PUBLIC VERSION

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RUBY RIVER CAPITAL LLC

Claimant

v.

CANADA

Respondent

(ICSID Case No. ARB/23/5)

CLAIMANT'S OBSERVATIONS ON RESPONDENT'S REQUEST FOR THE SUSPENSION OF THE PROCEEDINGS

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I. INTRODUCTION

1. In accordance with the Tribunal's instructions of 23 December 2023 and Rule 54(3) of the ICSID Arbitration Rules (2022) (**ICSID Arbitration Rules**), the Claimant hereby submits its observations in response to the Respondent's submission dated 22 December 2022.

2. In its submission, the Respondent first requests suspension of the proceedings in the present matter pursuant to Rule 54(2) of the ICSID Arbitration Rules, for as long and until the tribunals in the respective cases of *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America* (ICSID Case No. ARB/21/63) (***TC Energy***) and the ancillary proceedings in *Legacy Vulcan LLC v. United Mexican States* (ICSID Case No. ARB/19/1) (***Legacy Vulcan***) have addressed the jurisdictional objections raised by the United States and Mexico.[1] In the event that the Tribunal rejects the Respondent's request for the suspension of the proceedings, the Respondent further seeks the right to file a second request for bifurcation on the basis of some different jurisdictional objection at some later, unspecified date in the proceedings.[2] Finally, and in any event, the Respondent seeks a suspension of the procedural calendar requiring it to file any such objection and related request for bifurcation within 45 days of the filing of the Memorial, pending the Tribunal's response to its submission[3] (collectively, the **Request**).

3. The Respondent's Request is abusive and ill-founded on all counts. In the Claimant's respectful submission, it is to be rejected in its entirety, with an immediate order of costs to the Claimant.

4. *First*, the Tribunal has the power pursuant to Rule 54(2) of the ICSID Arbitration Rules to suspend proceedings upon the request of either party or on its own initiative. However, in accordance with the consistent practice which Rule 54(2) now codifies, that power is to be exercised only on the basis of compelling justifications established by the requesting party in light of considerations of fairness and prejudice, procedural propriety, costs and efficiency of the proceedings, and the balance of convenience of the parties, weighed against the Tribunal's inherent responsibility to proceed with the adjudication of the dispute without delay and in an efficient manner. To the best of the Claimant's knowledge, every NAFTA tribunal to which a request for suspension has been presented has rejected such a request. A similar pattern emerges outside of the NAFTA context. In the present case, none of the circumstances referenced in the Respondent's submission

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1 Respondent's Request, para. 24(i). *See also id.*, para. 21.

2 *Id.*, paras. 22-23 and 24(ii).

3 *Id.*, paras. 3 and 24(iii).

justify a suspension of proceedings. By contrast, granting the Respondent's Request would cause material prejudice to the Claimant. Accordingly, the Request is to be rejected (**Section II** below).

5. *Second*, Rule 44(1)(a)(i) of the ICSID Arbitration Rules decrees that a responding party "shall" file any request for bifurcation relating to a preliminary objection within 45 days after the filing of the memorial on the merits. The Respondent has failed to establish that the Tribunal, contrary to the terms of ICSID Arbitration Rule 44, has the power to order bifurcation to consider a preliminary objection for a second time, at some future (and uncertain) date in the arbitration. The Respondent's Request also ignores the severe procedural prejudice such an order would in any event impose upon the Claimant. The Respondent's attempt to have a "second bite at the cherry" through consecutive bifurcation requests is procedurally abusive and has no basis in the ICSID Arbitration Rules. Accordingly, this element of its Request is also to be rejected (**Section III** below).

6. *Third*, the Respondent has provided no justification for overturning the procedural calendar pending determination of the present Request. The default rule in arbitral proceedings is that the calendar as agreed between the disputing parties and ordered by the tribunal is to be respected, except as may be justified by exceptional circumstances. None are present here. On the contrary, the Respondent has abusively sought unilaterally to obtain a *de facto* extension of the time available to it for filing of any request for bifurcation by submitting its Request at 11:00 pm UK time on the Friday before Christmas. In the Claimant's respectful submission, the Request should summarily be dismissed by the Tribunal (if required with reasons to follow) upon review of the Claimant's submission, and the deadline of 5 January 2024 should be maintained, with no suspension (**Section IV** below).

7. The Claimant further expands on the above conclusions in what follows.

II. THE REQUESTED SUSPENSION IS UNWARRANTED AND SHOULD BE REJECTED

A. The power to suspend is to be exercised sparingly, in limited circumstances and only for compelling reasons

8. Presenting its request for suspension with reference to Rule 54(2) of the ICSID Arbitration Rules, the Respondent asserts that: « Cet article n'assujetti l'exercice de ce pouvoir discrétionnaire à aucune condition si ce n'est de donner aux parties la possibilité de présenter leurs observations.»[4] With regard to the exercise of this power, the Respondent asserts that:

[4] Respondent's Request, para. 15.

> « *La balance des inconvénients et une saine administration de l'arbitrage* militent en faveur d'une suspension de l'instance car les décisions à venir ne manqueront pas d'apporter un éclairage très utile sur la portée de cette annexe et donc sur la compétence du Tribunal pour trancher le différend qui lui a été soumis. »[5]

9. However, the Respondent also concedes that new Rule 54 is a codification of an already-recognised power of tribunals to suspend proceedings: « L'article 54 du Règlement d'arbitrage *a codifié ce principe* et permet dorénavant expressément au Tribunal de suspendre l'instance à la demande d'une des parties. »[6]

10. The Respondent's assertions regarding the test for ordering suspension pursuant to Rule 54(2) are without merit. *First*, the broader context of the ICSID Convention itself signals that the power to suspend proceedings is to be exercised only sparingly, and in highly targeted circumstances. *Second*, arbitral tribunals have consistently recognised that their inherent power to suspend proceedings ought only to be exercised in the presence of compelling reasons demonstrated by the requesting party, weighed against a tribunal's duty to proceed with the arbitration in a timely and efficient manner, in accordance with previous orders. *Third*, reflecting their appreciation of the narrow scope of their power, the consistent practice of arbitral tribunals, regardless of forum, is to reject such requests. In so doing, investment treaty tribunals have consistently recognized the prejudice that would otherwise result for the party opposing the request, and the tension between such requests and their responsibility to proceed with the arbitration without delay.

1. The context of the ICSID Convention confirms that it is a power to be exercised sparingly, in limited circumstances

11. Rule 54(2) expressly grants the Tribunal the power to suspend proceedings, either *sua sponte* or further to the request of a party. However, the context of the ICSID Convention itself confirms that such a power is to be exercised only sparingly.

12. Rule 54 reads in its entirety as follows:

> Rule 54 - Suspension of the Proceeding
>
> (1) The Tribunal shall suspend the proceeding by agreement of the parties.
>
> (2) The Tribunal may suspend the proceeding upon the request of either party or on its own initiative, except as otherwise provided in the ICSID Administrative and Financial Regulations or these Rules.

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5 Respondent's Request, para. 4 (our emphasis).

6 Respondent's Request, para. 15 (our emphasis).

> (3) The Tribunal shall give the parties the opportunity to make observations before ordering a suspension pursuant to paragraph (2).
>
> (4) In its order suspending the proceeding, the Tribunal shall specify:
>
> (a) the period of the suspension;
> (b) any relevant terms; and
> (c) a modified procedural calendar to take effect on resumption of the proceeding, if necessary.
>
> (5) The Tribunal shall extend the period of a suspension prior to its expiry by agreement of the parties.
>
> (6) The Tribunal may extend the period of a suspension prior to its expiry, on its own initiative or upon a party's request, after giving the parties an opportunity to make observations.
>
> (7) The Secretary-General shall suspend the proceeding pursuant to paragraph (1) or extend the suspension pursuant to paragraph (5) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal. The parties shall inform the Secretary-General of the period of the suspension and any terms agreed to by the parties.

13. The term "may" in Rule 54(2) of the ICSID Arbitration Rules indicates that an arbitral tribunal enjoys some discretion in deciding whether or not to suspend the proceedings following a unilateral request by one party. Such discretion, however, must be narrowly construed, in the sense that a tribunal may only suspend the proceedings where there are "compelling reasons"[7] or "good cause"[8] that necessitate a suspension.

14. The broader context of the Convention and of the ICSID Rules confirm this conclusion, as they expressly permit suspension of proceedings in only very limited circumstances.

15. The previous ICSID Arbitration Rules (2006) contemplated the suspension of the proceedings in a very limited set of circumstances and for defined periods of time, with the goal of preserving the integrity of the arbitration and ensuring the orderly conduct of the proceeding. Such circumstances included, for example, where a proposal had been made for the disqualification of an arbitrator;[9] where there was a vacancy on the arbitral

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7 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 18 (26 February 2001), para. 16, **CL-0143**. *See also*, by analogy, the same threshold applied by the International Court of Justice in determining whether to exercise its discretion to render an advisory opinion or not under Article 65(1) of its Statute which uses the word "may": *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 113, paras. 63-65, **CL-0144**.

8 *Ayat Nizar Raja Sumrain v. Kuwait* (ICSID Case No. ARB/19/20), Decision on Respondent's Request for Suspension of Proceedings and on the Procedure with regard to Claimants' Request for Provisional Measures, 23 April 2020, para. 8, **RL-001.**

9 ICSID Arbitration Rules (2006), Rule 9(6) ("The proceeding shall be suspended until a decision has been taken on the proposal [for the disqualification of an arbitrator].") and ICSID Arbitration Rules (2022), Rule 22(2) ("The proceeding shall be suspended upon the filing of the proposal until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding."). *See further* ICSID Conciliation Rules (2006), Rule 9(6) and ICSID

tribunal as a result of death, incapacity, resignation or disqualification of one of its members;[10] or following the filing of preliminary objections resulting in the suspension of the merits.[11]

16. These limited circumstances have been maintained in the 2022 Arbitration Rules,[12] which include additional (narrow) grounds for suspension. In particular, the most recent version of the ICSID Administrative and Financial Regulations contemplates the suspension of the proceedings in case of a default in payment,[13] whereas Rule 53(6) of the 2022 Arbitration Rules expressly provides for the suspension of the proceedings in case of a failure to comply with an order to provide security for costs.[14]

17. The common feature in all of these provisions is the presence of specific facts that objectively prevent the tribunal from performing its functions and require a temporary stay until that issue is resolved. It follows that the ICSID framework reserves the express and designated power to suspend the proceedings only in the presence of objective factors that materially prevent a tribunal from discharging its adjudicative task.

18. The insertion of Rule 54 in the 2022 ICSID Arbitration Rules was aimed at codifying the already-recognised inherent power of ICSID tribunals to suspend arbitral proceedings.[15] That codification does not imply that a tribunal now has an unfettered power to suspend proceedings regardless of circumstances and in disregard of its general duty to proceed with an arbitration without delay. On the contrary, the provision was intentionally left

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Conciliation Rules (2022), Rule 19(2) ("The proceeding shall be suspended upon the filing of the proposal until a decision on the proposal has been made, except to the extent that the parties agree to continue the proceeding.")

10 ICSID Arbitration Rules (2006), Rule 10(2) ("Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.") and ICSID Arbitration Rules (2022), Rule 26(2). *See further* ICSID Conciliation Rules (2006), Rule 10(2) and ICSID Conciliation Rules (2022), Rule 23(2) (reproducing the same rule in substance).

11 ICSID Arbitration Rules (2006), Rule 41(3) ("Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits.") and ICSID Arbitration Rules (2022), Rules 42(5), 44(1)(c) and (3). *See further* ICSID Conciliation Rules (2006), Rule 29(3) and ICSID Conciliation Rules (2022), Rule 33(3).

12 ICSID Arbitration Rules (2022), Rule 22(2) (disqualification proposal); ICSID Arbitration Rules (2022), Rule 26(2) (vacancy on the tribunal); ICSID Arbitration Rules (2022), Rules 42(5), 44(1)(c) and (3) (preliminary objections).

13 ICSID Administrative and Financial Regulations, Regulation 16.

14 ICSID Arbitration Rules (2022), Rule 53(6).

15 *See* ICSID Secretariat, "Proposals for Amendment of the ICSID Rules — Synopsis", Vol. 1 (2 August 2018) available at <https://icsid.worldbank.org/sites/default/files/publications/Synopsis_English.pdf> (accessed 28 December 2023), p. 7, para. 52 ("New rule AR 54 ((AF)AR 63) codifies suspension generally, allowing it on the agreement of the parties, request of a single party or on the initiative of the Tribunal"), **CL-0145**.

open-ended simply to "accommodate a wide array of case-specific considerations which would be raised by the parties."[16]

19. Rule 54 must also be interpreted in light of the Convention's overarching objectives enunciated in the preamble, including the "particular importance [attached] to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire". In the Claimant's respectful submission, Rule 54 should therefore be interpreted *narrowly* in the light of the object and purpose of the ICSID Convention, as applicable to a limited set of exceptional circumstances, notably where a suspension is required to preserve the integrity of the arbitration or to ensure the proper conduct of the proceedings.

20. The *travaux préparatoires* of the ICSID Convention confirm that the power to suspend proceedings codified in Rule 54 of the ICSID Arbitration Rules must be narrowly construed. The guidance they provide is directly relevant to the present Request. Notably, during the negotiation of the Convention, the Kingdom of Dahomey tabled a "tentative amendment" to allow arbitration proceedings to be suspended where a home State or host State had seized the International Court of Justice (**ICJ**) on a matter concerning the Convention's interpretation or application that could "affect the outcome of the proceedings".[17] The reason put forward was a possible lack of familiarity of arbitrators with the technicalities of international law and the desire to attain uniformity in the Convention's application.[18] Ultimately, however, that proposal was rejected out of fear that it would lead to dilatory tactics that would delay the proceedings.[19] As noted by the Chairman at the time:

> "[a] procedure of the kind proposed by the representative of Dahomey would make it easy for parties to frustrate the proceedings. The tribunal was a quasi-judicial body competent to determine questions of law including those concerning interpretation of the Convention . . . He felt that since one of the aims of the Convention was to provide for the speedy, as well as the just

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16 *See* ICSID Secretariat, "Proposals for Amendment of the ICSID Rules — Working Paper #2", Vol. 1 (March 2019), available at <https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf> (accessed 28 December 2023), p. 241, para. 372, **CL-0146**.

17 Loretta Malintoppi, "Article 64" in Stephan Schill and others (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, Cambridge University Press, 2022), para. 8, **CL-0147**.

18 *Id*.

19 *Id*.

> settlement of disputes, it should be possible to trust the tribunal to judge the merits of a query."[20] (Our emphases.)

21. The drafters of the Convention therefore rejected the notion that an ICSID tribunal should suspend its proceedings even where a State Party to a dispute before it were to seize the ICJ (or, by logical extension, another international court or tribunal) over a question that could affect the outcome of the proceedings. *A fortiori*, the same conclusion must apply where a legal issue is raised in an unrelated proceeding before another arbitral tribunal that may or may not be relevant to consideration of issues raised before or considered by the Tribunal.

22. In sum, a good faith interpretation of Rule 54 in light of the Convention's purpose, in its broader context and based on its preparatory work confirms that the power codified in Rule 54 must be narrowly construed and does not extend to the circumstances envisaged by the Respondent in its Request. As explained below, this interpretation is entirely consistent with the subsequent practice of ICSID arbitral tribunals.

2. The practice of arbitral tribunals confirms the restrictive approach to the suspension of arbitral proceedings

23. In its Request, the Respondent has mischaracterized the applicable legal test for suspension of proceedings, and is therefore unable to point to any legal authority that supports its Request. To the contrary, in line with the above analysis of Rule 54, the consistent rulings of investment tribunals both within and outside of the context of the North American Free Trade Agreement (**NAFTA**) confirm that the power to suspend should be exercised only sparingly and in light of compelling circumstances.

(a) The Respondent has misrepresented the applicable legal test

24. As the Respondent itself acknowledges, Rule 54(2) is in effect a codification of an existing, inherent power of suspension: « L'article 54 du Règlement d'arbitrage *a codifié ce principe* et permet dorénavant expressément au Tribunal de suspendre l'instance à la demande d'une des parties. »[21] What the Respondent fails to note, however, is that power so acknowledged has rarely been exercised, and certainly never in the circumstances it relies upon in its Request. As such, the approach to suspension under the now-express power of Rule 54(2) should be no different than the cautious and restrictive approach adopted by prior tribunals in the exercise of their inherent powers.

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[20] ICSID, *History of the ICSID Convention, Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (ICSID Publication 1968), Vol. II, Part 1, pp. 289-290, *see also* pp. 291-292, **CL-0148**.

[21] Respondent's Request, para. 15 (our emphasis).

25. Investment tribunals have consistently acknowledged that it is a matter of discretion whether or not to suspend proceedings, but in practice have exercised this discretionary power with great caution. In exercising their discretion, tribunals have noted that they should always start from a presumption that a party to an arbitration is entitled to have the arbitration proceedings continued at a normal pace,[22] in light of their duty to render an award in a timely manner[23] and in accordance with the previously-decided procedural orders.[24] Conversely, previous tribunals have ruled that a suspension of the proceedings will only be warranted in the presence of "compelling reasons"[25] or "good cause".[26]

26. Crucially, tribunals consistently have recognized that the burden to demonstrate these reasons falls on the party that makes the request.[27] As explained below, it is for the requesting party to sustain any application for suspension on grounds, among other things, going to considerations of fairness and prejudice, procedural propriety, costs and efficiency of the proceedings, and the balance of convenience of the parties.[28]

27. As such, the Respondent's invitation to the Tribunal that it simply consider the "balance of convenience" and the "sound administration of the arbitration"[29] puts forward only a

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22 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 18 (26 February 2001), para. 8, **CL-0143.**

23 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 380 ("although it is desirable to review the reasoning of the tribunal in the Corn Products proceeding, that desirability is outweighed by the duty of the Tribunal to the Parties in this proceeding to render its Award in a timely manner."), **CL-0021.**

24 *William Ralph Clayton and others v. Government of Canada* (UNCITRAL), Procedural Order No. 19 (10 August 2015), para. 16 (In the view of the Tribunal, "it should exercise its discretion taking account of the fact that it had already decided, in Procedural Order No. 3, to bifurcate the proceeding and that it is appropriate to follow its earlier Procedural Order unless good reason can be shown by Canada to the contrary.") (our emphasis), **CL-0149.**

25 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 18 (26 February 2001), para. 16 ("There are strong policy reasons for not placing the performance of its functions 'on hold' (unless of course the parties so agree); and no compelling reasons that it should do so have been provided to the Tribunal in this instance.") (our emphasis), **CL-0143**.

26 *Ayat Nizar Raja Sumrain v. Kuwait* (ICSID Case No. ARB/19/20), Decision on Respondent's Request for Suspension of Proceedings and on the Procedure with regard to Claimants' Request for Provisional Measures, 23 April 2020, para. 8, **RL-001.**

27 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 18 (26 February 2001), para. 8 ("for CANADA to succeed it must demonstrate to the Tribunal that the arbitration should be suspended pending the proceedings in the Federal Court."), **CL-0143**. *See also Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Procedural Order on Stay Application, 28 February 2017, para. 47 ("it is for the Claimants to sustain their application for a stay on grounds, *inter alia*, going notably to considerations of fairness and prejudice, as well as to the balance of convenience and cost between the Parties."), **CL-0150.**

28 *Id.*

29 Respondent's Request, paras. 6 and 14.

partial and incomplete view of the test typically applied by tribunals faced with requests for suspension. As explained in **Section II.B** below, the Respondent has equally failed to acknowledge and meet the burden it bears as requesting party to justify the disruption of the present proceedings and the setting aside of the Tribunal's responsibility to proceed in a timely fashion with the arbitration.

28. Tellingly, the Respondent has been unable to point to any legal authority in support of its argument that an ICSID tribunal should suspend the proceedings before it, until another ICSID tribunal, in unrelated proceedings between different parties, renders a decision on a jurisdictional objection that may be potentially relevant to its adjudicative task. In fact, the two legal authorities relied upon by the Respondent in its Request are wholly inapposite to the circumstances of this case and cannot justify the suspension of the present arbitration.

29. In its Request, the Respondent refers to the case of *Ayat Nizar Raja Sumrain and others v. State of Kuwait* as an example where an ICSID tribunal « a exercé sa discrétion en soupesant les inconvénients causés par la suspension de l'instance par rapport à ceux engendrés par sa poursuite ».[30] The Respondent however misrepresents the contents and outcome of that decision: in that case, the parties were *agreed* that the proceedings should be suspended due to the difficulties arising from the COVID-19 pandemic which had resulted in the blanket suspension of all non-critical governmental activities. Even though the claimant subsequently withdrew its agreement to Kuwait's request for the suspension of the proceedings, it nonetheless argued that the Tribunal had to consider its request for provisional measures prior to suspending the proceedings.[31] In the event, the tribunal endorsed the proposition that it had the discretion to suspend the proceedings upon the showing of "good cause"; the tribunal however was *not* persuaded that a suspension of the proceedings was appropriate, and provided further directions to the parties regarding the request for provisional measures.[32] Thus, the *Sumrain v. Kuwait* decision provides no support for the Respondent's Request, as the circumstances were different, and the Tribunal did not even agree to suspend in the absence of both parties' agreement.

30. The Respondent has also referred to the case of *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*.[33] That decision is equally unavailing. The *SGS v.*

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30 Respondent's Request, para. 15.

31 *Ayat Nizar Raja Sumrain v. Kuwait* (ICSID Case No. ARB/19/20), Decision on Respondent's Request for Suspension of Proceedings and on the Procedure with regard to Claimants' Request for Provisional Measures, 23 April 2020, para. 7, **RL-001.**

32 *Id.*, paras. 8 and 19-22.

33 Respondent's Request, footnote 18.

Philippines tribunal stayed the arbitral proceedings pending a determination by the competent local courts of the amounts payable by the Philippines to the claimant.[34] But the factual circumstances of its decision were fundamentally different from the present case: in *SGS v. Philippines*, the tribunal had jurisdiction under the umbrella clause of the BIT to entertain treaty claims arising in connection with alleged violations of an underlying contract for the provision of services concluded between the investor and the host State.[35] That underlying contract, however, provided for the exclusive jurisdiction of local courts over "all disputes" arising under the contract, and the Regional Trial Court had been seized of the underlying contractual dispute.[36]

31. On that legal basis, the ICSID tribunal held that its jurisdiction was "subject to 'the factual predicate of a determination' by the Regional Trial Court of the total amount owing by the Respondent".[37] It is for that particular reason that the *SGS v. Philippines* tribunal held that "an ICSID Tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision."[38] (Our emphasis) In other words, the treaty claim before the tribunal was factually dependent and predicated upon the determination of the contractual claim before local courts (which had exclusive jurisdiction over this issue), and consequently stayed the proceedings until local courts issued a decision on this issue. Evidently, no such question arises in the present case.

(b) Every request for suspension to date in NAFTA Chapter Eleven proceedings has been rejected

32. The Respondent in its Request also fails to acknowledge that in NAFTA Chapter Eleven proceedings, requests for suspension have universally been rejected, precisely as NAFTA tribunal have recognized that suspension of proceedings is to be ordered only sparingly, in exceptional circumstances.

33. To the best of the Claimant's knowledge, the issue has been addressed in four separate NAFTA cases. The most typical grounds for seeking suspension has been (as in the present case) where there is a procedure pending before another forum, either a tribunal or domestic courts. In all of these NAFTA cases, the request for suspension was denied. The Respondent fails to mention any of these prior cases in its Request.

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34 *SGS Société Générale de Surveillance S.A. v. Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction, 29 January 2004, para. 175, **RL-002**.

35 *Id.*, paras. 169-170.

36 *Id.*, paras. 22, 51(a), 106 and 137.

37 *Id.*, para. 174.

38 *Id.*, para. 173.

34. In *S.D. Myers, Inc. v. Canada* (***S.D. Myers***), Canada requested a stay of the damages phase in the arbitration, following issuance of the tribunal's partial award on jurisdiction and liability that found Canada in breach of multiple substantive obligations under NAFTA Chapter Eleven. Canada had previously applied for the setting aside of the partial award before Canadian courts, and therefore requested a suspension of the damages phase pending the outcome of the set-aside application.[39] The thrust of Canada's argument was that suspension would serve the "balance of convenience" (echoing the watered-down test the Respondent again seeks to have the Tribunal adopt through its present Request[40]). Canada emphasized a suspension would protect the parties and the tribunal from needless wasted effort and costs in the event that Canada's set-aside application were successful in local courts.[41] Moreover, Canada argued that there was a risk that the damages phase would become moot if the application were entirely successful, or could result in an inconsistent decision if the application were partially successful.[42]

35. In denying Canada's request,

> "The Tribunal's point of departure [wa]s the presumption that a party to an arbitration (whether claimant or respondent) is entitled to have the arbitration proceedings continued at a normal pace. Accordingly, for Canada to succeed it must demonstrate to the Tribunal that the arbitration should be suspended pending the proceedings in the Federal Court".[43]

36. In the event, the *S.D. Myers* tribunal took the view that on its own submissions, Canada "ha[d] come nowhere near to discharging the burden on it to show that the proper course for the Tribunal is to suspend the arbitration."[44] Given that

> "[a]n arbitral tribunal has no permanent, independent or institutional life of its own. There are strong policy reasons for not placing the performance of its functions 'on hold' . . . ; and no compelling reasons that it should do so have been provided to the Tribunal in this instance."[45]

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39 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Procedural Order No. 18 (26 February 2001), paras. 1-4, **CL-0143**.

40 Respondent's Request, paras. 10-11.

41 *Id.*, para. 10.

42 *Id. See also* Respondent's Application for a Stay of Proceedings Pending the Outcome of Canada's Federal Court Application to Set Aside (15 February 2001), para. 8, **CL-0151**.

43 *Id.*, para. 8.

44 *Id.*, para. 15.

45 *Id.*, para. 16.

37. Canada also put forward a further "balance of convenience" argument, that it was in the interests of both Canada and the general public that conclusive guidance should be given on matters of interpretation of the NAFTA.[46] The argument is analogous to the Respondent's attempted justification for suspension in the Request, pointing to pending decisions of other tribunals called to interpret Annex 14-C of the United States-Mexico-Canada Agreement (**USMCA**). The *S.D. Myers* rejected the argument as follows:

> "this argument takes insufficient account of the fact that *it is the duty of this Tribunal to both of the Disputing Parties to determine the disputes between them as expeditiously and efficiently as practicable*."[47] (Our emphasis)

38. It follows that the Respondent must adduce "compelling reasons" to displace the presumption that the Claimant is entitled to have the arbitration conducted at a normal pace and as expeditiously and efficiently as practicable. A mere claim that a tribunal may benefit from the guidance of other tribunals in the exercise of an adjudicative task it is specially charged to fulfil (which it must in any event undertake independently, and on the basis of the submissions of the parties to the arbitration before it), is not enough to displace that presumption. Just as in *S.D. Myers*, the Respondent in the present case has come nowhere near meeting the standard justifying suspension of proceedings.

39. Canada filed a similar suspension request following the rendering of an award on jurisdiction and the merits in the case of *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Canada (**Bilcon**).* In that case, the disputing parties had agreed to bifurcate proceedings between an initial jurisdiction and liability phase, and a subsequent damages phase. The tribunal having found Canada in breach of multiple standards of protection under NAFTA Chapter Eleven, the parties were to move on to the next phase, *i.e.* to address the quantum of the claimant's damages. Canada at that point filed a motion before the Federal Court seeking to set aside the tribunal's award on liability and jurisdiction. Canada next asked the *Bilcon* tribunal to stay its proceeding, pending the outcome of its challenge to the tribunal's merits decision before the Federal Court.

40. Canada submitted that a stay would be consistent with the rationale behind bifurcation of an arbitral proceeding, which is to avoid wasted time and expense on litigating compensation beyond the scope of actual liability, if any. For Canada, a practical consideration in favour of a stay in this particular case was to the effect that a stay would protect both parties against needless expense and inconvenience.[48] As such, the rationale

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46 *Id.*, para. 11.

47 *Id.*, para. 11.

48 *Id.*, paras. 17 and 20.

put forward by Canada in *Bilcon* largely echoes the one the Respondent now relies upon in its Request.

41. The *Bilcon* tribunal dismissed Canada's suspension request. In the view of the tribunal,

> "it should exercise its discretion taking account of the fact that it had already decided, in Procedural Order No. 3, to bifurcate the proceeding and that it is appropriate to follow its earlier Procedural Order unless good reason can be shown by Canada to the contrary."[49] (Our emphasis)

42. In rejecting Canada's request for suspension, the tribunal took note of Bilcon's concerns that a suspension would result in a "loss of momentum in the arbitral process" and the potential diminution of evidence.[50] The tribunal concluded:

> "Canada has not shown that considerations of efficiency favor a departure from proceeding in accordance with Procedural Order No. 3. Nor has it shown that Bilcon's concern about erosion of evidence, a matter that touches on the fairness as well as efficiency of the proceedings, is unwarranted."[51]

43. Similar considerations apply to the present case. For reasons further explored below, the Respondent has failed to establish how a suspension of the proceedings overturning the procedural calendar set out in Procedural Order No. 1 would favour the efficiency of the proceedings. At the same time, suspension would result in the loss of momentum in the arbitration and the risk of erosion of evidence.

44. Equally instructive in the NAFTA context are the proceedings between the United States and Mexico concerning the latter's tax measures on high-fructose corn syrup products, which generated a State-to-State dispute settlement procedure under NAFTA Chapter 20, proceedings before the World Trade Organization, as well as three parallel investor-State proceedings under NAFTA Chapter Eleven. *Inter alia*, in its submissions to the NAFTA Chapter Eleven tribunals, Mexico argued that it had acted lawfully by adopting counter-measures in response to the United States' unlawful conduct. Thus, Mexico requested suspension of (almost) all NAFTA Chapter Eleven proceedings pending the resolution of claims at the inter-State level. Yet no tribunal accepted Mexico's request:

    a. In the oral hearings in *Corn Products International Inc. v. Mexico* (***Corn Products***), Mexico proposed that the tribunal should stay the proceedings until the question whether or not the United States had acted unlawfully in the sugar access dispute had been resolved at the inter-State level, and then resume consideration of the

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49 *William Ralph Clayton and others v. Government of Canada* (UNCITRAL), Procedural Order No. 19 (10 August 2015), para. 16**, CL-0149.**

50 *Id.*, para. 23.

51 *Id.*, para. 24.

countermeasures issue when that question had been resolved.[52] The tribunal rejected the proposal. In its final award, the tribunal noted that, since the doctrine of counter-measures did not apply under NAFTA Chapter Eleven in any event, it was not necessary to stay the proceedings. The tribunal added that:

> "it would be impracticable for [NAFTA Chapter Eleven] tribunals to stay proceedings and await resolution of issues of this kind at the inter-state level. The Tribunal notes that, in the present case, the question whether or not the United States was in breach of NAFTA in the sugar access dispute had still not been resolved more than a year after the conclusion of the oral hearings."[53]

b. In *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (***Archer Daniels***), Mexico similarly contended that if the answer to the validity of the counter-measures defence it had put forward in the arbitration required a finding that the United States had violated the NAFTA, and the tribunal considered that this is a matter for a Chapter 20 tribunal, the tribunal should suspend the proceedings pending a determination of a Chapter 20 tribunal as to the validity of the counter-measures defence.[54] Just as the *Corn Products* tribunal, the *Archer Daniels* tribunal rejected the suspension request and conducted the necessary legal analysis itself: it found Mexico's impugned tax measures did not amount to a valid counter-measure. The suspension request had no basis and was accordingly denied.[55]

c. The issue was also raised (albeit indirectly) in *Cargill Incorporated v. Mexico* (***Cargill***). The tribunal observed that, whilst it was not bound by the holdings in the *Archer Daniels* and *Corn Products* proceedings, the significance of the question and the close relationship of the proceedings indicated that it would be useful for the tribunal to consider those tribunals' reasoning—if at all possible.[56] Whilst the *Cargill* tribunal had before it the *Archer Daniels* award, it did not receive the *Corn Products* award prior to its deliberations. Despite this, the NAFTA tribunal noted that "although it is desirable to review the reasoning of the tribunal in the *Corn Products* proceeding, that desirability is outweighed by the duty of the Tribunal to

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52 *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility (15 January 2008), Award, paras. 190-191, **CL-0025.**

53 *Id*.

54 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 November 2007), para. 181, **CL-0033.**

55 *Id.*, paras. 182-184.

56 *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 380, **CL-0021**.

the Parties in this proceeding to render its Award in a timely manner."[57] Thus, the tribunal did not await to review the *Corn Products* award before drafting its award.

45. These NAFTA Chapter Eleven awards are all relevant to the present Request. The parallel proceedings in the corn syrup cases were closely inter-linked, due to the identity of the measures and the parallel between Mexico's counter-measures defence and the lawfulness of the United States' conduct under international law. Despite this, none of the tribunals considered that it was appropriate to wait – much less suspend the proceedings before it – in order to obtain a decision by another arbitral tribunal, even at the inter-State level. *A fortiori*, the same conclusion must apply here, where there are no such links between this arbitration and *TC Energy Corporation* or *Legacy Vulcan* proceedings, and where the Respondent at best suggests decisions of these other tribunals might be "helpful" or "beneficial" to the Tribunal.[58]

46. To conclude, the Respondent has failed to provide any decisions in the NAFTA context to buttress its Request, because none exists – to the contrary, NAFTA precedent confirms the Request should be dismissed.

(c) Practice outside of the NAFTA context is to similar effect

47. The practice outside the NAFTA context confirms the restrictive approach investment tribunals take in response to requests for the suspension of arbitral proceedings.

48. In several cases, tribunals have been faced with requests to suspend proceedings to await the resolution of contractual claims before local courts and have rejected such requests. For example, in *Toto Costruzioni Generali S.p.A. v. Lebanon*, an ICSID tribunal reasoned that it would be improper to stay the proceedings to allow the Conseil d'Etat (the jurisdiction chosen in the contract) to decide on disputes about the breaches of contract out of which the investment treaty claim arose, noting that the two proceedings had different causes of action and the resolution of these claims by the domestic authority "could take a substantial period of time."[59] This confirms that outside the NAFTA context also, considerations of expedience and efficient resolution of treaty claims have been applied in determining whether or not to order suspension.

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57 *Id.*

58 Respondent's Request, para. 17.

59 *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, para. 220, **CL-0152**. *See also Impregilo S.p.A. v. Islamic Republic of Pakistan II*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras. 289-291 ("Since the two enquiries are fundamentally different (albeit with some overlap), it is not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty Claims"), **CL-0153**.

49. Another relevant case outside the NAFTA context is the CAFTA case of *Berkowitz and others v. Costa Rica*. In that case, the tribunal had issued an interim award on jurisdiction and liability and was set to indicate the next steps for considering arguments on quantum. In the meantime, the claimants filed a motion to vacate or set aside the award before U.S. courts and requested a stay of the proceedings, relying on the following justification:

> "The parallel course of these ongoing proceedings . . . represents a risk of forcing a party to adopt simultaneous, contradictory positions by accepting and challenging the Award at the same time, and mandates that, under the applicable agreements, rules, laws and treaties, these proceedings should be stayed until a final decision on the Application is issued."[60]

50. The cited grounds echo the Respondent's suspension request the present case, which seems to be motivated by its desire to avoid taking contradictory positions in this proceeding and the *TC Energy* and *APMC* proceedings over the proper interpretation of Annex 14-C of the USMCA (or indeed, to avoid having to take a position at all on that issue, at least at the present time). Unsurprisingly, the CAFTA tribunal rejected the suspension request. With respect to the applicable legal standard, the tribunal noted that:

> "In the absence of controlling requirements of that law directing an outcome, the exercise of the Tribunal's discretion must comport with the proper limits of its inherent competence as an international tribunal established by treaty for the purpose of the adjudication of investment disputes coming within the scope of Chapter 10 of the CAFTA . . . The question is whether it would be <u>appropriate</u> for the Tribunal to exercise its discretion to stay its proceedings in the present circumstances. The Tribunal observes that it is for the Claimants to sustain their application for a stay on grounds, *inter alia*, going notably to considerations of fairness and prejudice, as well as to the balance of convenience and cost between the Parties. The continuation of the proceedings commenced by the Claimants cannot without more be subject to a presumption in favour of a stay consequent only on the raising of a set aside challenge before the U.S. District Court. <u>To adopt such an approach would in effect be to give the Claimants a veto over the continuation of proceedings in the face of what they perceive to be an adverse decision or outcome.</u> <u>From a systemic perspective, such an approach would ultimately be encouraging of unsustainable set aside petitions motivated for reason of achieving some procedural advantage or enhanced negotiating position</u>. In this regard, the Tribunal notes that Article 17(1) of the UNCITRAL Arbitration Rules enjoins a tribunal, in exercising its discretion in the conduct of proceedings, 'to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.'"[61] (Our emphases)

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60 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Procedural Order on Stay Application, 28 February 2017, para. 21, **CL-0150.**

61 *Id.*, paras. 36 and 46-47.

51. Against this legal standard, the tribunal held that "the risk of forcing a party to adopt simultaneous, contradictory positions" in parallel proceedings did not warrant a suspension of the proceedings:

> "considerations of fairness and prejudice, and the balance of convenience and cost between the Parties, overwhelmingly favours the continuation of the proceedings . . . In the Tribunal's view, the Claimants in the present case have come nowhere near sustaining the case in favour of a discretionary decision by the Tribunal to stay its proceedings . . . having regard to the fairness of the proceedings and the balance of convenience between the Parties; the Tribunal concludes that a stay of its proceedings is not warranted in the interests of the administration of justice and that there is no sound and proper basis for it to exercise its discretion to order a stay of its proceedings."[62] (Our emphasis.)

52. The same conclusion applies here. The fact that Canada may be forced to adopt contradictory positions in parallel proceedings on the interpretation of Annex 14-C of the USMCA (or indeed, to take a position at all), does not come anywhere near a compelling reason that could justify a suspension of the proceedings. As explained below, granting such a request would be prejudicial to the Claimant and contravene judicial economy and procedural fairness.

53. In conclusion, the Respondent's Request misrepresents the applicable legal standard. A good faith interpretation of Rule 54, in light of the practice of NAFTA and non-NAFTA tribunals, confirms that the inherent power to suspend the proceedings must be narrowly construed and does not extend to the circumstances envisaged in the Request.

B. The Respondent has failed to establish that fairness and prejudice, procedural propriety, costs and efficiency of the proceedings, and the balance of convenience of the parties militate in favour of a suspension of proceedings

54. The Respondent bears the burden of proof to establish that compelling reasons necessitate the suspension of the proceedings, taking into account considerations of procedural fairness and procedural propriety, judicial economy and costs as well as the balance of convenience of the parties.

55. The Respondent has failed even to acknowledge that burden, much less discharge it. Even if the test in deciding whether to suspend proceedings was simply one of "balance of inconvenience" as the Respondent wrongfully alleges,[63] that balance clearly militates against the Tribunal suspending the proceedings. Nor would granting the requested suspension promote the "sound administration of the arbitral proceedings", as the

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62 *Id.*, paras. 49, 51 and 56.

63 Respondent's Request, paras. 4 and 16.

Respondent wrongfully asserts.[64] On the contrary, it would result in increased costs, delays and procedural unfairness to the Claimant.

56. Several factual circumstances militate against granting the Respondent's Request. *First*, the Request is fundamentally moot and speculative, as the Respondent itself has not raised an objection *ratione temporis* to the Tribunal's jurisdiction, and has actually signalled its intention not to do so. It would therefore be inappropriate to suspend the proceedings for an undetermined period of time, based upon a hypothetical objection. *Second*, the Request to suspend the proceedings until a decision is reached in the jurisdictional objection raised in *TC Energy* and *Legacy Vulcan* proceeds from the flawed premise that a decision by these tribunals would be somehow binding upon the Tribunal or otherwise determinative in the present proceedings, which is evidently not the case. *Third*, suspending the proceedings in these circumstances would upend the duty of the Tribunal to decide the present case in an expeditious manner, and would not result in any savings of time, as it could take several months before such decisions are rendered. *Fourth*, and in any event, given the timing and sequence of these parallel proceedings, the Tribunal will have any benefit their decisions may provide by the time it is called to consider its own jurisdiction in the present proceedings. *Fifth*, it is doubtful to what extent the decisions to be rendered by the *TC Energy* and *Legacy Vulcan* tribunals will be probative or relevant to the Tribunal's task, given that they will have likely been deprived of key evidence in considering the objections in question. *Finally*, the timing of the Request emphasizes the unfairness of suspending the proceedings at this juncture and confirms that it should be rejected.

1. The Request is moot and hypothetical as the Respondent itself has not even raised the jurisdictional objection in question, and signals it will not do so, for its own reasons

57. As a preliminary matter, the Respondent's Request must be rejected on the principal basis that it is moot and hypothetical. In its Request, the Respondent has failed to raise the jurisdictional objection referenced in either *TC Energy* or *Legacy Vulcan*, and has actually signalled its intention not to do so. The Respondent cannot legitimately ask the Tribunal to suspend proceedings in anticipation of a ruling on a jurisdictional issue on which the Respondent itself has not seen fit to take a position.

58. In its Request, the Respondent takes no position on the interpretation of Annex 14-C of the USMCA. The Respondent only states that: « les *États-Unis et le Mexique* contestent cette interprétation de l'annexe 14-C de l'ACEUM dans d'autres affaires mettant en cause des faits générateurs de responsabilité survenus après l'entrée en vigueur de l'ACEUM et

64 Respondent's Request, paras. 4 and 16.

l'extinction de l'ALÉNA. »[65] (Our emphasis.) This begs the question whether the Respondent itself raises or may seek to raise this same objection in the present proceedings. Tellingly, the Respondent also failed to make a non-disputing Party submission on the interpretation of Annex 14-C and its interaction with the NAFTA, either in *TC Energy* or in the ancillary claim proceedings in *Legacy Vulcan*, despite the opportunity to do so pursuant to NAFTA Article 1128, and despite the Respondent's regular practice of intervening pursuant to Article 1128 in NAFTA Chapter Eleven proceedings against the other two NAFTA Parties.

59. Again without taking a position of its own, the Respondent in its Request asserts that the *TC Energy* and/or *Legacy Vulcan* decisions will be helpful to the Tribunal considering its jurisdiction *of its own initiative*: « cet éclairage permettrait au Tribunal d'examiner de sa propre initiative si le différend qui lui a été soumis ressort de sa compétence, comme l'y autorise l'article 43(3) du Règlement d'arbitrage. »[66]

60. Emphasing its ambiguity on the jurisdictional point, the Respondent further confirms in relation to the second heading of its Request that it intends to raise a preliminary objection to jurisdiction and file a related request for bifurcation in this proceeding by 5 January should the proceedings not be suspended, but only on an issue *other* than the *ratione temporis* issue presently before the *TC Energy* and *Legacy Vulcan* tribunals:

> « La défenderesse considère qu'elle dispose de bons motifs pour s'objecter à la compétence du Tribunal qui ne sont pas liés à la portée de l'annexe 14-C. Elle entend les faire valoir dans la requête en bifurcation qu'elle déposera le 5 janvier advenant que le Tribunal refuse de suspendre l'instance. »[67]

61. In other words, the Respondent has indirectly confirmed, in multiple ways, that it has no intention of seeking bifurcation in accordance with the procedural calendar, on the basis of an objection to jurisdiction *ratione temporis*, based on the interpretation of Annex 14-C of the USMCA – precisely the issue currently being considered by the other NAFTA tribunals to which it refers.

62. The glaring failure of the Respondent to confirm its position on this issue at the present juncture confirms the present Request to be abusive and moot: the Respondent is seeking to have the present proceedings suspended pending determination of a jurisdictional objection it has not even seen fit to make itself in the present proceedings. Instead, in a manifestly procedurally improper manner, it is seeking to avoid having to take any position on the issue in question at all, and instead incite the Tribunal to consider the issue

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65 Respondent's Request, para. 8.

66 Respondent's Request, para. 17 (emphasis added).

67 Respondent's Request, para. 23 (emphasis added).

sua sponte, on the basis of reasoning presented before other tribunals in unrelated proceedings.

63. The Respondent telegraphs the circumstances of its silence on the relevant jurisdictional issue in its Request through its otherwise gratuitous acknowledgement of the importance of TC Energy as a company to the Canadian economy and to the Albertan economy in particular:

> "La compagnie TC Energy est une importante entreprise canadienne dont le siège social est situé à Calgary, en Alberta. Elle se spécialise dans le transport, la production et le stockage d'énergie et emploie plus de 7000 personnes. Elle possède des actifs évalués à plus de 100 milliards de dollars qui lui ont permis de générer l'année dernière des profits de près de 10 milliards de dollars.8 Il s'agit d'une compagnie dont l'importance pour la vitalité économique du Canada, et plus particulièrement celle de l'Alberta, ne saurait être sous-estimée. »[68]

64. The Respondent goes on to reference TC Energy's ongoing NAFTA Chapter Eleven claim against the United States, which is based upon measures arising during the three-year transitional period following entry into force of USMCA. [69] Notably, in that proceeding, TC Energy claims more than US$ 15 billion in damages for the measures adopted by the United States.[70]

65. As recently as last week, Alberta's Petroleum Marketing Commission (**APMC**) has reportedly advanced a further claim against the United States closely linked to the *TC Energy* proceedings.[71] In early 2020, the Government of Alberta also worked with TC Energy through the APMC to mitigate the pipeline constraint issues in the province with the Keystone XL Pipeline Expansion Project and agreed to provide financial support of Can$ 1.5 billion in equity investment in 2020 and a Can$ 6 billion loan guarantee in 2021.[72]

66. It is therefore clear that the Respondent has a substantial financial and political interest in the outcome of the *TC Energy* and the *APMC* proceedings. As noted above, in either *TC*

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68 Respondent's Request, para. 9.

69 Respondent's Request, para. 10.

70 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Request for Arbitration (22 November 2021), para. 99, **CL-0159.**

71 *See* IAReporter, "Three are in place to hear dispute between Alberta's Petroleum Marketing Commission and the USA" (21 December 2023), available at <https://www.iareporter.com/articles/three-are-in-place-to-hear-dispute-between-albertas-petroleum-marketing-commission-and-the-usa/> (accessed 28 December 2023), **Exh. C-0414**.

72 *See* Alberta Petroleum Marketing Commission, "Projects — Keystone XL Pipeline", available at <https://www.apmc.ca/about/projects> (accessed 28 December 2023), **Exh. C-0415**.

Energy or *Legacy Vulcan*, the Respondent failed to intervene under NAFTA Article 1128 on the issue of the temporal application of USMCA Annex 14-C. Obviously, had it joined the US and Mexico in opposing jurisdiction *ratione temporis* in those claims, it would have been acting directly against its own and Alberta's economic interests. In the present proceedings, by contrast, the Respondent's interest is defensive. Its Request expressly seeks to delay the present proceedings until *TC Energy* is decided, and to manufacture a procedural opportunity for a second-round jurisdictional objection at that juncture.

67. The Respondent's failure to take a position on the *ratione temporis* issue, and the use of the Request to introduce the *TC Energy* and *Legacy Vulcan* jurisdictional pleadings into the record of this proceeding simply confirms that the Request is otherwise a procedurally abusive tactic to introduce and maintain in play a potential jurisdictional objection on which the Respondent has manifestly failed to take a position, for reasons it has not disclosed. To say the least, the Respondent's positioning in this arbitration smacks of fundamental lack of principle, of political expediency, and of procedural abuse. Granting the Request would not be consistent with procedural fairness, judicial propriety, or the balance of convenience.

68. The Request must therefore be rejected on this basis alone.

2. The Respondent's Request is based upon the flawed premise that a decision by the *TC Energy* Tribunal (and/or *Legacy Vulcan* Tribunal) will be determinative in the present proceedings

69. In any event, the Respondent's Request is to be rejected as it proceeds from the assumption that the *TC Energy* tribunal's decision on jurisdiction *ratione temporis* would be somehow determinative or dispositive of the present proceedings. The Respondent's assumption is wrong. Pursuant to Article 1136 of the NAFTA and Article 14.D.13(7) of the USMCA, an award made by an arbitral tribunal shall have no binding force except between the disputing parties and in respect of the particular case. Whilst prior awards may provide useful guidance to the Arbitral Tribunal on an issue of interpretation, they are not binding upon it as such.

70. Thus, whatever position the *TC Energy* or *Legacy Vulcan* tribunals may adopt regarding the interpretation of Annex 14-C of the UMSCA, the Tribunal in this proceeding is called to conduct a proper interpretation of the terms of the Parties' consent and arrive at its own conclusions with respect to its jurisdiction, based on the customary rules of treaty interpretation, in light of the relevant provisions of the NAFTA and of the USMCA. The The Tribunal cannot simply delegate a determination of its own jurisdiction to the *TC Energy* or *Legacy Vulcan* tribunals.

71. Implicitly acknowledging and conceding this point, the Respondent suggests that the decisions in *Legacy Vulcan* and/or *TC Energy* would at best be "helpful" or "beneficial"

in the determination of its own jurisdiction.[73] This is far sight from discharging the burden the Respondent bears to demonstrate compelling or cogent reasons for suspending the present proceedings, with reference to considerations of fairness and prejudice, procedural propriety, costs and efficiency of the proceedings, and the balance of convenience of the parties. If followed, the Respondent's reasoning would support an infinite number of abusive requests for suspension of proceedings, on the sole basis that some other tribunal may or may not be about to issue an award that might potentially be of assistance to another tribunal. To the best of the Claimant's knowledge, no arbitral tribunal has ever ordered suspension of proceedings on this basis.

72. Indeed, even if the Tribunal were to find the reasoning of such other tribunals on the referenced point persuasive (a point which is far from certain), the factual circumstances of the present arbitration are such that these decisions would not be determinative.

73. Among other things, the Respondent's argument relies among other things on the flawed premise that the Claimant's "principal" claims factually rest on events post-dating 1 July 2020.[74] To the contrary, as demonstrated in the Memorial, the facts that form the basis of the Claimant's claims include breaches that were continuing in the first half of 2020, as well as specific measures that were adopted in March 2020 and continued through to 21 July 2021 and 7 February 2022.[75] For instance, in its Memorial the Claimant makes substantial claims regarding the negative continuing impact in the first half of 2020 of procedurally arbitrary and discriminatory decisions taken by both the Québec and Federal authorities with regard to the conduct of the environmental review process,[76] as well as the deliberate negative targeting of the Claimant through the Québec Government's gratuitous leak of confidential information regarding the withdrawal of a major potential source of private funding to the Project, in March 2020.[77] These events were part of a continuing course of illegal conduct that included events pre- and post-1 July 2020.[78]

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73 Respondent's Request, para. 17.

74 Respondent's Request, paras. 6 and 19 (stating that : « les principales réclamations de la demanderesse, et le coeur du différend entre les parties, portent sur la licéité des refus des gouvernements du Canada et du Québec d'autoriser les projets Énergie Saguenay et Gazoduc. Or, il est incontesté que ces faits sont survenus les 21 juillet 2021 et le 7 février 2022, soit postérieurement à l'entrée en vigueur de l'ACEUM et l'extinction de l'ALÉNA le 1er juillet 2020 »).

75 Claimant's Memorial on Jurisdiction and the Merits (21 November 2023), para. 382.

76 For example, for the discriminatory legal treatment meted out to GNLQ by the Québec Government by subjecting it to two separate and parallel environmental processes under the MELCC and CEAA 2012 regimes, *see id.*, paras. 474, 587 to 594. For the avoidance of doubt, the Claimant does not purport to provide here an exhaustive account of the facts and measures which pre-date the 1st of July 2020 and instead refers to its Memorial for a comprehensive account.

77 *Id.*, paras. 9, 215-220, 651 and 878(a).

78 For the avoidance of any doubt, the Claimant expressly denies the Respondent's attempt to mischaracterize its submissions on the effect of the coming into force of USMCA: the Claimant did not argue that the entry into force had the effect of "extinguishing" the obligations in the NAFTA (Respondent's Request, para. 7, citing para. 365 of the Claimant's Memorial). To the contrary, as argued in the Memorial it is plain and obvious that USMCA maintained in

74. In the result, even if the Tribunal were to find its jurisdiction limited to measures adopted prior to 1 July 2020 (which argument has not even been made by the Respondent, and which the Claimant entirely denies), any decision by the *TC Energy* and/or *Legacy Vulcan*, apart from lacking any force or effect on the Tribunal, would not be dispositive of the present arbitration. It is therefore futile to suspend the proceedings on that basis.

3. The argument that the suspension would only be for a few months is false

75. The requested suspension is also to be rejected given that it would result in severe delays in the conduct of the proceedings, in disregard of the procedural schedule fixed by the Tribunal. Suspension would also cause the loss of momentum in the arbitration, and pose a risk of corrosion of evidence as a result of the lapse of time since the relevant events took place.

76. Acknowledging that impact on the timing of proceedings is a consideration to be taken into account by the Tribunal, the Respondent argues that granting its present Request would result in a suspension of "at best a few months".[79]

77. This allegation is wholly unsupported by evidence, precisely because it cannot be predicted when the *TC Energy* and *Legacy Vulcan* tribunals will issue their awards. As noted by the *TC Energy* tribunal, in case of bifurcation, a hearing would take place at an undisclosed date, which – assuming post-hearing briefs – could reasonably lead to a decision on jurisdiction by September 2024, *i.e.* in nine months.[80] Taking into account the need for redactions, an award may be available by the end of 2024 at the earliest. The date for the award in the *Legacy Vulcan* ancillary claim proceedings remains "TBD".[81] By way of further example, in another NAFTA case against the United States the tribunal issued its decision following a decision on bifurcation after approximately 19 months.[82]

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force specific provisions of the NAFTA for a defined period of time and extended in time the application of NAFTA Chapter Eleven with regard to legacy NAFTA investors and their investments, providing such investors continuing NAFTA Chapter Eleven substantive protections and procedural rights with regard to measures adopted within three years of the coming into force of USMCA.

79 Respondent's Request, para. 20.

80 *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2 (13 April 2020), para. 32, **CL-0154**.

81 *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Revised Procedural Calendar for Ancillary Claim (13 April 2023), **CL-0156**.

82 *See, e.g.,* Case Details in *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, available at italaw.com/cases/1687, **CL-0155**.

78. Thus, the Respondent is simply engaging in wishful thinking, and is in fact seeking to suspend the present proceedings without a clear date for resumption, making the present request all the more abusive and again pointing to the balance of fairness being in the Claimant's favour.

4. In any event, to the extent the *TC Energy* and *Legacy Vulcan* decisions have any relevance to the present proceedings (which is not conceded), given the timing of these proceedings, the Tribunal will have any benefit from their decisions by the time it is called to consider its own jurisdiction in the present proceedings

79. The uncertainty regarding the timing of the outcome of these other pending proceedings simply reinforces the prejudice that would result to the Claimant were the Tribunal to suspend proceeds to await the outcome of other ongoing proceedings, the timing of which is uncertain, regarding a jurisdictional objection the Respondent has not even asserted in the present arbitration.

80. Conversely, if the Respondent's assertions about the timing of decisions in *TC Energy* and/or *Legacy Vulcan* are to be believed, by the time the Tribunal is called to make a determination on its own jurisdiction, it will have access to the decisions issued by these two other tribunals, to the extent they are relevant at all, which is not demonstrated.

81. This again strongly militates against suspension of the present proceedings on the basis of the Request: suspension would only cause unwarranted delay in the present proceedings, imposing substantial prejudice on the Claimant, with no corresponding benefit to the proceedings.

5. The *TC Energy* and *Legacy Vulcan* decisions will be all the less probative given that they will have likely been deprived of key evidence

82. The pointlessness of awaiting the *TC Energy* and/or *Legacy Vulcan* determination is emphasized, given known limitations on the factual basis for these decisions. It is well known that the USMCA Parties have imposed time-limited confidentiality restrictions on the preparatory materials of the USMCA: as a result of a Confidentiality Agreement, the full *travaux préparatoires* of the USMCA will not become publicly available until July 2024 at the earliest.[83] In the present proceedings, the Claimant has already sought their production by the Respondent, to no avail. Parallel requests in the United States and in

[83] United States – Mexico – Canada Agreement on Confidentiality (26-27 July and 1 August 2017), first point ("First, the negotiating parties agree that negotiating texts, proposals of each Government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, are provided and will be held in confidence by the recipients, unless each negotiating party whose positions are referred to in a communication agrees to its release . . . The negotiating parties have agreed to hold these documents in confidence for four years after entry into force of the results of this negotiation."), **CL-0157.**

Mexico have led to outright refusals or partial production subject to very heavy redactions, diminishing the usefulness or accuracy of these materials for the purposes of interpreting Annex 14-C.

83. Accordingly, a suspension of the present proceedings on the basis that the Tribunal should "await" the decisions of the tribunals in *TC Energy* and/or *Legacy Vulcan* is all the more flawed in that these tribunals will not have the benefit of the full *travaux préparatoires* in taking their respective decisions, due to the deliberate obstruction of the USMCA Parties to a good faith interpretation of Annex 14-C based on supplementary materials.

6. The timing of the Request further emphasises the unfairness of suspending the proceedings

84. Finally, the timing of the Respondent's request for suspension patently undermines its argument that doing so would promote procedural efficiency, "et ce, avant que les parties n'engagent d'importantes ressources humaines et financières à débattre des questions de fond."[84] To the contrary, the Respondent has deliberately awaited to seek suspension of the proceedings now, after the Claimant has expended enormous effort to timely file its Memorial. In effect, granting the suspension would at very least unfairly grant the Respondent substantial additional time for consideration of its response to the Memorial, in a manner contrary to the careful balance established in the procedural calendar adopted by the Tribunal in the present proceedings. For this reason, also, its Request is to be rejected.

III. BIFURCATION FOR PRELIMINARY CONSIDERATION OF A JURISDICTIONAL OBJECTION MUST BE REQUESTED, IF AT ALL, WITHIN 45 DAYS OF FILING OF THE CLAIMANT'S MEMORIAL

85. The Respondent in the alternative seeks the right to file a further request for bifurcation on the basis of a different jurisdictional objection, should any request for bifurcation it files on 5 January 2024 (if any) be refused, and/or if such an objection, considered on the merits by the Tribunal, is rejected:

> « La défenderesse considère qu'elle dispose de bons motifs pour s'objecter à la compétence du Tribunal qui ne sont pas liés à la portée de l'annexe 14-C. Elle entend les faire valoir dans la requête en bifurcation qu'elle déposera le 5 janvier advenant que le Tribunal refuse de suspendre l'instance. *Toutefois, si le Tribunal rejette cette demande de bifurcation, ou s'il rejette les objections préliminaires ayant été bifurquées, la défenderesse devrait être autorisée à déposer une seconde demande de bifurcation* afin de préserver la possibilité que toutes les objections à la compétence du tribunal qui peuvent plus efficacement

[84] Respondent's Request, para. 17.

> être tranchées dans une phase préliminaire ne soient pas plaidées et tranchées en même temps que les questions de fond. »[85]

86. The Respondent's extraordinary request has no support in the ICSID Arbitration Rules, in the NAFTA, or in the procedural orders adopted by the Tribunal in the present arbitration. It must therefore be rejected.

87. The Respondent manifestly intends to raise a first jurisdictional objection by 5 January and make a related request for bifurcation on grounds other than *ratione temporis* under Annex 14-C USMCA, as a stalling tactic pending the issuance of decisions by the *TC Energy* and/or *Legacy Vulcan* tribunals. The Claimant recalls that the Respondent will otherwise be required to file its Counter-Memorial by 27 March 2024, setting out its "full case" in response, including on the proper interpretation of USMCA Annex 14-C, a point on which it has notoriously remained silent to date, including in its Request.

88. Regardless of its motivations, the Respondent's request is legally unfounded, procedurally abusive, and cannot be sustained.

A. Rules 44 and 45 of the ICSID Arbitration Rules are clear and admit of no exceptions

89. The ICSID Arbitration Rules set out a careful and definitive regime for the consideration of requests for bifurcation. Rule 44(1)(a)(i) provides that "unless the parties agree otherwise" (which is not the case here), any request for bifurcation "shall be filed within 45 days after filing the memorial on the merits". If a party does not request bifurcation of a preliminary objection within the time limits referred to in Rule 44(1)(a) or the parties confirm that they will not request bifurcation, the *chapeau* of Rule 45 confirms that "the preliminary objection shall be joined to the merits" and that "the Tribunal shall fix time limits for submissions on the preliminary objection".

90. The Rules are prescriptive. They override the Tribunal's discretion to organize the proceedings as it sees fit on this issue. The repeated use of the term "shall" in these provisions makes clear that the rule is binding upon tribunals and admits of no exceptions. Rule 44(1)(a)(i) clearly sets out default requirements regarding the filing of a request for bifurcation by a respondent.[86] The preparatory work of Rule 44(1)(a)(i) expressly

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[85] Respondent's Request, para. 23.

[86] *See* Claimant's Submissions on the Proper Timing for the Respondent to File a Request for Bifurcation under the ICSID Arbitration Rules (2022) (11 August 2023), para. 35, citing Koh Swee Yen and Alvin Yeo, "Part 3, Rule 44" in Richard Happ and Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck/Hart/Nomos, 2022), pp. 464-465 ("the timetables for the filing of request for bifurcation under Rule 44(1)(a) are different in three scenarios: (i) where a preliminary objection is filed, (ii) where the objection relates to the ancillary claim, and (iii) where the facts on which the preliminary objection is based become known to the party at a later juncture. *These timetables are fixed unless the parties agree on a different time limit*. . . It bears mentioning that a

confirms this: in Working Paper #2, the ICSID Secretariat *confirmed* that even though an ICSID tribunal enjoys some discretion in fixing the various time-limits concerning the management of bifurcation requests, the 45-day time limit envisaged in Rule 44(1)(a)(i) is an "exception" to that discretion,[87] and cannot be derogated.

91. In the first session of the Tribunal, the Respondent insisted it could raise a preliminary objection and related bifurcation request in violation of the sequence prescribed by Rule 44(1)(a)(i) (*i.e.*, prior to the filing of the Claimant's Memorial and within 30 days of the Tribunal's first procedural order), suggesting written submissions on this point were warranted. The Tribunal accordingly invited the Parties to make written submissions on the proper interpretation of Rule 44(1)(a)(i). On the very day that submission was to be filed, the Respondent withdrew its position and agreed to file its bifurcation request 45 days after the Memorial, in compliance with Rule 44(1)(a)(i).[88] The effect of this agreement in line with Rule 44(1)(a)(i) was duly reflected in the Tribunal's Procedural Order No. 1, Annex B, Scenario 1. The Respondent now seeks to re-litigate this issue, inviting the Tribunal to frustrate its procedural calendar and allow for a "second bite at the cherry" in manifest breach of Rule 44(1)(a)(i). The Respondent's attempt is procedurally abusive and has no basis in the ICSID Arbitration Rules.

92. Leaving aside for a moment the abusive nature of the Respondent's attempt, the interpretation of ICSID Arbitration Rule 44(1)(a)(i) which underlies its Request is flawed and must be rejected. As explained in the Claimant's submissions dated 11 August 2023, the 2022 Arbitration Rules limit the Tribunal's ability to arrange the procedural calendar at its own discretion, in the face of specific prescriptions in the ISCID Convention or the Rules.[89] This is confirmed in Rule 10(1) of the 2022 Arbitration Rules, which provides for an ICSID tribunal's authority to "fix time limits for the completion of each procedural step in the proceeding, *other than time limits prescribed by the Convention or these*

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failure to comply with the time limits to file the requests for bifurcation may lead to the denial of such request."), **CL-0158.**

87 ICSID Secretariat, "Proposals for Amendment of the ICSID Rules — Working Paper #2", Vol. 1 (March 2019), available at <https://icsid.worldbank.org/sites/default/files/amendments/Vol_1.pdf> (accessed 28 December 2023), p. 203, para. 290 ("paragraph (1)(d) provides that the Tribunal fixes time limits for written and oral submissions on the request for bifurcation, as required. As noted above, these are most often established early in the proceeding before the actual request for bifurcation is filed, after consultation with the parties. The Tribunal has the discretion to determine these time limits, with the exception of the time limit for filing the request for bifurcation itself (to be filed in accordance with paragraph (1)(a)(i)).") (emphasis added), **CL-0146**. *See also* to the same effect: Koh Swee Yen and Alvin Yeo, "Part 3, Rule 44" in Richard Happ and Stephan Wilske (eds), *ICSID Rules and Regulations 2022: Article-by-Article Commentary* (Beck/Hart/Nomos, 2022), p. 467, **CL-0158**.

88 *See* Email from Jean-François Hébert to Benjamin Garel (11 August 2023), **Exh. C-0413.**

89 Claimant's Submissions on the Proper Timing for the Respondent to File a Request for Bifurcation under the ICSID Arbitration Rules (2022) (11 August 2023), para. 33.

Rules." (Our emphasis.)[90] Notably, this language departs from the previous Rule 26(1) in the 2006 ICSID Arbitration Rules, which conferred the same powers to a tribunal albeit without any limitations.[91] Similarly, Article 44 of the ICSID Convention provides that "[i]f any question of procedure arises *which is not covered by* this Section or *the Arbitration Rules* or any rules agreed by the parties, the Tribunal shall decide the question." (Our emphasis) The scope of the powers granted under Article 44 is therefore subject to the qualification that, if the Convention or ICSID Arbitration Rules prevent the tribunal from exercising a power, then the tribunal cannot rely Article 44 to reintroduce that function as an inherent power.[92]

93. The default sequencing of procedural steps for a request for bifurcation on a preliminary objection is expressly "covered" by Rule 44(1)(a)(i) of the 2022 Rules. It follows, in the Claimant's respectful submission, that there is no scope for any derogation from the Rule on the basis of the Tribunal's inherent or residual powers under the ICSID Convention.

94. There is consequently no basis in the ICSID Convention, the ICSID Arbitration Rules or Procedural Order No. 1 to justify a deviation from the rules set out in Rule 44(1)(a)(i).

B. The Respondent in any event has provided no compelling reason for subverting the procedural calendar set by the Tribunal

95. In any event, the Respondent has failed to provide any plausible justification for its Request, other than « préserver la possibilité que toutes les objections à la compétence du tribunal qui peuvent plus efficacement être tranchées dans une phase préliminaire ne soient pas plaidées et tranchées en même temps que les questions de fond ».[93]

96. Rules 44 and 45 of the ICSID Arbitration Rules are designed to ensure that all preliminary objections are raised in an orderly and timely fashion, without unnecessarily prolonging the proceedings. If the Respondent's position were to be accepted, a responding party would be able to prolong arbitral proceedings by filing multiple requests for the

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90 *Id.*, paras. 33, 35 and 37.

91 *Id.*, para. 34. Rule 26(1) under the 2006 ICSID Arbitration Rules stated that: "Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding …"

92 *Id.*, para. 35, citing Julien Fouret *et al.* (eds), *The ICSID Convention, Regulations and Rules: A Practical Commentary, Edward Elgar Publishing* (2019), p. 395, and Chester Brown, "Article 44" in Stephen W. Schill et al. (eds), *Schreuer's Commentary on the ICSID Convention Set : A Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (Cambridge University Press, 2022), Vol. II, p. 967 ("the tribunal may not go beyond the framework of the Convention, the Arbitration Rules and the parties' procedural agreements"), **CL-0160**.

93 Respondent's Request, para. 23.

bifurcation of the proceedings following consecutive preliminary objections. This outcome cannot be accepted.

97. Apart from being contrary to ICSID Rules and the procedural calendar, the Respondent's extraordinary request manifestly ignores the procedural injustice that would result for the Claimant in having round after round of "preliminary" objection considered *seriatim*, and the enormous procedural inefficiency in proceeding in that manner.

98. It follows that the Respondent's request for an authorization — « si elle le souhaite » — to file a second bifurcation request in 30 days following the rejection of its first bifurcation request or the rejection of its preliminary objections, is untenable both in law and in fact and must be rejected.

IV. THERE ARE NO GROUNDS FOR THE TEMPORARY SUSPENSION OF THE PROCEDURAL CALENDAR AND/OR GRANTING THE RESPONDENT ANY EXTENSION OF TIME

99. The Respondent's final request that the Tribunal temporarily suspend the proceedings to rule on this Request, and accordingly extend the time for the Respondent to file any bifurcation request on a preliminary objection, is equally flawed and unfounded.

100. As a matter of due process, the procedural calendar set by the Tribunal in Procedural Order No. 1 must be followed, subject only to compelling reasons that justify reasonable adjustments or modifications in accordance with the ICSID Arbitration Rules.

101. The Respondent cannot subvert the procedural calendar established by the Tribunal by now filing a request for the suspension of the proceedings on the basis of unrelated proceedings, of which it has been fully aware for nearly a year. Indeed, as early as January 2023, the Respondent knew that in the matter of *TC Energy*, the United States had made a request for bifurcation on the basis of an objection to the Tribunal's jurisdiction *ratione temporis*. The Respondent was also aware of the *TC Energy* tribunal's decision on bifurcation by mid-April 2023.[94] Moreover, the Respondent had been invited to make its NAFTA Article 1128 submissions in the *Legacy Vulcan* ancillary claims proceedings by 2 June 2023 (it failed to do so).[95] The Respondent has of course also been in possession of the Claimant's Notice of Intent to Submit a Claim to Arbitration since October 2022, took part in consultations in January 2023, and had the Claimant's Request for Arbitration in February 2023.

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94 *See* Case Details in *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, available at <https://www.italaw.com/cases/9339> (accessed 28 December 2023), **CL-0161**.

95 *Legacy Vulcan, LLC v. United Mexican States* (ICSID Case No. ARB/19/1), Revised Procedural Calendar for Ancillary Claim (13 April 2023), **CL-0156**.

102. Despite all this, at no point during the first procedural conference in August 2023 did the Respondent suggest that the Arbitral Tribunal should "suspend" the proceedings on the basis of the alleged relevance of other proceedings to the present arbitration, even were it in any way appropriate to do so (it is not).

103. The Respondent instead waited until the Claimant had filed its full Memorial, and only now, in the midst of the end of year holidays, and in the face of its obligation to take a position on jurisdiction by 5 January 2024, it seeks to overturn the procedural calendar, in a bid to grant itself substantial additional time to either formulate objections or in any event to consider its response on the merits to the Claimant's case. The Respondent's conduct is abusive and cannot be supported.

104. The Respondent has confirmed it already has formulated a preliminary objection (on grounds other than the *ratione temporis* issue it studiously avoids), and intends to file a request for bifurcation on that basis.[96] If that is so, it should proceed as laid down in the procedural calendar. Suspending that calendar to address the Respondent's ill-founded Request certainly generates no "efficiency" for both parties. Everything in the Respondent's behaviour is worthy of censure and should not be rewarded, even with the briefest extension of time.

105. For these reasons, this aspect of the Respondent's Request must also be rejected.

V. CONCLUSIONS

106. For these reasons, the Claimant respectfully requests that the Tribunal issue an order:

1) Rejecting the Respondent's request for suspension of the proceedings (if necessary and in the interests of time, with reasons to follow);
2) Confirming the Respondent's obligation to file any request for bifurcation on a preliminary issue in accordance with the procedural calendar established in Procedural Order No. 1 and Rule 44(1)(a)(i) of the ICSID Arbitration Rules (2022), *i.e.* within 45 days after the filing of the Claimant's Memorial;
3) Rejecting the Respondent's request for the temporary suspension of the procedural calendar in light of the present Request; and
4) In light of the manifestly abusive nature of the Respondent's Request, both with regard to the timing of its filing and its content, immediately finding costs in favour of the Claimant in respect of the present procedural exchange, in an amount to be determined in due course.

[96] Respondent's Request, para. 23.

107. The Claimant expressly confirms that its submissions here, focused on responding to the present Request, do not constitute its full submission on the substantive issue of temporal application of Annex 14-C of the USMCA (should that question be put in issue in these proceedings). The Claimant expressly reserves its right to make such full submissions if required, including in light of the Respondent's conduct, notably as manifested in its failure to take any position on this same issue to the present date.

Dated: 28 December 2023

London, UK

All of which is respectfully submitted,

Christophe Bondy

Steptoe International (UK) LLP