

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ruby River Capital LLC

v.

Canada

(ICSID Case No. ARB/23/5)

PROCEDURAL ORDER NO. 7

Decision on *Centre québécois du droit de l'environnement'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

20 December 2024

I. PROCEDURAL BACKGROUND

1. On 25 September 2024, the *Centre québécois du droit de l'environnement* (the “**CQDE**” or the “**Applicant**”) sought permission from the Tribunal to submit a written memorial as a non-disputing party in the present proceeding (“**CQDE’s Application**” or “**Application**”) in accordance with Article 24.1 of Procedural Order No. 1 (“**PO1**”). The Application enclosed the Applicant’s *Amicus Curiae* Memorial, dated of the same day.
2. On 25 October 2024, in accordance with the amended procedural calendar, the Parties filed observations on the CQDE’s Request (“**Claimant’s Observations**” and “**Respondent’s Observations**”).
3. In this Procedural Order, the Tribunal decides on the CQDE’s Application.

II. THE APPLICANT’S AND THE PARTIES’ POSITIONS

A. CQDE

4. The Applicant presents itself as a non-governmental organization, specifically a non-profit organization founded in 1989 under the laws of Québec, offering independent and non-partisan expertise in environmental law in Québec.¹ It protects citizens’ rights, raises public awareness about environmental protection, and participates in public consultations. Since its creation, it has submitted over 60 written submissions and legal analyses to various governmental bodies.²
5. As a preliminary matter, the Applicant indicates that it has initiated several legal actions related to environmental protection and has been recognized as *amicus curiae* in various jurisdictions. It cites the case of *Lone Pine Resources Inc. v. Canada* (ICSID Case No. UNCT/15/2), where it was granted permission to submit a written memorial, the tribunal finding that it had a relevant interest. The Applicant contends that its Application and

¹ CQDE’s Application dated 25 September 2024, para. 2.

² CQDE’s Application dated 25 September 2024, para. 4.

attached Memorial are similar to those filed in the *Lone Pine* proceeding, particularly with regard to the precautionary principle.³

(i) The non-contesting party is independent of the parties to the dispute.

6. The Applicant affirms its independence in the context of the present proceeding. None of the parties to the dispute is a member of the CQDE.⁴ Although the CDQE enters into research contracts with governmental entities, none of these contracts is related to the subject of the current dispute. The Applicant specifies that its research is systematically published on their website.⁵ Although they have received funding from the government of Québec for its environmental activities, this support is unrelated to the present dispute.⁶ The Applicant also specifies that it sometimes takes legal action against the governments of Québec and Canada to defend public interest causes.⁷ Finally, there is no financial or other connection between the Applicant and the arbitrators.⁸ The Applicant also submits that it has not received any external assistance, whether financial or in any other form, for the preparation of its memorial or the Application.⁹

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

7. The Applicant argues that it has a direct interest in the present dispute, as the legal issues raised concern environmental protection, particularly in the areas of climate change and biodiversity, which are at the core of its priorities and expertise.¹⁰ The Applicant has actively participated in public debates regarding the disputed project, by intervening with the Canadian Impact Assessment Agency and submitting several briefs during the public consultations on the project. These actions demonstrate its commitment to environmental issues and strengthen its interest in the legal aspects of the dispute at hand.¹¹

³ CQDE's Application dated 25 September 2024, paras. 5-8.

⁴ CQDE's Application dated 25 September 2024, para. 9.

⁵ CQDE's Application dated 25 September 2024, para. 10.

⁶ CQDE's Application dated 25 September 2024, para. 11.

⁷ CQDE's Application dated 25 September 2024, para. 12.

⁸ CQDE's Application dated 25 September 2024, para. 13.

⁹ CQDE's Application dated 25 September 2024, para. 14.

¹⁰ CQDE's Application dated 25 September 2024, para. 15.

¹¹ CQDE's Application dated 25 September 2024, para. 16.

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

8. The Applicant wishes to intervene on the issues already in dispute, without introducing new matters. It will focus on the precautionary principle in environmental law, explaining why the measures in dispute comply with this principle. Its position, based on considerations that are different yet complementary to those of the Respondent, will not raise any additional issues.¹²

(iv) 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

9. The Applicant argues that its submission will assist the Tribunal in resolving the factual and legal issues related to the proceeding by providing a perspective different from that of the Parties, particularly regarding the precautionary principle, which has not been addressed by them.¹³ The submission discusses the fundamental aspects of the dispute, including the legitimacy and consistency of the decisions made in the context of the environment, particularly with regard to protection against greenhouse gas (GHG) emissions and the conservation of biodiversity.¹⁴

10. The Applicant, whose mission is focused on the public interest and environmental protection, emphasizes that the outcome of this dispute could have a major impact on environmental policy, creating a "chilling effect" if the Tribunal concludes that the decisions of the governments of Canada and Québec were unreasonable or illegitimate.¹⁵ Such a decision could reduce the political will to take environmental protection measures, which would negatively affect the public interest.¹⁶

11. The Applicant also asserts that its intervention, limited to the submission of a memorial and without oral arguments, will not disrupt the proceeding or delay the timeline set by

¹² CQDE's Application dated 25 September 2024, para. 17.

¹³ CQDE's Application dated 25 September 2024, paras. 18-19.

¹⁴ CQDE's Application dated 25 September 2024, para. 20.

¹⁵ CQDE's Application dated 25 September 2024, para. 21.

¹⁶ CQDE's Application dated 25 September 2024, para. 21.

the Tribunal. The intervention will therefore not impose any additional burden or prejudice on the Parties.¹⁷

B. CLAIMANT

- (i) The submission would not bring a perspective, particular knowledge or insight that is different from that of the Parties to the dispute

12. The Claimant argues that the CQDE's request should be rejected under Article B(6) of the NAFTA Commission's Declaration on the Participation of Non-Disputing Parties, as the memorial proposed by the CQDE would not contribute usefully to the arbitration.¹⁸ According to the Claimant, the CQDE provides no perspective, knowledge, or insight distinct from that of the Respondent, particularly regarding the precautionary principle, which has already been addressed by the Respondent in the course of the proceeding.¹⁹
13. The Claimant further asserts that the CQDE's arguments on issues such as the impact of the LNGQ and Gazoduq projects on the energy transition, greenhouse gas (GHG) emissions, and the beluga population are largely similar to those of the Respondent. Therefore, the CQDE's submission would not add any value in terms of new perspectives and would not significantly contribute to the determination of the legal issues in the dispute.²⁰
14. Finally, although the Claimant opposes the CQDE's request for intervention, they respectfully submit to the Tribunal's decision regarding the admission of the CQDE's submission.²¹

C. RESPONDENT

15. From the outset, the Respondent expresses its support for transparency and openness in arbitration proceedings, emphasizing that the participation of *amici curiae*, such as the

¹⁷ CQDE's Application dated 25 September 2024, para. 22.

¹⁸ Claimant's Observations dated 25 October 2024, para. 2.

¹⁹ Claimant's Observations dated 25 October 2024, para. 3.

²⁰ Claimant's Observations dated 25 October 2024, paras. 4-5.

²¹ Claimant's Observations dated 25 October 2024, para. 6.

CQDE, contributes to the legitimacy of investor-state arbitration processes and promotes greater public acceptance of these mechanisms.²²

(i) The submission of the non-disputing party provides a perspective, specific knowledge, or insight distinct from that of the parties to the dispute.

16. The Respondent asserts that the CQDE's request meets the criteria outlined in Procedural Order No. 1 and the NAFTA Commission's Declaration. These criteria include the requirement for the memorial to address issues relevant to the dispute, provide a distinct perspective, and raise public interest issues. The Respondent believes that the CQDE's request fully satisfies these conditions.²³
 17. The CQDE's memorial addresses issues directly related to the subject of the dispute, particularly the application of the precautionary principle, which is central to the decisions made by the governments of Canada and Québec regarding the *Énergie Saguenay* project. The memorial examines how this principle influenced the environmental impact assessments of the project, particularly with regard to the energy transition, GHG emissions, and the protection of belugas. These elements are essential to understanding the legal framework of the decisions in question.²⁴
 18. Furthermore, the CQDE's memorial offers a unique perspective by detailing the role of the precautionary principle in assessing environmental risks, which has not been addressed by the parties to the dispute. This will provide valuable insights to the Tribunal in resolving the legal and factual issues related to the arbitration.²⁵
- (ii) The non-disputing party has a significant interest in the arbitration.
19. The Respondent also notes that the CQDE, as an environmental organization, has a direct and legitimate interest in this arbitration due to its role in defending environmental principles. This dispute, which concerns decisions to reject the *Énergie Saguenay* project

²² Respondent's Observations dated 25 October 2024, p. 1.

²³ Respondent's Observations dated 25 October 2024, p. 1.

²⁴ Respondent's Observations dated 25 October 2024, p. 1.

²⁵ Respondent's Observations dated 25 October 2024, p. 2.

for environmental protection and climate change reasons, raises major public interest issues, justifying the participation of the CQDE.²⁶

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

20. In light of these elements, Canada requests that the Tribunal favorably consider the request made by the CQDE. The participation of the CQDE would provide a valuable contribution to the proceeding by offering legal and environmental perspectives essential to guiding the Tribunal's decisions on public interest matters.²⁷

III. TRIBUNAL'S ANALYSIS

21. Section B.6. of the Statement of the Free Trade Commission on non-disputing party participation dated 7 October 2003, 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:

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

²⁶ Respondent's Observations dated 25 October 2024, p. 2.

²⁷ Respondent's Observations dated 25 October 2024, p. 2.

22. 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.

23. It is not disputed, and the Tribunal is satisfied, that the Applicant’s proposed submission addresses a matter within the scope of the dispute, that the CDQE has a significant interest in the proceeding and that it exists and operates independently from the Parties to the dispute.

24. The Tribunal also considers that the Applicant’s proposed submission would provide assistance in determining 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*”.

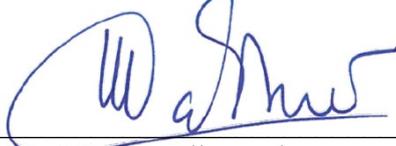
25. Indeed, the Tribunal has noted that the Parties’ submissions to date have addressed only briefly the precautionary principle, on which the Applicant proposes to opine and provide its views. The Tribunal is interested in, and would be assisted by, the Applicant’s perspective and insights on this topic.

26. The Tribunal has also noted that the Applicant's **proposed** submission was filed together with its Application, that its scope is limited and its length is reasonable. The Tribunal therefore considers that the Applicant's proposed submission would not disrupt the proceeding, nor would it unduly burden or unfairly prejudice either Party.

IV. TRIBUNAL'S DECISION

27. For the foregoing reasons, the Tribunal grants the CQDE's Application to submit a written memorial as a non-disputing party, and accepts the CQDE's Amicus Curiae Memorial dated 25 September 2024 into the record of this proceeding.

On behalf of the Tribunal,



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