IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE UNCITRAL ARBITRATION RULES (1976) BETWEEN

ALBERTA PETROLEUM MARKETING COMMISSION

Claimant

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE NO. UNCT/23/4

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 18, 2023, the United States hereby submits its request for bifurcation of these proceedings.

I. Introduction

2. This Tribunal lacks jurisdiction over this case, and should hear the following U.S. jurisdictional objections preliminarily, enabling the dismissal of this arbitration before the merits are briefed in full.

3. First, the Tribunal lacks jurisdiction *ratione temporis*. The United States has not consented to arbitrate claims under the North American Free Trade Agreement ("NAFTA") that arose after the NAFTA's termination. Claimant alleges that the United States breached NAFTA on January 20, 2021—more than six months after the NAFTA was terminated and superseded by the United States-Mexico-Canada Agreement ("USMCA")—when President Biden revoked the March 2019 permit (the "Permit") for the Keystone XL project.[1] Despite the fact that the NAFTA was terminated prior to the time of the permit revocation, Claimant contends that Annex 14-C of the USMCA ("Annex 14-C") permits it to submit its claims to arbitration under the terminated treaty.[2] But Annex 14-C only allows claims for a "breach of an obligation" under the NAFTA, a phrase that the USMCA Parties, NAFTA tribunals, and international scholars all agree establishes a *ratione temporis* limitation on consent: it limits that consent to breaches that are alleged to have occurred when the NAFTA's obligations were in force.

[1] *Alberta Petroleum Marketing Commission v. United States of America*, NAFTA/ICSID Case No. UNCT/23/4, Claimant's Memorial ¶¶ 5-6, 153 (Apr. 16, 2024) ("Memorial"); *see also Alberta Petroleum Marketing Commission v. United States of America*, NAFTA/ICSID Case No. UNCT/23/4, Notice of Arbitration ¶¶ 17, 38-39 (Apr. 27, 2023) ("Notice of Arbitration").

[2] Memorial ¶ 201; *see also* Notice of Arbitration ¶¶ 1, 10.

4. Second, separate and apart from the *ratione temporis* limitation, the Tribunal also lacks jurisdiction *ratione materiae*. Claimant cannot demonstrate that it had an "investment" (as defined by NAFTA), particularly when the alleged breach occurred. First, Claimant has not established that any of its interests in the Keystone XL project constituted an "investment" as defined by USMCA Annex 14-C and NAFTA Article 1139. Second, Claimant concedes that it withdrew the purported equity portion of its alleged interest in the United States on January 8, 2021, two weeks before the alleged breach.[3] Claimant's only alleged role in the Keystone XL project thereafter was (1) a loan guarantee and (2) interests in a Canadian special purpose vehicle ("SPV"), the value of which was measured in part by certain "accretion rights."[4] Neither the loan guarantee nor the so-called "accretion rights" were an "investment" as that term is defined in USMCA Annex 14-C and NAFTA Article 1139, and Claimant has not attempted to demonstrate otherwise.

5. These activities also were not located in the United States. The loan guarantee, a contractual obligation, was executed solely among Canadian entities associated with Claimant and TC Energy Corporation. It was created and administered entirely outside the United States. The "accretion rights" were not an investment in the United States, but rather a means for calculating the value of APMC's Class A shares in the Canadian SPV – an activity that was obviously in Canada. Thus, Claimant had neither an "investment" nor an investment "in the territory" of the United States as of the date of the alleged breach, as required by USMCA Annex 14-C and NAFTA Chapter 11.

[3] Memorial ¶ 81.

[4] Memorial ¶¶ 81, 206-207.

6. Finding for the United States on any of these objections will result in the dismissal of the entire case. These objections are entirely distinct from Claimant's assertions on the merits. It is therefore appropriate to bifurcate these proceedings and to hear the U.S. jurisdictional objections on a preliminary basis.

II. The Governing Arbitration Rules and Practice Favor Bifurcating the U.S. Jurisdictional Objections

7. Article 21(4) of the 1976 UNCITRAL Arbitration Rules provides: "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."[5] This rule creates a presumption in favor of bifurcating jurisdictional questions.[6]

8. Bifurcation is a "standard procedure" in UNCITRAL arbitrations.[7] In exercising their discretion to bifurcate proceedings into a separate juridical phase and suspend proceedings on the

[5] UNCITRAL Arbitration Rules, G.A. Res. 31/98, Art. 21(4) (Dec. 15, 1976). The use of "should" creates a presumption in favor of bifurcation under the 1976 UNCITRAL Rules, as compared to Article 23(3) of the 2010 UNCITRAL Arbitration Rules, which provides that the Tribunal "may" bifurcate. *See Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure ¶ 101 (Apr. 14, 2014) ("*Philip Morris Asia*, Procedural Order No. 8") (RL-0001).

[6] *See, e.g.*, *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised), ¶ 9 (May 31, 2005) ("*Glamis Gold*, Procedural Order No. 2") (RL-0002) ("Article 21(4) establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction."); *Mesa Power Group, LLC v. Government of Canada*, NAFTA/UNCITRAL, Procedural Order No. 2, ¶ 16 (Jan. 18, 2013) (RL-0003) (holding that under the 1976 UNCITRAL Rules "when a Party raises an objection to jurisdiction, the presumption is in favor of addressing the objection as a preliminary question"); *President Allende Foundation, Victor Pey Casado, and Coral Pey Grebe v. Republic of Chile (II)*, UNCITRAL, PCA Case No. 2017-30, Decision on Respondent's Request for Bifurcation ¶ 100 (June 27, 2018) ("*Pey Casado*, Decision on Request for Bifurcation") (RL-0004) ("The Tribunal agrees with Respondent that Article 21(4) of the UNCITRAL Rules creates a presumption in favor of treating the issue of jurisdiction as a preliminary question."); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2016-13, Procedural Order No. 4, Decision on Bifurcation ¶ 4.3 (Nov. 18, 2016) ("*Resolute*, Decision on Bifurcation") (RL-0005) (observing that Article 21(4) "creates a presumption in favour of bifurcation, subject to the Tribunal exercising discretion to deal with jurisdictional pleas together with the merits in appropriate circumstances.").

[7] *See, e.g.*, *Resolute*, Decision on Bifurcation ¶ 5.1 (RL-0005) (NAFTA Chapter Eleven tribunal deciding to treat the respondent's jurisdictional and admissibility objections as preliminary questions); *Canfor Corp. v. United States of America*, NAFTA/UNCITRAL, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings ¶ 55 (Jan. 23, 2004) (RL-0006) (NAFTA Chapter Eleven tribunal deciding to treat the respondent's jurisdictional objection as a preliminary question); *GAMI Investments, Inc. v. United Mexican*

merits, tribunals generally consider three factors: (i) whether the objection is *prima facie* 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.[8] Decisions to bifurcate have also been driven by overarching considerations of procedural fairness and efficiency.[9] All of these factors weigh in favor of granting the U.S. request for bifurcation for each of its jurisdictional objections.

States, NAFTA/UNCITRAL, Procedural Order No. 2, ¶ 1 (May 22, 2003) (RL-0007) (NAFTA Chapter Eleven tribunal deciding to address preliminary issues separate from proceeding on the merits); *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/UNCITRAL, Decision of the Tribunal on the Filing of a Statement of Defence ¶ 16 (Oct. 17, 2001) (RL-0008) ("[Jurisdictional issues] are […] frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter."). Bifurcation is also "standard" under the ICSID Rules. *See, e.g.*, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation ¶ 57 (June 13, 2013) ("*Emmis Int'l,* Decision on Bifurcation") (RL-0009) (deciding to hear respondent's objections to jurisdiction as a preliminary question); *Pey Casado*, Decision on Request for Bifurcation ¶ 118 (RL-0004) (deciding to hear jurisdictional objections as a preliminary question); 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., 2d ed. 2018) (RL-0010) ("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-0011) (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").

[8] *Philip Morris Asia*, Procedural Order No. 8, ¶ 109 (RL-0001); *TC Energy Corporation and TransCanada PipeLines Limited v. United States of America*, NAFTA/ICSID Case No. ARB/21/63, Procedural Order No. 2, ¶¶ 18-21 (Apr. 13, 2023) ("*TC Energy*, Procedural Order No. 2") (RL-0012); *Glamis Gold*, Procedural Order No. 2, ¶ 12 (RL-0002) (applying the standard of 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); *Resolute*, Decision on Bifurcation ¶ 4.3 (RL-0005) (stating "[t]he Disputing Parties also agree that for a Tribunal to determine whether bifurcation is appropriate in a given case, it is helpful to apply the three-part test applied in *Philip Morris v. Australia*", and proceeding to apply the framework); *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-0013); *Emmis Int'l*, Decision on Bifurcation ¶¶ 37(2), 41, 47-56 (RL-0009); *Global Telecom Holding S.A.E. v. Government of Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2, Decision on Respondent's Request for Bifurcation ¶ 100 (Dec. 14, 2017) (RL-0014); and *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of 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-0015).

[9] *See, e.g.*, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, UNCITRAL, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent Application for Bifurcation ¶ 78 (April 19, 2017) ("*Cairn Energy*, Procedural Order No. 4") (RL-0016) ("These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal's discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules."); *Glamis Gold*, Procedural Order No. 2, ¶ 11 (RL-0002)

III. Bifurcation Is Appropriate for the United States' Objection Based on a Lack of Jurisdiction *Ratione Temporis*

9. The first U.S. objection is that Annex 14-C does not provide jurisdiction *ratione temporis*, because Annex 14-C only applies to breaches of obligations of the NAFTA, and the NAFTA was terminated six months before the alleged breach. The United States requested bifurcation based on the same objection in *TC Energy Corporation and TransCanada PipeLines Limited v. United States*.[10] Applying the considerations for bifurcation discussed above, the tribunal in *TC Energy* concluded that bifurcation was appropriate. That tribunal explained that the U.S. objection based on Annex 14-C is "*prima facie* serious," "seems to essentially rest on legal considerations," and "any duplication of arguments and evidence that would have to be considered in a possible merits phase would appear to be limited."[11] The identical objection in this case should likewise be heard in a preliminary phase.

A. The United States' Objection Is Substantial

10. Claimant asserts only one potential basis for the United States' consent to arbitrate this claim: Paragraph 1 of Annex 14-C.[12] Annex 14-C extends the United States' consent to arbitrate certain claims for breach of the NAFTA for a period of three years, but nothing in Annex 14-C or elsewhere in the USMCA (or the NAFTA) provides that the United States shall continue to be bound by the NAFTA's substantive investment obligations after its termination. Accordingly, based on the well-understood meaning of the phrase "breach of an obligation," Annex 14-C only

("In examining the drafting history of Article 21(4) of the UNICTRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings."); *id.* ¶ 12(c) ("[I]f an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so.").

[10] *TC Energy*, Procedural Order No. 2, ¶ 4 (RL-0012).

[11] *Id.* ¶ 35.

[12] Memorial ¶ 201.

permits the submission of claims based on alleged breaches that occurred while the NAFTA was in force, not claims – like those that Claimant attempts to assert in this proceeding – 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

11. The USMCA entered into force on July 1, 2020. By the protocol that accompanied the USMCA, the entry into force of that treaty terminated and superseded the NAFTA.[13] In its Memorial, Claimant acknowledges that the USMCA superseded the NAFTA.[14]

12. The default position in customary international law, reflected in Article 70(1)(a) of the Vienna Convention on the Law of Treaties ("VCLT") 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."[15] Article 13 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Draft Articles on State Responsibility") also explains that "[a]n 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."[16]

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[13] *See* Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (R-0001) ("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."). *See also* USMCA, Annex 14-C ¶¶ 3, 5-6 (R-0002) (discussing the "termination of NAFTA 1994").

[14] Memorial ¶ 210.

[15] Vienna Convention on the Law of Treaties, art. 70(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (RL-0017). 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-0018).

[16] 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-0019).

13. The NAFTA does not contain a survival provision obligating a party to continue abiding by its terms for some period post-termination. Thus, on its face, once the NAFTA terminated on July 1, 2020, the United States (and the other NAFTA Parties) ceased to be bound by the substantive investment obligations in Chapter 11 of the NAFTA, and there could be no breach of an obligation thereof.

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

14. Claimant nonetheless argues that the USMCA Parties agreed, in Annex 14-C, to extend NAFTA's substantive obligations. The viability of Claimant's claims depends entirely on whether Claimant is correct in this interpretation.

15. Annex 14-C provides:

> 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.
>
> 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.
>
> 5. For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force 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 termination of NAFTA 1994, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.
>
> 6. For the purposes of this Annex:
>
> (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement;
>
> (b) "investment", "investor", and "Tribunal" have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994; and
>
> (c) "ICSID Convention", "ICSID Additional Facility Rules", "New York Convention", and "Inter-American Convention" have the meanings accorded in Article 14.D.1 (Definitions).[17]

16. As explained in Article 31(1) of the VCLT, these terms are to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty's] object and purpose." Here, the Parties provided their consent to arbitrate legacy claims in Paragraph 1, they explain the effect of such consent in Paragraph 2, they

[17] USMCA, Annex 14-C ¶¶ 1-6 (R-0002) (footnotes omitted).

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. Paragraph 5 clarifies that arbitrations initiated while the NAFTA was in force could continue after the NAFTA's termination, and Paragraph 6 defines certain terms for purposes of Annex 14-C.

17. The focus of the U.S. objection is the consent clause, Paragraph 1 of Annex 14-C. In that paragraph, the USMCA Parties provided consent to arbitrate certain claims for a "breach of an obligation" of the NAFTA after that treaty's termination. To that end, Annex 14-C permitted a three-year period to assert claims that arose while the NAFTA was in force. To be sure, this was an important provision – without it, investors with claims that arose prior to the NAFTA's termination, but who had not yet asserted those claims in arbitration, would have lost the ability to do so. This provision provided those investors with additional time to make their claims that they would not have otherwise had. But it did not extend the NAFTA's substantive obligations for an additional three years – those obligations ended with the NAFTA's termination. The USMCA, which came into force on the date that the NAFTA terminated, provided its own set of investment provisions, including investor protections. The USMCA Parties nowhere agreed to be bound by both the USMCA substantive investment obligations and the NAFTA's substantive investment obligations for a three-year period past the NAFTA's termination.

18. Claimant does not point to a single provision memorializing an agreement by the USMCA Parties to extend the application of the NAFTA's substantive obligations. Instead, Claimant relies on the incorrect assertion that "Paragraph 1 of Annex 14-C does not address temporal aspects of the conduct that could lead to a claim regarding a legacy investment."[18] But Claimant's argument ignores the ordinary meaning of Paragraph 1. The key text – namely, the reference to "breach of

[18] Memorial ¶ 226.

an obligation" under the specified NAFTA provisions – is not new. It derives almost verbatim from NAFTA Articles 1116(1) and 1117(1), which allowed claims alleging that another Party "has breached an obligation under" the same NAFTA provisions specified in Paragraph 1 of Annex 14-C.[19] All of the USMCA Parties – then the NAFTA Parties – agreed that this phrase in NAFTA Articles 1116(1) and 1117(1) provided a jurisdictional limitation *ratione temporis* to those claims that arose while the treaty was in force. The USMCA/NAFTA Parties' views are consistent with arbitral decisions and scholarly analysis with respect to this phrase.[20] The phrase "breach of an obligation" mirrors the phrase in Article 13 of the ILC Draft Articles on State Responsibility, discussed above. There is no reason to think that the USMCA Parties, in using a nearly identical phrase in Annex 14-C, meant to deviate from its accepted and ordinary meaning.

19. In its Memorial, Claimant has raised several subsidiary arguments in anticipation of this jurisdictional objection. But none can excuse Claimant's inability to allege a "breach of an obligation" under the specified NAFTA provisions, as required by Paragraph 1 of Annex 14-C. Claimant's failure to satisfy this requirement is dispositive of its claims. In any event, it is not necessary for purposes of this request for bifurcation to address all of Claimant's points. It is sufficient merely to show that the U.S. objection is *prima facie* "substantial" – a showing amply

[19] *See, e.g.*, *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 60 (Dec. 6, 2000) (RL-0020) (finding that the tribunal lacked jurisdiction under NAFTA Article 1117(1) to consider claims based on "measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when NAFTA came into force.").

[20] *See, e.g.*, *id.* ¶ 62 ("Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*."); Meg Kinnear *et al.*, *Article 1116 – Claim by an Investor of a Party on its Own Behalf*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1116-28 (2006) (RL-0021) ("In *Feldman v. Mexico*, the tribunal made clear that the 'scope of application of NAFTA in terms of time' defined the jurisdiction of the tribunal *ratione temporis*. It held that no obligations adopted under NAFTA existed before January 1, 1994, and thus its jurisdiction did not extend before that date.") (internal citations omitted).

made above. We will address each of Claimant's subsidiary arguments in our memorial on jurisdiction.

20. In sum, the terms of Annex 14-C of the USMCA serve only to extend the consent of the NAFTA Parties to arbitrate claims that arose prior to the NAFTA's termination for an additional three years (and to continue adjudication of pending claims). The Annex does not extend the application of the substantive investment obligations of NAFTA Chapter 11.[21]

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

21. The United States' *ratione temporis* objection is separate and entirely distinct from the merits because it is based on a straightforward application of Annex 14-C.[22] The jurisdictional objection does not require that the Tribunal analyze any factual evidence concerning alleged breaches asserted by Claimant other than the date of the supposed breach (January 20, 2021), which is uncontested. Aside from that date, there is no relevant overlap between the jurisdictional question of whether Claimant's claims fall within the scope of Annex 14-C and the merits question of whether the revocation of the Permit violated the United States' obligations under NAFTA Articles 1102, 1103, 1105, and 1110. In sum, the objection is not so intertwined with the merits as to make bifurcation impractical. Rather, the opposite is true.

[21] Nothing about Claimant's argument relying on supplementary means of interpretation undercuts the seriousness of the United States' objection, which relies on the text of Annex 14-C itself. The United States will nevertheless address in due course Claimant's recourse to supplementary means.

[22] *See, e.g.*, *TC Energy*, Procedural Order No. 2, ¶ 30 (RL-0012) (concluding with regard to the United States' Annex 14-C objection, "that bifurcation would not likely entail a substantial risk of duplication of arguments or evidence"); *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-0022) (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").

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

22. Finally, the request for bifurcation should also be granted because, if successful, the United States' objection will necessarily eliminate Claimant's entire case.[23] 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."[24] 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."[25] In sum, bifurcation of the United States' objection, if successful, will materially reduce both time and costs for the parties and the Tribunal.

IV. Bifurcation Is Appropriate for the United States' Objections Based on a Lack of Jurisdiction *Ratione Materiae*

23. The United States' two *ratione materiae* objections should also be heard in a preliminary phase because they are substantial, they are entirely distinct from the merits, and if successful, the objections will materially reduce time and costs, as they will eliminate the entirety of Claimant's claims.

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[23] *See, e.g.*, *TC Energy* , Procedural Order No. 2, ¶ 35 (RL-0012) (concluding with regard to the United States' Annex 14-C objection, that "any duplication of arguments and evidence that would have to be considered in a possible merits phase would appear to be limited"); *Carlyle Group L.P. et al. v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4, Decision on Bifurcation ¶ 68 (Jan. 20, 2020) (RL-0023) (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").

[24] 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-0024).

[25] *Id*. at 513.

A. The United States' Objections Are Substantial

1) Claimant's activities do not satisfy the definition of an "investment" under USMCA Annex 14-C or NAFTA Article 1139

24. Claimant has not identified an "investment" that it maintained at the time of the alleged breach.[26] The question of what constitutes an investment is "a threshold jurisdictional question in treaty arbitration."[27] Paragraph 6(b) of Annex 14-C provides that: "'investment', 'investor', and 'Tribunal' have the meanings accorded in Chapter 11 (Investment) of NAFTA 1994." The definition for "investment" is thus contained in Article 1139 of the NAFTA.

25. In its Memorial, Claimant asserts that "[t]he exact structure of the joint venture for the Keystone XL Project is somewhat complex."[28] Claimant has nonetheless failed to expressly address how any aspect of this complex structure constituted an "investment" by Claimant under USMCA Annex 14-C or NAFTA Article 1139. Indeed, Claimant's activities constituted a domestic stimulus program designed not to contribute to economic development in the United States but rather to support Albertan jobs and welfare at the onset of the COVID-19 Pandemic.

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[26] As noted previously, Annex 14-C only allows claims with respect to "legacy investments" for a "breach of an obligation" under the NAFTA. *See* USMCA Annex 14-C ¶ 1 (R-0002) ("Each Party consents, *with respect to a legacy investment*, to the submission of a claim to arbitration . . . alleging *breach of an obligation*" under the specified NAFTA provisions) (emphasis added). NAFTA tribunals also have always looked to the date of the measure to determine the protected "investor" and "investment." *See, e.g.*, *Westmoreland Coal Company v. Government of Canada (I)*, NAFTA/ICSID Case No. UNCT/20/3, Award ¶ 200 (Jan. 31, 2022) (RL-0025) ("[T]o have jurisdiction to bring a claim under Article 1116(1), the investor/claimant must comply with two requirements: firstly it must be claiming 'on its own behalf' such that *it held the investment at the time of the alleged breach* and is not bringing the claim on another's behalf; and secondly, that same investor (*i.e.* 'the' investor) must itself have suffered loss or damage arising out of that breach.") (emphasis added); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award Part VII-Annex, page 7 (Aug. 25, 2014) (RL-0026) (finding that "*at the relevant time*" "*on the date of the alleged NAFTA breaches*," "Apotex's ANDAs could not (yet) be characterised as 'property' for the purposes of NAFTA Article 1139(g), and (b). . . ") (emphasis added); *ADF Group Inc. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award ¶ 152 (Jan. 9, 2003) (RL-0027) (in determining whether the treatment afforded the claimant constituted a breach of Article 1102 of the NAFTA, the tribunal noted that the "scope of application of Article 1102 is indicated by the breadth of the definitional scope of the critical term 'investment'").

[27] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 217 (2d ed. 2017) ("MCLACHLAN") (RL-0028).

[28] Memorial ¶ 67.

When the Alberta Premier announced Claimant's involvement in the Keystone XL project on March 31, 2020, he made clear that the "government [was] backstopping the project to enable TC Energy to begin immediate construction on the Alberta portion of the pipeline."[29]

26. Without prejudice to whether Claimant made an "investment" at any point, what is clear is that at the time of the alleged breach (*i.e.*, on January 20, 2021), Claimant did not hold an "investment" as defined in NAFTA Article 1139. Claimant asserts that, on January 8, 2021, "TC Energy exercised the right to repurchase *substantially all* of the US Class A Interests held by the Enterprise [a Delaware-incorporated subsidiary of Claimant's] for CAD$ 630.8 million by drawing on the TC Energy credit facility guaranteed by APMC…."[30] As of the date of the alleged breach, according to the Memorial, Claimant's alleged investment in the Keystone XL project was limited to a loan guarantee and the calculation of the value of its investment *in Canada* through so-called accretion rights, as addressed further in Section IV(A)(2).[31]

27. NAFTA Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment.[32] NAFTA Article 1139 does not include loan guarantees or accretion rights, and limits "investment" to *inter alia* "a debt security of an enterprise," "a loan to an enterprise," and "an

[29] Government of Alberta, *Provincial investment kick-starts KXL pipeline* (Mar. 31, 2020) (R-0003).

[30] Notice of Arbitration ¶ 42 (emphasis added); *see also* Memorial ¶ 81.

[31] Memorial ¶¶ 81, 206-207. Claimant also expressly acknowledged that at least "US$325 million in equity [were] attributable to the KXL Expansion Project *in Canada*." Notice of Arbitration ¶ 36 (emphasis added).

[32] *See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) (RL-0029) ("NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA."). All three NAFTA Parties agree on this. *See, e.g., Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) (RL-0030) ("Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an 'investment' for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of 'investment' in Article 1139, however, encompass a mere hope that profits may result from prospective sales…."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada Pursuant to NAFTA Article 1128 ¶ 59 (Apr. 30, 2001) (RL-0031) ("The definition of 'investment' in NAFTA Article 1139 . . . is exhaustive, not illustrative."); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 19 (May 15, 2001) (RL-0032) ("[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.").

equity security of an enterprise." Claimant has not explained how the loan guarantee or accretion rights in this case could constitute such an investment.

2) Claimant's activities are not a "legacy investment" under Annex 14-C of the USMCA because they are not in the territory of the United States

28. Even if Claimant's activities qualified as an "investment," Claimant has failed to identify a "legacy investment" "in the territory" of the United States as defined in Paragraph 6 of Annex 14-C, which provides that:

> For the purposes of this Annex:
>
> (a) "legacy investment" means an *investment of an investor of another Party in the territory of the Party* established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement
>
> (emphasis added).

29. As mentioned, the definitions for "investment" and "investor of a Party" are contained in Article 1139 of the NAFTA. Thus, Annex 14-C, which establishes the scope and coverage of "legacy investment claims," expressly limits that coverage to an "investment of an investor of another Party in the territory of the Party." Given that NAFTA Article 1139 defines "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of such Party," Paragraph 6 of Annex 14-C makes clear that the scope and coverage of the protections of Annex14-C extends to "investments" only to the extent that the investor "owned or controlled directly or indirectly" the investment "in the territory" of another Party. [33]

[33] *See, e.g., Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶ 127 (Jan. 28, 2008) ("*Canadian Cattlemen*, Award") (RL-0033) (applying NAFTA Article 1101 "only to investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party"); *Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1,

30. The requirement in Annex 14-C that an investment must be in the territory of the Party is one that mirrors the territoriality requirement contained in Article 1101 (Scope and Coverage) of the NAFTA. Article 1101 provides:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.[34]

31. NAFTA tribunals have consistently recognized that investors initiating NAFTA proceedings must have an investment "in the territory of" the respondent State.[35] Indeed, a "salient characteristic" of the definition of investment in NAFTA Chapter 11 is "that the investment is primarily regulated by the law of a State other than the State of the investor's nationality."[36]

Award (on Jurisdiction) ¶ 105 (June 19, 2007) ("*Bayview,* Award") (RL-0034) (stating that, "in order to be an 'investor' under Article 1139 one must make an investment in the territory of another NAFTA State, not in one's own.").

[34] North American Free Trade Agreement, Ch. 11, art. 1101 (R-0004).

[35] *Cargill, Incorporated v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/2, Award ¶¶ 164-165 (Sept. 18, 2009) (RL-0035) ("This Tribunal agrees with the decision in *Bayview Irrigation District* that Article 1101(1)(a) applies only to investors of another Party who have, or are proposing to make, an investment in the state of the Party whose measure is complained of."); *Canadian Cattlemen*, Award ¶ 121 (RL-0033) ("Of these three classes of measures covered by Article 1101, the two focusing on 'investments' contain express territorial limitations, requiring that the investments be 'in the territory of the Party' adopting or maintaining the measure."); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/04/5, Award ¶ 273 (Nov. 21, 2007) ("*Archer Daniels Midland,* Award") (RL-0036) ("In a case such as the one at bar, this would exclude investments of ADM and TLIA located outside of Mexico, even if such investments are destined to promote fructose sales in Mexico."); *Bayview,* Award ¶ 103 (RL-0034) ("In the opinion of the Tribunal, it is quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party.").

[36] *Bayview,* Award ¶ 98 (RL-0034); *id*., ¶ 103 ("it is quite plain that NAFTA Chapter Eleven was not intended to provide substantive protections or rights of action to investors whose investments are wholly confined to their own

32. Claimant divested itself of substantially all alleged equity in any U.S. entity on January 8, 2021, prior to the alleged breach. [redacted].[37] The Class A accretion rights also existed entirely in Canada as a means for calculating the value of Claimant's interest in a Canadian entity.[38] Thus, there is no jurisdiction *ratione materiae* over the alleged investments, because they were not within the territory of the United States.

33. Claimant attempts to mask this obvious jurisdictional flaw by making two points. First, Claimant asserts that, "[a]lthough the equity contribution in the United States was returned to APMC," the value of the alleged equity "would thereafter be factored into the ***Canadian*** SPV Class A rights buy back price."[39] We have emphasized the word "Canadian" to show that, once again, the only alleged investment that remained after January 8, 2021, was in Canada, not the United States. And second, [redacted]

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national States, in circumstances where those investments may be affected by measures taken by another NAFTA State Party.").

[37] *See* Investment Agreement between TransCanada Pipelines Ltd. and APMC, dated 31 March 2020 at 1, 39-42 (C-110) (establishing debt guarantee agreement between Claimant and TransCanada Pipelines Ltd.). [redacted]

[38] Claimant states that, "[t]hrough its interest in the US SPV, *which was converted to rights through the Canadian SPV*, APMC was entitled to share in the income and profits of US SPV ....." Memorial ¶ 207 (emphasis added); *see also id.* ¶ 81 ("Although the equity contribution in the United States was returned to APMC with the accretion owed to date, the value of a continuing Class A accretion based on APMC's total equity contribution in the United States which had been bought back *would thereafter be factored into the Canadian SPV Class A rights buy back price*.") (emphasis added).

[39] Memorial ¶ 81 (emphasis added).

[redacted][41] In any event, these points, which will be further addressed in a U.S. memorial on jurisdiction, only confirm that Claimant no longer had any alleged investments in the United States by January 20, 2021, and that its interests in the Keystone XL project resided only in Canada.[42]

B. The United States' Objections Are Distinct From its Merits Arguments

34. The United States' jurisdictional objections *ratione materiae* are separate and entirely distinct from the merits because they involve evaluating the precise location and nature of Claimant's activities for purposes of the definitions for "legacy investment" and "investment" in Annex 14-C, and the definition of "investment" in NAFTA Article 1139. These objections will not require the Tribunal to analyze any factual evidence concerning Claimant's alleged breaches related to the revocation of the Permit.[43]

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[40] *Id.*

[41] To the extent Claimant refers to the remaining *de minimis* interest in the U.S. SPV that remained after the sale of "substantially all" of Claimant's interest, that *de minimis* interest is not an investment for the reasons described in Section IV(A)(1).

[42] *See, e.g.*, *Archer Daniels Midland*, Award ¶ 273 (RL-0036) ("In a case such as the one at bar, this would exclude investments of ADM and TLIA located outside of Mexico, even if such investments are destined to promote fructose sales in Mexico.").

[43] Memorial ¶ 81 (acknowledging that "that exercise [for the repurchase of the shares] did take place"); *see also Bayview*, Award (RL-0034) (rejecting jurisdiction because the investment was made by U.S. citizens on the territory of the United States, and under Mexican law the claimants held no rights to water on Mexican territory); *Canadian Cattlemen*, Award (RL-0033) (finding no jurisdiction, essentially because NAFTA Chapter 11 did not extend coverage to domestic investments); *Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility ¶ 158 (June 14, 2013) (RL-0037) ("[T]he Tribunal is clear that none of Apotex's characterisations of its alleged '*investment*' meet the requirements of NAFTA Article 1139, whether considered separately or together.").

C. The United States' Objections Will Dispose of Claimant's Entire Case

35. A ruling for the United States on either of its objections *ratione materiae* will necessarily eliminate Claimant's entire case. Because the existence of an "investment" is a "threshold jurisdictional question in treaty arbitration,"[44] there would be no need to engage in any intrusive, expensive, and complicated analysis on the merits of what led to the revocation of the Permit.

V. Bifurcation Is Also Supported by Reasons of Economy, Efficiency, and Fairness

36. Bifurcation in this case is not only permitted by the applicable arbitration rules, but is also supported by reasons of economy, efficiency, and fairness.[45] The United States' jurisdictional objections are based on the straightforward application of Annex 14-C, which is the sole basis for Claimant's assertion of the United States' consent to arbitrate.[46] A State's consent to arbitration is paramount[47] and impacts the very sovereignty of that State. Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,[48] it is axiomatic that a tribunal lacks

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[44] MCLACHLAN at 217 (RL-0028) (explaining that the existence of an "investment" is a "threshold jurisdictional question in treaty arbitrations").

[45] *See, e.g.*, *Cairn Energy*, Procedural Order No. 4, ¶ 78 (RL-0016) ("These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal's discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules.").

[46] The parties agree that Paragraph 1 of Annex 14-C provides the requisite consent for arbitrating claims related to a "legacy investment." *See* Memorial ¶ 201.

[47] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (2009) (RL-0038) ("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. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015) (RL-0039) ("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.").

[48] 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-0040).

jurisdiction in the absence of a disputing party's consent to arbitrate.[49] It is therefore fair and appropriate that a tribunal should determine whether a State has consented to arbitrate before proceeding to the merits of the arbitration, thus avoiding intrusive, expensive, and complicated analysis on the merits.

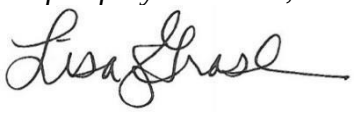
37. In addition, as discussed above, bifurcation would save significant time and expense by avoiding the need to plead the merits and adjudicate issues of liability and quantum.

38. Accordingly, and consistent with the presumption in favor of bifurcation established under the 1976 UNCITRAL Rules, hearing the United States' jurisdictional objections in a preliminary phase is the fairest and most efficient method of proceeding in the arbitration.

VI. Conclusion

39. 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 objections as a preliminary matter.[50]

Respectfully submitted,



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[49] *Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (RL-0041) ("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* Borzu Sabahi & Noah Rubins, *Consent to Arbitral Jurisdiction, in* INVESTOR-STATE ARBITRATION 309 (Borzu Sabahi, Noah Rubins & Don Wallace, Jr. eds., 2nd ed. 2019) (RL-0042) (explaining also that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

[50] The United States' request to bifurcate on the three bases set out in this brief are without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.

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