Public Version

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

REPLY OF THE UNITED STATES OF AMERICA TO CLAIMANT'S OBSERVATIONS ON THE REQUEST FOR BIFURCATION

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TABLE OF CONTENTS

1. In accordance with the Tribunal's Procedural Order No. 1 of December 18, 2023, the United States hereby submits its Reply to Claimant's Observations on the Request for Bifurcation of these proceedings.

I. Introduction

2. As the United States addressed in its Request for Bifurcation, the Tribunal lacks jurisdiction over this case. The Tribunal should hear the U.S. jurisdictional objections preliminarily, enabling the dismissal of this arbitration before the Parties are burdened with briefing the merits in full.

3. This Tribunal, operating under the UNCITRAL Rules (1976), should apply the presumption in favor of bifurcation included in those rules. Claimant's Observations commence with an extended explanation of why tribunals applying *other* sets of rules may or may not apply such a presumption. But the rules governing *this* arbitration – which Claimant itself selected – unquestionably require the application of the presumption. In order to overcome the presumption in favor of bifurcation, the Tribunal would have to determine that the specific objections are not *prima facie* substantial; that they are too intertwined with the merits to be heard separately; and/or that they would not save time or costs. Claimant has presented no basis for any such findings.

4. First, the U.S. objections are self-evidently substantial. With respect to the *ratione temporis* objection, Annex 14-C of the U.S.-Mexico-Canada Agreement (USMCA) provides a limited consent to jurisdiction solely for breaches of obligations of the NAFTA. The USMCA does not provide Claimant with a means to pursue arbitration of a claim that arose after the NAFTA terminated. It is uncontested that the permit revocation upon which Claimant's claims are based occurred six months after the NAFTA's termination, and therefore its claims are outside the scope

of this Tribunal's jurisdiction. None of Claimant's observations overcome the *prima facie* substantiality of this straightforward argument.

5. Claimant's arguments on the *ratione materiae* objection fare no better. The United States has presented objections that there was no Annex 14-C or NAFTA-qualifying "investment," nor any investment in the United States, on the date of permit revocation. While Claimant refers to a supposed "network of circumstances" to conjure the aura of an investment, none of its actual activities constituted an investment in the United States on the date of the permit revocation. In fact, its activities were primarily in Canada. The mere relation of Claimant's Canadian activities to TC Energy's work on the U.S. portion of the Keystone XL project is not sufficient. These objections are therefore *prima facie* substantial.

6. Second, Claimant is unable to demonstrate that the objections are intertwined with the merits. Claimant half-heartedly asserts that the United States' *ratione temporis* argument is in bad faith in order to create some link between that jurisdictional objection and the merits. This argument holds no water. Simply put, there is no bad faith in a negotiation between three sovereign States regarding limitations on consent to arbitrate, which were finalized in the USMCA long before Claimant even contemplated its alleged investment. And in any event, resolution of that issue would in no way prejudice or require consideration of the merits of the dispute.

7. Finally, Claimant cannot contest that finding for the United States on any of its objections will result in the dismissal of the entire case. Faced with this reality, Claimant ignores the third prong of the test for bifurcation, relying instead on a generalized "efficiency" argument that assumes that the objections will not succeed. But in addition to being the wrong test (efficiency in bifurcation is to be measured on the assumption that the objections will be upheld), Claimant's argument is wrong on its own terms: Claimant itself actually *lengthened* the proposed schedule for

bifurcated proceedings in this case before it was agreed by the Parties and adopted by the Tribunal. Having itself made the calendar longer, Claimant cannot now complain that the Request for Bifurcation should be rejected on the grounds of inefficiency.

8. For the following reasons, as well as those detailed in the Request for Bifurcation, it is appropriate to bifurcate these proceedings and to hear the U.S. jurisdictional objections on a preliminary basis.

II. The UNCITRAL Rules (1976) Favor Bifurcation

9. As Claimant acknowledges,[1] Article 21(4) of the UNCITRAL Rules (1976) – the rules that govern this arbitration – provides that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question." Faced with this clear hurdle, Claimant spends five pages of its Observations citing to *different* arbitral rules – and cases and commentary addressing those rules – asking this Tribunal to ignore the UNCITRAL Rules' clearly stated presumption in favor of bifurcation.[2]

10. To the extent that Claimant wishes that different arbitral rules applied, this is a problem of its own making. NAFTA Chapter 11, Section B, which provisionally provides the procedure for this arbitration pending this Tribunal's jurisdictional determination, grants investors a menu of procedural options from which they may select when filing a notice of arbitration. Specifically, NAFTA Article 1120(1) provides that:

> 1. . . . a disputing investor may submit the claim to arbitration under:

[1] *See Alberta Petroleum Marketing Commission v. United States of America*, NAFTA/ICSID Case No. UNCT/23/4, Claimant's Observations on Request for Bifurcation of Respondent United States of America ¶ 8 (June 17, 2024) ("Claimant's Observations").

[2] Claimant's Observations ¶¶ 8-19.

> (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
>
> (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
>
> (c) the UNCITRAL Arbitration Rules.

The NAFTA defines the "UNCITRAL Arbitration Rules" as the 1976 version of those rules.[3]

11. Both Canada and the United States are parties to the ICSID Convention,[4] so Claimant could have chosen to pursue its claim through the ICSID procedure, which would have included the 2022 iteration of the ICSID Rules, in accordance with Article 1120(1)(a).[5] Claimant instead expressly chose to assert its claims under the UNCITRAL Rules, under Article 1120(1)(c).[6] This choice of rules was presumably made due to some perceived benefit for Claimant. By virtue of that choice, however, Claimant cannot now appeal to other sets of rules to avoid the bifurcation presumption in the UNCITRAL Rules (1976).[7] Thus, the cases on which Claimant attempts to rely – including

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[3] North American Free Trade Agreement, Ch. 11, art. 1139 (R-0004) ("NAFTA (R-0004)") ("UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.").

[4] *See* ICSID, Database of ICSID Member States, https://icsid.worldbank.org/about/member-states/database-of-member-states (R-0005).

[5] TC Energy, for example, the claimant alleging the same breaches of the USMCA and NAFTA under similar facts, chose to assert its claim pursuant to NAFTA Article 1120(a). As the *TC Energy* claim was filed in 2021, the arbitration is governed by the 2006 ICSID Rules. *See TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 1, § 1 (Dec. 12, 2022) (R-0006).

[6] *Alberta Petroleum Marketing Commission v. United States of America*, NAFTA/ICSID Case No. UNCT/23/4, Notice of Arbitration ¶ 4 (Apr. 27, 2023) ("Notice of Arbitration").

[7] *See, e.g.*, Claimant's Observations ¶¶ 10-14. To be clear, while other sets of rules do not include an express presumption in favor of bifurcation, tribunals operating under those rules routinely grant bifurcation requests where the well-accepted *Glamis Gold* standard is met. In fact, the Tribunal in *TC Energy*, addressing the identical Annex 14-C objection raised here, chose to bifurcate the U.S. jurisdictional objection applying the standard under the 2006 ICSID Rules.

the *Red Eagle* case on which it places particular emphasis – are unhelpful to it because they are applying different rules and different treaties with their own bifurcation provisions.[8]

12. In contrast, the presumption in favor of bifurcation in the UNCITRAL Rules (1976) has been consistently applied by tribunals operating under those rules, as discussed in the U.S. Request for Bifurcation.[9] The *Glamis Gold* tribunal in particular was applying both Article 21(4) of the UNCITRAL Rules (1976) and the NAFTA, and its procedural order provides the well-accepted test this Tribunal should apply.[10] *Glamis Gold* and the cases that followed establish that, in determining whether the presumption in favor of bifurcation should be exercised, the Tribunal should consider (1) whether the objection is *prima facie* substantial or frivolous; (2) whether jurisdiction and the merits are so intertwined as to make bifurcation impractical, and (3) whether

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[8] *See* Claimant's Observations ¶ 12 n.8. The *Red Eagle* arbitration not only proceeded under the ICSID Rules, but also arose under the Canada-Colombia Free Trade Agreement, which has a specific provision addressing bifurcation. *See Red Eagle Exploration Ltd. v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation ¶¶ 1, 9 (August 3, 2020) (CLA-0050). The NAFTA has no such provision, and thus the bifurcation decision is governed solely by Article 21(4) of the UNCITRAL Rules (1976). Likewise, the parties in the *Windstream Energy* case, while arising under the NAFTA, utilized the 2013 version of the UNCITRAL Rules by agreement of the parties. *See, e.g.*, Claimant's Observations ¶ 18; *see also Windstream Energy LLC v. Government of Canada (II)*, PCA Case No. 2021-26, Procedural Order No. 1, ¶ 5.1 (Dec. 21, 2021) (RL-0043).

[9] *See Alberta Petroleum Marketing Commission v. United States of America*, NAFTA/ICSID Case No. UNCT/23/4, Request for Bifurcation of Respondent United States of America ¶¶ 7-8 and nn. 5-7 (May 16, 2024) ("U.S. Request for Bifurcation"); *see also Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL, Procedural Order No. 2, ¶ 16 (Jan. 18, 2013) (RL-0003) ("It follows that when a Party raises an objection to jurisdiction, the presumption is in favor of addressing the objection as a preliminary question. Indeed, it is good practice to let the parties 'know where they stand' – to use Redfern and Hunter's words – at an early stage and not to impose the burden of full-fledged proceedings on a party that disputes being subject to arbitration."); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2016-13, Procedural Order No. 4, Decision on Bifurcation, ¶¶ 4.3, 5.1 (Nov. 18, 2016) (RL-0005) (describing the "presumption in favour of bifurcation" as the standard procedure under UNCITRAL Rules (1976)); *WCV World Capital Ventures Cyprus Ltd. and Channel Crossings Ltd. v. The Czech Republic*, PCA Case No. 2016-12, Decision on Request for Bifurcation, ¶¶ 7-9 (Sept. 6, 2016) (RL-0044) ("*WCV Capital Ventures"*) ("The Rules clearly state that, as a general rule, the Tribunal should bifurcate the proceedings; the Rules, however, also empower the Tribunal to decide otherwise and to resolve jurisdictional objections in the final award. The Tribunal is of the opinion that it should only deviate from the standard rule for good reason.").

[10] *See* U.S. Request for Bifurcation ¶ 8 and nn. 8; *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 ¶ 12 (revised) (May 31, 2005) (RL-0002) ("*Glamis Gold"*); *see also Josias Van Zyl, The Josias Van Zyl Family Trust, and The Burmilla Trust v. The Kingdom of Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1 (Suspension, Bifurcation and Procedural Timetable), ¶ 42 (Nov. 3, 2016) (RL-0045) ("the Tribunal in *Glamis Gold* was interpreting Article 21(4) of the 1976 UNCITRAL Rules, which created a clear presumption in favour of bifurcation").

the objection, if successful, would materially reduce time and costs.[11] Despite its foray into inapplicable rules and treaties, it appears that Claimant agrees on the relevance of the *Glamis Gold* test for the U.S. Request for Bifurcation in this case.[12]

III. The United States' Objection Based on a Lack of Jurisdiction *Ratione Temporis* Meets the Standard for Bifurcation

13. The United States' objection to the Tribunal's jurisdiction *ratione temporis* under Annex 14-C is substantial, separate from the merits, and would increase the efficiency of these proceedings if successful. With respect to substantiality, the competing interpretation of Annex 14-C advanced in Claimant's Observations is ill-conceived, inconsistent with the ordinary meaning of the relevant treaty text, and nowhere near sufficient to call into doubt the seriousness of the United States' objection. As for the other two factors, (1) Claimant fails to establish that deciding the U.S. objection requires anything other than pure treaty interpretation, and (2) Claimant has not disputed that the objection is capable of resolving the whole case. Accordingly, each of the relevant factors weighs in favor of bifurcating the U.S. objection to the Tribunal's jurisdiction *ratione temporis*.

A. The United States' Objection is Substantial

14. The U.S. interpretation of Annex 14-C is based on the ordinary meaning of its terms, read in good faith, and in context, in accordance with the customary international law principles of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[13] In Paragraph 1 of Annex 14-C, the USMCA Parties consented to arbitrate certain claims, subject to several conditions. Most relevant here, the USMCA Parties' consent extends

[11] *See* U.S. Request for Bifurcation ¶ 8 and nn. 8.

[12] Claimant's Observations ¶ 7.

[13] Vienna Convention on the Law of Treaties, arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331 (RL-0017) ("VCLT").

only to claims for "breach of an obligation under" Section A of NAFTA Chapter 11 and two provisions of NAFTA Chapter 15.[14] As the International Law Commission explained, "[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,"[15] and therefore the consent provided in Paragraph 1 is limited to claims based on events occurring while the NAFTA was in force.

15. The USMCA Parties agreed that the USMCA would, upon its entry into force, terminate and supersede the NAFTA.[16] The USMCA entered into force on July 1, 2020, and, accordingly, the USMCA Parties were "release[d] . . . from any obligation further to perform the [NAFTA]"[17] on that date. Claims that, like Claimant's claims in this case, are based on events occurring after July 1, 2020, cannot allege a breach of the NAFTA's obligations. They are therefore outside the scope of the USMCA Parties' consent in Paragraph 1 of Annex 14-C and outside of the Tribunal's jurisdiction.

16. Claimant argues that this reading of Annex 14-C is "not credible" because there is "no clear textual support" for the U.S. position.[18] But the textual support laid out above is crystal clear. *First*, the USMCA Parties limited their consent in Paragraph 1 of Annex 14-C to "breaches" of specified NAFTA "obligations" and, *second*, they terminated the NAFTA. These two decisions, both expressly embodied in the USMCA's text, circumscribe the Tribunal's jurisdiction *ratione*

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[14] Agreement Between the United States of America, the United Mexican States, and Canada, Annex 14-C ¶ 1 (R-0002) ("USMCA").

[15] 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).

[16] *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). *See also* USMCA, Annex 14-C ¶¶ 3, 5-6 (R-0002) (discussing the "termination of NAFTA 1994").

[17] VCLT, art. 70(1)(a) (RL-0017).

[18] Claimant's Observations ¶¶ 22-23.

temporis to claims based on conduct occurring before July 1, 2020 (and after January 1, 1994, when the NAFTA entered into force).

17. Claimant's attempt to undermine the U.S. position boils down to three primary arguments, all of which are meritless. First, Claimant disputes that limiting the consent in Annex 14-C to claims for breach of certain NAFTA obligations also limits the Tribunal's jurisdiction *ratione temporis*. This issue was, however, already settled in the NAFTA context.[19] As in Annex 14-C, the USMCA Parties (then the NAFTA Parties) similarly limited their consent to arbitration in the NAFTA to claims "that another Party has breached an obligation" under specified NAFTA provisions.[20] Consistent with the U.S. position in this case, the USMCA Parties, tribunals, and scholars all understood this limitation to breaches of NAFTA obligations to bar claims based on events occurring when the NAFTA was not in force.[21]

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[19] U.S. Request for Bifurcation ¶ 18.

[20] NAFTA, Ch. 11, arts. 1116(1), 1117(1) (R-0004).

[21] U.S. Request for Bifurcation ¶ 18 & nn. 20. *See also* for Canada: *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Submission of the Government of Canada ¶ 18 (Oct. 6, 2000) (RL-0046) ("[I]nvestors are limited as to the claims they may bring. They may bring only claims arising from a breach of NAFTA. . . . A measure may only potentially violate NAFTA if the measure is effective or continues to be effective on or after the NAFTA entered into force, January 1, 1994."). For Mexico: *Bayview Irrigation District v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Mexico's Memorial on Jurisdiction ¶ 120 n.90 (Apr. 19, 2006) (RL-0047) ("[A]lleged acts or omissions of Mexico that occurred before the entry into force of the NAFTA on 1 January 1994 are beyond the Tribunal's jurisdiction *ratione temporis*.") (citing *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶¶ 60-63 (Dec. 16, 2002)) (CLA-0024); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Mexico's Counter-Memorial on Preliminary Questions ¶ 232 (Sept. 8, 2000) (RL-0048) ("It is open to an investor of another Party to claim compensation (subject to compliance with Section B, including the applicable limitation period) for breaches of Section A occurring after NAFTA's entry into force, whether they are entirely 'new' measures or continuing measures that became breaches of Section A when NAFTA entered into force. However, Chapter Eleven does not entitle an investor of another Party to claim compensation 'for loss or damage by reason of, or arising out of' an obligation under Section A before such obligations came into existence.") (emphasis in original). For the United States: *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Rejoinder on Competence and Liability at 5 (Oct. 1, 2001) (RL-0049) ("[I]t is now undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on acts or omissions of the United States that occurred after NAFTA's entry into force."); *Mondev International Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, U.S. Counter-Memorial on Competence and Liability at 21 (June 1, 2001) (RL-0050) ("[A]s the *Feldman* tribunal correctly found, because no Party was bound by an obligation under the NAFTA prior to January 1, 1994, acts or omissions that took place prior to that date cannot constitute breaches of the NAFTA.").

18. In its Observations, Claimant urges the Tribunal to ignore this longstanding consensus because it was developed in the context of claims "alleging breach of obligation for conduct before [the NAFTA] came into force"[22] rather than after the NAFTA terminated. Claimant's argument misses the point. Whether claims are based on events occurring before the NAFTA entered into force or after it terminated, the jurisdictional flaw is the same: the NAFTA's obligations were not binding on the Parties at the relevant time and, accordingly, a claimant cannot allege a breach of those obligations.

19. Claimant's second argument is that the USMCA Parties in fact agreed to bind themselves to the continued performance of the NAFTA's substantive investment obligations for three years after its termination. Certainly, had the USMCA Parties chosen to extend the substantive obligations of the NAFTA past its termination, there was language the Parties had used in other treaties that would have accomplished this goal.[23] The USMCA Parties did not include such language in Annex 14-C, and Claimant remains unable to point to any single provision in the treaty that embodies this purported agreement. Claimant instead relies on a patchwork combination of

[22] Claimant's Observations ¶ 27.

[23] 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0051) ("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.") (emphasis added); *see also* 2004 U.S. Model Bilateral Investment Treaty, art. 22(3) (RL-0052) (same); 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) (RL-0053) ("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-0054) ("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-0055) ("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-0056) ("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.").

the USMCA Protocol and references to the NAFTA in Paragraph 1 of Annex 14-C and its accompanying Footnote 20.

20. Claimant's argument begins from a faulty premise, namely that the USMCA Protocol "expressly calls for NAFTA's continued operation as articulated by relevant [USMCA] provisions in any event."[24] This is not, however, what the USMCA Protocol provides. The purpose of the USMCA Protocol, as reflected in its title,[25] and its primary function, as reflected in its first paragraph,[26] was to bring the NAFTA to an end and replace it with a new regime set out in the USMCA, which included an updated set of investment protections and, critically, no investor-State dispute settlement provisions as between Canada and the United States.

21. Claimant's attempt to circumvent the clear meaning and effect of the USMCA Protocol is based on the "without prejudice" phrase at the end of the Protocol's first paragraph. But this phrase does not, as Claimant wrongly asserts, "call[] for NAFTA's continued operation as articulated by relevant [USMCA] provisions,"[27] let alone do so "expressly." To the contrary, it says nothing about NAFTA continuing to operate or remaining in force after its termination. Rather, the "without prejudice" phrase states only that provisions of the NAFTA referenced in a specific USMCA provision shall have whatever effect they are given in that USMCA provision, notwithstanding the NAFTA's termination. Neither Paragraph 1 of Annex 14-C nor any other provision of the USMCA provides that NAFTA's substantive obligations (Section A) remain in force for events after the NAFTA's termination. Reading such a commitment into Annex 14-C

[24] Claimant's Observations ¶ 24.

[25] 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) (emphasis added).

[26] *Id.* ¶ 1 ("Upon entry into force of this Protocol, the USMCA, attached as 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.") (emphasis added).

[27] Claimant's Observations ¶ 24.

Paragraph 1 would not be avoiding prejudice to the provision, but rather fundamentally changing its meaning. This is obviously not what the USMCA Protocol's "without prejudice" language requires.

22. Footnote 20 to Annex 14-C Paragraph 1 is equally unhelpful to Claimant. Footnote 20 clarifies, "[f]or greater certainty," that the "relevant provisions" of various NAFTA chapters "apply with respect to . . . a claim" asserted under Paragraph 1. This clarification is entirely consistent with the U.S. interpretation of Paragraph 1 because it confirms that the sole class of claims that may be asserted under Paragraph 1 – *i.e.*, claims based on events occurring while the NAFTA was in force – will be governed by, and decided in accordance with, the relevant NAFTA provisions. Consistent with the use of "[f]or greater certainty" at the beginning of this text, footnote 20 is merely a restatement of the general principle of intertemporal law, which provides that "[a] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[28]

23. Claimant's third argument is that the final clause in Annex 14-C's definition of "legacy investment" – requiring that an investment be "in existence" as of the USMCA's entry into force – "militates in favour of an understanding that Annex 14-C was intended to protect and indeed continue to encourage investment during a transitionary period by maintaining NAFTA's Chapter 11 protections."[29] But the definition of "legacy investment" nowhere implies, let alone provides, that the NAFTA's substantive investment protections will continue to apply for any period following its termination.

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[28] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, [2001] 2 Y.B. INT'L L. COMM. 1, 57 (¶ 1), U.N. Doc. A/56/10 (2001) (RL-0057) (internal citations omitted).

[29] Claimant's Observations ¶ 34.

24. Paragraph 6 of Annex 14-C defines "legacy investment" in relevant part as an investment established or acquired while the NAFTA was in force and in existence on the date of entry into force of the USMCA.[30] This definition places temporal limits on the investments covered by the USMCA Parties' consent. At most, the legacy investment definition signals the USMCA Parties' preference for permitting claims by investors who maintained their investments as of the USMCA's entry into force, as opposed to those investors who did not.[31]

25. There are two critical flaws in Claimant's attempt to use the definition of "legacy investment" in support of its interpretation of Annex 14-C. *First*, in suggesting that Annex 14-C "was intended to protect and indeed continue to encourage investment . . . by maintaining NAFTA's Chapter 11 protections,"[32] Claimant ignores that the USMCA provided a new investment regime under Chapter 14 that was expressly intended to replace the old NAFTA Chapter 11 regime. Accordingly, there was no need to "maintain[] NAFTA's Chapter 11 protections" after the NAFTA terminated because the new set of investment protections in USMCA Chapter 14 immediately took their place.

26. *Second*, Claimant speculates that the majority of claims potentially arising under Annex 14-C would be claims for expropriation that would, Claimant seems to suggest, be excluded by the "legacy investment" definition.[33] Even if Claimant were correct, there is nothing inherently implausible about a reading of Annex 14-C that permits certain types of claims and excludes others. Treaty parties are free to impose such limits on the scope of investors and investments

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[30] USMCA, Annex 14-C ¶ 6 (R-0002).

[31] USMCA Article 14.1 defines "covered investment" as "an investment in its territory of an investor of another Party *in existence as of the date of entry into force of this Agreement* or established, acquired, or expanded thereafter." (R-0002) (emphasis added).

[32] Claimant's Observations ¶ 34.

[33] Claimant's Observations ¶ 35.

covered by their consent to arbitrate. But in any event, Claimant is incorrect as to the alleged disproportionate impact of the "legacy investment" definition with respect to claims for expropriated property. Claimant's argument would only apply to direct expropriation; *indirect* expropriation claims, which account for 550 of the 710 expropriation claims in the UNCTAD database on which Claimant relies, would fall within USMCA's "legacy investment" definition. Indeed, this flaw in Claimant's analysis is even starker in the NAFTA context: of the 92 NAFTA cases included in the UNCTAD database, only five – that is, a mere 5.4 percent of the total – alleged direct expropriation (and none of those cases were brought against the United States).[34]

27. In sum, the U.S. objection is plainly substantial. It is undisputed that a State cannot breach an obligation that did not bind it at the time of the permit revocation. When a State's consent to arbitration is limited to breaches of specific obligations, it has long been understood that this fundamental principle of State responsibility circumscribes the tribunal's jurisdiction *ratione temporis* to claims based on events occurring when those obligations were in force. The USMCA Parties terminated the NAFTA prior to the revocation of the Keystone XL pipeline permit and, accordingly, the Tribunal lacks jurisdiction over claims arising from that event.

B. The United States' Objection Is Entirely Distinct from the Merits

28. In an effort to inject merits issues into this purely jurisdictional objection, Claimant strains to allege bad faith on the part of the United States either in its negotiation of the USMCA or in its assertion of this *ratione temporis* objection.[35] In addition to being false, these vague, unsubstantiated allegations are irrelevant to the treaty interpretation question before this Tribunal.

[34] UNCTAD Investment Policy Hub, Investment Dispute Settlement Navigator, *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search (accessed July 2, 2024).

[35] Claimant's Observations ¶¶ 33, 36.

29. Deciding the United States' *ratione temporis* objection will require nothing more than an interpretation of Annex 14-C in accordance with the VCLT rules. The date of the sole event giving rise to Claimant's claims is uncontested – the Keystone XL permit was revoked on January 20, 2021[36] – so the Tribunal's analysis of the U.S. jurisdictional objection is limited to one question: does Annex 14-C provide consent for arbitration of a claim based on an event that took place after the NAFTA had terminated? Any supposed bad faith on the part of the United States relating to the merits of the claim – and there is none – cannot somehow create consent to arbitration among all three USMCA Parties where it is not reflected in the text of the treaty. As a result, the United States' objection is not intertwined with the merits, and bifurcation is fair to both parties.[37]

30. On its merits, Claimant's assertion of bad faith is misplaced. There is no rule that a State must remain in its free trade or investment agreements in perpetuity; States choose to terminate treaties all the time. In March 2017, when TC Energy was provided with a revocable Presidential Permit to build the cross-border portion of the Keystone XL pipeline, negotiations regarding the replacement of the NAFTA with the USMCA had not yet begun, and it was entirely possible that the NAFTA was going to be terminated in its entirety and not replaced with anything at all, as then-presidential candidate Trump had proposed in 2015.[38] There is thus no credible argument

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[36] Claimant's Memorial ¶ 2.

[37] Claimant's allegation that "the TC Energy proceeding tribunal did consider the claimants' similar position on the merits being intertwined" is false. Claimant's Observations ¶ 37. The tribunal in *TC Energy* concluded that the United States' "jurisdictional objection is not intertwined with the merits." *TC Energy and TransCanada PipeLines Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB/21/63, Procedural Order No. 2 (Apr. 13, 2023), § B.2. (RL-0012). *See also id.* ¶¶ 29-30 (noting that the United States' "jurisdictional objection revolves primarily on a point of interpretation of the USMCA annexes that is mainly premised on questions of public international law" and concluding that "bifurcation would not likely entail a substantial risk of duplication of arguments or evidence" even though claimants intended to make factual arguments concerning alleged representations made by the United States).

[38] President Trump, while still campaigning as a candidate in 2015, referred to the NAFTA as a "disaster" and stated that "[w]e will either renegotiate it or we will break it." Jill Colvin, *Trump: NAFTA trade deal a 'disaster,' says he'd 'break' it*, ASSOCIATED PRESS (Sept. 26, 2015) (R-0007). *See also* Crowell & Moring LLP Client Alert,

that, in replacing the NAFTA with the USMCA and providing limited consent to arbitrate breaches of obligations of the NAFTA, the United States was in any way acting in bad faith with respect to TC Energy or any other investor at that time.

31. In any event, the USMCA was concluded in November 2018, long before Claimant *in this case* chose to make its alleged investment in March 2020. The text of the USMCA was available to all investors to determine for themselves how it related to their supposed investments. The circumstances of the provision of the Presidential Permit, and the timing of the USMCA negotiations, have no bearing on Claimant's subsequent alleged investment in this case at all, and Claimant cannot allege that when the United States was negotiating the USMCA in 2017, it was acting in bad faith with respect to an investment that Claimant would not purportedly make until three years later.

32. The United States has also advanced a good faith interpretation of the treaty. Claimant is unaided by its repeated reference to the award in *Amco v. Indonesia*, which it quotes as stating that "any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of their commitments the parties may be considered as having reasonably and legitimately envisaged."[39] This statement stands merely for the premise that the language of a treaty – the "consequences of the[] commitments" – must be applied in good

NAFTA on the Brink (Jan. 27, 2017) (R-0008) ("The U.S.' exit from NAFTA would also mean certain investors would lose the Investor-State Dispute Settlement (ISDS) protections contained in Chapter 11 of the Agreement. . . . Once the withdrawal takes effect, U.S. investors would no longer be able to bring claims against Mexican and/or Canadian authorities resulting from government illegal expropriations, or arbitrary or discriminatory actions affecting investments"); Ashley Parker, *'I was all set to terminate': Inside Trump's sudden shift on NAFTA*, THE WASHINGTON POST (Apr. 28, 2017) (R-0009) (noting that President Trump was set to announce on the 100th day of his presidency that he was withdrawing from NAFTA).

[39] Claimant's Observations ¶¶ 32-33, 35.

faith in accordance with the VCLT.[40] This is also reflected in the paragraph prior to the one quoted by Claimant, in which the *Amco* tribunal wrote, "a convention to arbitrate is not to be construed restrictively, nor as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties,"[41] which in this case would be the USMCA Parties.[42] The United States in this case merely asks this Tribunal to apply the language of the USMCA in good faith and to reject Claimant's request that the Tribunal deviate from the plain language of the treaty.

IV. The United States' Objections Based on a Lack of Jurisdiction *Ratione Materiae* Meet the Standard for Bifurcation

33. The U.S. *ratione materiae* objections regarding the lack of a qualifying "investment" in the United States on the date of the permit revocation should be heard in a preliminary phase because they are substantial, they are distinct from the merits, and they will eliminate the entirety of Claimant's claims.[43]

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[40] Good faith requires that the interpreter stay true to the ordinary meaning of the text. RICHARD GARDINER, TREATY INTERPRETATION 44 (2d ed. 2015) (RL-0058) ("GARDINER") ("The obligation of good faith in applying the Vienna rules sets limits to the interpretative exercise."). *See also id.* at 167 ("Good faith has been considered as a constraining factor on the scope for implying terms into a treaty."); VCLT, art. 31(1) (RL-0017) ("A treaty shall 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 its object and purpose.").

[41] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction ¶ 14(i) (Sept. 25, 1983) (CLA-0061) (emphases omitted).

[42] *See also* GARDINER at 175 (RL-0058) ("Taken together, these rules [Articles 26 and 31 of the VCLT] call for good faith in the interpretation and performance of a treaty, and neither rule is open to question. But there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle . . . *pacta sunt servanda* cannot require departure from what has been agreed.") (quoting *R v Immigration Officer at Prague Airport ex parte European Roma Rights Centre* [2004] UKHL 55, at para 19).

[43] Claimant feigns surprise at this objection (Claimant's Observations ¶ 6), but it was Claimant who put forward a fact witness, an expert witness, and dozens of exhibits with its Memorial, all to explain the nature of its supposed investment. If the U.S. objections were as "frivolous" as Claimant now asserts, certainly such efforts would not have been necessary. In any event, all of this material was submitted for the first time with the Memorial, after which the United States raised this objection at the earliest possible point in the procedural calendar.

A. The United States' Objections Are Substantial

34. Claimant's arguments regarding the United States' two *ratione materiae* objections focus solely on their *prima facie* substantiality; however, when examined closely, those arguments do not undermine the substantiality of the U.S. argument but rather reinforce that there was no qualifying investment on the date of the permit revocation. Claimant relies on vague assertions of "interests" in a "network of circumstances" and "interconnections to U.S. enterprises and capital inputs."[44] These repeated ambiguities demonstrate the weakness of Claimant's case with respect to the specific elements of its supposed investment.

35. When the U.S. objections are presented in full, the Tribunal will be asked to examine the specific activities of Claimant that it alleges constitute an investment. Here, the supposed "network of circumstances" on which Claimant relies arise out of the Investment Agreement signed between APMC and TC Energy on March 31, 2020. That agreement contemplated that APMC would (1) fund a U.S. special purpose vehicle (SPV), (2) fund a Canadian SPV, and (3) provide a loan guarantee to TC Energy. None of these three aspects of the Investment Agreement, addressed in Claimants' Observations, constituted an "investment," and there was certainly not an "investment" in the United States on the date of the permit revocation.

1. The U.S. SPV

36. The lynchpin for the supposed "network of circumstances" that comprised Claimant's alleged investment is the Class A shares that Claimant purchased in 2020 in the U.S. SPV.[45] The

[44] Claimant's Observations ¶¶ 43, 54.

[45] *See* Investment Agreement between TransCanada Pipelines Ltd. and APMC, [redacted] (Mar. 31, 2020) (C-0110) ("Investment Agreement").

remuneration for the Class A shares were certain "accretion rights" that acted like interest, entitling Claimant to a 6% per annum return.[46]

37. Claimant asserts for the first time in its Observations that its Class A shares constituted an "investment" under NAFTA Articles 1139(a) and (h).[47] The United States will address such arguments in full in its jurisdictional objections. But it is apparent that even if the Class A shares could be considered an investment under Article 1139, Claimant divested itself of those shares on January 8, 2021 – prior to the permit revocation.[48] While Claimant asserts that it had a "direct chain of ownership and control from APMC to the SPV investment structure in the United States through to TransCanada LP, the holder of the KXL Presidential Permit,"[49] that chain was broken when the Class A shares were sold – APMC no longer had an investment related to the Presidential Permit.

38. Claimant nonetheless writes, "[t]he US Class A interest repurchase of January 2021 did not result in any change with respect to APMC's US-based ownership status regarding the US SPV and US SPV GP."[50] This is demonstrably untrue with respect to the U.S. SPV – by its own description, Claimant lost "substantially all" of its ownership interest in the U.S. SPV when it sold its shares.[51] And Claimant has not, and cannot, allege that the U.S. SPV GP was itself an investment, as it never provided capital to that entity.

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[46] *See* [redacted]

[47] Claimant's Observations ¶¶ 45, 55.

[48] Notice of Arbitration ¶ 42 ("TC Energy exercised the right to repurchase substantially all of the US Class A Interests held by the Enterprise for CAD$ 630.8 million by drawing on the TC Energy credit facility guaranteed by APMC . . . ."); *see also* Claimant's Memorial ¶ 81.

[49] Claimant's Observations ¶ 45 (quoting Notice of Arbitration ¶ 32).

[50] *Id.*

[51] Notice of Arbitration ¶ 42; *see also* Claimant's Memorial ¶ 81.

39. Claimant also cannot rely on the possibility that, under certain circumstances, [redacted] [52] While these ownership options were contemplated by the Investment Agreement, after January 8, 2021, Claimant held no Class A shares.[53] Thus, these are merely hypothetical, not actual, investments.

40. Aside from its interest in the U.S. SPV, Claimant has not asserted any direct investment in the United States. Without any investment in the U.S. SPV – in Class A, Class B, or Class C shares – on the date of the permit revocation, the rest of Claimant's argument on investment crumbles.[54]

2. The Canadian SPV

41. Claimant asserts in its Observations that it had two "interests" in the Canadian SPV: accretion rights and Class C conversion rights, both arising from its Class A shares in the Canadian SPV.[55] Neither of these "interests" constitutes an investment, and certainly not an "investment" in the United States. The Class A shares in the Canadian SPV were clearly situated in Canada, not the United States, and the accretion payments APMC may have received as a result were not a U.S. investment (even if the calculation of the accretion rights were based partly on the value of Claimant's terminated Class A shares in the U.S. SPV). Similarly, even if the Class C shares

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[52] *Cf.* Claimant's Observations ¶¶ 50-51.

[53] Investment Agreement, [redacted] (C-0110); *see* [redacted]

[54] *See* U.S. Request for Bifurcation ¶¶ 29-31 & nn. 33-35 (citing *inter alia Bayview Irrigation District et al. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/05/1, Award (on Jurisdiction) ¶ 105 (June 19, 2007) (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")). To differentiate its case from the *Bayview* decision, Claimant argues that the Keystone XL pipeline would have transported oil through the United States if it had been completed. But after Claimant divested itself of the Class A shares, the U.S. portion of the Keystone project was solely in the hands of one investor: TC Energy. Claimant cannot rely on TC Energy's alleged investment in the United States to somehow convert its investment on the date of breach – which was solely in Canada – into a U.S. investment.

[55] Claimant's Observations ¶¶ 51-53.

entitled Claimant to a share of assets sold by the Canadian SPV, that does not make Class C shares held in a Canadian corporation a *U.S.* investment (and, in any event, Claimant did not hold the Class C shares on the date of the permit revocation). In short, this was an investment in a Canadian corporation by another Canadian corporation, which is neither subject to the protections of NAFTA Chapter 11 nor within Annex 14-C's definition of "legacy investment."

3. The Loan Guarantee

42. The loan guarantee was not a covered "investment" under NAFTA Article 1139. Notably, Claimant concedes in its Observations that the loan guarantee is neither a loan nor "itself a debt security," but rather "a potential . . . contract obligation for Claimant to pay."[56] A *potential* contract *obligation* does not constitute an "investment" under Article 1139. Claimant also describes the loan guarantee as "consideration" for a "network of circumstances" that comprised its investment.[57] Consideration paid for an investment is not the same thing as an investment itself; it is the latter that determines whether USMCA Annex 14-C and NAFTA Chapter 11 apply. To the extent, for example, that the loan guarantee was part of the consideration for the purchase of the Class A shares in the U.S. SPV, Claimant has no claim because it sold that supposed investment on January 8, 2021, as discussed above. In short, the loan guarantee is simply "too remote from the protection NAFTA grants to covered investments."[58]

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[56] Claimant's Observations ¶ 43. Claimant is not alleging that the loan guarantee was a "loan to an enterprise" under NAFTA Article 1139(d).

[57] Claimant's Observations ¶ 43.

[58] *See, e.g.*, *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award ¶ 140 (Mar. 31, 2010) (RL-0059) ("[T]he issue here is that the right as defined does not appear to arise from a contract that might be considered directly related to the investment made. In fact, it is only a potential interest that may or not materialize under contracts the Investor might enter into with its foreign customers. But even assuming that an actual right is involved in this relationship, this appears to be too remote from the protection NAFTA grants to covered investments.").

43. However Claimant characterizes the loan guarantee, it is clear that it was not an "investment" *in the territory of the United States* at the time of the permit revocation. [redacted][59] [redacted][60] Thus, all of the activity associated with the loan guarantee occurred in Canada.

44. In short, the United States has demonstrated *prima facie* substantiality with respect to its *ratione materiae* objections. None of the components of the Investment Agreement that Claimant addresses in its Observations constituted investments in the United States on the date of the revocation. Joining them together in a "network of circumstances" does not somehow create an investment where none otherwise existed.

B. The United States' Objections Are Entirely Distinct From the Merits

45. In its Observations, Claimant does not challenge the second prong of the *Glamis Gold* test for bifurcation, related to whether jurisdiction and the merits are so intertwined as to make bifurcation impractical. As explained in the Request, the United States' objections involve a discrete threshold jurisdictional issue. In order to decide these objections, the Tribunal must only

[59] *See* Request for Bifurcation ¶ 32; Investment Agreement, [redacted] (C-0110) [redacted] (C-0284) [redacted] (C-0262) [redacted]

[60] [redacted] (C-0284).

determine whether any of Claimant's alleged activities constituted an "investment" under Annex 14-C of the USMCA and Article 1139 of the NAFTA, and if so, whether it was an investment "in the territory of" the United States at the time of the revocation. By contrast, the merits of Claimant's claims are concerned with conduct of the United States related to the revocation of the Presidential Permit. No factual details concerning the alleged measures will be necessary to decide the objections and, as a result, there will be no need to prejudge the merits. Ruling for the United States on either *ratione materiae* objection will eliminate the case in its entirety, reducing time and costs. Accordingly, the Tribunal should hear the United States' objections as a preliminary matter, consistent with the presumption in favor of bifurcation established under the 1976 UNCITRAL Rules.

V. Bifurcation Will Promote Efficiency

46. Claimant does not address the third prong of the *Glamis Gold* test for bifurcation, related to efficiency, with respect to any of the jurisdictional objections. Claimant instead provides a lengthy discourse at the end of its Observations on the efficiency of bifurcation as a general concept.[61] The thrust of Claimant's argument is that if the case is not dismissed on the basis of the U.S. jurisdictional objections, bifurcation would add to the overall length of the proceedings, and that therefore bifurcation should be denied. But this is true in every case where bifurcation is requested – if the jurisdictional objections fail in any bifurcated case, the case will take longer to resolve than if the case had not been bifurcated. If Claimant's test is correct, then bifurcation could never be granted – in contravention of Article 21(4)'s presumption in favor of bifurcation, as well as the practice of a number of tribunals in granting bifurcation (including the tribunal in the *TC Energy* arbitration, which was operating under the 2006 ICSID Rules).

[61] Claimant's Observations ¶¶ 57-62.

47. Of course, Claimant's proposed test is not the test enunciated in *Glamis Gold* and in numerous cases since. Claimant asks the Tribunal to consider whether bifurcation would be inefficient if the jurisdictional objections fail.[62] But the third prong of *Glamis Gold* requires the Tribunal to consider whether the objection, "***if granted***," would reduce time and costs.[63] Here, it undoubtedly would. If granted, any of the jurisdictional objections raised by the United States would dispose of the case in its entirety, relieving the Parties and the Tribunal from having to address the merits or damages. Significant time and costs would be saved.

48. Claimant also mischaracterizes the negotiation of Annex B of Procedural Order No. 1, in an effort to argue that the agreed calendar for the bifurcation phase of this case is unreasonably long. As Claimant acknowledges, and as the Tribunal noted in Procedural Order No. 3, "Claimant . . . reached agreement with the Respondent on a Procedural Calendar now incorporated in Annex B of PO No 1."[64] Claimant now asserts that it "only agreed to the outline of the dates of the Procedural Calendar to move on from the original debate on that basis."[65] Whatever internal motivation Claimant had for reaching that agreement is irrelevant. An agreement was struck, and the Tribunal approved it.

49. Nor is Claimant correct to assert that "the bifurcated schedule in the Procedural Calendar is effectively Respondent's proposal,"[66] much less that this is a ground for rejecting bifurcation as

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[62] Claimant's Observations ¶ 59 ("Bifurcation on the present Procedural Calendar will at least double [the time of a joined approach] *if the bifurcated objection or objections fail*.") (emphasis added).

[63] *Glamis Gold* ¶ 12(c) (RL-0002). *See also WCV Capital Ventures* ¶¶ 8-9 (RL-0044) ("The ultimate goal of bifurcation is to achieve procedural efficiency: if a jurisdictional objection ***is successful***, bifurcation will allow for an early termination of the arbitration, sparing the time and cost required to adjudicate the merits. It follows that the Arbitral Tribunal should order the proceedings to bifurcate, except when, after analysing each Objection separately, there are good reasons to believe that no procedural efficiency will be achieved.") (emphasis added).

[64] *Alberta Petroleum Marketing Commission v. United States of America*, NAFTA/ICSID Case No. UNCT/23/4, Procedural Order No. 3 ¶ 5(a) (June 11, 2024) ("Procedural Order No. 3").

[65] Claimant's Observations ¶ 58.

[66] *Id.*

inefficient. Far from simply accepting the calendar that it now claims is "effectively Respondent's proposal," the exchange between the Parties shows that Claimant carefully examined and edited the schedule – ***and made it longer***. In written and oral consultations, Claimant proposed an additional 30 days for the submission of its Memorial, and in the bifurcation phase specifically, an additional 15 days to file its Rejoinder – thus adding 45 days to the schedule initially proposed by the United States.[67] Claimant also proposed extensions to its own deadlines in the merits or non-bifurcated phase of the calendar. The United States initially indicated that it was "amenable to all of the suggestions you proposed to extend Claimant's deadlines except for the final one, on the rejoinder to jurisdictional objections."[68] Ultimately, however, the United States agreed to this deadline extension as well.

50. Thus, Claimant carefully considered the U.S. calendar proposal and opted to lengthen it by a month and a half. Claimant cannot now credibly complain about the length of the calendar and assert that the negotiated calendar is itself evidence of inefficiency. As it did in Procedural Order No. 3, this Tribunal should continue to hold Claimant to its procedural agreements.[69] In any event, applying the correct *Glamis Gold* standard, should the Tribunal dismiss the case due to lack of jurisdiction, considerable effort and time will be saved under the agreed schedule.

[67] Email from Ian Laird to David Bigge (Dec. 6, 2023) (R-0010) (attaching Claimant's edits to procedural calendar).

[68] Email from David Bigge to Ian Laird and Ashley Riveira (Dec. 6, 2023) (R-0011).

[69] *See* Procedural Order No. 3 ¶ 5(b) ("The existing timetable provides for an orderly consideration of preliminary objections, which will ensure the equality of the Parties to these proceedings.").

VI. Conclusion

51. For the foregoing reasons, and those stated in the Request for Bifurcation, 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.[70]

Respectfully submitted,

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[70] 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.