INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RUBY RIVER CAPITAL LLC

Claimant

v.

CANADA

Respondent

(ICSID Case No. ARB/23/5)

CLAIMANT'S REJOINDER ON THE RESPONDENT'S REQUEST FOR BIFURCATION

---

14 March 2024

***Counsel for Claimants*:**

Christophe Bondy
Alexandre Genest
Emmanuel Giakoumakis
Michael Lee
Lindsey Dimond

Steptoe International (UK) LLP
5 Aldermanbury Square
London, EC2V 7HR
United Kingdom

Table of Contents

I. INTRODUCTION

1. The context of the Respondent's request for bifurcation (the **Request**) is its failed attempt to seek suspension of the proceedings in late December 2023.[1] The Respondent sought suspension in light of a jurisdictional objection being aired in an unrelated NAFTA proceeding, while patently failing to confirm its own position on that same objection.[2] After the Tribunal rejected the Respondent's request for suspension on 31 December 2023,[3] by 5 January 2024 the Respondent had put forward the present Request on the basis of three novel jurisdictional objections — and notoriously, failed to raise precisely the objection that had been the basis for its request for suspension, only two weeks prior.

2. Not surprisingly, as the Claimant will briefly recall here, all three of the Respondent's newly-concocted objections are convoluted and strained. They provide no compelling basis for bifurcation.

3. This simply confirms the Respondent's Request for what it really is: a procedural tactic, meant to do nothing more than delay the present proceedings, if only for the period of addressing this Request. The Respondent's tactics deserve no reward, and to the contrary stand to be rejected and sanctioned with costs.

4. The Respondent having now filed its Reply on Bifurcation (**Reply**), the Claimant here seeks to assist the Tribunal by summing up the results of the parties' exchanges, demonstrating why the Respondent's Request should fail.

5. To recall, the test for bifurcation under Rule 44(2) of the (2022) ICSID Arbitration Rules reads as follows:

> "(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> (a) bifurcation would materially reduce the time and cost of the proceeding;
>
> (b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
>
> (c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical."

6. In its Reply, the Respondent has once again failed to meet its burden of proof under ICSID Rule 44(2) and explain why any of the three objections it presents warrant bifurcation.

---

1 Respondent's Request for Suspension of Proceedings (22 December 2023), paras. 1-4.

2 Claimant's Observations on Respondent's Request for Suspension of Proceedings (28 December 2023), paras. 66-67.

3 Letter from Mr. Benjamin Garel to the parties (31 December 2023), pp. 1-2.

7. On its first objection – concerning the alleged lack of an "investment" under Article 25(1) of the ICSID Convention – bifurcation would materially and unduly *increase* the time of the proceedings, contrary to ICSID Rule 44(2)(a).[4] Based upon the parties' submissions, if the Tribunal were to bifurcate but then either reject the Respondent's objections or join them to the merits, bifurcation would increase the length of the entire proceeding by at least 1⅓ years according to the Respondent's own calculations, and more likely by up to 2½ years according to the Claimant's.[5] The Respondent's briefer delay estimates rely upon a self-serving "fast track" approach to a bifurcated phase, assuming that the Tribunal will cut short the Claimant's right to be heard in response to the Respondent's jurisdictional challenges – an obvious violation of procedural fairness.[6] The Respondent also has nothing to say on the increased costs that bifurcation would entail.[7] Its Request therefore fails under Rule 44(2)(a).

8. The Respondent's suggestion that its first objection "would dispose of substantial portion of the dispute" under ICSID Rule 44(2)(b) is belied by the objection's intrinsic lack of substance and low chances of success.[8] The Respondent does not contest that the Claimant held investments within the meaning of NAFTA Article 1139.[9] Rather, its objection relies on an unprecedented reading of Article 25(1) of the ICSID Convention. In its Reply, the Respondent newly argues that Article 25(1) of the ICSID Convention requires State "admission" or "authorisation", regardless of any definition of "investment" or related conditions under the instrument of consent.[10] This interpretation is divorced from the text, context, object and purpose and drafting history of the Convention, which deliberately did not include any substantive rules governing the admission, promotion or protection of foreign investments.[11] The Respondent's only support for this implausible argument is a misleading reference to a handful of arbitral awards, taken out of their factual and legal context.[12]

9. The Respondent's first objection also fails to fulfil ICSID Rule 44(2)(c). The Respondent's Reply provided no response to the Claimant's demonstration that the determination of the existence of an "investment" requires a holistic assessment of the

---

4 Claimant's Response to Respondent's Bifurcation Request (5 February 2024), paras. 139-146 (**Claimant's Response**).

5 Réplique à la Réponse de la Demanderesse quant à la Demande de Bifurcation du Canada (26 February 2024), para. 112 (**Respondent's Reply**); Claimant's Response, paras. 141-142.

6 *See* paras. 30 to 35 below. *See also* Respondent's Reply, para. 102 and Tableau 3.

7 Claimant's Response, paras. 147-152.

8 Claimant's Response, Section II.C below.

9 *See* para. 52 below. *See also* Respondent's Reply, fn 10; Claimant's Response, para. 16.

10 Respondent's Reply, paras. 9-24.

11 *See* Section II.C.(a) below. *See also* Claimant's Response, paras. 75-91.

12 Claimant's Response, paras. 30-38 and 56-79. *See also* paras. 67-69 below.

Claimant's operations, a matter wholly intertwined with the merits.[13] Instead, the Respondent proposes that the Tribunal disaggregate the Claimant's investment, assessing the status of each component in isolation (and without reference to the broader context of the Claimant's investment activities and dealings with the Respondent).[14] This approach finds no basis in the practice of ICSID tribunals.[15] The Respondent moreover concedes that if the first objection were rejected or joined to the merits, bifurcation would duplicate the work of the parties, their counsel and the Tribunal in reviewing the evidence related to the existence of an investment and the Claimant's expropriation claim.[16] The only difference of view here is on the extent of duplication, which in the Claimant's submission would be substantial.

10. The Respondent's second objection, regarding the NAFTA Article 1117(2) time bar, again fails all three criteria under ICSID Arbitration Rule 44(2). First, addressing this isolated objection in a preliminary phase would manifestly fail to reduce the overall time or cost of the proceeding (Rule 44(2)(a)).[17] The Reply has no response on this front. Second, preliminary determination of this point would fall well short of disposing of all or any substantial portion of the dispute (Rule 44(2)(b)). The Respondent relies on a bare assertion to the contrary, which must fail.[18] Third, the Respondent's strained depiction of when the Claimant should have known about the NAFTA breach and related damage simply underlines the extent to which this objection is intertwined with the merits, to the point that it makes its bifurcation impractical (Rule 44(2)(c)).[19] Otherwise, the Respondent in its Reply seeks to sow confusion about the Claimant's substantive submissions. The Claimant has alleged breaches and related damages arising out of the organisation of the environmental review that became obvious only in light of events which post-dated the time bar under NAFTA Article 1117(2). The Respondent's mischaracterisation of the Claimant's position does not make its objection "serious".[20]

11. The Respondent equally fails to meet its burden under ICSID Rule 44(2) regarding its third jurisdictional objection, that a specific claim falls outside the scope of the Claimant's introductory pleadings. The Respondent fails to explain why the Tribunal should undertake the significant additional expense of a preliminary phase, merely to determine a limited aspect in the Claimant's case (contrary to Rule 44(2)(a)).[21] The Respondent has

13 Claimant's Response, para. 104.

14 Respondent's Reply, para. 30-44; Request for Bifurcation, paras. 37-42.

15 Claimant's Response, paras. 96-108.

16 Respondent's Reply, para. 88. *See also* paras. 45 to 50 below.

17 Claimant's Response, para. 203. *See also id.*, paras. 120, 126-127, 143.

18 Claimant's Response, paras. 204-206. Respondent's Reply, para. 123. *See also* paras. 75-77 below.

19 Claimant's Response, paras. 190-198. *See also* paras. 81 to 82 below.

20 Claimant's Response, paras. 173-189. *See also* Section III.B below.

21 Claimant's Response, paras. 230-231. *See also* Section IV.A below.

also failed to explain how this limited objection would dispose of "a substantial portion of the dispute" as required by Rule 44(2)(b).[22] Finally, the Respondent gives no meaningful rebuttal to the Claimant's demonstration that this objection is intertwined with the merits of this dispute, making bifurcation impractical under Rule 44(2)(c). Whilst the Respondent asserts that it will not be necessary to examine issues of substance in a "substantial matter", one may only understand the impugned measures (a March 2020 media leak by Québec, deliberately harming the Claimant) by considering the facts leading up to Québec's wrongful refusal in July 2021 – clearly, matters for the merits.[23] In any event, a close reading of the introductory pleadings confirms that the Claimant argued that the disingenuous conduct of the Québec Government in the lead-up to the wrongful refusal of the Projects amounted to a breach of NAFTA Article 1105. The Claimant set out the factual basis for its claims at a reasonable level of detail, and confirmed that its claims included facts that occurred prior to and after July 2020.[24] The Respondent's attempt to cast aspersions on these claims is not serious, and warrants no bifurcation.

12. In what follows, the Claimant will focus on the issue before the Tribunal – whether or not to bifurcate – addressing only in an incidental manner the Respondent's Reply arguments on the substance of its objections, which stand to be fully addressed along with the merits of this dispute.

II. THE RESPONDENT'S FIRST OBJECTION DOES NOT WARRANT BIFURCATION OF THE PROCEEDINGS

A. The Respondent has failed to explain why "bifurcation would materially reduce the time and cost of the proceeding" (ICSID Rule 44(2)(a))

13. In its Reply, the Respondent has once again failed to establish why its first objection meets the test under the first branch of ICSID Rule 44(2), and show that bifurcation would "materially reduce the time and cost of the proceeding".

14. *First*, the Respondent has come up with *no* response to the Claimant's demonstration that bifurcation on the basis of the first objection would materially increase the costs of this arbitration.[25] And for good reason: there is none. The Claimant's arguments on this point stand uncontested.

---

22 Claimant's Response, paras. 232-233. *See also* Section IV.A below.

23 Claimant's Response, paras. 228-229. Respondent's Reply, para. 93. *See also* paras. 99 and 107 below.

24 Claimant's Response, paras. 215-220. *See also* paras. 103 to 107 below.

25 Claimant's Response, paras. 147-152.

15. *Second*, the Respondent has come up with no convincing arguments refuting the Claimant's demonstration that bifurcation on the basis of the first objection would materially increase the time of this arbitration.[26]

16. As explained in the Claimant's Response on Bifurcation, the ordinary meaning of the phrase "would materially reduce" requires a tribunal to determine whether bifurcation would *actually* achieve procedural efficiency and fairness in light of the circumstances of the case, including a preliminary assessment of the likelihood of success of the objection in question.[27] In its Reply, the Respondent has chosen simply to ignore the Claimant's review of the new ICSID Rule 44(2)(a), which is grounded on the text and drafting history of this provision.

17. The Respondent instead asserts that previous tribunals have limited their enquiry to whether the objection is *prima facie* "serious" or "frivolous".[28] Any different interpretation, in the Respondent's view, would require the Tribunal to prejudge the substance of the objections presented in the written submissions on bifurcation, in breach of procedural equality.[29] In short, the Respondent would have this Tribunal interpret Rule 44(2)(a) to the effect that an objection is likely to reduce the length of the proceedings if it is merely *prima facie* arguable, regardless of its likelihood of success.[30]

18. There is no textual basis in the new ICSID Rule to support the Respondent's interpretation. Rule 44(2)(a) requires the party seeking bifurcation to demonstrate that bifurcation will enhance the efficiency of the process. In its ordinary meaning, "materially" means "in a clear and definite or important way".[31] Considering whether a "material reduction" in time is more likely than not to occur depends *inter alia* on some assessment of the chances of success of the objection. This is a *prima facie* test of chance of success, for the limited purposes of considering a request for bifurcation.

19. To buttress its position, the Respondent refers to the decisions of two UNCITRAL tribunals.[32] Neither of these decisions supports the Respondent's flawed interpretation of Rule 44(2)(a). The Respondent fails to mention that in *Resolute Forests* and in *Philip Morris*, the two tribunals applied Article 21(4) of the (1976) UNCITRAL Rules and Article 23(3) of the (2010) UNCITRAL Rules, respectively. These rules went as far as

---

26 Claimant's Response, paras. 139-146.

27 Claimant's Response, paras. 125, 133-136.

28 Respondent's Reply, para. 118.

29 Respondent's Reply, para. 117.

30 Demande de Bifurcation du Canada (5 January 2024), paras. 77-78 (**Request for Bifurcation**); Respondent's Reply, paras. 117-118; and the observations set out in Claimant's Response, paras. 115-127.

31 Definition of "materially" from the Oxford Advanced Learner's Dictionary (available online).

32 Respondent's Reply, para. 118, footnote 131.

prescribing a *presumption* in favour of bifurcation or granted a much wider margin of discretion.[33] This is evidently not the case under ICSID Rule 44(2)(a).

20. The Respondent also relies on an ICSID case decided roughly a decade ago, under the old (2006) ICSID Arbitration Rules. These former Rules set out a different test from that found in new ICSID Rule 44(2)(a), which expressly directs the tribunal to assess whether bifurcation "would materially reduce the time" of the proceeding.[34] The Respondent makes no comment on the drafting history of Rule 44(2)(a), which shows why the old ICSID Rule on bifurcation was amended. The *travaux préparatoires* confirm that the drafters of the 2022 ICSID Rules were concerned by the fact that bifurcation, on average, significantly added to the length and cost of ICSID proceedings, and that under the new Rule tribunals must examine whether bifurcation would *actually* reduce the time of the proceedings in a "material" way.[35] The Claimant's arguments on the *travaux* of Rule 44(2)(a) stand uncontested.

21. *Third*, the Respondent tries to challenge the statistical evidence presented by the Claimant in its Response, presumably to argue that bifurcation, on average, has resulted in shorter and more efficient proceedings.[36]

22. A closer look at the statistical data discredits the conclusions the Respondent seeks to draw. According to the data compiled by the ICSID Secretariat for the period 1 January 2015 – 30 June 2017, in the 15 cases that were bifurcated and led to an award declining jurisdiction, the average length of the proceeding (749 days) was 587 days shorter than the average length of all 63 cases that occurred in the examined period (total average: 1,336 days).[37] On that basis, the Respondent argues that bifurcation resulted in shorter proceedings when compared to cases where the tribunal granted bifurcation but denied

---

33 *Resolute Forest Products Inc. v. Canada* (UNCITRAL, PCA Case No. 2016-13), Procedural Order No. 4 (Decision on Bifurcation), 18 November 2016, para. 4.3, **Exh. RL-0052-ENG** ("As a starting point, Article 21(4) of the UNCITRAL Rules provides that '[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.' This creates a presumption in favour of bifurcation"); *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12), Procedural Order No. 8, 14 April 2014, para. 101, **Exh. RL-0058-ENG** ("As the Parties agree, the issue of bifurcation is subject to Article 23(3) of the UNCITRAL Rules of 2010 which provides that the Tribunal 'may' bifurcate, while the preceding UNCITRAL Rules of 1976 (which are not applicable to this procedure) provided that the Tribunal 'should rule' for bifurcation. (…) The Tribunal agrees with the Claimant that the new version can only be interpreted as giving the Tribunal a wider discretion"). (All emphases added.)

34 *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013, para. 37(b), **Exh. RL-0057-ENG**, where the *Emmis* tribunal held that it had to assess "[w]hether the request, if granted, would lead to a material reduction in the proceedings".

35 Claimant's Response, paras. 128-136.

36 Respondent's Reply, paras. 94-97.

37 By contrast, the average length of the 14 cases that were bifurcated and led to an award upholding jurisdiction was 1,893 days, which is 557 days longer than the average length of all 63 cases. *See* ICSID Secretariat, "Proposals for Amendment of the ICSID Rules: Working Paper" vol 3 (2 August 2018), "Schedule 9: Addressing Time and Cost in ICSID Arbitration", pp. 901-902, paras. 10-11, **Exh. CL-0227**.

the respondent's preliminary objection.[38] The Respondent fails to mention, however, that the total average length of these 63 proceedings included 34 cases where bifurcation was not even raised, or where bifurcation was requested, but was not granted.[39] ICSID tribunals in non-bifurcated proceedings sought precisely to avoid the delays bifurcation would cause, dismissing such requests.

23. A more accurate comparison arises between the average length of bifurcated ICSID cases (1,893 days for bifurcated cases that led to an award on the merits, and 749 days for bifurcated cases that led to an award declining jurisdiction), and the average duration of *all bifurcated* proceedings (total average: 1,301 days). When viewed against this benchmark, it becomes obvious that in bifurcated cases where the tribunal denied the preliminary objection, bifurcation resulted on average in longer proceedings, compared to the average length of all bifurcated cases.[40]

24. The ICSID statistics also must be carefully read when considering the average length of bifurcated proceedings where tribunals declined jurisdiction. The Secretariat counted into the average length two cases where the tribunal dismissed the case for "manifest lack of merit" through the expedited procedure envisaged in Rule 41(5) of the (2006) ICSID Arbitration Rules.[41] In these cases, the respective tribunals had to reach a decision on the objection within 60 days from the constitution of the tribunal or shortly afterwards (which is obviously not our case).[42] Removing these two cases, the average length of the remaining 13 proceedings where jurisdiction was denied was certainly much higher.

---

38 According to the Respondent's Reply, para. 95: «les données du CIRDI montrent que les procédures bifurquées ayant mené à une sentence déclinatoire de compétence étaient raccourcies de 600 jours par rapport à la moyenne de toutes les affaires CIRDI. C'est donc dire que la réduction moyenne de la durée de l'instance permise par la bifurcation dans un scénario où l'objection préliminaire à la compétence du tribunal est acceptée est supérieure à son allongement dû à l'accueil de la bifurcation dans un scénario où l'objection préliminaire à la compétence est finalement rejetée. Cette conclusion est confirmée par les données de durée moyenne de l'instance, montrant que la durée moyenne de l'instance des procédures CIRDI étudiées est de 1336 jours (toutes procédures confondues) et de 1301 jours pour les procédures bifurquées, incluant celles où les objections à la compétence sont déclinées» and footnote 110.

39 ICSID Secretariat, "Proposals for Amendment of the ICSID Rules: Working Paper" vol 3 (2 August 2018), "Schedule 9: Addressing Time and Cost in ICSID Arbitration", p. 899, para. 7, **Exh. CL-0227**.

40 *Id.*, p. 901, paras. 9-10. The average length of bifurcated proceedings was 1,301 days. The average length of the 14 bifurcated proceedings that resulted in an award on the merits was 1,893 days (*i.e.*, 592 days longer than average) whereas the average length of the 15 bifurcated proceedings that resulted in an award declining jurisdiction was 749 days (*i.e.*, 552 days shorter than average). Thus, the average delay was greater than the average economy of time.

41 *Id.*, p. 901, para. 10.

42 Pursuant to Rule 41(5) of the (2006) ICSID Rules, a respondent could file an objection that a claim is "manifestly without legal merit" no later than 30 days after the constitution of the tribunal and in any event before the tribunal's first session. The tribunal had to notify its decision on the objection "at its first session" (which, pursuant to Rule 13(1) had to take place no later than 60 days following the constitution of the tribunal) or "promptly thereafter". For example, a case falling within the Secretariat's time-period is *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award (9 March 2017), paras. 15-23, **Exh. CL-0255** where the tribunal rendered an award 188 days from its constitution (which took place on 2 September 2016).

25. The Respondent in support of its contention also quotes selectively — and out of context — from a 2019 academic publication by Lucy Greenwood.[43] The Respondent conveniently fails to quote the paragraph in full, as the author goes on to contradict the Respondent's position. The author first writes: "Where the bifurcated proceedings led to an award declining jurisdiction, the proceedings were around eighteen months shorter than the average. The data therefore supports the conclusion that if a separate phase of proceeding terminates the proceeding, then that proceeding will, on average, conclude more quickly than a proceeding where jurisdiction and merits are heard together." Yet the author then goes on to say:

> "If, however, the jurisdiction challenge is unsuccessful, then the data shows that the proceeding will take ***significantly longer*** to conclude. (…) in light of the additional research on duration of 'unsuccessful' bifurcated proceedings [I would] suggest that the assumption that bifurcation might reduce time and costs of the arbitration is flawed. Far from making this assumption, I would argue that the data suggests there should be a presumption against agreeing to bifurcate proceedings (on efficiency grounds) unless a tribunal can be confident that it is more likely than not that determination of the bifurcated issue (…) will result in termination of the proceeding".[44] (Emphases added.)

26. *Fourth*, the Respondent in fact admits that bifurcation would significantly increase the length of these proceedings, but attempts to distract from this fact with false comparisons. The Respondent accepts that, if the Tribunal were to bifurcate and then *reject* its objections, bifurcation would delay the proceedings « de seulement un an et quatre mois ».[45] The Respondent tries to downplay the gravity of this delay, arguing that the savings of time obtained through bifurcation in case of a successful objection (-1 year and 8 months, on its estimate) "surpass" the delays that bifurcation would cause in case of an unsuccessful objection (+1 year and 4 months, on its estimate).[46] In essence, the Respondent asks the Tribunal to "roll the dice" and delay the arbitration by "only" 1⅓ year, on the off-chance that its frivolous objection might be sustained, because the potential savings of time outweigh the anticipated delays by four months.

27. *Finally*, the Respondent takes issue with the Claimant's estimate that bifurcation could unnecessarily postpone an eventual award on the merits by at least 2 to 2 ½ years.[47] The Respondent failed in its initial Request to make *any* demonstration why bifurcation would "materially reduce" the length of this arbitration. The Claimant therefore provided conservative estimates in its Response of the impact that bifurcation could have had on the calendar, drawing on the most reliable sources: the time-limits fixed by the Tribunal

---

43 Lucy Greenwood, "Revisiting Bifurcation and Efficiency in International Arbitration Proceedings" (2019) 36(4) J Intl Arb 421, p. 425, **Exh. CL-0233**.

44 *Id.* (Emphasis added.)

45 Respondent's Reply, para. 112 (emphasis added).

46 Respondent's Reply, para. 113.

47 Claimant's Response, paras. 141-142.

in Procedural Order No. 1 (**PO1**); the time-limits set out in the ICSID Arbitration Rules; the average length of ICSID proceedings; and the time-limits in other NAFTA matters.[48]

28. The Respondent now argues that the Claimant's estimates are "not credible" on two grounds: (a) because the Claimant has "overestimated" the time required to hear the Respondent's objections in a preliminary phase as they could be "significantly shortened";[49] and (b) because the Claimant "underestimated" the time required to hear the dispute on the merits, analogising between this case and *Bilcon*.[50]

29. The Respondent's criticisms turn the logic of Rule 44(2)(a) on its head. It is the Respondent who bears the burden of demonstrating that bifurcation would "materially reduce" the time length of the proceeding—not the Claimant. The Respondent has failed in its task.[51]

30. The Respondent first argues that the Claimant has over-estimated the time required to address its jurisdictional objections in a preliminary phase, because the time-limits may be "significantly shortened". It alleges this may be achieved: (i) by reducing the time-limits for the written pleadings on the jurisdictional objections; (ii) by omitting a document production phase relating to jurisdiction; and (iii) by eschewing post-hearing briefs. Based on these "adjustments", the Respondent proposes that an award on jurisdiction could be forthcoming as early as 31 May 2025[52] — to recall, a point when the parties would otherwise be on the eve of a full hearing on the merits, according to the current calendar in Procedural Order No. 1.[53]

31. These arguments are predicated on truncating the Claimant's procedural rights in relation to an objection the Respondent suggests could be dispositive of this arbitration. It would be patently unfair to curtail the Claimant's ability to respond to the Respondent's objections in full, simply to attenuate the impact of the delays the Respondent itself has inflicted on this arbitration. The Claimant does not consent to this. Moreover, there is a substantial disconnect between the Respondent's insistence on the seriousness and importance of its jurisdictional objection, and the argument that the Tribunal should hear and decide it in a "fast-track" proceeding.

32. It is equally speculative to suggest that document production will be unnecessary at a jurisdictional phase. According to Article 43 of the ICSID Convention, the Tribunal may,

---

48 Claimant's Response, footnotes 201, 202 and 203.

49 Respondent's Reply, paras. 100 and 102.

50 Respondent's Reply, paras. 103-113.

51 Claimant's Response, paras. 139 *et seq*.

52 Respondent's Reply, para. 102.

53 Procedural Order No. 1 (updated on 10 January 2024), Annex B, Calendrier 3, PDF p. 28, point 21 ("Hearing – date to be confirmed in consultation with the Tribunal; target: May/June 2025").

if it deems it necessary at *any stage* of the proceedings, call upon the parties to produce documents or other evidence. Past tribunals have therefore included in their procedural calendars a distinct phase for document production in the event of bifurcation.[54]

33. In this case, there are strong reasons to believe that document production will indeed be necessary in any separate jurisdictional phase. On the Respondent's erroneous legal test, the existence of an "investment" under Article 25(1) of the ICSID Convention depends on its "admission" by the host State. The existence of an "admission" will inevitably require an assessment of the approach taken by Québec and Canadian governmental authorities *vis-à-vis* the Claimant and Symbio prior to and in the lead-up to the critical events. As explained in the Memorial, the Respondent repeatedly encouraged the Claimant to invest in its territory, through a provisional certificate from the Deputy-Minister of Finance that GNLQ would qualify as a "major investment project", [redacted][55] Ascertaining these facts may therefore require the production of documents to assess the Government's position *vis-à-vis* the investment.

34. It is also premature to suggest that post-hearing briefs will not be required in a separate jurisdictional phase. Whether or not post-hearing briefs are necessary depends on the quality, scope and depth of the arguments presented in the written submissions and oral argument, and any questions the Tribunal may have following the hearing.

35. In sum, the Respondent has provided no basis to dismiss the Claimant's time estimates as unreasonable. Moreover, its own estimates are premised on a drastic curtailment of the Claimant's procedural rights in a bifurcated phase.

36. In contrast to its proposed truncation of any jurisdictional phase, the Respondent seeks to *inflate* the likely length of the merits phase. It argues that the Claimant is wrong to « t[enir] pour acquis que le calendrier de l'ordonnance procédure 1 sera suivi à la lettre », and considers that the document production phase may significantly prolong the merits phase.[56] The Respondent refers to *Bilcon v. Canada* as a proceeding that is "similar to this case", warning that the document production phase in that matter lasted well over 3 years.[57] The Respondent asserts that it has "every reason to believe" that the present

---

54 E.g. *Aris Mining Corporation (formerly known as GCM Mining Corp. and Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 2 (11 July 2019), Annex A, Scenario 2, at p. 4, **Exh. CL-0256**; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Procedural Order No. 2 (6 May 2016), Annex A, Scenario One, points 8 to 12, at pp. 4-5, **Exh. CL-0257**.

55 For more details on these numerous overtures, *see* Witness Statement of Jim Illich (21 November 2023), paras. 163-178 and 186-191, **CWS-1**. Witness Statement of Tony Le Verger (21 November 2023), Section III.G, **CWS-3.**

56 Respondent's Reply, paras. 103-104.

57 Respondent's Reply, paras. 104-111, especially para. 109.

dispute will give rise to numerous document production requests and disagreements.[58] It then adds an entire year to the estimates put forward by the Claimant, claiming that an award on the merits might be issued as late as June 2029.[59]

37. In the Claimant's respectful submission, it would be inappropriate to award bifurcation on the basis of future hypothetical delays, premised on non-respect of the existing procedural calendar. In assessing the next steps in this proceeding, the logical starting point is the procedural calendar fixed by the Tribunal in PO1.

38. The Respondent's reference to the document production phase in *Bilcon* is not only speculative, but also its analogy to that case is wholly inapposite. It is notorious that *Bilcon* was an exceptionally protracted case in terms of document production. Document production in *Bilcon* differs from the present dispute in at least two, critical respects:

- *First*, in *Bilcon* the document production phase took place before the filing of the investors' memorial on the merits.[60] As a result, the claimants cast their nets as widely as possible, seeking to identify appropriate comparators for the purposes of formulating the claims in their memorial. To give one example, the claimants' requested documents "related to all mines, quarries and marine terminals in where no Panel Review or Joint Panel Review with another jurisdiction was held."[61] In the Respondent's own words, the claimants engaged in an "extensive fishing expedition during document disclosure" and the Respondent produced "over 50,000 documents from 170 different individuals and more than 12 different government departments."[62]

- In the present case, by contrast, the Claimant has already put forward in its Memorial a targeted set of comparators on the basis of publicly-available documents, concerning the criteria that were applied in the environmental review process.

- *Second*, delays in *Bilcon* were linked to the novelties presented at the time (about 10-15 years ago) from e-discovery processes, including the retrieval of electronically-stored information, the use of automated coding technology and the "limited guidance in applicable procedural rules concerning how to accommodate e-discovery

58 Respondent's Reply, para. 108.

59 Respondent's Reply, paras. 110-112 and Table 4.

60 *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04) Award on Jurisdiction and Liability (17 March 2015), paras. 62-71 and 95, **CL-0024-ENG**. The Investors submitted their Memorial on 25 June 2011. By mid-July 2011, the tribunal had addressed most of the document production phase, with the exception of limited issues of privilege and political sensitivity.

61 *Bilcon of Delaware et al v. Canada*, Respondent's Counter-Memorial (9 December 2011), para. 483, **Exh. CL-0258**.

62 *Id.*, paras. 480 and 482.

in the proceedings".[63] Since then, practice has considerably developed to accommodate e-discovery in a more efficient and targeted fashion. There is no reason to believe that the technical difficulties in *Bilcon* should serve as a blueprint for this arbitration. Indeed, the Respondent is unable to point to any other document production phase of analogous length over the past decade.

39. In sum, the Respondent has failed to discharge its burden of proof under ICSID Rule 44(2)(a). What the Respondent is proposing is in fact an extensive delay to the proceedings. Its Request should be denied on that ground alone.

B. The Respondent has again failed to explain why "the preliminary objection and the merits are so intertwined as to make bifurcation impractical" (ICSID Rule 44(2)(c))

40. The Respondent has also failed to discharge its burden under ICSID Arbitration Rule 44(2)(c), *i.e.* to demonstrate that the examination of its first objection may be made separate and apart from issues going to the merits of the dispute.

41. In its Reply, the Respondent ignores the Claimant's demonstration that the determination of the existence of an "investment" is closely linked to the merits and does not warrant a bifurcation (as recognized, among others, by the NAFTA tribunal in *Methanex*).[64] A determination of the various assets singled out in the Reply will require a careful examination of the underlying documents and testimony, which belong to the merits.

42. The Respondent also makes no comment on the Claimant's arguments that the existence of an "investment" under Article 25(1) of the ICSID Convention must be examined holistically, looking at the investor's operation "as a whole" and in its factual context.[65] These arguments stand uncontested before this Tribunal.

43. Instead of engaging with these arguments, the Respondent goes on to relate the different legal questions which, in its view, the Tribunal will need to determine at the merits stage when addressing the Claimant's claims under the NAFTA.[66] It argues that the documents and testimony that will be relevant to the assessment of the claims under NAFTA Articles

---

63 *See*, for example, Esmé Shirlow, "E-Discovery in Investment Treaty Arbitration: Practice, Procedures, Challenges and Opportunities" (2020) *Journal of International Dispute Settlement*, Vol. 11(4) 549, pp. 549-550, **Exh. CL-0259**.

64 Claimant's Response, paras. 94-95.

65 Claimant's Response, paras. 104-108.

66 Respondent's Reply, paras. 84 to 89. The Claimant expressly reserves its rights as to the characterization of the dispute and of the legal issues set out in the Reply.

1102, 1103 and 1105 « ne seront d'aucune utilité » to the determination of whether the Claimant held investments to begin with, and that these issues are distinct.[67]

44. The Respondent's arguments are false. On the Respondent's proposed test, the existence of an investment under Article 25(1) of the ICSID Convention depends on its "admission" by the host State. It stands to reason that, if Article 25(1) of the Convention prescribes a stand-alone condition of "admission" (which is denied), the Tribunal will have to look at the evidence of the Respondent's stance on the establishment and development of the Projects and the legitimate expectations it created. This turns to the evidence underlying the claims concerning the breach of NAFTA Article 1105, as far as the frustration of legitimate expectations are concerned. To conceal this flaw, the Respondent states in footnote 103 of its Reply that it does not recognize legitimate expectations as part of the standard in Article 1105. The practice of NAFTA tribunals however contradicts this.[68]

45. More importantly, the Respondent admits that the assessment of the claim under NAFTA Article 1110 will, to some extent, require the examination of evidence pertinent to determining the existence of an investment, in order to: (i) assess whether the Claimant had « un investissement susceptible d'être exproprié»; (ii) perform an analysis of the economic impact of the measure(s) on the economic value of that investment in order to determine whether an expropriation occurred; and (iii) determine the extent of the injury caused by said measure(s) on the investment.[69]

46. The Respondent therefore expressly concedes that the first objection does not meet the criterion set out in ICSID Rule 44(2)(c), at least as far as the Claimant's claims under Article 1110 of the NAFTA are concerned. Given that NAFTA Article 1110 requires the payment of compensation in case of an expropriation, the same evidence will no doubt be relevant to issues of quantum, and will also duplicate the Tribunal's task in that regard.[70]

47. The Respondent seeks to downplay this substantial duplication of work. It argues that duplication would be "superficial" because the Tribunal will examine the same evidence to answer different legal questions, and is in any event "negligible" compared to the work the Tribunal would perform if it found that it lacks jurisdiction in the merits phase.[71]

---

67 Respondent's Reply, paras. 86-87. With respect to Article 1105, the Respondent clarifies that « [i]l n'est pas du tout clair comment les questions liées au traitement « [d']un investissement effectué » peuvent être pertinentes pour déterminer si un tel investissement a été effectué en premier lieu ».

68 *See* Claimant's Memorial on Jurisdiction and the Merits (21 November 2023), pp. 201-203 (**Claimant's Memorial**), Section IV.B.1(d)(i) ("Legitimate expectations are a relevant factor in assessing a violation of the right to Fair and Equitable Treatment under NAFTA Article 1105(1)"), especially paras. 674-685.

69 Respondent's Reply, para. 88 (« l'analyse de certaines pièces pertinentes pour déterminer s'il existe un « investissement » aux termes de la Convention CIRDI pourrait être requise » [in assessing the expropriation claim]).

70 Claimant's Response, para. 100.

71 Respondent's Reply, para. 88.

48. The Respondent is wrong to take this position. The existence of an "investment", of a *de facto* expropriation, as well as claims on damages, are consequential legal questions that require a close review of documentary evidence and a careful assessment of testimony and expert evidence. There is nothing "superficial" in these legal issues.

49. Reviewing documentary and testimonial evidence is a time-intensive endeavour in its own right. Repeating the same exercise in different stages will only aggravate the length and complexity of the proceeding. From the perspective of judicial economy, it would be much more efficient for the Tribunal to examine the evidence relating to the existence of an "investment" together with the Claimant's expropriation claim and its case on damages.

50. Finally, the Respondent attempts to "offset" the duplication of work caused by bifurcation against the possible duplication that would occur in the off-chance that its objection were upheld.[72] This is a red herring. ICSID Rule 44(2)(c) requires an assessment of whether the objection and the merits are "so intertwined as to make bifurcation impractical". Speculative comparisons between hypothetical duplications are irrelevant to the test prescribed by Rule 44(2)(c).

C. The first objection is not serious

51. While the Respondent's request for bifurcation stands to be rejected on the basis of the above, cursory consideration of the substance of its first objection reinforces that outcome. The Respondent's first objection is based on an unprecedented interpretation of Article 25(1) of the ICSID Convention, based neither in fact nor in law. This also strongly militates against bifurcation, as the objection is *prima facie* flawed, substantially diminishing the likelihood it could overall reduce the time and costs of this proceeding.

52. With a view to assisting the Tribunal, the Claimant begins by briefly summarizing here what the Respondent does <u>not</u> appear to contest:

- *First*, the Respondent does not contest, subject to a review of ample evidence the Claimant already has submitted, that the Claimant committed "millions of dollars" in Canada to develop the Projects, including through the incorporation of companies.[73] The Respondent nonetheless argues that "no amount of money is sufficiently large to obscure the fact that at the time of the events giving rise to responsibility", the Projects allegedly had not been "admitted".[74]

---

72 Respondent's Reply, para. 88.

73 Respondent's Reply, para. 9 (« la demanderesse fait de nouveau grand cas dans sa réponse des millions de dollars qu'elle prétend avoir dépensés pour promouvoir les projets Énergie Saguenay et Gazoduq »).

74 Respondent's Reply, para. 9.

- *Second*, the Respondent does not contest, subject to a review of ample evidence the Claimant already has submitted, that the various assets held directly or indirectly by the Claimant in the two Projects qualify as "investments" within the meaning of NAFTA Article 1139, including tangible and intangible property.[75] Nor does the Respondent allege that these investments were not "admitted" under the relevant provisions of NAFTA Chapter Eleven.

- *Third*, the Respondent concedes that the drafters of the ICSID Convention did not provide a definition of "investment" in Article 25(1), and instead left the Contracting States some margin of discretion in defining the types of "investment" they wished to admit to the ICSID dispute settlement mechanisms in underlying instruments of consent; the Respondent nonetheless alleges that this remains subject to "outer limits" that operate as objective limitations to the Centre's jurisdiction, notably an (unstated) condition of "admission" by the host State.[76]

- *Fourth*, the Respondent accepts that the definition of "investment" in Article 25(1) of the ICSID Convention applies to projects which are still in the development phase, including those that have not reached a final investment decision or the commercial exploitation phase.[77] The Respondent also accepts that enterprises that are not going concerns may qualify as "investments" under Article 25(1) of the Convention.[78] The Respondent further accepts that the existence of a concession contract with the host State is not a pre-condition for the existence of an "investment".[79] It nonetheless qualifies these admissions, inventing the false condition that such investments must be "admitted" by the host State under the ICSID Convention.

- *Finally*, the Respondent does not contest, subject to a review of the ample evidence already in the record, that the Claimant held at least some tangible property rights in Canada (such as office equipment, leasehold improvements, technical and computer equipment etc.) necessary for the development of the projects. It nonetheless argues that: « [d]e tels actifs présentent des intérêts *de minimis* et ne sont pas suffisants pour

---

75 Respondent's Reply, fn 10 (« Dans sa réponse, la demanderesse allègue à plusieurs reprises détenir des intérêts pouvant être qualifiés d'investissements au sens de l'article 1139 de l'ALÉNA. Or, l'objection du Canada à la compétence du Tribunal se fonde exclusivement sur l'article 25 de la Convention CIRDI. »); Claimant's Response, para. 16.

76 Respondent's Reply, para. 14.

77 Respondent's Reply, para. 11 (« Le Canada ne conteste donc pas qu'un projet d'infrastructure en voie de développement puisse constituer un investissement même si celui-ci n'a pas atteint la phase d'exploitation commerciale pourvu toutefois que ce projet ait été admis (…) »).

78 Respondent's Reply, para. 11 (« Contrairement à ce que prétend la demanderesse, le défendeur ne prétend pas que seuls les intérêts découlant d'entreprises en activité peuvent être qualifiés d'investissements »).

79 Respondent's Reply, para. 23 (« Afin de dissiper tout doute qui puisse subsister à cet égard, le Canada ne plaide pas qu'un contrat de concession est une condition préalable à l'existence d'un investissement. »)

remplir le critère d'engagement de capitaux » under Article 25(1) of the Convention, and do not possess « caractéristiques d'un investissement autonome des projets ».[80]

53. The necessary and logical conclusion of the foregoing is that the Claimant had investments within the meaning of NAFTA Article 1139, which also come within the broad definition of "investment" in Article 25(1) of the Convention. The Respondent's attempt to bifurcate the proceedings despite these clear and unequivocal admissions does not withstand scrutiny, even on a *prima facie* basis.

54. The Respondent in essence argues that even though the Claimant held investments within the meaning of the NAFTA, Article 25(1) of the Convention requires separately that an investment be "admitted" or "authorized" by the host State for the investment to come into existence.[81] The Respondent more specifically alleges that the existence of an "investment" under Article 25(1) of ICSID was contingent upon the granting of an environmental approval under Canadian law.[82] On that basis, the Respondent posits that: « [l]'obtention de ces autorisations préalables constitue ainsi une condition d'admission des projets Énergie Saguenay et Gazoduq sur le territoire du Québec et du Canada. »[83] As a result, the wrongful refusal of the GNLQ and Gazoduq Projects at the provincial and federal level rendered those investments "inexistent",[84] precluding the Tribunal's jurisdiction.[85]

55. The Respondent's first objection proceeds from a fundamentally misconceived interpretation of Article 25(1) of the ICSID Convention. It finds no basis either in the practice of ICSID tribunals or the history of the ICSID Convention. It would lead to absurd results. It ignores all the evidence put forward in the Memorial. It certainly does not provide a sound basis to bifurcate the proceedings.

56. In what follows, the Claimant will simply point out some of the key flaws in this objection, which confirm that it is not serious enough to warrant bifurcation. The Claimant reserves its right to address the Respondent's arguments at the appropriate stage.

---

80 Respondent's Reply, para. 39.

81 Respondent's Reply, paras. 4, 9-11. For the Respondent, such "admission" or "authorization" may take the form of an environmental permit, a concession agreement, a statutory right or a contract with the host State, conferring a « droit acquis à la realisation [du projet] tel que ceux conférés, par exemple, par un contrat de concession. »

82 Respondent's Reply, p. 14 («[l]'admission des projets Énergie Saguenay et Gazoduq étaie [*sic*] assujettie à l'obtention des autorisations des gouvernements du Québec et du Canada »). *See also id.*, paras. 27-29.

83 Respondent's Reply, para. 28 (emphasis added).

84 Respondent's Reply, para. 29 («Les gouvernements du Québec et du Canada ayant refusé d'autoriser le projet Énergie Saguenay (...) ces projets ne peuvent être considérés comme étant des investissements existants»).

85 Respondent's Reply, para. 24 («N'ayant pas été admis sur le territoire du Québec et du Canada, les projets Énergie Saguenay at Gazoduq ne sont pas des investissements existants qui peuvent fonder la compétence du Tribunal. ». *See also id.*, para. 23 (« lorsqu'un État d'accueil refuse d'admettre sur son territoire un projet d'investissement, les dépenses et les ressources engagées pour réaliser cet investissement ne peuvent fonder la compétence d'un tribunal constitué sous la Convention CIRDI que s'ils se rapportent à d'autres actifs ou intérêts pouvant se qualifier d'investissement de manière autonome et distincte du projet ayant été refusé. »)

(a) The first objection proceeds from a flawed interpretation of Article 25(1) of the ICSID Convention

57. The Respondent devotes almost half of its latest Reply to convince the Tribunal that its first objection is "based on the terms of Article 25 of the ICSID Convention".[86] Yet the Reply does not even mention (much less apply) the customary rules of treaty interpretation codified in Articles 31-33 of the Vienna Convention on the Law of Treaties.

58. The Respondent's entire first objection stands or falls, depending on whether Article 25(1) of the ICSID Convention prescribes a condition for the "admission" or "authorization" of an investment by the host State, as the Respondent argues *ad nauseam*.[87]

59. The answer to this question is simple: it does not. The rules governing the admission and establishment of foreign investments in the host State's market are a matter of *substance*, not of procedure. Given the huge financial and political stakes involved in matters concerning the admission of foreign investors, States have taken different regulatory approaches, depending on the degree of market access to which they are willing to commit themselves, and their relations with treaty partners. These rules range from strict admission processes to a wide degree of market liberalization.[88]

60. NAFTA Chapter Eleven provides its own rules on the admission of investments in Articles 1101(2), 1102-1103 and 1111(1). These provisions allow NAFTA investors to make investments in the territory of other NAFTA Parties, subject to "special formalities in connection with the establishment of investments", "provided that such formalities do not materially impair the protections afforded by a Party" to investors and investments pursuant to Chapter Eleven (Article 1111(1)). NAFTA Article 1101(2) also recognizes that NAFTA Parties have the right "to refuse to permit the establishment of investment in such activities" as listed in NAFTA Annex III. On that basis, Mexico has reserved in its schedule the right to refuse the establishment of investments in the transportation, processing, storage, and foreign trade of natural gas. By contrast, Canada has not availed itself of Article 1101(2). In the absence of an Annex III schedule for Canada, the establishment of investments in such activities is permitted under the NAFTA.[89]

---

86 Respondent's Reply, Section II.

87 The Respondent refers to the purported lack of "admission" or "authorisation" of the GNLQ and Gazoduq Projects no less than 40 times in its Reply to argue that the Claimant had no "investments" under Article 25(1) of the Convention: *see* Respondent's Reply, paras. 4, 7, 9, 10-13, 20, 23-25, 26-31, 35-36, 40-41, 43, 46.

88 *See* UNCTAD, *International Investment Agreements: Key Issues*, Volume I, UNCTAD/ITE/IIT/2004/10, pp. 81–85, **CL-0090-ENG**, esp. p. 83, noting that the approach taken in NAFTA "is the approach preferred by firms and countries that are supportive of liberalization, as it offers the best access to markets, resources and opportunities. It allows investment decisions to be determined on the basis of commercial considerations, by reducing entry controls that create barriers to the integration of production across borders, a strategy increasingly pursued by TNCs." (Emphasis added.)

89 *See also* observations in Claimant's Response, paras. 78-79.

61. The Respondent's 2021 Model Foreign Investment Protection Agreement (**FIPA**), in contrast to prior Canadian investment treaty drafting, proposes strict rules regarding the "admission" or "authorization" of foreign investments in Canadian territory – presumably reflecting a current protectionist impetus in Canadian trade policy.[90] To the best of the Claimant's knowledge, these provisions have failed to be adopted in any recently negotiated treaty in force between Canada and a third State, including most recently in the Canada-Ukraine Free Trade Agreement (2023); the United States-Mexico-Canada Agreement (2019); the Canada-Moldova BIT (2018), or the Comprehensive Economic Trade Agreement with the European Union (2016).[91] They certainly are not reflected in the instrument of consent before the present Tribunal, the NAFTA.

62. The Respondent does not – and could not – argue that the definition of "investment" under Article 1139 of the NAFTA is subject to a general condition of "admission". It clearly is not. The Respondent similarly does not argue that the Claimant failed to meet a test of "admission" for its investments under the relevant provisions of NAFTA Chapter Eleven. To the contrary, the Respondent has remained conspicuously silent with respect to the Claimant's arguments under NAFTA Article 1101(2), which allows NAFTA Parties to reserve their right to refuse to permit the establishment of investment activities in designated sectors.[92]

63. Rather, the Respondent asks the Tribunal to read into Article 25(1) of the ICSID Convention a hitherto unknown *substantive* rule (analogous to the rules found in Canada's Model FIPA, not an in-force treaty), whereby a Contracting State retains the prerogative to "admit", "authorise" or "refuse" an investment, and that such admission, authorization or refusal is a condition for the existence of an "investment" for jurisdictional purposes.

64. The Respondent's new and wholly unsupported reading of Article 25(1) of ICSID, if given credence, would impose a massive chilling effect on substantial project investment in its territory and would dramatically prejudice the Respondent's in-force network of investment protection. Nearly all major industrial projects require substantial investment

---

90 Canada's Model Foreign Investment Promotion and Protection Agreement (2021) ("FIPA"), **CL-0043-ENG**. Article 2(1)(b) states that: "This Agreement applies to measures adopted or maintained by a Party relating to (…) a covered investment". Article 1 defines a "covered investment" separately from an "investment" as: "an investment (…) made in accordance with the applicable domestic law of the Party at the time the investment is made". Article 1 also defines the term "authorization" as "the granting of permission by a competent authority to a person with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in the territory of a Party". It also defines "authorization procedures" as the "administrative or procedural rules that must be adhered to in order to obtain, amend or renew an authorization". Article 18 states: "Each Party shall encourage the creation of favourable conditions for investment in its territory by investors of the other Party and shall admit those investments in accordance with this Agreement." Article 19 sets out rules on the processing of applications for an authorization. (Emphases added.)

91 Canada–Ukraine Modernized Free Trade Agreement (2023), Chapter 17, **Exh. CL-0260**; Agreement between the Government of Canada and the Government of Moldova for the Promotion and Protection of Investments (2018), **Exh. CL-0261**; Agreement between the United States of America, the United Mexican States, and Canada, Chapter 14, **Exh. CL-0262**; Canada-European Union Comprehensive Economic and Trade Agreement (2016), **CL-0044-ENG**.

92 Claimant's Response, paras. 78-79.

in a territory before ultimate regulatory approval. Such substantial up-front commitments all clearly count as "investments" under the many investment treaties Canada has carefully negotiated and adopted to date, most notably under the NAFTA.

65. The Respondent's new jurisdictional argument amounts to an unprincipled, textually unsustainable and unilateral attempted repudiation of its prior commitments through the "back door" of its strained interpretation of ICSID Article 25(1). Its arguments are unedifying. They are also wrong.

66. This first objection proceeds from a flawed interpretation of Article 25(1) of the Convention and is divorced from its text, context, object and purpose and drafting history.

- *First*, neither the text nor the context of Article 25(1) requires that an investment be "*admitted*" or "*authorised*" by the host State. Equally, there is nothing in Article 25(1) to suggest that domestic law may override the definition of "investment" in the NAFTA. Nor is there anything in the text to support the notion that compliance with environmental regulations is a precondition for the existence of an "investment".

- *Second*, the Respondent's interpretation is contrary to the object and purpose of the Convention, which "contributes to the improvement of the investment climate by offering a procedural framework for the settlement of disputes" but "does not attempt to develop substantive rules for the protection of private international investments"; these matters "are left to the agreement of the parties".[93]

- *Third*, the fact that the ICSID Convention did not lay out any substantive rules governing the admission of investment is confirmed by the *travaux préparatoires*. The drafters examined several proposals to include substantive rules in the Convention but eventually decided against it because "[d]oing so would have led to insurmountable difficulties in trying to reconcile sharply conflicting positions between different delegations and would have endangered the entire project."[94]

- *Fourth*, as noted above, the Respondent's interpretation leads to manifestly absurd or unreasonable results. Taken to its logical conclusion, a host State will be able to deny the existence of an investment (and shield itself from the jurisdiction of an ICSID tribunal otherwise validly established under the relevant instrument of consent and the Convention) by arguing that the project was not "admitted" on its territory as

---

93 Editors, "Preamble" in Stephan Schill and others (eds), *Schreuer's commentary on the ICSID Convention: A Commentary on the ICDIS Convention* (3rd edn, Cambridge University Press, 2022), p. 4, para. 15, **Exh. CL-0263**. *See also* Ursula Kriebaum, "Article 42" in *id.*, p. 802, para. 1, **Exh. CL-0264** ("The Convention does not provide substantive rules for the relationship between host States and foreign investors. It is merely designed to establish a procedural framework for the settlement of investment disputes.")

94 Ursula Kriebaum, "Article 42" in *id.*, p. 802, para. 1, **Exh. CL-0264.**

> it did not obtain each and every approval required by domestic law for the full extent of its operations. And this, *despite* the fact that multiple aspects of the enterprise – locally incorporated entities, relevant contracts, investments in equipment and so on – wholly comply with the definition of investment under the instrument of consent. If this restrictive definition were adopted, huge categories of investment would be barred from access to ICSID, even if the investor (as here) has committed tens of millions of dollars to the development of a multi-billion dollar investment in a foreign country and regardless of the terms of the host State's investment protection treaty.

67. The Respondent tries to conceal the fatal flaws in its argument through long, convoluted analogies with past cases that were decided under the UNCITRAL Rules or the ICSID Convention.[95] The fact that the Respondent's objection requires combing through obscure passages in selected awards to give it even a semblance of credence confirms *a contrario* that this is not a serious objection, and does not merit bifurcation.

68. In any event, the tribunals to which the Respondent refers in this manner addressed circumstances where the putative investor had in fact made little or no actual investment in the territory of the host State, and lacked a local commercial and corporate presence. The facts in the current dispute are exactly the opposite.[96] The Respondent's assertions that these tribunals relied upon Article 25(1) of the Convention to reach their conclusions are also plainly false.[97] These tribunals did not base their conclusions on the meaning of "investment" in Article 25(1) of the Convention; rather, their conclusions turn on the meaning of "investment" in the underlying instrument of consent.[98]

69. Most importantly, nothing in these awards supports the notion that Article 25(1) of the ICSID Convention prescribes a stand-alone requirement that a project be formally "admitted" under domestic law of the host State prior to being recognized as an investment, and regardless of the terms of the underlying instrument of consent.[99]

---

95 Respondent's Reply, paras. 15-22.

96 *C.f.* Claimant's Response, paras. 31-32 and 64-67 (with respect to *Mihaly v. Sri Lanka*), paras. 33-34 (with respect to *Montrose v. Sri Lanka*), and para. 71 (with respect to *Zhinvali v. Georgia*).

97 *See*, e.g., Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2010), p. 188 ("The issue before the [*Mihaly*] tribunal, properly defined, was whether various transactional documents concluded between the claimant and the Sri Lankan authorities memorialised a right under Sri Lankan law that was cognisable as an 'investment' pursuant to Article I of the USA/Sri Lanka BIT.") and pp. 188-189 (in *Zhinvali*, "the tribunal defined the issue as 'whether the Claimant's purported expenditures qualify as an "investment" under the 1996 Georgian Investment Law', which supplied the operative definition of an 'investment' for the purpose of Article 25(1) of the ICSID Convention"), **Exh. RL-0009.** (Emphases added.)

98 *C.f.* Claimant's Response, footnote 43 (with respect to the UNCITRAL proceedings in *Luigiterzo Bosca v. Lithuania*, *Nordzucker v. Poland* and *Doutremepuich v. Mauritius*), paras. 61-63 (with respect to *Mihaly v. Sri Lanka*) and paras. 69-70 (with respect to *Zhinvali v. Georgia*).

99 The Respondent continues to misrepresent the contents of the *Mihaly* award and fails to address most of the reasons set out in the Claimant's Response why this award is inapposite to this case (*see* Claimant's Response, paras. 57-67). In *Mihaly*, the tribunal relied on the US-Sri Lanka BIT (and not the ICSID Convention) to conclude that there was no "proof of admission of an 'investment' in being out of which a legal dispute could possibly have arisen" (Claimant's

(b) The Claimant held multiple assets that qualify as "investments" under the NAFTA and Article 25(1) of the ICSID Convention

70. Having set out its flawed arguments on the absence of an "admitted" investment, the Respondent seeks to disaggregate the Claimant's investment into its various parts to argue that, taken alone and independently, each would not qualify as an investment "autonomously" from GNLQ and Gazoduq.[100] This is false: under Article 25(1) of the Convention, a tribunal must not look at the individual assets or contractual arrangements making up an investment in isolation from one another, but should look at the assets as component parts of a larger, integrated investment undertaking.[101]

71. The Respondent goes on to deny that specific assets or interests held by the Claimant qualified as "investments" – despite that all clearly fall within the definition of investment under NAFTA Article 1139. For example, the Respondent asserts that, even though the acquisition of tangible and intangible property could amount to an "investment", it is a *de minimis* contribution.[102] It contends that the conclusion of a series of agreements for the provision of services impermissibly extends the notion of an investment.[103] The Respondent goes as far as arguing that the Claimant could have no reasonable expectation of profits and did not take any financial or commercial risk, apart from the regulatory risk – this, despite the nine years and well over 100 million dollars the Claimant committed to its territory, all to achieve the success of its enterprise.[104]

72. To determine the existence of an investment, the Respondent cannot legitimately focus on itemized assets in clinical isolation from the whole undertaking. The existence of an "investment" requires a holistic assessment into the various components that make up an operation.[105] The Claimant's demonstration in this regard stands wholly unrefuted.

73. For present purposes, the Claimant will say no more on the substance of the Respondent's objection. The main take-away of the above is that the Respondent's objection *prima facie* is not serious. It does not warrant "rolling the dice" in the Respondent's favour. Doing so would raise serious risk of materially extending the cost and length of the

---

Response, paras. 77-78). Also, there is nothing in the *Zhinvali* award to support the Respondent's interpretation that Article 25(1) requires the "admission" of an investment.

100 Respondent's Reply, paras. 30-37 (on the establishment of corporate entities), para. 38 (the [redacted]), para. 40 (intellectual property in technical studies, feasibility and market analyses), paras. 42-43 (on the agreement with Hydro-Québec) and para. 44 (on the term sheets with foreign off-takers).

101 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010), para. 92, **Exh. CL-0217**. *See also ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 331, **Exh. CL-0086.**

102 Respondent's Reply, para. 39.

103 Respondent's Reply, para. 41.

104 Respondent's Reply, para. 46 (« la demanderesse ne pouvait avoir une attente raisonnable de gains ou de bénéfices et qu'elle n'avait pas pris en charge de risque financier »).

105 Claimant's Response, para. 104-105.

present proceedings. There is simply no basis to warrant bifurcation to address this objection in a separate and preliminary stage.

III. THE RESPONDENT'S SECOND OBJECTION DOES NOT WARRANT BIFURCATION OF THE PROCEEDINGS

A. The Respondent has failed to explain why the second objection meets any of the criteria set out in ICSID Arbitration Rule 44(2)

74. In its Reply, the Respondent reiterates its request for bifurcation on the basis that the time bar under NAFTA Article 1117(2) excludes from the Tribunal's jurisdiction the NAFTA breaches arising out of the Respondent's decisions to subject the GNLQ Project to two environmental assessments (**EAs**).[106]

75. The Respondent's Reply fails to confirm that its second objection meets *any* of the criteria set out in ICSID Arbitration Rule 44(2) or to demonstrate its seriousness.

76. *First*, the Respondent has failed to set out anything in its Reply addressing how deciding its second objection at an early stage "would materially reduce the time and cost of the proceeding" within the meaning of ICSID Arbitration Rule 44(2)(a). As the Claimant has explained in its Response, the Respondent: (i) is seeking the manifestly inefficient suspension of the entire proceeding to address one isolated issue, which is interwoven with the Claimant's overall claims; and (ii) disregards the considerable impact that bifurcation would have on the procedural calendar in the likely event it is rejected.[107]

77. The Respondent's second objection in any event cannot block either the Tribunal's power or the need to consider facts that pre-date 17 February 2020 in order to decide the full scope of the present dispute.[108] In sum, the second objection will not reduce the amount of evidence that the Tribunal will need to consider in order to decide the present dispute.

78. *Second*, the Respondent in its Reply repeats the boilerplate assertion from its Request for Bifurcation[109] that its NAFTA Article 1117(2) objection would "régler une partie substantielle du différend".[110] The Respondent does not even try to explain why "determination of th[is] preliminary objection would dispose of all or a substantial portion of the dispute" within the meaning of ICSID Arbitration Rule 44(2)(b). Even if the objection were sustainable (*quod non*), this determination would leave the vast majority of the Claimant's claims to be argued and decided.

---

106 Respondent's Reply, paras. 47-61.

107 Claimant's Response, para. 203.

108 Claimant's Response, para. 201.

109 Respondent's Request for Bifurcation, para. 81.

110 Respondent's Reply, para. 123.

79. In any event, given that the Claimant became aware of all NAFTA breaches and related damages that it claims *after* 17 February 2020, the Respondent's second objection is effectively incapable of disposing of any part of the dispute.[111]

80. As a result, this objection fails the test under ICSID Arbitration Rule 44(2)(b), and it would be inherently inefficient to bifurcate for this objection.

81. *Third*, the Respondent is unable to rebut the conclusion that "the [second] preliminary objection and the merits are so intertwined as to make bifurcation impractical" pursuant to ICSID Arbitration Rule 44(2)(c).[112] As the Claimant explained in its Response, what is clear from the Respondent's second objection is that it is inextricably linked to facts that go to the merits of the dispute.[113]

82. The inquiry under NAFTA Article 1117(2) into when the Claimant "first acquired, or should have first acquired, knowledge" of the NAFTA breach and of the related damage from the decisions to subject the GNLQ Project to two EAs requires consideration of extensive facts that lie at the heart of the merits of the dispute, including the history of the conduct of the EAs from their start (to determine whether the Claimant might have "acquired knowledge" of a NAFTA breach prior to the 2020 cut-off), and specific facts of the events post February 2020 that cast the decision to hold two EAs in a new, unfavourable light.[114] These issues clearly are intertwined with the merits.

B. The second objection is not serious

83. The Respondent's Reply also fails to establish the seriousness of its second objection. This fundamentally undermines the Respondent's allegation that bifurcation would be efficient. The Respondent merely picked on incidental points to give the impression that its objection rested on serious concerns. This effort fails:

84. *First*, the Respondent attempts to convert its second objection into a legal disagreement, by attacking the Claimant's alleged interpretation of NAFTA Article 1117(2).[115] This is a failed attempt at isolating its second objection from the merits of the dispute. Despite framing the divergence between the parties' views as a legal one, the Respondent clearly underlines the importance of a merits-laden, fact-based inquiry for assessing whether the Claimant knew of incurred damages prior to 17 February 2020: « [s]i les faits démontrent

111 Claimant's Response, paras. 200, 205-206.

112 Respondent's Reply, para. 123.

113 Claimant's Response, paras. 190-198.

114 Claimant's Response, para. 202.

115 Respondent's Reply, paras. 48-52.

qu'elle [la demanderesse] avait connaissance de la perte ou du dommage subi avant la période de trois ans … ».[116]

85. *Second*, the Respondent's suggestion that the Claimant's interpretation of NAFTA Article 1117(2) is erroneous is itself ill-founded.[117] In its Reply, the Respondent alleges that the inquiry under NAFTA Article 1117(2) into when the Claimant "first acquired, or should have first acquired, knowledge" of the NAFTA breach and the related damage from the decisions to subject the GNLQ Project to two EAs can be carried out without delving into the facts that go to the merits of the dispute.[118]

86. The Respondent criticizes the Claimant for having supposedly failed to identify the moment when it first acquired knowledge of the alleged NAFTA breach from the decisions to hold two EAs and the corresponding damages.[119]

87. The Respondent further alleges that the Claimant has sought to use an arbitrary start date for the three-year limitation period under NAFTA Article 1117(2), which the Claimant supposedly chose for reasons of expediency.[120]

88. The Respondent refers to a statement of the Claimant's expert in Québec environmental law, Me Christine Duchaine, who considered it obvious ("évident") that undergoing two separate EAs would be more complex and costlier for GNLQ than having to undergo a single EA.[121] The Respondent then attempts to transform this narrow finding on EA costs into constructive knowledge on the part of the Claimant of a NAFTA breach and related damages. The Respondent argues that since the Claimant should have known back in January 2016 about increased EA costs, so too should the Claimant have known about the Respondent's NAFTA breach and the resulting damages.[122]

89. The Respondent grounds these positions on a misinterpretation of the Claimant's claims. First, the Claimant does not claim damages on the basis that undergoing two EAs instead of one increased its costs. Second, even a summary consideration of the merits-based facts (with which the second objection is extensively intertwined) suffices to show the lack of seriousness that underpins the Respondent's self-serving depiction of the Claimant's position. The Claimant's position is that it first acquired knowledge that the Respondent's 2015-2016 decisions to subject the GNLQ Project to two EAs breached the

116 Respondent's Reply, para. 48-53.

117 Respondent's Reply, para. 54.

118 Respondent's Reply, para. 92.

119 Respondent's Reply, paras. 51-52.

120 Respondent's Reply, para. 54.

121 Respondent's Request for Bifurcation, paras. 58-59, citing Expert Report of Me Christine Duchaine, 21 November 2023, p. 75, **CER-1**; Respondent's Reply, para. 92.

122 Respondent's Reply, para. 92.

NAFTA, thus causing damages to the Claimant only after: (i) the Québec Government's refusal of the GNLQ Project dated 21 July 2021; (ii) its simultaneous decision that the Gazoduq Project "died" together with GNLQ; and (iii) the Decision Statement of the Federal Government refusing to authorise the GNLQ Project dated 7 February 2022.[123]

90. It was impossible for the Claimant to anticipate back in 2015-2016 that the GNLQ Project would have to undergo an unfairly conducted BAPE public hearing process or just how badly the Québec Government would let its EA process be upended by issues within the exclusive jurisdiction of the Federal Government (notably, shipping and its alleged impact on belugas).[124] It was equally impossible to foresee that the Federal Government would simply parrot the manifestly arbitrary and discriminatory findings of the Québec Government's EA in its own EA.[125]

91. Similarly, the Claimant could not have been aware of the damages it had incurred as a result of the GNLQ Project having undergone two EAs before incurring them following the provincial refusal of 21 July 2021 and the federal refusal of 7 February 2022. As the tribunal in *Mobil v. Canada* stated:

> "[i]t is impossible to know that loss or damage *has been* incurred until that loss or damage actually has been incurred … To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty."[126]

92. It is plain that when the Claimant filed its Request for Arbitration on 17 February 2023, it did so within three years of having first acquired knowledge of all NAFTA breaches and damages that it claims, including the NAFTA breach and related damages that the Claimant incurred as a result of the GNLQ Project having undergone two EAs.

93. *Third*, the Respondent ignored the criteria for ordering bifurcation as set out in ICSID Arbitration Rule 44(2) to focus instead on a string of discrete points, none of which address the merits of bifurcation, and none of which demonstrate the seriousness of the second objection. These points include notably:

---

123 Claimant's Response, paras. 177, 183, 195; Claimant's Memorial, paras. 855-856. The Claimant reserves its right to further address at the appropriate juncture the Respondent's argument that the Claimant must have claimed all damages in the Memorial: *see* Respondent's Reply, p. 24, fn 65. Incidentally, in its Memorial the Claimant has already claimed all costs of carrying out EAs as part of its claim for damages that that arise out of the 2021-2022 provincial and federal refusals of the GNLQ Project that it put forward in its Memorial: *see* Memorial, paras. 407-418; Expert Report of Secretariat International Advisors LLC, 21 November 2023 (**CER-3**) Section 4.D, "Project development costs incurred through 2022".

124 Claimant's Response, paras. 183, 195.

125 Claimant's Response, paras. 184, 196.

126 *Mobil v. Canada*, Decision on Jurisdiction and Admissibility of 13 July 2018, paras. 154-155, **RL-0053-ENG**.

- The Respondent's failed analogy between the facts in *Bilcon* and those of the present dispute for purposes of its objection based on NAFTA Article 1117(2).[127] Suffice to say at this stage that in *Bilcon*, the tribunal hinged its decision on evidence that the investors in that dispute had to have been aware, at a very early stage of the EA, that having to undergo a joint review panel process amounted to a breach of the NAFTA, and that they would incur damages as a result of such a breach.[128] There is no such evidence in the present dispute;

- The Respondent's inaccurate suggestion that the Claimant relies on the theory of continuing breaches in order to avoid the application of NAFTA Article 1117(2).[129] Contrary to the Respondent's suggestion, the Claimant has submitted claims that comply with NAFTA Article 1117(2) without relying on continuing breaches to do so; and

- The Respondent's position, which the Claimant rejects, that the 2015-2016 decisions to hold two EAs are not continuing breaches.[130]

IV. THE RESPONDENT'S THIRD OBJECTION DOES NOT WARRANT BIFURCATION OF THE PROCEEDINGS

94. In its Reply, the Respondent continues to seek bifurcation on a limited aspect of the Claimant's case, concerning Québec's deliberate leak to the press of confidential information on the withdrawal of a major investor from the Project.[131] In so doing, the Respondent continues to put forward an excessively formalistic view of the level of specificity required in the introductory pleadings, which finds no support in the NAFTA and ICSID practice. In any event, the Respondent has failed to meet the test under ICSID Arbitration Rule 44(2). Its Request for Bifurcation on this ground cannot be accepted.

A. The Respondent has failed to explain why the third objection meets any of the criteria set out in ICSID Arbitration Rule 44(2)

95. Nothing in the Respondent's Reply demonstrates why the Respondent's third objection meets the criteria set out in ICSID Arbitration Rule 44(2).

96. *First*, the Respondent does not explain why addressing this particular objection at an early stage "would materially reduce the time and cost of the proceeding" within the meaning of Rule 44(2)(a). As explained above, the Respondent wrongfully criticises the time-

127 Respondent's Reply, para. 53.

128 *Bilcon of Delaware et al v. Government of Canada*, PCA Case No. 2009-04, UNCITRAL (1976), Award on Jurisdiction and Liability (17 March 2015), paras. 278-281, **Exh. CL-0024**.

129 Respondent's Reply, para. 54.

130 Respondent's Reply, para. 58.

131 Respondent's Reply, paras. 62 *et seq.*

estimates put forward by the Claimant. It however does not explain why the potential benefit of settling this limited objection at a preliminary phase outweighs the extensive delays that bifurcation would occasion.

97. *Second*, the Respondent does not explain why "determination of th[is] preliminary objection would dispose of all or a substantial portion of the dispute" within the meaning of Rule 44(2)(b), other than baldly alleging that this "would permit the settlement of a substantial part of the dispute."[132] Given that this objection concerns only one aspect of the case, judicial economy instead requires that this objection be examined together with the merits.

98. *Third*, the Respondent does not meaningfully engage with the Claimant's position that "the preliminary objection and the merits are so intertwined as to make bifurcation impractical" under Rule 44(2)(c). The Respondent simply states that it is not necessary to examine issues of substance « de manière importante » and that it is sufficient for the Tribunal to examine « si cette réclamation et les faits la sous-entendant, tels qu'apparus dans le mémoire, étaient déjà inclues dans les plaidoiries introductives ou non. »[133]

99. In the Claimant's respectful submission, one may only understand the meaning of the media leak in March 2020 by looking into the entire period that led up to the wrongful refusal of the Projects in July 2021. That is *precisely* why the examination of this objection must be done at the merits stage: in order to form an opinion on the facts underlying the leak of confidential information to the press, the Tribunal will need to examine the underlying evidence and factual context *which are properly a matter for the merits.* It would be both unfair to the Claimant and impractical to examine this point in isolation from the factual matrix of this case.

B. The third objection is not serious

100. The Request for bifurcation is further undermined by the lack of seriousness of the third objection. The Respondent accuses the Claimant of maintaining a deliberate « flou » on the contours of its claim relating to the leak of confidential information to the press « comme un événement distinct, survenu en mars 2020 », as a claim that is « autonome et distinct des refus des projets Énergie Saguenay et Gazoduq en juillet 2021 et février 2022. »[134] The Respondent denies the Claimant's position that this claim was implicit in the arguments presented in the Notice of Intent and the Request for Arbitration, because "such a statement does not withstand the test of reality",[135] as the relevant passages contain some « généralités, qui pourraient désigner n'importe quelle mesure que la

132 Respondent's Reply, para. 123.

133 Respondent's Reply, para. 93.

134 Respondent's Reply, paras. 65-66 and 63.

135 Respondent's Reply, para. 71.

demanderesse estime défavorable à son projet ».[136] It maintains that the introductory pleadings were not « sufficiently specific » to allow the Respondent to form an opinion on the factual basis of the claims set out therein.[137]

101. None of these arguments is serious. None of them warrants bifurcation of the proceedings.

102. *First*, the Respondent has put forward an excessively formalistic interpretation of Article 1119, which has no basis on its text. Article 1119 requires, in connection with the content of a notice of intent, that such notice "shall specify (…) (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; (c) the issues and the factual basis for the claim". The Claimant set out in Sections IV and V of its Notice of Intent the "provisions alleged to have been breached", as well as the "issues and factual basis for the claim". As such, the Claimant complied fully with the terms of Article 1119. The Respondent seeks to make a preliminary objection out of thin air.

103. *Second*, the Respondent's assertion that the Claimant is obfuscating the terms of its Request for Arbitration is false. The Respondent alleges that the claim concerning the media leak in March 2020 is a "new claim" that was not contemplated in the Claimant's introductory pleadings, which only focussed on events that occurred in July 2021 and February 2022. According to the Respondent: « les plaidoiries introductives [de la demanderesse] laissaient plutôt à penser que les réclamations de la demanderesse se fondaient sur les décisions de refus survenues en juillet 2021 et février 2022. »[138] The Respondent may believe so, but this is simply not true: at paragraph 25 of its Request for Arbitration, for example, the Claimant stated in no uncertain terms that:

> "The facts that form the basis of the present Request occurred before and within the three-year period set out in Article 3 of Annex 14-C. Consequently, the relevant provisions of the NAFTA apply with respect to such facts and events."[139]

104. It is therefore clear that the claims set out in the Request for Arbitration envisaged claims arising out of facts and events that occurred prior to July 2020, which is when the three-year period set out in Annex 14-C of the USMCA started. The deliberate leak of confidential information to the press in March 2020 took place prior to the 1st of July 2020. As a result, the NAFTA Chapter Eleven provisions invoked by the Claimant in its pleadings apply to the Claimant's claim that, by divulging confidential information to the press, the Respondent unfairly targeted the Claimant in breach of Article 1105 of the NAFTA. The Respondent's attempt to muddy the waters here is unavailing.

---

136 Respondent's Reply, paras. 72-73.

137 Respondent's Reply, paras. 75-79.

138 Respondent's Reply, para. 81.

139 Claimant's Request for Arbitration (17 February 2023), para. 25.

105. *Third*, the Respondent is wrong to assert that the introductory pleadings were too vague to include this claim in the scope of the dispute. A plain reading of the Notice of Intent (which runs across 46 pages) and Request for Arbitration (which runs across 56 pages) makes clear that the Claimant set out at a reasonable level of detail the facts and events that formed the basis of its claims under NAFTA Articles 1102, 1103, 1105 and 1110.[140]

106. As the Respondent admits, the Claimant expressly complained of the sudden change of behaviour *vis-à-vis* GNLQ that resulted in a "manifestly arbitrary and discriminatory refusal" of the Projects, as well as "Québec's shifting behaviour and outlook led to a series of backtracking on their initial financial commitments to the GNLQ Project", [redacted] This "change of heart was later manifested in improper intervention by high-level Québec politicians in the orderly conduct of the Project's environmental review".[141] This improper intervention in the orderly conduct of the process included the divulgation of sensitive information, which was aimed to undermine the credibility of Project in the public eye just before the BAPE hearings, and pave the way for the Projects' refusal.[142] The Claimant further developed its claims under NAFTA Article 1105 in its Memorial by adding more facts, as it is perfectly within its right to do so.

107. The Respondent tries in vain to interpret these passages as excluding the claim that Québec divulged confidential information to the press. However, the Government of Québec [redacted] it was seeking to invest in the Project, and leaked that information exactly when it backtracked on its previous offers. It is clear that the claim concerning the leak of confidential information to the press formed part of the Claimant's claims under Article 1105 of the NAFTA and is indissociable from the factual matrix of the present dispute.

108. *Finally*, the Respondent asserts that it could not "reasonably expect" to face this claim from the text of the introductory pleadings, but does not identify any prejudice it might have suffered from the alleged lack of specificity.[143] The Respondent simply ignores the conclusions of the tribunal in *Eco Oro v. Colombia*, which applied more strict provisions than NAFTA Article 1119,[144] and instead tries to distinguish the present case from *Chemtura.*[145] But the key point remains: whether or not it was a new "claim" or a new "argument", the *Chemtura* tribunal reasoned that the Respondent had not identified any

---

140 Claimant's Response, paras. 217-218.

141 Claimant's Request for Arbitration, para. 67. (Emphasis added.)

142 As noted in the Claimant's Memorial, para. 217, "[a] senior economic advisor to the Office of Premier Legault would later tell Tony Le Verger that the true reason for the Project's rejection on alleged environmental grounds was that the Government 'did not want to take the heat for a project that was not sure to get its financing in the long run'."

143 Respondent's Reply, para. 74; *see also* Claimant's Response, paras. 221-222.

144 Claimant's Response, para. 221 and footnote 272.

145 Respondent's Reply, para. 81.

prejudice to its ability to present responsive submissions. Similarly in this case, the Respondent has failed to explain what prejudice the lack of "specificity" in the introductory pleadings could have caused to it.

V. CONCLUSIONS

109. For these reasons, the Claimant respectfully requests that the Tribunal issue an order rejecting the Respondent's Request for Bifurcation.

110. The Claimant further respectfully requests that the Tribunal order the Respondent to pay the Claimant's costs in relation to this unnecessary procedural step.

111. The Claimant expressly confirms that its submissions do not constitute its full submission on the substantive or procedural aspects of the Respondent's preliminary objections or any future bifurcation request the Respondent may decide to make. The Claimant expressly reserves its right to make such full submissions if required.

Dated: 14 March 2024

London, UK

All of which is respectfully submitted,

Christophe Bondy

Steptoe International (UK) LLP