

**UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE
ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES,
ANNEX 14-C OF THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED
MEXICAN STATES, AND CANADA
AND
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT 1994**

**TC Energy Corporation,
TransCanada PipeLines Limited**

Claimants,

v.

The United States of America

Respondent.

ICSID Case No. ARB/21/63

**CLAIMANTS' OBSERVATIONS ON RESPONDENT'S REQUEST FOR BIFURCATION
OF PRELIMINARY OBJECTION**

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I. Introduction

1. On November 22, 2021, Claimants TC Energy Corporation and TransCanada Pipelines Limited (collectively, and together with their U.S. subsidiaries, “TC Energy”) submitted their Request for Arbitration (“RFA”) pursuant to Annex 14-C of the Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”) and Chapter 11 of the North American Free Trade Agreement (“NAFTA 1994”).¹ On January 11, 2023—over one year after Claimants submitted their RFA—Respondent submitted its Request for Bifurcation (“Bifurcation Request”), in which it asserted that Claimants’ claims are outside the Tribunal’s jurisdiction and requested that the Tribunal hear the objection in the preliminary phase of a bifurcated proceeding.² For the reasons explained below, Respondent’s objection is not substantial and serious. For that reason, and to ensure fairness and efficiency in the proceeding, the Tribunal should reject Respondent’s request.

2. Annex 14-C of USMCA (“Annex 14-C”) provides that, for a period of three years (“transition period”) after the date on which USMCA replaced NAFTA 1994, claimants holding “legacy investments” may bring claims alleging a breach of Section A of Chapter 11 of NAFTA 1994 using the procedures set forth in Section B of Chapter 11 of NAFTA 1994.³ Claimants’ claims are within the scope of Annex 14-C and are properly before the Tribunal. First, Claimants own legacy investments in connection with the Keystone XL Pipeline (the “KXL Pipeline” or the “KXL Project”).⁴ Second, Claimants alleged in their RFA that U.S. President Joseph Biden’s revocation of the Presidential permit (“2019 Permit”) to construct, connect, operate, and maintain the cross-border segment of the KXL Pipeline breached U.S. obligations under Section A of Chapter 11 of NAFTA 1994.⁵ Third, in filing their RFA, Claimants followed the procedures set forth in Section B of Chapter 11 of NAFTA 1994.⁶ Finally, Claimants filed

¹ See Claimants’ Request for Arbitration, Nov. 22, 2021 (“Claimants’ Request for Arbitration”).

² See Request for Bifurcation of Respondent United States of America, Jan. 11, 2023 (“Respondent’s Bifurcation Request”).

³ See Exhibit C-2, Agreement between the United States of America, the United Mexican States, and Canada, signed Nov. 18, 2018, entered into force July 1, 2020 (“USMCA”) at Annex 14-C, paras. 1, 3.

⁴ See Claimants’ Request for Arbitration at paras. 75-76.

⁵ See Claimants’ Request for Arbitration at paras. 89-98.

⁶ See Claimants’ Request for Arbitration at paras. 72-82.

their RFA well before the expiration of the transition period. Under the procedures set forth in the *Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada* (“USMCA Protocol”), USMCA replaced NAFTA 1994 on July 1, 2020,⁷ such that the transition period under Annex 14-C extends until July 1, 2023. As noted, Claimants filed their RFA well before that date, on November 22, 2021.

3. In its Bifurcation Request, Respondent asserts that Claimants’ claims are outside the scope of the Tribunal’s jurisdiction because NAFTA 1994 had terminated at the time President Biden revoked the 2019 Permit.⁸ Respondent’s simplistic objection misinterprets and, in critical aspects, wholly ignores, the relevant text and context of Annex 14-C, and the object and purpose of USMCA. For example, Footnote 21 of Annex 14-C provides that, if an investor is eligible to assert a claim under Annex 14-E of USMCA (which applies to certain kinds of infrastructure investors⁹) (“Annex 14-E”) in connection with measures that post-date the entry into force of USMCA, then the investor cannot bring a claim under Annex 14-C.¹⁰ Footnote 21 makes sense only if both Annex 14-C and Annex 14-E apply to measures that post-date the entry into force of USMCA. Respondent’s interpretation of Annex 14-C would render Footnote 21 *inutile*, contrary to the rules of treaty interpretation. Thus, it is not surprising that Respondent never even mentions Footnote 21 in its Bifurcation Request. As detailed below, an interpretation of Annex 14-C that is faithful to the rules of treaty interpretation as set forth in the Vienna Convention on the Law of Treaties (“VCLT”) clearly shows that, with respect to legacy investments, Annex 14-C extends the obligations of Section A of Chapter 11 of NAFTA 1994 for the duration of the transition period.

4. If the interpretation of Annex 14-C that Respondent now asserts truly reflected the intention of the USMCA Parties, Respondent could have—and surely would have—raised its objection at an earlier stage of the proceeding. Respondent had ample opportunity to do so. This

⁷ Exhibit R-1, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (“USMCA Protocol”).

⁸ Respondent’s Bifurcation Request at paras. 21-24.

⁹ See Exhibit C-2, USMCA at Annex 14-E, paras. 2, 6.

¹⁰ See Exhibit C-2, USMCA at Annex 14-C, n.21.

dispute began over one and a half years ago, when, on July 2, 2021, Claimants submitted their Notice of Intent to Submit a Claim to Arbitration (“Notice of Intent”).¹¹ On September 17, 2021, Claimants and Respondent held a video conference for purposes of settlement negotiations, followed by Claimants providing written responses to Respondent’s questions and a further settlement conference in February 2022. On November 22, 2021, Claimants filed their RFA with the International Centre for Settlement of Investment Disputes (“ICSID”). On December 7, 2021, Respondent objected to the registration of Claimants’ claims on grounds unrelated to its present objection (and subsequently withdrew that unrelated objection). Respondent did not even mention the objection it now raises at any point prior to the discussion leading to the procedural conference in December 2022.¹²

5. If Respondent genuinely believes that the scope of Annex 14-C is limited in the manner it currently asserts, then one would have expected Respondent to have mentioned such an important position at the earliest possible opportunity (and provided evidence of its veracity) in hopes of triggering a withdrawal of Claimants’ claims or to have used the position as leverage in settlement discussions. If successful, that approach would have saved the U.S. Government, Claimants, and ICSID time and resources, and would have provided a clear and simple response to the claims Claimants have asserted.

6. Further, Claimants have not identified a single statement from any of the USMCA Parties in connection with the conclusion of USMCA, and outside the context of an arbitration proceeding, that explains the scope and purpose of Annex 14-C in the manner Respondent now asserts. If the U.S. Government actually believes that U.S. citizens and corporations cannot bring legacy investment claims arising from measures taken during the transition period, then Respondent surely would have taken the earliest opportunity in a high-profile, highly-publicized dispute like this one to publicly clarify this position to its own constituents. Yet, the U.S. position did not become publicly known until the Bifurcation Request was posted on the ICSID docket in mid-January 2023.

¹¹ Exhibit C-3, TC Energy Corporation and TransCanada PipeLines Limited, Notice of Intent to Submit a Claim to Arbitration, July 2, 2021.

¹² Respondent first explained its jurisdictional objection to Claimants on November 30, 2022, one day prior to the first procedural conference before the Tribunal.

7. The fact that Respondent waited so long to raise its objection shows that the objection is not seriously held, but rather invented as a litigation tactic. It appears that Respondent's only interest is in further delaying the proceedings, likely to ensure that any award is issued long after the 2024 U.S. Presidential election. That strategy fully accords with Respondent's politicized treatment of the KXL Project for over fifteen years.

8. The Tribunal will recall that the saga surrounding the KXL Project began in 2008, when TC Energy submitted its first application for a Presidential permit for the KXL Pipeline.¹³ During the ensuing fifteen years (excluding the approximately four-year interlude when the Presidential permit was granted and in force), the U.S. Government subjected Claimants and their investments to abusive, politicized treatment that has cost Claimants billions of dollars. Respondent's Bifurcation Request, coming over a year after Claimants submitted their RFA, is merely another manifestation of that treatment. It would be unfair and prejudicial to Claimants to delay the proceeding any further. Claimants are entitled to their day in court, and the Tribunal should reject Respondent's baseless Bifurcation Request.¹⁴

9. Section II discusses the criteria for assessing Respondent's Bifurcation Request. Section III shows that Respondent's preliminary objection is not serious and substantial, in that it has no basis under the ordinary meaning of the text of Annex 14-C, as properly interpreted in its context and in light of the object and purpose of USMCA. Section IV shows that bifurcating Respondent's preliminary objection would be unfair and prejudicial to Claimants, and that Respondent's objection is intertwined with the merits of Claimants' claims in a manner that would eliminate or substantially reduce any procedural efficiency that might be gained from bifurcation. Section V concludes Claimants' Observations and requests an award of costs to cover the legal fees and other expenses that Claimants incurred to address Respondent's baseless request.

¹³ See Claimants' Request for Arbitration at para 1.

¹⁴ Under the Procedural Calendar adopted under Procedural Order No. 1, if the proceeding is bifurcated, a hearing on the merits likely will not commence until 2025, approximately four years from Claimants' Notice of Intent.

II. Criteria for Evaluating a Bifurcation Request

10. Arbitration tribunals have discretion to apply whatever criteria they deem relevant to determine whether to bifurcate a preliminary objection. Neither the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) nor the 2006 ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”) establishes criteria for determining whether to bifurcate a preliminary objection, nor do they create any presumption in favor of bifurcation.¹⁵ Article 41(2) of the ICSID Convention leaves the matter to the discretion of the Tribunal, providing only that

[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.¹⁶

As one recent tribunal noted, “it is not for the Claimants to prove compelling reasons to rebut a presumption of bifurcation.”¹⁷ Respondent carries the burden in the first instance to explain why bifurcation is appropriate.

¹⁵ Exhibit RL-5, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Procedural Order No. 2 (Decision on Bifurcation), Feb. 25, 2022 (“*RWE v. Netherlands*, Decision on Bifurcation”), at para. 44 (“Neither the ICSID Convention nor the Arbitration Rules set forth specific criteria to be considered in deciding whether to bifurcate objections, leaving the decision entirely to the discretion of a tribunal.”); Exhibit CL-13, *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, Aug. 3, 2020, at para. 40 (“According to ICSID Arbitration Rule 41, the Tribunal has discretion to bifurcate or not depending on the circumstances of each case. The Tribunal *may* bifurcate a proceeding to decide a preliminary objection. 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.”).

¹⁶ Exhibit CL-14, Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature Mar. 18, 1965, entered into force Oct. 14, 1966 (“ICSID Convention”), at Art. 41(2).

¹⁷ Exhibit CL-15, *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3 (Decision on Bifurcation), June 7, 2022 (“*Mainstream Renewable Power v. Germany*, Decision on Bifurcation”), at paras. 38-40 (“The ICSID Convention Article 41(2) relates exclusively to ‘[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal’, i.e., a jurisdictional objection. Article 41(2) does not create a presumption that a tribunal must deal with such objection by way of ‘preliminary issue’. Instead, and as both sides appear to accept, Article 41(2) leaves it to tribunal discretion to determine ‘whether to deal with [the objection] as a preliminary question or to join it to the merits of the dispute’.... As further noted by Schreuer, the proposal in the Working Paper and Preliminary Draft to the ICSID Convention that tribunals were mandated to decide jurisdictional objections as preliminary questions was expressly rejected in the final draft. The key factor is procedural economy in the particular case and that remains a matter for the Tribunal to determine solely in its discretion without any

11. Arbitration tribunals have suggested different criteria that might be relevant when deciding whether to bifurcate a preliminary objection. The oft-cited *Glamis Gold v. United States* tribunal summarized its approach to the question as follows:

Considerations relevant to this analysis [of whether to hear an objection in a bifurcated proceeding] include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings [*sic*], even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.¹⁸

12. Tribunals have found that “[a]ll three elements of the [*Glamis Gold*] test must be cumulatively satisfied to decide a preliminary objection to jurisdiction in a separate phase.”¹⁹

presumption in favour of a preliminary decision. Therefore, it is not for the Claimants to prove compelling reasons to rebut a presumption of bifurcation.”) (internal citations omitted).

¹⁸ Exhibit CL-16, *Glamis Gold, Ltd., v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), May 31, 2005, at para. 12(c) (internal citations omitted). See also Exhibit CL-17, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Procedural Order No. 4, Feb. 27, 2020, at para. 87; Exhibit CL-18, *Orazul International España Holdings S.L. v. The Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Respondent’s Request for Bifurcation, Jan. 7, 2021 (“*Orazul v. Argentina*, Decision on Bifurcation”), at para. 31; Exhibit CL-19, *Patel Engineering Limited v. Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3 (Decision on the Motion for Bifurcation), Dec. 14, 2020, at para. 61; Exhibit CL-20, *LSG Building Solutions GmbH and others v. Romania*, ICSID Case No. ARB/18/19, Procedural Order No. 3 (Decision on Bifurcation), Oct. 9, 2019, at para. 36; Exhibit CL-21, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 (Decision on Bifurcation), June 28, 2018 (“*Eco Oro Minerals v. Colombia*, Decision on Bifurcation”), at para. 49; Exhibit CL-22, *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), Jan. 31, 2018 (“*Glencore v. Bolivia*, Decision on Bifurcation”), at para. 39; Exhibit CL-23, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Procedural Order No. 2, Apr. 21, 2017, at para. 18; Exhibit CL-24, *Josias Van Zyl, Josias Van Zyl Family Trust and Burmilla Trust v. Kingdom of Lesotho*, PCA Case No. 2016-21, Procedural Order No. 1: Suspension, Bifurcation and Procedural Timetable, Nov. 3, 2016, at paras. 45-47.

¹⁹ Exhibit RL-24, *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 (Decision on Bifurcation), Aug. 13, 2020, at paras. 43-44 (“[T]he three factors identified [by the *Glamis Gold* tribunal] are not ‘stand-alone’ criteria. All three elements of the test must be cumulatively satisfied to decide a preliminary objection to jurisdiction in a separate phase. The Tribunal also considers that such criteria serve as mere guidance and should not be interpreted as restricting the Tribunal’s discretion to weigh each of the requirements when arriving at its decision. In order to decide whether the bifurcation of jurisdictional objections will lead to greater efficiency in the proceeding, the Tribunal must examine the legal and factual circumstances of each

Furthermore, even if the *Glamis Gold* criteria weigh in favor of bifurcation, arbitration tribunals retain the discretion to reject a request for bifurcation.²⁰ As the tribunal in *Cairn Energy v. India* held, the *Glamis Gold* test is not:

a stand-alone test. In particular, [the tribunal] does not agree that, if factors (a) and (b) are answered in the affirmative and factor (c) in the negative, a tribunal should necessarily bifurcate a jurisdictional objection.

As the tribunal in *Accession Mezzanine* stated and the Parties have expressly recognized, “an overarching question [is] whether fairness and procedural efficiency would be preserved or improved.” These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal’s discretion.... It is also worth noting that the *Glamis Gold* tribunal only enumerated the factors ... as non-exhaustive elements to be considered in the quest for procedural efficiency....

The Tribunal thus concludes that the question it must ask itself when considering whether to hear a jurisdictional objection as a preliminary question or to join it to the merits is the following: in the circumstances of the particular case, would bifurcation promote fairness and procedural efficiency? In answering that question, the

particular case.”); Exhibit CL-18, *Orazul v. Argentina*, Decision on Bifurcation at para. 31 (“[T]he case law...demonstrates that tribunals generally consider the following three cumulative factors when deciding whether to grant a request for bifurcation: a. Whether the preliminary objection is *prima facie* serious and substantial (in other words: does the objection have a reasonable chance of success and is not otherwise frivolous, vexatious or clearly without merit) b. Whether the jurisdictional objection is too intertwined with the merits, insofar as the Tribunal would have to already ‘*delve into the substance of the alleged breaches*’ or that a duplication of evidence would result, meaning any savings in time or cost from a bifurcation would be unlikely; and c. Whether the objection, if granted, will ultimately result in a material reduction of the merits phase of the proceedings, or even dispose of all or substantially all of the claims.”) (internal citations omitted).

²⁰ Exhibit CL-25, *Rand Investments Ltd. and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, June 24, 2019, at para. 16 (“[A]rbitral tribunals may well refuse to bifurcate jurisdictional objections even if all three factors are satisfied.”). See also Exhibit CL-26, *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4 (Decision on Request for Preliminary Phase on Jurisdiction), Dec. 31, 2020, at para. 45 (concluding that the criteria that the *Glamis Gold* tribunal identified “do not constitute a rigid test and are not the only criteria that may be considered by the Tribunal”); Exhibit CL-27, *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, Jan. 21, 2015, at para. 66 (“What is clear is that each case must turn on its own facts. And, this being so, the Tribunal does not consider that it should be placed in the ‘straightjacket’ of considering this question by reference to the *Glamis Gold* factors, and nothing further. To do so would be to overlook what can be discerned from relevant cases, namely 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. To identify, and discuss in turn, only certain identified factors may distract from the task at hand.”).

Tribunal may consider the factors identified by the *Glamis Gold* tribunal, among others.²¹

Other tribunals have similarly noted that fairness is a factor to be taken into account when deciding whether to bifurcate a proceeding,²² and have considered, for example, whether bifurcation would prejudice the claimant's rights.²³

III. Respondent's Preliminary Objection Is Not Serious and Substantial

13. In its Bifurcation Request, Respondent agrees that, in order to warrant bifurcation, its preliminary objection must be substantial.²⁴ That is a "a higher threshold ... than merely requiring that the objection is not frivolous or vexatious."²⁵ Furthermore, even if a preliminary objection were non-frivolous, that would not be dispositive.²⁶ For example, even if an objection were non-frivolous, lack of clear textual support for the objection would weigh heavily against bifurcation of the objection.²⁷

²¹ Exhibit CL-28, *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-07, Procedural Order No. 4 (Decision on the Respondent's Application for Bifurcation), Apr. 19, 2017, at paras. 77-81 (internal citations omitted).

²² Exhibit CL-15, *Mainstream Renewable Power v. Germany*, Decision on Bifurcation at paras. 44-45 (taking into account "general principles of fairness to both sides"). See also Exhibit RL-5, *RWE v. Netherlands*, Decision on Bifurcation at para. 44 ("[A]s noted by both sides, the analysis should be driven by the overarching considerations of procedural fairness and efficiency. The Tribunal fully agrees with this framework.").

²³ See Exhibit CL-29, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 3 (Decision on Bifurcation and Related Requests), July 8, 2016, at para. 20 ("Here, the Parties agree that four factors are to be examined by the Tribunal in deciding whether to bifurcate: a. Whether the jurisdictional objections have substance; b. Whether, the objections, if accepted, would result either in a dismissal of the entire case or at least a material reduction in the 'scope and complexity' of the proceeding; c. Whether the objections raise questions of merits which would need to be examined; and, d. Whether the bifurcation would prejudice the Claimants.").

²⁴ See Respondent's Bifurcation Request at para. 9.

²⁵ Exhibit CL-21, *Eco Oro Minerals v. Colombia*, Decision on Bifurcation at para. 51.

²⁶ Exhibit CL-30, *Aris Mining Corporation (formerly known as Gran Colombia Gold Corp.) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation), Jan. 17, 2020, at para. 27 ("[I]t is self-evident that a frivolous objection would not warrant bifurcation and the attendant delay in proceeding to determination of the merits. But this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation.").

²⁷ See Exhibit CL-22, *Glencore v. Bolivia*, Decision on Bifurcation at para. 42 ("[T]he Tribunal finds, on the basis of the material before it at this stage, no clear textual support in the applicable BIT for the proposition that this agreement requires material or active presence for a company to qualify as investor. Thus, although the Tribunal recognizes that the objection is not frivolous, and the contextual arguments posed by the Respondent in this regard are capable of being argued and worth exploring in depth, it is not convinced that this objection is sufficiently

14. Respondent's objection is not serious and substantial, in that it is based on a fundamentally flawed interpretation of USMCA. Section III.A summarizes the applicable rules of treaty interpretation. Section III.B shows that Respondent's interpretation of USMCA is at odds with the ordinary meaning of Annex 14-C, ignores the relevant context of that annex, and is contrary to the object and purpose of USMCA. Section III.C demonstrates that Respondent's assertion that the transition period was intended to align with the limitations period in Articles 1116(2) and 1117(2) of NAFTA 1994 is false and confirms the fabricated, *post hoc* nature of Respondent's objection.

A. Applicable Rules of Treaty Interpretation

15. The applicable rules for interpreting jurisdictional and consent provisions in a treaty are no different than the applicable rules for interpreting other treaty provisions. As the NAFTA arbitration tribunal in *Mondev International Ltd. v. United States* stated:

[T]here is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary law.²⁸

16. Article 31 of the VCLT provides as follows:²⁹

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

serious and substantial as to justify bifurcation. In light of this view, the Tribunal will not address the other two criteria.”).

²⁸ Exhibit CL-31, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, Oct. 11, 2002, at para. 43 (internal citations omitted). Resort to the rules of interpretation set forth in the VCLT is not controversial. In its Bifurcation Request, Respondent stated that, “[a]lthough the United States is not a party to the Vienna Convention, it has recognized since at least 1971 that the Convention is an ‘authoritative guide’ to treaty law and practice.” See Respondent's Bifurcation Request at n.12.

²⁹ Articles 32-33 of the VCLT are not immediately relevant to Respondent's preliminary objection.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty....³⁰

17. The overarching objective when interpreting treaties is to ensure that they are interpreted in good faith to reflect the intention of the parties. As the Commentary to the VCLT (the “VCLT Commentary”) states:

[T]he interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning.... [A] number of articles adopted by the [International Law] Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties.³¹

18. As the *Amco v. Indonesia* tribunal explained:

[L]ike any other conventions, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.

Moreover—and this is again a general principle of law—any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences

³⁰ Exhibit RL-16, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155 (“VCLT”), at Art. 31.

³¹ Exhibit CL-32, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II (“VCLT Commentary”), at p. 219.

of their commitments the parties may be considered as having reasonably and legitimately envisaged.³²

19. Respondent's interpretation of Annex 14-C is not based on a good faith interpretation of the treaty. Instead, it is a *post hoc* rationalization that is not consistent with the ordinary meaning of paragraph 1(a) of Annex 14-C, in light of its context and the object and purpose of the treaty, and is at odds with the USMCA Parties' contemporaneous explanations of the purpose of Annex 14-C.

B. An Interpretation of Annex 14-C Consistent with the VCLT Shows That a Claimant Holding a Legacy Investment May Bring a Claim in Relation to Measures Taken during the Transition Period

20. Section III.B.1 shows that the ordinary meaning of Annex 14-C is that claimants holding legacy investments may bring claims in relation to measures taken during the transition period. Section III.B.2 shows that the context of Annex 14-C confirms that, with respect to legacy investments, the obligations of Section A of Chapter 11 of NAFTA 1994 extend for the full duration of the transition period. Section III.C shows that Respondent's interpretation of Annex 14-C is inconsistent with the object and purpose of USMCA.

1. The Ordinary Meaning of Annex 14-C Is That a Claimant Holding a Legacy Investment May Bring Claims in Relation to Measures Taken During the Transition Period

21. Claimants have asserted claims in accordance with Annex 14-C, paragraph 1 of USMCA, which states as follows:

1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with

³² Exhibit CL-33, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Sept. 25, 1983, at para. 14. The tribunal in *Churchill Mining v. Indonesia* elaborated on the interpretive approach as follows: "According to Article 31 VCLT, a treaty must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. No special rule applies to the interpretation of a dispute settlement provision. Hence, such treaty provisions must be construed like any other, neither restrictively nor broadly.... The Parties concur, and rightly so, that the starting point for treaty interpretation is the text. The ordinary meaning of the text must be ascertained in the light of the context and the treaty's object and purpose, any subsequent agreement or practice of the Contracting States related to the interpretation of the treaty, and any other relevant rules of international law binding the Contracting States." Exhibit CL-34, *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, Feb. 24, 2014, at paras. 151-52 (internal citations omitted).

Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

- (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
- (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
- (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994. [FN20] [FN21]

[FN20] For greater certainty, the relevant provisions in Chapter 2 (General Definitions), Chapter 11 (Section A) (Investment), Chapter 14 (Financial Services), Chapter 15 (Competition Policy, Monopolies and State Enterprises), Chapter 17 (Intellectual Property), Chapter 21 (Exceptions), and Annexes I-VII (Reservations and Exceptions to Investment, Cross-Border Trade in Services and Financial Services Chapters) of NAFTA 1994 apply with respect to such a claim.

[FN21] Mexico and the United States do not consent under paragraph 1 with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

Annex 14-C, paragraph 3 then states that “[a] Party’s consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.”

22. Respondent argues that “[t]he Parties give their consent to arbitrate legacy claims in Paragraph 1” of Annex 14-C.³³ However, as can be seen from the above quoted passage, Annex 14-C does not refer to “legacy claims.” It refers to “legacy investments.”³⁴ The title of Annex 14-C refers to “legacy investment claims,” *i.e.*, claims related to legacy investments. Annex 14-C thus permits claims—and the Parties’ consent applies—with respect to “legacy investments,”

³³ Respondent’s Bifurcation Request at para. 18 (emphasis added).

³⁴ Paragraph 6 of Annex 14-C defines “legacy investment” as “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement.” Exhibit C-2, USMCA at Annex 14-C, para. 6. No such temporal limit is imposed on the measures underlying the claim itself.

i.e., investments that were established or acquired while NAFTA 1994 was in force and that were in existence when USMCA entered into force. It is not limited to claims that were in existence or that could have been brought only while NAFTA 1994 was in force.

23. Annex 14-C, paragraphs 1 and 3, state only four conditions for bringing a claim, all of which are met in this case:

- First, the claim must be “with respect to a legacy investment.”³⁵ As explained in the RFA, Claimants own and control legacy investments in connection with the KXL Project.³⁶
- Second, the claim must allege a breach of an obligation under Section A of Chapter 11 of NAFTA 1994.³⁷ As set forth on pages 46-50 of the RFA, Claimants have alleged that Respondent breached Articles 1102, 1103, 1105 and 1110 in Section A of Chapter 11 of NAFTA 1994. Whether Respondent in fact breached its obligations under Section A of Chapter 11 of NAFTA 1994 is a question on the merits, not a question related to jurisdiction.
- Third, the claim must be submitted “in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994.”³⁸ Claimants submitted their claims in accordance with those procedures, as explained on pages 40-44 of Claimants’ RFA.
- Fourth, the claim must be brought during the transition period.³⁹ USMCA entered into force, and replaced NAFTA 1994, on July 1, 2020.⁴⁰ Claimants submitted their claims to arbitration on November 22, 2021, prior to the expiration of the transition period.

Respondent has not challenged any of these points.

³⁵ Exhibit C-2, USMCA at Annex 14-C, para. 1.

³⁶ Claimants’ Request for Arbitration at para. 76.

³⁷ Exhibit C-2, USMCA at Annex 14-C, para. 1.

³⁸ Exhibit C-2, USMCA at Annex 14-C, para. 1.

³⁹ See Exhibit C-2, USMCA at Annex 14-C, para. 3.

⁴⁰ Exhibit C-84, Office of the United States Trade Representative, “United States-Mexico-Canada Agreement,” available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last accessed Jan. 27, 2023); Exhibit C-85, Office of the United States Trade Representative, “USMCA To Enter Into Force July 1 After United States Takes Final Procedural Steps For Implementation,” Apr. 24, 2020, available at <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>.

24. There is nothing in the text of Annex 14-C that provides that investors holding legacy investments may submit claims only with respect to measures taken prior to the time when USMCA replaced NAFTA 1994. If the USMCA Parties had intended to preclude claims with respect to measures occurring during the transition period, they would have made that intent clear, given the import of such a restriction. The USMCA Parties knew how to impose a temporal limitation on measures that could be challenged if they had wanted to do so, as they did with respect to legacy investments. This fact is borne out by comparing Annex 14-C with other provisions in USMCA (which serve as relevant context under Article 31 of the VCLT) and with other trade agreements that the USMCA Parties have entered into. For example:

- Article 34.1 of USMCA provides that Chapter 19 of NAFTA 1994 (which created a binational panel dispute settlement mechanism to hear appeals of antidumping and countervailing duty orders) “shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement.”⁴¹ The USMCA Parties thus explicitly limited the application of Chapter 19 of NAFTA 1994 to certain measures that predated the entry into force of USMCA.
- The Canada-Peru Free Trade Agreement suspended the application of the pre-existing Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (the “Canada-Peru FIPA”), but explicitly preserved investors’ ability (for fifteen years after the Canada-Peru Free Trade Agreement’s entry into force) to bring claims only with respect to “any breach of the obligations of the [Canada-Peru FIPA] that occurred before the entry into force of this Agreement.”⁴²
- Article 9.38(2) of the Canada-Panama Free Trade Agreement states that “[n]otwithstanding [the suspension of the Treaty between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments (“Canada-Panama FIPA”)], the [Canada-Panama FIPA] remains operative for a period of 15 years after the entry into force of this Agreement for the purpose of any breach of the obligations of the [Canada-Panama FIPA] that occurred before the entry into force of this Agreement. During this period the right of an investor of a Party to submit a claim to arbitration concerning

⁴¹ Exhibit C-2, USMCA at Art. 34.1.

⁴² Exhibit CL-35, Free Trade Agreement Between Canada and the Republic of Peru, signed May 29, 2008, entered into force Aug. 1, 2009, at Art. 845(2) (emphasis added).

such a breach shall be governed by the relevant provisions of the [Canada-Panama FIPA].”⁴³

- Article 30.8(3) of the Comprehensive Economic and Trade Agreement (“CETA”) between Canada and the European Union states that “a claim may be submitted under an agreement listed in Annex 30-A [a list of bilateral investment treaties that will be suspended when CETA enters into force] in accordance with the rules and procedures established in the agreement if: (a) the treatment that is the object of the claim was accorded when the agreement was not suspended or terminated; and (b) no more than three years have elapsed since the date of suspension or termination of the agreement.”⁴⁴ CETA was signed in October 30, 2016, approximately two years before USMCA was signed (on November 30, 2018).⁴⁵
- In their side letter in connection with the signing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”), Australia and Mexico terminated their bilateral investment treaty (the Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (“IPPA”)), but provided that the IPPA would “continue to apply for a period of three years from the date of termination to any investment ... which was made before the entry into force of the [CPTPP] for both Australia and the United Mexican States with respect to any act or fact that took place or any situation that existed before the date of termination A claim under Article 13 (Arbitration: Scope and Standing and Time Periods) of the IPPA may only be made within three years from the date of termination and only with respect to any act or fact that took place or any situation that existed before the date of termination.”⁴⁶ Australia and Mexico signed this letter on March 8, 2018, several months before USMCA was signed.

Annex 14-C is conspicuously lacking any similar language providing that claims may be brought only in connection with measures that were taken before USMCA replaced NAFTA 1994. Yet, the United States now attempts to read USMCA as though such language exists.

⁴³ Exhibit CL-36, Free Trade Agreement Between Canada and the Republic of Panama, signed May 14, 2010, entered into force Apr. 1, 2013, at Art. 9.38(2) (emphasis added).

⁴⁴ Exhibit CL-37, Comprehensive Economic and Trade Agreement between Canada and the European Union, signed Oct. 30, 2016, provisionally entered into force Sept. 21, 2017 (“CETA”) at Art. 30.8(3) (emphasis added).

⁴⁵ See Exhibit C-86, Government of Canada, “View the Timeline,” available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/view_timeline-consultez_chronologie.aspx?lang=eng (last accessed Jan. 28, 2023); Exhibit R-1, USMCA Protocol.

⁴⁶ See Exhibit CL-38, Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mar. 8, 2018 (emphasis added).

2. The Context of Annex 14-C Shows that the USMCA Parties Extended the Obligations under Section A of Chapter 11 of NAFTA 1994 for the Duration of the Transition Period

25. There is nothing extraordinary or unprecedented about extending the obligations of a treaty for a period of time after the treaty terminates. Article 70 of the VCLT recognizes this possibility,⁴⁷ and, as the VCLT Commentary explains, “when a treaty is about to terminate or a party proposes to withdraw, the parties may consult together and agree upon conditions to regulate the termination or withdrawal. Clearly, any such conditions provided for in the treaty or agreed upon by the parties must prevail”⁴⁸

26. Respondent recognizes that the USMCA Parties could have extended the obligations under Section A of Chapter 11 of NAFTA 1994 beyond the date when USMCA replaced NAFTA 1994, but wrongly asserts that they have not done so.⁴⁹ As explained in the sections that follow, when interpreting paragraph 1(a) of Annex 14-C based on its ordinary meaning and context, and in view of the object and purpose of USMCA, it is clear that the parties to USMCA and NAFTA 1994 could and did extend the substantive obligations in Section A of Chapter 11 of NAFTA 1994 for the duration of the transition period, with respect to legacy investments. In the words of the VCLT Commentary, that agreement “must prevail.”

a) The USMCA Protocol Recognizes That USMCA Provisions Referencing NAFTA 1994 Preserve Substantive Obligations of NAFTA 1994 after the Date When USMCA Entered into Force

27. Respondent argues that there is nothing in USMCA that extends the substantive obligations of Section A of Chapter 11 of NAFTA 1994 for the duration of the transition period. However, Respondent wholly ignores the USMCA Protocol, which explicitly recognizes that certain provisions of NAFTA 1994 have continuing effects after USMCA replaced NAFTA 1994. In particular, paragraph 1 of the USMCA Protocol states that, “[u]pon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the

⁴⁷ “Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty ... releases the parties from any obligation further to perform the treaty....” Exhibit RL-16, VCLT at Art. 70 (emphasis added).

⁴⁸ Exhibit CL-32, VCLT Commentary at p. 265.

⁴⁹ Respondent’s Bifurcation Request at para. 13.

NAFTA.”⁵⁰ Thus, when provisions of USMCA refer to provisions of NAFTA 1994, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA 1994.

28. Annex 14-C is precisely one of the provisions set forth in USMCA that (in the words of the USMCA Protocol) “refer[s] to provisions of the NAFTA.” Specifically, Annex 14-C provides that, for the duration of the transition period, investors holding legacy investments may bring claims “alleging breach of an obligation under ... Section A of Chapter 11 (Investment) of NAFTA 1994.” Footnote 20 in Annex 14-C further states that, *inter alia*, “[f]or greater certainty, the relevant provisions in ... Chapter 11 (Section A) (Investment) ... of NAFTA 1994 apply with respect to such a claim.” Consistent with paragraph 1 of the USMCA Protocol, the replacement of NAFTA 1994 by USMCA shall not “prejudice” the application of these provisions. Rather,

⁵⁰ Exhibit R-1, USMCA Protocol. The USMCA Protocol, which is the operative instrument governing the entry into force of USMCA, does not explicitly terminate NAFTA 1994. While paragraph 3 of Annex 14-C refers to “the termination of NAFTA 1994,” the preamble to the USMCA Protocol notes that USMCA is itself the result of “negotiations to amend the NAFTA pursuant to Article 2202 of the NAFTA....” The title of the USMCA Protocol refers to USMCA “[r]eplacing” NAFTA 1994, and paragraph 1 of the USMCA Protocol refers to USMCA “superseding” NAFTA 1994. The Preamble to USMCA states that the USMCA Parties resolved to “REPLACE [NAFTA 1994] with a 21st Century, high standard new agreement to support mutually beneficial trade leading to freer, fairer markets, and to robust economic growth in the region.” The Office of the U.S. Trade Representative (“USTR”) states on its website that USMCA “substituted the North American Free Trade Agreement (NAFTA).” Exhibit C-84, Office of the United States Trade Representative, “United States-Mexico-Canada Agreement,” available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last accessed Jan. 27, 2023). By contrast, paragraph 3 of the USMCA Protocol provides that the North American Agreement on Labor Cooperation “shall be terminated.” The USMCA Protocol does not use such language in connection with NAFTA 1994 itself. The terms “supersede” (in paragraph 1 of the USMCA Protocol) and “replace” (in the title of the USMCA Protocol) evidence that the USMCA Parties were not seeking a clean break from NAFTA 1994 in all aspects. Indeed, as explained by the Congressional Research Service (which is part of the U.S. Library of Congress and provides reports to congressional committees and Members of Congress), “If USMCA enters into force, it will supersede NAFTA.... However, USMCA allows certain NAFTA provisions to apply to specified claims brought under NAFTA for a limited period after USMCA enters into force.... [F]or certain claims brought by investors against a NAFTA Party involving investments established or acquired while NAFTA was in force and that still exist when USMCA enters into force, Article 14-C.1 permits the relevant NAFTA provisions to apply for three years after NAFTA is terminated.” Exhibit C-87, Congressional Research Service, “USMCA: Implementation and Considerations for Congress,” Legal Sidebar No. LSB10399, Jan. 30, 2020, at p. 3. As USTR stated in the Statement of Administrative Action accompanying the submission of the USMCA implementing legislation to the U.S. Congress, “In May 2017, the United States Trade Representative notified Congress of the President’s intent to enter into negotiations with Canada and Mexico to modernize the North American Free Trade Agreement (NAFTA), which has been in force since January 1994. As set out in paragraph 1 of the Protocol, the USMCA will supersede the NAFTA once it enters into force. Certain transitional provisions provided for in the USMCA are intended to ensure a smooth transition from one agreement to another.” Exhibit C-88, The Implementation Act for the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), at p. 1. The Implementation Article 34.1(1) of USMCA similarly provides that “[t]he Parties recognize the importance of a smooth transition from NAFTA 1994 to this Agreement.” Exhibit C-2, USMCA at Art. 34.1.

Annex 14-C preserves the obligations in Section A of Chapter 11 of NAFTA 1994 for the entirety of the transition period, with respect to legacy investments.

b) The Relationship among Annexes 14-C, 14-D, and 14-E Shows That Annex 14-C Allows Claimants to Submit Claims in Connection with Measures Taken during the Transition Period

29. The relationship among Annexes 14-C, 14-D, and 14-E of USMCA further shows that Annex 14-C allows claimants holding legacy investments to bring claims in connection with measures taken during the transition period. This relationship constitutes relevant context for interpreting Annex 14-C. The following table describes the scope and temporal application of these three annexes.

Annex	Coverage	Available to Challenge Measures Taken <u>Before</u> USMCA Replaced NAFTA?	Available to Challenge Measures Taken during the Transition Period <u>After</u> USMCA Replaced NAFTA?
Annex 14-C	<p>Allows claims for violations of Section A of Chapter 11 of NAFTA 1994.</p> <p>Protects legacy investments by Canadian, Mexican, and U.S. investors.</p>	Available with respect to legacy investments.	Available with respect to legacy investments <u>except</u> that (per Footnote 21 of Chapter 14) investors that are “eligible to submit claims to arbitration under paragraph 2 of Annex 14-E” may not submit claims under Annex 14-C.
Annex 14-D	<p>Allows limited claims (national treatment, MFN, direct expropriation).</p> <p>All claims subject to an exhaustion requirement.</p> <p>Applies between Mexico and the United States.</p>	Not available.	Available.
Annex 14-E	Highest level of protection. Full investor-state dispute settlement with respect to alleged breaches of Chapter 14, and without any	Not available.	Available.

	<p>requirement to exhaust local remedies.</p> <p>Available to investors in certain infrastructure sectors (e.g., oil and natural gas, telecommunications) that enter into certain government contracts.</p> <p>Applies between Mexico and the United States.</p>		
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30. As indicated in the above table, Footnote 21 of Chapter 14 of USMCA governs the relationship between Annex 14-C and 14-E, and provides as follows:

Mexico and the United States do not consent under paragraph 1 [of Annex 14-C] with respect to an investor of the other Party that is eligible to submit claims to arbitration under paragraph 2 of Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).⁵¹

Thus, pursuant to Footnote 21, investors holding legacy investments may not bring claims under Annex 14-C if they are eligible to bring claims under Annex 14-E.⁵² Footnote 21 thus precludes the possibility of two separate arbitrations involving the same measure and the same damages claims (one arbitration initiated under Annex 14-C, and another initiated under Annex 14-E) by ensuring that investors eligible to bring a claim under Annex 14-E cannot bring a claim under Annex 14-C.

31. Footnote 21 is a carveout from the coverage of paragraph 1 of Annex 14-C, and such a carveout makes sense only if Annexes 14-C and 14-E otherwise overlap. Here is the critical

⁵¹ Exhibit C-2, USMCA at Chapter 14, n.21.

⁵² Paragraph 2(a) of Annex 14-E provides that a “claimant, on its own behalf, may submit to arbitration under Annex (14-D Mexico-United States Investment Disputes) a claim: (i) that the respondent has breached any obligation under [Chapter 14 of USMCA], provided that: (A) the claimant is: (1) a party to a covered government contract, or (2) engaged in activities in the same covered sector in the territory of the respondent as an enterprise of the respondent that the claimant owns or controls directly or indirectly and that is a party to a covered government contract, and (B) the respondent is a party to another international trade or investment agreement that permits investors to initiate dispute settlement procedures to resolve an investment dispute with a government, and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach” The criteria for a claimant to assert a claim on behalf of an enterprise are similar in all relevant respects. See Exhibit C-2, USMCA at Annex 14-E, para. 2(b).

point: Given that Annex 14-E applies only to measures that post-date the replacement of NAFTA 1994 by USMCA,⁵³ Annex 14-C and Annex 14-E can overlap only if they both apply to measures that post-date the replacement of NAFTA 1994 by USMCA.

32. Respondent does not mention Footnote 21 anywhere in its Bifurcation Request. Respondent simply asserts that Annex 14-C applies only to measures taken prior to the replacement of NAFTA 1994. However, if Annex 14-C applied only to measures taken pre-replacement of NAFTA 1994, and Annex 14-E applied only to measures taken post-replacement of NAFTA 1994, the temporal scope of the two annexes would never overlap, and Footnote 21 would be entirely superfluous. It is a fundamental principle of treaty interpretation that treaty provisions should not be interpreted in a manner that renders them meaningless.⁵⁴ As the VCLT

⁵³ Annex 14-E allows claims only with respect to alleged “breache[s] [of] any obligation[s] under [Chapter 14 of USMCA].” See Exhibit C-2, USMCA at Annex 14-E, paras. 2(a)(i), (b)(i). Furthermore, under Article 14.2.3, Annex 14-E does not apply to “an act or fact that took place or a situation that ceased to exist before the date of entry into force of [USMCA].” Exhibit C-2, USMCA, at Art. 14.2.3.

⁵⁴ Exhibit CL-39, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, Dec. 19, 2012, at para. 52 (“Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect. This principle is one of the main features of the law of treaties and has been applied by many ICSID Tribunals.”) (citing Exhibit CL-40, *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, Dec. 30, 2010, at para. 107); Exhibit CL-41, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, Aug. 19, 2005, at para. 248 (“It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.”); Exhibit CL-42, *Poštová Banka, A.S. and ISTROKAPITAL SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, Apr. 9, 2015, at para. 293 (“Preference should be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not.”); Exhibit CL-43, *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, Apr. 6, 2018, at para. 182 (“*Effet utile*, although not expressly set out in the VCLT, is generally accepted to flow from the principle of interpretation of treaties in good faith as envisioned in VCLT [sic] Article 31(1).”); Exhibit CL-44, Appellate Body Report, *Canada – Measures Affecting The Importation of Milk and the Exportation of Dairy Products*, WT/DS113/AB/R, Oct. 13, 1999 (adopted Oct. 27, 1999), at para. 133 (“[T]he task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.”); Exhibit CL-45, Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Dec. 14, 1999 (adopted Jan. 12, 2000), at para. 81 (“[A] treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.”); Exhibit CL-46, Appellate Body Report, *US – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, Feb. 4, 2009 (adopted Feb. 19, 2009), at para. 268 (“The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it.... [A] treaty interpreter is required to have recourse to context and object and

Commentary states, “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”⁵⁵

c) The Definition of “Legacy Investments” Confirms That Annex 14-C Applies to Measures that Post-Date the Replacement of NAFTA 1994

33. Annex 14-C applies only to legacy investments, which, as discussed above, are defined as investments that were “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” USMCA.⁵⁶ These investments were initially made with the understanding that they would be entitled to protection under NAFTA 1994, and so it is logical that they would continue to be protected during the transition period. However, paragraph 1 of Annex 14-C does not protect investments that may have been made while NAFTA 1994 was in force but which no longer existed, or were no longer in the hands of the would-be investors, on the date of entry into force of USMCA. This is true even if the investors who had owned such investments would have had a claim under NAFTA 1994 while it was in force.

34. Respondent’s Bifurcation Request never references the definition of “legacy investment.” This omission is quite telling, given that the term is central to paragraph 1 of Annex 14-C, and a critical part of the ordinary meaning of the core provision at issue. The requirement that legacy investments continue to exist on the date of USMCA’s entry into force confirms the understanding that Annex 14-C is intended to extend to claims against measures taken during the

purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.”); Exhibit CL-47, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Apr. 29, 1996 (adopted May 20, 1996), at p. 23 (“One of the corollaries of the ‘general rule of interpretation’ in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”).

⁵⁵ See Exhibit CL-32, VCLT Commentary at p. 219.

⁵⁶ Exhibit C-2, USMCA at Annex 14-C, para. 6 (emphasis added).

transition period.⁵⁷ The only logical reason for limiting the scope of paragraph 1 of Annex 14-C to investors that held investments on the date of entry into force of USMCA would be to protect those investments with respect to measures taken after USMCA entered into force, *i.e.*, to give them continuing protection and (in the words of the USMCA Preamble) “support[] [the] further expansion of trade and investment.”⁵⁸ For example, protecting investments related to the KXL Project would (and did) promote continued investment in the project during the transition period. Allowing claims with respect to investments that no longer existed would be less likely to promote investment.⁵⁹

3. Respondent’s Interpretation of Annex 14-C Is Inconsistent with the Object and Purpose of USMCA as Set Forth in the Preamble

35. As noted, Article 31(1) of the VCLT requires that the terms of a treaty be interpreted “in their context and in the light of [the treaty’s] object and purpose.”⁶⁰ Under Article 31(2) of the VCLT, the context includes the preamble of the treaty. The USMCA Preamble also provides insight into the object and purpose of the agreement. Interpreting Annex 14-C in the manner that Respondent suggests would be inconsistent with that object and purpose.

⁵⁷ Limiting protection to existing investments also contrasts with the approach taken in the other agreements referenced in paragraph 24 above, all of which protected investments that were made while the terminated or suspended investment agreement was in force, even if such investments did not exist on the date of termination of the investment agreement.

⁵⁸ Exhibit C-2, USMCA at Preamble.

⁵⁹ In other situations where the United States has been party to an arrangement that replaced one investment agreement with another, but continued to allow claims under the earlier agreement during a transition period, the United States has followed an approach similar to that taken in USMCA. For example, in connection with the Dominican Republic-Central America Free Trade Agreement (“CAFTA-DR”), the United States and Honduras suspended the dispute settlement provisions of their earlier bilateral investment treaty (“BIT”) but, for a period of ten years from the date of entry into force of CAFTA-DR, they continued to allow claims to be brought under the BIT (i) “in the case of investments covered by the [BIT] as of such date” or (ii) “in the case of disputes that arose prior to that date and that are otherwise eligible to be submitted for settlement” under the dispute settlement provisions of the BIT. *See* Exhibit CL-48, Letter from Shaun Donnelly, U.S. State Department to Norman Garcia, Honduras Ministry of Industry and Commerce Regarding Relationship of CAFTA-DR to U.S.-Honduras BIT, Aug. 5, 2004. Category (i)—which is analogous to claims brought by holders of legacy investments under Annex 14-C—applies to acts taken before or after the entry into force of CAFTA-DR. Category (ii) is retrospective, and applies only to disputes that arose prior to the suspension of the BIT. Annex 14-C contains no analog to category (ii). The U.S.-Morocco Free Trade Agreement took a similar approach with respect to the U.S.-Morocco BIT. *See* Exhibit CL-49, United States-Morocco Free Trade Agreement, signed June 15, 2004, entered into force Jan. 1, 2006, at Art. 1.2.

⁶⁰ Exhibit RL-16, VCLT at Art. 31(1).

36. The Preamble to USMCA provides that the USMCA Parties intended to, *inter alia*:

- “ESTABLISH a clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment”;
- “PROMOTE transparency, good governance and the rule of law ...”; and
- “ESTABLISH an Agreement to address future trade and investment challenges and opportunities”⁶¹

The interpretation of Annex 14-C that Respondent suggests would not promote clarity, transparency, predictability, good governance, or the rule of law.

37. First, abruptly terminating the ability of holders of legacy investments to assert claims under Section A of Chapter 11 of NAFTA 1994 would not promote predictability, transparency, good governance, and the rule of law. To the contrary, it would create confusion and would allow the USMCA Parties to game the system, as Respondent is seeking to do in this case. We will address the facts of this dispute in greater detail in Section IV below. For purposes of the immediate discussion, however, it is sufficient to recall that, pursuant to the March 23, 2017 Termination Agreement and Release of NAFTA Claims (“Termination Agreement”), Claimants agreed to drop their earlier NAFTA claims (challenging the Obama Administration’s 2015 denial of TC Energy’s second application for a Presidential permit) on the condition that Respondent grant the Presidential permit to TC Energy for the KXL Pipeline.⁶² Respondent granted the permit, and Claimants accordingly withdrew their claims. Thereafter, Respondent withdrew from NAFTA and revoked the Presidential permit on the very same grounds that gave rise to Claimants’ original NAFTA claims, thereby reneging on the understanding that induced Claimants to terminate the earlier NAFTA arbitration.

38. Respondent now objects that Claimants may not assert NAFTA claims to challenge the revocation of the 2019 Permit. Not only is Respondent’s course of conduct grossly unfair, but interpreting Annex 14-C in a manner that precludes Claimants’ claims would undermine

⁶¹ See Exhibit C-2, USMCA at Preamble.

⁶² Exhibit C-53, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, Termination Agreement and Release of NAFTA Claims, Mar. 23, 2017.

transparency, predictability, good governance, and the rule of law. Bifurcating the proceeding would reward Respondent's egregious behavior by further delaying a decision on the merits. Upholding Respondent's objection would condone Respondent's "bait and switch" behavior of inducing Claimants to terminate their earlier NAFTA claims by promising a Presidential permit, then breaching that understanding by revoking the permit at a time when (according to Respondent's erroneous interpretation) Claimants have no legal recourse.

39. Second, as noted, Respondent's erroneous interpretation is a *post hoc* rationalization that effectively aims to change the meaning of the text and create unpredictability for investors. Those points are addressed above, and we will not repeat them here. Compounding the problem with Respondent's interpretation is the fact that (to Claimants' knowledge) at the time USMCA was concluded, none of the three USMCA Parties indicated that Annex 14-C permits claims only with respect to measures that pre-dated the replacement of NAFTA 1994. The Annex to this submission contains a compilation of statements made by the USMCA Parties and a former U.S. negotiator of the USMCA investment chapter regarding the scope of Annex 14-C. U.S., Canadian, and Mexican investors rely on such statements by their governments to understand the scope of their rights under applicable investment treaties and free trade agreements, including NAFTA 1994 and USMCA. Not one of these statements indicates that Annex 14-C is limited to challenging measures that pre-dated the replacement of NAFTA 1994.

40. Given the extraordinary limitation on the scope of jurisdiction that Respondent now advocates, and the impact that Respondent's interpretation would have on the protection accorded to their own nationals, surely the USMCA Parties would have made that intention clear at the time they concluded the treaty, or at least soon thereafter. They did not do so. Accepting Respondent's interpretation of Annex 14-C would not promote a "clear, transparent, and predictable legal and commercial framework for business planning, that supports further expansion of trade and investment."

C. Respondent's False Assertion That the Transition Period Was Intended to Align with the Limitations Period in Articles 1116(2) and 1117(2) of NAFTA 1994 Confirms the Fabricated, *Post Hoc* Nature of Respondent's Objection

41. Respondent denies that Annex 14-C extends the obligations of Section A of Chapter 11 of NAFTA 1994 for the duration of the transition period. Instead, Respondent argues that the

three-year transition period simply “matches the limitations period set out in NAFTA Articles 1116(2) and 1117(2).”⁶³ Respondent provides no evidence that it was the USMCA Parties’ intention to create such a correspondence. More to the point, Respondent’s position is not correct.

42. Under NAFTA Articles 1116(2) and 1117(2), a claimant may not assert a claim more than three years after it had knowledge of the alleged breach and knowledge of the resulting damages.⁶⁴ Both of these knowledge criteria (knowledge of the breach and knowledge of the damage) must be met before the limitations period begins. However, Annex 14-C refers only to a breach of Section A of Chapter 11 of NAFTA 1994 and says nothing about the investor’s knowledge of the damage arising out of a breach. By glossing over this fact, Respondent misleadingly suggests that the transition period was designed to align with the limitations period in NAFTA 1994.

43. To show why Respondent’s assertion is not true, consider this statement from Respondent: “Extending the Parties’ consent to arbitration by three years in the Legacy Investment Claims Annex ensures that investors who have claims based on pre-termination breaches will enjoy the full period allotted to them under the NAFTA to bring those claims, even if they accrued immediately before the NAFTA’s termination (*i.e.*, on June 30, 2020).”⁶⁵ However, suppose that a NAFTA Party breached Section A of Chapter 11 of NAFTA 1994 before the replacement of NAFTA 1994, but the investor did not acquire knowledge of damage arising from the breach until after the replacement of NAFTA 1994. In that situation, the three-year transition period specified in Annex 14-C would expire before the end of the limitations period, and the investor would not “enjoy the full period allotted to them under the NAFTA to

⁶³ Respondent’s Bifurcation Request at para. 19.

⁶⁴ See Exhibit C-1, North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed Dec. 17, 1992, entered into force Jan. 1, 1994, at Art. 1116(2) (“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”) (emphasis added), Art. 1117(2) (“An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.”) (emphasis added).

⁶⁵ Respondent’s Bifurcation Request at para. 19.

bring those claims.”⁶⁶ Respondent’s unsuccessful attempt to link the three-year transition period in Annex 14-C to the limitations period in NAFTA Articles 1116(2) and 1117(2) is not only incorrect but clearly shows the *post hoc*, unsubstantial nature of Respondent’s objection. Respondent has fabricated this linkage and asserted, with no evidence, that this is what the USMCA Parties intended.

IV. Bifurcating the Proceedings Would Be Unfair and Prejudicial to Claimants, and the Preliminary Objection Is Intertwined with the Merits of Claimants’ Claims

44. Bifurcating the proceedings to hear Respondent’s preliminary objection would be unfair and prejudicial to Claimants and would draw the Tribunal into an examination of the merits of Claimants’ claims. As context, it is helpful to recall briefly the fifteen-year history of this dispute. Claimants recounted many of the most salient facts in our RFA, and will elaborate further as the arbitration proceeds, but the general arc of the story bears repeating.

45. Claimants’ subsidiary TransCanada Keystone Pipeline, L.P. (“Keystone”) first applied for a Presidential permit for the KXL Pipeline in 2008.⁶⁷ On January 18, 2012, Respondent denied the permit but stated that “[t]his announcement is not a judgment on the merits of the pipeline.”⁶⁸ Keystone submitted its second application for a Presidential permit for the KXL Pipeline on May 4, 2012.⁶⁹

46. In connection with Keystone’s first and second applications, the U.S. Department of State (“State Department”) concluded on multiple occasions that the KXL Pipeline was unlikely to

⁶⁶ Respondent’s statement is also flatly incorrect with respect to investors who owned investments prior to the entry into force of USMCA, and suffered damages during that time due to a NAFTA Party’s breach of Section A of Chapter 11 of NAFTA 1994, but did not hold those investments on the date USMCA entered into force. These investors would not, in Respondent’s words, “enjoy the full period allotted to them under the NAFTA to bring those claims.” Such investors do not hold “legacy investments,” and are thus unable to assert any new claims during the transition period, even if their claims would otherwise have been within the three-year limitations period specified in NAFTA Articles 1116(2) and 1117(2).

⁶⁷ See Claimants’ Request for Arbitration at para. 1.

⁶⁸ Exhibit C-34, White House, Office of the Press Secretary, “Statement by the President on the Keystone XL Pipeline,” Jan. 18, 2012, *available at* <https://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline>.

⁶⁹ See Exhibit C-39, Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border, May 4, 2012.

have a significant impact on climate change.⁷⁰ Nevertheless, on November 3, 2015, the State Department denied Keystone’s second application.⁷¹ The State Department recognized that “the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States” but then concluded that “it is critical for the United States to prioritize actions that are not perceived as enabling further GHG emissions globally.”⁷² Given these false perceptions, the State Department concluded that “granting a Presidential permit for this proposed Project would undermine U.S. climate leadership”⁷³

47. By the time the State Department denied Keystone’s second application for a Presidential permit, TC Energy had already invested billions of dollars into the KXL Project in the legitimate expectation that the United States would conduct a fair administrative process consistent with decades of previous U.S. practice and precedent. Those investments, and TC Energy’s expected future earnings from the pipeline, were then lost due to a disingenuous assertion by the United States that denying the permit was necessary to show “climate leadership” based on (mis)perceptions, even though the United States had repeatedly concluded that the pipeline likely would not impact climate change. Therefore, in June 2016, Claimants submitted a Request for Arbitration under Chapter 11 of NAFTA 1994.⁷⁴

48. On January 24, 2017, President Donald Trump issued a Presidential Memorandum “invit[ing] TransCanada Keystone Pipeline, L.P. (TransCanada) to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation

⁷⁰ See Claimants’ Request for Arbitration at paras. 7, 30, 44.

⁷¹ See Exhibit C-46, U.S. Department of State, Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Nov. 3, 2015 (“2015 ROD”).

⁷² Exhibit C-46, 2015 ROD at p. 29 (emphasis added).

⁷³ Exhibit C-46, 2015 ROD at p. 31.

⁷⁴ See Exhibit C-48, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, ICSID Case No. ARB/16/21, Request for Arbitration, June 24, 2016.

of the Keystone XL Pipeline”⁷⁵ The Presidential Memorandum was clearly and explicitly intended to induce TC Energy to apply for a Presidential permit to construct the KXL Pipeline.

49. President Trump recognized the United States’ vulnerability in the then-pending NAFTA arbitration. Therefore, as a condition for granting the Presidential permit, he demanded that Claimants terminate the NAFTA arbitration. As reported in the press in March 2017:

Trump told the National Republican Congressional Committee’s March fundraising dinner that TransCanada dropped its lawsuit in late February only because he threatened to rescind his approval if the company did not do so.

“I said, ‘Wait a minute. I’m approving the pipeline and they’re suing us for \$14 billion and I’ve already approved it right?’” Trump said, according to a pool report of what was an otherwise closed-to-the-media event. The president said he deployed Gary Cohn, a former Goldman Sachs executive who now is now [*sic*] Trump’s chief economic adviser, to relay a message to the Canadian firm.

“Go back to them and tell them, if they don’t drop the suit immediately, we are going to terminate the deal,” Trump said he instructed Cohn.

...

Trump contended that essentially forcing TransCanada to drop the suit in the long run is “easier ... than settling for like \$4 billion in [*sic*] seven years from now.”⁷⁶

President Trump concluded his remarks by saying, “So, I just saw [Mr. Cohn] this morning. – I said, by the way, how did you do? He said, sir, they dropped the suit. Good.”⁷⁷

⁷⁵ Exhibit C-8, White House, Office of the Press Secretary, “Presidential Memorandum Regarding Construction of the Keystone XL Pipeline,” Jan. 24, 2017, *available at* <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-regarding-construction-keystone-xl-pipeline/> at Section 2.

⁷⁶ Exhibit C-51, John T. Bennett, “Trump Boasts of Forcing Canadian Firm to Drop Keystone Lawsuit,” *Roll Call*, Mar. 22, 2017, *available at* <https://www.rollcall.com/2017/03/22/trump-boasts-of-forcing-canadian-firm-to-drop-keystone-lawsuit/>. *See also* Exhibit C-52, Damien Paletta and Steven Mufson, “Trump Says He Told Aide to Threaten Keystone XL Pipeline Company over Arbitration Case,” *Washington Post*, Mar. 22, 2017, *available at* <https://www.washingtonpost.com/news/wonk/wp/2017/03/22/trump-says-he-told-aide-to-threaten-keystone-xl-pipeline-company-over-arbitration-case/>.

⁷⁷ Exhibit C-89, Factbase Videos, “Speech, Donald Trump at the NRCC Dinner – March 21, 2017,” *available at* <https://www.youtube.com/watch?v=gj3rGg4B2j4&t=91s>; Exhibit C-90, Factbase, Transcript of “Speech, Donald

50. On March 23, 2017, TC Energy and the United States entered into the Termination Agreement.⁷⁸ Pursuant to Section C of the Termination Agreement, Claimants “release[d], with prejudice, all claims raised in the NAFTA Arbitration” and “fully and finally release[d] all future claims arising out of events prior to the Effective Date” of the Termination Agreement. Section A of the agreement directly and explicitly tied the settlement to the issuance of the Presidential permit by defining the “Effective Date” (*i.e.*, the date when the Termination Agreement became effective) as “the date of issuance to the Applicant of a Presidential permit (‘the Effective Date’)”⁷⁹

51. When the Trump Administration granted Keystone a Presidential permit on March 23, 2017, it concluded that “a decision to approve this proposed Project at this time would not undermine U.S. objectives [in addressing climate change].”⁸⁰ Thus, the United States corrected the finding that had led to the 2016 NAFTA arbitration.

52. Each of these actions—Respondent’s denial of Keystone’s applications for a Presidential permit, Respondent’s subsequent invitation to Claimants to reapply for the Presidential permit, Respondent’s inducement to Claimants to terminate their previous claims under NAFTA 1994 as a condition to obtain the permit, and Respondent’s issuance of the Presidential permit—took place when NAFTA 1994 was in force. Furthermore, from the time of the Termination Agreement forward, Claimants acted with the understanding that Respondent had committed to issuing and maintaining the Presidential permit. Claimants legitimately expected that the United States would not reverse its position and subsequently revoke the permit on the very same (spurious) grounds that gave rise to the 2016 NAFTA arbitration.

Trump at the NRCC Dinner – March 21, 2017,” available at <https://factba.se/transcript/donald-trump-speech-nrcc-dinner-march-21-2017>.

⁷⁸ See Exhibit C-53, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, Termination Agreement and Release of NAFTA Claims, Mar. 23, 2017, at p. 2.

⁷⁹ Exhibit C-53, *TransCanada Corporation & TransCanada PipeLines Limited v. the Government of the United States of America*, Termination Agreement and Release of NAFTA Claims, Mar. 23, 2017.

⁸⁰ Exhibit C-54, U.S. Department of State, Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline, Mar. 23, 2017 (“2017 ROD”) at p. 29.

53. Respondent reneged on that commitment. Not only did President Biden revoke the 2019 Permit, but, in doing so, he drew a direct link between his own decision to revoke the 2019 Permit and President Obama’s 2015 decision to deny the permit.

54. In Section 6(b) of Executive Order 13990, the measure that revoked the 2019 Permit, President Biden stated:

In 2015, following an exhaustive review, the Department of State and the President determined that approving the proposed Keystone XL pipeline would not serve the U.S. national interest. That analysis, in addition to concluding that the significance of the proposed pipeline for our energy security and economy is limited, stressed that the United States must prioritize the development of a clean energy economy, which will in turn create good jobs. The analysis further concluded that approval of the proposed pipeline would undermine U.S. climate leadership by undercutting the credibility and influence of the United States in urging other countries to take ambitious climate action.⁸¹

55. Now, however, despite inducing Claimants to terminate the 2016 NAFTA arbitration with the promise of a Presidential permit and thereafter reneging on that commitment by revoking the 2019 Permit, Respondent asserts that Claimants are prohibited from challenging the revocation of the permit as a breach of NAFTA 1994. Respondent’s objection is inconsistent with the text of USMCA (as discussed above) and with fundamental considerations of fairness.

56. Equity calls for the Tribunal to reject Respondent’s Bifurcation Request. It is a well-established principle of international law that “[n]o one can be allowed to take advantage of his own wrong.”⁸² However, that is exactly what Respondent is seeking to do in this case. Respondent induced Claimants to terminate their earlier NAFTA claims with the promise of a permit, then, after the replacement of NAFTA 1994 and entry into force of USMCA, it broke that commitment. In doing so, Respondent is attempting to game the system in a manner that would prevent Claimants from asserting their claims under NAFTA 1994, leaving Claimants with no legal recourse to challenge Respondent’s egregious actions. Moreover, in asking the

⁸¹ Exhibit C-11, Executive Order 13990 of January 20, 2021, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” 86 Fed. Reg. 7037 (Jan. 25, 2021), at p. 7041.

⁸² Exhibit CL-50, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2nd ed., 2006), at p. 149.

Tribunal to hear the preliminary objection in a bifurcated proceeding, Respondent unjustifiably and unfairly seeks to draw out the arbitration and delay a hearing on the merits.

57. In light of the history summarized above, if the Tribunal were to hear Respondent's objection in a bifurcated stage of the proceeding, the Tribunal would inevitably be drawn into an examination of the merits of Claimants' claims, undermining any efficiency gains. For example, the Tribunal would need to assess the nature of Respondent's commitments under the Termination Agreement, the continuing legal effects of that commitment, and the relationship of that commitment to Respondent's obligations under NAFTA 1994 and USMCA. It would then need to assess, *inter alia*, whether those events and actions of Respondent left Respondent's hands unclean, foreclosing the arguments that it advances now, or whether Respondent is otherwise estopped from raising its objection given its course of abusive conduct and prior representations. Given the intertwining of Respondent's objection with the facts underlying Claimants' claims, bifurcation of Respondent's preliminary objection would be inappropriate, would not result in a material reduction in the proceedings, and would not advance the dual objectives of fairness and efficiency in the proceedings.

V. Conclusion and Request for Costs

58. For the reasons explained above, the Tribunal should reject Respondent's Bifurcation Request. Respondent bases its request on an objection that is not substantial and serious. Furthermore, its objection is intertwined with the facts underlying Claimants' claims and would require the Tribunal to address matters that are directly relevant to the merits of those claims. Hearing the objection in a bifurcated proceeding would be highly prejudicial to Claimants and unfair, particularly given the duration and nature of Respondent's egregious conduct, the delay in Respondent raising its objection, and the long delay that would be required to hear this baseless objection before proceeding to the merits phase.

59. Claimants respectfully request that the Tribunal award Claimants all costs and fees, including, without limitation, attorneys' fees and other expenses Claimants have incurred to address Respondent's Bifurcation Request.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "J. E. Mendenhall", is positioned above the typed name.

James E. Mendenhall
Jennifer Haworth McCandless
Eric M. Solovy
SIDLEY AUSTIN LLP
Counsel for Claimants

ANNEX

Statements from USMCA Parties:

- In a 2018 press briefing in connection with the conclusion of USMCA, “[t]wo senior [U.S.] administration officials” engaged in the following exchange:

Q: Can you go through any changes to Chapter 11 and the investor-state dispute settlement, both with Mexico and with Canada?

And secondly, can you talk a little bit about President Trump and what his level of involvement was during the final stage of negotiations?

SENIOR OFFICIAL: With respect to your second question, we’re just going to refer you to the White House for the involvement of President Trump.

But with respect to Chapter 11, the ISDS, basically we’re going to be phasing out Chapter 11 with respect to Canada.

SENIOR OFFICIAL: The investment protections in Chapter 11 are going to continue to be available. But the substantive investment protections are available to everyone.

There is a question of investor-state dispute settlement; that is going to be phased out with regard to Canada.⁸³

- In 2019, the U.S. International Trade Commission explained that:

ISDS expires for current investments three years after USMCA enters into force (pending claims can proceed in this window)... Annex 14-C of USMCA states that current and pending investments under the original NAFTA are still subject to the ISDS mechanism under the original NAFTA, following original Section B procedures indicated in NAFTA.⁸⁴

- In 2021, the U.S. State Department explained that:

Canada is not a party to the USMCA’s chapter on investor-state dispute settlement. Ongoing NAFTA arbitrations are not affected by the USMCA, and investors can file new NAFTA claims by July

⁸³ Exhibit C-91, “Quoted: Senior Administration Officials on the USMCA,” *World Trade Online*, Oct. 1, 2018, available at <https://insidetrade.com/trade/quoted-senior-administration-officials-usmca> (emphasis added).

⁸⁴ Exhibit C-92, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. No. 4889 (Apr. 2019), at p. 195.

1, 2023, provided the investment(s) were “established or acquired” when NAFTA was still in force and remained “in existence” on the date the USMCA entered into force. An ISDS mechanism between the United States and Canada will cease following a three-year window for NAFTA-protected legacy investments.⁸⁵

- The Congressional Research Service⁸⁶ explained that:

If USMCA enters into force, it will supersede NAFTA as stated in the USMCA Protocol and P.L. 116-113, § 601. However, USMCA allows certain NAFTA provisions to apply to specified claims brought under NAFTA for a limited period after USMCA enters into force.... [F]or certain claims brought by investors against a NAFTA Party involving investments established or acquired while NAFTA was in force and that still exist when USMCA enters into force, Article 14-C.1 permits the relevant NAFTA provisions to apply for three years after NAFTA is terminated. (This rule does not apply with respect to investors from Mexico and the United States with regard to claims involving government contracts that investors may bring under the USMCA investor-State dispute settlement mechanism.)⁸⁷

- In its Statement on Implementation of USMCA, the Government of Canada explained that:

Paragraph 1 [of Annex 14-C] allows the submission of a new claim by an investor in accordance with Section B of Chapter 11 of NAFTA, with respect to legacy investments, meaning those established or acquired while NAFTA was in force and in existence on the date of entry into force of this Agreement, for an alleged breach of an obligation under Section A of Chapter 11, or Articles 1503(2) and 1502(3)(a) of NAFTA. Paragraph 2 establishes the

⁸⁵ Exhibit C-93, U.S. Department of State, “2021 Investment Climate Statements: Canada,” *available at* <https://www.state.gov/reports/2021-investment-climate-statements/canada/> (last accessed Feb. 6, 2023). The U.S. State Department similarly concluded in 2022 that “investors can file new NAFTA claims by July 1, 2023, provided the investment(s) were ‘established or acquired’ when NAFTA was still in force and remained ‘in existence’ on the date the USMCA entered into force. An ISDS mechanism between the United States and Canada will cease following a three-year window for NAFTA-protected legacy investments.” Exhibit C-94, U.S. Department of State, “2022 Investment Climate Statements: Canada,” *available at* <https://www.state.gov/reports/2022-investment-climate-statements/canada/> (last accessed Feb. 6, 2023).

⁸⁶ The Congressional Research Service (“CRS”) is part of the Library of Congress and “serves as shared staff to congressional committees and Members of Congress. CRS experts assist at every stage of the legislative process — from the early considerations that precede bill drafting, through committee hearings and floor debate, to the oversight of enacted laws and various agency activities.” See Exhibit C-95, Congressional Research Service, “About CRS,” *available at* <https://crsreports.congress.gov/Home/About> (last accessed Feb. 4, 2023).

⁸⁷ Exhibit C-87, Congressional Research Service, “USMCA: Implementation and Considerations for Congress,” Legal Sidebar No. LSB10399, Jan. 30, 2020, at p. 3 (emphasis added).

requirements for the submission of a claim while paragraph 3 provides that claims with respect to legacy investments may only be brought within three years after NAFTA is terminated or superseded by this Agreement pursuant to paragraph 1 of the *Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*. Once three years have elapsed, no investor-State claims may be brought by Canadian investors or against Canada under NAFTA or CUSMA.⁸⁸

- In its Economic Impact Assessment of USMCA, Global Affairs Canada explained the scope of Chapter 14 as follows:

With respect to the NAFTA ISDS, the parties agreed to a transitional period of three years, during which ISDS cases can still be brought forward under NAFTA for investments made prior to the entry into force of CUSMA. Apart from this transition period, U.S. investors will not be able to launch ISDS claims against Canada, and Canadian investors will not be able to launch ISDS claims against the United States.⁸⁹

- The Government of Mexico has provided the following explanation of Annex 14-C:

In the case of claims that may arise between the investors from Canada and the United States with the respective governments, the dispute settlement mechanism under NAFTA will continue to be applied provisionally. Three years after the entry into force of the T-MEC [USMCA] said mechanism shall cease to apply for Canada and the US, and in the event a dispute arises between investors and governments, the parties shall resort to domestic courts or some other mechanism of dispute resolution.⁹⁰

This statement from Mexico is forward looking in that it refers to disputes that “may arise” in the future. Furthermore, it explains that investors are limited to bringing disputes to domestic courts only after the expiration of the transition period. The implication of this statement is that disputes

⁸⁸ Exhibit C-96, Government of Canada, “Canada-United States-Mexico Agreement – Canadian Statement on Implementation,” available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/implementation-mise_en_oeuvre.aspx?lang=eng#61 (page last modified Sept. 3, 2020).

⁸⁹ Exhibit C-97, Global Affairs Canada, “The Canada-United States-Mexico Agreement: Economic Impact Assessment,” Feb. 26, 2020, at p. 32.

⁹⁰ Exhibit C-98, Government of Mexico, Secretary of the Economy, “Reporte T-MEC: Capítulo de Inversión del T-MEC [USMCA Report: USMCA Investment Chapter],” Sept. 9, 2019, at p. 2 (unofficial translation).

arising during the transition period may be submitted to arbitration under NAFTA procedures.

Statements from a Former U.S. Negotiator of USMCA’s Investment Chapter:

- In an article for the *ICSID Review*, Lauren Mandell, a former Deputy Assistant U.S. Trade Representative for Investment and the lead U.S. negotiator of the USMCA investment chapter,⁹¹ stated:

The key features of this approach [in USMCA] were: ... a three-year transition period during which investors from all three jurisdictions could continue to use NAFTA ISDS rules and procedures to bring claims in relation to “legacy investments” established or acquired in the territory of another Party during the lifetime of the NAFTA.⁹²

Mr. Mandell went on to say: “Going forward, after a three-year transition period, US investment policy posits that these types of disputes will need to be resolved through alternative means.”⁹³ The implication of Mr. Mandell’s statement is that disputes arising during the transition period may be submitted to arbitration under NAFTA procedures.

- In a presentation at American University, Mr. Mandell stated:

One key feature is that the parties agreed to permit NAFTA ISDS claims for three additional years. So, July 1, 2020, NAFTA goes away but there was this view that the NAFTA ... that the parties could continue to bring claims under NAFTA rules for three years. This is Annex 14-C. But then I think the key point is that after July 1 of 2023, after the three year period, this transition period, the rules change significantly.⁹⁴

⁹¹ Mr. Mandell’s biography on his law firm’s website states: “Mr. Mandell served for six years in senior legal and policy roles at USTR. From 2016–2019, Mr. Mandell was the Deputy Assistant USTR for Investment, the agency’s lead for the negotiation, implementation and enforcement of investment chapters of free trade agreements and bilateral investment treaties. In that role, [he] serv[ed] as the US lead negotiator of the investment chapter of the USMCA....” See Exhibit C-99, WilmerHale, “Lauren Mandell (Special Counsel),” *available at* <https://www.wilmerhale.com/en/people/lauren-mandell> (last accessed Feb. 7, 2023).

⁹² Exhibit C-100, Lauren Mandell, “The Trump Administration’s Impact on US Investment Policy,” 35 *ICSID Review* 345 (2020), at p. 357.

⁹³ Exhibit C-100, Lauren Mandell, “The Trump Administration’s Impact on US Investment Policy,” 35 *ICSID Review* 345 (2020), at p. 358 (emphasis added).

⁹⁴ Exhibit C-101, American University Washington College of Law, *USMCA Chapter 14: Experiences (US Perspective)* (Panel Presentation by Lauren Mandell and others at Expert Panel Series on International Arbitration — Investment Agreements of the 21st Century: USMCA and Beyond, Oct. 25, 2022), *full video available at* <https://media.wcl.american.edu/Mediasite/Play/c9b76a5aa39f4b06809d33a6be13414c1d>.

- A piece that Mr. Mandell co-authored in 2021 stated, in connection with changes to Mexico’s Electricity Industry Law in 2021 (after the replacement of NAFTA and the entry into force of USMCA):

Foreign investors in the Mexican energy sector—especially investors pursuing remedies in Mexican court—need to exercise care to ensure that they do not inadvertently forfeit their rights to seek relief under international trade and investment agreements such as the USMCA. This note offers three tips for US and Canadian investors to preserve and advance their USMCA rights

Subject to an important exception, the USMCA eliminates ISDS with respect to Canada, and it narrows access to ISDS as between the United States and Mexico (excluding with respect to investors with certain defined government contracts). The exception is that US, Canadian and Mexican investors with “legacy investments” in the territory of another Party—investments established during the lifetime of the NAFTA (January 1, 1994–July 1, 2020)—have full access to ISDS under NAFTA rules for claims brought within three years after the date of the USMCA’s entry into force, meaning until July 1, 2023....

The ISDS landscape will change on July 1, 2023, three years after the date of the USMCA’s entry into force. Canadian investors will be unable to file new claims against Mexico, though they will still have access to ISDS under the CPTPP.... Therefore, US and Canadian investors in Mexico’s energy sector should be mindful of their potential change in circumstances on July 1, 2023. To file a claim before that deadline, an investor would need to submit a notice of intent to Mexico by April 1, 2023.⁹⁵

⁹⁵ Exhibit C-102, John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, “Three Tips for Investors in Mexico’s Energy Sector Regarding Potential USMCA Claims,” Mar. 18, 2021, *available at* <https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims> (emphasis added).