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Ruby River Capital LLC initiates NAFTA claim for 'gross procedural unfairness', 'manifest arbitrariness' and 'double standards' employed by Québec and Canada in rejecting GNLQ LNG project

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Introduction

After seven years of navigating separate provincial and federal regulatory processes and sourcing US$120 million in investments, GNL Québec Inc. (GNLQ)'s proposed liquefied natural gas (LNG) facility in Québec (the GNLQ Project) was rejected by both levels of government in 2021 and 2022. The governments justified their decisions based on a variety of factors, including anticipated negative net contributions to global GHG emissions, deceleration of energy transition through foreign LNG imports, and GNLQ's alleged failure to achieve social acceptability in Québec. On February 17, 2023, the United States parent company of GNLQ initiated an international arbitration claim against the government of Canada for, among other things, gross procedural unfairness, manifest arbitrariness and double standards employed by Québec and Canada in reaching their decisions, contrary to foreign investment safeguards set out in the North American Free Trade Agreement (NAFTA). This claim could have important implications for future environmental assessment decision-making across Canada.

On June 30, 2023, the sunset period for investor-state arbitrations under NAFTA expires. Investors will no longer be able to challenge unfavourable decisions made by Canadian federal or provincial governments against an investor from the United States or Mexico, or by the United States or Mexico governments against a Canadian investor. Investors of major projects denied by one of these governments should pay close attention to the GNLQ Project arbitration and consider whether to file their own claim by June 30, 2023 to preserve their rights under NAFTA.

Background

On February 17, 2023, Ruby River Capital LLC (Ruby River or the Claimant), one of the owners of GNLQ, filed a request for arbitration (Arbitration Request) with the World Bank Group International Centre for Settlement of Investment Disputes (ICSID) on behalf of Symbio Infrastructure Partnership Limited (Symbio) in response to Québec and Canada's denial of the GNLQ Project, and incidental dismissal of Gazoduq Inc. (Gazoduq)'s associated natural gas pipeline (Gazoduq Project) (collectively, the Projects). Ruby River claims that, by denying the Projects, Québec and Canada breached Chapter 11 of NAFTA which places obligations on Canada regarding its treatment of foreign investments.

The GNLQ Project was a proposed LNG facility and export terminal at the Port of Saguenay, Québec, which would have produced up to 10.5 million tonnes of LNG per year for 25 to 50 years. The Gazoduq Project was a proposed 780 kilometre long natural gas pipeline from North Ontario to the GNLQ Project, which would have transported natural gas (sourced in Western Canada) to the GNLQ Project. The Projects were proposed to be carbon neutral throughout their construction and operation.

The Projects would have been amongst the largest private industrial projects in Québec's history, with estimated capital costs of roughly US$11.2 billion. US$9 billion of this amount was initially committed by business investor Warren Buffet, but Buffet withdrew his commitment in 2020, citing concerns over disruptions to regulatory approval processes.

From 2014 to 2022, Ruby River and Symbio invested approximately US$120 million into the preparatory phase of the Projects, including various engineering and design studies, assessments of the environmental and socio-economic impacts of the Projects, consultation with local communities and Indigenous groups, and costs to advance regulatory applications.

Environmental assessments

The proposed GNLQ Project underwent an environmental assessment by the Québec's environmental assessment agency, Bureau d'audiences publiques sur l'environnement (BAPE), under Québec's *Environment Quality Act*. BAPE's Environmental Assessment Report (in French) (BAPE Report) was released on March 10, 2021. The BAPE Report cites concerns regarding GHG emissions, cumulative effects of related projects, uncertainty regarding LNG demand, effects on marine mammals, the energy transition of LNG purchasers, and the social acceptability of the GNLQ Project. The BAPE Report ultimately concluded that the risks of the GNLQ Project outweighed the advantages. At a press conference on July 21, 2021, Québec announced that it was refusing the GNLQ Project. Québec's decision was published in the Government of Quebec Gazette [PDF] (in French) on August 17, 2021.

The GNLQ Project was also subject to an assessment by the Impact Assessment Agency of Canada (IAAC) under the *Canadian Environmental Assessment Act (2012)*. IAAC's Environmental Assessment Report [PDF] (IAAC Report) was released in November 2021. The IAAC Report indicated the GNLQ Project would result in significant environmental effects, including effects resulting from GHG emissions; direct and cumulative effects on marine mammals; and effects on the cultural heritage of the Innu First Nations. On February 7, 2022, Canada released a Decision Statement refusing to approve the GNLQ Project.

ICSID jurisdiction

Canada and the United States are both contracting states to the ICSID Convention [PDF].

Article 25(1) of the ICSID Convention states that the ICSID's jurisdiction extends to "any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State", which by virtue of Article 25(2)(b) includes a corporation. This explains why the Arbitration Request was brought by Ruby River, Symbio's U.S. parent company.

Article 1122 of NAFTA sets out each NAFTA party's consent to ICSID arbitration under Article 25 of the ICSID Convention. NAFTA was replaced by the U.S.-Mexico-Canada Agreement (USMCA) on July 1, 2020. Chapter 14 of the USMCA contains similar provisions to NAFTA regarding the equitable treatment of foreign investors by each government. However, Article 14.2(4) of the USMCA specifically limits arbitration claims by foreign investors against Canada to legacy investment claims, as set out in Annex 14-C. Article 14-C authorizes the submission of an ICSID arbitration claim regarding a legacy investment (foreign investment made January 1, 1994 to July 1, 2020 in the territory of another USMCA party) pursuant to NAFTA Chapter 11 for a three year period (until June 30, 2023).

Alleged breach of NAFTA provisions

The Claimant alleges Canada breached articles 1102, 1103, 1105 and 1110 of NAFTA.

Articles 1102 and 1103

Articles 1102 and 1103 of NAFTA mandate that parties to NAFTA treat foreign investors no less favorably than the most favorable treatment accorded to domestic investors or any other investors.

The Claimant argues that Canada and Québec's refusal of the GNLQ Project constituted discriminatory treatment towards its U.S. investors. In particular, the Claimant alleges that Québec and Canada's environmental assessment processes were marred by double standards. For example, the Claimant notes that assessments of other projects (such as LNG Canada) did not consider GHG emissions on a global scale or the potential international impact of substituting other energy products. The Claimant argues that the application of these criteria solely to the GNLQ Project contradicts previous assessments and is manifestly discriminatory.

NAFTA Article 1105(1)

Article 1105(1) sets out a minimum standard of treatment and provides that parties to NAFTA must treat foreign investors in accordance with international law, including fair and equitable treatment and full protection and security.

The Claimant alleges that the "gross procedural unfairness" and "manifest arbitrariness" underlying Québec and Canada's refusal of the GNLQ Project constitute a breach of Article 1105(1). In particular, the Claimant argues Québec and Canada engaged in the following conduct, leading GNLQ and its affiliates to believe that the GNLQ Project would be approved:

- Québec made specific commitments to GNLQ in support of the GNLQ Project, inducing Symbio to make additional investments, including:
  - confirming Hydro-Québec would allocate electricity to the GNLQ Project
  - brokering a deal with Canada and local governments to ensure access to sufficient

lands at the Port of Saguenay

- providing tax incentives to the GNLQ Project
- establishing a dedicated Inter-Ministerial Committee to facilitate and assist the GNLQ Project to advance through the various stages of provincial approval
- making a formal offer to finance the GNLQ Project through Québec's economic development and investment agency, Investissement Québec

- Québec repeatedly voiced support for the GNLQ Project in the press and Québec Parliament.
- Québec and Canada repeatedly affirmed LNG's role in transitioning towards carbon-neutral economies.
- Between 2014 and 2022, Québec repeatedly supported or initiated other domestic LNG-related investments across Québec.

Following the issuance of the BAPE Report, Québec announced that the GNLQ Project would have to meet three additional criteria: (i) making a positive net contribution to global GHG reductions; (ii) promoting energy transition; and (iii) achieving social acceptability. The Claimant argues that first two criteria had never been mentioned before and the third only became a prominent issue following the issuance of the BAPE Report. However, the BAPE Report does discuss energy transition in section 3.4. Nonetheless, the Claimant argues that no opportunity was provided for GNLQ to respond to the new criteria.

The Claimant further alleges that rejecting the GNLQ Project was a political move by both Québec and Canada, and that their rejection had nothing to do with environmental concerns. In particular, the Claimant notes that Canada announced it would reject the GNLQ Project in the lead up to the federal election in the fall of 2021, after Québec had refused the GNLQ Project, but *prior* to the conclusion of IAAC's environmental assessment process.

Article 1110

Article 1110 of NAFTA provides that no party to NAFTA shall directly or indirectly expropriate a foreign investment in its territory, except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on the payment of compensation.

The Claimant argues that Québec and Canada's refusal of the GNLQ Project are "measures tantamount to expropriation … in that they substantially deprived Symbio and its U.S. investors of all economic value in their investments and of any reasonably-to-be-expected economic benefit." The Claimant further states that, as a result of Québec and Canada's decisions, Symbio's investments in both Projects "have essentially become worthless and any prospect of commercial return has now disappeared despite extremely strong global demand for LNG – and for reliable long-term supply from net-zero emissions export projects such as the GNLQ Project."

The Claimant argues that Canada did not pursue a legitimate public purpose, as its decision to refuse the GNLQ Project was arbitrary and politically-motivated. Therefore, according to the Claimant, Canada must pay compensation for the full market value of its expropriated investments.

Damages

The Claimant seeks US$120 million in sunk costs, and an additional US$20 billion in lost profits, as damages. The Claimant further seeks compound interest on the amount of damages awarded, and compensation for costs of the arbitration.

Next steps

The ICSID Acting Secretary General registered the Arbitration Request on March 9, 2023. While Article 37 of the ICSID Convention requires an arbitral tribunal to be constituted as soon as possible after registration of a request, no further process steps have occurred to date.

Implications

This arbitration highlights the interplay between government policy and environmental assessments, and the risk that environmental assessment regulations are becoming increasingly politicized. This echoes concerns recently raised before the Supreme Court of Canada in the *Impact Assessment Act* reference case that environmental assessments are increasingly being used as a vehicle to implement government policies that promote or seek to impede certain industries, such as oil and gas or coal, rather than focusing more specifically on safeguarding against adverse environmental effects from the particular project.

In the case of GNLQ's claim, an international body will assess whether Canada is liable for damages where a foreign company has invested in a project, pursued the project through Canadian and provincial regulatory processes (meeting all regulatory requirements along the way) and the project is subsequently rejected on policy grounds. If successful, this claim would provide significant ammunition to those who are advocating for changes to environmental decision-making in Canada. As such, this claim should be monitored by companies and investors considering investments in future major projects in the country.

This arbitration also highlights how private companies can avail themselves of the dispute resolution mechanism under NAFTA Chapter 11. GNLQ is not the first private company to bring this type of claim. For example, the ICSID is currently considering an arbitration claim under NAFTA made by TC Energy Corporation and TransCanada Pipelines Limited against the United States government related to President Biden's January 20, 2021 decision to revoke the approval for the Keystone XL Pipeline, issued by former President Trump on March 29, 2019. The ICSID is also currently considering an arbitration claim under NAFTA by United States Investors Koch Industries, Inc. (Koch) and Koch Supply & Trading, LP against the Canadian government related to Premier Doug Ford's cancellation of Ontario's *Climate Change Mitigation and Low-Carbon Economy Act* and Cap and Trade Program Regulation, under which Koch made investments in carbon allowances that subsequently became worthless. As noted above, the opportunity for private companies to initiate these types of claims will end after June 30, 2023. As such, any company that believes it may have grounds to initiate a NAFTA claim should consider doing so prior to June 30, 2023.