

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

**TC Energy Corporation,
TransCanada PipeLines Limited**

Claimants,

v.

The United States of America

Respondent.

ICSID Case No. ARB/21/63

**CLAIMANTS' REJOINDER REGARDING
RESPONDENT'S REQUEST FOR BIFURCATION**

March 22, 2023

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I. Introduction

1. Claimants hereby submit their Rejoinder answering Respondent’s March 2, 2023 Reply to Claimants’ Observations on the Request for Bifurcation of Respondent United States of America (“Reply”). In this Rejoinder, Claimants will show that Respondent has failed to present a substantial objection that could warrant bifurcation of the proceeding. Respondent has misinterpreted the terms of the United States-Mexico-Canada Agreement (“USMCA”),¹ misapplied principles of international law, and mischaracterized the points made in Claimants’ Observations. Claimants respectfully submit that it would be a waste of time and resources for the Tribunal and the parties to spend another year arguing about a jurisdictional objection that is clearly unfounded. Bifurcating Respondent’s objection would also be unfair and inefficient, and it would require the Tribunal to resolve matters relevant to the merits of Claimants’ claims. Claimants therefore ask the Tribunal to reject Respondent’s bifurcation request and move to the merits phase of the proceeding.

2. In their Observations, Claimants explained why Respondent’s interpretation of USMCA is incorrect.² Claimants methodically showed why the obligations set forth in Section A of the North American Free Trade Agreement 1994 (“NAFTA 1994”)³ (the “Section A obligations”) apply for the three years following the entry into force of USMCA (“transition period”), with respect to legacy investments. Respondent has failed to refute any of the points Claimants have raised. However, if the Tribunal accepts even one of Claimants’ points, that is sufficient to dispose of Respondent’s request for bifurcation. For example, if the Tribunal agrees that footnote 21 in Annex 14-C of USMCA (“Footnote 21”) has *effet utile* only if the Section A

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

² Respondent argues that its objection must be “substantial” because Claimants presented a careful analysis of the treaty text, over several pages, that showed that Respondent’s objection is not consistent with the ordinary meaning of the text of USMCA, in light of its context and object and purpose of the treaty. *See* Reply to Claimants’ Observations on the Request for Bifurcation of Respondent United States of America, Mar. 2, 2023 (“Respondent’s Reply on Bifurcation”), at para. 2 (“[T]he more than 18 pages that Claimants devote to their attempted rebuttal of the U.S. objection shows the substantiality of the objection and how seriously they must take it.”). However, an objection is not substantial merely because there are a half dozen reasons why it is wrong, rather than just one that could be summarized in a bullet point.

³ Exhibit C-1, North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, signed Dec. 17, 1992, entered into force Jan. 1, 1994 (“NAFTA 1994”).

obligations continue during the transition period, then that reason alone is sufficient to show that Respondent's objection is not substantial.

3. Respondent asserts that “[t]he starting point for interpreting the legacy investment claims annex is the termination of the NAFTA.”⁴ For Respondent, that is both the starting point and the ending point, as Respondent fails to conduct the analysis necessary to show that its objection is substantial. As Claimants showed in their Observations, and will show again in this Rejoinder, Respondent's objection is not based on a coherent interpretation of USMCA that accords with the method of analysis that Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”) requires. Indeed, Respondent never even refers to Article 31 of the VCLT in either its Request for Bifurcation or its Reply, and it implicitly questions the method of analysis set forth in Article 31.

4. Under a proper application of Article 31 of the VCLT, the termination of NAFTA 1994 is definitively not the starting point of the analysis. The starting point is interpreting USMCA, and in particular paragraph 1 of Annex 14-C, 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.”⁵ As Claimants have shown, an analysis of USMCA that accords with this principle shows that, with respect to legacy investments, the USMCA Parties extended the Section A obligations for the duration of the transition period.

5. Respondent says that its “objection was raised at the earliest possible stage in these arbitral proceedings in accordance with the governing ICSID Arbitration Rules.”⁶ Yet, Respondent does not deny that it could have raised its objection in connection with the registration of Claimants' Request for Arbitration or at any point during the parties' discussions pursuant to Article 1128 of NAFTA 1994.⁷ As indicated in Claimants' Request for Arbitration, representatives of Claimants and Respondent held settlement discussions on September 17,

⁴ Respondent's Reply on Bifurcation at p. 5 (capitalization omitted).

⁵ Exhibit RL-16, Vienna Convention on the Law of Treaties (1969), United Nations, *Treaty Series*, vol. 1155 (“VCLT”), at Art. 31.1.

⁶ Respondent's Reply on Bifurcation at para. 46.

⁷ Article 1118 of NAFTA 1994 requires that “[t]he disputing parties should first attempt to settle a claim through consultation or negotiation.” See Exhibit C-1, NAFTA 1994 at Art. 1118.

2021.⁸ If the scope of Annex 14-C of USMCA so clearly says what Respondent now asserts, and if Respondent is so clearly concerned with efficiency in these proceedings, then surely Respondent could have and should have raised the objection at that time.⁹ It did not do so, because its newly minted objection is a *post hoc* fabrication and a thinly veiled attempt to push the arbitration past the next U.S. Presidential election.

6. In Section II below, Claimants show that Respondent has conceded or not contested several important matters with respect to how the Tribunal should determine whether to bifurcate the proceeding.

7. In Section III below, Claimants address Respondent's deeply flawed interpretation of USMCA and show that Respondent's objection is not substantial. We show how Respondent has failed to reconcile its position with statements from the USMCA Parties that are contemporaneous with the entry into force of USMCA and has failed even to acknowledge (much less explain) the statements of its own former lead negotiator of the USMCA investment chapter that flatly contradict its current position. We show that Respondent's arguments are based on a misunderstanding of principles of international law and a mischaracterization of Claimants' arguments, and that they contradict and defeat Respondent's own position.

8. In Section IV, Claimants explain that Respondent has failed to show how the Tribunal could resolve Claimants' equitable arguments without addressing factual matters relevant to the merits of Claimants' claims.

9. In Section V, Claimants conclude the Rejoinder and reiterate their request for an award of costs and fees incurred in connection with Respondent's unjustified bifurcation request.

II. Respondent Does Not Contest the Standards of Bifurcation Discussed in Claimants' Observations

10. As Respondent notes in its Reply, the parties agree that the Tribunal may consider the factors that the *Glamis Gold* tribunal identified for assessing whether to bifurcate a preliminary

⁸ Claimants' Request for Arbitration, Nov. 22, 2021 ("Claimants' Request for Arbitration"), at paras. 19, 82.

⁹ Respondent asserts that "there is nothing unclear, unpredictable, or nontransparent about the U.S. interpretation of the Legacy Investment Claims Annex." Respondent's Reply on Bifurcation at para. 36.

objection¹⁰ and that the Tribunal should be guided by overarching considerations of procedural efficiency and fairness.¹¹ Respondent has also conceded or not contested the following points:

- Respondent “agrees with Claimants’ assertion that there is no presumption in favor of bifurcation under the ICSID Rules.”¹²
- Respondent admits that it bears the burden of showing in the first instance that its objection “is ‘substantial and not frivolous.’”¹³ It then asserts, without citation to any authority, that it does not bear the burden with respect to the other *Glamis Gold* factors.¹⁴ As the moving party, Respondent bears the burden to show that bifurcation is appropriate.¹⁵ This means that it bears the burden of proving all of its assertions, including its assertions that the three *Glamis Gold* factors are met and its assertions that bifurcation would promote procedural efficiency and fairness.

¹⁰ The *Glamis Gold* factors are “(1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings [*sic*], even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.” Exhibit CL-16, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), May 31, 2005, at para. 12(c) (footnotes omitted). Compare *id.* at para. 12(c), with Respondent’s Reply on Bifurcation at para. 6 (“The disputing parties agree that the standard this Tribunal should apply in determining whether to grant the U.S. Request for Bifurcation requires the analysis of three factors: (i) whether the objection is substantial or frivolous; (ii) whether the objection, if successful, would materially reduce time and costs; and (iii) whether jurisdiction and merits are so intertwined as to make bifurcation impractical.”) (footnote omitted).

¹¹ Respondent’s Reply on Bifurcation at para. 6.

¹² Respondent’s Reply on Bifurcation at para. 7, n.4.

¹³ Respondent’s Reply on Bifurcation at para. 7, n.4 (citation omitted).

¹⁴ See Respondent’s Reply on Bifurcation at para. 7, n.4.

¹⁵ See Exhibit CL-51, *Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3 (Decision on Bifurcation), Aug. 28, 2020, at para. 66 (“[T]he Respondent, as the requesting Party on this issue [*i.e.*, bifurcation], bears the burden of demonstrating that the facts currently in the record merit a conclusion by the Tribunal that bifurcation is merited.”) This conclusion is derived from the broader principle, not limited to bifurcation proceedings, that a party “who asserts must prove.” See, *e.g.*, Exhibit CL-52, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, Sept. 1, 2009, at para. 215 (“[T]he Committee considers the general principle in ICSID proceedings, and in international adjudication generally, to be that ‘who asserts must prove’, and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.”); Exhibit CL-53, *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Award, July 5, 2022, at para. 504 (“As to the burden of proof, the Tribunal intends to apply the well-known and widely applied principle that ‘he who asserts must prove’[;] in other words that each Party assumes the burden of establishing, to the appropriate degree of certainty, the propositions it relies on to establish the case which it advances before the Tribunal.”) (footnotes omitted).

- Respondent does not contest the point that tribunals retain the discretion to reject a bifurcation request based on their assessment of the entirety of the facts before them, even if the *Glamis Gold* criteria are met.¹⁶
- Respondent does not contest the point that, at a minimum, the *Glamis Gold* factors must be cumulatively satisfied before bifurcation is warranted. However, Respondent then flips this principle on its head by arguing that “[a]ll this means is that” the Tribunal should “take into account all of the factors.”¹⁷ “Cumulatively satisfied” means that all three of the factors must be met before bifurcating an objection, not just that the factors should be “take[n] into account.” “Cumulative” refers to all three factors together. If any one of the factors is not met (*i.e.*, not “satisfied”), then the three factors obviously cannot be “cumulatively satisfied.”
- Respondent does not contest the point that bifurcation is not appropriate if the objection lacks clear textual support, even if the objection is otherwise non-frivolous.¹⁸

11. As Claimants showed in their Observations and further discuss below, Respondent has not carried its burden of showing that bifurcation is appropriate.

III. Respondent’s Preliminary Objection Is Not Substantial

12. In their Observations, Claimants applied the analysis spelled out in Article 31 of the VCLT to interpret paragraph 1 of Annex 14-C of USMCA. Article 31 states 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.”¹⁹ Claimants showed that a good faith interpretation of USMCA that takes into account the text of paragraph 1 of Annex 14-C of USMCA, its context, and the object and purpose of the treaty leads to only one conclusion, namely that USMCA extends the Section A obligations during the transition period. Respondent appears to object to this interpretive approach. It complains that “Claimants ask the Tribunal to *infer* an agreement from a combination of the USMCA Protocol and reference to the NAFTA in paragraph 1 of the Legacy Investment Claims Annex.”²⁰ In fact, USMCA is clear on its face, but

¹⁶ See Claimants’ Observations on Respondent’s Request for Bifurcation of Preliminary Objection, Feb. 10, 2023 (“Claimants’ Observations on Bifurcation”), at para. 12.

¹⁷ Respondent’s Reply on Bifurcation at para. 7.

¹⁸ See Claimants’ Observations on Bifurcation at para 13.

¹⁹ Exhibit RL-16, VCLT at Art. 31.1.

²⁰ Respondent’s Reply on Bifurcation at para. 13 (emphasis in original).

where Claimants drew inferences, they did so because that is what a proper treaty analysis calls for. Inferring the meaning of a treaty from the text, context, and object and purpose of the treaty is not only appropriate but required under the principles of interpretation set forth in the VCLT.²¹

13. Claimants quoted the following excerpt from the Commentary to the VCLT in their Observations, but it bears repeating:

[T]he interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning. . . . [A] number of articles adopted by the [International Law] Commission contain clauses which distinguish between matters expressly provided in the treaty and matters to be implied in it by reference to the intention of the parties; and clearly, the operation of such clauses can be fully appreciated and determined only in the light of the means of interpretation admissible for ascertaining the intention of the parties.²²

²¹ As the tribunal in *Aguas del Tunari v. Bolivia* explained:

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. . . . [T]he Vienna Convention does not privilege any one of these three aspects of the interpretation method. . . . The Vienna Convention's directive to look to the ordinary meaning of a word in its context and in light of the object and purpose of the treaty is intended . . . (1) to find the intent of the parties in the specific instrument, (2) to respect the possibility that the parties have used the instrument to address issues of mutual concern in innovative ways, and (3) to not forcibly conform the specific aims of a treaty to general assumptions about the intent of states, assumptions which necessarily are based on assessments of past practice.

Exhibit CL-54, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction, Oct. 21, 2005, at para. 91 (footnotes omitted). *See also* Exhibit CL-55, Richard K. Gardiner, *Treaty Interpretation* (2015) (excerpts) at p. 181 ("[I]t is necessary to stress that the ordinary meaning is not an element in treaty interpretation to be taken separately when the general rule is being applied to a particular issue involving treaty interpretation. Nor is the first impression as to what is the ordinary meaning of a term anything other than a very fleeting starting point. For the ordinary meaning of treaty terms is immediately and intimately linked with context, and then to be taken in conjunction with all other relevant elements of the Vienna rules."); *id.* at p. 210 ("The linking factor in the first paragraph of the general rule of treaty interpretation between the context and the object and purpose of the treaty is that these are elements pertinent to finding the ordinary meaning of terms used in the treaty. Context in the Vienna rules denotes the idea of the focus of the interpreter's attention expanding out from the provision under consideration to the broader vision provided by the context as described by article 31, and then using this wider view to help home back in on the meaning of the term or terms in issue.").

²² Exhibit CL-32, Draft Articles on the Law of Treaties with Commentaries, Yearbook of the International Law Commission, 1966, vol. II, at p. 219.

14. Even if the USMCA were completely silent on the issue in dispute (which it is not), the Tribunal would still be required to interpret the treaty in light of the principles set forth in the VCLT.²³ We can only surmise that Respondent has failed to conduct the proper VCLT analysis because it knows that applying the principles in Article 31 of the VCLT would not support Respondent’s preferred position.

15. Respondent tries to divert attention from the primary question at issue. Respondent concedes, as it must, that the USMCA Parties could agree to extend the Section A obligations during the transition period, despite the fact that USMCA replaced NAFTA 1994 in July 2020.²⁴ Therefore, repeating *ad nauseum* that NAFTA has been terminated and that NAFTA contains no survival clause does not answer the question of whether, through USMCA, the USMCA Parties did, in fact, extend the Section A obligations. As Claimants have shown, the USMCA Parties did exactly that.

16. In the following sections, we show that Respondent’s objection is not substantial, and therefore does not warrant bifurcation.

A. Respondent’s Preliminary Objection Is Not Based on a Good Faith Interpretation of the Treaty

17. As Article 31 of the VCLT makes clear, the interpreter of a treaty must come to that task in good faith. Furthermore, as the tribunal in *ESPF Beteiligungs v. Italy* explained:

The preamble to the VCLT confirms that “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized” and States’ desire “to establish conditions

²³ This conclusion is the natural result of the process of treaty interpretation. *See, e.g.*, Exhibit CL-56, Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, Nov. 2, 2005 (adopted Nov. 28, 2005), at para. 109 (“Although Article 11.3 [of the World Trade Organization Anti-Dumping Agreement] is silent as to whether investigating authorities are required to establish the existence of a ‘causal link’ between likely dumping and likely injury, this ‘silence does not exclude the possibility that the requirement was intended to be included by implication.’”) (footnotes omitted); Exhibit CL-57, Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R, Mar. 26, 2014 (adopted Aug. 29, 2014), at para. 7.66 (“[T]he Appellate Body stated that ‘[t]he task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement. Such silence does not exclude the possibility that the requirement was intended to be included by implication.’”) (footnotes omitted).

²⁴ *See* Respondent’s Reply on Bifurcation at para. 12 (asserting that the Tribunal’s jurisdiction over Claimants’ claims turns on “whether the United States, Canada, and Mexico agreed in the USMCA to the post-termination survival of the NAFTA’s substantive investment obligations set out in Section A of Chapter Eleven”).

under which justice and respect for the obligations arising from treaties can be maintained.” . . .

[I]t is important that international law as expressed in treaties is capable of being known and is certain. This is of fundamental importance to States, as well as all international actors affected by such treaties. State sovereignty is guarded by this, as States negotiate and choose how to express their agreed limits to their sovereignty. It is also important for other international actors who rely on treaties that the terms of such treaties be clear and the obligations assumed to be certain. These principles are of fundamental importance to the rule of law.²⁵

18. This approach is, of course, fully consistent with the object and purpose of USMCA, which, as noted in Claimants’ Observations, is to establish and promote transparency, good governance, the rule of law, and a “predictable legal and commercial framework for business planning, that supports further expansion of trade and investment.”²⁶ A treaty party does not act in accordance with these principles, does not act in good faith, does not ensure that “international law as expressed in treaties is capable of being known and is certain,” and does not provide clarity and certainty for “international actors who rely on treaties,” if that treaty party takes one position in its public explanation of its obligations under the treaty and then takes an entirely different position when it is held to account in meeting those obligations.

19. Respondent has not arrived at its interpretation of USMCA in good faith. In their Observations, Claimants provided a compilation of statements made by the USMCA Parties that were intended to inform the public, especially investors, about the scope of protections available under USMCA. Claimants also provided statements from the former lead U.S. negotiator of the USMCA investment chapter regarding the scope of Annex 14-C. Not one of these statements indicated that Annex 14-C is limited to challenging measures that pre-dated the entry into force of USMCA.

20. In its Reply, Respondent offers no evidence countering those statements. Instead, it argues that none of the statements “*expressly* claim[s] that a holder of a legacy investment is

²⁵ See Exhibit CL-58, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, Sept. 14, 2020, at paras. 274-75.

²⁶ Exhibit C-2, USMCA at Preamble.

entitled to assert a claim under the Annex based on an alleged breach of the NAFTA occurring after its termination.”²⁷ Respondent has willfully ignored the obvious implication of the quotations, which is that, with respect to legacy investments, the Section A obligations remain in force during the transition period. Furthermore, Respondent has not even acknowledged the statements of its own former lead negotiator of the USMCA investment chapter, which clearly and explicitly show that Annex 14-C was intended to allow claims with respect to measures taken during the transition period.

21. The list of quotations is included as an annex to Claimants’ Observations. We will not repeat those quotations in full here, except to note that the various U.S., Canadian, and Mexican government officials and government publications stated that, *inter alia*, “[t]he investment protections in Chapter 11 are going to continue to be available”²⁸ after USMCA enters into force; “investors can file new NAFTA claims by July 1, 2023;”²⁹ “Annex 14-C.1 permits the relevant NAFTA provisions to apply for three years after NAFTA is terminated;”³⁰ and “ISDS cases can still be brought forward under NAFTA for investments made prior to the entry into force of CUSMA [*i.e.*, USMCA].”³¹

22. There are many more such statements that reflect the same understanding. For example, a member of the Canadian Government’s “core legal team supporting the [USMCA] negotiations” stated that, “[i]n the [USMCA], Canada has agreed to an additional 3-year period after the entry into force, in which an investor with a ‘legacy investment’ may bring a claim for a breach of the investment obligations under the NAFTA”³² Separately, a U.S. member of Congress, in a letter to the Office of the U.S. Trade Representative discussing Mexican measures

²⁷ Respondent’s Reply on Bifurcation at para. 38 (emphasis added).

²⁸ Exhibit C-91, “Quoted: Senior Administration Officials on the USMCA,” *World Trade Online*, Oct. 1, 2018, available at <https://insidetrade.com/trade/quoted-senior-administration-officials-usmca>.

²⁹ Exhibit C-93, U.S. Department of State, “2021 Investment Climate Statements: Canada,” available at <https://www.state.gov/reports/2021-investment-climate-statements/canada/> (last accessed Feb. 6, 2023).

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

³¹ Exhibit C-97, Global Affairs Canada, “The Canada-United States-Mexico Agreement: Economic Impact Assessment,” Feb. 26, 2020, at p. 32.

³² See Exhibit C-103, Michelle Hoffman, “Canada-United States-Mexico Agreement,” *The Canadian Bar Association*, Feb. 1, 2019, available at <https://www.cba-alberta.org/Publications-Resources/LawMatters/Articles/Canada-United-States-Mexico-Agreement>.

introduced during the transition period, noted the “surviving NAFTA commitments” and concluded that “it is true that U.S. energy sector investors with legacy NAFTA claims or government contracts can initiate investor-State cases to address some of their claims.”³³ The list goes on.³⁴

23. In their Observations, Claimants also provided various statements from the former lead U.S. negotiator of the investment chapter of USMCA. These statements explain that Annex 14-C established “a three-year transition period during which investors from all three jurisdictions could continue to use NAFTA ISDS rules and procedures to bring claims in relation to ‘legacy investments’ established or acquired in the territory of another Party during the lifetime of the NAFTA.”³⁵ He further stated that on “July 1, 2020, NAFTA goes away but there was this view . . . that the parties could continue to bring claims under NAFTA rules for three years.”³⁶ He repeated the point in yet another article that he co-authored. In that publication, he advised investors of their right to challenge Mexican measures taken during the transition period, stating that “US, Canadian and Mexican investors with ‘legacy investments’ in the territory of another Party—investments established during the lifetime of the NAFTA (January 1, 1994–July 1, 2020)—have full access to ISDS under NAFTA rules for claims brought within three years after the date of the USMCA’s entry into force, meaning until July 1, 2023.”³⁷ The article explains

³³ Exhibit C-104, Letter from Rep. Jodey C. Arrington to Ambassador Katherine Tai, July 1, 2021.

³⁴ See, e.g., Exhibit C-105, Government of Canada, “Explore key changes from NAFTA to CUSMA for importers and exporters,” available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/nafta-cusma_aceum-alena.aspx?lang=eng (page last modified Sept. 25, 2020) (“The Parties have also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of CUSMA.”); Exhibit C-106, Government of Canada, “Bill C-4, Canada-United States-Mexico Agreement Implementation Act,” available at <https://www.canada.ca/en/privy-council/corporate/transparency/briefing-documents/parliamentary-committees/standing-committee-internal-trade/bill-c-4-canada-united-states-mexico-agreement-implementation-act-february-18-2020.html> (page last modified Sept. 25, 2020), at Section C.21, p. 86 of PDF (“The Parties also agreed to a transitional period of three years, during which ISDS under the original NAFTA will continue to apply only for investments made prior to the entry into force of the CUSMA . . .”).

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

³⁶ Exhibit C-101, American University Washington College of Law, *USMCA Chapter 14: Experiences (US Perspective)* (Panel Presentation by Lauren Mandell and others at Expert Panel Series on International Arbitration — Investment Agreements of the 21st Century: USMCA and Beyond, Oct. 25, 2022), full video available at <https://media.wcl.american.edu/Mediasite/Play/c9b76a5aa39f4b06809d33a6be13414c1d>.

³⁷ Exhibit C-102, John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, “Three Tips for Investors in Mexico’s Energy Sector Regarding Potential USMCA Claims,” Mar. 18, 2021, available at

that “[t]he ISDS landscape will change on July 1, 2023, three years after the date of the USMCA’s entry into force. . . . US investors will lose the ability to lodge some types of claims that might otherwise be viable with respect to the new electricity law, including indirect expropriation and fair and equitable treatment claims. . . . Therefore, US and Canadian investors in Mexico’s energy sector should be mindful of their potential change in circumstances on July 1, 2023. To file a claim before that deadline, an investor would need to submit a notice of intent to Mexico by April 1, 2023.”³⁸

24. Respondent offers nothing in reply. These statements from the USMCA Parties (including their former negotiators) demonstrate that Respondent’s objection is not based on a good faith interpretation of USMCA.

B. Respondent Does Not Contest That Claimants’ Claims Comply with the Terms of Paragraph 1 of Annex 14-C of USMCA

25. As Claimants showed in their Observations, paragraphs 1 and 3 of Annex 14-C of USMCA enumerate four conditions for bringing a claim: (1) the claim must be with respect to a legacy investment; (2) the investor must allege a breach of one or more of the Section A obligations; (3) the claim must be submitted in accordance with Section B of Chapter 11 of NAFTA 1994; and (4) the claim must be brought during the transition period.³⁹ Through paragraphs 1 and 3 of Annex 14-C, the USMCA Parties extended the Section A obligations for the duration of the transition period. Respondent has not contested that Claimants have met each of the requirements specified in paragraphs 1 and 3 of Annex 14-C but argues—without textual support—that any alleged breach must relate to a measure taken before USMCA entered into force.

<https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims> (emphasis added). The authors also published a virtually identical version of this article under the title *How USMCA Empowers Investors Against Mexico Power Law*. See Exhibit C-107, David Ross, Danielle Morris, and Lauren Mandell, “How USMCA Empowers Investors Against Mexico Power Law,” *LAW360*, April 2, 2021, available at <https://www.law360.com/articles/1371056/how-usmca-empowers-investors-against-mexico-power-law>.

³⁸ Exhibit C-102, John F. Walsh, David J. Ross, Danielle Morris, and Lauren Mandell, “Three Tips for Investors in Mexico’s Energy Sector Regarding Potential USMCA Claims,” Mar. 18, 2021, available at <https://www.wilmerhale.com/en/insights/client-alerts/20210318-three-tips-for-investors-in-mexicos-energy-sector-regarding-potential-usmca-claims> (emphasis added).

³⁹ See Claimants’ Observations on Bifurcation at para. 23.

26. First, Respondent argues that paragraph 1 of Annex 14-C is a consent provision that “says nothing about extending the substantive obligations themselves [*i.e.*, the Section A obligations] for three years.”⁴⁰ However, Respondent does not deny that, through paragraphs 1 and 3 of Annex 14-C, the USMCA Parties consented to arbitrate alleged breaches of the Section A obligations for three years. The Section A obligations must, therefore, remain in force during that period, unless there is something in the text that says otherwise. Respondent seeks to read into Annex 14-C a temporal limitation that is not there.

27. The *Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada* (the “USMCA Protocol”)⁴¹ reinforces the conclusion that paragraphs 1 and 3 of Annex 14-C extend the Section A obligations for the duration of the transition period. The USMCA Protocol states that, “[u]pon entry into force of this Protocol, the USMCA, attached as an Annex to this Protocol, shall supersede the NAFTA, without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA.”⁴² Respondent asserts that “[t]he Protocol merely seeks to avoid prejudice to *USMCA provisions*, to the extent they ‘refer to provisions of the NAFTA.’”⁴³ The point Respondent is making is not clear. As Claimants showed in their Observations, 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.⁴⁴ In the context of paragraphs 1 and 3 of Annex 14-C, this means giving effect to the Section A obligations for three years with respect to legacy investments. There is nothing in the Protocol or Annex 14-C that states that the replacement of NAFTA 1994 is “without prejudice to those provisions set forth in the USMCA that refer to provisions of the NAFTA other than those that impose substantive obligations.”⁴⁵

⁴⁰ Respondent’s Reply on Bifurcation at para. 17.

⁴¹ Exhibit R-1, Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada (“USMCA Protocol”).

⁴² Exhibit R-1, USMCA Protocol.

⁴³ Respondent’s Reply on Bifurcation at para. 16 (emphasis in original).

⁴⁴ See Claimants’ Observations on Bifurcation at paras. 27-28.

⁴⁵ Respondent asserts that “Claimants do not argue that [the Protocol] constitutes an agreement to the post-termination survival of the NAFTA’s substantive investment obligations.” Respondent’s Reply on Bifurcation at para. 14. Respondent’s position is mystifying, as Claimants showed in detail how the USMCA, including the

28. Second, Respondent argues that paragraph 1 of Annex 14-C applies to claims and not to investments.⁴⁶ Respondent is wrong, and, again, the point Respondent is trying to make is not clear.⁴⁷ Claims must relate to an investment and to an investor. Paragraph 1 of Annex 14-C clearly states that “[e]ach Party consents, with respect to a legacy investment, to the submission of a claim”⁴⁸ By contrast—and much more relevant to the issue in dispute—there is nothing in paragraph 1 of Annex 14-C that says that claims must relate to measures that took place before the entry into force of USMCA.

29. Third, in its Reply, Respondent repeats the argument made in its Request for Bifurcation that the three-year transition period in Annex 14-C of USMCA aligns with the three-year limitations period in Section B of NAFTA 1994. To recall, under the three-year limitations period in Articles 1116-1117 of NAFTA 1994, an investor must bring a claim within three years of the time the investor (or an enterprise that it owns or controls) acquired, or should have acquired, knowledge of the alleged breach and knowledge that the investor (or the enterprise) has incurred loss or damage.⁴⁹ In its Reply, Respondent asserts that, “[w]here the Parties needed to, and did, add text to the USMCA was to give investors additional time to bring claims based on alleged breaches that occurred while the NAFTA was still in force, which was consistent with the three-year limitations period for the filing of claims in the NAFTA”⁵⁰ Respondent is careful not to say that this alleged alignment of the NAFTA limitations period and the USMCA transition period was actually intended. Respondent appears to describe the alleged alignment as a mere coincidence rather than the result of purposeful design.

USMCA Protocol and Annex 14-C, establish just such an agreement. *See* Claimants’ Observations on Bifurcation at paras. 27-28.

⁴⁶ *See* Respondent’s Reply on Bifurcation at para. 17 (emphasis added).

⁴⁷ Respondent seems to find the argument important, as it repeats the argument several times. Respondent first argues that “footnote 20 speaks solely of applying the NAFTA’s provisions to ‘a claim’ – not to investments or investors, as would be necessary if the Parties intended for the NAFTA’s substantive investment obligations to survive post-termination.” Respondent’s Reply on Bifurcation at para. 17. Respondent then argues that the Protocol “requires only that [paragraph 1 of Annex 14-C and footnote 20] be given effect, despite the NAFTA’s termination, for purposes of adjudicating certain specified claims.” Respondent’s Reply on Bifurcation at 19.

⁴⁸ *See* Exhibit C-2, USMCA at Annex 14-C, para. 1 (emphasis added).

⁴⁹ *See* Exhibit C-1, NAFTA 1994 at Arts. 1116-17.

⁵⁰ Respondent’s Reply on Bifurcation at para. 27.

30. In their Observations, Claimants showed that there was no clear alignment between the NAFTA limitations period and the USMCA transition period, and Respondent now reluctantly concedes the point.⁵¹ If there is any ambiguity about the USMCA Parties' intentions in adopting the three-year transition period, recent treaty practice confirms that parties routinely adopt a three-year transition period merely as a matter of convenience, not with the intention of linking the transition period with an underlying limitations period.⁵² In fact, treaty parties have often used a three-year transition period in situations in which a new investment agreement replaces an earlier bilateral investment treaty ("BIT"), even when the limitations period in the earlier BIT is for a different period or when the BIT has no limitations period at all. For example:

- In a side letter to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), Australia and Mexico terminated their pre-existing BIT. The BIT had a **limitations period of four years**, while the side letter imposed a **three-year transition period**.⁵³
- In the Australia-Chile Free Trade Agreement, the treaty parties terminated their pre-existing BIT. The BIT had **no limitations period**, while the side letter imposed a **three-year transition period**.⁵⁴
- The European Union-Mexico Free Trade Agreement (agreed in principle), the treaty parties agreed to terminate 14 pre-existing BITs, six of which contained **four-**

⁵¹ See Claimants' Observations on Bifurcation at paras. 41-43. Claimants showed that, if a breach occurs prior to the entry in force of NAFTA, but knowledge of the breach and damages occurs afterward, then the limitations period in NAFTA would actually extend beyond the USMCA transition period. See *id.* at para. 43. Respondent now concedes that point, but then argues that "accounting for the scenario that Claimants put forward would be impractical because it would require extending the Parties' consent to arbitration indefinitely into the future." Respondent's Reply on Bifurcation at para. 36, n.34. The impracticality of it is merely further proof that the two provisions were not intended to align. It is Respondent, not Claimants, that is trying to argue that there is an alignment between the limitations period and the transition. Therefore, it is Respondent's burden to show that there is alignment, and it has failed to do that.

⁵² Article 32 of the VCLT provides that "[r]ecourse may be had to supplementary means of interpretation . . . in order to confirm the meaning resulting from the application of article 21, or to determine the meaning when the interpretation according to article 31 . . . leaves the meaning ambiguous or obscure"

⁵³ Compare Exhibit CL-59, Agreement between the Government of the United Mexican States and the Government of Australia on the Promotion and Reciprocal Protection of Investments, 2483 U.N.T.S. 247, signed Aug. 23, 2005, entered into force July 21, 2017, terminated Dec. 30, 2018, at Art. 13(10), with Exhibit CL-38, Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mar. 8, 2018, at p. 1 of PDF, para. 2.

⁵⁴ Compare Exhibit CL-60, Agreement between the Government of Australia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments, signed July 9, 1996, entered into force Nov. 18, 1999, terminated Mar. 6, 2009, with Exhibit CL-61, Australia-Chile Free Trade Agreement, signed July 30, 2008, entered into force Mar. 6, 2009, at Annex 10-E, para. 3.

year limitations periods, while the Free Trade Agreement (“FTA”) imposed a **three-year transition period**.⁵⁵

- In the Comprehensive Economic and Trade Agreement between Canada and the European Union (“CETA”) (provisionally applicable), the treaty parties agreed to terminate eight BITs, four of which contained **no limitations period**, while CETA imposed a **three-year transition period**.⁵⁶
- In the Trade Agreement between Argentina and Chile, the treaty parties terminated their pre-existing BIT. The BIT had **no limitations period**, while the Trade Agreement imposed a **three-year transition period**.⁵⁷

⁵⁵ Compare Exhibit CL-62, Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments, signed June 29, 1998, entered into force Mar. 26, 2001, at Art. 11(3) (four-year limitations period); Exhibit CL-63, Agreement between the United Mexican States and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments, signed Aug. 25, 1998, entered into force Feb. 23, 2001, at Art. 12(3) (same); Exhibit CL-64, Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments, signed Nov. 12, 1998, entered into force Oct. 12, 2000, at Art. 9(3) (same); Exhibit CL-65, Agreement between the Government of the United Mexican States and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, signed Apr. 13, 2000, entered into force Sept. 24, 2000, at Art. 9(3) (same); Exhibit CL-66, Agreement between the Government of the Republic of Finland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments, signed Feb. 22, 1999, entered into force Aug. 30, 2000, at Art. 10(3) (same); Exhibit CL-67, Agreement between the Government of the Kingdom of Sweden and the Government of the United Mexican States Concerning the Promotion and Reciprocal Protection of Investments, signed Oct. 3, 2000, entered into force July 1, 2001, at Art. 9(2) (same), with Exhibit CL-68, European Commission, “EU-Mexico agreement: The Agreement in Principle,” Investment Chapter, Apr. 21, 2018, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en, at Art. 22.3.

⁵⁶ Compare Exhibit CL-69, Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments, signed Oct. 3, 1991, entered into force Nov. 21, 1993 (no limitations period); Exhibit CL-70, Agreement Between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments, signed Apr. 6, 1990, entered into force Nov. 22, 1990 (same); Exhibit CL-71, Agreement between Canada and the Slovak Republic for the Promotion and Protection of Investments, signed July 20, 2010, entered into force Mar. 14, 2012 (same); Exhibit CL-72, Exchange of Notes between the Government of Canada and the Government of the Republic of Malta Constituting an Agreement Relating to Foreign Investment Insurance, signed May 24, 1982 (no limitations period), with Exhibit CL-37, Comprehensive Economic and Trade Agreement between Canada and the European Union, signed Oct. 30, 2016, provisionally entered into force Sept. 21, 2017 (“CETA”), at Art. 30.8(2)(b) (three-year transition period).

⁵⁷ Compare Exhibit CL-73, Treaty Between the Argentine Republic and the Republic of Chile on the Promotion and Reciprocal Protection of Investments, signed Aug. 2, 1991, entered into force Jan. 1, 1995, terminated May 1, 2019 (no limitations period), with Exhibit CL-74, Trade Agreement Between the Argentine Republic and the Republic of Chile, signed Nov. 2, 2017, entered into force May 1, 2019, at Annex 8.2 (three-year transition period).

- In the Free Trade Agreement between Mauritius and China, the treaty parties terminated their pre-existing BIT. The BIT had **no limitations period**, while the FTA imposed a **three-year transition period**.⁵⁸
- In the Investment Protection Agreement between the European Union and Singapore, (signed, not entered into force), the treaty parties agreed to terminate 12 BITs. The BITs had **no limitations periods**, while the Investment Protection Agreement imposed a **three-year transition period**.⁵⁹
- In the Investment Protection Agreement between the European Union and Viet Nam (signed, not entered into force), the treaty parties agreed to terminate 21 BITs. The BITs had **no limitations period**, while the Investment Protection Agreement imposed a **three-year transition period**.⁶⁰

31. There is no relationship in these agreements between the limitation periods (if any) in the terminated BITs and the transition periods adopted in the replacement agreements. Rather, the three-year transition period appears to be merely what treaty parties have come to see as reasonable. USMCA is simply in line with this emerging trend in international practice.

32. Finally, Claimants noted in their Observations that footnote 20 of Annex 14-C specifically referred to the application of the Section A obligations with respect to claims asserted under paragraph 1 of Annex 14-C.⁶¹ In its Reply, Respondent notes that footnote 20 refers to many different chapters of NAFTA 1994, and then argues that “it strains credulity to suggest that the Parties meant to agree to a wholesale extension of substantial parts of the NAFTA for three additional years in a footnote.”⁶² Claimants never argued for a “wholesale extension” of these various chapters. Many of the chapters listed in footnote 20 are referenced in

⁵⁸ Compare Exhibit CL-75, Agreement between the Government of the Republic of Mauritius and the Government of the People’s Republic of China for the Reciprocal Promotion and Protection of Investments, signed May 4, 1996, entered into force Aug. 6, 1997, terminated Jan. 1, 2021 (no limitations period), with Exhibit CL-76, Free Trade Agreement between the Government of the Republic of Mauritius and the Government of the People’s Republic of China, signed Oct. 17, 2019, entered into force Jan. 1, 2021, at Art. 8.21.2(a) (three-year transition period).

⁵⁹ Compare Exhibit CL-77, Bilateral Investment Treaties to Be Terminated by EU-Singapore Investment Protection Agreement (no limitations periods), with Exhibit CL-78, Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part, signed Oct. 19, 2018, not yet entered into force, at Art. 4.12.3(c) (three-year transition period).

⁶⁰ Compare Exhibit CL-79, Bilateral Investment Treaties to Be Terminated by EU-Viet Nam Investment Protection Agreement (no limitations periods), with Exhibit CL-80, Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the other Part, signed June 30, 2019, not yet entered into force, at Art. 4.20.6 (three-year transition period).

⁶¹ See Claimants’ Observations on Bifurcation at para. 28.

⁶² Respondent’s Reply on Bifurcation at para. 18.

Chapter Eleven of NAFTA 1994,⁶³ certain of the chapters contain exceptions applicable to the substantive obligations in Chapter Eleven, and some contain definitions that are used in Chapter Eleven. Presumably, the USMCA Parties wanted to ensure that those references, exceptions, and definitions continued to apply during the transition period to claims made in accordance with paragraph 1 of Annex 14-C, despite the replacement of NAFTA 1994. There is no reason why that fact “strains credulity.” It is simply what the text says. For three years after the entry into force of USMCA, investors holding legacy investments may submit claims for breaches of the Section A obligations, and, pursuant to footnote 20, Section A of Chapter Eleven of NAFTA 1994 and various of chapters of NAFTA 1994 apply with respect to claims brought during that period.

C. Respondent’s Interpretation Would Render Footnote 21 Meaningless

33. As Claimants showed in their Observations, Footnote 21 of Annex 14-C definitively proves that paragraph 1 of Annex 14-C extended the Section A obligations for the duration of the transition period. Respondent’s response is based on a misunderstanding of basic principles of international law.

34. Again, the starting point of the analysis is Article 31 of the VCLT, which requires that, *inter alia*, the terms of a treaty be interpreted “in their context.”⁶⁴ Context includes “the immediate surroundings” of the provision in question and “any structure or scheme underlying a provision of the treaty as a whole.”⁶⁵ Furthermore, a treaty must be interpreted such that all of its terms have meaning and are not rendered *inutile*. As the World Trade Organization Appellate Body has found:

[T]he principle of effectiveness in the interpretation of treaties (*ut res magis valeat quam pereat*) . . . requires that a treaty interpreter:

⁶³ For example, Section A of Chapter 11 states, at Article 1101(3), that “[t]his Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services),” and, at Article 1110(7) (Expropriation), that “[t]his Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).” Exhibit C-1, NAFTA 1994 at Arts. 1101(3), 1110(7).

⁶⁴ Exhibit RL-16, VCLT at Art. 31.

⁶⁵ Exhibit CL-55, Richard K. Gardiner, *Treaty Interpretation* (2015) (excerpts), at p. 202.

“. . . must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”

In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to “read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.” An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.⁶⁶

35. The context of paragraph 1 of Annex 14-C, including Footnote 21, demonstrates that Annex 14-C was intended to permit claims with respect to measures taken during the transition period. Respondent’s interpretation would render Footnote 21 meaningless.

36. Under Footnote 21, if an investor is “eligible” to submit a claim under paragraph 2 of Annex 14-E, the investor may not submit a claim under Annex 14-C.⁶⁷ As Claimants explained in their Observations, Footnote 21 is a carveout from the scope of paragraph 1 of Annex 14-C. A carveout only makes sense if Annex 14-C and Annex 14-E overlap, and they can only overlap if the claims that can be made under each annex apply for an overlapping time period and for overlapping damages. Because Annex 14-E applies only to measures that post-date the entry into force of USMCA, Annex 14-C and Annex 14-E can only overlap if they both apply to measures that post-date the entry into force of USMCA.

37. In its Reply, Respondent agrees that Footnote 21 has meaning only if the claims that can be brought under Annex 14-C and Annex 14-E overlap.⁶⁸ However, Respondent refuses to recognize the obvious implication, which is that overlap is only possible if both annexes apply to measures that post-date the entry into force of USMCA. Instead, Respondent offers an

⁶⁶ Exhibit CL-81, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, Dec. 14, 1999 (adopted Jan. 12, 2000), at paras. 80-81 (emphasis in original, footnotes omitted).

⁶⁷ Footnote 21 states in full: “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).” Exhibit C-2, USMCA at Annex 14-E, n.21.

⁶⁸ Respondent’s Reply on Bifurcation at para. 31 (“Footnote 21 addresses a specific class of potential claimants, namely those who may have a claim under both Annex 14-C and Annex 14-E.”).

explanation that is not only convoluted and legally incorrect but that defeats Respondent’s own objection.

1. Respondent Misapplies the Concept of Continuing Breach

38. Respondent argues that Footnote 21 was intended to address situations where, for example, a claimant alleges a “continuing breach where the breach began before the termination of the NAFTA and continued after its termination.”⁶⁹ According to Respondent, “In the absence of footnote 21, such claimants could submit both a legacy investment claim under Annex 14-C, relying on the substantive obligations of the NAFTA because portions of the continuing breach predated its termination, and an Annex 14-E claim, relying on the USMCA with respect to portions of the continuing breach that postdate its entry into force.”⁷⁰ Respondent then asserts that “[t]his situation would cause confusion about which set of obligations and which arbitral regime would apply to the same alleged breach.”⁷¹ Respondent misunderstands the concept of “continuing breach.” A continuing breach that spans the time before and after the entry into force of USMCA can only occur if the Section A obligations continue during the transition period.

39. Article 14(2) of the Articles on Responsibility of States for Internationally Wrongful Acts (“Articles on State Responsibility”) explains the concept of a continuing breach as follows: “The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”⁷² The Commentaries to the Articles on State Responsibility explain that “a continuing wrongful act . . . occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.”⁷³ The key point is that a continuing breach

⁶⁹ Respondent’s Reply on Bifurcation at para. 31.

⁷⁰ Respondent’s Reply on Bifurcation at para. 31.

⁷¹ Respondent’s Reply on Bifurcation at para. 31.

⁷² Exhibit RL-23, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001)), at Art. 14(2).

⁷³ Exhibit CL-82, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the Work of its Fifty-Third Session (2008) (“Commentaries to the Articles on State Responsibility”), at p. 60 (emphasis added).

pertains to the breach of a single international obligation. A “continuing breach” is not a breach of one international obligation for some period of time, followed by the breach of an entirely different international obligation for a subsequent period of time. In such a situation, there are two breaches, not a single continuing breach that spans both periods. Therein lies the critical flaw in Respondent’s argument.

40. A continuing breach that spanned the period before and after the entry into force of USMCA would be possible only if the Section A obligations (*i.e.*, the breached obligations) remained in force during the transition period.⁷⁴ In that situation, the breach of NAFTA would begin when the measure was first taken (prior to the entry into force of USMCA) and would continue into the transition period. However, the entire basis of Respondent’s jurisdictional objection is its assertion that the substantive obligations under NAFTA 1994 abruptly terminated as soon as USMCA entered into force on July 1, 2020.⁷⁵ From that point forward, according to Respondent, only the USMCA obligations were in force. If that interpretation were correct, then there could not ever have been a “continuing breach” that spanned the period when the two treaties were in force, for the simple reason that the two treaties contain separate legal obligations. At most, under Respondent’s interpretation, there could have been two distinct breaches, which did not overlap in time and did not result in overlapping damages. The first breach would begin at the time the respondent took the measure in question and would continue until the termination of NAFTA 1994. A second and different breach (a breach of USMCA) would begin when USMCA entered into force and would continue until the measure ended.

41. Respondent is positing a situation in which there is a continuing act, not a continuing breach. Once that point is understood, the bizarre nature of Respondent’s argument becomes clear. Respondent is asserting that, if an investor is eligible to bring a claim under Annex 14-E

⁷⁴ An act that began before USMCA’s entry into force and continued after USMCA’s entry force would not be a “continuing breach” of USMCA that spanned the two periods. As explained by the Commentary to Article 14, a continuing breach occupies the period during which the act continues, “provided that the State is bound by the international obligation during that period.” Exhibit CL-82, Commentaries to the Articles on State Responsibility at p. 60. Absent an agreement to apply the treaty retroactively, a USMCA Party could not have been bound by a USMCA obligation before USMCA entered into force.

⁷⁵ Respondent’s Reply on Bifurcation at para. 12 (“As a result of the NAFTA’s termination, and consistent with customary international law, as reflected in Article 70 of the Vienna Convention, the Parties ceased to be bound by the NAFTA’s obligations on July 1, 2020.”) (footnote omitted).

with respect to damages incurred after the entry into force of USMCA, then it is prohibited from bringing a claim under Annex 14-C, which (under Respondent’s core theory) would cover a different breach, in a different time frame, for different damages. Respondent argues that allowing both claims to proceed would create “confusion,”⁷⁶ but there would be no confusion. NAFTA would apply before USMCA entered into force, and USMCA would apply after USMCA entered into force.⁷⁷

42. The text of Footnote 21 and Annex 14-E confirms that, under Respondent’s interpretation of Annex 14-C, there would be no overlap and, hence, no confusion, with respect to claims brought under Annex 14-C and 14-E. Footnote 21 states that an investor may not bring a claim under Annex 14-C if the investor is “eligible” to bring a claim under paragraph 2 of Annex 14-E. An investor is only eligible to bring a claim under paragraph 2 of Annex 14-E if, *inter alia*, the claim alleges a breach of an obligation under USMCA and “the claimant has incurred loss or damage by reason of, or arising out of, that breach.”⁷⁸ An investor is not eligible to bring a claim under Annex 14-E for damages that occurred before the entry into force of USMCA. If, as Respondent would have it, Annex 14-C permitted claims only with respect to breaches of NAFTA that occurred before the entry into force of USMCA, an investor would never be “eligible” to claim the same damages under Annex 14-E. There would be no overlap between Annexes 14-C and 14-E, and the carveout in Footnote 21 would be meaningless.

2. Respondent’s Interpretation of Footnote 21 Would Lead to Absurd Results

43. The practical implications of Respondent’s “continuing breach” argument further demonstrate the illegitimacy of Respondent’s position regarding Footnote 21. To recap, Respondent is arguing that, if there were a continuing act that spanned the time before and after

⁷⁶ Respondent’s Reply on Bifurcation at para. 31.

⁷⁷ The authority Respondent cites proves the point. Respondent refers to “confusion about which set of obligations and which arbitral regime would apply to the same alleged breach.” Respondent’s Reply on Bifurcation at para. 31. It then cites to Article 13 of the Articles on State Responsibility for the proposition that “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.” Respondent’s Reply on Bifurcation at para. 31, n.29. Respondent argues that the Section A obligations did not extend into the transition period. If that were correct, then the United States was not “bound by the obligation in question at the time the act [during the transition period] occurs,” and there could not have been any continuing breach that spanned the period before and after the entry into force of USMCA.

⁷⁸ Exhibit C-2, USMCA at Annex 14-E, paras. 2(a)(ii), 2(b)(ii) (emphasis added).

USMCA entered into force, then an investor who is eligible to bring a claim under Annex 14-E may not bring a claim under Annex 14-C even for breaches and damages that occurred before USMCA entered into force.⁷⁹ The entirety of those damages would simply be forfeited. If that were correct, then consider the following two situations:

- A. In Situation A, two years before USMCA entered into force, the U.S. Government adopted a measure that breached Chapter Eleven of NAFTA 1994. The measure was a continuing act that ended on July 2, 2020, one day after USMCA entered into force. The measure caused \$1 billion of damages while NAFTA was in force, and \$1,000 in damages during the one day it lasted while USMCA was in force. Under Respondent's theory, the investor would be eligible to bring a claim under Annex 14-E for the \$1,000 in damages it suffered while USMCA was in force but would be prohibited from asserting a claim under Annex 14-C for the \$1 billion of damages it suffered before USMCA entered into force. Despite suffering over \$1 billion in damages, the investor could only claim \$1,000.
- B. Situation B is the same as Situation A except that the measure terminated on June 30, 2020, one day before USMCA entered into force. The investor would not be eligible to bring a claim under Annex 14-E (because the measure pre-dated the entry into force of USMCA) but could claim under Annex 14-C for the entire \$1 billion in damages that it suffered while NAFTA 1994 was in force.

44. Situation A is an absurd outcome in itself, which is only compounded by the comparison to Situation B. The outcome in Situation A is also directly at odds with the intention of the USMCA Parties to provide Annex 14-E investors with the highest level of protection among all categories of investors protected by Chapter 14.⁸⁰ By contrast to Situation A, if an investor were

⁷⁹ See Respondent's Reply on Bifurcation at para. 31.

⁸⁰ See, e.g., Exhibit C-108, Statements from U.S. Trade Representative Robert Lighthizer during the U.S. Senate Committee on Finance, Hearing on The President's 2019 Trade Policy Agenda and the United States-Mexico-Canada Agreement, June 18, 2019, *available at* <https://www.finance.senate.gov/imo/media/doc/SFC%20Hearing%206-18-2019%20QFR%20Responses%20FINAL.pdf>, at p. 45 ("Because U.S. investors contracting with the Mexican government in sectors such as oil and gas, power generation, and telecommunications, may face unique political risks to longterm, capital-intensive projects, USMCA provides those investors access to ISDS for a broader scope of obligations, including MST, indirect expropriation, and performance requirement claims."); Exhibit C-109, Report of the U.S. Senate Committee on Finance with respect to USMCA Implementation Act, Oct. 21, 2020, *available at* <https://www.finance.senate.gov/imo/media/doc/CRPT-116srpt283.pdf>, at pp. 28-29 ("Under the reformed approach to ISDS in the Investment chapter, U.S. and Mexican investors in all sectors will have limited access to ISDS as a last resort to provide protection in the context of such egregious issues as discrimination and direct expropriation. In certain sectors-such as oil and gas, telecommunications, and certain infrastructure-investors that enter into government contracts will have broader access to ISDS to protect the long-term, capital-intensive investments in these sectors, which are subject to heightened political risks."); Exhibit C-91, "Quoted: Senior Administration Officials on the USMCA," *World Trade Online*, Oct. 1, 2018, *available at* <https://insidetrade.com/trade/quoted->

eligible to bring a claim under Annex 14-C but were not eligible to bring a claim under Annex 14-E, then, in Situation A above, the investor would be able to claim for the entire \$1 billion of damages that it suffered while NAFTA was in force.

3. The Text and Context of Annex 14-C Show the USMCA Parties Were Not Concerned with the Alleged “Confusion” That Respondent Now Imagines

45. The text and context of Annex 14-C make it clear that the USMCA Parties were not concerned about alleged “confusion” that could arise in situations where an investor submits a claim for breaches of NAFTA 1994 that occurred pre-USMCA and a separate claim under Annex 14-E for breaches of USMCA that occurred post-USMCA.

46. Assume, as Respondent posits, there is a continuing act that spans the period before and after USMCA entered into force. Assume also that the investor submitted a claim to arbitration for breach of NAFTA 1994 on June 30, 2020, one day before USMCA entered into force. Then, during the transition period, the investor initiates an Annex 14-E arbitration to challenge the same measure and claim damages incurred after the entry into force of USMCA. There is nothing that prevents the investor from pursuing both arbitrations. Paragraph 5 of Annex 14-C would allow the NAFTA arbitration to continue.⁸¹ Furthermore, Footnote 21 would not preclude the investor from continuing the NAFTA arbitration because Footnote 21 only limits the scope of consent under paragraph 1 of Annex 14-C, and the NAFTA arbitration would not have been initiated pursuant to that paragraph. There would also be nothing stopping the investor from initiating the separate claim under Annex 14-E for damages incurred after the entry into force of

senior-administration-officials-usmca, at p. 3 of PDF (“The United States and Mexico have agreed to a reformed model for ISDS, which will mean that all investors will have a limited form of ISDS, and there will be a full – there’s a full fleet of ISDS procedures currently available that will continue to be available to investors in a limited set of industries that face high fixed costs, high degree of political sensitivity, and where ISDS really could – the lack of ISDS could put our companies at a competitive disadvantage. And those are the oil and gas sector, transportation, infrastructure, and telecom.”).

⁸¹ Paragraph 5 of Annex 14-C states: “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.” Exhibit C-2, USMCA at Annex 14-C, para. 5.

USMCA. If the USMCA Parties were concerned about the kind of “confusion” Respondent suggests, then they would not have allowed separate arbitrations in this situation.

4. In the Absence of Footnote 21, Annex 14-E Investors Could Submit Claims under Annex 14-C with Respect to Measures Continuing During the Transition Period

47. The only reasonable interpretation of Footnote 21 is that, in the event of a continuing act that spans the period before and after entry into force of USMCA, the Annex 14-E investor must be allowed to bring a claim under Annex 14-C for damages that occurred before the entry into force of USMCA (alleging a breach of NAFTA 1994) and a separate claim under Annex 14-E for damages that occurred after the entry into force of USMCA (alleging a breach of USMCA). Absent Footnote 21, the investor could have brought two overlapping claims, one asserting a breach of NAFTA 1994 that spanned the period before and after the entry into force of USMCA and one asserting a breach of USMCA that covered only the portion of the measure that post-dated the entry into force of USMCA. That was the confusion that the USMCA Parties were seeking to avoid in Footnote 21, and that confusion could only arise if paragraph 1 of Annex 14-C allowed claims for measures taken during the transition period.

48. Respondent’s interpretation is not only incorrect but defeats its own objection. A good faith analysis of the hypothetical “continuing breach” (or continuing act) that Respondent posits merely confirms that paragraph 1 of Annex 14-C permits investors holding legacy claims to assert NAFTA claims with respect to measures taken during the transition period.

D. Respondent Fails to Show How Its Interpretation of USMCA Is Consistent with Approaches Taken in Other Investment Agreements

49. In its Request for Bifurcation and again in its Reply, Respondent refers to various model BITs that contain sunset clauses.⁸² It then argues that no such clause appears in NAFTA 1994 and USMCA.⁸³ Respondent never fully explains the relevance of these model BITs under Article 31 of the VCLT. The model BITs are not part of the text of USMCA nor are they relevant context under the VCLT. They also do not reflect USMCA’s object and purpose.

⁸² See Request for Bifurcation of Respondent United States of America, Jan. 11, 2023 (“Respondent’s Bifurcation Request”) at para. 18; Respondent’s Reply on Bifurcation at paras. 22-23.

⁸³ See Respondent’s Reply on Bifurcation at para. 24.

Nonetheless, to ensure a full response to Respondent's arguments, Claimants pointed to an example in the USMCA itself (which clearly is context under the VCLT) that showed that when the USMCA Parties sought to impose a temporal limitation on measures that could be challenged in dispute settlement, they did so explicitly.⁸⁴ Claimants also pointed to other investment treaties that (like USMCA) replaced earlier investment agreements.⁸⁵ Claimants showed that the treaty parties in those cases were explicit when they intended to limit claims under the older agreements to measures that were adopted prior to the entry into force of the new treaty.⁸⁶ If the USMCA Parties intended to include an analogous limitation in Annex 14-C of USMCA, they would have done so. They did not.

50. In its Reply, Respondent fails to distinguish the examples Claimants cited. Respondent bases its arguments on a misunderstanding of Claimants' position and a misinterpretation of the cited treaties.

51. First, Respondent notes that NAFTA 1994 does not contain a sunset clause.⁸⁷ Claimants never asserted that NAFTA 1994 contains a sunset clause. The replacement of NAFTA 1994 with USMCA was governed by the terms of USMCA, including Annex 14-C and the USMCA Protocol. It is USMCA that extends the Section A obligations for the duration of the transition period. The model BITs that Respondent cites are inapposite, as none of them dealt with a situation in which one investment agreement replaced another. They simply do not answer the question of whether and how one treaty (*e.g.*, USMCA) can extend the obligations of another treaty (*e.g.*, NAFTA 1994).

52. Second, in their Observations, Claimants cited to examples of other agreements that terminated and replaced earlier BITs.⁸⁸ Claimants showed that these agreements extended the substantive obligations of the earlier BITs but then explicitly allowed claims only with respect to

⁸⁴ See Exhibit C-2, USMCA at Art. 34.1.4 ("Chapter Nineteen of NAFTA 1994 shall continue to apply to binational panel reviews related to final determinations published by a Party before the entry into force of this Agreement.") (emphasis added).

⁸⁵ See Claimants' Observations on Bifurcation at para. 24.

⁸⁶ See Claimants' Observations on Bifurcation at para. 24.

⁸⁷ See Respondent's Reply on Bifurcation at para. 27.

⁸⁸ See Claimants' Observations on Bifurcation at para. 24.

measures that were taken before the BITs were terminated.⁸⁹ Claimants noted that USMCA contains no such temporal limitation.⁹⁰

53. Respondent's response is not clear, but it appears to argue that none of the various treaties Claimants cited terminated the sunset clauses of the earlier BITs, and, therefore, "[c]lear limitation language" was needed.⁹¹ In other words, Respondent seems to say, absent a clause allowing claims only with respect to measures that predated the termination of the BITs, the sunset clauses in the earlier BITs would have continued to allow investors to assert claims under the older BITs in connection with measures taken before and after the BITs terminated.⁹² This is clearly not correct.

54. For example, Claimants referred to a side letter between Mexico and Australia in connection with the signing of the CPTPP.⁹³ Through that side letter, Australia and Mexico terminated their earlier BIT.⁹⁴ The parties explicitly abrogated the sunset clause in Article 24 of the earlier BIT by agreeing that "the provisions for termination of the [BIT] contained in this letter shall, at the date of termination, supersede the provisions for termination contained in Article 24 (Duration and Termination) of the [BIT]."⁹⁵ Respondent is thus wrong when it implies that the sunset clause in the BIT would have continued in force absent a temporal limitation on the measures that could have been challenged under the old BIT. Once the sunset clause had been abrogated, no claims would have been permitted under the earlier BIT, and so there obviously would have been no need to limit claims to measures that pre-dated the termination of the BIT. Instead, under their new side letter (and not pursuant to the abrogated sunset clause in the BIT), Mexico and Australia chose to allow claims under the earlier BIT for

⁸⁹ See Claimants' Observations on Bifurcation at para. 24.

⁹⁰ See Claimants' Observations on Bifurcation at para. 24.

⁹¹ See Respondent's Reply on Bifurcation at para. 26.

⁹² See Respondent's Reply on Bifurcation at paras. 25-26.

⁹³ See Claimants' Observations on Bifurcation at para. 24.

⁹⁴ See Exhibit CL-38, Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mar. 8, 2018, at p. 1 of PDF, para. 1.

⁹⁵ See Exhibit CL-38, Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mar. 8, 2018, at p. 1 of PDF, para. 4.

three years. They then provided that such claims could only be brought “with respect to any act or fact that took place or any situation that existed before the date of termination.”⁹⁶ The USMCA Parties did not include any analogous temporal limitation in Annex 14-C of USMCA.

55. The parties to CETA followed a similar approach. As Claimants showed in their Observations, when CETA fully enters into force, it will terminate earlier BITs between Canada and various EU Member States.⁹⁷ CETA will allow investors to bring claims under the old BITs, but only with respect to measures that were taken when the BITs were in force.⁹⁸ Again, USMCA contains no analogous temporal limitation.

56. The operative provision in CETA is Article 30.8.⁹⁹ The table on the following page compares Article 30.8(1)-(2) of CETA with analogous provisions in USMCA:

⁹⁶ See Exhibit CL-38, Side Letter between Australia and Mexico Regarding Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Mar. 8, 2018, at p. 1 of PDF, para. 3.

⁹⁷ See Claimants’ Observations on Bifurcation at para. 24.

⁹⁸ Exhibit CL-37, CETA at Art. 30.8(2)(a).

⁹⁹ The European Union and Mexico agreed in principle to a virtually identical provision in April 2018 in the context of EU-Mexico FTA negotiations. See Exhibit CL-68, European Commission, “EU-Mexico agreement: The Agreement in Principle,” Investment Chapter, Apr. 21, 2018, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en, at Arts. 22.1, 3.

CETA	USMCA
<p>1. The [earlier BITs between Canada and EU Member States] shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement.</p> <p>[Article 30.8(1) of CETA]</p>	<p>1. 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.</p> <p>[USMCA Protocol]</p>
<p>2. Notwithstanding paragraph 1, a claim may be submitted under an [earlier BIT between Canada and an EU Member State] in accordance with the rules and procedures established in the agreement if:</p> <p>(a) the treatment that is object of the claim was accorded when the agreement was not suspended or terminated; and</p> <p>(b) no more than three years have elapsed since the date of suspension or termination of the agreement.</p> <p>[Article 30.8(2) of CETA]</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 . . . Section A of Chapter 11 (Investment) of NAFTA 1994. . . .</p> <p>3. A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.</p> <p>[Paragraphs 1 and 3 of Annex 14-C of USMCA]</p>

57. Given that CETA was signed just two years before USMCA was signed, it is not surprising that the CETA and USMCA texts are similar, but there is one critical difference: Annex 14-C of USMCA does not include anything like Article 30.8(2)(a) of CETA limiting claims to measures that pre-dated the entry force of the new agreement. If the USMCA Parties had intended to allow claims under paragraph 1 of Annex 14-C only with respect to pre-USMCA measures, they would have said so.

58. Respondent is wrong when it implies that the CETA Parties were forced to include the limitation in Article 30.8(2)(a) because, without it, the sunset provisions in the earlier BITs would continue to apply.¹⁰⁰ CETA Article 30.8(1) did not merely terminate the earlier BITs but

¹⁰⁰ See Respondent's Reply on Bifurcation at para. 26.

stated that the earlier BITs “shall cease to have effect.”¹⁰¹ Consequently, Article 30.8(1) of CETA fully abrogated the earlier BITs, including their sunset clauses.¹⁰² Article 30.8(2)(a) is not necessary to override the sunset clauses in those earlier BITs (nor was it drafted in a way that would accomplish that objective) because Article 30.8(1) already does so. Once CETA enters into force, investors will have access to the earlier BITs solely by virtue of the chapeau of Article 30.8(2), not because of the (abrogated) sunset clauses in the earlier BITs. Without Article 30.8(2)(a), investors could bring claims under the earlier BITs with respect to measure taken before or after the entry into force of CETA. With the inclusion of Article 30.8(2)(a), investors may challenge only measures taken before the BITs ceased to have effect. Again, by contrast, the USMCA Parties did not include any analogous temporal limitation in Annex 14-C of USMCA.

59. The glaring errors in Respondent’s analysis lay bare the fundamental problem with Respondent’s entire objection. As Claimants have shown, Annex 14-C extended the Section A obligations for the duration of the transition period. Having done so, the USMCA Parties did not then limit claims to challenges of measures that pre-dated the entry into force of USMCA.

E. Respondent Has No Explanation for the Scope of Protected Legacy Investments

60. Annex 14-C is available only to investors who hold legacy investments. Annex 14-C defines a “legacy investment” as “an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of” USMCA.”¹⁰³ As Claimants explained in their Observations, the only logical reason for limiting the scope of paragraph 1 of

¹⁰¹ Exhibit CL-37, CETA at Art. 30.8(1) (emphasis added). This is also clear with respect to Article 22 of Chapter 17 of the agreement in principle between the EU and Mexico, which, as noted above, provided that the earlier investment agreements “shall cease to have effect and shall be replaced and superseded” by the new FTA. Exhibit CL-68, European Commission, “EU-Mexico agreement: The Agreement in Principle,” Investment Chapter, Apr. 21, 2018, *available at* https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en, at Art. 22.1.

¹⁰² In paragraph 30 above, Claimants referenced several replacement agreements that terminated earlier BITs (or that will terminate earlier BITs upon the agreements’ entry into force). Each of those replacement agreements followed a similar pattern. They abrogated or amended the sunset clauses from the earlier BITs, imposed a new transition period, then explicitly limited claims under the terminated BITs to measures taken before the BITs were terminated.

¹⁰³ Exhibit C-2, USMCA at Annex 14-C, para. 6(a).

Annex 14-C to investors that held investments on the date of entry into force of USMCA would be to provide continuing protection of those investments.¹⁰⁴

61. Respondent does not engage with this point in any meaningful way. Instead, it simply points out that the definition of “legacy investment” “bars potential claimants who did not maintain their investments through the USMCA’s entry into force from asserting claims based on that category of breaches.”¹⁰⁵ Claimants agree that the definition of “legacy investment” precludes claims under Annex 14-C with respect to investments that did not exist when USMCA entered into force. The question Claimants were posing was why the USMCA Parties chose to cut off claims in such circumstances, if, as Respondent argues, Annex 14-C allows claims only for breaches that occurred before USMCA entered into force. If the intention of Annex 14-C was only to protect investors for breaches that have already occurred, then there is no reason why the USMCA Parties would not extend that protection to any and all investments that existed while NAFTA was in force, regardless of whether those investments continued to exist when USMCA entered into force.¹⁰⁶ Respondent has provided no explanation.¹⁰⁷ The most plausible reason for cutting off claims in this manner is because the USMCA Parties were focused on providing continuing protection of legacy investments. The best way to do that would be to allow claims under Annex 14-C with respect to actions that predated the entry into force of NAFTA and with respect to measures taken during the transition period.

¹⁰⁴ See Claimants’ Observations on Bifurcation at para. 34.

¹⁰⁵ Respondent’s Reply on Bifurcation at para. 34.

¹⁰⁶ In paragraph 30 above, Claimants referred to several replacement agreements that terminated earlier BITs (or that will terminate earlier BITs upon the agreements’ entry into force). Unlike USMCA Annex 14-C, those replacement agreements allowed claims under the terminated BITs only with respect to measures taken while the BITs were in force. Not one of those replacement agreements required that claimants in such cases hold protected investments on the date when the replacement agreement entered into force.

¹⁰⁷ In their Observations, Claimants referred to two agreements that replaced earlier BITs, *i.e.*, the U.S.-Morocco Free Trade Agreement and the Dominican Republic-Central America-United States Free Trade Agreement. See Claimants’ Observations on Bifurcation at para. 34, n.59. In each case, with respect to investors who held investments covered by the BIT on the date of entry into force of the replacement agreement (analogous to “legacy investments” under USMCA), the replacement agreement allowed claims with respect to actions taken before or after entry into force of the replacement agreements. See *id.* Respondent’s response is simply that the two free trade agreements did not terminate the earlier BITs while “USMCA expressly terminated the NAFTA.” Respondent’s Reply on Bifurcation at para. 28. As with the rest of its Reply, Respondent assumes that the termination or replacement of NAFTA 1994 ends the matter, and it fails to recognize that USMCA extended the Section A obligations for the duration of the transition period.

IV. Respondent’s Preliminary Objection Raises Issues That Are Intertwined with the Facts

62. As Claimants explained in their Observations, it would be unfair and inefficient to bifurcate Respondent’s preliminary objection. Claimants have been subjected to Respondent’s unfair treatment for fifteen years. They submitted their Request for Arbitration almost a year and a half ago. Respondent’s objection is clearly not substantial. Claimants respectfully submit that spending another year preparing written submissions and holding a hearing to debate these issues would be a waste of time and resources, and would unfairly delay a decision on the merits.

63. Claimants have shown that Respondent’s objection is not substantial. It is not supported by any good faith interpretation of USMCA that complies with the principles set forth in the VCLT. In addition, as Claimants explained in their Observations, there are equitable reasons for rejecting Respondent’s objection. Not only is Respondent acting with unclean hands, but its objection implicates other equitable issues, including whether Respondent’s actions estop it from raising its jurisdictional objection.¹⁰⁸ Unlike the issues discussed above that relate to a straightforward application of the VCLT interpretive principles to the USMCA, an examination of these equitable matters requires a highly fact-intensive examination of matters that are also part of the merits of Claimants’ claims.

64. Respondent asserts that “there is no relation between the U.S. jurisdictional objection and the allegedly wrongful acts.”¹⁰⁹ However, Respondent fails even to engage with the facts described in Claimants’ Observations. Respondent asserts that “if Claimants are correct that the alleged U.S. breaches of the NAFTA constitute unclean hands such that they can defeat a jurisdictional objection, then no jurisdictional objection could ever be heard in an investor-State dispute.”¹¹⁰ That is not true. Respondent’s behavior is not a commonplace breach of a State’s investment treaty obligations. As Claimants have shown—and Respondent has not denied—Respondent induced Claimants to withdraw their NAFTA 1994 claims in 2017 with the promise

¹⁰⁸ Claimants reserve the right to raise other equitable arguments in the context of any bifurcated proceeding or in connection with Respondent’s objection.

¹⁰⁹ Respondent’s Reply on Bifurcation at para. 43.

¹¹⁰ Respondent’s Reply on Bifurcation at para. 44.

of a Presidential permit.¹¹¹ Claimants withdrew their claims, Respondent granted the Presidential permit, and then, once USMCA entered into force, Respondent revoked the permit—and now argues that Claimants no longer have any recourse under NAFTA 1994.¹¹² Respondent’s actions were specifically designed to induce Claimants to drop their legal claims based on a promise that proved to be false. There is thus a clear and direct connection between, and a clear question of equity that arises from, Respondent’s position that Claimants cannot now assert NAFTA 1994 claims and its actions in inducing Claimants to withdraw their earlier NAFTA 1994 claims. For these same reasons, Respondent’s objection runs contrary to fundamental principles of good faith, transparency, good governance, and the rule law.

65. The fact that Claimants’ defense to Respondent’s jurisdictional objection requires an examination of matters that are relevant to Claimants’ merits claims is not extraordinary. Such overlap is the essence of what it means to have a jurisdictional objection that is intertwined with the merits of a claim, and Respondent has already conceded that bifurcation is not appropriate in such circumstances.¹¹³

66. With respect to Respondent being estopped from raising its jurisdictional objection, Respondent asserts that Claimants would need to “allege that they relied on a representation from the United States that Claimants would be permitted to assert breaches of NAFTA obligations that occurred after that treaty was terminated.”¹¹⁴ Claimants clearly relied on a promise that was intended to resolve Claimants’ claims under NAFTA 1994. Exactly what was represented and when, and whether Respondent’s actions in inducing Claimants to drop their earlier claims are sufficient to estop Respondent from raising its jurisdictional objection, again requires a deep examination of the facts, which would be inappropriate in the context of a bifurcation proceeding.

¹¹¹ See Claimants’ Observations on Bifurcation at paras. 48-52.

¹¹² See Claimants’ Observations on Bifurcation at paras. 53-55.

¹¹³ Respondent’s Reply on Bifurcation at para. 6.

¹¹⁴ Respondent’s Reply on Bifurcation at para. 45.

V. Conclusion

67. Respondent has failed to make even a *prima facie* showing that its preliminary objection is substantial. It has failed to show how the USMCA text supports its position and has not even conducted a proper analysis of the USMCA under the VCLT. Its position is contrary to the statements of the three USMCA Parties that were contemporaneous with the signing and entry into force of USMCA and contrary to statements made by its own lead negotiator of the USMCA investment chapter. Furthermore, its arguments are rife with misinterpretations of USMCA and other sources on which it relies. The objection is, furthermore, intertwined with the merits of Claimants' claims, and bifurcating the objection would be unfair and inefficient.

68. For these reasons, Claimants respectfully request that the Tribunal reject Respondent's Request for Bifurcation and move to the merits phase of the arbitration. Claimants also respectfully reiterate their request that the Tribunal award Claimants all costs and fees, including, without limitation, attorneys' fees and other expenses, that Claimants have incurred to address Respondent's Bifurcation Request.

Respectfully submitted,



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