LEGAL OPINION

International obligations governing Canada's development of new liquefied natural gas production capacity in light of the climate change emergency

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DAVID SUZUKI FOUNDATION
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Foreword

With the world drastically off track to meet the Paris Agreement's temperature goals, it is imperative that all governments commit to a just and equitable global fossil fuel phase-out. Countries such as Canada — the fourth-largest fossil fuel producer in the world and the only G7 country that hasn't reduced emissions since 1990 — have a special role to play in halting expansion of oil and gas production.

Concerned about the rapid growth of natural gas projects domestically and abroad, the David Suzuki Foundation requested a legal opinion from international jurist Jorge E. Viñuales, Harold Samuel Professor of Law and Environmental Policy at the University of Cambridge, to shed light on states' responsibilities that must be factored into energy decision-making in the context of a worsening climate crisis. The opinion uses the example of a Canada-based natural gas liquefaction and export project, LNG Canada, to assess whether government support for fossil fuel expansion corresponds with Canada's international legal obligations. The analysis is vital to governments everywhere, as it helps illustrate the climate change, human rights, investment and trade considerations that, together, shape state responsibilities regarding fossil fuels.

This opinion contributes to the mounting evidence that continued public investment in fossil fuels harms economic security, the environment and human rights. It lays down the rationale for why governments must cease all public financing and subsidies that further lock communities into the highly volatile and sundowning industries of oil, coal and gas.

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Executive summary

This Opinion examines the implications under international law of a package of measures introduced by the Government of British Columbia and the Government of Canada to support, enable and promote gas production and transport through construction of LNG terminals and associated infrastructure, mainly for export to Asian markets (the Transaction).

The main focus on this package of measures concerns an investment in two projects: a natural gas liquefaction facility based in Kitimat, British Columbia, and owned by LNG Canada, a joint venture among foreign companies Shell, Petronas, PetroChina, Mitsubishi and the Korea Gas Corporation (KOGAS); and a 670-km (416 miles) pipeline, owned by Coastal GasLink Pipeline Ltd., whose owners include domestic and foreign investors, designed to bring natural gas from northeastern British Columbia to be liquefied and prepared in the Kitimat LNG facility for export to Asian markets.

The Opinion analyzes whether the Transaction is consistent with the international legal obligations of Canada, in the specific context of the climate change emergency, having regard to the fact that the Transaction is likely to increase emissions of greenhouse gases, thereby contributing to depletion of the remaining carbon budget set by the temperature goal of the Paris Agreement, with the associated risks for humans and the environment, including by crossing critical thresholds, and also potentially exposing Canada to international claims under international investment agreements and international trade law.

The climate change emergency context is relevant to assess the diligence of the conduct entailed by the Transaction in light of its environmental implications and the risks it creates from the perspective of its economic viability. These two dimensions have a direct bearing on the identification of the main applicable rules of international law as well as on their interpretation and application to the Transaction.

From an environmental perspective, the Transaction unfolds in the context of a narrow and rapidly closing window to take climate action capable of limiting the increase in global average temperature to 1.5°C above pre-industrial levels, remain well below 2°C above pre-industrial levels and achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century. Every additional investment in the natural gas upstream sector, whether directly (exploration and extraction) or indirectly (through investment in midstream capacity — liquefaction terminals and pipelines — that incentivizes additional direct investment), adds in principle to emissions of GHGs as compared to a counterfactual in which the funds are invested in low- or no-emissions technologies, such as solar photovoltaic or wind (onshore and offshore) technologies, or are simply not invested in additional fossil fuels. The Transaction is therefore inconsistent with what the converging science on climate change and low-carbon pathways dictates.

The economic viability of providing additional support, direct or indirect, to the development of natural gas for liquefaction and export to Asian markets starting, approximately, in 2025 or perhaps later, has international legal implications. First, according to the International Energy Agency, the demand for natural gas globally is set to peak by 2030 under current policies or decline under net-zero policies. Second, a study commissioned by the David Suzuki Foundation suggests that exports of LNG from British Columbia to the Asian market would face a declining demand as well as more experienced and agile competitors operating at lower costs. Third, the presence of an international dimension in the Transaction has implications for Canada's exposure to international litigation under international investment and trade agreements.

The determination of the main rules of international law governing the Transaction relies on the characterization of the latter as, in essence, a package of measures attributable to the Government of British Columbia and the Government of Canada. Subsequently, the analysis must assess the consistency of the Transaction with a range of relevant international obligations arising mainly from customary international law as well as from the main climate change treaties, international human rights law, international investment agreements and international trade law.

The measures supporting, enabling and promoting gas production and transport are attributable to Canada to the extent that they are conduct of organs of the Government of British Columbia and/or the Government of Canada. Moreover, there is increasing authority for the proposition that the conduct of certain private entities is directly subject to certain international obligations.

With respect to the lawfulness of the Transaction, in light of the obligation of due diligence and its expressions under customary international law, and in the specific context of the climate change emergency, conduct supporting, enabling and promoting gas production and transport would, in principle, fall short of the level of diligence required under international law.

In the light of the UNFCCC and the Paris Agreement, interpreted together and by reference to the relevant customary international law, and in the context of the climate change emergency, the Transaction also falls short of displaying Canada's "highest possible ambition" in mitigation and of the objective — and correlative obligation — to make finance flows consistent with a pathway toward low greenhouse gas emissions and climate-resilient development.

Moreover, given the specific observations of human rights bodies and special procedures in relation to the Transaction and their more general statements in relation to the type of activity of which the Transaction is an example, there are grounds to conclude that aspects of the Transaction may constitute a violation of one or more human rights obligations of Canada. The aspects of the Transaction affecting Indigenous Peoples' rights — specifically the Wet'suwet'en Nation's right to free, prior and informed consent, their right not to be forcibly evicted from their land, government's duty to consult, the prohibition of racial discrimination and arbitrary detention, among others — may constitute a violation of one or more human rights obligations of Canada and of the implicated companies.

With respect to Canada's exposure to international litigation, in the circumstances of the Transaction considered in light of relevant international investment agreements, there is a risk that one or more foreign investors may seek to recoup an investment that has become economically unviable, arguing that this outcome is due to questionable measures adopted by Canada or its territorial subdivisions in breach of an investment agreement.

Although certain aspects of the Transaction provide support to render exports of natural gas more competitive in foreign markets, additional information would be needed to reach a conclusion on the potential for claims alleging that Canada has provided prohibited or actionable subsidies in breach of the Agreement of Subsidies and Countervailing Measures. Such information would relate *inter alia* to the ownership structure of the upstream natural gas industry and the projected impact of exports on foreign markets, as well as, more generally, to the specific measures that could be targeted in a claim, its timing, the States that would be bringing the claim and their specific situation, and the formulation of their specific claims.

I. SCOPE OF THE LEGAL OPINION REQUESTED

1. This Opinion has been prepared in response to a request for legal advice from the David Suzuki Foundation (DSF), a non-profit organization based in Vancouver, British Columbia, Canada. DSF's goal is to conserve and protect the natural environment and help create a sustainable Canada through evidence-based research, education and policy analysis.

2. My legal advice is sought with respect to the international legal obligations governing Canada's development of new liquefied natural gas (LNG) production capacity, particularly in British Columbia, in light of the climate change emergency.

3. The Opinion is based on my knowledge and experience of international law. It is prepared in my personal capacity and reflects my professional opinion as an expert in this area. It does not necessarily reflect the views of any of the organisations with which I am affiliated.

4. The scope of this Opinion is confined to matters of international law, and it is not intended to be an exhaustive examination of all relevant legal issues but only a general analysis of certain legal questions of particular relevance. When references to domestic law and domestic case law are provided, this is only to clarify the scope and implications of the relevant international legal obligations.

5. The information regarding Canada's development of new LNG production capacity in British Columbia (hereafter the Transaction), has been provided essentially by DSF. This Opinion relies in this regard on that information.

6. The general question addressed in this Opinion can be circumscribed by reference to seven main components. From this perspective, the general question is whether (i) the Transaction, (ii) is consistent with the international legal obligations of Canada, (iii) in the specific context of the climate change emergency, (iv) having regard to the fact that the Transaction is likely to increase emissions of greenhouse gases (GHG), (v) thereby contributing to the depletion of the remaining carbon budget set by the temperature goal of the Paris Agreement,[1] (vi) with the associated risks for humans and the environment, including through crossing critical thresholds (diligence requirements), and also (vii) potentially exposing Canada to international claims under international investment agreements and international trade law (economic risks).

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[1] 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Annex. The official texts of both the Decision and the Paris Agreement are available at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_CP_2015_10_Add.1.pdf (visited on 26 July 2023)

7. My overall conclusions on this general question are as follows:

(a) The Transaction examined from the perspective of international law in this Opinion is, in essence, a package of measures introduced by the Government of British Columbia and the Government of Canada to support, enable and promote gas production and transport through construction of LNG terminals and associated infrastructure, mainly for export to Asian markets.

(b) The climate change emergency context is relevant, under international law, to assess the diligence of the conduct entailed by the Transaction in light of its environmental implications and the risks it creates from the perspective of its economic viability.

(c) Measures supporting, enabling and promoting gas production and transport are attributable to Canada if they are conduct of organs of the Government of British Columbia and/or the Government of Canada. Moreover, there is increasing authority for the proposition that the conduct of certain private entities is directly subject to certain international obligations.

(d) In light of the obligation of due diligence and its expressions under customary international law, and in the specific context of the climate change emergency, conduct supporting, enabling and promoting gas production and transport would, in principle, fall short of the level of diligence required under international law.

(e) In light of the UNFCCC and the Paris Agreement, interpreted together and by reference to the relevant customary international law, and in the context of the climate change emergency, the Transaction falls short of displaying Canada's "highest possible ambition" in mitigation and of the objective — and correlative obligation — to make finance flows consistent with a pathway toward low greenhouse gas emissions and climate-resilient development.

(f) Given the specific observations of human rights bodies and special procedures in relation to the Transaction and their more general statements in relation to the type of activity of which the Transaction is an example, there are grounds to conclude that aspects of the Transaction may constitute a violation of one or more human rights obligations of Canada.

(g) The aspects of the Transaction affecting Indigenous Peoples' rights — specifically, the Wet'suwet'en Nation's right to free, prior and informed consent, their right not to be forcibly evicted from their land, the government's duty to consult, the prohibition of racial discrimination and arbitrary detention, among others — may constitute a violation of one or more human rights obligations of Canada and of the implicated companies.

(h) In the circumstances of the Transaction considered in light of the relevant international investment agreements, there is a risk that one or more foreign investors may seek to recoup an investment that has become economically unviable, arguing that this outcome is due to questionable measures adopted by Canada or its territorial subdivisions in breach of an investment agreement.

(i) Although certain aspects of the Transaction provide support to render exports of natural gas more competitive in foreign markets, additional information would be

needed to reach a conclusion on the potential for claims alleging that Canada has provided prohibited or actionable subsidies in breach of the SCM Agreement. Such information would relate *inter alia* to the ownership structure of the upstream natural gas industry and the projected impact of exports on foreign markets, as well as, more generally, to the specific measures that could be targeted in a claim, its timing, the States that would be bringing the claim and their specific situation, and the formulation of their specific claims.

8. This answer is based on the following analysis, which is organized in three parts: description of the Transaction (Section II); description of the climate change emergency context (Section III); analysis of the governing rules of international law (Section IV). Section V states the conclusions reached by the analysis.

II. THE TRANSACTION

9. The Transaction examined from the perspective of international law in this Opinion is, in essence, a package of measures introduced by the Government of British Columbia and the Government of Canada to support, enable and promote gas production and transport through construction of LNG terminals and associated infrastructure, mainly for export to Asian markets.

10. The initial and apparently main, albeit not only, focus on this package of measures concerns an investment in two main infrastructures: (i) a natural gas liquefaction facility based in Kitimat, British Columbia (the Kitimat LNG facility), and owned by LNG Canada (LNG Canada), a joint venture among foreign companies Shell, Petronas, PetroChina, Mitsubishi and the Korea Gas Corporation (KOGAS)[2]; and (ii) a 670-km (416 miles) pipeline (Coastal GasLink), owned by Coastal GasLink Pipeline Ltd., whose owners include domestic and foreign investors,[3] designed to bring natural gas from northeastern British Columbia to be liquefied and prepared in the Kitimat LNG facility for export to Asian markets.

11. As requested by the DSF, the legal analysis considers the Transaction as an example of a type of transaction characterized by new and additional promotion of investment in LNG

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[2] See the website of LNG Canada : https://www.lngcanada.ca/about-lng-canada/joint-venture-participants/ (visited on 26 July 2023). The media kit of LNG Canada specifies the share of each partner to the joint venture as follows : Shell plc, through its affiliate Shell Canada Energy (40%) ; PETRONAS, through its wholly-owned entity, North Montney LNG Limited Partnership (25%); PetroChina Company Limited, through its subsidiary PetroChina Canada Ltd. (15%); Mitsubishi Corporation, through its subsidiary Diamond LNG Canada Partnership (15%); and Korea Gas Corporation, through its wholly-owned subsidiary Kogas Canada LNG Ltd (5%), see https://www.lngcanada.ca/media-kit/ (visited on 26 July 2023).

[3] Including TC Energy, a Canadian company, Alberta Investment Management, a Canadian company, and Kohlberg Kravis Roberts & Co (KKR), a US investor (which acquired an equity interest in Coastal GasLink in partnership with the National Pension Service of Korea (NPS)). See the following KKR press release : https://media.kkr.com/news-details/?news_id=97dcaa21-9edf-41bf-9b06-9df2db3832ff (visited on 26 July 2023).

and, more generally, in the production and use of fossil fuels (coal, oil and gas) and associated infrastructures, despite the climate change emergency context. This section briefly describes the process and current state of development of the two aforementioned infrastructures, and then provides an overview of promotion measures. The climate change emergency context in which the Transaction is being supported, enabled and promoted is described in the following section.

12. Both the Kitimat LNG facility and the Coastal GasLink are, at the time of writing this Opinion, still under construction. According to the Government of British Columbia website,[4] construction of the Kitimat LNG facility received the requisite environmental assessment certificate on 17 June 2015 and approval of the British Columbia Oil and Gas Commission on 22 December 2015. Coastal GasLink received the requisite environmental assessment certificate on 23 October 2014 and approvals from the British Columbia Oil and Gas Commission between May 2015 and April 2016.[5] On 1 October 2018, LNG Canada announced that it had made a final investment decision regarding phase 1 of the Kitimat LNG facility development, which triggered continuation of construction plans to commence on the Coastal GasLink.[6]

13. Coastal GasLink is the only source of feedstock gas supply for LNG Canada's Kitimat LNG facility. The first phase of the Kitimat LNG facility has the potential to produce 14 million tonnes of LNG per annum (**mtpa**), which could be increased, if the facility is expanded in a second phase, to up to 28 mtpa.[7] Significantly, according to a survey prepared by Peters & Co for the Canada Energy Regulator (**CER**) and reported in the media, the production of natural gas from the Montney Shale area is expected to increase from the current 5.8 billion cubic feet per day (bcf/d) to 9.2 bcf/d, driven by pipeline expansion and export possibilities offered by the Kitimat LNG facility.[8] This amounts to a 59 per cent increase from current levels. This estimate is consistent with the 9.2 bcf/d by 2030 production rate projected for natural gas production from the Montney area in the evolving policies scenario of CER's Canada's Energy Future 2021.[9]

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4 This information is available at the following website : https://www2.gov.bc.ca/gov/content/industry/natural-gas-oil/lng/lng-projects/lng-canada (visited on 26 July 2023).

5 This information is available at the following website : https://www.bc-er.ca/what-we-regulate/major-projects/coastal-gaslink (visited on 26 July 2023).

6 See the Coastal GasLink project update of December 2018 at : https://www.coastalgaslink.com/siteassets/pdfs/about/resources/cgl-connector---december-2018.pdf (visited on 26 July 2023).

7 See the website of Shell, the main partners of the joint venture LNG Canada : https://www.shell.com/about-us/major-projects/lng-canada.html (visited on 26 July 2023).

8 See G. Jaremko, 'Montney Natural Gas Output Poised to Reach 9.2 Bcf/d on Pipeline Expansions', www.naturalgasintel.com (26 October 2022), available at: https://www.naturalgasintel.com/montney-natural-gas-output-poised-to-reach-9-2-bcf-d-on-pipeline-expansions/ (visited on 26 July 2023).

9 This projection is available on the website of CER at the following link : https://www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2021naturalgas/2021naturalgas.pdf (visited on 26 July 2023).

14. This substantial growth in natural gas development has been presented by the Government of British Columbia as a specific goal of its overhaul of the "policy framework for future projects" and, with respect to the LNG Canada, the measures were to be implemented only "if the proponents [were] able to conclusively decide on or before Nov. 30, 2018, to proceed with the construction of the LNG facility and associated investments."[10]

15. The overhauled policy framework includes several components. In addition to the measures taken by British Columbia, the federal government took measures directly supporting LNG production, and specifically the LNG Canada project. Both the British Columbia and federal measures were proposed in 2018, but their detail became known only during the course of 2019. On 25 March 2019, the Government of British Columbia announced the "Legislation introduced to complete the fiscal framework for LNG, jobs and benefits."[11] To implement the fiscal support measures, a specific Operating Performance Payments Agreement was also concluded between the Government of British Columbia and LNG Canada (**BC-LNG Canada Agreement**).[12]

16. An analysis by the Canadian Centre for Policy Alternatives (**CCPA**) of the financial support these measures represent for the LNG industry, with a specific discussion of LNG Canada, was published in May 2019.[13] In essence, according to this analysis, the BC-LNG Canada Agreement contains four main support measures: (1) discounted industrial electricity rate offered to LNG Canada by the Government through B.C. Hydro (support estimated to between C$32 and $59 million per year); (2) exemptions from increases in the British Columbia carbon tax (support estimated to C$62 million per year or possibly higher if the estimation integrates a subsequent schedule setting out an annual increase in the carbon tax until it reaches C$170/tonne); (3) a corporate income tax break effectively reducing the applicable tax rate from 12 to nine per cent; and (4) a deferral of provincial sales tax on construction that effectively amounts to an interest-free loan that does not need to be repaid for two decades (support estimated to C$17 million and $21 million per year). This analysis also notes the substantial investment made in expanding the electricity generation capacity of BC Hydro to service the gas fracking and LNG industries:

> Powering fracking and LNG will be the primary purpose of the 5,100 GWh per year Site C dam. BC Hydro is investing an estimated $10.7 billion for the Site

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10 The text quoted is extracted from a press release of March 2018 from the Office of the British Columbia Premier, then John Horgan, concerning the new framework for natural gas development. This information is available at : https://news.gov.bc.ca/releases/2018PREM0012-000480 (visited on 26 July 2023).

11 See the News Release at : https://news.gov.bc.ca/releases/2019FIN0035-000478 (visited on 26 July 2023).

12 Operating Performance Payments Agreement, Province of British Columbia & LNG Canada Development Inc. (LNG Canada), 25 March 2019, available at : https://news.gov.bc.ca/assets/releases/2019fin0035-000478/lng_agreement.pdf (visited on 26 July 2023).

13 See M. Lee, 'A critical look at BC's new tax breaks and subsidies for LNG', CCPA, May 2019, available at : https://policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2019/05/CCPA_BC%20Critiquing%20the%20LNG%20Canada%20agreement_FINAL_190506.pdf (visited on 26 July 2023).

> C dam plus $600 million for two transmission lines to provide electricity to upstream gas fracking and processing in the Northeast. An $82-million upgrade is also in the works to deliver electricity to the LNG Canada liquefaction terminal in Kitimat (of which $58 million will be paid by BC Hydro), and an as-yet-undetermined amount of funds will be spent to "refurbish" transmission lines between Terrace and Kitimat. The public costs of new generation and transmission infrastructure being built specifically for the gas industry will be spread across all ratepayers (including residential and commercial customers).[14]

17. The CCPA analysis also refers, without discussing it, to the substantial support provided to the LNG industry, and to LNG Canada in particular, by the federal government, quoting an estimate of C$1 billion in forgone revenue from tariff exemptions on imported fabricated industrial steel components.[15] This measure was made public in August 2019, and it consists of an exemption or "remission" on the anti-dumping and countervailing duties applicable, pursuant to a 2017 order of the Canadian International Trade Tribunal (**CITT**)[16] on fabricated industrial steel components from certain countries, including China (**Steel Tariff Exemption**).[17] In addition, the Canadian minister of finance announced in June 2019 that the federal government was supporting LNG Canada with C$275 million, including C$55 million for to replace a bridge in the District of Kitimat and C$220 million to "help fund energy-efficient gas turbines for LNG Canada."[18]

18. An updated overview of the funds spent by British Columbia to support LNG Canada and Coastal GasLink, taking into account developments as of 24 November 2022,[19] suggests that such support so far would amount to approximately C$6 billion, questioning the financial viability of the overall investment.

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14 See M. Lee, 'A critical look at BC's new tax breaks and subsidies for LNG', CCPA, May 2019, at page 3, available at : https://policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2019/05/CCPA_BC%20Critiquing%20the%20LNG%20Canada%20agreement_FINAL_190506.pdf (visited on 26 July 2023).

15 See M. Lee, 'A critical look at BC's new tax breaks and subsidies for LNG', CCPA, May 2019, at page 2, available at : https://policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2019/05/CCPA_BC%20Critiquing%20the%20LNG%20Canada%20agreement_FINAL_190506.pdf (visited on 26 July 2023).

16 CITT, Certain Fabricated Industrial Steel Components, Inquiry No. NQ-2016-004, Finding of 25 May 2017, available at: https://decisions.citt-tcce.gc.ca/citt-tcce/a/en/354750/1/document.do (visited on 26 July 2023).

17 Fabricated Industrial Steel Components Anti-dumping and Countervailing Duty Remission Order: SOR/2019-297, 8 August 2019, Canada Gazette, Part II, Volume 153, Number 17, available at: https://gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors297-eng.html (visited on 26 July 2023).

18 See the News release 'Government of Canada confirms support for largest private investment in Canadian history', 24 June 2019, available at : https://www.canada.ca/en/innovation-science-economic-development/news/2019/06/government-of-canada-confirms-support-for-largest-private-investment-in-canadian-history.html (visited on 26 July 2023).

19 See M. Simmonds, 'Is B.C.'s $6 billion commitment to Coastal GasLink and LNG Canada still economically viable?', The Narwhal, 24 November 2022, available at: https://thenarwhal.ca/bc-lng-canada-cgl-economics/ (visited on 26 July 2023).

19. There is clear evidence, therefore, that the Government of British Columbia and the Government of Canada have proactively supported development of the LNG industry as a means to expand extraction and export of natural gas.

20. There is also evidence that the Government of British Columbia was well aware that such expansion would have implications in terms of greenhouse gas emissions. In its presentation of the policy "overhaul" planned in relation to the Kitimat LNG facility and the Coastal GasLink — as well as other projects in this area — it specifically stated that "[m]eeting climate targets will not be easy and will require a concerted effort across all sectors to make the transition to a low-carbon economy. *The addition of emissions from LNG will increase this challenge* but government is committed to taking the steps necessary to achieve B.C.'s climate goals" (emphasis added).[20] This is confirmed by a May 2023 report from the Pembina Institute, according to which, "under currently implemented policy, our modelling shows that if LNG Canada Phase 1 and Woodfibre LNG — the only two projects on track to be built — proceed, emissions from B.C.'s oil and gas sector will be almost double the government's 2030 sectoral target."[21]

21. The environmental assessment report conducted as part of the Environmental Assessment Certificate process concluded that construction and operation of the Kitimat LNG facility would have a significant residual adverse effect in terms of GHGs.[22] The increase in GHG emissions would be equivalent to 6.6 per cent of British Columbia's emissions over those of 2011. Importantly, although the report noted that it took into account cumulative effects of GHGs as a global issue, the emissions deemed significant were limited to construction and operation of the facility, and did not take into account those arising from the very substantial natural gas production it is intended to promote in facilities in northeastern British Columbia or the emissions from burning the exported product (known as "scope 3" emissions). Similarly, the environmental assessment report underpinning the Environmental Assessment Certificate issued to Coastal GasLink concluded that the project would likely have significant residual adverse effects related to GHGs.[23] However, it neither included a cumulative effects assessment of GHG emissions nor, as before, a specific assessment of GHG emissions from additional

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20 The text quoted is extracted from a press release of March 2018 from the Office of the British Columbia Premier, then John Horgan, concerning the new framework for natural gas development. This information is available at : https://news.gov.bc.ca/releases/2018PREM0012-000480 (visited on 26 July 2023).

21 Jan Gorski, Jason Lam, *Squaring the Circle: Reconciling LNG expansion with B.C.'s climate goals* (Pembina Institute, May 2023), at page 1, available at : https://www.pembina.org/reports/squaring-the-circle-state-of-lng-2023.pdf (visited on 26 July 2023).

22 See Environmental Assessment Office (EAO), LNG Canada Export Terminal Project, Assessment Report, 6 May 2015, Section 5.2, available at : https://projects.eao.gov.bc.ca/api/public/document/58869075e036fb0105768b54/download/Assessment%20Report%20and%20Appendices%20for%20the%20LNG%20Canada%20Export%20Terminal%20Project%20dated%20May%206%2C%202015.pdf (visited on 26 July 2023).

23 EAO, Coastal GasLink Pipeline Project. Assessment Report, October 2014, Section 5.3, available at : https://projects.eao.gov.bc.ca/api/public/document/5e459849c981fe0021018fb0/download/CGL%20-%20Assessment%20Report%20for%20EAC%20Decision%20-%2020141008.pdf (visited on 26 July 2023).

production or from burning the exported product, which Coastal GasLink is specifically intended to support.

22. In addition, planned expansion of natural gas development that is enabled by the Kitimat LNG facility and Coastal GasLink relies heavily on extraction of non-conventional (shale) gas deposits, which has additional environmental implications beyond GHG emissions, particularly in relation to groundwater. Neither the Kitimat LNG facility environmental assessment report nor the one for Coastal GasLink took into account the implications for groundwater of the substantial increase in natural gas development enabled by these two infrastructures. The two reports focused instead, respectively, on the quality of surface waters affected (individually and cumulatively) by the construction and operation of the Kitimat LNG facility[24] and on the impact on "groundwater aquifers and groundwater supply wells within 1 km of the proposed route"[25] of Coastal GasLink. Yet, there is evidence that the increase in shale gas production promoted by the transport and liquefaction infrastructure under construction could have major implications for the use and contamination of water bodies in British Columbia. A February 2019 report from the Scientific Hydraulic Fracturing Review Panel commissioned by the British Columbia Minister of Energy, Mines and Petroleum Resources concluded, specifically in relation to northeast British Columbia (NEBC) the following:

> *The very rapid development of shale gas in NEBC has made it difficult to assure that risks are being adequately managed at every step*. Furthermore, the Panel could not quantify risk because there are too few data to assess risk. Nevertheless, it is the view of the Panel that the current regulations under many acts appear to be robust. At the same time, *insufficient evidence was provided to the Panel to assess the degree of compliance and enforcement of regulations*. One of the challenges with the current, generally non-prescriptive (i.e. objectives based) regulatory regime, is that *most of the details for environmental protection are not transparent; rather they are embedded within various permitting processes or industry best practices or guidance documents*. This is particularly problematic when there is shared regulatory responsibility, for example, concerning dams, spills and leaks, and disposal wells. From *a public perception perspective, the various activities associated with hydraulic fracturing appear to be unregulated, and this leads to fear and mistrust of the regulators* (emphasis added)[26]

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[24] See Environmental Assessment Office (EAO), LNG Canada Export Terminal Project, Assessment Report, 6 May 2015, Section 5.4, available at : https://projects.eao.gov.bc.ca/api/public/document/58869075e036fb0105768b54/download/Assessment%20Report%20and%20Appendices%20for%20the%20LNG%20Canada%20Export%20Terminal%20Project%20dated%20May%206%2C%202015.pdf (visited on 26 July 2023).

[25] EAO, Coastal GasLink Pipeline Project. Assessment Report, October 2014, Section 5.8.1, available at : https://projects.eao.gov.bc.ca/api/public/document/5e459849c981fe0021018fb0/download/CGL%20-%20Assessment%20Report%20for%20EAC%20Decision%20-%2020141008.pdf (visited on 26 July 2023).

[26] Scientific Hydraulic Fracturing Review Panel, *Scientific Review of Hydraulic Fracturing in British Columbia*, February 2019, Executive Summary, at page 3, available at : https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-gas-oil/responsible-oil-gas-development/scientific_hydraulic_fracturing_review_panel_final_report.pdf

23. In addition, expansion of natural gas development through the Kitimat LNG facility and Coastal GasLink has social implications, particularly for certain Indigenous Peoples in Canada, but also for other individuals and groups in Canada and abroad. Coastal GasLink affirms that it has reached agreement with 20 elected Indigenous groups along the route of the pipeline.[27] Sixteen First Nations have also signed Natural Gas Pipeline Benefit Agreements (**PBAs**) with the government of British Columbia relating to Coastal GasLink.[28] It has also been reported that 16 Indigenous communities along the pipeline route have acquired equity options that give them access to a 10 per cent equity interest in the project.[29] However, there are tensions with some other Indigenous groups. One aspect of the tension concerns representation of Indigenous communities and, particularly, the need to include not only band councils organized under the Indian Act but the collective, traditional and hereditary governance structures of the First Nations as a whole.[30] Specifically, a controversy has arisen regarding the treatment of Hereditary Chiefs and land defenders of the Wet'suwet'en Nation, in the development through their land of Coastal GasLink.[31] Similarly, the Supreme Court of British Columbia recognized that natural resource development, including oil and gas and related pipeline infrastructure, had violated the rights of Blueberry River First Nations under Canadian law.[32]

24. The implications of the expansion of natural gas development supported, enabled and promoted by the Government of British Columbia and enabled by the Kitimat LNG facility and Coastal GasLink must be assessed in the context of the climate change emergency, discussed next.

(visited on 26 July 2023). A report from non-profit organisation Stand.Earth of December 2022 confirms this public perception: 'British Columbia stands at a crossroads, with five proposed liquified natural gas (LNG) terminals along its coast. If these terminals are allowed to be built, it would require the province to more than double its fracked gas production. This directly threatens the rivers and lakes that feed the Peace and MacKenzie Rivers, as this thirsty form of energy extraction demands more and more water, with little oversight or monitoring from regulators', Stand.Earth, *Fracking with Freshwater. How the fracking industry in B.C. is poisoning billions of litres of water every year and how to stop it* (December 2022), available at : https://stand.earth/wp-content/uploads/2022/11/Fracking-water-report-pdf.pdf (visited on 26 July 2023).

27 See the section of their website devoted to these agreements : https://www.coastalgaslink.com/sustainability/indigenous-relations/ (visited on 26 July 2023).

28 The list and the text of these agreements is available at the following website : https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/natural-gas-pipeline-benefits-agreements (visited on 26 July 2023).

29 Holly Quan, 'First Nations take ownership stake in Coastal GasLink pipeline', 10 March 2022, *Context Energy Examined*, available at: https://context.capp.ca/energy-matters/2022/first-nations-take-ownership-stake-in-coastal-gaslink-pipeline/ (visited on 26 July 2023).

30 Letter from the Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and others to O.J. Pipelines Canada, 13 January 2023, Ref.: AL OTH 116/2022, page 5, available at : https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27690 (visited on 26 July 2023).

31 Letter from the Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and others to O.J. Pipelines Canada, 13 January 2023, Ref.: AL OTH 116/2022, page 2, available at : https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27690 (visited on 26 July 2023).

32 *Yahey v. British Columbia,* 2021 BCSC 1287, available at: https://www.bccourts.ca/jdb-txt/sc/21/12/2021BCSC1287.htm (visited on 26 July 2023).

III. THE CLIMATE CHANGE EMERGENCY CONTEXT

25. The context in which the Transaction unfolds is important for the assessment of its consistency with international law because some relevant international obligations contain a due diligence dimension that is inherently contextual (what is a diligent conduct or falls short of being so depends on the context). It is also important from the perspective of the Transaction's economic viability for Canada because such viability partly relies on the consistency with international law of certain aspects of the Transaction (the support given to an industry with the specific aim to increase its exports) and the conduct of both the provincial and the federal authorities may expose Canada to international litigation. This section describes the context relevant for both the diligence and the economic viability dimensions. Overall, this context can be described as one of climate emergency, with both environmental and economic implications.

26. Environmental dimension – From an environmental perspective, the Transaction unfolds in the context of a narrow and rapidly closing window to take climate action capable of limiting the increase in global average temperature to 1.5°C above pre-industrial levels (given that the expression "pre-industrial levels" refers to a global average temperature of 14°C, that means to limit such increase to no more than 15.5°C of global average temperature), remain well below 2°C above pre-industrial levels (i.e., to remain well below 16°C of global average temperature) and achieve "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (Article 4.1 of the Paris Agreement, now described as the "net zero" target). Every additional investment in the natural gas upstream sector, whether directly (exploration and extraction) or indirectly (through investment in midstream capacity — liquefaction terminals and pipelines — that incentivizes additional direct investment), adds in principle to GHG emissions compared to a counterfactual in which the funds are invested in low- or no-emissions technologies, such as solar photovoltaic or wind (onshore and offshore) technologies, or are simply not invested in additional fossil fuels. This is inconsistent with what the converging science on climate change and low-carbon pathways dictates. Some overarching findings from this converging scientific work are summarised next.

27. First, it is now unequivocally established that anthropogenic greenhouse gas emissions are the cause of global warming. In its latest report, the Intergovernmental Panel on Climate Change has made the following statement, in wording that expresses the scientific consensus on climate science, but that is also approved by IPCC States members: "Human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming, with global surface temperature reaching 1.1°C

above 1850–1900 in 2011–2020."[33] The report contains several other statements of particular relevance for understanding the climate change emergency context, including statements on the impacts of human-caused climate change and their amplification impacts by additional GHG emissions:

> Widespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere have occurred. Human-caused climate change is already affecting many weather and climate extremes in every region across the globe. This has led to widespread adverse impacts and related losses and damages to nature and people … Vulnerable communities who have historically contributed the least to current climate change are disproportionately affected…[34]
>
> Continued emissions will further affect all major climate system components. With every additional increment of global warming, changes in extremes continue to become larger…[35]
>
> Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid and sustained global greenhouse gas emissions reduction. The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels.[36]

28. Secondly, there is a rapidly closing window for effective action. This window is determined by reference to two interlocked aspects. One concerns the remaining CO2 "budget," which represents the amount of CO2 that can be released into the atmosphere without exceeding the temperature goal set in Article 2(1) of the Paris Agreement of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[37] The other is that this global average temperature can be understood as a critical threshold not to be crossed, which in turn makes possible to estimate the "time to threshold"; i.e., the period within which the temperature goal will be exceeded. According to the aforementioned 2023 IPCC report:

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33 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement A.1, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

34 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement A.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

35 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.1.3., available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

36 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.3, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

37 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Annex. The official texts of both the Decision and the Paris Agreement are available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/FCCC_CP_2015_10_Add.1.pdf> (visited on 26 July 2023).

> The best estimates of the remaining carbon budgets from the beginning of 2020 are 500 GtCO2 for a 50% likelihood of limiting global warming to 1.5oC and 1150 GtCO" for a 67% likelihood of limiting warming to 2oC...[38]
>
> If the annual CO2 emissions between 2020–2030 stayed, on average, at the same level as 2019, the resulting cumulative emissions would almost exhaust the remaining carbon budget for 1.5°C (50%), and deplete more than a third of the remaining carbon budget for 2°C (67%). Estimates of future CO2 emissions from existing fossil fuel infrastructures without additional abatement already exceed the remaining carbon budget for limiting warming to 1.5°C (50%) ... Projected cumulative future CO2 emissions over the lifetime of existing and planned fossil fuel infrastructure, if historical operating patterns are maintained and without additional abatement, are approximately equal to the remaining carbon budget for limiting warming to 2°C with a likelihood of 83%.[39]

Regarding the estimated "time to threshold," a study published in the *Proceedings of the National Academy of Sciences* in early 2023 summarizes the converging scientific estimates, offering its estimate for crossing the 1.5°C global warming threshold between 2033 and 2035, with a wider range between 2028 and 2039.[40] This is consistent with the recent estimate of the IPCC in its aforementioned 2023 report:

> continued greenhouse gas emissions will lead to increasing global warming, with the best estimate of reaching 1.5°C in the near term in considered scenarios and modelled pathways. Every increment of global warming will intensify multiple and concurrent hazards.[41]

29. Thirdly, the level of ambition expressed in NDCs remains insufficient, with a persisting gap between the level of mitigation required to respect the Paris Agreement's global average temperature goal and that currently pledged. According the IPCC's 2023 report:

> Global GHG emissions in 2030 implied by nationally determined contributions (NDCs) announced by October 2021 make it likely that warming will exceed 1.5°C during the 21st century and make it harder to limit warming below 2°C. There are gaps between projected emissions from implemented policies and those from NDCs and finance flows fall short of the levels needed to meet climate goals across all sectors and regions.[42]

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38 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.5.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

39 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.5.3, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

40 N. Diffenbaugh, E. Barnes, 'Data-driven predictions of the time remaining until critical global warming thresholds are reached' (2023) 120/6 *Proceedings of the National Academy of Sciences* e2207183120

41 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.1, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

42 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement A.4, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

The annual Emissions Gap Report published the UN Environment Programme in 2022 further stresses the inadequacy of current mitigation pledges. According to this report:

> The emissions gap in 2030 in 15 GtCO2e annually for a 2°C pathway and 23 GtCO2 for a 1.5°C pathway. This assumes full implementation of the unconditional NDCs, and is for a 66 per cent chance of staying below the stated temperature limit. If, in addition, the conditional NDCs are fully implemented, each of these gaps is reduced by about 3 GtCO2e.
>
> Policies currently in place with no additional action are projected to result in global warming of 2.8°C over the twenty-first century. Implementation of unconditional and conditional NDC scenarios reduce this to 2.6°C and 2.4°C respectively.
>
> To get on track for limiting global warming to 1.5°C, global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years, and they must continue to decline rapidly after 2030, to avoid exhausting the limited remaining atmospheric carbon budget.[43]

The latest NDC Synthesis Report, published on 26 October 2022, confirms the existence of a substantial gap between the current level of ambition expressed in NDCs and the target of the Paris Agreement:

> The difference between the projected emission levels that do not take into account implementation of any conditional elements of NDCs and the emission levels in the scenarios of keeping warming likely below 2 °C (with over 67 per cent likelihood) by 2030 is estimated to be 16.0 (12.0–19.4) Gt CO2 eq. In relation to the scenarios of limiting warming to 1.5 °C (with over 50 per cent likelihood) and achieving net zero emissions this century, the gap is even wider, at an estimated 23.9 (22.2–28.8) Gt CO2 eq. However, assuming full implementation of all latest NDCs, including all conditional elements, the gap is slightly narrowed, towards 12.5 (8.5–15.9) Gt CO2 eq in relation to the aforementioned 2 °C scenarios and towards 20.3 (18.7–25.3) Gt CO2 eq in relation to the aforementioned 1.5 °C scenarios.[44]

30. Fourthly, with respect to existing and new investment in fossil fuels, several studies converge on the conclusion that additional investment is inconsistent with the temperature goal of the Paris Agreement. According a 2021 report from the International Energy Agency (IEA), "[b]eyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or

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[43] UNEP, *Emissions Gap Report 2022 : The closing window. Climate crisis calls for rapid transformation of societies*, Executive Summary, at page xvi, available at : https://www.unep.org/resources/emissions-gap-report-2022?gclid=EAIaIQobChMIjO2oxJST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE (visited on 26 July 2023).

[44] Nationally determined contributions under the Paris Agreement. Synthesis report by the secretariat, FCCC/PA/CMA/2022/4, 26 October 2022, at paragraph 16, available at: https://unfccc.int/documents/619180 (visited on 26 July 2023).

mine extensions are required."[45] IEA executive director Fatih Birol clarified in his remarks reported in a May 2021 article in the *Guardian* that the IEA's study meant that "[i]f governments are serious about the climate crisis, there can be no new investments in oil, gas and coal, from now — from this year."[46] Another study, published in the leading scientific journal *Nature*, finds that, even in the absence of new fossil fuel power plants, the estimated carbon budget for a 1.5°C pathway would be exceeded, and over one half of the carbon budget for the 2°C pathway would be spent, if existing fossil-fuel energy infrastructure is operated as historically.[47] In addition, if fossil fuel–based power plants under construction, permitted or planned are effectively operated as historically, that would add an amount of CO2 close to the entire carbon budget for 2°C pathway.[48] As a result, the study concludes:

> our estimates suggest that little or no new CO2-emitting infrastructure can be commissioned, and that existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology) in order to meet the Paris Agreement climate goals.[49]

This is consistent with the conclusions stated in the aforementioned 2023 IPCC report in relation to fossil fuels:

> Limiting human-caused global warming requires net zero CO_2 emissions. Cumulative carbon emissions until the time of reaching net-zero CO_2 emissions and the level of greenhouse gas emission reductions this decade largely determine whether warming can be limited to 1.5°C or 2°C … Projected CO_2 emissions from existing fossil fuel infrastructure without additional abatement would exceed the remaining carbon budget for 1.5°C (50%).[50]
>
> All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade.[51]

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45 International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector* (May 2021), Summary for policymakers, at page 10, available at : https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroby2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf (visited on 26 July 2023).

46 F. Harvey, 'No new oil, gas or coal development if world is to reach net zero by 2050, says world energy body', *The Guardian*, 18 May 2021.

47 Dan Tong et al, "Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 *Nature* 373.

48 Dan Tong et al, "Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 *Nature* 373.

49 Dan Tong, Qiang Zhang, Yixuan Zheng, Ken Caldeira, Christine Shearer, Chaopeng Hong, Yue Qin, Steven J. Davis, "Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target" (2019) 572 *Nature* 373.

50 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.5, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

51 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.6, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

> Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems … and deliver many co-benefits, especially for air quality and health … Delayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages … Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies.[52]
>
> Net zero CO_2 energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels.[53]

31. Finally, if GHG emissions are allowed to continue and the increase in global average temperature exceeds 1.5°C, there is a risk that critical thresholds in biophysical subsystems (known as "tipping points") will be crossed, unleashing a self-reinforcing climate change dynamic, even if the increase in global average temperature remains below 2°C.[54] The study unveiling this risk, published in the *Proceedings of the National Academy of Sciences*, concludes, "[i]f the threshold is crossed, the resulting trajectory would likely cause serious disruptions to ecosystems, society, and economies. Collective human action is required to steer the Earth System away from a potential threshold and stabilize it in a habitable interglacial-like state."[55]

32. The environmental dimension of the climate change emergency context is important, indeed decisive, to assess what conduct is diligent or negligent under the rules of international law that contain a due diligence dimension. The scientific consensus makes clear that continued support for fossil fuels is inconsistent with the conduct that would minimize the risk of triggering cascading tipping points and the magnitude of adverse impacts. In such a context, conduct that may qualify as diligent is characterized, in the scientific sources reviewed, as follows: "global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years"[56]; "[b]eyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine

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52 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

53 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.3.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

54 W. Steffen et al, 'Trajectories of the Earth System in the Anthropocene' (2018) 14 *Proceedings of the National Academy of Sciences* 8252, at 8254.

55 W. Steffen et al, 'Trajectories of the Earth System in the Anthropocene' (2018) 14 *Proceedings of the National Academy of Sciences* 8252.

56 UNEP, *Emissions Gap Report 2022 : The closing window. Climate crisis calls for rapid transformation of societies*, Executive Summary, at page xvi, available at : https://www.unep.org/resources/emissions-gap-report-2022?gclid=EAIaIQobChMIjO2oxJST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE (visited on 26 July 2023).

extensions are required";[57] "little or no new CO2-emitting infrastructure can be commissioned, and that existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology) in order to meet the Paris Agreement climate goals"[58]; "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade"[59]; "Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade"[60]; 'Net zero CO2 energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels."[61]

33. Additional support, whether direct or indirect, for the upstream natural gas sector is in principle inconsistent with the type of conduct that, in the context of the climate change emergency, would be diligent according to science. This has been recognized by Canada as one of the signatories of the Statement on international public support for the clean energy transition, made on 4 November 2021, at the occasion of COP26:

> Our joint action is necessary to ensure the world is on an ambitious, clearly defined pathway towards net zero emissions, that is consistent with the 1.5°C warming limit and goals of the Paris Agreement, as well as the best available science and technology …
>
> Further, we will end new direct public support for the international unabated fossil fuel energy sector within one year of signing this statement, except in limited and clearly defined circumstances that are consistent with a 1.5°C warming limit and the goals of the Paris Agreement …
>
> In committing to the above we further recognise: …
>
> the findings of the Intergovernmental Panel on Climate Change (IPCC) and IEA net-zero analysis show that in the pathways consistent with a 1.5°C warming limit and the goals of the Paris Agreement, the global production and use of unabated fossil fuels must decrease significantly by 2030 …
>
> that investing in unabated fossil fuel-related energy projects increasingly entails both social and economic risks, especially through the form of

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57 International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector* (May 2021), Summary for policymakers, at page 10, available at : https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroby2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf (visited on 26 July 2023).

58 Dan Tong et al, 'Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 *Nature* 373.

59 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.6, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

60 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

61 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.3.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

> stranded assets, and has ensuing negative impacts on government revenue, local employment, taxpayers, utility ratepayers and public health.[62]

In an earlier Declaration of May 2016, the G7, which includes Canada, pledged to end most fossil fuel subsidies by 2025:

> Given the fact that energy production and use account for around two-thirds of global GHG emissions, we recognize the crucial role that the energy sector has to play in combatting climate change. We remain committed to the elimination of inefficient fossil fuel subsidies and encourage all countries to do so by 2025.[63]

What may be considered an inefficient fossil fuel subsidy may be evaluated in light of different yardsticks. The Canadian government released on 24 July 2023 Guidelines on Inefficient Fossil Fuel Subsidies.[64] Step 2 of these Guidelines provides that initiatives identified as fossil fuel subsidies according to Step 1 are considered potentially inefficient unless they meet one or more of six criteria:

> (1) ***Subsidies*** that enable significant net GHG emissions reductions in Canada or internationally In Alignment with Article 6 of the Paris Agreement;
>
> (2) ***Subsidies*** that support ***Clean Energy***, ***Clean Technology*** or ***Renewable Energy;***
>
> (3) ***Subsidies*** that provide an ***Essential Energy Service*** to a ***Remote Community;***
>
> (4) ***Subsidies*** that provide short-term support for ***Emergency Response;***
>
> (5) ***Subsidies*** that support ***Indigenous Economic Participation*** in ***Fossil Fuel Activities;***
>
> (6) ***Subsidies*** that support ***Abated*** production processes, or projects that have a credible plan to achieve net-zero emissions by 2030[65]

These Guidelines are a unilateral document of the Canadian government, which, as such, can in no way exempt Canada from discharging its international obligations. In all events, the two most directly relevant criteria in the light of the facts of the Transaction, namely (1) and (5), would require the Transaction to be genuinely aligned with Article 6 of the

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62 Statement on international public support for the clean energy transition, 4 November 2021, available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20230313124743/https://ukcop26.org/statement-on-international-public-support-for-the-clean-energy-transition/ (visited on 26 July 2023)

63 G7 Ise-Shima Leaders' Declaration, G7 Ise-Shima Summit, 26-27 May 2016, available at: https://www.mofa.go.jp/files/000160266.pdf (visited on 26 July 2023).

64 Inefficient Fossil Fuel Subsidies Government of Canada – Guidelines, available at: https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/inefficient-fossil-fuel-subsidies/guidelines.html (visited on 26 July 2023)

65 Inefficient Fossil Fuel Subsidies Government of Canada – Guidelines, at page 5 (Italics and emphasis original), available at: https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/inefficient-fossil-fuel-subsidies/guidelines.html (visited on 26 July 2023)

Paris Agreement, which is not the case (see paragraph 79 below), and/or to support Indigenous Economic Participation in the Transaction, which is debatable in a situation where there is no evidence (see paragraph 23 above) that "the main beneficiary of the funding or Measure are Indigenous peoples," as required by the very definition of "Indigenous Economic Participation" in Annex B of the Guidelines.

34. Economic viability dimension – The economic viability of providing additional support, direct or indirect, to development of natural gas for liquefaction and export to Asian markets starting approximately in 2025 or perhaps later, has international legal implications. These can be assessed from three standpoints: the overall prospects of natural gas globally; the specific prospects of the natural gas export industry in British Columbia, Canada; and the presence of an international dimension in the Transaction with implications Canada's exposure to international litigation.

35. Regarding the first standpoint, the IEA's authoritative annual *World Energy Outlook 2022*[66] examines the global prospects of natural gas. The IEA's analysis relies on three scenarios, with increasing climate change ambition. The less ambitious scenario is based on existing "stated policies" (STEPS). The second scenario takes into account the effects of pledges that have been announced, although they are not yet implemented (APS). The third scenario reflects a pathway that reaches net zero emissions by 2050 (NZE). For present purposes, the findings relating to the STEPS scenario are particularly relevant, because they reflect economic viability irrespective of new climate policies:

> For the first time, a WEO [World Energy Outlook] scenario based on prevailing policy settings has *global demand for each of the fossil fuels exhibiting a peak or plateau*. In the STEPS, coal use falls back within the next few years, natural gas demand reaches a plateau by the end of the decade, and rising sales of electric vehicles (EVs) mean that oil demand levels off in the mid-2030s before ebbing slightly to mid-century. (emphasis added)[67]
>
> One of the effects of Russia's actions is that the era of rapid growth in natural gas demand draws to a close. In the STEPS, the scenario that sees the highest gas consumption, global demand rises by less than 5% between 2021 and 2030 and then remains flat at around 4 400 bcm through to 2050. The outlook for gas is dampened by higher near-term prices; more rapid deployment of heat pumps and other efficiency measures; higher renewables deployment and a faster uptake of other flexibility options in the power sector; and, in some cases, reliance on coal for slightly longer. The Inflation Reduction Act cuts projected US natural gas demand in 2030 in the STEPS by more than 40 bcm compared with last year's projections, freeing

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66 IEA, *World Energy Outlook 2022*, available at : https://www.iea.org/reports/world-energy-outlook-2022 (visited on 26 July 2023).

67 IEA, *World Energy Outlook 2022*, Executive Summary, page 21, available at : https://www.iea.org/reports/world-energy-outlook-2022 (visited on 26 July 2023).

> up gas for export. Stronger climate policies accelerate Europe's structural shift away from gas. New supply brings prices down by the mid-2020s, and LNG becomes even more important to overall gas security. But momentum behind natural gas growth in developing economies has slowed, notably in South and Southeast Asia, putting a dent in the credentials of gas as a transition fuel. Most of the downward revision to gas demand to 2030 in this year's STEPS is due to a faster switch to clean energy, although around one-quarter is because gas loses out to coal and oil.[68]

If instead a state is serious about pathways that reach net zero emissions by 2050, then the focus must be on the IEA's NZE scenario. The prospects for fossil fuel demand, and specifically for natural gas demand, are described as follows:

> Oil, natural gas and coal accounted for around four-fifths of total energy supply worldwide in 2021. In the NZE Scenario, this share falls to around two-thirds in 2030 and less than one fifth in 2050, a proportion of which is used with CCUS and for non-energy uses. *Between 2021 and 2050*, coal demand declines by 90%, oil declines by around 80%, and *natural gas declines by more than 70%*. (…) *Natural gas demand drops from around 4,200 bcm in 2021 to 3,300 bcm in 2030, and 1,200 bcm in 2050. Rates of decline are fastest in the 2030s, when natural gas use falls by 7% per year on average*. Natural gas use continues to fall in the 2040s, but at a slower rate (around 3% per year) as reductions in gas use in power generation, industry and buildings are partly offset by increases in the volumes of gas being converted to low-emissions hydrogen (…) Russia's invasion of Ukraine adds an additional dimension to this analysis because it could lead to a substantial and prolonged reduction in Russian energy supplies. This is reflected in the updated NZE Scenario (…) For natural gas, *Russian production in the mid-2020s is lower than it was in the 2021 Net Zero Roadmap*. However, in contrast to oil, *near-term gas consumption has been revised downwards in this year's NZE Scenario as higher prices curb the cost effectiveness of gas helping to displace coal*. Some new infrastructure may be needed to facilitate the diversification of supply away from Russia, and, with careful investment planning, there are opportunities for these to facilitate future imports of hydrogen or hydrogen-based fuels. Nonetheless, *natural gas demand in the NZE Scenario can be met through continued investment in existing assets and already approved projects but without any new long lead time upstream conventional projects*. (emphasis added)[69]

36. Given the overall declining trajectory of natural gas demand in the 2050 horizon, both in the IEA's STEPS and NZE scenarios, but also the differences in time frame and magnitude between these two scenarios, it is important to determine the economic viability of the

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[68] IEA, *World Energy Outlook 2022*, Executive Summary, page 25, available at : https://www.iea.org/reports/world-energy-outlook-2022 (visited on 26 July 2023).

[69] IEA, *World Energy Outlook 2022*, pages 133-135, available at : https://www.iea.org/reports/world-energy-outlook-2022 (visited on 26 July 2023).

Transaction from the specific standpoint of Canada and British Columbia. A briefing document assessing LNG markets and the economic viability of British Columbia's LNG projects commissioned by the DSF from the economic consultancy François Delorme Consultation (FDC) Inc.[70] reaches the following conclusions:

> This analytical note assesses the prospects and merits of Canadian LNG export projects, with a particular focus on those located in British Columbia. The note concludes that these projects do not represent a viable climate solution and will not contribute positively to the economy and well-being of Canada and British Columbia.
>
> - Canada is currently a negligible player in global LNG markets.
> - Since 2021, Russia's behaviour has caused natural gas and LNG prices to rise and become highly volatile, amplified by its invasion of Ukraine. *There is significant uncertainty impacting natural gas and LNG markets.*[71] *These trends call into question the desirability of public policy support or financing of LNG export projects by Canadian governments*.
> - *If more LNG projects were to proceed, they would become operational too late to capitalize on high prices that currently prevail*.
> - *The most significant Canadian LNG projects are in British Columbia. These projects are aimed at the Asian market, where demand for LNG imports is in significant decline. Canada would face more experienced and agile competitors operating at lower costs*.[72]

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70 François Delorme Consultation (FDC) Inc., *Outlook and Critical Assessment of Canadian LNG Export Projects*, December 2022, unofficial English translation from French.

71 This conclusion is consistent with a study of the Institute of Energy Economics and Financial Analysis (IEEFA), which concludes: "High prices and supply disruptions have consequences. In many Asian nations, LNG has now acquired a reputation as a costly and unreliable fuel. Proposed LNG import projects in the region now face increased delay and cancellation risks, while governments in key LNG growth markets have announced new policies designed to limit dependence on global gas imports. This has clouded prospects for long-term demand in the regions that the global LNG industry had been counting on for robust growth," IEEFA, *Global LNG Outlook 2023-27*, February 2023, Executive Summary, at page 4, available at: https://ieefa.org/resources/global-lng-outlook-2023-27 (visited on 26 July 2023). Similarly, a study by Carbon Tracker highlights the volatility of the LNG markets and the risks of stranded assets in some Asian countries, see Carbon Tracker, *Stop Fuelling Uncertainty. Why Asia should avoid the LNG trap*, April 2022, available at: https://carbontracker.org/reports/stop-fuelling-uncertainty-why-asia-should-avoid-the-lng-trap/ (visited on 26 July 2023).

72 The increase in the costs of Canadian exports of LNG is consistent with the findings of another IEEFA Study, according to which, "In 2021, IEEFA reported that potential cost overruns on the Coastal GasLink (CGL) pipeline could become an impediment to further development of liquefied natural gas (LNG) projects in western Canada.1 The CGL pipeline is designed to supply natural gas to the LNG Canada project in Kitimat, B.C., the only LNG project currently under construction in the country. IEEFA argued that rising construction costs and policy challenges had eroded LNG Canada's financial underpinnings, casting a pall on proposals to build more LNG export capacity on Canada's west coast. In retrospect, this dour assessment may not have been nearly grim enough. The developer of the CGL pipeline announced in July 2022 that total pipeline construction costs had escalated by 70%. At the end of November 2022, the company said that costs had risen again, and that the company will provide a new estimate of higher costs early this year. The news came as western Canada's oil and gas industry faced a new royalty regime and other challenges that will likely raise gas production costs and create uncertainty about future production volumes." IEEFA, *British Columbia LNG Project Costs Rising Again*, February 2023, Executive Summary, at page 4, available at: file:///Users/jev32/Downloads/British%20Columbia%20LNG%20Project%20Costs%20Rising%20Again_February%202023-2.pdf (visited on 26 July 2023).

- *LNG projects require significant investment of public funds in the form of subsidies, tax incentives and infrastructure. Yet these projects would generate less revenue for the federal and provincial governments than the status quo (natural gas development shipped via pipelines). They would also divert financial resources that could be allocated to renewable energy development*.
- The positive economic and fiscal impacts of Canadian LNG projects are greatly overstated by their proponents.
- LNG projects are incompatible with the targets of the Paris Agreement, the CleanBC program and B.C.'s *Climate Change Accountability Act*. Contrary to the claims of their proponents, exporting LNG to Asia may not contribute to reducing global GHG emissions.
- *In addition to negative or disappointing economic outcomes and environmental impacts from LNG project, British Columbian and Canadian taxpayers are likely to see sub-optimal return on investment from public financing of LNG.* (emphasis added)[73]

37. Regarding the third standpoint, the Transaction involves the presence of foreign investors both in relation to the Kitimat LNG facility and Coastal GasLink, and possibly also in the natural gas production industry in northeastern British Columbia. This is relevant from the perspective of the international law of foreign investment. In addition, the Transaction involves matters relevant to international trade law, particularly regarding the support indirectly given — through a range of measures supporting and enabling liquefaction and transportation infrastructure —to an industry for the specific purpose of exporting its product, natural gas, to international markets. From this standpoint, the economic viability of the Transaction is affected by the potential exposure of Canada to international claims for alleged breach of investment and/or trade disciplines.

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38. Overall, *the climate change emergency context is relevant, under international law, to assess the diligence of the conduct entailed by the Transaction in light of its environmental implications and the risks it creates from the perspective of its economic viability*. These two dimensions have a direct bearing on the identification of the main applicable rules of international law as well as on their interpretation and application to the Transaction.

[73] François Delorme Consultation (FDC) Inc., *Outlook and Critical Assessment of Canadian LNG Export Projects*, December 2022, unofficial English translation from French, page 2 (Highlights).

IV. THE GOVERNING RULES OF INTERNATIONAL LAW

39. The determination of the main rules of international law governing the Transaction relies on the characterisation of the latter as, in essence, a package of measures introduced by the Government of British Columbia and the Government of Canada to support, enable and promote gas production and transport through construction of LNG terminals and associated infrastructure, mainly for export to Asian markets. The first step in the analysis is to determine whether the Transaction or aspects of it are attributable to Canada for the purpose of assessing the consistency of the conduct with the applicable international law. Subsequently, the analysis must assess such consistency in the light of a range of relevant international obligations arising mainly from customary international law, the main treaties focusing on climate change, international human rights law, international investment agreements and international trade law. The field to be covered is vast and the analysis is not intended to be exhaustive. In addition to the areas of international law retained for this analysis, other areas may also be relevant. Moreover, each of these areas is itself vast and some rules not specifically discussed in this Opinion may also have a bearing on the Transaction.

1. The duty-bearer

40. The measures supporting, enabling and promoting gas production and transport have been adopted both by the Government of British Columbia and the Government of Canada. The specific measures are described in Section II of this Opinion.

41. In international law, there are certain rules that determine which conduct is attributable to a State; i.e., considered conduct of the State, for the purpose of assessing the consistency or inconsistency of such conduct with the relevant international obligations, as well as the associated legal consequences. These rules are of customary nature[74] and therefore binding on all States. They are codified in the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[75] The most relevant rules for present purposes are those concerning the attribution to the State of the conduct of State organs.

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[74] The customary nature of attribution rules has been widely recognized in the case law of international courts and tribunals. See, e.g., *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62, paragraph 62; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p.168, paragraph 213; United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Report of the Panel (10 November 2004), WT/DS285/R, paragraph 6.128; United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Report of the Appellate Body (11 March 2011), WT/DS379/AB/R, paragraph 311, footnote 222; *Jan de Nul N.V., Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), paragraph 156; *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/17/1, Award (29 April 2020), paragraph 155.

[75] Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (visited on 26 July 2023).

42. A separate matter, discussed at the end of this section, is whether the conduct of private entities, such as a company or a joint venture, is subject to certain obligations of conduct under international law. This is, however, not a matter of attribution of conduct to the State. It concerns the range of duty-bearers, in addition to States, of one or more of the international obligations examined in Section IV.2.

43. Article 4 of ARSIWA provides that:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

44. This attribution rule is grounded in customary international law. The International Court of Justice (**ICJ**) has specifically recognized such grounding in a 1999 advisory opinion.[76] In the economic field, such customary grounding has been recognized by the World Trade Organisation (**WTO**)'s Appellate Body[77] and by investment arbitration tribunals.[78]

45. The legislation announced on 25 March 2019 by the Government of British Columbia,[79] as well as the support provided through the BC-LNG Canada Agreement,[80] clearly constitute conduct of state organs. The rule codified in Article 4(1) ARSIWA makes clear that these are deemed acts of Canada under international law because a state organ is such "whatever its character as an organ of the central Government *or of a territorial unit of the State*" (emphasis added). The Government of British Columbia qualifies as a territorial unit of Canada. The acts of its ministers and of its legislative assembly are acts of organs of this territorial unit of Canada, and therefore of Canada itself under international law.

46. With respect to the Steel Tariff Exemption[81] made public in August 2019 and the other support measures amounting to C$275 million announced in June 2019 by the Canadian

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76 See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p. 62, paragraph 62.

77 *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Report of the Appellate Body (11 March 2011), WT/DS379/AB/R, paragraph 311, footnote 222 (referring to an earlier panel decision).

78 *Ortiz Construcciones y Proyectos S.A. v. People's Democratic Republic of Algeri*a, ICSID Case No. ARB/17/1, Award (29 April 2020), paragraph 155 (referring to several earlier decisions).

79 See the News Release at : https://news.gov.bc.ca/releases/2019FIN0035-000478 (visited on 26 July 2023).

80 Operating Performance Payments Agreement, Province of British Columbia & LNG Canada Development Inc. (LNG Canada), 25 March 2019, available at : https://news.gov.bc.ca/assets/releases/2019fin0035-000478/lng_agreement.pdf (visited on 26 July 2023).

81 Fabricated Industrial Steel Components Anti-dumping and Countervailing Duty Remission Order: SOR/2019-297, 8 August 2019, Canada Gazette, Part II, Volume 153, Number 17, available at: https://gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors297-eng.html (visited on 26 July 2023).

minister of finance,[82] they also constitute acts of an organ of the State, and they are therefore attributable to Canada under international law.

47. Overall, these and other measures supporting, enabling and promoting gas production and transport are attributable to Canada if they are by organs of the Government of British Columbia and/or the Government of Canada. There is no indication here that any of the measures by these organs may be in contravention of instructions or acting beyond their authority. In all events, under the rule of international law codified in Article 7 ARSIWA,[83] the conduct of an organ "shall be considered an act of the State under international law if the organ […] acts in that capacity, even if it exceeds its authority or contravenes instructions." Action of an organ "in that capacity" is understood as conduct "carried out by persons cloaked with governmental authority."[84] Moreover, "[i]t is irrelevant for the purposes of attribution [under Article 4] that the conduct of a State organ may be classified as 'commercial' or *acta iure gestionis*."[85] Both acts in the exercise of public prerogatives and commercial acts are attributable to the State when they are performed by State organs.

48. On the separate matter that the conduct of certain private entities, including LNG Canada, the companies forming the LNG Canada joint venture, Coastal GasLink, its shareholders or other companies involved in the Transaction, may be subject to international obligations, this is not a matter of attribution of conduct to the State. It is a matter of whether such entities are duty-bearers under one or more of those international obligations. There is growing authority, including from decisions of international courts, tribunals and human rights bodies, for the proposition that such entities are indeed bound by at least some international obligations.[86] Of note, in *Nevsun v. Araya*,[87] the Supreme

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82 See the News release 'Government of Canada confirms support for largest private investment in Canadian history', 24 June 2019, available at : https://www.canada.ca/en/innovation-science-economic-development/news/2019/06/government-of-canada-confirms-support-for-largest-private-investment-in-canadian-history.html (visited on 26 July 2023).

83 See *Velásquez Rodríguez Case*, Inter-American Court of Human Rights, ICtHR Series C No. 4 (1988), Judgment (29 July 1988), paragraph 170;

84 See *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 518-131-2 (14 August 1991), *Iran-U.S. Claims Tribunal Reports*, vol. 27, p. 64, paragraph 83; Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 4, paragraph 13, and to Article 7, paragraph 7.

85 Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), commentary to Article 4, paragraph 6.

86 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, Award (8 December 2016), paragraphs 1193-1195 (where the tribunal considered that, as a matter of principle, nothing prevents international human rights law from applying to the conduct of a multinational enterprise). The position of the tribunal in Urbaser v. Argentine Republic was endorsed by the tribunal in *David R. Aven and Others v. Costa Rica*, ICSID Case No UNCT/15/3, Award (18 September 2018), paragraph 738. Further authority is provided by the position of: the Compliance Committee of the Aarhus Convention in Findings and recommendations with regard to communication ACCC/C/2009/37 concerning compliance by Belarus (adopted by the Compliance Committee on 24 September 2010), paragraph 68; the Independent International Commission of Inquiry on the Syrian Arab Republic in its Report of 22 February 2012, A/HRC/19/69, paragraph 106; the Independent International Fact-Finding Mission on Myanmar in its Report of 17 September 2018, A/HRC/39/CRP.2, paragraph 49.

87 *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII).

Court of Canada recognized that a claim for violation of customary international law principles protecting human rights may potentially be asserted against a corporation active in the extractive industries sector:

> it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in […] 'complicity offenses' […] However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.[88]

Further authority for the conclusion that private entities may be subject to international obligations can be derived from the language of certain treaty provisions[89] or their interpretation by authoritative commentaries.[90] There are, in addition, numerous policy instruments, guiding principles, performance standards and other similar instruments that specifically formulate duties for private entities, based on international obligations.[91] As a result, to paraphrase the Supreme Court of Canada, such international obligations do not have a "strictly interstate character" and there would be no need for the common law to evolve for them to bind corporations.

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88 *Nevsun Resources Ltd. v. Araya*, Judgment (28 February 2020), 2020 SCC 5 (CanLII), paragraph 113.

89 For example, the Aarhus Convention includes within the definition of 'public authority', as the duty-bearer of Article 4, not only the '[g]overnment at national, regional and other level' (Article 2(2)(a)) but also 'legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment' (Article 2(2)(b)) and '[a]ny other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b)' (Article 2(2)(c)). See Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447.

90 For example, the General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities from the Committee on Economic, Social and Cultural Rights acknowledges the possibility that business entities may be subject to international human rights obligations, when it states that it 'seeks to assist the corporate sector in discharging *their* human rights obligations' (emphasis added), Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, paragraph 5. Similarly, the General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights from the Committee on the Rights of the Child refers to the need 'to prevent the *infringement of children's rights by* business enterprises' (emphasis added), Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, paragraph 45. The *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016, A/HRC/32/45, specifically states at paragraph 35 that 'Although the present report focuses primarily on States' duties with respect to State-owned enterprises, it is important to recall that *such enterprises are commercial entities that should respect human rights like any other private enterprise*' (emphasis added).

91 See, most notably, the OECD, Guidelines for Multinational Enterprises, Annex I to the Declaration on International Investment and Multinational Enterprises, 25 May 2011; the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, HRC Resolution 17/4 (16 June 2011); the International Labour Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 5th edition (2017); or the International Finance Corporation, Performance Standards on Environmental and Social Sustainability (1 January 2012).

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49. The analysis in this section leads to the conclusion that *measures supporting, enabling and promoting gas production and transport are attributable to Canada if they are conduct of organs of the Government of British Columbia and/or the Government of Canada*. Moreover, there is increasing authority for the proposition that the *conduct of certain private entities is directly subject to certain international obligations*.

2. Legal implications arising from the perspective of the diligence required under international law

A. *Principles of customary international environmental law*

50. In international law, all States have the obligation to exercise due diligence when conducting activities that may cause significant harm to the environment of other States or of areas beyond the limits of national jurisdiction. This obligation is based on customary international law, and it was recognized both in general[92] — i.e., the duty to ensure that the State's territory is not used in such a way as to cause harm to others — and in the specific context of prevention of significant harm to the environment.[93]

51. The specific requirements of the obligation of due diligence have been clarified by the ICJ in the *Pulp Mills* case, where the Court observed that this:

> is an obligation which entails not only the *adoption of appropriate rules and measures*, but also a certain level of *vigilance in their enforcement and the exercise of administrative control* applicable to *public and private operators*, such as the monitoring of activities undertaken by such operators.[94]

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92 *Corfu Channel* case *(UK* v. *Albania),* ICJ Reports 1949, p. 4, at 22 (recognising the existence of 'certain general and well-recognised principles, namely every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States').

93 See *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, General List No 162 (unreported), paragraphs 83 and 99; *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), paragraph 941; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 706, paragraph 104; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Case No 21, paragraph 131; *In the matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan signed on 19 September 1960 (Islamic Republic of Pakistan v. Republic of India)*, PCA, Partial Award (18 February 2013), paragraph 451; *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, ICJ Reports 2010, p. 14, paragraph 197; *Gabcikovo-Nagymaros Project (Hungary/Slovakia),* Judgment, I. C. J. Reports 1997, p. 7, paragraph 140; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, paragraph 29; *Trail Smelter Arbitration*, Decisions of 16 April 1938 and 11 March 1941, RIAA vol. III, 1905–1982, 1963, at 1965.

94 See *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, ICJ Reports 2010, p. 14, paragraph 197 (emphasis added). The Court made this statement in relation to Article 41(a) of the Statute of the River Uruguay, but in a 2022 case, it recalled this precedent as an authority for the existence of the rule in general international law. See *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment of 1 December 2022, General List No 162 (unreported), paragraphs 99. In a previous case, the Seabed Chamber of the International Tribunal for the Law of the Sea had relied on the *Pulp Mills* precedent to characterise the obligation of due diligence in the law of the sea context. See

52. According to the ICJ, in the customary international law of environmental protection, the obligation of due diligence is given expression by three interrelated principles, one substantive and two procedural in nature:

> to fulfil its obligation to *exercise due diligence in preventing significant transboundary environmental harm*, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, *ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment*... If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, *to notify and consult in good faith* with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk. (emphasis added)[95]

53. Although general in nature, these international obligations are directly relevant to the Transaction. To assess their implications for the Transaction in the context of the climate change emergency, six aspects must be clarified: (i) the duty-bearer of the obligations; (ii) their spatial scope of application; (iii) the conduct governed by these obligations; (iv) the outcome that these obligations seek to prevent; (v) the requisite degree of diligence, in the specific context of the climate change emergency; and (vi) possible manifestations of what would constitute diligent conduct, or fall short of the required diligence, in a situation such as that of the Transaction.

54. First, it is undisputed that the State is the main duty-bearer of the obligation of due diligence and its expressions in customary international law. As suggested by the Supreme Court of Canada, it cannot be excluded that these obligations may have a wider set of duty-bearers, including private entities, but that is not clearly settled under international law.

55. Second, the spatial scope of application of the obligation of due diligence and its expressions extends not only to effects on other States but also to effects beyond national jurisdiction. This is the scope that the ICJ recognized to the principle of prevention of significant harm in its Advisory Opinion on the *Legality of Nuclear Weapons*, on which its subsequent decisions rely:

> In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance. Specific references were made to various existing international treaties and instruments (...) Also *cited were Principle*

Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 110.

95 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Construction of a Road in Costa Rica along the River San Juan (Nicaragua v. Costa Rica)*, ICJ Reports 2015, p. 665, paragraph 104 (emphasis added).

> *21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992* which express the common conviction of the States concerned that they have a *duty 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'* (…) Other States questioned the binding legal quality of these precepts of environmental law (…) The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. *The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment*. (emphasis added)[96]

This spatial scope is confirmed by the conclusion reached by the ITLOS Seabed Chamber in relation to the application of the principle of prevention and the requirement to conduct an environmental impact assessment in the Area — i.e., the seabed and subsoil beyond national jurisdiction — and this as a matter not only of treaty law but also of customary international law.[97] In the context of another expression of the obligation of due diligence, namely the obligation to protect and preserve the marine environment codified in Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS),[98] it is understood that such obligation applies to all the marine environment, whether under the jurisdiction of a State or beyond national jurisdiction.[99] Therefore, the consistency of the Transaction with the obligation of due diligence and its expressions must take into account the global environmental implications of the Transaction.

56. Third, the obligation of due diligence and its expressions govern any action/inaction by the duty-bearer, Canada, whether it is a specific act, a series of acts amounting to a composite act or a continuous conduct, including the constant failure to act with the requisite diligence.[100] Under customary international law, any such conduct, if inconsistent with the obligation of due diligence or its expressions, could be constitutive of a "breach" and give rise to the responsibility of Canada for an internationally wrongful act.

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96 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, paras. 27-28.

97 *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraphs 115-116, 147-148

98 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

99 *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, ITLOS Case No. 23, Order (25 April 2015), paragraphs 68-73; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion (2 April 2015), ITLOS Case No 21, paragraphs 111, 120; *In the matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines* v. *People's Republic of China)*, PCA Case No. 2013-19, Award (12 July 2016), paragraphs 927 and 940; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, PCA Case No. 2017-06, Award concerning the preliminary objections of the Russian Federation (21 February 2020), paragraph 295.

100 Responsibility of States for Internationally Wrongful Acts, draft articles and commentaries, *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), articles 14 and 15, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (visited on 26 July 2023).

57. Fourth, the principle of prevention seeks to prevent "significant"[101] harm or risk thereof. Risk is expressly addressed in Article 3 of the International Law Commission's 2001 Draft Articles on Prevention (**ILC Prevention Articles**), according to which, "the State of origin shall take all appropriate measures to prevent significant transboundary harm or *at any event to minimize the risk thereof*." (emphasis added)[102] These two types of outcomes to be prevented are characterized in Articles 2(a) and 2(b) of the ILC Prevention Articles. Article 2(b) defines "harm" as "harm caused to persons, property or the environment." Under Article 2(a), "risk of causing significant transboundary harm" includes "a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm." The ILC Prevention Articles do not define the term "significant," but the commentary to Article 2 notes that:

> It is to be understood that 'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.[103]

An indication of whether the detrimental effect is such that it reaches the threshold of significance may be given in case the conduct is inconsistent with other obligations, such as those arising from human rights treaties,[104] environmental treaties[105] or possibly soft-law instruments. The assessment of whether measures supporting, enabling and promoting gas production and transport can cause significant harm to the environment of other States or of areas beyond national jurisdiction, including the climate system, or of whether they pose a risk thereof, must be made in the context of the climate change emergency. An important factor in this regard, examined in Section III, is the scientific consensus reflected in the Summary for Policymakers of the IPCC's Synthesis Report of 2023 regarding two specific statements:

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101 *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Judgment, ICJ Reports 2010, p. 14, paragraph 101.

102 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, Article 3, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (visited on 26 July 2023).

103 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 2, paragraph 4, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (visited on 26 July 2023).

104 See e.g., *Budayeva and others v. Russia*, Judgment of 29 September 2008, ECtHR Applications No. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, paragraphs 128–137 (emphasising the obligations arising from the right to life 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life' and 'applying in the context of any activity, whether public or not, in which the right to life may be at stake').

105 See e.g. *In the matter of the South China Sea Arbitration before and Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013–19, Award of 12 July 2016, paragraphs 962–966 (referring to the fact that the activities unfolding under Chinese responsibility threatened species protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, United Nations, 993 UNTS 243).

> Continued emissions will further affect all major climate system components. *With every additional increment* of global warming, *changes in extremes continue to become larger*." (emphasis added)[106]
>
> Some future changes are unavoidable and/or irreversible but can be limited by deep, rapid and sustained global greenhouse gas emissions reduction. *The likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels*. (emphasis added)[107]

These two statements make clear that measures supporting, enabling and promoting gas production and transport, which in principle translate into additional emissions (when compared to a counterfactual in which the support is given to renewable energy or fossil fuel resources are left in the ground), increase the likelihood, the risk, of larger changes in extremes, including abrupt and/or irreversible adverse impacts.

58. Fifth, the latter risk of abrupt and/or irreversible changes, including potentially "very large adverse impacts" with each increment in emissions causing global warming is decisive to determine the degree of diligence required in the context of the climate change emergency. The commentary to the ILC Prevention Articles acknowledges the link between the magnitude of consequences and the degree of diligence: "the degree of care required is proportional to the degree of risk involved in the business."[108] Other relevant considerations determining the degree of diligence that must be displayed are the capabilities of the State supporting, enabling and promoting gas production and transport,[109] the historical moment — i.e., the climate change emergency context — at which diligence is assessed,[110] and the adoption and proactive enforcement of adequate measures to address the problem, achieving the deepest possible emission cuts. [111]

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106 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.1.3., available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

107 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.3, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

108 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 3, paragraph 18, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (visited on 26 July 2023). See also *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117; *Alabama claims of the United States of America against Great Britain*, Decision of 14 September 1872, RIAA vol. XXIX, 125-134, at 129

109 See *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraphs 158–9; Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, text and commentaries reproduced in *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Article 3, paragraph 13 13 ('The economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to dispense the State from obligation under the present articles'), available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf (visited on 26 July 2023).

110 *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117.

111 *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, ICJ Reports 2010, p. 14, paragraph 197 (emphasis added).

Importantly, as recognized by the ITLOS Seabed Chamber in its 2011 Advisory Opinion, "[t]he content of 'due diligence' obligations … *may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge*." (emphasis added).[112] The climate change emergency described in Section 3 of this Opinion, and the emphasis placed by the IPCC report, as well as other reports on the need to achieve the deepest possible emission cuts as soon as possible, is a decisive consideration in determining what is diligent conduct under international law.

59. The sixth and last aspect concerns the possible manifestations of what would constitute diligent conduct, or fall short of the required diligence, in a situation such as that of the Transaction. To recall one of the findings from Section III, the scientific consensus reviewed in that section makes clear that continued support for fossil fuels is inconsistent with the conduct that would minimize the risk of triggering cascading tipping points and the magnitude of adverse impacts. Diligent conduct, in such a context, is described as follows:

> "global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years"[113]
>
> "[b]eyond projects already committed as of 2021, there are no new oil and gas fields approved for development in our pathway, and no new coal mines or mine extensions are required"[114]
>
> "little or no new CO2-emitting infrastructure can be commissioned, and that existing infrastructure may need to be retired early (or be retrofitted with carbon capture and storage technology) in order to meet the Paris Agreement climate goals"[115]
>
> "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade"[116]
>
> "Deep, rapid and sustained mitigation and accelerated implementation of adaptation actions in this decade would reduce projected losses and damages for humans and ecosystems … and deliver many co-benefits,

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112 *Responsibilities and Obligations of States sponsoring Persons and Entities with respect to Activities in the Area*, Case No. 17, ITLOS (Seabed Dispute Chamber), Advisory Opinion (1 February 2011), paragraph 117 (emphasis added).

113 UNEP, *Emissions Gap Report 2022 : The closing window. Climate crisis calls for rapid transformation of societies*, Executive Summary, at page xvi, available at : https://www.unep.org/resources/emissions-gap-report-2022?gclid=EAIaIQobChMIjO2oxJST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE (visited on 26 July 2023).

114 International Energy Agency, *Net Zero by 2050. A Roadmap for the Global Energy Sector* (May 2021), Summary for policymakers, at page 10, available at : https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroby2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicyMakers_CORR.pdf (visited on 26 July 2023).

115 Dan Tong et al, 'Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target' (2019) 572 *Nature* 373.

116 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.6, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

> especially for air quality and health … Delayed mitigation and adaptation action would lock-in high-emissions infrastructure, raise risks of stranded assets and cost-escalation, reduce feasibility, and increase losses and damages … Near-term actions involve high up-front investments and potentially disruptive changes that can be lessened by a range of enabling policies"[117]
>
> "Net zero CO2 energy systems entail: a substantial reduction in overall fossil fuel use, minimal use of unabated fossil fuels"[118]

There is a notable, even stark, contrast between the type of conduct described in these statements extracted from scientific studies and the conduct of the Government of British Columbia and the Government of Canada in supporting, enabling and promoting gas production and transport, described in Section II.

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60. In conclusion, *in light of the obligation of due diligence and its expressions under customary international law, and in the specific context of the climate change emergency, conduct supporting, enabling and promoting gas production and transport would, in principle, fall short of the level of diligence required under international law*.

B. *The international law of climate change*

61. Two key aspects of the Transaction can be identified to structure the analysis conducted in this Section, namely the extent to which the measures supporting, enabling and promoting gas production and transport that are attributable to Canada are inconsistent with the latter's specific obligations in relation to climate change mitigation and to financial flows.

62. These two aspects are interrelated but there are specific provisions addressing them in the United Nations Framework Convention on Climate Change (**UNFCCC**)[119] and the Paris Agreement.[120] These are the two main treaties specifically devoted to climate change that are applicable to Canada in the period in which the measures supporting, enabling and promoting gas production and transport were adopted. This is because Canada has been a party to these treaties in the time period most relevant to the Transaction.[121] By contrast,

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117 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

118 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.3.2, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

119 United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107.

120 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Annex.

121 Canada ratified the UNFCCC on 4 December 1992 and the Convention took effect with respect to it on 21 March 1994, see the United Nations treaty collection website at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (visited on 26 July 2023). Canada ratified the Paris Agreement on 5 October 2016 and the Agreement took effect with

Canada informed its intention to withdraw[122] from the Kyoto Protocol[123] on 15 December 2011 and, according to Article 27(2) of this treaty, Canada's withdrawal took effect on 15 December 2012. From that date on, pursuant to Article 70(1) of the Vienna Convention on the Law of Treaties (**VCLT**),[124] Canada was no longer bound by the obligations of the Kyoto Protocol in relation to conduct subsequent to termination.

63. The UNFCCC states its overall objective in its Article 2:

> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

64. The third recital of the preamble of the Paris Agreement makes clear that this instrument is made "in pursuit of the objective of the Convention" and is "guided by its principles." Article 2 of the Paris Agreement confirms that this instrument is intended to enhance the implementation of the UNFCCC, including its objective:

> 1. This Agreement, *in enhancing the implementation of the Convention, including its objective*, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) *Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change*;
>
> (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and
>
> (c) *Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.* (emphasis added)

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respect to it on 4 November 2016, see the United Nations treaty collection website at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en (visited on 26 July 2023).

122 See Depositary Notification C.N.796.2011.TREATIES-1, 16 December 2011, available in at: https://treaties.un.org/doc/Publication/CN/2011/CN.796.2011-Eng.pdf (visited on 26 July 2023).

123 Kyoto Protocol to the United Nations Convention on Climate Change, 11 December 1997, 2302 UNTS 148.

124 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

For present purposes, letters (a) (mitigation) and (c) (finance) are particularly relevant, as they constitute a subsequent agreement, in the terms of Article 31(3)(a) of the VCLT, regarding what is the ultimate goal stated in Article 2 of the UNFCCC for States parties to both agreements.

65. Relevant context, in the technical term of Article 31(1) and (2) of the VCLT, for the interpretation of the provisions of the Paris Agreement, is provided by the decision of Conference of the Parties (COP)[125] of the UNFCCC, which adopted its text. The preamble of this decision, which was adopted by consensus, specifically refers to the understanding of all parties that "deep reductions in global emission will be required in order to achieve the ultimate objective of the Convention."[126] Importantly, this is a reference to "ultimate objective of the Convention," which is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." As discussed in the previous sub-section in relation to the obligation of due diligence under customary international law, the "level that would prevent dangerous anthropogenic interference with the climate system" is, at present, understood as the level that would limit the increase of global average temperature to 1.5°C above pre-industrial times; i.e., to 15.5°C (see Section III). This is because, as noted in the IPCC's Synthesis Report of 2023, "with every additional increment of global warming, changes in extremes continue to become larger"[127] and "[t]he likelihood of abrupt and/or irreversible changes increases with higher global warming levels. Similarly, the probability of low-likelihood outcomes associated with potentially very large adverse impacts increases with higher global warming levels."[128]

66. Further relevant context is given by the recognition in the preamble of the decision adopting the Paris Agreement of:

> the urgent need to address the significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.[129]

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125 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016.

126 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Preamble, sixth recital.

127 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.1.3., available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

128 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.3, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

129 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, Preamble, ninth recital.

This gap remains, as recognized in the IPCC's Synthesis Report of 2023[130] and UNEP's 2022 Emissions Gap Report:

> To get on track for limiting global warming to 1.5°C, global annual GHG emissions must be reduced by 45 per cent compared with emissions projections under policies currently in place in just eight years, and they must continue to decline rapidly after 2030, to avoid exhausting the limited remaining atmospheric carbon budget.[131]

This is an unprecedented context of climate change emergency, the seriousness and urgency of which has become increasingly understood in the years since the Paris Agreement was adopted. It is in this context that the obligations of Canada in relation to mitigation must be interpreted.

67. Mitigation – Under the UNFCCC, Canada is an Annex I country. Pursuant to Article 4(2) of the UNFCCC, each Annex I country is required (the term used is "shall") to "adopt national policies and take corresponding measures on the mitigation of climate change." Each State can decide the specific measures it adopts, but such adoption rests on each State's duty to take measures. This is a duty that must be interpreted in accordance with the obligation of due diligence and the principle of prevention of significant environmental harm, which as customary rules of international law are applicable to all States and hence "relevant" for the interpretation of the UNFCCC (see Article 31(3)(c) of the VCLT).

68. Similarly, the Paris Agreement's provisions on mitigation require from an Annex I country such as Canada the exercise of diligence in accordance with science. In addition to Article 2(1)(a), which refers both to the temperature goal but also to ultimate objective of the UNFCCC, three provisions are particularly relevant in this context, namely Article 3 and Article 4, paragraphs (1), (2) and (3):

> Article 3
>
> As nationally determined contributions to the global response to climate change, *all Parties are to undertake* and communicate *ambitious efforts* as defined in Articles 4, 7, 9, 10, 11 and 13 *with the view to achieving the purpose of this Agreement as set out in Article 2*. The efforts of all Parties *will represent a progression over time*, while recognizing the need to support developing country Parties for the effective implementation of this Agreement. (emphasis added)

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130 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement A.4, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

131 UNEP, *Emissions Gap Report 2022 : The closing window. Climate crisis calls for rapid transformation of societies*, Executive Summary, at page xvi, available at : https://www.unep.org/resources/emissions-gap-report-2022?gclid=EAIaIQobChMIjO2oxJST_gIVuBoGAB2YvQ5LEAAYASAAEgKv7PD_BwE (visited on 26 July 2023).

Article 4

> 1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim *to reach global peaking of greenhouse gas emissions as soon as possible*, recognizing that peaking will take longer for developing country Parties, and *to undertake rapid reductions thereafter in accordance with best available science*, *so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century*, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.
>
> 2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. *Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*.
>
> 3. Each Party's successive nationally determined contribution *will represent a progression* beyond the Party's then current nationally determined contribution and *reflect its highest possible ambition*, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. (emphasis added)

For an Annex I developed country such as Canada, the requirements are characterized by several terms: "to undertake … ambitious efforts … with a view to achieving the purpose of this Agreement as set out in Article 2"; "to reach global peaking of greenhouse gas emissions as soon as possible … to undertake rapid reductions thereafter in accordance with best available science"; "to pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions"; "progression … reflect[ing] its highest possible ambition."

69. Whether the provisions of the Paris Agreement are taken on a stand-alone basis or together with the obligation stated ("shall adopt") in Article 4(2) of the UNFCCC, with respect to which they constitute a subsequent agreement relevant for interpretation purposes (Article 31(3)(a) of the VCLT), they require the exercise of due diligence in adoption of mitigation measures. Crucially, the level of diligence displayed is to "reflect [the party's; i.e., Canada's] highest possible ambition."

70. From the perspective of mitigation, the question then becomes whether the Transaction — i.e., measures to support, enable and promote gas production and transport, in the specific climate change emergency context — constitute Canada's "highest possible ambition."

71. Canada, as part of the G7, is well aware that energy production and use constitute the main source of global annual emissions and that inefficient fossil fuel subsidies must be

eliminated. The G7's May 2016 pledge to end most fossil fuel subsidies by 2025 can be recalled in this regard:

> Given the fact that energy production and use account for around two-thirds of global GHG emissions, we recognize the crucial role that the energy sector has to play in combatting climate change. We remain committed to the elimination of inefficient fossil fuel subsidies and encourage all countries to do so by 2025.[132]

Of the two potentially applicable criteria in Canada's Guidelines on Inefficient Fossil Fuel Subsidies of 24 July 2023,[133] only one relates to the environmental integrity of Canada's "highest possible ambition" — i.e. that relating to mitigation action aligned with Article 6 of the Paris Agreement — and it is not met (see paragraph 79 below). In all events, under Article 27 of the VCLT, "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." *A fortiori*, a unilateral guideline provides no basis to claim an exemption from an international obligation.

72. After its first NDC of 2016, Canada submitted a revised NDC in July 2021 (**Canada's 2021 NDC**).[134] Of note, in Annex 2 of Canada's 2021 NDC, which communicates provincial and territorial climate action, the section on British Columbia makes no reference to the Transaction and the role of LNG in achieving emission reductions. This is an indication that, in its main climate change disclosure at the international level, Canada and British Columbia do not consider that the Transaction — specifically measures to support, enable and promote gas production and transport — can be framed or justified as mitigation measures. It is therefore highly questionable to present them as such.

73. Climate Action Tracker, an organization that gathers, analyzes and scores the NDCs of each country using a five-category ranking, from better to worse (1.5°C Paris Agreement compatible, almost sufficient, insufficient, highly insufficient, critically insufficient), gives Canada's 2021 NDC a score of "almost sufficient." Climate Action Tracker notes, in its explanation, that Canada has not submitted "a further NDC update in 2022, contrary to what it agreed under the Glasgow Climate Pact" and that, under its July 2021 NDC:

> Canada will cut emissions by at least 40-45% below 2005 levels by 2030, up from the previous target of 30% (incl. LULUCF). While stronger, the target still falls short of the at least 54% below 2005 level (excl. LULUCF) needed to be 1.5°C compatible on a global least cost basis. The CAT rates Canada's NDC target against modelled domestic pathways as "Almost sufficient". Canada is

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132 G7 Ise-Shima Leaders' Declaration, G7 Ise-Shima Summit, 26-27 May 2016, available at: https://www.mofa.go.jp/files/000160266.pdf (visited on 26 July 2023).

133 Inefficient Fossil Fuel Subsidies Government of Canada – Guidelines, at page 5 (Italics and emphasis original), available at: https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/inefficient-fossil-fuel-subsidies/guidelines.html (visited on 26 July 2023)

134 Canada's July 2021 NDC is available at : https://unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf (visited on 26 July 2023)

not on track to meet this target under current policies, nor do its planned policies fully close the gap.[135]

74. However, the overall score — including the NDCs, the country's policies and action, and climate finance — given to Canada is far lower ("highly insufficient").[136] The explanation provided for this poor score is as follows:

> Canada seems incapable of kicking its oil and gas addiction. It approved an offshore oil and gas megaproject in April 2022, even though the IEA says no new developments are needed if we are serious about achieving net zero. It continues to support the Trans Mountain pipeline, even though its own budget watchdog says the pipeline will no longer be profitable as costs to complete it have ballooned. And it seems determined to export LNG from its east coast to Europe even though this type of development puts the 1.5°C limit at risk.
>
> Canada's emissions are finally starting to trend downwards as the government continues to implement its climate policy agenda, but there remains a significant gap between current policies and Canada's NDC target - and 1.5°C compatibility. Implementing planned policies will go some way to closing that gap, but further action is needed.
>
> The government's own Environment Commissioner released a damning report in November 2021 outlining 30 years of the government's failure to meet its targets and reduce greenhouse gas emissions. The commissioner stressed the need for strong plans, the implementation of those plans, and called out policy incoherence, like the Trans Mountain purchase.
>
> Canada's overall CAT rating remains unchanged at 'Highly insufficient'. Canada needs stronger targets and faster policy implementation. To quote the commissioner: 'we cannot afford a fourth decade of failure on climate action'.
>
> Canada updated its long-term strategy in October 2022, which explores a number of different scenarios capable of achieving net zero emissions in 2050, but does not set a particular pathway for the country to follow, nor does it outline the policies and measures needed to achieve net zero. Reliance on LULUCF and CDR could be as high as 45% of Canada's emissions in 2020 (or 301 $MtCO_2e$), which calls into question the credibility of the target. Under all scenarios, Canada is still producing and exporting oil and gas in 2050.

75. The independent assessment by Climate Action Tracker is, technically, not determinative of whether Canada is displaying its "highest possible ambition" under the Paris

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135 See the explanation of the scoring of Canada's NDC at the Climate Tracker website : https://climateactiontracker.org/countries/canada/ (visited on 26 July 2023).

136 See the explanation of the overall scoring of Canada at the Climate Tracker website : https://climateactiontracker.org/countries/canada/ (visited on 26 July 2023).

Agreement, and/or under Article 4(2) of the UNFCCC (interpreted in the light of the Paris Agreement) and/or indeed under the obligation of due diligence and prevention under customary international law. But the underlying analysis provides a strong indication that Canada could display a much higher level of ambition. This is so, as discussed in Section III, not only from an environmental perspective, in light of the urgency to make deep emission cuts, but also from the perspective of the concerns regarding the economic viability of the overall Transaction.

76. Another important aspect to assess whether Canada is displaying its "highest possible ambition" concerns the integration, or lack thereof, of scope 3 emissions. Under a widely used GHG accounting tool known as the Greenhouse Gas (GHG) Protocol,[137] emissions fall into three categories or "scopes." Scope 1 emissions cover direct emissions from sources owned or controlled by the reporting entity. Scope 2 emissions cover indirect emissions arising from inputs (e.g., electricity, heat, cement, steel, fertilizers, etc.) purchased and consumed by the reporting entity. Scope 3 includes all other indirect emissions that occur in the entity's value chain, such as GHG emissions from burning the fossil fuels it sells. The Task Force on Climate Related Financial Disclosures (TCFD) recommends reporting scope 3 emissions "if appropriate."[138] The Implementing Guidelines of October 2021 revised the prior 2017 version on this point to encourage all sectors to disclose scope 3 emissions.[139] Such disclosure remains subject to a materiality test; i.e., to a test of financial relevance for a potential investor. The TCFD "strongly encourages all organizations to disclose Scope 3 GHG emissions. While the Task Force recognizes the data and methodological challenges associated with calculating Scope 3 GHG emissions, it believes such emissions are an important metric reflecting an organization's exposure to climate-related risks and opportunities."[140] Although the overall assessment of Canada's level of ambition by Climate Action Tracker scores it as "highly insufficient," it does not take into account the additional impact of the Transaction in terms of scope 3 emissions, namely the GHG emissions arising from burning the additional upstream gas production supported, enabled and promoted by the Transaction. This dimension is not specifically addressed in Canada's 2021 NDC or, as discussed in Section II, the reports underpinning the issuance of environmental assessment certificates for the Kitimat LNG facility or Coastal GasLink. However, as discussed in Section II, the Transaction is specifically designed to increase natural gas production for export, with clear implications for scope 3 emissions. Given the concerns regarding the economic viability of the Transaction (see Section III), scope 3 emissions are clearly material. Aside from their

137 Available at https://ghgprotocol.org/corporate-standard (visited on 26 July 2023).

138 TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017), pages 12, 27 and 79.

139 TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (October 2021), pages 5, 7, 21, 29.

140 TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (October 2021), page 29, footnote 48.

disclosure, they are unquestionably relevant from the perspective of whether Canada is displaying its "highest possible ambition."

77. Considered in this light, presenting the overall Transaction as a mitigation strategy, due to its purported potential to reduce GHG emissions abroad by replacing coal with exported Canadian LNG, would be disingenuous. The Transaction is specifically designed to increase the extraction of fossil fuels. A more appropriate counterfactual, particularly for an Annex I country such as Canada that cannot claim the benefit of the principle of common but differentiated responsibilities and respective capabilities, is a scenario in which no additional support for the upstream gas sector, whether direct or indirect (through LNG midstream infrastructure), is given. In fact, under the diligence required of Canada under customary international law, Article 4(2) of the UNFCCC and the Paris Agreement (particularly Article 4(3)), a more ambitious scenario in which shifting the substantial support the Transaction now provides to the natural gas industry to renewable energy technologies would be the most appropriate counterfactual.

78. In addition to selecting a counterfactual consistent with Canada's due diligence, it is noteworthy that, as observed earlier, Annex 2 of Canada's 2021 NDC makes no reference to the Transaction or to role of LNG in achieving emission reductions in its section devoted to British Columbia. Such an omission, in Canada's main climate change disclosure at the international law, detracts from the credibility of Canada's claim to pursue LNG exports as a global mitigation strategy.

79. A third reason is that, despite claims to the contrary, it is unlikely that Canada would be able to rely on Article 6(2) of the Paris Agreement to receive emission reduction credits in exchange for its LNG exports. The basic reason for this is that such emission reductions would, if they were effectively achieved, count for the territorial State buying the gas or, possibly, for the foreign State investing in the conversion of the infrastructure in the territorial State, not by the State selling at market rates the gas used in the converted infrastructure. Double counting of emission reductions was set as a principle since the adoption of the Paris Agreement, in the very text of Article 6(2) and its implementing decisions.[141] Thus, the only possibility for such emission reductions to count for Canada would be that the territorial State or the State investing in conversion relinquishes the entitlement to count the emission reductions for itself. There is no reason why either of these States would do so, in addition to paying the market price of gas or the cost of the investment. Unlike transfers under Articles 6 or 12 of the Kyoto Protocol, where a receiver country benefited from an emissions-reduction project in its territory normally involving a transfer of technology, selling gas to a receiver country at market rates does not provide such a benefit. In fact, even assuming (i) that gas is used instead of coal, (ii) that an

141 'Adoption of the Paris Agreement', Decision 1/CP.21, FCCC/CP/2015/10/Add.1, 29 January 2016, paragraph 36; 'Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement', Decision 2/CMA.3, FCCC/PA/CMA/2021/10/Add.1, 8 March 2022, paragraph 3(b), Annex, paragraph 21(d); Decision 6/CMA.4, FCCC/PA/CMA/2022/10/Add.2, 17 March 2023, paragraph 16(b)(i), Annex I, paragraph 18.

emission reduction is effectively achieved as compared to a business-as-usual scenario, and (iii) that it counts for Canada, the transfer of such emission reductions cannot be postulated for the entire Transaction. It is a project-by-project assessment and, in each case, these three non-obvious conditions would have to be met. More fundamentally, even if they were met, the emission reductions achieved would still fall short of a scenario in which Canada invests the relevant amounts in cleaner energy sources, such as renewable energy technologies, in what would constitute Canada's genuine "highest possible ambition." The type of cooperative approaches contemplated in Article 6(2) are not an instrument to make up for lower ambition in Canada's own climate policies but, as recognized by all parties of the Paris Agreement in Article 6(1), "to allow for higher ambition in their mitigation … actions."

80. Financial flows – Article 2(1)(c) of the Paris Agreement formulates as an objective of the Agreement "[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."

81. From this perspective, the question that arises is whether the financial flows underpinning the Transaction are (i) "consistent" (ii) with a "pathway towards low greenhouse gas emissions," and (iii) "climate-resilient development." Parameters (ii) and (iii) are cumulative: finance flows must be consistent with both "a pathway towards low greenhouse gas emissions" and "climate-resilient development." For the two parameters to be met, greenhouse gas emissions must be sufficiently low to be fit within the concept of "climate-resilient development."

82. The latter concept has been clarified by the IPCC in its 2023 Synthesis Report, the Summary for Policymakers, which was adopted by consensus by all States participating in the IPCC processes. The following clarifications are relevant in the present context:

> Climate resilient development integrates adaptation and mitigation to advance sustainable development for all, and is enabled by increased international cooperation including *improved access to adequate financial resources*, particularly for vulnerable regions, sectors and groups, and inclusive governance and coordinated policies … The choices and actions implemented in this decade will have impacts now and for thousands of years' (emphasis added).[142]
>
> Climate resilient development pathways have been constrained by past development, emissions and climate change and *are progressively constrained by every increment of warming, in particular beyond 1.5°C*. (emphasis added)[143]

[142] IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.1, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

[143] IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement C.1.1, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

These two clarifications make clear that financial flows are an important part of climate-resilient development and that such development must in principle follow a pathway consistent with limiting the increase of global average temperature to 1.5°C above pre-industrial levels. A pathway where GHG emissions are low enough to avoid "overshoot" — i.e., exceeding a certain warming level temporarily and then bringing the global average temperature below that warming level — are more consistent with climate-resilient development than pathways that lead to overshoot. The IPCC's Synthesis Report specifically observes, in this regard, that:

> All global modelled pathways that limit warming to 1.5°C (>50%) with no or limited overshoot, and those that limit warming to 2°C (>67%), *involve rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade*. Global net zero CO2 emissions are reached for these pathway categories, in the early 2050s and around the early 2070s, respectively. (emphasis added)[144]

83. Article 2(1)(c) of the Paris Agreement is not a mere objective devoid of correlative obligations. Article 3 specifically requires States "to undertake … ambitious efforts as defined in Articles … 9 … with the view to achieving the purpose of this Agreement as set out in Article 2." Article 9 is about finance, so it is clear that the requirement "to undertake … ambitious efforts" applies to the direction of finance flows. Moreover, as discussed earlier, these provisions of the Paris Agreement operate on a stand-alone basis but also as a specific interpretation of the broader requirements of Article 2 of the UNFCCC and of customary international law.

84. Under these international obligations, to deliberately direct finance flows in a manner that is inconsistent with a pathway where GHG emissions are sufficiently low and/or with climate-resilient development is, in turn, inconsistent with such obligations.

85. Climate Action Tracker estimates that, if all countries were to follow Canada's approach to policies and actions, it would lead to an increase in global average temperature of over 3°C and up to 4°C above pre-industrial levels.[145] On this basis, it gives Canada a score of "highly insufficient." Regarding specifically climate finance, Canada's performance is again rated "highly insufficient."[146] This is because Canada falls short of providing its fair share of international climate finance and because it continues to financially support fossil fuels. The full explanation provided by Climate Action Tracker is as follows:

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144 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.6, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

145 See the section on Canada's policies and action at the Climate Tracker website : https://climateactiontracker.org/countries/canada/ (visited on 26 July 2023).

146 See the section on Canada's climate fiance at the Climate Tracker website : https://climateactiontracker.org/countries/canada/ (visited on 26 July 2023).

> Canada's international public climate finance contribution is rated "Highly insufficient." The government recently announced a doubling of its climate finance over the next five years. While a positive move, Canada retains a poor rating as its contributions to date have been low compared to its fair share. Canada also continues to provide substantial support to fossil fuel developments abroad. To improve its rating, *Canada needs to stop funding fossil fuels overseas and accelerate commitments to increase climate finance*. Canada's climate finance is not sufficient to improve its fair share target rating, and the CAT rates Canada's overall fair share contribution as "Insufficient." (emphasis added)[147]

86. As noted earlier, the independent assessment by Climate Action Tracker of this point is not determinative. However, it confirms what appears plainly from the financial flows underpinning the Transaction, namely that they are directed toward supporting, enabling and promoting gas production and transport. The assessment points to a double inconsistency that, in order to be corrected, would require both more international climate finance consistent with "rapid and deep and, in most cases, immediate greenhouse gas emissions reductions in all sectors this decade,"[148] and less finance of fossil fuels production and transport. Moreover, the continued financing of natural gas production raises concerns associated with the economic viability of the Transaction (see Section III).

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87. In conclusion, *in the light of the UNFCCC and the Paris Agreement, interpreted together and by reference to the relevant customary international law, and in the context of the climate change emergency, the Transaction falls short of displaying Canada's "highest possible ambition" in mitigation and of the objective — and correlative obligation — to make finance flows consistent with a pathway toward low greenhouse gas emissions and climate-resilient development.*

C. *International human rights law*

88. The social implications of the Transaction discussed in Section II are relevant from the perspective of international human rights law. Both States and non-State actors have obligations under international human rights law (see Section IV.1), which can be generally summarized as the obligations, correlative to each human right, to respect the right[s]-holders, protect them from deprivation by third parties or other sources of harm, and fulfil the conditions enabling the full enjoyment of this right.[149] In the context of non-

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147 See the section on Canada's climate fiance at the Climate Tracker website : https://climateactiontracker.org/countries/canada/ (visited on 26 July 2023).

148 IPCC, Synthesis Report of the IPCC Sixth Assessment Report (AR6), Summary for Policymakers, March 2023, statement B.6, available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/ (visited on 26 July 2023).

149 Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (Art. 11), UN Doc. E/C.12/1999/5, 12 May 1999, paragraph 15; Report on the Right to Adequate Food as a Human Right. Final Report Presented by the Special Rapporteur Asbjørn Eide, UN Doc. E/CN.4/Sub.2/1987/23, 7 July 1987, paragraphs 66–69;

State actors, such as companies, which do not have a territory or exercise jurisdiction, these obligations are adjusted in terms arising from several instruments mentioned earlier in this Opinion (see paragraph 48 of this Opinion) and further discussed in this section.

89. This section examines two aspects of the Transaction in the light of the relevant obligations arising from international human rights law. First, the general obligations of duty-bearers, including Canada, to reduce their GHG emissions in order to respect, protect and fulfil human rights, both in their territory and under their jurisdiction, as applicable.[150] Second, the specific obligations of Canada and of implicated non-State actors, including Coastal GasLink, to respect and protect the human rights of Wet'suwet'en Indigenous Peoples and communities and of land defenders in relation to the ongoing construction of the Coastal GasLink pipeline.

90. **General obligations of duty-bearers to reduce GHG emissions to respect, protect and fulfil human rights —** With respect to the first aspect, the obligations arising from international human rights law in the context of the climate change emergency have been reaffirmed specifically in relation to the Transaction in a joint letter to company O.J. Pipelines Canada sent on 13 January 2023 by nine special procedures under the Human Rights Council (the **Joint Letter**), namely the Working Group on the issue of human rights

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African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center (SERAC) and Others v. Nigeria, Comm. no. 155/96 (27 October 2001), paragraphs 44–47.

150 It is now widely recognised that the human rights obligations of States extend to situations beyond their territoriy which are under the State's effective control : *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory, ICJ Reports 2004, p. 136, paragraphs 108–113; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, ICJ Reports 2008, p. 353, paragraph 109 ; *Delia Saldias de Lopez v. Uruguay*, HRC Communication no. 52/1979 (29 July 1981), paragraphs 12.1 and 12.3; *Association pour la sauvegarde de la paix au Burundi v. Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*, Communication no. 157/96 (29 May 2003), paragraph 75; *Al-Skeini and Others v UK*, ECtHR Application no. 55721/07 (7 July 2011), paragraphs 130-140; *Jaloud v the Netherlands*, ECtHR Application no. 47708/08 (20 November 2014), paragraph 139; *Alejandre and Others v. Cuba* (1999), IACommHR Case 11.589, Report no. 86/99, paragraphs 23–25; *Ecuador v. Colombia* (2010), IACommHR, Inter-State Petition IP-02, Report no. 112/10, paragraph 91. This also includes situations where the State has effective control over the source of harm: *Advisory Opinion OC-23/17 of November 15, 2017, requested by the Republic of Colombia: The Environment and Human Rights (State obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4.1 and 5.1 in relation with Articles 1.1 and 2 of the American Convention on Human Rights)*, paragraphs 101-102; *Basem Ahmed Issa Yassin v Canada*, HRC Communication no. 2285/2013 (26 July 2017), paragraphs 6.5-6.7; Concluding Observations on the Sixth Periodic Report of Germany adopted by the Committee at its 106th Session (15 October–2 November 2012) CCPR/C/DEU/CO/6, (12 November 2012), paragraph 16; *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 30 October 2018, CCPR/C/GC/36, paragraphs 21-22; Concluding observations on the sixth periodic report of Canada, E/C.12/CAN/CO/6 (23 March 2016), paragraphs 15 and 16; Concluding observations of the Committee on Economic Social and Cultural Rights: Germany E/C.12/DEU/CO/5 (12 July 2011), paragraphs 10-11; Concluding observations on the fourth periodic report of Austria E/C.12/AUT/CO/4 (13 December 2013), paragraphs 11-12; *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, paragraphs 31-33; *General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights)*, E/C.12/2002/11, 20 January 2003, paragraphs 31-34; *General Comment No. 18: The Right to Work*, E/C.12/GC/18, 6 February 2006, paragraph 30; *General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic Social and Cultural Rights)*, E/C.12/2000/4, 11 August 2000, paragraph 39; *General Comment 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, UN Doc. E/C.12/ 1997/8, 12 December 1997, paragraphs 11–14; Concluding Observations on Canada, CERD/C/CAN/CO/18, 25 May 2007, paragraph 17.

and transnational corporations and other business enterprises, the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the situation of human rights defenders, the Special Rapporteur on the rights of Indigenous Peoples; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and the Special Rapporteur on violence against women and girls, its causes and consequences.[151] This joint letter makes the following statement:

> The burning of fossil fuels constitutes one of the human activities that has the largest impact on the Earth's climate. In this context, we remain preoccupied by the impact of fossil fuels exploitation in general and the establishment of the pipeline in particular on greenhouse gas emissions, contributing to the current climate crisis. Climate change is having a major impact on a wide range of human rights today, and could have a cataclysmic impact in the future unless ambitious actions are undertaken immediately. Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development and cultural rights. In addition, guaranteeing a "safe climate" constitutes one of the substantive elements of the right to a clean, healthy and sustainable environment, as recognized by the Human Rights Council on 8 October 2021 (Res. 48/13) and the General Assembly on July 28 (A/76/L.75).[152]

91. These obligations have been generally recognised in the context of the wider type of activity of which the Transaction is an example, namely support for fossil fuel development despite the climate change emergency. A joint Human Rights and Climate Change statement of 14 May 2020 by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities concludes that:

> In their efforts to reduce emissions*, States parties should contribute effectively to phasing out fossils fuels*, promoting renewable energy and addressing emissions from the land sector, including by combating deforestation. In

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151 Letter from the Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and others to O.J. Pipelines Canada, 13 January 2023, Ref.: AL OTH 116/2022, available at : https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27690 (visited on 26 July 2023).

152 Letter from the Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and others to O.J. Pipelines Canada, 13 January 2023, Ref.: AL OTH 116/2022, page 6, available at : https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27690 (visited on 26 July 2023).

addition, *States must regulate private actors*, including by holding them accountable for harm they generate both domestically and extraterritorially. *States should also discontinue financial incentives or investments in activities and infrastructure that are not consistent with low greenhouse gas emissions pathways, whether undertaken by public or private actors, as a mitigation measure to prevent further damage and risk*. (emphasis added)[153]

92. Similarly, in a report of 15 July 2019, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment concluded the following:

> To address society's addiction to fossil fuels, all States should:
>
> (a) Immediately terminate all fossil fuel subsidies, except for clean cookstove programmes …
>
> (d) Limit fossil fuel businesses and their industry associations from influencing climate, energy and environmental policies, in light of their responsibility for the majority of emissions and their well-known efforts to subvert and deny scientific evidence of climate change …
>
> 78. Developed States should demonstrate leadership by:
>
> (a) *Prohibiting further exploration for additional fossil fuels, since not all existing reserves can be burned while still meeting the commitments of the Paris Agreement*;
>
> (b) Requiring all new natural gas power plants to use carbon capture and storage technology and requiring existing gas plants to be retrofitted with carbon capture and storage technology;
>
> (c) *Rejecting any other expansion of fossil fuel infrastructure*;
>
> (d) *Prohibiting the expansion of the most polluting and environmentally destructive types of fossil fuel extraction, including oil and gas produced from hydraulic fracturing (fracking)*, oil sands, the Arctic or ultra-deepwater (emphasis added)[154]

93. Other converging statements of what international human rights law requires have been made by human rights treaty bodies in relation to the broader issue of business and human rights. In its General Comment No. 24, the Committee on Economic, Social and Cultural Rights[155] clarifies the implications for business activities of the obligations arising from the International Covenant on Economic, Social and Cultural Rights (ICESCR).[156] The

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153 *Statement on Human Rights and Climate Change*, Joint statement by the Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child and the Committee on the Rights of Persons with Disabilities, 14 May 2020, HRI/2019/1, paragraph 12.

154 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 15 July 2019, A/74/161, paragraphs 77-78.

155 Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24.

156 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

Committee observes that States parties should "revise relevant tax codes, public procurement contracts, export credits and other forms of State support, privileges and advantages in case of human rights violations, thus aligning business incentives with human rights responsibilities."[157] In its General Comment No. 16,[158] the Committee on the Rights of the Child emphasizes that in adopting "adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations," States "should take into account that … violations of children's rights, such as exposure to … environmental hazards may have lifelong, irreversible and even transgenerational consequences."[159]

94. The Transaction is generally concerning and potentially in breach of Canada's and the implicated companies' human rights obligations because it supports, enables and promotes the production and use of natural gas. The aforementioned Joint Letter from nine human rights special procedures specifically identifies this concern:

> The exploitation of fossil fuels in general and the establishment of the 670-kilometres long pipeline in particular, would also impact climate change and threatens the completion of Canada's obligations in this regard, as outlined in the Paris Agreement. Upon completion, the expected capacity of the pipeline will be of up to five billion metric feet of natural gas per day.[160]

95. As a general matter, Canada's human rights obligations are relevant to determine whether Canada is displaying its "highest possible ambition" under Article 4(3) of the Paris Agreement, and/or under Article 4(2) of the UNFCCC (interpreted in the light of the Paris Agreement), and indeed under the obligation of due diligence and prevention under customary international law.

96. More specifically, consideration of the human rights obligations of Canada is important because these are stand-alone obligations of Canada, as a party to most major human rights treaties.[161] Assessing the consistency of the Transaction would require a case-by-

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157 Committee on Economic, Social and Cultural Rights, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, paragraph. 15

158 Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16.

159 Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, paragraph 4(a).

160 Letter from the Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and others to O.J. Pipelines Canada, 13 January 2023, Ref.: AL OTH 116/2022, page 3, available at : https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27690 (visited on 26 July 2023).

161 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (**ICERD**) (Canada ratified it on 14 October 1970); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (**ICCPR**) (Canada acceded on 19 May 1976); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (**ICESCR**) (Canada acceded on 19 May 1976); Convention on the Elimination of Discrimination against Women, 18 December 1979, 1249 UNTS 13 (Canada ratified it on 10 December 1981); Convention on the Rights of the Child, 20 November 1989, 1977 UNTS 3 (**CRC**) (Canada ratified it on 13 December 1991); Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3 (Canada ratified it on 11 March 2010)

case analysis in the light of a specific conduct (action/inaction) forming part of the broader Transaction as well as of specific human rights, most notably — as stated in the Joint Letter — the human rights to life, health, food, water and sanitation, a clean, healthy and sustainable environment, an adequate standard of living, housing, property, self-determination, development and cultural rights.

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97. All in all, however, *given the specific observations of human rights bodies and special procedures in relation to the Transaction and their more general statements in relation to the type of activity of which the Transaction is an example, there are grounds to conclude that aspects of the Transaction may constitute a violation of one or more human rights obligations of Canada*. The ICJ has considered that such the interpretation given by bodies such as the Human Rights Committee or regional courts carries "great weight" and must be given "due account."[162]

98. In addition, in the next paragraphs, the consistency with Canada's and the implicated companies' human rights obligations of some specific aspects of the Transaction relating to the situation of Wet'suwet'en Indigenous Peoples and communities, and of land defenders, is examined in more detail.

99. Human rights of the Wet'suwet'en Nation Hereditary Chiefs and land defenders demonstrating against Coastal GasLink – Construction of Coastal GasLink has led to allegations of human rights violations and abuses by Canada and the implicated companies. The Joint Letter summarizes the concerns in the following terms:

> we have received [information] concerning serious risks posed to Indigenous Peoples' rights in the context of oil and gas projects in British Columbia, Canada. Of particular concern are allegations of ongoing violations and abuses against Wet'suwet'en Indigenous Peoples and communities related to the development of the Coastal GasLink pipeline project, as well as the human rights violations of land rights defenders peacefully demonstrating against the Coastal GasLink (CGL) pipeline under construction that was approved in 2018 without the consent of the impacted Indigenous Peoples represented by the Wet'suwet'en Hereditary Chiefs. (emphasis original)[163]

100. This is not the first time such concerns have been raised. The UN Committee on the Elimination of Racial Discrimination (CERD) has raised similar concerns.

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162 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, p. 639, paragraphs 66-67.

163 Letter from the Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises, and others to O.J. Pipelines Canada, 13 January 2023, Ref.: AL OTH 116/2022, pages 1-2, available at : https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27690 (visited on 26 July 2023).

101. Acting under its Early Warning and Urgent Action Procedure, in December 2019 the CERD addressed the refusal by Canada "to consider free, prior and informed consent as a requirement for any measure, such as large-scale development projects, that may cause irreparable harm to indigenous peoples rights, culture, lands, territories and way of life"[164] and this specifically in the context of the Trans Mountain Pipeline Extension project and the "approval of new large-scale development projects on indigenous peoples traditional lands and territories without the free, prior and informed consent of affected indigenous peoples, such as the Coastal Gas Link pipeline in the territory of the Wet'suwet'en people."[165] The Committee further described the factual context by reference to the "forced removal, disproportionate use of force, harassment and intimidation by law enforcement officials against indigenous peoples who peacefully oppose large-scale development projects on their traditional territories."[166] On this basis, the Committee:

> *Call[ed] upon* the State party to immediately halt the construction and suspend all permits and approvals for the construction of the Coastal Gas Link pipeline in the traditional and unceded lands and territories of the Wet'suwet'en people, until they grant their free, prior and informed consent, following the full and adequate discharge of the duty to consult …
>
> *Urg[ed]* the State party to freeze present and future approval of large-scale development projects affecting indigenous peoples that do not enjoy free, prior and informed consent from all indigenous peoples affected;
>
> *Urg[ed]* the State party to immediately cease forced eviction of Secwepemc and Wet'suwet'en peoples;
>
> *Urg[ed]* the State party to guarantee that no force will be used against Secwepemc and Wet'suwet'en peoples and that the Royal Canadian Mounted Police and associated security and policing services will be withdrawn from their traditional lands;
>
> *Also urg[ed]* the State party to prohibit the use of lethal weapons, notably by the Royal Canadian Mounted Police, against indigenous peoples (emphasis original)[167]

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164 Committee on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, including Early Warning and Urgent Action Procedure, Decision 1(100), 13 December 2019, preambular paragraph 3, available at : https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/EWU/CAN/9026&Lang=en (visited on 26 July 2023).

165 Committee on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, including Early Warning and Urgent Action Procedure, Decision 1(100), 13 December 2019, preambular paragraph 5, available at : https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/EWU/CAN/9026&Lang=en (visited on 26 July 2023).

166 Committee on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, including Early Warning and Urgent Action Procedure, Decision 1(100), 13 December 2019, preambular paragraph 6, available at : https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/EWU/CAN/9026&Lang=en (visited on 26 July 2023).

167 Committee on the Elimination of Racial Discrimination, Prevention of Racial Discrimination, including Early Warning and Urgent Action Procedure, Decision 1(100), 13 December 2019, operative part, available at :

Canada replied on 7 July 2020 to the communication of this decision but, as noted in a subsequent letter from the CERD of 24 November 2020, "the Committee regret[ted] that the State party ha[d] provided no information on the measures taken to address the concerns raised by the Committee in its decision of 13 December 2019."[168]

102. At its 106th session, the CERD further considered information it received under its early warning and urgent action procedure in relation with the impact of the Trans Mountain Pipeline and the Coastal GasLink Pipeline on the situation of the Secwepemc and Wet'suwet'en communities. The factual assessment of the situation, communicated in a letter of 29 April 2022 to Canada's Permanent Representative to the UN Office in Geneva, is as follows:

> According to the information before the Committee, the Governments of Canada and of the Province of British Columbia have escalated their use of force, surveillance, and criminalization of land defenders and peaceful protesters to intimidate, remove and forcibly evict Secwepemc and Wet'suwet'en Nations from their traditional lands, in particular by the Royal Canadian Mounted Police (RCMP), the Community-Industry Response Group (CIRG), and private security firms. The information received specifies in particular that the Tiny House Warriors, a group of Secwepemc women, have been the target of surveillance and intimidation, and that numerous Secwepemc and Wet'suwet'en peaceful land defenders have been victims of violent evictions and arbitrary detentions by the RCMP, the CIRG and private security personnel in several occasions since the Committee's letter to the State party, dated 24 November 2020.[169]

The CERD expressly recalled its Decision 1 (100) of 13 December 2009 and "profoundly regret[ted] and [was] concerned that despite its calls to the State party, the information received point[ed] rather to an increase of the above-mentioned acts against Secwepemc and Wet'suwet'en peoples." Relying on Article 9(1) of the ICERD and Article 65 of its Rules of Procedure, the CERD requested Canada to:

> provide information on the measures taken to:
>
> (a) Cease the construction of the Trans Mountain Pipeline and the Coastal Gas Link pipeline, until free, prior and informed consent is obtained from,

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https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/EWU/CAN/9026&Lang=en (visited on 26 July 2023).

[168] Letter from Yanduan Li, Chair, Committee on the Elimination of Racial Discrimination, to H. E. Mrs. Leslie Norton, Permanent Representative of Canada to the United Nations Office in Geneva, 24 November 2020, CERD/EWUAP/102nd session/2020/MJ/CS/ks, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CERD/ALE/CAN/9296&Lang=en (visited on 26 July 2023).

[169] Letter from Verene Shepherd, Chair, Committee on the Elimination of Racial Discrimination, to H. E. Mrs. Leslie Norton, Permanent Representative of Canada to the United Nations Office in Geneva, 29 April 2022, CERD/EWUAP/106thsession/2022/MJ/CS/ks, available at : https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fALE%2fCAN%2f9554&Lang=en (visited on 26 July 2023)

> respectively, the Secwepemc people and the Wet'suwet'en people, following the full and adequate discharge of the duty to consult;
>
> (b) Engage in negotiations and consultations with the Secwepmc and We'suwet'en communities affected by the Trans Mountain Pipeline and Coastal Gas Link Pipeline and to report on the results of those negotiations and consultations;
>
> (c) Prevent and duly investigate the allegations of surveillance measures, practices of arbitrary detention, instances of excessive use of force against protesters, in particular those belonging to the Secwepemc and Wet'suwet'en peoples, by the RCMP, CIRG, and private security firms;
>
> (d) Cease the forced eviction of Secwepemc and Wet'suwet'en peoples [...]'[170]

103. The aforementioned Joint Letter from 9 UN special procedures specifically refers to the steps taken by the CERD to address the situation of Wet'suwet'en Indigenous Peoples and communities, emphasizing Canada's human rights obligations and those of the implicated companies.

104. Canada will take part in the Universal Periodic Review (UPR) process conducted by the UN Human Rights Council UPR Working Group in November 2023. Human rights organization Amnesty International has submitted, in this context, a statement regarding the situation of human rights in Canada.[171] Paragraph 31 of this submission expressly refers to the situation of the Wet'suwet'en Indigenous Peoples and communities:

> Indigenous land defenders have been criminalized for defending their territories against pipeline expansion. Letters from the Committee on the Elimination of Racial Discrimination in 2019, 2020, and 2022 urged Canada to halt construction of the Coastal GasLink pipeline until the Wet'suwet'en Nation grant their FPIC, and to withdraw policing and security forces from their territory. Despite this, Canada remains in non-compliance.[172]

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105. The foregoing considerations from a range of UN treaty bodies and special procedures, as well as from Amnesty International, lead to the conclusion that the *aspects of the Transaction affecting Indigenous Peoples rights, specifically, the Wet'suwet'en Nation's right*

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170 Letter from Verene Shepherd, Chair, Committee on the Elimination of Racial Discrimination, to H. E. Mrs. Leslie Norton, Permanent Representative of Canada to the United Nations Office in Geneva, 29 April 2022, CERD/EWUAP/106thsession/2022/MJ/CS/ks, available at : https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fALE%2fCAN%2f9554&Lang=en (visited on 26 July 2023)

171 Amnesty International, Canada : Human Rights in Peril, Submission to the 44th Session of the UPR Working Group of 10 November 2023, available at : https://www.amnesty.org/en/wp-content/uploads/2023/03/AMR2066272023ENGLISH.pdf (visited on 26 July 2023).

172 Amnesty International, Canada : Human Rights in Peril, Submission to the 44th Session of the UPR Working Group of 10 November 2023, paragraph 31, available at : https://www.amnesty.org/en/wp-content/uploads/2023/03/AMR2066272023ENGLISH.pdf (visited on 26 July 2023).

to free, prior and informed consent, their right not to be forcibly evicted from their land, the government's duty to consult, the prohibition of racial discrimination and arbitrary detention, among others, may constitute a violation of one or more human rights obligations of Canada and of the implicated companies.

3. Legal implications arising from the prospects of the Transaction

A. *Risks arising from international investment agreements*

106. The implications of the Transaction that are discussed in this section and the following one differ from those discussed so far in that they arise both from environmental concerns and from the concerns around the economic viability of the Transaction. From this perspective, the Transaction may expose Canada to international claims for alleged breach of investment disciplines. That may occur if a foreign investor seeks to recoup an investment that has become economically unviable, arguing that this outcome is due to questionable measures adopted by Canada or its territorial subdivisions in breach of an investment agreement. Given the economic importance of the Transaction, which has been reported as one of the largest investments in the history of British Columbia and Canada, the exposure would be substantial. That, in turn, adds to the environmental risks examined in the previous sections because, faced with such litigation exposure, Canada may press on with a Transaction that locks in production of fossil fuels despite the climate change emergency context.

107. The legal complexity arising in this context is that, on one hand, continuation of the Transaction has important environmental and financial implications (the latter consisting of continued support of an unviable industry) and, on the other hand, discontinuation of the Transaction could also have financial implications (exposure to litigation risk), leading to "regulatory chill" and locking in production of natural gas.

108. The analysis in this section is of an exploratory nature because key aspects remain entirely open at the present stage, including the possible measures (e.g., reducing or removing direct or indirect subsidies or support to fossil fuel producers), their timing, the entities which could bring a claim (i.e., which specific foreign investors), the treaties that they could rely on, and the formulation of their specific claims. However, the exploratory nature of the analysis does not mean that the risk is, as such, purely speculative, particularly if one considers recent cases in which environmentally and economically driven regulatory change has been challenged by fossil fuel companies for alleged breach of an applicable investment agreement.[173]

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[173] See e.g. *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands,* ICSID Case No. ARB/21/4, Request for Arbitration (20 January 2021); *Uniper SE*, *Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands,* ICSID Case No. ARB/21/22, Request for Arbitration (22 April 2021); *Westmoreland Mining Holdings LLC v. Canada (II)*, ICSID Case No. UNCT/20/3, Award (31 January 2022); *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc* v. *Italian Republic,* ICSID Case No. ARB/17/14, Award (22 August 2022). The fate of these

109. The litigation risk examined here has, in fact, materialized in relation to a transaction concerning the Keystone XL Pipeline project between Canada and the United States. In that case, the Obama administration's opposition to the project led to the filing of an investment claim against the United States for US$15 billion, plus interest.[174] Following a change of policy during the Trump administration, this claim was discontinued.[175] But after the Biden administration reverted to the previous policy, two claims were announced against the United States by foreign investors, respectively for US$15 billion[176] and US$960 million.[177]

110. It is not possible to take position in this Opinion on the prospects of any potential claims that may be brought against Canada in relation to aspects of the Transaction. The analysis focuses on whether the applicable international legal framework is such that one or more foreign investors could attempt an investment claim against Canada in relation to regulatory change concerning the Transaction. Such regulatory change could be the result of concerns about the economic viability of the Transaction and/or environmental concerns (see Section III). To assess the basis for Canada's exposure, it is necessary to ascertain whether foreign investors are involved in the Transaction and, if so, whether they could resort to investment agreements in an attempt to bring a claim against Canada.

111. Regarding the involvement of foreign investors in the Transaction, there is evidence that the joint venture, LNG Canada, developing the Kitimat LNG facility is owned by several foreign companies. As noted in Section II of this Opinion, the media kit of LNG Canada confirms the share ownership distribution across five foreign companies, which hold their shares through Canadian subsidiaries: Shell plc (United Kingdom), through its affiliate Shell Canada Energy (40%) ; PETRONAS (Malaysia), through its wholly owned entity, North Montney LNG Limited Partnership (25%); PetroChina Company Limited (China), through its subsidiary PetroChina Canada Ltd. (15%); Mitsubishi Corporation (Japan), through its

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claims has been very different but, for present purposes, it is the fact that such claims have been effectively brought that makes the risk concrete, rather than merely speculative.

174 *TransCanada Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration (24 June 2016), available at: https://www.italaw.com/sites/default/files/case-documents/italaw7407.pdf (visited on 26 July 2023).

175 *TransCanada Corporation and TransCanada PipeLines Limited v. United States of America*, ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding (24 May 2017), available at: https://www.italaw.com/sites/default/files/case-documents/italaw8574.pdf (visited on 26 July 2023).

176 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63, Request for Arbitration (21 November 2022). The USD 15 billion is based on media reports which refer to a press release of TC Energy, of 2 July 2021. See Lisa Bohmer, 'Cancellation of Keystone XL Pipeline prompts notice of dispute against the USA; Canadian claimant asks for over 15 billion USD in damages', Investment Arbitration Reporter, 3 July 2021; Lisa Bohmer, '15+ billion USD dispute over Keystone XL Pipeline proceeds to NAFTA legacy arbitration', 22 November 2021. According to the ICSID website, the case is currently pending: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63 (visited on 26 July 2023).

177 *Alberta Petroleum Marketing Commission v. United States of America,* UNCITRAL ad-hoc arbitration, 2022, Notice of Intent to submit an arbitration (9 February 2022), available at: https://www.italaw.com/sites/default/files/case-documents/italaw170036.pdf (visited on 26 July 2023). The amounts claimed are expressed in CAD dollars (1.3 billion). The USD figure is an approximative conversion.

subsidiary Diamond LNG Canada Partnership (15%); and Korea Gas Corporation (South Korea), through its wholly owned subsidiary Kogas Canada LNG Ltd (5%).[178] With respect to the Coastal GasLink, it is owned by Coastal GasLink Pipeline Ltd, a company whose owners include foreign investors, including Kohlberg Kravis Roberts & Co (**KKR**), a U.S. entity that acquired an equity interest in Coastal GasLink in partnership with the National Pension Service of Korea (**NPS**).[179] The structure and directness of the ownership are relevant considerations. However, indirect ownership of an investment is not necessarily an obstacle to bringing an investment claim.[180] In addition to the ownership structure of the Kitimat LNG facility and Coastal GasLink, the analysis would have to be extended to a number of companies involved in the upstream gas sector in northeastern British Columbia. As discussed in Section II, the Transaction is specifically intended to support, enable and promote gas production and transport in that region. Environmentally and/or economically driven changes in policy affecting the Transaction could therefore affect companies in that industry. Depending on the ownership structure of such companies and the nature of the changes, foreign companies having invested in such companies[181] may also potentially qualify to bring an investment claim.

112. The information in the previous paragraph indicates that companies from China, Japan, Malaysia, South Korea, the United Kingdom and the United States could potentially seek the protection of an investment agreement, if such an agreement is indeed available. Reliance on an investment agreement, whether a Bilateral Investment Treaty (**BIT**) or an investment chapter in a Free Trade Agreement (**IC-FTA**) (together International Investment Agreements or **IAA**) is a complex and detail-sensitive matter that can only be assessed on a case-by-case basis after a claim is brought. For present purposes, the focus is therefore on the general issue of whether there are one or more IIAs between Canada and the aforementioned countries.

113. The International Investment Agreements Navigator of the UN Conference on Trade and Development (**UNCTAD**) provides an overview of the IIAs in force between Canada and other States.[182] The following IIAs are relevant:

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178 See https://www.lngcanada.ca/media-kit/ (visited on 26 July 2023).

179 See the following KKR press release : https://media.kkr.com/news-details/?news_id=97dcaa21-9edf-41bf-9b06-9df2db3832ff (visited on 26 July 2023).

180 See Rudolf Dolzer, Ursula Kriebaum, Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 3rd edn. 2022), pages 117 et seq and cases reviewed therein; Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration. Substantive Principles* (Oxford University Press, 2nd edn. 2017), pages 248 et seq and cases reviewed therein.

181 Media reports suggest the presence of foreign investors (US company ConocoPhillips) in this industry and region. See available at : https://www.reuters.com/article/us-global-oil-canada-shale-analysis-idUSKBN2621JQ (visited on 26 July 2023).

182 UNCTAD's IIA Navigator, as it relates to Canada, is available at : https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada (visited on 26 July 2023)

China: Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (Canada-China BIT), 9 September 2012

Japan (and others): Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 8 March 2018, Chapter 9 (Investment)

Malaysia (and others): Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 8 March 2018, Chapter 9 (Investment)

South Korea: Free Trade Agreement between Canada and the Republic of Korea (Canada-Korea FTA), 22 September 2014, Chapter 8 (Investment)

United Kingdom: Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada (Canada-U.K. Agreement), 9 December 2020 (incorporating, with some modifications,[183] the text of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), 30 October 2016, chapter 8 (Investment))

United States (and Mexico): Agreement between the United States of America, the United Mexican States, and Canada (USMCA), 30 November 2018, Chapter 14 (Investment)

114. The texts of these IIAs differ, sometimes significantly. Given the uncertainty regarding potential future claims, my remarks here are confined to (i) highlighting some common components; (ii) determining whether one or more of these IIAs could indeed provide a basis for an investment claim against Canada; (iii) provisions in these IIAs addressing the possibility of regulatory change to protect the environment, including climate change measures.

115. On the first issue, these IIAs — with the exception of Canada-U.K. Agreement, which is an incorporation agreement referring to CETA — like other IIAs, present three common components: determination of the scope of the IIA (particularly the definition of "investment" and of which entity may qualify as a foreign investor); a range of investment disciplines (standards of treatment and expropriation clause); a dispute-settlement mechanism allowing, under certain conditions or for certain claims (e.g., legacy investment claims under Annex 14-C of the USMCA), a qualifying foreign investor to bring a claim against a State party to the IIA before an international dispute settlement mechanism (mainly, but not only, an investment arbitration tribunal).

116. On the second issue, and in light of the previous paragraph, these IIAs indeed provide a potential basis for an investment claim to be brought by a foreign investor involved in the Transaction against Canada. To provide a concrete illustration of how this risk could materialize, it is useful to recall the example of the investment claims announced against

[183] Of note, Annex A, Part B, chapter 8, paragraph 7, subjects the application of CETA's chapter 8, section F (Resolution of investment disputes between investors and states) to a comprehensive review of procedures. Section F is therefore not applicable upon entry into force of the Canada-UK Agreement.

the United States in connection with the Keystone XL Pipeline, respectively for US$15 billion[184] and US$960 million.[185] In both claims, Canadian investors are suing the United States under the USMCA (NAFTA) legacy investment claims provisions (Annex 14-C of the USMCA) for breach of investment disciplines resulting from the U.S. President Joseph Biden's 20 January 2021 revocation of the presidential permit for construction and operation of the Keystone XL Pipeline. Of note, the respondent party of an investment claim under international law would, in principle, be the national State, whether the challenged measures have been adopted by the federal government or by the government of a territorial subdivision.

117. The third issue concerns the provisions in the relevant IIAs relating to the possibility of regulatory change for environmental purposes. As a general matter, this issue is specifically addressed in the text of these IIAs, although in different ways. The following provisions are extracted from the text of the IIAs. They all concern the possibility of adopting environmental measures:

> CPTPP, Annex 9-B, section 3(b): Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.
>
> USMCA, Article 14.16: Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.
>
> USMCA, Annex 14-B, section 3(b): Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.
>
> Canada-Korea FTA, Article 8.10(1): This Chapter is not to be construed to prevent a Party from adopting, maintaining, or enforcing a measure consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

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184 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63, Request for Arbitration (21 November 2022). The USD 15 billion is based on media reports which refer to a press release of TC Energy, of 2 July 2021. See Lisa Bohmer, 'Cancellation of Keystone XL Pipeline prompts notice of dispute against the USA; Canadian claimant asks for over 15 billion USD in damages', Investment Arbitration Reporter, 3 July 2021; Lisa Bohmer, '15+ billion USD dispute over Keystone XL Pipeline proceeds to NAFTA legacy arbitration', 22 November 2021. According to the ICSID website, the case is currently pending: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63 (visited on 26 July 2023).

185 *Alberta Petroleum Marketing Commission v. United States of America,* UNCITRAL ad-hoc arbitration, 2022, Notice of Intent to submit an arbitration (9 February 2022), available at: https://www.italaw.com/sites/default/files/case-documents/italaw170036.pdf (visited on 26 July 2023). The amounts claimed are expressed in CAD dollars (1.3 billion). The USD figure is an approximative conversion.

Canada-Korea FTA, Annex 8-B, section (d): except in rare circumstances, such as, for example, when an action or a series of actions are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory regulatory actions of a Party that are designed and applied to protect legitimate public welfare objectives, such as, public health, safety, environment, and real estate price stabilisation through, for example, measures to improve the housing conditions for low-income households, do not constitute indirect expropriations.

Canada-China BIT, Article 33(2): 'Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

(b) necessary to protect human, animal or plant life or health; or

(c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Canada-China BIT, Article 33(2): Annex B-10, section 3: Except in rare circumstances, such as if a measure or series of measures is so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory measure or series of measures of a Contracting Party that is designed and applied to protect the legitimate public objectives for the well-being of citizens, such as health, safety and the environment, does not constitute indirect expropriation.

CETA (incorporated by the Canada-U.K. Agreement), Article 8.9: 1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity; 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

118. These clauses can be organized under three main categories: broad reservations of regulatory power for environmental purposes; a general exception clause applicable to environmental measures (Canada-China BIT); interpretive clauses and annexes stating the presumption that certain forms of regulatory change are not in breach of investment disciplines in general (CETA) or do not constitute an indirect expropriation. The operation of these clauses would depend on the text of the relevant clause, the nature of the

measure challenged and the formulation of the claim and the defence. But, together with other considerations relating to the reasonableness of expectations, the diligence displayed by the investor and, more generally, the need to take measures in the context of the climate change emergency, they would likely play a role in addressing the complexities identified at the beginning of this section.

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119. In conclusion, *in the circumstances of the Transaction considered in the light of the relevant IIAs, there is a risk that one or more foreign investors may seek to recoup an investment that has become economically unviable, arguing that this outcome is due to questionable measures adopted by Canada or its territorial subdivisions in breach of an investment agreement*.

B. *Risks arising under international trade law*

120. The Transaction may also expose Canada to international claims for alleged breach of trade disciplines, specifically under the legal framework of the World Trade Organization (**WTO**), which includes several agreements, most notably the Agreement of Subsidies and Countervailing Measures (**SCM Agreement**).[186] Certain aspects of the Transaction, including measures adopted by the Government of British Columbia and the federal government, introduce differences in the treatment of certain companies and industries, and they do so to render exports of natural gas in the form of LNG more competitive in foreign markets.

121. That may have implications for the litigation exposure of Canada as a State, which is responsible for its acts and those of its territorial subdivisions, and it may affect the Canadian economy in unpredictable ways, given the possibility under WTO law for aggrieved foreign States to "cross-retaliate" through measures in different sectors.

122. As in the previous section, the analysis in this section is also of a preliminary nature because several key aspects remain open, including the specific measures that could be targeted in a claim, their timing, the States that would be bringing the claim and their specific situation and, of course, the formulation of their specific claims. Moreover, the information required to assess different possible claims varies significantly and may not be available. However, as before, given the scale of the Transaction and the fact that Canada as a whole would be potentially exposed, with effects in other territorial subdivisions, this risk merits some comment in this Opinion.

123. The analysis proceeds in two steps. First, the Opinion introduces some key provisions and requirements from WTO law. Second, it briefly examines some relevant aspects of the

[186] Agreement on Subsidies and Countervailing Measures, 15 April 1994, 1869 UNTS 14.

Transaction in the light of such provisions and requirements. The Opinion does not discuss the institutional aspects of WTO dispute settlement. It must be noted, however, that although the WTO Appellate Body is not currently in operation, certain WTO Member States, including Canada, are part of an alternative appeal system, the Multi-Party Interim Appeal Arbitration Arrangement (MPIA). The MPIA is already in operation.

124. A claim against Canada for violation of a trade discipline under the WTO legal framework could be formulated in different ways. One possibility, although certainly not the only one, would be to claim that Canada is providing prohibited or actionable subsidies to its gas exporters to make their exports more competitive in foreign markets. As a general matter, when exports are supported through use of measures amounting to subsidies in the meaning of the SCM Agreement, such measures may indeed be inconsistent with this instrument.

125. Under Article 1.1 of the SCM Agreement, for a measure to be deemed a subsidy, there must be a "financial contribution by a government or any public body within the territory of a Member" or "any form of income or price support in the sense of Article XVI of GATT 1994" and a "benefit [must be] thereby conferred." Article 1.1(a)(1) provides a broad but exhaustive list of what is a financial contribution:

> (i) a government practice involves a *direct transfer of funds* (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) *government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);*
>
> (iii) *a government provides goods or services* other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments (emphasis added)

126. The terms used in Article 1.1 of the SCM Agreement have been subject to extensive clarifications in the case law of WTO dispute-settlement organs,[187] which will be recalled as necessary to analyze its application to certain aspects of the Transaction.

127. According to Article 3 of the SCM Agreement, subsidies that are conditional on export performance are prohibited:

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187 See the digest of relevant case-law maintained by the WTO on this provision : https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art1_jur.pdf (visited on 26 July 2023).

Article 3 – Prohibition

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) *subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance*, including those illustrated in Annex I ...
>
> 3.2 A Member *shall neither grant nor maintain subsidies* referred to in paragraph 1. (emphasis added)

128. *De facto* contingency on exports (contingency "in fact") has been characterized by WTO dispute-settlement organs as an objective and fact-specific standard.[188] In *Canada – Aircraft*, the WTO Appellate Body stated that:

> [t]he existence of the relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.[189]

It further clarified the standard by reference to a footnote (footnote 4) which appears right after the terms "in law or in fact" in Article 3.1(a) of the SCM Agreement. Based on this footnote, the Appellate Body reasoned that:

> satisfaction of the standard for determining de facto export contingency set out in footnote 4 requires proof of three different substantive elements: first, the "granting of a subsidy"; second, "is ... tied to ..."; and, third, "actual or anticipated exportation or export earnings" ...
>
> In any given case, the facts must "demonstrate" that the granting of a subsidy is tied to or contingent upon actual or anticipated exports. It does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result. The prohibition in Article 3.1(a) applies to subsidies that are contingent upon export performance.[190]

In a subsequent case against Canada, awareness that the domestic market is too small to absorb the subsidized production was deemed to provide an indication that the subsidy is granted upon export performance, but not a sufficient one because anticipation alone is not proof that granting the subsidy is tied to the anticipation of exportation.[191] In assessing *de facto* contingency the following factors must be taken into account:

> (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide

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188 *European Communities and* certain Member States - *Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paragraph 1051.

189 *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, paragraph 167.

190 *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, paragraphs 169, 171.

191 *Canada – Aircraft Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R, 28 January 2002, paragraphs 7.372-7.376.

> the context for understanding the measure's design, structure, and modalities of operation.[192]

129. Annex I of the SCM Agreement provides an illustrative list of the subsidies targeted by Article 3.1(a). This list includes, among other examples:

> (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance …
>
> (b) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.
>
> (e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.
>
> (g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption …

130. If a subsidy is not prohibited under Article 3 of the SCM Agreement, it may still be challenged if it is "actionable." To be so, it must be "specific to an enterprise or industry or group of enterprises or industries" in accordance with Articles 1.2 and 2 of the SCM Agreement and cause "adverse effects to the interests of other Members," as specified in Article 5.

131. The specificity condition is met if the granting authority or the legislation pursuant to which the granting authority operates "explicitly limits access to a subsidy to certain enterprises" (Article 2.1(a)). However, if access is based on clear and objective eligibility criteria that are strictly adhered to and automatically applied (Article 2.1(b)), the subsidy is not specific unless it is found to be specific in the way it is granted (*de facto*, in accordance with Article 2.1(c)). A subsidy is also specific if it "is limited to certain enterprises located within a designated geographical region" (Article 2.2).

132. As for "adverse effects," they are defined in Article 5:

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[192] *European Communities and* certain Member States - *Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paragraph 1046.

Article 5 - Adverse Effects

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> (a) injury to the domestic industry of another Member;
>
> (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;
>
> (c) serious prejudice to the interests of another Member …

133. The term "serious prejudice" is further specified in Article 6 of the SCM Agreement to include situations where "the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member" (Article 6(3)(a)) or "to displace or impede the exports of a like product of another Member from a third country market" (Article 6(3)(b)) or "the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market" (Article 6(3)(c)) or, still, "the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted. (Article 6(3)(d)).

134. To assess whether certain aspects of the Transaction may be deemed subsidies under the SCM Agreement and, if so, whether they are prohibited or actionable, it is first necessary to identify the measures that could be potentially challenged. As noted earlier, in the absence of a pending case, this can only be a preliminary examination, but not a merely speculative one, as suggested by the fact that Canada has already faced claims relating to support provided to commercial aircraft companies.

135. The key measures were discussed in Section II in relation to the Transaction, by reference to an analysis from the CCPA, of May 2019.[193] According to this analysis, the B.C.–LNG Canada Agreement contains four main support measures:

> (1) The Government of British Columbia, through BC Hydro, contributed discounted industrial electricity rate offered to LNG Canada (approximately C$32-$59 million per year);

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[193] See M. Lee, 'A critical look at BC's new tax breaks and subsidies for LNG', CCPA, May 2019, available at : https://policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2019/05/CCPA_BC%20Critiquing%20the%20LNG%20Canada%20agreement_FINAL_190506.pdf (visited on 26 July 2023).

(2) LNG Canada would enjoy exemptions from increases in the British Columbia carbon tax (approximately C$62 million per year, and possibly higher in light of the subsequent schedule of tax increases);

(3) LNG Canada would enjoy a corporate income tax break effectively reducing the applicable tax rate from 12 per cent to nine per cent and

(4) LNG Canada is granted a deferral of provincial sales tax on construction amounting to an interest-free loan that does not need to be repaid for two decades (approximately C$17-$21 million per year).

As also mentioned in Section II, according to media reports, British Columbia's support to LNG Canada and Coastal GasLink as of 24 November 2022 would amount to some C$6 billion.[194]

136. In addition to provincial support, the CCPA analysis also notes[195] that the federal government of Canada has provided support to the LNG industry, and to LNG Canada in particular, of approximately C$1 billion in forgone revenue from tariff exemptions on imported fabricated industrial steel components.[196] The federal government has also supported LNG Canada in other ways, including C$55 million to replace a bridge in the District of Kitimat and C$220 million to "help fund energy-efficient gas turbines for LNG Canada."[197]

137. Some of these measures could be considered financial contributions in the meaning of Article 1.1(a)(1) of the SCM Agreement, if the recipients are LNG Canada and/or Coastal GasLink. Cheaper electricity could arguably fall under letter (iii) (goods or services); tax exemptions, breaks and deferrals could arguably fall under letter (ii); the Steel Tariff Exemption would also arguably fall under that letter and the C$220 million to "help fund energy-efficient gas turbines for LNG Canada" would arguably fall under (i).

138. Whether a "benefit is thereby conferred" is a highly fact-specific inquiry. The basic standard is whether the financial contribution has made "the recipient 'better off' than it

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194 See M. Simmonds, 'Is B.C.'s $6 billion commitment to Coastal GasLink and LNG Canada still economically viable?', The Narwhal, 24 November 2022, available at: https://thenarwhal.ca/bc-lng-canada-cgl-economics/ (visited on 26 July 2023).

195 See M. Lee, 'A critical look at BC's new tax breaks and subsidies for LNG', CCPA, May 2019, at page 2, available at : https://policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2019/05/CCPA_BC%20Critiquing%20the%20LNG%20Canada%20agreement_FINAL_190506.pdf (visited on 26 July 2023).

196 Fabricated Industrial Steel Components Anti-dumping and Countervailing Duty Remission Order: SOR/2019-297, 8 August 2019, Canada Gazette, Part II, Volume 153, Number 17, available at: https://gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors297-eng.html (visited on 26 July 2023).

197 See the News release 'Government of Canada confirms support for largest private investment in Canadian history', 24 June 2019, available at : https://www.canada.ca/en/innovation-science-economic-development/news/2019/06/government-of-canada-confirms-support-for-largest-private-investment-in-canadian-history.html (visited on 26 July 2023).

would otherwise have been, absent that contribution"[198] and this can be assessed by looking at market conditions because:

> the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[199]

Recital D of the B.C.-LNG Canada Agreement makes clear that the aim is to reduce the costs of LNG Canada:

> Pursuant to a letter to the Proponent dated March 16, 2018 (the "Premier's Letter"), the Premier of the Province indicated an intention, upon receiving satisfactory notice from the Proponent of a Final Investment Decision, to direct responsible officials to prepare orders, regulations or Legislation as necessary for consideration by the provincial Ministries, Treasury Board, Cabinet or to be introduced into the Legislative Assembly, as necessary, *to establish "Measures" to reduce certain of the Proponent's costs in British Columbia that are associated with the Project in accordance with the "Joint Economic Model", as more particularly defined and described in this Agreement*. (emphasis added)[200]

Cheaper electricity, lower taxes and duties and direct contributions could be considered financial contributions that confer a benefit on the recipient, again, if by the latter it is understood LNG Canada or Coastal GasLink.

139. However, our understanding is that neither LNG Canada nor Coastal GasLink will own the gas that is transported, liquefied and then exported. As a result, the relevant financial contribution conferring a benefit would not be direct (to LNG Canada or Coastal GasLink) but indirect (to the upstream gas industry in northeastern British Columbia). In other words, the indirect recipients would not be LNG Canada or Coastal GasLink but companies in the upstream gas industry. Unless a sufficient basis for a direct framing of the claim can be identified (e.g., the owners of LNG Canada or Coastal GasLink are also involved in the upstream natural gas industry exporting the good), establishing such an indirect financial contribution could face significant legal hurdles. I do not have any specific information on the ownership structure of the upstream natural gas export industry. As a result, the analysis is pursued assuming that at least some additional legal hurdles may arise.

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198 *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, paragraph 157; *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*, WT/DS353/AB/R, 12 March 2012, paragraph 662.

199 *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, paragraph 157; *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*, WT/DS353/AB/R, 12 March 2012, paragraph 662.

200 Operating Performance Payments Agreement, Province of British Columbia & LNG Canada Development Inc. (LNG Canada), 25 March 2019, available at : https://news.gov.bc.ca/assets/releases/2019fin0035-000478/lng_agreement.pdf (visited on 26 July 2023).

140. Of particular note, according to Article 1.1(a)(1)(iii) of the SCM Agreement, the goods and services must be provided by a "government" and "general infrastructure" is not deemed to fall under this letter. It is unlikely that the Kitimat LNG facility and/or Coastal GasLink would be considered to be provided by the government, and it is unclear whether they would fall under the exclusion of "general infrastructure."[201] If, in this framing of the claim, the facts do not allow to argue for the existence of a financial contribution under letters (i), (ii) and (iv) of Article 1.1(a)(1), support for the development of liquefaction and transportation facilities for the upstream natural gas industry may not fall under letter (iii). As a result, under the indirect framing, it may be difficult to establish the existence of a qualifying subsidy.

141. Conversely, assuming a subsidy can be established under a certain framing of the claim against Canada, it would still be necessary to establish that such subsidy falls under the category of prohibited subsidies or actionable subsidies. For both categories, the specific framing of the claim could be decisive.

142. In relation to prohibited subsidies, the key question seems whether it can be established that the subsidies were granted in a manner that made them, at least *de facto*, contingent upon export performance. As noted earlier, factors such as "the design and structure of the measure," "the modalities of operation set out in such a measure," and "the relevant factual circumstances surrounding the granting of the subsidy"[202] would have to be taken into account. Legal commentary on this point emphasises circumstances such as the extent to which the Canadian market may be saturated (hence making the export rationale clearer), whether the government had a clear expectation that the goods would be exported and/or whether the expected scale of LNG exports is large.[203] Both the Kitimat LNG facility and Coastal GasLink are specifically designed to facilitate export of natural gas to Asian markets, and the support they receive from the Government of British Columbia and the Government of Canada seems clearly focused on that goal. If such support can be characterized as a subsidy to the upstream natural gas export industry, on the basis of a finer-grained inquiry into the ownership structure of this industry, some of the challenged measures may have a sufficient tie with export performance to be considered a prohibited subsidy.

143. With respect to actionable subsidies, the facts of the Transaction are such that the measures support specifically "certain enterprises," LNG Canada and Coastal GasLink (Article 2.1(a) of the SCM Agreement), and possibly also a specific group of upstream

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201 The expression 'general infrastructure' is clarified in *European Communities and* certain Member States - *Measures Affecting Trade in Large Civil Aircraft*, WT/DS316//R, 30 June 2010, paragraphs 7.1036-7.1039.

202 *European Communities and* certain Member States - *Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paragraph 1046.

203 See C. Harris Slattery, ''Fossil Fueling the Apocalypse': Australian Coal Subsidies and the Agreement on Subsidies and Countervailing Measures' (2019) 18 *World Trade Review* 109, at 123-124.

natural gas exporters. To assess the "specificity" of the subsidy with respect to the latter as well as its potential "adverse effects," additional factual information would be needed on the ownership structure of the upstream natural gas industry and on the projected impact of exports on foreign markets, as well as more generally on the specific measures that could be targeted in a claim, their timing, the States that would be bringing the claim and their specific situation, and the formulation of their specific claims.

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144. All in all, *although certain aspects of the Transaction provide support to render exports of natural gas more competitive in foreign markets, additional information would be needed to reach a conclusion on the potential for claims alleging that Canada has provided prohibited or actionable subsidies in breach of the SCM Agreement*. *Such information would relate* inter alia *to the ownership structure of the upstream natural gas industry and the projected impact of exports on foreign markets, as well as, more generally, to the specific measures that could be targeted in a claim, their timing, the States that would be bringing the claim and their specific situation, and the formulation of their specific claims*. This said, claims for violation of trade disciplines arising from the Transaction could be formulated in many other ways than the one reviewed in this section. The risk presented by such other formulations cannot be assessed in the abstract, but the point is to be noted.

V. CONCLUSIONS

145. On the basis of the foregoing considerations, I reach the following conclusions:

(a) The Transaction examined from the perspective of international law in this Opinion is, in essence, a package of measures introduced by the Government of British Columbia and the Government of Canada to support, enable and promote gas production and transport through the construction of LNG terminals and associated infrastructure, mainly for export to Asian markets.

(b) The climate change emergency context is relevant, under international law, to assess the diligence of the conduct entailed by the Transaction in light of its environmental implications and the risks it creates from the perspective of its economic viability.

(c) Measures supporting, enabling and promoting gas production and transport are attributable to Canada if they are conduct of organs of the Government of British Columbia and/or the Government of Canada. Moreover, there is increasing authority for the proposition that the conduct of certain private entities is directly subject to certain international obligations.

(d) In light of the obligation of due diligence and its expressions under customary international law, and in the specific context of the climate change emergency, conduct supporting, enabling and promoting gas production and transport would, in principle, fall short of the level of diligence required under international law.

(e) In the light of the UNFCCC and the Paris Agreement, interpreted together and by reference to the relevant customary international law, and in the context of the climate change emergency, the Transaction falls short of displaying Canada's "highest possible ambition" in mitigation and of the objective — and correlative obligation — to make finance flows consistent with a pathway toward low greenhouse gas emissions and climate-resilient development.

(f) Given the specific observations of human rights bodies and special procedures in relation to the Transaction and their more general statements in relation to the type of activity of which the Transaction is an example, there are grounds to conclude that aspects of the Transaction may constitute a violation of one or more human rights obligations of Canada.

(g) The aspects of the Transaction affecting Indigenous Peoples rights, specifically, the Wet'suwet'en Nation's right to free, prior and informed consent, their right not to be forcibly evicted from their land, the government's duty to consult, the prohibition of racial discrimination and arbitrary detention, among others, may constitute a violation of one or more human rights obligations of Canada and of the implicated companies.

(h) In the circumstances of the Transaction considered in the light of the relevant international investment agreements, there is a risk that one or more foreign investors may seek to recoup an investment that has become economically unviable, arguing that this outcome is due to questionable measures adopted by Canada or its territorial subdivisions in breach of an investment agreement.

(i) Although certain aspects of the Transaction provide support to render exports of natural gas more competitive in foreign markets, additional information would be needed to reach a conclusion on the potential for claims alleging that Canada has provided prohibited or actionable subsidies in breach of the SCM Agreement. Such information would relate *inter alia* to the ownership structure of the upstream natural gas industry and the projected impact of exports on foreign markets, as well as, more generally, to the specific measures that could be targeted in a claim, their timing, the States that would be bringing the claim and their specific situation, and the formulation of their specific claims.

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26 July 2023