IN THE MATTER OF AN ARBITRATION UNDER THE CANADA-UNITED STATES-MEXICO AGREEMENT ("CUSMA"), THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA"), AND THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ("UNCITRAL") ARBITRATION RULES

ALBERTA PETROLEUM MARKETING COMMISSION, Claimant, *v.* **THE GOVERNMENT OF THE UNITED STATES OF AMERICA** Respondent.	**ICSID Case No. UNCT/23/4**

CLAIMANT'S OBSERVATIONS ON REQUEST FOR BIFURCATION OF RESPONDENT UNITED STATES OF AMERICA

17 June 2024

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I. INTRODUCTION

1. Claimant submits its Observations on the Request for Bifurcation of Respondent United States of America dated 16 May 2024 (the "**Request**") pursuant to the Tribunal's direction in Procedural Order No. 1 and Annex B (the "**Procedural Calendar**").[1]

2. Respondent has made the following objections to the jurisdiction of this Tribunal as a basis for the bifurcation of the arbitration schedule under the Procedural Calendar, arguing that:

> *Annex 14-C does not provide jurisdiction ratione temporis, because Annex 14-C only applies to breaches of obligations of the NAFTA, and the NAFTA was terminated six months before the alleged breach.*[2] (the "***ratione temporis* objection**")
>
> and
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> *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**")

3. Respondent's arguments for bifurcation regarding both of these objections should be rejected by the Tribunal and the arbitration should continue the briefing schedule as set out under the non-bifurcation option of the Procedural Calendar. Respondent's arguments are based on a misrepresentation or misreading of positions set out in Claimant's Notice of Arbitration and Memorial and simply do not support its Request.

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[1] Claimant incorporates by reference the definitions of the Memorial. Claimant's Memorial dated 16 April 2024 ("**Memorial**"). Claimant also incorporates by reference the further definitions of Claimant's Request for Revision of the Schedule and Production of Documents dated 22 May 2024.

[2] Request for Bifurcation of Respondent United States of America dated 16 May 2024 ("**Request**"), para. 9.

[3] *Id.*, para. 4.

Based on Claimant's actual arguments, the balance of factors weighs in favour of dismissing the Request.

4. While Respondent's intention to put forward the *ratione temporis* objection was signaled from an early stage in the Proceeding, once it has come to doing so, Respondent has framed its argument without regard to Claimant's position set out in the Memorial. As discussed below, this is a strong basis on which to dismiss that aspect of the Request.

5. Moreover, the context of the CUSMA negotiations calls into question whether Respondent's *ratione temporis* objection can even be made in good faith. If Respondent is to be believed, on the one-hand it was negotiating and finalizing CUSMA in late 2018, including Annex 14-C and the purported timing limitation, while on the other hand, Respondent was in parallel actively encouraging renewal of investment in the Keystone XL Project – settling the previous NAFTA arbitration with TC Energy, then approving the new Presidential Permit needed to facilitate the investment of billions of dollars in the United States mere months later in March 2019, and thus establishing the legal rights upon which APMC relied to invest itself. The intertwining of these parallel events, and the apparent bad faith conduct of Respondent, can only be examined as part of the merits phase of the arbitration, thus providing a further basis on which to reject Respondent's Request regarding this objection.

6. As to the merits of the *ratione materiae* objection, that Respondent gave no hint of it earlier than the Request, although there is nothing new about the case put forward in the Memorial which could justify Respondent only realizing there was a point to make at that stage. This shows that this objection is an afterthought included to fill-out Respondent's

weak arguments in support of bifurcation. With some irony, the objection also involves Respondent ignoring whole swathes of treaty text. In light of these circumstances, Respondent has also failed to meet the strong onus on it to justify the extensive delay and expense of the jurisdiction phase briefing schedule into mid-2025 under the Procedural Calendar.

7. The Tribunal should accordingly reject Respondent's Request as not being a credible basis on which to justify the costly and inefficient bifurcation of the arbitration schedule. The *ratione temporis* objection is based on arguments that are simply not credible and do not meet the test of being sufficiently serious and substantial to justify the Request and delay to the Proceeding, and if taken seriously at this stage requires attention to context intertwined with the merits of Respondent's conduct in the circumstances of agreeing CUSMA. Similarly, with respect to the *ratione materiae* objection, Respondent's arguments ignore much of the facts set out in the Notice of Arbitration and Memorial to create a misleading characterization of Claimant's "investment", as defined under NAFTA Article 1139. Neither of the grounds are sufficient to justify bifurcation, and the Tribunal should dismiss Respondents Request and join the objections to the merits.

II. THE TEST FOR BIFURCATION

A. Bifurcation Should Not Be Presumed

8. Claimant recognizes that Article 21(4) of the Rules states that "[i]*n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question*" but of course the Article sustains the Tribunal's discretion: "*However, the arbitral tribunal may*

proceed with the arbitration and rule on such a plea in their final award."[4] Even on a plain reading, the use of the more permissive word "*should*", rather than the mandatory "*shall*", helps emphasize a tribunal's discretion. This is also made clear in the following sentence with the use of the word "*may*" in respect of permitting a tribunal to defer the decision on a preliminary question to the final award. To say that there is a hard presumption in favour of bifurcation would be to ignore the plain wording of the article. At best, the article is a general suggestion with a clear confirmation of a tribunal's ultimate discretion.

9. The primary rule of procedure of the Rules is enshrined in Article 15(1) that "[s]*ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*"[5] Given the Tribunal's broad powers, it is appropriate to take into consideration the trend of modern tribunal bifurcation deliberations, rather than a reflexive reliance on the general suggestion found in Article 21(4) of the Rules.

10. Since the Rules were promulgated in 1976, various other rules of international arbitration have been published, including updates to the original version of the UNCITRAL Rules. The general trend has, in fact, been to temper notions of any presumption toward bifurcation of jurisdictional challenges.

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4 UNCITRAL Rules, art. 21(4) (1976).

5 *Id.*, art. 15(1).

11. As Respondent acknowledges,[6] when the UNCITRAL updated its rules in 2010, Article 23(3) of the new rules differed from Article 21(4), removing any possible notion of a presumption in favour of bifurcation: "*The arbitral tribunal may rule on a plea* [regarding the tribunal's jurisdiction] *either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.*"[7] Rule 41 of the 2006 ICSID Arbitration Rules also makes no presumption in favour of bifurcation of a jurisdictional challenge.

12. The momentum of tribunal analysis of the 2006 ICSID Arbitration Rules has been to confirm that there is no presumption.[8] Indeed, between 2010 and 2020, of 101 publicly available ICSID and UNCITRAL tribunal decisions on bifurcation, over half of the requests were denied.[9]

13. Respondent's proposed test for bifurcation to hear the objections in advance of further hearing on the merits is set out in the Request as including three elements:

> *(i) whether the objection is prima facie substantial or frivolous; (ii) whether jurisdiction and merits are so intertwined as to make*

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6 Request, n.5.

7 UNCITRAL Rules, art. 23(3) (2010).

8 *See* Proposals for Amendment of the ICSID Rules – Working Paper, Vol. 3 dated 2 August 2018, para. 393 ("*ICSID case law has uniformly held that there is no presumption in favour of bifurcation, and has identified certain factors to be considered.*") (CLA-51); *Red Eagle Exploration Ltd. v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation dated 3 August 2020 ("***Red Eagle***"), para. 40 ("*ICSID Arbitration Rule 41 does not establish a presumption in favor or against bifurcation. ICSID Arbitration Rule 41 is silent on the circumstances, criteria or factors that the Tribunal may take into account in the consideration of objections to its jurisdiction.*") (CLA-50).

9 Between 2010 to 2017, there were 29 publicly available decisions on bifurcation (17 bifurcation decisions in ICSID arbitrations, and 12 bifurcation decisions in UNCITRAL arbitrations). There were 15 denials of requests for bifurcation (nine denials in ICSID and six in UNCITRAL arbitrations). *See* Jeffrey Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, paras. 5.25, 5.27 (2018) (CLA-52). Between 2017 and 2020, there were 72 publicly available decisions on bifurcation in ICSID and UNCITRAL arbitrations. Of these, there were 41 denials of requests for bifurcation. *See* Lucy Greenwood & Mark Luz, Decisions on Bifurcation in International Arbitration, dated 25 June 2020, slide 26, *available at* https://vimeo.com/432889038 (CLA-53).

> *bifurcation impractical; and (iii) whether the objection, if successful, would materially reduce time and costs.*[10]

14. These considerations closely match those required to be considered under the 2022 ICSID Arbitration Rules at Rule 44 for bifurcation of preliminary objections:

> *(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:*
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> *(a) bifurcation would materially reduce the time and cost of the proceeding;*
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> *(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and*
>
> *(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.*[11]

As with the 2006 version, an actual presumption in favour of bifurcation is absent from the 2022 ICSID Arbitration Rules.

15. Claimant agrees with Respondent's inclusion of "*whether the objection is prima facie substantial or frivolous*" among the elements of the test to assess. That consideration, and indeed the set of considerations in general set out in the Request, has been on the mind of investment tribunals since *Glamis Gold*,[12] as Respondent acknowledges.[13] Whether the objection is "*substantial*" is closely tied to the issues of efficiency and fairness. In *Red Eagle*, the tribunal observed:

> [I]*n its ordinary meaning "serious" may be considered as the opposite of frivolous. Something frivolous has "no useful or serious purpose". "Substantial" is defined as something of "considerable importance" or "weighty". The Tribunal is of the view that between*

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10 Request, para. 8.

11 ICSID Arbitration Rules, R. 44 (2022).

12 *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005, para. 12 (RL-0002).

13 Request, n.8.

> *frivolous and serious there may be degrees of seriousness that do not carry the weight to justify bifurcation. It is relevant here to recall that, in deciding whether or not to bifurcate the proceeding the Tribunal has discretion and needs to consider not only procedural efficiency but also fairness; it needs to strike a balance between the two. Both parties agree that the Tribunal needs to conduct an efficient and fair proceeding.*[14]

16. Indeed, the *Glamis Gold* test was formulated by a tribunal operating in 2005 under the Rules, before either the 2006 ICSID Arbitration Rules or the 2010 UNCITRAL Arbitration Rules were promulgated, and demonstrates the overriding considerations of efficiency and fairness in mind for modern tribunals, even when characterising Article 21(4) as an apparent presumption of the Rules. As Respondent recognises, the *Glamis Gold* criteria have been supported by many tribunals operating under arbitration rules such as the above ICSID rules that contain no presumption.[15] But at the heart of the matter is that *Glamis Gold* articulated criteria to consider toward a core goal, as noted by the *Gavrilović* tribunal: "[A] *governing principle that a decision on an application for bifurcation, like other procedural orders, must have regard to the fairness of the procedure to be invoked and the efficiency of the Tribunal's proceedings.*"[16] Respondent agrees with this point,[17] as does Claimant.

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[14] *Red Eagle*, Decision on Bifurcation dated 3 August 2020, para. 42 (CLA-50).

[15] Request, n.8 and citations therein.

[16] *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation dated 21 January 2015, para. 66 (CLA-54).

[17] Request, para. 8 ("*Decisions to bifurcate have also been driven by overarching considerations of procedural fairness and efficiency.*").

B. A Presumption of Protecting Against Longer Proceedings is Emerging

17. Statistics show that considerable time can be added to investment arbitration proceedings from bifurcation:

> [B]*ifurcation may result in the narrowing or even dismissal of claims, but can significantly add to the costs and duration of an arbitration. This has not gone unnoticed by users of the ICSID and other systems of dispute settlement. In an OECD public consultation on investor-dispute settlement, the cost/time issue was raised as a concern in the context of bifurcations, given that they can add anywhere from twelve to eighteen months (per phase, on average) to an arbitration that typically lasts three to four years.*[18]

18. The tribunal in *Windstream Energy* factored the time management balance of bifurcation: "[That] *a non-bifurcated hearing of the jurisdictional and substantive issues jointly would add only four months to the length of proceedings if jurisdiction were dispositive, and would save at least a year if not, is a major factor in the Tribunal's decision not to bifurcate the Interpretation Objection*."[19] This issue being a major factor for the Tribunal's decision in this Proceeding will be discussed further in Section V.

19. The experience of bifurcation outcomes has ultimately led to a call from a leading researcher for a presumption against it absent a *prima facie* assessment not merely that the objection is not frivolous, but that it is more likely than not to succeed.[20] Claimant agrees with this assessment and supports a presumption against bifurcation absent a

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[18] Jeffrey Commission & Rahim Moloo, PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION, para. 5.01 (2018) (CLA-52) (*citing* OECD, Investor-State Dispute Settlement Public Consultation Comments dated 30 August 2012, at 23 (CLA-55); ICSID, 2014 Annual Report, at 30 ("*The majority of arbitration proceedings concluded in FY2014 lasted on average just over three and a half years from the date of the tribunal's constitution.*") (CLA-56)).

[19] *Windstream Energy LLC v. Government of Canada (II)*, Procedural Order No. 2 dated 13 September 2022, para. 59 (CLA-57).

[20] *See* Lucy Greenwood, Revisiting Bifurcation and Efficiency in International Arbitration Proceedings, 36(4) J. INT'L ARB. 421, 425 (2019) ("*I would argue that the data suggests there should be a presumption against agreeing to bifurcate proceedings (on efficiency grounds) unless a tribunal can be confident that it is more likely than not that determination of the bifurcated issue . . . will result in termination of the proceeding.*") (CLA-58).

demonstration that the objection is likely to succeed. Clearly, as argued below, whether applying the "not frivolous" objection standard under *Glamis Gold*, or the more recently articulated "more likely than not to succeed" standard, there is a more than ample basis for this Tribunal to reject Respondent's Request when focusing on the core tenets of efficiency and fairness.

III. THE *RATIONE TEMPORIS* OBJECTION

20. The first objection by Respondent is that Annex 14-C does not provide jurisdiction *ratione temporis*, because "*Annex 14-C only applies to breaches of obligations of the NAFTA, and the NAFTA was terminated six months before the alleged breach.*"[21]

21. Respondent has relied upon the TC Energy tribunal's view that bifurcation of the *ratione temporis* objection was appropriate, noting that tribunal considered the objection "*prima facie serious*[.]"[22] Respondent elides that the tribunal in that proceeding considered "*the Claimants' arguments are equally so*[.]"[23] As matters have developed, in this Proceeding the Tribunal should consider that the balance of the elements of even the *Glamis Gold* bifurcation test has tipped in favour of Claimant and therefore the requested bifurcation in respect of the *ratione temporis* objection should be rejected.

A. Respondent's Position on the Treaty Text Is Not Credible

22. Although the Tribunal is not being asked to make a final determination on these jurisdictional questions, Respondent must set out its positions to a sufficient and credible

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[21] Request, para. 9.

[22] *Id.* (*quoting TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2 dated 13 April 2023, para. 35 (RL-0012)).

[23] *TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2 dated 13 April 2023, para. 35 (RL-0012).

extent to address the question of whether the challenge is substantial and not frivolous. It has previously been held that a circumstance where there is "*no clear textual support in the applicable BIT for the proposition*" is enough to deny bifurcation even while not considering the argued position entirely frivolous.[24] As discussed below, the Tribunal can safely conclude that Respondent has not only failed to demonstrate the degree of textual support necessary to justify bifurcation, but has undermined its Request by actively mis-construing to the Tribunal the content of NAFTA and CUSMA, and Claimant's positions.

23. First, Respondent, even while quoting the CUSMA Protocol in a footnote, disingenuously misrepresents its own negotiated treaty text and Claimant's position, stating: "*By the protocol that accompanied the* [CUSMA]*, the entry into force of that treaty terminated and superseded the NAFTA. In its Memorial, Claimant acknowledges that the* [CUSMA] *superseded the NAFTA.*"[25] However, Respondent conveniently ignores that CUSMA did not simply supersede NAFTA; rather, as the Protocol also states, it did so "*without prejudice to those provisions set forth in the* [CUSMA] *that refer to provisions of the NAFTA.*"[26]

24. Respondent also says now that "*NAFTA does not contain a survival provision obligating a party to continue abiding by its terms for some period post-termination*[,]"[27] which, although true that a certain form of survival provision language identified by Respondent

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[24] *Glencore Finance (Bermuda) Ltd. v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation) dated 31 January 2018, para. 42 (CLA-59).

[25] Request, para. 11.

[26] Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, dated 30 November 2018, para. 1 (CLA-39); *see also* Memorial, para. 222.

[27] Request, para. 13.

was not negotiated, is immaterial in the face of the Protocol wording which expressly calls for NAFTA's continued operation as articulated by relevant CUSMA provisions in any event.

25. Respondent states the default position of VCLT Article 70, which Claimant had expressly acknowledged in the Memorial,[28] while trivially adding the position in the *Articles on Responsibility of States for Internationally Wrongful Acts* ("**ARSIWA**") at Article 13.[29] There is no argument as to whether States should be held responsible for breaches of international law which does not exist. Respondent is simply pretending that what it agreed in CUSMA Annex 14-C was intended to achieve anything other than that "*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.*"[30]

26. The crux of the *ratione temporis* objection is Respondent's inaccurate description of Claimant's position: "*Claimant does not point to a single provision memorializing an agreement by the USMCA Parties to extend the application of the NAFTA's substantive obligations*."[31] Paragraphs 222 to 227 of the Memorial make entirely plain that Claimant relies upon numerous provisions memorializing the CUSMA Parties' agreement, including: the Protocol (as discussed above), paragraph 1 of Annex 14-C, and its footnote 20 in support, as extending NAFTA Chapter 11 obligations based on the assumptions of treaty

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28 Memorial, para. 222.

29 Request, para. 12 (citing International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/49(Vol. I)/Corr. 4 (2001), art. 13 ("*International obligation in force for a State*[:] *An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.*") (RL-0019)).

30 Memorial, para. 223.

31 Request, para. 18.

interpretation at VCLT articles 28 and 31. Moreover, the proper construction of footnote 21 also makes plain the intention of the CUSMA Parties to extend obligations through paragraph 1.[32] The fact that the Request claims otherwise is reason itself to disregard the credibility of the *ratione temporis* objection for failure to acknowledge Claimant's basic position, and reject Respondent's Request.

27. The Request suggests that paragraph 1 of Annex 14-C "*derives almost verbatim from NAFTA Articles 1116(1) and 1117(1)*[.]"[33] It is of course true that Article 1116(1) for example states "*An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under . . . Section A. . . .*" Respondent says that "[t]*here is no reason to think that the* [CUSMA] *Parties, in using a nearly identical phrase in Annex 14-C* [being "breach of an obligation"]*, meant to deviate from its accepted and ordinary meaning.*"[34] But Respondent's appeal to accepted and ordinary meaning is made by citation to analyses that claims could not be made under NAFTA alleging breach of obligation for conduct before it came into force,[35] which is irrelevant analysis of Articles 1116(1) and 1117(1) in NAFTA's original context. None of Claimant's argument in the Memorial concerning the VCLT, or indeed ARSIWA now raised by Respondent, make the assertion that a State could accidentally or involuntarily bind itself to treaty obligations

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32 Memorial, paras. 232-33.

33 Request, para. 18.

34 *Id.*

35 *Id.*, n.19-20 (the citations therein to *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues dated 6 December 2000, paras. 60, 62 (RL-0020) and Meg Kinnear et al., *Article 1116 - Claim by an Investor of a Party on its Own Behalf*, *in* INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1116-28 (2006) (RL-0021) are to analyses of conduct before NAFTA entered into force).

regarding its acts occurring before a treaty comes into force without express language or acts.

28. But it is Respondent's contention, ignoring the Protocol's language, that NAFTA was simply terminated by CUSMA, and so "*based on the well-understood meaning of the phrase 'breach of an obligation,' Annex 14-C only permits the submission of claims based on alleged breaches that occurred while the NAFTA was in force. . . .*"[36] If NAFTA was no longer in force at all, the situation would be that the CUSMA parties agreed to arbitrate claims regarding now-defunct obligations, since, as Respondent itself argues, there are allegedly no survival provisions in NAFTA.

29. This is simply incorrect on numerous grounds:

- the very absence of any other language than to say that claims of alleged breach of NAFTA "*obligation*" may be brought for three years to which the provisions of Section A of NAFTA Chapter 11 "*apply*",
- together with the broader context of the terms of Chapter 14 of CUSMA leading to redundant language and contradictory or absurd outcomes if Respondent's assertion of the scope of paragraph 1 were correct,[37] and
- the presumption of article 28 of the VCLT.

30. If the intention of the CUSMA parties was to only allow claims for past events, the parties would have been better to deviate from the language of Article 1116(1) of NAFTA, such as by agreeing instead that "*Each Party consents, with respect to a legacy investment and*

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36 *Id.*, para. 10.

37 Memorial, paras. 228-33.

regarding conduct of a Party before the entry into force of this Agreement, 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…" In other contexts in CUSMA, such express backward-looking language was indeed used.[38]

31. Respondent disingenuously claims its jurisdictional objections are based on the "*straightforward application of Annex 14-C*[.]"[39] But, in summary, the use of the word "*obligation*" in paragraph 1 does not answer on its own that the obligations of Section A of Chapter 11 of NAFTA ceased to bind the treaty parties for all purposes going forward when CUSMA superseded NAFTA. Nor is it a sufficient basis on which to justify Respondent's request. Far from Claimant not having pointed to what in Annex 14-C sustained the Section A obligations of NAFTA Chapter 11, it is Respondent who has failed to articulate why consent to claims drafted as lasting for three years regarding obligations declared incorporated from a superseded treaty without express language limiting application to past conduct was meant to be so limited. And, as noted above, the lack of "clear textual support" for its Request is a sufficient basis on which this Tribunal may reject Respondent's Request.

B. Construing "Legacy Investment" In Good Faith

32. Respondent has also made much of the issue of consent to arbitration.[40] Claimant does not deny at a fundamental level that Respondent is a sovereign and this arbitration is a

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38 *See, e.g.,* Canada-United States-Mexico Agreement, *entered into force* 1 July 2020 ("CUSMA"), art. 34.1(4) ("*Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement.*") (CLA-60).

39 Request, para. 36.

40 *Id.*

function of its consent. But its consent has already been plainly given in Annex 14-C and it is a matter for this Tribunal to interpret the scope of that consent as embodied in the relevant treaty text and circumstances.[41] With respect to the importance of these circumstances, the *Amco Asia* tribunal aptly observed 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.*"[42]

33. There are issues intertwined with the merits in respect of the good faith conduct of Respondent in asserting its interpretation of Annex 14-C, and accordingly the lack of grounds for its Request. If the CUSMA Parties had in fact taken in good faith the position Respondent now advocates when they were negotiating Annex 14-C, how does that square with the obvious consequences of those treaty commitments at the time they were negotiated? And more specifically, did Respondent "*tak*[e] *into account the consequences*" of its purported Annex 14-C interpretation in respect of the continued investments being considered in the Keystone XL Project at that very time?

34. In this context, the fact that a "*legacy investment*" is defined in paragraph 6 of Annex 14-C to be an "*investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement*" (emphasis added) is notable. The qualifying legacy investments are those existing before NAFTA was

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41 *See* Memorial, paras. 224, 234-35.

42 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated 25 September 1983, para. 14 (CLA-61).

replaced but maintained until CUSMA entered into force, thus excluding from on-going protection those investors whose investments no longer existed when CUSMA came into force. That very exclusion 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.

35. The alternative, as Respondent effectively contends now, would be that the CUSMA treaty parties intended to continue to expose themselves to historical NAFTA claims regarding still active investments, but not ones that became defunct, at the time of bringing CUSMA into force. Since investment treaty claims overwhelmingly allege expropriation[43] – *i.e.* the substantial deprivation of an investment,[44] it is not plausible that the intention of the legacy investment definition was to effectively limit paragraph 1 to consent to historic non-expropriation claims regarding still-extant investments, itself a likely almost non-existent set. That would not encourage future investment or likely benefit many if any prior investors with eligible but as yet unpursued NAFTA claims when CUSMA came into force. Indeed, the notion that a defense to an historical expropriation claim for lack of an investment existing when CUSMA came into force on Respondent's claimed scope of consent in this case is not far-fetched, given the *ratione materiae* objection Respondent makes on illegitimate grounds to claim that no investment existed at the time of breach in this case, as discussed further below. Given the attitude to claims

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[43] Of 799 investment treaty arbitration cases in the dataset kept by the United Nations Conference on Trade and Development for which type of breach alleged is recorded, 654 (82%) involved allegations of expropriation. *See* https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed on 30 May 2024 to produce the statistic).

[44] *See* Memorial, n.410 and citations therein.

from Respondent now, a good faith reading of what "*may be considered as having* [been] *reasonably and legitimately envisaged*"[45] is called for.

36. The incongruity of this expropriation implication resulting from Respondent's position is made starker by the fact that the CUSMA negotiation history runs parallel to the Keystone XL Project process. APMC relied upon the March 2019 Permit to invest in the Keystone XL Project in March 2020 precisely in the window where the CUSMA text had signaled continued protection for existing NAFTA investments as long as they remained in place when CUSMA came into force, given CUSMA was completed in November 2018 and was in the process of ratification in early 2020.[46] That by far the most likely candidate to consider intentionally benefitted and encouraged to invest by Annex 14-C, *i.e.*, an investor making their investment between finalization of CUSMA and it entering into force, should be considered denied that protection is a position best understood in context. In that regard, as a NAFTA Section B proceeding, this Tribunal "*shall decide the issues in dispute in accordance with* [NAFTA] *and applicable rules of international law.*"[47] As a general principle of international law, "[n]*o one can be allowed to take advantage of his own wrong*."[48] The Revocation is linked to prior expectations of stability generated before

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[45] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction dated 25 September 1983, para. 14 (CLA-61).

[46] Office of the U.S. Trade Representative, USMCA to Enter into Force July 1 After the United States Takes Final Procedural Steps for Implementation, dated 24 April 2020 (C-246); Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States, dated 30 November 2018, art. 2 ("*This Protocol and its Annex shall enter into force on the first day of the third month following the last notification.*") (CLA-39).

[47] North American Free Trade Agreement, Can.-Mex.-U.S., 17 Dec. 1992, 32 I.L.M 289 (1993) ("**NAFTA**"), ch. 11, art. 1131(1) (emphasis added) (CLA-38).

[48] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 149 (2d ed. 2006) (CLA-62).

CUSMA came into force by the Presidential Permit,[49] and was a matter well known to the United States as it was encouraging investment into the Keystone XL Project[50] while simultaneously creating CUSMA.

37. Of course, the TC Energy proceeding tribunal did consider the claimants' similar position on the merits being intertwined and found that "*based on the parties' submissions so far, it is not clear whether, and if so to what extent, these factual arguments concerning representations would overlap with questions of merits that the Arbitral Tribunal would have to address in case it decided that it has jurisdiction*."[51] But at this time the TC Energy proceeding tribunal has not ruled on the *ratione temporis* objection as put by the United States in that proceeding. It is entirely possible that it will ultimately consider the question worthy of joining with the merits after all, and a bifurcated proceeding would have entailed considerable delay. The Tribunal in this Proceeding should take seriously the risk of unfairness in elongating the process of the arbitration and reject Respondent's Request, a point discussed more fully below in Section V.

38. Accordingly, if decisions to bifurcate are driven by overarching considerations of procedural fairness and efficiency,[52] the balancing in this case mitigates in favour of deferring the *ratione temporis* objection and having it joined to the merits phase. The requesting party making a complicated and confusing argument does not demonstrate an

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49 *See* Memorial, para. 165 ("*As Professor Prakash comments, the 2019 Presidential Permit represented a type of domestic law property right upon which investors in the Project it permitted could be reasonably expected to rely*." *citing* Prakash Expert Report, para. 48).

50 *See id*., paras. 47-55.

51 *TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2 dated 13 April 2023, para. 29 (RL-0012).

52 As Respondent agrees. *See* Request, para. 8.

objection is "*substantial and not frivolous*." Further, the circumstances of negotiation demonstrate that such purported complexities, if any, would best be fully addressed if deferred and joined to the merits. Respondent's *ratione temporis* objection as a basis for bifurcation should thus be rejected.

IV. THE *RATIONE MATERIAE* OBJECTION

39. Respondent's *ratione materiae* objection is also based on fundamental mis-construals of the record, inapposite references to prior discussions of NAFTA Article 1139, and outright ignoring most of the categories of "*investment*" in Article 1139 that apply to Claimant. It cannot be said more simply – Claimant possessed an "*investment*" at the time of the Revocation. The Tribunal is in a position now, in respect of its decision on bifurcation, to simply and outright dismiss this as a ground for bifurcation. If Respondent wishes to maintain this palpably frivolous objection, it should be joined to the merits.

A. The Objection Sets Up a Straw Man

40. The Request notes that the definition of "*investment*" in NAFTA Article 1139 is exhaustive.[53] Claimant does not deny that, nor did it suggest otherwise in the Memorial or Notice of Arbitration.

41. But Respondent has falsely claimed "*Claimant's activities constituted a domestic stimulus program designed not to contribute to economic development in the United States but rather to support Albertan jobs and welfare at the onset of the COVID-19 Pandemic.*"[54] Respondent knows perfectly well, as stated since the Notice of Arbitration, that the

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53 *Id.*, para. 27.

54 *Id.*, para. 25.

majority of Claimant's capital investment funded activities were in the United States in 2020.[55]

42. Respondent has also claimed: *"As of the date of the alleged breach, according to the Memorial, Claimant's alleged investment in the Keystone XL project was limited to a loan guarantee and the calculation of the value of its investment in Canada through so-called accretion rights* [and] *NAFTA Article 1139 does not include loan guarantees or accretion rights."*[56] And Respondent's contention that Claimant does not have a *"legacy investment"* under the Annex 14-C definition is entirely parasitic on its analysis that at the time of the Revocation Claimant had no NAFTA Article 1139 *"investment."*[57]

43. Respondent disingenuously misses the point. While it is true that the Investment Agreement structure involved a buyback of APMC's US Class A interests on 8 January 2021, as noted in the Memorial: *"APMC thus continued to maintain its investment in the United States through the guarantee against the loan which had been used to partially*

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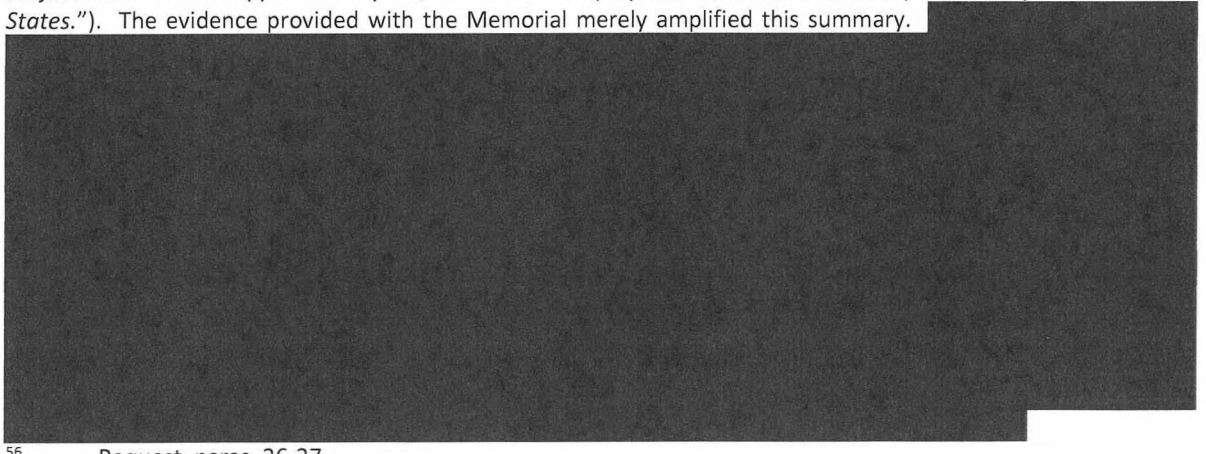
[55] Notice of Arbitration, para. 36 (*"By the end of 2020, APMC had invested equity in the KXL Expansion Project of approximately US$ 825 million, with approximately US$ 325 million in equity attributable to the KXL Expansion Project in Canada and approximately US$ 500 million in equity attributable to the KXL Expansion Project in the United States."*). The evidence provided with the Memorial merely amplified this summary.



[56] Request, paras. 26-27.

[57] *See id.*, para. 29.

repay its capital contribution, retaining its full risk exposure to the Project."[58] Respondent has narrowly focused on the fact that NAFTA Article 1139 includes as part of the categories of "*investment*": "*a debt security of an enterprise*," "*a loan to an enterprise*," and "*an equity security of an enterprise*".[59] The loan guarantee APMC gave in January 2021 is not itself a debt security of an enterprise owned by Claimant since it was a potential (and, owing to the Revocation, ultimately realized) contract obligation for Claimant to pay, rather than a debt security in its or its enterprise's favour. But Claimant, as a partner in the Project, unsurprisingly gave that loan guarantee in consideration of a network of circumstances which are covered by NAFTA Article 1139.

44. Respondent also repeatedly relies on the tribunal's commentary in *Bayview* for the position that an investment under NAFTA, and the relevant protections, are with relation to investments in the territory of another party: "*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.*"[60] But as the *Bayview* tribunal noted, and will be contrasted below, the investors in that case had:

> *substantial investments in Texas, in the form of their businesses and, in the context of these proceedings, more particularly in the form of the infrastructure for the distribution of the water that they extract from the Rio Bravo / Rio Grande. They have investments in the form of the water rights granted by the State of Texas. They are certainly "investors"; but their investments are in Texas*[.][61]

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58 Memorial, para. 206.

59 Request, para. 27.

60 *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award dated 19 June 2007 ("*Bayview*"), para. 105 (RL-0034); *see* Request, n.33, 35, 36, 43.

61 *Bayview*, Award dated 19 June 2007, para. 113 (RL-0034).

B. Various Article 1139 Categories Obviously Apply

45. First, to raise for the third time now, an enterprise itself is an investment under Article 1139 category (a), and is broadly defined in Article 201 of NAFTA.[62] Since the Notice of Arbitration, Claimant has relied on "*a direct chain of ownership and control from APMC in Canada to the SPV investment structure in the United States through to TransCanada LP, the holder of the KXL Presidential Permit . . . .*"[63] The 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. It remained a full partner in the Project at the time of the breach. Respondent's *ratione materiae* objection, and request for bifurcation to hear it, could be rejected right there. There is nothing further to debate nor is there a reason to argue such a point in a subsequent bifurcated jurisdiction phase.

46. The remainder of this argument essentially elaborates on a summary position stated as early as the Notice of Arbitration.[64] Article 1139 includes the following other categories ignored in the Request under which Claimant's Article 1139 investment existed:

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[62] *See* Memorial, paras. 205, 207, 210, 215; Notice of Arbitration, para. 35(i). An "*enterprise*" is "*any entity constituted or organized under applicable law, whether or not for profit, and whether or not privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association. . . .*" NAFTA, ch. 2, art. 201 (CLA-38).

[63] Notice of Arbitration, para. 32. Although Respondent has ignored the issue of Claimant having investments in the form of enterprises inside the territory of the United States entirely, for completeness it is of course the case that this direct chain is sufficient to consider them all Claimant's investment since under Article 1139 "*investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such* Party. . . ." (emphasis added). *See also* Memorial, paras. 69-70, and particularly para. 72 where the summary of the Notice of Arbitration is essentially repeated ("*There is thus a direct chain of ownership and control from APMC in Canada to the SPV investment structure in the United States through to US Carrier. . . .*"). [redacted]

[64] Although not explicitly, the Notice of Arbitration, para. 35 articulated connections to categories (a), (b), (e), (f) and (h) of the NAFTA Article 1139 definition of "investment" carried through the Memorial:
Accordingly, APMC established an "investment" in the territory of the United States as defined under NAFTA Article 1139, including, inter alia:
(i) Several U.S.-incorporated or established companies and partnerships described above, which are enterprises under the NAFTA Article 201 definition;

> *(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);*
>
> [. . .]
>
> *(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* [. . .].

47. And what "*interests*" means in NAFTA Article 1139 has been previously discussed in the *Lone Pine* case as clearly meant "*broadly*":

> *The term "interests" is not defined under NAFTA Article 1139(h). Therefore, the term "interests" under NAFTA Article 1139(h) must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"* [. . .]. *The Tribunal considers that the term must be interpretated* [sic] *broadly as covering a broad range of interests, provided that (i) the interests arise out of the commitment of capital in the territory of a NAFTA party towards economic activity in that territory, pursuant to a*

(ii) equity securities in the US SPV LP owned pursuant to the Investment Agreement, as well as under the related Transactions Agreements, including the APMC Loan Guarantee for the KXL Expansion Project;
(iii) an initial post-closing contribution under the relevant Transaction Agreements of US$ 48,245,855 on account of APMC's equity interest in the US SPV LP in early April 2020, and further cash contributions of approximately US$ 1 billion over the course of 2020 and into early 2021; and
(iv) as discussed further below in Section VI.E, an interest in the US SPV LP that entitles the Enterprise to share in the income and profits of US SPV LP for the full amount of the Class A Accretion attributable to the Class A Interests (and, in certain cases, to fully share in the income and profits), as well as a share in its assets upon dissolution up to its net contribution amount (and, in certain cases, to fully share in its assets upon dissolution), and discussed further below.

> *contract; and (ii) are not covered by the exclusionary language under NAFTA Article 1139(i) and (j). . . .*[65]

48. The exclusionary language referred to in NAFTA Article 1139 is:

> *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). . . .*[66]

49. While it is true APMC's capital contributions in 2020 also built infrastructure in Canada, the majority of its contributions and resulting infrastructure it supported was inside the United States,[67] including infrastructure directly regulated by the Presidential Permit running from the US-Canadian border into United States territory.[68] That infrastructure would have ultimately transported the oil through the United States if the Keystone XL Project had been allowed to be completed. This is all in contrast to the situation in *Bayview* where an input may have originated in Mexico (the waters of the Rio Grande), but no enterprises, rights or infrastructure related to the claimants to use it were inside

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65 *Lone Pine Resources Inc. v. Government of Canada, ICSID Case No. UNCT/15/2,* Final Award dated 21 November 2022 ("***Lone Pine***"), para. 355 (CLA-63).

66 In one respect the above passage from *Lone Pine* is not correct, insofar as sub-category (j) simply confirms the exhaustive nature of the definition of "*investment*" in Article 1139, in that "*other claims to money*" do not qualify as investments. It does not exclude any category which might otherwise satisfy Article 1139(h); it merely confirms that claims to money which do not satisfy an aspect of an interest set out in Articles 1139(a) through (h) do not qualify as "*investment*".

67 *See* n.55 above.

68 *See* TC Energy, Press Release, U.S./Canada border crossing completed, dated 25 May 2020 (C-112).

Mexico – they would not use the water until it reached Texas and had no legal rights in Mexico to it.

50. [redacted][69]

That is an interest in line with category (e) of Article 1139.

51. APMC also had, and exercised in the scenario of abandonment after the Revocation, Class A to Class C conversion rights to assets on dissolution of the Keystone XL Project in part consequent upon decommissioning of the infrastructure in the United States as well as the Canadian infrastructure built – hence the U.S. enterprises (in which Claimant indirectly remained a partner) involved in the Keystone XL Project and Investment Agreement structure were party to the Final KXL Agreement.[70] That is an interest in line with category (f) of the Article 1139 definition of "*investment*".

52. The Request baldly states that "*NAFTA Article 1139 does not include* [. . .] *accretion rights, and limits 'investment' to inter alia 'a debt security of an enterprise,' 'a loan to an enterprise,' and 'an equity security in an enterprise.' Claimant has not explained how* [. . .] *accretion rights in this case could constitute such an investment.*"[71] Although not explicitly cross-linking the accretion rights to sub-categories (e) and (h), the Memorial

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69 Investment Agreement between TransCanada Pipelines Ltd. and APMC, dated 31 March 2020 ("**Investment Agreement**"), [redacted]

70 [redacted]

71 Request, para. 27.

discussed their broad nature as an interest in the form of preferential return on capital invested in investment vehicles leading to economic activity, *i.e.*, building the Keystone XL Project, in the context of the Article 1139 framework.[72] The Request now has completely ignored the rest of that framework, apparently on the basis that the phrase "accretion rights" is not itself a recited sub-category and so it presumably cannot fit into any of the others despite the broad reference to "*interests*" which permeates several of the Article 1139 categories.

53. Fundamentally, the loan guarantee covered both past and future investments into capital inputs in the United States. That is why, when the loan guarantee was called and paid in June 2021, it was for CA$ 1 billion – because it included repaying the banks for the loan they had given TC Energy to conduct the US Class A buyback in January 2021, and for decommissioning activities (both in Canada and inside the United States) regarding what had been built until that point.[73] And that is why the Memorial stated that even after the 8 January 2021 buyback and establishment of the loan guarantee APMC "*retain*[ed] *its full risk exposure to the Project.*"[74] [redacted]

[redacted]

72 *See generally* Memorial, paras. 78-79, 204, 206-07, 209; [redacted]

73 [redacted]

74 Memorial, para. 206.

[redacted]

54. Respondent's complaint that APMC's rights to payment of its accretion rights and remaining buyback which characterize its loss would ultimately be channeled through Canadian entities[77] changes nothing about the fundamental interconnections to U.S. enterprises and capital inputs, and risks to funds APMC expended on infrastructure within the territory of the United States which still existed at the time of the Revocation. That such rights would be paid through a Canadian mechanism to the Canadian Investor, APMC, is uncontroversial.[78] [redacted]

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75 *See, e.g.,* [redacted]

76 *See, e.g., id.*; *see also* Memorial, para. 81 ("*Thus, APMC's fact of equity contribution in the United States would continue to profit it up to the time of the event of Keystone XL* [redacted] *even after return of capital in January 2021. . . .*"); [redacted]

77 Request, para. 32 ("*The evidence shows that the loan guarantee that remained after this divestiture was subject to an agreement between solely Canadian entities and was administered entirely within Canada. The Class A accretion rights also existed entirely in Canada as a means for calculating the value of Claimant's interest in a Canadian entity*" *citing* [redacted]

78 [redacted]

[redacted]

55. Even so, the variety of other investments in or related to United States territory and law including the enterprises themselves which Claimant possessed and were attacked and effectively destroyed by the Revocation were made within a contractual structure where the planned benefit to Claimant of implementing the investment was to be realized through the accretion rights.[80] And so whether one considers the accretion rights themselves as reflective of Article 1139 categories (e) and/or (h) investments harmed, or as the most likely but-for the Revocation benefit lost by harm to other collective investment rights,[81] would not qualitatively alter the framework of Claimant's methodology for the compensation it seeks, and any question of that methodology will be a matter for the merits.

56. Fundamentally, Claimant has not asserted that an investment in Canada without an investment in the United States would be sufficient to found jurisdiction, and Respondent has built a straw man to knock down by ignoring the multiplicity of elements of APMC's investment which were within Respondent's own territory or arising from capital

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79 Memorial, para. 82; [redacted]

80 Memorial, para. 268 [redacted]

81 *Id.*; [redacted] And while Respondent claims that considering the nature of the investment is separate from the harm done to it, that claim is made in partial but direct reliance on authority that while exhaustive the Article 1139 categories can be analysed collectively. *See* Request, para. 34 ("*The United States' jurisdictional objections ratione materiae* [. . .] *will not require the Tribunal to analyze any factual evidence concerning Claimant's* [sic] *alleged breaches related to the revocation of the Permit.*" (*citing Apotex Inc. v. United States of America*, NAFTA/ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, dated 14 June 2013, para. 158 ("[T]*he Tribunal is clear that none of Apotex's characterisations of its alleged 'investment' meet the requirements of NAFTA Article 1139, whether considered separately or together.*")) (RL-0037).

expenditure in its territory at the time of the Revocation and falling within categories (a), (b), (e), (f) and (h) of the Article 1139 definition.

V. THE BIFURCATION CALENDAR IS NOT EFFICIENT AND SHOULD BE REJECTED

57. The TC Energy proceeding tribunal felt comfortable in its view that it should bifurcate to consider essentially the same objection as the *ratione temporis* objection made here "*although it does not appear that bifurcation would necessarily result in a saving of time and costs in a no-jurisdiction scenario that would significantly exceed the added time and costs in the contrary scenario.*"[82]

58. Perhaps that made sense in that proceeding. On the current schedule in this Proceeding, if bifurcation were to occur, the Parties would conduct two rounds of briefing on the objections and various other intermediate steps. Claimant is cognizant that Procedural Order No. 3 recalls "*Claimant, having previously sought preliminary document production, reached agreement with the Respondent on a Procedural Calendar now incorporated in Annex B of PO No 1.*"[83] That agreement was in context of following a direction from the Tribunal to agree to dates for briefing both for bifurcation itself and the bifurcated objections phase, if any, as proposed by Respondent before the procedural conference,[84] modified by the Tribunal's direction that Claimant submit its Memorial ahead of any bifurcation objection.[85] Respondent's original calendar proposal for that procedural conference assumed the bifurcated jurisdictional phase could take approximately a

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82 *TC Energy Corp. and TransCanada Pipelines Ltd. v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2 dated 13 April 2023, para. 35 (RL-0012).

83 Procedural Order No. 3 on Claimant's Request for Revision of the Procedural Timetable, para. 5(a).

84 *See* Email from David Bigge to the Tribunal, dated 20 October 2023 (attaching Procedural Order No. 1 draft and Annex B draft Respondent version) (C-294).

85 First Session with the Tribunal, dated 30 November 2023, Tribunal ruling at 03:27:45-03:31:50.

year.[86] While Claimant respects the Tribunal's decisions and authority, Claimant was before the procedural conference and remains of the view that an extended bifurcated proceeding is a recipe for unnecessary delay and only agreed to the outline of the dates of the Procedural Calendar to move on from the original debate on that basis. But the bifurcated schedule in the Procedural Calendar is effectively Respondent's proposal.

59. On the present Procedural Calendar, although with dates not fixed, a joined approach could expect to reach a hearing of jurisdiction and the merits approximately a year after the decision on bifurcation.[87] Bifurcation on the present Procedural Calendar will at least double that time if the bifurcated objection or objections fail.[88] The comments of the *Windstream Energy* tribunal are instructive to this case: rejecting bifurcation is likely to save at least a year, potentially reaching the point of Tribunal decision on the objections around the same time either way but if combined with the merits leaving the Tribunal able to dispose of the entire Proceeding in a similar timeframe to simply hearing the preliminary objections. And given Claimant has already submitted its Memorial, the costs of a bifurcated Proceeding are not likely to be significantly less even if the Proceeding does not progress to the merits.

60. Specifically with regard to the *ratione materiae* objection, it was not raised during the first procedural conference in December 2023. Respondent cannot suggest that its objection

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[86] *See* Email from David Bigge to the Tribunal, dated 20 October 2023 (attaching Procedural Order No. 1 draft and Annex B draft Respondent version) (C-294).

[87] Full use of the Annex B schedule would indicate approximately 360 days from decision to reject bifurcation to the final step before a pre-hearing organizational meeting. Procedural Order No. 1, Annex B.

[88] *Id*. Steps leading to a hearing under the present Annex B preliminary objection schedule are to complete by 4 August 2025, with the Tribunal having previously reserved dates in September 2025 for any such hearing (as confirmed in Procedural Order No. 3, recitals 7 and 8), with the calendar for merits events the same as under a no bifurcation scenario thereafter.

was based on facts discovered from the evidence provided with the Memorial, since the Request relies upon passages from the Notice of Arbitration to bring the *ratione materiae* objection,[89] and nothing presented in the Memorial, or indeed synthesized in this response to the Request, moved beyond recasting and evidencing the position stated in the Notice of Arbitration.[90] The fact that Respondent did raise the possibility of the *ratione temporis* objection in December 2023, but not this one when it could have, reinforces that the *ratione materiae* objection is not credible.

61. In *Red Eagle*, one aspect of a request for bifurcation was expressly found not to be serious and substantial because it ignored the case made out by Claimant, and bifurcation was therefore rejected.[91] Claimant submits that the considerations set out in Section IV above similarly demonstrate that Respondent's *ratione materiae* objection is based on a mismatch to the terms of NAFTA Article 1139 given uncontestable facts, and as discussed above simply ignores or misapplies the position set out by Claimant as early as the Notice of Arbitration. To spend several months and multiple rounds of briefing on further argument before the Tribunal would be wasteful in the face of an easily dismissed objection.

62. Respondent's Request, if granted, will clearly result in an extended schedule of a year or more, with attendant costs, and thus would plainly not be the efficient alternative. As balanced with fairness, such inefficiency is particularly emphasized in light of the

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89 Request, para. 26.

90 *See* n.64.

91 *Red Eagle*, Decision on Bifurcation dated 3 August 2020, para. 50 ("*These considerations lead the Tribunal to conclude, first, that the Respondent's objection does not appear to be 'serious and substantial' because it omits to consider that the Notice of Intent did identify a legal and factual basis of Claimant's claim.*") (CLA-50).

insubstantial nature of Respondent's objections, as well as the potential intertwining with the merits of both objections. Respondent's bifurcation Request is neither fair nor efficient and should be rejected by this Tribunal.

VI. CONCLUSION

63. For the reasons given above, Claimant requests that the Tribunal issue an order:

a. dismissing Respondent's Request for Bifurcation, while directing Respondent to file its Counter-memorial in accordance with the Procedural Calendar; and,

b. for Claimant's costs to be awarded after further submissions, as to be directed by the Tribunal.

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Respectfully Submitted,

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