

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

**THE UNITED STATES OF AMERICA'S
MEMORIAL ON ITS PRELIMINARY OBJECTION**

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1. In accordance with the Tribunal’s Procedural Order No. 2 of April 13, 2023, the United States hereby submits its Memorial on its Preliminary Objection to the Tribunal’s jurisdiction under Annex 14-C to the United States-Mexico-Canada Agreement (“USMCA”), as well as the expert reports of Professor Richard Gardiner and Professor Hervé Ascensio.¹

I. Introduction

2. The United States objects to the Tribunal’s jurisdiction because the USMCA Parties’ consent to arbitration in Annex 14-C is limited to claims for the breach of certain obligations under the North American Free Trade Agreement (“NAFTA”) and Claimants cannot assert a breach of the NAFTA. The reason is simple: the NAFTA terminated on July 1, 2020, and Claimants’ claims are based exclusively on an event – President Biden’s revocation of the permit for the Keystone XL pipeline – that occurred more than six months later, on January 20, 2021. The permit revocation could not have breached the NAFTA because it occurred at a time when the United States was, as a result of the NAFTA’s termination, no longer bound to perform the relevant NAFTA obligations.

3. In an effort to remedy this dispositive flaw in their jurisdictional case, Claimants argue that Annex 14-C does more than extend the USMCA Parties’ consent to the arbitration of claims based on alleged breaches of the NAFTA. Claimants contend that Annex 14-C, in combination with the Protocol Replacing the NAFTA with the USMCA (the “USMCA Protocol”), contains an implicit agreement by the USMCA Parties that, despite the NAFTA’s termination and the absence of any survival provision in the NAFTA itself, the NAFTA’s substantive investment

¹ In this memorial, the United States cites Professor Gardiner’s Report as “Gardiner Report ¶ X” and Professor Ascensio’s Report as “Ascensio Report ¶ X”.

obligations would continue to bind them for three additional years beyond the NAFTA's termination.

4. Claimants cannot, however, point to any language in Annex 14-C reflecting such an agreement. No provision of Annex 14-C states that the substantive investment obligations in Section A of NAFTA Chapter 11 "shall continue to apply" or "shall remain in force" with respect to investors or their investments for any period of time after the NAFTA's termination. Rather, Annex 14-C provides only the USMCA Parties' "consent[], with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B" of NAFTA Chapter 11 and Annex 14-C, for alleged breaches of Section A of NAFTA Chapter 11, and specifies that such consent "shall expire three years after the termination of NAFTA 1994." The consent to arbitrate claims for an additional three years after the NAFTA's termination did not extend the substantive obligations themselves for an additional three years.

5. Nor does the USMCA Protocol help Claimants. The fact that the USMCA Parties' termination of the NAFTA was "without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA" cannot transform Annex 14-C into an agreement to extend the application of the NAFTA simply because it refers to the NAFTA. Rather, this "without prejudice" language accomplishes precisely what it says, ensuring that those parts of the USMCA that refer to the NAFTA are effective despite the fact that the NAFTA was itself terminated.

6. If the USMCA Parties had agreed to bind themselves to perform the NAFTA's substantive investment obligations for three additional years after the NAFTA had been terminated, that commitment would have been clear and unequivocal. Its absence from Annex 14-C is just as clear. Indeed, Professor Gardiner, whose well-regarded treatise on treaty

interpretation has been cited by both parties in this case, and Professor Ascensio, an expert in, among other topics, Article 70 of the Vienna Convention on the Law of Treaties, both opine that the USMCA Parties consented in Annex 14-C only to arbitration of claims based on alleged breaches occurring before the NAFTA's termination.²

7. Claimants' claims are outside the scope of Annex 14-C and the Tribunal has no jurisdiction to hear them. They must be dismissed.

II. Claimants Have Failed to Establish the Tribunal's Jurisdiction Over Their Claims

8. A State's consent to arbitration is paramount for the jurisdiction of an arbitral tribunal hearing a dispute against that State.³ Consent is the "cornerstone" of jurisdiction in investor-State arbitration,⁴ and it is therefore axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent.⁵ Claimants have the burden to establish the United States' consent to

² Gardiner Report ¶ F.2; Ascensio Report ¶¶ 8, 33.

³ See, e.g., ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 74, ¶ 125 (2009) (**RL-010**) ("Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself."); *AsiaPhos Ltd. & Norwest Chemicals Pte Ltd. v. China*, ICSID Case No. ADM/21/1, Award ¶ 59 (Feb. 16, 2023) (**RL-047**) ("[T]he jurisdiction of any arbitral tribunal should be based on the clear and unambiguous consent of both parties to have their dispute resolved by arbitration. This applies, in particular, in investment disputes where one of the parties is a sovereign State, which generally enjoys jurisdictional immunity from being sued in any kind of proceedings outside of its own State courts. Only where a State has waived its jurisdictional immunity by expressing its consent to have a dispute resolved by international arbitration in a clear and unambiguous manner does an arbitral tribunal have jurisdiction to decide on that dispute.") (internal citations omitted).

⁴ As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank's Member Governments, "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965) (**RL-012**).

⁵ *Renco Group Inc. v. Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 71 (July 15, 2016) (**RL-013**) ("It is axiomatic that the Tribunal's jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru."). See also CHRISTOPH SCHREUER, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 831 (Peter Muchlinski et al., eds., 2008) (**RL-014**) (explaining that "[l]ike any form of arbitration, investment arbitration is always based on an agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal's jurisdiction."); BORZU SABAHI ET AL., *INVESTOR-STATE ARBITRATION* 309, ¶ 9.01 (2d ed. 2019) (**RL-015**) (explaining that "[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals").

arbitrate this dispute.⁶ Because Claimants have failed to carry their burden, the Tribunal cannot exercise jurisdiction over this dispute.

9. The alleged basis for the USMCA Parties' consent to arbitration and the Tribunal's jurisdiction is Annex 14-C (Legacy Investment Claims and Pending Claims).⁷ The Tribunal's task in this phase of the case is therefore to interpret Annex 14-C, guided by the customary international law principles reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

10. Paragraph 1 of Annex 14-C defines the scope of the USMCA Parties' consent to arbitration:

Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:

- (a) Section A of Chapter 11 (Investment) of NAFTA 1994;
- (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and
- (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994.⁸

⁶ *ICS Inspection & Control Services Ltd. v. Argentina*, PCA Case No. 2010-09, Award on Jurisdiction ¶ 280 (Feb. 10, 2012) (**RL-048**) ("The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined."). See also *Pugachev v. Russia*, Award on Jurisdiction ¶ 248 (June 18, 2020) (**RL-049**) (noting that "[i]t is an accepted principle of international law that the claimant in an arbitration bears the legal burden of showing that the tribunal has jurisdiction to consider its claim").

⁷ The USMCA's other dispute resolution annexes, Annexes 14-D and 14-E, do not cover claims by Canadian investors.

⁸ Annex 14-C, ¶ 1 (footnotes omitted) (**C-0002**). The version of the USMCA that Claimants have submitted as Exhibit C-0002 does not appear to include the changes agreed in the December 10, 2019 Protocol of Amendment to the USMCA. Nevertheless, for ease of reference during this phase of the proceedings, the United States will continue to refer to Exhibit C-0002.

11. Paragraph 1 specifies that the Parties' consent to arbitration is limited to claims that allege breaches of the three sets of NAFTA obligations enumerated in subparagraphs (a) to (c).⁹ As explained in Article 13 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, "[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."¹⁰ Accordingly, in order to establish that their claims based on the January 2021 revocation of the Keystone XL pipeline can be submitted to arbitration under Paragraph 1 of Annex 14-C, Claimants must show that the NAFTA's obligations remained binding on the United States – and could, therefore, be breached by the United States – *when* that act occurred.¹¹ If not, Claimants' claims are outside the scope of Annex 14-C.

12. The NAFTA terminated as of the USMCA's entry into force on July 1, 2020.¹² Pursuant to customary international law principles reflected in Article 70 of the Vienna Convention, the

⁹ Paragraph 1 places other conditions on the Parties' consent, which will be discussed in more detail below. *See infra* ¶¶ 25-32.

¹⁰ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001) (**RL-023**). *See also* Ascensio Report ¶ 28 ("A breach must relate to a legal rule in force; if not, there would be no obligation and, consequently, no breach.").

¹¹ As Professor Schreuer observed with respect to consent to arbitration limited to claims alleging violations of a specific treaty: "[T]he entry into force of the substantive law also determines the tribunal's jurisdiction *ratione temporis* since the tribunal may only hear claims for violation of that law. For instance, under the NAFTA, the scope of the consent to arbitration is limited to claims arising from alleged breaches of the NAFTA itself." CHRISTOPH SCHREUER, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 859-60 (Peter Muchlinski et al., eds., 2008) (**RL-014**). Though Professor Schreuer's comments focused on a treaty's entry into force, his reasoning is equally sound as applied to a treaty's termination. *See also* Humphrey Waldo, Third Report on the Law of Treaties 11 (¶ 4), U.N. Doc. A/CN.4/167 (1964) (**RL-050**) ("[W]hen a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. The reason is that the 'disputes' with which the clause is concerned are *ex hypothesi* limited to 'disputes' regarding the interpretation and application of the substantive provisions of the treaty which, as has been seen, do not normally extend to matters occurring before the treaty came into force.").

¹² 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**) ("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). *See also* Annex 14-C, ¶ 3 (**C-0002**) ("A Party's consent under paragraph 1 shall expire three years after *the termination of NAFTA 1994*.")

NAFTA’s termination “release[d] the parties from any obligation further to perform the treaty,” subject to an agreement by the Parties, in the NAFTA or elsewhere, to extend the application of those obligations.¹³ The NAFTA itself contains no survival provision and, accordingly, the Tribunal’s jurisdiction hinges on whether the USMCA memorializes an agreement to be bound by the NAFTA’s substantive investment obligations for a period after the NAFTA’s termination. This is the critical question before the Tribunal.

13. Claimants have argued that Paragraph 1 of Annex 14-C, in addition to defining the scope of the USMCA Parties’ consent to arbitration, also extends the substantive obligations in Section A of NAFTA Chapter 11. As the United States will demonstrate in the sections that follow, it does not. Annex 14-C extends the Parties’ *consent to arbitrate* alleged breaches of the obligations in NAFTA Chapter 11, Section A for a period of three years after the NAFTA terminates. It does not extend *the obligations themselves* past the NAFTA’s termination. As Professor Gardiner confirms: “[T]he consent in Annex 14-C is consent only to submission to arbitration of claims alleging breach of obligations relating to acts and events taking place before the NAFTA, as the source of those obligations, was superseded on 1 July 2020.”¹⁴ Professor Ascensio is in accord: “Annex 14-C does not apply to claims alleging breaches of NAFTA occurring after its termination[.]”¹⁵

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

¹³ Vienna Convention on the Law of Treaties, art. 70(1)(a) (**RL-016**).

¹⁴ Gardiner Report ¶ F.2.

¹⁵ Ascensio Report ¶ 8. *See also id.* ¶ 33 (“Annex 14-C of USMCA, which contains the State’s consent to arbitration, relates to violations of NAFTA that occurred when this treaty was in force. It does not cover an alleged

14. The January 2021 permit revocation therefore cannot constitute a breach of the NAFTA.¹⁶ Claimants' claims based on the permit revocation are, accordingly, outside the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C and must be dismissed.

A. Annex 14-C, Interpreted in Accordance with Article 31 of the Vienna Convention, Does Not Extend the Application of the NAFTA's Substantive Investment Obligations

15. Article 31(1) of the Vienna Convention provides that “[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.”¹⁷ As the International Law Commission explained in its commentary on the draft text of the Vienna Convention, Article 31 “is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.”¹⁸

16. As reflected in the three sections that follow, a good faith interpretation of Annex 14-C's terms (1) in accordance with their ordinary meaning, (2) in context, and (3) in light of the

breach of the NAFTA due to events that took place after it terminated, *i.e.*, after 1st July 2020, as in the present case.”).

¹⁶ Accordingly, Claimants' repeated refrain that their claims satisfy all elements set out in Paragraphs 1 and 3 of Annex 14-C is wrong. *See, e.g.*, Claimants' Rejoinder Regarding Respondent's Request for Bifurcation ¶ 25 (Mar. 22, 2023) (“Claimants' Rejoinder on Bifurcation”).

¹⁷ Vienna Convention on the Law of Treaties, art. 31(1) (**RL-016**).

¹⁸ International Law Commission, Draft Articles on the Law of Treaties with commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 220 (¶ 11), U.N. Doc. A/CN.4/SER.A/1966/Add.1 (**CL-032**); *id.* 223 (¶ 18). *See also* Gardiner Report ¶ A.7 (“The rules of the Vienna Convention on the Law of Treaties 1969 apply. These rules have been accepted internationally as stating the customary international law rules for interpretation of treaties. Under these rules the starting point is the text.”) (citations omitted). Claimants' attempted use of statements by former government officials to suggest that the U.S. interpretation of Annex 14-C is not in “good faith” (Claimants' Rejoinder on Bifurcation ¶¶ 19-23) is wholly inconsistent with Article 31's focus on the treaty text. The statements that Claimants have identified may be taken into account, if at all, only as supplementary means of interpretation under Article 32 of the Vienna Convention. As explained below, however, these statements do not assist the Tribunal in answering the interpretive question before it. *See infra* ¶¶ 65, 84-92.

USMCA’s object and purpose confirms unequivocally that the USMCA Parties did not bind themselves to apply the NAFTA’s substantive investment obligations after its termination.

1) Annex 14-C’s Text Contains No Agreement to Extend the NAFTA’s Substantive Investment Obligations

a. The Overall Structure of Annex 14-C Demonstrates That It Provides Consent to Arbitrate, but Does Not Extend Substantive Obligations

17. Annex 14-C contains no text that constitutes an agreement by the USMCA Parties to bind themselves to the continued application of the NAFTA’s substantive investment obligations for three years after its termination.¹⁹ There is little need to take the interpretive exercise further because Claimants’ reading falls at this first hurdle.

18. Annex 14-C is not a complex provision. Each of its paragraphs has a single clear function. Paragraphs 1, 2, and 3 establish the substantive and temporal scope of the USMCA Parties’ consent to arbitration. Specifically,

- Paragraph 1 establishes the scope of the USMCA Parties’ consent to arbitration.
- Paragraph 2 provides that such consent, together with the submission of a claim to arbitration, shall satisfy the requirements of certain other international agreements.
- Paragraph 3 imposes a temporal limit on the USMCA Parties’ consent, providing that it “shall expire three years after the termination of NAFTA 1994.”

¹⁹ As Professor Ascensio concludes, “the analysis of USMCA shows that there is no transition period provided for in it, but that some specific provisions make reference to certain NAFTA provisions in order to extend their effect over time. Under Chapter 14 of USMCA, only Annex 14-C contains provisions of this type. They allow the NAFTA investor-to-State arbitration procedure to continue to be used to resolve the category of disputes named ‘legacy investment claims’. But there is no provision for the substantive obligations of NAFTA to be extended.” Ascensio Report ¶ 32.

19. Paragraphs 4 and 5 deal with proceedings initiated pursuant to the Parties' consent to arbitration. Paragraph 4 provides that arbitrations initiated under Paragraph 1 within the three-year time limit provided in Paragraph 3 may proceed to conclusion, and that "the Tribunal's jurisdiction with respect to such a claim is not affected by the expiration of consent referenced in paragraph 3." Paragraph 5 provides that an arbitration initiated while the NAFTA was in force may proceed to conclusion, unaffected by the NAFTA's termination. Finally, Paragraph 6 provides definitions applicable to Annex 14-C.²⁰

20. Critically, not one of these six paragraphs says anything about the continued application of the NAFTA's substantive investment obligations to investors or their investments.

21. Claimants' jurisdictional argument hinges on the text of Paragraph 1 of Annex 14-C. In Claimants' view, Paragraph 1 of Annex 14-C performs double duty, embodying both the USMCA Parties' consent to arbitration *and* a purported agreement to remain bound by the NAFTA's substantive investment obligations for a further three years. But only the former commitment appears in the text; there is no mention of the latter. Paragraph 1 states that the USMCA Parties "consent" to the arbitration of certain alleged NAFTA breaches, not that they agree to the extension of any of the NAFTA's substantive obligations.

22. The remaining paragraphs of Annex 14-C reinforce the conclusion that Paragraph 1 deals solely with the USMCA Parties' consent to arbitration. Paragraph 2 addresses the effect of "[t]he *consent* under paragraph 1" in combination with the submission of a claim to arbitration.²¹ Paragraph 3 provides that "[a] Party's *consent* under paragraph 1 shall expire three years after the

²⁰ Annex 14-C also includes two footnotes, which are discussed in further detail below (¶¶ 47-58), but for present purposes it is enough to say that neither includes an agreement to the extended application of the NAFTA's substantive obligations.

²¹ Annex 14-C, ¶ 2 (C-0002) (emphasis added).

termination of NAFTA 1994.”²² The specific language of Paragraph 3 is telling. Had Paragraph 1 been intended to memorialize an agreement between the USMCA Parties to extend the application of the NAFTA’s substantive investment obligations, not only would such an intent be evident from the text of that provision – and, to be clear, it is not – but one would also expect Paragraph 3 expressly to relieve the Parties from any obligation further to perform the NAFTA’s obligations after three years. It does not do so. Instead, Paragraph 3 ends only the USMCA Parties’ consent to arbitrate legacy investment claims, further confirming that such consent is Paragraph 1’s sole object.

23. Paragraph 4 is also consistent with this conclusion. Paragraph 4 provides that, “[f]or greater certainty, an arbitration initiated pursuant to the submission of a claim under paragraph 1 may proceed to its conclusion,” and that “the Tribunal’s jurisdiction with respect to such a claim is not affected by the expiration of *consent* referenced in paragraph 3.”²³ Again, the focus is on the USMCA Parties’ consent: such consent is given in Paragraph 1 and expires pursuant to Paragraph 3.

24. Finally, the text of Footnote 21, which creates a carveout from Paragraph 1, has a similar effect. In describing the carveout, Footnote 21 provides that “Mexico and the United States do not *consent* under paragraph 1” with respect to a specific category of investors.²⁴ Again, the focus is on the “consent” provided by the USMCA Parties under Paragraph 1. There is no reference to an agreement by the Parties to extend the application of the NAFTA’s substantive investment obligations, nor any attempt to carve investors out from that purported commitment.

²² *Id.*, ¶ 3 (emphasis added).

²³ *Id.*, ¶ 4 (emphasis added).

²⁴ *Id.*, ¶ 1 n.21 (emphasis added). *See also infra* ¶¶ 50-55.

b. Paragraph 1 of Annex 14-C Is Not an Agreement to Extend the NAFTA's Substantive Investment Obligations

25. Paragraph 1, the critical paragraph for Claimants' arguments, sets out the three key parameters of the USMCA Parties' consent to arbitration. None of these parameters includes an agreement of the Parties to extend the NAFTA's substantive obligations.

i. Claims Must Relate to a "Legacy Investment"

26. Paragraph 1 limits the Parties' consent to arbitrate to "legacy investments." "Legacy investment" is defined in Paragraph 6 of Annex 14-C 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."²⁵ This definition limits the USMCA Parties' consent to arbitration in two ways: (1) the investment must have been established or acquired during the period when the NAFTA was in force and, (2) the investment must still have been in existence on the date the USMCA entered into force. It therefore excludes from the USMCA Parties' consent investments that both pre-date the NAFTA, and investments that, despite having been established or acquired while the NAFTA was in force, were no longer in existence on the date the USMCA replaced the NAFTA.

27. In their bifurcation briefing, Claimants argued that the final clause in Annex 14-C's definition of "legacy investment" – requiring that an investment be "in existence" as of the USMCA's entry into force – supports their interpretation of the Annex. According to Claimants, this clause shows that the USMCA Parties were "focused on providing continuing protection of legacy investments."²⁶ This is not an "ordinary meaning" textual analysis. Such an analysis, had Claimants conducted one, would have confirmed that there is no discussion of "continu[ed]

²⁵ *Id.*, ¶ 6(a).

²⁶ Claimants' Rejoinder on Bifurcation ¶ 61 (emphasis omitted).

protection” of investments through the extension of substantive obligations of the NAFTA; rather, the definition of “legacy investments” merely serves to define and limit the scope of the USMCA Parties’ consent to arbitrate.

28. In any event, Claimants’ argument makes little sense. The final clause of the “legacy investment” definition – which, again, excludes investments that were not in existence when the USMCA entered into force – is redundant with respect to measures taken *after* the date the USMCA entered into force, as such measures could not have had any effect on an investment that had ceased to exist *before* that date, regardless of the definition of “legacy investment.”

29. Rather, the limitation on consent provided by the “legacy investment” definition only makes sense with respect to measures taken *before* the USMCA entered into force. The “legacy investment” definition serves to foreclose the USCMA Parties’ consent to arbitrate NAFTA claims with respect to investments that were established or acquired while the NAFTA was in force but were no longer “in existence” as of the entry into force of the USMCA. This category of investments could only have been affected by measures taken while they were in existence, *i.e.*, measures taken before the USMCA’s entry into force. Accordingly, the “legacy investment” definition does not support Claimants’ assertion that the USMCA Parties were focused on providing protection of legacy investments under the NAFTA that would continue after the USMCA’s entry into force.

ii. Claims Must Be Submitted to Arbitration in Accordance with Section B of NAFTA Chapter 11

30. Paragraph 1 indicates that claims must be submitted to arbitration in accordance with Section B of NAFTA Chapter 11. NAFTA Chapter 11 was divided into two sections: Section A established the substantive obligations each Party undertook with respect to covered investors and

investments, while Section B provided the investor-State dispute resolution mechanism for allegations of breach of the substantive obligations of Section A. The USMCA’s investor-State dispute resolution mechanism is sharply curtailed compared to Section B of NAFTA Chapter 11.²⁷ Annex 14-C indicated the USMCA Parties’ consent that, for three years after the termination of the NAFTA, investors with “legacy investments” alleging NAFTA breaches could continue to utilize the broader investor-State dispute resolution mechanism set out in Section B of NAFTA Chapter 11.

iii. Claims Must Allege a Breach of One of the Specified NAFTA Obligations

31. The final clause of Paragraph 1 limits the scope of the USMCA Parties’ consent to arbitration to claims for breach of the obligations included in NAFTA Chapter 11, Section A, and two articles of NAFTA Chapter 15. As Professor Gardiner opines, “[a]n obligation under Section A of Chapter 11 is one binding on the states parties to that treaty when the acts or events that are the subject of claims in the arbitration occurred.”²⁸ Thus, this limitation necessarily excludes (1) any claims not arising under the specified NAFTA clauses, and (2) claims based on acts occurring when the USMCA Parties were not bound by the specified NAFTA obligations. Nothing in the final clause of Paragraph 1 could be read to extend the application of the specified NAFTA obligations past the NAFTA’s termination.²⁹ And any argument that Paragraph 1 has such an effect cannot be based on an “ordinary meaning” analysis.

²⁷ For example, under Annex 14-D investors must first resort to local remedies before commencing investor-State arbitration, and can only bring investor-State claims for direct expropriation, national treatment, and most-favored-nation treatment. USMCA, Arts. 14.D.3(1)(a)(i), 14.D.5(1) (C-0002). Except with respect to investors eligible to submit claims under Annex 14-E, claims for indirect expropriation and minimum standard of treatment must be advanced by the investor’s home State.

²⁸ Gardiner Report ¶ E.3.

²⁹ Ascensio Report ¶ 28 (“Since the substantive provisions of the NAFTA have ceased to be in force on 1st July 2020, there can be no ‘breach’ of a substantive NAFTA obligation related to foreign investments after that date,

32. In sum, Paragraph 1 does nothing more than memorialize the USMCA Parties' consent to extend by three years the time during which a claimant with a "legacy investment" might assert a breach of the NAFTA and utilize the NAFTA's dispute resolution mechanism. Nowhere in Annex 14-C is there an agreement by the USMCA Parties to continue to be bound by the substantive obligations of NAFTA Chapter 11, Section A, during that same three-year period. Claimants seek to insert additional language in Paragraph 1, to the effect that the substantive obligations under Section A shall continue to apply for three years despite the NAFTA's termination. But that would be treaty revision, not treaty interpretation.

2) The Context of Annex 14-C Confirms That It Does Not Extend the NAFTA's Substantive Investment Obligations

33. The context of Annex 14-C further confirms that it cannot be read as an agreement to extend the application of the NAFTA's substantive investment obligations. Four aspects of the context in which Annex 14-C must be interpreted support the ordinary meaning of Paragraph 1: (a) the Preamble to the USMCA ("Preamble") and the USMCA Protocol; (b) the placement of Annex 14-C within the USMCA; (c) the footnotes to Annex 14-C; and (d) Article 34.1 of the USMCA.

a. The Preamble and the USMCA Protocol Emphasize the NAFTA's Termination and Its Replacement by the USMCA

34. The Preamble and the USMCA Protocol provide two points of supportive context for the U.S. interpretation of Annex 14-C. Both the Preamble and the USMCA Protocol make clear, *first*, that the USMCA Parties were bringing the NAFTA to an end and, *second*, that they were replacing it with a new and different trade and investment regime set out in the USMCA.

unless the USMCA extends such substantive obligations. As this expert sees no language in Annex 14-C or otherwise extending the substantive obligations of NAFTA Chapter 11, Section A, the 'breach of an obligation' necessarily refers to a breach of NAFTA predating its termination.").

35. Beginning with the Preamble, it states in its third paragraph that the USMCA Parties had resolved to:

REPLACE the 1994 North American Free Trade Agreement 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;³⁰

36. The USMCA Protocol, which is titled in full the “Protocol *Replacing* the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada”³¹ has similar language. The USMCA Protocol states in Paragraph 1 the USMCA Parties’ agreement that: “Upon entry into force of this Protocol, the USMCA . . . shall *supersede* the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.”³²

37. Annex 14-C itself was also drafted with the NAFTA’s termination firmly in mind, referring to it in three of the Annex’s six paragraphs.³³ For example, Paragraph 3 of Annex 14-C states: “A Party’s consent under paragraph 1 shall expire three years after the *termination* of NAFTA 1994.”³⁴

³⁰ Preamble to the USMCA ¶ 3 (C-0002).

³¹ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (R-0001) (emphasis added).

³² *Id.* ¶ 1 (R-0001) (emphasis added).

³³ Notably, Annex 14-C is one of the few parts of the USMCA, other than the USMCA Protocol and Preamble, that mentions the NAFTA’s termination.

³⁴ Annex 14-C, ¶ 3 (C-0002) (emphasis added); *see also 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).

38. The Preamble and the USMCA Protocol, together with the references to the NAFTA's termination in Annex 14-C, show that the USMCA Parties intended to leave the NAFTA behind in favor of the USMCA. The Preamble and the USMCA Protocol are wholly consistent with the U.S. interpretation of Annex 14-C, which ensures that the USMCA Parties' conduct after the agreement's entry into force with respect to investors and their investments would be assessed exclusively under Chapter 14 of the USMCA. Chapter 14, as compared to Chapter 11 of the NAFTA, includes entirely new provisions (*e.g.*, USMCA Articles 14.15 (Subrogation) and 14.17 (Corporate Social Responsibility)) and numerous revisions and clarifications to the text regarding substantive investment obligations. Moreover, claims alleging breach of the Chapter 14 obligations are subject to the USMCA's more restrictive investor-State dispute settlement regime, as embodied in Annexes 14-D and 14-E.

39. Claimants' interpretation of Annex 14-C would, by contrast, result in a period after the USMCA's entry into force during which the USMCA Parties' conduct would, with respect to legacy investments, be subject to two distinct sets of substantive investment obligations and could be the subject of arbitration under investor-State dispute settlement regimes in two different international agreements. Such an overlap is nowhere expressly contemplated by the USMCA Parties,³⁵ and Claimants' interpretation of Annex 14-C is incompatible with the Preamble and USMCA Protocol.

³⁵ As discussed below, the United States has, in certain instances, permitted the temporary coexistence of an older bilateral investment treaty and a new free trade agreement with the same counterparty. *See infra* ¶¶ 76-77. However, where it has done so, the United States and its counterparties have been clear about this intention by leaving the bilateral investment treaty in force. Here, by contrast, the United States and its counterparties terminated the NAFTA. The termination of the NAFTA, among other things, makes it clear that the USMCA Parties did not intend for the NAFTA's substantive investment obligations to be in force at the same time as the USMCA's substantive investment obligations.

40. In their bifurcation briefs, Claimants attempted to put the USMCA Protocol to a very different use. Rather than focusing on the stated purpose of the USMCA Protocol – namely, the replacement of the NAFTA with the USMCA – Claimants instead drew attention to the “without prejudice” phrase at the end of Paragraph 1. Claimants argued that this phrase means that “when provisions of USMCA refer to provisions of NAFTA 1994, the NAFTA provisions remain applicable despite the fact that USMCA replaced NAFTA 1994.”³⁶

41. The problem with Claimants’ reading of the USMCA Protocol is that it does not say anything about “NAFTA provisions remain[ing] applicable” following the NAFTA’s termination. Rather, Paragraph 1 of the USMCA Protocol seeks only to avoid “prejudice” to those USMCA provisions that refer to the NAFTA. These provisions must, in accordance with the USMCA Protocol, be permitted to function as written, despite the termination of the provisions of the NAFTA to which those references relate. The application of the USMCA Protocol’s “without prejudice” language therefore depends entirely on the meaning of each of the USMCA provisions at issue.

42. Paragraph 1 of Annex 14-C memorializes the USMCA Parties’ consent to arbitration of claims alleging certain breaches of the NAFTA (which could only arise while the NAFTA was still in force), under the dispute resolution framework in NAFTA Chapter 11, Section B. The “without prejudice” language in the USMCA Protocol ensures that this consent is given force. It eliminates the possibility of any dispute over whether the consent in Paragraph 1 of Annex 14-C is valid, despite the termination of the NAFTA and the consequent withdrawal of the Parties’

³⁶ Claimants’ Observations on Respondent’s Request for Bifurcation of Preliminary Objection ¶ 27 (Feb. 10, 2023) (“Claimants’ Observations on Bifurcation”). *See also* Claimants’ Rejoinder on Bifurcation ¶ 27 (asserting that “the only way to ‘avoid prejudice’ to the USMCA provisions that refer to provisions of NAFTA 1994 is to give effect to those NAFTA provisions.”).

consent to arbitration of NAFTA claims reflected in NAFTA Article 1122. The “without prejudice” language in the USMCA Protocol cannot, however, be read to supplement Paragraph 1 of Annex 14-C with an additional commitment to extend the application of the NAFTA’s substantive investment obligations, which is entirely absent from its text.³⁷

43. The Preamble and the USMCA Protocol therefore both support the U.S. interpretation of Annex 14-C. Consistent with the Preamble and the USMCA Protocol, Annex 14-C allows for claims based on alleged breaches of the NAFTA occurring while the NAFTA was in force, while likewise ensuring that alleged breaches occurring after the USMCA entered into force would be subject to the USMCA’s substantive investment obligations and (more limited) investor-State dispute settlement regime.³⁸

b. Annex 14-C Is a Dispute Resolution Annex and Does Not Impose Substantive Investment Obligations

44. The structure of the USMCA provides further contextual support for the ordinary meaning of Annex 14-C. The USMCA separates the articles relating to the Parties’ substantive investment obligations from those relating to investor-State dispute settlement, including provisions reflecting the Parties’ consent to arbitration. The USMCA’s substantive investment obligations are set out in the main body of Chapter 14, whereas the provisions on investor-State dispute settlement are in

³⁷ Similarly, in USMCA Article 5.19, the Parties agreed to establish a Sub-Committee on Origin Verification. Among this Sub-Committee’s functions is, according to Article 5.19(3)(b), “developing and improving the NAFTA 1994 Audit Manual and recommending verification procedures.” USMCA, Art. 5.19(3)(b) (C-0002). Nothing in this Article suggests that the relevant NAFTA obligations on origin verification still applied, but the USMCA Protocol’s “without prejudice” clause avoids any confusion about whether the Sub-Committee could undertake this task despite the NAFTA’s termination. Similarly, Article 10.12(15) requires the USMCA Parties to maintain or amend certain statutes related to antidumping and countervailing duties in their domestic legislation. USMCA, Art. 10.12(15) (C-0002). Among the statutes to be maintained are those each Party listed in its Annex to NAFTA Article 1904.15. The “without prejudice” clause simply ensures that the termination of the NAFTA does not render that reference a dead letter. Again, nothing in this reference to NAFTA in USMCA Article 10.12(15) suggests that the “without prejudice” clause in the USMCA Protocol meant that NAFTA Article 1904.15 itself “remain[ed] applicable,” as Claimants argue.

³⁸ The USMCA also offers State-to-State dispute settlement under Chapter 31.

Annexes 14-C, 14-D, and 14-E. This separation mirrors the structure of NAFTA Chapter 11, in which Section A contained the agreement’s substantive investment obligations and Section B contained provisions – including provisions expressing the Parties’ consent to arbitration – related to investor-State dispute settlement.³⁹

45. The separation of the USMCA Parties’ substantive investment obligations from the provisions governing investor-State dispute resolution reflects, among other things, the distinct nature of the consent to arbitration.⁴⁰ Consent to arbitration is an offer that the parties to an investment treaty extend, subject to certain conditions, to individual investors, and “[t]he perfected consent is not a treaty but an agreement between the host State and the investor.”⁴¹ The agreement to be bound by specific substantive investment obligations is, by contrast, more typical of commitments that treaty parties make to each other.⁴²

46. The terms of Annex 14-C must therefore be read in light of their placement outside of the main body of Chapter 14 – which contains the substantive investment obligations of the USMCA

³⁹ MEG N. KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 at 37 (2006) (**RL-051**) (“Section A of Chapter 11 sets forth the primary obligations of the Parties, while Part B sets forth the investor-State dispute resolution mechanism.”); *see also id.* 38 (“Section B . . . sets forth the dispute resolution procedures for arbitration that an investor of one NAFTA Party may institute against one of the other NAFTA Parties in which it is making, seeks to make, or has made an investment. Section B contains no substantive rights or obligations, but is devoted to the mechanism by which an investor may seek redress.”).

⁴⁰ Gardiner Report ¶ A.6 (“Consent underlies obligations relating to the arbitral process. In treaties, these obligations are typically in a set of provisions essentially distinct from the substantive provisions on treatment of investments. . . . Thus, the treaty structure of both the NAFTA and USMCA includes a body of substantive rules for treatment of investments and a body of jurisdictional and procedural rules for arbitration of disputes over the substantive rules.”).

⁴¹ CHRISTOPH SCHREUER, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 864 (Peter Muchlinski et al., eds., 2008) (**RL-014**).

⁴² Indeed, underlining the distinction between substantive investment protections, but that do not include a State’s consent to arbitrate disputes related to those protections directly with investors (such protections may, depending on the treaty, be subject to interstate dispute resolution provisions). For example, the U.S.-Australia Free Trade Agreement (2004) includes a full chapter on investment but does not include a consent to arbitrate directly with investors. United States-Australia Free Trade Agreement, U.S.-Aus., Chapter 11, May 18, 2004 (**RL-052**). The United States also maintains numerous Friendship, Commerce, and Navigation Treaties or Treaties of Amity that include protections for foreign investors but do not include consent to arbitrate directly with those investors. Treaty of Friendship, Commerce and Navigation, U.S.-Den., Oct. 1, 1951, 421 U.N.T.S. 105 (**RL-053**).

Parties – and in one of the investor-State dispute resolution annexes. This context confirms that Annex 14-C does not itself bear on the substantive investment obligations that bind the USMCA Parties. Again, it concerns only the USMCA Parties’ consent to arbitration, and no language in Annex 14-C extended the NAFTA’s substantive investment obligations beyond its termination.

c. The Footnotes to Annex 14-C Are Consistent with the U.S. Interpretation

47. Claimants rely on Footnote 20 and, more heavily, on Footnote 21 to Annex 14-C to support their interpretation of the Annex. But these footnotes do not assist Claimants.

48. Footnote 20 states that, “[f]or greater certainty, the relevant provisions in” various NAFTA chapters “apply with respect to . . . a claim” submitted to arbitration pursuant to Paragraph 1 of Annex 14-C. As use of the words “for greater certainty” signals,⁴³ Footnote 20 merely acknowledges that the relevant parts of the NAFTA that may relate to a claim brought under Paragraph 1, including definitions (NAFTA Chapter 2) and exceptions/reservations (NAFTA Chapter 21 and Annexes), apply to “a claim” based on breaches that occurred while the NAFTA was in force, despite the NAFTA’s termination.⁴⁴ It is a straightforward application of the general principle of intertemporal law that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”⁴⁵ Pursuant to this principle, an act occurring while the NAFTA was in force

⁴³ As a general practice, the United States uses the words “for greater certainty” in its international trade and investment agreements to introduce confirmation regarding the meaning of the agreement. In other words, the phrase “for greater certainty” signals that the text it introduces reflects the understanding of the United States and the other treaty party or parties of what the provisions of the agreement would mean even if the text following the phrase were absent.

⁴⁴ *See supra* ¶¶ 12-13, 17-32 (showing that the USMCA Parties’ consent to arbitration in Paragraph 1 of Annex 14-C is limited to claims based on alleged breaches occurring after the NAFTA entered into force and before it terminated on July 1, 2020).

⁴⁵ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, art. 13, [2001] 2 Y.B. Int’l L. Comm. 1, 57 (¶ 1), U.N. Doc. A/56/10 (2001) (**RL-054**) (internal citations omitted).

must be assessed in accordance with the substantive investment obligations of the NAFTA, while an act occurring after the NAFTA's termination and the USMCA's entry into force must be assessed in accordance with the USMCA's substantive investment obligations.⁴⁶ Footnote 20 is therefore wholly consistent with the U.S. interpretation of Annex 14-C, as described above, and it provides no support for Claimants' erroneous interpretation.

49. It should be underlined that the reason for the confirmation provided in Footnote 20 is that the NAFTA was terminated, including the relevant provisions referenced in Footnote 20, consistent with the USMCA Protocol discussed above. Footnote 20 carefully and explicitly limits the post-termination application of the provisions mentioned therein to a claim that is submitted pursuant to the consent provided in Paragraph 1 of Annex 14-C. Nothing in Footnote 20 purports to expand the set of claims that can be submitted pursuant to that consent. Certainly nothing in Footnote 20 expressly indicates the USMCA Parties' agreement to be bound by the obligations in Section A of NAFTA Chapter 11 for an additional three years after termination.

50. Footnote 21 is similarly unhelpful to Claimants. Footnote 21 provides that:

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).

51. Footnote 21 addresses potential claims under Annex 14-C by claimants who are also eligible to submit claims under Annex 14-E, such as, for example, a claimant alleging that one of the USMCA Parties adopted a wrongful measure prior to the NAFTA's termination which

⁴⁶ Breaches of the USMCA's substantive investment obligations, as reflected in Chapter 14, may be submitted to arbitration under Annexes 14-D and 14-E, but these annexes do not extend to Canadian investors (nor may U.S. and Mexican investors submit claims to arbitration under these annexes against Canada).

continues after the USMCA entered into force (and is also wrongful under the USMCA). Pursuant to Footnote 21, such a claimant cannot submit a claim related to the measure under Annex 14-C if that claimant would also be eligible to submit a claim under Annex 14-E. Footnote 21 funnels claimants who are eligible to use Annex 14-E into the USMCA's new dispute settlement regime, consistent with the USMCA's object and purpose, as discussed below.

52. Claimants' attempt to turn Footnote 21 to their benefit is convoluted and hinges on an attempt to rewrite the footnote so that it becomes *inutile* under the U.S. interpretation of Annex 14-C. Ignoring Footnote 21's text, Claimants contend that the footnote only applies where a claim for the same alleged breach and the same damages could be brought under both Annex 14-C and Annex 14-E. Claimants argue that because that would be impossible under the U.S. interpretation of Annex 14-C, the footnote is *inutile* unless Claimants' interpretation is accepted.⁴⁷

53. But as the scenario described in paragraph 51 demonstrates, Claimants are incorrect. Footnote 21 does have a function under the ordinary meaning of Annex 14-C, because it carves out from the consent to arbitration in Paragraph 1 of Annex 14-C "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)."⁴⁸ There is no requirement in the text that the investor be eligible to submit the "same" claim or a claim for the "same damages" under both Annex 14-C and Annex 14-E for Footnote 21 to apply. Rather, the footnote focuses on a discrete class of investors: those that are eligible "to submit claims" under Annex 14-E, which turns in significant part on the characteristics of the investor. As Professor Gardiner explains, "[i]n the footnote's formulation the denial of consent is related to the 'investor'

⁴⁷ Claimants' Rejoinder on Bifurcation ¶ 42.

⁴⁸ USMCA, Annex 14-C, ¶ 1 n.21 (C-0002) (emphasis added).

being ‘eligible to submit claims’ under Annex 14-E, not to any specific claim being the subject of a possible arbitration under Annex 14-E.”⁴⁹ Annex 14-E is only open to investors that enter into government contracts in specific sectors, such as oil and gas and power generation.⁵⁰ Under Footnote 21, Annex 14-E investors – who are afforded broader recourse to investor-State dispute settlement under the USMCA than other Chapter 14 investors – are ineligible for the extended three-year period to bring NAFTA Chapter 11 claims under Annex 14-C. Thus, contrary to Claimants’ assertion, Footnote 21 is not limited to situations in which an investor has a single identical claim for the “same damages” arising under both the USMCA and the NAFTA.

54. Claimants attempt to salvage their position by arguing that the interpretation of Footnote 21 described above “would lead to absurd results,” because hypothetical investors with large claims arising under Annex 14-C but small claims arising under Annex 14-E would be forced to abandon the large claim in favor of the small one.⁵¹ This is neither an absurd result⁵² nor one that is particularly unfair, as the default outcome under the NAFTA was that termination would have immediately eliminated all options for the submission of claims for alleged breaches of the NAFTA to investor-State dispute settlement. Instead, the USMCA Parties agreed in Annex 14-C to extend the period for most claimants with legacy investments to file claims under the NAFTA by three years, but likewise agreed to channel potential claimants with both Annex 14-C and Annex 14-E claims into the latter, which is part of the USMCA’s new investor-State dispute resolution

⁴⁹ Gardiner Report ¶ C.11.

⁵⁰ USMCA, Annex 14-E, ¶¶ 2(a)(i)(A), 6(a), (b) (C-0002). An investor must also be able to allege a breach of Chapter 14 of the USMCA, as well as loss or damage “by reason of, or arising out of, that breach,” in order to submit a claim to arbitration under Annex 14-E. *Id.* ¶ 2(a)(i), (ii).

⁵¹ Claimants’ Rejoinder on Bifurcation 21-22. To the best of the United States’ knowledge, there is no such investor in reality.

⁵² Gardiner Report ¶ C.11 (“There is nothing manifestly absurd or unreasonable in concluding that consent is not given for any legacy investment to be the subject of an arbitration where an investor is eligible to submit any claims to arbitration that would come within paragraph 2 of Annex 14-E.”).

mechanism. This agreement is consistent with the termination of the NAFTA in favor of the more circumscribed investor-State dispute settlement provisions of the USMCA.

55. Claimants' interpretation of Footnote 21 must therefore be rejected. Footnote 21 has clear utility under the U.S. interpretation of Annex 14-C, as explained above, and it therefore provides no support for Claimants' position. The fact that the proper reading of Footnote 21 does not produce the outcome to which Claimants or their hypothetical investor may think they are entitled does not render the provision *inutile*.

56. Even if Claimants were correct about Footnote 21's supposed lack of effectiveness – which they are not – it would have little bearing on the interpretive issue before the Tribunal. As demonstrated above, Annex 14-C does not contain an agreement between the USMCA Parties to bind themselves to apply the NAFTA's substantive investment obligations after the NAFTA's termination. Claimants cannot use Footnote 21's purported lack of utility under the U.S. interpretation of Annex 14-C to add such an agreement into the text. The principle of *effet utile* does not permit the radical revision that Claimants propose.⁵³

57. The Tribunal's duty in this case is to interpret Annex 14-C, not to revise it.⁵⁴ The International Court of Justice (ICJ) and ICSID tribunals have recognized that *effet utile* cannot be

⁵³ See International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int'l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.I (CL-032) ("Properly limited and applied, the maxim [*ut res magis valeat quam pereat*] does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty."). The Commission did not include a separate provision on *effet utile* in the Vienna Convention because "to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'." *Id.* In their bifurcation briefing, Claimants cited to the Draft Articles on the Law of Treaties with Commentaries on *effet utile*, but failed to include the text quoted above. See Claimants' Observations on Bifurcation ¶ 32, n.55.

⁵⁴ *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 84 (Dec. 8, 2008) (RL-055) (noting that the duty of an ICSID Tribunal, like the duty of an international court, is "to interpret the Treaties, not to revise them") (quoting *Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania (Second Phase)*, 1950 I.C.J. 221, 229 (July 18) ("*Interpretation of Peace Treaties*") (RL-056)). *Id.* ¶ 82 (finding that "the terms (the

used as a pretext to revise a treaty.⁵⁵ In the *Interpretation of Peace Treaties*, for example, the ICJ concluded that “the rule of effectiveness” could not justify the Court attributing to the dispute settlement provisions in the relevant peace treaties a meaning that would be contrary to their letter and spirit, on the pretext of remedying a default for which the treaties at issue had made no provision.⁵⁶ Footnote 21’s alleged lack of effectiveness cannot, therefore, be used as a basis to change the ordinary meaning of Annex 14-C’s terms.

58. In sum, Footnotes 20 and 21 do not support Claimants’ interpretation of Annex 14-C.

d. Article 34.1 Confirms that the USMCA Parties Did Not Extend the NAFTA’s Substantive Investment Obligations

59. Unlike Annex 14-C, in Article 34.1 (Transitional Provision from NAFTA 1994) the USMCA Parties expressly agreed that certain provisions of the NAFTA, namely Chapter 19, “shall continue to apply” in certain circumstances despite the NAFTA’s termination.⁵⁷ This language

text) of a treaty must always be adhered to, for the reason that a treaty expresses the mutual will of the Contracting States”). See also International Law Commission, Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. Int’l L. Comm. 187, 219 (¶ 6), U.N. Doc. A/CN.4/SER.A/1966/Add.1 (CL-032) (noting that the ICJ has indicated that “to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty”); *id.* 220-21 (¶ 11) (“the [International] Court [of Justice] has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain.”).

⁵⁵ See *Interpretation of Peace Treaties*, 1950 I.C.J. at 229 (RL-056) (noting that “[i]t is the duty of the Court to interpret the Treaties, not to revise them”); *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 84 (Dec. 8, 2008) (RL-055); *Banro American Resources, Inc. et al. v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Award ¶ 6 (Sept. 1, 2000) (RL-057) (“The Tribunal is certainly aware of the general principle of interpretation whereby a text ought to be interpreted in the manner that gives it effect –*ut magis valeat quam pereat*. However, this principle of interpretation should not lead to confer, *a posteriori*, to a provision deprived of its object and purpose a result that goes against its clear and explicit terms.”).

⁵⁶ *Interpretation of Peace Treaties*, 1950 I.C.J. at 229-30 (RL-056) (the Court declining to find that an intended three-member commission could properly be constituted with two members only, despite the illegal refusal of one of the parties to appoint its arbitrator and although the whole purpose of the jurisdictional clause was thereby frustrated). See also *South West Africa (Second Phase)*, 1966 I.C.J. 6, 48 ¶ 91 (July 18) (RL-058) (endorsing the Court’s holding in *Interpretation of Peace Treaties*).

⁵⁷ Gardiner Report ¶ C.6 (observing that Article 34.1 “allow[s] for a small number of features of the NAFTA to continue to have effect after the entry into force of the USMCA introduced the superseding regime” but “do[es] not provide for the investment regime of NAFTA to continue to apply from the point at which it was superseded”); Ascensio Report ¶ 19 (Article 34.1 “makes no reference to the NAFTA provisions offering substantial protection to foreign investment and whose breach could lead to arbitration between foreign investors and States (Section A of Chapter 11, Article 1503(2), and Article 1502(3)); nor does it mention the procedural protection offered by Chapter 11, Section B.”).

confirms that the USMCA Parties did not intend to extend any other NAFTA obligations, including the substantive investment obligations in NAFTA Chapter 11, after the NAFTA’s termination. Had they so intended, they would have included a reference to Chapter 11 in Article 34.1, or would have expressly specified in Annex 14-C that the NAFTA obligations referenced therein “shall continue to apply” after the NAFTA’s termination subject to a temporal limitation.⁵⁸ As a Panel constituted pursuant to USMCA Article 31 explained when interpreting Article 34.1:

In the view of the Panel, the NAFTA and the USMCA are separate treaties. Indeed, upon the entry into force of the USMCA, the NAFTA came to an end, “but without prejudice to those provisions set forth in USMCA that refer to the provisions of NAFTA.” It would have been possible for the Parties to have inserted a provision in the USMCA providing for the continuation of all obligations under the NAFTA as obligations under the USMCA. But they did not do so. The Parties created self-standing USMCA obligations even though such obligations were stated in “identical or nearly identical form” to obligations under NAFTA. Where the Parties wanted to carry over specific NAFTA obligations, such as NAFTA Chapter Nineteen, they did so explicitly in Article 34.⁵⁹

60. Claimants argue that USMCA Article 34.1 supports their interpretation of Annex 14-C, because it limits the applicability of NAFTA Chapter 19 “to final determinations published by a Party before the entry into force of [the USMCA].”⁶⁰ This text, Claimants contend, shows that the USMCA Parties knew how “to impose a temporal limitation on measures that could be challenged” in dispute settlement and could have done so in Annex 14-C.⁶¹ But Claimants miss

⁵⁸ Another potential approach is reflected in Chapter 4, footnote 82, of the USMCA, which expressly provides that a specified “transition” period “may include providing . . . treatment” under certain NAFTA provisions to eligible passenger vehicles or light trucks. USMCA, Chapter 4, Appendix, Art. 8(2)(a) n.82 (C-0002). There is no reference to “providing treatment” under NAFTA Chapter 11, Section A, in Annex 14-C.

⁵⁹ *United States – Crystalline Silicon Photovoltaic Cells Safeguard Measure*, USMCA Case No. USA-CDA-2021 31-01, Final Report ¶ 41 (Feb. 1, 2022) (RL-059) (internal citations omitted). The Panel also noted that the reference to a “smooth transition” in USMCA Article 34.1(1) cannot be treated as an implicit carryover of the NAFTA obligations into the USMCA when there are no other words in the USMCA doing that. *Id.* ¶ 42.

⁶⁰ USMCA, Art. 34.1(4) (C-0002).

⁶¹ Claimants’ Observations on Bifurcation ¶ 24; Claimants’ Rejoinder on Bifurcation ¶ 49.

the broader point about Article 34.1, which is that such a temporal limit with respect to Chapter 19 was only necessary because the article also contains express language stating that “Chapter Nineteen of NAFTA 1994 *shall continue to apply*” after the USMCA’s entry into force. Again, there is no reference in Article 34.1 to the continuing applicability of NAFTA Chapter 11, Section A, nor is there any comparable language in Annex 14-C. Accordingly, no temporal limitation was necessary with respect to claims under NAFTA Chapter 11.

3) The Object and Purpose of the USMCA Was to Replace the NAFTA, Not Extend It

61. As noted above, the USMCA Parties expressly resolved in the Preamble to “REPLACE the 1994 North American Free Trade Agreement with a 21st Century, high standard new agreement” to support trade and economic growth in the region. The USMCA Protocol similarly states that the USMCA “shall supersede the NAFTA,” and Annex 14-C itself repeatedly references the NAFTA’s termination.⁶² Not only did the USMCA expressly supersede and replace the NAFTA overall, but the USMCA specifically replaced the old investor-State dispute settlement regime of the NAFTA with a new regime, one that Canada chose not to join. The new USMCA regime is narrower than the one in Chapter 11 of the NAFTA, with express limitations not included in the NAFTA.⁶³

62. The U.S. interpretation of Annex 14-C is consistent with the object and purpose of the USMCA because it ensures that investor claims based on allegedly wrongful conduct occurring after the USMCA’s entry into force will be governed by the USMCA’s new substantive obligations and circumscribed dispute settlement regime. Accordingly, it confines legacy investment claims,

⁶² RICHARD K. GARDINER, TREATY INTERPRETATION 213, 218 (2d ed. 2015) (**RL-060**) (noting that while the preamble is a source of guidance on the object and purpose of a treaty, both the Vienna Convention and practice make it clear that an interpreter needs to take into account the whole treaty).

⁶³ See *supra* ¶ 30 & n.27.

which are governed by the NAFTA's substantive obligations, to conduct occurring prior to the USMCA's entry into force. Claimants' interpretation of Annex 14-C would, on the other hand, effectively delay the implementation of the USMCA's new regime for three years, maintaining significant parts of the NAFTA in force. This is hardly consistent with the USMCA Parties' stated purpose that the USMCA "replace" and "supersede" the NAFTA upon its entry into force.⁶⁴

63. Claimants argue that the Preamble supports their interpretation of Annex 14-C, but they ignore the part of the Preamble that is unfavorable to their theory.⁶⁵ In support, Claimants quote a few general principles stated in the Preamble indicating a desire to promote clarity, transparency, and predictability in the "legal and commercial framework."⁶⁶ None of these broad, aspirational phrases even remotely suggests an intent by the USMCA Parties to extend the substantive obligations of the NAFTA beyond its termination. To the contrary, the Preamble explicitly states that the USMCA was intended to replace the NAFTA. Indeed, having just one set of substantive obligations apply to the Parties and investors after the USMCA's entry into force – rather than two differing sets of obligations for a period of three years, as Claimants propose – provides far greater clarity, transparency, and predictability.

64. There is nothing unclear, nontransparent, or unpredictable about the United States' interpretation of Annex 14-C. In the absence of a survival clause in the NAFTA, there was no expectation that investors would be able to bring an investor-State arbitration under Chapter 11 of

⁶⁴ Ascensio Report ¶ 30 ("If the claimants' interpretation were to be followed, it would mean that, during a period of three years after the entry into force of USMCA, the NAFTA chapter relating to investment would not be replaced by the USMCA, but would continue to apply as it stands, in terms of both substance and dispute settlement. This would also result in a three-year overlap with the substantive provisions of USMCA Chapter 14 for investments existing at the time of the entry into force of the Protocol.").

⁶⁵ Claimants' Observations on Bifurcation ¶ 35; Claimants' Rejoinder on Bifurcation ¶ 12.

⁶⁶ Claimants' Observations on Bifurcation ¶ 36; Claimants' Rejoinder on Bifurcation ¶ 18.

the NAFTA following its termination.⁶⁷ As explained above, the object and purpose of the USMCA was to terminate the NAFTA and replace it with a new agreement that included a new investor-State dispute settlement regime. Accordingly, Annex 14-C provided holders of legacy investments three additional years following the NAFTA's termination to submit claims to arbitration based *only* on breaches that occurred while the NAFTA was in force.

B. Resort to Supplementary Means of Interpretation Is Unnecessary but, in Any Event, Confirms the U.S. Position

65. Article 32 of the Vienna Convention provides that “[r]ecourse *may* be had” to supplementary means of interpretation “to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”⁶⁸ Because the application of Article 31 to Annex 14-C unambiguously establishes that it does not extend the application of the NAFTA's substantive investment obligations beyond the NAFTA's termination, and because there is nothing manifestly absurd or unreasonable about this choice of the USMCA Parties, there is no need for the Tribunal to consider supplementary means of interpretation.⁶⁹

⁶⁷ See, e.g., Sidley Conference Invitation, USMCA – What Does NAFTA 2.0 Mean for Investor Protection in North America and Beyond? (Oct. 2018), <https://www.sidley.com/en/insights/events/2018/10/usmca-what-does-nafta-2-0-mean-for-investor-protection-in-north-america-and-beyond> (R-0005) (“If USMCA is implemented, investor-state arbitration to enforce key investor protections will be eliminated for U.S.-Canada investors and significantly restricted for U.S.-Mexico investors.”); Sidley Cross-Border Energy Update, Keys to Success in Cross-Border Energy Trade (Nov. 2019), <https://www.sidley.com/-/media/publications/keys-to-success-in-crossborder-energy-trade.pdf> (R-0006) (“Currently, under NAFTA, you can bring cases in arbitration – what is generally called investor-state dispute settlement or ISDS – and that has been significantly cut back. There are provisions in the USMCA that will extend it for certain types of energy investments, but perhaps not all, and it’s pretty circumscribed, so that’s a real loss for our client base.”).

⁶⁸ Vienna Convention on the Law of Treaties, art. 32 (RL-016) (emphasis added).

⁶⁹ Gardiner Report ¶ F.3 (“[T]here is nothing in the interpretative process to suggest an outcome that leaves the meaning [of Annex 14-C] ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Hence, no requirement arises to seek to determine the meaning from supplementary means of interpretation.”). See also *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award ¶ 79 (Dec. 8, 2008) (RL-055)

66. Nevertheless, should the Tribunal have recourse to supplementary means in order “to confirm the meaning resulting from the application of article 31,” the supplementary means before the Tribunal either confirm the interpretation set out in the preceding section or are of little help in the interpretive process. Below, the United States discusses three categories of documents outside the four corners of the USMCA that could be taken into account as supplementary means of interpretation: **(1)** relevant NAFTA provisions and their relationship to the provisions of Annex 14-C; **(2)** the USMCA Parties’ past practice with respect to treaties other than the NAFTA; and **(3)** statements of current or former officials of the USMCA Parties.

1) Annex 14-C’s Text Mirrors NAFTA Provisions That Relate to the Consent to Arbitration, Not the Imposition of Substantive Investment Obligations

67. Chapter 11 of the NAFTA provides a useful comparator in analyzing the terms of Annex 14-C. Two points, in particular, are worth emphasizing. *First*, Paragraphs 1 and 2 of Annex 14-C closely resemble NAFTA Articles 1116(1)/1117(1) and 1122, which concern the NAFTA Parties’ consent to arbitration. This is illustrated in the color-coded table below, which shows the similarities between the two sets of provisions. In the table below, the **green text** in the USMCA Annex 14-C column derives from NAFTA Article 1122(1), the **blue text** derives from NAFTA Articles 1116/1117, and the **orange text** derives from NAFTA Article 1122(2).

(“Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation.”); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. 624, 652-53, ¶¶ 52-53 (Dec. 17) (**RL-061**) (after expressing the Court’s conclusion on the interpretation of the text at issue “when read in context and in the light of the [treaty’s] object and purpose,” explaining that “the Court does not consider it necessary to resort to supplementary means of interpretation, such as the *travaux préparatoires* of the [treaty] and the circumstances of its conclusion, to determine the meaning of that Convention; however, as in other cases, it considers that it can have recourse to such supplementary means in order to seek a possible confirmation of its interpretation of the text of the Convention”) (citations omitted); *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, 63 (May 28) (**RL-062**) (“The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself.”).

NAFTA	USMCA Annex 14-C
<p>Article 1122(1)</p> <p>Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.⁷⁰</p> <p>Article 1116⁷¹</p> <p>1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:</p> <p>(a) Section A or Article 1503(2) (State Enterprises), or</p> <p>(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A,</p> <p>and that the investor has incurred loss or damage by reason of, or arising out of, that breach.</p> <p>Article 1122(2)</p> <p>The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:</p> <p>(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;</p> <p>(b) Article II of the New York Convention for an agreement in writing; and</p> <p>(c) Article I of the InterAmerican Convention for an agreement.</p>	<p>1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under:</p> <p>(a) Section A of Chapter 11 (Investment) of NAFTA 1994;</p> <p>(b) Article 1503(2) (State Enterprises) of NAFTA 1994; and</p> <p>(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.</p> <p>2. The consent under paragraph 1 and the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex shall satisfy the requirements of:</p> <p>(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute;</p> <p>(b) Article II of the New York Convention for an “agreement in writing”; and</p> <p>(c) Article I of the Inter-American Convention for an “agreement”.</p>

⁷⁰ The “procedures set out in this Agreement” are those contained in Section B of NAFTA Chapter 11. NAFTA, Chapter 11, Section B (C-0001).

⁷¹ Article 1117(1) is, in relevant part, nearly identical to Article 1116(1), except that it addresses the submission of a claim by “[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.” NAFTA, art. 1117(1) (C-0001).

68. NAFTA Articles 1116(1)/1117(1) and 1122 are part of the investor-State dispute resolution framework established in Section B of NAFTA Chapter 11, and are not part of the substantive obligations detailed in NAFTA Chapter 11, Section A. Article 1122 provides the NAFTA Parties' consent to arbitration and Articles 1116(1) and 1117(1) specify the types of claims that an investor may submit pursuant to this consent. Self-evidently, these articles impose no substantive investment obligations on the NAFTA Parties.

69. Accepting Claimants' interpretation of Annex 14-C would require the Tribunal to conclude that the terms of NAFTA Articles 1116(1)/1117(1) and 1122, when transposed with minor modifications into Annex 14-C, took on a wholly new function beyond the one that they performed in the NAFTA. According to Claimants, these terms not only set the scope of the Parties' consent but also embody an agreement to extend the NAFTA's substantive investment obligations for three years beyond termination. Claimants have not, however, identified any additional text that would account for this supplemental functionality, nor can they. To the contrary, as the above table shows, the changes are minor and none of the new text could be read to embody an agreement to extend the obligations in Section A of NAFTA Chapter 11.

70. The *second* point of similarity between NAFTA Articles 1116(2) and 1117(2) and Annex 14-C relates to the length of the USMCA Parties' consent to arbitration of legacy investment claims, which Paragraph 3 of Annex 14-C specifies shall last three years. This corresponds to the limitations period set out in NAFTA Articles 1116(2) and 1117(2), which provide that an investor may not make a claim "if more than *three years* have elapsed from the date on which the [investor/enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the [investor/enterprise] has incurred loss or damage."⁷² Accordingly, under

⁷² NAFTA, arts. 1116(2) & 1117(2) (C-0001) (emphasis added).

Paragraph 3 of Annex 14-C, investors who have claims based on pre-termination breaches receive a period consistent with the period allotted to them under the NAFTA to bring those claims, even if they accrued immediately before the NAFTA's termination (*e.g.*, on June 30, 2020).⁷³ In essence, Annex 14-C did nothing more than preserve the three-year claims limitation period in NAFTA Chapter 11 for most investors.

71. The relationship between Annex 14-C and relevant provisions in Section B of NAFTA Chapter 11 further confirms that the USMCA Parties did not agree in Annex 14-C to the extension of the NAFTA's substantive investment obligations. Rather, Annex 14-C merely extended the period for bringing a claim alleging a breach of the NAFTA, consistent with the provisions it mirrored in NAFTA Chapter 11, Section B.

2) Annex 14-C Does Not Contain the Language That the USMCA Parties Have Previously Used to Prolong the Obligations of a Terminated Treaty

72. Beyond the NAFTA, which was the USMCA's direct antecedent, the USMCA Parties' past treaty practice also confirms the meaning of Annex 14-C reached under Article 31 of the Vienna Convention. This practice discloses how the USMCA Parties draft language to

⁷³ In their bifurcation briefs, Claimants complained that the three-year period in Annex 14-C does not conform in all respects to the three-year period that investors would have had under NAFTA Articles 1116(2) and 1117(2) because it does not account for the possibility that an investor may not learn about the loss or damage incurred as a result of an alleged breach until sometime after the breach has occurred. *See* Claimants' Observations on Bifurcation ¶¶ 41-43; Claimants' Rejoinder on Bifurcation ¶ 29. The United States has explained the impracticality of addressing this specific scenario, which would require an effectively indefinite extension of the USMCA Parties' consent to arbitration with respect to legacy investment claims. Reply to Claimants' Observations on the Request for Bifurcation of Respondent United States of America ¶ 36 n.34 (Mar. 2, 2023) ("U.S. Reply on Bifurcation"). In any event, the alignment between the three-year period covered by Annex 14-C and NAFTA Articles 1116(2) and 1117(2) need not be perfect to support the U.S. interpretation of the Annex. Claimants have also suggested that the use of three-year "transition periods" in other agreements that replaced legacy bilateral investment treaties lacking limitations periods, or containing limitations periods of different lengths, undermines U.S. reliance on the correspondence between Annex 14-C and NAFTA Articles 1116(2) and 1117(2). *See* Claimants' Rejoinder on Bifurcation ¶ 30. But these other agreements are irrelevant (indeed, the majority do not even involve a USMCA Party). The fact that State Parties in other situations involving other agreements adopted a three-year "transition period" provides no insight on why the USMCA Parties limited their consent to arbitration to three years in Annex 14-C.

memorialize an agreement that a treaty's provisions will apply for some period after the treaty has been terminated. The absence of any language in Annex 14-C similar to what the USMCA Parties have previously drafted for this purpose supports the conclusion that the Parties did not intend for Annex 14-C to have this effect with respect to the NAFTA's substantive investment obligations.

73. Each of the USMCA Parties' model bilateral investment treaties ("BITs") contains language that extends the application of the BIT's obligations for a specified period after its termination. For example, the U.S. Model 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.⁷⁴

74. This provision extends the substantive obligations in the terminated treaty for a period of ten years past termination. The Canadian and Mexican models use similar language for the same purpose.⁷⁵

75. These model treaties show that the USMCA Parties had readily available language that could, with minor modifications, have been used to memorialize an agreement to extend the

⁷⁴ 2012 U.S. Model Bilateral Investment Treaty, art. 22(3) (**RL-017**) (emphasis added); *see also* 2004 U.S. Model Bilateral Investment Treaty, art. 22(3) (**RL-018**) ("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.").

⁷⁵ 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.").

application of the NAFTA's substantive investment obligations beyond the termination of the agreement. The USMCA Parties could have included, either in Annex 14-C or Article 34.1, a statement such as: "Section A of Chapter 11 (Investment) of NAFTA 1994 *shall continue to apply* to legacy investments" Fatally for Claimants' claims, however, the Parties did not include this or similar language in the USMCA.⁷⁶

76. Also relevant are examples (which Claimants themselves raised in their bifurcation briefing)⁷⁷ in which the United States and its counterparty chose *not* to terminate a legacy BIT despite the entry into force of a new free trade agreement between them. For instance, the United States did not terminate BITs with Morocco and Panama after entering into free trade agreements with both States. The United States likewise left its BIT with Honduras in force after both States became parties to the CAFTA-DR. Rather than terminate the legacy BITs in each of these examples, the State Parties suspended their dispute resolution provisions, subject to express exceptions allowing investors to continue submitting claims to arbitration under the BIT for ten years based on preexisting investments or disputes.⁷⁸ The substantive obligations under the BIT, which was not terminated, therefore remained in force despite the later free trade agreement. This arrangement allowed claimants with qualifying investments to submit claims to arbitration for alleged breaches of the BIT both pre- *and* post-dating the entry into force of the subsequent free trade agreement.

⁷⁶ As noted above, the USMCA Parties included similar language in Article 34.1 with respect to NAFTA Chapter 19, but not with respect to NAFTA Chapter 11. *See supra* ¶¶ 59-60.

⁷⁷ *See* Claimants' Observations on Bifurcation ¶ 34 n.59.

⁷⁸ United States-Morocco Free Trade Agreement, U.S.-Morocco, arts. 1.2(1), 1.2(4), June 15, 2004 (**CL-049**); United States-Panama Trade Promotion Agreement, U.S.-Pan., arts. 1.3(1), 1.3(3), June 28, 2007 (**RL-063**); 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**).

77. The approach that the United States took with respect to the Morocco, Panama, and Honduras BITs therefore demonstrates another avenue that would have been available to the USMCA Parties if they had wanted the NAFTA's substantive investment obligations to remain in force after entering into the USMCA. Rather than adopt this approach, the USMCA Parties terminated the NAFTA. This contrast further confirms that Annex 14-C does not allow claims based on conduct postdating the USMCA's entry into force.

78. In their bifurcation briefs, Claimants highlighted four other past treaties involving either Canada or Mexico, each of which replaced a legacy BIT with a new agreement, as purported support for their interpretation of Annex 14-C. These treaties are not relevant to the interpretive issue before the Tribunal because they address a different legal situation. Claimants rely on these treaties because they include express language limiting claims under the legacy BITs to alleged breaches occurring before the new agreement entered in force. Claimants suggest that, if the USMCA Parties had wanted to limit the NAFTA claims that could be submitted to arbitration under Annex 14-C in the same way, they could have included similar language. But Claimants' argument skips a critical step: the type of express limitation that is found in Claimants' examples is only necessary where the treaty parties have included language, whether in the legacy BIT or in the new agreement, that would otherwise result in the legacy BIT's substantive obligations continuing to bind them post-termination. The NAFTA, however, included no survival clause, and the USMCA Parties included no language in Annex 14-C binding them to continue applying the NAFTA's substantive investment obligations. Accordingly, the absence of an express temporal limitation of the type that appears in Claimants' examples tells the Tribunal nothing.

79. Unlike the NAFTA, each of the legacy BITs at issue in Claimants' examples contained 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.⁷⁹ In drafting language to address the transition from the legacy BIT to the new agreement, Canada, Mexico, and their counterparties were therefore operating under a different set of default conditions. Rather than releasing the Parties from any obligation further to perform the legacy BITs, as in the case of the NAFTA, termination would by default have resulted in a lengthy period of overlap, during which both the legacy BIT and the new agreement would continue to apply. The parties to these treaties therefore chose to eliminate the period of overlap through language in the later treaty – which was unnecessary for the NAFTA.

80. In addition to survival clauses in the legacy BITs, three of Claimants’ examples also included language in the new agreement that would, standing alone, have confirmed the ongoing applicability of the legacy BITs’ substantive obligations.⁸⁰ Beginning with the Canada-Peru and

⁷⁹ See 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**).

⁸⁰ Claimants’ fourth example is the Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”). See Claimants’ Rejoinder on Bifurcation ¶¶ 55-56. As noted, the legacy BITs terminated by the CETA all had survival clauses. Claimants assert that CETA Article 30.8(1)’s termination of the legacy BITs abrogated their survival clauses and that, as a result, there should have been no need to limit the claims that could have been brought under these BITs to situations in which “the treatment that is object of the claim was accorded when the agreement was not terminated.” CETA art. 30.8(2)(a) (**CL-037**). Even if the CETA Parties intended Article 30.8(1) to abrogate the legacy BITs’ survival clauses, this does not exclude the possibility that Article 30.8(2)(a) was intended as further confirmation that the survival clauses would not be honored to their full extent. The point

Canada-Panama Free Trade Agreements, both suspended a preexisting BIT subject to the following caveat: “*the [BIT] shall remain operative for a period of fifteen years* after the entry into force of this Agreement for the purpose of any breach of the obligations of the [BIT] that occurred before the entry into force of this Agreement.”⁸¹ As this excerpt shows, the temporal limitation on claims under the legacy BIT followed language stating that the BIT “shall remain operative” for a specified period.⁸² In light of this broad language providing for the continued operation of each legacy BIT, an express limitation was required to ensure that investors would only be able to bring claims based on alleged breaches occurring before the BIT’s suspension. In the absence of such language, the continued operation of the BIT would permit the submission of claims based on both pre- and post-suspension breaches.

81. The language in the Mexico-Australia side letter regarding the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is similar and is irrelevant for the same reason. The side letter provides that “*[t]he [BIT] shall 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 Agreement . . . with respect to any act or fact that took place or any situation that

remains that the CETA Parties drafted Article 30.8 against the background of legacy agreements that contained survival clauses. As a result, it has little relevance to the interpretation of Annex 14-C, which was negotiated to replace an agreement (the NAFTA) that did not. Claimants’ argument with respect to CETA Article 30.8 also fails because the CETA Parties were not attempting to allow for claims based on alleged breaches postdating the termination of the Parties’ legacy BITs. What Claimants must establish for their interpretation of Annex 14-C to prevail is that the USMCA Parties agreed to bind themselves to apply the NAFTA’s substantive investment obligations for a period after the NAFTA’s termination. The CETA Parties did not include any such agreement in Article 30.8 with respect to the obligations in the relevant legacy BITs and so a comparison of the text of that Article with Annex 14-C shows only that it is absent from both.

⁸¹ Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 (CL-035) (emphasis added); *see also* Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 (CL-036) (same).

⁸² Free Trade Agreement Between Canada and the Republic of Peru, Can.-Peru, art. 845(2), May 29, 2008 (CL-035) (emphasis added). *See also* Free Trade Agreement Between Canada and the Republic of Panama, Can.-Pan., art. 9.38(2), May 14, 2010 (CL-036) (same).

existed before the date of termination.”⁸³ While the temporal limitation is present here, it is again necessitated by a broad statement that the legacy BIT “shall continue to apply”⁸⁴ for a specified period after the new agreement’s entry into force.

82. Neither Annex 14-C nor any other part of the USMCA, however, includes language specifying that the NAFTA’s substantive investment obligations “shall remain operative” or “shall continue to apply” for any period. There was, accordingly, no need for an express temporal limitation on the claims for breach of the NAFTA that could be asserted under Annex 14-C because such claims are inherently limited to the period when the NAFTA was in force.⁸⁵

83. For the foregoing reasons, relevant past treaty practice of the USMCA Parties confirms that Annex 14-C does not contain an agreement to extend the application of the NAFTA’s substantive investment obligations after its termination.

3) Statements by Current or Former Officials of the USMCA Parties Do Not Support Claimants’ Position

84. Claimants have identified several statements by current and former officials regarding the USMCA that, in Claimants’ view, support their reading of Annex 14-C. These statements, however, provide little insight on the interpretive question before the Tribunal, which again is whether the USMCA Parties bound themselves to apply the NAFTA’s substantive investment obligations after its termination. Many of the statements are vague and none expressly address this question, let alone provide a considered analysis that could be persuasive to the Tribunal.

⁸³ 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) (CL-038) (emphasis added).

⁸⁴ *Id.*

⁸⁵ *See, e.g., supra* ¶¶ 11-13.

85. As the United States explained during the bifurcation phase, the statements that Claimants have identified are notable primarily because they do not say clearly that a holder of a legacy investment is entitled to assert a claim under Annex 14-C based on an alleged breach of the NAFTA occurring after its termination.⁸⁶ Claimants do not dispute this but argue that the statements imply that such claims would be viable.⁸⁷ Claimants are, in many cases, wrong about the implications to be drawn from the statements that they have identified. For example, the various references to submitting “NAFTA claims”⁸⁸ or “claim[s] for a breach of the investment obligations under the NAFTA”⁸⁹ during the period covered by Annex 14-C provide no help to the Tribunal. Both Claimants and the United States agree that Annex 14-C permits the submission of NAFTA claims – the dispute is whether “NAFTA claims” are limited to those that arose from breaches that occurred while the NAFTA was still in force, or whether the USMCA Parties agreed to the extended application of the NAFTA’s substantive investment obligations such that they could continue to be breached despite the NAFTA’s termination. In any event, this evidence is of no value for the Tribunal’s interpretive exercise.

86. Claimants draw particular attention to a WilmerHale client alert listing a former employee of the Office of the U.S. Trade Representative (“USTR”) as one of four “contributors.”⁹⁰ The client alert suggests that Annex 14-C might be used to challenge a Mexican electricity law enacted after the USMCA entered into force. The relevance of a law firm “client alert” issued roughly two

⁸⁶ U.S. Reply on Bifurcation ¶ 38.

⁸⁷ Claimants’ Rejoinder on Bifurcation ¶ 20.

⁸⁸ U.S. Department of State, “2021 Investment Climate Statements: Canada” (C-093).

⁸⁹ Michelle Hoffman, “Canada-United States-Mexico Agreement,” The Canadian Bar Association (Feb. 1, 2019) (C-103). *See also* Global Affairs Canada, “The Canada-United States-Mexico Agreement: Economic Impact Assessment” (Feb. 26, 2020) (C-097).

⁹⁰ 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) (C-102).

years after the USTR negotiator left government service could only be minimal at best.⁹¹ WilmerHale posted the client alert while the individual at issue was a lawyer in private practice, not a government official, and the intent of the document was to solicit interest from potential clients with business interests in Mexico: “WilmerHale stands ready to assist clients with respect to dispute settlement options under the USMCA and other trade and investment agreements with respect to Mexico’s amended Electricity Industry Law.”⁹² Moreover, the client alert does not explain the legal basis in the text of Annex 14-C for the views that it contains. It merely asserts these views. The WilmerHale client alert cannot, therefore, assist the Tribunal in its interpretation of Annex 14-C.

87. Claimants’ argument also ignores other public statements by officials of the USMCA Parties that do not fit their narrative. For example, the Deputy Prime Minister of Canada, Chrystia Freeland, issued a statement on the USMCA’s entry into force explaining that the new agreement “*removes* the investor-state dispute resolution system, which has allowed large corporations to sue the Canadian government for regulating in the public interest. Known as ISDS, this has cost Canadian taxpayers more than \$275 million in penalties and legal fees.”⁹³ This echoed earlier statements by Ms. Freeland – who was Minister of Foreign Affairs during negotiation of the USMCA – including in an October 19, 2018 op-ed:

Perhaps one of the achievements I’m most proud of is that the investor-state dispute resolution system, which in the past allowed foreign companies to sue Canada, *will be gone*. This means that Canada can make its own rules, about public health and safety, for

⁹¹ Lauren Mandell, LinkedIn Profile (last visited May 15, 2023) (**R-0007**) (indicating Mr. Mandell departed USTR in May 2019).

⁹² 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) (**C-102**). *See also id.* (“Many observers believe the law may . . . violate Mexico’s commitments under international trade and investment agreements, including the United States-Mexico-Canada Agreement (USMCA) . . .”).

⁹³ Statement by the Deputy Prime Minister on the entry-into-force of the new NAFTA, at 2 (June 30, 2020) (**R-0008**) (emphasis added).

example, without the risk of being sued by foreign corporations. Known as ISDS, this provision has cost Canadian taxpayers more than \$300 million in penalties and legal fees.⁹⁴

88. Unlike the statements in the WilmerHale client alert that Claimants attribute to the former USTR negotiator, Ms. Freeland’s statements were made in her official capacity, shortly after the USMCA negotiations concluded. Ms. Freeland made no reference to investors’ continued ability to hold Canada to the NAFTA’s substantive investment obligations for three years after its termination. To the contrary, she was unequivocal that Canada would be free of “the risk of being sued by foreign corporations” for actions taken after the USMCA entered into force.

89. Ms. Freeland’s description of the USMCA’s ISDS provisions mirrors statements made by Mexican officials in their official capacities. For example, the Undersecretary for North America in Mexico’s foreign ministry put out a factsheet stating: “It was agreed that the **Investor-State Dispute Settlement** mechanism [under the USMCA] will **not apply to Canada**.”⁹⁵ Again, there was no qualification suggesting that the NAFTA’s substantive investment obligations would continue to bind Canada for an additional three years. More recently, Mexico has expressed a consistent view of Annex 14-C in *Legacy Vulcan v. Mexico*, where claimants submitted an ancillary claim based on an alleged breach that occurred almost two years after the NAFTA’s termination. Mexico objected to the tribunal’s jurisdiction over the ancillary claim noting that Annex 14-C “grants investors a three-year period to claim a breach of the NAFTA that occurred before the NAFTA was terminated . . . [it] does not extend the protections of Section A of Chapter

⁹⁴ *Chrystia Freeland says the new trade deal prevented possible widespread economic disruption*, Canada’s National Observer (Oct. 19, 2018) (R-0009) (emphasis added). See also Deputy Prime Minister letter to party leaders regarding the new NAFTA (Jan. 26, 2020) (R-0010) (“The investor-state dispute resolution system – which has allowed large corporations to sue the Canadian government for regulating in the public interest – *is now gone*. Known as ISDS, this has cost Canadian taxpayers more than \$275 million in penalties and legal fees.”) (emphasis added).

⁹⁵ Secretaría de Relaciones Exteriores, United States – Mexico – Canada Agreement (USMCA): Investment and Investor-State Dispute Settlement Mechanism (emphases in original) (R-0011).

XI of the NAFTA for an additional three years.”⁹⁶ Mexico also indicated that the “USMCA Parties did not consent to allow NAFTA claims to be based on measures subsequent to the entry into force of the USMCA.”⁹⁷

90. The Canadian and Mexican understanding of how the USMCA curtailed ISDS coincides with the skeptical views of ISDS held by the lead U.S. negotiator of the USMCA, the U.S. Trade Representative Robert Lighthizer. Prior to, during, and after the negotiations, Ambassador Lighthizer made his concerns about ISDS known. During a March 2017 hearing, Ambassador Lighthizer stated that ISDS was “troubling to me on a variety of issues and on a variety of levels.”⁹⁸ Ambassador Lighthizer expanded on these views during a March 2018 hearing, in the midst of the USMCA negotiations:

We are skeptical about ISDS for a variety of reasons, which I would like to go into if I have a second to do it. Number one, on the U.S. side there are questions of sovereignty. Why should a foreign national be able to come in and not have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It doesn't strike me -- it strikes me as something . . . at least we ought to at least be skeptical of and analyze. . . . On the outgoing side there are many people who believe that in some circumstances, and I can discuss the varieties of them, in some circumstances it's more of an outsourcing issue.⁹⁹

91. Finally, after the USMCA negotiations were completed, Ambassador Lighthizer addressed several questions on ISDS during a June 2019 hearing, during which he reiterated his view that

⁹⁶ *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Mexico's Counter-Memorial on the Ancillary Claim (Dec. 19, 2022), ¶ 409 (English free translation) (“otorga a los inversionistas un periodo de tres años para reclamar un incumplimiento del TLCAN que haya ocurrido antes de que el TLCAN fuera terminado . . . no extiende las protecciones de la Sección A del Capítulo XI del TLCAN por otros tres años adicionales”) (Spanish original) (**RL-064**).

⁹⁷ *Id.*, ¶ 414 (English free translation) (“Partes del T-MEC no dieron su consentimiento para permitir que reclamaciones del TLCAN se basen en medidas posteriores a la entrada en vigor del T-MEC.”) (Spanish original).

⁹⁸ President's Trade Policy Agenda and Fiscal Year 2018 Budget, Hearing Before the Senate Committee on Finance, S. Hrg. 115–247, at 21 (June 21, 2017) (**R-0012**).

⁹⁹ U.S. Trade Policy Agenda, Hearing Before the House Committee on Ways & Means, Serial No. 11-FC08, at 19–20 (Mar. 21, 2018) (**R-0013**).

ISDS leads to outsourcing.¹⁰⁰ While specifically discussing the “changes in ISDS” under Annex 14-D¹⁰¹ and Annex 14-E,¹⁰² which Ambassador Lighthizer argued “improved the situation” from the perspective of those who are opposed to ISDS,¹⁰³ he never suggested that investors could, under Annex 14-C, continue to rely on the NAFTA’s broader ISDS framework for recourse against the USMCA Parties based on actions taken after the USMCA entered into force.

92. As the foregoing demonstrates, statements by current or former officials of the USMCA Parties do not support Claimants’ position.

III. Conclusion

93. Annex 14-C does not include an express agreement to extend the NAFTA’s substantive investment obligations past its termination. Nor can it be read to have provided such an extension implicitly. The sole interpretive question before the Tribunal must, accordingly, be resolved in favor of the United States.

94. The consequences of that conclusion are clear. The NAFTA’s termination released the United States and the other NAFTA Parties from any further obligations under its substantive provisions. The United States was therefore not bound by the NAFTA’s substantive investment obligations when President Biden revoked the permit for the Keystone XL pipeline on January 20, 2021. As a result, the permit revocation cannot have breached the NAFTA’s substantive investment obligations. Claimants’ claims based on the permit revocation accordingly are outside

¹⁰⁰ 2019 Trade Policy Agenda: Negotiations with China, Japan, the EU, and UK; new NAFTA/USMCA; U.S. Participation in the WTO; and other matters, Hearing Before the House Committee on Ways & Means, Serial No. 116-27, at 85 (June 19, 2019) (**R-0014**).

¹⁰¹ *Id.* at 61.

¹⁰² Asked about a “loophole whereas U.S. oil and gas, for example, this particular industry, can still contractually sue the Mexican government,” Mr. Lighthizer responded: “If you say, ‘How would I distinguish the oil and gas industry from other industries,’ I would say it’s, to me, that allowing ISDS that would incentivize moving a factory to Mexico is something that I think is a mistake and is bad, as in a subsidy, but that doesn’t apply to a natural resource where the industry has to go there.” *Id.* 85-86.

¹⁰³ *Id.* at 86.

the scope of the USMCA Parties' consent to arbitration in Paragraph 1 of Annex 14-C, which is limited to claims for breach of specified NAFTA obligations.

95. In light of the above, the United States respectfully requests the Tribunal to conclude that it lacks jurisdiction over Claimants' claims and to dismiss them in their entirety.¹⁰⁴

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa Grosh". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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¹⁰⁴ The United States' bifurcated jurisdictional objection is without prejudice to other jurisdictional objections or defenses that the United States may raise in other phases of this arbitration.