

IN THE ARBITRATION UNDER THE UNITED STATES-MEXICO-CANADA AGREEMENT AND THE ICSID
ARBITRATION RULES BETWEEN

TC ENERGY CORPORATION AND TRANSCANADA PIPELINES LIMITED

Claimants

-and-

UNITED STATES OF AMERICA

Respondent.

ICSID CASE No. ARB/21/63

**REPLY TO CLAIMANTS' OBSERVATIONS ON
THE REQUEST FOR BIFURCATION OF
RESPONDENT UNITED STATES OF AMERICA**

Lisa J. Grosh

Assistant Legal Adviser

John D. Daley

Deputy Assistant Legal Adviser

David M. Bigge

Chief of Investment Arbitration

Julia H. Brower

Nathaniel E. Jedrey

Melinda E. Kuritzky

Mary T. Muino

Alvaro J. Peralta

David J. Stute

Isaac D. Webb

Attorney-Advisers

Office of International Claims and
Investment Disputes

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

March 2, 2023

TABLE OF CONTENTS

I.	Introduction.....	1
II.	The Parties Agree on the Standard for Bifurcation.....	2
III.	Bifurcation Is Appropriate in This Arbitration	3
	A. The U.S. Objection to the Tribunal’s Jurisdiction Is Substantial	4
	1) The Starting Point for Interpreting the Legacy Investment Claims Annex Is the Termination of the NAFTA	5
	2) Claimants Have Not and Cannot Identify Any Provision of the USMCA Memorializing an Agreement to Extend the Application of the NAFTA’s Substantive Investment Obligations	6
	3) The Parties’ Prior Treaty Practice Further Undermines Claimants’ Argument.....	9
	4) Claimants’ Arguments Concerning Context and the USMCA’s Object and Purpose Fail	13
	5) Conclusion	18
	B. The United States’ Objection Will Eliminate Claimants’ Claims in Their Entirety and Bifurcation Would Promote Efficiency.....	18
	C. The United States’ Objection Is Distinct From its Merits Arguments and Bifurcation Is Fair to Both Parties	18
IV.	Conclusion	22

1. In accordance with the Tribunal’s Procedural Order No. 1 of December 12, 2022, the United States hereby submits its Reply to Claimants’ Observations on its Request for Bifurcation of these proceedings.

I. Introduction

2. As the United States showed in its Request for Bifurcation and will demonstrate further in this Reply, the three factors of the applicable test for bifurcation all weigh in favor of briefing the U.S. objection to jurisdiction separately from the merits of the case. Claimants, in their Observations on the U.S. Request for Bifurcation, devote most of their attention to the first factor, arguing that the U.S. objection to jurisdiction is not substantial. But, if anything, the more than 18 pages that Claimants devote to their attempted rebuttal of the U.S. objection shows the substantiality of the objection and how seriously they must take it.

3. Claimants do not dispute, nor could they, that the Tribunal lacks jurisdiction over their claims unless Claimants can show that the United States, Canada, and Mexico agreed in the USMCA that the NAFTA’s obligations would continue to bind them after the NAFTA’s termination on July 1, 2020. Claimants cannot, however, point to any text in the USMCA embodying such an agreement. Instead, they ask that the Tribunal infer an agreement from a combination of the USMCA Protocol and references to the NAFTA in the Legacy Investment Claims Annex. Claimants’ reading of the USMCA is untenable, as the United States discusses briefly below and will elaborate in more detail when it comes time to brief its objection to jurisdiction. For purposes of the U.S. Request for Bifurcation, however, it is enough that Claimants’ arguments are insufficient to show that the U.S. objection is less than substantial.

4. The other relevant factors weigh heavily in favor of bifurcation as well. With respect to the second factor, Claimants do not contest – nor could they – that a finding in favor of the United

States on its jurisdictional objection would bring an end to this case. As for the third factor, the resolution of the U.S. objection requires only an exercise in treaty interpretation and does not implicate any of the merits of Claimants' claims.

5. All three factors, as well as considerations of fairness and efficiency, therefore weigh in favor of bifurcation and the U.S. request should be granted.

II. The Parties Agree on the Standard for Bifurcation

6. The disputing parties agree that the standard this Tribunal should apply in determining whether to grant the U.S. Request for Bifurcation requires the analysis of three factors: (i) whether the objection is substantial or frivolous; (ii) whether the objection, if successful, would materially reduce time and costs; and (iii) whether jurisdiction and merits are so intertwined as to make bifurcation impractical.¹ The disputing parties also agree that such analysis should be guided by considerations of procedural fairness and efficiency.²

7. Claimants also argue that the three factors must be “cumulatively satisfied” to merit deciding a preliminary objection to jurisdiction in a separate phase.³ All this means is that the Tribunal’s review of the Request for Bifurcation is not a box-checking test, but rather an exercise of discretion that should take into account all of the factors and the two guiding considerations discussed above.⁴

¹ Request for Bifurcation of Respondent the United States of America (Jan. 11, 2023) (“U.S. Request for Bifurcation”), ¶ 9; Claimants’ Observations on Respondent’s Request for Bifurcation of Preliminary Objection (Feb. 10, 2023) (“Claimants’ Observations”), ¶ 11.

² U.S. Request for Bifurcation, ¶ 9; Claimants’ Observations, ¶ 12.

³ Claimants’ Observations, ¶ 12 (citing to *Carlos Sastre et al. v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 – Decision on Bifurcation, ¶¶ 43-44 (Aug. 13, 2020) (**RL-024**)).

⁴ The United States agrees with Claimants’ assertion that there is no presumption in favor of bifurcation under the ICSID Rules. *See* Claimants’ Observations, ¶ 10. Claimants, however, rely on the lack of a presumption to argue that the United States “carries the burden” with respect to bifurcation in the first instance. *Id.* As the Request for Bifurcation is purely procedural and not a claim or affirmative defense, it is not clear that any burden of persuasion would apply to the Request. *See, e.g., Caratube Int’l Oil Co. LLP and Devinci Salah Hourani v. Republic of*

8. With regard to this “cumulative” analysis, Claimants have presented no argument at all on the second factor, whether the objection, if successful, would materially reduce time and costs. Claimants have not contested that the U.S. objection, if granted, would dispose of Claimants’ entire case. This factor therefore weighs strongly in favor of bifurcation. Nor have Claimants presented a credible argument with respect to the consideration of efficiency; in fact, Claimants appear to concede that bifurcation here would yield efficiency gains, claiming only that – in Claimants’ erroneous view – the alleged intertwining of the merits (the third factor) would undermine such “efficiency gains” that would otherwise be achieved by granting the United States’ Request for Bifurcation.⁵ Weighing all of the factors and the two guiding considerations, and not just the subset Claimants chose to address in their Observations, it is clear that bifurcation is warranted in this case.

III. Bifurcation Is Appropriate in This Arbitration

9. As discussed in the sections that follow, **(A)** the United States’ jurisdictional objection is substantial; **(B)** if successful, the objection will materially reduce time and costs as it would

Kazakhstan (II), ICSID Case No. ARB/13/13, Award, ¶ 307 (Sept. 27, 2017) (“*Caratube II Award*”) (**RL-032**) (affirming that a claimant has the burden of proof with respect to its claims on the merits, and that a respondent has the burden of proof with respect to affirmative defenses). To the extent the United States bears any burden of persuasion on this procedural request, it is only with respect to the first factor, and it is only to demonstrate “*prima facie*” that its jurisdictional objection is “substantial and not frivolous.” See, e.g., *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. 2017-30, Decision on Respondent’s Request for Bifurcation, ¶ 102 (June 27, 2018) (**RL-033**) (describing the first factor as “whether the objections to jurisdiction are *prima facie* substantial and not frivolous”). The remaining two factors are not subject to any burden of persuasion. Finally, regardless of whether the Request for Bifurcation is granted, Claimants will ultimately bear the burden to demonstrate that this Tribunal has jurisdiction to hear their claims. See, e.g., *Caratube II Award*, ¶ 309 (**RL-032**) (affirming the longstanding rule that “Claimants have the burden of proving that this Tribunal has jurisdiction.”).

⁵ Claimants’ Observations, ¶ 57. As discussed in more detail below, Claimants’ arguments with respect to the intertwining of the merits are baseless. Claimants cannot seriously contend that the United States’ very narrow jurisdictional objection, requiring only an interpretation of the Legacy Investment Claims Annex, requires any analysis of the merits of their claims.

eliminate the entirety of Claimants' claims; and (C) it is entirely distinct from the merits, despite Claimants' attempt to demonstrate otherwise.

A. The U.S. Objection to the Tribunal's Jurisdiction Is Substantial

10. The U.S. objection to the Tribunal's jurisdiction is plainly substantial. The U.S. objection rests on two uncontroversial principles of customary international law. The first, set out in Article 70 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), is that a treaty's termination "releases the parties from any obligation further to perform the treaty."⁶ If the Parties intend to derogate from that principle, that intention should be clear from the ordinary meaning of the treaty text. The second principle underlying the U.S. objection is that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."⁷ The combined effect of these two principles, neither of which is disputed by Claimants, is that President Biden's revocation of the March 2019 permit (the "Permit") on January 20, 2021 – more than six months after the NAFTA's termination – cannot constitute a breach of the NAFTA and cannot, therefore, be submitted to arbitration under the Legacy Investment Claims Annex.

11. Claimants attempt in their Observations to overcome the straightforward application of these basic principles, but their arguments are deeply flawed and certainly fall far short of what would be necessary to establish that the U.S. objection is less than substantial. Consistent with Procedural Order No. 1, the United States offers responses to Claimants' arguments below but will respond more fully when it comes time to brief the merits of its objection to jurisdiction. The United States begins by highlighting the importance of the NAFTA's termination to the

⁶ Article 70(1)(a) of the Vienna Convention on the Law of Treaties (1969) (**RL-016**).

⁷ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)) (**RL-023**).

interpretation of the Legacy Investment Claims Annex (in Section 1), before responding to Claimants’ strained textual argument (in Section 2), attempted reliance on the Parties’ prior treaty practice (in Section 3), and points concerning context and the USMCA’s object and purpose (in Section 4).

1) The Starting Point for Interpreting the Legacy Investment Claims Annex Is the Termination of the NAFTA

12. The USMCA’s entry into force terminated the NAFTA.⁸ Claimants acknowledged this in their Request for Arbitration and Notice of Intent, stating unequivocally: “USMCA entered into force, *and NAFTA 1994 terminated*, on July 1, 2020.”⁹ As a result of the NAFTA’s termination, and consistent with customary international law, as reflected in Article 70 of the Vienna Convention, the Parties ceased to be bound by the NAFTA’s obligations on July 1, 2020.¹⁰ Claimants do not dispute this principle of customary international law but choose instead to emphasize that it is subject to two exceptions,¹¹ namely if “the treaty otherwise provides” or if

⁸ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (“Upon 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 NAFTA.” (emphasis added)) (**R-0001**). *See also* Legacy Investment Claims Annex, ¶ 3 (**C-0002**) (“A Party’s consent under paragraph 1 shall expire three years after *the termination of NAFTA 1994*.” (emphasis added)); *id.*, ¶ 5 (“For greater certainty, an arbitration initiated pursuant to the submission of a claim under Section B of Chapter 11 (Investment) of NAFTA 1994 while NAFTA 1994 is in force may proceed to its conclusion in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994, the Tribunal’s jurisdiction with respect to such a claim is not affected by *the termination of NAFTA 1994*, and Article 1136 of NAFTA 1994 (excluding paragraph 5) applies with respect to any award made by the Tribunal.” (emphasis added)); *id.*, ¶ 6 (“‘legacy investment’ means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of *termination of NAFTA 1994*, and in existence on the date of entry into force of this Agreement” (emphasis added)).

⁹ Request for Arbitration, ¶¶ 17, 74 (emphasis added); Notice of Intent, ¶ 18. Claimants tie themselves in knots in footnote 50 of their Observations attempting to characterize the USMCA’s effect on the NAFTA as something other than termination, suggesting that in “superseding” and/or “replacing” the NAFTA “the USMCA Parties were not seeking a clean break from NAFTA 1994 in all aspects.” Footnote 50 is, however, flatly inconsistent with the statements that Claimants made in their Request for Arbitration and Notice of Intent. As Claimants themselves plainly understood and accepted before it served their interests in this arbitration to question the point, the USMCA terminated the NAFTA on July 1, 2020.

¹⁰ *See, e.g.*, Article 70(1)(a) of the Vienna Convention on the Law of Treaties (1969) (**RL-016**).

¹¹ Claimants’ Observations, ¶ 25.

“the parties otherwise agree.”¹² The first exception is no help to Claimants because the NAFTA does not contain a survival provision that would extend its obligations for a period following termination.¹³ Thus, the viability of Claimants’ claims depends *entirely* on whether the United States, Canada, and Mexico agreed in the USMCA to the post-termination survival of the NAFTA’s substantive investment obligations set out in Section A of Chapter Eleven. If the Parties did not do so, Claimants cannot allege a breach of the NAFTA that postdates its termination, and their claims cannot be submitted to arbitration under the Legacy Investment Claims Annex.

2) Claimants Have Not and Cannot Identify Any Provision of the USMCA Memorializing an Agreement to Extend the Application of the NAFTA’s Substantive Investment Obligations

13. In their Observations, Claimants do not point to a single provision memorializing an agreement by the USMCA Parties to extend the application of the NAFTA’s substantive obligations. Nor could they have done so, because no such provision exists in the USMCA. In the absence of such a provision, Claimants ask the Tribunal to *infer* an agreement from a combination of the USMCA Protocol and references to the NAFTA in paragraph 1 of the Legacy Investment Claims Annex. Claimants’ argument fails. Neither the USMCA Protocol nor paragraph 1 of the Annex constitutes an agreement to extend the NAFTA’s substantive investment provisions beyond its termination. Nor does reading them together accomplish what neither achieves standing alone.

14. Claimants’ argument begins with a single sentence of the USMCA Protocol, which states: “Upon 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

¹² Article 70(1)(a) of the Vienna Convention on the Law of Treaties (1969) (RL-016).

¹³ U.S. Request for Bifurcation, ¶ 14.

provisions of the NAFTA.”¹⁴ Claimants do not argue that this constitutes an agreement to the post-termination survival of the NAFTA’s substantive investment obligations. Rather, they describe the effect of the Protocol as follows: “when provisions of USMCA refer to provisions of NAFTA 1994, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA 1994.”¹⁵

15. As the second, and final, step in their argument, Claimants note that the Legacy Investment Claims Annex references NAFTA Chapter 11 in paragraph 1 and the accompanying footnote 20. Claimants argue that, “[c]onsistent with paragraph 1 of the USMCA Protocol, the replacement of NAFTA 1994 by USMCA shall not ‘prejudice’ the application of these provisions” and, therefore, Claimants assert, the Legacy Investment Claims Annex “preserves the obligations in Section A of Chapter 11 of NAFTA 1994 for the entirety of the transition period, with respect to legacy investments.”¹⁶

16. Each step in Claimants’ argument is flawed. *First*, Claimants’ self-serving paraphrase of the USMCA Protocol is not consistent with the ordinary meaning of the text. The USMCA Protocol does not say anything about “NAFTA provisions *remain[ing] applicable* despite the fact that USMCA replaced NAFTA 1994.”¹⁷ The Protocol does not speak to the ongoing “applicability” of NAFTA provisions at all. Instead, the Protocol merely seeks to avoid prejudice to *USMCA provisions*, to the extent that they “refer to provisions of the NAFTA.”

17. *Second*, Claimants ignore what paragraph 1 and footnote 20 of the Legacy Investment Claims Annex actually do. As noted in the U.S. Request for Bifurcation, paragraph 1 extends the

¹⁴ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, ¶ 1 (R-0001).

¹⁵ Claimants’ Observations, ¶ 27.

¹⁶ *Id.*, ¶ 28.

¹⁷ *Id.*, ¶ 27 (emphasis added).

Parties' *consent to arbitrate* claims alleging breach of certain NAFTA obligations for an additional three years.¹⁸ Paragraph 1 says nothing about extending the substantive obligations themselves for three years. Likewise, footnote 20 states that "relevant provisions" of the NAFTA "apply with respect to . . . a claim" submitted to arbitration under paragraph 1, which is merely an acknowledgement "[f]or greater certainty" that the NAFTA applies to claims based on breaches that occurred when the NAFTA was in force, despite the fact that the NAFTA was terminated by the USMCA. Indeed, though Claimants gloss over this, it is important to recognize that footnote 20 speaks solely of applying the NAFTA's provisions to "a claim" – not to investments or investors, as would be necessary if the Parties intended for the NAFTA's substantive investment obligations to survive post-termination.

18. Claimants also neglect to mention that footnote 20 references not just Section A of NAFTA Chapter 11, which contains the NAFTA's substantive investment obligations, but also Chapter 2 (General Definitions), 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). If Claimants' interpretation of the USMCA Protocol were correct, then not only would Section A of Chapter 11 be "preserve[d] . . . for the entirety of the transition period, with respect to legacy investments,"¹⁹ but so would these five additional NAFTA chapters and seven annexes. It strains credulity to suggest that the Parties meant to agree to a wholesale extension of substantial parts of the NAFTA for three additional years in a footnote.

¹⁸ U.S. Request for Bifurcation, ¶ 17.

¹⁹ Claimants' Observations, ¶ 28.

19. Ensuring that the NAFTA's termination is "without prejudice" to paragraph 1 and footnote 20 of the Legacy Investment Claims Annex does not require that they be interpreted to extend the NAFTA's substantive obligations for three years, as Claimants would have it. It requires only that these provisions be given effect, despite the NAFTA's termination, for purposes of adjudicating certain specified claims. Thus, the consent embodied in paragraph 1 to the submission of certain NAFTA claims to arbitration – and the application of the relevant NAFTA provisions to those claims – must be honored, even though the termination of the NAFTA, which lacked a survival clause, would otherwise have barred investors from bringing such claims.

20. Claimants' attempt to combine the USMCA Protocol and paragraph 1 of the Legacy Investment Claims Annex into an agreement for the post-termination extension of the NAFTA's substantive obligations thus fails. There is no provision in the USMCA extending the obligations of NAFTA Chapter 11 past its termination. The USMCA Protocol simply cannot be read to preserve the NAFTA provisions referred to in the USMCA from termination.

3) The Parties' Prior Treaty Practice Further Undermines Claimants' Argument

21. Claimants also point to the Parties' prior investment treaty practice in an apparent effort to bolster their textual argument, but these references only serve to further undermine Claimants' position.

22. As an initial matter, Claimants' account of the Parties' past practice ignores the telling contrast between the inferences on which they seek to rely in interpreting the USMCA and the simple language that the Parties use in their model investment treaties to ensure the post-termination survival of a treaty's obligations. For example, the U.S. Model Bilateral Investment Treaty ("BIT") achieves post-termination survival in a single clear sentence:

For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.²⁰

23. The Canadian and Mexican models are similarly clear and succinct.²¹

24. The Parties therefore had language at hand that could, with minor modifications, have been used to memorialize an agreement to extend the application of the NAFTA's substantive investment obligations beyond the termination of the agreement. It is, accordingly, highly implausible they would have sought to achieve the same result by implication in the USMCA, as Claimants contend.

25. Claimants' discussion of the Parties' past investment treaty practice, however, is concerned with something else, namely the absence of language in the Legacy Investment Claims Annex that would expressly limit holders of legacy investments to bringing claims based on alleged breaches that occurred prior to the NAFTA's termination. Claimants point to several free trade agreements involving Canada and Mexico that superseded one or more legacy BITs and emphasize language in each agreement limiting investors to bringing claims based on alleged breaches occurring when the legacy BIT was in force (*i.e.*, prior to the entry into force of the new free trade agreement).²²

²⁰ 2012 U.S. Model BIT, art. 22(3) (**RL-017**). *See also* 2004 U.S. Model BIT, art. 22(3) (**RL-018**) (same).

²¹ 2021 Canada Model Agreement for the Promotion and Protection of Investments, art. 57(4) (**RL-019**) ("In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years."); 2014 Canada Model Agreement for the Promotion and Protection of Investments, art. 42(4) (**RL-020**) ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, Articles 1 to 41 inclusive, as well as paragraphs 1 and 2 of this Article, shall remain in force for a period of 15 years."); 2004 Canada Model Agreement for the Promotion and Protection of Investments, art. 52(3) (**RL-021**) ("In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles 1 to 51 inclusive, as well as paragraphs (1) and (2) of this Article, shall remain in force for a period of fifteen years."); 2008 Mexican Model of Investment Promotion and Protection Agreement, art. 30(4) (**RL-022**) ("This Agreement shall continue to be effective for a period of ten years from the date of termination only with respect to investments made prior to such date.").

²² Claimants' Observations, ¶ 24.

26. There is, however, a crucial difference between the NAFTA and the ten legacy BITs in Claimants' examples. Unlike the NAFTA, each of the legacy BITs included a survival clause providing that the BIT's provisions would remain in force for between 10 and 20 years following termination, with respect to investments (or, in some cases, commitments to invest) made prior to the date of termination.²³ Had Canada, Mexico, and their counterparties been silent in the superseding free trade agreement about the rights of investors to bring claims under the legacy BIT, each BIT's survival provision would have controlled and, as a result, investors would have been entitled to bring claims under the legacy BIT based on breaches occurring both before and after the BIT's termination.²⁴ Clear limitation language in the new free trade agreements was thus necessary to curtail the effects of the legacy BITs' survival clauses.

27. The NAFTA had no survival clause. The default position upon the NAFTA's termination was that investors would have no ability to submit new NAFTA claims to arbitration, regardless of when the alleged breaches underlying the claims occurred. Accordingly, there was no need for

²³ Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments, Can.-Peru, art. 52(3), Nov. 14, 2006, U.N.T.S. No. 55972 (**RL-034**); Treaty Between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments, Can.-Pan., art. XVIII(2), Sep. 12, 1996, 3080 U.N.T.S. 379 (**RL-035**); Agreement between the Government of the United Mexican States and the Government of Australia on the Promotion and Reciprocal Protection of Investments, Austl.-Mex., art. 24(3), Aug. 23, 2005, 2483 U.N.T.S. 247 (**RL-036**); Agreement between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments, art. XV(4), Can.-Croat., Feb. 3, 1997, 3087 U.N.T.S. 261 (**RL-037**); Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, Can.-Czech, art. XV(8), May 6, 2009, U.N.T.S. No. 53345 (**RL-038**); Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, Can.-Hung., art. XIV(3), Oct. 3, 1991, 3068 U.N.T.S. 313 (**RL-039**); Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Can.-Lat., art. XVIII(7), May 5, 2009, U.N.T.S. No. 53591 (**RL-040**); Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, Can.-Pol., art. XIV, Apr. 6, 1990, U.N.T.S. No. 52655 (**RL-041**); Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments, Can.-Rom., art. XVIII(7), May 8, 2009, U.N.T.S. No. 53574 (**RL-042**); Agreement between the Slovak Republic and Canada for the Promotion and Protection of Investments, Can.-Slovk., art. XV(7), July 20, 2010, 2817 U.N.T.S. 57 (**RL-043**).

²⁴ The parties to the Canada-Peru Free Trade Agreement and the Canada-Panama Free Trade Agreement suspended their legacy BITs, rather than terminate them. Canada-Peru Free Trade Agreement, Can.-Peru, art. 845(1), May 29, 2008 (**CL-035**); Canada-Panama Free Trade Agreement, Can.-Pan., art. 9.38(1), May 14, 2010 (**CL-036**).

the USMCA Parties to limit the rights available to investors to bring claims based on alleged breaches of the NAFTA occurring after its termination because investors never had any such rights under the NAFTA in the first place. Silence in the USMCA, therefore, achieved the same outcome with respect to the NAFTA that required additional text in Claimants' examples, at least for claims based on alleged breaches occurring after the NAFTA's termination. Where the Parties needed to, and did, add text to the USMCA was to give investors additional time to bring claims based on alleged breaches that occurred while the NAFTA was still in force, which was consistent with the three-year limitations period for the filing of claims in the NAFTA, but which the NAFTA itself did not grant them upon termination.²⁵

28. Claimants also point to two examples of U.S. practice involving a legacy BIT and a subsequent free trade agreement with the same counterparty that purportedly reflect "an approach similar to" the one that – according to Claimants – the Parties took in the USMCA.²⁶ Like Claimants' examples of Canadian and Mexican practice, however, these examples only serve to highlight the flaws in Claimants' reading of the Legacy Investment Claims Annex. In each example, the subsequent free trade agreement did *not* terminate the legacy BIT. Instead, while the subsequent agreement suspended the dispute resolution provisions in each BIT, subject to certain

²⁵ Claimants also refer to Article 34.1 of the USMCA, which provides that "Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement." It is not clear what relevance this provision, which does not relate to investor-State dispute settlement, could have to the proper interpretation of the Legacy Investment Claims Annex. Claimants' argument appears to be that because Article 34.1 limits the application of NAFTA Chapter 19 to "binational panel reviews related to final determinations published by a Party before the entry into force of [the USMCA]," this shows that the Parties could have likewise limited the Legacy Investment Claims Annex to alleged breaches occurring before the NAFTA's termination. The Parties, however, achieved this result in the Annex simply by not including language extending the application of the NAFTA's obligations following its termination. That they did not do so using language comparable to that found in Article 34.1 is irrelevant.

²⁶ Claimants' Observations, ¶ 34 n.59.

exceptions, they left the remaining provisions *in force*.²⁷ This is not “an approach similar to” the USMCA – it is wholly different, because the USMCA expressly terminated the NAFTA. If anything, these examples show a route that the Parties could have – *but did not* – take, had they intended to allow for investors to assert claims based on breaches of the NAFTA occurring after the USMCA’s entry into force.

29. In sum, Claimants’ references to the Parties’ prior investment treaty practice only serve to further undercut Claimants’ position on the Legacy Investment Claims Annex.

4) Claimants’ Arguments Concerning Context and the USMCA’s Object and Purpose Fail

30. Claimants offer a few additional arguments that purportedly confirm their interpretation of the Legacy Investment Claims Annex, but each is misguided. More importantly, not one of Claimants’ additional points supplies an independent basis for a purported agreement to prolong the application of the NAFTA’s obligations. Thus, Claimants’ jurisdictional theory must stand or fall on their strained interpretation of the text of the USMCA Protocol.

31. Turning to Claimants’ first point, the alleged “relationship among Annexes 14-C, 14-D, and 14-E of USMCA” does not support Claimants’ interpretation of the Legacy Investment Claims Annex.²⁸ Claimants’ argument does not actually rest on the “relationship” among these three annexes. Instead, Claimants rely solely on the references to Annex 14-C and Annex 14-E in footnote 21. Claimants argue that footnote 21 would be rendered meaningless under a reading that limits Annex 14-C to pre-NAFTA-termination breaches. Claimants are wrong. Footnote 21

²⁷ United States-Morocco Free Trade Agreement, U.S.-Morocco, arts. 1.2(1), 1.3, June 15, 2004 (CL-049); 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 (CL-048); Dominican Republic-Central America-United States Free Trade Agreement, art. 1.3(1), Aug. 5, 2004 (RL-044).

²⁸ Claimants’ Observations, ¶ 29.

addresses a specific class of potential claimants, namely those who may have a claim under both Annex 14-C and Annex 14-E. These might include, for example, claimants alleging a continuing breach where the breach began before the termination of the NAFTA and continued after its termination. In the absence of footnote 21, such claimants could submit both a legacy investment claim under Annex 14-C, relying on the substantive obligations of the NAFTA because portions of the continuing breach predated its termination, and an Annex 14-E claim, relying on the USMCA with respect to portions of the continuing breach that postdate its entry into force. This situation would cause confusion about which set of obligations and which arbitral regime would apply to the same alleged breach.²⁹ Footnote 21 operates to restrict such claimants to relying on Annex 14-E, and the USMCA’s substantive obligations, for these claims. Thus, the U.S. interpretation of the Legacy Investment Claims Annex gives meaning and effect to footnote 21; contrary to Claimants’ assertion, it is not without *effet utile*.

32. Claimants’ second point is based on the Legacy Investment Claims Annex’s definition of “legacy investment,” which provides:

“legacy investment” means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, *and in existence on the date of entry into force of this Agreement . . .*³⁰

33. Claimants’ argument hinges entirely on the inclusion of the final qualifying phrase, italicized above. Claimants argue that the “only logical reason” for including this qualification “would be to protect those investments with respect to measures taken *after* USMCA entered into

²⁹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13 (U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)) (**RL-023**) (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

³⁰ Legacy Investment Claims Annex, ¶ 6(a) (**C-0002**) (emphasis added).

force”³¹ But this qualification is irrelevant to such measures. Measures taken *after* the date the USMCA entered into force could not have had any effect on an investment that had ceased to exist *before* that date, regardless of the definition of “legacy investment.” In other words, the last part of the definition carves out a category of investments that could not, in any event, have given rise to claims based on measures taken after the USMCA entered into force – it is redundant, as far as those measures are concerned.

34. By contrast, the final part of the “legacy investment” definition could have teeth with respect to measures taken, and breaches allegedly occurring, *before* the USMCA entered into force. For example, an investor could have an otherwise viable legacy investment claim based on treatment accorded while the NAFTA was in force that would be cut off by the final part of the “legacy investment” definition if that investment was no longer in existence as of the USMCA’s entry into force. Thus, to the extent the qualifier is relevant at all, it is solely with respect to the universe of alleged breaches that occurred prior to the NAFTA’s termination. It bars potential claimants who did not maintain their investments through the USMCA’s entry into force from asserting claims based on that category of breaches. It provides no support, let alone dispositive support, for Claimants’ position.

35. Claimants’ final point relies on the object and purpose of the USMCA and it is equally flawed. Claimants contend that the U.S. interpretation of the Legacy Investment Claims Annex would result in an “abrupt[] terminat[ion] [of] the ability of holders of legacy investments to assert claims under Section A of Chapter 11 of NAFTA 1994”³² that “would not promote clarity,

³¹ Claimants’ Observations, ¶ 34 (emphasis in original).

³² *Id.*, ¶ 37.

transparency, predictability, good governance, or the rule of law,” which are factors mentioned in the USMCA’s preamble.³³ There are two critical flaws in Claimants’ argument.

36. *First*, Claimants disregard the NAFTA’s lack of a survival clause. Since the NAFTA entered into force, it was known that rights to bring an investor-State NAFTA arbitration would terminate with the NAFTA itself. The fact that the Legacy Investment Claims Annex does not permit the submission of claims based on alleged breaches of the NAFTA occurring when the NAFTA was no longer in force does not constitute an “abrupt termination” of any right or ability otherwise belonging to Claimants. After all, Claimants never had a right or ability under the NAFTA to submit such claims to arbitration after the NAFTA terminated. It is wholly consistent with “good governance” and the “rule of law” for the obligations detailed in a treaty to cease being binding upon that treaty’s termination. In fact, it is the default assumption under international law, and one that Claimants have failed to overcome.³⁴ *Second*, there is nothing unclear, unpredictable, or nontransparent about the U.S. interpretation of the Legacy Investment Claims Annex. The USMCA Protocol and the Legacy Investment Claims Annex are both clear that the NAFTA terminated on the USMCA’s entry into force.³⁵ Following the NAFTA’s termination, in

³³ *Id.*, ¶ 36.

³⁴ Furthermore, as compared to the default position under the NAFTA, the Legacy Investment Claims Annex can hardly be considered an “abrupt termination” of investors’ rights. To the contrary, the Legacy Investment Claims Annex provides holders of legacy investments three additional years in which to submit claims to arbitration concerning alleged pre-termination breaches of the NAFTA, effectively honoring the three-year limitations period provided in NAFTA Articles 1116 and 1117 with respect to such investments. Claimants contend that an investor who had knowledge of an alleged breach occurring while the NAFTA was in force but did not acquire knowledge of the loss or damage arising from the breach until after the NAFTA was terminated would not benefit from the full three-year period allotted under NAFTA Articles 1116 and 1117 to bring its claims. Claimants’ Observations, ¶ 43. While Claimants may be correct that, in this specific scenario, an investor would have fewer than the three years otherwise available under NAFTA Articles 1116 and 1117, this hardly negates the broader point, which stands with respect to other categories of investors (indeed, Claimants themselves acquired knowledge of the alleged breach and their alleged loss at the same time). Moreover, accounting for the scenario that Claimants put forward would be impractical because it would require extending the Parties’ consent to arbitration indefinitely into the future. In particular, it would be impossible to determine when all losses incurred by reason of, or arising out of, the universe of potential NAFTA breaches had been discovered by all potential claimants and so it would also be impossible to put an endpoint on the Parties’ consent in the Legacy Investment Claims Annex.

³⁵ *See supra*, ¶ 12.

accordance with basic treaty law, the NAFTA's substantive obligations ceased to bind the Parties. Because the USMCA lacks a clause that would have circumvented or delayed such an outcome by extending the NAFTA's substantive obligations, treatment accorded after the NAFTA's termination cannot, in accordance with a basic principle of State responsibility, have constituted a breach of the NAFTA.³⁶

37. In short, the treaty text is clear, the applicable principles of international law are clear, and their combined effect is equally clear: paragraph 1 of the Legacy Investment Claims Annex only permits the submission of claims to arbitration based on alleged breaches occurring when the NAFTA was in force. The notion that Claimants' interpretation of the Annex – which requires nearly 18 pages of its Observations to explain – is somehow more predictable or transparent than the straightforward U.S. position is simply not credible.

38. Nor do the various statements by government officials identified in the Annex to Claimants' Observations change the analysis. Even if the Tribunal were to take them into account, these general, high-level statements do not provide material support for either interpretation of the Legacy Investment Claims Annex before the Tribunal. While Claimants focus on the fact that none of the statements “indicate[] that Annex 14-C is limited to challenging measures that predated the replacement of NAFTA 1994,”³⁷ it is equally true that *none* expressly claim that a holder of a legacy investment is entitled to assert a claim under the Annex based on an alleged breach of the NAFTA occurring after its termination. And the latter silence is far more important because, again, the USMCA was negotiated against the background of the NAFTA, an agreement that, by

³⁶ See *supra*, ¶ 10.

³⁷ Claimants' Observations, ¶ 39.

its own terms, and under customary international law, left the holders of legacy investments with no recourse whatsoever upon termination.

5) Conclusion

39. The U.S. objection to the Tribunal's jurisdiction is therefore substantial. Claimants' arguments do not come close to demonstrating otherwise. Accordingly, this factor weighs strongly in favor of bifurcation.

B. The United States' Objection Will Eliminate Claimants' Claims in Their Entirety and Bifurcation Would Promote Efficiency

40. As noted above, Claimants present no facts or argumentation with respect to whether the U.S. jurisdictional objection would dispose of the entire case.³⁸ It is uncontested that a ruling in favor of the United States on its jurisdictional objection will, in fact, result in the dismissal of all of Claimants' claims and end this matter entirely. Such a dismissal would materially reduce the time and costs necessary to resolve this case. Furthermore, the dismissal of the case can be accomplished through the single jurisdictional objection raised by the United States. Thus, both the second factor in the bifurcation test, as well as the related efficiency consideration, weigh strongly in favor of bifurcating these proceedings.³⁹

C. The United States' Objection Is Distinct From its Merits Arguments and Bifurcation Is Fair to Both Parties

41. The resolution of the U.S. jurisdictional objection will require nothing more than a straightforward treaty interpretation. The United States is asking this Tribunal to find that the Legacy Investment Claims Annex does not permit claims for breach of NAFTA Chapter 11 arising

³⁸ See *supra*, ¶ 8.

³⁹ In addition, bifurcation would promote judicial economy, as the Tribunal would have to rule only on the limited jurisdictional objection and would not have to rule on any other legal issues. See, e.g., *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award ¶ 197 (Jan. 9, 2015) (**RL-045**) (noting, after concluding that the Tribunal lacked jurisdiction due to abuse of process, that “[c]onsiderations of judicial economy suggest that the Tribunal may dispense with dealing with arguments which have no impact on the award”).

after the NAFTA was terminated and the USMCA entered into force on July 1, 2020.⁴⁰ As the date of the alleged breach is uncontested – Claimants assert that it occurred on January 20, 2021⁴¹ – the Tribunal’s analysis of the U.S. jurisdictional objection is limited to one question: does the Legacy Investment Claims Annex permit the claim?⁴² Resolution of the jurisdictional objection requires no consideration of the merits of Claimants’ claim. Thus, the third factor weighs heavily in favor of bifurcation.

42. Claimants’ assertions to the contrary are unavailing. After a summary of the factual allegations relevant to its claim on the merits, Claimants allege that the Tribunal will have to consider these facts during the jurisdictional phase to dismiss the U.S. objection on unclean hands or estoppel grounds.⁴³ The facts as alleged cannot support either of these arguments.

43. Claimants first argue that various facts underlying their claim on the merits constituted such illegal or improper conduct as to constitute unclean hands on the part of the United States that should prevent it from asserting its jurisdictional objection. The gravamen of this argument, as Claimants describe it, is that “[n]o one can be allowed to take advantage of his own wrong.”⁴⁴ This argument is meritless for one simple reason: there is no relation between the U.S. jurisdictional objection and the allegedly wrongful acts. Neither the granting nor the revocation of the Permit forms the basis of the United States’ preliminary jurisdictional objection. Rather, the only acts that the United States is “taking advantage of” in order to assert its jurisdictional

⁴⁰ *See supra*, ¶ 12.

⁴¹ Request for Arbitration, Title of Section III.C (“Respondent Breached Its NAFTA Obligations by Revoking the 2019 Permit”); *id.*, ¶ 68 (detailing how the revocation of the Permit allegedly breached the NAFTA); *see also* U.S. Request for Bifurcation, ¶ 2 & n.1. President Biden issued Executive Order 13990, which revoked the Permit, on January 20, 2021. *See* Executive Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021) (C-0011).

⁴² That the jurisdictional objection is one of treaty interpretation is confirmed by Claimants’ Observations, which include 18 pages on the question of treaty interpretation, and only five on Claimants’ remaining arguments.

⁴³ Claimants’ Observations, ¶ 57.

⁴⁴ Claimants’ Observations, ¶ 56 (citing BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 149 (Cambridge Univ. Press 2006) (1953) (CL-050)).

objection are the termination of the NAFTA and the entry into force of the USMCA. Claimants cannot and have not alleged that the agreed termination of a treaty and the entry into force of another, carried out by three sovereign States, constitutes an improper or illegal act.

44. Put another way, if Claimants are correct that the alleged U.S. breaches of the NAFTA constitute unclean hands such that they can defeat a jurisdictional objection, then no jurisdictional objection could ever be heard in an investor-State dispute. In all investor-State cases, including this one, Claimants allege an act or series of acts that they assert constitute breaches of a State's international obligations with respect to the treatment of investors. Such allegations on the merits cannot, by themselves, constitute unclean hands such that jurisdictional objections must be dismissed out of hand. Rather, those alleged breaches of international law are to be addressed at the merits stage if and only if there is jurisdiction to hear the claim.

45. Claimants' estoppel argument fares no better. In order to rely on estoppel, Claimants would have to demonstrate that there has been some "declaration, representation, or conduct" on the part of the United States "which has in fact induced reasonable reliance by" Claimants with respect to the jurisdictional objection.⁴⁵ Claimants assert that they reasonably relied on alleged conduct indicating that the permit for the Keystone XL pipeline would not be revoked.⁴⁶ But for the United States to be estopped from asserting its *jurisdictional objection*, Claimants would have to allege that they relied on a representation from the United States that Claimants would be permitted to assert breaches of NAFTA obligations that occurred after that treaty was terminated.

⁴⁵ *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award ¶ 246 (Aug. 18, 2008) (RL-046).

⁴⁶ See Claimants' Observations, ¶ 52 ("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"); *id.*, ¶ 56 ("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.")

Claimants have not alleged, nor could they, that the United States made any such representation.⁴⁷

46. Finally, there is no procedural unfairness to Claimants resulting from bifurcation. Claimants' protestations notwithstanding, the objection was raised at the earliest possible stage in these arbitral proceedings in accordance with the governing ICSID Arbitration Rules, before any briefing on the merits, document exchange, or hearings. Claimants will be given a full opportunity to brief the jurisdictional objection and will be able to limit their efforts and expenses to that objection until the case is dismissed. There is thus nothing inherently unfair about bifurcating these proceedings that puts Claimants at a disadvantage in this case.

47. Claimants' arguments with respect to "fairness" and "equity," like their arguments on unclean hands and estoppel, center on the alleged NAFTA breaches committed by the United States.⁴⁸ But once again, if the alleged NAFTA breaches render bifurcation "unfair," then no investor-State case could ever be bifurcated, because all claimants in such cases allege wrongful acts on the part of the respondents. That bifurcation may lead to a delay in proceeding to an award on the merits also cannot, by itself, be unfair, because this would likewise apply to every investor-State case and eliminate any possibility of bifurcation.

⁴⁷ It strains credulity to suggest that Claimants believed that NAFTA would remain undisturbed by the Trump Administration. President Trump, while still campaigning as a candidate in 2015, referred to the NAFTA as a "disaster" and stated that "[w]e will either renegotiate it or we will break it." Jill Colvin, *Trump: NAFTA trade deal a 'disaster,' says he'd 'break' it*, ASSOCIATED PRESS (Sept. 26, 2015) (R-0002). Moreover, in January 2017, before Claimants terminated their NAFTA claim, President Trump made clear that the NAFTA Parties would be "renegotiating" the treaty. Laura Berman, *With Trump Renewing Vow to Renegotiate NAFTA, Here's Some of the Most Vulnerable Companies*, THESTREET.COM (Jan. 22, 2017) (R-0003); see also Mike Blanchfield & Alexander Panetta, *Trump commerce nominee Ross says U.S. won't be 'pushed around' on trade*, CANADIAN PRESS (Jan. 18, 2017) (R-0004) ("Ross said it was logical that the first order of business for the new administration would be to tackle NAFTA, and he made it clear he wasn't interested in tinkering. 'I think all aspects of NAFTA will be put onto the table.'").

⁴⁸ Claimants' Observations, ¶¶ 53-56.

48. It *would* be unfair not only to disregard the United States' choice, in the termination of the NAFTA and adoption of the USMCA, to limit its consent to arbitration in investor-State disputes, but also to deny the U.S. Request for Bifurcation to have this substantial jurisdictional objection heard at the earliest possible time in the arbitration. Claimants should not be permitted to force the United States to litigate the merits of this dispute when the United States has not consented to have this dispute arbitrated. Rather, the Tribunal should bifurcate these proceedings.

IV. Conclusion

49. For the foregoing reasons, and the reasons stated in its Request for Bifurcation, the United States respectfully requests that the Tribunal bifurcate the proceedings, suspend the proceedings on the merits, and decide the United States' jurisdictional objection as a preliminary matter.⁴⁹

Respectfully submitted,



Lisa J. Grosh

Assistant Legal Adviser

John D. Daley

Deputy Assistant Legal Adviser

David M. Bigge

Chief of Investment Arbitration

Julia H. Brower

Nathaniel E. Jedrey

Melinda E. Kuritzky

Mary T. Muino

Alvaro J. Peralta

David J. Stute

Isaac D. Webb

Attorney-Advisers

⁴⁹ The United States' request to bifurcate on the basis that Claimants' claims are outside the scope of the Legacy Investment Claims Annex and of the United States' consent to arbitrate is without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.

Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520