Public Version

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 REJOINDER TO RESPONDENT UNITED STATES OF AMERICA'S REPLY ON THE REQUEST FOR BIFURCATION

29 July 2024

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I. INTRODUCTION

1. Pursuant to the Procedural Calendar, Claimant submits its Rejoinder on the Request for Bifurcation of Respondent United States of America, in response to the Reply of the United States of America to Claimant's Observations on the Request for Bifurcation dated 8 July 2024 ("**Reply**").[1]

2. A point already becoming disconcerting is the casual frequency with which Respondent distorts or misrepresents the record.[2] Beyond that failure of procedural decorum, the Reply makes plain:

   a. The *ratione temporis* objection hinges on an unjustified linguistic presumption;

   b. The *ratione materiae* objection contradicts the NAFTA text; and

   c. Respondent has been reduced to blaming Claimant for Respondent's own proposals regarding the Procedural Calendar which show that granting the Request means delay, not efficiency.

3. Accordingly, Respondent's arguments for bifurcation regarding both objections should be rejected by the Tribunal and any further pursuit and consideration of the objections should be joined to the merits.

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[1] Claimant incorporates by reference the definitions of Claimant's Memorial, dated 16 April 2024 ("**Memorial**"), Claimant's Request for Revision of the Schedule and Production of Documents dated 22 May 2024, and Claimant's Observations on Request for Bifurcation of Respondent United States of America dated 17 June 2024 ("**Observations**").

[2] As noted in Claimant's letter to the Tribunal dated 7 June 2024, Respondent's submissions of 4 June 2024 repeatedly misrepresented Claimant's position and made inaccurate assertions. In a characteristically unnecessary comment, the Reply declares "*Claimant's allegation that the 'the TC Energy proceeding tribunal did consider the claimants' similar position on the merits being intertwined' is false*." (Reply, n.37) (emphasis added). To reaffirm: the TC Energy tribunal did consider arguments from TC Energy on that subject and Claimant's statement was not false. Claimant acknowledged that the TC Energy tribunal rejected those arguments in the very same sentence the Reply claims is inaccurate, but those arguments were considered and Claimant discussed reasons this Tribunal could, and should, take a different view from the TCE tribunal (Observations, para. 37). The Reply is replete with more serious distortions, as discussed below, and should be reviewed with caution.

II. EFFICIENCY AND FAIRNESS ARE THE TOUCHSTONES OF BIFURCATION ASSESSMENTS

4. In Section II of the Observations, Claimant presented a recent history of tribunal conduct under a variety of arbitral rules, including the 1976 UNCITRAL Rules, which shows a consistent pattern of international arbitral tribunals in investment treaty disputes emphasising efficiency and regularly exercising their discretion to deny bifurcation. In response to Claimant's argument the Reply complains that this Proceeding is under the Rules by Claimant's own choice,[3] and the Rules contain a presumption at Article 21(4).[4] But the Reply does not engage in a genuine debate. Instead, Respondent declares Claimant's argument "*unhelpful to it because* [the tribunals] *are applying different rules and different treaties with their own bifurcation provisions.*"[5]

5. However, Respondent continues to rely upon the *Glamis Gold* tribunal test, formulated under the Rules, applied by many tribunals under the Rules and other arbitral rules, and which, as Claimant noted, has essentially been mirrored in subsequent codified arbitral rules created since the widespread application of that test.[6] Far from being "*unhelpful*", the point is that, regardless of different arbitration rules and different treaties, the pattern of considerations has been a continuing development reflected in the practice of tribunals applying the Rules, the 2010 UNCITRAL Rules update, the 2006 ICSID Rules, or the 2022 ICSID rules update.

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[3] Reply, paras. 10-11.

[4] *Id.*, para. 9. Respondent ignores the plain meaning interpretation of Article 21(4) that this is ultimately not a presumption, but a confirmation of a tribunal's discretion (as noted at Observations, para. 8). Respondent would like to turn a "should" or a "may" into a "shall" and a "must", and would claim that in saying "[i]*n general*," the Rules are providing a directive rather than a general suggestion.

[5] Reply, para. 11.

[6] Observations, paras. 10-13, 14 (discussing the 2022 ICSID arbitration rules and the complete absence of any kind of mention of a presumption).

6. As Claimant's Observations noted,[7] even the *Glamis Gold* tribunal treated any presumption in the Rules as essentially hollow, and not a hard presumption, declaring that:

> *Article 21(4) does not require that pleas as to jurisdiction must be ruled on as preliminary questions. The choice not to do so is left to the tribunal's discretion.* [. . .] [T]*he primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings.*[8]

7. The *Glamis Gold* tribunal's analysis shaped subsequent tribunal conduct. Absurdly, Respondent complains that Claimant inappropriately drew from the *Red Eagle* tribunal's commentary on understanding the "*substantial and not frivolous*" limb that Respondent itself raised in the Request because *Red Eagle "not only proceeded under the* [2006] *ICSID Rules, but also arose under the Canada-Colombia Free Trade Agreement, which has a specific provision addressing bifurcation*."[9] As that tribunal noted, "*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*."[10] And in discussing the matter of the "*substantial and not frivolous*" limb at all, the *Red Eagle* tribunal was drawing on factors considered in the *Glamis Gold* case, regardless of the differing procedural context, precisely because of the similarity of the situation and the paucity of guidance on the exercise of tribunal discretion in the Rules and the 2006 ICSID arbitration rules.

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7 Observations, para. 16.

8 *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised) dated 31 May 2005, paras. 9, 11 (RL-2).

9 Reply, n.8.

10 *Red Eagle Exploration Ltd. v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation dated 3 August 2020, para. 40 (CLA-50).

8. Indeed, when Respondent says in the Reply that "*Glamis Gold and the cases that followed establish that, in determining whether the presumption in favour of bifurcation should be exercised,*"[11] it cross references a footnote in the Request citing predominantly decisions made under ICSID arbitration rules,[12] even while elsewhere the Reply denounces such decisions as meaningless.[13]

9. Claimant stands by the core message of "*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.*"[14] Accordingly, a modern tribunal, with the benefit of the consideration of past tribunal experiences, possesses clear discretion under the Rules and should reject a procedure unlikely to be more efficient rather than pursuing it merely because it *might* be so.[15]

III. THE *RATIONE TEMPORIS* OBJECTION

A. Respondent's Core Position is Disingenuous

10. The Reply does not significantly add to its arguments relating to the *ratione temporis* objection. The essential position is that Respondent wishes to delay progress on the merits in this Proceeding for over a year because paragraph 1 of Annex 14-C uses the word "*obligation*" and "*therefore the consent provided in Paragraph 1 is limited to claims based on events occurring while the NAFTA was in force.*"[16] This argument continues to

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11 Reply, para. 12.
12 *See* Request, n.8.
13 Reply, para. 11.
14 *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).
15 *See* Observations, Sec. II.B.
16 Reply, para. 14.

be unsustainable and is not sufficient to meet even the *Glamis Gold* bifurcation test, and should therefore be rejected.

11. However, Claimant wishes to take the opportunity to address a number of points raised in the Reply. Respondent starts its Reply by attempting to set up a straw man, suggesting, without citation, that "*Claimant disputes that limiting the consent in Annex 14-C to claims for breach of certain NAFTA obligations also limits the Tribunal's jurisdiction ratione temporis.*"[17] Claimant does not know what this means, but Respondent rejects this alleged position by once again noting that the NAFTA parties and prior tribunals have agreed that NAFTA obligations came into force when NAFTA did and did not bind the parties regarding prior conduct.[18] As addressed in the Observations, this continues to tell this Tribunal nothing at all about the proper interpretation of Annex 14-C and CUSMA generally as to whether the obligations of NAFTA Chapter 11 Section A were sustained after CUSMA superseded NAFTA.[19]

12. Next, Respondent complains that "*Claimant remains unable to point to any single provision in the treaty that embodies this purported agreement*"[20] to support the proposition that the CUSMA parties did "*bind themselves to the continued performance of the NAFTA's substantive investment obligations for three years after its termination.*"[21] That at least responds to Claimant's position, but Respondent is mis-stating the plain case before the Tribunal. There is no rule of law or interpretation in the VCLT, ILC Articles or

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17 Reply, para. 17.
18 *Id.*, n.21 (citing Request, para. 18 and n.20).
19 *See* Observations, para. 27 and n.35.
20 Reply, para. 19.
21 *Id.*

otherwise, and Respondent certainly cites to none, that the legal consequences of a treaty agreement must emerge from singular provisions, words, or in a certain format. As Claimant noted in the Memorial: *"as set out in paragraphs 1 and 3 of Annex 14-C, the Protocol must contemplate 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."*[22] The provision at paragraph 1 of Annex 14-C is where Respondent and the CUSMA treaty parties provide that appropriate investors with legacy investments may make claims of breach of NAFTA obligations, while paragraph 3 curtails for how long that may be done.

13. It is of course impossible to point to paragraph 1 as a single provision to demonstrate any agreement at all among the CUSMA parties, since paragraph 1 involves the term *"legacy investment"*, itself later defined at paragraph 6. Understanding the agreement made at paragraph 1 inherently involves a wider contextual reading, and certainly broader than the contrived interpretation of a single word devoid of context. Respondent's rhetoric belies that its core argument for bifurcation is that *"obligation"* is inherently a freestanding and backward-looking word in paragraph 1, paradoxically argued on the grounds that the word's use is forward-looking in NAFTA Chapter 11 passages.[23] Claimant's position that the use of the word *"obligation"* in paragraph 1 must be understood in the broader context of its use, including footnotes 20 and 21 to paragraph

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[22] Memorial, para. 223.

[23] Reply, para. 17 and n.21. All of the cases cited by Respondent address the issue of measures occurring before NAFTA was in force, not the situation before this Tribunal.

1 of Annex 14-C, paragraph 3 of Annex 14-C, other provisions of CUSMA, and the Protocol, is respectful of the VCLT interpretation principles.[24]

14. With specific regard to the Protocol, Respondent suggests that it "*says nothing about NAFTA continuing to operate or remaining in force after its termination. Rather, the 'without prejudice' phrase states only that provisions of the NAFTA referenced in a specific* [CUSMA] *provision shall have whatever effect they are given in that* [CUSMA] *provision, notwithstanding the NAFTA's termination.*"[25] Respondent appeals to a distinction without a difference. The Protocol says that if a provision of CUSMA states that a provision of NAFTA will have some continued effect, then it will despite NAFTA's termination. All Claimant has ever said is that Annex 14-C includes provisions which give NAFTA Chapter 11 continued effect, including the substantive obligations of Section A.

15. Respondent has addressed the Tribunal on the recent award in *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States*.[26] While the award is not public, Claimant understands it has concluded that proceeding after deliberations focusing on arguments relating to the *ratione temporis* objection. But the award cannot confirm[27] that Respondent's *ratione temporis* objection is *prima facie* substantial as framed in *this* Proceeding. Respondent has neglected to note that the award was not a unanimous tribunal finding in any event.[28] More particularly, the Request must be considered on its own merits *i.e.*, whether Respondent made a *prima facie* substantial showing; and

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24 Vienna Convention on the Laws of Treaties, 8 I.L.M. 679, art. 31(1) (CLA-42).

25 Reply, para. 21.

26 Letter from Respondent to the Tribunal dated 19 July 2024.

27 *C.f.* Letter from Respondent to the Tribunal dated 19 July 2024 at 2.

28 *See* ICSID, *TC Energy Corp. and TransCanada PipeLines Ltd. v. United States of America* (ICSID Case No. ARB/21/63) Case Details, https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/63.

Claimant stands by its position that there is no clear textual support for Respondent's objection as framed.[29]

16. It is not a *prima facie* substantial position to simplistically assert that "*obligation*" in paragraph 1 of Annex 14-C means "relating only to past events" because the Protocol terminated NAFTA. Paragraph 1 provides consent to claims for breach of obligation, paragraph 3 states that consent lasts for three years, footnote 20 states "*for greater certainty*" that Section A of Chapter 11 of NAFTA (which contains the referred-to obligations) applies to those claims, footnote 21 only makes sense if Annex 14-C is forward looking, and the Protocol expressly contemplated the continuation of NAFTA obligations by appropriate CUSMA provisions. The natural understanding is that the CUSMA parties consented to claims challenging conduct going forward as contravening the obligations of NAFTA Chapter 11 Section A, not simply past conduct (which could have easily been expressed).[30]

B. Merits Framing and Equity May Inform Interpretation

17. The Reply also pursues misleading arguments regarding wider contextual framing of the *ratione temporis* objection. If there are to be discussions of the meaning of Annex 14-C to justify Respondent's claim that it never had any intention of sustaining NAFTA investment protections after its termination, consideration of contextual cues which

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[29] *See* Observations, paras. 22, 31; *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).

[30] And as noted in the Observations, the CUSMA parties were express on occasions where an intention for a CUSMA provision's incorporation of a NAFTA provision was meant to have effect regarding conduct "*before the entry into force of this Agreement*" *i.e.* CUSMA: *see* Observations, para. 30.

encroach upon the merits of Claimant's case are entirely appropriate, and may in fact become inevitable.

18. In the Observations, Claimant noted that requiring a "*legacy investment*" to exist when CUSMA came into force closed off historical expropriation claims, and that this would radically reduce the scope of Annex 14-C's purpose if it was otherwise/ understood as protecting purely backward-looking claims.[31] Considering the wider context of concluding CUSMA, such an outcome is not plausible and provides a further basis to reject Respondent's objection, and to avoid bifurcation of the schedule.

19. The Reply's primary rebuttal to this is that "*Claimant's argument would only apply to direct expropriation; indirect expropriation claims . . . would fall within* [CUSMA's] *'legacy investment' definition*."[32] Respondent's position appears to be that indirect expropriation (in contrast to direct expropriation) does not involve the destruction of investments. That is, to say the least, a novel position. The concept of expropriation is well understood to involve the substantial deprivation of an investment.[33] Indirect expropriation is merely a methodological distinction of achieving that same result as a direct expropriation.[34] By a direct expropriation, the State directly deprives the owner of its legal ownership rights, for example by taking them for itself. Indirect expropriation achieves that deprivation by appropriate interference with rights, such that an investment becomes effectively valueless and often explicitly destroyed. Respondent apparently now asserts that owning

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31 Observations, paras. 34-36.
32 Reply, para. 26.
33 *See* Memorial, para. 192 (and citations therein).
34 *See id.*, paras. 192-93 (and citations therein).

an enterprise does not qualify as an investment under NAFTA (according to its arguments under the *ratione materiae* objection, discussed in Section IV below). Respondent would clearly be of the view that an enterprise it had indirectly expropriated of its valuable rights would no longer qualify as an "investment," as defined under NAFTA Article 1139, for the purposes of Annex 14-C. Accordingly, it would also conclude that an investor would not qualify as having a legacy investment under this definition which required an investment to continue to exist after a breach of NAFTA obligation until CUSMA came into force.[35]

20. The Reply's only new argument in its *ratione temporis* objection discussion is to say that the CUSMA parties could have used language in other treaties to extend obligations.[36] Respondent appeals to text in treaties which provide sunset clauses for their continued application after a treaty party seeks the treaty's termination. This discussion ignores a point raised in the Memorial: the uncontradicted, contemporaneous evidence from during the CUSMA negotiations (as presently available to Claimant) demonstrates support for Claimant's position. Specifically, a briefing from USTR about CUSMA Chapter 14 and Annex 14-C led the Industry Trade Advisory Committee ("**ITAC**") to understand that Annex 14-C was intended to act as a sunset clause for NAFTA Chapter 11, and ITAC

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[35] Notably, Respondent's position is inconsistent with NAFTA Article 1121(4), which anticipates the loss of control associated with an expropriation, and the resulting impossibility to meet the waiver requirement of Article 1121(1)(b) or 2(b). As Article 1121(4) states: "*Only where a disputing Party has deprived a disputing investor of control of an enterprise: (a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required*[.]" (CLA-38).

[36] Reply, para. 19.

commented it was unusually short at three years, compared with the 10-year sunsets the United States had included in other treaties.[37]

21. These issues relate to Respondent's deflection that the CUSMA text "*was available to all investors to determine for themselves how it related to their supposed investments.*"[38] As set out in Section IV.C of the Memorial, beyond the comments of ITAC, other public statements from the CUSMA parties and their negotiators flatly contradict Respondent's position in this Proceeding.[39] And Respondent's contention that CUSMA "*was concluded in November 2018, long before Claimant in this case chose to make its alleged investment in March 2020*"[40] is very much the point. The framework for considering the proper understanding of a good faith reading of the Annex 14-C terms, including a choice to require an investment to exist when CUSMA came into force in order for protection of a legacy investment to apply at all, and Respondent's equitable position now, is that Claimant established its investment structures by the end of March 2020. At this time, the only possible good faith understanding of the CUSMA text from the surrounding circumstances was that Claimant's investment would be protected under the NAFTA Chapter 11 framework for a further three years from CUSMA entering into force (which had not yet occurred at the time of Claimant's investment).

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[37] Memorial, para. 247 (and citations therein). Notably, ITAC worked contemporaneously by providing advice and views to US negotiators during the CUSMA negotiations, so had a direct insight into the intent of the United States and other Parties during the negotiations.

[38] Reply, para. 31.

[39] *See* in particular the discussions regarding the subsequent statements of negotiators for the United States (WilmerHale Client Alert, Three Tips for Investors in Mexico's Energy Sector Regarding Potential USMCA Claims, dated 18 March 2021, at 1-2 (Tips 1 and 2) (C-251)) and Mexico (Van Bael and Bellis, Investors' Right to Bring Investment Claims Under the NAFTA Investment Chapter Expires Soon, dated 13 March 2023, at 2 (C-257)) and a ministerial statement of Canada (Government of Canada, Minister of International Trade – Briefing Book at 66-67 (C-255)).

[40] Reply, para. 31.

22. Indeed, shortly after the Investment Agreement was executed, the United States gave notice that CUSMA would enter into force on 1 July 2020, thereby establishing the window of investment protection as between 1 July 2020 and 30 June 2023.[41] Moreover, construction on the Keystone XL Project was expected to be completed during this window.[42]

23. The above responses confirm Claimant's submissions in its Observations, that an unsupported *ratione temporis* objection cannot be the basis for a bifurcation application. The contextual background, which includes issues intertwined with the merits, and issues of procedural fairness and efficiency (as discussed below), all militate in favour of combining any consideration of this objection to the merits phase of the arbitration schedule.

IV. THE *RATIONE MATERIAE* OBJECTION

A. Respondent's Framing of its Objection Is Inconsistent with the NAFTA Text

24. A fundamental *prima facie* inadequacy and inconsistency of Respondent's framing in its *ratione materiae* objection has become increasingly explicit in its submissions. As a result, the Tribunal should reject this objection as a basis for bifurcation and order that it be joined to the merits.

25. In the Request, Respondent objected that the definition of "*investment*" in NAFTA Article 1139 is exhaustive,[43] and complained that Claimant had not labelled appropriate

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41 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, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation (C-246).

42 *See* Witness Statement of Adrian Begley, dated 16 April 2024, para. 28.

43 Respondent's Request for Bifurcation, dated 16 May 2024 ("**Request**") para. 27.

elements to claim any kind of investment fitting Article 1139 definitions.[44] By the Reply, three principal complaints are made by Respondent all of which defy the Article 1139 definitions:

a. "*When the US objections are presented in full, the Tribunal will be asked to examine the specific activities of Claimant that it alleges constitute an investment*[;]"[45]

b. Respondent also complains that "*Claimant relies on vague assertions of 'interests' in a 'network of circumstances' and 'interconnections to U.S. enterprises and capital inputs'* [;]"[46] and

c. "*Claimant has not, and cannot, allege that the US SPV GP was itself an investment, as it never provided capital to that entity.*"[47]

26. In complaining that assertions of "*interests*" and "*connections to U.S. enterprises and capital inputs*" are vague, Respondent has effectively decried Article 1139 of NAFTA itself as vague. The series of definitions in Article 1139 are in fact a network of circumstances and interconnections involving enterprises of a treaty party, using the terms "*interest*" or "*interests*" explicitly in relation to ***rights to income or profits of enterprises*** (sub-category (e)), ***rights to assets*** (sub-category (f)) and arising from ***the commitment of capital*** (sub-category (h)), and the whole set of Article 1139 definitions are collectively summarized

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44 Request, para. 25.
45 Reply, para. 35.
46 *Id.*, para. 34.
47 *Id.*, para. 38.

there as "***interests*** *set out in subparagraphs (a) through (h)*[.]" Article 1139 does not discuss "*activities*"; that is not the examination at issue here.

27. Article 1139 also does not state that financial capitalization defines an enterprise to qualify it as an investor's investment; rather, Article 1139 defines "*investment of an investor of a Party*" as: "*an investment owned or controlled directly or indirectly by an investor of such Party*[.]" Sub-category (a) of the definition of "*investment*" is simply "*an enterprise*[,]" and the definition of an enterprise at article 201 is "*any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association*[.]"

28. The Class A interests are not an enterprise, but the enterprises connected to the rights and interests of Claimant most certainly were at the relevant time all owned indirectly by Claimant. This has been stated since the Notice of Arbitration, discussed and evidenced in the Memorial and [redacted], but set out once again below. Contrary to Respondent's assertion,[48] the chain down from Claimant to the Presidential Permit holder, US Carrier, was unbroken at the time of the Revocation. Below is an extract of [redacted]:

[48] Reply, paras. 37-38.

[redacted]

29. Claimant indirectly owned and/or controlled the five American enterprises coloured in the above diagram at the relevant time of the Revocation. In particular, [redacted]:

- APMC was 100% owner of 2254746 Alberta Ltd ("**Canadian Holdco**"),[49] and 2254753 Alberta Ltd ("**APMC US Member**"),[50] two Canadian entities;

[49] [redacted]

[50] [redacted]

- In turn, Canadian Holdco 100% owned 2254746 Alberta Sub Ltd ("**APMC US Partner**"), an enterprise in the United States;[51]
- Meanwhile, APMC US Member was co-owner of another enterprise in the United States, 181531115 LLC ("**US SPV GP**"), along with 1991321 LLC ("**US SPV GP Holdco**", a subsidiary entity of the TC Energy project partner group);[52]
- Then, US SPV GP was itself a co-owner of TC Keystone Pipeline GP LLC ("**US Carrier GP**"), another enterprise in the United States, with TransCanada Oil Pipelines Inc. ("**TCOPI**", another subsidiary entity of the TC Energy project partner group);[53]
- APMC US Partner and US SPV GP, both indirectly owned by Claimant, were partners in a Delaware-registered partnership, 181531115 Limited Partnership ("**US SPV**") with 6512924 LLC ("**US SPV (TCPL) LP**", another subsidiary entity of the TC Energy project partner group);[54] and finally,
- US SPV and US Carrier GP were partners in another Delaware partnership, TransCanada Keystone Pipeline, LP ("**US Carrier**"), with TransCanada Keystone

[redacted]

51 [redacted]

52 [redacted] *See also* Investment Agreement between TransCanada Pipelines Ltd. and APMC, dated 31 March 2020 ("**Investment Agreement**"), [redacted] (C-110).

53 [redacted] *See also* Investment Agreement, [redacted] (C-110).

54 [redacted]. *See also* Investment Agreement, [redacted] (C-110).

Pipeline LLC ("**TCKP**", another subsidiary entity of the TC Energy project partner group).[55] And US Carrier held the Presidential Permit.[56]

30. None of these ownership relationships had yet ceased by the Revocation.[57] These were therefore investments of Claimant under Article 1139 sub-category (a). Quite how Respondent can now state seriously that "*Claimant has not, and cannot, allege that the U.S. SPV GP was itself an investment, as it never provided capital to that entity*" is unknown. Claimant has directly and indirectly stated that these entities are relevant enterprises several times in its submissions,[58] and is in no way debarred from doing so

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[55] [redacted] While the Investment Agreement was exhibited with the Memorial at exhibit C-110 in these proceedings, and as [redacted] the documents were not included in either form of the exhibit. [redacted] certain of which are referred to in that regard above. However, we have noted that the [redacted] was not included. It is submitted now as C-295 for completeness.

[56] Presidential Permit Authorizing TransCanada Keystone Pipeline, L.P. to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, dated 29 March 2019, 84 Fed. Reg. 13101 (3 April 2019) (C-86).

[57] Contrary to Respondent's unsupported conclusions at Reply, paras. 37-38, the U.S. Class A buyback did not end all Class A rights in the US SPV, and certainly did not end the partnership. [redacted]

[58] Notice of Arbitration, dated 27 April 2023 ("**Notice of Arbitration**"), para. 35: "*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*[.]" This obviously included US SPV GP, as discussed in the "*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*" (*Id.*, para. 32). This "*direct chain of ownership*" was again set out in the Memorial (Memorial, para. 72), followed by noting the NAFTA definition of "*enterprise*" (*Id.*, para. 205), and that "*all associated companies and contractual structures were in place by the end of March 2020. Therefore, APMC's investment was timely made in accordance with NAFTA's terms. . . .*" (*Id.*, para. 210). In Claimant's Observations, the position is discussed specifically with respect to the US SPV and US SPV GP: "*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.*" (Observations, para. 45).

because of the precise configuration of which entities directly received capital inputs in the Keystone XL Project structure.

31. In further defiance to Respondent's own treaty text, Respondent complains "*even if the Class C shares entitled Claimant to a share of assets sold by the Canadian SPV . . . Claimant did not hold the Class C shares on the date of the permit revocation*[.]"[59] Respondent was speaking of Claimant's position as regards the Canadian SPV, and Claimant acknowledges the direct ownership of Canadian interests is not sufficient for Claimant to have an appropriate investment in this case. But in saying this, Respondent simply ignores sub-category (f) of Article 1139: "*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)*[.]" 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). The conversion to Class C interests would happen as part of the process of dissolution according to whether appropriate interests existed. And Claimant had such interests, through the indirect chain of ownership to the enterprises involved. Class A interests in both the US and Canadian entities, subsisting at the time of the Revocation, were realised by conversion into Class C interests and redemption of other interests when the Keystone XL Project parties (which to be clear continued to include Claimant) entered into the Final KXL Agreement.[60]

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59 Reply, para. 41.

60 [redacted]

32. Respondent also claims the "*Class A shares in the Canadian SPV were clearly situated in Canada, not the United States, and the accretion payments APMC may have received as a result were not a U.S. investment (even if the calculation of the accretion rights were based partly on the value of Claimant's terminated Class A shares in the U.S. SPV).*"[61] Although not explicitly referencing sub-category (e) or sub-category (h) of Article 1139, Respondent is apparently denying their relevance.

- In particular, without explicitly saying so, Respondent's position must be that sub-category (h) does not say "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory,*" but rather something akin to "rights to payments from an enterprise in the territory of a Party arising from the commitment of capital or other resources to economic activity in such territory." But sub-category (h) does not condition how an investor's interest might be realised territorially, as long as that interest arises out of the commitment of capital in the territory of a relevant NAFTA party.
- Nor does sub-category (e) say that an investor can only have an investment in a NAFTA party by receiving a share in the income or profits of an enterprise by direct receipt from that enterprise in the territory of the relevant NAFTA party, or any other route where the investor receives the share by itself receiving an international financial transfer starting from an institution in the relevant NAFTA party. Sub-category (e) is simply an interest entitling the investor to share somehow in the income or profits of an enterprise based in the relevant territory.

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61 Reply, para. 41.

How the interests in the accretion rights ultimately reached Claimant are clearly not relevant.

33. Claimant actually had (and not conditionally) at the time of the Revocation through the contractual accretion rights, interests which arose from the commitment of capital in the United States based on a preferential right to share in the income of US SPV. That APMC had that interest by contractual payment flows from Canadian entities creates no barrier to consideration of those interests under the Article 1139 definitions. Those contractual "*interests*" remained, as set out in sub-category (h), "*arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory*[.]"

34. Respondent's discussion of the loan guarantee is not clear either.[62] In particular, Respondent's claim that "*all of the activity associated with the loan guarantee occurred in Canada*"[63] is irrelevant to considering whether Claimant had any interests appropriate to an investment under Article 1139 in this case. In any event, the statement is either trivially meaningless or not true. Insofar as "*all of the activity*" is meant by Respondent to encompass the question of to which entity the loan guarantee was given and who would be paid if it was activated: those were indeed Canadian entities. If "*all of the activity*" is meant to reflect a reasonable layperson's conception of why the loan guarantee was given and what physical activities in the real world it financially supported, Respondent knows perfectly well primary drawings on the loan by the time of the

62 Reply, paras. 42-44.

63 *Id.*, para. 43.

Revocation were to repay expenditure on activities in United States territory. The nature of the guarantee was such that, if the Keystone XL Project did not complete allowing for the loan repayment, the guarantee would expose the original capital outlaying party, Claimant, since it would have to repay the loan which had been used to repay it. And thus, APMC's capital expenditure in the territory of the United States would remain its own burden (and particularly a point for understanding Claimant's loss as discussed in Section IV.B below).

35. Respondent's citation to *Merrill & Ring Forestry L.P.* is entirely beside the point to any of this.[64] The tribunal in that case rejected the notion that the ability to enter into hypothetical contracts which was allegedly frustrated by the respondent state meant the hypothetical contracts were an "*interest*" under sub-category (h):

> *the issue here is that the right as defined does not appear to arise from a contract that might be considered directly related to the investment made. In fact, it is only a potential interest that may or not materialize under contracts the Investor might enter into with its foreign customers.*[65]

36. The loan guarantee is not an Article 1139 interest or investment. It was, though, a real contractual obligation which was activated because of Respondent's breach of obligation in the Revocation, and connected through a contractual network to elements which were Claimant's investments as defined by Article 1139.

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64 Reply, para. 42.

65 *Merrill & Ring Forestry L. P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Award dated 31 March 2010, para. 140 (RL-S9).

B. Respondent Really Appears to Complain about Damages Methodology

37. Respondent incorrectly claims, in respect of the *ratione materiae* objection, that "*Claimant does not challenge* [in the Observations] *the second prong of the Glamis Gold test for bifurcation, related to whether jurisdiction and the merits are so intertwined as to make bifurcation impractical.*"[66] The Observations in fact stated:

> *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, 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.*[67]

38. Indeed, Respondent states 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.*"[68] Respondent is misstating that the Class A shares are critically Claimant's investment in this case. Claimant's argument is that the Class A shares and the related accretion rights (and payments owed on Project Completion) support the appropriate measure of its damages caused by Respondent, as does the activation of the loan guarantee.[69] [redacted] Claimant had an ownership stake in a series of U.S. based enterprises and a variety of interests arising from the Investment Agreement structure and capital outlays connected to them which as a whole were harmed when the US Carrier's Presidential Permit was revoked. The purpose of the enterprises and the manner in which those interests could be realised was

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66 Reply, para. 45.
67 Observations, para. 55.
68 Reply, para. 36.
69 *See* Memorial, paras. 268-72.

fundamentally undermined by the Revocation leading to the Keystone XL Project abandonment. To reiterate "*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, would not qualitatively alter the framework of Claimant's methodology. . . .*"[70]

39. Accordingly, the question as to how exactly Claimant's investment was harmed and how it should be compensated for that harm is a matter for the merits. Respondent has demonstrated through its failure to correctly articulate Claimant's case that the issue of Claimant's investment is in fact closely intertwined with the merits and damages and should be heard together in a single phase when the related evidence can be examined by the Tribunal. Therefore, whether looking at the mischaracterization of Claimant's investment, or the plain intertwining of issues around the investment with merits and damages, the Tribunal has more than ample grounds to reject Respondent's *ratione materiae* objection as a basis for bifurcation.

V. RESPONDENT IS WRONG ABOUT THE TIMETABLE

40. Section V of the Reply is fundamentally wrong regarding the Procedural Calendar. In summary, Respondent again sets up a straw man, but in this instance argues that Claimant proposed a test that a bifurcated proceeding that fails to dispose of the matter is inherently unfair because it could simply cause delay, and if Claimant's position was taken seriously bifurcation would never be granted.[71] To be clear, Claimant's position is not

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70 Observations, para. 55.

71 Reply, para. 46.

that the possibility of delay of the merits should always be dispositive. By the same token, one could also set up a straw man arguing that bifurcation should always be granted because of the potential to save the effort of briefing merits and damages because of possible success on a jurisdictional challenge. Both arguments fail to reflect the full balancing required. In the specific facts of this case, though, bifurcation will delay the merits without a prospect of speeding the conclusion of the Proceedings as a trade-off – as a consequence of Respondent's own proposals – and that does matter.

41. Respondent also claims that Claimant lengthened the timetable of the Procedural Calendar and Respondent merely acquiesced in that regard.[72] Not only does that mischaracterize the context of Claimant's proposal for the timing of its Memorial submission,[73] it is in any event meaningless to the present discussion, which is whether a

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[72] Reply, para. 49.

[73] The Tribunal directed the Memorial as the first substantive step after the first procedural conference: First Session with the Tribunal, dated 30 November 2023, Tribunal ruling at 03:27:45-03:31:S0. After that, Respondent sent to Claimant a draft proposed timetable on 1 December 2023. This was essentially Respondent's pre-conference proposal for a bifurcated timetable altered only to move submission of Claimant's Memorial to the beginning, with the timing of that event taken from Claimant's pre-conference proposal to be 90 days from the previous event in the timetable, now to be from finalization of procedural order no. 1. *See* Email from David Bigge to Ian Laird and Ashley Riveira, dated 1 December 2003 (attaching Proposed Timetable) (C-296). Indeed, on 6 December 2023, Claimant provided a mark-up in which Claimant proposed a period of 120 days from procedural order no. 1 to complete its Memorial instead of 90 days. This was not Claimant unilaterally proposing lengthening a time period. This was a middle ground shift from the overall timeframe Claimant proposed in its pre-conference timetable for submission of its Memorial after a document production phase. Claimant's timetable proposal for the first procedural conference provided approximately 9S days from procedural order no. 1 until the conclusion of that production phase, and then 90 further days for completion of its Memorial thereafter. *See* Email from David Bigge to the Tribunal, dated 20 October 2023 (attaching Procedural Order No. 1 draft and Annex B draft) at 27 (C-294). Given the Tribunal's direction at the procedural conference, in the absence of that production phase, during which Claimant could of course have productively progressed various preparations for its Memorial simultaneously, Claimant proposed a 120 day period to complete its Memorial, still 2 months less than its original proposal, in response to Respondent's initial proposal that the elimination of the 9S day document production phase should mean moving straight to Claimant's original 90 days for Memorial preparation proposal, which would have halved the time from the first procedural conference to the conclusion of Claimant's Memorial. *See* Email from Ian Laird to David Bigge, dated 6 December 2023 (R-10).

split procedure going forward will be more efficient, and save time and costs. It remains, unacknowledged in the Reply, the fact that:

a. before the first procedural conference it was *Respondent* that proposed a split timetable in which hearing preliminary objections would take approximately a year leading into a hearing, followed by a merits phase of approximately a year and a half before a further hearing (at least two and a half years in total and possibly rather more), compared with a proposal from Claimant for a joined proceeding of less than two years leading into a combined hearing;[74] and

b. subsequent to the Tribunal's direction at the first procedural meeting for Claimant's Memorial to be presented before consideration of bifurcation, and guided by Respondent,[75] the parties followed closely the model of the timeframes for Respondent's original split/ bifurcated proposal (as they presented before the procedural conference). The only major difference was the shifting of the timing of the Memorial, and then creating the schedule with two overall options we now see in Annex B of Procedural Order No. 1. The second, non-bifurcated option, was scheduled to take approximately as long as reaching a hearing to determine solely the preliminary objections if bifurcation were approved – with both hearings possibly occurring in and around late summer/ early autumn 2025 – by essentially following the same schedule and timelines for it as Respondent proposed before

[74] Email from David Bigge to the Tribunal, dated 20 October 2023 (attaching Procedural Order No. 1 draft and Annex B draft) at 27-32 (C-294).

[75] Email from David Bigge to Ian Laird and Ashley Riveira, dated 1 December 2003 (attaching Proposed Timetable) (C-296).

the procedural conference for merits briefing other than the placement of the Memorial.[76]

42. Thus, when Respondent states *"should the Tribunal dismiss the case due to lack of jurisdiction, considerable effort and time will be saved under the agreed schedule"*[77] it is simply wrong. Under the Procedural Calendar in this Proceeding, little if any reduction in time would be achieved in the bifurcated schedule even if the Tribunal concluded either preliminary objection could dispose of the whole Proceeding. Respondent also remarks that bifurcation could enable *"the dismissal of this arbitratian before the Parties are burdened with briefing the merits in full."*[78] Given the additional briefing, travel and hearing time for counsel and the Tribunal for the bifurcated schedule, and the fact that Claimant's Memorial has already been submitted (*i.e.* the Parties have indeed already begun briefing of the merits), any savings of effort (and cost) is unlikely to be *"considerable. . . ."*

43. Claimant reiterates the apt comparison of the *Windstream Energy* proceedings[79] where the choice was between reaching a full hearing in less than 17 months, or a bifurcated

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76 *See* Procedural Order No. 1, Annex B and discussion of same in the Observations, para. 59.

77 Reply, para. 50.

78 *Id.*, para. 2.

79 Respondent also complains that the *Windstream Energy* tribunal was operating under the 2013 UNCITRAL Rules and so comparing its analysis is inapt: *see* Reply, n.8. Of course, in coming to its decision, that tribunal applied essentially the same framework Respondent at least purports to propose this Tribunal should use. *Compare "Relevant factors identified in prior decisions . . . include that the preliminary objections jointly or separately are: (a) prima facie serious and substantial; (b) able to be examined without prejudging or entering the merits; and (c) if upheld, would be dispositive of all or an essential portion of the claimant's claims"* (*Windstream Energy LLC v. Government of Canada (II)*, Procedural Order No. 2 dated 13 September 2022, para. 39 (CLA-57)) with *"the Tribunal should consider (1) whether the objection is prima facie substantial or frivolous; (2) whether jurisdiction and the merits are so intertwined as to make bifurcation impractical, and (3) whether the objection, if successful, would moterially reduce time and costs"* (Reply, para. 12). Either Respondent actually does not want that kind of analysis undertaken, or is being frivolously combative to claim *Windstream Energy* cannot provide a useful comparator.

proceeding reaching a hearing on preliminary objections in 12 months, with the remainder of the proceedings likely being another year after that if the objections were not dispositive.[80] The tribunal considered it appropriate to hear the full proceedings without bifurcation, since it would take only four months longer to reach a complete outcome than to reach the tribunal's deliberations on the preliminary objections alone, and bifurcation could delay determining the whole proceedings by at least a year.[81] Here, the choice is even starker. Claimant submits knowingly doubling by a year the length of time to complete the Proceeding if preliminary objections are not dispositive in bifurcated proceedings, compared with taking the same time to reach a hearing and for the Tribunal to be able to deliberate and conclude such an objection is dispositive whether bifurcating or not, is *per se* not fair or efficient.

44. In that context, the *TC Energy* proceeding award cannot meaningfully add to whether the Request makes efficient proposals in this Proceeding.[82] The scheduling choice here is what Respondent has proposed from the outset, not because it seeks efficiency but because it simply wishes to generate delay. It is even less fair and efficient when the objections are disingenuously and atextually framed. Moreover, if the Tribunal has any sympathy at all for Respondent's position, its deliberations could easily 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.

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80 *Windstream Energy LLC v. Government of Canada (II)*, Procedural Order No. 2 dated 13 September 2022, para. 58 (CLA-57).

81 *Id.*, para. 59.

82 *C.f.* Letter from Respondent to the Tribunal dated 19 July 2024.

VI. CONCLUSION

45. 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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