

IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE ICSID
ARBITRATION RULES BETWEEN

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

Claimants

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE No. ARB/21/63

**REQUEST FOR BIFURCATION OF
RESPONDENT UNITED STATES OF AMERICA**

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1. In accordance with the Tribunal’s Procedural Order No. 1 of December 12, 2022, the United States hereby submits its request for bifurcation of these proceedings.

I. Introduction

2. In their Request for Arbitration, Claimants allege that the United States breached Articles 1102, 1103, 1105, and 1110 of the North American Free Trade Agreement (“NAFTA”) when, on January 20, 2021—more than six months after the NAFTA was terminated and superseded by the United States-Mexico-Canada Agreement (“USMCA”)—President Biden revoked the March 2019 permit (the “Permit”) granted to Claimants by his predecessor.¹ The Permit authorized Claimants “to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Phillips County, Montana, for the import of oil from Canada to the United States.”² That authorization was subject to a number of express conditions, including that the Permit “may be terminated, revoked, or amended at any time at the sole discretion of the President of the United States”³

3. Claimants contend that Annex 14-C of the USMCA (the “Legacy Investment Claims Annex”) permits them to submit their claims to arbitration. But the Legacy Investment Claims

¹ Request for Arbitration, ¶ 1 (“The U.S. decision to revoke the permit was unfair and inequitable, discriminatory, expropriatory, and violated U.S. obligations under Chapter 11 of the North American Free Trade Agreement.”); *id.*, ¶ 18 (“Claimants’ claims against the United States arise out of the January 20, 2021, revocation of the Presidential permit to construct the KXL Pipeline, which was granted to TransCanada Keystone Pipeline, L.P. (“Keystone”) on March 29, 2019.”); *id.*, ¶ 26 (“On January 20, 2021, the same day he was sworn in as President of the United States, President Biden issued EO 13990, Section 6 of which revoked the 2019 Presidential Permit. The U.S. Government’s decision to revoke the 2019 Permit breached U.S. obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation) of NAFTA 1994.”); *id.*, ¶ 68 (“Claimants’ claims are based on the arbitrary, discriminatory, expropriatory, and damaging U.S. decision to revoke the 2019 Permit”); *id.*, ¶ 79 (“Claimants’ claims arise out of the January 20, 2021 revocation of the March 29, 2019 Presidential Permit to construct the KXL Pipeline.”). *See also*, Notice of Intent, ¶¶ 1, 14-15, 65.

² Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 84 Fed. Reg. 13101 (Mar. 29, 2019) (C-010).

³ *Id.*, Art. 1(1).

Annex only allows claims for breaches of the NAFTA. President Biden's revocation of the Permit, which is the sole basis for Claimants' claims, could not have breached the NAFTA because it occurred when the NAFTA was no longer in force.

4. Claimants' claims are therefore outside the scope of the Legacy Investment Claims Annex and of the United States' consent to arbitrate and should be dismissed.

5. In accordance with Article 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Arbitration Rules (2006), the United States respectfully requests that the Tribunal rule on this objection to its jurisdiction as a preliminary question, separate from the merits of the dispute.

6. Bifurcation in this case is not only permitted by the applicable arbitration rules, but is also supported by reasons of economy, efficiency, and fairness. The United States' jurisdictional objection is based on a straightforward application of the NAFTA and the USMCA. Ruling on this objection would not require the Tribunal to touch on the merits of the dispute. Moreover, if sustained, this objection will eliminate Claimants' entire claim. Bifurcation would therefore save significant time and expense by avoiding the need to plead the merits and adjudicate issues of liability and quantum. The United States thus respectfully requests that the Tribunal bifurcate the proceedings and adopt the pleading schedule set out in Track B.1 of Annex B to the Tribunal's First Procedural Order.

II. The Governing Arbitration Rules and Arbitration Practice Support Bifurcation in This Case

7. The ICSID Convention allows the Tribunal to address jurisdictional issues as a preliminary question, separate from the merits of the dispute. Article 41(2) of the ICSID Convention states:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal

which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

8. Article 41(2) of the ICSID Convention is supplemented by Rule 41(3) of the ICSID Arbitration Rules, which adds:

Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

9. Bifurcation is “standard procedure” in ICSID arbitration.⁴ In exercising their discretion to bifurcate proceedings into a separate juridical phase and suspend proceedings on the merits, ICSID tribunals have analyzed three factors: (i) whether the objection is substantial or frivolous; (ii) whether jurisdiction and merits are so intertwined as to make bifurcation impractical; and (iii) whether the objection, if successful, would materially reduce time and costs.⁵ Such analysis

⁴ CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 537 (2nd ed. 2009) (“SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*”) (“In the practice of ICSID tribunals, treatment of jurisdictional issues as preliminary questions is standard procedure.”) (RL-001); Baiju Vasani and Sarah Vasani, *Bifurcation of Investment Disputes*, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES* ¶ 12.03 (Katia Yannaca-Small ed., 2nd ed. 2018) (RL-002) (“It is usual practice in the conduct of ICSID proceedings for jurisdictional objections to be treated as preliminary questions.”); Andrea Carlevaris, *Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures*, in *LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER’S GUIDE* 173, 186 (Chiara Giorgetti ed., 2014) (RL-003) (noting that “it is still common practice for ICSID tribunals to treat jurisdictional objections as preliminary questions, and to suspend the proceedings on the merits pending a decision on jurisdiction”).

⁵ See “Bifurcation – ICSID Convention Arbitration (2006 Rules)” (RL-004) available at <https://icsid.worldbank.org/procedures/arbitration/convention/process/bifurcation/2006> (“The Tribunal has discretion to bifurcate jurisdictional issues (Article 41(2) of the ICSID Convention). ... The Tribunal may consider factors such as: the merit of the objection; whether bifurcation would materially reduce time and costs; and whether jurisdiction and merits are so intertwined as to make bifurcation impractical.”). See also *RWE AG and RWE Eemshaven Holding II BV v. The Netherlands*, ICSID Case No. ARB/21/4, Procedural Order No. 2 – Decision on Bifurcation, ¶ 44 (Feb. 25, 2022) (RL-005) (“*RWE et al. v. Netherlands* (Bifurcation)”); *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent’s Application for Bifurcation, ¶¶ 37(2), 41, 47-56 (June 13, 2013) (RL-006); *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 – Decision on Respondent’s Request for Bifurcation, ¶ 100 (Dec. 14, 2017) (RL-007); and *Tulip Real Estate Investment and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent’s Request for Bifurcation under Article 41(2) of the ICSID Convention, ¶¶ 30-31 (Nov. 2, 2012) (RL-008).

has also been driven by overarching considerations of procedural fairness and efficiency.⁶ All of these factors weigh in favor of granting the U.S. request for bifurcation.

III. Bifurcation is Appropriate in This Arbitration

10. As discussed in the sections that follow, (A) the United States' jurisdictional objection is substantial; (B) it is entirely distinct from the merits; and (C) if successful, the objection will materially reduce time and costs as it would eliminate the entirety of Claimants' claims.

A. The United States' Objection is Substantial

11. A State's consent to arbitration is paramount.⁷ Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,⁸ it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.⁹ The United States objects

⁶ *RWE et al. v. Netherlands* (Bifurcation), ¶ 44 (RL-005) ("the analysis should be driven by the overarching considerations of procedural fairness and efficiency."); *Accession Mezzanine Capital L.P. et al. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, ¶ 38 (Aug. 8, 2013) (RL-009) ("the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved").

⁷ See, e.g., ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 74, ¶ 125 (1st ed. 2009) (RL-010) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *William Ralph Clayton et al. v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability, ¶ 229 (Mar. 17, 2015) (RL-011) ("General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors.").

⁸ As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 23 (Mar. 18, 1965) (RL-012).

⁹ *Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, ¶ 71 (July 15, 2016) (RL-013) ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). See also CHRISTOPH SCHREUER, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 831 (Peter Muchlinski et al., eds., 2008) (RL-014) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); BORZU SABAH ET AL., *INVESTOR-STATE ARBITRATION* 309, ¶ 9.01 (2nd ed. 2019) (RL-015) (explaining also that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

to the jurisdiction of the Tribunal on the basis that Claimants' claims are outside the scope of the Legacy Investment Claims Annex and of the United States' consent to arbitrate. The Tribunal therefore lacks jurisdiction to hear Claimants' claims and they should be dismissed.

12. Claimants' claims, as set out in the Request for Arbitration, are based exclusively on President Biden's revocation of the Permit, an event that occurred on January 20, 2021,¹⁰ and thus more than six months after the termination of the NAFTA. While Claimants have alleged that the revocation of the Permit breached various obligations set out in Section A of NAFTA Chapter 11, those obligations were no longer in force when the Permit revocation occurred. Claimants purport to rely on the Legacy Investment Claims Annex as a basis for the Tribunal's jurisdiction, but that Annex merely extends the United States' consent to arbitrate certain claims for breach of the NAFTA for a period of three years. Nothing in the Legacy Investment Claims Annex or elsewhere in the USMCA (or the NAFTA) provides that the United States shall continue to be bound by the NAFTA's substantive obligations after its termination. Accordingly, the Legacy Investment Claims Annex only permits the submission of claims based on breaches that allegedly occurred while the NAFTA was in force, not claims – like those that Claimants attempt to assert in these proceedings – based on alleged breaches occurring *after* the NAFTA's termination.

1) The United States ceased to be bound by the substantive obligations in Chapter 11 of the NAFTA after the USMCA entered into force

13. On July 1, 2020, the USMCA entered into force, terminating and superseding the NAFTA.¹¹ The default position in customary international law, reflected in Article 70(1)(a) of the

¹⁰ See *supra*, ¶ 2, n. 1.

¹¹ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada provides: "Upon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA." (R-0001). See Legacy Investment Claims Annex, ¶¶ 3, 5-6

Vienna Convention on the Law of Treaties, is that “[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty[.]”¹²

14. The NAFTA does not contain a survival provision obligating a party to continue abiding by its terms for some period post-termination. Thus, once the USMCA entered into force, the United States (and the other NAFTA Parties) ceased to be bound by the substantive obligations in Chapter 11 of the NAFTA.

15. Accordingly, the obligations in NAFTA Chapter 11 ceased to bind the Parties on July 1, 2020.

2) The USMCA does not extend the application of the substantive obligations in Chapter 11 of the NAFTA

16. The Legacy Investment Claims Annex of the USMCA provides in relevant part:

1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

- (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
- (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
- (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.

(discussing the “termination of NAFTA 1994”) (C-0002). See also Request for Arbitration, ¶ 74 (“USMCA entered into force, and NAFTA 1994 terminated, on July 1, 2020.”).

¹² Article 70(1)(a) of the Vienna Convention on the Law of Treaties (1969) (RL-016). Although the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is an “authoritative guide” to treaty law and practice. See Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971), S. Ex. L. 92d Cong., 1st Sess., reprinted in 65 DEP’T ST. BULL. No. 1694, at 684, 685 (Dec. 13, 1971) (RL-031).

2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of: [the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute, the New York Convention for an agreement in writing, and the Inter-American Convention for an agreement].

3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.

4. For greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3, and Article 1136 (Finality and Enforcement of an Award) of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.¹³

17. The Legacy Investment Claims Annex of the USMCA extends the NAFTA Parties' *consent* to arbitrate certain claims after the entry into force of the USMCA on July 1, 2020, but it does not extend the term of the substantive obligations of the NAFTA beyond that date. Paragraphs 1 and 2 of the Legacy Investment Claims Annex closely track the language of NAFTA Articles 1116/1117 and 1122 from Section B of Chapter 11, which establish the Parties' consent to the submission of certain claims to arbitration and the effect of such consent. Like the NAFTA itself, however, the Legacy Investment Claims Annex does not include any provision extending the application of the substantive obligations set out in Section A of Chapter 11 beyond the NAFTA's termination.

18. Indeed, the contrast between the language used in the Legacy Investment Claims Annex and the language found in a typical model investment treaty survival provision is telling. Whereas, for example, the 2012 U.S. Model Bilateral Investment Treaty's ("U.S. Model BIT") survival

¹³ Legacy Investment Claims Annex, ¶¶ 1-4 (C-0002) (footnotes omitted).

provision unambiguously extends the application of *all* of the treaty’s provisions for a specified post-termination period—stating that “[f]or ten years from the date of termination, *all other Articles shall continue to apply to covered investments* established or acquired prior to the date of termination”¹⁴—the Legacy Investment Claims Annex is framed exclusively in terms of the Parties’ consent to arbitration. The Parties give their consent to arbitrate legacy claims in Paragraph 1, they explain the effect of such consent in Paragraph 2, they provide for the expiration of such consent after three years in Paragraph 3, and they clarify in Paragraph 4 that the expiration of such consent will not affect ongoing arbitrations.¹⁵

19. The three-year period covered by the Legacy Investment Claims Annex in Paragraph 3 matches the limitations period set out in NAFTA Articles 1116(2) and 1117(2), which provide that an investor may not make a claim “if more than *three years* have elapsed from the date on which the [investor/enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage.”¹⁶ Extending the Parties’ consent to arbitration by three years in the Legacy Investment Claims Annex ensures that

¹⁴ 2012 U.S. Model BIT, art. 22(3) (“For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.”) (**RL-017**) (emphasis added). *See also* 2004 U.S. Model BIT, art. 22(3) (**RL-018**) (same); 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) (**RL-019**) (“In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years.”); 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) (**RL-020**) (“In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years.”); 2004 Canada Model Agreement for the Promotion and Protection of Investments, art. 52(3) (**RL-021**) (“In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years.”); 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) (**RL-022**) (“This Agreement shall continue to be effective for a period of ten years from the date of termination only with respect to investments made prior to such date.”).

¹⁵ Legacy Investment Claims Annex, ¶¶ 1-4 (**C-0002**).

¹⁶ NAFTA arts. 1116(2) and 1117(2) (**C-0001**) (emphasis added).

investors who have claims based on pre-termination breaches will enjoy the full period allotted to them under the NAFTA to bring those claims, even if they accrued immediately before the NAFTA's termination (*i.e.*, on June 30, 2020).

20. In sum, the terms of the Legacy Investment Claims Annex of the USMCA serve only to extend the consent of the NAFTA Parties to arbitrate claims that arose prior to the NAFTA's termination (and to continue adjudication of pending claims). The Annex does not extend the application of the substantive obligations of the NAFTA Chapter 11.

3) Conduct postdating NAFTA's termination cannot breach the substantive obligations in NAFTA Chapter 11

21. The revocation of the Permit on January 20, 2021, more than six months *after* the termination of the NAFTA, cannot constitute a breach of the substantive obligations in NAFTA Chapter 11 because the United States was no longer bound by such obligations when it occurred.

22. As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts:

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.¹⁷

23. In January 2021, when President Biden revoked the Permit, the United States was no longer bound by the obligations in Chapter 11 of the NAFTA. President Biden's 2021 revocation of the Permit cannot, therefore, constitute a breach of the NAFTA. And while the United States was bound by the obligations in Chapter 14 of the USMCA at the relevant time, it has not consented to

¹⁷ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)) (RL-023).

arbitrate claims by Canadian investors like Claimants based on an alleged breach of those obligations, nor have Claimants asserted such a breach.

24. In conclusion, Claimants' claims must fail because they are outside the scope of the Legacy Investment Claims Annex and the Tribunal therefore lacks jurisdiction over them. The United States' objection is therefore manifestly substantial and weighs considerably in favor of bifurcation.

B. The United States' Objection is Distinct From its Merits Arguments

25. The United States' jurisdictional objection is based on a straightforward application of the NAFTA and the USMCA and is separate and entirely distinct from the merits.¹⁸ The jurisdictional objection does not require that the Tribunal analyze any factual evidence concerning Claimants' alleged breaches. In fact, there is no relevant overlap between the jurisdictional question of whether Claimants' claims fall within the scope of the Legacy Investment Claims Annex and the merits question of whether the revocation of the Permit violated the United States' obligations under NAFTA Articles 1102, 1103, 1105, and 1110.

26. In sum, the objection is not so intertwined with the merits as to make bifurcation impractical; rather, the obverse is true.

¹⁸ See, e.g., *Carlos Sastre et al. v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 – Decision on Bifurcation, ¶ 58 (Aug. 13, 2020) (**RL-024**) (finding that Mexico's objection could be examined without prejudging or entering the merits of the case because such objection "is a matter of interpretation of the applicable law" that "is not intertwined with the merits of the case"); *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Procedural Order No. 4 – Decision on Bifurcation, ¶¶ 4.18-4.19 (Nov. 18, 2016) (**RL-025**) (deciding to bifurcate and noting that the preliminary objection "will involve a distinct and relatively straightforward question of treaty interpretation" that "will involve no prejudgment of the merits" and that "[i]f successful, the objection would dispose of an essential part of the claim").

C. The United States' Objection Will Dispose of Claimants' Entire Case

27. The request for bifurcation should also be granted because, if successful, the United States' objection will necessarily eliminate Claimants' entire case.¹⁹ This objection thus would obviate the need for further briefing and proceedings on the merits. It would be “a waste of time and money for an arbitral tribunal to have conducted an arbitration from beginning to end if its award then proves to be invalid for lack of jurisdiction.”²⁰ The better course, therefore, is to “hear arguments on the issue of jurisdiction as a preliminary matter and render an interim award on the point”, which “enables the parties to know where they stand at a relatively early stage.”²¹ Moreover, “ICSID tribunals have routinely suspended proceedings on the merits upon receipt of an objection to jurisdiction.”²²

28. In sum, bifurcation of the United States' objection, if successful, will materially reduce both time and costs for the parties and the Tribunal. Bifurcation is not only consistent with the governing arbitration rules but is the most fair, efficient, and economical way to proceed in this matter.

¹⁹ *Carlyle Group L.P. et al. v. Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4 – Decision on Bifurcation, ¶ 68 (Jan. 20, 2020) (**RL-026**) (deciding to bifurcate because bifurcation “will enhance procedural efficiency” and if the jurisdictional objection were to be accepted, “it would lead to a complete dismissal of Claimants' claims”); *Raymond Charles Eyre and Montrose Development Ltd. v. Sri Lanka*, ICSID Case No. ARB/16/25, Procedural Order No. 2 – Decision on Bifurcation, ¶¶ 27-28 (Feb. 21, 2018) (**RL-027**) (finding that bifurcation is warranted, *inter alia*, because the jurisdictional objections, if accepted, “could lead to dismissal of the entire case or a substantial part of the case”, which would “promote procedural efficiency”).

²⁰ Sigvard Jarvin and Alexander G. Leventhal, *Objections to Jurisdiction*, in *THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* 507, 512-513 (Lawrence W. Newman & Richard D. Hill eds., 3rd ed. 2014) (**RL-028**).

²¹ *Id.* at 513.

²² SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 534 (**RL-001**). See e.g., *Bay View Group LLC and the Spalena Company LLC v. Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 2 on Bifurcation, ¶ 48(e) (Jun. 28, 2019) (**RL-029**) (suspending the proceeding on the merits pending the outcome of the preliminary objections that are to be determined as a preliminary question); *Inceysa Vallisoletana, S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award, ¶ 13 (Aug. 2, 2006) (**RL-030**) (noting that given the objections to jurisdiction, the tribunal suspended the proceeding on the merits pursuant to Rule 41(3) of the Arbitration Rules).

IV. Conclusion

29. For the foregoing reasons, the United States respectfully requests that the Tribunal bifurcate the proceedings, suspend proceedings on the merits, and decide the United States' jurisdictional objection as a preliminary matter.²³

Respectfully submitted,



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²³ The United States' request to bifurcate on the basis that Claimants' claims are outside the scope of the Legacy Investment Claims Annex and of the United States' consent to arbitrate is without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.