**PUBLIC VERSION**

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**RUBY RIVER CAPITAL LLC**

**Claimant**

**v.**

**CANADA**

**Respondent**

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

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# CLAIMANT'S OBSERVATIONS ON THE APPICATION FOR LEAVE TO SUBMIT A WRITTEN MEMORIAL AS *AMICUS CURIAE* BY THE GOVERNMENT OF QUEBEC

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**19 January 2024**


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## I. INTRODUCTION

1. Pursuant to Rule 67(3) of the ICSID Arbitration Rules (2022), and in accordance with the Tribunal's directions of 10 January 2024 and Procedural Order No. 1, the Claimant hereby submits its observations on the Government of Québec (**Québec**)'s request of 4 January 2024 for leave to file a written submission as a non-disputing party (the **Request**).

2. For the reasons set out below, the Claimant respectfully submits that Québec's Request is procedurally irregular, manifestly inadmissible and abusive and in any event does not meet the test for an *amicus curiae* request. Therefore, in our submission the Tribunal should reject its Request for leave either as inadmissible or as unfounded.

3. In accordance with the Tribunal's invitation to comment pursuant to Article 67(3) of the ICSID Arbitration Rules, the present submission is limited to observations on whether Québec should be permitted to file a written submission in the proceeding as *amicus* and on any conditions for filing such a submission. The present submission is without prejudice to any comments the Claimant might make on the substantive contents of Québec submission, which for the avoidance of any doubt the Claimant entirely rejects.

## II. QUÉBEC'S SUBMISSION IS INADMISSIBLE BECAUSE IT WAS FILED IN VIOLATION OF THE TRIBUNAL'S PROCEDURAL CALENDAR

4. As a preliminary matter, in the Claimant's respectful submission Québec's Request is inadmissible, having been filed in violation of the procedural calendar set down by the Tribunal in these proceedings.

5. The procedural calendar set out in Procedural Order N°1 confirms that applications for leave to submit *amicus curiae* submissions (if any) must be submitted by 24 April 2024.[1] This comes at a point in the procedural calendar after the Respondent has filed its Counter-Memorial and after any requests for production of documents have been addressed. By that time at least, the Respondent will have been obliged to state its "full case", including with regard to any jurisdictional objections it may have decided to raise. Until such time, requests such as the present are manifestly premature and therefore inadmissible on this basis alone.

6. The Claimant makes further submissions on Québec's lack of standing to make its related request for bifurcation in **Section IV,** below.

[1] Procedural Order No. 1, Annex B — Procedural Timetable (updated as of 10 January 2024), Scenario 2.

## III. QUÉBEC FAILS TO MEET EACH OF THE SUBSTANTIVE TESTS REQUIRED TO FILE AN *AMICUS* SUBMISSION

7. Québec in any event should not be allowed to file its *amicus curiae* submission in these proceedings, as it fails each of the tests set out in the ICSID Arbitration Rules and in the Statement of the North American Free Trade Agreement (**NAFTA**) Free Trade Commission on non-disputing party participation (**FTC Statement**).

8. ICSID Arbitration Rule 67(2) provides that in determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

> "*(a)* whether the submission would address a matter within the scope of the dispute;
>
> *(b)* how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties;
>
> *(c)* whether the non-disputing party has a significant interest in the proceeding;
>
> *(d)* the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and
>
> *(e)* whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission."

9. Rule 67(4) of the ICSID Arbitration Rules adds that:

> "(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length, scope or publication of the written submission and the time limit to file the submission."

10. Similarly, the NAFTA FTC Statement provides in Section B as follows:

> "2. The application for leave to file a non-disputing party submission will:
>
> (…)
>
> *(d)* disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
>
> (…)
>
> 6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:
>
> *(a)* the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a

> perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> *(b)* the non-disputing party submission would address matters within the scope of the dispute;
>
> *(c)* the non-disputing party has a significant interest in the arbitration; and
>
> *(d)* there is a public interest in the subject-matter of the arbitration.
>
> 7. The Tribunal will ensure that:
>
> *(a)* any non-disputing party submission avoids disrupting the proceedings; and
>
> *(b)* neither disputing party is unduly burdened or unfairly prejudiced by such submissions."

11. Thus, the FTC Statement adds to the ICSID Arbitration Rule 67(2) the criterion of "public interest" as an additional consideration that the Tribunal ought to take into account when determining the permissibility of an *amicus curiae* submission.

12. Applying any of the above tests, Québec's Request is to be rejected in its entirety.

### A. The scope of the "dispute" is undefined at the present stage

13. *First*, Québec's submission fails to comply with the requirement under ICSID Rule 67(2)(a) and Section B, Article 6(b) of the FTC Statement, that the issue raised by the would-be intervenor should be "within the scope of the dispute".

14. Québec argues that its submission is "within the scope of the dispute" in that the issue it purports to raise — that of consent to arbitration — is "inherent in any investment dispute", and is therefore "necessary to the resolution of the dispute".[2] Québec adds that a NAFTA tribunal has recognised the potential importance of a non-disputing party submission on issues going to its jurisdiction.[3]

15. Québec's arguments are without any merit and must fail. Québec's *amicus* submission fails to address a matter "within the scope of the dispute" for the purposes of Rule 67(2)(a) and Section B, Article 6(b) of the FTC Statement, for the simple reason that the position of the Respondent on the issue in question is at present unknown. Thus the "scope of the dispute" for the moment is undefined — in particular, on the point Québec raises.

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[2] Gouvernement du Québec, « Demande d'autorisation dépôt mémoire *amicus curiae* », 4 January 2024 (**Québec's Request**), para. 8.

[3] Québec's Request, para. 8.

16. These circumstances arise as a result of two circumstances: *first*, the Respondent's failure to date to take any position on the jurisdictional issue in question and *second*, the premature timing of the Request.

17. The existence of a "dispute" and the determination of its scope logically depend on the prior identification of the positions of the parties to the arbitration.[4] In the absence of such confirmation, the Tribunal cannot assume that any particular issue is in fact "disputed", and therefore falls within the scope of the issues put before it by the parties themselves. This is regardless of whether the point at issue goes to a question of jurisdiction, of merits, or indeed of damages.[5]

18. Nor does the mere invitation by a party to the dispute (or *a fortiori* here, by a non-party) prompting the Tribunal to consider an issue *sua sponte* elevate that issue to something "disputed" for the purposes of ICSID Arbitration Rule 67(2)(a).[6] As the tribunal in *Amco v. Indonesia* aptly noted, the existence and scope of a dispute must be delimited by reference to the parties' formal claims and defences, rather than the general subject matter within the scope of the tribunal's jurisdiction:

> "'A dispute' in arbitration is to be understood not merely as subject matter within the scope of jurisdiction that is contested, nor even arguments that have been advanced in oral hearings and responded to. Argument is directed to supporting a dispute: it does not define the dispute. *A dispute is defined by claims formally asserted and responded to in claim and defence, or in counterclaim and reply to counterclaim - in other words, the causes of action*."[7] (Emphasis added)

19. This alone is dispositive of the Request.

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4 *C.f. Mavrommatis Palestine Concessions, Judgment (Jurisdiction), P.C.I.J. Series A., No 2* (30 August 1924), p. 11, **Exh. CL-0162** ("A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.")

5 Richard Happ and Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck/Hart/Nomos, 2022), p. 651, para. 2489, **Exh. CL-0163** ("as prescribed by Rule 37(2), aspiring [Non-Disputing-Parties] are required to establish whether their written submission: (. . .) is within the scope of the dispute inasmuch as it does not introduce new issues or go beyond the dispute as defined by the parties"). (Emphasis added)

6 In this regard, the Claimant recalls that in its "Requête en Suspension d'instance" dated 22 December 2023, paras. 16-17, the Respondent requested the Tribunal to suspend the proceedings before it for as long as the respective tribunals in *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63) and *Legacy Vulcan LLC v. United Mexican States* (ICSID Case No. ARB/19/1), have not determined the preliminary objections raised by the United States of America and Mexico in these proceedings, without itself taking a position on those objections. The Respondent limited itself to noting that the awards rendered by those tribunals would clarify the effect of the provisions set out in Annex 14-C of the United States-Mexico-Canada Agreement (**USMCA**), adding that: « cet éclairage permettrait au Tribunal d'examiner de sa propre initiative si le différend qui lui a été soumis ressort de sa compétence, comme l'y autorise l'article 43(3) du Règlement d'arbitrage ». The Tribunal rejected that Request on 31 December 2023.

7 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding (10 May 1988), para. 135, **Exh. CL-0164**.

20. Accordingly, Québec's assertion that a NAFTA tribunal has "recognized the potential positive contributions of non-disputing parties on issues going to jurisdiction" is moot in circumstances where the existence or not of a dispute on the jurisdictional point it seeks to raise is unknown. In any event, Québec fails to mention that in the case of *United Parcel Service of America Inc v. Canada*, a NAFTA Chapter Eleven tribunal held that questions of jurisdiction are not among the matters on which it is appropriate to receive submissions from non-disputing parties, precisely because this is an issue for the disputing parties (notably, the Respondent) to raise and to define:

> "The Tribunal *does not consider that among the matters on which it is appropriate for the Petitioners to make submissions are questions of jurisdiction* and the place of arbitration. On both, the parties are fully able to present the competing contentions and in significant degree have already done so. In any event, *it is for the respondent to take jurisdictional points* and the parties themselves have the power to fix the place of the arbitration by agreement between them. The Tribunal does not consider that any other procedural matters of which it is aware should be the subject of *amicus* submissions."[8] (Emphasis added)

21. The tribunal's position in *UPS v. Canada* is perfectly in line with the views that the Respondent itself expressed in that very same case, which are instructive to this proceeding:

> "*The petitioners cannot introduce new issues to the litigation and should accept the parameters of the case as defined by the disputing parties. They should not take the case away from the disputing parties. Furthermore, in Canada's view, there is no basis to accept submissions by* amici *on jurisdictional issues*. The Petitioners seek the right to make submissions concerning the jurisdiction of the tribunal and, once they gain access to the pleadings, on whether the matters raised by the disputing investor are within the jurisdiction of the Tribunal. (...) With respect to the issue of jurisdiction, (...) the Petitioners effectively seek leave to make submissions on the interpretation of NAFTA Chapter Eleven.
>
> Questions regarding purely the interpretation of NAFTA Chapter Eleven are not matters upon which the Tribunal should receive *amicus* briefs. To permit the Petitioners to make submissions on this issue would accord to them the substantive rights of NAFTA Parties under NAFTA Article 1128, which is beyond the power of the Tribunal. In any event, the Petitioners do not have any particular or unique expertise in interpreting treaty obligations that would assist the Tribunal beyond that which is offered by the disputing parties and the Tribunal itself."[9]

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8 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), para. 71, **Exh. CL-0165**.

9 *Id.*, Canada's Submission on the Petition of the Canadian Union of Postal Workers and the Council of Canadians (28 May 2001), paras. 44-50 (internal paragraph numbers omitted), **Exh. CL-0166**.

22. Thus, on the Respondent's own submission, a would-be *amicus* does not have standing to make submissions on issues beyond the "parameters of the case as defined by the disputing parties", much less to introduce issues of jurisdiction which a respondent itself has not raised.

23. In support of its position that its submission is "within the scope of the dispute", Québec refers to the case of *Apotex Inc. v. United States*, where the tribunal did not subscribe to the "hard and fast rule" enunciated in *UPS v. Canada*, and suggested that non-disputing parties may be well-placed to provide assistance and perspectives or insights on questions of jurisdiction. In *Apotex*, however, the would-be *amicus* filed its request on 25 August 2011, only *after* the United States had filed its counter-memorial, and only *after* the tribunal had published a notice inviting non-disputing parties to make a written application.[10] Moreover, the would-be *amicus* Business Neatness Magnanimity (**BNM**) sought to present its views on a matter going to the heart of the dispute that had crystallized following the jurisdictional objections raised by the United States: namely, whether Apotex's expenditures for a regulatory approval qualified as an "investment", and whether Apotex was an "investor" within the meaning of NAFTA Article 1139.[11] Ultimately, the tribunal held that these issues were indeed a "matter within the scope of the dispute" as the United States had raised an objection to jurisdiction, but nonetheless refused BNM leave to submit an *amicus curiae* brief for different reasons.[12] Thus, *Apotex* stands for the exact opposite of the proposition Québec would have the Tribunal endorse.

24. Other cases Québec cites in connection with this point merely reinforce the conclusion that its Request should be dismissed, on this first basis alone. Québec references *Gramercy v. Peru* in support of the proposition that "[c]onsent is the cornerstone of jurisdiction".[13] In that case, however, the tribunal held that for there to be a dispute, the "disagreement must be between two parties, which hold opposite views" and "both parties must be aware that the dispute exists, the matter having been raised by one party and the counter-party showing some sign of opposition".[14] Similarly, Québec refers to the case of *Autopista v. Venezuela*, but there the tribunal held that a "dispute *between* the *parties*" is an "objective requirement"

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[10] *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011), paras. 2-4, **Exh. CL-0167**.

[11] *Id.*, para. 10.

[12] *Id.*, para. 33.

[13] Québec's Request, para. 8.

[14] *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award (6 December 2022), paras. 323-325, **Exh. RL-0032**.

under Article 25 of the ICSID Convention.[15] Québec's reference to such authorities is further inapposite in that none of them relates to a request for permission to make an *amicus curiae* submission.

25. In sum, Québec has not demonstrated that its submission relates to a matter that is "within the scope of the dispute" before the Tribunal. As such, Québec's attempt to seek *amicus* status fails on this first ground alone, and this finding is sufficient to dispose of its Request. The comments that follow concerning other grounds for dismissal of the Request are without prejudice to this position. The Claimant sets them out simply to confirm that the Request suffers from multiple fatal flaws.

### B. At the present stage the Tribunal has no basis for judging whether Québec's position is "different" from that of both disputing parties

26. *Second*, Québec's submission fails to meet the test under ICSID Rule 67(2)(b) and Section B, Article 6(a) of the FTC Statement, in that it fails to demonstrate "how the submission would assist the Tribunal to determine *a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties*".

27. Québec seeks to meet the test by asserting that its position on the issue it raises is different from that of the Claimant. However, it acknowledges that on the issue it raises, the Respondent has taken no position. Québec nonetheless asserts that there is "reason to believe" it will bring a "new perspective that is different from that of the parties to the arbitration", and that its submission will allow the Tribunal to have a "complete" perspective on the issues in dispute.[16]

28. Québec's submissions are vain and manifestly fail to meet the requirements of this branch of the test under ICSID Rule 67(2)(b), as well as Section B, Article 6(a) of the FTC Statement.

29. Québec's argument that its position is "different" from that of the Claimant is frivolous: the test under Rule 67(2)(b) is that a would-be intervenor's position is different from that of the *parties*, which presupposes that the Tribunal has full understanding and knowledge of the positions of both the Claimant and the Respondent. Unless the Tribunal has a full

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[15] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction (27 September 2001), para. 95, **Exh. RL-0033** (emphasis added).

[16] Québec's Request, para. 7 (« La perspective qu'entend offrir le Requérant à l'égard de la portée du consentement à l'arbitrage donné à l'Annexe 14-C de l'ACEUM est fondamentalement distincte de celle exprimée par la Demanderesse. Dans la mesure où le Défendeur ne s'est pas prononcé sur la question, il y a lieu de considérer la position du Requérant comme une nouvelle perspective qui est différente de celle des parties à l'arbitrage »).

understanding of both parties' position, it is unable to determine whether a would-be intervenor's submissions differs from the arguments already before it, and in what respect.

30. As things currently stand, the Tribunal *does not know* the Respondent's position on the specific issue Québec cites. To the contrary, for its own wholly opportunistic reasons (evoked in the Claimant's response of 28 December 2023 to the Respondent's failed request for suspension of the proceedings, filed on 22 December 2023), the Respondent has remained silent on the jurisdictional issue Québec raises (while signalling its potential intent to raise unspecified further jurisdictional issues at some future date).

31. The Tribunal cannot determine how Québec's submission would assist it to determine a factual or legal issue related to the proceeding "by bringing a perspective, particular knowledge or insight *that is different from that of the parties*", when the Respondent's position on the issue in question is wholly unknown. Contrary to Québec's suggestion, this is not a determination that can be made on the basis of speculation or belief. Nor can the "completeness" of submissions be judged where one of the two disputing parties to the arbitration has not yet opined on the issue in question in accordance with the procedural calendar.

32. Indeed, the need to know and appreciate the full position of both parties, when deciding on any request to admit a would-be *amicus* submission, is precisely why the calendar in these proceedings foresees such submissions should be filed only *after* the filing of the Respondent's Counter Memorial.

33. In an attempt to gloss over this fatal flaw, Québec contends that it should be permitted leave to submit its *amicus* "Memorial" because the observations it seeks to present will permit the Tribunal to benefit from a "complete picture of the questions in dispute" which, in Québec's view, is « l'objectif de ce critère ».[17] Québec is wrong to take this position. As explained by the tribunal in *Apotex Inc. v. USA* (an authority Québec itself cites), the purpose of the criterion at issue is to ensure that the tribunal benefits from specialized knowledge, experience or expertise on the issues in dispute which "would give it any particular perspective or insight *beyond that of the Disputing Parties*".[18] On that basis, the *Apotex Inc.*

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17 Québec's Request, para. 7.

18 *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011), para. 23, **Exh. CL-0167**; *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in response to a petition for transparency and participation as *amicus curiae*, (19 May 2005), para. 24, **Exh. CL-0168** ("The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided. The Tribunal will therefore only accept amicus submissions from persons who […] have the expertise, experience, and independence to be of assistance in this case.") (Emphasis added.)

tribunal rejected BNM's request to intervene in the proceedings, as "there [wa]s nothing to suggest that BNM [wa]s able to provide any assistance to this Tribunal that might not otherwise [have been] available to it."[19] In reaching this conclusion, the tribunal noted that BNM's submission was no "more than a legal analysis of the terms of the NAFTA, and previous arbitral decisions . . . undistinguished and uncoloured by any particular background or experience."[20]

34. By the same token, there is nothing to suggest here that Québec will provide any assistance that would not have otherwise been available to the Tribunal by the disputing parties. Québec has demonstrated no particular knowledge or expertise that could be of meaningful assistance to this Tribunal. Nor is there reason to believe that the disputing parties will fail to argue any salient legal issue. As explained by the NAFTA tribunal in *Methanex v. USA*, "the Tribunal must assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute."[21] In the same vein, the *Apotex Inc*. tribunal observed that:

> "the assessment as to the likely utility of a non-disputing party's submission should be made on the assumption that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute. (…) *There is no reason to conclude that the Disputing Parties will not competently and comprehensively argue all issues regarding jurisdiction, and bring before the Tribunal all relevant perspectives on the meaning and scope of Article 1139 of the NAFTA*."[22] (Emphasis added)

35. Similarly, Québec's reliance on *Resolute Forest Products v. Canada* is wholly inapposite. In that case, two international law scholars sought to intervene as *amici curiae*, in order to provide their legal expertise and knowledge by submitting a "scholarly examination of the *travaux préparatoires*" of the NAFTA in respect of the temporal jurisdiction limitations raised in relation to NAFTA Article 1116 and 1117.[23] The tribunal rejected their request, noting that:

> "the Tribunal does not consider that the Applicants, experienced and knowledgeable as they no doubt are as individual practitioners and scholars, bring a 'perspective, particular knowledge or insight different from that of the disputing

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19 *Id.*

20 *Id.*

21 *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to intervene as *Amici Curiae* (15 January 2001), para. 48, **Exh. CL-0169**.

22 *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011), paras. 24-25, **Exh. CL-0167**.

23 *Resolute Forest Products Inc. v. Canada*, PCA Case No. 216-13, Procedural Order No. 6, Decision on *Amicus* Application (29 June 2017), para. 2.6.1, **Exh. CL-0170**.

> parties' (…) This is particularly so in circumstances where both Disputing Parties are represented by experienced counsel who have extensively briefed the issues on the interpretation of NAFTA; the Tribunal is also in receipt of submissions from both the Non-Disputing Parties".[24]

36. By the same token, in the present case the Respondent is represented by counsel with experience in advising on legal disputes arising under the NAFTA. The tribunal has also made provision in Procedural Order No. 1 for the submission of Non-Disputing NAFTA Parties' submissions, pursuant to NAFTA Article 1128. There is no reason to believe that Québec will provide information that will be different from that already provided by the parties or of meaningful assistance. Nor does Québec profess to be in possession of materials related to the interpretation of the NAFTA or the USMCA otherwise unavailable to the Respondent.

37. The present case is also distinguishable from that of *Electrabel v. Hungary*, to which Québec further refers. In *Electrabel*, the tribunal authorized the European Commission (acting on behalf of the European Union, **EU**), to submit an *amicus curiae* brief, *inter alia*, on the interpretation of European Community Law and its connection with the Energy Charter Treaty (**ECT**). In so doing, the tribunal noted that the European Commission was "an expert commentator on European Community law" and was itself a Contracting Party to the ECT in which it played from the outset a leading role.[25] As a guardian of the EU Treaties, the Commission was therefore in a position to provide the tribunal with specialized knowledge and expertise on various issues at the heart of the dispute, such as the Commission's State aid investigation concerning the Power Purchase Agreements in Hungary, the effect of EU law in Hungary's legal system and the scope of the EU *acquis*.[26] As such, the circumstances of *Electrabel* are entirely distinct from the circumstances of the present case, where the issue Québec seeks to raise is one squarely within the competency of the disputing parties, and on which Québec has no particular expertise different from that of the disputing parties.

38. Finally, Québec's reference to its prior intervention in domestic proceedings in the case of *Metalclad* is inapposite, given both that the submission was made before a domestic court and the circumstances of Québec's submissions in that case were entirely different.[27] As the *UPS* tribunal held, it is inappropriate to extrapolate from rules applicable to a domestic

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[24] *Id.*, para. 4.4.

[25] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), paras. 4.89 and 4.92, **Exh. CL-0065**.

[26] *Id.*, paras. 4.93 *et seq.*

[27] *The United Mexican States v. Metalclad corporation*, Decision of the Supreme Court of British Columbia on the challenge by the Petitioner 2001 BCSC 664 BCSC 1529 (2 May 2001), **Exh. CL-0171**.

proceeding when assessing the admissibility of a request for permission to file an *amicus curiae* submission in a NAFTA proceeding. According to that tribunal:

> "We do not see as decisive for the existence of the power in [the applicable UNCITRAL Arbitration Rules] the presence or absence of *amicus* rules in the domestic law of the NAFTA Parties. The matter is to be determined under international law, especially NAFTA incorporating the UNCITRAL rules."[28]

39. In any event, Québec has not even referenced the test for admitting intervenors in set-aside proceedings in the court of British Columbia, nor how that test might relate to that under the ICSID Arbitration Rules and the FTC Statement.

40. Moreover, the factual context of Québec's intervention before the British Columbia Court in relation to the award in *Metalclad* bears no resemblance to that of the present case. In *Metalclad*, the measure at issue in the NAFTA proceedings had been adopted by a Mexican government authority. Mexico was the petitioner asking the British Columbia court to set aside of the NAFTA tribunal's award. Mexico had already set out its substantive legal arguments before the British Columbia court, and Québec in its intervention before the British Columbia Court simply agreed in substance with Mexico.

41. In the present case, by contrast, as further set out in relation to ICSID Arbitration Rule 67(2)(d) below, it is not credible to argue that Québec brings a perspective "that is different from that of the parties", in that Québec has been directly and intimately involved in the Respondent's defense of this claim since the outset.

42. Again, Québec's attempt to file an *amicus* submission fails on this second ground alone. This finding alone is sufficient to dispose of the Request.

### C. Québec bears no legal or financial obligations in connection with the present proceedings and bears no direct international responsibility for the claim, and therefore cannot claim a "significant interest in the proceedings"

43. *Third*, Québec's submission also falls foul of the requirement under ICSID Rule 67(2)(c) and Section B, Article 6(c) of the FTC Guidelines, both of which require a would-be third-party intervenor to have a "significant interest in the proceedings".

44. Québec asserts that it meets this test given that its own measures are challenged in the arbitration, and that it has "reasonable grounds to believe" that the Respondent may seek financial compensation from the Province, should an award be made against it arising out of

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[28] *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), para. 65, **Exh. CL-0165**.

such measures. In any event, Québec asserts that it "has the right" to ensure that its measures are evaluated in light of international law only by a competent tribunal.[29]

45. Québec goes on to acknowledge that tribunals have considered that requests for *amicus* intervention must be made by parties which have more than a general interest in the proceedings, and that this level of interest is attained where the requesting third party can demonstrate that the arbitration would have a direct or indirect impact on their rights or on the principles they assert.[30] Québec also acknowledges that requests have been rejected where the proceedings have only an incidental impact on the requesting parties' rights.[31] It asserts that it meets that threshold here, given that the legality of its own measures are at issue, and given that it risks a substantial financial penalty depending on the outcome of these proceedings.[32]

46. Québec's arguments are without merit and again fail to support its Request.

47. As a matter of both general international law and the NAFTA, the fact that measures adopted by Québec are at issue in these proceedings does not in itself justify Québec's request for intervention, given that Canada as the Respondent has full responsibility to respond to any claims of breach of international obligations arising out of such measures and bears full legal responsibility for any ensuing financial loss.

48. As a matter of general public international law, the Respondent is responsible for the consistency of any measures adopted by Québec with Canada's international obligations.[33] Article 105 of the NAFTA specifically reflects this general principle, providing that: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, *including their observance, except as otherwise provided in this Agreement, by state and provincial governments*." (our emphasis).

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29 Québec's Request, para. 4.

30 Québec's Request, para. 9.

31 Québec's Request, para. 9.

32 Québec's Request, para. 9.

33 ILC, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" (2001) in *Yearbook of the ILC*, Vol. II, Part Two, p. 39, commentary (5) ("In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs"), **Exh. CL-0111.** *See also id.*, pp. 40-41, Article 4 and commentaries (8)-(9) thereto ("the principle in article 4 applies equally to organs of the central government and to those of regional or local units. (. . .) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations").

49. Reflecting these legal circumstances, the Respondent is already fully engaged in the defense of Québec's position in these proceedings. Québec therefore has no claim that its interests (to the extent they exist, which is not conceded) would be unrepresented in this arbitration, but for its intervention. Indeed, as referenced below in respect of the test under ICSID Arbitration Rule 67(2)(d), Québec is already intimately and directly engaged in the Respondent's response to the present claim. Given the close collaboration between Québec and the Respondent in these proceedings, there is no argument Québec would otherwise have no presence in these proceedings commensurate to its alleged interest, but for an *amicus curiae* submission.

50. To the contrary, allowing such Québec's submission in the context of such collaboration would be abusive, as it would effectively grant the Respondent and Québec the ability to adopt manifestly contrary positions (notably, with regard to the issue addressed in Québec's purported *amicus* brief) notwithstanding that they functionally act in these proceedings as a single defendant. The *amicus* mechanism was not intended to effectively allow the Respondent "two kicks at the can" in respect of questions potentially in dispute in the arbitration, or *a fortiori* to adopt two diametrically opposed positions to suit its own divided interests – here, both to remain silent, and to take a position, on a jurisdictional point.[34]

51. In any event, in light of the relevant rules governing State responsibility for measures under the NAFTA and international law, Québec bears no direct international responsibility for its measures at issue, and the Tribunal has no power to make an award against Québec arising out of such measures. Instead, responsibility for the measures at the level of customary international law and under the NAFTA is entirely borne by the Respondent.[35]

52. Moreover, as Québec acknowledges, as a matter of domestic law the Respondent lacks any legal mechanism to seek indemnification from Québec for any award of damages and other financial compensation awarded against it by the Tribunal in these proceedings. As such, Québec's asserted fear of financial penalty is at best speculative, and cannot ground a request to allow an *amicus* submission.

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[34] That is especially so when the Alberta Petroleum Marketing Commission, a Provincial Corporation of the Government of Alberta, is pursuing a parallel claim against the United States of America in another NAFTA matter, based on a diametrically different interpretation of the provisions of Annex 14-C in respect of the revocation by U.S. President Biden of the Presidential Permit for the construction and operation of the Keystone XL pipeline, dated 20 January 2021: *Alberta Petroleum Marketing Commission v. United States of America*, ICSID Case No. UNCT/23/4, Notice of Arbitration (27 April 2023), paras. 1, 15-17, **Exh. CL-0172**.

[35] *See*, in this regard, *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001 (27 June 2001), p. 508, para. 114, **Exh. CL-0173**, where the International Court of Justice found that various authorities of the United States were responsible for failing to give effect to its provisional measures order, on account of the conduct by organs of the State of Arizona.

53. Given these circumstances, the arbitration has no direct or indirect impact on any rights or obligations purportedly held or owed by Québec. Accordingly, contrary to Québec's assertion that it is « en droit de s'attendre que seul un adjudicateur *compétent* se prononce sur la licéité de ses mesures au regard du droit international »,[36] the Province in fact has no legal basis to "expect" anything with regard to proceedings to which it is formally a stranger. Nor does such a legally unfounded "expectation" provide any legitimate grounds for admitting its submission. To the contrary, any objection to the Tribunal's jurisdiction must be raised in the normal course, if at all, by a party to the proceedings. In circumstances in which the Respondent is notoriously silent on the jurisdictional point Québec seeks to raise, in the Claimant's respectful submission it would be procedurally irregular for the Tribunal to allow a non-party to the proceedings effectively to step into the Respondent's shoes.

54. To justify its Request, Québec refers to the case of *Electrabel*, where the tribunal held that the European Commission had "much more than 'a significant interest' in these arbitration proceedings", as the case raised significant questions for the application and interpretation of EU law in the framework of investment law and its interaction with the ECT.[37] What Québec fails to acknowledge, however, is the tribunal's statement that the Commission should have played "a more active role as a non-disputing party in this arbitration, *given that (as was rightly emphasised in the European Commission's Submission), the European Union is a Contracting Party to the ECT* in which it played from the outset a leading role" whereas "the European Commission's perspective on this case is not the same as the Respondent's and still less that of the Claimant."[38] Leaving aside the fact that in this case the Respondent has not taken a position on the issue upon which Québec wishes to intervene, in *Electrabel* the Commission's "significant interest" stemmed from the fact that the EU was *itself* a party to the ECT.

55. Contrary to the European Union's position under the ECT, Québec quite obviously is not a Party to the NAFTA, nor to the USMCA. The "significant interest" of NAFTA Parties to present their views on the proper construction of the NAFTA is recognized in Article 1128 of the NAFTA, and is already reflected in the provisions of Procedural Order No. 1. The Government of Québec tries in vain to assimilate itself to other NAFTA Parties,[39] but it is

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[36] Québec's Request, para. 4 (italics in the original; underlining added).

[37] Québec's Request, footnote 15, citing *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 4.92, **Exh. CL-0065**.

[38] *Id.*, para. 4.92. (Emphasis added.)

[39] *C.f.* Québec, « Mémoire à titre d'amicus curiae », 4 January 2024, para. 55 (referring to the so-called « droits de tierce partie élargis ») and footnote 43, suggesting that it should be afforded the same treatment as the Government of the United States of America in *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Procedural Order No. 4 (4 December 2022), para. 12, **Exh. CL-0174**.

patently obvious that it is not. As a non-disputing party, Québec has no "significant interest" that could justify its intervention.

56. Québec's lack of standing as a Party to the NAFTA and to the USMCA also stands in stark contrast to the EU's position in *Electrabel*, insofar as the latter was decided under the 2006 ICSID Arbitration Rules. This also marks a difference. Contrary to the situation under the pre-existent 2006 Rules, the 2022 ICSID Arbitration Rules deal with the participation of Non-Disputing Treaty Parties (**NDTPs**) in a separate provision and in a manner that is materially different from the typical participation of Non-Disputing Parties (**NDPs**). According to the new Rule 68(1), an ICSID tribunal has an obligation, not just a discretion,[40] to allow a Party to a treaty that is not a party to the dispute "to make a submission on the interpretation of the treaty at issue in the dispute". Thus, the ICSID Arbitration Rules recognize an *ipso jure* "significant interest" for all treaty parties which non-treaty parties do not possess. According to the Commentary on ICSID Arbitration Rule 68(1):

> "Arguably, there are several procedural and substantive overlaps between NDP and NDTP participation, as evidenced by the similarities between Rules 67 and 68. (…) Nevertheless, in the authors' view, NDTP participation and 'general' NDP participation should not be treated on the same footing. First, NDTPs have an interest in the proceedings that is very specific compared to that of general third parties; they can bring to bear perspectives and evidence on questions of treaty interpretation that a NDP will most likely be unable to access.[41] (Emphasis added)

57. The "significant" and "very specific interest" attached to NDTPs — as opposed to other, non-treaty-party intervenors — stems from the fact that they have "a legitimate interest in the interpretation of the treaty provisions at issue because such an interpretation may affect the scope of its legal obligations under that treaty going forward", whereas pursuant to the customary rules of treaty interpretation, "the views of the NDTP on the correct interpretation of the treaty provisions at issue carries considerable weight, especially to prevent a one-sided interpretation of the treaty."[42]

58. Consequently, the EU's participation in the intra-EU BIT cases must not be confused or analogized with the normal participation of *other* non-disputing parties in investment treaty cases. According to the ICSID Rules Commentary,

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[40] Richard Happ and Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck/Hart/Nomos, 2022), p. 658, para. 2517, **Exh. CL-0163** ("This is unlike Rule 67, which leaves the permissibility of general NDP participation at the Tribunal's discretion, and that too, after it has elicited the disputing parties' views.")

[41] *Id.*, p. 656, paras. 2510-2511.

[42] *Id.*, p. 658, paras. 2519-2520.

> "absent express treaty provisions, NDTPs have ordinarily been granted the right to participate under the rules governing NDP participation[119] or, in a few instances, have been invited by the Tribunal to make submissions. (…)
>
> [119] For example, in *AES v. Hungary* and *Electrabel v. Hungary*, both being cases commenced under the [ECT] and administered by ICSID, the Tribunals were confronted with the intra-EU jurisdictional objection (…). In each of these cases, the European Commission (acting on behalf of the EU, which is a party to the Energy Charter Treaty) intervened as a "non-disputing party" under Rule 37(2) of the Arbitration Rules (…). *The EU's participation in these cases as a "non-disputing party" – which is supposed to be independent and not have a personal stake in the outcome of the dispute – raises some interesting questions because technically it is neither "independent" nor "neutral", having a significant interest in the arbitral tribunal upholding arguments by respondent EU Member States based on the intra-EU jurisdictional objection*."[43] (Emphases added)

59. In sum, Québec as a non-disputing party has demonstrated no "significant interest" that could justify its intervention as *amicus curiae*.

60. Again, Québec's request for intervention could be disposed of on the basis of its failure to meet this branch of the test alone.

### D. Québec in any event is already closely collaborating with the Respondent

61. *Fourth*, Québec's Request fails under ICSID Arbitration Rule 67(2)(d) and Section B, Article 2(d) of the FTC Statement, both of which consider linkages between the would-be *amicus* and the parties to the proceedings with a view to ascertaining that party's independence.[44] It is notorious that Québec and the Respondent are already in deep and sustained collaboration and coordination in devising the Respondent's response to the Claimant's claims in this arbitration. These ties alone should bar Québec from making an

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43 *Id.*, p. 657, para. 2516 and footnote 119.

44 *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Procedural Order No. 4 (23 February 2016), para. (D), **Exh. CL-0175** ("As regards independence, that it is to be inferred from (i) Section B.2(c) of the FTC Statement, which requires the application to describe the applicant, together with (ii) Section B.2(d) of the FTC Statement, which requires the application to disclose whether or not the applicant has any direct or indirect affiliation with any disputing party, that an amicus needs to be independent from the disputing parties"). *See also Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012), para. 49, **Exh. CL-0176** ("The Arbitral Tribunals agree with the Claimants' observation that an NDP should also be independent of the Parties. This is implicit in Rule 37(2)(a), which requires that the NDP bring a perspective, particular knowledge or insight that is different from that of the Parties. Other ICSID tribunals have also considered this to be a requirement of to admit amicus submissions"); *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (17 March 2006), para. 23, **Exh. CL-0177** ("The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case.") (All emphases added.)

*amicus* submission at any point in the proceedings, and *a fortiori* here given the circumstances of its present Request.

62. In its Request, Québec asserts that:

> « Il n'existe donc pas de lien de subordination entre le Requérant et le Défendeur. De plus, le Requérant n'a reçu aucune assistance financière de la part du Défendeur en lien avec le présent arbitrage et seuls les représentants du Requérant ont participé à la rédaction de la présente demande ainsi que du mémoire que le Requérant entend déposer avec la permission du Tribunal. »[45]

63. Québec's comments on the absence of a « lien de subordination », or the fact that the Respondent did not specifically participate in the drafting of Québec's would-be *amicus* submission, are irrelevant and wilfully misleading. Québec nicely alleges that it has not consulted with the Respondent *in relation to the present request.*[46] This careful phrasing begs the question of its broader, systemic collaboration with the Respondent in the latter's response to this claim.

64. In practice, there has been and will continue to be systemic coordination and collaboration between Québec and the Respondent in the preparation of the latter's submissions in this arbitration.

65. It is notorious that the Respondent has a regular practice of entering into Joint Defense and Confidentiality Agreements with sub-national governments whose measures are at issue in NAFTA Chapter Eleven proceedings. There is every reason to believe that the Respondent and Québec have entered into such an agreement in connection with the present claim.

66. In any event, reflecting their *de facto* direct collaboration in developing a position in these proceedings, the Respondent from the start insisted that Québec be directly copied on all procedural correspondence and all submissions filed in these proceedings (without awaiting a "public" version of the same). Indeed, multiple Québec representatives were present at and directly participated in the consultations in this matter pursuant to Article 1118 of NAFTA. Multiple Québec representatives were directly present at the first procedural hearing in this arbitration, at the Respondent's request.[47] The Respondent no doubt will call for Québec officials present at any future hearings in these proceedings.

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[45] Québec's Request, para. 3.

[46] Québec's Request, para. 3.

[47] Procedural Order No. 1, p. 2, listing several Québec officials "[o]n behalf of the Respondent".

67. Where the *amicus* has very close ties to one of the disputing parties which call into question its independence, previous tribunals have dismissed such attempts to intervene.[48] For example, in *Bernhard von Pezold v. Zimbabwe*, the claimant expressed concerns over the independence of the indigenous communities which sought to intervene as *amici, inter alia* because they were effectively organs of the State and therefore could not be independent of the respondent in the matter. The tribunal was not persuaded on the basis of the materials before it that the functions of the chiefs of the indigenous communities were functions of the government; the tribunal nonetheless implied that a different conclusion would have been sufficient to hold that the would-be intervenors lacked independence.[49] In any event, the tribunal found that the would-be intervenors presented close ties with a certain Mr. Secco and a legal entity (the Nyahode Union Learning Centre, "NULC") controlled by him, whose interests were adverse to the claimant. According to the tribunal, the fact that Mr. Secco and NULC had been involved in the preparation of the application of the would-be intervenors raised "legitimate doubts as to the independence or neutrality of the petitioners".[50] Notably, the *von Pezold* tribunal agreed with the claimant that the "*apparent* lack of independence or neutrality", rather than the lack itself, was "sufficient ground to deny the NDP Application".[51]

68. By the same token, the fact that the Province of Québec is, as a subnational unit, a "State organ" whose actions and omissions are attributable to the Respondent itself, together with the close ties between Québec and the Respondent, are both sufficient to deny the Request on the basis of a manifest lack of independence. In the Claimant's respectful submission, the mere appearance of lack of independence is enough to warrant the dismissal of the Request.

69. Contrary to Québec's suggestion, there is no precedent for allowing a sub-national government whose measure is at issue in a NAFTA proceeding directly to intervene as an *amicus* in that proceeding. To the best of the Claimant's knowledge, this has never occurred, nor has such an intervention been allowed in any equivalent investor-State proceeding.

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[48] Richard Happ and Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck/Hart/Nomos, 2022), p. 651, para. 2489, **Exh. CL-0163** ("tribunals have also considered whether the NDP is independent, i.e., whether it has an affiliation with any of the disputing parties or is financed or assisted by any government or entity in preparing the submission or is motivated by a personal or professional interest in the case.")

[49] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012), paras. 50-53, **Exh. CL-0176**.

[50] *Id.*, paras. 54-56.

[51] *Id.*, para. 56. (Emphasis added.)

70. As noted above, the example Québec cites of concerning its prior intervention as an *amicus* is wholly inapposite: the *Metalclad* proceeding to which it refers did not involve a Québec measure, but rather measures adopted by a Mexican State entity. Unlike here, Québec had had no role or presence in the related arbitral proceedings. Indeed, Québec's *amicus* standing was granted not by a NAFTA tribunal, but by a domestic Canadian court in the context of set-aside proceedings. Québec's intervention agreed with Mexico's counsel, and focussed on the applicable standard of review under the Commercial Arbitration Act and the International Commercial Arbitration Act, and did not extend to other issues.[52] As such, the example Québec cites provides no support to its request for intervention here.

### E. The issue of financial assistance is irrelevant

71. *Fifth*, Québec's effort to suggest it has received no third-party financial support for its intervention, as required under ICSID Rule 67(2)(e), is misleading and irrelevant.

72. The criterion of financial independence is intended to ensure that a would-be *amicus* is not unduly influenced by any undisclosed third party or a party to the dispute.[53]

73. Québec notes to this effect that it has received no financial or other support from any third party to prepare and file its submission.[54] Yet to the extent that it has any interest in these proceedings at all, Québec in effect indirectly receives extensive support from the Respondent in the form of a team of dedicated lawyers from Canada's Trade Law Bureau, who are all listed as counsel in the present proceedings.

74. Thus, while Québec may not have received financial assistance *qua*, it has nonetheless received by the Respondent "other assistance to file the submission" within the meaning of ICSID Arbitration Rule 67(2)(e), a factor which weighs against permission to intervene.

### F. The alleged public interest in its intervention

75. *Sixth*, while not a criterion for admission of third-party submissions under the ICSID Rules, Québec's submission also fails the FTC Statement's requirement at Section B, Article 6(d) that there be a "public interest in the subject-matter of the arbitration".

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52 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Decision of the Supreme Court of British Columbia on the challenge by the Petitioner 2001 BCSC 664 (2 May 2001), para. 56, **Exh. CL-0178**.

53 Richard Happ and Stephan Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck/Hart/Nomos, 2022), p. 651, para. 2489, **Exh. CL-0163** ("tribunals have also considered whether the NDP is independent, i.e., whether it has an affiliation with any of the disputing parties or is financed or assisted by any government or entity in preparing the submission or is motivated by a personal or professional interest in the case.") *See also* authorities mentioned at footnote 44 above.

54 Québec's Request, para. 3.

76. Québec argues that « la question soumise à l'arbitrage » is allegedly "in the public interest", given the significance of the Claimant's investment for the Québec economy, and given more general concerns about the legitimacy of investor-State arbitration and the potential for contradictory decisions on the jurisdictional issue Québec seeks to raise.[55]

77. Again, Québec's submission fails to justify its request for intervention at the present stage of the proceedings or at all. Québec refers to the substantive issues raised in the present arbitration to justify the "public interest", such as the public opinion surrounding Énergie Saguenay, questions concerning the Projects' greenhouse gas emissions and their potential impact on marine mammals.[56] Similarly, in all of the examples it mentions in its Request, the intervenors in question were seeking to make legal and factual submissions on the merits of the dispute, such as the environmental, cultural and human impacts of specific investments, which in the relevant tribunals' view met the "public interest" criterion.[57] Québec's intervention does *not* relate to any of the substantive legal or factual issues at stake in this arbitration, a point it fails to acknowledge. To the contrary, Québec's would-be intervention is limited to comments on the interpretation of the transitional period set out in Annex 14-C of the USMCA.

78. Conscious of this fatal flaw, Québec tries to ground a "public interest" in speculation on a potential conflict between the present and other NAFTA decisions and refers to:

> « [le] maintien de la confiance du public envers le système de règlement des différends investisseur-États … [qui] pourrait se voir minée par la poursuite de la présente procédure sur le fond alors que d'autres tribunaux arbitraux siégeant en application de l'Annexe 14-C de l'ACEUM examinent présentement des objections à leur compétence fondée sur la temporalité des mesures pouvant être contestées en vertu de cette annexe.» [58]

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55 Québec's Request, para. 10.

56 Québec's Request, para. 10.

57 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 19 (7 December 2018), para. 65, **Exh. CL-0179** ("In the present case, the existence of "a public interest" is certainly not disputed. The nature of the disputed Project, as well as the oppositions to it as far as they concern the people, the environment, the culture and the history, necessarily implicate a "public interest" and the outcome of these proceedings may impact upon it"); *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (15 January 2001), para. 49, **Exh. CL-0169** ("The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions."); *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Procedural Order on Amici Applications for Leave to File Non-Disputing Party Submissions (26 September 2017), para. 7, **Exh. CL-0180** ("the Tribunal accepts that [the "Centre québécois du droit de l'environnement"] meets the requirements of Procedural Order No. 1 and the NAFTA Commission Joint Statement; and that it has a relevant interest in this case, with considered views concerning several issues disputed between the Parties").

58 Québec's Request, para. 10.

79. Such an interest, however, even if it were established on the basis of evidence (*quod non*) is not in and of itself enough to warrant the conclusion that Québec has a public interest to intervene in this matter. If Québec's position were correct , the criterion of "public interest" would be met effectively in *every* NAFTA Chapter Eleven arbitration, as the "confidence" of the public in investor-State dispute settlement could be affected by the settlement of the issues in dispute. Such a wide interpretation would turn Section B, Article 6(d) of the FTC Statement meaningless and deprive it of its effective meaning.

80. Nor is the financial outcome of the proceeding sufficient to establish a "public interest". In *Gabriel Resources v. Romania* (a case which Québec itself cites), the tribunal stated that:

> "The Tribunal clarifies that this public interest does not arise simply because an award of damages against the Respondent would be paid from the Romanian Government's reserves (as was suggested by the Applications). If this were the case then there would be a sufficient public interest for the admissibility of *amici* briefs in all investor state arbitrations. That is not, therefore, an acceptable criterion."[59]

81. Even though investor-State proceedings generally raise issues of public importance, a would-be *amicus* must still identify a "specific public interest" beyond a mere interest of the public in the dispute. As the tribunal held in *Apotex Inc. v. United States* (again, a case upon which Québec itself relies):

> "Whilst it may be said that investment-arbitration tribunals generally deal with matters of public importance, it remains for the Applicant to identify the specific public interest which it considers to be at stake, or which may be affected by any decision, and which warrants submissions from individuals or entities or interest groups beyond those immediately involved as parties in the dispute."[60]

82. Finally, Québec's attempt to ground a "public interest" in potential contradictory decisions on the jurisdictional issue Québec seeks to raise is speculative at best. In circumstances in which the Respondent itself has not yet confirmed its position in the arbitration on the issue Québec seeks to raise, the importance of any "public interest" in Québec's submission cannot be assessed. The entire purpose of admitting third party submissions is to seek to ensure that parties with a true, intrinsic interest in the outcome of the arbitration have the opportunity to express their position, to the extent that it is additive of anything the disputing parties themselves have expressed to a tribunal. In this sense, again, Québec's request is at best premature.

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[59] *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania*, ICSID Case No. ARB/15/31, Procedural Order No. 19 (7 December 2018), para. 65, **Exh. CL-0179**.

[60] *Apotex Inc. v. United States*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011), para. 29, **Exh. CL-0167**.

### G. The burden on the Claimant and the related disruption of proceedings would be considerable

83. *Finally*, Québec's submission also manifestly fails the requirement set out in ICSID Arbitration Rule 67(4) and Section B, Article 7(a) of the FTC Statement, that the submission should not be disruptive of the proceedings, nor impose any undue burden or unjust prejudice on any disputing party, or unnecessarily complicate the process.[61]

84. In an effort to demonstrate that it fulfils these criteria, Québec refers to the Tribunal's power to raise an issue as to its own jurisdiction "at any time" in the proceedings of its own initiative pursuant to Rule 43(3), arguing that Québec's attempt to raise this issue at present would be no more disruptive than if the Tribunal itself were to do so. Québec further suggests that it is less disruptive for it to make its submissions earlier rather than later in these proceedings, among other things as this will allegedly provide the disputing parties with more time to respond to Québec's observations. Finally, Québec argues that its submission is all the less disruptive in that the Claimant has already stated its case on jurisdiction.[62]

85. Once again, Québec's arguments provide no support to its Request. To the contrary, they simply highlight why allowing it to intervene would be highly procedurally disruptive and grossly unfair and prejudicial to the Claimant.

86. Québec's attempt to confuse the admissibility of its submission, and the alleged "lack of disruption" that it would entail, with the Tribunal's ability to consider its own jurisdiction, is frivolous and without any merit. In essence, Québec is suggesting that it can usurp the Tribunal's power of appreciation and suddenly force onto the arbitral agenda an issue that has not yet even been put in dispute between the actual parties to the arbitration. To allow this would be an obvious abuse of the third-party submission mechanism and would be manifestly disruptive.

87. Allowing this submission at the present point, where the Respondent's own position on the issue in question has not even been confirmed, would be the equivalent of the Tribunal unjustifiably granting Québec the equivalent of full party status by raising issues not even disputed between the named parties to the arbitration, and moreover of allowing it to ignore the calendar set down in Procedural Order N°1. To the best of the Claimant's knowledge, such an abuse of the *amicus* procedure has never been permitted by any prior investment treaty tribunal.

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61 *C.f. United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), para. 69, **Exh. CL-0165**.

62 Québec's Request, para. 11.

88. Moreover, Québec's submission that it is "less disruptive now than later" presupposes that it would have the right to make such a submission *at any time,* which is not the case. Indeed, in the Claimant's respectful submission, as referenced above, given *inter alia* Québec's manifestly intimate collaboration with the Respondent in developing the latter's response to the present claim, Québec has no basis for requesting status as intervenor at any time.

89. In any event, Québec's argument seeks to engage the Tribunal in a wholly speculative exercise as to when a submission of this kind (assuming it were admissible at all, *quod non*), might or might not be more or less disruptive of the proceedings. It would certainly be highly disruptive and prejudicial for a third party to the proceedings to be granted the right to make submissions on a jurisdictional point which, again, the Respondent itself has not put in issue, and indeed before the Respondent has been obliged to make its "full case".

90. In this connection, it is worth repeating here the statement in *Apotex v. United States* that a NAFTA Chapter Eleven tribunal must proceed on the assumption that the disputing parties will make all necessary arguments, claims and submissions relevant to the dispute:

> "the assessment as to the likely utility of a non-disputing party's submission should be made on the assumption that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute. (…) *There is no reason to conclude that the Disputing Parties will not competently and comprehensively argue all issues regarding jurisdiction, and bring before the Tribunal all relevant perspectives on the meaning and scope of Article 1139 of the NAFTA*."[63] (Emphasis added)

91. It would be highly prejudicial for the Claimant to be put in a position of having to respond on the substance to arguments going to the Tribunal's jurisdiction in this case, before the Respondent's position on the same has been made clear.

92. Nor would it be procedurally fair for the Claimant to be forced to make submissions on a fundamental challenge to the Tribunal's jurisdiction, in the limited context of a response to a third-party intervention. To the contrary, in the procedural schedule the Tribunal has adopted in these proceedings, challenges to jurisdiction are to be addressed through full exchanges between the parties, supported as required by relevant witness or expert testimony and by relevant documentary support.

93. The notion that Québec's submission would be "less disruptive" in that the Claimant has stated its own position on jurisdiction is also a fallacy. It would obviously be highly disruptive to the present proceedings for the Tribunal to allow a non-party such as Québec

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[63] *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Procedural Order No. 2 on the Participation of a Non-Disputing Party (11 October 2011), paras. 24-25, **Exh. CL-0167**.

to randomly raise jurisdictional objections before the Respondent's own position on these issues has been clarified.

94. Indeed, Québec's submission to the effect that its Request would be "less disruptive" if admitted at the present stage of the proceedings is patently disingenuous, in that its request is accompanied by an invitation to the Tribunal to *suspend the proceedings on the merits* in favour of bifurcation to exclusively consider the issue Québec seeks to introduce,[64] including through the admission of further submissions on the part of Québec[65] (see **Section IV** below). As set out below, Québec wholly lacks standing to make either of these requests. But these circumstances certainly confirm that Québec's true intention is to seek the wholesale disruption of the present arbitration.

95. In the same vein, the two references Québec makes to past case-law are wholly inapposite to the procedural circumstances of this case. In *Gabriel Resources v. Romania*, the tribunal authorized three NGOs to intervene as *amici curiae*, only after the parties to the dispute had filed a memorial, a counter-memorial and a reply on jurisdiction and the merits, just a few months before the final hearing. Thus, the positions of both parties were fully set out in the arbitration.[66] This is evidently not the case here. Québec also refers to the case of *UPS v. Canada* for the proposition that the parties' rights will not be unfairly prejudiced because the parties will have the opportunity to respond to Québec's submissions. In that case, however, the *UPS* tribunal made clear that non-disputing parties do not have a right to make submissions of the kind envisaged in Québec's request and do not become a party to the proceedings (see paragraph 98 below). As such, this case too is unavailing.

96. For these reasons, Québec's Request to intervene as *amicus curiae* fails under any branch of the test mandated by the terms of the FTC Statement and the ICSID Arbitration Rules.

## IV. QUÉBEC LACKS STANDING TO FILE AN "OBJECTION À LA COMPETENCE" AND TAKE FURTHER PROCEDURAL STEPS IN THIS ARBITRATION

97. Even assuming that the Request were admissible (*quod non*), Québec as a would-be *amicus* lacks the standing to file an "objection à la competence",[67] much less request a bifurcation for the examination of its "objection" at a "preliminary phase".[68]

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64 Québec, « Mémoire à titre d'amicus Curiae », 4 January 2024, paras. 4, 40 *et seq.*

65 Québec, « Mémoire à titre d'amicus Curiae », 4 January 2024, para. 55.

66 Case details in *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, **Exh. CL-0181**.

67 Québec, « Mémoire à titre d'amicus Curiae », 4 January 2024, title of the electronic file.

68 *Id*., para. 40.

98. As noted above, Québec is neither a party to this arbitral proceeding, nor a Party to the NAFTA, and does not therefore have standing to make any submissions or take any procedural steps in this case. As noted by the NAFTA tribunal in *UPS v. Canada* (upon which Québec itself relies):

> "the receiving of such submissions from a third person is not equivalent to making that person a party to the arbitration. That person does not have any rights as a party or as a non-disputing NAFTA Party. It is not participating to vindicate its rights. Rather, the Tribunal has exercised its power to permit that person to make the submission. It is a matter of its power rather than of third party right."[69]

99. By the same token, the Québec Government lacks standing to undertake further procedural steps in the arbitration, such as to provide additional "explanations", "responses" or make "oral representations" to the Tribunal at a subsequent phase of the proceedings.[70] The procedural rights of an *amicus* are strictly delimited by the four corners of the NAFTA FTC Statement, the provisions of ICSID Arbitration Rule 67, and paragraph 24 of Procedural Order No. 1: all of these provisions limit the involvement of an *amicus curiae* to a single written submission, and nothing more.

100. This is also borne out of relevant NAFTA Chapter Eleven practice. NAFTA arbitral tribunals have consistently rejected attempts by *amici* to assert procedural rights they do not possess, including requests to attend hearings held *in camera* without the parties' consent,[71] to obtain access to pleadings and confidential material,[72] and to file post-hearing briefs,[73] stressing that *amici curiae* do not have "any rights at all" under the relevant NAFTA provisions.[74] The key principle that may be gleaned from this practice is that *amici* do not have a "party" status and "have no standing in the arbitration" to make any submissions or

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69 *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), para. 61, **Exh. CL-0165**.

70 Québec, « Mémoire à titre d'amicus Curiae », 4 January 2024, para. 55 and footnote 43.

71 *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (15 January 2001), paras. 41-42, **Exh. CL-0169**; *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* (17 October 2001), para. 67, **Exh. CL-0165**.

72 *V. G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Procedural Order No. 1 (4 June 2008), para. 38, **Exh. CL-0182**.

73 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part II.C, para. 44, **Exh. CL-0031**.

74 *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae* (15 January 2001), para. 46, **Exh. CL-0169**.

take any further procedural steps. Their position is effectively the same as any other member of the public.[75]

101. *A fortiori*, the same conclusion must apply to Québec's attempt to obtain a quasi-party status, arrogating for itself the ability to raise preliminary objections, seek the bifurcation of the proceedings, file written responsive submissions and participate in the oral hearings — in short, to step into the Respondent's shoes.

102. In support of its attempt to raise an "objection à la competence" before this Tribunal, Québec refers to *Electrabel v. Hungary*, as an example where a tribunal considered a jurisdictional objection raised by the European Commission as a non-disputing party.[76] This argument is misleading on a number of counts:

a. *First*, the *Electrabel* tribunal did not "consider an objection to jurisdiction" raised by the European Commission as a non-disputing party, as Québec would have this Tribunal believe. Rather, the tribunal directed the Commission to address in its submission specific issues of law,[77] and addressed the Commission's arguments on the relationship between the ECT and European Community law as a matter of "applicable law" relevant to the dispute.[78] It is on *that* basis that the *Electrabel* tribunal summarily "reject[ed] the European Commission's jurisdictional submissions as regards the EU law issue", referring to its prior "analysis and decisions regarding applicable law".[79]

b. *Second*, and as explained in greater detail in paragraphs 37 and 54 to 58 above, the present case is clearly distinguishable from *Electrabel*, as the EU was itself a Contracting Party to the ECT and therefore could participate in the arbitration as a non-disputing treaty party. The EU had a significant interest not only in the proper interpretation of the ECT, but also in the harmonious interpretation of European law by

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75 *V. G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Procedural Order No. 1 (4 June 2008), para. 38, **Exh. CL-0182** ("*Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their briefs must be limited to allegations, without introducing new evidence.")

76 Québec's Request, p. 4, footnote 9.

77 *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 4.89, **Exh. CL-0065** ("the Tribunal notes that while the European Commission is an expert commentator on European Community law and could accordingly assist the Tribunal by addressing several legal issues, the scope of its legal opinion should in principle be directed to addressing the following issues: (a) European Community Law and its connection with the Energy Charter Treaty; (b) Community Law and the State Aid investigation concerning the Power Purchase Agreements signed by Hungary; and (c) the Effect of Community Decisions on the European Union's Members States, particularly Hungary.")

78 *Id.*, Part IV ("Applicable Law(s)") and paras. 4.111 *et seq*.

79 *Id.*, para. 5.32.

the Court of Justice of the European Union. As such, Québec's position in this arbitration is hardly analogous to the position of the European Union in *Electrabel.*

c. *Finally*, Québec conveniently fails to mention that in the case of *AES v. Hungary* (another case where the Commission sought to challenge a tribunal's jurisdiction under the ECT), the tribunal reportedly:

> "allowed the [European Commission] to file a submission but not to access the parties' pleadings. The tribunal limited the [Commission]'s submission to 30 pages and confined the submission's scope to abstract legal discussion on, inter alia, the relationship between EU law and the ECT. The tribunal, furthermore, *declined to allow the [Commission] to challenge the tribunal's jurisdiction, apparently because neither of the disputing parties had mounted such a challenge*."[80]

103. While Québec suggests that the Tribunal must examine the question of its own jurisdiction "de sa propre initiative" at a preliminary phase,[81] this is nothing but a thinly-veiled attempt to seek bifurcation in violation of Rules 42 and 44 of the ICSID Arbitration Rules, which allow for the bifurcation of the proceedings upon request *by a party*. Québec's Request is simply an attempt effectively to have the Claimant face two Respondents at once on two different fronts, in manifest abuse of the *amicus curiae* procedure. There is no legal basis for a would-be *amicus* to undertake the procedural actions envisaged in Québec's Request.

## V. REQUEST FOR PRODUCTION

104. In connection with the present submission, the Claimant respectfully asks the Tribunal to exercise its power under Article 43 of the ICSID Convention, ICSID Arbitration Rule 36(3) and Article 15.11 of Procedural Order No. 1, to order immediate production by the Respondent of the Joint Defence and Confidentiality Agreements (or their functional equivalents) between itself and Québec.

105. In the Claimant's respectful submission, Québec's request to intervene stands to be rejected on the multiple grounds evoked above. The Tribunal therefore need not wait for production of any Joint Defence and Confidentiality Agreement between Canada and Québec, before disposing of Québec's present request to intervene as a third party. Rather, the Claimant invites the Tribunal to order production of the cited Agreements (or their functional equivalent) at the present time, to avoid the disruption of any future attempts by Québec to seek to intervene in the proceedings.

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[80] Epaminontas Triantafilou, "A More Expansive Role For Amici Curiae In Investment Arbitration?" (Kluwer Arbitration Blog) (11 May 2009), **Exh. CL-0183**.

[81] Québec's Request, paras. 4, 38-39 and 55-56.

## VI. CONCLUSIONS

106. For these reasons, the Claimant respectfully requests that the Tribunal issue an order:

1) rejecting Québec's request to intervene in these proceedings as an *amicus curiae*;
2) requiring the Respondent to produce a copy of its Joint Defense and Confidentiality Agreement with Québec (or of any equivalent agreements establishing conditions of collaboration between the Respondent or any of its sub-entities and Québec or any of its sub-entities in connection with the Respondent's defence of the present proceedings);
3) confirming Québec's lack of standing to invite bifurcation of the proceedings or to propose related additional submissions, and
4) ordering costs against the Respondent in connection with the present failed procedural intervention, given that the Respondent is already closely collaborating with Québec in connection with its response to the present claim, and should be held responsible for procedurally abusive steps taken by an entity for which it is responsible as a matter of international law.

107. In the event that the Tribunal should decide not to dismiss the present Request as inadmissible and exceeding Québec's procedural standing, the Claimant hereby reserves its right to make further observations on the admissibility and substance of Quebec's "*Amicus Curiae* Memorial" and the related requests made therein pursuant to ICSID Arbitration Rule 67(7), paragraph 24.1 of Procedural Order No. 1 and Section B, Article (8) of the NAFTA FTC Statement.

Dated: 19 January 2024

London, UK

Respectfully submitted on behalf of the Claimant,

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