INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

TC Energy Corporation and TransCanada Pipelines Limited

v.

United States of America

(ICSID Case No. ARB/21/63)

PROCEDURAL ORDER NO. 2

Members of the Tribunal
Mr. Alexis Mourre, President of the Tribunal
Mr. Henri C. Alvarez, Arbitrator
Prof. John R. Crook, Arbitrator

Secretary of the Tribunal
Mr. Gonzalo Flores

Assistant to the Tribunal
Ms. Valentine Chessa

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13 April 2023

I. Procedural Background

1. In accordance with Procedural Order No. 1 dated 12 December 2022:

    a. On 12 January 2023, the Respondent submitted its request for bifurcation ("**Request**");

    b. On 10 February 2023, the Claimants filed their observations on the Request for Bifurcation (the "**Observations**");

    c. On 2 March 2023, the Respondent filed its reply to the Observations (the "**Reply**");

    d. On 22 March 2023, the Claimants filed their rejoinder regarding Respondent's Request for Bifurcation (the "**Rejoinder**").

II. Parties' positions

A. The Respondent's position

2. The Respondent submits that the Tribunal has discretion to decide whether to bifurcate pursuant to the governing arbitration rules and arbitration practice.[1] On that basis, ICSID tribunals "routinely" suspend proceedings on the merits upon receipt of an objection on jurisdiction.[2]

3. As to the applicable standards, the Respondent submits that the Tribunal should be guided by considerations of procedural fairness and efficiency as well as by the following three standards: (i) whether the objection is substantial or frivolous; (ii) whether the objection, if successful, would materially reduce time and costs; and (iii) whether jurisdiction and merits are so intertwined as to make bifurcation impractical.[3]

4. In the instant case, bifurcation is appropriate for the following reasons:

    a. In January 2021, when President Biden revoked the Claimants' 2019 permit to construct, connect, operate, and maintain the cross-border segment of the KXL Pipeline ("**2019 Permit**"), the United States was no longer bound by the obligations of Chapter 11 of the North America Free Trade Agreement ("**NAFTA**"). Nothing in the United States-Mexico-Canada Agreement that replaced NAFTA on 1 July 2020 ("**USMCA**") or in NAFTA provide that the United States shall continue to be bound by NAFTA's substantive obligations after its termination. Annex 14-C of the USMCA ("**Annex 14-C**") only allows the submission of claims based on breaches that allegedly occurred while NAFTA was in force, and not of claims based on alleged breaches occurred after NAFTA's termination. The purpose of the Annex is solely to extend the consent of the NAFTA parties to arbitrate claims that arose prior to the NAFTA's termination.[4]

    b. The Protocol Replacing NAFTA with the USMCA ("**USMCA Protocol**") and

[1] Request, paras. 7-9.
[2] Request, paras. 27.
[3] Reply, para. 6.
[4] Request, paras. 12-24.

Annex 14-C are both clear that NAFTA was terminated upon the USMCA's entry into force.[5]

c. The Respondent's jurisdictional objection rests on two uncontroversial principles of customary international law. The first, set out in Article 70 of the Vienna Convention on the Law of Treaties ("**Vienna Convention**"), is that a treaty's termination releases the parties from any obligation to further perform the treaty.[6] If the parties intend to derogate from that principle, that intention should be clear from the ordinary meaning of the treaty. The second is that 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.[7] The combined effect of these two principles, neither of which is disputed by Claimants, is that President Biden's revocation of the 2019 Permit on 20 January 2021 – more than six months after NAFTA's termination – cannot constitute a breach of NAFTA and cannot, therefore, be submitted to arbitration under Annex 14-C.[6]

d. Neither NAFTA nor USMCA have a sunset clause. The U.S. Model Bilateral Investment Treaty ("**BIT**") achieves post-termination survival in a single clear sentence that was deliberately not used in the USMCA.[7] Unlike NAFTA, the legacy BITs in Claimants' examples included a specific survival clause. In two examples given by the Claimants, the subsequent free trade agreement did not terminate the legacy BIT.[8]

e. The Protocol does not speak of the ongoing "applicability" of NAFTA provisions.[9] The fact that Claimants never had a right or ability under NAFTA to submit claims based on alleged breaches of NAFTA occurring when NAFTA was no longer in force does not constitute an "abrupt termination" of any right or ability otherwise belonging to Claimants. It is rather the default assumption under international law, which is wholly consistent with "good governance" and the "rule of law", for the obligations detailed in a treaty to cease being binding upon that treaty's termination.[10] This is also consistent with the three-year limitation period provided in NAFTA Articles 1116 and 1117. The purpose of these provisions was to avoid an abrupt termination by allowing an investor to make a claim within three years from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor had incurred loss or damage.[11]

f. Footnote 20 in Annex 14-C is an acknowledgement "for greater certainty" that NAFTA applies to claims based on breaches that occurred when NAFTA was in force. It refers solely to applying the NAFTA's provisions to "a claim" – not to investments or investors, as would be necessary if the parties intended for NAFTA's substantive investment obligations to survive post-termination. It strains credulity to suggest that the parties meant to agree to a wholesale extension of substantial parts of NAFTA for three additional years in a footnote.[12]

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[5] Reply, para. 36.
[6] Reply, para. 10.
[7] Reply, paras. 22-24.
[8] Reply, paras. 26-28.
[9] Reply, para. 16.
[10] Reply, para. 36.
[11] Reply, para. 36.
[12] Reply, paras. 17-18.

g. Regarding footnote 21 of Annex 14-C, it has *effet utile* as it addresses a specific class of potential claimants, namely those who may have a claim under both Annex 14-C and Annex 14-E, including, for example, claimants alleging a continuing breach.[13]

h. Finally, the various statements by government officials relied upon by the Claimants do not say that a holder of a legacy investment is entitled to assert a claim under Annex 14-C based on an alleged breach of NAFTA occurring after its termination.[14]

5. The Respondent submits therefore that the jurisdictional objection is substantial and, because it does not require that the Tribunal analyze any factual evidence concerning Claimants' alleged breaches,[15] bifurcation would materially reduce both time and costs for the parties and the Tribunal, avoiding the need to plead the merits and adjudicate issues of liability and quantum.[16]

B. The Claimants' position

6. The Claimants submit that Annex 14-C provides that, for a transition period of three years after the date on which USMCA replaced NAFTA, claimants holding legacy investments may bring claims alleging a breach of Section A of Chapter 11 of NAFTA using the procedures set forth in Section B of Chapter 11 of NAFTA.[17]

7. The Claimants' claims are within the scope of Annex 14-C because:

a. Claimants own legacy investments in connection with the Keystone XL Pipeline;
b. U.S. President Biden's revocation of the 2019 Permit breached U.S. obligations under Section A of Chapter 11 of NAFTA;
c. In filing their Request for Arbitration, Claimants followed the procedures set forth in Section B of Chapter 11 of NAFTA;
d. The Claimants filed the Request for Arbitration on 22 November 2021, *i.e.*, before the expiration of the transition period (1 July 2023).[18]

8. As to the applicable standard, arbitral tribunals have discretion to apply whatever criteria they deem relevant to determine whether to bifurcate a preliminary objection, and there is no presumption in favor of bifurcation. The burden of proving that bifurcation is appropriate lies on the Respondent as it is not for the Claimants to prove compelling reasons to rebut a presumption of bifurcation.[19]

9. The Claimants refer to the three cumulative criteria outlined by the *Glamis Gold* tribunal[20] and to the concept of fairness that should guide the tribunal in its discretionary

[13] Reply, para. 31.
[14] Reply, para. 38.
[15] Request, paras. 25-26.
[16] Request, paras. 27-28.
[17] Observations, para. 2.
[18] Observations, para. 2.
[19] Observations, para. 10.
[20] Exhibit CL-16 "*Considerations relevant to this analysis [of whether to hear an objection in a bifurcated proceeding] include, inter alia, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider*

assessment of the relevant standards.[21]

10. According to the Claimants, the Respondent's preliminary objection is not serious and substantial for the following reasons:

    a. Respondent should have raised its objection at an earlier stage of the proceeding and the fact that Respondent waited so long shows that the objection is not seriously held.[22]

    b. Pursuant to Article 31 of the Vienna Convention, the overarching objective when interpreting treaties is to ensure that they are interpreted in good faith to reflect the intention of the parties.[23] However, none of the statements intended to inform the public by the USMCA parties[24] as well as by the U.S. negotiator[25] indicate that the protection afforded by Annex 14-C would be limited to measures pre-dating the entry into force of the USMCA.[26]

    c. The ordinary meaning of Annex 14-C is that claimants holding legacy investments may bring claims in relation to measures taken during the transition period because:

        i. The title of Annex 14-C refers to "*legacy investment claims*" *i.e.*, claims related to legacy investments. Annex 14-C thus permits claims – and the parties' consent applies – with respect to legacy investments, *i.e.*, to investments that were established or acquired while NAFTA was in force and that were in existence when the USMCA entered into force. There is nothing in the text of Annex 14-C that provides that investors holding legacy investments may submit claims only with respect to measures taken prior to the time when USMCA replaced NAFTA.[27]

        ii. The Respondent does not deny that, through paragraphs 1 and 3 of Annex 14-C, the USMCA parties consented to arbitrate alleged breaches of the Section A obligations for three years. The Section A obligations must, therefore, remain in force during that period, unless there is something in the text saying otherwise. In other words, the Respondent seeks to read into Annex 14-C a temporal limitation that is not there.[28]

        iii. The Respondent does not contest that the Claimants' claims comply with the terms of paragraphs 1 and 3 of Annex 14-C,[29] which state only four conditions for bringing a claim:

            - The claim must be "with respect to a legacy investment";
            - The claim must allege a breach of an obligation under Section A of

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whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost."

[21] Observations, paras. 11-12.
[22] Observations, paras. 6-7.
[23] Observations, paras. 15-19.
[24] Exhibits C-87, C-91, C-93, C-97, C-103, C-104, C-105.
[25] Exhibits C-100, C-101, C-102.
[26] Observations, Annex; Rejoinder, para. 19.
[27] Observations, para. 24.
[28] Rejoinder, para. 26.
[29] Rejoinder, para. 25.

Chapter 11 of NAFTA;
- The claim must be submitted "in accordance with Section B of Chapter 11 (Investment) of NAFTA";
- The claim must be brought during the transition period.[30]

iv. The comparison with other trade agreements that the USMCA parties have entered into shows that the parties knew how to impose a temporal limitation on measures that could be challenged if they had wanted to do so.[31]

d. The USMCA Protocol[32] confirms that paragraphs 1 and 3 of Annex 14-C extend to Section A obligations for the transition period.[33] In particular, paragraph 1 of the USMCA Protocol[34] shows that, when provisions of USMCA refer to provisions of NAFTA, as in Annex 14-C, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA.[35]

e. Footnote 20 of Annex 14-C refers to the application of Section A obligations with respect to claims asserted under paragraph 1 of Annex 14-C. It is not a "wholesale extension" but rather a clear reference to the fact that, for three years after the entry into force of USMCA, investors holding legacy investments may submit claims for breaches of some of the Section A obligations.[36]

f. The relationship between Annexes 14-C, 14-D, and 14-E of the USMCA shows that Annex 14-C allows claimants holding legacy investments to bring claims in connection with measures taken during the transition period. In particular:

- Annex 14-C allows challenge to measures taken before and during the transition period, except for (per footnote 21 of Chapter 14) investors that are "*eligible to submit claims to arbitration under paragraph 2 of Annex 14- E*".
- Annex 14-D, which is applicable in certain disputes involving investors from Mexico or the United States, allows challenge to measures taken only after USMCA replaced NAFTA.
- Annex 14-E, which is applicable in certain other disputes involving investors from Mexico or the United States, allows challenge to measures taken only after USMCA replaced NAFTA.
- Footnote 21 makes sense only if both Annex 14-C and Annex 14-E overlap and apply to measures that post-date the entry into force of the USMCA. Given that Annex 14-E applies only to measures that post-date the replacement of NAFTA by USMCA, Annex 14-C and Annex 14-E can overlap only if they both apply to measures that post-date the replacement of NAFTA by USMCA.[37] In this respect, Respondent misapplies the concept of continuing breach, which could only be possible if Section A obligations remained in force

[30] Observations, para. 23.
[31] Observations, para. 24, Rejoinder, paras. 49-59.
[32] Exhibit R-1.
[33] Rejoinder, para. 27.
[34] "*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*."
[35] Observations, para. 27.
[36] Observations, para. 28, Rejoinder, para. 32.
[37] Observations, paras. 29-32.

during the transition period.[38]

g. The Respondent's interpretation of Annex 14-C would not promote a "*clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment.*"[39] Upholding Respondent's objection would in fact condone Respondent's "bait and switch" behavior of inducing Claimants to terminate their earlier NAFTA claims by promising a Presidential permit, then breaching that understanding by revoking the 2019 Permit at a time when (according to Respondent's erroneous interpretation) Claimants had no legal recourse.[40]

h. The Respondent's assertion that the transition period was intended to align with the three years limitation period in Articles 1116(2) and 1117(2) of NAFTA is false. There is often no relationship in BITs between limitation periods and transition periods.[41] Contrary to Articles 1116(2) and 1117(2) of NAFTA, Annex 14-C refers only to a breach of Section A of Chapter 11 of NAFTA and says nothing about the investor's knowledge of the damage arising out of a breach. In case of breach of Section A of Chapter 11 of NAFTA before the replacement of NAFTA and if the investor did not acquire knowledge of damage arising from the breach until after the replacement of NAFTA, the three year transition period specified in Annex 14-C would expire before the end of the limitations period and the investor would not enjoy the full period allotted to it under NAFTA to bring those claims.[42]

11. In addition, the jurisdictional objection is intertwined with the merits of Claimants' claims as the Tribunal would need to assess, *inter alia*, the nature of Respondent's commitments under the 23 March 2017 Termination Agreement and Release of NAFTA Claims ("**Termination Agreement**"), the continuing legal effects of that commitment, and the relationship of that commitment to Respondent's obligations under NAFTA and USMCA. It would then need to assess whether those events and actions of Respondent left Respondent's hands unclean, foreclosing the arguments that it advances now, or whether Respondent is otherwise estopped from raising its objection given its course of abusive conduct and prior representations.[43]

12. In this respect, the Claimants highlight that Respondent's denial of Keystone's applications for a Presidential permit, Respondent's subsequent invitation to Claimants to reapply for the Presidential permit, its inducement to Claimants to terminate their previous claims under NAFTA as a condition to obtain the permit, and its issuance of the 2019 Permit, took place when NAFTA was in force. From the time of the Termination Agreement forward, Claimants acted with the understanding that Respondent had committed to issuing and maintaining the 2019 Permit. Claimants legitimately expected that the United States would not reverse its position and subsequently revoke the 2019 Permit on the same grounds that gave rise to the 2016 NAFTA arbitration.[44] Claimants have been subjected to Respondent's unfair treatment for fifteen years and Respondent's actions were specifically designed to induce them to drop their legal claims based on a promise that proved false. Hence, Claimants relied on

[38] Rejoinder, paras. 38-42.
[39] Exhibit C-2.
[40] Observations, paras. 36-40.
[41] Rejoinder, paras. 30-31.
[42] Observations, paras. 41-43.
[43] Observations, para 57.
[44] Observations, paras. 44-57.

a promise that was intended to resolve Claimants' claims under NAFTA.[45]

III. Discussion

13. At the outset, the Arbitral Tribunal emphasizes that this decision on bifurcation is procedural in nature and does not pre-judge in any way its future decision as to whether it has jurisdiction to adjudicate the claims made in this arbitration.

14. The Tribunal has carefully reviewed and considered all of the arguments presented by the parties on bifurcation. The fact that this order may not expressly reference all their arguments does not mean that such arguments have not been considered. The Arbitral Tribunal has only addressed the fact and legal arguments that it considers relevant for its decision.

15. The Arbitral Tribunal will first address the standards that should be applied to bifurcation (**A**), to then assess whether bifurcation is appropriate (**B**).

A. Applicable standards

16. These proceedings have been introduced on 22 November 2021, when Claimants submitted their Request for Arbitration to ICSID. It is undisputed that the ICSID Arbitration Rules that are applicable are those in force on that date (ICSID Arbitration Rules 2006).

17. It is also undisputed that the Arbitral Tribunal has, pursuant to Article 41 of the ICSID Convention and ICSID Arbitration Rule 41(4), the power to bifurcate the proceedings and to decide jurisdictional objections in a separate preliminary phase.

18. It is finally undisputed that the standards to be applied to decide whether bifurcation is appropriate are those identified by the *Glamis Gold*[46] tribunal, *i.e.*, whether the jurisdictional objection is *prima facie* substantial, whether it is so intertwined with the merits that it would be impractical to bifurcate, and whether bifurcating it would result in a more efficient arbitration.

19. The Arbitral Tribunal notes that the *Glamis Gold* standards have been partially incorporated in Rule 44(2) of the ICSID Arbitration Rules in force as from 1 July 2022, as follows:

> "*In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:*
>
> *(a) bifurcation would materially reduce the time and cost of the proceeding;*
>
> *(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and*
>
> *(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical*".

20. The Tribunal considers, as provided by the new Rule 44(2), that for bifurcation to be ordered, whether the jurisdictional objection is such as to put an end to all or a substantial

[45] Rejoinder, paras. 62-66.
[46] Exhibit CL-16.

part of the dispute should be weighed. There is however no dispute as to that last condition, for the parties agree that, should the Arbitral Tribunal accept the Respondent's jurisdictional objection, the dispute would come to an end.

21. The *Glamis Gold* standards are guidelines, rather than mandatory conditions that need to be cumulatively met for bifurcation to be ordered.

22. The Arbitral Tribunal will address each of these conditions in turn. In doing so, the Arbitral Tribunal is mindful of the fact that bifurcation is essentially a procedural decision that it has discretion to make.

B. Decision

1. The jurisdictional objection is not *prima facie* frivolous

23. As said above, the Respondent's jurisdictional objection is premised on the alleged fact that the NAFTA obligations have not been extended beyond 1 July 2020, when NAFTA was terminated and replaced by USCMA. The Respondent relies in this respect on the undisputed fact that NAFTA does not contain a sunset clause, and on the alleged fact that the Protocol replacing NAFTA by USCMA and its Annexes do not contain language extending these obligations beyond that date.

24. Rather, in Respondent's contention, Annex 14-C reflects the three-year time limitation contained in NAFTA[47] by allowing the submission of claims for three years after termination of NAFTA in respect of legacy investments, *i.e.*, investments established or acquired between 1 January 1994 and the date of termination of NAFTA. At no point does Annex 14-C make reference to the continued application of the NAFTA obligations beyond 1 July 2020. In this respect, the Respondent points to the U.S. Model BIT and other treaties where the State-parties' intention to extend treaty obligations beyond its termination is clearly expressed.[48]

25. The Claimants rely, in particular, on the fact that Annex 14-C provides for a three-year transition period during which the NAFTA obligations applicable to legacy investments are extended, which would be the only possible good faith interpretation satisfying Article 31 of the Vienna Convention.[49] The Claimants also rely on the fact that none of the statements intended to inform the public by USMCA parties[50] as well as by the U.S. negotiator[51] indicate that the protection afforded by Annex 14-C would be limited to measures pre-dating the entry into force of the USMCA.[52] This is confirmed, according to Claimants, by the comparison with other trade agreements that the USMCA parties have entered into, showing that the parties knew how to impose a temporal limitation and deliberately decided not to.[53] The Claimants further submit that the three-year period established by Article 3 of Annex 14-C does not reflect the NAFTA time limitation period, as a party acquiring knowledge of a measure pre-dating 1 July 2020 after that date would not enjoy three full years to make a claim.[54] Finally, the Claimants aver that footnote 21

[47] Reply, para. 36.
[48] Reply, paras. 22-24.
[49] Observations, paras. 15-19.
[50] Exhibits C-87, C-91, C-93, C-97, C-103, C-104, C-105.
[51] Exhibits C-100, C-101, C-102.
[52] Observations, Annex; Rejoinder, para. 19.
[53] Observations, para. 24, Rejoinder, paras. 49-59.
[54] Observations, paras. 41-43.

would be deprived of *effet utile* if Annex 14-C were to be interpreted as proposed by the Respondent.[55]

26. Without expressing any view as to whether it has or not jurisdiction to adjudicate the dispute, the Arbitral Tribunal is of the view that the Respondent's arguments are not *prima facie* frivolous. The Respondent raises a point of interpretation of Annex 14-C that has never until now been adjudicated and that is not apparently unreasonable. That said, and for the avoidance of doubt, the Arbitral Tribunal considers that the Claimants' arguments are equally not frivolous and expresses no view on the merits of the parties' positions.

27. The Arbitral Tribunal therefore concludes that none of the parties' arguments on its jurisdiction based on Annex 14-C – a question, again, that has never been addressed by any tribunal – is frivolous.

2. The jurisdictional objection is not intertwined with the merits

28. The requirement that the jurisdictional objection not be intertwined with the merits aims at avoiding the risk of a duplication of factual arguments and evidence in the jurisdiction and merits phase in case of a decision in favor of jurisdiction. To militate against bifurcation, it is therefore not only necessary that the jurisdictional objection needs to assess questions of fact – which may, as the case may be, require the hearing of witnesses – but also that these questions of fact be duplicative of questions and evidence that would need to be addressed in a possible merits phase.

29. The Arbitral Tribunal considers that the jurisdictional objection revolves primarily on a point of interpretation of the UMSCA annexes that is mainly premised on questions of public international law. The Arbitral Tribunal is of course mindful of the fact that the Claimants intend to submit that they relied on a promise that was intended to resolve Claimants' claims under NAFTA, and that this argument may involve factual considerations on the nature and timing of such representations. However, based on the parties' submissions so far, it is not clear whether, and if so to what extent, these factual arguments concerning representations would overlap with questions of merits that the Arbitral Tribunal would have to address in case it decided that it has jurisdiction.

30. As a consequence, the Arbitral Tribunal concludes that bifurcation would not likely entail a substantial risk of duplication of arguments or evidence.

3. Efficiency

31. Finally, the Arbitral Tribunal needs to assess whether a bifurcation would be efficient, which is to say whether it would result in a gain of time or in reduced costs. In order to assess gains of efficiency, it is necessary to compare the gains in time and costs that would result from bifurcation in the hypothesis of no-jurisdiction, with the added costs and time that would result from bifurcation in case the Tribunal decides that it has jurisdiction. Both scenarios have to be compared to the existing calendar in the case of no-bifurcation.

32. In the instant case, the non-bifurcated calendar contemplates a hearing in [redacted], which – assuming post-hearing briefs – would reasonably lead to an award by fall 2025. In case of bifurcation, a hearing in phase 1 would take place in [redacted], which – again assuming post-hearing briefs – would reasonably lead to a decision on jurisdiction by September 2024.

[55] Rejoinder, paras. 38-42.

33. Therefore, in a no-jurisdiction scenario, the saving in time would be approximately one year. Hence, the objection, if successful, would materially reduce time and costs. In the scenario in which the Tribunal upholds jurisdiction, there would be the need to establish a schedule for phase 2, which is unlikely to lead to a hearing on the merits [redacted], with the consequence that the final award would – assuming post-hearing briefs – not be made before the fall of 2026. That would be a delay of one year approximately compared to the non-bifurcated scenario. In sum, the gain of time resulting from bifurcation in case of no-jurisdiction would be more or less equivalent to the loss of time in the contrary scenario. As to costs, there is no evidence that the gain in costs in the former scenario would be significantly higher than the added costs in the latter scenario.

34. In sum, it does not appear that bifurcation would necessarily result in a more expeditious arbitration.

4. Conclusion

35. To conclude, the Arbitral Tribunal considers that, although it does not appear that bifurcation would necessarily result in a saving of time and costs in a no-jurisdiction scenario that would significantly exceed the added time and costs in the contrary scenario, other factors weigh in favor of bifurcation: the jurisdictional objection is *prima facie* serious (although the Claimants' arguments are equally so), and it seems to essentially rest on legal considerations. Further, any duplication of arguments and evidence that would have to be considered in a possible merits phase would appear to be limited.

36. As a result of this analysis, the Respondent's Application for Bifurcation is granted.

IV. Order

37. For the foregoing reasons, the Arbitral Tribunal:

(1) Grants the Respondent's request to bifurcate the jurisdictional objection;

(2) Decides that Procedural Calendar B shall apply;

(3) Reserves its decision on the costs of this application for a later stage of these proceedings.

On behalf of the Tribunal,

[Signed]

Mr. Alexis Mourre
President of the Tribunal