did not
crystallise until July 2021, less than three years before the initiation of these proceedings (Reply,
p.192 (¶¶561-568); Rejoinder on Jurisdiction, p.40 (¶¶100-113)).

²⁴³ Day-1-ENG, p.35(14-18); **CER-1 (Second)**, p.159 (¶436-441).

- The decisions of the Québec and Federal Governments would have been coordinated, and there would have been no room for the irregularities that plagued the Québec EA.²⁴⁴
- The Québec Government would not have been able to rush the end of the EA process to issue a decision rejecting the GNLQ Project, thereby forcing the Federal Government to follow suit.²⁴⁵
- The Federal Government would not have prejudged the outcome of the federal EA.²⁴⁶
- There would have been no room for the arbitrary and unlawful measures that tainted both the Québec and the federal EA processes.

268 As Me Duchaine explained at the Hearing, uncoordinated assessments represent the worst possible scenario for a project proponent. Decisions taken at one governmental level inevitably influence those taken at the other, particularly where both are addressing overlapping issues such as environmental impacts. Working in a disorganized or desynchronized manner introduces confusion, blurs jurisdictional boundaries, and undermines the integrity of the process:

“Me Duchaine.- [...] Et on aboutit, en bout de ligne, avec une décision qui, un peu, préempte la décision de l'autre gouvernement. Vous avez entendu Mme Bélanger qui disait : ‘C’est la première fois qu’on avait une décision du gouvernement provincial qui sortait. On se demandait si on devait continuer le processus nous-mêmes. » Donc, de penser que cette façon-là de procéder n’a pas d’influence sur la deuxième... le deuxième palier de gouvernement qui prend sa décision, c’est un peu se mettre des lunettes roses, dans le sens où je dis : nécessairement, ce qui se passe d’un côté va influencer l’autre. [...] Ici, vous l’avez : à un moment donné, le provincial commence à se poser des questions sur le béluga. Il y a des gens du fédéral qui disent « mais c’est notre compétence », mais ça n’a pas empêché le provincial de continuer à le regarder et de l’évoquer dans ses choses. Quand on

²⁴⁴ Day-1-ENG, p.43(8-16).

²⁴⁵ Reply, p.199 (¶579); Day-1-ENG, p.43(8-16).

²⁴⁶ Day-1-ENG, p.74(10-15).

travaille de façon coordonnée, on évite tout ça. C'est moins flou. C'est plus clair. C'est plus simple. Tout le monde reste dans son champ de compétences respectif. Et là, j'arrive à l'ultime : on obtient des décisions... deux décisions distinctes, on s'entend, mais des décisions qui sont rendues en même temps. [...] le fait de travailler de façon désorganisée ou désynchronisée, comme dans le dossier de GNL, c'est le pire scénario pour un initiateur."²⁴⁷

269 This was not a hypothetical risk, but precisely what happened to GNLQ. Provincial authorities allowed themselves to consider matters falling within federal jurisdiction, while federal authorities questioned whether it even remained appropriate to continue their own process following the issuance of the provincial decision.²⁴⁸ This procedural disorder was avoidable and is attributable to Canada's failure to ensure coordination.

270 **Third**, the process lacked transparency. Canada concealed from GNLQ the fact that the EAs would proceed in an uncoordinated manner, notwithstanding the legal framework calling for a single or joint EA. It did so until July 2021, when it became clear from the Québec Government's isolated decision that the two EAs had been conducted in an uncoordinated manner. It thus deprived the Claimant of the opportunity to protect its rights or to seek corrective measures and induced it to continuing investing in the Project.

271 **Fourth**, a different process would have produced a different outcome.

272 The Claimant does not contend that the GNLQ Project would necessarily have been approved had a single or joint EA been conducted. However, what is clear is that, but for Canada's breach, the process and its outcome would have been different. The Québec EA could not have followed such a fundamentally flawed process, including the consideration of elements outside its jurisdiction.

²⁴⁷ Day-7-ENG, p.67(31)-68(8).

²⁴⁸ The Agency postponed the publication of its draft report by about two months to consider whether such publication was still required in light of the Québec Government's decision; C-0470-FRA, p.2.

273 As Me Duchaine stated, it is impossible to prove with certainty what the ultimate outcome would have been.²⁴⁹ However, as she explained, a properly conducted process, throughout all procedural stages, could not have yielded the same decision in Québec. Even if the GNLQ Project had ultimately been refused, it would have been for different reasons. The decisions that exist in the record should not have been, and could not properly have been, issued in their current form:

“Me Hébert.- Dans le cas du Projet Énergie Saguenay, les deux gouvernements ont assujetti le projet à des évaluations environnementales, manifestement, et les deux rapports d’évaluation ont recommandé le refus du projet. Mais si je comprends bien, vous semblez dire dans vos rapports que si l’évaluation avait été conjointe, le rapport du comité d’examen conjoint aurait recommandé l’approbation du projet au ministre. J’aimerais savoir comment est-ce que deux recommandations négatives peuvent se convertir en une recommandation positive si elles sont jumelées ?

***Me Duchaine.-** La question est peut-être simple ; la réponse est complexe. La décision du gouvernement du Québec est une décision... et je n’ai pas analysé la décision du gouvernement fédéral. Il y a eu un autre expert qui a été mandaté pour ça. Mais la décision du gouvernement du Québec résulte d’un processus qui est faussé à base et qui est basé sur un non-respect des partages de compétences, un non-respect de la procédure qui est imposée et la tenue en compte, au niveau de la décision, d’éléments qui n’auraient pas dû faire partie du processus décisionnel provincial. Donc, ma conclusion à moi, c’est qu’au niveau du processus, si le processus s’était fait comme il se devait, pas juste au niveau de la commission conjointe, mais à toutes les étapes, la décision du gouvernement au niveau provincial n’aurait pas été la même. Elle n’aurait pas pu être la même. Peut-être que ça aurait été un refus, mais pour d’autres motifs, pas pour les motifs qu’on a là. La décision telle qu’on l’a là, telle qu’elle est*

²⁴⁹ Day-6-FRA, p.74(48)-75(5); Day-7-FRA, p.70(4-9).

présentement dans le dossier, n'aurait pas pu... n'aurait pas dû être émise par le gouvernement du Québec.”²⁵⁰

274 The same goes for the decision of the Federal Government.

275 On any view, had GNLQ been aware at the time of the flaws of the EA process to which it was being and would be subjected, GNLQ would not have continued to invest millions of dollars in advancing that process.

3.3 The Québec EA process was arbitrary and violated due process, resulting in a wrongful and discriminatory decision by the Québec Government in breach of Article 1105 NAFTA

276 The Hearing confirmed that the Québec EA process was arbitrary and violated due process, leading to a wrongful and discriminatory decision by the Québec Government.²⁵¹ That process, together with the resulting decision, violated Article 1105 NAFTA.

277 The GNLQ Project was singled out by the Québec Government: as one of the very few projects it refused to approve (**Section 3.4.1**); as the only private project required to conduct a cost-benefit analysis (**Section 3.4.2**); and as the project about which the Québec Government leaked confidential information to the press, to the proponent's detriment (**Section 3.4.3**).

278 The Québec Government unduly interfered with the EA process with Minister Charette belatedly and wrongfully imposing three conditions for the GNLQ Project approval (**Section 3.4.4**).

279 The EA process, which was riddled with irregularities and tainted by political interference, culminated in an unlawful and arbitrary decision (**Section 3.4.5**).

²⁵⁰ Day-6-FRA, p.74(34)-75(5); Day-7-FRA, p.68(36)-69(33).

²⁵¹ Reply, p.295 (s.4.1.3.3).

3.3.1 The GNLQ Project was among the 0.25% of projects that have been rejected in Québec since 1994

280 In the last 30 years, 99% of the large-scale industrial projects that have been subject to an EA in Southern Québec have been approved.²⁵² Me Duchaine found, of the 800 projects assessed in Southern Québec since 1994, only eight (including the GNLQ Project) were rejected.²⁵³

281 The Respondent did not challenge these statistics in its Rejoinder. Me Yergeau did not provide any data or analysis of the practice of the Québec Government and simply asserted that each EA was different and that a comparative exercise was unwarranted.²⁵⁴ Nor were Me Duchaine's statistics challenged at the Hearing.

282 Ms Gagnon confirmed they were "plausible":

"Me Barrier.- Mme Duchaine considère qu'entre 1994 et 2021, plus de 800 projets ont été soumis à l'évaluation environnementale. Est-ce que cela vous paraît un chiffre plausible ?

Mme Gagnon.- C'est plausible.

Me Barrier.- Et Me Duchaine indique que sur plus de 800 projets, sept seulement ont fait l'objet d'un refus par le gouvernement du Québec, donc huit avec le projet GNLQ. Est-ce que cela vous paraît plausible également ?

Mme Gagnon.- C'est plausible. Par contre, je ne sais pas si ça fait partie des statistiques, mais il y a définitivement de nombreux projets qui ne se rendent pas jusqu'à la décision.

Me Barrier.- Mais ils ne font pas l'objet d'un décret de refus ?

Mme Gagnon.- S'ils sont abandonnés avant la décision, effectivement, il n'y a ni autorisation, ni refus. [...]

²⁵² Counter-Memorial, p.224 (¶573); Reply, p.281 (¶¶835-841).

²⁵³ CER-1, p.47.

²⁵⁴ RER-6, p.81 (¶¶273-282).

Me Barrier.- *Donc si on reste sur les... si on reste sur les projets qui vont de l'avant et qui ne sont pas abandonnés en cours de route, le pourcentage de 1 % de non-autorisations vous paraît plausible ?*
[...]

Mme Gagnon.- *Oui, ça semble plausible.*²⁵⁵

- 283 When asked by the Tribunal how many of the 800 projects were approved by the Québec Government, Ms Gagnon skirted the issue by stating that projects may be halted at different stages and suggesting that the figure of 800 did not relate to actual decisions.²⁵⁶ Me Duchaine, however, confirmed that she had reviewed 800 **decisions**:

“Me Duchaine.- [...] *Les chiffres qu'on vous a donnés sont tirés du registre que le gouvernement du Québec publie sur son site, qui s'appelle 'Décisions du gouvernement depuis le 1er janvier 1994'.*

Et, s'agissant des décisions, les autorisations ou les refus qui sont inscrits, les projets qui sont en cours d'évaluation ne sont pas sur le registre.

*[...] On a arrêté en 2023, au moment où on a fait ça. À partir de ce moment-là, on avait 800 projets qui avaient fait l'objet de décision, soit un 'oui' soit un 'non', et là-dessus, il y avait eu sept refus [other than the refusal of the GNLQ Project].*²⁵⁷

- 284 Of the eight projects that were rejected since 1994, **six** were rejected due to a moratorium on waste management sites.²⁵⁸ In other words, outside of

²⁵⁵ Day-4-FRA, p.101(41)-102(21); Day-5-FRA, p.82(10-16) (“**Me Barrier.-** [...] *combien de projets qui étaient soumis à la procédure d'évaluation des impacts environnementaux que vous avez évalués depuis 2007 ont fait l'objet d'un décret de non-autorisation ou de refus de la part du gouvernement ? Et j'inclus ceux que vous avez pu traiter en tant que conseiller senior. M. Duquette.- Il n'y en a pas eu d'autres en fait, là. C'est le premier. Me Barrier.- Donc, 100 % d'autorisation. M. Duquette.- Oui.*”); Day-4-FRA, p.102(22)-103(40) (Ms Gagnon confirming that the projects she referred to at **RWS-22**, p.8 (¶28) were not rejected by the Québec Government but abandoned by their proponents).

²⁵⁶ Day-5-FRA, p.48(2-45).

²⁵⁷ Day-6-FRA, p.45(36-43).

²⁵⁸ **CER-1**, p.47-48.

a moratorium scenario, only **two** projects have been refused, including GNLQ.

285 At the Hearing, Ms Gagnon confirmed that the goal of the EA process under the LQE is to produce an environmentally and socially acceptable project:

“Me Barrier.- *Et vous indiquez plus bas que le but de la LQE [...] c’est d’orienter les projets vers l’acceptabilité. Est-ce que c’est bien ça que vous avez en tête... que vous dites, oui ?*

Mme Gagnon.- *En quelque sorte. En fait, c’est le principe que pour les activités qui sont identifiées, avant de pouvoir se réaliser, ils doivent obtenir une autorisation. Donc assurément, pour obtenir une autorisation, il faut qu’il y ait une démonstration que le projet soit acceptable au niveau environnemental.*

Me Barrier.- *Et vous expliquez ça, d’ailleurs, au paragraphe 24 de votre attestation en précisant que la loi – je vous cite : ‘implique donc un processus rigoureux visant l’élaboration d’un projet acceptable au niveau environnemental et social.’ C’est bien ça ?*

Mme Gagnon.- *Exact.*

[...]

Me Barrier.- *Et au paragraphe 26, si je vous résume, vous dites que l’étape d’examen de la recevabilité, notamment, permet souvent d’améliorer le projet, de l’amener à un stade supérieur. C’est bien ça ?*

Mme Gagnon.- *Oui. [...] Comme l’initiateur à la base souhaite réaliser son projet, c’est sûr que l’objectif ultime, c’est d’arriver à un projet qui est acceptable pour qu’il puisse aller de l’avant. Donc, c’est l’effet du processus.”*²⁵⁹

²⁵⁹ Day-4-FRA, p.100(21)-101(32).

286 Ms Gagnon also confirmed that the virtual absence of refusals is because projects can be modified or approved subject to conditions:

“Mme Gagnon.- [...] *dans les faits, comme je l’ai expliqué tout à l’heure, c’est que l’analyse environnementale, et c’est vrai, ça a été dit hier, c’est vrai que des refus, il n’y en a pas... ce n’est pas la majorité. Généralement, le projet va être capable de s’adapter, d’être modifié, modulé pour répondre aux préoccupations ou couvert par des conditions qui permettent de le rendre acceptable. Et puis parfois, les conditions vont faire en sorte qu’il ne sera pas réalisable. Mais il va quand même avoir été autorisé sous conditions.* [...]”²⁶⁰

287 The above supports Me Duchaine’s opinion that the LQE is a “*loi d’autorisation*”, i.e., proponents can presume that their projects will be approved, albeit subject to conditions and mitigation measures.²⁶¹

288 At the Hearing, the Respondent sought to justify the rejection of the GNLQ Project, by highlighting that the Project was one of a kind in Québec:

“Me Hébert.- [...] *Il s’agissait de l’un des plus grands projets d’infrastructures dans l’histoire du Québec et de loin le plus grand projet d’énergie fossile. Aucun autre projet d’énergie fossile de cette ampleur n’a jamais été proposé au Québec, ni avant ni après.*”²⁶²

289 Mr Duquette, however, testified that, in his view, the Project was **not** exceptional:

“Me Barrier.- *Lundi, je ne sais pas si vous avez eu l’occasion de lire le transcript, mais les représentants du Canada nous ont affirmé que le Projet Énergie Saguenay était un, je cite, ‘projet de très grande envergure, un des plus grands projets d’infrastructures dans l’histoire du Québec et de loin le plus grand projet d’énergie fossile’. Et ils ont aussi mentionné qu’‘Aucun autre projet d’énergie*

²⁶⁰ Day-5-FRA, p.37(19-24).

²⁶¹ CER-1 (Second), p.80 (¶¶239-261); Reply, p.282 (¶839).

²⁶² Day-1-FRA, p.52(1-3).

fossile de cette ampleur n'a jamais été proposé au Québec ni avant ni après'. Est-ce que vous êtes d'accord avec cette qualification ?

M. Duquette.- *Tout à fait.*

Me Barrier.- *Et ça ne vous a pas surpris que le ministère de l'Environnement vous mette en charge de ce projet alors que vous n'aviez que quatre procédures d'analyse environnementale en tant que chargé de projet auparavant ?*

M. Duquette.- *Non, pas du tout. Je ne veux pas me vanter, mais j'avais les capacités de le faire, ne serait-ce que par la nature même du projet qui était du gaz naturel, donc qui amenait un certain lot de risques technologiques de par son transport, son stockage et toute la partie ingénierie derrière une usine de cette ampleur-là. Et donc, ça faisait de moi un bon candidat à être chargé de projet pour un tel projet.*

Et l'ampleur du projet s'apparentait de loin, on peut le dire, en termes de fois, mais en termes d'impact au Québec et de médiatisation, ça ressemblait beaucoup à un des projets que j'ai faits, qui était Mine Arnaud, qui était tout aussi contesté, socialement et localement.

Donc c'est un peu en raison de ça que j'ai été choisi, donc pour diverses raisons, mais qui faisaient que cette charge de projet là me convenait.

Me Barrier.- *Donc vous avez été choisi pour cette expérience spécifique sur Mine Arnaud, sur laquelle on reviendra, mais aussi pour votre profil d'ingénieur pour comprendre les aspects plus technologiques du projet ?*

M. Duquette.- *Exact.*

Me Barrier.- *Et lorsque vous avez été nommé, est-ce qu'on vous a signalé des difficultés particulières au moment où vous êtes arrivé en 2017 ? Est-ce que Mme Gagnon ou quelqu'un d'autre vous a signalé des problèmes particuliers avec ce projet pour ce qui allait venir ?*

M. Duquette.- *Pas de problèmes particuliers autres que c'était un très grand projet avec un investissement très important. Non, rien de particulier.*

Me Barrier.- *Pas de drapeaux rouges, en somme ?*

M. Duquette.- *Pas de drapeaux rouges. Pour nous, un projet, c'est un projet ; on l'analyse et...".*²⁶³

290 In other words, the GNLQ Project did not present any specificities that would warrant a different treatment. And yet, the GNLQ Project, despite its alignment with Québec policies,²⁶⁴ and the support it had received from the Québec Government,²⁶⁵ became part of the only 1% of projects that have been rejected in Québec since 1994, one of the **two** projects, **0.25%** of the total, that were rejected outside the context of a legal moratorium. That is because the GNLQ Project was not assessed as it should have been, and in the same way as other projects.

3.3.2 No private project other than the GNLQ Project was forced to provide a cost-benefit analysis based on an unsuitable methodology

291 As explained in the Reply and at the Hearing,

- late in the provincial EA, the MELCC requested that GNLQ provide a cost-benefit analysis (in French, "*analyse avantage-coûts*", "**AAC**"), using a methodology that was unsuitable for private projects,²⁶⁶

²⁶³ Day-5-FRA, p.81(20)-82(9).

²⁶⁴ Reply, p.15 (¶¶51-82), p.276 (¶¶821-834); Day-1-ENG, p.17(20)-18(9); C-Presentation, p.6.

²⁶⁵ Reply, p.272 (¶¶810-812); CWS-1, p.18 (¶¶37-42, 47-48, 132-135); Day-2-ENG, p.418(14)-435(14).

²⁶⁶ Reply, p.72 (¶¶218-220, 222); CER-1 (Second), p.128 (¶¶336-341, 345); Day-1-ENG, p.52(2-13); C-Presentation, p.61.

- the Directive did not require an AAC,²⁶⁷ and the MELCC failed to define the analysis it required from GNLQ;²⁶⁸
- the request was unprecedented in Québec EAs;²⁶⁹
- GNLQ provided the MELCC with the parts of the AAC it was possible to carry out;²⁷⁰ and
- the MELCC recognised that the GNLQ Project would have more economic advantages than disadvantages,²⁷¹ but arbitrarily based its negative conclusion in the MELCC Report on unspecified other impacts;²⁷² that conclusion then became one of the bases for the Québec Government to reject the GNLQ Project.²⁷³

292 The Respondent argues that:

- GNLQ never presented an AAC, but the MELCC's experts accepted the economic analysis GNLQ presented;²⁷⁴
- the Directive indicated that the socioeconomic impact of the GNLQ Project would be evaluated;²⁷⁵
- the request to provide an AAC was not belated,²⁷⁶ nor unclear;²⁷⁷ and

²⁶⁷ Reply, p.73 (¶221); CER-1 (Second), p.129 (¶¶342-344); Day-1-ENG, p.51(18)-52(1); C-Presentation, p.60.

²⁶⁸ Reply, p.75 (¶225); p.298 (¶884); CER-1 (Second), p.130 (¶¶345-362).

²⁶⁹ Reply, p.74 (¶222); CER-1 (Second), p.140 (¶¶369-371), p.161 (Annex I) ("*Dans tous les projets comparables identifiés dans le premier rapport de la soussignée, pour lesquels une directive a été émise et une étude d'impact déposée entre 2001 et 2017, le MELCCFP n'a jamais demandé à l'initiateur de procéder à une AAC ou de monétariser les impacts environnementaux pour déterminer si le projet était rentable*").

²⁷⁰ Reply, p.75 (¶¶225-226); CER-1 (Second), p.135 (¶¶360-361); CWS-3 (Second), p.50 (¶¶157-159); CD-0127-FRA.

²⁷¹ Reply, p.75 (¶226); CWS-3 (Second), p.51 (¶160); C-0169-FRA, p.70.

²⁷² Reply, p.75 (¶226), p.298 (¶¶882-884); CER-1 (Second), p.138 (¶¶363-368); C-0169-FRA, p.70.

²⁷³ Reply, p.201 (¶¶587-588); C-0274-FRA, p.3.

²⁷⁴ Rejoinder, p.63 (¶¶145-150, 164).

²⁷⁵ Rejoinder, p.214 (¶514).

²⁷⁶ Rejoinder, p.214 (¶¶513-515).

²⁷⁷ Rejoinder, p.63 (¶¶145-150).

- in any event, the MELCC's request that GNLQ provide an AAC was not arbitrary or discriminatory.²⁷⁸

293 However, at the Hearing, Mr Duquette first confirmed that the request for an AAC was outside the scope of the Directive:

“Me Barrier.- Donc, on est d'accord que l'analyse avantage-coût ne figurait pas dans la directive ?

*M. Duquette.- Elle n'était pas dans la directive, non.”*²⁷⁹

294 Mr Duquette also confirmed that, the promoters in other contemporaneous projects were not required to provide an AAC:

“Me Barrier.- Il n'y avait pas eu d'analyse avantages-coûts sur le projet Mine Arnaud dont vous parliez tout à l'heure ?

M. Duquette.- Non, non, non. Ce n'était pas un encore... à ce moment-là, ce n'était pas... ça ne faisait pas partie des exigences, des bonnes pratiques qu'on avait à l'époque.

Me Barrier.- Et pour le projet Avitaillement à Montréal, pour le projet de construction d'un terminal d'approvisionnement de carburant aéroportuaire ?

M. Duquette.- Non plus, ça n'a pas été...

*Me Barrier.- Ça n'a pas été demandé.”*²⁸⁰

295 When asked whether GNLQ was the first promoter to be required to provide an AAC, he could not identify any private project for which it had been requested or done:²⁸¹

²⁷⁸ Rejoinder, p.214 (¶¶516-524). The Respondent also argues that Claimant's claim for breach based on the AAC request is barred since it was presented only in the Reply: Rejoinder, p.213 (¶¶509-511). That argument has no merit: the Claimant's submissions on the AAC came in response to Mr Duquette's first witness statement and were therefore timely: Reply, p.72-73 (¶218), p.297 (¶881).

²⁷⁹ Day-5-FRA, p.103(14-16).

²⁸⁰ Day-5-FRA, p.101(14-21).

²⁸¹ Reply, p.73 (¶220 and citations included therein).

“M. Duquette.- *Je ne pourrais pas vous garantir que c’est le premier projet [which provides and AAC], parce qu’il y a peut-être eu des projets de nature publique qui ont requis... qui ont émis des analyses avantage-coûts, notamment dans le cadre du projet de transport...*”²⁸²

296 Mr Duquette could only recall one other AAC ever being prepared – but by the MELCC, and not by a proponent:

“M. Duquette.- *En fait, moi, je ne suis pas du tout expert en analyse avantages-coûts. La seule analyse avantages-coûts que j’ai vue préalablement, c’était pour un projet d’une EES à l’île d’Anticosti sur les hydrocarbures, le développement des hydrocarbures à l’île d’Anticosti. [...] C’était une évaluation environnementale stratégique sur le développement de l’exploitation des hydrocarbures sur l’île d’Anticosti. [...] [C]’était le ministère de l’Environnement qui avait réalisé...*

Me Barrier.- *Qui avait réalisé l’étude ?*

M. Duquette.- *L’étude, oui.*”²⁸³

297 Mr Duquette’s evidence on the exceptional nature of an AAC is consistent with Mr Le Verger’s testimony that it was not possible for GNLQ to provide what the MELCC was requesting:

“M. Le Verger.- *WSP, en fait, n’avait jamais vu une telle demande sur un projet d’ordre privé quand le gouvernement l’a précisée. Enfin le [...] ministère de l’Environnement, pour être précis. Et, donc, il y a eu beaucoup de débats et de discussions par rapport à ce que devait contenir cette étude, ce qu’elle ne devait pas contenir. [...]*

Me Hébert.- *Donc, vous n’avez pas fourni l’information qui vous était demandée, parce que WSP estimait que c’était trop fastidieux ?*

²⁸² Day-5-FRA, p.102(42-44).

²⁸³ Day-5-FRA, p.100(43)-101(13).

M. Le Verger.- *WSP a estimé que c'était un travail important, en effet, et que, pour eux, ça ne devait pas faire partie de l'évaluation en lien avec un projet privé. Donc, on a essayé de fournir ce qui pouvait être fourni dans un laps de temps suffisamment court pour que le MELCC puisse continuer son analyse.*"²⁸⁴

298 Moreover, the data that GNLQ provided demonstrated that the GNLQ Project would have had a **positive socioeconomic** impact in Québec:

"Me Hébert.- [...] *Donc, je comprends de votre deuxième déclaration, du paragraphe 160, Monsieur Le Verger, que vous êtes d'avis que les avantages du Projet GNL Québec dépassent les coûts pour la société québécoise. Est-ce que c'est exact ?*

[...]

M. Le Verger.- *C'est une conclusion que je fais, dans ma déclaration de témoin, qui est en lien avec le rapport final du ministère de l'Environnement, qui, justement, précisait qu'il y avait un certain nombre d'éléments, qui n'avaient pas été partagés, de retombées économiques, notamment sur la compétitivité des entreprises, etc., au niveau du Québec, qui auraient fait que les retombées globales du Projet, socialement, au niveau québécois, auraient été positives. [...]"*²⁸⁵

299 Accordingly, the MELCC's request that GNLQ provide an AAC was unlawful, discriminatory, and in breach of due process.²⁸⁶ The MELCC acted unpredictably by introducing a new requirement during the EA²⁸⁷ that was not provided for in the Directive,²⁸⁸ by maintaining that requirement despite GNLQ's explanation that an AAC was ill-suited to a private project,²⁸⁹ and by failing to inform GNLQ either that the AAC was

²⁸⁴ Day-3-FRA, p.42(41-44).

²⁸⁵ Day-3-FRA, p.42(3-14); CWS-3 (Second), p.51 (¶¶160-162).

²⁸⁶ Reply, p.297 (¶¶881-884).

²⁸⁷ *Supra*, Section 3.3.2.

²⁸⁸ *Infra*, Section 3.5.1; Reply, p.73 (¶221).

²⁸⁹ CD-0127-FRA, p.1; CWS-3 (Second), p.50 (¶157); Reply, p.73 (¶220).

considered deficient,²⁹⁰ and, crucially; that it would be relied for the Government's decision.²⁹¹ The MELCC's assessment of the costs and benefits of the GNLQ Project was also arbitrary and lacked candour. It disregarded material information concerning the project's benefits and instead focused on the incomplete data contained in the AAC,²⁹² without giving GNLQ an opportunity to supplement its submission.

3.3.3 The Québec Government [REDACTED]

300 The Québec Government [REDACTED]
[REDACTED]²⁹³ Following the Hearing, that
allegation stands un rebutted.

301 Notably, the Respondent did not deny in its written submissions that the Québec Government was [REDACTED] even after the Claimant highlighted that absence of denial in its Reply.²⁹⁴ Nor did the Respondent deny this allegation at the Hearing.

302 The Respondent has merely asserted that the Claimant has failed to prove [REDACTED]²⁹⁵ Yet, the Respondent is the only Party capable of producing direct documentary or witness evidence to confirm or refute that allegation, and it has chosen not to do so.

303 The Claimant, for its part, adduced the evidence available to it, which indicates that the Québec Government was [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²⁹⁰ Reply, p.75 (¶225).

²⁹¹ Reply, p.74 (¶224).

²⁹² CWS-3 (Second), p.50 (¶¶158-162); Reply, p.75 (¶226), p.297 (¶¶881-884).

²⁹³ Memorial, p.75 (¶¶212-219); Reply, p.39 (¶¶116-121).

²⁹⁴ Reply, p.295 (¶877); Reply on Jurisdiction, p.47 (¶¶131-133); Rejoinder, p.201 (¶¶476-482); Memorial, p.76 (¶¶216-217); Counter-Memorial, p.220 (¶562).

²⁹⁵ Counter-Memorial, p.220 (¶562); Rejoinder, p.203 (¶481).

[REDACTED]
[REDACTED]²⁹⁶ The Respondent did not cross-examine either witness on this issue at the Hearing.

304 In contrast, Mr Koskinen, the Respondents' witness who liaised directly with Mr Illich regarding [REDACTED]
[REDACTED] at least to his own knowledge, stayed conspicuously silent on the issue until the Hearing.²⁹⁷

305 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁹⁹ More generally, Mr Koskinen's testimony proved unreliable; he was indeed consistent in making categorical statements that later turned out to be inaccurate or incorrect.

307 Hence, Mr Koskinen went out of his way to emphasise that communications between him and Mr Illich had always been initiated by

²⁹⁶ C-0245-ENG-FRA; C-0246-ENG-FRA; CWS-1, p.73 (¶213); CWS-2, p.67 (¶178); Memorial, p.76 (¶216); Reply, p.294 (¶¶874, 877).

²⁹⁷ RWS-8; RWS-21.

²⁹⁸ Day-5-ENG, p.1310(19)-1311(8)/Day-5-FRA, p.70(39-46).

²⁹⁹ Day-5-FRA, p.70(9-11).

Mr Illich,³⁰⁰ and had to amend his testimony when shown that the documentary evidence showed otherwise.³⁰¹

308 In the same vein, consistent with his second witness statement where he had sought to downplay the role of Mr François Pouliot (economic adviser to Mr Legault) in financing discussions between Symbio and the Québec Government,³⁰² Mr Koskinen testified: “*Au meilleur de mes souvenirs, je ne crois pas que M. Pouliot a eu des échanges avec le Premier ministre sur GNL Québec.*”³⁰³ This however was untrue, as demonstrated by a tweet from Mr Legault regarding a “good meeting” with GNLQ accompanied by a photo of Mr Pouliot next to Mr Legault himself, in attendance at a meeting with, among others, Mr Illich, in January 2020.³⁰⁴ This was an important issue given that Mr Pouliot was one of the few individuals in the

³⁰⁰ Day-5-ENG, p.1261(18)-1262(2)/Day-5-FRA, p.53(25-36) (“**Ms Baizeau.**-. And you did communicate with Mr. Illich. And, in fact, you say, at Paragraph 14 of your First Witness Statement, that you had several exchanges with Mr. Illich -- well, you say ‘mainly Mr. Illich.’ He says, in his evidence, that he had regular contacts with you. Do you remember how many calls you had with Mr. Illich? **M. Koskinen.**- *Pas le nombre précis, mais plusieurs, textos également, toujours à l’initiative de M. Illich. Je pense que c’est important de le noter. Ce n’est pas moi qui relançais le promoteur, c’est le promoteur qui me relançait pour le suivi de son Projet. Donc, je répondais aux sollicitations de M. Illich.*”).

³⁰¹ Day-5-ENG, p.1262(21)-1263(12)/Day-5-FRA, p.54(6-10) (“**Ms Baizeau.**-. Can we take a look, perhaps, to understand how that worked, at one of the – one exhibit that refers to an exchange with Mr. Illich. And it’s an exchange that – that’s JI-168. It’s an exchange that took place in 2022, and it says, there, ‘MK’ – that’s you, Martin Koskinen – sent JFI – Mr. Illich – a text message with a media article regarding Trudeau’s press conference. So here, that would be you who sent a text message to Mr. Illich. **M. Koskinen.**- *Est-ce que c’est suite à une sollicitation de M. Illich ? [...] Je n’ai pas souvenir mais je tiens quand même à souligner que si ce n’est pas la totalité des échanges, la très, très grande majorité était toujours, toujours initiée par M. Illich.*”).

³⁰² **RWS-21**, p.8 (¶¶37-38).

³⁰³ Day-5-FRA, p.75(4-5), p.75(15-18) (“**M. Koskinen.**- *[M. Pouliot] était impliqué mais il n’était pas l’acteur clé, dans l’analyse du dossier, parce qu’il y avait des contacts avec M. Le Verger. Et je vous rappelle que M. Illich passait directement par moi. Donc, il n’y avait pas de contact, à ma connaissance, avec M. Pouliot.*”).

³⁰⁴ Day-5-ENG, p.1328(12)-1329(2)/Day-5-FRA, p.77(1-9) (“**Ms Baizeau.**-. Can I ask you to have a look on screen at – this is a tweet from Mr. Legault taken from the Claimant’s Memorial at Page 73. And this is in January 2020. And you see here a picture. We are going to try and enlarge it. And it says in French: ‘*Bonne rencontre avec les dirigeants du Projet Énergie Saguenay, un projet d’investissement majeur.*’ And you see on the picture Mr. Illich on the left and on the right, we have Mr. Legault. And immediately to the right of Mr. Legault is Mr. Pouliot. You can confirm that? **M. Koskinen.**- *Oui.*”); **CWS-1**, p.52 (Figure 4); Memorial, p.73 (¶205).

Québec Government who knew about [REDACTED]
[REDACTED] as Mr Koskinen confirmed, and who therefore, like Mr
Koskinen, [REDACTED]³⁰⁵

309 The least credible part of Mr Koskinen's oral testimony was his denial that
he had discussed his testimony, written or oral, with Prime Minister
Legault or Ministers Charette, Girard, or Fitzgibbon, or that he had even
discussed the arbitration with Mr Legault, beyond, in his words:
"*Simplement le fait que je devais être à Washington pendant deux jours.*"³⁰⁶

310 For someone who is – again, his own words – the "*conseiller principal*" to
Prime Minister Legault,³⁰⁷ this is inconceivable. Particularly where, later
in his testimony, Mr Koskinen felt able to testify adamantly that Mr
Legault had **never** received [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]³⁰⁸

311 To conclude, based on the evidence and the absence of any rebuttal by the
Respondent, the Tribunal should conclude that the Québec Government
[REDACTED]
[REDACTED] in breach of IQ's confidentiality agreement with
Symbio.³⁰⁹

312 The Tribunal should also conclude, absent any other explanation from the
Respondent or Mr Koskinen, that the Québec Government's motive for

³⁰⁵ Day-5-ENG, p.1307(22)-1308(8)/Day-5-FRA, p.69(38-44) ("[**Ms Baizeau.**] Aside from
you, who at the Prime Minister's Office knew that this [REDACTED] Do you remember?
M. Koskinen.-*Il y a quelques personnes au cabinet du premier du ministre qui étaient
informées, dont François Pouliot, qui était le conseiller économique du Premier ministre. M.
Fitzgibbon... je vais parler du cabinet du Premier ministre. Il y avait M. Pouliot et moi. À
l'extérieur du cabinet du Premier ministre... mais ce n'est pas votre question, je vais vous
laisser aller.*").

³⁰⁶ Day-5-FRA, p.55(16).

³⁰⁷ Day-5-FRA, p.73(9).

³⁰⁸ Day-5-FRA, p.72(19-21).

³⁰⁹ **JI-0090-ENG-FRA.**

Mr Illich's conclusion that the Québec Government must have decided to discredit the Project to make it easier to backtrack on its own commitments to it remains unchallenged.³¹⁰

313 This conclusion is consistent with the later revelations by Mr Pouliot to Mr Le Verger, on 2 May 2022, that the true reason the Québec Government had rejected the Project was that it "did not want to take the heat for a project that was not sure to get its financing in the long run",³¹¹ and from Mr Fitzgibbon to Mr Illich on 9 June 2022 that "[p]olitics [wa]s 100% of the reason" to refuse the GNLQ Project.³¹² This evidence was not challenged at the Hearing and remains undisputed.

314 [REDACTED] form part of the series of acts and omissions comprising the Respondent's composite act in breach of Article 1105 NAFTA.³¹³

3.3.4 The Québec Government unlawfully interfered with the EA process

315 On 24 March 2021, after an irregular BAPE hearing,³¹⁴ and almost six years after the start of the Québec EA, Minister Charette imposed three new conditions for the approval of the GNLQ Project, *i.e.*, that it (i) contribute to a decrease in global GHG emissions, (ii) promote the energy transition and (iii) achieve social acceptability.³¹⁵ These conditions

³¹⁰ CWS-1, p.73 (¶¶215-217).

³¹¹ TLV-0176-ENG; CWS-3, p.63 (¶258).

³¹² CWS-1, p.93 (¶283).

³¹³ Memorial, p.195 (¶651); Reply, p.294 (s.4.1.3.2); Rejoinder on Jurisdiction, p.26 (¶60). To confirm the Claimant's position on the legal consequences of the leak, the Claimant does not allege that the leak amounted to a standalone breach of Article 1105 NAFTA; rather, that it contributed to a composite act in breach of Article 1105 NAFTA (Rejoinder on Jurisdiction, p.38 (¶93)). To the extent Section 4.1.3.2 of the Reply and footnote 164 of the Rejoinder on Jurisdiction suggest otherwise, the Claimant clarifies those passages accordingly.

³¹⁴ Reply, p.71 (s.2.5); Day-1-ENG, p.53(11)-55(12); C-Presentation, p.66 (and references included therein).

³¹⁵ C-0031-ENG-FRA, p.2.

were discriminatory, unreasonable, arbitrary, imposed without due process, in breach of Article 1105 NAFTA.³¹⁶ The Hearing confirmed as much.

3.3.4.1 Imposing three conditions at the eleventh hour was discriminatory

316 It is undisputed that this is the only instance in the history of EAs in Québec that a Minister has ever imposed conditions on a proponent (i) so late in the EA process and (ii) through a press conference.³¹⁷

317 Me Yergeau confirmed that, in over 50 years,³¹⁸ he had never seen this:

“Me Barrier.- Donc, vous me confirmez qu’aucun de ces 23 ministres, dans leur temps, n’a pris la parole publiquement pour imposer à un initiateur des conditions qui devront être remplies pour obtenir l’autorisation du projet et intégrer, par la suite, ces conditions dans la procédure d’analyse environnementale ?

Me Yergeau.- Il y a un monde de différence entre le fait que je ne le sache pas personnellement et le fait que ça ne se soit jamais produit.

Me Barrier.- Je vous demande uniquement ce qui est dans votre connaissance personnelle.

*Me Yergeau.- Moi, je n’en connais pas.”*³¹⁹

318 Ms Gagnon also could not recall this ever happening:

“Me Barrier.- Est-ce que le fait que le ministère énonce des critères en fin d’analyse, est-ce que c’est une surprise ? Pardon... des critères, je voulais dire des conditions d’autorisation du projet.

³¹⁶ Reply, p.79 (¶¶238-303); p.300 (¶¶891-902); Day-1-ENG, p.55(13)-65(3).

³¹⁷ Reply, p.81 (¶244), referring to the testimony of the Respondent’s own witness, Mr Duquette, at **RWS-5**, p.24 (¶52); Day-1-ENG, p.56(20)-57(12).

³¹⁸ Day-7-FRA, p.17(47)-18(1).

³¹⁹ Day-7-FRA, p.41(41)-42(3).

Mme Gagnon.- *De mon vécu, c'est quand même rare que le ministre aille d'office annoncer ses conditions dans un dossier. [...]*

Me Barrier.- *Madame Gagnon, vous dites « rare », mais ce n'est jamais arrivé, non ?*

Mme Gagnon.- *Je ne peux pas vous dire si c'est déjà arrivé.*³²⁰

319 Me Duchaine confirmed that this was unprecedented:

“Me Duchaine.- [...] *L'ajout de critères par le ministre après la réception du BAPE, dans une conférence de presse, sans avoir parlé avec ses analystes... [...] Ça ne s'était jamais vu avant. Ça ne s'est jamais vu depuis.*”³²¹

320 The Hearing thus confirmed that the GNLQ Project was treated differently as compared to other projects.

3.3.4.2 The three conditions were new and arbitrary

321 The three new conditions were not included in the MELCC Directive³²² and went beyond the scope of the Minister's powers under the LQE.³²³ The Minister's imposition of these conditions could thus not have been foreseen and lacked transparency. The Respondent has tried to downplay the novelty of these conditions, arguing that they were part of the Directive or known to GNLQ.³²⁴

322 The Hearing however confirmed that they were new.

323 **First**, the Respondent wrongly argues that social acceptability had been presented to GNLQ as a requirement.³²⁵ As demonstrated in the Reply, the Directive included an “encouragement” for GNLQ to hear the points of view of citizens and communities, and a “recommendation” to start

³²⁰ Day-5-FRA, p.36(25-36).

³²¹ Day-6-FRA, p.47(29-34); **CER-1**, p.82.

³²² Reply, p.87 (s.2.5.3.2); Day-1-ENG, p.56(7-19), 57(22)-59(9); **C-0198-FRA**.

³²³ **C-0512-FRA**; Day-1-ENG, p.57(13-19); C-Presentation, p.76-77.

³²⁴ Rejoinder, p.222 (¶¶535-550); Day-1-FRA, p.72(31)-73(12).

³²⁵ Rejoinder, p.223 (¶537); Day-1-FRA, p.72(42-46).

consultation processes.³²⁶ Me Duchaine confirmed that the Québec Government has never invoked social acceptability as the main reason for rejecting a project, let alone as a “condition” for approval.³²⁷

- 324 As Mr Le Verger explained, while the Directive referred to the notion of social acceptability, GNLQ could **not** have understood it as a **requirement** for the approval of the GNLQ Project:

“Me Hébert.- Donc, est-ce qu’on peut dire, Monsieur Le Verger, que la directive incluait l’acceptabilité sociale comme un sous-critère ou peut-être même un critère d’évaluation dans le cadre de la procédure d’examen ?

M. Le Verger.- La directive incluait cette notion. Elle n’en faisait pas une condition sine qua non, mais elle l’incluait, en effet.³²⁸

- 325 In the same way, while social acceptability was always a priority for GNLQ, as Mr Illich explained, achieving it was not a requirement:

“[Ms Tabet.-] [...] [W]ere you made aware of issues regarding social acceptability prior to the BAPE Report?

*[Mr Illich.-] Yes. **Social acceptability was very important to me personally, and from the very beginning of this Project**, it was one of my most important roles was to gain community support. And as we had meetings with community, Government officials, many times social acceptability was raised. **It wasn’t a requirement of us to prove in our [...] EA**, but [...] social acceptability was important.”*³²⁹

³²⁶ Reply, p.88 (¶¶260-264); CER-1, p.121; C-0198-FRA, p.3.

³²⁷ CER-1 (Second), p.113 (¶¶310-320).

³²⁸ Day-3-FRA, p.36(7-11); Day-2-ENG, p.513(2-9) (“[Mr Illich.-] [...] [T]here was a significant difference between the BAPE Report and the three conditions, and the reason is the BAPE Report does not – it’s just a tool. It’s for the Québec Government to consider. What Minister Charette did is he imposed three new conditions that were not part of the Project descriptions that we gave to the Québec Government [...]”).

³²⁹ Day-2-ENG, p.503(6-17).

- 326 **Second**, the ability for the GNLQ Project to promote the **energy transition** could not be a criterion for the Minister's decision, since it was not included in the Directive.³³⁰ Me Duchaine also explained that the Québec Government had never considered the ability of a project to promote the energy transition in prior decisions.³³¹
- 327 To side-step this issue, the Respondent has argued that this became a condition because GNLQ itself had presented its contribution to the energy transition as the *raison d'être* of the GNLQ Project.³³² This refrain was repeated by the Respondent's witnesses throughout the Hearing.³³³
- 328 However, as Me Duchaine confirmed, the *raison d'être* of a project is not a criterion for its assessment unless expressly included in the directive.³³⁴ In any event, the evidence shows that the *raison d'être* of the GNLQ Project was essentially commercial. As Mr Le Verger explained, the Project was intended primarily to meet growing demand for natural gas and, by replacing more polluting energy sources, to reduce GHG emissions:

“Me Hébert.- Donc, c’est vous qui expliquez, au ministère de l’Environnement et à l’Agence, les mérites... ou, donc, les mérites environnementaux ou les vertus environnementales de votre projet. Est-ce que c’est ce qu’il faut comprendre là de cet énoncé ?

M. Le Verger.- Ce qu’on explique dans ce paragraphe [CD-99, p.109], c’est que le Projet dans son ensemble se justifiait par le besoin supplémentaire de gaz naturel, et notamment de gaz naturel

³³⁰ Reply, p.89 (¶¶265-268); CER-1, p.24; Day-6-FRA, p.92(42)-97(1).

³³¹ CER-2 (Second), p.143 (¶380(b)).

³³² Rejoinder, p.226 (¶545); Day-1-FRA, p.73(3-12).

³³³ E.g., Day-5-FRA, p.94(3-6) (“**Me Barrier.-** On est d’accord que ça rejoint une des conditions qu’avait posées le ministre Charette, qui était de favoriser la transition énergétique et de contribuer aux diminutions mondiales des gaz à effet de serre ? **M. Duquette.-** Oui, et ça faisait référence à la justification du projet.”); Day-5-FRA, p.45(29-31) (“**Mme Gagnon.-** En fait, dans le dossier d’Énergie Saguenay [the issue of global GHG emissions], c’était au cœur même de la justification mise de l’avant par l’initiateur. [...]”).

³³⁴ Day-6-FRA, p.48(10-12) (“**Me Duchaine.-** [...] la justification du projet, c’était dans l’avis de projet. Le ministre a décidé de ne pas retenir les éléments au départ, dans sa directive, et de les ajouter par la suite. C’est du jamais vu.”); Day-6-FRA, p.98(7-14).

liquéfié ailleurs dans le monde, parce que nous sommes dans un contexte, en 2019, de transition énergétique, où les différents pays dans le monde font appel à ce gaz naturel pour remplacer des énergies plus polluantes, donc de réduire les gaz à effet de serre in fine grâce à cette mutation. [...]".³³⁵

329 Ms Gagnon admitted that GNLQ's contribution to the energy transition was only part of the justification for the Project:

*"Mme Gagnon.- Effectivement, c'était la raison d'être, une de... un des éléments de la raison d'être, la justification et les retombées du Projet qui étaient mises de l'avant... qui étaient mises de l'avant par l'initiateur."*³³⁶

330 **Third**, contrary to the Respondent's arguments³³⁷ and as Me Duchaine confirmed,³³⁸ the condition that the GNLQ Project should decrease global GHG emissions was outside the scope of the Directive and of Québec's constitutional power.³³⁹

331 The Respondent has sought to argue that the MELCC transmitted questions on this point to GNLQ, so that this issue should not have been new to it.³⁴⁰ This is disingenuous. The Hearing confirmed that that condition was raised for the first time at Minister Charette's press conference. Mr Illich explained:

"[Ms Tabet.-] [...] [C-58, p.2] also says: 'It is a project that, in total, will reduce GHG on the planet.' And I think that's what you told

³³⁵ Day-3-FRA, p.37(22-30); Day-2-ENG, p.406(6-10) (where Mr Illich confirmed that the positive contribution of the Project to the energy transition was a "selling point" of the Project – and not its justification).

³³⁶ Day-5-FRA, p.28(37-39).

³³⁷ Rejoinder, p.227 (¶¶547-550).

³³⁸ Day-6-FRA, p.94(12-22) ("**Me Hébert.-** [...] *Est-ce que l'effet du projet sur les émissions mondiales de GES ne pourrait pas être inclus dans cette description ?* **Me Duchaine.-** *Non, les gaz à effet de serre, pour ce qui est du Québec, ça va, mais l'impact mondial, ce n'est pas l'apanage du provincial, d'aucune façon. [...] je ne peux pas lire ce texte et commencer à dire que ça a des... on demande à l'initiateur de faire une évaluation environnementale qui sort du territoire du Québec. Je ne le ferai jamais.*").

³³⁹ Reply, p.91 (¶¶271-273); **CER-1**, p.88; **CER-1 (Second)**, p.143 (¶380(b)).

³⁴⁰ Rejoinder, p.227 (¶¶549-550).

Mr. Legault, I imagine, in your meeting, that that was the basis on which Mr. Legault was enthusiastic about the Project, wasn't it?

[Mr Illich.-] No, that's not the reason why Premier Legault supported investment in our Project.

[Ms Tabet.-] Would you say that this was a consideration that Premier Legault was expressing? [...]

[Mr Illich.-] Yes, it was [...] definitely an important theme for him. But the most important aspect of our Project, which he conveyed to us, was the economic benefits of this Project.

[...]

[Ms Tabet.-] Do you recall that the support was always conditioned on [...] reduction of GHG?

[Mr Illich.-] No. In fact, in many instances, it was not conditioned.

[...]

[Ms Tabet.-] I'm asking whether you recall being informed that [...] demonstrating that the Project would meet the stated objective of [...] contributing to global GHG emission reduction [...] was something the Government was concerned about? [...]

[Mr Illich.-] No. The answer is no. **The only time it came up was [...] when Minister Charette on March 24th of [2021] declared three conditions.** [...]”³⁴¹

332 In sum, the three conditions were not in the Directive, and had never been imposed as such; furthermore, two of them fell outside Québec's constitutional powers. Their imposition was arbitrary.

³⁴¹ Day-2-ENG, p.428(19)-429(14), p.433(15-18), p.502(6-20).

3.3.4.3 GNLQ was not afforded a meaningful opportunity to address the new conditions

- 333 Contrary to the Respondent's arguments,³⁴² GNLQ was not afforded sufficient time or opportunity to address Minister Charette's new conditions,³⁴³ which were, in any event, unattainable.³⁴⁴ The Hearing confirmed that the conduct of Minister Charette and the MELCC lacked candour and good faith, in breach of the Respondent's due process obligations.
- 334 **First**, at the Hearing, Mr Le Verger confirmed his written testimony that Minister Charette called a meeting after announcing the conditions but did not explain to GNLQ how they could be met.³⁴⁵
- 335 Me Duchaine also opined that the MELCC did not afford GNLQ the opportunity to meaningfully address these new conditions:

“Me Hébert.- Est-ce qu'ils auraient eu l'occasion de répondre aux conditions, de démontrer que leur projet satisfaisait aux conditions ?

Me Duchaine.- Je [...] n'étais pas impliquée dans le dossier de GNL Québec. Je peux vous dire qu'en temps normal, quand on se fait donner un enjeu de ce type-là, ça prend plus que 30 ou 45 jours pour pouvoir y répondre. Ça prend des études complexes, et c'est la raison pour laquelle je suis tant choquée par l'ajout à la dernière minute de ces critères-là. Et ce que je sais du dossier, c'est qu'il y a eu une demande d'information de la part de GNL Québec sur comment faire pour pouvoir convaincre le ministre du respect ces nouveaux critères d'approbation, et le ministre a dit : 'Je vous

³⁴² Rejoinder, p.228 (¶¶551-557); Day-1-FRA, p.73(13-29).

³⁴³ Reply, p.96 (¶¶289-298).

³⁴⁴ Day-1-ENG, p.60(5-11).

³⁴⁵ Day-3-FRA, p.40(39)-41(11); CWS-3, p.48 (¶¶196-198); CWS-3 (Second), p.40 (¶123); C-0267-FRA, p.2 (“The minister gives GNL Qc 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.”).

donne carte blanche.' Donc, ça veut dire : 'Je ne vous ai pas dit comment faire.'

Donc, en ce qui me concerne, moi, dans les dossiers dans lesquels je suis impliquée, quand on a un enjeu sérieux qui peut mettre en péril le projet, ça prend généralement plus de 45 jours pour le régler, et on note des indications de la part du ministère pour pouvoir répondre correctement à la question posée. Ici, je n'ai vu ni l'un ni l'autre[.]

[...]

Me Duchaine.- *Donc, pour répondre sur le terme 'occasion', oui, on a eu l'occasion. Est-ce que c'était suffisant ? Je ne pense pas.*³⁴⁶

- 336 **Second**, the questions that the MELCC transmitted to GNLQ after Minister Charette's press conference were drafted in such a vague manner that they made it impossible for GNLQ to address them.³⁴⁷ They also required demonstrating facts that were beyond GNLQ's control. Mr Duquette admitted that no promoter could make a definite demonstration that its Project would reduce global GHG emissions:

"M. Duquette.- *En fait, c'est que la portée de l'autorisation, il faut comprendre la nuance, c'est : un décret du gouvernement du Québec ne peut contraindre que le promoteur ou l'initiateur du projet en tant que tel.*

Et ainsi, les émissions produites par en l'aval, donc le produit du projet, ne pouvaient pas être attribuables au promoteur; on ne pouvait pas le contraindre à faire respecter certaines... certains engagements ou certaines conditions qui avaient été dans l'autorisation à des tiers au projet.

³⁴⁶ Day-6-FRA, p.98(29-46).

³⁴⁷ Reply, p.98 (¶294).

Donc, on ne pouvait pas demander à GNLQ de s'assurer que toutes les molécules de gaz qu'il allait vendre allaient amener au scénario en tant que tel."³⁴⁸

- 337 **Third**, the Hearing confirmed that the Québec authorities never intended to meaningfully consider the information GNLQ provided in response to the MELCC's questions.
- 338 As the Claimant explained, the documents withheld by the Respondent and identified in its privilege log would show that the Québec Government had already decided, in March 2021, to reject the GNLQ Project irrespective of GNLQ's responses.³⁴⁹ Accordingly, the Tribunal should draw the adverse inference that the decision pre-dated and pre-empted the outcome of the EA process.³⁵⁰ The evidence at the Hearing corroborated that inference.
- 339 Ms Gagnon testified that a draft "*note explicative*" from Minister Charette concerning the rejection of the GNLQ Project³⁵¹ had already been circulated in May 2021,³⁵² before the MELCC received GNLQ's responses to the new criteria on 3 June 2021,³⁵³ and before it purported to review them within the four days allocated to that exercise.³⁵⁴
- 340 She further testified that the questions were intended to "*donner l'opportunité à l'initiateur de répondre à [des] préoccupations qui demeuraient clairement énoncées.*"³⁵⁵ Yet, as Mr Duquette confirmed, the MELCC EA team was already "intensively" drafting the MELCC Report as early as March 2021, before GNLQ had even received the questions:

"[R]endus au mois de mars 2021, on était... On venait de recevoir... Eh bien, en fait, on venait de recevoir... Le rapport du BAPE venait

³⁴⁸ Day-5-FRA, p.94(22-30).

³⁴⁹ Reply, p.84 (¶¶250-251).

³⁵⁰ Reply, p.101 (¶¶300-303).

³⁵¹ Reply, p.101 (¶300).

³⁵² **RWS-22**, p.17 (¶51).

³⁵³ **C-0068-FRA**.

³⁵⁴ Reply, p.100 (¶298).

³⁵⁵ Day-5-FRA, p.29(4-5); **RWS-22**, p.16 (¶47).

*tout juste d'être publié. Et, à partir de là, nous, on était en analyse
environnementale intensive, en rédaction de notre rapport
d'analyse environnementale.*"³⁵⁶

- 341 Had the three conditions been critical to the EA and the MELCC's conclusion, the MELCC would have awaited GNLQ's responses before preparing its Report.
- 342 In sum, GNLQ could not meaningfully address three supposed "conditions". The Hearing confirmed that both these conditions and the resulting questions to GNLQ were a mere perfunctory step introduced after the Québec Government had already resolved to reject the Project. The process was neither genuine nor capable of influencing the outcome, in breach of due process, transparency, and good faith.

3.3.4.4 The three conditions were the result of a change of heart at the political level

- 343 In the Reply and at the Hearing, the Claimant established that the conditions imposed during the 24 March 2021 press conference were the product of a political change of heart, which pre-judged the outcome of the EA,³⁵⁷ and caused alarm within the Québec Government itself.³⁵⁸ The Respondent has failed to rebut these arguments.³⁵⁹
- 344 The evidence on the record shows that, as of early March 2021, the MELCC was going to approve the GNLQ Project without further questions for GNLQ,³⁶⁰ particularly none in relation to GHG emissions.³⁶¹

³⁵⁶ Day-5-FRA, p.86(13-16). To the point that communications with the Agency stopped completely, as Mr Duquette and Ms Bélanger both confirmed: Day-5-FRA, p.86(20-45)-87(1-17); Day-4-ENG, p.978(9-11)/Day-4-FRA, p.40(27-29).

³⁵⁷ Day-1-ENG, p.66; C-Presentation, p.79-83.

³⁵⁸ C-0280-FRA, C-0281-FRA; Day-1-ENG, p.60(19)-62(12).

³⁵⁹ Rejoinder, p.230 (¶¶558-561).

³⁶⁰ C-0502-FRA, p.1; C-0503-FRA, p.1; C-0504-FRA, p.1; Reply, p.83 (¶¶248-251); Day-1-ENG, p.63(17)-64(6); C-Presentation, p.80.

³⁶¹ C-0511-FRA, p.2-3; Reply, p.94 (¶282); p.305 (¶900); Day-1-ENG, p.65(9-13); C-Presentation, p.82.

345 The three new conditions first appeared [REDACTED]
[REDACTED]³⁶² After they were announced, the MELCC's technical team was pushed to prepare questions for GNLQ related to these conditions,³⁶³ in an attempt to save face.³⁶⁴ The evidence also shows that the Minister then rushed the completion of the MELCC Report.³⁶⁵

346 Minister Charette furthermore admitted a year later, during a press conference in July 2021, that the three conditions he had imposed for the approval of the GNLQ Project were the Government's **own conditions** – unrelated to the EA:

*“Je tiens à rappeler que ce qui est à la base de notre évaluation, naturellement, c’est la loi sur la qualité de l’environnement. Cette dernière expose différents critères, mais **le gouvernement avait également posé ses propres conditions** pour accepter ou non le projet, pour le rendre”*³⁶⁶

347 At the Hearing, Ms Gagnon acknowledged that the questions the MELCC transmitted to GNLQ on 26 April 2021³⁶⁷ came from Minister Charette:

“Me Barrier.- [...] [Citing Ms Gagnon's email to Mr Duquette dated 12 April 2021 at C-0511, p.2] *Quand vous dites ‘je sais que ce point ne vient pas de nous’, est-ce que vous voulez 34 dire qu’il vient du ministre Charette ?*

Mme Gagnon.- *En fait, je ne me rappelle pas exactement de ce que je voulais dire, à l’époque, mais, clairement, comme vous l’avez mentionné, **le ministre avait déjà fait état de... de ce qui était important, pour lui** pour soumettre sa recommandation, sur la base du rapport de la Commission d’enquête du BAPE qu’il avait reçu, qui est un des deux éléments sur lesquels il fait sa... à partir duquel*

³⁶² C-0603-FRA, p.1; Reply, p.85 (¶252); Day-1-ENG, p.65(14-19); C-Presentation, p.83.

³⁶³ C-0511-FRA, p.1.

³⁶⁴ C-0513-FRA, p.1; Day-1-ENG, p.66(8-13); C-Presentation, p.86.

³⁶⁵ C-0518-FRA; R-0189-FRA, p.1; Day-1-ENG, p.66(14-19); C-Presentation, p.86.

³⁶⁶ C-0284-ENG-FRA, p.1; Day-1-ENG, p.68(4-12); C-Presentation, p.89.

³⁶⁷ C-0268-FRA.

*il fait sa recommandation. Donc, clairement, ces éléments-là étaient importants.*³⁶⁸

348 Ms Gagnon then tried to suggest that the MELCC's April 2021 questions were meant as an opportunity for GNLQ to provide further explanations.³⁶⁹ The evidence shows otherwise (*supra*, Section 3.3.4.3). Ms Gagnon was pressing the MELCC's EA team to add these questions, even though they did not originate from the analysis team, and even though she knew that they would not meaningfully inform the assessment.³⁷⁰

349 The evidence also shows that the MERN [REDACTED]
[REDACTED]
[REDACTED]³⁷² a step that would not have been required if these were simply clarification requests.

350 In that context, the MELCC [REDACTED]
[REDACTED]³⁷³ and that these conditions came from "*le politique*", rather than from the EA process.³⁷⁴ In contemporaneous correspondence, Ms Gagnon reported on that meeting as follows:

"Le MEI se demandait d'où venaient les 3 critères énoncés par notre ministre pour GNL. Jean-François [Gibeault, sous-ministre adjoint au Bureau de la transition climatique et énergétique] a mentionné qu'il pouvait y avoir une distinction entre le ministère et le politique, et que cela a été un peu le cas pour GNL. Nous avons

³⁶⁸ Day-5-FRA, p.27(33-40); C-0511-FRA, p.2; Reply, p.94 (¶282).

³⁶⁹ Day-5-FRA, p.27(41-43); Rejoinder, p.74 (¶168).

³⁷⁰ C-0511-FRA, p.2 (where Ms Gagnon writes: "*il faudrait avoir des éléments sur le volet GES soulevé par le ministre, ce qu'il a dit, ce que nous pourrions penser recevoir, ce que nous pourrions conclure. Je sais que ce point ne vient pas de nous, mais il faudrait trouver des pistes d'orientation de tout ça, qu'est-ce qu'on pourrait demander à GNL ?*").

³⁷¹ C-0280-FRA.

³⁷² C-0281-FRA.

³⁷³ C-0281-FRA; Day-1-ENG, p.60(19)-62(19); C-Presentation, p.78.

³⁷⁴ C-0510-FRA, p.3.

notamment parlé du changement de position par rapport au projet, même si l'initiateur a bien fait ses devoirs."³⁷⁵

- 351 When asked by the Tribunal about this "change of position", Ms Gagnon remained evasive,³⁷⁶ and conceded that the rejection of the GNLQ Project came as a shock to economic actors and public institutions alike (including the MEI and the MERN):

"M. Legum.- Je n'ai toujours pas compris ce à quoi vous faites référence en parlant d'un changement de position.

[...]

Mme Gagnon.- Mais il faut comprendre que, pour le secteur... peut-être que pour le secteur économique ne pensait pas que les enjeux pouvaient mener... pouvaient aller jusqu'à un refus. Donc, peut-être que pour eux – je rapporte, comme je le disais, les discussions –, donc peut-être que pour eux ont vu ça comme un changement.

[...]

Donc, je pense que... peut-être, oui, effectivement, c'est peut-être un élément de surprise pour certains de l'appareil gouvernemental ou du politique, parce que... bon, je ne sais pas exactement. Mais dans les faits, c'est... d'après moi, probablement que le refus a quand même surpris certaines personnes. Peut-être l'initiateur, je ne sais pas.

En tout cas, bref, je ne me rappelle pas exactement pourquoi j'ai utilisé ces mots-là. Probablement que ça venait du secteur économique dans la rencontre. Peut-être qu'eux ont vu ça comme un changement de position de leur part."³⁷⁷

³⁷⁵ C-0510-FRA, p.3.

³⁷⁶ Day-5-FRA, p.34(1-28).

³⁷⁷ Day-5-FRA, p.37(9-33).

352 Ms Gagnon's professed memory lapse was striking. She recalled technical details of an EA completed in 2019,³⁷⁸ yet claimed not to remember what was said at a high-level Government meeting in which she participated in November 2021.

353 This posture mirrors the Respondent's broader evidentiary strategy. The Respondent refused to produce documents that would shed light on the discussions held within the Québec Government following the rejection of the GNLQ Project.³⁷⁹

354 The Claimant thus reiterates its request for an adverse inference that, following the rejection of the GNLQ Project, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] 381

355 In conclusion, the rejection of the GNLQ Project was the result of political interference, not the outcome of a fair or genuine EA process. Equally, the decision was not motivated by legitimate environmental concerns; it was the product of an opaque political decision.

3.3.5 The Québec Government's decision to reject the GNLQ Project breached Article 1105 NAFTA

356 The Québec Government's decision to reject the GNLQ Project breached Article 1105 NAFTA, not only because it was adopted in violation of due process, as demonstrated *supra*, Section 3.3, but also because it rested on erroneous conclusions regarding the social acceptability of the GNLQ Project and its alleged impacts on GHG emissions and beluga whales.

³⁷⁸ Day-5-FRA, p.44(33-37) ("Me Barrier.- [...] *Est-ce que vous vous souvenez du niveau d'émission de GES qui avait été calculé pour 34 le Projet Blackrock ? Mme Gagnon.- Je crois que c'était en dessous... c'est autour de 380 000 tonnes par année, mais il y avait plusieurs éléments qui étaient considérés dans ce calcul. Me Barrier.- 395, vous avez une très bonne mémoire... là-dessus, en tout cas !*").

³⁷⁹ Reply, p.124 (¶¶365-368).

³⁸⁰ C-0280-FRA; C-0281-FRA.

³⁸¹ Reply, p.86 (¶255), p.125 (¶368).

357 The Hearing confirmed as much and further established that the Québec Government rejected the GNLQ Project to advance its own purported interests, without regard to broader federal interests or objectives.

3.3.5.1 The decision on the social acceptability of the GNLQ Project was unjustified and arbitrary

358 In the context of EAs, including the GNLQ EA, social acceptability was only ever intended as a process, not an objective outcome to be reached.³⁸² The Québec Government's decision to reject the GNLQ Project based on alleged uncertainties as to its social acceptability was unjustified and arbitrary.³⁸³ Even more so, where the BAPE concluded that the social opinion across the Province was split – not negative overall.³⁸⁴

359 The Respondent's attempts to justify the decision of the Québec Government³⁸⁵ found no support in the documentary record or the evidence at the Hearing.

360 **First**, although social acceptability was indicated in the Decree as a ground for the refusal of the GNLQ Project, it was not actually discussed at the Cabinet level. Mr Charette, at the press conference held the day after the Government's decision to reject the GNLQ Project, and before the publication of the Decree, expressly admitted that "*nous [the Government] n'avons pas eu à évaluer l'acceptabilité sociale compte tenu que les deux premières conditions n'étaient pas respectées*".³⁸⁶

361 The fact that the Québec Government cited in the Decree a reason for rejecting the GNLQ Project that had not even been considered at the decision-making stage, confirms the arbitrariness of the decision.

362 **Second**, rejecting the GNLQ Project on this ground was discriminatory. The practice shows that the Québec Government has disregarded the

³⁸² Reply, p.112 (¶¶338); **CER-1**, p.117; *supra*, Section 3.3.4.2.

³⁸³ Reply, p.112 (¶¶338-348), p.319 (¶¶939-944).

³⁸⁴ **C-0250-ENG-FRA**, p.320; **C-0269-FRA**, p.65; **CWS-3 (Second)**, p.37 (¶¶117-122, 153-155); Reply, p.114 (¶¶342-344).

³⁸⁵ Rejoinder, p.76 (¶¶176-180), p.243 (¶¶599-605).

³⁸⁶ **C-0284-ENG-FRA**, p.4.

population's opposition to projects it wanted to approve, while it turned social acceptability into a "condition" for the approval of the GNLQ Project.³⁸⁷

- 363 Me Duchaine confirmed that social acceptability is always an issue under discussion, but has not previously or afterwards ever been given as a reason for rejecting a project, nor has it ever been put as a condition for approval:

“Me Hébert.- *Sur quoi vous basez vous pour dire que l’acceptabilité sociale ne peut pas faire l’objet d’une décision ?*

Me Duchaine.- *C’est que ça ne l’a jamais été. Donc, ce n’est pas... ça n’a jamais été un motif de refus. Et il y a beaucoup de décisions qui ont été rendues dans des dossiers où la conclusion était en effet que le projet faisait face à une opposition, puis qu’il n’y avait pas d’acceptabilité sociale du projet. Le projet a été autorisé quand même. Donc, c’est pour ça que je vous dis, ça ne... il n’y a pas de dossier à ma connaissance où l’acceptabilité sociale est une condition d’approbation. Et c’est ça que le ministre dit.*

Me Hébert.- *Mais est-ce qu’il y a quelque chose dans les lois ou les règlements d’application de la LQE qui exclut l’acceptabilité sociale des critères qui peuvent fonder une décision ?*

Me Duchaine.- *Non. Et je ne vous dirai pas non plus que le ministre ne peut pas refuser sur cette base-là. Ce que je vous dis, c’est que le ministre ne l’a jamais fait et qu’il n’en a jamais fait une obligation, une condition d’approbation d’un projet. Donc, c’est là que le traitement du dossier de GNL Québec se distingue de tous les autres dossiers où l’acceptabilité sociale est un enjeu tout le temps.”*³⁸⁸

- 364 Mr Duquette also confirmed that the MELCC treated the GNLQ Project differently from other projects in this regard. He first drew a parallel

³⁸⁷ Day-1-ENG, p.91(21)-92(19); C-Presentation, p.115; Reply, p.115 (345-346); **CER-1 (Second)**, p.115 (¶317, second and fourth bullets), p.145 (¶380(d)).

³⁸⁸ Day-6-FRA, p.93(30-45).

between the Mine Arnaud project and the GNLQ Project, asserting that both projects faced social opposition:

“Me Barrier.- *Et ça ne vous a pas surpris que le ministère de l’Environnement vous mette en charge [of the EA of the GNLQ Project] alors que vous n’aviez que quatre procédures d’analyse environnementale en tant que chargé de projet auparavant ?*

M. Duquette.- *Non, pas du tout. Je ne veux pas me vanter, mais j’avais les capacités de le faire [...]. Et l’ampleur du projet s’apparentait de loin, on peut le dire, en termes de fois, mais en termes d’impact au Québec et de médiatisation, ça ressemblait beaucoup à un des projets que j’ai faits, qui était **Mine Arnaud, qui était tout aussi contesté, socialement et localement.**”³⁸⁹*

365 He then confirmed that the analysis of the social acceptability of the two projects was (i) carried out by the same expert within the MELCC³⁹⁰ (Mr Carl Ouellet)³⁹¹ and (ii) drafted in virtually identical terms,³⁹² and yet led to opposite results, as the Mine Arnaud project was approved:

“Me Barrier.- [...] [S]i on va dans la conclusion pour Énergie Saguenay, il y a une conclusion qui est différente que dans le projet Mine Arnaud. Il est indiqué, [C-0269] page 65 :

‘Ainsi, à la lumière des éléments considérés, 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.’

Et en revanche, dans Mine Arnaud, le projet est recommandé pour une approbation. C’est bien ça ?

³⁸⁹ Day-5-FRA, p.81(28-39).

³⁹⁰ Day-5-FRA, p.98(11-12) (“**M. Duquette.-** Je vous confirme que c’est le même expert en impacts sociaux qui a fait l’analyse.”).

³⁹¹ Day-5-FRA, p.106(13-25). Mr Ouellet’s title was “Conseiller en évaluation des impacts sociaux” (CD-0289-FRA, p.129).

³⁹² TLV-0138-FRA, p.40 of PDF; C-0269-FRA, p.65.

M. Duquette.- *Le projet a été autorisé, oui.*”³⁹³

- 366 At the Hearing, Mr Duquette asserted that the conclusion that the GNLQ Project should be rejected came from the expert in social acceptability.³⁹⁴
This is a lie. The expert opinion Mr Ouellet signed on 15 March 2021³⁹⁵ concluded the GNLQ Project was “*acceptable tel que présenté*”.³⁹⁶
- 367 Furthermore, Mr Duquette confirmed that the social acceptability of the Mine Arnaud project was to be ensured with post-authorisation conditions, consisting in the creation of discussion fora:

“Me Barrier.- *Dans le projet Mine Arnaud, vous aviez une opinion qui était que l’acceptabilité sociale finirait par se faire avec les mesures mises en place par l’initiateur pour après l’autorisation ?*

M. Duquette.- *Les impacts étaient vraiment différents. C’est difficile de comparer directement les deux projets. Les opposants étaient surtout sur les nuisances, dans le fond, sur les poussières, la qualité de l’air et des choses comme ça. Donc, c’était vraiment sur une autre optique, mais c’est difficile de comparer une acceptabilité sociale de deux projets distincts sur des... en fait, une mine versus un projet de gaz naturel, on est ailleurs là, et pour...*

Mais c’est sûr que c’était vraiment différent. Puis il y avait potentiellement plus... les mesures pouvaient permettre certainement de rendre les opposants moins inquiets à terme. On ne pouvait pas juger, mais c’était potentiellement faisable, puisque les points 34 qui étaient rapportés, c’était surtout au niveau de la qualité de l’air ou des choses comme cela. Donc, il y avait des mesures qui pouvaient permettre d’éventuellement rendre les gens un peu plus confiants.

³⁹³ Day-5-FRA, p.98(38-45); **TLV-0138-FRA**, p.64 of PDF.

³⁹⁴ Day-5-FRA, p.96(41-42) (“**M. Duquette.-** [...] C’est cet expert-là qui est arrivé à la conclusion qu’il y avait... que c’était difficile de... de dire... d’affirmer qu’il y avait une acceptabilité sociale [...]”).

³⁹⁵ **CD-0289-FRA**, p.129 of PDF.

³⁹⁶ **CD-0289-FRA**, p.125 of PDF; Day-5-FRA, p.106(16-25).

Me Barrier.- *Ce n'est pas ce genre de mesures que vous mentionnez là. C'est la... essentiellement, ce sont les discussions avec la population et la création de comités.*

M. Duquette.- *Exact.*³⁹⁷

368 Mr Duquette's desperate attempt to differentiate the Mine Arnaud Project from the GNLQ Project is simply not credible. There is no explanation as to why similar conditions could not have been imposed on the GNLQ Project with an environmental authorisation, nor for the general disparity of treatment between the two projects – other than that the treatment of the GNLQ Project was discriminatory.

3.3.5.2 The decision on the alleged GHG emissions of the GNLQ Project was outside Québec's jurisdiction, arbitrary, discriminatory and in breach of due process and the Claimant's and Symbio's legitimate expectations

369 The Québec Government's decision to reject the GNLQ Project based on alleged uncertainties surrounding its impact on the energy transition and global GHG emissions was outside Québec's jurisdiction,³⁹⁸ arbitrary, discriminatory and violated due process, in breach of the Claimant's and Symbio's legitimate expectations.³⁹⁹

370 Despite the Respondent's attempts to justify such decision,⁴⁰⁰ the Hearing confirmed the Claimant's position.

371 **First**, the Québec Government saw LNG as part of the energy transition, and therefore the Claimant's and Symbio's expectations of support for an LNG project were justified.⁴⁰¹

372 When challenged about his understanding that the Québec Government supported LNG as a transition fuel on the basis of a June 2008 statement

³⁹⁷ Day-5-FRA, p.100(22-39).

³⁹⁸ Reply, p.103 (¶¶307-310), p.308 (¶¶907-913).

³⁹⁹ Reply, p.108 (¶¶323-337), p.310 (¶¶914-927).

⁴⁰⁰ Rejoinder, p.78 (¶¶181-190), p.235 (¶¶573-585).

⁴⁰¹ Reply, p.276 (¶821); Day-1-ENG, p.24(3)-25(15); C-Presentation, p.6.

by the Québec Government,⁴⁰² Mr Illich confirmed that he would be surprised if the Government had not referenced LNG.⁴⁰³ And indeed the document that was put to him does refer to natural gas as a “cleaner alternative[]” in the implementation of programs targeting a reduction in fuel oil consumption.⁴⁰⁴ Like many other policy statements made between 2014 and 2021,⁴⁰⁵ including statements made the day prior to the rejection of the GNLQ Project,⁴⁰⁶ it confirms the Québec Government’s support for natural gas and LNG projects, on which Symbio legitimately relied.

- 373 **Second**, the MELCC disregarded the opinion of its own experts that the GNLQ Project would lead to a net reduction in GHG emissions and their recommendation that it be authorised:

“[...] il est probable que le gaz naturel remplace principalement du charbon dans la première décennie du Projet, tel que souligné dans les études présentées, contribuant ainsi à une réduction de GES au niveau mondial.

*[...] le Projet n’est pas incompatible avec les objectifs de réduction de GES du Québec ni avec les objectifs de réduction de GES établi dans l’accord de Paris.”*⁴⁰⁷

- 374 Mr Duquette readily acknowledged that, in any event, downstream activities were outside the scope of the Government’s authorisation:

“M. Duquette.- [...] un décret du gouvernement du Québec ne peut contraindre que le promoteur ou l’initiateur du projet en tant que tel. Et ainsi, les émissions produites en l’aval, donc le produit du projet, ne pouvaient pas être attribuables au promoteur, on ne

⁴⁰² **C-0391-ENG**; Day-2-ENG, p.408(9)-409(12).

⁴⁰³ Day-2-ENG, p.409(8-12).

⁴⁰⁴ **C-0391-ENG**, p.23.

⁴⁰⁵ E.g., **C-0393-ENG-FRA**; **C-0394-ENG**; **C-0063-ENG**; **C-0396-ENG-FRA**.

⁴⁰⁶ **C-0034-ENG-FRA**, p.1.

⁴⁰⁷ **C-0032-FRA**, p.48 (DEC), p.59 (DPCA). Ms Gagnon argued that the analysis team of the MELCC can reach a global decision despite the contrary findings of the MELCC’s own experts (Day-5-FRA, p.31(4-10)). This is, however, not true. The normal practice is for the MELCC analysis team to follow the opinion of the experts consulted. **CER-1 (Second)**, p.110 (¶308); **CD-0278-FRA**, p.i; Reply, p.110 (¶330).

pouvait pas le contraindre à faire respecter certaines... certains engagements ou certaines conditions qui avaient été dans l'autorisation à des tiers au projet.”⁴⁰⁸

375 **Third**, the MELCC also disregarded GNLQ's commitments to become carbon neutral.⁴⁰⁹ At the Hearing, Mr Duquette conceded that GNLQ's carbon-neutrality plan would have compensated the GHG emissions of the GNLQ Project in Québec:

“M. Duquette.- En fait, le plan de carboneutralité venait amener le fait que le Projet de GNL Québec allait être un grand émetteur de GES, et la possibilité de rendre le projet carboneutre aurait permis d'un peu plus justifier le fait que le projet n'allait pas empiéter sur les émissions du Québec, en fin de compte.

Sachant qu'à plus long terme, il y avait un objectif de carboneutralité énoncé dans le plan d'économie verte aussi.”⁴¹⁰

376 In other words, the carbon-neutrality plan, which GNLQ provided voluntarily,⁴¹¹ could have been a condition for the approval of the GNLQ Project following the advice of the MELCC's own experts.⁴¹² Instead, it was disregarded.

377 **Fourth**, the MELCC's conclusions regarding the GHG emissions of the GNLQ Project were discriminatory.

378 Hence, a comparison between the MELCC's findings on the BlackRock Project and those on the GNLQ Project reveals an unjustified disparity of treatment. For both projects, the MELCC considered the impact on global GHG emissions. For the GNLQ Project, contribution to global GHG emissions was one of the grounds for rejection;⁴¹³ for BlackRock, the MELCC concluded, instead:

⁴⁰⁸ Day-5-FRA, p.94(23-28).

⁴⁰⁹ CWS-3 (Second), p.47 (¶¶144-145); Reply, p.109 (¶328).

⁴¹⁰ Day-5-FRA, p.90(27-32).

⁴¹¹ CWS-3 (Second), p.47 (¶144); Day-5-FRA, p.88(40)-89(10).

⁴¹² C-0032-FRA, p.63 (DPCA).

⁴¹³ C-0274-FRA, p.3.

*“d’un point de vue mondial, quel que soit le lieu d’implantation, l’usine constituera toujours une source d’émissions de GES. Or, le fait que celle-ci puisse être construite au Québec assure une prise en compte et un encadrement de cet enjeu. Les plans et programmes mis de l’avant par la province constituent également des incitatifs de réduction des émissions de GES.”*⁴¹⁴

- 379 The BlackRock project was eventually approved.⁴¹⁵ Ms Gagnon, who was the “directrice de la direction responsable de l’évaluation de ce projet”,⁴¹⁶ was again evasive on this issue:

“Me Barrier.- [...] *‘Quel que soit le lieu d’implantation, l’usine constituera toujours une source d’émission de GES. Or, le fait que celle-ci puisse être construite au Québec assure une prise en compte et un encadrement de cet enjeu. Les plans et programmes mis de l’avant par la province constituent également des incitatifs de réduction des émissions de GES.’* [C-0218, p.14]

Est-ce que vous seriez surprise si je vous disais que c’est tout ce qu’il y a sur les émissions de GES au niveau mondial dans le rapport Blackrock ?

Mme Gagnon.- *Oui... je n’avais peut-être pas bien saisi votre question. C’est là ce que je vois à l’écran, c’est effectivement... si on regarde l’usine et qu’on l’installe ailleurs dans le monde, il va toujours y avoir des émissions de GES, c’est l’affirmation qui est à l’écran. Je ne suis pas certaine de saisir la question. Il n’y a pas de lien, je veux dire, avec... j’avais cru comprendre que vous parliez d’émissions amont ou aval. Bref, j’ai peut-être mal saisi votre question.”*⁴¹⁷

- 380 The same conclusion of discriminatory treatment of the GNLQ Project can be drawn from the approval of the Stolt LNGaz project. The EA report for that project (issued in August 2015) considered its potential to **lower** GHG

⁴¹⁴ C-0218-FRA, p.14.

⁴¹⁵ CD-0021-FRA, p.3.

⁴¹⁶ Day-5-FRA, p.42(41-42).

⁴¹⁷ Day-5-FRA, p.45(7-19).

emissions in Québec because the LNG produced would be replacing more polluting fuels:

*“l’initiateur mentionne que si 50 % du GNL (500 000 t) est distribué au Québec à des établissements n’ayant pas accès au gaz naturel, et qui par conséquent substituerait de l’huile lourde ou légère par du GNL, la réduction d’émissions de GES pour le Québec serait de l’ordre de 600 000 t par année. Rappelons que Stolt LNGaz Inc. possède une licence d’exportation de l’ONÉ pour la vente d’un maximum de 500000 t de GNL par an. Ainsi, avec une seule unité de liquéfaction, Stolt LNGaz Inc. pourrait exporter 100 % de sa production à l’étranger et 50 % de sa production avec deux unités de liquéfaction. Ainsi, avec une production d’un million de tonnes par année, il est possible de penser qu’une réduction de 600 000 t de GES par année pour le Québec pourrait être réalisée grâce au projet.”*⁴¹⁸

381 Mr Duquette confirmed that the potential for LNG to substitute higher-GHG emitting fuels was part of the Government’s positive considerations for Stolt LNGaz:

“Me Barrier.- Et vous avez la conclusion par la suite, qui rappelle quand même que Stolt avait aussi une licence d’exportation.

Mais il est précisé que : ‘Il est possible de penser qu’une réduction de 600 000 tonnes de GES par année pour le Québec pourrait être réalisée grâce au projet.’

Donc le ministère accepte la possibilité que le GNL substitue au Québec l’huile lourde ou le gasoil dans les industries du nord du Québec et aboutisse à une réduction des émissions de GES au Québec. C’est bien ça ?

M. Duquette.- *C’est bien ça.*⁴¹⁹

⁴¹⁸ C-0355-FRA, p.20.

⁴¹⁹ Day-5-FRA, p.92(23-30).

- 382 By contrast, the MELCC simply disregarded GNLQ's commitment to sell a comparable quantity of LNG to the local market,⁴²⁰ which would have offset the entire GHG emissions of the plant in Quebec.⁴²¹
- 383 In sum, the evidence shows that the Québec Government's decision not to authorise the GNLQ Project based on its alleged GHG emissions was (i) unlawful because outside its jurisdiction; (ii) arbitrary, for ignoring the evidence provided by its own GHG experts showing that the GHG emissions should have been acceptable; and (iii) discriminatory, for treating the GNLQ Project differently to how Québec had treated other projects with respect to the assessment of GHG emissions.

3.3.5.3 The decision on the alleged impact on beluga whales of the GNLQ Project was outside Québec's jurisdiction, arbitrary, discriminatory and frustrated the Claimant's and Symbio's legitimate expectations

- 384 The Québec Government's decision to reject the GNLQ Project based on alleged uncertainties as to its impact on beluga whales violated due process, was arbitrary and discriminatory, and frustrated the Claimant's and Symbio's legitimate expectations.⁴²² The Respondent has tried to argue that it was part of the MELCC's mandate to assess the impact of the GNLQ Project on the belugas, and that the Québec Government's decision was otherwise in compliance with Article 1105 NAFTA.⁴²³
- 385 Here also, the Hearing confirmed otherwise.

⁴²⁰ CWS-3 (Second), p.10 (¶19); C-0043-ENG-FRA, p.7; Day-2-ENG, p.414(8-16) (“[Ms Tabet.-] And your Project was not aimed principally at providing natural gas to remote location. It was focused on the export market; isn't that right? [Mr Illich.-] Our Project was primarily an export LNG project. However, there was strong interest in Québec by the Government and companies for us to provide LNG to them. [Ms Tabet.-] That was only a small part of your Project? [Mr Illich.-] Correct.”); Day-3-FRA, p.34(9-21) (Mr Le Verger explaining GNLQ's decision to reserve some volumes of gas for the local market).

⁴²¹ CWS-3 (Second), p.11 (¶20).

⁴²² Reply, p.117 (¶¶349-365), p.314 (¶¶928-938).

⁴²³ Rejoinder, p.240 (¶¶586-598).

- 386 **First**, as explained *supra*, Section 3.2.1.3, Québec had no authority to issue any decision in relation to navigation, which falls within federal jurisdiction. This aspect of the decision was therefore unlawful.
- 387 **Second**, the evidence confirms that the protection of beluga whales was not the concern behind the Québec Government's decision to reject the GNLQ Project.⁴²⁴ Premier Legault confirmed as much,⁴²⁵ as did the later investments in port infrastructure on the Saguenay made by the Québec and Federal Governments.⁴²⁶ The MELCC's imposition of a "zero-noise" policy in the evaluation of the GNLQ Project⁴²⁷ was thus arbitrary.
- 388 **Third**, in any event, the MELCC's conclusions were once again not aligned with the conclusions of the experts it had consulted. The MFFP considered in November 2020, that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴²⁸
- 389 In January and June 2021, the MFFP noted, again, that "*les impacts du projet peuvent être gérés de manière satisfaisante, sous réserve de compléments d'informations et d'engagements satisfaisants pour réduire les impacts du projet sur la faune et ses habitats*".⁴²⁹ Mr Duquette confirmed his understanding of this opinion at the Hearing:

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

⁴²⁴ Day-1-ENG, p.25(16)-29(18); C-Presentation, p.15-16.

⁴²⁵ C-0033-FRA; JI-0196-ENG-FRA, p.3.

⁴²⁶ C-0457-FRA; CD-0056-FRA; C-0275-FRA; C-0276-FRA; C-0277-ENG; Reply, p.20 (¶69).

⁴²⁷ C-0269-FRA, p.34.

⁴²⁸ C-0532-FRA, p.1.

⁴²⁹ C-0032-FRA, p.8.

[REDACTED]
[REDACTED]³⁰

- 390 As Mr Bainbridge explained in its witness statement, GNLQ could indeed mitigate the noise generated by the vessels associated with the GNLQ Project.⁴³¹ The MELCC's conclusion,⁴³² which then formed the basis of the Decree,⁴³³ was thus contrary to the conclusion of the experts it had consulted, and to the information GNLQ had provided.
- 391 **Fourth**, the MELCC's conclusion and the Québec decision regarding the impact of the GNLQ Project on beluga whales was discriminatory. This was confirmed by Ms Gagnon.
- 392 Ms Gagnon confirmed that the BlackRock project, which was approved, will generate additional year-round navigation in exactly the same location as the GNLQ Project.⁴³⁴ She also confirmed that the BlackRock Project was approved on the basis of the promoter's engagement to discuss with experts possible measures to reduce the noise of ships in the Saguenay.⁴³⁵ On the other hand, the GNLQ Project, for which the promoter had taken far more significant engagements,⁴³⁶ was rejected under the pretext that "*la mesure la plus efficace pour contrer les effets du bruit demeure l'évitement*",⁴³⁷ a standard that the Québec Government had never applied before (or after). This was squarely discriminatory.

⁴³⁰ Day-5-FRA, p.106(4-10).

⁴³¹ The Respondent decided not to call Mr Bainbridge to testify at the Hearing; his testimony on the efficacy of the noise-mitigation measures proposed by GNLQ on the vessels it would charter therefore stands: **CWS-4 (Second)**, p.5 (¶¶12-23).

⁴³² **C-0269-FRA**, p.76.

⁴³³ **C-0274-FRA**, p.3.

⁴³⁴ Day-5-FRA, p.46(37-43); Reply, p.380 (¶¶1122-1124).

⁴³⁵ Day-5-FRA, p.46(26-30).

⁴³⁶ **C-0269-FRA**, p.33.

⁴³⁷ **C-0269-FRA**, p.34; Reply, p.316 (¶¶933-936).

3.3.5.4 The Québec Government's decision was not motivated by genuine environmental concerns

- 393 Contemporaneous statements made by Premier Legault⁴³⁸ and Ms Gagnon⁴³⁹ demonstrate that the true basis for the rejection of the GNLQ Project was the authorities' view that it would allegedly not generate sufficient benefits for Québec.⁴⁴⁰
- 394 At the Hearing, Ms Gagnon acknowledged that the rejection of the GNLQ Project was grounded in part in the assessment that it would not sufficiently benefit Québec.

“Me Barrier.- En l’occurrence, le projet Énergie Saguenay crée, certes, des emplois sur place, mais il visait à vendre du gaz qui venait de l’Alberta sur des marchés internationaux. Donc ces retombées sur le Québec étaient moins importantes qu’un projet local destiné à une productivité locale et destiné au marché local, c’est ça ?

Mme Gagnon.- Je ne suis pas en mesure de me positionner en comparaison, mais ça fait partie des éléments qui ont été questionnés.

[...]

Me Barrier.- [referring to C-0534-FRA, p.32] Là, vous faites l’énumération... C’est vous qui commentez sur le projet de rapport, vous indiquez que vous voulez la notion d’espace, et vous indiquez que : ‘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.’ Et vous ajoutez : ‘Cela me semble beaucoup pour un seul projet, qui ne vise pas à répondre à un besoin du Québec, ni en approvisionnement en ressources, ni en

⁴³⁸ JI-0196-ENG-FRA, p.3.

⁴³⁹ C-0533-FRA, p.3; C-0534-FRA, p.32.

⁴⁴⁰ Reply, p.123 (¶¶363-364); Day-1-ENG, p.25(16)-29(18); C-Presentation, p.14-16.

exportation de nos ressources ou produits d'ici. [...] est-ce que c'est cette notion d'espace et le fait qu'un projet mobilise des ressources, c'est un concept, vous dites, qui est pris en compte dans les analyses environnementales, dans les autres analyses environnementales conduites par le ministère de l'Environnement ?

Mme Gagnon.- [...] Autre élément, comme je le mentionnais, la raison d'être fait partie de l'analyse, effectivement. Il y a des projets, cela peut parfois permettre, cela ne va pas être nécessairement un élément de refus, **mais cela peut par contre faire basculer, mettre du poids vers l'autorisation d'un projet.** [...]”⁴⁴¹

- 395 These statements echo Premier Legault's admission, during a later radio interview, that the Project was rejected because it involved gas produced outside Québec, not needed domestically, and intended for export, and thus was not a “Québec” project:

*“La raison essentielle, c'est du gaz d'abord, du gaz qui n'est pas fabriqué au Québec qui vient de l'Ouest Canada, qu'on n'a pas besoin vraiment ici au Québec. Donc il faudra envoyer par bateau éventuellement en Europe. Donc je ne pense pas qu'on puisse associer le refus de GNL avec le fait qu'on va continuer de regarder des projets pour le port Saguenay.”*⁴⁴²

- 396 In conclusion, the Québec Government rejected the GNLQ Project based on Québec's own alleged interests, without regard to broader federal interests. As a result, the GNLQ Project was subjected to two uncoordinated provincial and federal EAs leading to separate decisions, rather than to a single federal or joint EA. Canadian law mechanisms were designed precisely to prevent such unilateral outcomes. Had the Federal and Québec Governments complied with their obligations at the outset of the EA process in 2015 and 2016, Québec could not have rejected the GNLQ Project on the grounds invoked, nor compelled the Federal Government to follow suit.

⁴⁴¹ Day-5-FRA, p.41(15)-42(2).

⁴⁴² **JI-0196-ENG-FRA**, p.3; **C-0284-ENG-FRA**, p.6.

3.4 The Federal Government's decision to reject the GNLQ Project was tainted by the Québec Government's decision, and was also wrongful and discriminatory, in breach of Article 1105 NAFTA

397 The Hearing confirmed that the Quebec Government's rejection, in July 2021, of the GNLQ Project tainted the federal EA (**Section 3.4.1**). Unsurprisingly, the grounds that appeared in the Federal Government's decision in February 2022 were outside the scope of the GNLQ Project and of the EA, unlawful and arbitrary (**Section 3.4.2**). Neither the Minister of Environment nor the Cabinet had the discretion to reject the GNLQ Project on those grounds (**Sections 3.4.3 and 3.4.4**).

3.4.1 The Federal Government pre-emptively rejected the GNLQ Project for improper political, rather than legal or technical reasons

398 The Hearing confirmed that the Federal Government led by Prime Minister Trudeau pre-emptively and wrongfully announced the rejection of the GNLQ Project at the federal level, whilst the federal EA was still ongoing. As explained, the sequence of events was as follows.⁴⁴³

399 After the Québec Government rejected the GNLQ and Gazoduq Projects in July 2021, Prime Minister Trudeau called federal parliamentary elections in August 2021. In the context of those elections, on 13 September 2021, *Le Devoir* reported that the Conservative Party, in opposition, which had previously supported the GNLQ Project, had decided to “*respecter les décisions du gouvernement Legault*” to reject it.⁴⁴⁴ The same article noted that Prime Minister Trudeau's incumbent Liberal Party had not yet taken a position on the issue.

400 The following day, on 14 September 2021, the same journalist from *Le Devoir* reported by tweet that a Liberal Party spokesperson had confirmed its position: “*Le Parti libéral du Canada est d'accord avec le gouvernement du Québec et n'appuie pas ce projet. Il est clair pour nous*

⁴⁴³ Day-1-ENG, p.70(19)-74(15); C-Presentation, p.96-101; Reply, p.126 (s.2.6.1); Memorial, p.103 (¶¶316-320).

⁴⁴⁴ **R-0191-FRA**, p.2.

qu'il ne verra pas le jour."⁴⁴⁵ Other media reported the same message shortly afterwards, attributing the position not only to the Liberal Party but specifically to "*l'équipe de Justin Trudeau*".⁴⁴⁶

- 401 The effect of Mr Trudeau's position was to confirm that the GNLQ Project would never receive environmental approval from the Federal Government, regardless of the next steps and outcome of the EA process.⁴⁴⁷ His motivations **can only have been political**, and not environmental, because the Agency had not yet issued a report to the Government opining on whether the project would have significant adverse environmental effects.⁴⁴⁸ For the same reason, as Mr Northey explained at the Hearing, rejecting the GNLQ Project at that stage was unlawful:

"[Mr Northey.-] [...] [T]here was no lawful authority to say no to this Project in September 2021. This no was so early it preceded four CEAA preconditions to a lawful no."⁴⁴⁹

- 402 The Respondent has denied that it pre-judged the outcome of the federal EA, relying on a formal distinction between a political party and the Government.⁴⁵⁰ That position, however, deliberately ignores the political reality as it stood in mid-September 2021. It is also undermined by the fact that neither the Federal Government nor the Liberal Party issued any statement to deny, correct or otherwise clarify the media reports. The effect of this silence was to confirm that, whichever party won the election, the GNLQ Project would not go ahead ("*il ne verra pas le jour*"), regardless of the ongoing EA process under CEAA 2012. In other words: regardless of the Agency's own conclusions regarding the environmental impact of the GNLQ Project, the Minister would find significant adverse

⁴⁴⁵ Reply, p.126 (¶¶372-373); C-0036-ENG-FRA.

⁴⁴⁶ C-0294-ENG-FRA, p.2; Memorial, p.104 (¶317).

⁴⁴⁷ Memorial, p.104 (¶319).

⁴⁴⁸ This is consistent with Mr Illich's unchallenged evidence that Federal Government Minister O'Regan told him the Federal Government's rejection of the GNLQ Project "had been driven by Québec's prior refusal" and that "the Project got into politics between the Federal and Québec Governments." CWS-1, p.92 (¶279).

⁴⁴⁹ Day-7-ENG, p.1880(16-19); Northey Presentation, p.30.

⁴⁵⁰ Rejoinder, p.86 (¶¶206-209); Day-1-FRA, p.74(23-26).

environmental effects, notwithstanding possible mitigation measures. The matter would then automatically be referred to the Cabinet, which would conclude that those effects were not justified.⁴⁵¹

403 Mr Northey explained:

“**[Mr Northey.-]** [...] I believe this focuses on trees to ignore the forest. I am not aware of any rebuttal of the truth of the media reports coming from the political party cited in them. And these reports advise this Project would never get approved, particularly during the election where these reports had maximum value.

I have never seen anything like this in Federal EA. I'm astonished to see it unrebutted. I'm depressed to see it unrebutted by anyone connected to the political party at issue that the political prejudgment came from the highest level politically and legally, the Prime Minister, the leader of all Ministers in the Federal Cabinet. **In my view, there's just no way to normalize this prejudgment. It was remarkable. It was contrary to law.**”⁴⁵²

404 The Respondent has also contended that the Agency staff working on the GNLQ Project EA were unaffected by politics and carried out their work independently.⁴⁵³ That argument is both inconsequential and unsupported.

405 **First**, even if there were credible evidence that the Agency's conclusions were unaffected, that would not alter the fact that Mr Trudeau's team had already decided they would not approve the project at Cabinet level. Nor, therefore, does it alter the conclusion that the Federal Government unlawfully pre-judged and pre-announced the outcome of the EA process. The fate of the federal EA was sealed either way.

406 **Second**, the Respondent's position is unsupported by credible evidence. The Respondent relies on Ms Bélanger's assertion in her second witness statement that by September 2021 the Agency had already decided to recommend a finding of significant adverse environmental effects on GHG

⁴⁵¹ Day-1-ENG, p.72(21)-73(19); **CER-2**, p.16 (¶¶45-47).

⁴⁵² Day-7-ENG, p.1879(22)-1880(14); Northey Presentation, p.29.

⁴⁵³ Rejoinder, p.88 (¶¶211-219); Day-1-ENG, p.74(27-34).

emissions and belugas.⁴⁵⁴ However, Ms Bélanger provided no corroborating evidence:

“[Ms de Germiny.-] But so you haven’t provided any drafts that show that the GHG emission conclusions were finalized before the version that was released to the public?

Mme Bélanger.- *Non. Aux Premières Nations, non. Donc, ce sont des documents internes.*

[Ms de Germiny.-] But I mean, with your Witness Statement, you have not provided documents. You haven’t provided a draft – right? – that demonstrates that the conclusions were final?

Mme Bélanger.- *Non, je ne pense pas. C’est ce que j’ai mentionné tout à l’heure.”*⁴⁵⁵

407 The Respondent also relies on Mr Trépanier and Mr Hubbard’s unsupported assertions that the DFO and the Agency were not influenced by political interference,⁴⁵⁶ but their evidence should also be treated with scepticism. As explained, despite the Tribunal’s document production orders, the Respondent identified but has withheld documents that would have allowed the Claimant to test that evidence, specifically:⁴⁵⁷

- four documents in response to the Claimant’s request for documents dated between November 2021 and February 2022 regarding the referral by the Minister of Environment and Climate Change to the Federal Government, which the Respondent identified but did not properly describe in its second privilege log;⁴⁵⁸
- two 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,

⁴⁵⁴ Rejoinder, p.91 (¶219); **RWS-14**, p.47 (¶94).

⁴⁵⁵ Day-4-ENG, p.1051(3-12)/Day-4-FRA, p.67(16-24).

⁴⁵⁶ Rejoinder, p.90 (¶215); **RWS-20**, p.9 (¶22); **RWS-18**, p.5 (¶13).

⁴⁵⁷ Reply, p.130 (¶¶386-389).

⁴⁵⁸ Reply, p.130 (¶386).

again identified but not properly described in the Respondent's privilege log.⁴⁵⁹

408 Mr Hubbard's testimony, in particular, is contradicted by Mr Le Verger's account, corroborated by contemporaneous notes, of conversations they had before and after the Québec Government announced its rejection of the GNLQ Project.⁴⁶⁰ As Mr Le Verger explained, his conversation with Mr Hubbard immediately prior to Québec's Decree left him confident that the Agency would not make a finding of significant adverse environmental effects, but Mr Hubbard's tone changed after Québec's Decree, when he suddenly appeared concerned, citing the upcoming federal elections. Although Mr Hubbard disputed the discussions of those meetings, he produced no contemporaneous notes, in contrast to Mr Le Verger.⁴⁶¹ When questioned on his notes at the Hearing, Mr Le Verger confirmed that they were produced in their original, unmodified format, directly from his OneNote.⁴⁶²

409 Further, the glimpses of internal Government documents that the Respondent did provide through document production suggest that Mr Trudeau's policy position likely affected the Agency's substantive recommendations.⁴⁶³ An internal DFO email dated 24 September 2021 suggests that the DFO team did not consider their proposed draft conditions would ever become relevant, because Mr Trudeau had already indicated he wanted to reject the GNLQ Project.⁴⁶⁴ This more likely than not had a substantive impact on the outcome: if the DFO officers had not already been told, in effect, that whatever conditions they proposed would be irrelevant, they might have been more motivated to propose, explain and promote conditions that would have made the GNLQ Project

⁴⁵⁹ Reply, p.130 (¶¶387).

⁴⁶⁰ **CWS-3 (Second)**, p.52 (¶¶165-170); **TLV-0154-ENG**.

⁴⁶¹ **RWS-18**, p.1 (¶¶3-8).

⁴⁶² Day-3-FRA, p.29(34)-30(4).

⁴⁶³ Reply, p.128 (¶¶380-381).

⁴⁶⁴ Reply, p.128 (¶¶380-381); **TLV-0156-FRA**.

environmentally acceptable (including properly considering those put forward by GNLQ and accepted for other projects).⁴⁶⁵

- 410 Again, Mr Northey, when questioned about that same DFO email at the Hearing, explained how it demonstrates the impact of the public statements attributed to the Prime Minister:

“**[Mr Hébert.-]** And it’s an email sent by a DFO – so a Department of Fisheries and Oceans biologist, maybe we can show it on the screen – Ms. Julie Corriveau to Ms. Marion Vachè, who is a team leader also at DFO. So those – a biologist and team leaders would not be particularly high-level civil servants?

[Mr Northey.-] I would agree.

[Mr Hébert.-] Okay. So it’s more towards working level than upper management, would you say?

[Mr Northey.-] Yes. But I guess, Counsel, the implications of this are that lower levels are aware of the Prime Minister indicating a position on a project subject to an assessment. That’s really what I took to be momentous about this. **Even this is permeated in one sense, the lower it goes, the more broad they understood this message from the Prime Minister. That’s why I call this a grave concern. There seems to be a widespread understanding. That’s what my version of ‘significant’ is.**”⁴⁶⁶

- 411 To conclude, the Federal Government unlawfully pre-judged the outcome of the federal EA in September 2021. The pre-judgment affected the substantive outcome of the EA. On this point, to the extent necessary the Claimant maintains its request that the Tribunal also draw the following adverse inference from the Respondent’s refusal to produce documents:⁴⁶⁷

Prior to its 7 February 2022 Decision Statement, the Federal Government had already decided to reject the GNLQ Project and

⁴⁶⁵ Day-1-ENG, p.96(18)-99(14); C-Presentation, p.123, 125.

⁴⁶⁶ Day-7-ENG, p.1897(22)-1898(18).

⁴⁶⁷ Reply, p.131 (¶389).

follow the Québec Government's own decision, regardless of the outcome of the federal EA process for the GNLQ Project.

- 412 This federal pre-judgment was yet another consequence of the Québec Government's unlawful assertion of control over the whole EA process, stemming from Canada's unlawful failure from 2015 to conduct a single federal EA or a joint federal-provincial EA. But for that failure, the Québec Government would not have had the opportunity to reject the GNLQ Project first while a separate, federal EA was still ongoing, and there would have been no reason for the Federal Government to bow to political pressure, rather than following the EA process governed by CEAA 2012.

3.4.2 The Federal Government's decision was based on grounds outside the scope of the EA, was unlawful and arbitrary, in breach of Article 1105 NAFTA

- 413 As confirmed at the Hearing, including by the evidence of fact and expert witnesses (in particular, Ms Bélanger, Ms Powell, and Mr Northey), the Federal Government's decision to reject the GNLQ Project was based on grounds outside the scope of the EA, was unlawful and arbitrary, and as such in breach of Article 1105 NAFTA.⁴⁶⁸

3.4.2.1 The Agency, the Minister of Environment, and the Cabinet could not conclude that upstream GHGs or marine shipping beyond GNLQ's care and control might result in significant adverse environmental effects

- 414 It is undisputed that the Agency has the power, at the start of a federal EA, to exclude factors from the scope of a project and EA,⁴⁶⁹ as confirmed by

⁴⁶⁸ C-Presentation, p.52, 54-55; Reply, p.125(s.2.6).

⁴⁶⁹ **CER-2**, p.29 (¶¶82-85); Reply, p.60 (s.2.4); Day-7-ENG, p.1861(20)-1862(4); Northey Presentation, p.10; Day-8-ENG, p.2127(17)-2128(5) (“**[Mr Northey.-]** [...] the Agency had the power to scope out certain parts of what the Proponent proposed, namely activities, under the power under Section 19(2) of CEAA, and the EIS Guidelines in question did exactly that on the pages that I took you to, I think it's Section 3.2.1. So we have a similar starting point, the difference is that I think the Agency had a power to do something different and exercise that power, and that power changed the scope of what the assessment was about and what project activities were included.”); Day-8-ENG, p.2072(4-12) (“**[Ms de Germiny.-]** Scoping

the Canadian courts, including the Canadian federal Court of Appeal in its June 2023 decision in *Sierra Club Canada v. the Minister of Environment*.⁴⁷⁰

415 At the Hearing, Ms Powell could not deny that, in that decision which concerned the Bay du Nord project, the Court confirmed that the guidelines in the underlying federal EA represented the final position regarding the scope of the project for the purposes of the EA.⁴⁷¹ She further confirmed that:

- the guidelines for that project (dated September 2018) excluded marine transportation and downstream GHGs;
- in April 2022, the Agency finalised the EA Report which, in line with those guidelines, maintained that exclusion;
- the Minister decided that the project would produce no significant adverse environmental effects; and
- the federal Court of Appeal dismissed Sierra Club Canada's challenge against the Minister's decision and upheld the scoping determination.⁴⁷²

416 As for Mr Northey, he explained that his opinion that **the Guidelines were binding** was based on both his interpretation of the statute (CEAA 2012) and relevant case law, including the Court's decision in *Sierra Club Canada v. the Minister of Environment*.⁴⁷³

417 It is in turn undisputed that section 3.2.1 of the Guidelines issued for the GNLQ Project contained two exclusions, one concerning upstream GHGs and the other marine shipping beyond the care and control of GNLQ:

determinations at the outset of a federal EA are telling the Proponent what the Project is going to be assessed on as a broad statement. [Ms Powell.-] Correct. [Ms de Germiny.-] [...] And when the Agency then reviews a Proponent's Environmental Impact Statement, it's assessing the conformity of that Statement with the Guidelines; right? That's the basic process. [Ms Powell.-] Correct.");

⁴⁷⁰ RN-0049-ENG.

⁴⁷¹ Day-8-ENG, p.2072(2-7).

⁴⁷² Day-8-ENG, p.2073(15)-2077(1).

⁴⁷³ Day-8-ENG, p.2006(10)-2007(6).

“Environmental Assessment Decision

The Minister’s decision under CEAA 2012 on whether the Project is likely to cause significant adverse environmental effects, and any conditions to the proponent, should the Project be allowed to proceed, will be based on environmental effects that are caused by the Project.

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 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 [...].”⁴⁷⁴

418 As a result of these exclusions:

- the Agency and the Minister of Environment could **not** conclude that either **upstream GHGs** relating to the GNLQ Project⁴⁷⁵ or **marine shipping beyond the care and control of GNLQ**⁴⁷⁶ would result in significant adverse environmental effects (under Section 19(1)(a) CEAA 2012);

⁴⁷⁴ **RN-0013-ENG**, p.4; **GB-0023-FRA**, p.5; Day-7-ENG, p.1862(6)-1865(21); Northey Presentation, p.11-14.

⁴⁷⁵ Day-8-ENG, p.2077(2-16); **RER-3**, p.55 (¶109); **RER-7**, p.47 (¶116); Day-7-ENG, 1862(6)-1865(21); Northey Presentation, p.12-14; *infra*, Section 3.4.2.3.

⁴⁷⁶ Day-8-ENG, p.2077(17)-2078(20); *infra*, Section 3.4.2.4.

- the Agency could **only** “collect information” regarding upstream GHG emissions and marine shipping beyond the care and control of GNLQ (under Section 19(1)(j)); and
- the Agency, Minister of Environment and the Cabinet also could not consider the possible **cumulative effects** of these excluded activities (as discussed in Section 3.4.2.2).

419 Mr Northey further explained that **the Minister** cannot consider for purposes of his decision under **Sections 19(1)(a)** and 52 CEAA 2012⁴⁷⁷ information that the Agency has collected under **Section 19(1)(j)**:

“[t]he effects of an activity expressly excluded from the Minister’s s.52 decision by s.19(2) cannot be ‘taken into account’ by the Minister under s.19(1)(j). An effect from an excluded activity is not an ‘other matter’ available for consideration by the Minister.”⁴⁷⁸

420 In the same vein, with regard to GHG emissions, Ms Bélanger confirmed her written evidence that, although the Agency asked GNLQ to provide an estimate of upstream GHG emissions, this was “*comme élément additionnel à considérer en application de l’alinéa 19(1)(j) de la LCÉE 2012*” and that “*ces émissions de GES ne seraient pas considérées comme faisant partie du projet*”. She testified as follows on this point:

“[**Ms de Germiny.-**] Ms. Bélanger, [...] I think you said that the Minister [...] cannot conclude that upstream GHG emissions result in significant adverse environmental effects; is that right?

Mme Bélanger.- *Ce que j’ai mentionné, c’est que les activités créant des émissions en amont, donc : l’extraction du gaz, le transport du gaz. Donc, ces activités-là ne sont pas sous le contrôle du promoteur, et l’Agence ne peut pas conclure sur l’importance des effets, et le ministre ne peut pas non plus conclure sur*

⁴⁷⁷ With regard to **Section 52 CEAA 2012**, Mr Northey confirmed: “[**Mr Northey.-**] [Section] 52 of CEAA [...] provides the legal context for decisions by the Minister and Cabinet. Subsection 52(1) provides the Minister with exclusive authority to decide whether any effects are significant, and, if so, to refer those effects to Cabinet. Subsection 52(4) governs the Cabinet who has power only through the Minister’s referral and only regarding justification for the referred effects.” Day-7-ENG, p.1860(21)-1061(7); Northey Presentation, p.9.

⁴⁷⁸ Northey Presentation, p.14.

***l'importance des effets et imposer des conditions sur ces activités-
là qui ne sont pas sous le contrôle du promoteur.***⁴⁷⁹

421 Further to questions from the Tribunal and the Respondent, Mr Northey expanded on the distinction in the Guidelines between the collection of information under Section 19(1)(j) and the assessment of information for purposes of Section 19(1)(a) of CEAA 2012:

“**[Arbitrator Legum.-]** If you look at the paragraph just above the one that's currently enlarged [...] At the very end of it, there's a reference to Part 2, Section 6.2.1, which I believe was the section that you were looking at before. And so my question is, is there any significance to the fact that, at the end of this discussion of 19(1)(j) matters, there's this reference to 6.2.1?

[Mr Northey.-] Mr. Arbitrator, **I would agree that is relevant because that suggests that that section is dealing with the 19(1)(j) information request and not what is the queue I've been calling to the Minister's Decision.** So I think it is relevant. [...]

Mr. Hébert: [...] So, Mr. Northey, is your testimony that the Agency could not look at the effects of **any** greenhouse gas emissions from this Project?

[Mr Northey.-] No. This is what – sorry. I've been at pains to try and explain. **The way the Guidelines are drafted, there are two queues for information to be considered. The 19(1)(j) queue, which we were just talking about, and then the queue under Environmental Assessment Decision.**

[Mr Hébert.-] Yes. I understand. Sorry. My question was not precise enough. So are you saying, Mr. Northey, that **the Minister**, the environment Minister could not draw any conclusions on the significant adverse environmental effects of **any** greenhouse gas emissions of this Project?

⁴⁷⁹ Day-4-ENG, p.992(8-22)/Day-4-FRA, p.45(21-30); Day-8-ENG, p.2037(2-4) (“**[Ms. Powell.-]** upstream GHGs were not included in the scope of the four corners of the ‘designated project.’”); *supra*, ¶¶414-418.

[Mr Northey-.] No, not at all. What I'm saying is, the Minister's conclusion cannot include [...] the production of upstream GHGs, the effects of those."⁴⁸⁰

422 At the Hearing, Ms Powell asserted that the upstream GHGs could be "assessed in accordance with the 2016 interim guidance" which is an Agency guidance note from January 2016 on the assessment of GHG emissions.⁴⁸¹ According to her, the guidance is "saying to proponents, **we want information** on upstream GHGs".⁴⁸² The 2016 guidance is, however, a red herring and this is undisputed:

- the guidance was issued in January 2016, **before** the Agency issued the Guidelines for the GNLQ Project and the Agency was therefore aware of that guidance when drafting the March 2016 Guidelines (including the exclusion of upstream GHGs);⁴⁸³
- the Agency could indeed consider upstream GHGs in connection with the GNLQ Project (under Section 19(1)(j) to collect information) but **not** for purposes of the assessment under Section 19(1)(a) and of the Minister's and Cabinet's decisions under Section 52.⁴⁸⁴

423 In sum, neither the Agency nor the Minister – or *a fortiori* the Cabinet – could determine that either upstream GHGs in connection with the Project or marine shipping beyond GNLQ's care and control would have significant adverse environmental effects.

3.4.2.2 The Agency, the Minister of Environment and the Cabinet also could not consider the cumulative effects of excluded activities

424 The Agency, Minister of Environment, and the Cabinet also could not consider the effects of the excluded activities or factors – upstream GHGs and marine shipping that was beyond GNLQ's care and control – by

⁴⁸⁰ Day-8-ENG, p.1990(14)-1992(4); CER-2 (Second), p.40 (¶¶94, 126).

⁴⁸¹ RN-0048-ENG; Day-8-ENG, p.2037(4-9).

⁴⁸² Day-8-ENG, p.2037(16-17).

⁴⁸³ Day-8-ENG, p.2106(16)-2107(3); CER-2 (Second), p.52 (¶133).

⁴⁸⁴ Day-8-ENG, p.2077(2-14); CER-2 (Second), p.40 (¶¶94, 126).

combining them with the effects of other projects, *i.e.*, they could not consider the **cumulative effects** of these activities.

425 It is undisputed that Section 19 of CEAA 2012 establishes the “factors” for a federal EA. Ms Bélanger, who was responsible for applying CEAA 2012 to numerous projects, including the GNLQ Project, confirmed the statutory framework for assessing the environmental effects of a project, including its cumulative effects:

- one of those factors is “the **environmental** effects” of a project, which are defined at Section 5 CEAA 2012;
- the proponent must identify the **significance** of those environmental effects;
- those environmental effects include under Section 19(1)(a) “any **cumulative environmental effects** that are likely to result from the designated project in combination with other physical activities that have been or will be carried out”;
- there is no **other** reference in section 19(1) to “cumulative effects” (including in Section 19(1)(j)); and,
- under Section 52 of CEAA 2012, the decision-makers are required to determine whether a project will cause significant adverse environmental effects as defined in Section 5.⁴⁸⁵

426 Ms Bélanger confirmed that there is no mechanism under CEAA 2012 – including under **Section 19(1)(j)** – for the decision-maker to consider **cumulative effects** of something that is **not** an environmental effect under Section 5:

“[**Ms de Germiny.**] And so, Section 19(1)(j) refers to any other matter relevant to the EA. That’s what it says; right?”

Ms Bélanger.- *Oui, toutes autres informations pertinentes à l’évaluation.*

⁴⁸⁵ Day-4-ENG, p.995(12-22)/Day-4-FRA, p.46(33)-47(5); **RN-0012-ENG; CD-0004-FRA.**

[Ms de Germiny.-] 19(1)(j) doesn't refer to 'environmental effects,' does it?

Ms Bélanger.- *Non.*

[Ms de Germiny.-] It doesn't refer to Section 19(1)(a)? It doesn't have a cross reference?

Ms Bélanger.- *Non plus.*

[Ms de Germiny.-] And it doesn't refer to cumulative effects?

Ms Bélanger.- *Non.*

[Ms de Germiny.-] **There is no mechanism under [CEAA] 2012 for the decision maker to consider cumulative environmental effects sorry, cumulative effects of something that is not an environmental effect under Section 5, is there?**

Ms Bélanger.- *Non. La loi est très claire à l'effet que le pouvoir décisionnel du ministre, 22 c'est sur les éléments de l'environnement listés à l'article 5.*⁴⁸⁶

427 Mr Northey confirmed that, as a result of section 3.2.1 of the Guidelines, neither the Agency nor the Minister could consider the possible **cumulative effects** of the **excluded** factors or activities:

“[Mr Northey.-] What are the legal implications of these determinations? There are several.

First, the Agency's treatment of 'significance' of effects under 19(1)(b). **The EA Report cannot lawfully identify a significant effect which the Minister cannot consider.**

Moving to second, Agency's treatment of 'environmental effects' under Section 19(1)(a).

The EIS Guidelines just reviewed provide two distinct reasons for this, the exclusion of activities from the environmental effects.

⁴⁸⁶ Day-4-ENG, p.996(9)-997(6)/Day-4-FRA, p.47(6-22).

First, the EA Report cannot lawfully identify an environmental effect which the Minister cannot consider for its significance.

Second, the EA Report cannot lawfully identify an effect from an activity that is not part of the Project.

[...]

The Agency's treatment of 'cumulative effects' under Section 19(1)(a).

The exclusion of these activities, the marine shipping, upstream activities causing GHGs, the exclusion of these activities from the Minister's decision on the significance of effects means that they must also be excluded from the EA Report's treatment of 'cumulative effects.'

As above, there are two reasons for this: First, the EA Report cannot lawfully identify cumulative effects for an effect which the Minister cannot consider for its significance.

Second, under CEAA, Section 19(1)(a) limits cumulative effects to effects of other activities 'in combination with' a Project effect. Where a Project effect comes from an activity that is 'not part of the Project,' there cannot be a Project effect within the meaning of Section 19(1). If there is no Project effect, there is nothing to be combined. As such, the EA Report cannot lawfully identify cumulative effects from an activity that is not part of the Project.⁴⁸⁷

- 428 In sum, neither the Agency nor the Minister – or *a fortiori* the Cabinet – could determine that either upstream GHGs in connection with the Project or marine shipping beyond GNLQ's care and control would have significant adverse environmental effects whether considered in isolation and/or with the effects of other existing or future projects.

⁴⁸⁷ Day-7-ENG, p.1864(6)-1865(21); Northey Presentation, p.12-14.

3.4.2.3 There was no basis for the Agency and thus the Minister to consider the effects of GHG emissions the way they did

429 At the Hearing, Ms Bélanger confirmed the key definitions:

- **Upstream** GHG emissions are emissions that would have been generated by the production, processing and transportation of natural gas **before** reaching the GNLQ site and thus generated almost entirely outside Quebec. More precisely, the GHG emissions from the **production and processing** of the natural gas would have been **entirely outside Quebec**, in western Canada, and the GHG emissions from the **transportation** would have been **almost entirely outside Québec**.⁴⁸⁸
- **Direct** GHG emissions, by contrast, are those that would have been generated by the GNLQ Project during the construction and operation of the GNLQ facility.⁴⁸⁹

430 There was no basis for the Agency to consider the effects of upstream and indeed all GHG emissions the way they did in the EA Report and the Minister to rely on its findings, as confirmed at the Hearing.

431 **First**, the Agency wrongly considered upstream GHGs in its assessment of significant adverse environmental effects under Section 19(1)(a) CEAA.⁴⁹⁰

432 As shown above, the Agency was not entitled to consider upstream GHGs in its assessment of significant adverse environmental effects of the GNLQ Project.

433 However, the Agency did consider upstream GHGs as part of its assessment of significant adverse environmental effects. The EA Report describes the direct GHG emissions of the GNLQ Project as

⁴⁸⁸ Day-4-ENG, p.986(20)-987(7), 1011(19-22)/Day-4-FRA, p.43(18-36).

⁴⁸⁹ Day-4-ENG, p.990(15-20)/Day-4-FRA, p.44(39-42).

⁴⁹⁰ Reply, p.140 (¶¶421-437); Day-1-ENG, p.48(4-15), 49(11-15).

459 kilotonnes per year⁴⁹¹ but then elsewhere describes the GHG emissions of the GNLQ Project, when “considering the upstream GHG emissions” as **7,150 kilotonnes per year**. Mr Northey noted:

“[Mr Northey.-] [The Agency’s third error was] to rely on the second meaning or use of ‘Project’ to include the excluded upstream production of GHGs. The Agency previously determined in the 2016 Guidelines and [...] acknowledged in this same Report, Page 41, that upstream production of GHGs was not part of the Project. So its effects were not Project effects.

It was also contrary to the Agency’s 2016 Guidelines for the Minister to make his CEAA Decision about the significance of effects to include the effects of the excluded upstream activities. Nevertheless, the EA Report presented its information on upstream emissions ‘to inform the Minister.’”⁴⁹²

- 434 Ms Bélanger herself confirmed that the Agency concluded that the upstream GHG emissions, **when combined with direct GHG emissions**, constituted a significant adverse environmental effect.⁴⁹³ She furthermore
- confirmed that she had not provided any support for the assertion in her second witness statement that “*l’Agence a conclu que les effets négatifs directs des émissions de GES du projet, en eux-mêmes, seraient importants;*”⁴⁹⁴ and

⁴⁹¹ **C-0037-ENG**, p.39 (“These direct emissions are assessed at 459 kilotonnes of CO2 equivalent per year.”). Although Mr Northey referred to direct emissions of 502.4 kt (Day-8-ENG, p.1866(14-15)), that figure, as calculated by the Agency, also comprises certain indirect emissions: **C-0037-ENG**, p.231; see p.47-48. By conflating direct and indirect GHG emissions, the Agency artificially increased the direct GHG emissions of the GNLQ Project to 502 kt per year, which is just above the limit on GHG emissions that the Federal Government had imposed on Murray River as a condition in 2017: **RN-0108-ENG**, p.9 (¶5.1).

⁴⁹² Day-7-ENG, p.1866(22)-1867(12); Northey Presentation, p.16; **CER-2 (Second)**, p.51 (¶132).

⁴⁹³ Day-4-ENG, p.1000(18)-1001(4)/Day-4-FRA, p.48(37-43).

⁴⁹⁴ Day-4-ENG, p.1002(15)-1003(1)/Day-4-FRA, p.49(17-25); **RWS-14**, p.29 (¶56).

- could not point to any conclusion in the EA Report that the direct GHG emissions of the GNLQ Project **alone** constituted a significant adverse environmental effect.⁴⁹⁵

435 Indeed, as Mr Northey noted, the EA Report contains no section on cumulative effects regarding GHG emissions. Instead, as he pointed out:

“**[Mr Northey.-]** the Agency previously determined in 2016 and acknowledged in the Report, that upstream production of GHGs was not part of the Project. So its effects were not Project effects. Therefore, **there was nothing from the Project to combine with other upstream activities to constitute cumulative effects under CEAA. The Agency Report, thus, wrongly sets out ‘the cumulative effects of upstream emissions.’**”⁴⁹⁶

436 The Tribunal twice asked Ms Bélanger whether the EA Report separately concluded that the direct GHG emissions and the upstream GHG emissions both, independently, amounted to a significant adverse environmental effect:

“**Mme la Présidente.-** [...] *il vous a été présenté [...] la Pièce [CD]-0068, qui était donc le rapport de l’Agence, et notamment la conclusion qui était, je crois, en page [52] [...] vous avez insisté sur le fait qu’il était précisé que le projet induirait des effets négatifs directs et cumulatifs importants, [...] laissant suggérer qu’il y avait en fait des effets négatifs importants, à la fois sur les effets directs et sur les effets cumulatifs [...]* Je voudrais juste savoir : **est-ce dans ce document, il y a des parties qui concluent de manière... ou en tout cas qui donnent des éléments de conclusion sur les effets négatifs directs d’une part, et puis sur les effets négatifs cumulatifs d’autre part ?**

Mme Bélanger.- *Oui, on y a fait référence tout à l’heure. Le paragraphe juste au-dessus, justement, qu’on voit, où on dit que l’estimation des émissions de gaz à effet de serre cumulatifs peut être caractérisée de la même façon que les émissions directes.*

⁴⁹⁵ Day-4-ENG, p.1005(9-22)/Day-4-FRA, p.50(2-22).

⁴⁹⁶ Day-7-ENG, p.1867(20)-1868(6); Northey Presentation, p.17.

Donc, c'est un peu l'inverse si vous voulez. Donc, on vient dire... on dit du même souffle que les émissions directes étaient aussi élevées en intensité, continues, irréversibles et globales en étendue.

Mme la Présidente.- *D'accord. Juste, moi j'étais sur la structure même du document... c'est le côté complètement cartésien... **il n'y a pas un chapitre sur les effets négatifs directs versus un chapitre sur les effets négatifs cumulatifs?***

Mme Bélanger.- *Dans ce rapport-là, les effets ont été traités par composante valorisée. Donc, on a traité des effets directs et cumulatifs pour chacune, donc...*

Mme la Présidente.- *C'est ce que je comprenais à la lecture du... de la table des manières, mais je voulais avoir confirmation.*⁴⁹⁷

437 As Ms Bélanger's confused and vague response shows, she could not point to separate conclusions in the EA Report that the GNLQ Project would generate direct GHG emissions and upstream GHG emissions that, each independently, would amount to a significant adverse environmental effect.

438 Indeed, while it is undisputed that the EA Report **discussed** both the direct and upstream GHG emissions; it nowhere concluded that the **direct** GHG emissions in and of themselves constituted a significant adverse environmental effect. As Ms Bélanger testified in her witness statement:

*“Deuxièmement, l'Agence a conclu que les **effets directs** des émissions de GES du projet, **lorsque cumulés aux effets des émissions en amont**, seraient eux aussi importants (effets cumulatifs).*⁴⁹⁸

439 The EA Report found (under the heading “Conclusion”):

“L'Agence reconnaît que les émissions de gaz à effet de serre entraînent des effets environnementaux à l'échelle globale en raison

⁴⁹⁷ Day-4-FRA, p.70(27)-71(9); Day-7-ENG, p.1868(7-12) (noting that the EA Report was not Cartesian in this respect).

⁴⁹⁸ RWS-14, p.30 (¶58).

***de leur nature cumulative** et de leur contribution aux changements climatiques. **Par conséquent**, malgré les mesures qui seront mises en place afin de limiter les émissions de gaz à effet de serre, **le projet induirait des effets négatifs directs et cumulatifs importants** qui pourraient avoir un impact sur l'atteinte des objectifs du Québec et du Canada en matière d'émissions de gaz à effet de serre et de changements climatiques.”⁴⁹⁹*

440 In other words, the EA Report did not conclude that the direct GHG emissions of the GNLQ Project would **in and of themselves** constitute a significant adverse environmental effect.⁵⁰⁰

441 **Second**, the Agency (and ECCC) overestimated the upstream GHG emissions.⁵⁰¹

442 At the Hearing, Ms Bélanger confirmed that the ECCC, the leading federal authority on the assessment of GHG emissions, concluded in June 2021 that the upstream GHG emissions relating to the GNLQ Project would be approximately 7,150 kilotonnes of CO₂ per year, but that this figure could well be an overestimate as the ECCC had concluded:

*“L’approche ACV [analyse cycle vie] **pourrait surestimer** les émissions par rapport à la méthode proposée par ECCC avec des facteurs d’émission [...]*

*Le promoteur a choisi d’effectuer une analyse du cycle de vie (ACV) pour estimer les émissions de GES du projet. La méthodologie d’ECCC mentionnée plus haut, quant à elle, utilise des facteurs d’émissions. **Le promoteur a estimé les émissions annuelles de GES en amont pour plusieurs activités reliées au projet qui ne***

⁴⁹⁹ **CD-0068-FRA**, p.51(30-37) (emphasis added); **C-0037-ENG**, p.48.

⁵⁰⁰ The only other reference to GHG emissions in the EA Report’s conclusions does not say “direct” GHG emissions: “The Agency concludes that the Project is likely to cause significant adverse environmental effects, as defined in the Canadian Environmental Assessment Act, 2012, on the following components, despite the implementation of mitigation and follow-up measures: **Greenhouse gas emissions**” (**C-0037-ENG**, p.211).

⁵⁰¹ Reply, p.145 (¶437); Northey Presentation, p.16; **RN-0003-ENG**, p.47-48.

*sont pas habituellement prises en compte par la méthodologie de
ECCC.*⁵⁰²

443 **Third**, the Agency wrongly concluded that the upstream GHG emissions
of the GNLQ Project would represent approximately 1% of Canada's GHG
emissions.⁵⁰³

444 At the Hearing, Ms Bélanger confirmed that (i) according to estimations,
only 358 to 573 kilotonnes of CO₂ equivalent (not 7,150) would have been
caused by the GNLQ Project, and (ii) that figure did not represent 1% of
Canada's GHG emissions, contrary to what the Agency's EA Report stated:

“**[Ms de Germiny.-]** [...] So here the EA report refers to the
upstream emissions as follows. I'm quoting -- well, in English
translation: 'Approximately 7,150 kilo-tons of CO₂ equivalent per
year including between 358 and 573 kilo tons of CO₂ equivalent per
year of additional **Project related emissions**.' You see that?

Mme Bélanger.- *Oui.*

[Ms de Germiny.-] So the figure of 7,150 kilo tons includes
emissions from preliminary work, exploration, extraction,
processing, transportation, and closure of the extraction site; right?

Mme Bélanger.- *Oui.*

[Ms de Germiny.-] And the figure between 358 and 573 kilo tons,
that corresponds to the share of the upstream emissions that **are**
Project related; right?

Mme Bélanger.- *Oui.*

[Ms de Germiny.-] And so I've done the math. The remaining
6,792 to 6,577 kilo tons are not Project related; is that fair?

Mme Bélanger.- *Oui en effet.*

⁵⁰² Day-4-ENG, p.1005(22)-1008(9)/Day-4-FRA, p.50(36)-51(35); CC-0034-FRA, p.21; CD-0068-FRA, p.52, C-0037-ENG, p.48.

⁵⁰³ Reply, p.143 (¶¶432-433); Northey Presentation, p.16.

[**Ms de Germiny.-**] And to come back to our discussion earlier, those are our upstream GHGs that already exist regardless of the Project; right?

Mme Bélanger.- *Oui.*

[**Ms de Germiny.-**] You explain in your Witness Statement that the Agency looked at Canada's GHG emissions in 2018 when considering the GHG emissions associated with the Project; is that right?

Mme Bélanger.- *Oui, ce sont les données disponibles qu'on avait à ce moment-là*

[**Ms de Germiny.-**] And Canada's GHG emissions in 2018 were 729,300 kilo tons of CO₂. Do you remember that figure. It's in the EA Report. We can maybe --

Mme Bélanger.- *Je n'ai pas de souvenir exact.*

[**Ms de Germiny.-**] Maybe we can pull it up. It is Page 41 of the French version. First paragraph.

Mme Bélanger.- *Oui.*

[**Ms de Germiny.-**] We see it midway through the paragraph; right?

Mme Bélanger.- *Oui.*

[**Ms de Germiny.-**] And in the EA Report, the Agency calculates that upstream emissions represent approximately 1 percent of Canada's GHG emissions; right?

Mme Bélanger.- *Oui.*

[**Ms de Germiny.-**] So when the Agency said that upstream GHG's represent approximately 1 percent of GHG emissions, it was looking at the 7,150 kilo tons figure and the figure of 729,300 kilo tons; is that fair?

Mme Bélanger.- *Oui.*

[**Ms de Germiny.-**] If the Agency had used the figure of Project related emissions of between 358 and 573, that percentage would have been much lower; right?

Mme Bélanger.- *Effectivement.*⁵⁰⁴

445 Ms Bélanger in turn could not deny that the average of 358 and 573 (465.5) is 0.06% of 729,300, *i.e.*, well below 1%.⁵⁰⁵

446 **Fourth**, the Agency wrongly compared the upstream GHG emissions associated with the GNLQ Project with the total Quebec GHG emissions.⁵⁰⁶

447 The Agency in its EA Report concluded that the upstream GHG emissions associated with the GNLQ Project represented “approximately 10% of Quebec’s greenhouse gas emissions.”⁵⁰⁷ This conclusion was wrong and arbitrary.

448 As Ms Bélanger confirmed, the **upstream GHG emissions** associated with the GNLQ Project would have been generated almost entirely **outside Quebec**, in western Canada,⁵⁰⁸ and should not have affected Quebec’s GHG emissions:

“[**Ms de Germiny.-**] You agree that if a GHG is emitted in Western Canada, it is increasing the GHG emissions in Western Canada?”

Mme Bélanger.- *Donc on a calculé, c’est le calcul qu’on a fait ici d’utiliser la contribution des émissions du projet aux émissions de la province, donc, du Québec et les émissions canadiennes. Donc, on peut appliquer la même logique, là. Ces émissions-là feraient partie du bilan de l’Alberta ou de la Colombie britannique au*

⁵⁰⁴ Day-4-ENG, p.1008(17)-1011(5)/Day-4-FRA, p.52(1-42); **CD-0068-FRA**, p.52; **C-0037-ENG**, p.48.

⁵⁰⁵ Day-4-ENG, p.1011(9-18)/Day-4-FRA, p.53(1-12).

⁵⁰⁶ Reply, p.144 (¶¶434-436); Northey Presentation, p.16.

⁵⁰⁷ **RN-0003-ENG**, p.48.

⁵⁰⁸ Day-4-ENG, p.987(12-19), 1013(6-15)/Day-4-FRA, p.43(31-36), 53(36-42).

niveau provincial, et au niveau cumulatif, il demeure que ces émissions-là de production sont dans l'atmosphère globalement.

[**Ms de Germiny.-**] [...] I don't think we are disagreeing, but there are provincial figures. There are provincial calculations and there is global; right? And we have documents. You produced reports. The ECC has Reports on provinces; right? So there are different calculations being done, and sometimes it is done just by Province and sometimes we are doing global. Is that a fair statement, what I've said?

Mme Bélanger.- *Oui, je pense qu'on se comprend là-dessus.*

[**Ms de Germiny.-**] So I mean, if we're talking about Provinces, if a GHG is emitted in Western Canada, it is increasing the GHG emissions in that area first and foremost; right?

Mme Bélanger.- *Je conçois que l'émission en Colombie-Britannique va faire partie – dans l'ouest du Canada – va faire partie du calcul des émissions de cette partie-là, mais elles vont aussi contribuer aux émissions globales du Canada, puisque c'est dans ce sens-là qu'on les a regardées pour venir mettre une valeur sur les effets cumulatifs sur les émissions de gaz à effet de serre au pays.*

[**Ms de Germiny.-**] And when you do your calculations by Province, if you calculate that a GHG emission is happening in Western Canada, it is not increasing the GHG emissions in Québec; right? Putting aside a global analysis

Mme Bélanger.- *Non*

[**Ms de Germiny.-**] You confirm?

Mme Bélanger.- *Oui, je confirme.*⁵⁰⁹

449 There was thus no reason for the Agency to compare the upstream GHG emissions associated with the GNLQ Project with the total number of GHG

⁵⁰⁹ Day-4-ENG, p.1012(7)-1014(1)/Day-4-FRA, p.53(21)-54(1).

emissions of Quebec and certainly no basis for it to conclude that those figures represented 10% of Quebec's GHG emissions.

450 **Fifth**, the Agency wrongly disregarded GNLQ's net-zero commitments which would have in any event neutralised GNLQ's direct GHG emissions.⁵¹⁰

451 It is undisputed that in February 2019 GNLQ had committed to building and operating a carbon-neutral plant.⁵¹¹ Ms Bélanger indeed confirmed the following at the Hearing:⁵¹²

- Although it was not required to do so, GNLQ submitted a carbon-neutrality (or "net-zero") plan.⁵¹³
- ECCC noted in June 2021 that GNLQ's carbon-neutral plan "went beyond the information required for this project" and made four **recommendations** (not requirements) to improve the plan, which it stated could be submitted later on – one year before the start of construction.⁵¹⁴
- ECCC was **not requesting** a net-zero plan for purposes of authorising the GNLQ Project for purposes of the federal EA.⁵¹⁵
- By contrast, federal authorities approved the Bay du Nord Project on the basis of a future net-zero commitment and even though the proponent had not submitted a carbon-neutrality plan. The Minister's April 2022 decision contained GHG-related conditions and mitigation measures, including that the proponent include GHG emissions reduction measures in the design of the project.⁵¹⁶

⁵¹⁰ Reply, p.141 (¶¶423-429); CER-2, p.48 (¶¶139-143).

⁵¹¹ C-0211-FRA; Reply, p.141 (¶¶423-429).

⁵¹² Day-4-ENG, p.1014(13)-1020(22)/Day-4-FRA, p.54(10)-56(14).

⁵¹³ C-0211-FRA.

⁵¹⁴ CC-0034-FRA, p.24.

⁵¹⁵ C-0037-ENG, p.48; CD-0068-FRA, p.51.

⁵¹⁶ Reply, p.140 (¶419); C-0365-ENG, p.iv, p.97, 99; C-0364-ENG; RN-0130-ENG.

- Similarly, the Cedar LNG Project was approved in March 2023, subject to the mitigation measure that it be carbon-neutral by 2050.⁵¹⁷

452 In other words, the Agency disregarded GNLQ's carbon-neutrality plan and provided no reason for doing so.

453 The Federal Government went on to reject the GNLQ Project, even though it approved projects with much higher direct GHG emissions both before and after.⁵¹⁸ Most recently, in September 2025, it approved the Ksi Lisims project,⁵¹⁹ a project similar to GNLQ in scale,⁵²⁰ which will emit **1,867,992 tonnes** per year of direct GHG emissions (almost four times GNLQ's projected emissions),⁵²¹ without imposing conditions relating to those emissions⁵²² (not even the implementation of Ksi Lisims' net zero plan⁵²³).

454 The Agency's treatment of GNLQ's carbon-neutrality plan was thus arbitrary and at odds with the treatment afforded to other proponents, and as such discriminatory.

455 **Sixth**, the Minister wrongly relied on the Agency's flawed EA Report, as summarised in the Agency's December 2021 memo.⁵²⁴

456 The Minister of Environment issued his decision on the GNLQ Project under Section 52 of CEAA 2012 on 9 December 2021. **That decision was**

⁵¹⁷ **C-0368-ENG**, p.413.

⁵¹⁸ Reply, p.359 (¶¶1061-1073) (discussing the LNG Canada and Pacific NorthWest projects, approved in 2015 and 2016, respectively).

⁵¹⁹ Claimant's letter to Tribunal dated 7 November 2025.

⁵²⁰ It will produce up to 12 million tonnes per annum of LNG, compared with the GNLQ Project's 10.5 million tonnes per annum: **C-0673-ENG**, p.436; **C-0037-ENG**, p.1.

⁵²¹ **C-0673-ENG**, p.73.

⁵²² **C-0670-ENG**, p.20-48. The Respondent suggested that the GHG emissions for Ksi Lisims would be lower (R-Presentation, p.147). This is misleading; lower emissions depend on connection to the hydropower network – an assumption that is not binding on the proponent and that remains uncertain: **C-0673-ENG**, p.608.

⁵²³ Which was, in any event, less credible than that of GNLQ; C-Presentation, p.122 (Showing that the net-zero plan provided by GNLQ was far more credible than those provided by the Bay du Nord, Cedar and Ksi Lisims projects, which were all approved).

⁵²⁴ Reply, p.126 (s.2.6.1, 4.1.3.3); **CER-2 (Second)**, p.53 (¶¶137-148); Northey Presentation, p.18.

based on the Agency's December 2021 memo to the Minister, which in turn referred to the EA Report.⁵²⁵

457 Regarding GHG emissions, [REDACTED]
[REDACTED]
[REDACTED]⁵²⁶ As Mr Northey testified:

“**[Mr Northey.-]** However, the memo[’s] conclusion that the project was likely to cause significant adverse effects was **entirely dependent on including upstream activities as part of the Project.** [...]”

Thus, **the Agency memo wrongly advised the Minister that the significant Project effects did not result from upstream activities.** [...]

However, you try to read this memo, its reasoning was fundamentally flawed.”⁵²⁷

458 As he further explained, the Minister's reliance on that memo and on the EA Report, and thus his conclusions were wrongful:

“**[Mr Northey.-]** The Minister signed and endorsed this memo as a Section 52 decision. **However, his decision was unlawful as it relied upon the legally flawed EA Report and Agency memo.**”⁵²⁸

3.4.2.4 There was no basis for the Agency and thus the Minister to consider the effects of marine shipping the way they did

459 The way in which the Agency considered the effects of marine shipping fared no better.

⁵²⁵ **TH-0003-FRA**; Reply, p.131 (¶390).

⁵²⁶ **TH-0003-FRA**, p.4.

⁵²⁷ Day-7-ENG, p.1869(10-20); Northey Presentation, p.18, 24; Day-7-ENG, p.1876(6-10) (“**[Mr Northey.-]** the only way the Agency's advice to the Minister was correct was if GNLQ was in care and control of all shipping on the Saguenay River but no Agency document established this.”).

⁵²⁸ Day-7-ENG, p.1869(21)-1870(2); Northey Presentation, p.18, 24; **TH-0003-FRA**.

- 460 **First**, under the Guidelines, the Agency and the Minister could not conclude that marine shipping that was beyond GNLQ's care and control would cause significant adverse environmental effects on beluga whales.⁵²⁹
- 461 As noted above, it is undisputed that under the Guidelines, marine shipping that was beyond the care and control of GNLQ was not part of the GNLQ Project and thus not part of the federal EA.⁵³⁰
- 462 At the Hearing, Ms Bélanger confirmed that accordingly, under the Guidelines, the Minister could not conclude that marine shipping which was beyond the care and control of GNLQ would result in significant adverse environmental effects **on beluga whales**.⁵³¹
- 463 **Second**, the Guidelines were never amended and the Agency's 20 August 2019 letter to GNLQ did not amend the scope of the EA of the GNLQ Project.⁵³²
- 464 While it is undisputed that the scope and guidelines for a federal EA may be amended, the Parties do not agree on the manner in which and when that amendment can take place.⁵³³
- 465 According to Mr Northey, there must be a clear amendment of the guidelines and that it should take place before the proponent submits its EIS; according to Ms Powell, there is no need to amend the guidelines.⁵³⁴
- 466 Mr Northey's conclusion that guidelines must be expressly amended is based on case law and practice, including the express amendment of

⁵²⁹ Reply, p.68 (¶204); **CER-2 (Second)**, p.39 (¶¶92-94); Northey Presentation, p.12, 19-20, 24-25; *supra*, ¶¶417-418.

⁵³⁰ Day-4-ENG, p.1024(10-)-1025(3)/Day-4-FRA, p.57(28-37); Day-8-ENG, p.1970(10-19), 1973(4)-1977(4) (testifying that marine shipping altogether was not part of the GNLQ Project and even within SPA waters); *supra*, ¶¶417-418.

⁵³¹ Day-4-ENG, p.1025(4-18)/Day-4-FRA, p.57(38)-58(5).

⁵³² Reply, p.63 (¶189); **CER-2 (Second)**, p.11 (¶22); Northey Presentation, p.19; C-Presentation, p.57-58.

⁵³³ Day-8-ENG, p.2079(16-20); Reply, p.63 (¶189); **CER-2 (Second)**, p.10 (¶21).

⁵³⁴ Day-8-ENG, p.2079(21)-2080(6); **CER-2 (Second)**, p.11 (¶23).

guidelines in six other cases.⁵³⁵ In her second report⁵³⁶ and at the Hearing⁵³⁷ Ms Powell did not dispute those findings, which related in part to the Rose Lithium-Tantalum Mining Project,⁵³⁸ the Lake Manitoba and Lake St. Martin Outlet Channels Project,⁵³⁹ and the Springpole Gold Project.⁵⁴⁰

467 By contrast, she was unable to provide a **single example** of a project where there was a change in scope of an EA by the Agency without an amendment of the guidelines.⁵⁴¹ As transpired from her cross-examination, none of the documents to which she had referred in her second report support her position:⁵⁴²

- **JL-54:** In this letter dated August 2018, the Agency informed GNLQ that it should consult the Huron First Nations and expressly referred to the 2016 Guidelines (in which the Agency had reserved the right to make such an amendment on that issue).⁵⁴³
- **SP-40:** In this letter dated August 2019 concerning the Laurentia Project, the Agency requested information from the proponent, the Quebec Port Authority. The letter does not refer to a change in scope of the project or the EA and involved a situation where the proponent had substantially changed the design of its projects in 2017-2019.⁵⁴⁴
- **SP-99:** In this letter dated November 2020, the Agency requested additional information and narrowed the scope of a project (it did not

⁵³⁵ **CER-2 (Second)**, p.10 (¶21); **RN-0151-ENG**, **RN-0158-ENG** to **RN-0168-ENG**; Day-8-ENG, p.2138(2)-2139(3).

⁵³⁶ **RER-7**, p.53 (¶126) (“[...] Mr Northey is correct that several projects undergoing EA have had their guidelines formally mended when changes arose [...]”).

⁵³⁷ Day-4-ENG, p.1034(22)-1036(8)/Day-4-FRA, p.60(42)-61(34) (regarding two of Mr Northey's examples, the Contrecoeur and Trois Rivières Projects).

⁵³⁸ Day-8-ENG, p.2091(21)-2092(17); **RN-0159-FRA**.

⁵³⁹ Day-8-ENG, p.2092(18)-2093(21); **RN-0166-ENG**.

⁵⁴⁰ Day-8-ENG, p.2093(22)-2094(21); **RN-0168-ENG**.

⁵⁴¹ Day-8-ENG, p.2095(8)-2107(3); **RER-7**, p.53-54 of PDF; Day-8-ENG, p.2138(2-12).

⁵⁴² **RER-7**, p.41 (¶¶102-103).

⁵⁴³ Day-8-ENG, p.2095(21)-2097(8).

⁵⁴⁴ Day-8-ENG, p.2097(15)-2100(7); Day-4-FRA, p.1036(1)-1039(6)/Day-4-FRA, p.62(1-38); **GB-0087-FRA**.

purport to expand the scope of the project or EA, unlike in the case of GNLQ).⁵⁴⁵

- **SP-100:** In this letter dated October 2014, the Agency requested more information from the proponent, following modifications to its project (by contrast, GNLQ did not amend the project after it had submitted its EIS, as defined under CEAA).⁵⁴⁶
- **SP-101:** In this letter to a project proponent dated February 2016, the Agency expressly referred to the underlying guidelines and expressly stated that it was adding a requirement and that the Minister of Environment would be able to consider the environmental effects of GHG emissions when making her decision.⁵⁴⁷

468 As for Ms Bélanger, while she testified in her witness statement that the Agency did not need to amend or re-issue the Guidelines,⁵⁴⁸ the examples she provided in support demonstrate the **opposite**:

- For the Contrecoeur and Trois Rivières projects, the Agency had **expressly notified** the proponent that it **was amending the Guidelines** (by requiring the proponent to consult an additional First Nations group).⁵⁴⁹
- For the Laurentia Project, (i) the proponent (not the Agency) had sought to amend the project, and (ii) the issue was the Minister's designation of the project for purposes of an EA; the situation was therefore different from that of GNLQ.⁵⁵⁰

⁵⁴⁵ Day-8-ENG, p.2100(8)-2103(5).

⁵⁴⁶ Day-8-ENG, p.2103(6)-2104(7).

⁵⁴⁷ Day-8-ENG, p.2104(6)-2107(3).

⁵⁴⁸ **RWS-14**, p.19 (¶¶32-34).

⁵⁴⁹ **RWS-14**, p.20 (¶34); **GB-0085-FRA**; **GB-0086-FRA**; Day-4-ENG, p.1034(22)-1036(8)/Day-4-FRA, p.60(42)-61(34).

⁵⁵⁰ **RWS-14**, p.20 (¶34); **GB-0087-FRA**; Day-4-ENG, p.1037(2)-1039(6)/Day-4-FRA, p.62(25-38).

469 Turning to the Respondent's **contention that the Agency's 20 August 2019 letter to GNLQ amended the scope of the GNLQ Project, it is equally unsupported by any evidence**, as the Hearing showed:⁵⁵¹

- It is undisputed that the letter was sent six months after GNLQ submitted its EIS and three months after the Agency sent to GNLQ a notice of conformity of the EIS with the Guidelines.⁵⁵²
- As Ms Bélanger and Ms Powell confirmed, the letter does not state that it is amending the Guidelines.⁵⁵³
- As Ms Bélanger and Ms Powell confirmed, the letter does not state that it is amending the exclusions from the Minister's decision on the significance of adverse environmental effects.⁵⁵⁴
- As Ms Powell confirmed, the Agency did not inform GNLQ – in this letter or otherwise – that it considered that GNLQ had care and control of marine shipping relating to the GNLQ Project.⁵⁵⁵
- The letter does not state that the Minister can now conclude that marine shipping, which is beyond the care and control of GNLQ, would result in significant adverse environmental effects.⁵⁵⁶
- On the contrary, the letter indicates that it is seeking to collect information to determine in the **future** what effects to include in the scope of a project (*"dans le but de définir la façon appropriée de déterminer quelles activités liées à un projet comme la navigation maritime."*).

470 The above directly undermines Ms Bélanger's written evidence that:

- "[a]lthough at the outset of the environmental assessment, the Agency considered marine navigation outside the area of jurisdiction of the

⁵⁵¹ Day-7-ENG, p.1872(17)-1874(12).

⁵⁵² **RN-0044-FRA; GB-0025-FRA; C-0043-ENG-FRA**, p.1029; **C-0030-ENG**; Day-8-ENG, p.2082(8-22), 2083(14-17).

⁵⁵³ Day-4-ENG, p.1028(20)-1029(1)/Day-4-FRA, p.59(4-7); Day-8-ENG, p.2083(4-7).

⁵⁵⁴ Day-4-ENG, p.1029(12-15)/Day-4-FRA, p.59(16-18); Day-8-ENG, p.2083(18)-2084(1).

⁵⁵⁵ Day-8-ENG, p.2084(2)-2085(5).

⁵⁵⁶ Day-4-ENG, p.1029(15-20)/Day-4-FRA, p.59(19-22); Day-7-ENG, p.1872(17)-1874(12); Northey Presentation, p.22; **RN-0044-FRA**.

Saguenay Port Authority to be an activity beyond the proponent's control, its **position changed**";⁵⁵⁷

- for which she cited the letter from the Agency to GNLQ dated 20 August 2019, and **no other document**.⁵⁵⁸

471 Furthermore, Ms Bélanger had to concede that **the Agency never informed GNLQ that the Agency's view had changed** and that it now understood, for whatever reason, that GNLQ did have care and control of certain shipping.⁵⁵⁹

472 **Mr Northey also rejected the proposition that the August 2019 letter (and correspondence from October 2019) put GNLQ on notice** that marine shipping would, from that point forward, fall within the scope of the GNLQ Project.⁵⁶⁰ In his opinion, the Agency's supplemental document request from October 2019 – which contained a boilerplate statement that “failure to show adequate mitigation measures may lead the Minister to conclude that the Project is likely to cause significant adverse environmental effects in its EA Report to the Minister” – also did not modify the 2016 Guidelines:

“**[Mr Northey.-]** Do I think this [referring to sentence above] is sufficient? I do not. I think what was required was a statement to say that, notwithstanding what we said in March 2016, that the Minister's Decision would not include ‘x’, it will now include that. And the August 20th letter that we started with does not say that, and this is a Guideline underneath all of that. I think this is quite buried for something that is quite important.”⁵⁶¹

473 **Third**, Ms Bélanger's claim that the August 2019 letter had been prompted by **a policy change** within the Agency was also dismantled. In her written statement, she had asserted that the August 2019 letter was prompted by

⁵⁵⁷ **RWS-1**, p.21 (¶58).

⁵⁵⁸ Day-4-ENG, p.1027(14)-1028(1)/Day-4-FRA, p.58(30-35); **GB-0025-FRA**; **RN-0044-FRA**; **RWS-1**, p.21 (¶58).

⁵⁵⁹ Day-4-ENG, p.1029(16-20)/Day-4-FRA, p.59(19-22).

⁵⁶⁰ Day-7-ENG, p.1951(11)-1955(21).

⁵⁶¹ Day-7-ENG, p.1955(14-21); **SP-0102-ENG**, p.4.

the federal Court of Appeal's decision in *Tsleil Watuth v. Canada*. However, she conceded at the Hearing that:

- The *Tsleil Watuth* decision was from August 2018 (more than a year earlier).⁵⁶²
- In between, and just weeks after the *Tsleil Watuth* decision, in September 2018, the Agency had issued the guidelines for the Bay du Nord project, in which it **excluded** marine shipping altogether.⁵⁶³

474 In other words, and as Mr Northey confirmed, Ms Bélanger's claim that the *Tsleil Watuth* decision had led the Agency to **extend** the scope of its review of the environmental impacts to marine shipping associated with projects is unsupported.⁵⁶⁴ The guidelines for the Bay du Nord project demonstrate the opposite since they **exclude marine shipping altogether** (including marine shipping that is within the care and control of the proponent), an exclusion that was upheld by the Canadian courts.⁵⁶⁵

475 In sum, at the federal level, marine shipping outside GNLQ's care and control remained outside the scope of the GNLQ Project and the EA.

476 **Fourth**, it is undisputed that GNLQ did not have care and control over marine shipping.⁵⁶⁶

477 The GNLQ 2015 Project Description stated, "marine transportation of LNG will be under the responsibility of specialized transporters."⁵⁶⁷ Thus, from the outset, GNLQ made clear that it would not have care and control

⁵⁶² Day-4-ENG, p.1032(7)/Day-4-FRA, p.60(16); **RN-0148-ENG**.

⁵⁶³ Day-4-ENG, p.1033(8)/Day-4-FRA, p.60(41); **RN-0049-ENG**, p.7 (¶17).

⁵⁶⁴ Day-7-ENG, p.1873(22)-1874(12); Northey Presentation, p.22.

⁵⁶⁵ Day-4-ENG, p.1033(8-21)/Day-4-FRA, p.60(30-41); **RN-0148-ENG**.

⁵⁶⁶ Reply, p.135 (¶¶405-408); Rejoinder, p.101, 249 (not contesting the Claimant's position that GNLQ did not have care and control over marine shipping); **CER-2**, p.31 (¶88); **CER-2 (Second)**, p.39 (¶¶93, 102-104).

⁵⁶⁷ **RN-0007-ENG**, p.28 of PDF.

over marine shipping, a point both Mr Northey and Ms Powell confirmed at the Hearing.⁵⁶⁸

478 It is also undisputed that GNLQ never amended the Project Description, nor did it ever inform the Agency that it would in fact have care and control over marine shipping.

479 The **one fact witness** who had the most knowledge about the question of care and control over shipping, **Mr Keith Bainbridge**, was not called to testify by the Respondent. Mr Bainbridge, who advised GNLQ at the time on matters related to shipping, provided two witness statements in this arbitration, in part explaining that control would have remained “at all times” with the shipmaster and shipping company.⁵⁶⁹ His evidence stands unchallenged.

480 Mr Northey also opined in his reports that GNLQ would not have had care and control over the ships, but Ms Powell never took a position one way or the other, as she conceded at the Hearing.⁵⁷⁰ Nor did she ever comment on Mr Bainbridge's evidence.

481 Although GNLQ might have had some **influence** over shipping, as Ms Powell conceded, “‘influence’ is different from ‘care and control.’”⁵⁷¹ Mr Northey confirmed that GNLQ's proposed mitigation measures

⁵⁶⁸ **RN-0007-ENG**, p.28 of PDF; Day-7-ENG, p.1944(9)-1948(18) (Mr Northey confirming his understanding of 2016 PPM to mean that GNLQ customers – not GNLQ – were responsible for marine shipping); Day-8-ENG, p.2039(13-15) (“[**Ms Powell.**-] The Proponent themselves [sic] was saying, when we started this process in 2015-16, we did not have control and did not purport to have control over marine shipping.”).

⁵⁶⁹ **CWS-4 (Second)**, p.4 (¶10).

⁵⁷⁰ Day-8-ENG, p.2087(8-13); **CER-2**, p.31 (¶88); Northey Presentation, p.20; **CER-2 (Second)**, p.42 (¶¶102-104); **RER-7**, p.45 (not addressing Mr Northey's opinion that GNLQ did not have care and control over shipping).

⁵⁷¹ Day-8-ENG, p.2086(13-15). Ms Powell thus contradicted and abandoned her confused and vague testimony during her presentation: “[**Ms Powell.**-] Canada says, okay, we believe you have control and we believe you have an ability to direct and influence, and so we're saying to you, that in that definition of ‘designated project,’ the incidental element includes marine shipping out to the St. Lawrence [...] And now the Agency is saying, wait, you have more control. You have more ability to direct and influence, and so we're going to include those aspects into the definition of ‘designated project.’” (Day-8-ENG, p.2035(19)-2036(18)) There was furthermore no reference in the August 2019 letter to the notion of “incidental” elements.

relating to shipping did not mean that it would have had care and control of the ships:⁵⁷²

[Mr Hébert.-] And do you agree that Proponents generally propose mitigation measures because they know that the environmental effects they wish to mitigate will be assessed for the purposes of Minister's determination on significant adverse environmental effects?

[Mr Northey.-] In a general sense, Counsel, that would be correct, but I have not seen EIS Guidelines before that excluded from the Minister's Decision various activities, including the shipping activities we're talking about. So, in a general way, I could agree with you. But, **in this instance, with the guidance in these EIS Guidelines, I don't agree with you. They were excluded from the Minister's Decision.**[...]

[Mr Hébert.-] So these are mitigation measures that Proponent proposed during the EA process, so not necessarily EIS, but during the EA process certainly, because this is stated in the report. And we see some of the mitigation measures, so keeping vessel speeds below 10 knots, integrating the latest noise reduction technologies, cleaning and repairing the propellers, so a proponent that offered such mitigation measures, wouldn't you expect them to have some sort of influence over the ability to carry out these undertakings?

[Mr Northey.-] Well, yes, but the word 'care and control,' in my understanding and I have been trying to figure this out, is that one party is in care and control. In my view, these measures are all very relevant, but **the shipper is the one that had care and control of the ship, and in order for any of these measures to be implemented, the Proponent would have needed to get the Agreement of the shipper. So I do not see any of this really**

⁵⁷² Many port-related EA reports reference the proponent having some influence over shipping but no project other than the GNLQ Project was effectively treated as having control over the ships: **SP-0079-ENG**, p.170 ("Although navigation conditions are beyond the [SPA's] control the organization is well placed to influence those involved in boat traffic, particularly in areas of high use by the St. Lawrence belugas."); **RN-0050-ENG**, p.91,97; **RN-0077-ENG**, p.4-5.

orienting the responsibility or care and control away from the shipper. It is just that they are going to contractually agree to do some things. But the shipper needed to agree.

[Mr Hébert.-] Right.

[Mr Northey.-] **I don't think that transferred care and control from the shipper to the company.**

[Mr Hébert.-] But there is certainly a level of influence. The Proponent is showing that it has some form of influencing these it has a certain way to influence the shipper to abide by these undertakings?

[Mr Northey.-] **Respectfully, Counsel, the word in the Guidelines is 'care and control.' 'Influence' does not appear, and I'm not sure how to assess what 'influence' means. What I say is that this does not change 'care and control.'"**⁵⁷³

482 Mr Northey also confirmed that, even if GNLQ concluded DES lease agreements with shipping companies, this did not mean that GNLQ would have care and control over the ships, distinguishing between “contractual or economic control” and physical control:

“[Mr Hébert.-] And Mr. Bidwai states: ‘as we commenced DES discussions with customers in 2017, we were looking to enter into long term Lease Agreements with shipping Companies in order to have full control over LNG vessels for 20 years.’

So it appears that, at least from the Proponent's perspective, they were looking at controlling the ships?

[Mr. Northey.-] **Respectfully, Counsel, I think that meaning of control is quite different from what we're talking about here. This is contractual or economic control** of just having a regular Contract like a anybody saying a long-term lease would say with some third party, ‘I want to have certainty.’

⁵⁷³ Day-7-ENG, p.1945(22)-1949(5).

I put the word ‘certainty,’ so I mean, again, I’m not an Expert on this. I’m just saying to you that this doesn’t affect what I think, **the meaning of ‘control’ is, which is who is running the ship.**”⁵⁷⁴

483 **Fourth**, the Agency wrongly considered the effects of marine shipping beyond GNLQ’s care and control.⁵⁷⁵

484 As Mr Northey explained, the Agency did so, first in the EA Report:

“Slide 12 [of Mr Northey’s presentation] excerpted the Agency’s EIS Guidelines, where they determined that ‘marine shipping associated with the Project that is beyond the care and control of GNL Québec’ was not considered to be part of the Project for purposes of this EA.

Without regard to this 2016 exclusion, the EA Report advised that ‘the Project includes marine transportation between the site and the St. Lawrence Estuary.’

The EA Report did not explain the Agency’s position on care and control. However, in order to include all marine shipping as part of the Project, the Agency needed to demonstrate that GNLQ had this care and control. So it does not explain it, and it does not address how GNLQ had the care and control.

As such, I conclude the Agency’s EA Report contradicted the Agency’s 2016 Determination, when the Agency said, without demonstrating that GNLQ was in greater care and control than the third-party shipper, that the Project included marine transportation from the facility site to the St. Lawrence Estuary.”⁵⁷⁶

485 In turn, the Agency’s December 2021 memo to the Minister of Environment comprised **three errors** in this regard:

“**[Mr Northey.-]** The **first error** in this memo is that [...] [it] ignored the EIS Guidelines when it advised the Minister that the

⁵⁷⁴ Day-8-ENG, p.1967(9)-1968(4).

⁵⁷⁵ Reply, p.133 (¶¶398-411); **CER-2**, p.30 (s.4.3.2); **CER-2 (Second)**, p.38 (s.4.3(2)).

⁵⁷⁶ Day-7-ENG, p.1870(19)-1871(5); Northey Presentation, p.20.

Project includes maritime transport between the site of the natural gas liquefaction complex and the maritime area of the St. Lawrence River.

Recalling the EIS Guidelines, the only way the Agency's advice to the Minister was correct was if GNLQ was in care and control of all shipping on the Saguenay River, but no Agency document established this [...].

The **second error**: The Agency's memo to the Minister also failed to advise the Minister -- on Slide 25 -- that its advice was inconsistent with its own distinction in the 2016 Guidelines between information for Section 19(1)(j) and the Environmental Assessment Decision. [...]

Third error, the Agency memo to the Minister contradicted the EIS Guidelines regarding what was excluded from the Minister's Decision on significant effects and wrongly ignored its inconsistent conclusions in 2018 and DFO's affirmation of these 2018 conclusions in 2021.

Contradicting the EIS Guidelines [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

You are already aware of the inconsistencies between this statement and the 2018 North Shore EA Report and DFO's 2021 input to the Agency on my Slide 23.”⁵⁷⁷

486 **Fifth**, the Agency had **already accepted** the cumulative effects of the GNLQ Project and the North Shore Terminal project at the time of approving the North Shore Project in 2018.⁵⁷⁸

⁵⁷⁷ Day-7-ENG, p.1875(21)-1878(6); Northey Presentation, p.24-26; **TH-0003-FRA**.

⁵⁷⁸ **CER-2 (Second)**, p.47 (¶¶116-118); Northey Presentation, p.23; **RER-7** (not addressing Mr Northey's opinion in this regard).

487 Ms Bélanger, who was project manager for both the North Shore project and the GNLQ Project, confirmed their similarities, including their same location and the fact that they anticipated adding a comparable number of ships, annually, on the Saguenay River (140 ships and between 140 and 165 ships per year by 2030, respectively).⁵⁷⁹ She also confirmed the following:

- The SPA (the proponent of the North Shore project) had calculated the cumulative effects of its project with other projects, including GNLQ.⁵⁸⁰
- It had assumed that GNLQ would add 160 ships per year, which was accurate since GNLQ later estimated an additional 140-165 ships per year.⁵⁸¹
- It had assumed that the North Shore project, combined with other projects, including GNLQ, would increase the number of ships on the Saguenay to 635 per year.⁵⁸²
- In October 2018, the Agency concluded that neither the direct nor the cumulative effects of the North Shore project would be significant.⁵⁸³
- Between 2018 and 2021, there were no other new projects in the area that would have affected the SPA's (and the Agency's) cumulative effects analysis.⁵⁸⁴

488 In this regard, Mr Northey noted that the August 2019 letter wrongly suggested that the GNLQ Project would significantly increase marine traffic:

“**[Mr Northey.-]** [...] the August 2019 letter, you can see on the second page, itself claims that ‘marine transportation related to the

⁵⁷⁹ Day-4-ENG, p.1039(16)-1042(1), 1043(9-15)/Day-4-FRA, p.63(4-11; 24-43), 64(19-22).

⁵⁸⁰ Day-4-ENG, p.1043(9-15)/Day-4-FRA, p.64(19-22).

⁵⁸¹ Day-4-ENG, p.1064(13-16)/Day-4-FRA, p.63(36-38).

⁵⁸² Day-4-ENG, p.1043(9-15)/Day-4-FRA, p.64(19-22); **C-0215-ENG**, p.186; **CD-0067-FRA**, p.203.

⁵⁸³ Day-4-ENG, p.1043(18)-1044(2, 18-22), 1045(1-6)/Day-4-FRA, p.64(25-31), 65(1-8); Day-7-ENG, p.1871(18)-1872(16); Northey Presentation, p.21.

⁵⁸⁴ Day-4-ENG, p.1047(1-15)/Day-4-FRA, p.65(37-47).

Project would result in a significant increase in navigation compared to the present situation.' But, as we just saw, the Agency concluded, in 2018, that an increase in navigation from 225 ships to 635 ships was not significant."⁵⁸⁵

489 Mr Northey also explained why the Agency had no basis to change its position from when the effect of the increased traffic was assessed for the North Shore Terminal in 2018:

"[**Mr Northey.**-] DFO, the Department of Fisheries and Oceans, the Federal authority on the belugas, advised the Agency in February 2021 [...] that its 2018 conclusions from the North Shore Project remained valid. It expressed a similar view in December 2020. The Agency Report, therefore, had no basis to reverse the 2018 conclusion in the North Shore Report that the Project alone would have no significant effects on the belugas or the 2018 conclusion that the cumulative effects of 635 ships was not significant."⁵⁸⁶

490 There was thus **no basis** for the Agency to change positions between 2018 and 2021 and to conclude, in 2021, that marine shipping associated with the GNLQ Project would cause a significant adverse environmental effect.⁵⁸⁷

3.4.2.5 There was no basis for the Agency and thus the Minister to consider the Effects on the Cultural Heritage of the Innu First Nations the way they did

491 It is undisputed that the Agency's conclusions on the cultural heritage of the Innu First Nations rested entirely on its findings regarding the alleged effects of the GNLQ Project on beluga whales. The Agency did not identify

⁵⁸⁵ Day-7-ENG, p.1873(15-21).

⁵⁸⁶ Day-7-ENG, p.1875(1-13); Northey Presentation, p.23; **RN-0147-FRA**; **TLV-0157-FRA**; Day-8-ENG, p.2136(3-7) ("[**Mr Northey.**-] [...] I don't find facts applied here for the change in position by the Agency").

⁵⁸⁷ Because the Agency could not consider for purposes of Section 19(1)(a) the possible adverse environmental effects of marine shipping beyond GNLQ's care and control, it also could not do a cumulative effects analysis. However, even if it somehow could do that analysis, there was no reason for it to change positions as compared to 2018.

any cultural-heritage impact independent of the alleged impact on belugas. As shown above, that assessment regarding the impact on beluga whales was itself outside the proper scope of both the GNLQ Project and the EA.

492 Mr Northey explained:

“**[Mr Northey.-] [...] absent significant effects on belugas**, the Agency reported no basis to conclude there be significant cultural heritage effects on Indigenous Peoples. Those effects were entirely due to significant effects on belugas.”⁵⁸⁸

493 Ms Powell also confirmed that the Minister's findings relating to the significant adverse effects in connection with belugas directly led to his conclusions regarding First Nations:

“**[Ms Powell.-] Because of those findings**, the Minister goes on to make cultural heritage findings on the Innu based on the beluga.”⁵⁸⁹

494 The Respondent has not challenged the Claimant's position that, to the extent that the Agency's findings regarding the First Nations' cultural heritage derived from a finding that would be impermissible under the CEAA 2012 and the EIS Guidelines (which is the case for marine shipping), those findings would also be impermissible.⁵⁹⁰

495 Accordingly, the Minister's reliance on these findings and his determination that there would be a significant adverse environmental effect on the First Nations' cultural heritage was also contrary to Canadian law, arbitrary and discriminatory and in breach of the NAFTA.⁵⁹¹

⁵⁸⁸ Day-7-ENG, p.1875(14-18); Northey Presentation, p.23; Counter-Memorial, p.62 (¶168).

⁵⁸⁹ Day-8-ENG, p.2039(6-8).

⁵⁹⁰ Reply, p.138 (¶413); **CER-2 (Second)**, p.38 (s.4.3(2)).

⁵⁹¹ Northey Presentation, p.23.

3.4.3 The federal Minister of Environment had no lawful basis or discretion to reject the GNLQ Project

496 It is undisputed that, under Section 52(1) CEAA 2012, the Minister of Environment has exclusive authority to decide whether any effects are significant.⁵⁹² However, as is also undisputed:

- the Minister (and in turn the Cabinet) cannot rely on an EA Report or process that is flawed.⁵⁹³
- an EA Report cannot be relied upon (let alone approved by the Cabinet) if it is “so deficient that [it] does not qualify as a ‘report’ within the meaning of the legislation”, as set out in the *Tsleil Watuth* and *Gitxaala Nation* cases.⁵⁹⁴

497 As Mr Northey confirmed at the Hearing and for the reasons set out *supra*, Section 3.4.2, the EA Report in this case was flawed and deficient, and thus did not pass the tests of *Tsleil Watuth* and *Gitxaala*.⁵⁹⁵

498 Accordingly, the Minister of Environment’s conclusion that the GNLQ Project would have three significant adverse environmental effects – effects relating to GHGs, effects resulting from marine shipping, and effects on cultural heritage also resulting from marine shipping – were also tainted and wrong.⁵⁹⁶ As Mr Northey confirmed, the Minister thus had no lawful basis to reject the GNLQ Project:

“[Mr Northey.-] under Section 52 of the CEAA, **the Minister had no authority to rely on the flawed EA Report and [December 2021] memo to decide that this Project was likely to cause three significant effects.** There were no other effects than the three I have described, the effects dealing with GHGs, dealing with marine

⁵⁹² Northey Presentation, p.9.

⁵⁹³ Northey Presentation, p.10,27; Day-7-ENG, p.1878(12-22).

⁵⁹⁴ **RN-0029-ENG**, p.64 of PDF (¶124); **RN-0148-ENG**, p.167 of PDF (¶¶468-473) (holding that Cabinet decisions may be quashed when they relied on a deficient report or a decision that contained legal errors); Day-8-ENG, p.2005(2)-2007(6); **CER-2 (Second)**, p.15 (¶30); **RER-3**, p.75 (¶154).

⁵⁹⁵ Day-7-ENG, p.1878(7-22); Northey Presentation, p.27.

⁵⁹⁶ **TH-0003-FRA**; **RN-0030-ENG**.

navigation, and the effects on cultural heritage related to the marine navigation.

Absent significant effects, CEAA is unequivocal. **The Minister had no discretion to refuse approval of this Project.**⁵⁹⁷

499 Professor Douglas asked Mr Northey about the constitutional law concept of collective responsibility of Cabinet, as it exists in the UK and Australia. Mr Northey responded that he did not think that concept “applie[d] to what is going on under the statute [CEAA 2012]” and that it is “quite distinct” since **the Cabinet effectively did not have oversight over the Minister’s decision under Section 52:**

“[**Arbitrator Douglas.-**] So by ‘statute,’ you can, in a sense, contract out of the ability of Cabinet to oversee the Minister’s Decision?

[**Mr Northey.-**] I absolutely think so, yes, sir.”⁵⁹⁸

500 In other words, the Cabinet had no lawful basis or discretion either to reject the GNLQ Project.

3.4.4 The Cabinet had no lawful basis or discretion to reject the GNLQ Project

501 In its decision, the Cabinet noted that the Minister had decided that the GNLQ Project was likely to cause the following significant adverse environmental effects:

“(a) changes to marine mammals, including Beluga whales (St. Lawrence Estuary population);

(b) with respect to the Innu First Nations of the Essipiunnuat, the Pekuakamiulnuatsh and the Pessamiulnutsh, effects occurring in Canada of changes to the environment, including to Beluga whales, on their cultural heritage; and

⁵⁹⁷ Day-7-ENG, p.1878(12-22); Northey Presentation, p.27.

⁵⁹⁸ Day-8-ENG, p.2003(20)-2004(21).

(c) changes to the environment that would occur outside Quebec resulting from the emission of greenhouse gases, given the magnitude that these emissions would have and their impact on the ability of Canada and Quebec to meet their respective climate change objectives.”⁵⁹⁹

502 However, since the Minister's decision was itself tainted by a flawed EA Report and unlawful, the Cabinet's conclusion that these effects were not justified was in turn unlawful.

503 As Mr Northey explained, because the Minister of Environment had no lawful authority to decide that the GNLQ Project was likely to cause significant adverse effects under Section 52(1) of CEAA 2012, **he had no lawful authority to refer any matter to the Cabinet** in the first place and the Cabinet had no authority to even render a decision:

“[**Mr Northey.**-] [...] CEAA assigns Cabinet a unique and specific role. Uniquely, Cabinet was the only decision maker having lawful authority to say no to a project.

Specifically, Cabinet was engaged only where the Minister made a lawful referral to it.

If Cabinet did not receive a lawful referral from the Minister, Cabinet had no lawful authority to say no to this Project.”⁶⁰⁰

504 With regard to the third finding (on GHG emissions), Ms Powell in her report sought to defend the Cabinet's decision in part by arguing that it did not refer to **upstream** GHG emissions, but only to GHG emissions generally. At the Hearing however, she had to concede that, unlike Ms Bélanger, she was not an expert in GHG emissions⁶⁰¹ and thus she could not dispute Ms Bélanger's evidence that upstream GHG emissions would have been **almost entirely outside** of Québec:

⁵⁹⁹ **RN-0030-ENG.**

⁶⁰⁰ Day-7-ENG, p.1879(3-10); Northey Presentation, p.9,28; **CER-2 (Second)**, p.14 (s.3.3).

⁶⁰¹ Day-8-ENG, p.2052(21)-2053(2); p.2017(8-13).

“[Ms de Germiny.-] And in the third paragraph [of the Cabinet decision], it refers to the 9 December 2021 Decision of the Minister and says that he found that the GNLQ Project is likely to cause three significant adverse effects, **the third item is at Item C is changes outside Québec, changes outside Québec resulting from the emission of GHGs.** Do you see that?

[Ms Powell.-] Yes.

[Ms de Germiny.-] Are you aware that Ms. Bélanger last week confirmed that GHGs are an area of specialty for her?

[Ms Powell.-] For?

[Ms de Germiny.-] That GHGs are an area of specialty for her?

[Ms Powell.-] No, I did not.

[Ms de Germiny.-] Are you aware that **Ms. Bélanger also confirmed last week that upstream GHG emissions associated with the Project would have been almost entirely outside Québec?**

[Ms Powell.-] I didn't hear that, no.

[Ms de Germiny.-] But you have no basis to dispute that; right?

[Ms Powell.-] I have no basis, no.

[Ms de Germiny.-] So changes to the environment that would occur outside Québec would have resulted from upstream GHGs, right, Ms. Powell?

[Ms Powell.-] My understanding from the Project Report was that the Project itself, their direct emissions were not insignificant. So I have no way technically to confirm that.

[Ms de Germiny.-] You've done no analysis of what is an upstream GHG or a direct GHG; right? That's not your area of competence? That's what you're saying?

[Ms Powell.-] No. I was relying on the Environmental Report.”⁶⁰²

505 In other words, the Cabinet’s reference to “changes to the environment that would occur **outside Quebec** resulting from the emission of greenhouse gases” referred to **upstream** GHG emissions.

506 At the Hearing, Professor Douglas asked whether it was a “surprising result” that, further to the expert opinions of Me Duchaine and Mr Northey, there were **two issues that neither the Quebec Government nor the Federal Government could consider**: upstream GHG emissions and the effects of marine shipping on beluga whales. As Mr Northey responded, the reasons for this relate to both constitutional law (but as a general matter) and the Agency’s own actions (in this case):

“[Arbitrator Douglas.-] [...] Just finally, it is sort of a taking a step back type question, but it seems from Me Duchaine’s Opinion and your Opinion that we get to the position where it was unlawful for the Minister at the Provincial level to take into account upstream greenhouse gas emissions and the beluga question, if I can put it that way. And it was also unlawful at the Federal level according to your position.

So we get to the position that neither the Provincial Government nor the Federal Government was able to take into accounts those two factors in their ultimate Decision. And I just wondered if that was a **surprising result**

[...] Or is it just – this is just something that happens in these types of exercises. Because factually, it seems these are two factors that may be important. People could disagree or agree as to whether or not the Project should be refused on that basis, but at least factually they seem to be something that one would take into account.

So we get to the position where neither the Federal nor the Provincial Governments were lawfully able to take those two factors into account?

⁶⁰² Day-8-ENG, p.2116(2)-2117(13).

[Mr Northey.-] I absolutely want to distinguish what is meant here. Correct. I believe and **I don't want to speak for my colleague by Expert on Environmental Law Québec, but I think the basis of her Opinion is a constitutional basis.**

The issue here, Federally, the comment I'm making is nothing to do with the Constitution at all. It is really to do with the Agency itself, and the Agency itself determining that it was going to scope things out of the EIS. I cannot explain the basis for that. I've given you that they did the same thing in another EIS, and I've given you another issue with the Bay du Nord.

So we have examples where they did it, but it's a very different issue in the sense that **they voluntarily [...] excluded these matters, not as a matter of constitutional doctrine. They were within scope constitutionally. So that makes it quite astonishing. I cannot explain why they did that.**

[Arbitrator Douglas.-] Okay. Thank you. That's helpful."⁶⁰³

- 507 In other words, neither the effects of marine shipping on beluga whales nor the effects of upstream GHG emissions by either the Québec or the Federal Government could provide grounds for rejecting the GNLQ Project – for constitutional law reasons (in the case of the Québec Government) and for reasons relating to the Agency's specific actions in this case (for the Federal Government). These reasons are not attributable to the Claimant or GNLQ. They are on the contrary independent of GNLQ.
- 508 If the Agency had wished to reserve the right to consider those effects on the environment and the right for the Federal Government to render a decision that considered those effects, it should not have done the exact **opposite**, by expressly excluding those effects from the scope of the GNLQ Project and EA.
- 509 GNLQ could not have complained or objected earlier – to the inclusion of those effects – than it did. It was only upon seeing the Québec and Federal Government decisions – including their grounds – that GNLQ realised that

⁶⁰³ Day-8-ENG, p.2007(6)-2009(8).

the grounds invoked were wrongful and unlawful, for constitutional and other reasons. GNLQ was again never informed that the federal authorities considered that something had changed and that those effects that had been **excluded** from the scope of the GNLQ Project and EA, were now **included**. If the federal authorities genuinely believed that there had been a change and that those effects needed to be considered and deemed within the scope of the GNLQ Project and EA, they had an obligation to inform GNLQ and to provide it ample opportunity to respond, to challenge that position and/or to make submissions on those effects. This is not what happened.

- 510 The Respondent certainly cannot escape liability on grounds that the outcome may seem, conceptually-speaking, surprising. The Respondent's own conduct led to that outcome. Ultimately, the Federal Government's rejection of the GNLQ Project was unreasonable, arbitrary, discriminatory and contrary to domestic law. It also lacked transparency and resulted from an EA process that itself had lacked transparency and due process. Accordingly, the decision violated Article 1105 NAFTA.

3.5 The Quebec and Federal Governments' discretion was constrained by provincial, federal and international law

- 511 The Claimant's case is not that the Respondent had no discretion to reject the GNLQ Project, but that the exercise of its discretion was constrained. To answer the Tribunal's question, this is how one can reconcile the fact that "Canada and Québec have discretionary power to grant environmental authorisations with the fact that the Claimant considers that the refusal decision in itself constitutes a violation of the Treaty."⁶⁰⁴
- 512 Indeed, first, there were specific limits to the discretion of the Québec and federal authorities under Canadian law (**Section 3.5.1**), but, in any event, the Tribunal must analyse whether the decisions breach the NAFTA irrespective of the level of discretion that the Québec and Federal Government enjoyed in reaching them (**Section 3.5.2**).

⁶⁰⁴ Tribunal's Questions, p.1 (B, fourth).

3.5.1 The discretionary power to grant environmental authorisations is subject to precise constraints under the Canadian constitution, Québec law and federal law

513 The Tribunal's question rests on the premise that "Canada and Québec have discretionary power to grant environmental authorisations". This premise is only correct subject to the following:

- as a matter of Canadian law, both the federal and Québec authorities have only limited discretion, as explained below; and
- as matter of fact, they did not have the discretion to render their decisions for the reasons invoked, as further explained in Sections 3.3, 3.4 and 3.5.

514 This is the case for the Québec Government and the Federal Government as confirmed at the Hearing.

3.5.1.1 The Québec Government has limited discretionary power under the LQE

515 The Québec Government's discretion to approve or not the GNLQ Project was squarely constrained. First, as explained *supra*, Section 3.2.1, it was constrained by the Canadian constitution: the Québec Government did not have jurisdiction to perform the EA of the GNLQ Project, since it fell squarely within exclusive federal jurisdiction.⁶⁰⁵ It was, furthermore, constrained by the MELCC Directive issued under the LQE for the GNLQ Project, which, as for any project, set the boundaries of the EA and of the Government's decision.⁶⁰⁶

516 The grounds invoked in the Decree for rejecting the GNLQ Project were outside the scope of Québec's constitutional powers, as well as outside the scope of the Directive.⁶⁰⁷ The Decree therefore cannot have constituted a proper exercise of the Québec Government's discretionary power.

⁶⁰⁵ Reply, p.42 (s.2.3.1); Day-1-ENG, p.37(2)-39(2).

⁶⁰⁶ Reply, p.61 (¶¶183-190); Day-1-ENG, p.44(2)-47(13).

⁶⁰⁷ Reply, p.302 (¶¶894, 907-913, 928); Day-1-ENG, p.46(14)-47(13).

517 The Respondent has argued that the discretion of the Québec Government is virtually unconstrained.⁶⁰⁸ As the expert evidence at the Hearing confirmed, this is not correct.

518 **First**, as Me Duchaine explained, the Government's discretionary powers are limited by the laws that grant them.⁶⁰⁹ Me Yergeau agreed:

“Me Yergeau.- [L]e ministre, lorsqu'il recommande et le gouvernement, lorsqu'il décide, doit évidemment agir dans l'objectif de la loi, doit tenir compte du processus, [...] ne peut pas ramener la procédure d'évaluation et d'examen des impacts sur l'environnement à un exercice de façade [...].”⁶¹⁰

519 **Second**, as Me Duchaine confirmed, a directive is binding and constrains the Government's discretion. Me Duchaine pointed to the *Bellefleur* decision, which ruled that the Minister limits his or her own discretion by emitting a directive,⁶¹¹ and explained as follows:

“[L]’arrêt Bellefleur [...] dit exactement que, lorsque le ministre émet sa directive, il encadre son... il limite sa discrétion. Donc, la Cour d’appel l’a déjà dit en 1993. Et non seulement ça, en 2012, dans un dossier que j’ai plaidé et où Me Yergeau représentait l’autre partie, on s’est rendu jusqu’à Cour d’appel, et la Cour d’appel a à nouveau rappelé ce principe-là [...] à l’effet que les directives encadrent le pouvoir législatif[recte : administratif]. [...] [L]e ministre a l’opportunité, lorsqu’il émet la directive, d’identifier les enjeux à gérer, et c’est à lui de faire cet exercice-là, à ce moment-là, et pas de faire un à-peu-près ou une approximation puis de changer d’idée trois ans plus tard”.⁶¹²

⁶⁰⁸ Rejoinder, p.51 (¶¶114-117, 198).

⁶⁰⁹ Day-6-FRA, p.41(32-34); Duchaine Presentation, p.17-19.

⁶¹⁰ Day-6-FRA, p.105(38-42).

⁶¹¹ **CER-1 (Second)**, p.60 (¶179).

⁶¹² Day-6-FRA, p.46(36-44); **CER-1 (Second)**, p.57 (¶¶172-179, 272-288) and the *Bellefleur* decision, **CD-0037-FRA**, p.71 of PDF (“Lorsque le Ministre établit les conditions de l’étude d’impact, il énonce le contenu qu’elle doit avoir, la nature, l’étendue et la portée de celle-ci, deux phénomènes juridiques importants se produisent. D’une part, **il fixe lui-même une limite**

520 Me Yergeau agreed that a directive is an important document, which is
“*indiscutablement obligatoire*”.⁶¹³

521 He also affirmed that *Bellefleur* is “*l’état du droit [...] l’arrêt le plus important jamais rendu par Cour d’appel*”.⁶¹⁴ However, he argued that, in the early 1990s, when *Bellefleur* was decided, directives were project-specific under the former LQE regime, but are no longer so under the current version of the LQE.⁶¹⁵ This proposition directly contradicted Ms Gagnon’s confirmation that the Directive was prepared for the GNLQ Project specifically:

“**Mme Gagnon.**- [...] *Dans le cas du Projet de GNL Québec, Énergie Saguenay, en fait, il y avait plusieurs [...] directives types [...] qui s’appliquaient à ce cas, parce qu’il y avait différentes composantes, donc il y a eu un amalgame de quatre directives pour produire la directive. Donc, plusieurs éléments qui, de toute façon, étaient les mêmes dans chacune des directives et l’ensemble des éléments ont été mis en commun pour produire la directive Énergie Saguenay. Donc, c’est vraiment un amalgame de l’ensemble des éléments qui se retrouvaient dans les quatre directives différentes [...]*”.⁶¹⁶

522 In any event, recent case law confirms that directives continue to constrain the Government’s decision-making under the current LQE regime in force as of 1994. In his first and second reports, Me Yergeau cited the decision

supplémentaire à sa discrétion puisqu’il indique les informations qu’il cherche, donc qu’il estime indispensables, et dont il entend au moins tenir compte dans sa prise de décision. Ce n’est pas n’importe quelle étude d’impact sur laquelle il annonce qu’il délibérera pour prendre sa décision, mais une étude spécifique contenant les renseignements demandés par lui. D’autre part, il définit certaines bases ou assises jugées essentielles à l’exercice de son pouvoir discrétionnaire.”).

⁶¹³ Day-7-FRA, p.31(1-4) (“**Me Yergeau.**- [...] [J]e n’ai jamais dit que les directives ne sont pas un document important : ils initient la prise de connaissance du dossier. C’est un document important.”), p.31(22-25) (“Le contenu de la directive est indiscutablement obligatoire [...].”).

⁶¹⁴ Day-6-FRA, p.106(9-10); Day-7-FRA, p.60(34-38, 43-46) (where the experts agree that the findings in *Germain Blanchard* and *Bellefleur* are authoritative on the question of government discretion).

⁶¹⁵ Day-6-FRA, p.104(1-48).

⁶¹⁶ Day-5-FRA, p.10(18-27).

of the Québec Court of Appeal in *Gestion environnementale Nord-Sud*,⁶¹⁷ a case in which he acted as counsel,⁶¹⁸ and which was decided in 2012, under the 1994 LQE.⁶¹⁹ Me Yergeau erroneously referred in his reports to a passage of the “context” section of the decision,⁶²⁰ stating that a directive consists in “instructions sent to the proponent of the project, informing it of the minimum requirements that the authors of the impact study must meet with respect to its nature, its extent and its scope”.⁶²¹ The actual decision of the judge, however, was:

“With his directives, the Minister clearly indicated to the Régie the parameters within which he intended to exercise his discretion by including in his considerations the issue of the source of the waste. He chose to require this information because he deemed it necessary for making his decision.”⁶²²

523 **Finally**, according to Me Yergeau, a directive “*n’est pas [a] document figé*”, and comprises “*la directive de départ*” and every request for information issued thereafter.⁶²³ This view has no basis under the LQE, as Me Duchaine explained:

“Me Duchaine.- [...] l’article 31.4 [...] permet au ministère de demander des informations additionnelles. [...] il permet au ministère de poser des questions pour approfondir les enjeux dans sa procédure. 31.4 n’est pas rédigé de manière à rouvrir le débat une fois que l’évaluation a été considérée recevable, c’est-à-dire

⁶¹⁷ **RER-2**, p.29 (¶82); **RER-6**, p.66 (¶220).

⁶¹⁸ Day-7-FRA, p.28(32-37).

⁶¹⁹ **MY-0026-FRA**, p.6 of PDF (¶¶16-17) (confirming that it refers to an EA started in 1996, *i.e.*, under the LQE regime that is still current).

⁶²⁰ Day-7-FRA, p.28(38)-29(9), 30(1-6).

⁶²¹ **MY-0026-FRA**, p.6 of PDF (¶17).

⁶²² **MY-0026-FRA**, p.25 of PDF (¶104). When asked about whether it makes a difference to include a proposition in the context of a judicial decision, or in its dispositive section, Me Yergeau stated that he had never thought of the question (Day-7-FRA, p.30(1-11)). After spending 10 years as a judge, this is simply not credible.

⁶²³ Day-7-FRA, p.28(23-28).

qu'une fois que le ministère est d'avis qu'elle répond à tous les enjeux identifiés dans la directive."⁶²⁴

524 In other words, directives remain the instrument through which Québec Ministers of Environment limit their own discretion under the LQE.

525 As recalled *supra*, Sections 3.2.1 and 3.3.4.2, the Québec Government did not have discretion to issue the Decree that it issued, as it reflected a decision based on grounds that fell outside of Québec's constitutional powers, as well as outside of the scope of the Directive.

3.5.1.2 The Federal Government has limited discretionary power under the CEAA 2012

526 Under the governing statute, the CEAA 2012, the federal decision-makers – in this case, the Minister of Environment and the Cabinet – have limited to no discretion to determine or assess:

- the significant adverse environmental effects of a project;
- the ways in which those effects may be mitigated; and
- whether to approve or reject a project.⁶²⁵

527 The Agency itself constrains the Minister's discretion on any given project through EIS guidelines issued at the outset of an EA.⁶²⁶ In the case of the GNLQ Project, however, the federal decision fell outside the scope of the EIS Guidelines, *i.e.*, outside the lawful scope of the Minister's discretion.⁶²⁷

528 In its Rejoinder, the Respondent maintains that the Federal Government has a broad discretion to change the parameters of the EA.⁶²⁸ As confirmed at the Hearing, this is not the case.

⁶²⁴ Day-6-FRA, p.89(21-29).

⁶²⁵ Reply, p.67 (¶¶201-210).

⁶²⁶ Day-1-ENG, p.47(14)-49(15).

⁶²⁷ Reply, p.132 (s.2.6.2.1), p.331 (¶¶975-977); Day-1-ENG, p.47(14)-51(6).

⁶²⁸ Rejoinder, p.257 (¶¶636-638).

529 **First**, as Mr Northey explained, CEAA 2012 limits the actions of the Minister and the Cabinet (as well as the Agency):

“[...] *Vavilov* [*i.e.*, Supreme Court decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* [RN-28]] principles advise us to interpret CEAA according to the constraints set out in a specific terms and provisions. Following *Vavilov*, I disagree with Ms. Powell that CEAA confers broad discretion on the Minister and Cabinet or the Agency. To the contrary, CEAA imposes limits which constrain their lawful actions.”⁶²⁹

530 Although Ms Powell testified that the “political actors” have broad discretionary power, she agreed that they were “absolutely constrained” by CEAA.⁶³⁰

531 **Second**, as Mr Northey confirmed, Section 19 of CEAA 2012 requires the Agency to define the **scope** of decision-making (in this case, by the Agency, Minister of Environment, and Cabinet),⁶³¹ which the Agency did for the GNLQ Project through the EIS Guidelines.⁶³²

532 He explained that the EIS Guidelines also distinguish between “information gathering” and “decision-making”;⁶³³ only the latter defines which environmental effects can be identified in the Agency’s report, and can form the basis of the Minister’s decision.⁶³⁴ This testimony remained un rebutted.

533 **Finally**, the Tribunal asked Mr Northey and Ms Powell whether the precautionary principle could justify or explain the Agency’s findings or the Minister’s decision. While they could not answer the question, this is only because the principle is not mentioned in any of the EA Report, the December 2021 recommendation to the Minister, the Minister’s Decision

⁶²⁹ Day-7-ENG, p.1857(2-11); Northey Presentation, p.3.

⁶³⁰ Day-8-ENG, p.2017(19)-2018(8).

⁶³¹ Day-7-ENG, p.1861(10)-1862(4); Northey Presentation, p.10.

⁶³² Day-7-ENG, p.1861(16)-1863(1); Northey Presentation, p.11.

⁶³³ Day-7-ENG, p.1862(16)-1864(4); Northey Presentation, p.11-12.

⁶³⁴ Day-7-ENG, p.1864(6)-1865(21); Northey Presentation, p.13-14.

or the Cabinet Decision.⁶³⁵ Ms Powell alluded to the fact that the precautionary principle is “in the statute”,⁶³⁶ possibly referring to Section 4 of CEAA.⁶³⁷ However, this principle does not appear in any of the provisions relating to the decision making of the Minister and Cabinet (Section 52),⁶³⁸ which, again, explains why neither she nor Mr Northey addressed it in their reports. It is simply not a factor in the decision-making under CEAA 2012.

534 Even if it were, that principle is not relevant to, and thus could not explain or justify, the Federal Government's rejection of the GNLQ Project in this case. That is because the grounds on which the federal refusal was based were unlawful, as also confirmed at the Hearing and explained *supra*, Section 3.4.

535 In other words, the precautionary principle cannot and did not in this case grant the Federal (or Québec) Government any greater discretion than they enjoy under Canadian law.⁶³⁹

3.5.2 In any event, the Respondent's discretion was constrained by its international obligations under the NAFTA

536 The discretionary power granted to governmental agencies under municipal law does not affect the Tribunal's mandate to assess whether they nonetheless act in breach of the NAFTA.

537 A State's decision-making is also constrained by those international standards that the State has agreed to abide by.⁶⁴⁰ The Claimant does not dispute that a high degree of deference is required towards a State's decision-making processes.⁶⁴¹ However, such deference does not justify or

⁶³⁵ Day-8-ENG, p.2139(8)-2140(12).

⁶³⁶ Day-8-ENG, p.2140(4-5).

⁶³⁷ **RN-0012-ENG**, p.3 (s.4(1)).

⁶³⁸ **RN-0012-ENG**, p.4-5;7-8;17 (ss.5, 19, 52).

⁶³⁹ Reply, p.405 (s.4.4).

⁶⁴⁰ Reply, p.262 (¶¶785-786), p.269 (¶¶802-804) (and references therein).

⁶⁴¹ Rejoinder, p.178 (¶¶433-441).

excuse decisions that otherwise amount to a breach of the State's international obligations.⁶⁴²

538 Indeed, prior tribunals interpreting the MST have held that discretion of administrative bodies under municipal law is not the end of a tribunal's scrutiny under international treaties,⁶⁴³ including in environmental matters. As the *Aven v. Costa Rica* tribunal held:

“Although Respondent argues that when Article 17.2(1)(b) [DR-CAFTA] establishes discretionary powers to the Treaty member Party with respect to investigatory, prosecutorial, regulatory and compliance for enforcement of environmental matters, this implies a manner of ensuring that a Party can, as it sees fit, implement its own environmental laws without fear of violating DR-CAFTA, the Tribunal believes that this is not an absolute right either that may be exercised in any manner Respondent desires. By signing the Treaty, Respondent has agreed that there are limits to the manner in which a Party may implement and enforce its own environmental laws. It must do so in a fair, non-discriminatory fashion, applying said laws to protect the environment, following principles of due process, not only for its adoption but also for its enforcement.”⁶⁴⁴

⁶⁴² E.g., *TECO v. Guatemala*, CL-042-ENG, p.101 (¶¶492-493) (“[T]he deference to the State’s regulatory powers cannot amount to condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process. [...] although the role of an international tribunal is not to second-guess or to review decisions that have been made genuinely and in good faith by a sovereign in the normal exercise of its powers, it is up to an international arbitral tribunal to sanction decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters.”).

⁶⁴³ Reply, p.269 (¶¶802-804 and references therein).

⁶⁴⁴ *Aven v. Costa Rica*, CL-404-ENG, p.130 (¶413); *Marfin v. Cyprus*, CL-405-ENG, p.65 of PDF (¶¶898-900) (Recognizing that a banking regulator has certain discretion in making its decisions, and that such decisions are generally owed deference by arbitral tribunals, but finding that, “[n]evertheless, [...] **such deference must not impede its task to verify whether international law was complied with.** If there is any evidence that a decision taken by a regulator was abusive, did not afford due process or was a pretense of form designed to conceal improper ends, a tribunal must find a breach of international law.”).

539 In conclusion, even if the discretionary powers of the Québec and Federal Governments were as vast as the Respondent contends, the Tribunal would still have to scrutinise how they were used against the MST under Article 1105 NAFTA.

3.6 The provincial and federal authorities' actions constituted a wrongful composite act in breach of Article 1105 NAFTA

540 In addition to constituting standalone breaches of Article 1105 NAFTA in 2015, 2016, 2021 and 2022, as explained *supra*, Sections 3.2, 3.3 and 3.4, the Respondent's acts and omissions from 2015 to 2022, when taken in aggregate, also constitute a wrongful composite act in breach of Article 1105 NAFTA.⁶⁴⁵

541 The Claimant has explained the series of acts and omissions by the Québec and federal authorities forming the composite act in breach of Article 1105. They are set out at paragraph 574 of the Reply.⁶⁴⁶ Notwithstanding the fact that some of those actions and omissions also amounted to standalone breaches of Article 1105, as explained *supra*, Section 2.4.1, such actions/omissions can (and in this case do) also form part of a series of actions and omissions that in aggregate amount to a composite breach of the same obligation. Indeed, those actions and omissions are connected in that they all related to the GNLQ Project and its EA process, from beginning to end.⁶⁴⁷

542 The composite nature of the breach is confirmed by the fact that it is the aggregation of each of the elements described in Sections 3.2, 3.3 and 3.4 that gives rise to the breach of Article 1105. For example, the MELCC's request for a cost-benefit analysis, or the Agency's attempt to extend the geographic scope of the EA, were both unfair treatment of the GNLQ Project. Nonetheless, by themselves they would not have been so unfair or inequitable as to breach the MST standard under Article 1105 NAFTA, had the Québec and Federal Governments approved the GNLQ Project rather

⁶⁴⁵ Memorial, p.123 (¶382); Reply, p.195 (s.3.2, ¶847); Day-1-ENG, p.125(17)-126(13); C-Presentation, p.18.

⁶⁴⁶ Reply, p.196 (¶574); C-Presentation, p.18.

⁶⁴⁷ Rejoinder on Jurisdiction, p.23 (s.2.2.2).

than rejecting it. However, the fact that Canada rejected the GNLQ Project partially by relying on those prior unfair actions, changes their character such that, when taken in aggregate with the later refusals, the process was “grossly unfair”, “unjust” and “idiosyncratic”, and violated due process through a “complete lack of candour in an administrative process”.⁶⁴⁸ It also frustrated the Claimant’s legitimate expectations.⁶⁴⁹ In other words: a breach of the MST under Article 1105.⁶⁵⁰

- 543 As explained, contrary to the Respondent’s position, the Claimant is not required to prove a “motive or purpose” behind the individual actions and omissions to establish that there was a composite wrongful act.⁶⁵¹ However, in this case, the common thread among all of the wrongful elements of the EA of the GNLQ Project is that they all flow from the Québec Government’s deliberate policy of constitutional overreach when carrying out EAs of projects located in Québec. As the Hearing confirmed,⁶⁵² the Québec Government intended to, and did, keep itself in a position to make the ultimate decision on whether the Symbio Project could proceed. Meanwhile, the Federal Government and the Agency failed to insist on the proper allocation of powers in accordance with Canadian constitutional law, and ended up sacrificing the integrity and lawfulness of its own EA process.
- 544 In short, Canada’s constitutional order failed to operate as intended and the Symbio Project became the victim of a rift between the province of Québec and the Federal Government.

⁶⁴⁸ *Waste Management v. Mexico*, **CL-040-ENG**, p.35 (¶98).

⁶⁴⁹ Memorial, p.226 (¶¶736-746).

⁶⁵⁰ *Supra*, Section 3.1.1; Reply, p.253 (¶761, s.4.1.1.2).

⁶⁵¹ Rejoinder on Jurisdiction, p.17 (s.2.2.1).

⁶⁵² *Supra*, Section 3.2.1.4.

4 THE RESPONDENT BREACHED ARTICLES 1102 AND 1103 NAFTA

545 The Claimant relies on its prior submissions concerning the applicable legal standards under Articles 1102 and 1103 NAFTA and the elements establishing breaches of those obligations in this case.⁶⁵³ The Claimant addresses below the Tribunal's questions concerning (i) the interpretation of Article 1102 NAFTA (**Section 4.1**) and (ii) the factual basis of the claims under Articles 1102 and 1103 NAFTA (**Section 4.2**).

4.1 The Claimant has correctly interpreted and applied Article 1102 NAFTA

4.1.1 Establishing a breach of Article 1102 does not require proof of discrimination based on nationality

546 As confirmed by numerous tribunals, establishing a breach of Article 1102 (or 1103) NAFTA does not require proving that the discrimination was based on the investor's nationality.⁶⁵⁴ The Respondent's argument to the contrary is unfounded.⁶⁵⁵

⁶⁵³ Memorial, p.135 (s.IV.A); Reply, p.332 (s.4.2).

⁶⁵⁴ *Feldman v. Mexico*, **RL-028-ENG**, p.75 (¶181-182) ("[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.**"); *Thunderbird v. Mexico*, **CL-057-ENG**, p.59 (¶177) ("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.**"); *Pope & Talbot v. Canada*, **CL-030-ENG**, p.36 (¶79); *Finley v. Mexico*, **CL-295-ENG**, p.149 (¶538) ("[T]o establish a breach of National Treatment under the NAFTA and the USMCA, a claimant must show that it or its investments (i) were given "treatment"; (ii) were in "like circumstances" with domestic investors and investments; and (iii) the treatment given was "less favourable" than that given to domestic investors or investments."); Reply, p.333 (¶¶986-990).

⁶⁵⁵ Rejoinder, p.121 (¶¶293-301); Day-1-FRA, p.76-77. The Parties appear to agree that (i) the evidentiary burden of proof shifts once a claimant has made a *prima facie* case (Reply, p.336 (¶¶991-999); Rejoinder, p.126 (¶¶302-305)) and that (ii) the analysis of "like circumstances" does not require treatment in identical circumstances (Reply, p.338 (¶¶1000-1007); Rejoinder, p.126 (¶¶306-311)).

547 At the Hearing, the Tribunal asked:

“[H]ow do you reconcile the fact that in Article 1102, Paragraph 4(b), there’s an express reference to discrimination by reason of nationality, but that express qualification does not appear in Paragraphs 1 or 2 of Article 1102?”⁶⁵⁶

548 Article 1102 NAFTA provides (in relevant part):

“1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

[...]

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.”

549 On their ordinary meaning, Article 1102(1) and (2) establish a positive and general obligation on State Parties to accord investors and investments of another Party treatment no less favourable than that accorded, in like circumstances, to their own investors and their investments. Neither

⁶⁵⁶ Day-1-ENG, p.312(3-7).

paragraph 1 nor paragraph 2 contains any reference to nationality-based discrimination as a limiting criterion for the scope of that obligation. If the NAFTA parties had intended for nationality-based discrimination to be a necessary condition to establishing a breach of Article 1102 (or indeed 1103), they would have indicated as much in the provision setting out the substantive obligation itself, *i.e.*, in paragraphs 1 and 2 of Article 1102 (or, similarly, 1103).

550 The words “for greater certainty” at the start of Article 1102(4) show that the examples in that paragraph 4 are not intended to alter the meaning of paragraphs 1 or 2 – else they would in fact only create greater **uncertainty**. Paragraph 4(b) merely clarifies that Article 1102 includes a prohibition on discrimination based on nationality. It does not confine the scope of Article 1102 to nationality-based discrimination alone. The obligation itself, contained in Articles 1102(1) and (2), is broader in nature and extends to any measure that results in less favourable treatment of investors of the other NAFTA parties or their investments in like circumstances. This necessarily includes, but is not limited to, measures that compel the sale of their investments solely because of their nationality.

551 In other words, as paragraph 4(b) clarifies, nationality-based discrimination will be **sufficient** to establish a breach of Article 1102(1) or (2). This is logical: in such circumstances, by definition the investor will receive treatment less favourable than the treatment the host State would accord to its own investor in the circumstances.

552 However, it is not a **necessary** condition to establish a breach. There can be circumstances where the investor or its investment suffers “less favourable” treatment than the host State would (in like circumstances) accord to its own investors or their investments, even if the reason for the disparity in treatment is not the investor’s nationality. Indeed, numerous past NAFTA tribunals have found breaches of Article 1102 without making any determination that the less favourable treatment at issue was based on nationality.⁶⁵⁷

⁶⁵⁷ *Feldman v. Mexico*, **RL-028-ENG**, p.78 (¶187); *Bilcon v. Canada*, **CL-024-ENG**, p.214 (¶¶724-725); *Finley v. Mexico*, **CL-295-ENG**, p.247 (¶¶857-863).

553 The Respondent has relied on a footnote in the *Resolute Forest* award stating that the phrase “[f]or greater certainty” in Article 1102, paragraph 4(b), reinforces the view that nationality-based discrimination remains “at the heart of NAFTA Article 1102.”⁶⁵⁸ That observation, however, does not alter the fundamental point that discrimination based on nationality is not a necessary element of a breach of Article 1102. On the contrary, the same tribunal expressly confirmed in the same paragraph of the award that Article 1102 does not require a claimant to prove positive discriminatory intent based on nationality:

“It should be stressed, however, that **a claimant does not have to provide proof positive of discriminatory intent to prevail in a claim under Article 1102.** This is agreed to by the Parties to this case [*i.e.*, Canada] as well as by the United States and Mexico. As held by past tribunals, in some cases, short of a smoking-gun, such proof of discriminatory intent may be impossible to provide.”⁶⁵⁹

4.1.2 Article 1102(3) requires a comparison of the treatment accorded at the same level of government only if the claim concerns treatment by a state or province

554 The Claimant has referred to several projects to which the Federal and Québec Governments accorded more favourable treatment, and which were “in like circumstances” for the purposes of Articles 1102/1103 NAFTA.⁶⁶⁰ In doing so, the Claimant compared the treatment accorded by the same level of government (*i.e.*, Québec or Federal) to GNLQ and the comparator projects.⁶⁶¹

⁶⁵⁸ *Resolute v. Canada*, **RL-087-ENG**, p.158 (fn.1175); Rejoinder, p.122 (¶¶295-296).

⁶⁵⁹ *Resolute v. Canada*, **RL-087-ENG**, p.157 (¶546).

⁶⁶⁰ Reply, p.341 (s.4.2.2); C-Presentation, p.107-108, 116-117, 120, 122, 123, 125-127 (which include references to the comparable projects the Claimant has relied on for its claim for breach of Articles 1102/1103, as well as other evidence of discriminatory treatment relevant for the Claimant's claim under Article 1105).

⁶⁶¹ Reply, p.342 (¶¶1013-1028) (referring to the treatment accorded by each level of government in failing to initiate a single federal EA or a joint EA under the Canada-Québec Agreement), p.348 (¶¶1033-1060, 1112-1124) (referring to the treatment accorded by the Québec Government) and p.359 (¶¶1061-1100, 1112-1116, 1125-1135) (referring to the treatment accorded by the Federal Government).

555 At the Hearing, the Tribunal asked:

“[H]ow should the Tribunal apply [Article 1102, paragraph 3]? Does it mean that when what is discussed is treatment by Quebec, such as the Quebec environmental assessment process and decision, we must look only to comparative treatment by Quebec and not necessarily comparative treatment by the Federal Government or by other entities. And, conversely, if what we’re talking about is treatment by the Federal Government, does that mean that it doesn’t matter what State or Province the underlying comparator was present in or involved in? Or does it mean something different?”⁶⁶²

556 Article 1102(3) provides:

“The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than **the most favorable treatment accorded**, in like circumstances, by **that state or province** to investors, and to investments of investors, of the Party of which it forms a part.”

557 The effect of Article 1102(3) is that, when comparing Québec’s treatment of the GNLQ Project to its treatment of Canadian investors’ investments, the Tribunal is limited to comparing such treatment to the treatment accorded to other comparable projects by Québec – and not by other provinces or the Federal Government.⁶⁶³

558 However, when comparing the Federal Government’s treatment of the GNLQ Project to its treatment of Canadian investors’ investments, this limitation does not apply. The Tribunal may consider the most favourable treatment accorded, “in like circumstances”, by any arm of the Canadian State to projects of Canadian investors, located anywhere in Canada.

⁶⁶² Day-1-ENG, p.312(11-22).

⁶⁶³ *Merrill v. Canada*, **CL-320-ENG**, p.36 (¶82) (“Treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors, subject to meeting the requirement to be in “like circumstances”, just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.”)

559 When considering the federal EA of the GNLQ Project as the relevant
“treatment”, most projects “in like circumstances” would be those also
assessed by the Federal Government under federal legislation; however,
there can still be “like circumstances” where a provincial government
assessed a project, for example under the substitution mechanism whereby
the Federal Government delegated part of its federal EA to a province.⁶⁶⁴
In such a case, nothing in Article 1102(3) prevents comparing the conduct
of the Federal Government with that of the provincial government.

4.2 The Respondent breached Articles 1102/1103 by treating the GNLQ Project less favourably than it treated comparable projects

560 The Tribunal asked the Parties to address further the facts underlying the
claims under Articles 1102/1103, “including with respect to the date on
which the alleged breaches occurred”.⁶⁶⁵

561 The Claimant's position is as follows: the Claimant was accorded less
favourable treatment by both the Québec and Federal Governments as a
direct consequence of their decision to pursue two parallel and
uncoordinated EAs (**Section 4.2.1**) and of the actions taken by each
authority during the course of those processes (**Sections 4.2.2 and 4.2.3**).

562 As for the dates of the breaches, on the ordinary meaning of Articles 1102
and 1103, the breach occurred when the GNLQ Project was accorded the
“treatment” that was less favourable than that of the relevant comparator
project. The dates of each alleged breach are explained below, including
the claim that the Respondent committed a composite act in breach of
Articles 1102 and 1103, addressed in **Section 4.2.4**.

4.2.1 The federal and Québec authorities treated the GNLQ Project less favourably by carrying out two separate EAs

563 The GNLQ Project should have been subject to a single federal EA. In
nevertheless initiating separate EAs at the federal and Québec levels, the

⁶⁶⁴ **CER-2 (Second)**, p.30 (¶70); Reply, p.359 (fn.1553).

⁶⁶⁵ Tribunal's Questions, p.2 (C.1).

two governments were required to apply the Canada-Québec Agreement. By failing to do so, the Respondent accorded less favourable treatment to the GNLQ Project than it accorded to its own investors, in breach of Article 1102 NAFTA.

564 **First**, the Federal Government assessed exclusively at least two comparable projects involving maritime infrastructure in Québec:⁶⁶⁶

- the North Shore Terminal project, with an EA from August 2015 to October 2018;⁶⁶⁷ and
- the Contrecœur project, with an EA from March 2016 to March 2021.⁶⁶⁸

565 These projects were in like circumstances as compared to the GNLQ Project, and the single, federal EA that was pursued in each case constituted more favourable treatment than the two parallel and uncoordinated EAs to which the GNLQ Project was subjected.⁶⁶⁹

566 The Respondent has argued that the North Shore Terminal and Contrecœur projects were port terminals, while the GNLQ Project was primarily an LNG liquefaction facility.⁶⁷⁰ As Me Duchaine explained, this is a mischaracterisation of the GNLQ Project.⁶⁷¹ Mr Northey furthermore highlighted the similarities between the GNLQ Project and the North Shore Terminal project in terms of the relationship between port and industrial facilities:

“[**Mr Hébert.**-] [...] there would be no major industrial infrastructure project associated with [the North Shore Terminal project, as opposed to the GNLQ Project]; is that right?

⁶⁶⁶ Day-1-ENG, p.86(1-16); C-Presentation, p.107. The Québec Government participated in these EAs in a consultative role: **C-0215-ENG**, p.ii; **RN-0077-ENG**, p.ii; Day-1-ENG, p.86(17)-87(3).

⁶⁶⁷ **RN-0046-ENG**, **C-0363-ENG**.

⁶⁶⁸ **RN-0047-ENG**, **C-0373-ENG**.

⁶⁶⁹ Reply, p.344 (¶¶1019-1023); Day-1-ENG, p.87(4-9); C-Presentation, p.107.

⁶⁷⁰ Rejoinder, p.131 (¶¶319-328); Day-1-FRA, p.78(7-11).

⁶⁷¹ *Supra*, Section 3.2.1.1; Day-6-FRA, p.44(10-20).

[**Mr Northey.**-] Well, I think the word ‘associated’ is a bit broad, Counsel. I think you can see here that the reason for this whole [North Shore Terminal] project in the first place appears to be that a mining company mentioned in the fifth line [of C-0215, p. 1] wants to use the port and becomes the first client for it. So the mining company seems, to me, to be associated with this Port Terminal.”⁶⁷²

567 The North Shore Terminal and Contrecoeur projects are appropriate comparators. The Respondent treated the GNLQ Project less favourably than it treated those projects, in breach of Article 1102 NAFTA (i) on **10 December 2015**, when the Québec Government wrongly issued the Directive,⁶⁷³ and (ii) on **15 January 2016**, when the Federal Government failed to assert its exclusive jurisdiction.⁶⁷⁴

568 **Second**, the Québec and federal authorities should have conducted a joint EA pursuant to the Canada-Québec Agreement,⁶⁷⁵ as they did with two LNG import terminals on the St. Lawrence River:⁶⁷⁶

- the Cacouna LNG project, with an EA from October 2004 to July 2007;⁶⁷⁷ and
- the Rabaska LNG project, with an EA from May 2004 to March 2008.⁶⁷⁸

569 The Respondent has sought to justify the difference in treatment of these projects as compared to the GNLQ Project, on the grounds that the Canada-Québec Agreement purportedly stopped applying in 2012 (once CEAA 2012 came into effect).⁶⁷⁹ That is not correct. The Canada-Québec

⁶⁷² Day-7-ENG, p.1919(4-14).

⁶⁷³ **C-0198-FRA; GB-0017-FRA** (confirming that the Directive was issued on 10 December 2015).

⁶⁷⁴ **RN-0026-ENG; GB-0018-FRA.**

⁶⁷⁵ *Supra*, Section 3.2.2.

⁶⁷⁶ Reply, p.345 (¶¶1024-1028); Day-1-ENG, p.87(10)-88(8); C-Presentation, p.108.

⁶⁷⁷ **CD-0173-FRA, CD-0134-FRA; CD-0031-FRA, CD-0150-FRA.**

⁶⁷⁸ **CD-0174-FRA, CD-0135-FRA; CD-0017-FRA, CD-0151-FRA.**

⁶⁷⁹ Rejoinder, p.136 (¶¶331-334); Day-1-FRA, p.78(12-33).

Agreement remained in effect and was applied in the context of other EAs in 2015/2016.⁶⁸⁰

- 570 The absence of a single federal EA or a joint EA had a material impact on the regulatory process, paving the way for arbitrary measures by each level of government and to jurisdictional encroachments. But for Canada's wrongful failure regarding the EA process, the decisions taken by the Federal and Québec Governments on the GNLQ Project would have been different.
- 571 The Respondent thus treated the GNLQ Project less favourably than it treated these and other projects that were jointly assessed by the Québec and Federal Governments. The "treatment" the GNLQ Project suffered was a failure to collaborate in a joint EA. The Respondent therefore breached Article 1102 NAFTA on **10 December 2015**, when the Québec Government wrongly initiated its own separate EA, without applying the Canada-Québec Agreement.⁶⁸¹

4.2.2 Québec authorities treated the GNLQ Project less favourably in relation to GHG emissions and the impact on beluga whales

- 572 The Québec Government accorded the GNLQ Project treatment less favourable than that accorded to the Blackrock Metals, Arianne Phosphate, Stolt LNGaz, Cacouna LNG and Rabaska LNG projects, which were in like circumstances for the purposes of Articles 1102/1103 NAFTA.⁶⁸²
- 573 The Québec Government accorded the **BlackRock Metals** project (approved in April 2019)⁶⁸³ more favourable treatment than the GNLQ Project.⁶⁸⁴
- In contrast to the GNLQ Project, in its assessment of the BlackRock Metals project, the MELCC did not consider any of its potential GHG

⁶⁸⁰ *Supra*, Section 3.2.2.1; Day-1-ENG, p.88(6)-89(13); C-Presentation, p.109.

⁶⁸¹ **C-0198-FRA**; *supra*, Section 3.2.2.2.

⁶⁸² Reply, p.348 (¶¶1033-1060, 1101-1124).

⁶⁸³ **C-0356-FRA**.

⁶⁸⁴ Reply, p.348 (¶¶1033-1044, 1117-1124); Day-1-ENG, p.93(4)-94(2); C-Presentation, p.116-117.

emissions arising from downstream transportation and use of the pig iron and ferrovanadium to be generated by the project, which could have been significant given both materials are primarily used in steel manufacturing.⁶⁸⁵ Nor did it seek to quantify the net impact of its processing facility on global GHG emissions.⁶⁸⁶ Unlike for the GNLQ Project, the MELCC accepted the mitigation measures proposed for the BlackRock Metals project, which contained far fewer commitments than those proposed by GNLQ.⁶⁸⁷ While the Respondent has tried to differentiate this project from the GNLQ Project,⁶⁸⁸ at the Hearing Ms Gagnon confirmed that the two projects, which had comparable GHG emissions,⁶⁸⁹ were assessed under the same GHG reduction target.⁶⁹⁰

- The MELCC concluded that the BlackRock Metals project was environmentally acceptable despite the marine traffic that it would add on the Saguenay River.⁶⁹¹ The Respondent has tried to differentiate that project on the grounds that (i) it would add fewer ships than the GNLQ Project, and (ii) it was approved earlier.⁶⁹² However, Québec has since continued to invest in port infrastructure on the Saguenay River,

⁶⁸⁵ Reply, p.348 (¶¶1035, 1042-1044).

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.*; **C-0218-FRA**, p.13-14, **C-0269-FRA**, p.39-40. On the fact that BlackRock Metals only made minimal commitments to reduce GHG emissions: Day-5-FRA, p.45(48)-46(8) (referring to **C-0218-FRA**, p.14: “**Me Barrier.- C’est des engagements qui étaient relativement minimum, non ? [...] Vous êtes d’accord que c’est la conclusion de l’équipe d’analyse** [that the project is acceptable with such commitments] ? **Mme Gagnon.- C’est effectivement la conclusion qui est dans le rapport.**”)

⁶⁸⁸ Rejoinder, p.137 (¶¶335-339).

⁶⁸⁹ The MELCC calculated GNLQ’s emissions at 453,130 tonnes per year, without considering mitigation measures (**C-0269-FRA**, p.12) and BlackRock Metals’ emissions at 395,000 tonnes per year (**C-0218-FRA**, p.13; Day-5-FRA, p.44(33-37)).

⁶⁹⁰ Day-5-FRA, p.44(27-31) (“**Me Barrier.- [...] Mais c’étaient les mêmes cibles et les mêmes objectifs de réduction de gaz à effet de serre qui s’appliquaient au Projet Blackrock et au Projet Énergie Saguenay ? Mme Gagnon.- [...] C’étaient les mêmes cibles que le Québec avait au moment de la décision, oui.**”).

⁶⁹¹ Reply, p.379 (¶¶1117-1118, 1122-1124).

⁶⁹² Rejoinder, p.164 (¶¶402-405).

confirming that no “zero-noise” policy is in place.⁶⁹³ The same points apply in relation to the EA and decision on the **Arianne Phosphate** project.⁶⁹⁴

574 The Québec Government accorded the **Stolt LNGaz** project (approved in August 2015)⁶⁹⁵ more favourable treatment than the GNLQ Project:⁶⁹⁶

- The MELCC’s review of the issue of GHG emissions for the Stolt LNGaz was far less stringent than for the GNLQ Project.⁶⁹⁷ Its analysis comprised less than one page of its assessment report.⁶⁹⁸ It took at face value, without scrutiny, the proponent’s statement that its LNG could reduce GHG emissions by 600,000 tonnes per year by substituting more polluting fuels.⁶⁹⁹ The Respondent argues that it was entitled to treat the Stolt LNGaz differently in this respect because it was only intended to supply local markets, whereas the GNLQ Project would primarily export LNG.⁷⁰⁰ However, that is both irrelevant and, in any case, incorrect: both projects would have served the local and international markets.⁷⁰¹ The Québec Government also treated the

⁶⁹³ Weeks after the rejection of the GNLQ Project, the Québec and Federal Governments committed to investing CAD 250 million in port infrastructure: Reply, p.20 (¶¶69, fn. 43); Day-1-ENG, p.25(16)-29(18); p.94(10)-95(10).

⁶⁹⁴ Reply, p.379 (¶¶1117-1121); Day-1-ENG, p.94(10)-95(10).

⁶⁹⁵ **C-0354-FRA**.

⁶⁹⁶ Reply, p.352 (¶¶1045-1056, 1112-1116). Contrary to the Respondent’s assertion (Rejoinder, p.140 (¶¶341); Day-1-FRA, p.77(29-32)), the Claimant has proven the nationality of the investor in the Stolt LNGaz project, namely that the proponent investment vehicle was Canadian and that the joint venture partners were third-State investors; therefore both Articles 1102 and 1103 apply (Reply, p.353 (¶¶1046)).

⁶⁹⁷ Reply, p.353 (¶¶1047-1056).

⁶⁹⁸ **C-0355-FRA**, p.20 (s.3.4.3).

⁶⁹⁹ *Ibid.*

⁷⁰⁰ Rejoinder, p.141 (¶¶342).

⁷⁰¹ Reply, p.354 (¶¶1049-1052) and evidence cited therein; Day-2-ENG, p.416(9-11) (“[**Mr Illich**.] the Stolt Project was -- had the ability to [...] export LNG as well as provide the local market.”); Day-3-FRA, p.34(17-21) (“**M. Le Verger**.- [...] [E]n janvier 2020, on n’avait pas commencé de discussions particulières [regarding sales of LNG to local market]. Mais un peu plus tard, dans le développement du projet, on avait commencé des discussions avec certains joueurs de la côte Nord qui pouvaient être intéressés par le gaz naturel liquéfié qu’on aurait produit.”).

Cacouna LNG and **Rabaska LNG** projects similarly favourably in relation to GHG emissions, compared with the GNLQ Project.⁷⁰²

- The MELCC concluded that the Stolt LNGaz project was environmentally acceptable despite the maritime traffic that it would generate on the St. Lawrence River, which is part of the critical habitat of beluga whales.⁷⁰³ The same point applies in relation to joint EAs and decisions on the **Cacouna LNG** and **Rabaska LNG** projects.⁷⁰⁴

575 In conclusion, the Québec Government treated the GNLQ Project less favourably than Canada's own investors and other third-State investors in breach of Articles 1102/1103 NAFTA. The "treatment", and therefore the breach, materialised once the Québec Government issued the Decree, based in part on the assessment in the MELCC Report, on **21 July 2021**.

4.2.3 Federal authorities treated the GNLQ Project less favourably in relation to GHG emissions and the impact on beluga whales

576 The Federal Government accorded the GNLQ Project treatment less favourable than the treatment it accorded the North Shore Terminal, Bay du Nord, LNG Canada, Pacific NorthWest LNG, Cedar LNG, Cacouna LNG, Rabaska LNG and Contrecœur projects, which were in like circumstances for the purposes of Articles 1102/1103 NAFTA.⁷⁰⁵

577 The **North Shore Terminal** project (approved in October 2018)⁷⁰⁶ was a multi-user marine terminal located opposite the GNLQ Project site on the

⁷⁰² Reply, p.358 (¶¶1057-1060).

⁷⁰³ Reply, p.377 (¶¶1112-1116).

⁷⁰⁴ *Ibid.*

⁷⁰⁵ Reply, p.359 (¶¶1061-1100, 1112-1116, 1125-1135).

⁷⁰⁶ **C-0363-ENG**.

Saguenay River.⁷⁰⁷ It received more favourable treatment than the GNLQ Project.⁷⁰⁸

- Despite having substantial projected GHG emissions, the Agency found the emissions of the North Shore Terminal project to be “low” and made no finding of significant adverse environmental effects. Furthermore, the Agency did not assess the net effect of the project on global GHG emissions.⁷⁰⁹
- The Agency concluded that the impact of the North Shore Terminal project on beluga whales would be acceptable, even when combined with the effects of the GNLQ Project (for which it reached the opposite conclusion).⁷¹⁰ As Ms Bélanger confirmed at the Hearing, the ships going to the North Shore Terminal would go through the exact same area as ships going to the GNLQ Project.⁷¹¹ The Respondent argues that the North Shore Terminal would have generated less marine traffic than the GNLQ Project.⁷¹² However, at the Hearing, Ms Bélanger confirmed that the evaluation of the North Shore Terminal project accounted for 160 passages per year for the GNLQ Project⁷¹³ and 140 passages connected to the North Shore Terminal, projecting a total of 635 passages per year by 2030 (including passages relating to other projects).⁷¹⁴ It concluded that the North Shore Terminal project would

⁷⁰⁷ **C-0215-ENG**, p.1; Day-4-ENG, p.1039(7-21)/Day-4-FRA, p.62(39)-63(7) (“[**Ms de Germiny.**] The North Shore Project was the Saguenay port authority’s project to build and operate a marine terminal on the Saguenay River; right? **Mme Bélanger.**- *Exact.* [**Ms de Germiny.**] And it was going to be a multi-user terminal to serve the region; right? **Mme Bélanger.**- *Oui.* [**Ms de Germiny.**] [...] The North Shore Project is just opposite where the GNLQ Project would have been; right? **Mme Bélanger.**- *Exact.*”).

⁷⁰⁸ Reply, p.364 (¶¶1074-1078, 1125-1130); Day-1-ENG, p.98(6)-100(12); C-Presentation, p.125-127.

⁷⁰⁹ Reply, p.364 (¶1075).

⁷¹⁰ Reply, p.381 (¶¶1125-1130); Day-1-ENG, p.99(15)-100(12); C-Presentation, p.126-127.

⁷¹¹ Day-4-ENG, p.1039(22)-1040(3)/Day-4-FRA, p.63(8-11).

⁷¹² Rejoinder, p.167 (¶¶406-409); Day-1-FRA, p.82(29-34); R-Presentation, p.154-155.

⁷¹³ GNLQ indeed envisaged 140-165 passages per year; **C-0376-FRA**, p.12.

⁷¹⁴ Day-4-ENG, p.1040(15)-1043(15)/Day-4-FRA, p.63(20)-64(22).

not have significant adverse environmental effects,⁷¹⁵ but reached the opposite conclusion for the GNLQ Project.⁷¹⁶

- The Agency accepted mitigation measures proposed for the North Shore Terminal project comprised only of a reduction of the number of vessel passages based on third-party commitments, but rejected the GNLQ Project despite its many commitments aimed at reducing the noise of the vessels that it would charter.⁷¹⁷

578 The Federal Government accorded more favourable treatment to the **LNG Canada** project (approved in June 2015),⁷¹⁸ and to the **Pacific NorthWest LNG** project (approved in September 2016),⁷¹⁹ since it approved them both despite each having projected annual GHG emissions several times greater than those projected for the GNLQ Project.⁷²⁰ In both cases, the relevant agency conducting the review⁷²¹ concluded that the GHG emissions would give rise to significant adverse environmental effects – like the Agency's conclusions in respect of the GNLQ Project – but the Federal Government nevertheless approved them, finding that the significant adverse environmental effects were justified in the circumstances.⁷²²

⁷¹⁵ **C-0215-ENG**, p.196, 212-214.

⁷¹⁶ **C-0037-ENG**, p.65.

⁷¹⁷ Day-1-ENG, p.98(6)-99(14); C-Presentation, p.125.

⁷¹⁸ **C-0357-ENG**; Reply, p.359 (¶¶1061-1067). The Respondent argues that the Claimant has not proven the nationality of the investor in the LNG Canada project for the application of Articles 1102 or 1103 NAFTA (Rejoinder, p.145 (¶352); Day-1-FRA, p.77(29-32)). On the contrary, the Claimant has established that the proponent investment vehicle is Canadian and that it is owned by third-State investors; therefore both Articles 1102 and 1103 apply (Reply, p.360 (¶1064)).

⁷¹⁹ **RN-0109-ENG**; Reply, p.362 (¶¶1068-1073).

⁷²⁰ Reply, p.359 (¶¶1061-1062, 1068-1071); Day-1-ENG, p.95(18)-96(12); C-Presentation, p.122 (and references therein).

⁷²¹ The BC EAO conducted the review of the LNG Canada project under the federal substitution mechanism under CEAA 2012 (Reply, p.361 (¶¶1066-1067); **C-0358-ENG**). The Agency conducted the review of the Pacific NorthWest LNG project (**C-0361-ENG**).

⁷²² Reply, p.359 (¶¶1062, 1070).

- 579 The Federal Government accorded more favourable treatment to the **Bay du Nord** project (approved in April 2022)⁷²³ and the **Cedar LNG** project (approved in March 2023⁷²⁴).⁷²⁵
- Despite both projects having comparable projected GHG emissions to those of the GNLQ project,⁷²⁶ the Agency determined that neither would give rise to significant adverse environmental effects due to GHG emissions and the Federal Government approved both projects.⁷²⁷
 - In respect of the Bay du Nord project, in contrast to its approach to the GNLQ Project, the Agency did not assess its contribution to global GHG emissions nor consider downstream emissions arising from the use of oil produced by the project, nor did it even assess GHG emissions at all as a standalone “valued component”, instead considering them only as part of its analysis on “Air Quality”.⁷²⁸
- 580 The Federal Government accorded more favourable treatment to the **Contrecoeur** project, as well as the **Cacouna LNG** and **Rabaska LNG** projects, in that it approved them despite their impact on the critical habitat of beluga whales.⁷²⁹
- 581 In conclusion, the Federal Government treated the GNLQ Project less favourably than the investments of Canada’s own investors and of third-State investors in breach of Articles 1102/1103 NAFTA. This “treatment”, and therefore the breach, materialised once the Agency issued its Report, the Minister referred the decision to the Governor in Council, and the Governor in Council announced its decision to reject the GNLQ Project in its Decision Statement on **7 February 2022**.

⁷²³ **RN-0130-ENG.**

⁷²⁴ **C-0366-ENG.**

⁷²⁵ Reply, p.365 (¶¶1079-1100).

⁷²⁶ Reply, p.367 (¶¶1085-1087, 1098).

⁷²⁷ Reply, p.365 (¶¶1079-1080, 1088-1090).

⁷²⁸ Reply, p.366 (¶1080).

⁷²⁹ Reply, p.377 (¶¶1112-1116, 1131-1135).

582 In respect of the Bay du Nord and Cedar LNG projects, although they were approved after the GNLQ Project was rejected, the breach is still dated 7 February 2022, as the relevant date is the date that the Claimant and Symbio's investment was accorded the "less favourable treatment".

4.2.4 The EA processes as a whole to which the GNLQ Project was subjected also constituted a wrongful composite act in breach of Articles 1102 and 1103 NAFTA

583 In addition to the standalone breaches committed by the Respondent in December 2015, January 2016, July 2021 and February 2022, described *supra*, Sections 4.2.1 to 4.2.3, the Respondent's acts and omissions also amounted to a composite act in breach of Articles 1102 and 1103 NAFTA.⁷³⁰

584 The standalone breaches are based on individual actions and omissions forming part of the EA processes that constituted "less favourable treatment" under Articles 1102 and 1103. However, taken in aggregate, the actions and omissions of the Québec and federal authorities during the course of the EA processes, in aggregate, also constitute "treatment" of the GNLQ Project that was "less favourable" than the treatment Canada accords to the investments of its own investors and third-State investors in like circumstances (for the reasons set out *supra*, Sections 4.2.1 to 4.2.3).

585 In accordance with Article 15 of the ILC Articles, the date of the breach of Articles 1102 and 1103 by composite act is that of the first act or omission forming part of the composite wrongful act: in this case, Québec's decision to initiate its own EA process by issuing the Directive on **10 December 2015**.⁷³¹

⁷³⁰ Reply, p.341 (¶1009); Rejoinder on Jurisdiction, p.15 (¶¶30, 65).

⁷³¹ *Supra*, Section 3.2; Reply, p.196 (¶574).

5 THE RESPONDENT BREACHED ARTICLE 1110 NAFTA

586 The Claimant relies on its prior submissions in the Memorial and the Reply concerning the Respondent's breach of Article 1110.⁷³² The Claimant addresses below the Tribunal's **three questions** regarding this claim.⁷³³

5.1 A claim for expropriation without compensation under NAFTA Article 1110(1) must, but need only, concern an "investment" within the meaning of that term under Article 1139

587 Subject to the cumulative conditions for a lawful expropriation under Articles 1110(1)(a) to (d), Article 1110(1) NAFTA proscribes the expropriation (direct or indirect) of "an investment of an investor". It also proscribes measures tantamount to expropriation "of such an investment". There is no indication in Article 1110 NAFTA (or indeed elsewhere in the treaty) that the word "investment" should not bear the same meaning as defined in Article 1139 NAFTA.⁷³⁴

588 Accordingly, identifying an "investment" – or indeed "investments" – under Article 1139 that has or have been expropriated or subject to measures tantamount to expropriation, is a necessary condition to establish a breach of Article 1110 NAFTA.

589 This is also a **sufficient condition** to establish a breach of Article 1110 NAFTA, if the cumulative conditions for lawful expropriation are not met.⁷³⁵ Contrary to the Respondent's arguments,⁷³⁶ there is no additional requirement under Article 1110 NAFTA to establish whether the "investments" fall into a subcategory of "rights capable of being expropriated".⁷³⁷

⁷³² Memorial, p.230 (s.IV.C); Reply, p.387 (s.4.3).

⁷³³ Tribunal's Questions, p.2 (C.3).

⁷³⁴ Reply, p.389 (¶1144).

⁷³⁵ It does not appear to be in dispute that the cumulative conditions for lawful expropriation are not met in the present case: Reply, p.404 (s.4.3.4); Rejoinder, p.260 (¶644).

⁷³⁶ Counter-Memorial, p.240 (¶599); Rejoinder, p.260 (¶¶645-661).

⁷³⁷ Reply, p.389 (s.4.3.1).

5.2 An opportunity to develop a project is not a listed “investment” under Article 1139, but the loss of such an opportunity can amount to an expropriation of investments

- 590 The “opportunity to develop a project” is not listed as one of the forms of protected “investment” under Article 1139. However, it does not follow, as the Respondent appears to assume,⁷³⁸ that State measures having the effect of denying such an opportunity cannot amount to a breach of Article 1110 NAFTA.
- 591 The Respondent’s position relies on a conflation of two concepts: (i) the characterisation of assets, rights or interests as “investments” and (ii) the source of their economic value as a business opportunity.⁷³⁹ The characterisation of an individual asset or right as an “investment” (or not as the case may be) is a legal question, applying the terms of Article 1139 NAFTA. Whether those assets, rights and interests as a whole amount to a valuable business opportunity is a factual question, with such value typically (but not necessarily) calculated by estimating the net present value of the anticipated future cashflows the assets, rights and interests will generate.
- 592 Those two concepts are not mutually exclusive. The “investments” that are the subject of an expropriation claim can, when considered as a whole, **also** amount to a valuable business opportunity. On the facts of a given case, the denial of that business opportunity can amount to an expropriation, or measures tantamount to expropriation, of the “investments” in question.⁷⁴⁰ Indeed, the question of whether there has been an expropriation or measures tantamount to expropriation is a fact-based enquiry to be assessed on a case-by-case basis and considering the investment as a whole.⁷⁴¹
- 593 Measures having a severe economic impact on the value of investments can (but do not always) amount to an expropriation or measures

⁷³⁸ Counter-Memorial, p.241 (¶¶605-608); Rejoinder, p.268 (¶663).

⁷³⁹ Reply, p.394 (¶¶1158-1159).

⁷⁴⁰ Memorial, p.233 (¶758); Reply, p.396 (¶¶1164-1165).

⁷⁴¹ Reply, p.392 (¶¶1152, 1164).

tantamount to expropriation under Article 1110 NAFTA.⁷⁴² Previous NAFTA tribunals have considered the severity of the economic impact of the measures to be the decisive criterion.⁷⁴³

594 As explained in Section 5.3 below, in this case, the Claimant's "investment" considered as a whole was the Symbio Project: a valuable business opportunity comprised of assets falling under the definition in Article 1139 NAFTA. The **economic value** of that investment lay in its opportunity to develop an operational, profitable natural gas transmission, liquefaction and export business. By unlawfully denying that opportunity, the Respondent took away all the value in the Claimant's investments and *de facto* expropriated them or subjected them to measures tantamount to expropriation.⁷⁴⁴

5.3 The Claimant has identified an investment defined under Article 1139 that was expropriated within the meaning of Article 1110(1)

595 In its Memorial, Reply and Rejoinder, the Claimant identified the following assets and interests, all of which are "investments" as defined under Article 1139 NAFTA and within the meaning of Article 1110(1) NAFTA:⁷⁴⁵

- Symbio, Symbio GP, GNL Québec Inc. and Gazoduq Inc., each of which are "enterprises" organised under the laws of Canada and therefore investments under Article 1139(a) NAFTA;
- through those entities, interests in Symbio entitling the Claimant to the income or profits of those enterprises, constituting investments under Article 1139(e) NAFTA;

⁷⁴² Memorial, p.232 (¶755); Reply, p.396 (¶1165).

⁷⁴³ Memorial, p.232 (¶755); *ADM v. Mexico*, at **Exhibit CL-033-ENG**, p.74 (¶240) ("Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place.")

⁷⁴⁴ Reply, p.396 (s.4.3.2).

⁷⁴⁵ Memorial, p.127 (¶¶404-417); Reply, p.391 (¶1150); Rejoinder on Jurisdiction, p.122 (¶350).

- interests arising from the commitment of capital and other resources to the development of the Symbio Project in Canada, constituting investments under Article 1139(h), including the land option agreement for the GNLQ Project site and expenditures and the commitment of resources towards obtaining the required permits and regulatory approvals for the Symbio Project;
- the Claimant's investments in tangible and intangible property resulting from the above-mentioned capital expenditures, including the numerous studies and reports commissioned to progress and de-risk the GNLQ and Gazoduq Projects and for their regulatory approval processes, which were acquired in the expectation of and used for the economic development of the Projects or for other business purposes, and therefore constitute investments under Article 1139(g) NAFTA.

596 In its Rejoinder, the Respondent repeats its position that the Claimant seeks to “*éviter d’identifier précisément les droits qu’elle détenait qui auraient fait l’objet d’une expropriation.*”⁷⁴⁶ It is difficult to see how the Respondent can maintain that position.

597 The Respondent may argue that the Claimant's investment or investments were not expropriated or subjected to measures tantamount to expropriation. But, having not disputed that the Claimant held the foregoing list of assets, rights and interests, nor that they were protected “investments” under Article 1139 NAFTA, the Respondent cannot credibly maintain that the Claimant has failed to identify any “investments” that it alleges have been expropriated.

598 Furthermore, on the evidence, Canada did *de facto* expropriate **all** the Claimant's aforementioned “investments” – the entire “investment”, considered as a whole – or it subjected them to measures tantamount to expropriation.⁷⁴⁷

599 The Claimant does not allege that its assets, rights or interests were directly expropriated. It acknowledges, for example, that it retains formal legal control over the Canadian entities, and that it still owns the studies it

⁷⁴⁶ Rejoinder, p.260 (¶645).

⁷⁴⁷ Reply, p.396 (s.4.3.2).

conducted. The point, rather, is that by arbitrarily rejecting the GNLQ and Gazoduq Projects, Canada deprived the Claimant and Symbio of the opportunity to realise the value of those assets, rights and interests.⁷⁴⁸ Mr Bidwai indeed confirmed at the Hearing, to the extent it was not already clear, that Canada's refusals to grant environmental approvals for the Projects deprived them of all their value.⁷⁴⁹

600 Mr Le Verger also confirmed that he understood approvals by both the Québec Government and the Federal Government were required for the Project to proceed, but that GNLQ continued its federal process out of obligation to its investors, so that they could decide the future of their investment in the Project:

“Me Hébert.- Donc je comprends, Monsieur Le Verger, qu'en date du 26 août donc, vous poursuiviez l'analyse, mais l'évaluation environnementale fédérale, vous l'avez poursuivie jusqu'à son aboutissement. Pourquoi l'avez-vous poursuivie jusqu'à son aboutissement, au mois de février 2022 ?

M. Le Verger.- Pour exactement la même raison que ce que j'explique ici, par rapport à monsieur... à ma discussion avec M. Hubbard. Donc, pour pouvoir avoir toutes les informations disponibles pour que nos investisseurs puissent prendre une décision sur le futur à donner au projet.

Me Hébert.- Est-ce que c'était votre... votre compréhension, Monsieur Le Verger, que pour aller de l'avant, le projet Énergie Saguenay avait besoin des deux autorisations ?

*M. Le Verger.- C'était ma compréhension, oui.”*⁷⁵⁰

601 Mr Le Verger's evidence is consistent with the economic reality facing Symbio once the Québec Government had rejected the GNLQ Project and announced that the Gazoduq Project “dies” with it. Although it was prudent to persevere through the final few months of the federal process out of

⁷⁴⁸ Memorial, p.234 (¶¶762-770); Reply, p.397 (¶1166).

⁷⁴⁹ Day-3-ENG, p.737(21)-738(6).

⁷⁵⁰ Day-3-FRA, p.30(27-37).

hope that some value could be salvaged, in reality, the Symbio Project could not go ahead, and the Claimant's investments in it were all valueless, once Québec announced its decision on 21 July 2021.

- 602 According to the Respondent, the Claimant's position "*voudrait dire qu'un gouvernement ne pourrait jamais refuser d'approuver un projet pour des raisons environnementales*".⁷⁵¹ This is a straw man fallacy. The Claimant does not argue that the Respondent was obliged to approve the Symbio Project to avoid expropriating it.
- 603 There are, of course, circumstances in which a State can legitimately refuse to approve a project for environmental reasons without triggering an expropriation. However, that is not the case here.
- 604 Canada did not reject the GNLQ Project in a legitimate exercise of regulatory authority. Rather, as shown *supra*, Section 3, it exercised its regulatory authority to reject the GNLQ Project in disregard of applicable Canadian law and due process, arbitrarily and discriminatorily.⁷⁵² It also exercised its authority by disproportionate means, as explained previously.⁷⁵³ These elements, combined with the severity of the economic impact on the Claimant's investments, confirm that Canada's measures amounted to an indirect expropriation, or measures tantamount to expropriation.

⁷⁵¹ Rejoinder, p.272 (¶671).

⁷⁵² Memorial, p.243 (¶784); Reply, p.399 (¶¶1173-1175; s.4.3.3).

⁷⁵³ Reply, p.403 (¶1177(v)).

6 THE RESPONDENT'S BREACHES ENTITLE THE CLAIMANT TO THE DAMAGES IT CLAIMS

605 As set out in **Sections 6.1** and **6.2** below, the Respondent's treaty breaches entitle the Claimant to compensation in the amount of USD 588 million, equal to the lost fair market value of the Symbio Project. Furthermore, the Respondent's attempts to disprove the Claimant's sunk costs are without merit (**Section 6.3**).

6.1 The Respondent's breaches of the NAFTA caused the losses claimed: the entire value of the Symbio Project

606 The Respondent's NAFTA breaches caused the Claimant and Symbio to suffer the loss of the entire value of the Symbio Project. The unfair conduct of GNLQ's EA processes leading to the Decree of 21 July 2021, put an end to the GNLQ Project and, with it, the Gazoduq Project.⁷⁵⁴ In doing so, the Respondent deprived Symbio of the opportunity to have its EA conducted fairly and thus to develop the Symbio Project. The value of that opportunity is equal to the fair market value of the Project in July 2021.⁷⁵⁵

607 As maintained at the Hearing, the Symbio Project represented a valuable opportunity, the loss of which is compensable under international law (**Section 6.1.1**). The loss of this opportunity fulfils the requirement to prove that the Respondent's breaches caused the Claimant loss, without needing to prove that the Project would have in fact entered operation (**Section 6.1.2**). In any event, the Respondent exaggerates the risks affecting the Project: but for the Respondent's breaches, the Project would in all probability have successfully reached FID and been built (**Section 6.1.3**).

⁷⁵⁴ Reply, p.427 (s.5.1.2.4).

⁷⁵⁵ Reply, p.428 (s.5.1.3).

6.1.1 The Symbio Project represented a valuable opportunity, the loss of which should be compensated

608 As explained, Symbio is entitled to damages for the total loss of its investment as at 21 July 2021.⁷⁵⁶ This loss amounts to the loss of its opportunity to develop the Symbio Project.⁷⁵⁷

609 To clarify the confusion perpetuated by the Respondent in its Rejoinder and at the Hearing,⁷⁵⁸ the Claimant is not claiming the total value of the Project had it been fully permitted, funded and with offtake agreements in place.⁷⁵⁹ If that had been the case, the value of the Claimant would be significantly higher, over USD 4 billion.⁷⁶⁰ The Claimant's claim is instead only approximately 15% of that value:

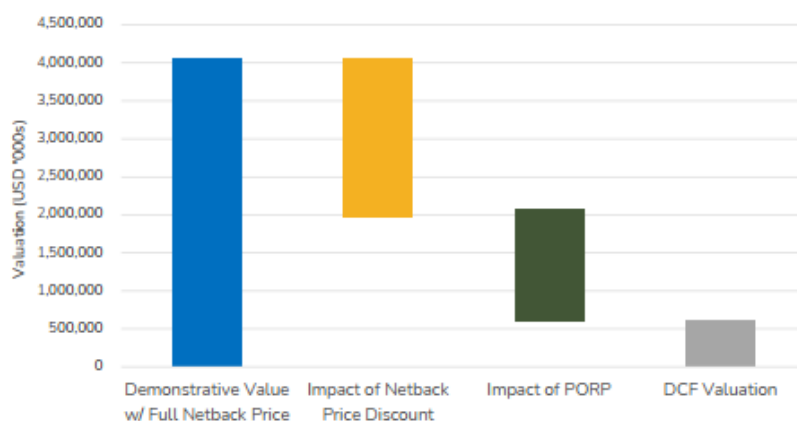


Figure 1: Impact of Netback Price Discount and PORP⁷⁶¹

610 The Respondent's allegation that the Claimant's investment had no value on 20 July 2021 would imply that, irrespective of Québec's decision, the Project was futile and had no prospects whatsoever.⁷⁶² This is directly

⁷⁵⁶ Reply, p.410 (s.5.1).

⁷⁵⁷ Reply, p.418 (¶¶1221-1232); Day-1-ENG, p.104(2-7).

⁷⁵⁸ Rejoinder, p.315 (¶¶780, 782); Day-1-ENG, p.274(18-19), 278(15-19).

⁷⁵⁹ Reply, p.418 (¶1221); Day-1-ENG, p.103(20)-104(1).

⁷⁶⁰ Reply, p.414 (¶1213); Day-1-ENG, p.102(15-17).

⁷⁶¹ CER-3 (Second), p.100 (table 13).

⁷⁶² Reply, p.26(84).

contradicted by the evidence including as presented at the Hearing, as explained below.⁷⁶³

- 611 It is common ground that a loss of opportunity is compensable under international law. Investment treaty tribunals have acknowledged that principle⁷⁶⁴ and the Respondent has not challenged it.⁷⁶⁵ However, the Respondent argues that the Claimant could not bring a claim for a loss of opportunity because it did not hold any “acquired rights” such as rights under a concession or a licence.⁷⁶⁶ The Respondent’s argument is misguided, as the Claimant held rights, by way of assets forming an investment under the NAFTA and the ICSID Convention.⁷⁶⁷
- 612 Furthermore, the Respondent is wrong to claim that an investor cannot have an opportunity without an “accrued” right. This premise rests on the assumption that an acquired right, like a concession, necessarily entails a guaranteed revenue stream. That assumption is incorrect. An acquired right does not guarantee revenues; nor does the absence of an acquired right preclude an opportunity to generate revenues.
- 613 Investment treaty decisions confirm as much. For instance, in *Sapphire*, the claimant owned an oil concession which had not been prospected and for which there was no guarantee that it contained viable oil reserves.⁷⁶⁸ Likewise, in *Gemplus*, the claimant was a start-up company which had been ordered to suspend its activities and had lost its key management. The tribunal noted for instance the “significant uncertainties associated with that income stream for the remaining 8.25 years of the Concession Agreement”.⁷⁶⁹ In both cases, the tribunals noted the lack of guaranteed revenue but nevertheless awarded compensation.
- 614 In parallel, investment treaty tribunals have accepted that an investor can claim for a loss of opportunity even where it does not hold an acquired

⁷⁶³ Reply, p.445 (¶¶1290-1346); *supra*, Section 6.2.

⁷⁶⁴ Reply, p.418 (¶¶1222-1230).

⁷⁶⁵ Rejoinder, p.322 (¶¶798-808).

⁷⁶⁶ Rejoinder, p.322 (¶¶798-807); Day-1-ENG, p.268(6)-269(2).

⁷⁶⁷ Rejoinder on Jurisdiction, p.116 (¶333), p.122 (¶350).

⁷⁶⁸ *Sapphire v. NIOC*, **CL-332-ENG**, p.21.

⁷⁶⁹ *Gemplus v. Mexico*, **CL-120-ENG**, p.329 (¶13-76).

right. For instance, in *Bilcon*, 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”.⁷⁷⁰ The Respondent accepts this.⁷⁷¹ Like Symbio, the claimant had a right to be treated fairly in accordance with the law.⁷⁷² The loss of that right constituted a loss of opportunity that is compensable.

615 The Respondent further argues that the Tribunal should not follow *Bilcon* and, instead draw guidance from the *Infinito Gold v. Costa Rica* and *Eco Oro v. Colombia* decisions which, it claims, declined to award damages for loss of opportunity in the absence of an environmental permit or exploitation concession.⁷⁷³ However, in neither of these cases did the tribunal dismiss a claim of loss of opportunity on the grounds that the investor did not have an “acquired right” – quite the opposite.

616 In *Eco Oro*, the claimant was deprived of the opportunity to obtain an environmental licence. While the tribunal recognised that “the only identifiable loss which does flow from the finding of a breach [...] is the inability of Eco Oro to apply for an environmental licence”,⁷⁷⁴ the claimant **refused** to claim damages for loss of opportunity and provided no evidence to value the lost opportunity.⁷⁷⁵ Accordingly, the tribunal concluded by majority:

“[...] to quantify the damages caused by Colombia’s breach, it was necessary for Eco Oro to provide some guidance to the Tribunal as to the value of Eco Oro’s lost opportunity in circumstances where the value of the Project was destroyed by a lawful measure carried out by Colombia. [...] **In the absence of any evidence or other basis on which the Tribunal can assess either the likelihood of an environmental licence being granted, or the value of the opportunity to apply for a licence which may or may not be**

⁷⁷⁰ *Bilcon v. Canada*, **CL-140-ENG**, p.46 (¶176).

⁷⁷¹ Day-1-ENG, p.269(14-18).

⁷⁷² Reply, p.421 (¶1228); Day-1-ENG, p.172(10-12).

⁷⁷³ Rejoinder, p.328 (¶¶814-819); Day-1-ENG, p.269(3-10).

⁷⁷⁴ *Eco Oro v. Colombia*, **RL-298-ENG**, p.130 (¶303).

⁷⁷⁵ *Ibid.*, p.131 (¶303).

granted, the majority of the Tribunal concludes that the only proper approach is to award no damages to Eco Oro.”⁷⁷⁶

617 Moreover, the Respondent ignores the tribunal's finding that the destruction of the value of the concession was caused by measures that fell within the **lawful exercise** of Colombia's police powers,⁷⁷⁷ and therefore did not deprive the claimant of its investment. Unlike the present case, Eco Oro's investment was worthless even in the but-for scenario.⁷⁷⁸

618 The distinctions extend further. In valuing its investment, Eco Oro relied on prior transactions. However, unlike the Claimant in the present case, Eco Oro did not rely on transactions involving the same project but instead referred only to other projects not subject to the same permitting risk.⁷⁷⁹

619 Similarly, in *Infinito Gold v. Costa Rica*, the claimant lost the opportunity to apply for a new exploitation concession. The claimant did not bring a claim for loss of opportunity, nor did it provide a methodology for its quantification.⁷⁸⁰ Nevertheless, the tribunal acknowledged that:

“Assuming *arguendo* that the 2010 Executive Moratoria did not already prevent Industrias Infinito from restarting the process, **the Claimant's harm would essentially consist in the loss of an opportunity or chance to apply for an exploitation concession.** Yet, the Claimant has not put forward a quantification for such a loss of opportunity, nor has it provided the Tribunal with any elements to calculate it.”⁷⁸¹

620 In both cases, the absence of an “acquired right” was not an obstacle to a claim for loss of opportunity.

⁷⁷⁶ *Ibid.*, p.137 (¶316).

⁷⁷⁷ *Ibid.*, p.138 (¶317).

⁷⁷⁸ *Ibid.*, p.131 (¶303).

⁷⁷⁹ *Eco Oro v. Colombia*, **CL-039-ENG**, p.361 (¶856); as the respondent noted in *Eco Oro v. Colombia*, **RL-298-ENG**, p.23 (¶65), p.29 (¶84).

⁷⁸⁰ *Infinito Gold v. Costa Rica*, **RL-299-ENG**, p.182 (¶585).

⁷⁸¹ *Ibid.*

6.1.2 The Respondent misstates the standard of proof for causation

- 621 While the Claimant bears the burden of proving that it has suffered a loss (*i.e.*, the loss of the opportunity to develop the Symbio Project), once the **fact** of this loss is established, it is not necessary to prove the precise **amount** of loss (*i.e.*, the value of this opportunity) with certainty. Rather, the Claimant “only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss”, similarly to anyone valuing a business by estimating its likely future earnings.⁷⁸²
- 622 These principles should be uncontroversial. Yet, at the Hearing, the Respondent misrepresented the applicable standard on causation.
- 623 **First**, having argued in its submissions that the Claimant must prove its loss with “reasonable certainty”,⁷⁸³ the Respondent elevated that standard in its opening to a “high degree of certainty”.⁷⁸⁴ This is a misreading of the requirement to prove that a breach caused a loss “in all probability”, which simply signifies the balance of probabilities.⁷⁸⁵ *Eco Oro*, on which the Respondent relies, confirms as much.⁷⁸⁶
- 624 **Second**, the Respondent went further, arguing that the Claimant must therefore prove “with a high degree of certainty” that “not only would it have obtained its regulatory approvals, but also its financing [and] it would have actually built and operated the two projects successfully.”⁷⁸⁷ This, the Respondent asserted, followed from *Bilcon*:

“[T]he [*Bilcon*] Tribunal concluded that the causal link between the NAFTA breach and the injury alleged by the investors had not been established. It agreed that there was a realistic possibility that the

⁷⁸² Reply, p.416 (¶¶1216-1218); *Lemire v. Ukraine (II)*, **CL-121-ENG**, p.70 (¶¶246-248).

⁷⁸³ Counter-Memorial, p.265 (¶667).

⁷⁸⁴ Day-1-ENG, p.274(18-19).

⁷⁸⁵ *Vivendi v. Argentina*, **CL-063-ENG**, p.250 (¶8.3.10); S. Ripinsky and K. Williams, *Damages in International Investment Law*, **CL-331-ENG**, p.12 of PDF.

⁷⁸⁶ *Eco Oro v. Colombia*, **RL-298-ENG**, p.126 (¶292) (“The Parties [...] agree that the burden is on Eco Oro, as Claimant, to establish its loss on the balance of probabilities.”).

⁷⁸⁷ Day-1-ENG, p.278(15-19).

project would have been approved, but it cannot be said that it would have been approved 'in all probability' [...]

[The Claimant] asks you not to follow *Bilcon's* application of the high degree of certainty standard to prove damages [...]."⁷⁸⁸

625 However, the Respondent misstates the *Bilcon* tribunal's key holding. While that tribunal indeed rejected a **lost profits** claim on the basis that it was not proven that the quarry would have become operational "in all probability", it concluded that it sufficed to award damages for **lost opportunity** that there was a "realistic possibility" that the quarry would have been approved.⁷⁸⁹

626 Here, similarly, the Claimant is not claiming lost profits; it is claiming the lost opportunity of developing the Project – which, as the *Bilcon* tribunal held, which was "broadly equivalent to the value of the opportunity to develop the [investment] subject to the EA."⁷⁹⁰ The Respondent is thus wrong to assert that the Claimant's valuation "assumes the Projects would have received their environmental approvals absent[t] the breach of NAFTA".⁷⁹¹ Rather, as explained below, permitting risk is priced into the fair market value of the Symbio Project as at July 2021.⁷⁹²

627 Indeed, *Bilcon* supports the Claimant's damages methodology. Like the Claimant, the *Bilcon* tribunal relied on precedent transactions that priced in the potential refusal of environmental approval when valuing *Bilcon's* lost opportunity.⁷⁹³ Moreover, the tribunal held that prospects of future earnings are relevant also in a claim for lost opportunity, as "[s]uch prospects inform the value of the opportunity that a claimant has lost".⁷⁹⁴ As explained below in Section 6.2, precedent transactions and the discounted value of future earnings confirm the Project's fair market value.

⁷⁸⁸ Day-1-ENG, p.271(9-15), 274(17-19).

⁷⁸⁹ *Bilcon v. Canada*, **CL-140-ENG**, p.43 (¶168), p.46 (¶175-176).

⁷⁹⁰ *Ibid.*, p.80 (¶281).

⁷⁹¹ Day-1-ENG, p.272(15-17).

⁷⁹² *Infra*, Section 6.1.3.1.

⁷⁹³ *Bilcon v. Canada*, **CL-140-ENG**, p.82 (¶289-290); Day-1-ENG, p.177(4-12).

⁷⁹⁴ *Ibid.*, p.82 (¶288).

6.1.3 In any case, the Respondent exaggerates the development risks affecting the Symbio Project

- 628 It follows from the above that the Claimant is not required to prove that it would have obtained all permits, financing and other conditions to bring the Project into operation.⁷⁹⁵ Such an approach would prevent compensation in any situation where a State's breaches destroyed the value of an investment before it became fully operational. Rather, as held in *Gemplus*, it suffices that there was a "reasonable opportunity" to develop the Project, which itself has monetary value that the Claimant lost.⁷⁹⁶
- 629 In any case, as explained below, the Respondent overstates the development risks facing the Project. The Hearing confirmed that, had GNLQ's EA been conducted fairly and in accordance with the NAFTA, the Claimant would in all likelihood have reached the necessary milestones to bring the Project into operation.⁷⁹⁷

6.1.3.1 GNLQ permitting

- 630 The Respondent argues, mistakenly, that the Claimant's damages claim takes as a given that both the GNLQ and Gazoduq Projects would have been approved, and fails to account for the risk that the Symbio Project would never have received its environmental approvals.⁷⁹⁸ It also overstates the permitting risk that the GNLQ Project would have faced, even in the but-for scenario, *i.e.*, absent the irregularities in the EA processes.⁷⁹⁹
- 631 Both arguments are without merit.
- 632 **First**, as explained *supra*, Section 6.1.2, the Claimant's *ex ante* damages claim specifically **does not** assume away permitting risk. Had Secretariat assumed both Projects would receive unconditional approvals, its valuation would be far higher, as reflected in Secretariat's *ex post* valuation

⁷⁹⁵ Reply, p.423 (¶¶1233-1237).

⁷⁹⁶ *Gemplus v. Mexico*, **CL-120-ENG**, p.338 of PDF (¶¶13-97–13-98).

⁷⁹⁷ Reply, p.445 (¶¶1290-1346); Day-1-ENG, p.106(16-18).

⁷⁹⁸ Rejoinder, p.340 (¶847).

⁷⁹⁹ Rejoinder, p.340 (¶848).

in their first report.⁸⁰⁰ Mr Sequeira explained this distinction between Secretariat's *ex post* and *ex ante* assumptions at the Hearing:

“[**Mr Neufeld.-**] [...] So you assume that the Respondent would have acted consistent with legal obligations in the But-For Scenario and would have approved the Project's Environmental Impact Assessments. There, by ‘Impact Assessments,’ you're referring to which permits?

[**Mr. Sequeira.-**] First of all, just to clarify, this comment and this statement applies to the ex-post valuation we were doing. Because, when you do an ex-post valuation, you have to determine how the Project would have progressed between the date of alleged expropriation and your Valuation Date. So in making -- in developing that Counterfactual Scenario and that counterfactual timeline, we assumed that you would have received or been approved for your permits, and this would include both the Federal and the Provincial Permits for the environmental assessment.

[**Mr Neufeld.-**] And the pipeline as well?

[**Mr. Sequeira.-**] And the pipeline as well, yes. But not -- just to be clear -- I'm sorry. **We don't make that same assumption for the ex ante valuation as of July 2021.**

[**Mr Neufeld.-**] Let's go to that assumption. It is at 3.8 of your Second Report. I think you do make that assumption, don't you? It says: ‘According to the Claimant's Provincial and Federal Law Experts, the GNLQ Project would, in all probability, have been approved if the environmental assessment process had been conducted in accordance with the law.’ So you do, don't you?

[**Mr. Sequeira.-**] **No. No, we don't.** Let's read the next sentence. It says: ‘For purposes of valuing the Projects, we, therefore, assume that this permitting process was ongoing as of the ex-ante Valuation Date.’ But that was -- just to clarify, we were summarizing our understanding of the Claimant's Law Experts view, but **from a**

⁸⁰⁰ Day-1-ENG, p.272(15-17); *supra*, Section 6.1.1.

valuation perspective, we are building in the process as an ongoing process. So there would be some permitting risk built into our valuation.”⁸⁰¹

633 As Mr Sequeira also explained,⁸⁰² both of Secretariat's valuation based on prior transactions and its DCF valuation factor in permitting risk that the GNLQ Project faced, but-for the alleged breaches:

- **Prior transactions:** in each financing round, the investors agreed on a valuation that implicitly reflected the risk that the GNLQ Project might not receive environmental approval. Secretariat explained:

“[Mr Sequeira.-] [...] So, for example, the investors are notified of the various risks impacting the Project. We have, on the left-hand -- the bottom left of the slide is an extract from the PPM that lists - - it's just a subset of the lists of the risks that are included in the PPM. For example, the financing risks, the permitting risks, the risk of securing long-term offtake, are all disclosed in that PPM and are being factored into the prices that are being paid by the investors in each of these financing rounds.”⁸⁰³

634 Mr Illich confirmed as much during his oral evidence:

“[Ms Tabet.-] [...] you refer to the fact that the Project is subject to federal and provincial environment assessments. So would it be fair to say that the investors understood that the Project would have to satisfy both permitting process? [...]

[Mr Illich.-]. Yes. This is what we informed our investors, both existing and new investors.”⁸⁰⁴

⁸⁰¹ Day-9-ENG, p.2557(1)-2558(19).

⁸⁰² Day-9-ENG, p.2560(12)-2561(10) (“But as a general matter, this Project had a number of risks which were flagged to investors in the PPMs, and **those risks would be factored in to our PORP or in our cash flow modeling and reflected in the valuation.** Just as those would have been reflected in the prices paid by investors in the financing round and the prices paid in those rounds.”).

⁸⁰³ Day-9-ENG, p.2462(8-17); Secretariat Presentation, p.13.

⁸⁰⁴ Day-2-ENG, p.456(13)-457(6).

- **DCF valuation:** as explained further below, Secretariat accounts for permitting risk by including a PORP of 4% in the *ex-ante* valuation.⁸⁰⁵
- 635 **Second**, the Respondent's argument that "*en réalité l'obtention des permis était très incertaine*",⁸⁰⁶ even absent the wrongful irregularities in the EA processes, similarly misses the mark. The evidence indicates the opposite. Had the Respondent complied with its obligations under the NAFTA, the GNLQ Project would, in all likelihood, have been approved.⁸⁰⁷
- 636 As the Hearing confirmed, with the exception of the GNLQ Project, almost all projects subject to an EA in Québec since 1994 have been approved.⁸⁰⁸ No LNG export project has ever been rejected in Canada, including in Québec, except for the GNLQ Project.⁸⁰⁹
- 637 The Respondent cites the presence of beluga whales and concerns raised at the BAPE hearings as examples of challenges the GNLQ Project would have faced regardless of the Respondent's breaches.⁸¹⁰ However, as the Claimant has demonstrated, the reliance on beluga whales to reject the GNLQ Project was, in the circumstances, unlawful.⁸¹¹ The same goes for the other grounds on which the Québec and Federal Governments relied.⁸¹²

⁸⁰⁵ *Infra*, Section 6.2.3.

⁸⁰⁶ Rejoinder, p.340 (¶848).

⁸⁰⁷ Reply, p.446 (¶1293); Day-1-ENG, p.108(6-19). Me Duchaine shares this opinion: **CER-1 (Second)**, p.159 (¶437-441) ("*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. [...] 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.*")

⁸⁰⁸ *Supra*, Section 3.3.1; Day-1-ENG, p.89(16)-90(7); C-Presentation, p.10, 111.

⁸⁰⁹ Day-1-ENG, p.95(11-17); C-Presentation, p.120. Projects approved: Cacouna LNG (**C-0349-FRA**); Rabaska LNG (**C-0352-FRA**); Gaz Metro GNL (**JI-0005-ENG**); Stolt LNGaz (**C-0354-FRA**); LNG Canada (**C-0357-ENG**); Woodfibre LNG (**RN-0144-ENG**); Pacific NorthWest LNG (**C-0360-ENG**); Cedar LNG (**C-0366-ENG**); Ksi Lisims LNG (**C-0670-ENG**).

⁸¹⁰ Rejoinder, p.340 (¶848).

⁸¹¹ *Supra*, Section 3.3.5.3.

⁸¹² *Supra*, Sections 3.3.5, 3.4.2.

Rather, both Governments rejected the GNLQ Project for illegitimate reasons, not out of genuine environmental concerns.⁸¹³

- 638 Removing these irregularities from the process therefore leaves **none** of the reasons upon which either Government relied to reject the GNLQ Project as again demonstrated at the Hearing.⁸¹⁴ If there were other, lawful reasons to reject the GNLQ Project, the Québec or Federal Government would have relied on them in their decisions. Where no such reasons arose in the actual scenario, there is no basis to assume reasons to reject the GNLQ Project would have arisen in the counterfactual scenario where the Respondent complied with the NAFTA.

6.1.3.2 Gazoduq permitting

- 639 As previously explained,⁸¹⁵ the Claimant does not need to prove that the Gazoduq Project would have received federal and provincial regulatory approvals for its damages claim to succeed. It need only demonstrate that, as at the valuation date, the Gazoduq Project was on track to receive regulatory approvals, *i.e.*, there was no indication that the Federal or Québec Government would necessarily refuse the Gazoduq Project.
- 640 The Claimant has discharged that burden. As of July 2021, when the Québec Government announced it had rejected the GNLQ Project and that the Gazoduq Project “died” with it,⁸¹⁶ Gazoduq estimated that it would receive its primary regulatory approvals by November 2023, in time for the Symbio Project to achieve FID in Q4 2023.⁸¹⁷
- 641 That estimate was reasonable.⁸¹⁸ As Mr Illich explained, the schedule gave Gazoduq until July 2022, *i.e.*, a further year, to finalise and submit its consolidated Application to the federal and Québec authorities.⁸¹⁹ The

⁸¹³ *Supra*, Sections 3.3.5.4, 3.4.1.

⁸¹⁴ Day-1-ENG, p.34(8)-77(1); C-Presentation, p.23-103.

⁸¹⁵ Reply, p.449 (¶1302); Day-1-ENG, p.109(10-20).

⁸¹⁶ Reply, p.175 (s.2.7.3).

⁸¹⁷ Reply, p.176 (s.2.7.4; s.2.7 generally); **CWS-1 (Second)**, p.22 (s.4); **CWS-7**, p.7 (ss.3-5); **CWS-5 (Second)**, p.5 (s.3); **CWS-6 (Second)**, p.23 (s.3); C-Presentation, p.139-142.

⁸¹⁸ Reply, p.180 (s.2.7.4.2).

⁸¹⁹ **CWS-1 (Second)**, p.32 (¶¶67-69).

evidence of Ms Menzies, whose oral testimony demonstrated her decades-long experience compiling federal pipeline regulatory applications, confirms that the July 2022 target was reasonable.⁸²⁰ After reviewing the draft Application as it stood in July 2021, she estimated that Gazoduq could have been in position to file it even earlier, in December 2021 to February 2022.⁸²¹ Mr Roux, who was not called for examination, confirmed that the July 2022 target gave sufficient time to gather Indigenous input on Gazoduq's Application.⁸²²

642 As Mr Illich further explained, Gazoduq had estimated that the remainder of the EA processes would last 440 days (plus 60 days of contingency),⁸²³ based on factors including the legislated deadlines under the IAA; the Gazoduq team's experience; their communications with the Agency about the new IAA process; precedent pipeline reviews in Canada; and an agreement between the Federal and Québec Governments to conduct joint hearings and issue coordinated decisions on Gazoduq's Application.⁸²⁴ Mr Illich's evidence was that the Symbio Project schedule could have absorbed up to eight months of delay in receiving Gazoduq's regulatory approvals without affecting the Q3 2027 target for first cargo, by utilising "early works", ordering long-lead equipment ahead of FID and accelerating the construction schedule.⁸²⁵ The Respondent did not question Mr Illich on these topics.

643 However, the Respondent overstates the risk associated with the regulatory process of the Gazoduq Project, arguing that "[p]lusieurs étapes importantes restaient à franchir et l'issue du processus ainsi que l'échéancier pour l'obtention des approbations demeuraient sujets à de nombreuses incertitudes."⁸²⁶ The Hearing showed that the evidence

⁸²⁰ CWS-7, p.18 (s.4.2).

⁸²¹ CWS-7, p.20 (¶59).

⁸²² CWS-6 (Second), p.26 (¶70).

⁸²³ CWS-1 (Second), p.33 (¶¶70-75).

⁸²⁴ Reply, p.181 (¶¶533-547) and the evidence cited therein.

⁸²⁵ CWS-1 (Second), p.38 (s.4.4).

⁸²⁶ Rejoinder, p.108 (¶259).

underlying the Respondent's attempts to downplay the prospects of the Gazoduq Project is not credible.

- 644 **As for the federal regulatory process**, the Respondent argues that its new IAA process would have been far longer and more complex than previous pipeline review processes under the auspices of the NEB.⁸²⁷ However, that is the opposite of what the Federal Government itself said at the time.⁸²⁸ None of the witnesses working in the Federal Government were willing to testify in support of the Respondent's position, including Mr Hubbard, the current President of the Agency who was heavily involved in Gazoduq's regulatory process.⁸²⁹ Mr Northey, an expert on federal environmental law including the IAA,⁸³⁰ testified during his presentation that he could not find any empirical support for Mr O'Gorman's opinions against Gazoduq's timeline projections for its review under the IAA.⁸³¹ The Respondent did not question Mr Northey on the IAA process.
- 645 Instead, the Respondent relies solely on the evidence of Mr O'Gorman to support its case on Gazoduq's federal review. However, the Hearing revealed him to be unreliable as an impartial expert, and his conclusions flawed, for the reasons below.
- 646 **First**, Mr O'Gorman's examination confirmed that he has **no relevant qualifications** to justify giving his opinions any weight as expert evidence. His academic background in chemistry and theoretical physics is irrelevant to issues of federal environmental law and regulatory practice.⁸³² He also confirmed that he has no legal qualifications,⁸³³ despite his opinions including, and depending on, his own explanations of federal regulatory

⁸²⁷ Counter-Memorial, p.288 (¶713); Rejoinder, p.108 (¶¶260-262).

⁸²⁸ Reply, p.177 (¶¶524-528).

⁸²⁹ **RWS-7; RWS-18**; Day-1-ENG, p.110(5)-111(6).

⁸³⁰ As Mr Northey explained in his presentation, he was part of the Expert Panel tasked with reforming CEAA 2012, resulting in a 2017 report (**SP-0002-ENG**) that ultimately led to the IAA (Day-7-ENG, p.1856(9-15)). He has also written two books on the IAA (Northey Presentation, p.2).

⁸³¹ Day-7-ENG, p.1881(19)-1883(1); Northey Presentation, p.32.

⁸³² Day-8-ENG, p.2169(5-7).

⁸³³ Day-8-ENG, p.2169(8-18).

law relating to pipelines.⁸³⁴ Mr O’Gorman accepted that his conclusions might differ if his understanding of the law were wrong,⁸³⁵ which the Hearing made clear was indeed the case.

647 Mr O’Gorman had misunderstood important aspects of the IAA that directly impacted his analysis. For example, he conflated two types of “review panels” in his analysis:

c) integrated review panels, a creation under the IAA for specific types of projects regulated by a “lifecycle regulator” (pipelines, electricity transmission lines and nuclear projects), for which the relevant Minister was **obliged** under the IAA to refer the assessment to the integrated review panel; and

d) what he called “general review panels”, whereby the Minister had **exercised his/her discretion** under CEAA 2012 to refer a project assessment to a review panel **precisely because of the complexity of the review**, *i.e.*, due to foreseen adverse impacts, public concerns, or to cooperate with a province for a joint provincial-federal review.⁸³⁶

648 The impact of this conflation on Mr O’Gorman’s opinions was clear from his direct presentation:

“**[Mr O’Gorman.-]** [...] I would say there is actually a lot of similarity between the review panel part of the process under the new Act and under CEAA 2012. So I think it is relevant to look at how review panels proceeded under CEAA 2012. It is relevant because **projects that are submitted to review panels have more potential for concern about impacts, widely considered to be the highest level of Federal assessment, as if it’s sent to a review panel.**”⁸³⁷

649 **Second**, Mr O’Gorman explained that he offered his opinions “based on his practical experience”,⁸³⁸ which according to him, amounts to “over 15

⁸³⁴ **RER-4**, p.7 (¶¶15, 18, 22, 28, 153 and footnotes 16, 144); **RER-8**, p.3 (footnotes 8, 17, 30).

⁸³⁵ Day-8-ENG, p.2171(2-13).

⁸³⁶ Day-8-ENG, p.2198(14)-2203(21).

⁸³⁷ Day-8-ENG, p.2149(2-10).

⁸³⁸ Day-8-ENG, p.2176(2-7).

years of practical experience with the impact assessment process and almost 30 years of experience in environmental regulatory and policy matters.”⁸³⁹ However, the Hearing confirmed that his only relevant experience was his short stint as Director of Review Panels at the Agency from 2011-2013. Even that experience is only indirectly relevant: Mr O’Gorman confirmed that the federal EA legislation in force at the time was CEAA 1992 (*i.e.*, not even the predecessor to the IAA – albeit it was in transition to CEAA 2012).⁸⁴⁰ As for the remainder of his experience:

- Mr O’Gorman conceded that the first 15 of those “30 years”, working “mostly in climate change analysis”,⁸⁴¹ was at best only tangentially related to EA processes.⁸⁴²
- He confirmed that his four years working for Barr Engineering covered a broad spectrum of environmental advisory work,⁸⁴³ only a subset of which involved advising Parks Canada (*i.e.*, not an industry proponent) on “small-scale environmental assessments under what at the time was Section 67 of CEAA 2012, projects on Federal lands.”⁸⁴⁴
- He acted as a hearing commissioner for the Alberta Energy Regulator from August 2017 to August 2022 but confirmed that, with one exception, the applications he dealt with were all governed by Albertan, not federal legislation.⁸⁴⁵ The exception – the Grassy Mountain Coal Mine joint review panel – was the only instance where he had acted as a member of a panel conducting a federal EA, but that also involved the application of Albertan legislation.⁸⁴⁶
- He confirmed he had never worked for a project proponent leading a project through an EA or impact assessment, and that he had never been

⁸³⁹ **RER-8**, p.1 (¶3).

⁸⁴⁰ Day-8-ENG, p.2178(10)-2179(12). Notably, the current Director of Review Panels at the Agency, who would presumably be in a much better position to testify to the functioning of the IAA integrated review panel process, has not been tendered as witness for the Respondent.

⁸⁴¹ Day-8-ENG, p.2177(5-6).

⁸⁴² Day-8-ENG, p.2176(1)-2178(9).

⁸⁴³ , **C-0570-ENG**, p.2-3.

⁸⁴⁴ Day-8-ENG, p.2179(13)-2180(22), 2194(12-17).

⁸⁴⁵ Day-8-ENG, p.2181(1-21).

⁸⁴⁶ Day-8-ENG, p.2182(12)-2184(3).

responsible for compiling and submitting an impact statement or environmental impact statement.⁸⁴⁷

- He confirmed that in 2022, when he started his consultancy (which has no other employees),⁸⁴⁸ he did not have “any practical experience working on a review process under the Impact Assessment Act”.⁸⁴⁹

650 Mr O’Gorman explained that he “consider[s] [him]self now a practitioner in this space, former regulator, now practitioner”.⁸⁵⁰ That may be so, and Mr O’Gorman may well advertise his consultancy services as such, but his experience does not qualify him to provide expert opinion.

651 **Third**, the Hearing also revealed that Mr O’Gorman was far from impartial. He candidly explained that he markets himself as someone who helped prevent a major industrial project, to appear attractive to First Nations Community clients:

“**[Mr O’Gorman.-]** [...] And I want to address your question about, is it [rejecting the Grassy Mountain Coal Mine project] something that I’m proud of.

[Mr Denison.-] Well, it’s something that you want your potential clients to know about you, isn’t it?

[Mr O’Gorman.-] Well, that’s very fair. Yes, it is, because, especially given that I am now focusing on trying to -- well, I mean, **this is one aspect of how one sells oneself as a consultant. To the extent that I am prioritizing trying to work for First Nation Communities as an expert on their side**, I will tell you that the view of many First Nation Communities about the Alberta Energy Regulator is exceedingly negative. And so, **in trying to highlight that**, yes, I was this AER -- I have been told, actually, explicitly, that that worked against me in **trying to go out and now become a consultant working for First Nations**.

⁸⁴⁷ Day-8-ENG, p.2193(20)-2195(1).

⁸⁴⁸ Day-8-ENG, p.2168(13-21).

⁸⁴⁹ Day-8-ENG, p.2190(15-20).

⁸⁵⁰ Day-8-ENG, p.2158 (2-4).

So an aspect of highlighting this was, I suppose, one could say, look, I was at the Alberta Energy Regulator and I had this interesting role, but I made a decision which was something that maybe you might not expect to have come from the Alberta Energy Regulator.

[Mr Denison.-] That's understandable, I suppose, but it's not something you mentioned in your Expert Reports though, the fact that you rejected it?

[Mr O'Gorman.-] No."⁸⁵¹

- 652 Indeed, the Hearing confirmed that Mr O'Gorman made no attempt to take a balanced view of the relevant evidence.⁸⁵² For example, in his first report, Mr O'Gorman went to considerable lengths to compare the Gazoduq Project to the regulatory processes for four **oil** pipelines.⁸⁵³ His report gave the impression that those were the **only** federally regulated pipelines in Canada in the 2010s, which is incorrect and misleading.⁸⁵⁴ He was forced to accept that he "should have acknowledged" the other federally regulated pipelines but, in his view, "[i]t wasn't important because no one pays nearly as much attention to those in [his] space."⁸⁵⁵
- 653 Mr O'Gorman was unable to give any convincing explanation as to why he had cherry-picked the oil pipelines but ignored other federal pipeline reviews as comparators, including 12 **natural gas** pipeline projects that underwent federal EAs under CEAA 2012, with regulatory processes far shorter than his predictions for the Gazoduq Project and all of which were approved.⁸⁵⁶ He eventually conceded that he had compared the Gazoduq

⁸⁵¹ Day-8-ENG, p.2189(8)-2190(13).

⁸⁵² Relatedly, Mr O'Gorman did not attend the examination of any of the Gazoduq-related fact witnesses during the Hearing and testified that he had only "quickly reviewed the transcripts, not in depth" (Day-8-ENG, p.2195(5-15)).

⁸⁵³ **RER-4**, p.27 (¶¶55-89).

⁸⁵⁴ **CWS-7**, p.26 (¶75).

⁸⁵⁵ Day-8-ENG, p.2205(14)-2209(11).

⁸⁵⁶ **CWS-7 (Annex B)**. Mr O'Gorman initially tried to argue that he had excluded certain pipelines from consideration because they were not "large-scale" (Day-8-ENG, p.2208(19)-2209 (11)), which he later clarified meant pipelines requiring more than 75km of new right of

Project to the four oil pipelines not because those were relevant comparators from a regulatory view, but **to try to portray pipeline reviews as controversial**:

“[**Mr Denison.-**] [...] Well, I read your First Report as a whole, and I think it included 12 pages on NEB-regulated pipelines that were oil pipelines. So you considered those to be relevant, didn't you?

[**Mr O’Gorman.-**] Yes.

[**Mr Denison.-**] All right.

[**Mr O’Gorman.-**] To some extent. Look, I agree what I said in my First Report about those four oil pipeline reviews was I gave them as an example that big pipeline projects in Canada were very controversial in the 2010s. So are they an explicit comparator to Gazoduc’s review process? No. Different legislation.

They are relevant **to get you to understand that pipelines have been controversial, and they have been controversial**, as I explained in my Second Report, not only because of the risk of an oil spill. And natural gas pipelines have a long list of Indigenous concerns that have been expressed about natural gas pipelines.

[**Mr Denison.-**] Okay. But they’re not talking about Indigenous concerns just now, we’re talking about length of the Federal review processes.

[**Mr O’Gorman.-**] Right.

[**Mr Denison.-**] And there’s, I think, 12, you said natural gas pipelines in this list. And --

[**Mr O’Gorman.-**] I think --

way (Day-8-ENG, p.2231(8)-2232(3)). However, that does not satisfactorily explain why he ignored the twelve pre-IAA natural gas pipelines that triggered federal EA under the CEAA 2012 regime. As Mr O’Gorman himself acknowledged in his second report, the trigger for federal EA under that earlier regime was not 75km of new right of way, but **any** pipeline over 40km in length: **RER-8**, p.11 (footnote 30).

[Mr Denison.-] -- we agreed that they were reviewed in an average of 24 months?

[Mr O’Gorman.-] Sure.”⁸⁵⁷

654 Mr O’Gorman also avoided engaging seriously with the Claimant’s evidence demonstrating the progress that it had made under the IAA process. Most notably, having initially argued that Gazoduq was “a long way from having adequately described its project” because “[a] complete [EIS] for projects undergoing a review panel assessment can easily contain more than 10,000 pages”,⁸⁵⁸ Mr O’Gorman did not meaningfully address the almost 10,000 pages of Gazoduq’s draft Application that the Claimant submitted in response.⁸⁵⁹ At the Hearing, all he had to say about that evidence was that its volume was “nothing to be surprised about”.⁸⁶⁰

655 In contrast, Mr O’Gorman was willing to cite any evidence that he could find that – in his view – supported his arguments. For example, he cited a bullet point from the TISG regarding Indigenous consultation requirements – which he described as “fantastic” – to suggest that Gazoduq had not meaningfully engaged with Indigenous communities.⁸⁶¹ However, he did not seriously engage with the Claimant’s documentary and witness evidence describing Gazoduq’s extensive engagement efforts or attempt to explain how it had, in his view, fallen short.⁸⁶² He also did not bring to the Tribunal’s attention parts of the TISG that contradicted his other opinions:

⁸⁵⁷ Day-8-ENG, p.2212(21)-2214(6).

⁸⁵⁸ **RER-4**, p.45 (¶103).

⁸⁵⁹ Multi-part exhibit **C-571**, summarised by Ms Menzies at **CWS-7 (Annex A)**. Mr O’Gorman confirmed at the Hearing that he had received the draft impact statement from the Respondent’s counsel: Day-8-ENG, p.2196(5-11).

⁸⁶⁰ Day-8-ENG, p.2158(5-14).

⁸⁶¹ Day-8-ENG, p.2160(11)-2170(13).

⁸⁶² A further telling example is where Mr O’Gorman speculated that Indigenous communities would have become concerned about the Gazoduq pipeline encountering construction issues simply because another pipeline, the other side of the country, had faced some construction issues. Mr O’Gorman showed a photograph and suggested that the fact there were no mountains visible somehow proved his point that the two pipeline routes had comparable topography: Day-8-ENG, p.2163(21)-2165(18).

notably, the provision allowing Gazoduq to “include an explanation justifying” if it could not provide certain requested information.⁸⁶³

656 **Fourth**, the Hearing revealed that Mr O’Gorman’s wife, Ms Renée Pelletier, is a Senior Partner of the law firm that represented Mamo Aki – the group of eight Indigenous communities that would have been most potentially affected by the Gazoduq Project.⁸⁶⁴ She was also, alongside Mr Northey, a co-author of a 2017 Expert Panel report on which Mr O’Gorman relied.⁸⁶⁵ Under cross-examination, Mr O’Gorman admitted that he knew Mamo Aki was a client of his wife’s firm, and that her firm had made representations to the Agency regarding the Gazoduq Project on their behalf.⁸⁶⁶ However, he did not think that it was relevant to disclose the fact that his wife was a Senior Partner of that firm,⁸⁶⁷ even after the Claimant had challenged his independence in its Reply.⁸⁶⁸

657 **In sum**, the Tribunal should afford no weight to the evidence from Mr O’Gorman, who has no relevant qualifications and almost no relevant experience to provide expert evidence on the federal regulatory process under the IAA and on Indigenous rights law.

658 **As for the Québec regulatory process**, the Tribunal heard from Mr Bergeron, but he too proved entirely unreliable as a fact witness. Like several of the Respondent’s witnesses, he appeared over-prepared and enthusiastically toed the party line, at times patently rehearsed.⁸⁶⁹

659 When cross-examined on his witness statements, Mr Bergeron confirmed that, where he had referred to documents, the facts presented were not in his own personal knowledge.⁸⁷⁰ In fact, he had copied and pasted,

⁸⁶³ **DO-0116-ENG**, p.2.

⁸⁶⁴ Day-8-ENG, p.2227(5)-2228(13).

⁸⁶⁵ **SP-0002-ENG**, p.115; Day-8-ENG, p.2217(15)-2219(5).

⁸⁶⁶ Day-8-ENG, p.2228(3-19).

⁸⁶⁷ Day-8-ENG, p.2228(20)-2229(1).

⁸⁶⁸ Reply, p.180 (¶529).

⁸⁶⁹ During his direct examination, for example, Mr Bergeron confirmed he was reading from “*notes mnémotechniques*” that he had jotted down upon arriving in the Hearing room: Day-6-FRA, p.11 (14-19).

⁸⁷⁰ Day-6-ENG, p.1431(5)-1433(19)/Day-6-FRA, p.13(14)-14(20).

verbatim, entire paragraphs of his statements from other documents, many of which were clearly not written by him, without indicating as much.⁸⁷¹ In addition he had done so selectively, *i.e.*, omitting sentences that, presumably, he considered less helpful to the Respondent's case.⁸⁷²

660 Where, in his witness statements, Mr Bergeron purported to testify to facts within his direct knowledge, they were invariably incorrect:

- He initially testified that he had **no** communications with his Gazoduq point of contact, [REDACTED] beyond March 2020.⁸⁷³ In reality, he had exchanged various emails and phone calls with [REDACTED] between January and July 2021, which he had forgotten.⁸⁷⁴ He conceded that he could not confirm or deny if he had yet further communications with her:

“**[Mr Denison.-]** [...] I’m talking about the period from January 2021 to July 2021, not afterwards. During that period, did you have other communications with [REDACTED] by telephone included, other than the ones that the Claimant has identified in the exhibits?

M. Bergeron.- *Je ne peux confirmer que j’ai eu ou non une communication avec [REDACTED] entre le 1er janvier 2021 et le 21 juillet 2021. Ma mémoire ne permet pas de vous indiquer si j’ai eu une conversation téléphonique, d’abord. Et, en second, rapidement, les communications avec [REDACTED] surtout lorsqu’il s’agissait de la procédure d’émission des permis et autorisations, étaient très brèves et de très courte durée.*”⁸⁷⁵

⁸⁷¹ Day-6-ENG, p.1435(9)-1437(16), 1442(21)-1443(21)/Day-6-FRA, p.14(45)-15(38), 17(33)-18(5).

⁸⁷² Day-6-ENG, p.1440(16)-1444(5)/Day-6-FRA, p.16(44)-18(10).

⁸⁷³ **RWS-3**, p.17 (¶¶44, 49).

⁸⁷⁴ Day-6-ENG, p.1447(1-11), 1450(22)/Day-6-FRA, p.19(15-23), 20(28-39).

⁸⁷⁵ Day-6-ENG, p.1468 (16-21)/Day-6-FRA, p.27 (24-29).

- He initially testified that, to his knowledge, Gazoduc had not obtained the required authorisations to conduct field studies,⁸⁷⁶ but that was shown to be false by emails on which he was copied at the time.⁸⁷⁷
- In his second witness statement, he asserted instead that Gazoduc had obtained just ten permits, supposedly based on searches of the Québec Government's records.⁸⁷⁸ However, he conceded at the Hearing that (i) he had not conducted these searches himself,⁸⁷⁹ and (ii) the Québec Government had deleted most of its documents relating to the Gazoduc Project:

“M. Bergeron.- [...] *Or, au cours des derniers mois, j’ai pu faire un réexamen des pièces qui avaient été conservées sous le dossier Gazoduc et, visiblement, une majorité des documents avait été éliminée aux fins de nettoyage des banques de disques durs et des banques de messages entreposés dans les disques durs.*”⁸⁸⁰

- After initially suggesting that Gazoduc would have required over 100 such permits,⁸⁸¹ Mr Bergeron conceded that he had conflated permits needed to complete field studies (*i.e.*, to complete the EA process) with permits needed to launch the project (*i.e.*, construct the pipeline):

“[Mr Denison.-] [...] [Y]ou said in order to complete its impact assessment, its EIS, and get the Project underway, Gazoduc had to carry out a number of ‘travaux préalables’, and then that’s where you then give your estimate of 100 or more permits; right?

M. Bergeron.- *Oui.*

[Mr Denison.-] So you’re talking [...] here about the completing the impact study and launching the project?

⁸⁷⁶ **RWS-3**, p.18 (¶47).

⁸⁷⁷ Day-6-ENG, p.1471(1)-1474(10)/Day-6-FRA, p.28(11)-29(16).

⁸⁷⁸ **RWS-21**, p.4 (¶16).

⁸⁷⁹ Day-6-ENG, p.1475(20)-1477(3)/ Day-6-FRA, p.29(43)-30(15).

⁸⁸⁰ Day-6-FRA, p.20(6-9), 23(1-8).

⁸⁸¹ **RWS-3**, p.18 (¶47); **RWS-21**, p.4 (¶15).

M. Bergeron.- *Euh, excusez, le dernier. Complete the impact study and..., j'ai manqué le dernier bout.*

[**Mr Denison.-**] Well your words, in French, *réaliser son étude d'impact et de mettre en marche son projet.*

M. Bergeron.- *Oui.*

[**Mr Denison.-**] So you've conflated two stages there, haven't you? Finishing the impact study, and launching the project. Just to be clear?

M. Bergeron.- *Oui. Oui.*⁸⁸²

661 To conclude, the Respondent's attempts to overstate the level of permitting risk attached to the Gazoduq Project are meritless. The Tribunal should accept the Claimant's evidence regarding the status and prospects of the Gazoduq Project, as described by Mr Illich, Mr Brintnell, Ms Menzies and Mr Roux in their witness statements.

6.1.3.3 Favourable LNG market

662 The Hearing also confirmed that the GNLQ Project had a commercially viable model and that, had it been permitted, it would have had little difficulty marketing its LNG profitably to offtakers.⁸⁸³

663 **First**, Mr Bidwai, Commercial Senior Vice President of GNLQ, explained that GNLQ relied on a proven Cheniere-style commercial model based on long-term GSAs and LNG SPAs.⁸⁸⁴ [REDACTED]

⁸⁸² Day-6-ENG, p.1492(7)-1493(1)/Day-6-FRA, p.35(43)-36(11).

⁸⁸³ Reply, p.461 (¶¶1331-1346); Day-1-ENG, p.112(10)-114(16).

⁸⁸⁴ Day-3-ENG, p.781(9-13); **CWS-2**, p.44 (¶¶112-116).

⁸⁸⁵ **CWS-2 (Second)**, p.3 (¶6); Day-9-ENG, p.2455(7-10).

- 664 **Second**, after a temporary oversupply in the market, industry experts such as Wood Mackenzie and Poten & Partners anticipated that LNG demand would exceed supply from around 2026-2027 and predicted sustained elevated European LNG imports for at least a decade.⁸⁸⁹ Europe would need close to 100 mtpa of new LNG offtake agreements – almost ten times GNLQ's nameplate capacity – to offset expiring LNG contracts and declining domestic natural gas production.⁸⁹⁰
- 665 European offtakers viewed Canadian LNG as a stable alternative to diversify their energy supply away from the US, Russia and the Middle East.⁸⁹¹ Furthermore, as Mr Bidwai explained, the carbon footprint of producing and transporting LNG from GNLQ was around five times less than U.S. Gulf LNG Coast and three times less than Russian pipeline gas, which offered substantial benefits for buyers:

[REDACTED]

⁸⁸⁶ Reply, p.461 (¶¶1332-1333); Day-9-ENG, p.2455(11-13).

⁸⁸⁷ Day-3-ENG, p.774(12)-775(11).

⁸⁸⁸ Day-3-ENG, p.775(12)-776(3); p.777(5-14).

⁸⁸⁹ **CWS-2 (Second)**, p.6 (¶¶12-13); **VB-0001-ENG**, p.127, 130; **SEC-0101-ENG**, p.10; **SEC-0019-ENG**, at 09:35.

⁸⁹⁰ Reply, p.464 (¶1338); **CWS-2 (Second)**, p.7 (¶14); **VB-0125-ENG-FRA**, p.56.

⁸⁹¹ Day-3-ENG, p.779(15)-780(10); **VB-0125-ENG-FRA**, p.47.

[REDACTED]
[REDACTED]⁹²

666 **Third**, as explained by Mr Bidwai, offtakers had already expressed strong interest in GNLQ's LNG.⁸⁹³ LNG SPAs and GSAs are commonly concluded 12-18 months before FID⁸⁹⁴ meaning that GNLQ expected to conclude binding offtake agreements from approximately Q2 2022 onwards, which would cover approximately 75-85% of its nameplate capacity to reach FID.⁸⁹⁵ Yet, by early 2021, [REDACTED]
[REDACTED]
[REDACTED]⁸⁹⁶ In other words, the demand for GNLQ's LNG would likely have exceeded its capacity.

667 The Respondent relies on Accuracy's opinion that GNLQ's exchanges with offtakers were mostly "unilateral".⁸⁹⁷ However, Accuracy appear to have based this opinion on a self-admittedly cursory review of the relevant communications with offtakers, due to the volume of communications to be reviewed, without considering their actual content.⁸⁹⁸ In fact, taking only [REDACTED] as examples, a proper review of the communications exhibited by Mr Bidwai would have confirmed that GNLQ held around 20 in-person or virtual meetings with [REDACTED]
[REDACTED] between late 2019 and mid-2021.⁸⁹⁹ These discussions involved senior executives, such as [REDACTED]

⁸⁹² Day-3-ENG, p.779(2-14); p.777(5-14) ("For the offtakers, environmental protection is at the forefront for them, not just -- not just as an ESG issue, as a commercial issue. Carbon tax has been in place in Europe for many years, and I'm sure you're all familiar with it. And it adds a cost to your energy supply. So all these parties are importing natural gas, and they're worried about having to pay a carbon tax for the energy that they're procuring.").

⁸⁹³ **CWS-2 (Second)**, p.8 (¶18).

⁸⁹⁴ Day-3-ENG, p.771(6-8); Reply, p.463 (¶1336); **CWS-2 (Second)**, p.8 (¶16); **CWS-8**, p.8 (¶16).

⁸⁹⁵ Reply, p.464 (¶1339); Day-1-ENG, p.113(19)-114(4).

⁸⁹⁶ Day-1-ENG, p.114(5-7); **CWS-2 (Second)**, p.15 (¶20).

⁸⁹⁷ **RER-5**, p.73 (¶252).

⁸⁹⁸ **RER-5**, p.195 (¶698).

⁸⁹⁹ **ACC-0088-ENG**, p.1; **VB-0174-ENG**; **VB-0175-ENG**; **VB-0176-ENG**; **VB-0177-ENG**; **VB-0178-ENG**; **VB-0130-ENG**; **VB-0131-ENG**; **VB-0132-ENG**; **VB-0162-ENG**; **VB-0163-ENG**; **VB-0169-ENG**; **VB-0166-ENG**; **VB-0167-ENG**; **VB-0168-ENG**; **VB-0130-ENG**; **VB-0131-ENG**; **ACC-0164-ENG**.

████████████████████⁹⁰⁰ Accuracy does not explain how it classifies such meetings, bilateral by nature, as merely “unilateral” communications by GNLQ. Notably, at the Hearing, the Respondent did not put a single question on GNLQ’s discussions with offtakers to Mr Bidwai, whose evidence on these discussions went unchallenged.⁹⁰¹

668 **Finally**, in July 2021, the LNG market was on an upward trajectory and predicted to be (and was, in fact) exceptionally favourable until 2023, when GNLQ expected to reach FID.⁹⁰² Mr Bidwai recalled how energy demand and prices recovered post-COVID, leading to the signing of new offtake contracts and FIDs:

“**[Mr Bidwai.-]** [...] Now, in July 2021, when our Project is canceled, the world has just been through the worst pandemic in a century. We’ve had an economic collapse. The price of TTF, the European Gas Index [...] has plummeted. It has gone all the way down to \$3 per MMBtu. By July 2021, that number has quadrupled already.

[...] So back in 2019, we expected a wave of FID to take place between 2019 and -- 2018 and 2022. The pandemic essentially interrupted that. It paused it for two years while no offtake got signed, no FIDs got made.

As we came to 2021, we were looking at an incredibly strong -- I would say the strongest LNG market of all time, starting in mid-2021, running all the way through the end of 2023.”⁹⁰³

669 That evidence is confirmed by the fact that, from 2021-2023, GNLQ’s would-be North American competitors executed long-term LNG SPAs for approximately 86 Mtpa, including with offtakers who had previously been in negotiations with GNLQ.⁹⁰⁴ Were it not for Québec’s Decree, it is highly

⁹⁰⁰ **VB-0160-ENG.**

⁹⁰¹ Day-3-ENG, p.787(1-18).

⁹⁰² Day-1-ENG, p.112(20)-113(6); **CWS-2 (Second)**, p.6 (¶12).

⁹⁰³ Day-3-ENG, p.771(12)-772(9).

⁹⁰⁴ Day-3-ENG, p.772(11-13).

likely that GNLQ would have concluded LNG SPAs and GSAs as planned in time for its FID targeted in December 2023.

6.1.3.4 Financing

670 By 2021, Symbio had raised ██████████ out of the ██████████ development budget (including contingencies) that it needed to reach FID. The Hearing confirmed that, had the Respondent not refused the GNLQ Project, it would in all likelihood have successfully raised the remaining capital and closed project financing at FID.⁹⁰⁵

671 As noted above, in early 2020, the COVID-19 pandemic had depressed energy demand and curtailed the then-current wave of investment in LNG projects. By July 2021, however, energy prices were recovering and the LNG market was entering a period of undersupply. Development resumed on projects that had been postponed and went on to reach FID from 2022 onwards.⁹⁰⁶

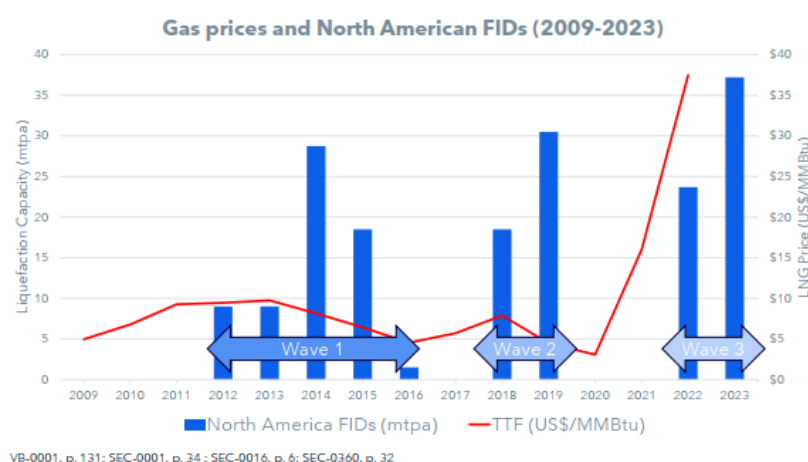


Figure 2: Claimant's Opening (Slide 150)⁹⁰⁷

672 Other North American LNG developers reaching FID in 2022-2023 included Venture Global in May 2022, NextDecade in July 2023 and

⁹⁰⁵ Reply, p.452 (s.5.2.3.3).

⁹⁰⁶ Day-1-ENG, p.117(1)-118(10).

⁹⁰⁷ C-Presentation, p.150.

673 It was not only Symbio's investors which considered it a viable financing case. In July 2021, Symbio was negotiating a new advisory mandate with [REDACTED] a leading investment bank. Mr Krolick, a project finance advisor of more than two decades' experience [REDACTED]

[REDACTED]

⁹¹¹ CWS-8, p.5 (¶¶ 8, 31); Day-8-ENG, p.2240(1-5).

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹¹²

- 675 This was not merely Mr Krolick's opinion. As he explained, financial advisors [REDACTED] meaning they must be selective in their business intake. [REDACTED]
[REDACTED] also had to screen the Symbio Project before even drafting an engagement letter.⁹¹³
- 676 Nevertheless, the Respondent has sought to downplay the prospects of Symbio raising the requisite funds. It relied on Mr Shultz, who presented himself as experienced in energy project finance, "primarily and most notably" in LNG.⁹¹⁴ The Hearing revealed that he had vastly overstated his experience.
- 677 Mr Shultz began by claiming that he "[had] worked on LNG transactions throughout my career including reviewing the Oman LNG transaction, Ras Laffan transaction".⁹¹⁵ Under cross-examination, however, he admitted he had merely read the transaction documents for these two projects as part of his training as a first-year analyst in 1997:

"[**Mr Veit.-**] So, as a junior associate around a quarter of a century ago, you reviewed documentations for two LNG Projects in the Middle East?

[**Mr Shultz.-**] Could you define the word 'review' in the way you're using it?

⁹¹² Day-8-ENG, p.2245(2)-2246(13).

⁹¹³ Day-8-ENG, p.2246(21)-2247(11).

⁹¹⁴ **RER-9**, p.1 (¶1).

⁹¹⁵ Day-9-ENG, p.2344 (13-15).

[Mr Veit.-] Well, you said 'you reviewed financing and commercial documentation'. It's your testimony, not mine.

[Mr Shultz.-] 'Review' means read, use, utilize, understand.

[Mr Veit.-] And you say, 'I was responsible for reviewing documentation.' You tell me what it means.

[Mr Shultz.-] I was reading the documentation, using them as part of my initial training as a first-year analyst.”⁹¹⁶

678 Furthermore, although Mr Shultz tried to take credit for “reviewing and close observation of [...] Sabine Pass”,⁹¹⁷ he admitted that, unlike Mr Krolick, he had never been involved in that project. Rather, his claimed experience derived purely from what he had read about it (and other North American projects) and an impromptu meeting in 2010:

“[Mr Veit.-] Okay. Now, coming back to you mentioning Sabine Pass Project that you reviewed, was that while you were at SocGen?

[Mr Shultz.-] No, I had left SocGen. That was in December of 2010 when I met one of the brothers, Charif -- brothers from Cheniere, at a conference in Barcelona, and I was no longer with SocGen at that time.

[Mr Veit.-] **So you met one of the founder's brothers at a conference -- [...]**

[Mr Shultz.-] There were two brothers. Yeah.

[Mr Veit.-] **-- two brothers in Barcelona at the conference?**

[Mr Shultz.-] **Correct.**

[Mr Veit.-] **But you weren't involved in any -- as an advisor as you confirmed in the Sabine Pass Project?**

⁹¹⁶ Day-9-ENG, p.2381(19)-2382(11).

⁹¹⁷ Day-9-ENG, p.2344(18-20).

[Mr Shultz.-] No, I was not.”⁹¹⁸

679 In contrast to Mr Krolick, Mr Shultz had never advised an independent LNG proponent, nor worked on LNG in North America. In fact, Mr Shultz's only experience in LNG in the past 15 years related to an LNG project involving the Qatari national energy company. However, working for a petrostate-owned energy company in the Middle East is hardly comparable to advising on project financing for an independent LNG proponent in North America.⁹¹⁹

680 Ultimately, Mr Shultz had to admit that this Qatari project was the total of his recent LNG experience and that he had **“a gap in LNG, per se”**.⁹²⁰

681 Not only that, Mr Shultz, purportedly an LNG expert, was not even aware that [REDACTED] had changed its name to [REDACTED] in 2018.⁹²¹ That confusion, moreover, had formed the basis of his misconceived opinions: Mr Shultz opined that [REDACTED] in supposed contrast to [REDACTED] was a “big Spanish market player”⁹²², and even doubled down on this point in cross-examination:

“[Mr Veit.-] Okay. And you then give [REDACTED] as an example of a small player in discussions with GNLQ whereas, you know, [REDACTED] [REDACTED] would be a big player. Do you remember that?

[Mr Shultz.-] And to add in more color to that [s]tatement, what distinguishes it is what will be known and well understood readily by the majority of credit markets and bankers, and [REDACTED] [REDACTED]”⁹²³

682 Once informed that [REDACTED] are, in fact, the same company, instead of admitting he was wrong, Mr Shultz made a volte-face to claim that “[t]hey [REDACTED] have not been a major player

⁹¹⁸ Day-9-ENG, p.2385(12)-2386(7).

⁹¹⁹ Day-9-ENG, p.2388(10)-2389(7).

⁹²⁰ Day-9-ENG, p.2388(7).

⁹²¹ Day-9-ENG, p.2436(11-16).

⁹²² Shultz Presentation, p.19.

⁹²³ Day-9-ENG, p.2436(2-10).

in my interaction.”⁹²⁴ That spoke to Mr Shultz’s troubling willingness to tailor his evidence to support his client’s position.

683 What is more, Mr Shultz’s opinions relied on factually inaccurate information that he admitted having sourced from ChatGPT.⁹²⁵ His report was littered with errors as to the dates of projects, their owners, and whether the owners were a major or independent.⁹²⁶ To take but one example, when comparing the fundraising of NextDecade for its Rio Grande project with Symbio, Mr Shultz erroneously stated that NextDecade took only two years to raise USD 135 million.⁹²⁷ In reality, NextDecade took **eight** years to raise this amount and 13 years to reach FID, critically undermining Mr Shultz’s thesis that Symbio was comparatively slow in raising funds.⁹²⁸

684 Mr Shultz’s errors were compounded by his circular definition of “major” as any company which “could credibly raise financing” and had the “ability to mobilize capital and invest in new projects”, regardless of whether it had any operating assets or ability to self-fund.⁹²⁹ That allowed him to reclassify many independent developers as “majors” and understate the proportion of LNG projects developed by independents.

685 In sum, Mr Shultz’s evidence should be discarded in its entirety.

686 In any event, Mr Shultz’s and the Respondent’s four key propositions – namely, that Symbio “failed” in its financing rounds; that the parallel financing of GNLQ and Gazoduq was an impediment to reach FID; that the development budget was insufficient; and that Symbio lacked a “strategic partner” – did not withstand scrutiny.

687 **First**, the Respondent’s criticism, that Symbio did not meet its financing targets in the third and fourth rounds, showed a lack of understanding of

⁹²⁴ Day-9-ENG, p.2436(16-21).

⁹²⁵ Day-9-ENG, p.2410(2-16).

⁹²⁶ **RER-9**, p.46; Day-9-ENG, p.2409(17)-2409(5); p.2399(11-18); p.2403(10)-2404(8).

⁹²⁷ **RER-9**, p.29 (¶79).

⁹²⁸ Day-9-ENG, p.2421(19)-2423(1).

⁹²⁹ Day-9-ENG, p.2398(5-20).

688 It is thus common practice for sponsors to set an ambitious fundraising target, knowing that this is not necessary to advance the project:

689 [REDACTED]
[REDACTED]
[REDACTED]

254

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁹³⁵

691 As explained below, Symbio raised sufficient funds for GNLQ and Gazoduq to achieve key milestones between 2020 and July 2021.⁹³⁶

692 **Second**, Mr Shultz argued that Symbio would have struggled to raise capital for the construction of the GNLQ and the Gazoduq Projects because of an alleged “cardinal rule” that lenders would never finance two projects dependent on one another.⁹³⁷ However, he did not seem to be aware that Symbio planned **simultaneous FID** for both projects in December 2023, once they were each permitted.⁹³⁸ Lenders would be financing the Symbio Project as a whole, not taking a risk on each constituent part.

693 While the point is therefore moot, even if Symbio had decided to delay FID for the Gazoduq Project, there is no “cardinal rule” that would have prevented positive FID for the GNLQ Project followed later by FID for the Gazoduq Project. Mr Krolick [REDACTED]

[REDACTED]
[REDACTED]⁹³⁹ Likewise, while NextDecade reached FID for its liquefaction project two years ago, its pipeline has not reached FID yet.⁹⁴⁰ He explained:

“[**Mr Krolick.-**] [...] [W]hen you separate them, you do have to be diligent as to how they interface with each other. But it is, again, common practice in a lot of the projects, the big projects that we see in the U.S. So actually having them combined would have been

⁹³⁵ Day-2-ENG, p.493(5-11).

⁹³⁶ *Infra*, Section. 6.2.2.4; **CWS-1 (Second)**, p.19 (¶42).

⁹³⁷ Rejoinder, p.249 (¶865); **RER-9**, p.25 (¶70).

⁹³⁸ **SEC-0070-ENG**, p.41 (“In order to ensure that the development of the pipeline is synchronized with the development of the LNG Project”); **SEC-0101-ENG**, p.7.

⁹³⁹ Day-8-ENG, p.2242(8-17).

⁹⁴⁰ Day-9-ENG, p.2336(3-17); Day-1-ENG, p.118(11-21).

easier, but having them separate is still very much financeable and feasible.”⁹⁴¹

694 **Third**, the Respondent takes issue with Symbio’s development budget of [REDACTED] claiming that this would be insufficient to fund developing both the GNLQ and the Gazoduq Projects.⁹⁴² In particular, it suggests that the [REDACTED] figure excludes Gazoduq’s development costs.⁹⁴³ That is incorrect. The 2021 PPM makes clear that the [REDACTED] estimate includes development capital for the Gazoduq Project, estimated at [REDACTED].⁹⁴⁴ Mr Bidwai explained that, while Symbio “was open to a couple of different possibilities”, such as selling part or all of Gazoduq to a developer, “this [REDACTED] figure was based on the premise that we would be developing [Gazoduq] to FID”.⁹⁴⁵

695 Moreover, Mr Shultz’s bare assertion that the development costs could reach USD 500 million⁹⁴⁶ carries no weight. That claim is unsupported by any evidence or financial modelling, being based solely on his asserted experience – which, as shown above, is entirely lacking. Mr Shultz admitted to not having even reviewed the contemporaneous budget breaking down the [REDACTED].⁹⁴⁷ By contrast, Mr Bidwai explained why that estimate was carefully considered:

“[**Mr Bidwai.**] [...] Our fixed costs were relatively low. We didn’t have -- I mean, if we were running this Project in Houston, we would have very highly compensated employees because it’s a much more competitive labor market. Where we were working, the

⁹⁴¹ Day-9-ENG, p.2337(18)-2338(2).

⁹⁴² Rejoinder, p.345 (¶856); **RER-9**, p.19 (¶53).

⁹⁴³ Day-2-ENG, p.526(7-17).

⁹⁴⁴ **SEC-0070-ENG**, p.11 (“Based on the current development budget, the Partnership expects that it will need approximately [REDACTED] in total development equity”); **SEC-0118-ENG**, tab “funding”; **SEC-0251-ENG**; Day-2-ENG, p.527(3-7) (“My understanding -- and once again, if I looked at the whole document – I’ll try to answer your question without looking at the whole document, but we needed a total of [REDACTED] to get to FID, and that included the pipeline”).

⁹⁴⁵ **SEC-0101-ENG**, p.9; Day-3-ENG, p.748(4-22).

⁹⁴⁶ **RER-9**, p.25 (¶¶68-69).

⁹⁴⁷ Day-9-ENG, p.2411(2)-2413(7).

cost of most employees was relatively low. The cost of office was relatively low. Most of our fixed costs were quite de minimis, and that's part of the reason why we were able to get by with a much more economical development budget than we might have to endure if we were in another location. [...]

We had an experienced team that had been through this before, and these are the numbers that they felt were quite achievable.”⁹⁴⁸

696 **Finally**, in July 2021, it was neither necessary nor expected for Symbio to have a strategic partner.⁹⁴⁹ Comparable LNG projects typically secured a investment from an energy major or a major infrastructure fund shortly before reaching FID.⁹⁵⁰ Thus, Blackstone invested in Cheniere's Sabine Pass project approximately five months before FID,⁹⁵¹ while NextDecade only concluded a framework agreement with TotalEnergies and Global Infrastructure Partners a month before FID for its Rio Grande project.⁹⁵²

697 Even Mr Shultz conceded that strategic investors typically prefer to invest once the project is de-risked, close to FID:

“[**Mr Veit.-**] [...] [Y]ou say that normally there is an expectation that [a] smaller company has derisked the Project before [a] large investor comes on board.

[**Mr Shultz.-**] That's in the ideal world, yes, correct.

[**Mr Veit.-**] So you would expect the strategic investor to invest when the project has been derisked around FID?

[**Mr Shultz.-**] I would hesitate to say that there is an absolute rule. There can be different situations where they would come in earlier. **Ideally from the investor perspective, they come in and it's**

⁹⁴⁸ Day-3-ENG, p.751(13)-752(13).

⁹⁴⁹ Rejoinder, p.346 (¶¶858-861).

⁹⁵⁰ Reply, p.454 (¶1313); Day-1-ENG, p.114(17)-115(11); C-Presentation, p.148; **CWS-8**, p.9 (¶19).

⁹⁵¹ **CWS-8**, p.9 (¶19); **AK-0006**, p.1; **AK-0007**, p.1.

⁹⁵² **CWS-8**, p.10 (¶19); **AK-0005**, p.1; **AK-0011**, p.1.

ready. If it's earlier on and they think it's a good opportunity, they can come in earlier. It is not absolute."⁹⁵³

698 Indeed, Mr Shultz had to admit that "some of these companies start as independent and you can become major".⁹⁵⁴ For instance, he accepted that Cheniere was an independent when it successfully developed the Sabine Pass project,⁹⁵⁵ as was Venture Global when it developed Calcasieu Pass.⁹⁵⁶ With FID targeted for Q4 2023, Symbio was still two or more years out from the time that strategic investors often invest.⁹⁵⁷ It was therefore a sign of the Project's strong financing prospects that Symbio was already in discussions with [REDACTED] [REDACTED] including equity and debt financing.

6.2 The fair market value of the Symbio Project in July 2021 was USD 588 million

699 The Hearing confirmed that Claimant has properly quantified the fair market value of the Symbio Project in July 2021 (**Section 6.2.1**) as USD 588 million, by reference to prior transactions (**Section 6.2.2**) and to Secretariat's DCF calculation which includes reasonable assumptions and accounts for any risks and uncertainties (**Section 6.2.3**).⁹⁵⁸

6.2.1 The relevant valuation date is 21 July 2021

700 The relevant valuation date is 21 July 2021, when Québec refused to authorise the GNLQ Project.⁹⁵⁹ In reference to the Tribunal's Question on the temporal scope of Canada's obligations under the NAFTA,⁹⁶⁰ this date applies if the Tribunal finds that, under Annex 14-C of the USMCA, the substantive obligations under the NAFTA remained in force for a three-

⁹⁵³ Day-9-ENG, p.2419(14)-2420(5).

⁹⁵⁴ Day-9-ENG, p.2407(12-13).

⁹⁵⁵ Day-9-ENG, p.2395(10-19).

⁹⁵⁶ Day-9-ENG, p.2401(10-12).

⁹⁵⁷ Day-2-ENG, p.453(6-13).

⁹⁵⁸ Day-1-ENG, p.121(17)-122(16); **CER-3 (Second)**, p.66 (¶¶4.2-4.3).

⁹⁵⁹ Reply, p.412 (¶¶1206-1213).

⁹⁶⁰ Tribunal's Questions, p.2 (C.4).

year period **or** that the Respondent's acts and omissions, in aggregate, formed a composite act which was in breach of the NAFTA and extended from 2015 to 2022.⁹⁶¹

- 701 In the case of a standalone breach, the relevant valuation date is usually straightforward: in an *ex ante* approach immediately before the breach. For a composite act, however, the appropriate valuation date is not necessarily the first, nor the last, in the series of measures; nor is it necessarily the same as the critical date for jurisdiction. Rather, the relevant valuation date including for "creeping" breaches of FET, is the "watershed" moment at which the investor suffered its "most serious" losses.⁹⁶²
- 702 Here, that "watershed" moment was Québec's Decree of 21 July 2021. Until that point, even with the wrongful parallel EAs and the irregularities in the Québec EA process, the Respondent could have still reversed course. Once the Québec Government refused the GNLQ Project, however, the fate of the Project was sealed – particularly once the Federal Government announced it would follow suit, rather than reaching its own, independent decision under the federal EA. The Respondent seems to accept as much, admitting that Québec's Decree "*a mis fin*" to the Symbio Project – which is why the Respondent takes the same valuation date.⁹⁶³ Secretariat confirmed it had valued the Claimant's losses on this basis:

"[**Mr Neufeld.-**] [...] So the damage you assess, the root cause of the damage you quantify are the EA refusals; correct?

[**Mr. Sequeira.-**] I can tell you my understanding of what it is. My understanding is that Claimants are alleging a series of actions that constitute a composite act that culminated or crystallized in the ultimate destruction of value through the July 2021 Measure or refusal. So that was the -- I said the 'ultimate act,' or, if you want, the watershed event that crystallized the damage, but I understand

⁹⁶¹ *Supra*, Section 2, in particular 2.2, 2.4 and 2.6.

⁹⁶² *Azurix v. Argentina*, **CL-077-ENG**, p.150 (¶¶417-418) and *Enron v. Argentina*, **RL-122-ENG**, p.125 (¶405), *Watkins v. Spain*, **RL-248-ENG**, p.199 (¶679).

⁹⁶³ Counter-Memorial, p.296 (footnote 1223).

there are a series of acts being alleged as part of a composite act that contributed to this destruction of value.”⁹⁶⁴

- 703 Moreover, the choice of valuation date should ensure full compensation.⁹⁶⁵ Here, an earlier date would undercompensate the Claimant because the Claimant – unaware of the irregular conduct of the EA processes, and being told its Project aligned with Québec and federal energy policy – continued to invest, and the Project continued to rise in value, until 2021.
- 704 It is only if the Tribunal finds that the NAFTA's substantive obligations expired on 30 June 2020 and that there was no wrongful composite act, that the value of the Project on 21 July 2021 would not be the relevant measure of compensation. Instead, the measure would be the losses incurred as a result of the Respondent's 2015-2016 breaches, as set out in Section 6.3.2 below.

6.2.2 Prior transactions are an appropriate benchmark for fair market value

- 705 Prior transactions (whether actual or contemplated) are a “useful” method and a “favoured anchorage” in determining the fair market value.⁹⁶⁶ Notably, the tribunal in *Bilcon* adopted this approach in valuing the claimant's loss of opportunity, finding that historical expenditure alone did not capture the “prospect that return on the investment might be generated in the event of the successful permitting [of the quarry]”⁹⁶⁷ and that it could “refer to certain past transactions [...] which allow it to establish an implied value range of the investment opportunity.”⁹⁶⁸ The tribunal relied on those transactions to determine the value of the lost opportunity,

⁹⁶⁴ Day-9-ENG, p.2493(8-20).

⁹⁶⁵ *Karkey v. Pakistan*, **CL-328-ENG**, p.185 (¶670).

⁹⁶⁶ Reply, p.468 (¶1353); S. Ripinsky and K. Williams, *Damages in International Investment Law*, **CL-331-ENG**, p.20 of PDF; **SEC-0369-ENG**, p.2 of PDF (¶5.21); **SEC-0365-ENG**, p.3 of PDF; Day-9-ENG, p.2460(12)-2461(1).

⁹⁶⁷ *Bilcon v. Canada*, **CL-140-ENG**, p.82 (¶288).

⁹⁶⁸ *Ibid.*, p.82 (¶289).

although it adjusted that value downwards to account for the fact those transactions did not fully “price in” permitting risks – unlike here.⁹⁶⁹

706 Applying the prior transactions approach in this case leads to an implied post-money valuation for the Symbio Project of [REDACTED] which was agreed by investors in the fourth financing round, transacting at arm's length. The value of the Project, confirmed by Québec, further increased between 2019 and July 2021 when Québec refused the GNLQ Project.

6.2.2.1 The price paid by the investors reflects the implied value of the Symbio Project

707 As Secretariat explained, the Tribunal has real-world evidence of the value of the Symbio Project from four rounds of funding in which investors acquired, at arm's length, ownership interests in Symbio.⁹⁷⁰ Investors were willing to subscribe for units in Symbio at increasing valuations as the Project was incrementally derisked:



⁹⁶⁹ *Bilcon v. Canada*, **CL-140-ENG**, p.87 (¶302). Compare *supra*, Section 6.1.3.1.

⁹⁷⁰ **CER-3 (Second)**, p.67 (¶4.6-4.7); Day-9-ENG, p.2461(2-8).

⁹⁷¹ **CER-3 (Second)**, p.30 (figure 1).

708 As also explained by Secretariat⁹⁷² and accepted by Accuracy,⁹⁷³ each financing round entailed precedent transactions, as Symbio sold – and investors bought – an interest in the partnership at an agreed price.

709 In 2019, at the start of the fourth round, Symbio's pre-money valuation was set at [REDACTED] did not share its internal methodology leading to [REDACTED] the valuation was effectively the result of a negotiation (as Symbio's sponsors had initially proposed a [REDACTED] ultimately did not invest, the important factor is that other investors accepted and invested at that price per unit, as Mr Sequeira confirmed:

“[Mr Neufeld.-] Right. Now, is it a problem that the valuation amount was set by a company that didn't actually invest in the Project?

[Mr. Sequeira.-] **Not at all. Not if it was also the basis on which a number of other investors, informed investors chose to invest.** So that would not be a problem all because those are -- as I said, those are all arm's-length transactions, where investors, after having reviewed significant amount of information, are choosing to invest and purchase shares at that pre-money valuation.”⁹⁷⁷

710 Symbio went on to secure [REDACTED]
[REDACTED]⁷⁸

711 Accuracy and Mr Shultz initially sought to exclude the [REDACTED] of convertible notes, claiming that they are “unusual” for project

⁹⁷² Day-9-ENG, p.2461(4-5).

⁹⁷³ Day-10-FRA, p.46(36-39) (“*Quand on est un actionnaire existant, quelque part, on est à la fois vendeur et acheteur.*”).

⁹⁷⁴ **CER-3 (Second)**, p.67 (¶4.6).

⁹⁷⁵ Day-2-ENG, p.483(7)-484(11).

⁹⁷⁶ Day-2-ENG, p.484(12-14).

⁹⁷⁷ Day-9-ENG, p.2507(5-15); **SEC-0219-ENG**, p.1.

⁹⁷⁸ Reply, p.468 (¶¶1353-1357); Day-1-ENG, p.120(14-17).

development companies⁹⁷⁹ and indicative of an inability to raise equity.⁹⁸⁰ However, convertible notes have been commonly used by other LNG developers including NextDecade and Venture Global.⁹⁸¹ Symbio also issued convertible notes in each of its first three financing rounds, all of which were subsequently converted into equity; the same would have occurred on closing the fourth round.⁹⁸² Both Accuracy and Mr Shultz retreated from their position and at the Hearing included convertible notes in the funds raised.⁹⁸³

712 The Respondent also contends that the price paid by Symbio's fourth-round investors did not reflect the implied value of the Project since, by July 2021, Symbio had only raised [REDACTED] [REDACTED] targeted in the PPM.⁹⁸⁴ This argument, too, went nowhere at the Hearing.

713 As Secretariat explained, the value of an investment is determined by those who agree to invest, not by those who decline. By analogy, the value of a house is determined by the buyer who completes the transaction, not by potential buyers who decline to purchase.⁹⁸⁵

714 Moreover, as explained above, the targets set out in the PPM are neither requirements nor commitments.⁹⁸⁶ In any event, Symbio would likely have closed the fourth round fully subscribed, were it not for Québec's decision to refuse the GNLQ Project in July 2021.⁹⁸⁷

715 To conclude, the additional capital raised in the fourth round not only confirmed but increased the value of the Symbio Project from [REDACTED]

⁹⁷⁹ **RER-9**, p.21 (footnote 16).

⁹⁸⁰ **RER-5**, p.121 (¶410).

⁹⁸¹ Day-9-ENG, p.2463(13-15); **CWS-8**, p.7(¶¶13); **PTS-0005-ENG**; **PTS-0012-ENG**.

⁹⁸² Day-9-ENG, p.2463(8-12); **CWS-2 (Second)**, p.32 (¶60-61).

⁹⁸³ Accuracy Presentation, p.9; Day-9-ENG, p.2346(4-17); Shultz Presentation, p.6.

⁹⁸⁴ Rejoinder, p.366 (¶¶930-936); Day-1-ENG, p.296(9-13).

⁹⁸⁵ Day-9-ENG, p.2523(21)-2524(9).

⁹⁸⁶ *Supra*, Section 6.1.3.4.

⁹⁸⁷ *Supra*, Section 6.1.3.4.

6.2.2.2 The investments in Symbio were made at arm's-length

716 The Hearing also confirmed that these prior translations were made at arm's length. The Respondent argues that the fourth-round valuation should be disregarded because the investors were not "independent" – either because most (but not all) had invested in previous rounds, or because they allegedly had professional or personal links with other investors.⁹⁸⁸ Those claims do not withstand scrutiny.

717 **First**, the Respondent is unable to cite any authority to support the proposition that tribunals should disregard prior transactions simply because they involve existing investors in the same investment. Notably, Canada successfully argued the opposite in *Bilcon*, namely that the tribunal should consider prior transactions between Bilcon and its joint venture partner.⁹⁸⁹

718 **Second**, there is no reason to disregard such transactions as a matter of economic principle. Investors – whether new or existing – have distinct commercial interests from the company in which they invest and are incentivised not to overpay, as Secretariat confirmed:

“[Mr Sequeira.-] [...] I would say that even if you had only existing investors investing in the fourth round, which is not the case, but let's assume it was, it would still be an arm's length transaction and arm's length price because not all existing investors are investing in each round, and so, there is some investors who are being diluted, and therefore, the checks and balances of that process would dictate that those prices are arm's length prices.”⁹⁹⁰

719 Importantly, investments by existing investors remained arm's length transactions because Symbio could not compel them to subscribe for units at a certain price, nor could they compel Symbio to sell its units at a certain price, *a fortiori* because they only had non-controlling interests, as Secretariat explained:

⁹⁸⁸ Rejoinder, p.368 (¶¶917-923).

⁹⁸⁹ Day-1-ENG, p.120(17-22); *Bilcon v. Canada*, CL-140-ENG, p.82 (¶¶289, 291).

⁹⁹⁰ Day-9-ENG, p.2465(1-9).

“**[Mr Bradshaw.-]** You were also asked about prior transactions, and the definition of Fair Market Value being an arm's length transaction between Parties acting independently. And the example was given of a parent and subsidiary company or a landlord and a tenant. [...] So my question is, how that relates then to a minority or noncontrolling interest. So if I were to buy shares in Apple or even a minority interest in a privately held company, would that make me a related party?

[Mr Sequeira.-] So no. I mean, you can take a minority interest and there are many third parties that would do that. When investors take a minority interest, there is sometimes a question of whether there is some minority discount that you might suffer because you are not controlling the company. You don't have influence on the direction. Some valuation practitioners might, therefore, say, look here, the Fair Market Value of the entire controlling stake is higher because there is some additional value in this case to the Claimant because they are the sponsors of the Project.

We have not taken that view. And part of the reason for that in as you can see in the valuation of the shares in Exhibit C-95 that we looked at, that all shares were ascribed the same price including Claimant shares. And so we have not taken that view, and we have not made any upward adjustments to those prior transactions to reflect Fair Market Value of Claimant's investment.”⁹⁹¹

720 **Third**, while conceding that the fourth round also attracted new investors, the Respondent argues that two of the three new equity investors were not independent because they had professional or personal ties (*e.g.*, sitting on the same boards) to the principals of other investors.⁹⁹² These alleged “ties” are inaccurate or overstated and in any case irrelevant: familiarity among investors does not, by itself, establish a lack of independence.⁹⁹³

⁹⁹¹ Day-10-ENG, p.2654(1)-2655(14).

⁹⁹² Rejoinder, p.369 (¶¶919-923).

⁹⁹³ Day-9-ENG, p.2463(16)-2465(21); Secretariat Presentation, p.15-16.

Tellingly, Accuracy declined to endorse the Respondent's position and agreed that the "venture capitalist space" is tight-knit:

"[**Mr Veit.-**] Would you agree with me that it is a fact that everyone knows everyone in the venture capitalist space? I mean, not everyone, but, you know, it's a tightly knit community?

[**M. Theau-Laurent.-**] *Oui. Oui, les investisseurs se connaissent. Ils se parlent. Oui. Peut-être pas tous, mais...*

[**Mr Veit.-**] There's a finite number of investors, and these professionals move from firm to firm?

[**M. Theau-Laurent.-**] *Oui, oui ça c'est...*"⁹⁹⁴

721 The Respondent further ignores the fact that Symbio's investors owe fiduciary duties to act in the best interest of their limited partners.⁹⁹⁵ Secretariat further explained:

[**Mr Bradshaw.-**] And you were also asked about professional or personal links between investors. And I think the example was given of Mr. Jim Breyer being on the Board of [REDACTED] For the Tribunal's benefit, I should say that is factually inaccurate. But if we assume that some of the Directors or investment managers of investors know one another, again, does that make them related Parties?

[**Mr Sequeira.-**] No. Not at all. And I think this was the main point I was trying to convey, both in my Direct Presentation and my cross, that these investment funds -- you know, [REDACTED] is an investment fund. It has an obligation to its limited partners to invest, you know, and get good returns, invest in a smart and responsible way.

So regardless of whether there is someone in the boat [*sic*], you can always have acquaintances. In fact, that is how sometimes initial leads are assessed and people get, you know, identified, but each

⁹⁹⁴ Day-10-ENG, p.2772(12-21)/Day-10-FRA, p.64(15-24).

⁹⁹⁵ Day-9-ENG, p.2464(12-14).

investor would have to do their own due diligence because they have obligations to their patrons or to their limited partners.”⁹⁹⁶

722 **Fourth**, the Respondent's contention that the existing investors' decisions to invest further capital in Symbio could have been affected by non-market factors like the “sunk costs fallacy” or reputational risks⁹⁹⁷ is unsupported:

- Accuracy acknowledged that the sunk costs fallacy is a well-known cognitive bias⁹⁹⁸ and likely to be known to sophisticated investors, such as [REDACTED] who would typically implement safeguards against irrational decision-making such as investment committees.⁹⁹⁹
- Accuracy retreated from the claim that Symbio's investors were influenced by reputational concerns, in particular as the identity of most investors was confidential, acknowledging that “*c'est davantage un point théorique qu'une application particulière à ce cas.*”¹⁰⁰⁰

723 **Fifth**, Accuracy initially argued that fourth-round investors may have attached value to the redemption rights for AAA-1 units, increasing the amounts they were willing to pay.¹⁰⁰¹ At the Hearing, however, Secretariat explained that these rights had at most “*de minimis*” value, since – in a scenario where the Project failed to reach FID and a majority of investors voted to redeem their units, Symbio would not have had the funds to redeem the units.¹⁰⁰² Accuracy had to admit that their second report was “*inexact*”, that they had overlooked the conditions limiting those redemption rights and that most investors ultimately considered the redemption rights not to have any value, since they waived those rights.¹⁰⁰³

724 **Finally**, Accuracy initially asserted that “several” investors complained about accessing information related to the Symbio Project, suggesting that

⁹⁹⁶ Day-10-ENG, p.2655(15)-2656(14).

⁹⁹⁷ Rejoinder, p.371 (¶¶924-926); Day-1-ENG, p.296(5-8).

⁹⁹⁸ Day-10-FRA, p.58(28-29).

⁹⁹⁹ Day-10-FRA, p.59(17-20, 36-37) (“*Mais il y a des process qui visent à s'assurer que les décisions d'investissement sont bien réalisées, bien sûr.*”).

¹⁰⁰⁰ Day-10-FRA, p.63(15-16).

¹⁰⁰¹ **RER-5**, p.100 (¶¶343-348).

¹⁰⁰² Secretariat Presentation, p.16; Day-9-ENG, p.2465(10-21).

¹⁰⁰³ Day-10-ENG, p.2774(1)-2777(2)/Day-10-FRA, p.64(44)-65(45).

they had not been well-informed.¹⁰⁰⁴ At the Hearing, Accuracy conceded having overstated its argument and confined it to an assertion that [REDACTED]¹⁰⁰⁵ However, that assertion was undermined by Mr Sanschagrín, IQ's Director of Specialised Investment, who confirmed having had access to a [REDACTED]¹⁰⁰⁶

725 Indeed, Symbio's investors expressly warranted that they had conducted their own due diligence and made an "independent decision" to invest,¹⁰⁰⁷ warranting as follows:

"The Investor has obtained or has been encouraged to obtain independent legal, income tax and investment advice [...]. The Investor and its [...] advisers have had a reasonable opportunity to ask questions and receive answers from the Limited Partnership [...] and to obtain additional information [...] necessary to evaluate the merits and risks of an investment [...]"¹⁰⁰⁸

726 There is no basis therefore for the Respondent to suggest that sophisticated investors – including infrastructure funds, venture capital funds, the [REDACTED] and family offices for high-net-worth individuals – would all have acted irrationally or anything other than at arm's length when investing in the Symbio Project.

6.2.2.3 Québec's contemplated investment confirmed Symbio's implied value

727 The Respondent's attempt to dismiss the relevance of prior transactions is further undermined by the fact that the Respondent itself, via the Québec Government, planned to invest in Symbio's fourth round at the very same

¹⁰⁰⁴ **RER-5**, p.84 (¶¶295-298).

¹⁰⁰⁵ Day-10-FRA, p.51(23-28).

¹⁰⁰⁶ Day-4-ENG, p.1092(5-11)/Day-4-FRA, p.83(20-27); **TLV-0129-ENG**. Mr Sanschagrín's assertion at the Hearing that the Project's [REDACTED] (Day-4-ENG, p.1093(10)-1094(19)/Day-4-FRA, p.84(1-24); **TLV-0129-ENG**, rows 240-431).

¹⁰⁰⁷ **R-0279-ENG**, p.8 (s.7 (b)).

¹⁰⁰⁸ *Ibid.*

728 In this regard, Mr Sanschagrin confirmed that the MEI approved [REDACTED]
[REDACTED] before knowing that [REDACTED]
would be investing in the fourth round:

[Mr Bradshaw.-] And underneath we see [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] yes?

Ceci étant, il reste quand même une lacune dans ce dossier, c'est qu'à ce moment-là, on ne sait pas qu'il y a [REDACTED] [REDACTED] qui prétend investir.

[...]»¹⁰¹¹

1012 **R-0270-FRA**, p.3.

Respondent's unsupported assertion that [REDACTED]
[REDACTED]¹⁰¹³

6.2.2.4 The implied value of the Symbio Project increased throughout 2019-2021

- 730 As the Claimant and Secretariat explain, between mid-2019 (when the fourth-round valuation was fixed) and July 2021, the value of the Project likely continued to increase as it passed further milestones.¹⁰¹⁴
- 731 During that period, for instance, GNLQ executed a FEED Agreement and agreed an EPC term sheet with Bechtel, signed GSA and SPA term sheets¹⁰¹⁵ and secured confirmation from Hydro Québec for the availability of 550 MW of renewable power.¹⁰¹⁶ Equally, the Gazoduq Project completed FEED studies for the pipeline, continued extensive local community and Indigenous consultations (including signing an MoU with Mamo Aki), secured confirmation from the MERN for the availability of a 150MW power block and prepared its consolidated Application.¹⁰¹⁷
- 732 Although early 2020 saw a slowdown and part-suspension of work as the pandemic began, by early 2021, GNLQ had completed the BAPE process and progressed discussions with offtakers and gas suppliers. Financially, Symbio had weathered the storm and gained as a new investor [REDACTED] which had [REDACTED]¹⁰¹⁸ In parallel, Symbio was negotiating an [REDACTED] which included financing options¹⁰¹⁹ and a [REDACTED] who envisaged an equity investment of [REDACTED]¹⁰²⁰ Furthermore, Symbio held discussions with [REDACTED]

¹⁰¹³ Day-1-ENG, p.302(18)-303(11).

¹⁰¹⁴ Day-1-ENG, p.120(6-13); Secretariat Presentation, p.17; Day-9-ENG, p.2467(5)-2468(6); Reply, p.470 (¶1358); **CER-3 (Second)**, p.69 (4.8); **CWS-1 (Second)**, p.8 (¶20); **CWS-2 (Second)**, p.22 (s.3) and p.29 (s.4).

¹⁰¹⁵ E.g., **SEC-0113-ENG**; **SEC-0163-ENG**; **JI-0040-ENG**.

¹⁰¹⁶ **SEC-0150-ENG**.

¹⁰¹⁷ E.g., **C-0550-ENG**, p.1; **SEC-0070-ENG**, p.62; **C-0571**, p.1; **CWS-7 (Annex A)**.

¹⁰¹⁸ **SEC-0219-ENG**; **SEC-0220-ENG**; Day-3-ENG, p.717(4-10).

¹⁰¹⁹ **SEC-0110-ENG**; Day-3-ENG, p.718(16)-719(4).

¹⁰²⁰ **SEC-0184-ENG**, p.1; Day-3-ENG, p.717(17-22).

██████████ interesting in investing equity in Gazoduq to “secure a right to construct the Project”.¹⁰²¹

733 All these factors were value-accretive and pointed to considerable positive momentum as the energy market recovered in 2021.

6.2.3 Secretariat's DCF calculation includes reasonable assumptions and accounts for development risks

734 The Claimant further relies on the DCF method to capture the increased value of the Project at July 2021.¹⁰²² Secretariat explained that their DCF valuation is based on the financial models prepared by Société Générale and uses cash flow inputs from independent gas price forecasts, GNLQ's term sheets and the forecast costs in FEED and pre-FEED studies.¹⁰²³ The DCF method was also used contemporaneously by prospective investors, ██████████¹⁰²⁴

735 Although the Respondent argues that the DCF method is inappropriate, the Respondent is content to rely on the ██████████ to the exclusion of all other valuations and contemporaneous transactions, to suits its own case.¹⁰²⁵ The Respondent however overlooks that ██████████ ██████████ was an outlier owing to its abnormally high ██████████ ██████████¹⁰²⁶ Even the MEI contemporaneously put little weight on ██████████ ██████████ when confirming its intention to invest.¹⁰²⁷ ██████████ itself

¹⁰²¹ Day-3-ENG, p.719(7-15).

¹⁰²² Day-1-ENG, p.121(16)-122(16); Reply, p.431 (s.5.2).

¹⁰²³ Day-9-ENG, p.2469(2)-2470(2).

¹⁰²⁴ Day-10-ENG, p.2779(18)-2780(4)/Day-10-FRA, p.66(39-44); **SEC-0205-ENG-FRA**, p.23; SS-0004, p.11 of PDF.

¹⁰²⁵ Day-1-ENG, p.300(19)-301(22). The Respondent's new claim at the Hearing that the ██████████ was “outdated” because it did not value Gazoduq is nonsensical. Having Symbio own Gazoduq allowed it to capture the value of pipeline fees that would otherwise have been paid to a third-party developer. Including Gazoduq would therefore have led to a **higher** valuation for the Symbio Project.

¹⁰²⁶ **CER-3 (Second)**, p.31 (¶3.39).

¹⁰²⁷ Day-4-ENG, p.1113(22)-1114(16)/Day-4-FRA, p.91(25-35).

acknowledged that adopting a discount rate of, e.g., [REDACTED] would result in a valuation of [REDACTED]¹⁰²⁸

- 736 In its DCF model, Secretariat appropriately incorporated project risks via conservative netback pricing assumptions and a PORP. Mr Johnson explained at the Hearing that valuers apply a PORP to pre-production projects to reflect development risks, with a PORP of 4% being consistent with the sources that Accuracy cited in its first report:

“[Mr Johnson.-] [...] The pre-operational risk premium, or PORP, captures additional risk specific to the development stage of these projects as compared to an operating project. Those risks include, for instance, financing and permitting which you’ve heard about.

We rely on a PORP of 4 percent. We consider this to be an appropriate PORP. It is actually in line with the sources that Accuracy set forth in its First Report. You see one of those sources [Exhibit AC-0026] quoted on the bottom of the screen there, which actually recommended a greenfield risk premium of only 1.5 to 2.5 percent.”¹⁰²⁹

- 737 The quadrupling of the PORP from 1% in the *ex post* scenario (which, Mr Sequeira explained, assumes that the Symbio Project would have been permitted, and where the main risks were cost overrun or delay in construction)¹⁰³⁰ to 4% in the *ex ante* scenario is largely due to factoring in permitting and financing risk which the Symbio Project faced in July 2021. By applying a 4% PORP, Secretariat discounts its valuation by USD 1.37 billion on top of the 70% discount resulting from its conservative revenue assumptions.¹⁰³¹ Combined, these adjustments are “effectively equivalent to a PORP of 9 percent if you only included risk in the Discount Rate.”¹⁰³²
- 738 Accuracy has not put forward its own DCF valuation. Nor has it sense-checked [REDACTED] against other development-stage projects

¹⁰²⁸ SS-0004-FRA, p.7 of PDF.

¹⁰²⁹ Day-9-ENG, p.2475(5-16).

¹⁰³⁰ Day-9-ENG, p.2556(20)-2557(22).

¹⁰³¹ Secretariat Presentation, p.23, 25; Day-9-ENG, p.2487(17-21).

¹⁰³² Day-9-ENG, p.2476(3-7).

(which, Accuracy confirmed at the Hearing, would indicate a valuation of well over USD 300 million even for the lowest comparator, Cedar LNG).¹⁰³³ Instead, Accuracy provided certain sensitivities to Secretariat's DCF model "*annulant la valeur des Projects*".¹⁰³⁴ The Hearing confirmed Accuracy's approach to be unrealistic and one-sided. For example:

- While Accuracy argued in its second report for a PORP higher than 4%, it selectively omitted the Vernimmen article recommending a PORP of 1.5%-2.5% that Accuracy had highlighted in its first report. Accuracy's excuse in cross-examination that it "forgot" this source was not credible.¹⁰³⁵ Furthermore, as noted above, it is inappropriate to take the PORP in isolation from Secretariat's conservative net revenue assumptions, which together correspond to an effective PORP of 9%.¹⁰³⁶
- Accuracy's sensitivity assuming a **63%** increase in capex would place GNLQ's capex at approximately **twice** that of U.S. Gulf Coast projects. It would mean GNLQ's capital intensity would exceed Cedar LNG (a small-scale, floating project whose construction costs Accuracy mistakenly overstated by 20%)¹⁰³⁷ and approach the total cost of the Yamal LNG facility and airport in northern Siberia.¹⁰³⁸ Unsurprisingly, Accuracy had to concede in cross-examination that neither Cedar nor Yamal LNG were comparable¹⁰³⁹ and that Bechtel had considered Québec's climate when estimating GNLQ's construction costs.¹⁰⁴⁰

739 Moreover, Accuracy failed to consider that the uncertainties associated with the development of the Project were not purely negative, but also encompassed upsides – e.g., if the Project was completed ahead of schedule or within budget without utilising the (additional) contingency,

¹⁰³³ Day-10-ENG, p.2780(20)-2782(8)/Day-10-FRA, p.67(12-36).

¹⁰³⁴ **RER-5**, p.194 (Annexes 7-9).

¹⁰³⁵ Day-10-ENG, p.2787(20)-2788(13)/Day-10-FRA, p.69(21-43).

¹⁰³⁶ **CER-3 (Second)**, p.96 (¶4.60).

¹⁰³⁷ Day-10-ENG, p.2797(18)-2801(2)/Day-10-FRA, p.73(11)-74(37).

¹⁰³⁸ Day-10-ENG, p.2796(15)-2797(10)/Day-10-FRA, p.72(42)-73(10).

¹⁰³⁹ Day-10-ENG, p.2797(11-17), p.2800(15)-2801(11)/Day-10-FRA, p.73(11-14), 74(1-7)

¹⁰⁴⁰ Day-10-ENG, p.2795(12)-2796(2)/Day-10-FRA, p.72(23-31).

similarly to other North American LNG projects built by Bechtel.¹⁰⁴¹ Accuracy's failure to consider upsides, instead modelling only sensitivities "*annulant la valeur des Projets*", confirms that its approach was reverse-engineered to arrive at the Respondent's desired valuation of zero, rather than an objective assessment of the fair market value of the Project.

6.3 The Respondent's attempts to disprove the Claimant's sunk costs are without merit

740 Since the fair market value of the Symbio Project greatly exceeded historical expenditure owing to the de-risking milestones achieved by Symbio, an award based on historical expenditures, *i.e.*, sunk costs, would significantly undercompensate the Claimant.¹⁰⁴² Nevertheless, the Respondent argues that even an award of sunk costs would supposedly place the Claimant in a better position than it would have been absent any treaty breach.¹⁰⁴³ That assertion, however, rests on the flawed premise that the Symbio Project was effectively doomed and thus worthless as at July 2021 – a premise that, as demonstrated above, does not accord with reality.

741 As explained below, sunk costs would only be an appropriate measure of damages if the Tribunal concluded that the Respondent's 2015-2016 breaches were the only actionable NAFTA breaches (**Sections 6.3.1**). The Respondent's attempts to disprove Symbio's historical expenditures in this scenario are meritless (**Section 6.3.2**).

6.3.1 Sunk costs would be an appropriate measure of loss only if the Tribunal concluded that the Respondent's 2015 and 2016 breaches were the only actionable breaches of the NAFTA

742 On the Respondent's instructions in its Rejoinder, Accuracy sets out two scenarios in which sunk costs could be an alternative measure of damages:¹⁰⁴⁴

¹⁰⁴¹ Day-10-ENG, p.2784(6-14)/Day-10-FRA, p.68(17-22).

¹⁰⁴² Reply, p.481 (s.5.3.3); Day-9-ENG, p.2478(19)-2479(8); Secretariat Presentation, p.31.

¹⁰⁴³ **RER-5**, p.378 (¶¶946-948).

¹⁰⁴⁴ **RER-5**, p.169 (¶596).

- a) as an alternative measure of fair market value; or
- b) where they represent irrecoverable costs that the Claimant would not have invested in the counterfactual scenario.

743 As regards the **first scenario**, sunk costs should not be used to value the Symbio Project where there is other, more reliable valuation evidence. Sunk costs have little correlation to the fair market value of an asset and have been treated as a “bottom line” below which compensation should not fall, where no other methodologies seem appropriate.¹⁰⁴⁵ Accuracy acknowledges that sunk costs might only be an appropriate measure of damages “*quand les incertitudes ont été jugées trop importantes.*”¹⁰⁴⁶

744 There is no reason for the Tribunal to reach that conclusion in the present case. As explained *supra*, Section 6.2, the Tribunal has at its disposal empirical and reliable evidence of the Symbio Project's fair market value, namely: (i) prior transactions involving the Project and (ii) a DCF calculation which incorporates the “uncertainties” of a development-stage project. Since there is reliable evidence of the Project's fair market value available, there is no reason to resort to sunk costs as a loose proxy.

745 As for the **second scenario**, it would arise should the Tribunal conclude (*quod non*) that (i) the substantive obligations of the NAFTA expired on 30 June 2020 and (ii) there was no wrongful composite act. In that case, as noted *supra*, Section 2.6, in answer to the Tribunal's questions, the Tribunal would still have to rule on the following claims:

- a) on 10 December 2015, the MELCC failed to defer to the Agency and issued the Directive, commencing its own EA, in breach of Articles 1102, 1103 and 1105 NAFTA;
- b) on 15 January 2016, the Agency failed to initiate a single federal EA or a joint (or cooperative) EA with the MELCC, thereby breaching Articles 1102, 1103 and 1105 NAFTA.

¹⁰⁴⁵ Reply, p.482 (¶¶1393-1396), citing *Khan Resources v. Mongolia*, **CL-345-ENG**, p.106 (¶409).

¹⁰⁴⁶ **RER-5**, p.169 (¶597(b)).

- 746 The Tribunal would then need to determine what losses flowed from those breaches and determine damages consistent with the principle of full reparation.
- 747 As explained in Section 3.2.5, in that scenario, it would not be possible to know precisely what would have happened but for the Respondent's breaches, and therefore whether the Québec and Federal Governments would have approved or nevertheless refused to approve the GNLQ Project.
- 748 However, what is clear is that the Claimant did suffer a loss as a result of those breaches alone: the irregularities in the GNLQ Project's EA process stemmed from Québec, at the outset, wrongfully asserting control over the EA process and the ultimate decision on whether the Project would go ahead, and the Federal Government allowing that to happen despite the clear framework calling for a single federal EA or a joint EA. Not only that, but the Québec and Federal Governments concealed the lack of coordination between the EA processes. Meanwhile, the Claimant invested [REDACTED] was expended from January 2016 onwards – in the Symbio Project on the expectation of a fair and lawful EA process.¹⁰⁴⁷ It would not have done so if it had been aware of the serious irregularities that were unfolding.
- 749 In such circumstances, as Accuracy acknowledges,¹⁰⁴⁸ it would be appropriate to award the Claimant its historical expenditures on the Symbio Project, on the basis that they represent the amount the Claimant was induced to invest on the expectation of a fair and lawful EA process, but which it would not have invested otherwise.
- 750 Full reparation further entails that interest would be payable on the amounts invested as of the date they were invested. Such interest, or an uplift for inflation, is required to compensate for the time value of money since the investor made its investments.¹⁰⁴⁹ Secretariat has set out the sums

¹⁰⁴⁷ CER-3 (Second)–Appendix M.

¹⁰⁴⁸ RER-5, p.169 (¶597(a)).

¹⁰⁴⁹ I. Marboe, “International Standard, Base of Value and Valuation Approaches”, CL-336-ENG, p.21 (¶4.146). In *PSEG v. Turkey*, at Exhibit CL-199-ENG, p.89 (¶351), as the claimant

invested on an annual basis.¹⁰⁵⁰ To simplify the calculation of interest, the Claimant, in this scenario, claims interest on the amounts invested in a given year as of 31 December of that year.

6.3.2 The Claimant has proven Symbio's historical expenditures on the Symbio Project

- 751 The Hearing showed that the Respondent's attempt to cast doubt on Symbio's historical expenditures fails.
- 752 **First**, the Respondent complains that GNLQ's and Gazodug's financial statements for 2020-2022 were not audited and, by excluding most expenses in those years, sought to reduce the total sunk costs by [REDACTED]¹⁰⁵¹ However, as Secretariat noted, companies are often valued using unaudited accounts¹⁰⁵² and there is no rule of law preventing the use of unaudited accounts in calculating damages.¹⁰⁵³ Furthermore, pursuant to the Tribunal's document production order, the Claimant produced a sample of invoices for 2020-2022 together with an accounts extract of its top suppliers.¹⁰⁵⁴ Accuracy admitted that it had not taken any issue with this sampling method, but simply aggregated the invoices in the sample – which is contrary to a sampling approach.¹⁰⁵⁵
- 753 As for the discrepancies alleged by Accuracy in certain, non-audited years, Secretariat explained that these “primarily relate to noncash items which therefore don't impact [its] quantification”.¹⁰⁵⁶ Secretariat's quantification

had not provided a year-by-year breakdown of expenses, the tribunal ordered interest to run from the midpoint date.

¹⁰⁵⁰ **CER-3 (Second)**, p.132 (Table 12); **CER-3 (Second)–Appendix M**.

¹⁰⁵¹ Rejoinder, p.382 (¶957-958); Day-10-ENG, p.2802(3-18)/Day-10-FRA, p.74(43)-75(9).

¹⁰⁵² Day-9-ENG, p.2478(9-13).

¹⁰⁵³ *Casinos v. Argentina*, **CL-391-ENG**, p.179 (¶532); *Ebrahimi v. Iran*, **CL-392-ENG**, p.47 (¶173).

¹⁰⁵⁴ PO5, Annex A, p.95 (Request No. 32).

¹⁰⁵⁵ Day-10-ENG, p.2803(1)-2805(2)/Day-10-FRA, p.75(13)-76(2).

¹⁰⁵⁶ Day-9-ENG, p.2478(2-8).

is confirmed by the fact that the sunk costs quantified align closely with the total funds raised by Symbio.¹⁰⁵⁷

754 **Second**, contrary to the Respondent's assertions, the costs in GNLQ's and Gazoduq's statements were incurred in connection with the Project. Accuracy conceded that both GNLQ and Gazoduq were special purpose vehicles whose only business was the Symbio Project.¹⁰⁵⁸ The only supposedly unrelated expenses identified by the Respondent were for feasibility work on hydrogen production at GNLQ, which it claims related to "a whole new project idea" that was "undertaken after July 21, 2021".¹⁰⁵⁹ That claim is false:

- As Mr Bidwai has explained, starting from 2019-2020, Symbio investigated producing liquid hydrogen from natural gas as a combined offering alongside LNG. Liquid hydrogen would be exported from the same terminal [REDACTED]¹⁰⁶⁰ It was thus an ancillary part of the GNLQ Project, albeit one to which Secretariat conservatively ascribed no value, which was rendered impossible when the GNLQ Project was refused.¹⁰⁶¹
- The two invoices on the hydrogen feasibility study identified by the Respondent were commissioned by GNLQ and relate to work between 30 April and 2 July 2021, *i.e.*, before Québec's Decree.¹⁰⁶²
- In any event, the total of the two invoices is around [REDACTED] or less than 0.1% of the Claimant's sunk costs.¹⁰⁶³

755 **Third**, although Accuracy says it cannot verify whether transactions with Freestone were on commercial terms, GNLQ's and Gazoduq's auditors

¹⁰⁵⁷ CER-3 (Second), p.132 (footnote 649).

¹⁰⁵⁸ Day-10-ENG, p.2805(4-7)/Day-10-FRA, p.76(3-5).

¹⁰⁵⁹ Day-1-ENG, p.309(2-12).

¹⁰⁶⁰ CWS-2, p.77 (¶¶210-220).

¹⁰⁶¹ Day-10-ENG, p.2651(20)-2653(11).

¹⁰⁶² ACC-0068-ENG; ACC-0069-ENG.

¹⁰⁶³ As shown in ACC-0068-ENG; ACC-0069-ENG and noted by Secretariat: "I know there are, I want to say, two invoices provided related to work that the Wood Group did in exploring this option. I think the total there is about [REDACTED] or something like that." (Day-10-ENG, p.2633(16-20)).

confirmed that all related party transactions were in the normal course of business¹⁰⁶⁴ and Symbio's investors, sophisticated parties, also reviewed the contracts with Freestone.¹⁰⁶⁵ Mr Bidwai's evidence on Freestone's commercial and technical services was not questioned in cross-examination.¹⁰⁶⁶ Moreover, Symbio's costs were in line with other North American LNG projects, which also supports their reasonableness.¹⁰⁶⁷

756 At the Hearing, the Respondent claimed that:

“[...] 75 percent of the expenses reported in the Claimant's accounts relate to three categories, taking place in large measure outside Canada. In particular, payments to Freestone, Symbio's parent company, amounted to 33 percent of Investment Costs. Travel Costs ate up another 17 percent. And foreign personnel costs another 24 percent.”¹⁰⁶⁸

757 The evidence on record shows that statement to be, again, misleading or plain wrong:

- The “33% percent” for “payments to Freestone” includes both fees and expenses (*e.g.*, US-based contractors hired by Freestone and recharged) and is inflated by excluding 2020-2022, when Freestone waived its fees. In fact, over the entire period, transactions involving Freestone represented only half as much as alleged by the Respondent (17% of total expenditure),¹⁰⁶⁹ of which service fees were far less than half.¹⁰⁷⁰

¹⁰⁶⁴ *E.g.*, C-0338-ENG, p.11 and C-0341-ENG, p.10.

¹⁰⁶⁵ CWS-2 (Second), p.38 (¶72).

¹⁰⁶⁶ CWS-2 (Second), p.36 (¶¶69-71).

¹⁰⁶⁷ CER-3 (Second), p.125 (¶¶6.1-6.2).

¹⁰⁶⁸ Day-1-ENG, p.306(19)-307(4).

¹⁰⁶⁹ [REDACTED]

¹⁰⁷⁰ Although Accuracy emphasises the service fee paid to Mr Illich via Freestone (RER-5, p.181 (¶¶640-642)), Accuracy (a) double-counts this fee, which was a maximum of [REDACTED] (b) omits that Mr Illich waived this fee after March 2020 and (c) does not compare this to other development-stage LNG projects. In 2021, the chairman of NextDecade, *e.g.*, was paid USD 9.2 million, including USD 1.35 million in cash: SEC-0490-ENG, p.57.

- The “17 percent” figure is not for travel but rather the total of what Accuracy calls “administrative expenses **and** travel”, most of which consists of office rental and other corporate expenses.¹⁰⁷¹
- The “24 percent” figure relates to staff salaries and benefits generally – and not, as the Respondent asserted, “**foreign** personnel”.¹⁰⁷² In fact, GNLQ’s and Gazoduq’s employees were largely in Canada.¹⁰⁷³
- The Respondent compounded its errors by adding the misleading figures above to arrive at a total of 75%, even though the first two categories overlapped, resulting in double-counting.¹⁰⁷⁴ In any event, there is nothing surprising, let alone improper, in the Claimant’s expenditure being mostly comprised of the costs of staff, consultants (such as technical and environmental experts) and office expenses.

758 As for the Respondent’s complaint that the sunk costs were incurred “in large measure” outside Canada, it is not only inaccurate, but irrelevant.¹⁰⁷⁵ What matters is that the costs were incurred to advance the Project.

759 **Fourth**, the Respondent’s argument that costs related to Gazoduq should be excluded also fails.¹⁰⁷⁶ The Gazoduq Project was envisaged to supply, and its viability depended on, the GNLQ Project. The refusal of one project (*i.e.*, the GNLQ Project), in the Respondent’s own words, “*aurait nécessairement entraîné la fin de l’autre*”,¹⁰⁷⁷ rendering as wasted the costs expended on Gazoduq.

760 **Finally**, the Respondent suggested belatedly at the Hearing that some of Symbio’s technical studies and other work might be “repurposed” such that the costs were not completely wasted.¹⁰⁷⁸ This argument goes nowhere. It is undisputed that, without environmental approval (in particular, without approval to navigate on the Saguenay, which Québec’s Decree purported

¹⁰⁷¹ **RER-5**, p.176 (Figure 63).

¹⁰⁷² *Ibid.*

¹⁰⁷³ **CWS-1**, p.28 (¶¶72-76); **CWS-3**, p.7 (¶21).

¹⁰⁷⁴ **RER-5**, p.176 (Figure 63).

¹⁰⁷⁵ Rejoinder on Jurisdiction, p.126 (¶¶359-360 and references therein).

¹⁰⁷⁶ **CWS-1**, p.28 (¶¶73-76); **CWS-3**, p.7 (¶21).

¹⁰⁷⁷ Counter-Memorial, p.265 (¶667 and footnote 1223).

¹⁰⁷⁸ Day-10-ENG, p.2641(9)-2642(9).

to rule out), there can be no facility on the GNLQ site. Symbio's technical studies were specific to a hydroelectricity-powered LNG facility on the Saguenay site and the pipeline needed to supply it; they are of no utility to another LNG developer at a different site. Equally, GNLQ's commercial studies, which envisaged exports from Saguenay in the market conditions as they existed at the time, are of no value to another developer in another location today. The absence of residual value is confirmed by the fact that, after 21 July 2021, no-one invested further in Symbio.¹⁰⁷⁹

6.4 Currency and interest

- 761 For the foregoing reasons, the Claimant is entitled to damages in the sum of USD 588,140,000. The Tribunal should award interest on this sum from 21 July 2021 to the date of payment of the award.¹⁰⁸⁰
- 762 The Respondent now concedes that the interest rate must match the currency of the award, but pivoted in its Rejoinder, seeking to justify interest at the Canadian sovereign bond rate, to argue that compensation should be awarded in CAD.¹⁰⁸¹
- 763 Here, the appropriate currency for compensation is USD. This is the currency in which Symbio raised funding from investors, in which GNLQ would have earned its sales revenues and incurred most of its costs, in which the contemporaneous models and valuations were denominated and in which the Claimant, a U.S. investor, would have repatriated its returns.¹⁰⁸² Awarding compensation in CAD would expose the Claimant to a foreign exchange risk that it would not bear in the but-for scenario. Worse, if compensation is converted to CAD as at the valuation date (or earlier), the devaluation of the CAD against the USD in recent years would lead to significantly undercompensating the Claimant.¹⁰⁸³

¹⁰⁷⁹ Day-10-ENG, p.2656(15)-2657(2).

¹⁰⁸⁰ Should the Tribunal award a lesser sum, based on sunk costs, instead of the fair market value, interest would be payable from the end of each year in which the costs were incurred: *supra*, Section 6.3.1.

¹⁰⁸¹ Rejoinder, p.390 (¶977).

¹⁰⁸² C-Presentation, p.158.

¹⁰⁸³ Day-1-ENG, p.123(9)-124(2).

- 764 The only rationale put forward by the Respondent as to why CAD is appropriate is that the Claimant's subsidiaries were in Canada and would have had to pay taxes in the local currency.¹⁰⁸⁴ However, there is no reasoned basis for focusing on the location of the **investment** (rather than the **investor**), which would mean that compensation must **always** be denominated in the host State currency. This is also contrary to the practice of investment tribunals.¹⁰⁸⁵
- 765 The Tribunal should therefore award compensation in USD, with interest at U.S. Prime + 1%, compounded annually. The Respondent's objection to the 1% margin over U.S. Prime (even though 1% is at the lower end of margins awarded by tribunals)¹⁰⁸⁶ is misguided. Specifically, the Respondent compares U.S. Prime + 1% as a floating rate with the forecast cost of debt of the GNLQ Project at the valuation date in July 2021, to argue that the former is excessive.¹⁰⁸⁷ This comparison is misleading, as interest rates have fluctuated with time. Comparing like-for-like, the cost of debt in July 2021 was equal to U.S. Prime + 1.25%, which speaks to the reasonableness of U.S. Prime + 1% as an interest rate.¹⁰⁸⁸

¹⁰⁸⁴ Rejoinder, p.390 (footnote 1809).

¹⁰⁸⁵ E.g., *Gemplus v. Mexico*, at **Exhibit CL-120-ENG**, p.364 of PDF (¶16-18) ("Given that the Claimants were foreign investors and that Mexican currency is historically subject to fluctuation, it would be reasonable to assume that the Claimants, if fully compensated by the Respondent on [the valuation date], would have required payment in US\$ [...]").

¹⁰⁸⁶ Reply, p.487 (s.5.4.1).

¹⁰⁸⁷ Accuracy Presentation, p.28.

¹⁰⁸⁸ **CER-3 (Second)**, p.97 (¶4.62); **C-0316-ENG**, p.4.

7 PRAYERS FOR RELIEF

766 The Claimant respectfully renews its requests for relief, as stated at paragraph 1434 of the Claimant's Reply.

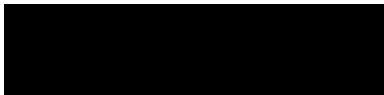
Respectfully submitted,

24 March 2026

For and on behalf of the Claimant,

Ruby River Capital LLC

Counsel for the Claimant



Domitille Baizeau
Marc D. Veit
Lorraine de Germiny
Augustin Barrier
Robert Bradshaw
Isabella Cannatà
Robert Denison
Margaux Bergère