

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Ruby River Capital LLC**

**v.**

**Canada**

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

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**PROCEDURAL ORDER NO. 6**

**Decision on Québec's Application for Leave to Intervene as Non-Disputing Party**

***Members of the Tribunal***

Ms. Carole Malinvaud, President of the Tribunal

Mr. Barton Legum, Arbitrator

Prof. Zachary Douglas KC, Arbitrator

***Secretary of the Tribunal***

Mr. Benjamin Garel

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20 December 2024

## I. PROCEDURAL BACKGROUND

1. On 4 January 2024, the Government of Québec (“**Québec**” or the “**Applicant**”) sought permission from the Tribunal to submit a written memorial as a non-disputing party in the present proceeding (“**Québec’s Application**”), assertedly in accordance with paragraph 24.1 of Procedural Order No. 1 (“**PO1**”). That paragraph authorized such applications to be filed in accordance with the timetable established in PO1, which set a deadline of 24 April 2024 for such applications.
2. As noted further below, the written memorial accompanying Québec’s Application advanced an objection to jurisdiction contending that the consent to arbitrate NAFTA claims given in Annex 14-C of the USMCA did not cover claims concerning matters post-dating the termination of the NAFTA.
3. On 5 January 2024, the Respondent filed a request for bifurcation based on jurisdictional objections that made no mention of Annex 14-C.
4. On 5 January 2024, the Claimant requested leave to submit preliminary observations regarding the admissibility of Québec’s Application.
5. On 10 January 2024, in accordance with ICSID Arbitration Rule 67(3), the Tribunal invited the Parties to submit their observations on Québec’s Application by 19 January 2024.
6. On 19 January 2024, the Respondent notified the Tribunal of its decision not to provide any remarks on Québec’s Application.
7. On the same date, the Claimant filed observations on Québec’s Application (“**Claimant’s Observations**”), together with legal authorities CL-162 to CL-183.
8. On 26 January 2024, Québec sought the Tribunal’s permission to submit a concise written submission, limited to ten pages, in order to reply to the Claimant’s Observations.
9. On 27 January 2024, the Claimant asked for Québec’s request to submit an additional response to be rejected and for the Respondent to bear the costs.

10. On 5 February 2024, the Tribunal informed the Parties that it considered itself to be sufficiently briefed on Québec's request for leave to file an *amicus curiae* submission.
11. On 15 July 2024, the Respondent filed its Counter-Memorial on the merits and memorial on jurisdiction. The Counter-Memorial asserted a jurisdictional objection based on the scope of consent in Annex 14-C of the USMCA.
12. On 17 September 2024, Québec (i) informed the Tribunal that, on 23 July 2024, an agreement was entered into with the Respondent regarding the management of this arbitration proceeding, (ii) and reiterated its request that the Tribunal declines jurisdiction to rule on Québec's measures because Canada did not consent to arbitration.
13. On 6 November 2024, the Claimant filed a letter opposing Québec's reiterated request.
14. In this Procedural Order, the Tribunal decides on Québec's Application.

## **II. THE APPLICANT'S AND THE PARTIES' POSITIONS**

### **A. QUÉBEC**

15. The Applicant presents itself as the government of one of the provinces of Canada, Québec, one of two governments whose measures are being challenged by the Claimant in the present proceeding.<sup>1</sup>
16. The Applicant submits that it is sovereign with respect to its exclusive competencies, that it is not subordinated to the Government of Canada, that it has not received any financial assistance from the Government of Canada in relation to this proceeding and that only the Applicant's representatives have drafted the Application. The Applicant further submits that it has no link with the Claimant.<sup>2</sup>
17. The Applicant contends that it has an interest in the proceeding because it concerns the legality under NAFTA of certain measures it took and because of the substantial

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<sup>1</sup> Québec's Application dated 4 January 2024, para. 2.

<sup>2</sup> Québec's Application dated 4 January 2024, para. 3.

financial impact the proceeding could have, since the Claimant may try to enforce against Québec any monetary award issued against Canada.<sup>3</sup>

18. The Applicant indicates that its written submission addresses the issue of consent to arbitration under Annex 14-C to the USMCA. The Applicant further states that the written memorial submits that the Tribunal should bifurcate the proceeding, rule on its jurisdiction in a preliminary phase and decline jurisdiction on the ground of lack of the Parties' consent to arbitration.<sup>4</sup>

19. The Applicant submits that its request for leave to submit a non-disputing party written submission should be granted because all the criteria that the Tribunal should consider under Section 6 of the Statement of NAFTA's Free Trade Commission on non-disputing party participation of 7 October 2003 ("**FTC Statement**") are satisfied.<sup>5</sup> In particular, the Applicant asserts that:

(i) The non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing Parties

20. The Applicant contends that its views on the scope of consent under Annex 14-C of the USMCA are fundamentally different from the Claimant's and that, since the Respondent had not made a submission on this issue (at the time of Québec's Application), it is appropriate to consider a new perspective that differs from the Parties' positions, to provide the Tribunal with a complete digest of the issues at stake.<sup>6</sup>

(ii) The non-disputing party submission would address matters within the scope of the dispute

21. The Applicant submits that the issue at stake – consent to arbitration – is a jurisdictional question inherent to any investment dispute, on which the Tribunal's jurisdiction

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<sup>3</sup> Québec's Application dated 4 January 2024, para. 4.

<sup>4</sup> Québec's Application dated 4 January 2024, para. 5.

<sup>5</sup> Québec's Application dated 4 January 2024, para. 6.

<sup>6</sup> Québec's Application dated 4 January 2024, para. 7.

depends, and that a NAFTA tribunal has acknowledged that non-disputing Parties' views on jurisdictional issues may be of interest.<sup>7</sup>

(iii) The non-disputing party has a significant interest in the arbitration

22. The Applicant asserts that because the dispute before the Tribunal concerns the legality and legitimacy of measures implemented by Québec and challenged by the Claimant, the Applicant has a direct and significant interest in the proceeding.<sup>8</sup>

(iv) There is a public interest in the subject-matter of the arbitration

23. The Applicant contends that because of the impact of the Claimant's investment project on the environment (locally and globally), on the habitat of autochthonous communities and on the ecosystems of endangered and protected species, the public interest in the subject-matter of the dispute is manifest. The Applicant further asserts that there is also a public interest in the dispute with respect to the more systemic issue of public confidence in the investor-State dispute settlement mechanisms.<sup>9</sup>

(v) The non-disputing party submission avoids disrupting the proceeding; and neither disputing party is unduly burdened or unfairly prejudiced by such submission

24. The Applicant submits that because a tribunal may, under ICSID Arbitration Rule 43(3), at any time on its own initiative consider whether a dispute is within its own competence, the filing of a written memorial by Québec regarding the Tribunal's jurisdiction would not be any more disrupting than if the Tribunal raised that question spontaneously. The Applicant adds that presenting such observations early on in the proceeding would arguably have a lesser disrupting effect.<sup>10</sup>

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<sup>7</sup> Québec's Application dated 4 January 2024, para. 8.

<sup>8</sup> Québec's Application dated 4 January 2024, para. 9.

<sup>9</sup> Québec's Application dated 4 January 2024, para. 10.

<sup>10</sup> Québec's Application dated 4 January 2024, para. 11.

## **B. CLAIMANT**

25. The Claimant objects to Québec’s Application. The reasons for its objection have evolved between the time it first opposed the application in January 2024 and when it renewed its opposition on 6 November 2024, after Québec reiterated its Application on 17 September 2024, principally because, in the meantime, the Respondent did raise in its Counter-Memorial on the merits and memorial on jurisdiction dated 15 July 2024 a jurisdictional objection based on the *ratione temporis* scope of Annex 14-C to the USMCA. The Tribunal summarizes below the Claimant’s arguments before and after such jurisdictional objection was raised.

### **Initial position**

26. As a preliminary matter, the Claimant submitted that Québec’s Request was in violation of the procedural calendar established in Procedural Order No. 1 and was therefore inadmissible.<sup>11</sup>
27. The Claimant then asserted that Québec’s Application does not satisfy any of the applicable criteria established by the ICSID Arbitration Rules and by the FTC Statement. The Claimant submitted in that respect that the criteria established by each instrument largely overlap, the FTC Statement adding additional criteria based on the existence of a “public interest” in the subject-matter of the arbitration.<sup>12</sup> Taking each criteria in turn, the Claimant made the following contentions.

(i) The submission would address a matter within the scope of the dispute

28. *First*, Québec did not establish that the written submission it wishes to file relates to a matter that is within the scope of the dispute pending before the Tribunal. For the Claimant, because the position of the Respondent on the jurisdictional issue in question was unknown at the time of the application, the “scope of the dispute” as concerns jurisdiction was undefined, especially with respect to the point raised by Québec.<sup>13</sup>

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<sup>11</sup> Claimant’s Observations dated 19 January 2024, paras. 4-6.

<sup>12</sup> Claimant’s Observations dated 19 January 2024, paras. 7-9.

<sup>13</sup> Claimant’s Observations dated 19 January 2024, paras. 13-25.

- (ii) The submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the Parties
29. *Second*, the Tribunal was unable, at the time of the application, to determine whether Québec’s position was “different” from that of both disputing Parties precisely because the Respondent had not yet taken any position on the jurisdictional issue in question.<sup>14</sup>
- (iii) The non-disputing party has a significant interest in the proceeding
30. *Third*, Québec has not validly established that it has a significant interest in the proceeding. For the Claimant, the fact that measures adopted by Québec are at issue in this proceeding does not in itself demonstrate that it has a significant interest because as a matter of international law and under the NAFTA, Canada, as the Respondent, has full responsibility to respond to claims of breach of international obligations arising of such measures. Moreover, Québec is directly engaged and represented in Canada’s response to the Claimant’s claims so that any interest it may have in the proceeding is already being advocated and pleaded.<sup>15</sup>
- (iv) The applicant has an affiliation, direct or indirect, with a disputing party
31. *Fourth*, Québec is already closely collaborating with the Respondent, which undermines its independence and warrants the denial of its request to intervene as an *amicus curiae*.<sup>16</sup> The Claimant points to extensive coordination between Québec and the Respondent in preparing responses to the Claimant’s claims, including Québec being directly copied on all procedural correspondence and submissions.<sup>17</sup> Despite Québec’s assertions that it has not received financial assistance or directly consulted with the Respondent in drafting its submission,<sup>18</sup> the Claimant argues that this claim is misleading, as their collaboration is systemic and ongoing.<sup>19</sup> Moreover, the Claimant

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<sup>14</sup> Claimant’s Observations dated 19 January 2024, paras. 26-42.

<sup>15</sup> Claimant’s Observations dated 19 January 2024, paras. 43-60.

<sup>16</sup> Claimant’s Observations dated 19 January 2024, para. 61.

<sup>17</sup> Claimant’s Observations dated 19 January 2024, para. 66.

<sup>18</sup> Claimant’s Observations dated 19 January 2024, para. 63.

<sup>19</sup> Claimant’s Observations dated 19 January 2024, para. 64.

highlights that Québec's role as a subnational government, whose actions are attributable to the Respondent, further calls into question its neutrality.<sup>20</sup> The Claimant also emphasizes that there is no precedent for allowing a subnational entity like Québec to intervene as an amicus in a NAFTA arbitration, especially when its own measures are under scrutiny, thus reinforcing the argument that Québec's intervention would lack the necessary independence.<sup>21</sup>

(v) The issue of financial assistance is irrelevant

32. *Fifth*, the Claimant argues that Québec's claim of not receiving third-party financial support for its *amicus* submission, as required under ICSID Rule 67(2)(e), is misleading and irrelevant.<sup>22</sup> The financial independence criterion aims to prevent undue influence from undisclosed Parties.<sup>23</sup> While Québec asserts it has not received financial or other support from third Parties, the Claimant highlights that Québec benefits indirectly from extensive legal assistance provided by the Respondent's team of lawyers, which raises concerns about its actual independence.<sup>24</sup> This indirect support, although not financial, should be considered in evaluating Québec's request to intervene.<sup>25</sup>

(vi) There is no public interest in the subject-matter of the arbitration

33. *Sixth*, the Claimant argues that Québec's submission fails to meet the "public interest" requirement under Section B.6(d) of the FTC Statement, which is needed for third-party interventions in investor-State arbitrations.<sup>26</sup> Québec claims its interest stems from the potential economic impact of the Claimant's investment on Québec and broader concerns about the legitimacy of investor-State arbitration.<sup>27</sup> However, the Claimant contends that Québec's intervention does not address any substantive legal or factual issues in the case but only concerns the interpretation of a specific provision of the

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<sup>20</sup> Claimant's Observations dated 19 January 2024, para. 68.

<sup>21</sup> Claimant's Observations dated 19 January 2024, paras. 69-70.

<sup>22</sup> Claimant's Observations dated 19 January 2024, para. 71.

<sup>23</sup> Claimant's Observations dated 19 January 2024, para. 72.

<sup>24</sup> Claimant's Observations dated 19 January 2024, para. 73.

<sup>25</sup> Claimant's Observations dated 19 January 2024, para. 74.

<sup>26</sup> Claimant's Observations dated 19 January 2024, para. 75.

<sup>27</sup> Claimant's Observations dated 19 January 2024, para. 76.



USMCA. The Claimant further argues that Québec’s reference to the potential for conflicting decisions in other NAFTA cases is speculative and does not establish a genuine public interest. They emphasize that public interest cannot be based on generalized concerns or potential financial outcomes, as seen in other cases like *Gabriel Resources v. Romania* and *Apotex Inc. v. United States*. The Claimant concludes that Québec’s request is premature and lacks a specific public interest that would justify its intervention.<sup>28</sup>

34. Finally, the Claimant argued, based on the facts at the time of Québec’s Application, that Québec’s submission would have significantly disrupted the proceeding and imposed an undue burden on the Parties, violating ICSID Arbitration Rule 67(4) and Section B.7(a) of the FTC Statement. Québec’s attempt to justify its intervention by claiming that it would be less disruptive than if the Tribunal raised jurisdictional issues itself was dismissed as frivolous.<sup>29</sup> The Claimant contended that allowing Québec to raise issues not yet disputed by the actual Parties would be an abuse of the third-party submission process and would unfairly grant Québec party status.<sup>30</sup> The Claimant also argued that permitting such a submission before the Respondent’s position on jurisdiction was clarified would prejudice the Claimant, as jurisdictional issues are meant to be fully addressed by the Parties, not through third-party interventions.<sup>31</sup> Québec’s assertion that its submission would be “less disruptive” is further criticized as disingenuous, given its request to suspend proceeding and bifurcate the case to address the issue it seeks to introduce.<sup>32</sup> Additionally, the Claimant distinguishes Québec’s case from past precedents, emphasizing that previous tribunals allowed third-party interventions only after the Parties had fully presented their positions.<sup>33</sup> Finally, the Claimant concluded that Québec’s request failed under all relevant criteria.

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<sup>28</sup> Claimant’s Observations dated 19 January 2024, paras. 77-82.

<sup>29</sup> Claimant’s Observations dated 19 January 2024, paras. 83-84.

<sup>30</sup> Claimant’s Observations dated 19 January 2024, paras. 86-87.

<sup>31</sup> Claimant’s Observations dated 19 January 2024, paras. 89-91.

<sup>32</sup> Claimant’s Observations dated 19 January 2024, para. 94.

<sup>33</sup> Claimant’s Observations dated 19 January 2024, paras. 102-103.

### Updated position

35. In its letter dated 6 November 2024, the Claimant reiterates its objection to Québec's Application, for the following reasons.
36. First, the Claimant submits that Québec's Application "*fails to meet several key requirements of an amicus curiae submission*", as set out in Section B.6. of the FTC Statement. The Claimants explains in that respect that:
- i. Québec's proposed submission would not assist the Tribunal by bringing a perspective or particular knowledge that is different from that of the Respondent, because Québec's perspective cannot be considered different from that of the Respondent and because Québec has not demonstrated having a "*particular knowledge or expertise regarding the scope and meaning of Annex 14-C of the USMCA that Canada would not have.*"<sup>34</sup>
  - ii. Québec does not have a "*significant interest in the arbitration*", because its interest cannot be different from that of Canada, "*which bears full international responsibility for Québec's actions and is representing Québec in the arbitration*".<sup>35</sup>
  - iii. "*Québec has failed to demonstrate that there is a public interest in the subject-matter of the arbitration*". For the Claimant, Québec's reference to the substantive issues at stake in the proceeding does not justify making legal submissions on a discrete jurisdictional issue separate from the merit issues of public interest.<sup>36</sup>
  - iv. "*Québec's submission would disrupt the proceeding and cause the Claimant to be "unduly burdened" and "unfairly prejudiced"* because it would provide the Respondent with two opportunities to advance the same jurisdictional objection and would force the Claimant to address it twice.<sup>37</sup>

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<sup>34</sup> Claimant's Letter s dated 6 November 2024, p.5.

<sup>35</sup> Claimant's Letter s dated 6 November 2024, p.6.

<sup>36</sup> Claimant's Letter s dated 6 November 2024, p.6.

<sup>37</sup> Claimant's Letter s dated 6 November 2024, p.6.

- v. Québec, as a constituent province of Canada, is part of the Respondent and is not independent from it. This is further evidenced by the fact that Québec is collaborating closely with the Respondent’s representatives in this proceeding, that five employees of the Québec Government have been put forward as witnesses, and that Québec and the Respondent have entered into an agreement on the management of the proceeding.<sup>38</sup>
37. Second, the Claimant contends that “*even if Québec could be considered as a genuine amicus curiae (quod non), Québec would still lack standing to file a jurisdictional objection, or take any procedural steps in this arbitration.*” The Claimant adds that “*Québec cannot rely on Rule 43 of the ICSID Rules, which concerns the Tribunal’s discretionary power with respect to its own jurisdiction, to usurp the Respondent’s otherwise expired right to request bifurcation under Rules 41 and 44 of the ICSID Rules.*”<sup>39</sup>”

### III. TRIBUNAL’S ANALYSIS

38. Section B.6. of the FTC Statement provides:

6. In determining whether to grant leave to file a non-disputing party submission, the Tribunal will consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address matters within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the arbitration;  
and
- (d) there is a public interest in the subject-matter of the arbitration.

7. The Tribunal will ensure that:

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<sup>38</sup> Claimant’s Letter s dated 6 November 2024, pp.6-7.

<sup>39</sup> Claimant’s Letter s dated 6 November 2024, p.7.

- (a) any non-disputing party submission avoids disrupting the proceedings; and
- (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

39. Similarly, and even if not directly applicable in this proceeding, ICSID Arbitration Rule 67 (1) and (2) provides:

(1) Any person or entity that is not a party to the dispute (“non-disputing party”) may apply for permission to file a written submission in the proceeding. The application shall be made in the procedural language(s) used in the proceeding.

(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

(a) whether the submission would address a matter within the scope of the dispute;

(b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties;

(c) whether the non-disputing party has a significant interest in the proceeding;

(d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and

(e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

40. The Tribunal might accept that Québec could be considered as having a significant interest in the proceeding and that its proposed submission would address a matter within the scope of the dispute.

41. The Tribunal notes, however, that the position advanced by Québec with respect to the *ratione temporis* scope of Annex 14-C to the USMCA is similar, in both content and intended outcome, to the arguments developed by the Respondent in its Counter-memorial on the merits and memorial on jurisdiction.

42. Therefore, the Tribunal does not consider that Québec’s proposed submission would provide assistance “to determine a factual or legal issue related to the proceeding by

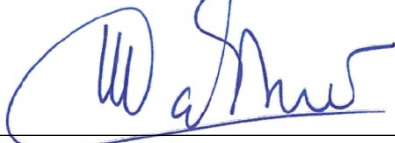
*bringing a perspective, particular knowledge or insight that is different from that of the parties.”*

43. Furthermore, and more fundamentally, in the Tribunal’s view Québec cannot be considered as a non-disputing party under the FTC Statement (or ICSID Arbitration Rule 67), at least in respect of the subject-matter of its proposed submission. The Tribunal notes indeed that:
- i. Eight representatives of Québec attended the first session of the Tribunal held on 2 August 2023;
  - ii. Québec and Canada entered into an agreement regarding the management of this arbitration proceeding, with the objective to “*defend the integrity of the Québec measures at issue in this dispute...*”;
  - iii. Several witnesses presented by Canada hold or have held positions of responsibility within the Government of Québec or a Québec public agency;
  - iv. Four representatives of Québec attended the procedural hearing held on 18 December 2024;
  - v. Representatives of Québec are on the distribution list of this case and therefore receive all case-related communications;
  - vi. Representatives of Québec have access to the case’s folder on Box and therefore have access to all case-related materials.
44. Given the involvement of Québec’s representatives through their access to all cases-related materials and communications, their attendance in all procedural sessions held in this case, the agreement with Canada regarding the management of the proceeding and the evident alignment between Canada’s and Québec’s interests and objectives in this arbitration, it is clear to the Tribunal that Québec is not an independent, non-disputing party in this proceeding.

**IV. TRIBUNAL'S DECISION**

45. For the foregoing reasons, the Tribunal rejects Québec's Application to submit a written memorial as a non-disputing party.

On behalf of the Tribunal,



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Ms. Carole Malinvaud  
President of the Tribunal  
Date: 20 December 2024