IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE UNCITRAL ARBITRATION RULES (1976)

(CORRECTED)

Alberta Petroleum Marketing Commission

Claimant

v.

United States of America

Respondent

(ICSID Case No. UNCT/23/4)

PROCEDURAL ORDER No. 4
ON
APPLICATION FOR BIFURCATION

Members of the Tribunal
Prof. Campbell A. McLachlan KC, President of the Tribunal
Mr. Stephen L. Drymer, Arbitrator
Prof. Sean D. Murphy, Arbitrator

Secretary of the Tribunal
Ms. Aïssatou Diop

Assistant to the Tribunal
Mr. Jack L.W. Wass

August 7, 2024

CONTENTS

I. INTRODUCTION 3
A. COMMENCEMENT OF ARBITRATION AND PARTIES 3
B. PROCEDURAL BACKGROUND 3
II. PARTIES' SUBMISSIONS 4
A. INTRODUCTION 4
B. TEST FOR BIFURCATION 7
(1) Respondent's submissions 7
(2) Claimant's submissions 8
C. PRELIMINARY OBJECTIONS RAISED BY THE UNITED STATES: (1) JURISDICTION *RATIONE TEMPORIS* 9
(1) Respondent's submissions 9
(2) Claimant's submissions 12
D. PRELIMINARY OBJECTIONS RAISED BY THE UNITED STATES: (2) JURISDICTION *RATIONE MATERIAE* 15
(1) Respondent's submissions 15
(2) Claimant's submissions 17
E. WHETHER BIFURCATION SHOULD BE GRANTED 19
(1) Respondent's submissions 19
(2) Claimant's submissions 19
III. TRIBUNAL'S ANALYSIS 20
A. INTRODUCTION: THE LEGAL TEST 20
B. THE *RATIONE TEMPORIS* OBJECTION 22
C. THE *RATIONE MATERIAE* OBJECTION 25
IV. DISPOSITION 26

I. INTRODUCTION

A. Commencement of arbitration and parties

1. This arbitration was commenced by Alberta Petroleum Marketing Commission on behalf of its enterprise 2254746 Alberta Sub. Ltd. (**APMC** or **Claimant**) against the United States of America (**United States, US** or **Respondent**) by Notice of Arbitration dated April 27, 2023 and received by the Respondent on May 22, 2023.

2. The Claimant brings this arbitration under the North American Free Trade Agreement (**NAFTA**) and Annex 14-C of the United States-Mexico-Canada Agreement (**USMCA** or **CUSMA**), and pursuant to Article 1120(1) of NAFTA and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (**UNCITRAL Rules 1976**).

3. This procedural order is the Tribunal's decision on the Respondent's Request for Bifurcation of Preliminary Objections.

B. Procedural background

4. On December 18, 2023, the Tribunal issued Procedural Order No. 1 (**PO No. 1**) which specified in Annex B a Procedural Calendar for the conduct of this arbitration. The Procedural Calendar *inter alia* permitted the Respondent to make an application for Bifurcation of Preliminary Objection(s) and set a timetable for the disposition of such an application if made.

5. On April 16, 2024, the Claimant submitted its Memorial with supporting documentation.

6. On May 16, 2024, the Respondent submitted its Request for Bifurcation (**Request**), contending that the Tribunal lacks jurisdiction *ratione temporis* and *ratione materiae* and requesting that the proceedings be bifurcated with the Respondent's preliminary objections on jurisdiction being resolved in a separate phase.

7. On May 22, 2024, the Claimant filed a Request for Revision of the Schedule and Production of Documents, requesting that the procedural calendar be revised to include a document production phase prior to its submissions on the Request, so as to enable it

to fully respond to the Request's position on the *ratione temporis* objection. After the receipt of submissions, the Tribunal by Procedural Order No. 3 dated June 11, 2024 ordered *inter alia* that: the Request for Revision of the Schedule and Production of Documents was denied, and the existing Procedural Calendar provided in Annex B to PO No. 1 was maintained.

8. On June 17, 2024, the Claimant submitted its Observations on Request for Bifurcation (**Observations**), contending that the Request should be denied and the Respondent's preliminary objections joined to the merits.

9. On July 8, 2024, the Respondent submitted its Reply to Claimant's Observations on the Request for Bifurcation (**Reply**).

10. On July 19, 2024, the Respondent wrote to the Tribunal to advise that on July 12, 2024 the arbitral tribunal in *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States* had issued an award dismissing the case for lack of jurisdiction *ratione temporis* ("***TC Energy* Decision**"). The Respondent's letter submitted that for the "purposes of the pending request for bifurcation, this award confirms that the U.S. objection *rationae temporis* is *prima facie* substantial and that bifurcation would be efficient. We request that the Tribunal take note of this development." The letter recorded that the United States "would be happy to add the *TC Energy* award to the record in this case once it is publicly available, if the Tribunal so requests."

11. At the date of this decision, no copy of the *TC Energy* Decision has been submitted to the Tribunal.

12. On July 29, 2024, the Claimant submitted its Rejoinder to the Reply (**Rejoinder**).

II. PARTIES' SUBMISSIONS

A. Introduction

13. The Claimant alleges that it had an investment in the Keystone XL pipeline being built by TC Energy Corporation pursuant to US Presidential permits issued in 2017 and 2019. It says that this investment was protected by obligations under NAFTA and Annex 14-C

of the USMCA, and the United States breached those obligations when the US President revoked those permits on January 20, 2021 by Executive Order 13990.[1]

14. The Respondent requests that the Tribunal bifurcate the proceeding and hear two objections to jurisdiction in a preliminary phase. These objections are:

> 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[2] (the ***ratione temporis* objection**)
>
> Claimant cannot demonstrate that it had an "investment" (as defined by NAFTA), particularly when the alleged breach occurred. 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[3] (the ***ratione materiae* objection**)

15. Annex 14-C of USMCA, which came into force on 1 July 2020, 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.

[1] Memorial, [1]-[7].

[2] Request, [9].

[3] Request, [4].

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).

16. Article 1139 of NAFTA includes the following relevant definitions:

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

B. Test for bifurcation

(1) Respondent's submissions

17. The Respondent submits that Article 21(6) of the UNCITRAL Arbitration Rules 1976 creates a presumption in favour of bifurcating jurisdictional questions, providing:[4]

[4] Request, [7].

> In 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.

18. The Respondent submits that in exercising their discretion whether to bifurcate, 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, while also considering "overarching considerations of procedural fairness and efficiency."[5]

19. The Respondent says that the Claimant had a choice of procedural options under NAFTA Article 1120 when commencing the arbitration, and chose to commence these proceedings under the UNCITRAL Rules 1976 instead of (for example) the ICSID procedure, which would have included the 2022 iteration of the ICSID Rules. The presumption in favour of bifurcation has been consistently applied by tribunals operating under the UNCITRAL Rules 1976, and the Claimant "cannot now appeal to other sets of rules" to avoid it.[6]

(2) Claimant's submissions

20. The Claimant acknowledges the provision addressing bifurcation in Article 21(6) of the UNCITRAL Rules 1976, but rejects the proposition that it imposes a "hard presumption in favour of bifurcation" and submits that at best it is a "general suggestion with a clear confirmation of a tribunal's ultimate discretion."[7] It says that efficiency and fairness are the "touchstones" of the required assessment.

21. The Claimant submits that in the exercise of its overall discretion under Article 15(1), the Tribunal is entitled to take into account the trend of how bifurcation has been treated in recent years, which tempers any notions of a presumption, and which suggests that a

[5] Request, [8].

[6] Reply, [9]-[12.

[7] Observations, [8]], citing in particular **RL-0002** *Glamis Gold Ltd v United States* NAFTA/UNCITRAL, Procedural Order No. 2 (May 31, 2005) (***Glamis Gold***).

presumption of protecting against longer proceedings is emerging, at least absent a *prima facie* assessment that the objection is more likely than not to succeed.[8]

22. The Claimant notes that the three considerations proposed by the Respondent derived from the *Glamis Gold* decision closely match those required to be considered under the 2022 ICSID Arbitration Rules, which does not have a presumption in favour of bifurcation.[9] The Claimant records its agreement with considering whether the objection is "prima facie substantial or frivolous" and submits that this is closely tied to the issues of efficiency and fairness;[10] it says that a modern tribunal, with the benefit of consideration of past tribunal experiences, should exercise its discretion to "reject a procedure unlikely to be more efficient rather than pursuing it merely because it *might* be so."[11]

C. Preliminary objections raised by the United States: (1) jurisdiction *ratione temporis*

(1) Respondent's submissions

23. The Respondent submits that its objection to jurisdiction *ratione temporis* supports bifurcation of the proceedings because it is substantial, it is distinct from arguments on the merits, and it would dispose of the Claimant's entire case.

24. *Substance of the objection.* The Respondent says that the consent to arbitrate found in paragraph 1 of Annex 14-C of USMCA is limited to claims based on events occurring while NAFTA was still in force.[12]

25. The Respondent notes that the USMCA entered into force on July 1, 2020 and, by the protocol accompanying that treaty, its entry into force terminated and superseded the

[8] Observations [10]-[12] citing *inter alia* the UNCITRAL Arbitration Rules 2010 and ICSID practice and [17]-[19] citing **CLA-58** Lucy Greenwood, "Revising Bifurcation and Efficiency in International Arbitration Proceedings" (2019) 36(4) J Int'l Arb 421.

[9] Observations, [14].

[10] Observations, [15]-[16]; Rejoinder, [9]; citing *Glamis Gold;* **CLA-50** *Red Eagle Exploration Ltd v Colombia* ICSID Case No ARB/18/12, Decision on Bifurcation (August 3, 2020); **CLA-54** *Gavrilović and Gavrilović d.o.o. v Croatia* ICSID Case No ARB/12/39, Decision on Bifurcation (January 21, 2015).

[11] Rejoinder, [9].

[12] Reply, [14].

NAFTA, releasing the Parties from any obligation to perform NAFTA from that date; the Respondent says its interpretation is "crystal clear" on the text of the provisions.[13] The Respondent relies on the provision in Article 70(1)(a) of the Vienna Convention on the Law of Treaties (**VCLT**) that the termination of a treaty "releases the parties from any obligation further to perform the treaty" unless the treaty provides otherwise, and says that NAFTA does not contain a "survival provision" that would oblige the United States to continue performing the treaty after termination.[14]

26. The Respondent says that the Claimant's case on jurisdiction depends on it establishing that Annex 14-C of USMCA constituted an agreement to extend NAFTA's obligations to capture a breach of NAFTA made after the date of termination.[15] The Respondent says that in paragraph 1 of Annex 14-C the States Parties provided consent to arbitrate certain claims for a breach of an obligation under NAFTA that occurred before the termination of that treaty and that:[16]

    a. the purpose of this provision was to give investors with claims that arose prior to NAFTA's termination, but who had not yet asserted those claims in arbitration, a period of time to do so; but

    b. the parties did not intend that clause to extend NAFTA's substantive obligations for an additional three years in respect of investments that subsisted at the time of NAFTA's termination but where the breach had not yet occurred.

27. In response to the Claimant's contention that paragraph 1 does not address temporal aspects of the conduct that could lead to a claim regarding a legacy investment, the Respondent relies on the ordinary meaning of the provision, and says that the language—"breach of an obligation" under the specified NAFTA provisions—was derived from NAFTA Articles 1116(1) and 1117(1) which the States Parties agreed provided a jurisdictional limitation *ratione temporis* to those claims that arose while the treaty was

[13] Request, [11]; Reply, [15]-[16].

[14] Request, [13].

[15] Request, [14].

[16] Request, [17].

in force; the consensus that developed under NAFTA as to claims based on conduct before NAFTA came into force is equally applicable to claims based on conduct after it was terminated.[17]

28. The Respondent says that in the absence of textual support, the Claimant's argument depends on a "patchwork combination of the USMCA Protocol and references to the NAFTA in Paragraph 1 of Annex 14-C and its accompanying Footnote 20." The Respondent says this argument proceeds from a faulty premise (because the real purpose of the Protocol was to bring the NAFTA to an end and replace it with a regime which did not include investor-State dispute settlement provisions); that the "without prejudice" phrase at the end of paragraph 1 does not call for NAFTA's continued operation as Claimant submits; and that "footnote 20 is merely a restatement of the general principle of intertemporal law".[18]

29. Finally, the Respondent says that 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."[19]

30. *Relationship to the merits and effect on the arbitration*. The Respondent says that the *ratione temporis* objection is "separate and entirely distinct from the merits" because it turns on the interpretation of Annex 14-C, will not require the Tribunal to analyse any factual evidence concerning alleged breaches other than the date of the alleged breach (January 20, 2021) which is uncontested, and does not overlap with the question of whether the revocation of the March 2019 Permit violated the Respondent's substantive obligations under NAFTA Articles 1102, 1103, 1105 and 1110. In those circumstances the Respondent submits that the objection is not so intertwined with the merits as to make bifurcation impractical, but the reverse.[20]

[17] Request, [18]; Reply, [17]-[18].

[18] Reply, [19]-[22].

[19] Reply, [23]-[27].

[20] Request, [21]

31. The Respondent says that the allegations of bad faith on the part of the Respondent in the negotiation of the USMCA or its assertion of the *ratione temporis* objection are irrelevant to the treaty interpretation question before the Tribunal. It says the allegation of bad faith is misplaced in circumstances where there is no rule that a State must remain in its free trade or investment agreements in perpetuity; when TC Energy was provided with a revocable Presidential Permit it was "entirely possible that the NAFTA was going to be terminated in its entirety and not replaced with anything at all", and the USMCA was concluded in November 2018 long before the Claimant in this case chose to make its alleged investment in March 2020. The Respondent says it "merely asks this Tribunal to apply the language of the USMCA in good faith".[21]

32. The Respondent says that if successful, this objection would dispose of the Claimant's entire case.[22]

(2) Claimant's submissions

33. The Claimant submits that Article 14-C establishes the Tribunal's jurisdiction, and in particular that:[23]

> NAFTA Chapter 11 was not superseded as far as legacy investments were concerned, but was rather maintained in force for such investments for an additional period of three years.

34. The Claimant submits that the Respondent's position on the interpretation of the treaty text "hinges on an unjustified linguistic presumption"[24] and is not credible, and a good faith interpretation of "legacy investment" is required.

35. *Substance of the objection*. The Claimant emphasises that while the USMCA superseded NAFTA, it did so without prejudice to the provisions of the former that refer to the latter, and the absence of a survival clause is immaterial "in the face of the Protocol wording

[21] Reply, [28]-[32].

[22] Request, [22].

[23] Memorial, [223]; Observations, [25].

[24] Rejoinder, [2].

which expressly calls for NAFTA"s continued operation".[25] It says practice on the question of whether NAFTA covered conduct prior to that treaty coming into force says nothing about whether the USMCA extended NAFTA's obligations when it superseded that treaty.[26]

36. The Claimant says that if, in accordance with the Respondent's interpretation, NAFTA was no longer in force at all after USMCA came into force, then "the situation would be that the CUSMA parties agreed to arbitrate claims regarding now-defunct obligations", but this cannot be correct taking into account: that Annex 14-C provides that claims of a breach of a NAFTA "obligation" may be brought for three years as to which the provisions of Section A of NAFTA "apply"; that the Respondent's language would lead to redundant language and contradictory and absurd outcomes; and the presumption of Article 28 of the VCLT regarding non-retroactivity of treaties. The Claimant says that its interpretation flows from the interpretation of the term "obligation" in its textual context, and if the parties had intended the result for which the Respondent contends they would have used clear language to that effect.[27]

37. The Claimant says that the *TC Energy* award (the text of which is not public) "cannot confirm that the Respondent's *ratione temporis* objection is *prima facie* substantial as framed in *this* Proceeding", which is a matter that must be considered on its own merits.[28]

38. *Construing "legacy investment" in good faith and relationship to the merits*. The Claimant notes that USMCA was being negotiated at the same time that investments in the Keystone XL Project were being sought, and says that if the USMCA Parties had in fact taken in good faith the position that Respondent now advocates, that cannot be reconciled with the consequences of those new treaty commitments in respect of the continued investments being considered at that time; it says that these issues are

[25] Observations, [24]-[25].

[26] Observations, [27]; Rejoinder, [11].

[27] Observations, [28]-[31]; Rejoinder, [13]-[14].

[28] Rejoinder, [15] (emphasis in original), contrasting the Respondent's letter of Respondent dated July 19, 2024 and also noting that the award was not unanimous.

"intertwined with the merits in respect of the good faith conduct of Respondent"[29] and "consideration of contextual cues which encroach upon the merits of Claimant's case are entirely appropriate, and may in fact become inevitable."[30]

39. The exclusion from protection of investments no longer in existence when USMCA came into force militates in favour of an interpretation that Annex 14-C was intended to protect investment during a transitional period by maintaining NAFTA's Chapter 11 protections, and "it is not plausible that the intention of the legacy investment definition"—given the exclusion of investments not in existence at the time of USMCA coming into force—"was to effectively limit paragraph 1 to consent to historic non-expropriation claims regarding still-extant investments, itself a likely almost non-existent set."[31] It rejects the Respondent's position that this interpretation would capture cases of indirect expropriation that did not involve the destruction of investments, since the concept of expropriation involves the substantial deprivation of an investment.[32] It says that APMC relied upon the March 2019 Permit to invest in the Project in March 2020 "precisely in the window where the USMCA text had signalled continued protection for existing NAFTA investments as long as they remained in place when CUSMA came into force" and that the "most likely candidate" for protection under Annex 14-C was an investor who made their investment between finalization of USMCA and it entering into force",[33] relying on contemporary documents to demonstrate an understanding that "Annex 14-C was intended to act as a sunset clause".[34]

[29] Observations, [32]-[34].

[30] Rejoinder, [17].

[31] Observations, [35].

[32] Rejoinder, [19].

[33] Observations, [36].

[34] Rejoinder, [20]-[21].

D. Preliminary objections raised by the United States: (2) jurisdiction *ratione materiae*

(1) Respondent's submissions

40. The Respondent raises two objections to the Tribunal's jurisdiction *ratione materiae*: (i) Claimant's activities do not satisfy the definition of "investment" under USMCA Annex 14-C or NAFTA Article 1139; and (ii) its activities are not a "legacy investment" under Annex 14-C of the USMCA because they are not in the territory of the United States.

41. *Substance of the objection*. The Respondent submits that the Claimant has failed to explain how any aspect of the "complex structure" of its interests in the Keystone XL Project constituted an "investment".

42. It notes that on January 8, 2021, the Claimant divested itself of substantially all alleged equity in any United States entity. In particular, TC Energy exercised the right to repurchase substantially all of the US Class A Interests held by the Enterprise (a Delaware-incorporated subsidiary of the Claimant) by drawing on the credit facility guaranteed by APMC, with the consequence that Claimant's alleged investment was limited to a loan guarantee and the calculation of the value of its investment in Canada through "accretion rights".[35]

43. First, the Respondent argues that Article 1139 provides an exhaustive list of what constitutes an investment, and this list does not include loan guarantees or accretion rights which do not qualify as "a debt security of an enterprise", "a loan to an enterprise", or "an equity security of an enterprise". As a consequence, the rights held by the Claimant at the time of the alleged breach did not constitute an "investment" in terms of Annex 14-C.

44. Second, the Respondent says that paragraph 6 of Annex 14-C defines "legacy investment" to mean "an investment of an investor of another Party *in the territory* of the Party" (emphasis added) such that the investment protection extends to "investments" only to the extent that the Claimant "owned or controlled directly or indirectly" the investment "in the territory" of the United States, mirroring the territoriality requirement

[35] Request, [26].

in Article 1101 of NAFTA.[36] The Respondent says that the loan guarantee that remained after the divestiture "was subject to an agreement between solely Canadian entities and was administered entirely within Canada" and the accretion rights "also existed entirely in Canada as a means for calculating the value of Claimant's interest in a Canadian entity."[37] The Respondent further submits:[38]

a. The argument that the value of the alleged equity would be factored into the Canadian Special Purpose Vehicle (**SPV**) Class A rights buy back price does not assist the Claimant, because this would be an investment in Canada.

b. The Claimant is wrong to suggest that APMC's investment in equity in the US SPV was still at risk after the relinquishment of its interest on January 8, 2021.

45. In reply, the Respondent emphasises that any investment would have to be based on the Investment Agreement between APMC and TC Energy signed on March 31, 2020, and none of the three aspects contemplated by that agreement constituted an investment:[39]

a. As to the US SPV, the Respondent says that even if the Claimant's Class A shares could be considered an investment, it divested themselves of those shares on January 8, 2021 which broke the chain of ownership, and the Claimant cannot allege that the US SPV GP was itself an investment as it never provided capital to that entity.

b. As to the Canadian SPV, the Respondent says that neither the Claimant's accretion rights nor its Class C conversion rights (both arising from its Class A shares in the Canadian SPV) constitute an investment, and certainly not one in the United States.

c. The Respondent says that the loan guarantee as a "potential contractual obligation" does not constitute an investment, and consideration paid for an investment is not

[36] Request, [28]-[31] (emphasis added).

[37] Request, [32] (citations omitted).

[38] Request, [33].

[39] Reply, [34]-[44].

the same thing as an investment itself, and certainly not one in the territory of the United States.

46. *Relationship to the merits and effect on arbitration*. As with its first jurisdictional objection, the Respondent says that determination of its objection *ratione materiae* will not require the Tribunal to analyse any factual evidence concerning alleged breaches relating to revocation of the Permit, and will dispose of the whole case.[40]

(2) Claimant's submissions

47. *Substance of the objection.* The Claimant accepts that the definition of "investment" in NAFTA Article 1139 is exhaustive, but says that the Respondent's argument on this point is a "straw man".[41] It says that after the buyback on January 8, 2021, it continued to maintain its investment in the United States through the guarantee against the loan which had been used to partially repay its capital contribution, retaining its full risk exposure to the project and an unbroken chain down to the Presidential Permit holder, and it gave this guarantee "in consideration of a network of circumstances which are covered by NAFTA Article 1139."[42]

48. The Claimant submits that various Article 1139 categories apply, given the need for "interests" to be interpreted broadly,[43] and the majority of its contributions and the resulting infrastructure were in the United States.[44] It says in particular that:

a. At the time of the revocation the Claimant indirectly owned and/or controlled five US enterprises which together constituted investments under category (a);

b. It had the possibility of taking over the Keystone XL Project, which is an interest in line with category (e) of Article 1139;

[40] Request, [34]-[35].

[41] Observations, [40].

[42] Observations, [42]-[43]; Rejoinder, [28], [34]-[36].

[43] Observations, [44]-[48].

[44] Observations, [49] contrasting **RL-0034** *Bayview Irrigation District et al v Mexico* ICSID Case No ARB(AF)/05/1, Award (June 19, 2007).

c. It had conversion rights to assets on dissolution which is an interest in line with category (f),[45] and that regardless of the fact that "accretion rights" is not a recited sub-category, the loan guarantee covered past and future investments into capital inputs in the United States, APMC retained its full risk exposure to the Project, and the planned benefit to APMC of implementing the investment was to be realised through the accretion rights, in line with category (e) and/or (h).[46]

49. As to the Respondent's argument that the Claimant's rights were not located in the United States, the Claimant says that category (h) does not "condition" how an investor's interest might be realised territorially as long as it arises out of the commitment of capital in the territory of the other State, and likewise category (e) does not require a direct receipt from an enterprise in the other State as long as the investor has an entitlement to share in the income or profits of an enterprise in that territory; it emphasises that the primary drawings on the loan by the time the permit was revoked were to repay expenditure on activities in the United States.[47]

50. *Relationship to the merits.* The Claimant says that this objection too is intertwined with the merits in a way that makes bifurcation inappropriate. It suggests that the Respondent's real complaint is about the Claimant's valuation methodology: on the Claimant's case, the Class A shares and the related accretion rights support the appropriate measure of damages, and the question of "how exactly the Claimant's investment was harmed and how it should be compensated for that harm is a matter for the merits" that is intertwined with the question of whether it had a qualifying investment.[48]

[45] Noting particular at Rejoinder, [31] that "Holding Class C shares at the date of treaty breach is irrelevant – having an interest at the time of treaty breach that entitles the owner to share in the assets of an enterprise on dissolution is what matters under sub-category (f)."

[46] Observations, [50]-[55]; Rejoinder, [30]-[36].

[47] Rejoinder, [32]-[34].

[48] Rejoinder, [37]-[40], noting in particular the Respondent's submission in Reply, [36] that 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."

E. Whether bifurcation should be granted

(1) Respondent's submissions

51. The Respondent submits that bifurcation should be granted in the circumstances addressed above, and in particular because (i) its objections are *prima facie* substantial, not frivolous; (ii) those objections are not intertwined with the merits and can be addressed independently; and (iii) the objections if upheld would dispose of the whole case and materially reduce time and costs.[49]

52. The Respondent also submits that bifurcation is supported by reasons of economy, efficiency and fairness. It relies on the fact that a State's consent to arbitration is "paramount" so it is fair and appropriate for the Tribunal to determine the question of jurisdiction before proceeding to the merits.[50] It says that the thrust of the Claimant's argument is that bifurcation would add to the overall length of the proceedings if the jurisdictional objections are not upheld, but this is true in every case where bifurcation is sought and the *Glamis Gold* test requires the Tribunal to ask whether the objection, if granted, would reduce time and costs.[51] The Respondent rejects the Claimant's characterisation of how the provision for bifurcation in the procedural calendar came about and the argument that this provides a basis for denying the Request.[52]

(2) Claimant's submissions

53. The Claimant submits that bifurcation is not efficient. It notes that the schedule included in the procedural calendar for bifurcation in PO No. 1 is "effectively Respondent's proposal" and is not efficient, in circumstances where a joined approach could expect to reach a hearing on jurisdiction and the merits a year after the decision on bifurcation, while bifurcation will at least double that time. It says that, given the Claimant has already submitted its Memorial, the costs of a bifurcated proceeding are not likely to be

[49] Request, [36]-[37].

[50] Request, [36].

[51] Reply, [46]-[47].

[52] Reply, [48]-[50]

significantly less even if the proceeding does not progress to the merits.[53] It emphasises that its position is not that the possibility of delay of the merits should always be dispositive, but that in this case bifurcation will delay the merits without a prospect of speeding the conclusion of the proceedings as a trade-off.[54] It also raises the possibility that deliberations of the jurisdictional objections could "stray into mixed merits questions leading to a decision in any event to defer ruling on the objections after the jurisdiction phase of a bifurcated procedure."[55]

III. TRIBUNAL'S ANALYSIS

A. Introduction: the legal test

54. The Tribunal has carefully considered the arguments advanced by both Parties on bifurcation. It has come to the view that it is in the interests of the fair administration of this arbitration that it should order bifurcation in order to enable the two preliminary questions as to its jurisdiction identified by the Respondent to be determined in a preliminary phase. Its reasons are as follows.

55. This arbitration is governed by the UNCITRAL Rules 1976. Article 21(4) contains a general presumption in favour of bifurcation. It provides that: "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question."

56. Whatever the position may be under other arbitration rules, Article 21(4) is the provision that guides the disposition of the present application in the present case. It does so as a result of the Claimant's choice to invoke arbitration under the UNCITRAL Rules and the Parties' agreement to apply the 1976 version of those Rules.[56] This is not to be lightly disregarded on the basis of other formulations subsequently adopted in other arbitration rules that are not applicable to these proceedings; nor can a presumption against bifurcation be applied contrary to the express terms of Article 21(4).

[53] Observations, [58]-[62]; Rejoinder, [40]-[43], citing **CLA-57** *Windstream Energy LLC v Canada (II)* PCA Case No. 2021-26, Procedural Order No. 2 (September 13, 2022).

[54] Rejoinder, [40].

[55] Rejoinder, [44].

[56] PO No 1, [1.1].

57. The Tribunal nevertheless retains a discretion to decide to join such a preliminary question to the merits, as the second sentence of Article 21(4) confirms. In deciding whether to exercise such discretion, the Tribunal has considered whether doing do will better promote the fair and procedurally efficient management of the case.

58. Although, as noted above, there are some differences of emphasis between the Parties on the weight to be attached to elements of the legal test, both Parties accept in substance the test enunciated in *Glamis Gold,* itself a NAFTA case decided under the UNCITRAL Rules.[57] The present Tribunal finds itself in agreement with the formulation of the relevant considerations adopted in that case, which it is content to adopt here.

59. The *Glamis Gold* Tribunal held:

> This Tribunal in examining the various sources finds that Article 21(4) contains a three fold test.
>
> a. First, in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.
>
> b. Second, the "plea" must be one that goes to the "jurisdiction" of the tribunal over the claim. For example, the presumption in Article 21(4) would not apply to a request to bifurcate the proceedings between a liability phase and a damages phase. Likewise, Article 21(4) would not apply to a request that the Tribunal first consider whether the actions complained of were the cause of the loss, even though such a determination might be efficient overall for the proceedings. The Tribunal does not mean to suggest that such a request can not be made to the Tribunal under, for example, Article 15(1), but rather seeks to emphasize that the presumption in favor of bifurcation contained in Article 21(4) extends only to pleas as to the jurisdiction of the tribunal.
>
> c. Third, if 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. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, inter alia, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.[58]

[57] *Glamis Gold Ltd v United States* NAFTA/UNCITRAL, Procedural Order No. 2 (May 31, 2005), **RL-0002.**

[58] ibid, [12], internal citations omitted.

60. Guided by these overall considerations, the Tribunal will proceed to give its reasons as to: (1) whether the Respondent's two objections are substantial or frivolous; (2) whether, if successful, the disposition of these objections would result in a material reduction in the next phase of the proceedings; and (3) whether bifurcation is practical, considering the extent to which the jurisdictional objections are intertwined with the merits.

61. The Respondent seeks preliminary determination of two objections to the Tribunal's jurisdiction. Although these have already been set out above, it is convenient for the purposes of the analysis to repeat them here. These objections are:[59]

> 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[60] (the ***ratione temporis* objection**)
>
> Claimant cannot demonstrate that it had an "investment" (as defined by NAFTA), particularly when the alleged breach occurred. 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[61] (the ***ratione materiae* objection**)

62. The Tribunal will take each objection in turn.

B. The *ratione temporis* objection

63. The Respondent first objects to the jurisdiction of this Tribunal on the ground of the temporal application of the treaty that the Claimant invokes as the basis on which it is entitled to pursue its claim, namely the reference in Annex 14-C(1) of USMCA to NAFTA. Under that provision, "[e]ach 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 … NAFTA."

64. Paragraph (3) goes on to provide that: "A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994."

[59] Request, [9] and [4] as quoted in Reply, [2].

[60] Request, [9].

[61] Request, [4].

65. Paragraph (6)(a) defines a "legacy investment" as:

> … 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

66. It is common ground that this provision provides the sole basis upon which the Claimant seeks to engage this Tribunal's jurisdiction.

67. The Parties are divided as to its proper interpretation *ratione temporis*:

    a. The Respondent objects that it applies only to breaches of an obligation under NAFTA. It alleges that, since the breach of which the Claimant makes complaint (the cancellation of the Keystone XL Pipeline licence) only occured after NAFTA's termination, Annex 14-C(1) does not apply;[62]

    b. The Claimant responds that this provision applies to qualifying investments made prior to the date of termination of NAFTA, and "extends to events and conduct occurring up to three years after CUSMA came into force"[63] provided only that the claim is submitted within three years of its termination.[64]

68. Detailed consideration of the merits of each Party's respective position on the proper construction of Annex 14-C(1) must necessarily await full pleading on the point. It suffices for the Tribunal to observe at this stage that it does not find the Respondent's objection on this ground to be frivolous. There is plainly a substantial question for the Tribunal to address as to the correct construction of the relevant treaty provision, applying the general rules of treaty interpretation and termination in public international law, as codified in the VCLT.

69. Further, the Tribunal considers that, if this objection were to be determined in the Respondent's favour, it would result in a substantial saving in time and costs. The *ratione temporis* objection raises a question of law that, if successful, would deprive the Tribunal

[62] Above, [24]-[29].

[63] Memorial, [217].

[64] Above, [35]-[36].

of jurisdiction in its entirety, obviating the need for further pleading or hearing on the many questions of merits and quantum that would otherwise arise.

70. It is of course correct, as the Claimant fairly observes, that the contrary is also true. A bifurcated hearing on jurisdictional objections will, if the Respondent does not succeed, undoubtedly occasion delay overall in the final disposition of the matter. However the Tribunal finds in this case that the efficiency gained by bifurcation outweighs any potential delay in the event that the jurisdictional objections do not succeed. It has the power to compensate the unsuccessful party in costs in that event.

71. Finally on this objection, the Tribunal considers that the objection *ratione temporis* is not materially intertwined with the merits such that it would be impossible to hear and determine the objection as a preliminary issue.

72. The Claimant alleges that it is necessary to consider the objection together with the case on the merits in order to evaluate the Respondent's good faith in raising the objection in light of 'contextual cues which encroach upon the merits of Claimant's case … and may in fact become inevitable.'[65]

73. As noted above, the matters that are relevant to the jurisdictional scope of Annex 14-C(1) USMCA are to be determined by reference to, and in the manner provided by, the customary rules of treaty interpretation and termination, as codified in the VCLT. Within the proper limits provided by that framework, both Parties will be at liberty to seek and deploy evidence and advance arguments. The issue to which that enquiry is to be directed is one of the temporal scope of the offer to arbitrate in the treaty and its acceptance. This does not entail consideration of the merits of the Claimant's claim of expropriation or other treaty breaches.

74. For these reasons, the Tribunal finds that the Respondent's objection to its jurisdiction *ratione temporis* warrants determination as a preliminary issue in a bifurcated hearing.

[65] Rejoinder, [17].

C. The *ratione materiae* objection

75. The Respondent's second preliminary objection to the Tribunal's jurisdiction, which it desires to have heard and determined in a bifurcated hearing, is brought on the basis that the Claimant's remaining interests in the Keystone XL project after January 8, 2021 do not constitute an 'investment' for the purposes of Annex 14-C USMCA, in that those interests were not '*an investment* of an investor of another Party *in the territory of the Party*'.[66] The Respondent argues that (a) the Claimant's interests do not qualify as an 'investment', as that concept is defined by reference to Article 1139 NAFTA; and (b) in any event, they do not meet the *ratione loci* requirement because no part of the Claimant's interests were made in the territory of the United States.[67]

76. The Claimant accepts that it must meet the definitions in Annex 14-C USMCA and Article 1139 NAFTA in order to have made a qualifying investment. It argues that it has done so, and that, so long as the interests that it holds are themselves made in an enterprise in the United States, the territoriality requirement is satisfied.[68]

77. The Tribunal considers that this objection is also substantial and not frivolous. It gives rise to a series of important questions of construction of the treaty provisions. It is true that, in this instance, the Tribunal will also have to consider some discrete elements of the factual record, namely the legal instruments on which the Claimant relies as constituting the legal materialization of its investment. However, it will be doing so for the sole purpose of deciding the jurisdictional question.

78. The Tribunal rejects the Claimant's submission that this issue is intertwined with determination of its damages claim. In the event that a quantum phase were to be reached, the Tribunal would be analysing the nature of the Claimant's interests for a quite different purpose, namely to establish the quantum of loss, if any, that was suffered by the Claimant as a distinct investor. At the jurisdictional stage, this question does not arise.

[66] Annex 14-C USMCA, [6](a), emphasis added.

[67] Above, [41]-[45].

[68] Above, [47]-[49].

The Claimant's interest in the Keystone XL project is relevant only to determine whether the jurisdictional threshold of a qualifying 'investment' has been met.

79. The Tribunal finds that determination of this objection as a preliminary issue would also promote efficiency, since it too is capable of being dispositive of the entire claim, such that a determination in the Respondent's favour would save time and costs that would otherwise be wasted pleading on issues of the merits that may not arise.

80. Accordingly, the Tribunal finds that this second jurisdictional objection is also fit for a bifurcated hearing.

IV. DISPOSITION

81. **Accordingly, and for the above reasons, the Tribunal hereby decides that:**

a. **The Respondent's Application for Bifurcation is granted;**

b. **The Tribunal will hear and determine the following two jurisdictional objections namely that:**

i. **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 *ratione temporis* objection),**

ii. **Claimant cannot demonstrate that it had an "investment" (as defined by NAFTA), particularly when the alleged breach occurred. 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 (the *ratione materiae* objection),**

as preliminary questions;

c. **Accordingly, the timetable provided in Annex B to PO No 1, as corrected by ICSID's letter of December 21, 2023, where bifurcation of preliminary objections is granted applies;**

d. **The hearing on preliminary objections is fixed for Monday September 8, 2025 to Wednesday September 10, 2025 in Washington, DC;**

e. **Costs reserved.**

For the Tribunal

[signed]

Professor C A McLachlan KC

Presiding Arbitrator

August 7, 2024