

# Kluwer Arbitration Blog

## The Request for Suspension of the Proceeding in *Ruby River Capital LLC v. Canada*: Legal Issues and Political Context

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For the first time under Rule 54(2) of the [ICSID 2022 Arbitration Rules](#), the Tribunal in *Ruby River Capital LLC v. Canada* (ICSID Case No. ARB/23/5) had to decide on a request for suspension of the proceeding. In its [Request for Suspension](#), Canada asked the Tribunal to suspend the proceeding until the Tribunal in *TC Energy Corporation and TransCanada Pipelines Limited v. United States* (ICSID Case No. ARB/21/63) had ruled on a preliminary objection regarding the scope of Annex 14-C of the [United States-Mexico-Canada Agreement](#) (“USMCA”). Following the [Claimant’s Observations](#), the Tribunal informed the disputing parties that it decided to reject the request in a [letter](#) dated December 31, 2023. It subsequently set out its reasons in a [procedural order](#) published on April 9, 2024, concluding that a suspension of the proceeding was ‘unwarranted and unjustified’.

This post examines the standard established by the Tribunal for suspension of the proceeding under the ICSID 2022 Arbitration Rules. It also emphasizes that, while understandable for political motivations, Canada’s refusal to articulate its position regarding the scope of USMCA Annex 14-C was ultimately taken into consideration by the Tribunal to reject the request for suspension.

### Legacy Investment Claims under NAFTA: An Uncertain Scope

In contrast to Chapter 11 of the [North American Free Trade Agreement](#) (“NAFTA”), [USMCA Chapter 14](#) does not provide a broad investor-state dispute settlement (“ISDS”) mechanism. While ISDS claims by US investors in Mexico and Mexican investors in the United States are covered by Annex 14-D, Canada and the United States have chosen to exclude this mechanism in their investment relations. The only available option for ISDS between Canada and the United States relates to ‘[legacy investment claims](#)’ under Annex 14-C. All Parties to the USMCA have thus consented to the submission of an ISDS claim in accordance with Section B of NAFTA Chapter 11 for a period of three years after the termination of this agreement.

Some investors have launched legacy investment claims during this three-year period for measures that were adopted after the termination of NAFTA. This includes both *TC Energy Corporation and TransCanada Pipelines Limited v. United States* and *Ruby River Capital LLC v. Canada*. Paragraph 6(a) of Annex 14-C clearly provides that a ‘legacy investment’ is an investment ‘established or acquired between January 1, 1994, and the date of termination of NAFTA 1994,

and in existence on the date of entry into force of this Agreement'. However, the text of Annex 14-C does not expressly address whether tribunals have jurisdiction over claims for measures that were adopted after the termination of NAFTA.

It is in this context that the request for suspension submitted by Canada is strongly tied to the scope of USMCA Annex 14-C. However, in its request, the Respondent did not expressly argue that tribunals do not have jurisdiction over legacy investment claims for measures adopted after the termination of NAFTA. It merely stated that the Claimant has relied on a specific interpretation of USMCA Annex 14-C that applies the three-year extension to substantive provisions included in Section A of NAFTA Chapter 11, in addition to the procedural mechanism provided in Section B. Given that the United States had challenged the jurisdiction of the Tribunal in *TC Energy Corporation and TransCanada Pipelines Limited v. United States* on the ground that USMCA Annex 14-C does not cover measures adopted after the termination of NAFTA, Canada argued that the balance of convenience and sound administration of arbitration require the suspension of the proceeding until that Tribunal had ruled on the preliminary objection to jurisdiction.

### **The Tribunal's Decision**

In its [Decision on the Respondent's Request for Suspension of the Proceeding and Other Requests](#), the Tribunal stressed that Rule 54(2) of the ICSID 2022 Arbitration Rules does not provide for an automatic or unconditioned suspension of the proceeding based on a disputing party's request. It also considered that exercising the discretionary power granted by this rule requires a consideration of the general duties of the Tribunal and the disputing parties established by Rule 3, which include a duty to 'conduct the proceeding in good faith and in an expeditious and cost-effective manner'.

The Tribunal considered four criteria to determine whether suspension of the proceeding was warranted or justified in that case: 1) balance of convenience; 2) costs and efficiency; 3) procedural propriety; and 4) fairness and prejudice. Without providing a detailed explanation of what each criterion includes, it then identified several reasons that were taken into consideration. Among others, it stressed that the Respondent had not raised the issue pertaining to the scope of Annex 14-C when establishing the procedural calendar nor indicated its intent to raise any objection on this matter. It also considered the uncertainty regarding the timing and the absence of any binding character on the Tribunal of other arbitral decisions. For each criterion, the Tribunal thus found that the Respondent had not established that suspension of the proceeding was warranted or justified.

The absence of a clear position from Canada regarding the scope of USMCA Annex 14-C ultimately impacted the Tribunal's decision on the request for suspension of the proceeding. When addressing the criterion of procedural propriety, the Tribunal found that 'it would be procedurally improper and counter to the Tribunal's duty and objective to conduct this arbitration efficiently and effectively, to depart from the timetable that was established at the outset of the proceeding, when the Respondent was aware of, but elected not to raise, the impending decisions' (para. 39(iii)).

### **The Political Context**

The concerns expressed by the Tribunal on the absence of objection regarding the scope of

USMCA Annex 14-C requires a consideration of the broader political context of Canada's request. Both the United States and Mexico have clearly argued that tribunals do not have jurisdiction over legacy investment claims for measures that were adopted after the termination of NAFTA. For example, in its [Memorial on its Preliminary Objection](#) in *TC Energy Corporation and TransCanada Pipelines Limited v. United States*, the United States considered that Annex 14-C does not expressly allow for the continued application of the substantive investment obligations in Section A of NAFTA Chapter 11. Likewise, in a [non-disputing party submission](#) in the same case, Mexico argued that a violation of the substantive provisions of NAFTA Chapter 11 was no longer possible after the termination of the agreement.

By contrast, Canada has been reluctant to make a similar argument. While useful in the context of *Ruby River Capital LLC v. Canada*, arguing that tribunals do not have jurisdiction over legacy investment claims for measures adopted after the termination of NAFTA would be detrimental to the Canadian investors in *TC Energy Corporation and TransCanada Pipelines Limited v. United States*. It could also have an impact on the proceeding in *Alberta Petroleum Marketing Commission v. United States* (UNCT/23/4), another legacy investment claim that relates to the revocation of a permit for the Keystone XL pipeline and that was initiated by a provincial corporation of the Government of Alberta. The divergent interests underlying these three cases is further illustrated by the [Request for Leave to File a Written Submission as a Non-Disputing Party](#) submitted by the Government of Québec in *Ruby River Capital LLC v. Canada*. When providing a rationale why the Tribunal should grant the request, the Government of Québec stressed that the Respondent had not articulated a clear position on the scope of USMCA Annex 14-C and intended to provide a different perspective from the one articulated by the Claimant.

It thus appears that a request for suspension of the proceeding emerged as Canada's best available option for political reasons. Rather than joining the United States and Mexico in seeking to clarify the scope of Annex 14-C, Canada strictly relied on the United States' preliminary objection to the jurisdiction of the Tribunal in *TC Energy Corporation and TransCanada Pipelines Limited v. United States* and hoped that the latter would settle the issue. Although the award was not publicly available at the time of writing this post, it has been reported that the case is now [concluded](#).

## Conclusion

Overall, the Tribunal's decision in *Ruby River Capital LLC v. Canada* sets the foundations to assess future requests for suspension of the proceeding under Rule 54(2) of the ICSID 2022 Arbitration Rules. The criteria established by the Tribunal are guided by a relatively clear presumption that disputing parties are entitled to have a proceeding conducted 'at a normal pace, according to the procedural timetable, efficiently and expeditiously' ([Decision on the Respondent's Request for Suspension of the Proceeding and Other Requests](#), para. 28). These criteria also appear as a means to ensure that a request for suspension is not used by disputing parties to buy some time and avoid making arguments that could cut both ways when considering other pending cases.

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